

**COMMISSION OF INQUIRY INTO THE DECLINE OF SOCKEYE SALMON IN THE
FRASER RIVER**

**In the matter of Her Excellency the Governor General in Council, on the recommendation
of the Prime Minister, directing that a commission do issue under Part I of the *Inquiries
Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as
Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River**

**FINAL SUBMISSIONS OF THE STÓ:LŌ TRIBAL COUNCIL
AND CHEAM INDIAN BAND STANDING GROUP**

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I. EXECUTIVE SUMMARY

1. These are the final submissions of the Stó:lō Tribal Council and Cheam Indian Band Standing Group (STC-CIB). We thank the Commission for the opportunity to appear before it, and we wish it well in its ongoing consideration of the complex issues before it.

2. These submissions begin by addressing, in Part II, the primary causes of the decline of sockeye salmon and the proper management approach that must flow from the reality of that decline.

3. As set out under Section A of Part II, the causes of the decline are best considered as cumulative in nature. No smoking gun has been found in this Inquiry; rather, sockeye have been suffering a thousand cuts in their migration from spawning ground and back again. As set out in Project 6, however, the primary causes of the decline in productivity are most likely found in the marine environment as the sockeye migrate up the coast; the poor marine conditions they encounter in the Strait of Georgia and Queen Charlotte Sound are linked to climate change. What is quite clear is that the declines are not caused in any significant way by delayed density dependence; that theory is simply not supported by the evidence. En route mortality is another problem caused by climate change. Although en route mortality does not contribute to the decline in productivity (since the measure of “recruits” is intended to take en route mortality into account), it certainly does affect the number of spawners, and so the amount of allowable harvest. Some commercial groups have long pointed fingers at First Nations for the increase in en route mortality; the evidence does not support that accusation, but instead clearly indicates that rising water temperatures and declining fish health are to blame.

4. Section B of Part II describes the appropriate management approach in the face of increasing stressors on sockeye and increasing climate and mortality uncertainty. The critical points are to protect biodiversity and habitats, and to ensure that harvest rates are sustainable for each sockeye population. In these respects the Wild Salmon Policy is generally correct.

However, the Department of Fisheries and Oceans (DFO) has failed to implement the WSP as fully and swiftly as it should. Much more effort needs to be made in this regard.

5. Under Section C of Part II, we submit that joint management with First Nations is critical to the conservation of Fraser sockeye. We set out five key conservation-related benefits of co-management with First Nations, and then describe how the implementation of the WSP requires the full engagement of First Nations through a joint management structure. The critical point with respect to co-management or joint management is that First Nations have an enormous amount of knowledge and energy to contribute to the conservation of fisheries resources, particularly Fraser sockeye. However, if the fisheries management system is to benefit from First Nations peoples' knowledge and energy, then it must incorporate First Nations themselves.

6. Part III of this submission turns more specifically to the relationship between Aboriginal peoples and Fraser sockeye. Section A speaks to the inextricable relationship between Stó:lō people and the *sthéqi*, which is the Halq'eméylem word from which "sockeye" is derived. Section B sets out some of the history of fisheries management and Aboriginal peoples: such as how the state imposed increasing regulation upon First Nations in order to limit their access to fish and so allocate more of the fishery to the commercial sector, and how current limitations upon Aboriginal fisheries for "conservation" purposes again imposes a system of reallocation of fish away from First Nations to other users.

7. Part IV addresses certain current DFO policies in respect of Aboriginal peoples. Section A addresses DFO's policy based approach to dealing with Aboriginal Fisheries as opposed to a rights-based approach which is key concern for First Nations, alongside the issue of ministerial discretion and lack of transparency in the current approach. Section B points to inter-jurisdictional issues and how working with First Nations could actually be of advantage to DFO since they lack the resources and mandate to be fully involved in such processes themselves. Section C under this Part discusses DFO's risk management approach, including its approach to negotiating agreements with First Nations. Section D uses the Coastwide Framework (CWF) as an example to illustrate that DFO continues to unilaterally develop policies regarding First Nations without their full participation and when it comes to share based management against

their will. Section E deals with DFO's failure to understand social and ceremonial aspects of the FSC fishery and other patronizing aspects of DFO's dealings with Aboriginal rights to fish and priority resource allocation. Section F addresses enforcement. While enforcement of harvest rates is a critical dimension of any sound fisheries management regime, that enforcement should be as community-based as possible in order to achieve maximum compliance from the communities. Conservation & Protection's (C&P) policing model needs to be adjusted to an approach more integrated with the rest of DFO, and more aimed at building bridges to communities. The enforcement of the ban of FSC fish creates enormous resentment within Aboriginal communities and uses up valuable DFO resources, even though the *sale* of FSC fish does not in itself pose any threat to conservation. Ultimately, DFO and First Nations should consider whether it would be better to move to an allocation regime that, while preserving priority, does not limit the uses to which the fish may be put.

8. Part V examines more specific aspects of joint management. Section A sets out two points about the nature of an appropriate joint management regime involving First Nations. We suggest that true joint management with First Nations will be very different from co-management with other user groups, given the unique, rights-based relationship between First Nations and Fraser sockeye. A joint management regime will also have to respond to the fact that, among Aboriginal communities, authority flows from the band level up, whereas with government it flows from the top down. A successful joint management regime will have to respond to this reality; DFO cannot insist upon a province-wide organization with full authority. Section B discusses two important aspects of achieving joint management. First, DFO needs to come forward with a strong demonstration of commitment to achieving true co-management, through such a mechanism as a Letter of Understanding. Second, Aboriginal organizations need adequate and stable funding to continue to build capacity. Funding in this regard is not keeping up with inflation, and is facing a five percent cut; at the very least the funding should not decrease. It also needs to be provided on a longer-term basis than the year-to-year funding that is presently provided if First Nations are to build more solid relationships. Section C turns to international considerations, setting out more detail on indigenous participation under the Pacific Salmon Commission and potential for improvement for participation from Indigenous Peoples

from Canada; and describing the role Indigenous peoples often play in Multilateral Environmental Agreements.

9. In Part VI we address the urgent need for more funding for fisheries management as a whole. The Commission has heard of the looming budget cuts DFO faces, and it has heard how the WSP is not being implemented as fully and swiftly as it needs to be. The plain reality – which DFO management nonetheless denies – is that DFO needs more money. This Commission should make it perfectly clear to the Government of Canada that the lack of funding is endangering the conservation of fisheries resources and risking the common heritage of future generations.

10. In the last section, Part VII, we list some of our more central recommendations.

II. THE PRIMARY CAUSES OF THE DECLINE AND THE APPROPRIATE MANAGEMENT APPROACH

11. In essence, this Commission’s mandate is two-fold: to determine why the Fraser sockeye have declined and to recommend what should be done about it. The second question, of course, takes guidance from the first, as management must respond to the causes of the decline so as to either remove or mitigate those causes or adapt to the new reality for sockeye populations. In this part of our submissions we trace an arc from what we see as the causes of the decline through to the appropriate management approach that should guide the fishery. We conclude this part by submitting that joint management between DFO and First Nations is critical to proper fisheries management in this new environment of increasing uncertainty.

A. THE PRIMARY CAUSES OF THE DECLINE

12. One of this Commission’s key tasks is to make independent findings of fact regarding “the causes for the decline of Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean”. This

section of these submissions sets out the STC-CIB’s views on the causes of the decline of Fraser sockeye.

13. Prior to setting out those views, the nature of the “decline” needs to be discussed. Most of the experts called in this Inquiry have problematized the decline of Fraser sockeye as a decline in productivity, meaning a decline in the number of recruits per spawner. As Peterman and Dorner set out in Project 10, there have been three separate phases of decline in productivity since 1950. The decline that has generally been referred to in this Inquiry began in the mid-1980s and then continued after the late 1990s.¹

14. The STC-CIB’s submissions on the decline in Fraser River Sockeye stocks are set out under the first subheading below, “The Causes of the Decline in Productivity Are Cumulative”. That section is then followed by a discussion of what is not causing the decline in productivity, which is overescapement and delayed density dependency. Last, the submissions under this part address the issue of en-route mortality, which is not generally considered to be a contributor to the decline in productivity (since productivity is a measure of recruits per spawner, and the estimate of recruits is intended to capture en-route mortality) but certainly is a contributor to the decline in the overall Fraser River Sockeye Salmon stocks.

The Causes of the Decline in Productivity Are Cumulative

15. This Commission has received expert evidence – both in writing and in oral testimony – on a wide range of potential causes of the decline in productivity, including: diseases and parasites (Project 1); contaminants (Project 2); freshwater ecology (Project 3); marine ecology

¹ See Project 10 at p. 2, and Project 6 in the Executive Summary.

(Project 4); salmon farms (Project 5); predators (Project 8); climate change (Project 9); and habitat in the Lower Fraser River and the Strait of Georgia (Project 12).

16. It does not appear that there is one primary agent of the sockeye's decline. Rather, the decline of the Fraser sockeye is best conceptualized as the result of a wide number of impacts, which are cumulative in nature, and which together impact on sockeye health and increase sockeye mortality at various life stages. The decline of the Fraser sockeye must be viewed holistically, as the result of a number of stressors on sockeye health.

17. By its very design, Project 6, by Marmorek et al., best encapsulates the nature of the decline in productivity of Fraser sockeye. Project 6 is also methodologically sound and scientifically rigorous, and the conclusions Mr. Marmorek and his co-authors reach are generally correct. The STC-CIB submits that the Commission should rely strongly on Project 6 as a guide to the primary factors in the decline in sockeye productivity.

18. In determining which of the multitude of stressors on sockeye are primarily responsible for their decline in productivity, four aspects of that pattern are decline must be kept in mind, as Marmorek et al. set out in the Executive Summary of Project 6:

- a. 17 of 19 Fraser sockeye stocks have declined in productivity over the last two decades;
- b. Most of 45 non-Fraser sockeye stocks that were examined show a similar recent decrease in productivity;
- c. The nine Fraser stocks with data on juvenile abundance do not generally reveal declines in juvenile productivity, but do show reductions in post-juvenile productivity; and
- d. There have been three phases of decline in productivity since 1950.

19. The scope of the decline in sockeye productivity is therefore not confined to the Fraser River, nor limited to the two decades usually cited. The first of these points is critical. All along

the coast sockeye productivity has been in marked decline. As Marmorek and his colleagues rightly observe, the primary causes of the decline in Fraser sockeye productivity are likely also responsible for the similar declines of sockeye productivity in other watersheds.

20. One of the central benefits of Project 6 is that it synthesized the data of the other projects – which relate to life stages and possible stressors – and then compared their relative explanatory power for the decline in productivity. As is set out on p. 36 of Project 6, Marmorek and his colleagues:

- a. Identified the patterns of change in productivity in the Fraser sockeye stocks;
- b. Identified factors that could have contributed to these changes in productivity; and
- c. Assessed the relative likelihood of feasible explanatory factors and their potential interactions, using a weight of evidence approach.

21. Using that approach, Marmorek and his colleagues identified the following factors as the most likely contributors to the decline in productivity:²

- a. Predators are possible primary factors during the coastal migration and migration to rearing areas, and during the sockeye's growth in the north Pacific and their return to the Fraser.
- b. Marine conditions during the coastal migration and migration to ocean rearing areas are likely primary causes of the general decline in Fraser sockeye productivity, and are very likely in respect of the 2009 returns. It is possible that poor marine

² For a summary within the Project 6 report, see Table 3 on p. 21 of Ex. 1575, the Addendum to Technical Report 6.

- conditions during the sockeye's growth in the north Pacific and their return to the Fraser are primary factors.
- c. The effects of climate change during the coastal migration and migration to ocean rearing areas are a likely primary factor, and are possible in respect of growth in the North Pacific and the return to the Fraser. It should also be noted that Marmorek and his colleagues concluded that climate change has definitely affected en-route mortality, but that affects only harvest and escapement, not productivity.
 - d. On the current data it is not possible to assess the relative likelihood that pathogens are primary factors.
 - e. Disease from salmon farms during the sockeye's coastal migration and migration to ocean rearing areas is unlikely to possible.
 - f. On the current data it is not possible to assess the relative likelihood that disease from hatcheries is a primary factor.
22. The stressors with the greatest likelihood of being primary factors in the decline of Fraser sockeye productivity are therefore marine conditions and climate change during the coastal migration and migration to ocean rearing areas. The marine conditions responsible may be physical conditions such as wind, river discharge, salinity, temperature, water density, and water column stability, or biological conditions such as the timing and magnitude of chlorophyll production. Climate change can affect these marine conditions, and can raise sea surface temperature and cause changes in predation, disease or food abundance and quality.³
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³ Project 6, p. 58.

Marmorek et al. compared results from the Strait of Georgia and Queen Charlotte Sound, noting marked differences in various patterns associated with marine conditions and climate change. It appears, however, that both areas are likely sites for these effects on sockeye, although sometimes in different ways and different years.

Overescapement Is Not a Cause

23. Throughout this Inquiry, some participants – particularly the United Fishermen and Allied Workers’ Union and West Coast Trollers’ Area G Association (together, the UFAWU) – have advanced the theory that overescapement is to blame for the decline in productivity through “density dependence” or “delayed density effects”. They support this position primarily by reference to the work of Dr. Carl Walters.

24. This theory must surely now be put to rest. Peterman and Dorner gave a careful study of their theory in Project 10, comparing it to actual sockeye production dynamics during the decline. They conclude that their data do not support the theory that overescapement is responsible for the declines. They summarize their findings in this regard in their Executive Summary at pp. 3-4 (underlining in the original):

In addition to describing similarities in productivity patterns, we also evaluated the hypothesis that large numbers of spawners could be detrimental to productivity (recruits per spawner) of Fraser sockeye populations. The downward time trend in productivity of these stocks, combined with successful management actions to rebuild spawner abundances, has led to speculation that these unusually large spawner abundances might in fact be to blame for declines in productivity and consequently also substantial declines in returns. For the Quesnel sockeye stock on the Fraser, there is indeed evidence that interactions between successive brood lines that are associated with large spawner abundances may have reduced productivity of subsequent cohorts. Thus, the recent decline in productivity for

Quesnel sockeye might be more attributable to increased spawner abundance than to broad-scale environmental factors that affect other sockeye stocks in the Fraser and other regions. However, other Fraser sockeye populations do not show such evidence. Our data do not support the hypothesis that large spawner abundances are responsible for widespread declines.

25. David Marmorek reviewed the findings of Peterman and Dorner in detail, and he sought out the views of Dr. Walters as well, which Dr. Walters set out in an email.⁴ On all of the evidence, Mr. Marmorek would place a lot more weight on the findings of Peterman and Dorner, as he explained under cross:⁵

I guess what I would say is I don't think it makes a lot of sense to analyze in detail what was a fairly short effort by a panel of scientists after that PSC workshop -- during and after that PSC workshop. I don't think you can compare that effort, which probably amounted to, you know, a week or two of time with the effort that was done by Drs. Peterman and Dorner over several months, over many stocks, to look at things in a lot of detail. Nor do I think you can compare an email that you just discussed with the effort by Drs. Peterman and Dorner. So I think you need to apply some level of weight to these different types of evidence, and I would put, as we did in our technical report, a lot more weight on the very thorough analysis by Peterman and Dorner in their Technical Report 10.

26. The best and largest body of evidence in this Inquiry reveals that overescapement is not a cause of the decline of sockeye productivity, and the STC-CIB submits that the Commissioner ought to accept that conclusion.

27. The overescapement theory is often aligned with a philosophy of fisheries management that is opposed to “weak stock management”. The position, it appears, is that weak stock management allows for too many spawners within strong stocks (because fishing is curtailed to

⁴ See Transcript, September 20, 2011, pp. 27-28 (in cross by Mr. Harvey).

⁵ Transcript, September 20, 2011, p. 31, ll. 22-38 (in cross by Mr. Harvey); emphasis added.

protect co-migrating weak stocks), and so gives rise to density dependence and delayed density dependence, which in turn produces weaker smolts and so more mortality. As discussed above, the theory that overescapement is behind the decline in productivity must be rejected on all the available evidence, and so this management position lacks an empirical basis. But what is more, David Marmorek in fact urged an opposite approach to fisheries management in light of his conclusion that poor marine conditions and climate change are the most likely causes of the decline in productivity. Some of that evidence emerged when Mr. Marmorek was under cross-examination by Mr. Harvey, who was advancing his overescapement theory.⁶

Q: Would you agree with this, that if the coastal marine conditions are more challenging nowadays for Fraser River sockeye, it is very important that the smolts entering the estuary are as well nourished as possible and as strong in terms of size, state of health and energy levels?

A: I think that's one of the things that's important. I think what's also really important, as was shown in one of the papers by Dick Beamish and co-authors, is that you need as many -- you need a wide diversity of life history types. So, for example, the Harrison sockeye that apparently are still doing well, and the South Thompson Coho that are still doing reasonably well - I think it was South Thompson --

MS. TSURUMI: (Inaudible - off microphone).

A: Chinook. Thanks.

MR. HARVEY: Yes.

A: Have later entry time into the Strait of Georgia. So I think when you have these highly variable marine conditions both from year to year and spatially, it's extremely important to have a wide diversity of life history types.

⁶ Transcript, September 20, 2011, p. 18, l. 40 – p. 19, l. 15; emphasis added.

28. Mr. Marmorek is emphasizing here is that the variable marine conditions he found to be the most likely causes of the decline in productivity make it even more important to protect the “portfolio of stocks”, so that stocks that are better adapted (or will become better adapted) can survive and thrive. What that means is that weak stock management is, according to Mr. Marmorek, the correct approach, contrary to the position advanced by the UFAWU and other groups, including the Fisheries Survival Coalition and the BC Wildlife Federation.

29. As will be seen below, Mr. Marmorek believes that the proper management approach is indeed to protect biodiversity so as to maximize the adaptive capacity of sockeye stocks, as well as to protect ecosystems. These are, in essence, the twin pillars of the Wild Salmon Policy.

The Increase in En Route Mortality

30. Another effect of climate change is the increase in en route mortality as the sockeye head up the river from Mission to the spawning grounds. This phenomenon, however, is not associated with the overall decline in sockeye productivity, as productivity is a measure of the number of recruits per spawner, and the estimate of recruits already factors in en route mortality. Rather, the significance of en route mortality is that it impacts the fishery, as it requires that harvesting be curtailed in order to allow for the desired level of escapement. En route mortality is not well understood by DFO and not properly accounted for, as is evidenced by huge differences in estimates (DBE’s). According to Hinch and Martins (Project 9), the increase in en route mortality generally began in 1992 for summer runs (Early Stuart, Early Summer and Summer), and in 1996 for one (Late). Hinch and Martins attribute the increases in en route mortality to warming river temperatures, as they note in the Executive Summary to their report (pp. 4-5; underlining added):

Eight out of 11 stocks had more than half of years between 1996 and 2008 when *en route* loss within those stocks exceeded 50%. There is clearly an effect of run timing on this pattern. The earlier runs (e.g. Early Stuart, Scotch, Seymour, Fennell, Gates and Nadina) and the later runs (Harrison, Portage and Weaver) have the most years with high *en route* loss. Summer-runs (e.g. Quesnel and

Chilko) have experienced few if any years with large (> 50%) *en route* loss. There is good evidence that the among-stock patterns in *en route* loss are indicative of stock-specific abilities to cope with warming rivers and high river temperatures.

Changing thermal conditions have been one of the largest environmental challenges that migrating adult Fraser River sockeye salmon have had to deal with over the past 20 years: 1) the Fraser River has experienced ~ 2.0 °C warming in the summer compared to 60 years ago, with average summer temperatures warming ~ 0.7 °C in the most recent 20 years; 2) there have been several recent years with extreme temperatures during mid-summer (water temperatures in 13 of the last 20 summers have been the warmest on record); and 3) since 1996, segments of all Late-run sockeye salmon stocks have been entering the Fraser River 3-6 weeks earlier than normal – they now encounter temperatures up to 5 °C warmer than they historically did and are spending longer in freshwater because spawning migration dates have not changed. Therefore Late-run fish have been exposed to freshwater diseases and parasites for much longer periods of time, with disease development being accelerated by higher than normal river temperatures (due to earlier river entry and climate warming), and greater degree day accumulation.

31. Plainly, the rise in river temperature is a major driver of the increase in *en route* mortality.

32. A likely further major cause of increasing *en route* mortality is an overall decline in fish health as a result of cumulative impacts experienced in earlier life history stages, as described by Dr. Kristi Miller. She testified that she began her research – with funding from the PSC, beginning in 2004 and 2005 – because it was recognized that *en route* mortality was both increasing and becoming less predictable. Dr. Miller’s research aimed at finding a genomic signature that would better enable managers to predict fish health, and therefore *en route* mortality.⁷ She has since been able to determine a mortality related signatures (MRS). Her research aims at taking a broader approach at examining overall fish health which would take

⁷ Transcript of August 25, 2011, p. 45, ll. 23-43 (Dr. Miller in cross by Ms. Schabus).

into account such things as environmental conditions and the presence of pathogens.⁸ Most recently her research has been able to isolate a parvo virus for the first time in Fraser River sockeye salmon and is in the process of investigating the effect on survival. She believes that the decline of the Fraser sockeye could be “a major fish health issue that includes fish health in response to environmental change.”⁹

33. The issue of en route mortality therefore appears to be related to the same forces primarily driving the decline in productivity: environmental changes that cumulatively impact fish health.

34. Hinch and Martins’ work provides an important correction to a previous understanding of en route mortality, as seen in the Williams Review.¹⁰ A number of witnesses before the Williams Review discounted the role of high temperature in the “missing fish” phenomenon because few carcasses were seen:¹¹

The Committee heard testimony from many witnesses who did not believe that high water temperature was a major factor in explaining the number of missing sockeye in 2004. Most of these witnesses based their testimony on observations that they observed fewer dead fish in 2004 compared to 1998, the last well known and reported year of high water temperature.

⁸ Transcript of August 25, 2011, p. 46, ll. 15-24 (Dr. Miller in cross by Ms. Schabus).

⁹ Transcript of August 25, 2011, p. 46, ll. 30-31 (Dr. Miller in cross by Ms. Schabus).

¹⁰ Ex. 606

¹¹ Project 9 report, p. 26.

35. Hinch and Martins' work not only demonstrates that high river temperatures are a key driver behind the increase in en route mortality but also explains the scarcity of carcasses:¹²

Despite large *en route* loss estimates for many stocks in recent years, there is little direct physical evidence in the form of carcasses for high levels of mortality of Fraser River sockeye salmon. However, the observation of sockeye salmon carcasses should not be expected in years of high estimated *en route* losses, given the fish's specific gravity being greater than 1 (i.e. meaning that dead sockeye salmon will sink in freshwater) and poor water clarity in the Fraser River. Carcasses could potentially become visible after resurfacing due to gas build-up; however their non-observation in the Fraser River suggest that water currents may lodge them within submerged debris or that scavengers (e.g. white sturgeon [*Acipenser transmontanus*]) may damage their internal cavity, which would prevent the build-up of gas necessary for floating (Patterson *et al.* 2007b). There have been few direct experimental studies to examine the location of carcasses during salmon migrations. In 2004, a year of extremely high *en route* loss in all run-timing groups of Fraser River sockeye salmon, a tracking study was conducted in the Harrison River system on a large number of migrating adult Weaver Creek sockeye salmon using acoustic „depth-sensing“ transmitters (Mathes *et al.* 2010; Mathes 2009). Investigators found that fish which perished prior to reaching spawning grounds were located on the bottom of the Harrison River or Harrison Lake supporting the hypothesis that salmon which naturally perish during migrations generally sink.

36. As during the Williams Review, before this Commission some participants have tried to point fingers at the First Nations fishery in the Fraser as the cause of the increase in en route mortality. Hinch and Martins' work and Dr. Miller's testimony reveal that those allegations are well off the mark. The increases in en route mortality are driven by environmental change, as is the broader decline in productivity.

¹² Project 9 Report, page 42; emphasis added.

37. However, it is worth addressing directly two of the allegations generally raised by participants such as the FSC.

38. The first allegation is that First Nations people along the Fraser are taking more fish than is estimated. This was, essentially, the attack that was levelled against First Nations people during the Williams review. That allegation is simply unsupported on the much more extensive evidentiary record before this Inquiry. The evidence of Randy Nelson and Scott Coultish, the two C&P witnesses, is particularly telling in this regard. In his examination, Mr. McGowan had the following exchange with Mr. Nelson:¹³

Q Yes. At present with respect to Fraser sockeye fisheries, do you have a credible enforcement presence?

MR. NELSON: On the Fraser River, yes. In some of the approach waters with other things that have happened to us in the Department, our patrol capacity and presence in marine waters all along the coast is much reduced. And but for on the Fraser River and in the Fraser River, I am satisfied and staff are satisfied that we have a handle on closed time fishing activity, and we're doing -- we're doing an adequate job.

39. Moreover, Karl English and his colleagues, who provided a technical report on (Project 7), found that catch monitoring within the First Nations fisheries are generally of high quality:¹⁴

The overall ratings for sockeye catch estimates for First Nation fisheries were: “Good” for accuracy, “Unknown” for precision and “Medium” for reliability (Table 4). Catch monitoring for First Nation fisheries was rated having higher quality than commercial fisheries because of the extensive efforts to verify effort and catch rates using independent surveys instead of reports from fishers (Alexander 2002). Regulations for mandatory landing sites for “Pilot Sales” and

¹³ Transcript of May 17, 2011, p. 8, ll. 35-46 (emphasis added).

¹⁴ Project 7, p. 23; emphasis added.

Economic Opportunity (EO) fisheries since 1993, and separation of FSC and EO fisheries since 2004, have substantially improved the reliability of catch estimates for EO fisheries.

40. The second allegation is that set nets in the First Nations fisheries lead to drop-out from the nets, causing more fish to die than are caught. That possibility was noted in the 2004 report of the Parliamentary Standing Committee on Fisheries and Oceans entitled *Here We Go Again ... Or the 2004 Fraser River Salmon Fishery*, where the Committee noted evidence to this effect given by one witness, Mr. Bob Gould.¹⁵ Mr. Eidsvik in particular pressed this argument in this Inquiry, including in his written cross-examination of Mr. English. In his written cross-examination questions of Mr. English,¹⁶ Mr. Eidsvik asked for Mr. English's views on the Standing Committee's comments on the drop out issue. Mr. English replied.¹⁷

[I]t should be noted that a gillnet checked and cleaned 12 time during a 24 hour period (i.e. every 2 hours) should catch substantial more fish that a net left unchecked and not cleaned for 24 hours, even if no fish dropped out of the net. It would not be scientifically defensible to claim that the difference in the number of fish caught using these [two] different fishing approaches is equal to the number of fish that fall out of the net, regardless of whether these fish die and drift down stream or survive and swim upstream.

41. In answer to Mr. Eidsvik's further question of whether "effective fisheries management" requires "the permanent elimination of setnets in the Fraser Canyon or other dangerous waters", Mr. English replied:

There are a number of factors that need to be taken into consideration for effective fisheries management and minimizing en-route loss. Set nets can be an effective

¹⁵ The report is Ex. 605. The note on Mr. Gould's evidence is at p. 33.

¹⁶ Ex. 1011.

¹⁷ Ex. 1011A, p. 2; emphasis added.

harvesting method with minimal drop outs and associated en-route loss in the Fraser canyon if these nets are continuously tended by the fishers, appropriate mesh sizes and hang ratio are used, and nets are not fished during periods when water temperatures are high.

42. First Nations – certainly the STC-CIB – are vitally interested in the success of Fraser sockeye. While there is no credible evidence that set nets are contributing in any substantial way to en route mortality, First Nations will certainly continue to improve their fisheries practices, with support from DFO.

43. Finally, it should be noted that the presence of a mortality related signature, and the isolation of a parvo virus in Fraser River Sockeye Salmon, exacerbated by high river temperatures and other stressors, is likely a further major cause for the overall decline in the Fraser River Sockeye Salmon stocks. En route mortality is not well understood by DFO and is not properly accounted for, as is evidenced by huge differences in estimates (DBE's). Rather than finger-pointing at Aboriginal Peoples, it should be realized that they bear the brunt of the effects of en route mortality and were the first to properly identify the pattern, about which they are very concerned. Generally the overall lack of reliability of estimates made by DFO and often seriously overestimated run sizes result in last minute measures that disproportionately affect Indigenous Peoples living along the Fraser River and depending on it to sustain their people. These could be mitigated if there was proper planning and management.

B. MANAGEMENT OF THE SOCKEYE FISHERY MUST PROTECT BIODIVERSITY AND ECOSYSTEMS

44. Based on the technical reports produced for this Inquiry – and particularly as synthesized and analyzed by David Marmorek and his colleagues – the management of the sockeye fishery must respond to the following realities:

- a. There will be increasing uncertainty in environmental conditions, and so increasing difficulty in predicting sockeye returns;
- b. There will be increasing stress on fish health; and

- c. Some of the sources of stress – such as climate change and poor marine conditions – have increasingly devastating effects which require a proper management response.

45. The question is how to manage in light of these new realities. The STC-CIB submits that two principles are paramount: that DFO must protect biodiversity and must protect ecosystems.

46. The value of protecting biodiversity within sockeye salmon stocks is that it can best preserve sockeye's ability to adapt to changing conditions – both genetically (by genetically developing greater tolerance to high temperatures, for instance) and phenotypically (by developing behavioural patterns that allow it to cope with rising temperatures, such as by entering the river earlier or later, depending on the run-timing group). What that means is that a broad portfolio of stocks must be preserved so as to provide the greatest scope to sockeye to adapt genetically and phenotypically to changing conditions.

47. David Marmorek testified to the critical importance of this approach when he was on the stand. As quoted earlier, under cross-examination by Mr. Harvey (who was advancing an entirely different management philosophy), Mr. Marmorek stressed the importance of preserving a portfolio of life histories to cope with changing conditions: “So I think when you have these highly variable marine conditions both from year to year and spatially, it’s extremely important to have a wide diversity of life history types.”¹⁸ Mr. Marmorek strongly re-emphasized the necessity of protecting biodiversity later in his testimony:¹⁹

Q: ... And so the point I want to focus on is that if we cannot prevent climate change, we cannot prevent some adverse changes in marine conditions and it

¹⁸ Transcript, September 20, 2011, p. 19, ll. 12-15.

¹⁹ Transcript, September 20, 2011, p. 101, ll. 14-37 (Mr. Marmorek in cross by Mr. Dickson); emphasis added.

becomes crucial that we protect the ability of sockeye to adapt to these changes; would you agree with that?

A: Yes, I think that's correct and to the degree that you can maintain diverse life histories and diverse habitats that potentially create across all the stock conflicts greater resilience to those varying conditions caused by climate change and perhaps other actions. In the paper by Mike Healey he lists a bunch. I think that paper has been circulated before.

Q: Yes, I think so. And that is the point that I want to drive to, that in the face of such things as climate change, we -- it becomes more and more important to protect biodiversity. Diversity, genetically and of life histories and habitat, broad portfolio of stocks; do you agree with that?

A: Yes, I agree with it and so do lots of others. There's a whole session on that at the American Fisheries Society conference earlier this month and that was one of the key recommendations.

48. As Mr. Marmorek observed in this quotation, it is also critical to protect “diverse habitats”. Indeed, without habitat, plainly sockeye cannot survive, as seen in the very decline of sockeye stocks: the primary driver of that decline is adverse changes in habitat, particularly in the ocean. An appropriate approach to fisheries management must protect the ecosystems of which sockeye are a part, if it is to conserve sockeye for future generations.

49. The protection of biodiversity and ecosystems are, of course, two of the key objectives of the Wild Salmon Policy. The WSP calls for the protection of biodiversity by defining sockeye populations according to genetically unique Conservation Units (CUs), and then seeking to manage so as to preserve the full range of CUs. The WSP seeks to protect habitat and ecosystems by taking a more integrated approach than the “no net loss” principle, which has been more project-focused. The WSP calls for more integration between DFO and other government agencies, and First Nations and stewardship groups.

50. The STC-CIB believes that the WSP’s objectives of protecting biodiversity and protecting habitat through an ecosystems approach are valid and critical to responding to the environmental changes that appear to be driving the decline in Fraser sockeye.

51. The third key objective of the WSP is managing the fisheries for sustainable benefits. Some First Nations, such as the member bands of the STC-CIB have depended upon Fraser sockeye for millennia, and it remains vitally important to the maintenance of both the culture and health of these First Nations. The STC-CIB therefore agrees that DFO must take steps to ensure sustainable harvest of Fraser sockeye, with a priority for First Nations, given their constitutionally protected rights. As such they should be involved in conservation decisions and not bear the brunt of them, rather reductions in catch due to conservation concerns should be applied to privilege based fisheries first and provision should be made to meet the priority for First Nations' Fisheries before any other fisheries are considered, if necessary by way of an additional management adjustment for indigenous uses due lack of reliability of DFO's estimates, resulting in substantive differences between pre-season and in season estimates, as compared to post season estimated numbers.

52. However, the emphasis within the objective of sustainable use of the sockeye has to be on *sustainability*. What level of harvest is allowed to be taken will always be a difficult question, one involving careful balancing. But again, the emphasis needs to be on conservation. If one thing is clear from the science, it is that we can expect greater uncertainty – with respect to marine conditions, in-river temperatures, and mortality. In the face of this great and growing uncertainty, fisheries management needs to be truly precautionary. Conservation must always be the first and dominant priority, and harvest must be only be allowed when and to the extent that it is certain that no serious risk to the conservation of a CU will occur. On the basis of their constitutionally protected rights, First Nations should be fully involved in decision-making, including regarding conservation, to which they have a positive contribution to make.

53. As seen in this discussion, the STC-CIB believes that the three core objectives of the WSP – the protection of biodiversity, protecting habitat through an ecosystems approach, and allowing for harvest where it is sustainable – are essentially the correct goals for fisheries management. So long as the WSP is implemented through co-management with First Nations (an issue addressed in the next section), the STC-CIB believes that WSP charts a prudent course for the management of the sockeye.

54. One of the critical findings of this Inquiry, however, must be that the WSP has been inadequately implemented by DFO. Again leaving aside the issue of co-management to the next section, DFO has not implemented most of the concrete actions called for by the WSP. There appear to be two overarching reasons for this: first, the lack of funding, and second, the lack of political will.

55. As one example of the kind of actions that have not been taken to implement the WSP, Mr. Marmorek spoke eloquently in his testimony of the kind of nuanced understanding of the characteristics of CUs that will be necessary to best adjust management practices to the changing environmental conditions that come with climate change. He agreed that doing that kind of nuanced analysis requires gathering more information about all the individual CUs.²⁰ Indeed, Mr. Marmorek recommended further research to gain a “better understanding of the status of smaller conservation units, consistent with the implementation of the Wild Salmon Policy” as a priority. That kind of work simply has not been done adequately to date.

56. Nor is DFO actually applying, on the ground, the principle of No Net Loss, as was seen in the unguarded memorandum prepared by Jason Hwang.²¹ Among the many criticisms he made of DFO’s performance in protecting habitat was this one:

We are without question not attaining no net loss. The impacts of habitat impacts are well known... Our staff are very disillusioned that the department is not doing more to address this.

²⁰ Transcript, September 20, 2011, p. 103, l. 23 – p. 104, l. 32 (Mr. Marmorek in cross by Mr. Dickson).

²¹ Exhibit 662

57. Mr. Hwang further commented on the lack of resources in the DFO Ecosystems Management branch and how the branch is overloaded with referrals and not able to address all concerns on the ground. First Nations are the ones who often articulate these concerns, as they are living in the territories along the migratory route of the Fraser River sockeye. Their ongoing observations and traditional knowledge are critical to the sustainable management of the Fraser River sockeye and their habitats, including integrated management of entire watersheds. Only by sitting alongside and involving First Nations in management and joint decision-making can DFO access these critical observations and knowledge for the sustainable management of the salmon.

58. There are many examples of how First Nations have contributed to more sustainable habitat management in their traditional territories, including by restoring fish habitat. In the case of the Stó:lō People, work regarding the Cultus Lake sockeye serves as a prime example. They have also applied to have habitat management projects funded within AFS agreements, which is often turned down. Additional funding for First Nations' habitat management and their full participation in decision making is the only way to ensure better habitat management along the migratory routes.

59. The STC-CIB believes that the WSP needs to be much more fully implemented, much more quickly with First Nations as co-managers and joint decision-makers. As discussed later in these submissions, that will require more funding and much more commitment from DFO. The current management approach is not working; much more needs to be done to achieve the kind of nuanced, holistic management regime the WSP envisions.

60. As discussed in the next section, a further necessary component of establishing a management regime that best meets the enormous challenges facing the sockeye fishery is robust co-management with First Nations.

C. CO-MANAGEMENT WITH ABORIGINAL PEOPLES IS ESSENTIAL TO SUSTAINABLE FISHERIES MANAGEMENT

61. A theme throughout this Inquiry has been the desire of First Nations to have full joint decision-making with DFO over the Fraser sockeye fishery.

62. There are many reasons to implement co-management with First Nations. From the First Nations' perspective, a central reason is that co-management is necessary to fully implement their Aboriginal rights to Fraser River sockeye salmon. First Nations have fished Fraser sockeye for millennia, and, as have other First Nations in other watersheds, *managed* the Fraser sockeye fishery;²² a right to manage Fraser sockeye is part of their Aboriginal right to the resource. In any event, even if First Nations' Aboriginal rights are thought to be limited to FSC rights, co-management is necessary to accommodate those rights, including the priority that accompanies them.

63. DFO does recognize that co-management with First Nations has a number of benefits related to Aboriginal rights in the fishery. One is that it can reduce the risk of litigation and confrontation with First Nations regarding their rights. Another is simply to assist in managing a sector whose proportional share of the fishery is growing as returns decline and the commercial fishery diminishes. A third is that co-management can help win greater "buy-in" from First Nations communities to the fisheries management regime, thereby securing greater cooperation, and so achieving a number of benefits – from reducing the perceived need for enforcement to harnessing the stewardship of those communities.

64. Out of recognition of these and other benefits, DFO has made a policy decision to pursue co-management with First Nations, as set out in the "Overview of the Fraser River Salmon Roadmap Initiative".²³

²² See, for example, the testimony of Professor Harris: Transcript of June 27, 2011, p. 94, ll. 1-39 (Professor Harris in cross by Mr. Dickson).

²³ Exhibit 1220, p. 4.

As outlined at previous Roadmap workshops, DFO is committed to the overarching goal of jointly (in partnership with First Nations) building a co-management process for Fraser Salmon that includes a vision, objectives, roles and responsibilities, clear outcomes, as well as a clear process for building an agreement (i.e. "roadmap" or action plan).

65. The three benefits set out above are themselves sufficient justification for pursuing robust co-management with First Nations. In the rest of this section, however, the STC-CIB will advance other reasons for co-management – reasons that are related to better managing Fraser sockeye so as to ensure their sustainability. Because the central reason to establish a regime of true joint decision-making between DFO and First Nations is what First Nations can offer toward the conservation of Fraser sockeye.

66. These submissions will focus on five key benefits that First Nations can bring to sockeye management if DFO creates the space for First Nations to co-manage with DFO as true decision-makers.

67. The first is that First Nations can offer Traditional Ecological Knowledge (TEK) of Fraser sockeye. The benefits of TEK have been accepted by a wide variety of witnesses in this Inquiry, but are perhaps best summarized by David Marmorek. He described TEK this way:²⁴

... I think it's a very important form of knowledge, in particular because of the time span both in duration and also in terms of resolution, namely that people, First Nations, have been in particular locations for a very long period of time, have seen many fluctuations in resources, have amazing memories about -- well, hopefully recorded from elders and the like about what's changed, but also because they're there all the time during a given year. So if something really unusual happens, oh, we had these really weird algal blooms in May before any of you scientists got up there with your sampling gear, they're there. And so I think

²⁴ Transcript, September 20, 2011, p. 98, l. 27 – p. 100, l. 3 (Mr. Marmorek in cross by Mr. Gailus).

that -- and in other work that we've done in the north and elsewhere, for example, in Tuktoyaktuk Inuit noticed that the broad whitefish tasted funny long before anybody detected that there were some petrochemicals in them.

...

So there are many examples like that. We did a report, actually, for the Pacific Fisheries Resource Conservation Council on traditional ecological knowledge, some of my colleagues did.

68. One of the elements that Mr. Marmorek touched on in this passage is truly critical for sockeye management. As Mr. Marmorek stated, First Nations elders have a wealth of knowledge of past conditions of habitat and sockeye stocks. Indeed, First Nations hold the longest-term knowledge of sockeye and their habitats, compared with any other source. That knowledge could be invaluable in establishing baselines for CUs, and for ecosystem restoration. That knowledge is also of high quality – high “resolution”, as Mr. Marmorek termed it – as it is born out of intensive use and familiarity of particular ecosystems and the animals and plants that live within them.

69. Ms. Farlinger, speaking as part of the DFO Priorities panel, agreed that much more can be done to incorporate TEK into fisheries management,²⁵ and indeed that is plainly the case. Mike LaPointe also spoke to the benefits for fisheries management of incorporating TEK,²⁶ stating that there is a “tremendous opportunity” to incorporate TEK into fisheries management and planning, but agreed that that TEK “is not currently being taken into account in those

²⁵ See Transcript of September 28, 2011 (in cross by Mr. Dickson).

²⁶ See Transcript of January 20, 2011, p. 71, ll. 31-47 (in cross by Ms. Schabus).

management decisions.”²⁷ But no matter how much DFO wishes to incorporate TEK into fisheries management, it will not be able to do so unless it incorporates First Nations into fisheries management. That is the key to unlocking TEK for management of sockeye: to incorporate TEK, the system must incorporate First Nations. Only First Nations and Aboriginal organizations have access to the knowledge-holders; only First Nations and Aboriginal organizations can properly translate that knowledge into a form that is reconcilable with the language of modern science; and only First Nations and Aboriginal organizations have the commitment to gather TEK and consistently apply it to the management of the fishery.

70. Traditional knowledge is collectively held and inter-generational, and it is based on long-term observations, which can help establish a baseline against which comparisons may be made. In times of a changing environment, First Nations in their territories are often the first to observe these changes and call for an appropriate management response. TEK can therefore assist with early detection of serious concerns and with informing an appropriate management response. Scientific research in many cases has confirmed such first-hand observations, but to simply await the outcome of scientific explanations, in light of observed severe changes, would not be an appropriate management response.

71. Many witnesses have spoken to the tremendous potential that integration of TEK and ongoing First Nations observations can have, including First Nations witnesses like Chief Willie Charlie from Chehalis who is a knowledge-holder and understands the dynamic nature of TEK. He described how everything evolves and is connected, and how First Nations peoples have a long history of use of the land and the resources within their territories. He also described how TEK has been validated by scientific research and he recommended integrating it with modern

²⁷ Transcript of January 20, 2011, p. 72, ll. 15-26 (in cross by Ms. Schabus).

technologies.²⁸ Examples of the TEK of the Stó:lō people in regard to fisheries management were provided by the Aboriginal Worldview and Knowledge Panel for the Lower Fraser on December 13, 2011, including environmental indicators for when different Fraser sockeye migrate upriver, and knowledge of weather patterns and observations of the snowpack, including on Mount Cheam, and ongoing observations by Stó:lō fishers.²⁹

72. A second key benefit of co-management with First Nations is that they have a permanent, year-round presence within or near critical habitat for sockeye. First Nations line the Fraser River from the mouth to the spawning grounds, and they have done so for millennia. Not only do they have long-term knowledge of habitats that would be invaluable to ecosystem restoration, as discussed above, but they are also present on the land and water now. As David Marmorek stated in his testimony quoted above: “they're there all the time during a given year. So if something really unusual happens, oh, we had these really weird algal blooms in May before any of you scientists got up there with your sampling gear, they're there.” First Nations are able to do such things as monitor and assess habitat and sockeye stocks, enforce harvest and habitat restrictions, and restore habitat.

73. A third benefit of co-management is that First Nations can provide a balance against DFO's management of the fishery. Many witnesses and participants in this Inquiry have noted the need for a person or body independent of DFO to ensure that the Commission's recommendations are carried out; more than one witness has suggested that the Commissioner play this role (which did not appear to meet with enthusiasm). First Nations can fulfil this role

²⁸ Transcript, December 13, 2010, p. 33 line 21 to page 34 line 3

²⁹ Transcript, December 13, 2010

and, as a co-manager, act as a watchdog over DFO into the future. No other group or sector or interest could play this part. No other sector has *rights* in the fishery; to no other group does DFO owe a duty to consult and accommodate. It is right and proper that First Nations have standing and authority equal to DFO over the management of Fraser sockeye.

74. One example where Indigenous Peoples already play such a role in regard to the Fraser River Sockeye Salmon is the US tribes in the Pacific Northwest. They co-manage the fisheries and even have a place on the Pacific Salmon Commission, and are able to veto action at that level. Assisted by the Northwest Indian Fisheries Commission, which provides technical services to the tribes, they bring a different perspective to the table and hold the authorities to account.

75. The fourth benefit of co-management is that it would harness the energy and expertise of communities that are vitally interested in the sustainability of Fraser sockeye for future generations. While DFO's mandate is, in part, to protect the sustainability of fishery resources, as an institution it cannot help but be removed from what those resources really mean to the communities which depend on them. DFO's headquarters, after all, are in Ottawa, very far from any of Canada's three oceans. And while many DFO personnel are personally and professionally committed to the preservation of sockeye, they must work within that Ottawa-based bureaucratic structure. First Nations have their headquarters in their communities, on their traditional territory, and within sockeye habitat. The Stó:lō believe themselves to be made of *sthéqi* – the Halq'eméylem word from which “sockeye” is derived. The *sthéqi* have been part of their culture, their diet and their survival for millennia. For the Stó:lō, it is not possible to consider the extirpation of sockeye as one possibility to be weighed against the cost of action. They feel compelled to act. They owe it to their ancestors to safeguard the *sthéqi* for future generations.

76. The fifth benefit is related. It is that First Nations have as part of their culture an ethic of conservation and an integrated view of ecosystems. Long-term thinking is part of the Aboriginal worldview, as is a holistic view of the environment. That worldview acknowledges and honours the interdependence of all things within the environment, including humans. It is just that kind

of ethic that must guide fisheries management in the new and increasing conditions of uncertainty. It is just that kind of worldview that the WSP attempts to harness by taking into account “ecosystem values”.

77. These five benefits will only accrue to the management of Fraser sockeye if First Nations are integrated into fisheries management by being joint decision-makers alongside DFO. To obtain indigenous knowledge and participation, fisheries management must incorporate Indigenous Peoples and organizations within the management regime.

78. In the preceding section, the STC-CIB has submitted that the basic objectives of the WSP are correct, and that the WSP needs to be implemented far more fully than it has been. Doing so properly will require real participation by First Nations. Indeed, all six strategies within the WSP significant participation by First Nations:

- a. Strategy 1: Standardized monitoring of wild salmon status. First Nations hold long-term TEK, and many live year-round in essential sockeye habitat and as such are able to observe patterns relating to sockeye health and abundance. First Nations have much to offer with respect to the identification of CUs (Action Step 1.1), the development of baseline data CUs and their benchmarks (Action Step 1.2), and monitoring and assessing the various CUs (Action Step 1.3). As will be discussed further below, First Nations (such as those involved in the Lower Fraser Aboriginal Fisheries Secretariat in the Lower Fraser) have demonstrated that they can be a vital part of a successful monitoring program.
- b. Strategy 2: Assessment of habitat status. Again, many Indigenous Peoples live year-round in habitat that is essential to sockeye, especially along the Fraser, and hold TEK relating to that habitat. First Nations hold vital knowledge of habitat characteristics, and are an essential component in properly documenting those characteristics (Action Step 2.1) and developing benchmarks for habitat status (Action Step 2.2). Further, the fact that many First Nations are situated within or near critical sockeye habitat means that they are best positioned to monitor and assess

habitat status on an ongoing basis (Action Step 2.3). Last, Action Step 2.4 calls for the establishment of an integrated data system for watershed management; First Nations need to be part of that process.

- c. Strategy 3: Inclusion of ecosystem values and monitoring. Strategy 3 tries to replicate the kind of holistic view of the environment that has been part of Aboriginal culture for millennia, and as such it needs to be implemented with guidance and input from First Nations. The identification of indicators to monitor status of freshwater ecosystems (Action Step 3.1) will be very shallow if it does not include TEK. This action step has not been accomplished to date; it is absolutely essential that the knowledge and experience of Aboriginal peoples be harnessed to achieve it.
- d. Strategy 4: Integrated strategic planning. Strategy 4 concerns the establishment of a planning process that is intended to integrate the needs of concerns of First Nations and Canadians. As the WSP recognizes, this process needs to meet the government's duty to consult with and accommodate First Nations. As has been emphasized over and over in this Inquiry, sockeye (and salmon more generally) are critical to the health and cultural integrity of First Nations, and many First Nations have Aboriginal rights to Fraser sockeye. First Nations need to be a major part of the planning process, on a level equal to DFO. The management of CUs on an interim (Action Step 4.1) or permanent (Action Step 4.2) basis must be done with the full involvement of First Nations.
- e. Strategy 5: Annual program delivery. There are four action steps with Strategy 5: assess the status of CUs and populations (5.1); plan and conduct annual fisheries (5.2); plan and implement annual habitat management activities (5.3); and plan and implement annual enhancement activities (5.4). Each and every one of these steps requires real integration of First Nations for success. Again, First Nations are a key component of properly assessing CUs and populations, based on their presence within critical habitat, and their traditional knowledge that habitat and the sockeye populations. First Nations also have, in many years, the largest fishery on Fraser

sockeye; their involvement in planning the fisheries must be central. Habitat management work will generally take place within the traditional territories of First Nations, and will often take place on or near their reserves. Enhancement activities must proceed with First Nations' input as to which CUs need to be prioritized.

- f. Strategy 6: Performance review. Strategy 6 calls for the kind of critical assessment of management that First Nations wish to play as joint managers. Fisheries management will only improve if it is objectively evaluated. First Nations should fill that watchdog role, for the reasons set out above. In this regard, they must be integrally involved in the post-season review of annual work plans (Action Step 6.1) and in the regular reviews of the success (or not) of the WSP (Action Step 6.2).

For these reasons, the STC-CIB says that true joint management between DFO and First Nations is critical to the conservation of the sockeye. First Nations have much to offer sockeye management, but to unlock that potential they must be fully integrated into the management regime. First Nations want to do this work, and it is just that they be part of it. DFO is increasingly recognizing the benefits of co-management, but they need to be encouraged, and Canadians need to assured it is the correction direction in which to proceed. This Commission can provide a service in both of these respects by recommending that DFO move more swiftly and determinedly to implement joint management and decision-making.

III. FIRST NATIONS AND THE FRASER RIVER SOCKEYE SALMON

A. The Inextricable Relationship of the Stó:lō People with the Sthéqi

79. In order to understand the present concerns of First Nations regarding the Fraser River Sockeye Salmon and make the right decision about future management, it is important to understand the importance of the relationship of First Nations, such as the Stó:lō People, with the *sthéqi*.

80. As stated at the outset of Professor Harris' paper on "the Recognition and Regulation of Aboriginal Fraser River Sockeye Salmon Fisheries"³⁰, Fraser River Sockeye Salmon is a cultural keystone species for Indigenous Peoples in the Pacific Northwest. This is especially true for the Stó:lō People, the People of the River, including the people from Cheam, for whom Fraser River Sockeye salmon is central to their culture and indigenous economies. Their territory covers much of the Lower Fraser River, from Kwantlen up into the Fraser Canyon past Yale and Sawmill Creek. The Pilalt Tribe, which the People at Cheam belong to, is responsible for a core part of this territory.³¹

81. The term "keystone species" was first used by ecologists recognizing that some species play an integral role in the overall structure and functioning of an ecosystem³². Leading ethnobotanist Dr. Nancy Turner further developed the term cultural keystone species that are the underpinning of a culture, as reflected by their fundamental role in diet, ceremonies of the indigenous peoples, and without them the societies they support would be fundamentally different³³.

82. As this and other research has shown that there is a strong correlation and overlap between biodiversity and cultural and linguistic diversity, meaning that the highest concentrations of biodiversity can be found in areas of linguistic diversity. The research has further shown that

³⁰ Harris, Douglas (2011) The Recognition and Regulation of Aboriginal Fraser River Sockeye Salmon Fisheries to 1982; prepared for the Cohen Commission, submitted January 12, 2011, page 1, footnote 2. (Exhibit 1135)

³¹ Transcript, December 13, 2011, p. 40 and 16

³² Garibaldi, A. and Turner, N. (2004) Cultural Keystone Species: Implications for Ecological Conservation and Restoration, *Ecology and Society* 9(3): p.1 (referred to in supra footnote 2)

³³ Supra p.1

indigenous peoples" interaction with the ecosystems and the different species has actually enhanced biodiversity³⁴.

83. Over millennia Indigenous Peoples in the Pacific Northwest have sustainably managed and used salmon in their respective traditional territories. Campbell and Butler researched archaeological evidence for resilience of Pacific Northwest Salmon Populations and the socio-ecological system over the last 7,500 years and concluded that Indigenous Peoples sustainably used, rather than overfished, despite the facts that the region supported extremely high human population densities, and that these communities had the technology to greatly reduce salmon populations³⁵. They further conclude that this resilience is best explained by generalized resource use and social institutions regulating fishing and that:

As historic and contemporary records illustrate, Indigenous Peoples of the Pacific Northwest engaged in complex rituals that reflected and contributed to core beliefs related to native animals and plants, and the landscape in which people lived. Traditions and institutions of First Nations peoples and Native Americans incorporated explicit monitoring of resource use and proprietorship, which helped convert open-access resources into common-pool ones³⁶.

84. What is referred to above are collective indigenous systems for managing sockeye salmon regulated by indigenous laws. This is reflected in the common law by recognizing Aboriginal collective rights to the fish. Although recognized at common law and constitutionally

³⁴ For a summary of this research please refer to: Luisa Maffi (2005) Linguistic, Cultural and Biological Diversity, *Ann. Rev. Anthropol.*, 2005, 29: 599-617

³⁵ Campbell, S. K., and V. L. Butler. 2010. Archaeological evidence for resilience of Pacific Northwest salmon populations and the socio-ecological system over the last ~7,500 years. *Ecology and Society* 15(1): p. 2 (Exhibit 1162)

³⁶ Exhibit 1162, p.2

protected, the substance of these rights is defined in Indigenous legal systems, not Western legal systems.

85. The Stó:lō People and its Pilalt tribe, of which the people at Cheam form a part, hold inherent Title and rights over their traditional territories, which flow from their connection to their land and water. These rights are enshrined in their indigenous languages, laws and systems for managing their land and waters. They are recognized by the Supreme Court of Canada as *sui generis* rights and legal systems, protected under section 35 of the Constitution.
86. The Supreme Court of Canada has further recognized that there is an economic and jurisdictional dimension to Aboriginal Title, which therefore has to be taken into account when dealing with fisheries management decisions in the traditional territories of Aboriginal Peoples. Professor Harris explained that, based on primary and secondary sources, it is accepted that First Nations all along the migratory route of the Fraser River sockeye extensively used and occupied the lands and waters necessary to access their fishing sites³⁷.
87. He further explained that while there was an exclusive right to ownership it also came along with obligations³⁸:

And so the concept of ownership, I think, merges quite nicely with the concept of stewardship, that there was not just rights but also responsibilities associated with ownership, responsibilities reflected in this notion of stewardship. And these responsibilities would include -- would varyingly include a responsibility to ensure that members of the community had sufficient access for their needs, a responsibility to ensure that the resource was managed on a basis that would allow it to continue to be used by the community for it to be managed sustainably. And so what I'm getting at.

³⁷ Transcript, June 27, 2011, p.77 lines 27-34

³⁸ Transcript p. 83, lines 9-21

88. Therefore First Nations as owners and stewards of the resource must be treated as equal decision-makers. The Department of Fisheries and Oceans cannot claim exclusive jurisdiction of fisheries and fisheries management in the traditional territories of Aboriginal Peoples; rather DFO has to engage with them on an equal footing.

89. It is also important to note that, in response to questions from counsel for the government of Canada, Professor Harris further explained that:³⁹:

the government was not granting fishing rights to Native people, but rather recognizing existing rights, or at least recognizing existing patterns of use in management of the fishery.

90. Following questions regarding whether the public right to fish could act as a limit on what the Crown could do in terms of recognition of Aboriginal rights to fish, Professor Harris made it clear that no such limitation existed since⁴⁰:

Aboriginal people had pre-existing rights to fisheries, rights that preceded the British assertion of sovereignty, that preceded the introduction of the common law to this territory. And so to characterize those rights as being rights that were being granted by the Crown I think is erroneous. I think what's happening is that Douglas is recognizing prior rights to the fisheries. And in that context, the public right to fish doesn't act as a limit on what the Crown can do.

91. This testimony speaks to the inherent rights of Indigenous Peoples to fish, and the recognition of those rights at common law as Aboriginal Rights, which remain informed by their indigenous systems and laws for managing their land and resources. First Nations whose traditional territories and waters are home to the Fraser River sockeye salmon runs

³⁹ Transcript, June 27, 2011, Cross-Exam by Mr. East, p.15 lines 28 onwards

⁴⁰ Transcript, June 27, 2011, Cross-Exam by Mr. East, p. 21 line 15 onwards

sustainably managed the runs until by law and policy they were excluded from management of the resource and marginalized in their access to it. Indigenous Peoples are the first to suffer from the drastic decline in the Fraser River sockeye stocks that continue to sustain their people, families, indigenous economies and cultures.

B. RIGHTING HISTORICAL INJUSTICE TO ENSURE FUTURE JUST AND SUSTAINABLE MANAGEMENT

92. It is on the basis of these historical facts and the evidence showing that First Nations had their own systems for sustainably managing and using salmon that Professor Harris provided a historical perspective⁴¹ and commented on the regulation of Fraser River sockeye salmon fishery following first contact.

93. Historical records document that Indigenous Peoples played a key role in the trade for salmon. Salmon was one of the principal exports for the Hudson Bay Company from the Pacific Northwest. As Professor Harris explains, the HBC only briefly tried to deploy its own workers on the Lower Fraser in the 1840s but decided to instead purchase fish from Aboriginal fishers⁴² as previously. The Fort Langley Journals⁴³ further document the ongoing salmon trade with First Nations, especially the Stó:lō people along the Lower Fraser, who asserted their rights to fish and trade in salmon.

⁴¹ Transcript, June 27, 2011, p. 76 line 29- p.77 line 10, p.93 line 34 to page 94 line 24

⁴² Exhibit 1135 p. 6 further set out in Mackie, Richard (1996) *Trading beyond the Mountains: The British Fur Trade on the Pacific, 1763-1843*; UBC Press, 221-30

⁴³ The Fort Langley Journals, Exhibit 1158 (excerpts)

94. Governor Douglas clearly recognized the central importance of fisheries to First Nations by setting out the right to “carry on fisheries as formally” in early treaties and later informing the House of Assembly that Aboriginal Peoples “were to be protected in their original right of fishing on the coast and in the bay of the colony”,⁴⁴ thereby recognizing an inherent right. Until the 1870s, the fisheries were almost entirely Aboriginal and the colonial government did not intervene⁴⁵.

95. Again in response to questions from Counsel for the Government of Canada, Professor Harris further explained that⁴⁶:

I think Douglas clearly thought he was protecting Aboriginal fisheries and securing them broadly and securing them in a different way than non-Natives would have access to the fishery.

96. This distinction is an important one and has to be maintained and implemented today, where Indigenous Peoples have constitutionally-protected inherent rights to their territories, waters and fish. In addition, these rights are collective rights that serve and provide for a community, rather than individual privileges in a commercial-industrial or recreational fishery.

97. The fishery had a clear sustenance and wealth element for Aboriginal peoples historically, as Professor Harris explained in response to questions by Mr. Harvey⁴⁷:

⁴⁴ Douglas to House of Assembly, 5 February 1859, in House of Assembly Correspondence Book, August 12, 1856 to July 6, 1859 (Victoria: W. Cullen, Printer to the King, 1918, Exhibit 1135 p.5 footnote 11

⁴⁵ Exhibit 1135, p.7

⁴⁶ Transcript, June 27, 2011, Cross-Exam by Mr. East, p. 18 line 14 onwards

⁴⁷ Transcript, June 27, 2011, Cross-Exam by Mr. Harvey, p. 54 line 36 onwards

sockeye salmon were the principal source of sustenance and wealth for aboriginal peoples in this part of the world and, yes, the fishery was exploited heavily by them.

98. He later further explained that⁴⁸:

99. So fish, and salmon in particular, was the single most important resource in the territory for aboriginal peoples, and this territory supported as large and as dense a pre-industrial non-agrarian population as existed anywhere in the world. There was a remarkable -- well, a remarkably dense sophisticated political society here that was built around the fishery, and a society that included a social hierarchy with nobility at the top and slaves at the bottom; a hierarchy that allowed for an enormous cultural production, a society rather that allowed for enormous cultural production. All of this was made possible because aboriginal people and the cultures that they built were specialists in the catching and processing of fish. In answer to questions from counsel for Canada, Professor Harris noted the central role of salmon in the creation of wealth in Aboriginal communities:⁴⁹

it's clear that fisheries were crucially important. It's also clear that fisheries were the central source of wealth, of economic activity, pivotal markers in a cultural and broader social makeup.

100. As one can see from this snapshot of evidence, the fisheries were central sites of economic activity and the creation of wealth in pre-contact First Nations communities. The notion that fishing was limited merely to uses of food, social and ceremonial purposes is unfounded. Rather, the fisheries were sources of wealth among First Nations; there is very plainly an economic dimension to Aboriginal rights in the fisheries. First Nations people

⁴⁸ Transcript, June 27, 2011, Cross-Exam by Tim Dickson, p.90, line 19

⁴⁹ Transcript of June 27, 2011, p. 18, ll. 10-13 (cross by Mr. East).

today know this to be true, and they regard the restrictions on the uses of fish to be part of the colonial apparatus designed to redistribute fish away from First Nations communities to the commercial fishery.

101. It is important to understand history, to understand the current fisheries management regime and to find a way to overcome historic injustice and ensure a more just and sustainable management of the salmon fishery.

102. The increased limitation of Aboriginal access to salmon, went hand in hand with the promotion of a commercial industrial fishery, especially once British Columbia joined Canadian federation in 1871. That is also the year the first salmon cannery opened in British Columbia, starting what is properly referred to as the commercial-industrial fishery⁵⁰. In this context and also in the context of the Cohen Commission proceedings it is important to make a distinction between the commercial-industrial fishery and the Aboriginal fishery. The latter is a communal fishery, which has sustained First Nations over millennia, who in turn hold collective rights to fish. The commercial-industrial fishery is dominated by corporations and individuals, holding individual licences and fishing privileges. Their primary goal is profit maximization and they have the necessary equipment to quickly exploit a fishery. On the other hand First Nations, especially along the Fraser River, conduct what ADM Bevan referred to as an “artisanal fishery” with nowhere near the same kill power over a brief period of time.

103. The number of canneries mushroomed, with fifty to eighty canneries operating each year by the first decades of the twentieth century. The commercial fleet also grew quickly.

⁵⁰ Exhibit 1135 pp. 2 and 8

Concerns over the sustainability of the salmon fishery were raised, with cannery operators lobbying to secure enough salmon given the increasing competition for fish⁵¹. In 1889 the Dominion Department of Fisheries instituted the first limited licence regime in BC and although the limit on numbers was later removed the participation of independent Aboriginal fishermen was reduced drastically and by the 1920s Aboriginal participation in the Fraser Commercial industrial fleet had become insignificant⁵². Even in the context of individual participation in the commercial industrial fishery, indigenous fishermen were subject to discrimination, including through federal policies⁵³.

104. As Professor Harris explains in his paper for the Cohen Commission, many Aboriginal fishers resented paying for permission to fish in waters they considered theirs⁵⁴.
105. Most troublesome remains the systemic discrimination against Aboriginal Peoples collectively by constructing an “Aboriginal Food Fishery”. The Dominion Fisheries Act (1868) entered into force in BC in 1877 and the Salmon Fishery Regulations had a clause entered in 1888, that⁵⁵:

Indians shall at all times, have liberty to fish for the purpose of providing food for themselves but not for sale, barter or traffic, by any means other than drift nets or spearing.

⁵¹ Exhibit 1135, p.11

⁵² Exhibit 1135, pp. 11-13

⁵³ Exhibit 1135, p.14

⁵⁴ Exhibit 1135, p.15

⁵⁵ Fishery Regulations for the Province of British Columbia, s. 1, Order in Council, November 26, 1888, Canada Gazette, Vol. 22, p.956, Exhibit 1135, p. 18, footnote 48

106. In 1894 the additional requirement of a permit was added, providing that Indians “may” fish with the permission of the inspector of fisheries⁵⁶. The Minister of Fisheries had already made clear the position of the Department, that Indian Food Fishery was not to be considered a right, but “an act of grace” bestowed by state⁵⁷. Since then and until today, DFO has maintained an approach that requires permits and licences issued at the discretion of the Minister and Aboriginal Peoples who fish without such are subject to enforcement and prosecution.

107. These limitations by way of law and policy were very contentious among Indigenous Peoples and remain major points of contention. In order to reshape the relationship between the Department of Fisheries and Oceans and Indigenous Peoples, these systemic issues will have to be addressed – not only to overcome a historic injustice, but to set the legal basis for true joint decision making and co-management to ensure sustainability of Fraser River Sockeye Salmon. Then and now DFO’s policies and regulations were aimed at protecting the exclusive jurisdiction of DFO over fisheries. This objective appears to be paramount for DFO, even ahead of conservation of Fraser River sockeye salmon stocks, which, as many have testified before the Cohen Commission, could be furthered through implementing co-management.

⁵⁶ Fishery Regulations for the Province of British Columbia, ss. 1, 6 Canada Order in Council, March 3, 1894, Canada Gazette, vol. 27, p. 1579, Exhibit 1135, p. 20, footnote 50

⁵⁷ Minister of Fisheries, Charles Tupper to Minister of the Interior, Edgar Dewdney, August 24, 1891, Library and Archives Canada (DIA, RG-10, vol. 3828, file 60926), Exhibit 1135, p. 20 footnote 51

108. Instead “conservation” has been abused as an argument to claim exclusive jurisdiction over fisheries management and further excluding Aboriginal peoples. Hence Professor Harris correctly raised the question of “conservation for whom?” in his testimony⁵⁸:

So I think conservation has been an important thread through much of the Department of Fisheries management of the fishery, but I think the question of conservation always has to be followed by another question which is for whom. For whom are fish being conserved. And I think the food fishery was part of a legal apparatus that was -- that was reallocating fish and reallocating fish to an industrial commercial fishery. And the food fisheries is part, and I think an important part, so this was the way in which a prior aboriginal fishery was confined or consigned to the margins.

109. The argument of limiting Aboriginal fisheries for conservation has also been repeatedly used. Historically and to date the argument has been used to close down Aboriginal fisheries while other fisheries continued. For example, following the Hell’s Gate rock slides the Indian food fishery was closed for many years and heavily restricted thereafter, whereas the commercial fishery in the mouth of the Fraser continued⁵⁹. Some of the representatives for the commercial industrial fisheries, even in the context of this Inquiry, kept making the point that the aim of conservation is to ensure “sustainable yield”, whereas Indigenous Peoples have argued for the conservation of Fraser River sockeye salmon stocks to ensure their sustainability for future generations. They continue to make the point that Indigenous Peoples have a right to the conservation of Fraser River sockeye stocks and that their *in situ* efforts are key to the sustainability of the Fraser River sockeye stocks.

⁵⁸ Transcript, June 27, 2011, Cross-Exam by Tim Dickson, p. 91, lines 28 to 40

⁵⁹ Exhibit 1135, p. 23, footnote 64

110. The current fisheries laws and regulations in regard to Aboriginal fisheries are not based on recognition of constitutionally protected rights to fish, but rather maintain the discretionary approach, whereby fisheries licences and permits are issued subject to the discretion of the Minister and under the conditions of the Department. If Aboriginal Peoples instead exercise their inherent rights to fish, they are prosecuted and forced to prove their Aboriginal rights to fish in court, where the federal government will deny those rights or argue that they were justified in their infringement of them.
111. The Department then and now took a very limited interpretation of fishing for food, rather than focusing on how fish had always been at the core of indigenous economies and provided food for Indigenous families, in more than one way. As is clear from the testimony of DFO officials, they have not even worked to understand the social and ceremonial aspects of the FSC fishery, which they claim to recognize as a constitutionally protected fishery. Instead they continue to use a negative definition of the food fishery: that fish is “not sold” and funds are inefficiently spent in an attempt to enforce⁶⁰ this artificial limitation then as much as now.
112. Additional discriminatory provisions were added as early as 1917 to fix places, methods and timing of the Indian food fishery along with reversing the burden of proof: if an “Indian” had sold fish, the accused had to prove that the fish had not been caught under a food fishing permit⁶¹. Similarly, today the reverse burden applies where Aboriginal peoples are required to prove an Aboriginal right to fish or sell fish, if prosecuted for fishing without a licence or selling fish. Furthermore, limitations as to area, methods and timing of Aboriginal fisheries
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⁶⁰ Exhibit 1135, p. 21, footnote 57 referencing hiring two additional fisheries officers on the Fraser River in 1915

⁶¹ Exhibit 1135, p.22, footnotes 58 and 59

remain in the licences and permits and if those are not followed Indigenous Peoples are prosecuted.

113. Regulation and enforcement have been strategically used to marginalize Indigenous Peoples along the Fraser River from the fisheries and, as Professor Harris explains to “further solidify the constructed boundary between food and commercial fishing”⁶², rather than turning to Indigenous Peoples to determine the appropriate definition of overall Aboriginal fisheries. In response to questions by Mr. Harvey, Professor Harris explained the problem with the concept of an Aboriginal food fishery then and now⁶³:

What I'm saying here is that it's crucially important to recognize the food fishery and the Indian food fishery as a legal construct and not as a reflection of past aboriginal practice. It's a construct that's created in the late 19th Century and carries through in Canadian law to the present, this category of Indian food fishing. And my argument there with Peter Millerd is that it's a problematic characterization because it requires not only the regulation of the catching of fish, but also regulation of the use of fish,

114. In the above-referenced paper, “Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood”,⁶⁴ which Professor Harris co-authored, it is explained that:

Second, with respect to the modern management of the fisheries, an allocation of fish for a particular purpose is a significant complicating factor. A food fishery requires the regulation not just of the act of fishing, but also of the uses of the fish caught. Regulating the fisheries themselves difficult enough task without also regulating how the fish are used. This second layer of regulation is difficult,

⁶² Exhibit 1135, p.23,

⁶³ Transcript, June 27, 2011, p. 55 line 30 onwards

⁶⁴ Harris, Douglas C. and Millerd, Peter, Food Fish, Commercial Fish, and Fish to Support a Moderate Livelihood: Characterizing Aboriginal and Treaty Rights to Canadian Fisheries (January 6, 2010). Arctic Review on Law and Politics, Vol. 1, pp. 82-107, 2010 (Exhibit 1150)

intrusive, and the source of considerable antagonism between Aboriginal peoples and the federal government.

115. Professor Harris explained the underlying problem in his testimony:⁶⁵

Regulating of fishery is difficult enough without also having to regulate the use of fish, which is almost an impossibility or at least requires a level of enforcement that becomes enormously difficult and expensive and does create resentment both within aboriginal communities and beyond.

116. On the basis of that he went on to recommend:⁶⁶

I think that the simplest allocation is the best, that there should just be an allocation of fish or a recognition of a right to a certain percentage of the total allowable catch and a right to participate in the management of that fishery, but that a bright line is preferable to a right based on the use of fish.

117. Furthermore, the construct of Indian food fishery in regard to fishery was what the Indian reserves did in terms of access to land, both resulting in economic marginalization. The issues are actually interconnected, as Professor Harris set out:⁶⁷

Aboriginal leaders remarked repeatedly on the inadequacy of the reserve grants, on the refusal to recognize Aboriginal Title and to negotiate terms of co-existence in a shared territory; and on the disjuncture between an Indian-reserve geography premised on access to fish and a legal regime that had, for the most part, detached the fisheries from the reserves and reallocated them to other users.

⁶⁵ Transcript, June 27, 2011, p. 55, line 44 onwards

⁶⁶ Transcript, June 27, 2011, page 56 line 21 onwards

⁶⁷ Exhibit 1135, p. 31, footnote 84

118. The paper “Five Issues – Five Battlegrounds” illustrates these interconnected issues for Indigenous peoples, and places the history of Indian fisheries in a historical perspective. It also sets out issues that remain unresolved today. The first issue is that Indigenous Peoples have never surrendered their lands and resources; that being so, they hold inherent rights and Aboriginal title to their traditional territories, which are the basis for the economic foundation of their communities. Indigenous Peoples have always stressed the critical importance of fish, both as a food source and to the community⁶⁸.

119. Professor Harris commented on the importance of the conclusions in the paper and the research of Reuben Ware, who he explained developed the first archival and legal record on the regulation of the fishery⁶⁹. He considered his research very strong, so it is worth to take into account the key points of the paper and the recommendations that flow from it⁷⁰:

- Aboriginal Peoples have never ceded control over their land and resources and as such they should be in control of them and Aboriginal rights should form an economic foundation for Indian communities.
- The critical importance of fish and fisheries to First Nations has to be recognized.
- First Nations then and now lament the tragic destruction of fisheries for First Nations under the management of the federal government and the exploitation of corporations. As such they recommend that First Nations play a central role in the restoration of the stocks.

⁶⁸ Exhibit 1166: Ware, Reuben (1983) Five Battlegrounds, Coqualeetza Training Centre for the Stó:lō Nation, pp 1-2

⁶⁹ Transcript, June 27, 2011, p. 98, lines 1-20

⁷⁰ Exhibit 1166: Five Battlegrounds, p.1-2

- Indigenous Peoples see the gradual development of government regulation as a restriction on Indian fishing rights, which has to be rectified.

IV. CURRENT DFO POLICIES WITH RESPECT TO ABORIGINAL PEOPLES

A. DFO'S Policy Based Approach

120. The current approach of the federal government, including DFO, to addressing Aboriginal rights is not based on recognition; rather, senior officials describe it as a “policy approach”⁷¹. In her testimony Julie Stewart, who works as a Director in the Aboriginal Policy and Governance Directorate at DFO headquarters in Ottawa⁷², went so far to state that:

the question of the existence of rights, who has rights, what the scope of the rights are, and what the nature of the rights are, is not something that we determine. Our approach rather, is to use programming and policy approaches to deal with issues around fisheries management.

121. The policy approach is what the work of the Aboriginal Policy and Governance Directorate focuses on both at headquarters and in the region, where the lead position in that regard is the Regional Director of the Treaty and Aboriginal Policy Secretariat⁷³. The Regional Director’s work focuses on the development and implementation of policies, strategies, tactics and programs, and the participation of DFO in the negotiation of agreements through the BC Treaty Commission Process (BCTC)⁷⁴. At the same time, these

⁷¹ Transcript, September 2, 2011, p. 75 lines 10-12, testimony of Kaarina McGivney; and p. 63 lines 18-27

⁷² Exhibit 1420, CV Julie Stewart

⁷³ Exhibit 1419, Job Description Regional Director of the Treaty and Aboriginal Policy Secretariat

⁷⁴ Supra, Exhibit 1419, p.2

high-ranking bureaucrats recognize that First Nations are important knowledge-holders and can contribute their knowledge to ensure conservation and more sustainable management, and that⁷⁵:

a number of our policies acknowledge the traditional ecological knowledge as something to consider in the Wild Salmon Policy, in the Species at Risk Act, etc.

122. What they fail to realize is that the only way to fully access traditional ecological and indigenous knowledge is to have First Nations fully participate in management, including habitat management, as joint decision-makers. They fail to distinguish First Nations from stakeholders⁷⁶ and to recognize the special role that First Nations' rights play when it comes to decision-making in their traditional territories. First Nations should be treated as joint decision-makers and distinct from stakeholders, since they collectively hold knowledge and rights that are constitutionally protected.
123. The failure of high level bureaucrats who work on Aboriginal policies to recognize the special standing of First Nations is cause for concern and underscores the failure of DFO to fully implement their constitutional obligations to First Nations. It raises the question about who is looking after the implementation of Aboriginal rights within DFO?
124. The result is a constitutional breach where the highest law in the land and the legislature protect Aboriginal rights, the judiciary recognizes Aboriginal rights, but the executive branch refuses to implement them. One way to remedy this constitutional breach is legislation implementing joint management and decision-making with First Nations and removing the unfettered discretion of the Minister regarding fisheries management decisions.

⁷⁵ Transcript, September 2, 2011, p.64 lines

⁷⁶ Transcript, September 2, 2011, p. 63 line 10 to page 64 line 37

125. STC-CIB has already made submissions in response to the Cohen Commission's Policy and Practice Report on Aboriginal and Treaty Rights, which were filed alongside this PPR 1 and spoken to in the course of the respective hearings. Since these submissions already form part of the record before the Commissioner they are not repeated here⁷⁷.
126. The recognition of Aboriginal rights and jurisdiction is the issue that has been raised in the context of the Roadmap process: that in order to implement co-management, there has to be a commitment at the highest level to make the necessary changes to the respective laws and policies, based on implementation of constitutionally protected Aboriginal rights. As Mr. Becker stated, it is not just about developing a document, it is about building a different relationship⁷⁸. He was supported by other witnesses on the Aboriginal worldview panels, who pointed out the problem that currently the process does not involve decision-makers, but rather technical people and there would have to be a real commitment to make the necessary changes in law and policy to implement joint decision-making.
127. Another problem in that regard is that DFO has a centralized management structure, based on the final (exclusive) decision-making power and discretion of the Minister. DFO representatives who meet with First Nations have very narrow mandates and lack decision-making power regarding issues, such as the implementation of Aboriginal rights, of central importance to First Nations.
128. On the other hand First Nations have a decentralized approach, where each nation has jurisdiction in their respective territories, so their decision-making power is strongest on the ground, and although they might have larger organizations assisting them at the local,

⁷⁷ PPR-1 with Reply Submissions, pp. 161 - 181

⁷⁸ Transcript, December 13, 2011, page 64 line 3-12

regional and provincial level, the decision-making authority remains with the respective nations in their traditional territories.

129. Other DFO officials, especially those working in habitat management, recognize the important role that First Nations and their knowledge play on the ground and that this is a field where there could be much improvement. They also recognize that there are fields, especially of overlapping jurisdiction, where working with Indigenous Peoples can get DFO to the table in more integrated management processes, where they otherwise do not have much decision-making power.

B. Inter-Jurisdictional Issues

130. One area where a tripartite⁷⁹ process between the federal government, provincial government and First Nations was suggested and welcomed by DFO is the crucial area of water management. Mr. Hwang, Area Manager of the Ecosystems Management Branch⁸⁰, BC Interior, agreed that he saw the value in having a holistic approach of looking at water management, and also land uses, et cetera, and that First Nations would have a key role to play in this process within their territories, as rights holders, land users and knowledge holders⁸¹.

131. Another inter-jurisdictional matter is gravel removal. DFO Biologist Jason Hwang who is responsible for the gravel file within the Department, agreed with Counsel for Canada that the matter is a jurisdictional challenge that the habitat management program faces.

⁷⁹ Transcript, September 16, 2011, p.80 line 28 to page 81 line 7

⁸⁰ Exhibit 647, CV Jason Hwang

⁸¹ Transcript, September 16, 2011, p. 92, lines 39-47

132. The province has set up a joint management committee, in which DFO participates, with a limited brief related to habitat issues. DFO is constrained by the resources available to it, so it does not independently consider flood hazard issues, which is considered a provincial responsibility⁸². There are no First Nations on the management committee⁸³, although they could substantively contribute to assessing all the issues related to sediment removal, including how to avoid negative impacts on fish habitat and flood mitigation. Indigenous Peoples are not even on the technical committee, although they should be represented both as knowledge-holders and decision-makers. The provincial Program Director Berardinucci agreed that there was room for improvement⁸⁴.

133. In regard to the lack of indigenous representation on the technical committee, DFO biologist Dr. Rempel agreed that it would be beneficial to have an indigenous member from the gravel reach and to be able to access information from indigenous peoples when it comes to the technical committee process⁸⁵.

134. DFO Ecosystem Manager Hwang agreed that there is a move to co-management and joint decision-making with First Nations, but it is not happening specifically for fish habitat management. He also observed that the Department has not moved to co-management when it comes to conservation and habitat protection.⁸⁶ He further confirmed that there is no joint

⁸² Transcript, June 16, 2011, page 107, lines 15-19; p. 105 lines 20-27

⁸³ Transcript, June 16, 2011, page 106, lines 22-33

⁸⁴ Transcript, June 16, 2011, page 107, lines 13-14

⁸⁵ Transcript June 16, 2011, page 65 line 41 to page 66 line 3

⁸⁶ Transcript, June 16, page 108, lines 18-27 and page 106 lines 2-7

decision-making with First Nations in place for gravel removal⁸⁷, but agreed that indigenous knowledge can have a positive effect when it comes to habitat protection⁸⁸.

135. Jason Hwang, as the DFO official responsible for gravel removal in the Lower Fraser, explained that gravel removal does not rate in terms of significance for habitat issues as they relate to sockeye. He compared it to the potential changes, such as changes in watersheds from mountain pine beetle⁸⁹. Those changes, along with logging, can lead to increased erosion and increased deposits of gravel in the Lower Fraser. Increased gravel accumulation constitutes a flood hazard and the province's flood hazard management program includes sediment removal⁹⁰.

136. The extremely limited sampling done by BCIT students does not meet basic scientific standards and methods to provide reliable information. Dr. Rosenau himself referred to it as "*de facto* sampling"⁹¹, based on a moment in time with no scientific reliability. Dr. Rosenau was successfully challenged on the reliability of the work and the overly broad conclusions drawn by counsel for Canada⁹² and in conclusion he even stated himself that the sampling was "not in the least representative".⁹³

⁸⁷ Transcript June 16, page 109, lines 12-19

⁸⁸ Transcript, June 16, page 108, lines 40-46

⁸⁹ Transcript, June 16, 2011, p. 92 lines 14-19

⁹⁰ Transcript, June 16, 2011, page 95 lines 20-22

⁹¹ Transcript, June 16, 2011, page 6, lines 37 and 38

⁹² Transcript June 16, page 29 line 1 onwards

⁹³ Transcript June 16, 2011, page 30 lines 5-13

137. DFO biologist Dr. Rempel further investigated the assertion by Dr. Rosenau that there might be a specific sockeye population spawning in the gravel reach, which was based on very limited and questionable work by students. Her conclusion, based on expert opinions within DFO, was that they are confident that they would have detected a persistent population in the area if it had existed, but they had not and hence the conclusion is that those are stragglers from other populations⁹⁴. Initial testing of the limited samples by the Pacific Salmon Commission attributes the sockeye found on the gravel reach to specific populations in the Upper Fraser River. Dr. Rempel further explained that there could be many explanations for this, including that the sampled fish could have been making their downstream migration from their natal spawning grounds to the estuary⁹⁵.
138. Dr. Rosenau's conclusions should be seen in that light. So should his tendency to make broad and sweeping conclusions, as evidenced by the editorial statements in regard to the Commissions' policy and practice report, which Commission Counsel, who had called and sought to qualify him broadly as a witness, opposed being marked as an exhibit, along with other counsel, including for Canada and the province. The Commissioner has since made a ruling and refused to admit it as an exhibit. The STC-CIB further submits that Dr. Rosenau should not be qualified as an expert in regard to fluvial geomorphology and hydrology as those relate to freshwater aquatic ecosystems and flood profiles, on the basis of his own admission that he is not a fluvial geomorphologist and the additional points raised by counsel for Canada, British Columbia and STC/CIB at the hearings on June 15, 2011⁹⁶.

⁹⁴ Transcript, June 16, 2011, page 32 lines 1-10

⁹⁵ Transcript, June 16, 2011, page 64 line 28 to page 65 line 21

⁹⁶ Transcript, June 15, 2011 – pages 81-88

139. Dr. Rempel conducted detailed research on the gravel reach and fish habitat in the context of her PhD research and she determined favourable habitat units for sockeye salmon such as channel nooks and bays, which are slack water habitats where she encountered all the 200+ sockeye salmon she sampled. She also confirmed that migrating salmon rely upon them, including to rest in their migration up are back eddies⁹⁷.
140. Dr. Rempel further confirmed that gravel removal can result in increased availability of ecologically significant habitats types such as open nooks, which have the highest density of juvenile fish, which is what happened following gravel removal at the specific gravel bar she studied⁹⁸. If done properly, gravel removal can create more diverse habitat units. This greater complexity of habitat is positive for many different species, including juvenile sockeye⁹⁹.
141. Overall, Dr. Rempel concluded that DFO has no empirical evidence to show a negative impact of gravel mining on sockeye salmon populations¹⁰⁰. We urge the Commissioner to accept the evidence of Dr. Rempel in that regard over the evidence of Dr. Rosenau, as Dr. Rempel's evidence is also supported by Jason Hwang. Furthermore, Dr. Rempel and Jason Hwang recognized the value of including indigenous knowledge and to ensure more integrated management. We suggest it would be to the advantage of DFO to have Indigenous Peoples at the table as decision makers since they have rights and knowledge that have to be

⁹⁷ Transcript, June 16, 2011, page 66 line 15 to page 67 line 1

⁹⁸ Transcript, June 16, 2011, page 67 line 9-20

⁹⁹ Transcript, June 16, 2011, page 67 line 35 to page 68 line 22 and line 44 to page 69 line 3

¹⁰⁰ Transcript, June 16, 2011, page 69 line 4-8

taken into account by both the province and DFO and can give the latter more weight in decision-making.

142. Chief Willie Charlie commented on the negative impacts that bad logging practices and increased sediment deposits have on fish habitat. He noted that there has been increased gravel build up in the Fraser River itself, and they have been working on restoring spawning channels, which have all been filled with silt. First Nations communities along the Lower Fraser have developed gravel removal plans which incorporate their traditional knowledge of river flow and areas used by sockeye in their migration and based on that the plans include areas for fish to rest and feed and further habitat considerations¹⁰¹.

143. This further underscores the importance of changing DFO's current policy approach to an approach that is based on the recognition of Indigenous Peoples as rights and knowledge holders and decision-makers within their territories.

C. DFO's Risk Management Approach

144. DFO's current approach does not recognize Aboriginal rights; rather, DFO considers and treats them as a risk and employs a risk management approach. One conclusion that can be drawn from that is that the government acknowledges that they do not have jurisdiction over Aboriginal rights, since they are derived from the inherent legal and management systems of Indigenous Peoples. If DFO could simply claim jurisdiction over Aboriginal rights, they would simply act as a regulator as they do with user groups and stakeholders, such as commercial and recreational fishermen. On the other hand, Indigenous Peoples have inherent rights and their own jurisdiction, and a system of joint decision-making and management

¹⁰¹ Transcript, December 13, 2011, p. 67 line 33 to p. 68 line 15 and p. 47 line 24 to p. 48 line 2

would create more certainty for all, including stakeholders. Instead DFO continues to employ a risk management approach that aims at mitigating the risk they consider Aboriginal rights to pose to their exclusive jurisdiction, thereby creating uncertainty through their own policies.

145. To this effect the Aboriginal Policy and Governance Risk Profile was developed, which sets out that:

The Aboriginal Policy and Governance Directorate (APG) is in the business of managing risk and does so through the implementation of several programs targeted to Aboriginal fishers, offering policy advice to the department on Aboriginal fishing issues, negotiating agreements on the management of Aboriginal fisheries,... advising federal negotiators on land claims and self-government, and promoting fisheries related economic opportunities for Aboriginal communities.

146. This brief statement encapsulates the approach taken by APG to manage risk based on a policy approach and negotiation of agreements and providing programs and economic opportunities as an incentive to sign such agreements. This approach inherently results in a lack of transparency, since negotiating mandates are closely guarded, and power and funding are exploited in such negotiating processes, resulting in further uncertainty for all. This approach does not enable co-management and joint decision-making, which requires disclosing all relevant information and engaging on an equal footing. During the Commission hearings, a number of First Nations political representatives and decision-makers have criticized DFO's approach which sees lower level DFO officials who lack decision-making

power on issues of key importance to First Nations, approach them with very limited negotiating mandates, as Councillor Quipp explained¹⁰²:

We may go sit at the table and have discussions with DFO but they always come with a mandate. And they always come with the thought that the person that comes to a meeting with us is so low on the totem pole they don't have any decision-making authority in order to -- you know, even say we -- we might have a level playing field at negotiating some kind of an agreement that we could all agree with.

147. The result is that the current approach does not result in a level playing field or anything close to true negotiations or resolution of the issues.

148. The APG risk management profile has identified eight key risks¹⁰³:

- a. Human resource capacity, which is termed as not having the skilled and knowledgeable human resources to deliver their programmes. In interactions with DFO this risk applies even more so to Indigenous Peoples and organizations, which often cannot hire or retain staff due to the lack of/ annual variations in funding.
- b. Litigation – the risk that legal action may be taken against DFO/GOC/provincial governments. The fact that only these governments are listed already implies that in court DFO takes a decision against Aboriginal rights, rather than alongside Indigenous Peoples.
- c. Confrontations – described as the risk of physical and serious non-physical confrontations between Aboriginal and non-Aboriginal fishing groups, between

¹⁰² Transcript, December 13, 2010, p. 46, lines 23-31

¹⁰³ Exhibit 1754, DFO Aboriginal Governance and Risk Profile, specifically refer to: Overview of risk profile, table with List of Risks, p.4

various Aboriginal fishing groups and between DFO and Aboriginal or non-Aboriginal fishing groups.

- d. Resource Misalignment – described as the risk that financial resources and accountability requirements will not align with program legal obligations and objectives.
- e. Negotiation and Implementation of Agreements – the risk that DFO agreements will not be negotiated or implemented.
- f. Exceptions to the policy framework, which are described as the risk that policy exceptions or positions outside of the policy will be made in the course of programme delivery
- g. Information for decision support, which is described as the risk that timely decision-making will not be supported by sufficient and appropriate information. Again this risk currently fully applies to Indigenous Peoples who are rarely provided the necessary information to engage in informed decision making, which has to be the basis of co-management and joint decision-making.

149. In their testimony, senior DFO officials have acknowledged that their management decisions have the potential of infringing on Aboriginal rights. As such, the government is required to conduct an assessment of the strength of claim for any potential infringement. Yet DFO has not developed a transparent strength of claim assessment¹⁰⁴. Neither is any provision made for compensation in case there is an infringement. Instead Director Stewart¹⁰⁵

¹⁰⁴ Transcript, September 2, 2011, p.52, lines 27-35, testimony of Kaarina McGivney; also at p. 71 lines 33-42

¹⁰⁵ Transcript, September 2, 2011, p.71, lines17-22

confirmed that APG employs a risk management approach to dealing with the Aboriginal right to fish. In regard to litigation risk, a special factor identified is that¹⁰⁶:

Approaches to fisheries management regimes are changing and may impact Aboriginal and treaty fishing rights,.. (including) harvesting on an open and competitive basis, to limiting the harvest yield with quotas

150. This provision recognizes that shifting to a quota or share-based management system could infringe Aboriginal rights, yet the Department has been promoting and proceeding with this approach without consulting with Indigenous Peoples and in the absence of prior recognition and protection of Aboriginal rights.

151. One of the risk mitigation measures suggested is negotiation of agreements¹⁰⁷, but in turn a separate risk refers to failure to negotiate and implement agreements.

152. Agreements are one of the main instruments that DFO for implementing their policies. They are strategically used to ensure ministerial and departmental discretion in management decisions. As DFO acknowledged, under the current agreements the decision-making authority rests with the Minister¹⁰⁸, which arguably remains the most closely protected concept, even before conservation of the Fraser River sockeye salmon and instead of joint decision-making and recognition of indigenous rights, which arguably could contribute to conservation and sustainable management of the Fraser River sockeye salmon. Kaarina McGivney acknowledged that agreements do not provide clarity with regard to the rights¹⁰⁹.

¹⁰⁶ Exhibit 1754, p.7

¹⁰⁷ Exhibit 1754, p.7

¹⁰⁸ Transcript, September 2, 2011, p. 75, lines 17-20

¹⁰⁹ Transcript, September 2, 2011, p. 75, lines 1-3

153. Similarly licences and permits are issued under the discretion of the minister¹¹⁰. In addition, standard terms of the agreement are set out by DFO. Also the terms and conditions for different DFO programs that form part of the agreements are predetermined. Template agreements are used and the terms and conditions are developed by the federal government and not subject to negotiation or even consultation with First Nations¹¹¹. Senior DFO bureaucrats further explained that they are subject to cabinet confidence¹¹². All funding in turn is channelled through DFO, creating a further imbalance in negotiations.

154. Across the board, First Nations decision-makers told the Commissioner that current “negotiation” processes with DFO do not provide a level playing field, the decision-makers are not in the room, the mandates of those in the room are very limited and in the end they operate on a “take it or leave it” basis. Grand Chief Clarence Pennier put it best when he stated¹¹³:

We really need to have a good negotiation or good understanding with several of the senior officials within the Department of Fisheries and Oceans at that level. Right now we're just meeting with people who come to our tables who put documents on our table and say, "This is what you're entitled to, or you're going to get." You either accept it or you don't accept it. That isn't negotiations.

155. First Nations representatives also talked about DFO’s divide and conquer strategy employed by DFO and how it has damaged relationships between First Nations. The witness

¹¹⁰ Transcript, September 2, 2011, p. 75, lines 21-23

¹¹¹ Transcript, Transcript, September 2, 2011, p. 76, line 35 to p. 77 line 35

¹¹² Transcript, September 2, 2011, p. 77, lines 34-37

¹¹³ Transcript, December 13, 2011, p. 21 lines 12-20

summary of Councillor June Quipp¹¹⁴ speaks to this issue and other concerns with DFO policies and approaches. We urge the Commissioners to take these concerns expressed by First Nations into account when making his recommendations.

156. As set out above the failure to negotiate agreements, and thereby assert control over Aboriginal Peoples, is a risk identified by APG. Kaarina McGivney acknowledged that a result could be discontent and Aboriginal Peoples could exercise their rights and the result would be enforcement. That would in turn lead to a more adversarial approach, which is exactly the opposite of the proper direction, which is toward more co-management and more integrated management¹¹⁵.

157. Yet DFO activated this very risk in the Lower Fraser in the 2011 fishing season by refusing to sign an agreement with the Stó:lō people after DFO had entered into negotiations and submitted an agreement and 11 bands had signed onto it. The proposed agreement was a comprehensive fisheries agreement, which includes both an allocation for FSC and economic opportunity fisheries in the agreement. The economic opportunity element is used by DFO as an incentive to get bands to sign on to the agreement but the FSC allocation applies to all bands in the area, including non-signatory bands¹¹⁶. Kaarina McGivney clarified that the Lower Fraser negotiating mandates are approved by the Minister, whereas mandates for FSC agreements alone are since 2007 developed in the region¹¹⁷. So in this case the Minister and headquarters remained involved in the determination of the mandates, which are not

¹¹⁴ Exhibit 278: Witness Statement of Councillor June Quipp, esp. p.4

¹¹⁵ Transcript, September 2, 2011, p. 75, line 31 to p. 76, line 6

¹¹⁶ Transcript, September 2, 2011, p. 78 line 14 to p. 79 line 16

¹¹⁷ Transcript, September 2, 2011, p. 78 lines 1-13

disclosed to the Stó:lō people. One of the results was the 2009 Comprehensive Fisheries agreement that applied to sockeye and had 17 signatory bands out of 26 Stó:lō bands;¹¹⁸ the number of signatory bands was similar in 2010 and clearly below 20 bands. Yet in 2011 DFO unilaterally refused to sign a comprehensive fisheries agreement; although 11 bands had already signed on, DFO suddenly required the signatures of a minimum of 20 bands¹¹⁹. The Area Director Diana Trager for the Lower Fraser was the one to announce the decision, but as set out above, the ministerial level was involved in the decision. The announcement was only made on August 8, 2011 well into in season management, in clear violation of DFO's own stipulation that agreement on such issues should be reached well before the season starts and in violation of all rules of good faith negotiations. As a result, DFO did not even have an FSC allocation in place for sockeye in the traditional territory of the Stó:lō people and no economic opportunity fisheries on sockeye took place in 2011.

158. As per APG's own risk profile, this jeopardizes the objective of increasingly involving Aboriginal people in decision-making processes in other areas of DFO's responsibility, including integrated oceans management, species at risk, habitat management, and scientific research. It further notes that:¹²⁰

Not reaching agreements causes uncertainty within the fishing community at large, especially in providing clarity with respect to rights of Aboriginal fishing groups. This uncertainty may lead to: confrontations between Aboriginal and non-Aboriginal communities, DFO enforcement and Aboriginal fisheries, litigation and damage to the reputation of DFO.

¹¹⁸ Exhibit 1250

¹¹⁹ Exhibit 1757, email by Area Director

¹²⁰ Exhibit 1754, p. 15

159. In this case the resulting loss to the reputation of DFO and the uncertainty was occasioned by DFO's unilateral decision not to sign a comprehensive fisheries agreement. Further documents, such as the DFO Lower First Nations Fisheries Plan¹²¹, show that this was orchestrated by DFO, again without disclosing these strategies to the respective First Nations.

160. For example, the document indicates that before 2005 Lower Fraser First Nations could decide how much of their combined FSC/economic (pilot sale) allocation they sold, but it changed thereafter. It specifically sets out that¹²²:

Recent allocations have been limited to 4% of the Canadian commercial TAC plus an additional amount that could be negotiated prior to the season if First Nations were prepared to accept a lower FSC amount. Lower Fraser River First Nations have not been attracted to this type of share-based economic fishery; and have largely rejected the concept of a of a lower FSC amount to offset economic access, given the lower priority and higher uncertainty associated with an economic allocation.

161. The reference to lower priority refers to the DFO policy under those agreements to require acceptance of the same priority as for a commercial fishery; it is a clear attempt by DFO to undermine any priority for Aboriginal Fisheries.

162. DFO recognized that there was a strong opposition by First Nations to this plan and they identified the risk that First Nations might not agree to reducing FSC in order to increase economic allocations. The response stipulated was¹²³: "Do not deviate from this approach

¹²¹ Exhibit 1756, Lower Fraser First Nations Fisheries Strategic Plan, Draft, February 22, 2010

¹²² Exhibit 1756 , p.3

¹²³ Exhibit 1756 , p. 10 (risk and mitigation measures table)

and limit any increases through additional licence retirement to levels that maintain incentives for treaties.”

163. DFO’s insistence on an approach that was opposed by First Nations in the Lower Fraser River resulted in fewer bands signing the agreement. Rather than working with First Nations and taking their positions into account, DFO unilaterally refused to sign a comprehensive fisheries agreement for sockeye, sticking with their “do not deviate” approach. Others refer to the approach as a “divide and rule” approach, which is also evidenced in the document, as set out in the Draft Appendix to the 2009/10 EO note for the Lower Fraser Area that refers to the Comprehensive Fishing Agreement for the Stó:lō People, consisting of 26 bands and proposes¹²⁴: “Although crude – the point is to move to smaller geographic scale fishery units. This will make the Stó:lō area issues less complex,…”

164. Indeed, quite crudely the document then continues to propose how to break up or divide and rule the Stó:lō people. Even more concerning, the DFO plan stipulates that¹²⁵:

the primary objective of PICFI is to support the integration of Lower Fraser First Nations economic fisheries with the general commercial fishery with a share-based management regime.

D. COASTWIDE FRAMEWORK

165. This direction was made in 2010, when the proceedings of the Cohen Commission were underway. Moving to a share based regime was identified as a potential infringement on Aboriginal rights and there had not been the necessary substantive consultations with Aboriginal Peoples. Promoting the share-based regime is consistent with the Coastwide

¹²⁴ Exhibit 1756, p. 17 onto page 18

¹²⁵ Exhibit 1756, p. 3 – 4th bullet

Framework (CWF), which Canada has never consulted First Nations on and the underlying documents of which the government has refused to disclose to the Cohen Commission. DFO announced on March 2, 2010 that it is deferring negotiation of fisheries components of treaties as per the CWF, since the Cohen Commission findings may have implications for the management of Salmon Fisheries. Continued efforts by DFO to promote share-based management as documented in the above document, show the bad faith of the government of Canada that Indigenous Peoples have to repeatedly deal with.

166. Indigenous Peoples continue to encounter an uneven playing field in negotiations and discussions with DFO when dealing with Aboriginal Fisheries. While DFO officials will often point to limitations in their mandates and the policies that instruct them, these policies and mandates are not transparent and accessible to Indigenous Peoples.

167. The internationally recognized principle of free prior informed consent, set out in the UN Declaration on the Rights of Indigenous Peoples should form the basis for all dealings with Indigenous Peoples. It requires as a first step that all relevant information be shared with Indigenous Peoples, so as to form the basis of any engagement and joint decision-making process. Specifically, the UNDRIP stipulates in Article 19 that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

168. This international principle clearly applies to Aboriginal fishing policies, the CWF and mandate information, yet it is not implemented by DFO and the government of Canada. The only document that has been disclosed in regard to the Coastwide Framework, is a summary

document entitled “Aboriginal Fisheries Framework”,¹²⁶ and even there the federal government is refusing to disclose the single allocation number that they unilaterally determined. The document was approved by the Minister, and neither before nor after the approval of the document was there any consultation with Indigenous Peoples on the document¹²⁷.

169. As senior DFO officials have acknowledged, they started work on the CWF because they realized that the treaty process had not moved as quickly as was originally anticipated and that some First Nations might never sign treaties and that the context that the fishery would have to be managed in a context of treaty and non-treaty First Nations¹²⁸. It envisions a single allocation for FSC and commercial purposes¹²⁹, which would stand simply vis-à-vis non-Aboriginal allocations. So while claiming to provide priority for FSC, a single allocation as proposed in the document cannot provide that.

170. The CWF continues to promote a policy-based approach.¹³⁰ Canada’s failure to disclose and involve Indigenous Peoples in the further development of its policies regarding Aboriginal Fisheries will remain the stumbling block that has to be overcome to move towards true collaborative management and joint decision-making. To claim to aspire to put such processes in place while refusing to disclose policies and mandate information, points to the greater underlying problem when it comes to Aboriginal fisheries. One risk clearly

¹²⁶ Exhibit 1426

¹²⁷ Transcript, August 19, 2011, page 31, lines 33-43 (Exam in Chief Mr. McGowan of Kaarina McGivney)

¹²⁸ Transcript, August 19, 2011, page 30, lines 11-22 and page 35, line 28-37

¹²⁹ Transcript, August 19, 2011, page 38, line 44 to page 39 line 3

¹³⁰ Transcript, August 19, 2011, page 35, line 1 onwards

associated with the current policy-based approach is the lack of transparency and inconsistent application of policies. Kaarina McGivney agreed that this is a potential risk,¹³¹ which in turn results in greater uncertainty which can only be overcome by adopting an approach based on recognition.

171. Instead of Canada choosing to implement Aboriginal Title and Rights to fish through legislative recognition following judicial recognition of such rights, Canada has continued to deal with these constitutionally protected rights at the administrative or policy level, removing it from the transparency and checks and balances that attach to legislative recognition and thereby further creating uncertainty and risks when it comes to management of Aboriginal fisheries.

E. Limitation of Food, Social and Ceremonial Elements

172. Even DFO's current approach to dealing with FSC does not live up to its constitutional obligations and does not provide transparency. DFO internally develops FSC mandates that are not shared with First Nations and disclosed and that limit negotiations. DFO's "command and control" approach in this regard causes stress between the Department and First Nations, and negatively affects DFO's management of the fishery.

173. Furthermore, DFO no longer negotiates fisheries agreements with single First Nations, but rather insists on signing Comprehensive Fisheries Agreements (CFAs) with larger groups. The incentive for signing CFAs is an economic opportunity component, which can only be accessed by First Nations who sign them (i.e. signatory bands). Yet those First Nations who refuse to sign the agreements so as not to undermine their constitutionally

¹³¹ Transcript, September 2, 2011, p. 75, lines 24-30

protected rights to fish (i.e. non-signatory bands) still find their FSC allocation covered as a whole under the agreements. First Nations have argued that this undermines the priority that should be allocated to the constitutionally protected right to fish for FSC purposes and the mandates given by DFO in regard to FSC allocations are therefore highly relevant.

174. DFO has failed to fully implement Aboriginal rights to fish for FSC purposes. There is also a lack of transparency regarding how DFO implements its constitutional obligations. There is no comprehensive policy regarding Aboriginal fisheries or specifically FSC allocations, or at least it has not been disclosed to date.

175. DFO's failure to fully implement FSC rights is further exemplified by the fact that DFO has not even tried to understand the scope of a social or ceremonial fishery from an Aboriginal perspective. Ceremonial permits in the Lower Fraser are limited to funerals¹³² and the only ceremonies that the DFO witness responsible for the respective policies could refer to are general ceremonies, but no reference was made to indigenous ceremonies and there is a clear lack of understanding of ceremonial fisheries by DFO¹³³. The same applies even more so when it comes to the social element.

176. First Nations witnesses testified in depth to the overall importance of salmon in their daily diets, cultural and spiritual life. In the case of the Stó:lō people, specific reference was made to the importance of salmon as a source of healthy nutrition (especially since many of their families live in poverty) and how salmon is provided to such community members who would otherwise be starving. In addition, the community has an obligation to feed those who attend their ceremonies or come to the smoke house, including those who live there

¹³² Transcript, December 13, 2010, p. 45 lines 12-15

¹³³ Transcript, September 2, 2011, p.60 line 33 to page 61 line 8

throughout the season. In many cases experienced fishermen share their catch with elders and others in the community or even other communities. Provision is made for preserving food, but when applications are made to fish for social purposes, including canning they are denied¹³⁴.

177. Nothing better illustrates the difference in worldviews than the denial of permits to hold first salmon ceremonies in Stó:lō communities in 2011¹³⁵. Chief Charlie explained the importance of the ceremony as follows¹³⁶:

Squawkum is that first fish, and it's like the -- and it's like the most prized fish of our people, the king of the fish, if you will, the one that you pay respect to, and the one that you have a ceremony for, because they're the first ones to return to the people. And once you have your ceremony for them, it's like they are supposed to go back and let the rest know that they're still being respected, so that the other numbers can happen, so the others will return.

Stó:lō laws require that the people honour and recognize the fish, because otherwise the fish will not return. To deny a ceremonial permit for a first fish ceremony and threaten enforcement measures adds insult to injury.

178. Understanding the social element would require also understanding the social impact of that the decline of (and limited access to) Fraser River Sockeye Salmon stocks has had on Indigenous Peoples along the Fraser River. The Akwé:Kon Guidelines relate to the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters

¹³⁴ References throughout the transcript of December 13, 2010

¹³⁵ Transcript, December 13, 2010, p.44 line 37 to p.45 line 3

¹³⁶ Transcript, December 13, 2010, p. 53, lines 1-11

traditionally occupied or used by indigenous and local communities.¹³⁷ The Guidelines were developed under the Convention on Biological Diversity (CBD) and provide direction for social impact assessments. For example provision 43 provides that:¹³⁸

43. In determining the scope of a social impact assessment, the following should be considered:

- i. Baseline studies;
- ii. Economic considerations;
- iii. Possible impacts on traditional systems of land tenure and other uses of natural resources;
- iv. Gender considerations;
- v. Generational considerations;
- vi. Health and safety aspects;
- vii. Effects on social cohesion;
- viii. Traditional lifestyles; and
- ix. The possible impact on access to biological resources for livelihoods.

179. All of these points should be taken into account along with impacts on biodiversity and full integration of TEK. Director Stewart agreed with the generality that those are considerations that should be taken into account for assessing social impacts¹³⁹, and we suggest that it should be specifically used to assess the social impact of the decline of Fraser River Sockeye Salmon and Fisheries management on Indigenous Peoples along the Lower Fraser.

¹³⁷ Exhibit 1753

¹³⁸ Exhibit 1753, provision 43

¹³⁹ Transcript, September 2, 2011, p. 70 line 2 to page 71, line 16

180. Similarly an indigenous, holistic approach should be taken to defining the social element of the Aboriginal right to fish and Aboriginal fisheries generally should be seen as a whole. In order to overcome historic and ongoing injustice – artificial legislative restrictions that were introduced to limit Aboriginal access to the fisheries has to be overcome.

181. DFO's own Handbook for Resource Managers acknowledges that¹⁴⁰:

The fisheries resource is of great importance to Aboriginal People. It is at the root of most of BC's Aboriginal cultures. Today, fish continues to form a major component of Aboriginal nutritional requirements, but traditionally the importance of fish extended well beyond its food value. In addition to their ceremonial significance, fish were a major commodity for trade among some Indian Bands and tribal groups with many of the groups expanding this trade with Europeans after contact.

182. It goes on to state that:¹⁴¹

183. Aboriginal people have long viewed federal laws and regulations on their fishing as unfair interference with their traditions. They have asserted an Aboriginal, or in some cases a treaty right, to fish or sell fish without regulation, which has not been recognized by Canada. In BC the first significant restrictions on the Aboriginal fishery came in 1888 when Fisheries Act Regulations provided that Aboriginals could, at all times, by any means other than drift nets or spearing, fish for food for themselves, but not for sale and barter. The Aboriginal fishing tradition having been thus restricted, more stringent restrictions were added over the years, with some of them being for conservation of the resource and others to promote development of new non-Native commercial and recreational fisheries. What has to be remembered is that from the outset the construct of the "Indian food fishery" developed by

¹⁴⁰ Exhibit 1752, Aboriginal Fisheries Strategy, Pacific Resource Managers' Handbook, June 2, 2003, p.8-9

¹⁴¹ Exhibit 1752, p. 9

the Department and then the FSC fishery, from an indigenous perspective has been an artificial construct that was meant to open up allocation for the commercial-industrial fishery and initially aimed at eliminating a separate indigenous fishery altogether¹⁴².

184. Professor Harris confirmed this when he testified that¹⁴³:

The second thing I would say is that body of law was designed primarily to reallocate fish to an industrial commercial fishery and in some cases on some rivers to a sport fishery. So that the focus of the *Fisheries Act* and the Regulations under it were really to open the resource up to that industrial commercial fishery and, as I said, in some cases a sport fishery.

185. Indigenous Peoples always saw and continue to see the distinction between the Indian food fishery and an economic fishery as a distortion because in traditional indigenous social systems no such distinction existed. Nor was there such a distinction in indigenous economies. The Five Battlegrounds paper concludes that¹⁴⁴:

The making of this distinction by governmental action in British Columbia is one of the main wedges in colonial rule that was established over Indians.

186. As Professor Harris further pointed out, the food fishery construct complicates fisheries management, posing a difficulty for the efficacy of fisheries management, because it requires regulation not just of the act of fishing but also of the uses of the fish that are caught, which in turn requires substantive resources for enforcement and creates adversarial relationships that all stand in the way of joint management of the fishery.

¹⁴² Exhibit 1135, p.33

¹⁴³ Transcript, June 27, 2011, p. 85, line 24 onwards

¹⁴⁴ Exhibit 1166: Five Battlegrounds, p.8

187. Instead, as set out in the earlier section, he recommended a simple allocation or a recognition of a right to a certain percentage of the total allowable catch and a right to participate in the management of that fishery, rather than an artificial distinction based on the use of fish. Aboriginal rights should be provided priority in the context of priority resource allocation and that they are the only constitutionally protected proprietary rights.

188. This is necessary in order to overcome the historic injustice, as Professor Harris concludes at the his paper for the Cohen Commission, which is a recommendation the STC/CIB standing group wholeheartedly supports¹⁴⁵:

The constitutional entrenchment of Aboriginal rights in 1982, and the judicial interpretation of these rights are beginning to provide the outlines of a new legal framework at the beginning of the twenty-first (century). That emerging framework must be constructed with knowledge of the history of the fisheries, including prior legal regimes and their effect on fishing communities, if it is to contribute to building sustainable and justly distributed fisheries.

189. Professor Harris further eloquently expanded on this in his testimony¹⁴⁶:

So I think there is a great deal more to a well-managed fishery than simply a set of technical or scientific or biological questions. I think that a well-managed fishery is only possible if it's a justly managed fishery. I think for me anyway, a well-managed fishery includes a sense of a fair distribution, of a fair allocation. So when I think of a well-managed fishery, I think of a fishery that is not only sustainable but also just. For me, that's part and parcel of a well-managed fishery.

190. The STC/CIB standing group could not have put it any better, which is why we recommend full indigenous participation in decision-making and management of the fisheries

¹⁴⁵ Transcript, June 27, 2011, Page 87 – line 17 onwards:

¹⁴⁶ Exhibit 1135, pp. 34 and 35

in their traditional territories, thereby addressing the historical injustice that continues to today and working towards sustainable management for future generations.

F. Enforcement

191. Every participant in this Inquiry believes, or should believe, that enforcement is an important element of fisheries management. Ensuring that harvest is *sustainable* is critical to the conservation of any fishery, and a sustainable harvest will always depend in some degree on enforcement. For its part, the STC-CIB believes that enforcement is very important to the management of the fishery.
192. This Inquiry has heard considerable evidence that C&P has a good handle on fishing that takes place outside of an allocation or an opening.¹⁴⁷
193. The STC-CIB will address two issues related to enforcement that it believes can make enforcement efforts more successful and more efficient.
194. The first is that the concept shared stewardship should much more extensively inform enforcement efforts. The fishery will never be adequately managed if enforcement comes only from enforcement *officers*; rather, *all users of the resource must police themselves*, in addition to patrols by enforcement officers. What is needed is community buy-in to the management regime. And that requires less of an adversarial approach, and more linkages between C&P and the communities it is policing. The DFO Priorities panel confirmed that “the old way of doing things” was not efficient and that it was important to obtain buy in and reliable data.

¹⁴⁷ See, for instance, Mr. Nelson’s testimony at Transcript of May 17, 2011, p. 8, ll. 35-46. The topic is addressed above under the subheading relating to en-route mortality.

195. Considerable evidence was heard in this Inquiry of very high level of adversarialism that has existed at times between C&P and First Nations. That adversarialism is tremendously unhelpful to the management of the fishery. It breaks down trust; it breaks down cooperation, both of which are required to implement co-management and joint stewardship and decision making with First Nations. The C&P's way of dealing with First Nations is far too reminiscent of colonial times; First Nations people are not likely to cooperate as long as that is the tone from C&P.

196. Unfortunately, there still appears too much of that kind of attitude within C&P. The much-touted "Project Ice Storm", whereby C&P investigated cold storage plants and concluded that they contained a great deal of FSC fish being stored for eventual sale, is a sad example. C&P's reasoning, it appears, was that the fish was packaged in a way it thought was not consistent with FSC use, but was consistent with sale.¹⁴⁸ And yet C&P has never conducted a study on how First Nations use FSC fish and how they store it.¹⁴⁹ More offensively, they have never even asked First Nations.¹⁵⁰ Rather, they simply came to the conclusion that most of that fish was destined for sale.

197. Scott Coultish went even further, opining that 97% of all FSC fish is sold.¹⁵¹ That is an absolutely outrageous statement. It is offensive, unfounded, and wrong. Perhaps its most offensive aspect is that Mr. Coultish never deigned to talk to the First Nations he was

¹⁴⁸ Transcript of May 18, 2011, p. 70, ll. 1-5 (Mr. Coultish in cross by Mr. Dickson).

¹⁴⁹ Transcript of May 18, 2011, p. 70, l. 47 – p. 71, l. 21 (Mr. Coultish in cross by Mr. Dickson).

¹⁵⁰ Transcript of May 18, 2011, p. 75, ll. 15-43 (Mr. Coultish in cross by Mr. Dickson).

¹⁵¹ Transcript of May 18, 2011, p. 78, ll. 8-17 (Mr. Coultish in cross by Mr. Dickson).

accusing of rampant illegality.¹⁵² He simply never asked. He never talked to First Nations about how they use FSC fish and how they store it. He never even bothered.

198. Statements such as these do nothing but break down trust between First Nations and DFO. Mr. Crey spoke very powerfully to this effect.¹⁵³ He spoke of how damaging it is to the relationship First Nations have with DFO; how it motivates some people to abandon that relationship, to abandon cooperation. It is hurtful to the dignity of First Nations, and it is hurtful to DFO's interest in managing the fishery.

199. The sort of casual denigrating of First Nations we saw from Mr. Coultish must end if enforcement is going to become more effective. The STC-CIB believes that the culture within C&P unfortunately breeds this sort of mindset. The STC-CIB submits that C&P needs to become more integrated with DFO, instead of less. The line reporting structure within C&P is unhelpful; it is too silo-ed, too independent of managers. It needs to become more integrated with DFO. Certainly C&P ought not to be given "agency status".

200. What is needed is more community-based policing. An excellent example of this was the Aboriginal Fisheries Guardians, which were present at one time in the Lower Fraser, but then discontinued. The consistent evidence on the Guardians program was that it was useful and should be re-established. Both Mr. Nelson and Mr. Coultish testified to this effect,¹⁵⁴ so did the DFO Priorities panel.

¹⁵² Transcript of May 18, 2011, p. 78, ll. 18-25 (Mr. Coultish in cross by Mr. Dickson).

¹⁵³ Transcript of July 5, 2011, p. 78, l. 40 – p. 80, l. 13 (Mr. Crey in cross by Mr. Dickson).

¹⁵⁴ Transcript of May 18, 2011, p. 85, ll. 14-20 (Mr. Coultish in cross by Mr. Dickson).

201. The second main point the STC-CIB wishes to advance here is that enforcement of the ban of the sale of FSC fish is unhelpful and inefficient. As Professor Harris observed, and as is discussed above, the food fishery is a legal construct originally designed to marginalize the Aboriginal fishery and to reallocate more fish to the commercial sector. This point is certainly not lost on First Nations. The restriction on the use of the fish they catch is paternalistic and unfair, especially given the relative poverty in which many First Nations live. The enforcement of that ban causes great resentment, as Professor Harris attested. It is also highly difficult to enforce, as exemplified, perhaps, by the charade that was Project Ice Storm. As Professor Harris stated, the restriction on use adds a “second layer of regulation” onto the regulation of harvest levels, and “that is intrusive, that requires a level of surveillance of people's lives, and is just enormously difficult. And so it complicates the management of the fisheries significantly.”¹⁵⁵

202. The real shame of it is that the enforcement of the ban contributes so little to conservation. Every witness who spoke to this issue – and there were many, including Mr. Nelson, Mr. Coultish, Mr. Rosenberger, Mr. Huber and Mr. Bevan, just among the DFO witnesses – agreed that, if a fish is legally caught within an allocation, then the sale of that fish does not raise a conservation concern. The availability of sale could perhaps motivate more fishing outside of the allocation, but mere sale does not impact on conservation. The real conservation concern is fishing outside an allocation or opening. Once a fish is caught, what happens to it is of no consequence to conservation. For the purposes of conservation, what matters is how many fish (and which fish) are caught.

¹⁵⁵ Transcript of June 27, 2011, p. 92, ll. 37-40 (Professor Harris in cross by Mr. Dickson).

203. In light of that, the notion that DFO should spend a substantial portion of its all-too-limited resources on the enforcement of the ban on the sale of FSC fish is absurd. Those efforts do nothing but create resentment within the Aboriginal community, and perpetuate the adversarialism continues to be an element of the DFO-First Nations relationship.
204. Furthermore First Nations see many of the current enforcement practices as violating their human and indigenous rights. They also see a double standard in terms of excessive enforcement against Aboriginal Peoples, whereas commercial and recreational fishermen go largely unchecked.
205. There is also a clear double standard in terms of monitoring. Aboriginal fisheries in the Lower Fraser have one of the most rigorous monitoring systems, where each fish caught in the economic opportunity fishery has to be counted and fisheries monitors oversee all Aboriginal fisheries. Similar standards are not applied in the commercial-industrial salmon fishery, let alone the recreational fishery, which has no mandatory reporting system in place. In order to ensure reliable numbers there should be the same monitoring standards applied to all fisheries.
206. Many witnesses have testified that a straight allocation of fish – without restriction as to use – is ultimately the allocation regime that should be adopted in respect of First Nations. Professor Harris strongly urged this approach,¹⁵⁶ and Barry Huber agreed that it is a matter that should be negotiable.¹⁵⁷

¹⁵⁶ Transcript of June 27, 2011, p. 97, ll. 9-15 (Professor Harris in cross by Mr. Dickson).

¹⁵⁷ Transcript of June 30, 2011, p. 70, ll. 15-29 (Mr. Huber in cross by Mr. Dickson).

207. That is indeed an option that needs to be explored. However, priority resource allocation is essential to First Nations; it is an expression of their constitutional rights, of their priority as holders of unceded Aboriginal rights in the fish by virtue of their continual use since time immemorial. If a straight allocation of fish – an allocation without restrictions as to uses – were ever negotiated between First Nations and DFO, priority resource allocation would have to be provided for. .

V. ACHIEVING JOINT MANAGEMENT

208. In the submissions above, the STC-CIB has urged that the sockeye fishery be jointly managed by DFO and First Nations. We have advanced this position both on the grounds that it is essential for the conservation of sockeye, and that it is an important and necessary step toward righting historic wrongs. In this section, we make more specific recommendations on what co-management means, and how it can be effected.

209. Prior to turning to those questions, however, it should be said that we do not expect this Commission to itself effect co-management, or to make very specific recommendations in that regard. Ultimately, a co-management regime must be developed by DFO and First Nations, both in terms of its content and its timing. It will not work if either of these elements is foisted upon them. However, this Commission can make broader recommendations aimed at encouraging the parties to continue to move – and to move more quickly – toward co-management, and it can make general recommendations as to what the parties should take co-management to entail. We address those questions in reverse order.

A. WHAT IS “CO-MANAGEMENT”?

210. Again, it is not necessary for this Commission to make very specific recommendations about the content of any co-management regime. However, there are two points about the content of co-management we believe the Commissioner should stress in his report.

211. The first is that co-management with First Nations is not the same as co-management with the commercial and recreational fisheries and environmental NGOs. The term “co-

management” has been used in the sense of collaborative management with all user groups, such as through the Integrated Harvest Planning Committee. This is not what First Nations, such as the STC-CIB, mean by co-management.

212. Rather, what First Nations are looking for in their relationship with DFO and the fishery is full joint decision-making. First Nations demand and deserve a role in the management of the fishery that is far more robust than that which should be afforded other user groups. Because, after all, First Nations are not mere user groups in respect of fisheries resources; First Nations are *rights-holders* in the fishery, and they have been the stewards of the resource since time immemorial. If what DFO offers First Nations in the way of co-management is merely on a par with that extended to the commercial and recreational sectors, then co-management with First Nations will most certainly fail. First Nations want to be joint decision-makers, and they will not settle for less.

213. That desire on the part of First Nations should be embraced by this Commission and by DFO. We have described above a variety of benefits that can accrue to the conservation of sockeye, as well as toward the righting of historical wrongs committed against First Nations. But a more concrete point is that full joint decision-making between a government authority and First Nations really can work. The Northwest Indian Fisheries Commission is a perfect example. Many witnesses spoke of the success of the NWIFC and tribal management of fisheries resources. Panel No. 50 – consisting of Marcel Shepert, Ross Wilson, Ernie Crey and Barry Rosenberger – agreed that the NWIFC is a model that should inform discussions here in British Columbia, although they stressed that what is needed is a “made in BC”

process.¹⁵⁸ Russ Jones also spoke very favourably of the NWIFC and its contribution to sustainability.¹⁵⁹

214. The most important element to consider in regard to co-management is not the processes that can lead to it, but the necessary substantive changes that need to be made and the recognition of First Nations' role as joint stewards and decision-makers.

215. The second point is that the form joint decision-making takes in British Columbia will have to respond to the reality of where First Nations see the source of their authority to manage the fishery. First Nations insist that the source of that authority be their constitutionally-protected rights in the fishery, as opposed to the *Fishery Act*. And Aboriginal rights are held at the level of the respective First *nations or collective rights holders*, not at the level of province-wide organizations.¹⁶⁰ Within the Aboriginal community, the farther away from the First Nations level, the weaker the authority. With government it is the other way around: the Minister of Fisheries has the ultimate authority, and those on the ground have the least.

216. The fact that DFO's and First Nations' sources of authorities come from opposite directions complicates co-management between them, but it is not insurmountable problem by any means. The NWIFC faces the same situation, but that model is working. To have different sources of authority and structures on the First Nations' and government sides can

¹⁵⁸ Transcript of July 4, 2011, p. 23, l. 13 – p. 24, l. 11 (Cross by Mr. Prowse).

¹⁵⁹ Transcript of June 28, 2011, p. 21, l. 49 – p. 22, l. 37 (In chief by Ms. Chan).

¹⁶⁰ Transcript of July 5, 2011, p. 67, l. 22 – p. 68, l. 13 (Mr. Crey in cross by Mr. Dickson).

actually serve as additional checks and balances, where First Nations can oversee DFO's work on the ground, based on their knowledge of their territories.

217. The critical point is that DFO must respect the organizational model that First Nations form within a co-management regime. It may be that First Nations together form a province-wide organization (among other "nested" organizations), or it may be that at the highest level there are a number of regional organizations. DFO must respect whatever outcome First Nations arrive at, as Mr. Rosenberg stated.¹⁶¹

B. STEPS TOWARD ACHIEVING CO-MANAGEMENT

218. In terms of how to arrive at a joint management regime, again this Commission cannot impose specific steps; how the process unfolds must be left to the parties. There are two recommendations the Commissioner could make, however, that would be helpful.

219. The first is that DFO must show its commitment to the process so that First Nations have the incentive to come to the table and really organize among themselves. That can be done – many witnesses spoke of their confidence in that regard – but what is required is a strong demonstration by DFO of its commitment to real joint decision-making with First Nations. Mr. Crey spoke of the concept of a Letter of Understanding, signed by First Nations and DFO within the Roadmap Process:¹⁶²

MR. CREY: Well, I would agree with the summary that Julie Gardner has provided here, that is, that there is a lot of process. There's a lot of talk. But what I don't see and what I think is required, Mr. Commissioner, is a clear signal from the Department that they're definitely prepared to go down the road of cooperative

¹⁶¹ Transcript of July 5, 2011, p. 68, l. 14 – p. 69, l. 6 (Cross by Mr. Dickson).

¹⁶² Transcript of July 4, 2011, p. 62, l. 34 – p. 63, l. 15 (Mr. Crey in cross by Ms. Gaertner).

or co-management. Insofar as the Aboriginal peoples are concerned, their arrangements with the Department of Fisheries and Oceans. That's what I see missing. The signal isn't there yet. And if I can conclude here, at the recent meeting in Campbell River, I thought maybe one way of letting the Department know what it is that I mean by a signal was to take up the issue with 1 the table there. And DFO was present at that meeting in Campbell River. And I suggested a memorandum of understanding that the First Nations and the Department could reach an understanding together on how they would proceed towards an arrangement for co-management and that both parties would sign off, the Department of Fisheries and Oceans would thereby give a very clear signal that it's their intention to pursue co-management, not more process, that it's more than talk, that there's a definite vision, particular goals in mind. And in turn, the First Nations, of course, too, the leadership would sign off on this document and commit themselves to a process.

220. That is a constructive concept that the STC-CIB submits ought to be recommended by the Commissioner. The Roadmap Process is making some encouraging progress, but what it really needs to take off is a strong demonstration of commitment on both sides.

221. The second point by way of the process point is that Aboriginal organizations need adequate and stable, long-term funding, so that they can continue to build capacity through Tier 1 processes. Currently, AFS funding is being cut by 5%, and is being eroded by inflation, as Barry Huber noted; at the very least the funding as to keep up with inflation.¹⁶³ The fact that much of the funding is year-to-year creates onerous administrative burdens, as well real uncertainty among Aboriginal organizations. Both of these are undesirable and unnecessary impediments to Aboriginal organizations building capacity.

222. The key conclusion with respect to co-management is that it must be embraced and encouraged to empower First Nations as joint stewards and decision-makers, serving as

¹⁶³ Transcript of June 28, 2011, p. 28, l. 2 – p. 49, l. 11 (In chief by Ms. Chan).

checks and balances on DFO. DFO and Fraser sockeye have much to gain if true joint decision-making with First Nations is embraced. What is required is political will.

C. INTERNATIONAL DIMENSIONS OF CO-MANAGEMENT

223. One example where co-management of the fisheries and priority resource allocation for Indigenous Peoples was implemented is in the State of Washington, with tribes that also actively participate in the fishery for the Fraser River Sockeye Salmon and who are Coast Salish People, like the People along the Lower Fraser and the Coast. The Oregon Boundary Treaty of 1846 between the United States and Britain, divided these tribal territories without any consideration to the Indigenous Peoples, and until today their territories remain culturally and environmentally connected. The respective Indigenous Peoples shared a cultural heritage and an economic base in the fisheries¹⁶⁴.

224. In that case the United States government and several tribal governments sued the State of Washington for disregarding their fishing rights. Washington State claimed exclusive jurisdiction over fisheries in state waters and following the propagation of the commercial industrial fishery. Similar to what is described for British Columbia in earlier sections, the state tried to reduce the collective tribal fishing rights to individual participation in the public fishery¹⁶⁵. The case is indexed as *United States v. State of Washington* (1974)¹⁶⁶ since in this

¹⁶⁴ Harris, Douglas (2008) The Boldt Decision in Canada, in *The Power of Promises: Rethinking Indian Treaties In The Pacific Northwest*, Alexandra Harmon, ed., University of Washington Press, 2008 (Exhibit 1163) pp. 128-129

¹⁶⁵ Exhibit 1163, p.130

¹⁶⁶ *U. S. v. State of Washington* 1974, (384 F. Supp. 312) (Boldt Decision)

case the federal government, living up to its trust relationship, brought historical and anthropological evidence that the tribes had an ongoing collective right to fish.

225. The decision, known as the Boldt Decision, named after Judge George Boldt, was released on February 12, 1974. In it Judge Boldt held that the right to “fish in common” amounted to 50% of the harvestable anadromous fish, which meant for commercial fishery, which was calculated after the deduction of the needs for conservation and Indian ceremonial and subsistence fishery¹⁶⁷.

226. The state has police power to regulate off-reservation native fishing only to the extent necessary and reasonable for conservation of the resource. In terms of the allocation, the brunt of conservation would be borne by commercial and sports fisheries, giving priority to native fisheries. The native right to fish furthermore has priority over the state’s right to manage the fishery, with the one exception being conservation and again there Indigenous Peoples co-manage the resource and are joint decision-makers on conservation decisions¹⁶⁸.

227. The Stevens treaties, which applied in the state of Washington, were similar in scope and wording to the Douglas treaties signed at a similar time on Vancouver Island, yet the Douglas treaty rights have to date not been implemented and upheld by the federal government in a similar manner¹⁶⁹. In the Pacific Northwest of the United States, the tribes now fully

¹⁶⁷ Exhibit 1163, p. 130-131; and U. S. v. State of Washington 1974, (384 F. Supp. 312)

¹⁶⁸ Exhibit 1163, p. 131 and 134

¹⁶⁹ Exhibit 1163, p.131

participate in habitat and fisheries management as joint decision-makers and in the case of sockeye salmon they have a right to two thirds of the TAC¹⁷⁰.

228. In commenting on the Boldt decision and the allocation that was implemented as a result, Professor Harris, stated:¹⁷¹

Yes. And this is, I guess, a reiteration of what I said earlier, but I think that a simple definition of the right is preferable to one that's defined in terms of use. Defining rights in terms of use creates a whole set of secondary problems that the simplest articulation of the right is the better. And the Boldt decision is one example of a simple articulation of the right that a fishery needs to be divided in two. And I guess my point about a simple articulation of the right about the problems that a food fishery creates is not to suggest that the fisheries should be exclusively aboriginal. That's not the point I'm trying to make. The point I'm trying to make is that the definition of the right, if it's to contribute to an effective management regime, ought to be a simple one that the right to the fish ought to be defined in terms of a bright line. And how the fish are used should be up to the communities for whom the allocation is held.

229. The tribes in Washington State are joint managers in terms of conservation and management decisions; they are decision-makers alongside other governments, with whom they engage in decision-making. In separate processes, the tribal, state and federal governments, on the one side, meet with stakeholders in the fishery to discuss their concerns and get their input into decisions, similar to consultative processes.

230. The Northwest Indian Fisheries Commission (NWIFC) was set up following the Boldt Decision, whose implementation provided that Indian tribes were to assume jurisdiction over

¹⁷⁰ Transcript November 9, 2011, p. 29 lines 31-35

¹⁷¹ Transcript June 27, 2011 p.96, line 43 to p.97 line 15

their fisheries, once they had the necessary capacity¹⁷². Some tribes already had the capacity and all have since acquire it and manage their own fisheries and make habitat and fisheries related decisions in their traditional territories.

231. The tribes remain sovereign in regard to fisheries in their traditional territories and waters, and they are supported by the NWIFC, providing “direct services to the tribes in their role as natural resource co-managers,” which include biometrics, fish health, and salmon management and for which they receive federal funding. It also provides a forum for tribes to address shared natural resource management issues and enables tribes to speak with a unified voice¹⁷³.

232. A similar service organization could be set up to support Indigenous Peoples and tribes in Canada in the transition to co-management, where Indigenous Peoples remain sovereign in their decision-making regarding fisheries and habitat management in their territories, but are assisted in obtaining the necessary capacity and support services, which are funded directly by the federal government.

233. The US tribes also participate independently at the Pacific Salmon Commission, where they have their own Commissioners and a right to veto decisions of the state or the federal government. A consensus rule is applied. Their representatives also sit on the Fraser River Panel again with decision-making power based on mandates from the tribes¹⁷⁴.

¹⁷² Exhibit 1163, p. 132

¹⁷³ Exhibit 1165, p.1

¹⁷⁴ Transcript, November 9, 2011, p.17 lines 2 to page 18 line 7

234. The PSC directly interacts with US tribes conducting programs together with the NWIFC, such as monitoring and the chair of the Fraser River technical panel has been an employee of the NWIFC. There is also a test fishery conducted by a US tribe. Although there are First Nations individuals involved in the test fishery in British Columbia, First Nations do not conduct the test fishery or receive the fish, which can amount to 100,000+ fish per season¹⁷⁵.
235. There are no Indigenous representatives with mandates from Indigenous Peoples from Canada as Commissioners or members on the Fraser River Panel – all are appointed by Canada. No are there any independent indigenous representatives from Canada who carry a mandate or represent tribal matters¹⁷⁶. PSC Chief Biologist Lapointe further clarified that the PSC does not engage in direct consultation with First Nations from Canada and that the Commission does not consider itself to have obligations to First Nations. Nor is priority resource allocation implemented at the treaty level.¹⁷⁷
236. As a result of history, including the strategic legislative exclusion of Aboriginal Peoples from a sales fishery, the Fraser River Panel has been regulating the commercial fishery and is largely attentive to the interests of the industry. Yet the PSC decisions during in-season management as to whether commercial fisheries will be open, directly impact Aboriginal fisheries. They also impact whether Aboriginal fisheries, especially economic opportunity fisheries, will be opened, although the Fraser River Panel does not claim jurisdiction over those fisheries. In order to properly take into account conservation concerns and overall

¹⁷⁵ Transcript, November 9, 2011, p. 29 line 42 to p. 30 line 17, p.31 lines 6-31

¹⁷⁶ Transcript, November 9, 2010, page 13 line 24 to p. 14 line 16

¹⁷⁷ Transcript, November 9, 2010, page 19 line 8-33 and page 20 line 2-9

concerns regarding the sustainable management of the fishery, it is essential that there be Indigenous Peoples at the table as decision-makers at the Fraser River Panel and the Pacific Salmon Commission¹⁷⁸.

237. The work of the Pacific Salmon Commission is also very important in terms of research and data collection for in-season management. Although they now rely on DFO for pre-season estimates, DFO's pre-season estimates have been very unreliable; they err in both directions, with estimates being too high and requiring drastic adjustments in-season that are not consulted upon, or they are too low. On the basis of them DFO also determines the spawning escapement targets. Pre-season estimates are not changed once the Fraser River Panel takes over regulatory control and switches to in season estimates¹⁷⁹. The pre-season estimates are the basis for DFO's limited consultations in the Lower Fraser and no consultations on the proper management of the fishery are undertaken based on in season estimates. Post-season run size estimates can again be vastly different differing up to 20 or 30%¹⁸⁰. Furthermore, reliable numbers cannot be provided since there are not spawning ground numerations for all species.

238. The PSC also provides the funding for and operates the test fisheries and acoustic counters. As a result of that they again determine estimates – not definite numbers – and estimates are becoming more and more difficult to rely upon, given increasing changes in climate and river conditions. PSC Chief Biologist Lapointe agreed that there is a need to take

¹⁷⁸ Transcript November 9, 2011, p. 15 lines 8-35

¹⁷⁹ Transcript November 9, 2011, p. 20 line 34 to p.21 line 4

¹⁸⁰ Transcript November 9, 2011, p. 25 lines 22-30; p. 32 lines 8-21

into account all the sources of uncertainty in in-season and pre-season estimates and change the way to do things, including being more precautionary.¹⁸¹

239. Furthermore, there is the issue of differences between estimates (DBE) regarding in-season management. It refers to initial estimates taken at the Missing Acoustic Counter operated by the PSC and the estimated returns to the spawning grounds; it is also referred to as “en route loss” and there could be errors in estimate at either location¹⁸². As a result there can be an adjustment of the estimated return numbers following the PSC post-season assessment. In terms of errors in estimates at the assessment locations, PSC Chief Biologist Lapointe agreed that there are problems, including with which species to attribute the estimates to; for instance, at times pink and sockeye salmon migrate together. An example of the problem is the 2005 PSC post season review¹⁸³, in which approximately 60% of the DBE (which accounted for almost 3 million sockeye salmon, which in fact never passed Mission) was attributed to biases in species composition assessments that were applied to Mission acoustic estimates. The majority of the remaining percentages in the DBE were also explained, including double accounting for fish especially in pink salmon years, only 7% were left unexplained¹⁸⁴.

240. The unexplained causes for increased en route mortality since the early 1990s have been increasingly studied, including by Dr. Kristi Miller who started her research with the early entry late run sockeye and the associated en route mortality.

¹⁸¹ Transcript November 9, 2011, p. 25 lines 13-19; p. 26 lines 27-31

¹⁸² Transcript November 8, 2011, p. 79 line 41 to p. 80 line 16

¹⁸³ PSC 2005 Post Season Review (Exhibit 74) especially numbered page 64 and Appendix

¹⁸⁴ Transcript November 9, 2011, p. 33 line 1 to page 34 line 46

241. PSC Chief Biologist Lapointe commented on the changes in migration patterns, especially regarding upstream migration. The early entry of the late run sockeye also creates problems at Mission because they mill around and pass the counter more than once and initially the counter could not determine direction of travel. The phenomenon generally caused problems for in-season predictions. In addition, pink salmon have also been migrating earlier and overlapping with sockeye, which in years like 2005 also entered very late, leading to increasing overlap and also making run timing groups harder to distinguish and predict.¹⁸⁵
242. The PSC and the Treaty also do not have an independent caucus of Indigenous Peoples for participation in the negotiations, unlike many multilateral environmental agreements (MEAs), where they have independent standing as rights and knowledge holders. There was no independent indigenous participation from Canada in the negotiation of the Treaty, not even consultation with Indigenous Peoples¹⁸⁶.
243. Many MEAs recognize indigenous knowledge as a key tool for sustainable development. Indigenous traditional knowledge is treated on equal footing with scientific knowledge and Indigenous Peoples participate independent of governments in many processes, including the negotiations under the UN Framework Convention on Climate Change (UNFCCC).
244. The Convention on Biological Diversity (CBD) recognizes traditional knowledge as a key tool to ensure the conservation and sustainable use of biological diversity – just as, if not more, important than Western scientific knowledge. It recognizes traditional knowledge in the provision on *in situ* conservation and in related provisions on sustainable use and access and benefit-sharing (ABS). Article 8(j) specifically stipulates that parties shall:

¹⁸⁵ Transcript, November 9, 2010, p.35 line 15 to p. 36 line 4

¹⁸⁶ Transcript, November 9, 2010, p. 36 line 6-47

Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

245. Canada, as a party to the CBD, must implement the CBD provisions and Conference of the Parties (COP) decisions through national legislation and policies. The CBD Conference of the Parties established the *Ad Hoc* Open-Ended Working Group on Article 8(j) (traditional knowledge) and related provisions, where Indigenous Peoples take the floor on equal footing with state governments and address issues related to the conservation and sustainable use of biodiversity.

246. One of the instruments elaborated by the Article 8(j) Working Group and approved by the Conference of the Parties are the Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place or which are likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. The Akwé: Kon Guidelines set out a prior informed consent standard:

53. Where the national legal regime requires prior informed consent of indigenous and local communities, the assessment process should consider whether such prior informed consent has been obtained. Prior informed consent corresponding to various phases of the impact assessment process should consider the rights, knowledge, innovations and practices of indigenous and local communities; the use of appropriate language and process; the allocation of sufficient time and the provision of accurate, factual and legally correct information.

247. Similar prior informed consent (PIC) standards are enshrined in other MEAs and international human and indigenous rights instruments, such as UNDRIP. There is a jurisdictional-procedural element to prior informed consent and a substantive element that ensures that the rights of indigenous peoples are taken into account, which enables the full participation of indigenous peoples as equal decision makers. We therefore recommend that the Cohen Commission consider those international standards, including prior informed

consent requirements, which could form the basis for a future more sustainable management regime for the Fraser River sockeye salmon that takes into account indigenous knowledge.

248. It is important to fully integrate Indigenous Peoples and their knowledge in decision making and to recognize the indigenous dimension to conservation. Indigenous Peoples as joint decision-makers can serve as checks and balances in fisheries management and can incorporate traditional knowledge into habitat and fisheries management and conservation decisions. The only way to properly incorporate traditional Indigenous knowledge is to incorporate Indigenous Peoples as decision-makers and co-managers from the local to the international level, including the Pacific Salmon Commission. Indigenous Peoples collectively are the proper Title and Rights holders in their respective territories and hold locally specific knowledge key to *in situ* conservation of *sthéqi*. The Fraser River is the lifeline and runs through the core of the traditional territory of the Stó:lō people and as such they have to be decision makers regarding the conservation and sustainable management of the *sthéqi*. Only a transparent comprehensive management approach, dedicated to preserving biodiversity, implementing weak stock management and taking into account indigenous knowledge, can ensure comprehensive implementation of the Wild Salmon Policy.

249. Joint management and stewardship with Indigenous Peoples in their respective territories will assist with the implementation of the WSP and biodiversity protection on the ground, which is also mandated under Canada's international obligations.

VI. THE URGENT NEED FOR MORE FUNDING

250. Throughout this Inquiry, the Commission has heard of the financial pressures facing DFO. The demands placed upon DFO are very significant, and as with any government service, financial resources are scarce. It is clear that they will become scarcer still, as DFO is facing serious funding cuts in the coming years, as was heard during the DFO Priorities panel.

251. It is clear as well that the management of Fraser sockeye is suffering as a result. In particular, the WSP has not been implemented as fully and quickly as it should have been.

The WSP is languishing as a program for concrete action. Instead of treating it as an action plan, the DFO Priorities panel – particularly Sue Farlinger – repeatedly insisted that DFO is implementing the “spirit” of the WSP, even though a great many of the concrete steps laid out in the WSP remain unfulfilled. This is entirely unacceptable.

252. The DFO Priorities panel also defended DFO’s budget, again and again. The panel repeated a mantra that they could do more with less, simply by improving management and finding efficiencies. With respect, that is always the defence when budgets are cut, and it is always hollow: it is incumbent upon any government department to always strive for efficiency in its use of resources, and there is no reason to believe that DFO’s efforts in that regard will be more effective after the cuts than they were before.
253. It is plain and obvious that DFO does not have enough money to do the job it should be doing. In particular, at present it does not have enough money to implement the WSP in anything approaching a timely and full way. More funding is desperately needed – to implement the WSP, to conduct more science research, to protect habitat, and to build more capacity among First Nations toward achieving true joint management. From the perspective of the STC-CIB, the Minister is failing to fulfil his mandate. , If the Minister claims exclusive jurisdiction of the fishery, then it is incumbent upon the Minister to properly manage the fishery. And a necessary feature of proper management of the fishery is plainly more funding.
254. The STC-CIB further believes that implementing joint management and decision-making with First Nations needs to be appropriately funded to ensure that the necessary capacities are in place to enable full and informed decision-making. Co-management with First Nations will have many benefits, including a more sustainable fishery and more cost efficient approaches to managing habitat and fisheries in the respective territories.

VII. RECOMMENDATIONS

255. The STC-CIB hereby respectfully submit the following recommendations, based on the evidence before the Cohen Commission and our understanding of the causes for the decline of the Fraser River Sockeye Salmon and the need for more sustainable management in the future. We urge the Commissioner to recommend the following:

- I. A transparent, comprehensive management approach dedicated to preserving biodiversity and implementing weak stock management, including a comprehensive, adequately funded implementation of the Wild Salmon Policy and incorporation of traditional knowledge and Indigenous Peoples through the processes discussed below.
- II. Recognize and incorporate the Indigenous dimension to conservation:
 - a. Indigenous Peoples/First Nations hold the longest-term knowledge of ecosystems and Fraser sockeye populations, which can help establish baselines for Conservation Units and ecosystem restoration. Traditional knowledge is an essential element in reversing the decline of Fraser sockeye and implementing the Wild Salmon Policy.
 - b. Indigenous knowledge is a cross-cutting issue in regard to habitat management, fisheries management and conservation and can help ensure full implementation of the Wild Salmon Policy.
 - c. Indigenous Peoples as joint decision-makers can serve as checks and balances in fisheries management and can incorporate traditional knowledge into habitat and fisheries management and conservation decisions. The only way to properly incorporate traditional Indigenous knowledge is to incorporate Indigenous Peoples as decision-makers and co-managers from the local to the international level (Pacific Salmon Commission).
 - d. Indigenous Peoples collectively are rights- and knowledge-holders and as such have a different role to play in fisheries management than commercial and recreational user groups. Indigenous Peoples should be fully engaged in all

decision-making processes, including habitat management and conservation. With respect to fisheries management decisions, Indigenous Peoples should engage with interest or user groups and the public alongside the federal government as joint decision-makers.

- III. There are many inter-jurisdictional situations where DFO often plays a quite limited role and has a limited mandate regarding habitat issues and cumulative effects. Aboriginal Title and rights apply to land and water and by having Indigenous Peoples at the table as joint decision makers with the provincial and federal government, they can ensure that the necessary attention is paid to conservation.
- IV. Commit to, and support the implementation of, true joint decision-making with First Nations:
 - a. The ultimate objective should be an Indigenous governance structure that shares fisheries management authority with DFO, with a level of authority similar to that of the Northwest Indian Fisheries Commission in the Pacific Northwest of the United States. Indigenous Peoples will need to be fully engaged in fisheries decision making at all levels – from the engagement of individual First Nations on local issues to independent Indigenous representation on the Pacific Salmon Commission.
 - b. There should be full transparency between DFO and this Indigenous governance structure, including regarding policies and mandates.
 - c. True joint management must include greatly enhanced funding to First Nations and related organizations for capacity-building.
 - d. Funding for the Indigenous governance structure and full involvement of Indigenous Peoples in management decisions should be directly to Indigenous Peoples (e.g.: through the Privy Council Office), not through DFO. There should be no conditions attached that limit indigenous decision-making power.
 - e. To reach this point of true joint decision-making, DFO needs to continue to engage in substantive engagement processes, including the Roadmap and First

Nations Fisheries Council Co-Management processes and engagement processes with Indigenous Peoples in their respective territories and waters, and:



- i. Unequivocally state to First Nations its commitment to true joint decision-making;
- ii. Provide multi-year funding to Indigenous Nations and organizations; and
- iii. Respect the institutions that First Nations form amongst themselves, without seeking to impose a particular model.

V. Enforcement should focus on conservation concerns and should be as community-based as possible:

- a. Recognize that the sale of fish caught under a licence or future joint decision-making regimes does not pose a risk to conservation.
- b. Commit to moving to a fisheries management system that meets the overall needs of Indigenous Peoples for sockeye salmon and fish generally, with priority and without restriction as to use (that is, for FSC purposes or for sale or barter).
- c. In the meantime, do not spend resources on enforcing against sales of FSC fish.
- d. More broadly, shift from an adversarial enforcement mentality (which creates mistrust) to co-management with full Indigenous participation in habitat management and fisheries monitoring and regulation where First Nations/Indigenous Peoples have ownership in the processes. As an example, restore – and indeed implement more widely – the Aboriginal Guardians program.
- e. Do not implement C&P’s requests for agency status, line reporting and increased funding for surveillance and high-tech equipment; they represent a misstep along an adversarial – rather than consensus-building – approach.
- f. Enhance the rigour and equality of monitoring programs across the fisheries.
- g. Increase enforcement efforts regarding habitat protection. Hold to the no net loss principle and go further to restore and enhance habitat.

- VI. Continue to move more of the fishery into the river to enable better management decisions and more selective fishing. Means to allow for First Nations fisheries in marine areas can and should be found.
- VII. Do not move to implementing individual transferable quotas, at least until the establishment of a true joint decision-making structure in which Indigenous Peoples are full decision-makers alongside the federal government, as described above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

	
Co-Counsel for the STC-CIB	Co- Counsel for the STC-CIB

October 17, 2011