

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

CLOSING SUBMISSIONS

Heiltsuk Tribal Council

October 17, 2011

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CLOSING SUBMISSIONS OF HEILTSUK TRIBAL COUNCIL

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1.0 The Heiltsuk People

1. The Heiltsuk have lived within and upon their homeland since time immemorial. Heiltsuk ancestral homeland comprises a defining portion of what is now known as the Central Coast of British Columbia. It extends from the southern tip of Calvert Island north to Klekane Inlet across from Butedale, inland from the head of Dean Channel and Inlet to the offshore area west of Goose Island, Aristazabal Island, and Calvert Island, and the intervening inlets, channels, islands and waterways (Exhibit 1264; Exhibit 1265).
2. The Heiltsuk assert aboriginal rights and title to their lands including the right to fish and steward marine resources. Heiltsuk have never surrendered or ceded these rights.
3. Chief Newman explained to the Commission that Heiltsuk are ocean people. Heiltsuk economy has always been based on marine resources. The archaeological digs at Namu showed Heiltsuk have been present in the area for at least 10,000 years and revealed bones of salmon and different kinds of fish. He explained that the reserves allotted to Heiltsuk were small because the economy was always based on the resources of the sea.
4. Salmon fishing, including Fraser River sockeye salmon (“FRSS”) has been an integral and defining constant of Heiltsuk life. It is traditionally harvested for food, social and ceremonial purposes. Chief Newman described for the commission celebrations involving the salmon dance at which his twin grandchildren were permitted to conduct the dance.
5. Heiltsuk also stewards its local salmon in its streams and rivers. Heiltsuk maintain extensive knowledge of the difference between local and passing stocks,

including Fraser River sockeye salmon and their migration routes through Heiltsuk territory, as well as to the north and south. The sockeye salmon migration path passes directly through Heiltsuk's traditional territory, specifically, in or about Goose Island, Purple Bluff (east of Goose Island) and Spider Island (Exhibit 1264; Exhibit 1265).

6. Passing sockeye salmon stocks play a key role towards Heiltsuk's subsistence. They have managed their resource base through a combination of maintaining and restoring local salmon producing systems, and applying their knowledge of the timing and migration routes of passing stocks.
7. As part of Heiltsuk's stewardship of local stocks, Heiltsuk has maintained a conservation hatchery at Emily Lake since the late 1990s. When the enhancement project was first commenced, total sockeye salmon in that system were only 800-1200 in number, and sometimes as low as 100. Through Heiltsuk's steady stewardship, the Tankeeah system currently enjoys an average of 6,500 sockeye salmon returns and is anticipated to be self-sufficient without enhancement in about 3 years. The adult return rate for released fry has been very successful; in contrast to an average return rate for other sockeye hatcheries of 1 percent, the average return rate for the Emily Lake sockeye lies in the range of 5-6 percent.
8. Heiltsuk's knowledge and dependence on a combination of local and passing stocks has been an important component of Heiltsuk's commercial fishing industry, as well as a part of Heiltsuk subsistence survival. Commercial harvest of marine resources by Heiltsuk is of paramount importance to the Heiltsuk economy. In recent years the fishing industry has experienced severe and harmful changes, but nonetheless remains the largest non-government employer for Heiltsuk.
9. Chief Newman testified that the decline in the commercial fishing industry had a devastating impact on Heiltsuk. There is now a high unemployment rate, HTC's fish plant closed down, the troll fleet was effectively eliminated, and 75% of the gill net fleet was wiped out. He explained that before the decline Heiltsuk were

independent people who did not depend on the government for hand-outs or funded housing. Heiltsuk fed their own people and built their own houses. Now Heiltsuk have become dependent on government.

10. The health of salmon and of the Heiltsuk cannot be separated. The decline of the salmon fishery has also lead to an epidemic of diabetes, cancer, heart problems, strokes, and a high rate of suicide. Components of Heiltsuk culture have been loss and with it a decline in independence and self-worth.
11. Redistribution customs ensure that even people who are not able to get out on the land still obtain a share of the food and resources. Trade continues between families, and nations, and the foods and materials gathered continue to provide large proportions of the food for ceremonies and feasts. The subsistence economy demonstrates a spiritual and cultural connection, but also a crucial material benefit that could be described as one of the healthiest elements of the contemporary economy in Bella Bella.

2.0 Challenges faced by the Heiltsuk

12. Heiltsuk is uniquely qualified to jointly manage the marine resources within their territories, to decide on and further conservation measures to preserve or restore fisheries, and to participate in the enforcement of conservation measures. Heiltsuk has occupied its territory since time immemorial, and will continue to do so forever. Heiltsuk exercises aboriginal rights to their marine resources, and uses their deep traditional knowledge of the local and passing stocks to steward the environment while sustaining their community physically and spiritually.
13. In recent years, DFO has advocated for “co-management” of fisheries resources with First Nations, but apart from some incremental steps towards capacity-building, DFO’s concept of co-management falls short of meaningful and effective joint or co-management. In practice DFO asserts exclusive authority over marine resources, regardless of Heiltsuk’s aboriginal rights. DFO largely still utilizes a top-down, “command and control” structure which is inconsistent with

any true concept of joint or co-management of the fisheries. DFO seems to prefer to have insufficient management on the central coast, rather than facilitating and ceding management authority to First Nations.

14. The DFO's command and control approach is characterized by opaqueness in its policies and decision-making. A pronounced example in this Commission is DFO's adamant refusal to disclose the food, social, and ceremonial fishery ("FSC") allocation mandate information, and the suite of Coastwide Framework documents developing new aboriginal fishing policies; despite its admitting their relevance to this Commission's work in understanding the decline and making recommendations on the restoration of FRSS; despite currently employing an end point percentage for aboriginal fishery allocations through the Coastwide Framework policies (McGivney and Stewart, September 2, 2011, p. 88, ll. 35-47 & pp. 89-90); and despite having a duty to consult with First Nations on FSC numbers (see as an example, Exhibit 305, CFA, Schedule B1, subsection 4(b) which sets out that FSC numbers are to be consulted upon annually).
15. The opaqueness of DFO decision-making creates a deep distrust between DFO and First Nations which manifests in every aspect of their relationships.
16. The DFO's insistence on maintaining a top-down, command and control approach in the face of inadequate resources and a lack of local knowledge results in an effective lack of management in many coastal communities, including in Heiltsuk territory. For example, Chief Edwin Newman, Hereditary Chief and Elder of the Heiltsuk First Nation, Chief Robert Mountain, elected councillor of the Namgis First Nation and Hereditary Chief of the Mamalilikula First Nation, and Mr. Naknakim of the Cape Mudge Band, Chief Treaty Negotiator for the Laich-Kwil-Tach Treaty Society, have all testified to there being a virtual absence of fishery compliance officers to monitor the coast (December 15, 2010, p. 77, ll. 17-47; p. 78, ll. 1-21) while at the same time, DFO has not funded the aboriginal guardian program sufficiently, or provided aboriginal guardians with sufficient powers to

monitor the coast (Coulthick, May 17, 2011, p. 20; Naknakim, December 15, 2010, p. 78, ll. 3-6; Wilson, July 4, 2011, p. 104, ll. 40-47; p. 105, ll. 1-4).

17. The lack of effective management on the central coast includes, in Heiltsuk's view, DFO failing to take a precautionary approach to permitting open net pen salmon farming activities, and failing to sufficiently support a diverse portfolio of salmon stocks by helping to restore salmon-bearing streams and rivers. This latter failure deprives communities, including First Nations communities which are most adversely affected by declining salmon fisheries, a means of compensating for variations in the abundance of individual stocks.
18. As part of the remedy to these management issues, Heiltsuk suggests true co-management as a worthy goal. The sustainability of BC's fisheries, and in particular BC's Fraser River sockeye salmon fisheries, requires proper coast-wide management. On the central coast, this means a conservation plan that promotes a balanced and a precautionary approach to protecting and fostering marine resources, and that restores and enhances local salmon-bearing streams; a continued, effective and transparent management presence; and a management model that provides for true consultation concerning aboriginal fishing, including FSC, which honours and respects aboriginal rights.

3.0 Summary of Recommendations

3.1. Overview

19. Toward the goal of Fraser River Sockeye Salmon stocks being preserved and better managed, Heiltsuk recommends the following measures, which are addressed in more detail further below:
 - **Conserve through caution:** A precautionary approach to conserving Fraser River Sockeye Salmon, including decision-making on the expansion and continuation of open net pen salmon farming activities. Heiltsuk Tribal Council recommends that, in keeping with the precautionary approach:

- DFO implements a moratorium on additional licenses for open net pen salmon farms off the coast of British Columbia until there is scientific certainty on whether pathogen transfers unreasonably negatively affect wild salmon, and if so, continue the moratorium until it is shown that these effects can be controlled;
- DFO requires a program of experimental fallowing of current open net pen salmon farms along the migration routes of the Fraser River sockeye salmon to provide scientific certainty on whether pathogen transfer unreasonably negatively affects wild salmon; and
- DFO funds or requires industry to undertake further closed containment aquaculture pilot projects as an alternative to open net pen aquaculture posing less uncertainty and risk for wild salmon.
- **Conserve holistically:** Recognition of the portfolio effect, and the need to support diverse sockeye salmon stocks, in order to reduce pressure and reliance on Fraser River Sockeye Salmon. Heiltsuk Tribal Council recommends that for the purpose of managing British Columbia's sockeye salmon fisheries holistically:
 - DFO funds the restoration of sockeye stream habitat on British Columbia's Central Coast;
 - DFO funds additional conservation hatcheries to rebuild sockeye salmon stocks along the Central Coast; and
 - DFO funds additional technical assistance in the restoration and enhancement activities conduction on the Central Coast.
- **Manage jointly:** Co-management of fisheries on the Central Coast that fosters more effective management and enforcement, by recognizing First Nations authority and responsibility to conduct management activities such as test-fishing, openings and closings, and enforcement. Heiltsuk

Tribal Council recommends that true joint management of the fisheries will require that:

- DFO recognizes First Nations as aboriginal title and rights-holders, and adopts a policy to address their issues separately from discussions with fishery resource user groups;
- DFO consults on and develops a transparent process for the recognition of First Nations' aboriginal title and rights as they relate to fishery resources;
- The Government of Canada clarifies and coordinates the respective roles and responsibilities for INAC and DFO in relation to aboriginal access to and management of the fisheries;
- DFO delegates authority to First Nations for the management of their local fisheries resources to incorporate their Aboriginal Traditional Ecological Knowledge into fisheries management;
- DFO provides increased and long term funding for the Aboriginal Guardian Program outside of AFS agreements;
- DFO provides First Nations with the power to determine openings and closings within their traditional territories;
- DFO provides funding and technical assistance for test-fishing activities on the Central Coast for the Fraser River sockeye salmon;
- DFO coordinates with the Province of British Columbia to recognize First Nations' jurisdiction over sports fishing activities within their traditional territory so they can manage, participate in and benefit economically from this industry;
- DFO provides additional economic opportunities for First Nations in the fisheries resources in their traditional territories in consultation

with First Nations to incentivize and support joint management activities;

- DFO discloses the current overall allocation for First Nations access to the fisheries;
- DFO consults with First Nations on the overall allocation for First Nations access to the fisheries;
- DFO provides funding and support for a Tier 1 process in which First Nations determine the allocation of fisheries resources among themselves; and
- The Pacific North Coast Integrated Management Area (“PNCIMA”) is adopted as a model for a joint management process, under which:
 - First Nations are treated as resource owners rather than users; and
 - First Nations are given 50:50 representation with the Crown.
- **Manage openly:** True consultation between DFO and First Nations, including meaningful disclosure of information relevant to decisions, resource-sharing and decision-making transparency; which honours aboriginal rights; and which provides a foundation for true co-management. Heiltsuk recommends that, in order to satisfy the Crown’s duty to consult:
 - DFO provides complete data regarding fish health on open net pen salmon farms to First Nations;
 - DFO provides independent technical assistance to First Nations to interpret and use this fish health data;

- DFO engages in deep consultation with First Nations regarding overall access for First Nations to the fishery resources;
 - DFO discloses the current end-point percentage and the methodology employed in managing to this percentage;
 - DFO abandons its mandate approach to FSC management;
 - DFO adopts a transparent and needs-based consultative approach to determining FSC allocations, or preferably allows First Nations to determine their overall access to fisheries resources between themselves;
 - DFO applies its Best Practices document to FSC management;
 - DFO recognizes the right of First Nations to enter into Nation-To-Nation agreements to address their food fishing needs; and
 - DFO allows First Nations to determine their overall access to fisheries resources between themselves.
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- **Manage fairly:** A coherent, transparent and fair approach to recognizing and allocating fish to satisfy the First Nations' priority right to fish for food, social and ceremonial (FSC) purposes is foundational to any proper management of Fraser River Sockeye Salmon. Given that Canada has developed end-point allocation figures to define First Nations access to fisheries resources, Heiltsuk again recommends that:
 - DFO discloses the current end-point percentage and the methodology employed in managing to this percentage; and
 - DFO allows First Nations to determine their overall access to fisheries resources between themselves.

20. One central issue problem is a lack of transparency in DFO's processes. DFO has and continues to develop and apply policies which are not disclosed to First Nations. Accountable governance requires transparency, yet transparency is a feature that DFO consistently and persistently lacks in its dealings with First Nations.

3.2. Limitations

21. Heiltsuk's recommendations are subject to some caveats. First, they are necessarily limited by Heiltsuk's opportunity to participate in the commission, and by the evidence admitted in this hearing.
22. Like many other participants, Heiltsuk received a small amount of funding for this commission which has permitted Heiltsuk to address only a selected number of issues. Heiltsuk has only been able to participate in exploring a fraction of the knowledge of the 173 witnesses giving evidence over 125 evidentiary hearing days, and to explore only a small handful of the documents, including Canada's disclosure which exceeds one-half-million documents.
23. For example, despite Heiltsuk having been granted separate participation on aquaculture (Ruling on Application to Vary Standing Brought by Heiltsuk Tribal council, May 10, 2010), Heiltsuk had less than ten minutes to cross-examine the Panel on Sea Lice and Fraser River Sockeye Salmon (Transcript Sept 6, 2011, p. 103, ll. 7-21 & pp. 105-109), and fifteen minutes to cross-examine the Panel on Perspectives on Management, Risk and Fin Fish Aquaculture (Transcript Sept 8, 2011, pp.106-113). Counsel for the First Nations Coalition, which also received only fifteen minutes, noted in advance the insufficient time for the First Nations Coalition to do their work. (Transcript Sept 8, 2011, pp. 89-90).
24. Heiltsuk was only permitted to have two of its members, Chief Edwin Newman and Mr. Ross Wilson, testify in this commission. As a result, Heiltsuk's testimony on a number of issues could not be put into evidence, and the evidence they were able to give could not be developed fully.

25. Similarly, the opportunity for First Nations to provide evidence on some key issues has been limited or non-existent in many cases. For example, the Panel on Perspectives on Management, Risk and Fin Fish Aquaculture lacked any First Nations representative, as noted by the First Nations Coalition (Transcript Sept 8, 2011, p. 90, ll. 2-32), the Musgamagw Tsawataineuk Tribal Council (Transcript Sept 8, 2011, p.99, ll. 36-39) and Heiltsuk Tribal Council (Transcript Sept 8, 2011, p. 106, ll. 3-6).
26. Heiltsuk was also concerned by the weighted focus of this commission on British Columbia's south coast and the Fraser River watershed. For example, Heiltsuk witness Mr. Wilson had to correct one of the commission's policy and practice reports which failed to list Heiltsuk as one of the First Nations that access the Fraser River sockeye salmon (July 4, 2011, p. 86, ll. 3-12). The migration route of the Fraser River sockeye salmon extends far north into the marine area and is relied upon by First Nations all along this route; it is for this very reason that Heiltsuk Tribal Council has participated in this commission.
27. Further, Heiltsuk objected to the admissibility of a document, *Socio-Economic Benefits of Finfish Aquaculture in BC Aboriginal Communities*, authored by unknown persons (Exhibit 1977), which purports First Nations, including Heiltsuk, have received employment, skills, leadership and social benefits from aquaculture in their jurisdictions. Although this document has been admitted into evidence, Heiltsuk has had no opportunity to cross-examine its author (who was not called as a witness), or to provide evidence to challenge its factual assertions (as no further Heiltsuk witness could be called to give evidence). This report was particularly repugnant to Heiltsuk as it wrongfully concluded that First Nations, including Heiltsuk benefitted economically, socially and culturally to the salmon farms on its territory. Heiltsuk has a zero-tolerance view of fin-fish aquaculture, is opposed to salmon farms on its territory, and would not agree that it benefits from these farms (Newman, December 15, 2010, p.74, ll. 36-47; p. 75, ll. 1-14); Backman, Stewart, Morton, September 8, 2011, p. 106 ll. 37-47; p. 107, p.108., p.109, ll. 1-21). No weight ought to be given to this report whatsoever.

28. Heiltsuk also makes its recommendations in the absence of evidence concerning many of DFO's current and planned suites of policies relating to aboriginal fishing – particularly the Coastwide Framework and FSC Mandate Information. Due to DFO having wrapped certain policies in a larger package of treaty negotiation issues, it has avoided disclosure of FSC mandates, and the Coastwide Framework, including end-point allocation percentages, through a combination of public interest immunity and cabinet privilege. Yet even Canada has not challenged the relevance of this information, which represents two years of work by Canada's most knowledgeable and experienced staff working together to articulate its vision for the appropriate balancing of competing factors and objectives in fisheries management. This information is not in evidence at this commission, and even a list which set out the titles of some 1700 documents making up a portion of the Coastwide Framework is absent, not having been admitted into evidence due to objections made by DFO.
29. From the perspective of HTC, regardless of what disclosure is or is not legally compellable, Canada's lack of voluntary disclosure continues a pattern of non-transparent dealings by DFO which often stymies the ability of First Nations to meaningfully question or challenge DFO decision-making.
30. Finally, while Heiltsuk is pleased to provide its perspective, it emphasizes for clarity that the Commission is not itself a form of consultation by Canada concerning any measures the Commission may recommend that may impact on aboriginal rights. Canada's duty to consult with respect to any measures it may choose to implement following this Commission will remain outstanding.
31. With these caveats, Heiltsuk recommends the following measures to better safeguard and manage the Fraser River Sockeye Salmon.

4.0 Detailed Recommendations

4.1. Conserve through caution: Apply a precautionary approach

32. The precautionary approach is a concept that has been canvassed throughout this commission. This approach recognizes the vast complexity of natural systems and the uncertainty surrounding the effects of novel human activities and development on these systems. The consequences of new developments and changes in management approaches may take considerable time to show themselves. The approach demands that management activities be proactive in the face of scientific uncertainty, and that caution be taken in embracing new development activities.
33. Heiltsuk Tribal Council endorses the application of this approach to fisheries management and submits that the precautionary approach requires a more cautious approach to the expansion and continuation of open net pen salmon farming activities on British Columbia's coast.
34. In Exhibit 207, a policy under DFO's Sustainable Fisheries Framework (Farlinger, December 16, 2010, p. 12, ll. 18-19), DFO provides a succinct definition for what they understand the "precautionary approach" to entail in the context of fisheries management (p. 1, ¶. 3):

In resource management, the PA [precautionary approach] is, in general, about being cautious when scientific information is uncertain, unreliable or inadequate and not using the absence of adequate scientific information as a reason to postpone or fail to take action to avoid serious harm to the resource.
35. The Government of Canada has committed itself at the national level to apply the precautionary approach in resource management, and this commitment in turn has been incorporated into the Wild Salmon Policy (the "WSP") among other policy documents guiding DFO's fishery management activities (Riddell, November 30, 2010, p. 46, ll. 35-40 & Farlinger, March 4, 2011, p. 66, ll. 22-34). Furthermore,

the precautionary approach is incorporated into legislation affecting fisheries management activities in Canada including the *Oceans Act*, S.C. 1996, c. 31, the *Species at Risk Act*, S.C. 2002, c. 29, the *Canadian Environmental Protection Act*, S.C. 1999, c. 33, and the *Canadian Environmental Assessment Act* S.C. 1992, c. 37 (PPR 3, p. 6, ¶. 16). Recent attempts to amend the *Fisheries Act*, R.S.C. 1985, c. F-14 have sought to incorporate the precautionary approach as well (PPR 3, pp. 12-13, ¶¶. 41, 43, 51).

36. The importance of the precautionary approach to the work of this commission was perhaps best expressed in the testimony of Dr. John Reynolds, Professor and Tom Buell B.C. Leadership Chair in Salmon Conservation of Simon Fraser University, on October 28, 2010 when he stated his hope that the commission “will not let people use scientific uncertainties as an excuse for inaction” (p. 23, ll. 32-34). Dr. Reynolds went on to clarify his understanding of the precautionary approach as follows (October 28, 2010, p. 24, ll. 1-6):

Placing the burden of proof on those who say that something is harming salmon stocks is not a precautionary approach. If an issue arises in which there’s uncertainty about a potential problem, the precautionary approach places the burden of proof on proponents of those activities.

37. Heiltsuk Tribal Council notes that the scientific evidence as to whether open net pen salmon farming has negative impacts on the wild salmon stocks along British Columbia’s coast remains controversial and in dispute. This was evident throughout the testimony given on disease and aquaculture in this commission.
38. Dr. Kristina M. Miller, Head of Molecular Genetics in DFO’s Science Branch, for example, gave testimony on her research into what may represent a novel pathogen found among salmonids during the commission’s evidentiary hearings on disease. Dr. Miller could not give any certainty that open net pen salmon farms would not play a role in the transmission of such a pathogen, were it to be verified (August 24, 2011, p. 81, ll. 32-35; p. 84, ll. 39-44; p. 98, ll. 11-24). Likewise, her colleague Dr. Kyle Garver, a research scientist with DFO, could not give any

certainty that open net pen salmon farming would not play a role in the transmission of any such pathogen (August 24, 2011, p. 99, l. 27).

39. Furthermore, Dr. Garver admitted that a significant amount of additional time spent on scientific studies would be necessary to further Dr. Miller's research (August 24, p. 90, ll. 39-42). Nevertheless, Dr. Miller testified very strongly that further research could show that the possible parvovirus pathogen she is researching represents a significant contributor to the decline of the Fraser River sockeye, if not the 'smoking gun' (August 24, 2011, p. 95, ll. 12-30). This evidence can be read in conjunction with evidence that open net pen salmon farms can greatly increase the level of pathogens in the environment and the rate at which wild fish are exposed to pathogens (see for example, Kent, August 23, 2011, p. 43, ll. 12-28).
40. Similarly, Dr. Lawrence Dill, Professor Emeritus of Simon Fraser University, could not provide an unqualified statement that there are no significant benthic and pelagic waste effects from open net pen salmon farms on wild sockeye salmon populations, noting the large number of farms that the Fraser River sockeye must pass sequentially during their migration through the Discovery Islands (August 25, 2011, p. 98, ll. 13-19). Dr. Dill also expressed the opinion that there was evidence to substantiate the hypothesis that open net pen salmon farms have some negative impacts on wild salmon (August 26, 2011, p. 39, ll. 42-46).
41. Dr. Dill likewise testified to the existence of uncertainty on what role sea lice might play as a vector for the transmission of pathogens between salmonids (August 26, 2011, p. 38, ll. 37-44). Mike Price, Biologist with Raincoast Conservation Foundation, has also done research indicating a positive correlation between open net pen salmon farm presence and sea lice on juvenile wild salmon, working in conjunction with the Heiltsuk (Exhibit 1476; Price, September 6, 2011, p. 109, ll. 1-6). Dr. Orr went further in testifying on sea lice as a potential vector for pathogen transfer, suggesting that open net pen salmon farming could pose a "fairly high risk" to wild stocks if disease is not properly controlled on

these farms (September 6, 2011, p. 23, ll. 28-35). Finally, Dr. Dill expressed a concern that the scientific research on the effects of open net pen salmon farms on the Fraser River sockeye salmon was limited to “correlations” as it has not yet been possible to “experimentally manipulate the farms” to better isolate any possible effects (August 26, 2011, p. 41, ll. 32-36).

42. The evidence in totality strongly suggests that pathogens can pose a great risk to wild salmon stocks and that open net pen salmon farming may be a significant contributor to the spread of pathogens to wild stocks. The potential for open net salmon farming to cause increased pathogen spread among wild salmon stocks clearly engages the precautionary approach.
43. It is also noteworthy that the licensing and siting of open net pen salmon farms is a variable that can be readily manipulated through management decisions, unlike environmental factors that fall outside DFO’s management control. In endorsing that the precautionary approach be applied to the licensing and siting of open net pen salmon farms with more rigour and scrutiny, Heiltsuk Tribal Council endorses, for example, the use of experimental following as one example of how the uncertainty in salmon aquaculture science might be better addressed through cost-effective DFO management actions (see Stewart, September 8, 2011, p. 10, ll. 13-23; Morton, September 8, 2011, p. 76, ll. 31-47 & p. 77, l. 1; Price, September 6, 2011, p. 23, ll. 42-45; Orr, September 6, 2011, p. 76, ll. 4-20). Heiltsuk Tribal Council also endorses efforts being taken to further research the potential of closed containment aquaculture as an alternative to open net pen aquaculture (see Stewart, September 8, 2011, p. 10, ll. 44-47; p. 11, ll. 1-6).

Specific Recommendations:

44. Heiltsuk Tribal Council recommends that, in keeping with the precautionary approach:
- DFO implements a moratorium on additional licenses for open net pen salmon farms off the coast of British Columbia until there is scientific

certainty on whether pathogen transfers unreasonably negatively affect wild salmon, and if so, continue the moratorium until it is shown that these effects can be controlled;

- DFO requires a program of experimental fallowing of current open net pen salmon farms along the migration routes of the Fraser River sockeye salmon to provide scientific certainty on whether pathogen transfer unreasonably negatively affects wild salmon; and
- DFO funds or requires industry to undertake further closed containment aquaculture pilot projects as an alternative to open net pen aquaculture posing less uncertainty and risk for wild salmon.

4.2. Conserve holistically: Recognize the portfolio effect

45. The portfolio effect is another fisheries management concept that has been discussed in the course of this commission. The theory behind the portfolio effect is that having a diverse portfolio of salmon stocks on which harvesting can occur allows fish management to better compensate for year-to-year variation in the abundance of individual stocks (Reynolds, October 28, 2010, p. 18, ll. 43-47 & p. 19, ll. 1-6). It draws an analogy between fisheries management and management of an investment portfolio. The theory suggests that maintaining a variety of diverse sockeye salmon stocks as opposed to concentrating on one individual stock will allow sockeye salmon fisheries overall to better weather temporary and permanent changes in productivity by reducing the risk of any one stock's reduction in productivity.
46. Heiltsuk Tribal Council endorses the recognition of the portfolio effect in fisheries management and currently applies it in its own local fisheries management activities. In particular, Heiltsuk Tribal Council submits that DFO should broaden the focus of its salmon management activities to encompass the diverse stocks along British Columbia's coast and thus diversify the available

sockeye salmon stocks for harvest beyond the Fraser River sockeye stocks that are the focus of this commission.

47. Chief Edwin Newman, a Hereditary Chief and Heiltsuk Elder, testified that DFO funding and management activities have historically concentrated on the salmon stocks of the Skeena and Fraser Rivers, while the smaller streams such as those of the Central Coast have been neglected; the consequence of this management approach for Heiltsuk has been to make them dependent on the Fraser River sockeye stocks for their food, social and ceremonial (“FSC”) fishing needs (December 15, 2010, p. 38, ll. 26-42).
48. Ross Wilson, the Director of the Heiltsuk Integrated Resource Management Department (“HIRMD”), similarly spoke to the need for Heiltsuk to access the passing Fraser River sockeye stocks to subsidize their FSC fishing needs (July 4, 2011, p. 93, ll. 1-6). Declines in the local stocks on which Heiltsuk rely for FSC sockeye salmon remains a significant concern for the nation (July 4, 2011, p. 88, ll. 1-3). Heiltsuk cannot fish local sockeye salmon stocks exclusively without extirpating these stocks at their current rates of productivity (Wilson, July 4, 2011, p. 86, ll. 28-34).
49. However, there are some two hundred salmon streams on the Central Coast, with as many as fifty streams that can be enhanced to greatly increase sockeye productivity (Wilson, July 4, 2011, p. 90, ll. 29-33). Historically, many of these local systems have been damaged by past DFO stream-cleaning activities which caused spawning habitat to wash out (Wilson, July 4, 2011, p. 91, ll. 10-15 & ll. 19-22). However, these systems can be rebuilt if stream restoration activities receive adequate funding (Wilson, July 4, 2011, p. 91, ll. 10-15). In times of great uncertainty for the sustainability of current harvest levels on the Fraser River sockeye stocks, Heiltsuk strongly recommends that DFO fund the restoration and enhancement of these Central Coast systems to better manage the coastal sockeye portfolio (Wilson, July 4, 2011, p. 92, ll. 40-43).

50. Heiltsuk Tribal Council currently operates a very successful conservation hatchery, the Emily Lake hatchery, which has been dedicated to the rebuilding of the local Tankeeah River sockeye system (Wilson, July 4, 2011, p. 89, ll. 20-41). Through marking the fry released from the hatchery with removal of the adipose fin, Heiltsuk have been able to determine the rates of return for spawning adult salmon (Wilson, July 4, 2011, p. 89, ll. 13-24). Mr. Wilson testified that these adult return rates average approximately 6% of the 100,000 fry released in the Tankeeah River system (July 4, 2011, p. 89, ll. 38-41). This return rate compares very favourably in comparison to the average return rate for sockeye hatchery fish which Ms. Carol Cross, DFO's SEP Strategic Initiatives Coordinator, identified as 1% (May 2, 2011, p. 124, ll. 4-11; Exhibit 349, p. 40). As a result of the high success rate of the Emily Lake enhancement project, it is predicted that the Tankeeah River system may be self-sufficient within as few as three years (Wilson, July 4, 2011, p. 90, ll. 2-5).
51. Furthermore, with as little additional funding as \$50,000 for stream restoration activities and expansion of the Emily Lake hatchery, Heiltsuk believes it possible to proceed with the rebuilding of a second local sockeye system in Kwakusdis River (Wilson, July 4, 2011, p. 92, ll. 2-15; Exhibit 1266). Mr. Wilson further testified that Heiltsuk has currently identified at least four sockeye systems on the Central Coast that can be rebuilt with adequate funding, with two requiring stream restoration and enhancement, and two requiring only enhancement activities (July 4, 2011, p. 92, ll. 40-43). Also significant with respect to the concerns raised with regards to the genetic effects of enhanced salmon is the fact that the process employed for Heiltsuk's Emily Lake hatchery maintains biological diversity of the fish it produces by employing a random selection process for brood stock and engaging in a matrix system for fertilization of the brood stock eggs (Wilson, July 4, 2011, p. 90, ll. 10-15). Heiltsuk believes that DFO support for Central Coast's local sockeye systems would decrease the pressure on the Fraser River sockeye by reducing the dependence of Coastal First Nations on these passing stocks and strongly endorses such a redistribution of DFO resources.

52. Mike Lapointe, the Chief Biologist of the Pacific Salmon Commission, endorsed the portfolio effect as being important to the management of the Fraser River sockeye salmon in his testimony before this commission on January 19, 2011 (p. 13, ll. 45-47 & p. 14, ll. 1-23; p. 96, ll. 38-47 & p. 97, l. 1). Likewise, Dr. Randall Peterman, Canada Research Chair in Fisheries Risk Assessment & Management at Simon Fraser University, accepted that where conservation hatcheries use brood stock from adjacent systems and rebuilt stocks can be harvested outside mixed stock fisheries, these hatcheries could effectively serve to increase the sustainable portfolio of harvest choices for sockeye (May 2, 2011, p. 118, ll. 26-46; p. 119, ll. 22-47 & p. 120, l. 1). Dr. Randall also accepted that these conservation hatcheries are consistent with the Salmon Enhancement Program's goal of restoring depleted stocks (May 2, 2011, p. 122, ll. 10-15). Furthermore, Dr. Peterman agreed that conservation hatcheries are consistent with obligations under the Wild Salmon Policy, as did Ms. Cross and Mr. Greg Savard, Acting Regional Director of DFO's Oceans, Habitat and Enhancement Branch (May 2, 2011, p. 122, ll. 45-47 & p. 123, ll. 1-6).
53. It is important to bear in mind that the current strength of particular salmon stocks may not be reflected in the future strength of these same salmon stocks, and there is no certainty on which stocks will carry the majority of harvesting activities in the future (Reynolds, October 28, 2010, p. 99, ll. 9-20). To be proactive in salmon management activities it is imperative that DFO take a broader view of sockeye salmon diversity along British Columbia's coast than focussing on the two largest watersheds.

Specific Recommendations:

54. Heiltsuk Tribal Council recommends that for the purpose of managing the British Columbia's sockeye salmon fisheries holistically:
- DFO funds the restoration of sockeye stream habitat on British Columbia's Central Coast;

- DFO funds additional conservation hatcheries to rebuild sockeye salmon stocks along the Central Coast; and
- DFO funds additional technical assistance in the restoration and enhancement activities conduction on the Central Coast.

4.3. Manage jointly: Engage in true joint management

55. A cornerstone of successful fisheries management for the Fraser River sockeye salmon will be the structuring of a joint management relationship between DFO and all First Nations that access and rely upon these resources. Much evidence was put before this commission with respect to the current dialogue between DFO and First Nations on how to structure their mutual relationship in managing the fisheries. Chief Edwin Newman made it clear to the commission that Heiltsuk Tribal Council, like many other First Nations, wishes to be involved in all aspects of the management of the fisheries resources in their traditional territory (Newman, December 15, 2010, p. 31, ll. 14-19). Heiltsuk Tribal Council wishes to add to this dialogue by making recommendations as to what joint management will need to be successful.

4.3.1. Aboriginal rights and title need to be recognized

56. It is well-established that First Nations have managed the fishery resources in their traditional territories since time immemorial (Harris, June 27, p. 93, ll. 34-44 & p. 94, ll. 1-39). Furthermore, First Nations have an authority and jurisdiction to manage the fisheries resources in their traditional territories (Huber, June 28, 2011, p. 12, ll. 31-47 & p. 13, ll. 1-6; Terry, June 28, 2011, p. 15, ll. 2-4). The authority and jurisdiction of First Nations to manage resources within their traditional territory arises specifically from their title and rights to these territories and their resources, and the recognition of Aboriginal title and rights will be a necessary first step towards true joint management of the fisheries.
57. Currently DFO manages the fisheries from a perspective that First Nations are on the same level as resource users, such as recreational and commercial fishers

(McGivney, September 2, 2011, p. 88, ll. 11-16; Jones, June 28, 2011, p. 45, ll. 21-41). This results in an inability to have meaningful discussions on the central issue of governance, and instead limits discussions to peripheral issues such as licensing and access (Jones, September 2, 2011, p. 46, ll. 1-6). Barry Huber, DFO Aboriginal Affairs Advisor for British Columbia's Interior, agreed in testimony that First Nation's interests cannot be appropriately addressed in a "multi-disciplinary" environment (June 28, 2011, p. 46, ll. 31-35). Mr. Huber also agrees that DFO's inability to develop a process for the recognition of title and rights poses a policy barrier to joint management (June 28, 2011, p. 53, ll. 14-19). Mr. Huber summarized the issue very concisely, stating that First Nations have rights whereas others, such as the commercial and recreational fishers, do not, and that this distinction needs to be made clear (June 28, 2011, p. 47, ll. 21-25). Neil Todd, Operations Manager for the Fraser River Aboriginal Fisheries Secretariat, similarly endorses the need for joint management to take place between DFO and First Nations only (June 28, 2011, p. 14, ll. 26-34). By treating First Nations as mere users, DFO undermines the authority and jurisdiction that First Nations have as a necessary implication of their title and rights.

58. There is some concern that DFO may not have the authority to design a process for the recognition of aboriginal rights and title. Mr. Barry Rosenberger, DFO Area Director for the Interior of British Columbia, for example, resisted the suggestion that DFO should recognize aboriginal rights and title stating that the Indian and Northern Affairs Canada ("INAC") has this responsibility and DFO has no mandate to make these decisions (July 4, 2011, p. 66, ll. 19-24 & ll. 28-30). If the differing roles and responsibilities of INAC and DFO as they apply to the fisheries stand in the way of designing a process for recognition, then these roles must be clarified and coordinated. It is likely that both federal ministries will need to be involved in designing a joint management process for the fisheries but this should not be seen as a bar to the recognition of rights and title as a step forward.

Specific Recommendations:

59. Heiltsuk Tribal Council recommends that true joint management of the fisheries will require that:
- DFO recognizes First Nations as aboriginal title and rights-holders, and adopts a policy to address their issues separately from discussions with fishery resource user groups;
 - DFO consults on and develops a transparent process for the recognition of First Nations' aboriginal title and rights as they relate to fishery resources; and
 - The Government of Canada clarifies and coordinates the respective roles and responsibilities for INAC and DFO in relation to aboriginal access to and management of the fisheries.

4.3.2. Joint management is key to applying First Nations' Traditional Ecological Knowledge

60. This commission has canvassed the importance of the Traditional Ecological Knowledge ("TEK") of First Nations to the effective management of the fisheries, and received a great deal of testimony on what constitutes this body of knowledge and why it is important to fisheries management. Equally important to the work of this commission, however, is how this knowledge can be implemented in fisheries management. Joint management is key to the application of TEK as this knowledge is the result of the long standing experience that First Nations have with their local ecosystems and resources and is not something that can or should be relinquished to DFO in a unidirectional manner.
61. First Nations' TEK can be applied through the recognition of their jurisdiction to manage the fisheries resources in their traditional territories. Both Mr. Todd and Mr. Huber recognize the need for First Nations and DFO to work together if TEK is to be incorporated into the management of the fisheries (Huber, June 28, 2011, p. 18, ll. 39-45; Todd, June 28, 2011, p. 19, ll. 3-21). Both Mr. Todd and Mr. Huber also recognize the important role of joint management in ensuring the appropriate and successful management of the Fraser River sockeye salmon from

a conservation perspective (Huber, June 28, 2011, p. 54, ll. 41-47 & p. 55, ll. 1-4; Todd, June 28, 2011, p. 19, ll. 3-21). Much of TEK is knowledge that is derived from First Nations' occupation of their traditional territories since time immemorial and its application will often be best suited to the management of the resources and habitat within these traditional territories, making the recognition of their authority and jurisdiction to manage fisheries within these territories the most obvious mechanism for the incorporation of this significant but amorphous body of knowledge.

Specific Recommendations:

62. Heiltsuk Tribal Council recommends that for effective joint management of the fisheries:
 - DFO delegates authority to First Nations for the management of their local fisheries resources to incorporate their Aboriginal Traditional Ecological Knowledge into fisheries management.

4.3.3. Joint management is practical in Heiltsuk Traditional Territory

63. Heiltsuk traditional territory is located in an area of British Columbia with minimal DFO presence, which can often mean a vacuum with respect to the various fishery management activities DFO ordinarily undertakes such as monitoring and enforcement. In this regard, it is important to note that this commission will be making recommendations to a government body that will be grappling with significant budget cuts while seeking to implement the work done by this commission (Dansereau, September 22, 2011, p. 2, ll. 20-46; p. 3, ll. 3-23). Joint management is more than simply a useful way to supplement DFO management activities in areas such as the Central Coast; it is a necessary response to the fact that current DFO presence in these areas is vastly insufficient to meet DFO's objectives and this presence is unlikely to increase in the foreseeable future.

64. Positioned on the Central Coast, Heiltsuk have early access to the migrating Fraser River sockeye stocks and an intimate familiarity with the conditions of the habitat for these migrating stocks within their traditional territory. Russ Jones, the Technical Director, Policy Analyst and Project Manager of the Haida Fisheries Program, testified to the value of involving First Nations along the migratory route of the Fraser River sockeye salmon that access these stocks and have a say over the habitat in their areas (June 28, 2011, p. 41, ll. 2-7).
65. DFO enforcement presence on British Columbia's coast, on the other hand, is greatly limited. As already stated, Chief Mountain of the Namgis, Chief Newman of Heiltsuk, and Mr. Naknakim of the Cape Mudge band all testified to the absence of fishery compliance officers to monitor coastal waters (December 15, 2010, p. 77, ll. 17-47; p. 78, ll. 1-21). Chief Newman gave particular testimony on the lack of enforcement against poachers on the Central Coast, as well as the Heiltsuk Nation's willingness to fill this management vacuum (December 15, 2010, p. 32, ll. 36-47). Mr. Scott Coultish, the Regional Chief of DFO's Conservation and Protection Intelligence and Investigation Services, based on British Columbia's coast in Prince Rupert, testified that despite bringing to the attention of his superiors the current lack of DFO enforcement presence on the coast he was told that further reductions would be made (May 17, 2011, p. 20). Mr. Coultish estimated based on these discussions that thirty to forty enforcement officers would be lost in the region, amounting to one quarter of the existing allotment and possibly resulting in the closing of 12 to 13 regional offices (May 17, 2011, p. 20, ll. 34-44).
66. The Aboriginal Fishery Guardian program currently allows for First Nations to undertake enforcement activities within their traditional territories and this program is funded through the agreements signed with First Nations under the AFS program (Malloway, May 12, 2011, p. 93, ll. 31-43). Mr. Coultish testified to the effectiveness of this program for providing enforcement activities in the past and supported a recommendation for its restoration (May 18, 2011, p. 25, ll. 6-14 & ll. 34-39; p. 85, ll. 14-20). There are some concerns, however, that the

Aboriginal Guardians are not given sufficient enforcement powers (Naknakim, p. 78, ll. 1-6). Similarly, Mr. Wilson testified to the need to provide the Aboriginal Guardians with standardized training (July 4, 2011, p. 104, ll. 43-47). Heiltsuk are willing to help fill the gap in DFO enforcement within their traditional territory, but will need reliable long term funding to do so. This may require funding for Aboriginal Guardians to be provided outside the AFS agreements. There is also a need to ensure Aboriginal Guardians are provided with the standardized training and enforcement powers necessary to appropriately fill the enforcement vacuum on British Columbia's coast.

67. The need to allow Heiltsuk to determine openings and closings also flows from the lack of DFO presence on the Central Coast. Chief Newman testified that for Heiltsuk to have total involvement in enforcement they would need to be ceded the power to make these decisions on when fisheries can take place (December 15, 2010, p. 31, ll. 20-25). Heiltsuk Tribal Council has an active fisheries program that spends time much of its time on the water monitoring and managing fisheries, and undertaking habitat restoration and stock enhancement activities. They are in the best position to make the determinations of openings and closings in their area by virtue of having the best information in this regard and the greatest presence in the waters where these fisheries are conducted.
68. Another issue canvassed in this commission was the fact that there is currently no test fishing within Heiltsuk traditional territory or anywhere north of the Central Coast along the Fraser River sockeye's migration route (Ryall, February 1, 2011, p. 66, ll. 16-27). This results in a lack of in season management information for the Fraser River sockeye salmon as they pass through the Central Coast where they are fished by the Heiltsuk (July 4, 2011, p. 93, ll. 22-25). Mr. Wilson testified that Heiltsuk would be able to undertake test-fishing activities on the Fraser River sockeye salmon as they pass through Heiltsuk traditional territory (July 4, 2011, p. 79, ll. 24-33). Mr. Wilson also testified that the Heiltsuk's position early on in the migration route of the Fraser River sockeye salmon would allow them to provide valuable on-the-ground information for in-season

management issues with respect to stock size, location and DNA (July 4, 2011, p. 25, ll. 24-30). Furthermore, Mr. Wilson testified to the fact that Heiltsuk already have experience in conducting test fisheries (July 4, 2011, p. 93, ll. 37-38 & ll. 40-42).

Specific Recommendations:

69. Heiltsuk Tribal Council recommends that for effective joint management of the fisheries:

- DFO provides increased and long term funding for the Aboriginal Guardian Program outside of AFS agreements;
- DFO provides First Nations with the power to determine openings and closings within their traditional territories; and
- DFO provides funding and technical assistance for test-fishing activities on the Central Coast for the Fraser River sockeye salmon.

4.3.4. Joint management will require the support of economic opportunities

70. Joint management of the fisheries will also require the creation of economic opportunities in keeping with modern times that can support and incentivize this process. As already discussed, First Nations are well positioned to jointly manage the fisheries resources in their territory because of their current and historical presence in these territories, and the vast knowledge gained through their occupation of these territories. Nevertheless, economic opportunities and incentives will be important to ensure that joint management is sustainable and effective in the long term. Mr. Jones testified to the need for incentives for First Nations to engage in a co-management process (June 28, p. 57, ll. 16-25). DFO must not only recognize First Nations' jurisdiction to manage the fishery resources within their traditional territories but also their right to be involved in any exploitation of these resources and share in the profit derived from them. Heiltsuk Tribal Council offers the recreational fisheries in their traditional

territory as an example of this that is relevant to the salmon fisheries of the Central Coast.

71. The decline of the fishery has resulted in there being no openings for commercial fishing of the FRSS on the Central Coast. However, the increase in the recreational fishery on the Central Coast is an opportunity to recover economic opportunities for Central Coast fishing communities. With the collaboration of the DFO, the Province, and First Nations, economic opportunities such as licensing First Nations guides to be used by sport fishing lodges can be created to benefit coastal communities where sports fishing is popular.
72. Chief Newman testified that while certain areas of the Central Coast are closed to commercial salmon fishing, such as Milbanke Sound, these areas are open to recreational fishing and are a popular destination for this purpose (December 15, 2010, p. 31, ll. 22-38). He has observed thousands of sports fishers come to Heiltsuk traditional territory every year in the summer time. (*Ibid.*) They fly into the Bella Bella Airport, fish at the lodges, and then leave on flights from the Airport, departing with boxes of frozen fish taken from Heiltsuk traditional territory, but without spending any money in the community or otherwise making any contributions to it (*Ibid.*).
73. Ms. Adams, Regional Recreational Fisheries Coordinator, Fisheries and Aquaculture Management, Regional Headquarters Pacific testified that a document entitled "A Vision for Recreational Fisheries in British Columbia, 2009-2013" (Exhibit 527) contained the strategic goal for there to be a realization of the full social and economic potential of the recreational fishery (Adams, March 3, 2011, p. 82, ll. 11-32). This document also acknowledged that recreational anglers from all over the world come to BC to fish and that the recreational fishery generates wealth and employment (*Ibid.*). Ms. Adams further testified in response to a question about whether Canada and BC collaborate to create recreational business for First Nations that she became aware during the

hearing of such opportunities being discussed between DFO, the Province, and Haida Gwaii (Adams, March 3, 2011, p. 83, ll. 3-16).

Specific Recommendations:

74. Heiltsuk Tribal Council recommends that for effective joint management of the fisheries:

- DFO coordinates with the Province of British Columbia to recognize First Nations' jurisdiction over sports fishing activities within their traditional territory so they may manage, participate in and benefit economically from this industry; and
- DFO provide additional economic opportunities for First Nations in the fisheries resources in their traditional territories in consultation with First Nations to incentivize and support joint management activities.

4.3.5. Joint management cannot wait for treaties

75. Joint management cannot wait for First Nations to enter into treaties or land claims agreements with the Crown. This commission was called by the Federal government to respond to the need for immediate reforms to how fisheries are being managed in British Columbia. This commission has also brought into focus the importance of clarifying how the jurisdictions and authorities of First Nations can be reconciled with those of the Crown for effective management of these resources. Effective and successful joint management will have various prerequisites that have been canvassed in this commission, such as capacity-building, stable long-term funding and recognition of aboriginal rights and title, and these will need time to develop. Nevertheless, the First Nations of British Columbia are numerous and diverse, as are their perspectives on the treaty process. A position that joint management needs to wait for treaties to be concluded is impractical and may preclude a successful joint management process altogether.

76. DFO has supported some initial steps towards shared authority over management of the fishery resources with First Nations through such programs as the Aboriginal Fishing Strategy (“AFS”) and the Aboriginal Aquatic Resource and Oceans Management (“AAROM”) programs. The AFS program has had success in building capacity; however, its funding has been undercut by inflation, not having been increased since it began in 1993, and has been further reduced by 5% (Huber, June 28, 2011, p. 27, ll. 26-38). The AFS program has also been seen as a coercive approach to involving First Nations in fisheries management, as First Nations were only allowed access to AFS funding if they signed onto the agreement (Huber, June 28, 2010, p. 8, ll. 27-39; Wilson, July 4, 2011, p. 82, ll. 47 & p. 83, ll. 1-21). Most significantly, the AFS program has been described by DFO as a ‘bridge to treaty’ (Crey, July 5, 2011, p. 74, ll. 46-47 & p. 75, ll. 1-2). Heiltsuk Tribal Council supports continued and increased funding of the programs supported under the AFS and AAROM programs but cautions strongly against DFO taking the position that these programs are to set the table for treaties.
77. Joint management is achievable without treaties and to be a realistic goal, it must be understood as something that will need to exist outside of or as a complement to the treaty process. Mr. Huber agrees that DFO’s past position on co-management that it needs to come out of the treaty process is untenable and co-management cannot wait for treaties or land claims agreements to be concluded (June 28, 2011, p. 53, ll. 34-40 & p. 54, ll. 5-7). Ms. McGivney, former Regional Director of DFO’s Treaty and Aboriginal Policy Directorate, testified to the fact that a comprehensive set of treaties is unlikely to be concluded for British Columbia in the near future, and that DFO’s approach to aboriginal fisheries must recognize the need to deal with both First Nations within and outside of the treaty process (September 2, 2011, p. 86, ll. 43-47 & p. 87, ll. 1-2). Mr. Huber similarly testified that a workable co-management process needs to accommodate for the fact that some participating First Nations will be in treaties whereas others possibly never will be (June 28, 2011, p. 69, ll. 28-40).

Specific Recommendations:

78. Heiltsuk Tribal Council recommends that for effective joint management of the fisheries:

- DFO does not require any treaties or land claims agreements as a prerequisite to a joint management process.

4.3.6. Joint management requires allocation to be determined between First Nations

79. Heiltsuk Tribal Council also submits that an important step towards joint management of the fisheries resources will be allowing First Nations to determine access for FSC and economic access purposes between themselves, rather than through DFO in keeping with confidential mandates. As discussed elsewhere in these submissions, it became apparent during the course of this commission that DFO has already determined an overall allocation for First Nations access to fisheries resources. This overall allocation number must be disclosed to First Nations, and a process allowed to develop whereby the First Nations determine amongst themselves each Nation's individual allocation from this global figure. Joint management must begin with a successful Tier 1 process between First Nations and this can only take place when DFO relinquishes direct control over allocation between First Nations.

80. Mr. Huber agreed in his testimony that a major challenge in moving towards a joint or co-management structure is the current lack of agreed-upon allocations for First Nations, which in turn would allow for more flexibility in how management decisions are made (Huber, June 28, 2011, p. 27, ll. 26-30). Mr. Crey also agreed that an important first step towards joint management would be the determination of aboriginal versus non-aboriginal access to fishery resources (July 4, 2011, p. 32, ll. 34-47 & p. 33, ll. 5-12). Mr. Rosenberger, too, endorsed the importance of clear allocations for First Nations and non-First Nations as a step towards joint or co-management (July 4, 2011, p. 33, ll. 15-19 & ll. 33-35). As already stated, Mr. Huber further endorsed the proposition that if allocations are defined for First Nations access to the fisheries then it may be appropriate for

First Nations to determine allocations among themselves (June 30, 2011, p. 81, ll. 37-47 & p. 82, ll. 1-2).

Specific Recommendations:

81. Heiltsuk Tribal Council recommends that for true joint management of the fisheries:
- DFO discloses the current overall allocation for First Nations access to the fisheries;
 - DFO consults with First Nations on the overall allocation for First Nations access to the fisheries; and
 - DFO provides funding and support for a Tier 1 process in which First Nations determine the allocation of fisheries resources among themselves.

4.3.7. The PNCIMA process provides a useful model for joint management

82. Heiltsuk Tribal Council asks that the commissioner consider the Pacific North Coast Integrated Management Area (“PNCIMA”) process as a very useful model for how joint management of the Fraser River Sockeye Salmon should be arranged between DFO and First Nations. In particular, this model treats First Nations as equal participants alongside the Crown in the management of the fisheries, giving them equal representation on its steering committee. It is also useful to note that through the marine use planning process, the PNCIMA model can also give First Nations the opportunity to meaningfully incorporate their TEK into the management of the fishery resources by identifying their understanding of the resources and habitats that exist within their waters. Furthermore, the PNCIMA process provides an excellent example of First Nations working together at a Tier 1 level to create a common position despite their individual differences, as this was necessary for the purpose of harmonizing the marine use plans of individual nations into plans covering larger geographic regions.

83. Mr. Wilson testified that a key element of the PNCIMA governance structure was the fact that First Nations are treated as owners and not users in this model (July 4, p. 79, ll. 24-33). Mr. Jones also testified during this commission on the work of the Great Bear Initiative Coastal First Nations in developing an integrated management plan for PNCIMA, noting that the work between DFO and First Nations was occurring on a government-to-government basis (June 28, 2011, p. 55, ll. 25-40). Mr. Jones further elaborated on the structure of the steering committee for this process as consisting of First Nations representatives from Haida Gwaii, the Prince Rupert area, the Central Coast, and Northern Vancouver Island, as well as representatives from Canada and the Province (June 28, 2011, p. 58, ll. 42-47 & p. 59, ll. 1-14; see Exhibit 1203). By allowing for involvement of First Nations in the fisheries management process in a manner that recognizes their jurisdiction, the PNCIMA process has had a remarkable amount of buy-in from First Nations along the coast, evidenced by the broad geographic participation in its steering committee.
84. Mr. Wilson also testified that through a body representing the four individual First Nations on the Central Coast called the Central Coast Indigenous Resource Alliance (“CCIRA”), these four First Nations had achieved a harmonized marine use plan covering their individual territories under the PNCIMA process (July 4, 2011, p. 105, ll. 13-21; see Exhibit 1268). Mr. Wilson furthermore gave an example of how under a harmonized process these First Nations were willing to respect their differences and compromise, such as was the case with respect to salmon farming on the Central Coast. Mr. Wilson stated that although only one of four Central Coast nations supports open net pen salmon aquaculture within their traditional territory, they had not sought a veto over that individual nation’s ability to allow for such activities within its own local marine use plan (July 4, 2011, p. 106, ll. 8-27). Mr. Jones likewise testified on the work being done with local communities under this process to develop common positions on important issues such as which marine areas are in need of protection (June 28, 2011, p. 41, ll. 12-17; see Exhibit 1346).

85. In the course of the evidentiary hearings for this commission, other witnesses also endorsed the PNCIMA model. For example, Mr. Rosenberger agreed that PNCIMA is one model for co-management that should be looked at (July 4, 2011, p. 68, ll. 3-6). Likewise, Marcel Shepert and Ernie Crey, two other First Nations witnesses on the topic of co-management with deep involvement in the Fraser River watershed similarly expressed support for the PNCIMA model during this commission (Shepert, July 4, 2011, p. 68, ll. 18-22; Crey, p. 68, ll. 27-28).

Specific Recommendations:

86. Heiltsuk Tribal Council recommends that PNCIMA be adopted as a model for a joint management process, and specifically:
- First Nations be treated as resource owners rather than users; and
 - First Nations be given 50:50 representation with the Crown.

4.4. Manage openly: Provide true consultation

4.4.1. The meaning of consultation

4.4.1.1. Introduction

87. The Heiltsuk have lived within and upon their homeland since time immemorial and assert aboriginal rights and title to their lands, including the right to fish and steward marine resources. Heiltsuk have never surrendered or ceded these rights.
88. Section 35 of the *Constitution Act, 1982* recognizes and affirms existing aboriginal rights in Canada. In *R v. Sparrow*, the Supreme Court of Canada recognized that the Crown owes aboriginal peoples a fiduciary duty when dealing with aboriginal rights and that, in this context, “federal power must be reconciled with federal duty”.

R v. Sparrow, [1990] 1 S.C.R. 1075 (“*Sparrow*”), at ¶ 62.

89. The Supreme Court of Canada has also recognized that the fiduciary relationship between the Crown and Aboriginal peoples demands that aboriginal interests be placed first.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010
 (“*Delgamuukw*”), per Lamer C.J., at ¶ 162

90. In *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court of Canada recognized that the process of proving an existing right in court is costly and time-consuming, and that aboriginal rights that have not been proven may be adversely affected by Crown actions. To undertake such actions without regard to their effect on potential Constitutional rights is inconsistent with the honour of the Crown.

Haida Nation v. British Columbia (Minister of Forests),
 [2004] 3 S.C.R. 511 (“*Haida Nation*”), at ¶ 38.

91. The duty to consult and accommodate is a means of upholding the honour of the Crown in the interim period between the assertion of aboriginal rights and the final determination of those rights. In *Delgamuukw v. British Columbia*, the Court expressed the view that a final determination of rights is better pursued through a negotiated settlement rather than litigation.

Delgamuukw, supra, at ¶ 186

4.4.1.2. Leading Cases

92. *Haida Nation* establishes that, where the Crown has real or constructive knowledge of an asserted aboriginal right, and contemplates actions that could affect that right, the Crown is subject to consult with and, if necessary, accommodate the interests of affected First Nations.

Haida Nation, supra, at ¶ 35

93. The degree of consultation required in a given situation depends on the *prima facie* strength of the First Nation's claim to its asserted aboriginal right, and the potential risk of infringement of that right due to the Crown's considered action. Where the *prima facie* strength of the claim is weak, and the risk of infringement is low, the duty to consult may consist only of providing the First Nation with notice of the impending action, and information relating to the action. Conversely, where the *prima facie* claim is strong, and the potential for adverse effects is high, "deep consultation, with the aim of finding a satisfactory interim solution, may be required".

Haida Nation, supra, at ¶¶ 43-4

94. The purpose of consultation is to allow both parties to become better informed. In addition, meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations.

Haida Nation, supra, at ¶ 46

95. The Supreme Court's subsequent decision in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* establishes that it is not sufficient for the Crown to take unilateral action, even when the action includes some intended accommodation of First Nations' interests. First Nations are entitled to consultation in order to allow their concerns to be heard, and to allow the Crown to give good faith consideration to possible means of minimizing harms and/or accommodating First Nations' interests.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, at ¶ 64

96. The duty to consult is a legal obligation that is Constitutional in origin. Therefore, statutory decision makers are not limited by their statutory mandate in discharging the duty to consult.

West Moberly First Nations v. British Columbia (Ministry of Energy, Mines and Petroleum Resources), [2011] B.C.J. No. 942 (C.A.) (“*West Moberly*”), per Finch C.J.B.C., at ¶ 106

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, [2010] 3 S.C.R. 103, at ¶ 48

Halfway River First Nation v. British Columbia, 1999 BCCA 470, 64 B.C.L.R. (3d) 206, at ¶ 177.

97. The Crown's obligation to reasonably consult is not fulfilled simply by providing a process within which to exchange and discuss information. Meaningful consultation requires more than attending numerous meetings and drafting emails. In considering whether consultation has been meaningful, the Courts have looked at the ultimate result and the rationale.

Wii'litswx v. B.C. (Ministry of Forests), 2008 BCSC 1139

Halalt First Nation v. B.C. (Environment), 2011 BCSC 945

West Moberly, supra

4.4.2. DFO Position on Consultation

98. DFO management of the sockeye fishery seeks to define the extent to which aboriginal groups, including Heiltsuk, can exercise their aboriginal fishing rights. DFO acknowledges that the current arrangement is a “medium-term” solution, pending a final settlement, and that this arrangement will continue for the foreseeable future (Exhibit 1426, page 1, ¶ 2; McGivney, September 02, 2011, page 87, ll. 31-46).
99. On March 16, 2011, Paul Ryall, a former Salmon Team Lead with DFO, under cross-examination by counsel for Canada, identified the following documents as informing DFO's approach to consultation with First Nations: “Consultation Framework for Fisheries and Oceans Canada” (Exhibit 594); “Consultation

Toolbox – Guide to Understanding Consultations” (Exhibit 595); “Consultation with First Nations - Best Practices, A Living Document” (Exhibit 596); and “Aboriginal Consultation and Accommodation - Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult” (Exhibit 597) (Ryall, March 16, 2011, pp. 41-43).

100. According to Mr. Ryall, the purpose of the Consultation Framework adopted by DFO is to “provide some guidance around consultation processes and... how to undertake them.” The Framework’s Executive Summary cites its purpose as ensuring that consultations are “transparent, accessible, and accountable”. (Exhibit 594, page v, ¶ 1). The Framework acknowledges that the Government of Canada recognizes a fiduciary duty towards aboriginal peoples (Exhibit 594, page 31, ¶ 2).
101. The Best Practices document adopted by DFO provides examples of best practices for negotiating with First Nations, and incorporates principles set out in *Haida Nation* (Ryall, March 16, 2011, p. 42, ll. 33-40). The Best Practices document contains a six-step method for consultation with First Nations. The procedure set out in the Best Practices document provides that DFO consultation with First Nations should include, *inter alia*, an exchange of information, bilateral meetings, a chance for First Nations to respond to the issues raised in bilateral meetings, a written response in turn from DFO to First Nations, and an assessment of whether the concerns raised in consultation call for accommodation of First Nations’ interests (Exhibit 596, pp. 9-11).

4.4.3. Heiltsuk’s Position on Consultation

102. The proper management of Fraser River Sockeye Salmon and of marine resources more generally cannot occur without a concrete commitment to transparent and accountable decision-making.
103. Furthermore, as a final negotiated settlement for all British Columbia’s First Nations is not likely to be reached in the short term, consultation-based management is likely to be the governing framework for the recognition and

protection of aboriginal rights for the foreseeable future (McGivney, September 2, 2011, page 87, ll. 31-46).

104. DFO clearly develops and applies policies which greatly impact First Nation's aboriginal rights to fish, yet is clearly failing to engage in deep consultation with First Nations on steps that do, or that may, affect aboriginal rights.
105. The Commission's mandate is to make recommendations for future DFO policies, but these recommendations must be consistent with Constitutional principles and the honour of the Crown. Insofar as the Commissioner makes recommendations regarding the implementation of measures designed to further the objective of conservation, recommendations that may impact aboriginal fishing rights should recognize and affirm DFO's obligation to engage in meaningful consultation.

4.4.4. DFO Failures to Consult: Examples

106. Heiltsuk, in particular, has a strong *prima facie* claim to its aboriginal fishing rights, as indicated by the facts in *R v. Gladstone*.

Gladstone v. Canada (Attorney General), [2005] 1
S.C.R. 325

107. Given the Crown's duty to consult, and given DFO's own formulation of best practices that makes an exchange of information the first step in consultation, a practice by DFO of actually applying its own consultation policies, including exchanging information with Heiltsuk, would not seem a controversial step.
108. Nonetheless, the need for an express recommendation by this commission that DFO *actually* consult with Heiltsuk (and other First Nations) as part of managing marine resources flows from notable instances where DFO has failed and continues to fail to disclose important information, consistent with what appears to be an actual practice of opaque decision-making.
109. Even should the Commission refrain from making any findings of law concerning consultation duties or breaches thereof, its jurisdiction includes finding that DFO

deals with FSC matters in an opaque manner that impedes both accountability and any move towards cooperative stewardship of marine resources between DFO and First Nations.

4.4.4.1. Non-disclosure of Farm Fish Health Data

110. Heiltsuk states that no fish health data is currently provided when consultations take place on open net pen salmon aquaculture facilities, and no provision is made for technical assistance with this information.
111. Dr. Jones, DFO Research Scientist, agreed that all competent and interested parties, including First Nations, should have access to salmon farm fish health data to assess the risk of open net pen salmon farms proposed within their traditional territory. He listed the following information that should be provided to First Nations: production data, information on the number of fish stocked, the time of stocking, information on treatment histories, information on lice counts, information on the species of lice, the stages of development of these fish, information on mortalities, particularly those of the fresh silver category from which clear health data may be obtained. He advised that to date he has not been asked by DFO to assemble such a package of information (Jones, September 7, 2011, p. 105-106).
112. This list of information to provide to First Nations in consultation on net pen salmon farms was further supplemented by Dr. Saksida who testified that environmental information would also be important to understanding the significance of any fish health information disclosed (Saksida, September 7, 2011, p. 106, ll. 5-10).
113. Mr. Clare Backman, Director of Environmental Compliance and Community Relations for Marine Harvest Canada, likewise agreed that the list of relevant fish health information articulated by Dr. Jones and Dr. Saksida is information that is important to share with First Nations during the consultation process (Backman, September 8, 2011, p. 110, ll. 17-27).

Specific Recommendations:

114. Heiltsuk recommends that, in order to satisfy the Crown's duty to consult:
- DFO provides complete data regarding fish health on open net pen salmon farms to First Nations; and
 - DFO provides independent technical assistance to First Nations to interpret and use this fish health data.

4.4.4.2. Non-disclosure of End Point Percentages

115. DFO has acknowledged that all FSC and aboriginal commercial fishing amounts are managed to a total "end-point cumulative allocation" which is a percentage of the total allowable catch. This percentage is determined by DFO, and is currently in use for governing all aboriginal access to the fisheries, including economic opportunity and FSC amounts (Exhibit 1426, page 2; McGivney, September 02, 2011, pp. 88-9).
116. No question exists that end-point allocations have been set, and is currently in use by DFO to make decisions in relation to PICFI, FSC allocation, treaty allocations, the Allocation Transfer Program ("ATP"), and First Nation economic opportunity fisheries being negotiated annually, as shown by the testimony of DFO Representative Kaarina McGivney (September 2, 2011, p.88, 1.35-p.90 l. 47).
117. Ms. McGivney acknowledged in cross-examination that neither the end point allocation system, nor the adopted percentage number itself, were the subject of consultation (September 02, 2011, p. 97, ll. 1-9).
118. DFO's failure to inform First Nations of the process and outcomes of the determination of the End Point Allocation figure is inconsistent with DFO's obligation to determine FSC allocations based on need, and the duty to consult on decisions that will affect the exercise of aboriginal fishing rights.

Specific Recommendations:

119. Heiltsuk recommends that, in order to satisfy the Crown's duty to consult:
- DFO engages in deep consultation with First Nations regarding overall access for First Nations to the fishery resources; and
 - DFO discloses the current end-point percentage and the methodology employed in managing to this percentage.

4.4.4.3. Non-disclosure of Maximum FSC allotments in CFAs

120. Each year Heiltsuk enters into an annual Comprehensive Fisheries Agreement ("CFA") with DFO. The CFA sets out, inter alia, terms on which FSC fishing is to be conducted.
121. Mr. Huber gave evidence that DFO does not disclose to First Nations its mandate numbers, which indicate the maximum FSC allocation available to particular First Nations (Huber, June 30, 2011, p. 79, ll. 15-47; p. 80, ll. 12-21, 22-25, 81, ll. 1-10).
122. Mr. Huber's rationale for DFO's non-disclosure was that negotiations could not work because First Nations would start with the maximum and demand more (Huber, June 30, 2011, p. 81, ll. 11-36). He testified that each party need to come to the table with "chips" to negotiate (Huber, June 30, 2011, p.94, ll. 6-27.) When asked, however, about whether there could be negotiation where all information is disclosed, Mr. Huber testified that if the allocations were defined then that would work (which he later corrected to mean that it could work) (Huber, June 30, 2011, p. 81, ll. 36-47; p. 82, ll. 1-2).

Specific Recommendations:

123. Heiltsuk recommends that, in order to satisfy the Crown's duty to consult:
- DFO abandons its mandate approach to FSC management; and

- DFO adopts a transparent and needs-based consultative approach to determining FSC allocations, or preferably allows First Nations to determine access to FSC and economic access between themselves.

4.4.4.4. No consultation on FSC Allotments

124. Appendix 1 to Schedule B-1 (Exhibit 305) shows a CFA agreement between DFO that confirms a part of Heiltsuk's aboriginal right to fish, namely a right to fish 20,000 pieces of Sockeye:

“This license authorizes fishing for the following species and quantities:
Sockeye (*Oncorhynchus nerka*) 20,000 pieces”

125. Mr. Wilson testified he understands “Sockeye” to include Fraser River Sockeye Salmon, and no one has ever advised him otherwise (Wilson, July 4, 2011, p. 81, ll. 36-47; p. 82, ll. 1-7). Heiltsuk elders have fished the Fraser River Sockeye Salmon that pass through Heiltsuk waters for as long as they can remember. Mr. Wilson recalls fishing for Fraser River sockeye salmon himself as a teenager, and fisherman have told him that during the days of the commercial fishery, Goose Island was very important for catching Fraser River sockeye salmon (Wilson, July 4, 2011, p.83, ll. 23-26; p. 85, ll. 12-47; p. 86, ll. 1-2).
126. Mr. Wilson testified to Heiltsuk's view that DFO must consult on the FSC numbers (Wilson, July 4, 2011, p. 101, ll. 33-35). Schedule B-1, sub-section 4(b) of HTC 2009-2010 CFA (Exhibit 305) stipulates that, “The quantities of fish reflected in the Communal License *are subject to consultation each year, at which time the needs of the members of the HTC and conservation requirements will be reviewed* by the Parties.” (emphasis added) Chief Newman has testified that consultation on FSC numbers is to establish Heiltsuk's need (Newman, December 15, 2010 p.37, ll. 18-22 and 40-47; p. 38, ll. 1-8; p. 67, ll. 43-47; p.68, ll. 1-3, 28-36).
127. In Mr. Wilson's experience, however, and based on his review of older documents, DFO does not and has not consulted on the number of 20,000 pieces

of Sockeye, or advised of a basis for that number. Mr. Wilson recalls from a discussion with DFO a few years ago that FSC was based on 2% of the total allowable catch, and he asked for the basis of the formula, but DFO did not provide him with any documentation (Wilson, July 4, 2011, p. 101, ll. 39-47; p.102, ll. 1-15).

128. Similarly Chief Newman, who has been Chief Councillor and member of the Heiltsuk Tribal Council, testified he did not ever recall an increase in the 20,000 Sockeye pieces, or Heiltsuk being consulted on FSC numbers in the AFS/CFA. His recollection is that DFO simply set out the FSC number for Heiltsuk's signature (Newman, December 15, 2010, p.37, ll. 18-22; 40-47; p. 38, ll. 1-8; p. 67, ll. 43-47; p.68, ll. 1-3, 28-36).
129. Under the current arrangement, DFO ties Heiltsuk's acceptance of proposed FSC numbers to fund that Heiltsuk needs to carry out management activities. For example, Mr. Wilson testified that the consequence of HTC declining to enter into the CFA would be no funding for any fishery management (Wilson, July 4, 2011, p. 82, ll. 47; p.83, ll.1-21).

Specific Recommendations:

130. Heiltsuk recommends that:
- DFO adopts a transparent and needs-based consultative approach to determining FSC allocations, or preferably allows First Nations to determine access to FSC and economic access between themselves.

4.4.4.5. No Consultation on In-Season Adjustments

131. On July 04, 2011, Ross Wilson testified as to Heiltsuk's efforts to obtain an in-season adjustment of Heiltsuk's FSC allocation for 2011, in the event of a strong return. Mr. Wilson testified that DFO's response did not meet the criteria set out in the Best Practices document adopted by DFO. In particular, DFO's response failed to meet the following prescribed guidelines:

- DFO failed to provide “sufficient information so that [Heiltsuk] can decide whether or not to participate in the consultation process” as set out in Step 1 of the Best Practices document (Wilson, July 04, 2011, p. 103, ll. 28-41). This step is designed to inform Heiltsuk if further consultation would be unproductive, e.g. if the stocks were in conservation that year (*Ibid.*).
- DFO “generally” fails to provide written responses to concerns raised by Heiltsuk during consultation processes, and failed to provide a written request addressing Heiltsuk’s concerns in respect of the in-season adjustment request in particular (Wilson, July 04, 2011, p. 103, ll. 42-7; p. 104, ll. 1-2).

Specific Recommendations:

132. Heiltsuk recommends that:

- DFO applies its Best Practices document to FSC management.

4.4.4.6. FSC allocation policies

133. As part of the larger problem of DFO’s governance lacking transparency, DFO appears to develop and apply policy rules impacting on aboriginal fishing rights without consulting on those policy rules, or even disclosing that they exist until they are applied. For example, as recently as 2010 during this commission, Heiltsuk lost an opportunity to access FSC fish during a record run of Fraser River Sockeye Salmon due to DFO applying a “secret” allocation rule that prevented Heiltsuk from having another Nation fish Heiltsuk’s FSC allotment, even though Heiltsuk could not know to fish, due to a lack of DFO in-season management while the salmon were swimming through Heiltsuk waters.
134. In particular, a well-known record-run of 34 million Fraser River Sockeye Salmon occurred in 2010. Heiltsuk lacks, however, the benefit of any in-season management of Fraser River Sockeye Salmon swimming through Heiltsuk’s traditional territories – Fraser River Sockeye Salmon in-season management does not start until test fishing occurs in Management Area 12, far to the south. Mr. Wilson testified there is no in season management data from DFO (Wilson, July

- 04, 2011, p.93, ll. 22-25). Heiltsuk did not and could not become aware of the strength of that year's run until the fish began to be counted in Johnston Strait.
135. To address Heiltsuk's lack of opportunity to exercise its FSC rights, Heiltsuk made a Nation-to-Nation agreement for another First Nation to catch its FSC allotment for both local and urban members, only to be informed by DFO officers – first by Kirsten Wong, then by Greg Thomas and Randy Brahniuk – that FSC could only be caught within Heiltsuk's management area, and that any FSC caught elsewhere would have to come off the *host* Nation's FSC allocation – a “rule” that Mr. Wilson testifies DFO never disclosed to Heiltsuk (Wilson, July 04, 2011, p. 94, ll. 10-47; p. 95, ll. 1-4).
136. Specifically, Mr. Wilson testified that when negotiating Heiltsuk's CFA, he was not advised that if Heiltsuk should enter into a Nation-to-Nation agreement, catch numbers would come off the *host* Nation. Indeed, Mr. Wilson testified to his speaking with three other First Nations, one of which understood that a Nation-to-Nation agreement would result in the catch numbers coming off the *requesting* Nation's allocation (Wilson, July 04, 2011, p.98, ll. 36-47; p. 99, ll. 1-9).
137. This incident illustrates a failure of DFO to consult about, or even disclose, a DFO policy significantly impacting on Heiltsuk's ability to carry out its aboriginal rights. Furthermore, this incident is remarkable because Mr. Wilson then asked for an accommodation, pursuant to Northern IMFP paragraph 5.3, which provides that “Communal licenses can be amended in-season for resource conservation purposes or to increase access for FSC purposes,” yet DFO responded (as confirmed in notes taken by Ms. Susan Behn Anderson of IMAWG), DFO could not accommodate Heiltsuk because DFO did not consider Northern First Nations to have access to Fraser River Sockeye Salmon (Wilson, July 04, 2011, p.96, ll. 1-11); that because Heiltsuk's allocations and fishing areas were set, DFO was working under treaty guidelines and policies and *had no option* (Wilson, July 04, 2011, p.97, ll. 26-41); and that Marine Area First Nations were limited to a total 260,000 Fraser River Sockeye Salmon for use as FSC

under pre-season planning, and *this number could not be changed, no matter how abundant the Fraser fish were* (Wilson, July 04, 2011, p.96, ll. 15-28). These responses are patently absurd, given the terms of Heiltsuk's CFA, the terms of the Northern IFMP, and Mr. Huber's testimony that DFO has in fact made accommodations when other host Nations have agreed (Huber, June 30, p. 91, ll. 5-14). This incident illustrates not only a failure to consult pursuant to the guidelines set out in the Best Practices document of DFO (Wilson, July 04, 2011, pp. 102-4), but a lack of accountability in DFO decision-making that a culture of transparency would promote.

138. DFO's failure to consult with Heiltsuk with respect to Heiltsuk's FSC allocation, either on a year-by-year basis or in response to Heiltsuk's direct requests for in-season adjustments, indicate that current DFO policy does not give sufficient effect to DFO's duty to consult with Heiltsuk in particular, or with First Nations generally.

Specific Recommendations:

139. Heiltsuk recommends that:
- DFO recognizes the right of First Nations to enter into Nation-To-Nation agreements to address their food fishing needs; and
 - DFO allows First Nations to determine their overall access to fisheries resources between themselves.

4.5. Manage fairly: Permit First Nations to allocate FSC between First Nations

140. DFO has recognized internally that many First Nations consider FSC allocations inadequate and inequitable, and that DFO has been lacking an analytic or administrative framework to deal with FSC allocations.
141. Mr. Huber, DFO Aboriginal Affairs Advisor, confirmed that, consistent with the document entitled *First Nation's Access to Food, Social, Ceremonial (FSC)*

Purposes, Trial Implementation of Evaluation Framework, dated May 2006, he understood that (Exhibit 1225):

- Fisheries Managers are frequently asked to increase FN FSC allocations or expand fishing area, without an analytical framework or clear administrative framework;
- This has led to ad-hoc decisions, confusion, disparities, among FNs and inconsistencies between AFS and Treaties; and
- FSC allocations are considered inadequate and inequitable by many First Nations.

142. DFO has also recognized internally that its FSC decision-making process requires more flexibility and transparency. In a document entitled, *FSC Access Guiding Principles*, DFO described its response to a report entitled “Our Place at the Table: First Nations in the BC Fishery” as being an Action Plan that included committing to working with First Nations to address concerns regarding fisheries access for FSC purposes, and for the longer term to develop a mutually agreeable framework for negotiating appropriate levels of fisheries resources for FSC (Exhibit 1224).

143. The draft document identified DFO seeking input from First Nations on FSC access issues, including principles that could guide FSC access decisions, and recognized the need for flexibility and transparency in the form of draft principles (Exhibit 1224):

Draft Principle #3: Processes and decisions regarding FSC access (amount, fishing area, and fishing opportunity) should incorporate some flexibility within a generally consistent approach.

...

3) Transparency. First Nations have expressed concerns around lack of transparency in decision-making re: FSC access. DFO is

accountable for its decisions and they should reflect agreed-upon guiding principles.

144. Mr. Huber testified he is currently on an FSC working committee intended to collaborate and develop FSC policy with First Nations. (Huber, June 30, p. 88, ll. 15-43). Heiltsuk's recent experiences with DFO management of FSC issues, as set out above, indicate that DFO has not yet managed to implement any of its goals of flexibility or transparency.
145. Given that Canada has developed end-point allocation figures to define First Nations access to fisheries resources, Heiltsuk submits, as noted above, that an important step towards joint management of fisheries would be disclosing these figures to First Nations, and allowing First Nations to determine access to FSC and economic access purposes between themselves, rather than DFO continuing to attempt direct control over allocation between First Nations.

5.0 Conclusion

146. We now come full circle to Heiltsuk's opening submissions to this commission on the question of how aboriginal law and rights should be addressed in this inquiry.
147. Heiltsuk's view is that implicit in the success of this commission is its recognizing existing aboriginal rights and acknowledging valid claims to as yet unproven aboriginal rights. Recommendations by this commission at either operational or policy levels must recognize these rights and respect these claims. This means the commission is able to evaluate the extent to which government practices have failed to give proper effect to aboriginal rights in favour of other interests. The commission should make recommendations about allocation which properly reflect the priority of aboriginal rights. The commission should make recommendations about joint management by First Nations exercising their right and duty to steward resources within their traditional territories.
148. The terms of reference provide for recommendations to improve future sustainability. These recommendations will necessarily address priority and

allocation. This commission simply cannot make recommendations about sustainability without the commission considering and providing for the priority of First Nations. The aboriginal right to fish and the priority recognized by the Supreme Court of Canada is an inherent component to any plan for sustainability.

149. This commission is uniquely situated. It is specifically designed to provide leadership. It is specifically mandated to not only find the facts necessary to draw inferences as to the cause of the decline of Fraser River sockeye salmon, but, most importantly, to make recommendations that are future-looking and provide leadership in formulating changes that favour sustainability. In exercising this leadership, the commission's recommendations should not only affirm and be consistent with aboriginal rights, but should also recommend broader cooperation by governments with First Nations, consistent with their aboriginal rights, consistent with their rights of self-government, and consistent with their rights to manage fisheries within their traditional territorial waters.
150. Heiltsuk Tribal Council wishes to conclude these submissions by thanking the Commissioner for overseeing this complex proceeding, Commission counsel and staff for assisting him in this matter, the numerous witnesses who testified before the commission, and finally, the numerous other participants who have worked so very hard to contribute meaningfully to this process.

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