

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

In the matter of His Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part 1 of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

**REPLY SUBMISSIONS OF THE GOVERNMENT OF CANADA
NOVEMBER 3, 2011**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	2
II.	CANADA’S RESPONSE TO CROSS-CUTTING ISSUES	4
	A. Over-Escapement.....	4
	B. Ecological Benefits and Economic Viability of Inland Commercial Sockeye Fisheries.....	5
	C. DFO’s Capacity to Consider and Weigh Social and Economic Issues.....	6
III.	CANADA’S RESPONSE TO PARTICIPANTS’ FINAL SUBMISSIONS	8
	A. Province of British Columbia (Participant No. 2).....	8
	B. BC Public Service Alliance of Canada and Union of Environment Workers BC (Participant No. 4)	9
	C. Rio Tinto Alcan Inc. (Participant No. 5).....	11
	D. Aquaculture Coalition (Participant No. 8).....	13
	E. Conservation Coalition (Participant No. 9).....	24
	F. Area D Salmon Gillnet Association and Area B Harvest Committee (Participant No. 10).....	37
	G. Southern Area E Gillnetters Association and BC Fisheries Survival Coalition (Participant No. 11).....	41
	H. West Coast Trollers Area G Association and United Fishermen and Allied Workers’ Union (Participant No. 12).....	43
	I. BC Wildlife Federation and BC Federation of Drift Fishers (Participant No. 13)....	55
	J. Tsawwassen First Nation and Musqueam First Nation (Participant No. 14).....	57
	K. Western Central Coast Salish First Nations (Participant No. 15).....	59
	L. First Nations Coalition (Participant No. 16).....	66
	M. Métis Nation British Columbia (Participant No. 17).....	75
	N. Sto:lo Tribal Council and Cheam Indian Band (Participant No. 18).....	78
	O. Heiltsuk Tribal Council (Participant No. 21).....	86
IV.	CONCLUSION	94
V.	LIST OF AUTHORITIES	95

I. INTRODUCTION

*Undoubtedly, the ability of an inquiry to investigate, educate and inform Canadians benefits our society.*¹

1. The Participants' submissions affirm the widespread interest in British Columbia in the Fraser sockeye resource. The submissions also reflect the Participants' often divergent perspectives on issues related to Fraser sockeye and its habitat. The Participants' submissions helpfully set out these divergent perspectives, frame the issues, and serve to both educate and inform.
2. Canada's reply submissions will identify and, in certain instances, address what are, from Canada's perspective, significant inaccuracies and omissions in the Participants' submissions, in order to assist the Commissioner in the preparation of his final report. These reply submissions are divided into two parts – a response to similar arguments and assertions that appear multiple Participants' submissions, and separate responses to various Participants' submissions. The fact that these reply submissions do not address a particular statement or assertion in a Participant's submissions should not be construed as agreement by Canada with the statement or assertion in question.
3. Before responding to individual aspects of the Participants' submissions, Canada wishes to note that some of the Participants advocate that the Commissioner should make findings or recommendations regarding legal issues, including issues relating to Aboriginal and treaty rights.
4. In reply to such submissions, Canada observes that the purpose of a commission of inquiry is to investigate, not to adjudicate. The Supreme Court of Canada, in *Canada v. Commission of Inquiry on the Blood System (Krever Inquiry)*, noted that:

[A]n inquiry is an investigation into an issue, event or series of events. The findings of a commissioner relating to that investigation are simply findings of fact and statements of opinion reached by the commissioner at the end of the inquiry. They are unconnected to normal legal criteria. They are based upon and flow from a procedure which is not bound by the evidentiary or procedural rules of a courtroom. There are no legal consequences attached to the determinations of a commissioner.²

¹ *Canada v Commission of Inquiry on the Blood System*, [1997] 3 SCR 440, at para 30 (*Krever Inquiry*).

² *Krever Inquiry* at para 34. See also *Beno v. Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)*, [1997] 2 FC 527, at para 23.

5. In *Dixon v Canada (Somalia Inquiry Commission)*,³ the Federal Court of Appeal also considered the purpose of a commission of inquiry. Mr. Justice Marceau, for the Court of Appeal, stated that:

It is easy to realize nowadays the tremendous impact that commissions of inquiry, as they now exist, may have on Canadian society, but, in my view, their public importance is not and cannot be the source of a special legal status.

[...]

As investigative bodies, they, of course, are called upon to seek the truth, and no doubt they are ideally suited for uncovering facts that could not be discovered otherwise (precisely because they have broad investigative powers, they are inquisitorial, and they are not subject to the strict rules of evidence that apply to a court of law). Hence, their prestige. But, nowhere do we find the imposition upon them of a duty to conclude. On the contrary, their purpose, which is primarily to advise and to help the government in the proper execution of its duties, is not conducive to settling issues and drawing definitive conclusions.⁵

6. The Terms of Reference for the Cohen Commission reflect this limitation on the powers of commissions of inquiry. They direct the Commissioner to make findings of fact and recommendations on the enumerated in the Terms of Reference. They do not direct the Commissioner to make findings, recommendations, or reach conclusions regarding legal issues.

7. In light of this jurisprudence, and of the Terms of Reference, Canada submits that the Commissioner does not have the authority – nor is this Commission the proper forum – for making findings or recommendations regarding any legal issues raised by the Participants.

8. Canada notes that some of the Participants have inaccurately described certain legal principles. Although the Commissioner should not make finding or recommendations regarding legal issues, Canada will nonetheless address significant inaccuracies in these submissions, in order to highlight that the law relating to fisheries, including Aboriginal and treaty rights, is complex, evolving, and often the subject of differing interpretations.

³ *Dixon v Canada (Somalia Inquiry Commission)*, [1997] 3 FC 169 (Fed. C.A.), at para.13; leave to appeal refused (1998) *Dixon v Commission of Inquiry into the Deployment of Canadian Forces to Somalia*) 226 NR 400, at para 18 (SCC) [*Dixon*].

⁵ *Dixon* at paras 13-14.

II. CANADA'S RESPONSE TO CROSS-CUTTING ISSUES

A. Over-Escapement

9. There are a number of submissions, most notably from West Coast Trollers Area G Association/United Fishermen and Allied Workers Union (Area G/United Fishermen), Area D Salmon Gillnet Association/Area B Harvest Committee (Area D/B) and the BC Wildlife Federation/BC Federation of Drift Fishers (BC Wildlife/Drift Fishers), that point to over-escapement as a significant or likely cause of the longer term decline of Fraser sockeye due to immediate or delayed density dependent impacts. Over-escapement is identified as one of many possible contributors to the decline in the evidence provided to the Commission. However, there are some errors in these Participants' submissions, largely of omission, regarding the topic of over-escapement.

10. The following is a brief summary of important evidence that Canada submits should be included when considering whether over-escapement is a key contributor to the decline of Fraser sockeye.

11. Technical Report No. 10, by Dr Randall M. Peterman and Dr Brigitte Dorner, states:

To summarize our analysis of density dependence, we conclude that although there is evidence of both simple and delayed density dependence for many Fraser stocks, our results do not support the general hypothesis that efforts to rebuild Fraser populations in recent years may have resulted in "over-spawning", thereby causing substantial declines in productivity for these stocks. The only exception to this generalization is the Quesnel stock, which shows evidence of both delayed density dependence and patterns of spawner and recruit abundance that are consistent with the hypothesis that recent declines in productivity are attributable mostly to increased spawner abundance.⁶

12. Technical Report No. 6, by David Marmorek *et al*, cites the conclusions of Dr Peterman and Dr Dorner on delayed density dependence, and notes that their analysis covered the cumulative impacts across all life history stages.⁷

13. The testimony of Dr Brian Riddell, on December 1, 2010, clarified that, although there is finite carrying capacity in lake environments, there is no evidence that at very high levels of

⁶ Exhibit 748 at p 45: Technical Report No 10, "Fraser River Sockeye Productions Dynamics", February 2011.

⁷ Exhibit 1896 at p 69: Technical Report No 6 "Fraser River sockeye salmon: data synthesis and cumulative impacts", April 2011.

escapement the number of juveniles produced crashes. The rate of return per adult has reduced, but the numbers of smolts leaving the lakes have not crashed.⁸

14. The testimony of David Marmorek, on September 20, 2011, compared the analyses of Dr Walters and Dr. Peterman in respect of this issue:

So they're both excellent fisheries scientists. But what we have here is one verydetailed report by Peterman and Dorner describing all their methods, on the other hand we have an email with a graph in it. So I think that if you're going to have an apples-to-apples comparison, what you really need is a very detailed description of exactly the methods that Dr. Walters used. Because I found in many previous cases that unless you know exactly what data and methods they're using, it's very hard to compare the conclusions.⁹

15. The summary of the April 2011 DFO Science Workshop states at page 7 that:

DD [density dependence] and DDD [delayed density dependence] likely contribute to reduced productivity in a number of stocks, but are unlikely the cause of the widespread declines observed within and beyond the Fraser River.¹⁰

16. While Canada acknowledges there may be risks associated with over-escapement, it is clear that these risks must be balanced with the negative consequences of under-escapement, ie not achieving escapement targets.

B. Ecological Benefits and Economic Viability of Inland Commercial Sockeye Fisheries

17. In their submissions, many Participants comment on inland commercial fisheries, some in a negative manner and others more positively. In response, Canada notes that arrangements aimed at testing the feasibility and economic viability of inland commercial fisheries are being undertaken as part of a strategy to improve the future sustainability of the Fraser sockeye fishery.

18. The Fraser sockeye resource is comprised of dozens of Conservation Units (CUs), as described in the *Wild Salmon Policy*. Achieving spawning escapement levels that ensure

⁸ Dr Brian Riddell, 1 December 2010, pp 76:24 to 77:21.

⁹ David Marmorek, 20 September 2011, p 28:2-26.

¹⁰ Exhibit 1364 at p 7: *Draft Summary Report: DFO synthesis workshop on the decline of Fraser River sockeye*, Vancouver Island Conference Centre, Nanaimo, BC, Department of Fisheries and Oceans, April 14-15, 2011.

biodiversity is essential in imparting resilience to the Fraser sockeye stock in the face of future environmental uncertainty.¹¹

19. Given the importance of biodiversity, managing coastal mixed stock fisheries to harvest Fraser sockeye is very challenging.¹² Harvesting at exploitation rates appropriate for large, productive CUs, or even those with average productivity, will result in the over-harvesting of less productive CUs. Over time, that could result in the extirpation of some CUs, and the reduction in resilience and production from all Fraser sockeye CUs.

20. Recognizing the need for more CU-specific management in the future, DFO has explored conducting commercial fisheries for Fraser sockeye and other Fraser salmon species in more terminal areas (ie locations closer to the spawning grounds), where CUs are disaggregated and harvest rates can be set at more sustainable rates.¹³ Many First Nations are situated in key terminal locations, and have been very interested in testing the feasibility and economic viability of inland commercial fisheries for sockeye, chinook, chum and pink salmon. The allocations for these demonstration fisheries come from licences that have been voluntarily relinquished by coastal commercial licence holders.¹⁴

21. DFO clearly understands that this work is exploratory and that, at some point in the future, inland commercial fisheries must be viable and self sustaining if they are to be successful.¹⁵ Results to date have been mixed, but show some promise.¹⁶ More work is required before the viability of large-scale operations can be evaluated.¹⁷

C. DFO's Capacity to Consider and Weigh Social and Economic Issues

22. A number of Participants claim that DFO either does not have the capacity to, or does not undertake, socio-economic analysis to support its decision making processes. In reply, Canada points out that, in recent years, DFO has improved its capacity to provide economic analysis and

¹¹ David Marmorek, 20 September 2011, p 19:12, p 101:14.

¹² Dr Carl Walters, 9 February 2011, p 57:31-46.

¹³ Julie Stewart, 19 August 2011, p 58:11-31.

¹⁴ Jeffrey Grout, 25 January 2011, p 37:19-36.

¹⁵ Julie Stewart, 2 September 2011, p 44:27-47.

¹⁶ Barry Rosenberger and Jeffrey Grout, 25 January 2011, pp 36:13 to 37:46.

¹⁷ Marcel Shepert, 4 July 2011, p 74:7-47.

information with the increased size of its regional Economic Analysis Unit. That unit is currently comprised of five economists.

23. With respect to the role of socio-economic analysis in decision-making, social and economic information is explicitly incorporated in a number of planning and decision-making processes such as those relating to the *Wild Salmon Policy*, Integrated Fisheries Management Plans (IFMPs), the *Salmon Enhancement Program*, and the *Species at Risk Act*.²⁰ As noted in the *Wild Salmon Policy*, resource management decisions will consider biological, social, and economic consequences, reflect best science including Aboriginal Traditional Knowledge, and maintain the potential for future generations to meet their needs and aspirations.²¹

24. Conservation decisions cannot be based solely on biological information. The maintenance of biodiversity and healthy ecosystems must be considered in the context of human needs for use now and in the future. Decisions will not be taken without regard to their cost or social consequences.²²

25. DFO conducts high-level analyses of the economics of the fisheries. Such analyses rely on extensive consultation processes to provide fishery-specific socio-economic information. This information routinely informs DFO decisions on harvest management, where biological considerations need to be weighted with socio-economic considerations. That said, while socio-economic considerations are important, the long term sustainability of the resource is paramount. This explains why DFO puts significant resources into understanding stock status and production dynamics.

26. Before socio-economic analysis can be completed, DFO sometimes undertakes pilot projects to acquire data and develop a more thorough determination of what alternative approaches for doing such analysis would require in terms of resources, and to assess and the implications for stakeholders.²³

²⁰ Susan Farlinger, 28 September 2011, pp 44:37 to 45:6.

²¹ Exhibit 8 at p 9: Department of Fisheries and Oceans, *Canada's Policy for Conservation of Wild Pacific Salmon*, 2005.

²² Exhibit 8 at p 9.

²³ Claire Dansereau, Susan Farlinger and David Bevan, 22 September 2011, pp 69:2 to 76:35.

III. CANADA’S RESPONSE TO PARTICIPANTS’ FINAL SUBMISSIONS

A. Province of British Columbia (Participant No. 2)

27. British Columbia’s submissions provide a detailed summary of the evidence before the Commission that is specific to various areas of provincial jurisdiction. In doing so, the submissions do not place much emphasis on the evidence that there are unknown effects – and possible cumulative sub-lethal stressors, factors, and effects – that may be impacting Fraser sockeye.²⁴ Canada notes that some of these potential effects fall within provincial jurisdiction, with the result that British Columbia has an important role in the sustainability of Fraser sockeye.

28. At **Page 13** this Participant states that “any” recommendations from the Commissioner should focus on DFO. Canada submits that the Commissioner’s Terms of Reference do not limit him to making recommendations only in relation to DFO. Given its constitutional authority over “Sea Coast and Inland Fisheries”, Canada has an important role to play in achieving the goal of future sustainability of the Fraser sockeye resource but others, including other governments, First Nations, commercial and recreational harvesters, and environmental groups, have important roles to play as well.

²⁴ Exhibit 73 (also Exhibit 203) at p 5: Randall M Peterman et al, *Synthesis of evidence from a workshop on the decline of Fraser River sockeye, June 15-17, 2010*, 31 August 2010; Exhibit 1896 at executive summary: Technical Report No. 6, “Fraser River sockeye salmon: data synthesis and cumulative impacts”, April 2011.

**B. BC Public Service Alliance of Canada and
Union of Environment Workers BC (Participant No. 4)**

29. At **Page 6 and Pages 9 to 11**, this Participant makes various statements regarding DFO's budget. Canada submits that several of these statements are inaccurate. In stating that DFO's budget will be cut by "at least 25.85%", this Participant refers to information on page 17 of the *Report on Plans and Priorities 2011-12*, Department of Fisheries and Oceans. That information includes budget reductions related to the end of Economic Action Plan funding (\$217 million), and to programs that are scheduled to end over the next several years.²⁵

30. In reply to this Participant's assertion, Canada notes that DFO has not planned a funding cut of \$500 million by 2013-2014. During cross-examination, Deputy Minister Claire Dansereau disagreed with the suggestion that DFO's budget is being reduced by 25%.²⁶ The Deputy Minister testified that, following from Strategic Review, the DFO budget was reduced by about 3%, a total of \$56.8 million, in stages over the three-year period from 2011 to 2014.²⁷

31. Canada observes that DFO budgets are adjusted to reflect government priorities. Departmental budgets will be reduced for programs that were approved previously, but only for a definite time period, as well as for government reduction exercises such as Strategic Review. Budgets will increase when funding is provided for new priority initiatives.

32. At **Page 13**, this Participant states:

There was some suggestion from Mr. Bevan that Mr. Nelson was not up to date with modern fishery strategy, attempting to undermine Mr. Nelson's compelling testimony.

In response, Canada states that the allegation that Associate Deputy Minister David Bevan was attempting to undermine Randy Nelson's testimony is unfounded. David Bevan was pointing to the need for DFO to make use of new technology in catch monitoring and enforcement.

33. At **Page 20**, this Participant states that:

In August 2011, Environment Canada announced that it would be eliminating over 11% of the positions in the Department, announcing close to 800 positions being

²⁵ Exhibit 1922 at p 7: *Report on Plans and Priorities, 2011-12*, Department of Fisheries and Oceans.

²⁶ Claire Dansereau, 26 September 2011, pp 29:44 to 30:10.

²⁷ Claire Dansereau, 22 September 2011, pp 2:40 to 3:19.

eliminated over the next three years, including 300 positions to be eliminated before the end of 2011.

Canada notes that there is no evidence before the Commission regarding elimination of positions or the particulars of Strategic Review at Environment Canada.²⁹

²⁹ Susan Farlinger, 26 September 2011, p 26:13-47.

C. Rio Tinto Alcan Inc. (Participant No. 5)

34. In replying to the Rio Tinto Alcan Inc. (Rio Tinto) submissions, Canada's intent is to assist the Commissioner with a balanced and accurate factual summary of the evidence led on the particular topics raised in the Rio Tinto submissions. That Canada does not reply to any specific point in the Rio Tinto submissions does not mean that Canada agrees with Rio Tinto's position on that point.

35. At **Paragraph 12** this Participant refers to the administration of the Nechako Fisheries Conservation Program, stating that:

The operation of the [Summer Temperature Management Program] and the monitoring of its effectiveness is overseen by the Nechako Fisheries Conservation Program ("NFCP"), which was established under the 1987 Settlement Agreement. The NFCP is administered by DFO, the Province, and RTA.

Canada notes that, in addition to DFO, British Columbia and Rio Tinto, the technical committee of the Nechako Fisheries Conservation Program also has representation from an independent technical expert.³⁰

36. At **Paragraph 21** this Participant cites Dr Macdonald as agreeing with the proposition that lowering the Summer Temperature Management Program's target at Finmoore to 18 degrees Celsius to benefit Fraser sockeye does not take into account potential negative consequences to local socio-economic interests. Canada notes that this is not what Dr Macdonald said. He referred to these socio-economic interests being considered when deciding whether or not to release more water in the Cheslatta system, not when changing the operation of the Summer Temperature Management Program by setting a new target temperature at Finmoore.³¹

37. A discussion of the other interests involved from DFO's perspective when considering changes to the current operation of the Summer Temperature Management Program can be found in the testimony of Jason Hwang.³² These include aquatic interests such as consideration of chinook salmon and sturgeon, which need to be balanced against sockeye.

³⁰ Policy and Practice Report 21, "Regulation of Water Uses in the Fraser River Watershed" 18 August 2011 at p 63.

³¹ Dr Steve Macdonald, 15 September 2011, p 28:24-46.

³² Jason Hwang, 16 September 2011, p 43:5-23.

38. At **Paragraphs 33 and 34** this Participant invite the Commissioner to recommend that the Summer Temperature Management Program continue in its current form, given its success. These paragraphs are not consistent with paragraph 32 of the Rio Tinto submissions and with the evidence that the Nechako Environmental Enhancement Fund Management Committee has been reconvened to examine in detail how to use its funds to explore alternatives to the operation of the Summer Temperature Management Program and how to move forward.³³ It is also relevant to note that Dr Macdonald opined that a surface water release facility or a cold water release facility would be beneficial for sockeye if managed accordingly.³⁴

³³ Jason Hwang and Glen Davidson, 16 September 2011, p 34:2-26.

³⁴ Dr Steve Macdonald, 15 September 2011, p 35:31-45.

D. Aquaculture Coalition (Participant No. 8)

39. Canada submits that the evidence before the Commissioner, in particular the expert evidence and scientific literature, shows that the cause of the long term decline in Fraser sockeye and the poor return in 2009 is multi-factored. The Aquaculture Coalition and Alexandra Morton (the Aquaculture Coalition), for their part, see the decline in productivity and the low return in 2009 as having been caused by the presence of fish farms in the Broughton Archipelago.

40. The Aquaculture Coalition says that finfish farms are point sources and amplify sea lice and other pathogens, which then spread outward to wild stocks. They say that no amount of fish health management and fish husbandry on finfish farms can prevent this spread. They go on to urge the Commissioner to conclude that finfish farms caused the 2009 poor return of Fraser sockeye and the long-term decline in productivity, and they suggest that open-net pen farms should be shut down, or at least removed from their present locations in the Broughton Archipelago.

41. The Aquaculture Coalition's argument is based on selected, and sometimes inaccurate, evidence, and it overlooks other evidence that is important for the Commissioner to consider. Canada will point out some significant examples where this occurs. In doing this, Canada's intent is to assist the Commissioner in having a balanced and accurate summary of the evidence as it pertains to aquaculture and disease.

42. Canada also refers to the submissions of the Participants, British Columbia and the BC Salmon Farmers Association (BC Salmon Farmers). Pages 95-148 of British Columbia's submissions contain a useful review of the evidence on disease and sea lice.³⁶ Pages 97 to 132 of the BC Salmon Farmers' submissions contain a useful review of the evidence on fish health management, disease and egg importation rules.³⁷ The First Nations Coalition also extensively review evidence on disease and sea lice at pages 95-116 of their submissions.³⁸

43. Canada replies to the Conservation Coalition's submissions on aquaculture and disease under the heading of reply to that Participant (No. 9).

³⁶ Written Submissions of British Columbia at pp 95-148.

³⁷ Written Submissions of BC Salmon Farmers Association at pp 97-132.

³⁸ Written Submissions of the First Nations Coalition at pp 95-116, paras 272-341.

44. Finfish farms, mostly containing Atlantic salmon, have been introduced into the ecosystem through which wild stocks, including Fraser sockeye, migrate. As such, they need to be properly managed and monitored in accordance with sound science to ensure that their presence and operations do not endanger either wild or farmed stocks. The expert evidence is that the level of risk posed by fish farms is low and manageable through the use of proper fish husbandry and fish health management. Ongoing, objective, and transparent monitoring, reporting and scientific research are key. Applying the precautionary principle and proper husbandry and fish health practices to aquaculture, finfish farms and wild stocks can co-exist and, at the same time, provide sustainable fisheries and economic benefits to both those who depend on wild stocks and farm fish. The Participant, Laich-kwil-tach Treaty Society and Aboriginal Aquaculture Association point to evidence in support of this at page 16 of their submissions.³⁹

45. The page references below are in reference to the Aquaculture Coalition submissions.

Part 1 – Causes of Decline

46. At **Pages 1-6**: While the Aquaculture Coalition contends that pathogens and disease became a problem when fish farms located on the Fraser sockeye migratory paths, however, the evidence shows that Fraser sockeye and other wild stocks have co-evolved and co-existed with pathogens for hundreds of years. For example, infectious haematopoietic necrosis virus has been known to be present in Fraser sockeye stocks for many years with large-scale mortality due to this pathogen occurring in 1973, which is before fish farms were in place in British Columbia.⁴⁰

47. Two observations that refute the Aquaculture Coalition's contention that disease is the primary cause of long-term declines and the poor return in 2009 are: a) pink salmon from the Fraser migrate through the same areas past finfish farms as sockeye do and have been higher in abundance during the 2000s compared to the 1990s; and b) juvenile Fraser sockeye that migrated past fish farms in 2008 came back in record numbers in 2010. The Fraser sockeye return in 2011 was within historic average ranges.

³⁹ Written Submissions of the Laich-kwil-tach Treaty Society and Aboriginal Aquaculture Association at p 16.

⁴⁰ Exhibit 1456: Kyle Garver, *Hypothesis: Diseases in freshwater and marine systems are an important contributor to the Fraser sockeye situation*, June 2010; Exhibit 1461: *Introduction to Pathogens, Diseases and Host Pathogen Interactions of Sockeye Salmon*; Dr Stewart Johnson, Dr Michael Kent, Dr Craig Stephen, Dr Christine MacWilliams, 22 August 2011, pp 60:30 to 61:22.

48. Further, it is noteworthy that if there was a disease outbreak it would likely be seen in fish farms first as the fish are easily observed and constantly monitored. Disease outbreaks in fish farms have decreased dramatically in the last decade. Wild stocks, for their part, migrate across a broad geographic range and likely encounter salmonids from all of the salmon producing countries in the North Pacific. As such, they are exposed to many and varied pathogens.

49. The Aquaculture Coalition says that the number of diseased fish in farms along the sockeye migratory route likely exceed the number of wild sockeye at times. This is unlikely. Even if mortality on farms from disease number 2 million per year, as the Coalition says, just one stock of Chilko Lake sockeye alone typically produce up to 20 million smolts annually. It is important to remember that the out-migrating smolts number in the hundreds of millions. It is a fact of nature that few survive to return as adult spawners.

50. At **Page 3, Footnote 6** with the exception of *Plasmacytoid Leukemia* (marine anaemia), the pathogens of concern were well known to have occurred in wild salmon stocks in British Columbia and the North Pacific long before salmon farming activities commenced.⁴¹ Pathogens and consequent disease in wild stocks are longstanding, and do not explain the long-term decline in productivity or the poor return in 2009 – especially when considered in light of the very high returns in 2010. The reports of Dr Kent, Dr Noakes and Dr Dill all discuss this.⁴²

51. At **Pages 5 and 9**: Dr Noakes' report discusses fish health events and presents Tables 6 and 7 on pages 25-26 that show there were few fish health events over the period 2002-2010 and, further, that high risk agents saw a decline in fish health events during that period.⁴³ Moreover, fish health events should not be equated with disease outbreaks. They also include anaesthetising

⁴¹ Exhibit 1679: *Ministry of Agriculture and Lands Briefing Note for Minister For Information*, 1 August 2007.

⁴² Exhibit 1543: Technical Report No 5A, "Summary of Information for Evaluating Impacts of Salmon Farms on Survival of Fraser River Sockeye Salmon", May 2011; Exhibit 1536: Technical Report No 5C, "Impacts of salmon farms on Fraser River sockeye salmon: results of the Noakes investigation", June 2011; Exhibit 1540: Technical Report No 5D, "Impacts of salmon farms on Fraser River sockeye salmon: results of the Dill investigation", June 2011; Dr Don Noakes, 25 August 2011, pp 103:6 to 105:28; David Marmorek, 19 September 2011, pp 78:26 to 80:38.

⁴³ Exhibit 1536: Technical Report No 5C, "Impacts of salmon farms on Fraser River sockeye salmon: results of the Noakes investigation", June 2011; Exhibit 1543 at p ii: Technical Report No 5A, "Summary of Information for Evaluating Impacts of Salmon Farms on Survival of Fraser River Sockeye Salmon", May 2011; Exhibit 1560 at p 5, fn 1: *British Columbia Ministry of Agriculture and Lands Annual Report Fish Health Program*, 2009; Dr Josh Korman, 25 August 2011, pp 84:24 to 86:8.

and handling fish to count sea lice each month, detectin4g and medicating against bacterial kidney disease, and other preventative medications.⁴⁴

52. At **Pages 6-9** this Participant contends there is a high rate of mortality in farmed fish attributable to disease. In fact, the overall survival of farmed Atlantic salmon in British Columbia is about 90% per cycle, a very high rate for fish. The infectious-related mortality of farmed Atlantic salmon in British Columbia is estimated at 2-3% per cycle. The remainder of the 10% mortality die of other non infectious causes, such as algae, low oxygen and predation.⁴⁵ Overall, great efforts are made to collect and screen farmed fish, resulting in very few viral pathogens having been detected in farmed fish in British Columbia.⁴⁶

53. At **Page 8** this Participant says that DFO apparently believes they do not have the right to seize or collect farmed fish samples. However, the fact is that while DFO prefers to work cooperatively with stakeholders, including the aquaculture industry, the *Fisheries Act* and the regulations made under that Act provide for appropriate authorities to seize fish and to obtain fish samples.⁴⁷

54. At **Page 13** this Participant suggests that Dr Kent's paper shows that regulatory authorities have failed to adequately research disease and any role that finfish farms may have in the transmission of disease.⁴⁸ Dr Kent does not say that. His report takes a broad view of sockeye diseases and parasites spanning the life cycle from egg to adult, and does not suggest that regulatory authorities have failed in researching disease and any role of finfish farms in the transmission of disease. The scope of Dr Kent's report is set out at page 38, Appendix 1 of that report.

⁴⁴ Exhibit 1560 at p 5; Exhibit 1543 at p 5; Dr Josh Korman, 25 August 2011, p 81:4-26.

⁴⁵ Exhibit 1560 at pp 18, 27; Dr Mark Sheppard, 31 August 2011, pp 85:3 to 86:32.

⁴⁶ Exhibit 1518 at pdf p 9: *Hypothesis: Diseases in freshwater and marine systems are an important contributor to the Fraser sockeye situation*; Exhibit 1546 at pdf p 3: *Errata to Technical Report 5B*; Exhibit 1549: List of Province of British Columbia Databases Provided to Dr Korman; Exhibit 1564: *British Columbia Ministry of Agriculture and lands Animal Health Branch - Fish Health Supplemental Appendices to the Annual Report Fish Health Program, 2009*; Dr Peter McKenzie, 31 August 2011, pp 72:10 to 73:12; Dr Mark Sheppard, 31 August 2011, pp 53:34 to 55:7.

⁴⁷ Exhibit 1611: *Draft Pacific Aquaculture Regulations Approach to Fish Health; Pacific Aquaculture Regulations, SOR/2010-270* cited in Policy and Practice Report 20, "Aquaculture Regulation in British Columbia" 28 July 2011 at p 20, para 34, fn 84.

⁴⁸ Exhibit 1449: Technical Report No 1, "Infectious Diseases and Potential Impacts on Survival of Fraser River Sockeye Salmon", February 2011.

55. At **Page 19** this Participant invites the Commissioner to conclude that, on most occasions, the cause of death is from an unknown disease. However, there are many different types of diseases – infectious and non-infectious – which include metabolic, nutritional, genetic disorders, and autoimmune diseases. Based on clinical tests available to veterinary pathologists (bacteriology, virology, histopathology), an “open diagnosis” should be interpreted as the lack of a clear indication of an infectious disease process.⁴⁹

56. At **Page 21**: The reference to Dr MacWilliams’ evidence about infectious salmon anaemia needs to be understood in context. A biosecurity breach in an aquaculture operation is a possible route for introducing pathogens.⁵⁰ Other possible routes are movement of fishing or other equipment, and ballast water discharges from ships. The infectious salmon anaemia virus has been introduced to the southern hemisphere of the Pacific Ocean. Equipment and ships move throughout the ocean. It is well recognized that trans-ocean and trans-continental movements of goods, equipment, and ships can introduce pathogens to new areas. Viral haemorrhagic septicaemia was introduced to the Great Lakes via baitfish movements of the sport fish industry. Numerous aquatic invasive species of plants and invertebrates have been spread worldwide. Fish farms are only one potential method for introduction of new pathogen agents.

57. At **Page 34** this Participant seeks to draw a connection between pre-spawn mortality and the long-term decline of Fraser sockeye productivity, contrary to current scientific understanding of en route mortality and pre-spawn mortality. The general consensus of scientists is that prolonged exposure in warm freshwater (above 18 degrees Celsius) increases the probability of both en-route and pre-spawn mortality. Dr Hinch, in Technical Report No. 9, speaks to this issue at pages 24-26, and 44-46.⁵¹ Disease has long been at the forefront of investigation into pre-spawn mortality, starting in the 1960s. As salmon approach spawning, their capacity to contend with pathogens is diminished. This diminished capacity and exposure to viral, parasite, bacterial, or fungal pathogens that exist in the Fraser River contributes to en-route and pre-spawning mortality. Negative effects of pathogens are increased with higher water temperatures. That said, it is premature to make conclusive statements about whether any novel pathogens or

⁴⁹ Dr Mark Sheppard, 31 August 2011, pp 85:8 to 86:32.

⁵⁰ Dr Christine MacWilliams, 23 August 2011, pp 47:41.

⁵¹ Exhibit 553 at pp 24-26, 44-56: Technical Report No 9, “A Review of Potential Climate Changes Effects on Survival of Fraser River Sockeye Salmon and an Analysis of Interannual Trends in En Route Loss and Pre-spawn Mortality”, February 2011; Dr Scott Hinch, 8 March 2011, pp 12:46 to 13:46, pp 32:41 to 33:18.

pathogens that change fish behaviour prior to river enter, are responsible for en-route or pre-spawn mortality.

58. At **Pages 36-37**: Dr Miller emphasized that the sample sizes in 2007 and 2008 were small and so, while there was a heavier presence of the mortality-related signature in 2007 than 2008 and this provides useful information, it cannot be used to reach conclusions.⁵² More generally, it is noteworthy that Dr Miller and Dr Garver both emphasized that they have not isolated a virus to this point in time, much less determined whether it may cause disease and mortality. The research being done by Dr. Miller in conjunction with Dr Garver is leading edge science and potentially very important. At the same time, Dr Miller and Dr Garver are properly cautious to not jump to conclusions ahead of what their research will support.⁵³

59. At **Pages 39-40** this Participant says that DFO has known for years a virus likely has a major impact on Fraser stocks. In fact, Dr Miller has hypothesized that there could be a virus and is conducting research, supported by DFO, to investigate. As noted, no conclusions have been reached to date. Sound science involves conducting research and drawing conclusions based on what the data supports.⁵⁴

60. The Aquaculture Coalition has also raised the issue of DFO funding for Dr Miller's work. That work has been funded by DFO and outside grants, and continues to be. Dr Miller and Dr Richards both testified that the Treasury Board rules that outside grant money cannot be used for indeterminate staff has created a funding problem for DFO across the spectrum of labs.⁵⁵ This is not particular to Dr Miller's lab, or to Science staff. DFO is funding Dr Miller's lab this fiscal year, including recent funding for testing fish farm fish, and is working with others to resolve the issue and ensure compliance with Treasury Board requirements concerning the use of outside money for indeterminate staff.

⁵² Dr Kristi Miller, 24 August 2011, pp 10:37 to 13:4, p 94:30-36.

⁵³ Dr Kyle Garver, 24 August 2011, pp 98:47 to 99:33; Dr Kristi Miller, 24 August 2011, p 98:5-25; 25 August 2011, p 26:3-8.

⁵⁴ Exhibit 558: Kristina M Miller et al, "Genomic Signatures Predict Migration and Spawning Failure in Wild Canadian Salmon" *Science* (14 January 2011).

⁵⁵ Dr Kristi Miller, 25 August 2011, p 39:10, pp 47:19 to 48:3, pp 55:6 to 56:40; Dr Laura Richards, 27 September 2011, pp 32:40 to 33:5.

61. At **Page 42** here and elsewhere, this Participant submissions place heavy reliance on the success of the Harrison sockeye, saying they remain in the Strait of Georgia, then exit via the Strait of Juan de Fuca. However, evidence of the Harrison migratory route is limited. The fact is that other fish residing in the Strait of Georgia for an extended period, such as herring, also did poorly in 2007, indicating that something went wrong in the Strait of Georgia that year.⁵⁶ The available data show that the zooplankton biomass was very low in the Strait of Georgia in 2005-2007, indicating poor feeding conditions those years.⁵⁷

62. At **Pages 42-43** this Participant submissions cast doubt on Dr Beamish's evidence and, specifically, his trawl surveys to determine the presence of sockeye in the Strait of Georgia in July, and their abundance. Although the surveys were not designed with juvenile Fraser sockeye in mind, the trawl is an effective tool to capture these fish when they are present. Clearly, sockeye were present as they were caught. Their small size in 2007 is consistent with the evidence of very low zooplankton biomass and low herring abundance, and supports that poor ocean conditions existed in the Strait of Georgia in 2007. As to juxtaposing this against the small size of sockeye in the Strait of Georgia in 2008, smaller fish can survive well in years of exceptionally good ocean conditions, as size-selective mortality can be reduced. This seems to be the case for sockeye smolts that entered the marine environment in 2008, with a record number of sockeye returning to not only the Fraser River in 2010, but also to Barkley Sound, the Columbia River and Rivers/Smith Inlet.

63. The Aquaculture Coalition also casts doubt on Dr Thomson's work. The analysis performed by Dr Thomson is rigorous and based on sound data provided by Environment Canada. While Commission Counsel did not call Dr Thomson as a witness, the fact is that he had access to additional data from Environment Canada that Dr McKinnell did not consider. Thus, the two scientists reached different conclusions.

64. The Aquaculture Coalition dismisses the probability of ocean conditions accounting for the magnitude of the 2009 poor return. The fact is that catastrophic poor returns due to excessively poor marine conditions, such as the unusually warm conditions along the Pacific

⁵⁶ Dr Richard Beamish, 6 July 2011, pp 72:33 to 74:35.

⁵⁷ Exhibit 1294: *Ocean conditions INSIDE and OUTSIDE the Strait of Georgia are important contributors to the Fraser Sockeye situation, including the high seas.*

coast in 2005, have led to multiple closures of salmon fishing from California north in recent years.

65. Changes in the marine environment can explain or contribute to the decline observed since 1992, as parallel declines in productivity have been documented by Dr Peterman and Dr Dorner for other sockeye stocks originating from a broad geographic area that do not migrate by salmon farms.⁵⁸

66. At **Pages 73-75**: As noted by David Marmorek, both Dr Dill and Dr Noakes concluded that sea lice are unlikely to have contributed to the decline in Fraser sockeye.⁵⁹ Dr Jones also reached this conclusion.⁶⁰ Further, *Lepeophtheirus salmonis* has not been shown to be a competent vector of diseases.⁶¹ In saying, “The real significance of the sea lice evidence...” in the middle of page 74, the Coalition misses a crucial point because it does not describe the species of sea lice - *Caligus clemensi* or *Lepeophtheirus salmonis*. The sea lice species of concern in relation to juvenile sockeye in British Columbia is *Caligus clemensi*. Although this species can be found on farmed salmon, it is more commonly seen on herring and other fish species that are distributed throughout the Strait of Georgia.⁶² Non-salmonid hosts of *Caligus clemensi* are not considered by the Coalition. Regarding the eight-point critique of DFO's response to disease or sea lice, there has been a very significant decline in sea lice numbers on wild pink and chum salmon in the Broughton Archipelago. This can be attributed to knowledge gained, in part, from DFO's sea lice research program, and the continued improvement of sea lice management in salmon aquaculture in British Columbia.⁶³

Part 2 – The Regulatory Environment

67. At **Pages 47 and 50-52**: DFO regulation of aquaculture, and of the fisheries generally, is in accordance with the *Fisheries Act*, and is based on sound science.⁶⁴ Since the introduction of the *Canadian Environmental Assessment Act*, the vast majority of licensed salmon farms (87%)

⁵⁸ Exhibit 748: Technical Report No 10, “Fraser River Sockeye Productions Dynamics”, February 2011.

⁵⁹ Exhibit 1896: Technical Report No 6, “Fraser River sockeye salmon: data synthesis and cumulative impacts”, April 2011.

⁶⁰ Dr Simon Jones, 6 September 2011, pp 74:36 to 75:14.

⁶¹ Dr Simon Jones, 6 September 2011, pp 26:18 to 27:38.

⁶² Dr Simon Jones, 6 September 2011, pp 11:40 to 12:12.

⁶³ Exhibit 1770: *Review Controlling salmon lice on farmed salmon and implications for wild salmon*, 2009.

⁶⁴ *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*].

have been subject to an environmental screening led either by the Department of Transport or DFO as the responsible authority. The remainder have screenings in process. The *Canadian Environmental Assessment Act* screenings are science-based risk assessments.⁶⁵ They are structured around Valued Ecosystem components, and include consideration of population level effects, impacts to fish habitat, and cumulative effects.⁶⁶

68. Under DFO's BCARP established in 2010, during the consideration of application for new licences and applications for new licences and applications for amendments to existing licenses that have the potential to substantially increase the environmental footprint, the Department will continue to conduct environmental reviews that consider potential impacts on valued ecological and social components under the ambit of the *Fisheries Act*.

69. *Fisheries Act* regulations, including *Fish Health Protection Regulations* the importation and movement within and between provinces of wild and cultured salmonid species (salmon and trout) to control and guard against disease.⁶⁷ While robust disease control programs existed, they varied from province to province and only targeted some species and specific facilities.

70. Increasingly, countries worldwide have put more stringent preventive measures in place at their borders to guard against the introduction and spread of diseases worldwide through trade in aquatic animals.

71. The National Aquatic Animal Health program and amendments to the Health of Animal Regulations enacted in December 2010 are intended to increase control over and prevent aquatic animal disease introduction to Canada in a way that meets international standards.⁶⁸ The regulations identify the most potentially harmful diseases and regulate over 400 commercial and non-commercial aquatic animal species susceptible to those diseases. The regulations are enforced at international borders and in all facilities across the country under one consistently

⁶⁵ *Canadian Environmental Assessment Act*, SC 1992, c 37.

⁶⁶ Exhibit 1625: CEAA Screening Report, *Grieg Seafood BC Ltd. Proposed Finfish Aquaculture Facility at Conception Point*, Nootka Sound BC; Andrew Thomson, 30 August 2011, p 61:21-47.

⁶⁷ *Fisheries Act*, RSC 1985, c F-14; *Fish Health Protection Regulations*, CRC, c 812 cited in Policy and Practice Report 20 at p 84, para 166, fn 311.

⁶⁸ *Health of Animals Regulations*, CRC, c 296; *Regulations Amending the Health of Animals Regulations*, SOR/2010-296; National Aquatic Animal Health Program cited in Policy and Practice Report 20, "Aquaculture Regulation in British Columbia" 28 July 2011 at p 54, para 102, fn 210.

applied national regulatory framework. In addition, the Reportable Diseases Regulations provide for mandatory reporting of specified diseases.⁶⁹

72. At **Page 48, Second Paragraph:** The *National Introductions and Transfer Code* minimizes the risk of aquacultured animals having or transferring any diseases to wild populations.⁷⁰ The Canadian Food Inspection Agency (CFIA) and DFO jointly deliver the National Aquatic Animal Health Program.⁷¹ This includes the management of and restrictions on the movement of animals and pathogens.

73. Several other regulations also include measures to control disease transfer including: the *Fishery (General) Regulations*, the *Pacific Fishery Regulations, 1993*, the *Management of Contaminated Fisheries Regulations*, the *Health of Animals Act*, and the *Fish Health Protection Regulations*.⁷² Specifically, Part VIII of the *Fishery (General) Regulations* provides for the control of introductions and transfers to manage risks from the genetic and habitat perspective. Effective and stringent control measures are in place in British Columbia to both control the introduction of and spread of infectious disease agents. These include proactive measures such as biosecurity protocols (disinfection and movement controls); vaccination, and regular and frequent health screening.

74. Reactive measures include fish health event contingency plans where, aquatic animal veterinarians independently or as directed by CFIA /DFO veterinarians implement protocols to control disease events. Where medical treatment is not a sufficient measure, fish may be removed from the water and destroyed. Disposal of carcasses has to be in accordance with *Health of Animals Act* requirements.⁷³

⁶⁹ *Reportable Diseases Regulations*, SOR/91-2 cited in Policy and Practice Report 20, “Aquaculture Regulation in British Columbia” 28 July 2011 at p 80, para 156, fn 290.

⁷⁰ *National Code of Introductions and Transfers of Aquatic Organisms*, September 2003 at s 1.1.5 cited in Policy and Practice Report 20, “Aquaculture Regulation in British Columbia” 28 July 2011.

⁷¹ Dr Laura Richards, 3 November 2010, p 116:22-33; 23 September 2011, p 4:9-30.

⁷² *Fishery (General) Regulations*, SOR/93-53 cited in Policy and Practice Report 3, “Legislative Framework Overview”, 1 November 2010 at p 7, para 23, fn 30; *Pacific Fishery Regulations, 1993*, SOR/93-54 cited in Policy and Practice Report 3 p 7, para 23, fn 31; *Management of Contaminated Fisheries Regulations*, SOR/90-351; *Health of Animals Act*, SC 1990, c 21 cited in Policy and Practice Report 20, “Aquaculture Regulation in British Columbia” 28 July 2011 at pp 20-21, para 101, fn 208; *Fish Health Protection Regulations*, CRC, c 812 cited in Policy and Practice Report 20 at p 84, para 166, fn 311.

⁷³ *Health of Animals Act*, s 48 cited in Policy and Practice Report 20.

75. Both proactive and reactive measures to control disease are undertaken pursuant to the *Pacific Aquaculture Regulations*, and are set out in the conditions of licence.⁷⁴ Fish health management measures are described in sections 4 to 9 of the Conditions of Licence. More detailed requirements are specified in Appendices 3-8 and 18. In addition, licensees are required to submit mortality management and fish health response plans to DFO for review and approval by DFO's aquatic animal health veterinarian and fish health staff.

76. At **Pages 48-50**: The use of the siting criteria set out on page 5 of Exhibit 1589 is the first screen of application review.⁷⁵ Criteria are in place to limit wild-farmed fish interactions, including a one kilometre setback from significant salmon-bearing streams. Recent DFO research suggests that Pacific salmon likely have well developed immune responses well before they travel one kilometre from their natal streams.⁷⁶ However, the precise geographic/temporal window of risk and the full extent of possible interactions have not been quantified so, as a matter of precaution, the criteria remain in place. If the first level of screening is satisfied, then applications are subject to a full assessment of potential impacts that includes social, cultural, ecological, and science elements. Multiple sectors, other government agencies, users of the marine environment, and stakeholders are consulted. The risk of pathogens and disease is taken into account, relying on the current state of science at the time the siting decision is made.

⁷⁴ *Pacific Aquaculture Regulations*, SOR/2010-270 cited in Policy and Practice Report 20 at p 20, para 34, fn 84.

⁷⁵ Exhibit 1589 at pp 5-6: *Draft Pacific Marine Finfish Aquaculture Application Part 1 – General Applicant Information*; Andrew Thomson, 30 August 2011, p 18:17-37; Clare Backman, 8 September 2011, pp 7:18 to 9:14.

⁷⁶ Exhibit 1768: Ben JG Sutherland et al, "Differentiation size-dependent responses of juvenile pink salmon (*Oncorhynchus gorbuscha*) to sea lice (*Lepeophtheirus salmonis*) infections", *Comparative Biochemistry and Physiology*, 11 April 2011; Dr Simon Jones, 6 September 2011, p 31:10-34.

E. Conservation Coalition (Participant No. 9)

77. At **Paragraph 2** of its submissions, this Participant submits that:

The Precautionary Principle has been expressly accepted into Canadian jurisprudence by the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*.⁷⁷

Canada notes that, in the paragraphs of the decision referred to, the Supreme Court of Canada only discusses whether the precautionary principle may have become a norm of customary international law, without concluding that it has. The Court notes that its interpretation of a statute at issue in that case “respects international law’s ‘precautionary principle’”.⁷⁸

78. At **Paragraph 5** this Participant states that:

With respect to [gravel mining], this Coalition adopts the critique that Dr. Rosenau made of the PPR on gravel mining in the Fraser River which was marked for identification as “EE” in the evidentiary hearings.

The Conservation Coalition also includes an Appendix to its submissions, which appears to be a critique of Policy and Practice Report 20, “Aquaculture Regulation in British Columbia”.

79. Neither of these critiques have been entered as evidence, and the Commissioner expressly refused to accept Document for Identification EE: Marvin Rosenau, “Comments on Policy and Practices [sic] Report Gravel Removal in the Lower Fraser River” (8 June 2011) as an exhibit given the established procedure to challenge the factual aspects of Policy and Practice Reports in oral evidence.⁷⁹ The Commission’s November 5, 2010, letter clearly states that “[i]f participants take issue with any facts in the PPRs, it is their obligation to challenge such facts in the course of the hearings through examination of witnesses.”⁸⁰

80. Despite this, the authors of both critiques either offer purported factual information or rely on documents that are not in evidence. Canada submits that, while the Commissioner may consider the portions of these critiques that are truly argument, he should place no weight on the

⁷⁷ Written Submissions of the Conservation Coalition at para 2(f).

⁷⁸ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, at paras 31-32, [2001] 2 SCR 241.

⁷⁹ Ruling of Commissioner Cohen, 11 October 2011 at paras 38, 41-43, 46.

⁸⁰ Letter of Mr BJ Wallace to all Participants, 5 November 2010 at p 1.

factual information or documents referenced in these critiques which are not in evidence – and which counsel have not had the opportunity of testing in cross examination.

81. At **Paragraph 12**, this Participant states that:

Of the 36 Fraser sockeye Conservation Units, 10 have not been assessed due to a lack of data; and of the rest that were preliminarily assessed seven are in the Red Zone; 13 are in the Amber Zone; five are in the Green Zone; and one was not assessed.

This statement is problematic in several respects. First, two versions of the Grant *et al.* report are referred to. The number of CUs referenced are drawn from a previous version of the paper, which Dr Holt cautioned was draft and should not be relied on due to biases in the analysis.⁸¹

82. Second, the latest draft of the paper, which is cited, does not provide a single status for each CU as the Conservation Coalition suggests. Rather, it provides a range of statuses across a range of metrics and benchmarks. Further work will be undertaken by DFO Science to develop a methodology to aggregate this range of statuses into a single red/amber/green status for each CU.⁸² Again, this draft is not final and its assessment of status should not be relied upon until finalized.

83. At **Paragraph 13**, this Participant states that:

Despite this, and despite the multiple CUs assessed in the Red Zone, there is very little evidence of management decisions (particularly habitat decisions) being directly informed by the WSP. As a result, current management is not occurring in a manner consistent with the objectives of the WSP.

Canada submits that there is evidence that, in the absence of a finalized assessment of CU status, DFO has managed salmon in a manner consistent with the objectives of the *Wild Salmon Policy*. For example, Mark Saunders has explained how the Salmon Outlook and “stocks of concern” drive annual salmon management, as detailed in the annual IFMPs.⁸³ Susan Farlinger, Regional

⁸¹ Exhibit 184: SCH Grant et al, “Fraser Sockeye (*Oncorhynchus nerka*) Wild Salmon Policy Evaluation of Stock Status: State and Rate”, 2010, Draft Working Paper 2010/P14; Dr Carrie Holt, 3 December 2010, pp 2:12 to 3:11; 2 December 2010, p 73:14-35; 7 December 2010, p 49:7-43, pp 51:35 to 54:27; Dr Laura Richards, 26 September 2011, pp 1:45 to 3:19.

⁸² Exhibit 1915 at p vii: SCH Grant et al, “Evaluation of Uncertainty Fraser Sockeye (*Oncorhynchus nerka*) Wild Salmon Policy Status Using Abundance and Trends in Abundance Metrics”, August 2011.

⁸³ Exhibit 445 at pp 27-36: *Pacific Region, Integrated Fisheries Management Plan Salmon Southern BC, June 1, 2010 to May 31, 2011*; Exhibit 947: Department Fisheries and Oceans, 2009 *Salmon Stock Outlook*, DFO website 30 May 2011; Mark Saunders, 2 June 2011, pp 65:28 to 66:9.

Director General, has also detailed the many ways in which the *Wild Salmon Policy* informs annual management decisions.⁸⁴

84. At **Paragraph 16**, this Participant opines that:

It may be that the optimal way to ensure longer-term funding for the *Wild Salmon Policy* is to reclassify it from a Policy to a Program or, perhaps, to reclassify its funding as A-based.

Canada notes that because the *Wild Salmon Policy* is to be implemented within existing funds by each responsible sector, funding for *Wild Salmon Policy* implementation is currently A-based.⁸⁵

85. At **Paragraph 26**, this Participant asserts that:

Decision making at DFO ultimately resides at the Ministerial level. While such decisions enable government to be responsible through the elective process, Ministerial decisions are often enshrouded in secrecy and apt to be influenced by factors and lobbying interests that too often leave conservation out of the equation.

The assertion that Ministerial decisions are influenced by lobbying interests is not supported by the evidence, including the evidence cited by the Conservation Coalition.

86. At **Paragraph 29**, this Participant states that:

In order to protect small, unproductive – but genetically irreplaceable – CUs, exploitation rates must be limited to a maximum of 10%

The evidence cited to support this proposition actually states that a maximum exploitation rate of 10-12% was recommended for Cultus and Sakinaw sockeye, not for all CUs.⁸⁶ Further, Dr. Davis expressed concern regarding a hypothetical exploitation rate of 20-30% for Cultus sockeye put to him by counsel – he did not state that a maximum exploitation rate of 10% was necessary for all small CUs.⁸⁷

87. At **Paragraph 32**, this Participant submits that:

⁸⁴ Written Submissions of Canada at para 438.

⁸⁵ Exhibit 8 at p 35: Department of Fisheries and Oceans, *Canada's Policy for Conservation of Wild Pacific Salmon*.

⁸⁶ Exhibit 1333 at p 1: Memorandum of Assistant Deputy Minister Fisheries Management, Cultus and Sakinaw Sockeye, to P MacGillivray, 17 September 2004.

⁸⁷ Dr John Davis, 8 July 2011, p 11:6-25.

Nonetheless, DFO will not require fisheries to move upriver absent commercial fishermen 'buy-in'; for which there is currently none.

There is ample evidence before the Commission that DFO is continuing to work with First Nations on demonstration in-river commercial fisheries.

88. **Paragraph 32** continues:

Furthermore, to date DFO has not been very supportive, let alone proactive, regarding terminal fisheries projects.

The evidence cited is a 2004 document. Canada submits that this is not an accurate representation of DFO's current efforts to explore terminal fisheries. Again, there is ample evidence before this Commission of the work undertaken in this area. It is submitted that a move towards more terminal fisheries must consider the impacts on coastal commercial harvesters and coastal First Nations.

89. At **Paragraph 35**, this Participant states that:

Mixed-stock fisheries also must rely heavily on preseason forecasts, which are highly inaccurate.

The salmon fishery is currently managed primarily on in-season abundance information, as noted in the evidence cited.⁸⁸

90. At **Paragraph 36**, this Participant opines that:

Nonetheless, selective fishing is not a substitute for the necessary shift to more terminal fisheries.

Canada submits that use of selective gear is only one aspect of selectivity – the use of time and area restrictions, discussed in the evidence cited here, is an important aspect of selectivity, and would include practices such as terminal fisheries.⁸⁹

91. At **Paragraph 38**, this Participant asserts that:

⁸⁸ Exhibit 718 at p 1: Technical Report No 7, "Fraser River Sockeye Fisheries and Fisheries Management and Comparison with Bristol Bay Sockeye Fisheries", February 2011.

⁸⁹ Dr Brent Hargreaves, 21 February 2011, pp 64:44 to 65:24.

A recent audit found that DFO has not met the majority of [Marine Stewardship Council] conditions, and the audit team expressed concern respecting DFO's ability to meet several key conditions.

This is an incomplete description of findings in the draft audit report, which concludes that:

- of the 14 conditions due in the first audit cycle, six conditions were successfully closed out; the remaining eight conditions showed progress and the audit team agreed to postpone review to the second audit (largely due to a lack of commercial fishery data from 2007-2009);
- of the 27 conditions due in the second audit cycle, 18 showed progress and are likely to be closed out at the second audit; nine conditions are considered to be behind schedule in that there is a concern that they will not be complete by the second audit; and
- of the four conditions due in the third audit, three have been closed out and one shows adequate progress.⁹⁰

92. When available, Canada will be filing the final audit report and the Commission will tender this as an exhibit. At that time, Canada will provide further written submissions on the final report.

93. At **Paragraphs 40-63**, dealing with aquaculture, this Participant contends that open-net pen salmon farming is a serious risk to wild salmon. They regard DFO support for aquaculture as being in direct conflict with its primary mandate to conserve wild fish stocks. Canada makes two general points in reply: a) as submitted in Canada's Final Submissions and in the reply to the Aquaculture Coalition, with proper fish health management and fish husbandry that are based on sound science, aquaculture and wild stocks can co-exist; and b) in *Morton*, finfish aquaculture has been determined to be a fishery and, thus, within the ambit of the *Fisheries Act*.⁹¹

94. More particularly, DFO's role is to advance sustainable aquatic ecosystems and support safe and secure Canadian waters, while fostering economic prosperity across maritime sectors and fisheries.⁹² The British Columbia Aquaculture Regulatory Program enables the federal

⁹⁰ Karl English, Greg Ruggerone & Steve Devitt, "Surveillance Report British Columbia Commercial Sockeye Salmon Fisheries", Draft, October 2011, circulated to all Participants 14 October 2011.

⁹¹ *Morton v British Columbia (Agriculture and Lands)*, 2009 BCSC 136, 92 BCLR (4th) 314, supplementary reasons for judgment 2010 BCSC 100, 2 BCLR (5th) 306 [*Morton*]; *Fisheries Act*, RSC 1985, c F-14.

⁹² Exhibit 980 at p 2: *Strategic Review of Toxic Chemicals Research in the Environmental Science Program and the Arctic Science Program, Science Sector, Fisheries and Oceans Canada*, 9 June 2003; Brian Wallace, 22 September 2011, p 36:11-38.

government to achieve this by integrating regulatory control with conservation of wild stocks and their habitat and, at the same time, support for sustainable aquaculture.⁹³ A clear, integrated regulatory system improves the competitiveness of the industry while maintaining environmental responsibility of the sector. Having aquaculture regulation and management under the DFO umbrella enables the harmonization of aquaculture activities in the context of larger, integrated area management plans, such as the Oceans Management Plan.⁹⁴

95. The protection of wild stocks and habitat is strengthened by a direct linkage between regulatory requirements and licensing conditions. The licensing regime under the *Pacific Aquaculture Regulations* is consistent with that for other fisheries managed by DFO, adjusted to address the uniqueness of the aquaculture sector.⁹⁵ Licences set enforceable conditions against which individual aquaculture licence holders must comply. Planned investment in strengthened compliance measures including the use of ticketable offences, greater linkages to licence conditions, and an increase in the percentage of farms audited annually is expected to lead to improved protection of the environment.

96. At **Paragraph 40** this Participant suggests that DFO does not exercise precaution in regard to aquaculture. In fact, veterinary oversight, fish husbandry requirements, fish health monitoring and reporting, and biosecurity steps are all examples of precaution.⁹⁶

97. At **Paragraph 43** this Participant refers to viral disease as being among the primary likely causes for the decline in Fraser sockeye productivity, referring to briefing notes to the Minister.⁹⁷ In fact, the briefing notes clearly state that no viral agents have been identified and

⁹³ Exhibit 1588: *British Columbia Aquaculture Regulatory Program Licensing Approach*, 17 June 2011; Exhibit 1591: *British Columbia Aquaculture Regulatory Program Policy Discussion Policy Suite 1*, 4 May 2011.

⁹⁴ Exhibit 1383: *Pacific North Coast Integrated Management Area (PNCIMA) initiative update: A Balanced Approach to Integrated Oceans Management*, May 2011; Exhibit 1384: *PNCIMA Initiative Engagement Strategy*, 30 May 2010; Exhibit 1385: *PNCIMA Planning Office PNCIMA Plan: Issue Outputs and Tasks Review & Recommendations*, 14 February 2011.

⁹⁵ *Pacific Aquaculture Regulations*, SOR/2010-270 cited in Policy and Practice Report 20, “Aquaculture Regulation in British Columbia” 28 July 2011 at p 20, para 34, fn 84.

⁹⁶ Exhibit 1594: *Finfish Aquaculture Licence 2010 under the Pacific Aquaculture Regulations*; Exhibit 1663: *Required Elements of a Fish Health Management Plan for Public and Commercial Fish Culture Facilities in British Columbia*, 13 June 2003; Exhibit 1664: *Template for Development of Facility – Specific Fish Health Management Plans British Columbia*, May 2006; Dr Peter MacKenzie, 31 August 2011, pp 19:17 to 20:35; Claire Backman, 7 September 2011, pp 52:41 to 53:42.

⁹⁷ Exhibit 616A: *Memorandum for the Minister Factors Affecting the 2009 Fraser Sockeye Return*, 3 December 2009; Exhibit 1371: *Memorandum for the Deputy Minister – “Update on Factors Affecting the 2009 Fraser River Sockeye Return”*.

that pathogens are one of ten factors that could have contributed to the poor return in 2009. Exhibit 1371 states that the poor 2009 return was most likely related to poor conditions throughout the ocean migration of sockeye which entered the ocean in 2007 compounded by as yet unidentified diseases.

98. At **Paragraph 63**, this Participant says there is strong evidence that infectious salmon anaemia can be transmitted vertically when, in all the evidence, the only suggestion of this is in Exhibit 1502.⁹⁸ The World Organisation for Animal Health states that there is no strong evidence on the vertical transmission of infectious salmon anaemia.⁹⁹ Canada has strict rules on the importation of eggs, requiring that they be from safe jurisdictions only and subject to rigorous quarantine.¹⁰⁰

99. Canada has further replied to issues regarding disease and regulatory control in the context of aquaculture in these reply submissions: See Canada's reply to the submissions of the Aquaculture Coalition (Participant No. 8) above.

100. At **Paragraph 67**, this Participant alleges that:

...nor has DFO undertaken recent assessments of the extent to which 'no net loss' is being achieved by permitted projects – ie compliance monitoring.

In the testimony cited, Patrice LeBlanc made it clear that, since 2005, DFO has had a compliance monitoring group, which provides "some audit and monitoring of conformity with the requirements of authorization."¹⁰¹ This monitoring unit is part of the Habitat Compliance Modernization component of the Environmental Process Modernization Plan, as addressed in detail by David Carter.¹⁰²

101. At **Paragraph 72**, this Participant contends that:

⁹⁸ Exhibit 1502: Siri Vike et al, "ISA virus in Chile: evidence of vertical transmission" *Archives of Virology* (29 October 2009).

⁹⁹ Exhibit 1676: "Chapter 2.3.5. Infectious Salmon Anaemia" *Manual of Diagnostic Tests for Aquatic Animals 2011* (2009).

¹⁰⁰ Dr Kent, 23 August 2011, pp 14:39 to 15:33; Dr McKenzie, 31 August 2011, pp 30:41 to 32:13.

¹⁰¹ Patrice LeBlanc, 4 April 2011, p 19:22-44.

¹⁰² David Carter, 6 April 2011, p 5:27-32; pp 6:37 to 8:8.

...the permitting by DFO of activities that are known to potentially impact salmon or their habitat should not be made in a vacuum, but must be formally assessed through the lens of the WSP and the 'no net-loss' policy.

Canada submits that any permitting by DFO under s. 35 or other habitat-related sections of the *Fisheries Act* is conducted through the lens of the no-net-loss guiding principle of the *Habitat Policy*. Virtually all authorisations require self-mitigation, or other compensation measures.¹⁰³

102. At **Paragraph 75**, this Participant asserts that:

Despite the Department making progress respecting the methodology to assess habitat, very little field work is being undertaken to establish indicators, and only a small number of assessments have been completed.

This is inaccurate. Canada notes that a complete suite of habitat indicators has been developed, peer reviewed, and published.¹⁰⁴

103. At **Paragraph 78** this Participant states that:

...or researching toxic algal blooms, which is not currently being researched by DFO even though it was specifically identified as one of three major potential causes of the decline of Fraser River sockeye salmon.

In the evidence cited here, Dr Laura Richards did state that that there was some sampling, collaborative work with Vancouver Island University, and satellite monitoring on toxic algal blooms being conducted by DFO.¹⁰⁵

104. At **Paragraph 82**, this Participant states that:

DFO would also benefit from concurrently developing a framework to guide monitoring efforts.

Heather Stalberg's evidence was that a monitoring framework should be developed before monitoring begins in order to set standards for data collection, set out the locations, intensity and frequency of sampling, address the ownership of data generated, and detail which parties are

¹⁰³ Claire Dansereau, 22 September 2011, p 27:9-26.

¹⁰⁴ Exhibit 175: HC Stalberg et al, *Canada's Policy for Conservation of Wild Pacific Salmon: Stream, Lake, and Estuarine Habitat Indicators*, 2009.

¹⁰⁵ Dr Laura Richards, 23 September 2011, pp 26:45 to 27:21.

responsible for which monitoring. Habitat monitoring under the *Wild Salmon Policy* will require the participation and, importantly, the coordination of those outside of DFO.¹⁰⁶

105. At **Paragraph 85** this Participant submissions contends that:

In addition, DFO and Environment must, at an absolute minimum, be required to implement the recommendations of the 2009 Auditor General report.

106. Similarly, the Conservation Coalition recommends, at **Paragraph 147**, that DFO implement the recommendation of the Commissioner of the Environment and Sustainable Development report titled “Protecting Fish Habitat”, and suggests that this report (and others) “have sat on the shelf of DFO’s libraries collecting dust”.

107. These paragraphs imply that DFO has neither implemented nor made progress on the implementation of these recommendations. This is incorrect. Exhibits 650, 665, and 657 all describe DFO’s progress in addressing these reports.¹⁰⁷

108. At **Paragraph 95**, this Participant states that:

Gravel reaches are very likely key habitat for genetically important and distinct sockeye salmon. Despite this, and despite multiple reasons for concern, DFO currently permits gravel removal in the Fraser River.

In the evidence cited, Dr Marvin Rosenau states that “we really do not understand the role of the gravel reach, vis-à-vis the sockeye” and that “those high-top gravel bars again, in my view, might provide a very key aspect to these admittedly small populations but potentially genetically important populations.”¹⁰⁸ Further, other evidence indicates that “there is very little evidence to support that a persistent sockeye spawning population exists in Maria slough” and that it is

¹⁰⁶ Exhibit 181 at p 4: *Summary of Anticipated Evidence Heather Stalberg Senior SARA Biologist, DFO Oceans, Habitat and Enhancement*, 17 November 2010; Heather Stalberg, 7 December 2010, pp 27:39 to 28:20; pp 34:45 to 35:6.

¹⁰⁷ Exhibit 650: *DFO & EC Response to May 2009 CESD Audit Report & Progress Made*, 28 October 2010; Exhibit 665: *DFO & Environment Canada Response to May 2009 CESD Audit Report and Progress Made*; Exhibit 657: *National Habitat Compliance Protocol between Habitat Management Program and Conservation and Protection Directorate*, December 2010.

¹⁰⁸ Dr Marvin Rosenau, 16 June 2011, p 27:39-41, pp 27:47 to 28:2.

“unlikely that these river-type sockeye are using habitats in the gravel reach as they make their sort of protracted downstream migration from the spawning grounds to the estuary.”¹⁰⁹

109. At **Paragraph 108**, this Participant claims that:

In this regard, DFO decided to cease toxic contaminants research on the basis that such matters are governed by section 36 of the *Fisheries Act*, and therefore come within the purview of Environment Canada.

While the evidence cited does state that the Environmental Sciences Strategic Research Fund ended, DFO does continue to have in-house expertise in toxicology, and its scientists continue to work collaboratively with those outside DFO on toxics effects on fish.¹¹⁰

110. At **Paragraph 112**, this Participant alleges that:

A complex jurisdictional matrix results in potential delays in response time due to confusion over who is the lead responder and jurisdictional squabbling.

There is no evidence – including the evidence cited – that there is jurisdictional squabbling and delays in marine spill response time. The evidence cited simply sets out the types of spills for which the Canadian Coast Guard is the lead responder.¹¹¹

111. At **Paragraph 113**, this Participant states that:

Notwithstanding the fact that DFO has the greatest expertise in marine contaminants, it is not a member of the Regional Environmental Emergencies Team or REET, which is consulted on larger marine spills.

This is incorrect. DFO is a member of the Regional Environmental Emergencies Team, and though its participation in the Team is not mandatory in every instance, it is consulted where its expertise is required as determined by the Chair of the Team. Dr Peter Ross gave specific examples of his participation, on behalf of DFO, in the Team process.¹¹²

112. At **Paragraph 116**, this Participant states that:

¹⁰⁹ Exhibit 1089 at p 1: Email from K Benner to L Rempel RE: Request for input on stream-race sockeye in Fraser near Chilliwack, 17 December 2010; Dr Laura Rempel, 16 June 2011, pp 25:44 to 26:21.

¹¹⁰ Dr Peter Ross, 14 June 2011, pp 78:44 to 79:11; Dr Robie MacDonald, 6 June 2011, p 17:20-32; pp 23:28 to 24:31.

¹¹¹ Sergio Di Franco, 17 August 2011, pp 55:30 to 56:19.

¹¹² Sergio Di Franco, Dr Peter Ross and Bruce Reid, 17 August 2011, pp 59:30 to 61:9.

Moreover, ecosystem health and not cost of clean-up must be the primary determinant respecting remediation.

This does not accurately reflect the testimony of Sergio Di Franco, who stated that the cost of any actions taken is one of many factors that the Canadian Coast Guard will consider in its response, and in monitoring.¹¹³

113. In reply to Conservation Coalition **Recommendation i.11**:

By December 2014, conduct an independent audit of WSP implementation.¹¹⁴

Canada notes that an independent performance review of the *Wild Salmon Policy* has been undertaken.¹¹⁵

114. Conservation Coalition **Recommendation ii.2** states:

Ensure that decision making occurs in as transparent a fashion as possible by suggesting that Ministers must give full reasons for decisions such as the listing of CUs under SARA.¹¹⁶

The power to decide to list or not list a species under the *Species at Risk Act* is conferred on the Governor in Council by the Act.¹¹⁷ Further, the Act already requires that the Minister publish the reasons for any decision either to not list a species or to refer the matter back to the Committee on the Status of Endangered Wildlife in Canada.¹¹⁸

115. It is unclear what the Conservation Coalition means by “full reasons for decisions”, but Canada submits that the deliberations of the Governor in Council on decisions to list under the *Species at Risk Act* are Cabinet confidences and are thus privileged under s. 39(2)(c) of the *Canada Evidence Act*.¹¹⁹

116. In reply to Conservation Coalition **Recommendation iii.3(i)**:

Re-establish a selective fishing policy and program that provides support for the development and/or expansion and management of in-river fisheries using selective

¹¹³ Sergio Di Franco, 17 August 2011, p 64:9-44; p 78:30-44.

¹¹⁴ Written submissions of the Conservation Coalition at p 8.

¹¹⁵ Written submissions of Canada at paras 435-437.

¹¹⁶ Written submissions of the Conservation Coalition at p 11.

¹¹⁷ *Species at Risk Act*, SC 2002, c 29, s 27(1).

¹¹⁸ *Species at Risk Act*, s (1.2).

¹¹⁹ *Canada Evidence Act*, RSC 1985, c C-5, s 39(2)(c).

gear (e.g. beach seines, fish wheels, fish traps, dip nets), preferential provision of quota to highly selective marine gear types (e.g. tooth tangle nets), as well as management and marketing.

While the selective fishing program ended in 2002, the selective fishing policy is an on-going policy that promotes sustainable fishing practices.¹²¹ Susan Farlinger explained that, since 2002, DFO continues to apply and test selective fishing methods through the IFMP process.¹²² A continuum of selective fishing measures are taken, ranging from time and area closures, use of selective gear (eg beach seines), demonstration fisheries that are more targeted, re-allocation of fish to protect weak stocks (such as early Stuart sockeye), to fisheries closures.¹²³

117. In reply to Conservation Coalition **Recommendation v.6:**

Local field staff, in association with a prosecutor, must have independent authority to determine when a *Fisheries Act* violation occurs, as well as when charges should be laid. Proper training and guidelines should be developed in this regard.

Canada submits that in British Columbia, only Crown counsel can make the decision to lay a charge and prosecute, and only a court can determine if a violation has occurred.

118. In reply to Conservation Coalition **Recommendation viii.1:**

Establish a formalized structure which ensures environmental impacts of marine spills are adequately considered.

Canada submits that the current Regional Environmental Emergencies Team structure currently fills this role, and that this recommendation does not suggest in what ways any new structure would be different from or an improvement upon the existing structure.

119. In reply to Conservation Coalition **Recommendation ix.2:**

Groundwater is a critical component of salmon habitat, and the federal government should take steps to regulate it in the face of provincial inaction.

Canada notes that, while there is evidence on the value of groundwater as a critical element of fish habitat, and some evidence that DFO can use the regulatory tools at its disposition in

¹²¹ Exhibit 266: Fisheries and Oceans Canada, *A Policy for Selective Fishing in Canada's Pacific Fisheries and Oceans Canada*, January 2001.

¹²² Susan Farlinger, 23 September 2011, p 11:2-15.

¹²³ Susan Farlinger, 23 September 2011, pp 14:30 to 15:5.

different ways to protect fish and fish habitat from harmful water uses, the regulation of groundwater is an area of provincial responsibility.¹²⁴

¹²⁴ Policy and Practice Report 21, “Regulation of Water Uses in the Fraser River Watershed” 18 August 2011 at para 7; Jason Hwang, 16 September 2011, p 46:11-32, pp 9:35 to 11:01; Dr Steve MacDonald, 15 September 2011, pp 6:45 to 8:17.

**F. Area D Salmon Gillnet Association and
Area B Harvest Committee (Participant No. 10)**

120. At **Page 7** of this Participant's submissions, Exhibit 1922, Fisheries and Oceans Canada's Report on Plans and Priorities 2011-2012, is cited in support of the statement that:

Whether temporary or not, the reality is that over the last two years the Department functioned with an infusion of additional capital that, nevertheless, was deficient in meeting DFO responsibilities. When factoring in these stimulus monies, and applying the anticipated cuts for the next three years, the reductions in budget amount to 25%.

As noted in Canada's reply to the submissions of Participant No. 4 (BCPSAC), DFO has not planned a funding cut of \$500 million by 2013-2014. During cross-examination, the Deputy Minister disagreed with the suggestion that DFO's budget is being reduced by 25%.¹²⁵

121. DFO budgets reflect government priorities, and change as priorities emerge or cease to be priorities. Departmental budgets will be reduced for programs that were approved previously, but only for a definite time period, as well as for government reduction exercises such as Strategic Review. Budgets will increase when funding is provided for new priority initiatives.

122. The Deputy Minister testified that, following from Strategic Review, the DFO budget was reduced by about 3%, a total of \$56.8 million, in stages over the three-year period from 2011 to 2014.¹²⁶

123. At **Page 21** of this Participant's submissions, Mr. Duncan, of the Native Brotherhood of BC, is relied upon for the statement that habitat issues had "the single most devastating impact on sockeye populations".

124. Canada observes that this submission does not cite the conclusion of David Marmorek, author of Exhibit 1896, that habitat was not the cause of productivity declines in Stage 1: incubation, emergence and freshwater rearing or Stage 5: migration back to spawn.¹²⁷ Exhibit 1896 provides a detailed analysis of the various habitat stressors in coming to the conclusion that these stressors are not a cause of decline.¹²⁸

¹²⁵ Exhibit 1922: *Report on Plans and Priorities 2011-2012*, Department of Fisheries and Oceans.

¹²⁶ Claire Dansereau, 22 September 2011, pp 2:25 to 3:17; 27 September 2011, p 10:11-23.

¹²⁷ Exhibit 1896 at pp 101, 103: Technical Report No 6, "Data Syntheses and Cumulative Impacts", April 2011.

¹²⁸ Exhibit 1896 at p 90.

125. At **Page 28**, this Participant states that there was “literally no evidence to suggest that DFO has been proactive with a habitat restoration program”.

126. Canada points out that a large portion of Policy and Practice No 11 pertained to habitat restoration and that Greg Savard testified about DFO’s habitat restoration program.¹²⁹

127. At **Page 34**, this Participant suggests that:

The test fishery program, funded out of the Larocque money (Pacific Integrated Commercial Fisheries Initiative money) ends on April 1st, 2012.

In reply, Canada notes that the test fishery program is not ending on April 1, 2012. Rather, it is the post-*Larocque* funding that is ending. The test fishery program does not rely on PICFI funding. Funding for the test fishery program is presently under review.¹³⁰

128. At **Page 38**, this Participant suggests that, in the implementation of the *Wild Salmon Policy*:

DFO has chosen to apply only one tool from their toolbox (i.e. curtailing the commercial catch)

Canada notes that Susan Farlinger, in her testimony before the Commission, provided a summary of numerous ways the *Wild Salmon Policy* is being implemented in a variety of decisions made each year:

- Decisions about harvest rates that specifically protect weak stocks;
- More recent management decisions to utilize conservation units and their benchmarks such as the early Stuart sockeye and Cultus sockeye;
- A significant reduction in the harvest rate;
- With respect to habitat, the implementation of a risk-based approach and identifying the pathways of effect;’
- The development of a framework for habitat reviews;
- The allocation of science priorities;

¹²⁹ Policy and Practice Report 11, “Overview of Habitat Enhancement and Restoration” 1 April 2011; Greg Savard, 2 May 2011, pp 64:39 to 65:7.

¹³⁰ Claire Dansereau, 23 September 2011, p 6:37-44; 28 September 2011, p 109:1-33.

- Adjustments to account for in-river mortality;
- Application of the Selective Fishing Policy;
- Demonstration share-based fisheries; and,
- Demonstration in-river fisheries.¹³¹

129. In response to the over-escapement and terminal fisheries issues raised in pages 44 to 48 of this Participant's submissions, Canada refers the Commissioner to Part II of Canada's reply submissions.

130. At **Page 57**, it is suggested that Scott Coultish testified that 97% of the FSC fish caught in the lower Fraser is being sold. Canada submits that this is an incomplete summary of his evidence on the following points:

- In the evidence cited, Scott Coultish stated that this number was "pretty close" to an accurate figure. However, he also noted that this information was provided orally by enforcement staff in a meeting, and was based on observations and experience in the field.¹³² It is clear from Scott Coultish's testimony that the figure of 97% was not obtained through any analysis of actual data on illegal FSC sales.
- Earlier in their testimony, Randy Nelson and Scott Coultish both stated that they "could not put a number" on the amount of illegal sales of FSC fish that occurs.¹³³
- Later in his testimony, Randy Nelson was asked about the 97% figure. He stated that "it's not anywhere near that number" and "I am not comfortable saying yes it's 97%."¹³⁴

131. At **Page 71**, this Participant states that:

The Rebuilding Strategy of 1987, which was predicated on increasing escapement and foregoing catch happens to coincide with the pronounced decline of the productivity of the stock

In response, Canada refers the Commissioner to the discussion of over-escapement in Part II of Canada's reply submissions.

¹³¹ Susan Farlinger, 22 September 2011, pp 49:33 to 51:1.

¹³² Exhibit 871: *Record of Meeting, Dates: April 27, 28 & 29, 2010, Purpose of Meeting: I & IS Work Planning and NEW IMAP Meeting*; Scott Coultish, 17 May 2011, pp 32:41 to 33:29.

¹³³ Randy Nelson and Scott Coultish, 17 May 2011, p 30:29-40.

¹³⁴ Randy Nelson, 17 May 2011, p 35:13-17.

**G. Southern Area E Gillnetters Association and
BC Fisheries Survival Coalition (Participant No. 11)**

132. At **Paragraph 31**, this Participant states that:

The over fishing of Early Stuart sockeye rests solely with in-river aboriginal fishing interests.

This allegation overlooks the fact that there can be illegal fishing in the Fraser Watershed for early Stuart sockeye and that such fishing can be conducted by Aboriginal or non-Aboriginal people. Salmon are a valuable commodity and it is not just Aboriginal people who can be involved in illegal fishing in the Fraser Watershed.¹³⁵

133. At **Paragraph 89**, this Participant asserts that:

There is obviously little understanding of the value of effective enforcement at DFO's highest levels.

David Bevan described the value of effective enforcement in instilling confidence amongst fishers that non-compliance will be addressed.¹³⁶ Further, Susan Farlinger described the importance of effective enforcement in meeting conservation objectives and allocation requirements.¹³⁷

134. At **Paragraph 91**, this Participant states that:

[Barry] Huber supports delegating the prevention and enforcement of illegal sales to the very communities who support illegal sales.

DFO's work to implement restorative justice, where appropriate, is described in paragraphs 190 to 194 of Policy and Practice Report 13.¹³⁸ The effectiveness of restorative justice in promoting compliance was described in the *2004 Southern Salmon Fishery Post-Season Review, Part One*

¹³⁵ Randy Nelson, 17 May 2011, p 14:34-38.

¹³⁶ David Bevan, 26 September 2011, p 15.

¹³⁷ Susan Farlinger, 26 September 2011, p 15.

¹³⁸ Policy and Practice Report 13, "Department of Fisheries and Oceans Policies and Programs for Fisheries Enforcement" 19 April 2011 at pp 90-92, paras 190-194.

Fraser River Sockeye Report (Williams Report).¹³⁹ That report recommends that “DFO should increase and enhance the Restorative Justice Program and apply it to all sectors”.¹⁴⁰

135. At **Paragraph 95**, this Participant alleges that “general ‘no charges’ orders” exist. In reply, Canada notes that, as evidenced by Exhibit 866 and Table 10 in Policy and Practice Report 13, many charges are laid against Aboriginal fishers every year in the Pacific Region.¹⁴¹

¹³⁹ Exhibit 606 at p 10, *2004 Southern Salmon Fishery Post-Season Review, Part One Fraser River Sockeye Report* (Williams Report).

¹⁴⁰ Exhibit 606 at p 41.

¹⁴¹ Exhibit 866: *Conservation and Protection Information Request – For Second Interview with Randy Nelson on Fisheries Enforcement*; Policy and Practice Report 13, “Department of Fisheries and Oceans Policies and Programs for Fisheries Enforcement” 19 April 2011 at p 88.

H. West Coast Trollers Area G Association and United Fishermen and Allied Workers' Union (Participant No. 12)

136. In its submissions, this Participant contends that “[t]he purpose of the *Fisheries Act* is and other federal statutes and treaties is to provide yield (harvest benefits) not conservation of fish *per se*.”¹⁴² In support of this proposition, this Participant cites portions of a number of cases relating to the interpretation of s. 91(12) of the *Constitution Act, 1867*, along with several federal statutes and international treaties. It is Canada’s submission that this Commission is not the appropriate forum to address or resolve arguments regarding the scope of s. 91(12) and its purported limiting effect on the scope of the *Fisheries Act*.

137. As noted in the introduction to these reply submissions, an interpretation of the *Constitution Act, 1867* and the *Fisheries Act* is well outside the Terms of Reference for this Commission. Further, it is unnecessary for the Commissioner to consider these issues in order to fulfill his mandate. This Commission is primarily mandated to consider the policies and practices of DFO, make findings of fact regarding the causes of the decline of Fraser sockeye, and make recommendations for the future sustainability of the resource. No part of this mandate requires that the Commissioner to engage in an exercise of constitutional interpretation, nor should he, or use such an interpretation to limit the purpose of the *Fisheries Act* in the manner proposed this Participant.

138. Further, even if such an exercise was within the Commission’s mandate, the Supreme Court of Canada, in *R v Blais*, expressly cautioned against an ahistorical approach to constitutional interpretation. In that case, Iacobucci J stated that judicial analysis must be anchored in the historical context of the provision under consideration.¹⁴³ The courts have approached the characterization of a law for constitutional purposes by looking beyond the direct legal effects of the law to inquire into the social or economic purposes for which the statute was enacted.¹⁴⁴ A reference to the state of the law before the legislation was enacted, or the legislative history of a statute, may also be required.¹⁴⁵

¹⁴² Written Submissions of Area G/United Fishermen at p 2.

¹⁴³ *R v Blais*, 2003 SCC 44, at para 40 [2003] 2 SCR 236.

¹⁴⁴ Peter W Hogg, *The Constitutional Law of Canada*, loose-leaf (consulted on 23 October 2011), 5th ed (Toronto: Thomson Reuters, 2007) 15-13 to 15-14 [Hogg].

¹⁴⁵ Hogg at 15-15.

139. It is submitted that, because the interpretation of s. 91(12) is not within the Commissioner's mandate and was not explored during the hearings, there has been no proper evidentiary foundation laid on which an interpretation of s. 91(12) – or its purported limiting effect on the *Fisheries Act* – can be argued or decided.

140. Canada further submits that court decisions, the *Fisheries Act* and other relevant statutes, and DFO policies confirm that conservation efforts are a valid exercise of the Minister's discretion.

141. In *Fowler v The Queen*, (which was cited by this Participant for its definition of the meaning of the word “fishery”), the Supreme Court of Canada held:

The earliest case in this Court in which the scope of the federal power to legislate in relation to sea coast and inland fisheries is *R. v. Robertson* [(1882), 6 S.C.R. 52], [...]

In the course of his judgment, Ritchie C.J., at p. 120, said this:

... I am of opinion that the legislation in regard to ‘Inland and Sea Fisheries’ contemplated by the *British North America Act* was not in reference to ‘property and civil rights’—that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries, in other words, all such general laws as inure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection,.... [emphasis added]¹⁴⁶

142. The Court in *Fowler* went on to say:

Reference to the first quoted passage in the judgment of Ritchie C.J. in the *Robertson* case was made by Chief Justice Laskin in *Interprovincial Co-Operatives Limited et al. v. The Queen*, at p. 495, a case which dealt with provincial legislation for the protection of provincial property rights in inland fisheries. The Chief Justice, who delivered the judgment of himself and Judson and Spence JJ., which dissented in the result, made the following statement which was not the subject of disagreement by the majority:

¹⁴⁶ Written Submissions of Area G/United Fishermen at para 7; *Fowler v The Queen*, [1980] 2 SCR 213 at 220-221 [*Fowler*].

... It is, in my view, untenable to fasten on words in a judgment, such as the words “tending to their regulation, protection and preservation”, which appear in the reasons in *The Queen v. Robertson*, and read them as if they have literal constitutional significance. Federal power in relation to fisheries does not reach the protection of provincial or private property rights in fisheries through actions for damages or ancillary relief for injury to those rights. Rather, it is concerned with the protection and preservation of fisheries as a public resource, concerned to monitor or regulate undue or injurious exploitation, regardless of who the owner may be, and even in suppression of an owner’s right of utilization.¹⁴⁷

143. In *R v Sparrow*, the Supreme Court of Canada went further and held that “it is clear that the value of conservation purposes for government legislation and action has long been recognized.”¹⁴⁸ The Court adopted its statement from *Jack v The Queen* that “any limitation upon Indian fishing that is established for a valid conservation purpose overrides the protection afforded the Indian fishery..., just as such conservation measures override other taking of fish.”¹⁴⁹ The court went on to hold that, in the allocation of fish, conservation is the first priority.¹⁵⁰

144. The priority of conservation as identified by the Supreme Court of Canada is reflected in DFO policies. For example, in the *Allocation Policy* and the *Wild Salmon Policy*, principles of or allocations for conservation receive the highest priority.¹⁵¹ It is submitted that these and other ‘conservation first’ policies adopted by DFO are valid exercises of the broad Ministerial discretion conferred by the *Fisheries Act*.

145. In *Comeau’s Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, the Supreme Court of Canada held:

This interpretation of the breadth of the Minister’s discretion is consonant with the overall policy of the *Fisheries Act*. Canada’s fisheries are a “common property resource”, belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister’s duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (s. 43).¹⁵²

¹⁴⁷ *Fowler* at 222-223 [emphasis added].

¹⁴⁸ *R v Sparrow*, [1990] 1 SCR 1075 at p 1114 [*Sparrow*].

¹⁴⁹ *Jack et al v The Queen*, [1980] 1 SCR 294 at p 313.

¹⁵⁰ *Sparrow* at p1116.

¹⁵¹ Exhibit 264 at pp 15-16: *An Allocation Policy for Pacific Salmon: A New Direction: The Fourth in a Series of Papers from Fisheries and Oceans Canada*, October 1999; Exhibit 8 at p 8: Department of Fisheries and Oceans, *Canada’s Policy for Conservation of Wild Pacific Salmon*, 2005.

¹⁵² *Comeau’s Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)*, [1997] 1 SCR 12 at para 37 [*Comeau’s Sea Foods*] [emphasis added].

146. In this regard, s. 43(b) of the *Fisheries Act* expressly states that the Governor in Council may make regulations pertaining to the “conservation and protection” of fish.

147. Further, it is submitted that other relevant federal acts, such as the *Species at Risk Act* and the *Oceans Act*, have a strong emphasis on conservation. The preamble to the *Species at Risk Act* recognizes that “wildlife, in all its forms, has value in and of itself and is valued by Canadians for aesthetic, cultural, spiritual, recreational, educational, historical, economic, medical, ecological and scientific reasons” and that it will “complement existing legislation” including, it is submitted, the *Fisheries Act*. The preamble to the *Oceans Act* states that “Canada holds that conservation... is of fundamental importance to maintaining biological diversity and productivity in the marine environment.”¹⁵³

148. At **Paragraph 34** this Participant states that:

Fishing on the Cultus stock has been almost entirely eliminated but ... that is not enough to break down the new form of low abundance equilibrium.

Canada submits that the National Conservation Strategy for the Cultus Lake Sockeye Salmon¹⁵⁴ concludes that recovery of the stock is possible, and sets out four recovery objectives to achieve this goal.¹⁵⁵ Dr Bradford testified that Cultus sockeye stocks are starting to recover.¹⁵⁶

149. At **Paragraph 42** this Participant cites a publication by Walters and Martell, *Fisheries Ecology and Management*, Princeton University Press, 2004, p 149 as the basis for the statement that fish recruitment is stable. This publication was not entered into evidence, and the statement was not subject to cross-examination. Canada submits that no weight should be given to this publication or to this statement.

150. At **Paragraph 61** this Participant states that:

[T]he FRSSI model does not embody the Larkin delayed density dependence model.

¹⁵³ *Oceans Act*, SC 1996, c 31, Preamble.

¹⁵⁴ Exhibit 925: Cultus Sockeye Recovery Team, National recovery for sockeye salmon (*Oncorhynchus nerka*), Cultus Lake population, British Columbia, Draft, 7 September 2004.

¹⁵⁵ Exhibit 925 at pp 31 to 33.

¹⁵⁶ Dr Michael Bradford, 1 June 2011, p 36:11-23.

This statement is not correct. The current Fraser River Sockeye Spawning Initiative model simulates Fraser sockeye stocks using a Larkin model.¹⁵⁷ The transcript reference cited refers to a time in 2005. Since then Fraser River Sockeye Spawning Initiative has been modified to include the Larkin model.

151. **Paragraphs 58 and 80-85** contain numerous references to Bristol Bay salmon management in Alaska and Columbia salmon management in Washington State. It is suggested that recent high returns to the Columbia, for example, are the direct result of the actions of United States fisheries managers: “[w]hat correlation could there be between Bristol Bay and the Columbia other than that they both share the U.S. approach to sockeye fishery management?” Canada notes that no evidence is cited that supports this conclusion.

152. Canada submits that any increases in productivity in the Columbia or Bristol Bay should not be attributed directly to management efforts on the basis of coincidence alone, and that simply adopting a vaguely defined “United States approach to fisheries management” on the Fraser River on the basis of coincidence would be inappropriate. In fact, numerous witnesses have testified that, for several reasons, these United States fisheries cannot be compared to the Fraser River. David Marmorek testified:

I don't think you can use reference populations that are that far away from the Fraser, because there are too many differences and some of Randall Peterman's work has shown that if you get more than about 500 kilometres away the variation from year to year amongst stocks starts to be very different.¹⁵⁸

153. Michael Lapointe also testified about the differences between Bristol Bay and the Fraser River, including differences in geography, climate and weather, jurisdictional context, and biology.¹⁶⁰ In addition, the authors of Technical Report No 7 note differences in management complexity, nature of the fisheries, portfolio of stocks, and variability in returns.¹⁶¹

154. At **Paragraphs 76-78 and 86-88** of this Participant's submissions, the Commissioner is invited to find that “the well-intentioned 1987 Rebuilding Strategy created a situation where

¹⁵⁷ Exhibit 400 at p 13: Mike Staley, “Fraser River Sockeye Spawning Initiative (FRSSI): A Review for the Cohen Commission”, October 2010.

¹⁵⁸ David Marmorek, 20 September 2011, p 16:15-24, pp 53:30 to 54:10.

¹⁶⁰ Michael Lapointe, 19 January 2011, pp 7:17 to 14:42.

¹⁶¹ Exhibit 718 at pp 162-168: Technical Report No 7, “Fraser River Sockeye Fisheries and Fisheries Management and Comparison with Bristol Bay Sockeye Fisheries”, February 2011.

excessive spawner density reduced and weakened the out-migrating smolts to such an extent that by 2009 the resource was unable to replace itself even with the commercial fishery completely closed.”¹⁶²

155. In response, Canada refers the Commissioner to Part II of Canada’s reply submissions for a discussion of over-escapement.

156. At **Paragraph 79**, this Participant dismisses both climate change and marine conditions as possible contributors to the decline in Fraser sockeye productivity. The Participant states that, because all Fraser stocks share the same marine conditions and climate but are experiencing different rates of (or no) decline, marine conditions cannot be the cause. This Participant further states that, because Harrison sockeye do not rear in a lake, but are not experiencing a decline in productivity, the cause of the decline must be in the various nursery lakes.

157. Canada submits that marine conditions are but one factor that may influence productivity. There may be other factors not shared among all Fraser stocks that may explain the differing rates of decline or absence of decline among stocks.¹⁶³ In this regard, Dr Richard Beamish testified that Harrison sockeye may not be experiencing the decline in productivity – they out-migrate as smolts generally much later in the year than other Fraser sockeye, and thus may avoid encountering the ocean conditions encountered by other stocks earlier in the season.¹⁶⁴ This is an example of a life history difference between stocks that may influence how various factors affect their productivity.

158. Further, there is evidence that climate change will not necessarily affect each Fraser stock in the same manner – because we don’t know which stocks will be better adapted to future climates, the protection of genetic diversity is necessary in order to ensure that salmon can continue to change and adapt.¹⁶⁵ The *Wild Salmon Policy* thus expressly states that protection of

¹⁶² Written Submissions of Area G/United Fishermen at para 88.

¹⁶³ Exhibit 1896 at pdf p 4: Technical Report No 6, "Fraser River sockeye salmon: data synthesis and cumulative impacts", April 2011.

¹⁶⁴ Dr Richard Beamish, 6 July 2011, pp 83:46 to 85:7.

¹⁶⁵ Dr Brian Riddell, 30 November 2010, p 12:2-19; 1 December 2010, p 28.

biodiversity – or a broad range of CUs – is necessary in order to protect against climate-related effects that are difficult to predict.¹⁶⁶

159. At **Paragraph 86**, this Participant states that:

The different Canadian approach was described by Mr. Bevan. He felt that the CSAS statement about the "removal rate" being the ratio of all human induced removals and total exploitable stock size (i.e. 20M stock size, 18M exploitable, 2M for spawning = 90% removal rate) was "an oversimplification". It is apparent that he would not accept the basic MSY premise of the UNFA as being applicable to sockeye. He said 'that's why there's a Wild Salmon Policy'.

This statement is problematic in several respects. First, the *1995 United Nations Agreement relating to the management and conservation of highly migratory and straddling fish stocks* does not apply directly to Fraser sockeye salmon.¹⁶⁷ However, the precautionary approach, as articulated in that agreement and others, has been adopted into domestic legislation and policy.¹⁶⁸

160. Second, the policies relevant to fisheries management include *A Framework for the Application of Precaution in Science-based Decision Making About Risk* and *A fishery decision-making framework incorporating the Precautionary Approach*.¹⁶⁹ The latter policy expressly states that it does not apply to salmon.¹⁷⁰ David Bevan and Susan Farlinger explained that this was because the precautionary approach outlined in that document was designed for multi-year-class populations and long-lived species with low natural mortality as opposed to salmon, which are short-lived, have high natural mortality, and generally migrate and spawn within a single year-class. The *Wild Salmon Policy* was drafted to apply a precautionary approach specifically to salmon.¹⁷¹

161. At **Paragraph 90**, this Participant urges the Commissioner to find that there is "no satisfactory proof" that marine conditions are causing a decline in productivity. However, it is

¹⁶⁶ Exhibit 8 at p 23, sidebar: Department of Fisheries and Oceans, *Canada's Policy for Conservation of Wild Pacific Salmon*, 2005.

¹⁶⁷ Policy and Practice Report 2, "International Law Relevant to the Conservation and Management of Fraser River Sockeye Salmon" at p 4 para 147.

¹⁶⁸ Written Submissions of Canada at paras 364-367.

¹⁶⁹ Exhibit 51: Government of Canada, *A Framework for the Application of Precaution in Science-based Decision Making About Risk*, Canada: Privy Council Office, 2003; Exhibit 185 (also Exhibit 207): *A fishery decision-making framework incorporating the Precautionary Approach*.

¹⁷⁰ Exhibit 185 (also Exhibit 207) at p 2, fn 4.

¹⁷¹ David Bevan, 23 September 2011, pp 63:28 to 66:44; Susan Farlinger, 23 September 2011, p 67:16-33.

submitted that, while proof is rare in science, there is significant evidence that marine conditions are affecting productivity, including:

- Technical Report No 6: “Based on plausible mechanisms, exposure, consistency with observed sockeye productivity changes, and other evidence, marine conditions and climate change are considered *likely* contributors to the long-term decline of Fraser River sockeye salmon. It is also *very likely* that poor marine conditions during the coastal migration life stage in 2007 contributed to the poor returns observed in 2009.”¹⁷²
- Technical Report No 4: “The coincidence of a shared change in sockeye salmon productivity in 1992 suggests that these stocks were affected by a relatively large-scale coastal influence that had a more persistent effect on stocks using Queen Charlotte Sound and Strait.”¹⁷³
- Technical Report No 4: “Oceanic conditions that are known to be associated with lower survival of Fraser River sockeye salmon occurred along much of the Fraser River sockeye salmon postsmolt migration route in 2007 where an extremely poor environment developed in Queen Charlotte Sound/Strait prior to and during the migration.”¹⁷⁴
- Exhibit 1309: “The synchronous response of virtually all of the major species in the surface waters of the Strait of Georgia in the spring of 2007 indicates that there was a collapse of the production of prey for these species. It is likely that climate and ocean conditions within the Strait of Georgia were responsible for the synchronous very poor production of prey and resulting poor survival of Pacific salmon and herring.”¹⁷⁵
- Exhibit 73: “physical and biological conditions inside the Strait of Georgia during the juvenile life stage are *very likely the major cause* of poor survival of the cohort that returned in 2009. Those conditions in the Strait are also *likely the major cause* of the long-term decrease in productivity of most Fraser sockeye stocks that has occurred since the late 1980s or early 1990s. Similar physical and biological conditions were judged to affect survival of Fraser sockeye outside the Strait of Georgia, but to a lesser degree.”¹⁷⁶

¹⁷² Exhibit 1896 at p 4 of Executive Summary: Technical Report No 6, “Fraser River sockeye salmon: data synthesis and cumulative impacts”, April 2011.

¹⁷³ Exhibit 1291 at p 145: Technical Report No 4, “The Decline of Fraser River Sockeye Salmon *Oncorhynchus nerka* (Steller, 1743) in Relation to Marine Ecology”, February 2011.

¹⁷⁴ Exhibit 1291 at p 133: Technical Report No 4, “The Decline of Fraser River Sockeye Salmon *Oncorhynchus nerka* (Steller, 1743) in Relation to Marine Ecology”, February 2011.

¹⁷⁵ Exhibit 1309 at pp 2-3: Expert report of Dr R Beamish et al, “Evidence of a synchronous failure in juvenile Pacific salmon and herring production in the Strait of Georgia in the spring of 2007”.

¹⁷⁶ Exhibit 73 (also Exhibit 203) at p 5: Randall M Peterman et al, *Synthesis of evidence from a workshop on the decline of Fraser River sockeye*, June 15-17, 2010, 31 August 2010.

162. In support of a recommendation to abandon the *Wild Salmon Policy* and FRSSI, this Participant states, at **Paragraphs 99-100**, that both are “hopelessly complex”, and implies that they are expensive compared to the simpler and “probably cost effective” management in Bristol Bay and by the previous International Pacific Salmon Fisheries Commission. There is no evidence cited, however, that would allow for a comparison of the cost of DFO management as compared to either Bristol Bay or by the previous Commission.

163. Further, it is submitted that any substantial changes to fisheries management – such as through the abandonment of the FRSSI process – should not be undertaken simply because aspects of the current regime are “too complex”. As discussed above, direct comparisons between the complexity of management in the Fraser and in Bristol Bay may not be appropriate, given the different nature of each fishery.

164. At **Paragraphs 104 et seq**, this Participant opines that:

The one thing that any manager would take from the model is that red means stop. The WSP’s emphasis on biodiversity, combined with its silence of the danger of oversupplying the spawning grounds, turns it into an instrument that inevitably leads resource managers to err on the side of over-escapement...

Canada submits that this statement does not accurately describe the *Wild Salmon Policy*. The *Wild Salmon Policy* does not mandate that all fishing on CUs in the red zone cease automatically – or any particular management response. Rather, a CU in the red zone means that there must be an “immediate consideration of ways to protect the fish, increase their abundance, and reduce the potential risk of loss” and that “biological considerations will be the primary drivers [of] management... .”¹⁷⁷

165. Further, this statement suggests that any reduction in harvest to protect a CU in the red zone will “inevitably lead” to over-escapement. This is not supported by any evidence.

166. This Participant states, at **Paragraph 111**, that:

...without scientific rigor initiatives billed as adaptive management may be little more than undisciplined trial and error, a poor paradigm for effective learning. The same may be said of initiatives billed as implementation of the WSP.

¹⁷⁷ Exhibit 8 at sidebar p 17: Department of Fisheries and Oceans, *Canada’s Policy for Conservation of Wild Pacific Salmon*, 2005.

Canada submits that this is an unfair characterization of the scientific research conducted to implement the *Wild Salmon Policy*. Science papers produced to support the implementation of the *Wild Salmon Policy* undergo a rigorous peer review process. For a more accurate description of the nature of the science work produced to date in support of the *Wild Salmon Policy*, see Canada's submissions at paras 394 to 422.

167. At **Paragraph 124**, it is alleged that:

Of the 165 Area G troll licences, 12 are held by DFO in PICFI "inventory" for the purposes of moving access to terminal areas.

Canada notes that this statement is inaccurate. Moving salmon licences inland is not a strict requirement of the Pacific Integrated Commercial Fisheries Initiative (PICFI) program. PICFI licences will be distributed based on the business plans of applicant groups. Coastal First Nations are more interested in non-salmon species since they tend to be more lucrative and since they already have sufficient salmon capacity. Interior First Nations are more interested in salmon species. The PICFI program was explained at a recent workshop as follows:

Approximately 15% of resources are notionally planned for salmon access, with the remainder devoted to other species. While there is some flexibility on this, the intent was to ensure there would be salmon access for interior First Nations and an opportunity for coastal First Nations to diversity access.¹⁷⁸

168. At **Paragraph 125** this Participant relies upon a description of the PICFI program from the 2009 *Ahousaht Indian Band and Nation v Canada (Attorney General)* British Columbia Supreme Court decision, which focused on the Aboriginal rights and title of the Nuu-chah-nulth, located on the west coast of Vancouver Island and with access to a variety of marine species and sockeye salmon that return primarily to Vancouver Island. This Commission heard much more relevant and up-to-date evidence on the application of the PICFI program. It is Canada's submission that the Commission should place no weight on factual information or documents not referenced in evidence, and which counsel have not had the opportunity of testing through cross-examination.

169. At **Paragraph 134** this Participant suggests that the aerial photographs adduced by Mr. Eidsvik, were accepted by Susan Farlinger to illustrate the reality of terminal fisheries. Canada

¹⁷⁸ Exhibit 1440 at p 1: Meeting Record, Access and Distribution Workshop, October 27, 2010.

notes that this is incorrect. Susan Farlinger stated that she had knowledge of a pink salmon, not sockeye, beach seine fishery happening that week, that DFO staff were at the site, and that she was told caught pink salmon were stacked on the shore before being loaded into crates for transport. Susan Farlinger stated that the pink salmon floating in the Fraser were not by-catch caused by the beach seine. It was her understanding that this was natural in-river mortality.¹⁷⁹

170. At **Paragraph 138** this Participant suggests that DFO is moving to implement individual transferable quota based fisheries without any socio-economic assessment and for reasons of “DFO convenience.” Canada notes that this is incorrect. DFO has taken a very careful and collaborative demonstration fishery approach to testing alternative share-based fishery management models, including individual transferable quotas. Demonstration fisheries are occurring with willing fleets only, and where they occur, they are being evaluated. Moreover, they are not undertaken for “convenience” but rather to achieve the goals set out in *Pacific Fisheries Reform* – “a sustainable fishery in which full social and economic potential, and stability and predictability, are achieved.”¹⁸⁰

171. At **Paragraph 141**, this Participant claims that “DFO is virtually coercing fishers to shift to ITQs by means of a fleet reduction program...”.

172. This is a serious allegation. Canada submits that there is no evidence, including the evidence cited, that such coercion is occurring. The proposition that DFO wanted to deliberately reduce the Area G fleet in order to coerce it into accepting an Individual Transferable Quota fishery was put to Jeffrey Grout, who expressly rejected it.¹⁸¹

173. **Recommendations 28 and 31** request the Commissioner to define the meaning of the “food, social and ceremonial” needs of First Nations, and invite the Commissioner to recommend when “FSC needs, and thus the s. 35 priority, have been satisfied.” Canada submits that the definition of FSC and the satisfaction of the s. 35 priority are legal issues. As stated in

¹⁷⁹ Susan Farlinger, 27 September 2011, p 61:26-44; Canada notes that the pictures were not entered into evidence and were marked for identification purposes only.

¹⁸⁰ Written Submissions of Canada at paras 581 to 696; Exhibit 468 at pdf pp 2-5: *Defined Shares for Salmon Management: Building a strategy*, 21 July 2009; Exhibit 482: Letter of R Kadowaki to D Barrett, 13 August 2007; Claire Dansereau, 22 September 2011, p 69:22-32.

¹⁸¹ Jeffrey Grout, 24 February 2011, pp 68:06 to 69:25.

the introduction to Canada's reply submissions, this is not the appropriate forum to rule on those issues.

**I. BC Wildlife Federation and
BC Federation of Drift Fishers (Participant No. 13)**

174. At **Paragraph 11**, this Participant states that the fishery is rights-based. Canada submits that this statement overlooks that, as affirmed by the BC Court of Appeal in *R v Kapp et al.*, the public right to fish has been substantially limited by the *Fisheries Act* and regulations:

The common law right to fish in Canada has been substantially limited by the *Fisheries Act*. That statute and the regulations passed pursuant to it control fishing. A right to fish in waters to which the statute has application does not exist in law unless authorized under that statute, usually by licence.¹⁸³

175. At **Paragraph 12**, this Participant conflates tidal waters and navigable waters – and non-tidal waters and non-navigable waters. The boundary between tidal and non-tidal waters is relevant with respect to jurisdictional issues.¹⁸⁴ A determination as to whether a body of water is navigable or not serves a very different purpose (ie determining whether the presumption of *ad medium filum aquae* applies).¹⁸⁵

176. Also at **Paragraph 12**, this Participant suggests that British Columbia has “title” to fisheries in non-tidal waters. This statement is not accurate. Where British Columbia owns the *solum* under non-tidal waters, it will have a proprietary interest in fisheries in those waters.¹⁸⁶

177. Further, this Participant states that Canada is the “regulator” of fisheries in non-tidal waters. This statement is not accurate. Canada has jurisdiction to conserve and protect fish in non-tidal waters. British Columbia issues licences for recreational fishing in non-tidal waters.¹⁸⁷

178. At **Paragraph 131**, this Participant:

[S]uggests that ‘aboriginal fisheries’ be restricted to the exercise of aboriginal fishing rights and that any controversy on the scope of such rights be dealt with in the courts, where it belongs.

¹⁸³ *R v Kapp*, 2006 BCCA 277, at para 19, 227 BCAC 248.

¹⁸⁴ Submissions of Canada, Appendix A at para 8.

¹⁸⁵ *R v Lewis*, [1996] 1 SCR 921; *R v Nikal*, [1996] 1 SCR 1013 [*Nikal*].

¹⁸⁶ Final Written Submissions of Canada, Appendix A at para 12.

¹⁸⁷ Final Written Submissions of Canada, Appendix A at para 9.

In making this suggestion, the Participant overlooks the many decisions in which Canadian courts, including the Supreme Court of Canada, have emphasized that negotiation – not litigation – is the preferred approach to achieving resolution of issues relating to Aboriginal rights.¹⁸⁸

¹⁸⁸ *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 1357, [2008] 1 CNLR 112; *R v Van der Peet*, [1996] 2 SCR 507, at para 313 [*Van der Peet*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 207 [*Delgamuukw*].

**J. Tsawwassen First Nation and
Musqueam First Nation (Participant No. 14)**

179. At **Page 6**, the Musqueam First Nation provides no evidence to support the statement that Musqueam allocations for salmon have been reduced since the mid-1990s. In fact, the statistics compiled by Bert Ionson, in his paper entitled *Lower Fraser First Nation Fisheries: Pilot Sales and Economic Opportunity, 1992-2008*, demonstrate that Musqueam allocations for sockeye salmon have remained relatively stable from the early 1990s to the present. Actual catch numbers varied from year to year, depending on run size and harvest effort.²⁶⁷

180. In reply to **Paragraph 3** of the Tsawwassen First Nation's submissions, Canada notes that the Tsawwassen allocation for domestic (FSC) purposes for Fraser sockeye is determined based on the run size. The allocation for Fraser sockeye is described in Policy and Practice Report 18 at Appendix 3, and in Appendix J-2 of the Tsawwassen Final Agreement²⁶⁸

181. In reply to **Paragraph 4** of the Tsawwassen First Nation's submissions, Canada submits that these submissions misstate the priority of laws set out in the Tsawwassen Final Agreement.²⁶⁹ The Tsawwassen First Nation claims that a Tsawwassen First Nation law made with respect to the Tsawwassen treaty fishing right prevails to the extent of a conflict over federal or provincial laws. Canada notes that this is only true for certain categories of laws, as defined in the Final Agreement. As stated in the Final Agreement:

51. Tsawwassen Government may make laws in respect of:
- a. the designation of individuals and vessels to harvest Fish and Aquatic Plants under the Tsawwassen Fishing Right; and
 - b. the distribution among Tsawwassen Members of Fish and Aquatic Plants harvested under the Tsawwassen Fishing Right.²⁷⁰

182. Pursuant to paragraph 52 of the Tsawwassen Final Agreement, a Tsawwassen law made in respect of the matters in paragraph 51 prevails in the event of a conflict with a federal or provincial law.

²⁶⁷ CAN056469 at Appendix pp 5-7, pdf pp 29-31, Bert Ionson, *Lower Fraser First Nations Fisheries Pilot Sales and Economic Opportunity 1992-2008*, November 2009 cited in Policy and Practice Report 18, "Department of Fisheries and Oceans Policies and Programs for Aboriginal Fishing" 2 December 2010.

²⁶⁸ Exhibit 287 at p 265, pdf p 5: *Appendices Tsawwassen First Nation Final Agreement*.

²⁶⁹ Exhibit 283: *Tsawwassen First Nation Final Agreement*, 6 December 2007.

²⁷⁰ Exhibit 283 at p 82: *Tsawwassen First Nation Final Agreement*, 6 December 2007.

183. The Final Agreement also provides the Tsawwassen First Nation with other law-making powers, at paragraph 53. However, federal and provincial laws prevail in the event of a conflict with these Tsawwassen laws:

53. Tsawwassen Government may make laws in respect of:
 - a. the designation of individuals and vessels by Tsawwassen First Nation to harvest Fish and Aquatic Plants under fishing licences that are issued to Tsawwassen First Nation but that are not Tsawwassen Harvest Documents;
 - b. the documentation of individuals and vessels designated by Tsawwassen First Nation; and
 - c. the Trade and Barter by Tsawwassen Members of Fish and Aquatic Plants harvested under the Tsawwassen Fishing Right.²⁷¹

54. A Federal or Provincial Law prevails to the extent of a Conflict with a Tsawwassen Law made under clause 53.

²⁷¹ Exhibit 283 at p 82: *Tsawwassen First Nation Final Agreement*, 6 December 2007.

K. Western Central Coast Salish First Nations (Participant No. 15)

184. At **Paragraph 17**, this Participant states that:

By contrast, a treaty right to engage in an economic fishery can be established if it can be shown that the aboriginal people who signed the treaty had an established commercial treaty at the time of treaty with the non-aboriginal or aboriginal communities and achieve protection for those fisheries in the treaty. *[emphasis in original]*

Canada notes that Treaty rights are not necessarily defined by the practices of the Aboriginal group at the time it enters into a treaty. Rather, the rights contained in the treaty are derived from the terms of agreement and the common intention of the parties. Canada submits that the Commissioner should refrain from making any findings of fact with respect to the interpretation or scope of treaty rights.²⁷²

185. At **Paragraph 27**, this Participant cites paragraph 64 of *R v Gladstone*. Canada observes that only a portion of this paragraph has been quoted, and is taken out of context. Canada submits that the Supreme Court of Canada did not say that “consultation or accommodation” is needed. Rather, it held that “questions relevant to the determination of whether the government has granted priority to aboriginal rights holders are those enumerated in *Sparrow* relating to consultation and compensation”. The Court then went on to enumerate other questions relevant to the issue of priority, including the factors listed in paragraph 27 of this Participant’s submissions.²⁷³

186. At **Paragraph 33**, this Participant states that:

All members of the WCCSFN are engaged in modern treaty negotiations under the auspices of the BC Treaty Commission...

In reply, Canada notes that although the Hwlitsum has filed a statement of intent to negotiate with the BC Treaty Commission, Canada has not agreed to enter into treaty negotiations with this group.²⁷⁴

187. At **Paragraph 36**, this Participant claims that members of the TTA are beneficiaries of the Douglas Treaties.

²⁷² *R v Marshall*, [1999] 3 SCR 456 at paras 14, 78 [*Marshall*]; *R v Sioui*, [1990] 1 SCR 1025 at pp 1068-1069 [*Sioui*].

²⁷³ *R v Gladstone*, [1996] 2 SCR 723 at para 64.

²⁷⁴ Kaarina McGivney, 2 September 2011, pp 31:33 to 32:1.

188. Canada submits that the question as to which modern day Aboriginal groups are beneficiaries of the Douglas Treaties is a question of mixed fact and law, and one that is not settled in the jurisprudence. While the members of the Te'mexw Treaty Association assert Douglas Treaty rights, this is not established in law.

189. At **Paragraph 47**, this Participant claims that:

The PST provides for bilateral management of all salmon originating in the waters of one country which are subject....

In reply, Canada notes that the Pacific Salmon Treaty does not provide for the “bilateral management” of salmon. Article 1, paragraph 6, of the Pacific Salmon Treaty, cited in support of this submission, only defines the salmon stocks that are subject to the treaty.²⁷⁵

190. At **Paragraph 52**:

The WCCSFN submit that the structure of the PSC and the manner in which [the Aboriginal Fisheries Exemption] is calculated creates a disincentive for Canada to provide sufficient sockeye to meet First Nation needs.

Canada notes that there is no evidence that the Aboriginal Fisheries Exemption has served to limit overall allocations of Fraser sockeye to Aboriginal groups for FSC purposes. Indeed, actual overall allocations since the Pacific Salmon Treaty was signed averages over 700,000 Fraser sockeye, while current FSC allocations amount to almost one million sockeye.²⁷⁶

191. At **Paragraph 53**, this Participant suggests that First Nations were not involved in the negotiation or re-negotiation of the PST.

192. Canada notes that consultation with Aboriginal groups takes place in part through the three First Nations members on the Fraser River Panel of the Pacific Salmon Commission: Grand Chief Ken Malloway, Marcel Shepert, and Brian Assu, who are actively involved in all aspects of the panel's responsibilities, including the re-negotiation of Fraser sockeye fishing arrangements. Note also that Grand Chief Saul Terry and Russ Jones are First Nations members

²⁷⁵ Pacific Salmon Treaty, Article 1, paragraph 6, <http://www.psc.org/pubs/Treaty.pdf>.

²⁷⁶ Exhibit 718 at Tables 3 and 5, pp 24, 28: Technical Report No 7, “Fraser River Sockeye Fisheries and Fisheries Management and Comparison with Bristol Bay Sockeye Fisheries”, February 2011.

of the Pacific Salmon Commission who provide guidance and leadership on matters related to the implementation and re-negotiation of the Pacific Salmon Treaty.

193. The evidence before the hearing was that the Aboriginal members on the Pacific Salmon Commission and Fraser River Panel do not represent, nor are mandated by, many or most of the Aboriginal groups in British Columbia. Michael Lapointe and Barry Rosenberger, amongst others, testified to the difficulties in obtaining mandated Aboriginal representation in the Pacific Salmon Commission and Fraser River Panel.²⁷⁸

194. Aboriginal groups and organizations have input into Pacific Salmon Commission and Fraser River Panel processes through the First Nation Caucus. This Caucus consists of two commissioners, ten panel members and nine technical staff. Participants in the First Nations Caucus have ties to Aboriginal organizations from diverse geographic areas throughout the Pacific region.

195. The Caucus began meeting in 2002, and it has received funding from DFO. Since 2005, DFO funding has been provided under the Aboriginal Aquatic Resources and Oceans Management (AAROM) program. In 2009-2010, it received \$160,605 in funding from DFO under AAROM. According to its terms of reference, the Caucus “works together to advance the individual and collective interests of First Nations in British Columbia”. The Caucus provides technical support and engages in outreach to Aboriginal groups to provide information and seek input on issues. Some of the AAROM funding is allocated for Caucus members to report back to Aboriginal organizations such as the First Nations Fisheries Council and to receive feedback on priority issues. The Caucus meets before and during each Pacific Salmon Commission session, and meets periodically by tele-conference at other times. Starting in 2008, it funded a conference line so that Aboriginal groups can listen in on bilateral Fraser River Panel meetings.²⁷⁹

196. At **Paragraph 54**, this Participant states that the Pacific Salmon Commission is responsible for establishing spawning escapement targets. This is incorrect. Canada notes that

²⁷⁸ Michael Lapointe, 19 January 2011, pp 50:22 to 52:2; Barry Rosenberger, 25 January 2011, p 27:2-11, p 28:22-32.

²⁷⁹ CAN080236 at pp 18, 26-28, *Aboriginal Aquatic Resource and Oceans Management Program (AAROM) Collaborative Management Contribution Agreement*, 26 June 2009 cited in Policy and Practice Report 18 “Department of Fisheries and Oceans Policies and Programs For Aboriginal Fishing” 2 December 2010.

the Pacific Salmon Commission, through the Fraser River Panel is only responsible for pre-season planning in Fraser River panel waters.²⁸⁰

197. It is stated, at **Paragraph 56**, that although the Pacific Salmon Commission and the Fraser Panel have nominal First Nations representation, the individuals are appointed by Canada, not by First Nations. In reply, Canada notes that all Canadian members to the Pacific Salmon Commission are appointed by Canada. Aboriginal members are appointed with input from Aboriginal organizations. Aboriginal representatives on the Pacific Salmon Commission, the Fraser River Panel and other panels were selected on the basis of their fisheries expertise and their affiliation with an Aboriginal organization likely to have significant interests in the subject matter to be dealt with.²⁸¹

198. At **Paragraph 58**, this Participant states that:

Decisions made at the Fraser River Panel and the PSC are exactly the type of high-level strategic decisions that the Supreme Court of Canada has stated require consultation with First Nations. The record before this Commission is that those consultations have not occurred.

In reply, Canada refers the Commissioner to its response to paragraph 53 of this Participant's submissions.

199. At **Paragraphs 71-72**, this Participant states that only "two foundational pieces" of the *Wild Salmon Policy* have been implemented. This is inaccurate. For an overview of the implementation of *Wild Salmon Policy* Action Steps, Canada refers the Commissioner to paragraphs 394 to 437 of Canada's Final Submissions.²⁸⁷

²⁸⁰ Policy and Practice Report 4, "Overview of the *Pacific Salmon Treaty* and the Pacific Salmon Commission Regarding Management of Fraser River Sockeye Salmon" 18 October 2010 at pp 6, 9.

²⁸¹ Policy and Practice Report 4 at p 24; CAN080236 at p 28, *Aboriginal Aquatic Resource and Oceans Management Program (AAROM) Collaborative Management Contribution Agreement*, 26 June 2009 cited in Policy and Practice Report 18, "Department of Fisheries and Oceans Policies and Programs for Aboriginal Fishing" 2 December 2010.

²⁸⁷ Written Submissions of Canada at paras 394-437.

200. At **Paragraph 111**, this Participant contends that “The endpoint is expressed as both a numerical number and a percentage.” In reply, Canada notes that the allocation endpoint expressed in the Aboriginal Fisheries Framework is a percentage only.²⁸⁹

201. At **Paragraph 116**, this Participant states that:

...the adoption of a global endpoint based on a percentage allocation in and of itself [is] a fundamental change to the constitutionally guaranteed FSC right of aboriginal [sic] if implemented.

Canada submits that adoption of a global allocation endpoint will not alter the priority allocated to fishing for FSC purposes. Kaarina McGivney testified that, in low run years, as currently, harvest for FSC purposes will amount for a very high percentage of the sockeye total allowable catch. The global allocation endpoint, which is for all salmon and not just sockeye, would have to be averaged over a period of a number of years.²⁹⁰

202. At **Paragraph 120**, this Participant claims that “DFO has conceded that current FSC allocations are not based on a consistent framework.”

203. In reply, Canada submits that the evidence cited does not support this submission, nor is the conclusion consistent with other evidence presented to the Commission. The evidence cited here is a 2005 memorandum to the Regional Director General.²⁹¹ That document states that “[c]urrent allocations have not been based on a consistent policy framework”.²⁹² Ms. McGivney did not agree with that statement, and it is evident why not. After 2005, as noted in the Participant’s submissions at paragraph 119 (and in a more complete manner in Canada’s Final Submissions) Canada developed, in consultation with Aboriginal groups, a set of guidelines, principles and frameworks for FSC fisheries management.²⁹³ This is foreshadowed in Exhibit 1744, where the memorandum notes that “[a] structured approach to deal with requests for increased salmon FSC allocations is currently being developed within the Region but will not be

²⁸⁹ Kaarina McGivney, 19 August 2011, p 38:21-24.

²⁹⁰ Kaarina McGivney, 19 August 2011, pp 37:26 to 38:13; 2 September 2011, pp 91:29 to 92:7.

²⁹¹ Exhibit 1744: Memorandum for the RDG, Pacific Region: *Request for Increased Sockeye Allocation for Cowichan Tribes*.

²⁹² Exhibit 1744 at p 2.

²⁹³ Kaarina McGivney, 2 September 2011, p 33:37-47.

ready for the 2005 fishery”.²⁹⁴ In other words, the concern expressed in the 2005 memorandum, and replicated in this submission, has been addressed by DFO’s 2006 FSC operational and evaluation framework, and related principles and guidelines.

204. At **Paragraph 126**, this Participant states that:

DFO practice suggests that those First Nations with modern treaties, or a regional Indian reserve, are arbitrarily enjoying an equal, or even prioritized, right to access particular areas as compared to those First Nations without a modern treaty, or regional Indian reserve, but who fished those same areas of the river historically.

These submissions are not supported by the evidence cited. Kaarina McGivney testified about the Hwlitsum group, which was not granted a license for a number of reasons. Further, Ms. McGivney expressly denied the suggestion from counsel for this Participant that DFO gives priority to modern treaty allocations over non-treaty groups. Moreover, Julie Stewart testified that, in a terminal fishing area, where a non-treaty First Nation was seeking to fish in an area overlapping with a treaty First Nation, DFO would seek collaboration between the treaty and non-treaty group.²⁹⁶

205. The submission, at **Paragraph 128**, that there is a “general unwillingness” in DFO to increase allocations because of its time-consuming process, is not supported by the evidence present. Barry Rosenberger did not testify to any unwillingness on the part of DFO to consider allocation increases, testifying rather that there is a formal process in place that takes time to complete. Similarly, the DFO FSC Operational Framework says nothing about a general unwillingness to increase allocations, but merely discusses the process for doing so. Indeed, the evidence cited, and other evidence about DFO’s FSC allocation framework (see Canada’s Final Submissions) indicates a willingness to consider such increases where an increase is merited.²⁹⁷

206. **Paragraphs 195-196** contain a discussion of the apparent wide disparity between pre-season forecasts and actual returns in some years. Canada notes that it is important to emphasize, as it did at paragraph 341 of Canada’s final submissions, that “[p]re-season forecasts for Fraser sockeye are probability distributions rather than predictions of the actual size of the

²⁹⁴ Exhibit 1744 at p 1: Memorandum for the RDG, Pacific Region: *Request for Increased Sockeye Allocation for Cowichan Tribes*.

²⁹⁶ Kaarina McGivney, 2 September 2011, pp 30:37 to 31:32, pp 35:39 to 36:29; p 36:38-42; Julie Stewart, 2 September 2011, p 37:32-37.

²⁹⁷ Exhibit 1226 at p 4: *First Nations Access to Fish for Food, Social and Ceremonial Purposes Part I: Pacific Region Operational Framework (Working Draft)*, 25 April 2006; Barry Rosenberger, 5 July 2011, p 78:4-21.

return. However, many people fixate on the median point on the probability distribution and misconstrue that as a prediction of the return”.²⁹⁸

²⁹⁸ Written Submission of Canada at para 341.

L. First Nations Coalition (Participant No. 16)

207. This Participant's submissions contain many comments that attribute positions to DFO, but without any grounding in the evidentiary record before the Commission. See, for example, paragraph 57 of the Executive Summary, and paragraphs 551 and 633 of the written submissions. Canada will not be responding to these statements. Canada does, however, reiterate that the fact that Canada does not respond to a particular statement or assertion in a Participant's submissions should not be construed as Canada's agreement with the statement or assertion in question.

208. At **Paragraph 14**, this Participant claims that:

Rather than recognize millennia of pre-existing Aboriginal fishing rights, as Governor Douglas did through the Douglas Treaties which recognized the rights of, inter alia, the Snuneymuxw, Tsartlip and Tsawout peoples to "carry on their fisheries as formerly", and as some of the Indian Reserve Commissioners did through their reserve allotments; officials from what was to become DFO began to conceive of Aboriginal fishing rights as a "privilege" or an "act of grace" bestowed on Aboriginal people, rather than a right.

In response, Canada notes that the legal theories expressed by Dr Harris, and in particular the theory expressed in this paragraph, are controversial and not established in the jurisprudence. In his testimony before the Commission, Dr Harris acknowledged that his legal and historical theories are both controversial and unresolved by the courts.³⁰⁰

209. Canada respectfully submits that the Commissioner should not adopt Dr. Harris' submission, as there has not been a full hearing of the factual record, supported by expert evidence and legal argument, as would be the case if the issues raised by Dr. Harris were addressed in contested litigation.

210. At **Paragraph 15**, this Participant states that:

The Crown's switch from an early recognition of broadly construed pre-existing Aboriginal rights, to the development of a de-minimis vision of Aboriginal people holding a privilege to fish for food has contributed to much conflict between First Nations and DFO.

In reply, Canada refers the Commissioner to its response to paragraph 14.

³⁰⁰ Dr Douglas Harris, 27 June 2011, p 23:3-32, p 32:14-33.

211. It is stated, at **Paragraph 17**:

As is expanded on in these submissions, the FNC submits that what Governor Douglas, reserve commissioners, and others intended in the late 19th and early 20th centuries was to recognize Aboriginal rights to fish.

In reply, Canada again refers the Commissioner to its response to paragraph 14.

212. At **Paragraph 28**, this Participant claims that:

Aboriginal title includes the right to exclusively use and occupy an area for a variety of purposes and the right to choose to what ends an area will be put. The right to choose how land is used necessarily includes a management component. Given the nature of Aboriginal title, the FNC submits that recognition by the Crown of the existence, or potential existence, of Aboriginal title to a territory that includes a fishery requires the recognition of the right to manage the fishery in that territory.

The conclusions of law in this paragraph are controversial. As discussed in more detail in Canada's submissions for the "Perspectives on Aboriginal and Treaty Rights Framework" hearing, the nature, scope and content of Aboriginal title remains unsettled in law. In particular, the question as to whether Aboriginal title to submerged lands is cognizable in law has not been settled in the jurisprudence. Canada submits that any declaration of Aboriginal title would not displace federal jurisdiction to manage the fishery. The Supreme Court of Canada has confirmed that DFO by necessity must retain its central authority to manage the fishery.³⁰¹

213. **Paragraph 30** states:

In the last few years, courts in British Columbia have begun to recognize broad Aboriginal rights to fish and sell fish (see, for example *Ahousaht Indian Band and Nation v. Canada (Attorney General)*).

Canada notes that this paragraph implies that there have been other cases in addition to *Ahousaht* (which is under appeal) and *Gladstone*. However, no other authorities are referenced. Rather, in other cases, the courts have declined to find an Aboriginal right to fish for commercial purposes or for sale. There is therefore no legal basis to assert that the courts in British Columbia "have begun to recognize broad Aboriginal rights to fish and sell fish."³⁰²

³⁰¹ *Nikal* at paras 101-102.

³⁰² *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2008 BCSC 447, 166 ACWS (3d) 407, Aff'd 2009 BCCA 593, 314 DLR (4th) 385, leave to appeal to SCC granted, 33581 (June 10, 2010); *Van der Peet*.

214. At **Paragraphs 31-32**, this Participant states that:

Courts have repeatedly indicated that the content of any Aboriginal right must be guided by the Aboriginal perspective of the right.

[...]

The FNC submits that Aboriginal rights to fish would be rendered meaningless by reducing an Aboriginal right to being simply a right of access or a right to harvest. Such a right, when viewed from the Aboriginal perspective, and when considered with an appreciation for the inherent nature of Aboriginal rights, always includes the right and responsibility to manage the fishery for present and future generations, and the right to make strategic and operational management decisions, including such matters as determining necessary conservation measures, chosen fishing methods, fishing times, and habitat protection measures.

Canada notes that there is no support in the jurisprudence for the “inherent nature of Aboriginal rights”, if that statement is intended to mean that there are generic Aboriginal rights common to all Aboriginal groups. The jurisprudence is clear that the content of any Aboriginal right will depend on the facts of each case. Aboriginal rights to fish are not generic in nature and do not exist in the abstract, but must be grounded in a factual context. So, for example, proof of an Aboriginal right to fish for FSC purposes does not necessarily include an inherent economic component, nor a right to manage the fishery.³⁰³

215. At **Paragraph 33**, this Participant contends that “[t]reaty rights also provide recognition of First Nations’ rights as managers of the fishery.”

216. Canada submits that the nature, scope and content of treaty rights are defined by the terms of the treaty and the common intention of the parties. These will obviously vary from case to case, and no general statement – such as the first sentence of this paragraph – can be made without a full consideration of the treaty as a whole, the factual context (supported by expert evidence in the case of historical treaties) and legal argument. See also the response to paragraph 14.³⁰⁴

217. At **Paragraph 33**, it is alleged that:

Courts have interpreted the “fisheries as formerly” provision in the Douglas Treaties as including, at the very least, a right of priority over existing fish stocks, and the

³⁰³ *Van der Peet* at para 69.

³⁰⁴ *Marshall* at paras 14, 78; *Sioui* at pp 1068-1069.

power to manage the fishery in a manner that does not jeopardize the constitutionally rights protected in the treaties.

Canada observes that this broad conclusion of law is based upon a single decision in an interlocutory proceeding where the court granted an injunction to prevent the construction of log booms in Nanaimo harbour. The excerpts quoted from the case in these submissions are *obiter* and not grounded in a full consideration of relevant evidence. This was admitted by the judge in this application, who cautioned that: “[i]n my view, the court would be ill-advised to come to any definitive view of the rights incidental to the right to ‘carry on fisheries as formerly’.”³⁰⁵

218. In response to **Paragraph 190** of this Participant’s submissions, which states that:

Dr. McKinnell testified that the most useful approach for understanding the 2009 poor return was to seek out any evidence of extreme observations that would match the extremely low survival for that particular year of sockeye. This is the approach adopted in Technical Report #4. His evidence was that for the SOG, there were variable patterns; however, 2007 freshwater discharge was the 17th highest year peak discharge in the record. Dr. McKinnell did not think that this was unusual.

Canada notes that the evidence of Dr. Stewart McKinnell refers to the Fraser River discharge, not to all the freshwater sources discharging into the Strait of Georgia. In his testimony, Dr Richard Beamish explained how a different report revealed anomalous freshwater discharge in the Strait of Georgia when all the rivers draining to this area accounted for.³⁰⁶

219. In response to **Paragraph 562** of this Participant’s submissions, which states that:

Of the FRSS CUs that DFO has assessed, approximately 20 are noted, preliminarily, as being “in yellow or red” (referring to Figure 3 of the WSP, which outlines the benchmarks and biological status zones to be determined for each CU). The authors of Technical Report #3, who were tasked with evaluating the status of FRSS, noted that 15 of the 36 CUs have a “poor” population status and are distributed across all timing groups.

Canada notes that the best evidence of the status of CUs is found in the August 25, 2011 draft of the Sue Grant paper, currently undergoing CSAS peer review³⁰⁷ The newer draft comes to a different conclusion in that it provides a range of statuses for each CU on each metric, as

³⁰⁵ *Snuneymuxw First Nation et al v HMTQ et al*, 2004 BCSC 205 at para 33, 26 BCLR (4th) 360.

³⁰⁶ Exhibit 1303: Richard E Thomson et al “Anomalous ocean conditions may explain the recent variability in Fraser River sockeye salmon production” May 2011; Dr Richard Beamish, 6 July 2011, pp 75:12 to 76:39.

³⁰⁷ Exhibit 1915 at p 14: SCH Grant et al, “Evaluation of Uncertainty in Fraser Sockeye (*Oncorhynchus nerka*) Wild Salmon Policy Status Using Abundance and Trends in Abundance Metrics”, 25 August 2011.

opposed to a single definitive status. Further work is being conducted that will amalgamate this range of statuses for each CU.³⁰⁸ The paper remains in draft form and should not be relied upon until finalized. Dr. Carrie Holt cautioned against the use of the first draft because it contained biases in the analysis.³⁰⁹ The assessments in this paper should not be relied on to inform management actions in the interim because the assessments of status that it contains may change during the ongoing peer review process.³¹⁰

220. Further on **Paragraph 562**, the CU status assessment found in Technical Report No. 3 should not be relied upon because, on cross examination, it was found to merely rely upon the data contained in two disparate DFO reports to come to its conclusion. The Pestal and Cass assessment, which was designed for the Pacific Salmon Commission to prioritize assessment projects, did not utilize *Wild Salmon Policy* benchmarks and the previous draft version of the Sue Grant paper from December, 2010.³¹² In addition, the approach used in Technical Report No. 3 did not utilize Dr. Holt's *Wild Salmon Policy* benchmark approach of red, amber and green benchmarks but simply interpreted any assessment as being either in "poor" or "good" condition using a simple numerical approach.³¹³

221. In response to **Paragraphs 584-586** of this Participant's submissions, which allege that DFO chose to conduct the five-year of the WSP internally, rather than pursue an independent review, Canada submits that DFO did not abandon an independent review of the *Wild Salmon Policy* under Strategy 6. This is addressed in Canada's Final Submissions, at paragraphs 435-437.³¹⁴ In addition, the consultant hired to conduct the review has consulted with First Nations and stakeholders.³¹⁵

222. In reply to **Paragraph 639** of this Participant's submissions, Canada submits that there is no evidence that DFO has articulated that co-management must include all of the items listed under this paragraph.

³⁰⁸ Exhibit 1915 at p vii.

³⁰⁹ Dr Carrie Holt, 2 December 2010, p 69:30-39, p 73:15-32; 7 December 2010, p 49:7-43; pp 51:35 to 54:27.

³¹⁰ Dr Carrie Holt, 2 December 2010, p 73:15-32; 3 December 2010, pp 2:12 to 3:11; 7 December 2010, p 49:7-43; pp 51:35 to 54:27; Dr Laura Richards, 26 September 2011, pp 1:45 to 3:19.

³¹² Katherine Wieckowski, 10 March 2011, p 49:21-43, p 50:36-42, p 54:3-13.

³¹³ Katherine Wieckowski, 10 March 2011, p 54:1-3, p 65:18-44, p 66:40-47.

³¹⁴ Written Submissions of Canada at paras 435 -437.

³¹⁵ Exhibit 959 at p 2: *Statement of Work, Performance Review of the Wild Salmon Policy*.

223. In response to **Paragraph 647**, which states that:

Barry Rosenberger, Area Director for the BC Interior Region, Canadian Chair of the FRP, and Chair of the FRIMT, noted that some First Nations' decisions not to access AFS or AAROM program dollars for the reasons noted above [paragraph 646], have posed challenges for First Nations' efforts to develop Tier 1 processes. He also noted that this left some First Nations with less capacity than others, and some First Nations with weaker working relationships with DFO than others. This process has fostered distrust amongst First Nations and with DFO.

Canada submits that Barry Rosenberger did not comment on the reasons why some First Nations decide not to access the Aboriginal Fishing Strategy or AAROM program dollars, and he did not refer to the evidence cited at paragraph 646.

224. In response to **Paragraph 660**, which states that:

In addition, the historic and modern tensions between the roles and responsibilities of AANDC and DFO, as it relates to First Nations' use and management of aquatic resources, remains a significant policy and practice barrier to the proper and just management of FRSS.

Canada submits that the reference to historic and modern tensions between Aboriginal Affairs and Northern Development Canada (AANDC) and DFO being a significant policy barrier to the proper and just management of Fraser sockeye has no basis in the evidence. The paragraph only cites Dr. Douglas Harris' work on the history of the fishery. There is no evidence that this disputed point of view on the history is in any way applicable to the current state of the affairs between AANDC and DFO, and there is certainly no evidence that any such tensions could be compromising the proper management of the Fraser sockeye.

225. At **Paragraph 668**, this Participant claims that:

It appears that DFO's official approach to dealing with Aboriginal title and rights is to avoid the "elephant in the room". The FNC submits that when the "elephant" is longstanding rights protected by s. 35(1) of the Constitution Act, 1982, which have attendant obligations on the part of Canada, avoidance is dishonourable, unacceptable, and inefficient. The cost is to continue a dysfunctional governance structure that can only result in increased conflict and litigation.

In response, Canada notes that DFO manages the fishery in accordance with the *Constitution Act, 1982*, legislation and applicable case law. DFO's role is not to determine Aboriginal groups' Aboriginal rights or title, or to arbitrate between conflicting rights. As often stated by witnesses

before the Commission, and in the submissions of the First Nation participants, issues of conflicting Aboriginal rights and interests should be resolved by Aboriginal groups themselves.³¹⁶

226. At **Paragraph 671**:

The FNC submits that what is needed to advance co-management is: (a) explicit recognition of Aboriginal title and rights and treaty rights or the willingness to proceed on the basis of a strong strength of claim...

Canada refers the Commissioner to its reply to paragraph 668. The obvious difficulty with a process of co-management, based upon strength of claim assessments of the Aboriginal groups involved, is that not all groups would hold the same right, and indeed almost all Aboriginal groups in British Columbia have claims to Aboriginal rights or title, or treaty rights, that overlap or conflict with other groups. DFO does not have a role as arbiter of these overlapping and conflicting rights claims.

227. At **Paragraph 682**, this Participant states as follows:

...whereas DFO is unwilling or unable to negotiate allocations, fishing plans, or set escapement goals on a bilateral level with local First Nations.

Canada notes that Barry Rosenberger testified that DFO does not set escapement goals with a single First Nation because such bilateral decisions would impact upon a larger group of First Nations. Barry Rosenberger was not referring First Nations' allocations and fishing plans, which can - be and are - negotiated between DFO and Aboriginal groups at a bilateral level.³¹⁷

228. In response to **Paragraph 730**, which states that:

In addition, Ms. Grant testified that there are certain key areas for data improvement to the forecasts. She identified a need for further research to understand the various mechanisms driving FRSS survival (both in the marine and freshwater environments). She also noted that utilizing more indicator stocks, as opposed to simply relying on the Chilko stock, which only tells part of the story, would improve DFO's ability to conduct forecasting. Finally, she testified that further work is required to "dis-aggregate" the 19 forecasted stocks so that individual CUs could be considered.

³¹⁶ Written Submissions of the First Nations Coalition at para 692; Exhibit 493 at p 75: *Our place at the table: First Nations in the B.C. Fishery*, May 2004.

³¹⁷ Barry Rosenberger, 25 January 2011, pp 6:45 to 7:12.

Canada submits that the revised list of CUs for Fraser sockeye from August 2011 that integrates Fraser Stock Assessment's Sockeye biological input into Dr Blair Holtby's CU list addresses the recommendation in this paragraph.

229. In response to **Paragraph 800**, which states that:

The FNC is concerned that Aboriginal Fisheries ranks so high on C&P's list of activity priorities, especially when areas such as habitat compliance, and oceans commercial fisheries and recreational fisheries (ranked #5, #11, #6, and #7, respectively) are not receiving the same level of attention or prioritization from C&P. This is especially troubling since from 2000 to 2010, in the Lower Fraser the occurrence level is higher for domestic/recreational fishers than it is for Aboriginal fishers, and in the South Coast, the occurrence level is higher for both domestic/recreational fishers and domestic/commercial fishers than it is for Aboriginal fishers. Despite this fact, C&P has not undertaken intelligence projects on recreational or commercial fisheries. C&P in the Pacific Region spend approximately 5% to 600% more time on Aboriginal Fisheries (as a percentage of their work effort) than any of the other 5 regions.

Canada notes that DFO's Conservation and Protection Sector does undertake intelligence projects relating to all sectors of the fishery, not only relating to First Nations.³¹⁸

230. In response to **Paragraphs 802-808** of this Participant's submissions, concerning illegal sales of FSC fish, Canada submits that there is ample evidence before the Commission that DFO is investigating these issues and addressing them from a public safety perspective.³¹⁹

231. In response to **Paragraph 859**, which states that:

Prior to making the decision to roll-over existing licences, DFO did not query whether: (1) the Province's siting criteria addressed current concerns or scientific information; or (2) whether the Province had properly applied the siting criteria used to determine the appropriate location of fish farms, which require, inter alia, that, (a) aquaculture operations be located at least 1km in all directions from a First Nations reserve, unless consent is received; (b) an appropriate distance from areas of "sensitive fish habitat" as determined by DFO; and (c) not in areas that would pre-empt important Aboriginal, commercial or recreational fisheries. DFO did not query whether the Province had undertaken consultation with First Nations regarding the placing of such farms within their traditional territories or along the migratory route of FRSS; DFO simply assumed that the siting criteria provided a sufficient buffer to protect wild salmon and that they had been applied properly.

³¹⁸ Scott Coultish, 18 May 2011, p 91:34-40.

³¹⁹ Scott Coultish, 17 May 2011, p 31: 29-47.

Canada submits that the environmental assessment process under the *Canadian Environmental Assessment Act* does address siting concerns in a scientifically based manner. The screening is a science-based risk assessment that is structured around Valued Ecosystem components and includes consideration of population level effects, impacts to fish habitat and cumulative effects. DFO did not roll over licences based solely on provincial decision making processes. The majority of licensed salmon farms have been subject to an environmental screening led either by Transport Canada or DFO as the responsible authority. The remainder have screenings in process.³²⁰

232. Further, it should be noted that while fish farm siting was under provincial licensing, all sites were assessed by DFO through the habitat review process and, where triggered, either a DFO led *Canadian Environmental Assessment Act* screening or a Transport Canada-led screening to which DFO provided expert advice. With this history, it is incorrect to state that DFO "did not query" the appropriateness of British Columbia's siting criteria or their application.

³²⁰ Exhibit 1625: CEAA Screening Report, *Grieg Seafood BC Ltd. Proposed Finfish Aquaculture Facility at Conception Point, Nootka Sound BC*; Andrew Thomson, 30 August 2011, pp 24-25, p 58, pp 93-95.

M. Métis Nation British Columbia (Participant No. 17)

233. At **Page 4**, this Participant states that:

The DFO will not consult with MNBC until the Metis Aboriginal right to fish in the Fraser River has been proven in court.

Canada notes that the testimony of Kaarina McGivney, cited in support of this submission, does not relate to Métis rights. Rather, Ms. McGivney was speaking about DFO policy with respect to providing First Nations with commercial access on a priority basis after a court decision proving the existence of a right to fish on a commercial basis.³²¹

234. At **Page 5**, this Participant makes the following recommendation:

Recommendation 1: It is recommended that until another preferable process is available, on account of the *prima facie* right of the Metis to fish in the Fraser River fishery, the DFO consult MNBC regarding the Fraser River fishery.

Canada submits that the question as to whether a Métis community has a *prima facie* right to fish in the Fraser River, and whether Canada is required to consult with the Métis Nation British Columbia (Métis Nation) is a question of mixed fact and law. Canada submits that the Commissioner should avoid any ruling or finding that Canada should consult with the Métis Nation, as this is outside of the Commission's mandate and Terms of Reference, or, alternatively, unnecessary to fulfill the Terms of Reference.

235. At **Page 10**, this Participant states that:

It appears that DFO has now signalled a policy change pursuant to which Aboriginal groups will have the opportunity to determine title and rights through negotiation.

Canada submits that this submission is incorrect and Canada points out that, no evidence is cited to support this claim. DFO's policies for the negotiation of treaties and for consultation are long-standing, as described in more detail in Canada's Final Submissions.³²²

236. At **Page 14**, this Participant claims that:

³²¹ Kaarina McGivney, 19 August 2011, p 11:34-38.

³²² Written Submissions of Canada at paras 486-493, 539-547.

Mr. David Bevan, Associate Deputy Minister at the DFO, does not believe that monitoring is an essential component of managing a fishery.

What David Bevan actually said was that “I think I'd agree, obviously, that catch monitoring is an essential component of management of fisheries.”³²³

237. At **Pages 15-16**, this Participant alleges that:

...the Pacific Region DFO refuses to enter into an AFS agreement with the Metis despite knowing that...the Metis occupy territory throughout the Fraser River fishery and would be able to collect data from across the region.

The Métis Nation has presented no evidence that DFO has the knowledge attributed to it in this paragraph. The footnoted testimony of Captain Gary Ducommun does not support this submission.³²⁵

238. At **Page 17 (last Paragraph)**, the Métis Nation makes allegations that are incorrect or not supported by the evidence. In particular, in this paragraph the Métis Nation alleges as follows:

- It is clear that the DFO has taken a relaxed position on enforcing its fines;
- Its officers are unaware of the process to collect that money;
- This amounts to a relatively lax monitoring and enforcement system for a resource that is quickly diminishing.

239. In support of this submission, the Métis Nation relies upon the evidence of DFO witness Randy Nelson, who testified as follows:

Q Can you tell me why that's happening? Is it that there is no follow-up at the governmental end for the collection? Is it a case of the court system not following it up? Where's the problem?

38 MR. NELSON: I'm not exactly sure, but I know we don't have a system to collect and follow up.³²⁶

³²³ David Bevan, 22 September 2011, p 18:15-17 [emphasis added].

³²⁵ Written Submissions of The Métis Nation at p 16, fn 50.

³²⁶ Randy Nelson, 8 April 2011, p 68:34-39.

240. Randy Nelson clarified his evidence on this point on May 17, 2011, when he testified as follows:

Yes, what I wasn't aware of and should have been is that, and I was accurate in what I said there in that we don't have a system to collect because it's the Public Prosecution Services' responsibility. What we do have, and I also wasn't aware of, we have a standard operating procedure, which explains to Fishery Officers, if you have something, a ticket that you wrote or a fine that was supposed to be paid by a certain date, contact the courts, find out if it's been paid. If it hasn't been paid, there is a procedure to follow to try and send a letter or something and then notify Public Prosecution that it has not been paid. And that's how they get added to it. Now, Public Prosecution, since 2009, have been making some focused efforts at recovering some of these fines. I should back up. Where it involves a DFO licence, like a commercial licence, we can go to our Licensing Department and ask that when they come to renew their licence, they pay the fine at that time or they don't get issued the licence. For most of the other fines, such as sport fishing licences, we don't have that capability. But with the Public Prosecution Services, they can access Canada Revenue and get it added onto the person's income tax. In other words, if they have an outstanding balance, their amount of fine would be deducted, if they have a refund coming. So there is a means to try and recover it.³²⁷

241. Randy Nelson's May 17, 2011, testimony demonstrates that DFO and the Public Prosecution Service of Canada have a process to account for and collect fines, and are taking steps to do so.

³²⁷ Randy Nelson, 17 May 2011, pp 54:3-31.

**N. Sto:lo Tribal Council and
Cheam Indian Band (Participant No. 18)**

242. At **Paragraph 88**, this Participant states:

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

This statement of the law is controversial. Canada respectfully reiterates that the Commissioner should refrain from making any findings as to the legal rights of the Participants.

243. At **Paragraph 100** of this Participant's submissions, it is alleged that "...there is very plainly an economic dimension to Aboriginal rights in the fisheries."

Canada notes that Aboriginal rights are case and site-specific; their content depends on the facts of each case. This statement of the law is controversial. Canada respectfully reiterates that the Commissioner should refrain from making any findings as to the legal rights of the Participants.

244. At **Paragraph 123**, this Participant states that:

The failure of high level bureaucrats who work on Aboriginal policies to recognize the special standing of First Nations is cause for concern and underscores the failure of DFO to fully implement their constitutional obligations to First Nations.

In response to this submission, and to paragraphs 122-124 generally, Canada refers the Commissioner to the myriad of DFO policies and programs dedicated to promoting a significant Aboriginal presence in the Pacific fisheries and to meet Canada's legal and constitutional obligations to Aboriginal peoples.³²⁸

245. This Participant states, at **Paragraph 144**, that:

One conclusion that can be drawn from that is that the government acknowledges that they do not have jurisdiction over Aboriginal rights, since they are derived from the inherent legal and management systems of Indigenous Peoples.

³²⁸ Written Submission of Canada at paras 224, 233-242.

This is a controversial statement of the law. Canada reiterates that issue as to whether a particular Aboriginal group has Aboriginal rights is not within the Commissioner's mandate, nor is it relevant to the Commission's Terms of Reference. Further, the role of Canada with respect to managing the fishery, including with respect to rights protected under s. 35 of the *Constitution Act, 1982*, is described in Canada's Final Submissions.³²⁹

246. At **Paragraph 150**, the Participant alleges that:

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

No evidence is cited in support of this assertion, which Canada disputes. Among other topics, the issue of quota or share-based management system has been discussed in some of the fall dialogue forum sessions.³³⁰

247. At **Paragraph 150**, this Participant asserts that:

Yet in 2011 DFO unilaterally refused to sign a comprehensive fisheries agreement; although 11 bands had already signed on, DFO suddenly required the signatures of a minimum of 20 bands...As a result, DFO did not even have an FSC allocation in place for sockeye in the traditional territory of the Stó:lō people and no economic opportunity fisheries on sockeye took place in 2011.

Canada submits that there is no evidence that DFO "suddenly" required 20 Sto:lo signatures on a 2011 Comprehensive Fishing Agreement with these First Nations – with the exception of a single email from Diana Trager dated August 8, 2011. The negotiation record is not in evidence.³³¹

248. Canada's policy is to issue a license and manage to a target allocation in the event that DFO is unable to negotiate a Comprehensive Fisheries Agreement with an Aboriginal group. Licenses were issued to Sto:lo groups to fish Fraser sockeye salmon for FSC purposes in 2011.³³²

³²⁹ Written Submissions of Canada at para 188.

³³⁰ Exhibit 190: DFO website, 5th Annual Fall Community Dialogues – 2008; Exhibit 218: Department of Fisheries and Oceans, *Fall 2006 Consultations*, 20 February 2007.

³³¹ Exhibit 1757: Email of Diana Trager, 8 August 2011.

³³² Exhibit 261 at p 4: *Policy for the Management of Aboriginal Fishing*, Fisheries and Oceans Canada, 6 August 1993.

249. Also, no evidence is provided to support the assertion that no Sto:lo groups received economic opportunities in 2011. In fact, the Scowlitz and Chehalis First Nations received licenses for economic opportunity fisheries for Fraser sockeye in 2011.³³³

250. At **Paragraphs 167-168**, this Participant states that:

The internationally recognized principle of free prior informed consent, set out in the UN Declaration on the Rights of Indigenous Peoples should form the basis for all dealings with Indigenous Peoples... This international principle clearly applies to Aboriginal fishing policies, the CWF and mandate information, yet it is not implemented by DFO and the government of Canada.

The UN Declaration on the Rights of Indigenous Peoples is an aspirational, non-legally binding document that does not reflect customary international law nor change Canadian laws. Canada will interpret the principles expressed in the Declaration in a manner that is consistent with the *Constitution Act, 1982* and domestic legal framework.³³⁴

251. At **Paragraph 169**, this Participant contends that:

So while claiming to provide priority for FSC, a single allocation as proposed in the document cannot provide that.

Canada notes that while allocation end points percentages articulated in the Coastwide Framework represent combined FSC and commercial allocations, DFO is still managing FSC fisheries separately from First Nation economic opportunity fisheries. The allocation end point percentage necessarily reflects an average over a number of years, as in low run years (such as in 2009) any fishing for FSC fishery will take a very high percentage of the total allowable catch of Fraser sockeye.³³⁵

252. At **Paragraph 173**, this Participant alleges that:

Furthermore, DFO no longer negotiates fisheries agreements with single First Nations, but rather insists on signing Comprehensive Fisheries Agreements (CFAs) with larger groups.

³³³ DFO website:

http://www.pac.dfompo.gc.ca/fraserriver/firstnations/HTMLs/EconomicOpeningTimes_Previous.html

³³⁴ AANDC website: <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>.

³³⁵ Kaarina McGivney, 19 August 2011, pp 37:26 to 38:13.

Canada submits that this statement is inaccurate. In appropriate circumstances, DFO will negotiate a Comprehensive Fisheries Agreement with a single First Nation.

253. Further, at **Paragraph 174**:

There is no comprehensive policy regarding Aboriginal fisheries or specifically FSC allocations, or at least it has not been disclosed to date.

Canada submits that the submission in this paragraph is not consistent with the evidence. Rather, DFO has a comprehensive policy framework (the Integrated Aboriginal Policy Framework) and a number of programs to address FSC and commercial harvesting by Aboriginal groups, and their involvement in the management of the fishery. These programs include, amongst others, the AFS, PICFI, AAROM, and the Allocation Transfer Program.³³⁶

254. This Participant, at **Paragraphs 175-176**, states that Ceremonial permits in the Lower Fraser are limited to funerals, and that when applications are made to fish for social purposes, including canning, those applications are denied.

255. In response, Canada reiterates that DFO issues communal licences under the *Aboriginal Communal Fishing Licences Regulations* to Aboriginal groups. The communal licences that are issued to Lower Fraser Aboriginal groups are for food, social and ceremonial (FSC) purposes. Courts have emphasized that Aboriginal fishing rights are communal rights, and DFO manages Aboriginal groups' fisheries in keeping with this principle. In other words, by issuing communal licences, DFO is providing communal fishing opportunities. DFO expects that an Aboriginal group will manage its fishery such that the fish harvested when the fishery is open will be used to meet the needs of the group, including the need for fish for ceremonies.³³⁷

256. In addition, DFO does, in certain circumstances issue licenses to allow harvesting of fish specifically for a ceremonial purpose. DFO has issued permits for a range of ceremonial purposes, including funerals, weddings, tournaments and other gatherings.³³⁸

257. At **Paragraph 183**, this Participant states that:

³³⁶ Kaarina McGivney, 2 September 2011, pp 106:41 to 107:29.

³³⁷ Kaarina McGivney, 19 August 2011, p 3:22-41.

³³⁸ Scott Coultish, 18 May 2011, p 54:14-30.

[Aboriginal people] have asserted an Aboriginal, or in some cases a treaty right, to fish or sell fish without regulation, which has not been recognized by Canada.

Notwithstanding this assertion, the Supreme Court of Canada has confirmed that Aboriginal rights are subject to regulation. In particular, the Court in *Nikal* ruled that: “If the salmon fishery is to survive, there must be some control exercised by a central authority” (set out in para 189 of Canada’s Final Submissions). Canada further submits that recognizing a right to fish, or sell fish, without regulation is inconsistent with a co-ordinated and integrated fisheries management regime.³³⁹

258. At **Paragraph 187**, this Participant states that:

Aboriginal rights should be provided priority in the context of priority resource allocation and that they are the only constitutionally protected proprietary rights.

This statement of the law is controversial. The concept of Aboriginal rights as a “proprietary right” is inconsistent with Supreme Court of Canada ruling confirming that the fisheries are a common property resource. Canada reiterates that the Commissioner should refrain from making any findings as to the legal rights of the Participants.³⁴⁰

259. At **Paragraph 195**, it is alleged that:

Considerable evidence was heard in this Inquiry of very high level of adversarialism [sic] that has existed at times between C&P and First Nations.

Canada notes that there was also testimony that this relationship has improved in recent years. Testimony to this effect was provided by Sto:lo Grand Chief Ken Malloway, who noted that “[m]any of the [C&P] folks that we work with now, we know them by name. We’ve known them for years, and we’ve got a better relationship with them than we did in the past.”³⁴¹

260. At **Paragraph 225**, it is stated that:

In [his decision] Judge Boldt held that the right to “fish in common” amounted to 50% of the harvestable anadromous fish, which meant for commercial fishery, which was calculated after the deduction of the needs for conservation and Indian ceremonial and subsistence fishery.

³³⁹ *Nikal* at paras 101-102.

³⁴⁰ *Comeau’s Sea Foods* at pp 25-26; *Larocque v Canada (Minister of Fisheries and Oceans)*, 2006 FCA 237 at para 13, 270 DLR (4th) 552.

³⁴¹ Grand Chief Ken Malloway, 12 May 2011, p 88:9–21.

However, the Supreme Court of the United States amended this decision so that the needs for Indian ceremonial and subsistence fishing were included the maximum 50% allocation set aside for the Washington State tribes in the Stevens Treaty. The Supreme Court also ruled that the tribal treaty share was intended to provide tribal members with a “moderate living”, and should be reduced if tribal needs are satisfied with a lesser amount.³⁴²

261. Also at **Paragraph 225**:

In terms of the allocation, the brunt of conservation would be borne by commercial and sports fisheries, giving priority to native fisheries.

The evidence cited does not support this submission.³⁴⁴ Rather, the Supreme Court of the United States ruled that treaty and non-treaty fishers have “equal rights...neither party may deprive the other of a "fair share" of the runs”.³⁴⁵ This ruling that neither party enjoys a priority of access to the fisheries, and the ruling that subsistence and ceremonial fisheries are included within the overall 50% tribal share of the fishery, are important differences between the legal and constitutional regime governing fisheries in British Columbia.

262. At **Paragraph 227**, this Participant states:

The Stevens treaties, which applied in the state of Washington, were similar in scope and wording to the Douglas treaties signed at a similar time on Vancouver Island.

No evidence is provided to support this submission, and the citation provided also does not support this submission.³⁴⁷ The language of the Douglas and Stevens Treaties is different on its face. The interpretation of the Douglas Treaties, and their meaning and scope, are controversial issues in the law. Canada respectfully submits that the Commissioner should refrain from making any findings as to the meaning, interpretation and scope of the Douglas Treaties, or to the legal rights of the Participants generally.

263. Further, at **Paragraph 231**:

³⁴² *Washington et al v Washington State Commercial Passenger Fishing Vessel Association et al*, 443 US 658 (1979) at pp 3, 9, 24-27; Exhibit 1163 at p 132: Douglas C Harris, *The Boldt Decision in Canada: Aboriginal Treaty Rights to Fish on the Pacific*.

³⁴⁴ Exhibit 1163.

³⁴⁵ *Washington et al v Washington State Commercial Passenger Fishing Vessel Association et al*, 443 US 658 (1979) at p 24.

³⁴⁷ Exhibit 1163 at p 131.

The [Washington State] tribes remain sovereign in regard to fisheries in their traditional territories and waters...

Canada notes that the Washington State tribes are not sovereign in relation to the exercise of federal powers. While the Supreme Court of the United States confirmed that state laws did not apply to tribal reservations, and waters flowing through them, the State of Washington has jurisdiction to limit the treaty right for conservation purposes.³⁴⁸

264. At **Paragraph 236**, this Participant contends that:

...it is essential that there be Indigenous Peoples at the table as decision-makers at the Fraser River Panel and the Pacific Salmon Commission.

Canada notes that there are three First Nations members on the Fraser River Panel of the Pacific Salmon Commission; Grand Chief Ken Malloway, Marcel Shepert, and Brian Assu, who are actively involved in all aspects of the panel's responsibilities, including the re-negotiation of Fraser River sockeye fishing arrangements. Note also that Grand Chief Saul Terry and Russ Jones are First Nations members of the Pacific Salmon Commission who provide guidance and leadership on matters related to the implantation and re-negotiation of the Pacific Salmon Treaty.

265. The evidence in the hearings was that the Aboriginal members on the Pacific Salmon Commission and Fraser River Panel do not represent, nor are mandated by, many or most of the Aboriginal groups in British Columbia. Michael Lapointe and Barry Rosenberger, amongst others, testified to the difficulties in obtaining mandated Aboriginal representation in the Pacific Salmon Commission and Fraser River Panel.³⁵⁰

266. Aboriginal Groups and organizations have input into Pacific Salmon Commission and Fraser Panel processes through the First Nation Caucus. This Caucus consists of two commissioners, ten panel members, and nine technical staff. Participants in the First Nations Caucus have ties to Aboriginal organizations from diverse geographic areas throughout the Pacific region.

³⁴⁸ *Washington et al v Washington State Commercial Passenger Fishing Vessel Association et al*, 443 US 658 (1979) at 24.

³⁵⁰ Michael Lapointe, 19 January 2011, pp 50:22 to 52:2; Barry Rosenberger, 25 January 2011, p 27:2-11, p 28:22-32.

267. The Caucus began meeting in 2002, and it has received funding from DFO. Since 2005, DFO funding has been provided under the AAROM program. In 2009-2010, the Caucus received \$160,605 in funding from DFO under AAROM. According to its terms of reference, the Caucus “works together to advance the individual and collective interests of First Nations in British Columbia”. The Caucus provides technical support and engages in outreach to Aboriginal groups to provide information and seek input on issues. Some of the AAROM funding is allocated for Caucus members to report back to Aboriginal organizations such as the First Nations Fisheries Council and to receive feedback on priority issues. The Caucus meets before and during each Pacific Salmon Commission session, and meets periodically by teleconference at other times. Starting in 2008, it funded a conference line so that Aboriginal groups can listen in on bilateral Fraser River Panel meetings.³⁵¹

268. At **Paragraph 237**, it is alleged that:

...no consultations on the proper management of the fishery are undertaken based on in season estimates.

269. Canada submits that DFO engages in extensive in-season consultations with Aboriginal groups, and particularly with groups, like Sto:lo, on the Lower Fraser River. For example, during peak summer fishing season, there are weekly – and at certain times daily – fishery planning calls with Aboriginal representatives.³⁵²

270. In reply to the allegation, at **Paragraph 242**, that:

There was no independent indigenous participation from Canada in the negotiation of the Treaty, not even consultation with Indigenous Peoples.

Canada refers the Commissioner to its response to paragraph 236 of this Participant’s submissions.

³⁵¹ CAN080236 at pp 18, 26-28, *Aboriginal Aquatic Resource and Oceans Management Program (AAROM) Collaborative Management Contribution Agreement*, 26 June 2009 cited in Policy and Practice Report 18 “Department of Fisheries and Oceans Policies and Programs For Aboriginal Fishing” 2 December 2010.

³⁵² Policy and Practice Report 4, “ Overview of the *Pacific Salmon Treaty* and the Pacific Salmon Commission Regarding Management of Fraser River Sockeye Salmon” 18 October 2010 at p 27; Barry Rosenberger, 17 January 2011, pp 87:47 to 89:12.

O. Heiltsuk Tribal Council (Participant No. 21)

271. At **Paragraph 56** of its submissions, this Participant states that:

...the recognition of Aboriginal title and rights will be a necessary first step towards true joint management of the fisheries.

As noted in the Introduction to these submissions, Canada respectfully submits that rulings on legal rights are not within the jurisdiction of the Commissioner and are not relevant to the Terms of Reference.

272. At **Paragraph 67**, this Participant states that:

The need to allow Heiltsuk to determine openings and closings also flows from the lack of DFO presence on the Central Coast...They are in the best position to make the determinations of openings and closings in their area.

Canada submits that, in light of the considerable evidence of the complexity of fisheries management and the need to coordinate the several fisheries that target migrating stocks (like Fraser sockeye), allowing individual First Nations to determine openings and closings, is obviously problematic. The Supreme Court of Canada recognized this in *Nikal* when it opined that “[i]f the salmon fishery is to survive, there must be some control exercised by a central authority”.³⁵³

273. At **Paragraph 68**, this Participant states that:

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.

Canada observes that the testimony of Paul Ryall (cited in support of this submission) and of Jim Cave is that the Heiltsuk fishing area (Areas 7 and 8) is not an optimal location for a test fishery because Fraser sockeye do not consistently migrate through that area.³⁵⁴

274. At **Paragraph 83**, this Participant states that Ross Wilson testified that a key element of the Pacific North Coast Integrated Management Area governance structure was the fact that Aboriginal groups were treated as “owners” and not “users” in this model.

³⁵³ *Nikal* at paras 101-102; Written Submissions of Canada at para 189.

³⁵⁴ Paul Ryall and Jim Cave, 1 February 2011, pp 66:26 to 68:14.

275. In reply, Canada notes that the Pacific North Coast Integrated Management Area Memorandum of Understanding confirms that the process is designed to promote integrated management and communications within the existing governance framework. In particular, the Memorandum of Understanding does not alter the existing governance authorities or jurisdiction of the parties.³⁵⁵

276. At **Paragraph 89**, this Participant states that:

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.

Canada notes that the full text of paragraph 162 provides context for this submission:

162 The second part of the test of justification requires an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and aboriginal peoples. What has become clear is that the requirements of the fiduciary duty are a function of the “legal and factual context” of each appeal (*Gladstone, supra*, at para. 56). *Sparrow* and *Gladstone*, for example, interpreted and applied the fiduciary duty in terms of the idea of priority. The theory underlying that principle is that the fiduciary relationship between the Crown and aboriginal peoples demands that aboriginal interests be placed first. However, the fiduciary duty does not demand that aboriginal rights always be given priority.³⁵⁶

277. At **Paragraph 100**, this Participant alleges that:

The Framework acknowledges that the Government of Canada recognizes a fiduciary duty towards aboriginal peoples.

Canada observes that the Framework is inaccurately quoted. It states that “the Government of Canada has a fiduciary relationship with Aboriginal peoples...”.

278. At **Paragraph 119** of this Participant’s submissions:

Heiltsuk recommends that, in order to satisfy the Crown’s duty to consult...DFO disclose the current end-point percentage and the methodology employed in managing to this percentage.

The allocation end-point is a Cabinet confidence pursuant to s. 39(2) of the *Canada Evidence Act*. Moreover, Canada submits that the Heiltsuk Tribal Council submission has confused and

³⁵⁵ Exhibit 1203 at p 6: *Memorandum of Understanding on Pacific North Coast Integrated Management Area Collaborative Oceans Governance*.

³⁵⁶ *Delgamuukw* at para 162 [emphasis added].

conflated the processes of consultation and negotiation. The allocation end-points inform negotiations with Aboriginal groups, both within and outside of treaty negotiations. There is no legal requirement for the Crown to disclose its mandates for negotiations with Aboriginal groups, particularly for interest-based negotiations in the British Columbia Treaty Process and pursuant to the Aboriginal Fisheries Strategy. Even in negotiations in the context of the Crown's duty to consult, there is no duty on the Crown to disclose its mandates. As noted by the Supreme Court of Canada in *Haida*, "mere hard bargaining... will not offend an Aboriginal people's right to be consulted."³⁵⁷

279. At **Paragraphs 131-138**, the Heiltsuk Tribal Council makes submissions on events relating to HTC harvest of sockeye salmon in 2010 and 2011. The evidence on this issue was presented by two Heiltsuk Tribal Council witnesses. The Commission did not call a DFO witness who had knowledge of the events surrounding the Heiltsuk Tribal Council salmon fishery in those two years. Canada submits that any findings of fact as to the extent or adequacy of DFO's in-season consultation with the HTC should take into account the incompleteness of the factual record and, in particular, the lack of evidence from relevant DFO officials. Canada submits that the Commissioner can consider the recommendations submitted by the Heiltsuk Tribal Council at paragraphs 130, 132 and 139 without making any findings of fact based on this incomplete factual record.

280. At **Paragraph 131**, this Participant states that:

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.

Canada notes that the Commission did not call a DFO witness to provide a complete factual record of these events, so the Heiltsuk Tribal Council's submission that DFO does not honour its own "Best Practices" document should be considered in that light. Moreover, the only evidence that Heiltsuk Tribal Council adduces for this assertions in this paragraph is an email from a DFO official to Ross Wilson seeking further information from the Heiltsuk Tribal Council in response to its request for a change to its fishing area for the 2011 fishing year. The email simply request

³⁵⁷ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 42, [2004] 2 SCR 511.

further information from Heiltsuk in order that DFO's could consider Heiltsuk's request. There is no evidence that Heiltsuk Tribal Council responded to this letter. Canada submits that this evidence and submission should be given little weight, and moreover does not support the Heiltsuk submissions. Greater weight should be given to the preponderance of evidence presented by Canada of the extensive consultations it undertakes with Aboriginal groups on a daily basis (see Canada's Final Submissions).³⁵⁸

281. At **Paragraphs 133-138**, the Heiltsuk Tribal Council alleges that DFO did not inform the Heiltsuk Tribal Council of a "secret" allocation rule that prevented an Aboriginal group from having its FSC sockeye allocation harvested outside of its designated fishing area by another Aboriginal group.

282. Canada notes that there are several difficulties with the submissions in these paragraphs. The evidence presented by the Heiltsuk Tribal Council reveals the following:

- a) The Heiltsuk Comprehensive Fisheries Agreement clearly indicates the Heiltsuk Tribal Council Fishing Area. There is no provision in the agreement for Heiltsuk to harvest fish outside this area, or for Heiltsuk Tribal Council to commission another Aboriginal group or any other party to harvest its allocation outside of this fishing area.³⁵⁹
- b) The Comprehensive Fisheries Agreement contains specific terms and conditions for how Heiltsuk can designate non-Heiltsuk members and vessels to fish the Heiltsuk FSC allocations. One of those conditions is that Heiltsuk must notify DFO of any such persons and vessels designated to fish the Heiltsuk FSC allocation prior to the commencement of fishing. The agreement does not permit a person designated to fish the Heiltsuk FSC allocation to fish outside the terms of the Heiltsuk communal licence, including the requirement to fish in the Heiltsuk fishing area defined in the agreement.³⁶⁰
- c) Ross Wilson testified that the Heiltsuk Tribal Council entered into a "Nation-to-Nation" agreement with another Aboriginal group to harvest 20,000 pieces of sockeye in Johnstone Strait. Johnstone Strait is outside of the fishing area authorized under the Heiltsuk's Comprehensive Fishing Agreement in 2010. There is no evidence that the 20,000 sockeye harvested for the Heiltsuk Tribal Council were taken pursuant to a licence issued by DFO under the *Aboriginal*

³⁵⁸ Written Submissions of Canada at paras 486-493; Exhibit 1269: Email of K Wong to R Wilson; Ross Wilson, 4 July 2011, pp 102:22 to 103:7; p 103:26-41.

³⁵⁹ Exhibit 305 at pp 13, 19: *Comprehensive Fisheries Agreement*, 9 December 2009.

³⁶⁰ Exhibit 305 at p 15, s 5: *Comprehensive Fisheries Agreement*, 9 December 2009.

Communal Fishing Licences Regulations. Ross Wilson testified that Heiltsuk Tribal Council did not inform DFO of this fishery.³⁶¹

- d) Ross Wilson further testified that he did not know that another Aboriginal group could not harvest Heiltsuk's FSC allocation outside of the fishing area defined in the Heiltsuk Comprehensive Fisheries Agreement.³⁶²
- e) The 20,000 pieces of sockeye salmon were landed at Bella Bella and distributed to Heiltsuk members and other persons.³⁶³ At this time Heiltsuk Tribal Council identified a need to provide sockeye salmon to its off-reserve members living in urban areas.³⁶⁴ Only at this point did Heiltsuk Tribal Council seek authorization from DFO for an allocation and license to harvest more sockeye salmon pursuant to a First Nation-to-First Nation agreement with an Aboriginal group in Johnstone Strait.

283. It is a longstanding DFO policy that all fisheries, including the FSC fisheries, are subject to licence requirements. The 1993 *Policy for Management of Aboriginal Fishing* - which is available on the DFO website – provides that all Aboriginal fishing will be conducted under the authority of communal licenses issued under the *Fisheries Act* and the *Aboriginal Communal Fishing Licences Regulations*. The policy provides that “Aboriginal fishing should occur within the areas that were used historically by the aboriginal group or First Nation.” The policy also clearly sets out that harvesting outside of an Aboriginal group's fishing area must be pursuant to the licence and allocation of an Aboriginal group with rights to fish in the area in question:

Aboriginal individuals who wish to fish in an area outside their historical area must be designated by an Aboriginal Fishing Authority having a communal licence to fish in the area in question. Such designation must be made under the agreement or licence with the relevant fishing authority and any fish harvested pursuant to the designation will be counted towards the allocation under its licence.

284. The evidence thus demonstrates that DFO's policy with regards to fishing outside an Aboriginal group's designated fishing area is not “secret”, but rather is public and long-standing. Furthermore, there is no evidence that Heiltsuk inquired about DFO's policy in this area until after it had already commissioned a vessel to harvest sockeye outside of its fishing area. This fishing was not conducted pursuant to the Heiltsuk Tribal Council's Comprehensive Fishing

³⁶¹ Exhibit 305 at p 15, s 5; Ross Wilson, 4 July 2011, p 94:1-10, p 94:34-39.

³⁶² Ross Wilson, 4 July 2011, p 94:34-39.

³⁶³ Exhibit 304 at p 1: *Aquatic Department Dutilh (Heiltsuk for news): 2010 FSC fishery*; Ross Wilson, 4 July 2011, p 94:34-39.

³⁶⁴ Exhibit 302 at p 1: *Notice to all Food fishers*, 7 June 2010; Ross Wilson, 4 July 2011, p 50:12-14.

Agreement, and there is no evidence that the fishing was conducted pursuant to a license issued under the *Fisheries Act*.³⁶⁵

285. Barry Rosenberger testified to the importance of Aboriginal groups harvesting their FSC allocations in their traditional fishing areas, and for DFO to have a process to address applications for changes to fishing area. In particular, in an already very complex fisheries management regime, unlicensed harvesting may disrupt the careful calculations for allocations, escapement and management adjustments:

And so when you are making those kinds of determinations and trying to best utilize all the fish and making an allocation to escapement and a management adjustment or to a First Nation or to some process, if there's other fish taken out in addition to that and they're not accounted or understood in the process, then you could be creating conservation concerns or allocation issues for some other groups.³⁶⁶

286. Barry Rosenberger noted that all four sockeye stock grouping are allocated out in the management process. Aboriginal groups on the Fraser River expressed concern about coastal Aboriginal groups harvesting sockeye outside of their traditional fishing areas.³⁶⁷

287. Heiltsuk Tribal Council's submissions are critical of DFO's refusal to authorize an in-season change to the Heiltsuk Tribal Council's fishing area, to allow the Heiltsuk to commission another group to harvest additional sockeye. For the reasons just noted, DFO takes seriously requests for changes to fishing area and has guidelines, and operational and evaluation frameworks, to consider such requests. Approval of these requests must be made by the Regional Director General. As noted by Barry Rosenberger, because of the management implications, these are not requests that can be accommodated at short notice late in the fishing season.³⁶⁸

³⁶⁵ Exhibit 261 at pp 2, 3, 7: *Policy for the Management of Aboriginal Fishing*, Fisheries and Oceans Canada, 6 August 1993; Barry Rosenberger, 5 July 2011, p 2:1-33.

³⁶⁶ Barry Rosenberger, 5 July 2011, pp 4:12 to 5:1.

³⁶⁷ Barry Rosenberger, 4 July 2011, pp 100:30 to 101:8.

³⁶⁸ Exhibit 1226 at pp 12-13: *First Nations Access to Fish for Food, Social and Ceremonial Purposes Part I: Pacific Regional Operational Framework (Working Draft)*, 25 April 2006; Exhibit 1229: *DFO Guidelines for Responding to Requests by Aboriginal Organizations to Fish for Food, Social and Ceremonial (FSC) Purposes in Areas not Previously Authorized Under Communal Licences Issued by DFO to the Aboriginal Organization for FSC Purposes*; Barry Rosenberger, 5 July 2011, p 78:4-21.

288. Ross Wilson agreed that the events surrounding the Heiltsuk Tribal Council's 2010 sockeye fishery are a case study demonstrating the need for a pre-season planning process involving DFO and multiple Aboriginal groups to plan the sharing and harvesting of salmon.³⁶⁹

289. At **Paragraph 137**, this Participant makes the following statement:

...Mr. Huber's testimony that DFO has in fact made accommodations [to Aboriginal groups seeking a change to fishing area] when other host Nations have agreed.

While Barry Huber testified that DFO has made accommodations with Aboriginal groups for harvesting outside of their traditional fishing areas, in accordance with policy, he also testified that it was not a frequent occurrence. There is also no evidence as to the circumstances under which those accommodations were made.³⁷⁰

290. At **Paragraphs 140-141**, this Participant states that:

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.

In support of this submission, Heiltsuk Tribal Council rely upon Barry Huber's testimony. He agreed with a DFO document that critiqued aspects of DFO FSC management policies and practices as of 2005.³⁷¹ The HTC submissions imply that these are concerns that are still extant. However, as explained in Canada's written submissions, DFO addressed these concerns by implementing, in consultation with First Nations, a comprehensive evaluation and operational framework relating to DFO management of the FSC fishery.³⁷²

³⁶⁹ Ross Wilson, 5 July 2011, p 23:33-46.

³⁷⁰ Barry Huber, 30 June 2011, p 91:5-14.

³⁷¹ Exhibit 1225: *First Nations Access to Fish for Food, Social and Ceremonial (FSC) Purposes: Trial Implementation of Evaluation Framework*, 2 May 2006.

³⁷² Barry Huber, 30 June 2011, pp 77:25 to 78:37; Kaarina McGivney, 2 September 2011, pp 106:41 to 107:29.

291. At **Paragraphs 147-149**, the Heiltsuk Tribal Council recommends that the Commissioner recognize and affirm Aboriginal rights, and to make recommendations on allocations, joint management and other topics on the basis of this recognition. Section 35(1) of the *Constitution Act, 1982* expressly recognizes and affirms the existing aboriginal and treaty rights of Aboriginal peoples. Canada respectfully submits that, while the existing legal and constitutional framework must necessarily inform the Commissioner's recommendations and findings, the Commissioner does not have the authority – nor is this Commission the proper forum – for the making of any findings relating to the Aboriginal or treaty rights of Aboriginal groups.

IV. CONCLUSION

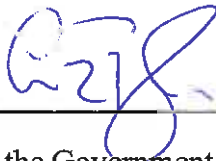
292. In addition to expressing a range of views – sometimes complementary and sometimes divergent – on the key issues under investigation by the Cohen Commission, some Participants contend that they bear little or no responsibility for the challenges that have faced Fraser sockeye. Canada notes that, pursuant to the Terms of Reference, it is for the Commissioner to make findings of fact, based on the evidence, as to the Participants' respective roles, if any, in the decline of Fraser sockeye stocks.

293. With that, Canada says that all of the Participants have a role to play in achieving the goal of a sustainable Fraser sockeye resource for the future. Canada has an important role to play in this regard – but other governments, First Nations, commercial and recreational harvesters, and environmental groups – have important roles to play as well.

294. Canada thanks the Participants and Commission Counsel and staff for their submissions, hard work, and cooperation throughout this inquiry. Canada looks forward to the Commissioner's final report.

All of which is respectfully submitted.

Dated at Vancouver, British Columbia, this 3rd day of November, 2011.



Counsel for the Government of Canada

V. LIST OF AUTHORITIES

Case Law

1.	<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i> , 2001 SCC 40, [2001] 2 SCR 241.
2.	<i>Beno v Canada (Commissioner and Chairperson, Commission of Inquiry into the Deployment of Canadian Forces to Somalia)</i> , [1997] 2 FC 527 (FCA).
3.	<i>Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)</i> , [1997] 3 SCR 440.
4.	<i>Comeau's Sea Foods Ltd v Canada (Minister of Fisheries and Oceans)</i> , [1997] 1 SCR 12.
5.	<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010.
6.	<i>Dixon v Canada (Governor in Council)</i> , [1997] FCJ No. 985 (QL) (FCA).
7.	<i>Dixon v Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission)</i> , [1997] SCCA No. 505 (QL).
8.	<i>Fowler v The Queen</i> , [1980] 2 SCR 213.
9.	<i>Haida Nation v BC (Minister of Forests)</i> , 2004 SCC 73, [2004] 3 SCR 511.
10.	<i>Jack et al v The Queen</i> , [1980] 1 SCR 294.
11.	<i>Larocque v Canada (Minister of Fisheries and Oceans)</i> , 2006 FCA 237, 270 DLR (4th) 552.
12.	<i>Lax Kw'alaams Indian Band v Canada (Attorney General)</i> , 2008 BCSC 447, 166 ACWS (3d) 407.
13.	<i>Lax Kw'alaams Indian Band v Canada (Attorney General)</i> , 2009 BCCA 593, 314 DLR (4th) 385.
14.	<i>Lax Kw'alaams Indian Band v Canada (Attorney General)</i> , 2010 CanLII 32422 (SCC).
15.	<i>Morton v British Columbia (Agriculture and Lands)</i> , 2009 BCSC 136, 92 BCLR (4th) 314.
16.	<i>Morton v British Columbia (Agriculture and Lands)</i> , 2010 BCSC 100, 2 BCLR (5th) 306.
17.	<i>R v Blais</i> , 2003 SCC 44, [2003] 2 SCR 236.
18.	<i>R v Gladstone</i> , [1996] 2 SCR 723.
19.	<i>R v Kapp</i> , 2006 BCCA 277, 227 BCAC 248.
20.	<i>R v Lewis</i> , [1996] 1 SCR 921.
21.	<i>R v Marshall</i> , [1999] 3 SCR 456.
22.	<i>R v Nikal</i> , [1996] 1 SCR 1013.
23.	<i>R v Sioui</i> , [1990] 1 SCR 1025.
24.	<i>R v Sparrow</i> , [1990] 1 SCR 1075.
25.	<i>R v Van der Peet</i> , [1996] 2 SCR 507.
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8.	<i>Management of Contaminated Fisheries Regulations</i> , SOR/90-351.
9.	<i>Oceans Act</i> , SC 1996, c 31.
10.	<i>Regulations Amending the Health of Animals Regulations</i> , SOR/2010-296.
11.	<i>Reportable Diseases Regulations</i> , SOR/91-2.
12.	<i>Species at Risk Act</i> , SC 2002, c 29.

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

In the matter of His Excellency the Governor General in Council, on the recommendation of the Prime Minister, directing that a Commission do issue under Part 1 of the *Inquiries Act* and under the Great Seal of Canada appointing the Honourable Bruce Cohen as Commissioner to conduct an inquiry into the decline of sockeye salmon in the Fraser River

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