

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

**Reply Submission of the Participants:
BC Fisheries Survival Coalition
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	MANAGEMENT BALKANIZATION.....	2
III.	FUNDING.....	6
A.	British Columbia's Terms of Union.....	6
B.	The Call for More DFO Funding	7
C.	Current DFO Spending	8
IV.	ENFORCEMENT OF ABORIGINAL FISHERIES.....	10
V.	ABORIGINAL TRADITIONAL KNOWLEDGE	12
VI.	SUBMISSION OF DOUGLAS HARRIS	15
VII.	TERMINAL FISHERIES	22
A.	Did Mixed-Stock Fisheries Cause A Decline in Fraser River Sockeye?	23
B.	Location of Upriver Commercial Fisheries to Avoid Stocks of Concern	26
C.	What are the Potential Earnings from Terminal Fisheries?	29
D.	Impact of Upriver Commercial Fisheries on Coastal Aboriginals.....	31
E.	Economic Potential of Fraser River Sockeye	31
F.	Economic Losses from Enroute Mortality	32
VIII.	THE WILD SALMON POLICY.....	33
	TABLE OF CASES	33

I. INTRODUCTION

1. The Governor General in Council directed this Commission to:
 - a. “investigate and make independent findings of fact regarding the causes for the decline of Fraser River sockeye salmon...” and “the current state of Fraser River sockeye salmon stocks,”¹ and;
 - b. “develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River...”²
2. The submissions of almost all Participants do not address the first questions asked by the Governor General in Council, namely:
 - a. On an *annual cyclical* basis, what is the extent, if any, of the decline in Fraser River sockeye?
 - i. has there been a decline in the total run size?
 - ii. has there been a decline in the net escapement?
 - iii. is any decline across all cycles from the first to last stock entering the river on an annual basis or is it limited to specific stocks in specific years?
3. After 125 days of hearings, twenty-one Policy and Practice reports, twelve Technical Reports and more than 55,000 pages³ of exhibits and close to \$30 million in expenditures, the evidentiary record of this Commission is inadequate to determine the current state of the Fraser River sockeye stocks and the extent of any decline.

¹ Commission *Terms of Reference* at a(i)(C)I and a(i)(C)II

² Commission *Terms of Reference* at a(i)(D)

³ Based on Exhibits 1214A to 1991 containing 22,677 pages of exhibits.

4. Without knowing what has or has not declined, this Commission cannot find the extent or cause of any decline: it is looking for the answer to an unknown problem.

5. Only after this Commission determined the current status of the stock in its historical context, could the Commission seek the causes of actual declines and proceeded to fulfill its mandate to “develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River...”⁴

6. The Commission’s failure to answer the first questions set to it by the Governor in Council is instructive because it begs the question: What is it about the Fraser sockeye fishery that encouraged this Commission⁵ to spend months studying DFO policy documents and a variety of arcane subjects without first answering the questions set out by the Governor in Council?

7. If this Commission is sufficiently introspective about its failure to answer these key questions, it will be considerably enlightened about why DFO’s management of the Fraser fishery has been a colossal failure and why the IPFSC (International Pacific Salmon Fisheries Commission) was so successful.

II. MANAGEMENT BALKANIZATION

8. The FNC is but one of the aboriginal groups to submit that co-management of the Fraser River fishery is not only wise policy, but a legal duty of the department.⁶

DFO Management Authority Has Been Affirmed Repeatedly

9. There is no legal requirement for co-management. The Supreme Court of Canada has rejected aboriginal claims to management authority in two cases. In *R. v. Nikal*, [1996] 1 S.C.R. 1013, Cory J. held for the majority on this point at para. XC that:

I cannot accept Millward J.’s finding that the appellant has a right not to comply with the directions of the Department of Fisheries and Oceans. This

⁴ Commission *Terms of Reference* at a(i)(D)

⁵ Pease in 1992, Fraser in 1994 and Williams in 2004 failed in this as well.

⁶ FNC Final Submission at pp. 226-253

finding is not supported by the evidence, nor is it sustainable in law. Moreover, this conclusion, if not conceded, was not seriously contested by the appellant.

10. In *R. v. Marshall*, [1999] 3 S.C.R. 533 a unanimous Supreme Court of Canada emphasized that even in the case of a treaty right at paras. 24, 25 and 40:

The Court was thus most explicit in confirming the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives, discussed below... the government's general regulatory power is clearly affirmed.

The paramount regulatory objective is the conservation of the resource. This responsibility is placed squarely on the Minister and not on the aboriginal or non-aboriginal users of the resource. The September 17, 1999 majority decision referred to *Sparrow*, supra, which affirmed the government's paramount authority to act in the interests of conservation. This principle was repeated in *R. v. Gladstone*, [1996] 2 S.C.R. 23, *Nikal*, supra, *Adams*, supra, *R. v. Côté*, [1996] 3 S.C.R. 139, and *Delgamuukw*, supra, all of which were referred to in the September 17, 1999 majority judgment.

11. With respect to the alleged duty of DFO to reach negotiated solutions to aboriginal claims, the Court held at para. 23:

The various governmental, aboriginal and other interests are not, of course, obliged to reach an agreement. In the absence of a mutually satisfactory solution, the courts will resolve the points of conflict as they arise case by case.

Balkanization of Management Authority

12. Fraser sockeye swim. That is the undeniable reason for a single management authority. Though individual aboriginal interests may be perfect fishery managers, there are 147 aboriginal bands with access to Fraser River sockeye. There are also various groups of public commercial and recreational fishermen and coastal and river communities all of whom have an interest in the fishery.

13. This Participant shares the concerns of other participants about DFO's management of the fishery during the past twenty years. This Participant disagrees, however, that fishery management will be improved by granting a variety of aboriginal or

other user groups authority to manage the fishery. There is a critical need for a single management authority over Fraser sockeye. This was one of two key factors that led to the 1937 salmon treaty with the United States and the creation of the IPFSC after almost 30 years of wrangling:

The two major issues that ultimately brought the treaty into fruition were the clear understanding in both countries that the most devastating fishery disaster known at the time needed to be fully identified and corrected, and that fishing in both countries required control by one agency represented by Commissioners from both countries.⁷

14. Since 1992, the single management authority model has been greatly undermined by DFO through the delegation of management authority to aboriginal interests and through the creation of commercial fisheries reserved for the Musqueam, Tsawwassen and Sto:lo which are not under the control of the Fraser River Panel of the Pacific Salmon Commission.

15. The problem of co-management problem is well-illustrated by the 25 years of argument over what co-management means. A 1986 memo⁸ from DFO's Area Manager on the Fraser River captures some of the problems:

The concept of co-management is not yet fully defined and at present each side applies a different meaning to the term. The view of the IIPC is that co-management implies recognition of ownership and that the fishery is then co-managed between the Government of Canada and the native people (owners)... The native approach is an example of a user group being both its allocator, manager and harvester – the best of all worlds but fraught with difficulty.

16. The confusion over what co-management means has carried over from 1986 into this Commission. Asked to define co-management, aboriginal representatives testified⁹:

MR. SHEPERT: I basically will defer that question since there is a tremendous amount of work at the B.C. wide level right now to define that. So I would leave that to the experts to define... Well, what it means to me personally is that there's a devolution within the Department of Fisheries and Oceans... an increased role for First Nations to set the course for their own.

⁷ Exhibit 75, Roos, J., *Restoring Fraser River Salmon*, p. 49

⁸ Exhibit 1277, GOC Memo from FJ Fraser to GE Jones, April 14, 1987, p. 7

⁹ Transcript, July 5/11, p47 L21

MR. WILSON: Well, first I'd like to make a point in saying that I'm on the working group with the First Nations Fish Council for co-management so that discussion is happening at that table... We want to be equal members at the table at all levels or all scales, whatever we want to call it.

MR. CREY: Well, I don't have a working definition of co-management in case that's what you're looking for... But I envision a process where, in the case of the Lower Fraser River, the Sto:lo and the Musqueam and all the other First Nations there are partners with the Department of Fisheries and Oceans in the management of their respective fisheries.

17. After 25 years of discussion, co-management is now the subject of road maps, councils and more discussions, but there are serious concerns with giving any user group management authority over the fishery. In *R. v. Kapp* 2006 BCCA 277, MacKenzie J. commented on these problems at para. 115:

In my view, there are sound reasons not to constitutionalize aboriginal commercial salmon fisheries. *Sparrow* pointed out that there are 91 separate bands along the Fraser with a claim to an aboriginal food fishery. If a commercial fishery is constitutionally recognized for some it will be hard to deny it to others. Recognition of the right also would require defining its extent in terms of quantities of fish taken and there is no obvious limit to commercial catches as there is with the food fishery to the reasonable food, cultural, and ceremonial requirements of particular bands. It would risk Balkanizing the commercial fishery and compounding the already formidable management challenges facing the DFO.

18. A simple illustration of one problem with aboriginal co-management is data collection and catch monitoring. Independence is so essential to proper management of the fishery that it is formally instituted in legislation. Section 39(1) of the *Fishery (General) Regulations* prohibits individuals from being fishery observers if they purchase fish for resale, are accredited under the *Professional Fish Harvesters Act* or own, operate, manage or are employed by an enterprise that catches, cultures, processes or transports fish. In the case of monitoring companies, s. 39.1(1) requires “a statement that discloses all conflicts of interest that the corporation or any of its directors, officers or employees, or any shareholder having a significant interest in the corporation may have with the fishing industry, and that explains how those conflicts are to be resolved.”

19. In the case of aboriginal commercial and FSC fisheries, these regulations appear to be ignored. Sto:lo fisherman, Ken Malloway, for example, is chair of the Fraser Valley Aboriginal Fisheries Society¹⁰ which monitors and observes Sto:lo fisheries.¹¹ The 2009 DFO document, *First Nation FSC Catch Monitoring and Reporting-Preliminary Considerations Standards and Recommendations*¹², does not build independence and lack of conflicts into the standards. At one of the most basic levels of fishery management, the credible collection of harvest data, aboriginal co-management has already led to the abandonment of key principles and regulations that govern public fisheries.

20. The proper alternative for aboriginal interests who desire co-management authority is to adopt the practice by aboriginal interests in Washington State. Commission PPR# 4 beginning at p. 35 shows aboriginal involvement in the Commission, but unlike Canada the aboriginal commercial fishery in Washington State, though it stems from a treaty right, is directed by the Fraser Panel.

21. **This Participant recommends that:**

- a. **all commercial fishing on Fraser River sockeye be managed by the Fraser panel of the Pacific Salmon Commission;**
- b. **all commercial fishing take place under the same rules and regulations including the monitoring of fisheries which shall be conducted independently of persons or organizations with an interest in the fishery.**

III. FUNDING

A. British Columbia's Terms of Union

22. Any discussion of funding for DFO must start with s. 5(E) of the *British Columbia Terms of Union* which states:

5. Canada will assume and defray the charges for the following services:--

¹⁰ Exhibit 853, Bio of Grand Chief Ken Malloway

¹¹ Exhibit 858, *Fraser Valley Aboriginal Fisheries Society (FVAS) Catch Monitoring Program 2010*

¹² Exhibit 860, *First Nation FSC Catch Monitoring and Reporting-Preliminary Considerations Standards and Recommendations*, 2009

E. Protection and Encouragement of Fisheries;

23. The constitutional status of the *BC Terms of Union* was set out in *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41. Iacobucci J. stated:

The required constitutional analysis begins with a recognition of the constitutional status of Term 11 of the *British Columbia Terms of Union*. Pursuant to s. 146 of the *Constitution Act, 1867* it was lawful for British Columbia to enter Canada upon terms which "shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland". Section 52(2) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, places the constitutional status of Term 11 beyond doubt. That section provides that the acts and orders listed in the Schedule to the *Constitution Act, 1982* are part of Canada's Constitution. The *British Columbia Terms of Union*, dated May 16, 1871, are listed as Item 4 in that Schedule.

24. DFO cannot rely upon funding shortfalls to justify its failure to protect the Fraser River sockeye fishery. Should there be any doubt that rebuilding Cultus sockeye, for example, is included in the term "protect" the doubt is resolved by the term "encourage."

25. For the purpose of this Commission, this participant goes no farther than contending that Canada's constitutional obligations under the *BC Terms of Union* require DFO to fund enforcement, stock assessment, critical science, and the minimal management and administrative support necessary to protect and encourage the Fraser River sockeye fishery.

B. The Call for More DFO Funding

26. Almost all parties and witnesses before the Commission argued that DFO needs more funding so the particular party or witness gains DFO funding to support their particular project. The Sto:lo, cite an "Urgent Need for More Funding" and:¹³

believes that implementing joint management and decision-making with First Nations needs to be appropriately funded to ensure that the necessary capacities are in place to enable full and informed decision-making.

27. The Conservation Coalition contends at para. 16:

¹³ Sto:lo/Cheam Final Submission

Part of the delay in implementing the WSP, particularly with respect to habitat matters, has been a lack of adequate funding. (Young, June 1, p. 80, ll. 23 – 28) According to former RDG Pat Chamut, “the first and easiest solution is probably about thirty or forty million dollars.” (November 29, p. 72, ll. 42 – 44). Others suggest approximately \$2.5 million - \$3 million annual funding is required to support implementation the WSP, and ensuring multi-year and additional funding for consistent long-term monitoring is seen as key...

28. With respect to Ecosystem Research Initiatives, the authors of Commission Technical Report #6 complain at para. 254 that:

This funding envelope severely limits the capacity of the ERIs to the point that the typical project being funded in the Pacific Region (where the ERI is focused on the Strait of Georgia) has a budget of \$10,000-\$20,000 per year (<http://www.pac.dfo-mpo.gc.ca/science/oceans/detroit-Georgia-strait/projets-projectseng.htm>). This level of support is insufficient to ever meet the goals of Integrated Management.

29. These and most other funding complaints inadvertently illustrate one of DFO’s biggest problems. DFO is trying to be all things to all people – it has forgotten its core mandate. Instead of a narrow focus on the management of Fraser River sockeye, the department is trying to “build capacity” in aboriginal organizations, conduct ecosystem research initiatives and promote the development of fish farms. Spread too thin, with hundreds of often conflicting policy objectives,¹⁴ DFO is doing almost everything badly. The shortage of funding for the pet projects of the multitude of researchers, bureaucrats and participant groups is the financial proof that DFO has lost its way.

C. Current DFO Spending

30. DFO has all the money it needs to fulfill its core Fraser sockeye responsibilities. An indication of the level of spending necessary to effectively manage the Fraser River salmon fishery is provided in the annual expenditures of the IPFSC. For the year ending November 30, 1985, for example, the IPFSC spent \$3,356,390 in 1985 dollars.¹⁵ This does not include many of DFO’s important activities in 2011, such as enforcement, but it provides a scale by which DFO’s management costs can be assessed.

¹⁴ Exhibits 8, 1924, 1923, 1923A, 1922

¹⁵ Exhibit 75, Roos, J., *Restoring Fraser River Salmon*, p. 437

31. Without considering DFO bloating and waste, funding shortfalls for key programs such as enforcement, can be resolved by terminating funding for non-core activities such as aquaculture, aboriginal organizations and other non-core activities.

32. DFO funding for aboriginal issues is illustrated in the *Treaty and Aboriginal Policy Directorate Budget 2009-2010*¹⁶ which shows DFO grants to aboriginal organizations of \$52 million in the fiscal year ended March 31, 2010.

33. An example of the type of grant made is the 2009-2010 *Comprehensive Fisheries Agreement* between DFO and the Musgamagw Marine Management Society.¹⁷ DFO granted \$185,000 to the Musgamagw for:

- a. \$35,000 for administrative costs related to the agreement
- b. \$147,500 to investigate and prepare reports on local fish stocks and consolidate aboriginal traditional knowledge
- c. \$2,500 to issue AFS communal licences and report catches.

34. In 1999, the Auditor General of Canada reported on the quality of data that DFO receives under the AFS program:¹⁸

At the time of our audit the Science Branch had received catch data for 1997 from fewer than 15 percent of the bands that were required to collect it. In 1998, the regional office reported that some First Nations on the north coast submitted either no catch data or data that were unusable. The regional office told us that some bands refuse to provide catch reports on salmon because of complications in treaty negotiations.

¹⁶ Exhibit 1429, *Treaty and Aboriginal Policy Directorate Budget 2009-2010*

¹⁷ Exhibit 308, *Musgamagw Marine Mgmt Society - Comprehensive Fisheries Agreement*, 2009, pp. 33-37

¹⁸ Exhibit 730, *Ch 20 of Report of the Auditor General of Canada*, Nov 1999 p. 20-18

35. DFO also funds various aboriginal lobby organizations such as those detailed in the AFS PICFI AAROM Funding Spreadsheets.¹⁹ One example is the advocacy group the First Nations Fishery Council which received \$300,000.

36. DFO has more than enough money to perform its core functions to protect and encourage the Fraser fishery. DFO spending unrelated to its primary mandate has caused funding shortfalls. The funding solution is *not* more money for DFO, but a refocus on its core functions. DFO should not fund advocacy activities of any organization, be it public commercial, aboriginal, recreational, fish farm or NGO. DFO should not fund any user or interest group to attend meetings or consult with the department.

37. **With respect to funding, this Participant recommends that this Commission:**

- a. identify DFO's core functions for the Fraser sockeye fishery. Such activities include enforcement, stock assessment, critical science and a minimal administrative budget to support these activities;**
- b. determine a budget to properly fund the core activities;**
- c. recommend funding the core activities at a set dollar value with an appropriate factor for growth;**
- d. recommend the termination of funding for all user and advocacy groups**

IV. ENFORCEMENT OF ABORIGINAL FISHERIES

38. The Sto:lo/Cheam contend that DFO should not enforce the law against illegal sales and instead simply grant aboriginal interests an allocation which they may use for any purpose.²⁰ This contention fails to recognize the difference between a food fishery

¹⁹ Exhibit 1430, *AFS PICFI AAROM Funding Spreadsheets*,

²⁰ Sto:lo Cheam Submission, p. 77

and a commercial fishery, but Jardine P.C.J. in *R. v. Douglas*²¹ highlighted the difference between the two fisheries in his ruling convicting several Sto:lo/Cheam fishermen for fishing during a closed time at para. 51:

On the evidence of Mr. Quipp, Mr. Wood and Mr. Victor, no one actually counts how many fish the Cheam catch. Mr. Quipp estimated his catch with Mr. Wood, his partner, to be conservatively 10,000 or more Sockeye, as well as more than 1,000 Chinook. If he is correct and there are 60 such fishers, the Cheam take a large number of fish. This would constitute an estimate in the hundreds of thousands. Mr. Quipp was candid when he said that of the fish he caught, he first satisfied his need, and then he sold approximately 90 percent of the remainder. (emphasis added)

39. Had Quipp restricted his fishing to fishing for “food,” he would have caught less than 1,000 sockeye and 100 chinook. Had the Cheam Band restricted its fishery to food, rather than illegal sales, the sockeye harvest would have been in the tens, not hundreds of thousands of sockeye.

40. DFO can get the FSC fishery under control by reducing FSC allocations to reasonable needs, reducing FSC fishing times and by ensuring that FSC is not sold. Of these three steps, assessing the true FSC needs is the most difficult, given the refusal of some groups to advise DFO about their FSC requirements and the exaggerations of FSC needs by other groups.

41. **This Participant recommends that DFO controlling illegal sales by:**

- a. fisheries for FSC purposes be restricted to one day per week (some aboriginal fishermen may not be able to fish on a specific day, each aboriginal witness before the Commission testified that their community shared the FSC catch among those without fish, so anyone not able to fish on a specific day would have their needs met through the community);**
- b. that regulations be passed requiring:**

²¹ *R. v. Douglas et al*, PCBC File No. 125032-2; upheld on appeal at *R. v. Douglas* 2007 BCCA 265

43. This participant agrees that there is some value brought to the science and fisheries management tables by all fishermen including recreational, public commercial and aboriginal fishermen. This participant does not, however, rank TEK or the knowledge of the membership of this participant on the same level as the science that drives the management of the Fraser fishery in 2011.

44. David Close is a Professor of Aboriginal Fisheries at UBC. He is also the Director of Aboriginal Fisheries Research at UBC and is a member of the faculty of the Department of Zoology and the Fisheries Centre at UBC.²³ Under cross-examination he testified:²⁴

Q Dr. Close, you have told us about the value of Aboriginal traditional knowledge and the need to insert, if I may, that knowledge, for want of a better term, we've been calling western science. And I heard, during your evidence, some very general principles, but I'm wondering if there are any specific areas where you think Aboriginal traditional knowledge would be particularly useful?

DR. CLOSE: Yes. Well, first of all, it's considered indigenous knowledge and then TEK, traditional ecological knowledge, is considered as a subset of indigenous knowledge. And also, I also, yesterday in the evidence, I mentioned that both of them - and I promote both of them - should be used in attaining knowledge about biological questions needed for management. So I'll just try to straighten that out. I think that, yeah, there are examples and there are many things that western science and society, the research that's going on in the Fraser right now, may not be addressing, and there are fisheries or species that may be in trouble that aren't being addressed, and this traditional knowledge might be the only knowledge base, and we need to be able to tap that and for better management. For example -

Q And I think we'd all agree that any knowledge from any source is useful, but it's the examples that I was interested in.

DR. CLOSE: Yeah, well, like oolichan, traditional knowledge on oolichan, they're basically about to be listed, I believe they should be, and they are in the Columbia, they were just listed as endangered, and there really hasn't been much work at all on oolichan using western science, you know, scientific methods. So I think that with that being said, I think there's a lot of knowledge based on thousands of years of use and harvest by First Nations and tribes in the States, so that's my main point.

²³ Transcript, Close, D., Oct. 28/10, p10 L17

²⁴ Transcript, Close, D., Oct. 29/10, p8 L12

45. Close was unable to provide a single specific example of where aboriginal knowledge would be useful in the management of the Fraser River sockeye fishery. There is a difference between local knowledge based on pattern recognition and real science which offers explanations for observed physical phenomena that can be justified and supported by controlled and repeatable experiments in which the variables are minimized.

46. Chief Charlie of the Chehalis elaborated on the type of traditional knowledge contained within his community:²⁵

Again, if you look at some of the traditional knowledge of how the elders used to think about the return of certain things, according to everything else around it sorry, I talk with my hands and so the pussy willows. When the pussy willows arrive and when the robins come back, and then when there's a little black bird that hops around at our we call our swimming holes, where you go for your spiritual bath, when those things come around again, that's when that early spring salmon comes back, the squawkum. So you look for those signs before you actually go out.

47. This knowledge is not equal to, for example, the scale and DNA analysis used to determine stock composition to help decide whether a fishery should be opened on a Monday or Wednesday. Aboriginal knowledge, along with the local knowledge of other fishermen, has severe limits. Musqueam Fisheries Commission representative Joe Becker accurately stated the problem with aboriginal traditional knowledge:²⁶

I think traditional knowledge, given the time frame of where we are today, has to evolve. Methods of fishing have changed. Fish have changed. So we use our traditional knowledge about run size and when fish are coming, but we fish by today's methods because of the technology.

48. Local and traditional knowledge held by Canadians of aboriginal and other ancestries is already formally included in the management of the Fraser River sockeye fishery through user group participation in the Pacific Salmon Commission. Although the PSC currently has no management authority over aboriginal fisheries on Fraser sockeye,

²⁵ Transcript, Dec. 13/11, Charlie, W., p69 L7

²⁶ Transcript, Dec. 13/11, Becker, J., p9 L14

whether for FSC or commercial purposes, aboriginal representatives are included at each level of the Commission, the Fraser River Panel and various technical committees.²⁷

49. Granting local forms of knowledge, including aboriginal knowledge, equal status with modern fisheries science will only cause further problems. The problems associated with the incorporation of TEK in other forums were reviewed by Widdowson F. who concluded in the use of TEK in the cases of oil sands development, the hunting of bowhead whales in the Arctic and global warming that²⁸:

it is difficult to see how epistemological relativism, by maintaining that there are different “ways of knowing”, can contribute to improved environmental policies. What it actually does is aid the process of “manufacturing uncertainty”, where governments delay decision making on the basis that negative environmental impacts have not been “proven”

50. **This Participant recommends that there be no formal status for and no process be created to formally recognize any form of local knowledge or historical knowledge be it held by Canadians of aboriginal ancestry or any other ancestry.**

VI. SUBMISSION OF DOUGLAS HARRIS

51. The submission by Douglas Harris, *The Recognition and Regulation of Aboriginal Fraser River Sockeye Salmon Fisheries to 1982*,²⁹ is heavily relied upon by the Sto:lo/Cheam, but Harris’s submission was a biased analysis that does not reflect the true proud history of Canadians of aboriginal ancestry in the British Columbia commercial salmon fishery. The examples below only scratch the surface of an analysis that misled rather than informed this Commission.

²⁷ PPR #4, pp. 36-42

²⁸ Widdowson, F., “Indigenous Ways of Knowing” and the Environment: Does Epistemological Relativism Contribute to the Protection of Western Lands?, p. 19

²⁹ Exhibit 1135. Harris, D., *The Recognition and Regulation of Aboriginal Fraser River Sockeye Salmon Fisheries to 1982*

The Missing Supreme Court of Canada Decision in Van der Peet

52. Harris relies a number of court decisions including the Supreme Court of Canada decision in *Sparrow* regarding the Musqueam fishery at the mouth of the Fraser River and the *Boldt* decision regarding aboriginal fisheries in Washington³⁰ as well as Vancouver Island treaties with the Hudsons Bay Company³¹:

The analysis begins with the Douglas Treaties, the fourteen agreements the Hudson's Bay Company signed on behalf of the British Crown with Aboriginal peoples on Vancouver Island in the early 1850s. The company concluded these agreements, which included a fisheries provision, with Aboriginal peoples who were all catching Fraser River sockeye. The right to "fisheries as formerly" in the treaties was early recognition of the importance of the fisheries to Aboriginal cultures and economies.

53. Notably absent from his submission is the Supreme Court of Canada decision *R. v. Van der Peet*, [1996] 2 S.C.R. 507 which dealt with Sto:lo claims to the trade and barter or commercial sale of Fraser River sockeye salmon and the Hudson's Bay Company. At para. 84, Lamer C.J. quoted the learned trial judge for the majority:

Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.

This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic.

³⁰ *ibid*, p. 33

³¹ *ibid*, p. 2

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly described trade as occurring through the "idiom" of maintaining family relationships:

The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. . . .and archaeological evidence was in conflict. This Court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.

Exchange of fish was subject to local conditions of availability, transportation and preservation.

The Supreme Court of Canada Decision in Nikal

54. Harris also disregards the finality of Supreme Court of Canada decisions on aboriginal claims to river and fishery ownership when he states at p. 34:

Two Supreme Court of Canada decisions in the mid-1990s suggest that the effective bonds between land and fish are likely to remain weak, despite the fishing purposes for which the majority of reserves in British Columbia were allotted. (emphasis added)

55. Rather than a "weak" link between reserves and the fishery, a unanimous Supreme Court of Canada held in *R. v. Nikal*, [1996] 1 S.C.R. 1013³² that any presumption that the fishery was included in Indian reserves was entirely rebutted after a thorough review of the historical record relating to the fishery and reserve creation:

Any intent to grant the bed of the river has been conclusively rebutted. It will be remembered that the acreage of the reservation indicates an intention to exclude the river. In addition, the retention of the fishery by the Crown leads to the presumption that the bed of the river was retained by the Crown. As Coulson and Forbes point out at p. 368 in *The Law relating to Waters, supra*, the cases of *Marshall v. Ulleswater Steam Navigation Co., supra*, and *Holford*

³² *R. v. Nikal*, [1996] 1 S.C.R. 1013 beginning at para. LXXXI, see also *R. v. Lewis*, [1996] 1 S.C.R. 921

v. Bailey (1846), 8 Q.B. 1000, 115 E.R. 1150 (reversed in the Exchequer Chamber on other grounds (1850), 13 Q.B. 426, 116 E.R. 1325), stand for the proposition that:

No doubt the allegation of a several fishery, *primâ facie*, imports ownership of the soil, though they are not necessarily united.

As a result, it would appear that the common law as it existed at the time the reserve was allotted would lead to the conclusion that the presumption that the title to the bed of the river would pass with the allotment of the shore had been rebutted. There is no doubt that the Crown intended to keep the fishery in its own possession. Accordingly, the allotment of the shore cannot be presumed to have included the title to the bed of the river *ad medium filum aquae*. To the contrary, the presumption is that with the title to the fishery goes the title to the bed of the river. The appellant has failed to demonstrate any intention or action on the part of the Crown to rebut this presumption.

It may now be helpful to summarize what I consider to be the relevant evidence and the applicable principles of law which determine the first issue.

1. The Crown in all of its manifestations was consistently clear in its statements that no exclusive fishery should be granted to Indian bands in British Columbia. This is consistent with the fact that the Crown had no power to grant an exclusive fishery, and that after Confederation this would involve the grant of provincial property.

...

3. The presumption *ad medium filum aquae* does not apply on the facts of this case because:
 - a. Correctly considered the river is navigable, and the application of *ad medium filum aquae* to navigable rivers was not adopted into the common law of British Columbia since it was unsuited to local conditions.
 - b. Fishing as a right can be the subject of a separate grant or reservation. On the facts of this case it is clear that the fishery was reserved from the allotment.

56. The decisions of the Supreme Court of Canada in *Van der Peet*, *Nikal* and *Lewis* show serious errors in Harris's theory of aboriginal fishing rights and ownership through the reserve creation process and the Hudsons Bay Company. Not every writer supporting aboriginal claims is expected to be an expert on the law, but Harris is a law professor at the University of British Columbia. His disregard for these decisions is the choice of an advocate, not the type of neutral expert retained by a commission of inquiry

Aboriginal Fishermen and the BC Fishery

57. Harris submits at p. 34 that:

Aboriginal fishers, so prominent and important while the industry emerged in the nineteenth century, had, by 1920, become an insignificant part of the fleet that worked the lower reaches of the Fraser River and the Strait of Georgia. This remained the case through most of the twentieth century.

58. Percy Gladstone of the well-known Heiltsuk Gladstone family offers a different analysis in his 1953 paper *Native Indians and the Fishing Industry of British Columbia*³³:

Despite these formidable difficulties, native Indians in growing numbers have more than held their own in the fishing industry of British Columbia. Today, perhaps as many as 10,000¹ of them derive their livelihood from fishing and allied occupations, and they have become a vital and necessary part of the labour force in that industry. Their ability to compete on an even basis with the whites is beginning to instil in them a new pride. They are rapidly losing their recent apathy, and becoming an organized and articulate element that may acquire a considerable economic and political bargaining power in this province.

59. Rolf Knight's book *Indians at Work*³⁴ also paints a different picture than Harris. In the chapter *Commercial Fishing and Cannery Work*, he describes aboriginal fishermen as capable, competitive and far from the victims of circumstance described by Harris. Harris is correct when he notes the decline in aboriginal participation in the Fraser River sockeye fishery, but fails to note that right from the beginning of the Fraser fishery, aboriginal fishermen came from all over the coast:

³³ Exhibit 1739, *Native Indians and the Fishing Industry of British Columbia*, pp. 20-21

³⁴ Exhibit 1946, Knight, R., *Indians at Work - An Informal History of Native Labour in BC, 1848-1930*, [1996] at p. 182

By the 1880s Indian fishermen and cannery workers were already drawn from long distances, travelling by canoe and steamer, to the major canneries. The Fraser River canneries drew Indian fishermen and workers from the length of the coast – from Sooke, from the Cowichan reserves on Vancouver Island and the Gulf Islands, from Musqueam and the lower Fraser Valley reserves, from the Kwakiutl of Alert Bay and Fort Rupert, from Bella Coola, and sometimes even from as far afield as the Skeena. Even canneries relying upon regional Indian labour also drew native fishermen and cannery workers from many different locales. This must have resulted in an interchange of experience and widened social contacts among members of Indian groups.⁵

60. In 1904, for example, some 300 aboriginal fishermen based on the Skeena River near Prince Rupert took advantage of jobs and advances offered by the Albion Cannery and left the Skeena for the Fraser River.³⁵ Following the collapse of the Fraser River fishery after the slides at Hells Gate, aboriginal fishermen from all over the coast moved their focus to the Skeena River. In 1925, in northern BC, aboriginals held 1,049 of 2,865 gillnet licences and were a substantial force in what then was the biggest fishery in BC.³⁶

61. Aboriginal fishermen also used their political power to reduce or eliminate their competition. Following the end of World War II, “some native spokesmen were vociferous proponents of Japanese Canadian exclusion.”³⁷ The *1925-26 Annual Report of the Department of Fisheries*³⁸ describes the results of earlier attempt to achieve the same result:

The department’s policy of eliminating the Oriental for the fisheries of the province with a view to placing the entire fishery in the hands of white British subjects and Canadian Indians appears to be working out well as is shown by statement No. 10 which covers a very large proportion of the total number of licences which Orientals were permitted to hold... it is the intention to continue this percentage each year until these industries are entirely in the hands of Whites or Canadian Indians.

³⁵ Exhibit 1946, Knight, R., *Indians at Work - An Informal History of Native Labour in BC, 1848-1930*, [1996] at p. 203

³⁶ Exhibit 1945, *Fifty-Ninth Annual Report of the Fisheries Branch for the Year 1925-26*, p. 3 of 4 (PDF)

³⁷ Exhibit 1946, Knight, R., *Indians at Work - An Informal History of Native Labour in BC, 1848-1930*, [1996] at p. 325

³⁸ *ibid*, p. 2 of 4 (PDF)

62. Although Harris did not provide this Commission with a single example of discriminatory government policies towards Canadians of aboriginal ancestry, in northern BC in the mid-1920s, aboriginal and “White” fishermen were permitted to use gas powered fishing vessels, but fishermen of Japanese ancestry had to row. Kitchen PCJ in *R. v. Kapp* 2003 BCPC 0279 described how fishermen of Japanese ancestry beat this DFO policy beginning at para. 144:

During the 1920's there had been a Federal government policy to gradually eliminate Japanese ancestry fishers from the commercial fishery. According to Rintaro Hayashi the white and Native fishers had lobbied the government for legislation preventing the Japanese ancestry fishers from using gas motor boats. Kasawa had said to himself,

"If I use a motorboat the government will arrest me and bring the case to court, then I can find myself in court without spending money. If I lose the case, I'll be put in jail because I'm single and have no responsibilities in life. I don't have to consider myself. Justice is my only concern, and whatever happens I will never regret risking imprisonment for it. After all, it isn't all bad if a jail cell becomes my home. Yet if I win..."

With these thoughts in mind Kasawa travelled from the Skeena area to Steveston where he sought the financial support of Budden's grandfather and the other Japanese fishers. He then returned to the Skeena, bought a second-hand motorboat and went fishing. He was arrested for breaking the discriminatory law and was taken to jail. According to Hayashi, he said to the judge at his trial,

"Your Honour, the reason why I'm here is not to defend myself, because I'm aware that I broke the law. I'm here to appeal for justice. We Japanese, like other people, have immigrated to Canada and have become citizens of Canada. Some of us have been born in Canada. Canada is not only your country but also our country. We're all Canadians. But according to the present fishing law, white and Indian fishermen can use motorboats while the Japanese cannot. We are not blind to this racial prejudice against us, Your Honour. My faith is in the principle of Justice upon which this country is founded. If justice is found anywhere on earth it is here in Canada. I want only to see justice done."

Kasawa won the case. Hayashi concluded in his book that, "You can be sure it was not only Kasawa's victory but also Canada's victory. Truly it was a triumph of justice over racial prejudice..."

63. After six weeks of trial, Kitchen PCJ summed up the history of Canadians of various ancestries in the BC commercial fishery at para. 38:

Aboriginals have had special access to the resource for food fishing ever since. Commercial fishing laws have been applied equally to Aboriginal fishers keeping them on the same footing as other Canadians in the commercial fishery. There has been systemic government discrimination from time to time but not involving Aboriginals; Oriental fishers have endured various government restrictions, restraints, confiscations, and prohibitions.

64. This Participant strongly contests the view that Canadian fishermen of aboriginal ancestry were incapable of competing in and were victims of various government policies designed to eliminate them from the BC commercial salmon fishery. A work of advocacy or art could make such a case through omissions and errors, but an honest careful review of the historical record shows that aboriginal fishermen were tough competitors on the water, were politically astute and were involved in all aspects of the industry from its outset.³⁹

VII. TERMINAL FISHERIES

65. Mr. David Levy, the chief scientist of this Commission, endorses upriver commercial fisheries⁴⁰ (terminal fishery is a misnomer), but his advocacy is typical of the terminal fishery submissions before this Commission: heavy on the concept, light on facts. Analysis of the need for and conservation impacts of upriver commercial fisheries is virtually non-existent. It is a policy built upon unproven assumptions. Among the many unanswered questions are:

- a. what evidence is there that mixed stock fisheries in the Lower Fraser and on the coast are responsible for the “decline” in Fraser River sockeye or even a decline in biodiversity?

³⁹ ³⁹ Exhibit 1946, Knight, R., *Indians at Work - An Informal History of Native Labour in BC, 1848-1930*, [1996] see the summary record of aboriginal involvement in industry strikes beginning at p. 200

⁴⁰ Exhibit 1947, Levy, *BC Sockeye Salmon Population Declines: Probable Causes and Recommended Response Strategies*, 2006, p. 26

- b. where would upriver commercial fisheries be located to achieve the claimed objective of not intercepting stocks of concern?
- c. to what extent, if any, would upriver commercial fisheries enhance biological diversity as compared to coastal commercial fisheries?
- d. what would be the impact on other runs of similar timing?

66. Several of these questions are briefly reviewed below, but the incomplete answers only serve to highlight the paucity of analysis on so-called terminal fisheries. The dearth of serious analysis shows that DFO's other justification for upriver fisheries – revenue for certain favoured aboriginal interests – is DFO's real reason to close coastal in favour of upriver commercial fisheries. There is, however, conclusive evidence that:

- a. potential earnings of upriver commercial fisheries are limited, irregular and insufficient to build an industry, yet endanger the coastal fishery;
- b. potential earnings for upriver aboriginal groups are largely, if not totally offset, by losses to aboriginal fishermen on the coast;
- c. the economic losses caused by harvesting substandard quality sockeye in upriver commercial fisheries will cause hundreds of millions of dollars in losses to Canada every decade.

A. Did Mixed-Stock Fisheries Cause A Decline in Fraser River Sockeye?

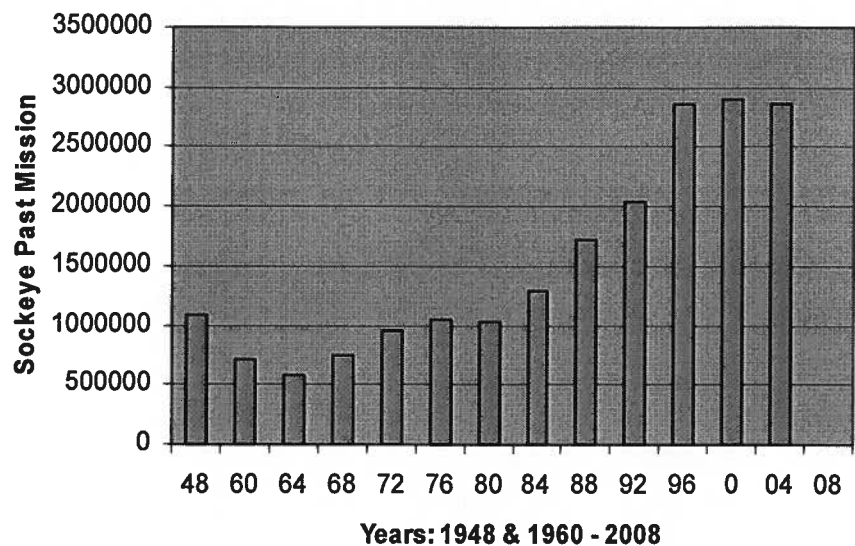
67. *Restoring Fraser River Salmon*⁴¹ shows the massive rebuilding of Fraser sockeye in total run size, escapement and biological diversity from 1946 to 1985 despite a much larger and much more intensive coastal commercial fishery. Also, since 1962, with rare exception, the coastal commercial fleet steadily increased the number of sockeye passing Mission upriver the boundary beyond which the coastal fleet is permitted to fish.⁴²

⁴¹ Exhibit 75, Roos, J., *Restoring Fraser River Salmon*

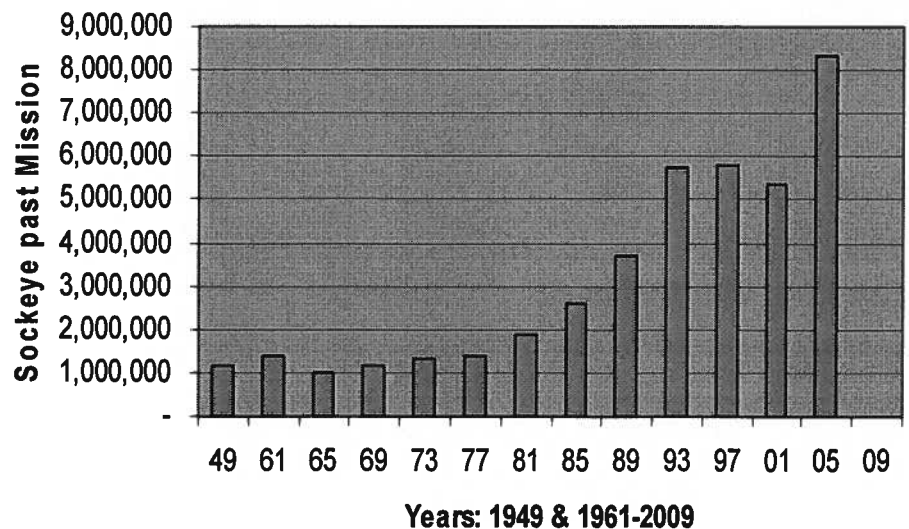
⁴² Data compiled from PPR #10, Table 6, pp. 20-22 and Ex. 75, Roos, J., *Restoring Fraser River Salmon*, pp. 385, 389, 391, 393, 395, 397, 433 (Gross Escapement = Net Escapement + Fraser River Indian Catches)

2008 CYCLE

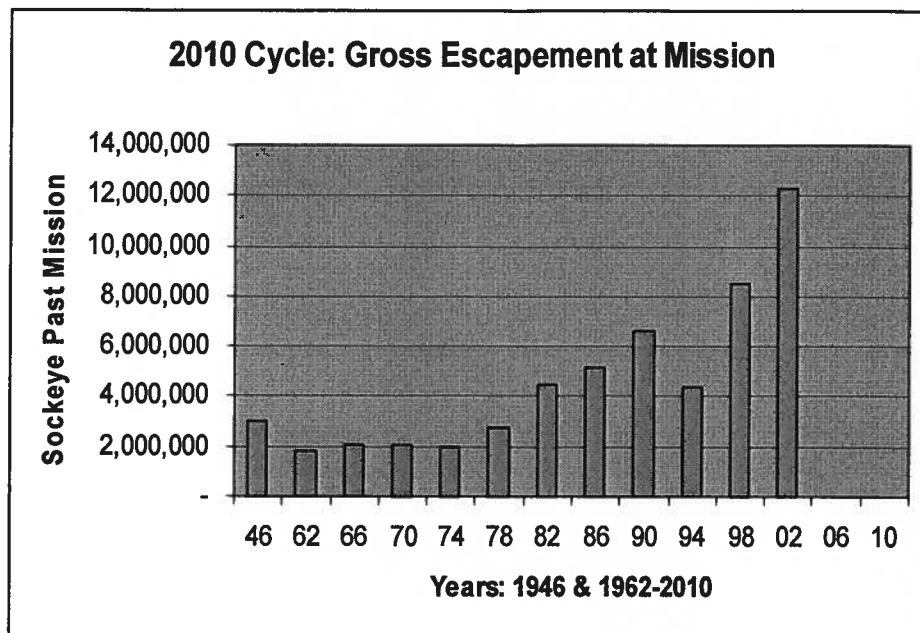
Year	Gross Escapement
1948	1,078,055
1960	711,674
1964	572,098
1968	750,897
1972	963,131
1976	1,056,915
1980	1,034,491
1984	1,288,477
1988	1,727,000
1992	2,036,000
1996	2,872,000
2000	2,892,000
2004	2,855,000
2008	evidence gap

2008 Cycle: Gross Escapement at Mission**2009 CYCLE**

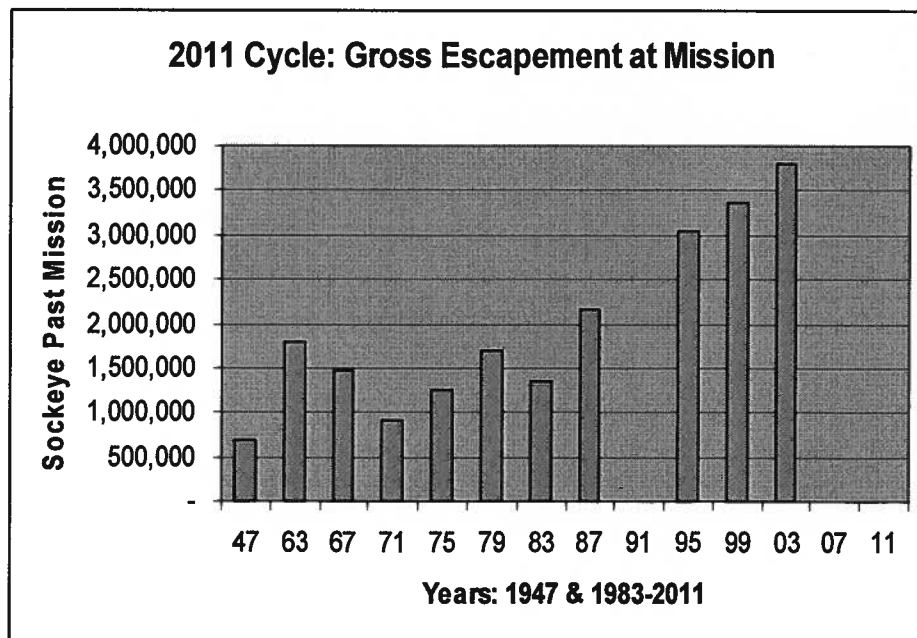
2009 Cycle	Gross Escapement
1949	1,167,649
1961	1,387,281
1965	972,841
1969	1,166,077
1973	1,344,959
1977	1,357,880
1981	1,884,160
1985	2,580,618
1989	3,718,000
1993	5,717,000
1997	5,804,000
2001	5,340,000
2005	8,343,000
2009	evidence gap

2009 Cycle: Gross Escapement at Mission

2010 CYCLE	
Year	Gross Escapement
1946	2,966,393
1962	1,761,452
1966	2,073,667
1970	2,093,776
1974	1,980,741
1978	2,751,870
1982	4,454,060
1986	5,121,000
1990	6,631,000
1994	4,359,000
1998	8,518,000
2002	12,252,000
2006	evidence gap
2010	evidence gap



2011 Cycle	
Year	Gross Escapement
1947	692,391
1963	1,796,926
1967	1,460,813
1971	901,984
1975	1,245,702
1979	1,699,537
1983	1,338,794
1987	2,153,000
1991	evidence gap
1995	3,054,000
1999	3,352,000
2003	3,807,500
2007	evidence gap
2011	evidence gap



68. These charts prove that the coastal commercial fishery has a long record of excellence in passing Fraser sockeye through their fisheries to Mission, upriver from

which fishing by the public commercial sector is prohibited. Even in years of crisis, such as 1992, the coastal commercial fleet passed a greater number of fish through its fishery than on the previous cycle.

69. A disappointing exception to this standard of excellence was coastal fleet over-fishing on the Adams Run in 1994 due to faulty run size calculations.⁴³ In 1994, although Late Run gross escapement was 1,138,000 sockeye compared to 3,557,000 in 1990. On the following cycle year in 1998, heavy restrictions on the coastal fleet rebuilt gross escapement to 3,310,000.⁴⁴

B. Location of Upriver Commercial Fisheries to Avoid Stocks of Concern

70. In his paper, chief Commission scientist David Levy states that “The decline in the Early Stuart population is primarily due to the reduction of the Driftwood River population.”⁴⁵ Levy further contends at p. 26 that:

To protect sockeye biodiversity and the reduction of fishing pressure on weak stocks, this will require the development of commercial inland fisheries.

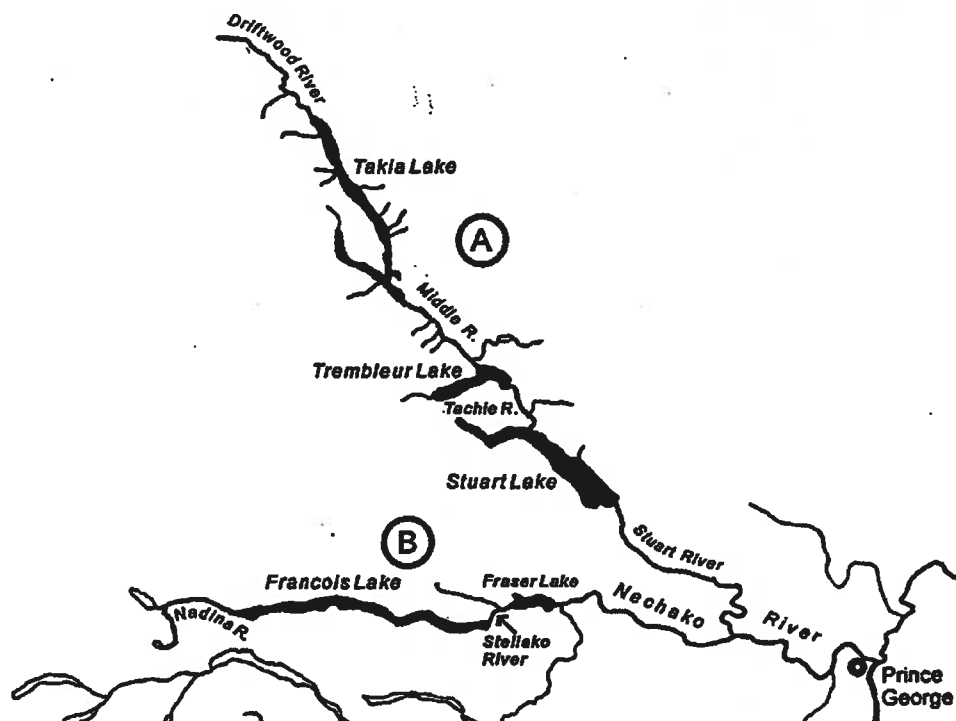
71. To test Levy’s statement in the context of Driftwood sockeye it is useful to consider the potential location of an upriver fishery to harvest the Early Stuart run timing group, but avoid the Driftwood component. The map below⁴⁶ shows that the Driftwood River is the northern extremity of all Fraser River sockeye spawning grounds.

⁴³ Exhibit 77, *Fraser River Sockeye 1994 - Problems & Discrepancies*, FRS Public Review Board, p. xiii

⁴⁴ PPR# 10 at pp. 32 and 33.

⁴⁵ Exhibit , Levy D., p. 15 & 26

⁴⁶ Exhibit 603, *Report of the Fraser River Panel to PSC on 2004 FRSS Fishing Season*, 2004, p. 35



72. As the map illustrates, no fishing could occur down-lake in the Takla, Trembleur, or Stuart Lakes region because any fishery would intercept Driftwood sockeye. Nor could there be a fishery on the Nechako River downriver of the Stuart River junction or anywhere on the Fraser River downriver from Prince George. Of course, no fishery could take place at the mouth of the Driftwood River because the harvest would be primarily Driftwood sockeye.

73. No so-called “terminal fishery” can rebuild Driftwood sockeye. If rebuilding Driftwood sockeye is a true objective, the only solutions are to enhance Driftwood habitat or close aboriginal fisheries (the only group to target the stock) on the Early Stuart run timing group or both.

74. Another example of DFO creating upriver commercial fisheries without testing unproven assumptions was the 2010 “terminal” fishery on Fraser River sockeye that

occurred somewhere⁴⁷ in Shuswap Lake. In 2010, the coastal commercial fishing fleet was closed prematurely on the grounds that it was intercepting too many Thompson River coho⁴⁸, yet the migration route for Thompson coho, both North and South Thompson requires passage through Shuswap Lake.

75. All the so-called terminal fishery did was move the seine fishery from the coast to Shuswap Lake where the concentration of Thompson coho was even greater. This new fishery catches Thompson coho that survived the arduous migration up the Fraser River. Even if one assumes the catch and mortality rates are the same as the coastal fishery (both rates are likely higher because of a narrow migration corridor and the catch and release will have higher mortalities on a coho weakened from its journey up the Fraser and Thompson rivers), the inland fishery has a negative conservation impact compared to the coastal fishery. Unfortunately, DFO has provided this Commission with no analysis of catch or mortality rates on coho in a seine fishery in Shuswap Lake or any other terminal fishery.

76. A key difference between so-called terminal fisheries in Shuswap Lake and coastal commercial fisheries is the conservation risks to stocks heading to a specific stream. There is no chance, for example, that a seiner could eliminate an entire run heading to a specific stream because the run is spread out, both geographically and over a number of days/weeks. In contrast, fish destined for a specific stream may group near the mouth of the stream while waiting for suitable conditions to move upstream which makes an entire stock particularly vulnerable to a fishery.

77. The lack of information DFO has about the alleged conservation benefits of upriver commercial fisheries was illustrated by RDG Farlinger's testimony:

Q Yeah. Thank you. So we've heard quite a bit about the economic cost of moving into terminal fisheries, and I gather there hasn't been a good study done. Have we looked at the biological cost of moving into terminal fisheries? Has

⁴⁷ Transcript, Sept. 27/11, Farlinger S., p42 L31

⁴⁸ Transcript, Sept. 27/11, Farlinger S., p83 L34

there been an analysis looking at specific proposed terminal fishing sites and whether or not they will protect stocks that are weak?

MS. FARLINGER: There has been a measure in terms of where demonstration fisheries take place, and a consideration of a reduction in the number of stocks that are fished. And the potential management tools like timing and other elements that are available further up the river as opposed to in a fishery where there are more stocks and more uncertainty with respect to the other fishery management elements.

78. Upriver commercial fisheries are a DFO major initiative justified by alleged conservation benefits, yet DFO's most senior official in the Pacific Region offered an unanalyzed and unproven "measure" and "consideration" of potential conservation benefits. Levy, DFO and others are using the guise of "conservation" to close coastal commercial fisheries in favour of inland commercial fisheries for reasons other than conservation.

C. What are the Potential Earnings from Terminal Fisheries?

79. Three studies are in evidence concerning terminal fisheries. The first study, *Terminal Fisheries Quality and Financial Variability*,⁴⁹ was conducted in 1994. The results were summarized at p. iii:

- The fresh fish evaluated were designated as Utility grade. All fish exhibited quality attributes typical of late run or sexually mature fish in that the fish skin was heavily watermarked and covered with slime. The colour of the flesh ranged from red to white, losing colour as the weeks progressed.
- Of the 44 canned product lots evaluated, 57% of the skinless/ boneless packs qualified as Acceptable, another 26% as Marginally Acceptable (due to pale colour) and the rest (17%) were designated as Grade B. Quality attributes included some late odours and flavours, heavily watermarked skin and soft texture. There was considerable variation in fish flesh colours, from pink to white/grey, within each treatment group and in some cases within the same can of fish.
- Those fish processed into barbecue style and hard cure cold smoked styles were also found Acceptable. As a result of low fat content the texture was grainy and chewy in many cases and the products were very thin.

⁴⁹ Exhibit 1423, *Terminal Fisheries Quality and Financial Variability*, 1994, p. iii

80. The second study was *Near Terminal Commercial Fisheries Development Program 2007*.⁵⁰ The fishery caught a total of 144 chinook and almost 11,000 pink salmon and its failed sales were summarized as:

Five restaurants in the BC southern interior were surveyed, but no sales were made. Three retail outlets in the Okanagan were contacted; two were sent small product samples and one bought a small quantity. The fish buyer/broker bought 25,215 lbs of pink salmon; the males were taken away at no charge. Approx. 1,500 lbs of chinook were also taken by the buyer/broker, but no payment of sales information was received. About 10% of the chinook produced in the program were actually sold.

81. The third study,⁵¹ *Okanagan Nation Alliance-Pilot Demo Fisheries 2010*, concerned the sale of sockeye caught in Okanagan Lake. With total revenues of \$10,983, the cost of producing the report likely exceeded the total revenue of the fishery.

82. This Participant concurs with the analysis on terminal fisheries in the final submission of the Seafood Producers Association Of British Columbia at pp. 8-9. The expertise of the processing sector in marketing one of British Columbia's most valuable food resources compared to DFO was conceded by DFO's Regional Director General:⁵²

Q So does anybody in DFO got the several hundred years of experience of marketing salmon that our major processors do?

MS. FARLINGER: I don't believe we have anyone in DFO with marketing experience. I would say that we meet regularly with processors, as well as with all of the other stakeholders. We meet regularly with the B.C.C. Food Processing group. (emphasis added)

83. Although DFO is meeting with, it is clearly not listening to the firms who do have the marketing expertise. Domestic and international markets demand high quality fish processed to the highest standards: salmon caught in upriver commercial fisheries do not make the grade. Every fish caught in a terminal fishery is a loss to the people who work in the coastal fishery and to British Columbia and Canada.

⁵⁰ Exhibit 1425, *Near Terminal Commercial Fisheries Development Program 2007*, p. iv

⁵¹ Exhibit 1424, *PICFI-Okanagan Nation Alliance-Pilot Demo Fisheries 2010-2011*, 2010, p. 18

⁵² Transcript, Farlinger, S., September 27, 2011, p43 L47

D. Impact of Upriver Commercial Fisheries on Coastal Aboriginals

84. No DFO terminal fishery study contemplates the effect on the large number of Canadians of aboriginal ancestry in the public commercial fishery. In her report, *Native Participation in Upriver Commercial Fisheries*,⁵³ Michelle James stated that Native fishermen hold 30 percent and operate an additional 2.2 percent of all regular commercial salmon licenses in BC. They also owned or operated 47.7% of the seine fleet in 2003.

85. Fraser sockeye are divided differently amongst the troll, seine and gillnet fleets on the coast. The seine fleet harvests about 50 percent of Fraser sockeye,⁵⁴ so even without considering gillnet and troll participation, for every 100 sockeye allocated to upriver aboriginal interests, 25 are taken directly from coastal aboriginal communities.

86. Compared to most coastal communities, especially isolated coastal reserves such as Alert Bay, Ahousaht and Bella Bella, the Okanagan offers a staggering abundance of economic opportunities. By design, however, upriver commercial fisheries reallocate high quality high value ocean caught sockeye from less-favourably located communities to inland commercial fisheries producing low quality low value fish in communities with an abundance of economic opportunities.

E. Economic Potential of Fraser River Sockeye

87. Fraser River Panel reports combined with aboriginal populations demonstrate the limits on the economic potential of Fraser sockeye:

Year	Canadian Commercial Harvest ⁵⁵	Landed Value of Harvest at \$10 per Sockeye	Number of Aboriginals With Access to Fraser Sockeye ⁵⁶	Annual \$ per 100 Percent of Aboriginal with Access to Fraser Sockeye	Annual \$ per 10 (ten) Percent of Aboriginal Population with Access to F.S.
2001	475,000	4,750,000	79,421	\$60	\$600
2002	2,447,000	24,470,000	79,421	\$308	\$308
2004	1,329,200	13,292,000	79,421	\$167	\$167
2005	141,500	1,415,000	79,421	\$18	\$18

⁵³ Exhibit 503, James, M., *Native Participation in BC Commercial Fisheries*, 2003, pp. 4 & 6

⁵⁴ Exhibits 458 and 459, *Summary of Final 2009 Allocation Charts and Tables from the CSAB/DFO Allocation Meeting*, 2009, p.

⁵⁵ Exhibits 70, 74, 602, and 603, *Annual Reports of the Fraser River Panel* for 2001, 2002, 2004 and 2005

⁵⁶ Exhibit 1221, *Population or Membership Data for Aboriginal Organizations*, (total of 2010 population)

88. Even if every single sockeye harvested for commercial purposes was reallocated solely to aboriginal groups with access to Fraser River sockeye, the annual gross income per person income would have been less than \$500. This does not even consider the cost of a fishing net. In the best year of the four years, even if only 10 percent of the aboriginal population with access to Fraser River sockeye fished commercially, gross income would have been only \$600.

89. This chart is also useful because that there can be no sustainable commercial fishery on the coast because most of the money is earned in one or two years of the four year cycle. For the same reason, there is no hope of a sustainable commercial fishery in inland waters, but the problem is magnified because the coastal fleet has access to all Fraser stocks whereas inland groups only have access to local stocks.

90. This analysis is incomplete because it does not reflect what should have been harvested in 2001 and 2002, the landed value per sockeye is generous, and it assumes that fish caught for food purposes is truly caught for food purposes and not sold, but it does illustrate the financial limits of the Fraser River sockeye fishery.

F. Economic Losses from Enroute Mortality

91. Although DFO is pressing ahead with inland commercial fisheries, DFO has not yet considered the losses that will arise from enroute mortality if coastal harvests are foregone in favour of expanded harvests in inland waters. These losses arise from fish that cannot be harvested in inland waters because they never reach those waters. Some of these fish could not be caught in coastal fisheries to ensure that escapement goals are met, but there is also a significant portion that could be harvested in coastal fisheries. DFO has done no analysis of this factor.

92. **The Participant recommends:**

- a. **That there be no commercial fishing in non-tidal waters except to control an unavoidable over-escapment.**

VIII. THE WILD SALMON POLICY

93. The *Wild Salmon Policy* was endorsed by almost all witnesses appearing before the Commission and in almost all the submissions to the Commission. This Commission spent considerable effort reviewing the *WSP*, but it was not a balanced approach

- a. There were 12.5 days of hearings concerning the *WSP*;
- b. On ten of those days, the panels consisted only of DFO witnesses or former DFO employees;
- c. Of the twelve witnesses who testified on the *WSP*, ten were DFO employees or former DFO employees;
- d. The public commercial fishery had one witness for two days on panels with at least three other witnesses, two of whom were DFO or former-DFO employees.

94. The public commercial sector was almost entirely marginalized from the hearings on the *WSP*, but there are also voices inside and outside of DFO who have serious concerns about the *WSP*. The evidentiary vacuum of contrary voices was highlighted by *WSP* advocate and former DFO employee Brian Riddell:

Q: Now, I was interested in your comment that some people in DFO haven't bought into the *WSP* or have concerns about it. I'm wondering, where are those voices?

DR. RIDDELL: Well, I mean, I don't –

Q: I don't see them reflected in the *WSP* or public discourse or this Commission. Maybe you can help me on that one. Where are they?

DR. RIDDELL: Well, I think in terms of the departmental and public discourse, we're past that. We had achieved this national policy, and it is their requirement, now, to implement this policy.

95. The preference for *WSP* advocates over witnesses with concerns about the *WSP* left many critical questions unanswered. Such questions include:

- a. Why do certain DFO and other scientists and other knowledgeable persons outside of DFO have problems with the *WSP*?
- b. What did fishery managers do prior to the *WSP* to preserve sockeye diversity while ensuring a sustainable public coastal commercial fishery?

96. These and many other questions about the *WSP* need answers, but the Commission only heard almost only from *WSP* advocates many of the questions about the *WSP* have been left unanswered. This participant cannot answer the first question, but IPFSC fishery managers were aware of and took numerous steps to protect biological diversity long before the *WSP* was a thought in someone's imagination.

In 1959 the Commission was concerned about high fishery exploitation rates on less abundant stocks migrating through the fishing areas at the same time as races of high production. An example was the Pitt River run, which suffered from low fry production caused by frequent flooding and scouring of its spawning areas.

97. There are two important points in this passage; (1), the managers of Fraser River sockeye wanted to protect weak stocks at least 40 years prior to the *WSP*, and (2), nature has made some spawning grounds less productive than others.

98. The question is how to deal with stocks that are less productive. As this Commission heard with respect to Cultus sockeye, DFO's primary approach was to ignore the problem until it became a crisis. Once it became a crisis DFO held consultation meetings, developed strategies and policies, but did little real work to rebuild Cultus sockeye for years other than close the public commercial fishery. DFO has still done almost no work on the habitat problems.

99. There is no reason to expect that DFO will act any differently to any red light stock, thus red light status means a closure or near closure of any harvest of co-migrating stocks. In contrast to DFO's Cultus approach, the IPFSC built an experimental hatchery in 1960 adjacent to the upper Pitt River, but within a couple years the IPFSC recognized

that the hatchery program was a failure and constructed an in-gravel incubation facility which had its first year of operation in 1963.⁵⁷ The four year period from problem, to hatchery, to failure, to new facility is remarkable given that DFO a similar period just to approve, but not fund, a seine operation to harvest a predator in Cultus Lake.

100. Another example of correcting deficiencies caused by nature stemmed from a drastic decline in Adams River sockeye following the tremendous return in 1958. Following low returns in 1962 and 1996, engineering studies determined that a natural change in flow distribution caused the right bank channel to dry considerably during the winter which exposed eggs and led to increased mortality. The *IPFSC* excavated the river bed to increase flow in the right bank channel from 10 to 40 percent. The process continued until 1978 when the lower Adams run regained abundance.⁵⁸

101. The productive coastal commercial fishery on Fraser River sockeye began in the 1880s, so by the time the *WSP* was created, there had been some 120 years of commercial fishing on the coast, but genetic diversity was abundant as was acknowledged by lead advocate for the *WSP*, Brian Riddell who testified.⁵⁹

Q And you'll accept that that diversity now can be described as "rich", or even as "staggering".

DR. RIDDELL: Those are both I think a bit subjective, I guess. But it's certainly a rich diversity when you look at the diversity that you have in salmon generally. It's much greater than a number of other fish species.

Q Well, the word "rich" I chose because it came from a paper that you had written.

DR. RIDDELL: Mm-hmm.

102. Fraser sockeye stocks that went extinct were made extinct by dams. As Riddle further testified with respect to extinct stocks of Fraser sockeye:

Q Yes. I thought you said there hadn't been an entire CU that had gone extinct.

⁵⁷ Exhibit 75, Roos, J., *Restoring Fraser River Salmon*, pp. 212-216

⁵⁸ Exhibit 75, Roos, J., *Restoring Fraser River Salmon*, p. 226; see pictures at p. 227

⁵⁹ Transcript, Dec. 1/10, Riddell, B., p16 L39 and see Exhibit 75, Roos, J., *Restoring Fraser River Salmon*, p. 40 for the specific cause of the Allouette and Coquitlam decline (dams)

DR. RIDDELL: You have to consider the lake-specific populations of sockeye would almost certainly have been CU's, and that, so we talk about Coquitlam, Alouette -- what was the other one? Oh, and then we had the Upper Adams River we referred to.

Q Yes.

DR. RIDDELL: Upper Adams being a dam effect, however.

Q Yes. Well, the Alouette and Coquitlam were also habitat-related issues, were they not?

DR. RIDDELL: Yes, they were, yes.

103. A key reason for the “magnificent” success experienced by the IPFSC⁶⁰ was “primarily related to the simplicity of its mandate and the efficient manner in which it was permitted to implement the decision making process.”⁶¹

104. In contrast to the IPFSC’s simple mandate, as stated by former RDG Paul Sprout,⁶² the *WSP* is now the key DFO policy:

So if you go back to number one, what's guiding number one? What's guiding the conservation objective? Well, domestically, from DFO's perspective, it will now be the Wild Salmon Policy. The Wild Salmon Policy will be informing number one.

105. The *WSP* is 57 pages long and written with so many platitudes, vague statements and contradictions that anyone reading the policy from any perspective can find something that will please their specific interest. If, for example, the reader is concerned about a loss of fishing opportunity due to concerns over a small stock.⁶³

The policy aims to maintain CUs but recognizes there will be exceptional circumstances where it is not feasible or reasonable to fully address all risks. Where an assessment concludes that conservation measures will be ineffective or the social or economic costs to rebuild a CU are extreme, the Minister of Fisheries and Oceans may decide to limit the range of measures taken. Such a decision will be made openly and transparently.

⁶⁰ Transcript, March 4/11, Sprout, P., p23 L23, “Would you agree that that was a pretty magnificent job of rebuilding Fraser sockeye? MR. SPROUT: I would.”

⁶¹ Exhibit 75, Roos, J., *Restoring Fraser River Salmon*, pp. 301-303

⁶² Transcript, March 4/11, Sprout, P., p22 L14

⁶³ Exhibit 8, *The Wild Salmon Policy – A Snapshot*, p. vi

106. If a reader is concerned about ecosystem management or biological diversity they will be reassured by:

This policy goal will be advanced by safeguarding the genetic diversity of wild salmon populations, maintaining habitat and ecosystem integrity, and managing fisheries for sustainable benefits.⁶⁴

107. The *WSP* means whatever the reader, policy maker or fishery manager wants it to mean. As to objectives and implementation, this problem was highlighted by the testimony of former RDG Paul Sprout:⁶⁵

Now, when you come to the Wild Salmon Policy, the question is, is are there objectives? Well, there is. I mean, look at the policy on page 8. There's a little house. And the little house at the top has a goal. Then it has objectives. Then it has strategies. There are six strategies. Under the six strategies there's 17 actions. So the strategies are bound to be realized by implementing these actions. Then there's a set of principles.

108. With respect to the strategies and actions, Holtby wrote in 2011⁶⁶:

There are over 450 CUs that have been identified for Pacific Salmon (Holtby and Ciruna 2007). While assessment methods for determining the biological status of CUs (Holt et al. 2009) are close to completion these methods tend to require an extensive analytical effort. Given the number of CUs and the wide range in the availability and quality of useful information for each CU, a method or tool to rapidly approximate conservation status, and the presence of severe data limitations, is required to prioritize both assessment and management activities.

109. Thus six years after the implementation of the *WSP*, DFO has yet to complete the process for determining the status of CUs and data limitations prevent the proper calculation of CU status even if there was a completed process. In fishermen terms, the *WSP*, at least with respect to Fraser River sockeye, is dead in the water

⁶⁴ *ibid*

⁶⁵ Transcript, March 4/11, Sprout, P., p22 L25

⁶⁶ Exhibit 1972, Holtby, L., *A Synoptic Approach for Assessing the Conservation Status of Pacific Salmon on a Regional Basis*, p. vii

110. The alternative to the uncertainty, confusion and wasted expenses created by the *WSP* is to return to the escapement strategy which rebuilt the Fraser River from destitute levels to great abundance by the end of the 1980s. This management strategy was based on clear measurable escapement goals for 19 stocks⁶⁷ which were combined into four major run timing groups.⁶⁸

111. This Participant adopts Recommendation 7 of the Participant, the West Coast Trollers (Area G) Association and United Fishermen and Allied Workers Union:

That the present WSP be scrapped and be replaced with a restatement, in simple and understandable terms, of the intent of the WSP to provide for MSY while avoiding any unreasonable and genuine risk of extirpation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

Date: November 3, 2011



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⁶⁷ See p. 45 of the *Report of the Fraser River Panel 1998*, at p. 45 (not in evidence)

⁶⁸ Transcript, Nov. 8/10, Lapointe M., p18 L29

TABLE OF CASES

TAB	CASE	PAGE/S
1	<i>British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)</i> , [1994] 2 S.C.R. 41	7
2	<i>R. v. Douglas et al</i> , PCBC File No. 125032-2	11
3	<i>R. v. Kapp</i> 2006 BCCA 277	17
3	<i>R. v. Kapp</i> 2003 BCPC 0279	21, 22
5	<i>R. v. Nikal</i> [1196] 1 S.C.R. 1013	2, 17
6	<i>R. v. Lewis</i> , [1996] 1 S.C.R. 921	17
7	<i>R. v. Marshall</i> , [1999] 3 S.C.R. 533	3
8	<i>R. v. Van der Peet</i> [1993] 5 WWR 459	16