

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

REPLY SUBMISSIONS

Heiltsuk Tribal Council

November 4, 2011

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1.0 Lack of transparency

1. DFO’s current fishery management regime applies a command and control approach lacking in transparency and accountability with respect to their policies and decision-making. This was a primary concern expressed in the final submissions of Heiltsuk Tribal Council (“Heiltsuk”), and it is echoed in the final submissions of various other participant groups in this commission, including First Nations, Non-Governmental Organizations and Commercial fishers.
2. This commission has been faced with the daunting task of understanding and providing recommendations on how to manage not only a biologically complex species—the life cycle of which carries these salmon across the province and deep into international waters—but also an iconic resource subject to numerous political complexities with conflicting stakeholder interests. DFO may fall back on this biological and political complexity as justification for their current opaque

centralized approach. Heiltsuk, however, submit that it is the very complexity of Fraser River sockeye salmon that necessitates a particularly high standard of transparency and accountability if these political and biological complexities are to be appropriately addressed.

2.0 Industry's influence on decision-making

3. A key concern expressed by other participant groups with respect to DFO transparency is that industry appears to have an improper degree of influence over DFO decision-making, putting into question whether DFO is truly managing the salmon fisheries with conservation as its primary concern.
4. Heiltsuk support the final submissions of the Conservation Coalition that focus on the lack of transparency and independence in DFO science (para. 22 - 26). The participant group comprised of the Area D Salmon Gillnet Association and Area B Harvest Committee ("SGAHC") has likewise expressed a concern that political considerations may be influencing DFO's decisions on what scientific work to undertake to the detriment of its mandate for conservation (pp. 62-63). This is clearly inappropriate.
5. Political motivations such as the promotion of industry, whether commercial fisheries or fish farming, should not be allowed to impede upon DFO's ability to effect conservation of the Fraser River sockeye salmon among other fisheries resources. The Commissioner's recommendations should be informed by the value of increased policy and decision-making transparency to keep DFO accountable to its stakeholders and thereby ensure greater cooperation and trust among these stakeholders.
6. Heiltsuk further endorse the final submissions of the Conservation Coalition in its expression of concern with DFO decision-making authority ultimately residing at the Ministerial level (para. 26). The First Nations Coalition ("FNC") also

expresses a concern in its final submissions that there is a lack of transparency regarding the Minister's role in the Integrated Fisheries Management Plan ("IFMP") process, and that the decisions reached through this process may be undercut by lobbying after meetings have already been closed (para. 758). Heiltsuk echo these concerns. DFO's current top-down and centralized approach leaves the ultimate decision-making authority unaccountable to stakeholders and may allow for an unwarranted amplification of industry influence.

7. Heiltsuk also share the concern expressed in the Conservation Coalition's final submissions that DFO gives preferential treatment to the aquaculture industry over other stakeholders and promotes this industry's interests over conservation (paras. 52-56). This is also argued strenuously in the submissions of the Aquaculture Coalition (pp. 66-68). Heiltsuk agree that the evidence before this commission has strongly suggested DFO's scientific capacity has been heavily weighted towards the defence of the aquaculture industry, putting into question its partiality and its legitimacy as regulator of the fisheries as a whole.

Endorsed recommendations:

8. Heiltsuk support the following recommendations of other participants:
 - a) The Conservation Coalition's recommendation that DFO "Examine the role of science in decision making and ensure its independence through the establishment of an independent body" (para. ii.1);
 - b) The Conservation Coalition's recommendation that DFO "Ensure that decision making occurs in as transparent a fashion as possible by suggesting that Ministers must give full reasons for decisions" (para. ii.2);
 - c) SGAHC's recommendation that DFO "Remove the aquaculture industry promotion, liaison and public affairs functions from DFO to ensure that the

Department's mandate to protect wild salmon is not compromised" (p. 75);
and

- d) SGAHC's recommendation that "Fish farm monitoring must be carried out by organizations (governmental or non-governmental) that are completely independent from the aquaculture industry to ensure a thorough and unprejudiced audit process".

3.0 Undisclosed policies and mandates for FSC allocations

- 9. Heiltsuk also wish to emphasize their concerns with the level of transparency in DFO's current management of aboriginal fishing activities. DFO's policies for making food, social and ceremonial ("FSC") fishing access and allocation decisions have been partially disclosed only as a result of the processes of this commission. These policies were not previously public or available to First Nations and therefore not consulted on.

- 10. As a result of this commission, FSC access and allocations have been shown to be based on undisclosed mandates and an unclear set of draft internal policies. DFO's current approach exacerbates distrust between First Nations and runs contrary to the Crown's duty to consult with respect to aboriginal fishing activities. This was a topic canvassed in Heiltsuk's final submissions (paras. 120-130 & 133-145), as well as those of the Western Central Coast Salish First Nations participant group (the "WCCSFN") (paras. 106-136) and the FNC (paras. 648-650). Heiltsuk wish to further address this issue in endorsing the submissions of other First Nations participants and their recommendations in this matter.

3.1. Prior FSC harvest is not a basis for determining future allocations

11. If DFO currently makes a community needs-based assessment of First Nations' FSC requirements when determining access and allocation, it is unclear how this is accomplished. In paragraph 502 of Canada's final submissions they cite various factors taken into account for the purposes of determining FSC allocations in consultation with First Nations. This list of factors includes a First Nation's "recent FSC fishery harvest", which is said to reflect the interest and fishing capacity of the First Nation. In this regard, Heiltsuk support the submissions of the WCCSFN where they identify this factor as illegitimate, stating (at para. 124):

Recent harvest is an obviously problematic factor when considering change in allocating quantities of sockeye for FSC purposes. Recent harvest is itself constrained by DFO's initial community level and global First Nation allocation numbers arrived at under the AFS initiative from the early 1990s. Use of this factor renders the inadequate allocations of sockeye self-perpetuating.

[Emphasis added]

12. As identified by the WCCSFN, reference to a First Nation's recent fishery harvest as a basis for future allocations creates an inappropriate path dependency, arbitrarily limiting FSC allocations based on earlier DFO allocation decisions. The FNC have likewise raised the issue of FSC allocations being primarily based on historic catch numbers in their final submissions, and rejected DFO testimony that these allocations are instead the result of negotiations (paras. 648-649). Using prior harvest rates is an inappropriate factor for determining future harvest rates, particularly as a primary factor for these decisions, and is inconsistent with DFO's stated approach that FSC allocations are needs-based (Exhibit 1957, p. 7) and determined as a result of negotiations with First Nations (McGivney, August 19, 2011, pp. 3-4).

3.2. Access to other foods is not a basis for setting salmon allocations

13. Another factor set out in paragraph 502 of Canada's final submissions to be considered by DFO in determining FSC allocations is "the use and availability of other foods". Heiltsuk support WCCSFN's submissions that the availability of alternate species or alternate sources of protein is an illegitimate consideration in determining a First Nation's FSC needs for a culturally preferred species such as sockeye salmon (para. 125). Heiltsuk and other First Nations have made extensive submissions in this commission with respect to the cultural importance of sockeye salmon to their communities. A First Nation's Food, Social and Ceremonial fish needs are something culturally and historically grounded that must be determined by negotiation and consultation with the affected First Nation, and it is not for DFO to determine that these needs should be substituted by "other foods".

3.3. Allocations do not accommodate First Nation population changes

14. Allocations for First Nations to have access to fisheries for FSC purposes must be based on the needs of the community. Heiltsuk agree with the WCCSFN's submissions that FSC allocation numbers have remained static over two decades in spite of tangible population growth in coastal First Nations, and DFO's general policy has been to refuse to alter FSC allocations (paras. 128-132). The FNC also notes that allocations have remained largely static since the 1990s (para. 649). The fact that these allocations have remained fixed in spite of tangible population growth and requests for greater allocations to accommodate this growth (among other needs-based concerns), runs contrary to the DFO policy statement cited in Canada's final submissions that "DFO will consult with First Nations on FSC needs" (para. 501).

15. In paragraph 502 of Canada's submissions, the factors to be considered in determining FSC allocations also include "community size (on and off reserve, and including but not necessarily limited to band membership)". The issue of

acquiring adequate FSC allocation for Heiltsuk's urban (off reserve) members has been particularly fraught with difficulty due to the geographic distance between their reserves on the Central Coast and their urban members, many of whom reside in the Lower Mainland. As set out in paragraphs 133-138 of Heiltsuk's final submissions, DFO has unilaterally limited Heiltsuk's ability to fish for FSC to the geographic area surrounding their reserves. This has largely impeded their ability to provide FSC fish to their geographically distant urban membership and highlights the need for appropriate consultation on FSC issues between First Nations and Canada, not only to determine allocations but also to determine appropriate access to accommodate the changing needs of a particular First Nation.

3.4. DFO's ability to negotiate allocations is improperly fettered

16. If FSC allocations are to be based on a community's needs, they cannot remain artificially fettered by policy-based limits. Heiltsuk support WCCSFN's submissions that the current DFO approach to managing FSC allocations under a fixed end-point allocation percentage for aboriginal access is inconsistent with the constitutional priority of First Nations' FSC fishing (para. 115). It remains unclear how an overall end point allocation translates into the individual FSC allocations determined for each First Nation (McGivney, September 2, 2011, p. 89, ll. 13-22). However, the very fact of having a fixed maximum allocation in the face of growing First Nation populations is clearly problematic on its face.

17. The evidence put before this commission was incomplete and as a result it was not possible to understand how an overall end point percentage interfaces with the FSC access decisions for individual First Nations, and what regime exists for setting current limits on this access (see *Ruling Re: Heiltsuk Tribal Council's Application for Production of FSC "Mandate Documents" and the Coastwide Framework Documents* dated September 20, 2011, and letter from Wayne G. Wouters, Clerk of the Privy Council and Secretary to the Cabinet dated

September 22, 2011). However, testimony was given on the existence of rigid mandates determined by DFO's Ottawa headquarters that constrain the FSC allocations that can be negotiated with individual First Nations (Rosenberger, January 24, 2011, p. 98, ll. 2-11; Crey, July 5, 2011, pp. 74-75; McGivney, September 2, 2011, p. 78, ll. 1-13). The testimony given has established that these FSC mandates emanate from Ottawa and are subject to ministerial approval.

18. It is unclear how this top-down fettering of FSC fishery allocations can be reconciled with a stated policy of negotiated allocations. What DFO has disclosed with respect to its policies for aboriginal access taken in light of First Nations' own experience with FSC allocation numbers remaining unchanged strongly suggests that DFO not only does not engage in meaningful consultation on FSC allocations but has constructed a system for fisheries management that largely precludes any meaningful consultation.

Endorsed recommendations:

19. Heiltsuk supports the following recommendations of other participants:
 - a. The WCCSFN's recommendation that "DFO step back from its current strategy on aboriginal fishing and engage in an open process of consultation and negotiation that includes disclosure, discussion of ultimate goals, and adaptation [to changes in] community need[s]" (para. 117);
 - b. The WCCSFN's recommendation that "the FSC allocation for community-based and global endpoint FSC allocations must be reassessed following consultation with First Nations, and must contain a clearly-articulated mechanism to provide for revisions where First Nation needs exceeds (sic) their allocation" (para. 134); and

- c. The FNC's recommendation that "Canada must conduct in-depth consultations with First Nations on its development of a percentage goal for the average total allowable catch that will be allocated to First Nations" and that "Canada must provide the capacity for First Nations to determine intertribal allocations amongst themselves" (para. 657).

4.0 Joint management provides better accountability

20. True joint management may provide the answer to participant groups concerns over a current management regime lacking in transparency and accountability. Canada and First Nations participants in this inquiry, including Heiltsuk, have already canvassed the topic of co-management or joint management of the fisheries between DFO and First Nations in detail. It is worth emphasizing, however, the role that joint management may play in providing more oversight for DFO's decision-making process. In this regard, Heiltsuk adopt the proposition put forward in the final submissions of STC/CIB that "First Nations can provide a balance against DFO's management of the fishery" (para. 73). Through true joint management the transparency concerns raised by having the Minister as "the ultimate arbiter in every decision", as described by Dr. Davis (May 31, 2011, p. 24, ll. 42-47), can be effectively alleviated so long as First Nations are provided with equal representation and authority to that vested in the Crown.
21. In the final submissions of STC/CIB they also argue that co-management provides for better accountability to the regions as compared to DFO's current centralized approach where the authority for many key decisions resting in Ottawa, "very far from any of Canada's three oceans" (para. 75). Heiltsuk strongly agree with this proposition. First Nations inhabit and depend upon the ecosystems that DFO is currently charged with conserving and protecting. Due to their heavy reliance on fisheries resources for their livelihood, First Nations must

uphold the conservation of the resource to sustain their very way of life and as such they are substantially accountable, unlike a bureaucracy based in Ottawa. Even without a joint management structure, First Nations are obliged to steward the resources on which they rely, whether or not they receive support and approval for these activities from DFO.

22. In Canada's final submissions they state that from DFO's perspective the *sine qua non* of any co-management structure is one with "clearly defined roles, mandates and responsibilities for each of the parties" (para. 514). In reply, Heiltsuk reiterate that the *sine qua non* of a true joint management structure will be equal representation and authority for First Nations alongside the Crown. With a structure that respects First Nations as resource owners and equal partners alongside DFO, a more balanced, accountable and inclusive approach to fisheries management could be effectively achieved.

5.0 New evidence of ISAV in British Columbia

23. Finally, Heiltsuk are obliged to comment on recent changes to the context in which the Commissioner will be drafting his final recommendations. On the same day as the deadline for participants' final submissions the commission brought to our attention that Simon Fraser University had issued a media release indicating a European strain of ISAV was found in Rivers Inlet sockeye salmon, collected from British Columbia's Central Coast. In light of this new information, the Aquaculture Coalition's final submissions state an intention to apply to reopen the commission to address this recent discovery (Executive Summary, pp. 3-4). Heiltsuk fully expects that information regarding this ISAV diagnosis will be permitted to be entered into evidence for these proceedings. Regardless of the manner in which this information is presented before the Commissioner, this eleventh hour discovery is a sobering reminder of the grave risks that may flow from the open net pen aquaculture operations on British Columbia's coast and the

uncertainty that remains regarding the effects of open net pen aquaculture on wild stocks.

24. In the final submissions of Canada (p. 674) and the BC Salmon Farmers Association (p. 127, 129 and 130) both participant groups assert that no exotic pathogens or diseases have been introduced into British Columbia by salmon farming activities. The Province of British Columbia more specifically states that Infectious Salmon Anaemia Virus (“ISAV”) has never been diagnosed in British Columbia and does not affect sockeye salmon (paras. 78-93). Any facts supporting these assertions should be closely scrutinized by the Commissioner when making final recommendations.

25. Heiltsuk also take note of the Aquaculture Coalition's submissions on possible indications of ISAV among the mortalities reported in the aquaculture fish health data that was disclosed through this commission's process (pp. 21-25). Such allegations must not be taken lightly by the Commissioner when formulating recommendations for changes to DFO's management regime. The results of an ISAV outbreak on British Columbia's coast would be disastrous.

26. Heiltsuk are principally located on the Central Coast where the recent ISAV discovery was made and heavily depend on wild salmon and herring stocks that intermingle with the Rivers Inlet sockeye salmon implicated in this discovery. Due to their geographic location and their dependence on the resources of the ocean, Heiltsuk would be among the first to be affected by an outbreak of ISAV among the Rivers Inlet sockeye. In light of this, we conclude these reply submissions with a reminder that the management activities of DFO have serious effects on communities throughout British Columbia. It is of critical importance that the Commissioner is forward-looking in his recommendations and considers not only what has been proven but also what the future may bring. A failure on DFO's part to take proactive steps may have devastating and irreversible results on British Columbia's fisheries.

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