

PART ONE

Commission activities

Establishment of the commission

In November 2009, the Governor General in Council issued Order in Council 2009-1860 establishing this Commission of Inquiry and appointing me as sole Commissioner under Part 1 of the *Inquiries Act*,¹ to inquire into the decline of sockeye salmon in the Fraser River.

The same Order in Council set the commission's Terms of Reference. The Order in Council with complete Terms of Reference appears as Appendix 1 at the end of this report. In brief, the Terms of Reference direct me:

- (A) to conduct the Inquiry without seeking to find fault on the part of any individual, community or organization, and with the overall aim of respecting conservation of the sockeye salmon stock and encouraging broad cooperation among stakeholders,
- (B) to consider the policies and practices of the Department of Fisheries and Oceans (the "Department")² with respect to the sockeye salmon fishery in the Fraser River – including the Department's scientific advice, its fisheries policies and programs, its risk management strategies, its allocation of Departmental resources and its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting and enforcement,

1 RS 1985, c. I-11.

2 In this report, the acronym DFO will be used to denote the Department of Fisheries and Oceans.

- (C) to investigate and make independent findings of fact regarding
 - (I) the causes for the decline of Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean, and
 - (II) the current state of Fraser River sockeye salmon stocks and the long term projections for those stocks, and
- (D) to develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River including, as required, any changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery, ...

As discussed later in this report, there have been several dozen examinations, investigations, and reports on various aspects of the Pacific fishery during the past three decades. Many of these studies were limited in scope to a specific aspect of the fishery, such as habitat or salmon farms, or to a specific year's return. Although this commission focuses only on Fraser River sockeye salmon, its mandate is broader than previous examinations. It calls for a consideration of all aspects of the Department of Fisheries and Oceans' (DFO's) past and present policies and practices in relation to the management of the Fraser River sockeye salmon fishery and an investigation - not limited to any one year's return - of the fish biology, ecosystem, and other causes for its decline. It is also the first commission of inquiry dealing with the Fraser sockeye fishery that has been established under the authority of the *Inquiries Act* since the 1982 Pearse Commission on Pacific Fisheries Policy.

Administration and organization

Before describing the details surrounding the commencement of our process, I wish to express my sincere appreciation to those former commissioners of public inquiries who so graciously and unstintingly accepted my request for information and assistance based on their wealth of experience in setting up a commission of inquiry. I extend my gratitude to Justices Dennis O'Connor, Stephen Goudge, Denise Bellamy, and Jeffrey Oliphant. For their time and assistance, I am also grateful to Dr. Harry Swain of the Centre for Global Studies; and Glenn Sigurdson Q.C. and the Honourable Barry Stuart, facilitators of the Integrated Salmon Dialogue Forum. In addition, I am appreciative of the time spent

by authors of previous reports related to my mandate for giving me their time to discuss their processes, notably Dr. Peter Pearse, the Honourable John A. Fraser, and the Honourable Bryan Williams.

I also wish to note my reliance on the recent publication by Ed Ratushny,³ professor emeritus of the Faculty of Law, University of Ottawa. Dr. Ratushny's book *The Conduct of Public Inquiries* proved most valuable at the initial stages of setting up this commission and has provided a wealth of information for researching many of the points that have arisen since the commencement of our process.

Finally, I wish to express the deep appreciation of the commission to the Federal Court of Canada, whose staff in Vancouver accommodated our requests to use the excellent courtroom facility and provided constant co-operation, hospitality, and kindness during the conduct of our hearings.

Office premises and commission staff

The Department of Public Works and Government Services Canada secured office space for the commission in downtown Vancouver and facilitated office improvements and the required security enhancements for the premises. Furniture and equipment were purchased and installed. The commission's office, at 650 West Georgia Street, is within one block of the Federal Court, where I anticipate conducting our evidentiary hearings.

For a complete listing of commission staff, see Appendix 2.

Website

The commission's bilingual website provides detailed information about the commission's activities; in addition, my rulings and the rules of procedure the commission has adopted are reproduced there. It will include transcripts and exhibits of each day's proceedings during the evidentiary hearings, and Policy and Practice Reports and Scientific Reports prepared by or for the commission will be posted there.

Members of the public are invited to make submissions on any matter relevant to the commission's Terms of Reference. After the submissions are reviewed for relevance and appropriateness, bilingual summaries, along with the submissions themselves, are posted on the commission's website.

3 Ed Ratushny, *The Conduct of Public Inquiries: Law, Policy, and Practice* (Toronto: Irwin Law, 2009).

Participants

Applications for standing

The Terms of Reference authorize me to grant an opportunity for appropriate participation in the commission to all persons who satisfy me that they have a substantial and direct interest in its subject matter.

Formal involvement in the commission's evidentiary hearings is restricted to participants. Participants are entitled to represent themselves or to be represented by counsel at the hearings; to propose witnesses to be called by commission counsel; to review documents disclosed by DFO and other participants; and to make oral and written submissions. They may also, as determined by the Commissioner, examine or cross-examine witnesses. Participants are required to notify the commission of documents in their possession relevant to the subject matter under study and, if requested to do so, to provide copies to the commission.

The commission adopted Rules for Standing and Funding (see Appendix 3), establishing the process the commission would follow in considering applications for standing. The rules provided in part:

- [T]he Government of Canada ... [has] standing throughout the inquiry.
- Commission counsel have the primary responsibility for representing the public interest, including the responsibility to ensure that all matters that bear upon the public interest are brought to the Commissioner's attention.
- The Commissioner may grant a person standing if he is satisfied that the person has a substantial and direct interest in the matters investigated in the inquiry or portions thereof.
- [P]ersons with standing are referred to as "participants."
- The Commissioner retains the discretion to vary a participant's participation or rescind standing.

A Notice for Standing and Funding published on the commission's website identified what would be considered in determining whether an applicant has a "substantial and direct interest" in the subject matter of the commission:

- the nature and extent of the applicant's rights or interest;
- why standing is necessary to protect or advance the applicant's rights or interest;
- whether the applicant faces the possibility of adverse comment or criticism with respect to its conduct;
- how the applicant intends to participate, and how this approach will assist the commission in fulfilling its mandate;

- whether and how the applicant's participation will contribute to the thoroughness and fairness of hearings;
- whether the applicant has expertise and experience relevant to the commission's work;
- whether and to what extent the applicant's perspective or interest overlaps or duplicates other applicants'; and
- whether the applicant may participate in another capacity – for example, a research body which may be otherwise consulted by the commission, or a witness who may testify – instead of being granted formal standing.

The Notice also made clear to applicants:

Where applicants have shared interests or a similar perspective in the subject matter of the inquiry, they should make a single application for standing, identifying those persons whose interests are reflected in the application. The Commissioner may make a grant of standing conditional upon such cooperation.

The commission received 50 applications for standing from the Province of British Columbia, the Pacific Salmon Commission, First Nations and other Aboriginal organizations, various commercial and recreational fishery interests, environmental and conservation organizations, and individuals. This number is significantly greater than for other federal commissions of inquiry. Under the commission's Rules for Standing and Funding, the Government of Canada was granted standing without having to apply.

The commission convened hearings on March 23 and 26, 2010, for certain applicants to supplement their written applications with oral submissions concerning their interests, and/or to state their positions on whether and how they may be able to collaborate with other applicants before the commission. In many cases, applicants for standing were able to reach agreements to collaborate with one another.

In a written ruling dated April 14, 2010 (see Appendix 4), I made 20 grants of standing for participation in the commission and set out my reasons for doing so. Many of these grants of standing are shared among applicants who originally applied individually. In total, 53 individuals, groups, and organizations are included in these 20 grants of standing.

I subsequently made the following rulings on applications to vary the standing ruling:

- On May 10, 2010, I ordered that the Heiltsuk Tribal Council may participate by separate counsel specifically for the evidentiary hearings pertaining to aquaculture, but that otherwise it remain part of the same standing group (see Appendix 5).
- On May 11, 2010, I allowed the application brought by the Snuneymuxw, Tsartlip, and Tsawout First Nations (collectively the Douglas Treaty First

Nations) that they be placed in the same participant group as, and share a single grant of standing with, the First Nations Coalition instead of the Western Central Coast Salish (see Appendix 6).

- On August 17, 2010, I allowed an application to sever the Heiltsuk Tribal Council from the standing group of which it was formerly a member, owing to conflicts within the group. The result is that the Heiltsuk Tribal Council receives individual standing as a participant (see Appendix 7).

The complete list of participants granted standing is included as Appendix 8.

Applications for funding

The Terms of Reference also authorize me to recommend to the clerk of the privy council that funding be provided, in accordance with terms and conditions approved by the Treasury Board, to ensure the appropriate participation of any person granted standing at the commission – to the extent of the person’s interest – if I am of the view that the person will not otherwise be able to participate in the commission. The terms and conditions approved by the Treasury Board state:

Eligible expenditures are restricted solely to legal costs, including disbursements and inter-city travel expenses incurred by counsel, subject to the maximum aggregate number of hours recommended by the Commissioner and approved by the Clerk of the Privy Council, and the limits set out herein. Any other types of costs incurred by a Recipient are excluded.

According to the commission’s Rules for Standing and Funding, applications for a funding recommendation had to be supported by an affidavit setting out

- (a) facts that demonstrate the person seeking funding does not have sufficient financial resources to participate in the work of the commission without financial assistance for legal counsel, and
- (b) facts in relation to any other sources of funds received, expected or sought by the person in relation to legal services rendered, or to be rendered, with respect to the inquiry.

Initially, many applicants for standing also applied for funding. After the Standing Ruling was released, commission counsel sought revised funding applications from nearly all the applicants for funding. In some cases, the commission required new applications because the Standing Ruling directed participants to share grants of standing, changing the footing on which the initial funding applications had been made. In other cases, I required additional information in order to make a recommendation, because the original funding applications and supporting affidavits failed to provide sufficient detail to permit me to assess the application thoroughly.

Funding recommendations to the clerk of the privy council

In preparing funding recommendations, I bore in mind several considerations:

- The hours I set out in the recommendations were the product of an assessment of the appropriate participation of each participant to the extent of that participant's interest as described in the Standing Ruling.
- The commission's approach was to look to junior counsel for much of the preparation work but to increase the proportion of funding for attendance at hearings by senior counsel. The commission allotted 80 percent of the recommended time for an applicant to preparation (60 percent to junior counsel and 20 percent to senior counsel), and 20 percent of the recommended time to attendance at hearings (7 percent to junior counsel and 13 percent to senior counsel). Preparation time was further subdivided and allotted to different activities.
- These funding recommendations reflected the overriding premise for a commission of inquiry – that commission counsel have the primary responsibility for representing the public interest, including ensuring that all matters that bear on the public interest are brought to my attention. Commission counsel are primarily responsible for document review, and they are responsible for organizing and leading all the evidence at evidentiary hearings. The aim is to provide adequate funding for participants to access documents, but in a context where commission counsel have identified for them, in advance, the key documents and intended hearing exhibits.
- It is unnecessary for all participants' counsel to attend all the commission's hearing days. Rather, participants' counsel are expected to attend only those hearing days on which their clients' interest, as set out in the Standing Ruling, is directly engaged. Transcripts will be made available after each hearing day, permitting an efficient means of monitoring the proceedings.

On May 12, 2010, I made recommendations (as amended on May 19, 2010) to the clerk of the privy council that funding be provided, in accordance with terms and conditions approved by the Treasury Board, to ensure the appropriate participation of some of those granted standing at the commission. A summary of those recommendations, which excludes the content of detailed affidavit evidence received by the commission (because of the confidentiality attaching to the financial information of the applicants), is included as Appendix 9. Fifteen of the 20 participants who had received grants of standing applied for funding. I recommended that 14 of these 15 participants should receive funding. These 14 participants included 44 individuals, groups, and organizations.

Government of Canada's decision respecting funding

On June 9, 2010, the clerk of the privy council advised the commission that the proposed funding had been granted as I had recommended, in accordance with the terms and conditions of the Treasury Board Contribution Program, to a maximum limit of \$3,423,200. I notified all participants accordingly.

Rules for Procedure and Practice

The Commission has adopted Rules for Procedure and Practice, which are included as Appendix 10. The matters addressed in the rules include the following:

- Commission counsel have the primary responsibility for representing the public interest, including the responsibility to ensure that all matters that bear upon the public interest are brought to my attention.
- A participant must identify to the commission documents in its possession or under its control relevant to the subject matter of the inquiry and, if requested to do so, provide copies of any such documents to the commission.
- Commission counsel may prepare reports setting out information derived from their review of previous examinations, investigations, and reports or identifying DFO's policies and practices with regard to the Fraser sockeye fishery (Policy and Practice Reports). These reports will be filed as exhibits and posted on the commission's website after participants have had an opportunity to comment on them. The reports are intended to inform my deliberations, and I may consider them in making findings of fact and recommendations.
- The commission may engage experts to conduct scientific and other reviews into the decline of Fraser sockeye and to prepare reports setting out their opinions (Scientific Reports). These reports will be filed as exhibits and posted on the commission's website. The reports are intended to inform my deliberations, and I may consider them in making findings of fact and recommendations.
- Hearings will be open to the public and may be video and audio recorded, unless I rule to the contrary. In the normal course, commission counsel will call and lead witnesses, who will give evidence under oath or affirmation and who will be subject to cross-examination. Participants may propose witnesses to be called by commission counsel. I may permit a witness to give evidence as a member of a panel of witnesses. Commission counsel plan to introduce the evidence of some witnesses by filing formal summaries of their expected testimony based on interviews, as provided for in Rule 22.

Disclosure of documents

Beginning in December 2009, commission counsel and the Department of Justice developed a process for the disclosure by Canada of documents relevant to the commission's mandate. Relevant documents are being disclosed to the commission in digital format according to the following priority – DFO “core” documents, DFO emails, and, finally, documents from other government departments. According to the Terms of Reference, the commission is required to use Ringtail Legal, the automated document management program specified by the Attorney General of Canada.

Given the commission's broad mandate, disclosure and review of documents are massive endeavours. As of early September 2010, DFO had produced approximately 75,000 core documents to the commission. I acknowledge, with appreciation, the exceptional resources that DFO and the Department of Justice have committed to this daunting task. The documents produced to date in fact constitute only a fraction of the total volume of documents that the federal government anticipates reviewing and potentially producing. The total number of documents to be reviewed is estimated to be

- DFO core documents (other than emails) – 75,000;
- DFO emails going back five years – 400,000; and
- documents from other government departments – 35,000.

Since April 2010, commission staff have been reviewing the Ringtail Legal document management database to identify important documents that shed light on DFO's policies and practices involving the Fraser sockeye fishery and to identify departmental employees who may be called as witnesses during the commission's evidentiary hearings.

In addition to DFO's disclosure of documents, the commission anticipates receiving disclosure of relevant documents from other federal departments and agencies, including Indian and Northern Affairs Canada, Foreign Affairs and International Trade Canada, Environment Canada, Transport Canada, and the Canadian Environmental Assessment Agency. The commission is also pursuing disclosure of relevant documents from other participants – including the Province of British Columbia, which has documents relating to a wide range of relevant matters, among them habitat, logging, mining, water quality, and salmon farms. Commission counsel request specific materials after reviewing participants' lists of documents they consider to be relevant.

The commission has provided participants with Ringtail Legal licences and training, giving them full access to all documents that the commission has received through this disclosure process.

Conducting interviews

Through a review of the Ringtail Legal document database, the commission's legal team has been able to identify many people knowledgeable about fisheries management and scientific issues who need to be interviewed prior to the commencement of the evidentiary hearings. Participants have also proposed people for interviews. The commission's legal team conducted interviews throughout the summer of 2010, and interviews will continue during the evidentiary hearings.

Applications brought by participants

The commission's Rules for Procedure and Practice provide that a participant may apply to me for an order or direction by preparing an application in writing and delivering it and supporting material, including affidavits, to the commission. The commission shall promptly deliver the application and supporting material to the other participants, who may file written materials in relation to the application. I may make an order or direction based on the written material filed or, at my discretion, after hearing oral argument.

I have received the following applications:

- *Authority to make findings of misconduct.* In June 2010, a participant raised with the commission the issue of whether I am authorized to make findings of misconduct against any individual. That issue calls for a consideration of paragraph (a)(i)(A) of this commission's Terms of Reference, which directs me "to conduct the Inquiry without seeking to find fault on the part of any individual, community or organization, and with the overall aim of respecting conservation of the sockeye salmon stock and encouraging broad cooperation among stakeholders ..." My ruling on this application is included as Appendix 11.
- *Production of documents respecting fish health.* In September 2010, an application was made under the commission's Rules for Procedure and Practice seeking production, from the governments of Canada and British Columbia and from the BC Salmon Farmers Association, of documents related to fish health and aquaculture facilities.

Discussion Paper

On June 3, 2010, the commission published a Discussion Paper (included as Appendix 12) that outlined issues which the commission intends to investigate. This paper included a discussion of technical and scientific issues as well as issues relating to management of the fishery. Participants were invited to comment on the issues identified in the Discussion Paper both through written submissions and at two days of public hearings held on June 15 and June 16, 2010.

Evidentiary hearings

Commencing on October 25, 2010, I am conducting evidentiary hearings regarding the issues that the commission is mandated to investigate. The commission plans to conduct most of these hearings at the Federal Court, 801 – 701 West Georgia Street, Vancouver, BC. The hearing schedule is posted on the commission’s website and will be updated regularly. These hearings will be conducted in accordance with the commission’s Rules for Procedure and Practice.

Depending on the issue under consideration at the hearings, the commission may adopt a variety of formats, including the following:

- An individual witness, including an expert, may testify under oath or on affirmation, and then be subject to cross-examination.
- A group of witnesses, including experts, may give evidence as members of a panel.
- Policy and Practice Reports may be tendered as exhibits.
- Subject to the consent of participants, a summary of a person’s interview may be filed as an exhibit without that person testifying.
- Technical and scientific witnesses may present evidence in panel discussions and forums at which they can exchange views and challenge one another’s findings and conclusions in an open and non-formal setting.

Public forums

At the time of writing this report, public forums were under way at which I was able to hear from members of the public on the issues I am mandated to consider. These forums were slated to take place in summer and fall 2010 in the following 10 coastal and Fraser River communities along the sockeye salmon migratory route:

August 18	Lillooet
August 25	Campbell River
September 1	Prince Rupert
September 13	Steveston
September 14	Nanaimo
September 16	Victoria
September 20	New Westminster
September 23	Prince George
September 29	Chilliwack
October 21	Kamloops

I acknowledge with thanks the First Nations that welcomed the commission to their traditional territories. All the people who attended the public forums spoke passionately and eloquently about the importance of the Fraser sockeye fishery and offered many helpful suggestions for my consideration.

I express my sincere appreciation for their attendance and for their thoughtful presentations. Summaries of presentations made at these public forums are or will be posted on the commission’s website.

Site visits

At the time of writing this report, I was in the process of visiting communities that I expected would provide me with context on and information about various aspects of the Fraser sockeye fishery. Site visits were planned for the following communities between August 12 and October 22, 2010:

August 12	Mission/Agassiz	Traditional Native fishery at Cheam Beach Mission hydroacoustic counter Inch Creek hatchery Swift Aquaculture (land-based facility)
August 19	Lillooet	First Nations fishery on the Bridge River – to observe dip net and gillnet fishing, fish drying
August 19	Yale	Qualark acoustic site
August 26	Campbell River	Marine Harvest salmon fish farm (Quadra Island)
September 1 September 2	Prince Rupert	North Pacific Cannery Heritage Museum Canadian Fishing Company Cannery
September 13	Steveston	Gulf of Georgia Cannery National Historic Site – to learn about sockeye fishing gear, technology, and equipment
September 23	Prince George	Northwood pulp mill (effluent treatment)
September 29	Maple Ridge	Alouette sockeye re-anadromization project
October 21	Harrison Mills	Weaver Creek spawning channel
October 22	Kamloops	Adams River salmon run, spawning grounds, and interpretation centre

I repeat my sincere thanks to the First Nations that welcomed the commission to their traditional territories. At most of these locations, the space available meant the number of people who could attend was limited. To ensure there is a record of what I saw and heard, a videographer recorded the proceedings. I wish to express my

appreciation to the many people who took time to assist with these site visits, which have deepened my understanding of the various aspects of the Fraser sockeye fishery.

Public submissions

Members of the public are invited to express their views on issues related to the commission's mandate by making a public submission on the commission's website⁴ or by commenting on another person's submission.

As of September 15, 2010, the commission had received 153 relevant and appropriate written submissions, as set out in Table 1. Because most submissions discuss more than one sub-topic, the number next to a main topic is not the sum of its sub-topics.⁵

Table 1: Topics Raised in Written Public Submissions to Cohen Commission

Topics in Public Submissions	Submissions Referencing Topic	
	Number	Percentage
Aquaculture	93	61
Aquaculture (unspecified)	48	31
Sea lice	30	20
Disease	16	10
Waste	13	9
Pesticides/antibiotics	6	4
Aquaculture (other)	4	3
Alien species	2	1
Fraser River Watershed Impacts	29	19
Contaminants/pollution/sewage	18	12
Habitat loss	14	9
Urbanization	4	3
DFO Harvesting Responsibilities	26	17
Enforcement	10	7
Harvest management	17	11
High seas fisheries	5	3
Sport fishery	2	1

[cont'd]

4 <http://www.cohencommission.ca/en/submissions/SubmissionForm.php>

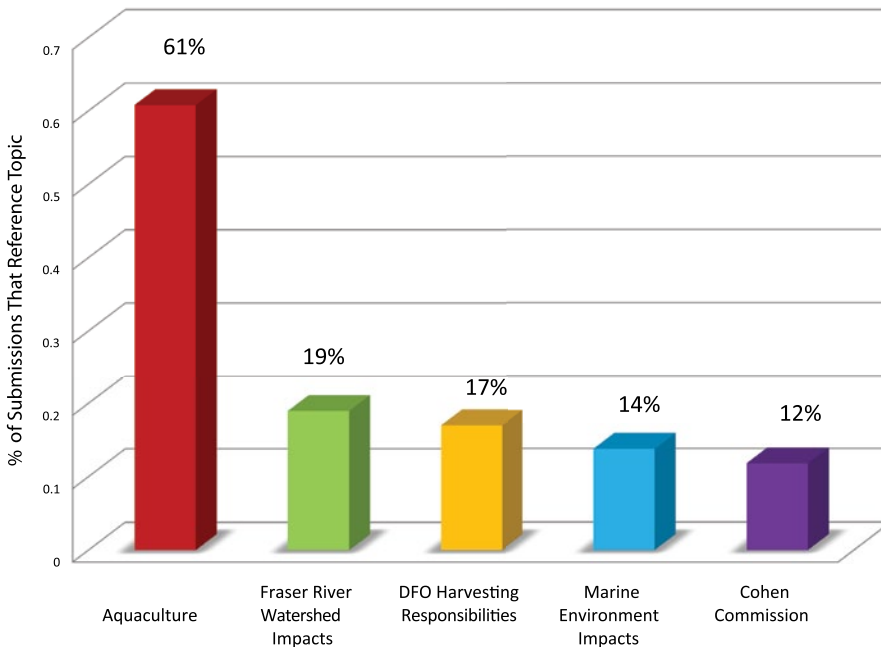
5 For each main topic set out in boldface (e.g., **Fraser River Watershed Impacts**), the number in column 2 represents the total number of separate submissions that discussed that topic. However, the numbers for all sub-topics within that main topic will typically be greater, because any one submission may discuss two or more of those sub-topics.

[cont'd]

Topics in Public Submissions	Submissions Referencing Topic	
	Number	Percentage
Marine Environment Impacts	21	14
Climate change	11	7
Food abundance	8	5
Marine ecology (other)	4	3
Cohen Commission	18	12
Scientific Advisory Panel	6	4
Commission (other)	5	3
Terms of Reference	5	3
Participant funding	2	1
Standing Ruling	1	1
DFO Organizational Structure	17	11
Organizational structure	17	11
Predation	9	6
Predation	9	6
Other	8	5
Legal Framework	6	4
Aboriginal right to fish and food security	6	4
Conditions at a Specific Location	5	3
Shuswap Lake	4	3
Adams River	1	1
Coquitlam River	1	1
DFO Protection of Wild Stocks	4	3
Wild Salmon Policy	3	2
Biodiversity protection	1	1
<i>Species at Risk Act</i> (SARA)	1	1
Naturally occurring diseases/viruses/ bacteria/parasites, etc.	2	1
Naturally occurring diseases/viruses/ bacteria/parasites, etc.	2	1

Figure 1 identifies the five most prevalent topics in public submissions.

Figure 1: Five Most Prevalent Topics in Public Submissions



Staying informed

There are several ways through which interested members of the public can stay informed about the work of the commission, including:

- attending the evidentiary hearings or reading the transcripts of those proceedings;
- reading the commission's Discussion Paper; and
- reading the Policy and Practice Reports, Scientific Reports, status reports, and reports to government, which will be posted on the commission's website.

Final report

According to the commission's Terms of Reference, I am

- to consider the policies and practices of the Department of Fisheries and Oceans (the "Department") with respect to the sockeye salmon fishery in the Fraser River – including the

Department's scientific advice, its fisheries policies and programs, its risk management strategies, its allocation of Departmental resources and its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting and enforcement,

- to investigate and make independent findings of fact regarding
 - the causes for the decline of Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean, and
 - the current state of Fraser River sockeye salmon stocks and the long term projections for those stocks, and
- to develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River including, as required, any changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery, ...

Findings of fact and recommendations must await my consideration of the whole of the evidence emanating from the hearings, public forums, site visits, and public written submissions. All the evidence generated by the commission's proceedings will form the basis for reaching conclusions, which will take into account the recommendations contained in past reports and the government's history of responses to these reports.