Clerk of the Privy Council and
Secretary to the Cabinet

Greffier du Conseil privé et
Secrétaire du Cabinet

Ottawa, Canada
K1A 0A3

SEP 2 2 2011

The Honourable Mr. Justice Bruce I. Cohen
Commissioner
Commission of Inquiry into the Decline
of Sockeye Salmon in the Fraser River
P.O. Box 11530, Suite 2800
Vancouver, British Columbia
V6B 4N7

Dear Mr. Justice Cohen:

I am writing further to your ruling of September 20, 2011, re: Heiltsuk Tribal Council's Application for Production of FSC "Mandate Documents" and the Coastwide Framework Documents, ordering the production of the end-point outcome percentage information which is referred to in the Government of Canada's submission of June 17, 2011.

I have examined and carefully reviewed the three documents listed in the Schedule attached hereto for the purpose of determining whether they contain information constituting confidences of the Queen's Privy Council for Canada and whether they should be protected from disclosure pursuant to section 39 of the *Canada Evidence Act*.

I certify to this Commission of Inquiry pursuant to subsection 39(1) of the *Canada Evidence Act*, that all of the documents referred to in the said Schedule are, or contain, confidences of the Queen's Privy Council for Canada for the reasons set out in the Schedule attached hereto and I object to the disclosure of these documents and the information contained therein.

.../2

I further certify to this Commission of Inquiry that paragraph 39(4)(a) of the *Canada Evidence Act* does not apply in respect to these documents as they have not been in existence for more than twenty years and that paragraph 39(4)(b) of the said *Act* does not apply in respect of these documents.

If oral evidence were sought to be given on the contents of the documents to the disclosure of which I have in this letter objected, I would object to such evidence on the same grounds as described above in relation to the documents or information in question.

Yours sincerely,

Wayne G. Wouters

Attachment

SCHEDULE
To a Letter from Wayne G. Wouters to
The Honourable Mr. Justice Bruce I. Cohen
Dated September 22 , 2011

1 Memorandum for the Honourable Gail Shea, Minister of Fisheries and Oceans, from Claire Dansereau, Deputy Minister, dated August 18, 2009, and a transmittal note from David Millette, Director General, Aboriginal Policy and Governance, via Robert Lambe, Associate Assistant Deputy Minister, Fisheries Management, Fisheries and Oceans, dated August 14, 2009, and attached presentation to Cabinet, in preparation for a meeting of Ministers.

This document consists of information contained in a record the purpose of which was to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph 39(2)(d) and is therefore within paragraph 39(2)(e) of the *Canada Evidence Act*.

2 Briefing deck and talking points for the Honourable Charles Strahl, Minister of Indian Affairs and Northern Development, and the Honourable Gail Shea, Minister of Fisheries and Oceans [November 2009], for a presentation to be made to Cabinet.

This document consists of information contained in a record the purpose of which was to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph 39(2)(d) and is therefore within paragraph 39(2)(e) of the said *Act*.

3 Chain of emails between Guy Beaupré, A/Associate Assistant Deputy Minister, Ecosystems and Fisheries Management, Claire Dansereau, Deputy Minister, and David Millette, Director General, Aboriginal Affairs and Governance, Department of Fisheries and Oceans, dated February 2, 2010, on a presentation made to Cabinet.

This document provides information on a presentation made to Cabinet. It consists of information contained in a record the purpose of which was to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph 39(2)(d) and is therefore within paragraph 39(2)(e) of the said *Act*.

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

RULING RE: HEILTSUK TRIBAL COUNCIL'S APPLICATION FOR PRODUCTION OF FSC "MANDATE DOCUMENTS" AND THE COASTWIDE FRAMEWORK DOCUMENTS:

The Honourable Bruce I. Cohen, Commissioner

I. The Application

1. The participant, the Heiltsuk Tribal Council ("HTC"), seeks an order pursuant to Rule 19 of the commission's *Rules for Procedure and Practice* (the "Rules").

2. Specifically, the HTC seeks an order that:

(a) the Government of Canada produce:

(i) all documents containing the "mandate information" about the management of food, social, and ceremonial fisheries ("FSC") referenced in Mr. Rosenberger's testimony on January 24 and 25, 2011 (the "mandate documents") for which Canada has not obtained a ruling of privilege; and

(ii) all Coastwide Framework documents, for which Canada has not obtained a ruling of privilege; and

(b) leave for the HTC to apply for additional relief in relation to the consequences of late disclosure or non-disclosure by Canada.

II. Introduction

3. The HTC applies for the production of two sets of documents, referred to as the Coastwide Framework, and the mandate documents. The HTC submits that these documents are essential to the commission's mandate.

4. Canada resists production of these documents. It has produced what it asserts is a summary of the Coastwide Framework, but it argues that the remaining parts of the Coastwide Framework and the mandate documents are privileged. Canada submits

that they are privileged, either as Cabinet confidences or as communications that are protected by settlement privilege or public interest immunity. Because the two sets of documents were created under different circumstances, Canada argues that the claims of privilege apply differently to each of the sets of documents.

III. History of the Application

i. Coastwide Framework Documents

5. On November 1, 2010, commission counsel sent a document titled "35 Treaty Fishery Questions" to Canada, which inquired into and sought production of the "Coastwide Framework". At that time, commission counsel understood the Coastwide Framework to constitute a single document.

6. On January 17, 2011, Canada provided the commission with its written responses. Canada asserted that the Coastwide Framework was protected by Cabinet confidence pursuant to subsection 39(1) of the *Canada Evidence Act*, and also protected by settlement privilege. On those bases, Canada declined to produce the Coastwide Framework.

7. On January 31, 2011, counsel for the HTC inquired as to whether commission counsel would challenge Canada's claim of privilege over the Coastwide Framework.

8. On February 7, 2011, commission counsel, by way of reply to the HTC's inquiry, sought confirmation that the Clerk of the Privy Council had issued a certificate pursuant to subsection 39(1) of the *Canada Evidence Act* (a "s. 39(1) certificate") objecting to the disclosure of documents related to the Coastwide Framework.

9. On February 11, 2011, Canada advised that it had not obtained a s. 39(1) certificate. Canada attached correspondence between its counsel and commission counsel describing its understanding of an agreement made between counsel on an alternate procedure to be followed in respect of claims of Cabinet confidence.

10. On February 18, 2011, the HTC inquired as to the status of Canada's claim of privilege over the Coastwide Framework. The HTC expressed its wish to ensure that it

have sufficient time to bring an application for production of the Coastwide Framework documents.

11. On February 22, 2011, commission counsel advised counsel for Canada that its understanding of the agreement referred to by Canada did not include acceptance of Canada's assertion of a s. 39(1) privilege claim in the absence of a s. 39(1) certificate. It also advised Canada that it intended to make a submission to the Clerk of the Privy Council and the Minister against certifying the Coastwide Framework as a Cabinet confidence.

12. On March 18, 2011, the HTC submitted its Notice of Application for the Coastwide Framework.

13. On March 23, 2011, commission counsel made a written request to the Clerk of the Privy Council, against certifying the Coastwide Framework as a Cabinet confidence.

14. The HTC agreed to hold its application in abeyance pending the outcome of commission counsel's submission to the Clerk of the Privy Council.

15. Commission counsel notified all participants that I would not make a ruling on the HTC's application for mandate documents until counsel for the HTC had the opportunity to review materials that Canada was to provide by May 6, 2011.

16. On April 21, 2011, Canada confirmed its agreement to either produce or claim privilege over the Coastwide Framework documents and any information contained therein by the deadline of May 6, 2011.

17. On May 6, 2011, Canada confirmed that it continued to assert privilege over the Coastwide Framework documents and information contained therein. Canada also proposed to disclose a different document called the "Aboriginal Fisheries Framework" which purported to provide a summary of the Coastwide Framework. Canada's proposal to disclose the "Aboriginal Fisheries Framework" was contingent on all of the participants agreeing not to take the position that said disclosure would waive privilege over the documents and over the Coastwide Framework in general. The other

participants accepted Canada's condition for disclosure of the Aboriginal Fisheries Framework document.

18. On May 16, 2011, Canada provided the commission with a copy of the Aboriginal Fisheries Framework document and a list of the Coastwide Framework documents over which Canada continued to claimed privilege.

ii. Mandate Information

19. On January 31, 2011, counsel for the HTC requested that commission counsel refer to the testimony of Mr. Barry Rosenberger on January 24th and 25th, 2011, and requested that Canada produce a copy of "mandate documents" that were referred to by Mr. Rosenberger in his testimony.

20. On February 10, 2011, commission counsel sought clarification as to what was meant by "mandate documents" and Canada's position on disclosure of the mandate documents.

21. On March 18, 2011, the HTC brought its application for production of mandate documents related to the FSC fishery by Canada.

22. On March 28, 2011, I made an Order extending the time for responses to the HTC's application until April 7, 2011, at the request of Canada.

23. Between March 25, 2011, and April 7, 2011, the commission received submissions from the Tsawwassen First Nation and Musqueam Indian Band, the Musgamagw Tsawataineuk Tribal Council, the Sto:lo Tribal Council and Cheam Indian Band, the Western Central Coast Salish First Nations, and Canada.

24. On April 13, 2011, commission counsel circulated a letter extending the deadline for Canada's completion of disclosure of the mandate documents, including stating its position on privilege, until May 6, 2011. The HTC's deadline to respond to the disclosure with an application for further production was set for June 6, 2011.

25. On May 6, 2011, Canada provided

a. 28 redacted DFO documents, containing negotiation mandates relating to food, social and ceremonial ("FSC") fisheries;

b. A list describing the 28 above-noted documents;

c. A list describing 165 DFO documents that relate to the FSC fishery negotiation mandates, over which Canada claimed privilege.

26. On June 7, 2011, commission counsel advised that it did not intend to make a separate application to challenge Canada's claims of privilege or to compel production of the documents over which privilege was claimed.

27. On June 14, 2011, the HTC filed its application with supplementary materials for production of both the Coastwide Framework and mandate documents.

28. On June 17, 2011, Canada applied to the commission pursuant to Rule 17.2 for an order that the submissions, affidavit material and all appended documents be treated as confidential and subject to undertakings provided under Rule 17 until 30 days following the Commissioner having ruled on the HTC application and, if judicial review is taken from such a ruling, until the final determination of any judicial review and the applicable appeal periods.

29. On June 22, 2011, the HTC filed submissions opposing Canada's application for confidentiality over application and supplementary materials in this application.

30. On June 28, 2011, in reply to the HTC's opposition to Canada's application, and taking into account a ruling issued by me on June 23, 2011, Canada modified its application to maintain confidentiality over all of the filed materials herein to seek an order that said materials be redacted to remove references to compelled documents.

31. On August 10, 2011, I released a ruling granting Canada's modified application for an order redacting the application materials and supporting documents to maintain confidentiality over all affidavits and supporting materials, but to make public the parties' submissions once they were redacted to remove information referencing the content of compelled documents.

32. On August 19, 2011, the Aboriginal Fisheries Framework document was introduced into evidence during the testimony of Ms. Kaarina McGivney, who was Regional Director of the Treaty and Aboriginal Policy Directorate from June 2001 until 2009.

IV. The Applicable Rules

33. The Rules provide:

> 12. As soon as possible after being granted standing, but subject to Rule 14, a participant shall do the following:
>
> > a) identify to the commission documents in its possession or under its control relevant to the subject matter of the inquiry; and
> >
> > b) if requested to do so, provide copies of any such documents to the commission. Wherever possible, documents shall be provided electronically."
>
> 14. Unless a different procedure is set out in the *Canada Evidence Act*, R.S.C. 1985, c. C-5, where the Commissioner requires the production of documents under Rule 12 and the participant to whom the requirement is directed objects to the production of any document(s) on any ground of privilege,
>
> > a) The participant shall specify the privilege claimed and the basis for the claim;
> >
> > b) The participant and commission counsel shall attempt to resolve the issue of privilege informally;
> >
> > c) If the participant maintains his or her claim of privilege, and the matter cannot be resolved informally, the participant may apply, in compliance with Part H of these Rules, to the Commissioner for a ruling;
> >
> > d) The Commissioner may, if necessary, inspect the document(s) and may rule on the claim, or refer the matter to the Federal Court for determination under section 18.3 of the Federal Courts Act, R.S.C. 1985, c.F-7; and
> >
> > e) If the claim of privilege is dismissed, the document(s) shall be produced to commission counsel."

18. Where a participant believes that documents in the possession of another participant are necessary and relevant to the inquiry, a participant may ask commission counsel to request specific documents from another participant. Commission counsel may accede to or decline such a request."

19. Where the participant has asked commission counsel to request documents from another participant and commission counsel has declined to do so, the participant may apply, in compliance with Part H of these Rules, to the Commissioner for an order that the other participant produce the documents in issue."

V. The Mandate Documents

34. The "mandate documents" refer to the information that is provided by DFO senior management to the DFO negotiators who seek agreements under the Aboriginal Fisheries Strategy ("AFS") with individual First Nations and aboriginal organizations. An aboriginal organization can include an individual First Nation, a First Nation band council, or an organization that represents a territorially-based aboriginal community. The AFS was launched by the DFO in 1992, following the 1990 Supreme Court of Canada decision in *R. v. Sparrow* [1990] 1 S.C.R.1075 ("*Sparrow*"). *Sparrow*, and subsequent decisions including *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ("*Van der Peet*") first set out the First Nations right and priority to fish for food, social and ceremonial purposes ("FSC fishing"). The agreements that are entered into through the AFS are generally for FSC fishing access, and can also include economic opportunity fishing access.

35. Since the *Sparrow* and *Van der Peet* decisions, the DFO has made allocations of fisheries access and funding to First Nations or Aboriginal Organizations for FSC purposes. Where possible, these allocations have been made through negotiation and agreement between the DFO and First Nations. In cases where the First Nation or aboriginal organization and DFO have been unable to reach agreement through negotiations, DFO has issued communal FSC licences to First Nations. These agreements or licences set out funding and fishing access.

36. The most sensitive component of the mandate documents is the sets of instructions that are given to DFO negotiators, and in particular, the maximum numbers of fish and maximum funding amount that the DFO negotiators are permitted to agree to in FSC agreements. Senior DFO officials determine the maximums that DFO negotiators may agree to in negotiations, then communicate those maximums or mandates to the individual DFO negotiators who attempt to reach agreements with First Nations or aboriginal organizations. The DFO negotiators are permitted to negotiate up to but not exceeding those allocation maximums.

VI. The Coastwide Framework documents

37. The Coastwide Framework documents were confirmed in the testimony of Ms. Kaarina McGivney to be the draft and working documents of a new approach to aboriginal communal fishing that was undertaken by DFO in 2008. Ms. McGivney testified that a three-page document that Canada disclosed to the commission entitled the "Aboriginal Fisheries Framework" sets out a summary of the contents of the Coastwide Framework documents. The need for the new approach was identified as necessary as a result of an evaluation of the way that the fishery was being managed in light of certain important court decisions in the previous approximately 15 years relating to the rights of First Nations in relation to the fishery. The allocation of First Nations fishing access was done on the assumption that the conclusion of treaties with First Nations was imminent and the current process was temporary. By 2008, the DFO recognized that it should not regard the conclusion of First Nations treaties as something that would happen in the near term. Therefore, the approach to aboriginal communal fishing should be regarded as a middle- to long-term policy. The Coastwide Framework was intended to be a new approach to developing policy that incorporated those more realistic assessments of the situation.

38. The Coastwide Framework was not finalized, and would have required Cabinet approval in order to be implemented. Canada submits that it has identified more than 1700 Coastwide Framework documents, and that identification was not exhaustive. In 2009, the near-collapse of the Fraser River sockeye salmon fishery led to the

establishment of this commission, and the Coastwide Framework was put on hold pending the outcome of this commission.

39. The most sensitive information from Canada's perspective in the Coastwide Framework documents is the "end-point outcome percentage", which is different from the mandate information. The Coastwide Framework documents refer to the DFO's approved goal with respect to aboriginal communal fishing as a percentage of the total allowable catch for the fishery as a whole. Canada claims privilege over that number as well.

VII. Submissions of the Participants

40. This application was complicated by a discussion concerning thousands of documents, claims of three different kinds of privilege and submissions by seven different participants. Because of the voluminous submissions and for ease of analysis, I have summarized the submissions of the participants by subject-matter in order to present the competing arguments concerning the same issues immediately following one another.

41. My preliminary organization of the participants' submissions is as follows:

a. The HTC applied for the production of documents. Its primary argument is that the documents are highly relevant to the commission's mandate, and in any event Canada should disclose the documents in the course of its duties to First Nations. Canada counters that the documents are tangential, rather than central to the commission's mandate. The government of British Columbia supports Canada's position. Commission counsel does not take a position on the relevance, but cautions that any order for production take into account the effect that such an order would have on the commission's own process.

b. Canada objects that even if the documents are highly relevant, production should not be ordered. Canada makes this argument on several alternative grounds.

    i. The documents should not be disclosed because of public interest immunity (common law);

    ii. The mandate documents are subject to settlement privilege; and

iii. The Coastwide Framework documents are Cabinet confidences.

c. The HTC and other First Nations submit that none of the three objections made by Canada is legally valid. Commission counsel agrees with the HTC that Canada's claims of cabinet confidence over these documents are not substantiated.

42. The submissions of each of the parties are set out in that order below. My decision follows.

A. The relevance of the documents to the commission's mandate

iii. The HTC

43. The HTC submits that Canada conceded the relevance of the Coastwide Framework documents in its submissions to the commission on April 7, 2011. The HTC submits that the Coastwide Framework documents will contain information about the following:

> The integrated fisheries management strategy;
>
> The fish allocation strategy which DFO advises establishes an end-point cumulative allocation outcome for salmon that will guide all fisheries negotiations with all BC First Nations, inside and outside treaties;
>
> The FSC fishing-allocation strategy;
>
> The commercial fishing allocations strategy;
>
> The components within the Coastwide Framework which will support a shift to more cost-effective and manageable watershed or regional fisheries arrangements and which align with broad fisheries management approaches and policies such as the Wild Salmon Policy and the Sustainable Fisheries Framework;
>
> The components within the Coastwide Framework which DFO advises reflect regional or watershed or ecosystem approaches, incorporate reliable and consistent fisheries monitoring and reporting, are inclusive of relevant local and traditional knowledge, and secure an integrated commercial fisheries where all participants have the same priority of access and operate under common rules;
>
> The components within the Coastwide Framework which DFO advises will move to broader collaborative fisheries arrangements at tribal groupings and watershed levels; and

> The components within the Coastwide Framework which DFO advises will establish manageable fisheries arrangements that can respond to the volatility and unpredictability of future harvest levels and particularly that of salmon.

44. The HTC says that the mandate information and the Coastwide Framework are highly relevant to this commission because they reflect the maximum harvest rate, an aspect of the policy by which DFO manages FSC fisheries, and an aspect of the lack of collaboration and consultation in DFO negotiations with First Nations. The Commissioner and participants do not otherwise have access to these maximum FSC allocation numbers, or the policies and practices by which these numbers are arrived at and used in negotiations.

45. Mandated FSC funding amounts (as distinct from allocations of fisheries access) are also redacted and/or not disclosed by DFO. As with the mandated maximum FSC allocation numbers, the HTC says that the maximum funding allocation is relevant to the amounts available for FSC fishing-related activities, an aspect of the policy by which DFO manages FSC fisheries, and an aspect of the lack of collaboration and consultation in DFO negotiations with First Nations. These amounts of funding are an important part of all First Nations' FSC fisheries, as they fund activities such as habitat monitoring, enhancement and restoration, catch monitoring, water quality assessments, escapement and stock assessments, stream surveys, community consultation, food, social and ceremonial fishery management plans, and overall capacity development for First Nations' fishery management branches. Without the disclosure of the mandate documents, the Commissioner and participants will not have access to these maximum FSC funding allocations, or the policies and practices by which these numbers are arrived at and used in negotiations.

46. The HTC refers to the granting of standing to representatives of 45 First Nations, as well as an emphasis in hearing topics on aboriginal fishing and the co-management of the fishery with First Nations as evidence of the importance of policy information on management of the First Nations fishery to the commission's work.

47. The HTC submits that the witness topics and the evidence summaries indicate the centrality of the Coastwide Framework documents to the commission. The HTC submits that many of the titles of documents over which privilege is claimed reveal their connection to DFO's aboriginal fishing policies and practices. Some of the document titles that the HTC refers to include:

a. Presentation entitled "Food Social and Ceremonial Fisheries (FSC) – An overview: Determining FSC Levels Analyzing Key Perceptions and Outlining Mitigating Strategies and Next Steps"

b. Chart/Table entitled "Estimated Fraser River FSC Catch"

c. Presentation entitled "Options for Commercial Fisheries Allocations"

d. Report entitled "Treaty Framework: Application of Analytical Model to First Nations' Food Social and Ceremonial Shares of Fraser River Sockeye Salmon – Proposed Storyline"

e. Presentation entitled "Pacific Aboriginal Fisheries Framework (PAFF) – Focus On Aboriginal Fisheries Allocations".

48. The HTC says that the components of the Coastwide Framework also appear to offer solutions to existing issues, by reflecting regional watershed or ecosystem approaches, incorporating reliable and consistent fisheries monitoring and reporting, incorporating relevant local and traditional knowledge, securing an integrated commercial fishery where all participants have the same priority of access and operate under common rules, and establishing manageable fisheries arrangements that can respond to the volatility and unpredictability of future harvest levels and particularly that of salmon.

49. The HTC submits, with reference to the commission's Policy and Practice Report on the DFO's Policies and Program's for Aboriginal Fishing, that the Coastwide Framework is slated to become the guiding document for future DFO policy in this area, and is already referenced in existing documents such as the Pacific Integrated Commercial Fishing Initiative ("PICFI"). The Coastwide Framework is intended to "guide the distribution of fisheries allocation and access for all species harvested in the Pacific Region." The Framework as described by Canada addresses the management

of aboriginal fisheries for treaty and non treaty arrangements. As such, the Framework is necessary and relevant to the commission's mandate in light of the commissioner's duty to consider the DFO's policies and practices regarding the sockeye salmon fishery.

50. The HTC submits in addition that the Terms of Reference require that I make recommendations for improving the future sustainability of the fishery. Decisions regarding future sustainability will necessarily involve allocations of a finite resource between many stakeholders. The Coastwide Framework describes the plan under development to determine how such allocations are to be divided between stakeholders, according to the priorities identified by Canada. In order to make informed and effective recommendations, the Commissioner should have access to the prospective management policies described in the Coastwide Framework.

51. In reply to Canada's submissions, the HTC submits that Canada has not disclosed its documents in enough detail for the HTC to be able to make more specific arguments regarding whether the documents would be directly useful to the commission. The HTC says that the burden cannot lie with it to demonstrate that the documents are needed by the commission when the content has been kept confidential.

52. The HTC submits that commission counsel's own submissions to the Privy Council make it clear that it regards the Coastwide Framework documents critical to the commission's mandate.

iv. The FNC

53. The FNC supports the submissions regarding the relevance of the documents to the commission's mandate. It also strongly supports the HTC's position that Canada cannot meet its obligations to First Nations if it maintains secrecy over relevant information during those negotiations. It also agrees with the HTC's position that any argument of Canada's opposing disclosure should consider that Canada has an incidental obligation to disclose the information in any event and is likely in breach of that obligation by withholding information. This should bear on any argument concerning the public interest in withholding or maintaining confidentiality over the documents.

v. The Sto:lo Tribal Council and Cheam Indian Band (the "STCCIB")

54. The STCCIB adopt the HTC's submissions on the relevance of the documents.

55. The STCCIB adds to the HTC's submissions on relevance that the documents are "fisheries policies" that are subject to examination by this commission as part of its mandate, and therefore fall squarely within information that must be disclosed and examined by this commission.

vi. The Western Central Coast Salish First Nations

56. The Western Central Coast Salish First Nations adopts the submissions of the HTC on the relevance of the documents. It submits that the mandate documents are an integral part of the statutory, regulatory and management processes of the DFO and required for the commission to carry out its mandate. They should be disclosed as part of Canada's negotiations with First Nations, and there is therefore no reason to withhold them from this commission.

vii. Canada

57. Canada has conceded the relevance of the documents to the commission's mandate. However, Canada strenuously argues that the documents are not of central importance, and are unlikely to decisively influence any of my conclusions or recommendations. Therefore, Canada submits that the information is of only peripheral relevance and that there is little or no probative value to the documents.

58. Canada submits that the mandate documents are not probative of the issues that are being considered by the commission. The commission has the actual allocations and the actual funding from past years. Canada argues that the actual FSC allocations and the actual funding numbers are much more probative of DFO's policy than allocation maximums which do not have any real relevance to FSC fishing once the agreements are made.

59. With respect to the Coastwide Framework generally, Canada argues:

> While the Coastwide Framework is relevant to the Aboriginal fishing hearings, they are not central to the Commission's mandate, as described in the Terms of Reference set out below. The Terms of Reference call upon the Commission to investigate and make findings of fact with respect to the causes for the decline of Fraser River sockeye salmon, the current state of Fraser River sockeye salmon stocks and the long term projections for those stocks. The Commissioner is also called upon 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.
>
> Information relating to a treaty policy that has yet to be finalized or implemented would not contribute to the Commissioner's understanding of the causes of decline, or current and long term prospects, of Fraser River sockeye salmon stocks.
>
> Finalization of the Coastwide Framework has been deferred, pending the findings and recommendations of Commissioner Cohen in this inquiry. Once in final form, aspects of the Coastwide Framework will be likely to require Cabinet approval before it can be implemented.

60. In Canada's submission, the information provided in the Aboriginal Fisheries Framework provides sufficient information for the Commissioner to know the possible direction of DFO's Aboriginal fisheries policies, and to formulate recommendations in light of that knowledge.

61. Canada submits that full disclosure of the Coastwide Framework documents would not contribute appreciably to the fulfilment of the Commission's mandate. The Coastwide Framework was an unfinished, prospective policy, and has been put on hold pending the commission's recommendations.

62. Canada asserts that the commission's mandate is to investigate *actual* DFO policies and practices. Given that the Coastwide Framework is not an actual policy or practice, the balancing of interests favours maintaining privilege over the Coastwide Framework documents, which are being developed largely for the purpose of providing guidance on the negotiation of fisheries components of treaties.

viii. British Columbia

63. British Columbia supports Canada's submissions. In the alternative, it submits that if I order that any documents that evidence positions taken in treaty negotiations be produced, that I exempt any documents that relate to provincial documents or communications that were created for treaty negotiations.

ix. Commission Counsel

64. Commission counsel has not made a submission on the probative value of the mandate documents or the Coastwide Framework documents to the commission's mandate. It first sought this information from Canada November 1, 2010 and February 22, 2011, and then in a letter to the Clerk of the Privy Council on March 23, 2011, but then did not seek it again after the Aboriginal Fisheries Framework document was provided.

65. Commission counsel has not made a specific request for the mandate documents, but it notes in its submissions that it has made repeated requests for all

relevant documents and refers to Canada's concession that the mandate documents are relevant in Canada's April 7, 2011 correspondence.

B. Privilege

66. Canada argues that the documents are protected from disclosure by settlement privilege, the Coastwide Framework documents constitute a Cabinet confidence, and all of the documents should be exempt from disclosure by public interest immunity. The other participants oppose Canada's position.

i. Canada

67. Canada submits that settlement privilege is defined as

> a common law privilege that protects from disclosure of documents or communications created for, or communicated during, settlement negotiations, and made with a view to avoiding or settling a litigious dispute. Such communications are protected from disclosure and inadmissible in evidence. Settlement privilege continues to apply to settlement negotiations, even if the negotiations are successful and settlement is reached, or conversely, if negotiations are unsuccessful.

68. A communication constitutes a settlement negotiation if it can meet a three-part test, as articulated in Sopinka et al, *The Law of Evidence in Canada*, 2d ed. (Markham: Butterworths, 1999) (*"The Law of Evidence in Canada"*) at p. 810, as adopted in *Ross River Dena Council v. Canada* 2009 YKSC 4 ("*Ross River*"):

> (a) At the time of the communication, there was a litigious dispute in existence or within contemplation; and
>
> (b) The purpose of the communication must have been to attempt to effect a settlement.
>
> (c) That the communication was made with the intention that it would not be disclosed, regardless of whether a settlement was achieved. (the "Sopinka test")

69. Canada submits that settlement privilege is generally considered to be a class privilege. As a class privilege, once it is found that communications are protected by settlement privilege, there is a *prima facie* presumption of non-disclosure and

inadmissibility for all documents and communications related to the settlement negotiations in question.

70. Canada asserts that the Coastwide Framework meets all of the tests of settlement privilege. First, Canada submits that most First Nations in treaty negotiations, including the participants in this inquiry, have filed litigation against Canada in the BC Supreme Court, in the form of protective writs. These are not in all cases active litigation but they qualify as litigation as per the test. Further, those First Nations that have not filed protective writs are also engaged in settling litigious disputes, because in those cases, litigation is in contemplation rather than in existence.

71. Canada submits that the primary purpose of modern treaty negotiations is to address and settle First Nations' unresolved claims to Aboriginal rights and title, and the courts have emphasized the importance of negotiations between the Crown and First Nations in order to reconcile aboriginal and non-aboriginal rights and interests. Further, the Coastwide Framework was under development with the purpose of settling those unresolved claims.

72. Second, the parties' expectation that confidentiality will remain over settlement documents is met in treaty negotiations because the Crown and the First Nations routinely seek assurances from one another that communications will not be disclosed if negotiations fail. Canada submits that this part of the test is not always applied in the analysis of settlement privilege in British Columbia, and cites *B.C. Children's Hospital v. Air Products Canada Ltd.*, (2003), 224 D.L.R. (4th) 23 at para. 26 in support of that proposition.

73. Third, Canada further submits that treaty negotiations are clearly intended to effect a settlement of First Nations' outstanding legal claims under section 35 of the *Constitution Act, 1982*, and thereby to end litigious disputes over those claims.

74. Canada submits that not only does settlement privilege apply to direct communications, but also internal documents and communications relevant to those negotiations. The privilege therefore applies to any confidential mandates, guidelines,

and other documents that help develop and articulate Canada's negotiating position in treaty negotiations, even if those documents were not disclosed to the other parties to the negotiation. Canada submits the British Columbia Court of Appeal was prepared to accept that notes of a mediation session were *prima facie* subject to settlement privilege in *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada* (2005) 40 B.C.L.R. (4th) 180 ("*Dos Santos*") because of the "blanket" application of settlement privilege. It therefore submits that this commission should infer that similar types of documents, such as those that develop and articulate negotiation strategies and positions would not be exchanged with the other party during settlement negotiations, but still would be protected by settlement privilege.

75. Canada submits that the Coastwide Framework documents were prepared in support of Canada's effort to develop and internally communicate Canada's position in treaty negotiations. The goal of the Coastwide Framework was to provide clear direction to address fisheries components of treaties, and improve linkages between fisheries arrangements inside and outside of treaties. Treaty negotiations are intended to resolve actual or contemplated litigious disputes over aboriginal and treaty rights. In Canada's submission, therefore, the Coastwide Framework documents are protected by settlement privilege. The fact that its internal processes in preparation for treaty negotiation are lengthy and complex and therefore generate more documents than non-government processes does not disentitle it to the protection of settlement privilege.

76. Finally, Canada submits that there is no public interest that justifies an exemption to settlement privilege for the reasons set out above. The maintenance of settlement privilege over the documents and communications created for treaty negotiation purposes is essential to the success of those negotiations. If the Coastwide Framework documents were disclosed, public knowledge of Canada's "bottom line" would make it more difficult, expensive, and time-consuming to conclude treaties.

ii. The HTC

77. The HTC submits that settlement privilege does not apply to the documents for several reasons. First, there is no litigious dispute in relation to the FSC fishery and

funding allocations that is sought to be compromised or settled by the negotiations that take place. The mere fact that there may be overarching litigation contemplated between the parties is not sufficient to cause all discussions between the parties on every topic to be privileged. Second, settlement privilege only applies to disclosures between parties during negotiations (*Ross River*, *supra*). The documents were never communicated by Canada to any First Nation. The third part of the test, that the parties had to have an expectation of confidentiality when they made the communications, cannot apply, only because the documents were never exchanged at all. However, Canada's argument that settlement privilege can be extended to its own internal working documents, which were never disclosed to the other party to the dispute simply does not fit within any definition of settlement privilege known to law.

78. Finally, if settlement privilege does apply to these documents, a public interest exception should be made on the basis that a competing pubic interest outweighs the public interest in encouraging settlement. The public interest in this case is the commission having all the information that it needs to complete its mandate.

iii. The FNC and the Western Central Coast Salish First Nation

79. The FNC and the Western Central Coast Salish First Nation support the position of the HTC on settlement privilege.

iv. The STCCIB

80. The STCCIB adopts the HTC's positions on settlement privilege and adds that to the extent that settlement privilege applies to the documents, Canada has waived that privilege by establishing this commission.

v. British Columbia

81. British Columbia adopts Canada's position on settlement privilege.

C. Cabinet Confidence Pursuant to Section 39(1) of the *Evidence Act*

i. Canada

82. Canada asserts that the Coastwide Framework documents are Cabinet confidences pursuant to section 39(1) of the *Canada Evidence Act* ("Cabinet confidences").

83. Canada acknowledges that an objection under s. 39 of the *Canada Evidence Act* can only be made by a Minister of the Crown or the Clerk of the Privy Council.

84. However, Canada submits that the Clerk of the Privy Council has competing demands on his time and a very busy schedule, and the task of reviewing documents to prepare a s.39 certificate for signature is a complex and time-consuming process, which cannot be delegated. Given the nature of this task, the Clerk of the Privy Council would not have been able to complete it in time for the Aboriginal fishing hearings which commenced in June, 2011.

85. Canada says that in place of a section 39(1) certificate, commission counsel agreed that a s.39(1) certificate would not be required, unless requested by the commission after an initial determination by the Department of Justice counsel in consultation with the Director and Counsel, Cabinet Confidences division within the Office of the Counsel to the Clerk of the Privy Council. Canada submits that if the commission orders production of the documents, then it will consult with the Clerk of the Privy Council and provide him an opportunity to issue a certificate as necessary.

ii. The HTC, the FNC, the Western Central Coast Salish First Nations, and the STCCIB

86. The HTC submits that unless Canada produces a certificate pursuant to section 39(1) of the *Canada Evidence Act*, a claim that the Coastwide Framework documents are Cabinet confidences must fail.

87. The FNC, the Western Central Coast Salish First Nations and the STCCIB adopt the HTC's submission on this point.

iii. Commission counsel

88. Commission counsel submits that an objection to disclosure under s. 39 of the *Canada Evidence Act* must include:

a. The objection must be made before a court, person or body with jurisdiction to compel the information;

b. The objection must be made by a Minister of the Crown or the Clerk of the Privy Council;

c. The Minister or Clerk must certify this objection in writing to the court, person or body; and

d. The information at issue must constitute a Cabinet confidence.

89. Commission counsel submits that no agreement with counsel for Canada has displaced Canada's obligation to produce all relevant documents in the absence of a section 39(1) certificate. If Canada does not produce a certification pursuant to section 39(1) that the Coastwide Framework documents are Cabinet confidences, then they are not protected from production by cabinet privilege or any agreement with counsel.

D. Public Interest Immunity

i. Canada

90. Canada asserts that both the information in the Coastwide Framework and the mandate documents are protected from disclosure by "public interest immunity" under the common law (*Carey v. Ontario* [1986] 2 S.C.R. 637) ("*Carey*").

91. In *Health Services and Support Facilities Subsector Bargaining Assn. v. British, Columbia*, [2002] B.C.J. No. 2464 (Y.T.S.C.) ("*Health Services*"), Burnyeat J. cited *The Law of Evidence in Canada*, *supra*, with respect to the factors which courts have considered in weighing the competing public interests against and in favour of disclosure of information for which public interest immunity is claimed:

> The judge must weigh the competing public interests by considering such factors as: (a) the probative value of the evidence in the particular case and how necessary it will be for a proper determination of the issues, (b) the subject matter of the litigation, (c) the effect of non-disclosure on the public

> perception of the administration of justice, (d) whether the claim or defence involves an allegation of government wrongdoing, (in which case the claim for immunity may be motivated by self-interest and not a genuine concern for the secrecy of the information), (e) the length of time that has passed since the communication was made, (f) the level of government from which the communication emanated, and (g) the sensitivity of the contents of the communication (including whether and the extent to which there has been prior publication of the information). The court, therefore, must balance the possible denial of justice that could result from non-disclosure against the injury to the public arising from disclosure of public [sic] documents which were never intended to be made public.

92. This test requires the court to balance the interest in maintaining confidentiality with the public interest in having the documents made public, or made available for the public use for which they are sought.

93. The first interest to be considered in applying this test is the probative value of the documents for the evidence in the particular case, and how necessary the information will be for a proper determination of the issues in question. Canada's position on the probative value of the documents to the commission's mandate is set out above.

94. Canada submits that disclosure of its allocation and funding endpoints would cause harm in that it would be unable to negotiate FSC allocation and funding agreements with First Nations and aboriginal organizations going forward. It says that although FSC negotiations occur annually, DFO's FSC negotiation mandates have remained relatively constant over the years and, therefore, disclosure of DFO's negotiation mandates for past negotiations would provide First Nations with insight into DFO's present and future confidential negotiation mandates. As a result, disclosure of confidential FSC negotiation mandates would fundamentally change and negatively impact the nature of the negotiating relationship between DFO and First Nations and aboriginal organizations.

95. Canada says further that if First Nations had knowledge of DFO's allocation and funding endpoints, it would be difficult for DFO to engage in the "give and take" that typifies most negotiations. DFO would be increasingly challenged and prejudiced in its

ability to advance important interests through negotiations, such as ensuring adequate catch monitoring and reporting.

96. Canada submits that if DFO's confidential allocation maximums were disclosed, the mandate amount would likely become the minimum acceptable level from the First Nations perspective. This would eliminate the flexibility to reserve a portion of the mandate allocation to respond in a timely manner to in-season requests from a First Nation for additional FSC fishing opportunities. Also, if there were intense pressure from all First Nations for all FSC allocations to reflect maximum mandated amounts, this would have the potential to adversely impact fish stocks, particularly in years of low abundance.

97. Canada contends that disclosure of the mandate information and the Coastwide Framework documents could also jeopardize the ability to successfully conclude negotiations and achieve AFS agreements. If the mandate for a specific negotiation is known at the outset of negotiations, parties may become frustrated at the inability to move beyond initial positions in response to information brought forth in those negotiations, and this could reduce the likelihood of reaching an agreement. AFS agreements are the main mechanism for funding FSC catch monitoring programs, without which objectives relating to conservation and orderly management of fisheries can be compromised.

98. Canada asserts that public knowledge of Canada's "bottom line" in treaty negotiations through disclosure of the Coastwide Framework end-point outcome percentage would make it more difficult, expensive, and time-consuming to conclude treaties.

ii. The HTC

99. The HTC says that the *Health Services* case that Canada relies on to assert public interest immunity has no relevance to a dispute between government and First Nations, because the case relates to the government's bargaining relationship with trade unions. Because Canada has no fiduciary duty to trade unions, and it has no

historical basis with trade unions that give rise to a duty of honour of the Crown, a case dealing with trade unions is inapplicable to this matter.

100. The HTC submits that there is no public interest in keeping the mandate documents or the Coastwide Framework documents confidential. The public interest requires disclosing of the mandate documents and the Coastwide Framework documents, because Canada cannot fulfil its duties of good faith, honour, and fiduciary duty to the First Nations if it bargains with undisclosed confidential information.

VIII. Decision

101. I have organized my decision as follows:

a. Does settlement privilege operate in this case to allow Canada to maintain confidentiality over the documents?

b. Are the Coastwide Framework documents Cabinet confidences?

c. Does public interest immunity apply to allow Canada to maintain confidentiality over the documents?

A. Settlement privilege

102. Canada claims that the documents are privileged because they are documents created for the purpose of settling a litigious dispute. The HTC submits that the concept of settlement privilege has no application to any of the documents.

103. Canada correctly notes that a three-part test has generally been used to define settlement privilege (*Ross River*, *supra*):

> (a) At the time of the communication, there was a litigious dispute in existence or within contemplation; and
>
> (b) The purpose of the communication must have been to attempt to effect a settlement.
>
> (c) That the communication was made with the intention that it would not be disclosed, regardless of whether a settlement was achieved.

104. *Ross River, supra*, stated, quoting *Middelkamp v Fraser Valley Real Estate Board*, (1992), 71 B.C.L.R. (2d) 276 (C.A.):

> Considering the enormous scope of production which is required by our almost slavish adherence to the Peruvian Guano principle, (1882) 11 Q.B.D. 55, the questionable relevance and value of documents prepared for the settlement of disputes, and the public interest, I find myself in agreement with the House of Lord that the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket, prima facie, common law", or "class" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.
>
> In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served...

105. Canada relies on the comments made in this quote that refer to settlement privilege as a "class privilege". Canada submits that this means that there is a *prima facie* presumption of non-disclosure and inadmissibility for all documents and communications related to settlement negotiations. Canada relies on *B.C. Children's Hospital v. Air Products Canada Ltd.*, (2003), 224 D.L.R. (4th) 23 (C.A.) ("*Children's Hospital*") for this proposition.

106. In *Children's Hospital, supra*, the court considered the nature of settlement privilege. As Canada argues, the court found that consistent with *Middelkamp*, settlement privilege is a "blanket" or *prima facie* privilege that applies to all documents regarding settlement.

107. In both *Middelkamp* and *Children's Hospital*, *supra*, the "documents relating to settlement" are documents or communications that have been *exchanged between parties* who are adverse to each other in the dispute in question, namely the dispute that they are seeking to settle. In *Children's Hospital*, the Court reaffirmed that settlement privilege is a "blanket" privilege, citing *Rush & Tompkins Ltd. v. Greater*

London Council, [1988] 3 All E.R. 737 ("*Rush & Tompkins*") with approval where the court refused production of information, stating:

> Lord Griffiths refused production of this information because, as he said at p.744, it would be harmful to the conduct of settlement negotiations in multi-party litigation "if solicitors thought that what was said and written between them would become common currency available to all other parties to the litigation".

108. However, the issue in that case was whether settlement privilege extended to the settlement agreement itself, as opposed to simply the communications exchanged between the parties in the course of settlement negotiations. The majority of the court held that the privilege did apply to the settlement agreement.

109. The only case cited that considered whether settlement privilege could apply to a communication that had *never been disclosed* to the other party is *Ross River, supra.* That case concerned documents quite similar to those under consideration herein. In that case, Canada asserted settlement privilege to protect reports that had been prepared for its strategy in treaty negotiations from disclosure. The reports had never been disclosed to the Kaska First Nations group that it was negotiating with. The court held that settlement privilege did not apply, stating at paragraph 44:

> In any event, it seems clear that the Report was not part of any particular settlement proposal, nor was it otherwise disclosed, either publicly or confidentially, in the negotiations respecting the Kaska claims in either British Columbia or the Yukon. Therefore, I question whether it can truly be held to be a document which was communicated' in furtherance of settlement. Is it sufficient that the Report was "generated in relation to" the negotiations...? I do not think so. The driving principle behind the notion of settlement privilege is that the law encourages settlements and permits the parties to exchange correspondence and documents with a view to resolving their disputes, without fearing that such correspondence and documents will be used as evidence if the settlement fails [citation omitted]. In this case, there is no evidence that the Report was used in that fashion or that it is deserving of protection for the reasons set out in *Middelkamp*, cited above.

110. Canada submits that in *Dos Santos*, *supra*, the court was willing to consider notes from a mediation part of the "blanket" settlement privilege. In that case, all of the documents over which settlement privilege was claimed were documents that had been

exchanged between the parties, rather than one party's own notes regarding the mediation or settlement. It is difficult to ascertain what the nature of the documents was that the court may have been prepared to find were subject to settlement privilege, because ultimately the court held that all of the documents should be disclosed. This case is not helpful to Canada's assertion that documents prepared for the purpose of settlement but not disclosed to the adverse party are privileged.

111. I find that the law in British Columbia is that settlement privilege is a blanket or class privilege, and that it applies to communications that meet the three-part "Sopinka" test that was set out in *Ross River*, *supra*. It is both implicit from the "Sopinka" test, and was explicitly set out in *Ross River* that settlement privilege applies to communications that have been *disclosed to the party that is adverse in interest* in the litigious dispute.

112. In this case, Canada asserts that it is a "litigious dispute" with the First Nations with whom it negotiations FSC allotments of sockeye salmon. The litigious dispute is not in regard specifically to the FSC allotments for a particular year that are the subject of the negotiations in question, but rather the litigious dispute is with regard to outstanding negotiations and litigation regarding the First Nations overall treaty issues. Some of the First Nations have filed protective writs in respect of these disputes and others have not.

113. I agree with Canada's position that there is a litigious dispute between itself and the First Nations that have filed protective writs, and arguably with those First Nations that have not filed such writs but with whom Canada negotiates from time to time on the overall issues of treaties. Notionally, this satisfies the first branch of the test. However, it is questionable whether the FSC year-over-year allotments are part of the overall treaty disputes. Canada itself asserts that "the FSC allocations are negotiated annually outside of the treaty process". For the purposes of this test, I will assume that the treaty negotiations constitute a litigious dispute, and that therefore this part of the test is met.

114. However, when I go to the second and third parts of the test, I am unable to accede to the argument that Canada makes, which is that communications are made with an implicit intention that they will not be disclosed, and that the communications are

made with the purpose to settle that dispute. Neither of these two tests have any application whatsoever to the communications that are at issue in this application.

115. With regard to the third branch of the test, even if I accept that the negotiations over year-over-year FSC allocations may be made for the purpose of settling a dispute, the negotiations over year-over-year FSC allocations cannot be said to be made for the purpose of settling *the litigious dispute that Canada refers to*, which is the overall treaty negotiation. The communications made for the purposes of settlement must be made for the purposes of settling the litigious dispute and not an ancillary matter in order for this part of the test to be satisfied.

116. The second branch of the test requires that the communication must have been made with the express or implied intention that it would not be disclosed in the event that the negotiations failed. I find that this part of the test – that the documents must have been communicated with an intention that they remain confidential - cannot apply to the documents at issue in this application. There was no "intention that the communication would not be disclosed in the event that the negotiations failed" because there was no communication to the adverse party that would be available for the party to use against the communicator in a litigious dispute. The whole basis for settlement privilege is to protect communications made between parties adverse in interest in settlement negotiations. In this case, there were no such communications. I find therefore that none of the documents are protected by settlement privilege.

B. Cabinet confidence

117. Canada submits that the Coastwide Framework documents are Cabinet confidences, pursuant to section 39(1) of the *Canada Evidence Act* ("Cabinet confidences"). Commission counsel submits that an objection to disclosure under s. 39 of the *Canada Evidence Act* must include the following:

a. The objection must be made before a court, person or body with jurisdiction to compel the information;

b. The objection must be made by a Minister or the Crown of the Clerk of the Privy Council;

c. The Minister or Clerk must certify this objection in writing to the court, person or body; and

d. The information at issue must constitute a Cabinet confidence.

118. Commission counsel submits that no agreement with counsel for Canada has displaced Canada's obligation to produce all relevant documents in the absence of a section 39(1) certificate. If Canada does not produce a certification pursuant to section 39(1) that the Coastwide Framework documents are Cabinet confidences, then they are not protected from production by cabinet privilege or any agreement with counsel.

119. Canada refers to an agreement between counsel displacing a need for a section 39(1) certificate, though Canada acknowledges that if I order production of the documents, it will then be required to seek a section 39(1) certificate in order to substantiate its claim that the Coastwide Framework documents are Cabinet confidences.

120. I find that section 39(1) of the *Canada Evidence Act* is clear that without a certificate from the Clerk of the Privy Council certifying the Coastwide Framework documents as Cabinet confidences, section 39(1) affords no protection from disclosure. Canada has not provided a certification that the Coastwide Framework documents are Cabinet confidences. Therefore, the Coastwide Framework documents are not Cabinet confidences as per section 39(1) of the *Canada Evidence Act*.

C. Public Interest Immunity

121. Public interest immunity is a common law doctrine that provides for the exclusion of sensitive government information from production where the disclosure of that information would cause harm that is not in the public interest. Where a government body asserts public interest immunity, the determination as to whether the immunity should attach involves weighing the competing public interests against and in favour of disclosure and, if necessary, examining the information (*Carey*, *supra*).

122. Public interest immunity was summarized in *Carey*, *supra* as follows:

> ... Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making processes at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

123. In *Health Services*, *supra*, Burnyeat J. set out a list of factors to be weighed in analyzing whether information is protected from disclosure by public interest immunity. This list is set out in Canada's submissions in paragraph 91, above.

124. In considering a claim of public immunity, the court in *Health Services*, *supra*, refers to the possible denial of justice that could occur when a litigant is denied access to relevant information in a court proceeding. This inquiry is different from a judicial proceeding, and does not carry the same risk of the denial of justice to a litigant in the same way that a judicial proceeding does. However, I refer to the terms of reference in this inquiry, which state that "the Government of Canada has committed to full cooperation with an inquiry". I am aware of the very important interest in having all of the necessary information before the inquiry, in order that the participants and the public can have confidence in the conclusions and recommendations that are ultimately reached.

125. This analysis requires a balancing of the probative value of the information and how necessary it will be for a proper determination of the issues for which it is being produced against any harm to the public interest that would result from its disclosure. Additional factors to be balanced include the subject-matter of the litigation, the effect of non-disclosure to the public perception of the administration of justice, whether there is an allegation of government wrong-doing, the length of time that has passed since the

communication was made, the level of government from which the communication emanated, and the sensitivity of the contents of the information (including whether there has been previous publication).

126. The parties have agreed that both the mandate information and the Coastwide Framework documents satisfy the minimal, broad test of relevance to the commission's mandate. If I find that there would be harm to the public interest by disclosing the information, then I must go on to examine its likely probative value to my mandate and the other factors relating to the sensitivity of the information in order to determine whether the information should be protected by public interest immunity.

127. I have considered whether there would be any negative effect on the public interest if the mandate documents and the Coastwide Framework documents were made public.

128. Canada's central argument in opposing this application is that disclosing the mandate information and the Coastwide Framework documents will compromise its ability to negotiate aboriginal communal fishing access and funding agreements with First Nations and aboriginal organizations going forward. Canada currently has the responsibility to allocate FSC fishing access to the Fraser River sockeye salmon fishery to First Nations. Canada also enters into agreements with some First Nations for communal fishing for economic purposes. Collectively, I will refer to aboriginal communal fishing access for FSC purposes and economic purposes as "aboriginal communal fishing access". It is in the public interest that Canada administer aboriginal communal fishing access in a way that best balances the First Nations' needs and is sustainable for the fishery. In the absence of a recommendation by this commission, or a determination by another administrative or judicial body that its present process is not an appropriate way to carry out that task, the public interest is in allowing Canada to carry out its administration of aboriginal communal fishing as it has done and as it believes is the optimal way to carry on.

129. I will first deal with Canada's argument that the disclosure of the mandate information would cause harm to this process.

130. Canada argues that in effect, disclosure of DFO's negotiation mandates for past negotiations would provide First Nations with DFO's future confidential negotiation mandates. This is because Canada's negotiating mandates change very little year over year, and Canada submits it would be obvious to a negotiator with access to a previous year's mandate information what the mandate information would be going forward.

131. Canada asserts that it would be difficult for DFO to engage in the "give and take" that typifies most negotiations if the First Nations' negotiators had knowledge of DFO's mandate information. Canada argues that DFO would be prejudiced in its ability to advance important interests, such as ensuring adequate catch monitoring and reporting through negotiations. It says that if the mandate for a specific negotiation were known at the outset, parties would become frustrated at the inability to move beyond initial positions in response to information brought forth in those negotiations, and this would reduce the likelihood of reaching an agreement.

132. Canada's submission is that if DFO's mandate information were disclosed, the mandate amount would likely become the minimum acceptable level from the First Nations' perspective. This would also eliminate the flexibility, for example, to reserve a portion of the allocation to respond in a timely manner to in-season requests from a First Nation for additional FSC fishing access. For these propositions, Canada relies on the affidavit evidence of Brigid Payne, Manager of Policy Analysis and Treaty Support in the Treaty and Aboriginal Policy Directorate in the Pacific Region of the DFO.

133. The HTC argues that Canada's fiduciary duty to the First Nations, and the honour of the Crown, preclude it from negotiating aboriginal communal access to the fishery with undisclosed "mandates". It says that any negative change in the current negotiating practice that would result from disclosure of the mandate information would bring Canada more into line with its obligations toward the First Nations.

134. I accept Canada's argument that disclosure of the mandate information would fundamentally change the current approach to allocations of FSC fishing access for the reasons it refers to in its submissions.

135. If I were to require Canada to make the mandate information public, it would require Canada to change its approach to FSC access negotiations. Canada would no longer be able to send negotiators to meet with First Nations or aboriginal organizations to negotiate FSC fishing access, because they would know the maximum amounts available prior to the negotiation.

136. For these reasons, I am persuaded that there would be a negative consequence to the disclosure of the mandate information sought by the applicants. It would be likely to create an overall increase in demand on aboriginal communal fishing access, and therefore on the resource as a whole. Moreover, if I were to order production of these documents, it may create conditions that require a change in the DFO's current practice in the aboriginal communal fishery in advance of the participants' submissions on that practice and in the absence of my consideration of whether a recommendation to change that current practice is warranted by all the facts and evidence before the commission. I would create the need for a change without any recommendations for a process to replace the current practice.

137. I wish to make it clear that my conclusion that there would be harm to the public interest from disclosing information that would change the bargaining relationship with the First Nations does not reflect a decision with respect to any findings or recommendations I might make about the current practice for allocation of aboriginal communal fishing access. This is an application for the production of documents. The commission has not completed its evidentiary hearings or heard submissions from participants.

138. I next have to consider whether there would be harm to the public interest if the Coastwide Framework documents were made public by disclosure to this commission. The Coastwide Framework documents are prepared in support of Canada's efforts to develop and internally communicate Canada's position in treaty negotiations. As noted in the Aboriginal Fisheries Framework document, the Coastwide Framework will provide clear direction to address fisheries components of treaties, and improve linkages

between fisheries arrangements inside and outside of treaties. Treaty negotiations, as indicated earlier, are intended to resolve disputes over aboriginal constitutional rights.

139. Canada submits that disclosure of the Coastwide Framework documents would be harmful in particular to Canada's relationship and negotiations with parties with whom Canada is in active treaty negotiations. These parties include the Province of British Columbia and those First Nations with whom Canada is or has been in active treaty negotiations. Canada's submission is that the Coastwide Framework documents contain sufficient information about Canada's existing negotiation mandates and positions to negatively impact upon Canada's current and future negotiations with First Nations in the British Columbia treaty process.

140. Canada relies on the affidavit evidence of Sarah Murdoch, the acting Regional Director of Treaty and Aboriginal Policy within the DFO as support for these assertions.

141. Neither the HTC, nor the participants who supported its application have made substantive submissions to counter Canada's assertions of harm to the public interest from disclosure of the Coastwide Framework documents. The HTC rightly notes that there must be evidence of the harm that is said to arise as a result of the disclosure of government documents, rather than just an assertion of unspecified harm. The HTC states in its submissions of June 14, 2011 that Canada's assertions in its letter of May 6, 2011 were mere suggestions. The HTC reserved the right to submit affidavit evidence in reply to Canada's further evidence brought on the subject. Canada made submissions including Ms. Murdoch's affidavit evidence on June 17, 2011. The HTC did make reply submissions on June 20, 2011 but it did not respond to the points in Ms. Murdoch's affidavit with any evidence that contradicted Ms. Murdoch's affidavit evidence.

142. Instead, the HTC argues that as a matter of law, Canada cannot negotiate in accordance with its obligations to the First Nations without disclosing its negotiating positions. This is an argument that I do not have the jurisdiction to resolve on this application, or indeed within my mandate.

143. I accept Canada's submission that there would be harm to the public interest from disclosure of the mandate information and from disclosure of the Coastwide Framework documents. Canada's affidavit evidence is uncontradicted on this point. The test for public interest immunity requires a weighing of the severity of that harm with the probative value of the documents to the issues under consideration under my Terms of Reference.

144. In assessing the probative value of information, the fact that it satisfies the broad test of *relevance* is not sufficient to determine whether its production should override negative consequences of disclosure; the information must be *probative*. I use the term "probative" to describe information that has a likelihood of meaningfully influencing one or more findings of fact, or recommendations that I might make in my report.

145. I have considered the probative value of the information at issue separately for the different groups of documents; first the mandate information, and second, the Coastwide Framework documents.

146. First, I have considered the probative value of the mandate numbers that are used for annual negotiations of aboriginal communal fishing access. As the participants have agreed, aboriginal communal fishing is a significant part of the Fraser River sockeye salmon fishery. In some years, the sockeye salmon returns are sufficiently low that the only fishing allowed is FSC fishing. Other than in years of great abundance, FSC fishing comprises a significant component of the total permitted sockeye fishery.

147. However, the issue is the probative value of the mandate information to the commission. Even without the mandate information, the commission has access to the completed agreements for past years, including the last completed agreements, which outline the actual FSC allotments of fisheries access and funding. From these agreements, the total FSC allotments for past years can be determined. The commission also has actual harvest numbers for the fishery in past years, which differ from the allocations, based on the abundance of the fishery.

148. While past practices are relevant to my conclusions and recommendations about the fishery, it seems that potential outcomes that could have occurred in the past but did not (namely, allocation maximums that were not reached through negotiation) are of limited or no probative value. Past mandate information is of little relevance once the agreements have been concluded. I find therefore that to the extent that the mandate information relates to past aboriginal communal fishing access, it would have limited or no probative value.

149. However, Canada has disclosed that the mandate information tends to remain constant year over year, and so past mandate information is reflective of future mandate information.

150. These prospective future negotiations for annual aboriginal communal fishing access are the principal reasons that Canada resists disclosure of past mandate information. I have therefore considered whether hypothetical future bargaining mandates are likely to be probative of the issues on which I am to reach conclusions and whether they would be likely to influence my finding or recommendations.

151. My Terms of Reference include considering past policies and practices, and making recommendations for changes going forward. I can do that without reference to what might have been done in the future in the absence of my recommendations. Beyond the knowledge that DFO negotiators are given allocation instructions from which they negotiate the agreements, I do not find that knowing specific mandate information with individual details would meaningfully influence my findings or recommendations.

152. In addition, I have weighed the other factors that courts have considered in deciding whether information should be granted public interest immunity. I have grouped these considerations into two categories.

153. First, the case law considers the effect of non-disclosure of this information on the public perception of the administration of justice, including whether the information is at issue in a claim of government wrongdoing. There is no claim that the mandate

information is being withheld because the government wishes to conceal wrongdoing. While the participants who seek this information argue that the government should disclose the information in order to foster a more consultative process, they do not assert that there is government malfeasance which is being covered up.

154. Second, I must consider the sensitivity of the information based on: the level of government from which the communication emanated, prior publication and the amount of time since the communication was made (and I infer that this part of the test includes whether the information is still in use). In *Carey*, *supra*, the court described this as the nature, contents and timing of when the information is to be revealed, and noted that these considerations are more relevant to its sensitivity than the level of government from which it emanates. In application to the mandate information, the mandates are developed and approved by senior DFO officials. The information is used on an ongoing basis, and if I ordered it released, it would disrupt the exercise of a current policy.

155. I find that these factors balance toward maintaining public interest immunity over the mandate documents. While this information is not said to emanate from the highest level of cabinet, the other factors support immunity. To require disclosure would disrupt an ongoing implementation of policy.

156. I find that the mandate information is of little probative value to the issues I am to consider. Having found that the disclosure of the mandate information would cause harm to the public interest, the probative value of the mandate documents does not warrant overriding the likely negative consequences of disclosure. The disclosure of the mandate information would stymie DFO's approach to negotiating aboriginal communal fishing access agreements, without my having made findings or recommendations that it is advisable to do so.

157. To assess the likely probative value of the Coastwide Framework documents, I have considered their content as disclosed by the submissions of the parties, and the testimony of witnesses.

158. The key details that have been revealed about the Coastwide Framework documents can be summarized as follows:

a. The Coastwide Framework is an articulation of principles for the negotiation and implementation of fisheries agreements, including an allocation strategy, that was under development from approximately 2008 until 2009, when the incomplete process was discontinued;

b. The purpose of the Coastwide Framework was to develop a new approach for negotiating the fisheries chapters in First Nations treaties;

c. The factors leading to the perceived need for a new approach to fisheries negotiations for treaties included protracted treaty negotiations, judicial decisions and legislation affecting the current legal regime, and a recognition that treaties were unlikely to be concluded in the short- or medium-term;

d. The aspects of the Coastwide Framework documents that were retained and referred to for further policy development are articulated in a short document called the "Aboriginal Fisheries Framework", which was approved by the Minister of the Department of Fisheries and Oceans;

e. The Aboriginal Fisheries Framework included work that culminated in a "end-point percentage" for salmon and non-salmon fish, which is a stated percentage goal for the average total allowable catch that will be allocated to aboriginal communal fishing over the long term;

f. The "end-point percentage" is currently being used to guide developments and changes to policies and programs that relate to allocations for aboriginal communal fishing.

159. I have additional information about the Coastwide Framework documents from Exhibit 1426 to the testimony of Ms. Kaarina McGivney, who was one of the authors of that exhibit. Ms. McGivney's testimony before me on August 19, 2011, that:

a. The Aboriginal Fisheries Framework reflects the outcome of all of the other Coastwide Framework documents;

b. The Aboriginal Fisheries Framework was approved by the Minister of Fisheries and Oceans in the fall of 2009 shortly before the establishment of this commission was announced. The policy direction expressed in the Aboriginal Fisheries Framework requires further development which will be informed by the outcome of this commission;

c. The Aboriginal Fisheries Framework reflects the current status of the DFO's policy with respect to the administration of aboriginal FSC fishery allocation;

d. Other than the Aboriginal Fisheries Framework, the Coastwide Framework documents have not been approved by cabinet.

e. No formal changes in policy have been made or amended as a result of the Coastwide Framework documents or the Aboriginal Fisheries Framework.

160. Ms. McGivney also testified on September 2, 2011, as did Ms. Julie Stewart, who is Director of the Pacific Integrated Commercial Fisheries Initiative ("PICFI") within DFO. Both Ms. McGivney and Ms. Stewart testified that the "end-point percentage", which is expressed in the Aboriginal Fisheries Framework as XX% for salmon, is currently being used as a guide for any policies that would have an impact on the overall percentage of the salmon fishery that is to be allocated to aboriginal communal fishing. These programs include PICFI, the Allocation Transfer Program (the "ATP"), FSC allocations, and any new programs that could affect this overall "end-point percentage". This testimony confirmed information that was referenced in the HTC's submissions, from the commission's Policy and Practice Report on the DFO's policies in regard to aboriginal fishing.

161. The Aboriginal Fisheries Framework is an exhibit in this inquiry. It describes percentage goals for aboriginal communal fishing over the long term for both salmon and non-salmon, but does not say what the percentages are. Canada advises that these end-point outcomes are described in a separate document, over which it claims privilege. I will refer to that separate document as the "end-point percentage" document.

162. The development of the Coastwide Framework was an initiative relating to treaty negotiations with First Nations, which arose out of circumstances which are discussed above in the section setting out the parties' submissions. The essential factors are that the Coastwide Framework was a new set of policies for the negotiation of the fisheries chapters of First Nations treaties under development but put on hold prior to the establishment of this commission. Canada has provided information about the factors

that caused the DFO to begin to fashion a new policy direction, which include prolonged negotiation of First Nations treaties, a number of court decisions regarding aboriginal fishing rights, new legislation, and a diminishing resource, which combined with FSC access, substantially restricted fishing opportunities other than FSC fishing.

163. This testimony, and my examination of the Aboriginal Fisheries Framework, satisfy me that the undisclosed end-point percentage for salmon reflects a current policy that is in effect and governs DFO's actions and policy choices in the Fraser River sockeye salmon fishery (although the Aboriginal Fisheries Framework does not state that the XX% for salmon is limited to sockeye salmon). The policy is that programs relating to aboriginal communal fishing access must be developed or changed in accordance with the end-point outcome percentage. As a result, the end-point outcome percentage does and will directly affect policies relating to conservation of the Fraser River sockeye and the sustainability of the fishery at the highest level of DFO policy-making. The end-point percentage is very likely to be probative of issues I will consider.

164. I agree with Canada's submissions that with the exception of the Aboriginal Fisheries Framework the Coastwide Framework is a draft of a prospective policy the development of which is in abeyance pending the completion of the work of this commission,. My mandate is to consider DFO policies and practices. The Coastwide Framework is not a policy or practice, save for the determination of allocation endpoints.

165. I also find that the Coastwide Framework documents relate primarily to Canada's prospective approach to treaty negotiations with First Nations. Other than the end-point allocation, the Coastwide Framework documents are unlikely to be probative of questions that are at the core of, rather than peripheral to, my mandate.

166. I must balance the harm to Canada's interests in having the Coastwide Framework documents disclosed publicly with the importance of having the content available for the proper resolution of the issues before this inquiry. I will do this first in regard to the endpoint percentage document, and then in relation to the balance of the documents.

167. In regard to the endpoint percentage document, as it relates to salmon, I have found that it is a current policy of the DFO, affecting the allocation of a large proportion of the Fraser River sockeye salmon fishery. All DFO programs that allocate aboriginal communal fishing access are governed to some extent by this policy. Together, this constitutes a significant part of the total allowable catch of Fraser River sockeye salmon. It may be highly probative of the issues that are at the core of my mandate. Despite the finding that there may be harm to the public interest if that document is disclosed, I find that the harm to this inquiry's ability to carry out its mandate without the information contained in that document requires that it be disclosed.

168. In regard to the balance of the Coastwide Framework documents, I accept Canada's submission that while these documents are relevant to aboriginal communal fishing, they are not sufficiently probative of issues that are central to the Commission's mandate to warrant the harm to the public interest. My Terms of Reference call upon me to investigate and make findings of fact with respect to the causes for the decline of Fraser River sockeye salmon, the current state of Fraser River sockeye salmon stocks and the long-term projections for those stocks. My mandate also includes developing 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 DFO in relation to the management of the Fraser River sockeye salmon fishery.

169. The treaty process for First Nations is relevant to this commission insofar as it relates to access to the Fraser River salmon fishery. However, policies related to Canada's strategy and planning for treaty negotiations is peripheral rather than central to my mandate. I find that the harm that would occur to Canada's negotiation process from disclosure of the Coastwide Framework documents outweighs the likely probative value of the documents to this commission.

170. I have considered the other factors that relate to public interest immunity as set out above in relation to the Coastwide Framework documents. These factors are the sensitivity of the information and the extent to which the government's attempt to invoke

immunity is based on improper considerations of embarrassment or wrongdoing. There is no suggestion that the government is attempting to invoke immunity based on improper considerations of embarrassment or wrongdoing. In terms of its sensitivity, the information emanates from Cabinet. Some of the information relates to current policy – the end-point outcome percentage document – and the remainder consists of communications regarding a policy direction which were incomplete and ultimately shelved.

171. Bearing in mind that this is an inquiry and not litigation, and given my findings of the low likelihood of these documents having any probative value to my findings of fact and recommendations, I am satisfied that the Coastwide Framework documents, other than the end-point outcome percentage document as it relates to salmon, are protected by public interest immunity.

172. Finally, the HTC, the Sto:lo Tribal Council and Cheam Indian Band, the Musqueam Indian Band, the Musgamagw Tsawataineuk Tribal Council, and the Western Central Coast Salish First Nation all made extensive submissions arguing strongly that Canada's duties to First Nations preclude Canada from withholding information relating to negotiations with them. Assuming without deciding that Canada's duty to First Nations precludes it from negotiating with undisclosed endpoints, this is not an issue that the commission has the jurisdiction to resolve. My jurisdiction to order the production of documents is for the purposes of drawing conclusions and making recommendations pursuant to the commission's mandate. The production of information to the commission can only be ordered in relation to its mandate and not to redress separate grievances that may arise out of the same information.

173. Therefore, with the exception of the end-point outcome percentage document, I conclude that an order for production of the remainder of the Coastwide Framework documents is not in the public interest.

174. In the result, I order that Canada produce the end-point outcome percentage document which is referred to in its submission of June 17, 2011, at paragraph 32, as follows:

> The Aboriginal Fisheries Framework document refers to "allocation endpoints for Aboriginal commercial and food social and ceremonial allocations of salmon and non-salmon species. These allocation endpoints are not contained in the documents; rather, these endpoints are expressed as "XX%" and "YY%". **Canada asserts that the allocation endpoints are described in a separate document** that is subject to Cabinet confidence pursuant to s. 39(1) of the *Canada Evidence Act,*

as it relates to salmon species, prior to close of business on Thursday, September 22, 2011.

175. In all other respects, this application is dismissed.

Dated September 29, 2011

The Honourable Bruce I. Cohen
Commissioner