

Policy and Practice Report
Department of Fisheries and Oceans Policies and Programs
for Aboriginal Fishing
2 December 2010

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Introduction

- 1 This policy and practice report (“Report”) provides an overview of the Department of Fisheries and Oceans’ (“DFO”) policies and programs related to Aboriginal participation in Fraser River sockeye fisheries and fisheries management. The information contained in this Report is derived from documents disclosed to the commission or otherwise obtained through the commission’s investigations. The accuracy of this report is therefore subject to the accuracy of the documents so provided or obtained. Descriptions of policy and program objectives, purposes, intentions, outcomes, reviews or any other qualitative assessments contained in this Report are as provided in the documents cited and are not necessarily the views of the commission.
- 2 This Report is not comprehensive of all DFO policies or programs related to Aboriginal fisheries. It is intended to provide a contextual background for the Aboriginal fisheries portion of the commission’s hearings, scheduled for early 2011. Certain topics not covered in this Report, but relevant to Aboriginal fisheries and Aboriginal participation in fisheries management, such as catch monitoring, habitat management, enforcement and harvest management, are covered by other sections of the commission’s hearings plan.
- 3 The commission’s Terms of Reference direct the Commissioner to use the automated documents management program specified by the Attorney General of Canada, the Ringtail database. Source references in this Report refer to the unique document identifier attached to a given document by the Ringtail database. To identify a document that has been referred to by its Ringtail identifier, see Appendix 6. Documents that have been disclosed to the commission but that have not yet been entered into the Ringtail database are identified as “Non-Ringtail documents” and will be provided to participants to the inquiry directly.

The Legal Framework for Aboriginal Fisheries

The Constitution Act, 1867

- 4 The federal government holds jurisdiction over sea coast and in-land fisheries by virtue of s. 91(12) of the *Constitution Act, 1867*. This includes jurisdiction over the Canadian Fraser River sockeye fishery, exercised primarily through DFO and Canada's shared management with the United States of America through the Pacific Salmon Treaty and Pacific Salmon Commission.
- 5 Under s. 92(13) of the *Constitution Act, 1867*, British Columbia holds jurisdiction over proprietary aspects of fisheries in waters where the Provincial Crown owns the underlying land, including the right to prescribe terms and conditions upon which the fisheries may be granted, leased or otherwise disposed of. British Columbia ("BC") also holds authority for fish buying, vending and processing activities and the harvesting of aquatic plants.¹

Aboriginal and Treaty Rights

- 6 Section 35(1) of the *Constitution Act, 1982*, recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, which includes the Inuit, Indians² and Métis. A number of seminal cases regarding Aboriginal rights to fish have been decided by the Supreme Court of Canada. For a discussion of the Aboriginal and treaty rights related to the Fraser sockeye fishery, see the commission's paper entitled "The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery," together with written and oral submissions of participants in response.³

Fisheries Act, c. F-14

- 7 The *Fisheries Act* is a federal law that regulates sea coast and in-land fisheries. Among other things, it authorizes the Minister of Fisheries and Oceans, in his

¹ CAN046350 at p. 3.

² Also called First Nations.

³ See October 26, 2010 transcripts, available online at <http://www.cohencommission.ca/en/Schedule/>

absolute discretion, wherever the exclusive right of fishing does not already exist by law, to issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.⁴ Although it is a law of general application, there are certain provisions of the *Fisheries Act* that may affect Aboriginal traditional fishing methods, such as weirs or fish wheels, more acutely. For example, s. 29(1) of the *Fisheries Act* provides that “no one shall erect, use or maintain in any of the Canadian fisheries waters, whether subject to any exclusive right of fishery or not, any net, weir or other device that unduly obstructs the passage of fish.”

- 8 Section 43 of the *Fisheries Act* authorizes the Governor in Council to make regulations for carrying out the *Act*. One such regulation, the *Aboriginal Communal Fishing Licences Regulations*, pertains specifically to Aboriginal participation in fisheries.

*Aboriginal Communal Fishing Licences Regulations*⁵

- 9 The *Aboriginal Communal Fishing Licences Regulations* (the “ACFLR”) were enacted in June 1993, pursuant to s. 43 of the *Fisheries Act*, revoking and replacing the *Aboriginal Fisheries Agreements Regulations*. According to then-Minister of Fisheries and Oceans, the Honourable John C. Crosbie, the ACFLR were enacted to “improve in-river management and enforcement with regard to Aboriginal fisheries on the west coast.”⁶
- 10 The ACFLR provides a licensing mechanism for Aboriginal fisheries, whether to access fish for food, social or ceremonial (“FSC”) purposes, or for economic purposes under the pilot sales or economic opportunity fisheries as part of the Aboriginal Fisheries Strategy (“AFS”).⁷ The ACLFR apply to several fisheries throughout Canada, including fisheries in water areas enumerated in Schedule II

⁴ Fisheries Act, s. 7(1).

⁵ Aboriginal Communal Fishing Licences Regulations, SOR 93-332.

⁶ CAN000114

⁷ CAN000059 at p. 2; Note however that communal fishing licences may have already been issued to several Aboriginal communities in British Columbia prior to enactment of the ACLFR. See CAN000085.

to the *Pacific Fishery Management Area Regulations*⁸ and salmon fisheries in British Columbia.⁹ However, the ACFLR do not apply in respect of fishing in national parks.¹⁰

- 11 The ACFLR marked a change from licensing Aboriginal individuals to fish, to licensing “Aboriginal organizations” to fish under communal fishing licences. An “Aboriginal organization” is defined to include an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based Aboriginal community.¹¹ No licence fee is payable with respect to a licence issued under the ACFLR.¹²
- 12 Aboriginal communal licences may carry conditions or restrictions on fishing (described below in the section on “Aboriginal Communal Fishing Licences”). When the ACFLR were first enacted, s. 6 provided that “in the event of any inconsistency in respect of fishing and related activities carried on in accordance with a licence, between the condition of the licence and any other regulations made under the *Fisheries Act*, the conditions of the licence prevail to the extent of the inconsistency.”¹³ However, this provision was repealed in 2002.

Aboriginal Communal Fishing Licences

- 13 The Minister may issue communal fishing licences to Aboriginal organizations pursuant to the ACFLR. In these licences, the Minister may designate the persons who may fish under the authority of the licence and the vessels that may be used.¹⁴ If the Minister does not designate the persons or the vessels who may fish under the authority of the licence, then the Aboriginal organization receiving the communal licence may do so.¹⁵

⁸ Pacific Fishery Management Area Regulations, 2007, SOR/2007-77

⁹ ACFLR, s. 3(1)(d).

¹⁰ ACFLR, s. 3(2).

¹¹ ACFLR, s. 2.

¹² CAN000059 at p. 2.

¹³ For a copy of the original provision, see CAN001548.

¹⁴ ACFLR, s. 4(2).

¹⁵ ACFLR, s. 4(3) and 4(4).

14 Aboriginal communal fishing licences may contain conditions and restrictions where necessary “for the proper management and control of fisheries and the conservation and protection of fish.”¹⁶ In particular, the Minister may specify in a licence conditions respecting any of the matters set out in paragraphs 22(1)(b) to (z.1) of the *Fishery (General) Regulations* and any conditions respecting any of the following, without restriction:¹⁷

- Species and quantities of fish taken or transported
- Designation requirements
- Identification of fishing vessels and gear
- Locations and times of landing fish
- Methods for landing fish and quantification of fish
- Reporting of fishing activities
- Locations and times of inspections of fishing vessels
- Maximum number of designated persons or vessels
- Type, size and quantity of fishing gear
- Marking of fish for scientific or administrative purposes
- Disposition of fish caught

DFO Policies, Guidelines and Handbooks for Issuance of Aboriginal Communal Fishing Licences

15 In August 1993, DFO issued its Policy for the Management of Aboriginal Fishing. This policy was created as an initial guide to the implementation of DFO’s Aboriginal Fisheries Strategy and to reflect the Supreme Court of Canada’s decision in *R. v. Sparrow*. The Policy for the Management of Aboriginal Fishing describes several Aboriginal fisheries topics in detail, such as the definition for Aboriginal fishing, regulation of Aboriginal fishing, fishing allocations, DFO

¹⁶ ACFLR, s. 5.1.

¹⁷ ACFLR, s. 5.1.

accountabilities, consultations and negotiations, and also provisions of Aboriginal fishing agreements and communal licences. The policy is described in greater detail below, in the section on “Department of Fisheries and Oceans Policy for the Management of Aboriginal Fishing, 1993.”

- 16 In regards to communal licences, the 1993 Policy for the Management of Aboriginal Fishing provides that “to ensure conservation” all communal licences shall, as a minimum, contain the following provisions or terms and conditions:
- An allocation to the Aboriginal fishery for each species or stock to be fished for which other fisheries have “limited access” or are “quota-limited.”
 - Provision for the designation of individuals by the Aboriginal Fishing Authority¹⁸ to fish under the agreement or licence.
 - A form of identification to be carried by all designated individuals to evidence their authority to fish.
 - Provision for monitoring, by the Aboriginal Fishing Authority in cooperation with DFO, of the catch by designated individuals sufficient to ensure that the aggregate harvest does not exceed the allocation.
 - A maximum limit on the number of individuals who may be designated to fish and on the type and amount of gear to be used by those individuals.
- 17 In May 1998, DFO developed a Pacific Region “Communal Licence Handbook”¹⁹ to “describe and standardize the licensing process” and to “allow communal licences to be drafted, reviewed and issued efficiently and effectively.”²⁰ Building on the Policy for the Management of Aboriginal Fishing, the Communal Licence Handbook states that “DFO attempts to attain mutually agreeable arrangements that facilitate effective fishery activities. It is understood that these arrangements are reflected in the communal licences.” However,

...where consultations fail to produce an agreement, DFO’s policy is to issue a communal licence anyway, to ensure that DFO has taken all reasonable steps to

¹⁸ CAN008862: The 1993 Policy provides that Aboriginal fishing agreements will define and establish Aboriginal Fishing Authorities which will be responsible for managing fishing under the Agreements, in cooperation with DFO, according to the terms of those Agreements.

¹⁹ CAN000061.

²⁰ CAN000061 at s. 1.1.

authorize the fishing activity and to specify conditions that apply. Where there is no Aboriginal Fishery Strategy agreement in place and DFO ‘imposes’ a communal licence, DFO should be cautious in setting the conditions that will apply to the communal licence. Conditions attached to such a licence should be the minimum required to effect valid legislative objectives, such as conservation measures.²¹

- 18 The Communal Licence Handbook describes the types of communal licences (or templates) that DFO has developed to fit particular circumstances. These include the following:²²

“Single Species” - This template is used to licence fishing of a single species, typically salmon. It is used to licence all fisheries on the Fraser River and for the spawn-on-kelp fishery in the North Coast.

“Multi-Species” - This template uses separate schedules to licence fishing for a number of different species, for example, salmon, herring and shellfish. Typically it is used in the North and South Coast Divisions.

“Supplemental” - This licence is required when food fishing occurs outside of the area described in the communal licence. This is approved due to the inability to achieve the required harvest under the existing communal licence.

“Dry rack” – This is used exclusively to licence First Nations who are fishing in the Fraser Canyon.

“Ceremonial” – This licence may be issued when fishing is restricted or prohibited due to management reasons when local stocks cannot support an open fishery but may not be threatened by limited effort. It is intended to allow fishing for ceremonial purposes only. Ceremonial licences are used almost exclusively in the lower Fraser River.

“Interim” – This type of licence is generally issued to Aboriginal organizations pending completion of negotiations. After issuing the interim licence, any changes to that communal licence necessitated by subsequent negotiations would be addressed by way of amendments to the licence.

- 19 The Communal Licence Handbook also sets out the various accountabilities for DFO staff in regards to issuance of communal licences. Licences can be issued from either the Division Offices or from the field offices of DFO.²³ The Aboriginal

²¹ CAN000061 at s. 2.0.

²² CAN000061 at s. 3.0.

²³ CAN000061 at s. 3.4.

Fisheries Sector²⁴ must consult with the Fisheries Management Sector²⁵ and the Conservation and Protection Sector before producing a licence, and legal counsel may review the licence if it contains unique conditions or raises other legal issues.²⁶ Communal licences must be signed by a conservation and protection fishery officer.²⁷

- 20 In February 2001, DFO developed “Guidelines Respecting the Issuance of Licences under the *Aboriginal Communal Fishing Licences Regulations*” (the “ACFLR Guidelines”).²⁸ According to the ACFLR Guidelines, their purpose is to “confirm the approach that DFO has taken since the ACFLR were enacted in June 1993.”²⁹ The ACFLR guidelines apply wherever the Minister issues licences under the ACFLR.
- 21 The ACFLR Guidelines reiterate that the issuance of a licence under the ACFLR is not recognition that a particular Aboriginal group has an Aboriginal or treaty right to fish, but rather is a tool that assists in the management of the fisheries and the conservation of fisheries resources to promote stability in fisheries.³⁰ Where an agreement is reached, licences issued will reflect the fisheries access and licence conditions described in the agreement. Where an agreement is not reached, the Minister will review the consultations held and take into account the preferences and concerns expressed by the Aboriginal organization, conservation requirements and other matters. Licences issued would then contain conditions that the Minister believes would meet the requirements of *Sparrow* and subsequent decisions, and that are required for the proper management and control of fisheries and the conservation and protection of fish.³¹

²⁴ Now the Aboriginal Policy and Governance Branch.

²⁵ Now the Ecosystems and Fisheries Management Sector.

²⁶ CAN000061 at s. 4.1.

²⁷ CAN000061 at s. 4.2.

²⁸ CAN000059

²⁹ CAN000059 at p. 1.

³⁰ CAN000059 at p. 2.

³¹ CAN000059 at p. 3-4.

The ACFLR Guidelines also state that,

...depending on the Aboriginal group involved, discussions held, preferences expressed and other matters, the Minister may need to include licence conditions that are inconsistent with specific regulatory requirements. Under the *ACFLR*, conditions that are inconsistent with requirements in other regulations made under the *Fisheries Act* can be included in a communal licence. In the event of an inconsistency between a condition in a communal licence and such other regulations, the conditions of the licence prevail to the extent of the inconsistency.³²

- 22 However, the above section of the ACFLR Guidelines reflects s. 6 of the ACFLR, which as described above, was repealed in 2002.³³
- 23 For a sample Aboriginal Communal Fishing Licence, see the “T’Souke First Nation, Multi-Species Communal Licence.”³⁴

Other Sources of Fisheries Regulation

- 24 In addition to the *Fisheries Act* and ACFLR, a band council operating under the federal *Indian Act*³⁵ may also have the authority to make band by-laws in respect of fishing on reserve lands. Section 81(1)(o) of the *Indian Act* provides that “the council of a band may make by-laws not inconsistent with this Act or with any regulation made by the Governor in Council or the Minister, for any or all of the following purposes, namely... the preservation, protection and management of fur-bearing animals, fish and other game on the reserve.” The applicability of this provision to Fraser River sockeye is discussed in the commission’s paper entitled “The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery” and the oral and written submissions of participants in response.³⁶
- 25 Modern treaties may also recognize a First Nation’s concurrent law-making powers in respect of certain fisheries matters. In some situations a First Nation’s laws will prevail to the extent of inconsistency with federal or provincial laws. For a

³² CAN000059 at p. 3, referring to ACFLR s. 6.

³³ SOR/2002-225, s. 14.

³⁴ CAN179432

³⁵ *Indian Act*, R.S. 1985, c. I-5.

³⁶ See October 26, 2010 Transcripts, available at www.cohencommission.com/schedule

discussion of the scope and nature of such law making powers, see the commission's paper entitled "The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery" and the oral and written submissions of participants in response.

The Department of Fisheries and Oceans

- 26 According to DFO, there are approximately 198 First Nations in British Columbia, and of those, roughly 146 groups have access to Fraser River salmon.³⁷ As the agency of the Government of Canada with primary responsibility for oceans and the management and protection of fisheries, DFO has had increasing involvement with Aboriginal groups over the past 15 years. Also, DFO is one of the federal departments with the largest on-the-ground presence in coastal Aboriginal communities and is therefore in a position to contribute to the broader Government of Canada objectives of improving the socio-economic conditions of Aboriginal peoples and their communities.³⁸
- 27 DFO operates according to a Program Activity Architecture, with Program Activities designed according to the Strategic Outcome that they are intended to address. Sub-activities and sub-sub-activities are then created to support Program Activities. Aboriginal fisheries and Aboriginal participation in fisheries management are primarily associated with DFO's Strategic Outcome of "Sustainable Fisheries and Aquaculture" and its Program Activity of "Ecosystems and Fisheries Management" (formerly Fisheries and Aquaculture Management) and the sub-activity of "Aboriginal Policy and Governance."³⁹
- 28 Figure 1 highlights Aboriginal Policy and Governance sub-activity within DFO's Program Activity Architecture.⁴⁰

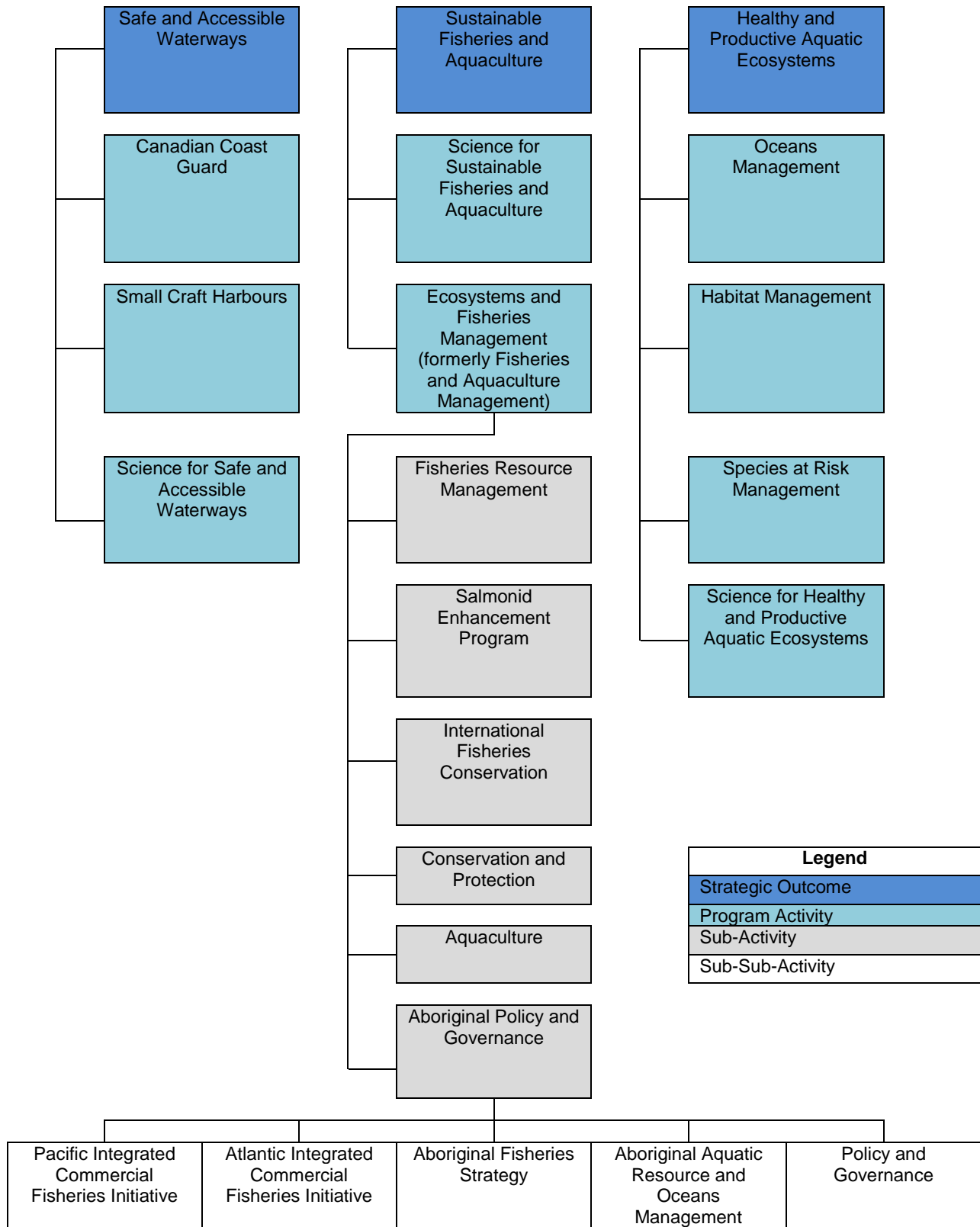
³⁷ See also, CAN014565.

³⁸ CAN075948

³⁹ Although Aboriginal interests may arise in relation to other Strategic Outcomes and Program Activities as well.

⁴⁰ CAN185947

Figure 1: DFO Program Activity Architecture and Aboriginal Policy and Governance



Note: Sub-activities and sub-sub-activities not shown for all Program Activities

The Aboriginal Policy and Governance 'Branch'⁴¹

- 29 Aboriginal Policy and Governance is a sub-activity of Ecosystems and Fisheries Management. It encompasses five sub-sub-activities including the Aboriginal Fisheries Strategy (“AFS”), the Aboriginal Aquatic Resource and Oceans Management (“AAROM”) Program, the Pacific Integrated Commercial Fisheries Initiative (“PICFI”), the Atlantic Commercial Fisheries Initiative (“ACFI”) and Aboriginal Policy and Governance generally. Aboriginal Policy and Governance (the sub-activity) is overseen and operationalized by a number of positions, termed here for ease of reference the Aboriginal Policy and Governance ‘Branch’. As will be explained below, this Branch is primarily comprised of individuals from DFO’s national Ecosystems and Fisheries Management Sector, the national Policy Sector, members of the Pacific Region’s Aboriginal Policy and Governance Directorate and employees reporting to the Pacific Region’s Director of Special Projects (Fisheries Reform, PICFI).⁴²
- 30 The Aboriginal Policy and Governance Branch holds three main responsibilities within DFO:⁴³
- The delivery of Aboriginal specific programs which provide for the effective management of the fisheries in a manner consistent with Supreme Court of Canada decisions, including *Sparrow* and *Marshall*. These programs are intended to provide a bridge to the development of the fisheries components of land claims and treaties and to provide a co-managed Aboriginal fisheries management regime.
 - The provision of policy advice on Aboriginal issues to the Department and to the Minister and the development of proposals and policies for fisheries management.

⁴¹ The Aboriginal Policy and Governance “Branch” has not been consistently defined in documents reviewed. However, this term is used for ease of reference to collectively describe positions related to the Aboriginal Policy and Governance sub-activity. The names of individuals contained in this Report are obtained primarily from Organizational Charts disclosed to the commission by DFO, and their accuracy is subject to that of the documents relied on.

⁴² As will be described below, many other positions located throughout Pacific Region DFO offices may also carry a planning, development and operational role in relation to Aboriginal Policy and Governance.

⁴³ CAN008736 at p. 1.

- Participation in the Department of Indian Affairs led negotiations on claims, self government and treaty processes.

31 According to a 2007 “Aboriginal Policy and Governance Risk Profile Final Report,”⁴⁴ the Aboriginal Policy and Governance Branch,

...is in the business of managing risks and does so through the implementation of several programs targeted to Aboriginal fishers... offering policy advice to the Department on Aboriginal fishing issues, negotiating agreements on the management of Aboriginal fisheries, helping integrate these into the overall management framework, advising federal negotiators on land claims and self-government, and promoting fisheries-related economic opportunities for Aboriginal communities.⁴⁵

32 In meeting its responsibilities, the Aboriginal Policy and Governance Branch is guided by a set of objectives articulated in the 2005-2010 DFO strategic plan entitled “Our Waters, Our Future.”⁴⁶ These objectives are as follows:

- To enhance the involvement of Aboriginal groups in the fisheries management decision-making process using a model of shared stewardship in which Aboriginal groups collaborate with DFO in decision-making;
- To increase involvement of Aboriginal groups in the decision-making process in other areas of DFO’s responsibility including integrated oceans management, species at risk, habitat management, scientific research and aquaculture development;
- To improve the stability of the west and east coast fisheries by resolving commercial access issues;
- To manage the fisheries in a manner that is consistent with the constitutional protection provided to Aboriginal and treaty rights by section 35 of the *Constitution Act, 1982*; and
- To contribute to the broader Government of Canada objective of improving the quality of life of Aboriginal people through greater access to economic opportunities, such as commercial fishing.

33 In addition, the Aboriginal Policy and Governance Branch is tasked with translating national strategic plan goals related to strengthening DFO’s relationship with Aboriginal peoples into DFO activities and program priorities.⁴⁷

⁴⁴ CAN075948

⁴⁵ CAN075948 at p. 1.

⁴⁶ CAN075948 at p. 1. For the strategic plan, see CAN024582.

Figure 2: “Strategic Context – DFO National Strategic Plan and Aboriginal Priorities”⁴⁸



34 In 2007, the Aboriginal Policy and Governance sub-activity underwent an internal risk profile assessment. Risks identified related to human resource capabilities, litigation, confrontations, resource misalignment, negotiation and implementation of agreements, exceptions to DFO’s policy framework and information for decision support. For a more detailed description of the Aboriginal Policy and Governance Risk Assessment, see: “Department of Fisheries and Oceans: Aboriginal Policy and Governance Risk Profile, Final Report, April 2007.”⁴⁹

National Aboriginal Policy and Governance Organizational Structure

35 In Ottawa, DFO’s Aboriginal Policy and Governance sub-activity is overseen by members of the Ecosystems and Fisheries Management Sector as well as the Policy Sector. In the Ecosystems and Fisheries Management Sector the relevant positions and accountabilities are as follows:

⁴⁷ CAN037165 at p. 4.

⁴⁸ CAN037165 at p. 4.

⁴⁹ CAN075948

- Director General, Aboriginal Programs and Governance - David Millette

This position is fairly new, having been created on or about May 2010. Formerly there was a Director General of Aboriginal Policy and Governance that oversaw both policies and programs (instead of having one Director General for Programs and another for Policy).⁵⁰

- Executive Director, Aboriginal Programs – Rose-Marie Karnes

This position is “accountable for planning and managing the delivery of programs for the development and negotiation of fishery and related provisions of Aboriginal claims and self-government and treaty issues, and provides direction and leadership with respect to regional negotiations. Monitors litigation before the courts to Aboriginal fishery rights and ongoing negotiations across the country and provides analysis and expert advice to management and stakeholders. Manages research, analysis and input with regard to the Aboriginal Affairs programming, the Aboriginal Fisheries Strategy and related policies and provides authoritative advice and intelligence on emerging Aboriginal fisheries issues.”⁵¹

- Director, Pacific Integrated Commercial Fisheries Initiative – Julie Stewart

This position is “accountable for providing professional leadership for managing the design, development and delivery of the Pacific Integrated Commercial Fisheries Initiative (PICFI) and in particular engaging key federal departments, leading the negotiation process on PICFI with BC First Nations and with regional and national First Nations associations and commercial fisheries leaders, providing departmental leadership required to obtain funding for the PICFI in its delivery ensuring the sustainable development of Canada’s commercial fisheries in the Pacific.”⁵²

- Director, Atlantic Integrated Commercial Fisheries Initiative – Kevin Fram

This position does not relate to Fraser River sockeye.

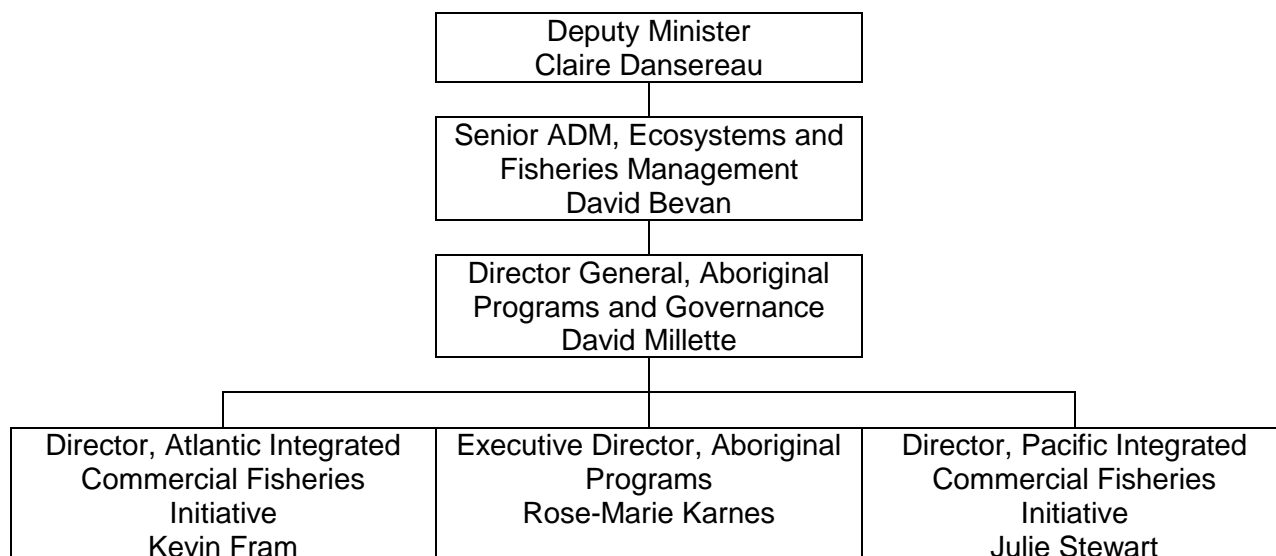
36 Figure 3 illustrates the organizational and line reporting structure for the above Ecosystems and Fisheries Management Sector individuals, where relevant to Fraser River sockeye.

⁵⁰ For a description of the previous role, see CAN285287.

⁵¹ CAN285302

⁵² Non-Ringtail document: Government of Canada Executive Group Position Description: Director, Pacific Integrated Commercial Fisheries Initiative

Figure 3: National Headquarters, Ecosystems and Fisheries Management Sector, Aboriginal Programs and Governance relevant to Fraser River sockeye⁵³



37 In the Policy Sector, also in Ottawa, positions and accountabilities are as follows:

- Director General, Fisheries and Aboriginal Policy – Nadia Bouffard

As with the Director General, Aboriginal Programs and Governance, this position is fairly new, having been created on or about May 2010. Formerly there was a Director General of Aboriginal Policy and Governance that oversaw both policies and programs.⁵⁴

- Director, Treaty, Policy and Programs – Robert Lamirande

This position is “accountable for providing professional leadership for the design, development and delivery of Department of Fisheries and Oceans integrated positions with respect to Aboriginal fisheries access and management in the negotiation of treaties led by Indian and Northern Affairs Canada to address Aboriginal comprehensive land claims and traditional fishing rights, for providing leadership to DFO managers and employees in the design and development of ways and means to achieve in treaty implementation a strong Aboriginal participation in the management of a sustainable integrated fishery respecting the Minister’s authority to manage the Canadian fishery while reflecting the interests of all harvesters, and for

⁵³ CAN185656

⁵⁴ For a description of the previous role, see CAN285287.

providing expertise in constitutional questions and litigation regarding Aboriginal fisheries claims and rights.”⁵⁵

- Director, Strategic Aboriginal Policy – Deborah Price

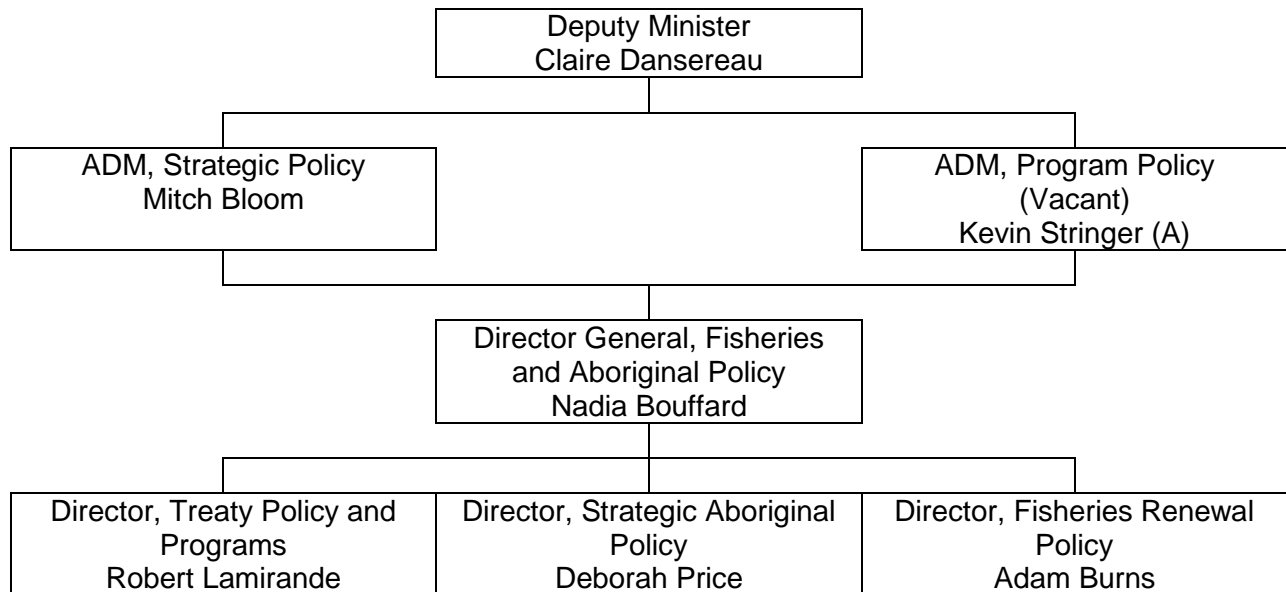
This position is “accountable for developing, overseeing and monitoring the development and implementation of the strategic policy and operational frameworks, strategies and programs to articulate and advance departmental initiatives with respect to the participation of the Department in national and regional treaty and claims negotiations and the participation of Aboriginal peoples in the various fisheries.”⁵⁶

- Director, Fisheries Renewal – Adam Burns

The Director of Fisheries Renewal reports to the Director General of Fisheries and Aboriginal Policy. However, his responsibilities are for fisheries policy generally and not for Aboriginal fisheries.

38 Figure 4 illustrates the organizational and line reporting structure for the above Policy Sector individuals.

Figure 4: National Headquarters, Policy Sector, Executive Level, Fisheries and Aboriginal Policy⁵⁷



⁵⁵ CAN285300

⁵⁶ CAN285301

⁵⁷ CAN185656

Regional Aboriginal Policy and Governance Organizational Structure

39 In the Pacific Region, responsibilities related to Aboriginal Policy and Governance sub-sub-activities are held by members of the Aboriginal Policy and Governance Directorate, and also by the Director of Special Projects (Fisheries Reform, PICFI) and her team.⁵⁸

40 The positions and accountabilities of members of the Pacific Region Aboriginal Policy and Governance Directorate are as follows:

- Regional Director, Treaty and Aboriginal Policy – Kaarina McGivney

This position is responsible for the following: “the development and implementation of policies, strategies, tactics and programs in support of the Aboriginal Fisheries Strategy; the participation of the Department in the negotiation of Aboriginal land claims and self government agreements, through the BC Treaty Commission Process, with a primary goal of ensuring Aboriginal access to fisheries and integration into the management of the fishery resource for Aboriginal claimants; the coordination of Regional and Headquarters participation in land claims negotiations through the BC Treaty Commission; consultation with leaders of Aboriginal communities to establish and implement an agenda for their participation in the effective management of the fisheries resource in conjunction with the Regional Directors, Fisheries Management and the Area Directors; and Departmental initiatives to improve the economic base of Aboriginal fishing communities.”⁵⁹

- Aboriginal Aquatic Resource and Oceans Management Co-ordinator – Vacant

This position is responsible for overseeing and coordinating regional activities and agreements made under the Aboriginal Aquatic Resource and Oceans Management Program.

- Aboriginal Fisheries Strategy Program Manager – J. Johansen

This position oversees Aboriginal Fisheries Strategy program planning and development and is also responsible for the development and maintenance of Aboriginal Fisheries Strategy Agreements.

⁵⁸ CAN014616

⁵⁹ CAN285314

- Senior Negotiator – A. MacDonald

This position is accountable for developing long-range treaty goals and strategies for the Pacific Region; leading the development of policy relative to treaty fisheries options, and provides coaching and mentorship to Regional Negotiators; and acting as the primary resource of departmental expertise on complex treaty issues.

- Regional Negotiators

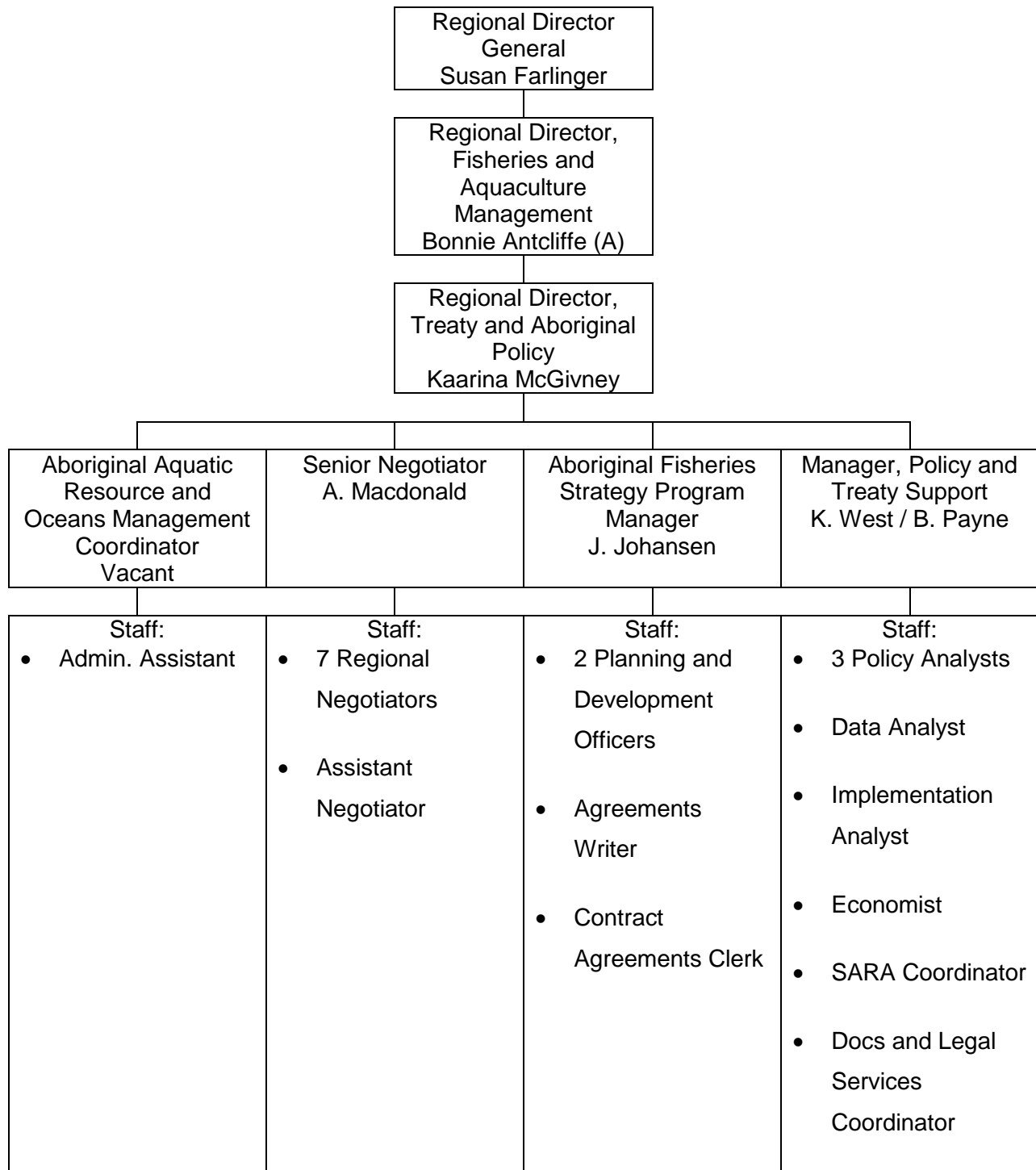
These positions are accountable for negotiating fisheries agreements at treaty tables on behalf of Canada and DFO and developing long-range negotiating strategies (1-3 years) in concert with the Senior Negotiator and others.

- Manager, Policy and Treaty Support – K. West / B. Payne

This position is accountable for directing the integration of long-term treaty directions into operational guidelines, standards and procedures relating to First Nations; participating in the development of short and medium term Aboriginal policy relating to various DFO sectors/areas; and leading multi-disciplinary interdepartmental Aboriginal policy development teams.

- 41 Figure 5 illustrates the organizational and line reporting structure for the above members of the Pacific Region Aboriginal Policy and Governance Directorate.

Figure 5: Pacific Region Treaty and Aboriginal Policy Directorate Organization Chart⁶⁰



⁶⁰ See: CAN285314, CAN185658 and CAN185947.

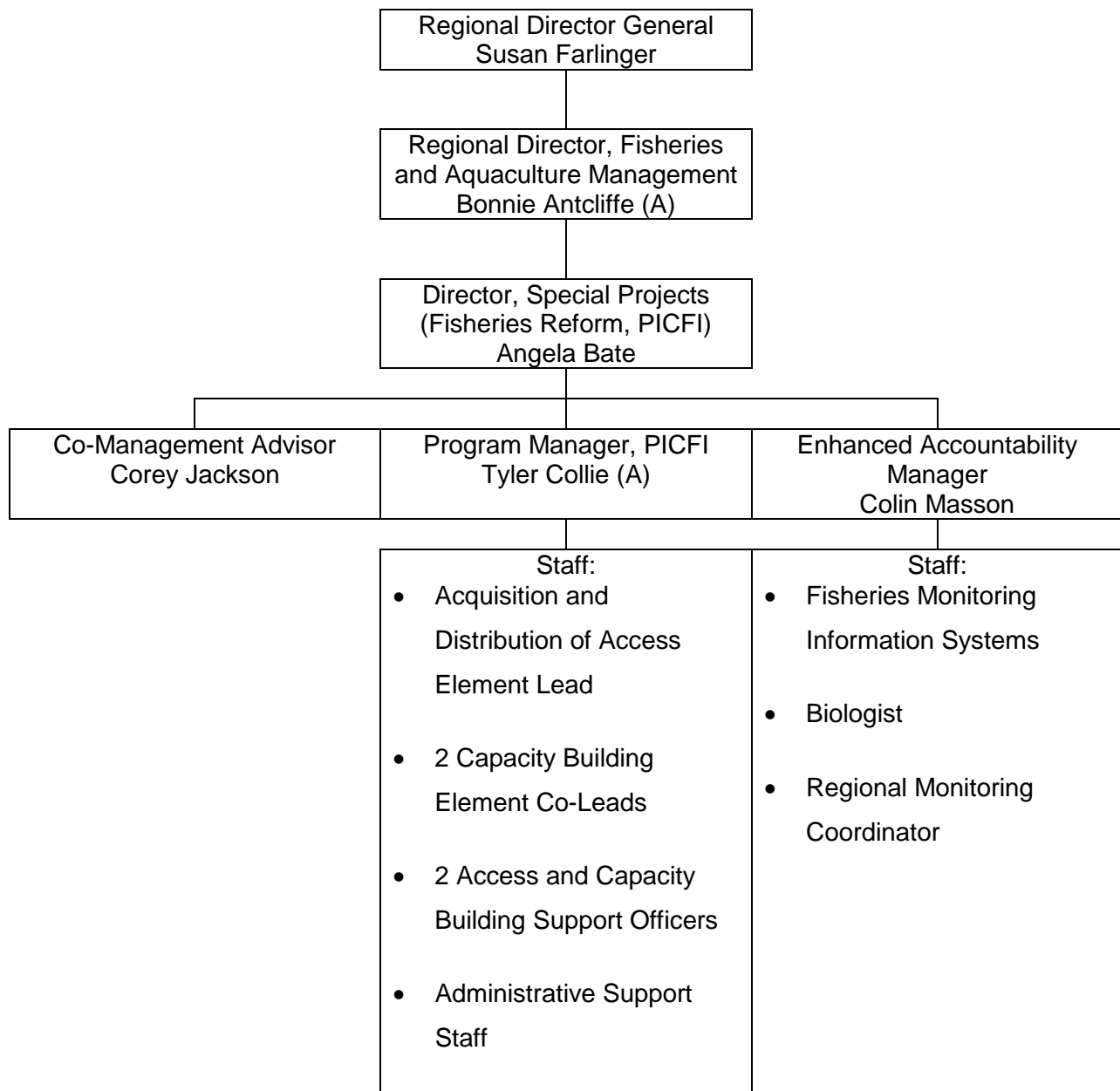
42 In the Pacific Region, one of the Aboriginal Policy and Governance's sub-sub-activities, the Pacific Integrated Commercial Fisheries Initiative (PICFI), is overseen separately by a Director of Special Projects (Fisheries Reform, PICFI). Her responsibilities are as follows:

- Director, Special Projects (Fisheries Reform, PICFI) – Angela Bate

This position is responsible for regional implementation of PICFI with objectives of building capacity of First Nations to manage increased fisheries access provided by an access relinquishment program, developing a catch monitoring strategy, and enhancing collaborative management mechanisms; providing strategic advice on Fisheries Reform issues and contribute to renewal of Aboriginal fisheries programs; and manages a staff of eight with functional responsibilities for a team of up to thirty people.

43 Reporting to the Director, Special Projects (Fisheries Reform, PICFI) are, among others, a Co-Management Advisor, a PICFI Program Manager and an Enhanced Accountability Manager. Figure 6 illustrates the organizational and line reporting structure as related to the Director, Special Projects (Fisheries Reform, PICFI).

Figure 6: Pacific Region PICFI Organization Chart⁶¹



⁶¹ CAN014616. Also based on information provided by Department of Justice.

Area-based Positions

- 44 Many positions located throughout DFO's Pacific Region offices, as opposed to in the national or regional headquarters, also have a significant role to play in supporting and operationalizing Aboriginal Policy and Governance matters. These may include, among others, harvest and resource management staff, conservation and protection staff, Aboriginal affairs advisors, and other program development and operations staff.

The Aboriginal Fisheries Policy Framework

- 45 In recent decades, DFO has developed a series of overarching policies in relation to Aboriginal participation in fisheries. This section of the policy and practice report describes an Aboriginal fisheries policy framework by setting out, in chronological order, a selection of these Aboriginal fisheries-related policies. The Report then describes the policies and operational guidelines that pertain to Aboriginal food, social and ceremonial fishing allocations and access.

Department of Fisheries and Oceans Policy for the Management of Aboriginal Fishing, 1993⁶²

- 46 Following the Supreme Court of Canada's 1990 decision in *R v. Sparrow*, DFO developed and implemented its Aboriginal Fisheries Strategy ("AFS", described in greater detail below). The 1993 Department of Fisheries and Oceans Policy for the Management of Aboriginal Fishing (the "1993 Policy") was created to both guide the implementation of the Aboriginal Fisheries Strategy and to reflect the law on Aboriginal fishing rights as stated in *Sparrow*. The 1993 Policy applies to all species of fish and covers a broad range of Aboriginal fishing topics. A selection of these topics and related policy sections are described below:

⁶² CAN008862

Aboriginal Fishing

- 47 According to the 1993 Policy, “Aboriginal fishing” means fishing under the authority of a communal licence issued pursuant to the *Aboriginal Communal Fishing Licences Regulations*, whether for fish for food, social or ceremonial purposes, or fish for sale.
- 48 The 1993 Policy provides that Aboriginal fishing should be limited to areas that were used historically by an Aboriginal group or First Nation. In determining who should fish, it states that fishing opportunities will be provided to the First Nation having historical use and occupancy of the area. The First Nation receiving the communal licence would be required to administer fishing opportunities for the benefit of its members collectively rather than individually. The 1993 Policy also provides that Aboriginal fishing for food, social and ceremonial purposes will have first priority, after conservation, over other user groups. Aboriginal fishing for such purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, to achieve a valid health and safety objective, or to achieve another substantial and compelling objective.⁶³

Regulation of Aboriginal Fishing

- 49 The 1993 Policy provides that Aboriginal fishing will be conducted under the authority of a communal licence issued under the *Fisheries Act*. Food fish permits would no longer be issued to individuals, as they had been in the past. Also, DFO would endeavour to negotiate with First Nations for mutually agreeable arrangements for Aboriginal fishing, such arrangements to be described in Aboriginal fishing agreements under the AFS.

Aboriginal Fishing Allocations

- 50 The 1993 Policy provides that DFO shall give first priority of access to fish, after conservation needs are met, to Aboriginal people to meet their needs for food, social and ceremonial purposes, to the extent possible given the availability of

⁶³ CAN008862at p. 2.

fisheries resources within areas used historically by the group. It also provides that DFO will consult with respect to allocations. Information on community size (including but not necessarily limited to band membership), recent food fishery harvests, trends in such harvests, current food preferences and use and availability of other foods may be used to establish the reasonable food requirements of members of the community represented by the First Nation. Allocations may also provide fish for sale.

DFO Accountabilities

- 51 The 1993 Policy also sets out the various accountabilities for staff in its implementation. Regional Directors General are responsible for the implementation of procedures and for ensuring that all personnel involved in the management of Aboriginal fishing are properly informed, are given a copy of the 1993 Policy, other relevant policies or guidelines, licences and agreements and are performing their duties in a manner consistent with the 1993 Policy and related guidelines.
- 52 The 1993 Policy states that Area Managers or Area Directors are responsible for ensuring that all consultation requirements set out in Aboriginal Fishing Agreements or Communal Licences within their fishing areas are met and the activities of Native Fishery Guardians (described in greater detail below) are coordinated with those of DFO enforcement staff to provide for effective enforcement and training, including on-the-job training through joint patrols.
- 53 Further, the 1993 Policy provides that Aboriginal Fishing Coordinators are responsible for various tasks including, among other things, issuing communal licences, ensuring that DFO staff and First Nations are informed of the terms of Agreements or licences before commencement of fishing and maintaining written records of consultations with First Nations.

Other Topics

- 54 A series of other topics are also covered by the 1993 Policy. These include consultations and negotiations, identification of First Nations for the purpose of establishing Aboriginal fishing authorities, provisions of watershed framework agreements, provisions of Aboriginal fishing agreements and communal licences, cooperative management sub-agreements, designation of individuals, control of fishing methods, the negotiation process, enforcement and the employment of Aboriginal fishery guardians.

Pacific Fisheries Reform, 2005

- 55 In 2005, DFO announced “Pacific Fisheries Reform”⁶⁴ and committed \$5.2 million to address four key themes: sustaining strong salmon populations; strengthening DFO programs; making progress on increasing First Nations’ access to economic fisheries; and improving the economic performance of fisheries.
- 56 In September 2005, DFO released a “Discussion Paper on the Implementation of Pacific Fisheries Reform,”⁶⁵ listing its “key elements”, two of which relate to the participation of First Nations in the fishery, and to shared management, responsibility and accountability. The discussion paper provides as follows:

...Third, reform must, in the immediate future, enhance the place of First Nations in the fishery. First Nations have expressed dissatisfaction with their declining involvement in certain commercial fisheries, their lack of economic fishing opportunities more generally, as well as their difficulties in access fish for food, social and ceremonial purposes in some cases. Further, many First Nations are unhappy with their role in the management of the fisheries resources that are important to them.⁶⁶

.....Fourth, reform needs to re-define the role of First Nations, stakeholders and government in the management of fisheries... Increased accountability and responsibility for management by harvesters, including shared funding of management costs, would enhance the ability of DFO to deliver on its

⁶⁴ DFO Moves Ahead with Reform to Pacific Fisheries: <http://www.dfo-mpo.gc.ca/media/npres-communic/2005/hq-ac64-eng.htm>

⁶⁵ CAN002514

⁶⁶ CAN002514 at p. 6.

conservation mandate and control the cost to the public of fisheries management over time.⁶⁷

- 57 A “DFO Action Plan for Reform of Pacific Fisheries,”⁶⁸ suggests that Pacific Fisheries Reform also pertains to FSC fishing allocation and access. In that document, DFO committed to “work with First Nations to address concerns regarding fisheries access for FSC purposes” and to “work with First Nations to develop a mutually agreeable framework for negotiating appropriate levels of fisheries resources for FSC purposes.”⁶⁹

Five Year Strategic Plan: “Our Waters, Our Future 2005-2010”⁷⁰

- 58 In 2005, DFO also announced its Five Year Strategic Plan: Our Waters, Our Future 2005-2010 (the “Strategic Plan”) to guide the work of DFO over the next five years and to outline DFO’s vision, objectives, priorities and activities.⁷¹ In regards to Aboriginal fisheries, the Strategic Plan notes that,

....building stronger relationships and improving the quality of life of Aboriginal people in Canada is a key commitment of the federal government. Fisheries and Oceans Canada has an important role to play in meeting this commitment by helping to build capacity and increase access to economic opportunities in Aboriginal communities where DFO manages the fishery.⁷²

- 59 The Strategic Plan sets out a special over-arching objective with respect to First Nations: “to better address commercial access issues and more actively involve Aboriginal groups in decision-making processes.”⁷³ In addition, the Strategic Plan suggests that by “building on existing relationships with Aboriginal groups, DFO will work to improve decision-making processes and management decisions while increasing certainty and stability for all groups around fishery access.”⁷⁴

⁶⁷ CAN002514 at p. 7.

⁶⁸ Cited CAN037330 at p. 3.

⁶⁹ Cited in CAN037330 at p. 3.

⁷⁰ CAN024582

⁷¹ CAN024582 at p. 1.

⁷² CAN024582 at p. 9.

⁷³ CAN024582 at p. 10.

⁷⁴ CAN024582 at p. 10.

60 The Strategic Plan also identifies five goals for Aboriginal Policy and Governance over the period of 2005-2010:⁷⁵

- Enhance the involvement of Aboriginal groups in fisheries management decision-making processes using a model of shared stewardship in which Aboriginal groups collaborate with the Department in decision-making;
- Have greater involvement of Aboriginal groups in the decision-making processes in other areas of DFO's responsibility including integrated oceans management, species at risk, habitat management, scientific research and aquaculture development;
- Improve the stability of the West and East Coast fisheries by resolving commercial access issues;
- Continue to manage the fisheries in a manner that is consistent with the constitutional protection provided to Aboriginal and treaty rights by section 35 of the *Constitution Act, 1982*; and
- Contribute to the broader Government of Canada objective in improving the quality of life of Aboriginal people through greater access to economic opportunities, such as commercial fishing.

*An Integrated Aboriginal Policy Framework, 2006-2010*⁷⁶

61 In 2005, DFO also developed a "Vision and Strategy" to address Aboriginal interests in fisheries and oceans.⁷⁷ This Vision and Strategy provides a background for the Integrated Aboriginal Policy Framework 2006-2010 (the "IAPF"), which followed shortly after.

62 According to the IAPF, its purpose is to "provide guidance to DFO employees in helping to achieve success in building on [DFO's] relations with Aboriginal Groups."⁷⁸ Its objectives are to serve as a guide for DFO employees, to provide strategic policy direction for the development of operational guidelines and programs, and to guide DFO in discussions and collaboration with other federal

⁷⁵ CAN024582 at p. 23.

⁷⁶ CAN000178

⁷⁷ For Draft Vision and Strategy documents, see CAN008989 and CAN008970.

⁷⁸ CAN000178 at p. 1.

agencies, provinces, territories, stakeholders and Aboriginal groups.⁷⁹ The IAPF builds on the objectives of DFO's Strategic Plan.⁸⁰

63 The IAPF sets out DFO's vision of "supporting healthy and prosperous Aboriginal communities through building and supporting strong, stable relationships; working in a way that upholds the honour of the crown; and facilitating Aboriginal participation in fisheries and aquaculture and associated economic opportunities and in the management of aquatic resources."⁸¹

64 The IAPF sets out its guiding principles:⁸²

- Be respectful of Aboriginal peoples and their communities, their rights, values and aspirations;
- Be proactive; seek timely, innovative approaches to resolving emerging issues through discussion, negotiation and reconciliation;
- Access the knowledge, wisdom and skills of Aboriginal people through participatory and collaborative management and decision-making processes; and
- Attempt to accommodate Aboriginal interests in aquatic resources and oceans management, taking into account the need for conservation of the resource, its effective and efficient management and the interests of Canadians.

65 The IAPF then enumerates seven action plan strategies for DFO:⁸³

1. Building and supporting strong, stable relationships – by maintaining and improving working relationships with Aboriginal people through fostering an internal culture and external climate of mutual understanding and respect.
2. Taking into account Aboriginal and treaty rights – by carrying out DFO's mandate in a manner consistent with the constitutional protection provided for existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.
3. Participating in the negotiation of land claims agreements, also referred to as modern treaties – as part of the negotiation processes led by Indian and

⁷⁹ CAN000178 at p. 1.

⁸⁰ CAN000178 at p. 3.

⁸¹ CAN000178 (preface)

⁸² CAN000178 at p. 4.

⁸³ CAN000178 at p 4-5.

- Northern Affairs Canada (INAC), address matters related to the use and management of aquatic resources, habitats and ocean spaces.
4. Supporting increased Aboriginal participation in co-management of aquatic resources – by working with Aboriginal groups to increase their participation in the management and protection of aquatic resources, habitats and ocean spaces, including policy and program formulation, planning, resource management decision-making and program delivery.
 5. Providing for increased Aboriginal participation in integrated commercial fisheries and in other economic opportunities in the aquatic sector – by facilitating greater participation in sustainable integrated commercial fisheries and aquaculture opportunities and in aquatic resource management.
 6. Building Aboriginal capacity to participate in the aquatic sector – by working with Aboriginal groups through programs such as: Aboriginal Fisheries Strategy (AFS); Aboriginal Aquatic Resource and Oceans Management (AAROM); Aboriginal Inland Habitat Program (AIHP); Marshall Response Initiative (MRI); Atlantic Integrated Commercial Fisheries Initiative (AICFI); Pacific Integrated Commercial Fisheries Initiative (PICFI) and with other agencies of the Government of Canada, to increase the capacity of Aboriginal groups to participate in the aquatic resource sector.
 7. Building DFO's capacity to serve Aboriginal groups – providing organizational and staff capacity to serve Aboriginal groups and respond to emerging issues through organizational and training initiatives.

Aboriginal Fisheries Allocation and Access

- 66 DFO describes Aboriginal fisheries allocation and access in a number of policies and operational guidelines, recognizing that “for many Aboriginal communities, food, social and ceremonial (FSC) fisheries are an important part of their culture.”⁸⁴
- 67 DFO defines “allocation” as “the amount or share of the fisheries resource or allowable catch and/or effort that is distributed or assigned by the Minister to those permitted to harvest the resource.”⁸⁵ DFO defines “access” as “the opportunity to

⁸⁴ CAN008933

⁸⁵ CAN00178 at p. 19.

harvest or use fisheries resources, generally permitted by licences issued under the authority of the Minister of Fisheries and Oceans.”⁸⁶

How Allocations are Determined

- 68 The 1993 Policy provides that, for First Nations having historical use and occupancy of an area in question, DFO will consult with respect to allocations. DFO will also use Information on community size (including but not necessarily limited to band membership), recent food fishery harvests, trends in such harvests, current food preferences and use and availability of other foods to establish the reasonable food requirements of members of the community represented by the First Nation.⁸⁷ The 1993 Policy also states that such allocations may include fish for sale.⁸⁸ Allocations are then recorded as a provision of a fishing agreement and in an Aboriginal communal fishing licence issued pursuant to the ACFLR.⁸⁹
- 69 DFO’s 1999 Allocation Policy for Pacific Salmon⁹⁰ (the “1999 Allocation Policy”), a policy that pertains to several species of salmon and harvest by all sectors, sets out a series of “Allocation Principles”. Allocation Principle Two states that “after conservation needs are met, First Nations’ food, social and ceremonial requirements and treaty obligations to First Nations have first priority in salmon allocation.” In determining this allocation, the 1999 Allocation Policy states that DFO will consult with First Nations each year on their needs for food, social and ceremonial fish and on matters that may affect their fishing and their preferred fishing methods.⁹¹ The 1999 Allocation Policy states that “fishing has a cultural component for First Nations” and reassures that this policy does not define the

⁸⁶ CAN00178 at p. 19.

⁸⁷ CAN008862 at p. 6.

⁸⁸ CAN008862 at p. 6. Allocations for commercial purposes may be expressed as a percentage of the allowed catch from a particular stock.

⁸⁹ CAN008862 at p. 8.

⁹⁰ CAN021242

⁹¹ CAN021242 at p. 17.

nature and scope of treaty rights and will not affect the scope of treaty negotiations over fishery harvest levels.⁹²

Priority of Access for FSC Fishing

70 DFO also describes the priority status of Aboriginal fishing for FSC purposes in several documents.

71 The 1993 Policy provides that “Aboriginal fishing for food, social and ceremonial purposes will have first priority, after conservation, over other user groups. Aboriginal fishing for such purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, to achieve a valid health and safety objective, or to achieve other substantial and compelling objectives.”⁹³ This priority for FSC fishing will be given “to the extent possible given the availability of fisheries resources within areas used historically by the group.”⁹⁴

72 The 2005 Policy for Conservation of Wild Pacific Salmon⁹⁵ states that

...DFO seeks to manage fisheries in a manner consistent with the decision of the Supreme Court of Canada in *R. v. Sparrow* and subsequent court decisions such as the decision of the BC Court of Appeal in *R v. Jack, John and John*. Specifically, DFO is committed to managing fisheries such that Aboriginal fishing for food, social and ceremonial purposes has priority over other fisheries.⁹⁶

73 The 1999 Allocation Policy also reiterates the priority of First Nations access for FSC fishing. It states that “although pacific salmon are the common property of all Canadians, not all Canadians have equal access to the resource. The Constitution of Canada recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada” and “common property does not imply equal

⁹² CAN021242 at p. 17.

⁹³ CAN008862 at p. 2.

⁹⁴ CAN008862 at p. 6.

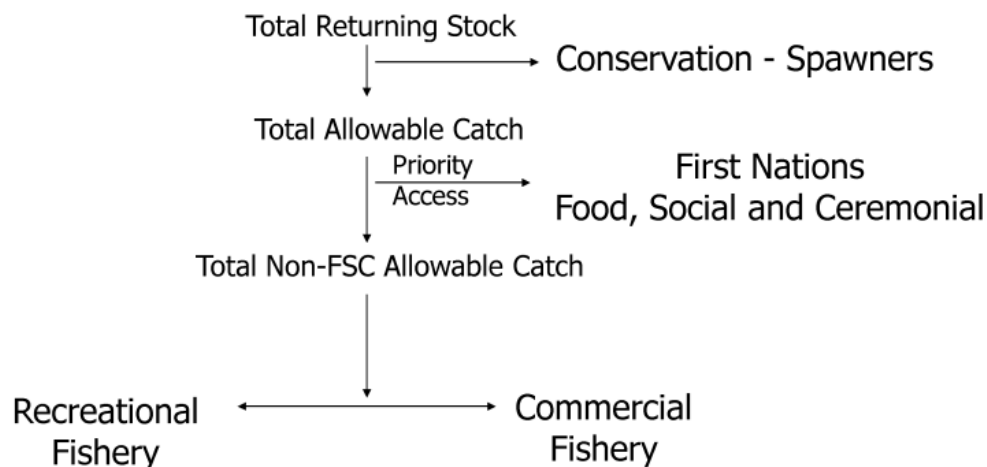
⁹⁵ CAN015920

⁹⁶ CAN015920 at p. 2.

access.” Rather, “the Aboriginal right to fish for food, social and ceremonial purposes has priority, after conservation, over other uses of the resource.”⁹⁷

74 Figure 7 illustrates how DFO allocates salmon and highlights the priority access for First Nations FSC fishing.

Figure 7: How Salmon are Allocated⁹⁸



DFO Guidelines for FSC Allocation and Access

75 DFO has developed a number of guidelines directed at operational decision making regarding FSC allocation and access. Note that the terms “allocation” and “access” appear to be used similarly or synonymously under certain guidelines.

76 An undated DFO document entitled “FSC Launch Group – Policies and Practice”⁹⁹ sets out the following guidelines for implementing FSC policies in consultation with First Nations:

- Decisions regarding FSC fishing should consider the diversity and abundance of fisheries resources available in the fishing area of the Aboriginal group or First Nation.
- Decisions regarding FSC fishing should take into account FSC fishing by other Aboriginal groups and First Nations on the same stock/species.

⁹⁷ CAN021242 at p. 18.

⁹⁸ CAN046349 at p. 4.

⁹⁹ Non-Ringtail document: FSC Launch Group – DFO Policies and Practice.

- Fishing for FSC purposes is an opportunity to harvest, not a guarantee of a specific allocation.
- Decisions regarding FSC fishing should take into account differences between First Nations (e.g. community needs, preferences, social and cultural differences, community use, etc.).
- Aboriginal fishing for FSC purposes should be carried out in context with integrated fisheries management plans for the fishery.

77 A 2006 “First Nations Access to Fish for FSC Purposes: Draft Guiding Principles” document also sets out eight draft principles for discussion with First Nations, intended to form “a basis for a mutually acceptable framework for negotiating FSC access.”¹⁰⁰ These guiding principles are as follows:

- Processes and decisions regarding FSC access (amount and fishing area) should honour Canada’s obligations to First Nations.
- Aboriginal fishing for FSC purposes should have first priority in management decisions, after conservation, over other user groups.
- Processes for making FSC access decisions should incorporate some flexibility within a generally consistent approach.
- Decisions regarding FSC fishing areas should take into consideration information relating to First Nations’ claimed traditional territories.
- Decisions regarding FSC amounts should take into account the diversity and abundance of fisheries resources available in the First Nations fishing area (consider the available “fish basket”).
- FSC access decisions should take into account community use and operational factors.
- Decisions regarding FSC fishing should take into account the FSC access of other Aboriginal groups.
- Decisions regarding FSC access should take into account differences among First Nations (e.g. community needs, preferences, social and cultural differences, community use, etc.).

78 In April and May 2006, DFO also developed a draft Operational Framework and a series of Evaluation and Decision Frameworks in regards to First Nations access

¹⁰⁰ CAN037330at p. 5.

to fish for FSC purposes.¹⁰¹ These documents identify the three types of FSC fishing requests commonly received and suggest operational approaches to each. Common requests include allocation increases, changes to fishing area, and commercial and/or recreational closures to facilitate harvesting of fish for FSC purposes. The criteria for evaluating requests are: legal considerations; fisheries resource diversity, abundance and parity issues; fisheries capacity, governance and operational issues; and treaty-related issues. The FSC Access Operational Framework also sets out the roles and responsibilities of the Area Directors, the Aboriginal Policy and Governance Director, Fisheries and Aquaculture Management staff (now Ecosystems and Fisheries Management) and the Department of Justice in addressing FSC access requests.

- 79 In April 2010, DFO developed a “Draft Method for Sharing FSC Sockeye when the FSC Total Allowable Catch is Less than the Combined FSC Needs” (the “Draft Method for Sharing FSC Sockeye”).¹⁰² This document states that

...in most years, fisheries are managed in-season to provide opportunities for all First Nations to achieve communal licence harvest targets. However, if in-season assessments of sockeye run-size are lower than forecast pre-season, the situation could arise where the number of harvestable sockeye is insufficient to meet FSC needs. In this circumstance, DFO must still manage to achieve escapement objectives, and consequently, must reduce the harvestable surplus available for FSC fisheries. The issue that must then be resolved is how to equitably share any reduction to FSC catch targets among individual First Nations, especially for groups with differential access to the resource.¹⁰³

- 80 The Draft Method for Sharing FSC Sockeye outlines potential approaches to sharing a limited sockeye surplus among First Nations in the specific circumstance where the First Nations FSC targets cannot be met due to a lack of abundance of sockeye in-season. It also sets out the following draft principles to be applied in preparing sockeye sharing arrangements:

1. All planned harvest will remain within conservation constraints.

¹⁰¹ See CAN002691, CAN000174, CAN000175, CAN000176, CAN000177 and non-Ringtail document: First Nations Access to Fish for FSC Purposes: FSC Access Evaluation Framework General Guidance, undated.

¹⁰² CAN095121

¹⁰³ CAN095121 at p. 1.

2. The run-timing group which has a total allowable catch (“TAC”) above the harvest rate floor¹⁰⁴ will be fully harvested within conservation constraints.
3. Run-timing groups whose allowable TACs are generated as a result of harvest rate floors implemented to allow harvest of more abundant, co-migrating stocks will only be harvested to the extent required to access the more abundant group.

FSC Allocations for Fraser River sockeye

- 81 This section of the policy and practice report sets out preliminary information regarding Aboriginal FSC allocations. The commission is also expected to publish a science report entitled “Fraser River Sockeye Fisheries and Fisheries Management” as part of the commission’s scientific research program.¹⁰⁵ That report is anticipated to contain greater detail as to allocation and catch numbers for all harvest sectors. For information on commercial access provided to First Nations through the Aboriginal Fisheries Strategy Pilot Sales Program, the Allocation Transfer Program and the Pacific Integrated Commercial Fisheries Initiative, refer to those sections of this policy and practice report, below.
- 82 There are no Fraser River sockeye licences issued to the Métis peoples of British Columbia.¹⁰⁶
- 83 For FSC allocations issued between 1995 and 2002, see Table 2 of the Government’s Response to Request for Information about the Aboriginal Fisheries Strategy and the Marshall Decision.¹⁰⁷ The following tables describe DFO’s recorded allocation of Fraser River sockeye for FSC purposes in 2009, which totalled 1,029,650 pieces for all First Nations.¹⁰⁸

¹⁰⁴ A harvest rate floor is a minimum harvest rate applied to run-timing groups that would otherwise have no allowable fishing mortality based on the size of their return. A harvest rate floor is implemented to allow some harvest of stronger stocks while keeping the impact on weaker stocks at an acceptable level. For instance, a 20% harvest rate floor was applied to the Late-run timing group in 2008 and 2009.

¹⁰⁵ “Project 7”

¹⁰⁶ Note that DFO’s position on licensing fishing for Métis, as of 2002, is available CAN063994, p. 30, and 51-52.

¹⁰⁷ Government’s Response – Request for Information about the Aboriginal Fisheries Strategy (AFS) and the Marshall Decision, 2002, Table 2, available at: <http://www.dfo-mpo.gc.ca/reports-rapports/afs-srapa/resp-rep-eng.htm>

¹⁰⁸ Information for Tables 1 to 4 from CAN285085.

Table 1: 2009 Fraser River Sockeye Communal Licence Allocations for FSC – Lower Fraser Area

Issuing Office	Licence Holder	Fraser Sockeye Maximum Retention Amount (in pieces)
LFA - Annacis	Lower Fraser River First Nation Group	300000**
LFA - Annacis	Semiahmoo	3500*
LFA - Annacis	Squamish	20000*
LFA - Annacis	Kwikwetlem First Nation	3500
LFA - Annacis	Tsleil-Waututh	7000*
LFA - Annacis	Hwlitsum	5000*
LFA - Annacis	Musqueam First Nation	75000**
LFA - Annacis	Tsawwassen First Nation	13000***
LFA - Annacis	Mount Currie	10000*
	Total FSC Communal Licence Allocation for Lower Fraser	437000

Notes: * No licence issued in 2009 – Maximum Retention Amount is from previous year

** Licences issued on a weekly basis without Maximum Retention Amount. Number used for Seasonal Planning

***Tsawwassen treaty domestic allocation – estimated average amount.

Table 2: 2009 Fraser River Sockeye Communal Licence Allocations for FSC – BC Interior

Issuing Office	Licence Holder	Fraser Sockeye Maximum Retention Amount (in pieces)
Williams Lake	Carrier Sekani Tribal Council	17500
Williams Lake	Esketemc Northern Shuswap And Tsilhqotin	75000
Kamloops	High Bar First Nation	8000
Williams Lake	Kluskus First Nation	1500
Williams Lake	Lheidli T'Enneh Indian Band	7000
Williams Lake	Lhtako Dene Nation	1500
Kamloops	Lower Nicola Indian Band (L. Nicola)	130000
Kamloops	Nicola Tribal Association	Included in L. Nicola
Kamloops	Nicommen Indian Band	Included in L. Nicola
Kamloops	Nlaka'Pamux First Nation	Included in L. Nicola
Williams Lake	Nadleh Whut'En Band	5000
Williams Lake	Nazko Indian Band	1500
Kamloops	St'At'Imc Nation	65000
Kamloops	Xaxli'P Band	Included in St'At'Imc
Williams Lake	Stellat'En First Nation	2500
Williams Lake	Tl'Azt'En Nation	10000
Williams Lake	Toosey Indian Band	5000
Kamloops	Whispering Pines Band	2000
Kamloops	Adams Lake Band	170*
Kamloops	Bonaparte Band	115*
Kamloops	Kamloops Band	100*
Kamloops	Little Shuswap Band	75*
Kamloops	Neskonnliith Band	40*
Kamloops	Simpcw FN	230*
Kamloops	Skeetestchen Band	330*
Kamloops	Splatsin FN	40*
	Total FSC Communal Licence Allocation for BC Interior	332600

Note: * No licence issued in 2009. Maximum Retention Amount is from previous year.

**Table 3: 2009 Fraser River Sockeye Communal Licence Allocations for FSC
– South Coast**

Issuing Office	Licence Holder	Fraser Sockeye Maximum Retention Amount (in pieces)
Port Alberni	Nuu-chah-nulth Tribal Council (NTC)	26400****
Port Alberni	Ahousaht First Nation	Included in NTC
Nanaimo	Beecher Bay	1050
Nanaimo	Chemainus First Nation	15000
Nanaimo	Cowichan Tribes	30000
Port Alberni	Ditidaht First Nation	Included in NTC
Port Alberni	Ehattesaht	Included in NTC
Nanaimo	Esquimalt Nation	1000
Nanaimo	Halalt First Nation	3500
Port Alberni	Hesquiaht First Nation	Included in NTC
Campbell River	Homalco Indian Band	4000
Port Alberni	Huuayaht	Included in NTC
Campbell River	Johnstone Strait First Nations (JSFN)	80000
Campbell River	Namgis First Nation	Included in JSFN
Port Alberni	Ka:Yu:'K'T'H' / Che:Ktles7et'H'	Included in NTC
Port Hardy	Klahoose First Nation	4000
Nanaimo	Lake Cowichan First Nation	250
Nanaimo	Lyackson First Nation	4000
Nanaimo	Malahat First Nation	1200
Port Alberni	Mowachaht First Nation	Included in NTC
Nanaimo	Nanoose First Nation	4500
Port Alberni	Nuchatlaht Indian Band	Included in NTC
Nanaimo	Pacheedaht First Nation	6500
Nanaimo	Pauquachin First Nation	2000
Nanaimo	Penelakut First Nation	12000
Nanaimo	Qualicum First Nation	1000
Port Hardy	Quatsino Indian Band	4000
Pender Harbour	Sechelt Indian Band	15000
Powell River	Sliammon First Nation	10000
Nanaimo	Snuneymuxw First Nation	17000
Nanaimo	Songhees First Nation	2100
Port Alberni	Tla-O-Qui-Aht First Nation	Included in NTC
Nanaimo	Tsartlip First Nation	7500
Nanaimo	Tsawout First Nation	4000
Nanaimo	Tseycum First Nation	1050
Nanaimo	T'Souke Indian Band	3000
Port Alberni	Ucluelet	Included in NTC
	Total FSC Communal Licence Allocation for South Coast	260050

Note: **** Communal amount of Fraser sockeye for NTC. Licences issued to individual NTC First Nations have combined Fraser and Barkley sockeye amounts.

FSC Catch of Fraser River sockeye

84 Due to the low returns of Fraser River sockeye in 2009, preliminary catch estimates indicate that the total recorded catch of FSC sockeye was 72,152 pieces. This is illustrated in Table 4, which compares the total licence allocations, the amount recorded in the IMFP and the 2009 preliminary catch estimate for South Coast, Lower Fraser and BC Interior Areas.

Table 4: 2009 Fraser River Sockeye FSC Fishery Summary (Allocations and Preliminary Catch Estimate)

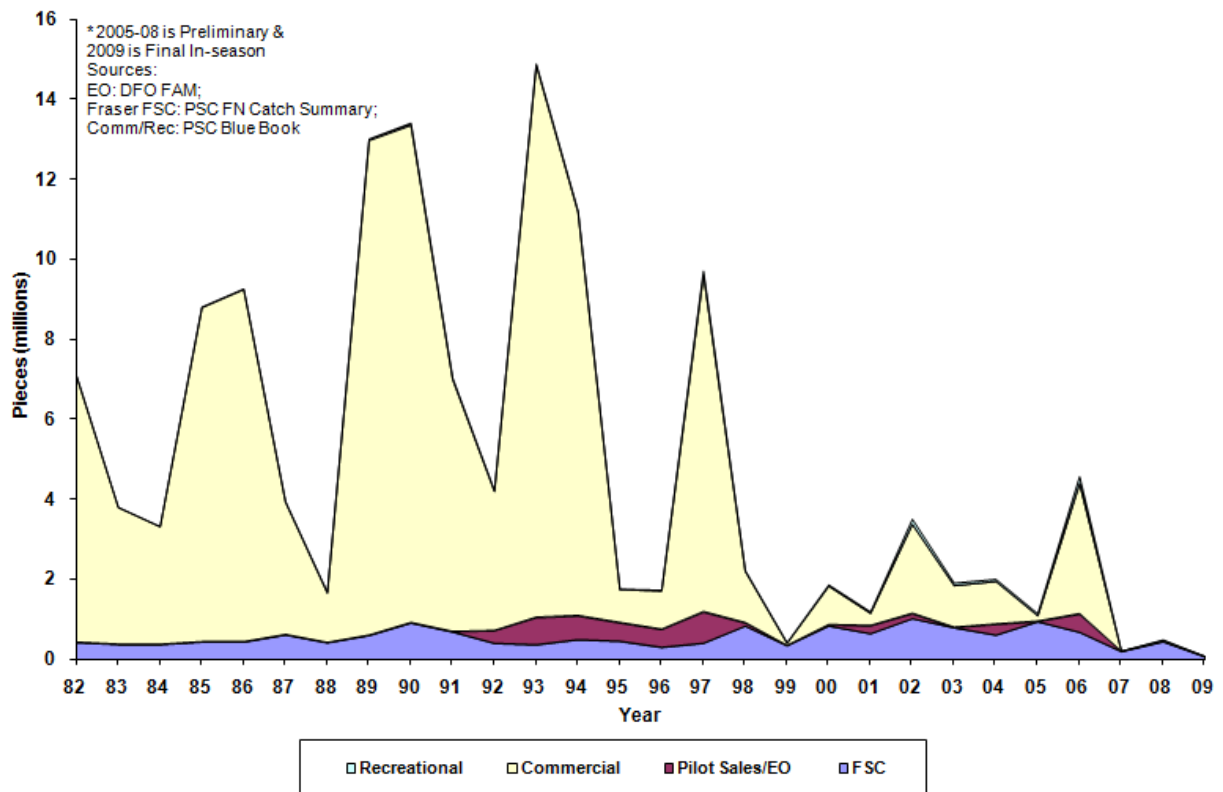
	South Coast Area	Lower Fraser River	B.C. Interior	Total
Licence Amount	260,050	437,000	332,600	1,029,650
IFMP Amount	260,000	449,000	300,000	1,009,000
2009 Catch (preliminary)	10,325	21,680	40,147	72,152

Notes:

1. The discrepancy between LFA licence and IFMP amounts is due to the change in Tsawwassen's allocation under treaty which is an abundance-based formula averaging 13,000 pieces. Their previous allocation was fixed at 25,000 pieces.
2. Opportunities for First Nations FSC fisheries targeting Fraser River sockeye in 2009 was reduced due to the much lower than anticipated returns of most of the Fraser River stocks. As a result, actual harvest was much less than pre-season planning targets.

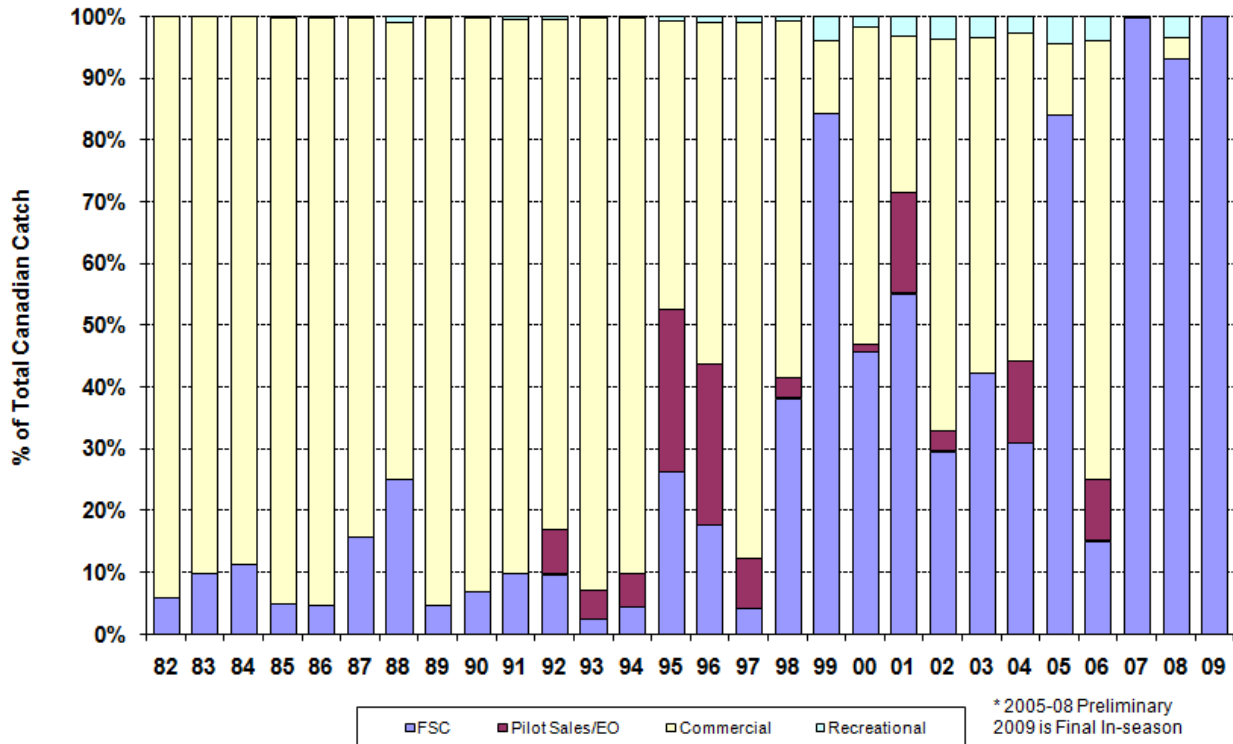
85 The following tables illustrate the total Fraser River sockeye FSC harvest for the period of 1982 to 2009, relative to the harvest levels achieved by other groups. Figure 8 presents a measure of catch in sockeye pieces, whereas Figure 9 displays the same information in terms of percentage of the total Canadian catch.

Figure 8: Canadian Catch of Fraser River sockeye in Pieces by Sector 1982 – 2009¹⁰⁹



¹⁰⁹ CAN185675

Figure 9: Percent Composition of Canadian Catch of Fraser River sockeye by Sector 1982 – 2009¹¹⁰



¹¹⁰ CAN185675

The Aboriginal Fisheries Strategy

86 In its 1990 *R. v. Sparrow*¹¹¹ decision, the Supreme Court of Canada found that where an Aboriginal group has an Aboriginal right to fish for FSC purposes, this right takes priority, after conservation, over other uses of the resource. In 1992, DFO introduced the Aboriginal Fisheries Strategy (“AFS”) to provide, among other things, for the effective management of the Aboriginal fishery in a manner consistent with the *Sparrow* decision.¹¹² Noting that “it will take time” to conclude treaty negotiations,¹¹³ DFO states that the AFS was also designed to serve as a bridging arrangement in fisheries matters during the negotiation of comprehensive land claims and self-government agreements.¹¹⁴ In this regard, DFO hoped that the AFS would provide Aboriginal people with fisheries benefits in advance of final treaty settlement and “to decrease or eliminate the current conflict over resources.”¹¹⁵ Such benefits include economic opportunities on the understanding that “increased Aboriginal participation in fisheries can provide economic development and employment opportunities to improve the economies of Aboriginal communities.”¹¹⁶

87 According to DFO, the AFS is one of its most important tools for engaging Aboriginal groups.¹¹⁷ Its objectives are as follows:¹¹⁸

- To provide a framework for the management of fishing by Aboriginal groups for food, social and ceremonial purposes;
- To provide Aboriginal groups with an opportunity to participate in the management of fisheries, thereby improving conservation, management and enhancement of the resource;
- To contribute to the economic self-sufficiency of Aboriginal communities;

¹¹¹ [1990] 1 S.C.R. 1075.

¹¹² CAN000178 at p. 16.

¹¹³ CAN002333 at p. 3.

¹¹⁴ CAN000178 at p. 16.

¹¹⁵ CAN002333 at p. 3.

¹¹⁶ CAN002333 at p. 4.

¹¹⁷ CAN024582 at p. 23.

¹¹⁸ DFO AFS website: <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>

- To provide a foundation for the development of self-government agreements and treaties; and
- To improve the fisheries management skills and capacity of Aboriginal groups.

88 According to DFO, the AFS is not rights based, although as a matter of policy, the AFS is used to provide for the management and regulation of Aboriginal FSC fisheries through negotiated agreements.¹¹⁹ It applies wherever DFO manages the fishery and land claims settlements have not yet resulted in a fisheries management framework.¹²⁰

AFS Agreements

89 One of the key elements of the AFS is the negotiation of time-limited fisheries agreements (“AFS Agreements”) between First Nations and DFO on harvest plans and communal licences. In addition to harvesting opportunities, AFS Agreements may provide for funding for fisheries management and economic opportunities, including access to commercial fishing opportunities.¹²¹

90 In order to be eligible for an AFS Agreement, an Aboriginal group must meet the following criteria:¹²²

- It must represent an identifiable community base (because the Aboriginal fishing right is communal);
- There must be a history of fishing;
- The group must presently be active in fishing; and
- The group must have a governance structure in place that represents its membership in negotiation of an AFS agreement.

¹¹⁹ CAN008848

¹²⁰ CAN00178 at p. 16.

¹²¹ CAN00178 at p. 16.

¹²² CAN063994 at p. 12.

91 DFO recognizes that there are many different organizational structures for Aboriginal groups and the ACFLR defines an Aboriginal organization as broadly including Indian bands, Indian band councils, tribal councils and organizations that represent a territorially based Aboriginal community.¹²³ According to DFO,

...it may not be possible or appropriate to consult with every Aboriginal organization that wishes to be involved in the process. In this regard it should be remembered that DFO does not have a mandate to determine whether an Aboriginal group has Aboriginal or treaty rights to fish, or the nature and scope of any such rights.¹²⁴

92 In determining which are the most appropriate Aboriginal organizations to consult with and to enter into AFS Agreements with, DFO considers the following:¹²⁵

- Whether the Aboriginal organization is an Indian band or represents one or more Indian bands;
- Whether the Aboriginal organization represents a territorially based Aboriginal community or a group of territorially based Aboriginal communities;
- What access to fisheries resources is available to the Aboriginal organization;
- Is access to fisheries resources available to the Aboriginal organization or its members through access provided to another Aboriginal organization;
- The likelihood that the particular organization speaks for a community or communities that today best represent Aboriginal societies that may be able to claim Aboriginal or treaty rights to fish; and
- The likelihood that the particular organization may represent individuals with a connection to the community referred to above.

93 There are two main types of negotiated agreements made between DFO and Aboriginal organizations: Comprehensive Fisheries Agreements and Project Funding Agreements, summarized briefly below.¹²⁶ For a more detailed description of AFS Agreements and guidance for managers in respect of their issuance and implementation, see the 1995 "Department of Fisheries and Oceans Pacific

¹²³ ACFLR, s. 2.

¹²⁴ CAN000059 at p. 4.

¹²⁵ CAN000059 at p. 4.

¹²⁶ CAN000089

Region AFS Desk Book”¹²⁷ and the 2003 “Aboriginal Fisheries Strategy Pacific Region Resource Managers’ Handbook.”¹²⁸

Project Funding Agreements

94 Project Funding Agreements may be used to support a broad range of activities, such as cooperative management programs that involve Aboriginal people in activities that directly benefit the resource, such as habitat assessment and enhancement, fisheries enhancement and cooperative research.¹²⁹ Project Funding Agreements may also be used to support training of Aboriginal groups assuming management roles in the fishery,¹³⁰ or to support participation in consultations or attendance at meetings.

Comprehensive Fishing Agreements

95 Fisheries Agreements negotiated under the AFS could contain the following components:¹³¹

- Provisions with respect to amounts that may be fished for food, social and ceremonial purposes;
- Terms and conditions that may be included in the communal fishing licence (e.g. species, amount that may be fished, area, gear, times, reporting requirements);
- Arrangements for co-operative management by the Aboriginal group and DFO of fishing by the group for food, social and ceremonial purposes;
- Co-operative management projects for the improvement of the management of fisheries in general, such as stock assessment, fish enhancement and habitat management; and
- Provisions related to communal licences under the Allocation Transfer Program (ATP) for obtaining access to commercial fisheries and/or other economic development opportunities.

¹²⁷ CAN002690

¹²⁸ CAN038242

¹²⁹ CAN063994 at p. 11.

¹³⁰ CAN063994 at p. 12.

¹³¹ DFO AFS website, <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>; See also CAN008673

- 96 For a sample Comprehensive Fishing Agreement for the Lower Fraser, see “Comprehensive Fisheries Agreement for Sockeye Pink and Chum Salmon CFA2009-1912.”¹³²

Fraser Watershed Agreement, 1993¹³³

- 97 In addition to the Project Funding Agreements and Comprehensive Fishing Agreements currently in place under the AFS, an important aspect of early AFS implementation was the signing of a 1993 Fraser Watershed Agreement between DFO and “Schedule A” First Nations (a group of approximately two dozen Aboriginal groups situated in the Fraser watershed). This Agreement terminated on March 31, 1999 and was not renewed.
- 98 According to the Fraser Watershed Agreement, its purpose was to provide for a coordinated approach to the conservation, protection and enhancement of fisheries, fish and fish habitats (including fish health, quality and allocations) in an area designated under the agreement that roughly covered the entire Fraser watershed. Note however, that not all Aboriginal groups within the Fraser watershed signed on to the agreement.
- 99 The Fraser Watershed Agreement did not purport to define or limit Aboriginal rights. However, DFO and signatory First Nations agreed to establish a cooperative management structure that included the use of three committees: a Steering Committee, a Technical Committee and a Monitoring and Enforcement Committee.
- 100 The Steering Committee would consist of no more than 10 members appointed by the First Nations and up to three members appointed by DFO. Its task was to, inter alia: coordinate implementation of the Fraser Watershed Agreement; work towards developing a procedure to facilitate decision making; review recommendations of the Technical Committee and the Monitoring and Enforcement Committee and report on issues on which the Committees could not reach consensus, and to

¹³² CAN095988

¹³³ CAN285118

make recommendations in respect thereof to the Regional Director General; and to provide reports to the Regional Director General, including majority and minority opinions on any issue on which the Steering Committee could not reach consensus.

- 101 The Technical Committee would also consist of no more than 10 members appointed by the First Nations and up to three members appointed by DFO. Its task was to, inter alia: recommend a fishing plan with respect to harvesting by First Nations for the Area; review in-season information and recommend amendments to the fishing plans; recommend Area production plans; and recommend stock and habitat assessment and monitoring plans. The Technical Committee could have sub-committees, which would be responsible for consultations with the First Nations. DFO and the First Nations agreed to share information with each other in a timely way to facilitate work of the Technical Committee.
- 102 The Monitoring and Enforcement Committee would also consist of no more than 10 members appointed by the First Nations and up to three members appointed by DFO. Its task was to, inter alia: recommend a coordinated monitoring and enforcement plan with respect to fishing and related activities within the Area by the First Nations (including details of landing sites, inspection, data collection, quality control, monitoring, daily enforcement activities and mechanisms for reporting); recommend a coordinated enforcement protocol with respect to enforcement activities by First Nations and DFO (including coordinating joint enforcement activities); review performance of Aboriginal fisheries officers; and assist in development of a Training Program. The Monitoring and Enforcement Committee could be organized into subcommittees and was to consult with First Nations.
- 103 The Fraser Watershed Agreement also set out that each signatory First Nation would agree to enter into a “Bilateral Agreement” with DFO (that is, an AFS Agreement). The Bilateral Agreements were required to contain: allocations; provisions on roles and responsibilities for stock assessment; restrictions on

fishing effort, gear type and requirement for standardized gear marking; a requirement that all fishing be conducted under a Communal Licence; requirements for comprehensive catch monitoring programs; conditions of sale, including mandatory landing sites; enforcement protocols addressing, fishing without a licence or designation card, fishing during closed times or in closed areas, use of unauthorized gear, improperly and inadequately marked gear, misreporting or failing to report catch, unauthorized sale etc.; and provisions for the employment of Aboriginal fisheries officers.

- 104 The Fraser Watershed Agreement elapsed on March 31, 1999 and, as mentioned earlier, was not renewed. Around 2001, in considering the possibility of a developing a new watershed process, a committee comprised of First Nations and DFO staff from the lower, mid and upper Fraser River commissioned a report on the scope, timing and potential steps required to implement a Fraser watershed process. This report provided 13 recommendations towards that goal.¹³⁴
- 105 At present there does not appear to be a watershed wide management process for First Nations. Several authors over the years have commented on whether or not such a process would be helpful.¹³⁵ For example, in a 2009 report on Lower Fraser First Nations fisheries prepared for DFO,¹³⁶ the author noted that, although “the need for a common management structure must be reconciled with the need of individual First Nations to be recognized as entities,”

...it is not practical to have a large number of meetings to undertake consultations, plan fisheries for different aggregations that need to fish in the same area often with overlapping times and other complications related to management (catch monitoring) and enforcement. As well there is a desire to have some days of “no fishing” each week to allow for a flow of fish to upstream communities. Multiple days of concurrent fishing with nets could impact on this objective. For this reason, it is desirous to have communities whose members fish throughout the lower Fraser operate under a single management regime.¹³⁷

¹³⁴ CAN068771

¹³⁵ See for example, CAN046352 at p. 2 and CAN056469 at p. 17.

¹³⁶ CAN056469

¹³⁷ CAN056469 at p. 17.

106 Similarly, an undated draft “Report on BC Common Table Discussions – Fisheries Component”¹³⁸ document expresses the following concern in relation to treaties:

...The absence of any form of BC-wide umbrella agreement, or other clearly understood treaty framework is a particular problem. Without this broad guidance, First Nations, who seek highly table-specific solutions, and Canada and BC, who need to ensure that the multiple treaties produce a consistent set of manageable outcomes, are often in conflict.¹³⁹

AFS Budget

107 The AFS was originally announced in 1992 as a seven-year \$140M program¹⁴⁰ with an estimated 70% of those funds to be spent in British Columbia.¹⁴¹ The AFS is now a permanent DFO sub-sub-activity, with annual national funding of \$35 million.¹⁴² This includes approximately \$10.2 million per year attributed to the Allocation Transfer Program, within AFS (described in greater detail below).¹⁴³

108 In the Pacific Region, the annual AFS funding level is approximately \$20 million¹⁴⁴ with \$14 million for co-management related activities under AFS Agreements and 6 million to fund the Allocation Transfer Program.¹⁴⁵ For more information on AFS budgets, see the Aboriginal Fisheries Strategy’s annual reports.¹⁴⁶

AFS Outcomes

109 On a national basis, the AFS allows DFO to have a relationship with about 225 Aboriginal groups¹⁴⁷ through approximately 125 AFS Agreements.¹⁴⁸ Approximately two thirds of all AFS agreements are entered into with Aboriginal

¹³⁸ CAN046352

¹³⁹ CAN046352 at p. 2.

¹⁴⁰ CAN000001

¹⁴¹ CAN002329

¹⁴² DFO AFS website: <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>. See also CAN008673. Or, perhaps \$32 million if taking into account \$2 million re-profiled to the Aboriginal Aquatic Resource and Oceans Management Program since 2004-2005 (CAN008848).

¹⁴³ CAN008848

¹⁴⁴ CAN008848

¹⁴⁵ CAN008996 at p. 7.

¹⁴⁶ For example, AFS Annual Report 2007-2008 at CAN008996.

¹⁴⁷ CAN024582 at p. 23.

¹⁴⁸ DFO AFS website: <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>

groups in DFO's Pacific Region.¹⁴⁹ In 2009, the Regional Director of Aboriginal Policy and Governance reported that 100 AFS Agreements were in place with a total of 170 Aboriginal groups in British Columbia.¹⁵⁰

110 According to DFO, the AFS has also led to better monitoring of Aboriginal fishing, improved co-operation on enforcement, more selective fishing and the creation of approximately 1300 seasonal jobs per year since 1993 in such areas as commercial fishing, processing, monitoring and fishery enhancement activities.¹⁵¹ For example, in British Columbia for the fiscal year 2007-2008, 15 Aboriginal Fisheries Guardians and 722 other individuals were employed seasonally in projects funded through AFS Agreements.¹⁵²

AFS Accountabilities

111 Overall accountability for the AFS rests with the Assistant Deputy Minister, Fisheries Management.¹⁵³ The Director General, Aboriginal Policy and Governance, signs AFS Agreements on behalf of Canada and is responsible for developing policy and overall co-ordination of the AFS. The Regional Directors General are responsible for implementing the AFS in their respective regions.¹⁵⁴

112 Negotiation of the terms and conditions of the AFS Agreements with Aboriginal groups is the responsibility of the regional DFO offices. In the Pacific Region, the Area Managers or officials at the Area level undertake AFS negotiations.¹⁵⁵

¹⁴⁹ DFO AFS website: <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>

¹⁵⁰ Non-Ringtail document: DFO's Role regarding First Nations Access to Fisheries in British Columbia: First Nations Fisheries Assembly, October 29, 2009, Kaarina McGivney.

¹⁵¹ DFO AFS website: <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>. See also CAN008673.

¹⁵² CAN008996

¹⁵³ Now the Assistant Deputy Minister, Ecosystems and Fisheries Management.

¹⁵⁴ CAN063994 at p. 13.

¹⁵⁵ CAN008759

AFS Program Evaluations

113 The AFS has undergone a series of reviews since its inception in 1992. This Report will focus on a selection of the more recent reviews of the AFS.

*Aboriginal Fisheries Strategy Review – Final Report, Aboriginal Policy and Governance Branch, November 2002*¹⁵⁶

114 An extensive review of AFS was conducted by the Aboriginal Policy and Governance Branch in 2002. It examined the AFS and related programs in light of how it had performed against its objectives, how it is positioned to address the evolving legal landscape, whether it can meet the changing mandate of Fisheries and Oceans Canada and, more broadly, the federal government's objectives concerning Aboriginal people. It also examined whether the AFS can meet the expectations of Aboriginal groups as they relate to fisheries and fisheries management.

*Strengthening Our Relationship: The Aboriginal Fisheries Strategy and Beyond, October 2003*¹⁵⁷

115 In the spring of 2002, DFO officials met with Aboriginal groups interested in the AFS to “find out what works, what does not work, and what can be changed over the short and long term to make the AFS more efficient and effective.”¹⁵⁸ In the Strengthening Our Relationship report, DFO summarized the benefits of AFS and concerns regarding AFS that arose from those discussions:

116 Reviewers identified several benefits of AFS, including the following:¹⁵⁹

- The AFS provides a number of Aboriginal groups with the opportunity to play a meaningful role in management of the fisheries. It also provides a relatively stable framework in which to negotiate fisheries arrangements with DFO.

¹⁵⁶ CAN063994

¹⁵⁷ CAN000101

¹⁵⁸ CAN000101 at p. 1.

¹⁵⁹ CAN000101 at p. 4.

- Multi-year working arrangements have been beneficial. Although they have their limitations, they promote capacity-building and longer-term planning, and give some assurance that the program will continue from year to year.
- The AFS has led to improved relationships between Aboriginal groups and DFO and with the federal government in general. As an example, joint management and technical committees have provided a helpful tool for DFO and Aboriginal groups to work together and with other stakeholders.
- Stock assessment, habitat and science projects carried out under AFS agreements provide Aboriginal groups and DFO with better species and habitat information for decision-making.
- The program provides economic opportunities through new or expanded jobs in areas where there can often be unfavourable employment prospects. Training initiatives have also had a positive impact on Aboriginal communities.
- The AFS provides beneficial commercial fisheries opportunities through the Allocation Transfer Program.
- In some cases, the AFS is useful for leveraging funds from other sources to build a broader resource management program.

117 According to DFO, reviewers heard the following concerns about the AFS:¹⁶⁰

- The annual nature of AFS funding does not promote long-term strategic planning, and reduces partnering opportunities with other organizations.
- AFS agreements are too long and complicated, with overly detailed and stringent reporting requirements.
- Some Aboriginal groups feel that there should be some form of general recognition of the constitutional protection provided to Aboriginal and treaty rights in the language of the AFS agreement.
- The AFS should be better linked to other DFO sectors, as well as other government programs and initiatives.
- The AFS needs to provide a greater management role for Aboriginal groups in the fisheries.
- Programming should be expanded to the entire ecosystem or watershed to facilitate more accurate resource monitoring and analysis efforts.

¹⁶⁰ CAN000101 at p. 5.

- DFO does not sufficiently take into account Aboriginal stock assessment and traditional knowledge into its decision-making processes.
- Professional development training should be provided to fishers, guardians, and to those who administer AFS agreements.
- Some Aboriginal groups have pointed out that the Guardian program should be re-designed to provide full-time jobs, and that Guardians should also have the same enforcement authority as DFO fishery officers.
- DFO should provide more commercial access for Aboriginal groups, and make available more licences under the Allocation Transfer Program.
- Some Aboriginal groups would like economic opportunities to be built into the overall management of the fishery.
- DFO does not sufficiently take into account AFS program administration costs incurred by Aboriginal groups, nor provide enough emphasis on contracting with Aboriginal groups.
- Issues of fairness and clarity need to be addressed with respect to the Marshall Response Initiative.
- Some scepticism was expressed about the purpose of the 2002 engagement process, itself, with many Aboriginal groups noting that DFO did not make significant changes following the 1996 AFS review. Similarly, many expressed the belief that DFO would ignore the results of the 2002 meetings, as many Aboriginal groups believed the Department had with the National Aboriginal Guardian Program Review.
- The Department needs to communicate more effectively with Aboriginal groups.

118 After considering the benefits and concerns surrounding AFS, DFO offered several proposals to “contribute to more effective DFO programming and decision-making and a stronger DFO-Aboriginal relationship built on mutual respect and benefits.”¹⁶¹ The proposals include the following:¹⁶²

1. **A renewed commitment and approaches to the AFS** - Including maintaining the AFS core mandate, longer term simpler AFS agreements, straightforward, streamlined reporting requirements, flexible approach to

¹⁶¹ CAN000101 at p. 2.

¹⁶² CAN000101 at p. 7ff.

capacity-building and economic opportunities, better communications and ongoing dialogue.

2. **A new Aboriginal Aquatic Resource and Oceans Management Program** - Including the development of a program designed to assist Aboriginal groups in developing the capacity to play a more active role in key areas of fisheries and oceans management. Particular emphasis is placed on Aboriginal participation in multilateral decision-making and advisory processes that involve fishers, scientists, industry representatives, conservation groups, DFO officials and other government departments. At the time, this program was announced as including engagement of Aboriginal Fishery Officers, and provision of commercial fishing and aquaculture opportunities to First Nations.
3. **Better programming coordination with other federal departments and potential changes to DFO's own practices and approaches** - Including internal DFO capacity development and better linkages with other federal departments.

*Audit and Evaluation Directorate: Aboriginal Fisheries Strategy, Formative Evaluation, June 2007*¹⁶³

119 In 2007, the DFO Audit and Evaluation Directorate performed a formative evaluation of AFS, with three objectives: (1) to assess whether the AFS was consistent with departmental and government-wide priorities and whether it realistically addresses an actual need (2) to determine the extent to which the program outputs and outcomes, as earlier identified by a Departmental Audit and Evaluation Committee, have been achieved; and (3) whether the most appropriate and efficient means were being used to achieve objectives, relative to alternative design and delivery approaches. Following the review, four recommendations were proposed by the Departmental Audit and Evaluation Committee:

- That the Assistant Deputy Minister, Fisheries and Aquaculture Management (now Ecosystems and Fisheries Management) determine the information requirements for measuring the impact of the AFS.
- That DFO develop guidelines for the administration of the Aboriginal Guardian activity of AFS, identifying roles and responsibilities, objectives and expected results to be achieved.

¹⁶³ CAN029465

- That DFO develop a program manual that includes program guidelines, desktop procedures, as well as best practices.
- That DFO and Aboriginal groups reach agreement on activities undertaken, that these are reflected in agreements and that reporting requirements for these activities be clearly stated in the agreements.

*Audit and Evaluation Directorate: Audit of the Aboriginal Fisheries Strategy, Final Audit Report, November 2007*¹⁶⁴

120 Coincident with the AFS formative evaluation, the DFO Audit and Evaluation Directorate also prepared an audit of the AFS. The objectives of this audit were as follows: (1) to assess the policies, practices, controls and reporting systems in place for the AFS Program; (2) to determine the extent to which payments made under the Program were in accordance with departmental policies, practices and controls as well as Central Agency Policies and the *Financial Administration Act*; and (3) to determine the extent to which the terms and conditions of the program and contribution agreements were complied with. This audit report came to the following conclusions:

- Roles and responsibilities for delivery of the AFS program were clearly defined, but generally have not been well understood or followed as intended. The Program would benefit from greater involvement of national and regional finance to support the administration of contribution agreements and mitigate potential risks.¹⁶⁵
- Without consistent direction on the determination of eligibility of activities or items, AFS program management may create precedents that can cause difficulties in future negotiations and program delivery.¹⁶⁶
- The agreement negotiation process varied among Regions. In some instances, it consisted essentially of renewing the previous year's contribution agreement without substantive review. In addition, standard clauses were missing from contribution agreements.¹⁶⁷

¹⁶⁴ CAN029466

¹⁶⁵ CAN029466 at p. 8.

¹⁶⁶ CAN029466 at p. 9.

¹⁶⁷ CAN029466 at p. 10.

- Deficiencies in the AFS program administration processes resulted in payments being issued improperly and without sufficient substantiation.¹⁶⁸
- The recipient audit strategy in the Risk-Based Audit Framework developed in 2003 has not been fully implemented. Recipient audit reports were not available for the contribution agreements examined during this audit.¹⁶⁹
- Project objectives and expected results for recipients to report against have not been included in project descriptions in contribution agreements.¹⁷⁰

Aboriginal Fisheries Programs and Initiatives

121 In addition to and in support of the AFS, DFO has implemented a broad array of programs in relation to Aboriginal fisheries and Aboriginal participation in fisheries management. According to DFO, these programs “are designed to strengthen the relationship between the federal government and Aboriginal groups and communities by supporting integration in the commercial fishery and the development of scientific, technical and administrative capacity of Aboriginal groups.”¹⁷¹ The various programs are designed to “address First Nation interests and assertions of rights through policy and program responses, with the objectives of minimizing litigation risks, providing a bridge to final treaties, and facilitating the transition to a post-treaty environment.”¹⁷²

122 This policy and practice report provides a summary of the major Aboriginal fisheries programs and initiatives undertaken by DFO, roughly in chronological order.

The Aboriginal Guardian Program

123 In December 1992, DFO announced the Aboriginal Guardian Program, as a component of the AFS, to enable Aboriginal groups to participate in fisheries monitoring, stock management, fishery enhancement and assessment, habitat

¹⁶⁸ CAN029466 at p. 12.

¹⁶⁹ CAN029466 at p. 14.

¹⁷⁰ CAN029466 at p. 15.

¹⁷¹ CAN00178 at p. 8.

¹⁷² CAN008889. See also CAN00178 at p 8.

protection and enforcement.¹⁷³ According to DFO, the program is also intended to provide economic benefits to First Nations in the form of seasonal employment.¹⁷⁴

124 The Aboriginal Guardian Program is administered through AFS Agreements, which set out the guardian's responsibilities and authorities. As such, the role of guardians varies as between different AFS Agreements negotiated between DFO and Aboriginal organizations.¹⁷⁵ In general, an Aboriginal guardian's functions may include stock assessment activities and providing catch information as it pertains to Aboriginal fisheries within the context of AFS Agreements. Guardians may also be required to monitor the safe unloading, handling, holding and transportation of fish, or to carry out law enforcement functions such as issuing warnings, gathering evidence, taking statements from accused persons or witnesses, seizing fish and gear, laying charges, preparing court briefs, testifying in court, and completing court documents.¹⁷⁶ Some guardians may also play a role in habitat management, including the reporting of habitat activities that are harmful to fish habitat, removal of obstructions, habitat enhancement, monitoring of water levels and fish ways, and the collection of samples.¹⁷⁷ Aboriginal Guardians may be designated as Fishery Guardians by the Minister pursuant to s. 5 of the *Fisheries Act*.¹⁷⁸

A History of the Aboriginal Guardian Program

125 The Aboriginal Guardian Program started with \$1.3 million in 1992 to provide training and equipment for Aboriginal guardians in the Lower Fraser area.¹⁷⁹ The Aboriginal community to be served by the guardian chooses candidates for the Aboriginal Guardian Program. To be considered, candidates are also required to

¹⁷³ CAN000001

¹⁷⁴ CAN000090

¹⁷⁵ For an example AFS Agreement Schedule setting out responsibilities and authorities of Haida Fishery Guardians, see CAN008753.

¹⁷⁶ For a description of a "standard" Aboriginal Guardian designation and powers of Aboriginal Guardians, see CAN008749 at p. 4.

¹⁷⁷ CAN000001 at p. 1.

¹⁷⁸ CAN000090

¹⁷⁹ CAN002309

meet certain qualifications.¹⁸⁰ That year, 81 Aboriginal guardians from British Columbia were trained, with 50 additional trainees set for 1993.¹⁸¹

126 In 1995, further training of Aboriginal Guardians was suspended following a government-wide program review.¹⁸² According to DFO, although the Aboriginal Guardian Program improved relations between DFO and Aboriginal people, the program was suspended in the late 1990s due to difficulties in administration and funding restrictions.¹⁸³ A limited number of Aboriginal Guardians continued to be employed through AFS agreements, but there was no Aboriginal Guardian training for these individuals between 1995 and 2008.¹⁸⁴ In 2006, a DFO survey identified 54 Aboriginal Fisheries Guardians in the Pacific Region,¹⁸⁵ although only 9 of these were formally designated as such.¹⁸⁶ By 2008, the number of Pacific Region Aboriginal Fisheries Guardians employed through AFS Agreements was 15.¹⁸⁷

Evaluations of the Aboriginal Guardian Program

127 The Aboriginal Guardian Program has been reviewed several times since it was created and a selection of those reviews is summarized in this policy and practice report.

128 In December 1999, a “National Aboriginal Guardian Program Review” was prepared by Robert Warren for DFO’s Conservation and Protection (C&P) Branch.¹⁸⁸ This review offered several recommendations for improvement of the Aboriginal Guardian Program.¹⁸⁹ One of these recommendations was for the Aboriginal Guardian Program to be continued and re-established as a DFO program housed within Conservation and Protection and with defined objectives,

¹⁸⁰ CAN000001

¹⁸¹ CAN000001

¹⁸² CAN008880

¹⁸³ CAN000090

¹⁸⁴ CAN008749 at p. 1.

¹⁸⁵ CAN008751

¹⁸⁶ CAN037415 at p. 4.

¹⁸⁷ CAN008996

¹⁸⁸ CAN004568

¹⁸⁹ CAN004568, recommendations at p. 4ff.

policies and procedures. The report suggested that provision must be made for ongoing evolution and improvement of the program through, among other avenues, serious consideration of proposals put forth by Aboriginal groups.

- 129 A “Pacific Regional Proposal for an Aboriginal Fishery Officer Program” was prepared within DFO in response to the National Aboriginal Guardian Program Review.¹⁹⁰ This proposal suggested that DFO recruit and train additional Aboriginal Fishery Officers, in the context of a program that “would ultimately recruit between 150-200 [Aboriginal Fishery Officers].”
- 130 In 2007, an “Aboriginal Guardian Program Training Needs and Feasibility Progress Summary” was prepared by an external contractor, Talon Development Services Inc.¹⁹¹ The review examined existing Aboriginal guardians, their roles and training, and proposed guardian training programs. In preliminary findings, the report suggested that “the value being obtained from the Aboriginal Guardian Program [was] likely well below potential, due to the lack of training” and that “safety and liability concerns [were] elevated.”¹⁹² The report suggested that additional training would “increase safety and job performance, including quality of monitoring, stock and habitat assessment.”¹⁹³

Recent Developments

- 131 In 2008 and 2009 re-training initiatives were implemented for the Aboriginal Guardian Program.¹⁹⁴ In 2008, 30 Aboriginal Guardians¹⁹⁵ were re-trained from the Pacific Region, and in 2009 an additional two Aboriginal Guardians from the Pacific Region received training¹⁹⁶ at a cost of approximately \$250,000.¹⁹⁷

¹⁹⁰ CAN186081

¹⁹¹ CAN037415

¹⁹² CAN037415 p. 13.

¹⁹³ CAN037415 p. 13.

¹⁹⁴ CAN008723 and CAN008880.

¹⁹⁵ Or former Aboriginal Guardians.

¹⁹⁶ CAN008751

¹⁹⁷ CAN008880 at p. 5.

132 Around 2009 a National Aboriginal Guardian Working Group was established. This group is overseen by the Director General of Conservation and Protection (Paul Steele), the Director General of Aboriginal Programs and Governance (David Millette) and Regional Directors of Conservation and Protection.¹⁹⁸ The National Aboriginal Guardian Working Group is tasked with establishing a structure for the Aboriginal Guardian Program and identifying a strategic training plan for the next three years¹⁹⁹ and to consider a set of policy issues that have been identified as a result of discussions with Aboriginal Guardians, trainers and members of the Working Group.²⁰⁰

Excess Salmon to Spawning Requirements

133 The Excess Salmon to Spawning Requirements (“ESSR”) initiative was implemented together with the AFS in 1993. ESSR are salmon which cannot be harvested in approved fisheries (including FSC fisheries) and which return to spawning grounds in numbers exceeding DFO’s assessment of the physical incubation and rearing capacity of a natural area or an enhancement facility.²⁰¹ Allowing commercial harvest of these “excess” stocks is intended to make the “best use of the harvestable portion of the stock” while still allowing for optimum returns (in terms of spawning, production, and value).²⁰²

134 The availability of ESSR harvest opportunities is determined according to a 1993 “Harvesting of Excess Pacific Salmon to Spawning Requirements Operational Policy.”²⁰³ In this policy, DFO states that its first priority is to provide adequate escapements to perpetuate and rebuild the salmon resource.²⁰⁴ DFO does not intend for the ESSR to establish new ESSR fisheries to displace existing fisheries

¹⁹⁸ CAN008751

¹⁹⁹ CAN008751

²⁰⁰ CAN008748 at p. 5.

²⁰¹ CAN007410 at Part II.

²⁰² CAN007410 at Part I.

²⁰³ CAN007410

²⁰⁴ CAN007410 at Par III.

and therefore DFO will attempt to eliminate or minimize the availability of ESSRs through commercial, recreational or FSC harvesting.²⁰⁵

135 However, if DFO determines that there is a population of ESSR available for harvest, those fish will be made available in the following order of priority.²⁰⁶

- The first priority will be to use surpluses to meet outstanding food fish requirements, which cannot be met through approved section 35 fisheries. This may be done under a communal licence or AFS agreement.
- As a second priority, all or part of the harvesting opportunity may be offered to the local First Nations or tribal council. The harvested fish may be sold with the profits supporting an agreed upon fisheries related project. In the case of locally operated facilities, the profits will be directed towards the operation of the facility.
- As a third priority, if the First Nation or tribal council declines or fails to respond within a specified period, the harvesting opportunity may be offered to a community group. The harvested fish may be sold with the profits supporting an agreed upon fisheries project.
- As a fourth priority, if the First Nation and community groups decline the offer, the excess Crown-owned salmon may be offered for sale by competitive tender. The ESSR are considered Crown-owned if returning to a government-run enhancement facility.

ESSR Reporting

136 The harvest of ESSRs is subject to independent audit processes and the cost of such audit is assumed by the harvester.²⁰⁷ Also, following completion of harvesting, the harvester is responsible for preparing and submitting a report outlining the catch, assessment of escapement sampling results, and other activities associated with the harvest.²⁰⁸ DFO Area staff will collect and validate all ESSR data and send a copy of the final report to the Salmon Officer, Fisheries

²⁰⁵ CAN007410 at Part III.

²⁰⁶ CAN007410 at Part IV, s. 2, CAN001059 and CAN000170. See also CAN096995.

²⁰⁷ CAN007410 at Part III.

²⁰⁸ CAN007410 at Part IV, s. 5

Management at regional headquarters. The Salmon Officer will then submit a summary spreadsheet to the Regional Catch Statistics Unit.²⁰⁹

ESSR Accountabilities

137 DFO is solely responsible for identifying and allocating ESSRs.²¹⁰ Harvesting is done under a ministerial authorization or an ESSR licence and such licences are non-transferable and non-leasable.²¹¹ Individuals or groups authorized to harvest an ESSR must contribute, by competitive tender or agreement to reinvest profits from sale of the surplus, to measures that provide benefits for the common property fishery or for the resource.²¹²

Pilot Sales Program and Economic Opportunity Fisheries

138 In 1992, DFO introduced the Pilot Sales Program as part of the Aboriginal Fisheries Strategy.²¹³ By licensing the sale of salmon, DFO intended for the Pilot Sales Program to assist Aboriginal people toward economic self-sufficiency, while at the same time provide for improved conservation, management and effective protection and enforcement of the salmon resource.²¹⁴ The Pilot Sales Program was limited to three geographic areas - the lower Fraser River, the Skeena River and in the Alberni Inlet-Somass River on the West Coast of Vancouver Island.²¹⁵ In the Lower Fraser, Sto:lo, Musqueam and Tsawwassen First Nations participated in the Pilot Sales Program. At the time, DFO believed that Aboriginal interest in selling fish was “concentrated on a limited number of watersheds and geographic areas where fish are abundant and Native bands have traditionally harvested large quantities of fish.”²¹⁶

²⁰⁹ CAN000170 at p. 4.

²¹⁰ CAN007410 at Part III.

²¹¹ CAN007410 at Part IV s. 3.3.

²¹² CAN007410 at Part III.

²¹³ CAN032232. See also CAN056469.

²¹⁴ CAN032232

²¹⁵ CAN000159

²¹⁶ CAN002330

- 139 The Pilot Sales Program consisted of two components: (1) agreements and licences and (2) a monitoring program. Pilot sales were authorized under an AFS Agreement and a corresponding communal licence issued to an Aboriginal organization. The communal licence would set out details of the authorized fishing area, gear, fishing times (or process by which fishing times would be developed), allocation and catch monitoring requirements. Agreements also set out funding arrangements and in some cases the duties of Aboriginal Fishery Guardians.²¹⁷
- 140 According to DFO, harvest limits set out in the agreements were negotiated with Aboriginal organizations based on historic catches and fisheries management considerations, augmented in the Fraser and Somass River fisheries by a reallocation of catching capacity through a commercial salmon fishing licence retirement program in 1993 (the Allocation Transfer Program, described in greater detail below).²¹⁸ Originally, the negotiated quantities of catch set out under pilot sales encompassed all uses for the fish caught, including sale and FSC purposes.²¹⁹
- 141 The monitoring component of the Pilot Sales Program was implemented on the Lower Fraser through the use of mandatory landing sites. This was intended to provide a better estimate of catch by directing that all fish be taken to set locations and counted.²²⁰ Monitoring of the Pilot Sales fishery was carried out by Aboriginal Fishery Guardians in cooperation with DFO Fishery Officers.²²¹ In addition, joint technical committees would monitor in-season catches to ensure incorporation of conservation and other management considerations, including release of incidentally-caught species.²²²

²¹⁷ CAN056469

²¹⁸ CAN000159. See also CAN002296

²¹⁹ CAN002330

²²⁰ CAN056469 at p. 8.

²²¹ CAN000159

²²² CAN002309 at p. 2.

A History of Fraser River Pilot Sales

- 142 The Pilot Sales Program underwent significant changes since its inception in 1992. For a chronology of developments in the Pilot Sales Program (and the subsequently named “Economic Opportunity” fisheries), see Bert Ionson’s 2009 report: “Lower Fraser First Nations Pilot Sales and Economic Opportunity 1992 – 2008.”²²³ In brief, there were some years in which AFS Agreements could not be reached, and therefore sales were not permitted. Also, various changes were made to catch monitoring strategies and the proportion of catch that could be sold. In 1999, following the introduction of DFO’s “Allocation Policy for Pacific Salmon,”²²⁴ the program was also changed to accord pilot sales fisheries the same priority as the commercial harvest.
- 143 In 2003, Kitchen Prov Ct. J. determined in *R v. Kapp*²²⁵ that the pilot sales fishery was inconsistent with the equality provisions of the *Charter*. As a result, DFO terminated pilot sales agreements that were in place and suspended negotiations for new pilot sales agreements.²²⁶ In 2003, there were only FSC fisheries.²²⁷
- 144 In July, 2004 the BC Supreme Court allowed the appeal of the *Kapp* decision and held that the lower Fraser River pilot sales fishery was not inconsistent with the equality provisions of the *Charter*.²²⁸ Following the BC Supreme Court decision, First Nations were provided with an alternative to “pilot sales” through new “economic opportunity” arrangements on the lower Fraser River. The economic opportunity fishery is a modified form of the Pilot Sales Program that seeks to address some of the criticisms faced by the earlier program.²²⁹ For example, the new economic opportunity fisheries agreements specify a clear separation between FSC allocations and the commercial portion of the allocation. In addition,

²²³ CAN056469

²²⁴ CAN021242

²²⁵ 2003 BCPC 279.

²²⁶ CAN000159

²²⁷ CAN056469 at p. 15.

²²⁸ 2004 BCSC 958. See also CAN000159.

²²⁹ CAN000159. See also CAN056469 at p. 15.

First Nations economic opportunity fisheries are tied to the availability of regular commercial fisheries on a particular stock.

- 145 In June 2006, the *Kapp* decision was affirmed by the BC Court of Appeal, thereby confirming the Minister's ability to authorize First Nations economic opportunity fisheries without violating the equality provisions of the *Charter*.²³⁰ The BC Court of Appeal decision was affirmed by the Supreme Court of Canada in June 2008.²³¹

Program Evaluations

- 146 In 1994, an external contractor, Gardner Pinfold Consulting Economists Ltd., prepared an "Evaluation of the Pilot Sale Arrangements of Aboriginal Fisheries Strategy."²³² This report summarizes the "mixed reviews" that the Pilot Sales Program had received from various groups.²³³
- 147 In 1997, a fact finding review was prepared by James Matkin entitled "Working Towards More Certainty and Stability: Fact Finding Review of the AFS Pilot Salmon Sales Program."²³⁴ The purpose of the fact finding review was to "find ways of reducing the conflict and uncertainty that the Pilot Salmon Sales Program has created since its inception in 1992."²³⁵
- 148 In 2009, a review was prepared by Bert Ionson entitled, "Lower Fraser First Nations Pilot Sales and Economic Opportunity 1992 – 2008."²³⁶ This report chronicles the pilot sales fisheries on the Lower Fraser River from their inception in 1992 until 2008.

²³⁰ 2006 BCCA 277. See also CAN000159.

²³¹ 2008 SCC 41.

²³² CAN004570

²³³ CAN004570 at p. 54.

²³⁴ CAN002624

²³⁵ CAN002624 at p. 2.

²³⁶ CAN056469

Allocation Transfer Program

- 149 In 1992, DFO implemented a “Pacific Commercial Licence Retirement Program” as a pilot program to “test ways of reducing catching power in the commercial fleet so that fishing opportunities for commercial operators would not be affected when fishing opportunities were transferred to Aboriginal groups under the AFS.”²³⁷ In November 1993, Russell Mylchreest of DFO Pacific Region reviewed this pilot licence retirement program and concluded that it had worked well and had “proceeded smoothly, provided fair compensation for the licence, and appears to have retired the licences in a cost effective manner.”²³⁸
- 150 In 1994, DFO amended the AFS to include the Allocation Transfer Program (“ATP”).²³⁹ As with the pilot Pacific Commercial Licence Retirement Program, the ATP was initiated to ensure that commercial operators were not affected, and that no additional pressures were placed on fisheries resources, when fishing opportunities are provided to Aboriginal communities. According to DFO, a corresponding purpose of the ATP is to address the increasing demand for commercial fisheries access by First Nations and to support fisheries-based economic development for coastal First Nations through increased participation in the commercial fishing industry.²⁴⁰
- 151 The ATP operates by permanently retiring licence eligibilities from interested commercial fishers on a voluntary basis. The program focuses on full fee limited entry commercial licences and acquires these licences at fair market value.²⁴¹ Licences for the harvest of Fraser River sockeye are included as part of the ATP, however, this program primarily targets licences for non-salmon fisheries.²⁴² After commercial licence relinquishment, an equivalent commercial fishing capacity (licence or allocation) is then re-issued to an Aboriginal organization on a

²³⁷ CAN001568

²³⁸ CAN002686 at p. 14.

²³⁹ CAN008848

²⁴⁰ CAN000091. See also CAN008866 at p. 5.

²⁴¹ CAN000066

²⁴² CAN001152 at p. 9.

communal basis under an AFS Agreement²⁴³ and pursuant to the *Aboriginal Communal Fishing Licence Regulations*.²⁴⁴

152 ATP funds were originally used to purchase licences. However, as a result of changes introduced in 1998, ATP funds may now be used to purchase the following:²⁴⁵

- Market value of commercial fishing opportunity;
- Market value of quota associated with a valid commercial licence eligibility of a Individual Vessel Quota (IVQ) fishery;
- Market value of fishing gear and equipment;
- Market value of commercial fishing vessel;
- Associated transaction costs;
- Reasonable compensation for removing licence eligibility from an existing vessel where the licence eligibility is retired, but the vessel is not required;
- Market value for construction of new vessel or upgrading of an existing vessel (where the acquisition of a used vessel is not a viable option);
- Other related costs.

153 Going forward, ATP and acquisition of commercial access through the Pacific Integrated Commercial Fisheries Initiative have now been rolled together to create efficiencies under a “single integrated acquisition process.”²⁴⁶ This is described in greater detail in the PICFI section, below.

ATP Eligibility

154 Aboriginal organizations seeking access to communal commercial licences under ATP must have a current AFS Agreement²⁴⁷ or Comprehensive Fisheries

²⁴³ DFO ATP website: <http://www.pac.dfo-mpo.gc.ca/abor-autoc/atp-ptaa-eng.htm>

²⁴⁴ CAN008848

²⁴⁵ CAN008866 at p. 5 and CAN008676.

²⁴⁶ CAN043586 at p. 23

²⁴⁷ CAN000091

Agreement;²⁴⁸ a satisfactory record of compliance with conservation and fisheries management principles and practices and satisfactory compliance with the terms of their AFS agreement.²⁴⁹ In addition, the Aboriginal organization must demonstrate good business practices through the preparation of business plans and other planning documents, such as a Commercial Fishing Proposal²⁵⁰, which indicates the financial benefit, employment and skill-development targets of the group.²⁵¹

155 Priority of access is provided to eligible Aboriginal groups that contribute to long-term Aboriginal employment and community economic development, as well as increased participation of Aboriginal people in the fisheries. Aboriginal groups that benefit from the ATP will be required to re-invest a reasonable portion of their profits towards fisheries management activities and fisheries related economic development.²⁵² The terms of such re-investment are outlined in the AFS Agreement associated with the Aboriginal organization receiving a licence under the ATP.²⁵³

156 Commercial licence holders may relinquish their licences under the ATP. They may also relinquish vessels and gear, if relinquished in conjunction with their commercial fishing licence.²⁵⁴ Licences that are band-held, or granted by the Minister to Aboriginal peoples under special conditions will not be considered for retirement.²⁵⁵ The primary criterion for retirement will be the lowest cost²⁵⁶ and DFO is not obligated to accept all of any of the proposals for retirement

²⁴⁸ DFO ATP website: http://www.pac.dfo-mpo.gc.ca/tapd/atp_e.htm; Note however that exceptions can be made to this requirement. Commercial access may be considered without an AFS agreement already in place (CAN008676 at s. 3.2). Also, if an Aboriginal organization refuses to sign an AFS agreement in future years, DFO on the discretion of the Minister, may continue to re-issue licences provided under the ATP in previous years (CAN008676 at s 3.3). Generally ATP licences would not be revoked if an AFS agreement is not signed in subsequent years as long as there has been compliance with the terms of the licence (CAN021297 at p. 2).

²⁴⁹ CAN000091

²⁵⁰ CAN040464

²⁵¹ CAN000091

²⁵² CAN000091

²⁵³ DFO ATP website: <http://www.pac.dfo-mpo.gc.ca/abor-autoc/atp-ptaa-eng.htm>

²⁵⁴ CAN008676 at s. 8.

²⁵⁵ CAN000020 at p. 2.

²⁵⁶ CAN000066

received.²⁵⁷ Should DFO accept a retirement proposal, the licence holder must complete a “Commercial Fishing Licence Eligibility Relinquishment” form. Retirement is a relinquishment of all authorities under that licence and is irrevocable.²⁵⁸

ATP Budget

157 When the AFS was first announced, a total of \$7 million was marked “for the retirement of commercial licences, primarily in the Pacific salmon fishery, in order to facilitate reallocation to Aboriginal groups”, through the pilot Pacific Commercial Licence Retirement Program.²⁵⁹

158 When DFO announced the ATP in 1994, it was presented as a national six-year program²⁶⁰ with \$42 million in funding over six years. The Pacific Region was set to receive \$35 million (\$5.75 million for each of the first four years and \$6 million for each of the last two years).²⁶¹ After the initial six years, the ATP was extended nationally, with relatively stable A-based funds. Approximately \$10.2 million is set aside annually on a national basis for ATP²⁶² with Pacific Region receiving approximately \$4 - 6 million each year.²⁶³

ATP Outcomes

159 According to DFO, the ATP was intended to facilitate the voluntary retirement of commercial fishing licences and vessels/equipment and to issue communal commercial fishing licences and provide vessels/equipment to Aboriginal groups without increasing the effort on the resource.²⁶⁴ The ATP was originally limited to a ceiling of five per cent per fishery over the first six years of the program.²⁶⁵

²⁵⁷ CAN000020 at p. 2.

²⁵⁸ CAN000066

²⁵⁹ CAN002333 at p. 2.

²⁶⁰ CAN000066

²⁶¹ CAN000066

²⁶² CAN008848. See also CAN008866 at p. 5-6.

²⁶³ CAN000091. See also DFO ATP website: http://www.pac.dfo-mpo.gc.ca/tapd/atp_e.htm (accessed March 22, 2010) and CAN008848.

²⁶⁴ CAN008759

²⁶⁵ CAN000066

Progress was to be measured in the number of commercial licences transferred to Aboriginal organizations, the number of Aboriginal organizations participating in the commercial fisheries and by the improvement of relations with Aboriginal organizations and other stakeholders.²⁶⁶

- 160 DFO reports that, since the launch of the ATP, approximately 900 commercial fishing licences have been issued to Aboriginal groups nationally.²⁶⁷ Approximately 155 licences were acquired in the Pacific Region, across all species, as of 2008.²⁶⁸ This has led to 41 agreements entered into with 50 bands worth approximately \$50 million in licences and gear.²⁶⁹
- 161 In regards to Pacific salmon, Table 5 illustrates the quantities and licence areas for commercial salmon licences relinquished under ATP since 2007.

Table 5: Pacific Salmon Licence Relinquishments under ATP from Fiscal year 2007/2008 to 2009/2010²⁷⁰

Licence Type Retired	Licence Area	Fee ¹	2007/08	2008/09	2009/10	Total
Salmon Seine	A			1	1	2
	B			1	2	3
Salmon Gillnet	C		1	1	5	7
	C	R		1	2	3
	D		1	2	7	10
	D	R			1	1
	E		2		7	9
	E	R			1	1
Salmon Troll	F				1	1
	G		2			2
	H				1	1

¹R = reduced fee; otherwise full fee

²⁶⁶ CAN008759

²⁶⁷ DFO AFS website: <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/afs-srapa-eng.htm>

²⁶⁸ CAN008866 at p. 7. See also CAN001152 at p. 8.

²⁶⁹ Non-Ringtail document: DFO's Role regarding First Nations Access to Fisheries in British Columbia: First Nations Fisheries Assembly, October 29, 2009, Kaarina McGivney.

²⁷⁰ DFO PICFI website: <http://www.pac.dfo-mpo.gc.ca/fm-gp/picfi-ipcip/index-eng.htm>

162 For the future, DFO contemplates that commercial fishing opportunities provided under the ATP may be “reflected in future modern treaty arrangements and serve as a mechanism for building capacity of Aboriginal groups in the management of commercial fisheries authorities and enterprises on an incremental basis.”²⁷¹ DFO states that, subject to consultation with the Aboriginal organization,

...over a period of time, Aboriginal organizations allocated ATP commercial harvest opportunities may be expected to use a portion of their revenues realized from ATP licences for fisheries-management activities and fisheries-related economic development. As a result, co-management funding for Aboriginal organizations with ATP licences could be reduced by a certain % over a period of years.²⁷²

ATP Accountabilities

163 Overall accountability for the ATP rests with the Assistant Deputy Minister, Fisheries and Aquaculture Management (now Ecosystems and Fisheries Management). The Director General, Aboriginal Policy and Governance or Regional Directors General are responsible for developing policy and overall coordination of the program. The Regional Directors General are also responsible for implementing the program in their respective regions.²⁷³

164 DFO advises First Nations seeking commercial access under the ATP to contact their local Resource Manager for information about ATP and AFS Agreements.²⁷⁴ ATP business plans are evaluated and prioritized within each DFO area office.²⁷⁵ In the Pacific Region, Area Managers or officials at the area level undertake AFS negotiations.²⁷⁶

165 In order to provide DFO with assistance in identifying licences for possible retirement, DFO contracts an “Independent Program Coordinator.” At one point, this Independent Program Coordinator was the Native Fishing Association.²⁷⁷

²⁷¹ CAN008848

²⁷² CAN008676 at s. 9.7.

²⁷³ CAN008759

²⁷⁴ DFO ATP website: <http://www.pac.dfo-mpo.gc.ca/abor-autoc/atp-ptaa-eng.htm>

²⁷⁵ DFO ATP website: <http://www.pac.dfo-mpo.gc.ca/abor-autoc/atp-ptaa-eng.htm>

²⁷⁶ CAN008759

²⁷⁷ CAN000091 and CAN000020. For more on the Native Fishing Association, see: <http://www.shoal.ca/index.htm>

However, the Native Fishing Association has since been replaced by Price Waterhouse Coopers.

166 Implementation of the ATP is also guided by the “Allocation Transfer Program National Policy” drafted in approximately 1995 and updated in 2002.²⁷⁸

ATP Evaluation

167 In 2008, an external contractor, Blue Sea Consulting Ltd., evaluated the ATP in a report entitled: “Allocation Transfer Program (ATP) of the Aboriginal Fishing Strategy (AFS), Discussion Paper: Roadmap 2008-2012 and Beyond.”²⁷⁹ Among other things, this report suggested that the terms and conditions of ATP be extended to allow ATP funds to be used to support other AFS priorities, such as business planning, monitoring and enforcement, and co-management.²⁸⁰

Aboriginal Aquatic Resource and Oceans Management Program

168 The Aboriginal Aquatic Resource and Oceans Management (“AAROM”) program was launched in October 2004²⁸¹ as a response to a 2002-2003 Aboriginal Fisheries Strategy renewal process.²⁸² AAROM was originally intended to be a five-year contribution program operating from fiscal year 2004-05 to 2008-09.²⁸³ However, it is now an ongoing program.

169 According to DFO, the purpose of AAROM is to provide funding to qualifying Aboriginal groups to form aquatic resource and oceans management organizations capable of hiring or contracting skilled personnel, in order to allow them to effectively participate in decision-making and advisory processes.²⁸⁴ Some eligible groups may also be given funding “to obtain commercial licences, vessels and

²⁷⁸ CAN008676 and CAN021298.

²⁷⁹ CAN008866

²⁸⁰ CAN008866 at p. 34-35.

²⁸¹ CAN005126 at p. 7.

²⁸² CAN000088. See also CAN000101.

²⁸³ CAN023911

²⁸⁴ CAN000088. See also CAN000093.

gear and to build capacity to take advantage of aquaculture opportunities” or for the engagement of Aboriginal Fisheries Officers.²⁸⁵

170 According to DFO, AAROM responds to a number of issues identified during discussions on the renewal of the Aboriginal Fisheries Strategy.²⁸⁶ These issues include the desire of Aboriginal groups to have a greater participation in aquatic resource and oceans management processes, DFO’s expanding responsibilities requiring engaging Aboriginal groups on a broad range of issues, and that existing programming prior to AAROM had been focused on fisheries management, limiting DFO’s ability to respond to the evolving aspirations of Aboriginal people.²⁸⁷

171 With these issues in mind, DFO states that AAROM is designed to do the following:²⁸⁸

- To assist Aboriginal groups in acquiring the administrative capacity and scientific/technical expertise to facilitate their participation in aquatic resource and oceans management;
- To encourage the establishment of collaborative management structures that contribute to integrated ecosystem/watershed management and planning processes;
- To enhance existing collaborative management structures, where appropriate;
- To facilitate sound decision making in advisory and other processes related to a number of areas of DFO responsibility;
- To strengthen relationships through improved information sharing among Aboriginal communities, DFO and other stakeholders and among Aboriginal communities; and
- To contribute to the federal government's broader objective of improving the quality of life of Aboriginal people.

172 According to DFO, AAROM is different than AFS in four key aspects.²⁸⁹ First, AFS focuses more on developing Aboriginal management capacity at the operation and

²⁸⁵ CAN000088

²⁸⁶ CAN000093 at p. 1.

²⁸⁷ CAN000093 at p. 2.

²⁸⁸ CAN000088. See also DFO AAROM website <http://www.dfo-mpo.gc.ca/fm-gp/Aboriginal-autochtones/aarom-pagrao/index-eng.htm>

project-based level, while AAROM emphasizes strategic capacity to participate in DFO and multi-stakeholder decision-making processes. Second, the AFS is more concerned with effective fisheries management whereas AAROM may serve as a platform to gain access to other DFO sectors and to other government departments. Third, the AFS is largely applied at the community or local level, while AAROM encourages cooperation at a broader, inter-community level. Fourth, AAROM offers the potential for enhanced monitoring and enforcement opportunities.

- 173 The AAROM program is comprised of three main components: collaborative management, capacity building and economic opportunities.²⁹⁰
- 174 The collaborative management component supports the creation and development of AAROM groups, or “AAROM bodies” formed by multiple First Nations working together. This is intended to facilitate the shared accumulation of capacity and the engagement of skilled personnel (biologists, technicians, fisheries managers etc) to manage their activities, to participate effectively in DFO advisory and decision-making processes (and those of other government departments as appropriate) and for funding and developing Aboriginal fisheries officers.
- 175 The capacity building component provides funds to those groups that do not yet qualify for collaborative management and related opportunities but are committed to working towards doing so. Activities funded could include: facilitating dialogue among multiple groups interested in forming aggregations along watershed/ecosystem lines, implementation of sound business practices and reporting procedures, and administrative, financial and legal preparations for the establishment of an aggregate body.
- 176 The economic opportunities component involves the voluntary retirement of commercial licences and transfer of commercial opportunities (including licences and acquiring vessels and gear) to eligible AAROM bodies. It also includes

²⁸⁹ CAN000101 at p. 13.

²⁹⁰ CAN023911 at p. 2.

provision of funding to enable groups to pursue aquaculture-related activities, including the provision of technical and financial assistance to develop new opportunities and training (increasing job skills, internship and mentoring initiatives) and development assistance, including feasibility and environmental studies.

AAROM Agreements

177 AAROM support is provided pursuant to a “Contribution Agreement,” whether for the collaborative management, capacity building or economic opportunity component of the AAROM program. AAROM Contribution Agreements may provide for any of the following items:²⁹¹

- Establishing AAROM collaborative management structures or AAROM bodies;
- Accessing skilled professional, administrative and technical expertise from within the Aboriginal community or other external sources but excluding public office holders;
- Participating in aquatic resource and oceans management planning – through development of resource and oceans management plans and coordination of community input into the development of plans;
- Developing or providing input into the development of models, structures and processes to guide the interactions of external bodies and agencies with the respective Aboriginal group;
- Planning and holding consultation sessions with member communities on AAROM-related issues;
- Participating in various government technical committees and other multi-stakeholder fora;
- Developing, implementing and monitoring AAROM capacity building strategies;
- Developing enforcement capacity including Aboriginal fishery officers and upgrading the skills of Aboriginal Guardians;

²⁹¹ CAN005126

- Collaborating in scientific research efforts related to aquatic resource and oceans management;
- Participating in and providing input to various aquatic and oceans resource policy and management processes;
- Undertaking scientific research activities to support appropriate watershed / ecosystem-based management efforts, including the collection and gathering of Aboriginal traditional knowledge;
- Conducting community outreach, stewardship and awareness activities;
- Conducting liaison activities with other relevant / interested parties;
- Developing protocols on Aboriginal traditional knowledge, dealing with new and innovative approaches to collect, analyze and integrate this information into environmental and habitat assessments and management practices;
- Ongoing program planning, administration and reporting activities of the AAROM collaborative management body; and
- Negotiations and implementation of related AAROM agreements (and associated protocols) for which DFO is a signatory.

178 For a sample AAROM Collaborative Management Contribution Agreement, see the AAROM agreement for the Shuswap Nation Tribal Council.²⁹²

AAROM Program Eligibility

179 To qualify for AAROM funding, Aboriginal groups within a common watershed or ecosystem are required to work together and adhere to certain requirements related to management practices.²⁹³ However, the program is only available to groups that are located where DFO manages the fishery, and that have not signed comprehensive land claims agreements that address eligible activities under AAROM.²⁹⁴

²⁹² CAN046585

²⁹³ CAN000088

²⁹⁴ CAN000088

180 An AAROM National Steering Committee assesses all proposals for AAROM funding and makes final recommendations on recipient eligibility and agreement funding levels.²⁹⁵

AAROM Budget

181 AAROM was originally announced as a five year program, from fiscal year 2004-05 to 2008-09. During that period, DFO budgeted approximately \$51.0 million for AAROM.²⁹⁶ AAROM is now an ongoing program, with national planned spending of \$11.1 million annually.²⁹⁷ In the Pacific Region, AAROM receives between \$6 million²⁹⁸ and \$7 million annually.²⁹⁹

AAROM Outcomes

182 DFO developed the AAROM Program with the expectation that AAROM bodies “will represent member groups/ communities in interactions with DFO, at the multi-stakeholder level and, potentially, with other federal government departments” and would “bring together a number of communities with similar interests and goals that come together voluntarily.”³⁰⁰ However, relationships between the federal government and AAROM groups would “not replace existing relationships between the department and First Nations.”³⁰¹

183 On a national basis, 53 Capacity Building and 33 Collaborative Management Agreements have been entered into since the program began.³⁰² In the Pacific Region, DFO retired 15 commercial salmon licences between 2004 and 2007 using AAROM funding.³⁰³ As of 2009, 14 AAROM agreements representing 123

²⁹⁵ CAN023911 at p. i. For a sample AAROM Rating and Assessment Grid, completed for Nicola Tribal Association February 28, 2005 at CAN033260.

²⁹⁶ CAN023911 at p. i; note the same document says the funding totalled \$74.8M over five years at p. 1.

²⁹⁷ CAN005126

²⁹⁸ CAN037165 at p. 7.

²⁹⁹ DFO AAROM website: http://www.pac.dfo-mpo.gc.ca/abor-autoc/agreements-ententes-eng.htm#AFS_Agreements

³⁰⁰ CAN000093

³⁰¹ CAN000093

³⁰² CAN023911 at p. I (as of 2009).

³⁰³ CAN023911 at p. 10.

bands and totalling \$6 million in annual funding have been reached in British Columbia.³⁰⁴

184 Table 6 lists the 14 AAROM groups in British Columbia, their member aboriginal organizations and the annual funding that they received from DFO in fiscal year 2009-2010 (unless otherwise indicated).

Table 6: Fraser River and South Coast AAROM Groups as of August 2010³⁰⁵

AAROM Group	Member Bands	DFO Funding FY 2009-10³⁰⁶
A-Tlegay Fisheries Society	We Wai Kum (Campbell River), We Wai Kai (Cape Mudge), Komox, Tlowitsis, Kwiakah	\$179,200 ³⁰⁷
First Nations Marine Society	Cowichan, Gwawaenuk, Klahoose, Malahat, Qualicum, Snaw Naw As (Nanoose), Squamish, Tsawout, T'Sou-ke, We Wai Kai, Tlowitsis, Ehattesah, Homalco, Lyackson, Pauquachin, Sliammon, Snuneymuxw, Tsartlip, Tseycum, Wei Wai Kum, Comox, Kwiakah	\$130,400 ³⁰⁸ (2008-2009)
Fraser River Aboriginal Fisheries Secretariat (administered by Nicola Tribal Association)	Cook's Ferry, Coldwater, Nicomen, Upper Nicola, Shackan, Nooaitch [Nuaitch], Secwepemc, Carrier Sekani TC, Sto:lo TC, Sto:lo Nation, Chawathil, Saik'uz, Siska, Splantsin (Spallumcheen), Adams Lake, Simpcw, Tzeachten, Yakwekwioose, Sumas, Seabird Island, Musqueam, Chehalis, Katzie, Tsawwassen, Yale, Lower Nicola, High Bar, Tl'azt'en, Eketemc, Canim Lake, Soda Creek, Williams Lake, Nazko, Canoe Creek	\$750,700 ³⁰⁹
Lower Fraser Aboriginal Fishery Assembly	Sto:lo Tribal Council, Musqueam, Matsqui, Chehalis, Sto:lo Nation	Not available ³¹⁰
Musgamagw Territorial Marine	Tswataineuk, Kwicksutaineuk Ah-kwaw-ah-mish, Gwawaenuk	Not available ³¹¹

³⁰⁴ Non-Ringtail document: DFO's Role regarding First Nations Access to Fisheries in British Columbia: First Nations Fisheries Assembly, October 29, 2009, Kaarina McGivney. See also CAN037165 at p. 9.

³⁰⁵ CAN185655

³⁰⁶ Funding is in regards to fiscal year 2009-2010, except where otherwise indicated.

³⁰⁷ CAN080231

³⁰⁸ CAN080224. An agreement for fiscal year 2009-2010 could not be located at this time.

³⁰⁹ CAN046502

³¹⁰ No Agreement could be found for 2009-2010. A 2008-2009 AAROM Capacity Building Support Contribution Agreement for Sto:lo Nation is found at CAN080230, but not for the "Lower Fraser Aboriginal Fishery Assembly."

³¹¹ The commission was not able to locate a funding agreement for this group at this time.

Management Society		
Secwepemc Fisheries Commission	Kamloops, Little Shuswap, Neskonlith, Simpcw, Shuswap, Splat sin, Adams Lake, Bonaparte, Skeetchestn, Whispering Pines/Clinton	\$693,000 ³¹²
Upper Fraser Fisheries Conservation Alliance	Takla Lake, Lheidli T'enneh, Nadleh Whuten, Stelat'en, Nak'azdli, Saik'uz, Tl'azt'en, Alexandria, Alexis Creek, Eketemc, Tl'etingox-t'in, Canim Lake, Xenigwet'in, Soda Creek, Burns Lake, Stone, Williams Lake, Canoe Creek	\$663,000 ³¹³
Nuu-chah-nulth Tribal Council	Ehattesaht, Mowachaht/Muchalaht, Ka:'yu:'k't'h'/Che:k:tl'es7et'h'F, Nuchatlaht, Pacheedaht, Ahousaht, Tla-o-qui-aht, Hesquiaht, Ditidaht, Huu-ay-aht, Hupacasath, Tseshaht, Toquaht, Uchucklesaht, Ucluelet	\$941,910 ³¹⁴
First Nations Fisheries Council	Province Wide	\$952,970 ³¹⁵
Pacific Salmon Commission First Nations Caucus	--	\$160,605 ³¹⁶
Okanagan Nation Alliance	Osoyoos, Penticton, Lower Similkameen, Upper Similkameen, Westbank, Upper Nicola, Okanagan	\$213,000 ³¹⁷ (draft only)
Canadian Columbia River Inter-Tribal Fisheries Commission	St. Mary's, Tobacco Plains, ?Akisq'nuk, Lower Kootenay	\$100,000 ³¹⁸ (draft only)
Lillooet Tribal Council	Tsal'alh, T'it'q'et, Sewk'elw'as, Xwisten, N'Quatqua	\$150,000 ³¹⁹
N'laka'pamux Nation Tribal Council	Ashcroft, Oregon Jack Creek, Lytton, Skuppah, Kanaka Bar, Boothroyd, Boston Bar, Spuzzum	\$101,900 ³²⁰

³¹² CAN080241

³¹³ CAN037742

³¹⁴ CAN080238

³¹⁵ CAN080232

³¹⁶ CAN080236

³¹⁷ CAN041700

³¹⁸ CAN041652

³¹⁹ CAN080233

³²⁰ CAN080237

AAROM Accountabilities

- 185 Overall accountability for AAROM rests with the Associate Assistant Deputy Minister, Fisheries Renewal.³²¹ In 2008-2009, some of the administration of the program was delegated to the Pacific Region, which is responsible for approximately half of the AAROM bodies under the national program. The authority to enter into agreements continues to rest with national headquarters and new proposals continue to be reviewed by the National Steering Committee. National headquarters also continues to provide overall programming guidelines. However, the Pacific Region has assumed the following implementation and delivery roles: drafting of agreements, signing of agreements / amendments (by the RDG Pacific Region), final authority in reviewing and approving reports, and authority to requisition payments.³²²
- 186 AAROM Agreements set out specific reporting requirements for AAROM bodies, including the form and content to be provided in yearly interim and final reports. For agreements over \$250,000 AAROM bodies are further required to submit monthly reports, in order to receive their funding.³²³

AAROM Program Evaluation

- 187 After the first year of AAROM, DFO prepared an “Aboriginal Aquatic Resource and Oceans Management Program (AAROM): Implementation Report Card for 2004-2005.”³²⁴ This report card assesses AAROM program activities undertaken during its first year.
- 188 In 2009, DFO prepared an “Evaluation of the Aboriginal Aquatic Resource and Oceans Management Program Final Report.”³²⁵ This report suggested that “there is a continuing need of ensuring Aboriginal participation in fisheries and oceans

³²¹ CAN023911 at p. i.

³²² CAN023911 at p. 6.

³²³ CAN023911 at p. l; For a sample AAROM Report, see the Upper Fraser Fisheries Conservation Alliance 2005 Final Report at CAN068229.

³²⁴ CAN008665

³²⁵ CAN023911

matters”³²⁶ and offered seven recommendations for improvement of the AAROM program.³²⁷

189 A summative evaluation of the AAROM transfer payment program is scheduled for 2012-2013.³²⁸

Pacific Integrated Commercial Fisheries Initiative

190 The Pacific Integrated Commercial Fisheries Initiative (“PICFI”) was announced in July, 2007³²⁹ and received Treasury Board approval in September, 2007.³³⁰ It is a five-year³³¹ initiative set to end on March 31, 2012.³³² According to DFO, the purpose of PICFI is to support BC First Nations in integrated commercial fisheries; to develop sustainable fisheries enterprises; and to increase First Nation participation in fisheries management decision making processes.³³³ In particular, PICFI seeks to support the long term economic viability of BC commercial fisheries and the sustainability of the resource, and also to “establish fully integrated commercial fisheries,³³⁴ where all commercial harvesters fish under common and transparent rules, with a higher standard of accountability for all resource users, and strengthened collaboration and cooperation amongst users.”³³⁵

191 PICFI is structured around four key elements: (1) increased First Nations access to commercial fisheries; (2) capacity building; (3) co-management; and (4) enhanced accountability.³³⁶

192 The commercial access element of PICFI is designed to meet the following objectives:³³⁷

³²⁶ CAN023911 at p. i.

³²⁷ CAN023911 at p. lii.

³²⁸ CAN005126 at p. 8.

³²⁹ CAN000178 at p. 10.

³³⁰ CAN008889

³³¹ CAN002480 at p. 6.

³³² CAN022811 at p. 3.

³³³ CAN000178 at p. 10. To see a list of issues that PICFI was intended to address, see CAN002480 at p. 2.

³³⁴ For a list of DFO principles for an integrated commercial fishery, see CAN002480 at p. 4, and CAN043586 at p. 4.

³³⁵ CAN002480 at p. 1. See also CAN043586 at p. 3.

³³⁶ CAN002480

- Acquiring licences and quota to support First Nations fisheries enterprises;
- Providing vessels and gear according to First Nations business plans;
- Providing opportunities for commercial harvesters who wish to exit the industry;
- Increasing First Nations' participation in commercial fisheries coast-wide, including in-river commercial access to salmon;³³⁸
- Providing greater certainty and stability around access to commercial fisheries, a more predictable business environment and encourage investment in the industry; and
- Addressing salmon allocation and mitigation issues in the Lower Fraser River and Somass River.

193 The commercial access activities of PICFI (i.e. licence relinquishment) have been integrated with the ATP licence relinquishment activity in order to provide for a more streamlined process. DFO aims to apply “fair market value” criteria in selecting and relinquishing licences, and to match this with First Nations interests. A maximum of 15% of licence relinquishment funding is applied to salmon access, with the remainder of funds used for other coastal fisheries.³³⁹ Salmon access is primarily used to support in-river First Nations commercial opportunities and to advance the implementation of defined shares.³⁴⁰

194 The capacity building element of PICFI “recognizes that simply having access to economic opportunities, like access to commercial fisheries, does not guarantee long-term economic success; that there are specific skills and governance practices and structures that provide a foundation for long-term success.”³⁴¹ The objectives of the capacity building element are: to support development of First Nations business planning and management, and fisheries training and mentoring

³³⁷ CAN043586 at p. 22.

³³⁸ Note that salmon access acquired under PICFI is also used to test the feasibility and manageability of in-river commercial fisheries. See CAN043586 at p. 25.

³³⁹ CAN043586 at p. 23.

³⁴⁰ CAN043586 at p. 24.

³⁴¹ DFO PICFI website: <http://www.pac.dfo-mpo.gc.ca/fm-gp/picfi-ipcip/index-eng.htm>

requirements; and to support effective use of commercial access by First Nations and the development of business management skills.³⁴²

195 There are two subcomponents to the capacity building element: the development of Commercial Fisheries Enterprise Operations; and fisheries training.³⁴³ DFO states that Commercial Fisheries Enterprise Operations are aimed at facilitating successful and sustainable First Nation-owned and operated commercial fisheries enterprises.³⁴⁴ DFO anticipates that ten First Nations Commercial Fisheries Enterprises will be established among Coastal First Nations, and another five Commercial Fisheries Enterprises will be established by In-River First Nations.³⁴⁵ According to DFO, fisheries training, the second subcomponent of the capacity building element, is intended to assist eligible First Nations members to obtain the skills necessary to fish safely and effectively in various fisheries, including supporting the skill needed for vessel maintenance.³⁴⁶

196 DFO states that the co-management element is designed to improve co-management among First Nations (in conjunction with the AAROM program) and also to improve co-management among all fishery participants.³⁴⁷ To improve co-management among First Nations, this element aims to achieve the following:³⁴⁸

- Establish centres of expertise to address areas of mutual interest between DFO and First Nations;
- Facilitate inter-tribal dialogue on policy development;
- Support ongoing input on the design and implementation of PICFI;
- Increase effective involvement in existing processes;

³⁴² CAN002480 at p. 8.

³⁴³ DFO PICFI website: <http://www.pac.dfo-mpo.gc.ca/fm-gp/picfi-ipcip/index-eng.htm>. See also, CAN043586 at p. 29

³⁴⁴ For information on the five-stage process for developing a Commercial Fisheries Enterprise, and the applicable selection criteria for approving Commercial Fisheries Enterprises, see CAN043586 at p. 30.

³⁴⁵ CAN043586 at p. 31.

³⁴⁶ DFO PICFI website: <http://www.pac.dfo-mpo.gc.ca/fm-gp/picfi-ipcip/index-eng.htm>. See also CAN043586 at p. 29.

³⁴⁷ CAN002480 at p. 9.

³⁴⁸ CAN043586 at p. 15-17.

- Hold Fraser watershed-wide bi-lateral workshops to deal with difficult issues that are barriers to progress;
- Support negotiations of defined economic shares and separation of FSC and economic access among Lower Fraser and Somass First Nations; and
- Support the development and application of salmon share based management approaches in inland and coastal First Nations commercial fisheries.

197 To improve co-management among all fishery participants, the co-management element of PICFI aims to achieve the following:³⁴⁹

- Analyze current processes and making recommendations for improvements;
- Support initiatives aimed at developing share-based management in the commercial salmon fishery;
- Support broad discussions on potential new governance models (e.g. the Integrated Salmon Dialogue Forum);
- Support development of a Fraser River co-management strategy, including First Nations FSC planning; and
- Provide funding to integrated co-management processes.

198 For additional information on the objectives and plans of the PICFI co-management element, see “PICFI Co-management Year 4 Workplan (2010-11), Draft, January 2010”.³⁵⁰

199 The enhanced accountability element of PICFI is divided into three subcomponents: increased fisheries monitoring and catch reporting (FM&CR); enhanced compliance monitoring; and the development of a traceability framework.³⁵¹ The increased FM&CR subcomponent includes establishing and implementing catch monitoring and reporting standards, improving information management and clarifying roles and responsibilities with respect to FM&CR.³⁵² The enhanced compliance monitoring subcomponent includes the creation of a

³⁴⁹ CAN043586 at p. 15-17.

³⁵⁰ CAN004894. See also CAN004911.

³⁵¹ CAN043586 at p. 7.

³⁵² CAN043586 at p. 8.

dedicated unit with specialized training and expertise in intelligence-led policing; including gathering and analyzing intelligence, identifying and targeting problems and evaluating results, restricting the access of unlawful product to the commercial marketplace and therefore removing the economic incentive for illegal harvest.³⁵³ The traceability framework subcomponent includes the design and implementation of a program to enable regulators and certifiers to trace fish from the point of harvest to the point of final sale.³⁵⁴

PICFI Eligibility

- 200 All BC First Nations situated where DFO manages the fisheries are eligible for commercial fishing licences and quota, vessels and gear, and funding for capacity building or participation in inter-tribal and multi-lateral co-management processes.³⁵⁵ First Nations are not required to apply in aggregates,³⁵⁶ and need not be in treaty negotiations to apply.³⁵⁷
- 201 Non-profit organizations aimed at improving resource conservation and fisheries viability are also eligible to apply for PICFI support to establish multi-lateral co-management structures that include all stakeholders in the fisheries. In addition, some direct financial support may be provided to assist commercial fish harvesters in off-setting costs in experimenting with salmon share-based management approaches.³⁵⁸
- 202 All commercial fish harvesters with a licence issued under the *Pacific Fishery Regulations Schedule II*, are eligible to apply for PICFI support to retire their fisheries access (licence and quota) and vessels and gear, on a voluntary basis.³⁵⁹

³⁵³ CAN043586 at p. 9.

³⁵⁴ CAN043586 at p. 10.

³⁵⁵ CAN008889 at p. 3.

³⁵⁶ CAN008889 at p. 3.

³⁵⁷ CAN002480 at p. 11.

³⁵⁸ CAN008889 at p. 4.

³⁵⁹ CAN008889 at p. 4.

PICFI Budget

203 PICFI was announced as a \$175 million, five-year initiative.³⁶⁰ This total was to be distributed among the four PICFI elements as follows:³⁶¹

- Access: PICFI provides \$115 million over five years for obtaining commercial access through a voluntary commercial licence retirement program. Of this, \$15 million is notionally allocated to acquiring commercial salmon access to support in-river commercial fisheries (with five anticipated in-river groups each receiving an average of \$3 million in access).³⁶² Approximately \$90 million is notionally allocated to acquire access for coastal groups (with ten aggregate groups receiving an average of \$8 million in access each, and an additional five individual First Nations, receiving about \$2 million in access each).³⁶³ As of 2008, PICFI provided in excess of \$25 million per year to the Pacific Region for acquiring commercial access.³⁶⁴
- Capacity building: PICFI provides \$12.5 million over five years for capacity building. However, a 2008 PICFI five-year plan has noted that anticipated funding required for capacity building exceeds the amount allocated by \$3 million. The five-year plan suggests that managers will likely need to reallocate funds from other PICFI elements to meet this shortfall.³⁶⁵
- Co-management: PICFI provides approximately \$11 million over five years to support co-management projects.³⁶⁶
- Enhanced accountability: PICFI provides approximately \$10.5 million over five years to support enhanced accountability (catch monitoring, reporting, traceability etc.).³⁶⁷
- Operational support: A further \$26 million is set aside to help implement PICFI.³⁶⁸

³⁶⁰ CAN002480 at p. 6.

³⁶¹ CAN08889 at p. 2.

³⁶² CAN043586 at p. 38.

³⁶³ CAN043586 at p. 38.

³⁶⁴ CAN008866 at p. 13.

³⁶⁵ CAN043586 at p. 35.

³⁶⁶ Note that the PICFI Co-management budget is described as \$10.5 million over five years in CAN063252.

³⁶⁷ Note that the PICFI Enhanced Accountability budget is described as \$11 million over five years in CAN063252.

³⁶⁸ CAN063252

PICFI Outcomes

- 204 According to DFO, PICFI was designed to provide “greater certainty and stability around fisheries access and allocation, as well as enhanced monitoring, reporting and enforcement, in support of strengthened economic viability and fisheries resource sustainability.”³⁶⁹ In particular, DFO intends PICFI to achieve: a higher standard of reporting and monitoring for all resource users; increased ability to meet conservation objectives by strengthening enforcement levels; strengthened cooperation and collaboration amongst users; improved economic performance; greater certainty around access and allocation for all participants; and jobs and incomes for First Nations in commercial fisheries and related areas.³⁷⁰
- 205 DFO reports that PICFI outcomes achieved so far include setting up the program elements, acquiring commercial access and building the training modules necessary to facilitate First Nation participation in commercial fisheries. In addition, the co-management and enhanced accountability elements have been advanced through the development of reporting and monitoring standards, new models of co-management and governance, ecosystem-based management, traceability in support of “ocean to plate” and Marine Stewardship Council certification and new methods of enforcement.³⁷¹ In general, DFO reports that “progress has been made on all four elements, but there is still significant work to be done....”³⁷²
- 206 In regards to the access element, DFO states that it may be “difficult to acquire adequate amounts of sought-after licences and quota for more lucrative fisheries.”³⁷³ However, as of December 2009, \$43.4 million in commercial licences have been relinquished as part of PICFI.³⁷⁴

³⁶⁹ CAN00178 at p. 10.

³⁷⁰ CAN002480 at p. 12.

³⁷¹ CAN008889 at p. 3.

³⁷² CAN022811 at p. 3.

³⁷³ CAN043586 at p. 27.

³⁷⁴ CAN018498 at p. 4.

207 Table 7 depicts the number of Pacific Region salmon licences relinquished under PICFI from fiscal year 2007-2008 to 2009-2010.

Table 7: Salmon Licence Relinquishments under PICFI from Fiscal year 2007-2008 to 2009-2010³⁷⁵

Licence Type Retired	Licence Area	Fee ¹	2007/08	2008/09	2009/10	Total
Salmon Seine	A		4		9	13
	B		2		7	9
	B	R			1	1
Salmon Gillnet	C		4	4	8	16
	C	R		1		1
	D		8	4	9	21
	D	R		1		1
	E		3	8	18	29
Salmon Troll	F		4	9	4	17
	G		1			1
	G	R			1	1
	H		2	7	3	12

¹R = reduced fee; otherwise full fee

208 As mentioned in the ATP section above, DFO has combined the ATP licence relinquishment program with the PICFI licence relinquishment program. Table 8 depicts the number of Pacific Region salmon licences relinquished under both ATP and PICFI since fiscal year 2007-2008.

³⁷⁵ DFO PICFI website: <http://www.pac.dfo-mpo.gc.ca/fm-gp/picfi-ipcip/index-eng.htm>

Table 8: Salmon Licence Relinquishments under PICFI and ATP Programs from January 1, 2008 to May 20, 2010³⁷⁶

Licence Type Retired	Licence Area	Fee ¹	PICFI	ATP	Total
Salmon Seine	A		13	2	15
	B		9	3	12
	B	R	1		1
Salmon Gillnet	C		16	7	23
	C	R	1	3	4
	D		21	10	31
	D	R	1	1	2
	E		29	9	38
	E	R		1	1
	E				
Salmon Troll	F		17	1	18
	G		1	2	3
	G	R	1		1
	H		12	1	13

¹R = reduced fee; otherwise full fee

209 For fiscal year 2009-2010, DFO reports that its PICFI efforts will be:

... focused on the elements of enhanced accountability and co-management. Under enhanced accountability, an improved and streamlined data management system (PacFish) for DFO will be put in place and a catch monitoring strategy, developed with First Nations and stakeholders, will be finalized. This will include an e-log system that will improve catch reporting in recreational, FSC and commercial fisheries. Under Co-management, work will be undertaken with the First Nations Fisheries Council, and a discussion paper for consultation will be finalized within DFO. As well there will be another round of licence and quota access in the fall and the first distribution (short term, for halibut and sablefish). The element of capacity building will focus on implementing training through its mentoring program and evaluation of [expressions of interest].³⁷⁷

³⁷⁶ DFO PICFI website: <http://www.pac.dfo-mpo.gc.ca/fm-gp/picfi-ipcip/index-eng.htm>

³⁷⁷ CAN022811 at p. 2.

PICFI Accountabilities

210 Overall accountability for the PICFI program rests with the Assistant Deputy Minister, Ecosystems and Fisheries Management. At national headquarters, a Director of PICFI holds the following accountability:

... providing professional leadership for managing the design, development and delivery of the Pacific Integrated Commercial Fisheries Initiative (PICFI) and in particular engaging key federal departments, leading the negotiation process on PICFI with BC First Nations and with regional and national First Nations associations and commercial fisheries leaders, providing departmental leadership required to obtain funding for the PICFI in its delivery ensuring the sustainable development of Canada's commercial fisheries in the Pacific.³⁷⁸

211 In the Pacific Region, a Director of Special Projects (Fisheries Reform, PICFI) is responsible for regional implementation of PICFI. She is assisted by Element Leads (or Co-Leads) for each of access, capacity building, co-management and enhanced accountability elements of the initiative. For information on their line reporting structure, refer to Figure 6: Pacific Region PICFI Organization Chart.

Other Aboriginal Fisheries Programs and Initiatives

212 Several other DFO programs and initiatives are either smaller in scope or not directly relevant to Fraser River sockeye. These programs and initiatives are described in brief to provide a context for DFO's broad programming.

First Nations Selective Fisheries Gear Purchase Program

213 In 2000, then Minister of Fisheries and Oceans, the Honourable Herb Dhaliwal announced funding for 31 projects under the First Nations Selective Fisheries Gear Purchase Program. The selective fisheries funds were to be provided to groups through the Aboriginal Fishing Strategy (AFS) agreements. Thirty-five British Columbia and Yukon First Nations would receive a total of \$500,000 to

³⁷⁸ Non-Ringtail document: Government of Canada Executive Group Position Description: Director, Pacific Integrated Commercial Fisheries Initiative.

improve selectivity in First Nations' FSC fisheries with support for selective gear purchases and training programs.³⁷⁹

Aboriginal Inland Habitat Program

214 The Aboriginal Inland Habitat Program was developed to assist Aboriginal groups located in inland provinces to be involved in the management of fish habitat activities. It is intended to increase capacity of Aboriginal communities in inland Canada to participate in decision-making related to habitat management activities, and to foster relations between DFO and Aboriginal groups.³⁸⁰

Marshall Response Initiative

215 The Marshall Response Initiative (the "MRI") was introduced in 2000 in response to the 1999 Supreme Court of Canada decision in *R v. Marshall*,³⁸¹ which decided that treaties signed in 1760 and 1761 by Mi'kmaq and Maliseet First Nations ("MMFNs") include a communal right to hunt, fish and gather in pursuit of a "moderate livelihood". The Supreme Court of Canada decision affected 34 MMFNs in New Brunswick, Nova Scotia, Prince Edward Island and the Gaspé area of Quebec. This program consisted of negotiated interim fisheries agreements that provided MMFNs with access to the commercial fishery. In total, fisheries agreements were negotiated with 32 of the 34 MMFNs. The MRI is no longer active.³⁸²

At Sea Monitoring Initiative

216 The At Sea Monitoring Initiative was a four-year program instituted as part of the MRI to further develop the skills of MMFN members to fish safely and effectively in various fisheries. It was designed to build the capacity within MMFN communities

³⁷⁹ CAN000119. See also CAN000120.

³⁸⁰ CAN00178 at p. 9.

³⁸¹ [1999] 3 S.C.R. 456.

³⁸² CAN00178 at p 9-10.

to become independent in providing their training requirements. This initiative is no longer active.³⁸³

Fisheries Operations Management Initiative

217 The Fisheries Operations Management Initiative was a four year program created in February 2004, aimed at providing individuals with business and management mentoring as well as strengthening community-level fisheries management structures within individual MMFNs. Delivery was through Chiefs and councils of First Nations and Aboriginal organizations. The initiative helped Aboriginal people to manage fishery operations and establish rules so that benefits from the fishery are shared by the community. This initiative is no longer active.³⁸⁴

Atlantic Integrated Commercial Fisheries Initiative

218 The AICFI program was announced in 2007 as a successor to the MRI. It is designed to assist MMFNs to maximize potential from existing access and strengthen the accountability and transparency of their fishing enterprises.³⁸⁵

Modern Treaties and Harvest Agreements

219 This section of the policy and practice report adds to the description of treaties contained in an earlier commission paper entitled “The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery,”³⁸⁶ and should be read in conjunction with that paper and corresponding written and oral submissions of participants in response.³⁸⁷ The focus of this policy and practice report is on modern treaties. Historic treaties will be discussed in greater detail in the commission’s contracted research paper entitled “A History of the Regulation of the Aboriginal Fraser River Sockeye Salmon Fishery to 1982.”

³⁸³ CAN00178 at p. 10.

³⁸⁴ CAN00178 at p. 10.

³⁸⁵ CAN00178 at p. 10.

³⁸⁶ October 1, 2010. Available online at <http://cohencommission.ca/en/PolicyAndPracticeReports.php>

³⁸⁷ For oral submissions, see Cohen Commission Transcripts, October 26, 2010.

The Modern Treaty Process

220 The modern treaty process originates from the signing of the British Columbia Treaty Commission Agreement on September 21, 1992, amongst Canada, British Columbia and the First Nations Summit (a consortium of British Columbia First Nations).³⁸⁸ The BC Treaty Commission Agreement authorized the creation of the BC Treaty Commission, under the *Treaty Commission Act*,³⁸⁹ to facilitate the negotiation of treaties among BC First Nations, Canada and British Columbia.

221 There are six stages to the treaty process, which are as follows:³⁹⁰

1. Statement of Intent to Negotiate

The First Nation files a statement of intent to negotiate with the BC Treaty Commission, identifying the governing body with authority to negotiate on the First Nation's behalf, and the geographic territory claimed.

2. Readiness to Negotiate

Canada, BC and the First Nation meet to exchange information and discuss their readiness to negotiate by considering factors such as whether qualified negotiators have been hired, identifying concerns, and assessing resources.

3. Negotiation of a Framework Agreement

The parties agree to the subjects to be negotiated. This forms a "table of contents" for the final agreement.

4. Negotiation of an Agreement in Principle ("AIP")

This is the first stage of substantive treaty negotiations. The AIP identifies and defines the Aboriginal rights to be contained in the treaty and also outlines governance, financial settlement, dispute resolution and treaty implementation considerations. However, fishery allocations are not yet quantified at this stage.

³⁸⁸ *Treaty Commission Act*, R.S.B.C. 1996, c.461, s.1. The Nisga'a Final Agreement was reached using a distinct process.

³⁸⁹ *Treaty Commission Act*, R.S.B.C. 1996, c.461.

³⁹⁰ BC Treaty Commission: www.bctreaty.net/files/sixstages

5. Negotiation to Finalize a Treaty

A treaty document is drafted to embody the substantive agreement reached in the agreement in principle. This is a constitutional instrument to be signed and ratified.

6. Implementation of the Treaty

Implementation plans and activities specific to the treaty are performed.

DFO's Participation in Treaty Negotiations

222 According to the Integrated Aboriginal Policy Framework, a major and ongoing responsibility of DFO is supporting the development and establishment of various inter-governmental, treaty and governance relationships through its participation in the negotiation, settlement and implementation of land claims agreements and self-government arrangements in partnership with INAC, provincial land territorial governments, and Aboriginal people. In addition to developing negotiating positions relating to fisheries and oceans matters, DFO is also involved in negotiating Treaty Related Measures and Incremental Treaty Arrangements.³⁹¹

223 DFO participates in treaty negotiations through its Aboriginal Policy and Governance Directorate. One of the three main responsibilities for this directorate is its “participation in the Department of Indian Affairs led negotiations on Claims, Self Government and Treaty Processes.”³⁹²

Fisheries Chapters of Modern Treaties

224 There are four modern treaties that involve Fraser River sockeye. These treaties were signed by the Lheidli T'enneh Indian Band, the Tsawwassen First Nation, the Maa-Nulth First Nations and the Yale First Nation. At the time of writing this Report, only the Tsawwassen First Nation Final Agreement is in force. The status of each treaty is summarized in Table 9 below.

³⁹¹ CAN000178 at p. 8.

³⁹² CAN008736 at p. 1.

225 The descriptions of treaty provisions contained in this policy and practice report are based upon a review of the Lheidli T'enneh, Tsawwassen, Maa-Nulth and Yale Final Agreements only. This policy and practice report therefore describes only a small set of modern treaties. It is possible that Final Agreements signed in the future, or signed in other provinces, may contain different provisions. Also, another modern Final Agreement in British Columbia, the Nisga'a Final Agreement, is not canvassed in this Report.

Table 9: Status of Modern Final Agreements involving Fraser River Sockeye

First Nation Name and Location	Date Treaty Process Began	Date Final Agreement Initialled or Signed by Negotiators	Status
Lheidli T'enneh Band, located near Prince George	December 1993 ³⁹³	October 29, 2006 ³⁹⁴	Not in force. A Lheidli T'enneh ratification vote held on March 30, 2007 failed to achieve the requisite majority of votes. ³⁹⁵
Tsawassen First Nation, located south of Vancouver	December 16, 1993 ³⁹⁶	December 6, 2007 ³⁹⁷	In force. The effective date was April 3, 2009 ³⁹⁸
Maa-nulth First Nations, five Nuuchah-Nulth First Nations located on the west coast of Vancouver Island	March 2, 2004 ³⁹⁹	April 9, 2009 ⁴⁰⁰	This agreement has been ratified and will come into force on April 1, 2011.
Yale First Nation, located in the Fraser River Canyon north of Hope	April 26, 1994 ⁴⁰¹	February 5, 2010 ⁴⁰²	Not yet in force. The agreement has not yet been ratified.

³⁹³ Ministry of Aboriginal Relations and Reconciliation: <http://www.gov.bc.ca/arr/firstnation/lheidli/default.html>

³⁹⁴ Date initialled. Ministry of Aboriginal Relations and Reconciliation:

<http://www.gov.bc.ca/arr/firstnation/lheidli/default.html>

³⁹⁵ Ministry of Aboriginal Relations and Reconciliation: <http://www.gov.bc.ca/arr/firstnation/lheidli/default.html>

³⁹⁶ BC Treaty Commission: <http://www.bctreaty.net/nations/tsawwassen.php>

³⁹⁷ This signature date is named on the Ministry of Aboriginal Relations and Reconciliation website

(<http://www.gov.bc.ca/arr/firstnation/tsawwassen/default.html>) and is found written on the copy of the Final Agreement posted on that site. However, it conflicts with the signature date named on the BC Treaty Commission website, of 26 June 2008 (<http://www.bctreaty.net/nations/tsawwassen.php>)

³⁹⁸ BC Treaty Commission: <http://www.bctreaty.net/nations/tsawwassen.php>

³⁹⁹ BC Treaty Commission: <http://www.bctreaty.net/nations/maanulth.php>

⁴⁰⁰ Ministry of Aboriginal Relations and Reconciliation:

http://www.gov.bc.ca/arr/firstnation/maa_nulth/default.html

⁴⁰¹ BC Treaty Commission: <http://www.bctreaty.net/nations/yale.php>

⁴⁰² Date initialled. Ministry of Aboriginal Relations and Reconciliation:

<http://www.gov.bc.ca/arr/firstnation/yale/default.html>

226 The fisheries chapters of Final Agreements differ from each other in material respects. For a more detailed summary and comparison of selected fisheries provisions from the Lheidli T'enneh, Tsawwassen, Maa-Nulth and Yale Final Agreements, see Appendix 3. The fisheries chapters of these agreements contain key concepts that are generally introduced below:

Food Social and Ceremonial Allocations

227 Final Agreements typically include a recognition of the right to fish for FSC purposes (also called “domestic purposes”), within designated fishing areas subject to restrictions based on conservation, public health and public safety.⁴⁰³ This right encompasses the harvest of all species within that designated fishing area.⁴⁰⁴ An FSC harvest level (or allocation) pertaining to a key species for which access is fully subscribed or contentious, such as Fraser River sockeye, has typically been specified using an abundance-based formula relative to the Canadian Total Allowable Catch. This provides for a harvest level of Fraser River sockeye that reflects the available harvest in a given year.

228 Harvest levels vary between agreements and range from an abundance-based two percent of the first 250,000 Canadian Total Allowable Catch for the Lheidli T'enneh Indian Band⁴⁰⁵ to a fixed 0.13366 percent of all Canadian Total Allowable Catch for the Maa-Nulth First Nations. Abundance-based harvest levels are often capped at a maximum number of sockeye pieces, as is the case in the Lheidli T'enneh, Tsawwassen and Yale Final Agreements. However, the fixed harvest level in the Maa-Nulth Final Agreement appears to not have a cap.

⁴⁰³ CAN046349 at p. 9.

⁴⁰⁴ CAN115559 at p. 8.

⁴⁰⁵ The Lheidli T'enneh Final Agreement provides for a Fraser Sockeye allocation of 2% of Cdn TAC where Cdn TAC is equal to or less than 250,000 sockeye. If Cdn TAC is above 250,000 sockeye but less than 840,000 sockeye, then the allocation is 5,000 sockeye plus 1.246% of the portion of Cdn TAC above 250,000. The maximum allocation is 12,350 sockeye. See Appendix 3 for additional details.

229 According to DFO, treaty harvest levels are based on current and historic harvest levels for the signatory First Nation plus a one-time increase.⁴⁰⁶ Once a harvest level has been set, it will not increase over time.⁴⁰⁷

Harvest Documents

230 A modern treaty First Nation's right to fish is evidenced by a "Harvest Document"⁴⁰⁸ issued annually by the Minister. The Harvest Document sets out the terms and conditions applicable to the group's FSC fishery for that year and all FSC fishing must be conducted in accordance with the provisions of the Harvest Document. Generally, neither Canada nor British Columbia may charge a licence fee for the Harvest Document nor charge a management fee for participation in the FSC fishery.

Harvesting FSC Fish

231 Generally, FSC fish may be harvested by anyone designated to do so by the First Nation holding the fishing right, whether or not that person is a member of the First Nation. However, designated individuals must be identified by documentation that is issued by the First Nation.

Prohibition on Sale of FSC Fish

232 Final Agreements specify that FSC fish may not be sold. FSC fish may only be traded or bartered amongst members of the First Nation, or with other Aboriginal peoples of Canada. However, the Lheidli T'enneh Final Agreement (but not the other agreements) provides that the Lheidli T'enneh Band may annually transfer up to 50% of its FSC allocation to its Harvest Agreement allocation, such that 50% of the original FSC allocation may be sold.

⁴⁰⁶ CAN115559 at p. 8.

⁴⁰⁷ CAN115559 at p. 8.

⁴⁰⁸ Harvest Document is a collective term generally defined in the treaties as including permits, licences, documents or amendments there to issued under federal or provincial law in respect of the First Nation's treaty fishing right.

Overages and Underages

- 233 The final agreements allow for a system of adjusting the FSC harvest level in any given year to account for the overage or underage in an FSC catch in previous years. This overage and underage is calculated with reference to criteria set out in the Fisheries Operational Guidelines as established jointly by the parties (described further below). For example, if the First Nation harvested less than its FSC allocation of fish in a previous year due to the over-harvest by another group, then this “underage” of fish is added to the First Nation’s current year allocation. An underage is not applied if the First Nation was given reasonable opportunity to fish and the fish were not there (whether for conservation or environmental reasons).⁴⁰⁹
- 234 Alternatively, if a First Nation harvests in excess of its allocation in a given year, then that amount of over-harvest is carried forward and applied to reduce the next season’s allocation. Under some treaties, however, it appears that the First Nation may not be required to make more than a 5% adjustment to a harvest allocation in a given year to account for past overages or underages, unless the parties otherwise agree.⁴¹⁰

Joint Fisheries Committee

- 235 The creation of a Joint Fisheries Committee (“JFC”) appears common to all final agreements, although the details of a JFC’s responsibilities vary. A JFC is comprised of a member from each of the parties to the agreement (BC, Canada, and the First Nation⁴¹¹). Generally, the JFC is tasked with cooperatively planning the FSC⁴¹² fishing activities of the First Nation, including stock assessment, fisheries management, stock enhancement, catch monitoring, and enforcement duties of the First Nation. If a multi-First Nations fisheries management process is

⁴⁰⁹ CAN115559 at p. 14.

⁴¹⁰ See for example, CAN012550 at s. 6.3.4.

⁴¹¹ Or First Nations, where a Final Agreement is signed by a group of First Nations, such as the Maa-Nulth Final Agreement.

⁴¹² Note that under some Harvest Agreements, for example the Tsawwassen Harvest Agreement, the JFC will also play a role in planning the First Nation’s commercial harvest.

established in British Columbia, then the final agreements generally contemplate that some functions of the JFC may be attributed to that process.

Annual Fishing Plan

236 Each year, the signatory First Nation is required to create an Annual Fishing Plan outlining various aspects of its intended fishery. The content required in such plans varies slightly between agreements. However, Annual Fishing Plans generally describe the intended harvest, locations, timing, catch methods, gear types, reporting requirements and sometimes enforcement measures related to the fishery. Under some agreements the fishing plan is created with input from the JFC, and under other agreements, the First Nation will create the plan on its own.

237 After an annual fishing plan is created, it is then forwarded to the JFC. The JFC reviews the plan and submits recommendations to the Minister on appropriate provisions to be contained in the First Nation's Harvest Document. If the JFC cannot agree on the recommendations to be provided to the Minister, then each member of the JFC may submit its own recommendations. The Minister then considers these recommendations in drafting the Harvest Document and its related terms and conditions. If the provisions of a Harvest Document differ significantly from the provisions recommended by the JFC, then the Minister will provide written reasons to the First Nation and the JFC. If the Minister subsequently amends a Harvest Document, she will also give notice, provide written reasons, and where practicable, discuss those amendments in advance with the First Nation and the JFC.

Fisheries Operational Guidelines

238 The final agreements each state that Canada, British Columbia and the signatory First Nation⁴¹³ will jointly create and maintain Fisheries Operational Guidelines ("FOGs"). The contents of such FOGs vary. However, the FOGs generally contain

⁴¹³ Or First Nations, where a Final Agreement is signed by a group of First Nations.

the operating principles, procedures and guidelines required to assist the parties and the JFC in implementing the fisheries chapters of the agreements.⁴¹⁴

239 The FOGs may also provide for the creation of a Joint Technical Committee (“JTC”) to assist the JFC in areas requiring scientific and technical expertise. The JTC may be responsible for conducting and coordinating scientific technical aspects of the final agreement, including reviewing run size predictions and in-season adjustments, determining allocations, defining project activities and determining overages and underages.

Harvest Agreements

240 Each final agreement provides that the parties will enter into a harvest agreement, which is intended to provide commercial fishing opportunities to the First Nation. The effective date of the harvest agreement is typically tied to the effective date of the final agreement, unless otherwise agreed to by the parties. So far, only the Tsawwassen First Nation’s Harvest Agreement is in force.

241 The final agreements typically provide that the harvest agreement does not form a part of the treaty, is not treaty agreement in and of itself and does not recognize or affirm Aboriginal rights within the meaning of sections 25 or 35 of the *Constitution Act, 1982*. The Maa-Nulth Final Agreement is unique in that, although the Maa-Nulth Harvest Agreement itself provides that it is not a treaty and does not affirm Aboriginal rights, the final agreement contemplates an amendment to the Maa-Nulth Harvest Agreement if the highest court that hears the *Ahousaht* litigation determines that the Maa-Nulth have an Aboriginal right to fish and to sell fish on a commercial basis.

242 The contents of the harvest agreements vary as described further below and in Appendix 4.

⁴¹⁴ See also CAN046349 at p. 11.

Enforcement Agreements

243 The Tsawwassen Final Agreement, but not the Lheidli T'enneh, Maa-Nulth or Yale final agreements, provides that the parties may enter into an Enforcement Agreement "in respect of the enforcement of Federal and Provincial laws and Tsawwassen Laws in respect of fisheries." However, it is unclear whether such an agreement has been executed.

Stewardship and Enhancement Agreements

244 The Tsawwassen, Maa-Nulth and Yale final agreements provide that the parties may negotiate agreements in respect of the First Nation's enhancement and stewardship activities. The L'heidli T'enneh Final Agreement appears to be silent on the issue.

Fisheries Management Funds

245 Early treaties included fisheries management funds, intended to support ongoing fisheries management, conservation or stewardship programs run by the First Nation. The Lheidli T'enneh Final Agreement included a \$3 million fund, whereas the Tsawwassen Final Agreement included a \$1 million fund. However, the subsequent Maa-Nulth and Yale final agreements did not include fisheries management funds.

Commercial Fishing Capital Support

246 The Tsawwassen Final Agreement included \$1,115,000 towards a Tsawwassen Commercial Fish Fund to support Tsawwassen First Nations commercial fishing ventures, and the Ma-Nulth Final Agreement included the issuance of three salmon licences to the Maa-Nulth First Nations on the effective date of the agreement. However, the Lheidli T'enneh and Yale final agreements do not specifically include commercial fishing capital or licensing support.

Surplus Salmon

247 The final agreements provide that the Minister may authorize the harvest of surplus salmon returning to the First Nation's fishing area. The terms and conditions of any surplus salmon harvest will be determined by the Minister, generally based on recommendations from either the First Nation or the Joint Fisheries Committee.

Harvest Agreements

248 Harvest agreements are side agreements to the treaty, which do not form a part of the treaty and are not constitutionally protected. Harvest agreements differ from each other in material respects. The Lheidli T'enneh, Tsawwassen, Maa-Nulth and Yale Harvest Agreements are summarized and compared in Appendix 4. However, harvest agreements typically contain concepts which may be generalized as follows:

Terms and Renewals

249 Each harvest agreement lasts for an initial term of 25 years. The harvest agreement will either be automatically renewed, or renewed at the option of the First Nation, on the same terms and conditions in perpetuity.

Commercial Allocation or Commercial Fishery Access

250 The Lheidli T'enneh, Tsawwassen and Yale harvest agreements express a percentage allocation based on the Canadian Commercial Total Allowable Catch ("CCTAC") for Fraser River sockeye that may be harvested by the First Nation for economic purposes. The definition for CCTAC varies, but it is roughly equal to the Canadian Total Allowable Catch less the total of all FSC allocations.

251 The harvest agreement allocations vary significantly. For example, the Lheidli T'enneh Harvest Agreement provides for a commercial allocation of 0.7043% of the CCTAC of "Upper Fraser" sockeye (which means 0.7043% of Fraser River sockeye originating in or upriver of Naver Creek). In addition, the Lheidli T'enneh

Band may transfer up to 50% of its FSC allocation to its harvest agreement allocation. In contrast, the Tswwassen and Yale Harvest Agreements provide for a commercial allocation of 0.78% of the CCTAC of Fraser River sockeye (which includes all sockeye returning to the Fraser River drainage system) and up to 1.15%⁴¹⁵ of CCTAC of Fraser River sockeye, respectively, with no transfer of FSC allocation to the commercial fishery.

252 The Maa-Nulth Harvest Agreement does not express a percentage commercial allocation. Instead it provides that the Minister will grant fishery access by issuing a commercial salmon licence for each similar licence “relinquished” by the Maa-Nulth First Nations (up to a total of eight licences).

253 In all cases, the Minister retains authority to manage the commercial fisheries, including determining whether or not to open a commercial fishery. Fishing under harvest agreements are still subject to closures, and may be limited by measures necessary for conservation, public health or public safety.

Licensing

254 The Lheidli T’enneh, Tsawwassen and Yale Harvest Agreements provide that, for every year in which there is a commercial fishery, the Minister will issue to the First Nation one or more licences to provide for the commercial allocation. The Maa-Nulth Harvest Agreement provides that a licence will be issued each year for each salmon licence that was relinquished by the Maa-Nulth, as described above. Some harvest agreements provide that where no licence is issued (e.g. where there is no general commercial fishery) the Minister must provide written reasons. There will be no fee for any licences issued under harvest agreements.

255 Licences may contain terms and conditions, including a limitation on the fishing area in which the licence may be exercised. Individuals fishing under the licence

⁴¹⁵ The Yale First Nation Harvest Agreement provides a range of commercial allocation percentages (1.0027% - 1.15%) that increase according to whether the YFN have relinquished one, two or three Area E Salmon gill net licences. Please see Appendix B for details.

must be designated by the First Nation, and must carry personal non-transferable documentation issued by the First Nation which evidences such designation.

Management Costs

256 Where other commercial fishers contribute to the management costs of the commercial fishery, then the First Nation will also be required to pay such management costs.

Harvest Agreement Fishing Plans

257 The Lheidli T'enneh and Tsawwassen harvest agreements provide that each year, the First Nation will create a fishing plan setting out how the First Nation plans to fish under the harvest agreement (including a description of the stocks to be fished, the methods, locations, gear, vessels, catch monitoring, reporting etc.). The harvest agreement fishing plan will be provided to the JFC, who will then forward its recommendations to the Minister. The Minister will consider these recommendations in issuing the annual harvest agreement licence, and in the case of the Tsawwassen Harvest Agreement, will provide written reasons to the Tsawwassen First Nation and the JFC explaining any differences between the licences and the proposed fishing plan. The Maa-Nulth and Yale Harvest Agreements do not specifically require an annual fishing plan.

Integrated Commercial Fishery Planning

258 The harvest agreements generally provide that the First Nation may participate in integrated planning processes established by the Minister, and in consultative processes, on the same basis as other participants in the commercial fishery.

Contemplation of a Future Quota-based System

259 Although the Lheidli T'enneh Harvest Agreement does not contemplate a future quota-based fisheries system, the later agreements do. The Tsawwassen and Maa-Nulth Harvest Agreements provide that the commercial allocation or licences, respectively, will be amended to reflect the new system, on the same basis as for

the general commercial fishery. However, the Yale Harvest Agreement provides that the Yale First Nation may request that either any new eligible quota be reallocated to the commercial allocation, or that any commercial allocation be reallocated to the new system. If a quota-based system is introduced in British Columbia, harvest agreements may require amendment.

Amendment, Termination and Compensation

260 Harvest agreements may be amended on written agreement of the parties. Additionally, the Minister may unilaterally amend, or may terminate the agreement upon payment of fair compensation as determined through negotiation or dispute resolution. An amendment requiring compensation could include a reduction in the commercial allocation, or some other reduction in the fishery access granted to the First Nation as part of the harvest agreement terms. The notice period required for amendment or termination varies between 120 days to one year.

Status of Fishery-Related Treaty Negotiations in British Columbia

261 In addition to the four final agreements described above, there are three Agreements in Principle related to Fraser River sockeye that have been signed or initialled. These are the Agreements in Principle involving the Sliammon Indian Band, the Yekooche First Nation and the In-SHUCK-ch Nation.

Table 10: Status of Selected Agreements in Principle involving Fraser River Sockeye

First Nation Nation and Location	Date treaty process began	Date AIP initialled or signed by negotiators
Sliammon Indian Band, located near Powell River on the south coast of BC, north of Vancouver	May 20, 1994 ⁴¹⁶	December 6, 2003 ⁴¹⁷
Yekooche First Nation, located north of Prince George in northern central BC	May 11, 1995 ⁴¹⁸	August 22, 2005 ⁴¹⁹
In-SHUCK-ch Nations, three First Nations located in the Lillooet River valley north of Harrison Lake	April 24, 2004 ⁴²⁰	August 25, 2007 ⁴²¹

Common Table Process, Coastwide Framework and Canada's Action Plan for BC Treaties

262 In 2008, noting that treaty negotiations had not progressed as quickly as originally anticipated, Canada, BC and more than 50 First Nations came together in a process called the “Common Table” to discuss ways to reduce obstacles to concluding treaties.⁴²² British Columbia, Canada and First Nations made presentations at the Common Table, setting out their respective concerns and suggested approaches to addressing the negotiation of fishery chapters in

⁴¹⁶ BC Treaty Commission: <http://www.bctreaty.net/nations/sliammon.php>

⁴¹⁷ Date signed. BC Treaty Commission: <http://www.bctreaty.net/nations/sliammon.php>

⁴¹⁸ BC Treaty Commission: <http://www.bctreaty.net/nations/yekooche.php>

⁴¹⁹ Date signed. BC Treaty Commission: <http://www.bctreaty.net/nations/yekooche.php>

⁴²⁰ BC Treaty Commission: <http://www.bctreaty.net/nations/inshuck.php>

⁴²¹ Date signed. BC Treaty Commission: <http://www.bctreaty.net/nations/inshuck.php>. Note this date differs from the 28 October 2006 date of a press release from the Minister of Aboriginal Relations and Reconciliations, and written atop of a copy of the In-SHUCK-ch AIP (both available at http://www.gov.bc.ca/arr/firstnation/in_schuck_ch_nation/default.html).

⁴²² CAN031245 at p. 2.

treaties.⁴²³ Some of the concerns identified through the Common Table Process and subsequent discussion relate to approaches to fish allocation in treaties given uncertainty surrounding the status and management of certain fisheries resources, the management of treaty fisheries arrangements that may involve numerous First Nations and the implementation and management of Aboriginal fishing arrangements for First Nations outside of treaties.⁴²⁴

263 Around 2008, it appears that Canada also began to develop a “Coastwide Framework” to guide the distribution of fisheries allocation and access for all species harvested in the Pacific Region. Not much is publicly available about the Coastwide Framework, but adherence to its guidelines is articulated with respect to DFO programs such as PICFI.⁴²⁵ In 2008, pending the development of the Coastwide Framework, the negotiation of fisheries chapters in BC treaties was deferred.⁴²⁶ Development of the Coastwide Framework in turn has also been deferred, pending the findings and recommendations of Commissioner Cohen in this inquiry.⁴²⁷

264 In 2010, building upon the Common Table Process, Canada developed an action plan to support progress in the BC Treaty Process.⁴²⁸ Canada reiterated that it is committed to reconciling Aboriginal and Crown interests through the negotiation of modern treaties, that the conclusion of more treaties is both possible and necessary and that it believes that negotiations under the BC treaty process is the best method of resolving outstanding rights and title issues and arriving at fair, affordable and honourable treaties that balance the interests of First Nations and all Canadians.⁴²⁹ The action plan consists of several elements, including:

⁴²³ For BC’s presentation, see CAN046350. For Canada’s presentation, see CAN046349. For a presentation by Robert Morales, Chief Negotiator for the Hul’Qumi’Num Treaty Group, see CAN046351.

⁴²⁴ CAN031245 at p. 6.

⁴²⁵ See for example CAN043586 at p. 24, or CAN018498 at p. 7.

⁴²⁶ CAN185883. See also CAN031249 at p. 5.

⁴²⁷ CAN185883

⁴²⁸ CAN031245

⁴²⁹ CAN031245 at p. 2.

- Allowing the negotiation of language in treaties that recognizes existing Aboriginal rights, and that such rights have not always been respected;
- Introducing a new method of achieving certainty in treaties that addresses First Nations' concerns with the extinguishment of rights;
- Strengthening and streamlining Treaty-Related Measures, which are government-funded projects undertaken by First Nations;
- Providing modern treaty First Nations with power to establish fines and administrative penalties on treaty settlement lands comparable to provincial and federal fines and penalties for similar regulatory offences; and
- Developing a new approach for financing self-governing First Nations that is more transparent, fair and efficient, and taking into account the unique circumstances of self-governing groups.

265 Canada's plan to support progress in the BC Treaty Process also involves a further deferral of negotiations regarding fisheries chapters in treaties "pending the potential adoption of new policy approaches informed by the findings and recommendations of the Cohen Inquiry."⁴³⁰ However, the Yale, In-SHUCK-ch and Sliammon final agreement negotiations would be allowed to continue.⁴³¹

Co-Management and Consultation

266 This section of the policy and practice report provides a general summary of DFO's policies and approaches to co-management and consultation in relation to Aboriginal participation in the fisheries. It does not discuss broader multi-sectoral advisory or consultative processes such as the Integrated Harvest Planning Committee, the Integrated Fisheries Management Plan process, or the Integrated Salmon Dialogue Forum, which also involve First Nations participants. For a review of the duty to consult, see the commission's paper entitled "The Aboriginal and Treaty Rights Framework Underlying the Fraser River Sockeye Salmon Fishery" and the written and oral submissions of participants in response.⁴³² The discussion of co-management and consultation contained in this Report is intended as an overview only.

⁴³⁰ CAN031245 at p. 6.

⁴³¹ CAN031245 at p. 6.

⁴³² See October 26, 2010 Transcripts, available at www.cohencommisson.ca/schedule

267 To provide a contextual background for fisheries-related co-management and consultation, this Report starts by setting out a summary of selected relationship building efforts made between Canada, British Columbia and First Nations in recent decades.

Relationship Building between First Nations and the Federal and Provincial Governments

268 In 1995, a federal interdepartmental working group prepared a report entitled “Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues: A Guide for Managers.”⁴³³ This report describes the special relationship that the government has with Aboriginal peoples and sets out specific fiduciary duties or obligations that may arise. It states its purpose as “provid[ing] guidelines for managers to assist them in their dealings with Aboriginal people.”⁴³⁴

269 In 1996, the Royal Commission on Aboriginal Peoples released its “Royal Commission Report on Aboriginal Peoples.”⁴³⁵ This extensive five volume report concluded that fundamental change was needed in the relationship between Aboriginal and non-Aboriginal people in Canada. “The Royal Commission’s vision included rebuilding Aboriginal nationhood; supporting effective and accountable Aboriginal governments; establishing government-to-government relationships between Canada and Aboriginal nations; and taking practical steps to improve the living conditions of Aboriginal people. It called for partnerships based on the four principles of mutual respect and recognition, responsibility and sharing.”⁴³⁶

270 In 1997, building upon the work of the Royal Commission on Aboriginal Peoples, the Department of Indian and Northern Affairs (INAC) published “Gathering Strength: Canada’s Aboriginal Action Plan.”⁴³⁷ According to this Action Plan, its purpose is to renew the federal government’s relationship with the Aboriginal people of Canada, based upon principles of mutual respect, mutual recognition,

⁴³³ CAN000008

⁴³⁴ CAN000008 at p. 2.

⁴³⁵ <http://www.ainc-inac.gc.ca/ap/rrc-eng.asp>

⁴³⁶ As summarized in “Gathering Strength: Canada’s Aboriginal Action Plan”, see CAN00147.

⁴³⁷ CAN00147. For a 2000 progress report on this action plan, see CAN000148.

mutual responsibility and sharing. Its four key objectives were to: renew partnerships; strengthen aboriginal governance; develop a new fiscal relationship (by reaching financial arrangements with Aboriginal governments and organizations to foster self-reliance) and support strong communities, people and economies (by improving health and public safety and strengthening Aboriginal economic development).

271 In 2000, a “Joint Fisheries Dialogue for BC Memorandum of Understanding”⁴³⁸ (MOU) was entered into between DFO (Pacific Region), INAC (British Columbia Region), Human Resources Development Canada (BC-Yukon Region), Environment Canada (Pacific and Yukon Region), Parks Canada (Western Region), First Nations Summit, BC Aboriginal Fisheries Commission, and the Native Brotherhood of British Columbia. The purpose of this MOU was to confirm the commitment of the Parties to work together to establish a joint process that allows them to engage in a dialogue on a broad range of policies related to fish, fisheries and related social, economic and environmental issues.⁴³⁹ The MOU set out the structure and process for dialogue, listed topics to be discussed, and established a joint Steering Committee to oversee the process.⁴⁴⁰

272 In 2005, British Columbia announced “The New Relationship with Aboriginal People.”⁴⁴¹ This document is the result of meetings held between the Province, the First Nations Summit, the Union of BC Indian Chiefs and the BC Assembly of First Nations in March 2005. The purpose of the meetings was to develop new approaches to consultation and accommodation and to address Aboriginal concerns based on openness, transparency and collaboration. The “New Relationship” is intended to reduce “uncertainty, litigation and conflict for all British Columbians”⁴⁴² by establishing “processes and institutions for shared decision-making about the land and resources and for revenue and benefit sharing,

⁴³⁸ CAN000099

⁴³⁹ CAN000099 at s. 2.1.

⁴⁴⁰ For a sample Dialogue Forum Report arising as a result of this MOU, see CAN078346.

⁴⁴¹ BC website: http://www.gov.bc.ca/themes/new_relationship.html. See also BC website: http://www.newrelationship.gov.bc.ca/agreements_and_leg/new_relationship_agreement.html

⁴⁴² BC website: http://www.gov.bc.ca/themes/new_relationship.html

recognizing, as has been determined in court decisions, that the right to Aboriginal title “in its full form”, including the inherent right for the community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions, is constitutionally guaranteed by section 35.”⁴⁴³

273 In May 2005, the Assembly of First Nations and the Minister of Indian Affairs and Northern Development signed “A First Nations-Federal Crown Political Accord on the Recognition and Implementation of First Nations Governments.”⁴⁴⁴ The parties agreed to establish a Joint Steering Committee with representation from the Assembly of First Nations and Canada (represented by INAC) to undertake and oversee joint action and cooperation on policy change, including the establishment of a framework or frameworks, to promote meaningful processes for the recognition and reconciliation of section 35 rights, including the implementation of First Nation governments.

274 In November 2005, the Government of British Columbia, the Government of Canada and BC First Nations (through the Leadership Council) signed the “Transformative Change Accord” to develop a new government-to-government relationship founded on reconciliation, recognition and respect of Aboriginal rights and title.⁴⁴⁵ The purpose of this accord was to “bring together the Government of British Columbia, First Nations and the Government of Canada to achieve the goals of closing the social and economic gap between First Nations and other British Columbians over the next 10 years, of reconciling Aboriginal rights and title with those of the Crown and of establishing a new relationship based upon mutual respect and recognition.” The parties agreed to immediate actions to improve relationships and to close the gap in economic opportunities for Aboriginal peoples.

⁴⁴³ BC website: http://www.newrelationship.gov.bc.ca/agreements_and_leg/new_relationship_agreement.html;
Reviews and updates on the New Relationship can be found at:

<http://www.newrelationship.gov.bc.ca/publications/index.html>

⁴⁴⁴ INAC website: <http://www.ainc-inac.gc.ca/ai/mr/nr/m-a2005/02665afn-eng.asp>

⁴⁴⁵ CAN097512. See also CAN046309 at p. 4.

Co-Management

- 275 DFO has stated that co-management “is an important part of its mission” to maintain Canada’s fisheries cooperatively, with all stakeholders, to conserve the resource and achieve sustainable use for the people of Canada.⁴⁴⁶ It is one of DFO’s “means of fulfilling [its] legal obligations to Aboriginal peoples.”⁴⁴⁷ In the 2006-2010 Integrated Aboriginal Policy Framework, co-management is defined as “the sharing of responsibility and accountability for fisheries management between Fisheries and Oceans Canada and resource users. Co-management will eventually encompass the sharing of authority for fisheries management.”⁴⁴⁸
- 276 According to DFO, its policy is to “shift from top-down, centralized management of the fisheries resource by the Department to a shared stewardship of the resource that includes the devolution of certain fisheries management authorities to resource users.”⁴⁴⁹ In addition, this shared stewardship relationship is to be “partially defined by the Federal Policy Framework on the Inherent Right to Self-Government which allows for the negotiation of jurisdictional authorities to [First Nations] in areas of federal responsibility (including fisheries).”⁴⁵⁰
- 277 Co-management may take a variety of forms. DFO considers participation in the Integrated Fisheries Management Plan process to be the basic form of fisheries co-management.⁴⁵¹ Alternate co-management frameworks are found in other DFO documents such as the 1993 Policy for the Management of Aboriginal Fishing, informal co-management arrangements and AFS Agreements.⁴⁵² However, according to DFO, “fisheries co-management exists in its most advanced form under Canada’s various land claims settlements where co-management is

⁴⁴⁶ CAN000046 at p. 4.

⁴⁴⁷ CAN021299 at p. 2.

⁴⁴⁸ CAN00178 at p. 20. For another DFO definition of co-management, see CAN021299.

⁴⁴⁹ CAN00178 at p. 20.

⁴⁵⁰ CAN021299 at p. 3. For a copy of “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government,” 1995, see INAC website: <http://www.ainc-inac.gc.ca/al/ldc/ccl/pubs/sg/sg-eng.asp>

⁴⁵¹ CAN000046 at p. 3.

⁴⁵² CAN000046 at p. 7.

legislated”⁴⁵³ and the Minister exercises authority informed by recommendations from a joint management board.⁴⁵⁴

278 According to DFO, there are three main streams of co-management activities that are supported under the AFS: 1) negotiation of fisheries management arrangements through administrative support, negotiations support and community meetings; 2) management of Aboriginal fishing through catch monitoring, enforcement, fishing plans; and 3) other stewardship-related activities such as community based research, fish enhancement and habitat restoration.⁴⁵⁵ Co-management support and development among First Nations as well as among all fishers is also one of the four elements of PICFI.

Selected Reports Related to Co-Management

279 Over the years there have been many reports prepared in regards to co-management. This Report highlights three reports prepared in 2010.

280 In March 2010, Bert Ionson prepared a report for DFO entitled “Fisheries Management: First nations Salmon Fisheries, Fraser River: A report outlining requirements for Treaty and Fishery Agreement Implementation.”⁴⁵⁶ This report is not specifically written in regards to co-management but rather outlines the fishery management requirements needed to properly manage fisheries. The report also makes recommendations as to how management units might be aligned to achieve management objectives (both conservation and harvest) and may inform co-management discussions.

281 In April 2010, an external contractor, Dovetail Consulting Group, prepared a report for the PICFI Co-Management Lead entitled “An Overview of Issues concerning First Nations and DFO Co-management of Fisheries in the Pacific Region,

⁴⁵³ CAN000046 at p. 3.

⁴⁵⁴ A DFO “Summary of Co-management in the Fraser Watershed” to September 2009 is found at CAN047074 at p. 8.

⁴⁵⁵ CAN021299 at p. 4.

⁴⁵⁶ CAN069266

DRAFT”.⁴⁵⁷ The objective of this report was to provide DFO with a better understanding of advisory and co-management processes involving First Nations, to highlight key issues related to DFO and First Nations engagement in these processes, and to articulate ways in which DFO could work more collaboratively with First Nations on fisheries management processes.

282 In June 2010, the First Nations Fisheries Council produced a discussion paper entitled “Co-Management: What factors could BC First Nations consider when exploring the potential co-management of fisheries and aquatic resources?”⁴⁵⁸ This discussion paper is designed to assist First Nations in developing a vision and strategy for exploring co-management with DFO.

Consultation

283 A summary of federal government, and specifically DFO, consultation policies and guidelines is provided in chronological order below:

284 In 2004, DFO prepared a “Consultation Framework for Fisheries and Oceans Canada”⁴⁵⁹ (the “Consultation Framework”) to create a foundation upon which DFO officials could “build a common understanding and coordinated approach to consultations in support of departmental decision-making processes.”⁴⁶⁰ The Consultation Framework states that “DFO will undertake consultations in order to improve departmental decision-making processes, promote understanding of fisheries, oceans and marine transport issues, and strengthen relationships.”⁴⁶¹

285 The Consultation Framework set out information on whom to consult, how to consult and when to consult. It also provided three themes, nine principles and various guidelines as follows:⁴⁶²

⁴⁵⁷ CAN285155

⁴⁵⁸ CAN285276

⁴⁵⁹ CAN000074

⁴⁶⁰ CAN000074 at p. v.

⁴⁶¹ CAN000074 at p. v.

⁴⁶² CAN000074 p.15 to p. 23.

- Theme 1: Planning and Evaluating

Principle 1 - Commitment – Effective consultations require leadership and a shared commitment so that results from consultations will be considered in the decision-making process.

Principle 2 – Evaluation – Consultations will be evaluated periodically throughout the process and at their conclusion based on objectives set out in an established consultation plan.

Principle 3 – Timing – Consultations will be organized with appropriate timeframes and deadlines so that participants are provided reasonable time to prepare and provide their input.

- Theme 2: Building Mutual Respect

Principle 4 – Inclusiveness – Consultations will involve the appropriate range of groups or individuals that may have an interest in, be affected by or can make a meaningful contribution to a government decision.

Principle 5 – Accessibility – Reasonable steps will be taken to determine how clients, stakeholders, and others wish to be consulted and to provide them with relevant, understandable information.

Principle 6 – Clarity – Participants need to know the objective of consultations and be able to understand the information and documentation they receive.

- Theme 3: Improving Consultation Culture

Principle 7 – Accountability – Roles and responsibilities in consultations will be clearly communicated.

Principle 8 – Transparency – Consultations will be documented and results disseminated in a timely manner.

Principle 9 – Coordination – Viewpoints, perspectives and comments on consultations, including the process and the product will be shared within the department and take into account impacts on and feedback from other initiatives.

286 Also in 2004, DFO prepared a “Consultation Toolbox: A Guide to Undertaking Consultations,”⁴⁶³ to provide “practical guidance and tools for planning and evaluating consultations” and to support the DFO Consultation Framework.⁴⁶⁴

⁴⁶³ CAN022784

⁴⁶⁴ CAN0022784 at p. 1.

287 In June 2006, DFO further prepared a “Consultation with First Nations: Best Practices” (“Consultation Best Practices”) document, to provide interim guidance to staff in Pacific region pending development of national policies and guidelines respecting consultation with First Nations.⁴⁶⁵ According to the Consultation Best Practices document, it is not a statement of DFO or Government of Canada policy, but rather provides a collection of “best practices” for discussion and further development. It articulates DFO’s goal of involving First Nations in the early stages of policy, project and program development where policies, projects or programs may affect the interests of First Nations. It also sets out a non-exhaustive list of situations in which consultation may be necessary, in a fisheries context.⁴⁶⁶

288 The Consultation Best Practices guide characterizes consultation as a process, rather than singular act⁴⁶⁷ and then proposes a six-step process for consultation where the anticipated impact of a management decision on a First Nation was considered to be “medium to high”.⁴⁶⁸ In brief, the six step process articulated in the Consultation Best Practices guide involves the following:

1. Informing the First Nation of DFO’s Intent to Consult

This is done by providing sufficient information so that the First Nation can decide whether or not to participate in the consultation process, outlining the issues and decision that need to be made and explaining DFO’s understanding of the potential impacts on the First Nation. DFO would also inform a First Nation of the proposed timeline for consultation, the proposed process and whether or not funding is available for participation.

2. Information Exchange (Initial Meeting)

This is an opportunity to present information and clarify issues, as well as identify initial concerns. The appropriate DFO staff should be present to answer questions concerning the issues under discussion.

⁴⁶⁵ CAN002688

⁴⁶⁶ CAN046309 at p. 6.

⁴⁶⁷ CAN046309 at p. 2.

⁴⁶⁸ CAN046309 at p. 10-11.

3. Bilateral Discussions (Follow-up Meetings)

This is an opportunity to discuss First Nations concerns and interests, clarify information, provide DFO's perspective, and explore ways in which the First Nation's interests and concerns may be addressed. Bilateral discussions may result in the need for additional information and/or response. Additional meetings or communication may be required to address further concerns and answer questions.

4. First Nations Response to DFO

Where possible it can be helpful if First Nations provide a written or verbal response to what has been discussed during the bilateral consultations.

5. DFO Response to First Nations

Wherever possible, DFO will provide a written response to the concerns raised during the consultative process. This response should explain in as much detail as appropriate, how the First Nation's interests and concerns have, or have not been addressed by DFO and suggest whatever follow up steps may be appropriate.

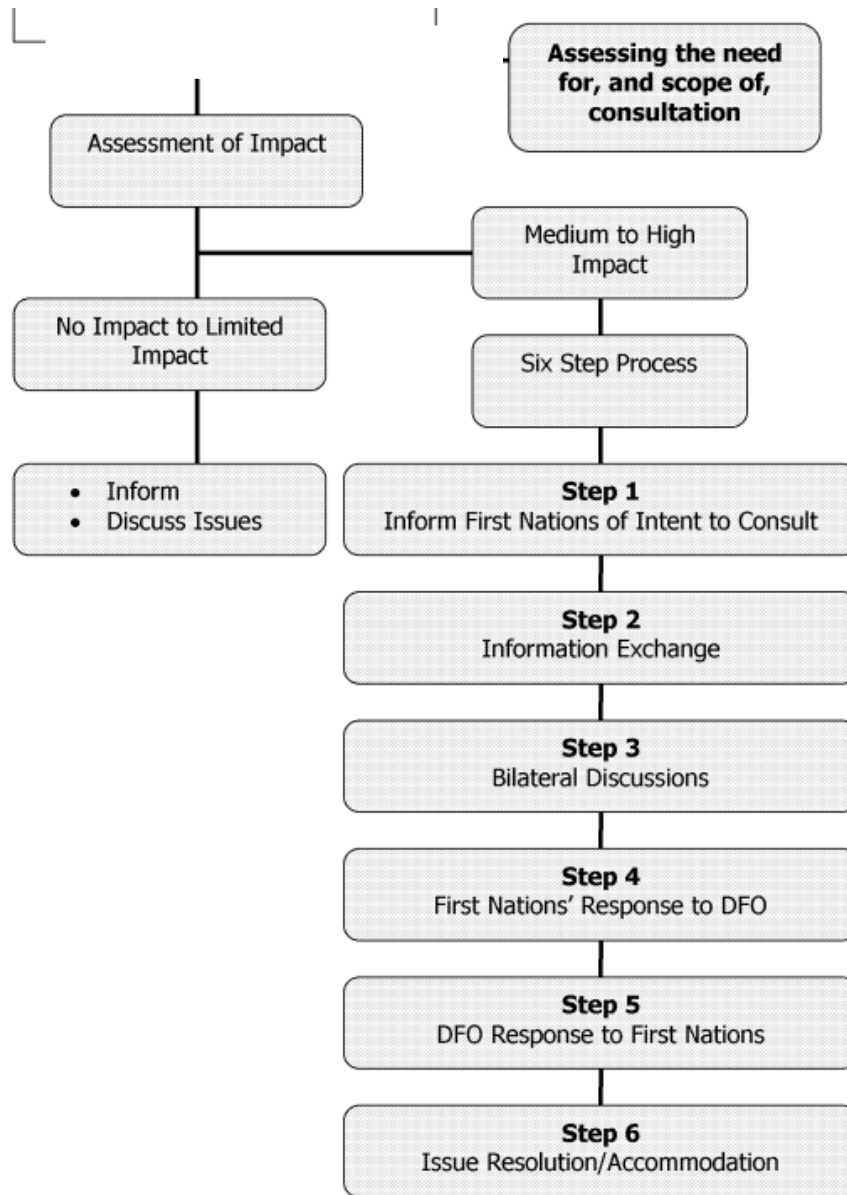
6. Issue Resolution / Accommodation

The Consultation Best Practices guide refers to the Supreme Court of Canada decision in *Haida Nation v. British Columbia Minister of Forests*⁴⁶⁹ to describe the issue resolution and accommodation step to consultation.

⁴⁶⁹ 2004 SCC 73.

289 Figure 10 provides a graphical representation of the six-step consultation process articulated in the Consultation Best Practices guide.

Figure 10: Consultation Process Flowchart from “Consultation with First Nations: Best Practices” 2006⁴⁷⁰



⁴⁷⁰ CAN046309 at p. 13.

- 290 In February, 2008, the Government of Canada issued its “Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult” (the “Interim Guidelines”).⁴⁷¹ This document focuses on when, who and how to consult pursuant to common law duties described by the Supreme Court of Canada in its *Haida, Taku River*, and *Mikisew Cree* decisions.⁴⁷² According to the Interim Guidelines, its purpose is to provide practical advice and direction to federal departments and agencies regarding the legal requirement for the Crown to consult with Aboriginal groups and, when appropriate, accommodate their interests.⁴⁷³
- 291 The Interim Guidelines describes a set of legal principles and concepts related to consultation, including the honour of the crown, reconciliation, reasonableness, meaningful consultation, good faith, and responsiveness.⁴⁷⁴ The Interim Guidelines then describes a series of practical principles, such as mutual respect, accessibility and inclusiveness, openness and transparency, efficiency and timeliness.⁴⁷⁵ This document also contains other practical information for managers, by describing the roles and responsibilities of various parties to consultation, setting out general instructions on process organization, and identifying financial and human resource considerations, training consideration and whether counsel from the Department of Justice need to be retained.
- 292 In November, 2008, DFO published its “Operational Guide for Applying the Process of Risk Management and Canada’s Guidance on the Legal Duty to Consult with Aboriginal People” (the “Operational Guide”).⁴⁷⁶ According to the Operational Guide, its purpose is to provide a model for DFO staff to follow in order to conduct business in headquarters or in their regions and areas in a manner consistent with the Aboriginal Policy and Governance Directorate mandate

⁴⁷¹ CAN056909

⁴⁷² CAN056909 at p. 5.

⁴⁷³ CAN056909 at p. 7.

⁴⁷⁴ CAN056909 at p. 9-10.

⁴⁷⁵ CAN056909 at p. 10-11.

⁴⁷⁶ CAN008993

and the risk profile developed for Aboriginal Policy and Governance.⁴⁷⁷ The Operational Guide also provides a seven-step risk management process for managers to follow.

The “Forum” and “Roadmap” Process

293 The “Forum” and “Roadmap” processes engage both co-management and consultation concepts and illustrate some of DFO’s more recent activities in this regard.

294 In 2008, it was predicted that poor returns of Fraser salmon would limit fishing opportunities and could potentially impact FSC harvests. Recognizing this, DFO initiated a series of workshops to engage Fraser River First Nations regarding harvest planning for the 2008 season. These workshops were viewed as productive and at the end, First Nations requested that DFO support continuation of these meetings in order to build upon progress made. Continued workshops were to be organized by an ad hoc committee known at first as the “Interim-Fraser River and Approach Working Group” and later simply the “Fraser River and Approach Working Group” (“FRAWG”). FRAWG consists of representatives from First Nations and DFO⁴⁷⁸ and operates with the administrative assistance of the Fraser River Aboriginal Fisheries Secretariat (described below).⁴⁷⁹

295 The meetings organized by FRAWG are called the “Forum on Conservation and Harvest Planning for Fraser Salmon” (the “Forum”). These meetings, which remain ongoing, are intended to improve engagement between DFO and First Nations regarding the management of Fraser salmon in light of conservation concerns. The Forum meetings are also meant to provide First Nations with technical information, to assist in their understanding of this information, and for DFO to hear First Nations views on how best to manage fisheries.⁴⁸⁰

⁴⁷⁷ CAN008993 at p. 1.

⁴⁷⁸ CAN018331 at p. 2.

⁴⁷⁹ CAN047074 at p. 1.

⁴⁸⁰ CAN047074 at p. 1.

- 296 The Forum met three times in 2008 and five times in 2009.⁴⁸¹ Although First Nations were not able to develop a coordinated FSC harvest sharing plan for Fraser River salmon stocks as a result of the Forum, DFO noted that the meetings had advanced relationship building among First Nations and between First Nations and DFO. First Nations also indicated a desire to continue building on the progress made and to further engage in the development of a co-management structure or process between First Nations and DFO that would allow for increased joint-decision making.⁴⁸²
- 297 In response to First Nations' desire to build a more permanent co-management structure, DFO agreed to work with FRAWG to plan for additional workshops focused on longer-term co-management issues. According to DFO, these issues may include ensuring appropriate political and technical representation at meetings and initiating planning processes that might lead to a more permanent co-management process for Fraser salmon.⁴⁸³ To distinguish these longer-term focussed meetings from the Forum, the new meetings are called the "Roadmap" meetings. Approximately \$250,000 was provided by DFO in fiscal year 2009-2010 through AAROM and PICFI to cover the costs associated with Forum and Roadmap meetings.⁴⁸⁴
- 298 In 2009, DFO developed a "Three Year Co-Management Engagement Strategy"⁴⁸⁵ in relation to the Forum and Roadmap meetings. In year one (fiscal year 2009-2010), the plan calls for a continuation of the Forum meetings, further collaboration with FRAWG, and engagement of Fraser First Nations on a more permanent co-management process ("Roadmap"). In year two (fiscal year 2010-2011), the plan calls for a continuation of FRAWG, Forum and Roadmap, as well as the implementation of a negotiated engagement or co-management process for annual pre-season harvest planning. By year three (fiscal year 2011-2012), the

⁴⁸¹ CAN018331

⁴⁸² CAN047074 at p. 1.

⁴⁸³ CAN047074 at p. 2; see also CAN029476 and CAN018331.

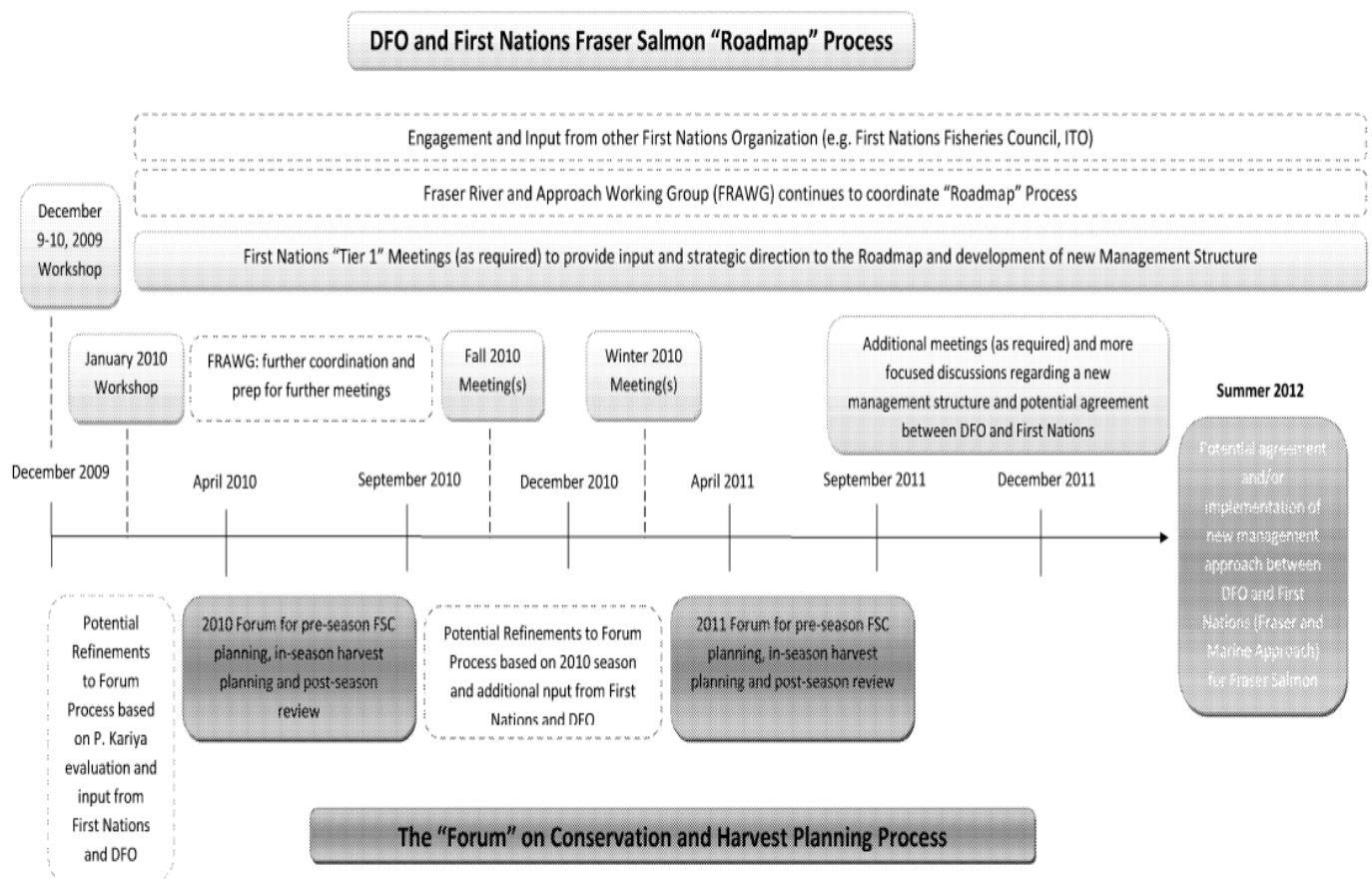
⁴⁸⁴ CAN018331

⁴⁸⁵ CAN047074

plan was to hold a workshop on the new Fraser co-management process with a joint signing ceremony of a co-management agreement between DFO and First Nations. Year three would also allow for implementation and refinement of the co-management agreement and process.

299 Figure 11 is a graphical representation of the Three Year Co-Management Engagement Strategy described above.

Figure 11: Draft Overview of DFO –First Nations “Roadmap” Process and Forum on Conservation and Harvest Planning⁴⁸⁶



⁴⁸⁶ CAN029474

Selected First Nations Organizations

300 The following section of this Report briefly introduces a selection of British Columbia Aboriginal organizations carrying mandates in respect of fisheries on a provincial or regional level. This list is not comprehensive, does not describe Nation or Tribal fisheries commissions, and does not describe all AAROM bodies operating at an area-level.⁴⁸⁷

The First Nations Leadership Council

301 On March 17, 2005, the BC Assembly of First Nations, First Nations Summit and Union of BC Indian Chiefs signed a Leadership Accord,⁴⁸⁸ affirming their respect, recognition and support for one another and to formalize a cooperative working relationship to politically represent the interests of First Nations in British Columbia. Together, the three groups formed the First Nations Leadership Council and, in 2007, released their Action Plan for fisheries entitled: “BC First Nations Fisheries Action Plan: Preparing for Transformative Change in the BC Fishery.”⁴⁸⁹

302 In brief, the BC Assembly of First Nations is a Political Territorial Organization that represents the 203 First Nations in British Columbia.⁴⁹⁰ It is the regional arm of the National Assembly of First Nations and its mandate is to work towards creating new and better memories for First Nations that include meaningful participatory relationships with the provincial and federal governments as well as with industry, and which close the socio-economic gap that exists for First Nations.⁴⁹¹ The current regional chief is Puglaas (Jody Wilson-Raybould) of the We Wai Kai First Nation.

303 The Union of BC Indian Chiefs was founded in 1969 by a majority of the Indian chiefs in BC, and was the first provincial Aboriginal organization to represent on-reserve Indian people in BC. The Union’s organizational structure is similar to a

⁴⁸⁷ For a list of Pacific Region AAROM bodies, see Table 6.

⁴⁸⁸ Non-Ringtail document: First Nations Leadership Council, Leadership Accord, March 17, 2005.

⁴⁸⁹ CAN032610

⁴⁹⁰ BC AFN website: http://www.bcafn.ca/index.php?option=com_content&task=view&id=98&Itemid=129

⁴⁹¹ BC AFN website: http://www.bcafn.ca/index.php?option=com_content&task=view&id=98&Itemid=129

labour union; it is a democratic organization that takes direction from its grassroots members – in this case, chiefs, elders, community members, women, youth and spiritual leaders.⁴⁹² The current president is Grand Chief Stewart Phillip of the Penticton Indian Band and the vice-president is Chief William Charlie of Chehalis Indian Band.

304 The First Nations Summit was formed in 1990 to represent the interests of First Nations which have agreed to participate in BC treaty negotiations. It is comprised of a majority of First Nations and tribal councils in BC and provides a forum for First Nations in BC to address issues related to treaty negotiations as well as other issues of common concern.⁴⁹³ The First Nations Summit Task Group is the political executive of the First Nations Summit. The current Task Group consists of Grand Chief Edward John, Chief Douglas White III and Dan Smith.

Province-wide Fisheries Organizations

BC Aboriginal Fisheries Commission

305 The BC Aboriginal Fisheries Commission, formerly the BC Aboriginal Peoples Fisheries Commission, was an organization of First Nations formed in the mid 1980s. Its purpose was to advise on a broad range of fisheries matters⁴⁹⁴ and to advance the interests of First Nations in regards to the fishery. This organization was wound up around 2005.

First Nations Fisheries Council

306 In 2007, the First Nations Leadership Council's "BC First Nations Fisheries Action Plan" proposed the formation of a First Nations Fisheries Council ("FNFC") to develop and carry out the action items contained in that plan. By the fall of 2007, the First Nations Leadership Council appointed the founding members of the FNFC.

⁴⁹² UBCIC website: <http://www.ubcic.bc.ca/about/history.htm>

⁴⁹³ FNS website: <http://www.fns.bc.ca/about/about.htm>

⁴⁹⁴ CAN002690 at p. 34.

307 The FNFC works with and on behalf of BC First Nations to protect and reconcile First Nations rights and title as they relate to fisheries and the health and protection of aquatic resources. Its objectives are to do as follows:⁴⁹⁵

- Advance and protect First Nations title and rights related to fisheries and aquatic resources, including priority access for food, cultural and economic purposes;
- Support First Nations to build and maintain capacity related to fishing, planning, policy, law, management, and decision-making at a variety of scales (local, regional, national, international); and
- Facilitate discussions related to the development of a BC-wide First Nations-based collaborative management framework that recognizes and respects First Nations jurisdiction, management authority and responsibilities.

308 To carry out these objectives, the FNFC has developed four working groups, focusing on: (1) section 35 FSC fisheries; (2) aquaculture, (3) co-management and (4) salmon shares or quota fisheries.⁴⁹⁶ Draft terms of reference have been developed for each of these groups and are in the process of being finalized.

309 According to a FNFC Factsheet, the FNFC employs five staff members: an executive director (Brenda McCorquodale), a co-management coordinator, two co-management policy analysts, and a communications coordinator.⁴⁹⁷ According to the FNFC website, its council members are as follows:⁴⁹⁸

- Allan Claxton - South Island
- Cliff Atleo - Nuu-chah-nulth (West Coast Vancouver Island)
- John Henderson - Kwakwaka'wakw (Northern Vancouver Island & Mainland Inlets)
- Steve Carpenter - Central Coast
- Russ Jones - Haida Gwaii

⁴⁹⁵ CAN285276

⁴⁹⁶ CAN069364 at p. 1.

⁴⁹⁷ FNFC undated factsheet, available at: <http://www.fnfisheriescouncil.ca/>

⁴⁹⁸ FNFC website: <http://www.fnfisheriescouncil.ca/index.php/news/fnfc-communicues>

- Don Roberts - North Coast
- Walter Joseph - Upper Skeena
- John Ward - Northern Transboundary
- Howie Wright - Columbia Transboundary
- Thomas Alexis - Upper Fraser
- Vacant - Mid-Fraser (2)
- Ken Malloway - Fraser Valley
- Wayne Sparrow - Lower Fraser/ Lower Mainland

310 The FNFC is an AAROM body and in fiscal year 2009-2010, the FNFC received \$952,970 from DFO as part of a Capacity Building Contribution Agreement.⁴⁹⁹

Watershed-wide Fisheries Organizations

Inter Tribal Treaty Organization

311 The Intertribal Treaty Organization (“ITO”) was established in 2009 to implement the 1989 *Inter-Tribal Fishing Treaty Between Indian Nations – A treaty of Mutual Purpose and Support*.⁵⁰⁰ The ITO is a political organization comprised of indigenous nations, operating on a nation-to-nation level. Its mandate is to do as follows:

- Protect and enhance the salmon fisheries of the Fraser and Columbia Rivers, their watersheds, tributaries, and ecosystems;
- Implement the Inter-Tribal Fishing Treaty (1989);
- Support and promote the development and implementation of Indigenous Laws for the survival of the salmon, fisheries and ecosystems upon which they depend;

⁴⁹⁹ CAN080232

⁵⁰⁰ Note, original signatories to the ITFT are: Cariboo Tribal Council, Carrier-Sekani Tribal Council, Chilcotin Ulkatcho-Kluskus Tribal Council, Kootenay Indian Area Council, Lillooet Tribal Council, Nicola Valley Indian Administration, Nlaka’pamux Nation Tribal Council, Okanagan Tribal Council, Sto:lo Nation Society, Sto:lo Tribal Council and Shuswap Nation Tribal Council.

- Support tribal nations in re-establishing strong, sustainable traditional economies based on the salmon and fisheries resource; and
- Provide a representative voice for indigenous nations regionally, nationally and internationally.

312 According to the ITO's website, it is led by its chief executive officer, Grand Chief Saul Terry of the Stl'atl'imx Nation, and by its three Commissioners: Chief Thomas Alexis (Carrier/Sekani), Chief Marilyn Camille (Secwepemc), and Chief Phillip Campbell (N'Laka'pamux).⁵⁰¹

Fraser River Aboriginal Fisheries Secretariat

313 The Fraser River Aboriginal Fisheries Secretariat ("FRAFS") was jointly established by First Nations and DFO in 1994, to provide communications and support services to the steering committee formed under the 1993 Fraser Watershed Agreement.⁵⁰² Although the Fraser Watershed Agreement expired in 1999, DFO and First Nations have maintained FRAFS to carry out the following mandate:⁵⁰³

- To assist DFO in its communications with Fraser River First Nations on fisheries issues;
- To assist Fraser River First Nations in understanding and interpreting information provided to them by DFO; and
- To assist Fraser River First Nations to communicate among themselves and develop positions and initiatives in regard to fisheries issues.

314 FRAFS provides communications and biological support services to First Nations through a communications coordinator and two consulting biologists. The communications coordinator produces the FRAFS newsletter "Watershed Talk" and distributes communications among First Nations and between DFO and First Nations.⁵⁰⁴ The biologists participate in fisheries management issues on behalf of First Nations, which may include participating in committees or processes

⁵⁰¹ ITO website: http://intertribaltreaty.org/contact_us.html

⁵⁰² FRAFS website: <http://www.frafs.ca/?q=node/5>

⁵⁰³ FRAFS website: <http://www.frafs.ca/?q=node/5>

⁵⁰⁴ FRAFS website: <http://www.frafs.ca/?q=node/5>

sponsored by the government in order to provide technical expertise from a First Nations perspective.⁵⁰⁵ The biologists also help to interpret fisheries management policies, initiatives and decision from DFO for First Nations.⁵⁰⁶

315 In addition, FRAFS provides operational and administrative support to the Forum and Roadmap processes described earlier in this policy and practice report.

316 According to the FRAFS website, FRAFS consists of an executive committee, an executive committee chairperson, two biologists, a Fraser watershed joint technical committee, a communications coordinator, and an operations manager.⁵⁰⁷ The executive committee is the management body that provides direction to the Secretariat as a whole and is accountable for meeting the terms of FRAFS funding agreement with DFO.⁵⁰⁸ The executive committee consists of nine First Nations members (Ken Malloway,⁵⁰⁹ Mike Jimmy, Ernie Crey, Murray Ross, Fred Fortier, Gord Sterritt, Thomas Alexis, Brenda McCorquodale and Saul Terry) and two DFO members (Barry Huber and Todd Johansson).⁵¹⁰

317 FRAFS is an AAROM body and in fiscal year 2009-2010, it received \$750,700 from DFO as part of AAROM (\$582,500) and PICFI (\$168,200) Contribution Agreements.⁵¹¹

Sub-regional Fisheries Organizations

Upper Fraser Fisheries Conservation Alliance

318 The Upper Fraser Fisheries Conservation Alliance (“UFFCA”) was formed in 2001, as a coalition of Upper Fraser First Nations. Its primary objective is to further the fisheries and aquatic resource related interests of the Upper Fraser First

⁵⁰⁵ FRAFS website: <http://www.frafs.ca/?q=node/5>

⁵⁰⁶ FRAFS website: <http://www.frafs.ca/?q=node/5>

⁵⁰⁷ FRAFS website “About FRAFS”: <http://www.frafs.ca/?q=node/7>

⁵⁰⁸ FRAFS website “About FRAFS”: <http://www.frafs.ca/?q=node/7>

⁵⁰⁹ Chairperson

⁵¹⁰ FRAFS website: <http://www.frafs.ca/?q=node/29>

⁵¹¹ CAN046502

Nations.⁵¹² According to its website, the UFFCA seeks to achieve this by working to ensure that the anadromous stocks within the Upper Fraser Watershed are managed in a sustainable and effective manner based on the best available science, traditional ecological knowledge and meaningful principles of conservation and ecosystem health.⁵¹³

319 The UFFCA states that its key functions are to do as follows:⁵¹⁴

- Provide technical analysis and advice on stock conservation including the identification of stocks in need of conservation actions;
- Review federal, and to a lesser degree, provincial fisheries programs, stock and habitat assessments, enhancement initiatives, and government policies and practices related to conservation of UFFCA stocks of interest;
- Respect and honour the role of Aboriginal traditional knowledge (ATK) and its role in informing and furthering science; and
- Provide information to UFFCA member communities on a wide range of policy issues and programs related to fisheries resources.

320 The UFFCA membership consists of approximately 29 Aboriginal organizations situated throughout all portions of the Upper Fraser Watershed from the confluence of Deadman Creek to the headwaters of the Fraser River. The UFFCA is lead by an executive director (Brian Toth), a board of directors (eight individuals representing seven member Bands),⁵¹⁵ community fish representatives, technical biologists⁵¹⁶ and administrative staff.⁵¹⁷

⁵¹² UFFCA website: http://www.uffca.ca/index.php?option=com_content&view=article&id=1&Itemid=82

⁵¹³ UFFCA Facebook Page: <http://www.facebook.com/group.php?gid=27851381472>

⁵¹⁴ UFFCA website: http://www.uffca.ca/index.php?option=com_content&view=article&id=45&Itemid=2

⁵¹⁵ Noella William (Xat'sull First Nation), Thomas Alexis (Tl'azt'en Nation), Paul Grinder (Tsilhqot'in National Government), Randy Billyboy (Tsilqot'in National Government), Andrew Meshue (Williams Lake Indian Band), Bill Sepert (Carrier Sekani Tribal Council), Irvin Gagnon (Lheidli Tenneh First Nations) and Terry Boyd (Red Bluff First Nation).

⁵¹⁶ UFFCA website: http://www.uffca.ca/index.php?option=com_content&view=article&id=47&Itemid=64

⁵¹⁷ UFFCA website: http://www.uffca.ca/index.php?option=com_content&view=article&id=47&Itemid=64

321 The UFFCA is an AAROM body and in fiscal year 2009-2010 it received \$663,000 from DFO as part of a Collaborative Management Agreement.⁵¹⁸

Lower Fraser Aboriginal Fishery Assembly

322 A Lower Fraser Aboriginal Fishery Assembly (“LFAFA”) is a relatively new AAROM body representing the Sto:lo Tribal Council, Musqueam Indian Band, Matsqui Indian Band, Chehalis Indian Band and Sto:lo Nation. It succeeds former Lower Fraser Aboriginal fisheries groups such as the Lower Fraser Fishing Authority and the Lower Fraser Aboriginal Resource Management Board. The mandate of the LFAFA is to do as follows:⁵¹⁹

- Provide basic support to re-establish a Lower Fraser forum to facilitate tier 1 (First Nations to First Nations) discussions on fisheries;
- Develop an effective participation model for Lower Fraser River First Nations to address common issues while maintaining their individual watershed / sub-watershed AFS and AAROM groups; and
- Eventually engage with DFO once the First Nation to First Nation model is firmly established.

Interim Marine and Approach Working Group

323 DFO advises that several marine and approach area First Nations have met on an informal basis to discuss their mutual fisheries interests, in a group called the Interim Marine and Approach Working Group (“IMAWG”).

Selected First Nations Fisheries Reports

324 This section of the policy and practice report highlights three prominent reports authored by First Nations groups that have provided information and recommendations relevant to Aboriginal fisheries and Fraser River sockeye. This summary represents only a limited glimpse of the many First Nations reports on fisheries issue.

⁵¹⁸ CAN037742

⁵¹⁹ CAN185655

Our Place at the Table⁵²⁰

325 In January 2004, a steering committee made up of leaders of the First Nations Summit and the BC Aboriginal Fisheries Commission appointed a First Nation Panel on Fisheries comprised of Russ Jones, Marcel Shepert and Neil Sterritt. The First Nation Panel on Fisheries was asked to articulate a vision for future fisheries management and allocation and to identify what principles would help to achieve that vision. It was also asked to describe a workable framework for management that would provide some certainty to users in terms of access and use of fisheries resources.

326 To complete their task, the First Nation Panel on Fisheries held public meetings in seven B.C. communities and considered written and oral submissions. The Panel also commissioned reports analyzing the following: the case law surrounding the Aboriginal right to fish; treaties and other processes relating to fisheries allocation and management; situations in other jurisdictions; and various fisheries in different parts of British Columbia. In May 2004, it published “Our Place at the Table” and offered the following seven recommendations to the Government of Canada:

- Canada must immediately take steps to ensure that First Nations have access to adequate quantities of fisheries resources for food, social and ceremonial purposes.
- As a starting point and as an interim measure, Canada take immediate steps to allocate to First Nations a minimum of 50 per cent share of all fisheries, with the understanding that this may eventually reach 100 per cent in some fisheries.
- First Nations themselves must address intertribal allocations.
- Canada immediately increase treaty settlement funds, or funds through other negotiating processes, to enable purchase or buy-back of licences and allow for the reallocation recommended above.
- Canada immediately recognize in policy, and implement through negotiated agreements, the Aboriginal right to manage fisheries.

⁵²⁰ CAN002698

- Canada clearly articulate how it will provide fisheries resources for First Nations commercial benefit, in light of the uncertainty created by the *Kapp* decision and the loss of pilot sales.
- A moratorium be placed on the further introduction of individual property rights regimes such as Individual Fishing Quotas (IFQs) unless First Nation interests including allocations in those fisheries are first addressed.

*BC First Nations Fisheries Action Plan*⁵²¹

327 In May 2007, the First Nations Leadership Council (consisting of the BC Union of Indian Chiefs, the First Nations Summit and the BC Assembly of First Nations) released its report entitled “BC First Nations Fisheries Action Plan: Preparing for Transformative Change in the BC Fishery” (the “Action Plan”).

328 According to the Action Plan, First Nations in BC had lacked a strong, collective vision and strategy to achieve progress on their goals in the fishery, and “as a result, First Nations often find themselves reacting to issues that arise from government decisions on policy, legislation and programs, as well as actions and decisions taken by the commercial, sport and recreational fishing sectors or others.”⁵²² To address this issue, BC First Nations gathered together in the fall of 2006 to build upon the work of the First Nation Panel on Fisheries’ “Our Place at the Table” report.

329 The Action Plan was developed as a result of these meetings amongst First Nations. It outlines a vision, goals and principles for changes in management and allocation in the BC fisheries, and is intended to provide a “solid foundation for future action.” In doing so, the Action Plan identifies six key themes and develops multiple action items in respect of each of them. The themes are as follows:

- Relationships and Reconciliation;
- Aquatic Resource Sharing (Allocation);
- Safeguarding Habitat and Responding to Threats;

⁵²¹ CAN032610

⁵²² CAN032610 at p.1.

- Aquatic Resource Management;
- Building Solid Economic Opportunities; and
- Negotiations and Litigation.

330 The Action Plan also proposes the creation of a BC First Nations Fisheries Council, to “engage with First Nations in implementing a detailed work plan” based on the action items set out in the Action Plan.

First Nations Fisheries Council – DFO Commitment to Action

331 The First Nations Fisheries Council, guided by the BC First Nations Fisheries Action Plan, is developing a shared “Commitment to Action” with DFO. This document outlines priority work plan items to change the way DFO manages the fisheries. Specific items in the work plan relate to: 1) a process for developing a co- management framework with BC First Nations; 2) section 35 FSC fisheries; 3) DFO’s proposed move to a defined share system for salmon; and 4) aquaculture framework discussions.⁵²³

332 As of May 26, 2010 the draft Commitment to Action had not yet been signed by both parties.⁵²⁴

*A Scoping of Aboriginal Implications of Renewal of the Fisheries Act, 1985*⁵²⁵

333 In 2006, the Assembly of First Nations commissioned Russ Jones, of the Haida Fisheries Program, to produce a discussion paper on the Aboriginal implications of renewal of the *Fisheries Act*. In a fairly comprehensive report, this discussion paper gives the background behind some of the proposed *Fisheries Act* changes, analyzes components of the *Fisheries Act* under review and identifies priority issues to be considered by First Nations. The discussion paper also provides a summary of recommendations.

⁵²³ In regards to a Draft Work Plan, see CAN033852.

⁵²⁴ CAN069364

⁵²⁵ CAN014192

APPENDIX 1: A Timeline of Selected Policies, Programs, Cases and Reports relating to Aboriginal Fisheries and Fraser River sockeye

1980

December *Jack et al v. The Queen*, [1980] 1 S.C.R. 294.

1982

Turning the Tide: A New Policy for Canada's Pacific Fisheries, Commission on Pacific Fisheries Policy, by Dr. Peter Pearse

1989

March *Tsawout Indian Band v. Saanichton Marina Ltd. (1989)*
Inter-Tribal Fishing Treaty Between Indian Nations signed by eleven Tribal Councils

1990

May *R. v. Sparrow*, [1990] 1 S.C.R. 1075

1992

June DFO announces Aboriginal Fisheries Strategy (AFS). The Pilot Sales Program is introduced as part of AFS.

December DFO announces Aboriginal Guardian Program

1993

April "Fraser Watershed Agreement" is signed by DFO and "Schedule A" First Nations

June Governor-in-Council enacts the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332

August DFO issues its *Policy for the Management of Aboriginal Fishing*

1994

DFO establishes the Allocation Transfer Program (ATP), as part of AFS
Fraser River Aboriginal Fisheries Secretariat (FRAFS) established by First Nations and DFO

1995

December *R. v. Sampson* (1995), 16 B.C.L.R. (3d) 226 (B.C.C.A.)

December *R. v. Jack, John and John* (1995), 16 B.C.L.R. (3d) 201 (B.C.C.A.)

Fraser River Sockeye 1994: Problems and Discrepancies, Report of the Fraser River Sockeye Public Review Board, by Hon. John Fraser, Chair

Report to the Minister of Fisheries and Oceans on the Renewal of the Commercial Pacific Salmon Fishery, Pacific Policy Roundtable, by Louis Tousignant

1996

- April *R. v. Lewis*, [1996] 1 S.C.R. 921
April *R. v. Nikal*, [1996] 1 S.C.R. 1013
April *R. v. Badger*, [1996] 1 S.C.R. 771
August *R. v. Van der Peet*, [1996] 2 S.C.R. 507
August *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672
August *R. v. Gladstone*, [1996] 2 S.C.R. 723
October *R. v. Adams*, [1996] 3 S.C.R. 101
Tangled Lines: Restructuring the Pacific Salmon Fishery, A Federal/Provincial Review of the Mifflin Plan

1997

- January *Comeau's Sea Foods v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12
December *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010
Department of Indian and Northern Affairs publishes *Gathering Strength: Canada's Aboriginal Action Plan*

1998

The West Coast Report, Report of the Standing Committee Fisheries and Oceans Canada, by Charles Hubbard, M.P., Chair

1999

- March *R. v. Sundown*, [1999] 1 S.C.R. 393
September *R. v. Marshall*, [1999] 3 S.C.R. 456
November *R. v. Marshall*, [1999] 3 S.C.R. 533
Pacific Salmon: Sustainability of the Fisheries, Report of the Auditor General of Canada

2000

- July *R. v. Huovinen*, 2000 BCCA 427
The Effects of Salmon Farming in BC on the Management of Wild Salmon Stocks, Report of the Auditor-General of Canada

2001

Upper Fraser Fisheries Conservation Alliance (UFFCA) established
Independent Review of Improved Decision Making in the Pacific Salmon Fishery, Institute for Dispute Resolution, University of Victoria, by Stephen Owen and Maureen Maloney

2002

- December *Wewaykum Indian Band v. Canada*, 2002 SCC 79

2003

- September *R. v. Powley*, [2003] 2 S.C.R. 207
- October Sliammon First Nation ratifies Agreement-in-Principle
The 2001 Fraser River Salmon Fishery, Report of the Standing Committee on Fisheries and Oceans, by Tom Wappel, M.P., Chair
Review of the 2002 Fraser River Sockeye Fishery, Report by the External Steering Committee, by Patrick Chamut, Chair

2004

- February *Snuneymuxw First Nation v. British Columbia*, 2004 BCSC 205
- October DFO establishes Aboriginal Aquatic Resource and Oceans Management Program (AAROM)
- November *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550
- November *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511
Treaties and Transition: Toward a Sustainable Fishery on Canada's Pacific Coast, Report of the Federal-Provincial Task Force, by Prof. Donald McRae and Dr. Peter Pearse
Salmon Stocks, Habitat, and Aquaculture, Report of the Federal Commission of the Environment and Sustainable Development
Salmon Stocks, Habitat, and Aquaculture, Report of the Auditor General of New Brunswick
Our Place at the Table: First Nations in the BC Fishery, First Nation Panel on Fisheries, by Russ Jones, Marcel Shepert and Neil Sterritt

2005

- March Yekooche First Nation ratifies Agreement-in-Principle
- March "Leadership Accord" signed by the BC Assembly of First Nations, First Nations Summit and Union of BC Indian Chiefs
- November "Transformative Change Accord" signed by the Government of British Columbia, the Government of Canada, and the First Nations Leadership Council
- November *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388
DFO issues "*Our Waters, Our Future*" Strategic Plan, 2005-2010
Part One: Fraser River Sockeye Report, by Hon. Bryan Williams, Chair
Here we go again... or the 2004 Fraser River Salmon Fishery, Report of the Standing Committee on Fisheries and Oceans, by Tom Wappel, M.P., Chair
An Assessment of Fisheries and Oceans Canada Pacific Region's Effectiveness in Meeting Its Conservation Mandate, David Suzuki Foundation, by David L. Peterson, Allen Wood and Julia Gardner

2006

- December *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686
A Scoping of Aboriginal Implications of Renewal of the Fisheries Act, 1985,
Assembly of First Nations, by Russ Jones

2007

- March Lheidli T'enneh Band votes against ratification of Final Agreement
May *R. v. Douglas et. al.*, 2007 BCCA 265
July DFO announces Pacific Integrated Commercial Fishery Initiative (PICFI)
July Tsawwassen First Nation ratifies Final Agreement
July Huu-ay-aht First Nations ratify the Maa-nulth Final Agreement
August In-SHUCK-ch First Nation signs Agreement-in-Principle
October Ka:'yu:'k't'h'/Che:k'tles7et'h First Nations ratify the Maa-nulth Final Agreement
First Nations Fisheries Council (FNFC) established
DFO issues *An Integrated Aboriginal Policy Framework, 2006-2010 Final Report, Volume One*, Special Committee on Sustainable Aquaculture, Legislative Assembly of British Columbia, by Robin Austin
BC First Nations Fisheries Action Plan: Preparing for Transformative Change in the BC Fishery, First Nations Leadership Council

2008

- June *R. v. Kapp*, 2008 SCC 41
August *R. v. Douglas*, 2008 BCSC 1098
Interim-Fraser River and Approach Working Group (I-FRAWG) created to organize meetings of the Forum on Conservation and Harvest Planning for Fraser Salmon (FORUM)

2009

- April Tsawwassen First Nation Treaty comes into effect
November *Ahousaht Indian Band v. Canada (AG)*, 2009 BCSC 1494
December *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2009 BCCA 593
Intertribal Treaty Organization (ITO) established
Final Report and Recommendations, Report of the BC Pacific Salmon Forum, by the Honourable John Fraser
Protecting Fish Habitat, Report of the Commissioner of the Environment and Sustainable Development

2010

- February Final Agreement initialled by Yale First Nation; ratification pending
Priorities and Strategies for Canada's Wild Pacific Salmon and Steelhead, Pacific Fisheries Resource Council

2011

April Maa-nulth Final Agreement to come into force

2012

March Pacific Integrated Commercial Fishery Initiative (PICFI) scheduled to terminate

APPENDIX 2: A Summary of Selected Recommendations from Previous Reports relating to Aboriginal Fisheries and Fraser River Sockeye

The following tables contain a selection of recommendations from previous reports that relate to Aboriginal participation in fisheries or fisheries management. This is not a comprehensive list of all recommendations that may have been made in relation to these topics. In particular, general recommendations that bear on all harvest groups may or may not have been included.

2005 – Bryan Williams: The 2004 Southern Salmon Fisher Post-Season Review⁵²⁶

Number	Recommendation
5.	“The use of the First Nations FSC harvest in marine waters should be incorporated as part of the test fishing program on a long-term basis. This requires secure long-term funding for the catch monitoring carried out during the First Nations Marine Society FSC fishery.”
6.	“That DFO convene a meeting with First Nations, fisheries stakeholders, and Conservation and Protection staff to assess the province-wide state of catch monitoring. The participants should examine budgets, personnel needs, transparency, accuracy (bias), problem areas, and ways to improve monitoring programs in all sectors.”
7.	“That DFO, First Nations and stakeholders establish a semi-regular (perhaps annual) review of the status and adequacy of the province-wide catch monitoring program.”
10.	“That resources for catch monitoring be restored to an adequate level in commercial, recreational, and First Nations fisheries as determined through the process in recommendation 6.”
23.	“Approval of a change in gear type, such as the 2004 approval of the use of drift gill nets by the Cheam First Nation, should not take place in the absence of an objective determination of the comparative fishing power of the different gear.”
44.	“The PSC FRP is the critical link in management of Fraser sockeye. The Canadian consultative and management structures for all fisheries impacting on Fraser sockeye should be integrated with the Canadian section of the FRP. In particular, First Nations’ consultative processes must be fully engaged with that process. In addition, the Canadian chair of the FRP should be the senior authority on all fisheries management decisions relating to Fraser sockeye throughout the South Coast and be empowered to make those decisions on a timely basis.”
45.	“DFO should vigorously pursue solutions to resource sharing and aboriginal claim accommodation.”

⁵²⁶ CAN002496

2004 - The First Nation Panel on Fisheries: Our Place at the Table: First Nations in the BC Fishery⁵²⁷

Number	Recommendation
1	"Canada immediately take steps to ensure First Nations have access to adequate quantities of fisheries resources for food, social and ceremonial purposes."
2	"As a starting point and an interim measure, Canada should take immediate steps to allocate to First Nations a minimum 50 per cent share of all fisheries, with the understanding that this may eventually reach 100 per cent in some fisheries."
3	"First Nations themselves must address intertribal allocations."
4	"Canada immediately increase treaty settlement funds, or funds through other negotiating processes, to enable purchase or buy-back of licences and allow for the reallocation above."
5	"Canada immediately recognize in policy, and implement through negotiated agreements, the aboriginal right to manage fisheries."
6	"Canada clearly articulate how it will provide fisheries resources for First Nations commercial benefit, in light of the uncertainty created by the <i>Kapp</i> decision and the loss of pilot sales."
7	"A moratorium be placed on the further introduction of individual property rights regimes such as Individual Fishing Quotas unless First Nation interests including allocations in those fisheries are first addressed."

2004 – D. McRae and P. Pearse: Treaties and Transitions, Toward a Sustainable Fishery on Canada’s Pacific Coast⁵²⁸

Number	Recommendation
Fisheries Management	
[FM]1.	"The same rules of fishing and the same standards for reporting catches should apply to all commercial fishers." (p. 19)
Coordination of Fishing	
[CoF]3.	"Membership on the Commercial Salmon Advisory Board and Area Harvest Committees should be adjusted over time to include representation of new participants, such as the Nisga'a and other First Nations that engage in commercial fishing." (p. 32)
Co-Management	
[CM] 1.	"The Minister of Fisheries and Oceans (Minister) should issue a policy statement declaring that the government supports co-management as a means of improving the management of fisheries. " (p. 31)
[CM]4.	"Membership in a Fisheries Association should be required for anyone participating in a particular commercial fishery. " (p. 31)

⁵²⁷ CAN002698

⁵²⁸ CAN001130

Transition	
[T] 1.	“DFO should announce formally that it will offset adverse impacts on established fishers arising from reallocation of rights to fish under treaty settlements. “ (p. 48)
[T] 2.	“Whenever new commercial fishing rights that will adversely impact established fishers are created, or allocations of fish for the aboriginal food fishery (for food, social and ceremonial purposes) are significantly increased, equivalent rights should be purchased from the established commercial sector.” (p. 49)
[T] 3.	“Pending the appeal of the Kapp decision, DFO should consult with First Nations representatives to identify possible interim arrangements for First Nations fishing in order to facilitate an orderly transition both to treaties and to an integrated commercial fishery.” (p. 50)
[T] 5.	“There should be close consultation between DFO and First Nations licence holders about the nature of the restrictions to be included in the new quota licences for First Nations commercial fishers.” (p. 51)

2003 – Patrick Chamut: Review of the 2002 Fraser River Sockeye Fishery⁵²⁹

Number	Recommendation
1	<p>“Wild Salmon Policy</p> <p>It is recommended that the Department [DFO] conduct consultations on a wild salmon policy and associated guidelines, with First Nations, harvesters and other interest groups including conservation organizations, and the policy should be finalized by December 31, 2003. This policy will provide a framework for defining conservation objectives for naturally spawning salmon and will include direction for resource management (conservation units and reference points), habitat protection, enhancement and aquaculture.”</p>
3	<p>“Fraser River First Nations Watershed Process</p> <p>It is recommended that the Fraser River First Nations Watershed process be further supported by ensuring technical support is provided for continued improvements in the efficiency of annual management planning and consultation processes.</p> <p>Also, support should be provided to coastal First Nations who choose to form an aggregate body representing First Nation communities.”</p>
5	<p>“IFMP Issues for 2003</p> <p>Pending completion of a wild salmon policy and completion of long-term escapement goals for Fraser River sockeye, it is recommended that consultations be held with First Nations and stakeholders (including conservation organizations) on escapement targets to guide resource management for the 2003 fishery. As well, there will be consultations on the management objectives for Cultus Lake and Sakinaw Lake sockeye in 2003, relating to both fishing and habitat protection, and</p>

⁵²⁹ CAN002450

	other means of stock rebuilding.”
6	<p>“Food, Social, and Ceremonial Obligations</p> <p>All harvesting plans will continue to be designed to ensure that, after conservation objectives have been addressed, priority access for FSC purposes is provided over other uses.”</p>
8	<p>“Enforcement</p> <p>It is recommended that the Department [DFO] consult with First Nations and stakeholders on enforcement issues:</p> <p>...</p> <ul style="list-style-type: none"> • Partnership arrangements and protocols with First Nations and stakeholders should be developed or improved, wherever possible. These would formalize the shared roles and responsibilities, and could include improved monitoring and catch reporting, co-management issues, or on-ground interactions between the parties. <p>...”</p>
10	<p>“In-Season Estimates and Data</p> <p>It is recommended that the Department [DFO] work with the staff of the Pacific Salmon Commission, First Nations and stakeholders to develop improved in-season estimates of run size and timing. A number of avenues will be explored to develop these improvements:</p> <p>...</p> <ul style="list-style-type: none"> • traditional knowledge and on-water information will be evaluated as a means of augmenting these information sources; and <p>...”</p>

2003 – Tom Wappel: The 2001 Fraser River Salmon Fishery, Report to SCOFO⁵³⁰

Number	Recommendation
1	<p>“That DFO return to a single commercial fishery for all Canadians, in which all participants in a particular fishery would be subject to the same rules and regulations. Consequently DFO should bring to an end the pilot sales projects and convert current opportunities under the pilot sales program into comparable opportunities in the regular commercial fishery.”</p>
3	<p>“That, as long as pilot sales agreements continue, food and sale fisheries on the Fraser River and elsewhere on the coast of British Columbia be kept completely separate; and</p> <p>That equal priority of access to the resource be provided to all commercial fisheries</p>

⁵³⁰ CAN002446

	whether public or AFS pilot sales fisheries and that all measures required for conservation purposes be applied equally to both fisheries.”
4	“That DFO establish realistic Aboriginal food fisheries and that the Department follow through on the commitment of the previous Minister to the Standing Committee on Fisheries and Oceans to ensure that food fishery access is not being abused.”
6	<p>“That DFO fund and support activities of more fisheries officers;</p> <p>That any person who has been convicted of a fisheries violation, not be designated as guardian;</p> <p>That DFO provide the resources for guardians to complete all phases of their training;</p> <p>That the monitoring and enforcement component be separated out of AFS agreements and that the guardian program be funded directly to ensure stability of the program and to provide autonomy to Aboriginal fisheries officers and guardians; and</p> <p>That, to provide greater independence for Aboriginal fisheries officers and guardians, they, together with DFO fisheries officers, be responsible to the head of DFO enforcement.”</p>

2001 – Institute for Dispute Resolution (IDR): Independent Review of Improved Decision Making in the Pacific Salmon Fisher: Final Recommendations, 2001⁵³¹

Number	Recommendation
CONTEXT STATEMENT AND SYNOPSIS OF RECOMMENDATIONS	
6.	“Establish a Policy Advisory Committee (PAC) and a public Policy Forum process for discussion of key policy issues amongst all sectors, First Nations and the federal and provincial governments.”
7.	“Strengthen the three tiered process that First Nations and Governments are developing in order to more effectively fulfill Constitutional and fiduciary obligations and ensure that the three tiered process is effectively integrated into the overall system of decision making while simultaneously enabling improved First Nation participation in multi-party discussions.”
9.	“The recommendations contained in this report should be provided to First Nations for consideration in the Tier 2, government to government, consultation between First Nations and Fisheries and Oceans Canada that will occur after this independent review is completed. This consultation will include how First Nations will be resourced to participate meaningfully.”

⁵³¹ CAN000047

1999 – Auditor General of Canada: Chapter 20, Fisheries and Ocean: Pacific Salmon: Sustainability of the Fisheries, November 1999⁵³²

Number	Recommendation
p. 20-18, para. 20.61	“The Department [DFO] should evaluate the comprehensiveness and quality of data collected under the Aboriginal Fisheries Strategy (AFS) and the adequacy of the standards and procedures that guide data collection, compilation and reporting, with a view to improving and expanding the role of the AFS in this area.”

1998 – Charles Hubbard, M.P.: West Coast Report, Report of the SCOFO, 1998⁵³³

Number	Recommendation
4.	<p>Aboriginal Issues</p> <p>“The Committee recommends that:</p> <p>The government reconsider its AFS Pilot Sales Program and further recommends that increased aboriginal participation in the commercial fishery be achieved by buying back existing commercial licences and transferring them to First Nations fishermen. However, this should not diminish the Department's [DFO] overall objective of reducing fleet capacity.”</p>

1997 – James Matkin: Working Towards More Certainty and Stability: Fact Finding Review of the AFS Pilot Salmon Sales Program, February 1997⁵³⁴

Number	Recommendation
p.37	“It is also recommended that responsibility for the administration of the allocations, which cover the AFS pilot sales, be transferred from the DFO to the new arms-length tribunal.”

1996 – Art May: Altering Course, A Report to the Minister of Fisheries and Oceans on the Intersecoral Allocation of Salmon in British Columbia⁵³⁵

Number	Recommendation
<i>Summary Letter to the Minister</i>	
Para. 17	“The first priority in allocation is and will continue to be allocations for food, social and ceremonial purposes under Section 35 of the Constitution Act. It will also be necessary to set out certain requirements as a consequence of treaties and other agreements with First Nations.”

⁵³² CAN002511

⁵³³ CAN002837

⁵³⁴ CAN000263

⁵³⁵ CAN000280

1995 – John Fraser: Fraser River Sockeye 1994, Problems and Discrepancies⁵³⁶

Number	Recommendation
4.	“We recommend that DFO, in conjunction with provincial authorities, First Nations, commercial and recreational fishery groups, implement (both in marine and in-river areas) a revised system to ensure that catch information is timely and reliable, given that accurate counting and timely reporting of catch are fundamental to conservation. The system must also include a more stringent paper trail wherein there must be stricter control of landing and sales slips and a mandatory retention of sales slips with fish through to retail sale or export.”
6.	“We recommend that DFO develop better co-ordinated inter-party communications among its staff and between its staff and PSC, First Nations, commercial and recreational fishing groups, with a greater degree of co-operation aimed at enhanced in-season management and post-season evaluation and at fostering closer working arrangements among all parties, and facilitate clearer and more transparent management and allocation policies.”
7.	“We recommend that DFO and PSC give First Nations greater and more meaningful access to, and involvement in, the management process.”
8.	“We recommend that DFO, PSC, First Nations and user groups institute a formalized pre-season review of each season's management plans and strategies to be followed by a post-season performance analysis. Independent experts should be invited to assist in extending the range of expertise and in promoting transparency in the management process.”
19.	“We recommend that DFO ensure that AFS agreements clearly identify the Minister's responsibility for conservation, and that final authority to regulate and protect fish and fish habitats remains vested in DFO.”
20.	“We recommend that DFO expedite the implementation of an effective training program to develop fisheries management, enforcement and administrative capacity within First Nation communities.”
21.	“We recommend that DFO, in consultation with First Nations, separate food and commercial fish in time and space to promote more effective enforcement.”
22.	“We recommend that all AFS agreements contain a dispute resolution mechanism and, when feasible, be cast within multi-year frameworks.”
23.	“We recommend that the pilot sales project not be expanded at present.”
24.	<p>“We recommend that, in those AFS agreements having a pilot sales component:</p> <ul style="list-style-type: none"> • no sale of fish or payments to First Nations for AFS purposes be permitted until agreements are completed and signed; • the agreements specify that DFO Fishery Officers and Aboriginal Fishery

⁵³⁶ CAN032201

	<p>Officers be responsible to and directed by a DFO official;</p> <ul style="list-style-type: none"> • landing sites be clearly identified; • the agreements require that fish landings and the sale of fish be documented; and • any sale of fish other than that recorded and documented at a designated landing station be deemed to be an illegal sale.”
25.	“We recommend that in First Nation territories where there are no AFS agreements, DFO implement plans to improve the quality of catch estimates.”
26.	“We recommend that DFO pursue a policy of purchasing licences in the commercial sector and transferring these to First Nation communities, not for traditional Aboriginal fisheries, but to increase their participation in established commercial fisheries in a manner consistent with the laws and regulations pertaining thereto.”

1992 – Peter Pearse: Managing Salmon in the Fraser, Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation⁵³⁷

Number	Recommendation
Essential Conditions for Success	
	<p>“Indian groups must work together</p> <p>Ideally all tribal groups in B.C. would agree to negotiate collectively...to enter into an interim fisheries framework agreement. ... Even more urgent is a riverwide agreement embracing all Indian communities on the Fraser.</p> <p>...</p> <p>Tribal groupings and bands in the Fraser basin face widely differing circumstances and have differing aspirations. These must be accommodated in order to reach agreement and can best be done with sub-agreements for particular bands or groups of bands.</p> <p>...</p> <p>These arrangements should be designed to facilitate contractual arrangements among Indian communities. ...Native groups themselves must work together to affect these changes... . The government should support [current] efforts and move as quickly as possible.” (p. 30-31)</p>
	<p>“Strict Enforcement</p> <p>...</p> <p>Any new Agreements must have strong enforcement designed to generate the support and co-operation of native signatories through joint programs, monitoring and surveillance. This cannot be achieved without the active participation of native people...The Department [DFO] must accept ultimate responsibility for enforcement.</p>

⁵³⁷ CAN002473

	..." (p. 32-33)
	<p>“Consultative Structures <i>Consultation on Broader Issues of Indian Fishery Policy</i></p> <p>... [S]ome native groups, mainly on the upper Fraser, expressed a need for a forum to consider broader issues of Indian fisheries policy, such as their rights to quantities or shares of migrating stocks [T]he expressed need for a forum to deal with such issues should be acknowledged and if other mechanisms prove inadequate, something additional should be created.” (p. 35)</p>
	<p>“Agreements <i>Landing sites</i></p> <p>“Musqueam and Tsawwassen group, which fishes from boats with nets, designated particular sites for landing fish under their Agreement, thus facilitating the recording of catches. Up-river, Sto:lo fishermen fish mainly from the shore with set gillnets; the designated landing sites were not enforced. Last summer’s experience suggests that in order to maintain accurate records of catches it will be necessary to identify certain sites to which catches must be brought for that purpose.” (p. 36)</p>
	<p>“Agreements <i>Control of Fishing Effort</i></p> <p>Since the native communities themselves are in the best position to deal with the allocation of permits, future Agreements should call on them to control the amount of gear within an agreed limit.” (p. 36)</p>

APPENDIX 3: Summary and Comparison of Fraser River sockeye related Provisions from Fisheries Chapters of Modern Final Agreements

	Lheidli T'enneh (LT)	Tsawwassen (TFN)	Maa-nulth (MN)	Yale (YFN)
Effective Date	Not in force. Ratification vote failed on March 30, 2007.	3 April 2009	1 April 2011	Not in force. Not yet ratified.
Date Initialled or Signed by Negotiators	29 October 2006 (initialled)	6 December 2007 (signed)	9 April 2009 (signed)	5 February 2010 (initialled)
FSC Sockeye Salmon Allocation	<ul style="list-style-type: none"> • 2% of Cdn TAC (up to Cdn TAC of 250,000) • 5,000 sockeye plus 1.246% of Cdn TAC above 250,000 (where Cdn TAC more than 250,000 and less than 840,000) • Maximum of 12,350 sockeye (s.31) 	<ul style="list-style-type: none"> • 1% of Cdn TAC (up to Cdn TAC of 500,000) • 5,000 sockeye plus 0.40904% of Cdn TAC above 500,000 (where Cdn TAC more than 500,000 and less than 3,000,000) • Maximum of 15,226 sockeye (s.23, Appx J-2) 	<ul style="list-style-type: none"> • 0.13366% of Cdn TAC • No maximum (s.10.1.19e, Sched.5) 	<ul style="list-style-type: none"> • 0.9097% of Cdn TAC • Maximum of 7,278 sockeye (s. 8.7.1, Sched. 8-A)
Does treaty specify that Minister may reduce FSC sockeye allocation?	<p>No. Only "Fixed" Harvest Levels may be reduced.</p> <p>Where LT has a Fixed Harvest Level for a stock or species of salmon, and the Minister, in a year, reduces fixed allocations for FSC to other Aboriginal groups for that stock or species, the</p>	<p>No. Only "fixed number" allocations may be reduced. No definition for "fixed number".</p> <p>In any year, in respect of a stock or species for which there is a TFN allocation expressed as a "fixed number" and the quantity of stock or</p>	<p>No. Only "fixed amounts" or "minimum amounts" may be reduced. No definition for these terms.</p> <p>In any year, in respect of a MN allocation for a species or stock that is a fixed amount or has a minimum, and the quantity of</p>	<p>Yes. Reduction is not limited to fixed number allocations.</p> <p>In any year, where the quantity of a stock or species available for harvest is not sufficient to meet all anticipated allocations to YFN and other Aboriginal groups</p>

	<p>Minister may reduce the LT Fixed Harvest Level for that year (s.101)</p> <p>“Fixed”, in relation to Harvest Levels, means a constant quantity or quota of Salmon that does not change with abundance (chapter 1 definitions)</p>	<p>species available for harvest is not sufficient to meet all anticipated allocations for FSC purposes, the Minister may reduce the allocation (s.24)</p>	<p>species or stock is not sufficient to meet all anticipated allocations for MN and other Aboriginal groups, the Minister may, considering JFC recommendations, reduce the allocation (s.10.1.22)</p>	<p>for FSC purposes, the Minister may reduce the allocation (s.8.7.2); Minister will inform take into account JFC recommendations (s.8.7.3) and provide reasons to the YFN and JFC (s.8.7.4)</p>
Overage / Underage Adjustment	<p>Fisheries Operational Guidelines will provide a system of adjusting FSC harvest level to account for “overages and underages” in catch in previous years (s.52)</p>	<p>Fisheries Operational Guidelines will provide a system of adjusting FSC harvest level to account for “overages and underages” in catch in previous years (s.28, Appx J-3)</p>	<p>Fisheries Operational Guidelines will describe when and how adjustments are made to a MN allocation to account for harvests that exceed or fail to meet MN allocation in a year (s.10.4.40)</p>	<p>Fisheries Operational Guidelines will provide a system of adjusting FSC harvest level to account for “overages and underages” in catch in previous years (s.8.8)</p>
Limitations on FSC Catch	<p>Fishing Area (s.1) Conservation (s.2a) Public health (s.2b) Public safety (s.2b)</p>	<p>Fishing Area (s.1, s.6) Conservation (s.2) Public health (s.2) Public safety (s.2)</p>	<p>Fishing Area (s.10.1.6b) Conservation (s.10.1.2) Public health (s.10.1.2) Public Safety (s.10.1.2)</p>	<p>Fishing Area (s.8.1.4.a) Conservation (s.8.1.3) Public health (s.8.1.3) Public Safety (s.8.1.3)</p>
Who can catch FSC sockeye?	<p>Any individual designated by LT (member or non-member)(s.5)</p>	<p>Any individual designated by TFN (member or non-member) (s.15, s.55)</p>	<p>Any individual designated by MN (member or non-member) (s.10.1.44)</p>	<p>Any individual or vessel designated by YFN (member or non-member) (s.8.6.2)</p>
Fisher Documentation required?	<p>Yes, LT will issue documentation to every individual</p>	<p>Yes, where TFN designates an individual or</p>	<p>Yes, where MN designates an individual or</p>	<p>Yes, where YFN designates an individual or</p>

	who harvests under the Fishing Right (s.27)	vessel, TFN will issue written documentation (s.57)	vessel, MN will issue written documentation (s.10.1.52)	vessel, YFN will issue documentation (s.8.6.5)
Sale of FSC sockeye?	No (s.8, s.11)	No (s.19)	No (s.10.1.9)	No (s.8.1.17)
Transfer of FSC fish to Harvest Agreement	Yes, up to 50% of FSC fish can be transferred to Harvest Agreement allocation (s.32-34)	Not mentioned.	Not mentioned.	Not mentioned.
Trade and Barter of FSC sockeye?	Yes, amongst LT and with other Aboriginal people resident in Canada (s.9)	Yes, amongst TFN and with other Aboriginal people of Canada (s.4)	Yes, amongst MN or with other Aboriginal people of Canada (s.10.1.4)	Yes, amongst YFN or with other Aboriginal people of Canada (s.8.4.1)
Surplus Salmon returning to Fishing Area	Minister may authorize the LT to harvest surplus salmon returning to LT fishing area on agreement with LT re: terms and conditions (s.59)	Minister to set procedures for identification and harvest of surplus salmon in Harvest Document, with recommendations from JFC (s.74)	Minister may authorize harvest of surplus salmon and set terms and conditions, with recommendations from JFC (10.3.1-3)	Minister may authorize harvest of surplus salmon and set terms and conditions, with recommendations from JFC (s.8.10.1-3)
No fee FSC fishery	Not mentioned.	Neither Canada nor BC will charge a fee for a Harvest Document, or any management fee or landing fee in respect of FSC fisheries (s.18)	MN are not required by Canada or BC to pay any fee or charge for a MN Harvest Document (s.10.4.33)	Canada will not charge a fee for a Harvest Document, or any management fee or landing fee in respect of FSC fisheries (s.8.1.6); BC will not charge a fee for a Harvest Document (s.8.1.7)
Fisheries Management Fund	\$3,000,000 to establish a fisheries fund to support ongoing	\$1,000,000 to establish a fisheries fund to promote	None.	None.

	fisheries management programs, including conservation and protection, sustainable management, stewardship (s.22-23)	conservation and protection, facilitate sustainable management, promote stewardship (s.97)		
Commercial Fishing Capital Support	None.	\$1,155,000 for a "Tsawwassen Commercial Fish Fund"	On the Effective Date, Canada will issue to MN three salmon licences (one category A licence for Area D gill net and two category A licences for Area G troll) (s. 10.2.12; Sched 8)	None.
Annual Fishing Plan	LT to develop an annual fishing plan, re: FSC harvest, location/timing, methods, monitoring, reporting etc and provide to the JFC, who will make recommendations to the Minister (s.93-95)	TFN to develop an annual fishing plan re: FSC harvest, location/timing, method, gear, monitoring, reporting, enforcement etc. and provide to the JFC, who will make recommendations to the Minister (s.65-67)	MN to submit an annual fishing plan to the JFC (s.10.4.5) setting out stocks harvested, location, timing, method, gear, monitoring, enforcement, etc (s.10.4.29); the JFC will review it and make recommendations to the Minister (s.10.4.9)	YFN to develop an annual fishing plan re: FSC harvest, location, timing, gear, catch data, catch monitoring, reporting, enforcement, etc. and provide to the JFC, who will make recommendations to the Minister (s.8.14.1-4)
Data Collection	Parties will provide each other with access to such information as may be reasonably necessary, including catch data related to the FSC fishery,	TFN will provide catch data and other info as required by Harvest Document, Federal or Provincial law (s.22)	MN will provide catch data and other info as required by Harvest Documents, Federal or Provincial law (s.10.1.18)	YFN will provide biological samples, catch data and other info as required by Harvest Document, federal or provincial law (s.8.1.8)

	to enable the JFC to carry out its functions (s.70)			
Fisheries Operational Guidelines	Canada, BC and LT will establish and maintain the FOGs, setting out principles, procedures and guidelines to assist them and the JFC in implementing the fisheries chapter of the Final Agreement (s.106); FOGs are not a treaty, are not part of the treaty, and do not create legal obligations (s.107)	Canada, BC and TFN will establish and maintain the FOGs, setting out principles, procedures and guidelines to assist them and the JFC in implementing the fisheries chapter of the Final Agreement (s.79-80)	Canada, BC and MN will establish and maintain FOGs, setting out principles, procedures and guidelines to implement the fisheries chapter of the Final Agreement (s.10.4.39) FOGs will include procedures of the JFC (s.10.4.13)	Canada, BC and YFN will develop and maintain FOGs to assist in implementing the fisheries chapter of the Final Agreement (s.8.5); FOGs do not create legal obligations (s.8.5.3) FOGs will describe exchange of info procedures re: biological samples, catch data (s.8.1.9)
Joint Fisheries Committee	Yes, with one member from Canada, BC and LT (s.69) To cooperatively plan for FSC fishing, fisheries management, monitoring and enforcement, environmental protection, etc. (s.67, s.71)	Yes, with one member from Canada, BC and TFN (s.70) To facilitate cooperative assessment, planning and management of FSC fishery, enhancement, stewardship, monitoring, enforcement, etc. (s.68ff)	Yes, established by Canada and a representative from each MN First Nation (s.10.4.3); BC may also appoint one member (s.10.4.4) To cooperatively plan and manage FSC fishery, stock assessment, enhancement, stewardship, catch monitoring, enforcement, environmental protection, ocean management etc. (s.10.4.1)	Yes, with one member from Canada, BC and YFN (s.8.11.12) To cooperatively plan FSC fishery, monitoring, enforcement etc. (s.8.11.1)
Minister retains	Yes (s.6)	Yes (s.14)	Yes (s.10.1.8)	Yes (s.8.1.16)

authority to manage and conserve fish				
Harvest Document	Minister will issue LT a Treaty Harvest Document for FSC harvest, with conditions (s.96ff)	Minister will issue TFN a Harvest Document (s.59ff); harvesting under the Fishing Right will be in accordance with Harvest Documents (s.5,)	Minister will issue MN one or more Harvest Documents (s.10.4.30); harvesting under the Fishing Right will be conducted in accordance with the Harvest Documents (s.10.4.32)	Minister will issue YFN a Harvest Document (s.8.15.1); harvesting under the Fishing Right will be in accordance with the Harvest Documents (s.8.1.5)
In-Season changes to Harvest Document	Yes, but Minister will give notice and receive recommendations from JFC as far in advance as possible and will notify LT (s.102-105)	Yes, but if possible, Minister will give notice, provide reasons, discuss amendment in advance, with TFN and JFC (s.63-64)	Yes, Minister will give notice and, where practical, discuss the amendment in advance with MN and JFC (s.10.4.36)	Yes, Minister will give notice and written reasons and, where practical, discuss change in advance with YFN and JFC (s.8.15.6)
Law making (FN law prevails over BC/Fed law)	<ul style="list-style-type: none"> Who may harvest under the FSC right Distribution of fish caught under the FSC right to LT members Other matters as agreed (s.24) 	<ul style="list-style-type: none"> Who, and which vessels may harvest under the FSC right Distribution of fish caught under FSC right to TFN members (s.51) 	<ul style="list-style-type: none"> Who, and which vessels, may harvest under the FSC right Distribution of fish caught under FSC right to MN members (s.10.1.39) 	<ul style="list-style-type: none"> Who, and which vessels, may harvest under the FSC right Distribution of fish caught under FSC right to YFN members (s.8.3.1)
Law making (BC/Fed law prevails over FN law)	<ul style="list-style-type: none"> Trade or barter of FSC fish Distribution, at no charge, of FSC fish to non-LT members Documentation to be held by designated fisher (s.26, 	<ul style="list-style-type: none"> Trade or barter of FSC fish Who may fish under licences issued to TFN that are not FSC Harvest Documents Documentation to be held 	<ul style="list-style-type: none"> Trade or barter of FSC fish Documentation to be held by designated fisher and vessel (s.10.1.41) 	<ul style="list-style-type: none"> Trade or barter of FSC fish Documentation to be held by designated fisher and vessel (s.8.3.3)

	s.28)	by designated fisher (s.53)		
Harvest Agreement?	Yes (s.60-61)	Yes (s.102)	Yes (s.10.2.1)	Yes (s.8.2.1)
Enforcement Agreement?	Not mentioned.	Parties may negotiate enforcement agreements in respect of fisheries (s.92-93)	Not mentioned.	Not mentioned.
Stewardship and Enhancement Agreement?	Not mentioned.	Canada and TFN may negotiate agreements in respect of TFN enhancement and stewardship activities (s.95)	Parties may negotiate agreements concerning MN enhancement and stewardship activities (s.10.5.2)	Canada and TFN may negotiate agreements in respect of YFN enhancement and stewardship activities (s.8.16.2)
Aquaculture Tenure?	Not mentioned.	TFN may give notice within 10 years that it wishes to negotiate a shellfish aquaculture tenure (s.108-110)	MN may apply to BC for a shellfish aquaculture tenure in lands designated for MN (s.10.2.10)	Not mentioned.
Contemplates Emerging Commercial Fisheries?	No.	Yes, where Minister proposes emerging commercial fisheries, TFN will be advised and consulted on participation and allocation (s.106-107)	Yes, where Minister proposes emerging commercial fisheries in the west coast of Vancouver Island, MN will be advised and consulted on participation and allocation (s.10.2.6)	No.
Contemplates Multi-FN Fisheries Management?	Yes, if multi-FN fisheries management process	Yes, if "regional fisheries committee" established for	Yes, where a "regional fisheries committee" is established for	Yes, if "regional management advisory process for Aboriginal

	established in FR watershed, LT may be consulted and participate (s.77ff)	FN fisheries, the parties will determine which JFC functions may be left to that committee (s.81ff)	Aboriginal fisheries, the parties will determine which JFC functions may be left to that committee (s.10.4.17)	fisheries” established, JFC will determine which JFC functions may be left to that process (s.8.12ff)
Contemplates Multi-sector Advisory Process?	Yes, if multi-sector fisheries advisory process established, LT may be consulted and participate (s.89ff)	Yes, if “public fisheries management advisory process” established, TFN may be consulted and participate (s.89-91)	Yes, if “public fisheries management advisory process” MN may participate on the same basis as other FNs (s.10.4.27)	Yes, if “public fisheries advisory process” established, YFN may participate on the same basis as other FNs (s.8.13.1)

APPENDIX 4: Summary and Comparison of Fraser River sockeye related Provisions from Harvest Agreements

	Lheidli T'enneh (LT)	Tsawwassen (TFN)	Maa-nulth (MN)	Yale (YFN)
Effective Date	Not in force	1 January 2010	Not yet in force.	Not in force.
Date Signed by Negotiators	Unknown	8 December 2006	__ December 2006	5 February 2010
Term	25 years (s.11)	25 years (s.3)	25 years (s.4)	25 years (s.19)
Renewals	Automatically renewed in perpetuity on the same terms and conditions (s.12)	Renewed for 15 year terms in perpetuity, at the option of TFN (s.4)	Renewed for 15 year terms in perpetuity, at the option of MN (s.5)	Automatically renewed for additional 15 year terms, in perpetuity, on the same terms and conditions unless YFN gives notice of non-renewal (s.20)
Commercial Allocation	<ul style="list-style-type: none"> • 0.7043 % of Cdn Commercial TAC of Upper Fraser Sockeye Salmon for that year (s.16a) • plus any transfer of up to 50% of the FSC Catch (s. 16b and Final Agreement s. 32-33) 	<ul style="list-style-type: none"> • 0.78% of Cdn Commercial TAC of FR Sockeye (s.11a) 	None.	<ul style="list-style-type: none"> • 1.0027% Cdn Commercial TAC of FR Sockeye Salmon where no licences relinquished • 1.0518% Cdn Commercial TAC where one Area E Salmon Gill net licence relinquished • 1.1009% Cdn Commercial TAC where two Area E Salmon Gill net licences relinquished • 1.15% Cdn Commercial TAC where three Area E Salmon Gill

				net licences relinquished (s.12a-d)
Licences	Each year, the Minister will issue one or more Licences to provide for the Commercial Allocation (s.7)	Each year, the Minister will issue to the TFN licences for the TFN Commercial Allocation (s.12); if no licence is issued, the Minister will provide written reasons to TFN (s.9)	<p>In any year with a General Commercial Fishery for Area D Gill Net, the Minister will issue MN a salmon licence for Area D for each Area D Salmon Gill Net Licence relinquished by MN (s.11)</p> <p>In any year with a General Commercial Fishery for Area G troll, the Minister will issue MN a salmon licence for Area G for each Area G Salmon Troll Licence relinquished by MN (s.12)</p> <p>Up to 8 licences may be relinquished (s.14) within 15 years (s.15);</p> <p>If no licences are issued because of conservation, public health or public safety, the Minister will provide reasons to MN (s.9)</p>	Each year where there will be a commercial fishery for FR sockeye, the Minister will issue a licence to YFN (s.8); if no licence is issued, the Minister will provide written reasons to YFN (s.7)
Surplus Allocation	Joint Fisheries Committee (JFC)	Not mentioned.	Not mentioned.	Not mentioned.

	may recommend an allocation of the surplus salmon entering the LT Fishing Area (s.21)			
Minister retains authority to manage commercial fishery	Minister retains authority to manage commercial fisheries, including whether to have a commercial fishery and if so, where and when (s.8)	Minister retains authority to manage commercial fisheries, including whether to have a commercial fishery and if so, where and when (s.8)	Minister retains authority to manage commercial fisheries, including whether to have a commercial fishery and if so, where and when (s.8)	Minister retains authority to manage commercial fisheries, including whether to have a commercial fishery and if so, where and when (s.6)
Area Restriction	LT Fishing Area only (s.7)	TFN Fishing area, unless otherwise agreed, or unless the licence issued is comparable to an Area E Gillnet Licence, in which case the area will be the same as for other holders of Area E Gillnet Licences (s.17)	Built into licences as Area D (s.11) or Area G (s.12) [Area D is comprised of a portion of the south coast; Area G is comprised of a portion of the west coast of Vancouver Island and Queen Charlotte Strait]	All or part of the YFN Fishing Area (s.10)
Stock or species Restriction	Yes, stock and species restriction. Allocation is based on "Upper Fraser Sockeye Salmon" only (s.7) "Upper Fraser Sockeye Salmon" means sockeye salmon that originate in the FR drainage system in or upriver of Naver Creek, but does not include kokanee salmon	Species restriction only. Allocation is based on "Fraser River Sockeye Salmon" "Fraser River Sockeye Salmon" means sockeye salmon that return to the Fraser River drainage system, but does not include kokanee salmon (s.1)	No stock or species restriction evident in Harvest Agreement (but may be set out in licences). Area D and Area G licences refer only to "salmon" (s.11-12)	Species restriction only. Allocation is based on "Fraser River Sockeye Salmon" "Fraser River Sockeye Salmon" means sockeye salmon stocks whose natal waters are in the Fraser River watershed (s.1)

	(s.2)			
Fishery Restrictions	Fishing subject to closures (s.4)	Minister retains authority to determine whether to have a commercial fishery (s.8)	Minister retains authority to determine whether to have a commercial fishery (s.8)	Minister retains authority to determine whether to have a commercial fishery (s.6)
Other Restrictions	Not mentioned.	Fishing limited by measures necessary for conservation, public health or public safety (s.7)	Fishing under the Agreement is subject to conservation, public health and public safety (s.7)	Fishing is subject to measures necessary for conservation, public health or public safety (s.5)
Designation of Fisher	LT to designate who carries out the Licence (s.30) and issue personal non-transferable documentation to that person (s.31)	TFN to designate individuals and vessels to fish under the licences (s.30); and issue written documentation to evidence designation (s.34)	MN to designate individuals and vessels to fish under the licences (s.83); and issue written documentation to indicate the designation (s.85)	YFN to designate who carries out the Licence (s.30) and issue personal non-transferable documentation to that person (s.31)
Fees	Minister will not charge a fee for Licences (s.34)	Minister will not charge a fee for licences under the agreement (s.38)	Neither Canada nor BC will charge a fee for licences under the agreement (s.88)	Minister will not charge a fee for Licences (s.34)
Management Costs	LT may be required to pay management costs, if other commercial fishers must pay as well (s.35)	TFN may be required to pay management costs, other than licence fees, if other commercial fishers must pay as well (s.39)	MN may be required to pay management costs, other than licence fees, where other commercial fishers must pay as well (s.89)	YFN may be required to pay management costs, if other commercial fishers must pay as well (s.35)
Harvest Agreement Fishing Plan	Each year, LT will give the JFC, for its review, a fishing	Each year, TFN will give the JFC, for its review and	Not mentioned.	Not mentioned.

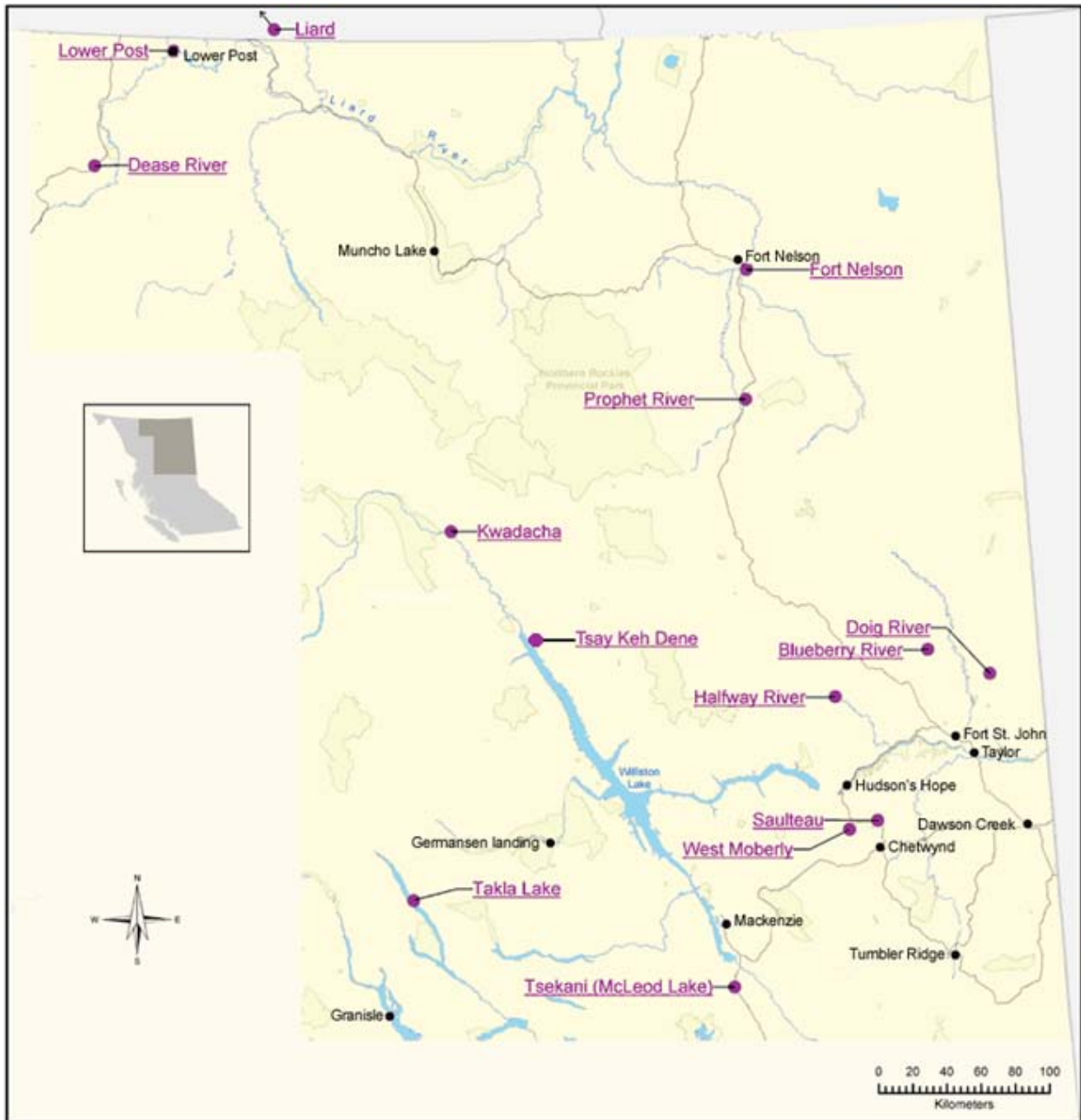
	<p>plan setting out how LT plans to fish under this Agreement (gear, timing, stocks, catch monitoring, reporting, etc). The JFC forwards its recommendations to the Minister, who retains authority over provisions in the Licence (s.37-42)</p>	<p>comment, a fishing plan setting out stocks to be fished, method, location, gear, vessels, catch monitoring, reporting, etc. (s.40-42); Minister will provide comments received from an integrated planning process to TFN and JFC (s.44); TFN may voice disagreement with comments from the integrated planning process (s.45); Minister will provide written reasons to TFN and JFC for any differences between the licence and proposals from TFN (s.47)</p>		
<p>Integrated Commercial Fishery Planning</p>	<p>If Minister establishes a planning process for commercial fisheries for Upper Fraser Sockeye Salmon, LT will be consulted (s.44) and may participate (s.43)</p>	<p>TFN may participate in integrated planning processes established by the Minister, and in consultative processes, on the same basis as other participants in other commercial fisheries (s.48-49)</p>	<p>MN will participate in integrated planning processes on a similar basis as other participants in the general commercial fishery (s.79); If the Minister established consultative processes regarding fisheries management systems or</p>	<p>YFN will participate in integrated planning processes on a similar basis as other participants in the general commercial fishery (s.37)</p>

			management costs, MN may participate on the same basis as participants in other commercial fisheries (s.80)	
Contemplates future quota-system?	No.	Commercial Allocation will be changed to the new system on the same basis as for the General Commercial Fishery (s.19) Also requires JFC to conduct a post-season review (s.20)	Licences issued under the agreement will be changed to the new system on the same basis as for the General Commercial Fishery (s.77)	YFN may request that any new quota be reallocated to the Commercial Allocation, or any Commercial Allocation be reallocated to the new system (s.42-44)
Amendment	On negotiation pursuant to the dispute resolution process set out in the Final Agreement (s.14) or on written agreement of the parties (s.15)	With written agreement of the parties (s.52); a party may request amendment and the other party must indicate if it is willing to negotiate amendment (s.50-51)	With written agreement of the parties (s.92)	With written agreement of the parties (s.24)
Fair compensation on amendment / termination	The Commercial Allocation may be reduced, or the agreement terminated upon 240 days notice and payment of fair compensation as determined via dispute resolution (s. 26-29)	Any party may reduce the allocation or terminate the agreement on one year's notice (s.54); TFN will be entitled to fair recompense as determined by negotiation or dispute resolution (s.55-60)	Any party may terminate the agreement or reduce fishing access described in the agreement on 120 days notice (s.94); MN will be entitled to fair compensation (s.95) as negotiated (s.96) or determined by dispute resolution (s.98)	The Commercial Allocation may be reduced, or the agreement terminated upon 240 days notice and payment of fair compensation as determined via dispute resolution (s.25-28)

Assignment	LT may not assign or subcontract the Agreement or any part thereof (s. 52)	TFN may not assign or subcontract the agreement or any part thereof (s.68)	MN may not assign the agreement or any part thereof (s.109)	YFN may not assign or subcontract the Agreement or any part thereof (s.48)
Note:			Harvest agreement may be amended if a right to fish and to sell fish caught under that right on a commercial basis is held by the highest court that hears <i>Ahousaht</i> litigation (s.90 and s.10.2.3 of the Final Agreement)	

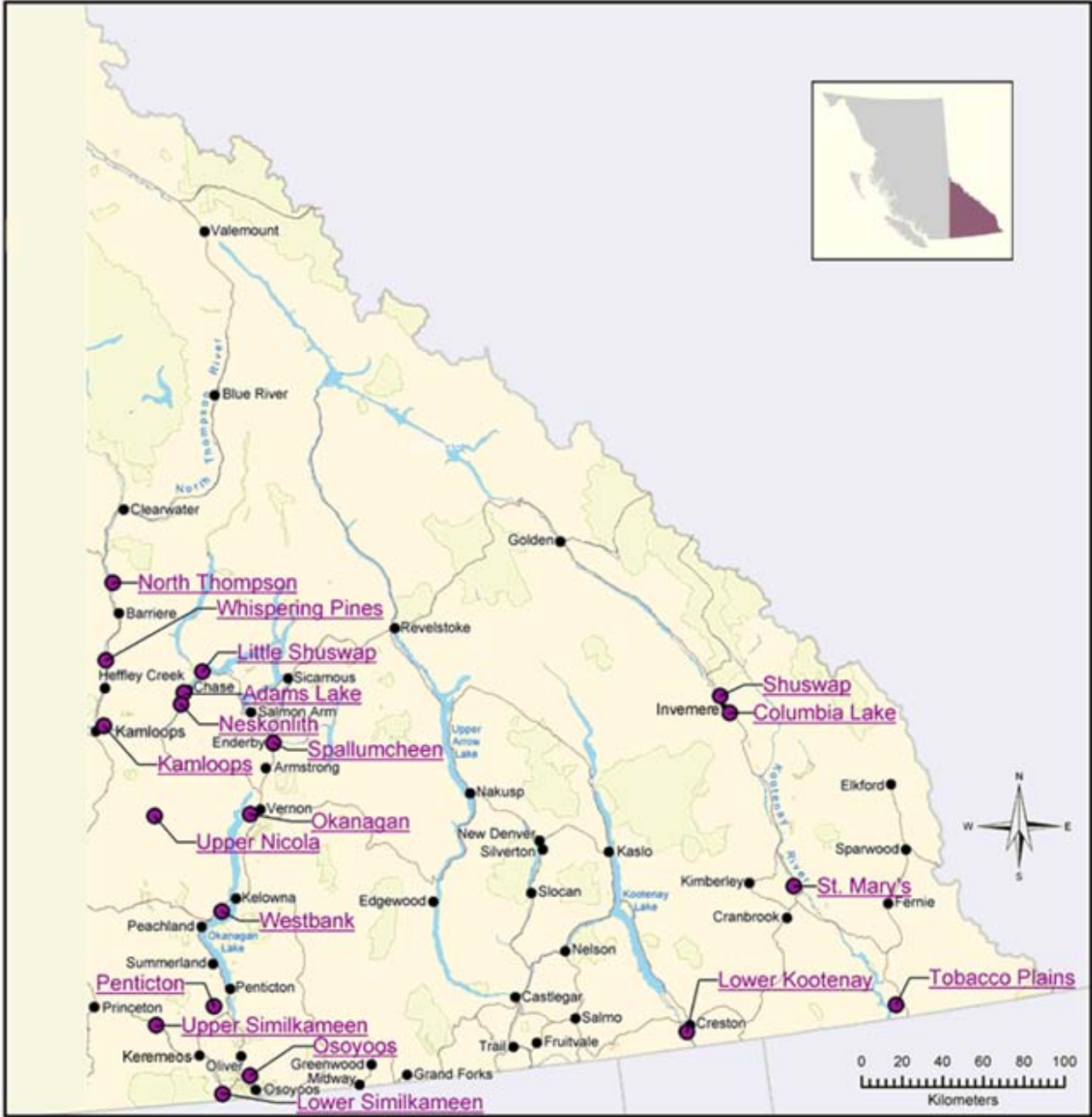
APPENDIX 5: Maps of British Columbia First Nations according to the BC Ministry of Aboriginal Relations and Reconciliation⁵³⁸

Map of North Western BC First Nations According to the Ministry of Aboriginal Relations and Reconciliation



⁵³⁸ Ministry of Aboriginal Relations and Reconciliation website: <http://www.gov.bc.ca/arr/treaty/regional.html#>

Map of South Eastern BC First Nations According to the Ministry of Aboriginal Relations and Reconciliation



Map of South Western BC First Nations According to the Ministry of Aboriginal Relations and Reconciliation



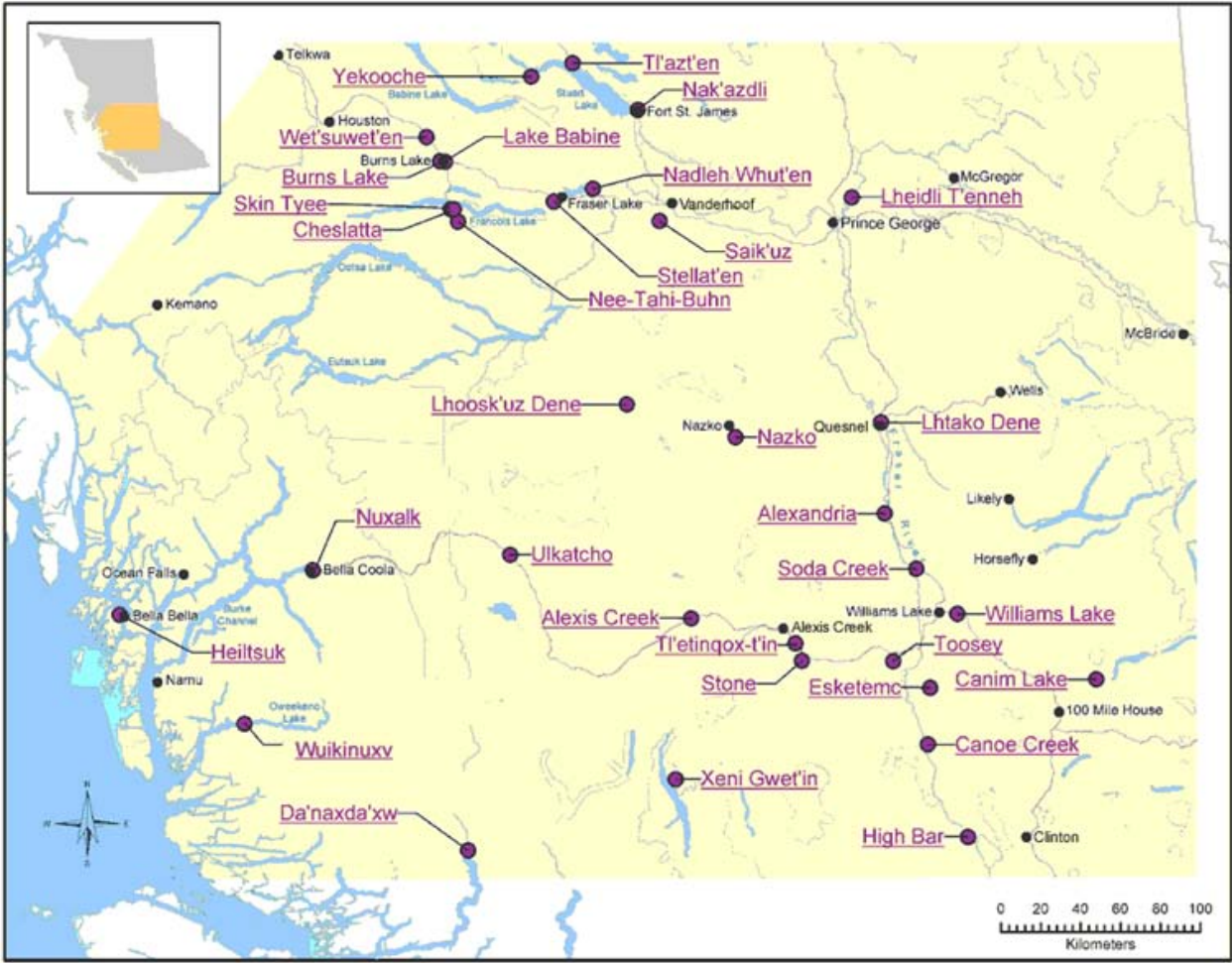
Map of Vancouver Island First Nations According to the Ministry of Aboriginal Relations and Reconciliation



Map of North Western BC First Nations According to the Ministry of Aboriginal Relations and Reconciliation



Map of Central BC First Nations According to the Ministry of Aboriginal Relations and Reconciliation



APPENDIX 6: List of Documents Referred to in this Policy and Practice Report

TITLE	DOCUMENT IDENTIFIER OR SOURCE
Backgrounder, Fisheries Guardian Program, December 7, 1992	CAN000001
Fiduciary Relationship of the Crown with Aboriginal Peoples: Implementation and Management Issues: A Guide for Managers: Report of an Interdepartmental Working Group to the Committee of Deputy Ministers on Justice and Legal Affairs, October 1995	CAN000008
2003 Pacific Fisheries Licensing Unit Manual: Aboriginal Communal Commercial Licensing, updated June 20, 2003	CAN000020
DRAFT Framework and Guidelines for Implementing the Co-management Approach: Context, Concept and Principles, January 1999	CAN000046
Independent Review of Improved Decision Making in the Pacific Salmon Fishery, Institute for Dispute Resolution, University of Victoria, 2001	CAN000047
Guidelines Respecting the Issuance of licenses under the <i>Aboriginal Communal Fishing Licenses Regulations</i> , DFO, February 7, 2001	CAN000059
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