

Commission of Inquiry into the Decline of
Sockeye Salmon in the Fraser River



Commission d'enquête sur le déclin des
populations de saumon rouge du fleuve Fraser

Public Hearings

Audience publique

Commissioner

L'Honorable juge /
The Honourable Justice
Bruce Cohen

Commissaire

Held at:

Room 801
Federal Courthouse
701 West Georgia Street
Vancouver, B.C.

Tuesday, July 5, 2011

Tenue à :

Salle 801
Cour fédérale
701, rue West Georgia
Vancouver (C.-B.)

le mardi 5 juillet 2011



Errata for the Transcript of Hearings on July 5, 2011

Page	Line	Error	Correction
78	42	CMP	C&P
83	19	matte	matter
85	7	'sort of' is repeated twice	remove sort of
85	33	delve into	development of

APPEARANCES / COMPARUTIONS

Patrick McGowan Jennifer Chan	Associate Commission Counsel Junior Commission Counsel
Mark East Charles Fugère	Government of Canada ("CAN")
Clifton Prowse, Q.C. Boris Tyzuk, Q.C.	Province of British Columbia ("BCPROV")
No appearance	Pacific Salmon Commission ("PSC")
Chris Buchanan	B.C. Public Service Alliance of Canada Union of Environment Workers B.C. ("BCPSAC")
No appearance	Rio Tinto Alcan Inc. ("RTAI")
No appearance	B.C. Salmon Farmers Association ("BCSFA")
No appearance	Seafood Producers Association of B.C. ("SPABC")
No appearance	Aquaculture Coalition: Alexandra Morton; Raincoast Research Society; Pacific Coast Wild Salmon Society ("AQUA")
No appearance	Conservation Coalition: Coastal Alliance for Aquaculture Reform Fraser Riverkeeper Society; Georgia Strait Alliance; Raincoast Conservation Foundation; Watershed Watch Salmon Society; Mr. Otto Langer; David Suzuki Foundation ("CONSERV")
No appearance	Area D Salmon Gillnet Association; Area B Harvest Committee (Seine) ("GILLFSC")

APPEARANCES / COMPARUTIONS, cont'd.

Phil Eidsvik	Southern Area E Gillnetters Assn. B.C. Fisheries Survival Coalition ("SGAHC")
No appearance	West Coast Trollers Area G Association; United Fishermen and Allied Workers' Union ("TWCTUFA")
Keith Lowes	B.C. Wildlife Federation; B.C. Federation of Drift Fishers ("WFFDF")
Tina Dion	Maa-nulth Treaty Society; Tsawwassen First Nation; Musqueam First Nation ("MTM")
John Gailus Sarah Sharp	Western Central Coast Salish First Nations: Cowichan Tribes and Chemainus First Nation Hwlitsum First Nation and Penelakut Tribe Te'mexw Treaty Association ("WCCSFN")
Brenda Gaertner Leah Pence	First Nations Coalition: First Nations Fisheries Council; Aboriginal Caucus of the Fraser River; Aboriginal Fisheries Secretariat; Fraser Valley Aboriginal Fisheries Society; Northern Shuswap Tribal Council; Chehalis Indian Band; Secwepemc Fisheries Commission of the Shuswap Nation Tribal Council; Upper Fraser Fisheries Conservation Alliance; Other Douglas Treaty First Nations who applied together (the Snuneymuxw, Tsartlip and Tsawout); Adams Lake Indian Band; Carrier Sekani Tribal Council; Council of Haida Nation ("FNC")
Joseph Gereluk	Métis Nation British Columbia ("MNBC")

APPEARANCES / COMPARUTIONS, cont'd.

Tim Dickson	Sto:lo Tribal Council Cheam Indian Band ("STCCIB")
No appearance	Laich-kwil-tach Treaty Society Chief Harold Sewid, Aboriginal Aquaculture Association ("LJHAH")
Krista Robertson	Musgamagw Tsawataineuk Tribal Council ("MTTC")
Ming Song Lisa Fong Benjamin Ralston	Heiltsuk Tribal Council ("HTC")

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1
PANEL NO. 50
Cross-exam by Mr. East (CAN)

1 Vancouver, B.C./Vancouver
2 (C.-B.)
3 July 5, 2011/le 5 juillet 2011
4

5 THE REGISTRAR: The hearing is now resumed.
6

7 BARRY ROSENBERGER, recalled.
8

9 ROSS WILSON, recalled.
10

11 ERNIE CREY, recalled.
12

13 MARCEL SHEPERT, recalled.
14

15 MR. MCGOWAN: Mr. Commissioner, the examination of this
16 panel will continue with Mark East going next.

17 THE COMMISSIONER: Thank you.

18 MR. EAST: Mark East for the Governor -- Government of
19 Canada, with my co-counsel - I was thinking of
20 Governor Douglas, sorry - and my co-counsel
21 Charles Fugère. I have been allocated 55 minutes.
22 I'm going to try to keep this a bit shorter,
23 because I know we need to get back on time today.
24 So I'm going to try to get my time done in 45
25 minutes, if I can.
26

27 CROSS-EXAMINATION BY MR. EAST:
28

29 Q Most of my questions, at least to start with, will
30 be for Mr. Rosenberger. Mr. Rosenberger, at the
31 end of the day yesterday we were talking about --
32 Ms. Fong was asking questions about the Heiltsuk
33 fishery in 2010 and the fishery that took place in
34 Johnston Strait, which is outside the Heiltsuk
35 licensing area, and you were starting to provide
36 an answer with respect to some of the management
37 implications of harvesting outside of the fishing
38 area. And Ms. Fong ran out of time and you
39 weren't able to get to that answer. So I'd like
40 to start with that, if I may.

41 Before I do that, I just want to take -- I'd
42 like to look at a couple of documents and put them
43 to you, if I could. The first one is Exhibit 261,
44 and this is DFO's Policy for the Management of
45 Aboriginal Fishing, dated August 6th, 1993.
46 You're familiar with this document?
47

MR. ROSENBERGER: I am.

July 5, 2011

1 Q And this is a -- this is a public document. It's
2 on, it looks like this version is from the DFO
3 website?

4 MR. ROSENBERGER: That's correct.

5 Q If you go over to page 2, under "B. Policy",
6 subheading "Aboriginal Fishing", first bullet.
7 I'm just going to take you to a couple of quotes
8 and then I'm just going to ask you some questions.
9 It says here:

10
11 Aboriginal fishing should occur within the
12 areas that were used historically by the
13 aboriginal group of First Nation.
14

15 And then if we could go to page 7 of the document,
16 down under subheading "11. Designation of
17 Individuals", fourth bullet. And I just want to
18 read this into the record:
19

20 Aboriginal individuals who wish to fish in an
21 area outside their historical area must be
22 designated by an Aboriginal Fishing Authority
23 having a communal licence to fish in the area
24 in question. Such designation must be made
25 under the agreement or licence with the
26 relevant fishing authority and any fish
27 harvested pursuant to the designation will be
28 counted towards the allocation under its
29 licence.
30

31 Are you familiar with those two provisions of the
32 Policy?

33 MR. ROSENBERGER: Yes, I am.

34 Q And then if we can go to Exhibit 1229, please,
35 this is Canada's Tab 13. And if you go over to
36 page 2, under "Policy Guidance", there's three
37 bullets there. And I would just like to -- well,
38 maybe the second bullet, sub-bullet. First of
39 all, let me talk about this document. If we can
40 go back to the first page, sorry, I'll make sure
41 you understand -- you understand what this
42 document is.

43 So these are DFO's Guidelines for Responding
44 to Requests by Aboriginal Organizations to Fish
45 for Food, Social and Ceremonial (FSC) Purposes in
46 Areas Not Previously Authorized Under Communal
47 Licenses Issued by DFO. And it says at the top,

1 "Internal DFO Guidelines". Are you familiar with
2 these guidelines?

3 MR. ROSENBERGER: Yes, I am.

4 Q So going back, sorry, to page 2. Maybe I'll just
5 go to the fourth sub-bullet:

- 6
7 o Where an Aboriginal individual wishes to
8 fish for FSC purposes in an area outside
9 their community's historical area, and
10 in the historic area of another
11 Aboriginal group, the individual may be
12 designated by the other Aboriginal group
13 to fish under their communal licence for
14 FSC purposes for the area in question.
15 The other Aboriginal group must count
16 the harvest against the allocation
17 provided under the communal licence
18 issued to it.

19
20 And continuing further, the next paragraph:

21
22 With respect to the above points, see in
23 particular fisheries agreements negotiated
24 under the AFS and the following paragraphs
25 from the "Policy for the Management of
26 Aboriginal Fishing"...

27
28 And we just went to those. So let me stop there.
29 Would you agree that this is a long-standing DFO
30 policy.

31 MR. ROSENBERGER: Yes, I would.

32 Q And why is it, why is it that DFO has this policy.
33 Why can't First Nations fish their FSC allocation
34 under licences wherever they wish?

35 MR. ROSENBERGER: Under the court cases, the First
36 Nations have -- and their land claim treaty
37 process, First Nations have asserted a right and
38 titles to certain areas. So what we're striving
39 for here is to make sure that we're following in
40 that process. And from the Department's side of
41 things, in the -- well, up until 1992, in some
42 areas 1990, the Department issued individual
43 fishing licences to any First Nations person from
44 Canada to fish pretty much in any area. And that
45 was -- significant concerns were expressed by
46 First Nations that claimed certain territories,
47 that the Department was making -- was infringing

1 on their rights, limiting their fisheries or
2 causing other concerns.

3 And so the Department moved towards band
4 licensing, in some places around -- in some places
5 in the late '80s, but a few in 1990, and then all
6 areas with the policy change from the Aboriginal
7 fishery communal licences in 1992. So the
8 Department's trying to meet the objectives that
9 the First Nations have laid out, and that the
10 rights arise from a given area, not from, for
11 example, all of Canada.

12 Q Thank you for that. And are there management
13 implications with respect to especially, I guess,
14 for passing stocks with respect to this policy,
15 what we I guess call -- sometimes is called the
16 "Adjacency Policy".

17 MR. ROSENBERGER: The management implications I was
18 starting to describe yesterday is that the goals
19 and objectives are to try to understand the total
20 run size, but then to allocate that out to various
21 components. So a conservation or the spawning
22 objective being the highest priority, we take in
23 account for the Fraser a management adjustment
24 that takes into account the differences between
25 our estimates, or the estimates that are adopted
26 by the Panel, and what we might see as far as
27 catch and escapements upstream, and then allocate
28 out to the First Nations and others. And we're
29 doing that on the four stock groupings as has been
30 described in this process. And generally there's
31 one or more of those stocks is a limiting factor,
32 or it might even be another species, coho or pink
33 in different times.

34 And so when you are making those kinds of
35 determinations and trying to best utilize all the
36 fish and making an allocation to escapement and a
37 management adjustment or to a First Nation or to
38 some process, if there's other fish taken out in
39 addition to that and they're not accounted or
40 understood in the process, then you could be
41 creating conservation concerns or allocation
42 issues for some other groups.

43 Q So to put this in, I guess, in a summary way, it's
44 not just that DFO in managing the stocks needs to
45 know how many fish are being taken, but needs to
46 know where they're being taken and -- and when in
47 any given year?

1 MR. ROSENBERGER: That's correct.

2 Q Okay. Now, if we can go to the same document,
3 over the next page, and there's a list of
4 different -- maybe zero in on the list of nine
5 factors. And it says:

6
7 ...DFO will take the following factors into
8 account when reviewing a request from an
9 Aboriginal organization.

10
11 And this is a request for a change in fishing area
12 from what's in its licence. And there there's a
13 number there, and I guess number 3 is the one
14 we've just been talking about:

15
16 3. potential impact on other Aboriginal
17 groups or other users of the resource;

18
19 Is that what you're talking about, about the
20 potential impact of moving that harvest to another
21 area to -- outside the licence area? Is that --
22 was that what's being addressed there?

23 MR. ROSENBERGER: This is somebody making a request.
24 These are the -- some of the factors and that one
25 is one that could affect another group, and so
26 yes, this is part of that process that we're
27 concerned about.

28 Q Okay. I'll probably try to come back to this
29 issue if I have time, but I just want to go on to
30 another document and another topic. I'd like to
31 go to Commission's Tab 36, please. This is a
32 document dated February 7, 2001, "Guidelines
33 Respecting the Issuance of Licences under the
34 **Aboriginal Communal Fishing Licences Regulations.**"
35 Do you recognize this document?

36 MR. ROSENBERGER: I do.

37 MR. MCGOWAN: Perhaps I could have this marked as an
38 exhibit.

39 THE REGISTRAR: That will be Exhibit 1270.

40
41 EXHIBIT 1270: Guidelines Respecting the
42 Issuance of Licences under the **Aboriginal**
43 **Communal Fishing Licences Regulations**
44 **(ACFLR)**, February 7, 2001
45

46 MR. EAST:

47 Q Now, down at the bottom of that first page, and

1 it's talking about the *Sparrow* decision, and the
2 very last sentence, and this is something that
3 came up yesterday:
4

5 An additional consideration is that DFO does
6 not have the mandate to determine whether an
7 Aboriginal group has aboriginal or treaty
8 rights to fish, or the nature and scope of
9 any such rights.

10
11 And we discussed that yesterday, and I think your
12 evidence yesterday, Mr. Rosenberger, was that this
13 was something that properly falls within the
14 federal system, into the Department of Indian and
15 Northern Affairs.

16 MR. ROSENBERGER: That's correct.

17 Q Does this mean, however, that DFO doesn't consider
18 Aboriginal -- the issues of Aboriginal rights and
19 title when it's seeking to consult with First
20 Nations?

21 MR. ROSENBERGER: Could you reframe the question,
22 please.

23 Q Maybe we can go to page 4 of the document, please.
24 And here's a page that talks about the "Directives
25 for Licensing", and it discusses the issue of
26 consultation with Aboriginal organizations. And
27 one of the things that I've noticed in the
28 documents, and there's a good example here, is
29 there's references to Department of Fisheries
30 taking into account the historical fishing areas
31 of First Nations.

32 MR. ROSENBERGER: That's correct.

33 Q So it's kind of a, I would suggest, perhaps an
34 awkwardness in that whereas DFO doesn't have a
35 mandate to determine or seek to determine
36 Aboriginal rights and title. It nevertheless has
37 to be cognizant of First Nations assertions and
38 claims of Aboriginal rights and title when it
39 manages the fishery. Would you agree with that?

40 MR. ROSENBERGER: Yes, I would.

41 Q So would you agree that consultation with respect
42 to these sort of rights and title is an important
43 mandate for the Department of Fisheries and
44 Oceans?

45 MR. ROSENBERGER: Yes, I would.

46 Q Perhaps we can move to Commission Tab 32, please.

47 MR. LUNN: Would you like to mark (indiscernible - away

1 from microphone).

2 MR. EAST: I think this one --

3 MR. LUNN: I'm sorry, we just did --

4 MR. EAST: I think I did mark this one as an exhibit.

5 This is another DFO document entitled

6 "Management guidelines to address FSC sharing

7 arrangements for Fraser sockeye when Total

8 Allowable Catch does not meet FSC harvest

9 targets." Do you recognize this document?

10 MR. ROSENBERGER: Yes, I do.

11 MR. EAST: Can I have this one marked as an exhibit,
12 please.

13 THE REGISTRAR: That will be Exhibit 1271.

14

15 EXHIBIT 1271: Management guidelines to
16 address FSC sharing arrangements for Fraser
17 sockeye when Total Allowable Catch does not
18 meet FSC harvest targets, August 12, 2009
19 [DFO]

20

21 MR. EAST:

22 Q If we can just go over to the second page at the
23 bottom. And you can see it, just for the record,
24 at the bottom of the page it says "August 12,
25 2009". Under "Proposed Sharing Methods" in the
26 first sentence, it says:

27

28 With the exception of Early Stuart sockeye,
29 there is currently no arrangement to
30 apportion the pre-season FSC targets among
31 individual First Nations for each run-timing
32 group.

33

34 And I think that's consistent with the evidence we
35 heard yesterday, would you agree with that?

36 MR. ROSENBERGER: Yes, I would.

37

38 Q In other words, although the total FSC target
39 is split into the four run-timing groups for
40 planning purposes, there are no allocation
41 agreements in place to apportion fish from a
42 specific run-timing group among individual
43 First Nations groups. The Department is
44 proposing that any remaining FSC target
45 assigned to the other three run-timing groups
46 will be combined for the purposes of
47 apportioning among individual First Nations

1 groups.

2
3 I'm just going to stop there. And without going
4 into this in any further detail, is this the
5 document that kind of guides DFO managers in
6 apportioning FSC allocations, especially when
7 there's -- in low run years?

8 MR. ROSENBERGER: Yeah, when there's not enough sockeye
9 to meet all of the objectives that we have laid
10 out for First Nations, food, social and
11 ceremonial, and the IFMP, this is the guidelines
12 that we are using.

13 Q Okay. Yesterday, Mr. Rosenberger, and I think for
14 much of the discussion yesterday and last week,
15 we've been talking a lot about the parties'
16 different aspirations for co-management
17 arrangements that -- arrangements and processes.
18 And I think I gleaned from your evidence yesterday
19 your view that these processes, if that were --
20 that are underway, if successful, will set aside
21 integrated processes at the coast-wide and perhaps
22 sub-regional level for co-management of fish,
23 including sockeye.

24 MR. ROSENBERGER: That's correct.

25 Q In your view, will those processes wholly replace
26 engagement by DFO with First Nations at a local
27 level?

28 MR. ROSENBERGER: I don't believe that they will. The
29 Department is proposing a process where they're --
30 it's a pyramid, for want of a better word, but
31 there will be the bilateral or local area
32 consultations and co-management, and so the --
33 with defined issues and responsibilities that will
34 be clear, and some of the defined issues and
35 responsibilities at a sub-regional level, and then
36 others that might be at a watershed level or
37 larger.

38 Q And I guess the -- the concept there would be that
39 the engagement at the local level will be somehow
40 ideally integrated more -- more effectively than
41 perhaps at present, with these regional and coast-
42 wide bodies.

43 MR. ROSENBERGER: That's correct.

44 Q And is one of the issues, I guess, with respect to
45 DFO currently, is it true that especially in your
46 area, talk about the BC Interior, is a significant
47 portion of your time and resources, not just yours

1 but of your staff, spent in engaging with First
2 Nations at different levels?

3 MR. ROSENBERGER: That's true.

4 Q Yes. And one of the, I guess, perhaps benefits,
5 of this work for the Department of Fisheries and
6 Oceans in this time of perhaps finite resources,
7 that this would allow DFO to be able to allocate
8 its resources more efficiently with the same
9 results.

10 MR. ROSENBERGER: That's one of the objectives of
11 trying to build this process is so that there's
12 best use of all the resources, those that are
13 available to First Nations and those that are
14 available to the Department, and that we set those
15 priorities and process to the best use we can.

16 Q Perhaps we can go to Exhibit 1220, please. I
17 believe it's 1220, it's Canada's Tab 30. And
18 there was some discussion yesterday about
19 commitment, commitment on both sides, First
20 Nations and also the Government of Canada. I just
21 want to go to page 4 of this document -- well,
22 first of all, I'll just identify the document
23 again for the record. This is the -- I believe
24 it's a DFO document discussing "Overview of the
25 Fraser River Salmon Roadmap Initiative" and on
26 page 4, if we could go -- page 3 to the bottom,
27 sorry. And the last bullet, and we'll carry over
28 onto the next page:

29
30 • As outlined at previous Roadmap workshops,
31 DFO is committed to the overarching goal of
32 jointly (in partnership with First Nations)
33 building a co-management process for Fraser
34 Salmon that includes a vision, objectives,
35 roles and responsibilities, clear outcomes,
36 as well as a clear process for building an
37 agreement (i.e. "roadmap" or action plan).

38
39 And keep going down, please. And it's:

40
41 • Achieving this goal will require: --

42
43 And this is what I want to talk about a bit:

44
45 o a strong commitment from both DFO and
46 First Nations;
47 o dedication of resources from both DFO

1 and First Nations;
2

3 And I think, Mr. Rosenberger, this is consistent
4 with what we heard yesterday.

5 MR. ROSENBERGER: Yes, I believe it is.

6 Q And I guess one of the interesting Catch-22s about
7 this from both sides is that -- let's just talk
8 about it from DFO's perspective. To be a
9 commitment of -- in the terms of policy commitment
10 and resource commitment, I guess both sides would
11 like to have some sense that there's a prospect
12 that that money will be money well spent, and that
13 there will be a reasonable chance of success from
14 the commitments made. Would you agree with that?

15 MR. ROSENBERGER: Yes, I would.

16 Q And I think that goes both ways in the sense we
17 heard yesterday from the witnesses about concerns
18 that DFO may pull back from the efforts that First
19 Nations are putting in. I guess it's equally the
20 same from the Department of Fisheries and Oceans
21 that if you're going to go back and seek a mandate
22 and a commitment and money, some of the questions
23 you're going to be facing from your decision-
24 makers is to what extent in your view are First
25 Nations in a situation where they can respond and
26 provide this commitment. Would you expect that
27 that would be some of the responses you would get
28 back?

29 MR. ROSENBERGER: Yes, I would.

30 Q So would you agree that one of the values of the
31 current process, the Forum and Roadmap process, is
32 it helps both sides in developing that, making
33 that progress to the point where you can go back
34 to your respective decision-makers and say "We've
35 made this much progress thus far, and I think we
36 can take the risk of putting in the money and
37 commitment that we need." Would you see this as
38 one -- one way that the Forum and Roadmap is
39 helping this overall process?

40 MR. ROSENBERGER: Yes, I would.

41 Q Okay. I'm going to ask a question of Mr. Crey.
42 One of the examples you gave yesterday was an idea
43 about signing an MOU, and I just want to stay on
44 this theme for a second. From the perspective of
45 the First Nations, who would have signed this MOU
46 if it had been put forward?

47 MR. CREY: The political leadership of the communities

1 on the Fraser.
2 Q And who specifically, like, what would this be,
3 each First Nation through its band council?
4 MR. CREY: In some instances. In other instances the
5 First Nations have organized themselves into
6 collectives called tribal councils and often have
7 confidence in those tribal councils to discuss and
8 enter into these kinds of arrangements and sign
9 off on a broad interest in that part of the
10 watershed for that tribal nation.
11 Q And would it include coastal and approach groups?
12 MR. CREY: Sorry, I meant to -- didn't mean to exclude
13 them.
14 Q Okay.
15 MR. CREY: Yes.
16 Q Yes. So the idea would be a MOU that would be
17 signed by the political leadership of all the
18 First Nations that are engaged in harvesting
19 Fraser River sockeye?
20 MR. CREY: That's right, or their designates. Right.
21 Q Okay. And this is something that you feel that
22 through this, the Forum and Roadmap process, that
23 you'd be able to obtain that kind of a mandate to
24 sign an MOU?
25 MR. CREY: Well, it's not so much me, but --
26 Q I'm sorry, I should say the political leadership
27 of -- well, that's a good question. Political
28 leadership of what organization? What forum would
29 you use in order to get that kind of commitment
30 from all these different groups?
31 MR. CREY: Well, I think in a situation like that, the
32 First Nations leadership would probably take a lot
33 of heart, would have a lot of interest in such an
34 agreement, and I'm sure that the majority of them
35 would endorse a memorandum of understanding like
36 that, where both parties, the First Nations
37 themselves and the Government of Canada, through
38 the Department of Fisheries and Oceans, would
39 agree on where it is that they're going, building
40 this co-management relationship. I think -- I
41 think that would occur. I think that could take
42 place.
43 Q Thank you. On this document, this is the same
44 document as before, I'd like to go back one page.
45 I'm going to change direction again, and I'm sorry
46 I'm kind of hopping from subject to subject. I
47 want to return to -- to a discussion that was had

1 yesterday, and I want to focus this question on
2 Mr. Rosenberger, because I don't think he had an
3 opportunity to weigh in on this discussion. But
4 if we can focus in on the -- it's the use of the
5 term "dialogue". And on the third, fourth and
6 sixth bullets on this -- on this document, and
7 it's interesting that the term "dialogue" was used
8 in this context, and I think there was some
9 criticism of it. The third bullet says:

- 10
11 o Dialogue regarding the management of
12 integrated commercial fisheries impacting
13 Fraser salmon;

14
15 When I read that, "management of integrated
16 commercial fisheries", that's in respect of the
17 fishery, all commercial fisheries, including
18 Aboriginal but also non-Aboriginal fisheries?

19 MR. ROSENBERGER: That's correct.

20 Q And on the fourth bullet:

- 21
22 o Dialogue regarding the management of
23 recreational fisheries impacting Fraser
24 salmon;

25
26 So that's not necessarily including Aboriginal
27 recreational fishers, but all recreational
28 fishers?

29 MR. ROSENBERGER: That's correct.

30 Q And on the sixth bullet:

- 31
32 o Dialogue regarding DFO policies and programs
33 which impact on Fraser salmon;

34
35 Now, I think implicit in that is policies and
36 programs generally that impact on Fraser salmon?

37 MR. ROSENBERGER: That's correct.

38 Q So when we're talking about these kind of issues,
39 are we now into an area of what we would call Tier
40 3 discussions, when we're talking about dialogue
41 in these areas?

42 MR. ROSENBERGER: Well, these areas will impact more
43 than just the First Nations to DFO process, and
44 the Department's trying to get across in this
45 document is -- there are issues where we're
46 looking to have -- we're looking to define the
47 roles and responsibilities of a number of factors,

1 and there's eight or nine of them here. And what
2 the Department is trying to make clear is that
3 there are other interests besides First Nations
4 interests and we will discuss how those roles and
5 responsibilities will be aligned. But they're not
6 necessarily ones that bilateral relationship would
7 be the only decision-making or the only place
8 where there would be interactions.

9 Q And I guess that's one of the key points about the
10 Tier 3 options and discussions we've had, is that
11 until such time that there's a co-management Tier
12 3 structure where all the harvesters are in the
13 same room and in the same body, there's going to
14 have to be a role for DFO management in order to
15 ultimately make those decisions as between these
16 different harvesting groups. Would you agree?

17 MR. ROSENBERGER: Well, I see a role for the Department
18 now, and I see a role for the Department even once
19 the structure is in place.

20 Q Okay, thank you. Another area, another document
21 that we talked about yesterday and I'd like to
22 take you to, Mr. Rosenberger, is Exhibit 290. And
23 this is the -- one of the documents relating to
24 the Forum. And again there was -- this is last --
25 the last paragraph, and I don't want to spend too
26 much time on this, but this is something that was
27 raised with the panel, and I don't think you had a
28 chance to weigh in on it, so I just want to ask
29 you now. And this is a comment we had about --
30 again, this is a DFO document, as I understand it,
31 and the first sentence says:

32
33 Through this process it became clear that
34 despite the efforts of DFO staff to support
35 this outcome...

36
37 And I should back up and say the immediate
38 previous line, the "Desired outcomes" in the
39 previous paragraph:

40
41 Desired outcomes included the development of
42 a sharing plan for Early Stuart sockeye...

43
44 Through this process it became clear that
45 despite the efforts of DFO staff to support
46 this outcome, First Nations collectively
47 lacked the capacity to develop a coordinated

1 FSC harvest sharing plan for Fraser River
2 salmon stocks.
3

4 And then it talks about what was achieved at the
5 Forum. Another interesting comment I want to ask
6 you about, later on it says, and there was:
7

8 ...a much better understanding of the
9 complexity involved with the management of
10 Fraser River salmon.
11

12 I want to stop there. Can you just talk a little
13 bit about what some of the issues that were
14 discussed and have been discussed in this topic?
15 What some of those complexities are, and also what
16 are some of the different interests and
17 perspectives that you've heard been expressed at
18 the Forum?

19 MR. ROSENBERGER: I think the First Nations have put
20 considerable effort and made considerable progress
21 on understanding each other's fisheries. I think
22 there was a fairly significant lack of
23 understanding between some of the First Nations
24 Interior groups versus some of the Coastal groups,
25 fishing, fishing opportunities, different stocks.
26 Some of the kinds of things that Mr. Wilson, you
27 know, described yesterday in this process were the
28 kinds of things that were being described in the
29 Forum process. So there's a growing understanding
30 about what stocks, what species, harvests,
31 availability, how people fish, how they make some
32 of their decisions. So going through that and in
33 some of the approaches that they've strived for
34 and some of the options that have -- you know,
35 they've worked on over time, what does that mean.

36 So again, yesterday, for example, Mr. Shepert
37 talked about the groups that generally he's from,
38 you know, really supporting a three-week closure
39 around Early Summer stocks. They came to a
40 consensus that they provided a recommendation on
41 for this year, I think it was the same one last
42 year, of a one-week closure during that timeframe.
43 But there's others trying to understand, well,
44 what's the implication because of the co-migration
45 overlap of timing of stocks, species, implications
46 to other places.

47 So I think there's been significant progress

1 on that side of things, and the -- a variety of
2 First Nations have put out quite different views.
3 We have -- some of those have been provided in
4 letters to the Department, and some of them in the
5 discussion at the Forum. You know, different
6 escapement objectives to be used in a given
7 scenario for different stock groupings between
8 years, things like that.

9 Q Okay, thank you. I'm going to switch gears again
10 and go to a -- the subject of the in-river
11 demonstration fisheries that took place, and Mr.
12 Shepert helpfully gave some background on that.
13 And I just want to ask a couple of questions for
14 you, Mr. Rosenberger, but I'm happy to have Mr.
15 Shepert or anybody else wade in. On Tab 6 of
16 Canada's documents, perhaps go there first -- or
17 actually, Tab 5, I'm sorry. But I think there has
18 been some -- some questions and some discussion at
19 earlier panels about the commercial viability of
20 in-river demonstration fisheries, and Mr. Shepert
21 spoke about that yesterday. Here's a document,
22 Mr. Rosenberger, I believe you're familiar with.
23 Can you explain what this is?

24 MR. ROSENBERGER: This is an accounting from the
25 Okanagan Nation Alliance, that's the ONA of the
26 title.

27 Q Mm-hmm.

28 MR. ROSENBERGER: Of their commercial fishery that
29 occurred in 2010, last year. So this is a fishery
30 that takes place at about 900 miles inland, and I
31 get my miles because it comes through the U.S.
32 system, that's where we keep track, so...

33 Q These aren't Fraser sockeye?

34 MR. ROSENBERGER: These are bound for the Okanagan
35 River via the Columbia, so they migrate up through
36 the Columbia and the nine dams.

37 Q Okay.

38 MR. ROSENBERGER: So the harvest that took place last
39 year, it shows that there was a harvest of just
40 over 1,000 fish and it shows where some of the
41 products, how they processed them. What it
42 doesn't get into is where they -- where and who
43 they actually sold them to, and that side of it.
44 But just to add that many of these fish went into
45 restaurants and high-end markets, and they
46 actually have an agreement for this year where a
47 significant restaurant chain in B.C. will be

1 featuring these salmon for this year's fishery.
2 So what this was meant for is to show that the
3 harvest, what the possibility of products are.
4 What it doesn't show is that they've been able to
5 make good progress on getting good value for the
6 fish that they've harvested, and...

7 Q Well, maybe we can go to the next page. I think
8 that helps that last part. And just this is an
9 example in the same document about some of the --
10 some of the prices, I guess, for the sockeye that
11 were --

12 MR. ROSENBERGER: Yes, it is.

13 Q -- for the salmon that were harvested, and I'm not
14 sure if they were --

15 MR. ROSENBERGER: Yeah, they are sockeye.

16 MR. EAST: Could I have this marked as an exhibit,
17 please.

18 THE REGISTRAR: That will be Exhibit number 1272.

19
20 EXHIBIT 1272: ONA Pilot Demo Catch
21 (Landings) 2010 and Lake-to-Plate Pricing
22

23 MR. EAST:

24 Q And just on the same theme, if we can go to
25 Canada's Tab 6, please. And I believe, Mr.
26 Shepert, is this the -- what you were talking
27 about yesterday. This is a document that appears
28 to be from the Secwepemc Fisheries commission.
29 It's an order form for these Wild B.C. Salmon
30 products. Is this the -- was this the fishery
31 that you were discussing yesterday? Are you
32 familiar with this document? I think, Mr.
33 Rosenberger, you are.

34 MR. SHEPERT: I need to see the cover on this. I've
35 seen a number of these and I'm not sure. We have
36 participated collectively with the Secwepemc.
37 This could be from the report that we did jointly
38 with the UFFCA and the Secwepemc, I'm not exactly
39 sure, but I am familiar with the fishery.

40 Q Okay. Thanks. And, Mr. Rosenberger, are you
41 familiar with this document?

42 MR. ROSENBERGER: Yes, I am.

43 Q And it's an order form for persons to purchase
44 this product, Riverfresh Wild BC Salmon?

45 MR. ROSENBERGER: Yes, from the Secwepemc people.

46 Q From the Secwepemc people. And under -- and I
47 probably should have brought this into the last

1 panel for discussion, but under the last heading
2 "Smoked Sockeye", there's some references to price
3 per pound and per 100 grams for in-river sockeye
4 salmon.

5 MR. ROSENBERGER: Yes, there is, and for the -- the top
6 two are for fresh or fresh frozen fish.

7 MR. EAST: Yes, that's right, sockeye is there, as
8 well. Could I have this marked as an exhibit,
9 please.

10 THE REGISTRAR: That will be Exhibit 1273.

11
12 EXHIBIT 1273: Riverfresh Wild BC Salmon
13 Order Form, Secwepemc Fisheries Commission
14

15 MR. EAST:

16 Q One of the related issues that's come up from time
17 to time is the process by which licences, I guess,
18 purchased or retired under programs like the
19 Aboriginal -- the ATP and under PICFI are used in
20 order to provide the access to these in-river
21 fisheries. And I just want to go to another
22 document in Canada's list. It's Tab 20. Now,
23 this appears to be a deck for the IHPC. Are you
24 familiar with this deck?

25 MR. ROSENBERGER: Yes, I am.

26 Q It's called "Commercial & First Nations Inland
27 Demonstration Fisheries, 2010 Overview", and can
28 you just explain briefly what the purpose of this
29 deck was for?

30 MR. ROSENBERGER: One of the staff of the Department,
31 Ann-Marie Huang, prepared this document to make a
32 presentation at the Integrated Harvest Planning
33 Committee meeting this year. The -- what we're
34 demonstrating through the slides is how licences
35 have been purchased back from commercial.
36 fishermen, transferred and there's areas --
37 there's a Skeena, Nass examples in this deck, as
38 well as for the Fraser.

39 Q Maybe we'll spend a couple of minutes on this
40 document. Perhaps we can go to -- and just for
41 the record, the date on this document is 24th of
42 March, 2011. If we can go to page 6, please. And
43 so this slide and the next one talks about the
44 guidelines used by DFO to transfer salmon shares
45 from the commercial fleet into the in-river; is
46 that right?

47 MR. ROSENBERGER: That's correct.

1 Q And if you go to the slide, sorry, page 7. Yes,
2 that's right. And on the third bullet:

3
4 ➤ Where a sub-set of stocks are being harvested
5 by inland fisheries (e.g., Fraser), each
6 commercial licence is treated like a
7 portfolio of stocks with different stocks
8 (e.g. Chilko vs Weaver) going to different
9 inland groups.

- 10
11 • stocks are not "convertible" e.g., X% of
12 Chilko cannot be converted to Y% of
13 Horsefly
14

15 Can you explain what that's about, and why that's
16 -- why that's done in this way?

17 MR. ROSENBERGER: The Department's objective is to --
18 you can't transfer from -- straight across from a
19 mixed stock fishery in any given area, and all
20 mixed stock fisheries are not the same, if you're
21 fishing in Johnston Straits versus Juan de Fuca,
22 or even off the mouth of the Fraser, or in the
23 Lower Fraser. So the -- what we're striving for
24 is to make sure we transfer portions the same way
25 that we're moving them out of the -- those mixed
26 stock fisheries and moving them into inland
27 fisheries. So if someone was looking to fish for
28 Chilko fish, for example, and you wanted to fish
29 in the Chilcotin, then you wouldn't give them
30 Quesnel fish or Horsefly fish, as they're
31 described here, that would be migrating to a
32 different part of the watershed. So it's trying
33 to match all those different fish and stocks to
34 the licences we've purchased and the transfer of
35 that total allowable catch into the various
36 portions of the Fraser.

37 Q And maybe just quickly just go to the highlights
38 of this deck, perhaps go to page slide 9. And
39 this identifies some of the First Nations
40 demonstration fisheries in 2010, and you'll see
41 under the third bullet, there's the "Riverfresh
42 Partnership" and I think that's the -- that's
43 related to that order form we just saw just a
44 moment ago.

45 MR. ROSENBERGER: That's correct.

46 Q And the other one is the "UFFCA Partnership".
47 And, Mr. Shepert, that's the one that you're

1 involved with?

2 MR. SHEPERT: Yes.

3 Q Okay. And there's a couple of others, Chehalis
4 and Scowlitz First Nation for Fraser sockeye in
5 the Harrison River. I won't go into further
6 detail in this document because I think that's
7 going to be a bit -- take a bit too much time.
8 Perhaps I can just go to maybe page 18 and then --
9 19, sorry, and this is a discussion of a
10 hypothetical example about how this might work for
11 the Fraser. And here, Mr. Rosenberger, you have a
12 hypothetical example where there's a total
13 Canadian commercial TAC of a million fish, and
14 it's split out in this pie chart according to Late
15 Run, Early Summer and Summer Run TACs.

16 MR. ROSENBERGER: That's correct.

17 Q And if you go over to page 20, that pie chart is
18 separated out by the different areas. Maybe you
19 can just remind us again what Area B, D, E, G and
20 H are.

21 MR. ROSENBERGER: These are licence groupings, so
22 licence Area B is seine fleet in southern waters
23 of British Columbia. Licence Area D is gillnet
24 fisheries, primarily for the purposes of the
25 Fraser in Johnston Straits, but it's northern
26 Strait of Georgia, Johnston Straits, and around
27 partial -- partway down the West Coast of
28 Vancouver Island. Area E is the licence area for
29 gillnets in the Lower Fraser River, Area 29 and
30 around the Juan de Fuca southern portion of
31 Vancouver Island. Licence Area G is trollers on
32 the West Coast of Vancouver Island and around into
33 the top of Johnston Straits. And licence Area H
34 is trollers in Georgia Strait and up into Johnston
35 Straits.

36 Q Okay. And just to give an example of how this
37 process works, maybe we can go to page 22. And
38 for each one of these areas, as I understand it, a
39 number of licences. And so on this one it's Area
40 D, 359 licences available, which represents 21.5
41 percent of the commercial Fraser River TAC in
42 2010. And it says on the right in the small pink
43 box:

44
45 33 licences in 2010...were available from DFO
46 inventory for [Fraser River sockeye] inland
47 [demonstration] fisheries.

1 And I understand there's a similar slide for each
2 one of the different areas.

3 MR. ROSENBERGER: That's correct.

4 Q And if you get to slide number 26, I think there
5 wasn't any licences for Area G, so you ended up
6 with these four different areas, and you added up
7 all the different licences from the areas, and you
8 added together the total number of licences from
9 the DFO inventory that are going to be used for
10 allocations of the in-river demonstration fishery;
11 is that right?

12 MR. ROSENBERGER: It's not a -- this is an accounting
13 of the licences.

14 Q Yes.

15 MR. ROSENBERGER: It's -- involved the whole deck, it's
16 a multiplication times the total allowable catch,
17 and the equal signs at the bottom is the 12.46 is
18 the percent of total allowable catch that can be
19 moved into the demonstration fisheries. There are
20 Area G licences, for example, but Area G in 2010
21 did not have a total allowable catch assigned to
22 it, so it's essentially a number times zero. So
23 there's nothing to add into the -- into the
24 formula.

25 Q I see. Okay. So you have 12.46 percent of the
26 total allowable catch. If we can go over to page
27 27. So going back to the hypothetical one million
28 TAC in total, you have the 12.46 for the
29 demonstration TAC and the rest 87.54 is the TAC
30 for the area gear commercial fisheries?

31 MR. ROSENBERGER: That's correct.

32 Q And if we go over to the next slide, that 12.46 is
33 in turn broken up into the three run groups.

34 MR. ROSENBERGER: Correct.

35 Q Early Stuart has been left out. And then the last
36 slide, or sorry, slide 29, that 12.46 is again
37 broken out by the various natal streams and
38 different runs. Is that what this is -- this
39 slide is doing?

40 MR. ROSENBERGER: That's correct. So that we use those
41 proportions then by those stocks to allocate it
42 back to the various demonstration fisheries around
43 the -- around the Fraser watershed. And in this
44 one you'll note that there's two or three of those
45 slices of the pie that were not allocated out, so
46 we used those opportunities to provide extra
47 protection to some of the stocks of concern.

1 Q And I notice that some of these -- some of the
2 smaller slices, including Cultus and on the top,
3 Bowron, these are not being used for the
4 demonstration fisheries?

5 MR. ROSENBERGER: Correct.

6 Q You can explain -- and is that for conservation
7 reasons?

8 MR. ROSENBERGER: Correct, that was the comment I just
9 made, sorry.

10 MR. EAST: Okay. I'd like to have this document marked
11 as an exhibit.

12 THE REGISTRAR: That will be Exhibit 1274.

13
14
15
16
17

EXHIBIT 1274: Huang, Commercial & First
Nations Inland Demonstration Fisheries - 2010
Overview, March 24, 2011 [IHPC]

18 MR. EAST:

19 Q My last few questions, I think, are going to be
20 for Mr. Wilson, if I may, and I was -- I won't
21 have the time to discuss in great detail some of
22 the things we discussed yesterday. But I just
23 wanted to ask you, Mr. Wilson, with respect to the
24 Heiltsuk. And you talked a bit yesterday about
25 some of the coastal and North Coast -- Central
26 Coast and North Coast organizations that the
27 Heiltsuk are involved with. Are the Heiltsuk
28 involved in any kind of formal way with aggregates
29 or groups of First Nations that are on the Island
30 or in the South Coast?

31 MR. WILSON: Other than IMAWG?

32 Q And what is the role of IMAWG, and what is
33 Heiltsuk's role in IMAWG?

34 MR. WILSON: Well, Heiltsuk's role in IMAWG is -- it
35 was created from our attention to the sectoral
36 meetings, and IMAWG had a meeting at the same
37 time, and just happened to show up to a meeting
38 and decided this was a great process to be
39 involved in. The IMAWG process is basically -- it
40 started out as a process to provide information to
41 First Nations groups on fishery issues, all
42 fishery issues, not just the Fraser River sockeye.

43 Q And would it be a process ideally where, for
44 example, if a run like 2010 ever came along again
45 for sockeye, or for chum or pink, that it would be
46 useful process whereby DFO can get together with
47 all the coast-wide coastal groups, and discuss

1 each First Nations expectations for harvest in the
2 upcoming year, in one forum where the different
3 First Nations can share their different
4 perspectives on their harvest. Would you agree
5 that that would be a useful process?

6 MR. WILSON: I agree, but it would be a challenge,
7 because the bands outside the Fraser, there's
8 quite a number of bands. So I think you'd have to
9 break them into regions, as well.

10 Q I'm thinking in terms of a Coastal group, like a
11 Coastal region, including South Coast, as well as
12 Central and North Coast, perhaps that's -- perhaps
13 using the IMAWG forum.

14 MR. WILSON: That format possibly, yes.

15 Q I didn't want to get too much into the details of
16 what happened with the Heiltsuk fishery in 2010.
17 I mean, some of the key players in the DFO
18 perspective aren't here to get into that. But
19 what I gather from this is a sense of frustration
20 from the Heiltsuk, that in 2010 there was a very
21 large year, and although a certain number of
22 salmon were caught, there was a sense that there
23 were more fish to be caught if the opportunity had
24 been allowed.

25 MR. WILSON: Correct.

26 Q And DFO was in a situation where it was managing
27 the fishery with respect to a number of different
28 coastal groups, and had certain guidelines and
29 rules that it had to follow, and different
30 processes that it had to follow, and that was
31 frustrating for the Heiltsuk.

32 MR. WILSON: Yes.

33 Q And is this really a good case study for how
34 perhaps a different way of approaching these
35 issues would be to have some kind of an integrated
36 process, a pre-season, pre-planning process, where
37 DFO and the various groups that have allocations
38 on the coastal areas can get together and talk
39 about their interests in accessing these large,
40 potentially large runs of salmon, and discussing
41 how those shares can be allocated as between
42 themselves, with -- in consultation with DFO.
43 Isn't this a really good case study of how that
44 would have been useful if that had been in place?

45 MR. WILSON: Yes, it would have been, both if the
46 stocks were in conservation or in abundance.

47 MR. EAST: Okay. I think actually I'll just leave my

1 questions there. Thank you. Thank you, Mr.
2 Commissioner.

3 THE COMMISSIONER: Thank you very much, Mr. East.

4 MR. PROWSE: Yes. My name is Clif Prowse, I'm the
5 lawyer for the Province of British Columbia that
6 doesn't really know much about First Nations
7 issues, but I, with some supervision from Mr.
8 Tyzuk, get to ask a few questions today. I'll
9 endeavour to keep this short.

10
11 CROSS-EXAMINATION BY MR. PROWSE:

12

13 Q Mr. Lunn, could we have Exhibit 1223, please. So
14 one of the -- in preparing to do this, I had
15 several discouraging conversations with people as
16 I looked for an easy answer to the issues that are
17 confronting this panel and the Commission. And
18 the general answer I got was there are no easy
19 answers. But then someone said, well, what we
20 really need is something like the Northwest Indian
21 Fisheries Commission. So I guess my first
22 question is whether each of you would agree or
23 disagree, or are able to comment on whether that
24 might be something to be strived for in our
25 context here.

26 MR. SHEPERT: I think the Northwest Indian Fisheries
27 Commission is a good example, it's -- but it's
28 made for Washington State tribes. It has its own
29 history and its own way of doing business. I
30 would suggest that it represents what is possible,
31 that B.C. is languishing behind, and that whatever
32 is created here would be made for B.C. It's not
33 going to be the same. It's not a cookie cutter
34 issue here. So I would be encouraged to -- to
35 utilize certain elements of the -- of what we can
36 learn from Washington State example, but again,
37 it's not going to be the same for B.C.

38 Q All right. Does anyone else have a comment on
39 that?

40 MR. WILSON: One of the challenges with it is some B.C.
41 First Nations are in Treaty and some aren't.

42 Q Sorry, and so that would just complicate the
43 process?

44 MR. WILSON: It could.

45 Q And, Mr. Crey?

46 MR. CREY: I would agree that it's a model that can
47 inform a future forum here in British Columbia. I

1 agree that it's a model that could inform us,
2 along with others elsewhere.

3 Q All right. And, Mr. Rosenberger?

4 MR. ROSENBERGER: I think it's one of the options,
5 models as Mr. Crey just described, that should be
6 reviewed and considered and looked to see how ---
7 what elements of it might be applicable, and to
8 the same for many other models. One was raised
9 yesterday to look at, and I think there's a few
10 others you could consider on options for moving
11 forward.

12 Q So then the question is, to the extent that it is
13 a viable option, how would we get there from here.
14 Mr. Shepert, do you have a view on that? How
15 would you process towards something like the
16 Northwest Indian Fisheries Commission?

17 MR. SHEPERT: So the question is how would we get to
18 something like that? Well, I think it -- back in
19 2002, I was part of a team that put together a
20 report called "Our Place at the Table", B.C. First
21 Nations in the fishery, and I think one of the
22 things that we talked about, and we're talking
23 specific about sockeye here. So I think one of
24 the comments, one of the recommendations that were
25 made in there, and this again probably comes from
26 the Boldt type decision, is that 50 percent would
27 be a nominal starting point with -- with the
28 possibility of up to 100 percent for certain
29 species in certain areas.

30 So I think, yeah, I think that one of the
31 possibilities or one of -- if we were to have just
32 a eureka moment and we woke up one day and
33 suddenly 50 percent of the sockeye fishery was
34 transferred to First Nations, and then let them
35 figure it out, much like what happened in the
36 Washington State example, might be one way to do
37 that. I'm not saying it's the only way. I think
38 that negotiations are still on the table and a
39 good way to proceed. But I think that that's --
40 that's what happened down there.

41 Q Mr. Rosenberger, do you have any comments on that?

42 MR. ROSENBERGER: Well, process-wise, from the
43 Department's -- how we're seeing this moving
44 forward is the Roadmap process. So what we're
45 trying to do is in that process is to get parties
46 to look at various models and look to see what the
47 interests are and try to develop the, you know,

1 vision and mandate around the parties and see what
2 our options are for moving forward. So for us
3 it's the Roadmap process.

4 Q Mr. Shepert, I noticed in your c.v. that you've
5 had extensive training, and do I understand a
6 practical involvement in mediation type processes,
7 including in a family law type context?

8 MR. SHEPERT: That's correct.

9 Q How do you -- what are the lessons from that kind
10 of family law context where you can get some very
11 dysfunctional conflicts going on, and different
12 ways are used to resolve them. What are the
13 lessons from that kind of context to this kind of
14 context, or have you thought about that?

15 MR. SHEPERT: I think when you're talking about the
16 work that I do, first of all, we start with an
17 agreement to mediate, which is a good faith
18 document. So as with any negotiation, you have to
19 have both parties negotiating in good faith. And
20 everything must be possible. Everything must be
21 put on the table. It needs to be open,
22 transparent, and you know, the rest speaks for
23 itself. What the outcome is, is not for me to
24 judge.

25 Q One of the precepts of mediation, at least in some
26 theories, is that all the parties need to be aware
27 of the best alternative to a negotiated agreement,
28 which again in the family law context typically
29 would include litigation. How does the litigation
30 process impact on the way forward here?

31 MR. SHEPERT: That's a good question. I'm a
32 peacemaker, that's what I do, it's in my nature.
33 So I think that from my perspective I would always
34 look at it from the situation that I think that
35 both parties would be better suited to sit down
36 and have a discussion, as opposed to litigate. I
37 think that litigation is time consuming, it's
38 costly, and all too often in First Nations
39 country, we see the rulings come down, yet we see
40 change being very slow. In fact, we often see
41 that the people setting the parameters are the
42 people that we just came out of court with. So
43 that's why I think that sitting down to have a
44 mediation or a negotiation, whatever you want to
45 call it, is infinitely better and leads to more
46 enduring outcomes.

47 Q I wanted to refer to the Integrated Salmon

1 Dialogue Forum, which I think Mr. Crey has talked
2 about in an earlier hearing. Mr. Shepert, am I
3 correct in thinking that you had some dealing with
4 the ISDF and probably didn't stick with that
5 process; is that a fair summary?

6 MR. SHEPERT: That's a fair summary. I was involved in
7 the inception. Again, as I've talked about
8 yesterday, in the Upper Fraser we feel sometimes
9 you're kind of damned if you do and you're damned
10 if you don't. Sometimes the principle will tell
11 you that this is probably not the best place to be
12 sitting, on the other hand, decisions are being
13 made and if you don't show up, well, those that
14 show up do the work. That's sort of the -- what
15 we talk about in our industry. So, yeah, I have
16 been involved in it, but quickly realized from the
17 very beginning that this was a multi-sectored
18 approach and really, I believe, as I said
19 yesterday, Tier 1 has to be strong. Your
20 cornerstone is based on Tier 1/Tier 2,
21 relationship and so it's pre-emptive - or it's not
22 pre-emptive, that's not the word I'm looking for -
23 but it's too soon to get into those kinds of
24 processes until the other two have been worked out
25 satisfactorily by both parties.

26 Q That leads to the question of but what's the
27 timeframe that we all have to work with to deal
28 with what we're told is 20-year decline of Fraser
29 River sockeye salmon, and is there a role for some
30 kind of multiparty process as an interim, in
31 effect, process, without prejudice to the rights
32 of the First Nations that are involved.

33 MR. SHEPERT: Can you rephrase that, please, or reframe
34 it. I kind of see where you're going with that,
35 so in the interim, until that -- until the
36 relationship is strengthened and in a good working
37 way, we still need to have sort of interim
38 measures, or at least allow the third parties to
39 the table. I think that's already going on. Life
40 goes on. The fishery will continue. So, yes,
41 those things will happen.

42 But in my -- my viewpoint, one of the most
43 encouraging things about this whole process is the
44 ability perhaps to have those kinds of check-ins
45 over the next year, to kind of, I guess, have an
46 oversight, somebody with oversight. Oh, for
47 example, Mr. Commissioner, to follow through and

1 make sure that these things happen. The
2 recommendations that come out of here are
3 extremely important. It couldn't be more timely.
4 We are in a really, really precipitous decline,
5 particularly in the Upper Fraser. So in my
6 opinion, I think, you know, a three-year to a
7 four-year timeframe, which has already been
8 alluded to last year, wouldn't be unrealistic and
9 could probably achieve good results.

10 Q Mr. Crey, do you have any comments about -- you
11 talked yesterday about that on the Lower Fraser
12 there had been some reaching out to I'll call them
13 Tier 3 groups that -- do you have a perspective on
14 when that's useful and when it's not?

15 MR. CREY: It's useful any time, it's useful all the
16 time, especially if you're on the Lower Fraser.
17 It's -- there's an interface there of commercial,
18 sport and Aboriginal interests in the fishery.
19 They share a common geographical area, a common
20 river, they fish side-by-side. So it's important
21 to have relationships with the other interests in
22 the fishery, including, I might add, the "green"
23 people, the environmentalists who are active on
24 the Lower Fraser River.

25 Grand Chief Ken Malloway and I, and I think
26 Grand Chief Ken Malloway was here earlier. We
27 call him Wileleq in the Fraser Valley. He's one
28 of our hereditary leaders. Both he and I joined
29 in on the discussions at the Integrated Salmon
30 Dialogue Forum. And in particular both of us were
31 interested in the Monitoring and Compliance
32 Committee, because both he and I know that right
33 at the very heart of the issue in the fishery is
34 confidence that one, or the three groups may have
35 or may not have in the numbers, the catches that
36 are recorded and reported. We feel that right at
37 the heart of the issue is catch and the
38 reliability of catch information. So we both
39 zeroed in on the Compliance and Catch Monitoring
40 Committee and the work that it's doing.

41 And we'd like to think we've done a lot of
42 good work with other committee members. And it's
43 not just Aboriginal people, it's sport fishery
44 interests, commercial fishing interests, and we're
45 not talking about novices, we're talking about
46 senior commercial fishermen, been in the business
47 for years and very capable people they are. As

1 well as sport fishing interests with a long, long
2 history in the sport fishery, and being advocates
3 for their interests. And of course on our side of
4 the table, Aboriginal people. And there were
5 conservation groups in the room, as well.

6 So we paid a lot of attention, devoted a lot
7 of time to the meetings of that committee, and we
8 worked out projects on the Lower Fraser together,
9 such as giving the committee an opportunity to
10 tour our chum fisheries, to see how closely
11 they're managed and how the accounting of the
12 catch is done. And we have plans this summer for
13 a project in the sockeye fishery in monitoring
14 that should provide valuable lessons for all of
15 us. And we plan on continuing to do work with
16 that -- with that committee, on into the future,
17 as long as it has -- as long as it's a working
18 committee and has a mandate to continue onward.

19 Q Thank you. Mr. Wilson, yesterday your counsel put
20 in the Central Coast First Nations Marine Use
21 Plan, Executive Summary, which was Exhibit 1269,
22 and that has some reference in it to what I'll
23 call Tier 3 involvement with the multi-sectoral.
24 How do you see the -- first of all, do you have
25 any knowledge of the ISDF, the Integrated Salmon
26 Dialogue Forum, were you part of that at all?

27 MR. WILSON: No.

28 Q How do you see the role of Tier 3 processes as we
29 deal with the ongoing annual and decadal declines
30 in the Fraser River sockeye salmon fortunes.

31 MR. WILSON: Well, I could speak for the Central Coast
32 Harmonized Marine Use Plan, which would set up a
33 technical group that would address how we go about
34 meeting with the other user groups. Well, I'll
35 rephrase that: the user groups, we're not
36 considered user groups.

37 Q Yes.

38 MR. WILSON: So that technical committee would
39 represent the Central Coast. It's a little bit of
40 a challenge in the Central on sport fishing
41 specifically, because the majority of the sport
42 fishers are lodge, lodge-driven, so they have
43 clients fly in, and I believe a lot of those
44 clients are not from B.C., so they clearly don't
45 understand the issues of First Nations entitlement
46 rights and access, of course. So it would be a
47 challenge, but the technical committee would be

1 burdened with that task.

2 Q Working through these problems.

3 MR. WILSON: Yes.

4 MR. PROWSE: Mr. Commissioner, those are my questions.

5 THE COMMISSIONER: Thank you very much, Mr. Prowse.

6 MR. MCGOWAN: I wonder if this might be time for a

7 brief morning adjournment, Mr. Commissioner.

8 THE COMMISSIONER: Yes, that's fine, thank you. Shall

9 we say ten minutes?

10 MR. MCGOWAN: Ten minutes, yes.

11 THE COMMISSIONER: Thank you very much.

12 THE REGISTRAR: The hearing will recess for ten
13 minutes.

14

15 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)

16 (PROCEEDINGS RECONVENED)

17

18 THE REGISTRAR: Order. The hearing is now resumed.

19 MR. EIDSVIK: Good morning, Mr. Commissioner. Philip

20 Eidsvik for the Area E and B.C. Fisheries

21 Coalition. Good morning, panel members.

22

23 CROSS-EXAMINATION BY MR. EIDSVIK:

24

25 Q Mr. Rosenberger, how long have we known about the
26 stock problems in Early Springs and Early Stuarts?

27 MR. ROSENBERGER: Stocks are reviewed annually so the
28 information on the trends are something that's
29 discussed on an annual basis and have been for all
30 the years that we're doing management.

31 Q Yeah, I mean when has the trend been in a place
32 where none of us are very happy?

33 MR. ROSENBERGER: I would suggest there was a few
34 people rather happy last year with the trend.

35 Q On Early Stuarts and Early Springs?

36 MR. ROSENBERGER: The Early Stuart return last year is
37 the second largest escapement on its cycle that we
38 have records for, for the 50-some years. We did
39 not monitor one of the key streams. That wouldn't
40 have made it the largest escapement but it's a
41 significant escapement and the total return was
42 relatively large.

43 Q And what about the three previous cycles?

44 MR. ROSENBERGER: The returns on a number of those
45 cycles are relatively lower in some of the years
46 but some of the years they're not dissimilar.
47 We've been experiencing fairly significant en

1 route mortalities on a number of those populations
2 so the total return is down but the more
3 significant issue is the en route mortality at
4 this stage.
5 Q If I remember correctly even in, I think, it was
6 2000 we were down to 10,000 spawners or something?
7 It's okay if you don't --
8 MR. ROSENBERGER: Not to my record. Twenty to 30,000
9 is the normal range of spawners for three of the
10 four cycle years.
11 Q Okay. And what's our spawner goal for that
12 overall?
13 MR. ROSENBERGER: We don't have a specific goal by each
14 of the systems. That's part of the work that
15 we're undertaking right now with the Wild Salmon
16 Policy establishing lower reference points and
17 upper reference points.
18 Q And what's the upper reference point on the good
19 year?
20 MR. ROSENBERGER: We don't have those established at
21 this point.
22 Q What were they previous, say, during the 1990s?
23 Would 200,000 be off by far as a spawning
24 escapement goal for Early Stuarts?
25 MR. ROSENBERGER: Well, I don't have all the specific
26 information on the goals on each of the years.
27 Q Okay. Maybe you can help me on this point. Has
28 any public commercial fishing happened on Early
29 Stuarts in the last 20 years?
30 MR. ROSENBERGER: Yes.
31 Q Can you tell me what year?
32 MR. ROSENBERGER: 1993 and 1994.
33 Q Anybody fished Early Stuarts since 1993/1994?
34 MR. ROSENBERGER: Has anybody fished since then?
35 Q Yes.
36 MR. ROSENBERGER: Yes.
37 Q Has there been any fishery on Early Stuart sockeye
38 since 1993/'94?
39 MR. ROSENBERGER: Yes.
40 Q And who were those fisheries?
41 MR. ROSENBERGER: Primarily, they're harvested in the
42 First Nations food, social, ceremonial fishery.
43 Q Okay. What about Early Springs? I know there
44 used to be an Early Spring fishery in Area E in
45 the lower river by the gillnet fleet. Can you
46 tell us the last time there was a targeted fishery
47 on Early Springs by the public commercial fleet?

1 MR. ROSENBERGER: The in-river gillnet fishery closed
2 in '79 or '80. The chinook as a whole manages an
3 aggregate. We primarily try to define areas where
4 we find weaker stocks, which the earliest timed
5 chinook populations in the Fraser are and try to
6 minimize the impact. But we don't set directed
7 harvests in the mixed stock fisheries by
8 individual single stock.
9 Q But generally, the Early Springs, April, May, part
10 of June?
11 MR. ROSENBERGER: Their migration timing is
12 significantly longer than that.
13 Q Yeah, but from when can you tell me?
14 MR. ROSENBERGER: The first fish start entering the
15 Fraser usually sometime in late February and March
16 and they'll continue to enter the Fraser into
17 August.
18 Q And has there been an FSC fishery on Early Springs
19 to the last ten, 15 years?
20 MR. ROSENBERGER: Yes, there has.
21 Q Okay. I want to talk just a bit about management
22 issues. And this is an easy question. I'm not
23 suggesting a number. But if the FSC allocation
24 for Fraser River sockeye was 200,000 pieces, for
25 example, it'd be a pretty easy fishery to manage
26 and deliver 200,000 every single year; is that
27 correct?
28 MR. ROSENBERGER: The relative value or numerical value
29 doesn't necessarily change the ability to define
30 what's easy or hard in returning; it's making sure
31 that you have clear numbers and a process that
32 you're taking into account in the management.
33 Q Easier to deliver 200,000 than a million-plus?
34 MR. ROSENBERGER: Well, that would depend on the volume
35 of fish coming back in total and where they were
36 migrating to in the Fraser.
37 Q In the last ten years, would it have been easier
38 to deliver 200,000 sockeye into the river than a
39 million sockeye in the river for food purposes?
40 MR. ROSENBERGER: I think your concept that a smaller
41 number is easier than a larger number is the key
42 point there so I would agree with that.
43 Q Mr. Crey, maybe you can help me on this. Can you
44 tell me what year the Sto:lo didn't fish Early
45 Stuart sockeye? You're pretty good at this. I
46 know you've got it in your head.
47 MR. CREY: Mr. Commissioner, I take all compliments.

1 But I think your confidence may be misplaced. I
2 can't recall the last year that there was a
3 directed Sto:lo fishery on Early Stuart sockeye.
4 I don't have my notes with me.
5 Q Okay. Thank you. Mr. Crey, while you're on it,
6 with respect to sharing the space on the river,
7 you were part of a group that sought an injunction
8 unsuccessfully to get the sports fishermen off the
9 river during certain fisheries, certain Sto:lo
10 fisheries; is that correct?
11 MR. CREY: Mr. Commissioner, that's incorrect. It was
12 my community, my Band, Chief-in-Council, that
13 sought an injunction and they weren't successful.
14 They were successful in getting an interim
15 injunction over a weekend but a different decision
16 was made the following week and that was at the
17 Supreme Court in Victoria.
18 Q Yes, and you were at court that day, were you?
19 MR. CREY: Yes, I was observing on behalf of the Sto:lo
20 Tribal Council.
21 Q Yeah, and there was a permanent injunction that
22 you sought, that that particular group sought?
23 MR. CREY: Once again, Mr. Commissioner, I wasn't in
24 the court to seek a permanent injunction; it was
25 the Band, the Cheam First Nation. And I was an
26 observer in the courtroom.
27 Q Okay, thank you. And with respect to litigation
28 versus non-litigation, the Sto:lo litigated the
29 question of commercial sale to the Supreme Court
30 of Canada in **Van Der Peet**, did they not?
31 MR. CREY: Yes, they did.
32 Q And the court found no sale and no trade embargo,
33 correct?
34 MS. GAERTNER: I'm not sure that we need an
35 interpretation of what the Supreme Court of Canada
36 has said.
37 MR. EIDSVIK: Maybe perhaps I can ask it a different
38 way.
39 Q Are you aware that there's no commercial right to
40 sell for the Sto:lo?
41 MS. GAERTNER: Again, I'm not sure that this witness
42 needs to give a legal opinion on the state of
43 affairs in the law.
44 MR. EIDSVIK: That's fine. Could you bring me Tab
45 Number 95, please, Mr. Lunn?
46 MR. LUNN: From Area E?
47 MR. EIDSVIK: Yes.

1 Q Mr. Crey, has the legal and illegal sale of Sto:lo
2 fish had an impact on the ability of elders to get
3 food fish?

4 MR. DICKSON: Excuse me. Sorry, Mr. Commissioner, I
5 object to this article being placed into evidence.
6 Back in the enforcement hearings, we had a
7 discussion. I objected to Mr. Eidsvik's attempted
8 admission of a transcript and you ruled that it
9 ought not to be admitted. And this article, as I
10 understand, has a reference to that transcript.
11 Most of it is about it, I believe. I think there
12 were two articles and I believe this is the one.
13 And so I object on that basis. It would be
14 allowing through the back door what wasn't allowed
15 through the front. Thank you.

16 MR. EIDSVIK: I don't believe the articles do deal with
17 it in detail. What it deals with is the
18 availability of food fish. Certainly, the second
19 one. And the first one is related and you spoke
20 in the article, I believe. And I think, Mr.
21 Commissioner, when you did reject it, one of the
22 reasons was because Commission counsel objected
23 because it was old. The transcript was 1989 and
24 at that time we all thought 1989 was sort of
25 irrelevant to the Commission. Since then we had
26 the Harris paper that dealt with the period, I
27 think, prior to contact, up till 1980 so clearly
28 age isn't an issue. And I think the question of
29 the impact of legal and illegal sales is important
30 to the Commission on the food fish.

31 MR. MCGOWAN: I'm sorry, Mr. Dickson. The objection of
32 Commission counsel was based on several grounds.
33 One was the age of the paper. One was the
34 possible source of the paper; it appeared to have
35 been disclosure from a criminal case and the
36 concerns arise about whether it was provided in
37 breach of an implied undertaking. The third
38 ground is perhaps related to the direction in your
39 terms of reference not to seek to find fault and
40 this transcript seemed to be directed at
41 unearthing potential criminal activity of a
42 specific individual.

43 And it was on those bases that I objected at
44 the time and maintain the objection. With respect
45 to this article, if what Mr. Eidsvik wants to do
46 is put a statement of Mr. Crey to him and ask him
47 about it, that may well be appropriate. If he

1 wants to put a proposition to him with or without
2 the article and ask whether he adopts it, that
3 might be appropriate but I wonder if we should
4 hear the question and then have a chance for
5 counsel to consider it before the question is
6 answered.
7 THE COMMISSIONER: I was just going to say I had lost
8 the train of thought and had forgotten the
9 question, Mr. Eidsvik, given counsel's objection.
10 So perhaps you could just --
11 MR. EIDSVIK: I don't think I got to the question, Mr.
12 Commissioner.
13 THE COMMISSIONER: All right. Perhaps you could put
14 your question to the witness.
15 MR. EIDSVIK: Yes, I shall.
16 THE COMMISSIONER: Thank you.
17 MR. EIDSVIK:
18 Q In Mark Hume's article, he quotes Gail Sparrow,
19 who talks about the impact, the very negative
20 impacts, of legal and illegal sale of food fish on
21 the ability of elders to get food fish. Do you
22 hear these types of complaints in your community
23 as well?
24 MR. DICKSON: Sorry, Mr. Commissioner, I don't object
25 to that question but I would ask that the article
26 be taken off the screen, if we could. Thank you,
27 Mr. Lunn.
28 MR. CREY: Sorry.
29 MR. EIDSVIK:
30 Q Sorry, Mr. Crey. Did you get my question?
31 MR. CREY: I'm not sure now.
32 Q Well, we'll go over it one more time. Has the
33 legal and illegal sale of food fish in your area
34 affected the ability of elders to get their food
35 fish?
36 MR. CREY: Not to my knowledge.
37 Q About last year, I think it was, a Sto:lo
38 grandmother took out an ad in the Farmer's News
39 offering to buy sports fish. Were you aware of
40 that?
41 MR. CREY: Yes, I was aware of that.
42 Q And why did she offer to buy the sports fish?
43 MR. CREY: I don't know. I don't know the lady in
44 question and I don't know why she followed that
45 path.
46 Q You didn't inquire?
47 MR. CREY: I didn't know who to inquire of. It was an

1 anonymous letter.
2 Q No, it was an ad in the newspaper. You didn't see
3 the ad?
4 MR. CREY: Yeah, I saw it but there was no name
5 attached. I didn't know the source of the
6 complainant or who the person was.
7 Q Okay. The second article in that tab refers to
8 the issue of cold storage, which I think is useful
9 to undertake. And perhaps, did you read Mark
10 Hume's article where he quoted you on the cold
11 storage?
12 MR. CREY: Yes, I did, Mr. Commissioner.
13 Q Did he quote you accurately? Did he quote you
14 accurately?
15 MR. CREY: I don't have the benefit of the article in
16 front of me.
17 Q Well, you do now.
18 MR. EIDSVIK: It's page 2 on the tab, Mr. Lunn.
19 MR. CREY: Apparently I don't. Oh, there it is.
20 MR. EIDSVIK:
21 Q And you say:
22
23 About one-third of our fish were in cold
24 storage.
25
26 And you, yourself, said that:
27
28 Salmon is served at almost every ceremony so
29 it wouldn't be unexpected.
30
31 Did you, yourself, store fish in cold storage?
32 MR. CREY: Sorry, Mr. Commissioner, I don't believe
33 this is the article in question that's on my
34 screen. I think this is a story --
35 MR. EIDSVIK: If you'd go to page 2, please, Mr. Lunn?
36 Q You can see the last couple of lines there.
37 MR. EIDSVIK: Is there only two pages in that tab, Mr.
38 Lunn?
39 MR. LUNN: Yes, two articles together.
40 MR. EIDSVIK: I'm sorry, Mr. Commissioner. There's
41 been an error here. I'm not sure. We'll move on.
42 Q Thank you, Mr. Crey. But maybe you can answer the
43 question for me anyway. Did you store fish in
44 cold storage?
45 MR. CREY: Personally, no, I didn't.
46 Q Any idea how much it costs to store a fish in cold
47 storage?

1 MR. CREY: Since I don't know how much it cost, I can't
2 answer your question.

3 Q Okay, thank you. To what extent does illegal sale
4 of food fish take place in your area?

5 MR. DICKSON: Sorry, Mr. Commissioner. Respectfully, I
6 think that question is going a little bit outside
7 of your terms of reference and your explanation
8 that this is not directed at finger-pointing.
9 We've had the enforcement hearings as well to
10 explore that issue. And I think during those
11 hearings, there was some care taken not to turn
12 this inquiry into a finger-pointing exercise. And
13 my concern is that that line of questioning that I
14 hear my friend begin is going outside of that
15 scope.

16 MR. EIDSVIK: I'm not asking, Commissioner, to make
17 blame but I think the level of sale and illegal
18 sale and the impact it has on fisheries management
19 and the disappearance of Fraser River sockeye is
20 one of the critical issues before the Commission.
21 I'm not asking the Commission to make any finding.
22 What I'm trying to do is get a sense of how
23 widespread it is in the community and whether it's
24 a big factor or not. And we haven't heard the
25 evidence of Mr. Crey and I think it would be
26 useful.

27 THE COMMISSIONER: I think that it might be helpful,
28 Mr. Eidsvik. I'm not going to tell you how to
29 pose your questions, that's up to you. But it
30 might be helpful and more respectful perhaps just
31 to couch it in terms of what his understanding is
32 of the issues you've just raised. In other words,
33 I think the question was put to him as if --

34 MR. EIDSVIK: Mr. Commissioner, I can do that.

35 THE COMMISSIONER: But I think if you ask him whether
36 he has any understanding around those issues and
37 how it relates to fisheries management, that might
38 be helpful.

39 MR. EIDSVIK: Thank you.

40 Q Mr. Crey, perhaps you can help me on this one.
41 Now, in the management of Fraser River sockeye in
42 the Lower Fraser River, is illegal sale and
43 illegal fishing an issue?

44 MS. GAERTNER: Mr. Commissioner, I'm wondering if I
45 could understand what Mr. Eidsvik means by
46 "illegal sale" and "illegal fishing"? That's a
47 conclusion of law left for judges and not for

1 anybody else. And so if he wants to frame a
2 question, I think he needs to tell us what he
3 means by that.

4 MR. EIDSVIK:

5 Q Fishing during a closed time, fish caught under a
6 licence that does not authorize sale. How big an
7 issue are those issues, fishing during a time when
8 DFO has not opened a fishery, and I'm talking the
9 Lower Fraser Aboriginal Fishery, and sales of fish
10 when sale is not authorized. Are those issues of
11 concern in the Lower Fraser?

12 MR. CREY: Well, they appear to be issue of concern to
13 some folks but I don't think those folks are in
14 our community; they appear to be outside the
15 community.

16 Q So if there is illegal sale, sale of fish caught
17 not under a commercial licence, and fishing during
18 a closed period, that's not a concern to your
19 community?

20 MR. CREY: Currently, Mr. Commissioner, when we do sell
21 fish that we catch, we do so under agreements with
22 Fisheries and Oceans Canada. We also have what
23 are called food/social/ceremonial fisheries.
24 Those fish are intended for just what it's
25 described as, a fishery for food, social needs in
26 the community and ceremonial purposes. So we do
27 get opportunities to catch and sell fish but it's
28 done under agreements with Fisheries and Oceans
29 Canada and it's closely regulated.

30 Q So a person sitting outside looking into the
31 fishery in the Lower Fraser, the Aboriginal
32 fishery, doesn't have to be concerned about
33 illegal sale or illegal fishing? Is that what
34 you're saying? I'm trying to get that. I
35 understand that some fisheries are legal where
36 sale is allowed, some fisheries are just food.
37 What I'm trying to find out is, is this an issue
38 that fishery managers should be concerned about?

39 MR. CREY: Well, you'd have to ask a fishery manager,
40 to be perfectly honest, and you have one sitting
41 here.

42 Q Thank you. Mr. Rosenberger, have you heard
43 concerns from fishery enforcement officers about
44 the level of illegal sale and the level of
45 unauthorized fishing in the Lower Fraser?

46 MR. ROSENBERGER: Yes, I have.

47 MR. EIDSVIK: Thank you. Mr. Lunn, if I could perhaps

1 have Tab 72 from our documents, please? I'm going
2 to go to page -- you'll see on the left-hand side
3 of the page at the top, 119, please. And if I
4 could have this tab entered as an exhibit, Mr.
5 Commissioner?
6 THE COMMISSIONER: Just before you do that, Ms.
7 Gaertner is on her feet.
8 MS. GAERTNER: I'm sorry. Before we mark this as an
9 exhibit, I'd like to know what it is and whose
10 evidence this is and whether it's relevant to what
11 we're doing and all of those things.
12 MR. EIDSVIK: Mr. Commissioner, if I'm continually
13 interrupted with these kind of questions, my 20
14 minutes will be gone. I know in hockey where
15 somebody makes an objection and one side loses,
16 there's a penalty to the person making the
17 objection. I think it goes with measuring sticks.
18 Maybe that would be appropriate here.
19 MS. GAERTNER: I beg your pardon?
20 MR. EIDSVIK: Hockey sticks.
21 MS. GAERTNER: What are you suggesting?
22 MR. EIDSVIK: I'm suggesting where a lot of my time is
23 taken up in --
24 MR. MCGOWAN: I'm sorry, Mr. Commissioner. I'm going
25 to suggest counsel's remarks be addressed to the
26 Commissioner and not to each other.
27 MS. GAERTNER: I'm sorry, Mr. Commissioner, but there
28 is a certain level of respect that I'm expecting
29 in this room and I am doing my work.
30 MR. EIDSVIK: I would not intend to cause an affront to
31 my friend at any time. What I'm merely saying,
32 Mr. Commissioner, if I'm continually interrupted
33 on basic issues and long explanations about every
34 exhibit I'll never get through this cross.
35 MS. FONG: Mr. Commissioner, I'm very sorry to take up
36 my friend's time here but I think it's fair to say
37 we all knew in this room that there was an
38 application made and it was in respect to the
39 representation of your particular client and one
40 of the concerns was the fluid running of this
41 particular hearing. Objections are made. They're
42 not made frivolously. They have to be made.
43 They're made properly. Ms. Gaertner made her
44 objections properly. And I think it would be
45 appropriate in asking your questions if you're
46 careful in how you ask them so that then the
47 witness can answer them and we can run

1 efficiently. But there should be, of course, no
2 penalty and I do find that quite offensive.
3 MR. EIDSVIK: I'm not offended to it. If I was
4 standing up and taking somebody's time on who they
5 thought they was unreasonable, I would raise an
6 objection to the loss of time. The document in
7 question at Tab Number 72 is a series of documents
8 that were entered into the case, **Van Der Peet**,
9 where it went to the Supreme Court of Canada. The
10 Supreme Court of Canada accepted them as valid
11 exhibits and these are merely copies from the
12 exhibits filed in the Supreme Court of Canada. So
13 I don't think there should be an issue with them,
14 Mr. Commissioner. And that's clearly indicated on
15 the first page of the tab.
16 MR. MCGOWAN: I wonder, Mr. Eidsvik, and I haven't had
17 a chance to look at all of these documents right
18 now but I wonder if he has a question for the
19 witness if he ought to just put it and we can
20 carry on until somebody finds a question
21 objectionable. I know Mr. Eidsvik is over his
22 time allotment by a couple of minutes but he has
23 had a number of interruptions so please carry on
24 for a few more.
25 MR. EIDSVIK:
26 Q The documents in question, one of the issues they
27 raise, is the level of food fish taken in the
28 fishery in the Lower Fraser River versus in the
29 Upper Fraser River. And your allocation this
30 year, I think, for the Sto:lo is about 300,000
31 sockeye; is that correct? For 2010, Mr. Crey, for
32 food?
33 MR. CREY: Sorry. For this year, Mr. Commissioner,
34 this is a matter under discussion. I don't know
35 what this year's allocation is.
36 Q I'm sorry, Mr. Crey. I meant to refer to 2010.
37 MR. CREY: There was an agreement for 2010. I'm sorry,
38 Mr. Commissioner, I don't have last year's
39 agreement in front of me to review the
40 allocations, as they're set out in the agreement.
41 Q I can see I'm going to be under time pressure here
42 so maybe I can shorten this up a little bit. In
43 terms of food fish, what is a legitimate
44 allocation for food fish per person, Mr. Crey?
45 MR. CREY: Mr. Commissioner, what folks may not
46 understand is allocations of fish in the
47 Aboriginal fishery are not on a person-by-person

- 1 basis. They're allocations that are broad and are
2 intended for communities fishing in a particular
3 geographic area, in this case of the Lower Fraser
4 River, so the fish are not apportioned out as to
5 the individual Aboriginal person.
- 6 Q So if you're, say, a member of the Kwantlen Band,
7 you couldn't say to the Kwantlen, well, here's
8 your allocation for the Kwantlen and then they
9 would divide up among their community because it
10 is a communal allocation, isn't it?
- 11 MR. CREY: The Kwantlen First Nation, Mr. Commissioner,
12 fishes collectively with a large number of Bands
13 situated between the Port Mann Bridge and Sawmill
14 Creek in the Fraser Canyon. That area of the
15 river, when there is an allocation, for example,
16 for food, will fish that allocation, they'll put
17 fishermen out on the river to catch fish for their
18 food, social and ceremonial need, along with the
19 other Bands as well. And the fishery is managed
20 by a communal licence that stipulates where
21 fishing may take place, by what means and the
22 duration of the fishery and the disposition of the
23 fish.
- 24 MR. EIDSVIK: Perhaps I could have Tab 77 of our
25 documents, Mr. Lunn? Page 2 of that.
- 26 Q And partway down the page, and Mr. Crey, perhaps
27 you can help me again, we see the Kwantlen Band
28 and it's the population, 173 total, and a hundred
29 on reserve and 73 off the reserve; is that
30 correct?
- 31 MR. CREY: Mr. Commissioner, I have to apologize. I
32 don't know the source of this demographic
33 information. If it comes from Indian and Northern
34 Affairs Canada, and it might, and it's for 2002,
35 that that may be the case. It may be a bit
36 different because that was in 2002; it's now 2009.
37 So the Band population may be larger.
- 38 MR. EIDSVIK: Okay. Thank you. If I could have that
39 marked as an exhibit, Mr. Commissioner?
- 40 MS. GAERTNER: What is the source of this document?
- 41 MR. EIDSVIK: It's Indian Affairs and it's titled at
42 the top there, "Band Registered Indian Population
43 by Sex and Residence".
- 44 MS. GAERTNER: I see the title. I see the bottom. It
45 says "IMB". I'm not familiar with, is this an
46 Indian Affairs document?
- 47 MR. EIDSVIK: Yes.

1 MS. GAERTNER: And we're to trust you on that? Could
2 we have at least the cover sheet provided at
3 another time?

4 MR. EIDSVIK: Of course. Now, if we go to Tab 88,
5 please.

6 THE COMMISSIONER: We just have to mark that, Mr.
7 Eidsvik. I'm sorry. What is the number, Mr.
8 Registrar?

9 THE REGISTRAR: That would be Exhibit Number 1275.

10

11 EXHIBIT 1275: Registered Indian Population
12 by Sex and Type of Residence by Group,
13 Responsibility Centre and Region, 2002
14

15 MR. EIDSVIK: And if we go to Tab 88, please? This is
16 the DFO's 2002 harvests of Aboriginal fish in the
17 Lower Fraser River.

18 MR. LUNN: I'm sorry. Did you say Tab 88?

19 MR. EIDSVIK: Tab 88. That's correct, Mr. Lunn. Thank
20 you. If we go to page 4 and if you can flip that
21 up, if it's possible? Thank you, Mr. Lunn.

22 Q And if we go to the column it's about midway
23 through, this is the sockeye catch, the Kwantlen
24 sockeye catch. And you can see, Mr. Lunn, if you
25 add up the 38, 683 and the 566, that gives us the
26 Kwantlen food fishery catch for 2002 on sockeye;
27 is that correct? If this table and DFO's got it
28 right?

29 MR. CREY: Sorry.

30 Q Do I have that correct, Mr. Crey?

31 MR. CREY: I don't know. I'm looking for your
32 reference here so lead me to it.

33 Q The reference is on the first page where it comes
34 from. This column, if you see "Port Mann to
35 Mission" --

36 MR. CREY: Right.

37 Q -- and then underneath that you'll see two columns
38 titled "Kwantlen".

39 MR. CREY: Right.

40 Q One is the setnet fishery, one is the driftnet
41 fishery.

42 MR. CREY: Right.

43 Q And at the bottom, we have 38,683 for drift, 566
44 sockeye for setnet.

45 MR. CREY: Those would be the recorded catches.

46 Q Those would be the recorded catches?

47 MR. CREY: Yes.

1 Q Now, if we go back to the 173 people and divide
2 that into the 39,000 sockeye, we get about 220
3 sockeye a person. How's your math?

4 MR. CREY: It's pretty good.

5 Q Okay. Have I got that about right?

6 MR. CREY: You do.

7 Q Okay. So a sockeye is about five pounds, five-
8 and-a-half pound?

9 MR. CREY: In the round.

10 Q In the round, yeah. So here we have over a
11 thousand pounds of sockeye in the round plus
12 chinook plus coho plus pink plus steelhead plus
13 chum in that food fishery in that year. So we're
14 over a thousand pounds per every man, woman and
15 child. Is that a reasonable food fish number?

16 MR. CREY: Well, Mr. Commissioner, with respect, it may
17 be in the eyes of some but I noticed at the top of
18 the page and, Mr. Commissioner, I'd draw your
19 attention to that. It says:

20
21 First Nations sockeye catches, including
22 ceremonial.
23

24 There isn't any reference to social. But these
25 fish are taken and each family in the community
26 would have some of these fish for food. But
27 what's not well understood outside of the Sto:lo
28 community, Mr. Commissioner, or at least I don't
29 think it is, is that the communities have a very
30 rich ceremonial life. For example, they have
31 naming ceremonies, and this would be true of all
32 the First Nations on the Lower Fraser River. I'll
33 just give a few examples. Naming ceremonies,
34 celebrating the birth of a child, marriages, what
35 is commonly referred to as potlatches. There are
36 funerals in our communities. And I can provide a
37 long, long list. Some of these events, these
38 social/cultural events in the community, might
39 include 20 people.

40 In other instances, if, for example, a
41 prominent leader in the community passes on, there
42 may be a thousand people present at such an event
43 in our community. The host community is obliged
44 to provide fish on such occasions. So what the
45 communities do is they catch a lot of fish for
46 food for immediate needs that they may have in
47 each of the families in the community but they put

1 a lot of fish up for the winter months for events
2 that can be foreseen and others that can't. So
3 they put them in storage. They store them in
4 their household, in some instances, and as we know
5 now, many of these communities will put some of
6 these fish up in cold storage plants.

7 But the fish are used for food but they're
8 used more broadly in the community than just
9 simply adding up what the catch is and then
10 dividing that catch by the number of residents in
11 the community. On the face of it, it looks like a
12 lot of fish but what folks don't understand,
13 people looking from outside of our community into
14 the community don't understand or don't fully
15 appreciate, is the community shares that fish very
16 broadly.

17 Q So would the sharing of fish in the Lower Fraser
18 be any different in the Upper Fraser in terms of
19 communities?

20 MR. CREY: I would expect there are some similarities
21 in the cultural life of the community but I'm not
22 the person to ask about life in the upper reaches
23 of the watershed.

24 MR. EIDSVIK: Mr. Commissioner, I have one or two last
25 questions and then I'm done.

26 Q Mr. Crey, how many Aboriginal Canadians are on and
27 have access on the Fraser River? Can you tell me
28 the population of people that have access to
29 Fraser River sockeye on the Fraser? Do you know
30 that?

31 MR. CREY: Well, with respect, Mr. Commissioner, that's
32 a difficult one to respond to. But generally
33 speaking, what we see in the watershed are 97
34 First -- we don't see but there are approximately
35 97 First Nations and approximately half, if not
36 more of the province's First Nations folk, live in
37 those communities throughout the watershed. Some
38 are at home on reserve and some are away in city,
39 either upgrading their education or they're away
40 for health care or they've found employment that
41 has taken them away from the community. But as a
42 rule, in the summer, they do come home and they do
43 fish along with the rest of us and we share our
44 catch with them.

45 MR. EIDSVIK: Perhaps I can have a couple more minutes.
46 Mr. Lowes has graciously given me some of his
47 time. Tab 73 in my set of documents on page 349,

1 please, Mr. Lunn?

2 MR. MCGOWAN: Mr. Commissioner, I'm not sure whether
3 Mr. Eidsvik intended to mark that last exhibit. I
4 don't believe it was given an exhibit number.

5 MR. EIDSVIK: Yes, I did, I'm sorry. Thank you.

6 MR. MCGOWAN: And I'll just say in order to get through
7 the afternoon we do need to finish up even with
8 Mr. Lowes' time certainly before the lunch hour.

9 MR. EIDSVIK: Thank you. If I could go to page 349 on
10 our document --

11 THE COMMISSIONER: Just before you go there, Mr.
12 Eidsvik, I think you wanted Tab 88 marked; is that
13 correct?

14 MR. EIDSVIK: Yes, that's correct. I'm glad that --

15 THE REGISTRAR: That would be Exhibit 1276.

16
17 EXHIBIT 1276: Fisheries and Oceans
18 Memorandum - Lower Fraser River First Nation
19 Salmon Fisheries Report for Week Ending
20 November 10, 2002
21

22 MR. EIDSVIK: And Tab 72 as well. And I will bring a
23 cover sheet for it so perhaps we can mark it for
24 identification today and when I supply the cover
25 sheet we can mark it as an exhibit.

26 MR. MCGOWAN: I'm sorry. I don't believe Tab 72 is the
27 one you meant to refer to, Mr. Eidsvik.

28 MR. EIDSVIK: Sorry. Which one was that, Mr. McGowan?

29 THE COMMISSIONER: I think it's Tab 73 that you.

30 MR. EIDSVIK: Seventy-three. Yes, that's where I am
31 right now. Perhaps we can move on to Tab 73. I'm
32 at page 349, Mr. Lunn.

33 MR. LUNN: Thank you.

34 MR. EIDSVIK: And it's in the top left-hand of the
35 document. If we go to page 1 on that, it's a DFO
36 memo dated April 14th, 1987. And I'm actually at
37 page 10 of that memo, if it helps. So if we go to
38 page 349, Mr. Lunn.

39 MR. LUNN: Yes.

40 MR. EIDSVIK:

41 Q And this is raising the point that I was raising
42 with you, Mr. Crey, and I'll just briefly read in
43 part of the second paragraph referring to in-river
44 allocations. A second problem related to the
45 catch by the IFF, that would be the old Indian
46 Food Fishery, I think; isn't that correct? What
47 was termed then the Indian Food Fishery, what is

1 today the FSC Fishery?

2 MR. CREY: That's correct.

3 Q It's distribution throughout the watershed.

4
5 For example, the Sto:lo's with 2,800 people
6 caught 320K sockeye for a per capita catch of
7 600 lbs of fish. Comparing this to the catch
8 by the 3,500 Carrier-Sekani's of Prince
9 George of 27K for a per capita catch of 50
10 lbs illustrates the gross disproportion of
11 catch between up-river and down-river
12 fishermen.

13
14 Do you think there is a gross disproportion
15 between up-river and down-river FSC fisheries, Mr.
16 Crey?

17 MR. CREY: Well, Mr. Commissioner, with respect, there
18 are so many things that come into play here that
19 it's almost too difficult for me to decide where
20 I'll start in response to this. On the face of
21 it, it would look that way. But it depends on the
22 history of the fishery and the extent of the use
23 of the fishery in different reaches of the
24 watershed. On the Lower Fraser, most of the
25 passing sockeye stocks are there and available for
26 harvest and there's a community very much
27 interested in harvesting these fish.

28 And over time, they've become accustomed to
29 catching a number of fish. And even in that era,
30 they sorted out these arrangements with Fisheries
31 and Oceans Canada. In fact, I worked in the Lower
32 Fraser office of the Department of Fisheries and
33 Oceans in that era. So whilst this may reflect
34 accurately the catch on the Lower Fraser at that
35 time and there may have been smaller catches in
36 the upper reaches of the watershed, I acknowledge
37 that. But to put a value judgment on it, I
38 wouldn't go that far.

39 MR. EIDSVIK: Mr. Commissioner, the other tab I was
40 looking to enter was the population data that was
41 at Tab 77. If I could have that identified and
42 I'll bring the cover sheet and have it entered as
43 an exhibit at a later date.

44 MS. GAERTNER: Mr. Commissioner, as it relates to this
45 particular tab, let's start here, he's referred to
46 one paragraph and a bunch of collections of
47 various different exhibits that were before the

1 Supreme Court of Canada. If he wants that one
2 paragraph with the memo which is the memo of April
3 14th, 1987, that may be the appropriate exhibit
4 that can go in. He's put it to the witness and
5 the witness has responded. But there's a lot of
6 other collections he's picked and chosen between
7 the exhibits. I think that if this is the exhibit
8 he intends to rely on, then let's keep it to that.

9 MR. EIDSVIK: One of the problems we have in the
10 Commission, Mr. Commissioner, is getting our
11 documents in. And the documents were all accepted
12 by the Supreme Court of Canada as real legitimate
13 documents. I would have referred to a number of
14 others in each tab, if I had time, but I don't.

15 THE COMMISSIONER: Well, at this point, Mr. Eidsvik,
16 let's mark this document, which has a face page,
17 and you went to that a moment ago so perhaps we
18 can just go back to the face page, Mr. Lunn --

19 MR. LUNN: Certainly.

20 THE COMMISSIONER: -- of that particular document. And
21 if you could describe that on the record, Mr.
22 Eidsvik, so we ensure --

23 MR. EIDSVIK: That is a memo dated April 14th, 1987,
24 from F.J. Fraser to G.E. Jones concerning the 1987
25 Fraser River IFF.

26 THE COMMISSIONER: And it's page 349 of that document
27 that you have made reference to; is that correct?

28 MR. EIDSVIK: Mr. Commissioner, at least I think it
29 would be appropriate to put the whole document in.

30 THE COMMISSIONER: No, I just wanted to make sure I
31 understood what page you had referred to.

32 MR. EIDSVIK: Oh, okay. Yes, it was 349.

33 THE COMMISSIONER: Okay. Yes, well, then that's the
34 document that should be marked as an exhibit, Mr.
35 Registrar.

36 THE REGISTRAR: That will be Exhibit 1277.

37

38 EXHIBIT 1277: Government of Canada Memo
39 dated April 14, 1987, from F.J. Fraser to
40 G.E. Jones - 1987 Fraser River I.F.F.

41

42 MR. EIDSVIK: And I'm not sure where we left our
43 document at Tab 77, the Registered Indian
44 Population.

45 MR. MCGOWAN: Mr. Commissioner, my understanding is
46 that document has already been marked as document
47 1275, Exhibit 1275.

1 MR. EIDSVIK: Thank you. And I'll bring a cover page
2 to relieve Ms. Gaertner's concerns. Thank you,
3 Mr. Commissioner. Thank you, panel members.

4 THE COMMISSIONER: Thank you, Mr. Eidsvik.

5 MR. MCGOWAN: Mr. Lowes, did you have any questions?
6 Mr. Gale is next, Mr. Commissioner. We have five
7 more minutes.

8 THE COMMISSIONER: I'm sorry. Mr. Lowes does not have
9 any questions?

10 MR. MCGOWAN: Sorry. Mr. Lowes has just indicated to
11 me he does not have any questions.

12 MR. LOWES: Well, if I've got five minutes.

13 MR. MCGOWAN: I must have misunderstood the vigorous
14 shaking of the head.

15 MR. LOWES: Well, I thought we had to be finished at
16 12:30 and I'm prepared to finish at 12:30, Mr.
17 Commissioner.

18

19 CROSS-EXAMINATION BY MR. LOWES:

20

21 Q This is a question for each of the panellists,
22 perhaps in turn, but my impression of the
23 materials that were called the roadmap and those
24 sorts of things were that they were discussions to
25 try to come to some sort of definition of what the
26 terms "joint management" or "co-management" mean,
27 some kind of agreed definition; is that correct?
28 Perhaps Mr. Rosenberger, you can answer that
29 question.

30 MR. ROSENBERGER: The roadmap process is one place
31 where the Department is working on how co-
32 management might be defined in the Fraser. And
33 the Department's also working on broader co-
34 management issues through other sources in this
35 region.

36 Q Well, the distinction that I'm making is between a
37 process that's aimed at arriving at an agreed-to
38 definition and a process that is aimed at
39 achieving an objective that's already defined.
40 And I'm assuming that the roadmap process is the
41 former rather than the latter.

42 MR. ROSENBERGER: That's correct.

43 Q And I'm assuming that each of the members of the
44 panel has his own definition of what he means when
45 he uses the term "co-management". So perhaps
46 starting at my left and working to the right you
47 could give the Commissioner your definition of co-

1 management. Mr. Wilson?

2 MR. WILSON: Well, first I'd like to make a point in
3 saying that I'm on the working group with the
4 First Nations Fish Council for co-management so
5 that discussion is happening at that table.

6 Q Yeah, when you use the word, what do you mean?

7 MR. WILSON: What do we mean? We want to be equal
8 members at the table at all levels or all scales,
9 whatever we want to call it.

10 Q Yeah, equal to whom?

11 MR. WILSON: To Department of Fisheries and Oceans.

12 Q To the Government of Canada?

13 MR. WILSON: Department of Fisheries and Oceans.

14 Q And Mr. Crey?

15 MR. CREY: Well, I don't have a working definition of
16 co-management in case that's what you're looking
17 for.

18 Q Yes.

19 MR. CREY: But I envision a process where, in the case
20 of the Lower Fraser River, the Sto:lo and the
21 Musqueam and all the other First Nations there are
22 partners with the Department of Fisheries and
23 Oceans in the management of their respective
24 fisheries. They have certain duties and
25 responsibilities and they govern their activities
26 by certain principles and work with a common
27 vision and specific goals in mind.

28 Q All right. And the partnership, does that include
29 members of the public, as distinct from the
30 Government of Canada? What's called third
31 parties?

32 MR. CREY: I think, Mr. Commissioner, with respect,
33 what we've heard these past two days and we may
34 hear more today is that the First Nations right
35 now are striving hard to build a Tier 1 level
36 process between and amongst themselves and a
37 strong Tier 2 process working with DFO as our
38 partners. And we're hard at work at that.

39 And I think, Mr. Commissioner, you might have
40 recalled my comments yesterday that the Sto:lo are
41 already well down the road to building good
42 working relationships with conservation groups on
43 the Lower Fraser River, sport fishing interests
44 and commercial fishing interests. In fact, it's
45 just not a relationship where we just meet and
46 talk.

47 We've actually formed a society in common

1 together. It's called the Salmon Table Society.
2 And in that society, we work on specific projects.
3 In other words, we're willing and able and we've
4 demonstrated that we're prepared to be inclusive
5 of and work with other interests in the fishery.

6 Q And I commend you for that. Mr. Shepert, your
7 definition of co-management?

8 MR. SHEPERT: I basically will defer that question
9 since there is a tremendous amount of work at the
10 B.C.-wide level right now to define that. So I
11 would leave that to the experts to define.

12 Q No, no, when you use the word, what do you mean?

13 MR. SHEPERT: Well, what it means to me personally is
14 that there's a devolution within the Department of
15 Fisheries and Oceans, as in most INAC programs.
16 There has been a devolution in health care, in
17 education and so on so there's got to be a
18 devolution process. So I see that the devolution
19 of decision-making, giving it to the regions, more
20 of the decision-making on a scale level, and an
21 increased role for First Nations to set the course
22 for their own destinies, as opposed to having it
23 set for them.

24 Q And finally, Mr. Rosenberger, when you use the
25 term co-management, what do you mean?

26 MR. ROSENBERGER: Co-management is an objective that I
27 strive for of working to have shared
28 responsibilities with First Nations and other
29 parties that have interests, in this case, around
30 the Fraser salmon resource with a clearly defined
31 roles and responsibilities with each of the
32 parties.

33 MR. LOWES: Thank you. I have no more questions.

34 MR. MCGOWAN: Till two o'clock, Mr. Commissioner?

35 THE COMMISSIONER: Thank you.

36 THE REGISTRAR: The hearing is adjourned until 2:00
37 p.m.

38
39 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
40 (PROCEEDINGS RECONVENED)

41
42 THE REGISTRAR: The hearing is now resumed.

43 MR. MCGOWAN: Mr. Commissioner, just before we continue
44 with the examination of this panel, I just have
45 one housekeeping matter that needs to be
46 addressed. You may recall on April 21st, during
47 the Project 10 examination portion of the

1 hearings, there was a document put to one of the
2 witnesses by Mr. Harvey which he was unable to
3 identify. That was marked at that time as Exhibit
4 Y. If we could have that brought up, please. It
5 appears to be PowerPoint presentation titled,
6 Where Have All the Sockeye Gone. Through
7 discussions with commission counsel, Mr. Harvey
8 and commission counsel determined that an
9 appropriate way to identify this document may be
10 through an affidavit. The affidavit has now been
11 prepared by a gentleman by the name of Dennis
12 Brown. It's been circulated to all participants,
13 none of whom had an objection to it being entered
14 by way of affidavit, although I understand Ms.
15 Gaertner has a brief comment to make.

16 MS. GAERTNER: Mr. Commissioner, I'm okay about it
17 going in this way as a matter of expedience, but I
18 do want to note that unlike other documents that
19 have gone in in this way, this is a document which
20 contains opinions and ideas that Mr. Walters has
21 and held at that point in time and obviously we
22 will have no opportunity to examine him on that.

23 MR. MCGOWAN: With that said, Mr. Commissioner, I'm
24 going to suggest this become the next exhibit now,
25 an exhibit proper.

26 THE REGISTRAR: The exhibit number is 1277 (sic).

27
28 EXHIBIT 1278: Affidavit of Dennis Brown and
29 Where Have All the Salmon Gone by Carl
30 Walters - formerly Exhibit Y for
31 identification
32

33 MR. MCGOWAN: Thank you. Mr. Gailus will be next
34 cross-examining.

35 MR. GAILUS: Mr. Commissioner, John Gailus, on for the
36 Western Central Coast Salish. I have 40 minutes
37 allocated to me. I expect I'll probably need it,
38 unless the panel had a big lunch and don't feel
39 like answering my questions.
40

41 CROSS-EXAMINATION BY MR. GAILUS:
42

43 Q Just by way of introduction for the panel, the
44 First Nations that I represent include the
45 Cowichan tribes, Penelakut tribe, Chemainus First
46 Nation although they've changed their name - I
47 can't pronounce it - and Hwlitsum First Nation, as

1 well our standing group is the Te'mexw Treaty
2 Association, as well, and these are First Nations
3 who have Douglas Treaty rights and they include
4 Malahat, Beecher Bay, Nanoose - who else am I
5 missing - Sooke and Songhees, and Songhees First
6 Nations. So First Nations whose reserves are
7 located on Vancouver Island.

8 Given the limited amount of time that I have,
9 I might be jumping around a little bit, but I want
10 to thank my friends, Mr. Lowes and Mr. Eidsvik for
11 kind of setting the table for some of the things
12 that I wanted to discuss with the panel this
13 afternoon. But before I get to that, I just want
14 to get some clarification from the First Nations
15 panel members. We've heard through the first part
16 of the aboriginal world view perspective from a
17 number of the First Nations witnesses that First
18 Nations are not getting enough FSC fish. Now --
19 and I think I heard that yesterday quite clearly
20 from Mr. Shepert that certainly for the First
21 Nations that he's representing, they're not
22 getting enough fish. And I wanted to put that to
23 the other two First Nations witnesses and I want
24 to couch that a little bit though and say - and I
25 think, Mr. Wilson, you addressed this a little bit
26 yesterday as well, but the question is assuming,
27 you know, 2009, separating that out, but assuming
28 that you signed off your CFA agreement and you
29 were allocated, for instance, 20,000 sockeye, is
30 that a sufficient amount for your nation in terms
31 of its FSC needs? So if you actually go out and
32 catch that amount of fish, is that a sufficient
33 amount? So I'll put that to you first, Mr.
34 Wilson?

35 MR. WILSON: Thank you, Mr. Gailus. So last year when
36 we received the 20,000 pieces from the Johnstone,
37 that fish went to every household in the community
38 of Bella Bella. So you're looking at 12, 1300
39 people receiving specifically sockeye. So this
40 past years our people didn't have to ration our
41 food intake, our sockeye food intake this past
42 year, because of the availability of that fish.
43 But in saying that, our urban members never got
44 any fish. And that was the purpose of us going
45 after an increase in the allocation, so I have to
46 say that the 20,000 pieces as identified in our
47 AFS agreement was not adequate.

1 Q Mr. Crey?

2 MR. CREY: Yes, thanks for the question. Again, with
3 respect, Mr. Commissioner, it's a very general
4 question and I think it really needs to be more
5 specific, but I'll do my best. There are some
6 seasons in which the returns for the Fraser are
7 very poor. 2009 is but one example. In that type
8 of season, there's insufficient fish on the Lower
9 Fraser River. Last year was unusual and the
10 returns to the Fraser River were even greater than
11 was anticipated by either the Pacific Salmon
12 Commission or the Department of Fisheries and
13 Oceans or, indeed, any longstanding observer of
14 the fishery although we all understood that it was
15 the dominant year for sockeye returns. But no one
16 anticipated the size of last year's returns.

17 So last year there was a lot of fish around
18 and much of the need of the First Nations on the
19 Lower Fraser were met.

20 Q Mr. Shepert, do you have any further comment?

21 MR. SHEPERT: Since I've been working in the fishery,
22 15 years, I have never seen the numbers that First
23 Nations need in the Upper Fraser ever obtained.

24 Q Thank you. Now, I've got a series of questions
25 for you, Mr. Rosenberger, and put you on the hot
26 seat. In the last panel we heard from Mr. Huber,
27 who said that AFS funding has been reduced by five
28 percent. Do you agree with that statement?

29 MR. ROSENBERGER: Yeah, I don't have specific knowledge
30 of all various funding envelopes.

31 Q Would you say it's remained relatively constant,
32 you know, based on own knowledge?

33 MR. ROSENBERGER: That would be my understanding is
34 it's been relatively constant through all of its
35 time period.

36 MR. GAILUS: Okay. If I could ask to have Exhibit 1224
37 put up, please?

38 Q So this is a background information document for
39 -- I think we saw this yesterday, draft FSC access
40 guiding principles. You've seen this document. I
41 think it was actually put to you yesterday, was it
42 not?

43 MR. ROSENBERGER: Yes.

44 Q And if we go to the bottom, right to the bottom of
45 that first page, it looks like it's from 2006,
46 correct?

47 MR. ROSENBERGER: That's correct.

1 Q Okay. So unfortunately the pages aren't numbered,
2 but let's go to the fourth page in, I believe it
3 is.
4 MR. EAST: I'm sorry, Mr. Commissioner, just to
5 clarify, I don't believe this particular document
6 was put to Mr. Rosenberger. I thought it was put
7 to Mr. Huber.
8 MR. GAILUS: Okay.
9 MR. EAST: So maybe if you could just ask Mr.
10 Rosenberger if he actually has familiarity with
11 this document.
12 MR. GAILUS: I thought I did.
13 Q Mr. Rosenberger, do you have any familiarity with
14 this document?
15 MR. ROSENBERGER: Yes, I do.
16 Q Okay. Thank you. So just going to draft
17 principle number 3, so it would be the next page
18 over, if we can just highlight that:
19
20 Processes and decisions regarding FSC access
21 (amount, fishing area and fishing
22 opportunity) should incorporate some
23 flexibility within a generally consistent
24 approach.
25
26 Now, I note this is a draft but, do you agree with
27 that statement?
28 MR. ROSENBERGER: Yes.
29 Q And is this a principle that DFO has implemented
30 or is applying in practice?
31 MR. ROSENBERGER: Yes.
32 Q Okay. Now, I believe we heard from you yesterday
33 that allocations have remained - I'm going to use
34 the word static but I don't want to put words in
35 your mouth. I don't think that was the language
36 that you used - since the early '90s; is that
37 correct?
38 MR. ROSENBERGER: Some have been consistent or
39 relatively unchanged. Others have changed fairly
40 substantially.
41 Q Okay. But in terms of the -- if we can call it a
42 global allocation, has that remained relatively
43 constant?
44 MR. ROSENBERGER: Global allocation to B.C. or...?
45 Q Fraser River sockeye, for instance?
46 MR. ROSENBERGER: It's been relatively consistent.
47 Q Okay. Now, I didn't get this down in my notes and

1 -- when we were talking about yesterday about the
2 initial numbers were based on a number of factors
3 and can you remind us again what those factors are
4 that DFO looks at?

5 MR. ROSENBERGER: The historical catch at the time that
6 they were being discussed, needs that First
7 Nations groups may have put forward, the -- any
8 rationale of any numbers that they were
9 subscribing to. We have looked at the
10 populations, fishing areas that individuals fished
11 in when some of those catches occurred and then
12 where some of those groups may have changed
13 fishing locations as we moved away from individual
14 licenses and into band licensing, those type of
15 concepts.

16 Q Okay. Can we pull up Tab 50 of -- I think it's
17 commission counsel documents? Now, I don't
18 believe this has been entered as an exhibit yet,
19 but you'll note this is a -- this is the
20 Government of Canada's Response to Treaty Fishery
21 Questions and it's dated January 13th, 2011. I
22 want to take you to the fifth page of that and
23 it's response number 9. So 9(c) - I think you've
24 addressed those issues there, if we look at them.
25 I'll just read them out for you:

26
27 Factors considered in the negotiation of
28 First Nations FSC allocations could include:
29 recent harvest levels (reflecting interest
30 and fishing capacity and FSC allocations);
31 species availability...; species abundance;
32 consideration of allocations for other First
33 Nations; and, population size (on reserve,
34 off reserve). In the treaty context, FSC
35 levels have been negotiated with reference to
36 the above factors.

37
38 Do you agree with that statement?

39 MR. ROSENBERGER: Yes, I do.

40 Q Okay. Thank you. Now, in terms of these factors
41 and the information when we're talking about the
42 initial allocations, what process does DFO follow
43 to essentially update this? Do you look at these
44 factors annually, every five years, every ten
45 years, like how do you go about establishing those
46 factors that would go into an FSC negotiation?

47 MR. ROSENBERGER: The information is reviewed annually

1 as far as the catches in the various areas. If
2 there are requests for change, those would be
3 reviewed. There's -- this document talks about --
4 this one and one of the other ones that was
5 reviewed earlier today talk about the process for
6 considering making changes in the allocations, so
7 it's an annual process.

8 MR. GAILUS: Okay. Could I have that entered as the
9 next exhibit, please?

10 THE REGISTRAR: That will be Exhibit 1278 (sic).

11
12 EXHIBIT 1279: Canada's Response to Treaty
13 Fishery Questions - January 31, 2011
14

15 MR. GAILUS:

16 Q Now, as I said at the beginning, some of the First
17 Nations that I represent have Douglas Treaty
18 rights and I just wanted to get a sense of whether
19 the department has any policy to address these
20 First Nations who have, you know, rights to fishes
21 formerly. Does that feed into these factors?

22 MR. ROSENBERGER: That would be considered in the area
23 where they're looking at them.

24 Q Okay. Now, one of the factors that we looked at
25 there is population. And if I can ask for Exhibit
26 1221 to be brought up, please.

27 THE REGISTRAR: Excuse me, the last exhibit should have
28 been 1279. And this new one would be 1280.

29 MR. MCGOWAN: I'm sorry, Mr. Commissioner, I wonder if
30 Mr. Registrar could clarify which exhibit is 1279
31 and which is 1280?

32 THE REGISTRAR: Pardon me, the last exhibit was 1279,
33 and that was Tab 50 of the commission.

34 THE COMMISSIONER: What is 1278, Mr. Registrar?

35 MR. LUNN: If I can assist, that was document for
36 identification "Y", that became 1278.

37 MR. MCGOWAN: Okay. Just for the record, so the
38 transcript picks it up - what was Exhibit Y for
39 identification is now exhibit proper 1278.

40 THE COMMISSIONER: Right. Thank you.

41 MR. GAILUS: And we were going to look at Exhibit 1221,
42 please.

43 MR. LUNN: It's on the screen.

44 MR. GAILUS: Here we go. Can we just -- maybe just
45 blow that up a little bit?

46 MR. LUNN: Is there a question you'd like --

47 MR. GAILUS: Just the first page for now.

1 MR. LUNN: I can blow it up this much.

2 MR. GAILUS: Okay. Perhaps maybe just the top third
3 then.

4 Q I guess we're kind of stuck with the document as
5 we have, but I think -- the purpose that I'm
6 bringing this up is - and I'm not certain whether
7 you can read this clearly, Mr. Rosenberger, but if
8 you look at the First Nations listed there and
9 there's two other pages and I note -- I note that
10 Heiltsuk is not listed on there, so that may have
11 been related to the PPR, as well, but you'll note
12 that there are -- you know, historically we see
13 that there are substantial increases in the First
14 Nations population; you'd agree with that?

15 MR. ROSENBERGER: There are increases along each of the
16 band rows, yes.

17 Q Okay. And one of the factors when we're talking
18 about allocations obviously is population; you'd
19 agree with that?

20 MR. ROSENBERGER: That's one of the factors we
21 consider, yes.

22 Q Okay. And would you consider an increase in
23 population to be equivalent to an increase in
24 need?

25 MR. ROSENBERGER: That's the linkage, yes.

26 Q Okay. And would that also support an increased
27 allocation?

28 MR. ROSENBERGER: Not necessarily.

29 Q Okay. And why not?

30 MR. ROSENBERGER: We'd have to look and see what the
31 catches are, what the availability of fish are.
32 There's -- as the previous document you identified
33 showed that there are more than just sockeye, more
34 than just salmon, so there's a number of factors
35 but if a group or whoever is looking to make a
36 change, if they have catch that's substantially
37 less than the current allocation then it may not
38 need to have an increase in that allocation.

39 Q Okay. Now, I'd like to look at -- just look at a
40 couple of examples and maybe if we can -- we can
41 look at the Musqueam - and I'm not doing this to
42 pick on Musqueam - so if we look at Musqueam from
43 1992, the number there is 873 - 2009, 1231 and
44 then 1247 in 2010. Now, we go down a couple of
45 rows and we get to Squamish, and their population
46 was 2499, and 3694 in 2009. I just want to point
47 out two other nations that we represent. We have

1 Cowichan on the next page. It's near the bottom.
2 And that's 2748 in 1992, up to 4383 in 2009, and
3 finally, if you go to the next page over,
4 Songhees, who are Douglas Treaty, 305 to 509 in
5 2009.

6 Now, just keeping those numbers in mind, can
7 we pull up -- I don't know if we can keep this on
8 the screen, as well. If we can pull up the Policy
9 and Practice Report Number 18 and page 37, please.
10 It's actually -- it would be the next page over.

11 Sorry. Have we got the right one up here?

12 MR. LUNN: PPR18?

13 MR. GAILUS: I'm looking for the tables.

14 MR. MCGOWAN: The tables commence on page 40.

15 MR. GAILUS: Okay. Thank you. Sorry, on my copy it's
16 37.

17 Q So, and as I said, I don't want to -- I'm not here
18 to pick on Musqueam. In fact, I think Musqueam
19 has already said that their FSC needs are not
20 being met, but I just want to do a little bit of
21 contrast here so you'll note that Musqueam's
22 allocation 75,000, Squamish 20,000 and if we go
23 the next page over, we have -- actually, probably
24 the next page over then. Sorry. We have Cowichan
25 at 30,000, Songhees, which was the other one that
26 Douglas Treaty First Nations down the bottom, at
27 2100.

28 Now, I recognize that there is no sort of
29 magic formula out there, but given these increases
30 in population that we looked at, does -- has DFO
31 addressed the allocation issue with these First
32 Nations and do you actually conduct a needs
33 assessment?

34 MR. ROSENBERGER: Yeah, I don't deal directly with any
35 of those First Nations groups, so I don't have any
36 knowledge that I could tell you what process
37 they've worked with.

38 Q Okay. But you would -- you'd, I suppose, agree
39 that the skewing of the numbers leads to, at least
40 on the face of it, there's a discrepancy there
41 that could lead to conflict?

42 MR. ROSENBERGER: Yeah, I don't have enough knowledge,
43 as I mentioned earlier, just because the
44 population changed, that's one factor, but there
45 may be a large number, for example, of other
46 species that there's some change been made on or
47 that's meeting the needs. I don't have enough

1 detail here that I could answer your question --
2 Q Okay.
3 MR. ROSENBERGER: -- or make any comments.
4 Q Okay. But, I suppose on a more macro level, you
5 know, we can certainly take notice that all First
6 Nations are growing. In fact, they are the
7 fastest-growing group in Canada and have -- you
8 know, does DFO have a plan for accommodating this
9 increase in population with allocations?
10 MR. ROSENBERGER: Yes, I think you answered your own
11 question. That was one of the things we were
12 taking a look at is populations.
13 Q Okay. So would you agree though you may be
14 lagging behind somewhat on that?
15 MR. ROSENBERGER: If you'd like to talk about in the
16 groups that I do this work for, I could probably
17 give you some more specifics, but in these cases,
18 I don't have any specifics that I could tell you
19 how effective they are in reviewing them or what
20 changes have been requested or any of that kind of
21 detail.
22 Q Okay. Now, for the First Nations representatives,
23 I suppose, if you want to comment whether you have
24 a sense of the rate of growth in your communities
25 and whether or not you're making these sorts of
26 submissions to DFO on increasing your allocations
27 given your increase in population and also the
28 impact of Bill C-3 which is the McIvor Amendments
29 to the **Indian Act**. Mr. Wilson, do you have any
30 comments on that?
31 MR. WILSON: As I described earlier, there was a high
32 need for our urban members to get FSC fish
33 allocations, so that is our strategy from this
34 year on.
35 MR. SHEPERT: Well, speaking from the Upper Fraser,
36 population aside, there have been not enough fish
37 for the past 15 years, as I've stated earlier, so
38 it's a bit of a moot point. We first need to get
39 the fish home before we can start talking about
40 feeding each individual member of the nations.
41 Q Mr. Crey?
42 MR. CREY: I'd maybe like to, Mr. Commissioner, link
43 this back to an earlier question, but of course to
44 answer the question that's been put to me right
45 now. As the fish return to the Fraser, depending
46 on the season, there may be more fish in a given
47 season in the upper reaches of the watershed which

1 afford some First Nations an opportunity to fish.
2 I would agree with Marcel -- Mr. Shepert rather,
3 that usually it's not nearly enough. But in some
4 seasons, they do get some opportunity.

5 On the Lower Fraser, it's a different
6 situation. Most of the sockeye stocks that make
7 their way to the Fraser, some of them are
8 indigenous or local stocks on the Lower Fraser,
9 such as on the Harrison and the Cultus Lake. Most
10 other stocks are going by and as geography would
11 have it and interest in the fishery and the skill
12 levels of the fishermen, the Sto:lo community does
13 well in the fishery. And when you look at the
14 numbers caught on the Lower Fraser between and
15 amongst the Sto:lo, the Musqueam and the
16 Tsawwassen, between the mouth of the river and
17 Sawmill Creek in the Fraser Canyon, in some
18 seasons their catches can be very healthy, look
19 good, and in all of that you would think their
20 needs are being met. And what I'd like to say is
21 that by and large, much of the need is met but
22 there are some First Nations communities on the
23 Lower Fraser and sometimes you can't see it in the
24 midst of all the statistics that are presented,
25 that have lost fishing opportunities.

26 For example, the Soowahlie First Nations near
27 Cultus Lake fished in the past on a small run of
28 sockeye called the Cultus Lake sockeye. It's the
29 most highly-studied population of sockeye, I
30 think, on the entire Pacific Coast, if I'm not
31 mistaken. Well, they've lost this fishery. They
32 can't fish that stock.

33 And there's another stock of fish that makes
34 its way up the Vedder Canal into the Chilliwack
35 River and vents onto the Chilliwack Lake and that,
36 too, is a small run of sockeye that the Ch-ihl-
37 kway-uhk, which would include the Soowahlie,
38 fished on in the past, but no longer get to fish
39 on them. So there's a dislocation even on the
40 Lower Fraser River, an estrangement between the
41 communities that once fished these two stocks of
42 fish and what is currently occurring today.

43 So it's complex. My answer is it's a complex
44 question and it's not as easy as giving global
45 numbers and presenting them in charts and graphs
46 or in representations like this. But I would say
47 generally throughout the Fraser watershed, the

1 needs of the First Nations for their food, social
2 and ceremonial needs are not being met by a long
3 shot.

4 Q Thank you. Just stepping back, Mr. Rosenberger,
5 there were a couple of questions there that I
6 asked and you said you couldn't answer them
7 because it's not your area that you work in. Can
8 you tell us who is the person who might have those
9 answers?

10 MR. ROSENBERGER: Some of the First Nations that you
11 mentioned are on the South Coast, so South Coast
12 Area office would be the contact for Vancouver
13 Island and the Sunshine Coast area and then the
14 Lower Fraser for groups like Musqueam.

15 Q And -- you know, and I might be going beyond your
16 area of expertise, but would that be something
17 that perhaps the regional director would have
18 knowledge of?

19 MR. ROSENBERGER: Which regional director?

20 Q Well, we have another panel, Ms. McGivney or Ms.
21 Stewart?

22 MR. ROSENBERGER: Yes, I would think that Ms. McGivney
23 would have some knowledge about some of those
24 other groups.

25 Q Okay, thank you. Now, I just wanted to go to
26 Exhibit 295, please. And we've seen this document
27 a few times. Can we turn to page 3? And right at
28 the bottom.

29 MR. LUNN: The whole section?

30 MR. GAILUS: Just the bottom section, starting with:

31
32 More broadly...

33
34 Please.

35 MR. LUNN: Thank you.

36 MR. GAILUS:

37 Q Now, Mr. Lowes asked you each a question of what
38 your definition of co-management is. I'm not
39 going to ask you that. But this is the definition
40 of co-management that comes out of paper and it
41 says:

42
43 "A partnership in which government agencies,
44 local communities and resource users, NGOs
45 and other stakeholders share the authority
46 and responsibility for the management of a
47 specific territory or set of resources."

1 My question is for, I guess for each of you, is:
2 do any of the AFS agreements that we've been
3 looking at in your opinion, so the CFO and the
4 AAROMs and the PICFIs, do any of those agreements
5 meet that definition?

6 Mr. Wilson?

7 MR. WILSON: Give me a few minutes to think this
8 through?

9 MR. GAILUS: Okay.

10 MR. SHEPERT: I'll take a shot at it. You're saying
11 that all of the programs which DFO administers for
12 First Nations including PICFI, AAROM and AFS, do
13 they meet this threshold? Do they meet this
14 standard?

15 Q We've been talking a lot about -- we've been
16 throwing this term "co-management" around quite a
17 bit and I just want to get a sense of whether you
18 think if, you know, applying this definition of
19 co-management, whether or not those programs meet
20 that definition. Or if they meet it somewhat, you
21 can feel free to answer that.

22 MR. SHEPERT: Okay. So I would say that in limited
23 situations that there is some ability to, you
24 know, to make decisions at a local level, but it's
25 very limited at this particular time. I'm
26 thinking of bigger things, like the implementation
27 of Wild Salmon Policy, for example, there has been
28 other than just consultation, sometimes people
29 refer to it as drive-by consultation. It's a duty
30 that the government has to do. It's not
31 meaningful, it's not bringing First Nations
32 particularly in the Upper Fraser into the fold in
33 terms of setting all that stuff. So I would say
34 in that particular regard, which we're very
35 interested in doing, it's not meeting this test at
36 all by any stretch of the imagination. But in
37 sort of local, more smaller situations, I think
38 the First Nations are exerting some authority to
39 the best of their ability to do so, including
40 development of management plans and presenting
41 those to DFO which, in the past, they hadn't been
42 able to do and are now capable of doing. So it's
43 very limited. It needs way more work and I'm
44 hoping that will come in the future.

45 Q So if I can say that, you're saying that there is
46 room in certain circumstances for First Nations to
47 develop their own policy, apply their own

1 knowledge and laws in the management of the
2 fishery?

3 MR. SHEPERT: Yes.

4 Q And the example would be -- like under which type
5 of agreement?

6 MR. SHEPERT: Well, I'm only familiar -- I haven't been
7 involved in AFS for quite a few years. Those are
8 specific to specific bands and/or tribal councils
9 and I work for an AAROM organization, so I can
10 only speak from it from the AAROM perspective, but
11 again, as I'm saying, I mean, if you're looking at
12 implementation of, say, FRSSI, for example, the
13 Fraser River Sockeye Spawning Initiative, I think
14 in a really -- if it were really good,
15 collaborative approach to that, there would be a
16 lot more meaningful dialogue, there would be a lot
17 more engagement and then there would be critical
18 decision points that would have to be met that
19 would be agreed to by the parties. That hasn't
20 happened to date. So and I think it falls short
21 of what I would call a co-management arrangement.

22 Q Any other comments from Mr. Crey or Mr. Wilson?

23 MR. CREY: Well, I'd like to start and stop with,
24 "No" --

25 Q Okay.

26 MR. CREY: -- but unfortunately I can't stop myself. I
27 would say that we're in the early stages of
28 exploring ways to get to co-management, closer to
29 meeting this description that we're seeing in
30 front of us on the screen and we're happy to do
31 that, but we're some distance from that now. But
32 I think there's interest there on the part of
33 government and right now, the leadership in the
34 Sto:lo area, and I'm merely their advisor, we're
35 encouraging the department to move quickly along
36 the road to getting to a place where we have
37 something resembling what it is you see there on
38 your screen, where there is a central role for
39 First Nations in the management of passing fish
40 stocks and fish stocks indigenous to their
41 territory, a central role in management.

42 MR. WILSON: I was just thinking about PNCIMA structure
43 where you have First Nations, the federal and
44 provincial government agencies at the steering
45 committee level. So I would read a partnership in
46 which government agencies and First Nations share
47 the authority and responsibility for management of

1 specific territory or set of resources. We're
2 considered owners, not users.

3 Q Okay. So if I can just clarify, Mr. Wilson, the
4 PNCIMA model would fit this description?

5 MR. WILSON: That's correct.

6 Q Thank you. Mr. Crey, yesterday you talked about
7 the Sto:lo co-management proposal that was
8 presented. Are there any elements of Sto:lo co-
9 management model reflected in any of these
10 agreements or is -- as a follow-up, if you say no,
11 is Sto:lo though still pursuing those co-
12 management options that you put forward quite some
13 time ago?

14 MR. CREY: You're taking me to a difficult chapter in
15 history of the Sto:lo people, and our bid with the
16 federal government to enter into a co-management
17 working relationship and that would be that
18 proposed co-management agreement that the Sto:lo
19 people, the overwhelming majority of the
20 communities worked long hours, day, day in and day
21 out, month after month for the better part of a
22 year, developing and which was finally rejected.
23 And it was never clear why it was rejected. We
24 could have been ten or 11 years further down the
25 road towards the world of co-management, something
26 that you see, as I say, represented here up on the
27 screen. We could have been so much further down
28 the road.

29 But we haven't given up. We don't have
30 agreements currently that approximate what it is
31 that you see there, but we remain hopeful and
32 we're -- we have what you call stick-to-it-ness,
33 and we're still at it.

34 Q Thank you. In the limited time I have left, I
35 wanted to -- wanted to actually ask about the
36 First Nations organizations and I, just for the
37 sake of clarity to the First Nations panel
38 members, I think this was asked by Mr. East of Mr.
39 Rosenberger, whether or not you'd agree that these
40 organizations, First Nations Fisheries Council,
41 First Nations -- Fraser River Aboriginal
42 Secretariat and some of the other organizations
43 we've been looking at, they do have a very
44 important purpose, but whether or not you'd agree
45 that as the nations are the rights-holders, that
46 matters of consultation, accommodation,
47 allocation, you know, habitat management, that

1 those matters will likely remain with the First
2 Nations. Would you agree with that statement, Mr.
3 Wilson?

4 MR. WILSON: Yes.

5 Q Mr. Crey?

6 MR. CREY: Yes, I do.

7 Q Mr. Shepert?

8 MR. SHEPERT: I also agree.

9 Q Thank you. I just want to get to a couple of
10 recommendations. So if we could turn to Exhibit
11 493, please. Actually, before I get there - I'm
12 being pulled in all different kind of directions
13 here - Mr. Rosenberger, when we were talking about
14 Douglas Treaties, I think you said that was an
15 area you couldn't really talk about either, given
16 where your location is. Again, is that a matter
17 that the regional director, directors or someone
18 in the South Coast could probably speak to?

19 MR. ROSENBERGER: Yes, I believe so.

20 Q Okay. Thank you. So we had Our Place at the
21 Table. If you could turn to page 4, please.
22 Thank you.

23 And, Mr. Shepert, my question is for you. I
24 believe you're one of authors of this report?

25 MR. SHEPERT: Yes.

26 Q And I just want to take you to the last
27 recommendation. It says:

28
29 A moratorium be placed on the further
30 introduction of individual property rights
31 regimes such as Individual Fishing Quotas
32 unless First Nation interests include
33 allocations in those fisheries are first
34 addressed.

35
36 Do you still agree with that statement?

37 MR. SHEPERT: Yes.

38 Q I was wondering if you could just quickly
39 summarize for the commissioner your reasons for
40 holding that view.

41 MR. SHEPERT: Well, this report was done in '02, so my
42 recollection may be a little bit sketchy, but as
43 far as I remember on this particular point, this
44 report was commissioned in light of or in response
45 to the Pearse and McRae, who had put out a report
46 in looking at fisheries in a post-treaty
47 environment. So you have to remember that their

1 recommendations in their report had some -- was
2 really about ITQs, individual transferable quotas.
3 They believed that the only way and they were
4 demonstrating in their report that all over the
5 world that the ITQ was the way to go.

6 We as First Nations people felt that neither
7 here nor there on that particular point. All we
8 knew at this particular time was hold on a second.
9 Have you sat down and done your homework? Have
10 you talked to the First Nations people in the
11 province? You know that there's a lot of tension
12 and there's a lot of stuff going on around the
13 fishery. So we said before we go to move to any
14 kind of a new regime, you need to stop the whole
15 movement towards ITQs until some of these other
16 issues have been addressed. That particular
17 bullet was around that particular piece. And I
18 still hold to that.

19 Q Okay. Thank you. My final question is for Mr.
20 Rosenberger, and again on recommendations. Now,
21 some of the participants have recommended a move
22 to a terminal fishery for sockeye salmon. And we
23 looked earlier at all the various numbers for the
24 various First Nations who essentially rely upon
25 Fraser River sockeye for their FSC needs. And I'm
26 -- and you may not be able to answer this question
27 but whether or not, you know, DFO -- now DFO would
28 address a move to, say, a terminal fishery to
29 address all the First Nations who rely on FSC, all
30 of their needs.

31 MR. ROSENBERGER: Well, hopefully I can answer it,
32 because that's part of my responsibilities. So as
33 Fraser Panel chair and also as one of the area
34 directors in the department we have a priority of
35 the spawning objectives as the highest priority
36 and then First Nations fisheries for food, social,
37 ceremonial as the second highest, so when you take
38 a look at years recently, for example, '07, '08
39 and '09, when we didn't have sufficient fish
40 either to meet all of those needs or enough to
41 have those fisheries and escapement objectives
42 met, there wasn't commercial or recreational
43 fisheries or fairly limited. In 2010 when we had
44 enough fish to meet the objectives that we were
45 striving for, we were able to have fisheries for
46 commercial fisheries as well and some of those are
47 in the terminal areas.

1 Q But would you agree that, you know, given some of
2 the discussion earlier that we had around First
3 Nations fishing outside of their traditional areas
4 that if the recommendation is that there be a
5 terminal fishery, DFO would likely have to have a
6 bit of a sea change in their policy?

7 MR. ROSENBERGER: No, I think that change is already
8 occurring. We've, as you can see in some of the
9 earlier documents, at this stage the department
10 has already purchased back for the demo fisheries
11 approximately 12.5 percent. That's not the only
12 fisheries that are going on for economic
13 opportunities for First Nations. There's also the
14 economic opportunity fisheries in the Lower Fraser
15 and there's also the -- some licence transfers
16 directly to some of the First Nations in coastal
17 areas. So there's a number of different aspects
18 going on there. The amount of fish and where the
19 First Nations groups are making the requests, the
20 part that we're, you know, making adjustments for
21 at this stage, but I think we're on that track at
22 this point in time.

23 Q And just one point of clarification, though, are
24 you not just addressing the economic opportunity
25 of fisheries here?

26 MR. ROSENBERGER: My first comment was on FSC side and
27 the second part was --

28 Q Okay.

29 MR. ROSENBERGER: -- on the commercial or economic
30 opportunity side.

31 MR. GAILUS: Okay. Thank you. Those are my questions.

32 THE COMMISSIONER: Thank you.

33 MR. DICKSON: Mr. Commissioner, it's Tim Dickson for
34 the Sto:lo Tribal Council and Cheam Indian Band.

35
36 CROSS-EXAMINATION BY MR. DICKSON:

37
38 Q Mr. Crey, my first questions are for you. I
39 understand that you're on the executive committee
40 of the Lower Fraser Fisheries Alliance?

41 MR. CREY: Yes, that's correct.

42 MR. DICKSON: Mr. Lunn, if we could have Tab 30 from
43 our list, please?

44 Q These are the terms of reference for the LFFA, as
45 I understand it?

46 MR. CREY: Yes, that's correct.

47 MR. DICKSON: Could we have that entered as the next

1 exhibit please, Mr. Registrar?
2 THE REGISTRAR: That will be Exhibit 1280.

3
4 EXHIBIT 1280: Terms of Reference for the
5 Signatories - undated
6

7 MR. DICKSON:

8 Q Mr. Crey, you spoke yesterday of some of the work
9 that is being done to develop the LFFA and Mr.
10 Lunn, our Tab 31, please. This is the LFFA's
11 five-year strategic framework and I'd like that
12 entered as the next exhibit if you can -- if you
13 can agree that that's what it is, Mr. Crey.

14 MR. CREY: Yes, I do.

15 MR. DICKSON: Thank you. Mr. Registrar?

16 THE REGISTRAR: That will be Exhibit 1281.

17
18 EXHIBIT 1281: Fisheries Working Together -
19 Five-Year Strategic Framework
20

21 MR. DICKSON:

22 Q Mr. Crey, this document sets out some of the
23 LFFA's ongoing work but I'd like to take you just
24 to one paragraph on page 2, the first paragraph,
25 Mr. Lunn. Thank you. And this says that:

26
27 The Lower Fraser Fisheries Alliance was
28 established in 2010, and has been empowered
29 by its 29 member First Nations to establish a
30 First Nation to First Nation ("Tier 1")
31 working relationship and build capacity. The
32 organization will work towards collaborative
33 management under a Tier 2 and Tier 3
34 processes in the future and if successful
35 will help facilitate discussions with local,
36 federal and provincial governments regarding
37 the recognition of First Nations inherent
38 rights with respect to the management of
39 fisheries and aquaculture.
40

41 Now, I want to focus on last words, the
42 recognition of First Nations inherent rights with
43 respect to the management of fisheries. Am I
44 correct, Mr. Crey, in thinking that what this
45 document is envisioning is co-management based on
46 First Nations' inherent aboriginal rights in the
47 fish, as opposed to co-management being grounded

1 only in the department's authority?

2 MR. CREY: Well, their rights and their title and, yes,
3 I would agree.

4 Q And those aboriginal rights and title, as I
5 understand them, they're held at the First Nation
6 level, as opposed to at a more aggregated level,
7 at a larger aboriginal organization group level.

8 MR. CREY: Yes, at the First Nations level.

9 Q And so if First Nations are going to work together
10 with DFO in large aggregates in a joint management
11 process, then I understand that the mandates must
12 come from the First Nations level.

13 MR. CREY: That's correct.

14 Q Mr. Rosenberger, you've spoken some of the
15 benefits of DFO in reaching co-management
16 arrangement with First Nations and some of those
17 benefits, I think, are efficiencies because DFO
18 can then work with aggregated bodies. And I just
19 want to put it to you that for this co-management
20 process to work, for the relationship between DFO
21 and First Nations to work, it will be critical
22 that DFO respects the source of First Nations
23 authority too and is flexible and does not insist
24 on a one-stop-shop model for all co-management.
25 Is that fair enough?

26 MR. ROSENBERGER: Yeah, I don't think the department
27 has been insisting on one-stop shopping. You have
28 some groups that participate in multi-stakeholder,
29 multi First Nations arrangements and others that
30 are not interested in participating, so there are
31 bilateral only arrangements. The process that I
32 was describing as -- is that the bilateral
33 relationship stays so that's the nations, the
34 department, and defining what those -- what is
35 going to be the roles and responsibilities at that
36 level and then that those groups look to mandate,
37 as you described it, to larger bodies, and then
38 bringing them together so that there's this tier
39 of integration so that you have the ability to
40 work at various issues at various levels in an
41 effective process.

42 Q Yes. And what that arrangement will look like at
43 the end of the roadmap process, if the roadmap
44 process is successful obviously remains in doubt,
45 if the process is in process. And it may be that
46 when you go up the pyramid you can get to a
47 province-wide organization on the First Nations

1 side. But it may also be that there have to be
2 several larger -- large organizations and that you
3 can't just have the one provincial organization,
4 and do you accept that DFO has to respond to the
5 reality of what that process leads do?

6 MR. ROSENBERGER: Yes.

7 Q And now, on the roadmap process, one of the
8 concerns that I've heard expressed, Mr.
9 Rosenberger, is that the representatives on the
10 DFO side are not currently mandated to negotiate a
11 co-management arrangement and it's unclear to
12 First Nations whether Ottawa will mandate them to
13 do so and will mandate them how far, how large
14 will their mandate be? And the concern is that it
15 could wind up like the Sto:lo experience that Mr.
16 Crey has spoken about.

17 And if this -- if that were to occur, if
18 ultimately Ottawa doesn't mandate what the parties
19 and the roadmap -- doesn't allow, doesn't
20 authorize what the parties and the roadmap process
21 have come to agree to on a provisional basis,
22 you'll accept that that will be damaging to
23 relations with First Nations?

24 MR. ROSENBERGER: Yeah, I don't see it as that the
25 people involved in the process at this point will
26 carry it to the point where on the DFO side that
27 it would go to Ottawa for a mandate to do that or
28 nothing else. The way the process, in fact, works
29 within the department is it's an iterative
30 process. The individuals that are at that table
31 do give regular briefings and options and bring
32 back into the department the discussion and the
33 options, if you will, of what is being considered
34 where things might be able to go or where they
35 might be interested in taking them. The direction
36 is iterative, as well and so at this stage, I
37 think in some of the discussion and description
38 here earlier was that the group that is working on
39 that now needs to give enough clarity around what
40 exactly is it that they're striving for, who is it
41 that's in the room, what are all their objectives
42 and at that stage, I think you'll start to either
43 see whether there is enough cohesiveness, enough
44 people in the room, you know, as you've described,
45 and it won't be one-stop shopping. If there's 80
46 percent of the First Nations are not interested in
47 being there, they want to do -- sorry bilateral

1 level only, and you have 20 percent of the people
2 in that room, is that the best formula in place?
3 It might work for those 20, but if it's -- if the
4 structure that's being proposed or the people that
5 are looking to be involved -- it'll have to be
6 balanced. So I don't see it, though, as the key
7 issue here is it won't be that the individuals in
8 that room, at least from the department's side,
9 that they're not telling anybody they're off in a
10 closet playing, doing something and one day
11 they'll pop up and say, "Hey, it's this or
12 nothing." That's not the way it's working.

13 Q Well, one of the suggestions coming from Mr. Crey
14 is that an MOU be developed, as you've heard,
15 that'll give a little bit of clarity as to what's
16 being discussed here and it would serve the
17 purpose, as I understand it, of sort of drawing
18 out both sides, DFO and First Nations, to see the
19 level of support there is for that.

20 Now, do you support that proposal?

21 MR. ROSENBERGER: Yeah, I don't think we're calling it
22 an MOU, but the idea of a document, that's why the
23 department has put on the table the eight or nine
24 issues that we're looking to have some discussion
25 around. We've had other documents and discussion
26 around the relative level of scope of issues. The
27 previous gentleman's questions that he put to the
28 other panel members about, you know, is this the
29 way co-management is working and do you agree that
30 there's -- that it's functioning. I may have
31 missed the opportunity of pushing the button, but
32 I'll get my answer in here now. So today we have
33 the comprehensive fisheries agreements with groups
34 that we have a clear mandate that we understand
35 who they are, where the areas we're striving to
36 look at so there's been some examples. And so
37 when you have those, you have a territory that you
38 know. On the testimony yesterday from the
39 Heiltsuk you could see how there's a defined area
40 that people understood. There's some defined
41 allocations. The fisheries, what would they be
42 deciding at that level, so in the past, as this
43 discussion has gone on, the department decided who
44 was fishing wherever. That community or that
45 groups of communities in those geographic areas
46 have that authority. The department's not sending
47 somebody to another person's area, those kind of

1 things, without consultation, without the process
2 steps. So what gear, what's the area, what -- the
3 allocation, there's some discussion. People are
4 signing off, whether they agree with it, you know,
5 the level and those kind of things at this stage.
6 There's some of the groups give a -- they have the
7 authority to define who's fishing. Some of those
8 groups withdraw that authority and they advise the
9 department. These people are no longer allowed to
10 fish. Those kinds of things happen. That's not
11 the department. That's a shared co-management and
12 at a level where we have clear people we
13 understand, you know, what's the -- what is it
14 that we can sign off with and we have some
15 reasonableness from our side, we think it's
16 totally reasonable, but there may be overlaps and
17 uncertainties at territories that we don't
18 understand, so that's why there's some language in
19 there to cover those kind of things off.

20 On these broader groups and dealing with the
21 forum and other places, we're not asking the forum
22 people to make decisions on commercial fisheries
23 for non-natives in Johnstone Straits. We don't
24 know that they're mandated. We don't know what
25 representation they're bringing. We don't know
26 that that's going to fit in everything. Those are
27 the steps we're trying to work on at these various
28 levels that we're trying to work our way through,
29 so when we get to the understanding and hopefully
30 the roadmap does get us there and is a process
31 that will work that out, what you need to have is
32 these various tiers and levels being integrated
33 with those clear responsibilities and mandates
34 understood from both parties. That's the
35 objective that we're striving for.

36 Q Mr. Shepert made the suggestion, and we heard it
37 last week as well, Mr. Rosenberger, that there be
38 a third party involved in this process, perhaps as
39 a mediator, kind of arbitrator. And it was
40 suggested that Commissioner Cohen could serve that
41 role. Do you support the notion of having a third
42 party facilitator, perhaps, on this process?

43 MR. ROSENBERGER: We've had facilitation in a number of
44 different parts of it today and trying to develop
45 it. So that facilitation is still going on in
46 some ways. Mr. Shepert is helping to facilitate
47 some parts of these at this stage and there's been

1 others. One of the documents that came out here
2 earlier had Mr. Crey's name on it and so others
3 have been involved with this. When we get to
4 whatever it is we're -- you know, we collectively
5 agree that we're striving for, it may be that we
6 have to have a facilitator to make that -- parts
7 of it function, all of it function in different
8 places.

9 My point is if you -- is that facilitator and
10 so just to say you have to have him, is the
11 facilitator going to go to every bilateral
12 arrangement and every -- for all those situations?
13 Are they going to come at the subregional area?
14 Are they coming at the watershed level? Are they
15 -- there's a lot of places to work out. The role
16 of a facilitator at the stages we're at now I
17 think is very useful once we have clearly defined
18 roles and responsibilities, how that might play
19 out. It's a possibility, but, you know, have to
20 have it, don't have to have it, that's too early
21 at this stage from what I've seen.

22 Q Mr. Crey and Mr. Wilson, do you want to weigh in
23 on this topic? Do you support the notion of a
24 third party involvement?

25 MR. CREY: My concern, Mr. Commissioner, is we may
26 remain where it is we're at now in our
27 relationship with DFO, which isn't all bad. There
28 are many good folks from the department that do
29 work closely with us. We do have meetings that
30 are encouraging. There's a lot of positive
31 exchanges between us. But what I was envisioning
32 is the statement from both the First Nations and
33 the Government of Canada as represented by DFO
34 that they're committed to working towards a co-
35 management working relationship. A statement from
36 both parties, the First Nations themselves, the
37 leadership, and of course the Government of
38 Canada, and my point was is that would provide an
39 impetus, it would be encouraging to the First
40 Nations and bring First Nations that are quite
41 sceptical at this time, reluctant to get involved.
42 I'm persuaded that it would bring them to the
43 table and they would begin the important dialogue,
44 the important discussions that we're all looking
45 for so that we can work our way down towards a co-
46 management working relationship between the First
47 Nations where it comes to Fraser River sockeye for

1 sure, in the approach areas, and on the watershed
2 itself and perhaps even more broadly than that.

3 But if what is being proposed by the
4 department is simply we'll continue to discuss,
5 we'll continue to explore, you know, we'll
6 continue to talk with you, there are no signposts
7 ahead. And sometimes maybe that's just how life
8 is. But what we're talking about here is at the
9 end of the day, what we're talking about is
10 halting, if we can, the decline of Fraser River
11 sockeye stocks and where First Nations are
12 concerned, we're specifically talking about the
13 role that we can play in that enterprise. What
14 can we do, what talents can we lend, what energies
15 can we lend, what skills can we lend, to work
16 towards that end, the restoration of the sockeye
17 stocks and in the case of our communities, the
18 restoration of our fisheries and, of course, doing
19 that together with other First Nations and in the
20 case of the Sto:lo for sure, working with other
21 interests in the fishery, which we've already got
22 a start on.

23 Q Yes, and --

24 MR. WILSON: Sorry, Mr. Dickson?

25 Q Oh, I'm sorry, Mr. Wilson.

26 MR. WILSON: May I make a comment?

27 Q Yes.

28 MR. WILSON: I think a mediator would be a good option,
29 providing that both DFO and First Nations are of
30 equal standing, meaning owners and not users. We
31 have to get away from lumping us in with the
32 sectoral meetings and other user groups.

33 Q Thank you for that. Mr. Crey, I want to follow up
34 on what you were speaking there of the need for a
35 clear signal and as you say, I think that was --
36 that's directed at convincing First Nations that
37 this process is real and they've got to come to
38 the table and with their political leadership and
39 really get engaged. If a co-management
40 arrangement is actually reached and it's
41 implemented, then at that point First Nations are
42 going to have to work together to manage their
43 fisheries. And this morning Mr. Prowse for
44 British Columbia brought up the example of the
45 Northwest Indian Fisheries Commission and that was
46 brought up last week and last week Russ Jones gave
47 evidence, I think the tenor of it was that the

1 Washington tribes have been quite successful in
2 reaching consensus and managing their fisheries
3 and obviously working together is going to be a
4 critical aspect of that co-management.

5 Do you think that First Nations in B.C. can
6 also be successful in that respect?

7 MR. CREY: I have no doubt they can be and they will
8 be. It's that important to them. There's a heavy
9 reliance on the fishery and they know full well
10 that if they are to have a fishery, enjoy a place
11 in the fishery, exercise the rights that they have
12 in the fishery, they fully realize now and they're
13 coming to the table, we see them in goodly numbers
14 at these joint meetings with the Department of
15 Fisheries and Oceans and, of course, at the Tier 1
16 level, that they're going to have to work one with
17 the other up and down the full length of the
18 Fraser watershed. It's -- and I mean its
19 tributaries, as well, and more recently there's
20 been inclusion of approach area of First Nations
21 as well. They come to the table. They know full
22 well that if they're going to restore fisheries or
23 enjoy a place in the fishery, that they're going
24 to have to work with one another, cooperate with
25 one another and, of course, work closely with the
26 Department of Fisheries and Oceans as well.

27 Q Mr. Crey, as you know, in some years some bands in
28 the Fraser watershed don't sign, choose not to
29 sign comprehensive fisheries agreements. Do you
30 see some prospect that such bands would engage in
31 an co-management process?

32 MR. CREY: I'm particularly glad you asked that
33 question because I suppose ironically - I don't
34 know if ironic is the correct word here but I'll
35 use it. Ironically, the First Nations that are
36 not signing agreements these days are the very
37 First Nations on the Lower Fraser that led the
38 Sto:lo into the agreements in the first instance.
39 They did so because they saw a promise of a new
40 working relationship with the Department of
41 Fisheries and Oceans. They saw the prospect of
42 restoring a commercial aspect to their fishery,
43 that they had been denied for a hundred years or
44 more. They signed the first agreement in 1992.
45 This was all under the banner of the AFS.
46 The AFS was described amongst other things,
47 held out the promise but described itself in part,

1 the department described it as a bridge to treaty,
2 Mr. Commissioner. And it held out the bright
3 promise of a lot of other ways that the First
4 Nations on the Lower Fraser could involve
5 themselves. But as time progressed, we got to the
6 point and it still is the case today, where the
7 Department of Fisheries and Oceans and although
8 they're wonderful people that do show up and do
9 work with us from the department, they arrive
10 amongst the Sto:lo at around about this time of
11 the year, Mr. Commissioner, and they say we have a
12 mandate from Ottawa to provide you with "X" number
13 of sockeye salmon if there's going to be an
14 economic opportunity fishery and so many fish for
15 food needs, and off in the Fall in the odd year,
16 so many pink salmon and chum salmon each year.
17 But particularly when it comes to sockeye,
18 unfortunately these folks from DFO that show up
19 say they don't have a mandate to negotiate the
20 number of sockeye. They come with a mandate.
21 They put the agreement, the comprehensive
22 fisheries agreements, in front of our communities
23 and say it's a take it or leave it scenario.
24 Sorry, we don't have any other mandate. There's
25 no room to negotiate.

26 But to be completely fair, in some of these
27 agreements there is what is commonly referred to
28 as an escalator clause which really means that if
29 the runs come in at levels higher than anticipated
30 at the outset of the season, there is a clause in
31 the agreement that allows for incremental
32 increases in the sockeye harvest for sales
33 purposes. So to be completely fair, that is
34 there. But in essence, the department doesn't
35 come and negotiate sockeye allocations with us.
36 They come with a fixed number in mind and they
37 tell us that's their offer, it's the final offer.
38 When it comes to chum salmon, sometimes there's
39 some latitude for the departmental people that
40 show up and when it comes to pink salmon sometimes
41 there is some latitude there, as well. But
42 overall, they seem to come these days with fixed
43 numbers of fish in mind and it's very much a take
44 it or leave it scenario.

45 Q Thank you. Mr. Wilson, I think you have a -- I
46 think you signalled to make a comment.

47 MR. WILSON: Yes, sorry, Mr. Dickson. I just wanted to

1 make comment to your question on can First Nations
2 be successful.

3 Q Yes.

4 MR. WILSON: I'm certain we can be successful. We have
5 a vested interest. First Nations have a vested
6 interest. And that interest is the future of
7 access and our -- the future of our children.
8 We've always been doing this for them. So I'm
9 certain we can be successful.

10 Q Thank you. Mr. Shepert, I'd like to follow up on
11 what Mr. Crey was discussing at the tail end of
12 his answer. He began to speak of DFO's approach
13 to negotiating FSC allocations and Mr. Lunn, if we
14 could go to Exhibit 1243, please. And Mr.
15 Shepert, this will appear to be a 1993 DFO
16 document and in this first page, it's setting out
17 what I understand to be DFO's negotiation mandate
18 and this first page concerns the Carrier Sekani
19 and down at the bottom --

20 MR. MCGOWAN: Mr. Commissioner, I apologize for
21 interrupting my friend. There was some evidence
22 about this and I'm going on my recollection here.
23 I don't have a note in front of me, but my
24 recollection is that Mr. Huber's evidence was that
25 this was not DFO's mandate. This was a document
26 that he prepared for his own -- for himself in
27 preparation but this was not something that was
28 handed down to him from above.

29 MR. DICKSON: Well, I do apologize, I misspoke. And
30 thank you for clarifying that, Mr. McGowan. As
31 you state it, I think I do recall that now.

32 Q So, Mr. Shepert, if you look down at the bottom,
33 you can see under allocation, and there's Section
34 35, 50,000 sockeye. Do you have any knowledge of
35 that allocation for the Carrier Sekani?

36 MR. SHEPERT: As a matter of fact I do. It's my
37 recollection this was a fairly heated time. What
38 year was this document?

39 Q I understand it's 1993.

40 MR. SHEPERT: So then I wasn't around for this
41 particular piece. I came on in '96, so I wasn't
42 around for this, but I was around for subsequent
43 agreements. That number was fairly static for a
44 number of years and led to some fairly serious
45 tension between the leadership of the Carrier
46 Sekani people, at that time was Lynda Prince, as I
47 recall, and the sort of -- as I recall it, just to

1 make it very quick here, is that there had to be a
2 number in the agreement, otherwise there would be
3 no agreement. The Carrier Sekani believed
4 vehemently that they would -- as has been
5 expressed by other people on the panel, that the
6 need is something that is, you know, is discussed
7 internally, there are, you know, obvious needs but
8 I think that the feeling of the Carrier Sekani at
9 that particular time was we had been in such
10 declines that the numbers were not accurately
11 reflective, there weren't enough fish to really
12 meet the needs at the time, but as I recall, DFO
13 needed to put a number into the agreement in order
14 to execute the agreement.

15 So a number was basically randomly picked and
16 it was, as Barry said, probably based on some of
17 the past, but one of the problems with that is
18 when the numbers are in decline, of course there's
19 not enough fish to catch, so you can't really base
20 what the need is on an arbitrary number when fish
21 are not returning in their historic numbers. But
22 in order to move this through, it was a bit
23 coercive. There was a lot of tension. Barry
24 said, "I'll just put the number in." Lynda was
25 like, "Fine." And that was it. And that's as I
26 recall how these numbers were arrived at.

27 Q And Mr. Lunn, if we could go to Exhibit 1226,
28 please. And this document, as I understand DFO's
29 document, First Nations Access to Fish for FSC
30 Purposes, and if we could go to electronic page 4,
31 Mr. Rosenberger, I wanted to ask you about bullet
32 (c) there, subparagraph (c) and that document --
33 that subparagraph says that:

34
35 A review of fish mandates and communal
36 licences confirmed that for the majority of
37 First Nations communal licence amounts are
38 already at the mandate levels; therefore, in
39 the majority of circumstances increasing an
40 allocation in a communal licence will require
41 at least a temporary mandate change. This is
42 a time-consuming process requiring sign-off
43 by numerous branches in the department.
44

45 When I read that, it looks like, to me, this is in
46 2006, that DFO representatives are not -- they
47 don't have room in their mandates to authorize an

1 increase in FSC allocations, and that to get an
2 increase, is a difficult process. Is that a fair
3 representation of the state of affairs?

4 MR. ROSENBERGER: So as it states, the number of the
5 agreements are at the mandated number. What it's
6 trying to give direction to staff is if they have
7 formal requests or they're looking to make formal
8 requests in the process, and we have a formalized
9 process that needs to occur to be able to make
10 these changes, that they need to do that work and
11 do it timely if they want to make sure they can
12 get it in. It's not one of these things that you
13 can ask on the 22nd of August and hope you're
14 going to have a change on the 23rd of August in a
15 given year. So there is a process for making
16 changes. There are sign-off levels in the
17 structure that are laid out. Some of them change
18 between whether it's location mandate, gear or
19 whatever, so there's different parts of different
20 levels in the organization. So that's what it's
21 trying to describe.

22 Q Mr. Crey, I'd like to ask you about going back to
23 non-signatory bands, as in bands who do not sign
24 comprehensive fisheries agreements, I understand
25 that some of those bands have complaints that DFO
26 does not give priority to their FSC fisheries.
27 Can you just briefly, because I don't have much
28 time left, can you briefly give the commissioner a
29 sense of what that complaint has been?

30 MR. CREY: Well, this is the case, and in one
31 particular instance, the Matsqui First Nation, I
32 think they're taking their dissatisfaction on that
33 matter to court. I think they've gone to court.
34 I don't know when their hearing date is, but
35 they're most unhappy, so they're headed off to
36 court, looking for a resolution in the courts.
37 Apparently there isn't one available for them
38 through discussions with the Department of
39 Fisheries and Oceans.

40 Q I'm going to turn to the sale of FSC fish. Mr.
41 Crey, I believe you were here for the hearings on
42 enforcement. One of the CMP witnesses, Scott
43 Coultish, stated that he believed that close to 97
44 percent of all FSC fish is sold. What's your
45 reaction to that statement?

46 MR. CREY: Well, I was here that day and I left this
47 building very unhappy with that allegation. I

1 think it's groundless. I think it's opinion.
2 I've looked after the Sto:lo fishery along with
3 the chiefs and actually working closely with the
4 Department of Fisheries and Oceans from 1992 to
5 about 2003 and I myself have fished in the Lower
6 Fraser fishery starting as a young boy of 12 at
7 Hope and every summer since 1984 I've gone home to
8 fish at Cheam. That's where I fish.

9 All the fishermen I know look after their
10 families and their communities and for someone to
11 make a remark like that without any foundation,
12 without any direct evidence, hurt. It hurt the
13 community. When that story hit the *Globe & Mail* I
14 got -- I stopped counting the number of phone
15 calls. We go and fish. We fish for our children.
16 We fish for our elders, we fish for our
17 communities. And to have something like that in
18 publication, especially from the mouth of someone
19 working in the department, people that we've
20 worked hard with to improve our working
21 relationship with, that damaged the relationship.

22 Now, I've been left and I'm doing it every
23 day working hard to say look, don't let us let
24 that careless remark interfere with and bring to
25 an end the really important work we're trying to
26 do with people like Barry here, whom I have the
27 utmost respect for, and many of the other people
28 like Barry Huber and some of the other DFO
29 employees you see sitting back here.

30 With a lot of difficulty, Mr. Commissioner, I
31 had to go home and work hard to keep this
32 relationship back on track, along with our
33 hereditary chief Ken Malloway. Anyway, the word
34 today from our community is we haven't given up.
35 We're going to keep this working relationship on
36 track. We're going to try to keep it positive, in
37 spite of remarks like that, that are so damaging.

38 People need to understand that our children
39 go to the public school system and the colleges
40 and universities in the Fraser Valley. When a
41 careless remark like that happens and it's
42 happened in the past when my children have come
43 home from school, they've had to fight their way
44 home. They've been spat on. And the leaders have
45 come to me and said, "Let's stop trying to work
46 with them. Let's just get out on the river and
47 fish. To hell wit them." And my council and that

1 of Chief Ken Malloway and one of our foremost
2 chiefs in the past, Chief Sam Douglas, Chief
3 Lester Ned, all of these people who led us into
4 these agreements and encouraged those of us that
5 are younger to work with the Department of
6 Fisheries and Oceans, they always said, "Keep up
7 that work. Don't give up on it. There will be
8 trying times ahead. It's too important to not do
9 the right thing. Work with the Department of
10 Fisheries and Oceans, as tough as it might get."
11 So we resolve, Mr. Commissioner, even when remarks
12 like this happen, and as much as they hurt, we've
13 resolved to continue working with the department.
14 Q Mr. Rosenberger, if a fish is legally caught under
15 a communal licence, do you agree that whether the
16 fish is eaten by an aboriginal person or it's sold
17 by an aboriginal person does not impact on
18 conservation of sockeye?
19 MR. ROSENBERGER: The use of individual fish is not in
20 the -- a conservation issue. The accounting for
21 them, good records, good records of the spawning
22 grounds, other biological and environmental type
23 aspects are the drivers for management decisions
24 and issues.
25 Q Do you think it would be constructive to move
26 toward a regime where First Nations are allocated
27 a certain amount of fish without restrictions on
28 their use?
29 MR. ROSENBERGER: Yeah, my personal opinions on that
30 are not what's going to drive what's going to
31 happen. The government needs to provide mandates
32 and I work for the government. The current
33 departmental mandate is that we have separate
34 commercial and FSC fisheries. So that's where I'm
35 working.
36 Q Well, if you could provide your personal view,
37 you've been involved in -- on DFO and working with
38 First Nations for a long time. In your personal
39 view, would it be constructive?
40 MR. ROSENBERGER: I'd rather not provide my personal
41 view, thanks.
42 Q Well, I'd like to open that up to the panel. Mr.
43 Shepert, do you think it would be constructive to
44 move to a straight allocation of fish?
45 MR. SHEPERT: Do I think it would be constructive?
46 Q Yes.
47 MR. SHEPERT: I think it would be a great first step,

1 without getting into any quantum or percentages.
2 I think it's been a major -- it's a brick wall.
3 We haven't -- so I think what we've learned from
4 the Washington model is that once an allocation is
5 given, things happen very rapidly and we've been
6 having dialogue for years and years and years.
7 And as much as I'm interested in the dialogue
8 because it's part of my professional life, I
9 believe that a quantum, be it whatever it happens
10 to be, would be a great place to start. It would
11 automatically put a lot of the onus back on the
12 First Nations. They would take their rightful
13 place as managers of the resource, and then the
14 integration of the two bodies, that of the federal
15 government and the First Nations would begin,
16 because we've been talking a long time and I think
17 it would be a good starting point.

18 Q Mr. Wilson, do you have any comment?

19 MR. WILSON: No.

20 Q Mr. Crey, I'd like to ask you a little bit about
21 terminal fisheries. Obviously the -- many of the
22 Sto:lo and Lower Fraser bands fish on the main
23 stem of the Fraser and I've heard some suggestions
24 that there's a perception that the Sto:lo are
25 opposed to terminal fisheries and do you have any
26 comment on that? Do you -- is that perception
27 correct?

28 MR. CREY: Well, I don't think it's correct and if
29 people who make that kind of assertion realize, if
30 they really knew our fishery and realized that
31 there are terminal fisheries on the Lower Fraser
32 River that the Sto:lo take part in such as the
33 Chehalis - there's desire for terminal fishery on
34 the Chilliwack system where the Chilliwack Lake
35 sockeye go, they would think differently. They
36 would think differently if they were aware of the
37 Katzie people and the Kwikwetlem people, who would
38 fish on Pitt River sockeye and are desirous of a
39 fishery. Those are terminal fisheries. And where
40 we would have terminal fisheries, why would we
41 object to other folks further on up in the
42 watershed to have terminal fisheries and see
43 sufficient fish return there to have terminal
44 fisheries? The two don't go together. They can't
45 be reconciled. We have our own terminal fisheries
46 and the desire for additional terminal fisheries
47 in our own area. And we've seen the value of

1 participating with First Nations in the upper
2 reaches of the watershed and in the Nicola Valley.
3 We've foregone fishing opportunities to permit a
4 sufficient escapement into other reaches of the
5 watershed where people might have an opportunity
6 to have terminal fisheries, so those are
7 misperceptions of the Sto:lo world view.

8 Q Thank you. I just have one more point I would
9 like to cover. Mr. Lunn, if we could have our Tab
10 18 please.

11 Mr. Crey, this is an article by Parzival
12 Copes entitled Aboriginal Fishing Rights and
13 Salmon Management in British Columbia: Matching
14 Historical Justice with the Public Interest and if
15 we look -- if we just scroll down slightly, Mr.
16 Lunn, and sort of in the middle of the abstract,
17 there's this sentence:

18
19 This chapter proposes a salmon management
20 strategy for the dual purpose of
21 strengthening the economies of First Nations
22 river communities and substantially
23 increasing the production of salmon from the
24 Fraser and Skeena watersheds for the benefit
25 of all stakeholders. This would involve an
26 additional transfer of a modest share of the
27 salmon harvest from the mixed stock
28 commercial sea fisheries to the aboriginal
29 river fisheries.
30

31 I'm essentially out of time, but Mr. Crey, Mr.
32 Shepert, is this a proposal in broad terms that
33 you would support?

34 MR. CREY: It is.

35 MR. SHEPERT: Absolutely.

36 MR. DICKSON: And if I could have this document marked
37 as the next exhibit, please.

38 MR. LUNN: Did you want to mark Tab 31?

39 MR. DICKSON: Yes, I did. I apologize. Thank you, Mr.
40 Lunn.

41 MR. LUNN: Oh, it is already marked then.

42 THE COMMISSIONER: I'm sorry, what exhibit? Oh yes,
43 1281.

44 THE REGISTRAR: The next exhibit is number 1282.
45
46
47

1 EXHIBIT 1282: Aboriginal Fishing Rights and
2 Salmon in B.C. - Matching Historical Justice
3 with the Public Interest
4

5 MR. DICKSON: Thank you. Thank you to the panel.
6 Those are my questions.

7 MR. MCGOWAN: Perhaps a short break, Mr. Commissioner?

8 THE COMMISSIONER: Okay.

9 THE REGISTRAR: The hearing is recessed for ten
10 minutes.
11

12 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
13 (PROCEEDINGS RECONVENED)
14

15 THE REGISTRAR: Order. The hearing is now resumed.

16 MS. ROBERTSON: Mr. Commissioner, I'm Krista Robertson,
17 counsel for the Musgamagw Tsawataineuk Tribal
18 Council. Good afternoon, panel. I just have a
19 very few questions for you about a matter that
20 hasn't come up, so far, on this panel, and that is
21 the presence of Atlantic salmon farms on the
22 migratory route of Fraser River sockeye, as a
23 management issue. We do have hearings coming up
24 on this topic, but we won't have an opportunity to
25 hear your views, from a management perspective, at
26 that time, so I'd like to canvas your views now.
27

28 CROSS-EXAMINATION BY MS. ROBERTSON:
29

30 Q Mr. Crey, on the Lower Fraser groups that you work
31 with, is this a management concern, that being
32 that Fraser River sockeye juveniles are likely to
33 encounter salmon farms in the marine approach
34 areas?

35 MR. CREY: Mr. Commissioner, we have an elaborate
36 monitoring program on the Lower Fraser. I think
37 Chief Ken Malloway may have described that when he
38 was here a number of weeks back, how we monitor
39 our fisheries. For a decade and a half, now, our
40 fishermen have been catching Atlantic salmon in
41 their nets, not in great numbers, but they have
42 been picking them up in their nets and reporting
43 them to our monitors. And that's when our
44 concerns about salmon farms first arose. And over
45 the last decade and a half, but certainly in
46 recent years, there's been a lot of concern in the
47 community about disease transfer between salmon

1 farms and wild sockeye stocks of Fraser origin and
2 other salmon species that swim by or are close to
3 these facilities, these salmon farms. And there's
4 a lot of questions. There is a lot of concern.

5 I don't think that people have sufficient
6 information in Sto:lo country to draw any hard and
7 fast conclusions, except save and except to say
8 that they're concerned.

9 Q Thank you. And that leads to my next question to
10 you, Mr. Crey: Have you communicated these
11 concerns with DFO and do you feel that you've been
12 given enough information from DFO around these
13 potential risks, to your satisfaction?

14 MR. CREY: Concerns have been expressed, but we're like
15 other British Columbians, what we hear largely
16 from the Department is they have some concerns,
17 but by and large they're supportive of the salmon
18 farms, and they don't seem to have a lot of
19 concern about some of these issues. I'm not so
20 sure why that is, but when we engage with them
21 about the salmon farms, they don't express a lot
22 of anxiety about it. And a lot of what we hear is
23 support for this growing industry, and it's
24 substantial now.

25 More particularly, though, we have
26 environmental groups. This morning I referred to
27 them as the green people. You know, we have the
28 red people, the white people, and now there's the
29 green people, the environmentalists. They have
30 come into our territory and they've talked to us a
31 lot about salmon farms and the issue of disease
32 transfer and the like, and it adds to our concern
33 and alarm, and I understand that's one of the
34 issue that this Commission of Inquiry is
35 examining. And so we await, with everyone else,
36 what -- the conclusions the Commission reaches,
37 and any recommendations that might flow from those
38 -- flow from that.

39 Q Thank you. And just to clarify, when you say you
40 hear support, do you mean support from DFO for
41 aquaculture? You had mentioned that you hear
42 support.

43 MR. CREY: Yes, on a number of occasions, the minister
44 of -- the previous Minister of Fisheries, Gail
45 Shea made trips to the west coast, took part in
46 promotional events associated with salmon farms,
47 and I think even went to Norway, Mr. Commissioner,

1 promoting additional Norwegian investment in
2 salmon farms on British Columbia's coastline.
3 Q Thank you. Mr. Shepert, in terms of your
4 participation with the Upper Fraser groups, what's
5 been your experience around management concerns?
6 Are they on the radar of your group?
7 MR. SHEPERT: We've done a lot of sort of sort of
8 cross-pollination with other inland First
9 Nations groups, for example, Skeena, and I know
10 that there's been some information exchanged. I
11 know that the Skeena Watershed Authority, which is
12 run by the First Nations on the Skeena, have had
13 their counsel draft a letter stating that the
14 impact, the potential impact, or the potential for
15 impacts to First Nations' rights to their fishery
16 are real and substantial and, therefore, they have
17 basically requested an all out, no more moratorium
18 on any new licensing for aquaculture in their
19 region, because they feel that it can and
20 potentially will impact their ability to access
21 fish in the future.
22 Q Thank you. And Mr. Shepert, maybe I'll just stay
23 with you for a moment. Are you aware, then, that
24 DFO, at the end of 2010, took over the regulation
25 and licensing of aquaculture from the province?
26 MR. SHEPERT: I am.
27 Q And were you ever involved in any kind of
28 consultation information-sharing processes with
29 DFO around the development of a new regulatory
30 regime for aquaculture?
31 MR. SHEPERT: No.
32 Q Mr. Crey, have your groups ever been involved in
33 consulting with DFO around -- delve into
34 regulation of aquaculture, salmon aquaculture,
35 that is?
36 MR. CREY: No, but I think I do recall a note or a
37 letter being circulated to the First Nations,
38 inviting some opinion, inviting us to get
39 information from the Department. I can't
40 distinctly remember the letter and its date, but I
41 do recall something of that nature coming about,
42 or coming around, being circulated. And like Mr.
43 Shepert has pointed out, I think a number of our
44 First Nations have sent letters to -- letters out
45 to the Department, asking that there be a halt put
46 to net pens in water, marine waters, and support
47 for close containment salmon farming.

1 Q Thank you. Mr. Shepert, back to you for just a
2 moment. You say it's not an issue that's coming
3 up, necessarily, in the Upper Fraser management
4 groups, but are you aware that the juvenile Fraser
5 River sockeye are running past salmon farms in the
6 marine approach areas?

7 MR. SHEPERT: Absolutely.

8 Q And based on the potential for there to be an
9 interaction between the farm salmon and the wild
10 salmon, in your view, should DFO be consulting
11 with the Fraser River groups, the Upper Fraser
12 River groups, around licensing of these farms and
13 the regulation of them?

14 MR. SHEPERT: It's really an area outside of my
15 expertise. I don't feel comfortable commenting on
16 that right now. Yeah, it is what it is. Sorry.

17 Q That's okay. Mr. Wilson, can I turn to you?
18 Given the importance of the Fraser River sockeye
19 to the Heiltsuk, do you feel that you're getting
20 enough information from DFO around the management
21 of salmon farming and the potential risks of
22 salmon farming and the Fraser River sockeye?

23 MR. WILSON: No. In regards to consultation, we have a
24 position against the new regulations that went to
25 the Federal Government, and it probably got to
26 stage 2 of the best practices on Canada's
27 consultation paper, so we do have a position on
28 establishing new farms, because we do have a
29 couple farms in our territory. And we've also
30 engaged in a study to see the impacts of lice on
31 juveniles as they got closer to the salmon farm.
32 I believe it's going to come up when you have an
33 aquaculture presentation.

34 Q All right, thank you. And just for the purpose of
35 this, just try to focus on to what extent, as a
36 management issue, are salmon farm licensing coming
37 to your tables.

38 Just one last question, then, around the
39 actual licensing of aquaculture. This is post-
40 December 18th, 2010. For all three of you, has
41 DFO consulted with you about the issuance of
42 actual licences of salmon farms on the migratory
43 routes of Fraser River sockeye?

44 MR. WILSON: On the migratory routes?

45 Q Yes.

46 MR. WILSON: No.

47 MR. CREY: As I mentioned, I know a circular came

1 around. I don't think it was necessarily
2 soliciting our opinion about whether or not one
3 particular farm or the other, or particular set of
4 regulations, you know, soliciting our point of
5 view on that. We're alive to the issue, but --
6 and while it's definitely on our radar screen, in
7 our community we've had some of our cultural and
8 spiritual people, one of them was here the other
9 day, sitting in the back, who's actively involved
10 where the salmon farm issue is concerned, and
11 works with the groups that are involved with it,
12 has worked with our communities to try to inform
13 us about what the issues and concerns may be, but
14 I can't recall - I could be wrong - a letter or an
15 invite asking for our opinions about licensing or
16 any proposed regulations.

17 Q Thank you. Mr. Shepert?

18 MR. SHEPERT: The answer's, for me, no.

19 MS. ROBERTSON: Thank you. Those are my questions.

20 MS. GAERTNER: Mr. Commissioner, I think we're at the
21 time of re-direct, and I understand, from Mr.
22 McGowan, that I have five minutes, so I'll do my
23 best to finish. I just have a couple of
24 housekeeping...
25

26 CROSS-EXAMINATION BY MS. GAERTNER:
27

28 Q First of all, Mr. Shepert, if you'd only done this
29 once I wouldn't have to do this, but you did this
30 a couple of times. So can I go to Exhibit 493.
31 You referenced Our Place at the Table as 2002. I
32 wonder if I could show you the inside page of
33 Exhibit 493 and bring you into 2004?

34 MR. SHEPERT: Thank you.

35 Q Thank you. And then I'd like to take -- Mr.
36 Rosenberger, may I take you to -- may I have
37 Exhibit 1271 and 1235 up side-by-side.

38 MR. LUNN: 1271 and 1235?

39 MS. GAERTNER: Yes, please.

40 Q 1271 is the document you referred to earlier, Mr.
41 Rosenberger. That's the 2009 Management
42 Guidelines for Sharing Arrangements when we can't
43 meet FSC harvest targets, and you spoke about that
44 as being the guidelines the Department is using
45 right now.

46 Mr. Huber was able to confirm Exhibit 1235,
47 in the evidence earlier last week, I guess, now,

1 but wasn't able to speak much about it. Are you
2 familiar with the second document, the one on the
3 left? It's dated April 15th 2010, so it's a year
4 later and it's a much thicker document, with a
5 fair bit of -- if you could scroll down through
6 that document, that might help Mr. Rosenberger.
7 Are you familiar with that document?

8 MR. ROSENBERGER: Yes, I am.

9 Q And is that the document the Department is now
10 using to consider issues around equitable sharing
11 when we can't meet -- can't reach FSC
12 requirements?

13 MR. ROSENBERGER: Yeah, I don't -- I think the second
14 document is really updating on the first, and the
15 general principles of sharing between the three
16 geographic areas based on their licence
17 allocations is the key, and then it describes some
18 other options and things to consider in moving
19 past that.

20 Q Do you know whether these have been the subject of
21 dialogue or discussions, these principles that
22 you've set out on April 15th, 2010, with the First
23 Nations, on the Fraser River?

24 MR. ROSENBERGER: Yes.

25 Q So you have taken these meetings -- this document
26 and these principles, the principles in the second
27 one, to actual meetings?

28 MR. ROSENBERGER: I'm not certain that the document has
29 been there. There was a PowerPoint deck that was
30 provided at the second forum meeting this year - I
31 believe it was the second; the second or third one
32 - that were describing some options that the --
33 trying to work our way through this and show the
34 options and how the Department was using this and
35 whether the First Nations thought those were the
36 most appropriate or they had other ideas or places
37 where they could use this document to help them in
38 their discussions in trying to come up with a
39 sharing arrangement.

40 Q But the actual Exhibit 1235 has not been shared?

41 MR. ROSENBERGER: I'm not certain whether that actual
42 document was shared or not.

43 Q All right. Could I now go to Exhibit 1274?
44 You'll recall your evidence earlier, Mr.
45 Rosenberger, on this document, and explaining some
46 of the example, your counsel went through as to
47 how to move some of the shares from PICFI acquired

1 buyback licences or ATP buyback licences into the
2 Fraser River, and I'm just curious, if you step
3 back for a moment, it appears the approach the
4 Department is using in this document isn't driven
5 really by conservation, it's driven by what we've
6 acquired in the commercial fishery and, therefore,
7 what we can move into the upper river. And would
8 you agree that in addition to that practical
9 exercise, it might also be useful to look at what
10 we need to harvest in the upper river for
11 conservation purposes and that that flexibility
12 would be useful to you?

13 MR. ROSENBERGER: I think the document was trying to
14 demonstrate both parts. That's where I describe
15 that there's a couple of pieces on the pie, and
16 the latter parts of the document where we've -- we
17 now have these licenses which allow us to have a
18 share of the total allowable catch. Not all that
19 catch that we've moved from the mixed stock
20 fishery is all being reallocated in other areas.
21 So parts of those are being used for conservation
22 purposes, and that the places where there are
23 abundant stocks, like in last year in this
24 example, is showing for Chilko and Adams, whatever
25 those parts are, that part is allocated out.

26 Q Sorry, I don't think I -- thank you for that. You
27 did explain fairly well this morning about how for
28 those stocks of imminent concern you're protecting
29 some of that -- or the buyback area. But my
30 question went more to if you step back from the
31 buyback for a moment, you recognize that there are
32 benefits for harvesting in the known fisheries for
33 conservation purposes, like harvesting for
34 commercial purposes, that shouldn't only be driven
35 by PICFI-acquired allocations; it should be driven
36 by an overview of the fishery and looking at
37 what's necessary -- what's beneficial for
38 conservation purposes?

39 MR. ROSENBERGER: That underlies the whole fishery, not
40 just this part, so that's why the conservation is
41 the first priority, and you need to meet those
42 objectives. We do that, as was described earlier,
43 in the January or February sessions with the
44 harvest management. There's management
45 adjustments, First Nations allocations we're
46 striving for, so I might be missing the point, but
47 this is not the only document or the only process

1 that's driving conservation.

2 MS. GAERTNER: I think I better not take any more time,
3 given that -- thanks.

4 MS. FONG: Lisa Fong, for Heiltsuk Tribal Council. My
5 question is for Mr. Wilson.

6
7 CROSS-EXAMINATION BY MS. FONG:

8
9 Q You told Ms. Robertson that there were two salmon
10 farms on Heiltsuk territory. My question for you
11 is this: Was Heiltsuk consulted regarding - by
12 either DFO or the Province, depending when that
13 time was, I guess - was Heiltsuk consulted about
14 these salmon farms and did Heiltsuk agree to have
15 these salmon farms on their territory?

16 MR. WILSON: They were consulted, but not to the degree
17 of the best practices paper, and we never agreed.

18 MS. FONG: Thank you. Those are my questions.

19 MR. EAST: Mr. Commissioner, Mark East for the
20 Government of Canada. Just one question for Mr.
21 Rosenberger.

22
23 CROSS-EXAMINATION BY MR. EAST, continuing:

24
25 Q Earlier today Mr. Eidsvik was asking some
26 questions about allegations of fishing during
27 closed times and allegations of sale of FSC fish,
28 contrary to the terms of a licence, and one of the
29 questions asked of you, Mr. Rosenberger, was
30 whether you were aware of information about these
31 issues provided to you by conservation protection
32 official of DFO. What I want clear on is whether
33 you had any follow-up to that as to what your
34 views are on the information that you received,
35 and I just wanted to give you an opportunity to
36 comment on that.

37 MR. ROSENBERGER: There's been a number of discussions
38 and information provided over a number of years
39 that I've been in the Department. One that might
40 help to clarify some parts of this discussion, at
41 least for the Upper Fraser's point of view, after
42 the last inquiry, which may not have been the
43 formal title, but when Justice Williams was
44 looking at Fraser sockeye issues, one of the
45 recommendations was to do an in-depth study of
46 illegal fishing that had been raised in that
47 process, which is somewhat similar, that is still

1 of concern today.

2 So in the B.C. Interior there was a
3 relatively in-depth process and study that
4 occurred in 2005 and 2006, working cooperatively
5 between the various parts of the Department at the
6 resource management folks working with the
7 conservation protection staff, were able to
8 collect a series of data, look at catch rates in
9 open fisheries, counting of illegal nets and fish
10 that they were able to -- the C&P folks seized.
11 The results of those studies indicated that -- and
12 it's very difficult, I should add, describing the
13 process here, to get somebody who's just been
14 apprehended for some illegal activity to give you
15 a lot of information on their catch rates and
16 things like that that we ask legitimate fishers,
17 so they tend not to be as cooperative in that
18 process.

19 But there are ways of trying to work your way
20 through some of those details so there's the
21 documentation of how that occurs. But there's
22 also those two studies with fairly limited
23 expansion of data that indicate that the numbers
24 are probably more in the 1,000 sockeye level in
25 each of those two years.

26 So substantiating information, I think, is
27 the key thing that needs to be done in being able
28 to take into account in an appropriate manner.

29 There was a similar study in '05 in the Lower
30 Fraser. I don't think it was quite as successful
31 in gathering all the data, but the same way that
32 we try to use that kind of information in our
33 decisions and process.

34 MR. EAST: Those are my questions. Thank you, Mr.
35 Commissioner.

36 THE COMMISSIONER: Thank you, Mr. East.

37 MR. MCGOWAN: Okay, Mr. Commissioner, I have a few
38 questions in re-examination.

39
40 RE-EXAMINATION BY MR. MCGOWAN:

41
42 Q Picking up just where Mr. East left off with the
43 studies you were referring to, those were studies
44 for the B.C. Interior only; is that correct?

45 MR. ROSENBERGER: The two studies I described that had
46 much more information on in '05 and '06 were in
47 the B.C. Interior. I also mentioned that there

1 was a study that went on in '05 in the Lower
2 Fraser.

3 Q Thank you. If we could have the Canada's list of
4 documents number 22 up, perhaps just to put the
5 document in front of you I think you're referring
6 to. Perhaps it's -- yes, it's Canada's list, at
7 number 22.

8 Is this the document you were referring to?
9 MR. ROSENBERGER: Yes, it is.

10 Q And these were the more complete studies that you
11 were referring to, correct?

12 MR. ROSENBERGER: That's correct.

13 Q And these dealt with, as we said, the B.C.
14 Interior only?

15 MR. ROSENBERGER: This study does, yes, that's correct.

16 Q Only for years 2005 and 2006?

17 MR. ROSENBERGER: That's correct.

18 Q And I see the reference there to no expansion.
19 And is the reference to no expansion an indication
20 that there was no an expansion factor applied for
21 times when C&P may not have been in the area or
22 been patrolling to detect any of the activity
23 that's referred to in the chart?

24 MR. ROSENBERGER: No, it's not referring to no patrols.
25 So if you go to the middle portion there, between
26 columns B to E, it would describe the relative
27 patrols that were undertaken in any of the given
28 subdivision of the B.C. Interior, such as Mid
29 Fraser, Upper Fraser and Upper-Upper Fraser --

30 Q Yes.

31 MR. ROSENBERGER: -- and I don't have the delineation
32 of those.

33 The expansion, there's very little of the
34 data is expanded, and it's where we have some
35 information where a fishery officer, for example,
36 observed an illegal net during a closed time.
37 They may or may not have -- well, they did not, in
38 this case, retrieve that net, themselves, at that
39 point, but waited to try to observe it's -- to
40 identify who might have been fishing that net. So
41 they have a timeframe, now, that they can use for
42 the information, so if that person subsequently
43 picked the net up a couple of hours later, you can
44 get more specific catch per unit effort, as
45 opposed to trying to use data from a fishery
46 before or after.

47 The other side of this is where we thought we

1 had limited information on the -- trying to match
2 up the frequency of patrols to some of the periods
3 of monitoring in each of the areas.

4 Q Okay. Thank you. So does this include
5 information about when fishery officers were not
6 on the water, or only information about when they
7 were on the water?

8 MR. ROSENBERGER: Well, when you expand it, it's for
9 times and/or locations that they weren't present.

10 Q Okay. And that expansion, it says, "no
11 expansion"; does that mean that expansion was not
12 applied to these numbers?

13 MR. ROSENBERGER: That's correct.

14 MR. MCGOWAN: Okay. I wonder if that should be the
15 next exhibit, just to help complete Mr.
16 Rosenberger's evidence on that issue.

17 THE REGISTRAR: The next exhibit will be 1283.

18
19 EXHIBIT 1283: B.C. Interior Unsanctioned
20 Harvest 2005
21

22 MR. MCGOWAN: And if we could have Exhibit 1274,
23 please, and specifically if we could go to page
24 28, and then to page -- starting at page 28,
25 please.

26 Q Mr. Rosenberger, this is the PowerPoint
27 presentation that Mr. East took you to, dealing
28 with the commercial and First Nations --
29 commercial First Nations inland demonstration
30 fisheries; do you recall that?

31 MR. ROSENBERGER: Yes, I do.

32 Q I just want to make sure I understand your
33 evidence on this point. The page we're looking
34 at, now, shows, really, the extraction of 12.46
35 percent out of the conventional commercial fleet
36 by -- through the PICFI buyback, and then,
37 ultimately, a reallocation to First Nation
38 demonstration fisheries summers or for
39 conservation; is that a fair overview?

40 MR. ROSENBERGER: Well, subsequent ones show that.

41 Q Yes.

42 MR. ROSENBERGER: So this is showing that there's a
43 portion of the whole and that the portion is made
44 up by, in this case, three different stock groups.

45 Q Okay, thank you. And if we can flip to the next
46 page, then, that you were referencing. This shows
47 a reallocation of those pieces of the fishery,

1 correct?
2 MR. ROSENBERGER: Which were allocated in the year
3 2010, that's correct.
4 Q Okay. So 12.46 percent was taken out, and 12.46
5 percent was reallocated; is that correct?
6 MR. ROSENBERGER: No. So 12.46 was taken out, and then
7 the areas where there's two or three areas --
8 there's two areas on there, so the very top
9 wording, where it says 12.46 percent of Bowron,
10 Gates, Nadina, Pitt, da da da --
11 Q Yes, sorry, my question was sloppy. You had
12 explained this before, that some of them were
13 retained for conservation purposes --
14 MR. ROSENBERGER: That's correct.
15 Q -- and not reallocated.
16 MR. ROSENBERGER: So they're not all reallocated.
17 Those stocks of concern were not allocated out.
18 Q But the stocks that weren't of concern and that
19 were reallocated, they were reallocated at the
20 level of 12.46 percent?
21 MR. ROSENBERGER: There's three different agreements,
22 and I have one of them in my head, and it was --
23 I'm assuming that they all were, but I'm not
24 certain that I could say that for certain, no.
25 Q Okay. My question, then, is: Where, in this
26 calculation is the issue of en route mortality
27 taken into account?
28 MR. ROSENBERGER: Well, that comes into account before
29 you get -- it's taken into account before you
30 calculate the total allowable catch.
31 Q Yes, but total allowable catch, if 1,000 fish are
32 caught in the marine area, if you leave those same
33 1,000 fish, assuming they were all heading to one
34 area, a number of those would die after they were
35 available to the commercial -- conventional
36 commercial fleet before they get to the terminal
37 areas, would they not?
38 MR. ROSENBERGER: Potentially. So the accounting for
39 that -- for the purposes of Fraser management,
40 occurs at Mission.
41 Q Okay. Is there any calculation, when you're
42 dealing with these reallocations, which takes into
43 account en route mortality from Mission to the
44 terminal area, that's applied?
45 MR. ROSENBERGER: We don't apply the management
46 adjustment to allowable catch; we only apply the
47 management adjustment to meet the escapement

1 objective.
2 Q Thank you. If we could turn, then, to document
3 1273, please. Okay, I must have the wrong number,
4 then. I'm looking for a document that was put to
5 Mr. Rosenberger, titled ONA Pilot Demo Catch.
6 MR. LUNN: 1272.
7 MR. MCGOWAN: 1272, thank you.
8 Q You recall this was a document put to you by Mr.
9 East when he was asking you questions about
10 commercial viability of in-river demonstration
11 fisheries?
12 MR. ROSENBERGER: I do.
13 Q And this is a document which deals with not a
14 Fraser sockeye catch, but another sockeye in-river
15 demonstration fishery, and sets out some of the
16 numbers that were caught, along with some of the
17 prices which were -- for which the fish were sold
18 at, is that right?
19 MR. ROSENBERGER: That's correct.
20 Q Is this the extent of the analysis with respect to
21 commercial viability that was done with respect to
22 this project?
23 MR. ROSENBERGER: For the Okanagan, this slide and the
24 subsequent one with the pricing on it, is taken
25 from about a 60-page deck that the Okanagan Nation
26 Alliance provided on talking about some of the
27 work that they were doing. It had a number of
28 items around the management objectives, their food
29 fishery, parts like that, so this is not a
30 complete presentation of that deck.
31 Q Okay. Do you know what the cost of the catch
32 monitoring associated with this fishery was?
33 MR. ROSENBERGER: I should know.
34 Q And I realize I'm putting you on the spot, so if
35 you --
36 MR. ROSENBERGER: Well, I mean, I'm aware of it, I had
37 to sign off on the documents, but I couldn't tell
38 you off the top of my head, sorry.
39 Q And do you know what the wages paid to the fishers
40 were, that were associated with this fishery?
41 MR. ROSENBERGER: No.
42 Q Okay. Has the Department of Fisheries and Oceans
43 done, with respect to this demonstration fishery,
44 or with respect to any other demonstration
45 fishery, a full economic viability analysis which
46 takes into account the cost of catch monitoring,
47 the cost of wages paid, variations in the return

1 of stocks over years, to determine what the
2 commercial viability of any of these demonstration
3 fisheries is, moving forward?

4 MR. ROSENBERGER: There's been studies done in the
5 Fraser since 1993 on viability of fish meeting
6 inspection standards, what that would take, the
7 potential changes in fisheries management,
8 potential benefits of some of these fish, foregone
9 catch because of mixed stock, and stocks of
10 concern issues in the marine side of things.
11 There's a couple of studies, I'm not certain of
12 the years, but I think it's late '90s and a couple
13 of them in the 2000s, that the Department
14 commissioned. And then First Nations people,
15 which I believe feeds into an annual accounting
16 which was called the -- or is called a PICFI
17 report, that's put out annually on all the
18 different fisheries, has some of that type of data
19 in it. So when you're talking about a
20 comprehensive one, I'm not certain whether those
21 cover off all of your issues, but there are places
22 that are being looked at. I'm not certain that
23 they've all come together in one place.

24 Q And to some extent, that's being done under the
25 PICFI program?

26 MR. ROSENBERGER: It's almost exclusively being done
27 under PICFI.

28 Q Thank you. I'll follow up with Ms. Stewart on
29 that.

30 I have one final, very brief, question for
31 you, Mr. Shepert. You told Mr. Dickson, in
32 response to his question, that you favoured a
33 straight quantum allocation with no restrictions
34 with respect to sale to First Nations. At
35 present, there is efforts made to --

36 MR. SHEPERT: I don't believe I said that.

37 Q Okay, then perhaps I've misquoted you, then.
38 Maybe clarify what you --

39 MR. SHEPERT: I think that a good starting point is to
40 allow a quantum of fish to be transferred
41 immediately, so that we can get on with the
42 business of managing our own fisheries. That's
43 more or less what I was saying.

44 Q Okay. Does your vision of an initial first step
45 include priority for the entirety of the
46 allocation for First Nations, in terms of
47 management, the way priority is applied to FSC

1 fish at present?

2 MR. SHEPERT: So the question is: When a quantum of
3 fish is being, say, hypothetically being
4 transferred to the First Nation, does it still get
5 afforded the same FSC priority?

6 Q Yes, is that what you're seeking or what you're
7 proposing?

8 MR. SHEPERT: I think that would be in the best
9 interest of conservation.

10 MR. MCGOWAN: Thank you. Those are my questions, Mr.
11 Commissioner.

12 THE COMMISSIONER: Thank you.

13 MS. GAERTNER: Mr. Commissioner, I left one question
14 unfinished. If I may have your indulgence, I
15 don't think it will take long.

16 THE COMMISSIONER: I do have to adjourn, Ms. Gaertner.

17 MS. GAERTNER: All right.

18 THE COMMISSIONER: So if it's very quick --

19 MS. GAERTNER: I promise it'll be very quick.

20
21 CROSS-EXAMINATION BY MS. GAERTNER, continuing:
22

23 Q Mr. Shepert, in Mr. Dickson's questions of you, he
24 was speaking on the issue of having a facilitator
25 or mediator and referred to Russ Jones's evidence.
26 Russ Jones's evidence was that he felt it would be
27 useful to have judicial oversight, such as a
28 Commissioner Cohen, to try to have the parties
29 complete the work of co-management. With that
30 information in front of you, do you think that is a
31 useful recommendation?

32 MR. SHEPERT: As somebody who works in the field, I do.
33 I think -- and again, having studied both Māori
34 and the Washington State models, these were
35 critical pieces to making the positive change that
36 eventually effected the entire fishery. Yes, we
37 need judicial oversight, and I would recommend I
38 would like to have somebody like Commissioner
39 Cohen be that person.

40 MS. GAERTNER: Thank you, Mr. Commissioner. Those are
41 my questions.

42 THE COMMISSIONER: Thank you very much. Well, it's
43 been a long day, a long couple of days. Thank you
44 very much Mr. Wilson, Mr. Crey, again. Mr.
45 Shepert and Mr. Rosenberger, this is, I think, a
46 second, or perhaps third time that you've been
47 here. Thank you very much. I do appreciate, very

1 much, your taking the time to attend here, your
2 willingness to answer the questions of counsel and
3 Mr. Eidsvik, and I wish you well. Thank you very
4 much.

5 We're adjourned, then, until tomorrow morning
6 at ten o'clock?

7 MR. MCGOWAN: Tomorrow morning at ten o'clock, Mr.
8 Commissioner. Thank you.

9
10 (PROCEEDINGS ADJOURNED TO WEDNESDAY, JULY 6,
11 2011, AT 10:00 A.M.)
12
13
14

15 I HEREBY CERTIFY the foregoing to be a
16 true and accurate transcript of the
17 evidence recorded on a sound recording
18 apparatus, transcribed to the best of my
19 skill and ability, and in accordance
20 with applicable standards.
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26 Pat Neumann
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29 true and accurate transcript of the
30 evidence recorded on a sound recording
31 apparatus, transcribed to the best of my
32 skill and ability, and in accordance
33 with applicable standards.
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Susan Osborne

I HEREBY CERTIFY the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability, and in accordance with applicable standards.

Karen Hefferland