

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.

Friday, September 2, 2011

**Tenue à :**

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

le vendredi 2 septembre 2011

## **APPEARANCES / COMPARUTIONS**

Patrick McGowan Jennifer Chan	Associate Commission Counsel Junior Commission Counsel
Mitchell Taylor, Q.C. Charles Fugere	Government of Canada ("CAN")
Boris Tyzuk, Q.C.	Province of British Columbia ("BCPROV")
No appearance	Pacific Salmon Commission ("PSC")
No appearance	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")
No appearance	Maa-nulth Treaty Society; Tsawwassen First Nation; Musqueam First Nation ("MTM")
Leah DeForrest	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	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.**

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

**TABLE OF CONTENTS / TABLE DES MATIERES**

	PAGE
PANEL NO. 54 (Recalled):	
KAARINA MCGIVNEY	
Cross-exam by Mr. Eidsvik	1
Cross-exam by Ms. DeForrest	23/33
Cross-exam by Ms. Gaertner	47/50
Cross-exam by Ms. Schabus	64/66/68/71/77/84
Cross-exam by Ms. Fong	85/90/96
Cross-exam by Mr. Taylor (cont'd)	102/103/107
JULIE STEWART	
Cross-exam by Mr. Eidsvik	22
Cross-exam by Ms. DeForrest	37
Cross-exam by Ms. Gaertner	38/47
Cross-exam by Ms. Schabus	63/65/67/71/77/82
Cross-exam by Mr. Taylor (cont'd)	103

**EXHIBITS / PIECES**

<u>No.</u>	<u>Description</u>	<u>Page</u>
1737	<b>Employment Equity Act</b> - Annual Report 2008, excerpt	17
1738	DFO Memorandum re "Salmon Drop-out Rates - REMEC/PSARC", May 17, 1996	21
1739	Gladstone, Native Indians and the Fishing Industry of British Columbia, February 1953	22
1740	The Report of the British Columbia Claims Task Force, June 28, 1991, The First Nations of British Columbia, The Government of British Columbia, The Government of Canada	24
1741	Communal Licence Handbook, Aboriginal Fisheries, Department of Fisheries and Oceans, Pacific Region, Vancouver, May 1998	26
1742	Email string between Jordan Point and Jeff Johansen, July 18, 2008 and attached Draft Briefing Note for the Minister, Access and Adjacency Issues for Salish Tribes, and Hwiltsum (sic) Assertions to Fish in the Lower Fraser	28
1743	Email from Kaarina McGivney to Jeff Johansen re "Hwiltsum-AFS Agreement for 08-09 ??", June 20, 2008	32
1744	Memo for the RDG Pacific, re Request for Increased Sockeye Allocation for Cowichan Tribes (Decision Sought), 2005	34
1745	Decision Note for the RDG, Pacific Region (For Decision) - Change of Fishing Area - Hul'Qumi'num Treaty Group	37
1746	Evaluation of PICFI Project 6B119, Final Report, Aug 31, 2010 [DFO Evaluation Directorate]	39
1747	Fishing for a Better Future: A First Nations Business Case for a Second Phase of PICFI, Aug 2011 [FNFC]	46
1748	PICFI Evaluation Form for Aggregate FNS, May 5 2009 EOI Review, [dated Oct 14, 2009	48
1749	PICFI Consultation Plan 2009-2010 (Final), Sep 2009	49
1750	Fisheries Consultations with First Nations in British Columbia - Western Canada Aboriginal Law Forum - May 26, 2009	59

**EXHIBITS / PIECES**

<u>No.</u>	<u>Description</u>	<u>Page</u>
1751	Consultation and Accommodation and Fraser Salmon Management - March 30, 2010	59
1752	Aboriginal Fisheries Strategy, Pacific Region, Resource Managers' Handbook - June 2, 2003	69
1753	Akwé: Kon Guidelines	69
1754	Department of Fisheries and Oceans - Risk Profile for Aboriginal Policy and Governance	76
1755	Letter to Grand Chief Clarence Pennier, Sto:lo Tribal Counsel from Kaarina McGivney - undated	82
1756	Lower Fraser First Nations Fisheries Strategic Plan - Draft February 22, 2010	83
1757	Email from Diana Trager dated August 8, 2011 "Subject: Proposed Port Mann to Sawmill Comprehensive Fisheries Agreement	84
1758	E-mail from Julie Stewart to Robert Lamirande, Subject: PICFI and Coastwide Framework, dated November 23, 2010	102

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

6 THE REGISTRAR: The hearing is now resumed.  
7

8 KAARINA MCGIVNEY, recalled.  
9

10 JULIE STEWART, recalled  
11

12 MR. MCGOWAN: Yes, Mr. Commissioner, this is the  
13 conclusion of the final panel on the Aboriginal  
14 Fishing portion of the hearing. You'll recall the  
15 witnesses are on my left, Ms. McGivney, and on my  
16 right, Ms. Stewart. The witnesses have been sworn  
17 and they're still under oath. Mr. Eidsvik will be  
18 examining first today.

19 MR. EIDSVIK: Good morning, Mr. Commissioner, good  
20 morning, witnesses.  
21

22 CROSS-EXAMINATION BY MR. EIDSVIK:  
23

24 Q Ms. McGivney, the terms of reference of this  
25 Commission set out an overall aim of conservation  
26 of the salmon stock and encouraging broad  
27 cooperation amongst stakeholders. That's one of  
28 the issues that I'm going to focus on this  
29 morning. No doubt you'd agree with me that broad  
30 cooperation amongst stakeholders is a worthwhile  
31 goal, the same way you'd want broad cooperation  
32 with the people you work with at DFO.

33 MS. MCGIVNEY: Yes, I do.

34 Q Now, in the transcript of your August testimony at  
35 page 26 and line 45 you refer to the all citizens  
36 commercial fishery as the non-aboriginal fishery.  
37 And I don't have to bring you to that reference  
38 because you can pretty easily tell the  
39 Commissioner which salmon fishery in British  
40 Columbia is non-aboriginal.

41 MS. MCGIVNEY: I'm sorry, I don't know the context that  
42 you are talking to.

43 Q Well, maybe just answer the question. Is there a  
44 salmon fishery on the Fraser River sockeye stock  
45 that's non-aboriginal?

46 MS. MCGIVNEY: There are components of the fishery that  
47 are non-aboriginal.



1 Q Such as?  
2 MS. MCGIVNEY: There is the seine fishery.  
3 Q You don't think there's any aboriginal people that  
4 work in the seine fishery or own seine boats?  
5 MS. MCGIVNEY: Oh, I probably wasn't clear in terms of  
6 saying aboriginal communal access. So non-  
7 aboriginal communal access, so within those  
8 fisheries there may be some aboriginal individuals  
9 that participate. There may also be some  
10 aboriginal communal access that's provided through  
11 ATP licences, for instance.  
12 Q So to shorten it, there's no such thing as a non-  
13 aboriginal fishery on Fraser sockeye, is there?  
14 MS. MCGIVNEY: In the context that there's no exclusion  
15 of aboriginal people from fisheries?  
16 Q No, in the context that a large portion of the  
17 seine fleet and the gillnet fleet are Canadians of  
18 aboriginal ancestry, how can you say that the  
19 fishery is non-aboriginal?  
20 MS. MCGIVNEY: Okay, I wasn't -- I didn't mean to say  
21 it was --  
22 Q Okay.  
23 MS. MCGIVNEY: -- non-aboriginal.  
24 Q So you'd agree with me that the public commercial  
25 fishery is a racially integrated industry with  
26 large aboriginal participation and other types of  
27 Canadians?  
28 MS. MCGIVNEY: People can -- yes, people can  
29 participate in that fishery. And we have --  
30 Q And they do.  
31 MS. MCGIVNEY: Yes, and we have mechanisms for  
32 providing aboriginal communal access, and  
33 individuals may participate in the way that others  
34 may.  
35 Q But a long time before there were communal  
36 licences, aboriginal people participated at high  
37 levels in the fishery, didn't they?  
38 MS. MCGIVNEY: Yes, there was participation by  
39 aboriginal fishers in the fishery.  
40 Q Thank you. Now, following the end of the Vietnam  
41 war there was also a substantial influx of  
42 Vietnamese refugees into the fishery, is that  
43 correct, especially in the gillnet fishery on the  
44 Fraser River?  
45 MS. MCGIVNEY: I haven't actually studied the  
46 participation in the fishery to that degree, so  
47 I'm not -- I don't know.

- 1 Q You don't think that's useful information for a  
2 person trying to define the structure of the  
3 future fishery?
- 4 MS. MCGIVNEY: We're not -- we open the fishery for  
5 people to access it. I'm not sure that we want to  
6 be going through analysis, through a racial  
7 analysis on the fishery participants. And it  
8 would be difficult to also conduct that, because  
9 individuals, how do you find their -- how would  
10 you be able to identify what their various  
11 backgrounds are?
- 12 Q That's an interesting point, because prior to  
13 1992, the only legal commercial fishing groups  
14 were seiners, trollers and gillnetters; is that  
15 correct?
- 16 MS. MCGIVNEY: I believe there is a recreational  
17 fishery, as well.
- 18 Q The only legal commercial fishing groups were  
19 seiners, trollers and gillnetters.
- 20 MS. MCGIVNEY: Yes.
- 21 Q And on occasion there would have been disputes  
22 between those groups over issues like allocation,  
23 fishing time, gear time, areas?
- 24 MS. MCGIVNEY: Yes (indiscernible - overlapping  
25 speakers).
- 26 Q You may have been involved in some of those  
27 disputes, actually, in your years at DFO, I  
28 suspect.
- 29 MS. MCGIVNEY: Yes.
- 30 Q Some of them got pretty hot?
- 31 MS. MCGIVNEY: Yes.
- 32 Q Yeah. But there was no racial element between  
33 gillnetters, seiners and trollers, is there?  
34 You're either a seiner, you're a gillnetter or a  
35 troller. There's no racial definition, you're  
36 simply a seiner, right?
- 37 MS. MCGIVNEY: Yes.
- 38 Q And a fisherman of any type was free to join any  
39 gear type. If the troller thought the seiners  
40 were having some big advantage with DFO, they  
41 could go out and buy a seine boat.
- 42 MS. MCGIVNEY: Yes.
- 43 Q But a fisherman can't change their race, can they?
- 44 MS. MCGIVNEY: No.
- 45 Q Yeah. Thank you. Now, in 1992 DFO imposed  
46 commercial fisheries in the Lower Fraser  
47 restricted to specific aboriginal groups, and

1           those two -- two of those fisheries included the  
2           Musqueam and Sto:lo; is that correct?  
3   MR. TAYLOR: Well, "commercial" is a loaded word, and I  
4           don't believe it's accurate to say that they were  
5           termed that. Maybe Mr. Eidsvik should use the  
6           term that was in place at that point. I can't  
7           remember the word, quite frankly, but it wasn't  
8           commercial.  
9   MR. EIDSVIK: I think it was called --  
10  MR. TAYLOR: At some point they became pilot sales, but  
11           I don't think that was the term in the early  
12           1990s.  
13  MR. EIDSVIK: I bow to my friend's preference for the  
14           use of a different word for commercial, so let's  
15           call it pilot sales.  
16  Q           There was a fishery which allowed the sale of  
17           sockeye on the Lower Fraser River, which was  
18           restricted to the Musqueam, Sto:lo, among certain  
19           other aboriginal groups; is that correct?  
20  MS. MCGIVNEY: Yes.  
21  Q           And these fisheries stem from the policy decision  
22           of the Minister?  
23  MS. MCGIVNEY: Yes.  
24  Q           So now instead of a fight between seiners,  
25           gillnetters and trollers, DFO has ensured that  
26           there's going to be a fight between racial groups  
27           when it comes to allocations, fishing openings and  
28           gear types, et cetera; is that correct?  
29  MS. MCGIVNEY: DFO isn't encouraging user groups to  
30           fight. We are encouraging groups to work together  
31           towards a collaborative fishery.  
32  Q           Well, you just agreed with me a moment ago that  
33           there was fights over allocation and enforcement  
34           areas. Do you think all of a sudden these are  
35           going to stop?  
36  MS. MCGIVNEY: I don't believe that disagreements are  
37           going to stop, or conflicts are going to stop, but  
38           the intent that the Department is moving forward  
39           with is trying to work towards a collaborative  
40           fishery.  
41  Q           Well, I've heard about the Department attempt, but  
42           through this policy, DFO's pretty well guaranteed  
43           that what used to be fought out between seiners  
44           and gillnetters and trollers is now fought out  
45           between gear types, as well as certain racial  
46           groups; is that correct?  
47  MS. MCGIVNEY: By bringing in an access, there is now

1 another element in the fishery in terms of  
2 aboriginal communal commercial access. Yes.  
3 Q Now, would you agree with me that the -- and I  
4 think you've talked about you want to have an  
5 integrated fishery, everybody works together.  
6 Would you agree with me there's lots of  
7 differences between how the Musqueam/Sto:lo  
8 fishery on the Lower Fraser works compared to the  
9 public commercial fishery on the Lower Fraser?  
10 MS. MCGIVNEY: It operates -- there are some  
11 differences. It operates in -- there are some  
12 differences in terms of the area and gear, just as  
13 there is differences between how the gillnet and  
14 the seine fishery might operate in the Fraser, as  
15 well.  
16 Q Musqueam/Sto:lo commercial fisheries are operated  
17 under the aboriginal fishing licences, right,  
18 while the public fisheries primarily are operated  
19 under the fishery general regulations and the  
20 Pacific regs; is that correct?  
21 MS. MCGIVNEY: Yes.  
22 Q So there's a difference.  
23 MS. MCGIVNEY: Yes, there is.  
24 Q Now, the Musqueam/Sto:lo commercial fishery does  
25 not fall under the authority of the Fraser Panel,  
26 does it?  
27 MS. MCGIVNEY: Not under the international panel, I  
28 don't believe. I think it's considered within  
29 Canada's negotiations at the international table.  
30 Q Yes, but the Fraser Panel meets, and then in a  
31 separate room over there we have DFO meeting with  
32 Musqueam/Sto:lo groups deciding about their  
33 fishery, but in another room, that's where the  
34 Fraser Panel meets to discuss openings for the  
35 public fishery; is that correct?  
36 MS. MCGIVNEY: Actually, when I was on the Panel, I  
37 don't believe it was like that, and I'm not sure  
38 how it's conducted now.  
39 Q Well, where do the -- where are the openings for  
40 the Musqueam/Sto:lo decided, then? Where are they  
41 talked about and discussed?  
42 MS. MCGIVNEY: It's in the -- in the planning for the  
43 fishery, and I believed it was all part of  
44 discussions that look at the whole fishery, the  
45 integrated fishery together. There may be some  
46 specific discussions that occur with those groups  
47 about their interest in those fisheries.

- 1 Q Mr. Lunn, perhaps I could have Exhibit 1250 up,  
2 please. And if we could go to -- and when we get  
3 to it, you'll see at page 15, Mr. Lunn, at section  
4 2(a), DFO contracts to manage all other fisheries  
5 with the goal of providing the bands with an  
6 opportunity to catch their allocation. There's no  
7 such agreement with other user groups, is there,  
8 that DFO doesn't contract to manage other  
9 fisheries to ensure they get their allocation. Do  
10 you see that anywhere in writing with the Area E  
11 fleet, for example?
- 12 MS. MCGIVNEY: Could you just go back to which --
- 13 Q Look at section -- look at section 2(a). Is that  
14 written in contract anywhere with Area E, or the  
15 Area B seine fleet, or Area D gillnetters?
- 16 MS. MCGIVNEY: No, it isn't. These are contribution  
17 agreements, Comprehensive Fisheries Agreements  
18 that we have with the First Nations.
- 19 Q And no Comprehensive Fishery Agreement with the  
20 Area E fleet, is there.
- 21 MS. MCGIVNEY: Not in the same format. There are  
22 discussions about allocations and objectives of  
23 managing the fishery towards those broad  
24 allocations.
- 25 Q At page 29, Mr. Lunn, at section 1(a) there's an  
26 allocation set out, food fish allocation for FSC  
27 purposes. But if a commercial licence is issued,  
28 all this fish can be sold; is that correct? Under  
29 the provisions if a commercial licence is issued,  
30 this FSC allocation can also be sold; is that  
31 correct?
- 32 MR. TAYLOR: I'm just going to interject. In my view,  
33 when Mr. Eidsvik says "commercial" it doesn't mean  
34 commercial with any legal connotations, in  
35 aboriginal context.
- 36 MR. EIDSVIK: I'm not sure I get my friend's point.  
37 But I think what he's trying to say is --
- 38 MR. TAYLOR: Mr. Eidsvik well knows that there are huge  
39 issues around the word "commercial" in the context  
40 of aboriginal fishing. If he's going to continue  
41 to use the word, I'm just putting down the caveat  
42 that in fairness to the witness and for clarity, I  
43 think it should be taken that it doesn't mean  
44 commercial in the sense that some litigants in  
45 other forums want to use the word "commercial" as  
46 a right.
- 47 MR. EIDSVIK: Let me be really, really specific, then.

1 Q This particular allocation can be sold if DFO  
2 issues a communal licence that has a provision for  
3 sale; is that correct?

4 MS. MCGIVNEY: It depends on what year this is. My  
5 understanding is that we had gone to a process  
6 whereby we were keeping the food, social,  
7 ceremonial allocation separate from the economic  
8 opportunity allocation, and that there was a  
9 separation in terms of the access for those fish  
10 in that the amount that was set out for that was  
11 not for sale. That's my --

12 Q So your evidence then is that this allocation can  
13 never be sold?

14 MS. MCGIVNEY: I'm not sure which -- this is for the  
15 Lower Fraser, for FSC purposes --

16 MS. SCHABUS: Mr. Commissioner, I'm going to interject,  
17 and I'm going to ask to first establish that we  
18 are actually dealing with the Comprehensive  
19 Fisheries Agreement from 2009, so for  
20 clarification of the witness so she can comment  
21 accordingly.

22 I am also going to ask, and raise an  
23 objection along the lines of Canada. Firstly,  
24 when Mr. Eidsvik is referring to commercial  
25 fishery, I would ask him -- and I would ask to  
26 keep in mind the distinction between the  
27 mainstream commercial fishery and an aboriginal  
28 communal fishery, and secondly -- and that's the  
29 document that he's referring to here is actually  
30 pertaining to.

31 And secondly, in my submission, he has not  
32 established, and this witness is actually  
33 indicating to him that she is not in a position to  
34 comment in detail on the mainstream commercial  
35 fishery, so those questions shouldn't be put to  
36 this witness.

37 And I'm also going to just raise a flag  
38 regarding his characterization of racial-based  
39 fisheries and issues in that regard, which clearly  
40 have been dealt with by the Supreme Court of  
41 Canada.

42 MR. EIDSVIK:

43 Q Can you tell me the difference between a fish  
44 that's sold under a communal licence for dollars  
45 and a fish that's sold in the public commercial  
46 fishery for dollars?

47 MS. MCGIVNEY: I'm not sure what kind of -- what kind

1 of difference (indiscernible - overlapping  
2 speakers).  
3 Q There isn't, there isn't any difference, is there.  
4 MS. MCGIVNEY: You're saying a fish that is sold under  
5 a communal licence. So there could be a communal  
6 licence that allows for sale?  
7 Q That's -- that's what I'm talking about.  
8 MS. MCGIVNEY: There might be a communal licence that  
9 does not allow for sale, so I'm not --  
10 Q Well, I'm saying under --  
11 MS. MCGIVNEY: There's a difference between those two,  
12 because under the communal licence that is -- does  
13 not permit sale, that would be illegal to sell  
14 that fish.  
15 Q I'm talking about a communal licence where sale is  
16 authorized. Is there any difference between a  
17 fish sold in that fishery and a fish sold in what  
18 I call the public all citizens commercial fishery?  
19 MS. MCGIVNEY: They've been harvested under a different  
20 authorization, but the -- I don't think there's a  
21 difference in the --  
22 Q Thank you.  
23 MS. MCGIVNEY: -- in the fish.  
24 Q The typical agreement with the Sto:lo and the  
25 Musqueam, and I'm using those, I recognize there's  
26 other agreements involved in, first, commercial  
27 sale, but I'm just using those as examples. Those  
28 agreements establish a planning committee. is that  
29 correct, or a joint technical committee. I'm not  
30 sure what the term is for some of these.  
31 MS. MCGIVNEY: I'm sorry, within the agreement there is  
32 a --  
33 Q Yes.  
34 MS. MCGIVNEY: -- desire to have some discussions  
35 together, yes.  
36 Q So is there a representative of the public  
37 commercial fishery on that committee?  
38 MS. MCGIVNEY: That's discussed within the contribution  
39 agreement, the Comprehensive Fisheries Agreement  
40 with the aboriginal group, no, there wouldn't be.  
41 Q So despite the fact that the fishery is a public  
42 resource, not owned by Canada, all in-season,  
43 post-season and pre-season discussions concerning  
44 this commercial fishery are secret, not public.  
45 MS. MCGIVNEY: I wouldn't characterize it that way.  
46 There is discussions that are happening at the  
47 bilateral level between the First Nations and the

1 Department in terms of their interest about the  
2 fishery and the harvest plan, but there's other  
3 discussions that occur, I think there was a fair  
4 bit of discussion during some previous testimony  
5 about broader forums where there's integration  
6 within the First Nations more broadly, the  
7 different aboriginal groups, as well as there's  
8 discussions at the Integrated Harvest Planning  
9 Committee about the various obligations and plans  
10 for those fisheries.

11 Q So when the Fraser Panel decides to open a  
12 fishery, there is aboriginal representatives on  
13 the Fraser Panel representing aboriginal fishing  
14 groups. There's representative representing the  
15 public commercial fisheries. There's DFO. In  
16 this case there's only DFO and the specific  
17 aboriginal group; is that correct?

18 MS. MCGIVNEY: Yes, for those specific bilateral  
19 issues.

20 Q Now, even on the Fraser Panel, you're familiar  
21 with Mike Staley?

22 MS. MCGIVNEY: Yes.

23 Q Mike Staley sits on the Fraser Panel Technical  
24 Committee as a representative of aboriginal  
25 fishing interests; is that correct?

26 MS. MCGIVNEY: I believe so.

27 Q Is there any representative from the public  
28 commercial fishery on the Technical Committee?

29 MS. MCGIVNEY: I don't know the current mix of the  
30 committee. It's been some time since I've been  
31 associated with the Salmon Commission.

32 Q When you were on -- when you were on the Panel --

33 MS. MCGIVNEY: Back in the '90s, no, there was not  
34 another --

35 Q Yes.

36 MS. MCGIVNEY: -- technical person from the -- from the  
37 other interests.

38 Q Thank you. Now, at page 36 of the Comprehensive  
39 Fisheries Agreement there's a monitoring and  
40 enforcement protocol that sets out how DFO will  
41 deal with persons who are fishing, breaking the  
42 rules of the fishery. Do you sign a monitoring  
43 and enforcement protocol with the public  
44 commercial salmon fleet in the Lower Fraser?

45 MS. MCGIVNEY: I don't sign it with the -- those  
46 protocols, directly with the aboriginal groups  
47 myself, either. But the -- I don't -- I think



1           there are some monitoring protocols that  
2           Enforcement is doing with various groups, is my  
3           understanding.

4           Q    No, I'm asking you specifically, and maybe I  
5           shouldn't have used the word "you". Does DFO sign  
6           a monitoring enforcement protocol, a written one,  
7           with the Area E commercial fishing fleet?

8           MS. MCGIVNEY: I don't know.

9           Q    Thank you. Now, this particular agreement we  
10          looked at is what we call a Comprehensive  
11          Fisheries Agreement and it's typical of that style  
12          of agreement with other aboriginal groups?

13          MS. MCGIVNEY: This is -- you're asking is this  
14          agreement typical?

15          Q    Yeah, it's basically a framework and then the  
16          terms might be slightly different between groups,  
17          but the basic framework of the agreement is about  
18          the same; is that correct?

19          MS. MCGIVNEY: Generally, yes.

20          Q    Now, when we talked about the Joint Technical  
21          Committee or the Planning Committee here for the  
22          Sto:lo, we've also got one for the Musqueam,  
23          there's one for the Tsawwassens through the  
24          Treaty, and you can stop me, there's probably one  
25          with the Yale, and so on up and down the Fraser  
26          River. And so we have a whole bunch of little  
27          different management bodies, operating in secret,  
28          making their own rules, how they're going to fish,  
29          whereas prior to 1992 we only had the Fraser Panel  
30          making all the rules, deciding when and who  
31          somebody's going to fish; is that correct?

32          MS. MCGIVNEY: I think that there's discussions  
33          happening bilaterally, but in terms of the  
34          decisions that are being made about how that  
35          fishery is going to be conducted, we encourage  
36          those to occur in broader forums because of that  
37          need to be able to integrate. If there are  
38          discussions at that bilateral level, the  
39          Department is going into that, considering that  
40          broader -- the broader interests. And so, yes,  
41          having numerous small groups, having discussions  
42          about the fishery that is sort of a gauntlet and  
43          affects others, it's better to have those in a  
44          broader forum, and that's part of what we've been  
45          working towards in the AAROM program, to bring  
46          groups together to have that discussion with  
47          aboriginal groups and to provide them that

- 1 mechanism to be able to feed into the broader  
2 integrated processes, as well.
- 3 Q Maybe I can cut through a little bit here.  
4 Bilateral, the word "bilateral" is really code for  
5 aboriginal/DFO/exclude the public, isn't it?
- 6 MS. MCGIVNEY: A bilateral could also be the meetings  
7 DFO has with the Area E gillnetters, or it could  
8 also be with the seiners. I mean, it's bilateral  
9 means it's two parties as opposed to multiple  
10 parties.
- 11 Q But when you meet with the Sto:lo there is no  
12 public interest there, is there. It's DFO,  
13 supposed to represent the public interest, and the  
14 Sto:lo; is that correct?
- 15 MS. MCGIVNEY: Yes.
- 16 Q Yes, thank you. Now, since 1992 there's been a  
17 substantial protest movement against these  
18 fisheries for the Musqueam/Sto:lo; is that  
19 correct?
- 20 MS. MCGIVNEY: There's -- there has been some  
21 controversy around them and there has been some  
22 litigation around them, as well.
- 23 Q There was fishery protests involving hundreds of  
24 fishermen, hundreds of prosecutions. Some  
25 fishermen had their boats seized, some were  
26 jailed, lots have paid fines; is that correct?
- 27 MS. MCGIVNEY: There's been a variety of actions, yes.
- 28 Q Now, the, of course, the Musqueam/Sto:lo are free  
29 like any other Canadian to participate in the  
30 public commercial fishery, aren't they?
- 31 MS. MCGIVNEY: They may -- they may seek access the  
32 same way others do, yes.
- 33 Q And in fact some of the really good fishermen on  
34 the coast are Canadians of aboriginal ancestry,  
35 and have been for a long time.
- 36 MS. MCGIVNEY: That's quite possible.
- 37 Q I'm not asking if it's possible. You know that,  
38 don't you.
- 39 MS. MCGIVNEY: I know -- I don't know for sure. I  
40 haven't looked at people's fishing records and  
41 knowing that, but I do -- have heard through  
42 secondary sources that there are some good  
43 fishermen that are of aboriginal descent.
- 44 Q Now, the Integrated Fishing Policy, through that  
45 policy you're trying to ensure that all fishermen  
46 are being treated equally, even if they fish in  
47 separate commercial fisheries, is that correct,

- 1 separate fisheries where fish are sold; is that  
2 correct? You're trying to sort of make a level  
3 playing field for everyone, even though --
- 4 MS. MCGIVNEY: The integrated fishery concept is to  
5 make a level playing field, address the specific  
6 circumstances, of different groups, but to have  
7 basically a common approach to the fishery that's  
8 of the same priority for all of the groups.
- 9 Q Now, to a fisherman standing on the dock, from the  
10 fishermen that I represent, looking at somebody  
11 fishing when they're tied to the dock, even if  
12 they're fishing under the same rules, which we've  
13 already seen they're not, they really feel like  
14 you've resurrected the separate but equal  
15 doctrine. Do you think that's a fair comment?
- 16 MS. MCGIVNEY: I don't know what those fishermen are  
17 feeling. I've heard them -- I've heard through  
18 various reports that that might be what their  
19 thoughts are.
- 20 Q But essentially it is at the very best, if you  
21 manage to make the same rules for everyone, at the  
22 very best we've got separate but equal, don't we?
- 23 MS. MCGIVNEY: Well, I mean, I think there has to be  
24 some recognition of some of the differences and, I  
25 mean, for instance, those fishermen might be  
26 gillnet fishermen watching the seiners fish off  
27 the mouth in the same area, so there's differences  
28 in terms of how gear are handled and what -- how  
29 the various approaches to the fishery are managed.
- 30 Q And you just answered the question a moment ago  
31 that the -- that that gillnet fishermen watching  
32 the seiner is free to go seining if he wants to,  
33 but he can't join the Musqueam fishery or the  
34 Sto:lo fishery, can he, because he can't change  
35 his race.
- 36 MS. MCGIVNEY: There's a component of the fishery that  
37 has been allocated for aboriginal access.
- 38 Q But it's not all aboriginal access, aboriginal  
39 fishermen in Campbell River who had a big huge  
40 investment in the fishery, were also forced to sit  
41 tied to the dock and watch, weren't they, if they  
42 had a gillnet licence on the Fraser.
- 43 MS. MCGIVNEY: Those with a licence -- the fishery  
44 would be open for what it's described to be open  
45 for. If it's for the gillnet fleet, if it -- if  
46 it's for the aboriginal economic opportunity  
47 access, as well.

- 1 Q My point is here I think that "aboriginal" is  
2 misleading, because it's not aboriginal. Somebody  
3 from the Campbell River Band or the Cowichan Band,  
4 or in aboriginal groups in Alert Bay, they can't  
5 fish in the Lower Fraser in the Musqueam/Sto:lo  
6 fishery, can they.
- 7 MS. MCGIVNEY: Unless they are designated by those  
8 groups.
- 9 Q And how many Campbell River Band members have been  
10 Musqueam designated?
- 11 MS. MCGIVNEY: I don't know, that's -- the Musqueam  
12 would be able to answer that for you.
- 13 Q So you don't actually have any idea. Okay, thank  
14 you. Now, have you advised your bosses that  
15 there's alternatives to setting up separate  
16 commercial fisheries for the Minister's favoured  
17 racial groups, or favoured aboriginal groups.
- 18 MS. MCGIVNEY: We've looked at options for how communal  
19 access can be provided, if that's what you're  
20 asking.
- 21 Q Well, are you familiar with how the -- when the  
22 Government of New Zealand settled the treaty with  
23 the Maori, they brought them -- bought the Maori  
24 into the public commercial fishery and everyone  
25 there fishes under the same rules and regulations;  
26 is that correct?
- 27 MS. MCGIVNEY: Yes. Well, actually, as far as I know  
28 it is. I don't -- I haven't studied that  
29 arrangement, but I know there's a different type  
30 of arrangement there.
- 31 Q What percentage of the population in New Zealand  
32 is comprised by the Maori, and what percentage of  
33 the fishery was included in that settlement?
- 34 MS. MCGIVNEY: I don't know what the ratio is, I'm  
35 sorry.
- 36 Q And there's no separate aboriginal food fishery in  
37 New Zealand is there.
- 38 MS. MCGIVNEY: I understand that they're having some  
39 discussions around that, and I'm not sure how  
40 that's proceeding. I didn't -- there were some  
41 members here, I think, last year from the Maori  
42 group and I wasn't able to attend those  
43 presentations, but I did understand that there was  
44 some discussion regarding they were looking at how  
45 that element of the fishery would be implemented.
- 46 Q Now, when aboriginal treaties were settled in  
47 Alaska in the 1960s, no separate commercial

1 fishery was created in Alaska for aboriginal  
2 groups, was there.

3 MS. MCGIVNEY: I don't believe so.

4 Q Matter of fact, there's not even a separate food  
5 fishery for aboriginal groups in Alaska, is there,  
6 it's a subsistence fishery for all non-  
7 metropolitan Alaskans; is that correct?

8 MS. MCGIVNEY: That's my understanding.

9 Q Now, do you know if you've advised your bosses of  
10 these things? Has the Minister been told about  
11 these alternatives?

12 MS. MCGIVNEY: I personally haven't. I think actually  
13 the -- some of these ideas of different approaches  
14 have been discussed in terms of options that might  
15 be looked at. Some of those were discussed at the  
16 Common Table proceedings, the concept of the New  
17 Zealand process and the U.S. processes, et cetera.

18 Q Now, following the Supreme Court of Canada  
19 decision in **Marshall**, in the Maritimes, DFO didn't  
20 create separate commercial fisheries there, did  
21 they. They bought the aboriginal groups in the  
22 Maritimes into the public commercial fishery,  
23 everyone fishes under the same rules and  
24 regulations; is that correct?

25 MS. MCGIVNEY: That's my understanding.

26 Q So here we have a policy that's caused great  
27 controversy and bitterness. They don't do it in  
28 Alaska. They don't do it in New Zealand. We  
29 haven't done it on the Maritimes. Can you tell me  
30 why, I mean, even Canadian, why are Canadian  
31 fishermen in the public fishery in the Maritimes  
32 being treated with more respect than the B.C.  
33 commercial fishermen have been shown, that those  
34 in the public fishery.

35 MS. MCGIVNEY: Yes, in B.C. one of the challenges we  
36 have is that aboriginal rights, the extent and  
37 scope of those rights haven't been defined, and so  
38 the Department has developed policies to approach  
39 how to address some of the interests that have  
40 been brought forward, and that actually then the  
41 policy (indiscernible - overlapping speakers).

42 Q Excuse me, are you qualified to talk on questions  
43 of aboriginal rights? I always get heck when I  
44 raise points of law in here, and I'd like to  
45 engage in that discussion with you, but I think  
46 it's probably inappropriate, and maybe --

47 MR. MCGOWAN: (Indiscernible - overlapping speakers)

1 Mr. Commissioner, the -- Mr. Eidsvik asked the  
2 witness for an answer which sought her reason or  
3 perhaps DFO's reason for doing certain things and  
4 the Department or the witness's understanding of  
5 the law may well be relevant to the rationale for  
6 proceeding in a certain way. I don't find the  
7 answer objectionable and I'd suggest the witness  
8 be permitted to conclude her answer.

9 MR. EIDSVIK: I'm in agreement with that.

10 Q So you're saying that there's aboriginal fishing  
11 rights in the Fraser River have not been defined.  
12 I'm trying to summarize what you're saying.

13 MS. MCGIVNEY: I'm saying in B.C. there was a -- the  
14 Department has taken a broad policy approach  
15 because of the -- because of the fact that there  
16 have not been long-standing treaties, and the  
17 aboriginal rights are not -- the scope and extent  
18 of those are not clarified. So the policy  
19 approach is that there is a policy approach to try  
20 to provide through our programs, provide access  
21 for food, social, ceremonial purposes. And we've  
22 also looked to providing the First Nations with  
23 some economic opportunities on the same basis as  
24 the regular fisheries.

25 Q Now, the Sto:lo litigated the question of  
26 commercial sale and trade and barter to the  
27 Supreme Court of Canada in the *Van der Peet* case.  
28 Is that not a decision that says what the  
29 Department should do? You're saying we have to do  
30 this because of aboriginal rights. Supreme Court  
31 of Canada has spoken on this.

32 MR. TAYLOR: I object, if the question is to ask this  
33 witness to interpret the *Van der Peet* case.

34 MR. EIDSVIK: Mr. Commissioner, I think it would be  
35 helpful to answer the question. The Commission  
36 counsel said we're going to engage in a discussion  
37 on law. I'm simply asking her, what's the law.

38 Q And I just need to know, the Supreme Court of  
39 Canada decision in *Van der Peet* has no relevance  
40 to what you do?

41 MR. TAYLOR: It's trite to say that the witness is here  
42 to tell Mr. Commissioner facts, and not tell Mr.  
43 Commissioner law. Mr. Commissioner (1) will know  
44 the law, but (2) that's for counsel to make  
45 submissions on.

46 MR. EIDSVIK: I actually agree with Mr. Taylor, and I  
47 don't think that there is an aboriginal right and

1           we'll set that aside for a moment for a better  
2           day.

3           Q     Now, would you expect broad cooperation amongst  
4           the people in your workplace if your workplace was  
5           segregated by race in the same way that fishermen  
6           in the Lower Fraser have been segregated?

7           MS. MCGIVNEY: You're asking me about my workplace?

8           Q     Yes, I am. How would you like it if you went to  
9           work tomorrow and you were told you couldn't go to  
10          work because the government didn't think you were  
11          the right race.

12          MS. MCGIVNEY: I wouldn't like that.

13          Q     Well, I see a bit of a smile on your face, and I  
14          think you're taking the question not very  
15          seriously. But if you're a Vietnamese refugee who  
16          came to Canada, worked three jobs to get money to  
17          buy a boat and is now told he doesn't have a place  
18          in the commercial fishery because he's the wrong  
19          race, and has been going on for 20 years, this is  
20          not a funny issue to them. So I'm asking you the  
21          question seriously. Would you accept that type of  
22          program in our workplace?

23          MS. MCGIVNEY: No, I wouldn't.

24          Q     So why is it being -- why does the --

25          MS. SCHABUS: Mr. Commissioner, I'm going to -- I'm  
26          going to object vehemently against this line of  
27          questioning. Mr. Eidsvik continues to himself  
28          qualify what is a rights-based fishery and  
29          aboriginal communal fishery, that DFO has policies  
30          on, as a race-based fishery and that is not  
31          something that has been established, for the  
32          witnesses. It's not how those policies are set  
33          out. And, frankly, this line of questioning as  
34          been put forward by Mr. Eidsvik is misleading, and  
35          it's actually misleading the witnesses and he  
36          keeps suggesting these points. But the witness is  
37          actually making a distinction.

38                 I'm strongly objecting to Mr. Eidsvik  
39          continuing to refer to this fishery as a race-  
40          based fishery, and I would ask that the proper  
41          terms, which are aboriginal communal fishery, and  
42          food, social and ceremonial fisheries, be referred  
43          to. And that Mr. Commissioner rule that this line  
44          of questioning as a race-based fishery not be  
45          pursued, especially in light of Supreme of Court  
46          of Canada decisions who have made it very clear  
47          that this is not a race-based fishery that we are

1 dealing with.

2 MR. EIDSVIK: I agree with my friend on that point.

3 Q There is clearly a rights-based fishery on the  
4 Fraser River, it's called the food, social and  
5 ceremonial fishery. Would you agree with me  
6 there? Undoubtedly the food, social and  
7 ceremonial fishery for the Sto:lo and the Musqueam  
8 is a rights-based fishery; is that correct?

9 MS. MCGIVNEY: DFO has a policy approach. We provide  
10 access for food, social, ceremonial purposes.  
11 There is in our agreements, there is a clause that  
12 neither agrees or denies that there are rights.

13 MR. EIDSVIK: Mr. Lunn, if I could have up Tab 15,  
14 please, in our set of documents.

15 MR. LUNN: Which tab is that again?

16 MR. EIDSVIK: Tab 15 in our set of documents. It's the  
17 **Employment Equity Act** Report 2008. If we can go  
18 to about the -- I'm looking for Table 1, it's  
19 about the fourth or fifth page in, Mr. Lunn.  
20 Sorry, if you could flip that around. Next page,  
21 Mr. Lunn, please. I'd like to get this entered as  
22 an exhibit, Mr. Commissioner.

23 THE COMMISSIONER: Could we just have a description of  
24 what it is, Mr. Eidsvik.

25 MR. EIDSVIK: It's the **Employment Equity Act** Report for  
26 Canada, produced by the Government of Canada,  
27 describing aboriginal participation in various  
28 federal government departments. Now, there's two  
29 federal government departments in this -- or,  
30 sorry.

31 THE REGISTRAR: That will be Exhibit 1737.

32  
33 EXHIBIT 1737: **Employment Equity Act** - Annual  
34 Report 2008, excerpt  
35

36 MR. EIDSVIK: 1737, thank you.

37 Q There's two federal departments primarily engaged  
38 in this particular hearing, it's the Department of  
39 Justice and the Department of Fisheries. And if  
40 we look down in the column here, partway down  
41 you'll see Department of Justice in Canada, and  
42 you'll see they've got 5,000 employees and 172  
43 aboriginal employees, or 3.4 percent. That's  
44 about one-tenth of the participation rate in the  
45 public commercial fishery, isn't it?

46 MS. MCGIVNEY: I don't understand the relevance of  
47 this.



1 Q I think you --  
2 MS. MCGIVNEY: I don't --  
3 Q I'm not asking for --  
4 MS. MCGIVNEY: -- I don't know what the numbers are in  
5 the participation in the fishery or in the general  
6 public.  
7 Q You don't know what the aboriginal participation  
8 rate is in the commercial fishery, in the public  
9 commercial fishery? Isn't your whole objective  
10 that I've heard for the past number of times that  
11 we're trying to enhance aboriginal economic  
12 development in the fishery?  
13 MS. MCGIVNEY: I was interpreting based on your earlier  
14 comments about aboriginal individuals, and I don't  
15 know how many aboriginal individuals are in the  
16 commercial fishery. So could you reword your  
17 question again. Maybe I misinterpreted it.  
18 Q I think we can just move on, onto the next one.  
19 And if we look at Department of Fisheries, I see  
20 that Department of Fisheries has a 3. -- 3.6  
21 aboriginal participation rate. No matter how you  
22 cut it, Department of Justice and Department of  
23 Fisheries have utterly failed in the aboriginal  
24 participation department, compared to the public  
25 commercial fishery; is that correct?  
26 MR. TAYLOR: I object to this line of questioning. It  
27 has nothing to do with this commission of inquiry.  
28 MR. EIDSVIK: It has everything to do with this  
29 commission of inquiry, Mr. Commissioner. We've  
30 heard again and again that the Department is  
31 intending to create increased aboriginal economic  
32 development. They're doing so by setting up  
33 separate fisheries, by excluding fellow fishermen  
34 that I represent from the fishery, and my question  
35 to follow up on this --  
36 MR. TAYLOR: Well, there's an objection standing. This  
37 line of questioning is going at whether this or  
38 that department has this or that level of  
39 participation of different people, four years or  
40 three years ago. It's out of date. The issue  
41 here is fish, not employment equity in government  
42 departments, and I object to the question.  
43 MR. EIDSVIK: Let me slightly reword the question.  
44 Q Now, the Department of Fisheries, it has a number  
45 of floors in the building downtown; is that  
46 correct, in the Burrard building?  
47 MS. MCGIVNEY: Yes.

1 Q Would it lead to broad cooperation between  
2 employees if certain floors were reserved for  
3 certain races of Canadians?

4 MR. MCGOWAN: Mr. Commissioner, I just rise to note we  
5 are very tight on time today. This line of  
6 questioning seems to be getting fairly far into  
7 the periphery of matters that are central to your  
8 mandate. Mr. Eidsvik is reaching the end of his  
9 time allotment. I'm not sure in terms of using  
10 our time most efficiently, whether pursuing this  
11 line of questioning is going to be of great  
12 assistance to you, Mr. Commissioner.

13 MR. EIDSVIK: Mr. Commissioner, I am almost done with  
14 that line of questioning, and I can stop now. But  
15 I can tell you that the reaction to the counsel in  
16 the room and the reaction of the witnesses shows  
17 how difficult a problem this is for the fishermen  
18 that I represent. It's fine for them to say it's  
19 not appropriate, but we live with this every  
20 single day. We've lived with it for 20 years. If  
21 I could have Tab 70, Mr. Lunn, please.

22 MS. GAERTNER: Mr. Commissioner, if I may, it's Brenda  
23 Gaertner for the First Nations Coalition. If  
24 there was a single question that said how many  
25 aboriginal people have been working with the  
26 Department of Fisheries and Oceans in a particular  
27 year, and there's an exhibit that needs to be  
28 attached to it, that's a fair question, I think.  
29 We're all learning to try to figure out how to  
30 work together. And you might want to know how  
31 much staff are aboriginal people, to see how well  
32 we're doing in terms of cross-cultural work. But  
33 if he's going to continue to make submissions and  
34 go on and on and on about what he'd like to do  
35 with that, I think we'll wait for final  
36 submissions on that.

37 MR. EIDSVIK: Tab 70 in our documents, please, Mr.  
38 Lunn.

39 Q This is a DFO memo discussing salmon drop-out  
40 rates in the set-net fishery in the Fraser Canyon.  
41 And there was -- it describes a PSARC request that  
42 DFO undertake a study to measure drop-out rates in  
43 the Fraser Canyon set-net fishery, and that was  
44 never done. Can you tell me if the person is  
45 right, he's saying that a large amount of fish  
46 drops out dead of set-nets, and has there been a  
47 study done to deal with that? We've had millions

1 of fish disappear in the Fraser River since 1992.  
2 Do you know if there's been anything done on this?  
3 You're the...

4 MS. MCGIVNEY: I don't know. This is the first time  
5 I've heard of the term "drop-out rates", so I'm  
6 just trying to understand what's meant by it.

7 MR. EIDSVIK: Okay. If I could get Tab 41 of our  
8 documents --

9 MS. SCHABUS: I'm going to object, Mr. Commissioner.

10 MR. EIDSVIK: -- please, Mr. Lunn.

11 MS. SCHABUS: I'm going to object to it being marked,  
12 and I'm also going to object to the question,  
13 because clearly the witness doesn't have the  
14 expertise and the knowledge to answer the  
15 question.

16 And when talking about equity like my friend  
17 likes to, I'd like to point out that he's over his  
18 time allocation, that he was accommodated to  
19 actually cross-examine on these issues out of  
20 order, and that he was actually supposed to have  
21 done that at the last hearing without a reason  
22 being provided to other counsel as to why. And we  
23 only to -- and in all fairness, I actually  
24 represent an aboriginal group and we have very  
25 serious issues regarding aboriginal fisheries that  
26 go to the core of the Commission, and the core of  
27 the hearing topics, and I have a shorter time  
28 allocation than Mr. Eidsvik, and I'd like to at  
29 least use it to its fullest. So I'm asking at  
30 this stage that this line of questioning be  
31 discontinued.

32 MR. MCGOWAN: Mr. Commissioner, if I could just briefly  
33 address a couple of points my friend made. The  
34 first issue she raised was whether Mr. Eidsvik was  
35 here last day and whether a reason has been  
36 provided. Mr. Eidsvik contacted Commission  
37 counsel. He alerted them to the fact he wouldn't  
38 be there. He provided an explanation that was  
39 satisfactory to Commission counsel. That's all I  
40 have to say on that issue.

41 With respect to the question as to drop-out  
42 rates, if the question to the witness is: are  
43 you, as somebody who was the Director of Treaty  
44 and Aboriginal Policy for a number of years, aware  
45 of whether the Department has conducted the type  
46 of study referred to in this document? In my  
47 submission, the question is appropriate. If the

1 witness doesn't know, that will be the answer.

2 MR. EIDSVIK:

3 Q You don't know?

4 MS. MCGIVNEY: I don't know.

5 MR. EIDSVIK: I wonder if I could have that document  
6 entered as an exhibit.

7 THE COMMISSIONER: Yes, very well.

8 MR. EIDSVIK: I have one last document and then I'm  
9 done, Mr. McGowan.

10 THE REGISTRAR: That will be 1738.

11

12 EXHIBIT 1738: DFO Memorandum re "Salmon  
13 Drop-out Rates - REMEC/PSARC", May 17, 1996

14

15 MR. EIDSVIK:

16 Q If we could go to Tab 41, please, Mr. Lunn, in our  
17 set of documents. And this is a report by Percy  
18 Gladstone of the famous Heiltsuk family, the  
19 Gladstones, and it's a journal article. If you  
20 could just go to page 2, Mr. Lunn. And he talks  
21 about, and it's -- I won't bring your attention to  
22 it too much, Mr. Commissioner, simply that this  
23 paper is written in 1953 and it describes  
24 aboriginal participation in the fishery. And at  
25 the one, two, three, the paragraph just above  
26 "Tribal Fishing Economy", and he -- and there's  
27 difficulties for all of us in the fishing industry  
28 but he talks -- this is 1953:

29

30 Despite these formidable difficulties, native  
31 Indians in growing numbers have more than  
32 held their own in the fishing industry of  
33 British Columbia. Today, perhaps as many as  
34 10,000 of them derive their livelihood from  
35 fishing and allied occupations, and they have  
36 become a vital and necessary part of...that  
37 industry. Their ability to compete on an  
38 even basis with the whites is beginning to  
39 instil in them a new pride. They are rapidly  
40 losing their recent apathy, and becoming an  
41 organized and articulate element that may  
42 acquire a considerable economic and political  
43 bargaining power in this province.

44

45 Now, that's something we can be pretty darn proud  
46 of, isn't it, as Canadians. This is what the  
47 fishery in 1953 looked like.

22

PANEL NO. 54

Cross-exam by Mr. Eidsvik (SGAHC)

Cross-exam by Ms. DeForrest (WCCSFN)

1 MS. MCGIVNEY: There was a -- based on this, there was  
2 a significant component of aboriginal fishermen.  
3 Q And if I could have one last question for Ms.  
4 Stewart and I'm done. Were you aware that in 1953  
5 to become a lawyer an aboriginal person had to  
6 drop their Indian status just to go to university?

7 MS. STEWART: I was not aware of that.

8 MR. EIDSVIK: Yeah. Thank you, Mr. Commissioner.  
9 Those are my questions.

10 THE COMMISSIONER: Thank you, Mr. Eidsvik.

11 MR. MCGOWAN: Mr. Commissioner, Ms. DeForrest will be  
12 the next counsel.

13 MR. EIDSVIK: And I should mark that last exhibit,  
14 please. Thanks. Well, I like to finish with a --  
15 with a splash.

16 MS. DEFORREST: Mr. Commissioner, my name is Leah  
17 DeForrest --

18 MR. EIDSVIK: Just before we get to that, could we get  
19 that document marked as an exhibit, please.

20 THE REGISTRAR: That will be 1739, that's document  
21 number 41.

22

23 EXHIBIT 1739: Gladstone, Native Indians and  
24 the Fishing Industry of British Columbia,  
25 February 1953  
26

27 MR. EIDSVIK: Thank you.

28 MS. DEFORREST: Thank you, Mr. Commissioner. My name  
29 is Leah DeForrest. My last name is spelled  
30 capital "D", small "e", capital "F", double --  
31 sorry, "o", double "r", e-s-t. I am here on  
32 behalf of the Western Central Coast First Nations,  
33 for the Hwlitsum First Nation and Penelakut Tribe  
34 in particular. I understand that I am allotted 35  
35 minutes this morning. However, I'll do my best,  
36 I understand we're short for time, so I'll do my  
37 best.  
38

39 CROSS-EXAMINATION BY MS. DEFORREST:  
40

41 Q A majority of my questions are for Ms. McGivney,  
42 just so you're aware. And if I can have document  
43 -- our first document being Tab 42, please,  
44 brought up on the screen. Ms. McGivney, I  
45 understand that you previously held a position as  
46 the Director of Treaty and Aboriginal Policy  
47 Director; is that correct?

September 2, 2011

1 MS. MCGIVNEY: Yes, I have.

2 Q Thank you. And as a result you'd be somewhat  
3 familiar with the B.C. Treaty Process; is that  
4 correct?

5 MS. MCGIVNEY: Yes.

6 Q And under this process you'd understand that for  
7 First Nations wishing to begin participation in  
8 this process that they would file a Statement of  
9 Intent?

10 MS. MCGIVNEY: Yes.

11 Q And that would generally include a map of -- this  
12 document would have a map that set out sort of the  
13 general geographic area of the First Nations  
14 traditional territory?

15 MS. MCGIVNEY: Yes.

16 Q Okay. And if I could go to page 16 of this  
17 document, please. Thank you. And just under  
18 "Submission of Statement of Intent to negotiate a  
19 treaty" it just states that -- it sets out that:

20

21 The Statement of Intent should identify the  
22 following:

23

- 24 • The First Nation;
- 25
- 26 • The general geographic area of the First  
27 Nation's traditional territory; [and]
- 28
- 29 • A formal contact for [the communicator].
- 30

31

Is that correct?

32 MS. MCGIVNEY: I'm sorry, could you repeat? I was  
33 reading right there.

34 Q Sorry. I just read that little section under  
35 "Stage 1: Submission of Statement of Intent",  
36 that:

37

38 The Statement of Intent should identify the  
39 following:

40

- 41 • The First Nation;
- 42
- 43 • The general geographic area of the First  
44 Nation's traditional territory; [and]
- 45
- 46 • A formal contact for communication.
- 47

1           You'd agree with that?

2       MS. McGIVNEY: Yes.

3       MS. DeFORREST: Thank you. Could I have that document  
4           marked as an exhibit, please, Mr. Lunn.

5       THE REGISTRAR: Exhibit 1740.

6

7                   EXHIBIT 1740: The Report of the British  
8                   Columbia Claims Task Force, June 28, 1991,  
9                   The First Nations of British Columbia, The  
10                  Government of British Columbia, The  
11                  Government of Canada

12

13       MS. DeFORREST: Thank you.

14       Q     And you'd agree with me that there's -- that this  
15           negotiation process is evident, it's not evidence-  
16           based; is that correct?

17       MS. McGIVNEY: The Treaty Process?

18       Q     That's correct, the B.C. Treaty Process?

19       MS. McGIVNEY: Yes.

20       Q     Yes, that's right. And that as a result there's  
21           no Crown inquiry to research into the validity of  
22           the territorial assertion, or the geographic scope  
23           or the nature of any aboriginal rights, for  
24           example, fishing of the First nations in question;  
25           is that correct?

26       MS. McGIVNEY: I don't know if -- sorry, can you say  
27           that again? I'm just --

28       Q     There's no Crown inquiry into the validity of the  
29           territorial assertion that's brought in with the  
30           Statement of Intent?

31       MS. McGIVNEY: There's no requirement for that. There  
32           may be some Crown investigation on that. I don't  
33           know.

34       Q     Okay, thank you. And I just have some questions,  
35           could I have Exhibit 1270, please, with respect to  
36           the Aboriginal Fishing Strategy. Exhibit 1270 is  
37           a Guidelines Respecting the Issuance of Licences  
38           under the **Aboriginal Communal Fishing Licences,**  
39           **(ACFLR)**, it's dated February 7th, 2001. And  
40           beginning at the top of page 1, it indicates that  
41           DFO does not -- sorry, at the bottom of page 1.  
42           It indicates that:

43

44                   ...DFO does not have the mandate to determine  
45                   whether an Aboriginal group has aboriginal or  
46                   treaty rights to fish, or the nature and  
47                   scope of any such rights.

1 And continuing on the next page, please. And the  
2 issuance, sorry, just at the bottom of that  
3 paragraph:

4  
5 The issuance of a licence under the **ACFLR** is  
6 not a recognition that a particular  
7 Aboriginal group has an aboriginal or treaty  
8 right to fish, rather it is a tool that  
9 assists in the management of the fisheries  
10 and the conservation of fisheries resources  
11 and helps to promote stability in fisheries.  
12

13 Is that correct?

14 MS. MCGIVNEY: Yes.

15 Q And so therefore you would agree with me that the  
16 issuance of a communal licence does not give the  
17 right to fish, but it's simply a DFO fisheries  
18 management tool, correct?

19 MS. MCGIVNEY: Correct.

20 Q And further, if we go to page 4 of this document,  
21 the second paragraph. Sorry, just one moment.  
22 I'm just having difficulties finding my place  
23 here.

24 MR. LUNN: Would you like to see the whole page?

25 MS. DeFORREST: Please, thank you. Sorry, one moment,  
26 please.

27 Q Sorry. And just at the second paragraph at the  
28 second line:

29  
30 In this regard it should be remembered that  
31 DFO does not have a mandate to determine  
32 whether an Aboriginal group has aboriginal or  
33 treaty rights to fish, or the nature and  
34 scope of any such rights.  
35

36 Is that correct? So DFO does not have that  
37 mandate.

38 MS. MCGIVNEY: Correct.

39 Q Thank you. And if I could go to our document Tab  
40 33, please, Mr. Lunn, page 3, paragraph 2.0,  
41 indicates:

42  
43 Where consultations with an Aboriginal  
44 community fail to produce an agreement on the  
45 quantity of fish to be taken and the  
46 conditions under which the community will  
47 fish for food, social and ceremonial



1                   purposes, DFO's policy is to issue a communal  
2                   licence.  
3

4                   That's correct. So with respect to -- my question  
5                   is with respect to issuing a communal licence,  
6                   where consultations with an Aboriginal community  
7                   fail to produce an agreement, the DFO policy is to  
8                   issue a communal licence, correct?

9                   MS. MCGIVNEY: Yes, with those groups that we are  
10                   looking at providing access for FSC under our  
11                   policies.

12                   Q    And you're familiar with the Hwlitsum First  
13                   Nation?

14                   MS. MCGIVNEY: Yes, I am.

15                   Q    And if I could go to our document at Tab 40,  
16                   please, Mr. Lunn. Thank you. This is an email  
17                   dated July 28th -- sorry, July 18th, 2008, and  
18                   it's from Jordan Point and you are c.c.'d on  
19                   this --

20                   THE COMMISSIONER: Do you want that tab marked?

21                   MS. DeFORREST: I'm sorry?

22                   THE COMMISSIONER: Do you wish to mark that last tab?

23                   MS. DeFORREST: Oh, I'm sorry. I do wish to mark that  
24                   last tab, sorry.

25                   THE COMMISSIONER: And what tab number was it?

26                   MS. DeFORREST: 33, thank you.

27                   THE REGISTRAR: That will be 1741.  
28

29                   EXHIBIT 1741: Communal Licence Handbook,  
30                   Aboriginal Fisheries, Department of Fisheries  
31                   and Oceans, Pacific Region, Vancouver, May  
32                   1998  
33

34                   MS. DeFORREST: Thank you.

35                   Q    If I could go to our document, Tab 40, please.  
36                   This is an email from -- dated July 18th, 2008,  
37                   and it's from Jordan Point, and it's c.c.'d to  
38                   you, and there's an attachment to this email, a  
39                   briefing note. Could I go to that briefing note,  
40                   please, it's at, I believe, page 4 of this email.  
41                   And I'm sorry, if I could go back to the first -  
42                   sorry - no, I'm sorry, we're here. So this  
43                   briefing note is entitled "Access and [Agency]  
44                   Issues for Salish Tribes, and Hwiltsum (sic)  
45                   Assertions to fish in the Lower Fraser"; is that  
46                   correct?

47                   MS. MCGIVNEY: "Access and Adjacency".

1 Q Thank you.

2 MS. MCGIVNEY: I think you used a different word.

3 Q Sorry, I did. Thank you. It's "Access and  
4 Adjacency" - thank you - "Issues for Salish  
5 Tribes, and Hwiltsum (sic) Assertions to Fish in  
6 the Lower Fraser". And under the second bullet  
7 point it indicates that:

8

9

- 10 • Complicating this environment is a group  
11 called the Hwiltsum (sic), they are status  
12 Indians, but not an **Indian Act** Band. The  
13 Hwiltsum (sic) assert that they are  
14 descendants of a larger Salish Tribe (the  
15 Lamalchi) that evidence shows were connected  
16 to the Penelakut and Chemainus, which clearly  
17 showed historical *Continued Use and Occupancy*  
18 on the Fraser, since the time of contact.  
19 They number approximately 300 members and  
20 have an elected Chief and Council.

21

22

So you'd agree with me that that was your  
information in July of 2008?

23

MS. MCGIVNEY: Correct.

24

Q Thank you.

25

MS. MCGIVNEY: Is that the date on this? I don't see  
-- is this the same as the document you just  
showed me previous, 2008?

26

27

Q It's attached to the email that was sent to you.

28

MS. MCGIVNEY: Because it doesn't have the date at the  
top. It usually has the date under "2000" it just  
says an "X", so I'm not sure of the -- if it's  
part of that other document, then, that is the  
timing.

29

30

31

32

33

Q Thank you. And you'd agree with me that the AFS  
was initially designed as a bridging tool, used  
until agreements could be negotiated; is that  
correct?

34

35

36

37

MS. MCGIVNEY: As a -- as a bridge towards treaty, yes.

38

Q Thank you. And if I could go to the briefing  
note, page 3 of the briefing note and the second  
bullet from the top indicates:

39

40

41

42

43

INAC has indicated that it is a DFO decision  
and that they have no concerns (is this  
accurate?) however, some local [First  
Nations] would take exception to HFN licenced  
(sic) within the Area (Musqueam, Tsawwassen).

44

45

46

47

1           So as a result, would you agree with me that  
2           Indian and Northern Affairs Canada and now  
3           Aboriginal Affairs and Northern Development  
4           Canada, is heavily involved in decision-makings  
5           with respect to the issuing of communal licences.

6   MS. MCGIVNEY: Not on a regular basis, but on specific  
7           cases we may ask their advice.

8   Q       But this email you would indicate that -- or this  
9           email seems to suggest that INAC has indicated  
10           that it's a DFO decision, which to me suggests  
11           that DFO defers to INAC.

12   MS. MCGIVNEY: This is, I guess, as it's written with  
13           the question behind it and the comment is -- or,  
14           sorry, I guess the comment refers to something  
15           different. But I think it's written with a  
16           question meaning we need to check that. It's  
17           draft. This isn't the final version of the  
18           document because it didn't have any of the code  
19           numbers at the beginning, so it's a draft. This  
20           is just -- and it's not indicating that INAC has  
21           precedence over DFO decisions. We as federal  
22           departments try to work together to be coordinated  
23           in our various approaches, and in some cases in  
24           issuing licences we would seek if there's -- if  
25           there's issues around that, we would seek some of  
26           their advice regarding it.

27   Q       So you seek INAC's advice. But in this case it  
28           looks like it's questioning whether INAC has any  
29           concerns with respect to this particular licence;  
30           is that correct?

31   MS. MCGIVNEY: It looked like that was the question and  
32           it was left as a question. I know that certainly  
33           since then I have had some communication with INAC  
34           that is different from this.

35   Q       Okay. And in this particular case, it's INAC  
36           indicating to DFO that it's a DFO decision.

37   MS. MCGIVNEY: Yes, that's what it says.

38   MS. DEFORREST: Thank you. Could I have that document  
39           marked as an exhibit.

40   THE REGISTRAR: Exhibit 1742.

41  
42           EXHIBIT 1742: Email from Jordan Point to  
43           Jeff Johansen, July 18, 2008 and attached  
44           Draft Briefing Note for the Minister, Access  
45           and Adjacency Issues for Salish Tribes, and  
46           Hwiltsum (sic) Assertions to Fish in the  
47           Lower Fraser

1 MS. DeFORREST: Thank you.  
2 MR. TAYLOR: And just for clarity, that document, I  
3 take it to be the entire tab. Its not clear to me  
4 what all is in that tab, but --  
5 MS. DeFORREST: Yes.  
6 MR. TAYLOR: -- I take that to be the case.  
7 MS. DeFORREST: That is the correct case. I'm sorry.  
8 MR. TAYLOR: Maybe you could just define what's in the  
9 tab that you've now just marked.  
10 MS. DeFORREST: Certainly. What's in the tab is an  
11 email from Jordan Point and it's dated July 18th,  
12 2008 and attached to that email, and I apologize,  
13 I thought I had set this out in the beginning, is  
14 a briefing note entitled "Access and Adjacency  
15 Issues for Salish Tribes, and Hwiltsum (sic)  
16 Assertions to Fish in the Lower Fraser".  
17 MR. TAYLOR: A draft briefing note.  
18 MS. DeFORREST: Thank you. If I could go back to our  
19 previous document 39, Tab 39, which is now  
20 exhibited.  
21 MR. LUNN: I don't think we've exhibited Tab 39. Did  
22 you mean 33?  
23 MS. DeFORREST: Pardon me.  
24 Q If I could go to our Tab 39, please. Thank you.  
25 And this is an email from yourself to Jeff  
26 Johansen and the subject line is "Re: Hwlitsum-  
27 AFS Agreement for [20]08-09 ??" And it reads:  
28  
29 We had agreed to a basic funding agreement.  
30 Their application has been received by BCTC.  
31 There has not been a decision for the parties  
32 to proceed with negotiations. Dfo (sic)  
33 should NOT issue a communal licence to this  
34 group at this time. Kaarina.  
35  
36 That was your email?  
37 MS. McGIVNEY: Yes.  
38 Q So in this particular case, despite the DFO policy  
39 to issue a communal licence, you declined to do so  
40 when the Hwlitsum applied for access to FSC fish  
41 for 2008 and 2009?  
42 MS. McGIVNEY: Yes.  
43 Q I'd like to go back to our document, Tab 40, which  
44 was just exhibited, Mr. Lunn, sorry. If I could  
45 go to page 2 of the briefing note. And just at  
46 the fourth bullet it says:  
47

1           In 2002, departmental C&P staff began to  
2           observe Vancouver Island tribes entering the  
3           Fraser by Gillnet, seeking to fish with-out a  
4           licence and thus compel a trial and a  
5           constitutional "Aboriginal Rights" defence.  
6           Charges were laid in the case of the Hwiltsum  
7           (sic), but not in the case of the Vancouver  
8           Island tribes. The Hwiltsum (sic) offenders  
9           eventually pled guilty, and thus avoided an  
10          aboriginal rights defence.

11  
12          So not only was a licence not issued to the  
13          Hwiltsum for their 2008 and 2009 application, in  
14          fact, previously in 2002, C&P staff had prosecuted  
15          them; is that correct?

16       MS. MCGIVNEY: That was some individual offenders, yes.

17       Q     And you were aware of this at the time when you  
18           received the draft briefing note in 2008, you were  
19           aware of the history of that; is that correct?

20       MS. MCGIVNEY: Yes, it was in the briefing note.

21       Q     Thank you. And if I could go to the PPR18 at page  
22           40, which is the Table 1, 2009 Fraser River  
23           Sockeye Communal Licence Allocations, you spoke  
24           about this last day when you were providing  
25           testimony. There was in fact an allocation of  
26           Fraser sockeye assigned to the Hwiltsum for 5,000  
27           pieces; is that correct?

28       MS. MCGIVNEY: There's an allocation put aside, yes.

29       Q     Okay. And despite the assigned allocation, no  
30           communal licence was issued to Hwiltsum?

31       MS. MCGIVNEY: Correct. We have encouraged them to  
32           coordinate with other groups to have some access.

33       Q     And given that INAC apparently had no concerns  
34           about this application, do you recall what  
35           considerations led you to deny their application  
36           for a communal fishing licence?

37       MS. MCGIVNEY: Well, as I said, I had had subsequent  
38           discussions with INAC and there were some  
39           concerns. We have worked with this group and  
40           tried to encourage them to participate with other  
41           groups that have existing agreements, and have  
42           their access through that.

43       Q     Okay. So you're saying initially INAC didn't have  
44           concerns, and then you had discussions with INAC  
45           and they did raise some concerns, and as a result,  
46           a licence wasn't issued; is that correct?

47       MS. MCGIVNEY: Not just -- that was one of the factors

- 1 to consider. But we are looking to provide them  
2 the access through other agreements.
- 3 Q My question was, what were the factors that  
4 prevented you from issuing the communal licence?  
5 So aside -- so INAC had some concerns. What was  
6 that concern?
- 7 MS. MCGIVNEY: They had some concerns in terms of  
8 issuing the licence and in the context of how the  
9 federal government was addressing this group.  
10 They haven't -- they don't have a land-based area.  
11 They're coming forward with a claim. There's a  
12 number of elements in terms of dealing with groups  
13 coming forward that aren't part of sort of what  
14 has been accessed on the longer-term through the  
15 AFS. So they had not been part of the original  
16 AFS component. They seemed to be related to one  
17 of the groups within that, and so rather than  
18 going and parsing out another agreement, the  
19 objective is to try to get them to work with  
20 others and have that access through that.
- 21 Q And what were the other factors?
- 22 MS. MCGIVNEY: There was the -- this is the -- is this  
23 still associated with that email and the decision  
24 note? Is this the same timing? Yes. So the  
25 other factors I think were linked in with the fact  
26 that they hadn't -- that Canada and B.C. haven't  
27 accepted them to move forward into the B.C. Treaty  
28 process to advance that process with them.  
29 They've submitted an application into the process,  
30 but the other parties to the agreement haven't  
31 advanced the negotiations. So that was another  
32 consideration.
- 33 Q So you're not aware that they have been accepted  
34 by -- under the B.C. Treaty Process.
- 35 MS. MCGIVNEY: They submitted a Statement of Intent as  
36 the first step of the B.C. Treaty Process, but  
37 there haven't -- there hasn't been an acceptance  
38 by all parties to proceed with that negotiation.
- 39 Q But B.C. is one of the parties that has accepted  
40 them; is that correct?
- 41 MS. MCGIVNEY: Not to my knowledge. The B.C. Treaty  
42 Commission accepted the application that was sent  
43 to them. That's what I understand has been  
44 accepted.
- 45 Q So ultimately you're suggesting that they fish  
46 under someone else's licence as opposed to having  
47 their own licence issued.

1 MS. MCGIVNEY: Yes.  
2 MS. DeFORREST: Okay. If I could go to our document  
3 number 34, please, Mr. Lunn.  
4 THE REGISTRAR: Excuse me, Ms. DeForrest, before you go  
5 forward, do you wish to mark the Tab 39?  
6 MS. DeFORREST: I do. I'm sorry. Thank you.  
7 THE REGISTRAR: Yes, that will be marked as 1743.

8  
9 EXHIBIT 1743: Email from Kaarina McGivney to  
10 Jeff Johansen re "Hwlitsum-AFS Agreement for  
11 08-09 ??", June 20, 2008  
12

13 MS. DeFORREST: Thank you.  
14 MR. LUNN: Sorry, Tab...?  
15 MS. DeFORREST: 34, it's a Memorandum for the RDG,  
16 Pacific Region.

17 Q And this document is entitled "Memorandum for the  
18 RDG, Pacific Region, Request for Increased Sockeye  
19 Allocation for Cowichan Tribes". And if we go to  
20 -- and you'd agree with me that this document sets  
21 out that in 2005, and this is under the first  
22 bullet, that the Cowichan are seeking an  
23 allocation to increase their allocation, and  
24 essentially from 20,000 sockeye to 130,000  
25 sockeye. And where I get those numbers from, if  
26 you go to the bottom of the first page, the  
27 Cowichan request is for an increase of a hundred  
28 and, sorry, from -- they're increasing -- pardon  
29 me. They're seeking to increase their existing  
30 allocation from 20,000 sockeye to 130,000. So  
31 130,000 sockeye is on this page. And then if you  
32 go to the second page -- further down, sorry. At  
33 the very bottom, the line:

34  
35 The 20,000 allocation results in an average  
36 of 5 sockeye per person.  
37

38 So I'm assuming that that's speaking to their  
39 current allocation. So my question is essentially  
40 this document, you'd agree that this document is  
41 setting out an application to increase their  
42 existing allocation. Do you understand that?

43 MS. MCGIVNEY: Yes.  
44 MS. DeFORREST: Thank you. And if I go to page 2, the  
45 second bullet please.  
46 Just a moment, please. Perhaps, Mr.  
47 Commissioner, we could take a break at this time.

1 THE COMMISSIONER: Thank you.

2 MS. DeFORREST: Thank you.

3 THE REGISTRAR: The hearing will now recess for 15  
4 minutes.

5

6 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)

7 (PROCEEDINGS RECONVENED)

8

9 THE REGISTRAR: The hearing is now resumed.

10 MS. DeFORREST: Thank you.

11

12 CROSS-EXAMINATION BY MS. DeFORREST, continuing:

13

14 Q Ms. McGivney, before we took the break, we were  
15 looking at our document at Tab 34. In particular,  
16 it's an application, a request for increased  
17 sockeye allocation for the Cowichan tribes. You'd  
18 agree with me that the Cowichan are the largest  
19 First Nation in the province, and --

20 MS. McGIVNEY: Sorry, I know they're large. I can't  
21 actually remember whether they're the largest or  
22 not.

23 Q At the bottom of this document --

24 MS. McGIVNEY: Does it say?

25 Q Oh, I'm sorry, I didn't mean to cut you off.

26 MS. McGIVNEY: No.

27 Q At the bottom of this document, if you just go to  
28 the bottom, it indicates:

29

30 The Cowichan are the largest First Nation in  
31 the province and have a relatively low  
32 allocation.

33

34 That's correct that's set out in the document?

35 MS. McGIVNEY: That's what it says in the document,  
36 yes.

37 Q Thank you. And then going back up to the top of  
38 the page, the third bullet down. The document  
39 also sets out that:

40

41 Current allocations have not been based on a  
42 consistent policy framework.

43

44 Is that correct?

45 MS. McGIVNEY: That's what the document says.

46 Q Thank you.

47

MS. McGIVNEY: I don't agree with that statement.



1 Q If we go to the first page of this document under  
2 the "Summary", second bullet, the recommendation,  
3 the last sentence of the second bullet is that:

4  
5 It is recommended that an interim step be  
6 taken by increasing the sockeye allocation  
7 for the Cowichan Tribes by 10,000 in 2005.

8  
9 That's what's indicated on the summary?

10 MS. MCGIVNEY: That's what's indicated.

11 Q Thank you. And if we go to PPR 18 at page 42,  
12 Table 3 --

13 MS. DEFORREST: I'm sorry, could we mark this document  
14 as an exhibit, please?

15 THE REIGSTRAR: It's Tab 34, be 1744.

16  
17 EXHIBIT 1744: Memo for the RDG Pacific, re  
18 Request for Increased Sockeye Allocation for  
19 Cowichan Tribes (Decision Sought), 2005

20  
21 MS. DEFORREST:

22 Q And if we go to PPR 18 at page 42, Table 3, the  
23 allocation for Cowichan tribes indicates, in 2009,  
24 that it's 30,000, correct?

25 MS. MCGIVNEY: I can't find it on there.

26 Q It's the fifth one down from the top.

27 MS. MCGIVNEY: Oh, sorry, I was looking at the top, the  
28 issuing office. Okay, yes, that's what it  
29 indicates.

30 Q And this is in 2009, and the previous application  
31 was -- the memorandum was dated 2005. My question  
32 is that allocations in general remain fairly  
33 static; is that correct?

34 MS. MCGIVNEY: Generally, yes.

35 Q Okay. If I could go to our document number 41,  
36 please? The first point under "Background", I'll  
37 just read this in. It says:

38  
39 Hul'qumi'num Treaty Group (HTG) is comprised  
40 of Penelakut, lyackson, Cowichan, Chemainus  
41 and Lake Cowichan Bands that are annually  
42 provided access to Fraser sockeye. The  
43 fishery is generally undertaken by means of a  
44 seine vessel in Johnstone Strait or off the  
45 mouth of the Fraser River.

46  
47 And then the second bullet says:

1                   For many years, Cowichan Band has demanded  
2                   the opportunity to reinstate one of their  
3                   historical practices of fishing in the Fraser  
4                   River.  
5

6                   You're aware of that?

7                   MS. MCGIVNEY: Yes.

8                   Q     And then turning to page 3 of this document, under  
9                   the "Recommendations", the first bullet, you would  
10                  agree with me that the recommendation indicates  
11                  that:  
12

13                  DFO indicate(d) support for a limited fishery  
14                  in 2005 authorizing the HTG to fish in the  
15                  Fraser River. The objective, subject to  
16                  consultation, would be to minimize  
17                  interaction with all groups by fishing during  
18                  one of the two open periods for local First  
19                  Nations but in an area removed from the main  
20                  fishing area (Canoe Pass).  
21

22                  So essentially they were recommending that the HTG  
23                  be allowed to fish in the Canoe Pass area; is that  
24                  correct?

25                  MS. MCGIVNEY: Yes, that's what I understand.

26                  Q     And, to your knowledge, did they fish in the Canoe  
27                  Pass area?

28                  MS. MCGIVNEY: I don't know. I don't know that I was  
29                  involved with this back in 2005.

30                  Q     Okay, so you're not sure. All right. So you'd  
31                  agree with me that where there's a fishery  
32                  overlap, that is, access to fisheries between  
33                  First Nations with a modern treaty and First  
34                  Nations without a modern treaty, then DFO will  
35                  consult with the modern treaty First Nation prior  
36                  to issuing any licences or changes to existing  
37                  licences for the non-treaty First Nation; is that  
38                  correct?

39                  MS. MCGIVNEY: Where there's overlap, DFO would consult  
40                  with all of the First Nations involved in that  
41                  overlap, whether they be treaty or non-treaty.

42                  Q     So is it DFO's position that allocations of --  
43                  that a First Nation with a modern treaty has a  
44                  priority right to fish over First Nations with no  
45                  treaty but a strong aboriginal rights claim?

46                  MS. MCGIVNEY: No. The fishing areas under treaty are  
47                  identified but don't -- they do not exclude others

1 from fishing within that area. So there wouldn't  
2 be a priority for one. We seek to provide the  
3 access for both the treaty First Nations, and if  
4 it's agreed, the access for non-treaty First  
5 Nations in that area.

6 Q But the key is that if it's agreed, and agreed by  
7 the First Nation holding the modern treaty in that  
8 fishing area, correct?

9 MS. MCGIVNEY: No, the First Nation holding a modern  
10 treaty would not have veto over letting others  
11 fish in that area. DFO seeks to have cooperation  
12 of First Nations. I think there's a number of  
13 First Nations, Musqueam and Tsawwassen that both  
14 fish in that area. So having a group that has not  
15 recently been fishing in that area that those  
16 groups have access to, we would seek to have a  
17 coordinated approach to that, whether they be in  
18 treaty or non treaty.

19 Q So where you have a situation where you have a  
20 First Nation with a modern treaty, and then  
21 another First Nation with an aboriginal right and  
22 they're seeking access to that area, and the First  
23 Nation existing in that area disagrees, you would  
24 not issue a licence; is that correct? You would  
25 defer to that First Nation; is that correct?

26 MS. MCGIVNEY: DFO considers the information and tries  
27 to seek collaboration, but we would make the  
28 decision based on our policies and consideration  
29 of the circumstances.

30 Q Are you aware of a situation where DFO has issued  
31 a communal licence in a situation where there was  
32 a First Nation with a modern treaty and they  
33 objected to another First Nation with a rights-  
34 based claim fishing in that area?

35 MS. MCGIVNEY: Yes, I think there's -- there are some  
36 situations.

37 Q Can you be more specific on that?

38 MS. MCGIVNEY: My recollection is that there has been  
39 some disputes in the Nisga'a, in the Gitanyow  
40 area, and the Nisga'a did not want the Gitanyow to  
41 fish in a particular area, and that access was  
42 provided.

43 Q Thank you. And with respect to -- sorry. My last  
44 question is moving to -- given that you seem to be  
45 moving fisheries from a marine area to a terminal  
46 fishery, has there been -- how are you going to  
47 accommodate First Nations that already have

1 treaties within the terminal area with new First  
2 Nations coming in and seeking access in those  
3 areas?

4 MS. MCGIVNEY: I'm not sure I totally understand your  
5 question. It sounds like you're inferring that we  
6 are trying to move -- you identified moving  
7 fisheries to more terminal areas which is a  
8 broader strategy with regards to the Wild Salmon  
9 Policy and conservation and sustainability, but  
10 we're not looking to move access of a First  
11 Nations fishery for food, social, ceremonial into  
12 a different area as a result of those decisions.

13 Q Right, I understand that, but under the PICFI  
14 program, you're moving commercial licences to more  
15 terminal, correct?

16 MS. MCGIVNEY: Maybe Julia would be able to respond on  
17 that.

18 Q Okay.

19 MS. STEWART: So under PICFI, the objective, as part of  
20 an overall fisheries reform agenda with respect to  
21 the salmon fishery is to shift the fishing effort  
22 from the coastal fisheries to more terminal areas  
23 where weaker stock management can be accommodated.

24 Q So you're shifting the fisheries from the coastal  
25 area to the terminal area and my question is so  
26 where you have a terminal area where you have  
27 treaties in place and then other First Nations  
28 coming in and seeking access to that area, what  
29 consideration has been made in terms of -- it's  
30 almost like you're stacking the fishery in the  
31 terminal area.

32 MS. STEWART: So the terms of the treaty would be  
33 respected. To the extent that another group was  
34 seeking access in that particular area, we would  
35 seek collaboration between the two groups. That's  
36 sort of one of the overriding objectives of the  
37 Department.

38 MS. DeFORREST: Thank you. And I have one -- if I  
39 could seek that that document be exhibited,  
40 please.

41 THE REGISTRAR: Exhibit 1745.

42  
43 EXHIBIT 1745: Decision Note for the RDG,  
44 Pacific Region (For Decision) - Change of  
45 Fishing Area - Hul'Qumi'num Treaty Group  
46

47 MS. DeFORREST: Thank you. And I see that I'm out of

1 time. Thank you.

2 MS. GAERTNER: Good morning, Mr. Commissioner. It's  
3 Brenda Gaertner for the First Nations Coalition,  
4 and I'm here alone today and so I'll muddle  
5 through my documents as best I can and hope that  
6 I'll remember all my questions. I have been  
7 allotted 45 minutes. I am hoping to complete my  
8 work in that time, Mr. Commissioner. I have to  
9 say that my clients do want to note that on this  
10 important issue, and with this important panel,  
11 the fact that Mr. Eidsvik was given the same  
12 amount of time is a bit of concern to them.

13 I've done my best to get my questions done  
14 within that time period. I know it's an extremely  
15 difficult job of the Commission counsel to do  
16 that, but they asked me to make note of that,  
17 given the topic that we have here and its import  
18 to our clients.

19 I'm going to do well, and thank you, Ms.  
20 McGivney and Ms. Stewart, for being here today.

21  
22 CROSS-EXAMINATION BY MS. GAERTNER:

23  
24 Q You've done a lot of work, so far, Ms. McGivney,  
25 this morning, so I'm going to change my questions  
26 around and give you a little bit of a break and  
27 start with Ms. Stewart, who I haven't had a chance  
28 to work with as often as I have with Ms. McGivney.  
29 So we'll start today, I guess, in many ways.  
30 Thank you for coming from Ottawa to participate in  
31 this inquiry, and I'm hoping that we can do some  
32 useful work together today.

33 MS. STEWART: We may as well.

34 Q I want to start by just refreshing the  
35 Commissioner on PICFI.

36 MS. GAERTNER: And I'm just going to read from the  
37 Policy and Practice Report, Mr. Commissioner. It  
38 was a while ago that you heard the evidence in  
39 chief and I found this useful last night to just  
40 get the dates.

41 Q The PICFI is the Pacific Integrated Commercial  
42 Fisheries Initiative announced in 2007, and  
43 received Treasury Board approval in September of  
44 2007. It's a five-year initiative set to end in  
45 March 31st of 2012. According to DFO, the purpose  
46 of PICFI is to support B.C. First Nations in  
47 integrated commercial fisheries, to develop

1           sustainable fishery enterprises and to increase  
2           First Nation participation in fisheries management  
3           decision processes. It's this program that you've  
4           been working with during your time with the  
5           Department of Fisheries and Oceans; is that  
6           correct, Ms. Stewart?

7   MS. STEWART: Yes, for a portion of the time I've been  
8           at DFO.

9   Q       And there were a lot of questions by Commission  
10           counsel on August 19th about DFO moving to support  
11           terminal fisheries, part of the plans for PICFI.  
12           I'm going to revisit that topic with you a little  
13           bit today, but I want to lay some foundation  
14           first.

15           First, can you agree that the PICFI program  
16           lays the foundation for greater certainty for all  
17           industry participants, First Nations and non First  
18           Nations, through working together on a harvest  
19           strategy to maximize the value of commercial  
20           fisheries within the context of sustainability?

21   MS. STEWART: Yes.

22   Q       I understand there was an evaluation which was  
23           conducted on PICFI and that a final report was  
24           produced in August 31st, 2010; is that correct?

25   MS. STEWART: I can't recall the date, but it was  
26           around that time, yes.

27   Q       Well, let's get First Nations Tab 97. Will that  
28           help you in confirming the date of the report?

29   MS. STEWART: Yes.

30   MS. GAERTNER: Can I have that marked as the next  
31           exhibit?

32   THE REGISTRAR: Exhibit 1746.

33  
34           EXHIBIT 1746: Evaluation of PICFI Project  
35           6B119, Final Report, Aug 31 2010 [DFO  
36           Evaluation Directorate]  
37

38   MS. GAERTNER: Mr. Lunn and Mr. Giles, I've lost that  
39           list. I've jumped ahead so we're not going to be  
40           able to use the exhibited numbers on there. We'll  
41           use that list in other ways. Sorry.

42   Q       The report was done by DFO's Evaluation  
43           Directorate; is that correct?

44   MS. STEWART: Yes.

45   Q       And the report made a number of findings about the  
46           PICFI program and a number of recommendations; is  
47           that correct?

1 MS. STEWART: Yes.

2 Q Could I go to pages 8 and 9? The first  
3 recommendation was that DFO show a bit more  
4 flexibility for some of the requirements around  
5 Aggregate Bodies and that:

6  
7 ...any criteria, for example, on the minimum  
8 numbers of bands should be developed in  
9 consultation with FNs [First Nations] and  
10 communicated to FN [First Nation] clients.  
11

12 Would you recommend that that be a useful way of  
13 improving how we implement PICFI going forward?

14 MS. STEWART: In fact, throughout the process of having  
15 groups identify themselves, there has been  
16 flexibility. We had originally expected that  
17 there would be approximately 15 PICFI groups,  
18 PICFI applicant groups, and I believe we're  
19 somewhere around 25. So in fact there have been  
20 some variations in our approach.

21 Q And are you willing to continue that variation to  
22 look at how best to implement the goals of PICFI  
23 rather than the standard of the number of bands  
24 that need to be part of an aggregate?

25 MS. STEWART: I don't believe that there was any fixed  
26 number of bands that would be involved in any  
27 particular PICFI organization. The important  
28 criteria, as far as DFO was concerned, was that  
29 the group make sense from the point of view of  
30 synergies, coming together, making the most  
31 appropriate use of the resources that were  
32 available.

33 Q All right. Let's move on to recommendation number  
34 2. The DFO review of this program suggests that  
35 you improve your consultation and communication:

36  
37 ...possibly through a steering committee that  
38 includes FN [First Nation] representation.  
39

40 Are you considering that change?

41 MS. STEWART: There has been a fair bit of consultation  
42 and communication. There was a technical group  
43 that was formed under the First Nations Fisheries  
44 Council that worked with us on some of the process  
45 development. PICFI is winding down at the end of  
46 this fiscal year, so depending on what happens in  
47 the future, that recommendation may come into

1 play.

2 Q Was that work in part done through the First  
3 Nations Fisheries Council and DFO's Economic  
4 Access Working Group?

5 MS. STEWART: I believe there was a technical group  
6 that was formed, and the work that it was doing  
7 has morphed, I guess is the right way to put it,  
8 into the work of the Economic Access Working Group  
9 now.

10 Q And then recommendation 3 is that you:

11  
12 ...lead a move toward a terminal fishery for  
13 salmon, offering support for this transition  
14 through all elements of the initiative.

15  
16 Again, is that the intention of -- if PICFI is  
17 renewed - I appreciate that that decision has not  
18 been made - but I'm sure that you're looking at  
19 these criticisms or -- not so much criticism, but  
20 recommendations moving forward. Do you agree that  
21 that's an important component of PICFI moving  
22 forward?

23 MS. STEWART: Yes, it is.

24 Q Now, I'm going to pick up on recommendation number  
25 7 in which DFO recommends that:

26  
27 ...should plan for the continuation of PICFI  
28 activities after the 5-year program ends --

29  
30 No:

31  
32 ...should plan for the continuation of PICFI  
33 activities after the 5-year plans (sic)...

34  
35 So that your own Department recommended, on a  
36 review of this, that this continue; is that  
37 correct?

38 MS. STEWART: Yes.

39 Q We're midstream the work that we're doing; is that  
40 correct?

41 MS. STEWART: Yes.

42 Q Now, are you aware of the call by the First  
43 Nations Fisheries Council's Economic Access  
44 Working Group for the continuation of PICFI  
45 program for the second five-year term?

46 MS. STEWART: I was aware that the FNFC had feelings in  
47 that vein, yes.



1 MR. GAERTNER: Mr. Commissioner, when Russ Jones - I  
2 hope you recall him, you've seen so many witnesses  
3 through this inquiry - came, he spoke about the  
4 work of the First Nations Access Working Group and  
5 he actually gave to you an outline of a document  
6 that they were preparing at the time and advised  
7 that we would get it as soon as we can. I got it  
8 on the day that I sent it to counsel. I  
9 appreciate it was after time was up, but I  
10 received it by way of email on August 30th and  
11 then forwarded it to Commission counsel and the  
12 Department of Fisheries or the Department of  
13 Justice on the same day.  
14 I would like this tendered. I understand  
15 that Ms. Stewart received it shortly thereafter  
16 also. It was in an email attached dated August  
17 30th, if you have that, Mr. Lunn.  
18 MR. LUNN: Your tab again?  
19 MS. GAERTNER: It was a document attached to an email  
20 from Ms. Pence to you on August 30th. Just while  
21 you're looking for that, I can proceed to ask some  
22 questions on it. There's no problem with that.  
23 MS. STEWART: Could I just --  
24 MS. GAERTNER: Sure, absolutely.  
25 MS. STEWART: Sorry. I haven't been in my office for a  
26 few days so it may be --  
27 MS. GAERTNER: Ahh.  
28 MS. STEWART: -- in my in-basket.  
29 MS. GAERTNER: Okay. I'm not going to ask you detailed  
30 questions on it. I just found -- I would like to  
31 have it tabled as a document. Mr. Jones did  
32 advise the Commission he would provide it as soon  
33 as it was ready. It has been provided to the  
34 Department directly from the First Nations  
35 Fisheries Council. I think it's just useful.  
36 It's a good summary of some of the principles and  
37 approaches that go forward.  
38 Q I promise I won't ask you detailed questions on  
39 details within it - you obviously haven't seen it  
40 - if you're okay with that?  
41 MS. STEWART: Yes.  
42 Q All right.  
43 MR. MCGOWAN: Just for Mr. Lunn's benefit, I believe  
44 the document is titled, "Fishing For A Better  
45 Future", if that assists you in locating it.  
46 MR. LUNN: Thank you, yes, it does.  
47 MR. TAYLOR: The email came at 8:56 a.m. on August

1 30th.

2 MS. GAERTNER: Thank you.

3 Q All right. So in that document, and generally  
4 speaking, Ms. Stewart, there's the suggestion that  
5 some of the successes of PICFI-1 include securing  
6 some access for -- in terms of buy-backs,  
7 increased collaboration with First Nations, some  
8 business planning and some increased  
9 accountability. Would you agree that those are  
10 some of the successes we've already achieved under  
11 PICFI-1?

12 MS. STEWART: Those are some of the successes.

13 Q Yes. And are you agreed that some of the lasting  
14 benefits of a PICFI-1 process, and especially if  
15 we had the opportunity of PICFI-2, would be to  
16 reduce conflicts, and in that way, provide savings  
17 to Canada, enhanced regional economics, improve  
18 fisheries management and the benefit -- and the  
19 provision of social benefits to First Nations?

20 MS. STEWART: I think that's all fair to say.

21 Q And would you agree that those are benefits of  
22 value to all of the public and ones that DFO wants  
23 to support?

24 MS. STEWART: Yes.

25 Q Now, I wasn't sure I understood the tenor and  
26 suggestions in Commission counsel's questions to  
27 you when he suggested that terminal commercial  
28 fisheries would result in less fish available for  
29 commercial fisheries and, in particular, he  
30 suggested if there were -- and I hope you remember  
31 this example -- 100 fish from the commercial marine  
32 fisheries acquired through buy-backs and then move  
33 them into the river, that somehow en-route  
34 mortality would result in less fish being  
35 available for in-river terminal commercial  
36 fisheries. Do you remember that question and that  
37 exchange?

38 MS. STEWART: I do.

39 Q Now, it was my observation there was some  
40 confusion in your response, but your response at  
41 that time was that it was possible that could  
42 happen. To your knowledge, would it be correct to  
43 suggest that en-route mortality is considered and  
44 adjusted prior to the identification of the total  
45 allowable catch and definitely prior to the  
46 commercial total allowable catch, and so we do an  
47 en-route mortality consideration prior to them

1           even knowing exactly what number of fish will be  
2           available for commercial fisheries?

3   MS. STEWART: I'm not a fisheries expert, but my  
4           understanding is that when escapement targets are  
5           set, that that's the time when -- or the point in  
6           the process where the en-route mortality is taken  
7           into account. So the number of fish that need to  
8           reach the terminus counts for -- there's a  
9           calculation at that point, is my understanding.

10   Q       And in fact it's your understanding that part of  
11           the goal of the terminal fisheries is to improve  
12           how we select fish for harvest for commercial  
13           purposes and so that when there's an abundance  
14           that can be identified in-river, that can't be  
15           identified in the marine, that that abundance be  
16           harvested.

17   MS. STEWART: That's right, and it has to do with the  
18           fact that some stocks that are weaker and need the  
19           escapement into those terminal fisheries -- or  
20           terminal spots where they spawn, those weaker  
21           stocks need to be protected and, in some cases,  
22           the impact on the coast is that the stronger  
23           stocks, although they could be harvested, that  
24           opportunity is precluded by the fact that the  
25           weaker stocks are mixing with them and they need  
26           to be protected and not be harvested.

27   Q       Thank you, Ms. Stewart. Now, another question  
28           that Commission counsel asked that troubled my  
29           clients was - particularly the Shuswap Fisheries  
30           Commission -- or the Secwepemc Fisheries  
31           Commission from Kamloops - was the suggestion that  
32           somehow DFO would be providing up front support  
33           for these commercial opportunities indefinitely,  
34           and somehow in the future.

35           Would you agree that the goal of both DFO  
36           and, for example, the Secwepemc Fisheries  
37           Commission is to identify business opportunities  
38           that will stand on their own in good time and have  
39           the opportunity to provide a reliable source of  
40           economic opportunities for those communities?

41   MS. STEWART: I would say that that's the objective of  
42           both Canada and the Secwepemc. I think my  
43           comments were made in the context, at that time,  
44           that we're in the early stages, in the learning  
45           stages with --

46   Q       Yes.

47   MS. STEWART: -- those fisheries.

1 Q And it's clear at this point in time that the  
2 capacity requirements to identify opportunities,  
3 to develop the business opportunities, First  
4 Nations clearly need that capacity for this to be  
5 an honourable program.

6 MS. STEWART: Yes.

7 Q Now, just to be clear, in PICFI-1 where there were  
8 \$175 million budgeted, as I understand it, 150  
9 million was budgeted for the commercial licence  
10 and gear transfers, and that as of June 2011, 427  
11 or 6.9 percent of the coast-wide licences and  
12 quota valued at more than -- around 86.4 million  
13 had been purchased; is that correct? So you've  
14 spent at least 86.4 million as of June 2011 in the  
15 buy-backs.

16 MS. STEWART: The overall amount that has been  
17 identified for access is 110 million, ten of which  
18 has been identified notionally for vessels and  
19 gear, so the resulting amount that would be --  
20 that has been identified for the relinquishment of  
21 access is 100 million. And, yes, you're correct,  
22 around 86 million has been expended to date.

23 Q And 25 commercial fishing enterprises throughout  
24 B.C. involving approximately 90 First Nations have  
25 been -- are being worked on?

26 MS. STEWART: I'm not sure that I can speak to the  
27 number of First Nations. It would be in that  
28 area, but yes, the 25 enterprises.

29 Q And do you recall the report, "Our Place at the  
30 Table"?

31 MS. STEWART: Yes.

32 Q And do you recall that it originally estimated  
33 that approximately \$500 million would be needed to  
34 achieve the 50 percent share that was the goal of  
35 that report?

36 MS. STEWART: I don't recall the number off the top of  
37 my head, but I do recall that it was in that  
38 general ballpark.

39 MS. GAERTNER: I wonder if I could take you to the --  
40 let's go back to the document that's on there and  
41 go to page 8. I think it's a quote, if I'm hoping  
42 right.

43 Q If I could take you to the second paragraph under  
44 PICFI, Integrated Commercial Fishing Initiative,  
45 and it summarizes:

46  
47 Our Place at the Table originally estimated

1 that about \$500 million was needed to achieve  
2 at 50% share of all commercial fisheries.  
3 The DFO minister initially indicated that  
4 PICFI would be \$350 million to a large First  
5 Nations meeting in BC. In the end DFO  
6 announced a 5-year program for \$175 million.  
7 The rationale for the reduction was that  
8 PICFI was to be a pilot that would assessed  
9 and expanded once it had matured.

10  
11 Was that consistent with your understanding?

12 MS. STEWART: I was not in my current position at the  
13 time that the Minister made announcements about  
14 PICFI. But that is consistent with my  
15 understanding.

16 Q Ms. McGivney, is that consistent with your  
17 understanding?

18 MS. MCGIVNEY: Yes, it is.

19 MS. GAERTNER: Thank you. Could I have that document  
20 marked as the next exhibit?

21 THE REGISTRAR: Exhibit 1747.

22  
23 EXHIBIT 1747: Fishing for a Better Future: A  
24 First Nations Business Case for a Second  
25 Phase of PICFI, Aug 2011 [FNFC]

26  
27 MS. GAERTNER:

28 Q I just want to take you to the section on  
29 "Successes, Challenges and Opportunities", so if  
30 you could scroll down a bit. You'll see that some  
31 of those same recommendations, worded in slightly  
32 different ways that were found in your midterm or  
33 formula of evaluation, show up here in the First  
34 Nations Fisheries Council document, so it appears  
35 there's some synergies in how both DFO and First  
36 Nations Fisheries Council have assessed the  
37 strength of this program and where it needs to  
38 improve in terms of more flexibility, improved  
39 consultation and communication, continue to lead  
40 in the move toward a terminal fishery for salmon.

41 MS. GAERTNER: If you could go over to the next page?

42 MR. LUNN: To the first page?

43 MS. GAERTNER: No, just the next page. Just continue  
44 scrolling down.

45 Q Streamline applications, continue to investigate  
46 the potential for cooperation with other federal  
47 agencies.

1                   They're suggesting a judicious use of the  
2                   model that's been developed in Atlantic, and  
3                   definitely that you should plan for the  
4                   continuation of PICFI after 2012.

5                   So there's some similarities in the  
6                   recommendations and the critique, you'd agree with  
7                   me on that, on the ones that I just took you to?

8                   MS. STEWART: Yes.

9                   Q     And, most importantly, do you take it as a success  
10                   that after the bumps and challenges of first  
11                   implementing PICFI and getting understandings on  
12                   the ground as to how it would work, that as we've  
13                   come to the end, the First Nations Fisheries  
14                   Council is saying, yes, Department of Fisheries  
15                   and Oceans, proceed with this, we believe it has  
16                   some value and worth to moving forward on the  
17                   objectives. Do you see that as a success story?

18                   MS. STEWART: I would say that given that we've  
19                   received some evaluations internally and that the  
20                   First Nations feel that PICFI has been a success,  
21                   that I would call it a success, to a degree.

22                   Q     And, Ms. McGivney, would you also agree that this  
23                   type of complimentary work is a turning stone in  
24                   many ways in the work that is going on between  
25                   First Nations and DFO on fisheries matters at a  
26                   policy level and a program level?

27                   MS. MCGIVNEY: Yes, I would.

28                   Q     I commend your work. I think it's a good thing  
29                   that we have examples like this.

30                   Then I want to take you to some final  
31                   questions about the Secwepemc Fisheries Commission  
32                   study. It's found at page 17, but I'd like to  
33                   actually put a couple of documents in around that.  
34                   In Commission counsel's questions again, at the  
35                   last time, he asked some questions pointing to the  
36                   suggestion that the Secwepemc project may not be  
37                   viable. I'd like to take you to Tab 100 of the  
38                   First Nations Fisheries Council.

39                   Ms. Stewart, are you familiar with this  
40                   evaluation?

41                   MS. STEWART: Yes.

42                   Q     And would you agree that the Secwepemc Fisheries  
43                   Commission is working hard to develop  
44                   relationships both with other First Nations in  
45                   order to provide broader marketability for the  
46                   product and that they've been working hard within  
47                   the AAROM process to figure out how to work with

1 the Department to establish the necessary business  
2 entities, and they're looking extremely difficult  
3 -- taking extremely aggressive, I would say, or  
4 maybe "aggressive" is not the right word, but  
5 they're working. You'll see -- you'll go through,  
6 Commissioner, you'll see page after page of the  
7 evaluation of the Secwepemc Fisheries Commission's  
8 proposal under PICFI. Is that correct?

9 MS. STEWART: Yes, they have been working very  
10 collegially with other groups and have been  
11 working very strenuously -- maybe that's the word,  
12 strenuously --

13 Q That's a good word.

14 MS. STEWART: -- at identifying how that fishery could  
15 operate in a profitable manner.

16 Q And would you agree that if we simply had a  
17 cancellation of PICFI, these initiatives which are  
18 conservation-based, are dedicated, they're  
19 collaborative, are at risk?

20 MS. STEWART: I guess that would speak to the internal  
21 resources of the groups what other alternatives  
22 might be available, but I think it's probably fair  
23 to say that without PICFI, it would be much more  
24 of a challenge.

25 Q And in fact we haven't got the licences  
26 transferred there yet. We're still acquiring  
27 them, that's correct, so they don't even have the  
28 -- I would say the capital yet in their hands to  
29 rely upon to develop their own business project.  
30 They have to continue through the transfers  
31 program that PICFI provides for.

32 MS. STEWART: We need to -- in order for there to be a  
33 more permanent and policy-based fishery of this  
34 sort, we need to move forward with the defined  
35 share work that the Department is undertaking.  
36 These demonstration fisheries, both inland and on  
37 the coast, are part of that puzzle.

38 MS. GAERTNER: Thank you. Could I have that marked as  
39 the next exhibit?

40 THE REGISTRAR: Exhibit 1748.

41  
42 EXHIBIT 1748: PICFI Evaluation Form for  
43 Aggregate FNS, May 5 2009 EOI Review, [dated  
44 Oct 14, 2009  
45

46 MS. GAERTNER: While we're at it, can we go to First  
47 Nations Coalition Tab 99, which is the PICFI

1 Consultation Plan.

2 Q Ms. Stewart, could you identify that and -- it's  
3 Department's Final Consultation Plan on PICFI.

4 MS. STEWART: Yes, for '09/'10.

5 MS. GAERTNER: Thank you. Could I have that marked as  
6 the next exhibit?

7 THE REGISTRAR: Exhibit 1749.

8

9

EXHIBIT 1749: PICFI Consultation Plan 2009-  
2010 (Final), Sep 2009

10

11

12 MS. GAERTNER: And did we mark First Nations Tab 97?

13 THE REGISTRAR: Yes, we did, 1746.

14 MS. GAERTNER: Thank you. I think I'm going to run out  
15 of time if I spend more time on PICFI, Ms.  
16 Stewart, but thank you very much.

17 Q Perhaps I should just finish by saying that given  
18 your work within this, and appreciating that many  
19 of the decisions that are made, financial and  
20 otherwise, are being made right now are on hold,  
21 do you think it's a worthwhile effort, and in the  
22 public interest, that we continue to implement the  
23 PICFI and have a PICFI-2 so that we can move  
24 forward with the initiatives that have started?

25 MS. STEWART: If you're asking my personal opinion --

26 Q Personal and professional.

27 MS. STEWART: Personal and professional. I think that  
28 we've definitely taken some strides forward not  
29 only with respect to the move to define shares,  
30 i.e. the demonstration fisheries that are being  
31 undertaken, but in other areas as well, including  
32 on the co-management front, on the enhanced  
33 accountability front. So I would say that there's  
34 some very positive work that's happening.

35 Q And that if the Commissioner was looking for  
36 places where numerous of the issues that face him  
37 as it relates to long-term conservation,  
38 governance and management, that the PICFI model is  
39 the model he should consider carefully?

40 MS. STEWART: I certainly feel that it's worth  
41 consideration by the Commissioner.

42 Q Thank you for that, Ms. Stewart.

43 Ms. McGivney, I have to use the rest of my  
44 time for questions with you. I'm going to start -  
45 it may seem like an odd place to start - but I'm  
46 going to start with the description of the  
47 position of the Regional Director of Treaty and



1 Aboriginal Policy Division. I understand that's  
2 Exhibit 1419.

3 When I was reviewing it in preparation for  
4 this opportunity to ask questions of you here, I  
5 found myself taking a deep breath when I read it.  
6 At page 7 of this document, in particular number  
7 8, is it your job to resolve major crises between  
8 aboriginal communities, other stakeholders and the  
9 federal government on matters pertinent to the  
10 fisheries or support area directors in such  
11 activities? Was that the weight that you held on  
12 your shoulders while you were there?

13 MS. MCGIVNEY: I provided advice to area directors,  
14 provided advice nationally, et cetera. This work  
15 description is quite old and hasn't been updated  
16 for some time. You'll note I don't believe the  
17 AAROM program is even included in it, which came  
18 in, in 2003. So the work description hasn't been  
19 reviewed in some time.

20 Q Now, just so that people aren't worried that I'm  
21 wasting precious time here, would you agree that  
22 that's -- the problem that's here, and we heard it  
23 a bit today again, is one of the challenges  
24 associated with the Department of Fisheries and  
25 Oceans work, is that being trained as a scientist  
26 doesn't necessarily get you trained in conflict  
27 resolution, and that it may be useful to really  
28 look at how the Department can step out of that  
29 job a bit and leave that for others.

30 MS. MCGIVNEY: Leave the conflict resolution for  
31 others?

32 Q Yes.

33 MS. MCGIVNEY: Certainly within the Department, we are  
34 recognizing that the competencies required for  
35 carrying on some of the work to bring together  
36 stakeholders and to try to seek collaboration is  
37 requiring different skill sets than we have  
38 before. Certainly that element has been  
39 acknowledged.

40 Q And would you also agree that in order to do your  
41 work well, resolving disputes between First  
42 Nations puts DFO in a very uncomfortable position?

43 MS. MCGIVNEY: Yes, it's much more -- it would be  
44 better if the First Nations could resolve those  
45 issues themselves.

46 Q So going forward, when we look at governance  
47 models, those types of disputes are better left in

- 1 the hands of First Nation organizations and those  
2 First Nations can rely upon themselves (sic).
- 3 MS. MCGIVNEY: Yes, as long as it's inclusive,  
4 inclusive meaning that all of the various First  
5 Nations that would be involved are party and  
6 supportive of that approach.
- 7 Q Inclusive, fair, transparent, all of the things  
8 that a good dispute resolution process would  
9 require.
- 10 MS. MCGIVNEY: Yes.
- 11 Q Would you also agree that there are significant  
12 disputes within the Department of Fisheries and  
13 Oceans? That wasn't quite put there, but -- and  
14 significant challenges, given the different silos  
15 within the Department and the different objectives  
16 of some of the groups, including competition for  
17 funding sometimes, and all of that, that that's  
18 another significant problem that the Department of  
19 Fisheries and Oceans faces, and including  
20 particularly your group.
- 21 MS. MCGIVNEY: There has been some of that. I think  
22 that in more recent years, there's been a real  
23 strengthening of trying to integrate within the  
24 Department and to remove those silos. There's  
25 been a new reorganization in national  
26 headquarters, so there's been recognition that the  
27 silos that have been there in the past are not the  
28 best way for the Department to operate, and trying  
29 to create a more integrated planning at more  
30 senior levels, and to feel that down into the  
31 working level as well.
- 32 MS. GAERTNER: All right. I want to turn to two  
33 documents. One is document 122 on the First  
34 Nations Coalition's list and the other is Exhibit  
35 972. I only have 15 minutes actually. I'm going  
36 to have to go to Exhibit 295, sorry. Keep those  
37 up, I'm going to use them all.
- 38 Q Ms. McGivney, I'm going to have to go to some of  
39 the places where we're challenged rather than  
40 focus on where the successes are for a moment. So  
41 if we may, I'm going to go to page 11. This is  
42 the First Nations Fisheries Council's co-  
43 management discussion paper. You're familiar with  
44 this?
- 45 MS. MCGIVNEY: Yes, I've seen it.
- 46 Q And at page 11, it talks about two of the policy  
47 barriers that challenge the implementation of co-

1 management. One is the issue of fettering the  
2 authority of the Minister - you're quite familiar  
3 with that challenge - and the other is the  
4 inability for DFO to develop a process for the  
5 recognition of First Nations title and rights, or  
6 to lay out a transparent strength of claim  
7 standard assessment to evaluate asserted title and  
8 rights.

9 I want to turn, first of all, to the second  
10 one. Why is it that DFO is unable to develop a  
11 process for the recognition of the rights or to  
12 lay out a transparent strength of claim standard  
13 assessment?

14 MS. MCGIVNEY: DFO, as I think came up in some earlier  
15 documents, is not mandated to determine rights,  
16 yet we have an obligation to respect rights in the  
17 management of the fisheries. So part of the  
18 challenge -- I think right now the processes that  
19 are open to clarify what rights and title there's  
20 -- the scope and extent of the rights and title  
21 are undefined and the processes to resolve those  
22 are through the treaty process as well as through  
23 various litigations.

24 So that process doesn't -- the responsibility  
25 for the reconciliation of those rights and title  
26 does not lay with DFO.

27 Q You have a responsibility to assess the strength  
28 of claim for any potential infringements that may  
29 result from decisions you've made, and as I have  
30 heard it - and I want to just have it confirmed -  
31 you are not developing a transparent strength of  
32 claim assessment for that work at this present  
33 time; is that correct?

34 MS. MCGIVNEY: Not that I'm aware of. We have --

35 Q Is that -- sorry.

36 MS. MCGIVNEY: -- in a case where there's a decision  
37 that may impact on a group that is making a claim,  
38 we welcome any information that they would have  
39 with regards to their claim, but we also take an  
40 approach in terms of trying to address and work  
41 collaboratively towards resolving so that the  
42 decision is not going to be affecting the  
43 potential claims.

44 Q Is it fair to say that DFO would prefer just to  
45 get on with trying to figure out what it means to  
46 implement a FSC right or a right to manage in a  
47 real context and they would prefer to actually get

1 onto what it means on a day-to-day basis for the  
2 management of the fishery as distinct from  
3 spending public resources on developing strengths  
4 of claim analysis for all First Nations along the  
5 migratory route of the Fraser River sockeye  
6 salmon?

7 MS. MCGIVNEY: DFO's responsibilities are to manage the  
8 fishery, and so having some clarity around what  
9 the access for the food, social, ceremonial  
10 priority allocation would be, would be helpful to  
11 be able to then move forward in terms of operating  
12 and managing the fishery and would bring some  
13 stability to the fishery.

14 Q So did I hear your evidence right that DFO is  
15 really relying on further court cases for that?  
16 Is that what we're going to have to wait for? Are  
17 we going to have to continue to litigate in these  
18 matters?

19 MS. MCGIVNEY: I was identifying that there's two  
20 different routes by where the clarity comes out  
21 about the rights and title, and one is through the  
22 treaty process and the other is through  
23 information provided through the courts.

24 Q But you'll agree that courts are both costly,  
25 time-consuming and increase conflict; is that  
26 correct?

27 MS. MCGIVNEY: Yes.

28 Q So it's a very difficult way of moving forward.  
29 Would you also agree on that?

30 MS. MCGIVNEY: Yes.

31 Q So if we can find ways of avoiding court and  
32 moving forward to resolve issues, that's the  
33 preferred method?

34 MS. MCGIVNEY: Yes.

35 Q All right. I'm going to take you to First Nations  
36 Tab -- Exhibit 972, which is the Gardner paper  
37 prepared for Corey Jackson. Are you familiar with  
38 that?

39 MS. MCGIVNEY: Yes, I think I've seen it. I haven't  
40 studied in great depth.

41 Q All right. Well, I won't take you to all the  
42 details of it, then, but you'll accept that as  
43 some of the potential benefits of co-management  
44 are higher accountability, less conflict, higher  
45 compliance, improved relations, more equitable  
46 management, progress towards the recognition of  
47 rights and title, better information for fisheries

1 management, improved effectiveness of fisheries  
2 management, protection and enhancement of the  
3 resource, and more efficient management. Would  
4 you agree that those are all some of the goals of  
5 establishing a co-management regime?  
6 MS. MCGIVNEY: Yes, I think co-management can help to  
7 support a lot of those elements. I didn't catch  
8 them all.  
9 Q There was nothing that jumped out at you that you  
10 would disagree with.  
11 MS. MCGIVNEY: Well, just the one comment about the co-  
12 management actually resolving the rights. I  
13 wasn't --  
14 Q Progress towards recognition. I didn't say  
15 "resolve".  
16 MS. MCGIVNEY: Okay, yes. Okay.  
17 Q I said "progress towards".  
18 MS. MCGIVNEY: Okay, so yes, I would agree.  
19 Q Thank you. And thanks for catching that; that's a  
20 good one.  
21 So let's look at that one challenge which we  
22 heard about which is the fettering of the  
23 Minister's authority. Are you familiar with the  
24 PNCIMA model?  
25 MS. MCGIVNEY: Yes, I am.  
26 Q Now, the evidence that Paul Sprout and Sue  
27 Farlinger gave at the beginning of this inquiry  
28 was that a multi-year Tier 1, Tier 2 process would  
29 be a useful way of moving forward, and then Dr.  
30 Davis from headquarters -- you're familiar with  
31 all of these people, correct?  
32 MS. MCGIVNEY: Yes. Dr. Davis?  
33 Q Davis.  
34 MS. MCGIVNEY: John Davis?  
35 Q Yes. Yes. Spoke about the values that have come  
36 out of the Haida Gwaii model, which is a very  
37 similar model to the PNCIMA. I want to take you  
38 to the PNCIMA model which is Exhibit 1203. Do you  
39 see that as a very useful model for looking at a  
40 strategic level, the implementation of co-  
41 management for the Fraser River sockeye salmon?  
42 MS. MCGIVNEY: I haven't studied it in detail to look  
43 at how it would be applied to the Fraser salmon  
44 approaches. I think it would be worth looking at.  
45 I think that there are, as we discussed before,  
46 different levels of co-management, different sort  
47 of scales, and different elements. So this is

1 definitely coming at one particular more strategic  
2 level, as you say, as opposed to some of the more  
3 operational levels that might be implemented in  
4 different ways.

5 Q And you'll agree that the strategic model  
6 implementing it successfully will help you  
7 understand better the scale-based analysis that  
8 are a bit of a challenge for understanding what  
9 needs to happen at the strategic level, what needs  
10 to happen at the regional level and what needs to  
11 happen at the local level.

12 MS. MCGIVNEY: Yes, and --

13 Q So the --

14 MS. MCGIVNEY: -- one of the things, I think a key  
15 thing in doing that, is who is the agreement with,  
16 and so that's a real critical part in terms of  
17 representation from the First Nations and who's  
18 being involved in that (indiscernible -  
19 overlapping voices).

20 Q Yes, and the Commissioner has heard lots of  
21 evidence about the challenges around  
22 representation and mandate, so you would agree  
23 that we need to focus on clarifying at a Tier 1  
24 level the processes that need to go forward so  
25 that it's clear who's mandated to speak on what  
26 issues.

27 MS. MCGIVNEY: Yes. There's an element at that level,  
28 but we also need to progress on the Tier 2 and  
29 Tier 3 as well.

30 Q It will be difficult to proceed at Tier 3 without  
31 Tier 1 attended to. Do you agree that that's one  
32 of the challenges out there, is that we're -- yes,  
33 I'll stop there.

34 MS. MCGIVNEY: Yes, it is a challenge, but I don't know  
35 that we can get to full resolution of Tier 1. The  
36 management of the fishery has to continue, so we  
37 need to continue to work towards those other  
38 processes as well.

39 Q Now, if I could go to First Nations Commission's  
40 (sic) Tab 63, Exhibit 860. Now, I have to move  
41 on, and I had quite a bit more questions on that,  
42 Ms. McGivney, but we'll have to continue our work.  
43 There is an underpinning that's challenging  
44 for my clients that I'd like to give you an  
45 opportunity to talk about so we can get to see how  
46 we can improve this. We heard some evidence  
47 around this report. Are you familiar with this

1 report?

2 MS. MCGIVNEY: Yes, I am.

3 Q And you're aware that one of the topics this paper  
4 discussed was collaboration between First Nations  
5 and DFO when it comes to catch monitoring?

6 MS. MCGIVNEY: Yes.

7 Q And then if I turn to Exhibit 862, you had some  
8 concerns about the earlier draft of this paper as  
9 it applied to the section on collaboration; is  
10 that right?

11 MS. MCGIVNEY: Yes, I think I raised that in this  
12 email.

13 Q And in this email you wrote that:

14  
15 The only part that raised some question for  
16 me about sharing it at this time was the  
17 whole section on collaboration. I've pulled  
18 some specific statements out below.

19  
20 In particular:

21  
22 FSC fisheries are a constitutionally  
23 protected communal right.

24  
25 Why did you pull that section out?

26 MS. MCGIVNEY: I pulled it out because as our AFS  
27 agreements indicate, we don't -- we don't agree or  
28 deny that these are communal rights, so it just --  
29 just in terms of wanting to move forward, the  
30 importance of the catch monitoring report was to  
31 start to talk about the catch monitoring, and my  
32 comments around the co-management were not that I  
33 didn't support the need for co-management, but  
34 that the focus of the report should be focusing on  
35 the catch monitoring and trying to focus the  
36 discussions in that way as opposed to the  
37 discussions around co-management which often go  
38 quite broad and not quite so focused.

39 Q You went on in the email to note that you also had  
40 concerns or questions about the section that  
41 stated - and I'm just quoting:

42  
43 Both DFO and First Nations must agree on a  
44 common understanding of collaboration. Both  
45 must identify their requirements within this  
46 relationship and be willing to seek and  
47 commit to collaborative solutions to common

1                   problems. Once common objectives are  
2                   identified, the development of appropriate  
3                   standards and monitoring problems can occur.  
4

5                   Can you tell me what about that statement raised  
6                   questions for you?

7                   MS. MCGIVNEY: Again, I think it was more the focus on  
8                   the co-management component of it as opposed to  
9                   the catch monitoring. So it was certainly not any  
10                   suggestion that collaboration is not important.  
11                   It's just the focus within that report, I was  
12                   concerned that it would lead discussions around to  
13                   the co-management issues as opposed to focusing on  
14                   the catch monitoring.

15                   Q    Have you been instructed --

16                   THE COMMISSIONER: I apologize. We're going to take  
17                   the noon break now.

18                   THE REGISTRAR: The hearing is now adjourned till 2:00  
19                   p.m.  
20

21                   (PROCEEDINGS ADJOURNED FOR NOON RECESS)

22                   (PROCEEDINGS RECONVENED)  
23

24                   THE REGISTRAR: Hearing is now resumed.

25                   MS. GAERTNER: Mr. Commissioner, I understand I have  
26                   approximately seven more minutes, so I'll do my  
27                   best.  
28

29                   CROSS-EXAMINATION BY MS. GAERTNER, continuing:  
30

31                   Q    Ms. McGivney, I just -- I left off without getting  
32                   to the final question on that email exchange. I  
33                   don't need to take you back to that email  
34                   exchange. You'll remember it, I'm sure, and  
35                   you'll remember that the issue was whether or not  
36                   you could acknowledge in the document that FSC  
37                   fisheries are a constitutional right that First  
38                   Nations have; do you remember that, that that was  
39                   part of the discussion with you and Colin?

40                   MS. MCGIVNEY: Yes.

41                   Q    Why is it that you felt you could not make that  
42                   acknowledgement in written form?

43                   MS. MCGIVNEY: I -- I explained my reasons earlier in  
44                   terms of just that it was -- it's just a broad  
45                   statement. Can I see what it said again?

46                   MR. LUNN: Do you have an exhibit number?

47                   MS. GAERTNER: Eight-sixty. Well, it's a report and I



1           actually have to find the email.

2       MR. LUNN: Is that the email 862?

3       MS. MCGIVNEY: It was just on the bottom of the page  
4           before. There it is. Okay.

5       MS. GAERTNER:

6       Q     FSC Fisheries are a constitutionally-protected  
7           communal right. Why was it necessary for that to  
8           take -- to take that out?

9       MS. MCGIVNEY: I just recall that the discussion within  
10           all of this was around the co-management element  
11           and I just wanted to focus it back on catch  
12           monitoring. I didn't specific -- I can't recall  
13           sort of -- this was kind of just a reaction to  
14           having looked at it quickly and just thinking that  
15           some of these things needed to be just thought out  
16           and whether we could put it in or not, but the  
17           focus of the document was on catch monitoring, and  
18           so was it required in there.

19       Q     So remember when I took you back to that report  
20           that was done and which the two of the policy  
21           challenges that we have is the minister's --  
22           fettering the minister's discretion and the  
23           acknowledgement of constitutional rights. This  
24           second issue, this acknowledgement of  
25           constitutional rights is something we see  
26           constantly in the materials before First Nations  
27           Fisheries Council and the Department of Fisheries  
28           and Oceans and otherwise as a way of moving  
29           forward. We need to get through to the issue on  
30           recognition of title and rights. What's  
31           preventing the Department of Fisheries and Oceans  
32           from doing that? Are you advised not to  
33           acknowledge?

34       MS. MCGIVNEY: I think that that question is just the  
35           context within which those kind of statements are  
36           made, so there is the constitution which  
37           acknowledges aboriginal rights and food, social,  
38           ceremonial is part of that. It's the question  
39           about the scope and extent, who holds those  
40           rights, et cetera, where there are some  
41           challenges, so just when we see statements like  
42           that sometimes we'll just -- or I've kind of just  
43           put a caution and want to look at it in the  
44           broader context of what that -- how that's being  
45           referred to.

46       Q     And your approach is to, when possible, not use  
47           it?

1 MR. LOWES: Excuse me. Mr. Commissioner, I hesitate to  
2 rise but it's on that same subject that we've  
3 dealt with a few times and perhaps Ms. Gaertner  
4 can help by clarifying what she means by  
5 acknowledge. Does acknowledge mean admit or does  
6 acknowledge mean something else?

7 MS. GAERTNER: I'll withdraw the question.

8 Q Could I go to First Nations Coalition Tab 35? Ms.  
9 McGivney, this is a meeting both you and I  
10 attended back in March the 30th and 31st of 2010.  
11 Do you remember that meeting?

12 MS. MCGIVNEY: Oh, yes.

13 Q And these are minutes that are produced by FRASS  
14 (phonetic) which is an executive that includes DFO  
15 and First Nations?

16 MS. MCGIVNEY: Yes.

17 MS. GAERTNER: Could I have these marked as the next  
18 exhibit?

19 Q Now I just want to take you to the bottom --  
20 sorry. I'm sorry.

21 THE REGISTRAR: Just to keep things in sequence, did  
22 you want to mark Tab 122 first?

23 MS. GAERTNER: Sure.

24 THE REGISTRAR: That would be 1750.

25

26 EXHIBIT 1750: Fisheries Consultations with  
27 First Nations in British Columbia - Western  
28 Canada Aboriginal Law Forum - May 26, 2009  
29

30 THE REGISTRAR: And then your Tab 35 would be 1751.

31 MS. GAERTNER: Thank you.

32

33 EXHIBIT 1751: Consultation and Accommodation  
34 and Fraser Salmon Management - March 30, 2010  
35

36 MS. GAERTNER:

37 Q And I just want to take you to the bottom of page  
38 8, if I can, and this is reflective of the  
39 presentations that were given and this is Sue  
40 Farlinger's response around the relationship  
41 between collaborative decision-making and the  
42 consultation process and how we can do there. And  
43 she says:

44

45 Sue Farlinger responded that nobody in DFO  
46 has the right to delegate decision making  
47 authority.

1           So that's the fettering issue.  
2

3           If we build an effective process to consult  
4           and collaborate on designing a plan at a  
5           strategic and operation level, we're  
6           effectively created a collaborative  
7           management structure. That is DFO's  
8           intention.  
9

10          Do you share that intention?

11 MS. MCGIVNEY: Yes.

12 Q       Do you believe that that's the way forward?

13 MS. MCGIVNEY: Yes.

14 Q       Do you believe that when looking at the  
15       improvements that we need to make in order to  
16       improve efficiencies in the management of the  
17       fisheries that this type of collaborative effort  
18       needs to be a priority for managing people  
19       relations?

20 MS. MCGIVNEY: Yes.

21 Q       Thank you.

22 THE COMMISSIONER: What is the tab of that?

23 THE REGISTRAR: Tab 35.

24 MS. GAERTNER:

25 Q       And then I want to just finish. I was just  
26       rushing. I'm -- bear with me. I want to just ask  
27       a couple questions again arising from questions  
28       that were asked by commission counsel in the  
29       previous time, Ms. McGivney. He asked about  
30       definitions of ceremonial and definitions of  
31       social, you'll recall those questions?

32 MS. MCGIVNEY: Yes.

33 Q       And the suggestion was that the definition of  
34       ceremonial applied to a number of different  
35       ceremonies that First Nations have. As it relates  
36       to Fraser River sockeye salmon is it your  
37       understanding that the only ceremonial licences  
38       are for funerals and, to quote Ernie Crey, that  
39       many people are told it would be helpful if First  
40       Nations could tell DFO when you can expect someone  
41       to die?

42       Do you follow that? The issue is, I'm sorry,  
43       it's a bit of a joke and I'm sorry I went too fast  
44       and didn't -- Ernie would have told it much, much  
45       better than I, Commissioner, but as it relates to  
46       ceremonial issues for Fraser River sockeye salmon  
47       the only ceremonial licences are for funerals

1 right now. It's even difficult for some people to  
2 get licences for salmon ceremonies.  
3 MS. MCGIVNEY: I think what I explained then was what  
4 we've been trying to do is work the licence to  
5 encompass all three processes generally so that  
6 the community can decide to put fish aside in the  
7 event of ceremonies or at funerals or births,  
8 whatever. So --  
9 Q I can --  
10 MS. MCGIVNEY: -- it's more working from one  
11 allocation --  
12 Q I can appreciate where you want to go right now.  
13 I just want to make sure we're clear on the  
14 evidence that right now the only ceremonial  
15 licences that are available for Fraser River  
16 sockeye salmon in river are for funerals.  
17 MS. MCGIVNEY: I don't know that because --  
18 Q Okay. All right.  
19 MS. MCGIVNEY: -- I thought that we were working  
20 towards one.  
21 Q We may be working towards one. That's great.  
22 The second issue that was very important for  
23 a number of my clients who heard the evidence was  
24 this issue on the definition of social. You'll  
25 agree that there's a longstanding disagreement  
26 between First Nations and DFO regarding the  
27 definition of social purposes and the priorities  
28 attached to it?  
29 MS. MCGIVNEY: Yes.  
30 Q You'll also agree that there's a disagreement  
31 between First Nations and DFO regarding how to  
32 implement the priority for food, social and  
33 ceremonial purposes and how to implement the words  
34 from the Supreme Court of Canada that First  
35 Nations should not bear the brunt of conservation.  
36 MS. MCGIVNEY: Yes, there's different interpretations  
37 of that.  
38 Q And so it will be extremely useful to put these  
39 collaborative processes into place so we can avoid  
40 further litigation; is that correct?  
41 MS. MCGIVNEY: Yes, it would.  
42 Q And then I have one final question on Exhibit  
43 1196. I promise it's my last. Well, you may not  
44 even know this document, so if I can -- document  
45 1196, this is a public perception audit that the  
46 First Nations Fisheries Council did in November of  
47 2010. Are you familiar with this document?

1 MS. MCGIVNEY: No, I'm not.  
2 MS. GAERTNER: I won't proceed with the questions then,  
3 Mr. Commissioner, but I do believe that -- and I  
4 would ask that future DFO witnesses do become  
5 familiar with this, as this document, I think, is  
6 relevant to the public perceptions around First  
7 Nations fisheries issues.  
8 MR. TAYLOR: We try to ensure that witnesses as they  
9 come up see the lists of documents that  
10 participants put out for that panel and if Ms.  
11 Gaertner puts it on a panel, we will endeavour to  
12 pass it through. Thank you. We will try to --  
13 you're speaking of the final panel no doubt and --  
14 MS. GAERTNER: I am. On the final panel.  
15 MR. TAYLOR: -- we'll try to do that.  
16 MS. GAERTNER: This was on my list.  
17 Q I'll just ask the question and see if you can  
18 agree with this or not, if you can.  
19 How important do you think it is that First  
20 Nations be involved in the management of fisheries  
21 within their traditional territories in B.C.?  
22 Seventy-three percent of the respondents felt it  
23 was very important. Do you believe that kind of  
24 information about the public perception is useful  
25 for you going forward when implementing new  
26 changes around the management of the fisheries?  
27 MS. MCGIVNEY: The question is --  
28 Q Seventy-three --  
29 MS. MCGIVNEY: -- whether --  
30 Q Seventy-three percent of public -- the -- of B.C.  
31 public believe it's very important that we move on  
32 to First Nations being involved in the management  
33 of the fisheries within their traditional  
34 territories.  
35 MS. MCGIVNEY: So that is -- come through a valid  
36 information collection and it's useful information  
37 for us in terms of going forward.  
38 MS. GAERTNER: Yes. This public perception audit is --  
39 how they did it and who did it and all of that is  
40 set out in this exhibit, Exhibit 1196.  
41 Thank you, those are my questions.  
42 MS. SCHABUS: Mr. Commissioner, if I may, Nicole  
43 Schabus, co-counsel for Sto:lo Tribal Council and  
44 Cheam Indian Band.  
45  
46  
47

1 CROSS-EXAMINATION BY MS. SCHABUS:  
2

3 Q I'm going to be directing my first few questions  
4 to the panel as a whole, and I want to start off  
5 with an issue somewhat arising from this morning  
6 and I'm also going to invite Ms. Stewart to  
7 comment on this. When you are dealing with  
8 indigenous peoples, in regard to Fraser River  
9 sockeye salmon generally, you're dealing with  
10 indigenous peoples as rights-holders. I'm not  
11 asking you to go into the elements and the details  
12 about the rights, but I'm just asking you to  
13 confirm that when you are actually dealing with  
14 indigenous peoples you are dealing with them as  
15 rights-holders.

16 Let's give Ms. Stewart a go. She didn't get  
17 to talk in the morning on that issue.

18 MS. STEWART: So DFO's approach is a policy approach.  
19 We manage fisheries consistent with the guidance  
20 that we have from the courts, and as Kaarina has  
21 stated earlier, the question of the existence of  
22 rights, who has rights, what the scope of rights  
23 are, what the nature of those rights are is not  
24 something that we determine. Our approach,  
25 rather, is to use programming and policy  
26 approaches to deal with issues around fisheries  
27 management.

28 Q And I'm not trying to push you again on the  
29 content of the rights, but you -- there is a  
30 recognition in DFO generally that there are --  
31 there's a constitutionally-protected aboriginal  
32 right to fish and that right is collectively held  
33 by indigenous peoples, right?

34 MR. TAYLOR: Well, that's not an accurate statement of  
35 the constitutional fishing right that First  
36 Nations have. It's not a wide open-ended right.

37 MS. SCHABUS:

38 Q And I'm not suggesting that. But DFO recognizes  
39 generally that there is a constitutionally-  
40 protected aboriginal right to fish for food,  
41 social and ceremonial purposes, right?

42 MR. LOWES: With respect, the law is exactly the  
43 opposite. The law is that aboriginal rights are  
44 not generic and they are not based on a  
45 generality. They are dealt with on a case-by-  
46 case, group-by-group, area-by-area basis.

47 MS. SCHABUS: I'm going to ask Ms. Stewart to answer

1 the question.

2 THE COMMISSIONER: Ms. Schabus, we're not going to get  
3 a ruling on what you're asking this afternoon and  
4 I'm not sure if the witness can answer your  
5 question. I'm content to have you ask it again,  
6 but I fear that it's going to bring other people  
7 to the microphone, so...

8 MS. SCHABUS: It's no problem, Mr. Commissioner. I'm  
9 ready to move on.

10 Q You'd agree with me, and I'm again putting it to  
11 both of you, that there is an indigenous element  
12 to conservation and that involvement of indigenous  
13 peoples when it comes to conservation and habitat  
14 management is an important factor that DFO is  
15 aiming at?

16 MS. STEWART: Are you speaking about the involvement of  
17 indigenous groups in fisheries management?  
18 Because a lot of what we've been talking about  
19 today has been exactly that and I wouldn't  
20 restrict it to indigenous peoples but to all  
21 stakeholders, whether they be the public,  
22 recreational fishermen, commercial fishermen with  
23 respect to fisheries management. So that's why  
24 there's such an emphasis on collaboration and co-  
25 management.

26 Q And I was actually trying to go a little bit  
27 further, so that's why I'm -- let me try and  
28 specify that. I'm actually talking about not just  
29 fisheries management but also habitat management  
30 and the overall -- when dealing with conservation  
31 generally, that there is -- it's important to have  
32 indigenous peoples involved and to have them  
33 participate with their knowledge, for example, so  
34 as to implement the Wild Salmon Policy.

35 MS. MCGIVNEY: Yes, I think it's important to have  
36 indigenous people involved, as it is to have all  
37 other interested parties involved, as well.

38 Q Okay. But indigenous peoples, there's also a  
39 recognition within DFO that indigenous peoples are  
40 important knowledge-holders and such, can  
41 contribute their knowledge to ensure conservation  
42 and more sustainable management, right?

43 MS. MCGIVNEY: Yes. And we -- a number of our policies  
44 acknowledge the traditional ecological knowledge  
45 as being something to consider in Wild Salmon  
46 Policy, in the **Species At Risk Act**, et cetera.

47 Q Now, just so we get the terms right, when we are

1 talking about an aboriginal economical opportunity  
2 fisher, are we still talking about -- and I think,  
3 Ms. McGivney, you referred to it as such, is a  
4 communal fishery, right?

5 MS. MCGIVNEY: Yes, it's licensed through the  
6 aboriginal communal regulations.

7 Q And one of the -- the elements I think Ms.  
8 Stewart, my -- in chief you were asked about  
9 profitability when it comes to PICFI and some of  
10 those communal fisheries, but I would suggest to  
11 you, and I'm -- that you would agree that it's  
12 important to actually also take into account other  
13 factors that the fishery and the communal fishery  
14 contributes to indigenous people such as the  
15 opportunity to pass on knowledge, to provide for  
16 the community, to engage in fisheries practices,  
17 et cetera? Those are also factors that should be  
18 taken into account when evaluating aboriginal  
19 communal fisheries?

20 MS. STEWART: Yes, and in fact, in some of the interior  
21 demonstration fisheries there has been a draw on  
22 traditional practices and exploration of the use  
23 of them.

24 Q Now, I'd like to take you to Tab 28 on our list of  
25 documents. And that would be, just because it's  
26 really small, the Resource Manager's Handbook for  
27 the Aboriginal Fisheries Strategy. And I'm going  
28 to take you - and I indicated that for your  
29 testimony specifically I'm going to start taking  
30 you to the bottom of page 8, that's the document  
31 number page 8. Yeah, that would be the correct  
32 page, Mr. Lunn. If you could zoom in on the very  
33 last paragraph, please. And I'm just going to  
34 take you to the very last sentence and ask you if  
35 you agree with the statement set out in this  
36 document, namely that:

37  
38 Today, fish continues to form a major  
39 component of Aboriginal nutritional  
40 requirements, but traditionally the  
41 importance of fish extended well beyond its  
42 food value. In addition to their ceremonial  
43 significance, fish were a major commodity of  
44 trade among some Indian bands and tribal  
45 groups with many of these groups expanding  
46 this trade with Europeans after contact.  
47



1           You would agree with that?

2       MS. STEWART: Is that --

3       Q     I'm opening it to both of you.

4       MS. STEWART: Oh, okay.

5       MS. MCGIVNEY: Yes, I think that that was -- that  
6           statement is -- has -- is true.

7       Q     And I would suggest to you that for the Lower  
8           Fraser River, what my clients call the suk-kegh or  
9           the sockeye salmon formed an important basis of  
10          their indigenous economies and DFO recognized this  
11          because they had one of their first pilot sales  
12          projects starting in 1993 there, correct?

13      MR. MCGOWAN: I just rise. I'm concerned that my  
14          friend is getting into sort of a historic analysis  
15          of whether a particular First Nation engaged in a  
16          fishery on a commercial level and I'm -- it may be  
17          getting to the fringes of the mandate and getting  
18          into particular sensitive areas. I question the  
19          value of pursuing that, Mr. Commissioner.

20      MR. LOWES: And, Mr. Commissioner, I would add to my  
21          friend's objection that the extent to which the  
22          sockeye or salmon were part of the indigenous  
23          economy was the very issue in the *Van der Peet*  
24          case.

25      MS. SCHABUS:

26      Q     Well, Mr. Commissioner, I'm going to connect it to  
27          the present and to the issue at hand, which is  
28          when we're dealing with the Aboriginal Fisheries  
29          Strategy the rationale that's being provided in  
30          the following paragraphs, and if I can put that to  
31          the witnesses, you'd agree with me that one of the  
32          -- one of the things that you are learning your  
33          fisheries managers to -- in this handbook and  
34          those are the resource managers that have to deal  
35          with allocation decisions on the ground and  
36          explain them, you're alerting them to the issue  
37          that - and I'm going to ask Mr. Lunn to zoom in on  
38          paragraph 2 of the document, page 9, that:

39  
40                   Aboriginal peoples have long viewed federal  
41                   laws and regulations on their fishing as an  
42                   unfair interference with their traditions.  
43                   They have asserted an Aboriginal, or in some  
44                   case a Treaty right, to fish and sell fish  
45                   without regulation, which has not been  
46                   recognized by Canada.

47

1           You're alerting them to that outstanding issue,  
2           right?

3       MS. MCGIVNEY: That -- it's being alerted that that is  
4           the aboriginal peoples' view.

5       Q       And it continues on to explain that:

6  
7                       In B.C. the first significant restrictions on  
8                       the Aboriginal fishery came in 1888 when the  
9                       **Fisheries Act** regulations provided that  
10                      Aboriginals could... fish for food for  
11                      themselves, but not for sale or barter.

12  
13           And one of the reasons was -- of some of those  
14           restrictions was to promote development of non-  
15           Native commercial and recreational fisheries,  
16           right? That's part of the rationale given?

17       MS. MCGIVNEY: I think this paragraph is referring to  
18           what we've heard from aboriginal groups. I'm not  
19           sure -- I haven't done a historical analysis  
20           myself.

21       Q       And that's fine, but the department is alert to  
22           that, right and --

23       MS. MCGIVNEY: Aware that this is where aboriginal --  
24           what the aboriginal perspective is.

25       Q       And that is actually why -- and your response is  
26           actually the Aboriginal Fisheries Strategy and the  
27           explanation that continues on is that aboriginal  
28           peoples continue to look at fisheries resources to  
29           provide part of their much-needed economic base.  
30           And that's actually what you're trying to do  
31           through the Aboriginal Fisheries Strategy.

32       MS. STEWART: Through the allocation transfer program  
33           we've moved on that agenda, as well as with PICFI.

34       Q       And -- exactly. So also through pilot sales and  
35           economic opportunity fisheries, right?

36       MS. STEWART: Yes.

37       Q       So they are also -- DFO's policy response, as you  
38           would probably call it, to overcoming some of that  
39           historical injustice and redistribution.

40       MS. STEWART: Those policies and programs were  
41           developed because it was going to be of assistance  
42           and it was going to support better fisheries  
43           management. The objective has been better  
44           fisheries management overall.

45       Q       Now, when we asked -- and when Ms. McGivney, when  
46           you were asked in chief to give us a definition of  
47           what is food, social and ceremonial fisheries and

1 I don't want to be critical and actually, the  
2 words that I'm going to be using are probably  
3 going to sound that way, but I'm going to explain  
4 what I mean. You kind of used an inverse or  
5 backwards or so to say negative definition in the  
6 sense that you were saying it's fishing for  
7 domestic purposes but not for sale, so you were  
8 defining it more as what it isn't than as a  
9 detailed definition of what it actually -- a  
10 positive definition that defines the different  
11 elements.

12 MS. MCGIVNEY: I was -- I was identifying how we talk  
13 about domestic fisheries in treaties and it's part  
14 of the definition that they are not for sale.

15 Q Now, has DFO ever tried to arrive at a positive  
16 definition based on an indigenous understanding of  
17 those elements of the food, social and ceremonial  
18 elements?

19 MS. MCGIVNEY: I guess the definition is really just  
20 without clarity around what food, social and  
21 ceremonial is but that's essentially what the  
22 definition is for food use and use in ceremonies.

23 Q But, for example, when it comes to ceremonies, and  
24 my friend was talking about that, and you were  
25 shown in chief a chain of emails that was talking  
26 about the -- an internal email within DFO talking  
27 about the need to talk about ceremonial permits,  
28 and you indicated that there was no such  
29 discussion within DFO took place, you're also not  
30 aware of any discussion with indigenous peoples to  
31 actually determine what their ceremonies are and  
32 what would be appropriate under ceremonial use?

33 MS. MCGIVNEY: Well, what we -- when we negotiate  
34 allocations with First Nations we seek to come up  
35 with an allocation that would meet the food,  
36 social, ceremonial interests and come to an  
37 agreement on what the fishery would be managed to  
38 for those purposes --

39 Q But you've heard --

40 MS. MCGIVNEY: -- on the priority basis.

41 Q And I think what Ms. Gaertner was trying to tell  
42 you is you've heard the concern that there is an  
43 indication that the only ceremonial permits that  
44 are being granted these days are for funerals.  
45 But you're not aware of any definition that would  
46 allow for ceremonial permits for other purposes?

47 MS. MCGIVNEY: I didn't realize that -- I didn't

1 realize that ceremonial permits were still being  
2 issued. I thought that we were issuing food,  
3 social, ceremonial licences that would encompass  
4 all three purposes.

5 Q Now, when it comes to the social element, you also  
6 didn't -- you actually haven't worked with  
7 indigenous peoples on a definition of social  
8 elements, correct?

9 MS. MCGIVNEY: Not specifically.

10 Q Have you looked at international standards and  
11 standards that Canada is a party to in defining  
12 social elements?

13 MS. MCGIVNEY: No. Our negotiations with First Nations  
14 are to try to seek agreement on how we're going to  
15 manage the fishery for those three purposes and  
16 come to an agreement on one allocation.

17 Q Now, I'm going to ask, Mr. Lunn, to bring up our  
18 Tab 21, the Akwé: Kon Guidelines, and go to  
19 Article 39. Now, for the explanation, just to put  
20 it into context, on the first page of the  
21 document, our Tab 21, if you can just briefly  
22 leave that on, it says "CBD" that's Conventional  
23 and Biological Diversity guidelines. And they're  
24 actually guidelines on social, cultural and  
25 environmental impact assessments and I'm going to  
26 ask Mr. Lunn to go to paragraph 39.

27 THE REGISTRAR: While he's moving to that, did you wish  
28 to mark Tab 28?

29 MS. SCHABUS: I should have. I'm very sorry about  
30 that. If we could please mark that.

31 THE REGISTRAR: It's 1752.

32

33 EXHIBIT 1752: Aboriginal Fisheries Strategy,  
34 Pacific Region, Resource Managers' Handbook -  
35 June 2, 2003  
36

36

37 MS. SCHABUS: And I'm also going to seek to mark the  
38 next document.

39 THE REGISTRAR: It will be 1753:

40

41 EXHIBIT 1753: Akwé: Kon Guidelines  
42

42

43 MS. SCHABUS:

44 Q Starting at article 39, there's a reference to  
45 social impact assessments and I'm going to ask Mr.  
46 Lunn to actually pull in on paragraph 43 which is  
47 on the next page. And I'm just going to ask you

1 to comment on the -- and look at the elements that  
2 are set out there. When determining social  
3 impacts or social elements, this one is the one  
4 that sets out specifically social elements to  
5 consider such as:

6  
7 (a) Baseline studies --

8  
9 Or historic baselines.

10  
11 (b) Economic considerations;

12  
13 (c) Possible impacts on traditional  
14 systems of land tenure --

15  
16 Or in this case I would suggest fish.

17  
18 (d) Gender considerations;

19  
20 (e) Generational considerations;

21  
22 (f) Health and safety aspects;

23  
24 (g) Effects on social cohesion;

25  
26 (h) Traditional lifestyles; and

27  
28 (i) The possible impact on access to  
29 biological resources for livelihoods.  
30

31 You'd agree that those are important elements that  
32 could be taken into account when looking at social  
33 elements?

34 MS. MCGIVNEY: I don't have a lot of experience in  
35 doing social impact assessments. My understanding  
36 is that they are done though in relation to some  
37 major development. I'm not sure how this  
38 applies --

39 Q And that is fine but --

40 MS. MCGIVNEY: -- to fisheries.

41 Q -- this one is -- I'm just trying to point you to  
42 elements that are used and that Canada is a party  
43 to the Convention on Biological Diversity and they  
44 are looking at different social elements that  
45 should be taken into account and I'm just  
46 suggesting to you that those would be good  
47 elements to consider when looking at social

1 elements -- or at the social aspect and social  
2 dimension.  
3 MS. STEWART: I'm wondering if there isn't some more  
4 context around what the document is discussing  
5 when it's talking about social impact assessments  
6 but --  
7 Q It basically talks about -- about developments  
8 that affect the lands and waters of indigenous  
9 peoples or also management decisions so that's  
10 where I'm -- I'm basically only suggesting it to  
11 you to set out different elements that can be  
12 taken into account when looking at a social  
13 aspect.  
14 MS. STEWART: I guess in the generality, those are  
15 considerations one could take into account for  
16 assessing social impacts.  
17 Q Now, I'm going to move to the next issue. DFO,  
18 and especially the aboriginal policy and  
19 governance secretariat has a risk management  
20 approach to dealing with the aboriginal right to  
21 fish, correct?  
22 MS. STEWART: That's part of it.  
23 Q I'm going to ask Mr. Lunn to pull up our Tab 23.  
24 And you actually had an aboriginal policy and  
25 governance risk profile developed, correct, for  
26 your directorate?  
27 MS. MCGIVNEY: Yes. This is a standard approach that's  
28 being taken in the federal government for all  
29 programming.  
30 Q Okay. But you had a specific one done for  
31 aboriginal policy and governance, right?  
32 MS. MCGIVNEY: Yes.  
33 Q And one of the -- and the way -- so when it comes  
34 to the risk management approach to dealing with  
35 aboriginal rights, the way the challenge is set  
36 out is that many fisheries management actions  
37 could be seen as infringing on aboriginal rights.  
38 Ms. McGivney, you actually participated in some of  
39 the high-level workshops to develop those risk  
40 management frameworks, the last one probably in  
41 2009?  
42 MS. MCGIVNEY: Yes.  
43 Q And I'm -- in looking at those documents one of  
44 the things that they talk about that you were  
45 explaining to us that what you're doing is you're  
46 managing the fisheries, right? And one of the  
47 things that you're alerted to as a risk is that

1 management decisions could be seen as infringing  
2 aboriginal rights, correct?  
3 MS. MCGIVNEY: Some could, yes.  
4 Q Now, when going to document 23, there is a number  
5 of high risks that were found and determined in  
6 this risk assessment if I could take you to page  
7 4, document page 4, so, Mr. Lunn, I'm not making  
8 your life easy. It's the table basically. If you  
9 could zoom in on the table, not the squares but  
10 the words. Thank you.  
11 And so basically, the seven highest risks  
12 that you determined or that were determined in  
13 this risk assessment are set out in that table?  
14 MS. MCGIVNEY: Yes. And these are risks of us being --  
15 risks related to being able to meet the objectives  
16 of the programs.  
17 Q Correct. And the objectives are also set out in  
18 this document, right?  
19 MS. MCGIVNEY: I can't recall. They must be though.  
20 Q I could take you to the following page, page  
21 number 6, second next page, page number 6 of the  
22 document that talks about the objectives that are  
23 at risk. Actually, those are not the overall  
24 objectives. Those are the objectives that are at  
25 risk in regard to specific. The overall  
26 objectives are on page number 1 of the document,  
27 document page number 1. Yeah, correct, at the  
28 bottom. Which include enhancing the involvement  
29 of aboriginal peoples in fisheries management  
30 decision processes, et cetera. So those are the  
31 objectives you are managing to, correct?  
32 MS. MCGIVNEY: Mm-hmm. Yes.  
33 Q And those are the risks that you identified that  
34 are set out in the table, right?  
35 MS. MCGIVNEY: The risks of not achieving those  
36 objectives.  
37 Q Correct. And so some of the risks -- I'm just  
38 going to run through all of them, but take you to  
39 some specific ones: so human resource capability;  
40 litigation; confrontations; resource misalignment;  
41 negotiation and implementation of agreements;  
42 exceptions to policy framework; and information  
43 for decision support; right? Those were the  
44 highest risks that were identified through this  
45 risk assessment process?  
46 MS. MCGIVNEY: Yes.  
47 Q And if I can take you specifically to the

1           litigation risk and that is on page 7 of the  
2           document, a risk that legal action may be taken  
3           because of unilateral changes in fisheries  
4           management regimes is one of the risks that you  
5           identified?

6   MS. MCGIVNEY: I'm sorry, I can't see where --

7   Q    Yeah. I'm going to ask Mr. Lunn to zoom in on the  
8           risk drivers, correct? So one of the risks that  
9           is identified there is the second bullet:

10  
11                   Approaches to fisheries management regimes  
12                   are changing and may impact Aboriginal and  
13                   treaty ... rights.

14

15   MS. MCGIVNEY: Yes.

16   Q    And there can also be, for example, if you have --  
17           if a fisheries management regime is changing as  
18           you are suggesting, for example, to share-based  
19           management, that is one of the risks that will be  
20           identified there, right?

21   MS. MCGIVNEY: That may impact.

22   Q    And then the next risk that I would like to take  
23           you to is confrontations and that is on page 10 of  
24           the document. And one of the risk drivers that  
25           is identified is that:

26

27                   ...program is unstable and its ongoing  
28                   alignment with policy direction is at risk,  
29                   which creates situations of uncertainty on  
30                   the ground.

31

32   MS. MCGIVNEY: Yes. This is saying these kind of  
33           scenarios could potentially lead to confrontation.

34   Q    Correct. So --

35   MS. MCGIVNEY: It's not saying that the program is  
36           unstable, but if the program was unstable, then --

37   Q    And if there was lack of clarity in the policy, et  
38           cetera, right?

39   MS. MCGIVNEY: Yes.

40   Q    And it also speaks to --

41   MS. MCGIVNEY: Potential risk, potential.

42   Q    Potential risks. It's actually -- this one is  
43           classified to be at an unacceptable level  
44           currently by your management, aboriginal policy  
45           and governance management. Mr. Lunn, on page 11,  
46           the last paragraph and the first line, correct,  
47           the risk was deemed unacceptable by your



1 management, correct?

2 MS. MCGIVNEY: Yes.

3 Q And another risk that was identified - and that is  
4 at page 14 of the document, Mr. Lunn - is to do  
5 with negotiation and implement of agreements. And  
6 one of the risk drivers can be:

7  
8 Delays in receipt of guidance, or lack of  
9 clear guidance from Justice Canada...

10  
11 That's the first bullet. And then taking you to  
12 the third bullet:

13  
14 New federal directives providing different  
15 guidance or a change in business tactics may  
16 alienate Aboriginal communities...

17  
18 MS. MCGIVNEY: Yes. Again, these are potential --

19 Q Correct.

20 MS. MCGIVNEY: -- scenarios that might cause --

21 Q Might cause --

22 MS. MCGIVNEY: -- would hamper us.

23 Q But again, this risk was also deemed to be  
24 unacceptable at the level it was at was -- at the  
25 current level it was deemed to be at, it was  
26 unacceptable.

27 MS. MCGIVNEY: It was -- it's deemed to be a potential  
28 high risk.

29 Q Yes. And one of the possible consequences - Mr.  
30 Lunn, and that would be on page 15 - if you could  
31 zoom in, in the very middle, possible  
32 consequences. The first bullet:

33  
34 Not reaching agreement causes uncertainty  
35 within the fishing community at large,  
36 especially in providing clarity with respect  
37 to rights of Aboriginal fishing groups. This  
38 uncertainty may lead to: confrontations  
39 between Aboriginal and non-Aboriginal  
40 communities, DFO enforcement and Aboriginal  
41 fisheries, litigation and damage to the  
42 reputation of DFO.

43  
44 Correct? That's -- that's one of the possible  
45 consequences that was identified if there is a  
46 failure to reach agreement on issues?

47 MS. MCGIVNEY: Yes. It was identified. I think that

1           it's -- and again, I'm not sure this is worded  
2           entirely correctly, because the agreements don't  
3           provide clarity with regards to the rights, but  
4           the agreements provide for an opportunity to work  
5           together and have an orderly fishery with  
6           commonly-agreed terms.  
7           Q     And that's where I want to take you now. So the  
8           current approach that your directorate takes, the  
9           aboriginal policy and governance directorate,  
10          takes is one -- is a policy-based approach, you  
11          explained to us, right?  
12          MS. MCGIVNEY: Yes.  
13          Q     So on the basis of policies, you then try to, when  
14          it comes to fisheries management, negotiate  
15          agreements, correct?  
16          MS. MCGIVNEY: Yes.  
17          Q     And under those current agreements, the final  
18          decision-making authority rests with the minister,  
19          right?  
20          MS. MCGIVNEY: Yes.  
21          Q     And also licences and permits issued are issued  
22          under the discretion of the minister?  
23          MS. MCGIVNEY: Yes.  
24          Q     And the risks that can be associated with such a  
25          policy-based approach that we just talked about,  
26          some of those risks are lack of clarity and  
27          transparency and inconsistent application of  
28          policies?  
29          MS. MCGIVNEY: I think that was one of the potential  
30          risks that was identified.  
31          Q     And when it comes to negotiating agreement, there  
32          is the risk that you will not reach agreement?  
33          MS. MCGIVNEY: There is that possibility.  
34          Q     And there's also the risk of discontent and  
35          litigation and exercise of aboriginal rights as a  
36          result of not being able to reach such an  
37          agreement or because there isn't agreement with  
38          the terms set out in the agreements?  
39          MS. MCGIVNEY: Sorry? Could you repeat that again?  
40          Q     Sure. I'll try. There is also the risk that  
41          there could be discontent or if there's lack of  
42          agreement on an agreement, there could be  
43          discontent litigation and people could decide,  
44          indigenous peoples could decide to exercise their  
45          rights and the result would be enforcement and  
46          further confrontation, right?  
47          MS. MCGIVNEY: That would have been identified in here

1 as --  
2 Q Leading to a more adversarial approach and exactly  
3 in the opposite direction of where we want to go  
4 when it comes to co-management and more integrated  
5 management, right?  
6 MS. MCGIVNEY: Correct.  
7 Q Now, when it comes to agreements currently by DFO,  
8 I'd like you, Mr. Lunn, to pull up --  
9 MS. MCGIVNEY: Actually --  
10 MS. SCHABUS: I'm going to ask to mark the last  
11 exhibit.  
12 MS. MCGIVNEY: Could I just make a comment about this  
13 report? There's another element that -- like  
14 you've been identifying where the risks, potential  
15 risks, are but another part of this process is how  
16 are we going to mitigate those risks. And so we  
17 do things so that hopefully these will -- these  
18 risks will not come into play.  
19 MS. SCHABUS:  
20 Q And that's why part of your approach is that  
21 policy-based approach I was taking you to, signing  
22 -- working on agreements, et cetera, right?  
23 MS. MCGIVNEY: It's part of that, but I believe we also  
24 in the document identified how we mitigate against  
25 these risks.  
26 Q And if I could take you to --  
27 MS. SCHABUS: I'm going to ask if we could mark this  
28 last document as an exhibit.  
29 THE REGISTRAR: 1754.  
30  
31 EXHIBIT 1754: Department of Fisheries and  
32 Oceans - Risk Profile for Aboriginal Policy  
33 and Governance  
34  
35 MS. SCHABUS: And, Mr. Lunn, if we could go to Tab 46.  
36 Q This is a letter by you, Ms. McGivney, to SCC that  
37 talks about the terms and conditions that govern  
38 all DFO aboriginal programs?  
39 MS. MCGIVNEY: Yes.  
40 Q And what do you -- this is in 2009, I believe.  
41 What you're basically talking about is that the  
42 terms and conditions that all -- that govern all  
43 DFO aboriginal programs are currently being  
44 revised, right? And that is the delaying the  
45 signing of agreements in 2009, right?  
46 MS. MCGIVNEY: Yes. What -- we had hoped that we could  
47 have gone with the previous templates, the

- 1 previous agreements because of the timing of when  
2 the information about the change in the terms and  
3 conditions came forward, but because of the change  
4 in the terms and conditions, we actually had to  
5 make some changes and so as a result, I needed to  
6 write to all of the First Nations to indicate that  
7 even though we'd given them some previous notice  
8 that we didn't anticipate that the new Ts and Cs  
9 were going to affect their agreements, there were  
10 some small changes and I wanted them all to be  
11 informed of what those changes were, so that when  
12 our staff went out there, they would understand  
13 these components needed to be put in place in  
14 order to comply with the Treasury Board  
15 requirements.
- 16 Q Now, those terms and conditions are developed and  
17 set out by the federal government, right?
- 18 MS. MCGIVNEY: Yes.
- 19 Q And they're not subject to negotiation?
- 20 MS. MCGIVNEY: The terms and conditions, no.  
21 They're --
- 22 Q And you also don't consult indigenous peoples on  
23 them, right?
- 24 MS. MCGIVNEY: The whole of -- I think there was  
25 discussions in the renewal about some of the  
26 elements and we certainly hear from First Nations  
27 about their concerns about our programming and  
28 administration and so in renewing those, we were  
29 bringing forward some of the -- we were bringing  
30 forward changes that would address some of those  
31 changes.
- 32 Q But there was no direct consultation on them at  
33 all, right?
- 34 MS. MCGIVNEY: I don't think we can consult. I think  
35 it's a cabinet confidence.
- 36 MS. STEWART: It is a cabinet confidence until those --
- 37 Q Now, all funding that you are talking about here  
38 is channelled through DFO, correct?
- 39 MS. MCGIVNEY: It's -- yes, the funding comes through  
40 DFO.
- 41 Q And you usually use template agreements and you  
42 just change whatever work is covered under the  
43 agreements, right?
- 44 MS. MCGIVNEY: We negotiate the projects that might be  
45 done under the agreements as one of the elements  
46 of the negotiations.
- 47 Q Now, when it comes to Lower Fraser aboriginal

- 1 fisheries, we heard about the mandates for FSC  
2 fisheries and that until 2007 they were developed  
3 and approved in Ottawa. In the Lower Fraser River  
4 you have comprehensive fisheries agreements.  
5 Where are those mandates developed?
- 6 MS. MCGIVNEY: Yes, I realize that I was speaking  
7 generally when I was saying that those were  
8 approved at that level. The Lower Fraser mandates  
9 for the negotiation of the comprehensive fisheries  
10 that include the economic opportunity fisheries  
11 are approved by the minister.
- 12 Q They are directly at the ministerial level?
- 13 MS. MCGIVNEY: Yes.
- 14 Q The mandates. Now, just to clarify, those  
15 comprehensive fisheries agreements have as part of  
16 it an economic opportunity element which is part  
17 of the incentive to sign such agreements?
- 18 MS. MCGIVNEY: The mandate has included that in the  
19 past.
- 20 Q But it also has the overall FSC allocation for the  
21 area in it?
- 22 MS. MCGIVNEY: Yes.
- 23 Q And so that number, that overall number, is also  
24 determined by the minister, right? Both those  
25 numbers?
- 26 MS. MCGIVNEY: It would all be part of the note going  
27 forward.
- 28 Q And then the concept that evolves from that is  
29 that some bands do sign onto the comprehensive  
30 fisheries agreement so that they can access  
31 economic opportunity fisheries and you referred to  
32 those as signatory bands, right?
- 33 MS. MCGIVNEY: Those bands that sign would be  
34 signatory.
- 35 Q And then there's non-signatory bands, that's for  
36 the bands that don't sign onto the agreements,  
37 right?
- 38 MR. MCGOWAN: Mr. Commissioner, I just -- I rise for a  
39 moment. There's been several occasions where my  
40 friend - and I'm sure it's not intentional - is  
41 sort of clipping off the answers of the witness  
42 and I just ask her to give the witness sufficient  
43 time to answer each question fully before she  
44 commences her next question.
- 45 MS. SCHABUS: I'm sorry about that. I'm trying to rush  
46 through that.
- 47 Q Did you want to add something? I'll just take you

1 to it. There's basically a difference between  
2 signatory bands who then have access to the  
3 economic opportunity fisheries and non-signatory  
4 bands, they don't have access to an economic  
5 opportunity fishery, correct?  
6 MS. MCGIVNEY: Correct. We try to negotiate an  
7 agreement in the Lower Fraser with the broad  
8 group. The intent is to have as many signatories  
9 as we can.  
10 Q But for the on-signatory bands, they are still  
11 counted under the overall FSC allocation?  
12 MS. MCGIVNEY: Correct.  
13 Q And so that number is not negotiated at all with  
14 the non-signatory bands?  
15 MS. MCGIVNEY: We negotiate with them. We may not get  
16 to an agreement.  
17 Q So in 2009 - we've seen this morning you were  
18 shown the comprehensive fisheries agreement for  
19 2009. And at that time you had 17 signatory  
20 bands. If you want me to take you to it, I can,  
21 but you'd probably agree out of 26 there was 17  
22 signatory bands?  
23 MS. MCGIVNEY: I can't recall the actual numbers,  
24 but --  
25 MS. SCHABUS: Mr. Lunn, if you could indeed pull up  
26 Exhibit 1250, I believe it is. Five minutes.  
27 Q And if I could take you to the signatory --  
28 signature page which is towards the end. I  
29 actually can't give you the number. It's starting  
30 -- it repeats the document page number -- it's  
31 fine. I can establish that in submissions.  
32 That's not a problem.  
33 You'd also agree that in 2010 a similar  
34 comprehensive fisheries agreement was signed?  
35 MS. MCGIVNEY: I can't recall -- I -- I was in the  
36 position until August 20th is when I changed, but  
37 I went on vacation July 23rd, so I'm not sure  
38 whether -- I don't believe there was an agreement  
39 signed before I left.  
40 Q No problem. I'm going to ask Mr. Lunn to call up  
41 Tab 25 from commission counsel.  
42 MS. MCGIVNEY: Or maybe there was.  
43 Q And this is a -- it's a different issue now. It's  
44 actually the Lower Fraser First Nations Fisheries  
45 Strategic Plan and the very last page of that, if  
46 you need to see it, would show an email about an  
47 event to discuss that. It involves Diana Trager,

1           yourself and others; you're aware of that?

2 MS. MCGIVNEY: I recall a meeting to that effect.

3 Q       And one of the things that was discussed under  
4       that Lower Fraser First Nations Fisheries Plan is  
5       actually that -- if I could take you to page  
6       number 3 of the document, it talks in bullet 2  
7       about:

8  
9           Recent economic allocations have been limited  
10          to 4 percent of the Canadian commercial TAC  
11          plus an additional amount that could be  
12          negotiated prior to the season if First  
13          Nations were prepared to accept a lower FSC  
14          amount.

15  
16         And it indicates that:

17  
18                 Lower Fraser First Nations have not been  
19                 attracted to this type of share-based  
20                 economic fishery, and have largely rejected  
21                 the concept of a lower FSC amount to offset  
22                 increased economic access, given the lower  
23                 priority and higher uncertainty associated  
24                 with an economic allocation.

25  
26         You are aware of that?

27 MS. MCGIVNEY: Yes.

28 Q       Yet the instruction of the department was to  
29       continue with that approach, despite the  
30       resistance of aboriginal peoples?

31 MS. MCGIVNEY: I believe that was in the plan.

32 Q       I could take you to page 10 of the document very  
33       briefly to the risk drivers, and risk number 2,  
34       that the intent would still be to proceed with  
35       such an approach -- do you see that? If Mr. Lunn  
36       could zoom in on number 2:

37  
38                 First Nations might not agree with reducing  
39                 FSC to increase economic allocations.

40  
41         And the possible mitigation is:

42  
43                 Do not deviate from this approach and limit  
44                 any increases through additional licence  
45                 retirement to levels that maintain incentives  
46                 for treaties.

47

1 MS. MCGIVNEY: You're asking for --  
2 Q So that was the direction that you had. Thank  
3 you. And just to briefly connect this to 2011, I  
4 believe --  
5 MS. MCGIVNEY: This -- I mean, this was a discussion.  
6 I don't know that this document went through any  
7 formal approvals, as well. It was a proposal put  
8 forward by the aboriginal fisheries advisor and  
9 was discussed as a basis for --  
10 Q And it's actually in line with what is the  
11 Aboriginal Fisheries Framework or the Coastwide  
12 Framework and the approach suggested therein to  
13 move to a share-based management approach.  
14 MS. MCGIVNEY: The concept of moving to a share-based  
15 management --  
16 Q So that was already being put in place in 2010.  
17 MR. MCGOWAN: Mr. Commissioner, if the witness could be  
18 allowed to finish their answers, please.  
19 MS. SCHABUS: Sorry.  
20 Q That was already in place in 2010, right?  
21 MS. MCGIVNEY: I'm sorry, what was in place?  
22 Q That was the approach that was being actively  
23 pursued in 2010?  
24 MS. MCGIVNEY: The --  
25 Q A share-based management approach --  
26 MS. MCGIVNEY: A share-based management --  
27 Q -- as set out --  
28 MS. MCGIVNEY: -- approach to the economic opportunity  
29 fisheries, yes.  
30 Q To implement the Aboriginal Fisheries Framework  
31 and the Coastwide Framework, aiming at that?  
32 MS. MCGIVNEY: As I said in my previous testimony,  
33 those are documents still in progress, but in --  
34 it would still align with that concept.  
35 Q And I'm running out of time and I know you were  
36 not in your position in 2011 but you are aware  
37 that actually in 2011 there was no comprehensive  
38 fisheries agreement signed for the Lower Fraser  
39 River, that DFO actually unilaterally made the  
40 decision?  
41 MS. MCGIVNEY: Actually, I didn't -- I haven't had the  
42 opportunity to be --  
43 Q Ms. Stewart --  
44 MS. MCGIVNEY: -- briefed on that.  
45 Q -- are you aware of the fact that no  
46 comprehensive --  
47 MR. MCGOWAN: I'm just going to rise again. It's



1 continuing to happen. The witness is -- it's  
2 continuing to happen. The witness is not being  
3 permitted to finish her answers and I understand  
4 we have time constraints, but I am going to ask  
5 that the witness be permitted to complete each of  
6 her answers before --  
7 MS. SCHABUS: Of course.  
8 MR. MCGOWAN: -- the next question is asked.  
9 MS. SCHABUS: I'm really sorry.  
10 Q I understand you weren't in the position. You  
11 can't comment on it. I'm trying to seek an answer  
12 from Ms. Stewart, unless you wanted to add  
13 something?  
14 MS. MCGIVNEY: No, I can't comment on it.  
15 MS. STEWART: If I'm -- in my position, this isn't  
16 something that would -- this file wouldn't be  
17 something that I would be intimately involved  
18 with, but I do recall that there were some  
19 discussions about wanting to reach an agreement.  
20 I'm not sure what the outcome of those discussions  
21 were.  
22 MS. SCHABUS: If we could mark this document as an  
23 exhibit and if Mr. Lunn could just very briefly  
24 pull up Exhibit -- my tab -- our Tab 53 and I'm  
25 going to leave it at that.  
26 THE REGISTRAR: Could you slow down just a second,  
27 please.  
28 MS. SCHABUS: I know.  
29 THE REGISTRAR: Exhibit -- or Tab 46 you've not marked  
30 that. Did you wish that marked?  
31 MS. SCHABUS: Yes, please.  
32 THE REGISTRAR: That will be 1755.  
33  
34 EXHIBIT 1755: Letter to Grand Chief Clarence  
35 Pennier, Sto:lo Tribal Counsel from Kaarina  
36 McGivney - undated  
37  
38 MS. SCHABUS: Yes, please.  
39 THE REGISTRAR: Now, Tab 25 consists of two documents.  
40 Can you clarify which ones you want marked?  
41 MS. SCHABUS: I'm fine with just marking the  
42 substantive document. The email doesn't have to  
43 be marked.  
44 THE REGISTRAR: Okay. Thank you.  
45 MS. SCHABUS: And I'm just going to ask --  
46 THE REGISTRAR: That's 1756.  
47 MS. SCHABUS: Thank you.

1 EXHIBIT 1756: Lower Fraser First Nations  
2 Fisheries Strategic Plan - Draft February 22,  
3 2010  
4

5 MS. SCHABUS:

6 Q And I'm just going to ask one more --

7 MR. MCGOWAN: I'll just say, Mr. Commissioner, in terms  
8 of timing, I don't want to interrupt my friend but  
9 she has -- is over the allotment and I'm just  
10 cautious because we're now in a situation where  
11 she's using Ms. Fong's time and I just draw that  
12 to everybody's attention to -- hopefully we can  
13 proceed.

14 MS. SCHABUS: I've confirmed with my friend and she's  
15 okay with me asking one last question.

16 Q If we could pull up Tab 53 from our list of  
17 documents, that was the email. And just, Ms.  
18 Stewart, if you could have a quick look at that  
19 email, that's an email dated August 8th, 2011  
20 referring to the Comprehensive Fisheries Agreement  
21 from that area Port Mann to Sawmill Creek that  
22 indicates that while the department was looking  
23 for 20 bands to sign the agreement, only 11  
24 signatures were received and therefore, the  
25 department is unable to move forwards on this  
26 agreement.

27 MS. STEWART: I'm not familiar with this email. That's  
28 what it says. That's all I can say.

29 MS. SCHABUS: If I could ask to have that marked as an  
30 exhibit?

31 And just to confirm with Ms. McGivney, that  
32 puts us when it comes to the risk management  
33 framework that we were looking at and the danger  
34 and the risks that arise when agreements can't be  
35 signed, that puts us in that very situation where  
36 you had an unacceptable risk because no agreement  
37 could be reached and you actually do not have an  
38 agreement in place, neither regarding economic  
39 opportunity, nor FSC fisheries?

40 MR. TAYLOR: Well, before there's an answer, if there  
41 were to be one, I'm rising. This question is an  
42 example of something I've noticed,  
43 unintentionally, I think, but there's a very long  
44 statement that contains many clauses and then  
45 there's sort of an inferred "will you agree with  
46 that" but it's not clear that that's the question,  
47 so two points, and I'm really asking my friend to

1           clarify the question. This is not an opportunity  
2           to make a submission or a speech, but rather to  
3           ask a question. So I ask that there be a  
4           question.

5           And secondly, try to break it down as opposed  
6           to having five questions in one.

7 MS. SCHABUS:

8 Q       And I'm sorry about that. I'll take you to the  
9       very point. A situation like this where no  
10       comprehensive fisheries agreement is signed, could  
11       you comment on the risk that arises in a situation  
12       like that and how it's dealt with in your risk  
13       management framework?

14 MS. MCGIVNEY: It's preferable to have agreements. I  
15       think we've identified that a number of times and  
16       that you have cooperation, common goals, common  
17       objectives. We seek to get those agreements.

18       As you pointed out there's a variety of risks  
19       that could arise if you're not able to have an  
20       agreement that we discussed in the previous  
21       document and I think you went through all of those  
22       potential points that had been identified as  
23       potential outcomes of not having agreements.

24 MS. SCHABUS: Thank you. Those are all my questions.

25 MR. MCGOWAN: Perhaps have our break, Mr. Commissioner?

26 THE REGISTRAR: Ms. Schabus, in your race to the finish  
27       line there, Tab 53, do you want that marked --

28 MS. SCHABUS: Yes, I had asked for that to --

29 THE REGISTRAR: -- as 1757?

30 MS. SCHABUS: -- please be marked. Thank you. And  
31       sorry for rushing.

32

33           EXHIBIT 1757: Email from Diana Trager dated  
34           August 8, 2011 "Subject: Proposed Port Mann  
35           to Sawmill Comprehensive Fisheries Agreement  
36

36

37           (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

38

39

40

THE REGISTRAR: The hearing is now resumed.

41

MS. FONG: Mr. Commissioner, Lisa Fong, for Heiltsuk  
42       Tribal Council, and with me is my co-counsel,  
43       Benjamin Ralston.

44

45

CROSS-EXAMINATION BY MS. FONG:

46

47

Q       My first questions are going to be for Ms.

1 McGivney, and Mr. Lunn has pulled up my first  
2 document very efficiently. It's the Aboriginal  
3 Fisheries Framework. Ms. McGivney, if you could  
4 just take a look at the second bullet under the  
5 first heading, the first heading being the  
6 Fisheries Environment, the second bullet, where it  
7 reads:

8  
9 The negotiation and implementation of First  
10 Nation fishing arrangements in BC treaties  
11 have become increasingly challenging.  
12

13 And then you'll see a list of dashes of the  
14 particular challenges. So you'll agree with me  
15 that this paragraph identifies the challenges in  
16 negotiating and implementing aboriginal fishery  
17 arrangements in BC treaties, correct?

18 MS. MCGIVNEY: Correct.

19 Q And if we can just take a look at that first dash,  
20 and you can take a moment to read it. Now, the  
21 challenge here is that if the fish allocations in  
22 existing treaties were extrapolated to apply to  
23 all potential treaties, then there wouldn't be  
24 sufficient fish allocation for the non-aboriginal,  
25 commercial and recreational fisheries; did I get  
26 that right?

27 MS. MCGIVNEY: That was the concern that was raised.

28 Q Thank you. And then on the second dash, if you  
29 could read that --

30 MS. MCGIVNEY: Am I supposed to read it out loud?

31 Q No, no, sorry, just read it to yourself and I'll  
32 ask you the question. Thank you. As I understand  
33 the challenge there, the challenge here is the  
34 amount of resources that's required to manage a  
35 large number of diverse fishery arrangements on a  
36 broad regional scale. That's the challenge?

37 MS. MCGIVNEY: Sorry, you're saying it's the number --  
38 the number?

39 Q That second dash --

40 MS. MCGIVNEY: Yes?

41 Q -- is one of the challenges, and I just want to  
42 make sure we understand the challenge for this  
43 Coastwide Framework. And so as I understand it,  
44 the challenge here is the amount of resources  
45 that's required to manage a large number of  
46 diverse fishery arrangements on a broad regional  
47 scale; is that how you understand it?

1 MS. MCGIVNEY: So resources is one element of it, in  
2 terms of being able to do it. Part of the other  
3 element is that because the fishery needs to be  
4 managed on a broader basis, doing small,  
5 individual negotiations is -- doesn't bring it all  
6 together. If you have a broader, collaborative  
7 group, you can bring all of the issues to the  
8 table and it's more effective. So it also links  
9 into how the fishery is managed and what the best  
10 cooperative management arrangements might be.

11 Q So that focuses on a better result, as opposed to  
12 administrative resources of DFO? Am I getting  
13 that right?

14 MS. MCGIVNEY: I would say both elements contribute.

15 Q Okay. And then that third dash, if you could read  
16 that, so we make sure we understand that challenge  
17 as well. Okay. My understanding of that  
18 challenge is that it's the same sort of challenge,  
19 but respecting a problem of fluctuating abundance  
20 of the natural resource; is that right?

21 MS. MCGIVNEY: Yes. There's the fluctuating abundance  
22 of the fish and just having an integrated  
23 management system being able to bring the sort of  
24 management in a cohesive, integrated way forward.

25 Q Okay. And then that --

26 MS. MCGIVNEY: And having -- I think the other key  
27 thing is that it creates a lot of specific  
28 management objectives, so it's always -- it's  
29 easier to achieve simpler objectives than many,  
30 many small objectives.

31 Q Multiple objectives, okay. And then that fourth  
32 dash, I'm going to read that:

33  
34 - over the medium term the Aboriginal rights  
35 of most First Nations will need to be managed  
36 outside treaties.

37  
38 Are you able to tell us what that means, the  
39 medium term?

40 MS. MCGIVNEY: Do you mean in terms of number of years?

41 Q Is that what it -- do you know what that is?

42 MS. MCGIVNEY: I don't think there's a specific. I  
43 think it means in the next while. We're a ways  
44 away from the majority of First Nations in BC  
45 having treaties, and so that's going to take I  
46 don't know how long, if ever we get to that stage,  
47 so in that term period, whatever it might be,

1           there will be managing both those in treaty and  
2           those out of treaty.  
3       Q     Okay. And the challenge there is exactly as you  
4           say, if I'm correct, it's managing that interface  
5           between the non-treaty and the treaty aboriginal  
6           fisheries; is that the challenge?  
7       MS. MCGIVNEY: That's one of the challenges, the  
8           combination of the interface between them, but  
9           also addressing the management of those fisheries  
10          just without even that interface, just the --  
11       Q     Just the sheer number of them?  
12       MS. MCGIVNEY: -- the sheer -- the number of them, as  
13          well as --  
14       Q     Right.  
15       MS. MCGIVNEY: -- the need to manage for the undefined  
16          food, social, ceremonial access.  
17       Q     I see. And this document, I understand the AFF to  
18          be a precursor to the Coastwide Framework. So the  
19          Coastwide Framework, is it -- it's aimed at  
20          overcoming these challenges; am I right about  
21          that?  
22       MS. MCGIVNEY: The Coastwide Framework was work that  
23          was done in advance of this, and so this is  
24          actually more the culmination --  
25       Q     I see.  
26       MS. MCGIVNEY: -- of the work --  
27       Q     Okay.  
28       MS. MCGIVNEY: -- that was done there.  
29       Q     Okay. And I'm correct, then, the Aboriginal  
30          Fisheries Framework is aimed at meeting these or  
31          overcoming these challenges.  
32       MS. MCGIVNEY: This is why it was initiated. I don't  
33          -- the concepts are there to move forward to  
34          address many of these challenges, but a lot of the  
35          details still need to be worked out.  
36       Q     Okay. But that's the aim, though?  
37       MS. MCGIVNEY: Yes.  
38       Q     Okay. Now, I just want to drop under Key  
39          Principles, over onto the second page, and if you  
40          could look at the second dash under that second  
41          page, where it reads:  
42  
43                 - recognition that all resource users must be  
44                 accommodated (a fishery for all) --  
45  
46                 Do you see that?  
47       MS. MCGIVNEY: I did --

1 Q Okay. Sorry.

2 MS. MCGIVNEY: -- very quickly.

3 Q We're moving fast, I know. Okay, so the second  
4 dash:

5

6 - recognition that all resource users must be  
7 accommodated (a fishery for all)...

8

9 Do you see that, now?

10 MS. MCGIVNEY: Yes.

11 Q Okay. And when you say "all resource users," for  
12 DFO does that include First Nations, or are First  
13 Nations considered the owners as opposed to just  
14 resource users?

15 MS. MCGIVNEY: That considers First Nations as well as  
16 other resource users.

17 Q Okay. And when you say "a fishery for all," or,  
18 sorry, when it says, "a fishery for all," does  
19 that mean that the FSC access as a priority will  
20 be respected in this AFF?

21 MS. MCGIVNEY: I don't think that particular clause  
22 means that. I think that that's identified in the  
23 first bullet on the page:

24

25 - FSC...access has priority after  
26 conservation and allocations will be  
27 established and...separated (sic) from  
28 commercial allocations.

29

30 Q Right. So that priority is going to be respected  
31 by this --

32 MS. MCGIVNEY: Fishery for all.

33 Q -- fisheries framework?

34 MS. MCGIVNEY: Yes.

35 Q Thank you. Okay. Now, let's go down to  
36 Allocation Strategy, that first bullet under that  
37 heading:

38

39 The Allocation Strategy establishes end-point  
40 cumulative allocation outcomes for salmon and  
41 non-salmon species that will guide all  
42 fisheries negotiations with all BC First  
43 Nations, inside and outside of treaties.

44

45 Now, the end-point cumulative allocation, it's a  
46 percentage, right?

47 MS. MCGIVNEY: Can you just go down a little bit

1 further, please, down the page? Yes.  
2 Q Okay. And in fact, that percentage, the number  
3 itself, it's been set by DFO?  
4 MS. MCGIVNEY: It's been approved by the Minister.  
5 Q Right. But there's a number that exists, that's  
6 my point?  
7 MS. MCGIVNEY: Yes.  
8 Q Right. And you testified, I read your testimony  
9 on August 19th, so as I understood it, you  
10 testified on August 19th that the end-point  
11 percentage is currently in use by DFO to manage  
12 fisheries; is that correct?  
13 MS. MCGIVNEY: It's being used to -- in consideration  
14 of new -- of changes to access so that it will be  
15 in line and consistent with that broad outcome in  
16 the long term. So there's still a lot -- I think  
17 I explained, also, that there is still a lot of  
18 work to undergo about exactly how to implement and  
19 to look towards achieving that outcome, but what  
20 we're doing is any changes that we're making now,  
21 we're looking to ensure that it doesn't limit our  
22 ability to achieve that outcome.  
23 Q Okay. So when you say "changes" I just want to be  
24 clear; changes to what?  
25 MS. MCGIVNEY: Well, for instance, the -- looking at  
26 the PICFI allocations in terms of providing groups  
27 additional allocations.  
28 Q Okay. And any other changes? Can I sort of get a  
29 laundry list of the changes? We just want to  
30 understand what the effect is of this percentage,  
31 currently.  
32 MS. MCGIVNEY: Well, it would relate to percentage --  
33 it would relate to provision of allocation.  
34 Q Okay.  
35 MS. MCGIVNEY: To changes from where sort of things  
36 have been.  
37 Q Okay. So apart from PICFI, what about other --  
38 does it affect other programs like, for example,  
39 the FSC allocations?  
40 MS. MCGIVNEY: Changes to FSC allocations would be  
41 considered in this context as well. Any treaty  
42 allocations that might be being negotiated, but  
43 we're not negotiating treaty allocations right now  
44 until the --  
45 Q Right. Okay. But that concept?  
46 MS. MCGIVNEY: But that concept.  
47 Q Okay. So apart from PICFI, the FSC allocations,



1 treaty allocations, if they were being negotiated  
2 at this time, are there other allocations or  
3 programs that are being -- where the percentage  
4 number is being reflected upon or used somehow in  
5 moving forward?  
6 MS. MCGIVNEY: Potentially the Allocation Transfer  
7 Program as well, and any others?  
8 Q Right. The ATP?  
9 MS. MCGIVNEY: Yes, ATP. I can't think of any other.  
10 MS. STEWART: If there were to be --  
11 Q I'm sorry, can you speak into your mike?  
12 MS. STEWART: If there were to be new programs, they  
13 would --  
14 Q Okay.  
15 MS. STEWART: -- have to reflect it as well.  
16 Q Sorry, Ms. Stewart, are you aware of any new  
17 programs that are currently being -- where this  
18 number, this percentage number, is being used or  
19 somehow factored in?  
20 MS. STEWART: No, you were asking for a laundry list.  
21 That would be another --  
22 Q Okay. Okay. But you don't know of any specific  
23 new programs?  
24 MS. STEWART: No.  
25 Q Okay. And Ms. McGivney, do you know of any  
26 specific new programs?  
27 MS. MCGIVNEY: No, I don't.  
28 Q Okay. So in terms of the laundry list, we've got  
29 PICFI, the FSC allocations, treaty allocations, if  
30 there were treaty, which there isn't right now,  
31 ATP, and if there were new programs. Is there  
32 anything else, between the two of you, you can  
33 think of that this number would currently feed  
34 into or assist in developing?  
35 MS. STEWART: Economic opportunity fisheries that were  
36 encompassed in an agreement.  
37 Q And those are First Nation economic opportunity  
38 fisheries you're talking about?  
39 MS. STEWART: Yes.  
40 Q Okay. And these are ones that are being  
41 negotiated annually; is that right, the  
42 economic --  
43 MS. MCGIVNEY: Yes, the annual economic opportunity  
44 fishery allocations --  
45 Q Okay.  
46 MS. MCGIVNEY: -- would be considered within the  
47 context of this.

1 Q Okay. I was just picking up on the thought that  
2 you had initially -- when you were telling me that  
3 it's the increases where the percentage number of  
4 is of assistance. But it's not just the  
5 increases, it's also these annual negotiations  
6 where this end-point number is being factored  
7 into?

8 MS. MCGIVNEY: Well, existing is obviously part of  
9 that, now. So "any changes to existing," that's  
10 what I was meaning by "increases".

11 Q Okay. Thank you. Now, we've heard -- now, this  
12 is my question for Ms. McGivney. We've heard  
13 evidence earlier in this proceeding of DFO having  
14 a mandate number representing the maximum  
15 allocation when negotiating FSC allocations. Now,  
16 is that mandate number concept still in place such  
17 that it's working in tandem with the end-point  
18 percentage?

19 MS. MCGIVNEY: Yes.

20 Q Yes. And are you able to explain to me, like  
21 what's the relationship between the two? And I  
22 ask that because the mandate number, as I  
23 understand it, it's a number, it's a static  
24 number, as opposed to an end-point allocation  
25 percentage, and percentage is a variable number,  
26 can change year to year. So what is the  
27 relationship between the two of them? How are  
28 they used together?

29 MS. MCGIVNEY: The end-point outcome is looking at a  
30 percentage based on looking at a number of years  
31 and sort of a year period, and so then you can  
32 look at what the actual percentage might work out  
33 to be. That's going to be comprised of some of  
34 the more number-oriented FSC plus any share-based  
35 FSC or any share-based commercial. So it rolls it  
36 all up to look at what that percentage is over  
37 that period of years, assuming what those fixed  
38 numbers for the FSC that you're referring to, how  
39 they would be included within that.

40 Q Okay. And what confused me, when I was trying to  
41 understand how this system works, is if you've got  
42 both the static number of FSC allocation and you  
43 have a percentage which is variable, what happens  
44 in one of those years where there simply isn't  
45 enough fish to meet the percentage, so 30 percent  
46 of nothing is nothing, but you have this number  
47 that's static? So how does this cumulative system

1 of running both of these systems deal with that  
2 situation?

3 MS. MCGIVNEY: Well, you can't -- it can't be applied  
4 to a single year because of that factor of the  
5 variance, so you need to be looking at a period of  
6 years and looking at an average of what you're  
7 trying to achieve.

8 Q Okay. But the reality of life is that the year  
9 occurs, people -- First Nations have to fish, and  
10 if they're being told at the same time that  
11 they've got a percentage allocation as well as a  
12 static number allocation, and there's, you know,  
13 nothing left for -- like there's no fish for the  
14 percentage allocation, they're still left with the  
15 number, like what's the system?

16 MS. MCGIVNEY: Well, it's the same system that we have  
17 now. If the food, social, ceremonial allocations  
18 have a priority, most of those are in the context  
19 of an actual -- of a fixed number or a level, and  
20 that priority needs to be achieved first. So in a  
21 low run, if there's only that many fish, then  
22 that's the only fishery that would occur. Beyond  
23 that, the commercial fishery would be able to take  
24 place and that would be based on share base for  
25 both the aboriginal commercial as well as the non-  
26 aboriginal.

27 Q Okay. I'm going to come back to it a little bit  
28 later. I'm going to think about what you said.  
29 But now I'm going to move onto PICFI. Mr. Lunn,  
30 could you please pull up document 104. And now  
31 I've got questions for Ms. Stewart. Heiltsuk  
32 document 104. Thank you.

33 Ms. Stewart, this is an e-mail and it's from,  
34 it says, Julie Stewart, and it's got an address on  
35 it. Is this your e-mail? Is that your address,  
36 your e-mail address?

37 MS. STEWART: Yes.

38 Q Okay. And so is this an e-mail from you to Mr.  
39 Lamirande?

40 MS. STEWART: Yes, it does appear to be.

41 Q Okay.

42 MS. STEWART: I'm just reading it here.

43 Q Sorry. Just let me ask the question, because I'll  
44 read it through with you. Mr. Lamirande, who is  
45 he?

46 MS. STEWART: He's a colleague of mine. He works in  
47 our Program Policy Branch. He is with the treaty

1 side of the house.

2 Q Treaty side of the house, okay. And the date of  
3 this e-mail is November 23rd, 2010, and you'd  
4 agree with me that this date occurred after the  
5 commencement of these Commission hearings?

6 MS. STEWART: Yes.

7 Q Okay. Now, coming down to the e-mail, I'm going  
8 to skip that first paragraph, but I'm going to go  
9 to the second paragraph where it starts, "I need  
10 to talk to Sarah," do you see that?

11 MS. STEWART: Yes.

12 Q Okay. So it reads:

13  
14 I need to talk to Sarah about TAPD opposition  
15 to PICFI negotiations, and potential refusal  
16 to sign off on agreements because of  
17 incorporation of FSC future needs into  
18 coastwide allocation framework.

19  
20 Stop there. I'm just going to go back. Who's  
21 Sarah?

22 MS. STEWART: That's referring to Sarah Murdoch, who is  
23 the acting director of TAPD, Treaties and  
24 Aboriginal Policy Development.

25 Q Okay. And then further on in that sentence, where  
26 it reads:

27  
28 ... and potential refusal to sign off on  
29 agreements...

30  
31 What kind of agreements are we speaking of?

32 MS. STEWART: PICFI agreements.

33 Q Okay. So these are individual agreements with  
34 First Nations?

35 MS. STEWART: With either First Nations or First Nation  
36 aggregates who are PICFI groups.

37 Q Okay. And then there it says:

38  
39 ...because of incorporation of FSC future  
40 needs into coastwide allocation framework.

41  
42 Can you explain to me, what are you trying to  
43 convey there is the problem or the tension?

44 MS. STEWART: This is referring to some conversations  
45 that we were having between the PICFI group and  
46 the TAPD group around the -- around the  
47 application of the AFF, the Allocation Framework,

1 with respect to PICFI.  
2 Q Okay. And specifically, like what about the AFF  
3 would somehow affect the signing off of PICFI  
4 agreements?  
5 MS. STEWART: So as Kaarina said, we are taking into  
6 account the AFF as we move forward, and that is a  
7 consideration, and so TAPD looks at PICFI  
8 agreements with a view to what the impact is.  
9 Q I see. And when you say like considering the AFF,  
10 are you speaking about that holistically, or are  
11 you talking about particular aspects of the AFF,  
12 like we've talked about the end-point percentage,  
13 or are we talking more broadly than just the end-  
14 point percentage?  
15 MS. STEWART: In particular, the end-point  
16 percentage --  
17 Q Okay. So that was the tension --  
18 MS. STEWART: -- concept.  
19 Q Okay. But in this e-mail, then, the tension here,  
20 then, was the percentage is somehow causing some  
21 conflict in terms of signing off on these PICFI  
22 agreements; is that right?  
23 MS. STEWART: So let me just clarify that this was more  
24 around the process of getting agreements through  
25 the approval stages than it was anything  
26 substantive. It was a question of we were wanting  
27 to get agreements through and we were having some  
28 bottlenecks with respect to TAPD consideration of  
29 those agreements. So it's really a -- it was a  
30 process issue.  
31 Q I see. So then it goes on here and says, "We've  
32 got a real problem brewing," so what's the real  
33 problem brewing that you're trying to convey here?  
34 MS. STEWART: That we were having this bottleneck and  
35 we weren't able to get agreements out and, of  
36 course, some of those agreements were impacting on  
37 the ability of groups to go out and fish.  
38 Q Right. Okay. And did you eventually have a  
39 discussion with Mr. Lamirande?  
40 MS. STEWART: He sits right beside me, so we have a lot  
41 of conversations.  
42 Q So you sent him this e-mail? Okay. But did you  
43 have a discussion with Mr. Lamirande respecting  
44 this e-mail?  
45 MS. STEWART: Yes.  
46 Q Okay. And is that discussion any different than  
47 what you've been talking to me about?

1 MS. STEWART: I think we probably -- well, we were just  
2 talking generally about Coastwide Framework.  
3 Q Okay. Were the agreements eventually signed?  
4 MS. STEWART: I believe so. I can't remember the  
5 specific agreements that were getting caught in  
6 this bottleneck. I believe so.  
7 Q Okay. And what were the bottlenecks, just so I  
8 have some clarity?  
9 MS. STEWART: The fact that there are a number of  
10 approvals that are required for PICFI agreements  
11 which provide access, short-term access, for the  
12 PICFI applicant groups. There's a number of  
13 people who have to sign off on them and we were  
14 having a problem with getting agreements through  
15 the TAPD review --  
16 Q Mm-hmm.  
17 MS. STEWART: -- and moving along through the process.  
18 Q I see. Ms. Gaertner referenced the end of this  
19 PICFI program and how it -- there's a  
20 consideration for renewal of this program, and  
21 what I'm wondering is, the AFF, is that a  
22 consideration in determining whether PICFI is  
23 going to be renewed? I'll use the word "renewed"  
24 or "recreated".  
25 MS. STEWART: It would certainly be a consideration,  
26 and particularly with respect to what would the  
27 impact going forward be.  
28 Q Okay. And specifically, that end-point  
29 percentage, right?  
30 MS. STEWART: I would say the whole of the AFF.  
31 Q Okay. And so is that part of the holdup for why  
32 PICFI -- the PICFI number two hasn't, you know,  
33 been announced or occurred, is that there's --  
34 you're developing the AFF or you're waiting for  
35 the AFF or it has to do with the AFF?  
36 MS. STEWART: Well, I wouldn't say that there's any  
37 holdup because of the AFF. We're now in a  
38 situation where there's analysis that's ongoing.  
39 We are providing advice and options and analyses  
40 to senior management. Before a program can be  
41 established and before resources can be accessed  
42 for a new program or a renewed program there has  
43 to be a process where cabinet makes a decision.  
44 All of that still -- all of those considerations  
45 and whether or not there would be an option put  
46 forward to cabin that there be another PICFI,  
47 that's still all under discussion.

- 1 Q Okay. I'm back to Ms. McGivney. And what I'm  
2 asking you is: What was the span of time between  
3 formally beginning to consider and end-point  
4 cumulative allocation to actually coming up with  
5 the actual number itself and then putting it in  
6 effect. I'm assuming we're talking years. How  
7 many years are we talking; do you remember?  
8 MS. MCGIVNEY: Yeah, I can't remember.  
9 Q Okay. More than a year; more than two years; more  
10 than three years; as many as 10? Where's your  
11 ballpark?  
12 MS. MCGIVNEY: Sorry, moving from the concept that  
13 there needed to be some kind of end-point --  
14 Q Or identifying the end-point accumulation system  
15 as a possibility and then deciding that, yes,  
16 that's a great way to go, and then coming up with  
17 a number and now implementing it, what span of  
18 time are we talking about?  
19 MS. MCGIVNEY: I'd have to go back and look at the  
20 records in terms of the discussion, but like the  
21 concepts began, I'd say, probably -- it probably  
22 took two years since sort of the concept and then  
23 the decisions to the decision by the Minister.  
24 But that's kind of a rough estimate.  
25 Q Okay. That's fine. And I think what I'll do is  
26 I'm going to write a letter to your counsel and  
27 ask that question, then you can reflect back on  
28 that and answer it.  
29 Now, in the formative stages of  
30 considering --  
31 MR. TAYLOR: We'll reflect back on whether we'll answer  
32 it.  
33 MS. FONG: Always.  
34 Q Okay, so in the formative stages of considering an  
35 end-point allocation system, were First Nations  
36 consulted over this kind of system? And I do mean  
37 a formal consultation process.  
38 MS. MCGIVNEY: This is internal work that was done  
39 within the Department that was informed by a  
40 number of things in the past, one being the First  
41 Nations Fisheries Panel, the Panel report, the  
42 First Nations Fisheries Action Plan, all of our  
43 consultations with First Nations over the years,  
44 et cetera. And so that -- all of those things fed  
45 into the development -- were considerations in  
46 terms of moving forward with that, as well as the  
47 common table discussions.

1 Q Right. But in terms of the actual like end-point  
2 allocation system itself, there was no direct  
3 consultation on that, is what I'm hearing from  
4 you; that's right?

5 MS. MCGIVNEY: No.

6 Q Okay. And in terms of the percentage number  
7 itself, the number, there was no consultation on  
8 the number, itself, as well?

9 MS. MCGIVNEY: No.

10 Q Okay. And then this number, given that it's being  
11 used currently to negotiate FSC access, is this  
12 end-point percentage number disclosed to First  
13 Nations?

14 MS. MCGIVNEY: So it's not being used to negotiate  
15 current agreements. We're testing the  
16 negotiations in the levels that we do against to  
17 ensure that there's room, but there's a lot of  
18 factors in terms of how to implement, how to move  
19 forward with that, that are identified within the  
20 framework that there's more work to be done in  
21 terms of implementing and moving forward. What  
22 we're doing is we're -- when there are, as I said,  
23 these changes coming in, we're testing them  
24 against consistency with this so that it doesn't  
25 -- we don't do anything that isn't going to be  
26 inconsistent with the general outcome that's given  
27 by the AFF.

28 Q Right. And this testing of consistency against  
29 this percentage number, do you disclose that to  
30 First Nations, both the testing and the number?

31 MS. MCGIVNEY: No, it's an internal process because, up  
32 till now, this has been internal.

33 Q All right. And are you able to tell me why  
34 there's that lack of disclosure to First Nations?  
35 What's the rationale behind that?

36 MS. MCGIVNEY: This process was under development and  
37 the Minister had made the decision just prior to  
38 when the Cohen Commission was announced, and so  
39 then the decision was before advancing further on  
40 the AFF in terms of the -- developing the ideas  
41 further or advancing the specifics that we would  
42 await the outcome of the Commission and be  
43 informed by that in terms of how to move forward  
44 into the future.

45 Q Okay. Mr. Lunn, could we go back to the  
46 Aboriginal Fisheries Framework, and while you're  
47 doing that, I'm just going to ask Ms. McGivney:



1 Is there a plan to disclose the end-point  
2 percentage number or that end-point percentage  
3 system to First Nations, currently?

4 MS. MCGIVNEY: I don't think there's been a plan to  
5 disclose it or not to disclose it. That hasn't  
6 been determined yet. As I said, the decision had  
7 just been made by the Minister, but I think if you  
8 look towards the end of the Aboriginal Fisheries  
9 Framework - I think it's almost at the every end  
10 section - it does refer to developing it. It's  
11 the next page, I believe, please. Sorry, the next  
12 page. So the last bullet:

13  
14 Following the process of policy development  
15 and engagement, the Minister...will seek any  
16 necessary policy or financial approvals...as  
17 required.

18  
19 So the content is that there would likely, as DFO  
20 does with the majority of its work, would be some  
21 kind of engagement around the elements of the  
22 framework.

23 Q Okay. Since we're there, Mr. Lunn, could you  
24 scroll up the page, and I'm looking for the first  
25 bullet on that page where it reads, "Under the New  
26 Fisheries Arrangement component," okay? So Ms.  
27 McGivney:

28  
29 Under the New Fisheries Arrangement component  
30 of the Framework, DFO will adopt a  
31 differentiated approach for treaty  
32 settlements, with the scale and scope of a  
33 treaty group's involvement in collaborative  
34 decision making...differing depending on the  
35 size of the treaty group and with allocation  
36 arrangements varying depending upon the  
37 species and their current management regimes.

38  
39 Am I understanding it right, that DFO is going to  
40 treat small treaty groups differently from large  
41 treaty groups?

42 MS. MCGIVNEY: Well, the concept in this is that  
43 because of the details and the way that the  
44 fisheries treaty settlements were going, that we  
45 can better manage the fishery for sustainability  
46 in terms of different kinds of management  
47 arrangements. So when dealing with very, very

1 small groups within a network of a fishery where  
2 there's many other groups that aren't part of that  
3 treaty, what we might be able to provide in that  
4 agreement might be a little less or require some  
5 different connections to those other groups than a  
6 system where you may have a whole watershed of all  
7 of the First Nations within that agreeing to a  
8 common treaty that then they would be able to have  
9 greater treaty arrangements that would relate to  
10 the broader management of the fishery. So the  
11 concept is that you would have a different  
12 approach based on what aligns with the fisheries  
13 management as well as with the various treaty  
14 groups.

15 Q Right. And has it decided largeness or smallness,  
16 whether that's based on number of groups,  
17 aggregate of number of persons, mass of land  
18 covered by groups, like what does that mean, the  
19 largeness or smallness of a treaty group?

20 MS. MCGIVNEY: I think there's a lot to still be  
21 developed under this. It's a concept about  
22 fitting things towards what makes sense from a  
23 fisheries management perspective as well as what  
24 is being entered into from the treaty perspective.  
25 And there's a resources issue as well that comes  
26 into this in terms of the cost associated with  
27 delivering the treaty obligations.

28 Q Right. So when it says:

29  
30 ...with the scale and scope of a treaty  
31 group's involvement in collaborative decision  
32 making...differing depending on the size of  
33 the treaty group.  
34

35 I read that to mean the extent of co-management  
36 opportunities are going to -- for a First Nation  
37 are going to depend on the size of their treaty  
38 group; is that right? Like that's the idea, you  
39 get more co-management if you're bigger; you get  
40 less co-management if you're smaller?

41 MS. MCGIVNEY: Yes, but it's not just the size. I  
42 think it relates back to the fisheries management  
43 units and how they -- how much the management with  
44 that treaty group relies -- is potentially  
45 affecting the -- affecting other groups. So if  
46 you're able, as I said, to have a coordinated  
47 group and they were willing to come to a treaty

1 arrangement in a watershed that was managing  
2 particular stock, then the management elements  
3 wouldn't have to include as many others. It would  
4 still link -- need to have some linkages towards  
5 the broader, you know, the Tier 3 level, but you  
6 would have less of the individual bilateral  
7 arrangements.

8 Q So would it be your view that the smaller treaty  
9 groups are going to be -- they're going to be  
10 disadvantaged or penalized for just being smaller  
11 and not being given that level of co-management?

12 MS. MCGIVNEY: I don't think it's about penalizing the  
13 small groups, it's about managing the fishery and  
14 having those groups participate in the management  
15 processes that are necessary to get to sustainable  
16 fisheries.

17 Q I'm being given my five-minute warning here. Very  
18 quick question for Ms. Stewart, and Ms. McGivney,  
19 feel free to jump in quickly, which is that I've  
20 looked at that PICFI five-year plan which was  
21 brought to your attention in the last proceeding -  
22 we're not going to go there, because we don't have  
23 time - but it identifies a share-based option  
24 being contemplated by DFO for First Nations'  
25 fisheries arrangements. And as I understand it,  
26 that share-based option is what's referenced as  
27 well in the AFF under New Fishery Arrangement  
28 Options; is that right? Did I make that  
29 connection properly? That's the same option?

30 MS. STEWART: I think the share-based arrangement  
31 referred to with respect to PICFI is the  
32 Department's objective to explore a defined share  
33 or share-based mechanism for the management of  
34 salmon.

35 Q Right. And my question to you was: The five-year  
36 PICFI plan identifying that share-based option is  
37 the same share-based option that's being  
38 identified in the AFF?

39 MS. STEWART: No, they're different share-based  
40 options.

41 Q Okay.

42 MS. STEWART: The option in PICFI, or the share -- the  
43 reference to share-based in PICFI is referring to  
44 a change from the present mechanisms that we use  
45 for managing salmon fisheries, particularly with  
46 respect to sockeye, where there's a total  
47 allowable catch that is managed through control on

1 effort, to a new way of managing, where it would  
2 be a percentage-based approach where -- buttressed  
3 by strong monitoring, catch monitoring and  
4 reporting, so that participants in a commercial  
5 fishery would fish to a share, rather than having  
6 an open -- rather than a management regime where  
7 we open the fishery, everybody fishes, but there's  
8 not sort of a share of the TAC that's assigned to  
9 a licence, per se. So that reference in the five-  
10 year plan is to define shares as one of the  
11 objectives of PICFI, and that's why we're using  
12 PICFI resources to explore demonstration fisheries  
13 that would -- where we could explore those  
14 mechanisms.

15 MS. FONG: Okay. I see I'm running out of time. I  
16 still have a significant number of questions and  
17 documents which I need to exhibit. And Mr.  
18 Registrar, if I could please exhibit that e-mail,  
19 the one from Julie Stewart.

20 THE REGISTRAR: Yes, your document number 4, yes.

21 MS. FONG: So what Heiltsuk will be asking for are some  
22 answers to written questions and also submitting  
23 our documents in writing, if we can manage that.

24 MR. MCGOWAN: Mr. Commissioner, it might be an  
25 appropriate time for me to rise and address this  
26 issue. I don't have an objection to what Ms. Fong  
27 is requesting. There are a couple of other  
28 participants who had requested allocations after  
29 the time allocations were already handed out, and  
30 recognizing that there was not likely to be any  
31 time for them to ask their questions orally, have  
32 asked that I communicate to you their desire to  
33 submit written questions to be answered by this  
34 panel.

35 Mr. Harvey, for one of the commercial groups,  
36 is one, and Ms. Dion, who had planned to be here,  
37 but I think recognized that there was not  
38 sufficient time for her to ask her questions  
39 orally, had indicated that she may seek to do so  
40 in writing.

41 I would suggest a procedure whereby Ms.  
42 Fong's additional questions, and anybody else who  
43 didn't ask or didn't have sufficient time, provide  
44 their questions in writing, but perhaps an interim  
45 step of an opportunity of circulating them to  
46 counsel for objections, if necessary.

47 THE COMMISSIONER: I would not be encouraging written

102

PANEL NO. 54

Cross-exam by Ms. Fong (HTC)

Cross-exam by Mr. Taylor (CAN)

1           questions, Mr. McGowan. I understand Mr. Harvey  
2           has --

3 MR. MCGOWAN: Yes.

4 THE COMMISSIONER: -- sent you some questions, which  
5           you're going to circulate to the participants for  
6           their reaction, or their views, I should say, and  
7           I'm not, at this point, granting leave to Ms. Fong  
8           to provide written questions. I think she can  
9           submit them to you and you can circulate them to  
10          the participants and I can hear any views that  
11          they might have with respect to whether those  
12          questions should be put to these witnesses in  
13          writing. And I say that because it places a  
14          burden on the witnesses and on counsel with regard  
15          to answering written questions. So I'm not saying  
16          they can't be done that way, I'm just saying there  
17          should be an opportunity for participants to  
18          respond.

19 MR. MCGOWAN: Yes, Mr. Commissioner. I'm sure counsel  
20          will bear in mind your comments regarding the  
21          burden and consider only those questions that are  
22          absolutely essential.

23 MS. FONG: Yes, Mr. Commissioner. Thank you very much.  
24          Those are my questions.

25 THE REGISTRAR: Ms. Fong, your document number will be  
26          1758.

27  
28                   EXHIBIT 1758: E-mail from Julie Stewart to  
29                   Robert Lamirande, Subject: PICFI and  
30                   Coastwide Framework, dated November 23, 2010  
31

32 MS. FONG: Thank you.

33 MR. TAYLOR: I have some re-direct, and it all comes  
34          out of today's evidence, and I think they're all  
35          for you, Ms. McGivney.  
36

37 CROSS-EXAMINATION BY MR. TAYLOR, continuing:  
38

39 Q          Mr. Eidsvik asked you some questions this morning  
40          about common rules versus different rules for  
41          different fishers, and he referred to New Zealand  
42          and Alaska and the Maritimes in Canada, and then  
43          brought you back to the BC Coast; do you recall  
44          that --

45 MS. MCGIVNEY: Yes.

46 Q          -- evidence, generally? Now, this was in the  
47          context of PICFI. Just to be clear, as I

September 2, 2011

- 1 understand it, and there's been mention made of  
2 this, there are two programs, are there not, that  
3 involve, at least as part of these -- part of what  
4 they do, the buying of licences from fishers, the  
5 Federal Government buying licences from the  
6 fishers and then, through a process, transferring  
7 the, what I'll call, freed-up capacity over to  
8 First Nations as communal licences, and that's an  
9 element of both PICFI and the Allocation Transfer  
10 Program; is that right?
- 11 MS. MCGIVNEY: Correct.
- 12 Q And the Allocation Transfer Program, I think, has  
13 about 75 million dollars for that purpose, in it?
- 14 MS. MCGIVNEY: The Allocation Transfer Program had an  
15 annual budget of about five, six million  
16 dollars --
- 17 Q Okay.
- 18 MS. MCGIVNEY: -- for Pacific Region, and so it's  
19 probably totalling that since the beginning in  
20 '93. I don't have the exact number, but...
- 21 Q All right. And that's still going on?
- 22 MS. MCGIVNEY: Yes.
- 23 Q And PICFI is a five-year program that, I think you  
24 said this morning, that about 100 million was  
25 available for licences, buy and transfer, and  
26 about 84 has been paid or spent? Maybe Ms.  
27 Stewart wants to answer that.
- 28 MS. STEWART: Yes. About 86 --
- 29 Q All right.
- 30 MS. STEWART: -- at last count. There are some  
31 additions, but...
- 32 Q Okay. And then, to be clear, these purchases of  
33 licences that are then retired, and then the  
34 capacity, as I call it, is moved to a First  
35 Nation, those purchases are on a willing sell or  
36 willing buyer basis, aren't they?
- 37 MS. MCGIVNEY: Correct.
- 38 Q They're voluntary?
- 39 MS. MCGIVNEY: Correct.
- 40 Q And then, with PICFI, and Mr. Eidsvik, I think,  
41 was primarily focused on that, do I understand  
42 that PICFI is, if you like, testing out economic  
43 opportunity fisheries, that's one of the  
44 objectives for First Nations?
- 45 MS. STEWART: It's one of the objectives.
- 46 Q And the licences that are retired and then  
47 capacity made available for First Nations, some of

- 1           that goes inland -- in river and some of it stays  
2           in the marine area; is that right? In other  
3           words, some of the reallocated capacity stays in  
4           the marine area and some of it goes into the  
5           river?
- 6   MS. STEWART: Yes, under PICFI we're relinquishing  
7           access in a number of fisheries, groundfish,  
8           shellfish, et cetera, as well as salmon.
- 9   Q   And for the marine side of it -- well, firstly, do  
10           you know the percentages of this freed-up capacity  
11           that stays in the marine area versus what goes  
12           into the river?
- 13   MS. STEWART: Are you referring to salmon or to  
14           overall --
- 15   Q   Overall.
- 16   MS. STEWART: -- relinquishments?
- 17   Q   But if you know the information for overall and  
18           salmon specifically, you can say it.
- 19   MS. STEWART: I believe that about seven percent of the  
20           resources for relinquishment have gone towards  
21           salmon, if I'm not mistaken.
- 22   Q   Okay. I'm interested --
- 23   MS. STEWART: Sorry.
- 24   Q   -- in, at the moment, the division between marine  
25           and inland.
- 26   MS. STEWART: So to date of the salmon access that has  
27           been relinquished, it has, if not 100 percent,  
28           very close to it, been used to mitigate for the  
29           inland demonstration fisheries in aid of this move  
30           to defined share management regime.
- 31   Q   All right. And the amount beyond seven percent  
32           that's salmon is other species, I take it?
- 33   MS. STEWART: Yes.
- 34   Q   And where did that go, marine or inland?
- 35   MS. STEWART: So those would be --
- 36   Q   That would stay in the marine, because there's --  
37           it's salmon in-river and other species are in the  
38           marine; is that the idea?
- 39   MS. STEWART: Yes. Salmon is the only species that DFO  
40           manages that would be available for inland First  
41           Nations.
- 42   Q   And for the marine, which would be the other  
43           species, then, for this new capacity with new  
44           licences, firstly, those are communal licences  
45           that are given to the First Nations; is that  
46           right, as opposed to individuals?
- 47   MS. STEWART: Yes. No, they're licences issued under

- 1           the **Aboriginal Communal Fishing Licences Regs.**
- 2       Q     And the rules that would apply to those other
- 3           species marine licences, the new ones, those would
- 4           be the same rules as for other commercial fishers,
- 5           would they?
- 6       MS. STEWART: Yes. There are some differentiations
- 7           because of the way that the regulations have been
- 8           written. So for example, licences under the
- 9           ACFLRs, the **Aboriginal Communal Fishing Licences**
- 10          **Regulations**, allow for the designation of the
- 11          actual individuals who will carry out the fishing
- 12          by the aboriginal organization --
- 13       Q     All right.
- 14       MS. STEWART: -- so there are some differentiations,
- 15          but largely, yes.
- 16       Q     But in principle, you're taking old marine
- 17          capacity for non-salmon species, buying it and
- 18          putting it into communal First Nation licences,
- 19          and putting them back in the same marine area or
- 20          in the generally same marine area?
- 21       MS. STEWART: Yes. And the objective is that there
- 22          would be integration of the Aboriginal Communal
- 23          Commercial Fishing --
- 24       Q     Right.
- 25       MS. STEWART: -- and the fleet at large, so fishing
- 26          under common rules.
- 27       Q     All right. So you're staying in the same
- 28          geographic area. And that's essentially the same
- 29          thing as what was done in the Maritimes, isn't it?
- 30       MS. STEWART: Yes, under the MRI, the Marshall Response
- 31          Initiative.
- 32       Q     Right. And in New Zealand as well?
- 33       MS. STEWART: I'm not a hundred percent familiar with
- 34          the --
- 35       Q     That's fine, then.
- 36       MS. STEWART: -- New Zealand --
- 37       Q     In terms of the freed-up capacity under PICFI
- 38          that's now moved in-river, you're moving it into a
- 39          different geographic area, of course, and,
- 40          therefore, rules are set that fit that different
- 41          geographic area; is that the situation?
- 42       MS. STEWART: For example, the techniques and the gear
- 43          that would be used in those fisheries, inland
- 44          would be quite different from that used in coastal
- 45          salmon fisheries.
- 46       Q     You don't have a seine boat in Kamloops, for
- 47          example?



- 1 MS. STEWART: Well, actually, there is beach seining.  
2 Q All right. You don't have a big boat, though?  
3 MS. STEWART: There's no big boats in those lakes, no.  
4 Q Except for the fast ones that go up and down the  
5 river with skiers, I guess. Moving on, though, is  
6 it the case, though, that when you have the new  
7 licences, the same conservation, escapement, TAC  
8 priorities, all of that's the same under the new  
9 licences, the same principles apply under the new  
10 licences as what existed under the old licences?  
11 MS. STEWART: In terms -- the escapement numbers don't  
12 change. Those are set as part of the broader  
13 management, and they're set in the Integrated  
14 Fisheries Management Plan, so those numbers don't  
15 change. The catch that's associated with those  
16 licences are accounted for in the broader  
17 management. I'm not sure I'm answering your  
18 question.  
19 Q Well, I just wondered if there's any differences  
20 in principles or objectives for conservation, or  
21 priority or TAC that would apply just because you  
22 moved a licence capacity from the marine area  
23 under the old one, now bought it and moved it  
24 inland, you still have the same conservation  
25 objectives and priorities of fishery that would  
26 apply, don't you?  
27 MS. STEWART: No, and in fact, the whole raison d'état  
28 for doing these demonstration fisheries inland is  
29 because of conservation concerns and the mixing of  
30 weak stocks with the stronger stocks, and the fact  
31 that coastal fisheries are not, from time to time,  
32 are not able to fish --  
33 Q All right.  
34 MS. STEWART: -- because of the weak stocks.  
35 Q Right.  
36 MS. STEWART: So this allows us to target and --  
37 Q Inland you can have targeted fisheries?  
38 MS. STEWART: You can avoid the conservation concerns a  
39 whole lot easier when you're fishing in terminal  
40 or near terminal fisheries.  
41 Q All right. Thank you. One final question, Ms.  
42 McGivney. Mr. Lunn, I didn't alert you, I'm  
43 sorry, 1744, it's a briefing note from the 205.  
44 Ms. DeForrest put this briefing note that's coming  
45 up -- now up on the screen to you, Ms. McGivney.  
46 On page 2, there is a statement in that second --  
47 third bullet:

1  
2           Current allocations have not been based on a  
3           consistent policy framework.  
4

5           Ms. DeForrest asked if you would agree with that  
6           and you said, "I don't agree," and then she moved  
7           onto another question and you didn't have a chance  
8           to expand or explain. When you say you don't  
9           agree with that statement, can you just explain  
10          your answer?

11       MS. MCGIVNEY: While I think we do have a consistent  
12          policy framework and a large part of what follows  
13          in that paragraph includes that, we have some  
14          basic elements which are conservation is a key  
15          priority, that -- conservation is paramount, that  
16          FSC has a priority in terms of management, and  
17          that fishing will occur in areas fished  
18          historically. That's the main policy guidance.  
19          And then we consider a number of individual  
20          situations for that particular First Nation, which  
21          are -- many of them are outlined: What are the  
22          available stocks; What's the capacity to fish;  
23          What's the historic catches; the specific  
24          circumstances. And so the policy framework is  
25          that there's that broad-guiding policy and we look  
26          and adjust based on the specific circumstances of  
27          the First Nation and --

28       Q       All right.

29       MS. MCGIVNEY: -- the information available.

30       MR. TAYLOR: Thank you. Those are my questions.

31       MR. MCGOWAN: Thank you, Mr. Commissioner. I see that  
32          it's four o'clock. I should just say, my  
33          colleague, Ms. Chan, alerted me to the fact that  
34          when I suggested perhaps written questions, the  
35          way I addressed it may have suggested I was  
36          opening it up to those who had already asked and  
37          concluded their questioning. That was not my  
38          intention, and if it sounded like that, I  
39          certainly apologize. I was certainly limiting it  
40          to those two who had alerted me and addressed that  
41          with me ahead of time, and perhaps if Ms. Fong had  
42          a question she didn't get to ask. But I apologize  
43          if it sounded like I was attempting to open it up  
44          to the room.

45       THE COMMISSIONER: Thank you, Mr. McGowan. First of  
46          all, I want to thank all of the counsel in the  
47          room for your cooperation. Ms. DeForrest, I'm

1           sorry?

2 MS. DeFORREST: Sorry, Mr. Commissioner, I'm not sure  
3           of the process. Just a question has arisen for me  
4           just with respect to my friend's redirect on that  
5           last exhibit. I'm just not sure if I have an  
6           opportunity to --

7 THE COMMISSIONER: I think not, Ms. DeForrest.

8 MS. DeFORREST: Thank you. Sorry. I wasn't sure.  
9           Thank you.

10 THE COMMISSIONER: I'd like to thank counsel who are in  
11           the room. Ms. Gaertner and Mr. Taylor, for sure,  
12           have had a long week, I know that, and all of you  
13           have had long weeks, but perhaps in other  
14           locations. So I thank you all for your  
15           cooperation and particularly for Commission  
16           Counsel, who prepared for today, and also the last  
17           time that these two panel members were here, and I  
18           want to thank them for coming back. We never know  
19           whether people are really going to return, but you  
20           did and we're very grateful for that and thank you  
21           so much. I think you've travelled a distance, one  
22           of you has, anyway, so thank you for doing that.  
23           It's a long weekend. Take advantage of it.  
24           We'll see you next week, some of you, anyway.  
25           Thanks very much.

26 THE REGISTRAR: The hearing is now adjourned for the  
27           day and will resume Tuesday, September 6th, at  
28           10:00 a.m.

29  
30                           (PROCEEDINGS ADJOURNED TO TUESDAY, SEPTEMBER  
31                           6, 2011, AT 10:00 A.M.)  
32  
33  
34

35                           I HEREBY CERTIFY the foregoing to be a true  
36                           and accurate transcript of the evidence  
37                           recorded on a sound recording apparatus,  
38                           transcribed to the best of my skill and  
39                           ability, and in accordance with applicable  
40                           standards.  
41  
42  
43

44                           \_\_\_\_\_  
45                           Pat Neumann  
46  
47

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

7  
8  
9  
10 \_\_\_\_\_  
11 Diane Rochfort  
12  
13

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

20  
21  
22 \_\_\_\_\_  
23 Susan Osborne  
24  
25  
26  
27

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

34  
35  
36 \_\_\_\_\_  
37 Karen Hefferland  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47