

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:

Hearing Room, 12th Floor
BC Securities Commission
701 West Georgia Street
Vancouver, B.C.

Wednesday, November 9, 2011

Tenue à :

Salle d'audience du 12^e étage
BC Securities Commission
701, rue West Georgia
Vancouver (C.-B.)

le mercredi 9 novembre 2011



Errata for the Transcript of Hearings on November 9, 2011

Page	Line	Error	Correction
5	28	they're	their
5	38	I know for the precautionary approach that if	I'm all for the precautionary approach, but if
9	37	the brother Gavin Hume	the brother of Gavin Hume
14	7	This was, to me, one of the two	This was to be one of the two
15	15	Stock Specific Trends and Productivity	Stock Specific Trends in Productivity
15	37	Exhibit 299	Exhibit 399
16	38	this right in 2010,	this, write in 2010,
20	35-36	use the same fleet	use the seine fleet
21	29	So we recognized	So they recognized
43	11	Justice Boldt	Justice Orrick

APPEARANCES / COMPARUTIONS

Brian Wallace, Q.C. Wendy Baker, Q.C. Patrick McGowan	Senior Commission Counsel Associate Commission Counsel Associate Commission Counsel
Mitchell Taylor, Q.C. Tim Timberg	Government of Canada ("CAN")
Clifton Prowse, Q.C. Boris Tyzuk, Q.C. Tara Callan	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")
Tim Leadem, Q.C.	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")

APPEARANCES / COMPARUTIONS, cont'd.

Don Rosenbloom	Area D Salmon Gillnet Association; Area B Harvest Committee (Seine) ("GILLFSC")
No appearance	Southern Area E Gillnetters Assn. B.C. Fisheries Survival Coalition ("SGAHC")
Christopher Harvey, Q.C.	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")
Brad Caldwell	Maa-nulth Treaty Society; Tsawwassen First Nation; Musqueam First Nation ("MTM")
John Gailus Robert Clifford (articled student)	Western Central Coast Salish First Nations: Cowichan Tribes and Chemainus First Nation Hwlitsum First Nation and Penelakut Tribe Te'mexw Treaty Association ("WCCSFN")
Brenda Gaertner Leah Pence	First Nations Coalition; First Nations Fisheries Council; Aboriginal Caucus of the Fraser River; Aboriginal Fisheries Secretariat; Fraser Valley Aboriginal Fisheries Society; Northern Shuswap Tribal Council; Chehalis Indian Band; Secwepemc Fisheries Commission of the Shuswap Nation Tribal Council; Upper Fraser Fisheries Conservation Alliance; Other Douglas Treaty First Nations who applied together (the Snuneymuxw, Tsartlip and Tsawout); Adams Lake Indian Band; Carrier Sekani Tribal Council; Council of Haida Nation ("FNC")

APPEARANCES / COMPARUTIONS, cont'd.

Joseph Gereluk	Métis Nation British Columbia ("MNBC")
Tim Dickson	Sto:lo Tribal Council
Nicole Schabus	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")
Ming Song	Heiltsuk Tribal Council ("HTC")

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1 Vancouver, B.C. /Vancouver
2 (C.-B.)
3 November 9, 2011/le 9 novembre
4 2011
5

6 THE REGISTRAR: The hearing is now resumed.

7 THE COMMISSIONER: Mr. Harvey.

8 MR. HARVEY: Yes.
9

10 SUBMISSIONS FOR WEST COAST TROLLERS AREA G ASSOCIATION;
11 UNITED FISHERMEN and ALLIED WORKERS' UNION BY MR.
12 HARVEY:
13

14 MR. HARVEY: Good morning, Mr. Commissioner. Mr.
15 Commissioner, it's no small task to condense 125
16 days of evidence into one hour, so I'm going to
17 jump right in. I have prepared a booklet of the
18 exhibit excerpts. Mr. Lunn has an extra copy
19 there, and I have extra copies here if anyone else
20 would like to...

21 My goal and my clients' goal, Mr.
22 Commissioner, in this Commission is in fulfilling
23 the purpose which is reflected in the terms of
24 reference, so I'd like to start, Mr. Lunn, with
25 page 1 of my booklet which is the terms of
26 reference and to note -- and I've highlighted some
27 of the passages there in the preamble. The
28 preamble recites that:
29

30 ...the decline in sockeye salmon stocks in
31 the Fraser...has necessitated the closure of
32 the fishery for a third [successive]
33 consecutive year...
34

35 That emphasizes what brought this Commission into
36 being.
37

38 ...that decline has been attributed to the
39 interplay of a wide range of factors --
40

41 And you've heard much about that.
42

43 -- including --
44

45 And then they're listed. Then it says:
46

47 Whereas the Government of Canada wishes to

1 take all feasible steps to identify the
2 reasons for the decline --

3

4 And then it carries on. You're charged with
5 making -- you're directed in paragraphs 1 a., b.
6 and c., and c. in particular emphasizes:

7

8 ...to investigate and make independent
9 findings of fact --

10

11 In other words, they're to be your findings of
12 fact.

13

14 (i) the causes for the decline...

15

16 And then over the page:

17

18 ...to develop recommendations for improving
19 the future sustainability of the sockeye
20 salmon fishery in the Fraser River
21 including...changes to the policies...

22

23 Et cetera, in relation to the management of the
24 fishery.

25

26 So, Mr. Commissioner, you're expected to do,
27 really, three things. You're expected to look
28 beyond the range of factors that the decline has
29 been attributed to. You're expected to identify
30 the reasons for the decline, and you're expected
31 to develop recommendations for the future
32 sustainability of the fishery.

33

34 The first point I take from this is that your
35 focus is intended to be on sustaining the fishery,
36 not the fish. Harvesting, not preserving the
37 fish, is the point of the exercise. Therefore,
38 the focus of my submission is on the concept of
39 maximum sustainable yield, MSY, which goes right
40 through my submissions 'cause that's the focus of
41 your mandate as I interpret it, and I hope what I
42 say may be of some assistance in fulfilling that.

43

44 The problem - Mr. Lunn, this is Exhibit 573A,
45 page 6, and I've -- sorry, this is a page which I
46 haven't got in my booklet. It's page 6 from 573A
47 and it -- oh, I'm sorry, it's not the graph number
6, it's page number 6 which is graphs 9 and 10, I
think. Yes, that page.

47

This page illustrates the problem, Mr.

1 Commissioner. It's on the screen. It shows the
2 total returns in the top graph increasing.
3 There's a problem obviously after the 1958 run
4 which I'll touch upon, and then the runs are
5 gradually built up, as Mr. Eidsvik demonstrated,
6 to '92 levels, and then they've been dropping ever
7 since until the 2010 level.

8 If we look carefully - maybe Mr. Lunn could
9 highlight at the bottom part of this page - what
10 you see in the -- I'm sorry, Mr. Commissioner,
11 this is on the screen and not in my booklet. It
12 should be in my booklet 'cause it's page 6 of
13 Exhibit 573A, it's an important page.

14 The upper left-hand graph shows the total
15 return index peaking '92, '93, and then dropping.
16 That's the problem. The percentage of run
17 harvested is the upper right-hand graph, and
18 that's the problem to the fishery. The bottom
19 left-hand graph illustrates the problem in
20 management, in my submission, because you can see
21 the escapement levels going up to '92, and I say
22 that's what - by the essential laws of biology -
23 has caused the decline. But the escapement levels
24 are held up, they're increased until the early
25 2000s, and then they stop (sic) dropping.

26 In 2005, they're still above historic
27 averages, and 2005 is the year that led to the
28 disastrous 2009 run. So the escapement levels are
29 still above historic averages. It's not until
30 2006 that escapement levels return to historic
31 averages. That's an essential --

32 THE COMMISSIONER: Where is this page from, Mr...?

33 MR. HARVEY: It's 573A, Exhibit 573A, page 6. It
34 should be in the booklet 'cause I've got other
35 graphs from the same presentation.

36 THE COMMISSIONER: All right. Thank you.

37 MR. HARVEY: That is the Pacific Salmon Commission
38 workshop. It's Mike Lapointe's slides from the --
39 he's from the Salmon Commission.

40 So just to outline where I'm going, I'll deal
41 only with two points in these oral submissions,
42 both relating to the MSY concept. The first
43 relates to the constitutional and statutory
44 framework, and I say that should cause DFO to
45 focus on use rather than conservation per se.

46 I should say that throughout these
47 submissions, I'll be making the point that the DFO

1 has lost its vision, it's become an aimless
2 department of government. Insofar as it has a
3 vision of a primary goal at all, it is
4 conservation of biodiversity of fish rather than
5 sustaining the fishery for the benefit of
6 Canadians. I say that's inconsistent with the
7 statutory mandate.

8 Second main point I'll deal with is biology,
9 and I will say that it requires some understanding
10 on your part of the basic biological attributes of
11 sockeye to understand what went wrong since DFO
12 took over from the old Salmon Fisheries
13 Commission, and what action is urgently required
14 to restore the fishery.

15 The constitutional statutory mandate is
16 covered starting at paragraph 4 of my written
17 submissions, which I won't turn to now. I say
18 this provides the lens through which the
19 Commission should review and assess the work of
20 DFO. DFO is not a federal Department of Parks,
21 nor is it the equivalent to the Department of
22 Trade and Industry, but it's closer to Trade and
23 Industry, I say, than it is to Parks. The best
24 analogy perhaps would be with the Provincial
25 Department of Forestry, because forests are
26 similarly a renewable resource. Conservation of
27 forests is an important component of the mandate
28 of the Department of Forestry, but it's not an end
29 in itself. Sustainable use is the end or the goal
30 of the Department of Forests, and so it should be
31 for Fisheries.

32 Conservation, of course, is relevant to the
33 sustainable part of that equation, but it's the
34 use of the forests, and equally the fisheries, by
35 humans and the contribution to the GDP of B.C. and
36 Canada that's the primary consideration.

37 Canada responds to these submissions by
38 referring to, among other things, what the Supreme
39 Court of Canada said in *Comeau's Sea Foods*. I'll
40 read it:

41
42 ...the Minister's duty to manage, conserve
43 and develop the fishery on behalf of
44 Canadians in the public interest.

45
46 But, Mr. Commissioner, the words are
47 "conserve and develop", which is totally different

1 than "conserve or develop". One gives DFO the
2 option of conserving fish and ignoring the
3 fishery, and the other doesn't. I say that DFO
4 does not have the option of putting conservation,
5 per se, ahead of sustainable use.

6 Canada further quotes from the preamble to
7 the **Oceans Act**, says:
8

9 Canada holds that conservation...is of
10 fundamental importance to maintaining
11 biological diversity and productivity in the
12 marine environment.
13

14 Well, again, the wording is "biological diversity
15 and productivity", not "or".

16 Mr. Commissioner, this is not just quibbling
17 words. It's an important distinction. In nature,
18 survival of the fittest rules in the Darwinian
19 theory, and as we get into, if we are, an area of
20 dramatic climate changes, stronger stocks, in the
21 Darwinian sense, will have a better chance than
22 weaker stocks. And the evidence before this
23 Commission indicates -- gives some indication of
24 what are the stronger stocks and what are the
25 weaker stocks. Some witnesses have suggested we
26 should be propping up the weaker stocks. They
27 must be protected regardless of costs because
28 they're biological diversity may somehow save the
29 fishery in the future.

30 I say that's totally unrealistic. The Cultus
31 sockeye will never replace the Quesnel, Shuswap or
32 Chilko CUs. Sockeye simply can't be moved around
33 the province. We know that because of their
34 genetic makeup. We must remember, then, to
35 approach this question with pragmatism and
36 perspective. I say that DFO appears to have lost
37 that.

38 I know for the precautionary approach that if
39 someone suggests that we should sacrifice hundreds
40 of millions of dollars of GDP every year for 100
41 years to guard against the eventuality that we may
42 need weak stocks to restock the Fraser fishery in
43 100 years' time, I say that's a preposterous
44 suggestion.

45 Mr. Leadem says that I'm suggesting that
46 sustainability can be achieved without
47 conservation. That's not what I'm suggesting.

1 Sustainability obviously has to have due regard
2 for conversation, sustainable use has to have due
3 regard for conservation. What I say is that
4 sustainable use cannot be achieved by focusing on
5 conservation rather than use or yield. I say that
6 the statutory mandate requires DFO to focus on
7 yield and on conservation insofar as it is
8 supportive of use. So conservation is a
9 supportive goal rather than a goal in itself.
10 It's not the decline of genetic diversity that led
11 to this Commission. It's the decline of the
12 fishery.

13 Mr. Leadem refers to various references in
14 the **Fisheries Act** to fish, but he overlooks the
15 constitutional context. He suggests that the
16 Court of Appeal decision in **MacMillan Bloedel** was
17 obiter, and he prefers lower court decisions from
18 other jurisdictions. But those decisions all
19 affirm -- and I'll quote one of the standard
20 phrases [as read]:
21

22 That the federal power in relation to
23 fisheries is concerned with the protection
24 and preservation of fisheries as a public
25 resource.
26

27 Not one of the cases says that the
28 preservation of fish, without any link to actual
29 or potential fisheries, is within federal power.
30 If that were so, the goldfish in my goldfish bowl
31 at home would be subject to federal jurisdiction
32 because they're fish. There's no link between
33 those fish and the fisheries, so they are simply
34 outside federal jurisdiction and they're within
35 provincial jurisdiction under the **Wildlife Act** as
36 are probably most of the exotic fish species in
37 the aquarium. So it's not "fish" that is the
38 constitutional and statutory focus; it's
39 fisheries.

40 At paragraph 16 of my written materials, my
41 written submissions, I refer to another important
42 statute. I don't think it's necessary to bring it
43 up on the screen, but the statute is the -- I say
44 this in paragraph 16:
45

46 The human-centric purpose of the **Fisheries**
47 **Act** is further supported by amendments in

1 1995 to the **Auditor General Act** that required
2 departments and agencies, including DFO, to
3 develop their own sustainable development
4 strategies. This led in 2008 to the passage
5 of the **Federal Sustainable Development**
6 **Act**...the creation of...Strategy - all of
7 which require DFO to:
8

9 And I quote from the Strategy:

10
11 Deliver an integrated fisheries program that
12 is credible, science-based, affordable,
13 effective and contributes to sustainable
14 wealth for Canadians.
15

16 Now, that is an important statute. It's been
17 ignored by Canada and by all the other
18 participants as far as I can see. It encapsulates
19 the true -- what should be the true focus under
20 **The Fisheries Act** and it's a governing strategy
21 developed under a different statute.

22 There are similar principles set out in the
23 treaty, both -- I deal with the two treaties, the
24 United Nations Fisheries Agreement -- this is at
25 paragraph 25 of my submissions -- I'm sorry, 23 of
26 my submissions is the UNFA. It incorporates the
27 principle of sustainability and optimum
28 utilization. At page 25 (sic), I turn to the
29 Pacific Salmon Treaty, and it similarly deals with
30 optimum production. You can see under
31 "Principles", Article III:
32

33 With respect to stocks subject to this
34 Treaty, each Party shall conduct its
35 fisheries and its salmon enhancement programs
36 so as to:
37

- 38 (a) prevent overfishing and provide for
39 optimum production...
40

41 The following page, I set out another section of
42 the treaty regarding implementation of Article
43 III, where I've got 1(b).
44

45 The principal goals of the Treaty are to
46 enable both countries, through better
47 conservation and enhancement, to increase

1 production...
2

3 That's the focus of the treaty, the Salmon Treaty,
4 as it of the United Nations Treaty.

5 A final point on optimum production that I'd
6 like to make is this: Both Canada and B.C.
7 suggest -- support the notion that Canada should
8 share its management responsibilities with
9 stakeholders. I say, Mr. Commissioner, that this
10 is a dangerous notion. It's contrary to the
11 sovereign constitutional authority of DFO, and
12 that responsibility cannot be shut down or
13 abdicated. I like the word abdicated. That's the
14 term that John Fraser likes to use, and he used it
15 in his 1995 report. The responsibility rests with
16 DFO. That's a sovereign constitutional
17 responsibility.

18 It's all very well to take soundings of the
19 views of stakeholders, but DFO is responsible and
20 accountable for what it does. It's no good for
21 managers to inform the Minister that any given
22 decision is acceptable because stakeholders, or
23 some stakeholders agree with it. In my clients'
24 view, this put -- my clients' view this process is
25 a means of avoiding responsibility and
26 accountability by DFO. It's not just prejudicial
27 to minority groups. It's an abdication of
28 responsibility and accountability.

29 The evidence you've heard, Mr. Commissioner,
30 indicates that the reason why most stakeholders
31 support consultation is because they distrust DFO,
32 and there seems to be good grounds for that. But,
33 in my recommendations, I propose another means of
34 ensuring trust, and that's an audit procedure or
35 an adaptive management retrospective process
36 whereby someone in the Auditor General's
37 Department would do a review and report to
38 Parliament or the Cabinet each year on the
39 question whether DFO is achieving the maximum
40 sustainable benefit to Canadians from the fishery
41 resource.

42 In my written submissions, I suggest the
43 appointment of a Commissioner of Productivity
44 within the Auditor General's Department. There's
45 already a Commissioner for Sustainability which
46 covers off the conservation side. But what is not
47 covered off anywhere, and DFO is woefully

1 inadequate, is in dealing with socioeconomic
2 consequences of their actions.

3 If you look at the 2010 run, for example -
4 and I touched upon this in the limited time I had
5 to cross-examine the DFO panel in the final days
6 of the hearing - there was at least \$100 million
7 worth of foregone harvest in the Shuswap run
8 alone. That's just foregone harvest. It doesn't
9 take into account the density dependent effects
10 that are going to affect future harvests.

11 Nobody does a retrospective analysis of that.
12 Nobody puts in their report setting that out so
13 the government can see what wastage is taking
14 place here, what losses in terms of jobs and the
15 economy and the reasons for it. If there were
16 some sort of an audit, DFO would have to say,
17 "Well, we had to do that to protect Thompson River
18 coho," or whatever it was, the reasons for it.
19 All right, well, let's see what numbers you
20 protected and whether some other more cost-
21 effective means could be employed. So that's the
22 basic thinking behind that suggestion that I made.

23 To put this in context, Mr. Taylor asserts
24 that DFO is a science-based Department. I say
25 that's completely contrary to the evidence. DFO
26 is not a science-based Department at all. They're
27 a policy-based Department. They spend far more
28 time on policies, writing memos, than they do on
29 science. If it were science-based, their
30 scientists would have a much higher stature in the
31 Department. They'd be up there in the pantheon of
32 the Gods at DFO. People like Jeremy Hume would be
33 directing harvest strategies like the four senior
34 biologists in Alaska do with respect to the
35 Bristol Bay fishery.

36 I don't know if you know that Jeremy Hume is
37 the brother Gavin Hume. A cynic might say the
38 legal profession holds up better prospects for
39 good lawyers than the DFO does for good
40 scientists.

41 I'm not suggesting that, but I am suggesting
42 that it can't be said that DFO is a science-based
43 Department. The scientists do not direct harvest
44 strategies. The policy-makers do and it's based
45 largely on consultation with uninformed persons,
46 uninformed in the sense that they're lay people,
47 not scientists.

1 Mr. Commissioner, DFO, I say, suffers from a
2 systemic dysfunctionality. Unfortunately, no
3 recommendations by you for new policies will cure
4 that dysfunctionality. There has to be a major
5 change in the checks and balances that affect
6 DFO's actions. The only solution I can see, as
7 I've said, is for some sort of an outside audit.
8 John Fraser recommended that there be an audit of
9 conservation, and that is done quite well, but
10 there's got to be an audit of productivity.

11 Remember, Mr. Commissioner, that jobs and the
12 economy are said to be the first priority of
13 Canadians. That's what the present government
14 tells us every time they launch a new action.
15 Jobs and the economy are the first priority
16 certainly of the coastal communities in B.C., but
17 they are not the first priority of DFO which is
18 quite obvious from the evidence.

19 Consider for a moment the situation of fish
20 processors. They must be one of the few
21 industries in the world without any assurance of
22 supply of raw product. They can't raise their
23 prices to their suppliers to get more product.
24 They're completely at the mercy of DFO as are the
25 fishermen. They don't have what supply-managed
26 agricultural processors have, which is a quota-
27 based system that assures supply. They don't have
28 any market mechanism. They have nothing. It's
29 amazing that they've been able to continue to run
30 a viable business, particularly with DFO seemingly
31 having as its lowest priority the need of the
32 industry, fishermen, processors, and the need of
33 people to obtain food products. So something has
34 to be done about that. It requires, I say, a very
35 creative and strong recommendation on your part.

36 Mr. Commissioner, I've had a lifelong
37 connection with the fishing industry since I got
38 my first job in a fish plant a week after my 15th
39 birthday in 1955. I then spent some years on a
40 scout boat with the seine fleet on the Nass,
41 around the Charlottes, down the central coast,
42 spent seven years as a commercial fisherman. Then
43 throughout my legal career, I've represented
44 fishermen.

45 My greatest hope, I must say - and I echo
46 some of the feelings that Dennis Brown articulated
47 in his evidence - my greatest hope is that you can

1 do something effective in this Commission. The
2 model I look to is the MacDonald Royal Commission
3 on the economy. It was set up in 1982 by the
4 Trudeau government, reported to the Mulroney
5 government in '85. One of its recommendations
6 related to a more market-oriented economy and it
7 recommended pursuing a free trade agreement with
8 the U.S. That Royal Commission report gave
9 impetus to the free trade debate which I think
10 followed after the report was issued, but it gave
11 a strong impetus to it and it allowed it to be
12 carried through. I don't think it's unrealistic
13 to say without that Royal Commission report, we
14 might not have NAFTA today.

15 Now, a similar sort of thing could be done
16 with the fishery. The fishing industry at one
17 time was a main driver to the B.C. economy. The
18 2010 sockeye return shows us what the resource is
19 capable of, but there has to be changes within DFO
20 if the fishing industry is ever going to be able
21 to again become a major driver. If it does become
22 a major driver to the B.C. economy, then, Mr.
23 Commissioner, I say DFO would have earned the
24 right to call for more budget funding.

25 There's been a whole lot of bleating about
26 inadequate funding, but we've forgotten that if a
27 department can't produce tax revenue, it can't
28 expect to receive tax funding. The Department has
29 got to earn its funding, and it's simply not doing
30 that.

31 Let me turn to biology 'cause I've only got
32 32 minutes left. In my paper, I deal with this in
33 my written submissions starting at paragraph 28.
34 I deal with general concepts about the equilibrium
35 establishing forces that exist in nature. This
36 section, I should say, draws heavily on this book
37 by Walters and Martell, "*Fisheries, Ecology and*
38 *Management.*" It's published by the Princeton
39 University Press. I got it on Amazon.com. I say
40 if there are only two books that you read in the
41 more general reading, this should be one. Roos's
42 Salmon Commission book on restoring Fraser sockeye
43 should be another, and if you've got time for a
44 third, it should be Dennis Brown's book, which
45 recounts the anguish that the fishing industry has
46 gone through in these years of declining
47 fisheries.

1 Dr. Walters, we know from his evidence and
2 from what other witnesses have said, is a leader
3 in the field of population dynamics. As I said at
4 the outset, Mr. Commissioner, you are expected to
5 sort through the interplay of a wide range of
6 factors - that's the way it's put in the terms of
7 reference - and find what has caused the decline.
8 To do that, in my submission, you can't delegate
9 that to the writers of the technical reports. You
10 can't delegate - and I say this with respect to
11 both you and your science advisor - you can't
12 delegate that to your science advisor.

13 I have some passages in my written submission
14 at paragraphs 112 to 114 about my concerns about
15 the science advisor and his role on this panel.
16 But basically I'm saying that these are not
17 concepts, these biological concepts are not such
18 that someone with a legal mind cannot cut through
19 them and determine the cause of the decline.

20 The first point to remember in the sockeye
21 ecosystem is this, that it always accommodates,
22 through the years of the old Fisheries Commission
23 management, humans as major predators.
24 Equilibrium was established prior to 1985 whereby
25 human predation accounted for around 80 to 85
26 percent of the adult recruits. It removed them
27 from the ecosystem. Sockeye abundance was
28 gradually increased during that period and then
29 starting in '87, DFO made a major change. It
30 removed progressively the human predators from
31 this ecosystem. It was all well-intentioned, but
32 it had an effect just as significant as removing
33 pikeminnow predators from the Cultus. It had a
34 different effect, and I'll come to that.

35 I'm turning to density dependence, both
36 simple density dependence and delayed density
37 dependence. I say, Mr. Commissioner, there's
38 nothing complex about this. Everyone knows that
39 if you spread too many carrot seeds in your
40 garden, you're not going to get a good crop of
41 carrots, and that model will persist every year.
42 Some years it will be a better growing season, and
43 some years a worse growing season, but too many
44 carrots, poor crop. That is the scientific model
45 that applies. Whether that's a law of biology,
46 whether that's a theory of biology or what,
47 doesn't matter.

1 But every scientist knows about models.
2 Galileo and Copernicus developed models. I
3 Googled this, this morning, and came up with this
4 [as read]:

5
6 Galileo's work founded the modern scientific
7 method of deducing laws to explain the
8 results of observation and experiment.

9
10 Too many carrots in the garden? Too many carrots
11 seeds in the garden, poor crop. That's
12 observation and experiment, and a model gets
13 developed from that. The Ricker and the Larkin
14 models are just that.

15 Now, there are residuals in the carrot
16 analogy. That's poor growing season, better
17 growing season. Peterman and Dorman dealt -- got
18 quite interested in residuals. But what exactly
19 is a residual? I say it's something interfering
20 with the model. But residuals may be of great
21 interest to scientists, but if you focus on the
22 residuals, you tend to forget that there are
23 variations. They result in variations of the
24 model. They don't change or negate the model.

25 If I could turn back to my collection of
26 exhibits to page 3 of the exhibits, which is taken
27 from Exhibit 53 -- 573A. It's page 10. Here you
28 have in the top graph, you can see what the basic
29 model does. Mike Lapointe says this in the slide
30 [as read]:

31
32 Expect productivity to decline with
33 increasing spawner abundance.

34
35 That's the Ricker model. He's got the sloping
36 curve there. That's the Ricker model.

37 Then you see he's got residuals. Residuals
38 can bring it up or they can bring it down. That's
39 what a residual factor is. That's what Peterman
40 and Dormer spent a lot of time looking at. But
41 you can't forget the basic model.

42 The bottom slide on this page defines, in the
43 red print, the residuals:

44
45 Trends in residuals used to examine
46 productivity patterns remaining after
47 removing effects related to changing spawner

1 abundance.

2
3 So it's that additional element.

4 The next page in this booklet is page 12.
5 And here you can see trends in productivity, the
6 Quesnel stocks, and the trends in productivity --
7 we know this. This was, to me, one of the two
8 major stocks in 2009 and it basically collapsed.
9 There's the declining trendline. Below that is
10 the Ricker and Larkin models, and you can see
11 there's very little residual effect. And Peterman
12 confirmed this, that the Quesnel decline is
13 basically consistent with the Larkin model,
14 delayed density dependence. So the residual
15 effect -- contribution is small. It's mostly
16 excessive spawner abundance.

17 The bottom of the page is the late Shuswap,
18 and similarly, Peterman said it was both the
19 Ricker and the Larkin model fit with the Shuswap
20 trends in productivity, and you see that by the
21 straight line. There's very little residual
22 effects.

23 The next page, page 17, is the 2009 sockeye
24 forecast. You can see the breakdown. Forecast
25 was 10.5 million, Chilko 4.2, Quesnel 3.6, others
26 2.7. That was the forecast. The bottom slide on
27 this page shows the returns, hugely under the
28 estimate. From 4 million Chilko, 270,000 return;
29 Quesnel, 3 million estimate, 2,020 (sic) return.
30 That's the problem that gave rise to this
31 Commission.

32 The next page is page 17 -- I'm sorry, yes,
33 page -- the next page, page 25, at the top I refer
34 to this page from Mike Lapointe's slides because
35 it's been suggested all the growing seasons -- or
36 the conditions, the environmental conditions were
37 different year to year. You can see on the right
38 these are the years we're talking about. But the
39 changing -- the variations in ocean conditions
40 were within the same range as we've always had
41 going back to 1960. Ocean conditions always
42 fluctuate and the sockeye take that into account.
43 There's nothing in the ocean conditions to account
44 for the dramatic declines we've seen in sockeye.

45 On page 26, the slides deal with -- if I
46 start with the top slide, yes, the summary of
47 multi-year comparisons. 2008, productivity was

1 below average, most stocks, but higher in '07/'09.
2 Then the conclusion: do not show a common
3 pattern.

4 At the bottom of the page, the comment:

5
6 Underscores the futility of these broad
7 comparisons and the need for Fraser-specific
8 indicators.
9

10 So, in other words, we can't look at salt
11 water, we've got to look at fresh water. Salt
12 water is a common -- common to all the species.
13 Fresh water lifecycle is different and that's on
14 the next page, page 8 of this. The bottom of the
15 page, "Stock Specific Trends and Productivity".
16 Down the right-hand column, these are the
17 different -- these are the trends. It gives the
18 brood year that the most recent decline began,
19 which is mostly different one from the other. The
20 right-hand column, "Percentage Change". The
21 percentage variation is huge. The Quesnel has
22 declined by 93 percent, the Harrison has increased
23 by 140 percent, and there's everything else in
24 between.

25 I say the only inference to draw from that is
26 that something stock-specific is driving the
27 declines, not the shared ocean environment.

28 The next page in my compendium of exhibits,
29 I've got a -- there's a similar graph if we go
30 down a bit, Mr. Lunn. There it is in the middle
31 of the page. This is from Technical Report 4, and
32 again, it shows the variations in ocean conditions
33 from warm and unproductive to cool and productive
34 going back to 1979. In other words, we've always
35 had these features.

36 The next page I want to refer to deals with
37 Exhibit 299. This is Pestal and Cass, "Updated
38 Methods of Assessing." This, Mr. Commissioner, I
39 think is the best simplified -- the best way to
40 understand the difference between the Ricker and
41 the Larkin models. Ricker model basically just
42 deals with the effects on the generation in
43 question, whereas the Larkin model deals with the
44 influence of excessive spawning escapement on
45 successive brood years, but I've got this in here
46 because if you take time to read this, it's just
47 about all you need to understand the difference

1 between the two models.

2 The next page indicates which model fits
3 better in the different runs. You'll see the
4 Larkin full model fits better Scotch, Seymour,
5 Chilko, Quesnel and Stellako.

6 The next page in this exhibit shows you what
7 happens and how the models affect returns. These
8 have the -- this is the Quesnel run on this page,
9 1948 to 2008. You can see the "Spawner" column,
10 the amounts of spawners right up until 1981, less
11 than a million. From '85 on, they're in excess of
12 one million. Let's look at 2001 and 2002 more
13 closely. 2001, 3.5 million spawners. This is
14 where the carrying capacity is less than a
15 million. Three-point-five million spawners, the
16 return, 3.7 million four years later. See it on
17 the right-hand column. So basically a one-to-one
18 recruitment.

19 Second year, it's done again, over three
20 million, 3,062,000 spawners, and the recruitment
21 then drops to 640. This is the effect of delayed
22 density dependence. Mr. Peterman said this run is
23 consistent with delayed density dependence. This
24 is what it does in practice, huge loss of stocks.

25 Then look what happens again. We've got
26 2005, it's still about twice the optimum, 2005,
27 and the run is not here, but if you want to write
28 it in, I'll show you where you find this. The
29 recruits column is 220,000, 2005. Oh, we've seen
30 that already, 2,000 and 20,000 (sic) for Quesnel.

31 In 2006, the spawning escapement drops way
32 down, 169,000. That's within the lower and upper
33 benchmark range for that run. In other words,
34 this is optimum. There was, as we know, a huge
35 return in 2010.

36 But here's something else to write in, and
37 this is most troubling. If you want to add to
38 this right in 2010, the spawning escapement is in
39 excess of three million again. Nothing's been
40 learned. In excess of three million, and it's
41 going to be hugely detrimental again. Where you
42 find this, this number is at page 15. I'll just
43 skip ahead for a moment where we find these
44 numbers. Page 15, Mr. Lunn.

45 There's the Quesnel. This is from Exhibit
46 1908, Selbie and others, DFO workshop. The
47 asterisk in the upper corner is basically the --

1 this is the photosynthetic rate. This is the
2 determination of carrying capacity -- and I don't
3 know why there are two bars in this one. The
4 escapement in females is either 1.5 or 1.75
5 approximately, so it's in excess of three million.

6 If you want to go on this page, if you look
7 down, Shuswap, same thing. The asterisk shows the
8 carrying capacity and the escapement in 2010 in
9 excess of 3.5 million females. In other words, in
10 excess of seven million spawners, hugely --
11 there's a loss in foregone harvest and there's
12 going to be a huge impact in four years' time.
13 The same for the Chilko. If we go back -- in the
14 interest of time, I won't deal with the Chilko,
15 but I can deal with page 14, that's back one page,
16 the Late Shuswap.

17 The Late Shuswap, it's interesting to start
18 this in 1954. Spawners just over two million
19 which, in the Roos book, is said to be optimum and
20 a huge return, 15 million. In 1958 -- and this is
21 discussed in the Roos book, and I've got
22 references to it in my written submissions --
23 there was a problem with the seine fleet, taken by
24 surprise in some way. They weren't effective in
25 catching as many fish as they should have in 1958.
26 Spawners -- so what the Commission did, they put
27 an electric fence up on the Adams run to try to
28 stop the excess spawners getting in.
29 Unfortunately, it was ineffective, so they had 3.2
30 million spawners in '58, and it led to -- and you
31 can see the recruits, 2.2 million.

32 If we follow this down, the spawners were
33 kept down until huge spawning in 2002, 5.5
34 million. So with a little more than one-to-one
35 recruitment. In 2006, it's 2.8, but on the
36 effective female side it's 1.1 million spawners,
37 which is almost identical to 1954. And we got a
38 record run in 2010, 15 or 20 million. I'm not
39 sure what it is for the Shuswap. It was a huge
40 return.

41 Then, if you want to write this in, about 7.1
42 million spawners in 2010, which is hugely in
43 excess of historic levels. That, Mr.
44 Commissioner, is the problem. With everything
45 that's been done, the Wild Salmon Policy which
46 everyone says is the answer, the FRSSI scheme, all
47 this complex management, and this is what results

1 from it. There's a very serious problem out there
2 that something has to be done about.

3 Peterman and Dorner, there's controversy over
4 what proportion of the decline is caused by
5 residual factors, what proportion by density. So
6 Peterman looked at the residuals. I've got the
7 results of this starting at page 22. This is from
8 Peterman and Dorner. Because undeniably, there
9 are some residual factors affecting -- the top of
10 the page is the Early Stuart, and this blue line
11 is Larkin and the red line is Ricker. You'll see
12 they're varying, so there are residuals in Early
13 Stuart and the Bowron. Fennell, the Ricker -
14 that's the bottom of the page - the Larkin line is
15 flat, no residuals.

16 The next page, Gates, Nadina, basically no
17 residuals. Pitt, there are obviously residuals.
18 Next page, Scott and Seymour, very little residual
19 factors with respect to Larkin. Quesnel - this is
20 page 25 - Quesnel is at the bottom of the page and
21 this was in the body of the Peterman report.
22 You'll see there's no residual departure from the
23 Larkin model.

24 But that tells you really very little,
25 because whether there's a slight residual factor
26 or no residual factor, it tells you very little.
27 What is significant is the Larkin model itself and
28 the Ricker model. Too many carrot seeds, too
29 little crop. That's the scientific method that
30 Galileo talks about.

31 The Shuswap, I should say, page 27, a few
32 more pages on, Shuswap, as we've heard from a
33 number of witnesses, is consistent with both the
34 Ricker and the Larkin model and, as we would
35 expect it to be consistent therefore in 2014 as
36 well, which is the major problem that we have.

37 So, Mr. Commissioner, this evidence I say
38 fully supports Dr. Walters' conclusion, and this
39 is -- that he sets out in that email, but he
40 described more fully in his evidence -- that the
41 models explain most of the trend. Most of the
42 loss is due to the basic model, which is due to
43 excessive escapement. In other words, the
44 variations -- the residuals, the variations due to
45 factors other than parental abundance are minimum.
46 This explains also, of course, why there's a wide
47 variation in stock-specific declines. They start

1 at different times, they range from minus 92
2 percent to plus 140 percent. It explains why the
3 Columbia to the south and Bristol Bay to the north
4 have had a totally different experience.

5 If you read only one page of my written
6 submissions, Mr. Commissioner, it should be page
7 21 which sets out the basic Ricker curve. Because
8 once you understand this, you can understand quite
9 clearly, see quite clearly what has happened. I
10 should say what I should have done here is written
11 in - and perhaps you could do this on your own
12 notes - on the bottom line is spawners. That's
13 the horizontal line is spawners. The vertical
14 line is recruits. As the spawners increase,
15 there's a sharp -- this is the left-hand slope of
16 the curve -- there's a sharp increase. At low
17 spawner numbers, there's a sharp increase in
18 recruits. The rate of increase is far greater
19 than the norm, and then at what's called the MSY
20 level, the angle is the same as the straight line,
21 oblique angle.

22 Then there's the dome of the curve. That's
23 the maximum number of -- that's the maximum
24 carrying capacity level, if you will, then it
25 declines down. So the spawners increase and
26 you're into the area of diminishing returns, so
27 anyone approaching harvest management with a
28 business perspective take into account the law of
29 diminishing returns and will look at the levels
30 which are recorded here, look at the USMY (sic)
31 range. That is meant to be the range between
32 upper and lower benchmarks.

33 I should say there's something else in my
34 exhibits that -- yes, my exhibit bundle, which has
35 that range from the Grant report. This is
36 starting at page 16 of my exhibit booklet. Grant
37 et al, Exhibit 1915. It's page 16, Mr. Lunn, of
38 my exhibit book.

39 This page relates to Chilko and I just have
40 that page there for the purpose of identifying
41 Chilko. It's the next page which has the upper
42 and lower benchmarks for the Chilko, 39 lower, 273
43 upper. If you go two pages further on, this is
44 the Quesnel upper and lower benchmarks, 121,00
45 701,000 upper benchmark for Quesnel. This is the
46 stock that got the three million escapement in
47 2001, 2002.

1 Two pages further on is the Shuswap, lower
2 Shuswap -- or Late Shuswap. The benchmarks there,
3 which are set by Grant et al, 355,000 is the
4 lower, 1.288 million is the upper benchmark.
5 These are set at 80 percent of MSY, so MSY would
6 be calculated at 1.4, 1.5 million, something like
7 that. This is the stock that had a seven million
8 escapement in 2010.

9 So this whole complex scheme, I say, is
10 utterly useless in practice, and totally
11 detrimental. And my submissions are that the WSP
12 should be scrapped and replaced by something
13 simple and understandable.

14 In the remaining few minutes, I would like to
15 deal -- well, firstly, finish this. If I could
16 turn to page 34 of this book of exhibits, you can
17 see at page 34 what -- this is what the Alaskans
18 are doing. The Alaskans have the same
19 precautionary approach, the same United Nations
20 Fisheries Agreement, and this graph shows until
21 1982, there were wild increases in escapement -
22 this is the low grey-coloured area - but they
23 managed to level off the escapements pretty well
24 starting from 1982. And look at the huge dark
25 portion which is the catch. That means jobs, that
26 means economy, that means support for coastal
27 communities, et cetera, et cetera.

28 The subsequent pages are from this same
29 exhibit, Technical Report 7. They describe how
30 the Alaskan managers go about it. They have clear
31 goals and they apply them. That's the model, I
32 say, that we should be applying here as well.

33 My conclusions are these, Mr. Commissioner.
34 I say, firstly, back to basics. DFO should go
35 back to basics. Facilitate fishing, use the same
36 fleet as the tap to turn on and off to control
37 escapement, focus on stock assessment, focus on
38 enforcement and stop spending the majority of your
39 budget on consultations and developing policies.
40 Develop optimum harvest strategies based on simple
41 functions of current stock size and the
42 recruitment rate variables that are based on
43 historic data.

44 In order to determine current stock size,
45 which is critically important, they must deploy
46 in-season monitoring systems - test fishing if you
47 will - but some in-season monitoring systems in

1 the approach waters that allow managers to achieve
2 their spawning goals in the -- spawning goals by
3 quickly learning about current stock size as the
4 season proceeds.

5 I say apply the lower benchmarks and upper
6 benchmarks in the way the U.S. managers do, and
7 apply them to the four run-timing groups, because
8 that's the only practical way to do it.

9 The Wild Salmon Policy I say is words, words,
10 words. It's so complex that it obscures the goal
11 of productivity for the benefit of Canadians.
12 Funding, I say that we first have to earn the
13 right to receive more funds.

14 I say with respect to terminal fisheries, and
15 this is paragraph 125 on in my submissions. I
16 just want to leave that with you, but I'd like to
17 explain one thing. I refer to inherently high
18 risk of terminal fisheries. Mr. Commissioner, in
19 the days -- in my high school days, one of the
20 things I saw was creek guards on all the little
21 creeks around the Charlottes and places. They
22 were guardians, they had a little hut to live in
23 and their sole function was to make sure that no
24 seine boats came within the boundary of those
25 creeks.

26 Why that was so critically important is all
27 it would take is one seine set close to the
28 terminal area there to wipe out an entire stock.
29 So we recognized that as being inherently risky to
30 fish in terminal areas. The same thing applies
31 with terminal areas upstream. If we're going to
32 go to terminal fisheries, we're going to have to
33 greatly increase the enforcement budget. We're
34 going to have to have the equivalent of the fish
35 guardians in the old days, because all it would
36 take is some excessive fishing in a terminal area
37 where stocks are concentrated, that you could wipe
38 out an entire stock.

39 If you have excessive fishing in a mixed
40 stock area, you're not going to wipe out a whole
41 stock because they're mixed. They're all equally
42 impacted. But there's an increased risk in
43 fishing close to the terminal areas. That's one
44 of the many arguments, in my submission, against
45 terminal fishing. Nobody's considered who's going
46 to pay for the enforcement of terminal fishing,
47 terminal fishing areas scattered throughout the

1 province. Terminal commercial fishing, I'm
2 talking out; in other words, fishing that has the
3 incentive of making money.

4 Mr. Commissioner, those are my submissions.

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

6 Mr. Lowes?

7 MR. LOWES: J.K. Lowes, Mr. Commissioner, with Brad
8 Caldwell, for the B.C. Wildlife Federation and the
9 B.C. Federation of Drift Fishers.

10

11 SUBMISSIONS FOR B.C. WILDLIFE FEDERATION AND B.C.

12 FEDERATION OF DRIFT FISHERS BY MR. LOWES:

13

14 MR. LOWES: I'm not sure if -- yes, it is. J.K. Lowes,
15 Mr. Commissioner with Brad Caldwell for the B.C.
16 Wildlife Federation and the B.C. Federation of
17 Drift Fishers.

18 I originally was allocated an hour. I
19 donated 15 minutes of that to Ms. Baker to deal
20 with housekeeping matters. I understand that she
21 dealt with those with more expedition, and so with
22 your indulgence, Mr. Commissioner, I think I'll be
23 closer to the original than the latter.

24 Briefly, in my oral submissions, Mr.
25 Commissioner, what I intend to do is briefly set
26 out the objective and structure of the written
27 submissions, touch a little bit on the law, and
28 not so much in the law, per se, but the
29 implications flowing from the law. Then going to
30 my submissions on the questions before the
31 Commission which I break down into three
32 questions, really. What is the present situation?
33 What does the past say about declines; in other
34 words, a causation issue. And what do we do in
35 the future?

36 If I have a little bit of time at the end, I
37 do want to deal with some of the replies on my
38 submissions on the law.

39 The written submission, Mr. Commissioner, is
40 in two parts reflecting the dual role of counsel
41 for the participants in these proceedings. The
42 main thrust of the submissions is essentially
43 pursuant to my view of what the role of a
44 participant is. A participant isn't here to
45 advocate a cause. A participant is here to assist
46 you, Mr. Commissioner, in answering the questions
47 that you've been asked.

1 However, of course, the participant is a user
2 group and I am an advocate for that group, so I've
3 divided my submission into two parts: one dealing
4 with what I call the main issue, or the main
5 objective, which is to assist you as a
6 participant, and the other is to set out the
7 specific interests and positions of the
8 recreational fishing industry. In these oral
9 submissions, I will simply deal with the first
10 objective and leave the more specific one to your
11 reading.

12 Briefly, and I think I can cover this before
13 the break, Mr. Commissioner, I would like to start
14 with a few remarks about the law, and that's set
15 out at pages 3, 3 to 5 of my factum -- or my
16 submission, rather -- and what I basically say is
17 this, that it's essential to understand at the
18 outset that the fishery is rights-based, and that
19 the government of Canada has no proprietary rights
20 in the fishery.

21 The implications of that are this, that
22 because it has no proprietary interest in the
23 fishery, Canada cannot create proprietary
24 entitlements in others. That principle clearly
25 places limits on the ability of Canada to create
26 entitlements for individuals or groups of
27 individuals. In specific terms, Mr. Commissioner,
28 that has implications for share-based management,
29 and I deal with that in more specific terms at
30 paragraphs 166 to 170 of my submission.

31 It has particularly strong implications for
32 the use of fish or access to the fishery as
33 currency for the satisfying of aboriginal
34 aspirations.

35 The *Larocque* case says that fish cannot be
36 used as currency by the Department for paying its
37 test-fishing expenses, and similarly, the access
38 to the fishery cannot be used as currency to
39 satisfy the aspirations of particular user groups.

40 I say also, Mr. Commissioner, that because
41 they occupy the position of a steward or trustee,
42 as distinct from a proprietary -- from a
43 proprietor, rather, Canada cannot abdicate its
44 responsibility to the public by sharing its
45 authority in such a way as to promote the interest
46 of particular groups at the expense of others, or
47 at the expense of the public at large. That has

1 implications in the sense that it provides limits
2 to Canada's ability to adopt co-management, at
3 least co-management at the government-to-
4 government level regimes. That, as Mr. Harvey
5 indicated, was an abdication of Canada's
6 responsibility to the public as a trustee of the
7 resource.

8 Turning specifically to the question of
9 aboriginal rights, Mr. Commissioner, it is my
10 position that policy distinctions between fishing
11 by aboriginal Canadians and fishing by the
12 Canadian public at large should be congruent with
13 the judicially-defined interfaces, first between
14 aboriginal rights and the public right, and
15 second, between aboriginal rights and Crown
16 sovereignty.

17 There's a distinction to be made, Mr.
18 Commissioner, between fishing by aboriginal
19 Canadians and fishing pursuant to the exercise of
20 an aboriginal right. What I mean by those
21 interfaces, Mr. Commissioner are this: There is
22 an interface between the public right and
23 aboriginal rights. That interface has been drawn
24 by the Supreme Court of Canada, particularly in
25 the 1996 cases.

26 In 1996, the Supreme Court of Canada sat for
27 five days. They heard seven cases dealing with
28 aboriginal rights claim, five from British
29 Columbia. That was **Van der Peet N.T.C.**
30 **Smokehouse, Gladstone, Nikal and Lewis.** They
31 issued reasons for judgment which -- the full
32 court sat. There are two sets of dissents and the
33 majority judgment. The decisions refer to one
34 another, cross-referenced to one another and they
35 really lay down the law in no uncertain terms
36 about the interface between the public right to
37 fish and the aboriginal rights.

38 In paragraph 18, I set out a summary of what
39 that interface looks like from the 1996 cases
40 which, incidentally, have been followed since
41 1996, not only by the judges who were the majority
42 in those cases, but also by the judges who had
43 dissented and, in particular, the present Chief
44 Justice.

45 The principles, Mr. Commission, are this.
46 Aboriginal rights exist within a legal context
47 which recognizes the public right to fish. That's

1 **Gladstone.** Aboriginal rights are additional to,
2 not substitutional for the public right. Every
3 aboriginal Canadian shares in the public right to
4 fish with his non-aboriginal countrymen. His
5 aboriginal rights, if he has any, are additional.
6 The principle of special rights for some Canadians
7 is an exception to the general constitutional rule
8 of universal individual's rights. That's right
9 out of **Van der Peet**.

10 Consequently, the existence, the scope and
11 the protection of aboriginal rights is to be
12 defined and confined to the rationale for the
13 exception. The rationale is the integrity of
14 aboriginal identity. That's the constitutional
15 value that is protected. In the words of the
16 Supreme Court of Canada in the **Van der Peet**
17 trilogy, what's protected is aboriginal
18 specificity, and that is what is necessary to
19 ground an aboriginal right.

20 Of course, it's trite law that the definition
21 of an aboriginal right is an activity which is an
22 element of a custom, practice or tradition which
23 is integral to the distinctive culture. It's the
24 core of the aboriginal identity. It's not fishing
25 by aboriginal people. It is the exercise of a
26 tradition that existed and was central to the
27 community prior to contact and remains so.

28 Now, with respect to the second interface,
29 that is, the interface between aboriginal rights
30 and Crown sovereignty, I say simply that
31 constitutional protection for aboriginal rights is
32 limited to a burden of justification similar to s.
33 1 of the **Charter**. Aboriginal rights are not
34 absolute. They may be infringed as long as the
35 infringement is not justified (sic).

36 The point of that law in these proceedings,
37 Mr. Commissioner, is that neither -- is in
38 paragraph 20 -- that neither policy - that is
39 policy of DFO - nor an overbroad application of
40 the constitutional duty to consult and
41 accommodate, should be allowed to usurp the
42 judicial determination of those interfaces. The
43 determination and the delineation of those
44 interfaces is a matter of the application of the
45 constitution, and that is a judicial function. It
46 is not a function of the policy development branch
47 of the Department of Fisheries and Oceans.

1 Perhaps you will want to break. Before we
2 do, Mr. Commissioner, I would just refer you to
3 paragraph 23 of my submissions in which I point
4 out that two of your colleagues, the late chief
5 Justice Brenner and Mr. Justice McKenzie, saw fit
6 to make comments about the expansion of aboriginal
7 fisheries, if I can put it that way, even where
8 constitutional -- made comments that it wasn't
9 necessarily good policy, and they made those
10 comments for different reasons.

11 Chief Justice Brenner, after upholding the
12 constitutionality of the pilot sales, which are
13 now the Economic Development Fisheries, pointed
14 out the social cost and queried whether those
15 sales programs should be continued. Mr. Justice
16 McKenzie pointed out the problem of the
17 balkanization of the fisheries, which Mr. Eidsvik
18 alluded to yesterday, and indicated that he didn't
19 think that the pilot sales program should be
20 expanded.

21 I will then turn to the main thrust of my
22 submissions.

23 THE COMMISSIONER: Thank you.

24 THE REGISTRAR: The hearing will recess for 15 minutes.

25
26 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)

27 (PROCEEDINGS RECONVENED)

28
29 THE REGISTRAR: The hearing is now resumed.

30 THE COMMISSIONER: Mr. Lowes.

31
32 SUBMISSIONS FOR B.C. WILDLIFE FEDERATION AND B.C.
33 FEDERATION OF DRIFT FISHERS, continuing:

34
35 MR. LOWES: Yes, Mr. Commissioner, before I get into my
36 main submission, I should clarify that when I use
37 the term "Aboriginal fishery", I'm referring to an
38 "Aboriginal only" fishery. And the bottom line of
39 my submission is that Aboriginal only fisheries
40 should be restricted to fisheries in what is being
41 exercised as an Aboriginal right. To the extent
42 that Aboriginal individuals are fishing other than
43 pursuant to an Aboriginal right, they're fishing
44 as a member of the public, they're fishing as a
45 recreational fisher, or as a commercial fisher,
46 and pursuant to the same rules as everyone else.
47 And that's the -- the importance of the -- of

1 remembering that Aboriginal rights are additional.

2 When we sat down, Mr. Commissioner, to look
3 at the three questions essentially that you've
4 been asked to deal with, and the mass of evidence
5 and submissions that you've received, we quite
6 frankly wondered how we were going to do it. And
7 what we did was we came up with a number of
8 focusing concepts, and we found those focusing
9 concepts useful in making our way through the --
10 through the issues. And essentially the structure
11 of my submission is to offer you the focusing
12 concepts as an analytical tool, and to show you
13 what the use of those concepts resulted in, in our
14 examination of the questions, and ultimately what
15 those focusing concepts result in terms of
16 recommendations for the future.

17 There are five concepts that we found useful.
18 They're not new, and other parties or other
19 participants will refer to them.

20 The first is, and these are found at page --
21 starting at page 5 of my submissions. The first
22 is "Pragmatism", and that simply means focus on
23 the immediate and practical as distinct from the
24 remote and the merely theoretical. And quite
25 frankly, Mr. Commissioner, much of the evidence,
26 particularly the scientific evidence, is remote
27 and theoretical.

28 The second guiding concept is "Interests and
29 Values". And this means having regard to the
30 interest or value often hidden or obscured, which
31 underlies the evidence or positions of witnesses
32 or participants. And by that we don't mean that
33 the witnesses and participants have a hidden
34 agenda. And indeed, the agenda of most of the
35 participants, or virtually all of the participants
36 and most of the witnesses, is not hidden. And it
37 doesn't mean, as would happen in a trial, that the
38 function of this tribunal is to sift and discount
39 biases. It's exactly the opposite.

40 I will make this statement in a couple of
41 contexts, Mr. Commissioner. This not a trial. It
42 is a commission of inquiry. This is very -- an
43 important distinction in the treatment of the
44 evidence, and I will go into some of the
45 implications of that later. But here it is the
46 function of this tribunal, I submit, or it is
47 useful to this tribunal, I submit, to take into

1 account the interests and values which underlie
2 the submissions and the evidence.

3 In short, and to use a term that was used by
4 my friend, Ms. Gaertner, early in the proceedings,
5 all world views are to be identified and to be
6 taken into account.

7 The third guiding or focusing concept is
8 "Proportionality". And that means two things, Mr.
9 Commissioner. First, and this is very important,
10 it means recognizing that most, if not all, of the
11 issues before you are issues of degree; they are
12 relative, not absolute. They are issues of
13 degree. How much? They are not categorical
14 either/or. For example, what is the risk?

15 And secondly, Mr. Commissioner,
16 proportionality means also having due regard to
17 the interests and values and therefore the
18 relative priority and importance of those
19 interests and values. For example, what is an
20 acceptable risk under particular circumstances?

21 And as I indicated, paragraph 29, Mr.
22 Commissioner, we've chosen the word
23 "proportionality" rather than "balance", because
24 it emphasizes the notion of judgment, of weighing
25 and of prioritizing in dealing with matters of
26 degree.

27 The fourth focusing concept is "Terminology",
28 and I suggest very strongly, Mr. Commissioner,
29 that it is important to be sensitive to the use
30 and misuse of language. Many and if not all of
31 the participants and witnesses have special
32 interests, and those interests can be obscured by
33 the vagueness of the language.

34 More importantly, as I say, many, if not most
35 of the terms and concepts used are ambiguous in
36 the abstract, and require context in order to
37 provide specific content. Some examples, some
38 egregious examples are co-management, over-
39 escapement, rights, and even conservation. You'll
40 recall, Mr. Commissioner, that there was a special
41 panel, one of the first panels in these
42 proceedings was devoted to trying to -- to
43 debating or to giving evidence on what the word
44 "conservation" meant, and how it related to a term
45 like "sustainable use".

46 And I would submit, and you'll also recall,
47 the evidence, I think it was Mr. Chamut who said

1 that the Wild Salmon Policy was essentially the
2 DFO's definition of conservation. In other words,
3 it defined conservation in terms of biodiversity.
4 It separated sustainable use and conservation,
5 defining conservation effectively as biodiversity.

6 And I say that that's only one definition.
7 The term "conservation" is an ambiguous term and
8 needs to be used in -- with sensitivity to the
9 context in which it was used by witnesses, or is
10 used by participants, and ultimately is used by
11 you, Mr. Commissioner.

12 The fifth focusing concept is dealing with
13 the "Perspective", and it has two parts, and that
14 is that the perspective is that of a public
15 resource. I agree with Mr. Harvey's remarks this
16 morning that the focus is to be on the Fraser
17 River sockeye as a "resource", as distinct from
18 but not ignoring an element of nature. The
19 appropriate perspective is not that of the species
20 and it's not that of Mother Nature, but the human
21 beings which relate to both the species and Mother
22 Nature.

23 And I believe that Canada also made this
24 submission, and indeed referred to the same
25 passage in the *Ward* case, which I set out at
26 paragraph 31, and which, as you may recall, Mr.
27 Chamut agreed was effectively the perspective from
28 which he viewed his responsibilities when he was
29 with the Department.

30 The second part of the concept, public
31 resource, is "public", and what that really does,
32 Mr. Commissioner, it embodies the legal principles
33 that I identified at the outset. It's closely
34 linked to that of resource, but it adds the legal
35 dimension. And by "public", I mean the Canadian
36 public.

37 And the concept has two important
38 implications. First, as I indicated earlier,
39 public is the antithesis of private or exclusive,
40 and second, public, the public resource emphasizes
41 the obligations as distinct from the powers of the
42 Government of Canada and in particular the DFO.
43 The Crown is a trustee of the resource. It is not
44 the owner, and public emphasizes that.

45 Now, at paragraph 34 I set out the "Use of
46 the Guiding Concepts". And this is what we --
47 what we suggest for you, Mr. Commissioner, and for

1 your staff when looking at the evidence and the
2 questions.

3 As I indicated, there are three essential
4 time periods which are to be looked at. There's
5 the present, i.e., what is the state of the
6 sockeye. There's the past, what is the cause of
7 the present state of the sockeye, and there's the
8 future, what should we do in the future?

9 Now, in looking at the present and the past,
10 that is, in focusing on your fact-finding task,
11 and in particular the question of causation, we
12 say that those focusing concepts give rise to the
13 following guidelines:

14 Pragmatism gives rise to the guideline, focus
15 on the knowable and the doable. And again
16 remember that essentially Canada advised you or
17 recommended the same

18 Proportionality plays out as look at the
19 situations and problems as matters of degree,
20 rather than as categorical. And this will have a
21 special application when it comes to dealing with
22 the schools of thought on causation which I will
23 say ultimately, Mr. Commissioner, are not mutually
24 exclusive. And when I -- I'll get to that.

25 The focusing concept of interests and values
26 results in the direction to focus on the
27 underlying interests and values, as well as the
28 specific situations and problems. And in that way
29 you will take into account that this is a
30 resource, and it is a public resource, and that
31 there are conflicting and competing interests and
32 values that are relevant to resolution of even
33 specific situations and problems.

34 The focusing concept of the perspective, that
35 is, focusing on the species as a public resource,
36 is especially important when defining the issues.
37 As Mr. -- the sub-issues, the issues that need to
38 be broken out in order to come down to the main --
39 the main issue. As Mr. Harvey said, you will
40 focus -- if you focus on the resource, you ask
41 different questions than if you are focusing on
42 the species or the ecology generally. The issues
43 will be defined in human terms.

44 And finally, the value or the focusing
45 concept of terminology, I have said, be clear to
46 the point of bluntness. There's been a lot of
47 jargon used in these proceedings, a lot of

1 bureaucratic jargon. One got sick of hearing
2 words like "array" and "suite" and "visions" and
3 that sort of thing, without really knowing what
4 they meant. And there's been a lot of scientific
5 jargon and the recommendation that we have, or we
6 urge you to look through that jargon and to look
7 at what the witnesses were really saying, and what
8 the documents really say in plain -- in plain
9 English.

10 Now, the questions that are before you, as I
11 indicated, Mr. Commissioner, are set out in
12 paragraph 36 of my submissions. Mr. Harvey read
13 you the Terms of Reference and put them in the
14 formal language. In informal language they're
15 simply this. What is the present situation? What
16 is the cause of the present situation? And what
17 should be done in the future? Now, the rest of
18 this submission addresses those three questions in
19 light of the focusing concepts and the guidelines.

20 Starting at page 9, I deal with the present
21 because that is where the Terms of Reference
22 begin, and that is what -- what is the status?

23 Now, I say that it's important before looking
24 for causes in the decline of the Fraser sockeye
25 salmon, it's important to be specific as to what
26 is the subject being measured, and what is the
27 metric being used. As you heard, Mr.
28 Commissioner, that there is a distinction between
29 the aggregate and the stocks, the components that
30 make up that aggregate. So is this -- is the
31 status that is being measured the status of the
32 individual components, or is it the status of the
33 Fraser River sockeye which, as Mr. (sic) Walters
34 indicated during his evidence, is a system in and
35 of itself.

36 The second part of that question is what is
37 the metric? Is the metric the abundance? Is the
38 metric the ratio of responders to recruits, the
39 production ratio. Those are questions that should
40 be set out at the outset and it should be made
41 clear. Because as I set out in paragraph 41,
42 keeping those distinctions in mind, here is the
43 pattern that I say is -- is the pattern that
44 reflects the present status.

45 And I'm thankful to Mr. Harvey for producing
46 the book of exhibits, because the pattern that we
47 set out in paragraph 41 is essentially in our

1 words what we say the exhibits, especially the
2 graphs of Mr. Lapointe, tell us. So he went
3 through in detail; I will simply set out what we
4 say those documents show.

5 But in the aggregate, the Fraser River
6 sockeye have experienced a severe decline in the
7 ratio of recruits to spawners between the years
8 '95, approximately, to 2009. However, when
9 measured in terms of abundance, the decline is
10 from an extraordinary high level of returns, which
11 Mr. Harvey pointed out in between -- around 1985
12 to 1990, to levels which are more consistent with
13 historical averages.

14 So when you look at the question of decline
15 or are describing decline, the question arises,
16 decline from what? And what is the perspective?

17 If you go back in the graph to the '40s and
18 look forward, you'll see that there hasn't been a
19 severe decline. If you go into the mid-'80s to
20 '90s, you're at the top of the peak of the
21 returns, of course it's a drastic decline. So are
22 you measuring a decline in historical terms, or
23 are you measuring the decline from that top of the
24 -- of the peak.

25 So as I say, in terms of abundance, it's from
26 an extraordinary high level to a level that is low
27 but, stepping back, is not inconsistent with
28 historical averages.

29 I say that the drastic decline in both, that
30 is, in abundance and in the ratio of recruits to
31 spawners, is driven by the decline in the larger
32 stocks. That most of the stocks, particularly
33 most of the smaller stocks, are relatively stable
34 and healthy, and that the most serious problems
35 are stock-specific and identifiable.

36 And I won't go into it, but in the following
37 paragraphs, I set out, Mr. Commissioner, where you
38 can look to find out the best evidence on the
39 status of those -- of those individual stocks, and
40 then essentially Slaney and Dr. Walters in his
41 slide show, "Where Have All the Sockeye Gone?"
42 Unfortunately, we don't have an equivalent
43 analysis using the new units, the conservation
44 units, and so the analysis will have to be made in
45 terms of the traditional stocks and/or the
46 aggregate.

47 Now, at paragraph -- starting at paragraph

1 47, I set out what -- again what we say the
2 pattern is shown by the evidence, and in
3 particular the evidence referred to by Mr. Harvey
4 this morning.

5 What is the decline that we're talking about?
6 We say there are two declines before the
7 Commission. There's a long-term decline, and the
8 precipitous collapse in 2009. And by long-term
9 decline I set out in paragraph 48 -- and there's
10 an error here, Mr. Commissioner. I say that the
11 description is a four-year cycle average. It's in
12 fact a description of the history of the 2009
13 cycle year. So by decline, we mean this, long-
14 term decline.

15 By 1993 the aggregate stocks on that cycle
16 year were built from a low following the Hell's
17 Gate slide, to approximately 23 million. From '94
18 to 2008, they declined to the order of two
19 million, and that decline was in stages. From 23
20 million in '93 to 60 million in '97, roughly, to
21 seven million in 2001, approximately, to seven
22 million in 2005, approximately, and to virtually
23 zero in 2009 or two million.

24 By short-term collapse we refer to the facts
25 that in 2009 the escapement was just over a
26 million, which is less than one-half of the
27 average cycle escapement and approximately a third
28 of the escapement in the previous cycle year. And
29 here's the important factor that was drawn to your
30 attention by Mr. Harvey, that this decline took
31 place during the period in which the commercial
32 harvesting rate had dropped from an average rate
33 of 80 percent between 1950 and 1990, to firstly
34 approximately 40 percent in the mid-'90s to the
35 mid-2000s, and then essentially zero from 2006.

36 Notwithstanding that, escapement had
37 increased by approximately a factor of three from
38 mid-1950 levels from 1990 to the mid-2000s.

39 In terms of recruits per spawner, I set that
40 out at paragraph 51, and as Mr. Harvey indicated
41 they have fluctuated, and by -- between 1992 and
42 2009 they had dropped to barely one recruit per
43 spawner on an aggregate basis.

44 Now - and I'm at paragraph 57 here, Mr.
45 Commissioner - this decline didn't occur in a
46 policy/political vacuum. Over the critical period
47 there were important and significant changes in

1 both management mechanics and policies that were
2 not driven at all, or not solely driven by
3 biological or environmental concerns. The
4 measures were proactive rather than reactive, and
5 they include these:

6 The 1987 rebuilding program.

7 The Aboriginal Fishing Strategy.

8 The redesign of the commercial fishery for
9 "economic efficiency" through the Mifflin and
10 Anderson plans.

11 The expanding mandate of DFO. You'll recall,
12 I think it was Ms. Dansereau, who used the term
13 "mandate creep".

14 And the shift in responsibility for setting
15 escapement goals from the Pacific Salmon
16 Commission to DFO.

17 A further significant change, Mr.
18 Commissioner, was that to "weakest stock
19 management". And although that policy cannot be
20 completely delinked from conservation issues, it
21 does share the characteristics of being proactive
22 and aggressive, rather than reactive and
23 incremental with the other changes.

24 At paragraphs 59 through 64 I set out what I
25 say are the implications of those changes, and
26 given the time constraints I won't go into them
27 now.

28 I would point out, however, at paragraph 63,
29 when we talk about the range of objectives and
30 consequent policies, Mr. Commissioner, you will
31 probably recall a number of occasions when you
32 asked witnesses from the Department of Fisheries
33 and Oceans about the hierarchy of policies and
34 visions and discussion papers, and that sort of
35 thing, and also what you are to do with the fact
36 that so many of them were described as works in
37 progress. And that is part of the -- of the
38 context in which this decline takes place.

39 One asks how can those policies and those
40 programs be related to one another, be
41 coordinated, be implemented, be assessed and be
42 modified, when they're works in progress and one
43 does not necessarily flow from -- one move does
44 not necessarily flow from the completion of the
45 former one.

46 I want to quickly, but in some depth, go to
47 the question of the evidence on causation. And my

1 bottom line there, Mr. Commissioner, is this.
2 You've heard from what I categorize as two schools
3 of thought. There's the population dynamics
4 school of thought, and there's the environmental
5 effects school of thought. And those schools of
6 thought have come up with different hypotheses,
7 and they've come up with going to different
8 evidence in support of those hypotheses.

9 When push comes to shove, I agree with Mr.
10 Harvey's submission that the evidence dealing
11 with, and the hypothesis with respect to the
12 population dynamics school, that is preferable for
13 a number of reasons which I will outline in a
14 minute, to the evidence from the other school.

15 But I do have some remarks to make which are
16 not in my written submission about how -- they're
17 my suggestions about how the Commission should
18 treat the evidence in those two schools of
19 thought. And this is this, Mr. Commissioner. It
20 is not necessary -- it's not necessary to decide
21 between these approaches. This is not an
22 either/or issue for the Commission, for a number
23 of reasons.

24 First of all, as I indicated earlier, this is
25 not a trial. You are not called upon to resolve a
26 dispute between interested parties, let alone a
27 debate between scientists. You are charged with
28 the responsibility of finding out the facts, of
29 determining where the truth lies, and the truth
30 may have multiple layers.

31 Secondly, the objectives of the two
32 approaches are substantially different. The
33 objective, if I understand it, of all of the
34 scientists is to find correlations between
35 variables, to find a "Y" which is a function of an
36 "X". In the population dynamics school, the "X"
37 is the number of spawners and the "Y" is the ratio
38 of recruits to spawners. In the environmental
39 effects school, the "X" is something else, we
40 don't know what, and the "Y" is the ratio of
41 recruits to spawners. They're looking for
42 correlations. The level of analysis is different.
43 This is why you don't have to choose between them.

44 In the population dynamics school, as I
45 understand it, the existence of the correlation is
46 itself significant. As the number of spawners
47 goes up, the ratio of spawners to recruits, or

1 recruits to spawners goes down. It doesn't matter
2 why, it's just that the correlation is there.
3 It's been shown to be there. It's embodied in the
4 Ricker and Larkin curve, and Mr. Walters, to
5 personify that school -- Dr. Walters to personify
6 that school simply says there's the correlation.
7 We don't have to understand why it works to know
8 that it works.

9 It's like understanding an algebraic
10 equation. You don't have to give a value to the
11 "X" to watch the function of the "Y" and the "X".
12 You don't have to understand the content of the
13 quanta to watch the quanta in -- the behaviour of
14 the quanta in quantum physics. It's like a
15 bracket. It's like a bracket, you don't have to
16 know what's in the bracket. They're different
17 levels of analysis.

18 The stages of verifiability and development
19 are different. The Ricker and Larkin models are
20 verified and used by fisheries managers and
21 biologists.

22 With respect to the alternative, the
23 environmental effects, there's no specific
24 correlation postulated, let alone verified, let
25 alone used. At the end of the day, and again if I
26 can personify it, Dr. Peterman and Dr. Marmorek
27 say there's something at work probably other than
28 or in addition to population dynamics, but we
29 don't know what it is.

30 As I will indicate in a minute in a little
31 more detail, the two approaches are not mutually
32 exclusive. It doesn't have to be one cause. It
33 can be multiple causes. There can be different
34 causes between different stocks. And again, as I
35 indicated, Mr. Commissioner, these are matters of
36 degree. It's not an either/or choice. You don't
37 have to choose between Walters and Peterman.

38 And lastly, and I think this is the most
39 important point, the population dynamics approach
40 applies by definition to large stocks. The large
41 stocks are the important stocks, economically and
42 biologically. They drive the system. And even if
43 the population dynamics approach only explained
44 the decline in one stock, the Quesnel, and it
45 doesn't. I say that it is a probable cause of the
46 decline in most of the large stocks. But even if
47 it explained the decline only in one stock, if

1 that stock is significant from both a biological
2 and a social and economic point of view, that is a
3 matter of urgent -- of urgency to the Commission.

4 Having said those, why you need not choose
5 between the two schools of thought, Mr.
6 Commissioner, I'd like to turn to paragraph 68 and
7 indicate why I prefer in the context of this
8 Commission, the population dynamics school.

9 I say firstly it provides a clear and
10 supportable hypothesis for the cause of the long-
11 term decline.

12 Secondly, it provides an explanation, both
13 for the collapse in 2009 and the large return in
14 2010, and Mr. Harvey took you through that
15 explanation.

16 Thirdly, it does not require the
17 identification of the specific causal factor. As
18 I indicated, you don't have to know why the ratio
19 goes down when the population goes up. You just
20 have to know that it does. You don't have to know
21 why, you don't have to know where, you don't have
22 to know whether the effects are in the lake, the
23 river, or the ocean, or you don't have to know
24 when in the lifecycle it operates, or whether it
25 depends on single or multiple environmental
26 factors. It's there, it's tried and true, it's in
27 the Larkin and Ricker models.

28 And I think, perhaps most importantly, it
29 provides a practical means of testing the
30 hypothesis and, if supported, taking remedial
31 steps. The remedial steps being, of course,
32 dealing with exploitation rates.

33 Now, I say in paragraph 69, that while not to
34 be ignored, the environmental approach in the
35 main, as we've seen in these proceedings, does not
36 have the same clarity in terms of hypothesis; does
37 not account for the collapse in 2009 and the large
38 return in 2010; requires identification of a
39 specific factor or factors, in fact, that's the
40 object of the exercise. And finally, if proven,
41 offers no apparent short-term remedy other than
42 ever diminishing fisheries. And that's where we
43 are if the population dynamics school is ignored
44 or rejected.

45 I don't have the time, Mr. Commissioner, to
46 go into the evidence and the detail. It's in my
47 written submission about the difference between

1 the two schools of thought.

2 Perhaps I'll just take you quickly to
3 paragraph 94 where I say this. The evidence shows
4 that density-dependent effects are a likely cause
5 of the decline in production of some stocks and
6 that these stocks are the major components of the
7 Fraser River sockeye. The possibility, or even
8 probability, that other factors are at play in
9 other stocks, or even the same stocks, does not
10 diminish the importance and urgency of attending
11 to the impacts of over-escapement.

12 I'll skip very quickly, I think I have a few
13 minutes left, just to highlight how the focusing
14 concepts play out into the future, that is, the
15 recommendations, and I'll be at page 23 of the
16 submission. And these really are recommendations
17 that are directed at the Department of Fisheries
18 and Oceans.

19 "Pragmatism" plays out as the direction to be
20 conservative in the approach to changes in
21 fisheries management. We've heard a number of
22 witnesses talk about uncertainty and the need for
23 transformative remedies. At paragraph 110 I deal
24 with that.

25 The second direction given by the focusing
26 concept of pragmatism is attend to the known,
27 stock-specific problems. And there are three, the
28 Early Stuart, the Early migrating Lake sockeye,
29 and the Cultus.

30 And thirdly, apply the principles of adaptive
31 management, which are all found in Dr. Walters'
32 textbook referred to by Mr. Harvey this morning.

33 "Proportionality" manifests as look to the
34 costs as well as the benefits of management
35 decisions, strike the appropriate balance between
36 management and science, and strike the balance
37 between science and experience, both personal and
38 institutional.

39 "Perspective", I've really dealt with that.
40 The point is that the fisheries resource, or the
41 fishery is a public resource.

42 Very, very, very quickly, the question on the
43 interest of terminology, or the governing concept
44 of terminology, really comes down at the end to a
45 plea for transparency. A plea for transparency
46 from the Department of Fisheries and Oceans as to
47 what they're doing and why they're doing it, and

Submissions by Mr. Lowes (WFFDF)

Submissions by Mr. Gailus (WCCSFN)

1 in particular transparency about the Aboriginal
2 agenda. Are we talking about fishing issues that
3 relate to Aboriginal people, or are we talking
4 about Aboriginal issues that relate to fishing?
5 Because they're two different things: what is
6 driving the agenda with respect to Aboriginal
7 fisheries, and the relationship between those
8 fisheries and the public fishery.

9 I see that I'm out of time, Mr. Commissioner.

10 I wish you well and I hope that our focusing
11 concepts help you in your endeavour.

12 THE COMMISSIONER: Thank you very much, Mr. Lowes.

13
14 SUBMISSIONS FOR WESTERN COAST SALISH FIRST NATIONS:
15 COWICHAN TRIBES AND CHEMAINUS FIRST NATION,
16 HWLITSUM FIRST NATION AND PENELAKUT TRIBE, TE'MEXW
17 TREATY ASSOCIATION BY MR. GAILUS:
18

19 MR. GAILUS: Mr. Commissioner, John Gailus, I'm here
20 today on behalf of Western Central Coast Salish
21 First Nations. And with me here today is Robert
22 Clifford, he's an articulated student, he helped us
23 out on the written submissions, which I don't
24 intend to refer to in any detail. I just want to
25 make note, however, that you'll see on the first
26 page there, this was quite a collaborative effort.
27 Ms. Leah DeForrest, David Robbins, Holly Vear,
28 Robert James and Sarah Sharp. We worked together
29 on these submissions and managed to pull them
30 together. They're quite comprehensive
31 submissions, Mr. Commissioner, and we look forward
32 to you reviewing them.

33 Just by way of background, again, for the
34 record, Mr. Commissioner, when we speak of the
35 Western Central Coast Salish First Nations, we're
36 talking about nine First Nations: Cowichan,
37 Chemainus, Penelakut, Hwlitsum and the members of
38 the Te'mexw Treaty Association: Songhees,
39 Nanoose, Beecher Bay, T'Souke and Malahat.

40 My clients have asked me to thank you, Mr.
41 Commissioner, for granting them standing in this
42 Commission and giving them the opportunity to
43 participate.

44 We would also echo the comments of counsel as
45 to the thanks for Commission counsel and staff and
46 the degree of professionalism and hard work.

47 For the next day and a half, Mr.

1 Commissioner, you are going to be hearing from a
2 number of First Nations participants. I have the
3 privilege to bat leadoff for the First Nations, so
4 I need to talk a little bit about the law. We're
5 going to briefly discuss causes and DFO
6 priorities, and then the main part of our
7 submissions are going to be on the Aboriginal
8 issues.

9 So we've got some submissions, Mr.
10 Commissioner, in reply to B.C. and Canada, and I
11 guess to a certain extent Mr. Lowes has nicely
12 teed this up for us.

13 We submit, Mr. Commissioner, Canada and
14 British Columbia's submissions are illustrative of
15 the impoverished view of Aboriginal and treaty
16 rights. There's three areas in particular that
17 require comment. The Aboriginal Rights Framework,
18 the Aboriginal right to fish for what's commonly
19 been known as FSC purposes, and Canada's approach
20 to Douglas Treaties.

21 Now, B.C. at page 18 of its main submission
22 says this:

23
24 ...the Commissioner is not required to, nor
25 should he, make findings with respect to the
26 state of the law concerning Aboriginal rights
27 and title with respect to fisheries, given
28 the evolving state of the law...

29
30 We submit that, Mr. Commissioner, your
31 recommendations must be cognizant of, and
32 consistent with the s. 35 jurisprudence.

33 We have provided a legal framework in our
34 submissions that we say must guide you in making
35 your recommendations. We also want to take a look
36 at PPR1, our written submissions in reply to that,
37 as well as some of the -- all of the, I would say,
38 First Nations' submissions in that regard.

39 My paragraph 10, it's at page 2 of our final
40 submission, I wanted to summarize this, but I
41 don't think I could put it any better than this,
42 Mr. Commissioner. We say the Commission must also
43 have regard to these rights in formulating its
44 recommendations. The Commission's recommendations
45 are only useful to the extent that they can be
46 lawfully implemented. As such, these
47 recommendations must be consistent with the

1 existing Aboriginal and treaty rights of all
2 affected Aboriginal peoples in accordance with the
3 fashion that those rights are protected by s. 35
4 of the **Constitution Act**. This means regard must
5 be had both to the substantive aspects of
6 Aboriginal and treaty rights. I mean the
7 Aboriginal right to fish, as well as the rules
8 limiting the extent to which the government can
9 interfere with these rights. And I would also add
10 to this the right of consultation that comes from
11 that.

12 Now, B.C. goes on at paragraph 4 of its reply
13 and says:

14
15 ...consideration of the Aboriginal right to
16 fish should not include making any specific
17 rulings or findings with respect to the scope
18 of Aboriginal title or the Aboriginal right
19 to fish or with respect to treaty rights to
20 fish.

21
22 Now, Mr. Commissioner, you're not going to be
23 expected to make any specific rulings on the
24 Aboriginal title or the Aboriginal rights of the
25 participants in this Inquiry. But I think we
26 should take a look at what Dr. Harris had to say
27 in his testimony of June 27th. It's at page 90 of
28 the transcript. So at line 7, this is actually
29 Mr. Dickson doing some cross-examination. He
30 says:

31
32 And then you say in this first paragraph on
33 this page further:

34
35 Fish were crucially important as food in
36 many Aboriginal societies in North
37 America, but also facilitated the
38 accumulation of wealth.

39
40 And then he goes on to say:

41
42 And I'm interested in the last portion...

43
44 Dr. Harris at line 19 replies, and says:

45
46 So fish, and salmon in particular, were the
47 single most important -- or was the single

1 most important resource in the territory for
2 aboriginal peoples, and this territory
3 supported as large and as dense a pre-
4 industrial non-agrarian population as existed
5 anywhere in the world. There was a
6 remarkable -- well, a remarkably dense
7 sophisticated political society here that was
8 built around the fishery, and a society that
9 included a social hierarchy with nobility at
10 the top and slaves at the bottom; a hierarchy
11 that allowed for an enormous cultural
12 production, a society rather that allowed for
13 enormous cultural production.
14

15 All of this was made possible because
16 aboriginal people and the cultures that they
17 built were specialists in the catching and
18 processing of fish.
19

20 And, Mr. Commissioner, to sum up Dr. Harris's
21 testimony, and we address this also in our written
22 submissions, salmon was the centrepiece of the
23 society and it continues to be so. There was a
24 sophisticated, organized society whose sustenance,
25 culture and economy was built around the fishery.

26 This isn't a matter that's in dispute, Mr.
27 Commissioner. The historical and anthropological
28 evidence on this is overwhelming. In *Sparrow* the
29 court opined and said the existence of a right is
30 not a subject of serious dispute.

31 I submit, Mr. Commissioner, when it --
32 certainly when it comes to fishing for food,
33 social and ceremonial purposes, there should be no
34 dispute that each of the First Nation participants
35 in this inquiry, as well as the other First
36 Nations along the migratory route, has an
37 Aboriginal right to fish for FSC purposes.

38 Although some of Dr. Harris's evidence may be
39 controversial, the historical record is not.
40 First Nations have fished since time immemorial
41 for food, social and ceremonial purposes.

42 Now, this fact is implicitly recognized by
43 DFO throughout its policy and its operations
44 decisions. We have licensing. We have openings.
45 We have the priority that's given to Aboriginal
46 fishing. I submit this may explain why DFO does
47 not comply with the *Haida* consultation framework.

1 There's no need to do a strength of claim if the
2 right exists.

3 Finally, I'll just wrap up here, Mr.
4 Commissioner.

5 There is a dispute, we agree, whether the
6 Aboriginal right to fish includes a right to sale
7 or even a moderate livelihood. However, the right
8 is not simply the right to dip the net in the
9 water and come up empty. And I didn't come up
10 with that, that comes from a judgment of Mr.
11 Justice Boldt in the U.S. Washington case, 1980,
12 what's often referred to as Boldt, and that's
13 found at paragraph 189 of our submissions.

14 I note the time, Mr. Commissioner.

15 THE COMMISSIONER: Thank you very much.

16 THE REGISTRAR: The hearing is adjourned until 2:00
17 p.m.

18
19 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
20 (PROCEEDINGS RECONVENED)

21
22 THE REGISTRAR: The hearing is now resumed.

23 THE COMMISSIONER: Mr. Gailus.

24
25 SUBMISSIONS FOR WESTERN COAST SALISH FIRST NATIONS:
26 COWICHAN TRIBES AND CHEMAINUS FIRST NATION,
27 HWLITSUM FIRST NATION AND PENELAKUT TRIBE, TE'MEXW
28 TREATY ASSOCIATION BY MR. GAILUS, continuing:

29
30 MR. GAILUS: Mr. Commissioner, John Gailus on again for
31 the Western Central Coast Salish. I have one more
32 straw man argument to address, and then I want to
33 talk about the causes of decline.

34 At paragraph 188 of its reply, Canada states:

35
36 ... the question as to which modern day
37 Aboriginal groups are beneficiaries of the
38 Douglas Treaties --

39
40 - and you will recall, five of the First Nations
41 that I represent claim to be Douglas Treaty
42 successors -

43
44 -- is a question of mixed fact and law, and
45 one that is not settled in the jurisprudence.
46 While the members of the Te'mexw Treaty
47 Association [TTA] assert Douglas Treaty

1 rights, this is not established in law.
2

3 We submit, Mr. Commissioner, this is a
4 bizarre position for the Crown to take, given that
5 it is a party to this treaty, but one that the
6 members of TTA and other Douglas Treaty First
7 Nations have repeatedly dealt with. I submit, Mr.
8 Commissioner, the answer to this argument can be
9 found in **Mikisew**, which is in our list of
10 authorities, at paragraph 34, where Mr. Justice
11 Binnie says:
12

13 In the case of a treaty the Crown, as a
14 party, will always have notice of its
15 contents.
16

17 Now, he didn't mention the issue that we're
18 addressing here, but one would expect that the
19 Crown would also be expected to know who the
20 successors, successor bands are to the treaty that
21 they've entered into. Given the degree of control
22 that we've heard about that the Crown has
23 exercised over Aboriginal people, dividing them
24 into bands, it's disingenuous of Canada to say we
25 don't know who the successors of the Douglas
26 Treaty are. The fact is, it's these five First
27 Nations. There's no dispute on this.

28 The reason why I wanted to address these straw
29 man arguments, Mr. Commissioner, is to illustrate
30 the fundamental schism that exists between First
31 Nations and the Crown generally, but in fisheries
32 in particular.
33

34 Now we go to the causes. We've heard, and
35 we've got quite extensive submissions in our
36 written submissions on this, but I just want to
37 highlight a couple of those for you, Mr.
38 Commissioner.

39 As you're aware of, throughout their
40 lifecycle, sockeye salmon are subject to multiple
41 stressors in both the freshwater and the marine
42 environment. Although the causes of the long-term
43 decline are not entirely clear - I think I'm
44 adopting Canada's submission here - it seems to be
45 that climate change and warming ocean conditions
46 may be a driver. Not a cause, but a driver of
47 other cumulative effects. And we went through
these, harmful algae blooms, decreased nutrients,

1 pathogens, invasive species, finfish aquaculture
2 and predators. That does not mean that the
3 freshwater environment of the Fraser River is a
4 pristine oasis for salmon. The cumulative effects
5 of contaminants, wastewater, logging, mining,
6 hydro, gravel removal, urbanization and warming
7 river temperatures, all impact upon the sockeye
8 salmon in its journey out to sea.

9 And I think Mr. Leadem did a very good job of
10 going through each of these topics in detail.
11 While these may not necessarily be primary
12 drivers, it would be reckless to state they do not
13 impact on salmon.

14 Now, B.C., at paragraph 33 of its
15 submissions, makes this statement:

16
17 None of the provincial topics, individually
18 or collectively, is responsible for the 20-
19 year decline of Fraser River sockeye salmon
20 or the collapse in 2009.

21
22 Now, we felt it necessary to reply to that,
23 Mr. Commissioner, and at paragraph 2 of our reply,
24 we say this:

25
26 WCCSFN's submissions comprehensively canvas
27 the individual Technical Reports that suggest
28 that increasing freshwater and ocean
29 temperature is the underlying condition
30 contributing to other factors that stand to
31 impact sockeye salmon mortality. Dismissing
32 other factors is a simplification of the
33 evidence. All of the factors mentioned above
34 in paragraph 1 --

35
36 - those being logging, urbanization, wastewater,
37 et cetera -

38
39 -- may play a significant role in the
40 cumulative impacts that sockeye salmon
41 encounter during their lifecycle. The fact is
42 that the Fraser River watershed is far from
43 the pristine watershed that British
44 Columbia's submissions paint it to be.

45
46 Habitat, and habitat protection both in-river
47 and in the marine environment must be a priority

1 for DFO. We've heard the evidence. DFO isn't
2 doing habitat. And similarly, B.C. needs to be
3 protecting habitat.

4 In a particular geographic location, Mr.
5 Commissioner, salmon may be influenced by a number
6 of variables. In addition, these variables may
7 change throughout their lifecycle, whether in the
8 freshwater or the marine environment. We submit
9 that future research should focus on these
10 potential causes, the causes that Mr. Marmorek in
11 his evidence and in Technical Report 6 talked
12 about in the marine environment.

13 Future research must be conducted with
14 cumulative effects in mind, rather than looking at
15 these causes in isolation. We submit that
16 knowledge of these cumulative effects will
17 hopefully allow better decisions in a host of
18 areas, including pre-season and in-season
19 estimates on returns.

20 Now, at page 45 of our submissions, Mr.
21 Commissioner, we make some general recommendations
22 on this, and I'd like to turn to those.

23 So right at the bottom we've got "Causes" and
24 the "Recommendations".

25 Overall there's a need for better science.

26 Areas of the marine migratory route,
27 especially the North Pacific, Queen Charlotte
28 Sound, and the Strait of Juan de Fuca, also I'd
29 say Strait of Georgia, as well, should have
30 priority for the collection of scientific data.

31 There is a need for science information to
32 inform DFO policy, not for policy accountabilities
33 to drive science. We've heard this from several
34 of the participants.

35 And finally, First Nations need to be
36 intimately involved in providing Traditional
37 Ecological Knowledge, TEK, and assisting in data
38 collection.

39 I want to move on to DFO organization. I
40 want to go through this just in a very summary
41 fashion, given the amount of time that I have.

42 But not unlike the sockeye salmon, the DFO is
43 subject to multiple stressors: decreased funding;
44 increased responsibility in the area of finfish
45 aquaculture; implementing complex policies such as
46 the Wild Salmon Policy; scientific uncertainty in
47 the face of climate change; and ever-increasing

1 consultation obligations with First Nations.

2 Now, many of the participants have
3 recommended that DFO be provided with increased
4 funding to address these stressors, and others.
5 Now, while we support these recommendations, I
6 think we need to take a reality check. We suggest
7 that if they don't get increased resources, they
8 need to focus on certain priorities.

9 First, co-operational areas, in particular
10 habitat, enforcement and protection.

11 Second, the implementation of the Wild Salmon
12 Policy should be a priority and adequately funded
13 with clear benchmarks and reasonable timeframes
14 for implementation.

15 Third, as detailed in our written
16 submissions, meaningful consultation and co--
17 management with First Nations should be a
18 priority.

19 Fourth, the test fishery needs a multiyear
20 funding commitment.

21 Fifth, science should be focused on the
22 priority areas set out in Technical Report 6.
23 That's the Marmorek Cumulative Effects report, and
24 DFO should seek out funding partners.

25 I want to turn now to consultation and the
26 aboriginal right to fish. Now, we've already
27 dealt with the aboriginal right to fish earlier,
28 but with that right come incidental rights. And
29 that comes from the **Mitchell** case, which is in our
30 list of authorities.

31 Similarly, the right is much broader, as I
32 said, than the right to dip a net in the water.
33 And for that we referenced the **Saanichton Marina**
34 and **West Moberly** cases, as well as the Boldt
35 series of decisions from Washington State.

36 We say inherent in that right includes a
37 right to manage the fishery, as well. Dr.
38 Harris's evidence was that of pre-contact
39 societies with a complex social structure who had
40 their own customs and law and methods of fisheries
41 management. You'll recall, Mr. Commissioner, that
42 he pointed to the Cowichan as an example of
43 fisheries management and the conservation ethic.

44 We submit, and I think the law is pretty
45 clear on this, that Canada has a duty to manage
46 the fishery in a manner that does not infringe
47 upon these constitutionally protected s. 35

1 rights.

2 Now, the second aspect is **Haida** and the
3 consultation requirement. We spent some time on
4 this during the hearings. We know that DFO
5 doesn't do the strength of claim analysis. It's
6 not clear whether they do the second part of the
7 test, which is the potential for adverse impact.
8 But regardless, we say they have a strong claim,
9 so the duty to consult when decisions have the
10 potential to adversely affect First Nations
11 rights.

12 Now, this engages a whole host of DFO
13 decisions, decisions regarding allocations,
14 access, habitat, and so on, have the potential to
15 impact upon these s. 35 rights. We go into this
16 in some detail in our written submissions, Mr.
17 Commissioner. But in essence, we say that
18 strategic decisions, and this comes right out of
19 **Haida** and **Rio Tinto**, starting from the Pacific
20 Salmon Treaty, the Fraser River Panel, down the
21 chain, all these decisions require meaningful
22 consultation with First Nations.

23 I want to talk a little bit about where the
24 rubber hits the road on this, and that's in the
25 matter of allocations, whether First Nations are
26 getting their fish requirements. The testimony on
27 this, Mr. Commissioner, is clear. First Nations
28 dietary and cultural needs are not being met.
29 Allocations have remained static since the
30 implementation of the AFS Strategy, post-**Sparrow**,
31 1992. Meanwhile, First Nations populations are
32 exploding, not in the sense of Mr. McDade's
33 explosive factory, but fish numbers haven't moved.

34 During the course of the hearing we heard
35 about the Coastwide Framework, which among other
36 things has established an endpoint allocation for
37 First Nations in B.C. Now, this endpoint
38 allocation was arrived at without consultation
39 with First Nations. That's in Ms. McGivney's
40 testimony, and Canada has claimed a Cabinet
41 confidence and refused to disclose this number.

42 At page 22, paragraph 116 of our written
43 submission, Mr. Lunn, perhaps I'll just read it
44 out. We say this:

45
46 The danger of an percentage allocation model
47 in this case is best illustrated by

1 considering the FSC fishery. The FSC is a
2 priority, needs based fishery. Thus it does
3 not follow that the percentage of the fishery
4 it consumes should decline if the fishery
5 declines. Instead, what one would expect to
6 see is that the priority principle, and
7 that's outlined in *Sparrow*, subject to the
8 ultimate conservation limit, would act to
9 increase the percentage of the declining
10 fishery dedicated to the FSC fishery, while
11 displacing non-Aboriginal fisheries and
12 potentially aboriginal economic fisheries as
13 is required by *Sparrow*. Thus the adoption of
14 a global endpoint based on a percentage
15 allocation is in and of itself a fundamental
16 change to the constitutionally guaranteed FSC
17 rights of Aboriginals, if implemented.

18
19 Now, in addition to this, we know that fish
20 numbers for various groups of First Nations,
21 whether we're talking Lower Fraser, Upper Fraser,
22 marine and approach, are also fixed.

23 Finally, First Nations individual allocations
24 have generally remained static.

25 We say that FSC allocation decision-making is
26 based on illegitimate factors. I'd like to look
27 at Canada's response to the s. 35 questions that
28 the Commission counsel put to them. We've got
29 them at paragraph 123, page 24 of our submissions,
30 Mr. Lunn. It's the part indented there. Canada
31 says this:

32
33 Factors considered in the negotiation of
34 First Nations FSC allocations could include:
35 recent harvest levels...; species
36 availability...; species abundance;
37 consideration of allocations for other First
38 Nations; and, population size (on reserve,
39 off reserve). In the treaty context FSC
40 levels have been negotiated with reference to
41 the above factors.

42
43 Now, recent harvest is obviously problematic
44 because the numbers have been fixed in *Sparrow*.
45 We say use of this factor renders the inadequate
46 allocations of sockeye self-perpetuating.

47 Similarly, alternate species availability

1 lacks legitimacy. First Nation sockeye fishing
2 traditions cannot be arbitrarily substituted for
3 by virtue of having access to another protein
4 source.

5 Finally, the relevance of allocations for
6 other First Nations is also highly questionable.
7 These allocations, too, were arrived at post-
8 Sparrow in the early '90s, again, self-
9 perpetuating.

10 Finally, and we make reference to this in our
11 reply. There's a reference there to game. I'm
12 not sure that a deer would be out in the fishery.

13 The testimony of the DFO witnesses, they
14 don't have a plan for how they'll accommodate
15 First Nation needs in light of these increases in
16 population. They don't intend to conduct a needs
17 assessment for each First Nation. And we address
18 this at paragraph 132 on page 26. I'm not going to
19 go there, given the time.

20 Population, we say, population and preferred
21 species must be the driver for allocation
22 decisions.

23 And FSC allocations require more transparency
24 and must be based on clear policy - rather than
25 draft, we saw a lot of draft policies - with
26 mechanisms to provide for revisions to allocation,
27 based on increases in population, as well as
28 changes to area.

29 I want to talk briefly on the terminal
30 fishery.

31 The Conservation Coalition and some of the
32 First Nation participants argue that terminal
33 fisheries will assist in ensuring a more robust
34 fishery from the conservation perspective, and
35 recommend a move to more terminal fisheries.

36 Now, this is where we part ways with some of
37 our First Nation colleagues. We don't support a
38 move to a terminal fishery at this time that
39 excludes or even limits exercise of our clients'
40 constitutionally protected Aboriginal rights to
41 fish sockeye in the places where this was
42 traditionally done.

43 You'll recall, Mr. Commissioner, that the
44 **Adams** case from the Supreme Court of Canada
45 established that Aboriginal rights are site-
46 specific.

47 Similarly, if there was a move to a terminal

1 fishery, to exclude the interception fisheries,
2 this would likely be seen as unjustifiable under
3 the **Sparrow** test and not honourable for the Crown
4 to tell the First Nations, go fish elsewhere.

5 We submit that both traditional interception
6 and terminal fisheries can coexist. Conservation
7 of sockeye does not require a choice between a
8 interception fishery and a terminal fishery. The
9 combination of better science, understanding of
10 CUs under the WSP, targeted openings, to have less
11 impact on weaker stock, and specific fishing gear
12 and techniques, we suggest is a less intrusive
13 solution than a terminal fishery.

14 I might add that a move to a terminal-only
15 fishery would be potentially fatal to the
16 commercial fishery and contrary to the
17 constitutional rights of First Nations generally,
18 and obviously the WCCSFN particularly.

19 Similarly, we don't support a share-based
20 fishery.

21 And we agree with and adopt the Sto:lo and
22 Cheam submissions at paragraphs 149 and 150 of
23 their submissions.

24 We also support the recommendation in "Our
25 Place at the Table", Exhibit 493, that ITQs not be
26 introduced until s. 35 rights of First Nations are
27 accommodated.

28 Finally, there's the matter of the
29 socioeconomic factors. And it pains me to say it,
30 but we agree with Area G, at paragraphs 139 to 140
31 regarding the potential impacts of a move to ITQs
32 -- Mr. Harvey's clients.

33 Finally, I want to go to "Co-Management". We
34 agree with our First Nation colleagues about the
35 need to move to a true co-management structure for
36 fisheries. We submit there is a legal and a
37 political basis for co-management.

38 Now, we have suggested a move to a Boldt-type
39 model, true co-management. You will recall, Mr.
40 Commissioner, that Boldt is actually the judge in
41 the case in Washington State involving a number of
42 Tribes who signed on to what are known as the
43 Stevens Treaties. Negotiated around the same time
44 as the Douglas Treaties in British Columbia.

45 It's also interesting to note that the
46 signatories to those treaties are Coast Salish
47 people, relatives of my clients and many of the

1 other First Nation participants here. They've
2 been doing co-management for 40 years, Mr.
3 Commissioner.

4 We recognize that there are impediments to
5 co-management. I discussed at the outset the
6 positions taken by B.C. and Canada in this.

7 DFO decision-making is also an impediment.
8 My friend, Mr. Taylor, said it's incremental,
9 consultative and transparent. We say it's ad hoc,
10 autocratic and opaque.

11 At paragraph 671 of the First Nations
12 Coalition submissions, which we adopt, Ms.
13 Gaertner goes into some detail in terms of what
14 the other impediments to a co-management system
15 would be. In particular is this first principle,
16 Mr. Commissioner, which we discussed in some
17 depth:

18
19 a. explicit recognition of Aboriginal title
20 and rights and treaty rights or the
21 willingness to proceed on the basis
22 of...strength claim;
23

24 DFO doesn't do either.

25
26 I'd recommend the other principles, as well:

27
28 b. clarity among First Nations, and between
29 First Nations and Canada, on the elements and
30 principles of co-management;
31

32 c. the incremental sharing of management
33 [and] responsibilities...;
34

35 d. a clear commitment from Canada of its
36 willingness to negotiate and implement co-
37 management with First Nations;
38

39 e. dedicated resources...;
40

41 f. a champion...;
42

43 g. [developing], resourcing and...use of Tier
44 1 and 2 processes...;
45

46 h. ...immediately...increased First Nations
47 representation on the Fraser River Panel to a

1 minimum of 50 percent;

2
3 i. support...capacity building and meaningful
4 involvement [with] individual First Nations
5 and Tribal Councils...and provide technical
6 expertise, and policy advice to First
7 Nations.
8

9 In order to get here, though, Mr.
10 Commissioner, First Nations have a lot of work to
11 do. The structure must be built from the ground
12 up and capacity needs to be provided to First
13 Nations and to DFO. We cannot rely on the
14 existing groups as it's recognized, there's
15 problems with authority. They're not the rights
16 holders, or in many cases the knowledge holders,
17 and we're talking about Traditional Ecological
18 Knowledge. First Nations have to get their house
19 in order, as well, in order to make the co-
20 management structure work.

21 Now, Mr. Buchanan spent a lot of time asking
22 certain questions in his presentation about, well,
23 we really don't know what this thing's going to
24 look like, so where do we start?

25 Well, there needs to be political will on all
26 sides. B.C. needs to get on board. They play a
27 significant role in habitat and land use decisions
28 that affect habitat.

29 There's been some really good work done in
30 the Forum and the Roadmap processes that we
31 wouldn't want to lose.

32 How? How do we get there?

33 Well, first the **Fisheries Act** needs to be
34 amended. Canada's got it on as a priority, so
35 let's get on with it. But do so in a manner that
36 acknowledges the need for First Nations co-
37 management, without fettering the Minister's
38 discretion.

39 In our written submission, we make reference
40 to the B.C. **Haida Gwaii Reconciliation Act**,
41 something that B.C. enacted to enable co-
42 management in Haida Gwaii. Similarly, Parks
43 Canada, agent of the federal Crown, is doing co-
44 management with the Haida in the Gwaii Hanaas.

45 Second, we need a framework agreement or an
46 MOU amongst the three governments. Examples
47 abound in Health, Education, Child and Family

Submissions by Mr. Gailus (WCCSFN)
Submissions by Mr. Dickson (STCCIB)

1 Services, where the three governments have come
2 together and entered into a co-management
3 agreement. There isn't an impediment to this.

4 The status quo is not working, Mr.
5 Commissioner. My friend Mr. Timberg says we have
6 to consult with over 130 First Nations, mostly
7 bilaterally, which takes up huge resources. We
8 agree. If they're actually doing proper
9 consultation, it would likely take even greater
10 human resources and financial resources. We
11 submit co-management, true co-management, will
12 lead to a more efficient use of resources. This
13 solution would be a model of what the Supreme
14 Court of Canada has termed "cooperative
15 federalism", all three governments working
16 together for a common goal.

17 I notice I'm out of time, Mr. Commissioner,
18 but I just want to take you to our
19 recommendations, and they're right at the end, at
20 page 63, although there's no -- there's no number
21 there, Mr. Lunn.

22 So we've got "Appendix A", which we're
23 calling "General Principles". This is our -- our
24 top ten list, Mr. Commissioner.

25 And then behind that is the "Table of
26 Recommendations" which is supposed to be labelled
27 "Appendix B", which Mr. Clifford created. He went
28 through our submissions and parsed out 111 -- 111
29 different recommendations. I didn't figure we had
30 more than 25, but apparently they're there.

31 In conclusion, Mr. Commissioner, you face a
32 daunting task. Your hard work is just beginning.
33 The First Nations that I represent, as well as
34 First Nations about the Province and throughout
35 the Province are anxiously awaiting your report,
36 and we look forward to reading it, and wish you
37 the best of luck. Thank you.

38 THE COMMISSIONER: Thank you very much, Mr. Gailus.
39 Mr. Dickson.

40
41 SUBMISSIONS FOR STO:LO TRIBAL COUNCIL AND CHEAM INDIAN
42 BAND BY MR. DICKSON:

43
44 MR. DICKSON: Mr. Commissioner, Tim Dickson for the
45 Sto:lo Tribal Council and the Cheam Indian Band.
46 Mr. Commissioner, we have 45 minutes, which will
47 be divided between Ms. Schabus and myself.

1 Before I turn to our substantive issues, I
2 want to express our appreciation for this Inquiry,
3 and for the efforts of yourself, of Commission
4 counsel and staff, of the other participants, and
5 of all of the witnesses.

6 The topic of this Inquiry is enormously
7 important and a huge amount of public money and
8 time has been devoted to it. And I don't say
9 this, Mr. Commissioner, to add to the weight
10 already upon your shoulders, but rather to stress
11 that much will be lost if this opportunity is not
12 seized to make bold recommendations for the
13 management of Fraser sockeye. You have been
14 granted the mandate, the forum, and the resources
15 to position you to make far-reaching
16 recommendations, and I urge you not to fear making
17 them.

18 Let me turn to the issues I will speak to.
19 There are five of them: First, I will address
20 what we see as the nature and causes of the
21 decline of the Fraser sockeye. Next, I will turn
22 to what we say is the proper management philosophy
23 to respond to that decline. Third, I will address
24 the benefits for the future sustainability of the
25 sockeye in implementing joint management between
26 DFO and First Nations. And we see these three
27 points as inextricably linked. The first leads to
28 the second which leads to the third. I will also
29 address a fourth point, which is the monitoring
30 and enforcement over the Aboriginal fishery. And
31 as a last point, I will briefly address the
32 testimony of Dr. Harris, and then Ms. Schabus will
33 take over the podium.

34 So let me turn to the first topic, which is
35 the nature and causes of the decline. One thing
36 is clear in this Inquiry, Mr. Commissioner, and
37 that is that there is no one cause of the decline
38 of the Fraser sockeye. We do not have a smoking
39 gun scenario. Rather, we have a scenario of a
40 thousand cuts suffered by the sockeye as they
41 travel down the river and up the coast and back
42 again. They are subjected to a large range of
43 stresses that impact upon their health and lead to
44 their mortality.

45 And in this way the causes of the decline of
46 Fraser sockeye are best conceptualized as
47 cumulative in nature. As Mr. Leadem described in

1 his oral submissions, they are synergistic and
2 sometimes additive, but in any event the
3 widespread declines are best thought of as a
4 combination of a large number of stressors on the
5 fish that together lead to their mortality.

6 And in this sense, Project 6 by David
7 Marmorek and his colleagues is important in
8 conceptualizing this cumulative aspect of the
9 causes of the sockeye's decline.

10 In that project, that Technical Report is
11 also important in identifying where those
12 cumulative effects are becoming realized, where
13 the impacts are the largest, and the Project 6
14 team concluded that marine conditions on the
15 outmigration and climate change are the most
16 likely drivers of sockeye mortality, the largest
17 drivers. And as a general proposition we commend
18 Project 6 to you. The analysis, in our view, is
19 sound and the conclusions well supported.

20 One of the key implications of Project 6, Mr.
21 Commissioner, and indeed of the overall body of
22 evidence in this Inquiry, is that we live in an
23 era of changing environmental conditions, of
24 increasing uncertainty, and of higher mortality
25 for sockeye. In these conditions, many of the
26 conditions that are most closely linked to the
27 decline of the sockeye cannot be fixed by DFO, or
28 indeed Canada alone. Some contributing stressors
29 like contaminants maybe, but others, including big
30 ones, cannot.

31 And here let me just pause to note that one
32 of the most important pieces of evidence in this
33 inquiry is the finding by Peterman and Dorner in
34 Project 10 that most of the 45 sockeye stocks
35 outside of the Fraser that they examined displayed
36 a similar decline as Fraser stocks. This is not
37 just a Fraser River problem. This is happening
38 all up and down the coast.

39 So the most important focus has to be on how
40 to manage properly within these conditions. And
41 this is the second broad point I wish to address.

42 The key aspects of the appropriate management
43 philosophy are to protect the biodiversity among
44 the sockeye and to protect ecosystems. And if you
45 add into that list that fisheries must be managed
46 in a sustainable manner, then those are the three
47 core principles of the Wild Salmon Policy, and we

1 support those principles, and we broadly support
2 the policy.

3 Mr. Leadem called it a home run. We say it's
4 at least a base hit.

5 Let me just address the biodiversity point
6 for a moment. If we can't reverse climate change
7 and we can't reverse deteriorating marine
8 conditions, then it is essential that we preserve
9 the ability of the sockeye to adapt to those
10 changes.

11 And that means that you need to preserve
12 diversity, both genetic diversity and diversity
13 among life histories. Because some populations
14 will do better than others and relatively they
15 will thrive, and you need to preserve those
16 populations so that those successful traits are
17 not lost, but rather propagated. And so we say
18 that generally weak stock management is the right
19 course.

20 And let me just address here for a moment the
21 issue of over-escapement. This is an issue in
22 which the battle lines are drawn between the
23 commercial and recreational groups on the one
24 hand, and DFO, the Conservation Coalition and the
25 First Nation groups on the other. And it is
26 related to a difference in management philosophy,
27 essentially, whether you are opposed to or
28 advocate for weak stock management.

29 The Sto:lo and the Cheam do not see that
30 over-escapement poses a significant concern in the
31 context of the widespread declines of sockeye.
32 And so we say that weak stock management is the
33 proper approach.

34 Mr. Rosenbloom took us on yesterday, saying
35 that we stated that there is no evidence of the
36 decline from over-escapement. And that's not
37 quite right. What we rely upon in our submissions
38 at paragraph 24 is Project 10 by Peterman and
39 Dorner, who addressed this issue of over-
40 escapement, among other things, and they noted
41 that there is some evidence that might suggest
42 that the Quesnel stock is declining from spawner
43 overabundance, but that's it. That's the only
44 stock which may support the hypothesis.

45 And Peterman and Dorner concluded, quote:

46
47 Our data do not support the hypothesis that

1 large spawner abundances are responsible for
2 widespread declines
3

4 And we go on in our submissions to note that
5 David Marmorek preferred the evidence of Peterman
6 and Dorner to that of Carl Walters, and we
7 respectfully submit that you should, too.

8 So in our submission, the correct approach is
9 weak stock management, and to put it another way,
10 the Wild Salmon Policy's goal of protecting
11 biodiversity and ecosystems is the right
12 philosophy. But philosophy alone will do nothing
13 for the sockeye. What is needed is action, and in
14 this DFO has failed. DFO has not adequately
15 implemented the policy.

16 And this is an issue on which we agree with
17 Mr. Rosenbloom. And he and Mr. Leadem and the
18 Gardner Pinfold report, the draft report, have
19 spoken to this point. I will not linger on it.

20 I will only say that Ms. Farlinger's
21 testimony from the DFO Priorities panel left a
22 large impression on me. When she was asked
23 questions about the implementation of the Wild
24 Salmon Policy, she repeatedly responded that the
25 policy is being implemented in spirit. The policy
26 is being implemented in spirit, but not in body,
27 and that's not nearly enough.

28 Philosophy won't save the fish, and neither
29 will theology. What is needed, Mr. Commissioner,
30 is action. And we join the other participants in
31 calling for more funding for the implementation of
32 the Wild Salmon Policy. And in our reply
33 submissions we adopt a number of the
34 recommendations from the Conservation Coalition
35 and the First Nations Coalition in this regard,
36 and I'll leave those with you.

37 Mr. Commissioner, to recount to this point,
38 our submission is that based on Project 6, you
39 should find that the major drivers of the decline
40 in productivity are deteriorating marine
41 conditions and climate change, and this reality
42 mandates a management approach that preserves
43 biodiversity and ecosystems. Essentially, the
44 core of the Wild Salmon Policy is correct. The
45 issue is that the Wild Salmon Policy needs to be
46 implemented.

47 I'd like to turn to my third topic, which is

1 co-management between DFO and First Nations. As
2 you know, we say that is essential, and it is
3 essential in two respects. The first is that co-
4 management is part of the basket of rights that
5 some First Nations have in Fraser sockeye. And
6 indeed, co-management is necessary to ensure the
7 conservation of the sockeye so that First Nations
8 can continue to exercise their constitutional
9 rights to take the fish.

10 Now, I know that the nature of Aboriginal
11 rights is controversial, and it's the subject of
12 evolving case law, and anyway it's not an issue
13 you have been squarely mandated to determine. But
14 you should have this point in mind, Mr.
15 Commissioner, it is not controversial among First
16 Nations that they have a right to co-management.
17 That is a deep-seated conviction among First
18 Nations people, and they will continue to push for
19 it.

20 What I do say, with respect, you are mandated
21 to consider, is the second reason co-management is
22 essential, which are the many benefits for the
23 conservation of the sockeye that will flow out of
24 it.

25 In our submissions at paragraph 66 to 77, we
26 set out five of these benefits, and I will touch
27 briefly on three of them here in my oral
28 submissions.

29 The first of these benefits, Mr.
30 Commissioner, is the incorporation of Traditional
31 Ecological Knowledge, TEK, not just of the sockeye
32 stocks, but of the sockeye's habitat. Because it
33 should be remembered that First Nations live along
34 the Coast and the Fraser River, and they have for
35 millennia, and they do today, and they have a deep
36 reservoir of traditional knowledge of that habitat
37 and of the sockeye within them.

38 Many witnesses in the hearings spoke of the
39 enormous value of TEK to fisheries management, and
40 many DFO witnesses, including at the highest
41 level, acknowledged that DFO is not adequately
42 incorporating TEK, and that's very clear. And the
43 problem DFO faces with incorporating TEK is that
44 they don't know how to do it, and how could they?

45 Mr. Taylor called DFO a science-based
46 organization, and Mr. Harvey took issue with that
47 and called it a policy-based organization. But

1 what is clear is that it is not a TEK-based
2 organization. It would never be able to
3 incorporate TEK on its own. It doesn't know how
4 to do it, and it won't know. But it wants to --
5 it wants to have the benefit of TEK, and that is
6 proper. It should want to have the benefit of it.
7 But the point is this, to incorporate TEK in the
8 fisheries management, Aboriginal groups and
9 Aboriginal organizations must be incorporated into
10 fisheries management, and that is done through co-
11 management.

12 A second benefit of co-management, Mr.
13 Commissioner, is that First Nations can serve as a
14 balance to DFO, in a manner similar to the role
15 the Northwest Indian Fisheries Commission plays in
16 Washington State. As this inquiry heard from a
17 number of witnesses, that model is working. And a
18 benefit of it, of course, is that it allows for
19 the inclusion of TEK.

20 But also it allows for the inclusion of the
21 energy and commitment of the tribes toward the
22 conservation of the fish. That is, it allows the
23 bureaucracy of government to be balanced by the
24 tribes, who have a direct and profound stake in
25 the conservation of the fish and the
26 sustainability of the fishery. To put the point
27 briefly, if the fish are lost, government
28 officials might lose their employment, but the
29 tribes, and here in B.C., First Nations, would
30 lose their culture.

31 And that leads me to the third and last
32 benefit of co-management I'll speak to here, that
33 is that First Nations have deep within the core of
34 their cultures an ethic of conservation and an
35 integrated view of the environment. And those are
36 values and perspectives that are essential to the
37 sustainability of the sockeye, and they are
38 fundamental principles of the Wild Salmon Policy.

39 DFO adopted that policy in 2005, but those
40 principles have been part of Aboriginal cultures
41 for a very long time. And if the principles are
42 going to be put into practice, if they are going
43 to be implemented in body as well as in spirit,
44 then First Nations will have to be intimately
45 engaged in that process.

46 Now, I wanted to pause here and draw your
47 attention to one of the differences between the

1 commercial and recreational groups and the
2 conservation and Aboriginal groups. The former
3 emphasize sustainable use. Really, they emphasize
4 fisheries over fish. Indeed, Mr. Harvey this
5 morning went so far as to suggest that DFO is
6 mandated to care only about fisheries, and I
7 suppose, especially about his clients' fisheries.
8 And that approach is exactly contrary to the Wild
9 Salmon Policy, and indeed the commercial and
10 recreational groups reject the Policy.

11 And if you believe that the Wild Salmon
12 Policy is broadly correct, and we submit that you
13 should, then DFO will need more of the perspective
14 that First Nations have to offer, which focuses on
15 conservation and long-term sustainability.

16 And indeed, Mr. Commissioner, when you look
17 at the six Strategies of the Wild Salmon Policy,
18 you will see that the close participation of First
19 Nations is essential to each of them. And I'll
20 just touch on the first three.

21 Strategy 1 calls for "Standardized monitoring
22 of wild salmon status". Well, the baseline data
23 and benchmarks that are to be developed need to
24 take into account the enormous reservoir of
25 knowledge that is TEK. And monitoring and
26 assessing of conservation units need to utilize
27 the fact the First Nations people live year round
28 along critical sockeye habitat.

29 Strategy 2, is the "Assessment of habitat
30 status", and the same points apply here. That
31 must incorporate TEK and that must utilize First
32 Nations living alongside sockeye habitat.

33 Strategy 3 calls for the "Inclusion of
34 ecosystem values and monitoring". Well, of
35 course, a holistic integrated view of the
36 environment is central to Aboriginal world views,
37 and monitoring and observation is the very basis
38 of TEK.

39 And in our written submissions, Mr.
40 Commissioner, we break down the Strategies by the
41 Action Steps, and we show the importance of co-
42 management to each of them, and I'll leave that
43 with you for now.

44 So my submission is that co-management is
45 essential to sound fisheries management. And in
46 my submission, you should urge DFO to commit more
47 fully, more genuinely to real co-management, real

1 joint decision-making with First Nations.

2 We have more specific recommendations in our
3 submissions with respect to the necessary steps to
4 achieving co-management, including that DFO
5 demonstrated support for co-management by entering
6 into a letter of understanding with First Nations
7 in the Roadmap process, and that DFO provide
8 longer-term funding for the building of capacity
9 among First Nations, including Tier 1 processes.

10 I wanted to say here just something about the
11 form that co-management will eventually need to
12 take, a point Mr. Gailus touched on, and that is
13 that it will need to respect the source of
14 authority on the Aboriginal side. And that is at
15 the level of First Nations, because that is where
16 Aboriginal rights are held, not within Aboriginal
17 organizations. The aggregate groups, the
18 Aboriginal organizations, will play very important
19 technical roles, but the decision-making authority
20 must ultimately find its source with First
21 Nations.

22 And let me here just express our appreciation
23 for organizations like the First Nations Fisheries
24 Council. In this Inquiry they form with other
25 groups the First Nations Coalition. And I suggest
26 that their involvement in this Inquiry
27 demonstrates the kind of rigour and creativity and
28 commitment that Aboriginal organizations like the
29 Fisheries Council will bring to co-management.
30 Because many of the practical constructive and
31 forward-looking recommendations that have been
32 presented to you, Mr. Commissioner, come from the
33 First Nations Coalition. And groups like the
34 Fisheries Council will bring that to co-
35 management, and that is a strength of co-
36 management, that is one of the enormous benefits
37 of it. But I urge you as well to keep in mind
38 that any legitimate and resilient system of co-
39 management will have to base authority on the
40 Aboriginal side in the First Nations.

41 I want now, Mr. Commissioner, to turn to
42 monitoring and enforcement within the Aboriginal
43 fishery. This is a subject that has arisen in
44 many of the past reviews of the Fraser fishery,
45 and of course it arose within this Inquiry.

46 Again and again over the decades, the
47 commercial groups, of which Mr. Eidsvik's

1 Coalition is merely the vanguard, have made all
2 sorts of baseless allegations against the
3 Aboriginal fishery. And I suggest, Mr.
4 Commissioner, that you ought to take the
5 opportunity of this inquiry to state the truth
6 about the Aboriginal fishery, and that is this:
7 first, that the monitoring of the Aboriginal
8 fishery is adequate and provides fairly good
9 coverage; and (2) that there is credible
10 enforcement on the Aboriginal fishery and there is
11 no over-harvesting in the Aboriginal fishery that
12 is a cause of the decline. Those are the facts,
13 and they are well borne out by the evidence, and
14 we give the references in our primary submission
15 and in our reply, as does the First Nations
16 Coalition.

17 We submit that DFO's focus in terms of
18 enforcement in the Aboriginal fishery must instead
19 be on shared stewardship, on building buy-in
20 within the communities on supporting their efforts
21 to police themselves. And initiatives like the
22 Aboriginal Guardian Program are very important
23 here, as Mr. Bevan noted. And he and Mr. Nelson
24 agreed that the program should be restored, and we
25 urge you to make that recommendation.

26 There is another issue within this subject,
27 and that is the sale of FSC fish. You have heard,
28 Mr. Commissioner, outrageous and unsupported
29 statements in this regard, like Mr. Coultish's
30 belief that that 97 percent of all FSC fish is
31 sold. And baseless statements like that one, from
32 a C&P witness, demonstrate very clearly that C&P
33 needs to spend more time building trust and
34 communication with First Nations than it does now.

35 Indeed, the evidence clearly shows that C&P
36 has no idea how First Nations use and store FSC
37 fish. They've never conducted a study. They've
38 never even asked the communities. And Ernie Crey
39 spoke to how damaging such statements are to the
40 relations between DFO and Aboriginal communities,
41 and we suggest that C&P's approach needs to shift
42 more to Pillar III, more to collaboration and
43 communication, and more to share stewardship.

44 Now, Mr. Commissioner, you've also heard some
45 very well-supported facts about the sale of FSC
46 fish. You've heard that the enforcement of it
47 uses up enormous C&P resources and with little

1 result. You've heard that it creates huge
2 antagonism between DFO and First Nations.

3 You've heard from Dr. Harris that the ban on
4 the sale of FSC fish was a legal construct
5 designed to marginalize the Aboriginal fishery and
6 create space for the commercial fishery. And
7 you've heard that many First Nations people regard
8 that ban as unjust.

9 And most importantly, Mr. Commissioner, you
10 have heard every DFO witness who has spoken to the
11 point, agree that the sale of a legally caught,
12 properly accounted for FSC fish does not pose a
13 conservation concern. And obviously that's right.
14 The conservation concern is over-harvesting, not
15 the sale of FSC fish. And the evidence shows that
16 over-harvesting is not a serious problem within
17 the Aboriginal fishery.

18 So all this enforcement effort on sales, and
19 all the antagonism it engenders is for nothing,
20 from a conservation perspective. And we submit
21 that you should make that clear in your report,
22 and you should urge DFO to step back on this issue
23 a bit, readjust its priorities and focus instead
24 on cultivating trust and shared stewardship.

25 I need to stay on the sales issue for just a
26 moment longer, because I need to address our
27 opponents on this issue, which are the commercial
28 group. Because that is what they are on this
29 issue, they are opposed to the Aboriginal fishery.
30 And the reason why is because it eats into their
31 allocations, and into their market shares. And
32 that's the plain and obvious truth.

33 That's why they took a challenge to the pilot
34 sales program, which allowed for legal sales, all
35 the way to the Supreme Court of Canada in the **Kapp**
36 case. They want to roll back the clock to when
37 they didn't have to compete with the Aboriginal
38 communal sales fishery. And that's why Mr.
39 Eidsvik yesterday and Mr. Lowes today cite the
40 lower court decisions in **Kapp**, where they won, and
41 refuse to acknowledge the judgment of the Supreme
42 Court of Canada where they lost.

43 They refuse to acknowledge the reality of
44 First Nations special relationship to the fishery.
45 And I suggest that you have heard enough of that
46 relationship to understand the key points, that
47 First Nations have rights in the fishery that were

1 long denied them, and that there are grave
2 historical injustices here that need remedying.
3 And I urge you to reject the position stated by
4 Mr. Eidsvik and his allies, and reject them
5 soundly and clearly, and help put them to rest.

6 And I want to touch just on one more point,
7 and that is Dr. Harris. Because you heard from
8 him some of the context and history of the
9 Aboriginal fishery, and I want to say a quick word
10 about his testimony. He has come under attack
11 from some participants here. Part of their
12 complaint is that he opined on legal matters, and
13 part of it is that they didn't like his opinions.
14 And that was the nature of his brief, Mr.

15 Commissioner. He was asked to give you a legal
16 history of the Aboriginal fishery up to 1982, and
17 that would necessarily involve some opining on
18 legal matters, and it will of course cause some
19 anxiety in DFO, the Province, and other groups who
20 seek to minimize Aboriginal rights.

21 And I just say to you, Mr. Commissioner, that
22 you could not have had come before you with this
23 brief a more balanced, neutral and authoritative
24 witness than Dr. Harris. And I suggest to you
25 that his evidence is very important to
26 understanding some of the tensions that exist
27 between First Nations and DFO, among other things,
28 and I urge you to pay heed to it.

29 Thank you, Mr. Commissioner. I turn over the
30 podium to Ms. Schabus.

31 THE COMMISSIONER: Thank you, Mr. Dickson.

32
33 SUBMISSIONS FOR STO:LO TRIBAL COUNCIL AND CHEAM INDIAN
34 BAND BY MS. SCHABUS:

35
36 MS. SCHABUS: Mr. Commissioner, I'm going to pick up
37 where my friend left off. And just looking at
38 Commission counsel, I want to indicate that
39 although my co-counsel ate some five of my
40 minutes, Mr. Gereluk was kind enough to share five
41 of his minutes with me. So I would hope that I
42 get some leeway. But I'd like to launch right
43 into it.

44 Mr. Commissioner, First Nations are the first
45 to be negatively impacted by the decline of the
46 Fraser River sockeye salmon. Fraser River sockeye
47 salmon is a cultural keystone species for

1 indigenous peoples in the Pacific Northwest. This
2 is especially true for the Sto:lo people, the
3 People of the River, including the people at
4 Cheam, for whom the *sthéqi*, that's the
5 Hal'gemeylem name from which the English word
6 "sockeye" is derived, is central to their culture
7 and indigenous economies.

8 Within living memories of the elders they
9 still remember times of abundance like the
10 ancestors enjoyed throughout their lifetime. In
11 turn you heard Aboriginal witnesses testify how
12 they are worried about their grandchildren and
13 future generations, and how they will be able to
14 maintain the relationship with sockeye salmon that
15 is central to their culture.

16 Indigenous peoples have their own collective
17 systems for managing sockeye salmon, including
18 indigenous laws to protect them.

19 The common law recognizes Aboriginal right to
20 fish, as *sui generis* rights, which are also
21 constitutionally protected in Canada. But the
22 substance of these rights is enshrined in
23 indigenous legal and management systems, and a lot
24 can be learned from them.

25 A number of participants are missing those
26 important points that we are actually dealing with
27 ancestral and inherent rights, and these rights
28 are also collectively held and controlled. They
29 cannot be compared to individual rights with an
30 oversimplified equality argument.

31 We therefore disagree with the submissions of
32 the B.C. Fisheries Survival Coalition, and the
33 Area E, and the B.C. Wildlife Federation.
34 Repeated references to race-based fishery, and
35 comparisons to privileged placed fisheries of
36 individuals distract from the communal nature of
37 Aboriginal fishery and its basis in indigenous
38 legal systems.

39 The comments are also not consistent with the
40 Supreme Court of Canada decisions that have upheld
41 Aboriginal rights, and rule them their
42 constitutional protection.

43 We take issue, as my colleague already has,
44 with the finger pointing on the part of
45 participants, such as unsubstantiated references
46 to Aboriginal fisheries in regard to differences
47 between estimates, or DBEs. Mr. Eidsvik did so

1 yesterday, and when he talked about and suggested
2 that there could be dropouts from set nets, an
3 issue that was not established in evidence before
4 the Commission. Instead, he referred to old
5 documents that have long been overtaken by
6 research since.

7 Similarly, Area G especially in their written
8 submissions, especially in paragraph 134, and the
9 B.C. Wildlife Federation, especially in paragraph
10 60 and 61, have added references, unsubstantiated
11 references to DBEs.

12 Pacific Salmon Commission Chief Biologist
13 Mike Lapointe pointed to apparent correlations
14 between DBEs and water temperatures, and he
15 generally considered environmental factors as the
16 major factor relating to the difference between
17 estimates. It is therefore frankly misleading to
18 then go on and suggest a correlation to the new
19 in-river fisheries as the B.C. Wildlife Federation
20 does in their submissions.

21 We have already addressed the issue of DBEs,
22 and its causative phenomenon of en route mortality
23 in our initial submissions. We just want to point
24 out here that the Pacific Salmon Commission had
25 funded extensive research, including the genomics
26 research of Dr. Kristi Miller, to get to the
27 bottom of en route mortality. This research has
28 since uncovered a mortality-related signature and
29 for the first time an isolated parvovirus in
30 sockeye salmon. This research should therefore be
31 fully funded and supported to better understand
32 the causes of en route mortality and death,
33 resulting difference between estimates.

34 This integrated fish health research
35 correlated with analysis of environmental factors
36 should assist in better estimates, so as to avoid
37 the current differences between estimates and to
38 make better management decisions. Pointing to
39 earlier reports that fail to entirely recognize
40 the phenomenon of en route mortality is not
41 helpful and misleading.

42 Indicative, if you look at Canada's reply
43 submissions, is that they hardly raise any issue
44 with the submissions of commercial groups despite
45 -- and also recreational groups despite numerous
46 inaccurate and frankly inappropriate comments in
47 regarding to Aboriginal rights and Aboriginal

1 fisheries and conservation issues generally.

2 On the other hand, every time Aboriginal
3 participants mention rights, they try to limit
4 them and beat down any federal obligation. This
5 attitude on the part of the Canadian government
6 and its silence in light of inappropriate
7 assertions and interpretations, on the part of
8 some commercial groups is disconcerting, and that
9 it is also indicative of attitudes that have to be
10 countered and rejected, since they stand in the
11 way of finding a more constructive approach to
12 future management of Fraser River sockeye salmon.
13 To show leadership is to put an end to such
14 antics.

15 Other groups, for example the Conservation
16 Coalition stated in their reply submissions at
17 paragraph 113, likewise the submissions of Area E,
18 have little merit to them. The premise that the
19 decline of Fraser River sockeye is due to illegal
20 overfishing, termed poaching in its submission, by
21 the Aboriginal fishing sector, is in our view
22 patently wrong and moreover dangerously close to
23 racist sentiment that should have no place in this
24 inquiry.

25 We wholeheartedly agree with this point, and
26 further want to point out that such racist
27 sentiment should have no room in discussions about
28 fisheries management. We again urge you, Mr.
29 Commissioner, as we do in our reply submissions at
30 paragraph 44 to 46, to put an end to this.

31 As stated earlier, we want to suggest to you,
32 Mr. Commissioner, that the first step and first
33 important step in properly dealing with First
34 Nations regarding management of Fraser River
35 sockeye salmon, is recognition of Aboriginal
36 rights. Canada has never taken this step, and it
37 complicates any move towards true co-management
38 and joint decision-making.

39 Limitations in Canada's laws and policies
40 remain a major point of contention for indigenous
41 peoples. In order to reshape the relationship
42 between the Department of Fisheries and Oceans and
43 indigenous peoples, these systemic issues will
44 have to be addressed. Not only to overcome an
45 historic injustice that Professor Harris talked
46 about, but to set the legal basis for true joint
47 decision-making and co-management to ensure

1 sustainability of Fraser River sockeye salmon.

2 Then and now. DFO's policies and regulations
3 were aimed at protecting the exclusive
4 jurisdiction of DFO fisheries. This objective
5 appears to be paramount for DFO, even ahead of
6 conservation of Fraser River sockeye salmon
7 stocks, which, as many have testified before the
8 Cohen Commission, could be furthered through
9 implementing co-management fully with Aboriginal
10 peoples.

11 Mr. Commissioner, you heard from senior DFO
12 managers, including from the Aboriginal Policy and
13 Governance Directorate, that rather than
14 recognizing or implementing Aboriginal rights,
15 they are using Aboriginal programming and policy
16 approaches.

17 Furthermore, Canada treats Aboriginal rights
18 as a risk and applies a risk management approach.
19 While a risk management approach might be
20 appropriate to dealing with environmental
21 phenomena that are not easily predictable, in
22 regard to Aboriginal rights, it just creates
23 additional uncertainty in the management of Fraser
24 River sockeye salmon for all.

25 Aboriginal rights are an issue that could
26 easily be addressed by recognition and
27 implementation of those rights in fisheries
28 management.

29 DFO's current risk based management and
30 policy approach, especially regarding Aboriginal
31 fisheries, results in a lack of transparency that
32 prevents effective participation of First Nations
33 in decision-making, or even meaningful
34 consultation, for that matter. Negotiating
35 mandates are closely guarded, information is not
36 openly shared, and therefore does not enable
37 informed decision-making and co-management. This
38 results in ongoing infringement of aboriginal
39 rights.

40 DFO themselves acknowledge that a number of
41 their management decisions have the potential of
42 infringing Aboriginal rights, including the shift
43 to a quota or share-based management system. Yet
44 DFO has been promoting and proceeding with this
45 approach without consulting with Aboriginal
46 peoples and First Nations, and without first
47 addressing outstanding issues of recognition of

1 Aboriginal title and rights.

2 The lack of transparency in DFO policies
3 regarding fisheries management, especially
4 Aboriginal fisheries, is evidenced most recently
5 by the development of the Coastwide Framework
6 without any direct input and consultation with
7 First Nations, including setting the endpoint for
8 a single allocation.

9 International standards and principles
10 relating to indigenous peoples stipulate that
11 indigenous peoples should be involved at all
12 stages of decision making, and also in the
13 development of laws and policies that affect them.
14 The Coastwide Framework is clearly an example on
15 point, yet, its contents and development have been
16 closely guarded, including from the Cohen
17 Commission and First Nations have had no say
18 regarding its development.

19 Mr. Commissioner, we are not asking you to
20 make a ruling on Aboriginal rights, but you are
21 tasked with making recommendations to ensure
22 future sustainability of Fraser River sockeye
23 salmon. Recognition of the important and unique
24 role that First Nations play in the future
25 sustainable management of Fraser River sockeye
26 salmon is key in that regard.

27 As a result, a first important step in that
28 direction, we respectfully submit to you, is that
29 you should recommend that First Nations are
30 recognized as rights holders and treated as such
31 by DFO. In making recommendations, it's important
32 to have a forward looking approach, aiming at
33 better future sustainability of Fraser River
34 sockeye salmon, and new approaches are clearly
35 needed.

36 You can also look to international standards
37 and principles for a better approach. In regard
38 to indigenous peoples and their involvement in
39 decision-making, we want to point you to the
40 internationally recognized principle of prior
41 informed consent. The principle is compelling
42 because it requires as a first step that all
43 relevant information is shared with indigenous
44 peoples so they can make an informed decision on
45 the basis of it.

46 Transparency and open sharing of information
47 is a key element that is missing from DFO's

1 current management approach.

2 We have heard from other participants,
3 including public interest advocacy groups, that
4 information should be made more broadly available,
5 so that the public can form their own opinions.
6 Aboriginal peoples agree. It is important to have
7 all the necessary information to engage in an open
8 debate and informed decision-making.

9 By implementing a prior informed consent
10 standard, indigenous peoples as decision-makers
11 can ensure that all the necessary information is
12 provided and made available.

13 Indigenous peoples can also serve as checks
14 and balances on DFO to ensure that they do not
15 take unilateral decisions that negatively impact
16 and infringe on Aboriginal rights, or negatively
17 impact the sustainability of Fraser River sockeye
18 salmon and their habitat.

19 Mr. Gailus has already referred, and we also
20 support the development of a model similar to the
21 Boldt model in the United States, where indigenous
22 peoples are co-managers of the Fraser River
23 sockeye salmon. The tribes are joint decision-
24 makers regarding fisheries management. In that
25 case, the federal government brought a case
26 alongside the tribes against the State of
27 Washington, which in turn have implemented the
28 court decisions, again taking the important step
29 of recognition and implementation.

30 And we also support the recommendation that
31 the independent indigenous participation of 50
32 percent, a minimum of 50 percent on not just the
33 Fraser River panel, but the Pacific Salmon
34 Commission overall, including the Commissioners
35 that are independently mandated by Aboriginal
36 peoples.

37 Mr. Commissioner, you've heard a lot about
38 the changes in the environment, but this also
39 requires a change in the management approach.
40 DFO's current unilateral non-transparent
41 management approach has not and cannot result in
42 sustainable management of Fraser River sockeye
43 salmon.

44 Mr. Leadem took you through many of the
45 impacts that Fraser River sockeye salmon encounter
46 along the migratory route, from urbanization to
47 increased impact on riparian areas, logging,

1 resulting erosion, pollution, and it's important
2 to also note that climate change at its current
3 rate is a human-caused phenomenon. These are all
4 things that the Fraser River sockeye salmon have
5 to struggle with in their lifespan.

6 Similar to First Nations, the environment
7 that they have to navigate has dramatically
8 changed in the last 100-plus years, and especially
9 in the last 20-plus years, they've been
10 increasingly stressed, and we've seen a resulting
11 overall decline in fish health.

12 The Fraser River sockeye salmon are very
13 resilient creatures, but it is important that we
14 give them the fighting chance by focusing more of
15 our effort on the ground, and protecting this
16 diversity and biodiversity of the ecosystems they
17 depend on.

18 We will not take you through our -- to the
19 different impacts in detail, and also want to
20 point out that we actually make recommendations
21 and endorse others' recommendations in regarding
22 to habitat management in our reply submissions.

23 Now, these are only the physical changes in
24 the environment that Fraser River sockeye salmon
25 have to navigate. It is just lucky that they do
26 not see the bureaucratic maze that is the current
27 framework for their management or they might get
28 lost forever. You just have to look at Canada's
29 submissions to see the bureaucratic maze, and also
30 note how little money and effort is expended on
31 proper management on the ground.

32 This is a maze that indigenous peoples have
33 to navigate if they want to participate in the
34 management of Fraser River sockeye salmon, and
35 this is why it is so important to ensure
36 transparency and involve them as equal decision-
37 makers to ensure that they serve as checks and
38 balances on DFO and bring management decisions
39 down to the ground in their territories.

40 You have heard a lot of budget cuts and
41 reduced ability of DFO personnel to address
42 habitat-related issues. Indigenous peoples not
43 only hold knowledge, but they are also present in
44 their territories. And as such they are often the
45 first to recognize negative impacts or changes.
46 Working with indigenous peoples as co-managers
47 ensures that there are more eyes and ears on the

1 ground and that decisions are carefully considered
2 in the local context.

3 You have heard a lot about the inability of
4 DFO to deal with all development proposals in the
5 respective territories, and to achieve no net loss
6 of habitat. A number of habitat-related impacts
7 are complicated by inter-jurisdictional issues,
8 where the Province makes key decisions or
9 downloads responsibility to municipalities or the
10 professional reliance model, and DFO is
11 increasingly missing from the table.

12 Now, both the Province and the federal
13 government cannot deny that they have an
14 obligation to consult with First Nations, so
15 working with First Nations can ensure as strong a
16 voice for fisheries habitat and fish-related
17 concerns at those tables. Integrated management
18 and joint decision-making with fisheries
19 management will ensure better overall habitat
20 management, and can help ensure that cumulative
21 effects are better addressed in the future. Joint
22 management decisions and decision making with
23 First Nations should not be seen as a threat, but
24 as an opportunity to provide more and ensure more
25 sustainable management of Fraser River sockeye
26 salmon.

27 The Conservation Coalition endorses moving to
28 co-management, and also endorses our call for
29 increased transparency and First Nations
30 involvement in decision-making. And we strongly
31 urge you, Mr. Commissioner, to do the same.

32 Finally, I would like to thank you, Mr.
33 Commissioner, for all the patience that you have
34 shown and the understanding of Fraser River
35 sockeye salmon that you have built. I also want
36 to thank your staff for helping us all navigate
37 the increasingly difficult and challenging waters
38 of management of Fraser River sockeye salmon.

39 Thank you.

40 THE COMMISSIONER: Thank you, Ms. Schabus.

41 THE REGISTRAR: The hearing will recess for 15 minutes.

42
43 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

44 (PROCEEDINGS RECONVENED)

45
46 THE REGISTRAR: Order. The hearing is now resumed.

1 SUBMISSIONS FOR MÉTIS NATION BRITISH COLUMBIA BY MR.
2 GERELUK:
3

4 MR. GERELUK: Thank you. My name is Joe Gereluk. I
5 represent the Métis Nation of British Columbia, a
6 group whose traditional rights are guaranteed by
7 s. 35 of the **Charter** and who has provincial-wide
8 presence in the Province of British Columbia.

9 The Métis Nation, unfortunately, has not been
10 part of and has been excluded from any
11 consultation process with respect to the sockeye
12 or any other fishery in the Province of British
13 Columbia. DFO, although excluding the Métis
14 Nation from representation in British Columbia and
15 from the consultation process in British Columbia,
16 has provided the Métis people in other provinces
17 and other regions an opportunity to be heard and
18 an opportunity to be consulted in relation to
19 various resource-based issues.

20 In spite of having a foot in both the First
21 Nations camp and the European camp, the Métis
22 Nation, as I said, has been excluded from any
23 meaningful consultation or any consultation
24 absolutely. So that has been one of the central
25 themes, or the central theme of the MNBC, or the
26 Métis Nation's submissions in their written
27 submissions to this Commission.

28 We seek an opportunity to be meaningfully
29 consulted with respect to the sockeye fishery, and
30 any fishery, for the benefit of the Métis citizens
31 and people of British Columbia and for the
32 preservation and sustainability of that resource.

33 The Métis claims a right to be consulted
34 based on the principles advanced in the **Haida**
35 decision, where it's stated there's a duty to
36 consult with Aboriginal groups who have advanced
37 the *prima facie* right to be consulted. That
38 consultation is not based on the proof of right as
39 it may arise through a court decision, but based
40 on the --

41
42 ...the duty arises when the Crown -

43
44 -- I'm quoting from **Haida** --

45
46 - the Crown has knowledge, real or
47 constructive, of the potential existence of

1 the Aboriginal right or title and
2 contemplates conduct that might adversely
3 affect it.

4
5 As a s. 35 Aboriginal group, the Métis say, and
6 partially as our participation in this Commission,
7 the Métis say they have a potential Aboriginal
8 right and there are some actions with respect to
9 the sockeye fishery that will affect that right.

10 In the relation to the establishment of the
11 right, the Métis further propose that there are
12 submissions and evidence in the Commission
13 hearings that referred to an expression or a
14 signal that perhaps there could be a time when
15 Aboriginal rights could be determined without
16 having to present evidence and arguments through
17 litigation, a process that the Métis has not gone
18 through yet and, therefore, that evidence is
19 provided by Ms. McGivney with respect to the
20 rights issue, and it leads to a belief that there
21 is a light in the litigation tunnel. And I'd like
22 to just quote from some of Ms. McGivney's
23 testimony, and that was found -- or stated in the
24 September 2011 transcripts -- hearings, and I'm
25 looking at pages 14 and 15.

26 On page 14, Ms. McGivney answers some of the
27 questions posed by Mr. Eidsvik about what the
28 policy is with respect to DFO and how they do it,
29 and he quoted Alaska and New Zealand, and he
30 asked, on line 29:

31
32 Can you tell me why, I mean, even Canadian,
33 why are Canadian fishermen in the public
34 fishery in the Maritimes being treated with
35 more respect than the B.C. commercial
36 fishermen have been shown, that those in the
37 public fishery.

38
39 And Ms. McGivney responds by saying:

40
41 Yes, in B.C. one of the challenges we have is
42 that aboriginal rights, the extent and scope
43 of those rights haven't been defined, and so
44 the Department has developed policies to
45 approach how to address some of the interests
46 that have been brought forward, and that
47 actually then the policy,

1 And then it becomes indiscernible. On page 15,
2 starting at line 9, Mr. Eidsvik requests -- asks:

3
4 I'm in agreement with that. So you're saying
5 that there's aboriginal fishing rights in the
6 Fraser River have not been defined. I'm
7 trying to summarize what you're saying.

8
9 And Ms. McGivney responds by saying:

10
11 I'm saying in B.C. there was a -- the
12 Department has taken a broad policy approach
13 because of the -- because of the fact that
14 there have not been long-standing treaties,
15 and the aboriginal rights are not -- the
16 scope and extent of those are not clarified.
17 So the policy approach is that there is a
18 policy approach to try to provide through our
19 programs, provide access for food, social,
20 ceremonial purposes. And we've also looked
21 to providing the First Nations with some
22 economic opportunities on the same basis as
23 the regular fisheries.

24
25 This carries on that day with some evidence as
26 well from Ms. McGivney responding to Ms.
27 DeForrest, and on page 25 of that transcript there
28 was some discussion about similar issues. Ms.
29 DeForrest asks Ms. McGivney:

30
31 And you'd agree with me that there's -- that
32 this negotiation process is evident, it's not
33 evidence-based; is that correct?

34
35 And Ms. McGivney responds:

36
37 The Treaty Process?

38
39 And Ms. DeForrest asks:

40
41 That's correct, the B.C. Treaty Process?

42
43 Ms. McGivney responds by saying:

44
45 Yes, that's right. And that as a result
46 there's no Crown inquiry to research into the
47 validity of the territorial assertion, or the

1 geographic scope or the nature of any
2 aboriginal rights, for example, fishing of
3 the First nations in question; is that
4 correct?
5

6 And Ms. McGivney says:

7
8 I don't know if -- sorry, can you say that
9 again?
10

11 Ms. DeForrest says:

12
13 There's no Crown inquiry into the validity of
14 the territorial assertion that's brought in
15 with the Statement of Intent?
16

17 And Ms. McGivney says:

18
19 There's no requirement for that. There may
20 be some Crown investigation on that. I don't
21 know.
22

23 To be fair, further on in the testimony, Ms.
24 DeForrest reads in:
25

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

32 And Ms. McGivney responds, "Correct."

33 I read that in for the purpose of saying,
34 ultimately it's the view of the Métis Nation that
35 enforcement or the provision or the determination
36 of rights, which now rests with the courts in
37 consideration of Indian and Northern Affairs
38 Canada Policy, DFO policy, is contrary to the
39 notion of consensus, the notion of consultation
40 reaching consensus with all interested parties in
41 the sockeye and fishery in the Fraser River
42 generally. I suggest that although it's not a
43 current acknowledged method of obtaining
44 recognizing enforceable rights, which is left with
45 the courts, it is an expression of hope that
46 sooner or later the need for Aboriginal rights to
47 be determined through an adversarial court process

1 may give way to an understanding by way of
2 negotiated rights with appropriate evidentiary
3 safeguards. If DFO is not the authority in that
4 regard, certainly it can ignite the process with
5 Indian and Northern Affairs Canada.

6 Leaving aside our earlier discussion about
7 the duty of DFO to consult with the Métis Nation,
8 it is contented that consultation with the Métis
9 would provide real benefit to the sockeye fishery
10 in the Fraser in relation to fish monitoring and
11 enforcement of DFO policy. We note that in the
12 commissions and the committees and the reports
13 leading up to the Wild Salmon Policy, that the
14 majority of the reports spoke about effective and
15 timely monitoring, which was a serious issue that
16 had to be dealt with in more detail, and we have
17 dealt with this in more detail in our written
18 submissions.

19 It appears that without a significant
20 increase in the number of DFO agencies and
21 officials in the field, effective and dependable
22 fish monitoring must rely on the data provided by
23 resource users. Without the numbers provided by
24 the Métis, that data is incomplete.

25 Mr. Jantz gave evidence on that subject on
26 May 11th, and I'll just briefly read a bit of what
27 he had to say. In response to Ms. Chan:
28

29 Mr. Jantz and Mr. Parslow, just to wrap up
30 with the Fraser River First Nations FSC and
31 economic opportunity fisheries catch
32 monitoring, could you speak to whether or not
33 you feel the catch monitoring and reporting
34 provides you with accurate and reliable
35 estimates, and if you'd like to add to that
36 any recommendations that you have for
37 improving that process?
38

39 And Mr. Jantz says -- responded similarly to what
40 Mr. Parslow stated, but further added:
41

42 There are opportunities for improving some of
43 the catch estimates in the section of the
44 Fraser River immediately above what we call
45 the mid-river area, so it's the upper Fraser.
46 In that particular area, we don't have full
47 coverage of the fishery and our current

1 funding levels through AFS programs
2 primarily, in many years, often do not cover
3 the full duration of the fishery.

4 So we are put in a position where we have
5 to extrapolate catch for those periods when
6 we don't have coverage. So that's one area
7 that we could certainly improve our
8 monitoring.
9

10 And it's our submission that the Métis, with
11 province-wide representation, representing
12 something like 35 communities throughout the
13 province, would benefit, that consultation with
14 the Métis would benefit the monitoring
15 circumstance that is the gap in monitoring that's
16 been evidenced by Mr. Jantz.

17 In addition, besides monitoring, the studies
18 refer to a need to deal with -- effectively deal
19 with enforcement of DFO policies. If the Métis
20 were part of the consultation process they would
21 certainly assist through monitoring and presence
22 throughout the province, assist in the enforcement
23 of current DFO policies.

24 Mr. Parslow responded in similar fashion to
25 Mr. Jantz with respect to that issue. And if I
26 could read from the September (sic) 11th
27 transcript what Mr. Parslow had to say to that in
28 response to Ms. Chan's question. He talks about
29 the driftnet fishery, but in one sentence says, on
30 line 27:
31

32 I mean, the other piece would be providing
33 some sort of independent validation of catch
34 numbers. I think those are the main things.
35 The other piece would be actually rebuilding
36 the relationships with the groups which we're
37 not receiving numbers from and addressing
38 those concerns so that our dataset is more
39 complete, because that is a hole in our
40 dataset at the current time.
41

42 In B.C., the Métis Nation sees a need for peace in
43 the water. While consultation is central to the
44 issue of maintaining a relationship between all
45 users and determining in advance allocations of a
46 sockeye resource, the current manner that DFO
47 proceeds in allocating the resource by not

1 including all stakeholders, the Métis Nation
2 included, is in the consultation process prior to
3 allocation has a detrimental effect to that
4 relationship.

5 The ultimate resulting allocation may not be
6 affected, but if all stakeholders have a voice, at
7 least gaining an understanding of the perspectives
8 of all parties would be helpful.

9 The broad principle. I'd like to speak very
10 briefly about the cumulative effect of the
11 philosophy surrounding the disappearance of the
12 sockeye in the Fraser, and I've had some readings
13 in with respect to the Tragedy of the Commons, and
14 I'm not sure if that issue has been brought up,
15 but that's a philosophy that deals with the issues
16 relating to the depletion of a common resource and
17 specifically relating to the costs of
18 overpopulation in relation to the use of a common
19 resource with the inevitable and ultimate result
20 the exhaustion of that resource.

21 While that philosophy may or may not be
22 applicable in this instance, it seems that it at
23 least has some relevance. The proposed remedy
24 provided by that philosopher, Mr. Garrett Hardin,
25 through that inevitable result and the
26 preservation of the common resource was the
27 requirement for change in society's values.

28 Society's currently -- and I think that value
29 is reflected in DFO policies, it's reflected in
30 the manner in which DFO proceeds to allocate
31 resources, is currently based on the commercial
32 value of the sockeye fishery. It's based on, and
33 it sees that as a society-driven response. What I
34 think and what the MNBC thinks requires to be done
35 is a change in the social values that lead to this
36 depletion, that may save this resource. And the
37 change should come from society in general so that
38 there's no reliance on the commercial value, total
39 reliance on the commercial value of the resource
40 but, instead, a value in the intrinsic value in
41 having a unique species, like the sockeye,
42 preserved for the uniqueness itself.

43 Certainly there is food, social and
44 ceremonial as far as First Nations are concerned.
45 There's the necessity for food. But that, in our
46 view, takes, and it's stated in DFO policy, it
47 takes second place behind the conservation of this

1 resource. The conservation of this resource is
2 dependent upon, in our view, a change in social
3 consideration of the sockeye and other fishery in
4 the Fraser.

5 So the broad principle is consensus-building
6 so that all of the stakeholders who have an
7 interest in sockeye fishery can work together for
8 a common purpose, the common purpose being the
9 preservation and conservation and sustainability
10 of this resource. Meaningful consultation with
11 all of the stakeholders, including the Métis, and
12 engagement of society as a whole, and that poses
13 certainly a problem to engage society as a whole
14 when stakeholders claim absolute rights, claim
15 prior rights, which we recognize are certainly a
16 valid point, but in order to engage society as a
17 whole, I think it's necessary to ensure that
18 society has an interest, a definable interest in
19 the resource, and until that happens, society will
20 have difficulty becoming fully engaged in this
21 process, and the common tragedy may occur, which
22 is the depletion and the extinction of this
23 resource.

24 It's not our suggestion to paint a gloomy
25 picture, but in following certain philosophical
26 threads, it seems to me that there's an inevitable
27 result here that should be -- that we need to deal
28 with, and only through society's engagement, in
29 our view, will that happen.

30 I bow to the philosophy of the First Nations,
31 who clearly seek not -- they seek the right to
32 manage the resource. I bow to their traditional
33 ecological knowledge, the use of that knowledge in
34 order to proceed, and this is a management issue
35 and I think youth consultation with all the
36 parties would certainly be a benefit for that
37 purpose.

38 I do want to point out that use of
39 traditional knowledge on the behalf of DFO -- I'm
40 sorry, the science on behalf of DFO is, to the
41 exclusion of traditional knowledge, does not
42 accommodate the role that traditional knowledge
43 can play in the preservation and sustainability of
44 the resource. Captain Ducommun, on behalf of the
45 Métis Nation, has commented on that subject, and I
46 do point out that there's a large discipline
47 surrounding the principle of integrated science.

1 The Métis Nation believes that expanding the use
2 of traditional knowledge would be an advantage to
3 the fishery.

4 The Métis Nation submits that it would be
5 desirable for the Department of Fisheries and
6 Oceans to focus fully on implementing the Wild
7 Salmon Policy. Clearly, there's an issue
8 surrounding the funding for the Wild Salmon
9 Policy, and there has been some delay in
10 implementing it. As a result of the delays, the
11 Métis Nation has a reserved confidence in the
12 final implementation and effectiveness of the Wild
13 Salmon Policy; however, it is a program, it is a
14 policy, it's in existence, and that's why the
15 Métis Nation has reserved confidence in it.

16 In our view, then, Mr. Commissioner, we see,
17 as I said earlier, a need for peace in the water,
18 a consultation process which includes all
19 interested parties, and which involves society as
20 a whole.

21 And I think - I know it's early, but those
22 would be our submissions. We have provided
23 submissions which cover our view of the need to be
24 consulted, in particular the Métis, who have been
25 excluded and who, in our view, have a right to be
26 consulted, and we would ask, Mr. Commissioner,
27 that there be some indication that DFO consider at
28 least, at the very least, some consultation
29 process.

30 THE COMMISSIONER: Thank you very much, Mr. Gereluk.
31 Thank you. I understand, from Commission Counsel,
32 that we're now adjourned until tomorrow morning.
33 Thank you very much.

34 THE REGISTRAR: The hearing is now adjourned until
35 tomorrow at 10:00 a.m.

36
37 (PROCEEDINGS ADJOURNED TO THURSDAY, NOVEMBER
38 10, 2011, AT 10:00 A.M.)
39
40
41
42
43
44
45
46
47

1 I HEREBY CERTIFY the foregoing to be a
2 true and accurate transcript of the
3 evidence recorded on a sound recording
4 apparatus, transcribed to the best of my
5 skill and ability, and in accordance
6 with applicable standards.
7
8
9

10 _____
11 Diane Rochfort
12

13 I HEREBY CERTIFY the foregoing to be a
14 true and accurate transcript of the
15 evidence recorded on a sound recording
16 apparatus, transcribed to the best of my
17 skill and ability, and in accordance
18 with applicable standards.
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20
21

22 _____
23 Pat Neumann
24

25 I HEREBY CERTIFY the foregoing to be a
26 true and accurate transcript of the
27 evidence recorded on a sound recording
28 apparatus, transcribed to the best of my
29 skill and ability, and in accordance
30 with applicable standards.
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34 _____
35 Karen Hefferland
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