

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.

Thursday, November 10, 2011

Tenue à :

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

le jeudi 10 novembre 2011



Errata for the Transcript of Hearings on November 10, 2011

Page	Line	Error	Correction
61	10	politicized	de-politicized

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")
Don Rosenbloom	Area D Salmon Gillnet Association; Area B Harvest Committee (Seine) ("GILLFSC")

APPEARANCES / COMPARUTIONS, cont'd.

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")
No appearance	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 Crystal Reeves	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")
No appearance	Métis Nation British Columbia ("MNBC")

APPEARANCES / COMPARUTIONS, cont'd.

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

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1 Vancouver, B.C. /Vancouver
2 (C.-B.)
3 November 10, 2011/le 10
4 novembre 2011
5

6 THE REGISTRAR: The hearing is now resumed.
7 THE COMMISSIONER: Good morning, Ms. Gaertner.
8 MS. GAERTNER: Good morning, Mr. Commissioner.
9

10 SUBMISSIONS FOR THE FIRST NATIONS COALITION: FIRST
11 NATIONS FISHERIES COUNCIL; ABORIGINAL CAUCUS OF
12 THE FRASER RIVER; ABORIGINAL FISHERIES
13 SECRETARIAT; FRASER VALLEY ABORIGINAL FISHERIES
14 SOCIETY; NORTHERN SHUSWAP TRIBAL COUNCIL; CHEHALIS
15 INDIAN BAND; SECWEPENC FISHERIES COMMISSION OF THE
16 SHUSWAP NATION TRIBAL COUNCIL; UPPER FRASER
17 FISHERIES CONSERVATION ALLIANCE; OTHER DOUGLAS
18 TREATY FIRST NATIONS WHO APPLIED TOGETHER (THE
19 SNUNEYMUXW, TSARTLIP AND TSAWOUT); ADAMS LAKE
20 INDIAN BAND, CARRIER SEKANI TRIBAL COUNCIL AND
21 COUNCIL OF HAIDA NATION BY MS. GAERTNER:
22

23 MS. GAERTNER: So it's a great pleasure and much honour
24 that I stand here before you, Mr. commissioner
25 after all of these months and work that we have
26 done together. As you know, our Coalition has
27 been here I think every day of this inquiry, in an
28 effort to assist you in your work.

29 And today I'm going to start with some
30 opening comments, and then I'm going to give you a
31 walk through the Terms of Reference that I think
32 are important in how you frame your work, and the
33 work that -- and the evidence that's been done.
34 It will come as no surprise to you that I'll spend
35 a little time on conservation and collaboration
36 and how those are linked together.

37 And then I will move on to what I think is
38 one of the strengths of the work that we have done
39 and have offered to you in the voluminous pages
40 that our strong team has provided to you, which is
41 to review the causes, the state of the stocks and
42 the causes of decline. Because as I often say,
43 it's important to understand the nature of the
44 challenges and the problems that we have in order
45 to look towards the types of solutions that might
46 be useful to us. And so I think it's extremely
47 important that I spend some time on that, and so I

1 think the first half of my submissions will be
2 there, in the state of the stocks and the causes
3 of decline. And then I will turn to the policies
4 and practice and procedures that we think are
5 relevant to your considerations. And hopefully I
6 will have time in my concluding comments, which
7 will be the seventh round that we'll have together
8 in terms of topics, to walk you through a little
9 bit of the work that we have done on proposed
10 recommendations for your consideration.

11 So I begin by saying it's an honour and
12 privilege to carry the responsibility of
13 representing the First Nations Coalition in this
14 Inquiry, and from this humble place I offer these
15 prayers of gratitude, first to the large
16 collection of First Nations and First Nations
17 organizations within our Coalition who have
18 entrusted our team with the work that we have
19 diligently accepted.

20 So often there is a perception that First
21 Nations can't work together. We disagree, and we
22 believe this Coalition has showed very clearly
23 that the matters of conservation and
24 sustainability of wild salmon fisheries, there is
25 much common ground amongst First Nations, and that
26 common ground is palpable in the work that we have
27 done before you.

28 I have gratitude for all the meetings and
29 calls and the perspectives and the education that
30 my clients have provided our team, and because it
31 has been invaluable in the work that I have done
32 before you, Commissioner Cohen.

33 Next, I have much gratitude for the team:
34 Leah Pence, Crystal Reeves, Anja Brown and Clo
35 Ostrove for the long days and nights of work that
36 I am deeply grateful for. Their work is around
37 you. It's surrounding you in all the pages that
38 we have done and all of the pages and exhibits
39 that we have provided to you.

40 I also want to thank Mr. Lunn, Natasha Tam
41 and Sarah Panchuk, and all of Commission counsel.
42 This is a complex task, a complex piece of work, a
43 complex group of people working, and it has been
44 cordial, respectful, and I am grateful for that.

45 Finally - well, not so quite finally - I want
46 to extend my gratitude to you, Mr. Commissioner.
47 It has been my observation that you listen deeply

1 and that you are respectful and patient. And
2 those three skills are extremely important skills
3 in the work of Fraser River sockeye. It is what
4 we as organizations and people working with salmon
5 must do more and more with each other. We must
6 listen deeply, we must be respectful, and we must
7 be patient with each other so that we can hear
8 each other well and move on together. And so it's
9 those skills of yours that I have been grateful
10 that are passed across.

11 I often wonder how best to help you in this
12 task. I trust our diligent work will inform your
13 efforts, and that we have fairly represented to
14 you the evidence in a balanced way through the
15 written submissions and our work. You can see
16 that the First Nations Coalition took the work of
17 this Commission seriously and that we have not
18 been here to waste each others time.

19 Finally, I want to be very grateful to the
20 Fraser River sockeye salmon. It's a resilient
21 resource of an amazing place called the Pacific
22 Northwest. I pray to the Creator that these last
23 round of my words will help shed light with you on
24 the world where wild salmon, in this case Fraser
25 salmon, have a place in the circle and web of life
26 and at our tables, all of our tables.

27 So turning to the Terms of Reference. When
28 you look at your Terms of Reference, and in
29 particular in section a.(i) large A, you get the
30 first two critical principles in which you work.
31 Commissioner Cohen, I think you have two
32 principles from which you have to look at all of
33 this evidence and then you have three tasks. And
34 those principles are extremely important.

35 The principles of the conservation of Fraser
36 River sockeye salmon, that is not in debate. That
37 is the principle under which you are to work.

38 And a second principle, equally important, is
39 the encouragement of broad cooperation among
40 stakeholders. That is another principle in which
41 you are to work. That's why it's important you
42 understand the perspectives and the skills and the
43 responsibilities that First Nations can bring to
44 this table. Because you must encourage
45 collaboration, and collaboration will and must
46 include a respectful, active place at the table
47 for First Nations.

1 Secondly, and the work that you then have is
2 to investigate and make findings of fact regarding
3 two things: the current state of Fraser River
4 sockeye salmon and the causes of decline. And
5 that's why I'm going to take time through that
6 because the evidence has been complex and we've
7 done our best to distil it. And so I'm going to
8 take you through those places where we distilled
9 those two key components.

10 And then you're asked to consider the
11 policies and practices, including a whole risk of
12 those things, and then develop recommendations.
13 And those policies and practices are relevant to
14 your two principles, that the principle of
15 conservation and the principle of encouraging
16 broad cooperation, and it's those matters that I
17 will bring to your attention in detail.

18 It perhaps goes without saying that I must
19 put on the record that we rely in full on our
20 written submissions, both in the main and the
21 reply, and our oral submissions here are simply to
22 complement the work, shed light through the oral
23 tradition on the many days of evidence and pages
24 of words that we have written.

25 We also rely fully on our written submissions
26 in reply to PPR1. I always think that's so
27 important, that the foundational PPR has been the
28 one on Aboriginal rights and title. And we draw
29 your attention to something we raised at the
30 beginning of this Inquiry, which is of course it
31 is not your job to determine new law. It is a
32 challenge not to understand the law related to
33 DFO's obligations, to conserve and honourably
34 respect s. 35 rights. The challenge is to apply
35 it in a manner that addresses the complexities
36 both of Fraser River sockeye salmon and, more
37 difficultly, the humans.

38 The First Nations Coalition is one of the few
39 participant groups in this Inquiry that was
40 awarded a full grant of standing. We've been
41 actively participating in all matters, and why?
42 Because it illustrates the breadth and depth of
43 the concern First Nations have regarding all
44 matters and issues related to the Fraser River
45 sockeye salmon.

46 While there are many reasons to be very
47 concerned about the status of the fish, and DFO's

1 policies and practices, we were given a particular
2 brief in this matter, which was to approach it
3 forward looking and recommendation based. It's
4 easy to criticize. It's easy to find fault. It
5 is much more difficult to find solutions, and the
6 work of the First Nations Coalition has been
7 inspired by the ancestors in aid of this and
8 future generations to look for solutions.

9 Either the specific recommendations or the
10 evidentiary foundation for them has all been
11 canvassed in the hearings before you. We took
12 effort to make sure that our recommendations were
13 founded in the evidence and that is how we have
14 participated throughout this inquiry.

15 We remain committed. Commissioner Cohen,
16 halfway through this inquiry one of the chiefs
17 that I represent came and spoke to me about how we
18 were in one step, that I wasn't to worry too much.
19 As you have seen on many times I get worried and I
20 get concerned about the state of many things, not
21 only the stocks, but the humans. And he reminded
22 us, me, that we're on one step further along the
23 path of reconciliation.

24 And that is your work. It is the work of one
25 step further along the path of reconciliation. It
26 is your job to find in that path a place that
27 engenders the most collaboration amongst
28 governments, and in this case there are three
29 primary governments, Canada, the Province and
30 First Nations, NGOs and all the stakeholders
31 interested in the long-term sustainability of the
32 Fraser River sockeye salmon.

33 So why is First Nations perspectives
34 important to you? Because they are a keen
35 government, a government keen to exercise their
36 responsibilities in this matter, not to abdicate
37 them.

38 They are keen to work with those that are
39 stakeholders and NGOs and other governments, who
40 care about the long term sustainability of Fraser
41 River sockeye salmon. Their traditional laws
42 require them, it's not a debate, to honour and
43 respect salmon so that they may ensure the
44 sustainability of their future generations.

45 Aboriginal teachings don't separate species
46 from ecological habits and -- habitats and
47 ecosystems. They include cultural, spiritual,

1 ethics in the management of the fisheries. For
2 example, and it's an often one quoted: all
3 relations must be maintained respectfully in order
4 to be -- in order to be sustainable for this and
5 future generations.

6 I hearken back to the early stories that we
7 placed before you to frame your consideration.

8 The Haida people spoke of the supernatural
9 Creek Woman who stands at the front of their
10 creeks to regulate flows and look after the salmon
11 as they come and go. And I've often imagined the
12 strength of that woman at the front of the Fraser
13 River.

14 The Secwepemc people told of Coyote and how
15 his deepest gift to the people of this land was
16 the fish, and how their stories, and it was both
17 the Secwepemc stories and the story from Fred
18 Sampson of Siska, that I want to refresh your
19 memory on. Because the story that Dr. Ron Ignace
20 came to you to tell was the story of how Coyote
21 not only brought them the biggest gift that they
22 could in their communities, which was the fish,
23 but when his own ethics got mixed up and he got
24 bold, or he got wasteful, the salmon left. And
25 they teach the children that from the earliest
26 place. Why? Because it's a cute story? No.
27 Because the fundamental challenge for human-salmon
28 relations is one of respect and not arrogance, and
29 not greed. And that's a deep one.

30 It's a deep one in all of the evidence that
31 you've looked at. The stewardship and the respect
32 that infuses First Nations approaches to fisheries
33 management is throughout their indigenous laws,
34 customs, traditions, practices and stories.

35 Chief Willie Charlie of Chehalis told about
36 the salmon is medicine food. It's an interesting
37 perspective, given how much food and health their
38 communities rely on. The salmon is not only their
39 brothers and their sisters, but it's medicine.

40 Chief Fred Sampson spoke of how he gets to
41 walk down to his fishing rock and in that rock
42 there are three layers responsive to the different
43 runs that come up that river. And he gets to put
44 his feet in the place where that -- all of his
45 ancestors have been. I had the wonderful good
46 fortune once of walking through Peru and walking
47 along the rocks of people that have left pathways

1 for centuries and centuries for us to come. And
2 Chief Fred Sampson goes down to the river and he
3 puts his feet in the feet of his ancestors in
4 order to put his net, or his -- his net into the
5 river.

6 And then Chief Charlie said to all of us,
7 this great resource belongs to all of us, and it
8 belongs to our future generations. And so it's up
9 to the work of all of us to protect that.

10 This respectful, holistic relationship to
11 salmon within a complex ecosystem that treats
12 salmon as sacred for this and future generations
13 is the ethic that guides First Nations fisheries
14 management, and we submit that this is the ethic
15 that should similarly guide all those who are
16 committed to the long term sustainability of the
17 Fraser River sockeye salmon, and their fisheries.
18 We have a lot to learn from those that have been
19 here.

20 I hearken back to Dr. Douglas Harris's work.
21 As you know, he's the Nathan Nemetz Chair in the
22 Legal History at the University of British
23 Columbia and an author of several books and
24 scholarly articles. And there is some debate as
25 to what he's come to tell you, but I can tell you
26 for sure that an important thing that's stayed
27 with me since he left is that -- which I believe
28 is very relevant to your Terms of Reference, is
29 that in this step along the path of
30 reconciliation, and in order to fully understand
31 the challenges and put them in, we must move
32 towards a just fishery. By achieving a just
33 fishery through the way we manage, through the way
34 we allocate, the way we consider it, we will have
35 a functional, efficient, and sustained fishery.

36 There is a recommendation, that my friends
37 have taken -- a number of friends in this room
38 have taken a touch issue with, that our Coalition
39 has put before you, which is that DFO must
40 actively take steps to recognize and affirm
41 Aboriginal title rights and treaty rights, and
42 promote reconciliation with First Nations in all
43 matters related to the fishery, including Fraser
44 River sockeye salmon.

45 Now, some might say that you can't recognize
46 or make findings of fact or law regarding the
47 contents of rights and titles. There's no

1 disagreement with that. We haven't led evidence
2 that can allow you to take that complex issue and
3 make it, as you know, judges are often tasked with
4 that -- when tasked with that, take a whole year
5 or two to look at just that in this kind of
6 context. So this is not the correct forum for you
7 to make findings of fact regarding the content or
8 strength of claim. And no findings regarding the
9 rights that are not yet recognized by the courts
10 or by DFO.

11 As I've said, the reality is not whether
12 First Nations hold title rights and treaty rights,
13 it's how those rights change, and more
14 particularly how the responsibilities that flow
15 with those rights.

16 Now, when Aboriginal came to you and talked
17 to you, they didn't talk to you about their rights
18 so much, they talked about the responsibilities
19 that they as leaders and as technical advisers
20 have. It's how those rights change colonial
21 assumptions and priorities and management
22 decisions that ran largely unchecked, until s. 35
23 and **Sparrow** and **Gladstone** and **Haida** and others.

24 DFO must continue its efforts to find a way
25 to become more respectful to First Nations in all
26 matters, and so must all the stakeholders in this
27 room. They are rights holders. Your work must
28 pave the way for that work to move forward if we
29 are going to find collaboration. There are many
30 places of conflict, not only in the courts, but
31 also on the river, and the work that you are to do
32 provides a unique and important place in the role
33 of collaboration.

34 In 2004 the First Nations Panel on Fisheries,
35 which is Exhibit 493, and I'm not going to take
36 you to there, articulated a vision for future
37 fisheries management that would place certainty --
38 at least some certainty to users in terms of
39 access and use of fisheries resources. There are
40 been recommendations that were put before the
41 Crown in "Our Place at the Table", and there is
42 evidence to suggest that the Crown is moving to
43 implement some of those recommendations. However,
44 seven years after the release of "Our Place at the
45 Table", many of these recommendations are still
46 waiting to be realized. I think it's important
47 that you consider carefully that exhibit,

1 Commissioner Cohen, because it takes you quite to
2 the present of the nature of the work and the
3 recommendations that we need going forward.

4 All right. So now I have to take you to the
5 second principle in your Terms of Reference, which
6 is the principle of respecting conservation. And
7 again I'm at page 15 and paragraphs 48 and 49 of
8 our submissions. But where I want to really say
9 is that at the most basic, and I say this, at the
10 most basic, and this is the words, the persistence
11 of a biodiverse population of salmon allows for
12 the possibility of the persistence of a diverse
13 population of First Nations. They are one and the
14 same. The principle of biodiversity and ecosystem
15 management is an old principle that is an ethical
16 foundation with First Nations.

17 Now, John Reynolds, Dr. John Reynolds, the
18 Tom Buell, BC Leadership Chair in Salmon
19 Conservation at SFU, said it this way:
20

21 In essence, in order to adjust and evolve to
22 changing environmental conditions, including
23 climate change and other impacts of human-
24 caused as well as naturally occurring events,
25 fish need --

26
27 - and here's the quote -

28
29 -- "as much room to manoeuvre as possible",
30 as the erosion of diversity constrains the
31 species' options for the future.

32
33 Dr. Scott Hinch, Professor at UBC's Faculty
34 of Forest Sciences and the Institute of Resources,
35 said it this way:
36

37 In my view it's paramount to be able to
38 protect as many of these populations as
39 possible, --

40
41 - paramount -

42
43 -- because we don't know what environmental
44 conditions are going to change like in all
45 the different life stages, and there will be
46 some populations that may be able to cope
47 particularly well. We just don't know that

1 yet. And having the ability of some of these
2 populations to either expand their range or
3 move their range is going to be important for
4 the persistence of the species. And so this
5 is a standard conservation biology
6 perspective on biodiversity. It's not just
7 mine --

8
9 - and it's not just -

10
11 -- for Fraser sockeye. I think that's the way
12 most conservation biologists feel about most
13 populations

14
15 It's not about just saving the strong stocks or
16 the big stocks. No biologist has come to you and
17 said that. Not a single biologist has come to say
18 that the way to preserve long-term sustainability
19 of Fraser River sockeye is to focus only on the
20 big stocks.

21 The next principle within conservation that I
22 need to hearken on today is the principle of
23 precaution. And there is at page 18, paragraph 52
24 onward, we present to you a bit of the dialogue
25 that occurred about the difference between
26 precautionary principles and precautionary
27 approaches, and we found that the work of Dr.
28 Peterman was the most useful, perhaps because he
29 spends a lot of time educating young aspiring
30 biologists on this, about the difference between
31 the precautionary approach and the precautionary
32 principle. And he had divided it into three
33 standard responses: either you protect it all, you
34 pretend like it's not a problem and you do
35 whatever you want, or somewhere in between. It's
36 a kind of an interesting division of three
37 standards.

38 I'm at paragraph 60 of my main submissions,
39 and 61.

40 And then he goes on to consider how you would
41 choose that appropriate precaution and in what
42 particular situation. And of course, Commissioner
43 Cohen, you are completely familiar with the choice
44 amongst that range of precaution depends on who is
45 going to carry the risk, and how that risk is
46 going to be carried.

47 And so of course in all matters of fisheries,

1 First Nations have an absolute interest, and in my
2 submission the Crown has an obligation to consult
3 and not just to consult, to accommodate, the
4 concerns First Nations have about what risks are
5 being taken when, and how in relation to these
6 fish. It is in that fundamental start what
7 research is being done, what's the question for
8 the researcher. How is it going to be done, what
9 decisions are going to be made in the interim,
10 where are we going with this, that those risks and
11 values and approaches are best understood. We're
12 going to -- we can continue to waste time on
13 research, if that -- if those preliminary eyes are
14 not brought to the questions that are being asked
15 and how we're approaching this.

16 And thankfully, the law makes it clear that
17 DFO is legally required to meaningfully consult
18 with First Nations to understand their values, to
19 deal with their risk tolerances and to accommodate
20 the interest and concerns, for it is
21 unquestionable that the risks associated with the
22 management of Fraser River sockeye salmon are
23 causing great concerns for First Nations, and they
24 must be adequately informed and consulted
25 regarding those, and thankfully they are willing
26 to bring their expertise to the table, so that
27 those risks are assessed appropriately, and a
28 precautionary principle and the approach moves
29 from words and policies and gets applied on the
30 ground.

31 You know, one of the things that I have so
32 enjoyed about working with Aboriginal people is
33 while they are incredible orators, they watch what
34 people do, not what they say. They watch how we
35 act on the ground. So these policies, and we
36 commend them, are strong. There are things that
37 could be clarified, and if we must, but the effort
38 must be not in clarifying principles, but figuring
39 out how appropriately to put them onto the ground.

40 And I can rest assured that with First
41 Nations at the table, that step will happen. We
42 will move from talking about principles and
43 talking about approaches to saying how does that
44 work on the ground. Because that's what they ask
45 on a regular occasion: How is the precautionary
46 principle happening with mixed stock fisheries?
47 How is the precautionary principle happening when

1 we open aggregates before we fully understand what
2 the run size is? How is that being applied?
3 Those are the questions they ask me and they ask
4 the Department of Fisheries and Oceans. And that
5 is an incredibly important question that requires
6 consultation and accommodation.

7 At paragraph 64 on page 22 of my submissions,
8 and I don't need to take you to it again, unless
9 you'd like, Commissioner, you will recall that on
10 a number of occasions I took a number of
11 scientists to Exhibit 1348. And 1348 is the
12 expert report that came out of the scientist
13 leaders that have met in April of 2011 to talk
14 about the state of the ocean and where we are in
15 relation to the state of the ocean. You might
16 recall that on a number of occasions I asked the
17 scientists about what -- sorry, the scientists
18 that came to give evidence about the
19 recommendations that these world-renowned
20 scientists called for, which is reversing the
21 burden of proof within the precautionary
22 principle, so activities proceed only if they are
23 shown not to harm the ocean, singly, or in
24 combination with other activities.

25 You might wonder why that might be relevant,
26 and you heard a number of scientists get concerned
27 because they immediately think that development
28 cannot proceed. Well, that is how First Nations
29 have always instructed me. That's what I've heard
30 from them from the very beginning is, yes,
31 development can proceed as long as we know it
32 won't affect the fish.

33 You know, I heard, and you'll recall the
34 evidence on IPPs and the suggestion made by a
35 couple of the witnesses, while that First Nations
36 might not only talk about, you know, being
37 interested in fish, because they want to do IPPs
38 sometimes, whatever, of course they want to do
39 development. They have communities that need to
40 move forward in a modern context. But what's the
41 principle they use when looking at all of that?
42 It's the reverse principle that's here. They say
43 make sure you don't affect our fisheries, and then
44 you can proceed. They don't say go ahead and
45 let's figure out later whether this can proceed or
46 have an effect. If you can show that it doesn't,
47 then we are very interested. Because our

1 commitment first is to the wild stocks and to what
2 they have provided to our communities in the past
3 and into the future.

4 So I'm going to move on now and I'm going to
5 take you to the areas of the findings of fact
6 regarding the current state of the Fraser River
7 sockeye and the causes of decline, and I am going
8 to now take you into our main submission, and in
9 particular to paragraphs 73 onward on page 26.
10 And you'll see from paragraph 73 through to 81,
11 and then I have three editions. We took time to
12 go through the evidence and summarize as best we
13 could the key findings of fact that we think are
14 relevant to the work that you have been doing and
15 hearing around the current state of the stocks.

16 Of course, both science and traditional
17 ecological knowledge have ways of assessing the
18 strengths and vulnerabilities of Fraser River
19 sockeye salmon.

20 You know, an amazing thing, of course, about
21 the river is that it supports the largest
22 abundance of Fraser River sockeye in the world --
23 or at least sockeye salmon in the world, for a
24 single river. It's an incredibly long river,
25 1,600 kilometres, the watershed size is 223,000
26 square kilometres, the lake nursery area is huge.
27 Over 50 percent of all salmon production in
28 British Columbia occurs from the Fraser watershed.
29 And that Fraser watershed has a very complex
30 groupings of tributaries, streams, marshes, bogs,
31 and the dependence of that salmon on this various
32 habitat is real from First Nations perspectives.
33 They don't say anything is irrelevant in that
34 whole migratory route. It's all important.
35 That's how we get this complex and incredibly old
36 sockeye. It's no error that complexity amongst
37 the habitat, the complexity amongst the stocks is
38 fundamental. And so is that long distance.

39 Fraser River sockeye have widely varying life
40 histories, genetics and habitat characteristics
41 that create different levels of vulnerability to
42 the stresses that each stock encounters. The
43 effects of those stressors on survival at any life
44 part of the history stage, depend on both the
45 magnitude of the stress and the vulnerability of
46 the salmon.

47 And I'll stop there for a moment. So often

1 we think, well, this little stressor over here, or
2 this little stressor over here isn't important.
3 I'm going to get to that in a minute. But you
4 have to look at the health of the habitat, and the
5 health of the salmon to determine whether or not
6 cumulatively or otherwise the stresses are
7 important. And the characteristics that have been
8 found within the evidences before you, is that
9 that varies between the stock and the specific
10 part of the ecosystem that they rely on.

11 At paragraph 77 I think begin to list the
12 descriptions of the state of the stocks from the
13 scientists. Interestingly, until 1977 about 80
14 percent of the sockeye salmon used the southern
15 route. And now an increasing number,
16 approximately 50 percent, enter the Strait of
17 Georgia via the northern route. Although the
18 cause of that change is not yet known, years of
19 warmer sea surface temperature on the West Coast
20 of Vancouver Island may have resulted in more
21 Fraser River sockeye salmon using the northern
22 route.

23 Despite an understanding of the migratory
24 patterns of Fraser River sockeye salmon, the least
25 well known part of their life is their life at the
26 sea. The oceanic distributions of populations of
27 sockeye are not known with sufficient accuracy to
28 understand if they have varied from year to year,
29 or decade to decade, or place to place.

30 In 2009 only 1.5 million adult Fraser River
31 sockeye returned to their spawning grounds, the
32 lowest number since 1947 and only 14 percent of
33 the pre-season forecast of 10.5. This 2009 event
34 was only the most recent in a series of
35 indications that the population is facing serious
36 widespread problems. While the largest returns of
37 these fish in 80 years occurred in the early '90s,
38 this situation has now changed to having the
39 lowest returns since the 1920s in 2007, '08 and
40 '09.

41 Declining productivity, you've heard much
42 about that, has occurred over a much larger area
43 than the Fraser watershed and it's not unique to
44 it. Most Fraser and many non-Fraser sockeye
45 stocks show a decrease in population.

46 Seventeen of the 19 stocks of Fraser River
47 sockeye salmon have shown declines in productivity

1 over the last two decades. Seventeen of the 19, a
2 significant amount of those stocks, Commissioner
3 Cohen, are in decline. Two exceptions are
4 Harrison and Late Shuswap, and you often heard
5 scientists compare, and we primarily stayed within
6 Fraser River sockeye to do the comparisons. But
7 of course when looking at a wild stock, we're not
8 going to have all the details of any one
9 particular stock, so they use comparisons. And
10 here the two particular comparisons that I think
11 are relevant is the Harrison and the Late Shuswap.

12 The Harrison fish are known to have quite
13 different juvenile life histories from other
14 sockeye. They go to sea as fry instead of one
15 year later as smolts, and then they appear to
16 migrate through the Strait of Juan de Fuca, rather
17 than Johnstone Strait. Those things are relevant
18 when you consider the state of the stocks and the
19 nature of the problems that are before us. Most
20 stocks had very poor returns per spawner in 2009,
21 but the Columbia River did fine.

22 Historical data on the survival of the stocks
23 by life stage shows that the declines in total
24 life-cycle productivity from spawners to adult
25 recruits have usually, and that's all we can say,
26 has usually been associated with the declines in
27 juvenile to adult survival, but not with the
28 freshwater stage of spawner to juvenile
29 productivity.

30 We only have nine Fraser River sockeye stocks
31 where we have data on juvenile abundance. Only
32 Gates sockeye has shown declines in juvenile
33 productivity, but seven of the nine stocks showed
34 consistent reductions in both juvenile
35 productivity over those years with declining
36 productivity from spawners to recruits.

37 There have been three separate phases of
38 declines in productivity in Fraser River sockeye.
39 It didn't start in the '90s; since 1950s. It
40 first started in the 1970s. Then there was
41 another one, the second in the mid-1980s, and the
42 most recent one is in the late 1990s, with
43 individual stocks showing different trends.

44 More importantly for the state or the causes
45 of decline from our perspective is that over the
46 last two decades there has been an increasing
47 amount of en route loss and pre-spawn mortality,

1 or premature mortality on the spawning grounds of
2 returning adult sockeye.

3 ERL and PSM in adult Fraser River sockeye are
4 significant factors that reduce the number of
5 effective female spawners, and thus pose a threat
6 to the long-term viability of the populations.

7 Generally, en route loss began to be reported
8 back in 1992 for Early Stuart, Early Summer, and
9 the Summer runs, but not until 1996 for the Late
10 runs. So it's not just in the Late runs. No one
11 should suggest that that's true.

12 Relative to total catch -- relative to the
13 total catch and spawning ground escapement level,
14 levels of ERL have been increasing. These fish
15 are dying before they do what genetically they're
16 programmed to do. Why? That's the question you
17 have to ask. Not why is the marine changing, but
18 why are these fish dying before they get to the
19 spawning ground, and when they get to the spawning
20 ground, why aren't they spawning? That's the
21 nature of the problem.

22 The Early runs have the most years with high
23 ERL, and the Summer runs, the Quesnel and Chilko
24 have experienced few, if any years, with large
25 ERL.

26 There is good evidence that among the stock
27 patterns, en route loss are indicative of stock
28 specific abilities to cope with warming rivers and
29 high river temperatures. That's important also.
30 It's not hitting all of the stocks all in the same
31 way. That's something that's relevant when you
32 consider the causes of decline and the steps we
33 must take.

34 Run timing appears to be relevant to en route
35 loss. En route loss is stock specific with Summer
36 runs having the greatest thermal tolerance,
37 relative to earlier and later runs. Research to
38 date emphasizes that stock-specific responses to
39 temperature and climate warming need to be
40 considered in fisheries management and in
41 conservation strategies

42 Pre-spawn mortality, and when we get to
43 contaminants, you'll see why I think it's -- or we
44 think it's incredibly important that you look at
45 pre-spawn mortality is highly variable among
46 stocks, the run-timing groups and the years.

47 Spawning abundance has declined in Early

1 Stuarts and several Late run stocks during a time
2 period when en route loss has become a significant
3 component of the total fate of adult migrants in
4 these groups of fish.

5 Spawning abundance hasn't declined. Why?
6 Because of the management adjustment, and that
7 management adjustment is one of the strongest
8 precautionary principles we're taking in the
9 management right now.

10 Many fish, Fraser River sockeye salmon are
11 strongly cyclical, where others aren't.

12 While the literature offers some support that
13 both simple and delayed density dependence occur
14 for Fraser River sockeye, studies have so far
15 failed to show conclusively that either form of
16 density dependence has had substantial influences
17 on Fraser River sockeye salmon dynamics.

18 The results to date do not support the
19 general hypothesis that efforts to rebuild Fraser
20 population in recent years have resulted in
21 "overspawning". The only exception to this
22 generalization is the Quesnel stock, which shows
23 some evidence of delayed density dependence, and
24 I'm going to turn to that topic in full. You'll
25 hear if I have time, the traditional knowledge
26 about this notion of over-escapement is not there.
27 The belief that somehow we're putting too many
28 spawners on the spawning ground is phenomenally
29 confusing to the knowledge of traditional --
30 Aboriginal people. When you're looking at an
31 ecosystem, you look at the whole of the ecosystem
32 and how it's balanced.

33 I want to direct you to paragraph 79
34 onwards, 79, 80 and 81 of my submissions on the
35 state of the stocks. Keeping in mind that it's
36 important not to just look at the stocks, but to
37 look at the ecological systems. And so it's clear
38 and as I go on, that the ecological system is
39 totally dynamic, and it has strongly changed as a
40 result of human activity over the last 100 years.

41 Because I want to add three additional facts
42 to that list, I'm going to find my place in my
43 submissions.

44 At paragraph 348, page 119, there's an
45 additional fact that I think is important in the
46 state of the stocks, which is that salmon are
47 highly susceptible to impacts from contaminants.

1 This is not a species that can handle contaminants
2 that well. Quite the opposite. They are
3 inherently more sensitive to most contaminants
4 than other aquatic organisms. Another fact that I
5 think is extremely important when you consider the
6 state of the stocks.

7 And secondly, the temperature is the master
8 biological factor for fish and can affect fish
9 acutely and chronically. It controls everything
10 from metabolism, to physiology, to behaviour, to
11 feeding.

12 And then finally at paragraph 177 of our
13 submissions, page 65, a fact that's relevant to
14 the marine situation, is that Dr. McKinnell made
15 it clear that the maturing fish, and that's the
16 fish that are in the ocean, must find food to put
17 on 50 percent of their weight in the last spring
18 at sea. So if that food in the large ocean aren't
19 there, because there are, as Dr. Peterman
20 suggested, a lot more pinks in the open ocean than
21 there ever has been, then those salmon are not
22 going to return from the ocean strong and fat, and
23 that's exactly what they need to be. They need to
24 be strong and fat to make it all the way home.

25 It's important to recognize that many of the
26 difficult threats to salmon are human population
27 growth oriented, or water quality, or the quantity
28 and quality of the habitat. You might say these
29 are out of the direct responsibilities of the
30 Department of Fisheries and Oceans.

31 It's interesting how the suggestions made in
32 writing in oral submissions is that by one of the
33 levels of government coming to the table, i.e.,
34 First Nations, and offering their help and their
35 expertise, that that is somehow an abdication of
36 responsibility on the part of the federal Crown.
37 The federal Crown and the Department of Fisheries
38 and Oceans cannot solve this problem by
39 themselves. There is no suggestion that they can.
40 They can't solve it by themselves within their own
41 government. They can't solve it without the
42 provincial government at the table, accepting
43 their responsibilities, and First Nations at the
44 table, and I would submit all the members of the
45 public, and all of the stakeholders here. But
46 those three governments must be at the table in
47 order for there not to be an abdication of

1 responsibilities.

2 Now, much like a salmon, I've got to speed up
3 a certain part of this run, and I'm going to work
4 through as quickly as I can something that if we
5 go to, Mr. Lunn, if we could pull up Exhibit 1896,
6 that page in the -- I want this on the -- on the
7 sheet, not because you have to study it while I'm
8 doing it, but I think it's an incredibly important
9 graphic overlay of what I'm about to do, and I
10 always found having those things in front of me at
11 least helps me understand the nature of the
12 problem. And what I'm asking Mr. Lunn to put
13 forward to you, is the figure 3.3-1 of the report,
14 Technical Report 6, that Mr. Marmorek came and
15 gave evidence on. And it just helps to get a
16 sense of the problem, Mr. Commissioner. It's not
17 an easy problem to solve as to all of the
18 contributing factors to the causes of decline.

19 It's clear that it's human related. There is
20 no doubt about it that it's the activities of
21 humans that are challenging Fraser River sockeye
22 salmon.

23 Now, there's a couple of ways that I want to
24 do this to get the nesting going on, and the first
25 is the nature of the causes of decline in the
26 freshwater and the challenges associated with
27 that, and then I want to go to the causes of
28 decline in the marine. And then we have to nest
29 those geographical ways of separating it into the
30 other types of challenges, all of which you've
31 heard. But we took great pain in the written
32 submissions to go in detail to provide you, in my
33 view, and of course we're speaking our own
34 perspective, but in a very balanced way of the
35 evidence.

36 So that, you know, this is a public inquiry,
37 this is not a trial. We're not here to mislead or
38 suggest otherwise. It's been our approach to
39 bring forward the evidence as best we can, and in
40 a way that doesn't have to overly convince you of
41 something far along the thing. It's pretty
42 obvious, in our view, the nature of the
43 complexities associated with this.

44 So in the freshwater, urbanization is an
45 extremely challenging component of the impacts to
46 Fraser River sockeye. In 2005 there were four
47 million people within British Columbia with 3.2

1 million people living in the urban areas
2 concentrated around the Lower Fraser River and the
3 Strait of Georgia. Many of the development
4 activities for housing, industry, infrastructure,
5 transportation, forestry, agriculture and mining,
6 have also taken place at or near the Lower Fraser
7 River. And in urban and industrial centres along
8 the shorelines around the Strait of Georgia, and
9 have the potential to interact with habitats used
10 by the Fraser River sockeye.

11 We strongly rely on the testimony of Jason
12 Hwang and Rebecca Reid and Michael Crowe and
13 Patrice Leblanc, showing that there is a slow net
14 loss of habitat for Fraser River sockeye all along
15 the Fraser River watershed, and that there is
16 rapidly increasing amounts of impacts occurring
17 from urbanization all along that migratory route
18 in the freshwater.

19 And the challenges with urbanization are
20 extremely difficult, when we get to contaminants
21 and other matters. It may be that we can try to
22 deal with things as we -- as we need to, but there
23 are some things, particularly as it relates to
24 contaminants, that are going to require very
25 strong efforts.

26 We heard from my friend from the Province
27 that logging has -- we can check logging off the
28 list, we don't have to worry about logging. And
29 that's not the perspective that the First Nations
30 Coalition has. There was very little time in this
31 Inquiry provided to look at this and that's no
32 fault, there were so many matters that had to be
33 looked at. We can't conclude is not having an
34 effect. More research is clearly needed on
35 forestry interactions.

36 And DFO's research funds as it relates to
37 that have completely dried up. Witnesses weren't
38 comfortable with this. The mountain pine beetle,
39 the riparian standards and fish stream crossings
40 are not being properly looked at, and no rigorous
41 monitoring or data collection is occurring. When
42 we add to that the complexities of climate change
43 when this type of habitat and the unique
44 components of this habitat are only going to
45 become more important, then we say it's extremely
46 important that the Province come to the table and
47 work hard with us to ensure that logging practices

1 in the Province are done precautionary.

2 I want to turn to water use. Michael Crowe
3 testified that:

4
5 ...water management issues are one of the
6 greatest challenges we face in the BC
7 Interior Region in terms of ensuring
8 conservation and protection of fish and fish
9 habitat.

10
11 You'll recall that former Regional Director
12 General, Paul Sprout, and the present Regional
13 Director, Sue Farlinger, brought water management
14 issues to you and said that they are one of the
15 strong challenging matters that requires
16 collaboration with the Province.

17 Groundwater concerns were some of the
18 strongest concerns for the salmon in the Interior
19 that Dr. Macdonald spoke about:

20
21 ...we wouldn't have sockeye salmon if it
22 wasn't for groundwater.

23
24 Dr. Macdonald said.

25 Dr. Orr talked about needing to ensure that
26 pumping wells did not reduce the groundwater
27 levels beyond what the sockeye could handle.

28 In our view, the Province is not adequately
29 regulating or protecting water for sockeye, nor
30 groundwater. And this was confirmed by DFO's
31 witness, Jason Hwang. Jason Hwang talked about
32 and agreed that legislating environmental flow
33 standards on fish bearing streams in the **Water Act**
34 would be excellent to help protect fish.

35 The First Nations Coalition submits that
36 decisions related to water management have the
37 potential to affect the exercise of their
38 Aboriginal rights. They submit that it would be
39 useful to have a clear tripart (sic) consultative
40 process involving First Nations, the Province and
41 DFO to consider how the **Water Act** and the
42 modernization can be done in a manner that
43 protects Fraser River sockeye salmon.

44 Just while I'm on water, there's an exhibit
45 that I brought to your attention, which is Exhibit
46 1861, which is a good news story, one that my
47 friend from the Province spoke about in his

1 submissions, and what was that? That was the
2 Bridge -- sorry, Schedule 5 to the Relations
3 Agreement of the St'at'imc's agreement with BC
4 Hydro, which was the Lower Bridge River Flow
5 Adaptive Management Decision Making Framework.

6 Now, Commissioner Cohen, I've often wondered
7 why it is that lawyers are here listening to all
8 this evidence about fish and what -- you know, we
9 heard so much about what scientists can offer, and
10 all of the ways they do it, and we've heard about
11 what First Nations. So what can lawyers offer?
12 What can our perspective offer?

13 Well, often, we understand decision-making
14 processes and structures and how they can be
15 created in a manner that provides fairness and
16 leads to justness. And that decision-making
17 process that's there in that exhibit is an
18 excellent example of what happened when the
19 St'at'imc, DFO and others began to work together
20 to figure out how to make decisions about water
21 and sockeye, and what values were going to be
22 included, and how there was going to be a place
23 for all those values.

24 And it did take time. It was a bit
25 precedent-setting in the work of BC Hydro and the
26 Province in this matter. And the St'at'imc were
27 determined to make sure their values were
28 included. And you'll remember Mr. Higgins saying:

29
30 But it was through the exploration of our
31 values and that the time we spent together
32 that we did find a way that we could bring
33 [all of this] this information in.
34 ...ultimately [it] led to a place where we
35 had agreement on what the best way forward
36 was. ...it was a very high value.
37

38 So in general, in response to the reply that
39 the Province made at a number of paragraphs and in
40 their submissions on how matters within the
41 provincial jurisdiction are all fine. We say that
42 all of the issues with respect to urbanization in
43 the freshwater environment clearly show that the
44 Province must come to the table with active hands
45 in the work of the sustainability of Fraser River
46 sockeye. And that in our view, the way that we
47 can help them structure the way they talk is to

1 recommend, as we have in our suggested
2 recommendations, Commissioner Cohen, we know
3 you're working to provide recommendations to the
4 federal Crown. But your recommendations must
5 include the strong suggestions and the strong
6 recommendations that they seek to find clear
7 tripart consultative processes that deal with
8 matters of cross-jurisdiction.

9 I have to now turn, I must before the break,
10 get through the causes of decline. And so the
11 next is the "Causes of Decline in the Marine
12 Environment". The weight of the evidence supports
13 the conclusion that the marine environment is the
14 major cause for the poor 2009 Fraser River sockeye
15 returns, and is a significant for the overall
16 declining trends in recent years.

17 We say strongly, Commissioner Cohen, that we
18 need to understand more specifically the migratory
19 route, and as Mr. Marmorek said, the bottlenecks
20 along the migratory route of the Fraser River
21 sockeye salmon. And that's not just the migratory
22 route in the Strait of Georgia, although that's a
23 good place to start. But we must, as the evidence
24 shows, go all the way up to the Gulf of Alaska.

25 In our submission, Dr. Peterman also says
26 that -- or the information in his expertise brings
27 is that we also need to look closely at what's
28 happening in the Gulf of Alaska. And Dr. Welch's
29 comments that I put there for you:

30
31 I think it's clear from the data that's
32 available that they're not randomly
33 distributed [in the Gulf of Alaska]. We
34 don't fully understand [it], but there are
35 multiple sources of evidence that suggest
36 different stocks have, at least to some
37 degree, different areas of distribution
38 within the Gulf of Alaska.

39
40 I think that is relevant, given the concerns
41 around international protection of pinks and the
42 competition for food.

43 As it relates to the longer term declines and
44 the decadal shifts that have occurred, we strongly
45 recommend both Technical Report 4 and Technical
46 Report 10. There were substantive substantial
47 work by experts in the field, who had the

1 opportunity to review the best evidence and
2 information we can, to look at what's happening in
3 the marine. The Technical Report suggests it can
4 be characterized as a 15-year decline in marine
5 productivity, which bears a strong resemblance to
6 the shift to lower productivity in 12 of the 16
7 stocks.

8 The climactic marine changes and productivity
9 changes were also picked up by Dr. Randall
10 Peterman and Dr. Brigitte Dorner who found that:

11
12 ...most Fraser and many non-Fraser [River]
13 sockeye stocks, both in Canada and the USA
14 show a [decline] in productivity...

15
16 Linked to what is occurring in the marine.

17 Specifically with respect to 2009, now I was
18 very grateful that weight of the focus and during
19 the Inquiry was not only on 2009, because as you
20 know, sockeye salmon have varying trends, and
21 within the different stocks have varying trends.
22 But what 2009 was so troubling about, was that it
23 was expected to be such a large year and it came
24 across with very, very smaller.

25 So we learned something that Aboriginal
26 people have been concerned about for quite a long
27 time is that this declining trend has the ability,
28 depending on what happens, to all of a sudden take
29 out very large amounts of salmon from the marine.

30 So it's not just a declining trend that we
31 have to look at, and I think that's important for
32 your work, Commissioner Cohen. It could be that
33 some will say, just look at the productivity
34 trends over times and make your decisions and only
35 look at the marine. We can't do that. Because
36 the vulnerability of the stock could be affected
37 in quite a different -- many different places
38 within.

39 And what we learn in 2009 is that the best
40 scientific evidence after all of the work that
41 happened here. We wouldn't know that, if this
42 work hadn't happened, we wouldn't know that. The
43 research wouldn't have been able to be done in
44 that kind of comprehensive way. Is that there
45 were unusual wind patterns in the Queen Charlotte
46 Strait that contributed to low surface salinity.
47 There was the most extreme sea surface temperature

1 value since 1982 was in 2007. And the winter of
2 2006 into 2007 was the most extreme with a thick
3 layer of freshwater coming off the coastal
4 mountains into the Queen Charlotte Strait.

5 The consequences of all of that is that Dr.
6 McKinnell as one of the many esteemed scientists
7 in PICES who did the Technical Report 4 concluded
8 that the marine conditions they observed in the
9 Queen Charlotte Strait region and the Queen
10 Charlotte Sound regions, and even in the Southeast
11 Alaska, through the life history of the Fraser
12 River smolts, from 2007 and 2009 were consistent
13 with the idea of poor survival in the marine.
14 Marine conditions may have first occurred in the
15 Strait of Georgia, and that's what Dr. Beamish
16 tells us, and then that had a footprint of the
17 larger scale effect that's going on.

18 It was clear between Dr. Beamish and Dr.
19 Welch and Dr. McKinnell that it's not just the
20 Strait of Georgia that we can look at. That's
21 where Dr. Beamish's eyes are. The eyes must go
22 broader, and they must include the work that it's
23 in Queen Charlotte Strait and the Sound, to begin
24 to understand what's going to occur and could
25 occur in any one given year.

26 Frankly, the marine is not one big empty box,
27 or blue box, or however the different metaphors
28 that I've heard over the while. The marine is a
29 very complex series of many, many different types
30 of ecosystems. It's our understanding of the
31 marine from a scientific perspective that needs to
32 be developed. Are we going to wait for all of
33 that research to occur? Frankly, I don't think
34 that humans' relationship to Fraser River sockeye
35 can wait until we understand all of the oceans.
36 And frankly, shame on us if we did wait.

37 I found it very fascinating that the coastal
38 First Nations, the Haida that I represent here and
39 other coastal First Nations along the Coast, over
40 the last number of years, when working
41 collaboratively on ecosystem-based management,
42 what was the first, one of the first and important
43 steps they took forward? They started mapping
44 that marine and they started mapping the sensitive
45 areas around that marine. Why? Because we don't
46 need to wait for research to protect important
47 places.

1 We don't need to do more research in the
2 marine to say important areas of the migratory
3 route of Fraser River sockeye need to be protected
4 and preserved in a precautionary manner. And it's
5 that research that I commended to you on a number
6 of occasions that the Haida have done and the
7 coastal First Nations have done to ensure that we
8 take steps now to protect the areas. And in the
9 international world they're often called refugia.
10 Here we can talk about sensitive areas. We can
11 talk about refugia. We can do whatever we need
12 to, but we need to figure out where that migratory
13 route is and we need to take steps now to protect
14 it. In over time, as we go, as funding allows, of
15 course, we need to understand the marine
16 environment more. But we need to understand where
17 the salmon are and where we need to protect them
18 in the marine.

19 Many have come to you to talk -- here to
20 speak about aquaculture. I'm going to separate
21 what I'm going to speak on "Aquaculture". I'm not
22 going to say much. There has been much spoken
23 about it. It is an area of great concern to all
24 those that care about wild salmon. What I can say
25 as most succinctly as possible is that the
26 location and the density and the situation that
27 results in the fact that we have no strong
28 reliable evidence to understand the interactions
29 between farmed salmon and wild salmon, who's
30 bearing those risks? Those risks are being borne
31 by the wild salmon and those who rely on the wild
32 salmon, and in particular First Nations of this
33 Province.

34 It is shocking, it was shocking for me -- I
35 hope when you spent those two weeks and heard and
36 saw the response that we had, it was shocking that
37 people (a) first of all sometimes don't think that
38 First Nations care about this. It's one of their
39 grave concerns. They've raised it with both the
40 Province and the federal government for many
41 years. They have substantive concerns, and not
42 one of the Crown governments can show you any deep
43 substantive work that they have done with First
44 Nations to properly inform them about the nature
45 of the risks associated with disease transfer to
46 wild fish, how that risk is being borne, what is
47 that risk, and how could finfish aquaculture

1 properly be managed as a ways to avoid those
2 risks.

3 There has been some debate about what the
4 scientists say and which scientist you should
5 believe, and which scientist you shouldn't believe
6 as it relates to aquaculture.

7 As you saw, Commissioner Cohen, our approach
8 in this inquiry with scientists was not to go
9 after them about whether they should be relied
10 upon or not. Science provides an information base
11 from which we make decisions. The biases, the
12 approaches, the perspectives, the history of a
13 scientist is relevant to you when you're looking
14 at that. But, you know, I regretted on a number
15 of occasions that the few times when others in the
16 room found it important to spend large amounts of
17 time criticizing on whether or not a person had
18 the credentials to speak what they are concerned
19 about, or the research they have. It would have
20 been more useful, in my submission, if we had had
21 the information and I regretted that. And it
22 continues to be a very strong concern for First
23 Nations that we get the information.

24 And so in our effort on aquaculture, we make
25 it very clear and in all of the recommendations
26 that First Nations must be involved in developing
27 and doing an analysis, including the risk
28 assessment analysis on what are the ecologically
29 and socially tolerable levels of disease that may
30 transfer from farm fish to wild fish.

31 We say that DFO must implement a research
32 program and we recommend that that research
33 program be funded by industry, that monitors and
34 understands the interactions between farm fish and
35 wild fish, and in this case the industry that I'm
36 referring to is the aquaculture industry. This
37 research has to be multi years. It has to include
38 specific work on the role of pathogens and the
39 transfer from wild -- from farm to wild and wild
40 to farm, and all the way in between. And it has
41 to consider the evolving interactions between
42 environmental factors such as climate change,
43 including increased water temperatures, pathogens,
44 and disease.

45 We're not in the situation we were in the
46 '70s or the '80s or the early '90s as it relates
47 to water temperature. Those are changing and you

1 heard much evidence about how contaminants and
2 pathogens are becoming increasingly of concern
3 because of the changes in the water temperature.
4 So to somehow suggest that the perceptions and the
5 ideas that were being used in the 1980s could
6 inform good decisions now is not acceptable. It's
7 not appropriate to turn a blind eye here,
8 Commissioner. These are grave concerns and the
9 world has changed since those original siting
10 decisions were made. They have changed
11 fundamentally. There is a change in circumstances
12 that requires different eyes, more precaution, and
13 the location of those farms and the density of the
14 farms in those unique places on the Fraser River
15 sockeye salmon migratory route must be looked at
16 very carefully.

17 Just so the aquaculture industry doesn't feel
18 I'm only concerned with contaminants from there,
19 you have heard the issues as it results around
20 urbanization. There are many clear concerns that
21 the wastewater streams of our urbanizations are
22 causing grave concern. There are over 200
23 substances, chemicals of potential concern being
24 released into the aquatic ecosystems within the
25 Fraser River Basin. I refer you to Technical
26 Report with respect to that. Many of them exceed
27 the toxicity screening values.

28 The results of the assessment of Technical
29 Report 2 was indicated that exposure to
30 contaminated surface water and sediment or
31 accumulation of contaminants in fish tissues pose
32 potential hazards to sockeye salmon utilizing
33 spawning, rearing and migration habitats within
34 the Fraser River Basin. The chemicals of concern
35 that occurred in water at concentrations
36 sufficient to adversely affect the survival,
37 growth, and reproduction of Fraser River sockeye
38 salmon, and those chemicals of concern, those 200
39 don't even include the emerging chemicals of
40 concern.

41 And then to add insult to injury,
42 Commissioner Cohen, salmon accumulate those
43 chemicals as they feed and they bring them back to
44 their natal streams. Those chemicals don't go
45 away. And so when there's a lot of salmon that
46 get exposed to them, they take them all the way
47 back to their natal streams, and they're passed

1 on.

2 The eastern shoreline of the Strait of
3 Georgia shows very high concentrations of PCBs and
4 PBDEs and it's quite likely that's coming through
5 our wastewater. I found it amazing to learn all
6 of this and then to hear the Province submit to
7 you that there is nothing in their jurisdiction of
8 concern to the decline of Fraser River sockeye
9 salmon. Frankly, I'm not sure who they're trying
10 to kid. They're not kidding the First Nations.

11 Optimistically, I can refer you to work
12 that's being done to collaborate in terms of
13 finding out how the role of these contaminants can
14 be best understood. We have things like the Siska
15 study and a number of other studies that we refer
16 to in our report that show the work that can be
17 done when governments collaborate to look at these
18 important matters.

19 Now, if you take contaminants and you take
20 urbanization, you take the marine environment, and
21 then you add to it climate change, and you
22 recognize as the report of Dr. Hinch and others
23 did that climate change brings a number of habitat
24 protection measures of increased concern. We add
25 to the concerns about predation. We add the
26 concerns of a number of factors for climate
27 change.

28 I do have to ask you what's wrong with the
29 reversal of the application of the precautionary
30 principle. When are we going to wait to do it?
31 For how long will we wait to seriously ask
32 ourselves when can we apply a precautionary
33 principle that makes sure that before humans do
34 more along that migratory route, we prove it won't
35 cause further harm. And when will we begin to
36 take the steps to own the responsibilities we have
37 that it is our actions that are threatening Fraser
38 River sockeye salmon, and that it is our failure
39 to act that's threatening Fraser River sockeye
40 salmon.

41 Dr. Hinch mentioned, and I think it's of
42 importance, that with the growing concerns about
43 how temperature will affect survival of the
44 sockeye, that we'll need to consider stock or
45 conservation unit specific management. He also
46 mentioned very specific habitat protection
47 measures that will need to be taken in order to

1 help Fraser River sockeye salmon evolve through
2 the changes in climate. If Fraser River sockeye
3 are going to survive for our children and our
4 grandchildren, then there will need to be more
5 habitat measures, not less.

6 I want to just stop there. There's been a
7 lot of talk about no net loss and those components
8 of habitat management. In addition to it not
9 being monitored, not being successful, First
10 Nations don't accept the notion that there can be
11 a no net loss of habitat by substituting one part
12 of habitat for another part of habitat. All parts
13 of habitat are important to Fraser River sockeye
14 salmon.

15 Finally, I'm not going to take much time on
16 the "Cumulative Impacts" section because at the
17 beginning of this inquiry, Commissioner Cohen, we
18 made submissions to you from the First Nations
19 perspective that it was of course cumulative
20 impacts that were the cause of the decline. So it
21 became no surprise at the end of the day that
22 that's what Mr. Marmorek concluded. But what's of
23 more importance, I think, of course studying it
24 and looking at the work that is done and
25 synthesized, it's very important and I was
26 grateful to the work Mr. Marmorek did in
27 synthesizing.

28 And he did something wise, from my history of
29 working with Fraser River sockeye salmon and
30 others, instead of telling us what the priorities
31 of research should be, or telling us why he thinks
32 that, he gave us a process for determining that,
33 and he suggested who should be at that process in
34 order to determine those priorities. Because as
35 ecosystems change, those priorities will change,
36 and as funding and research changes, those
37 priorities will change. But it's how we determine
38 research priorities and expenditures of money that
39 are key and important to looking at cumulative
40 impacts. It's how we ask the question.

41 You know, a couple of times in my own
42 humbleness, I sometimes got, oh, man, I should
43 have asked that scientist a question more precise.
44 You saw how many of the scientists like the
45 questions very, very precise. And a couple of
46 times, and for some reason the one with Dr.
47 McKinnell and I became of concern and I wish I

1 could remember the specific question, but I can't
2 right at the moment. But I remember him saying "I
3 can't answer that because it's not precise enough
4 a question."

5 And I can tell you that that's a concern that
6 many First Nations governments and others have
7 brought to me on a number of occasions. They have
8 said "Who's deciding the question of these
9 scientists?" And now you have just oodles of
10 evidence to show to you why that's of concern, and
11 why it's important to make sure that we ask the
12 right questions.

13 And so what Mr. Marmorek does is after
14 reviewing all these cumulative effects and being
15 clear to you why we have a cumulative effects
16 situation, his strongest recommendation was the
17 proper process for moving forward.

18 I think it's about 11:15, Commissioner Cohen.
19 I'll just say this. I'm about halfway through, so
20 hopefully I will finish on time, and I'm doing my
21 best. And I just found it very interesting, not
22 only in the written material and the oral
23 presentation, and all of the way through, when I
24 asked the First Nations Coalition at the beginning
25 of this brief, you know, was it the environment or
26 was it DFO's policies and practices and procedures
27 that have caused the decline of Fraser River
28 sockeye, and they sort of smiled at me as they
29 often do when I ask questions like that, because
30 it's sort of obvious to them they're sort of the
31 same. And it was hard pressed for them to say
32 it's only in the environment, or it's only in the
33 policies and practices of DFO. It's in all of it.

34 The policies and practices of DFO, and the
35 policies and practices not just of DFO, of the
36 colonial governments, has got us to where we are.
37 Decisions that are made about resource extraction
38 and otherwise have got us to where we are now.
39 And so for the rest of my submission, about
40 halfway through, I'm going to spend time on the
41 policies and practices of DFO and the
42 recommendations going forward. Thank you.

43 THE COMMISSIONER: Thank you very much.

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

45
46 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
47 (PROCEEDINGS RECONVENED)

1 THE REGISTRAR: The hearing is now resumed.

2

3 SUBMISSIONS BY MS. GAERTNER, continuing:

4

5 MS. GAERTNER: Mr. Commissioner, I (indiscernible - no
6 microphone) table of contents of my materials
7 right now just to ground us in the work that we
8 must do to get to the spawning grounds in about 47
9 minutes.

10 You'll see that in these submissions, I've
11 already covered up to page 3, which was to provide
12 the overview and the First Nations perspective,
13 and then the state of the stocks, causes of
14 decline. I'm now turning to policies and
15 practices of DFO at page 174 onward, and you'll
16 see that through these submissions, I've -- we've
17 -- I definitely emphasize "we" -- have been trying
18 to tackle all the significant policies and
19 practices of DFO related to Fraser River sockeye.

20 We started with ecosystem-based management.
21 I said a fair bit of the First Nations perspective
22 on ecosystem-based management. We then go to TEK,
23 Wild Salmon Policy, species at risk, habitat
24 management. I'm going to spend some time with you
25 on TEK, Wild Salmon Policy, First Nations co-
26 management, but if I run out of time, I'm not
27 going to be able to get to all of these other
28 matters.

29 You'll see also over to page 5 that we take
30 on in detail the harvest management issues. I'm
31 going to try to highlight some of the key areas,
32 but I have to say that these are very detailed
33 submissions on harvest management aspects because,
34 of course, one of the key aspects of how to adjust
35 human behaviour around the fisheries is through
36 harvest management, and so I've gone through all
37 of the areas that you heard much evidence with
38 (sic) and have some comments on the monitoring -
39 although that's been covered well by Tim Dickson
40 in this matter - and then commercial fishing,
41 aquaculture and the regulation of aquaculture.

42 At the end of it, I really want to spend a
43 little time on the recommendations because we
44 believe that those are the ways that you will help
45 us envision the future and work together. So
46 let's hope by ten minutes before I'm finished,
47 we'll touch on those. So that's where we are.

1 As I said, ecosystem-based management, I've
2 spent some time talking to you about that already.
3 It's fundamental to the way that First Nations see
4 the world, and one of the things I think is
5 important is that scientists, in order to answer
6 very precise questions and to see the world in
7 very precise -- spend a lot of time doing that,
8 and it's only more recently that ecology -
9 recently in colonial development - ecology has
10 been the way science is now developing to look at
11 and understand the world of wild species in
12 relation to humans.

13 That, of course, is an old tradition and why
14 I'm emphasizing that is that it's important when
15 looking at all of this to have the patterns in
16 one's mind and in one's culture that brings it all
17 together. You know, there are some that are very
18 skilled at looking at precise things, and then
19 there are ways of thinking and ways of being that
20 integrate it all, and there are very different
21 ways of thinking and different ways of being.

22 It's why one of the amazing gifts that
23 aboriginal leaders and aboriginal people have is
24 they start by seeing it all together. And then
25 through their interaction with scientists and
26 others, they're learning, and we're all trying to
27 find a place where all of it together and in its
28 individual wholes has its place. So when it comes
29 to applying ecosystem-based management, I look
30 forward to and we all look forward to the place
31 where aboriginal perspectives can be there.

32 Traditional ecological knowledge, you've
33 heard quite a bit about that. We started in the
34 early days to bring to your attention the
35 convention on biological diversity that was passed
36 and Canada signed it in 1992 which, when looking
37 at biological diversity internationally, there was
38 the agreement that the practices and innovations
39 and the ways of knowledge of indigenous and local
40 communities embodying traditional lifestyles are
41 absolutely relevant for conservation and the
42 sustainable use of biological diversity.

43 In paragraph 534 and 535, we went back to
44 some of the early evidence that we provided to you
45 about what traditional ecological knowledge is,
46 how it is that cumulative body of knowledge and
47 practice and expertise that's dependent on many of

1 the same things that scientific method is
2 dependent on, observation, questions, hypothesis,
3 experimentation, interpretation and reporting.

4 I'm fond of remembering Dr. David Close's
5 evidence about how you blend them together only
6 'cause I got this lesson early in my work, which
7 is that in a modern context, aboriginal people
8 have to have their computer in one hand and a drum
9 in the next. I like that metaphor because it
10 talks about how you bring those two worlds
11 together, and it is in the bringing of those two
12 worlds together that the traditional ecological
13 knowledge, I believe, has a very unique role at
14 the table.

15 Neil Todd, who's the operations manager of
16 the Fraser River Aboriginal Fishing Secretariat
17 said it this way, and I want to bring his evidence
18 to your mind right now, which is that traditional
19 ecological knowledge is integral to First Nations,
20 and it's integral to the management of salmon that
21 has to be brought to the table. We asked him the
22 question of how - and this was a question I asked
23 my clients quite a bit through this inquiry - is
24 how should be do this? At the end of the day,
25 they said what Neil said here, which is that it
26 can only be brought to the table through a joint
27 management process whereby First Nations can sit
28 at a management decision-making table as partners
29 in the management decision-making process.

30 That's how we ensure traditional ecological
31 knowledge and, here, that's where I think joint
32 management is absolutely critical to trying to
33 ensure the survival, sustainability and hopefully
34 flourishing of Fraser River sockeye salmon.

35 Numerous scientists came before you, Dr.
36 Riddell, Dr. Welch, Dr. Hinch, Dr. Miller-
37 Saunders, Dr. Irvine, Dr. Holt, Dr. Trites, Mr.
38 Whitehouse, I mean, the list goes on and on, and
39 have testified about the importance of considering
40 and including traditional ecological knowledge in
41 the work that scientists and western scientists
42 are doing. The question isn't should we do this,
43 of course. The question is how should we do this.
44 Increased co-management, of course, is the way to
45 ensure that that unique knowledge is there.

46 Also, DFO, with the help of the First Nations
47 Fisheries Council, we believe could develop the

1 set of best practices and guidelines for the use
2 of traditional ecological knowledge. Thankfully,
3 as we reviewed in our submissions, there's
4 examples of how this is happening now.

5 I don't have time today to go through all of
6 the evidence and all of the submissions around the
7 Wild Salmon Policy and it shouldn't, in no way,
8 suggest that this -- the First -- this -- the Wild
9 Salmon Policy is, and we support what the
10 Conservation Coalition said: that is the method by
11 which we move forward in a manner that puts into
12 the ground the policies that are necessary for
13 change.

14 I found it telling that Pat Chamut, when he
15 came and gave evidence about something that he
16 left us with after his years of work on the part
17 of Department of Fisheries and Oceans could simply
18 call that the implementation was disappointing.

19 DFO must demonstrate a stronger commitment to
20 implement and must grasp the complexity of the
21 implementation of the Fraser River sockeye salmon.
22 It's not enough, and it's not even appropriate to
23 use pilot projects in other parts of the Pacific
24 Northwest to say that we're moving on with the
25 Fraser River sockeye salmon implementation of the
26 Wild Salmon Policy.

27 In our view, there are four primary
28 explorations that are needed to implement the Wild
29 Salmon Policy. One is terminal or near terminal
30 river or near river fisheries on known stocks,
31 both in the coastal watersheds and in the Fraser
32 watersheds. We also believe it's important that
33 we look very carefully at selective harvesting
34 methods. We must continue to bring into bear
35 seasonal closures to protect weak conservation
36 units, and we must do improved stock and habitat
37 assessment at a conservation unit level.

38 Mr. Leadem from the Conservation Coalition
39 took you through all of the recommendations of the
40 most recent Gardner Pinfold draft report. It
41 won't come as a surprise when you look at it, but
42 much of the evidence of this inquiry was reviewed
43 when they completed this, and that much of the
44 recommendations are consistent with the evidence
45 that you've heard. We recommend that draft report
46 to you, and think that the recommendations that
47 they have compiled are very useful syntheses of

1 where we can move forward.

2 Particularly of note for us is that the -- at
3 one of the foundational steps, which is the
4 Strategy 1, they do strongly recommend the
5 distribution indicators and we, as you have heard
6 in the evidence, have strongly advised that First
7 Nations must see distribution indicators in the
8 application of Strategy 1, as at the heart of the
9 work on the conservation unit -- at the heart of
10 the work on Strategy 1 and conservation units in
11 the Wild Salmon Policy for First Nations, and it
12 is a place where we must move forward.

13 Most importantly, Strategy 4 is where the
14 rubber hits the road. Strategy 4 is where we can
15 begin now. We don't have to wait until Strategy
16 1, 2 and 3 are all at a scientifically acceptable
17 standard. Nothing will ever be perfect in the
18 application of the Wild Salmon Policy, and it will
19 be organic and evolutionary. We can't rely on the
20 Integrated Harvest Planning Committee to do the
21 implementation of the Wild Salmon Policy. The
22 Harvest Committee is precisely that; it's a
23 Harvest Committee. It's not what was envisioned
24 by the Wild Salmon Policy. We must have a
25 planning process that's more akin to what's
26 envisioned in a Tier 1, 2 and 3 process to
27 properly implement Strategy 4.

28 You'll see that we've gotten down to very
29 specific suggestions on recommendations, including
30 that there should be at least five million over
31 the next five years devoted to the implementation
32 of the Wild Salmon Policy, including a champion
33 within the Department of Fisheries and Oceans, and
34 a core group of people on the Fraser watershed
35 that are willing to work to implement, at a
36 recovery team level, the work of the Wild Salmon
37 Policy. True implementation of the Wild Salmon
38 Policy will, in our submission, require an
39 efficient application of the Tier 1, 2 and 3
40 management processes.

41 I regret -- because I find examples to be
42 very keen ways of understanding human behaviour,
43 and the **SARA** policy is an important policy for
44 Fraser River watershed and most in particular, the
45 Cultus example. I was very pleased that your
46 Commission counsel took time in the evidence to
47 make sure we understood the Cultus example, not

1 just because of Cultus; because it revealed the
2 challenges associated with applying the policy.

3 Dr. Davies (sic) testified that although DFO
4 had undertook careful evaluations of the impacts,
5 he and others, both within and outside of DFO,
6 recognized the many deficiencies in the content,
7 in the methods that were used by DFO and in the
8 socioeconomic reports that DFO had developed. The
9 criticisms of the reports included that the
10 analyses were over-simplified, the analyses
11 overstated the economic impact of listing Cultus
12 sockeye. The 125 million was criticized as being
13 a revenue number, not a net number.

14 Now, most importantly, it talked about the
15 losses associated with listing rather than the
16 benefits associated with the listing, and the
17 fears associated with listing. I just -- again,
18 Commissioner Cohen, I'm not going to go into the
19 detail about all the socioeconomic matters, but I
20 have to say from my years of working with the
21 St'at'imc on the B.C. Hydro matter, that it is an
22 extremely complex matter to look at the
23 socioeconomic impacts associated with the loss of
24 a run to aboriginal people.

25 Many, many communities rely on only a small
26 part of the Fraser River sockeye salmon for the
27 foundation of their communities. Only maybe one
28 of those stocks, not all of those stocks. So when
29 those stocks are gone, their relationship to
30 Fraser River sockeye are gone, and that
31 socioeconomic impact has not been considered in
32 any of these reports yet. They have not even
33 begun to look at the complexity, and with all due
34 respect, it will not be scientists who can do this
35 type of work. This work must be done, but it must
36 be done collaboratively if decisions like **SARA** and
37 the Wild Salmon Policy are going to be implemented
38 any way that they've been envisioned.

39 Another thing that we were all very
40 disappointed about with respect to the Cultus
41 decision was that First Nations had fears that
42 DFO's headquarters would make socioeconomic
43 assumptions about not listing Cultus or listing
44 them, and that that would trump their concerns
45 around the health of the salmon populations, and
46 that concern proved to be justified. The evidence
47 before you exemplifies that. The First Nations

1 were outraged that DFO didn't share their concerns
2 in a transparent way and that those concerns be
3 raised before decisions were made.

4 Further concerns became clear when not only
5 did DFO fail to share the socioeconomic analysis
6 with First Nations, they failed to share them with
7 their own team. The members of their own recovery
8 team, a group established in 2003, did not have a
9 full ability to respond to the concerns that
10 headquarters had about the socioeconomic analysis,
11 and the evidence of somebody like Neil Shubert
12 that came before you was that he was quite
13 surprised by that. Of course. You ask recovery
14 teams to put all that work into doing all of the
15 analysis and then some groups of people in Ottawa
16 make decisions without making sure that the people
17 on the ground have had an adequate opportunity to
18 clearly bring forward their concerns about the
19 adequacy of the information, the adequacy of the
20 perspectives, all of those things.

21 If we're going to get on with it, then Ottawa
22 must respect the hard work that goes on, on the
23 ground, and must ensure that there are processes
24 in place when key decisions like this are vetted
25 on the ground and they have the proper
26 information. In Cultus, you have an amazingly
27 useful example for you how that is not happening
28 and did not happen.

29 I'm going to turn now to a matter of grave
30 importance to the First Nations Coalition and
31 First Nations of this entire province, and that's
32 the matter of co-management. Now, I want to just
33 step back because I don't want you to, in any way,
34 think that co-management and the issues of co-
35 management are not within your terms of reference.
36 They must be within your terms of reference if the
37 principle on which you are working is
38 collaboration. It is absolutely clear that co-
39 management must be considered and must be an
40 emphasis on the work of DFO.

41 There is dysfunction, as there always is in
42 an evolving process, perhaps, but we need to cut
43 through where that dysfunction is and get it
44 fixed. You've heard evidence over evidence that
45 DFO prefers Tier 3 processes, the processes where
46 everybody is together. Well, you will hear in my
47 submissions, and you'll see them written over, the

1 Tier 3 processes will only work if Tier 1 and Tier
2 2 processes are properly in place, functional and
3 respectful. First Nations are not going to come
4 to Tier 3 processes. The law does not require
5 them and they will not go there if it's -- they
6 are expected to negotiate out the content of their
7 s. 35 rights with stakeholders who treat them only
8 as competing harvesters. They are not. They are
9 holders of rights. They have a unique
10 constitutional place, they have a unique
11 governance place, and these Tier 1, Tier 2 and
12 Tier 3 processes are not intended to exclude.
13 That has never been the intention of First Nations
14 and they don't.

15 What they are intended to do is provide clear
16 roles and responsibilities and processes for
17 decisions to be made wisely. If you jump to Tier
18 3 without getting Tier 1 and Tier 2 in place, you
19 are going to continue with this dysfunction. And
20 with all due respect, DFO likes to go there too
21 quick. I was comforted, and I hope you were, that
22 at the early part of December of last year when I
23 asked Sue Farlinger and Paul Sprout what they
24 thought about Tier 1 and Tier 2, they both agreed
25 that they need to be focused on, they need multi-
26 year funding and we need to get on with that work.
27 That is an extremely important bit of evidence for
28 you, Commissioner Cohen.

29 All the work that followed there continued
30 with that. The work that all of the witnesses
31 that we brought forward during the aboriginal
32 fishery section, many of them talked about how we
33 can move forward, not whether we're working
34 forward with co-management.

35 Now, the evidence in this inquiry illustrates
36 easily, in my submission, the difficulties that
37 DFO and First Nations face when meeting their
38 obligations under s. 35, and more importantly, the
39 obligations to the resource. You've heard of the
40 complex geography. There's also complex First
41 Nations relations and the fact that First Nations
42 and management decisions involve so many layers of
43 consideration.

44 I want to turn you to paragraph 635 if I may,
45 which was a paper prepared by the First Nations
46 Fisheries Council -- oh, no, actually, it was
47 prepared for DFO. That's even better. It's a

1 2010 paper prepared for DFO by a Dr. Julie
2 Gardner, who's working with DFO and First Nations
3 on co-management and, at paragraph 635, we list
4 all of the reasons and the rationales for co-
5 management:

6
7 Higher acceptability and legitimacy for
8 government;

9
10 Higher compliance with management measures
11 and regulations;

12
13 Less conflict;

14
15 Improved relationships;

16
17 More equitable management;

18
19 Which I say will lead to more just fisheries.

20
21 Progress towards recognition of Rights and
22 Title;

23
24 Better information for fisheries management;

25
26 Improved effectiveness of fisheries
27 management;

28
29 Protection and enhancement of the resource;

30
31 Tailoring to local circumstances;

32
33 Self-determination for First Nations;

34
35 More efficient management --

36
37 Well, that will be useful, given the reduction in
38 budgets. Let's make our management more
39 efficient.

40
41 Community development...

42
43 Greater access to...resources...

44
45 [Better] learning opportunities.

46
47 All of these rationales for co-management

1 were put to Kaarina McGivney, the former Regional
2 Director for DFO for Treaty and Aboriginal Policy
3 Development, and she agreed that all of those were
4 reasons the DFO had accepted as being useful for
5 establishing a co-management regime.

6 It comes as no surprise that for the First
7 Nations Coalition, it is not whether co-management
8 will occur, but it's how. DFO, in their evidence,
9 recognized the implementation of co-management
10 will eventually encompass the sharing of authority
11 for fisheries management, resulting in a shift
12 from the top down, centralized management of
13 fisheries resources to shared stewardship of the
14 resource. Mr. Huber testified that he uses this
15 approach in all of his work with co-management
16 regimes through the Roadmap Initiative or
17 otherwise.

18 In order to implement efficient governance
19 structures, DFO, the Province and First Nations
20 will benefit from clear governance structures that
21 efficiently outline the roles and responsibilities
22 of all of these governments in the decision-making
23 that must occur. First Nations Fisheries Council,
24 together with many First Nations in the Fraser
25 River Aboriginal Fishing Secretariat, have been
26 providing technical support to both DFO and to
27 First Nations governments in how to envision these
28 types of processes to go forward.

29 We talked a little bit about the necessity
30 for incentives. Why? Because these processes
31 have actually taken a fair bit of time. I, in my
32 own short lifetime on this planet, have been
33 spending a fair bit of time working with First
34 Nations on trying to see how we can implement Tier
35 1 and Tier 2 processes. They do take time, they
36 take patience, but they also take incentives. And
37 so we gave you examples of the types of incentives
38 that DFO and First Nations clearly need to look at
39 in order to get this work done.

40 First Nations need to know that they will
41 have a voice, and that their voice will be
42 respected in management decisions. That sounds
43 simple, but it's difficult, and it's an important
44 incentive. There is no point in continuing to
45 work if you're ignored. But it is extremely
46 inspiring to know that when you're -- when you
47 come to work and you go and do this work, that

1 your concerns will be properly heard and that will
2 make a difference.

3 So First Nations need to know that if they
4 are going to do this Tier 1 and Tier 2 and Tier 3
5 process, and they are absolutely committed to
6 doing it, that their voice, their concerns will
7 make a difference in decisions. They need to know
8 that this is going to result in the conservation,
9 and they need to know that changes will occur in
10 allocations, fishing practices and fishing
11 management. Change must occur, and those are the
12 types of incentives we want you to consider and
13 have spent time giving you evidence on and
14 summarizing, as to why that needs to occur.

15 How this is going to occur, at paragraph 271
16 (sic), that what's needed in order to advance co-
17 management is respect or the explicit recognition
18 of aboriginal title and rights; clarity among the
19 governments; incremental sharing of management
20 responsibility; clear commitments; dedicated
21 resources; and then practically speaking, given
22 the work that happened with the Wild Salmon
23 Policy, it is the First Nations Coalition's view
24 that a champion within DFO must be identified to
25 see the Roadmap Initiative and the resulting co-
26 management arrangements through to completion.

27 The development, resourcing and successful
28 use of Tier 1 and Tier 2, leading into Tier 3
29 processes, require a firm commitment of human
30 resources in addition to financial resources. In
31 our observation, that type of champion would also
32 be useful in the First Nations so that there were
33 two champions that were charged, over a period of
34 time -- you heard evidence from Mr. Huber for the
35 Department of Fisheries and Oceans, and First
36 Nations representatives that are involved in the
37 Roadmap process, that they feel that with that
38 work, the appointments of champions and the
39 identification of resources, that the structure
40 could be put in place and the processes could be
41 in place within a two to three-year period of
42 time.

43 That is, relatively speaking -- and a very
44 important bit of information for you because these
45 people have been working very hard. They wouldn't
46 have come to you and told you something that was
47 impossible or that -- and they wouldn't have set

1 themselves up a task that they couldn't do.
2 That's the time frame that they think, with the
3 appointment of the necessary people, to make sure
4 - and the resources - that this work could be
5 done. Frankly, that's a very short period of time
6 in the management of the Fraser River sockeye, but
7 it is critical in terms of the vision that we have
8 for moving forward.

9 In addition, Mr. Rosenberger talked about the
10 work associated with tiering it. That's another
11 level of detail that we spent some time in the
12 evidence, Commissioner. Tiering it is to
13 recognize that not all decisions happen at a
14 strategic level, that there are many decisions
15 that have to occur amongst all of the First
16 Nations. There are some decisions that will need
17 to occur and work that needs to happen at a tribal
18 level. There are some decisions that will happen
19 at a community level. All that tiering work that
20 has to happen can be done, and it was suggested
21 could be done initially through the development of
22 the structures.

23 The rush to the Tier 3 process is dangerous,
24 in my submission. It could backfire. So we
25 suggest instead of steamrolling ahead to Tier 3
26 processes, in order to ensure the stakeholders are
27 not feared (sic) that they aren't going to be
28 included, has the problem of First Nations not
29 going, and we have quotes and we have evidence to
30 tell you -- and, in my mind, have the work of Russ
31 Jones saying to you how -- when First Nations
32 found that existing processes which were all in
33 Tier 3 in which there's sort of a tacit approval
34 by their participation, makes First Nations very,
35 very nervous.

36 What First Nations have found is that an
37 existing process is that you're put in the
38 position of giving tacit approval to decisions
39 that undermine First Nations rights and
40 responsibilities. I think in a way it's almost
41 discrimination through equality. First Nations
42 have the rights under the constitution that are
43 acknowledged, prior rights to the fishery. By
44 forcing First Nations to participate with other
45 groups on an equal basis, you're not recognizing
46 that prior right which is quite different.

47 I think that it's one thing, and I think it

1 should be comforting for not only you but all of
2 those that are looking at this, we're not saying
3 it's just a Tier 1 and Tier 2 process. No one's
4 ever suggested that. First Nations are willing to
5 work with those that care about the long-term
6 sustainability of the sockeye and the fisheries.
7 But they need to make sure that the structures are
8 reliable and respectful.

9 All right. I think I have about 15 minutes
10 to wrap up or so, and so I'm going to move
11 forward. As I mentioned, at pages 259 onward, we
12 move to the harvest management and challenges
13 around harvest management. I'm not going to spend
14 detail in there because if I tried, I would start
15 stumbling all over my words, so I'm not going to
16 rush through all of them.

17 But I am going to say that we have to move
18 from aggregates to conservation units, both at the
19 PSC and at the Fraser River Panel, and in all
20 domestic fisheries. We need to do the work to
21 clean up the run-timing groups. The run-timing
22 groups were set at a time and in a place in which
23 First Nations were not at the table. There's much
24 that we've learned since then. The run-timing
25 groups are extremely important.

26 We're looking at the climate variabilities
27 and develop -- and determining openings and
28 closings of fisheries. I found it odd that it
29 hasn't changed since the work has changed, and Dr.
30 Woodey, I think -- I think it was in the '80s,
31 recommended this work be done. It still hasn't
32 happened. We must do that in order to properly
33 set the foundation at the PSC level for the
34 implementation and the better implementation of
35 the Wild Salmon Policy.

36 We have to rework FRSSI, which is the process
37 that's being used to set up escapement levels, so
38 that they are more attentive to conservation
39 units.

40 Of central importance, as an absolute minimum
41 going forward, Commissioner, we have to put stock
42 assessment as a high priority, but increased stock
43 assessment at the conservation unit level. It's
44 not good enough for scientists to say, "We can't
45 give you the information about all the other
46 conservation units 'cause we're not collecting
47 that information and we're not doing that

1 information." The Wild Salmon Policy needs to
2 shift so that we ensure that our stock assessment
3 work is done at a conservation unit level, and
4 we've set out very specific recommendations on
5 that, at page 275, paragraph 746, onward.

6 Dr. Riddell and Dr. Whitehouse had three
7 specific elements in stock assessment programs
8 that the First Nations Coalition agrees with and
9 accepts. The collection of escapement
10 information, of course, is the backbone of that
11 work. Telemetry work is also going to be
12 important, and we say increasingly important,
13 given all that we've learned about the marine
14 environment.

15 Then the Qualark program, we understand that
16 that funding is at risk, and we say the Qualark
17 program is extremely important to the -- as a
18 verification to what has been historically
19 unreliable information from Mission.

20 Now, one of the things that I have -- aren't
21 you glad that you don't have to hear all the
22 harping I do after I leave the courtroom -- but
23 one of the things that I've spoken a lot about
24 with my clients is the management adjustment, and
25 the management adjustment is a very important
26 piece of work in harvest management right now. It
27 is really, if one was to look at how all of the
28 precaution, all the climate change, everything
29 else that's going on, and then look at the state
30 of the stocks with respect to en-route loss and
31 pre-spawn mortality, it's the only way that we're
32 actually making adjustments clearly and as to how
33 we use our perception of the fishery, which is
34 often done mathematically and through numbers to
35 try to make sure that we're protecting the stocks.
36 So the management adjustment has to clearly be
37 kept and it must be supported by stronger research
38 and stronger assessments.

39 It doesn't have all of the information, and
40 in fact, I quite recall the scientist in DFO who
41 came and gave evidence around the management
42 adjustment about how much of it is done, that
43 needs to include a fuller dataset of environmental
44 conditions.

45 One of the last things I'm going to speak
46 about with respect to management adjustments is
47 the role of terminal and near-terminal river

1 fisheries. PICFI, which was the first of the
2 Pacific Integrated Commercial Fishing Initiatives
3 is, as you've heard, scheduled right now to
4 sunset. DFO's evaluation in 2010, as it relates
5 to PICFI, clearly says that moving towards a
6 terminal fishery for salmon should lead to
7 significant benefits from increased selectivity
8 and lower cost of capture.

9 In a document called "Fishing for a Better
10 Future", the First Nations Fisheries Council - and
11 I refer to paragraph 773 of my document with
12 respect to that - talks about the benefits of
13 renewing PICFI and the value of moving from mixed-
14 stock aggregate fisheries into not just terminal
15 fisheries, it's more terminal and near-terminal
16 river fisheries.

17 You know, often the concern is that that's
18 going to mean -- and I need to put this concern to
19 rest -- that aboriginal -- first of all,
20 aboriginal people in the marine or the approach
21 won't be fishing. That is not the position of the
22 First Nations Coalition in this inquiry
23 whatsoever. All those that have a priority access
24 to Fraser River sockeye salmon along the migratory
25 route will continue to do that, and must continue
26 to do -- the plans must include them. Rather that
27 this shift from the way we are fishing now to a
28 shift in which we know what stocks we are
29 harvesting and when, and the abundance associated
30 with them, will continue to develop near-terminal
31 and terminal fisheries throughout the territories.

32 It will actually relieve some of the
33 pressures associated with Fraser River sockeye
34 and, to the extent that those pressures can't be
35 relieved by other stocks, of course access for FSC
36 fisheries and the priority fisheries will occur in
37 the marine.

38 Briefly on the regulation of aquaculture, DFO
39 has not adequately responded to the numerous
40 concerns First Nations have raised over the last
41 two years since the **Morton** decision and prior to
42 that, about how wild salmon and their habitats
43 will be protected. First Nations Coalition
44 submits that the rushed and ad hoc approach that
45 DFO used in relation to the decisions to roll over
46 aquaculture licences demonstrates a failure to
47 truly appreciate, address and accommodate the

1 concerns that First nations had already raised
2 with DFO and continue to raise. Fin fish
3 aquaculture along the migratory route of the
4 Fraser River sockeye salmon is an industry without
5 certainty of operations from the First Nations
6 perspective.

7 Prior to making the decision to roll over
8 existing licences, DFO didn't ask whether the
9 province's siting criteria addressed current
10 concerns or scientific information. It didn't ask
11 whether the province had properly applied the
12 siting criteria used to determine the appropriate
13 location, and it didn't ask whether First Nations,
14 all along the migratory route, had been adequately
15 consulted about the potential impacts of such fish
16 farms on wild salmon, including Fraser River
17 sockeye salmon.

18 Since that first rollover decision in 2010,
19 DFO has not undertaken any comprehensive studies
20 to address First Nations' concerns regarding the
21 location, size, number and density of fish farms
22 along this route, or the cumulative impacts. It
23 is our submission that Canada, the First Nations
24 and the aquaculture must take immediate steps,
25 with the assistance of the protocol that I
26 suggested to the representative of industry, to
27 move forward to determine not only how the
28 consultation will occur, but the accommodations to
29 address their concerns.

30 I have five minutes to deal with the matters
31 of my reply and five minutes to deal with my
32 recommendations. I'm going to go very briefly
33 into my reply. I leave it for you to review it.
34 I just want to say that as it relates to financial
35 -- the financial crisis, of course more money is
36 necessary to implement the Wild Salmon Policy, to
37 implement all of the changes that are being
38 suggested, but we can't -- and, in that way, we
39 can embrace the work that Area B and D has done
40 about -- in their -- their request is and their
41 submissions about the need for more money.
42 However, I make one distinguishing feature which
43 is that it's over-simplistic to think that it's
44 only money that's preventing the conservation of
45 Fraser River sockeye salmon.

46 I wouldn't have spent all this time talking
47 to you about the ethic of conservation and

1 sustainability and the complexities of inter-
2 jurisdictional matters and the state of the stocks
3 to suggest that it's only the failure of money.
4 More money, if directed correctly, might help to
5 conserve Fraser River sockeye salmon conservation
6 units if existing and new money is prioritized to
7 ensure there are proper managements, efficient
8 advisory processes, science and the integration of
9 traditional ecological knowledge. First Nations
10 don't have the choice to say that without more
11 money, Fraser River sockeye salmon will be in
12 imperilled. We must work with existing pockets of
13 money and any new pockets of money that are put
14 forward to properly conserve.

15 I'm going to leave my submissions on MSY
16 speak for themselves. They're set out at
17 paragraph 25 of Area G's submissions. They assert
18 that -- although I have to say -- I must say this:
19 I found it quite surprising that Area G had
20 suggested that the Pacific Salmon Treaty was based
21 foundationally on the MSY. You know, if it had
22 been, we would have spent much, much more time on
23 that. In the reply, I'll just note that Article
24 III(1)(a) of the Pacific Salmon Treaty refers to
25 preventing over-fishing and providing for optimum
26 production. Optimum production is not the same as
27 MSY.

28 Optimum production includes many other goals
29 including, for example, ensuring distribution and
30 quality of the fisheries that are not included in
31 the notion of MSY. In fact, in our view, Article
32 I(5) of the Pacific Salmon Treaty defines over-
33 fishing in relation to MSY.

34 PST has, as its primary goal, the prevention
35 of historical problems in both the Canadian and
36 American commercial fisheries of over-fishing and
37 providing for optimum production. The PST does
38 not and could not, in our submission, require DFO
39 to manage based on MSY.

40 So you know they're there, Commissioner
41 Cohen, and I'm sure there are many ways of doing
42 this, but speaking it orally might bring it more
43 to life. In our reply, and in particular at
44 paragraphs 77 onward, at page 26, we deal with a
45 topic of apparently grave concern to Area G,
46 delayed density dependence, cyclic dominance, and
47 something called over-escapement. I just want to

1 say that it's useful to acknowledge that this
2 scientific hypothesis or theory of delayed density
3 dependence doesn't equate to over-escapement and
4 it doesn't equate to that being harmful for
5 sockeye. This was explained carefully during the
6 panel on over-escapement. But his own submissions
7 -- and this was the quote that Dr. Walters -- this
8 is the quote that I'm relying on for Dr. Walters
9 that my friend Mr. Rosenbloom took issue with, and
10 I was so embarrassed because so much of the
11 citation in our work is so excellent because my
12 team members did it. This citation I did, and it
13 was in error, and I regret that.

14 But, in fact, I thought it must mean that I
15 was supposed to go back and look at it more
16 carefully, and so I did. The error that I made
17 was a page reference. The line reference is
18 correct, it's line 23 to 37, but it's the page.
19 So footnote 82 is supposed to read "February 9th,
20 2011, page 61", not page 57.

21 I just want to say two things about Dr.
22 Walters again. There's some suggestion that --
23 you know, Dr. Walters, of course, is a good
24 scientist, and there's no suggestion otherwise.
25 So are Dr. Peterman and Dr. Dorner, and they had
26 the opportunity to spend an amazing amount of time
27 with the information that they had; not something
28 that Dr. Walters had. But the important thing
29 about Dr. Walters - and he says that here, at page
30 61 [as read]:

31
32 I have to wear two hats in answering these
33 questions.

34
35 And the questions were about the importance of
36 genetic complexities.

37
38 As a biologist, I abhor the idea of losing
39 these unique evolved genomes like Cultus
40 Lake. It's a unique culture. But, on the
41 other hand --

42
43 And he says it immediately.

44
45 -- if I tried to emphasize with or put myself
46 in the place of commercial fishermen, and
47 over the last few years, I have to worry

1 about the effect of this on them.
2

3 And so his concerns here are not founded on
4 his concerns as a biologist. His concerns are
5 founded on his concerns for the commercial
6 industry in the aggregate mixed-stock fishery.
7 That's where it's founded. And so you have to ask
8 yourselves is that the sustainable future for our
9 fisheries? There's no evidence to suggest that in
10 front of you. There's no evidence to suggest that
11 staying out in the marine and harvesting mixed
12 stocks is sustainable any longer. All of the
13 evidence points to the selective fisheries and to
14 the known stock fisheries. That's where the
15 evidence on conservation lies. You can't have a
16 sustainable fishery if you don't have a resource.

17 I'm not going to be able to go into any
18 further detail about anything except the
19 recommendations.

20 Commissioner Cohen, pages 22 onward of our
21 Executive Summary, we didn't have a long closing
22 submission on the way forward or any of the ways
23 -- because we did it through our work on the
24 suggested recommendations that we are asking you
25 to look at. We had judgment calls and we worked
26 closely with our clients on these recommendations.
27 I think that's very important for you to know.
28 These were not the work of the legal team. This
29 is the work of those that deeply rest with this
30 work.

31 What these recommendations reflect are quite
32 comprehensive and there is this debate should your
33 recommendations be one or two or three or four and
34 make it clear that's all you want to do, or should
35 there be many. When we tried to do one or two or
36 three or four, they got so general. They got so
37 principle-based that's it's very difficult to
38 implement them or hold anybody accountable to
39 implementing and it would be sad if your work was
40 not something we could all implement well and
41 clearly.

42 So we had to weigh it the other way. Of
43 course, you will make your own determinations of
44 this. We're just suggesting that there be a
45 balance between those principled approaches that
46 are broad, but also very specific proposals on
47 much of the specific evidence that you've done.

1 In that way, we've set those out for you in this
2 work. We set out the principles and then our
3 suggested detailed recommendations. It will be of
4 course for you to look at all of this and to see
5 whether the evidence is there.

6 I have to say we built them from the review
7 of the evidence and we did our work in the hearing
8 so that you had witnesses you could reply upon,
9 not our voices, but the witnesses that you could
10 rely upon for the value of these recommendations,
11 and they're here.

12 I just want to turn to -- and you'll see they
13 flow through all of the things that you heard
14 about and that we talked about or that we've
15 written about. But I'm going to take you to the
16 last one, because there was only a little bit of
17 evidence with respect to this and primarily from
18 our clients. It's at page 38 of the Executive
19 Summary. It's topic number 114, and it's a
20 recommendation around the implementation of this
21 work.

22 I by no means want to suggest that this is
23 the most important recommendation. It's not, all
24 of the recommendations before it (sic). But I
25 have to observe that it was useful for us to have
26 this inquiry for many, many different things. But
27 just one of the things that it was useful for is
28 that it put a fire under DFO, and we got things
29 done during this inquiry that we might have waited
30 for a number of years to get done.

31 There's movement on the Wild Salmon Policy on
32 the conservation units alone that I don't think
33 would have happened as quickly. There are many
34 things that are moving because of this inquiry.
35 Why? Well, there's all kinds of good reasons, one
36 of which it's the public inquiry and DFO's actions
37 are being attended to. But also importantly,
38 there's a judicial oversight role that you have
39 played to hold people accountable for their
40 actions. Frankly, that's extremely useful in
41 moving change.

42 Now, I am sure there are all good reasons why
43 you might not want that job, and I admire anyone
44 and everyone who dedicates them (sic) to
45 understanding the complexities of Fraser River
46 sockeye. But I can tell you, you are now a holder
47 of a unique amount of information as a judge and

1 as someone with the judicial oversight and the
2 complexities of the parties, not making rulings in
3 a particular trial, and that role is going to be
4 important going forward, the role of having
5 somebody that we can turn to that understands all
6 of this and we don't have to spend another two
7 years informing you about that.

8 So I want you to consider that when you
9 consider how best to move forward with
10 implementations. It is a unique investment of
11 public resources into you, and you will be very
12 useful (sic) going forward to ensure this is
13 implemented.

14 Now, if you're convinced that making a
15 recommendation like that is not in the best
16 interests of salmon, we spent some time looking at
17 a couple of other options for oversight, and
18 you'll see those at paragraphs A, B and C.

19 Now, it's interesting, isn't it, as I
20 conclude my remarks, that First Nations have
21 turned to you and said, "That's an important
22 thing." They don't know what your recommendations
23 are going to be, they don't know where we're going
24 forward, but they know that having a third party
25 who is watching and assisting governments to do
26 the right thing consistent with the law, and
27 consistent with sustainability and cooperation,
28 will only be a good thing. It has been a good
29 thing, it's been a bunch of work.

30 I commend you to the work that you're going
31 to go forward (sic). I hope that you will be
32 inspired by the work that happens before you now,
33 and I hope that you will have a great dose of
34 precaution and a great dose of biodiversity, and
35 that the wisdom of your insights will help all of
36 us in this room continue to work hard for the
37 long-term sustainability of Fraser River sockeye.

38 THE COMMISSIONER: Thank you, Ms. Gaertner. I
39 understand Mr. Donovan is here, but I -- it's been
40 suggested, Mr. Donovan, that we take a lunch break
41 now. Does that offend you?

42 MR. DONOVAN: (No audible response - shrugs).

43 THE COMMISSIONER: I'm not sure what I'd say if you
44 said it did offend you.

45 THE REGISTRAR: The hearing is adjourned until 2:00
46 p.m.
47

1 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
2 (PROCEEDINGS RECONVENED)
3

4 THE REGISTRAR: Order. The hearing is now resumed.
5 THE COMMISSIONER: Mr. Donovan.
6

7 SUBMISSIONS FOR LAICH-KWIL-TACH TREATY SOCIETY CHIEF
8 HAROLD SEWID, AND THE ABORIGINAL AQUACULTURE
9 ASSOCIATION BY MR. DONOVAN:
10

11 MR. DONOVAN: Mr. Commissioner, Allan Donovan for the
12 Laich-Kwil-Tach Treaty Society. I'm going to
13 surgically divide my 12-and-a-half minutes into
14 four portions, dealing with highlighting four of
15 the six written submissions and recommendations
16 from the Laich-Kwil-Tach Treaty Society, and then
17 tag off to Mr. Kelliher, who will speak, in the
18 remaining 12.5 minutes, on the issues in the
19 written submissions raised by the coalition
20 partner AAA.

21 The first submission that's critical to our
22 clients are the first recommendation that we have
23 is right at the top of page 2 of the written
24 recommendations, and it's an overarching one, that
25 the Commission ensure, or recommend that Canada
26 ensure that policy reforms don't negatively impact
27 coastal First Nations access to and participation
28 in the Fraser River fishery.

29 Our clients are coastal First Nations who
30 fish primarily in the areas of Johnstone Strait
31 and the interstices between the islands. This is
32 saltwater, but it's basically like a river system
33 where fish are concentrated as they split at the
34 top of Vancouver Island, many of them heading down
35 through Johnstone Straits. It's a natural area
36 for First Nations fishing and the Laich-Kwil-Tach
37 people and, indeed, many, many First Nations along
38 the coast rely heavily on the Fraser River
39 sockeye, and it's an ancient reliance that
40 continues today.

41 We flagged, on pages 3 and 4 of our written
42 submissions, some of the evidence that you heard
43 in documents that were entered, documents being
44 archival Government of Canada documents, that
45 underline that this reliance on the fishery for
46 livelihood purposes has been one of antiquity,
47 that at the time reserves were set apart for our

1 clients and for other coastal First Nations, it
2 was acknowledged that these were small, often
3 described as worthless or barren pieces of land
4 that would only be suitable for reserves because
5 the First Nations would continue to earn their
6 living from the sea.

7 The documents underline that our clients, in
8 particular, but other coastal First Nations were
9 toilers of the sea because they would never be
10 toilers of the land, as a government official put
11 it.

12 The reserve commissioners were told to not
13 interfere with the livelihoods and avocations of
14 our clients, and in order to fulfil that
15 requirement they set apart very small reserves
16 that were meant to be bases for continued fishing
17 for livelihood and, of course, for food and other
18 purposes. Now, this continued, the economic
19 dependence of the coastal First Nations on the
20 livelihood fishery and on fishery for food, social
21 and ceremonial purposes, and it's a dependence and
22 a reliance that continues to this day, although it
23 has been damaged and undercut in the past by ill-
24 advised licensing policy reforms that pushed, in
25 the '60s and '70s a large number of commercial
26 aboriginal fishers out of the industry.

27 I should say at this point that the Supreme
28 Court of Canada issued its decision on Lax
29 Kw'alaams this morning, with profound disregard
30 for the fact that I'd be making my oral
31 submissions. But that decision, in very brief,
32 dismissed the Lax Kw'alaams appeal and held that
33 they hadn't, as the courts below had held on the
34 particular facts of that case they hadn't made out
35 a commercial right to fish. It also commented on
36 the reserve creation argument made by Lax
37 Kw'alaams and on their facts it was found that the
38 reserve creation didn't give rise to a fiduciary
39 obligation on the Crown to grant special rights.
40 It's an important case and it's been referred to
41 in -- it's a short case, but you'll have to read
42 it to see where it takes you. But our submission
43 on it is that it doesn't, in any way, undermine
44 the history and the compelling facts that flow
45 from the very small reserve allotment on the coast
46 and the intention that First Nations living there
47 would, indeed, continue to make their livelihood

1 from the sea. They can, they have, and they don't
2 have any other large land resources to turn to,
3 leaving aside the much bigger unresolved question
4 of aboriginal title to the land, itself.

5 So our arguments remain as they have been,
6 that it was always intended that these people
7 would continue their livelihood from commercial
8 fishing and, in fact, they have. Despite the
9 policy reforms that have pushed many of them out
10 of the industry, our clients have continued to
11 persevere and, in many ways, excel at commercial
12 fishing. A lot of that evidence is laid out at
13 pages 4 and 5 of our written submissions.

14 Despite the odds, they've managed to hold
15 onto their involvement in commercial fishing,
16 which is profoundly important to them as a people
17 and turns as a linchpin on access and continued
18 access to Fraser River sockeye.

19 We note, at page 5, that the continuation of
20 access to Fraser River sockeye for commercial
21 purposes for our clients and for other aboriginal
22 people on the coast is vital, first in terms of
23 the connection to their culture, and this is a
24 critical way that young aboriginal people from
25 these communities get out on the land, get out on
26 the water, and involve themselves in the
27 traditional livelihood of their parents and their
28 grandparents going back, I'm told, generations.
29 It's a way to transmit traditional knowledge and
30 it's also fundamentally connected to the food,
31 social and ceremonial fishery because the coastal
32 experience has been that those communities that
33 have continued access to commercial fishing are
34 able to use that capacity to address food, social
35 and ceremonial needs. When you sever one of
36 those, you sever both.

37 And the other point, carrying over onto page
38 6, is that this is fundamental question of
39 survival of aboriginal communities up and down the
40 coast. They rely on this, as Ms. Gaertner
41 correctly pointed out in her submission this
42 morning, economic development is fundamental, and
43 economic opportunities are fundamental to
44 aboriginal nations. Without access to resources
45 and a way of life that can sustain these
46 communities, the communities will fail and untold
47 damage will be done to their culture and to their

1 very people.

2 On page 6 we noted that Mr. Naknakim's
3 evidence, where he pointed out that it's critical
4 that the community, these communities remain in
5 the industry, and he explained, legitimately,
6 these communities want to continue to make a
7 living in their territory. Mr. Duncan is quoted
8 as saying:
9

10 Many remote communities on the coast, I mean
11 you just can't pick up and go away. A
12 reserve is a reserve. You have nowhere else
13 to go. Fishing has been a mainstay for many,
14 many years.
15

16 And other compelling comments along the same lines
17 on the same page.

18 So our submission is that government policies
19 have gone badly wrong for the coastal First
20 Nations in the past, when they were forced out of
21 the industry, to some degree, by the Davis and
22 Mifflin plans. We want this Commission, we ask
23 that this Commission make an overarching
24 recommendation that whatever DFO and Canada does,
25 they don't make things worse for these people and
26 they don't, in any way, impede their access to the
27 Fraser River and sockeye.

28 Now, on pages 8 and 9 we make some brief
29 comments on co-management. It's certainly in the
30 interest of First Nations, as Ms. Gaertner has
31 explained and others have set out. Our only
32 comment on that would be, we hope, the obvious
33 one, that there is an enormous diversity in
34 interests and locations and goals and aspirations
35 between First Nations. Anyone who talks about the
36 aboriginal perspective should probably be saying
37 "an" aboriginal perspective, or the aboriginal
38 perspective as they understand it. There are many
39 aboriginal perspectives, and the perspectives of
40 the coastal First Nations in their involvement in
41 the Fraser River sockeye are going to be different
42 from those who are differently situated; those who
43 have treaty rights versus those who have
44 aboriginal rights; those who have a long history
45 involved in the commercial industry; and those who
46 have no such history. And based on location and
47 migration routes, it's no failing to have a

1 diversity of interest. It is a failing to assume
2 that there should be one aboriginal perspective
3 and there can be some magic organization where you
4 put two parties or two groups, DFO and an
5 aboriginal group in a room and everything will be
6 worked out. No one is suggesting that. What we
7 do suggest positively is that this Commission
8 recommend that increased capacity be provided,
9 financial capacity for sub-regional aboriginal
10 groups, and we give the example on page 10 of the
11 A-Tlegay group and the Fisheries Society in the
12 Laich-Kwil-Tach territory. This is a group that's
13 been making real strides on the ground in science
14 and in monitoring and reporting, and we say, in
15 our submission, that it's through groups like this
16 that issues of authority and technical scientific
17 capacity can be built from the ground up, so we'd
18 have a foundation for real joint management or
19 real co-management.

20 Now, on page 11 and following, we make some
21 comments on the terminal fishery. And this is a
22 huge concern to our clients, and we know it's a
23 concern to other parties, like the Coast Salish,
24 who intervened in these proceedings. The concern
25 is based on a number of factors that are set out
26 at page 11. The first one is we're are looking at
27 a profound devaluation of the resource. The study
28 that was entered through Mr. Morley indicated that
29 you would be looking at a valuation of upriver
30 caught fish in the range of 23 to 36 cents a pound
31 versus \$1.60 to \$2.30 for fish in the marine area.
32 So a five-fold or one-fifth valuation. And he
33 makes the further point that because of mortality
34 and attrition going upstream, you'd effectively
35 have to allow two fish to escape the marine
36 environment to get one up to be captured in the
37 terminal fishery, so another 50 percent discount
38 or devaluation.

39 Now, this evidence was put in and wasn't
40 challenged on cross-examination. It seems to be
41 the only evidence of a profoundly important point.
42 We're looking at a 10-fold devaluation of the
43 value of this resource, so a literal decimation of
44 the industry. Even if the figures are somewhat
45 off, a huge, huge discount of the value of the
46 resource, so why should this be even considered?

47 The argument turns on weaker stocks. In

1 paragraph (b) of page 11, we set out a number of
2 more moderate, reasonable tools that have been
3 identified for protecting vulnerable stocks. And
4 so it's like the American soldier, an officer said
5 after the Ben Tre, "We had to destroy the village
6 in order to save it." Mr. Commissioner, you don't
7 have to recommend the destruction of this industry
8 in order to save it, or the destruction of the
9 value of this fishery. There are more moderate,
10 more surgical tools to get the same result.

11 Outside of the value in sustainability,
12 there's the socioeconomic impact that shifting the
13 resource capture from the marine to the terminal
14 area will impact, will affect the livelihood of
15 communities, aboriginal communities like the ones
16 we represent on the coast. And Ms. Gaertner, in
17 her reply submission, addresses this issue by
18 saying that, to be clear, the FNC is not
19 recommending the pursuit of the commercial
20 terminal and near terminal fisheries at the
21 expense of coastal First Nations.

22 Those are comforting words, Mr. Commissioner,
23 but in our submission, they can't change the fact
24 that without the aid of very advanced quantum
25 physics, you can't harvest the same fish in two
26 different locations. If we are going to move the
27 large share of the fishery away from the ocean
28 interception areas where it currently goes on into
29 the upriver, you are going to remove the ability
30 of our clients to continue sustaining themselves
31 and their community not only through food, social
32 and ceremonial fisheries, but through the
33 commercial fisheries that they have been engaged
34 in and will continue to engage in.

35 There is only one set of fish. My daughter,
36 when she was very little, used to think there was
37 a difference between live chickens that you saw at
38 the farm and meat chickens, as she called them,
39 that you see at the store, and we didn't have the
40 heart to tell her that's the same chicken. This
41 is the same fish, and if you shift a huge level or
42 significant level of harvest away from the marine
43 areas, you are creating very significant
44 socioeconomic impacts on the people who can least
45 afford it, people who have been dependent on this
46 resource, and have the profound goal of continuing
47 that relationship with this industry and this way

Submissions by Mr. Donovan (LJHAH)

Submissions by Mr. Kelliher (LJHAH)

1 of life that supported them when so many other
2 changes, negative changes, have effected
3 communities up and down the coast.

4 The final comment, much less controversial,
5 is that the expanded coastal test fishing should
6 be endorsed and should be well funded and secured.
7 This is one of the means of getting the proper
8 science about how many fish are coming, their
9 species division and their timing, to better
10 enable DFO and managers to make proper decisions
11 about how to allocate between sectors. To cut out
12 the small levels of funding that are there for
13 that type of management make no sense at all and
14 it makes eminent sense to, instead, support that
15 gathering of knowledge and better manage the
16 fishery in that regard. Thank you, sir.

17 THE COMMISSIONER: Thank you, Mr. Donovan. Mr.
18 Kelliher.

19
20 SUBMISSIONS FOR LAICH-KWIL-TACH TREATY SOCIETY CHIEF
21 HAROLD SEWID, AND THE ABORIGINAL AQUACULTURE
22 ASSOCIATION BY MR. KELLIHER:

23
24 MR. KELLIHER: Thank you, Mr. Commissioner. Having
25 only 12 minutes, I'll be challenged to bore you
26 all within that period of time. I have a narrow
27 submission. I represent, of course, the
28 Aboriginal Aquaculture Association, First Nations
29 that are engaged in and, in various ways, benefit
30 from aquaculture, a subject that's featured
31 prominently in these hearings, and a subject of
32 considerable controversy.

33 I would like to emphasize that the First
34 Nations that are members of the Aboriginal
35 Aquaculture Association are, because they
36 recognize the advantages that exist today, but I
37 think perhaps more so the advantages that may well
38 exist tomorrow with aquaculture in their
39 traditional territories. It's an advantage,
40 obviously, in terms of wealth creation for them,
41 the development of technical and managerial
42 entrepreneurial expertise, the development of
43 economic infrastructure in communities, the
44 opportunity, most importantly, for aboriginal
45 people to continue to live in their own
46 communities.

47 In circumstances where the economic

1 conditions are oftentimes dire with the failure of
2 the logging industry, in many respects the
3 commercial fishing industry, we have the emergence
4 of an industry that has enormous positive
5 potential for First Nations. You have heard from
6 Mr. Mack (phonetic) referring to the Kitasoo and
7 that is referred to in the socioeconomic report
8 submitted by the Aboriginal Aquaculture
9 Association. This is an illustration of what is
10 possible for First Nations with this industry, a
11 small community in the central coast devastated by
12 the decline in previous sources of income,
13 developing a salmon farm and processing plant, the
14 processing plant, alone, generates 2.2 million
15 dollars monthly, a million dollars in wages into
16 the community each year from the processing plant,
17 half a million in wages from the fish farm. This
18 allows that community to continue, to thrive, to
19 survive. It gives young people some opportunities
20 in all manner of economic activities, and is an
21 illustration of the real benefits that this
22 industry holds for First Nations on the coast.
23 You've also heard, loud and clear, that the
24 industry is not universally embraced either with
25 First Nations or a non-aboriginal community.

26 It may be that when the farms were first
27 located there was not the legal framework that
28 would motivate industry or government, for that
29 matter, to consult with First Nations, and it may
30 be that these farms were located at the front door
31 of many First Nations without consultation,
32 without accommodation, without any thought
33 whatsoever. That policy of indifference and, if I
34 may say, arrogance, is not one that is likely to
35 endear everyone to that industry, initially.

36 It is, I think, apparent that those days have
37 changed, that there is, now, an obligation for
38 consultation and accommodation, and one can
39 anticipate that that consultation will be serious,
40 and the accommodation will be a process by which
41 First Nations can truly have a significant stake
42 in this industry. It may be that government and
43 the DFO spokesperson, at one point, Mr. Thomson,
44 acknowledged that the DFO may well recognize the
45 issuance of new licences as a constituent within
46 the accommodation process. And the Aboriginal
47 Aquaculture Association will urge the Commission

1 to recommend that First Nations be given a
2 priority in terms of acquisition of new licences.

3 There are a number of reasons why the
4 industry isn't universally embraced. The factors
5 that I've mentioned constitute one. I think the
6 other most significant is that the science
7 surrounding aquaculture has been more, if I may
8 say, in the nature of advocacy than -- much of it,
9 than objective science, and it appears that
10 politics have been clothed in science for reasons
11 other than being wholly informative about the
12 issues of aquaculture. The upshot of that has
13 been divisions within First Nations, coastal First
14 Nations and obviously between coastal First
15 Nations and those First Nations who depend on the
16 salmon in the river who would, understandably,
17 take a position of zero risk. It's vitally
18 important that that science be politicized, that
19 it be of such independence and intensity that
20 decisions can be made as to whether or not to
21 engage in this industry, founded on reason and
22 science and not advocacy and politics, and so the
23 Aboriginal Aquaculture Association will urge the
24 Commissioner, as others have as well, to promote
25 independent scientific study of aquaculture and
26 its relationship with the wild stocks.

27 But as the science stands today, I think it's
28 a fair thing to say that of those experts that
29 came before you, there was virtual unanimity on
30 the prospect that the wild stocks could survive
31 and thrive, could co-exist, with open-pen
32 aquaculture. I think that that point can be
33 advanced with confidence as a result of the
34 evidence that's come before this Commission.

35 The points, Mr. Commissioner, that the
36 Aboriginal Aquaculture Association wish to leave
37 with you are the recommendations that First
38 Nations, as I have mentioned, be given priority by
39 way of accommodation in the issuance of new
40 licences, that consultation reflect their
41 interests in this industry, that DFO, the
42 Department of Fisheries, enter into a co-
43 management scheme with First Nations and including
44 the Aboriginal Aquaculture Association, which
45 would include an integration of the Aboriginal
46 Aquaculture Association's certification program.

47 And finally, and most importantly, and a bit

1 repetitively, that the priority be given to
2 independent research into the implications of
3 aquaculture on the wild stocks because, as having
4 been a continuing thread throughout this
5 proceeding, there isn't any stakeholder who
6 doesn't see the survival of the wild stocks as the
7 ultimate priority.

8 Thank you, Mr. Commissioner.

9 THE COMMISSIONER: Thank you, Mr. Kelliher. Ms. Song.

10
11 SUBMISSIONS FOR HEILTSUK TRIBAL COUNCIL BY MS. SONG:

12
13 MS. SONG: Ming Song, counsel for Heiltsuk Tribal
14 Council. I have with me my co-counsel, Lisa Fong
15 and Benjamin Ralston. We have in the audience
16 Chief Councillor, Marilyn Slett of the Heiltsuk
17 Tribal Council, Hereditary Chief Mr. Harvey
18 Humchitt, Senior, and Kathy Brown, Community
19 Member.

20 We have the honour of being the last
21 participants of this hearing. Being the last
22 participants, you have already heard and received
23 a multitude of both oral and written submissions
24 and replies and we will not, or try our best, not
25 to duplicate them.

26 We are going to focus on three discreet
27 issues. My submissions will cover, in very, very
28 broad strokes, the aboriginal right to fish and
29 consultation. Mr. Ralston will cover the issues
30 of joint management and aquaculture. Ms. Fong
31 will cover the FSC fishery and closing remarks.
32 Their submissions will provide more detail and
33 further substantive arguments regarding the
34 aboriginal right to fish and consultation.

35 Mr. Justice Binnie, in the **Mikisew** decision
36 said:

37
38 The fundamental objective of the modern law
39 of Aboriginal and treaty rights is the
40 reconciliation of Aboriginal peoples and non-
41 Aboriginal peoples and their respective
42 claims, interests and ambitions.

43
44 The management of these relationships takes
45 place in the shadow of a long history of
46 grievances and misunderstanding. The
47 multitude of smaller grievances created by

1 the indifference of some government officials
2 to Aboriginal people's concerns and the lack
3 of respect inherent in that indifference has
4 been as destructive of the process of
5 reconciliation as some of the larger and more
6 explosive controversies.
7

8 This quote accurately reflects my client's
9 everyday reality in dealing with government. Yet,
10 despite this, no matter how devastating,
11 challenging and, at times, very discouraging what
12 seems to be a continuous uphill battle for my
13 clients that they face, the issues regarding their
14 aboriginal rights are important to them and the
15 Heiltsuk are not going away.

16 Mr. Harvey Humchitt, Sr. has asked us to
17 share with you how important the sockeye salmon is
18 to him and to the Heiltsuk:
19

20 Sockeye salmon, like many of our natural sea
21 resources, is very important to the Heiltsuk.
22 We are known as the ocean-going people or the
23 salmon people. I have seen the abundance of
24 the sockeye in the 1960's where there were
25 millions and millions of returning spawners
26 reduced to just a handful of salmon. I have
27 witnessed the flourishing salmon industry
28 going from thriving communities to ghost
29 towns. We are concerned that the loss of the
30 sockeye salmon will change the way of life
31 for the Heiltsuk.
32

33 When I was a little boy growing up in Namu, I
34 would go fishing with my dad and never
35 thought there would be a day when we would
36 have to worry about the salmon. Today, you
37 look at the mighty Fraser and wonder whatever
38 happened. How did we get to the state we are
39 in and how much more can we do to the
40 sockeye. What about our grandchildren and
41 what will they have if we lose our salmon?
42 We have always been taught that we need to
43 take care of our natural resource and by
44 doing that nature will provide for you.
45

46 The loss of sockeye salmon completely changes
47 the Heiltsuk way of life and we have seen

1 this with other sea resources that we used to
2 depend on. We need to protect our salmon.
3

4 The Heiltsuk also asked us to remind the
5 Commission of why they are here, why they have
6 chosen to travel from Bella Bella to be here
7 today, why they chose to participate in this
8 Commission. They believe the Commission can truly
9 make a difference. They believe this is an
10 opportunity for positive and real change. They
11 hope that you, Mr. Commissioner, will have really
12 listened to their concerns and will truly consider
13 these concerns in making your recommendations.

14 Lastly, the recommendations that you make
15 will have either a direct positive or negative
16 impact on the quality of their lives.

17 Throughout this hearing and in closing
18 submissions, we have heard statements or there
19 have been suggestions that First Nations are and
20 should be treated as mere stakeholders and all
21 stakeholders should be treated the same.

22 So there is no misunderstanding, I wish
23 to set the record straight once and for all. This
24 is not about the inability to fish for recreation
25 or employment. This is about cultural survival.
26 This is about preserving an activity that is
27 integral to the Heiltsuk people. And I wish to
28 emphasize the word "integral" as that word is used
29 to define "aboriginal rights" pursuant to **Van der**
30 **Peet**.

31 Heiltsuk and other First Nations before this
32 Commission are not mere stakeholders. They are a
33 third level of government. They have
34 constitutionally recognized aboriginal rights
35 which includes the right to fish. No other
36 stakeholder possesses such status or recognition.

37 The Supreme Court of Canada decisions in
38 **Gladstone** and **Sparrow** provide a clear and
39 comprehensive guide to priority and allocation of
40 the fishery. According to these decisions,
41 government must demonstrate that its actions are
42 consistent with the government's fiduciary duty
43 towards aboriginal peoples. This means the
44 correct order of priority in the fisheries is as
45 follows: conservation; Indian fishing; non-Indian
46 commercial fishing; and non-Indian sports fishing.
47 End of story.

1 Canada and B.C. are urging this Commission
2 not to make a ruling on the scope and nature of
3 aboriginal or treaty rights to fish. In
4 particular, B.C. stated that you should not make
5 any recommendations based on aboriginal rights and
6 title given the nature of this forum and the
7 evidence from witnesses chosen by Commission
8 Counsel. If that is the case, then I ask you, Mr.
9 Commissioner, Why is the Heiltsuk here? Why were
10 we given participant status?

11 We are not asking the Commission to make new
12 law. We are asking you, Mr. Commissioner, in
13 drafting your recommendations, to recognize,
14 acknowledge and consider that the First Nations
15 who stand before you have constitutionally
16 protected rights to fish. Anything less
17 diminishes the credibility and integrity of this
18 Commission.

19 Canada has also suggested that we have
20 inaccurately interpreted the law as it relates to
21 the Crown's fiduciary duty. At paragraph 276 of
22 its reply submissions it points out that we forgot
23 to include the last sentence of a quote from
24 **Delgamuukw** regarding the priority of aboriginal
25 interests. The sentence is:

26
27 However, the fiduciary duty does not demand
28 that aboriginal rights always be given
29 priority.
30

31 In response, we state that although aboriginal
32 rights in general may not always be given
33 priority, **Sparrow** and **Gladstone** clearly set out
34 the priority of allocation as it relates to
35 fishing to aboriginal peoples.

36 With respect to the issue of consultation and
37 accommodation, we say the following: Within First
38 Nations' constitutionally protected aboriginal
39 rights, is the right to be properly and duly
40 consulted and accommodated. Canada appears to
41 have three broad replies which suggest they have
42 satisfied this duty. First, is Canada's
43 consultation policy, as set out in its
44 submissions, starting at paragraph 489. This
45 policy, is made up of several documents. At
46 paragraph 490, it says, in 2004, DFO produced its
47 *Consultation Framework for Fisheries and Oceans*

1 Canada, which sets out nine principles. At
2 paragraph 491, it states that in 2006, DFO
3 prepared another consultation guidance document,
4 entitled *Consultation with First Nations: Best
5 Practices - A Living Document*. This entailed a
6 six-stage process.

7 At paragraph 492, it states that in March
8 2011, Canada released *Aboriginal Consultations and
9 Accommodation: Updated Guidelines to Federal
10 Officials to Fulfill the Duty to Consult*. This
11 entailed four phases and within those phases are
12 various steps.

13 What these policies, best practices and
14 guidelines fail to tell us, what Canada has failed
15 to show us, is whether these documents were the
16 product of consultation and whether these
17 documents were disclosed to First Nations in their
18 development. In fact, we have been told during
19 this Commission that there are certain policies
20 regarding consultation that are not disclosed to
21 First Nations. This failure to disclose, in our
22 view, does not satisfy the Crown's duty to
23 consult.

24 Canada's second broad reply to consultation
25 begins at paragraph 493 of its written
26 submissions, that it has consulted with First
27 Nations through extensive meetings and emails. In
28 response, we say: quantity does not equal quality;
29 process does not equal substance; and in so doing,
30 quantity and process does not equal meaningful
31 consultation. It is well established law, as we
32 set out in paragraph 97 of our written
33 submissions, that the Crown's obligation to
34 reasonably consult is not fulfilled simply by
35 providing a process within which to exchange and
36 discuss information. Meaningful consultation
37 requires more than attending numerous meetings and
38 drafting emails. In considering whether
39 consultation has been meaningful, the courts have
40 looked to the ultimate result and the rationale.

41 Canada's third broad reply to consultation is
42 found at paragraphs 504 to 509 of its submissions
43 regarding policy development. The duty to consult
44 has been met, they say, by the drafting vast
45 numbers of documents. Again, these actions, in
46 and of themselves, do not meet the test of
47 consultation. Throwing a maze of policies,

1 frameworks, vision statement and a myriad of other
2 documents at First Nations does not meet the duty
3 of consultation, nor is it good enough to tuck
4 away hundreds of these documents on a website, in
5 a library or other public place, and Ms. Fong will
6 provide more details on that matter.

7 Were First Nations involved in the drafting
8 of these documents? If so, to what extent have
9 First Nations been involved? What information, if
10 any, was provided to First Nations?

11 It is established law that the duty to
12 consult requires consultation at the strategic,
13 policy level. As Rio Tinto said:

14
15 Government action is not confined to
16 decisions or conduct which have an immediate
17 impact on lands and resources. A potential
18 for adverse impact suffices. Thus, the duty
19 to consult extends to "strategic, higher
20 level decisions" that may have an impact on
21 aboriginal claims and rights.
22

23 During this Commission, we have seen
24 documents disclosed by DFO which are policies used
25 to manage fisheries. We have heard evidence of
26 existing policies, and policies to be created that
27 will affect aboriginal fishing rights. Yet
28 various First Nations have testified they have not
29 seen some of these documents, and it is unlikely
30 First Nations will ever see these documents.

31 As a result, in the end, the quote which I
32 began my submissions with from **Mikisew**, the shadow
33 of a long history of grievances and
34 misunderstandings, continues.

35 If government continues to act in a manner
36 that, in Heiltsuk's view, ignores their
37 obligations to First Nations, is not made to
38 change the way they deal with First Nations, or to
39 account for its actions, the objective of
40 reconciliation will continue to remain elusive.

41 Mr. Commissioner, your journey continues. I
42 will simply leave you with Mr. Humchitt, Senior's
43 last words:

44
45 We need to protect our salmon.
46

47 Thank you, Mr. Commissioner. I will now turn the

1 microphone over to Mr. Ralston.
2 THE COMMISSIONER: Thank you very much, Ms. Song. Mr.
3 Ralston.
4

5 SUBMISSIONS FOR HEILTSUK TRIBAL COUNCIL BY MR. RALSTON:
6

7 MR. RALSTON: Benjamin Ralston, for Heiltsuk Tribal
8 Counsel. Now, my co-counsel, Ming Song, began
9 these submissions with a reference to the long
10 history of grievances and misunderstanding that
11 characterizes the relationship between First
12 Nations and Canadian governmental entities such as
13 DFO. This is the context in which reconciliation
14 must take place between aboriginal and non-
15 aboriginal peoples. I would like to now turn to a
16 subject with which we have all become quite
17 familiar over the past year-and-a-half; that's
18 joint management. And I'd like to pose this as
19 one potential way forward towards a goal of
20 reconciliation.

21 We've made extensive written submission on
22 this topic. At this time, I'll simply draw your
23 attention to our key recommendations. I wish to
24 first highlight key elements as to what is
25 necessary for joint management between First
26 Nations and DFO to be successful. Then, I will
27 expand upon the benefits that true joint
28 management can hold for our fisheries.

29 Also, with respect to terminology, you will
30 note that I refer to joint management in these
31 submissions. Now, co-management is a term that's
32 been espoused by DFO to describe what we see as
33 moderate levels of First Nations involvement in
34 fisheries management. Our clients, however,
35 prefer the term "joint management". This more
36 accurately reflects a model in which First Nations
37 govern the fisheries alongside representatives of
38 the Department of Fisheries and Oceans.

39 First of all, we recommend that aboriginal
40 rights and title be recognized by DFO as a
41 prerequisite to true joint management. First
42 Nations are rights and title holders. This is
43 uncontroversial. As canvassed by Ms. Song, the
44 case law has shown that aboriginal rights may
45 include access to fisheries for food, social and
46 ceremonial purpose, as well as economic access.
47 In our submission, for First Nations to be able to

1 effectively exercise these rights there must also
2 be an implicit jurisdiction for them to manage
3 their fisheries. However, this is not a question
4 we can rightfully put to you to decide.

5 What is clear in the jurisprudence on
6 aboriginal right sand title is that DFO has a duty
7 to consult with First Nations as rights and title
8 holders. Furthermore, First Nations' status is
9 such that it gives rise to the fiduciary
10 relationship between them and DFO. And because
11 aboriginal right sand title are constitutionally
12 protected, DFO must take care not to occasion
13 their infringement. It is for these very reasons
14 that DFO is interested in pursuing a shared
15 management structure with First Nations.

16 DFO has testified that it seeks to ease its
17 current burden of consultations through a shared
18 management structure. Nevertheless they
19 consistently refuse to acknowledge the aboriginal
20 rights and title that give rise to the duty to
21 consult that they bear. This is clearly
22 unworkable on its face.

23 Likewise, in their final submissions, Canada
24 states that the *sine qua non* of any co-management
25 structure is that it sets out:

26
27 clearly defined roles, mandates and
28 responsibilities for each of the parties.
29

30 What Canada fails to address in this submission,
31 however, is how First Nations' roles, mandates and
32 responsibilities in a joint management structure
33 can be clearly defined without recognition of the
34 rights and title upon which these inevitably must
35 be based.

36 As set out in the package Ms. Song quoted
37 from the **Mikisew** decision, reconciliation is the
38 overall objective for the jurisprudence on
39 aboriginal and treaty rights. Reconciliation is
40 also the goal of the treaty process. Joint
41 management, likewise, has an important role to
42 play in this process of reconciliation. Yet, for
43 reconciliation to take place, it will be necessary
44 to address head on what is being reconciled.
45 Reconciliation requires that aboriginal right sand
46 title be given full and meaningful effect within
47 the context of DFO's mandate to administer the

1 salmon fishery.

2 We also recommend that DFO treat First
3 Nations as resource owners and not users in a
4 joint management structure. This means First
5 Nations must have 50/50 representation alongside
6 the Crown.

7 In the evidence before the Commission,
8 various models have been proposed for a joint
9 management structure. For example, extensive
10 submissions have been made on the fisheries
11 management regime in the State of Washington that
12 came as a result of the historic Boldt decision.
13 Witnesses and participant's counsel have likewise
14 made reference to the Archipelago Management Board
15 established under the Gwaii Haanas Marine
16 Agreement between the Crown and the Haida Nation.

17 Heiltsuk witness Ross Wilson also had the
18 opportunity to testify to his own experiences with
19 successful joint management structures. In
20 particular, he gave evidence with regards to the
21 steering committee of the Pacific North Coast
22 Integrated Management Area, known as PNCIMA, and
23 the management board of the Hakai-Luxvbalis
24 conservancy area within Heiltsuk traditional
25 territory.

26 Heiltsuk endorse all four of these models as
27 worthy of your review as well as DFO's.
28 Implementing an appropriate collaborative
29 management structure for British Columbia's
30 fisheries will not be as simple as importing one
31 of these structures wholesale. However, there is
32 a commonality between all these models that we put
33 forward as a necessary element for any successful
34 joint management structure. First Nations are
35 given equal representation alongside non-
36 aboriginal government representatives.
37 Furthermore, First Nations are treated as resource
38 owners and not users.

39 In reply, Canada has taken issue with our
40 submissions on the PNCIMA governance model.
41 Canada suggests that we mischaracterize this model
42 as treating First Nations as owners rather than
43 users. Canada reminds us that the Memorandum of
44 Understanding underlying PNCIMA:

45
46 ...does not alter the existing governance
47 authorities or jurisdiction of the parties.

1 We agree that the PNCIMA process does to expressly
2 declare First Nations are owners of fisheries
3 resources. However, by recognizing First Nations'
4 rights to equal participation at the strategic and
5 governance level, DFO does respect First Nations'
6 greater stake in the fisheries. First Nations see
7 this as respectful of their status as rights and
8 title holders, as opposed to user groups, such as
9 recreational and commercial fishers. In this way,
10 the are treated as owners, having an interest in
11 the fisheries that goes far deeper than issues of
12 allocation.

13 I want to now turn to three practical and
14 cost-efficient benefits of joint management for
15 ensuring better management of the fisheries, as we
16 understand that your recommendations will
17 inevitably be grounded in the conservation of the
18 Fraser River sockeye salmon stocks.

19 First of all, joint management will help to
20 streamline and better structure DFO's consultation
21 activities. If appropriately structured, true
22 joint management will ensure that DFO is
23 consulting with First Nations on policies and
24 fisheries management decisions from the beginning
25 of the policy development process. This is in
26 keeping with their legal obligations.

27 It is important to point out as other
28 participants have that aboriginal rights belong to
29 individual First Nations. This is a fact that
30 must be respected in an proposed joint management
31 structure. Likewise, decisions will need to be
32 made at various levels within the overall
33 management structure. Thus, joint management will
34 not eliminate the need for all bilateral meetings.
35 However, if properly mandated and structured,
36 joint management can ensure consultation at the
37 broad, strategic level is conducted in a more
38 orderly and efficient fashion. This is
39 particularly important to note as it is likely a
40 key motivator for DFO to engage in joint
41 management.

42 Secondly, joint management at a local level
43 addresses the need for "on the ground support"
44 that is not available under DFO's sole management
45 of the fisheries at this time.

46 In our written submissions, we canvass in
47 detail the evidence before this Commission

1 regarding the lack of DFO presence along British
2 Columbia's coastline. With significant impending
3 cuts to DFO's operating budget, further reductions
4 to the amount of DFO staff on the water are
5 clearly foreseeable. Joint management at a local
6 level can assist by empowering First Nations
7 members to fill this vacuum for on-the-ground
8 support of fisheries management activities in a
9 cost-efficient and effective manner. As stated by
10 other participants before us, First Nations
11 provide an invaluable year-round local presence.
12 Ceding First Nations jurisdiction for local
13 management activities also allows for the
14 incorporation of their local knowledge and
15 traditional ecological knowledge into fisheries
16 management.

17 I would like to take a moment to highlight
18 three specific examples set out in our written
19 submissions for how sharing management
20 responsibilities between First Nations and DFO
21 might allow for greater efficiencies in the
22 overall structure of fisheries management.

23 First, we recommend that the Aboriginal
24 Fisheries Guardian program receives stable long-
25 term funding and standardized training. The
26 Guardians provide an excellent example of how
27 ceding local management to First Nations can
28 create greater efficiencies. They provide cost-
29 effective monitoring and enforcement capacity to
30 coastal and in-river fisheries, and can provide a
31 venue for aboriginal knowledge to be incorporated
32 into these activities. The evidence before you,
33 however, is that they require greater support from
34 DFO in order to fully realize their potential.

35 We also recommend that Heiltsuk be given the
36 power to make determinations of all openings and
37 closings within their traditional territory,
38 including commercial and recreational. Heiltsuk's
39 fisheries department spends a far more significant
40 time on the water than DFO, and Heiltsuk have the
41 best information for making these determinations.
42 Canada's reply is that such an approach would be
43 "obviously problematic" due to the complexity of
44 fisheries management, as well as the need to
45 coordinate various fisheries that target migrating
46 stocks. However, Heiltsuk's evidence in this
47 hearing is that coordination with other First

1 Nations already exists. For example, Heiltsuk
2 issued a closure on FSC fishing for the passing
3 Early Stuart sockeye salmon in 2010. This was in
4 response to a request for Tier 1 working groups
5 overseeing the Fraser River sockeye stocks.

6 Canada cites **R. v. Nikal** for the principle
7 that the salmon fishery requires control exercised
8 by a central authority. However, **Nikal** should not
9 be read in such a way that the central authority
10 overseeing the salmon fishery cannot be a joint
11 management authority. This is not what the case
12 stands for. We submit that it is obviously
13 problematic for decisions on openings and closings
14 to be made by managers outside the area where
15 these decisions are implemented. Closings and
16 openings must not be made without the benefit of
17 eye and ears on the fishery itself. Joint
18 management offers the potential for a appropriate
19 balance to be struck between the need for overall
20 coordination of management activities and the
21 incorporation of local information and knowledge
22 into management decisions.

23 We also recommend that DFO support Heiltsuk
24 in conducting test fishing activities on the
25 Fraser River sockeye salmon within their
26 traditional territory. Our final submissions
27 canvass Heiltsuk's experience with test fishing
28 activities, as well as their knowledge of the
29 Fraser River sockeye salmon's migration route and
30 the need for in-season management within their
31 waters. Canada's reply to this is that the
32 evidence suggests Heiltsuk's traditional territory
33 is not optimal for conducting test fishing
34 activities. We wish to note that only Heiltsuk
35 witnesses have attested to having tangible
36 knowledge of the Fraser River sockeye's migration
37 through these waters. As such, they are the only
38 witnesses to give any meaningful evidence with
39 respect to the sustainability of test fishing in
40 this location.

41 Further, we submit that joint management
42 provides more oversight and transparency with
43 respect to DFO decision-making. Many of the
44 submissions before you have focused on the lack of
45 transparency in DFO's current decision-making
46 process. Concerns have been raised that DFO's
47 current top-down management structure may be

1 particularly susceptible to the influence of
2 industry lobbyists. This is, in part, because the
3 Minister remains the ultimate authority over any
4 of the Department's decisions. Likewise,
5 allegations have been made that DFO gives
6 preferential treatment to the aquaculture industry
7 over other stakeholders. And Heiltsuk, as well as
8 other First Nations, have raised numerous concerns
9 with the lack of transparency with respect to
10 DFO's policies governing aboriginal fisheries.

11 If a joint management structure is adopted in
12 which First Nations are given equal representation
13 alongside the Crown, many of these concerns will
14 disappear. I will refer you to the oral
15 submissions of counsel for the Conservation
16 Coalition in this regard. This group of NGOs has
17 expressly recognized the value of joint management
18 in balancing DFO's management objectives against
19 those of First Nations. First Nations' world views
20 are inherently tied to the long-term
21 sustainability of the fish, as they rely on these
22 fish culturally, socially, as well as
23 economically, and they will continue to rely on
24 the fish for generations. They are inseparable
25 from the land and the water that make up their
26 traditional territories, and in this way they are
27 inseparable from the fish and their habitat, too.
28 By distributing control over fisheries management
29 through a joint management structure, both First
30 Nations and the public at large can be assured
31 that industry pressure is not compromising the
32 decisions being made by this management body.

33 We also wish to make a few final comments on
34 the topic of aquaculture. Our written submissions
35 set out Heiltsuk's position in this regard, and we
36 also wish to adopt and endorse the oral
37 submissions given by the Conservation Coalition
38 and the Aquaculture Coalition earlier this week.
39 Furthermore, we note that additional hearings will
40 be held in December of this year on the topic of
41 Infectious Salmon Anaemia Virus, at which time we
42 will be able to challenge the unified assertion of
43 Canada, the Province and the B.C. Salmon Farmers
44 Association that no exotic pathogens have been
45 found in British Columbia waters.

46 At this time, I would like to pick up on the
47 submissions of Mr. McDade for the Aquaculture

1 Coalition with respect to transparency and
2 disclosure for fish health information from salmon
3 farms. Mr. McDade noted that the fish health data
4 produced through this Commission has been
5 invaluable in understanding what is actually
6 happening on fish farms in terms of pathogens and
7 disease. Had this Commission not taken place,
8 this information would not otherwise have been
9 made available. Mr. McDade also brought you to
10 the limited information that will be made public
11 through DFO's new proposed licensing requirements.

12 Heiltsuk wishes to direct your attention to
13 the testimony of Dr. Jones and Dr. Saksida cited
14 in paragraphs 111 and 112 of our written final
15 submissions. These witnesses stated that in order
16 to access the risk of open net pen salmon farms,
17 all competent and interested parties, including
18 First Nations, should have access to a wide range
19 of fish health information, including production
20 data on the number of fish stocked, the time of
21 stocking, treatment histories, lice counts, the
22 species of lice, the stages of development of the
23 fish, and the mortalities, as well as
24 environmental information. We recommend that DFO
25 provide this information and more to First Nations
26 for consultation on proposed aquaculture
27 activities. We furthermore recommend that DFO
28 make this level of detailed information available
29 to the public. This level of transparency is
30 absolutely necessary if there is to be an
31 confidence in the sustainability of this form of
32 economic activity.

33 I'd also like to take a moment to highlight
34 our submissions in reply to those of Mr. Kelliher
35 for the Aboriginal Aquaculture Association just
36 now. Now, Mr. Kelliher referred to a document
37 entitled *Socioeconomic Benefits of Finfish*
38 *Aquaculture in B.C. Aboriginal Communities*, which
39 was authored by some unknown person. Heiltsuk
40 objected to the admissibility of this document,
41 which purports that First Nations, including
42 Heiltsuk, have received employment, skills,
43 leadership and social benefits from aquaculture
44 and their jurisdictions. Although this document
45 has been admitted into evidence, Heiltsuk has had
46 no opportunity to cross-examine its author, who
47 was not called as a witness in these hearings, or

1 to provide evidence to challenge its factual
2 assertions, as no further Heiltsuk witness could
3 be called to give evidence.

4 This report was particularly repugnant to
5 Heiltsuk as it wrongfully concluded that First
6 Nations, including Heiltsuk, benefitted
7 economically, socially and culturally from the
8 salmon farms on its territory. Heiltsuk has a
9 zero tolerance view of a finfish aquaculture and
10 open net pens, and is opposed to salmon farms on
11 its territory and would not agree that it benefits
12 from these farms. We submit that no weight should
13 be given to this report.

14 We also wish to highlight our recommendation
15 that DFO funds additional conservation hatcheries
16 to rebuild sockeye salmon along British Columbia's
17 coast. The Emily Lake hatchery that is operated
18 by the Heiltsuk Nation is an object of great pride
19 in the community. At paragraphs 50 to 52 of our
20 written final submissions, we set out in detail
21 the success that Heiltsuk has had in running this
22 inexpensive sockeye hatchery. It is temporary in
23 nature, and aimed at rebuilding their local
24 systems. Operations such as these further the
25 important goals of maintaining a diversity of
26 sockeye stocks. This, in turn, leads to better
27 distribution of harvesting activities, and will
28 also provide greater genetic diversity to weather
29 the uncertainty of climate change.

30 We note that the B.C. Salmon Farmers
31 Association suggest that hatcheries pose unknown
32 risks for pathogen transfer and criticizes our
33 recommendation on this basis. The Salmon Farmers
34 Association has no evidentiary basis to criticize
35 the fish health procedures adopted by conservation
36 hatcheries, such as Emily Lake, nor do we have
37 evidence before this Commission to combat this
38 baseless assertion.

39 In closing, I wish to reiterate Heiltsuk
40 Elder Harvey Humchitt's imperative statement that
41 we need to protect our salmon. We ask that you,
42 Mr. Commissioner, recognize the efforts to date of
43 Heiltsuk and other First Nations to do just this.
44 To protect their salmon. We also ask that you
45 give guidance to DFO as to how the conservation
46 activities of first Nations can be better
47 coordinated and supported through a restructuring

1 of their organization. Joint management is not a
2 management experiment as some counsel have
3 suggested to you. Rather, joint management is a
4 necessary move forward for DFO. It is necessary
5 not only for reconciliation with aboriginal
6 peoples, but also, quite importantly, for the sake
7 of the salmon.

8 Thank you. And now I'll turn to Lisa Fong.

9 THE COMMISSIONER: Thank you, Mr. Ralston.

10 MS. FONG: Mr. Commissioner, I note the time, but I am
11 the last speaker and I will be about 16 minutes,
12 so I can proceed or we can take a break at your
13 pleasure.

14 THE COMMISSIONER: No, you can proceed, thank you.

15 MS. FONG: We'll proceed, thank you.

16
17 SUBMISSIONS FOR HEILTSUK TRIBAL COUNCIL BY MS. FONG:

18
19 MS. FONG: Mr. Commissioner, the FSC fishery matters to
20 your recommendations, because the Fraser salmon
21 are harvested in the FSC fishery. You've heard
22 evidence that in some years the FSC fishery has
23 the only harvest of Fraser salmon. This
24 inextricable link necessarily means that any
25 recommendations made as to the management of the
26 Fraser salmon will affect the FSC fishery.

27 Now, the FSC fishery is an aboriginal right.
28 Therefore, your recommendations must account for
29 aboriginal rights. By accounting for aboriginal
30 rights, we mean not only those aboriginal rights
31 which have been proven in courts, but also those
32 asserted aboriginal rights which have not yet been
33 proven. It would be wrong and short-sighted for
34 this Commission to prejudice those yet-to-be-
35 proven rights.

36 At the heart of DFO's management of the FSC
37 fishery lies the duty to consult. You've heard
38 from Ms. Song on the duty to consult. DFO must
39 consult with First Nations when it contemplates
40 conduct that may adversely affect the aboriginal
41 right to fish, including any potential right.
42 That was in *Haida*. DFO must consult with respect
43 to operational decisions, but also with respect to
44 strategic planning for resources, and that was in
45 *Haida*, most recently the case of *Rio Tinto*, a case
46 of 2010 Supreme Court of Canada. And I say that
47 because Canada criticized some of us for not

1 naming more recent cases.

2 Heiltsuk's experience with DFO's management
3 of the FSC fishery is that it fails to meet its
4 duty of consultation, and I'm going to spend my
5 time, today, speaking about three examples. And
6 all three of these examples have one common theme,
7 and that theme is a lack of transparency. The
8 lack of transparency includes DFO failing to give
9 notice, for example, of policies or framework, to
10 DFO failing to disclose relevant information, and
11 to DFO failing to provide reasons for its
12 decisions.

13 Lack of transparency prevents First Nations
14 from being properly consulted and heard, and makes
15 DFO unaccountable. Lack of transparency not only
16 reflects a lack of consultation, but it
17 demonstrates poor governance. Now, some of these
18 participants, and especially Canada and the
19 Province, have urged you not to make any rulings
20 of law, and have cautioned you specifically
21 against rulings on aboriginal rights and
22 consultation, but this does not preclude what
23 Heiltsuk urges you to do, which is to make
24 recommendations that take account asserted
25 aboriginal rights. This also does not preclude
26 you from finding that DFO, in fact, manages the
27 FSC fishery without transparency or
28 accountability.

29 So now I move to my first example. The first
30 example of a failure to consult First Nations is
31 DFO's refusal to disclose the end-point percentage
32 and its system. DFO has already admitted that all
33 FSC and aboriginal commercial fishing amounts are
34 managed to a total end-point cumulative
35 allocation, which is a percentage of the total
36 allowable catch. This percentage has been
37 determined by DFO, and is currently in use for
38 governing all aboriginal access to the fisheries,
39 including economic opportunities and FSC amounts.

40 The end-point allocation may adversely affect
41 aboriginal rights. The amount of fish in the FSC
42 fishery is based on need, which should be
43 determined through consultation, and yet Ms.
44 McGivney acknowledged, in cross-examination, that
45 neither the end-point allocation system, nor the
46 adopted percentage number itself were the subject
47 of consultation.

1 Canada has refused to disclose the end-point
2 percentage or its system. In response to a
3 disclosure order of this Commission, Canada
4 claimed cabinet privilege and obtained a
5 certificate under s. 39 of the **Evidence Act**. Now,
6 there is absolutely no question that the
7 information is privileged, that's what that
8 certificate means, and that was Canada's reply to
9 Heiltsuk's complaint of lack of transparency in
10 its reply submission, but that does not detract
11 from the enormity of DFO failing to disclose what
12 is really one of the most important management
13 decisions affecting Fraser salmon, which is how
14 many Fraser salmon can be harvested for the FSC
15 fishery. Why don't we know that?

16 This also does not detract from the enormity
17 of DFO failing to disclose the fact that there was
18 an end-point allocation, or that there was an end-
19 point allocation system, until forced to do so in
20 this Commission. You will remember that
21 disclosure was made in the face of Heiltsuk's
22 application for the production of the Coastwide
23 Framework documents, and not as part of the normal
24 course of production in this Commission.

25 Now, from a transparency perspective, the
26 secrecy of the end-point allocation means a lack
27 of consultation as well as a process where neither
28 First Nations nor the general public can assess
29 the merits of the allocation or the allocation
30 process.

31 Heiltsuk recommends that Canada disclose the
32 existing end-point allocation, of course, after
33 dealing with s. 39 certificate, and that,
34 furthermore, or if they can't, that Canada go
35 forward using an FSC allocation process to be
36 developed in consultation with First Nations.

37 This takes me to my second example. The
38 second example of DFO's failure to consult is a
39 lack of consultation with Heiltsuk on its annual
40 FSC allotments in its Comprehensive Fisheries
41 Agreement, I'll call it the CFA. Heiltsuk has
42 20,000 pieces of sockeye as an FSC allotment in
43 its CFA. FSC allotments, by their very
44 definition, may adversely affect the aboriginal
45 right to fish and, therefore, must be consulted
46 upon. This is expressly recognized right in the
47 CFA, that there will be a yearly consultation on

1 the allotment, at which time the parties are to
2 review needs and conservation requirements. Chief
3 Newman has testified that the purpose of the
4 consultation on FSC numbers is to establish
5 Heiltsuk's need.

6 Mr. Wilson, who is the Director of the
7 Heiltsuk Integrated Resource Management
8 Department, and who has been a Chief Councillor of
9 Heiltsuk Tribal Council, testified that based on
10 his review of older documents, DFO does not and
11 has not consulted on the number of 20,000 pieces
12 of sockeye or advised of a basis for that number.

13 Similarly, Chief Newman, how has been Chief
14 Councillor and member of the Heiltsuk Tribal
15 Council, testified he did not ever recall an
16 increase in the 20,000 sockeye pieces or Heiltsuk
17 being consulted on FSC numbers in its CFA. His
18 recollection is that DFO simply set out the FSC
19 number for Heiltsuk's signature.

20 And notably, Canada, in its reply submission,
21 remains silent about this evidence. Rather,
22 Canada proceeds, in its reply submission, to
23 states that in determining allocations for FSC
24 purposes:

25
26 DFO will consider a number of factors in
27 consultation with the First Nations in
28 question...

29
30 And goes on to set out these factors. Now, this
31 apparent transparency, because I suggest that's
32 what that argument's about, is belied by the
33 footnoted policy - go right to the document; you
34 can look at the document. It's a 1993 policy for
35 the Quebec region, and the link doesn't work to
36 the cite, so it's not even posted right now. The
37 other footnoted document is correspondence from
38 DFO to Commission Counsel, Ms. Chan. I mean,
39 obviously, neither of these document could
40 constitute disclosure for purposes of
41 consultation. And I come back to what Ms. Song
42 says, it's not consultation to create a maze of
43 documents and say, "You know what, you could have
44 looked at them on the website," or, "They were
45 available on that dusty shelf in that old library
46 over there." That's not enough.

47 Finally, there has been absolutely no

1 evidence of consultation on these factors that
2 determine the FSC allocation. So from a
3 transparency perspective, DFO's FSC allocation
4 process is opaque. DFO has not provided Heiltsuk
5 with information on its allocation process and
6 has, in fact, failed to apply any allocation
7 process to ensure that Heiltsuk's FSC allocations
8 continues to meet their needs. We obviously
9 recommend a transparent and needs-based
10 consultative approach to determining FSC
11 allocations.

12 And now that takes me to my third example,
13 which is DFO's failure to consult with Heiltsuk on
14 its FSC needs in-season. Heiltsuk lacks in-season
15 management of Fraser salmon swimming through its
16 territorial waters in the central coast. As a
17 result, in 2010, Heiltsuk was unaware of the
18 strength of the run that year until after the fish
19 had left Heiltsuk waters and were counted in
20 Johnston Strait. In seeking to have FSC fished by
21 another First Nations, Heiltsuk found itself
22 informed by DFO officers, first by Kirsten Wong,
23 then by Greg Thomas and then by Randy Brahniuk,
24 that FSC could only be caught within Heiltsuk's
25 management area, and that FSC caught elsewhere
26 would have to come off the host nation's FSC
27 allocation, a rule that Mr. Wilson testified DFO
28 never disclosed to Heiltsuk at the time they
29 entered the agreements or otherwise. Indeed, Mr.
30 Wilson later spoke to three other First Nations,
31 with one understanding that a nation-to-nation
32 agreement would result in the catch numbers coming
33 off the requesting nation's allocation, so the
34 opposite.

35 Mr. Wilson then asked for an accommodation.
36 DFO gave various remarkable responses. DFO said
37 it did not consider Northern First Nations to have
38 access to Fraser River sockeye salmon, and yet
39 Heiltsuk's CFA provides for sockeye expressly.
40 DFO said Heiltsuk's allocations and fishing areas
41 were set, DFO was working under treaty guidelines
42 and polices and had no option, and yet the
43 Northern IMFP paragraph 5.3 expressly provides for
44 amendments in-season for increase in FSC. And
45 again, DFO also said that marine area First
46 Nations were limited to a total 260,000 Fraser
47 salmon, and again, the IMFP north expressly

1 provides a system for an amendment to increase FSC
2 in-season.

3 The facts illustrate a management rule that
4 DFO did not develop in consultation with First
5 Nations or disclose in advance to First Nations.
6 Canada submits, in its various responses, first,
7 that the factual record is incomplete because the
8 Commission didn't present DFO witnesses with
9 direct knowledge on this particular incident. But
10 Canada really is in the least favourable position
11 to argue a lack of opportunity to present
12 evidence. In its own submission it admits that 80
13 percent of the witnesses that were called in this
14 hearing were DFO witnesses. It says it produced,
15 and I believe them, over half a million documents,
16 and we all know Canada was given the lion's share
17 of the time to conduct direct and cross-
18 examination of witnesses and to make submissions.
19 And we're not being critical of that, whatsoever,
20 because, of course, this is a Commission about
21 their management and that's appropriate.

22 But Canada has had a full opportunity to
23 cross-examine the Heiltsuk witnesses, which it
24 didn't, on this issue. It could have adduced
25 relevant documents, and it could have adduced
26 testimony through one of their many witnesses,
27 including Mr. Rosenberger, who could have informed
28 himself by speaking to his subordinates, Mr.
29 Thomas and Mr. Brahniuk. It is not reasonable for
30 Canada to now say, in reply, it didn't have
31 opportunity to present rebuttal evidence.

32 Canada also now argues an interpretation of
33 the terms of the Comprehensive Fisheries Agreement
34 that prevents fishing out of area without DFO
35 authorization and says, "Heiltsuk, you ought to
36 have known better. Why do you complain?" But
37 Canada failed to raise these points with Heiltsuk
38 witnesses in cross-examination. If Canada had
39 done so, the witnesses might have testified as to
40 their interpretation of those agreement terms,
41 they might have testified about why they think
42 their aboriginal rights are being limited by the
43 CFA, or they might have talked about how it was
44 their view that nation-to-nation agreements are
45 outside of the DFO purview. Again, it's not open
46 to Canada and it is unreasonable for them to now
47 say, you know, "We should hold them to those terms

1 without cross-examination." It's like impeachment
2 without taking the issue up with the witness.

3 As an answer to Heiltsuk's submission that
4 DFO did not disclose a management rule that any
5 FSC caught elsewhere would have to come off a host
6 nations' FSC allocation, Canada implies that the
7 management rule has been in place since 1993, and
8 it was on a website and we should have known about
9 it. But the 1993 policy, it's the same one I'm
10 speaking of, it says it's from the Quebec region,
11 is not readily available, we tried the url, and it
12 only refers to an aboriginal fishing authority
13 treating an aboriginal individual seeking to fish
14 in areas not of its own. It does not refer to
15 agreements between First Nations. And
16 furthermore, there was no evidence that this
17 policy, this 1993 policy from the Quebec region,
18 was in place when Heiltsuk sought to fish outside
19 of its management area in 2010. There was no
20 cross-examination on it. There wasn't even a
21 document that was presented during that part of
22 the hearing.

23 Even Mr. Huber, a very senior DFO employee,
24 testified on June 30, 2011, that he did not know
25 DFO's policy on allocation between First Nations
26 fishing out of the management areas, even though
27 he sits on the current FSC Task Force.

28 And finally, Canada now asserts that past
29 concerns about FSC allocations being inadequate
30 and inequitable and applied without analytic or
31 administrative framework have now been addressed
32 by a DFO:

33
34 ...implementing in consultation with First
35 Nations, a comprehensive evaluation and
36 operational framework,
37

38 That's in their reply, paragraph 290. And yet, if
39 you look at the fine print in the footnote, yet
40 Canada only refers to documents marked "draft" and
41 which were not disclosed to First Nations, being
42 stamped "Protected for Negotiations". We know
43 what that means because Heiltsuk, in particular,
44 had to deal with that issue. The evidence does
45 not disclose any comprehensive evaluation and
46 operational FSC framework implemented in
47 consultation with First Nations. It might have

1 been the case that the information from *Our Place*
2 *at the Table* was used to develop these draft
3 evaluation and operational frameworks, but that
4 does not mean these drafts or their final
5 versions, if they exist, were made in consultation
6 with First Nations.

7 Not surprisingly, Heiltsuk's recommendation
8 here is for proper consultation on in-season
9 management of FSC. Proper consultation requires
10 transparency, including DFO's FSC policies,
11 operations and frameworks.

12 Now, interestingly through all this, given
13 the evidence and the positions of Canada and First
14 Nations at this Commission, DFO's failure to
15 consult on FSC might be best addressed by DFO
16 agreeing to a strong model of joint management
17 where First Nations will manage their own FSC
18 allocations.

19 There has been ample evidence from Mr. Wilson
20 that the foundations on the central coast are a
21 collaborative and well-functioning collective.
22 You have heard evidence about the four nations
23 forming the Central Coast Indigenous Resource
24 Alliance supporting marine use planning. You've
25 also heard evidence about them forming the Central
26 Coast Commercial Fishing Association, developing
27 business plans for PICFI licenses. And most
28 recently, the crowning achievement, they have
29 achieved Tier 1 completion of their marine use
30 plan under PNCIMA.

31 Heiltsuk's recommendation is that this
32 Commission promote a strong model of joint
33 management where First Nations are at the
34 decision-making table with full information, 50/50
35 representation, and have management of their own
36 FSC allocations. We think this would benefit
37 everybody and would be very efficient.

38 That's the end of my main submission, but
39 because we are the last participant, we want to do
40 our round of thank-yous. So, first, we want to
41 thank the participants, themselves, for applying
42 to provide information and share information with
43 this Commission. We want to thank, heartily,
44 their counsel, especially those who have come
45 through snow or rain on a daily basis and put in
46 all this good and hard work, you know, on short
47 timeframes and often living off cookies at night.

1 And our team, in particular, wants to thank the
2 FNC team. We recognize that they were here every
3 single day of hearing and without them First
4 Nations would not have been able to cover all the
5 issues in this very large hearing. We want to
6 thank the staff of the Commission for being able
7 to organize this mammoth operation and doing
8 incredible, magical things with documents and
9 screens and herding all of us along. And we want
10 to thank the Commission Counsel for their great
11 and hard work and all those fabulous PPRs and the
12 reports, and also, you know, just for herding us
13 along during the hearing, which I know, at times,
14 was not so easy.

15 And, of course, first and foremost, we wish
16 to thank Mr. Commissioner for taking on this
17 incredibly daunting task, many would not have, for
18 showing the obvious commitment to this work and
19 carrying it out so wonderfully, and at all times
20 being generous and kind and super-efficient.
21 Thank you very much. Those are our submissions.

22 THE COMMISSIONER: Thank you, Ms. Fong, very much.

23 I always like to wait a minute or so to make
24 sure that is the last word. I'm learning. I'm a
25 slow learner, but I'm learning.

26 You've all been most gracious to those of us
27 sitting up here. This room didn't provide the
28 same logistics that we had in courtroom 801, so
29 I've agreed to have Commission Counsel sit up here
30 so we had enough seats out there for participants
31 and their counsel, and so you've been directing
32 all of your comments up here and we have heard
33 them and we're all very taken aback, frankly, by
34 the gracious ways you've expressed your views, and
35 I thank you for that.

36 I do want to thank the participants and their
37 counsel for their participation in this Commission
38 of Inquiry. I can easily say without your
39 constant willingness to find compromise and seek
40 cooperation amongst each other and the extent of
41 your courtesy and professionalism displayed
42 throughout the hearings and the entire process,
43 the Commission could not have done its important
44 work.

45 I also want to say your dedication and very
46 hard work, which was evident here, is clearly
47 reflected in your written and oral submissions. I

1 have found your submissions most thoughtful and
2 helpful to me in the process of understanding your
3 respective positions, as I ultimately must do in
4 carrying out my duties as set out in the terms of
5 reference.

6 You have served your groups and clients, as
7 well as the salmon, with a deep sense of
8 commitment to this process, and on behalf of the
9 Commission staff and myself, you deserve our
10 mutual gratitude.

11 I also wish to express a deep appreciation to
12 the entire Commission staff. In carrying out your
13 role as participants, you have come to know and
14 work with most of the Commission staff. You have
15 seen and, in fact, you have mentioned in your
16 remarks here this week, their dedication to the
17 work when you have met with them over document
18 production or witness interviews, staff and
19 participant meetings, and in these hearings.

20 I have had the distinct privilege of working
21 on an almost daily basis with this outstanding
22 team of women and men who have given me their
23 unstinting support throughout the process and they
24 have displayed a deep and abiding interest in
25 subject mater of this Inquiry. They are fully
26 committed to the goal of the Commission in
27 producing a report which will contain a thorough
28 review and consideration of the evidence and the
29 participants' positions on the evidence.

30 Finally, as far as thank yous go, I want to
31 thank those, and you've mentioned them as well,
32 who have worked in the hearing rooms and behind
33 the scenes to translate and record the evidence,
34 to manage the exhibits and the documents, and to
35 operate the technology, which has been so
36 fundamental to our process. Without their
37 assistance, we simply could not have run the
38 hearings. They have performed a most valued
39 contribution to the process.

40 And I'm also grateful to the Federal Court in
41 this building, and the B.C. Securities Commission,
42 where we're now reposed, who have allowed us to
43 use their facilities and have shown us great
44 hospitality.

45 Some of you sitting in this room, today, and
46 some who are not here, today, I have known and
47 respected for years as highly skilled and

1 competent counsel. Others, including some non-
2 lawyer spokespersons in this process, I have come
3 to know and respect through your participation in
4 this process.

5 I am indebted, truly indebted to all of you
6 for your hard work, for your diligence, and for
7 your many contributions. It has been truly an
8 honour to me to serve in this position. I shall
9 never forget all of you and the passion that you
10 have each shown for the work we are all engaged in
11 and for the goals and objectives expressed in the
12 terms of reference.

13 I understand we have a couple of more days to
14 go with respect to hearings, and that will unfold
15 in due course. But in the meantime, I wish each
16 and every one of you good health, much happiness,
17 much success, and that you may all come to realize
18 what an important contribution you've made. Thank
19 you very much.

20 We are adjourned, generally.

21 THE REGISTRAR: The hearings are now adjourned until
22 December dates to be determined.

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24 (PROCEEDINGS ADJOURNED, GENERALLY)
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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 Pat Neumann
12
13

14 I HEREBY CERTIFY the foregoing to be a
15 true and accurate transcript of the
16 evidence recorded on a sound recording
17 apparatus, transcribed to the best of my
18 skill and ability, and in accordance
19 with applicable standards.
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23 _____
24 Diane Rochfort
25

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