

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



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

Public Hearings

Audience publique

Commissioner

L'Honorable juge /
The Honourable Justice
Bruce Cohen

Commissaire

Held at:

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

Tuesday, October 26, 2010

Tenue à :

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

le mardi 26 octobre 2010

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Lisa Glowacki	Morton; Raincoast Research Society; Pacific Coast Wild Salmon Society ("AQUA")
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David Butcher	Southern Area E Gillnetters Assn. B.C. Fisheries Survival Coalition ("SGAHC")
Christopher Harvey	West Coast Trollers Area G Association; United Fishermen and Allied Workers' Union ("TWCTUFA")
Keith Lowes	B.C. Wildlife Federation; B.C. Federation of Drift Fishers ("WFFDF")
Tina Dion Joseph Arvay	Maa-nulth Treaty Society; Tsawwassen First Nation; Musqueam First Nation ("MTM")
David Robbins Gary Campo John Gailus Robert Janes Karey Brooks	Western Central Coast Salish First Nations: Cowichan Tribes and Chemainus First Nation Hwlitsum First Nation and Penelakut Tribe Te'mexw Treaty Association ("WCCSFN")
Brenda Gaertner	First Nations Coalition: First Nations Fisheries Council; Aboriginal Caucus of the Fraser River; Aboriginal Fisheries Secretariat; Fraser Valley Aboriginal Fisheries Society; Northern Shuswap Tribal Council; Chehalis Indian Band; Secwepemc Fisheries Commission of the Shuswap Nation Tribal Council; Upper Fraser Fisheries Conservation Alliance; Other Douglas Treaty First Nations who applied together (the Snuneymuxw, Tsartlip and Tsawout)
Barbara Harvey Rob Miller	Adams Lake Indian Band Carrier Sekani Tribal Council ("FNC")
Bertha Joseph	Council of Haida Nation

APPEARANCES / COMPARUTIONS, cont'd.

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Tim Dickson Nicole Schabus	Sto:lo Tribal Council Cheam Indian Band ("STCCIB")
Allan Donovan R. Keith Oliver Steven Kelliher	Laich-kwil-tach Treaty Society James Walkus and Chief Harold Sewid Aboriginal Aquaculture Association ("LJHAH")
Lisa Fong Ming Song	Heiltsuk Tribal Council ("HTC")
Krista Robertson	Musgagmagw Tsawataineuk Tribal Counsel ("MTTC")

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Opening remarks by Commission counsel

Vancouver, B.C./Vancouver (C.-B.)
October 26, 2010/le 26 octobre 2010

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3
4 MR. MCGOWAN: Good morning, Mr. Commissioner. While I
5 don't intend to make a substantive submission to
6 you today, I do wish to make a few introductory
7 comments about this portion of the hearings. In
8 early June of this year, the Commission circulated
9 to participants a preliminary discussion paper,
10 which outlined the issues the Commission intended
11 to consider as part of its investigation into the
12 decline of the sockeye salmon in the Fraser River.
13 The Commission invited participants to provide
14 input as to whether there were additional issues
15 the Commission ought to consider.

16 You will recall, Mr. Commissioner, that on
17 June 15th and 16th of this year, you held hearings
18 and heard from participants a number of helpful
19 suggestions of additional areas they felt ought to
20 be included in the Commission's work. One such
21 suggestion came from counsel for the First Nations
22 Coalition, Ms. Gaertner, who expressed her view
23 that an understanding of the constitutionally-
24 protected aboriginal and treaty rights and title
25 is important to the Commission's work.

26 At the June hearings and subsequently, a
27 number of other participants communicated support
28 for Ms. Gaertner's suggestion and encouraged the
29 Commission to include a process to assist you in
30 developing an understanding of the aboriginal and
31 treaty rights framework related to the fishery and
32 the various participants' perspectives of this
33 framework.

34 Commission counsel agreed that although your
35 terms of reference do not direct you to make
36 findings of aboriginal rights and title that an
37 overview of this area of law may be helpful to you
38 in providing contextual background for the factual
39 information yet to come. To assist you in your
40 understanding of the legal framework and to
41 provide a platform for today's discussion,
42 Commission counsel has prepared a discussion paper
43 designed to provide an overview of some of the
44 significant applicable law. That paper is titled
45 "The Aboriginal and Treaty Rights Framework
46 Underlying the Fraser River Sockeye Salmon
47 Fishery".

Opening remarks by Commission counsel

1 Now, Mr. Commissioner, I've had the registrar
2 place before you a binder which contains that
3 submission and I understand that's been provided
4 to you previously. There are also the submissions
5 of other counsel, which I'll come to in a moment.

6 Now, the framework paper drafted by
7 Commission counsel is primarily a survey of
8 aboriginal and treaty rights cases heard by the
9 Supreme Court of Canada and B.C. cases with an
10 emphasis on those cases, which deal directly with
11 fisheries. The paper does not extend into areas
12 such as international law or law from other
13 jurisdictions.

14 In preparing the paper, Commission counsel
15 has strived to present an objective and balanced
16 summary of the law. Commission counsel has
17 endeavoured to maintain a neutral tone throughout
18 the discussion paper and does not offer any
19 opinion on the manner in which this legal context
20 ought to inform your findings of fact or
21 recommendations. The paper covers a number of
22 topics including constitutional recognition and
23 affirmation of aboriginal and treaty rights,
24 aboriginal title to marine areas or rivers, the
25 aboriginal right to fish, treaty rights in the
26 fishery, management of the fishery and duty to
27 consult.

28 Given the broad nature of the paper and its
29 intended purpose as an overview of the law, it
30 should be recognized that there may be additional
31 cases or details, which were not covered. We
32 invited counsel for the participants to highlight
33 details or cases not canvassed in the paper that
34 they view to be of particular importance and that
35 are relevant to your mandate.

36 I should not that while there are a number of
37 judgments of the Supreme Court of Canada and B.C.
38 courts, which offer guiding principles in relation
39 to aboriginal treaty and rights framework, some
40 aspects of this framework remain subject to
41 ongoing litigation. For example, at least two
42 cases originating in this province and cited in
43 the Commission's paper are presently under appeal.
44 The **Ahousaht** case, I understand, is being heard at
45 the end of this year in the B.C. Court of Appeal,
46 and the **Lax Kw'alaams** case is expected to be heard
47 at the Supreme Court of Canada sometime early next

Opening remarks by Commission counsel

1 year.

2 Now, Mr. Commissioner, we do not suggest this
3 paper is the final word on the legal framework.
4 We are hopeful that this paper, together with the
5 submission of participants, will provide you with
6 some background on this legal framework which
7 impacts on the management of the fishery you are
8 considering.

9 There are two very brief points of
10 clarification with respect to the framework
11 provided by Commission counsel and I'll just
12 address those briefly now. First, at paragraph 64
13 and following, there's a section and I'm not sure
14 you need to go there, Mr. Commissioner. I'll just
15 give you these brief points of clarification.

16 At paragraph 64 and following, after
17 describing the right as characterized in each
18 case, the paper distinguishes aboriginal right to
19 fish for food, social and ceremonial purposes from
20 an aboriginal right to fish for what in the paper
21 is called "commercial purposes". I just want to
22 be clear, Mr. Commissioner, the word "commercial"
23 is not applied as a term of art here but rather
24 simply to connote fishing for the purpose of sale
25 or profit. Commission counsel does not intend the
26 use of the term "commercial purposes" in this
27 section to necessarily refer to sale on an
28 industrial scale.

29 The second point of clarification, Mr.
30 Commissioner, relates to the final paragraph of
31 the draft of the Commission's paper. That's
32 paragraph 191. And in that paragraph there's a
33 reference to "proven and unproven claims of
34 aboriginal rights and titles". Just to be clear,
35 the qualifier "proven" in this paragraph is
36 intended to apply to the word "rights" only.

37 Now, with respect to this portion of the
38 hearing, Mr. Commissioner, I wish to be clear that
39 the proceedings today and tomorrow are not in the
40 nature of an application. You are not, Mr.
41 Commissioner, being asked to make any ruling
42 whatsoever. Instead, this is an opportunity for
43 the participants to, collaboratively I hope,
44 address the legal framework so you will have some
45 appreciation of this framework and their
46 respective positions on it as you receive evidence
47 throughout the hearings.

Opening remarks by Commission counsel

1 To facilitate input from the participants,
2 Commission counsel circulated its framework on
3 October 1st and invited participants to respond
4 with written submissions of no more than 20 pages.
5 Ten participants have provided written submissions
6 addressing issues canvassed in the Commission's
7 paper. I have asked our registrar to provide you
8 with the binder which I spoke of earlier and it
9 should have copies of each of the participants'
10 written submissions that provided them. Those
11 will be contained at Tabs 3 through 12 in the
12 binder.

13 Now, I would propose that each of these
14 should be marked as an exhibit when addressed by
15 the participant who submitted them. I think
16 perhaps the appropriate thing to do, Mr.
17 Commissioner, given that these are legal
18 submissions as opposed to facts, might be to have
19 them marked for identification but I'm in your
20 hands on that.

21 THE COMMISSIONER: No, that's fine. Thank you, Mr.
22 McGowan.

23 MR. MCGOWAN: Now, I've also asked the registrar to
24 place before you copies of all of the authorities,
25 which have been provided and they're there in the
26 event you need them. Counsel for each participant
27 will have the opportunity today and tomorrow, if
28 necessary, to make oral submissions commenting on
29 the framework paper. Specifically, the Commission
30 has asked the participants to focus their
31 submissions towards their clients' position on the
32 law including areas of agreement or contention
33 and, perhaps most importantly, the practical
34 implication of this law within the context of the
35 inquiry's mandate.

36 Counsel for each participant group will have
37 20 minutes to present their oral submissions.
38 Following this, each participant group will have
39 five minutes in reply. The order of presentations
40 and replies will follow the ordering of
41 participants as set out in the attachment to Mr.
42 Wallace's letter of October 22nd. That would be
43 the same order we followed yesterday, Mr.
44 Commissioner. We have a tight schedule planned
45 and I'd ask counsel to please be mindful of the
46 time limits and to keep track of the time while
47 they're making their presentations so that

Submissions by Mr. East (Government of Canada)

1 everybody has an opportunity to address these
2 issues.

3 As a final point, Mr. Commissioner, I wish to
4 thank counsel for their participants, many of whom
5 have much experience in this subject area, for
6 their thoughtful written submissions and for what
7 I am sure will be useful contributions today and
8 tomorrow.

9 Now, at this point, Mr. Commissioner, I
10 suggest it would be appropriate to have the
11 Commission's paper marked as the next exhibit for
12 identification. That's the paper, for the record,
13 titled "The Aboriginal and Treaty Rights Framework
14 Underlying the Fraser River Sockeye Salmon
15 Fishery" dated October 1st, 2010. And I have
16 provided an electronic copy to Mr. Lunn.

17 THE REGISTRAR: That will be marked for identification,
18 A.

19

20 MARKED A FOR IDENTIFICATION: "The Aboriginal
21 and Treaty Rights Framework Underlying the
22 Fraser River Sockeye Salmon Fishery" dated
23 October 1, 2010
24

25

26 MR. MCGOWAN: Yes, Mr. Commissioner, subject to any
27 questions you may have about the process today, I
28 think we're ready to proceed. And the first
29 presenter will be the Government of Canada.

30

31 MR. EAST: Good morning, Mr. Commissioner. My name is
32 Mark East and with me today is my colleague,
33 Charles Fugere. We are counsel for the Government
34 of Canada in today's proceeding. Canada has
35 provided written submissions in response to the
36 Commission's paper regarding "The Aboriginal and
37 Treaty Rights Framework Underlying the Fraser
38 River Sockeye Salmon Fishery".

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In these oral submissions today, we will
highlight certain points in relation to this legal
framework that Canada submits are of particular
importance. As a general comment, the
Commission's paper, in our view, represents a
generally fair, balance and helpful overview of
this legal framework. This framework is complex,
dynamic and evolving. It is also often
controversial and contentious. As we've just
heard Commission counsel mentioned, many of the
issues and topics described in the paper are the

Submissions by Mr. East (Government of Canada)

1 subject of active litigation.

2 In light of this concern, we note that the
3 paper in places engages in what we consider to be
4 perhaps unnecessary and sometimes unhelpful
5 speculation as to the possible future direction or
6 evolution of the aboriginal and treaty rights
7 legal framework. And we note in particular
8 paragraphs 25, 30, 70, 130, 133 and 147. Some of
9 these examples are noted in our written
10 submissions. We respectfully submit that you, as
11 Commissioner, should refrain from endorsing those
12 parts of the paper that reflect opinion or
13 speculation nor the opinions or opinions in the
14 participants' submissions that are inconsistent
15 with the jurisprudence that exists currently.

16 As already noted, many issues described and
17 discussed in the paper on many aspects of the
18 aboriginal and treaty rights framework are
19 controversial. The courts have stated numerous
20 times that the questions relating to aboriginal
21 and treaty rights are necessarily contextual and
22 fact-specific. The often contradictory positions
23 in the participants' written submissions provide
24 ample demonstration, we submit, as to why legal
25 questions in this area should be considered on a
26 foundation of facts supported by evidence and with
27 full opportunity to test the evidence and advance
28 legal arguments.

29 Turning to specific comments on the paper, we
30 refer you to our written submissions in response
31 to the paper's observations regarding the law in
32 relation to aboriginal title and in particular to
33 potential claims to aboriginal title to submerged
34 lands in marine areas and rivers. We note that
35 this area of the law is particularly controversial
36 and is the subject of ongoing litigation. No
37 aboriginal group has, to date, established
38 aboriginal title in law and there are significant
39 questions as to whether and under what
40 circumstances and aboriginal group could establish
41 title to submerged lands.

42 In Canada's written submissions, we examine
43 some of the questions that a court would need to
44 consider in order to making a finding of
45 aboriginal title to submerged lands. And in this
46 respect, we note that the paper contains a
47 significant omission in failing to consider or

Submissions by Mr. East (Government of Canada)

1 even mention the Supreme Court of Canada decision
2 in **R. v. Bernard; R. v. Marshall**, which along with
3 **Delgamuukw**, are the leading cases on the nature
4 and scope of aboriginal title. **Bernard** and
5 **Marshall** are particularly relevant to the question
6 as to whether an aboriginal group could
7 demonstrate the requisite degree of exclusive and
8 regular physical occupation of a site to establish
9 aboriginal title to submerged lands. In **Bernard;**
10 **Marshall**, building on **Delgamuukw**, is also
11 important in describing the relationship of
12 aboriginal title to common law notions of title.
13 This becomes important when considering the
14 question as to whether aboriginal title to
15 submerged lands is cognizable in the common law or
16 whether such title is fundamentally incompatible
17 with the notion of fish in tidal waters as a
18 common property resource and with the common law
19 public rights to fish in marine areas or to
20 navigation. As the Commission paper notes at
21 paragraph 24, Madam Justice Garson considered
22 these arguments relating to claims to aboriginal
23 title to submerged lands in the **Ahousaht** case
24 although she did not need to make a ruling on the
25 claim for title. She expressed doubt the claim
26 was legally tenable. And that's at paragraph 502
27 of that decision.

28 We make these submissions not to seek your
29 endorsement of the positions advanced on this
30 topic in Canada's written submissions but simply
31 to demonstrate that the question of aboriginal
32 title to submerged lands is very complex and
33 controversial.

34 On a similar theme, at paragraph 68 and 69,
35 the Commission paper infers that the court in
36 **Ahousaht** ruled in favour of an aboriginal right to
37 fish for commercial purposes equating that finding
38 with the ruling of the Supreme Court of Canada in
39 **Gladstone**. And as we've heard today in the
40 Commission counsel's opening submissions, as I
41 understand it, the paper did not intend by this in
42 these paragraphs to equate the decisions of
43 **Ahousaht** and **Gladstone** so I won't spend much time
44 in contrasting and comparing these two decisions.
45 However, I think it's worthwhile to take a look at
46 some of the key elements of what Justice Garson
47 said in the **Ahousaht** decision. Madam Justice

Submissions by Mr. East (Government of Canada)

1 Garson was explicit in describing the plaintiff's
2 right in that case as "less than a right to a
3 modern industrial fishery or to unrestricted
4 rights of commercial sale". And that's at
5 **Ahousaht** at paragraphs 486 and 487. Justice
6 Garson declined to characterize the right as
7 commercial to the extent that judicial authorities
8 use the term to indicate sale on a large
9 commercial sale noting that the plaintiff's
10 aboriginal right was not for the purpose of
11 accumulating wealth. We, therefore, submit that
12 the paper overreaches in equating the decision in
13 **Ahousaht** with the ruling in **Gladstone**.

14 More generally, as with claims to aboriginal
15 title to submerged lands, claims to aboriginal
16 rights to harvest and sell fish on a commercial
17 basis remain a contentious and controversial area
18 of the law. As noted by Commission counsel today,
19 in particular, the Supreme Court of Canada will
20 consider these questions in **Lax Kw'alaams** and the
21 hearing date is scheduled, I believe, for February
22 17th, 2011. And the B.C. Court of Appeal will
23 hear the appeal in **Ahousaht** on December 6th, 2010.

24 In contrast to the relatively nascent
25 jurisprudence relating to claims to aboriginal
26 title to submerged lands or to aboriginal rights
27 to fish for commercial purposes, there is a
28 substantial jurisprudence in relation to the
29 aboriginal right to fish for food, social and
30 ceremonial, or also called "FSC", purposes and in
31 relation to the duty to consult. We submit that
32 this part of the legal framework, which is
33 summarized well in the Commission's paper, merits
34 particular attention.

35 As a starting principle, it is
36 uncontroversial in the jurisprudence that Canada
37 has the obligation, responsibility and
38 jurisdiction to manage the fisheries. And for
39 that reference, I would recommend **Sparrow**, page
40 1118 of the SCR Reporter. The Supreme Court in
41 **Nikal** provides a particularly powerful statement
42 as to the Federal Crown's responsibilities in
43 managing the salmon fishery for all users. If the
44 salmon fishery is to survive, there must be some
45 control exercised by essential authority. It is
46 the federal government which will be required to
47 manage the fishery and see to the improvement and

Submissions by Mr. East (Government of Canada)

1 the increase of the stock of that fishery. It is
2 for the federal government to ensure that all
3 users who are entitled to partake of the salmon
4 harvest have the opportunity to obtain an
5 allotment pursuant to the scheme of priorities set
6 out in *Sparrow*.

7 The Commission's paper, too, refers to this
8 important principle, referring you to paragraphs
9 155 to 158, including another important and
10 compelling statement of the Supreme Court of
11 Canada in *R. v. Marshall II* at paragraph 40 of
12 that case. Starting at page 34, the paper
13 describes the essential elements for the legal
14 justification of infringements of aboriginal
15 rights, as articulated in *Sparrow*. The
16 jurisprudence in connection with the justification
17 of infringements, and, in particular, those cases
18 specific to the management of Fraser River salmon
19 merit particular scrutiny. In applying the legal
20 test for justification, the Supreme Court of
21 Canada has emphasized that "courts must consider
22 the specific factual context in any given case
23 when applying the justification test, including
24 the requirements for consultation and priority".
25 That's in *Sparrow* at page 1111. The court has
26 also ruled that the standard to be applied is one
27 of reasonableness, *Nikal*, paragraph 110.

28 These themes are prominent in the B.C. Court
29 of Appeal decision in *R. v. Douglas*, referred to
30 in the paper as "*Douglas 2007*". And also, in four
31 decisions rendered in 2008 by Madam Justice Smith
32 of the Supreme Court of British Columbia on
33 appeals of convictions of members of the Cheam
34 First Nation for unauthorized fishing during the
35 1999 fishing season. In three of the appeals,
36 Justice Smith upheld the convictions but granted
37 the appeal in *R. v. Tommy*, also described in the
38 paper as "*Douglas 2008*". We submit that these
39 four appeals, as well as the earlier B.C. Court of
40 Appeal decision in *Douglas* provide important
41 clarity to the principles for the justification of
42 infringements of First Nations rights to harvest
43 Fraser River salmon for FSC purposes. And in
44 particular, we recommend to you the ruling of
45 Justice Smith in *R. v. Douglas 2008*, BSCC 1098,
46 where at paragraph 61, she summarizes the key
47 principles to be applied with respect to the

Submissions by Mr. East (Government of Canada)

1 infringement of aboriginal rights to fish for FSC
2 purposes. Of the principles described by Justice
3 Smith in this decision, three are of particular
4 importance. Conservation as a valid legislative
5 objective, the priority of aboriginal rights to
6 fish for FSC purposes and Canada's duty to consult
7 with respect to infringements of aboriginal rights
8 to fish for FSC purposes.

9 The courts have afforded DFO considerable
10 deference in determining whether the Department is
11 pursuing a valid legislative objective when that
12 objective is conservation. The court in **Sparrow**
13 considered the justification of conservation and
14 resource management as surely uncontroversial.
15 There is controversy in the jurisprudence as to
16 what constitutes conservation, how it is defined
17 or whether some measures instituted by DFO are
18 validly for the purposes of conservation. This
19 controversy is noted in some of the other
20 participants' submissions. The court in **Nikal**
21 clarified that in managing the salmon fishery,
22 conservation entails more than simply preventing
23 the elimination of the salmon, rather, management
24 imports a duty to maintain and increase reasonably
25 the resource. Paragraph 102.

26 Justice Smith in the four 2008 appeals noted
27 previously returned consistently to the theme that
28 determining the needs of conservation as a valid
29 legislative objective requires a contextual and
30 fact-specific inquiry. The court in those cases
31 also expressly endorsed the principle of managing
32 the conservation of fisheries for all user groups
33 often with competing interests as a valid
34 legislative objective. Justice Smith ruled that
35 in the justification analysis reasonableness of
36 DFO's conservation measures cannot be assessed
37 with the benefit of hindsight. Justification will
38 focus on the reasonableness of DFO's decisions in
39 the circumstances. The court noted:

40
41 However, in the absence of evidence of *mala*
42 *fides*, it is not the role of the courts to
43 second-guess management decisions that fall
44 within the range of 'reasonable and
45 necessary'.
46

47 That's at **Douglas 2008**, BCSC 1098, para. 31. In

Submissions by Mr. East (Government of Canada)

1 that same case, Justice Smith, noting the
2 importance of the contextual analysis in the
3 justification inquiry, questioned whether a
4 specific definition of conservation beyond its
5 current broad meaning that includes the protection
6 and enhancement of the resource is possible or
7 even desirable. That's at paragraph 33.

8 Another area of controversy in DFO's
9 management of the Fraser River salmon fisheries is
10 the question of whether DFO affords sufficient
11 priority to First Nations to meet their FSC
12 requirements. In particular, can DFO meet its
13 obligations to afford priority to aboriginal FSC
14 fishing when it provides prior or contemporaneous
15 opportunities to recreational or commercial
16 fishers? This theme is central to the **Douglas**
17 ruling of the B.C. Court of Appeal and to the
18 mixed stock salmon appeals before Justice Smith.
19 And I should note here as an aside that the B.C.
20 Court of Appeal has agreed to hear the appeal of
21 some of these defendants in the rulings of Justice
22 Smith on this issue of priority.

23 Again, the courts emphasize that they must
24 take a contextual approach to the question of
25 priority. In **Sparrow**, the Supreme Court ruled
26 that DFO's conservation and management plans must
27 ensure that aboriginal rights are taken seriously.
28 Page 1119. The court elaborated on this principle
29 in **Gladstone** at paragraph 63:

30
31 Priority under Sparrow's justification test
32 cannot be assessed against a precise standard
33 but must rather be assessed in each case to
34 determine whether the government has acted in
35 a fashion which reflects that it has truly
36 taken into account the existence of
37 aboriginal rights.
38

39 What this principle from **Sparrow** means in
40 practical terms is articulated by the B.C. Court
41 of Appeal in **Douglas 2007**. At paragraph 54, the
42 court said:

43
44 This is not to say that the priority required
45 by Sparrow means that the food, social and
46 ceremonial fisheries must always precede or
47 occur contemporaneously with the non-

Submissions by Mr. East (Government of Canada)

1 aboriginal fisheries. As part of the
2 contextual analysis into priority, it will
3 sometimes be necessary to consider the
4 practical difficulties occasioned by the
5 movement of the fish themselves. The Fraser
6 River sockeye encounter numerous fisheries,
7 including aboriginal, recreational and
8 commercial, as they migrate from the Pacific
9 to their spawning grounds. If a non-
10 aboriginal fishery could never precede any of
11 the aboriginal fisheries, the result would be
12 an exclusive food, social and ceremonial
13 fishery, regardless of need and abundance of
14 stock. That cannot be the intended result of
15 Sparrow.

16
17 And we note that leave to appeal to the Supreme
18 Court of Canada was denied in this case. We
19 submit that the guidance from the courts on the
20 question of priority can be summarized as follows.
21 Firstly, determining whether the First Nations FSC
22 fishing has been afforded adequate priority
23 requires a contextual analysis of the particular
24 circumstances of the case. Second, DFO's
25 conservation and management plans must treat
26 aboriginal peoples in a way ensuring that their
27 rights are taken seriously. Third, the brunt of
28 conservation measures must be borne by
29 recreational and commercial fisheries rather than
30 the First Nations FSC fisheries. Fourth, priority
31 for First Nations FSC fisheries does not mean that
32 such fisheries must always precede or occur
33 contemporaneously with recreational or commercial
34 fisheries. Fifthly, in certain circumstances,
35 harvest and recreational, or arguably by analogy,
36 commercial fisheries, do not necessarily violate
37 the principle of priority for First Nations FSC
38 fisheries.

39 In the time I have remaining, I'll turn
40 quickly to the issue of the duty to consult. The
41 B.C. Court of Appeal in *Douglas 2007* similarly
42 applied this contextual and fact-specific approach
43 to determining if DFO had, in justifying
44 infringements of the appellants' aboriginal
45 rights, engaged in adequate consultation. The
46 *Douglas* decision at paragraphs 39 to 47 is
47 important in setting out certain consultation

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1 principles specific to the management of the
2 Fraser River salmon fishery. These principles
3 include, firstly, DFO's emphasis on early and
4 extensive joint consultations with Fraser River
5 First Nations was reasonable and appropriate,
6 particularly considering the nature of the Fraser
7 River salmon fishery, the number of First Nations
8 involved and the lack of unanimity between them on
9 important issues. That's at paragraph 40. DFO is
10 not required to consult with each aboriginal group
11 on all openings and closings of the salmon
12 fisheries where those closures are consistent with
13 the overall strategy, that is, the strategy on
14 which DFO consulted at the start of the season.
15 Paragraph 42. Aboriginal groups have reciprocal
16 obligations to participate in DFO efforts at and
17 processes for consultation. Paragraph 45.
18 Finally, perfection in consultation is not
19 required. The court said that DFO's efforts to
20 consult, while not perfect, were reasonable and in
21 good faith. DFO provided consultation in good
22 faith appropriate to the circumstances. Paragraph
23 47.

24 To conclude, these aforementioned cases and
25 other jurisprudence directly applicable to the
26 management of Fraser River fisheries emphasize the
27 following themes. Canada and DFO have an
28 essential role in managing the fisheries. The
29 task of managing the fishery for some 93 First
30 Nations and for commercial and recreational users
31 is a complex and difficult task. DFO's management
32 decisions are to be considered on a standard of
33 reasonableness always with consideration of the
34 factual context in which those decisions are made.
35 Perfection is not the standard. The courts have
36 demonstrated deference in allowing DFO to manage
37 the fishery consistent with this contextual
38 approach. Within this context, as the Supreme
39 Court of Canada indicated in *Sparrow*, Canada is
40 required to treat aboriginal peoples in a way
41 ensuring that their rights are taken seriously.

42 Mr. Commissioner, this concludes our
43 submissions on this topic subject to the
44 opportunity for reply submissions and subject to
45 any questions that you might have.

46 THE COMMISSIONER: Thank you very much, Counsel.

47 MR. TYZUK: Mr. Commissioner, my name is Boris Tyzuk

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1 and I am appearing for the Province --

2 THE REGISTRAR: Speaker, microphone, please.

3 MR. TYZUK: There we go. Mr. Commissioner, my name is
4 Boris Tyzuk. I'm appearing for the Province of
5 British Columbia. And with me is D. Clifton
6 Prowse. We, too, would like to thank the
7 Commission for a well-done and relatively balanced
8 overview paper. The Province does have a number
9 of concerns about the paper and those concerns are
10 set out in the written submissions and I will make
11 some comments to them in these oral comments. I
12 do note, though, that two matters, which the
13 Province did bring to light concerning the use of
14 "commercial purposes" in the paper and the
15 reference in paragraph 191 "to prove an aboriginal
16 title" have been spoken to by the Commission and
17 we thank them for those clarifications.

18 There are a number of speculative provisions
19 and opinions expressed in the paper that the
20 Province submits, for the reasons set out in the
21 submissions and in these oral remarks, the
22 Commissioner should not consider in carrying out
23 his inquiry pursuant to the mandate. Examples of
24 some of these are found in paragraphs 25, 30, 70,
25 130 and 133. These speculative provisions or
26 opinions involve areas of the law that, as you can
27 see from the submissions provided and comments
28 that have already been made, are unsettled or
29 controversial or are issues that are before the
30 courts. But more importantly, as is evidenced by
31 a review of the written submissions filed today,
32 there are many unresolved issues, many differing
33 interpretations of the law and this inquiry, as
34 was mentioned by Commission counsel, has no
35 specific mandate to inquire into aboriginal or
36 treaty rights. The terms of reference, I note, do
37 not include any reference to that nor do we submit
38 is this inquiry process set up for such a task and
39 thus, we submit, it is not advisable for you, as
40 the Commissioner, to make any rulings or findings
41 in this particular area of the law. I won't go
42 through all of the specific comments in the paper
43 but there will be a few that I will mention.

44 With respect to the aboriginal title section,
45 we feel that it is an important omission that no
46 reference was made to the Supreme Court of Canada
47 decision in **R. v. Bernard; R. v. Marshall,**

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1 probably the most important aboriginal title
2 decision from the Supreme Court of Canada since
3 **Delgamuukw**. At paragraph 3 of our written
4 submission, we point out that **Bernard; Marshall**
5 deserves consideration, as it not only confirms
6 certain aspects of **Delgamuukw**, namely, that
7 exclusive occupation was satisfied by actual and
8 exclusive physical occupation of definite tracts
9 of land but gave greater direction on the kind and
10 degree of occupation necessary to ground an
11 aboriginal title and the need for regular use of
12 defined tracts of land in that regard.

13 We make references in paragraphs 5 and in 6
14 of our written submission to the speculative
15 nature. Paragraphs 25 and 30 of the paper dealing
16 with aboriginal title in relation to marine areas
17 and rivers. However, we would note that paragraph
18 29 of the paper points out the lack of
19 jurisprudence in regard to this area. In
20 paragraphs 10 to 20, we spend a little time
21 clarifying matters relating to modern treaties.
22 And Mr. Commissioner, I confess this is a result
23 of the four years as I've spent as lead counsel of
24 the Province in the Nisga'a final agreement
25 negotiations so it's a matter of just clarifying
26 some of the points there. There is no presumption
27 of ambiguity in any of the modern B.C. treaties.
28 They are very comprehensive. It's a full and
29 final settlement of all existing claims. And
30 there are no exclusive governance powers. It's a
31 concurrent governance model and those are set out
32 there. And the provisions that I have referred to
33 deal with those.

34 Further, at paragraph 17 of our submission,
35 we note we're not aware of any decision in Canada
36 that sets out a general right of self-governance
37 for aboriginal groups or First Nations. And
38 according to the Supreme Court of Canada, any
39 particular right to self-government must be proved
40 in accordance with the tests set out in **Van der**
41 **Peet**.

42 Now, as the second question, which is the
43 practical implications. As pointed out in the
44 Province's written submissions, there's no
45 requirement in the terms of reference to make any
46 ruling or interpretation of law in regard to the
47 aboriginal and treaty rights in general for the

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1 Fraser River sockeye salmon. And the reasons are
2 these. As has been pointed out, there is no
3 reference to aboriginal treaty right in the terms
4 of reference. This inquiry, with its particular
5 format and its limited timeframe, is not suited to
6 the fact-specific requirements of proving
7 aboriginal rights and titles. I understand that
8 in the **Ahousaht** case there were approximately 110
9 days of trial. I don't think we have that many
10 days set aside. Matters concerning infringement,
11 justification or consultation are again fact-
12 specific and, as stated above, this inquiry is not
13 the appropriate forum to make such findings.

14 This is clearly an area of the law that is
15 subject to differing interpretations. It is
16 controversial. Cases are before the courts and,
17 as can be evidenced from the various written
18 submissions and the law, while it is evolving,
19 does not always do so predictably. And just to
20 provide a bit of example of how differing things
21 are, I will make a few comments on the written
22 submission of the First Nations Coalition because
23 that is the one that we received first. And it's
24 just to give a sample, again not to suggest that
25 one interpretation is any better than the other
26 but just to note what the differences are, Mr.
27 Commissioner.

28 The Province submits that the First Nations
29 Coalition's submissions mischaracterize the
30 aboriginal right to fish at paragraph 9. And then
31 through paragraphs 11 to 15. By implying there is
32 an inescapable conclusion that such rights provide
33 the legal foundation for First Nations to
34 demonstrate jurisdiction over fisheries, including
35 management, stewardship and allocation of
36 fisheries resources. The Province disagrees
37 completely and would say the law recognizes that
38 there is an aboriginal right to fish. The verb.
39 And within that right to fish may be internal
40 processes of allocation in the aboriginal
41 community and decision-making about when and when
42 not to fish but that an aboriginal fishing right
43 has never been said to create management
44 jurisdiction over a fishery that is also accessed
45 by others.

46 Likewise, at paragraph 34, the Province takes
47 some issue with the submission of the First

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1 Nations Coalition that the jurisprudence supports
2 a fulsome right to a fishery. In paragraph 45,
3 there are references to the inherent right of
4 self-government. The Province deals with these in
5 paragraph 17 of its submission in terms of the
6 basic proposition.

7 Paragraph 46 of the First Nations Coalition
8 paper is another example of an assertion with
9 which the Province takes issue as that paragraph
10 purports to combine aboriginal title, we say not
11 yet proven anywhere, an aboriginal right to the
12 fishery, which we say overstates the law, and the
13 exercise of self-government, which we say there's
14 no case law that shows there are any particular
15 self-government rights to date, as the basis for
16 First Nations to be meaningfully involved in all
17 matters related to the fishery and directly
18 involved in all decisions that have the potential
19 to impact the fishery, including habitat.

20 At paragraphs 51 and 52 of the FNC paper,
21 these assertions of aboriginal rights are combined
22 with references to the B.C. Treaty process and
23 other processes to advocate that the inquiry needs
24 to direct that collaborative management and shared
25 decision-making models be developed and
26 implemented. Once again, the Province challenges
27 the logic used. Undefined aboriginal rights are
28 very, very different from carefully negotiated
29 treaty rights found in modern treaties in British
30 Columbia. And I will just make note of a couple
31 of these. As I said, Mr. Commissioner, I was
32 involved in the Nisga'a Treaty negotiations for
33 four years, as well as in the first round of the
34 Sliammon AIP negotiations, the Nuu-chah-nulth AIP
35 negotiations and part of the Sechelt negotiations.
36 For some reason, I was always involved in the
37 fisheries negotiations.

38 These were always the toughest negotiations.
39 In the Nisga'a final agreement, we had 57 drafts
40 of the fisheries chapter from the AIP stage to the
41 final agreement stage. These negotiations were
42 always challenging, more challenging than any
43 other subject matter. And no doubt that
44 representatives from the First Nations will
45 indicate you the passion and the feeling that they
46 had towards this. But as someone who was there at
47 the table all the time, you felt it was always

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1 difficult. These are very difficult issues.
2 Those provisions from the fish chapters in
3 Nisga'a, Tsawwassen and Maa-nulth have been very
4 carefully negotiated. And as in all negotiations,
5 they are the result of compromises by all parties.
6 The fisheries chapters in the modern B.C. treaties
7 cannot be compared to generally undefined
8 aboriginal rights that are asserted in the FNC
9 paper.

10 We categorically disagree with the statement
11 at paragraph 29 at the FNC written submission,
12 which suggests that there is sufficient judicial
13 direction available to advance changes to the
14 *status quo*. Clearly, this is the opposite. While
15 there are some settled areas of the law, as
16 appropriately summarized in parts of the
17 Commission's paper, many important areas remain
18 unresolved. So then the question that becomes
19 asked, as to what practical applications they are
20 with respect to this particular exercise.

21 In its written submission, the Province
22 expressed some uncertainty on the point. However,
23 the Commissioner would no doubt, in considering
24 the existing and settled law, including the
25 existing and settled law in regard to aboriginal
26 and treaty rights underlying the Fraser River
27 sockeye fishery. You could consider these in
28 carrying out your mandate and developing
29 recommendations pursuant to item (d) of your terms
30 of reference for improving the future
31 sustainability of the sockeye salmon fishery in
32 the Fraser River.

33 To conclude, Mr. Commissioner, again, the
34 paper is a very good and relatively balanced
35 overview of the law in this area. As we have
36 said, as there is no reference to aboriginal
37 treaty rights in your terms of reference, there is
38 no need to make any nor is it advisable to make
39 any findings in relation to the law of aboriginal
40 or treaty rights of First Nations generally or any
41 particular First Nation.

42 And finally, the Commissioner can use the
43 existing and settled law, including the law
44 relating to aboriginal and treaty rights in
45 considering the recommendations he may wish to
46 develop in fulfilling the terms of reference.

47 Mr. Commissioner, these are our submissions,

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1 subject to the right of reply and any questions
2 which you may have.

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

4 MR. MCGOWAN: Now, Mr. Commissioner, I notice we've
5 proceeded without marking the last two papers for
6 identification. Perhaps we should attend to that
7 now.

8 THE COMMISSIONER: Yes, we'll go back then to Canada's
9 paper, which I have at Tab 3 of my binder. Is
10 that correct, Mr. McGowan?

11 MR. MCGOWAN: Well, the Commission's paper has been
12 marked Canada's paper would be B for
13 Identification.

14 THE COMMISSIONER: That's the one I have at Tab 3 of my
15 binder?

16 MR. MCGOWAN: Yes, that's correct.

17 THE REGISTRAR: That'll be marked B for Identification.

18
19 MARKED B FOR IDENTIFICATION: Submissions of
20 Government of Canada by Mr. East
21

22 THE COMMISSIONER: And then the Province's submission,
23 which I have at Tab 4 of my binder.

24 MR. MCGOWAN: That's correct. At Tab 4 of your binder,
25 Mr. Commissioner, will be C for Identification.

26 THE REGISTRAR: C for Identification.

27 THE COMMISSIONER: Thank you very much.

28
29 MARKED C FOR IDENTIFICATION: Submissions of
30 Province of British Columbia by Mr. Tyzuk
31

32 MR. MCGOWAN: Mr. Commissioner, next on the list is
33 Pacific Salmon Commission. I don't see Mr. Hunter
34 here nor do I see Mr. Buchanan for the Public
35 Service Alliance of Canada. I've been advised
36 that while somebody is here for participant 5, Rio
37 Tinto Alcan, they don't intend to make an oral
38 submission, which brings us to participant 6, the
39 B.C. Salmon Farmer's Association, who I'm just
40 being advised now doesn't have an oral submission
41 to make. Is anybody here for the Seafood
42 Producers today? Well, we're moving right along
43 to participant number 8, the Aquaculture
44 Coalition.

45 UNIDENTIFIED SPEAKER: They're not here. No one's
46 here.

47 MR. MCGOWAN: He was here?

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1 UNIDENTIFIED SPEAKER: They're not here.

2 MR. MCGOWAN: They're not here. Sorry, okay. Is
3 anybody here for the Conservation Coalition today?

4 UNIDENTIFIED SPEAKER: Yes.

5 MR. MCGOWAN: You are. All right. No submissions for
6 the Conservation Coalition. The Area D
7 Gillnetters, I don't see Mr. Rosenbloom here. Nor
8 Mr. Butcher for participant 11. Mr. Harvey? With
9 the utmost efficiency, we're at participant 12,
10 Mr. Commissioner, the West Coast Trollers Area G
11 Association.

12 MR. HARVEY: It's Chris Harvey. I've not submitted a
13 party and I only have one point to make on the
14 Commission's paper. It arises out of what is said
15 at paragraphs 54 and 55 of the Commission's paper
16 where a quote from Mr. Justice Dickson's judgment
17 in **Jack v. The Queen** is set out. The quote refers
18 to an order of priorities, a four-fold order of
19 priorities, which I submit is somewhat misleading.
20 The four-fold order of priorities there set out
21 is:

- 22
23 1. Conservation;
24 2. Indian fishing;
25 3. Non-Indian commercial fishing; and,
26 4. Non-Indian sports fishing.
27

28 And the passage from the judgment goes on to
29 identify that as being the position taken by the
30 aboriginal defendants to which Mr. Justice Dixon
31 agrees with the general tenor of the argument.
32 And the paper in paragraph 55 says that the court
33 in **Sparrow** adopted this prioritization. My
34 submission is that that is somewhat misleading.
35 That general statement has been overtaken by any
36 number of other cases subsequently that focused on
37 the basis of evidence on the priorities in the
38 fishery and set them out on the basis of
39 conservation. Section 35, fishing. And then
40 commercial and sports fishing together.

41 So in other words, the description of non-
42 Indian commercial fishing has been superseded and
43 not followed. And indeed if it had been followed,
44 it would require some fundamental changes in the
45 practical management of the commercial fishery
46 because Indian and non-Indian fishers operate
47 together under the same umbrella and basically the

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1 same priority.

2 Those are my submissions.

3 THE COMMISSIONER: Thank you, Mr. Harvey.

4 MR. LOWES: Mr. Commissioner, J.K. Lowes for the B.C.
5 Wildlife Federation and the B.C. Federation of
6 Drift Fishers. With your indulgence, Mr.
7 Commissioner, I'd like to, before I begin my
8 submission, make a few remarks about the man who
9 up until about a week ago was giving me
10 instructions. I'm speaking about William John
11 Otway, "Bill", as he was known, who passed away on
12 Sunday, 17th of October, at the age of 75. Bill
13 was a lifelong angler, hunter and outdoorsman.
14 Mr. Commissioner, he dedicated his life to the
15 preservation of that outdoor way of life. He
16 served in many capacities with the B.C. Wildlife
17 Federation, the Sports Fishing Advisory Board. He
18 was retained by DFO as the recreational fishery
19 ombudsman. He prepared and made submissions to
20 Parliamentary fishery committees. He participated
21 in all of the inquiries since and including that
22 conducted by Dr. Pearce in 1982. Many ministers of
23 fishery were deluged by his correspondence. He
24 was a member of the Williams Inquiry.

25 He lobbied hard, Mr. Commissioner, for the
26 establishment of this Commission and he looked
27 forward to giving evidence. I last saw Bill three
28 days before his death and from his bed in the
29 hospice in Merritt, he was still giving me
30 instructions. He called for his notebooks to be
31 brought to the hospice from home so he could
32 review them with me and ensure I got it right.
33 Mr. Commissioner, he expressed the same passion
34 for the well-being of the Fraser River sockeye
35 that you described in your opening remarks
36 yesterday. He urged me to continue on my way past
37 Merritt up to the Adams River to see the spawning
38 salmon, a sight which is both awesome and poignant
39 at the same time. Mr. Commissioner, Bill saw this
40 Commission as vitally important. He wished you
41 well in its conduct. His message, which is our
42 message, was that of inclusiveness, of keeping the
43 fish and the fishery for the public to be
44 cherished and enjoyed by all Canadians.

45 Dealing with the paper that was done by
46 Commission counsel, I, too, like British Columbia
47 and Canada, start by commending Commission counsel

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1 on the report. Mr. Commissioner, they've produced
2 a framework, which, given the controversial nature
3 of the issues involved, provides a reasonably
4 objective summary of the jurisprudence, as it
5 stands today. I qualify that, as did Canada and
6 British Columbia, with the speculative nature of
7 the comments on title and some of the
8 extrapolations from cases dealing with land and
9 land-based resources to the fishery.

10 In addition to being comprehensive and just
11 as important, Commission counsel have recognized
12 the dynamic and evolving nature of the
13 jurisprudence, as well as the inherent difficulty
14 of translating that jurisprudence into fisheries
15 policy and management practice.

16 Mr. Commissioner, my submission is in two
17 parts, one general and one specific. In this oral
18 submission, I will only refer to the general
19 comments and leave it to you to look at the
20 specific paragraph-by-paragraph review. Mr.
21 Commissioner, the fundamental point of fisheries
22 law is that the resource is rights-based. Unlike
23 the land and land-based resources, the fishery,
24 which is the subject matter of this inquiry, the
25 Fraser River sockeye, is not a Crown asset. It is
26 the common property of all Canadians. The Crown
27 is a steward or a trustee for the public. As
28 pointed out in the practice report, the
29 relationship of the Crown to the resource has been
30 expressed in terms of a legal obligation or duty
31 to the public different from the general political
32 obligation of providing good government.

33 Mr. Commissioner, ensuring the integrity of
34 the public nature of the resource is the prime
35 concern of this participant. And in that light,
36 we commend to the Commission the **Railway Belt**
37 case, which describes the origins of the public
38 right and its nature as an ancient liberty
39 recognized in **Magna Carta**. The **Railway Belt** case
40 is contained in my book of authorities and I won't
41 ask you to turn it up. As can be seen, however,
42 Mr. Commissioner, from those reasons for judgment,
43 the right of fishing is as much a part of Canada's
44 British heritage as it is of the aboriginal
45 heritage of some aboriginal communities.

46 In passing, I also make reference, Mr.
47 Commissioner, to the **Armor** case, again, referred

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1 to in my authorities, a decision of the Australian
2 High Court in which the High Court of Australia
3 identified the public right of fishing, together
4 with that of navigation, as constraints on the
5 Crown's capacity to recognize aboriginal title to
6 submerged land, which would be in conflict with
7 those public rights so that any aboriginal title
8 to submerged land must be consistent with those
9 public rights.

10 And this participant, Mr. Commissioner,
11 stresses the fact that the public to which the
12 resource belongs includes every individual
13 Canadian of aboriginal descent. Aboriginal
14 Canadians when fishing other than pursuant to
15 aboriginal or treaty rights, i.e., recreationally
16 or commercially, are exercising the same public
17 right of fishery, as their non-aboriginal
18 countrymen.

19 Mr. Commissioner, this proposition seems
20 obvious but it is usually overlooked in the
21 public, political and even sometimes the legal
22 discourse about aboriginal rights. To put it
23 bluntly, there's no such thing as a non-aboriginal
24 fishery. Aboriginal fishing rights are not
25 substitutional; they are additional. The public
26 right is not exclusionary but inclusive. And that
27 inclusiveness is the central position of this
28 participant. We ask you, therefore, Mr.
29 Commissioner, to be careful in the use of
30 terminology, that if it is necessary to
31 distinguish, the distinction not be between
32 aboriginal and non-aboriginal fisheries but
33 between fishing pursuant to an aboriginal right or
34 treaty right and fishing pursuant to a public
35 right, between the aboriginal fishery and the
36 public fishery and that it be kept in mind that
37 the public fishery is inclusive of all aboriginal
38 Canadians.

39 Mr. Commissioner, it's the recognition of the
40 special and additional nature of aboriginal rights
41 that drives the substance and the methodology for
42 the determination, description and application of
43 those rights laid down by the Supreme Court of
44 Canada in the seminal cases of **Sparrow, Van der**
45 **Peet** and **Gladstone** and which this Commission
46 should, with respect, keep in mind throughout.
47 Mr. Commissioner, in its conclusion, the report

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1 states, and I quote:

2
3 In practical terms, uncertainties may remain
4 as to exactly how such rights and titles
5 ought to inform the detailed decision-making
6 inherent to managing a complex fishery.
7

8 Mr. Commissioner, this participant couldn't agree
9 more. It is suggested that much of the focus of
10 this Commission should be on the question of how
11 such uncertainties have been dealt with and how
12 such dealings may be improved in the future. In
13 opening remarks made before this Commission in
14 June, the point was made by many that scientific
15 controversies and uncertainties, although
16 important in themselves, were secondary to the
17 issue as to how such controversies and
18 uncertainties were managed by government. The
19 point made here is that the same applies in
20 controversies over aboriginal fishing rights. The
21 function of this Commission is not to settle the
22 law or even to apply it, but rather, we submit, to
23 review the way in which the jurisprudence informs
24 or doesn't inform fisheries management and to
25 provide guidance for that process. We suggest,
26 respectfully, therefore, that the Commission be
27 alive not simply to controversies or uncertainties
28 themselves, and there many and serious, but also
29 to the sources and potential sources of those
30 uncertainties.

31 Clearly, Mr. Commissioner, some of those
32 uncertainties are based in the jurisprudence
33 itself. The courts have clearly stated that
34 aboriginal claims to fishing rights are fact-
35 specific and consequently must be dealt with on a
36 case-by-case basis. Further, such concepts as
37 priority and consultation are relative and
38 contextual rather than absolute and categorical.
39 Still further, the jurisprudence is dynamic and
40 developing. The report, like any survey of the
41 jurisprudence, is a snapshot of a process.

42 Another source of uncertainty to which
43 particular attention should be paid is the
44 interface between law and policy, between the
45 judicial and the executive functions. Appellate
46 decisions, even at the level of the Supreme Court
47 of Canada, are focused primarily on correcting

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1 error and providing guidance to lower courts.
2 They are not policy manuals. Government and, in
3 particular, the DFO, however, must follow the law,
4 as laid down in those decisions. This is
5 particularly the case where, as stated above, it
6 is managing the exercise of rights of access by
7 individuals to their own common property. This
8 Commission, with respect, should examine how DFO,
9 its policies and practices, are informed by the
10 law with a view to making recommendations for the
11 improvement of that process.

12 A further potential source of uncertainty, we
13 suggest, is the administrative level at which the
14 law is to be interpreted and applied. Briefly
15 put, this Commission should investigate where in
16 the management process and by whom such difficult
17 questions as whether priority has been given,
18 consultation occurred or food, social and
19 ceremonial needs met, are answered.

20 Notwithstanding the preliminary and general
21 nature of both the practice report and this
22 comment, however, there are two concerns about the
23 application of the policy on aboriginal rights,
24 which are of concern to this participant and
25 should be raised here. These are the dual systems
26 of fisheries management and the lack of
27 quantification or transparency about
28 quantification respecting aboriginal fishing
29 rights.

30 With respect to the first, Mr. Commissioner,
31 there's a tension in the management of the
32 aboriginal fisheries between an integrated
33 management and segregated fisheries. It is the
34 concern of this participant that numerous
35 management problems are caused or exacerbated by
36 the existence of two management regimes, one for
37 the public fishery and the other for the
38 aboriginal fishery. Without getting into detail,
39 this participant is concerned that these dual
40 systems result in different standards and, in
41 particular, different standards with respect to
42 conservation, i.e., different escapement
43 objectives, different fishing rules, differences
44 in the reliability of data and differences in
45 enforcement. The existence of a dual system also
46 runs counter to the nature of managing the fishery
47 as organic hole. This latter problem, which I

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1 will refer to briefly in a moment, was commented
2 on by Mr. Justice Mackenzie of the Court of Appeal
3 in **Kapp** when he recognized the management problems
4 caused by the Balkanization of the commercial
5 fishery.

6 The second area of concern is the lack of
7 quantification. There's no apparent attempt to
8 qualify the real food, social and ceremonial needs
9 of the groups holding aboriginal food fishing
10 rights. This results in apparent *per capita*
11 allocations which are out of all proportion to
12 reasonable domestic needs. This, in turn, leads
13 to the inference that substantial quantities of
14 food fish are, in fact, sold. The lack of
15 quantification also concerns this participant in
16 the context of treaties and harvest agreements
17 where it results in the lack of any indication as
18 to the ultimate extent to which access is to be
19 reallocated from the public to the treaty-based
20 fishery.

21 Mr. Commissioner, the essence of the law,
22 both Canada and British Columbia have suggested
23 that there is a core in the report that is sound
24 and some speculation. And this participant
25 agrees. The essence of the law is in the seminal
26 cases decided in the 1990's and in particular,
27 **Sparrow, Van der Peet** and **Gladstone** in which the
28 Supreme Court of Canada consciously laid down the
29 substantive principles and the methodologies for
30 the determination of the claims to aboriginal
31 fishing rights, their existence, nature and scope,
32 their relationship to other rights and their
33 relationship to government power. This is the
34 core of the law dealing with aboriginal rights of
35 fishing. Cases involving aboriginal title,
36 together with cases involving consultation and
37 accommodation with respect to land and land-based
38 resources, are at the periphery. It is
39 appreciated that this -- the consideration of
40 these matters is necessary for the sake of
41 completeness but in relating them to the fishery,
42 however, they must be recognized as speculative.

43 And finally, dealing with the translation of
44 law into policy, Mr. Commissioner, and this is in
45 my written submission, it's notable that of the
46 three judges who commented on the policy
47 underlying the commercial aboriginal fishery in

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1 the aboriginal fishing strategy in the case of
2 **Kapp** all were critical of it. Judge Kitchen found
3 that the impugned licensed provisions were not
4 only unconstitutional but socially disruptive and,
5 hence, unwise. Chief Justice Brenner, although
6 finding constitutionality queried whether the
7 program, which was then suspended, should be
8 reinstated, he stated, and this is at paragraph
9 120 and 121 of the report, which is in my report,
10 and quote:

11
12 In many respects, the pilot sales program has
13 had an unfortunate history. It has generated
14 much ill will between those who work in the
15 two fisheries. It has also generated ill will
16 amongst Aboriginals who work in the
17 commercial fishery and those who work in the
18 P.S.P. fishery. This stands in contrast to
19 the positive acceptance of other A.F.S.
20 measures such as a licence buy-back program.

21
22 In view of my conclusion that there has been
23 no s. 15 breach, the Minister, subject to
24 further decisions of the higher courts, is
25 left with the absolute discretion...to re-
26 institute the P.S.P. However, before doing so
27 and perhaps in giving consideration to other
28 methods, or to changes in the P.S.P. that
29 might be employed to accomplish the same
30 objective, it would be this court's hope that
31 the Minister would consider the history of
32 the P.S.P. and would further consider the
33 extent to which it has enhanced or diminished
34 the overall strategic objective of
35 reconciliation between Aboriginals and non-
36 Aboriginals in our country.

37
38 And again in the same case but at the level of the
39 Court of Appeal, I read from paragraph 115 of the
40 judgment of Mr. Justice Mackenzie in **Kapp**.

41
42 In my view, there are sound reasons not to
43 constitutionalize aboriginal commercial
44 salmon fisheries. Sparrow pointed out that
45 there are 91 separate bands along the Fraser
46 with a claim to an aboriginal food fishery.
47 If a commercial fishery is constitutionally

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1 recognized for some it will be hard to deny
2 it to others. Recognition of the right also
3 would require defining its extent in terms of
4 quantities of fish taken and there is no
5 obvious limit to commercial catches as there
6 is with the food fishery to the reasonable
7 food, cultural, and ceremonial requirements
8 of particular bands. It would risk
9 Balkanizing the commercial fishery and
10 compounding the already formidable management
11 challenges facing the DFO. It would fail to
12 recognize the aboriginal component of the
13 existing commercial fishery, including the
14 nearly half of the seine fleet, that accounts
15 for a large share of the commercial catch of
16 Fraser sockeye in most years. It would
17 threaten to undermine the greater aboriginal
18 participation in the integrated commercial
19 fishery which in many ways sets the fishery
20 apart as an example for other sectors of the
21 economy.
22

23 Thank you, Mr. Commissioner, those are my
24 submissions.

25 THE COMMISSIONER: Thank you, Mr. Lowe. And thank you
26 very much for your words with respect to Mr.
27 Otway.

28 MR. MCGOWAN: I wonder if we might have Mr. Lowe's
29 paper marked as the next exhibit for
30 identification.

31 THE COMMISSIONER: Yes, I have it, Mr. McGowan, at Tab
32 6 of my binder so that will be the next.

33 THE REGISTRAR: Marked for identification, D.

34 THE COMMISSIONER: Thank you.
35

36 MARKED D FOR IDENTIFICATION: Submissions of
37 WFFDF by Mr. Keith Lowes
38

39 MR. MCGOWAN: Now, Mr. Commissioner, I note the time.
40 Would this be a convenient time for the morning
41 adjournment?

42 THE COMMISSIONER: Yes, thank you very much. The
43 hearing will now recess for 15 minutes.
44

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

Participant No. 14
James Reynolds
In chief by Mr. McGowan

1 MR. MCGOWAN: Next is our participant 14, Mr.
2 Commissioner. Is it Mr. Reynolds?
3

4 EXAMINATION IN CHIEF BY MR. MCGOWAN:
5

6 MR. REYNOLDS: Mr. Commissioner, my name is James I.
7 Reynolds, that's R-e-y-n-o-l-d-s. I have with me
8 today the general counsel for the Tsawwassen First
9 Nation, Ms. Tina Dion, D-i-o-n.

10 I'm appearing today for participant group
11 number 14 which is made up of the Maa-nulth Treaty
12 Society, the Musqueam Indian Band and the
13 Tsawwassen First Nation, although the Maa-nulth
14 Treaty Society has decided not to take an active
15 part in these submissions.

16 My submissions will mainly summarize the
17 contents of the written submissions of the
18 Musqueam and Tsawwassen on the practical
19 implications of the law of aboriginal and treaty
20 rights within the context of the Inquiry's
21 mandate. I believe you have a copy of those
22 written submissions and you may wish to note the
23 paper for identification purposes.

24 THE COMMISSIONER: We'll do that at the conclusion of
25 your remarks.

26 MR. REYNOLDS: Thank you. Before dealing with the
27 practical implications of the law, I would like to
28 make five comments on the substantive law. The
29 first is that we agree with other submissions that
30 the Commission's paper gives a fair and balanced
31 view of the law on the whole.

32 Secondly, we do not agree with every
33 statement in the paper and our failure to state
34 our views on the substantive law is not to be
35 taken as agreement with those statements.

36 Thirdly, in our respectful submission, the
37 Commissioner has no power to make rulings on the
38 law of aboriginal and treaty rights and we are not
39 asking you to do that.

40 Fourth, the paper and an understanding of
41 such rights are important to an understanding of
42 DFO's management of the fishery and to possible
43 recommendations that you may choose to make, and
44 we wish to thank the Commission counsel for
45 preparing the paper.

46 Fifth, the Commission's recommendations
47 should not be contrary to constitutionally

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1 protected rights if they are to be effectively
2 implemented.

3 Turning now to the written submissions, they
4 are divided into two parts. Part 1 consists of
5 Musqueam's submissions on the practical
6 implications of the **Sparrow** decision within the
7 mandate of the Inquiry. Part 2 consists of
8 Tsawwassen's submissions on the practical
9 implications of its final agreement or treaty
10 within the mandate of the Inquiry.

11 As indicated at page 3 of the written
12 submissions, as I think is well known, in the 1990
13 **Sparrow** case the Supreme Court of Canada upheld
14 the decision of the B.C. Court of Appeal that the
15 Musqueam have an aboriginal right to fish in the
16 Fraser River for food, social and ceremonial
17 purposes. The court left aside the question of
18 the aboriginal right to sell the fish because of
19 the way the case had been presented in the courts
20 below.

21 I note that the **Sparrow** case was the first
22 Supreme Court of Canada case that considered the
23 aboriginal right to fish and, indeed, s. 35 of the
24 **Constitution Act**, 1982, that recognizes and
25 affirms the existing aboriginal and treaty rights.
26 **Sparrow** also incorporated, within s. 35, the
27 fiduciary obligation of the Crown and the duty to
28 consult that had been recognized by the court six
29 years earlier in the **Guerin** case. That case was
30 also a case brought by the Musqueam.

31 I think it's important to note that the
32 Musqueam do have a proven - and I stress the word
33 "proven" - aboriginal right to fish for food,
34 social and ceremonial purposes, and that this
35 right is protected by the Crown's fiduciary duty.

36 As noted at page 4 of the written
37 submissions, the response of the federal
38 government to **Sparrow** was to introduce the
39 Aboriginal Fishing Strategy, an annual
40 comprehensive fishery agreement to regulate
41 fishing by aboriginal groups, including Musqueam,
42 and to do so in a manner that was intended to
43 respect **Sparrow**. The courts have consistently
44 urged governments, including First Nations, to try
45 and resolve these issues through agreements.

46 Musqueam has shown repeatedly that it's
47 prepared to defend its aboriginal rights and title

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1 by litigation, if necessary, up to the highest
2 courts. However, its preference has always been
3 to avoid litigation and to try and resolve
4 disputes by negotiated settlements as repeatedly
5 encouraged by the courts. Therefore, Musqueam has
6 agreed, in most years, to enter into comprehensive
7 fisheries agreements.

8 It did so initially with great hope and
9 expectation based on its discussions at the time
10 with DFO that, over time, the comprehensive
11 fisheries agreements would give the band an
12 effective form of cooperative management.
13 Unfortunately, as set out at pages 5 to 8 of the
14 written submissions, the early promise of **Sparrow**
15 and the resulting comprehensive fisheries
16 agreements of a meaningful form of cooperative
17 management have proven elusive.

18 Instead, the annual negotiations and the
19 implementation of the agreements have been a
20 source of frustration and confrontation. In the
21 submission of Musqueam, DFO's approach to co-
22 management is based upon DFO giving instructions
23 to the band on a shared-delivery of DFO-designed
24 programs, bureaucratic paperwork and reviews, a
25 reduction in budgets, and abrupt shifts in the
26 focus of operations as new government programs are
27 introduced.

28 We also submit that the **Sparrow** scheme of
29 priority of allocation of the resource, first to
30 Musqueam, second -- sorry, second only to
31 conservation concerns has not been consistently
32 applied. There's no meaningful form of
33 cooperative management of the sockeye fishery in
34 the Fraser and the band has no meaningful say in
35 the sustainability of that fishery.

36 As noted at the bottom of page 6 of the
37 written submissions, the agreement set up a weak
38 system of a planning committee which has to react
39 to decisions made by DFO on how Musqueam's
40 participation in the fishery would be managed by
41 DFO. There's not sufficient time for the Musqueam
42 representatives to react, and the regional
43 Director General of DFO has the final say.
44 Musqueam has no say in the management by DFO of
45 the fishery by other user groups who dominate the
46 fishery to the detriment of the band and the
47 sustainability of the fishery and often contrary,

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1 in the submission of Musqueam, to the **Sparrow**
2 scheme of priority.

3 As noted at page 8 of the written
4 submissions, it's not only Musqueam that suffers
5 from Musqueam's lack of meaningful say in the
6 management of the fishery. You may recall that in
7 his welcome to the Commission in July, Musqueam
8 elder noted that Musqueam had lived with the
9 fishery for thousands of years and it sustained
10 them and their culture. But in the hundred years
11 -- the colonial era of 100, 150 years, and
12 especially with the arrival of industrial fishery,
13 the fishery has declined. Over thousands of
14 years, the Musqueam developed an understanding of
15 the fishery, an understanding that seems to have
16 eluded the scientists that DFO relies upon.
17 They've developed traditional knowledge that's
18 been passed generation to generation and still
19 survives today. Musqueam is very concerned about
20 the sustainability of the fishery and therefore of
21 its economy and culture.

22 I want to make, and I've been asked to make
23 by my clients, a very important point. Although
24 the paper talks about rights, and we're talking
25 about rights today, it's central to Musqueam
26 culture that the right to fish comes with a
27 responsibility to respect the salmon. It comes
28 with the responsibility to ensure the
29 sustainability of the fishery for future
30 generations. There are no rights without
31 responsibilities and that's firmly established in
32 the Musqueam culture.

33 It's relevant to note that the only salmon-
34 bearing creek in Vancouver is Musqueam Creek.
35 There is no other salmon-bearing creek in
36 Vancouver. There is only Musqueam Creek. That's
37 located on the Musqueam Reserve. The Musqueam
38 have undertaken much conversation and habitat
39 restoration along the Fraser within their very
40 limited resources.

41 In **Sparrow**, the Supreme Court of Canada
42 referred to the conservation consciousness of the
43 Musqueam, and we respectfully submit that it's
44 time again that this conservation consciousness
45 and Musqueam's traditional knowledge be heard
46 again through meaningful cooperative management of
47 the fishery by DFO and Musqueam -- throughout

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1 Musqueam's traditional territory.

2 Musqueam respectfully submits that as part of
3 the recommendations for improving the future
4 sustainability of the fishery, the Commissioner
5 should recommend that DFO enter into good faith
6 negotiations on an agreement with Musqueam for
7 meaningful cooperative management of the fishery.

8 I would now like to turn to Part 2 of the
9 written submissions starting at page 10. Part 2
10 deals with the practical implications of the
11 treaty signed with the Tsawwassen First Nation
12 that came into force last year, the practical
13 implications of that treaty within the context of
14 the Inquiry's mandate.

15 I noted earlier that Musqueam was the first
16 First Nation to prove an aboriginal right to fish,
17 indeed any aboriginal right. For its part,
18 Tsawwassen First Nation was the first First Nation
19 to enter into a treaty within the B.C. treaty
20 process and it was the first First Nation to
21 establish a treaty right to fish in the Fraser.

22 The treaty or final agreement established
23 mechanisms for a collaborative management of the
24 fishery. In order to facilitate the cooperative
25 assessment, planning and management of the
26 fishery, it set up a Joint Fisheries Committee
27 with representatives from the First Nation, the
28 province and Canada.

29 As noted at page 11 of the written
30 submissions, Tsawwassen's submissions are intended
31 to provide the Commission with an understanding of
32 the Joint Fisheries Committee in considering the
33 possibilities that exist for the co-management of
34 the fishery. Tsawwassen is not suggesting that
35 the committee is the alternative or the only
36 alternative to the annual comprehensive fisheries
37 agreements that, as I've indicated, were
38 introduced by DFO in response to the **Sparrow**
39 decision, or even that the joint fisheries
40 committee is a more appropriate process.

41 Tsawwassen recognizes that it's for each
42 First Nation to make its own submissions on the
43 form of management that it wishes to see, but it's
44 hopeful that its submissions in the paper and
45 today will be helpful to other First Nations and
46 to the Commissioner.

47 The Joint Fisheries Committee or JFC model

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1 may contain elements desirable for the future co-
2 management of the Fraser River fishery by First
3 Nations and other governments. These elements
4 include a long-term structured relationship that
5 consists of representatives from the different
6 governments that will provide for a more reliable
7 long-term system of co-management including
8 allocation and sustainability. In the respectful
9 submission of the Tsawwassen, these desirable
10 elements could be replicated in agreements outside
11 of treaties if that is the desire of the First
12 Nations in question.

13 We note that the fisheries chapter of the
14 final agreement provides for clear rules around
15 things like dispute resolution.

16 As noted at page 12 of the written
17 submissions, although the JFC, the Joint Fisheries
18 Committee, is a relatively new process, the
19 relationship between DFO and Tsawwassen has
20 improved since its introduction, and Tsawwassen is
21 hopeful for the future. The JFC process has
22 improved the mode and quality of communication
23 respecting fish management and Tsawwassen now
24 regards itself and is regarded as a key partner.

25 Page 13 of the written submissions describe
26 how salmon is allocated under the final agreement.
27 Tsawwassen's allocation for the last ten years,
28 and now under the final agreement, has been under
29 one percent of the Canadian total allowable catch
30 for the Fraser River sockeye salmon.

31 Page 14 of the written submissions discusses
32 the commercial fishery. As with other commercial
33 fishers, Tsawwassen wants its share of the
34 benefits from the fishery. However, unlike other
35 commercial fishers, Tsawwassen has the added
36 mechanism and responsibility of working through
37 the Joint Fisheries Committee to manage and
38 enhance the fishery. This will likely result in
39 long-term benefits to all users, not just
40 Tsawwassen.

41 At pages 15 and 16 of the written
42 submissions, there's a description of the
43 composition and procedure of the Joint Fisheries
44 Committee.

45 Page 17 of the written submission suggests
46 that since DFO meets on an annual basis with other
47 First Nations under the Aboriginal Fishing

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1 Strategy, that it would be possible that elements
2 of the JFC process might be incorporated within
3 that strategy. This would provide long-term
4 security to the First Nations over fisheries
5 management. It would also assist DFO to achieve
6 its objective of reconciling the demands of First
7 Nations for an enhanced role in management while,
8 at the same time, meeting its statutory obligation
9 to manage the fishery.

10 At page 18 of the written submissions, we
11 stress that any determination by the Commissioner
12 that results in DFO modifying the manner of
13 deciding the Canadian total allowable catch, or
14 even the actual amount itself, will clearly and
15 significantly impact Tsawwassen's constitutional
16 right to fish for food, social and ceremonial
17 purposes. It is very important that this right is
18 protected and respected during this Inquiry and in
19 any final determination or recommendation that the
20 Commissioner makes. From Tsawwassen's
21 perspective, the terms that protect access to the
22 fishery for food, cultural and ceremonial purposes
23 are among the most important aspects of the final
24 agreement.

25 To conclude, in the respectful submission of
26 the Tsawwassen, those First Nations who wish to
27 participate more fully in stewardship and
28 enhancement of the fishery should not be excluded
29 from those activities, especially given their
30 traditional knowledge of the resource, simply
31 because they have not signed a treaty.

32 That completes our submissions. Thank you.

33 THE COMMISSIONER: Thank you very much, Mr. Reynolds.
34 We'll mark your submission at Tab C of my binder
35 as the next lettered exhibit for identification.

36 MR. REYNOLDS: Thank you.

37 THE REGISTRAR: E for identification.

38 THE COMMISSIONER: Thank you.

39
40 MARKED E FOR IDENTIFICATION: Submissions of
41 Mr. James Reynolds
42

43 MR. JANES: Mr. Commissioner, Robert Janes appearing on
44 behalf of the Western Central Coast Salish First
45 Nations. We filed a written brief which I hope
46 you have.

47 THE COMMISSIONER: I'm just looking for that now. Mr.

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1 McGowan, what tab is that at? Oh, I have it now.
2 I think it's Tab 12.

3 MR. JANES: Thank you.

4 THE COMMISSIONER: Thank you.

5 MR. JANES: And I don't propose, of course, to go
6 through that. I primarily plan to touch upon
7 certain highlights in it and relate it to some of
8 the comments that have been made to you today.

9 I'd start off by saying that we offer this
10 paper principally to address certain issues which
11 we see as being -- requiring some colouring or
12 some further elaboration in the context of what we
13 see as overall a fair and relatively balanced
14 presentation of the law in the Commission's paper.
15 However, we do think there's certain issues which
16 need to be highlighted and brought out, perhaps
17 for some different reasons than some of my other
18 friends have highlighted.

19 But I want to start off, Commissioner, with
20 the question of what are the practical
21 implications of the whole aboriginal and treaty
22 rights framework for the Commission? Why is the
23 Commission turning its mind to this question at
24 all? Because we agree, as other counsel have
25 said, you are not called upon to make any findings
26 of aboriginal rights or title and you are not
27 well-positioned to do so. So the question may
28 occur, well, why would one even engage in this
29 task at all?

30 The answer lies in the fact that you are
31 tasked, in part, with the job of making
32 recommendations with respect to the Department of
33 Fisheries and Oceans, future management of the
34 Fraser River sockeye, and that -- those
35 recommendations, if implemented, will inevitably
36 have implications for how the Department of
37 Fisheries and Oceans manages other aspects of the
38 fisheries. In doing that, the Department of
39 Fisheries and Oceans clearly has to come to grips
40 with the modern constitutional reality that
41 aboriginal and treaty rights are to be respected
42 as legal rights.

43 One of the most profound concerns that all of
44 our clients have - and I think this is reflected
45 amongst many of the aboriginal peoples - is that
46 the Department of Fisheries and Oceans appears
47 largely to have taken the approach which says

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1 food, social and ceremonial fisheries, the FSC
2 fisheries, have been proven in court. We have to
3 deal with these. But that other fisheries and
4 other potential rights which found claims to those
5 fisheries are speculative.

6 So commercial fisheries or quasi-commercial
7 fisheries or food -- or fisheries that are
8 directed at moderate livelihood, sale-type
9 fisheries, or fisheries founded in aboriginal
10 title are speculative. Until a court tells us to
11 deal with it, we will not and cannot deal with
12 these matters.

13 In our submission, this has engendered
14 feelings of hostility, of non-cooperation, of
15 frustration and has led to conflict between
16 aboriginal people and non-aboriginal people with
17 respect to the management of these rights and the
18 recognition of those rights, and the proper
19 reconciliation of those rights. For aboriginal
20 people, it creates the sense that these rights are
21 still not recognized as legal rights, to use the
22 words of **Sparrow**. Still not recognized as legal
23 rights.

24 For non-aboriginal people, there's often a
25 sense that the Department of Fisheries and Oceans
26 is recognizing the rights through the back door by
27 perhaps allocating too much to FSC. What we are
28 going to be submitting to you is that the reason
29 you have to address these issues is to give the
30 Department of Fisheries and Oceans -- or at least
31 encourage the Department of Fisheries and Oceans
32 to properly take grip of the mandate that it has
33 been given in numerous cases to take on the
34 process of recognizing aboriginal rights and
35 reconciling them in the context of the fisheries.

36 You've heard it said that the Department of
37 Fisheries and Oceans has the power to manage the
38 fisheries, but the court, in **Gladstone** - and we
39 reference this at page 23 of our submission -- and
40 I apologize for going over the length, we actually
41 didn't note the page length -- makes the point
42 that ultimately the management of the fisheries is
43 subject to both substantive and procedural
44 limitations. It's just at the end of it 'cause it
45 -- it frames it in terms of the right. The right,
46 that is, in this case a commercial right, is that:
47

Submissions by Mr. Janes (WCCSFN)

1 ...once both procedural and substantive; at
2 the stage of justification the government
3 must demonstrate both that the process by
4 which it allocated the resource, and the
5 actual allocation of the resource which
6 results from that process, reflect the prior
7 interest of aboriginal rights holders in the
8 fishery.
9

10 This is not an unfettered power to manage the
11 fishery. It is a power to manage the fisheries
12 which is subject to the substantive limitations
13 imposed by aboriginal rights, and in this case, I
14 highlight, it's a commercial aboriginal right, not
15 just FSC rights and the procedural obligations.

16 In that context, I'd like to move to the
17 question of aboriginal title. In common with some
18 of my friends, I, too, want to comment on the
19 absence of commentary on the **Marshall** and **Bernard**
20 case. Although as often in the cases with the
21 Supreme Court of Canada's jurisprudence in
22 aboriginal rights and title, I take a somewhat
23 different conclusion from what the court has
24 written than my friends do. What's been urged
25 upon you is the -- and in Canada's submission and
26 the submission of British Columbia is that the
27 court in **Marshall** and **Bernard** emphasize the
28 question of physical occupation of lands. On that
29 basis, the argument is put to you that this really
30 precludes any consideration of aboriginal title in
31 the context of submerged lands.

32 This is significant because of course, then,
33 there could be fisheries attached to those or
34 exclusive fishing rights in those areas, because
35 how could you physically occupy submerged lands?

36 In our submission, at page 10 and 11, we cite
37 the -- the entire quote from **Marshall** and **Bernard**
38 in this regard. What the court is very careful to
39 do is to make it clear that examining the question
40 of physical occupation requires more than just
41 thinking of village sites or enclosed fields or
42 the classic sorts of things that are sometimes
43 conjured up by that. But instead, it covers a
44 wider range of activities that's driven by the
45 character of the land and the character of the
46 aboriginal people and how they use the land.

47 While they don't specifically talk about

Submissions by Mr. Janes (WCCSFN)

1 submerged lands, there's discussion, for example,
2 in the -- just at the page 11 in the last part of
3 the quote -- was an example.
4

5 For example, where marshy land is virtually
6 useless except for shooting, shooting over it
7 may amount to adverse possession.
8

9 In the case of submerged lands, we would
10 suggest that the use of those lands as fishing
11 stations, as fishing sites for reef net fisheries
12 are the kinds of uses -- for shell fisheries, are
13 the kinds of uses which would constitute the use
14 that would be appropriate for foreshores,
15 submerged lands, reefs. You come to the Fraser
16 Canyon, the various fishing stations that are
17 found along there. And that it is too simple an
18 answer to say that the use of the word "physical
19 occupation" excludes aboriginal title and all that
20 goes with it.

21 And so too does the reliance upon this
22 concept of the public right to fish and the
23 various references that are made in the
24 Commission's paper, and had been alluded to quite
25 eloquently by Mr. Lowes in his submissions to the
26 rights, going back to the *Magna Carta* of the
27 public right to fish.

28 We wish to highlight that there are two
29 distinctions or two considerations that you should
30 take into account, Mr. Commissioner, when
31 considering this concept of the public right to
32 fish in tidal waters.

33 The first is that in Canada, we received
34 English law in a very particular way. It was
35 received with the understanding that it would have
36 to be modified to take into account local
37 circumstances and we reference this in our paper.
38 I would suggest to you that in British Columbia,
39 and on the Fraser River and in relation to the
40 lands, the submerged lands of the Fraser River, of
41 the foreshores of Vancouver Island and the Lower
42 Mainland, the fact that aboriginal people were
43 here before the English arrived, before the
44 government asserted the application of English
45 law, has to be one of the most predominant local
46 circumstances imaginable. It was not an empty
47 land in which the *Magna Carta* could be adopted

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1 from 1215 and conveniently moved from the Fields
2 of Runnymede to the coast of British Columbia.

3 To give you a simple example from the context
4 of our clients, that is, my personal clients, that
5 is, the Te'mexw Treaty Association, these people
6 signed treaties with the Crown in 1850 and '51 in
7 which they were promised the right to fish as
8 formerly which, we'll eventually show you,
9 included things like reef fisheries. That
10 preceded the adoption of English law in British
11 Columbia.

12 To say that the public right of fishery,
13 which was adopted about six to seven years after
14 these treaties were signed, would somehow trump
15 these rights would be astounding, I'd suggest.
16 And even Canada, in its submission, refers to
17 **Gladstone** in this regard, but I would highlight to
18 you that **Gladstone** actually raises this issue in
19 the context of justification. That's important,
20 because justification implies that the right has
21 been recognized as existing and that what's
22 engaged in at that point is a balancing of rights
23 subject to all the rules around priority and
24 honourable conduct by the Crown. It is not a
25 denial of the potential of these rights.

26 The final point I want to end off on -- and
27 again, this is just to highlight a few of the
28 pieces out of the paper -- is the question of what
29 I'll call commercial and quasi-commercial rights
30 or sale rights. The first point I'll make, I
31 referenced earlier, is that the Department of
32 Fisheries and Oceans has really failed to adopt
33 any coherent approach in the
34 consultation/accommodation process to recognizing
35 these rights where they exist.

36 That's not to say there should be a holus-
37 bolus just grant of these rights. There's no
38 doubt they're specific to specific situations.
39 But there should be a mechanism to meaningfully
40 recognize them and not just say, "Over to the
41 courts." The whole point of the process is to say
42 "not the courts".

43 Second, for treaties -- and of course this is
44 of interest to the Te'mexw people particularly.
45 It's important to note that the rights contained
46 in treaties are determined with reference to the
47 time at which the treaties are made. In the case

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1 of the Douglas treaties, that was some twenty-or-
2 so years after contact with Europeans, by which
3 time there was well-established trade between the
4 aboriginal peoples and the Hudson's Bay Company.
5 The aboriginal peoples were the fishermen who sold
6 the fish to the Hudson's Bay Company to provide
7 them with food. So there should be great caution
8 exercised in drawing any conclusions with respect
9 to aboriginal rights that necessarily transfer to
10 treaty rights.

11 But in the end, we submit that all of this is
12 before you because, as Mr. Reynolds says, if your
13 recommendations are to be practically implemented,
14 they have to conform with the constitutional
15 framework that Canada and the Supreme Court of
16 Canada have created, which has been designed to
17 recognize aboriginal rights, to use the words of
18 Haida, and then to achieve a reconciliation of
19 those rights, not to merely deny or fail to deal
20 with those rights.

21 Thank you.

22 THE COMMISSIONER: Thank you very much, Mr. Janes.

23 MR. MCGOWAN: We could perhaps mark Mr. Janes' paper,
24 Tab 12.

25 THE COMMISSIONER: Tab 12, Exhibit...?

26 THE REGISTRAR: F for identification.

27

28 MARKED F FOR IDENTIFICATION: Submissions of
29 WCCSFN by Mr. Robert Janes
30

31 MR. MCGOWAN: I think we have just enough time for Ms.
32 Gaertner's submission before lunch.

33 MS. GAERTNER: Mr. Commissioner, I am going to be a
34 little bit longer than 20 minutes, but I
35 understand my friend, Mr. Dickson won't be, and so
36 if -- with your leave, he's happy to take this
37 time and I'll begin after lunch.

38 MR. DICKSON: Thank you, Mr. Commissioner. It's Tim
39 Dickson for the Sto:lo Tribal Council and the
40 Cheam Indian Band.

41 Like the other participants, Mr.

42 Commissioner, on the whole we, too, regard --

43 THE COMMISSIONER: I apologize for interrupting. Have
44 you filed a paper?

45 MR. DICKSON: Sorry, Mr. Commissioner, we have.

46 THE COMMISSIONER: I'll just --

47 MR. DICKSON: I don't know the tab number.

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1 THE COMMISSIONER: All right. I'll just find that.

2 Sorry for interrupting. I just want to --

3 MR. DICKSON: Not at all.

4 MR. MCGOWAN: I believe you'll find that at Tab 9, Mr.
5 Commissioner.

6 MR. COMMISSIONER: Thank you.

7 MR. DICKSON: Thank you, Mr. Commissioner. I'm just
8 going to touch on some of the highlights that we
9 set out in that paper, Mr. Commissioner. As I
10 say, on the whole, like the other participants we,
11 too, regard the report as a good snapshot of the
12 law as seen in the case law at this time.

13 We wish to make a few comments on the report,
14 including on the practical implications of the
15 law. I begin with a few comments on inherent
16 rights. It's important, in our view, to
17 understand that aboriginal peoples like the Sto:lo
18 have inherent rights. That means that they have
19 rights that do not depend on the Canadian state
20 for their existence. They exist not because they
21 are recognized at common law or by the
22 constitution, but rather because these aboriginal
23 peoples are a sovereign people.

24 Before Europeans came, they had their own
25 legal systems, land tenure systems, management
26 regimes for water and natural resources and
27 wildlife. Since time immemorial, they were
28 sovereign within their own traditional
29 territories, exercising the rights and privileges
30 that sovereignty confers.

31 That is what must be reconciled with the
32 assertion of Canadian sovereignty. As Chief
33 Justice Lamer stated in *Van der Peet*, aboriginal
34 rights come down to this one simple fact, that
35 when Europeans arrived in North America,
36 aboriginal peoples were already here living in
37 communities on the land and participating in
38 distinctive cultures as they had done for
39 centuries. It is this fact, and this fact above
40 all others, which separates aboriginal peoples
41 from all other minority groups in Canadian society
42 and which mandates their special legal and now
43 constitutional status.

44 When the Europeans arrived, the Sto:lo were
45 already here living in communities on the land.
46 They were also fishing in the river for sockeye.
47 Indeed, the Sto:lo are the people of the river and

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1 the word "sockeye" is actually an Anglicization of
2 "sticky" which is the Halq'eméylem word for the
3 species. Sockeye, and salmon more generally, have
4 always been fundamentally important to the Sto:lo
5 and many other aboriginal peoples. The Sto:lo
6 lived off the fish. It supported their
7 communities. They fished it for food, used it for
8 social and ceremonial purposes and they traded it.
9 No distinctions were drawn between these uses.
10 There were no rights to do one but not another.

11 The Sto:lo also governed themselves with
12 respect to fishing as well as other things. They
13 determined when they would fish and how, and to
14 whom they would trade and how much, and how they
15 would relate to other aboriginal peoples. These
16 were rights and privileges they exercised as
17 sovereign peoples and they had those rights then
18 and they continue to exist today.

19 What I have just said reflects some of the
20 reality of inherent aboriginal rights. But having
21 the state recognize those rights is a different
22 thing altogether. Aboriginal law has been
23 developed because First Nations have sought
24 protection from the courts against the state's
25 infringement of their rights. The law of
26 aboriginal rights has been in constant development
27 since the 1970s. Generally, that's been a good
28 thing for aboriginal peoples since, in the modern
29 era, it has been primarily through the courts that
30 they've achieved recognition of their rights, and
31 the trend of aboriginal law has been toward
32 protection of an increasingly wide array of
33 aboriginal rights and the holding of the Crown to
34 a duty to act honourably.

35 But litigation is full of challenges. One
36 challenge is the fact itself that the law is in
37 flux. For instance, in *Sparrow*, the court found
38 that the Musqueam had an aboriginal right to fish
39 for FSC purposes, but the court didn't set out a
40 test for the proof of an aboriginal right. So
41 when the Sto:lo came to assert their right to sell
42 fish in *Van der Peet*, they could not know the test
43 to meet and the result is that they may have to
44 return to court in the future to achieve
45 recognition of their right to sell fish.

46 Also, while the Court of Appeal found in
47 *Douglas*, 2007, as you've heard, that the priority

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1 afforded to FSC fisheries does not always mean
2 priority in time. The Court of Appeal has
3 recently given leave to a subsequent case to
4 revisit that point.

5 Another difficulty with litigation is the
6 complexity that it poses. The trial in **Delgamuukw**
7 lasted 384 days resulting in the Supreme Court
8 sending the case back for retrial. The trial in
9 **Chilcotin** lasted 339 days and resulted in the
10 trial judge opining that the Chilcotin had
11 aboriginal title to about 2000 square kilometres
12 of land, but he declined to make a declaration to
13 that effect because of the nature of the
14 pleadings.

15 So aboriginal litigation is very lengthy and
16 very costly and often does not result in
17 resolution of the claims. The parallel process to
18 litigation, the treaty process, has also been
19 notoriously unproductive. It's so far yielded two
20 treaties, although I should note that the Maa-
21 nulth treaty will come into force next year.

22 So if you were to measure the extent of
23 aboriginal and treaty rights in this province only
24 by what has been proved in court to this point,
25 you would conclude that there was very little, but
26 that would be of course entirely untrue. Canada
27 and British Columbia did take that position for
28 many years, and to a large degree, continue to do
29 so today.

30 The Supreme Court of Canada, however, has
31 held that such a position is contrary to the
32 honour of the Crown. As the court stated in
33 **Haida**, to limit reconciliation to the post proof
34 sphere risks treating reconciliation as a distant
35 legalistic goal devoid of the meaningful content
36 mandated by the solemn commitment made by the
37 Crown in recognizing and affirming aboriginal
38 rights and title. This is not reconciliation, nor
39 is it honourable.

40 The Crown's duty to act honourably requires
41 it to respect aboriginal rights, even when they
42 have not yet been proven. When the Crown knows of
43 a claim to an aboriginal right and is
44 contemplating some action that could negatively
45 affect it, that it must consult and accommodate.
46 The depth of the consultation and accommodation is
47 dependent not upon the right already being proved,

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1 but rather on the *prima facie* strength of the
2 claim and the seriousness of the impact.

3 When we think about that test in the context
4 of Fraser River sockeye, we submit that two things
5 are immediately apparent. The first is that there
6 can be no serious question, no honourable question
7 - if I can put it that way - that there is a very
8 wide range of aboriginal rights in Fraser sockeye.
9 Fishing salmon, including sockeye, is what Fraser
10 River First Nations did. Perhaps nothing else was
11 as defining of their cultures.

12 Second, while the various decisions that DFO
13 makes will differ in terms of their specific
14 impacts on these rights, it is obvious, on a
15 broader view, that decisions that affect the
16 numbers and kinds of sockeye that swim up the
17 river, and First Nations' entitlements to take
18 those fish, how many and how and when, and how
19 many fish will be allowed to escape to the
20 spawning grounds to provide for future
21 generations, all of these are of the utmost
22 importance to First Nations. Fishing sockeye is
23 central to these communities.

24 The report suggests, at paragraphs 115 and
25 116, a number of things that we say do not fully
26 reflect the full content of the honour of the
27 Crown. It suggests that the fact that one
28 aboriginal group has a right to do a particular
29 thing will not be without something more
30 sufficient to demonstrate than any other group
31 holds (sic) the same right, that the vast majority
32 of the right to fish claims asserted in respect of
33 Fraser River sockeye have yet to be determined by
34 the courts, that DFO may be required to apply
35 tentatively principles relating to justification
36 of infringements of aboriginal rights, and that in
37 some cases, a duty to consult and possibly to
38 accommodate may arise.

39 In our submission, it should be obvious that
40 there are a wide range of aboriginal rights in
41 sockeye all up and down the Fraser River, and that
42 the Crown's duty to consult and accommodate in
43 respect of those rights is very deep indeed.

44 One of the things aboriginal peoples like the
45 Sto:lo really seek in the sockeye fishery is to
46 share decision-making over the sockeye with the
47 Crown. They want to manage the sockeye through a

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1 truly collaborative process. They don't just want
2 to be told by DFO how many fish they can fish and
3 when and how, for instance. They want to make
4 those decisions with DFO.

5 There are good policy reasons for DFO to
6 share decision-making with First Nations. One
7 reason is that the decision-making process could
8 thereby incorporate aboriginal traditional
9 knowledge. Another reason is just to ensure that
10 decisions on a topic so important are guided by
11 the communities who have the most at stake in the
12 future sustainability of the sockeye.

13 But there are also legal reasons. Under the
14 law as it stands now, the Crown ought to recognize
15 that aboriginal peoples have very strong claims to
16 rights related to the stewardship of sockeye and
17 the management of the fisheries through their
18 territories. The honour of the Crown requires
19 that these claims be accommodated.

20 In our submission, international law also
21 supports that conclusion. There is growing
22 international acceptance, as seen in the U.S.
23 Declaration on the Rights of Aboriginal Peoples,
24 of the principle that states [as read]:
25

26 ...shall consult and cooperate in good faith
27 with the indigenous peoples' concern through
28 their own representative institutions in
29 order to obtain their free, prior and
30 informed consent before adopting and
31 implementing legislation or administrative
32 measures that may affect them.
33

34 The vast majorities of countries around the
35 world, Australia and New Zealand among them, have
36 endorsed the Declaration. So far, Canada has not.

37 Indeed we say instead of meaningfully
38 consulting with First Nations and accommodating
39 the rights within a co-management regime, Canada
40 demands that First Nations sign comprehensive
41 fishery agreements which they write unilaterally.
42 We say this is not meaningful consultation nor
43 accommodation.

44 I have just one more point I wish to touch
45 on, Mr. Commissioner, and that is that the Crown's
46 duty to consult and accommodate First Nations in
47 respect of Fraser sockeye, including through co-

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1 management, means that it must provide adequate
2 and stable funding to First Nations so that they
3 can develop the capacity to meaningfully engage in
4 that consultation and co-management. If we
5 consider the duty to consult as it was described
6 by the B.C. Court of Appeal in *Halfway River*, we
7 can see this point.

8 The Court of Appeal stated there that [as
9 read]:

10
11 ...the Crown's duty to consult imposes on it
12 a positive obligation to reasonably ensure
13 that aboriginal peoples are provided with all
14 necessary information in a timely way so that
15 they have an opportunity to express their
16 interest and concerns and to ensure that
17 their representations are seriously
18 considered, and whenever possible,
19 demonstrably integrated into the proposed
20 plan of action.
21
22

23 Well, the management of Fraser sockeye raises
24 technical issues that plainly require specialized
25 education and experience. The duty to consult,
26 let alone the duty to co-manage, cannot be
27 fulfilled simply by providing all necessary
28 information. That may work in many contexts.
29 That alone cannot work here. A First Nation can
30 only provide meaningful input in the complex area
31 of fisheries management if it has a high degree of
32 technical capacity. That means that a First
33 Nation must be able to employ technical
34 consultants to allow it to participate in
35 consultations with the Crown and especially co-
36 manage with the Crown. The result is that, in our
37 submission, in order to fulfill its duty of
38 honourable conduct, the Crown must provide
39 adequate and stable funding to First Nations to
40 allow them to develop this technical capacity.

41 Indeed, one of the First Nations' largest
42 frustrations, as I hear it, is that the funding
43 they receive from DFO, aside from being inadequate
44 in terms of dollar amounts is year by year where
45 it is provided. They need stable long-term
46 funding to be able to develop capacity and perhaps
47 to form larger organizations for the purposes of

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1 consultation and co-management with DFO.

2 We say the provision of stable adequate
3 funding is obviously necessary to make
4 consultation and co-management meaningful in an
5 area that is this technically complex. The courts
6 have begun to recognize this point and we have
7 noted a number of cases in this respect in our
8 submission at paragraphs 59 through 61.

9 Those are my submissions.

10 THE COMMISSIONER: Thank you very much, Mr. Dickson.
11 The paper that is at Tab 9, then, will be marked
12 as the next exhibit.

13 THE REGISTRAR: For identification, G.

14
15 MARKED G FOR IDENTIFICATION: Submissions of
16 STCCIB by Mr. Tim Dickson
17

18 THE COMMISSIONER: Thank you. Mr. McGowan?

19 MR. MCGOWAN: Perhaps an appropriate time. Till two
20 o'clock, Mr. Commissioner?

21 THE COMMISSIONER: Thank you very much.

22 THE REGISTRAR: The hearing is now adjourned until 2:00
23 p.m.
24

25 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

26 (PROCEEDINGS RECONVENED)
27

28 THE REGISTRAR: Order. This hearing is now resumed.

29 MR. MCGOWAN: Yes, Mr. Commissioner, and Ms. Gaertner
30 is up and I understand that she has perhaps had
31 some discussions with some of our colleagues here,
32 who have agreed to share some of their time with
33 her, so I'll let her address you on that.

34 THE COMMISSIONER: Thank you. Ms. Gaertner?

35 MS. GAERTNER: Mr. Commissioner, I'd like to be able to
36 stand on my own two feet with my own time;
37 however, I understand that there is somewhat of a
38 trading that occurs in these rooms, and so
39 although, again, I stressed, as I have stressed
40 with this coalition, I speak on behalf of a lot of
41 people and a lot of interest, and sometimes I may
42 not be able to say it in as short a period of time
43 as others.

44 I have, however, been advised by participants
45 number 9, the Conservation Coalition, and 20, the
46 Musgagmagw participants, that they are happy to
47 have me use their 20 minutes, and so I think that,

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1 collectively, should give me more than enough.
2 And so, on that, I'll proceed.

3 I wanted to start by expressing my gratitude
4 to the Commissioner for taking the time to do all
5 the site visits. While there are so many more
6 that you could have done as part of your
7 preliminary work, and I'm sure you appreciate
8 that, given the months that you did do, I'm
9 confident from your opening remarks that the
10 importance of the Fraser River fishery has become
11 more of a reality in your own life experience as a
12 result of those visits.

13 Many of the places that you went to I've also
14 visited or spent time during the time that I've
15 been working for First Nations, and there were a
16 few that I hadn't been to, and I totally regretted
17 that my own time commitments prevented me from
18 getting there, and I was grateful from your
19 expressions yesterday because, for me, my learning
20 has been that knowing the place from which people
21 live and how they relate to the fish is one of the
22 most important teachings around the importance of
23 the fish to those people, and that if we spend
24 time in Vancouver talking about fish, it doesn't
25 quite give you the right flavour, and that it's
26 extremely necessary to spend time on those rocks
27 and in those places with the people to begin to
28 grasp the depth of relationship that they have.

29 I also wanted to begin my submissions to this
30 inquiry by expressing and saying that over the 25
31 or so years that I've worked for First Nations,
32 working for salmon is one of the most honourable
33 parts of my profession, and I was touched and
34 pleased to hear the Commissioner speak, yesterday,
35 of that honour in your own approach.

36 The sacredness of salmon to First Nations is
37 such an important part of that relationship. We
38 treat things that are sacred different than we
39 treat things that are just numbers or a problem to
40 solve. We are careful before we act, before we
41 speak, how we act, how we complete a task, and how
42 we pass it on to next generations. All must be in
43 right relations when we are relating to something
44 that is sacred.

45 And so it could be said that the work we're
46 doing here is cloaked with that same sacred
47 relationship and must, therefore, be in right

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1 relations. And I thought, again, Mr.
2 Commissioner, I would take a moment to talk about
3 that concept or right relations. It's a very,
4 very old way of expressing a very basic concept,
5 which is being in a good or right place with
6 another, whether that's with an animal, a place,
7 water, or other human beings. It's an old ethic
8 at the heart of many indigenous cultures around
9 the world.

10 Whenever I begin a project, whenever I'm
11 sitting at negotiating tables - not at court
12 tables - but whenever I'm sitting at negotiating
13 tables, especially ones of this magnitude and this
14 significance, I rest within that principle and
15 offer it to those I'm working with, for, or
16 against. And so now I ask myself, "How can I be
17 in right relations with all the positions and
18 everybody around this room?" And I'm left wanting
19 to share with you another teaching on this topic.
20 It's a teaching I received from an anthropologist
21 by the name of Angelie Zarion (phonetic). She's
22 worked all over the world with cultures and
23 indigenous people all over the world, and one of
24 her techniques and one of her skills is to
25 summarize teachings so that they're meaningful in
26 a modern context. And so she summarized right
27 relations amongst humans as an act of prayer, a
28 way of being in this way, four-fold way:

29 One, show up, be present and pay attention,
30 be respectful. The court process and the process
31 you have here has a bit of a one-up on a lot of
32 other fishing meetings I've been to where people
33 are very heated and a lot of arguments are going
34 on and the room is very contentious.

35 Listen. Again, you're very skilled at that.
36 You've been trained at that. You have to pay
37 attention. What she goes is one step further:
38 Pay attention to what is heart and has meaning.

39 Thirdly; speak the truth. And again, this
40 process will help to ensure that all of us speak
41 the truth before you.

42 The last item, I think, is one of the most
43 challenging items for any processes, especially
44 those in which there is advocates that are trained
45 to act on behalf of interests.

46 And the last one is to be open, but not
47 attached to outcome. I must say, I struggle with

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1 that regularly. I want to get right down to your
2 recommendations and what I want you to do in this
3 commission and how to get there. But, rather, I'm
4 here to be open and not attached to the outcome.

5 I offer this to all of those around. I'm
6 more than happy to be reminded of these principles
7 as the time goes on, and I think it will be useful
8 for us to ensure that we stay in right relations
9 to each other and to the salmon for whom we're all
10 here working.

11 I turn, now, to the topic at hand and, again,
12 as Commission counsel opened this morning and
13 reminded me, I'm grateful for the Commission for
14 taking up the opportunity, as I suggested, to
15 review the law of Aboriginal rights and title and
16 treaty rights as part of the beginnings of the
17 hearing, and particularly, to allow the
18 participants to engage in a dialogue about this
19 area of the law in order to find out areas of
20 agreement and disagreement.

21 In my view, the paper that was presented by
22 the Commission is a useful overview. It
23 thoroughly canvasses a snapshot of the ever
24 evolving legal framework. As you will hear in my
25 oral submissions, the challenge, I believe, is not
26 the law but the application of that law to a very
27 complex fishery.

28 Oddly, I would make this observation: The
29 Federal Crown chose not to discuss the practical
30 implications of this law and took the time to
31 discuss, in full, their views on the law. Suffice
32 it to say that in our view, whenever dealing with
33 the issues of law, the challenge will be to apply
34 them.

35 Going first, now, this inquiry is to be
36 conducted within the context of the Canadian law.
37 You are not being asked to make rulings on any
38 specific rights as it applies to any specific
39 findings or any specific situations. A judge,
40 however, being asked to consider recommendations
41 on how to rebuild the Fraser River sockeye, must
42 take notice of the legal framework that governs
43 and affects salmon. Undoubtedly, that framework
44 concludes the constitution and, in particular,
45 constitutionally protected s. 35 rights related to
46 that fishery.

47 We all agree that the Commissioner has no

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1 authority to decide legal rights or obligations
2 and, therefore, will not be making rulings on the
3 state of law. However, I want to take you to a
4 quote from Ed Ratushny's book. I know it's in
5 your binder of submissions, tucked into the front
6 page, because I just passed it around this
7 afternoon. This is more in reply to a paragraph
8 in Canada's argument, where he refers to the first
9 paragraph of the quote, on page 162, but I have to
10 take you to the subsequent paragraphs.

11 And so Canada takes you to the first
12 paragraph, on page 162, which reads:

13
14 A commission of inquiry has no authority to
15 decide legal rights or obligations; the fact-
16 finding function of a commissioner has an
17 intrinsic value quite apart from that of
18 serving as the foundation for determining
19 rights or obligations.
20

21 But I want to take you to two paragraphs further
22 than that in the same description of the basic
23 functions of an inquiry [as read]:

24
25 It would be a sterile exercise merely to
26 record these conclusions -

27
28 -- which are your conclusions of fact --

29
30 - since they provide a unique opportunity to
31 go one step further; that is, to make
32 recommendations to avoid similar problems
33 occurring in future. The commissioner must
34 become educated throughout the inquiry
35 process in order to draw lessons from the
36 events. The recommendations can relate to
37 laws, administrative practices,
38 relationships, and organizational structures,
39 and can inform public and political
40 discussion and debate.
41

42 And then, just as I think of salmon, I think of:

43
44 In many respects, the journey of a
45 commissioner of inquiry is as important as
46 the destination.
47

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1 Commissioner, Cohen, we submit you have a unique
2 opportunity to go one step further than finding
3 facts about the state of decline for the Fraser
4 sockeye. Rather, as we submitted in our opening
5 remarks regarding the scope of this inquiry, it is
6 your ability and responsibility to make
7 recommendations regarding the sustainability and
8 improved management of the fishery that is of
9 critical importance to my clients and the members
10 of the public at large. These recommendations
11 will very much relate to the application of the
12 law by the Department of Fisheries and Oceans,
13 including the administrative practices of DFO and
14 the relationships and organizational structures
15 that would be useful for the sustainability and
16 improved management of the Fraser River sockeye.

17 In our submission, the debate resulting from
18 the submissions that are before you should not
19 focus so much on the state of the law but, rather,
20 the challenges to implement the law. We are
21 hoping that the Commissioner will here, during the
22 course of this inquiry, ways of improving our
23 relationship to salmon, including the ethics of
24 sustainability.

25 You are also likely to hear about measure
26 that, given the last 20 years or so with the
27 development of the law to date, require changes,
28 further changes to the status quo in terms of the
29 management of the fisheries.

30 In the views of many First Nations, DFO has
31 not been truly responsive to s. 35 law as it is
32 already developed, and in this way I would like to
33 note that I support the submissions that were made
34 by Mr. Dickson and Mr. Reynolds today, regarding
35 the frustrations that many First Nations have
36 experienced. Mr. Reynolds spoke about it directly
37 as it relates to Musqueam, whose case whose rights
38 were determined in *Sparrow*. Mr. Dickson talked
39 about it as it relates to the Fraser River First
40 Nations. Many, many, have experienced increasing
41 frustration that the law has changed but it has
42 not been sufficiently implemented on the ground.

43 Having read Mr. East's submissions on behalf
44 of the Department of Justice, it was clear to me
45 why it's very difficult for the Department of
46 Fisheries and Oceans to get on with the business
47 at hand in a constitutionally respectful and, we

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1 submit, useful manner. Continued legal denial or
2 *de minimis* of the rights the First Nations hold is
3 a significant handicap for DFO's managers.

4 Oddly, some of that reluctance seems to
5 disappear when the Crown enters into treaties,
6 modern treaties, with First Nations, who
7 negotiated those treaties, relying specifically on
8 the rights entitled that others assert.

9 We agree with the Commission's paper and with
10 Keith Lowes' and Bradley Caldwell's, counsel for
11 the B.C. Wildlife Federation and the B.C.
12 Federation of Draft Fishers, at paragraphs 14 to
13 18 of their submissions, where they note that in
14 practical terms uncertainties remain on how such
15 Aboriginal rights and title ought to inform the
16 decision-making inherent in managing a complex
17 fishery.

18 Gratefully, I believe you will find that good
19 governance in the complexities of the modern
20 Fraser River sockeye, is an inclusive governance
21 system which we believe can be implemented in a
22 manner that's transparent and consistent with
23 s. 35 rights. Again, it's a matter of political
24 will.

25 Like my friends, Mr. Lowes and Mr. Caldwell,
26 we agree that the Commission must be alive to the
27 controversies and uncertainties regarding the
28 implementation, alive to the fact that the case
29 law is dynamic and evolving and, we submit, must
30 be acutely aware of the interface between law and
31 policy.

32 There are two topics that I want to briefly
33 speak on with respect to the content of the law
34 before I turn to the practical implications. The
35 first is the dialogue and discussions as have
36 happened both in the written submissions and
37 orally today on the Aboriginal title to fresh and
38 marine waters. And you'll find our submissions at
39 page 1 of our written submissions, and I'm going
40 to take you to paragraphs 5, 6, and 7.

41 Clearly, while all aspects of Aboriginal law
42 will evolve over time, it is neither impossible
43 nor, in our submissions, doubtful to successfully
44 the law of Aboriginal title to include water
45 areas.

46 I take you to paragraph 5 in my written
47 submissions in which I outline how First Nations,

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1 including those members of the FNC, have
2 consistently and strongly asserted that the
3 territories over which they exercise and hold
4 Aboriginal title, include not only the land.
5 Water is often described by most First Nations as
6 a key to life, and it goes without saying, if you
7 look at the settlement of British Columbia, that
8 the lakes, rivers, banks, fishing rocks, and the
9 parts of the ocean, seabed and foreshore that they
10 have traditionally used and occupied, are still
11 being relied upon by them today. First Nations'
12 use and occupation of their territories is
13 interconnected with the resources of their
14 territories. For the First Nations of the Fraser
15 Watershed and the marine area along the migratory
16 route of sockeye salmon, use and occupancy of
17 fresh and marine waters will be directly related
18 to the presence of fish and marine mammals in
19 those territories.

20 First Nations' connections to those vital
21 resources for sustenance, for economics, for
22 spiritual, social, ceremonial and other purposes,
23 together with the practices of fishing, hunting,
24 gathering, are all foundations for and indicia of
25 Aboriginal title.

26 You'll also note that the traditional
27 villages, and later reserves, are often located in
28 areas adjacent to or in strategic locations along
29 the Fraser River, its tributaries, and key marine
30 access points. These rivers, streams, lakes and
31 marine areas are a fundamental part of the First
32 Nations' territories and how they have used those
33 territories, the Aboriginal title they rely upon
34 and, most particularly for you, the stewardship
35 responsibilities that they exercise in relation to
36 them.

37 I understand my friends take issue with the
38 conclusions and perhaps the strength of my
39 conclusion in paragraph 6. I am prepared to make
40 an amendment to the word "predictable" to
41 "possible"; however, the First Nations Coalition
42 submits the judicial findings of Aboriginal title
43 to marine and river areas and the salmon resources
44 are a possible evolution of the law of Aboriginal
45 title should First Nations not be able to achieve
46 recognition of those rights outside of the
47 courtroom.

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1 And again, I adopt the submissions of Mr.
2 Reynolds, on behalf of the Musqueam and
3 Tsawwassen, when he took you to a quote of the
4 Supreme Court of Canada, which encourages us all
5 to be at the negotiating tables rather than in the
6 courts.

7 Meanwhile, and Mr. Dickson raised this point
8 briefly in his submission, but I have to
9 underscore it and stress it in the context of the
10 management of the fishery, until those cases, and
11 only if those cases are necessary, these
12 assertions of strong Aboriginal title and
13 interests require the Crown to proceed honourably
14 when contemplating any actions or decisions that
15 could affect such title. Without such caution or
16 respect of the Crown, they would be reverting to a
17 post-proof sphere and, as stated by the Court in
18 **Sparrow** and again **Haida**, would then be treating
19 reconciliation as a "distant legalistic goal,
20 devoid of the 'meaningful content'".

21 Turning a bit in response to Canada's
22 submissions, and in particular their paragraphs 4
23 to 6, Canada suggests that the Commission's
24 framework paper cross the line from summarizing
25 the law to speculating about its future direction.
26 Oddly, I think Canada has done exactly what they
27 criticize the Commission in doing. Canada's
28 discussion about the possible evolution of the law
29 of Aboriginal title and, in particular, the
30 arguments that title would not likely be proven to
31 freshwater and marine spaces is, in our
32 submission, entirely speculative and unhelpful.

33 If I read and heard Mr. East correctly, he
34 hypothesizes that the common law test for
35 Aboriginal title to the fishery is so stringent
36 it's out of the reach of most First Nations, and
37 in my submission, that is totally contrary to both
38 the spirit and the intent and all the Supreme
39 Court of Canada rulings with respect to s. 35.

40 S. 35 isn't there so that we can somehow
41 figure out, from an Aboriginal context, how to fit
42 into Canadian common law. S. 35 is there so that
43 we can adapt and adjust our laws to properly
44 recognize and respect and reconcile the Aboriginal
45 rights and title of First Nations of this country.

46 It is our submission that Canada spends, from
47 pages 10 to 15, stating its opinion on where the

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1 law should go and, with respect, that's not the
2 purposes of this inquiry. The Commission got it
3 right the first time. The Commission recognized
4 that the law of Aboriginal rights and title is
5 evolving, and noted and remained open to the
6 possible directions it may take.

7 I also want to stress that it's my view that
8 he does exactly the same thing in paragraph 18 of
9 his submissions. I'm not going to go through the
10 detail of it. Again, you'll hear that he
11 suggests, or you'll see that he suggests that it
12 would be much more difficult to establish
13 exclusive and physical occupation in the Fraser
14 River and its tributaries. Of course, it's the
15 submissions that I made, and you heard from Mr.
16 Dickson, that First Nations along the river could
17 meet this test, should this be necessary.

18 Again, in our view, as I'll review more
19 substantively in my submission, it's the clear
20 assertion and the constant assertion, together
21 with the constant use and continued use of that
22 river that shows that the First Nations have a
23 very strong relationship to that fishery and
24 rights associated with that fishery, and it's
25 those assertions that are strictly and must be
26 honourably dealt with in the context of DFO's
27 obligations around management.

28 Oddly, my friend, Mr. East, relies on **Bernard**
29 **and Marshall** to discount exactly what the court in
30 that decision, I think, says as it relates to the
31 recognition that a First Nations use of a place
32 for fishing could ground Aboriginal title.
33 Canada's treatment of **Bernard and Marshall**
34 completely overlooked the requirement for the
35 court to consider the Aboriginal perspective when
36 determining an Aboriginal right or title claim.

37 When determining an Aboriginal title or
38 rights claim, the court must start with the
39 understanding the claim for the First Nations'
40 perspective, understanding the practices, uses and
41 nature of occupation from an Aboriginal
42 perspective, and then looking for a corresponding
43 common law right. Canada forgets this.

44 In addition, we say that if and when such a
45 claim is made, the court will have to consider
46 whether the test for Aboriginal title to land
47 needs to be adjusted when dealing with water

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1 spaces.

2 Next in the area of the law, I want to turn
3 to the Aboriginal right to manage, which we begin
4 to discuss particularly at page 3 of our
5 submission, and I want to take you to paragraphs
6 12 through 15.

7 It's our submission that implicit in s. 35
8 Aboriginal rights to fish for sockeye salmon is
9 the responsibility to make management decisions,
10 including such things as fishing methods,
11 openings, and stewardship measures that need to be
12 in place.

13 The courts have repeatedly indicated the
14 content of that right must be guided by the
15 perspective -- sorry, I am repeating myself there.

16 The First Nations Coalition submits that the
17 law on Aboriginal rights to fish should not be
18 rendered meaningless by reducing an Aboriginal
19 right to fish to something we now call a harvest
20 right. Such a right, when viewed from the
21 Aboriginal perspective, always includes the right
22 and responsibility to manage the fishery for
23 present and future generations, which, in modern
24 times, can, as a minimum, be described as the
25 right to be meaningfully and collaboratively
26 involved in strategic and operational aspects of
27 the management of the resource.

28 I also note that treaty rights also provide a
29 recognition of First Nations' rights as managers
30 of the fisheries. In particular, I am
31 representing Snuneymuxw, Tsartlip and Tsawout, who
32 are holders of the Douglas Treaty rights, and
33 those include fisheries and formally, and in
34 paragraph 14 I refer to cases that have, in our
35 submission, provided a foundation for the right to
36 manage fisheries.

37 Finally, I just want to respond on the bit of
38 the law that was taken up by the participants in
39 response to the Commissioner's paper on the duty
40 to consult. In particular, Canada's argument at
41 paragraph 28 of its submission, that the
42 Commission has gone too far in saying that the
43 assertions of Aboriginal title to marine areas may
44 be sufficient to place consultation obligations on
45 the Crown. And they say that **Haida** was clear that
46 the Crown has an obligation to consult when it has
47 knowledge, real or constructive, of the potential

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1 existence. So that's what I say.

2 In **Brokenhead**, the Federal Court emphasized
3 that the claim must be credible to engage the duty
4 to consult. What Canada does is say, by quoting
5 Professor Newman, is to somehow suggest that the
6 idea is there can be no overriding doubts or, if
7 there are overriding doubts, that somehow that
8 undermines the obligation to consult.

9 Although the Federal Court, in **Athabasca**,
10 referred to Professor Newman's writing, it did not
11 specifically adopt his understandings of when the
12 duty to consult arises. The First Nations
13 Coalition submits that there are no overriding
14 doubts test as to when the Crown is obliged to
15 consult. **Haida** remains the authority in this
16 regard. All that **Athabasca** says is that you need
17 a nexus between the claimed Aboriginal right and
18 the impugned government activity. The fact that
19 First Nations have used and occupied the Fraser
20 River area and its tributaries for their fishery
21 for hundreds of years is not speculative, it's not
22 theoretical, and it's not hypothetical. First
23 Nations have credible Aboriginal title claims to
24 the fish and marine waters that support sockeye
25 salmon, and these claims must be treated
26 respectfully by the Crown by recognizing those
27 claims give rise to a duty to consult when the
28 Crown contemplates conduct that could affect such
29 claims.

30 One last matter in reply on some of the
31 comments that were made around the law and some
32 facts is that in Canada's submissions, it seems to
33 suggest or cast doubt on which modern day nations
34 are signatories to the Douglas Treaty. The First
35 Nations Coalition submits that it's patently clear
36 that the Snuneymuxw, the Tsartlip and the Tsawout
37 First Nations are signatories to the Douglas
38 Treaty. There is case law that supports that and
39 confirms that for each one of them. **Morris and**
40 **Olson**, the injunction case as it relates to
41 **Snuneymuxw** and the **Saanichton Marina** case are all
42 cases that specifically deal with each of those
43 communities.

44 So I'm not quite sure where the Crown was
45 going with that, but I wanted to make it
46 abundantly clear that for the three clients I'm
47 representing, there's no doubt that they're

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1 holders of the Douglas Treaty right.

2 Mr. Commissioner, I'm now going to take you
3 to the substance of my paper as it relates to the
4 practical implications of this law for the mandate
5 and work of those Commissioner, and I'm going to
6 start at page 6, and the rest of my oral
7 submissions will be based on that, and I'm just
8 stressing some of the things that I've covered in
9 my written materials.

10 As you'll see in paragraphs 23 through to 26,
11 I wanted to ground this challenge, which is the
12 challenge of reconciliation. One of the first
13 topics the Commission paper took on when it
14 reviewed the law is the fundamental intention of
15 s. 35 law is to bring reconciliation.

16 And so I think it is extremely important,
17 when you look at the intention of that law and how
18 it applies to your mandate, to recognize that
19 there's a historical context for that
20 reconciliation and, in particular, as it relates
21 to the Fraser Watershed and the coastal marines of
22 what is now British Columbia, these people had
23 created lives that were deeply connected with the
24 salmon.

25 You've heard lots about that. I'm not going
26 to repeat anything. I've written, in the
27 paragraphs that follow that, but perhaps bring it
28 home, a couple of things that I always think is
29 useful. Often, it's suggested that some of the
30 ethics and myths that First Nations hold as it
31 relates to the salmon are really not that relevant
32 today, and I disagree terribly with that
33 suggestion.

34 One of the things that I've learned through
35 my time with First Nations and the salmon is just
36 how important those older traditions are to
37 teaching us ethical behaviour. You know, it's one
38 thing to come in and have a principle of use that
39 includes often using a resource to extinction.
40 It's another thing to have the ethical foundations
41 of the government that teach people right from the
42 beginning, right relations, with that resource.

43 And so often so many of the stories, some of
44 which you may have heard as you travelled through,
45 are not just cute stories, they were stories that
46 people were taught from the get-go so that they
47 understood what it meant to go down to those

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1 rocks, what it meant to take the fish, what it
2 meant to feed the families, how much to take, when
3 to take it. All of those things were practical
4 teachings that many of the fishers still carry.
5 Some of it have lost it as a result of
6 colonization, there's no doubt about that.

7 And there were two, as in preparation for
8 this hearing, that made me smile, and so I thought
9 I'd bring them to this room today.

10 The first is the Haida people have, through
11 this preparation, taught us about their
12 relationships to the creeks and their territories.
13 And in their teachings, every one of their creeks
14 has a supernatural being, a creek woman, who is a
15 steward of that resource. And so before any
16 salmon is taken from the creeks or the rivers,
17 permission from the creek woman must be obtained
18 and respect must be paid through offerings.

19 I was thinking about that story this morning
20 as I walked to work, and I imagined the creek
21 woman that's sitting at the front of the Fraser
22 River and how powerful a being she may be, given
23 the strength of that river, and perhaps whether or
24 not we're in right relations with her or not.

25 The other story that I thought I'd bring home
26 to you, today, is an Interior Salish story that I
27 most recently heard from Dr. Ron Ignace, who I
28 believe may be a witness in this hearing later on,
29 and he tells the Secwepemc story of the Coyote.
30 Now, Coyote is an extremely important part of the
31 creation stories of all of the Salish people,
32 because the Coyote is the transformer who brought
33 life into the manifested world, into the
34 manifested places we have before us.

35 And one of the stories they teach all of
36 their fishers up in Skeetchestn is the story about
37 Coyote, who is a transformer, travelling up the
38 river and into the Secwepemc territory. And
39 Coyote apparently gets hungry at various times and
40 developed quite a hankering for fish. And after
41 trying a number of numerous different ways of
42 getting himself into various different forms so he
43 could attract the fish, he was eventually taken in
44 by three medicine women who, for four day sand
45 four nights, worked him, as they say, and
46 eventually, as a result of the strength that he
47 obtained through those teachings, he was able to

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1 break the dam and summon the salmon up the river.

2 Now, apparently, Coyote got very impressed
3 with himself and he began to catch a whole lot of
4 those salmon and set up those beautiful drying
5 racks, some of which I understand you saw, at
6 least when you were in Bridge River, and had all
7 these drying racks packed full of salmon. And so
8 he decided he wanted to hold a large meeting and
9 show off those salmon to everybody around as to
10 how much he had caught. However, just as he was
11 doing that, the salmon jumped off the racks and
12 returned to the river, and all that was left on
13 the racks was the slime from the skin on the
14 stick.

15 Now, you might ask, "What's that story about
16 and why did the fisherman learn that story?"
17 Apparently, it's extremely important, from the
18 Secwepemc's perspective, to learn that when you
19 inflate your ego and spend your time showing off
20 how much you've caught, you're disrespectful to
21 the salmon. The Secwepemcs say that when we
22 disrespect that salmon and their homes and are
23 more concerned about, I'm going to say, numbers,
24 here, and they say "showing off your catch," then
25 the salmon will leave us.

26 It's interesting to apply that story to the
27 ethics of Fisheries management over the last
28 hundred years and begin to ask the question why
29 the salmon are going away.

30 In just over a century, much of what has been
31 fundamentally changed has resulted in the brink of
32 extinction of a salmon fishery that's meant a lot
33 to First Nations.

34 In paragraph 25 and 26 I talk about what led
35 to the **Sparrow** decision. In 1992, after **Sparrow**,
36 DFO then moves to the AFS strategy. And again, I
37 support the submissions that were made by Mr.
38 Reynolds this morning about the challenges that
39 have happened with AFS.

40 All of this to say, and I say it at the end
41 of paragraph 27, that the path towards
42 reconciliation paved by the court decisions is not
43 for the weak of heart. Applying those court
44 decisions in the context of colonization in the
45 fisheries and, in particular, both the commercial
46 and recreational fisheries that have developed, is
47 an extremely difficult task for DFO managers, for

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1 First Nations' managers and, in my submission, Mr.
2 Commissioner.

3 The next practical challenge, as it relates
4 to the law, is on page 9 of my submissions and, in
5 particular, the Aboriginal perspective on the
6 content of Aboriginal title and rights to the
7 fisheries. As I've already mentioned, and as
8 you're already aware, there are numerous Supreme
9 Court of Canada decisions that speak about
10 ensuring that when applying and considering the
11 rights protected by s. 35, we be informed by the
12 Aboriginal perspectives.

13 And so I took from my clients and from the
14 work that's been done with respect to First
15 Nations' relationships to their fisheries, and
16 provided you as best I can a summary of the key
17 components of the Aboriginal perspective on the
18 content of Aboriginal title and rights, and you
19 can find that at paragraph 31.

20 I stress that it includes the responsibility
21 to protect, conserve and sustain the fishery for
22 this and future generations and with it,
23 therefore, the responsibility to manage and
24 preserve the salmon in the environment in which it
25 relies.

26 It also includes the responsibility to other
27 First Nations who access, depend upon, and are
28 similarly related to the salmon. There are many
29 stories about how when First Nations along the
30 river accessed that early steward about how many
31 days the fish have to be passing before they can
32 start accessing that fish to ensure that the
33 people up river have an opportunity to access the
34 same fish.

35 Thirdly, the right to harvest salmon for all
36 purposes within their homelands and, in
37 particular, to harvest salmon to support thriving
38 families and villages and nations. So often in
39 our perspective we compartmentalize the right to
40 fish in the way that we, as colonists, have
41 compartmentalized the right to fish, but over and
42 over again I've heard from First Nations the
43 integrated nature of their relationship to that
44 fishery and how it has always supported thriving
45 villages, families and nations.

46 Thirdly (sic), the right includes the right
47 to harvest salmon using all the traditional

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1 methods that they've known and passed down over
2 the centuries, and the methods that have evolved
3 and developed over time.

4 And, finally, the right and responsibility to
5 exercise and maintain proper relations to the
6 salmon and its ecology, including the rivers - and
7 I should have said, also, lakes there - the
8 rivers, the lakes, the forests and the marine
9 areas.

10 All those are components indicia parts of the
11 rights and Aboriginal people have traditionally
12 used, continue to use, and will continue to
13 assert, and I'm sure that they can exercise in a
14 modern context.

15 Paragraph 34, I submit that the jurisprudence
16 required for the recognition of an Aboriginal
17 right to the fishery has already been laid. By
18 relying upon both the common law as established
19 and First Nations' perspectives on Aboriginal
20 title and rights, sufficient changes could be made
21 to the management of the Fraser River sockeye
22 salmon fishery that would not only pave the way
23 for reconciliation, but also substantively
24 increase the likelihood of ensuring the
25 sustainability of those fisheries.

26 One of your challenges in this inquiry will
27 be to diligently look to find solutions that
28 balance both the rights that First Nations
29 exercise and the sustainability of that fishery.
30 And lucky, we will be coming here with
31 opportunities and suggestions and solutions for
32 you to do that.

33 Another practical, and I would say one of the
34 most difficult components of applying the law, has
35 been the constitutional priority that's been
36 afforded the Aboriginal right to fish for what we
37 call food, social and ceremonial purposes.

38 Since *Sparrow*, that right has been confirmed
39 in law, and since *Sparrow* there have been
40 differing perspectives on what that priority means
41 and whether DFO is meeting it.

42 The constitutional priority of s. 35 fishing
43 rights should not be equated to priority of
44 access. The priority of that right must be given
45 a fulsome interpretation.

46 I'm not going to read out the quote that I
47 have set out for you at page (sic) 36, I leave it

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1 for you to read, but it's clear in the context of
2 the title, questions arising that in **Delgamuukw**
3 the court adopted, from **Gladstone**, relevant
4 questions as to whether the Crown is showing
5 priority for Aboriginal fishing rights, and they
6 were speaking in a much, much broader context than
7 just priority of access.

8 So what are these practical implications?
9 Well, I say there's two: one, what does
10 conservation mean; and, second, how can First
11 Nations food, social and ceremony priorities be
12 protected in a fishery that has historically
13 denied that right and faces continued pressures
14 from other users and industries, especially users
15 like the commercial and recreational fisheries
16 that have traditionally accessed that fishery
17 prior in time.

18 Now, we're going to spend a little bit of
19 time later this week on the whole issue of "What
20 does conservation mean?" At the end of paragraph
21 38, I just want to stress that the level of risk
22 tolerance that's inherent in DFO's management
23 approach has often been unacceptable to First
24 Nations whose own laws, practices and traditions
25 require a much more precautionary approach that
26 builds, rebuilds and sustains a very complex
27 mixed-stock fishery for this and future
28 generations.

29 Now, I want to say, and I have a quote that
30 I'm going to read in paragraph 39 up on the top of
31 page 12, which is, the Crown's submission somehow
32 suggests that the leading case on priority is the
33 **Douglas** case, and I respectfully disagree. The
34 leading case on priority is **Sparrow**. It sets out
35 the principle as it relates to **Sparrow**. **Douglas**
36 applies it to a very fact-specific situation and
37 setting that arose in **Cheam**, but I think what's
38 going to become very important is a line from
39 **Sparrow**. We've seen it, and we've seen the
40 challenges associated with applying this over the
41 last few years, but it's very clear that
42 particularly during times of scarcity that
43 priority and balancing are a little bit difficult
44 to do. You can't balance priorities if there
45 aren't enough fish. And we say that if in a given
46 year -- we agree with the Court in **Sparrow** and we
47 submit this is something that DFO has an extremely

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1 difficult time implementing on the ground. If, in
2 a given year, conservation needs required a
3 reduction in the number of fish to be caught such
4 that the number equalled the number required for
5 food by the Indians, then all the fish available
6 after conservation would go to the Indians,
7 according to the constitutional nature of their
8 fishing right.

9 That is going to be something you will have
10 to consider, Commissioner Cohen, when you consider
11 the implications and the challenges associated
12 with a fishery that is at risk.

13 Now, as part of the priority and its an
14 acknowledgment and not something that I'm hiding
15 from, of course there's a test of reasonableness
16 when assessing infringements and scrutinizing
17 government actions related to that priority, but
18 it should come as no surprise to you that when a
19 test of reasonableness is used, that different
20 people are going to have different views on what's
21 reasonable.

22 And while the First Nations Coalition
23 recognizes the successful implementation of the
24 FNC priority as a challenge, we also submit that
25 neither the complicated nature of the fishery,
26 which we often hear about, nor the pressures from
27 the various interests, are sufficient excuses for
28 failing to honour the constitutionally held right
29 to priority of First Nations.

30 Now, you might wonder where I'm going with
31 all of that and what that might mean for you. In
32 paragraph 42, one of the issues that I want to
33 raise with you that I know the evidence in the
34 next while will deal with is, so how do you solve
35 that trickiness of priority and the fact that the
36 Fraser River is filled with First Nations along
37 tributaries with a lot of different streams, and
38 there has been a number of suggestions and
39 strategies that have been posed to DFO on many
40 occasions, in many ways, and in paragraph 42 I
41 quote from Parzival Copes, who has written an
42 article on Aboriginal fishing rights and salmon
43 management in British Columbia, and I set out what
44 he has summarized as what's called terminal
45 fisheries. So it's one of the ways to reduce
46 fishing effort on mixed stocks as much as possible
47 is using these terminal fisheries. And the other

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1 is to employ selective fishing techniques, such as
2 weirs and traps and fishwheels and beach and purse
3 seines, and all of the others that he lists.

4 Ironically, these are exactly how First
5 Nations have managed the fishery and were managing
6 the fishery when we arrived in this area of the
7 province.

8 The First Nations Coalition is not satisfied
9 the DFO is committed to these solutions. We say
10 there's been insufficient effort employed to date
11 to transition an unsustainable marine mixed stock
12 fishery into a more traditional and long standing
13 practice of the selective terminal fisheries.

14 And we submit that this inquiry will, amongst
15 other things, need to explore why there's such
16 resistance to that change. It will be useful for
17 all of us to know what the challenges are to
18 implementing that, and the steps that may be
19 necessary so that they can be implemented.

20 The next area that I want to speak to is the
21 meaningful participation in the management of the
22 fishery. You've heard, on many occasions already
23 today, the inherent responsibilities that First
24 Nations have to the fishery, whether it's a part
25 of title or their rights or they exercise as self-
26 government. At paragraph 47, I picked up a quote,
27 again from Parzival Copes in the same article, and
28 I thought it was useful. Actually, it's the first
29 time I've seen it so succinctly put into a
30 paragraph, on the complexities of fisheries
31 management.

32 And I say that not because it's so complex we
33 should therefore just leave it for DFO to do.
34 Quite the opposite. I say it to suggest that DFO
35 has been slow to substantively work with First
36 Nations to develop the transparent and inclusive
37 processes that are adequately resourced and
38 accountable to make their participation useful to
39 DFO, responsible to their own rights and
40 responsibilities, and effective for the management
41 of the fishery.

42 I'm also going to suggest, at paragraph 48,
43 that our own history and our own work over the
44 last 20 years also suggests that there are
45 challenges that are inherent in the number of
46 First Nations that access these runs all
47 throughout the marine and the Fraser River

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1 Watershed, many of which are organized in various
2 ways in operating with distinct political
3 authorities and mandates. Most of them have
4 inadequate resourcing in order to have and ensure
5 fulsome political representation when necessary,
6 and definitely the necessary sufficient technical
7 expertise.

8 In that regard, I support the submissions of
9 Tim Dickson earlier today about the need to have
10 technical expertise that's reliable and much more
11 than based on an annual funding.

12 Just because it's challenging doesn't make it
13 impossible. With adequate human and financial
14 resourcing dedicated to overcoming these
15 obstacles. It is possible and, I submit at
16 paragraph 49, at the top of page 15, what needs to
17 be done. We need to develop, resource, organize
18 and refine what's been called the Tier 1 process.
19 I'm not sure, Mr. Commissioner, whether you're
20 familiar with those terms yet or not, but Tier 1
21 refers to -- there's three tiers. Tier 1 -- oh,
22 you've got it, okay. Tier 1 is discussions and
23 the relationship that's necessary amongst First
24 Nations; Tier 2 is First Nations and Federal
25 Government; and Tier 3 would eventually get us to
26 talking to all of the participants in the fishery.

27 The second is to engage in a process that
28 ensures and obtains the necessary mandates from
29 First Nations. The third is the technical
30 capacity, expertise and support. And then,
31 finally, we need to encourage and work with DFO to
32 develop the Tier 2 government-to-government
33 processes that would address, amongst other
34 things, the establishment of selective and
35 terminal fisheries.

36 Now, I made a point, at paragraph 51, that I
37 just want to pick up, especially in response to
38 Mr. Lowes' comments about an integrated and
39 segregated system. I have to say that I think for
40 most First Nations, giving DFO the credit of
41 saying that the management is done in a systematic
42 way is a first step. Many people do not
43 experience it as systematic. Most people
44 experience it as quite chaotic, very reactive,
45 very unclear on what processes are being used for
46 what purposes, who's going to be engaged in those
47 discussions, how the decisions will be made as a

Submissions by Ms. Gaertner (FNC)

1 result of that engagement. It isn't clear.

2 And so when Mr. Lowes suggests that we have a
3 dual system, I think that's being kind. I think
4 it's basically a piecemeal system that's being --
5 that's not guided by defined terms of reference
6 and is not clear how it's being implemented.

7 Again, I would say that one of your tasks,
8 when looking at management and recommendations
9 around management, is to figure out, what is the
10 resistance to change that's occurred, that still
11 is alive within DFO subsequent to these cases.
12 Why can't we have effective and transparent
13 decision-making processes that engage all of those
14 that are involved and care about the management of
15 the fishery? What are the steps that are going to
16 be necessary to get there, and what's the funding
17 that will be necessary to ensure that we get
18 there?

19 My last point to make, today, results from
20 the honour of the Crown and the duty to consult
21 and accommodate. The practical implications of
22 the clear enunciation of the justification test
23 pronounced in *Sparrow*, the judicial clarifications
24 that the honour of the Crown is always at stake in
25 its dealings with First Nations, and DFO's
26 knowledge of the existence, both real and
27 potential, of s. 35 Aboriginal rights, is that,
28 unquestionably, DFO must meaningfully consult the
29 rights holders prior to making decisions that have
30 the potential to impact such rights, with the goal
31 of addressing their concerns.

32 Over the last few decades, the Federal Crown,
33 and in particular DFO, has clearly been put on
34 notice in addition to the proven Douglas Treaty
35 rights, that First Nations asserts strong *prima*
36 *facie* claims for First Nations title and rights to
37 the Fraser River Watershed and, particularly, to
38 the sockeye.

39 Given DFO's knowledge of such assertions,
40 their willingness to offer AFS Agreements, and
41 their tendency, in my submission, to admit the
42 existence of s. 35 FSC rights, First Nations
43 assert that the consultation must occur at the
44 deepest level of the *Haida* spectrum.

45 It is the FNC's submission that if DFO takes
46 a position contrary to that they should not only
47 advise First Nations, but they should provide

Submissions by Ms. Gaertner (FNC)

1 sufficient opportunity and resources in order for
2 First Nations to gather the information that's
3 necessary for the Crown to make an informed
4 decision.

5 All that being said, there are practical
6 implications associated with implementing the duty
7 to consult and accommodate, including there's
8 inadequate human and financial resourcing for both
9 DFO and First Nations to adequately engage.

10 And, you know, I'm just going to take this
11 moment. This is one of those times where maybe
12 it's too much of a jump, but I actually
13 anticipated that in the Crown's submissions, when
14 looking at the application of this law to the
15 fisheries, we might have heard the challenges we
16 hear from a lot of DFO managers, which is that
17 they don't have the human resources or the
18 financial resources to fully and properly engage
19 in these processes.

20 Secondly, the challenge is a meaningful
21 engagement during in-season decision making
22 processes. You are going to hear and you've
23 probably already surmised from the work that
24 you've done, we got a little bit of it yesterday
25 already, that while we can do a lot of predictive
26 modelling, there are too many issues that are
27 coming at these fish to be that accurate with our
28 predictive modelling. So in-season decisions are
29 some of the most time sensitive decisions, but
30 they're also the ones that are most likely to
31 result in direct infringements to s. 35 fishing
32 rights. There has not been, in our submission,
33 adequate effort by DFO to develop options for
34 meaningful in-season consultation and involvement
35 in decision making.

36 Secondly, in the area of consultation, there
37 is a lack of reliable and timely information.
38 Often, First Nations get information way too late
39 in the decision making process. There is so much
40 complexity, both at the political, economic,
41 scientific and traditional knowledge base in order
42 to inform decision makers, and if we're getting
43 decisions right before a decision -- we're getting
44 the decision is going to be made, it's way too
45 late to inform the decisions (sic).

46 While consultation may not always result in
47 providing First Nations with a veto, we have that

Submissions by Ms. Gaertner (FNC)

1 direction from the courts. We also have the
2 direction that consultation must be meaningful,
3 must be timely, and with sufficient information to
4 provide a real opportunity to engage.

5 Many First Nations have observed the DFO has
6 not only failed to satisfy this obligation, but it
7 also relies on the time sensitive nature of its
8 decisions to substantively continue operating
9 according to the status quo without truly
10 incorporating the guidance from *Haida* and *Taku* on
11 this point.

12 Finally, and it's no accident that my
13 submissions with respect to the honour of the
14 Crown in consultation come back to and result in
15 some of the same submissions I made on management.
16 The First Nations Coalition offers the observation
17 that until DFO and First Nations develop effective
18 Tier 1 and Tier 1 processes, many of the legal
19 obligations held by DFO and the responsibilities
20 held by First Nations will remain frustrated.

21 In closing, I wish to express gratitude for
22 the Commission in taking time at the early part of
23 this inquiry to do this review. I think it's
24 useful, because at least now you have a flavour of
25 the nature of the differences amongst the
26 participants around the application of this law
27 and a practical implication so that every time it
28 comes up we won't be arguing it in the same way
29 but, rather, that we'll have had an opportunity to
30 set that foundation. I hope the submissions
31 around the practical implications bring you a
32 little bit clearer into where the areas of
33 frustration are with First Nations and DFO so that
34 we can ground this inquiry towards its
35 recommendation.

36 Thank you.

37 THE COMMISSIONER: Thank you very much, Ms. Gaertner.
38 Mr. McGowan?

39 MR. MCGOWAN: Yes, Mr. Commissioner, just to provide
40 you with an update as to where we stand --

41 THE COMMISSIONER: Just before you do that, I don't
42 think we've marked, yet, this.

43 MR. MCGOWAN: You're right. Of course.

44 THE COMMISSIONER: I believe it's at Tab 8 of my
45 binder, anyway.

46 MR. MCGOWAN: Yes, Mr. Commissioner, it's at Tab 8 of
47 your binder and should be marked on its own as

Submissions by Ms. Fong (HTC)

1 being the next exhibit for identification.

2 THE REGISTRAR: H for Identification.

3

4 MARKED H FOR IDENTIFICATION: Submissions of
5 HTC by Brenda Gaertner
6

7 MR. MCGOWAN: Thank you. Now, Mr. Commissioner, just
8 to update you and the others in the room as to
9 where we stand, that was participant 16.

10 Participant 17 is the Métis Nation. I haven't
11 seen Mr. Gereluk here. Participant 18 has gone
12 already; that was Mr. Dickson.

13 Mr. Donovan, who is counsel for participant
14 19, had originally requested to make his
15 submission by way of telephone, but has
16 subsequently advised that he is not available to
17 do so today, but his written submissions are found
18 at Tab 11 of your binder, and perhaps in his
19 absence we could mark those as the next exhibit
20 for identification?

21 THE COMMISSIONER: All right.

22 THE REGISTRAR: That will be I for Identification.

23

24 MARKED I FOR IDENTIFICATION: Submissions of
25 LJHAH by Mr. Allan Donovan
26

27 MR. MCGOWAN: And Ms. Robertson, I understand, gave her
28 time over to Ms. Gaertner, which will leave Ms.

29 Fong, who I understand does have some submissions.

30 Now, I don't know, perhaps you want to take a
31 break before that? I understand Ms. Fong is going
32 to be about 15 minutes.

33 MS. FONG: Ten, 15 minutes.

34 THE COMMISSIONER: I'm content to hear Ms. Fong now,
35 Mr. McGowan, if that's okay?

36 MR. MCGOWAN: Thank you.

37 MS. FONG: Lisa Fong, counsel for Heiltsuk Tribal
38 Counsel. With me is my co-counsel, Ming Song, and
39 articulated student Benjamin Ralston.

40 Mr. Commissioner, we have provided a written
41 submission, and the basis of that written
42 submission was clarifying the law in *Sparrow* and
43 *Gladstone*. I believe Your Lordship has that
44 behind one of your tabs.

45 THE COMMISSIONER: I'm just looking for it now, Ms.

46 Fong. Just bear with me for just a moment.

47 MS. FONG: Thank you. Yes, I think it's at Tab 10 of

Submissions by Ms. Fong (HTC)

1 mine; is that correct, Mr. McGowan?

2 MR. MCGOWAN: That is correct, Mr. Commissioner.

3 THE COMMISSIONER: Thank you.

4 MS. FONG: Having found your way to Tab 10, now I have
5 to confess that I won't be speaking about that
6 written submission, but, rather, I'll be giving an
7 oral submission on the practical implications of
8 the law of Aboriginal rights and treaty rights in
9 this Commission, and in doing so I'm not going to
10 speak about the substantive Aboriginal rights law,
11 because that's been done very ably by many counsel
12 today; rather, I just want to address how
13 Aboriginal law and Aboriginal rights should be
14 addressed in this inquiry and how far this
15 Commission can go.

16 So the simple answer to the question is that
17 the recommendations of this Commission must
18 recognize and honour First Nations' Aboriginal
19 rights and treaty rights. Now, this answer's
20 complicated by Aboriginal rights exercised and
21 asserted by First Nations being broader than those
22 rights legally recognized to date. Many
23 Aboriginal rights currently before courts or
24 tribunals remain to be legally recognized, and
25 First Nations exercise many more Aboriginal rights
26 not currently part of any process of formal
27 recognition.

28 Nonetheless, Heiltsuk, for example, their
29 Aboriginal rights have never been seeded,
30 surrendered or extinguished, including their
31 inherent right to self-government or to manage
32 their fisheries.

33 In Heiltsuk's view, implicit in the success
34 of this Commission is its recognizing existing
35 Aboriginal rights and its acknowledging valid
36 claims to yet unproven Aboriginal rights.
37 Recommendations by this Commission at either
38 operational or leadership levels must recognize
39 these rights and respect these claims, otherwise
40 the mandate of the Commission in making meaningful
41 recommendations will be unduly limited, and I'll
42 talk about that a bit more.

43 In the context of the inquiry where the
44 Commission's mandate expressly includes addressing
45 DFO policy, this means the Commission is able to
46 evaluate the extent to which government practices
47 have failed to give proper effect to Aboriginal

Submissions by Ms. Fong (HTC)

1 rights in favour of other interests. This means
2 the Commission must formulate recommendations
3 about allocation which properly reflect Aboriginal
4 rights to priority.

5 Now, on a broader policy and leadership
6 level, the Commission may make recommendations
7 about stewardship, which are consistent with and
8 which recognize the benefits of co-management by
9 First Nations claiming and exercising a right and
10 a duty to steward resources within their
11 traditional territories.

12 Such recommendations would be consistent with
13 the Commission's overall aim of encouraging broad
14 cooperation among stakeholders and developing
15 recommendations about sustainability.

16 Now, the Province, in their submission, has
17 urged limits to what this Commission should find
18 and recommend. The Province says this inquiry is
19 not about Aboriginal or treaty rights or
20 Aboriginal fishing. The Commission's not
21 required, they say, to make findings of law or to
22 apply or interpret law in general or in
23 particular.

24 Heiltsuk disagrees. The Province's position
25 is too narrow. It is no answer to merely say that
26 the words "Aboriginal rights" and "treaty rights"
27 were not written into the terms of reference of
28 this Commission. The terms of reference provide
29 for recommendations to improve future
30 sustainability. These recommendations will
31 necessarily address priority and allocation. This
32 Commission simply cannot investigate and make
33 recommendations about sustainability without the
34 Commission considering and providing for the
35 priority of First Nations. The Aboriginal right
36 to fish and the priority recognized by the Supreme
37 Court of Canada is an inherent component to any
38 plan for sustainability.

39 Now, Canada's position is that it recognizes
40 the Commissioner must be cognizant of the legal
41 framework, but it says, however, that the
42 Commission is to apply the law as it currently
43 stands and not to pronounce upon or seek to direct
44 the evolution of Aboriginal rights or treaty
45 rights' framework.

46 Heiltsuk disagrees. Canada's position is too
47 limiting. The nature of the Commission, here, is

Submissions by Ms. Fong (HTC)

1 broader than what Canada implies. This Commission
2 is uniquely situated. It is specifically designed
3 to provide leadership. It is specifically
4 mandated to not only find the facts necessary to
5 draw inferences as to the cause of the decline of
6 sockeye salmon, but, most importantly, to make
7 recommendations that are future-looking and
8 provide leadership in formulating changes that
9 favour sustainability.

10 Now, in their submissions, Canada quotes from
11 Mr. Ratushny's book, and we picked up on that same
12 paragraph that Ms. Gaertner picked up on, which I
13 wish to emphasize [as read]:
14

15 But it would be a sterile exercise merely to
16 record these conclusions, since they provide
17 a unique opportunity to go one step further.
18 This is to make recommendations to avoid
19 similar problems occurring in the future.
20 The commission must be educated throughout
21 the inquiry process in order to draw lessons
22 from the events. The recommendations can
23 relate to laws, administrative processes,
24 relationships, and organizational
25 structures -
26

27 -- and this is important --
28

29 - and can inform future public and political
30 discussion and debate.
31

32 It's our submission that the Commission may
33 comment on existing law of Aboriginal rights and
34 may anticipate its development when fashioning
35 recommendations for sustainability. The fact that
36 First Nations self-government has not yet been
37 judicially determined to be an Aboriginal right
38 does not prevent this Commission from commenting
39 on that possibility and does not foreclose the
40 Commission from recommending, for example, co-
41 management of marine resources by First Nations.

42 Every First Nations here may say something
43 different about the method of stewardship, but
44 every First Nations here, we've heard, will say
45 it's traditional knowledge and its right and duty
46 of stewardship is part of the solution of
47 sustainability of sockeye salmon.

Submissions by Ms. Fong (HTC)

1 This Commission, I'm going to come back to,
2 is uniquely situated. The subject matter of its
3 inquiry and recommendations is complex and multi-
4 faceted. It includes the environment, the
5 business of aquaculture, the extensive policy and
6 practices of the Provincial and Federal Fisheries,
7 Aboriginal rights and policies, and the public
8 interest in sustainable salmon fishing.

9 The tools available to this Commission are
10 powerful. As demonstrated, the Commission
11 conducts its own research, commissions its own
12 expert reports, conducts interviews of witnesses
13 and has a right to speak to a range of persons,
14 including scientists, environmentalists, members
15 of the public, First Nations and governments, and
16 will hold extensive evidential hearings over the
17 next few months.

18 As a result, the Commission will be uniquely
19 situated to make comprehensive findings of fact
20 and provide leadership to fashioning forward-
21 looking recommendations that address systemic
22 problems.

23 Heiltsuk submit the Commission's
24 recommendations should address both operational
25 and policy issues. They should affirm and be
26 consistent with Aboriginal rights and they should
27 encourage broader cooperation by governments with
28 First Nations, consistent with their Aboriginal
29 rights, consistent with their rights of self-
30 government, and consistent with their rights to
31 manage fisheries within their traditional
32 territorial waters.

33 Those are our submissions, and we'll provide
34 a copy of the oral submission in writing to Mr.
35 McGowan.

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

37 MS. FONG: Thank you.

38 MR. MCGOWAN: And if we could perhaps mark the written
39 submission that is -- has been provided, I believe
40 it was Tab 10, Mr. Commissioner, if that could be
41 the next --

42 THE REGISTRAR: For Identification, J.

43
44 MARKED J FOR IDENTIFICATION: Submissions of
45 HTC by Ms. Lisa Fong

46
47 MR. MCGOWAN: Thank you. And I'm just noting, Mr.

Reply by Mr. East (Government of Canada)

1 Commissioner, there's one additional written
2 submission that has been provided that was not
3 spoken to today. It's provided on behalf of the
4 Southern Area E Gillnetters Association and B.C.
5 Fisheries Survival Coalition. Mr. Butcher was not
6 here today, but did provide that submission, and
7 perhaps it should be marked as the next exhibit.
8 It's at Tab 5 of your binder.

9 THE REGISTRAR: For identification, K.

10
11 MARKED K FOR IDENTIFICATION: Submissions of
12 SGAHC by Mr. David Butcher
13

14 MR. MCGOWAN: Mr. Commissioner, that brings us to the
15 end of the principal submissions. We had
16 indicated an opportunity for a five-minute reply
17 by any participant who felt the need to do so.
18 Perhaps we could take a brief break and I can
19 canvass the room.

20 THE COMMISSIONER: All right. I thought we could maybe
21 just do that before we break so we have some sense
22 of --

23 MR. MCGOWAN: Certainly, Mr. Commissioner.

24 THE COMMISSIONER: Maybe that would be convenient. If
25 any counsel can indicate to Mr. McGowan if you
26 wish to make a reply submission, could you do that
27 now, please.

28 MR. MCGOWAN: Mr. Lowes and Mr. East, for the
29 Government of Canada, have both indicated they
30 will require a few minutes. Mr. Tyzuk has
31 indicated, for the Province, maybe a couple of
32 minutes, Mr. Commissioner. Is there anybody else?

33 THE COMMISSIONER: If counsel don't mind, we could take
34 a short break and then come back and wind up with
35 those few submissions.

36 THE REGISTRAR: We will now recess for 10 minutes.
37

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

41 THE REGISTRAR: The hearing is now resumed.

42 MR. MCGOWAN: Mr. Commissioner, I believe we just have
43 a couple of reply submissions, starting with Mr.
44 East on behalf of Canada.

45 MR. EAST: Mr. Commissioner, I just have two points;
46 one specific and I think one more general, in
47 rebuttal.

Reply by Mr. East (Government of Canada)

1 Firstly, and this is in response to something
2 that was raised in the submissions of the Sto:lo
3 Tribal Council - I believe that's Exhibit G - and
4 there was a reference, a short reference in the
5 oral submissions, but I think a much more detailed
6 reference in the written submissions, relating to
7 the United Nations declaration for the rights of
8 indigenous people. And I just want to leave a
9 short note as to what the legal status, or
10 Canada's position, at least, on the legal status
11 of that document in domestic law.

12 As a United Nations general assembly
13 resolution, and what we call the UNDRIP, is a non
14 legally binding instrument. It was adopted as an
15 aspirational document. It does not reflect
16 customary international law and there's no legal
17 effect in Canada.

18 Consequently, the UNDRIP should not -- should
19 be given no weight as an interpretive source in
20 domestic law. However, and I think this is
21 important to point out, in the Speech from the
22 Throne on March 3rd, 2010, the Government of
23 Canada committed to take steps to endorse this
24 aspirational document in a manner fully consistent
25 with Canada's constitution and laws. Canada,
26 however, has not yet endorsed the declaration.

27 Moving, now, to a more general point, some of
28 the submissions today, I think, characterized
29 Canada's submissions as yet another in a long list
30 of litanies of denial, and I think the term was
31 "*de minimis* procedures". And also, there was a
32 reference to Canada's submissions not addressing
33 the practical implications of the legal framework.

34 Now, I think it would be foolish to deny that
35 there is a theme in the jurisprudence, wherein the
36 courts have prodded grudging Federal and
37 Provincial Governments to give effect to the
38 substantive promise of s. 35 rights. But to say
39 that Canada - and I think, here, I can speak for
40 B.C., although Mr. Tyzuk will correct me if I
41 overstep my bounds here - but to say that Canada
42 remains resolutely rejectionist in its approach to
43 Aboriginal rights, including title, is incorrect
44 and we submit simplistic.

45 Today, we have heard discussion of a number
46 of things, including the Aboriginal fishing
47 strategy as a response to the *Sparrow* decision,

Reply by Mr. East (Government of Canada)
Reply by Mr. Tyzuk (Province of British Columbia)
Reply by Mr. Lowes (WFFDF)

1 the B.C. treaty process and the negotiation of
2 cooperative management arrangements and self-
3 government. The pilot sales program, which
4 provides opportunities for First Nations to fish
5 for commercial purposes, which was negotiated and
6 which was provided in advance of any court
7 declaration of such commercial fishing rights.

8 And you will hear, throughout the course of
9 this, and you have heard and your staff have heard
10 and you will hear throughout the course of this
11 inquiry, about the various consultation
12 initiatives of government programs and processes
13 for Aboriginal people and for fisheries,
14 generally.

15 So I just want to leave you with the point
16 that if you have not heard from me, Mr.
17 Commissioner, you will hear, throughout the course
18 of this inquiry, from DFO staff and from many
19 others, all about the practical implications and
20 challenges facing DFO staff in reconciling s. 35
21 Aboriginal and treaty rights with Canada's
22 obligation to manage the fishery for all
23 Canadians.

24 And I think I'll just leave it there, thank
25 you.

26 THE COMMISSIONER: Thank you very much.

27 MR. TYZUK: Mr. Commissioner, I wasn't going to say
28 anything, but British Columbia has undertaken many
29 different initiatives from the new relationships
30 to interim agreements to the various treaty
31 processes and other things, so clearly it takes
32 the direction of the courts seriously.

33 That's all I have to say. Thank you.

34 THE COMMISSIONER: Thank you.

35 MR. LOWES: J.K. Lowes. Mr. Commissioner, I know it's
36 late and I have three brief points.

37 Notwithstanding that it's late, two of them are
38 very technical, and the third is more general.

39 Dealing with the technical points, you've
40 heard a number of submissions dealing with what
41 could be called a governance dimension to
42 Aboriginal fishing rights, and the suggestion that
43 the law is -- there's no law on the point, I would
44 point out, and I've referred to this in paragraph
45 43 of my submissions, Mr. Commissioner, that the
46 **Nikal** case in the Court of Appeal was argued on
47 the basis of a self-governance dimension to the

Reply by Mr. Lowes (WFFDF)

Reply by Mr. Janes (WCCSFN)

1 Aboriginal fishing right, and I've included in my
2 list of authorities, or my authorities brief, the
3 passages from the Court of appeal.

4 I might say that the case then went on to the
5 Supreme Court of Canada and was argued by **Nikal** as
6 a self-government case. Now, if you read the
7 Supreme Court of Canada decision, you'll see that
8 the decision was virtually devoid of any reference
9 to self-governance, and what I say in my
10 submission is that implicit, or at least that
11 silence in the face of the way in which the case
12 was argued in the courts below, is, in itself,
13 significant and that what, indeed, the Supreme
14 Court of Canada did implicitly in **Nikal**, was what
15 they did explicitly in **Pamajewon**, and that is, in
16 effect, reject a self-government claim in favour
17 of an analysis based on **Van der Peet**.

18 The second technical point I'd like to take
19 up is with respect to Mr. Janes' submission on the
20 public right and why it either was not received or
21 was modified in British Columbia. That submission
22 clearly overlooks the **Railway Belt** case, a
23 decision of the judicial committee in 1914, which
24 explicitly held that the public right existed in
25 British Columbia.

26 But on a more technical point, the **Yarmirr**
27 case, which I have referred to, was not based on
28 anything to do with the reception of the common
29 law. The concept in the **Yarmirr** case was that the
30 public rights of navigation and fishery were, in
31 effect, a burden on the prerogative power of the
32 Crown and, of course, the assertion of
33 sovereignty, colonial sovereignty, is an exercise
34 of the prerogative power. In other words, the
35 Crown, in asserting sovereignty over Australia,
36 could not recognize Aboriginal title that was
37 inconsistent with the rights which had been
38 guaranteed in **Magna Carta**, but the situation is
39 identical in British Columbia, in my submission.

40 And on the more general point, you've heard a
41 lot about conservation consciousness, stewardship
42 and traditional knowledge, and I would simply make
43 the point, which should go without saying, that
44 the conservation ethic is not confined to the
45 Aboriginal community.

46 MR. JANES: Robert Janes, for the Western Central Coast
47 Salish group. Just on the public right of fishery

Reply by Mr. Janes (WCCSFN)

1 point, I don't agree with Mr. Lowes' point about
2 reception, and I'd just highlight two issues here.
3 Number one is, of course, the New Zealand courts
4 have taken a very different approach to that, and
5 that's highlighted in our argument, essentially
6 accepting the idea that the reception point that
7 has the effect of not completely allowing the
8 public right to trump the other rights.

9 The second point that goes with that, and I
10 guess I'll just say I'll play a technical response
11 to a technical response which, of course, is that
12 the **Magna Carta** right, itself, was qualified by
13 the fact that it did not displace private rights
14 of fishing, which were longstanding in the English
15 phrase, predating the reign of Henry II. The
16 courts in New Zealand have recognized that the
17 Aboriginal fisheries have that same quality of
18 being ancient, longstanding rights, which would
19 not be taken away by **Magna Carta** or its adoption
20 into Canada which, frankly, only makes sense in
21 the context of the modern Aboriginal law policy in
22 Canada that we are trying to recognize the fact
23 that the Aboriginal people were here first.

24 THE COMMISSIONER: Thank you, Mr. Janes.

25 MR. MCGOWAN: Mr. Commissioner, I don't see anybody
26 else moving to the microphone, and I think that
27 means we're at the end of a long day. We've moved
28 through this material a little more quickly than
29 we anticipated, which is the good news. The,
30 perhaps, not so good news, from moving this matter
31 forward, is that we have arranged, as the next
32 topic, a panel of witnesses on matters related to
33 conservation. Those panellists are scheduled for
34 Thursday, and I understand are not available
35 tomorrow. Where that leaves us is we have a down
36 day tomorrow, recommencing on Thursday with the
37 topic that was scheduled for that day and which we
38 hope will conclude on Thursday.

39 THE COMMISSIONER: Thank you, Mr. McGowan.

40 I want to, before adjourning, thank each and
41 every counsel who spoke here today, and I also
42 want to thank all of those who were not here today
43 but filed their submissions in response to the
44 Commission's paper. I found your submissions very
45 helpful and informative and an important
46 ingredient as we move forward in considering all
47 of the issues that this Commission is mandated to

Submissions by Mr. Dickson (STCCIB)

1 investigate. So I'm grateful to all of you.

2 As Mr. McGowan said, we are very hopeful not
3 to have many down days, but in a long process like
4 this, and in the interests of scheduling
5 witnesses, there may be, from time to time, such
6 down days. We have them here, and we have them in
7 trials, of course, so as lawyers and as judges
8 we're not -- I'm used to that, but we try to avoid
9 it as best we can.

10 So we're now, as I understand it, adjourned
11 until 10:00 a.m. on Thursday morning. Thank you
12 all very much.

13 THE REGISTRAR: The hearing is now adjourned until
14 10:00 a.m. Thursday morning.

15
16 (PROCEEDINGS ADJOURNED AT 3:40 P.M. UNTIL
17 THURSDAY, OCTOBER 28, 2010, AT 9:30 A.M.)
18
19
20

21 I HEREBY CERTIFY the foregoing to be a
22 true and accurate transcript of the
23 evidence recorded on a sound recording
24 apparatus, transcribed to the best of my
25 skill and ability, and in accordance
26 with applicable standards.
27
28
29

30 _____
31 Karen Acaster

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

41 _____
42 Diane Rochfort
43
44
45
46
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Proceedings

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

Karen Hefferland

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