

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

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701 West Georgia Street
Vancouver, B.C.

Thursday, June 30, 2011

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701, rue West Georgia
Vancouver (C.-B.)

le jeudi 30 juin 2011

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Vancouver, B.C./Vancouver
(C.-B.)
June 28, 2011/le 28 juin 2011

1
2
3
4
5 THE REGISTRAR: The hearing is now resumed.

6 MS. TESSARO: Good morning, Mr. Commissioner. It's
7 Lara Tessaro, for the record, Commission counsel.
8 Before we return to aboriginal fisheries, we have
9 a brief housekeeping matter that we need to
10 address over the next few minutes.

11 As you'll recall, Mr. Commissioner, on June
12 3rd, the Wild Salmon Policy panel on Strategy 4
13 concluded, but due to time constraints, neither
14 counsel for Canada nor for the Commission were
15 able to conduct their re-examinations, so it was
16 therefore agreed that Canada and Commission
17 counsel could conduct those re-examinations in
18 writing.

19 Canada did conduct written re-examination of
20 their witnesses on that panel, namely Paul Ryall
21 and Mark Saunders. Likewise Commission counsel
22 conducted written re-examinations of all four
23 witnesses on that panel, namely of Jeffery Young,
24 Rob Morley, Paul Ryall and Mr. Saunders. So
25 that's six written re-examinations in total, and
26 this morning I would like to tender the questions
27 asked and answered in these six re-examinations as
28 six separate exhibits. I should note in addition
29 that some of these re-examinations have sub-
30 exhibits which I'll explain as we proceed.

31 The first exhibit to be marked is a letter
32 containing Canada's re-examination of Paul Ryall
33 with Mr. Ryall's answers.

34 THE REGISTRAR: That'll be marked as Exhibit 1214.

35
36 EXHIBIT 1214: Canada's Written Re-
37 Examination of Paul Ryall re WSP 2 Integrated
38 Planning, June 9, 2011
39

40 MS. TESSARO: And as a sub-exhibit to this, I would
41 also like to mark a 2008 publication by Jonathan
42 Deroba and James R. Bence entitled, "A Review of
43 Harvest Policies." Mr. Ryall referenced this
44 publication in his answer and Canada provided it
45 for the purpose of marking it.

46 THE REGISTRAR: That'll be marked as Exhibit number
47 1214A.

1 EXHIBIT 1214A: Deroba and Bence, a Review of
2 Harvest Policies 2008
3

4 MS. TESSARO: I should also note simply for the record
5 that Mr. Ryall's answer referenced the 2010
6 escapement strategy memo and provided a hyperlink
7 to that document. That document is already on the
8 record before you as Exhibit 407.

9 The second exhibit to be marked is Canada's
10 re-examination of Mark Saunders.

11 THE REGISTRAR: That will be marked as 1215.
12

13 EXHIBIT 1215: Canada's Written Re-
14 Examination of Mark Saunders re WSP 2
15 Integrated Planning, June 13, 2011
16

17 MS. TESSARO: Third is Commission counsel's re-
18 examination of Rob Morley.

19 THE REGISTRAR: Exhibit 1216.
20

21 EXHIBIT 1216: Commission Counsel's Written
22 Re-Examination of Rob Morley re WSP 2
23 Integrated Planning, June 15, 2011
24

25 MS. TESSARO: Next is Commission counsel's re-
26 examination of Jeffery Young.

27 THE REGISTRAR: Exhibit 1217.
28

29 EXHIBIT 1217: Commission Counsel's Written
30 Re-Examination of Jeffery Young re WSP 2
31 Integrated Planning, June 15, 2011
32

33 MS. TESSARO: And next is Commission counsel's re-
34 examination of Paul Ryall.

35 THE REGISTRAR: Exhibit 1218.
36

37 EXHIBIT 1218: Commission Counsel's Written
38 Re-Examination of Paul Ryall re WSP 2
39 Integrated Planning, June 16, 2011
40

41 MS. TESSARO: And again here there's a sub-exhibit to
42 be marked, and I should explain this. The sub-
43 exhibit is Mr. Ryall's revised answer to question
44 5. Initially, in answering question 5, Mr. Ryall
45 did not have access to Exhibit 920 which was
46 referenced in the question. Therefore, Mr. Ryall
47 provided this revised answer upon receiving access

1 to Exhibit 920. So if this question on the screen
2 here could be marked as the sub-exhibit.

3 THE REGISTRAR: It'll be marked as 1218A.

4 MS. TESSARO: Thank you.

5

6 EXHIBIT 1218A: Revised Answer to Question 5
7 of Commission Counsel's Re-Examination of
8 Paul Ryall re WSP (Part 2), June 20, 2011

9

10 MS. TESSARO: And then finally, the next exhibit is
11 Commission counsel's written re-examination of
12 Mark Saunders.

13 THE REGISTRAR: Exhibit 1219.

14

15 EXHIBIT 1219: Commission Counsel's Written
16 Re-Examination of Mark Saunders re WSP 2
17 Integrated Planning, June 16, 2011

18

19 MS. TESSARO: Here there are three sub-exhibits to be
20 marked which I should take some care to explain.
21 The first and second sub-exhibit to Mr. Saunders'
22 re-examination are two draft tables that he
23 provided in response to question 4, sub-question
24 (b). He was asked to provide the current form of
25 the Grant Holt et al publication, and we're aware
26 here that the working draft of that paper is
27 currently Exhibit 184.

28

29 In responding to that request, Mr. Saunders
30 provided Exhibit 184 plus two revised tables.
31 Those two revised tables we should mark as the
32 first two sub-exhibits to Exhibit 1219.

32

33 THE REGISTRAR: The first one will be marked as 1219A.
34 The second will be marked as 1219B.

34

35 EXHIBIT 1219A: WSP Abundance Metrics, Draft
36 June 2011 [Chart]

37

38 EXHIBIT 1219B: WSP Trends Metrics, Draft
39 June 2011 [Chart]

40

41 MS. TESSARO: And then finally - and I thank you all
42 for your patience with this exercise - is the
43 third sub-exhibit to Mr. Saunders' re-examination
44 by Commission counsel. Here, as with Mr. Ryall,
45 Mr. Saunders did not have access to the referenced
46 exhibit in answering question 8, sub-question (d).
47 Therefore, Mr. Saunders gave a revised answer to

1 question 8(d) with proper access to what is
2 Exhibit 946, and his revised answer is on the
3 screen now and it should wholly supplant his
4 initial answer. If that could be marked as the
5 final sub-exhibit to his re-examination.
6 THE REGISTRAR: Exhibit 1219C.

7
8 EXHIBIT 1219C: Revised Answer to Question 8D
9 of Commission Counsel's Re-Examination of
10 Mark Saunders re WSP (Part 2)

11
12 MS. TESSARO: Thanks to everybody for indulging that
13 exercise. Thank you, Mr. Commissioner.

14 THE COMMISSIONER: Thank you, Ms. Tessaro.

15
16 BARRY HUBER, recalled.

17
18 NEIL TODD, recalled.

19
20 GRAND CHIEF TERRY, recalled.

21
22 RUSS JONES, recalled.

23
24
25 MR. EAST: Mr. Commissioner, Mark East for the
26 Government of Canada. I'm resuming my cross-
27 examination. I have a maximum of 35 minutes. I
28 hope to get done before then, so I'll be done no
29 later than 10:45 this morning.

30
31 CROSS-EXAMINATION BY MR. EAST, continuing:

32
33 Q Continuing on with some questions, Mr. Huber,
34 about the forum and roadmap process, and at the
35 end of the last day we had just started to talk
36 again about the origins of that process.

37 MR. EAST: I'd like to start today with Canada's Tab
38 30, if I may.

39 Q Now, this document, the header talks about the
40 Fraser River salmon roadmap background document.
41 Title is "Overview of the Fraser River Salmon
42 Roadmap Initiative".

43 Mr. Huber, do you recognize this document?

44 MR. HUBER: Yes.

45 Q It's not dated. Do you have a sense of when this
46 was done, and when this was -- and who prepared
47 it?

1 MR. HUBER: Well, I probably prepared it. I prepared a
2 lot of documents related to that.

3 Q Okay.

4 MR. HUBER: That would have been more -- the forum
5 processes started really in 2008, so that would
6 lead to probably 2009, later in the year.

7 MR. EAST: Okay. Perhaps I can mark this document as
8 an exhibit before I go further.

9 THE REGISTRAR: It'll be marked as 1220.

10

11 EXHIBIT 1220: Overview of the Fraser River
12 Salmon Roadmap Initiative, undated

13

14 THE COMMISSIONER: Twenty-one, is that, Mr. Registrar,
15 or 20?

16 THE REGISTRAR: I'm sorry?

17 THE COMMISSIONER: Would that be 21 or 20?

18 THE REGISTRAR: Twenty.

19 THE COMMISSIONER: Thank you.

20 MR. EAST:

21 Q Looking first of all at the first two bullets
22 under "Purpose", I'd just like to read this:

23

24 The Fraser River Salmon Roadmap ("Roadmap")
25 Initiative is aimed at building a co-
26 management structure, process and agreement
27 between Fisheries and Oceans Canada (DFO) and
28 First Nations from the Fraser River
29 Watershed, Vancouver Island and Marine
30 Approach areas, related to Fraser salmon.

31

32 So is this an accurate description of these two
33 bullets of what the purpose, in your view, is of
34 the roadmap process?

35 MR. HUBER: Yes.

36 Q Okay. Perhaps I -- one of the things I wanted to
37 do, we've been talking about the forum and roadmap
38 together and I just want to get some perhaps
39 clarity on the record, the differences, as you see
40 them, between the forum on one hand, and the
41 roadmap on the other.

42

43 So perhaps over on page 2 we could go next.
44 In the first bullet, the first sentence talks
45 about the origins of the forum and you discussed
46 that the other day. I want to go to the next
47 line:

47

1 Since that time, [2008] the Forum has evolved
2 into a Tier 1 and Tier 2 process for First
3 Nations to come together and with DFO to
4 review technical information, discuss
5 management issues and approaches related to
6 Fraser salmon, and ultimately inform the
7 development of local First Nations harvest
8 plans and the Departments Integrated
9 Fisheries Management Plan.

10
11 Would you agree that's a description of what the
12 forum is doing?

13 MR. HUBER: Yes.

14 Q So getting from this, it appears that it is a
15 technical and advisory body for DFO and the First
16 Nations and perhaps the decisions with respect to
17 allocations and other issues are made elsewhere?

18 MR. HUBER: Well, their recommendations are made to the
19 Department from participants on management
20 actions. The way the consultation process works
21 now, still, after receiving those recommendations,
22 the Department makes decisions.

23 Q Okay. And from a First Nations perspective, I
24 understand this is not intended to be a decision-
25 making body?

26 MR. HUBER: Not at this time, but in the future with
27 the right political engagement, it could be.

28 Q Okay. I just want to go to the next bullet.
29 Distinguishing, I guess, the roadmap initiative,
30 it says here:

31
32 While the Forum has provided a good venue for
33 Tier 1 and 2 discussions regarding FSC
34 fisheries, it [was] is widely recognized that
35 a more formal and comprehensive co-management
36 agreement would benefit both DFO and First
37 Nations.

38
39 And I guess that's what we've been talking about.
40 I'd like to go down to the last line.

41
42 There was general agreement by participants
43 to continue the Roadmap Initiative as a
44 separate process aimed at the establishment
45 of a more formal, longer-term arrangement for
46 management of Fraser salmon.
47

1 So is that what you're talking about, that this
2 could become at some point a more permanent
3 arrangement?

4 MR. HUBER: That's correct, and it would be more
5 comprehensive, broad-based. It would include like
6 other issues that First Nations are interested in
7 like stewardship.

8 Q And would the idea there be that this more
9 permanent arrangement would be more of a decision-
10 making, I guess, a politically-based body?

11 MR. HUBER: Not in itself, but it would, in the
12 process, in the outline of the roadmap, it would
13 show where the decisions are made.

14 Q Okay.

15 MR. HUBER: Roles, responsibilities, accountabilities.
16 Everything from -- it would look at linkages to
17 the First Nations Fisheries Council right down to
18 the First Nation or individual band level.

19 Q And I'd like to return to that in a moment. I
20 just want to finish with this document and then
21 we'll get back and follow on that theme.

22 Perhaps we can go back to page 1. Under
23 "Introduction", the third bullet under
24 "Introduction". It says:

25
26 To date, the Roadmap initiative has had
27 strong participation from First Nations
28 technical and non-technical advisors, with
29 some limited participation of political
30 leaders. Both DFO and First Nations have
31 indicated that greater engagement on the part
32 of First Nations political leaders will be
33 required in order to establish a framework
34 for developing a co-management process and
35 structure, as well as (ultimately)
36 negotiating and endorsing an agreement.

37
38 Do you agree that this is one of the challenges
39 and one of the -- I guess one of the challenges
40 facing the roadmap process is getting greater
41 engagement from First Nations' political leaders.

42 MR. HUBER: It is a challenge. They have many
43 responsibilities, so I can appreciate the
44 situation.

45 Q Yeah. I didn't mean that necessarily as a
46 criticism, but just as would you agree that it
47 would be essential to have that political

1 engagement for this to go forward?

2 MR. HUBER: It is, and that's envisioned through the
3 Tier 1 process.

4 Q And, to be fair, it's also something that could be
5 said of the federal government as well, the need
6 to --

7 MR. HUBER: Yes.

8 Q -- engage with mandates. Okay. Maybe we can go
9 over to page 2, please.

10 MR. HUBER: Just to correct, now that we've gone
11 through it a bit more, Corey Jackson and I would
12 have been the primary developers of this document.

13 Q And I just want to go over to where it says who
14 was involved in the roadmap initiative. It talks
15 about who's coordinating the roadmap initiative, a
16 body called the:

17
18 Fraser Salmon Roadmap Planning Group (FSRPG),
19 which consists of appointed members (and
20 alternates) from the following organizations:
21 Fraser River Aboriginal Fisheries Secretariat
22 (FRAFS), Island Marine and Aquatic Working
23 Group (IMAWG) First Nations Fisheries Council
24 (FNFC), and Fisheries and Oceans Canada
25 (DFO).
26

27 One group that's not on there, and this is maybe a
28 question for Chief Terry, is I don't see the
29 Intertribal Treaty Organization listed. Is there
30 a reason for that? Are you involved in the forum
31 and roadmap process?

32 GRAND CHIEF TERRY: I was involved in the initial
33 stages of discussion regarding the inadequacies of
34 sharing of a diminished resource which really
35 prompted the initiation of this body. But this
36 has evolved to a different stage now, and it's not
37 really -- the ITO or the Intertribal Treaty
38 Organization is quite a different approach to how
39 this management has to be approached.

40 Q So the Intertribal Treaty Organization, would it
41 be involved further down the road if and when a
42 more comprehensive formal co-management process is
43 developed as a result of this roadmap process?

44 GRAND CHIEF TERRY: Well, like I indicated the other
45 day, I think there needs to be an understanding
46 reached between the Government of Canada and our
47 respective peoples or nations to make an

1 arrangement on how we shall -- a relationship that
2 we can live with regarding management of the
3 fisheries.

4 MR. EAST: Okay. I'd like to follow up on that, and
5 I'd like to go to Canada's Tab 10 and I apologize
6 Mr. Lunn, about -- I know it's an exhibit already.
7 This is the Three-Year Strategic Approach.
8 I'm sorry, Mr. Jones -- Chief Jones, I'm
9 sorry I missed that.

10 CHIEF JONES: I'd just like to add, since we're
11 discussing kind of the participation of various
12 organizations. It does mention the First Nation
13 Fishery Council as being involved, and that mainly
14 has been as an observer in the process, although
15 some of the members of the First Nations Fishery
16 Council such as Ken Malloway are involved in the
17 watershed. So I think there is kind of
18 involvement from political leaders who have
19 connections, I'd say, to the Fishery Council or
20 possibly other organizations.

21 So I just wanted to note that, that even
22 though the organizations might be named here,
23 there are leaders from -- who are involved in
24 these processes that are also engaged.

25 MR. EAST: Okay, thank you. Actually, it's Exhibit
26 290, Mr. Lunn, and on page 3.

27 Q And under number 2, "Further Collaboration", third
28 sub-bullet. I just want to know -- this document
29 is dated September 27th, 2009. Maybe just to set
30 the context, go to the previous page at the
31 bottom. This was supposed to be a list of the
32 year one activities and recognizing, I think the
33 evidence has been, that some of these dates have
34 slipped.

35 Go onto the next page, then. So this is year
36 one activities to happen in 2009, 2010. I just
37 want to know if this took place. It's a meeting
38 under the third sub-bullet under number 2.

39
40 A meeting with the Inter-Tribal Treaty
41 Organization and First Nations Fisheries
42 Council representatives to clarify the areas
43 of interest in management of Fraser salmon
44 stocks, as well as associated planning
45 processes and representation...

46
47 I'm just curious if that meeting actually took

1 place and if any progress has been made toward
2 that end?

3 GRAND CHIEF TERRY: I believe that there was a meeting
4 that transpired, but the Intertribal Treaty
5 Organization was not a part of that, or there was
6 an assessment of some kind of relationship-
7 building exercise, but we were not part of it.

8 Q Chief Jones?

9 CHIEF JONES: Could you repeat the question?

10 Q Oh, sorry, I was just wanting to know if you had
11 any knowledge about whether this meeting took
12 place as scheduled in this document between the
13 First Nations Fishery Council and the Intertribal
14 Treaty Organization.

15 CHIEF JONES: I'm looking at where --

16 Q Oh, sorry, this is on --

17 CHIEF JONES: -- it mentions First Nations Fishery
18 Council.

19 Q -- page 3, number 2, third bullet. And it says:

20
21 A meeting with the Inter-Tribal Treaty
22 Organization and First Nations Fisheries
23 Council representatives...

24
25 Is planned or would take place. This is
26 prospective at the time, and I just wanted to know
27 if that had taken place and if there had been any
28 resolution.

29 CHIEF JONES: I don't believe that that meeting took
30 place either.

31 Q Okay. I'll leave that. I just want to return and
32 step back a bit and ask some more questions of Mr.
33 Huber about the forum and roadmap generally.

34 Mr. Huber, do you envision that the forum
35 and roadmap processes, however they turn out, will
36 be permanent as they're set up now, or do you
37 suspect that they'll lead to -- and I think you
38 maybe already answered this -- or they'll lead to
39 something different, something more permanent.
40 Are these transitional or are they expected to be
41 permanent?

42 MR. HUBER: They're transitional, although the forum,
43 because it's worked well, will be, I think -- it's
44 an annual planning process, so it will be
45 established. Maybe it'll be called something
46 different.

47 But once an agreement -- I expect to come out

1 of the roadmap process an agreement with the First
2 Nations in the Fraser and marine approach areas on
3 how we'll engage, how we'll work together and the
4 various scope of activities that'll include. And
5 I expect the forum to be a part of - as a result
6 of the agreement - an ongoing occurrence.

7 Q And following on that, do you expect that if, as
8 something that comes out of this process is a
9 province-wide co-management type process, do you
10 expect that it will replace or substitute for the
11 necessity currently for Canada to consult directly
12 with First Nations at a local level?

13 MR. HUBER: No, there will still be some requirement at
14 a local level. I expect, as in most agreements,
15 that not everybody will participate. So those
16 that participate will describe in the agreement
17 how the engagement will occur. And maybe even in
18 that description there may be local engagement as
19 well.

20 We will be looking, the Department, through
21 its AAROM, its programs, to build in efficiencies
22 in our communication. So as we spoke the other
23 day about a tribal representation as opposed to
24 First Nations and the decision-making authority,
25 that's an advantage that I would see and I think
26 the Department would see in this process in the
27 final agreement to where we can get economies of
28 scale (sic).

29 Q There was an interesting document that Ms.
30 Gaertner put up the other day. I think it was
31 PNCIMA and it was a model where First Nations, at
32 an individual level, fed into maybe a tribal or
33 regional aggregated level and then fed into a more
34 province-wide or watershed-wide level and then fed
35 into ultimately a Tier 3 process. Is that one
36 model that you have thought about or envisioned --

37 MR. HUBER: Yes.

38 Q -- as the ultimate outcome? Maybe sticking with
39 that model, what elements -- assuming that such a
40 model can be put in place, what elements of co-
41 management between -- oh, I'm sorry, Chief Jones.

42 CHIEF JONES: I just wanted to add, since we're getting
43 into kind of different models for co-management,
44 some work that the First Nations Fishery Council
45 has done is do a survey of First-Nation
46 organizations that are involved in various
47 activities in the watershed. It is kind of

1 looking -- I think any kind of model that we look
2 at is going to have to look -- I mean, we'd be
3 looking for some efficiencies in kind of how we
4 operate, but in some ways, it's going to be kind
5 of a different organization than the ones that are
6 there now, or there'll be some changes, I'd say.

7 Q Okay. And I guess the idea, from what I'm
8 gathering, is that at the end of this process
9 there will be a model that will define how the co-
10 management would take place at the different
11 levels of engagement. So, for example, what's
12 going to be decided at a local level versus what's
13 going to be decided at an aggregated regional
14 level versus what's decided at a province-wide
15 level. Is that the idea?

16 MR. HUBER: That will be part of it. I mean, there's a
17 whole communications tech support. We'll build
18 the linkages including with the regional First
19 Nation Fisheries Council. We're trying to build
20 this from the bottom up. We would like the ITO to
21 participate and be on our planning group. The
22 invitation has been there. Because we want all
23 those interests that we would engage with to help
24 build this.

25 Q Yes, Chief Terry?

26 GRAND CHIEF TERRY: I think we need to keep in mind the
27 kind of mandate that we have, and under the
28 structure that's been established with the
29 Intertribal Treaty Organization, it is a mandated
30 process, that is, that those folks involved are
31 elected people and they are given a particular
32 mandate to pursue. So therefore I think that that
33 needs to be kept in mind in establishing various
34 processes.

35 Q Okay. I'd like to switch focus a little bit then
36 at this point, and I just -- first of all, I want
37 to talk and maybe ask a question of Chief Jones
38 about the Gwaii Haanas agreement. I raised this
39 with Guujaaw when he was here in December and
40 talked a little about the same subject matter, so
41 I was pleased to see it came up the other day.

42 One thing about the Gwaii Haanas agreement,
43 as I understand it, is that it's an innovative
44 agreement because the parties to it, the Council
45 of the Haida Nation and the federal government,
46 and I guess the provincial government more
47 recently, have agreed to set aside their

1 differences with respect to issues of jurisdiction
2 and focus on a consensus model for co-management
3 of the Gwaii Haanas Park. Is my understanding
4 correct on how that's essentially structure?

5 CHIEF JONES: That's pretty close, although it's an
6 agreement with the federal government and the
7 Haida, and on the federal side, it's Parks Canada,
8 representative of Environment Canada and
9 Department of Fisheries and Oceans. The province
10 gave up their interest prior to kind of the
11 establishment of the area of the **National Parks**
12 **Act** and the **National Marine Conservation Areas**
13 **Act**.

14 Q Yeah, and I think we saw there was a separate
15 agreement that had been entered into with British
16 Columbia.

17 Would you agree that one of the reasons that
18 this Gwaii Haanas agreement has worked well is
19 because the Haida, the Council of the Haida Nation
20 are united internally in providing a mandate to
21 its representatives on that Park Board.

22 CHIEF JONES: I'd agree that has been, I guess, a
23 significant factor. We have a governance
24 framework that has been in place for a number of
25 years. It's involved a Haida constitution which
26 has been agreed to by the citizens of the Haida
27 Nation, and it also mandates kind of our -- we
28 have an elected council and a president and vice-
29 president who represent us. So it provides
30 something that the representatives on the
31 Archipelago Management Board -- there's currently
32 three Haida and three federal representatives.
33 The Haida representatives can bring things back
34 for decision within that Haida Nation process.

35 I'd say that in the Fraser, there's potential
36 also to kind of develop that governance framework
37 and I think Chief Saul Terry was talking about the
38 work he's been doing, right? But I think that has
39 happened with many other First Nations in the
40 province, and I think also it can also happen
41 around specific issues.

42 I know that you saw the other document that
43 was entered about the working models for
44 collaborative management.

45 Q Mm-hmm.

46 CHIEF JONES: You know, governance is a big part of
47 effective co-management. And it also provides a

1 way for First Nations, I guess, to bring their
2 interests into kind of a discussion or a
3 negotiation. But it takes time to put in place,
4 and I think in the Fraser, I think that's what
5 we're seeing over these past few years is kind of
6 that effort both to identify kind of what needs to
7 be done, but also how First Nations would be
8 involved in kind of decision-making.

9 Q Chief Terry?

10 GRAND CHIEF TERRY: If I may, Mr. Commissioner, I
11 wanted to also point out that in the Gwaii Haanas
12 arrangement there, I think that's a demonstration
13 of a mandate being pursued by the Haida and a
14 willingness on the part of the Government of
15 Canada to interface with them. I believe that
16 that's good and they're providing a united effort
17 there. It's very important.

18 But I'm kind of jealous of them because of
19 the fact that they're geographically located in a
20 manner that it really fits in with what I believe
21 used to be called the Blue Water Policy. That is,
22 they're not connected directly with the land mass
23 of the rest of Canada. So I think that their
24 reality is quite different than that of we in the
25 nations within the Fraser River watershed areas.

26 Q Yes. Chief Jones?

27 CHIEF JONES: Maybe I'll just add that that agreement
28 just didn't happen overnight. From the time that
29 Canada established the area as a national park
30 reserve until the Gwaii Haanas agreement was
31 signed took, I can remember, six, five or six
32 years or so. Then until the time when the Gwaii
33 Haanas Marine Agreement was signed, it was only
34 signed in January 2010.

35 So we can look at the governance side on the
36 First Nations, but I think you also have to look
37 at the federal side, is that often these kinds of
38 arrangements take some time to move through,
39 whether it's a First Nations process or a
40 government process.

41 Really, that's I think where the political
42 will becomes important. You know, I think
43 particularly if both parties might be ready to
44 engage but unless there is that kind of political
45 will to actually bring that through and actually
46 make a change, in some ways, we're left in limbo.

47 Q Thank you for that. I'm just going to, with the

1 remaining time, just switch focus and maybe go to
2 Exhibit 493, "Our Place at the Table". These are
3 some question I think again for Chief Jones as I
4 understand you were one of the authors of that
5 report?

6 CHIEF JONES: That's correct.

7 Q If you can go to page 75, I just want to discuss a
8 couple of the recommendations.

9 Just while that's coming up, I'll just
10 introduce this. I think Dr. Harris on Monday
11 spoke quite a bit about the Boldt decision in the
12 United States. I think his view was that as a
13 just result, and something that he would recommend
14 as appropriate for British Columbia and talked a
15 little bit about the Stevens Treaty and the
16 decision in the Boldt case in the 1970s and the
17 results from that.

18 If we look at recommendation number 2, this
19 is the one which provides more detail, my copy
20 provides more detail about this. Well, maybe I'll
21 just go to the recommendation itself:

22
23 As a starting point and an interim measure,
24 Canada should take immediate steps to
25 allocation to First Nations a minimum 50
26 percent share of all fisheries, with the
27 understanding that this may eventually reach
28 100 percent in some fisheries.

29
30 Now, my understanding of the Boldt decision is
31 that the fishery in the Washington State is shared
32 as a result of that decision, 50 percent between
33 the Washington State tribes and the other fishers
34 in the State; is that correct? Have I got that
35 right?

36 CHIEF JONES: Basically, yeah.

37 Q And the paper here notes that the allocation -- as
38 it's based on aboriginal rights and title, some
39 fisheries may be allocated up to 100 percent. I
40 just want to clarify what is being suggested here.
41 I'm unclear whether you're recommending
42 eliminating, first of all, the distinction between
43 food, social, ceremonial fisheries and commercial
44 fisheries on the aboriginal side. This was
45 something that was recommended by Dr. Harris on
46 Monday, and I'm just curious if that was something
47 that you had discussed or is implicit in this

1 recommendation?

2 CHIEF JONES: I think in this recommendation here, we
3 weren't necessarily distinguishing between the
4 commercial or food, social, ceremonial fisheries.
5 But I think that it is speaking mainly to economic
6 access, though.

7 You mentioned Washington State. The 50
8 percent isn't based on Washington State. It was
9 recognizing that aboriginal title and Crown title
10 -- you know, there's issues here in British
11 Columbia. And so the rationale in this case was
12 that aboriginal title is the underlying title, so
13 an equal share should be -- is a good starting
14 point for balancing, I guess, those interests in
15 fish.

16 Q And was the 50 percent target that's set out here,
17 was that in some respects based on the Boldt
18 Washington State model as a starting point?

19 CHIEF JONES: I think if you read back in the report, I
20 think there is a statement about the kind of
21 rationale and it gets back to what I've talked
22 about, balancing aboriginal title and Crown title.
23 I think in Washington State, it is based on a
24 treaty, a treaty right and interpretation of
25 treaty language, right?

26 Whereas we have the Douglas treaties here,
27 but of course in the rest of the province, we
28 don't have treaties. So it's not just speaking to
29 basically those groups that may have treaties
30 similar to what there is in Washington State.

31 Q Okay.

32 CHIEF JONES: I know I'm not 100 percent -- we were
33 recognizing that there are some fisheries where
34 there already is -- like the herring spawn and
35 kelp fishery --

36 Q That's right.

37 CHIEF JONES: -- where there is some quite high First
38 Nation participation and we don't want to make a
39 recommendation that we should reduce those
40 fisheries and I think also I heard yesterday, or
41 the day before yesterday, it was mentioned about,
42 for instance, Early Stuart, which are mainly
43 harvested in First Nations fisheries. There's
44 also a U.S. -- potential U.S. share in some cases,
45 but I think that we weren't going to say 50
46 percent when we recognize that in some fisheries,
47 there already is some greater-than-50 percent-

1 share for First Nations.

2 Q I guess where I'm going with this is I'm just
3 trying to be clear in my own mind as to whether
4 the expectation would be that the allocation of 50
5 percent or more, depending on the circumstances,
6 would be that the constitutional priority
7 recognized for aboriginal rights would continue to
8 be in place, or was it an idea of trying to adopt,
9 in total, through agreement, the Washington State
10 model of 50 percent without the priority?

11 CHIEF JONES: The constitutional priority of course
12 would still be there, because there are no
13 treaties signed. You know, this proposes an
14 interim measure, a way of balancing the interests
15 of the Crown with the interests of First Nations.
16 I think it's both a First Nations panel report and
17 the Pearson McRae report recognized that this is
18 an issue that has been outstanding for a very long
19 time. And that if there isn't kind of -- so it's
20 a recommendation to decision-makers, basically,
21 that we need to address these issues and it
22 proposed a concrete step to address it.

23 The federal government, through Pacific
24 Fisheries reform and then PICFI, on their side,
25 took an initial step in addressing mainly the
26 commercial access side of it. I think there is
27 recommendation of one, you know, around food,
28 social, ceremonial fisheries as well.

29 Q Okay.

30 CHIEF JONES: So I think it's -- I think this really is
31 a decision for individual First Nations to resolve
32 in terms of their balance between food, social,
33 ceremonial and economic fisheries. I think there
34 are some examples of First Nations that basically
35 manage both fisheries together. It's up to the
36 fisher to decide what they'll do with the fish,
37 right, which is consistent with what Dr. Harris
38 proposed.

39 I think there may be other First Nations who
40 would manage their own fisheries for that
41 priority, for traditional -- we call it
42 traditional use, Haida, we don't call it food,
43 social, ceremonial fishery. That is kind of a
44 construct of the current legal system, rather than
45 the way we see the fish.

46 Q Thank you. I have probably just enough time for
47 one more question. Oh, sorry, Chief Terry?

1 GRAND CHIEF TERRY: Yes. I wanted to comment because
2 of the fact that as the Intertribal Treaty
3 Organization were very concerned about this as
4 being a very important matter where we need to be
5 very cautious about in terms of saying that we're
6 looking at a 50 percent start-off for
7 negotiations.

8 As Mr. Jones indicated, that there's no
9 agreement between our nations and the Government
10 of Canada in terms of fishery resources yet, and
11 so I would take it that that is a matter that
12 needs to be further discussed.

13 Just also for clarification, I'm certain that
14 there's greater understanding already, but just so
15 that I can express it is that when we say First
16 Nation, what are we referring to? Is it a band or
17 not? When the ITO says "First Nation", it is a
18 nation. It is a grouping of communities that are
19 coming together that formed that particular
20 nation. So it's more of, one might say, an
21 international definition of what a nation is, and
22 not as has come to be understood as a replacement
23 name for a band. Thank you.

24 Q Just my last question, and perhaps we can go to
25 the bottom of page -- sorry, page 75. I just want
26 to talk a little bit about the dispute resolution
27 issue that, Chief Jones, you discussed the other
28 day. This is recommendation 3 which is:

29
30 First Nations themselves must address
31 intertribal allocation.
32

33 Right at the very bottom of that page, you refer
34 to:

35
36 Disputes arising over what constitutes a fair
37 share are almost certain. For that reason,
38 an effective dispute resolution mechanism is
39 also needed.
40

41 And then over to the next page:

42
43 We recommend that there be a coast-wide
44 adjudication process, or regional processes,
45 and that they are binding on the parties.
46

47 Does that feed into what you were suggesting the

1 other day, Chief Jones, that this is something
2 that perhaps could be subject to some kind of
3 judicial oversight, like in the Boldt scenario?

4 CHIEF JONES: I think that's a possibility. I mean,
5 this is a recommendation, I think a recommendation
6 that was made at the time to First Nations as well
7 as the federal and provincial government. There
8 hasn't been much further work done on this kind of
9 approach.

10 I think the day before yesterday when I was
11 talking about oversight, I saw this, I saw the
12 oversight as a way of both providing some more
13 impetus to the process, you know, and probably
14 helping the negotiation by knowing that if there's
15 a chance to try to reach agreement, but the
16 parties can bring issues back to another --
17 basically another party to try to get past
18 impasses, and I think that did work quite well in
19 the United States after the Boldt decision.

20 The court had made a decision about the
21 allocation, but basically how you would manage the
22 fisheries, there was still a lot of questions in
23 both the tribes and often the state brought issues
24 back to the court to get direction on things they
25 couldn't resolve, right? So I think that's one
26 mechanism.

27 You could also have this -- this says "having
28 a binding process" would certainly make it
29 simpler, but you could also have other processes.
30 In the Gwaii Haanas agreement, for instance, there
31 also is a process of getting a third party to
32 review issues and provide advice to the parties as
33 well.

34 Q Thank you. And just my last follow-up question on
35 that, in the next paragraph we talk about -- and
36 you talk about Washington State and the Maori and
37 you go into further detail elsewhere in your
38 paper. I'm interested in some of the principles
39 that could be considered for this dispute
40 resolution process, and it talks about the
41 relative strength of aboriginal treaty rights to
42 the fishing area or stock. Is this something that
43 you would also, as an option, have as a potential
44 dispute resolution, a judicial oversight dispute
45 resolution process, some kind of process to
46 include the relative strength of aboriginal treaty
47 rights? I'll await your answer.

1 MR. EAST: But perhaps while you're thinking about
2 that, I'd like to go, as my last document, Exhibit
3 295, Mr. Lunn.

4 CHIEF JONES: So the Intertribal -- I see, I mean, this
5 was a recommendation about intertribal sharing,
6 right, so I think really I'd like to go back to
7 revise my answer before, because I think that's
8 really for First Nations to decide on the dispute
9 resolution process, and the court or some other
10 binding process might be something that First
11 Nations would decide on, but really, it's
12 something that First Nations have to come to
13 agreement on.

14 MR. EAST:

15 Q Right. And that takes me to my next point which
16 is Exhibit 295 on page 11. This is something that
17 came up the other day. Ms. Gaertner took you to
18 this, and under "Policy Barriers" on the second
19 bullet, it talks about some of the two key policy
20 barriers, and number 2 says:

21
22 An inability for DFO to develop a process for
23 the recognition of First Nations title and
24 rights, or to lay out a transparent "strength
25 of claim" standard assessment to evaluate
26 asserted title and rights.

27
28 Based on your paper, "Our Place at the Table", and
29 the recommendation that intertribal allocation
30 should be determined by First Nations themselves,
31 do you really want the Department of Fisheries to
32 get involved in the issues of determining and
33 bringing its perspective on "strength of claim" to
34 the various First Nations in the province?

35 CHIEF JONES: I think it would help to know kind of how
36 the Government of Canada is currently deciding on
37 allocations. Is it based on "strength of claim"
38 or are there other factors? Population seems to
39 be kind of a factor that's been used in treaty
40 negotiations more than rights and title arguments.

41 Just as an example, the Haida Nation provided
42 information to the Department of Fisheries and
43 Oceans back in 1998 about commercial/aboriginal
44 rights to halibut and herring spawned on kelp, and
45 we have, I think, very good information, and we've
46 really received no kind of effective response or
47 answer to how the Crown is addressing those

1 existing aboriginal rights.

2 So I think it would be helpful to kind of
3 have -- to know how the Crown is approaching those
4 issues both in treaty negotiations as well as
5 fishery allocations, whether it's through PICFI or
6 others. But I think it is kind of better in some
7 ways if First Nations, together, can work out
8 those issues.

9 The Fishery Council has started a dialogue on
10 intertribal sharing just earlier this month. We
11 had a workshop where we talked about that, and
12 it's looking at are there some principles that can
13 apply.

14 In New Zealand, you know, this was something
15 that the Maori did. It took some time, but they
16 went through that process. So it is, in some
17 ways, a way of bringing First Nations together,
18 also having them work together more kind of in
19 watersheds or around specific fisheries which may
20 make it easier to resolve some of the management
21 issues for migratory stocks, such as -- whether
22 it's Fraser sockeye or halibut or other species.

23 And I think you have to recognize that "Our
24 Place at the Table" wasn't just dealing with
25 salmon. It's also dealing with a whole range of
26 species. For some, you may need to work on the --
27 having First Nations working together kind of in
28 larger bodies. In other cases, you may not need
29 that. Strength of claim may be the major factor
30 for a secondary species like geoduck clam, right,
31 or maybe in the case of herring where herring come
32 back always to spawn in the same area. So that
33 may be more important, in some cases, than other
34 factors.

35 Q To Chief Terry and Mr. Todd?

36 GRAND CHIEF TERRY: Thank you. I just wanted to make
37 certain -- I've been listening and a phrase that
38 has been used here is "title and rights" and
39 "rights and title". I don't believe that they're
40 interchangeable. I believe that there's a
41 significant difference in law, and I really would
42 be wondering how the Commission would be looking
43 at the difference in those two phrases.

44 So I just wanted to cite that because of the
45 fact that we have a clear understanding of who has
46 title in our homeland areas, and then the rights
47 that are derived from that title. It's quite

1 specific, and the introduction of rights and
2 titles is quite a different thing, I believe.
3 Thank you.

4 MR. EAST: My time is up, so I should probably sit down
5 unless, Mr. Todd, you wanted to...?

6 MR. TODD: Very quickly, to go back to your question
7 about the policy barriers, number 2 in particular,
8 the Department of Fisheries and Oceans' mandate is
9 based on "room for all" in the fishery. That is
10 obviously a government Crown policy, so hence
11 number 2, as it states, the inability for DFO to
12 develop a process for the recognition of First
13 Nations titles and rights, because obviously to do
14 so would seriously constrict that mandate "room
15 for all".

16 So the Department is not necessarily the root
17 of the problem here that we're trying to grapple
18 with. It's the Crown, it's the Government of
19 Canada. So that's why that barrier was stated as
20 it was, in my opinion.

21 MR. EAST: Thank you. Those are my questions Mr.
22 Commissioner.

23 MR. MCGOWAN: Mr. Commissioner, I believe Mr. Harvey
24 was going to go next.

25 MR. HARVEY: Thank you. It's Chris Harvey for the Area
26 G Trollers and the United Fisherman and Allied
27 Workers Union.

28

29 CROSS-EXAMINATION BY MR. HARVEY:

30

31 Q Gentlemen, I'd like to start with a reference to
32 what Chief Terry said. Chief Terry, you said that
33 fish are important to First Nations. They're
34 needed to feed First Nations people over the
35 winter, and I'm not challenging that in any way.
36 But I want to ask you, would you agree that Canada
37 has a fiduciary obligation to provide the
38 regulatory structure that will reasonably ensure
39 that First Nations people do receive their food
40 fish?

41 GRAND CHIEF TERRY: I think from experience, that if
42 that were the case, then we'd have more confidence
43 in the system.

44 Q Yes.

45 GRAND CHIEF TERRY: However, there have been numerous
46 examples where there were promises made but not
47 kept.

1 Q Yes.

2 GRAND CHIEF TERRY: But going back to the fundamentals,
3 though, of management, we feel that we had, and
4 still have, the ability to manage the fishery
5 within our respective territories, and that we're
6 quite prepared to embark into a system or process
7 whereby we can discuss how it is that we can
8 properly manage the resource in order to conserve
9 it.

10 Now, the other day I mentioned that maybe we
11 concentrate so much on harvesting that we have
12 lost sight of how to protect, enhance and sustain
13 the fishery within all areas of our respective
14 territories.

15 Q Yes. Yes, well, I don't want to ask you about
16 that so much as the method of delivering fish to
17 the people and First Nations communities.

18 First of all, it's generally only a small
19 proportion of the people in the community who do
20 that actual fishing; is that right? As a general
21 rule, there are many elders and others who don't
22 actually do the fishing.

23 GRAND CHIEF TERRY: Well, I do fish. So it depends on
24 one's ability and capacity to be able to go and
25 actually catch their fish.

26 Q Yes.

27 GRAND CHIEF TERRY: We have had elders in my community
28 -- for example, we had an elder that was in his
29 eighties and we saw him carrying his dipnet along
30 with his knapsack to the fishery, and then, a
31 number of hours later, he was coming back with his
32 sack full.

33 Q Yeah.

34 GRAND CHIEF TERRY: So there is the capacity there, and
35 we feel that we can. Those that need to replenish
36 their fish stocks do do that, and for those of us
37 that cannot, then others certainly provide the
38 means by which we can acquire the fish for the
39 winter.

40 Q Yes. Because the point is that all members of the
41 community are meant to receive the fish that they
42 require.

43 GRAND CHIEF TERRY: That's right.

44 Q Yes. And on the coast, the general situation is
45 that there'll be a person with a fish boat who'll
46 go out and catch the fish and then provide the
47 fish to other community members. Does that --

1 GRAND CHIEF TERRY: That's my understanding.

2 Q Yeah. Now, sometimes it's been known that the
3 fishermen who catch the fish will sell it for
4 their own gain rather than distributing it amongst
5 the community. You've known that to happen, I
6 expect; is that right?

7 GRAND CHIEF TERRY: Well, it's certainly a practice
8 that was done in the earliest days until such time
9 it was outlawed from --

10 Q Yes.

11 GRAND CHIEF TERRY: -- having to be done by powers that
12 be back in Ottawa or local government.

13 Q Yes. So if a person, for example, catches 100
14 fish, he might, if he's looking to a self-
15 interest, sell them. I think last year the going
16 rate was about \$20 a fish. That's \$2000. Or he
17 might, if he's more responsible and appreciates
18 the intent of the constitutional priority, he
19 might distribute it amongst the band members.
20 That's the choice that the person catching the
21 fish has to make, would you agree?

22 GRAND CHIEF TERRY: Well, self-interest? Are you
23 describing, then, that the commercial industry is
24 primarily involved in harvesting because of the
25 fact of self-interest?

26 Q No, no. I was simply trying to get to how is the
27 Government of Canada or the First Nations
28 government, how can they take action to ensure
29 that the people in the community who are not able
30 to actually do the fishing, to ensure that they
31 get the fish?

32 GRAND CHIEF TERRY: We, sir, have our ways and means of
33 distributing and sharing and making good use of
34 the resource. We contend that we have the means
35 by which to make decisions on how best to use the
36 particular resource that may be coming to or
37 through our territory. So that's the basis. The
38 practices and use are well-delineated and we tend
39 to observe them quite well, unless -- but too
40 often they're interfered with.

41 Q All right. Well, I've got limited time so I can't
42 pursue that very much further, I'm sorry.

43 Chief Jones, I wanted to ask you another
44 question, but did you want to say something on
45 this point?

46 CHIEF JONES: Yes, since you were talking about the
47 coastal fishery, I'm quite familiar with the

1 coastal fishery.

2 Q Yes.

3 CHIEF JONES: So you were talking about people go out
4 with their commercial boats to go fish for food,
5 and that certainly was the case going back 30, 40
6 years in our area. Currently there's very few
7 people that still have commercial boats. They've
8 lost basically their licences. In some cases,
9 they've been sold. So we have very few commercial
10 fishermen left in our communities.

11 Q Yes.

12 CHIEF JONES: In our community too, like Chief Saul
13 Terry mentioned, we have many people go out on
14 their own sometimes with skiffs and we go out and
15 catch our own food.

16 On the issue of sale of fish, I know you're
17 well aware that with the Aboriginal Fishery
18 Strategy, I mean, there were initiatives that were
19 put in place to try to address some of the issues
20 you're talking about. There were some pilot sales
21 programs, one in the Lower Fraser, another in
22 Skeena, another over in Barclay Sound, in which
23 there was a communal licence issue that did allow
24 sale. It was negotiated between the First Nations
25 that were involved in the fishery.

26 But there was a Commission that was held
27 shortly after that, that said that there was no
28 more pilot sales going to be negotiated, and so we
29 went through a number of years where those
30 mechanisms weren't available to us, and it's
31 really only through this new PICFI program where
32 again there is an opportunity to try to work,
33 accommodate against those issues around the
34 interests of First Nations aren't just in the food
35 or subsistence fishery. I mean, they are also for
36 economic benefit from the fisheries similar to
37 many other Canadians.

38 Q Yes. So I gather what you're saying is it's
39 important for the coastal communities to maintain
40 their presence in the commercial fishery because
41 having the boats there assists in delivering the
42 food fish to the people in the community who don't
43 have a boat. That's --

44 CHIEF JONES: I mean that is certainly one part of it,
45 but I know in our area too, what we've been
46 seeking for many years are allocations of fish, so
47 at least we can manage our own fishery, and again

1 we can determine the type of use that we want,
2 whether it's use it as a food fishery or for
3 economic purposes.
4 Q Yes, but there's a constitutional duty to deliver
5 food fish to the weaker members of the band, is
6 there not?
7 MS. GAERTNER: That's a question of law.
8 MR. HARVEY: All right. I'll leave that, I'm sorry,
9 and I've got limited time as I say.
10 Q Chief Jones, I wanted to ask you this, something
11 more about the coastal First Nations. You owned a
12 boat yourself I see from your c.v. from 1979 to
13 1985; is that correct?
14 CHIEF JONES: That's correct.
15 Q Was that a troller?
16 CHIEF JONES: Yes, it was.
17 Q Yeah. Your father, I think, was a good fisherman
18 as well and a good shipwright; is that correct?
19 CHIEF JONES: That's correct.
20 Q Your grandfather, Albert Jones, was a renowned
21 fisherman as well and a prospector; is that right?
22 CHIEF JONES: Yes, he was.
23 Q Yes. Am I right, then, in 1958 - you may have to
24 answer this in general terms - but I understand in
25 1958 there were 52 trollers in Skidegate when the
26 population was only 213. Does that sound about
27 right to you?
28 CHIEF JONES: Yes, it does. We've had many people talk
29 about the loss of access in Skidegate.
30 Q Yes. And there's been a loss of access and the
31 Haida Nation is pressing for a restoration or
32 greater access to the commercial fishery; correct?
33 CHIEF JONES: Yeah, fisheries is one of the few kinds
34 of economic opportunities in our area.
35 Q Yes.
36 CHIEF JONES: We have a large fishery, something like
37 18 percent of all the commercial values of all
38 fisheries occurs around in our waters, and we
39 would like access to that.
40 Q Yeah. And there's a similar story in other
41 communities, Port Simpson or Lax Klamaans,
42 Kitkatla, Metlakatla, Hartley Bay, Klemtu, Bella
43 Coola, Owikeeno, Alert Bay, Fort Rupert, Quatsino,
44 Kyuquot, Zabellos, Ahousaht, Ucluelet, a similar
45 story. A former presence in the commercial
46 fishery that was greater, very much a need for a
47 commercial presence because of the remote location

1 and dependence on the sea and a pressing desire to
2 have a greater presence today. Is that pretty
3 much a common theme?

4 CHIEF JONES: Yeah, I think that's -- if you go back
5 historically, certainly that's what's happened,
6 and a lot of that has been through licensing
7 policies and sometimes it's like buybacks. It's
8 also been new fisheries like shellfish fisheries,
9 dive fisheries for geoduck, or sea urchin.
10 Basically in those policies, there hasn't been --
11 we would consider there hasn't been fair
12 distribution, I guess, or access for First Nations
13 in those new fisheries.

14 Q Yes. The fishermen in the past decades in your
15 area and other coastal First Nations have made
16 huge contributions, haven't they? I'm talking
17 about people like Dempsey Collinson in your area,
18 Roy Jones, Sr., Paul Pearson, Willis Crosby,
19 Sidney Crosby, all Haida I think fishermen.

20 CHIEF JONES: Yes. Yes, they are. They have been
21 very --

22 Q They all made huge contributions to the
23 communities, did they not, in terms of employment
24 and economic well-being?

25 CHIEF JONES: That's right. It does make a big
26 difference having someone in the commercial
27 fishery and having a commercial fishing business
28 or a vessel.

29 Q Yes. And the same thing in Old Masset, Robin
30 Brown, Wilson Brown, Jeff White, Oliver White and
31 lots more.

32 CHIEF JONES: Yes, and of course I don't think any of
33 the ones you've mentioned are still involved in
34 the commercial fishery.

35 Q In the Alert Bay area, the Assus and the Sewids
36 and the Beans families who've been in the fishery
37 for generations, are you aware of that?

38 CHIEF JONES: Yes, I am, and I think it's the same
39 situation in many of those communities. There's
40 very few boats or licences.

41 Q Yes. Fort Rupert, James Walkus, Walter
42 Cadwallader, Alfred Hunt. Actually I think those
43 three are still involved in the fishery, aren't
44 they?

45 CHIEF JONES: Possibly.

46 Q Campbell River, the Robert and Chikkites families,
47 they're still involved in the fishery, I think,

1 aren't they?

2 CHIEF JONES: I know the Roberts' are.

3 Q Yes, all right. And the coastal communities all
4 have this in common, don't they, that there are
5 remote communities, many without even roads to
6 them, and they have miniscule reserves, correct?

7 CHIEF JONES: Yes, I think Doug Harris spoke of that as
8 well.

9 Q Yes. And Doug Harris showed us a map showing that
10 the upriver reserves are larger and he explained
11 the agrarian purposes for those larger allotments.

12 MS. GAERTNER: Sorry, I don't think that's a correct
13 summary of the evidence.

14 MR. HARVEY: Well, there was a chart that went up.
15 That's what I was referring to.

16 MS. GAERTNER: The "larger" is inaccurate I think even
17 if you reflect on the chart.

18 MR. HARVEY: All right. Well, the chart speaks for
19 itself.

20 Q Chief Jones, do you have a view on that subject?
21 Is that not a well-known subject and something
22 that's often discussed as between coastal First
23 Nations and upriver First Nations, that they got
24 the larger reserves based on the idea that they
25 were to derive their income from land? Coastal
26 First Nations were expected to derive their income
27 from the sea and got smaller reserves.

28 CHIEF JONES: I think in the Haida Nation, our approach
29 has not been to look at the size of reserves.
30 It's been around our historic occupation of Haida
31 Gwaii waters, and so you're aware that the Haida
32 Nation has a case for aboriginal title through all
33 of Haida Gwaii and the waters around Haida Gwaii.
34 It's currently in abeyance and we're involved in
35 reconciliation discussions.

36 Q Yes.

37 CHIEF JONES: But I think our approach hasn't been
38 focusing on these reserves. I know when the
39 reserves were surveyed in our areas, my great
40 grandfather, Amos Russ, testified before the
41 Reserve Commission and they said that we own all
42 the area. These are areas we use, but we're not
43 going to put forward a list of areas to be set
44 aside as reserves because we own the whole areas.

45 Q Yes. The result --

46 CHIEF JONES: That was back in around 1910.

47 Q All right. We've heard evidence of PICFI licences

1 being taken from the coastal areas and the
2 allocations effectively being transferred upriver.
3 In the west coast Vancouver Island area that my
4 clients are in, or one of my clients in
5 particular, there are 14 PICFI troll licences and
6 we heard that a lot of those are being transferred
7 upriver.

8 Now after the Court of Appeal decision in the
9 **Ahousaht** case, I think the DFO is finally looking
10 to leave them in the coastal areas. Do you have a
11 view as to the transfer of commercial fishing
12 opportunities away from the coast upriver, Chief
13 Jones?

14 CHIEF JONES: I know that the basis for that, there's
15 both an issue of justice in terms of -- because
16 the First Nations up the river, we heard about
17 barricades -- The Barricade Treaties have been
18 denied commercial access.

19 Then I think the other issue has to do with
20 -- I've lost my train of thought.

21 MR. HARVEY: Yes, so did I. By my reckoning, I've got
22 five minutes left of my -- I've got one more
23 topic, if I could.

24 THE COMMISSIONER: I don't think you connected on that
25 last question and answer, so maybe you want to try
26 that again.

27 MR. HARVEY:

28 Q What do you think about commercial fishing rights
29 being taken in the PICFI program from the coastal
30 areas, transferred upriver?

31 CHIEF JONES: Yeah, so the other issue is the
32 conservation issue, so basically a movement
33 towards more terminal fisheries puts less pressure
34 on weak or species at risk or stocks at risk.

35 Q I know that's the DFO position, but how does it
36 affect coastal First Nation communities who cannot
37 get those PICFI licences.

38 CHIEF JONES: I think there's an opportunity for
39 terminal fisheries in coastal areas as well, so I
40 think that's one way of kind of addressing that,
41 but current DFO policy doesn't allow that
42 discussion. Allocations currently can be
43 discussed and negotiated for inland fisheries, but
44 for coastal First Nations, just have to have
45 licences, so I think there are some opportunities
46 for terminal fisheries in the coast that should be
47 explored.

1 Q But I thought the object of the PICFI licence
2 scheme was to buy licences out of the non-
3 aboriginal commercial fishing users and transfer
4 them to First Nations for commercial fishing
5 purposes.

6 CHIEF JONES: I think that has been happening, and some
7 of those licences, I think, have been used for
8 economic opportunity fisheries inland, and First
9 Nations basically include salmon licences in their
10 business plan also can have access to salmon
11 licences that have been retired. There also is a
12 mechanism to avoid kind of disproportionately
13 affecting certain categories of licences, whether
14 it's an AI licence, which can only be held by a
15 First Nation person --

16 Q All right. Well, I won't press you further on
17 that, but there is one other topic I wanted to ask
18 you about.

19 THE COMMISSIONER: Mr. Harvey, I think Chief Terry had
20 a --

21 MR. HARVEY: Oh. Chief Terry?

22 GRAND CHIEF TERRY: Yes, I'd like to comment on the
23 point that you're trying to make in terms of
24 moving a particular program around or utilizing it
25 to manipulate management of a commercial interest.
26 From our point of view in the ITO or the
27 Intertribal Treaty is that we have the right to
28 determine how it is that we shall use the
29 resource. Currently, however, we have a problem
30 in terms of adequacy of the stocks to be able to
31 utilize a more wider scope of economic enterprise.

32 Also, I think that we're getting into more of
33 how is it that these particular programs are being
34 established? I think that there's a fine point,
35 Mr. Commissioner, whereby there's a political
36 reason for incorporating these programs to the
37 interior and there needs to be a way, find a way
38 in which we, the people, can determine how it is
39 that an economic venture is to be pursued.

40 Q Yes. Thank you, Chief Terry. Now, finally, this
41 very important subject of the model. On the west
42 coast of Vancouver Island, there's an Aquatic
43 Management Board model that's been discussed here,
44 and as part of its website material, it has this
45 under the heading of "Inclusivity". I'm going to
46 ask Chief Jones how this compares with the Haida
47 Gwaii Haanas model.

1 Inclusivity. Coastal communities and other
2 persons or bodies affected by aquatic
3 resource management should have an
4 opportunity to participate in the formulation
5 and implementation of integrated aquatic
6 resource management decisions. Participation
7 of coastal communities and other persons and
8 bodies affected by aquatic resource
9 management will promote improved decisions.

10
11 On the Gwaii Haanas model, there is a board
12 of six, three of which are Haida, and three of
13 which are Government of Canada; is that correct?

14 CHIEF JONES: That's correct.

15 Q No non-Haida communities represented or non-Haida
16 stakeholders?

17 CHIEF JONES: There was an Advisory Board which was
18 established which was made up of mainly community
19 members. There was representatives from the
20 commercial fishing industry who worked to
21 recommend an interim management plan for the area
22 and --

23 Q Yes.

24 CHIEF JONES: -- that was something which was adopted
25 by the -- this is for the marine area.

26 Q Yeah, but it didn't affect the board members. And
27 out of the members, some of the Canada board
28 members were in fact Haida Nation persons. A
29 gentleman by the name of Gladstone who's the Park
30 Manager was on that board for a time?

31 CHIEF JONES: Yeah, if you're referring to the
32 Superintendent of Gwaii Haanas --

33 Q Yes.

34 CHIEF JONES: -- you're correct. He is a Haida.

35 Q Yes.

36 CHIEF JONES: He's been involved in that organization
37 for the last 15 or so, 20 years.

38 Q Yes. Now, that model is applied on the -- and
39 Haida Gwaii were -- about 50 percent of the
40 population is non-Haida; is that approximately
41 correct for the population mix?

42 CHIEF JONES: Roughly.

43 Q It's led to a certain feeling in the non-Haida
44 citizens that they've been disenfranchised, has it
45 not, and it's led to some litigation?

46 CHIEF JONES: I think there's a lot of support for --
47 like I mentioned, there's an Advisory Board that

1 was involved in developing an interim management
2 plan, and certainly there always are individuals
3 who won't agree with things, whether it's what
4 government does or whether it's what the Haida
5 Nation does. Yes, there was a court case that
6 was, I believe, a tour operator who wanted a
7 larger allocation of visitor days.
8 Q Yeah, his quota was determined by this board, and
9 the board adopted a rule that if you wanted to
10 increase your quota allotment, you had to be a
11 Haida blood (sic). You had to have a blood
12 connection with the Haida Nation; is that correct?
13 CHIEF JONES: I don't think that's correct. Under the
14 management plan, there's a limited number of
15 visitor days and those days are an allocation.
16 There's a certain number that were allocated to
17 existing users of which there were no Haida
18 involved.
19 Q Yes.
20 CHIEF JONES: And then there was also an allocation
21 that's in place for future Haida businesses. And
22 it was based on kind of their historic visitor
23 days, right? So there was one operator who wanted
24 to expand their business and that was what the
25 court case was about.
26 Q Yeah, and he couldn't because he wasn't Haida. If
27 he had been Haida, he could have; that's what it
28 comes to?
29 CHIEF JONES: Well, he has a licence and he's operating
30 under a certain management plan and I think he
31 would have liked to change the management plan.
32 Q Yes.
33 CHIEF JONES: But it went through a public process and
34 it was approved by --
35 Q Oh, yes.
36 CHIEF JONES: -- the Government of Canada and the Haida
37 and --
38 Q Yes, yes.
39 CHIEF JONES: -- that's been followed in the management
40 of the area.
41 Q Yeah. But you mentioned this model and you
42 mentioned Inuvaluit agreement that is a similar
43 model, but that model has never been used in a
44 southern Canadian context for the allocation of
45 commercial rights of access to a public resource,
46 has it?
47 CHIEF JONES: In the Canadian context?

1 Q Yeah, southern Canadian context. Geographic --
2 CHIEF JONES: I didn't mention Inuvaluit model,
3 although I know about it.
4 MR. HARVEY: All right. I'm sorry, my time's run out.
5 I can't pursue it further.
6 MR. MCGOWAN: Perhaps an appropriate time to take a
7 short break?
8 THE REGISTRAR: The hearing will now recess for ten
9 minutes.

10
11 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
12 (PROCEEDINGS RECONVENED)
13

14 THE REGISTRAR: The hearing is now resumed.
15 MR. EIDSVIK: Good morning, Mr. Commissioner and panel
16 members, Philip Eidsvik for Area E and the
17 Coalition.
18

19 CROSS-EXAMINATION BY MR. EIDSVIK:
20

21 Q Mr. Huber, I had a couple of questions for you on
22 population, but first thing I don't think we have
23 on the record is Fraser River are fully
24 subscribed, aren't they?

25 MR. HUBER: I don't know what you mean by "fully
26 subscribed".

27 Q There's no extra fish. If you give some from --
28 an increase to one group, you have to take it from
29 a different group?

30 MR. HUBER: I wouldn't agree with that. We're trying
31 to --

32 Q And why --

33 MR. HUBER: Well, we're trying to manage stocks here
34 and we're trying to manage all stocks. So but if
35 you're doing that properly, there are going to be
36 some stocks that one might call surplus to the
37 spawning grounds that could have been caught, but
38 they can't because of management actions that are
39 needed to protect the weaker stocks, plus, you
40 know, there's a considerable debate over surplus
41 stocks on the spawning ground because there are
42 many benefits on an ecosystem basis to having, you
43 know, extras fish on the spawning grounds.

44 Q Well, if you look at the total allocation of
45 Fraser sockeye and took the commercial, public
46 commercial opportunity, which is to catch the
47 surplus that's not required for conservation, or

1 for Aboriginal FSC purposes, you would say it is
2 fully subscribed; am I correct?
3 MR. HUBER: If you want to interpret it that way. I'm
4 not sure the fish would interpret it that way.
5 Q Can you tell us about how many Aboriginals have
6 access to Fraser River sockeye for FSC purposes?
7 I know there's Commission document, Tab 45, and
8 perhaps, Mr. Lunn, you could pull that up. I
9 don't know if you -- have you had a chance to
10 review that, Mr. Huber?
11 MR. LUNN: I'm sorry?
12 MR. HUBER: Well, there's 203 First Nations --
13 THE COMMISSIONER: Tab 45.
14 MR. HUBER: -- approximately in the province. In the
15 work I'm doing with the Fraser River and the
16 Marine approach areas, there's approximately 150
17 First Nations, but I think even Russ gets a few
18 Fraser sockeye up in his part of the world.
19 MR. EIDSVIK: Yeah. I believe in the Commission
20 documents -- Tab 45, Mr. Lunn. Yes, if this could
21 be entered as an exhibit. It's a table of
22 Aboriginal Groups with access to Fraser River
23 sockeye and their populations.
24 THE REGISTRAR: That will be marked as 1221.
25
26 EXHIBIT 1221: Population or Membership Data
27 for Aboriginal Organizations [DFO]
28
29 MR. EIDSVIK:
30 Q Chief Terry, about how many Aboriginal people
31 roughly are there in your area?
32 GRAND CHIEF TERRY: By --
33 Q By number.
34 MR. HUBER: -- you say which area, I don't know what
35 you're...
36 Q I'm referring to what you call your homeland.
37 GRAND CHIEF TERRY: The St'at'imx, they're about 6,000.
38 Q About 6,000. And what percentage of the run of
39 the Fraser sockeye run that goes into your area do
40 you harvest normally and do you intend to harvest
41 subsequent to a settlement, a treaty settlement?
42 Sorry, let me ask the question in a different way.
43 Do you have a sense of the total Fraser sockeye
44 run, do you harvest five percent, ten percent, do
45 you have a number like that?
46 GRAND CHIEF TERRY: We don't have a number like that,
47 as you say. But as Mr. Huber knows quite well,

1 our folks, we go to the river and we seek to
2 acquire the fish we need for the winter, and then
3 once we reach, meet that need, then we leave, and
4 it's that kind of arrangement that we have amongst
5 our people.

6 Q Now, I know there's some -- you have commercial
7 ambitions for that area and I wonder have you done
8 any studies on the value of fish caught in your
9 homeland?

10 GRAND CHIEF TERRY: Any studies of...?

11 Q Any studies on a business plan, what the value of
12 the fish are, what the markets might be, that sort
13 of stuff?

14 GRAND CHIEF TERRY: We've initially in, for example, in
15 1981, we did a study on the quality of some of the
16 salmon that were coming through. That was the
17 intent, to get a value added kind of an approach
18 to -- with our area. Yeah, we're making
19 initiatives of that nature.

20 Q Yes. Did any conclusion come out of the study
21 about the value that you can remember?

22 GRAND CHIEF TERRY: The value that -- and some of the
23 stocks, and they were quite different than
24 different stocks that were coming to or through
25 our area, and they were beginning -- in terms
26 looking at marine source, or harvest at the marine
27 level, that would be termed as number one, I
28 believe, and then they were beginning to reach
29 their upper limit, depending on what one was
30 looking at and how one was to commercialize the
31 catches that we're having. So it depended on what
32 use we were making, or what kind of value added we
33 were making of the fish.

34 Q Would you, if you had commercial opportunity, and
35 I'm getting a little bit confused, would you
36 harvest in the marine area, or would you harvest
37 in your, what you describe as your homeland?

38 GRAND CHIEF TERRY: I think we're currently discussing
39 ways and means and how we can develop our own
40 brand, as the current language says, and we do
41 have a high quality salmon in our area that we
42 process for our own use. And so we're looking at
43 avenues on how we can perhaps utilize this unique
44 processing.

45 Q Now, if commercial salmon fisheries moved inland,
46 into your area, will all Canadians in that area be
47 eligible to buy -- or, sorry, catch and sell fish,

1 or would it be limited to your Aboriginal groups?
2 GRAND CHIEF TERRY: Well, we're looking at it in terms
3 of "we" being the decision-makers in the area
4 currently, and how we would work that is yet to be
5 worked out.

6 Q I guess I'm wondering if you can help me a little
7 more directly on that. Would you support the
8 opening of commercial fisheries for everybody who
9 lives in your region, not just your Aboriginal
10 groups?

11 GRAND CHIEF TERRY: I think that it is something that
12 if indeed it is opened up, and then that's for
13 non-Aboriginals, they fall under a different
14 jurisdiction than we feel we do. And so therefore
15 it's not -- for our own determination, it would be
16 for our peoples that we would be making these
17 determinations, that is that for St'at'imx or
18 Nlaka'pamux or Ts'ilhqot'in or Carrier or Sekani,
19 or others, Tsawataineuk.

20 Q But so, but you don't have a position right now
21 that says let's open up the commercial salmon
22 fishery in inland areas of B.C. for everyone.
23 That's not your policy right now?

24 GRAND CHIEF TERRY: No, it's not a matter that's
25 specifically spelled out that way.

26 Q Okay, thank you. Mr. Huber, can you tell me what
27 the purpose and allocation for FSC fish is amongst
28 Fraser River groups, and how DFO calculates that?

29 MR. HUBER: Well, we consult and work with, I prefer we
30 -- you know, we have a partnership relationship
31 with First Nations, but technically we consult on
32 their needs. I've determined a lot of the numbers
33 that would go in a communal licence, for example,
34 by working with the First Nations, and
35 understanding what the needs are. And the other
36 understanding is that I've had is that those needs
37 change, and the allocations are in the communal
38 licence who would need to change. It's based on
39 their needs of the community. And we look at the
40 current catches and our catch records and their
41 catch records, and we try to reach an agreement.
42 And in many cases we do reach an understanding of
43 what the need is each year. But our objective is
44 to -- whether it's with an individual First Nation
45 or the Tribal Nation to reach agreement on what
46 those numbers would be.

47 The biggest challenge for leaders is -- and I

1 can certainly understand this, is signing an
2 agreement to any numbers, because there's a lack
3 of trust, and I don't blame them, that on how that
4 things that they sign now may impact their
5 interest in the future. But still by working with
6 the groups we in many cases can agree on a number,
7 at least understand a number, that will meet the
8 current needs.

9 Q I understand it's -- I think what you're telling
10 me is it's a negotiated number?

11 MR. HUBER: It should be, in my mind. I've always
12 tried to do that.

13 Q Can you give me a little more hand on that,
14 because if you negotiate a number that's 500
15 pounds, it might be too much. If you negotiate a
16 number that's ten pounds, it's too little.
17 Doesn't DFO have any standard that's saying we
18 think each Aboriginal person needs say 100 pounds
19 of sockeye per year?

20 MR. HUBER: No, we don't.

21 Q And can you tell me why that is?

22 MR. HUBER: Well, the needs of the various communities
23 vary, their access to various resources varies,
24 and the returns to the areas vary. So there's
25 various considerations each year that you look at.
26 But the need is fairly consistent. It can't
27 always be met, because the stocks just aren't
28 there. But we certainly, based on the returning
29 stocks, try to understand what the community needs
30 are in a given year, and make sure that the
31 opportunity to catch those, that we manage to
32 that.

33 Q Maybe you can help me a little bit, Chief Terry,
34 because I'm a bit -- I'm struggling with this a
35 little bit. The per person -- the per person
36 requirement for sockeye salmon, you must have a
37 good sense of that, given your thousands of years
38 in the area, exactly how much a person would need
39 within some kind of range. Can you give us an
40 idea what that range is?

41 GRAND CHIEF TERRY: They would vary, I'm certain,
42 because of the reality of any given day or year.
43 One must really understand really the -- and a lot
44 of folks don't really understand our peoples. And
45 you know the -- what is, for example, right now
46 within our area there is an economic situation
47 that finds that unemployment is staggering within

1 our communities, and not only within our own
2 communities, but in the population in general.
3 The economy is such that we rely more greatly upon
4 the salmon resource now than ever before. And yet
5 we are hampered by the fact that the stocks are
6 said to be in grave danger of becoming extinct.

7 And so we have to pursue acquisition of food
8 for our people in various ways. And so it's an
9 economic matter. We have to look at it in a
10 cultural context. You know, they say that
11 ceremonial matters are important, and they are
12 important to our people. The spiritual aspects
13 are important. And all of those kind of things
14 have a role to play within our community and
15 dictate to a great extent the needs from various
16 resource sectors.

17 Q Well, I'm trying to, and maybe you can help me,
18 I'm trying to get a range. Is the number a pound
19 a day, or is that too low?

20 GRAND CHIEF TERRY: Well, Mr. Eidsvik and Mr.
21 Commissioner, we've done studies that where folks
22 are trying to substitute, for example, how many
23 fish do you eat per year or per week or per, you
24 know, and amend so that they can maybe substitute
25 some chicken or something or beef or something
26 else to alleviate our situation there.

27 But I think that that's a question that we
28 have to determine for ourselves, what is our need.
29 For example, economically a lot of our folks are
30 unemployed, so therefore they're on welfare. And
31 they're having to get by on say \$200 a month per
32 person, if the person is an individual, and then
33 it escalates from there per family. And so
34 therefore how does one get by on what used to be
35 \$185 a month, or \$200 now, I believe it's been
36 raised, the welfare level, and so therefore we
37 need access to our fishery to augment our various
38 needs. And how does one calculate that, you know.

39 Q That helps a lot. So what you're saying is then
40 when you go to DFO you say we need access, rather
41 than a number.

42 GRAND CHIEF TERRY: Sir, we don't go to DFO a lot of
43 times to be able to calculate these matters. The
44 need is there, as I've expressed earlier, that our
45 folks, when they go fishing, they are the ones
46 that determine what it is that they're going to
47 need for the winter in their calculation.

1 Q That's pretty helpful, and my only point was, and
2 I was trying to get at, is how does DFO plan on
3 how much fish to deliver up the river, how much
4 fish to put on the spawning grounds, how much fish
5 to catch below, if they don't have a number. But
6 I think you've resolved that. You just say we
7 need to be open for fishing and have access to
8 fish. Have I got that correct?

9 GRAND CHIEF TERRY: That's right. And I think that we
10 are the ones to determine, when, who, how, where,
11 and how much one needs to be able to get by in
12 these areas.

13 Q Thank you, Chief Terry. Chief Jones, I have a
14 couple of questions for you. And I was interested
15 in your discussions on New Zealand and Boldt, and
16 you mentioned that the commercial fishing
17 component in New Zealand was settled, and you can
18 correct me if I've got some of this wrong, but I
19 just want to try and get a quick summary of it.
20 It was the Treaty of Waitangi that settled finally
21 the financial fisheries component of that is what
22 we're referring to when you talk about the New
23 Zealand settlement, isn't it?

24 CHIEF JONES: I think the Treaty of Waitangi was back
25 in the 1840s or so, and so really that didn't --
26 it recognized their right to fish, but it wasn't
27 addressed until much later.

28 Q That's right, and the settlement that you referred
29 to was the recognition of the fisheries component
30 of the Treaty of Waitangi from many years ago and
31 finally got settled about the '80s, didn't it, the
32 1980's, somewhere in there?

33 CHIEF JONES: I'd have to go back and look at the
34 documents.

35 Q Okay. Do you remember specifically was in that,
36 because my understanding is they bought 50 percent
37 of Sealord Fisheries and transferred it over to
38 the Maori Fisheries Commission; is that correct?

39 CHIEF JONES: I think that was the starting point. It
40 had to do with the introduction of the co-
41 management system in New Zealand, and the Maori
42 challenged that in court and then through
43 negotiation, you know, there was an agreement
44 basically to provide a share to the Maori, and it
45 was done through -- and part of it was that
46 purchase of Sealord, but it also was a certain
47 percentage of existing quota fisheries, the quota

1 fisheries that were put in place by the
2 government. So there was a recognition that that
3 quota system basically has affected Maori
4 interests in the fishery.

5 Q I think that's helpful. I seem to remember that
6 it was 10 percent of the quota fisheries and 20
7 percent of any new fisheries that were developed.
8 Do you remember that, or have I got that wrong?

9 CHIEF JONES: I don't remember the exact percentages.
10 There is Andrew Day, as I mentioned, had done a
11 report for "Our Place at the Table", where he does
12 lay out the history of that. And then also there
13 is also a brief history in that, the "Trajectory
14 of Pacific Fisheries" document that was presented
15 as evidence earlier.

16 Q Now, you are aware that in New Zealand that all
17 commercial fishermen fish under the same rules and
18 regulations?

19 CHIEF JONES: I think there is a commercial fisheries
20 and there's also traditional fisheries, so they're
21 not under the same rules and regulations.

22 Q And the traditional fisheries are non-commercial.
23 You're not sure? Okay.

24 CHIEF JONES: I think we mainly -- we were looking
25 mainly at the commercial component, because, you
26 know, that kind of was the context we were looking
27 at New Zealand because you know, that was kind of
28 what was addressed. And I think there still is an
29 issue, I think, around the traditional fisheries
30 and that's still being negotiated or they're still
31 trying to resolve that in New Zealand.

32 Q Thank you. And are you familiar with the
33 settlement in Alaska?

34 CHIEF JONES: Yes, I am.

35 Q Now, in Alaska, again it was the government bought
36 capacity for Aboriginal groups and they
37 extinguished the food fishery. There's no
38 separate Aboriginal food fishery in Alaska any
39 more, is there?

40 CHIEF JONES: I'm aware that there is a subsistence --
41 they call it a subsistence fishery.

42 Q Yes, and open for all Alaskans, isn't it?

43 CHIEF JONES: I think it's open to rural, rural
44 Alaskans, and so that is -- that has been a court
45 issue because there are Alaskan Natives who are
46 considered rural, so I think there has been issues
47 around that, as well. But I know, you know, from

1 my experience in Alaska that a majority of fishers
2 are Alaska Natives, so even -- and there are other
3 community -- and like you say, there's other --
4 there's Alaskans who aren't Alaska Natives at all,
5 so participate in that fishery.

6 Q Yes. I think my understanding is the same as
7 yours, if you live in a rural area, you have a
8 right to fish in the subsistence fishery, and it
9 doesn't matter what type of Alaskan you are; is
10 that correct?

11 CHIEF JONES: I think those are the Alaskan
12 regulations, I believe. Yes.

13 Q Perhaps I can bring up in my list of documents,
14 Mr. Lunn, Tab 93. And while that's happening,
15 perhaps I can ask you about the -- quickly about
16 the settlement on the East Coast following the
17 **Marshall** decision by the Supreme Court of Canada.
18 Again there Aboriginal communities were bought
19 into the fishery and fish under the same rules and
20 regulations commercially as every other Canadian.

21 CHIEF JONES: If I can just go back to the Alaskan
22 fishery. I think it was an oversight in that
23 negotiation that fisheries weren't addressed
24 through the **Alaskan Native Claims Settlement Act**,
25 and basically the whole provisions around the
26 subsistence fishery were something which were
27 addressed later, right. And so I think that's the
28 problem. If you don't deal with those things,
29 they'll keep coming up later, and that's, you
30 know, that's what's happened.

31 I know in the East Coast, there's a program
32 similar to the PICFI program here, the Allocation
33 Transfer Program, and that was kind of the
34 **Marshall** response initiative, you know, it...

35 Q And the last thing I want to bring up, there's an
36 article here called "The Hard Way" and if I could
37 have this entered as an exhibit, Mr. Commissioner.

38 THE COMMISSIONER: I'm sorry, Mr. Eidsvik, this is Tab
39 93, is it?

40 MR. EIDSVIK: Tab 93 of our documents.

41 THE COMMISSIONER: Thank you.

42 THE REGISTRAR: That will be Exhibit 1222.

43
44 EXHIBIT 1222: "The Hard Way" from *The*
45 *Westcoast Fisherman*, News Briefs, December
46 1992
47

1 MR. EIDSVIK: And the article that we're looking at is
2 called "The Hard Way".

3 MS. GAERTNER: Mr. Commissioner, I wonder if for the
4 record we could find out where this article came
5 from, what this article is. I don't know, I don't
6 know it.

7 MR. EIDSVIK: If you look at the bottom of the page,
8 Ms. Gaertner, you'll see *The Westcoast Fisherman*,
9 December 1992.

10 Q Now, I'm looking at "The Hard Way", and it's the
11 way they control the illegal sales in the
12 subsistence fishery in Alaska. And I note that
13 they had one person there who was a buyer who was
14 selling fish illegally, and they fined him \$1
15 million and six months in jail, but when he
16 couldn't pay, the fine was lowered to \$100,000 and
17 his multimillion dollar processing company was
18 taken away. His operation included a 200-foot
19 processing barge, three 100-foot barges, and 14
20 tenders, all valued at four-and-a-half million
21 dollars. In addition, he has agreed never to buy
22 fish in Alaska again, after he gets out of jail.

23 Now, if we had those types of penalties for
24 illegal sales of fish, and I don't care whether
25 it's sports fish, Aboriginal fish, commercial guys
26 selling it illegally, we could probably get a
27 pretty good handle on illegal sales of fish in
28 B.C., couldn't we. Mr. Terry, do you have any
29 comment on that, or any other panel member? And
30 that was my last question. Mr. Jones?

31 CHIEF JONES: I don't think getting a handle on it is
32 kind of what the way I'd put it, because I think
33 it's a -- you know, enforcement is a major issue
34 particularly when rights issues are involved. You
35 know, I mean, I agree in commercial fisheries
36 where you have fishing under licences, you know,
37 that enforcement is kind of an important part of
38 it. But I think when you come down to other
39 fisheries where there's, you know, kind of you're
40 trying to address rights issues through some
41 regulatory regime.

42 It's important to first of all see whether
43 you can reach agreement on what the regulations
44 are, and that's, I think, what these whole co-
45 management approach is about, is trying to reach
46 agreement on, you know, how a fishery is
47 conducted. And so you address the conservation

1 issues, you know, you address the rights issues.
2 So I don't think just focusing in on the
3 enforcement really is, you know, without context,
4 gets at the heart of the issue or resolves the
5 issues.

6 MR. EIDSVIK: Thank you, I'm out of time. Thank you
7 for answering my questions, panel.

8 THE COMMISSIONER: Mr. Eidsvik, you did ask if any of
9 the panel members had a comment (indiscernible -
10 overlapping speakers).

11 MR. EIDSVIK: Oh, I'm sorry.

12 Q Did anybody else have anything they wanted to add
13 on that.

14 GRAND CHIEF TERRY: And in my determination, the matter
15 would be irrelevant in terms of trying to charge
16 an Aboriginal person, a St'at'imx especially, in
17 my territory, because we do have the right to take
18 the fish, and what we do with it is to be
19 determined by us. And if you're talking about a
20 commercial enterprise that's, you know, under a
21 different regime of permit or a licence, then
22 however, you know, whatever punishment there is
23 there, then may be determined through that
24 particular process. But for us, I think it's a
25 right that we have.

26 And in terms of enforcement, our people know
27 what is right and what is wrong, and we carry out
28 our practices accordingly.

29 Q Maybe I can have one follow-up, with reference to
30 say the illegal sale of fish caught for food
31 purposes, or fishing during a closed time.

32 GRAND CHIEF TERRY: Really, we don't really accept
33 that, and a lot of our folks feel that that is
34 wrongful to say that we are doing wrong by
35 selling, you know. Whose rules are we working
36 under, and I think that that's a question that
37 continues to fester or continues to need dealing
38 with.

39 Q Mr. Huber, and Mr. Todd, before I get out of here,
40 and I can let my friend stand up, do you have
41 anything to add?

42 MR. HUBER: I would -- that's the punitive, what you
43 referred to, and an extreme one. Those aren't the
44 normal situations we're dealing with. We're often
45 dealing with small sales. Chief Terry has, you
46 know, passed on how it is with his community, and
47 many are like that. So what we do try to do is

1 reach agreements and understand the rules and I've
2 had many, many agreements. I've negotiated
3 agreements all over this province.

4 And there are rules, and when people break
5 the rules, we try to, you know, we build in
6 mechanisms to deal with them. One that we've
7 really invested in heavily with the Department is
8 restorative justice or community justice. So the
9 idea there is that you do establish rules, if they
10 are, and you try to make sure the community
11 understands them and have bought them when they're
12 jointly developed, and when you have community
13 support, of course, you have less offenders. And
14 also the idea with restorative justice, community
15 justice, is that you change the person's attitude,
16 and you're not going through courts, you save
17 money, and you change behaviour, and you build
18 relationships with the community members.

19 So I prefer that inasmuch as we can we take
20 processes into account that, you know, that change
21 the way people behave. And going to court and
22 getting a small slap on the wrist with a fine is
23 the way it's been done in the past. That doesn't
24 work and it doesn't serve the long-term interests
25 of the Department or the community.

26 MR. TODD: Thank you. I've heard a lot of nonsense
27 over the years about illegal sales of fish. What
28 almost never comes up is the fact that the fish in
29 question are caught in a fishery where the
30 Minister has determined there is an allowable
31 catch. The Minister has opened the fishery.
32 People have fished that fishery. They were
33 legally harvested. So I don't think that in the
34 vast majority of cases or instances where what is
35 termed "illegal sales of fish", has anything to do
36 with calling into question the sustainable or the
37 sustainability of the sockeye salmon runs in the
38 Fraser River.

39 MR. EIDSVIK: Mr. Commissioner, this is a very
40 interesting subject that I would love to have more
41 time to pursue, but I see my friend is standing
42 behind me, and I'll leave it at that. Thank you.

43 THE COMMISSIONER: Thank you, Mr. Eidsvik.

44 MR. LOWES: J.K. Lowes for the B.C. Wildlife Federation
45 and the B.C. Federation of Drift Fishers.
46
47

1 CROSS-EXAMINATION BY MR. LOWES:
2

3 Q Mr. Todd, in these vast number of cases where
4 fisheries were open and fisheries were sold, did
5 you happen to read the licence conditions?

6 MR. TODD: I'm not involved in those fisheries, so, no.

7 Q And so as far as you know, those licence
8 conditions might have prohibited sale?

9 MR. TODD: I guess we're getting into the area now of
10 because of my work and association with First
11 Nations, I think there's a very sincere belief and
12 possibly some grounds, even under our current
13 laws, and the **Constitution**, that they have the
14 right to do with the fish, once it's caught, that
15 they wish to do with it. And I think Grand Chief
16 Saul Terry and others have expressed that pretty
17 clearly.

18 Q Yeah. Where do you get that opinion?

19 MR. TODD: Which opinion? That there's a strong belief
20 in the right, that the right includes the right
21 to --

22 Q Yeah.

23 MR. TODD: -- some economic wellbeing?

24 Q Yeah.

25 MR. TODD: Where do I get that opinion? I get that
26 opinion from the people I work with, sir.

27 Q Okay. I'm really more interested in Mr. Huber.
28 Mr. Huber, you made a statement yesterday which I
29 found, to say the least, interesting. And my note
30 of that statement is "First Nations have rights,
31 others don't." Do you stand by that statement?

32 MR. HUBER: Well, that was taken out of context, and I
33 should have been a little more careful of my
34 wording. I was speaking --

35 Q You sure should have.

36 MR. HUBER: Yeah, well, I was speaking right before
37 that about the food fish licences that we issue.
38 So I was talking specifically about the food
39 fishery, and because I issued those licences for
40 years. I couldn't issue you one or myself one, I
41 could only issue that to Aboriginal people, and
42 that told me that they had a right that you or I
43 didn't.

44 Q Okay. So perhaps what you meant to say was that
45 some Aboriginal groups have Aboriginal rights to
46 fish for food, social and ceremonial purposes, and
47 non-Aboriginal people don't have that right. Is

1 that a more accurate way of putting it?

2 MR. HUBER: I should have reflected it that way. I
3 mean, what I certainly see here, people are very
4 quick to take things out of context.

5 Q Well, I don't think I took it out of context.

6 MR. HUBER: Well, you did, I'm sorry.

7 Q All right. So you would agree with me, then, that
8 non-Aboriginal people have -- or the public of
9 Canada have rights.

10 MR. HUBER: Obviously.

11 Q Yeah, obviously. And indeed I see that you are a
12 recreational fisher?

13 MR. HUBER: Very much so.

14 Q Right. And you have a right to fish
15 recreationally.

16 MR. HUBER: I have a privilege.

17 Q You have a privilege. And what is the source of
18 that privilege?

19 MR. HUBER: That's the laws in the country.

20 Q Now, you've used the word "laws" and "rights"
21 throughout your evidence, Mr. Huber. What is the
22 source of your information as to what the law is
23 governing the fishery, and in particular the
24 Aboriginal fishery? Where do you get your
25 information?

26 MR. HUBER: The same place you do. We have policies,
27 we have regulations and we have court decisions.

28 Q All right. And you say that the public right to
29 -- or the public fishery is based on privilege, do
30 you, rather than a right?

31 MR. HUBER: I would --

32 Q All right.

33 MR. HUBER: -- yes, I would view it that way.

34 Q Okay. Well, I'm going to read you a passage and
35 you tell me whether or not you agree with it:

36
37 Finding its subjects exercising this right as
38 from immemorial antiquity the Crown as *parens*
39 *patriae* no doubt regarded itself bound to
40 protect the subject in exercising it, and the
41 origin and extent of the right as legally
42 cognizable are probably attributable to that
43 protection, a protection which gradually came
44 to be recognized as establishing a legal
45 right enforceable in the Courts.

46
47 Do you disagree with that?

1 MR. EAST: Mr. Commissioner, he's asking Mr. Huber to
2 comment on a clearly legal text and provide a
3 legal opinion. I don't think this is appropriate.
4 MR. LOWES: I'm not asking him to provide his legal
5 opinion. I'm asking him to -- well, perhaps I can
6 put it this way.
7 Q You describe yourself as an Aboriginal Affairs
8 Advisor; is that correct?
9 MR. HUBER: That was my position title. I'm on
10 assignment right now.
11 Q Right. Right. And who did you advise?
12 MR. HUBER: That's the position in the Department and I
13 advise our departmental officials and First
14 Nations, as well.
15 Q Yeah. And what do you advise them about?
16 MR. HUBER: Well, I engage a lot with them and I advise
17 them about what's going on, what the Department's
18 priorities are, how we deliver programs, and
19 countless things.
20 Q And does that advice include what the guiding
21 legal principles are that govern the fisheries?
22 MR. HUBER: I would provide the direction I get from
23 the Department, how we are responding to those
24 decisions.
25 Q All right. And in what form do you get direction
26 from the Department?
27 MR. HUBER: Well, we, like any organization, we have --
28 we have management, and directors and that, so --
29 Q Right.
30 MR. HUBER: -- it gets passed down to me through the
31 chain of command.
32 Q And in particular in what form do you get
33 direction as to what the law is that governs the
34 fishery.
35 MR. HUBER: Well, some of the laws are clear, and
36 regulation, others as it evolves through court
37 decisions, we get a departmental interpretation,
38 but I also sit with First Nations and I hear their
39 interpretations, as well.
40 Q Okay. And the departmental interpretation is that
41 the public fishery is pursuant to a privilege?
42 MR. HUBER: Well, I can't say that. I don't believe
43 that, you know, that doesn't come down through our
44 hierarchy that it's a privilege.
45 Q Well, where do you get -- where do you --
46 MR. HUBER: Well, that's my view.
47 Q Where do you get the opinion?

1 MR. HUBER: That's my view, because I didn't come here
2 with a right to a recreational fishery.
3 Q Sorry, you didn't come where with a right?
4 MR. HUBER: Well, I don't -- I live in B.C., but I
5 don't believe I just have a right as opposed to --
6 my opportunity to fish is dependent on the
7 regulations that the responsible authorities
8 develop. And I cannot, in my mind, as opposed to
9 First Nations, I can't make a case for saying that
10 I have a right.
11 Q And that is the belief that you take into the room
12 when you negotiate on behalf of the Canadian
13 public with Aboriginal groups about co-management.
14 MR. HUBER: I take into the room a suite of
15 understandings and I try to work with people to
16 resolve issues and conflict.
17 Q And one of those understandings is that the
18 Canadian public, and in particular you as a member
19 of the Canadian public, have no rights of fishery.
20 MR. HUBER: We have a privilege there that to access
21 the fishery. How you interpret that in legal
22 terms, I don't know.
23 Q Well, I'm interested in how you interpret it in
24 legal terms, because you're the one that's doing
25 the negotiating.
26 MR. HUBER: Well, I don't go in there negotiating my
27 fishing opportunities. I go in there to work with
28 Aboriginal people and carry out the Department's
29 mandate, and I base it on -- well, things are
30 evolving with First Nations. You can -- well, we
31 all see that.
32 Q Well, isn't the Department's mandate to manage a
33 public resource?
34 MR. HUBER: That's the mandate of the Minister. That's
35 what's said, yes.
36 Q And isn't the Minister responsible to the public?
37 MR. HUBER: Absolutely.
38 Q Right. And is it your view that that public is
39 fishing by virtue of a privilege?
40 MR. HUBER: That's the way I interpret it.
41 Q You were, I think you said, involved with the
42 introduction of the Aboriginal Fishing Strategy?
43 MR. HUBER: I was.
44 Q And you're familiar with its development and
45 history?
46 MR. HUBER: Very much so.
47 Q Yes. And you indicated that one of your concerns

1 dealing with Aboriginal groups and Aboriginal
2 people is creating relationships of, and in
3 particular creating relationships of mutual
4 respect and trust?
5 MR. HUBER: That's right.
6 Q Between those groups and the Department?
7 MR. HUBER: Yes.
8 Q Would you agree that relationships of mutual
9 respect and trust are also important with respect
10 to non-Aboriginal users, or the, let's put it this
11 way, the public?
12 MR. HUBER: Absolutely right.
13 Q And you're aware that parallel with the
14 development of the Aboriginal Fishing Strategy
15 there were a number of people who disagreed with
16 that policy?
17 MR. HUBER: For sure.
18 Q Yeah. And have consistently disagreed with it for
19 over 20 years?
20 MR. HUBER: You're never going to get everybody to
21 agree. People look after self-interest.
22 Q Yeah, and this involved hundreds of fishermen
23 protesting over the years?
24 MR. HUBER: I've seen that, yes.
25 Q Yeah. What was DFO's -- what did DFO do to
26 establish a relationship, and in particular a
27 relationship of mutual respect and trust to those
28 people?
29 MR. HUBER: Fortunately we have courts that --
30 Q Yes. They prosecuted them; is that right?
31 MR. HUBER: We try to build relationships and we're
32 continuing to try to build relationships to
33 resolve issues.
34 Q By prosecuting the protestors.
35 MR. HUBER: I mean, to me, we know what happened there,
36 but we're trying to change the way we've done
37 things in the past by not only working with First
38 Nations, but other interests working with First
39 Nations as well. So how, you know, the history is
40 there, it's written, and we're trying to change,
41 and that's what I'm primarily interested in
42 changing with collaborative management, how things
43 are done.
44 Q Yeah, okay. Well, let's deal with this
45 cooperative management or collaborative
46 management. I took it from the discussion that
47 the endgame or the objective is to create a

1 decision-making as distinct from an advisory body;
2 is that correct?

3 MR. HUBER: Well, we want to work together to try and
4 reach a consensus on how to do things. There will
5 be -- obviously decisions have to be made and we
6 will look to find ways to change that, more
7 engagement with First Nations, but also to clearly
8 define where the decision's made, and who has
9 responsibility and accountability.

10 Q Yeah. But there's no doubt in your mind that at
11 the end of the day it's the Minister of Fisheries
12 or the Government of Canada that makes the
13 decision.

14 MR. HUBER: I view it as the Minister will need to
15 retain that responsibility.

16 Q Okay. And the scope of the decision-making body,
17 is that over the management of the public fishery,
18 as well as the Aboriginal fishery?

19 MR. HUBER: We're, as far as decision-making, what
20 we're talking about it's to do with the First
21 Nations fisheries, but there's also we need to
22 consider those fisheries that impact First Nations
23 fisheries.

24 Q Yeah. And so I take it that there would be an
25 attempt to reach consensus over a decision as, for
26 example, when, where, and to what extent the Area
27 E Gillnetters would fish.

28 MR. HUBER: No, that's not what we're talking about.

29 Q Okay. What are we talking about?

30 MR. HUBER: We're talking about the First Nations
31 fisheries and ensuring that there's access to
32 those fisheries. And, you know, how your Area E,
33 I mean, this is where we get into where shares, if
34 we had shares, you would devise your plan to get
35 your share, and we would, you know, have a
36 comprehensive plan, how each of the interests gets
37 their shares. Right now, the way it is, the
38 Department's left to make a decision that you're
39 on and how that's harvested and when.

40 Q Yes. And so a decision, at least under the
41 current regime, as to -- that would affect the
42 access to First Nations to fisheries would involve
43 making sure that someone else stopped in order to
44 provide the access; isn't that right?

45 MR. HUBER: That's the way it works. I mean,
46 somebody --

47 Q Yeah.

1 MR. HUBER: I mean, it's been that way. I've managed
2 lots of commercial fisheries. So certainly not
3 everybody can fish every way they want. There's
4 got to be a plan in place where -- and we have an
5 allocation policy and we have plans and we consult
6 with the various groups and we put it in a harvest
7 plan and an integrated harvest plan each year, so
8 you can -- so people can see what the plan is.
9 Q Yes. Now, Mr. Todd, you also made a statement
10 that I found rather astounding. You said that, my
11 note is, that "The Government of Canada's policy
12 that there should be room for all in the fishery
13 was a problem." Is that right?
14 MR. TODD: I don't believe I said it was a problem.
15 Q Unfortunately we don't have a court reporter to
16 read it back, but that's the note that I made.
17 MR. TODD: I think it's pretty clear from all kinds of
18 testimony, as well as what all of us have seen
19 over the years, that a blanket statement like
20 "room for all" can imply that that means everybody
21 can take part in all fisheries, and that is
22 obviously not the case.
23 Q All right, so --
24 MR. TODD: And under times where we have stocks
25 threatened and some scarcity in many years, then I
26 think it's obvious that that sort of overarching
27 policy statement, if you will, is kind of
28 misleading.
29 Q All right. So you're not to be taken to be
30 asserting that the existence of a public fishery
31 is a problem.
32 MR. TODD: I certainly did not say that.
33 Q No. Nor did you intend to.
34 MR. TODD: Well, so far I don't have any intentions to,
35 but I did say that there are going to be
36 constraints on that policy because of us trying to
37 manage the resource more effectively. I didn't
38 say the latter part, but that's what I meant when
39 I said "those constraints".
40 Q Well, such as limitation of licences.
41 MR. TODD: Absolutely. Absolutely. I can give you a
42 case in point.
43 Q No, no, I'm not quarrelling with you. I'm just
44 saying that's -- I take it that that's what you're
45 getting at. Not everyone can fish all the time.
46 That's what you're saying.
47 MR. TODD: That's correct. Right.

52

PANEL NO. 49

Cross-exam by Mr. Lowes (WFFDF)

Cross-exam by Ms. DeForrest (WCCSFN)

1 Q But you don't quarrel over the fact that from
2 Canada's perspective the fishery is a public
3 resource. It is a resource for the public of
4 Canada.

5 MR. TODD: That's a term that is used in legal areas
6 that I'm not qualified to comment on.

7 Q And has been used for a century, at least.

8 MS. GAERTNER: I'm not sure how much longer we're going
9 to have the debate about what the law is and what
10 isn't the law and how long it's going to be -- are
11 you asking him to comment on how long that law has
12 been in place --

13 MR. LOWES: No.

14 MS. GAERTNER: -- and where we are?

15 MR. LOWES: No. I'm making a statement and finishing
16 my cross-examination. Thank you.

17 THE COMMISSIONER: Thank you, Mr. Lowes. I'm sorry,
18 who follows Mr. Lowes, Mr. McGowan?

19 MR. MCGOWAN: I believe Ms. DeForrest is next.

20 THE COMMISSIONER: Your microphone, please.

21 MS. DeFORREST: Thank you. Sorry, Mr. Commissioner and
22 panel members. My name is Leah DeForrest. My
23 last name is spelled D-e-F-o-r-r-e-s-t, and I am
24 here on behalf of the Western Central Coast Salish
25 First Nations. I am allotted 30 minutes, Mr.
26 Commissioner, and I expect to take that full time.
27 I'm not sure if you'd like me to continue or begin
28 after the lunch break.

29 THE COMMISSIONER: Yes.

30 MR. MCGOWAN: Mr. Commissioner, we are very tight for
31 time, so I would suggest continuing, using every
32 minute we have.

33 MS. DeFORREST: Thank you. Mr. Lunn, I provided you
34 with a number of documents, if you could pull up
35 Exhibit number 493, please -- sorry, a listing of
36 the documents I intend to refer to. Exhibit
37 number 493, in particular, page number 4, the
38 recommendations.

39

40 CROSS-EXAMINATION BY MS. DeFORREST:

41

42 Q This is a question for Chief Jones, as well as Mr.
43 Huber and Grand Chief Terry, if you'd like to
44 provide comment, I'd appreciate your comments, as
45 well. My question is that almost seven years has
46 elapsed since the recommendations found in this
47 document were made. How has DFO responded to

June 30, 2011

1 these recommendations? Mr. Jones, if you'd like
2 to start -- or, sorry, Chief Jones, if you'd like
3 to start.

4 CHIEF JONES: Are you talking about all the
5 recommendations, or...

6 Q Yes, in general, whether -- basically what I'm
7 trying to get at is if these recommendations had
8 any impact on DFO's approach.

9 CHIEF JONES: Yes, I think they did. There was a
10 Pacific Fisheries Reform Policy which, you know,
11 there was some public dialogue on that, and that
12 was put in place. And then following that there
13 was a Pacific Integrated Commercial Fishery
14 Initiative, and I think it only responded to some
15 of these issues.

16 Q Okay.

17 CHIEF JONES: So I think it was, as I mentioned before,
18 a first step at addressing the second
19 recommendation, around allocating more fish to
20 First Nations. I think there was some co-
21 management elements to the PICFI program, you
22 know, which had been trying to address some of the
23 co-management issues or the food, social,
24 ceremonial issues. But I think some of them have,
25 it's just been a start, and I think we don't
26 necessarily -- there hasn't been a lot of progress
27 in some areas, or we're still at a point where we
28 haven't seen results, I guess you could say.

29 I think certainly on the Issue 4, you know,
30 the Aboriginal right to manage fisheries, I'd say
31 there's been -- there's been some discussion of
32 co-management, but that, you know, certainly
33 hasn't been something which has been addressed at
34 all.

35 And I just say, you know, in the case of, you
36 know, the relationship between the U.S. tribes and
37 the federal government, you know, those have been
38 quite important, those kind of policy statements,
39 you know, around recognizing the rights of -- I
40 don't think it was rights to manage, but it was
41 self-government, kind of along those lines.

42 And I think in terms of the last
43 recommendation on individual quotas, you know,
44 that was part of Pacific Fisheries Reform, so
45 introducing individual quotas in the salmon
46 fishery, that has been a great concern for First
47 Nations. DFO has moved ahead with, you know, with

1 demonstration fisheries, and I guess the concern
2 has been that these are just going to be made
3 permanent fisheries with very little, you know,
4 input from First Nations, or even public dialogue.
5 I think several people have talked about the
6 importance of public dialogue. In some ways I
7 think it's entrenching rights of existing
8 commercial fisheries. You know, there's certainly
9 windfall benefits from increase in value. You
10 know, at the same time that there's only kind of
11 this first small step at addressing First Nation
12 access.

13 Q Thank you. And Mr. Huber, would you comment?

14 MR. HUBER: Well, the work I'm doing is focusing on
15 working with First Nations to help not only
16 determine how to share fish, especially in times
17 when there's not enough to meet everybody's needs
18 to work out sharing arrangements, but also to
19 create a better understanding on what the needs
20 are and how we can better manage the fishery. So
21 I think the Department has invested in this
22 collaborative management and through PICFI, has
23 invested a lot towards developing the mechanisms
24 for working together, and also to -- so that's
25 sort of setting the table so that it can make it,
26 operationalize it, but also providing resources
27 to, you know, buy the access out and transfer to
28 First Nations. So I guess we're, you know,
29 working on pieces of it, the recommendations.

30 Q Thank you. And Grand Chief Terry, would you like
31 to comment?

32 GRAND CHIEF TERRY: I wasn't a party to the authoring
33 of this document. However, we are very concerned
34 for the matter of, you know, the establishment of
35 a management process recognition of our people's
36 capacity to manage the fishery resource, and we
37 are quite prepared to pursue some of these
38 recommendations, I guess, that sort of touch on a
39 lot of the things that we've outlined within our
40 -- the Intertribal Fishery Treaty that outlines a
41 lot of these matters that are important for a
42 proper management of the fishery.

43 But I think that what we come to the table
44 with is that we do have the ability to manage, and
45 we have the capacity that is and we have all the
46 wherewithal to be able to do that, and we have not
47 been given that opportunity, and we continue to be

1 told that we have to wait, we have to wait, we
2 have to build up our capacity.

3 But I would challenge the Government of
4 Canada that perhaps they don't have the capacity
5 to come to our table to be able to talk about how
6 it is that fisheries is managed by our people,
7 and, you know, maybe it's a constraining by the
8 process that they have to abide by, and we say
9 that much of the matters that were discussed in
10 earlier discussions are matters that haven't been
11 dealt with in terms of lands and resources.
12 Somebody's enriching themselves on the backs of
13 our people by not resolving the land and resource
14 issues of our people, and yet we're told, no, no,
15 no, you can't, you don't have the capacity. We
16 say we do, and we are prepared to go forward and
17 prove that.

18 And that's what the Intertribal Treaty
19 Organization is about. We're trying and making
20 efforts to implement. The fact that we have
21 political authority, we have economic aspirations
22 within our territories, we have culture that we
23 would like to have enhanced once again, and these
24 points need to be pursued in something like that,
25 and the spirit of our people has been challenged
26 in everything. And so we say, ah, if various
27 recommendations are to be pursued, ah, let's see
28 if they can. We go back for many, many, many
29 hearings.

30 I participated, for example, within the
31 Penner report, talking about jurisdiction,
32 authority or governance. That is paramount. If
33 you don't have governance, there's no point in
34 continuing on. The Mackenzie Pipeline hearing,
35 for example, was stopped because I think that they
36 needed to have that clearly understood, or the in
37 terms of the Alaska agreement, as well, that
38 governance is important. And we have that, if
39 there's to be recommendations to be pursued, we
40 have our contributions to address those.

41 Q Thank you. Chief Jones, I noticed that your hand
42 was up earlier. Did you have something to add.

43 CHIEF JONES: I just wanted to add on the sixth
44 recommendation which mentions the **Kapp** decision,
45 there was concern at the time that because the
46 Department's stopped issuing licences for pilot
47 sales, but basically that case went through appeal

1 and the courts ruled, you know, that there was a
2 legitimate objective, you know, on the part of
3 Fisheries and Oceans to make allocations to First
4 Nations for commercial purposes. And so but I
5 think another thing that has happened since then,
6 so that was resolved. And I think that's the
7 whole program approach, you know, of reallocating
8 to First Nations is a legitimate approach.

9 The other thing was around an integrated
10 commercial fishery, this whole idea of room for
11 all, you know, that was brought up earlier, you
12 know, has -- is there an issue for First Nations,
13 and you're probably familiar with, in the case of
14 the Nuu-Chah-Nulth, you know, where there again it
15 was something that was the Nuu-Chah-Nulth have
16 lost access to the fishery, you know, commercial
17 fishery similar to most coastal first nations.
18 And the courts said that that integrated fishery
19 approach, you know, was something that infringed
20 with the Nuu-Chah-Nulth rights. And so I think
21 that is, we have to find a different way of
22 basically doing it, and that's what this whole
23 approach to negotiation allows us.

24 MR. EIDSVIK: Mr. Commissioner, I'm noticing quite a
25 bit of straying off into issues of law again, and
26 now we've already been talking about whether DFO
27 policies for the current fishery infringe upon the
28 Nuu-Chah-Nulth rights, and I know there's some
29 sensitivity about discussing issues of law, and I
30 just think that -- thank you.

31 MS. DeFORREST: Thank you. I won't pursue that any
32 further, Mr. Commissioner. I'm in your hands with
33 respect to...

34 THE COMMISSIONER: Yes, we'll take the lunch break now,
35 thank you.

36 MS. DeFORREST: Thank you.

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

39
40 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

41 (PROCEEDINGS RECONVENED)

42
43 THE REGISTRAR: The hearing is now resumed.

44
45 CROSS-EXAMINATION BY MS. DeFORREST, continuing:

46
47 Q Mr. Lunn, I've requested that you bring up Exhibit

1 number 295. It's a "Co-Management Discussion
2 Paper", in particular I'd like the panel members
3 to look at page number 5. There's a "Spectrum of
4 Engagement" table, Table number 1. And that
5 table:

6
7 ...illustrates the spectrum of engagement in
8 decision-making...

9
10 I'm just reading from the top of the page here:

11
12 ...the spectrum of engagement in decision-
13 making, moving from centralized government
14 management on the left to local community
15 management on the right.

16
17 I'd request that each of the panel members plot
18 for me and tell me how you would plot the
19 following programs along the spectrum.
20 Essentially beginning at the far left there's
21 "Informing" and "Information Exchange" and then
22 "Advisory", "Partnership/Shared Management", and
23 "Devolution".

24 So beginning with the Pacific Integrated
25 Fisheries Initiative, PICFI, where would you plot
26 that along the spectrum? Beginning with Mr.
27 Huber.

28 MR. HUBER: That's difficult, I think it crosses a
29 number of the -- I mean, to start with, this is
30 just an example. There's different versions of
31 this with the same idea that moving from right to
32 left, more authority or decision-making. Of
33 course, when the program started, there was a lot
34 of information exchange, informing, and as we've
35 moved along and developed the program, we get into
36 more the partnership side, and First Nations, a
37 part of that, working amongst themselves to figure
38 out how as a business model it would work. So
39 we're moving, I would say to the right, and some
40 of it's moved into the "Partnership" side.

41 Q Where would you suggest it falls currently. You
42 say it's moving more towards the right. Where
43 does it fall currently?

44 MR. HUBER: Well, it's more than "Advisory" in the
45 sense that First Nations now with their economic
46 fisheries are not only having built their business
47 plans, they're doing the harvesting and they're

1 doing the marketing of fish. So they're making
2 management decisions as far as a business
3 operation.

4 Q Thank you. And, Mr. Todd, where would you plot
5 PICFI?

6 MR. TODD: I've had very little involvement with the
7 PICFI program, but I did participate in one
8 project this past summer, almost a year ago now,
9 and so I would say even with an active fishery we
10 were at the "Advisory" stage.

11 Q Thank you. And Grand Chief Terry, where would you
12 plot PICFI?

13 GRAND CHIEF TERRY: Well, from our approach, it
14 permeates the whole spectrum, I would say, in
15 terms of management or governance right on
16 through, depending on where our technical people
17 are, our advisory groups, and so on and so forth
18 would be dealing with these matters, and then
19 relaying them along. I know for us, I know that
20 the program is coming to an end, I think next
21 year, isn't it? And for our interests are in
22 being involved in developing economic basis, so I
23 guess we're at the "Governance" end of things
24 right now.

25 Q Okay. And Chief Jones.

26 CHIEF JONES: I think I'd say it's more at the
27 "Advisory" level, and it's important to recognize
28 that there's different elements to the program.
29 You know, there's kind of a licence -- there's an
30 access, acquisition and distribution element,
31 there's a co-management element, and there's a
32 enhanced accountability, and there's one other
33 element, as well. So I think they all are a
34 little different. But to a large extent, a lot of
35 the programs are Aboriginal programs. And so I
36 know there was a recent midterm review of PICFI
37 that was done by the -- I guess the Evaluation
38 Director of DFO, and that in one recommendation
39 that came out of that was more involvement by
40 First Nations in the decision-making, you know,
41 around the PICFI program and how it's developed
42 and designed. So I think there's a recognition,
43 too, by government, as well.

44 Q Okay. And the same question with respect to
45 plotting where the Aboriginal and Aquatic Resource
46 and Oceans Management program would fall, and if
47 you'd like to plot that, Mr. Huber.

1 MR. HUBER: Our focus right now with the program is to
2 build this foundation for engagement with the
3 First Nations, and actually with First Nations
4 and, you know, the recreational and commercial
5 interests, as well. So it's still in development,
6 and we've made a lot of progress in the last year
7 in the sense of sub-aggregates of groups working
8 together. The Lower Fraser, for example, 29 of
9 the 30 First Nations have now formed an alliance.
10 Off the mouth of the Fraser the IMAWG group has
11 developed substantially, and the Upper Fraser
12 Fisheries Conservation Alliance has been operating
13 for a number of years. So we're, you know,
14 basically we're still in the building block stage,
15 but we're doing that together. So where it fits
16 on that spectrum, again, I would say it's in
17 several places, between "Information Exchange" and
18 "Partnership".

19 Q Thank you. Mr. Todd?

20 MR. TODD: I'm not sure that the AAROM program in
21 particular lends itself to this, to trying to
22 categorize it with this particular spectrum. I
23 think this is kind of a little bit more aimed at
24 the types of things that are -- that go on in
25 terms of actual fisheries management decision-
26 making processes, or other types of resource
27 management and decision-making processes.

28 I would have to say that from my experience
29 with the AAROM program, it's a funding program,
30 and it's not an operational program so much, at
31 least where I'm involved anyway. So I guess what
32 it is is a combination of "Information Exchange"
33 and "Advisory".

34 Q Thank you. And, Grand Chief Terry?

35 GRAND CHIEF TERRY: Yeah, AAROM is a funding agency or
36 a funding source that was augmenting the AFS, I
37 would understand. And so if we're talking about
38 it in terms of the ITO, much like the other one,
39 PICFI, as well, we'd have to look at it as a
40 governing body and determine whether or not we
41 play a role in there. And it's been a difficult
42 one for the ITO to be involved in right now,
43 because I think the, at least from my experience,
44 and along with Barry, is that it's going to be a
45 hard fit for the Department to deal with on a
46 nation-to-nation, nation-by-nation basis.

47 Q Thank you. Chief Jones, could you tell me where

1 you would plot the Gwaii Haanas Marine Agreement
2 on the spectrum.

3 CHIEF JONES: Well, it's not an AAROM program.

4 Q Yes, sorry.

5 CHIEF JONES: But I think it probably would fit under
6 the -- more under the "Partnership/Shared
7 Management".

8 Q Thank you.

9 CHIEF JONES: And I think under AAROM, you know, we are
10 -- Haida Nation is involved also in marine
11 planning, the PNCIMA area, and I'd say there we're
12 in between "Advisory" and "Partnership/Shared
13 Management", and I think there is kind of this
14 structure, you know, for PNCIMA, government-to-
15 government structure. And it took some time to
16 put that in place, you know, it took five years
17 until we, you know, finally there was an MOU
18 signed that kind of established this governance
19 structure. So I think that what the AAROM
20 program, it depends on the will of both parties as
21 well as the issue in terms of whether you can kind
22 of get agreement on how to move ahead.

23 And within the Fraser, I'm not -- I'd have to
24 defer to my colleagues, other colleagues in terms
25 of their assessments.

26 Q Thank you. And I'm sorry, just to clarify, where
27 would you plot the Gwaii Haanas Marine Agreement
28 on that spectrum?

29 CHIEF JONES: On the "Partnership/Shared Management".

30 Q Thank you.

31 CHIEF JONES: And I'd say there are some instances,
32 like with the Watchmen, Gwaii Haanas Watchmen
33 Program, where I guess it still would fit pretty
34 much under that same level.

35 Q Thank you. And Chief Jones, also the Kuinst'Aaguu
36 and the Kunst'Aavah Reconciliation Protocol, which
37 I understand is Exhibit 1200, where would you plot
38 that on the spectrum?

39 CHIEF JONES: I'd say it also would be more the
40 "Partnership/Shared Management" level.

41 Q Thank you. Chief Jones, recognizing that 2009 was
42 an anomaly, I'm just going to ask some questions
43 with respect to annual catch. What percentage of
44 the annual catch represents the First Nations
45 share for each year since 1993. Are you aware of
46 those figures, Chief Jones?

47 CHIEF JONES: The First Nations share of...

1 Q What's the percentage of the annual catch that's
2 represented by the First Nations share for each
3 year since 1993. So if you look at Table --
4 pardon me, if you look at Exhibit number 493 at
5 page 23, Figure 15, it indicates the Fraser River
6 catch by sector. So the question that I'm asking
7 is what percentage of the annual catch is
8 represented by the First Nations share for each
9 year since 1993. So that's 1992 to 2002, sorry,
10 in particular from 2003 to now, would you know?

11 CHIEF JONES: What the share is now?

12 Q Yes.

13 CHIEF JONES: I don't have those figures offhand. I
14 have seen tables which try to describe that. I
15 think I'd have to look back at this figure just to
16 remind myself what the Canadian Aboriginal catch
17 is, whether that's food, social, ceremonial,
18 because then there's also pilot sales catch, you
19 know, on the Fraser, as well as, you know, there's
20 some commercial catch and you know there are some
21 First Nations participate, but that wouldn't be
22 included, I'm sure, in these numbers.

23 Q Okay. So are you aware of figures that indicate
24 the Canadian Aboriginal -- the percentage of the
25 Aboriginal catch as a percentage of the total
26 catch?

27 CHIEF JONES: Certainly for the food, social and
28 ceremonial catch, those figures are available.

29 Q Thank you. Sorry, yes, go ahead, Mr. Huber.

30 MR. HUBER: Maybe I just could help clarify that a bit.

31 Q Thank you.

32 MR. HUBER: The Aboriginal catch for the Fraser -- on
33 Fraser sockeye, if there's a relative abundance
34 around, is, I mean, it's got more stability than
35 the commercial catch, because it gets first
36 priority after conservation. So you're going to
37 have years, and we've just gone through a number
38 of years, where we've had, you know, severe
39 conservation, up till last year, issues for Fraser
40 sockeye. So in those years, of course, with the
41 commercial fisheries being closed, the Aboriginal,
42 the percent of the harvest, is going to be high.
43 The harvest is going to be relatively small, but
44 the percent of that Aboriginal harvest, because of
45 the priority, is going to be high. So that just
46 looking at reading percentages like that from
47 year-to-year, really doesn't give you a good

1 comparison.

2 Q Thank you. Chief Jones, I'm wondering with your
3 work with and involvement with various First
4 Nations, I'm wondering if you are aware of whether
5 individual First Nations FSC needs are being met.

6 CHIEF JONES: I know what I've -- what we heard during
7 the hearings from the First Nations panel was it
8 wasn't being met in many areas that, you know, on
9 the Skeena, on the Fraser, and even on the Coast.
10 And there was, you know, there's a variety of
11 reasons, and I think we went into some of those
12 reasons in the report.

13 Q Thank you. And I'm sorry, which report?

14 CHIEF JONES: In "Our Place at the Table".

15 Q Thank you.

16 CHIEF JONES: And then there's also, as I mentioned,
17 there's a food, social, ceremonial workgroup
18 that's economic -- a workgroup that's set up under
19 the Fisheries Council, and that group has been
20 meeting since last summer, right also try to scope
21 out, you know, some of the issues, and some of the
22 policy issues, you know, as well as other issues
23 around that. And my understanding is that, you
24 know, they've developed a work plan, but they
25 haven't made much progress, you know, I think at
26 addressing the substantive issues around the, you
27 know, why those needs aren't being met in many
28 cases, or in some cases.

29 Q Thank you. If I can jus ask Mr. Lunn to pull up
30 our document number 38, so West Coast Central --
31 thank you. If we can go to page 258, there's a
32 conclusion there, and, Mr. Jones, this is a --
33 sorry, Chief Jones, this is a question for you.
34 The conclusion that's found at number 8 -- if I
35 can just have a moment, please. Thank you. I'll
36 just read this in:

37
38 Co-managers have been successful in producing
39 knowledge at different scales to better
40 reflect local ecological conditions and
41 coast-wide trends. Co-management has also
42 provided for the production and integration
43 of different types of knowledge and created
44 institutional paths for the transfer of
45 knowledge at different geographic and
46 political scales.
47

1 Essentially, co-management -- and just reading
2 down to the bottom of this paragraph:

3
4 Co-management has substantially enhanced the
5 institutional fit of the management system,
6 focusing fisheries managers' attention on a
7 more expansive geographic region and a more
8 inclusive suite of impacts.
9

10 This article references "Marine Policy 26 (2002)
11 253-259" and it's authored by Syma A. Ebbin, and I
12 understand that you have some familiarity with the
13 Washington State fisheries?

14 CHIEF JONES: Yes.

15 Q And with respect to the conclusion that's set out
16 at number 8 that I've just read portions of into
17 the record, would it be fair to say that you agree
18 with this conclusion?

19 CHIEF JONES: In general I'd agree co-management, you
20 know, does lead to better management, and part of
21 it is because of better exchange of information
22 and a more holistic view of kind of the fishery.
23 And I think in the case of Washington State there,
24 each of the 21 tribes who are part of the
25 Northwest Indian Fish Commission, they manage
26 their own fisheries, and they do that through
27 their own local processes, even though, you know,
28 there's agreement among them on a co-role-
29 management plan, and so that allows them to bring
30 kind of that knowledge into their local process.

31 So that's an important part of, you know,
32 kind of effective engagement at a local level is
33 to, you know, kind of having -- often, like in our
34 area it's consensus-based decision. So we have
35 public meetings, you know, engage the people who
36 are actually involved in the fishery and
37 developing rules for the fishery, and it does lead
38 to, you know, better compliance, kind of better
39 information, as well as enhanced benefits from the
40 fishery.

41 Q Thank you. And I'm just wondering if you can
42 speak to how First Nations feed -- with respect to
43 allocations, how they feed their concerns
44 regarding allocations into the Pacific Salmon
45 Commission process.

46 CHIEF JONES: I'd say that's not done very effectively
47 at present, and it's partly because of the

1 structure is not kind of a representative
2 structure. We're all -- all the commissioner and
3 panel members are all appointed by the Department
4 of Fisheries and Oceans. I think it would be a
5 much stronger process if there was that
6 accountability, you know, to Tier 1 processes that
7 were, first Tier 1 First Nation processes.

8 And I think that going back to the kind of
9 the example from the United States, on their side,
10 you know, the tribes have our -- they work with
11 the state and also the federal governments, and
12 they also put forward names of people to be
13 involved in the panels or the commission. And you
14 know, those are selected by the federal
15 government, but I think the fact that in most
16 cases those are the same people who are put
17 forward by the tribal leaders, tribal leadership.

18 MS. DeFORREST: Thank you. I understand that I'm out
19 of time, but before I conclude, I'd just like to
20 mark our document number 38 as the next exhibit,
21 if that's possible, please. That's the document
22 containing the conclusion, the article authored by
23 Syma A. Ebbin.

24 THE REGISTRAR: That will be marked as Exhibit number
25 1223.

26
27 EXHIBIT 1223: Syma A. Ebbin, Marine Policy
28 26 (2002) 253-259, Enhanced fit through
29 institutional interplay in the Pacific
30 Northwest Salmon co-management regime
31

32 MS. DeFORREST: Thank you.

33 MR. DICKSON: Yes, Mr. Commissioner, it's Tim Dickson
34 for the Sto:lo Tribal Council and Cheam Indian
35 Band.
36

37 CROSS-EXAMINATION BY MR. DICKSON:
38

39 Q Mr. Lunn, I'd like to ask you to pull up Exhibit
40 1210, if you could. It's Tab 28 on Canada's list,
41 if that's easier. Yes. And if you could just
42 scroll to the top of that, Mr. Lunn. Thank you.
43 Now, this is one of the consultation records that
44 was referred to last day by counsel for Canada.
45 Mr. Huber, if we look at this document, this is
46 one of the tabs, it's Port Mann to Sawmill Creek,
47 2007. And if we look at this document just where

1 it is on the screen now, I think we see that the
2 first two entries, the January 23 entries are both
3 emails where DFO is providing information, I think
4 with respect to the forecasts; is that right?
5 MR. HUBER: That looks like that's correct, yes.
6 Q And then the next four, as I look at them, are
7 entries recording phone conversations on a variety
8 of topics, requests for salmon ceremony, some kind
9 of payment inquiry, financial reporting, and the
10 like; is that so? Those go --
11 MR. HUBER: Yes.
12 Q -- February 21 through March 2, I believe.
13 MR. HUBER: And that's what it reads there. I didn't
14 produce this document, or give direction to the
15 staff in that area.
16 Q Very well. And the next four, when I look at
17 them, they seem to be scheduling consultation
18 meetings.
19 MR. HUBER: Yes.
20 Q And just by looking at it, this document appears
21 to record all sorts of contacts that DFO has with
22 First Nations, and my point is that not all of
23 them are actual consultation meetings. In fact,
24 if we look at here, a number of them are quite a
25 lot more minor than that, would you agree?
26 MR. HUBER: Well, they're not actual meetings, but
27 they're keeping track, I mean, the Department
28 staff try to arrange meetings, and sometimes they
29 have a difficulty in doing that. There's
30 resistance from some First Nations to engage with
31 the Department. But there's an obligation to
32 consult and there's an obligation -- they don't, a
33 First Nation isn't forced to engage with the
34 Department, but the Department has to make an
35 honest effort and staff are -- should be tracking
36 that they're doing their jobs.
37 Q Right. And it's tracking all those contacts.
38 And, Mr. Lunn, if I could go to Exhibit 596,
39 please. Mr. Huber, this is -- this will be the
40 consultation with First Nations Best Practices
41 Guide. And, Mr. Lunn, if we could go to
42 electronic page 10, please. There's that box in
43 the middle of the page, "Records of Consultation",
44 and it says this:
45
46 It is very important to keep records of all
47 letters, meetings, including attendance

1 lists, telephone calls, site visits, and
2 other efforts by the Crown to consult with
3 First Nations at all stages of consultation.
4 These are all considered to be elements of
5 the consultation process, although no one
6 element until itself is considered full
7 consultation unless the First Nation has
8 agreed that it is.
9

10 And the spreadsheet we were just looking at, the
11 Excel spreadsheet, that's what that is, right?

12 MR. HUBER: That's correct, yes.

13 Q Yes. And the purpose of it is to track DFO's
14 consultation efforts, so that it can prove
15 consultation if it needs to; is that right?

16 MR. HUBER: That's right, yes.

17 Q And as this Best Practices document suggests, to
18 me anyway, it's not clear what actually
19 constitutes consultation. And I want to ask you
20 about that, if I can, by going to an observation
21 that Ms. Gaertner made in her Fraser Watershed
22 process paper, and that's -- Mr. Lunn, that's
23 Exhibit 1207. Ms. Gaertner's going to have to
24 suffer some embarrassment while I read her work.
25 And to page 10, please, and it's that paragraph
26 I(a) noted that:
27

28 There is a significant lack of clarity at
29 both First Nation meetings and DFO/First
30 Nation meetings regarding such principal
31 matters as: intentions, goals, agendas,
32 mandates, representation, and function. It
33 is not clear whether a particular meeting is
34 serving an information gather, advisory or
35 decision making purpose. This lack of
36 clarity breeds distrust, unspoken and
37 conflicting agendas, increased unwillingness
38 to participate in fear of what it will be
39 used for, and irritants such as too many
40 meetings to attend which do not have
41 meaningful or concrete results.
42

43 And do you agree with those broad observations?

44 MR. HUBER: This was written back in 2004, I believe.

45 Q Yes.

46 MR. HUBER: And I would think the Department's doing
47 better today, but there's lots of room for

1 improvement, and this is why we're working and
2 expending a lot of resources to build this co-
3 management, this foundation, these types of
4 agreements that will help clarify this. This is
5 often a challenge for departmental staff to know
6 when there's been enough consultation or adequate
7 consultation. With agreements on how to go about
8 that, and in our partnership relationship,
9 consultation can actually become embedded in the
10 process and it won't be near the issue.

11 Q Yes. And from what I hear from your answer, then,
12 you agree that more clarity and a more structured
13 process is desirable.

14 MR. HUBER: And we are attempting to do that, and we
15 have made improvements.

16 Q Mr. Todd, I'd like to open this up to the panel.
17 Do you share Ms. Gaertner's concerns, and maybe
18 you could comment on Mr. Huber's response.

19 MR. TODD: Yes. I have and do share those very same
20 concerns. With the Fraser River Aboriginal
21 Fisheries Secretariat, and the proliferation of
22 initiatives that were being funded through the
23 Secretariat by the Department, all very well-
24 meaning, but there were certainly some growing
25 pains, and that was a fairly major initiative of
26 mine last summer and fall and in the winter was to
27 actually try to bring some clarity to these
28 various initiatives by drafting terms of
29 references for each one, and trying to more
30 accurately describe sort of what the purpose of
31 the initiative was and how it was going to be
32 carried out and under what sort of, not rules, I
33 guess, but sort of terms of engagement.

34 So I do agree with Mr. Huber that there's
35 progress being made on that front.

36 Q Thank you. I want to turn now, if I can, to the
37 food fishery. On Monday, as some of you know,
38 because some of you have commented on it,
39 Professor Harris testified that the restriction on
40 the sale of Aboriginal food fish is a legal
41 construct and he noted that the enforcement on the
42 ban on sales is difficult, intrusive and a source
43 of considerable antagonism between Aboriginal
44 peoples and the federal government. And he
45 testified that a better regime is a
46 straightforward allocation of fish without a
47 restriction on use.

1 And I think I've heard some support from the
2 -- perhaps from the right-hand side of the panel,
3 and I'm going to turn to Mr. Huber with some
4 questions on that. But if any of the three of you
5 would like to comment, now is an opportunity of
6 you want to comment further, and if not, I'll go
7 to Mr. Huber.

8 Well, if nobody jumps up, then I'll go to Mr.
9 Huber.

10 MR. TODD: Sorry, just before you do that --

11 Q Yes.

12 MR. TODD: -- I lost the thread there that you were
13 asking us to comment on. I'm sorry.

14 Q Yeah, my apologies. So the comment was that the
15 restriction on the ban of sales of food fish is a
16 source of considerable tension, uses a lot of
17 resources, very difficult to enforce, and that a
18 better approach in Professor Harris's view is a
19 straightforward allocation of fish without a
20 restriction on use. Mr. Todd.

21 MR. TODD: I agree with Mr. Harris wholeheartedly.

22 Q Anybody else. Mr. Jones?

23 GRAND CHIEF TERRY: Yes. I think that the
24 representation that is made by Mr. Harris goes to
25 a great distance in, you know, reaching the
26 understanding that we have is that we do have the
27 authority to make decisions on how we use our
28 fish.

29 CHIEF JONES: And I, you know, I agree, too that it's
30 an impediment to working together and an example
31 would be the communal licences that the Department
32 issues to First Nations. Usually those aren't
33 mutually agreed and that's one of the major
34 irritants, you know, is that there's a complete
35 prohibition on sale, and by agreeing to that
36 licence, you're agreeing to this, which in some
37 cases is an Aboriginal right. But there's no
38 discussion really of, you know, kind of that those
39 kinds of issues with the Department. It seems
40 like more of an arbitrary decision by the
41 Department, both about an allocation and also the
42 use.

43 Q Mr. Huber, this morning Mr. Lowes was complaining
44 of the prosecution of the fishermen who protested
45 the pilot sales program by fishing illegally, and
46 that his reference is to the **Kapp** case, is that
47 your understanding?

1 MR. HUBER: Well, there's been a fair number of
2 prosecutions over the years, I'm not too sure if
3 it was the **Kapp** case. You know, the Survival
4 Coalition and others, I guess, have had these
5 protest fisheries. They've gone through the
6 courts.

7 Q Yes. There's been a series and the most prominent
8 of which has been the **Kapp** case. And I understand
9 that John Cummings, the former Member of
10 Parliament, was recently fined \$200 for his
11 involvement and that he and the others intend to
12 appeal that fine. Do you know anything about
13 that?

14 MR. HUBER: No. No, but he, I mean, we're in Canada.
15 People have a right to protest one way or another,
16 but the government is responding to the courts.
17 It's responding to building our relationship with
18 First Nations and finding ways to settle issues.
19 So if it's a question whether the government acted
20 lawfully, I believe the courts have verified that
21 the government has.

22 Q I suppose Mr. Lowes' point when he was bringing
23 this up is that prosecution strains relationships
24 with the Department.

25 MR. HUBER: Definitely, with anybody, that's a negative
26 way to deal with issues.

27 Q Yes. And we've seen that on the First Nations
28 side, I believe, where substantial enforcement
29 attention is given to Aboriginal fisheries in
30 respect of the ban on the sale of FSC fish. And
31 that's correct?

32 MR. HUBER: And it will continue until we resolve the
33 issues of allocation and shares and get some of
34 these settlements in place.

35 Q Yes. And on that, you agree that the enforcement
36 of the band creates a great deal of antagonism and
37 uses substantial DFO resources?

38 MR. HUBER: Of course it does.

39 Q And as Grand Chief Terry stated this morning, if
40 the fish is caught legally, then what's done with
41 it, whether it's used for food, or whether it's
42 sold, has nothing to do with conservation. You'd
43 agree with that?

44 THE COMMISSIONER: Mr. Lowes?

45 MR. LOWES: Well, my friend's question, first of all,
46 implies an assumption, and secondly implies an
47 assumption that is wrong. Presumably if the

1 licence that fish are to be harvested for -- but
2 not for sale, and the fish are harvested for sale,
3 it is not caught legally.

4 MR. DICKSON: If there's an allocation --

5 MR. LOWES: Perhaps my friend can define what he means
6 by "fish caught legally".

7 MR. DICKSON: Thank you, Mr. Lowes, I appreciate that.

8 Q So if there's an allocation that allows the fish
9 to be caught, it's an FSC fish, what is done with
10 it, whether it's sold, whether it's eaten by that
11 person, by that community, that doesn't raise a
12 conservation concern. You'd agree?

13 MR. HUBER: It wouldn't if it's within the allocation
14 or the management plan, if it's accounted for.

15 Q And so I think as you suggested a moment ago,
16 would you agree that it would be constructive to
17 move toward an allocation regime for Aboriginal
18 fisheries that does not restrict the use of fish,
19 that removes that source of tension.

20 MR. HUBER: I've dealt with many Aboriginal groups and
21 some of them want their FSC allocation kept
22 separate. Some of them are afraid that in the
23 future if it's just open, that the community
24 members will lose the cultural aspect in that. So
25 there is support for separating the two. But in
26 my mind, that's something that should be
27 negotiable with the First Nations. I mean, they,
28 when we talk about governance and authority, that
29 comes into play.

30 Q I appreciate those comments.

31 I want to turn to another topic, which is co-
32 management. And, Mr. Lunn, I'd like to bring up
33 Exhibit 295, if I could. Thank you. And it's
34 page 8 that we're going to, it's a diagram I'm
35 looking for. Yeah, it's a couple of pages down, a
36 few pages. That's the one.

37 Mr. Jones, what this diagram shows, I
38 believe, is that, well, as the caption says, it's
39 "Opposing Strengths of Authority for First Nations
40 and DFO". And on the left I think it's intending
41 to indicate that strength of authority on the
42 Aboriginal side is highest at the more local
43 level, and the opposite is true on the government
44 side, and so the mandates are sort of coming from
45 different directions. One's bottom-up, one's top-
46 down. Is that a fair summary?

47 CHIEF JONES: I think that's a mismatch, and this is

1 again, it shows Department of Fisheries and
2 Oceans, and so other organizations like, for
3 instance, Parks Canada, you have a different
4 structure.

5 Q Right. Right. I shouldn't have said government
6 -- DFO. And, Mr. Lunn, if we go over to the next
7 page, just at the bottom, there's a comment in the
8 paper, Mr. Jones, that says that:

9
10 One way to overcome this challenge is through
11 the development of common Tier 1 forums,
12 which bring together First Nations within a
13 more broad spatial area...

14
15 And I take it, the paper here is stressing the
16 importance of these Tier 1 processes, because
17 always the ultimate authority is going to remain
18 at the First Nation level because they're the
19 rights holders; is that -- is that fair?

20 CHIEF JONES: That's correct, and by bringing First
21 Nations together, kind of to work together, it
22 makes the -- there's a mismatch, you know, between
23 the DFO decision-making and First Nation decision-
24 making. So it does help to address that mismatch.

25 Q Yes. And, Mr. Huber, last day Mr. East was asking
26 you about this, and sort of indicating that DFO
27 wanted to engage with First Nations at "as large
28 an aggregated level as possible", and I believe
29 that you replied by saying, by expressing your
30 agreement with Grand Chief Terry's vision of co-
31 management with Aboriginal Nations, "Nations" in a
32 larger sense, as opposed to individual First
33 Nations. Do you recall that?

34 MR. HUBER: I do, but just to clarify, you can have a
35 larger aggregate, such as the Forum, where you're
36 there to exchange information and to create an
37 understanding, and we can get highly skilled
38 technical people in attendance. We can't ask
39 these people to travel around every community.

40 Q Right.

41 MR. HUBER: But you not only get those kind of skilled
42 people there, you -- it helps build capacity with
43 the First Nations technical people, and for them
44 and everybody to hear the issues. So we get a
45 good understanding and a good grounding of what
46 the issues are. So it sets the stage for better
47 decision-making.

1 The question with Saul, when you referred to
2 it, Saul there, it was his vision that the
3 authorities at the Nation level, and the support
4 for that would be, of course, often the nations
5 have, you know, four, six, eight, ten, sometimes
6 more First Nations members.

7 Q Mm-hmm.

8 MR. HUBER: So it's a more efficient way to get things
9 done and it ensures, in my mind, another assurance
10 that there's -- groups are working together.

11 Q Yes.

12 MR. HUBER: So the more communications, the more
13 effectively we can do that, the better.

14 Q Yes. And the point -- the point I want to get to
15 here is that I think it's important to keep in
16 mind that co-management won't work if DFO sits
17 back and demands that First Nations aggregate up
18 to the provincial level. My point is that DFO has
19 to respect the source of Aboriginal authority.
20 It's got to strive to find a workable solution
21 within this dynamic of opposing levels of
22 authority.

23 MR. HUBER: I fully agree with that, and that's what
24 we're trying to do.

25 Q Yes.

26 MR. HUBER: And that's why we would like Chief Terry to
27 participate with us.

28 Q Yes.

29 MR. HUBER: In building this.

30 Q Yes.

31 MR. HUBER: And, Mr. Jones, on this topic, I just want
32 to follow up on one of Mr. East's questions from
33 last day. He suggested in one of his questions,
34 to my ears, that this internal Tier 1 organizing
35 is for First Nations to work out for themselves,
36 and I was reminded of your discussion of the Boldt
37 decision, that once Judge Boldt found that the
38 tribes had a right to manage their fisheries, the
39 tribes were able to come together over time to
40 work together. And my question is whether you see
41 it as important, perhaps as essentially, that DFO
42 come forward and send a clear message that it is
43 prepared to share decision-making authority, to
44 recognize First Nations concurrent authority in
45 the management of the fisheries.

46 CHIEF JONES: Yes, absolutely. You know, I think
47 there's -- you have to have the political will and

1 that has to be communicated. And I think the
2 other important part is providing the incentives
3 for First Nations, you know, to be involved. And
4 I think it goes beyond, you know, it goes beyond
5 kind of the involvement and decision-making or the
6 access to food, social, ceremonial fisheries. You
7 know, it also has to involve other incentives like
8 economic access.

9 Q Mr. Huber, it strikes me that it would be a tragic
10 result, if at the end of the Roadmap process
11 Ottawa decided it wasn't comfortable with the
12 joint management arrangement that had been worked
13 out by the parties in that process. Would you
14 agree with that?

15 MR. HUBER: We will engage with the Ottawa staff, we
16 wouldn't be agreeing to something that Ottawa is
17 not going to agree to. We'll have the
18 communications, and we'll know before we get to
19 that point whether we can reach an agreement or
20 not.

21 Q Yes.

22 MR. HUBER: But obviously Ottawa is going to have to
23 support it.

24 Q Right. And how will that take place? Will that
25 be transparent to First Nations in the process?

26 MR. HUBER: We will. We will engage with, at
27 appropriate times, senior officials, and including
28 inviting them to participate in the process.

29 Q And I know that earlier in your testimony you said
30 that it's best to let the roadmap process develop
31 and not be too positional at this stage - I think
32 that was your word, "positional"?

33 MR. HUBER: Yeah, that's right.

34 Q Yeah. But isn't it essential for First Nations to
35 come together into the process to have a clear
36 statement from Canada that it's willing to engage
37 in the joint management?

38 MR. HUBER: That's helpful, and it's important that
39 they lay their interests on the table.

40 Q Yes. All sides have to lay their interests on the
41 table?

42 MR. HUBER: Yes.

43 Q And it's important in this process for Canada to
44 lay its commitment to joint management on the
45 table?

46 MR. HUBER: Well, in my mind, there's a difference
47 between laying your interest on the table and

1 being positional about it. In the past, and that
2 was one of the failings of the earlier watershed
3 agreement, many people took strong positions and
4 some of the leaders took very strong positions,
5 and later on, as things evolved, it's very
6 difficult to back away from those positions, so I
7 think it's -- that's an important lesson.

8 Q Thank you. Those are my questions. Sorry, Grand
9 Chief Terry?

10 GRAND CHIEF TERRY: Yes, I'd just like to add that I
11 think it's important to understand why it's
12 important, I feel, to recognize our respective
13 nations. In the interest of the issue at hand
14 here, in terms of why is the resource
15 disappearing. Our nations are concerned for that,
16 because, currently, we've looked at the management
17 for 20, 30 years and experienced much of the,
18 firsthand, the curtailment of access to the
19 resource in the name of conservation.

20 We believed that it was for the purpose of
21 conservation. But, you know, when you lay out
22 your harvest plans, who's there to really benefit
23 from this? And it certainly has not been our
24 peoples. But if there is, indeed, now a shortage
25 of stocks and they continue to diminish, I think
26 in spite of last year's efforts, that -- or
27 returns, that is, not efforts but returns, that
28 were in greater numbers for a certain sector of
29 the watershed, much of the other parts of the
30 watershed continue to suffer shortage of returns
31 of stocks of salmon.

32 So in our opinion, as in the Intertribal
33 Fishery Treaty, we say that there needs to be a
34 close look taken of how management is being done.
35 And we believe there needs to be a change. And
36 how does, then, the ITO or the implementation of
37 it in nation to nation treaty of ours, fit into
38 this process in order to facilitate a regeneration
39 of stocks that come tour through our territories?
40 We think that it's critical, because our nations
41 are intimately familiar with our various
42 territories, our homelands. We are aware of all
43 the waterways and habitats, and everything and
44 anything that effects the fish.

45 And in terms of policy-making, for example,
46 the Wild Salmon Policy, within the Wild Salmon
47 Policy they refer to conservation units, and they

1 generally are watershed-based. And when you look
2 at our nation's boundaries over territories, they
3 generally are watershed-based. You can almost see
4 the watersheds as they come to or through to the
5 main stem, for example, of the Fraser or the
6 Thompson or the Columbia.

7 And so I think that our nations, then, could
8 be looked at as the conservation units that could
9 be put -- made operational in order to more
10 practically work with the -- not only in terms of,
11 I guess, the habitat and making certain that
12 there's certain matters that don't affect forest
13 activities or other industrial activities, can be
14 managed and observed within the territory, and we
15 have our people there that can and have and are
16 doing that, even today.

17 And so I think that the important -- I just
18 wanted to make certain that there's an
19 understanding of why it is we emphasize that we
20 need recognition and respect for the entities of
21 our nations. Not only do we have vested interests
22 as these are our homelands, but we need to
23 re-energize or regenerate stocks and lands and
24 resource issues within our territories, and fish
25 is one of them.

26 And, too, because of the economic situation
27 these days, Mr. Huber indicates that budgets are
28 being cut to the bone, if not beyond, and we think
29 that in the nation-to-nation process that we're
30 putting forward, that there can be a more
31 practical use of meagre dollars and -- because we
32 would be -- there would be not as much a need to
33 pull leaders from right across the province and
34 come together month after month, but you'd have a
35 smaller number that are mandated to address
36 particular issues and then they are responsible
37 for returning the message, then, back to their
38 respective nations.

39 And I think that, you know, these are just a
40 small sample of what I think it is why it is that
41 it's important to look at a more intimate
42 involvement by our nations within the management
43 of the fisheries so that we can bring back greater
44 numbers of fish to our people.

45 MR. DICKSON: Thank you.

46 GRAND CHIEF TERRY: Thank you.

47 MS. FONG: Mr. Commissioner, Lisa Fong, for Heiltsuk

1 Tribal Council. With me are my co-counsel, Ms.
2 Ming Song and Mr. Benjamin Ralston.

3 Mr. Lunn, if we could start with pulling up
4 Heiltsuk document number 59, please? And my
5 questions are for Mr. Huber. Thank you.
6

7 CROSS-EXAMINATION BY MS. FONG:
8

9 Q Mr. Huber, can you see the screen? Thank you.
10 Now, this document's entitled Draft FSC Access
11 Guiding Principles, and if I can have Mr. Lunn
12 pull us into the next page, I'm just going to read
13 certain portions before I ask you the question.
14 You'll see the heading, Background for First
15 Nations Consultation Sessions:
16

17 In response to the Pearce/MacRae Report, the
18 First Nation Panel on Fisheries was
19 established, with representatives appointed
20 by a steering committee made up of leaders of
21 the First Nations Summit and the B.C.
22 Aboriginal Fisheries Commission.
23

24 Now I'm going to drop down to halfway through that
25 paragraph, seven lines down, where it reads:
26

27 In addressing these tasks, the Panel engaged
28 with First Nations across BC, and worked with
29 the visions, ideas, and information to
30 develop the report entitled, *Our place at the*
31 *table: First Nations in the BC Fishery...*
32

33 Now I'm going to drop down to second full
34 paragraph:
35

36 Fisheries and Oceans Canada responded to this
37 report in April 2005 with an Action Plan
38 which contained the following commitment to
39 First Nations regarding FSC access:
40

41 *Food, Social and Ceremonial Fisheries -*
42 *DFO will work with First Nations to*
43 *address concerns regarding fisheries*
44 *access for food, social and ceremonial*
45 *purposes.*
46

47 Mr. Huber, that's part of the commitment, correct?

1 Yes, I'm sorry, can you just speak into your --
2 MR. HUBER: That's what it reads, yes.

3 Q Yes. And then:

4
5 *In addition, for the longer term, the*
6 *Department will work with First Nations to*
7 *develop a mutually agreeable framework for*
8 *negotiating appropriate levels of fisheries*
9 *resources for food, social and ceremonial*
10 *purposes.*

11
12 So that's another part of that commitment, a
13 mutually agreeable framework; do you agree with
14 that?

15 MR. HUBER: Yes.

16 Q Okay. I'm going to come back to this document
17 later to ask you some questions. For now, could I
18 get this marked as the next exhibit, please?

19 THE REGISTRAR: This will be Exhibit 1224.

20
21 EXHIBIT 1224: Draft FSC Access Guiding
22 Principles, Background Information for DFO
23 Internal Use

24
25 MS. FONG: Mr. Lunn, if you could pull up our next
26 document, which is Heiltsuk document number 75.
27 Thank you.

28 Q Mr. Huber, this document's entitled, First Nations
29 Access to Fish for Food, Social and Ceremonial
30 (FSC) Purposes. You'll see it's dated May 2nd,
31 2006, and it's in PowerPoint form. Do you
32 recognize this document as part of the work that
33 was done for the action plan that was referred to
34 in the previous document?

35 MR. HUBER: Well, I may have seen it. I don't -- it
36 doesn't look familiar when I look at it on the
37 screen.

38 Q Okay. Well, we'll go a little farther into the
39 document, then. Mr. Lunn, if you could forward us
40 to -- let's go to frame 3, or page 3, and I'm
41 going to refer you to the second and third bullet,
42 under the heading, Background. Now, the second
43 bullet reads:

44
45 Fisheries Managers are frequently asked to
46 increase FN FSC allocations or expand fishing
47 area, without an analytical framework or

1 clear administrative framework.

2

3 Now, this is, and again, we're in 2006, did you
4 understand this to be a problem?

5 MR. HUBER: Yes.

6 Q Okay. Now, I'm going to read third bullet:

7

8 Has led to ad-hoc decisions, confusion,
9 disparities, among FNs and inconsistencies
10 between AFS and Treaties.

11

12 Did you understand, at that time, that that was
13 the feedback you were getting from First Nations?

14 MR. HUBER: I could see that.

15 Q Is that a "yes"?

16 MR. HUBER: Yes.

17 Q Thank you. And now, if we could forward to the
18 next page, entitled, Drivers for Change, and I'll
19 just refer you to that first bullet -- or the
20 first paragraph. It reads:

21

22 FSC allocations are considered inadequate and
23 inequitable by many First Nations.

24

25 And again, Mr. Huber, was that the message that
26 DFO was getting from First Nations?

27 MR. HUBER: Yes.

28 Q Thank you. And now, if we could forward to the
29 next page, driver number 3. Now, driver number 3,
30 if you just read that, my understanding of driver
31 number 3 is the commitments which were -- which I
32 referenced in the previous document; in other
33 words, the commitment of DFO to work with First
34 Nations to address FSC access, and also to
35 developing mutually-agreeable framework for FSC
36 access; is that correct?

37 MR. HUBER: Yes.

38 Q Thank you. And now if we could forward to the
39 next frame and then go past the next frame and
40 onward to FSC Access Strategy Components. Thank
41 you.

42 Now, these components, I'm going to take you
43 to what I believe are the documents for items 2, 3
44 and 5. So Mr. Lunn, if you could assist us, and
45 sorry, I'm missing my document here, but the
46 operational framework is Heiltsuk document 31.
47 Okay. Yes, thank you, if you could have them up

1 on the screen at the same time, that would be
2 helpful.

3 Mr. Huber, do you recognize this document
4 that reads, First Nations Access to Fish for Food,
5 Social and Ceremonial Purposes, Part 1: Pacific
6 Region Operational Framework, as being the
7 corresponding document to item 2 in that
8 PowerPoint, the Operational Framework?

9 MR. HUBER: There was a lot of work done on that. I
10 certainly recognize the document on the right.

11 Q Okay. So it could be a version of the operational
12 framework that this PowerPoint would give the
13 presentation on?

14 A They'd be referencing, yes.

15 Q Okay. So again, let's go farther into the
16 document and I'll ask you some questions. If we
17 could go to page 4, please -- sorry, because I'm
18 missing my document here. Okay, I'm just going to
19 read that first sentence:

20
21 These are confidential internal DFO
22 documents --

23
24 MR. LUNN: Sorry, I'm just trying to blow it up a
25 little for you.

26 Q Sorry.

27
28 -- exempt from Access to Information
29 requests. They define DFO's negotiating
30 envelope with respect to AFS agreements,
31 including -

32
33 -- and this is important --

34
35 - maximum allocations for some fish species,
36 and funding levels for each Agreement.

37
38 And then if we drop down to one, two, three, the
39 third paragraph with the sub paragraphs to it,
40 you'll note it says:

41
42 The following general guidance applies with
43 respect to AFS Fish Mandates:

44
45 a) "Mandate" species including Sockeye...

46
47 So these are my questions for you. My

1 understanding in reading this is that, first,
2 these AFS mandates are not disclosed to First
3 Nations; is that correct?
4 MR. HUBER: That's correct.
5 Q Okay. And then, second, the AFS mandates include
6 a maximum allocation for fish species; is that
7 correct?
8 MR. HUBER: We generate a number, yes, and I
9 participate in that for the areas I operate in.
10 Q Okay. And for one of those species it's sockeye?
11 MR. HUBER: Yes.
12 Q And so putting that together, what it means is
13 that there's a maximum allocation for sockeye
14 that's an AFS mandate?
15 MR. HUBER: Well, it's a maximum at the time.
16 Annually, we'd review those mandates and adjust
17 them. I've had them changed at different times,
18 myself.
19 Q Right. But the point being that there's one for
20 sockeye?
21 MR. HUBER: Yes.
22 Q Okay. And then third, if I read this correctly as
23 well, there's an AFS mandate, including maximum
24 funding levels for AFS agreements?
25 MR. HUBER: That's right.
26 MS. FONG: Okay. And I see that we're at 3:01 right
27 now. Would this be an appropriate time to take a
28 break? Or I can keep going.
29 THE COMMISSIONER: Yes, you can keep going, that's
30 fine.
31 MS. FONG: Thank you.
32 Q So for clarity, then, taking that information, as
33 I understand it, the quantity of FSC fish
34 represented in the AFS agreements may be less than
35 what is the maximum mandated quantity?
36 MR. HUBER: That's correct.
37 Q Okay. And again, then, it's the same thing with
38 the funding, right, in that the funding for AFS
39 agreements may be less than what the maximum
40 mandated funding is?
41 MR. HUBER: It could be, although what has happened is,
42 because AFS funds haven't changed since -- and, in
43 fact, they've actually been reduced by five
44 percent, there's not much room. We're at the
45 maximum. If we're changing a mandate, it means
46 taking money from one group and giving it to
47 another.

1 Q Okay. But these, again, these mandate numbers for
2 funding and for FSC fish are not disclosed to
3 First Nations, correct?

4 MR. HUBER: That's right. There's a negotiation that
5 takes place, and I'd be one of the first to defend
6 that policy.

7 Q Okay. And to this day, that's still what occurs;
8 it's not disclosed to First Nations?

9 MR. HUBER: That's right. There's a good reason for
10 that.

11 Q Okay. And let's get to your good reason. Am I
12 right to say that DFO's rationale for not
13 disclosing this mandated information, this secret
14 mandated information, is so that during the
15 negotiation process it's got the ability to give
16 and take in its negotiation, to give and take from
17 one nation to a different nation?

18 MR. HUBER: Well, not from one nation to another
19 nation. It's when I -- if I go to the table to
20 negotiate, I want whoever I'm negotiating with to
21 know that I'm the negotiator. If I just lay the
22 maximums out, well, they're going to start with
23 the maximums, and then I can't move, and then
24 they're going to say, "Well, send the next guy
25 that can change those numbers." I want to go in
26 there with something to negotiate with, and I've
27 negotiated many agreements with First Nations.
28 Their negotiators also come to the table with
29 things they want. It may be wording in
30 agreements, it may be funding, it may be fish
31 numbers. So their negotiator and ours needs
32 flexibility, and they have to have some -- he's
33 got to take something back to their communities to
34 show that he's made some gains, too.

35 So there's, you know, it's -- that's the way
36 the process works, then.

37 Q How very interesting, because I wonder, given your
38 discussion about building trust and having a Tier
39 1 process for First Nations to come together and
40 make decisions on their own and then come to Tier
41 2, how about another way of doing this, which is
42 put all your cards on the table so that you have
43 the trust and you build the trust, and then work
44 from there on the hard issues? Because you can
45 have trust and work on hard issues. What about
46 that kind of a process, where there's just equal
47 information on the table?

1 MR. HUBER: If we get to where the allocations are
2 defined, that will work.

3 Q Thank you. So let's get back to these secret
4 mandates, though. And I don't know -- I'm going
5 to ask you this question and I'm going to ask you
6 to pause for a moment, because I don't know if I'm
7 going to draw an objection from your counsel, so I
8 want to give him an opportunity to make the
9 objection.

10 So today, so currently, in relation to
11 maximum mandated quantities of FSC fish, okay, how
12 is that coverage organized? And what I mean by
13 that is, are AFS mandates organized by a
14 particular species, or particular regions, sub-
15 regions, or tribes? so one moment.

16 MR. EAST: Mr. Commissioner, I think we're starting,
17 now, to cross into an area that's been covered by
18 the submissions that we have before you on the
19 issues of what the mandates are and what they
20 cover, and the actual substance of those mandates,
21 and we object on that basis. And you have our
22 submissions on that.

23 MS. FONG: I'm content to rely on our written
24 submissions, thank you. And with that objection,
25 I'm also going to ask the same question, but in
26 relation to the funding, and I will acknowledge my
27 friend will make an objection and we will both
28 rely on our written submissions. Thank you.

29 MR. HUBER: Maybe could I just clarify a point? I did
30 say something that -- I can't clarify a point?

31 MS. FONG: I'll let your counsel --

32 MR. HUBER: I was mindful of my comment the other day,
33 when I -- I said something "will" work; I should
34 say it "may" work. I mean, it's a negotiation and
35 we work together to find solutions but, you know,
36 being something -- saying something "will" may be
37 a little over-presumptuous.

38 MS. FONG: Thank you. Now, Mr. Lunn, if we could go to
39 page 8 of this document?

40 MR. LUNN: Of Tab 31?

41 MS. FONG: This is the -- yes, that's right, the one on
42 the right side of the screen.

43 MR. LUNN: Thank you.

44 MS. FONG:

45 Q Okay, Mr. Huber, page 8 is part 3 of this
46 operational document, and it reads, Roles and
47 Responsibilities in Managing FSC Access. And

1 under General Issues it reads:
2

3 This section describes the process for
4 addressing requests for an increase in
5 allocation or a change in fishing location --
6

7 Stop there. And if you drop below to iv, one of
8 the six different types of requests it addresses
9 is:

10
11 Change to a fishing area (permanent or
12 temporary)
13

14 And now, Mr. Lunn, if you could take us to page
15 12. Okay, so page 12 has a "iv" matching the
16 heading which I just referenced you to, Changes to
17 a fishing area (permanent or temporary), and I
18 won't ask you to read it all. It's the process
19 for the steps to be taken when an area manager is
20 asked this question by a First Nation. But I will
21 ask Mr. Lunn to flip to next page.

22 And the part I'm interested in, in this next
23 page, is the heading in the middle, it's
24 Accounting for Catch Outside the Normal Fishing
25 Area, and it's the second hard bullet, which I
26 will call the accounting rule. In other words,
27 what happens to the fish that a First Nations
28 catches outside of its management area? Where
29 does it get counted, with the host nation or the
30 guest nation? So according to this:
31

32 If members of one First Nations are fishing
33 in the fishing area of another First Nation,
34 without a CL-TA -
35

36 -- and that's, I understand, to be Communal
37 Licence-Temporary Amendment --
38

39 - they must be designated by the "host" First
40 Nation, and conform to the conditions set out
41 in the communal licence of the host First
42 Nation.
43

44 And here's the count:

45
46 Their catch is counted against their own
47 First Nation's allocation if they have an

1 allocation for the species or stock being
2 harvested. If the "guest" First Nation does
3 not have an allocation for the species or
4 stock they are catching, the catch is counted
5 against the allocation of the host First
6 Nation.
7

8 So based on this particular regime, my
9 understanding is that it works this way: If the
10 guest nation has the species in their own communal
11 licence, then the fish they catch outside of their
12 management area is then counted against their own
13 number. But, if they don't have that species in
14 their communal licence, then it's counted against
15 the host nation numbers; is that correct?

16 MR. HUBER: That's what it reads and the host nation
17 would need to agree to that. They may not agree
18 that that's going to come off their allocation
19 and, as such, you know, they wouldn't get approval
20 to fish there.

21 Q Right. But assuming, I mean, realistically, it
22 probably never happens without an agreement --

23 MR. HUBER: Yes, yes.

24 Q -- between nations, so now we're really talking
25 about when there is an agreement, what happens to
26 those numbers.

27 MR. HUBER: Yeah.

28 Q Okay. So what I'd like to understand is -- my
29 understanding is that this is no longer the rule;
30 is that right?

31 MR. HUBER: Well, I haven't dealt with this situation,
32 personally, on the Fraser. So what is your new
33 understanding?

34 Q My current understanding is that there is no such
35 flexibility. It does not matter whether the guest
36 nation has the species in their communal licence
37 or not, it is one solid, red-line rule that says,
38 "The numbers are counted off the host nation."
39 That's my understanding. Is that -- does that
40 accord with --

41 MR. HUBER: To be honest, I'm not up on that, although
42 I should be. I'm participating on the FSC working
43 group, and as Russ said, we've got a lot of
44 progress to be made, but we are looking at those
45 issues.

46 Q Okay. So when you're -- you said you negotiate a
47 lot of agreements, and I'm assuming that that also

1 means AFS agreements, correct?

2 MR. HUBER: Yes.

3 Q Okay. So when you negotiate AFS agreements, do
4 you disclose to First Nations these sorts of
5 fishing out of your area rules, in advance of
6 making the deal?

7 MR. HUBER: Yeah, well, the groups I've dealt with on
8 the Fraser, that hasn't been, you know, an issue,
9 but I know it's more of an issue -- what's really
10 prompting this a lot is in a lot of the First
11 Nations areas the stocks they used to fish are in
12 a decline, so they're, you know, in an effort to
13 conserve them, they don't have access to those
14 stocks, so they're looking at fishing other
15 stocks, such as Fraser salmon. So this has
16 created a situation where there's, you know, more
17 of this need to access fish in other areas.

18 Q Right.

19 MR. HUBER: So it's --

20 Q And have you heard about the, you know, the
21 coastal concern, which is that the Fraser River
22 sockeye run past the coast before there's any test
23 fishing that's done down in the south, and so
24 there's that timing problem, the fish have gone by
25 the time they know there's a giant run. So what
26 do they do then? Perhaps they can fish outside of
27 their management area. And I'll bring that up
28 later. But do you recognize that --

29 MR. HUBER: Yes.

30 Q -- as being another problem?

31 MR. HUBER: Yes.

32 MS. FONG: Thank you. I'd like that document
33 exhibited, please, the one on the right.

34 THE REGISTRAR: Ms. Fong, before you proceed to that,
35 did you wish to mark Tabs 75 and 31?

36 MS. FONG: Yes, please. Thank you.

37 THE REGISTRAR: Okay, perhaps we'll do that, first.
38 Tab 75 will be marked as 1225, and Tab 31 will be
39 marked as 1226.

40

41 EXHIBIT 1225: First Nations Access to Fish
42 for Food, Social and Ceremonial (FSC)
43 Purposes: Trial Implementation of Evaluation
44 Framework, May 2, 2006

45

46 EXHIBIT 1226: First Nations Access to Fish
47 for Food, Social and Ceremonial Purposes,

1 Part 1: Pacific Region Operational Framework
2 (Working Draft) April 2006
3

4 THE REGISTRAR: And the tab you just mentioned is...?

5 MR. LUNN: That was the one she mentioned.

6 THE REGISTRAR: That is 31, okay. Good. We're good,
7 thank you.

8 MS. FONG: Thank you. And Mr. Lunn, if you could bring
9 down the document on the right, leave the
10 PowerPoint up on the left, and bring up document
11 number 32, Heiltsuk's document number 32. Thank
12 you. -

13 Q Mr. Huber, now, this is a document that's entitled
14 Part 2: Pacific Region Evaluation and Decision
15 Framework, and it's got that same front page as
16 the previous document. Do you, by any chance,
17 recognize this, now referencing back to our
18 PowerPoint, as being item number 3?

19 MR. HUBER: Well, I mean, there were so many documents
20 and iterations of this, I'm sure I've seen, you
21 know, this.

22 Q Okay.

23 MR. HUBER: Whether I've seen this specific document, I
24 can't say.

25 Q Okay. And we'll go into the document and see if
26 you recognize the principle. If we can go to the
27 next page of the evaluation framework. Thank you.
28 So under Background, it reads:

29
30 The FSC Access Evaluation Frameworks were
31 developed to improve consistency of how FSC
32 access requests are addressed, while also
33 providing flexibility to address the unique
34 circumstances of each Aboriginal group.
35

36 Did you understand, way back in 2006, that this
37 would be the goal of this evaluation framework, to
38 improve consistency, but at the same time have
39 flexibility, because you recognized that First
40 Nations are different?

41 MR. HUBER: Well, that was my understanding.

42 Q And would you be able to say that it is DFO's
43 approach that they recognize that there's not one
44 rule that fits all for First Nations because they
45 are different?

46 MR. HUBER: That's true.

47 THE COMMISSIONER: Would this be a good time to take

1 the break, Ms. Fong?

2 MS. FONG: Yes.

3 THE COMMISSIONER: Okay.

4 MS. FONG: Thank you.

5 THE REGISTRAR: The hearing will now recess for 10
6 minutes.

7

8 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)

9 (PROCEEDINGS RECONVENED)

10

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

12 THE COMMISSIONER: Ms. Fong.

13 MS. FONG: Thank you. Could I have that, the
14 Evaluation Framework, marked as the next exhibit,
15 please?

16 THE REGISTRAR: Exhibit Number 1227.

17

18 EXHIBIT 1227: First Nations Access to Fish
19 for Food, Social and Ceremonial Purposes,
20 Part 2: Pacific Region Evaluation and
21 Decision Framework (Working Draft) May 2006
22

23

24 MR. FONG: And Mr. Lunn, you can take down the
25 Evaluation Framework, and if you could please
26 bring up Heiltsuk document number 59, the one
27 entitled, Draft FSC Access Guiding Principles.

28

29 CROSS-EXAMINATION BY MS. FONG, Continuing:

30

31 Q Mr. Huber, this document you've seen already, the
32 Draft FSC Access Guiding Principles. My
33 understanding is this, or a version of it -- like
34 it, is item 5 in the FSC access strategy
35 components. Are you aware of that? Sorry, into
36 the microphone, please.

37 MR. HUBER: Yes, I would have -- would be aware of
38 that.

39 Q Okay. Thank you. And Mr. Lunn, if we could
40 advance to page 5, please. Page 5 is Draft
41 Principle 3. Now, Draft Principle 3 reads:

42

43 Processes and decisions regarding FSC access
44 (amount, fishing area, and fishing
45 opportunity) should incorporate some
46 flexibility within a generally consistent
47 approach.

1 And if we then drop down to Potential Discussion
2 Issues, you'll see point 1):
3

4 Balance between flexibility and consistency -
5 agreement on Guiding Principles would be a
6 big step towards consistency and
7 transparency. DFO has no intention of trying
8 to develop a one-size-fits-all formula.
9

10 So this is consistent with the document you've
11 just seen, which is the Evaluation Framework,
12 those principles of consistency yet flexibility,
13 correct?

14 MR. HUBER: Yes.

15 Q Okay. And then we're into number 3), please:
16

17 Transparency: First Nations have expressed
18 concerns around lack of transparency in
19 decision-making re: FSC access. DFO is
20 accountable for its decisions and they should
21 reflect agreed-upon guiding principles.
22

23 I'll stop there. So that phrase, "agree-upon
24 guiding principles", you'll agree with me that the
25 agreed upon guiding principles means agreed upon
26 between DFO and First Nations, correct?

27 MR. HUBER: I'm not -- that was an internal development
28 document. It should be.

29 Q I'm sorry, could you speak into the microphone.

30 MR. HUBER: The other day I was breaking people's
31 eardrums. Sorry about that. I should read that
32 again, then. The principles in that, this was an
33 internal document. I would say I'm not clear on
34 that statement.

35 Q So you're saying you're not clear on when they say
36 "agreed-upon guiding principles," who are the
37 parties that are supposed to agree upon it? It
38 seems to me it's self-evident; it's government and
39 First Nations, or DFO and First Nations.

40 MR. HUBER: It definitely should be. I mean, that's
41 the work I'm doing now, and I expect that will be
42 part of it for sure that, you know, where we, you
43 know, collaborate and develop things jointly.

44 MS. FONG: Okay. Mr. Lunn, we can take down the
45 PowerPoint on the left, and if -- but leave the
46 Draft Principle 3 up. And if you can then pull
47 up, side-by-side, Heiltsuk document number 43,

1 entitled, Management Principles for FSC Fisheries.
2 Q Now, Mr. Huber, during the break I had arranged
3 for you to review Management Principles for FSC
4 Fisheries, that document on the left --
5 MR. HUBER: Mm-hmm.
6 Q -- those nine principles. And what I'm going to
7 ask you is, are you aware that this document,
8 Management Principles for FSC Fisheries, this --
9 my understanding is that this is the final, or
10 close to final version of those draft principles
11 on the right; is that correct?
12 MR. HUBER: This was years ago and I haven't looked at
13 it for years, but it would be. I mean --
14 Q That would be the typical sort of reiteration of
15 how things happened?
16 MR. HUBER: Yes.
17 Q Okay. Now, if you could -- now you've read --
18 I've read to you the draft principle. And if you
19 can take a look at those nine principles on the
20 left, Management Principles for FSC Fisheries,
21 you'll agree with me that that draft principle #3
22 didn't make it into one of the nine principles?
23 MR. HUBER: I'm looking at -- on the left side,
24 document number 3? And it didn't make it into the
25 right-hand document, is that --
26 Q The left-hand. So the right-hand document, draft
27 principle, didn't make it into the Management
28 Principles.
29 MR. HUBER: Okay.
30 Q The right didn't make it into the left.
31 MR. HUBER: Oh, number 3, under Potential -- where are
32 you looking on the right-hand document?
33 Q Sorry, the right-hand document, you'll see the
34 heading, Draft Principle #3 --
35 MR. HUBER: Yes, yes.
36 Q
37 Processes and decisions regarding FSC
38 access...should incorporate some flexibility
39 within a generally consistent approach.
40
41 MR. HUBER: Okay.
42 Q That principle didn't make it into Management
43 Principles for FSC Fisheries --
44 MR. HUBER: It's not there.
45 Q -- one of the nine?
46 MR. HUBER: Yes.
47 Q Okay. Thank you. Mr. Lunn, if we can then, on

1 that left side document, the Management Principles
2 for FSC Fisheries, then go to page 3. Now, at the
3 top of page 3 there is a heading called, NTC
4 Fishing Area Considerations. Mr. Huber, NTC,
5 would that be Nuu-chah-nulth?

6 MR. HUBER: That would be, yes.

7 Q Thank you. And I'm just going to read you some of
8 the solid bullets here and then ask you my
9 question. So the first solid bullet:

10
11 Aboriginal fishing should occur within areas
12 that were traditionally used by First Nation.
13 (Principle 4)
14

15 And then we drop down to the next solid bullet:

16
17 Exceptions to fishing in areas traditionally
18 used by First Nations may be considered in
19 rare cases where there are compelling
20 management reasons to relocate harvesting
21 activities...
22

23 And then we drop down to the next solid bullet,
24 not the inset ones:

25
26 Natural fluctuations in abundance or
27 migratory patterns of target species or stock
28 will not normally be considered rationale for
29 NTC harvesting opportunities outside their
30 Fishing Area. (Principle 6)
31

32 So would you agree with me, given that this is
33 attached to the document, Management Principles,
34 like it is page 3 of this document, what this is,
35 is an application of those principles to a
36 specific --

37 MR. HUBER: Yes.

38 Q -- situation, Nuu-chah-nulth situation?

39 MR. HUBER: Yes.

40 Q And do you happen to know whether this is like an
41 example, a hypothetical example, or whether this
42 is an actual example, like an actual application,
43 a real-life application?

44 MR. HUBER: I don't know.

45 Q Okay. And would you agree with me, given what
46 I've read to you, that First Nations seeking to
47 fish out of their management areas, that would be

1 very -- like based on this application, that would
2 be difficult to get approval by DFO? Those would
3 be rare circumstances?
4 MR. HUBER: It's definitely an issue. I mean, we have
5 made those accommodations at times, but there's
6 sensitivities both ways, of course, for the area
7 where you want to access the fish there's often --
8 the First Nations in those areas are reluctant to
9 agree. And then there's been times when the
10 Department's gone ahead and it's created conflict.
11 Q Okay. But in times when other First Nations have
12 agreed, the host nations have agreed --
13 MR. HUBER: Yes, we've done that.
14 Q -- that would still be a rare circumstance where
15 DFO would allow this, based on this application of
16 those nine principles?
17 MR. HUBER: Well, it can happen. I mean, in the policy
18 it provides for that and it has happened, but it's
19 not frequent, put it that way.
20 Q Okay. Thank you. Mr. Lunn, you can take down
21 both those documents now -- oh sorry, I would like
22 them marked as the next exhibits, please.
23 THE REGISTRAR: 59 has already been marked as 1224.
24 MS. FONG: Thank you.
25 THE REGISTRAR: And 43, you wish that to be marked?
26 MS. FONG: Yes, please.
27 THE REGISTRAR: 1228.
28
29 EXHIBIT 1228: Management Principles for FSC
30 Fisheries
31
32 MS. FONG: And Mr. Lunn, could you please pull up
33 Heiltsuk document 58.
34 Q Mr. Huber, this is a document titled, DFO
35 Guidelines for Responding to Requests by
36 Aboriginal Organizations to Fish for FSC outside
37 of their management areas - I'll just cut that
38 short - and if we can take a look at -- if we can
39 scroll down to the bottom of the document, there's
40 an electronic marker on this, and it indicates to
41 me that it came from -- it looks like it came from
42 one of your files. So are you familiar with --
43 sorry, if we can go back to the whole document.
44 MR. HUBER: It did come off one of my directories, yes.
45 Q And can you read that tag --
46 MR. HUBER: Should I deny that?
47 Q No. No, but I'm just ask -- if we can go to the

1 second page, please, under Policy Guideline,
2 you've already told me that you don't often deal
3 with requests from First Nations that fish out of
4 the management area. And here I just want to
5 establish, under Policy Guidance, the fourth empty
6 bullet is what I would consider to be the new --
7 the current -- what I believe is the current
8 accounting rule, and the actual rule, itself, is
9 the last sentence, itself, of that fourth empty
10 bullet, which is:

11
12 The other Aboriginal group must count the
13 harvest against the allocation provided under
14 the communal licence issued to it.
15

16 MR. HUBER: Yes.

17 Q Okay. So does this refresh your memory and
18 establish that this is the current accounting
19 rule?

20 MR. HUBER: That was the rule for a long time. The
21 earlier discussion we had, I wasn't clear on it,
22 but this rule we've used for, you know, for a long
23 time, yes.

24 Q Okay. And this rule is narrower than, for
25 example, --

26 MR. HUBER: Yes.

27 Q -- the one in the Operational Guideline, correct?

28 MR. HUBER: It is, yes.

29 Q And again, this is not a rule that's given to
30 First Nations in advance of them negotiating their
31 FSC or their AFS agreements?

32 MR. HUBER: No, we discuss this situation. We have,
33 from the Fraser, even, First Nations' members
34 travel to the Skeena to get fish and when they go
35 to the Skeena to get their fish they would come
36 out of where the group's allocation that they went
37 and accessed the fish from.

38 Q Right. But my question to you is, prior to
39 negotiating their AFS agreements, this isn't
40 information that's provided to First Nations?

41 MR. HUBER: That particular rule, yes.

42 Q And do you know if that's true right up the coast?

43 MR. HUBER: Well, I don't -- I can't say for all my
44 staff, but certainly in the Interior where I work.

45 Q Okay, thank you. I have one more document. Mr.
46 Lunn, could you please pull up Heiltsuk's
47 Comprehensive Fisheries Agreement, it's Heiltsuk

1 Number 13, Exhibit 305. Okay, and could you
2 please go to page 19.

3 Mr. Huber, this is Heiltsuk's AFS agreement,
4 and on page 19 is a schedule for the FSC schedule
5 -- or sorry, it's an appendix to the FSC schedule,
6 and it provides that Heiltsuk can have 20,000
7 pieces of sockeye; did you see that, sir?

8 MR. HUBER: Yes.

9 Q Thank you. Now, my question for you pertains to
10 an event which happened to my client in 2010.
11 Last fishing season, in 2010, so that was the year
12 when there was that very abundant sockeye run, 34
13 million sockeye, Heiltsuk Late Summer, because all
14 the fish had run past earlier in the season,
15 because that's when they pass Bella Bella, had
16 then asked for to fish out of their management
17 area, down south in the Georgia Strait, because
18 there were all these fish, and the nation that
19 they spoke to agreed to it, and the question
20 became, you know, would DFO permit it to occur.
21 And DFO said, "No," and DFO said, "No," for a
22 number of reasons. I'm going to ask you to
23 assume I'm right about why DFO said, "No," because
24 that will come into other evidence.

25 One of the reasons was that they were told
26 that Heiltsuk, or the northern First Nations, did
27 not have an allocation for Fraser River sockeye
28 salmon. So based on your experience with these
29 agreements and negotiating with these agreements
30 and dealing with these agreements, this allocation
31 for 20,000 pieces of sockeye, does that include
32 Fraser River sockeye?

33 MR. HUBER: Well, I'm not familiar with the stocks that
34 the First Nations harvest in that area. I'm
35 assuming, if what you've just told me, that it
36 doesn't.

37 Q Well, this is what it says in their AFS agreement.

38 MR. HUBER: Right. And it's --

39 Q And we can agree Fraser River sockeye salmon is
40 sockeye, right?

41 MR. HUBER: There's usually -- there's an allocation in
42 a fishing area, and if they access the 20,000
43 within the area they -- that's issued in the
44 licence in the agreement and there happen to be
45 Fraser sockeye in there, they could harvest them.

46 Q Thank you. I just want to come back to, as my
47 last question, the comments you made about the

1 AFS, the secret mandates. You said that you would
2 defend it to the - if I get this right - defend it
3 strenuously not disclosing that information in
4 negotiating AFS agreements, correct?
5 MR. HUBER: Yes.
6 Q Okay. And as I understood your rationale for
7 that, your rationale was, "Well, both sides of the
8 table come to the table with secrets and it's the
9 only way we can manage fisheries"?
10 MR. HUBER: Well, I don't know if I like to
11 characterize it as secrets. You come to the table
12 to negotiate an agreement and you understand each
13 -- obviously, in a negotiation, each of the
14 parties is going to have, I like to think of them
15 as, chips to negotiate with, and flexibility.
16 Q And is it possible that First Nations don't have
17 that same view in that they've got their chips on
18 the table and they'd prefer to have everybody's
19 chips on the table so that you can have a
20 negotiation based on trust with all the
21 information on the table?
22 MR. HUBER: That's not my experience, and I've dealt
23 with First Nations all over the - including the
24 Nisga'a - they like to negotiate, and I don't see
25 a -- and a negotiation where everybody lays their
26 chips on the table, that isn't -- I haven't had
27 that experience as being a good way to negotiate.
28 MS. FONG: Okay, thank you. Those are my questions.
29 THE COMMISSIONER: Ms. Fong, is that --
30 MS. FONG: I'm sorry, was there a --
31 THE REGISTRAR: Would you like to mark this?
32 MS. FONG: Yes, could I please mark that last document?
33 THE REGISTRAR: That was Tab 58. That will be marked
34 as 1229.
35 MR. MCGOWAN: If we could just -- before we mark that,
36 can we just pull up document --
37 MR. HUBER: And just to add to that, is that it just
38 forces you to be positional right off the bat, and
39 it forces the parties to then elevate it to
40 another level if there's not agreement. So, you
41 know, and I look to engage in a process where you
42 can reach agreements, you know, at the level
43 you're working at, at the working level.
44 MS. FONG: Okay. And Heiltsuk 58, could we have that
45 marked as an exhibit as well?
46 THE REGISTRAR: That will be 1229.
47

1 EXHIBIT 1229: DFO Guidelines for Responding
2 to Requests by Aboriginal Organizations to
3 Fish for Food, Social and Ceremonial (FSC)
4 Purposes in Areas Not Previously Authorized
5 Under Communal Licenses Issued by DFO to the
6 Aboriginal Organization for FSC Purposes
7

8 THE COMMISSIONER: And what is Tab 13, then, Mr.
9 Registrar?

10 THE REGISTRAR: Exhibit 305.

11 THE COMMISSIONER: Thank you.

12 MR. MCGOWAN: Yes, Mr. Commissioner, Ms. Gaertner has
13 some re-examination, and Commission Council will
14 take the final 10 minutes in re-examination. And
15 that should round out the day.

16 MS. GAERTNER: Mr. Commissioner, we're not going to be
17 finished in the 20 minutes, in terms of re-
18 examination. I have more than 10 minutes, in
19 terms of documents, so I will try to do what I
20 can, but I think I'm going to have to ask some
21 follow-up questions in writing, if that's
22 permissible for the re-direct.
23

24 CROSS-EXAMINATION BY MS. GAERTNER, Continuing:
25

26 Q Mr. Jones, Mr. Tyzuk, for the Province, two days
27 ago asked you questions regarding the mandate of
28 the First Nations Fisheries Council, and in your
29 answers you spoke about the regional meetings and
30 the appointments that FNFC has received from
31 those. Can you advise the Commissioner about the
32 relationship between the FNFC and the leadership
33 council, in particular the UBCIC and the Summit,
34 and also the AFN, because there's also, as I
35 understand it, relationships that provide mandates
36 that way, also?

37 CHIEF JONES: Yes, I think I mentioned that initially
38 the First Nation Council members were appointed by
39 the leadership council and then once there was a
40 mandate to basically appoint -- to establish
41 geographic representation, the council was
42 established. And so we give regular reports back
43 to members of the leadership council, whether
44 that's the Union of BC Indian Chiefs, the First
45 Nations Summit, and the BCAFN, and we're currently
46 working on some MOUs that will kind of clarify
47 kind of how we will work together, you know, on a

1 range of issues, you know, from operational issues
2 to political issues.

3 Q And is it my understanding that that draft accord
4 is presently being discussed and you anticipate
5 completing it in the near future.

6 CHIEF JONES: Yes, that's one of our priority items for
7 this year.

8 Q And would you be happy to provide that to the
9 Commission once it's completed?

10 CHIEF JONES: Of course.

11 Q And similarly, at paragraph 331 of the PPR related
12 to this matter, it suggests that the Commitment to
13 Action is actually not signed; is that correct, or
14 has the Commitment to Action been signed? And I
15 can take you to Exhibit 1191 if that might be
16 helpful.

17 CHIEF JONES: Yes, it was signed. I was there when it
18 was signed in June last year.

19 Q All right. And it's signed by both the Department
20 of Fisheries and Oceans, in particular, Paul
21 Sprout, and by members of the First Nations?

22 CHIEF JONES: Yes, that's correct.

23 Q All right. And then if I could have Canada's
24 documents Tab 41 and Tab 9, this first document,
25 at Tab 41, is the draft work plan for the food,
26 social and ceremonial fisheries working group; is
27 that correct?

28 CHIEF JONES: Yes, it is.

29 MS. GAERTNER: Could I have that marked as the next
30 exhibit?

31 THE REGISTRAR: 1230.

32

33 EXHIBIT 1230: Draft Workplan - Food, Social
34 and Ceremonial Fisheries Working Group -
35 January 20, 2010

36

37 MS. GAERTNER: And could I have Tab 9, then.

38 Q Is that that the work plan for the co-management
39 group?

40 CHIEF JONES: Yes, it is.

41 Q Thank you. Could I have then, now, Exhibit 945,
42 please, which -- these are marked. Could I have
43 this one marked, also, thank you?

44 THE REGISTRAR: Yes, that will be marked as 1231.

45 That's Tab 9.

46

47 EXHIBIT 1231: First Nations - DFO Co-

1 Management Working Group - Rolling Draft
2 Workplan - October 31, 2010
3

4 MS. GAERTNER: Thank you.

5 MR. LUNN: Exhibit 945?

6 MS. GAERTNER: Then Exhibit 945, which is Tab 59 in the
7 First Nations Coalition's documents, Commissioner,
8 if you want to go to the actual document again.
9 But if you go, then -- if you scroll down -- I'm
10 sorry, that document is -- 945A is what I need,
11 sorry. And there isn't page numbers in that, and
12 you're going to have to find the page for Fraser
13 River Aboriginal Fisheries Secretariat. You'll
14 see it at the bottom -- perfect, thank you.

15 Q Mr. Todd, that document reflects work that the
16 Department of Fisheries and Oceans has done to
17 compile references to meetings that apparently
18 were had with the FRAFS around WSP implementation.
19 I want to take you to the Visions Workshop of
20 2010, in October 13th and 14th. You were at that
21 meeting?

22 MR. TODD: I missed the first day; I was at the second
23 day.

24 Q To your knowledge, was the WSP talked about at
25 that workshop?

26 MR. TODD: Not to my knowledge. It's certainly, from
27 my recollection, it was not on the agenda.
28 Somebody, during some conversation, may have said
29 something that had "WSP" in a sentence, but as a
30 topic, Visions topic, to my knowledge it wasn't on
31 the agenda.

32 Q And to your knowledge, was it in any way
33 substantively addressed at that Visions
34 conference?

35 MR. TODD: Not to my knowledge.

36 Q Thank you. Mr. Huber, your counsel asked you a
37 number of questions regarding Canada's
38 consultation and best practices and the work of
39 the consultation secretariat - we're done with
40 that exhibit, if that's okay - and if I need to, I
41 can take you to Exhibit 596, but more importantly,
42 I think it's important that we understand here,
43 and the Commissioner gets a sense of it, who does
44 the strength of claim analysis on behalf of the
45 Department when assessing potential impacts to
46 First Nations rights?

47 MR. HUBER: It would be the staff in the areas in

1 treating aboriginal policy, and our unit there has
2 looked at that issue.

3 Q Who's responsible for requesting that these be
4 done?

5 MR. HUBER: I don't know on that. I --

6 Q So you don't request that they be done?

7 MR. HUBER: No.

8 Q And why is that, that you're not requesting
9 strength of claim analysis if you're talking about
10 potential implications to FSC allocations on the
11 Fraser River sockeye?

12 MR. HUBER: On the Fraser and what I've been doing, it
13 just hasn't been an issue. The allocations that
14 we have on the Fraser, the First Nations haven't
15 been meeting those allocations, so we haven't been
16 pressured. I mean, one of the reasons they
17 haven't met the allocations is the stocks have
18 been in not very good shape for some time.

19 Q So when you make decisions about openings and
20 closings and the potential for those impacts to
21 First Nations rights, you don't assess strength of
22 claim; is that correct?

23 MR. HUBER: Well, on the Fraser, the groups I deal --
24 have dealt with, I just assume they have a strong
25 strength of claim. It's obvious to me they do.

26 Q Thank you. Could I then have First Nations
27 Coalition documents 89 to 94. And Mr. Huber, I
28 just need you to identify some of these so I can
29 get them marked, and then I've got a couple of
30 questions.

31 Can you identify document 89 as the document
32 the Department of Fisheries and Oceans created as
33 it relates to First Nations access to FSC?

34 MR. HUBER: I've seen so many of these, so I'm sure --
35 yeah, I would have seen this, yes.

36 MS. GAERTNER: Could I have this marked as the next
37 exhibit.

38 THE REGISTRAR: Exhibit 1232.

39

40 EXHIBIT 1232: Discussion Paper, First
41 Nations Access to Food, Social and Ceremonial
42 Purposes: An Overview of Strategic Issues
43 and Recommendations, Draft #2

44

45 MS. GAERTNER:

46 Q And can I take you to Issue 3, Priority of Access
47 in this document. For some reason I don't have --

1 and if you go to the next page, you'll see that
2 and option was, in option B), was to:

3
4 Conduct a Regional review of allocations to
5 identify situations where they are widespread
6 low allocations...
7

8 Did that happen? Did this regional review of the
9 allocations of FSC occur?

10 MR. HUBER: I think it did, but I, you know, I wasn't
11 involved in that, myself.

12 Q And yet that would be something that would be
13 directly part of your discussions with First
14 Nations on the Fraser?

15 MR. HUBER: Well, we haven't focused -- my focus has
16 been on building this structure, not on arguing
17 over numbers. In fact, I've tended to stay away
18 from that argument, because we're trying to build
19 the foundation of where we can have those -- so we
20 can have those discussions.

21 MS. GAERTNER: Could I have this marked as the next
22 exhibit?

23 THE REGISTRAR: 1233.

24 MR. LUNN: Are we still on 89?

25 THE REGISTRAR: Are you still on Tab 89?

26 MS. GAERTNER: I was.

27 THE REGISTRAR: Okay, I'm sorry, that is 1232.

28 MS. GAERTNER: All right. Let's go to 90.

29 Q Is this an example of how the Department puts
30 their decision -- access decision package
31 together?

32 MR. HUBER: Are you asking me if that's an example?

33 Q Yes. Just an example of the approach the
34 Department uses when assessing FSC?

35 MR. HUBER: I mean, we prepared a template for that.
36 This would be the template.

37 MS. GAERTNER: Could I have that marked as the next
38 exhibit?

39 THE REGISTRAR: 1233.
40

41 EXHIBIT 1233: FSC Access Decision Package -
42 Example
43

44 MS. GAERTNER: Could I take you to Exhibit (sic) 91.

45 Q Are you familiar with this document?

46 MR. HUBER: Yes. Yeah.

47 Q Could I ask you to explain principle number 10:

1
2 FSC access decisions will take into
3 consideration operational factors such as
4 First Nations capacity and governance (e.g.
5 resource management cooperation and
6 participation)...

7
8 I must say, when I looked at that it somehow
9 suggested that if First Nations cooperated that
10 that would be considered in their FSC allocations.
11 Is that what you were intending?

12 MR. EAST: Sorry, Mr. Commissioner - sorry - I'm
13 wondering why we're getting into new areas? I
14 understood Ms. Gaertner was going to put in some
15 documents for the record, but now we're getting
16 into areas that aren't proper re-direct, in my
17 view.

18 MS. GAERTNER: Well, you raised, in your examination,
19 the FSC and the consultative obligation, so I'm
20 responding to questions you've raised in your
21 direct.

22 MR. EAST: Just, perhaps, Mr. Commissioner, I have a
23 chance to raise a couple questions in response,
24 after Ms. Gaertner's done?

25 MR. HUBER: Did you want me to respond to that?

26 MS. GAERTNER: Yes, please, Mr. Huber.

27 MR. HUBER: I didn't make that clause, and I did look
28 through, you know, it's been some time since I
29 looked through it, but within last year I had a
30 look through that and there's a number of things I
31 would change. That's one of them.

32 MS. GAERTNER: Could I have that marked as the next
33 exhibit?

34 THE REGISTRAR: 1234.

35
36 EXHIBIT 1234: Draft: Principles to Guide FSC
37 Access Decisions

38
39 MS. GAERTNER: And then, finally, if we go to document
40 94.

41 Q Mr. Huber, this is a document, I believe, that the
42 Department's created. If you look at the bottom
43 of it, it's in April 2010; is that correct?

44 MR. HUBER: Yes.

45 Q And this is a draft of the methods for sharing FSC
46 sockeye when there is -- the FSC total allowable
47 catch is less than the combined FSC needs; is that

1 correct?

2 MR. HUBER: Yeah.

3 Q Are you familiar with this document?

4 MR. HUBER: Well, I would need to read through it to
5 refresh my memory.

6 Q But you can confirm this is a document the
7 Department has created?

8 MR. HUBER: Yes.

9 MS. GAERTNER: And you have seen it. Could I have this
10 marked as the next exhibit?

11 THE REGISTRAR: 1235.

12

13 EXHIBIT 1235: Draft - Methods for Sharing
14 FSC sockeye when the FSC Total Allowable
15 Catch is less than the combined FSC needs -
16 Internal, for discussion purposes only

17

18 MS. GAERTNER:

19 Q Are you aware of whether or not that's been
20 ground-truthed with the First Nations?

21 MR. HUBER: No.

22 Q It has not, or you're not aware?

23 MR. HUBER: I'm not aware. I just - since these were
24 developed, I just have not -- that has not been a
25 focus of my attention.

26 Q All right. Thank you, Mr. Huber.

27 My next question is for you, Mr. Jones. My
28 understanding is that you -- you gave evidence,
29 earlier, about the FNFC proposal re PICFI and, in
30 particular, the recommendation that it be renewed
31 and a particular amount of that renewal of 425
32 million. Is the FNFC presently developing a
33 document which details why that's your
34 recommendation and why it's 425 million?

35 CHIEF JONES: Yes, we are, and we have had, also,
36 discussions with the Department of Fisheries and
37 Oceans representatives through the Economic Access
38 Work Group.

39 Q And would you be happy to provide that document to
40 the Commission upon its completion?

41 CHIEF JONES: Yes, we would.

42 MS. GAERTNER: All right. I have just five documents I
43 intend to just have them marked in the next -- as
44 quickly as I possibly can. Mr. Commissioner,
45 these documents are documents related to
46 aquaculture. They are documents of the FNFC.
47 There's not, presently, any intention to call a

1 member of the FNFC during that period, so I have
2 to get Mr. Jones to confirm them.

3 Q So if I could take you to, first of all, FNFC
4 document 24. Mr. Jones, do you recognize that
5 document?

6 CHIEF JONES: Yes, I do.

7 Q It's a letter from FNFC to the Minister?

8 CHIEF JONES: Yes.

9 MS. GAERTNER: Can I have that marked as the next
10 exhibit

11 THE REGISTRAR: Exhibit 1236.

12

13 EXHIBIT 1236: Letter dated August 10, 2010,
14 from First Nations Fisheries Council, to The
15 Honourable Gail Shea, Minister of Fisheries
16 and Oceans

17

18 MS. GAERTNER: If I could take you to FNFC document 26.

19 Q Mr. Jones, do you recognize that document?

20 CHIEF JONES: Yes, I do.

21 Q It's a letter from FNFC to David McCallum?

22 CHIEF JONES: Yes.

23 MS. GAERTNER: Could I have that marked as the next
24 exhibit?

25 THE REGISTRAR: 1237

26

27 EXHIBIT 1237: Letter dated November 16,
28 2010, from First Nations Fisheries Council,
29 to David McCallum, Aquaculture Management
30 Branch

31

32 MS. GAERTNER: If we could go to document number 25.

33 Q This is a letter from the First Nations Leadership
34 Council to Honourable Gail Shea, in which the FNFC
35 is cc'd. Do you recognize this document?

36 CHIEF JONES: Yes, I do.

37 MS. GAERTNER: Could I have that marked as the next
38 exhibit?

39 THE REGISTRAR: 1238.

40

41 EXHIBIT 1238: Letter dated August 10, 2010,
42 from First Nations Leadership Council, to the
43 Honourable Gail Shea, Department of Fisheries
44 and Oceans

45

46 MS. GAERTNER: If we could go to document number 22.

47 Q This is a Summary Report of the Aquaculture

1 Community Meetings that the FNFC completed. Do
2 you recognize this document?

3 CHIEF JONES: Yes, I do.

4 MS. GAERTNER: Could I have this marked as the next
5 exhibit?

6 THE REGISTRAR: 1239.

7

8 EXHIBIT 1239: Summary Report of the
9 Aquaculture Community Meeting at Kamloops,
10 BC, Co-Hosted by: The First Nations Fisheries
11 Council and the Department of Fisheries and
12 Oceans on: February 9, 2010

13

14 MS. GAERTNER: Could I take you to document number 20.

15 Q This is a report the FNFC has done on the proposed
16 federal aquaculture regulations. Do you recognize
17 that document?

18 CHIEF JONES: Yes, I do.

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

21 THE REGISTRAR: 1240.

22

23 EXHIBIT 1240: First Nations Views on a
24 Proposed Federal Aquaculture Regulation for
25 British Columbia, May 7, 2010

26

27 MS. GAERTNER: Could I go to document number 21.

28 Q This is a report done by the FNFC for the --
29 regarding the development of the integrated
30 management on aquaculture plans. Do you recognize
31 that document?

32 CHIEF JONES: Yes.

33 MS. GAERTNER: Could I have that marked as the next
34 exhibit?

35 THE REGISTRAR: 1241.

36

37 EXHIBIT 1241: First Nations Fisheries
38 Council, Planning for the Development of
39 Integrated Management of Aquaculture Plans
40 and an Advisory Committee Process for
41 Aquaculture: Considerations for British
42 Columbia First Nations, January 2011

43

44 MS. GAERTNER: The final document is FNFC document
45 number 82. Sorry, two more documents. Thank you,
46 Mr. Jones, those are the ones for you.

47 Mr. Huber, these are -- the next two

1 documents are for you.

2 Q Mr. Huber, this appears to be a previous draft of
3 the document that we now have at Exhibit 290. Do
4 you recognize this document? I believe that you
5 mentioned that you drafted this.

6 MR. HUBER: Yes. I've drafted so many different
7 documents.

8 MS. GAERTNER: May I have that marked as a next
9 exhibit?

10 THE REGISTRAR: 1242.

11
12 EXHIBIT 1242: A Collaborative Approach to
13 Developing a Co-Management Structure for
14 Fraser River Salmon Stocks, a Focus on the
15 Aboriginal Component - Draft-090908bh
16

17 MS. GAERTNER: I was going to ask you some questions,
18 but I'll have to move on, on that. And finally,
19 may I have First Nations document 93.

20 Q Mr. Huber, is this an example of a negotiation
21 mandate that you're provided as it relates to the
22 negotiations of FSC?

23 MR. HUBER: Yes.

24 Q And you'll confirm for me that there seems to be a
25 set amount of money and a set amount of FSC
26 allocations in this, there isn't a range; is that
27 correct?

28 MR. HUBER: That's right.

29 MS. GAERTNER: Those are my -- may I have that marked
30 as the next exhibit.

31 THE REGISTRAR: 1243.

32
33 EXHIBIT 1243: Negotiation Mandate
34

35 MR. HUBER: I mean, you'll notice it's not set yet,
36 it's requested.

37 MS. GAERTNER:

38 Q But your recommendations, your mandate for
39 recommendations is a solid number of funding and a
40 solid number for allocation? You're not given a
41 range in there, are you?

42 MR. HUBER: No, but when I went to negotiate I may not
43 negotiate to that level. I would just make sure
44 that I had that approved ahead of time.

45 MS. GAERTNER: All right. Gosh knows, I hope I got all
46 my documents in. Thank you so much for your
47 patience on all of that.

1 MR. EAST: Mr. Commissioner, if I could ask a couple of
2 questions in re-direct. Perhaps on that last
3 document, if we could have that last one back up?
4 It says, Negotiation Mandate. If we could just go
5 down to the footer at the bottom.
6

7 CROSS-EXAMINATION BY MR. EAST, Continuing:
8

9 Q Mr. Huber, is this a document that -- just take a
10 look, and it seems to have come from your
11 database.

12 MR. HUBER: Yeah.

13 Q Now, this document, if we can go back up, is this
14 a document that has been provided to you by the
15 Department of Fisheries, or is this something that
16 you put together?

17 MR. HUBER: I put that together.

18 Q Okay. So this isn't what you would call a formal
19 DFO mandate that's provided to you?

20 MR. HUBER: No.

21 Q Okay. So this is something that you prepared as a
22 bit of a summary of information that you have from
23 other sources?

24 MR. HUBER: Whenever I wanted something I would go
25 about justifying it.

26 Q Okay. Thank you. The second question I have
27 relates to a question Ms. Gaertner asked you about
28 strength to claim assessments. In your
29 experience, in the area that you work in, engaging
30 with First Nations on FSC allocation questions, is
31 it your experience that the First Nations that
32 you're dealing with have approached you and
33 requested that DFO demonstrate its strength of
34 claim analysis of that First Nations strength of
35 claim or other First Nations strength of claim, is
36 that something they typically request that you
37 present?

38 MR. HUBER: I haven't had that experience, no.

39 MR. EAST: Thank you, those are my questions.

40 MR. MCGOWAN: Mr. Commissioner, I see we're at four
41 o'clock. Commission counsel did have a couple of
42 questions that we were considering in re-
43 examination.

44 THE COMMISSIONER: That's fine.

45 MR. MCGOWAN: Did you want to carry on for a minute or
46 two, or should we just -- okay, fair enough.

47 MS. CHAN: Thank you, Mr. Commissioner. Jennifer Chan

1 again for the Commission, and just a few points of
2 clarification, and I will be very quick with this.
3

4 RE-EXAMINATION BY MS. CHAN:
5

6 Q Mr. Jones, you were speaking about PICFI, and I
7 understand you described it as the first step
8 taken to address longstanding issues of access to
9 the commercial fishery, and just that phrasing of
10 it, calling it the first step, Mr. Huber, I was
11 wondering if you wanted to clarify about the
12 allocation transfer program and whether or not
13 that also provided commercial access to First
14 Nations, to the fishery.

15 MR. HUBER: It was the ATP allocation -- it was part of
16 the AFS program.

17 Q And that would have preceded the PICFI program?

18 MR. HUBER: That's right, and the fish from the
19 allocation transfer program -- well, and the
20 licensing, would have been -- it was transferred
21 to the community. It was a communal arrangement.

22 Q Okay. Sorry, Mr. Jones, you wanted to --

23 CHIEF JONES: Maybe the point I'd make is that the
24 allocation transfer program, you know, was the
25 range of five million dollars a year, you know,
26 since about '94, and I think the difference with
27 PICFI was it was 110 -- it was \$115 million over
28 five years, so it was a significant increase, but
29 it was also -- it didn't reach kind of the point
30 where we would say it was an adequate amount.

31 Q Thank you. Although I understand not all of that
32 PICFI money was directed towards the acquisition
33 of commercial access; is that right?

34 CHIEF JONES: No, it's 175 million over five years, and
35 115 million was for access or gear, and I think
36 about 10 percent of the 115 million was gear and
37 the rest for access.

38 MS. CHAN: Thank you. Mr. Commissioner, there is more
39 information on the ATP program in the PPR at pages
40 70 and following.

41 Q And another point of clarification, Mr. Jones, you
42 were asked, as well, about your understanding of
43 what percentage of the fishery was caught by First
44 Nations, and I believe we have some information on
45 that in the Policy and Practices Report as well,
46 at page 45.

47 MR. LUNN: Page 45 or --

- 1 MS. CHAN: Page 45.
2 MR. LUNN: Thank you.
3 MS. CHAN:
4 Q And Mr. Huber, you responded, I understand, by
5 saying that FSC numbers were generally quite
6 stable, but the percentage might fluctuate,
7 depending on the amount of returns. And does this
8 table here on the screen exemplify that shift in
9 percentages that you were talking about?
10 MR. HUBER: That's correct, yeah, that looks like
11 that's what that illustrates.
12 Q And does it -- sorry, does it --
13 MR. HUBER: And in low abundance years there's the high
14 percentage of First Nations catch.
15 Q Okay. And moving onto a question that came about
16 in discussions about Our Place at The Table, and
17 there was discussion of recommendation number 3,
18 which I understand says that First Nations,
19 themselves, must address the issue of allocations.
20 Mr. Huber, I wonder, is the issue of FSC
21 allocation something that has come up in the forum
22 process that you described earlier?
23 MR. HUBER: Yes. I missed the first part of your
24 question there.
25 Q I'm just tying that into the recommendation from
26 Our Place at The Table, it says that First
27 Nations, themselves, must address the issue of
28 allocations. I was wondering if that's something
29 that's being addressed in the forum process.
30 MR. HUBER: That's a big issue at the table. In these
31 years of low abundance, we've -- and we focused,
32 right at the beginning of the forum process in
33 2008 as there wasn't enough fish to meet, and we
34 knew that -- or didn't expect there to be to meet
35 First Nations needs on the Fraser and the marine
36 approach areas, those that harvested the main
37 harvesters, so we were looking for them to come
38 together and discuss how they would share what was
39 available and come up with a plan. We would like
40 to see that, in particular in years where there's
41 low abundance, that the groups, themselves, come
42 together and figure out how to share what's
43 available.
44 Q So that would be a year like 2009 where, for
45 example, all of the fishery was to go to FSC
46 purposes; is that right?
47 MR. HUBER: That's right. And quite frequently the

1 Early Stuarts, the first run, is basically a First
2 Nations only fishery.

3 Q And have agreements been reached through that
4 process of sharing the FSC allocation through the
5 forum program?

6 MR. HUBER: No. We did once, in 1996, for the Early
7 Stuarts, since we had a formula. Since then, we
8 haven't been able to achieve that.

9 Q Sorry, Mr. Todd, I saw you had a desire to answer?

10 MR. TODD: Just for clarity, in 2009, to my knowledge,
11 there wasn't really an FSC fishery, so there was
12 not any kind of question of sharing. 2009 is when
13 the run failed and virtually all fish that
14 returned were destined for the spawning grounds.
15 There were some individual efforts at obtaining
16 some FSC fish - Chief Saul Terry can speak to that
17 - but they were not coordinated in any way, and
18 the Department was actually out enforcing no
19 fishing bans.

20 Q I understand that's an issue that may come up in
21 the following days as well.

22 And my last question is to you, Chief Terry.
23 You've been discussing, today, the Intertribal
24 Treaty Organization. I understand that that's a
25 fairly new organization that you're heading up. I
26 just wondered, with the development of
27 organization at nation level, is that something
28 that's ready now to engage with DFO in a process
29 of co-management? Are those nation structures set
30 up yet?

31 GRAND CHIEF TERRY: Yes, they are. We are set up and
32 the structure is established. The operational
33 capacity, though, is not there. That's the
34 difficulty right now. But we do have a
35 constitution and bylaws under the Intertribal
36 Treaty Organization that pretty well outlines how
37 we operate.

38 Q And would all the relevant bands that would be
39 governed under this ITO model that you have
40 described, have they all signed onto the ITO right
41 now?

42 GRAND CHIEF TERRY: We have established a document to
43 which they could apply their mark or so on, and
44 what the process is, that each of the nations
45 would establish their representative, along with
46 an alternate, and if they sign on, and five have
47 indicated that they have, then it is the,

1 internally, their responsibility to get the
2 acquiescence of the -- or the concurrence of their
3 own members to, you know, to make it unanimous, as
4 one might say. But we are working towards that.

5 I indicated the other day that it is not an
6 easy task and that it is really the colonial
7 experience, if you will, is something that we need
8 to sort of overcome in many instances, and so
9 we're working very hard at that.

10 MS. CHAN: Thank you, those are my questions.

11 THE COMMISSIONER: Thank you, Ms. Chan. Mr. Registrar,
12 could you bring up Exhibit 295 for me, please? I
13 may not have the right document. Is there a page
14 5 to that document?

15 MR. LUNN: Yes.

16 THE COMMISSIONER: No, that's not it. Let me just
17 check. I don't think that's the one I want. Try
18 Exhibit -- I wanted the document, Mr. Registrar,
19 that has the spectrum on it.

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

21 THE COMMISSIONER: Is it on the screen? Yes, thank you
22 very much. My apologies. Thank you.

23
24 QUESTIONS BY THE COMMISSIONER:

25
26 Q I just wanted to ask you, Mr. Huber, if I could,
27 just for clarification, for my purposes, in these
28 columns, and I'm just looking, first, under
29 Government Management, it says:

30
31 DFO informs First Nations and stakeholders of
32 decisions,

33
34 And then, in the next column, under, Information
35 Exchange:

36
37 DFO informs First Nations and stakeholders
38 what management actions it intends to take,

39
40 And so on. I don't have to read that to you, you
41 can read it for yourself. And there's another
42 reference to the stakeholders under Advisory. And
43 then, under the Partnership Shared Management,
44 there's a reference to stakeholders. And in the
45 final column, under Devolution, it says:

46
47 Government delegates the authority for

1 resource management, First Nations, and/or
2 stakeholders...

3
4 I just wonder if you could clarify for me what it
5 means by "and/or stakeholders" in that column?

6 MR. HUBER: First of all, this is, Mr. Commissioner,
7 the document the First Nations Fishery Council
8 generated. I believe --

9 THE COMMISSIONER: I understand that, but you've seen
10 this document?

11 MR. HUBER: I have, yes.

12 Q And I just wondered what your understanding was of
13 that. Perhaps Mr. Jones could also --

14 MR. HUBER: Well, that would be -- yeah, the delegation
15 of authority, maybe Russ would be --

16 THE COMMISSIONER: What was your understanding of that,
17 and then maybe I could ask him what his --

18 MR. HUBER: Well, my understanding of that delegation
19 of authority would be that there's an agreement
20 that -- and would be spelled out what decision-
21 making authority the group has, whether it's a
22 First Nation or it could be --

23 THE COMMISSIONER: I see, okay.

24 MR. HUBER: -- other stakeholders.

25 THE COMMISSIONER: Mr. Jones, I'm sorry?

26 CHIEF JONES: I'm just trying to think if I can think
27 of any examples of whether it's been -- of
28 devolution. I'd say like -- I guess an example,
29 the razor clam fishery that we're involved in co-
30 managing, we basically do stock assessments, you
31 know, and we take -- collect catch information,
32 you know, we report back to DFO kind of monthly
33 catches, but then -- and then meet at the end of
34 the year and discuss a management plan, so that is
35 kind of getting more towards possible devolution,
36 but I think there still is -- the Federal
37 Government still does play a role in, you know,
38 just checking and making sure things are going
39 okay, that kind of thing.

40 So I think there are some fisheries where,
41 you know, that could happen. I think particularly
42 where it's the First Nations or others who are
43 basically collecting all the information about the
44 fishery and essentially doing the management,
45 doing the enforcement, you get closer to that, you
46 know, that devolution.

47 THE COMMISSIONER: That's helpful, thank you very much.

1 I'm sorry, Ms. Gaertner?:

2 MS. GAERTNER: It's not a question; I missed one
3 document on the aquaculture. May I put it in? I
4 know I'm really pressing my luck.

5 THE COMMISSIONER: Not at all.

6 MS. GAERTNER: Could I have document 23 on the First
7 Nations Coalition list?

8 THE COMMISSIONER: I wondered about that. I think you
9 skipped over that --

10 MS. GAERTNER: I did skip over that. I'm so sorry.

11 THE REGISTRAR: That's Exhibit Number 1244.

12

13 EXHIBIT 1244: Letter dated July 23, 2010,
14 from First Nations Summit, to the Honourable
15 Gail Shea, Department of Fisheries and Oceans

16

17 MS. GAERTNER: Thank you.

18 THE COMMISSIONER: I take it, Mr. McGowan and Ms. Chan,
19 that ends the --

20 MR. MCGOWAN: Yes, Mr. Commissioner.

21 THE COMMISSIONER: Well, I wanted to thank the panel
22 members very much for your attendance here and for
23 answering the questions of counsel and myself, and
24 I want to thank you for your cooperation. We had
25 to -- an unforeseeable circumstance required us to
26 cancel yesterday, so I'm very grateful that you
27 were able to make yourselves available today.
28 Once again, I thank you very much for that.

29 And I want to thank Ms. Chan and Mr. McGowan
30 for preparing for this hearing and conducting the
31 panel, initially, and for all of the participants'
32 counsel here, today, and Mr. Eidsvik, who were
33 asking questions, I thank you for that, and for
34 staying within your time constraints.

35 And so I take it, Mr. -- Ms. Chan or Mr.
36 McGowan - I don't know who's going to tell me -
37 we're off until Monday, now, at 10:00 a.m.; is
38 that correct?

39 MR. MCGOWAN: Yes, Mr. Commissioner, we'll adjourn,
40 now, until Monday, 10:00 a.m., and we'll proceed
41 on Monday with the next panel, which will carry on
42 for those two days.

43 THE COMMISSIONER: Thank you very much. And I know
44 tomorrow is a holiday, so I wish you all a very
45 pleasant and well-earned, restful weekend, thank
46 you very much.

47 THE REGISTRAR: The hearing is now adjourned until

1 Monday at 10:00 a.m.
2

3 (PROCEEDINGS ADJOURNED AT 4:14 P.M. UNTIL
4 MONDAY, JULY 4, 2011, AT 10:00 A.M.
5
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9

10 I HEREBY CERTIFY the foregoing to be a true
11 and accurate transcript of the evidence
12 recorded on a sound recording apparatus,
13 transcribed to the best of my skill and
14 ability, and in accordance with applicable
15 standards.
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20 Diane Rochfort
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25 and accurate transcript of the evidence
26 recorded on a sound recording apparatus,
27 transcribed to the best of my skill and
28 ability, and in accordance with applicable
29 standards.
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34 Pat Neumann
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39 and accurate transcript of the evidence
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41 transcribed to the best of my skill and
42 ability, and in accordance with applicable
43 standards.
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47 Karen Hefferland