

COHEN COMMISSION UPDATE 2011

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Cohen Commission into the Decline of Fraser Sockeye

Last year the Prime Minister announced a federal commission be struck specifically to examine the collapse of Fraser sockeye, which for many, was met with rolling eye balls. For those of us who have been around a while this commission would be the fourth such commission into the state of the salmon in British Columbia within the last 20 years almost one per salmon life cycle. The only difference with this commission is that it would have the powers to subpoena witnesses, yet it is to find "no fault" but could make "findings of misconduct" if this is warranted in the evidence. The commission will consider the policies and practices of the Department of Fisheries and Oceans with respect to the sockeye salmon fishery in the Fraser River – including the Department's scientific advice, its fisheries policies and programs, its risk management strategies, its allocation of Departmental resources and its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting and enforcement. The question is, does this represent an opportunity for UFFCA to have its concerns heard and to finally affect change in management to protect sockeye stocks of concern in the headwaters of the Fraser River.

In order to address the commission or to receive funding, you or your group had to have "standing" status which is a technical term meaning only parties with "standing" can access funding for legal representation if they can show a need, address the commission in the evidentiary hearings, call witnesses, and cross examine witnesses. From the outset the commission encouraged parties to work together in aggregates to streamline the process, and to save money. This meant that the UFFCA had to forge partnerships with other First Nations organizations to form a larger First Nations coalition which, after many conference calls and legal wrangling is made up of the following:

Two broad based umbrella organizations: the First Nations Fisheries Council ("FNFC") and the Aboriginal Caucus of the Fraser River Aboriginal

Fisheries Secretariat ("AC FRAFS").

Three fisheries organizations with fisheries related mandates: the Fraser Valley Aboriginal Fisheries Society ("FVAFS"), the Secwepemc Fisheries Commission of the Shuswap Nation Tribal Council ("SFC") – representing 10 member bands, and the Upper Fraser Fisheries Conservation Alliance ("UFFCA") – representing 23 Tribal Councils and First Nations of the upper Fraser.

And in addition we have **specific title and rights holders from along the Fraser, the tributaries and the coastal/marine environment:** the Chehalis Indian Band ("CIB"); the Adams Lake Indian Band ("ALIB"); the Northern Shuswap Tribal Council ("NSTC") – four member bands, the Carrier Sekani Tribal Council ("CSTC") – 8 first nations, the Council of Haida Nation ("CHN"), and the Douglas Treaty First Nations of Snuneymuxw, Tsartlip and Tsawout First Nation.

The First Nations Coalition have hired Mandell Pinder and Associates to represent their interests at the commission. Brenda Gaertner is the senior lawyer; she has a small legal team assisting her which is a rather large undertaking since the sheer volume of paper is unbelievable.

To get things started, the commission released a discussion paper where they outlined what they hoped to do in the inquiry. On June 16th, the First Nations Coalition made oral submissions (written submissions followed on June 25th) in response to the Discussion Paper. In particular, the First Nations Coalition emphasized the need to use conservation as the lens for the Inquiry, the need for the issue of conservation to be the first topic of the Inquiry, the need to understand and reconcile the place and role of sec.35 (1), Aboriginal treaty, rights and title within the Inquiry, and to canvass issues relating to constitutional and international obligations to First Nations, co-management and shared decision making, and food social and ceremonial fisheries during the course of the Inquiry. First Nations also

wanted the commission to consider the interaction of various impacts on Fraser River sockeye salmon including conducting an analysis of cumulative impacts, and the benefit of developing an approach at the outset of the Inquiry as to how the Commission will use and arrive at its recommendations.

In addition, the First Nations Coalition listed 6 areas in which we hoped to see recommendations:

1. Principles and approaches informing Conservation;
2. First Nations and DFO collaborative/co- management/shared decision making structures and processes;
3. Development of a re-building strategy, including recommendations related to such things as: biodiversity, mixed stock aggregate fisheries, terminal fisheries, spawning habitat, safety of migration routes, healthy and safe fresh water and marine ecosystems, and the potential changes required in our modern day multi-sectoral fisheries (Aboriginal, recreational, and commercial);
4. Changes to DFO policies, practices and to implement the re-building strategy;
5. Improving information base, including stock assessments and harvesting impacts; and

Establishing benchmarks for success.

Transcripts of these submissions, along with all other Cohen Commission hearings, are available on the website at: <http://www.cohencommission.ca/en/Schedule>.

On July 8th, in response to the submissions made by participants in June, the Commission released a Document entitled "Commission's Intended Course of Action". In this document, the Commission listed the Technical and Scientific Research Projects to be undertaken and proposed a list of topics to be investigated in the evidentiary hearings.

Upcoming Events:

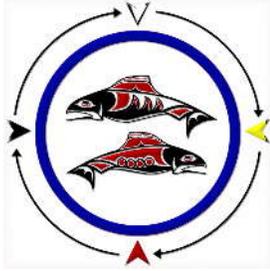
- **UFFCA General Meeting**
January 21st–PG Native Friendship Centre

UFFCA Mailing Address:

1041 Whenun Road
Prince George, B.C.
V2K 5X8

Website:

www.uffca.ca



WATERSHEDS SOURCE

COHEN COMMISSION UPDATE 2011—CON'T

On July 13th, the First Nations Coalition submitted to the Commission of list of people who should be called as witnesses during the Inquiry. From July through to December, Commission counsel conducted a number of preliminary interviews with the people listed on our July 13th list of potential witnesses.

From July through to October, counsel for the First Nations Coalition prepared for the evidentiary hearings by reviewing documents, developing a strategy and approach to the hearings in collaboration with clients, attending meetings and conferences, and drafting various submissions. The evidentiary hearings commenced in Vancouver on October 25th. The topics covered during the evidentiary hearings in 2010 were as follows:

- October 25: Life Cycle of the Salmon
- October 26: Perspective on the Aboriginal and Treaty Rights
- Framework Underlying the Fraser River Sockeye Salmon Fishery
- October 28-29: Conservation, Sustainability and Stewardship
- November 1-4: DFO Organizational Structure, and Scientific advice and decision-making
- November 8-9: Pacific Salmon Commission and Pacific Salmon Treaty
- November 29-December 9: Wild Salmon Policy (Part 1)
- December 13-16: Aboriginal Worldview, Cultural Context and Traditional Knowledge.

Counsel for the First Nations Coalition actively participated in the hearings. Counsel were present every day to hear testimony, question witnesses, and deliver submissions. The evidentiary hearings, which generally occur from 10am to 4pm at the Federal Court, 701 West Georgia, Room 801, are open to the public. Transcripts from each day of the evidentiary hearing are available to the public at <http://www.cohencommission.ca/en/Schedule> once translated unverified and un-translated transcripts (which are subject to your undertaking) are circulated to all participants via email within 48 hours.

Summary of 2011 Cohen Commission Work Ahead

The evidentiary hearings continue (likely until the summer) in 2011, the following topics are scheduled to be covered:

- Harvest Management (Parts 1 and 2) (January 17-February 9)
- Commercial Fishing (6 days) (TBA)
- Recreational Fishing (2 days) (TBA)
- Aboriginal Fishing (7 days) (TBA)
- Habitat Enhancement and Restoration (TBA)
- Predation (TBA)
- Habitat Management Overview (TBA)
- Enforcement (TBA)
- Wild Salmon Policy (Part 2) (TBA)
- Effects on the Fraser River Watershed: pulp mills, municipal waste water, logging, gravel removal, metal mining, hydro, water temperature, urbanization
- Aquaculture and Diseases (TBA)
- Effects on Habitat in the Marine Environment (TBA)
- Cumulative Impact Assessment (TBA)
- Other Fisheries Models (TBA)
- DFO Funding and Budget (TBA)
- DFO Wrap-Up (TBA)

Following the evidentiary hearings counsel for each participant group will have an opportunity to make closing submissions. Updated Hearings Plans are sent by the Commission staff on Fridays. The most recent hearings plan (which includes a more detailed list of topics and witnesses for each of the issues noted above) was emailed to participants on January 10, 2011 (the Document is called "Cohen Commission Hearings Plan Version 4.7 - January 10, 2011").

The legal team prepares for evidentiary hearings by reviewing summaries of evidence (where available), reviewing relevant documents, reviewing practice and policy reports that are produced by the Commission, listening to testimony, and most importantly: by con-

sulting with the members of the First Nations Coalition. Given the nature of this Inquiry, legal counsel often require feedback, input, and instruction from the members of the First Nations Coalition on an urgent basis (i.e. in the evening at the close of the evidentiary hearings in preparation for cross-examination of witnesses the following day).

I wonder if, after all is said and done and millions of dollars spent, the commission will be able to deal with the core issues plaguing First Nations namely access to more food fish, lack of specific reference to First Nations and shared decision-making; the lack of specific reference to the cultural connection First Nations have to salmon and their habitat, and the rights of First Nations related to harvesting activities which are constitutionally protected rights unlike other sectors.

It remains unclear at this time what kind of review of DFO Organizational Structure will be conducted and just how deeply it will be examined and recommendations made to change it. The commission must review DFO policies governing 'harvesting' and 'conservation'; however, Conservation is positioned in the paper as a subsection of DFO's organizational activities rather than the context for their activities.

The final problem is that, like his predecessors, Cohen characterizes 'Aboriginal' as a sector as though it were the same as all of the other sectors, which according to the constitution, is not so. One can also see that if this is the lens through which Cohen is looking that the same old "Fraser-centric" approach to solving salmon access for approach First Nations will continue to come at the expense of the effective management of other smaller stocks which many upper Fraser First Nations rely on.

Finally, I am hopeful that some positive changes will come from this report because of the sheer interest and commitments made by our First Nations coalition, and the incredible legal team we have supporting us. Brenda Gaertner and Leah Pence have done an incredible job and it is incumbent upon all of us participating in this process to remain hopeful and supportive.

