HOUSE OF COMMONS
CANADA

CONSTITUENCY OFFICE
4871 DELTA ST.
DELTA, B.C.
V4K 2T9
TEL: (604) 940-8040
FAX: (604) 940-8041
E-mail: cummins@dccnet.com

JOHN CUMMINS, M.P.
DELTA-RICHMOND EAST

OTTAWA OFFICE
ROOM 548 CONFEDERATION BLDG.
HOUSE OF COMMONS
OTTAWA, ON K1A 0A6
TEL: (613) 992-2957
FAX: (613) 992-3589
E-mail: cummij@parl.gc.ca
www.johncummins.ca

January 28, 2010

The Honourable Chuck Strahl, P.C., M.P.
Minister of Indian Affairs
House of Commons
Ottawa, Ontario K1A 0A6

Dear Minister:

Re: Impact of Yale Final Agreement on the Cohen Inquiry

On November 6, 2009 the Prime Minister announced the establishment of a Judicial Inquiry into the decline of sockeye salmon in the Fraser River to be chaired by Mr. Justice Bruce Cohen of the British Columbia Supreme Court.

The Order-in-Council establishing the Judicial Inquiry directs Justice Cohen to consider the policies and practices of the Department of Fisheries and Oceans (DFO) with respect to its fisheries policies and programs, its fisheries management practices and procedures, including monitoring and enforcement.

Justice Cohen is directed to develop recommendations as to "changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery."

At the very moment that the Judicial Inquiry is set to undertake a groundbreaking evaluation and assessment of fisheries management practices, including monitoring and enforcement, and to recommend to the Prime Minister necessary changes to fisheries management practices, the Department of Indians Affairs is about to sign-off on a Final Agreement or Treaty with the Yale Indian Band.

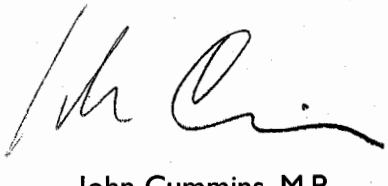
The basic framework for the Final Agreement is set out in the Agreement-in-Principle (AIP). When the AIP was signed, Yale Chief Robert Hope described the agreement as a "Fish Treaty" and for good reason as it impacts every conceivable aspect of fisheries management on the Fraser, from monitoring and enforcement to who will have access to Fraser River sockeye.

The Yale Final Agreement will deal with the very issues that the Cohen Inquiry must address and will move them behind a constitutional wall where neither his investigation nor his recommendations can touch them. Furthermore the signing of the agreement may signal to the judge that treaties and their impact on fisheries management are not to be evaluated or assessed.

If the Yale Final Agreement is to be signed off, our Government's commitment to the Cohen Inquiry will be put in doubt. Fishermen will rightly conclude that Mr. Justice Cohen's work will be a waste of time. These same fishermen who have been the most fervent supporters of the Prime Minister's efforts to establish the Judicial Inquiry will be left to conclude that our Government is not committed to the successful conclusion of the Inquiry.

It would be folly to sign a Yale "Fisheries Treaty" prior to May 1, 2011 when Mr. Justice Cohen reports his findings and recommendations to the Prime Minister.

Yours truly,



John Cummins, M.P.
Delta-Richmond East

Enclosure: Backgrounder on Impact of Yale Treaty on the Cohen Inquiry

BACKGROUNDER ON
YALE TREATY IMPACT ON COHEN INQUIRY

The Cohen Inquiry

- On November 6, 2009 the Prime Minister announced the establishment of a Judicial Inquiry into the decline of sockeye salmon in the Fraser River to be chaired by Mr. Justice Bruce Cohen of the British Columbia Supreme Court.

- The Order-in-Council establishing the Judicial Inquiry directs Justice Cohen to consider the policies and practices of the Department of Fisheries and Oceans (DFO) with respect to its fisheries policies and programs, its fisheries management practices and procedures, including monitoring and enforcement.

- Justice Cohen is directed to develop recommendations as to "changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery."

- At the very moment that the Judicial Inquiry is set to undertake a groundbreaking evaluation and assessment of fisheries management practices, including monitoring and enforcement, and to recommend to the Prime Minister necessary changes to fisheries management practices, the Department of Indians Affairs is about to initial a Final Agreement or Treaty with the Yale Indian Band.

- <u>The basic framework for the Final Agreement is set out in the Agreement-in-Principle (AIP). It impacts every conceivable aspect of fisheries management on the Fraser, from monitoring and enforcement to who will have access to Fraser River sockeye</u>.

- The Yale Final Agreement will deal with the very issues that the **Cohen Inquiry** must address and will move them behind a constitutional barrier where neither his investigation nor his recommendations can touch them. The approval of the Final Agreement by the Cabinet and its initialing by the Minister of Indian Affairs may well signal to Justice Cohen that the impact of native fisheries on fisheries management is not to be evaluated or assessed.

Quantities in Excess of Food Requirements are Impossible to Monitor

- The Yale AIP specifically provides for the transfer of more than 13,000 salmon annually to the Band as a treaty-based constitutional right. Only 57 registered persons live on the Yale Reserve.

- This allocation of 13,000 salmon has little in common with the limited nature of the right to fish to meet food, social and ceremonial needs as set out by the Supreme Court in the *Gladstone* decision. In *Gladstone* the court noted that the right to food fish is limited to the food needs of the band making the claim --

  > "The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited – at a certain point <u>the band will have sufficient fish to meet these needs</u>."

  The constitutional right recognized by the Supreme Court of Canada makes clear that food fish must be caught for the band's consumption not for trade.

- Furthermore, the Court in its *Van der Peet* decision clearly rejected claims of a aboriginal right to harvest Fraser River salmon for sale or barter, but these are the very salmon the AIP would allow to be traded or bartered as a constitutionally protected treaty-right.

- The quantities of salmon in the Yale AIP are many times beyond what could be reasonably used by the Band for food purposes. The only possible use for such a large quantity is illegal sale or trafficking.

- The blanket authorization to harvest salmon in excess of food needs creates a fishery that is virtually impossible to monitor. It is impossible to distinguish between a fish caught in a food fishery as opposed to one actually caught in the commercial fishery. As a result it is impossible to monitor or control the illegal movement of fish into the commercial fishery.

- The opportunity to move food fish into the commercial fishery means that huge numbers are caught, often beyond the allotment given.

- This problem confounds fisheries management and is one of the key issues that must be addressed by the Cohen Inquiry. How the Inquiry can address this problem when it is shielded by a Treaty is unclear.

Second Commercial Fishery

- In addition to the treaty-right to trade and barter Fraser River salmon, the Final Agreement can be expected to provide for special commercial access to what remains of the general commercial fishery.

- The Yale AIP indicates that treaty negotiations are to address the creation of a "Yale First Nation commercial fisheries." If the Yale Final Agreement creates a treaty-based commercial fishery, it will be a second commercial fish right because the AIP has already creates a trade and barter fishery which will operate as a limited commercial fishery.

- The allocations and special provisions for a Yale commercial fishery have not been made public. It is anticipated there will be a special commercial allocation provided through either an additional percentage of the catch, special licensing scheme or some other treaty mechanism.
- The trial judge in *Kapp* warned:

> "The courts so far have generally rejected claims of an aboriginal right to a commercial fishery. Treaty negotiations are occurring in which commercial fishing rights are a central issue. **The gratuitous granting of these rights by the Department under such circumstances is reasonably perceived to be rash and imprudent."**

- The introduction of second commercial fishery at Yale will further complicate fisheries management and is one of the issues that must be addressed by the Cohen Inquiry.

Impact of Allocations

- The Department of Fisheries claims only 33 percent of the Total Allowable Catch would be required to satisfy Indian claims in British Columbia. The 33 percent figure appears to be based on a departmental study to assess the "coast wide implications" of the Nisga'a treaty allocations. Interestingly that study was based on a Nisga'a treaty allocation of 26 fish per person.

  The 2009 Tsawwassen Treaty provides 157 sockeye per person (both trade and barter allocation and the commercial allocation).

- Based on the Tsawwassen allocation of 157 sockeye per person over 170 percent of the Total Allowable Catch of Fraser sockeye would be required if the salmon allocations given the Tsawwassen Indian Band are repeated for all bands claiming Fraser sockeye. Not only are there not enough fish to satisfy Indian claims to similar allocations, there would be nothing for sport or commercial fisheries.

- In a year of low returns the Yale Band will receive 0.9 percent of the Total Allowable Catch of Fraser River sockeye, the very fish under review by the Cohen Inquiry. This trade and barter allocation provides for a maximum of 48 sockeye per person for each of the 57 persons who live on Reserve and the 94 who live elsewhere in North America.

  Given that the registered population of the Yale Band is far less than 0.9 percent of the population of registered Indians claiming Fraser River sockeye, significantly

more than 100 percent of the Total Allowable Catch will be required to just satisfy all aboriginal claimants to Fraser River sockeye.

Balkanization of Management Moves Toward System Breakdown

- The Yale Final Agreement will further Balkanize fishery management and enforcement by transferring salmon out of the public fishery into separate treaty-based fisheries managed, monitored and enforced by the Yale Band. The Cohen Inquiry will be hamstrung in its evaluation of fisheries management practices and policies by the constitutional shield that will fall into place protecting the Yale Treaty once it is signed.

- There is little room for error in fisheries management. The courts in British Columbia have all cautioned against constitutionalizing the Balkanization of fisheries management. Mr. Justice Mackenzie, writing for the majority in the British Columbia Court of Appeal in the *Kapp* decision advised:

> "**In my view, there are sound reasons not to constitutionalize aboriginal commercial salmon fisheries**. *Sparrow* pointed out that there are 91 separate bands along the Fraser with a claim to an aboriginal food fishery. Recognition of the right also would require defining its extent in terms of quantities of fish taken and there is no obvious limit to commercial catches as there is with the food fishery to the reasonable food, cultural, and ceremonial requirements of particular bands. **It would risk Balkanizing the commercial fishery and compounding the already formidable management challenges facing DFO.** It would fail to recognize the aboriginal component of the existing commercial fishery, including the nearly half of the seine fleet, that accounts for a large share of the commercial catch of Fraser sockeye in most years. It would threaten to undermine the greater aboriginal participation in the integrated commercial fishery which in many ways sets the fishery apart as an example for other sectors of the economy."

- The Yale AIP indicates that the Final Agreement will address "Yale First Nation fisheries monitoring and enforcement activities" under the rubric of "co-operative planning and management functions." Imagine the time required by DFO staff to attempt to manage an already naturally complicated fishery further complicated by 90 or more Fraser River bands each with their own enforcement and monitoring regimes.

  The Treaty-mandated allocations further move fishery management exponentially toward system breakdown when we add in various shutdowns in the fishery required to ensure the arrival of the agreed number of sockeye at Yale, Tsawwassen, Maa-nulth and elsewhere along the Fraser and up the coast.

- The government should not be making fundamental changes to Fraser sockeye management while the Judicial Inquiry into Fraser sockeye is

underway, by entering into a Treaty that would further Balkanize fisheries management.

- The impact of fisheries Balkanization and how it confounds the already formidable management challenges facing DFO will be a central focus of the Inquiry.

Threat to Conservation

- For well over 100 years commercial fishing has been prohibited above Mission to protect fish from harmful and unsustainable exploitation. All that was allowed was a limited sports fishery and an aboriginal food fishery which until the mid-eighties was just that, a food fishery. That is not to say there has not been massive illegal fishing and movement of food fish into the commercial fishery.

- The Yale Treaty would give constitutional cover to excessive exploitation of salmon stocks where they are most vulnerable in the narrow and braided waters of the Fraser above Mission and in the Fraser Canyon. It is here that the AIP and the Final Agreement will create large constitutionally protected treaty fisheries.

- A House of Commons Fisheries Committee report on the threats to the Fraser River salmon fishery described the situation in the following manner:

> "Salmon migrating in the swift Fraser Canyon waters are forced to hug the canyon wall and dash from back eddy to back eddy as they fight their way upriver. During an aboriginal fishery, set-nets create an almost impenetrable barrier to fish. The set-nets hang from the upriver end of each back eddy and are often made of monofilament creating an almost invisible barrier in the silt-laden water.
>
> To bypass the nets, the fish must squeeze between the rock wall of the canyon and the upper end of the net, or swim under it. Fish which to choose to ignore the back-eddy and fight the current are often caught in the surging water and swept back downstream.
>
> Sockeye have limited energy reserves because they do not eat once they enter fresh water. Repeated encounters with nets severely impairs their ability to reach the spawning grounds."

- Netting fish in the Fraser Canyon when they are most vulnerable, battling swift flowing currents is a practice that the Cohen Inquiry must evaluate if it is to fulfill its mandate. It is an environmental and conservation nightmare due to the stress fishing places on the salmon and the high incidence of mortality associated with the practice.

- The Yale Final Agreement will exacerbate an existing problem by expanding the scope of authorized fisheries in the Fraser Canyon and putting in constitutional cement a troubling practice which would otherwise be investigated by Justice Cohen.

John Cummins, M.P.
January 28, 2010