# Tsawwassen Treaty and Fishery Side-Agreement

**Tsawwassen Indian Band**

# Review of Commercial Salmon Allocations

**Impact Analysis Applying Tsawwassen Benchmark to Fraser River Fishery**

**John Cummins, M.P.**
Delta-Richmond East

"Combining the catch permitted under the Trade and Barter and Commercial fishery entitlements and applying those entitlements to all aboriginal claimants to Fraser sockeye would result in a harvest which is larger than the entire Fraser sockeye run in 91 of the last 113 years."

"Numbers talk and these numbers speak loud and clear of the end of the public recreational and commercial fishery open to every resident of British Columbia."

"It became crystal clear as I studied the Tsawwassen Treaty and its application to the salmon runs over the last century that, with the stroke of a pen, our governments are ending the common recreational and commercial fishery that has always been open to every citizen of British Columbia, indeed every citizen of Canada. "

**John Cummins, M.P.**
**November 27, 2007**

"Let me also be clear – in the coming months, we will … oppose racially divided fisheries programs."

**The Right Honourable Stephen Harper, P.C., M.P.**
**Prime Minister of Canada**
**July 7, 2006**

"I can assure you that we remain opposed to a separate, constitutionally entrenched commercial fishery."

**The Honourable Gordon Campbell**
**Premier of British Columbia**
**October 26, 2001**

"These fisheries are morally, ethically and legally wrong. The Department of Fisheries has a big enough job managing one commercial fishery. Trying to manage two separate fisheries is putting the resource at risk. It is absurd that the fisheries department conducted a buy-back of commercial boats at the same time it was encouraging the growth of a new commercial fleet in the exclusive aboriginal commercial sector."

**Gordon Campbell, M.L.A.**
**Leader of the Opposition**
**August 15, 1997**

The Courts so far have generally *rejected claims to 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.**

**Judge W.J. Kitchen.**
**Provincial Court of British Columbia**
**Her Majesty the Queen v. Kapp**

**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. If a commercial fishery is constitutionally recognized for some, it will be hard to deny it to others. 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 the 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.**

**Mr. Justice Mackenzie**
**B.C. Court of Appeal**
**Her Majesty the Queen v. Kapp, 2006 BCCA 277 (para. 115)**

**"Charter of Rights (Criminal) - Constitutional law - Right to equality - Discrimination based on race** - Aboriginal peoples - Aboriginal rights - Fishing - Division of powers - **Whether federal action to segregate a workplace by race or ancestry is consistent with s. 15 of the Charter** or is saved by either s. 25 or s. 1 - **Whether a federal fisheries program which imposes segregation, by race or ancestry, on the commercial salmon fishery in the public navigable waters of the tidal Fraser River, British Columbia, is consistent with s. 15 of the Charter** - Whether the executive branch of government has constitutional and legislative authority to override the common law public right of fishery by licensing a separate and segregated commercial fishery restricted to members of aboriginal groups selected in the absolute discretion of the Minister - Whether a stay of proceedings against the Applicants was correctly entered by the trial court pursuant to s. 24 of the Charter."

"In 1998 the federal Crown filed eleven informations charging 145 commercial gillnet fishers with fishing during a close time, contrary to s. 53(1) of the Pacific Fisheries Regulations, 1993. They were charged with committing an offense contrary to s. 78 of the Fisheries Act, R.S.C. 1985, c. F-14, as amended. Fishing in the area was closed at that time to all except those authorized by a license issued to the Musqueam, Burrard and Tsawwassen Indian Bands under the authority of the Aboriginal Communal Fishing Licenses Regulations…"

**Kapp v. Her Majesty the Queen (Case Summary)**
**Office of the Registrar, Supreme Court of Canada**
**Appeal scheduled for December 2007**

## EXECUTIVE SUMMARY

The Tsawwassen Treaty and related side-agreements establish two commercial treaty-fisheries. This has occurred in spite of two Supreme Court of Canada decisions that have soundly rejected special aboriginal commercial rights to salmon in British Columbia. One of those decisions specifically rejected the aboriginal right to a segregated commercial fishery on the Lower Fraser in an area that now forms part of the Tsawwassen Territory created by the Treaty.

The Trade and Barter fishery under the authority of the Treaty is a limited commercial fishery that allows the fish caught to be traded[1] with any aboriginal group in Canada. The Trade and Barter fishery doubles the catch of the food[2], social and ceremonial fishery that it replaces. This new commercial fishery is described in the Treaty as the *Tsawwassen Fishing Right.*

The Treaty also requires the government to enter into a side-agreement referred to as a *Harvest Agreement* which establishes a second commercial fishery.

The fish harvested under both the Trade and Barter allocation and the Commercial allocation can be fished by whomever the Band has designated or licensed. It is believed that corporate interests controlled by Jimmy Pattison have an interest in fishing treaty allocations. If this were to happen, small boat operators, both native and non-native would be pushed out of the Fraser salmon fishery.

If salmon allocations equal to those established by the Tsawwassen Treaty are granted to other aboriginal claimants of Fraser sockeye, there will be no sockeye left for other Canadians in public commercial or recreational fisheries.

Major problems include:

- The Treaty creates a new Tsawwassen right to Trade and Barter[3] or to sell "food" fish.[4] The Trade and Barter salmon allocation amounts to approximately 461 pounds of fish per man, woman and child or double the Tsawwassen "food" allocation for 1996.

- **If the 0.78 percent of the Total Allowable Catch of sockeye granted to the Tsawwassen Band for their Commercial allocation were to be the Benchmark allocation for the other Bands claiming Fraser River fish it would result in the**

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[1] In the Treaty Fisheries Chapter at clause 4: "Tsawwassen First Nation and Tsawwassen members have the right to Trade and Barter Fish and Aquatic Plants harvested under the Tsawwassen Fishing Right, among themselves or with other aboriginal people in Canada."

[2] Between 1999 and 2006 aboriginal groups harvested an average of 46 percent of the Fraser River sockeye run in native-only commercial and food fisheries.

[3] Treaty documents also refer to the Trade and Barter or Tsawwassen Right allocation as an allocation for "Domestic Purposes." For example, in clause 1 – "Tsawwassen First Nation has the right to harvest for Domestic Purposes."

[4] The Treaty defines "Domestic Purposes" to mean "food, social or ceremonial purposes."

**equivalent of 177 percent of the Total Allowable Catch being committed to these Bands.**

- **Applying the Tsawwassen *Benchmark* of both Trade and Barter and Commercial allocations to all aboriginal claimants to Fraser sockeye would result in a harvest larger than the entire Fraser sockeye run in 91 of the last 113 years.**

## Preface

The Tsawwassen Treaty gives the Band two allocations of fish, a Trade and Barter allocation identified in the Treaty and a Commercial allocation identified in the Harvest Agreement. These allocations of salmon granted the Tsawwassen Band mark the beginning of the end of the Fraser River fishery.

If the 0.78 percent of the Total Allowable Catch of sockeye granted to the Tsawwassen Band for their Commercial allocation were to be the Benchmark allocation for the other Bands claiming Fraser River fish it would result in the equivalent of 177 percent of the Total Allowable Catch being committed to these Bands.

There would be no fish left for the public recreational and commercial[5] fisheries.

Combining the catch permitted under the Trade and Barter and Commercial fishery entitlements and applying those entitlements to all aboriginal claimants to Fraser sockeye would result in a harvest (of 9,824,589 sockeye) which is larger than the entire Fraser sockeye run in 91 of the last 113 years.

Numbers talk and these numbers speak loud and clear of the end of the public recreational and commercial fishery open to every resident of British Columbia.

It became crystal clear as I studied the Tsawwassen Treaty and its application to the salmon runs over the last century that, with the stroke of a pen, our governments are ending the common recreational and commercial fishery that has always been open to every citizen of British Columbia, indeed every citizen of Canada. .

[5] Aboriginal Canadians currently comprise more than 35 percent of the participants in the public commercial salmon fishery.

## Overview of this Analysis

1. This analysis addresses:

    *(i)* the quantity or number of fish allocated,
    *(ii)* their percentage of the Total Allowable Catch and
    *(iii)* their impact on the Fraser River fishery as a whole.

    This paper will itemize the salmon allocations granted to the Tsawwassen Band by the Treaty and then apply these allocations to actual runs on the Fraser.

    It will consider what the fishery will look like should the Tsawwassen Treaty allocation serve as a model for the other treaties that will be signed in the coming months and years.

2. Throughout the analysis, numbers and percentages have been used. While these numbers are based on data available from Indian Affairs, Fisheries and Oceans, the Pacific Salmon Commission and Industry sources as well as from the Treaty documents, their use is intended to merely illustrate or give a perspective of what will happen to the fishery in the future as a result of the allocations to the Tsawwassen Band and more importantly, if the Tsawwassen allocations become a *Benchmark*[6] for salmon allocations to other Bands.

    It is all too easy to quibble over run sizes or the number of aboriginals. While the numbers are important, specific numbers attached to Bands or run sizes are not the issue. What is at issue is the general direction of the allocations and whether viable public recreational and commercial fisheries will remain after such treaty allocations are made.

3. This analysis does not consider the crippling management structure created by the Treaty, a structure that will handcuff the Minister and undermine his ability to protect fish stocks, nor does it consider the cost of operating a separate structure that challenges the Department's management of the fishery.

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[6] Throughout the analysis the term "Tsawwassen Benchmark" is applied to combined allocations granted in the Tsawwassen Treaty and used as a Benchmark for all claimants to Fraser River Sockeye unless stated otherwise.

## Part I: The Tsawwassen Fish Allocations

The Treaty and related side-agreements establish two commercial fishery allocations:

(a) the Tsawwassen Trade and Barter allocation and
(b) the Tsawwassen Commercial allocation.

These commercial fisheries have been created in spite of two Supreme Court of Canada decisions[7] that have soundly rejected special aboriginal commercial rights to salmon in British Columbia. One of the decisions specifically rejected the aboriginal right to a segregated commercial fishery on the Lower Fraser in an area that now forms part of the Tsawwassen Territory created by the Treaty.

(a) The Trade and Barter fishery under the authority of the Treaty is a limited commercial fishery that allows trade of the fish caught with any aboriginal group in Canada. The Trade and Barter fishery is substantially larger than the existing food, social and ceremonial fishery that it replaces. This new commercial fishery is described in the Treaty as the *Tsawwassen Fishing Right.*

(b) The Treaty also requires the government to enter into a side-agreement called a *Harvest Agreement* which establishes a second commercial fishery.

**Fears have been expressed by some fishermen that these allocations in the Treaty and Harvest Agreement are really a cynical ploy which appears to advance the interests of aboriginals but all while serve the corporate interests of a few large fish processors.**

Both the Trade and Barter allocation[8] and the Commercial allocation[9] can be fished by any individual or corporate interest designated or licensed by the Band.

This opens the door for the Canadian Fishing Company[10] (Canfisco) owned by Jimmy Pattison and other large corporations to catch the commercial allocations provided for in the Tsawwassen Treaty and in those that come after it.

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[7] See Appendix B for discussion of the Supreme Court of Canada decisions.

[8] Clause 55 of the Treaty states: "Where a Tsawwassen Allocation for a species of Fish or Aquatic Plants has been established under this Agreement, *Tsawwassen First Nation may designate Tsawwassen Members and other individuals to harvest that species of Fish* or Aquatic Plants under the Tsawwassen Fishing Right."

While there are limitations on the exchange of Trade and Barter fish it is not at all clear if these limitations will apply after the initial exchange and if they do, can they and will they be enforced?

[9] Clause 30 of the Harvest Agreement states: "The Tsawwassen First Nation will *designate individuals to fish* under the licenses issued to implement this Agreement and the *vessels that are used*."

[10] According to the Jim Pattison Group website, Canfisco owns and operates three major processing plants in Vancouver and Prince Rupert. "It also owns and operates the largest fleet of company vessels in British

**Mr. Pattison's senior corporate staff has already begun conducting negotiations with Fraser River Bands to gain access to the large commercial allocations of salmon that these Bands expect to receive as a result of Treaty negotiations.**

**Large fishing corporations will pay a royalty to each Band to harvest its allocations. The treaties are likely to ensure that large corporate processing interests will get the fish while the small boat fishermen, native and non-native, will effectively be put out of business.**

The Federal Treaty Negotiator[11] has advised that both the Tsawwassen Trade and Barter fishery and the Tsawwassen Commercial fishery "will be managed as part of the integrated management approach for all *commercial* fisheries."

In the unlikely event that any fish remain for the public after treaties are signed, the Department of Fisheries and Indian Affairs will decide whether the rules for the Treaty/corporate fishery are merely "comparable" or actually identical to the rules under which members of the public will fish. Fisheries and Indian Affairs describe this new management scheme as "integrated fisheries management," but the playing field will be tilted in favour of the aboriginal treaty signatories and one of two major fish corporations at the expense of the public.

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Columbia." Canfisco's US affiliate is Alaska General Foods and operates processing plants in Ketchikan and Naknek.

[11] "While there will be a clear separation between Tsawwassen's domestic/FSC fisheries and Tsawwassen's commercial fisheries, they will be managed as part of the integrated management approach for all commercial fisheries with common conservation, monitoring and enforcement standards."

# Part I (a): The Tsawwassen Trade and Barter Allocation

## Sockeye Allocation

1. The Sockeye salmon allocation for the Trade and Barter fishery or what the Treaty calls the *Tsawwassen Right* fishery is set out in the Treaty as follows:

   a) When the Canadian Total allowable Catch for Fraser River sockeye salmon is 500,000 or less, 1.0% of the Canadian Allowable Catch for Fraser River sockeye salmon;

   b) When the Canadian Total Allowable Catch for Fraser River sockeye salmon is greater than 500,000 and less than 3.0 million, then 5,000 Fraser River sockeye salmon plus 0.49004 % of that portion of the Canadian Total Allowable Catch for Fraser River Sockeye that is greater than 500,000 and less than 3.0 million; and

   c) When the Canadian Total Allowable Catch for Fraser River sockeye salmon is equal to or greater than 3.0 million, then 15,226 Fraser River sockeye salmon.

2. Some claim that this sliding scale formula will limit the amount of the catch that is constitutionally protected, by linking it to run abundance. This is not so.

   **Had the Trade and Barter sliding scale formula for sockeye been in effect from 1990 onwards, in 14 out of those 17 years the full entitlement—or the "cap"—of 15,226 would have been taken.**

   **So for all intents and purposes the "cap" will be the allocation.**

3. The Tsawwassen 2006 Comprehensive Aboriginal Fishing Strategy Agreement allowed 6250 sockeye to be taken in what was then called the food, social and ceremonial fishery.

   **The Treaty would more than double the former "food" allocation to the Tsawwassen Band and would turn it into a limited *commercial* allocation that can be traded.**

   **Thus the new Treaty entitlement for Trade and Barter is 244 percent larger than the existing food fishery allotment.**

## Chum Allocation

4. The Chum salmon allocation for the Trade and Barter fishery is set out in the Treaty as follows:

   "In any year, the Tsawwassen Fishing Right Allocation for chum salmon will be 2.58% of the terminal Surplus of Fraser River chum salmon to a maximum of 2,576 Fraser

> River chum salmon."

5. This Chum allocation of some 2,576 salmon may in isolation seem like a small amount, but if extrapolated to cover just the Lower Fraser River Bands, it will represent a significant portion of the average annual catch of Chum in the terminal area.

## Pink Allocation

6. The Pink salmon allocation for the Trade and Barter fishery is set out in the Treaty as follows:

> "In any year, the Tsawwassen Fishing Right Allocation for pink salmon will be that number of fish caught incidentally in the harvest of Tsawwassen Allocation for sockeye salmon, up to a maximum of 2,500 Fraser River pink salmon."

7. It is not at all clear that Tsawwassen would be limited to 2,500 pink salmon. Past practice by the Department of Fisheries and Oceans would suggest that it is highly unlikely that the Department would ever shut down the Tsawwassen sockeye fishery—were it unusually late-timed—simply to stay below this by-catch limit for Pinks.

## Chinook Allocation

8. The Chinook salmon allocation for the Trade and Barter fishery is set out in the Treaty as follows:

> "In any year, the Tsawwassen Fishing Right Allocation for Chinook salmon will be determined by an abundance based formula, based on Canadian Total Allowable Catch that produces an annual harvest of 625 Fraser River Chinook…."

9. In 1980 the Department of Fisheries and Oceans closed all commercial fishing of Chinook salmon for conservation reasons. Although the runs have subsequently improved, the commercial Chinook fishery was never re-instated. Meanwhile, the Native-only fishery for Chinooks has continued, and in fact expanded.

## Coho Allocation

10. The Coho salmon allocation for the Trade and Barter fishery is set out in the Treaty as follows:

> "In any year, the Tsawwassen Allocation for Coho salmon . . . will result in an annual harvest of 500…."

11. Since 1996 the Department has turned the commercial salmon fishery virtually upside down in order to impose a zero mortality rate on Coho. This has had grave consequences for the industry, and was a major reason why the commercial fleet has been reduced by over half since 1996.

The Department used the urgent appeal for conservation to justify the harsh Coho restrictions it imposed on the commercial fleet. Yet for some reason that same urgency does not apply to Indian fisheries. Again the five hundred Coho given to the Tsawwassen Band may not seem like much, but if that *Tsawwassen Benchmark* were to be applied to all South Coast Bands in an equal measure it would pose a serious risk to Coho stocks.

DFO must be consistent, and not demonstrate favouritism. Either there is a crisis, and all fishermen must shoulder the conservation burden equally, or there is not. In which case, the Department should give the commercial sector similar treatment when it comes to allowing a small by-catch of Coho, incidental to the harvest of other stronger species of salmon. It should be noted that the zero mortality provision for Coho imposed on the commercial sector has resulted in the sacrifice of millions of surplus salmon since 1996.

## Establishment of Non-Allocated Species Allocations (Crab)

12. The Treaty only sets Trade and Barter allocations for salmon but it contains a mechanism to establish a Treaty allocation for Non-Allocated Species. It states in clause 32 (c):

> "Base Period" may for a Non-Allocated Species means a period of 10 calendar years immediately preceding the date of a proposal made under clause 34 for the establishment of a Tsawwassen allocation for the Non-Allocated Species, or such other period as the Minister and Tsawwassen First Nation may agree."

13. The Treaty does not create a specific Trade and Barter allocation for crab.[12] The Treaty in clause 34 provides for "the establishment of a Tsawwassen Allocation for Non-Allocated Species" such as crab. Clause 35 states**:**

> "The Minister and Tsawwassen First Nation *will* propose the establishment of a Tsawwassen Allocation for crab under clause 34 in the twelfth year after the effective date or such other date as the Minister and Tsawwassen First Nation may agree."

[12] See Clause 31.c of the Treaty – "a Tsawwassen Allocation for crab has not been established under this Agreement."

The Treaty Negotiator explains the provisions in the Treaty as follows: "The Treaty/Final Agreement deals only with the Tsawwassen Fishing Right, which covers only the domestic/FSC harvest (for Crab, in clauses 31 to 36+), conducted in accordance with the Tsawwassen Harvest Document (s) issued by the Minister. Clause 4 provides for the limited Trade and Barter of those harvests."

In the event the two parties do not agree on what the long-term allocation of crab should be, the Treaty lays out several provisions for arbitrating the matter.

The approach taken to establish the Tsawwassen Band's access to crab resembles what in the fishing industry vernacular is known as "fishing for history." The catch history, established over the twelve years after the purchase, will eventually become a permanent allocation.[13]

The crab fishery is very lucrative and likely to become even more valuable over time. The value of that fishery in perpetuity is hard to quantify at this time, but it certainly will far exceed the initial seed money provided to purchase crab licenses.

[13] The Federal Treaty Negotiator explains it this way – "With respect to the *domestic*/FSC Crab harvest, Tsawwassen for the past few years has been harvesting Crab on a 50 traps per vessel basis, replacing an earlier total-traps basis. The Tsawwassen Fishing Right in respect of Crab continues this current 50 tpv *domestic* harvest effort basis for 12 years (three full Crab cycles) during which time additional harvest baseline data is to be compiled – remembering that the *domestic* and commercial harvests will be strictly separated, and that data will be used along with the other items listed in clause 36 of the Fisheries Chapter and the objectives in Clauses 37 to 39 to inform what an allocation for the Crab species should be."

# Part I (b): The Tsawwassen Commercial Allocation

## Commercial Allocation for Sockeye, Chum, Pink

15. The Harvest Agreement[14] established as a Treaty side-agreement creates a Tsawwassen Commercial Allocation equivalent to:

    a) 0.78% of Canadian Commercial Total Allowable Catch for Fraser Sockeye Salmon for that year;
    b) 3.27% of Terminal Commercial Catch of Fraser Chum Salmon for That Year; and
    c) 0.78% of Canadian Commercial Total Allowable Catch of Fraser River Pink Salmon for that year.

16. As the Courts have consistently denied that there is an Aboriginal right to sell fish taken in Native-only fisheries this clause creates a right or obligation that lacks either an historical and a legal basis:[15] **The Tsawwassen Treaty and its Harvest Agreement create a special aboriginal commercial allocation where the Supreme Court has specifically declared no aboriginal right exists.**

17. The Harvest Agreement in clause 15 notes that the Commercial fishery will operate under "comparable" requirements to the Fraser River Commercial Fishery:

    > "The fishing envisioned by this Agreement for Salmon will have *comparable* requirements as a Fraser River Commercial Fishery or a General Commercial Fishery."

    The use of the word "comparable" suggests that the fishery will not operate under the rules governing the public fishery. "Comparable" does not suggest participation in a common public fishery with the same rules for everyone no matter the racial or cultural heritage of the fishermen.

    It sounds like more of the same race-based segregation that has characterized the federal government's approach to the commercial fishery on the Fraser since 1992 following the *Van der Peet* decision of the B.C. Supreme Court holding that there was an aboriginal right to trade salmon.

    That decision was found to have been wrongly decided and overturned, first by the B.C. Court of Appeal and finally by the Supreme Court of Canada in 1996, yet the segregated fishery triggered by the wrongly decided lower court decision in *Van der Peet* continues to this day.

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[14] Clause 102 of the Treaty requires that the parties enter into a Harvest Agreement: "On the Effective Date, Canada, British Columbia and Tsawwassen First Nation will enter into a Tsawwassen First Nation Harvest Agreement."

The Harvest Agreement was signed by the Chief Federal Negotiator on December 8, 2006 at the time the initialing of the Treaty by the federal and provincial governments.

[15] Van der Peet. See Appendix B for discussion of Van der Peet decision

18. The Harvest Agreement in clause 16 also states that the licenses issued under the Treaty side-agreement will be "comparable" to licenses in the public fishery:

> "The licenses issued to implement this Agreement for salmon will provide for sale of fish and will be *comparable* to licenses issued to participants in a Fraser River Commercial fishery, or a general commercial fishery."

Again it is noteworthy that the Harvest Agreement states that the new Tsawwassen Commercial salmon fishing licenses will be "comparable" to licenses used in the public commercial fishery rather than saying they will simply be regular commercial licenses treated like all other commercial licenses.

19. **The net result of the Tsawwassen Treaty and Harvest Agreement is that discriminatory[16] policies will be directed towards both Native and non-Native commercial fishermen, who are not beneficiaries of a Treaty settlement.**

## Crab Allocation

20. According to clause 105 of the Treaty and clauses 23 – 29 of the Harvest Agreement the Tsawwassen Band will be given $450,000 from the federal government to buy existing commercial Crab licenses. They will then be able to turn in up to five commercial crab licenses per year in exchange for the new Tsawwassen Commercial Crab licenses as set out in the Treaty and Harvest Agreement. As with salmon, the Tsawwassen Band will be free to designate or license native or non-native fishermen to harvest crab under the Treaty's new Commercial licenses.

Again similar to the provisions of the Harvest Agreement on salmon commercial licenses, Clause 27 of the Agreement provides that the Tsawwassen commercial crab licenses will provide for the sale of crab and will be "comparable" to a Commercial Crab License.

**The Department of Fisheries and Indian Affairs tend, in carefully worded statements, to imply that the commercial fishery will be an integrated one with Treaty-licenses being identical to the licenses used in the public fishery. If that were so the Band would not be turning in licenses from the public fishery and exchanging them for special Treaty-licenses with all the bells and whistles that a constitutionally protected Treaty would create. One can only assume that Treaty-licenses will take precedence over and open more doors than a simple fishing license from the public fishery ever could. Pity the poor fisherman left holding a license in the public fishery.**

[16] Many industry observers believe there was a deliberate intent by the federal government to reduce commercial fishing opportunities in recent years—under the false rubric of "risk averse management'—in order to drive non-Native participants from the commercial fishery. This in turn, it is believed, is making the re-allocation of the Salmon fishery to Native groups that much easier—and cheaper.

21. The Tsawwassen Band will be able to sub-lease these crab licenses, resulting in the possibility of fishing corporations eventually controlling the harvest. This would fly in the face of the whole point of the government procuring these licenses for the Tsawwassen Band in the first place.

22. It should be noted that Clause 105 of the Treaty not only provides $450,000 for a Tsawwassen Commercial Crab Fund, but also $1,155,000 for a Tsawwassen Commercial Fish Fund, all to increase the "commercial fishing capacity" of the Tsawwassen Band.

Assuming there are actually 273 Tsawwassen Band members this works out to a per capita amount of $5879. Extrapolated across all South Coast Bands this would result in a total sum of $36,789,018.[17] Of course this amount would be even larger if one extrapolates the cash equivalent for the Tsawwassen fisheries allocations to all B.C. coastal tribes.

Excluding the value of the fish allocations the cash value of the Fisheries Chapter of the Tsawwassen Treaty is $2,605,000 (that is $1,000,000 for Enhancement and $1,605,000 for fishing licenses) or $9542 per Band member. If extrapolated to all South Coast Bands the cost to taxpayers would amount to $59,710,973.

[17] $5879 x 62,577

## Part II. The Impact of the Tsawwassen Treaty on the Salmon Fishery

23. The Trade and Barter allocation[18] gives the Tsawwassen Band allocations of all five species of Fraser Salmon.

24. The Trade and Barter allocation provides the Band—on a sliding scale formula based on the Total Allowable catch—with up to 15,226 Fraser Sockeye each year.

25. If the sliding scale formula --- which calculates the Tsawwassen Trade and Barter Allocation (*Tsawwassen Fishing Righ*t) for sockeye—had been in effect between 1990 and 2006, it would have resulted in an average annual catch of 12,131 sockeye by the Tsawwassen Band in that period.

The same formula if applied to the past five years-- 2002 to 2006-- would have produced an average annual harvest of 13,127.

**The 13,127 is a net increase of 6883 over the 6,250 Fraser Sockeye allocated in 2006 as food fish. That is to say the Trade and Barter allocation is double the food fish allocation that it is supposedly replacing.**

**The Proposed Tsawwassen Trader and Barter Allocation Formula Applied 1990-2006**

| Year | Total Catch of Fraser Sockeye | Proposed Tsawwassen Fishing Right |
|---|---|---|
| 1990 | 13,404,000 | 15,226 |
| 1991 | 7,045,000 | 15,226 |
| 1992 | 4,213,000 | 15,226 |
| 1993 | 14,884,000 | 15,226 |
| 1994 | 11,207,000 | 15,226 |
| 1995 | 1,751,000 | 12,004 |
| 1996 | 1,801,000 | 12.004 |
| 1997 | 9,706,000 | 15,226 |
| 1998 | 2,339,000 | 13,956 |
| 1999 | 417,000 | 4,170 |
| 2000 | 1,834,000 | 12,336 |
| 2001 | 1,201,000 | 9,804 |
| 2002 | 3,446,000 | 15,226 |
| 2003 | 1,966,321 | 12,865 |
| 2004 | 1,948,000 | 12,792 |
| 2005 | 1,131,911 | 9,527 |
| 2006 | 4,507,500 | 15,226 |
| **Average 1990-2006** | | **13,015** |

[18] Found in Appendix J-2 of the Treaty. The specific Trade and Barter allocations are all found in the Appendix to the Treaty. The Appendix is over 350 pages. It is a volume of Treaty documents separate from the "Final Agreement."

26. Article 10 of the Treaty's Harvest Agreement also gives the Tsawwassen Band 0.78% of the Canadian Commercial Total Allowable Catch of Fraser Sockeye on an annual basis.

**If applied to the years 1990 to 2006, this would have resulted in an additional allocation—all of which could be sold—of 30,584 sockeye.**

27. **If the 0.78 percent of the Total Allowable Catch for sockeye granted to the Tsawwassen Band for their Commercial allocation were to be the Benchmark allocation for the other Bands claiming Fraser River fish it would result in the equivalent of 177 percent of the Total Allowable Catch being committed to these Bands, leaving nothing for public commercial and recreational fisheries.**

**Tsawwassen Commercial Allocation of Fraser Sockeye Formula Applied to 1990-2006**

| **Year** | **Canadian Commercial Catch** | **Tsawwassen Commercial Allocation** |
|---|---|---|
| 1990 | 12,451,000 | 96,735 |
| 1991 | 6,321,000 | 49,303 |
| 1992 | 3,477,000 | 27,120 |
| 1993 | 13,820,000 | 107,796 |
| 1994 | 10,094,000 | 78,000 |
| 1995 | 817,000 | 6,300 |
| 1996 | 955,000 | 7,449 |
| 1997 | 8,435,000 | 65,793 |
| 1998 | 1,278,000 | 9,968 |
| 1999 | 49,000 | 382 |
| 2000 | 968,000 | 7,550 |
| 2001 | 295,000 | 2,301 |
| 2002 | 1,283,000 | 17,027 |
| 2003 | 1,032,223 | 8,051 |
| 2004 | 1,058,000 | 8,252 |
| 2005 | 129,379 | 1,009 |
| 2006 | 3,251,900 | 25,364 |
| **Average (1990-2006)** | | **30,495** |

## Tsawwassen Benchmark

28. Using an index of 13,000 for the Tsawwassen Trade and Barter allocation and 30,000 for the Tsawwassen Commercial allocation the combined annual average allocation works out to an average of **43,000** Fraser Sockeye each year.

**That amount of sockeye divided among the 273**[19] **Tsawwassen Band members works out to 157 sockeye per person each year.**

[19] According to Indian Affairs, the "Registered Population as of March 2007" was 273, of that total registered population some 163 lived on the Tsawwassen Reserve. Numbers vary slightly depending on the period used.

**It is reasonable to assume that this per capita allocation of 157 sockeye per person will form a precedent or *Benchmark* for future negotiations[20] with other bands.**

## Tsawwassen Benchmark – Applied to South Coast

29. If one takes the Tsawwassen *Benchmark*[21] and applies it to the South Coast Bands (Vancouver Island, South Coast Mainland, and Fraser Watershed) yet to settle their land claims, the resulting allocation is enormous.

30. There are approximately 62,577 aboriginals belonging to all the South Coast Bands that could conceivably claim a portion of Fraser Sockeye migrating through waters adjacent to their communities.

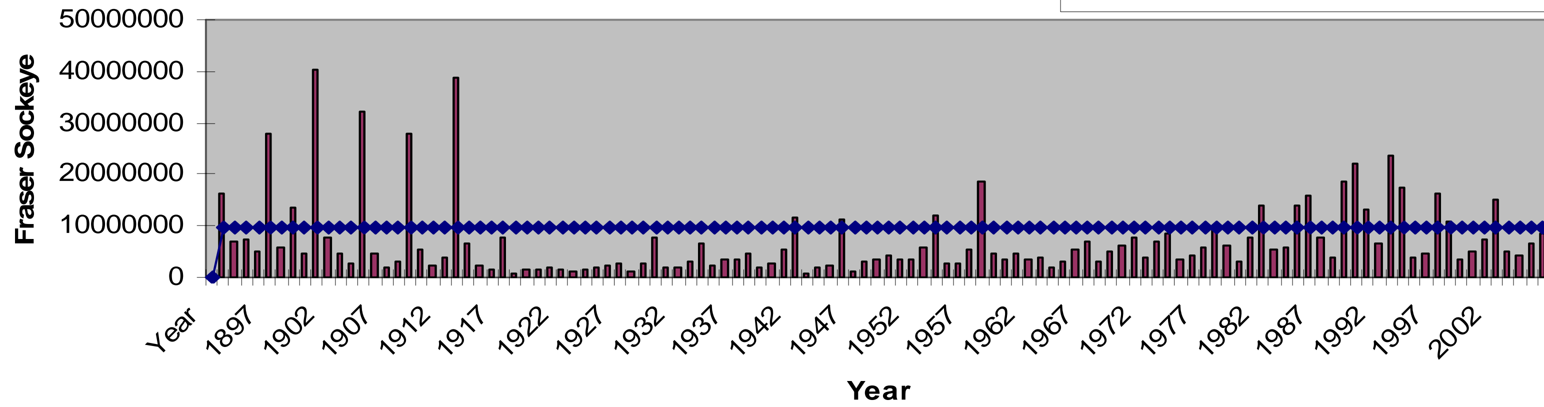
**The *Tsawwassen Benchmark* of 157 Fraser Sockeye per person per year works out to a grand total of 9,824,589.**

**To put this figure in perspective it is worth noting that this would have been larger than the entire run in 91 out the 113 years, since records have been kept for Fraser sockeye.**

On November 16, 2007, the Minister of Indian Affairs advised Parliament with regard to the number of Band members: "163 members belong to the First Nation … There are a total of 104 Tsawwassen members who reside off reserve."

[20] Government negotiators may claim that this is not true, and that future allocations to other bands may be less generous. However, this is hard to believe, and government negotiators have so far failed to explain how this might be the case.

[21] The Tsawwassen Benchmark is 157 Sockeye per person.


Tsawwassen Benchmark backcast over Past Runs
Total Return Of Fraser Sockeye
Tsawwassen Benchmark
50000000
40000000
30000000
20000000
10000000
0
Fraser Sockeye
Year
1897
1902
1907
1912
1917
1922
1927
1932
1937
1942
1947
1952
1957
1962
1967
1972
1977
1982
1987
1992
1997
2002
Year

## Tsawwassen Benchmark – Applied to Fraser Basin Bands

31. For the purposes of discussion the application of the Tsawwassen *Benchmark* could be limited to only those Bands on the Fraser Basin, excluding[22] Bands on Vancouver Island (40), and the South Coast B.C. (12).

Nevertheless, even if one only considers those Indian Bands that are located in the Fraser River Basin the implications of the *Tsawwassen Benchmark* are still enormous.

There are at least 80 bands, with a total population of 32,856, in the Fraser watershed.

**If the *Tsawwassen Benchmark* of 157 fish per person were extrapolated for only the Fraser Basin Bands an allocation of 5,158,392 Fraser sockeye would be required to satisfy the demand.**

## Tsawwassen Benchmark – Applied to Lower Fraser Bands

32. The Department may try to claim that not all 62,304 Indians belonging to South Coast bands will make a claim for Fraser sockeye similar to that of the Tsawwassen. Assuming this to be true—which is very unlikely—it is worth considering the impact of the *Tsawwassen Benchmark* just on those bands living in the lower Fraser area such as the Sto:lo and Cheam who are already very heavily involved in the Fraser Sockeye fishery.

33. There are roughly 18,848 aboriginals[23] who belong to Bands that comprise the Lower Fraser region. These Bands include the Lower Mainland Alliance, Coast Mountain/In-Shuck-chi, Fraser Canyon bands, Lillooet Tribal Council, Nicola Tribal Council, Nlaka'pamux Nation, and the Sto:lo. These are the core groups active within the Fraser Indian fishery, and the Aboriginal Fisheries Strategy pilot sales program.

**Using the *Tsawwassen Benchmark* as a template, these groups could claim to a minimum of 2,959,136 Fraser sockeye each year. However, given their militant stance regarding Aboriginal fishing rights it is probable that these groups—particularly the Sto:lo—will demand an even larger per capita share.**

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[22] All of those Bands are situated on or near the migration routes of Fraser Sockeye.

This assumes that the federal government can limit or will limit the allocation of Fraser Sockeye only to those Bands situated on the Fraser Basin and in the process deny all those outside of that geographical arena, an unlikely prospect considering that an allocation of Fraser sockeye has already been made in the Maa-nulth Treaty involving bands on the West Coast of Vancouver Island.

[23] Registered or Status Indians

34. In this day and age when the legally reported Indian catch hovers around 1 million sockeye per season, 2,959,136 sockeye given to the Lower Fraser Bands may not seem like much. However, it is far out of line—assuming the number stays at that level—with the average annual Indian Food Fishery catch between 1946 and 1990 (Pre-*Sparrow* decision), was only 233,784.[24]

35. In other words, applying the *Tsawwassen Benchmark* to just the Lower Fraser bands—a totally unlikely prospect—the end result will be an amount 10 times greater than the long-term average catch in what was once officially called the Indian Food Fishery (IFF), by the old International Pacific Salmon Fisheries Commission (IPSFC), which managed Fraser sockeye fisheries from 1937 to 1985.

36. It is worth noting that neither the Indian population, nor Fraser River salmon runs have grown by a factor of ten since the days of the International Pacific Salmon Fisheries Commission. Meanwhile, Ottawa's recent policies have dramatically increased the Indian catch. The *Tsawwassen Benchmark* will increase that amount even more.

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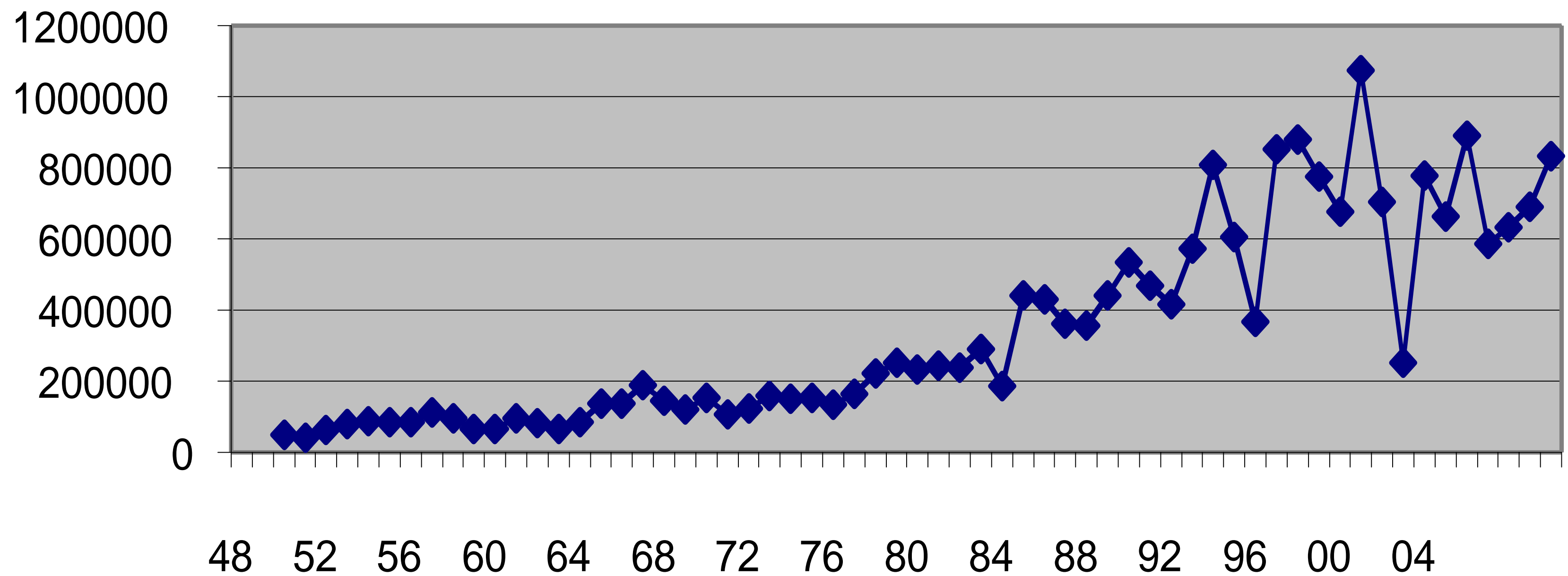
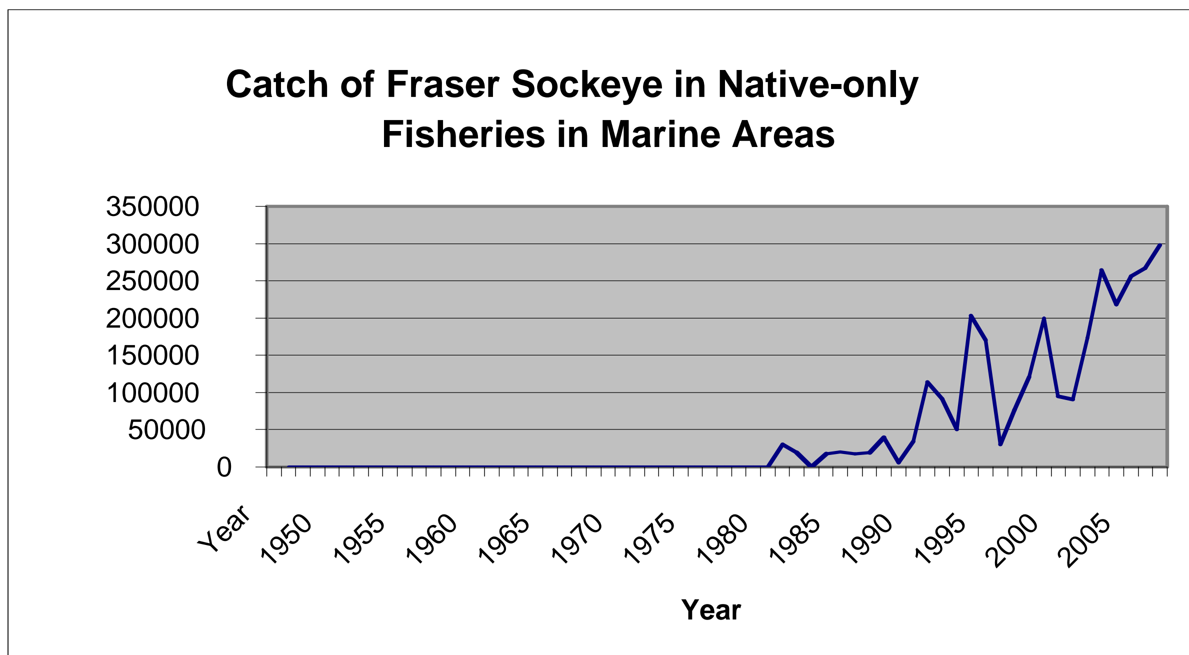
[24] That figure is closer to what was the traditional Indian food consumption of Fraser sockeye actually was, prior to the Department's controversial decision to allow the commercialization of fish caught in Native-only salmon fisheries in 1992.


Catch of Fraser Sockeye in Native-only Fisheries in the Fraser River
Fraser Sockeye
1200000
1000000
800000
600000
400000
200000
0
48
52
56
60
64
68
72
76
80
84
88
92
96
00
04
Year 1948 to 2004

## Marine Based Native-Only Fisheries

37. The difference between the historic Indian food fishery catch levels, prior to the 1990's, and those of today becomes even more extreme when one includes the landings from the marine-based Native-only fishery.

    At one time this catch was almost negligible as most Native people living in coastal communities and reserves obtained their food fish as participants in the general commercial fishery. However, major policy changes as a result of Department's peculiar reading of the *Sparrow* decision (1990) resulted in a dramatic expansion in that fishery as well.




## The 33 Percent Deception

38. Of course the Department of Fisheries and Oceans will no doubt try to claim that the above analysis is misleading or alarmist. Citing the much ballyhooed Pearse /McRae report, in a letter written in January 2007, Indian Affairs Minister Jim Prentice stated:

> "The cumulative effect of treaty allocations on the overall harvest of Fraser River sockeye has been examined. The Pearse/McRae report estimated in 2004 that, based on the allocations provided in agreements-in-principle agreed to at that time, the cumulative result of settling all treaties would result in approximately 33 percent of the sockeye harvest being provided to First Nations for both food, social and ceremonial and commercial fisheries."

There is no possible way that the Indian allocation of Fraser sockeye can be capped at 33 percent of the Canadian catch, given the precedents that have been set in the Yale, Lheidli T'enneh, and Tsawwassen agreements.

However reassuring Mr. Prentice's claim was intended to be, it was misleading and was perhaps designed by federal bureaucrats to mislead.

39. Neither Professor Peter Pearse nor the Department of Fisheries and Oceans can realistically explain how Indian allotments will be kept to 33 percent of the allowable harvest**.**

Instead they make vague assurances that the settlement of Land Claims will not appreciably change current or existing harvest levels of Indian Bands. But even a simple look at the numbers shows otherwise.

**In fact one must question where both Professor Pearse and the Indian Affairs Minister get their facts, as since 1999 the Indian-only catch has on average equaled 46 percent of the Canadian catch.**

**Comparison of Native and Commercial Sectors Exploitation of Fraser Sockeye**

| Year | Integrated Commercial | Native-Only |
|---|---|---|
| 1999 | 17% | 64% |
| 2000 | 60% | 36% |
| 2001 | 36% | 55% |
| 2002 | 67% | 29% |
| 2003 | 57% | 37% |
| 2004 | 56% | 42% |
| 2005 | 11% | 83% |
| 2006 | 70% | 29% |
| **Average** | | **46%** |

40. Whether one considers the Tsawwassen *Benchmark* on a strict numerical basis or a percentage basis, the outcome is equally <u>unsustainable</u>.

**The entire Fraser salmon resource will be potentially exhausted by Indian claims, leaving nothing left over for the public fishery.**

## Conclusion – Where Do We Go From Here

41. Either one of two conclusions must be drawn from all of this:

    a) The Department of Fisheries, under political pressure from Indian Bands, will eventually have to offer future claimants amounts close to, or even in excess of, the *Tsawwassen Benchmark*—thus eating up the entire available harvest; or,

    b) the negotiators of the Tsawwassen deal failed to calculate the long term, precedent-setting implications of the *Tsawwassen Benchmark*.

    Either interpretation should be sufficient grounds for scrapping the Fisheries Chapter in the Tsawwassen Treaty and its Harvest Agreement side-deal and starting over with a more realistic approach.

    At some point responsible, reality-based thinking must enter into the Land Claims process if the resource—let alone the common or public component of the fishery—is to survive.

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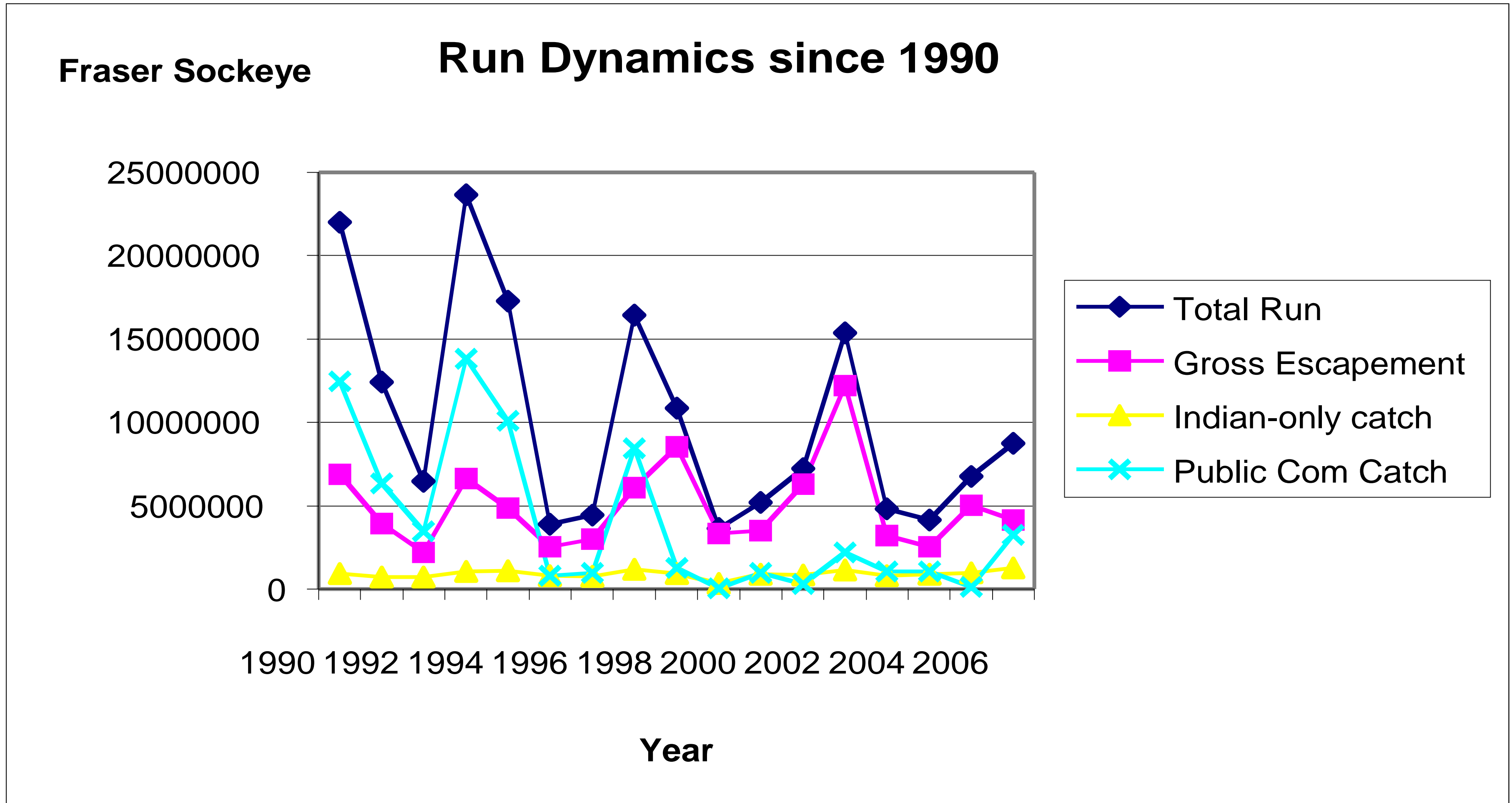
**APPENDIX A**



## Appendix B – Excerpt from 2003 House of Commons Fisheries Committee Report on the Fraser River Fishery

### INTRODUCTION

Despite substantial runs of several species of salmon on the Fraser River, the B.C. commercial salmon fishing fleet was effectively shut out of the fishery in the 2001 fishing season. Some fleet sectors had minimal openings while others did not fish at all. In fact, over the period 1998-2001, the commercial fishery has been virtually shut down.

The impact on the lives of the fishermen and other workers who depend on the commercial fishery has been devastating. …

To appreciate the present day context in which the Fraser River salmon fishery operates, it is helpful to have an understanding of the evolution of DFO policies implemented over the last decade beginning in 1992 with the Aboriginal Fisheries Strategy (AFS), which came about as result of the Supreme Court of Canada *Sparrow* decision. Many of the witnesses who appeared before the Committee believe that the AFS played a large part in the inability of commercial fishermen to fish in 2001 and has contributed to the declining financial viability of the commercial fishery since 1992 when it was introduced. …

### THE 1990 SPARROW DECISION

In 1990, the Supreme Court of Canada ruled in the case of *Regina v. Sparrow* that a lower Fraser River Band, the Musqueam, enjoyed an Aboriginal right to fish for salmon for food, social and ceremonial purposes.1 The anthropological evidence relied on to establish the existence of the right suggested that, for the Musqueam, fishing for salmon had always constituted an integral part of their distinctive culture. Later, the Supreme Court of Canada, in the Van der Peet decision, clarified that participation in the salmon fishery was an Aboriginal right because it was an "integral part" of the "distinctive culture" of the Musqueam.

The Supreme Court in *Sparrow* also found that the right to fish for salmon for food was second in priority only to conservation requirements.

In reaching its decision, however, the Supreme Court declined to consider whether there was also an Aboriginal right to fish for commercial purposes.

### ABORIGINAL RIGHT TO FISH COMMERCIALLY

In June 1993, the B.C. Court of Appeal considered the issue of an Aboriginal right to sell salmon in *R. v. Van der Peet* and *R. v. N.T.C. Smokehouse Ltd.* The Court also considered the Aboriginal right to sell herring spawn on kelp in *R. v. Gladstone*. In each case, a majority of the Court ruled that the Aboriginal right did not include the right to sell. These cases were

subsequently appealed to the Supreme Court of Canada, which considered them together to examine the question of a constitutionally protected Aboriginal right to sell.3, 4, 5

In the cases of *Van der Peet* and *N.T.C. Smokehouse*, a majority of the Court held that neither the Sto:lo, a lower Fraser River band, nor the Shesaht and Opetchesaht bands, Port Alberni bands, had an Aboriginal right to the sale of salmon.

In *Van der Peet*, the Court addressed the question of how Aboriginal rights should be defined as well as the purposes behind section 35 of the *Constitution Act, 1982,* recognizing and affirming those rights. The Court ruled that existing Aboriginal rights entitled to constitutional protection are practices, customs or traditions that were integral to the distinctive culture of the Aboriginal group claiming the right prior to contact with Europeans. The Court also held that Aboriginal rights are not universal in nature but are, rather, specific to individual Aboriginal communities. That is to say, their scope and content must be determined on a case-by-case basis.

In *Van der Peet*, the Court noted that "Claims to Aboriginal rights must be adjudicated on a specific rather than general basis":

> Courts considering a claim to the existence of an Aboriginal right must focus specifically on the practices, customs and traditions of the particular Aboriginal group claiming the right. In the case of *Kruger*, supra, this Court rejected the notion that claims to Aboriginal rights could be determined on a general basis. This position is correct; the existence of an Aboriginal right will depend entirely on the practices, customs and traditions of the particular Aboriginal community claiming the right. As has already been suggested, Aboriginal rights are constitutional rights, but that does not negate the central fact that the interests Aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of Aboriginal people has an Aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another Aboriginal community has the same Aboriginal right. The existence of the right will be specific to each Aboriginal community.

In *Gladstone*, however, the Court allowed the appeal. The Court found that a commercial trade in herring spawn on kelp had been an integral part of the distinctive culture of the Heiltsuk prior to European contact.

In *Gladstone*, the Court noted two significant differences between the exercise of the Aboriginal right to fish for food, social and ceremonial purposes identified in Sparrow and the Aboriginal right to sell herring spawn on kelp commercially.  First, the Court noted that the right identified in Sparrow had an internal limitation and the right identified in *Gladstone* did not, and discussed the implications of this difference:

> First, the right recognized and affirmed in this case — to sell herring spawn on kelp commercially — differs significantly from the right recognized and affirmed in Sparrow — the right to fish for food, social and ceremonial purposes. That difference lies in the fact that the right at issue in Sparrow has an inherent limitation which the right recognized and affirmed in this appeal lacks. The food, social and ceremonial needs for fish of any given band of Aboriginal people are internally limited — at a certain point the band will have sufficient fish to meet these needs. The commercial sale of the herring spawn on kelp, on the other hand, has no such internal limitation; the only limits on the Heiltsuk's need for

> herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource.
>
> The significance of this difference for the Sparrow test relates to the position taken in that case that, subject to the limits of conservation, Aboriginal rights holders must be given priority in the fishery. In a situation where the Aboriginal right is internally limited, so that it is clear when that right has been satisfied and other users can be allowed to participate in the fishery, the notion of priority, as articulated in Sparrow, makes sense.
>
> Where the Aboriginal right has no internal limitation, however, what is described in Sparrow as an exceptional situation becomes the ordinary: in the circumstance where the Aboriginal right has no internal limitation, the notion of priority, as articulated in Sparrow, would mean that where an Aboriginal right is recognized and affirmed that right would become an exclusive one. Because the right to sell herring spawn on kelp to the commercial market can never be said to be satisfied while the resource is still available and the market is not sated, to give priority to that right in the manner suggested in Sparrow would be to give the right-holder exclusivity over any person not having an Aboriginal right to participate in the herring spawn on kelp fishery.
>
> Where the Aboriginal right is one that has no internal limitation then the doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an Aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of Aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users.

On this point the Court concluded by stating that:

> under Sparrow's priority doctrine, where the Aboriginal right to be given priority is one without internal limitation, courts should assess the government's actions not to see whether the government has given exclusivity to that right (the least drastic means) but rather to determine whether the government has taken into account the existence and importance of such rights.
>
> The existence of such difficult questions of resource allocation supports the position that, where a right has no adequate internal limitations, the notion of exclusivity of priority must be rejected.

The second significant difference according to the Court was that conservation was the only objective that need be satisfied prior to the Aboriginal right as identified in Sparrow, whereas in the right identified in Gladstone other objectives in addition to conservation might be considered:

> I now turn to the second significant difference between this case and *Sparrow*. In *Sparrow*, while the Court recognized at p. 1113 that, beyond conservation, there could be other "compelling and substantial" objectives pursuant to which the government could act in accordance with the first branch of the justification test, the Court was not required to delineate what those objectives might be. Further, in delineating the priority requirement, and the relationship between Aboriginal rights-holders and other users of the fishery, the only objective considered by the Court was conservation. This limited focus made sense in Sparrow because the net-length restriction at issue in that case was argued by the Crown to have been necessary as a conservation measure (whether it was necessary as such was not actually decided in that case); in this case, however, while some aspects of the government's regulatory scheme arguably relate to conservation — setting the total allowable catch at 20 per cent of the estimated herring stock, requiring the herring roe fishery to bear the brunt of variations in the herring

> stock because it is more environmentally destructive — other aspects of the government's regulatory scheme bear little or no relation to issues of conservation.
>
> …
>
> As such, it is necessary in this case to consider what, if any, objectives the government may pursue, other than conservation, which will be sufficient to satisfy the first branch of the *Sparrow* justification standard.13
>
> Aboriginal rights are recognized and affirmed by s. 35(1) in order to reconcile the existence of distinctive Aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory; they are the means by which the critical and integral aspects of those societies are maintained. Because, however, distinctive Aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that Aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of Aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.
>
> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. In the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on their successful attainment.

In addition, in Gladstone the Court discussed another factor that must be considered when managing a fishery that includes an Aboriginal commercial right to fish. The Court stated:

It should also be noted that the Aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:

> …the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike.
>
> …
>
> > [I]t has been unquestioned law that since *Magna Charta* [sic] no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation.
>
> (*Attorney-General of British Columbia v. Attorney General of Canada*, [1914] A.C. 153 (J.C.P.C.), at pp. 169-70, per Viscount Haldane.)
>
> While the elevation of common law Aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an Aboriginal

> right to harvest fish commercially existed. As was contemplated by *Sparrow*, in the occasional years where conservation concerns drastically limit the availability of fish, satisfying Aboriginal rights to fish for food, social and ceremonial purposes may involve, in that year, abrogating the common law right of public access to the fishery; however, it was not contemplated by *Sparrow* that the recognition and affirmation of Aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an Aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to Aboriginal rights; however, the recognition of Aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.

Thus, in summary, the legal principles that apply to the Fraser River sockeye fisheries are as follows:

a) The Aboriginal right to harvest fish for food, social and ceremonial needs holds priority over the public commercial and recreational fisheries. The Department of Fisheries and Oceans has a constitutional obligation to ensure that these requirements are fulfilled.

b) There is not a general constitutional right for Aboriginal Canadians to fish commercially and each claim must be decided on its merits.

c) There is currently no Aboriginal right to engage in commercial salmon fishing on the Fraser River.

d) There is a public right to engage in the Fraser River commercial and recreational salmon fisheries that is held equally by all Canadians.