



COHEN COMMISSION: A CALL TO ACTION

By Holly Vear

On October 31, 2012, Commissioner Cohen released his report setting out the findings of the “Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River.” The Report warned of an “uncertain future” for Fraser River sockeye, setting out 75 specific recommendations calling for immediate changes to the management of the fishery and for national and international policy development to address the effects of climate change.

The Inquiry lasted for two-and-a-half years and a number of First Nation groups were granted standing to present evidence at the hearings. Each group consisted of multiple First Nation bodies representing a wide-range of interests related to the sockeye fishery.

The Commissioner’s Report points to numerous factors that contribute to the decline of Fraser River sockeye including: the impact of climate change on sockeye lifecycles, habitat destruction, the impacts of open-net pen aquaculture practices, and insufficient funding for DFO to carry out its mandate to sustainably manage the fishery. Commissioner Cohen directly criticized the federal government’s move to amend the *Fisheries Act* and other important environmental laws before the Commission’s Report was finished. The Commissioner concluded that the legislative amendments in the omnibus budget bill “lower the standard of protection for

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UPCOMING EVENTS:

December 10: Beaver Lake Cree Nation case management meeting regarding *Alphonse Lameman vs Canada and Alberta*.



NEW DIRECTIONS FROM SCC

On October 25, the Supreme Court of Canada (SCC) denied leave to appeal two Federal Court of Appeal decisions; *Ballantyne v. Canada*, 2012 FCA 95 and *Canada v. Robertson*, 2012 FCA 94. This denial is significant because in these two cases the court found that although the income at issue was derived from commercial fishing operations conducted mostly off reserve, the income was sufficiently connected to the reserve to exempt it from taxation pursuant to section 87 of the *Indian Act*. These cases stand in contrast to a long line of heavily criticized decisions that systematically found business income to be part of the “commercial mainstream” or not part of a “traditional way of life” and therefore not eligible for the on-reserve taxation exemption.

The Supreme Court of Canada, in the investment income cases of *Bastien Estate v Canada*, 2011 SCC 38, and *Dube v Canada*, 2011 SCC 39, determined that courts should not give the “commercial mainstream” factor too much weight nor should the exemption depend on whether it is related to preservation of the “traditional way of life”. These SCC cases were applied and followed by the Federal Court of Appeal in *Ballantyne* and *Robertson*.

It remains to be seen how the courts will apply the section 87 exemption to other types of income beyond these specific commercial fishing enterprises, but these cases are a welcome step in the right direction.



Fraser River sockeye salmon” and warned that reducing DFO oversight will impair DFO’s ability to manage threats to the long-term sustainability of the fishery.

Despite Commissioner Cohen’s warning and call to action, all signs indicate that the federal government has no intention of abandoning its current policy of watering down environmental laws and diluting DFO’s ability to carry out its job to protect wild salmon stocks. The sad fact is that the citizens of British Columbia and Canada are likely to continue to rely on legal action by First Nations to continue to protect important salmon populations. ❖



KASKA WARN YUKON GOVERNMENT THEY WILL FIGHT PROPOSED CHANGES TO OIL & GAS ACT

On October 25, 2012, Kaska representatives issued a press release expressing dismay and disbelief at the Yukon Government’s proposed legislative changes to the *Oil and Gas Act* and warned they will fight any attempt to proceed with the planned amendments.

Chief Liard McMillan spoke out against the changes, saying they renege on promises made to the Kaska and other Yukon First Nations in the negotiations which led to the devolution of oil and gas powers from Canada to the Yukon Government. The amendments also appear to be aimed at paving the way for large-scale shale gas fracking in the Yukon.

The Chief stated: “The Premier has chosen a reckless course of action that we believe undermines the validity of the devolution of oil and gas powers to the Yukon Government from Canada. If the Yukon Government

proceeds with this assault on a right we negotiated as condition of transfer of powers to Yukon, we will fight back.”

In 1997, in recognition of the un-extinguished title rights that Yukon First Nations hold to their traditional lands, CYFN, the Kaska Nation and the Yukon Government reached an historic Memorandum of Agreement to allow First Nations to support the devolution of oil and gas administration to the Yukon Government. In return, the Yukon Government promised that the Kaska would have the power of veto over any new oil and gas development in Kaska Traditional Territory.

Chief Liard noted that the Kaska people have been prepared for some time to consider consent to oil and gas development in Kaska territory where it is done in accordance with the highest environmental standards and with appropriate accommodations to the Kaska people for impacts on their constitutionally-protected interests.

Kaska representatives also voiced worries about shale gas fracking and its impact on the environment. Large-scale land leases for shale gas explorations have already been issued by the British Columbia government in Kaska traditional territory south of the border – resulting in a recent massive shale gas find by the Apache Corporation in the Liard River basin.

Ross River Chief Jack Caesar said, “We must be involved in a meaningful way in all decisions that impact our lands and our communities. We are not prepared to stand idly by and allow the Yukon Government to make unilateral decisions that will have such negative lasting effects.”

Kaska representatives will be working together in the weeks ahead to vigorously oppose this action by the Yukon Government. ❖



SEASON’S GREETINGS FROM W&CO



Everyone at Woodward and Company LLP would like to extend their wish to you for a joyful holiday season and a very happy New Year!