

**THE COHEN COMMISSION OF INQUIRY INTO
THE DECLINE OF SOCKEYE SALMON IN THE FRASER RIVER**

**RULING RE: CANADA'S MOTION TO WITHDRAW QUESTIONS PUT TO MR.
OTTO LANGER FOR CROSS-EXAMINATION**

The Honourable Bruce I. Cohen, Commissioner

I. The Application

1. This is an application by the participant the Government of Canada ("Canada") to have questions that were put to Mr. Otto Langer in written cross-examination (the "questions") withdrawn, and in the alternative, to object to Mr. Langer's answers to the questions.

II. History of this application

2. On September 12, 2011, I ruled that Otto Langer would be permitted to provide an affidavit setting out evidence from his direct knowledge to answer questions which had been posed by commission counsel and by the First Nations Coalition to Paul Steele, Randy Nelson and Manon Bombardier.

3. On September 22, 2011, Mr. Langer filed an affidavit (the "Revised Affidavit #1") that purported to address the issue defined in my ruling. The participants Canada, the B.C. Salmon Farmers' Association ("BCSFA"), and counsel for the commission all objected to portions of the Revised Affidavit #1 on the basis that the affidavit went beyond the scope of my September 12 ruling, and in some cases that certain parts of the affidavit would, if admitted, be prejudicial to some participants.

4. On October 7, 2011, I ruled that the Revised Affidavit #1 would be entered into evidence as exhibit #1974, but with paragraphs 15, 18-25, 27-32, 34, the

final sentence of paragraph 14, and exhibits A and B struck out. I also ruled that commission counsel and participants' counsel were permitted to send their cross-examination questions in writing to the commission by not later than October 11th, and that Mr. Langer would be permitted to set out his responses to said questions not later than October 17, 2011.

5. Counsel for Mr. Langer requested an extension of the October 17th deadline to October 20th, 2011 for filing the affidavit in response. None of the other participants objected to this extension of time for filing. On October 19, 2011, counsel for Mr. Langer provided Mr. Langer's responses (the "responses"), and on October 20th, 2011, Mr. Langer provided an affidavit confirming that the responses were his sworn testimony.

6. On October 24, 2011, Canada made submissions purporting to withdraw its cross-examination questions, with the presumed effect that the responses would not be entered into evidence. In the alternative, Canada made submissions objecting to the admissibility to many of the responses on several bases.

7. On October 25, 2011, in response to Canada's submissions, the Conservation Coalition and the Area D Salmon Gillnet Association and Area B Harvest Committee (Seine) (the "Area D and B participants") made submissions objecting to Canada's attempt to withdraw its questions. These participants submitted that once one or more cross-examination questions have been asked and responded to, the questions cannot be withdrawn by the party leading the cross-examination.

8. On October 26, 2011, Canada made further submission in reply. Canada submitted that the process of written cross-examination was unsatisfactory and an error of law. It submitted that written cross-examination was sufficiently distinct from oral cross-examination that the rule that a question "asked and answered" cannot be withdrawn does not apply, and that it ought to be permitted to withdraw its entire cross-examination.

III. Decision

9. The purpose of my ruling of September 12, 2011 that permitted Mr. Langer to provide an affidavit and to allow for cross-examination on that affidavit was to put information before the commission that I believed might be helpful to my consideration of the issues before me. While I am cognizant of fairness to participants in allowing cross-examination, ultimately the purpose of all material received into evidence is to assist me in reaching conclusions and making recommendations. I do not find that it would be helpful to my consideration of the issues before me to allow Canada to withdraw all of its cross-examination questions and thereby have the responses fall away, whether or not it is open to me to do so. In considering the evidentiary record when making my final conclusions and recommendations, I have the task of deciding on the relevance and on the appropriate weight that should be given to the documentary record and records of testimony, both oral and written. Submissions made by the participants on this matter will assist me in making these assessments. Ultimately, I will make the final determinations of relevance and weight to accord the evidence.


10. In Canada's submissions of October 24, 2011, it notes that it has not acquiesced to the answers in chief that were provided by Mr. Langer through his affidavit that was sworn on September 22, 2011, but rather Canada reserves the right to make arguments on the relevance and weight that should be given to those answers.

11. Canada also submits that certain specific responses to its cross-examination questions are objectionable, and specifies the reasons for its objections. I will consider these submissions, both on Mr. Langer's answers in chief and his responses on cross-examination when deciding the relevance of the responses and the weight to give to the responses in my final conclusions and recommendations.

12. I order that commission counsel's cross-examination questions and Canada's cross-examination questions that were posed to Mr. Langer be marked as sub-exhibits 1974A and 1974B respectively, and that Mr. Langer's responses to commission counsel's questions and to Canada's questions be entered into evidence and marked as sub-exhibits 1974C and 1974D respectively. I further order that the documents appended to Mr. Langer's responses not be entered into the evidentiary record.

Dated

November 10, 2011



The Honourable Bruce I. Cohen
Commissioner