

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

**RULING RE: CONFIDENTIALITY OF MATERIAL FILED IN THE HEILTSUK
TRIBAL COUNCIL'S APPLICATION FOR PRODUCTION OF DOCUMENTS
PERTAINING TO THE COASTWIDE FRAMEWORK AND DOCUMENTS
CONTAINING FSC "MANDATE INFORMATION" ABOUT THE MANAGEMENT
OF FOOD, SOCIAL AND CEREMONIAL FISHERIES OVER WHICH
GOVERNMENT OF CANADA CLAIMS PRIVILEGE:**

The Honourable Bruce I. Cohen, Commissioner

I. The Application

1. The participant the Heiltsuk Tribal Council ("HTC") has brought an application for the production of documents over which legal privilege has been asserted by the Government of Canada ("Canada"). In that application, the HTC seeks an order for the production of Food, Social and Ceremonial ("FSC") mandate documents and for the production of Coastwide Framework documents (the "privilege application").
2. In respect of the privilege application, Canada has brought the present application, by which it seeks an order that:
 - (a) compelled documents (as that term is used in my ruling on undertakings of confidentiality released June 23, 2011) should remain confidential and subject to the undertakings of confidentiality unless/until made an exhibit in the evidentiary hearings, in which case it/they become public as exhibits;
 - (b) counsel and participants' written submissions that are contained within the application materials should be redacted by commission counsel to redact any references to information drawn from compelled documents, so as to preserve the confidentiality of the content of compelled documents and the compelled documents themselves;

(c) affidavits and materials appended to affidavits remain confidential, as they serve only to support arguments made in the written submissions and, given the volume of materials involved, it would be an unreasonable burden on commission counsel to review them for redaction.

II. History of this application

3. Prior to March 18, 2011, there was various correspondence among counsel for some of the participants and commission counsel on the matter of a large number of documents whose subject-matter was relevant to the commission, and over which Canada claimed privilege, and on that basis, refused to produce to the commission.
4. On March 18, 2011, the HTC brought a notice of application for the production of the Coastwide Framework and for production of mandate information about the management of FSC fisheries, over which Canada had claimed privilege. On June 14, 2011, the HTC filed written submissions in the privilege application.
5. On June 17, 2011, Canada made submissions in reply in the privilege application. Canada also brought an application pursuant to Rule 17.2 that the commission, participants, and counsel remain bound by their undertakings of confidentiality in respect of all application material until the later of 30 days following my ruling on the privilege application and the final determination of any judicial review taken from such ruling (including any appeal therefrom) (the “confidentiality application”).
6. On June 22, 2011, the HTC made submissions opposing the confidentiality application.
7. On June 23, 2011, I released my Ruling on Undertakings of Confidentiality in response to two applications brought by the Aquaculture Coalition (the “Ruling”).

8. On June 28, 2011, Canada made submissions in reply to the HTC's response, in which it modified the relief sought in the confidentiality application to the relief set out above to reflect the process set out in the Ruling.

III. Rules

9. The Rules provide:

17.2 Application materials referred to in Rules 65-72 are part of the public record, with the following caveats and exceptions:

(a) Application materials filed with the Commission on or before 29 March 2011 are not part of the public record and are to be treated as confidential, subject to Rule 17 and Rule 17.1;

(b) Application materials filed with the Commission on or after 30 March 2011 will be treated as confidential and subject to undertakings provided under Rule 17 for three full business days after the commission has circulated such documents to participants. After three full business days have passed, participants and counsel are released from their Rule 17 undertakings in respect of these application materials, except where any participant has applied to stay such a release. Where a participant or counsel makes an application to stay the release of Rule 17 undertakings in respect of specified application materials, the undertakings will continue to apply to the materials in question until the Commissioner rules on the stay application; and

(c) Commission counsel may, without application by a participant, stay the release of the Rule 17 undertakings contemplated in subsection (b) where documents otherwise subject to the undertaking are included in application materials.

17.3 Commission counsel will notify participants immediately of any stay of the release of Rule 17 undertakings made under Rule 17.2 (b) or (c).

17.4 Participants' final written submissions before the commission are part of the public record and not subject to Rule 17 undertakings.

IV. Submissions in Support of the Confidentiality Application

10. Canada says that the publication of the submissions and supporting materials prior to my ruling on the privilege application would subvert the assertions of privilege and thereby undermine the very process of having me

consider and decide the questions that are before me. It says that in an application in respect of legal privilege over documents, it is particularly important to prevent the publication or disclosure to third parties of any information or documents about the asserted privileges or privileges themselves that would occur if a participant simply including that information in an affidavit or attached documents as exhibits to affidavits.

11. Canada submits that it released one document, the Aboriginal Fisheries Framework document, on the agreement of participants that the participants will not rely on the disclosure of that document to assert that Canada waived privilege over other privileged documents. Canada says that if the document were given to the media or members of the public, its privilege would be lost.

V. Submissions opposing the Application

12. The HTC opposed the relief claimed in the confidentiality application. The HTC set out its submissions opposing that relief on June 22, 2011. Because of the timing of the release of the Ruling, the HTC did not have an opportunity to address the framework for confidentiality of application materials that I addressed therein. In its reply submissions of June 28, 2011, Canada modified the relief it sought in accordance with the Ruling. Because the HTC has not withdrawn its opposition to Canada's application, I have assumed that the HTC opposes any sealing or redacting of submission materials in the privilege application, for the reasons set out in its submissions of June 22, 2011.

13. The HTC strongly opposes the sealing of materials in the privilege application. The HTC submits that the purpose of Canada's application is to prevent the public from knowing about the nature and content of the dispute and of the existence and nature of the documents in issue, rather than simply to maintain the privilege over documents that it asserts in the application. It says that Canada seeks this secrecy over the existence and nature of the documents, even though it is the general nature of the documents that Canada relies on in asserting that its claim of privilege should prevail. It submits that if Canada were

to succeed on both the claim of privilege and the application to seal the application materials, the result would be the withholding of government documents which are relevant to the inquiry for reasons that the public cannot know, which subverts the principle of openness.

14. The HTC submits that even if Canada's position prevails in the privilege application, the public is entitled to know the nature of the dispute, that such documents exist and are relevant, but that aspects of public policy have required that they be kept secret.

15. The HTC submits that openness and transparency are hallmarks of a public inquiry.

VI. Decision

16. The principle issue resolving the scope of the documents that are caught by the confidentiality undertaking is set out in paras. 46 and 47 of the Ruling, as follows:

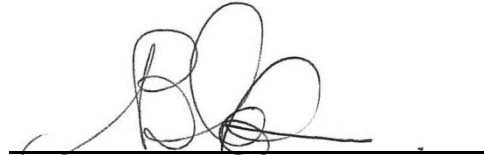
“...[T]he confidentiality of application materials must be temporarily extended when an objection is made, for the limited purpose of protecting against premature publication of compelled documents or their content. However, I do not consider it necessary to keep confidential the fact that an application has been made, the general nature of the application, or the position of participants, if those matters can be described in language that preserves the confidentiality of compelled documents and their contents. When the situation arises, it may be appropriate for commission counsel to draft a statement for inclusion on the commission's website, and for commission counsel, and for participants and their counsel to be guided by that statement when speaking publicly about an application.

The goal underlying these procedures should be to protect the confidentiality of compelled documents and the information contained in them, but otherwise to provide the public with as much information as possible about the commission's activities, including applications.”

17. In my opinion, Canada should be granted the order sought in the confidentiality application because employing the process set out in the Ruling

meets the concerns raised by the HTC, namely that the public will be made aware of the nature of the dispute, that certain documents exist and are relevant, but that privilege is claimed and the basis for that claim. This result maintains the confidentiality over the information taken from compelled documents until a ruling is made, or until the compelled documents are made public as part of the commission's proceedings, which is in keeping with my view that what needs to be treated confidentially, at least provisionally, are compelled documents, until questions of relevance, privilege and confidentiality are resolved.

Dated August 10th, 2011

A handwritten signature in black ink, consisting of several loops and flourishes, positioned above a horizontal line.

The Honourable Bruce I. Cohen
Commissioner