

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

**RULING ON DISCLOSURE OF DOCUMENTS BY
CANADA AND BRITISH COLUMBIA UNDER CLAIMS OF PRIVILEGE**

The Honourable Bruce I. Cohen, Commissioner

I. Introduction

1. In my Ruling of November 24, 2011 I ordered, at paragraph 82, that British Columbia, the British Columbia Salmon Farmers Association, and Canada would produce documents relating to testing for ISA v in wild or farmed salmon the Pacific Region, and relevant laboratory and testing protocols relating to testing for ISA v.
2. In my Ruling of December 1, 2011 I confirmed that I would review any documents over which Canada claimed privilege, and if I determined that the documents were privileged, the documents would be returned to Canada without further disclosure or review, all of which is consistent with my November 24, 2011 Ruling. Although not specified in my December 1, 2011 Ruling, which was made in response to a specific application by Canada, I intend in the same way to review any documents over which British Columbia claimed privilege.

II. Documents over which privilege is asserted

3. British Columbia produced a list of six documents over which solicitor client privilege was claimed. Canada produced a list of 48 documents over which various claims of solicitor client privilege, litigation privilege, and lawyer's brief privilege were asserted.
4. No submissions were received with respect to any of the documents.
5. For the purposes of my ruling, I outline the fundamental principles which guided me in my assessment of the documents.
6. Solicitor client privilege has been defined as follows:

Solicitor-client privilege attaches to oral or written communications between a client and a lawyer in the following circumstances:

1. where a client seeks advice from a lawyer,
2. where a lawyer provides advice in his or her professional capacity;

3. where the communication between the client and the lawyer relates to legal advice;
4. where the communication between the client and the lawyer is made in confidence;

Hubbard, Magotiaux, Duncan, *The Law of Privilege in Canada*, Vol. 2
(Toronto: Canada Law Book, 2011) p.11-4.1

7. Litigation privilege, unlike solicitor client privilege, is not an absolute privilege.

The elements of litigation privilege have been described in Hubbard, et al. as:

The elements required in order to claim work product or litigation privilege over documents or communications are as follows:

- the documents or communications must be prepared, gathered or annotated by counsel or person's under counsel's direction;
- the preparation, gathering or annotating must be done in anticipation of litigation;
- the documents or communications must meet the dominant purpose test;
- the documents, or the facts contained in the documents, need not be disclosed under the legal rules governing the proceedings; and
- the documents or facts have not been disclosed to the opposing party or to the court.

p. 12-3

8. Lawyer's brief privilege was summarized by Madam Justice Gray in *Keefer Laundry Ltd. V. Pellerin Milnor Corp. et al*, 2006 BCSC 1180 at para. 103 – 105:

Lawyer's Brief Privilege protects the lawyer's work product, including any notes and information or reports collected to prepare for litigation or to give legal advice. If a group of unprivileged documents is collected, the collection itself becomes privileged. (*Piercy v. Piercy* (1990), 75 D.L.R. (4th) 299, 48 B.C.L.R. (2d) 145 (C.A.); *Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129 at page 136, 55 D.L.R. (4th) 577 (C.A.))

This privilege is based on the theory that no one should be permitted to "look into the mind" of the lawyer as he or she is preparing a case. The purpose of Lawyer's Brief Privilege is to ensure that the lawyer can make all necessary inquiries so that he or she is able to give the client complete advice and to properly prepare for litigation. (*Hodgkinson v. Simms, supra.*)

In order for Lawyer's Brief Privilege to attach, there must be an exercise of the lawyer's skill and judgment in assembling the allegedly privileged information. (*Hunt v. T&N plc* (1993), 15 C.P.C. (3d) 134, 77 B.C.L.R. (2d) 391 (C.A.))

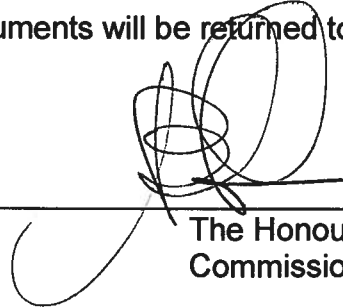
III. Disposition

9. Based on the principles privilege summarized above, I have reviewed the documents produced by British Columbia and Canada.

10. In the case of British Columbia, I find that documents BCP1002583, BCP1002588, and BCP1002427 are not privileged documents and will be produced. The remaining documents will be returned to counsel for British Columbia.

11. In the case of Canada, I find that documents DFO-600382 [00-01], DFO-600382 [01-01], DFO-601422, and DFO-602159 are not privileged documents and will be produced. The remaining documents will be returned to counsel for Canada.

Dated: December 7, 2011



The Honourable Bruce I. Cohen
Commissioner