

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

**RULING ON ADMISSIBILITY OF REVISED AFFIDAVIT #1
OF OTTO LANGER SWORN SEPTEMBER 22, 2011**

The Honourable Bruce I. Cohen, Commissioner

1. 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 counsel for the commission and the First Nations Coalition to Paul Steele, Randy Nelson and Manon Bombardier.
2. Counsel for the Conservation Coalition has provided a Revised Affidavit #1 of Otto Langer, dated September 22, 2011, in response to my ruling ("Langer Affidavit").
3. Canada, the Province of B.C., B.C. Salmon Farmers Association ("BCSFA"), and counsel for the commission have all objected to portions of the Langer Affidavit being admitted into evidence in its present form. Canada and commission counsel object to para. 9-32 and exhibits A and B. The Province objects to para. 21, 28 and 30, and exhibits A and B. BCSFA objects to any mention of aquaculture, and in particular objects to para. 30, 31 and exhibit B.
4. The issue raised by the participants is whether paragraphs 9 - 32 and exhibits A and B go beyond the scope of response permitted by my ruling.
5. Mr. Langer was permitted to address four questions, from his own direct knowledge based on his previous experience working with the Department of Fisheries and Oceans ("DFO") or Environment Canada ("DOE"). Mr. Langer identified that he was unable to answer questions relating to First Nations economic opportunity fisheries or s. 42 of the *Fisheries Act*.

6. The remaining issue left open by my ruling is addressed at para. 31 of my ruling. As the admissibility of the challenged paragraphs in Mr. Langer's affidavit relates directly to para. 31 of my previous ruling, I reproduce it here in its entirety:

31. One of the subjects of direct examination was whether the administration of s. 36 of the *Fisheries Act* should revert to the responsibility of DFO from Environment Canada. Commission counsel asked the witnesses whether it would change the amount of resourcing involved to have responsibility for s. 36 moved to the DFO. Mr. Steele testified that his experience with transfers of functions across departments was that they did not always happen effectively because each department had a tendency to hold onto its own jurisdiction. He did note that when the directive came directly from high political authority the transfer happened much more effectively. When Dr. Bombardier was asked for her opinion on the questions, she testified that she had no comment because it was beyond her level.

7. I refer to the transcript at pages 29 -30 where the following question is asked of Mr. Steele:

Q. Mr. Steele, I'd like to, if I might, just sort of pick up on the question of at a broad level what the cost implications would be, for example, of a move to bring s. 36 back to DFO and I appreciate I'm not calling you as a budgeting expert, but at a very simplistic level, it would seem that if there's – if the same work is being done, whether it's done under two agencies or one, there may be some cost involved in the transition to having one agency do it, but that if it's a matter of reallocating rather than changing the amount of work done, that would seem to be cost-neutral. Now, sometimes the simplistic is simple, as well, and wrong. Can you comment on that at a broad level? Would it change the amount of resourcing involved to have responsibility for s. 36 moved to the Department of Fisheries and Oceans?

Transcript, 7 April 2011, at pp. 29, l. 42 – p. 30, l. 11

8. Mr. Steele responds to this question as follows:

MR. STEELE: Difficult to answer without having done any real analysis on the question. I know that from past experience, whenever there's a discussion between two departments about a transfer of resources at any significant level, that that usually runs into a lot of complications. The department that would be the potential people transferring resources will usually find numerous arguments to say that, you know, other activities still need to be continued, that the people that are subject to a potential transfer are carrying out other roles which would still be required within their department. People don't give up resources easily, generally

speaking, and the negotiations on that kind of thing can become quite complicated and quite lengthy and protracted and often don't lead into a successful conclusion unless, of course, you know, if it comes down from in this case I guess it would almost be a cabinet-level decision.

Q Mm-hmm.

MR. STEELE: Or even perhaps prime ministerial level, you know, as was done back in the late '70s to say that this will happen, and obviously then it will happen. If it's left to departments to negotiate between themselves, then oftentimes the negotiations don't come to fruition to my experience.

Transcript, 7 April 2011, at p. 30, l.12 - 39

9. At page 30, l. 40 Dr. Bombardier is asked whether she agrees with the comments, to which she answers: "I'm sorry, I cannot really comment. It's beyond my level."
10. I permitted Mr. Langer to file an affidavit to address certain specific gaps in the evidence, as identified in my ruling. I permitted him to "provide limited evidence for the sole purpose of answering these same questions", i.e. the questions put to the identified witnesses which they were unable to answer. I did not permit Mr. Langer to file an affidavit to express generally his concerns with the operation of DFO or to provide evidence or views on the topics raised generally with these witnesses.
11. Counsel for the Conservation Coalition states in his submission at para. 9:

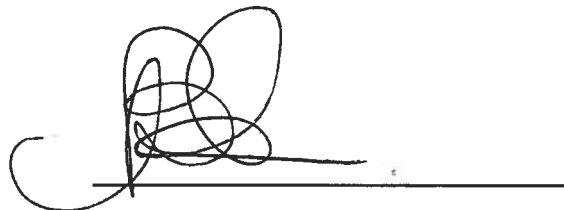
In his affidavit, Mr. Langer deposes to his direct and personal experience based on his past employment with DOE and DFO regarding the workings and confusion emanating from the split in administration over sections 35 and 36 of the *Fisheries Act*. This is the sole focus of his affidavit.
12. Mr. Langer was not given leave to address his experience with the workings and confusion emanating from the split in administration over sections 35 and 36 of the *Fisheries Act*. Mr. Langer was invited to address the question posed to Dr. Bombardier and, inferentially, posed to Mr. Steele, namely whether it would change the amount of resourcing involved to have responsibility for s. 36 moved to DFO from DOE.

13. Rather than reject the Langer Affidavit in its entirety based on the above submission of counsel for the Conservation Coalition, I have reviewed each paragraph of the Langer Affidavit and considered whether each falls within the scope of the questions I have permitted him to answer.
14. Paragraphs 1 – 8, 33, and 35 – 37 are not challenged, and I will allow them. I find that paragraphs 9 – 13, 16 - 17 and 26 provide background and contextual evidence which is sufficiently related to the resourcing question as to be admissible. I find that all of paragraph 14, except for the final sentence, is admissible on the same basis.
15. I accept the submissions of Canada and commission counsel generally that paragraphs 15, 18 – 25 and 27 – 32, the final sentence of paragraph 14, and exhibits A and B extend far beyond the narrow scope of the evidence permitted by my ruling, namely Mr. Langer's personal knowledge of resource implications relating to the transfer of responsibility for s. 36 of the *Fisheries Act* between DFO and DOE.
16. I ruled that Mr. Langer could file an affidavit to allow for an efficient process to address the specific evidentiary gaps identified above. The evidentiary phase of the commission is almost complete, with no more days for oral evidence scheduled. To allow Mr. Langer to introduce a broad scope of evidence, extending well beyond the specific questions identified in my ruling, raises a number of issues of procedural fairness.
17. I accept the submissions of Canada that paragraphs 15, 18 – 25, 27 – 32, the final sentence of paragraph 14, and exhibits A and B to the Langer Affidavit are objectionable, containing speculation, editorial and judgmental comment, and opinion on past administration practices as Mr. Langer sees it. Although not challenged by any participant, I find that paragraph 34 is objectionable on the same basis. I also accept Canada's submission that Mr. Langer makes comments about former colleagues who do not have an ability to answer the assertions made by him, all of which go beyond the resourcing question I

permitted him to speak to. Contrary to the submissions of counsel for the Conservation Coalition, I do find that it would be prejudicial to some of the other participants to allow paragraphs 15, 18 – 25, 27 – 32, 34, the final sentence of paragraph 14, and exhibits A and B to the Langer Affidavit to be entered into evidence at this stage of the proceeding.

18. If I were to allow paragraphs 15, 18 – 25, 27 – 32, 34, the final sentence of paragraph 14,, and exhibits A and B to the Langer Affidavit into evidence, I would, in fairness, be required to allow Canada and other participants to enter rebuttal affidavits to address the challenges and assertions made by Mr. Langer. As these paragraphs and exhibits of the Langer Affidavit do not address the issues on which I permitted Mr. Langer to file an affidavit, I find that it is preferable to the process of the commission to have the challenged paragraphs and exhibits removed from the Langer Affidavit.
19. The Revised Affidavit #1 of Otto Langer will be entered into evidence as Exhibit 1974 with paragraphs 15, 18 – 25, 27 – 32, 34, the final sentence of paragraph 14, and exhibits A and B struck out.
20. Commission counsel and participants may pose cross-examination questions by sending their questions in writing to the commission by not later than October 11. Commission counsel shall circulate the questions to counsel for the Conservation Coalition and all participants. Mr. Langer will then have until not later than October 17, 2011.

Dated October 7, 2011



The Honourable Bruce I. Cohen
Commissioner