

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

**RULING ON DISPOSITION OF DOCUMENTS MARKED FOR
IDENTIFICATION**

The Honourable Bruce I. Cohen, Commissioner

I. The Application

1. This application is for rulings on the admissibility of documents tendered during the evidentiary hearings but marked for identification, because objection was taken to their admissibility (the "ID documents").
2. The application results from a request by commission counsel for submissions on the disposition of the ID documents. Commission counsel called for participants to indicate which, if any, of the ID documents they wished to have admitted as exhibits. Other participants were given an opportunity to object to any of those ID documents being admitted. The participant who requested the document then had an opportunity to reply.

II. Rules

3. Subject to the Act and the Terms of Reference, the conduct of and procedure to be followed at the inquiry are under the control and discretion of the Honourable Bruce I. Cohen (the "Commissioner").

26. In advance of the Policy and Practice Reports becoming exhibits before the Commissioner, the commission may provide an opportunity to participants to comment on the Policy and Practice Reports. Participants may also propose witnesses for commission counsel to call during the hearings, to support, challenge, or comment upon the Policy and Practice Reports.

27.1 Any document which is specifically identified and referenced in a Policy and Practice Report may be relied on by the Commissioner in his deliberations and such documents are not required to be marked as exhibits before the Commissioner.

31.1 Participants may seek to have commission counsel file expert reports before the commission by providing written notice to commission counsel 45 days prior to the first scheduled hearing day of the related hearing topic. Written notice must include sufficient information about the report and its author(s) for commission counsel to determine whether they will call the author(s) as an expert witness(es) and file the report. In the event that commission counsel determines that a proposed expert report will not be tendered, the participant proposing the report may apply to the Commissioner under Part H of these Rules.

31.2 Participants must provide any expert reports referred to in Rule 31.1 to commission counsel no later than 30 days prior to the first scheduled hearing day of the related hearing topic.

41. The Commissioner may receive any evidence that he considers helpful in fulfilling the mandate of the commission whether or not such evidence would be admissible in a court of law.

42. Once final, any Policy and Practice Reports and any Scientific Reports are exhibits before the Commissioner without the necessity of being introduced into evidence through a witness.

III. History of this Application

3. On September 8, 2011, commission counsel circulated a list of the ID documents to all of the participants and advised them the commission would adopt the following procedure for accepting submissions on the ID documents:
 - a. If a participant sought to have any of the ID documents admitted into evidence as an exhibit, it had until September 13, 2011 to make submissions to that end;
 - b. Any participant who objected to the admissibility of any document that another participant sought to have admitted could respond no later than September 15, 2011;
 - c. Commission counsel were to provide submissions in response by September 16, 2011;

- d. On September 13, 2011, commission counsel advised that participants could reply to submissions opposing their requests by September 19, 2011.
4. The participants Canada, the BC Salmon Farmers Association (the "BCSFA"), the Aquaculture Coalition, the Conservation Coalition, the Area D Salmon Gillnet Association and Area B Harvest Committee ("Area D and B"), the Area G (West Coast Trollers) and UFAWU ("Area G"), the First Nations Coalition (the "FNC"), the Laich-Kwil-Tach Treaty Society (the "LKTS"), the Aboriginal Aquaculture Association (the "AAA") and Chief Harold Sewid (the LKTS, AAA and Chief Harold Sewid are collectively referred to as the "LJHAH") made submissions on or before September 13, 2011.
 5. The participants Canada, British Columbia, the BCSFA, the Aquaculture Coalition, the Conservation Coalition, the STC-CIB, and the Heiltsuk Tribal Council (the "HTC") made submissions in response on or before September 15, 2011.
 6. Commission counsel made submissions in response on September 16, 2011.
 7. The participants Canada, British Columbia, the BCSFA, the Aquaculture Coalition, the Conservation Coalition and Area D and B made submissions in reply on or before September 19, 2011.

IV. Documents

8. As of September 19, there were a total of 45 outstanding ID documents, (35 lettered documents plus 10 in the folder for document "R").
9. No participants applied to have the following 24 documents entered into evidence: L, O, P, Q, R-1, R-7, R-8, R-12, R-13, R-14, R-15, R-16, R-18, AA, GG, HH, II, JJ, NN, PP, YY, BBB, CCC, and GGG. These documents will not be marked as exhibits.

10. Participants sought to have 20 documents entered as exhibits. Two of the 20 documents (documents P and BB) were subsequently entered into evidence through the testimony of a witness at a hearing.
11. No participants made submissions opposing 5 documents: T, R-19, U, X or Z. These documents will be marked as exhibits.
12. Participants made submissions opposing 14 of the documents. Although no participant applied to have document NN entered as an exhibit, the Aquaculture Coalition made submissions opposing document NN. The ID documents that were contested are: CC, DD, EE, FF, MM, OO, QQ, WW, XX, ZZ, AAA, DDD, EEE and FFF (collectively with document III, the “contested ID documents”). At the evidentiary hearing on September 20, 2011, the Area G participants sought to enter document III as an exhibit. I advised the participants that the commission would allow submissions on document III until September 22, 2011. The Area G participant, Canada, the FNC and commission counsel made submissions on document III.

V. Decision

General Approach to Evidence at this Commission of Inquiry

13. The rules of evidence that govern the kind of evidence that may be brought before a commission of inquiry are more flexible than the rules of court. While I have broad discretion in deciding what principle to apply to the admission of evidence, I must consider fairness to the participants and to the public.
14. The principles for the admission of evidence at a public inquiry have been stated as follows by Professor Ratushny in *The Conduct of Public Inquiries: law, policy and practice* (Toronto: Irwin Law, 2009) at 250-251 (“Ratushny”):

The procedural flexibility available to commissions of inquiry provides opportunities to expedite hearings by presenting evidence in different

ways. It is not necessary to adduce all evidence through traditional witness testimony and primary documents... The only limit on how a commission of inquiry may present evidence is the principle of fairness.

15. Similarly, Simon Ruel notes in *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) (“*Ruel*”) at 90 that less formal methods of adducing evidence may be used including

Factual overview reports, statements or narratives, background papers or detailed chronologies prepared by commission staff, parties with standing or witnesses.

16. Counsel for virtually all of the participants have also submitted that I must consider the overall fairness of the approach, and that this requires consistency of application of the rules I adopt. While some counsel submit that this requires using the same rules throughout the inquiry, other counsel argue that fairness favours adhering to the rules adopted early but they acknowledge that changes in the inquiry circumstances may require a change in the rules in order to be fair to participants. I agree that consistency is important but that fairness may require a change in approach.
17. The commission’s rules provide that I may consider evidence that is helpful in fulfilling my mandate, including evidence that would not be admissible in court. The rules provide expressly that the Commissioner may consider Scientific Reports, Policy and Practice Reports, and Public Submissions.
18. Rule 27.1 provides that I may rely on any document that is identified and referenced in a Policy and Practice Report. Rule 31 provides that I may consider the Scientific Reports to make findings of fact and recommendations. Policy and Practice Reports are prepared by commission staff and are entered without a witness speaking to them or being available for cross-examination. The Rules also provide that Scientific Reports may be entered without a witness, although none were.

In addition, Rules 32-38 provide for public and participant submissions, which are vetted only to ensure they are not offensive, unfairly prejudicial or defamatory. Rule 38 provides that I may consider the Public Submissions to make findings of fact and recommendations.

19. The effect of these rules and the principle that an inquiry commissioner is not bound by the strict rules of evidence is that the record contains evidence having a broad range of reliability. In reaching my conclusions and making recommendations, reliability will be an important consideration.
20. In considering the applications to have the ID documents admitted as exhibits, I have considered the breadth of the evidentiary record. While some of the contested ID documents do not meet all of the usual standards for admissibility of evidence, to exclude them would be to apply a higher standard because a participant sought to have the document admitted as an exhibit rather than as a public submission.
21. I have determined that I should apply a liberal approach to admitting the contested ID documents. As a result, I have reviewed each of them and the objections to admitting it, to determine whether admitting it would be unduly prejudicial either to the interests of a participant or to the public interest.

Specific Documents

22. Documents AAA, DDD, EEE, FFF, III, DD, MM, OO, QQ, WW, XX and ZZ will be marked as exhibits and entered as evidence.
23. Document AAA is titled "Sea Lice – Could They Act As Disease Vectors?" It was prepared by Dr. R.J. Lewis and is dated July 19, 2011. The report was prepared for the commission as an expert report, but Dr. Lewis was not called to testify. The report was adopted by another witness who summarized its findings.

24. Document DDD is titled "What is happening to the Fraser sockeye?" It was prepared by Alexandra Morton, and it is dated August 14, 2011. Ms. Morton was called to testify but not as an expert witness.
25. Document EEE is a report that was prepared by the Canadian Aquaculture Systems Inc. for the Aboriginal Aquaculture Association. The stated purpose of the report is to provide socio-economic data on the participation of First Nations people in finfish aquaculture.
26. Document FFF is an affidavit of Mr. Rob Morley of the Canadian Fishing company attaching a chart with information about First Nations individuals' participation in the Seafood Producers' Association of British Columbia. Although Mr. Morley was called to testify, the chart and affidavit were prepared after his testimony.
27. Document III is an email from Dr. Carl Walters to Mr. David Marmorek, who testified before the commission. The email discusses Mr. Walters' opinion of some graphs that are attached to the email, and the opinions of a third scientist. Mr. Marmorek confirmed the authenticity of the email during his testimony.
28. Document DD is titled "Juvenile Sockeye Use of the Lower Fraser River and its Estuary: A note for submission to the Cohen Commission". It was prepared by Otto E. Langer and is dated December 15, 2010. It also states that it is a "draft". This document consists of the author's description of the sockeye's use of the Lower Fraser River and estuary. The document includes many statistics and detailed descriptions of the sockeye's activities in specific areas, although no citations were given for the facts in the report. None of the papers cited in this document are in evidence before the commission.
29. Document MM is titled "Vancouver Airport Fuel Delivery Project: Brief to the BC Environmental Assessment Office". It was prepared by Otto Langer and dated April 26, 2011. The report was prepared as a

submission to the BC Environmental Assessment Office and it sets out Mr. Langer's opinion regarding a possible expansion of the Vancouver Airport. The document deals with possible risks of jet fuel spillage along the migratory route of Fraser River sockeye.

30. [Paragraph 30 deleted]
31. Document OO is a report prepared by Larry Hammell, titled "Qualitative assessment of risk, and mitigation, of importing exotic disease through eggs". It is dated July 10, 2011 and revised August 18, 2011. This document was prepared for the purpose of submission to this commission. It contains information about the risks of importing diseases into British Columbia based on a report about the history of Atlantic salmon egg importation. Mr. Hammell was not called as a witness.
32. Document QQ is titled "Graphs of BCMAL Audit data". It was prepared by Alexandra Morton and is undated.
33. Document WW is titled "Assessing the impact of salmon farming on Pacific salmon at the population level in British Columbia". It was prepared by R. Beamish and dated July 2011. Dr. Beamish testified at the commission, but the report was prepared after his testimony. The paper also reviews the work of other scientists, some of whose evidence was given at the commission.
34. Document XX is titled "Atlantic & Pacific Farm Salmon Mortalities". It was prepared by Alexandra Morton and is undated.
35. Document ZZ is titled "Infectious Diseases and Potential Impacts on Survival of Fraser River Sockeye Salmon". It was prepared by Dr. Michael Kent and is dated August 10, 2011. Dr. Kent testified at the commission, but this document was prepared after he testified, so he was not cross-examined on the report.

36. None of these documents were tendered as expert reports. In some cases, the authors of the reports were called to testify, but the reports were prepared after their testimony had concluded. In other cases, the author was called to testify but the report purports to give some opinion evidence that would ordinarily be only permitted by a qualified expert witness. Finally, in certain cases, the author was not called to testify, and portions of the report or the whole report was adopted in the testimony of other witnesses. In addition, most of these reports were prepared for the purpose of submission to this commission.
37. These documents contain information that could be useful to the consideration of issues under review in this inquiry. Participants may make submissions on the weight that should be given to them.
38. Documents CC, EE and FF will not be marked as exhibits.
39. Document CC is a document titled "Review of DFO Actions and Decisions on Gravel Removal on the Lower Fraser River as Related to the 2007-2008 Spring Bar Project: A review of DFO Access to Information and Privacy Act (ATIP) Files Specific to Gravel Removal on the Fraser River". This document was prepared by Otto Langer, and dated March 20, 2010. This document states that it was based on documents that the author obtained from the DFO pursuant to information requests under access to information legislation ("ATIP requests"). The resulting report was based on excerpts from those documents and Mr. Langer's comments on those documents. None of the documents are attached to the report nor any of the documents referred to have been brought to my attention as being part of the evidentiary record.
40. The document is largely the author's opinion based on the documents and his own experiences. His views are expressed in inflammatory language, and the author makes many accusations of wrongdoing against DFO and DFO employees. These accusations are based on information that is not

before me on the evidentiary record. I find that it would be unduly prejudicial to the interests of those accused of wrongdoing based on evidence that is not before the commission to admit this document into evidence.

41. Document EE is titled "Comments on Policy and Practices (sic) Report: Gravel Removal in the Lower Fraser River", and dated June 8, 2011 by Marvin Rosenau. The document reviews the Policy and Practice report that was prepared by the commission. Dr. Rosenau adopted this document as his evidence when he testified before the commission.
42. Document EE was prepared despite a practice that was established by commission counsel at the outset of the hearings that written commentary on the Policy and Practice Reports ("PPRs") would not be admissible. The practice that was adopted was that participants could make corrections or criticisms to the PPRs orally during a witness's testimony. The participants will also be permitted to make written submissions on the PPRs during their final submissions.
43. It would be prejudicial and unfair to the participants who have complied with the commission's practice during the course of the commission to admit this document.
44. Canada asked that document FF be entered as an exhibit if EE were entered. Given my decision not to admit EE, document FF will also not be admitted.

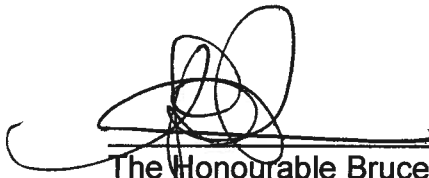
VI. Disposition

45. I order that:

Documents marked as AAA, DDD, EEE, FFF, III, DD, MM, OO, QQ, WW, XX, ZZ, T, R-19, U, X and Z for identification shall be marked as exhibits.

Document	Exhibit Number
AAA	Exhibit 1975
DDD	Exhibit 1976
EEE	Exhibit 1977
FFF	Exhibit 1978
III	Exhibit 1979
DD	Exhibit 1980
MM	Exhibit 1981
OO	Exhibit 1982
QQ	Exhibit 1983
WW	Exhibit 1984
XX	Exhibit 1985
ZZ	Exhibit 1986
T	Exhibit 1987
R-19	Exhibit 1988
U	Exhibit 1989
X	Exhibit 1990
Z	Exhibit 1991

46. In respect of the remaining documents, these applications are dismissed.

Dated October 11, 2011 
 The Honourable Bruce I. Cohen
 Commissioner

October 11, 2011 – Corrigendum to the Ruling issued advising that document “NN” had not been sought to be entered as an exhibit and therefore would not marked as an exhibit, and changes were made to paragraphs 10, 12, 22, 30 and 45 to reflect that change.