

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

RULING ON THE ADMISSIBILITY OF DOCUMENTS

ISAv HEARINGS – DECEMBER 2011

The Honourable Bruce I. Cohen, Commissioner

I. The Application

1. In December 2011 participants were invited to make submissions on which of the documents marked for identification during the ISAv hearings should be entered as exhibits in this Inquiry.
2. On January 3, 2012, the Province made an application to have two new documents marked as exhibits in this Inquiry.
3. This ruling will address both issues.
4. The Province seeks to have document QQQ entered as an exhibit, and in support of this applies to have the Affidavit of Dr. Gary Marty sworn December 29, 2011 entered as an exhibit. In addition, the Province seeks to have an article by J. R. Winton, entitled "Isolation of a New Reovirus from Chum Salmon in Japan" entered as an exhibit.
5. The Aquaculture Coalition seeks to have document TTT entered as an exhibit. Although the Aquaculture Coalition does not indicate expressly that it is seeking to have document TTT-A entered, this may be implied as document TTT-A is the C.V. of the author of document TTT.
6. The Aquaculture Coalition opposes the affidavit of Dr. Marty and the J.R. Winton article being entered as exhibits.

7. Canada supports the Province in seeking to have document QQQ marked as an exhibit, and opposes the entry of both documents TTT and TTT-A as exhibits. In its responsive materials Canada has included an affidavit of Mark Higgins, a fish health biologist at the Department of Fisheries and Oceans. The affidavit of Mr. Higgins is provided for the purposes of this application, but Canada also applies to have the Higgins affidavit entered as an exhibit in this Inquiry if document TTT is entered.
8. Canada also supports the affidavit of Dr. Marty being entered as an exhibit, but opposes the entry of the J.R. Winton article.
9. The Province opposes the entry of documents TTT and TTT-A as exhibits.
10. No other participants made submissions on these documents.
11. I received submissions from commission counsel on the Province's application to mark the two new documents as exhibits.
12. In ruling on the admissibility of documents TTT, TTT-A, and QQQ, I refer to my Ruling dated October 7, 2011 where I stated the principles I would apply to such applications:
 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.
13. In the instant application I have adopted the same approach to the admissibility of documents. In doing so I have reviewed the submissions for and against admitting documents, to determine whether such admission would unduly prejudice either the interests of the participants or the public.
- II. Admissibility of documents QQQ, TTT and TTT-A**
14. Document QQQ is entitled “Summary of Animal Health Care Centre PCR results for infectious salmon anaemia virus (ISAv) in tissues from British Columbia farmed salmon, 2003 – 2011”. The Aquaculture Coalition raised concerns with this document in the hearing, but did not make a formal submission opposing the entry of document QQQ. The Aquaculture Coalition did make a submission opposing the additional documents sought to be entered by the Province, and those submissions will be addressed below.
15. I see no prejudice to the participants or the public in document QQQ being marked as exhibit 2146.
16. Document TTT is a study entitled “A Critique on Infectious Salmon Anemia Virus Detection Capabilities of the Canadian Fish Health Protection Regulations”, written by Ms. Sally Goldes. Ms. Goldes is identified on her C.V., document TTT-A, as being a senior fisheries biologist (Bio4) with the BC Ministry of Environment, Lands & Parks, Fisheries Branch from 1985 to 2001.
17. The Aquaculture Coalition did not seek to have document TTT entered as expert evidence, and the content of the document was not adopted by any witness. The witness to whom document TTT was presented acknowledged that he had seen the document in preparation for the Inquiry.

18. Many studies and articles have been admitted into evidence in this Inquiry without the authors being present as witnesses, and without the content of the document being adopted by a witness.
19. I find that the admission of document TTT, along with the C.V. of Ms. Goldes identified as document TTT-A, is consistent with the practice adhered to throughout this Inquiry. The participants were not taken by surprise by document TTT as it was available to them in preparation for the days of hearing on ISAv. The document contains information that could be useful to the consideration of issues under review in this Inquiry, and participants have made submissions on the weight to be given document TTT should it be entered as an exhibit.
20. Document TTT will be marked as exhibit 2147, and document TTT-A will be marked as exhibit 2147A.

III. Admission of new evidence:

Affidavits of Marty and Higgins, J.R. Winton article

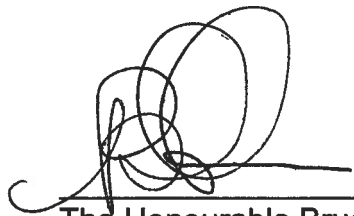
21. The matter of the admissibility of the new evidence proposed by Canada and the Province is quite different from that of the admissibility of the documents marked for identification.
22. I have considered the content of the affidavits and article and all of the submissions for and against admitting them as exhibits. In this regard, I find the reply submissions of commission counsel most persuasive that none of them should be entered as exhibits. Commission counsel submitted, as follows:
 4. As a general matter, the conduct of this Inquiry has permitted participants to lead a wide variety of documents, often in circumstances that would not permit admission in the course of an ordinary civil or criminal trial. Such flexibility, however, has its limits. It may be counter-productive to admit a document that would itself trigger responses and additional evidence to respond to the first document. In this situation, admitting the document would have the effect of expanding the hearings and evidence; it could

trigger applications for responsive evidence to be admitted, and could require a new process for additional submissions with respect to the new evidence.

5. We respectfully suggest that these considerations are at play with the Province's Documents. They would open up a new area and could trigger a call-and-response with other participants seeking to lead evidence and make submissions with respect to reoviruses. While this issue arose unexpectedly during the hearings, that fact itself illustrates that this topic was not central to the issues explored during the three days of evidence on ISAv in December, 2011. Nor did this reovirus issue emerge during the earlier hearings on disease and on aquaculture, totalling almost three weeks of hearing time, and including testimony from Dr. Marty. In this sense, the relevance of the Province's Documents is significantly reduced, and as such we expect they would not be necessary for the Commissioner to discharge his mandate.
6. Though the Winton et al. paper dates back to 1981, the Marty affidavit dates to 29 December 2011. Allowing a participant to lead sworn evidence after the close of evidentiary hearings, in this manner, is out of step with the conduct of this Inquiry generally.
7. Commission counsel anticipate that Dr. Marty's affidavit is by no means free of controversy. His assertion at para. 4 that the Province's Animal Health Centre employed "fully validated primers and probes" is an example of a statement that, if led, would likely be challenged by some participants. This is, in other words, not straightforward evidence capable of being adduced by affidavit. If led, we expect participants – and likely commission counsel - would then seek to cross-examine on the affidavit. This would of course require that hearings be re-opened, again.

23. Dealing first with the affidavits, the evidence contained in them may lead to applications for cross-examination by participants or commission counsel. In addition, there is the possibility they may also lead to applications by participants to provide evidence in response and to make submissions. In other words, the admission of the affidavits could lead to circumstances generating applications to re-open the hearings.
24. In my opinion, at this stage of the commission's process the need for finality of gathering new evidence greatly outweighs any potential probative value of admitting the affidavits and thus dictates that they should not be entered into the proceedings as exhibits.
25. Finally, the J.R. Winton article is dated in 1981 and as such could have been available to the Province at the time of the hearings in December. In my view, if it were relevant and important to the Province's position, it ought to have been disclosed to all participants at that time and tendered through a witness who would have had the opportunity to comment on it.
26. Accordingly, J.R. Winton article will not be entered as an exhibit.

Dated February 7, 2012



The Honourable Bruce I. Cohen
Commissioner