

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

RULING ON UNDERTAKINGS OF CONFIDENTIALITY

The Honourable Bruce I. Cohen, Commissioner

I. Introduction

1. This Ruling is in response to the following applications, all related to undertakings of confidentiality:

(a) On April 13, 2011 counsel for the Aquaculture Coalition applied in writing, on behalf of Alexandra Morton, a member of that participant group, to be relieved of her undertaking of confidentiality in order to make a report to a federal government agency. On this application I received written submissions from British Columbia, the Conservation Coalition, and the BC Salmon Farmers Association (BCSFA). This application was subsequently withdrawn.

(b) On April 29, 2011 the Aquaculture Coalition applied for a ruling respecting the scope of documents to be kept confidential under the commission's *Rules for Procedure and Practice*. On this application I received written submissions from commission counsel, BC Public Service Alliance of Canada and Union of Environment Workers BC (BCAUWEW), BCSFA, British Columbia, Canada, and Conservation Coalition.

(c) In relation to both of these applications, British Columbia and BCSFA applied for orders that application materials be treated confidentially. On these applications, I received written submissions from commission counsel, Canada, Aquaculture Coalition and Conservation Coalition.

2. From my review of these applications and submissions, I am satisfied that they thoroughly review the facts and chronology of events, identify the issues, and advance arguments in favour of and opposed to the various positions taken. I am satisfied that I am able to resolve the applications on the basis of the written submissions, and without an oral hearing.

3. To place the applications into an appropriate context, it is necessary to comment briefly on the legal powers of commissions of inquiry, and to set out a brief chronology of events.

II. Production of documents to a commission of inquiry

4. This federally-appointed commission of inquiry (the “commission”) derives its authority from the *Inquiries Act*, R.S.C. 1985, c. I-11 (the “Act”). In order to assist commissions in obtaining access to all information and documents relevant to their mandate, the Act grants commissioners certain powers concerning evidence, as set out in section 4:

The commissioners have the power of summoning before them any witnesses, and of requiring them to:

(a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and

(b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.

5. According to s. 4(b), a commission’s power to compel production of documents is not unlimited – production must relate to the matters into which the commissioner is appointed to examine. In addition, the commission’s *Rules for Procedure and Practice* (the “Rules”) provide mechanisms for participants to request non-publication of confidential personal or financial information.

6. The challenge facing commissions of inquiry is to strike a balance between obtaining access in a timely manner to all information relevant to the subject matter of the inquiry, and respecting legitimate claims of confidentiality.

III. The Commission's Rules and practices

7. The Rules, which deal with document production, initially provided as follows:

B. DOCUMENT PRODUCTION

11. In these Rules, the term "documents" is intended to have a broad meaning, and includes the following forms: written, electronic, audiotape, videotape, digital reproductions, photographs, maps, graphs, spreadsheets, microfiche and any data and information recorded or stored by means of any device.

12. As soon as possible after being granted standing, but subject to Rule 14, a participant shall do the following:

(a) identify to the commission documents in its possession or under its control relevant to the subject matter of the inquiry; and

(b) if requested to do so, provide copies of any such documents to the commission. Wherever possible, documents shall be provided electronically.

13. Wherever possible, commission counsel will seek to reach an agreement with a participant concerning which documents need to be produced to the commission.

14. Unless a different procedure is set out in the *Canada Evidence Act*, R.S.C. 1985, c. C-5, where the Commissioner requires the production of documents under Rule 12 and the participant to whom the requirement is directed objects to the production of any document(s) on any ground of privilege,

(a) The participant shall specify the privilege claimed and the basis for the claim;

(b) The participant and commission counsel shall attempt to resolve the issue of privilege informally;

(c) If the participant maintains his or her claim of privilege, and the matter cannot be resolved informally, the participant may apply, in compliance with Part H of these Rules, to the Commissioner for a ruling;

(d) The Commissioner may, if necessary, inspect the document(s) and may rule on the claim, or refer the matter to the Federal Court for

determination under section 18.3 of the *Federal Courts Act*, R.S.C. 1985, c. F-7; and

(e) If the claim of privilege is dismissed, the document(s) shall be produced to commission counsel.

15. Upon the request of commission counsel, a participant shall provide the commission a true copy or the original of any document disclosed under Rule 12.

16. Subject to Rule 17, the commission shall treat all documents it receives as confidential, unless and until they are made part of the public record, or until the Commissioner otherwise determines. This does not preclude commission counsel from showing a document to a potential witness, in respect of an interview pursuant to Rule 21.

17. Commission counsel will provide documents and information to counsel for both participants and witnesses upon their executing a written undertaking that the documents and information will be kept confidential and used only for the purposes of the inquiry, unless and until the documents or information are or become part of the public record. Counsel may provide such documents and information to their clients only upon the clients executing a written undertaking to the same effect. The commission may require that documents provided and all copies thereof be returned to it, or confidentially destroyed.

Participant Requests for Documents

18. Where a participant believes that documents in the possession of another participant are necessary and relevant to the inquiry, a participant may ask commission counsel to request specific documents from another participant. Commission counsel may accede to or decline such a request.

19. Where the participant has asked commission counsel to request documents from another participant and commission counsel has declined to do so, the participant may apply, in compliance with Part H of these Rules, to the Commissioner for an order that the other participant produce the documents in issue.

20. A participant ordered to produce documents under Rule 19 shall provide those documents to the commission. The commission will then produce those documents to all participants.

8. The focus of these Rules is documents that are in the possession or control of participants, which the commission determines it needs access to, in order to carry out its mandate. The commission may compel production of those documents. In this

Ruling I will refer to such documents as “compelled documents”. As Rule 16 makes clear, the commission must treat such documents as confidential, at least initially.

9. Early production of compelled documents enables commission counsel to review them in confidence, identify potential witnesses, identify the disclosing participant’s policies and activities, and make decisions about which documents will be tendered as exhibits at the commission’s evidentiary hearings.

10. This pledge of confidentiality has the added benefit of encouraging participants to make complete disclosure early in the commission’s activities, as opposed to raising objections about disclosure on a document-by-document basis.

11. It is also important that the participants have early access to compelled documents, to improve their understanding of the issues and to assist in their preparation for examination of witnesses.

12. Treating compelled documents confidentially until they are tendered as exhibits also means that their public disclosure is contemporaneous with other evidence relating to them, so that media and interested members of the public have a broader context within which to understand the relevance and significance of the compelled documents.

13. To facilitate this early access, the commission has followed the Rules developed by other commissions of inquiry (e.g., The Davies Commission Inquiry into the death of Frank Paul, the Braidwood Commission on the death of Robert Dziekanski, the Walkerton Inquiry) to disclose compelled documents to counsel for participants, provided that they undertake to keep confidential the documents and the information they contain. The commission made early electronic disclosure to participants, along with training on how to access and search the document management program. The undertaking applicable to counsel for participants states:

**Commission of Inquiry into the Decline of
Sockeye Salmon in the Fraser River**

UNDERTAKING OF COUNSEL

I, _____, undertake to the Commission that:

1. I will use any document or information provided to me by the Commission solely for purposes associated with the Commission;
2. I will not disclose any such document or information to any person except:
 - a. a person for whom I act in the Commissions proceedings;
 - b. a person who represents or is a member of an organization for whom I act in the Commissions proceedings;
 - c. an expert witness retained or consulted by me in relation to these proceedings;
 - d. to the extent necessary for the purpose of conducting an interview, a potential witness in these proceedings;
 - e. legal staff or assistants;
 - f. as required by law;
3. I will only disclose any such document or information to a person allowed for in paragraphs 2(a)-(e) if the person has first given to me a written undertaking in the form attached hereto;
4. I will store all information and documents provided to me by the Commission in a manner designed to preserve confidentiality;
5. At the conclusion of the Inquiry, I will destroy, or return to the Commission, all documents and information which remain the subject of this undertaking, except as otherwise required by law.

I understand that I will no longer be bound by this undertaking:

1. In relation to any document or information which has become part of the public record by:
 - a. becoming an exhibit at the Commissions evidentiary hearings, or
 - b. being placed by the Commission on its website.
2. To the extent the Commissioner or Commission counsel release me, in writing, from this undertaking.

Date: _____

Signature of Counsel

14. The commission also agreed to give participants themselves (and others assisting participants and the commission in the conduct of the inquiry) access to compelled documents, if they signed similar undertakings of confidentiality. The undertaking applicable to participants states:

**Commission of Inquiry into the Decline of
Sockeye Salmon in the Fraser River**

UNDERTAKING

I, _____, undertake to the Commission that:

1. I will use any document or information provided to me by the Commission, a lawyer acting for me, or a lawyer acting for any participant solely for purposes associated with the Commission;
2. I will not disclose any such document or information to any person, except as otherwise required by law;
3. I will store all such information and documents in a manner designed to preserve confidentiality;
4. At the conclusion of the Inquiry, I will destroy, or return to the Commission, all document and information which remain the subject of this undertaking, except as otherwise required by law.

I understand that I will no longer be bound by this undertaking:

1. In relation to any document or information which has become part of the public record by:
 - a. becoming an exhibit at the Commission's evidentiary hearings, or
 - b. being placed by the Commission on its website;
2. To the extent the Commissioner or Commission counsel release me, in writing, from this undertaking.

Date: _____

Signature

Witness Signature

Print Witness Name

15. According to Rule 16, the confidentiality of compelled documents continues until either a specific document is made part of the public record (e.g., by being filed as an exhibit), or until the Commissioner otherwise determines (e.g., a participant might apply under Rule 65 for an order that confidentiality no longer attach to a specific document).

16. The commission's Rules and practices are designed to ensure that participants are given reasonable notice before a compelled document is made public, so that objections can be raised before publication. For example:

- Commission counsel advises all participants of what compelled documents it intends to file as exhibits during the evidentiary hearings.

- Before using a document in cross-examination, counsel must provide reasonable notice to the witness and to all participants having an interest in the subject matter of the proposed evidence (Rule 61).
- A participant who seeks to have the confidentiality of a compelled document lifted must apply to the Commissioner for an order (Rule 65).

17. I should pause to note here that over the past 18 months, the commission has received from the Department of Fisheries and Oceans (“DFO”) and from other federal departments and agencies (through the Department of Justice), more than 50 disclosures totaling approximately 500,000 documents. These documents have been entered into Ringtail, the commission’s searchable document management program. British Columbia and several other participants have also disclosed documents, which have been added to Ringtail.

18. From my review of the materials submitted with these applications, I believe that there is general agreement among commission counsel and participants respecting the confidentiality of compelled documents, and acceptance of undertakings as a vehicle to provide early access to compelled documents and as a means to expedite the commission’s hearing process. The issue that is under dispute is whether the commission’s use of undertakings is, or ought to be, extended to other documents, such as applications, materials filed in support of applications, and correspondence between or among counsel relating to the applications.

19. I turn now to the sequence of events that led to the applications before me.

IV. Chronology of events

20. The first instance of the commission treating confidentially documents and information received from participants arose in April 2010, when the commission invited those who had received participant status to apply for public funding under the federal government’s Contribution Program. The commission treated those applications as confidential because of personal financial information contained in

them, and did not disclose them to the public. In my June 9, 2010 written recommendations to the Privy Council Office on funding, I continued that confidentiality, by stating at para. 16:

I have not provided the content of the detailed affidavit evidence received by the commission, in the discussion that follows. I have identified the affiant but said no more. I have taken this approach because of the confidentiality attaching to the financial information of the applicants.

21. The confidentiality of documents arose again later in 2010 and in early 2011. On March 22, 2011 commission counsel invited all participants to offer input on whether the commission should continue to treat application materials as confidential under the undertaking, or make such materials public. Several participants emphasized the importance of commissions of inquiry being public in the fullest sense. They distinguished between compelled documents that should be treated confidentially, and application materials, affidavit materials, and submissions of counsel that should be presumptively public. The opposing view was that all documents disclosed to the commission, including affidavit materials and written submissions, should be treated as confidential. To do otherwise would encourage applications attaching compelled documents, and then releasing those documents to the public and media on the ground that they formed part of an application.

22. On March 30, 2011, commission counsel set out the commission's position in a letter to all participants, stating in part:

By this letter, commission counsel release all participants and participants' counsel from their undertakings with respect to application materials, with the following caveats and exceptions: . . .

In respect of future applications (from today forward), the undertaking continues to apply to application materials for three full business days after the commission has circulated the material to participants. If, during those three business days, a participant applies to stay the release of the undertaking in respect of its own or another participant's application materials, in part or in whole, commission counsel will stay the release of the undertaking in relation to those materials in order to permit the Commissioner to determine whether the material should be made public.

Commission counsel may, of their own initiative without application by a participant, stay the release of the undertaking if documents subject to the undertaking or other confidential information or materials are included in application materials.

23. According to commission counsel's letter, "This approach strikes a balance between the public nature of this inquiry and the need for transparency, and the need to avoid the potential for participants to circumvent the undertaking merely by attaching documents to application materials." Commission counsel also expressed the commission's position that "the undertaking continues to apply to correspondence and other documents circulated by the commission", but not to final written submissions.

24. On April 20, 2011, the commission amended its *Rules for Procedure and Practice*, to reflect the position set out in commission counsel's March 30th letter.

Rule 16 was amended, and Rules 17.1-17.4 were added, as follows:

16. Subject to Rule 17, 17.1 and 17.2, the commission shall treat all documents it receives as confidential, unless and until they are made part of the public record, or until the Commissioner otherwise determines. This does not preclude commission counsel from showing a document to a potential witness, in respect of an interview pursuant to Rule 21.

17. Commission counsel will provide documents and information to counsel for both participants and witnesses upon their executing a written undertaking that the documents and information will be kept confidential and used only for the purposes of the inquiry, unless and until the documents or information are or become part of the public record. Counsel may provide such documents and information to their clients only upon the clients executing a written undertaking to the same effect. The commission may require that documents provided and all copies thereof be returned to it, or confidentially destroyed.

17.1 Either the Commissioner or commission counsel may release a participant or counsel in writing from complying, in whole or in part, with an undertaking made under Rule 17. Participants and counsel may also be released from their undertakings in respect of application materials by operation of Rule 17.2.

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.

V. The April 13 application

25. On April 13, 2011 counsel for the Aquaculture Coalition wrote to commission counsel, requesting that his client Alexandra Morton be released from her undertaking with respect to 35 compelled documents, so that she could make a report to a federal government agency. Counsel submitted that Ms. Morton had a statutory duty to make the report, and sought only a limited release in order to make the report. This request for a release was in keeping with the wording of the undertaking that Ms. Morton had signed in May 2010, which stated in part: "I understand that I will no longer be bound by this undertaking . . . 2. to the extent the Commissioner or Commission counsel release me, in writing, from this undertaking".

26. In accordance with commission counsel's March 30th letter setting out the commission's position respecting application materials, commission counsel circulated the Aquaculture Coalition application to all other participants, inviting comments by

April 20th, and adding: "This exchange of correspondence is itself subject to the undertaking of confidentiality."

27. On April 15th British Columbia objected to Ms. Morton being partially released from her undertaking. British Columbia also stated the expectation that this motion and all supporting material will remain subject to the undertaking.

28. On April 21st commission counsel advised counsel for the Aquaculture Coalition that he was prepared to give Ms. Morton a limited release for the sole purpose of allowing her to make a report to the specified federal government agency, but that the undertaking remained in effect in respect of any other disclosure of the 35 compelled documents or their content, and that disclosure of the fact that a report had been made to authorities based on these confidential documents would be considered a breach of the undertaking. Commission counsel added:

The limited release contemplated in this letter will not take effect until 28 April 2011 in order to allow any participant who disagrees with this limited release to file an application to the Commissioner by 4:00 p.m. on 27 April 2011. In the event that such an application is filed, the limited release will be stayed until the Commissioner makes a determination on the application.

29. British Columbia and the BCSFA objected to the limited release. However, the objections were not received by the commission until after the 4:00 p.m. deadline and participants were not advised until the following day. In the interim, Ms. Morton made the report to the federal government agency.

30. On April 27th, British Columbia advised commission counsel that a provincial official had also made the report to the federal government agency that Ms. Morton had sought permission to make. These two events had the effect of rendering moot the Aquaculture Coalition's initial application, and counsel for the Aquaculture Coalition withdrew it.

31. However, British Columbia also submitted that the application materials should remain subject to the undertaking, because there was "a substantial risk that incorrect

information (or only part of the information) could be made public which could result in . . . various non-parties suffering economic harm”. The BCSFA made a submission to the same effect. The objections to disclosure of the application materials meant, under Rule 17.2(b), that the undertakings would continue to apply to application materials until I rule on that issue.

32. Therefore, I must rule on the ancillary question of whether to release counsel and participants from their undertakings with respect to the April 13th application materials.

VI. The April 29 application

33. On April 29, 2011, counsel for the Aquaculture Coalition wrote to commission counsel, seeking an oral hearing before me respecting commission counsel's interpretation of the Rules, and his position and rulings on the scope of documents that are caught by the confidentiality undertakings. In the view of counsel for the Aquaculture Coalition, the intent of the undertakings Rule and the understanding of counsel at the time they signed the undertakings were that the undertaking applied only to compelled documents. He expressed concern that the effect of commission counsel's interpretation was to prevent public disclosure of the fact that an application had been made, of the content of materials filed in support, and of the submissions made by participants on various procedural and substantive matters. He submitted that privacy in such matters is not appropriate for a public inquiry.

34. On May 3, 2011, commission counsel sent this application to all participants inviting responses and, consistent with the amended Rules, added; “Under Rule 17.2, the application materials attached will be treated as confidential and subject to the undertakings provided under Rule 17 for three full business days after today, unless an application is received to stay such a release”. On May 6th, three participants applied for a stay of the release from the undertaking, effectively rendering the Aquaculture Coalition application, supporting materials, and all other participants' submissions confidential until I ruled on the Aquaculture Coalition application.

35. Consequently, I must rule on:

- The principal issue of the April 29th application, being the scope of documents that are caught by the confidentiality undertaking, and
- The ancillary question whether counsel and participants should be relieved of their confidentiality undertaking with respect to the April 29th application.

VII. Scope of documents that are caught by the confidentiality undertaking

36. Commission counsel and five participants filed written submissions on this issue. I agree with the view expressed in several submissions that one of the important purposes of a commission of inquiry is to inform and educate the public about the matter the commission is charged to investigate. Openness and transparency facilitate that goal. In the absence of compelling reasons to the contrary, witnesses should testify in public, counsel should make their submissions in public, and applications should be brought in public. Commissions are established to respond to matters of urgent public concern and, while a commission must ensure that its procedures are fair to all involved, the public has a right to know what the commission is doing, what evidence it is hearing, and what issues it is considering.

37. One important exception to that rule relates to compelled documents. For the reasons discussed earlier in this Ruling, I endorse the practice of other commissions that such documents (and the information they contain) ought to remain confidential until the decision is made to tender them as exhibits during the evidentiary hearings.

38. The issue that has arisen in this inquiry is whether other documents, such as application materials, ought to be treated confidentially as well, if only temporarily. Several reasons are advanced for treating such materials confidentially. Reliance is placed, for example, on Rule 11 that states: "In these Rules, the term 'documents' is intended to have a broad meaning", and on Rule 17 that refers to "documents and information". Also, the form of undertakings used by this commission casts the net widely to include "any document or information provided to me by the commission",

which could be interpreted to include not only compelled documents but also any other type of document provided to participants by the commission, such as application materials, and correspondence among commission counsel and participants.

39. It is also argued that if application materials are not treated confidentially, there is a risk that a participant might circumvent the spirit of the rule by attaching compelled documents to an application, and making the application materials public.

40. As I stated earlier, it is my understanding that participants agree generally that if application materials include compelled documents or information from such documents, confidentiality should continue to apply to such documents/information, until they are tendered as exhibits in the evidentiary hearings, or until I order that they no longer be treated as confidential (e.g., if I am satisfied that a particular compelled document is already in the public domain). Beyond that, the positions of the participants diverge. Some say that, in a public commission of inquiry, application materials should be presumptively public. Others say the opposite, that application materials ought to remain confidential because they may contain compelled documents, or because confidentiality is required in order to prevent a collateral “trial by media”, or to prevent misuse and irrevocable damage to the economic interests and reputations of participants and individuals. In its May 30th submission, the BCSFA stated:

It is not necessary to publish application materials and the positions of participants on “Commission business” to satisfy the public interest. The BCSFA submits that doing so will only encourage participants to take extreme positions in applications and correspondence prior to the hearings for the purpose of attracting media coverage of their own discrete issues to the detriment of the other areas being investigated by the Commission. . . .

The BCSFA says that its concern is that the public and the media may be misled by the misrepresentation of documents or information, including correspondence and submissions, by other participants.

41. In my view, what needs to be treated confidentially, at least provisionally, are compelled documents, until questions of relevance, privilege, or confidentiality are

resolved. While I think it is fair to say that the focus of Rules 11-20, as originally promulgated, was compelled documents and their contents, the language used in the Rules and in the undertakings was general enough that they could reasonably be interpreted as applying to more than compelled documents.

42. There is a concern that application materials may include compelled documents, or may refer to information contained in such documents. It may be quite appropriate to include such documents or information in application materials filed with the commission of inquiry, in order to explain the need for the ruling sought. It is appropriate for commission counsel to circulate such application materials to all participants and their counsel, who are bound by their undertaking to treat them confidentially, at least initially.

43. With respect to the issue of how application materials should be treated, the commission's Rules give affected participants three full business days to object to publication of application materials. If no objection is made, participants and their counsel are released from their undertaking to keep the application materials confidential, and either they or commission counsel can inform the public of the fact and contents of the application. That is in keeping with the opening words of Rule 17.2: "Application materials referred to in Rules 65-72 are part of the public record". As stated earlier in this Ruling, the commission's processes for dealing with applications should be presumptively public.

44. If an objection is made to publication of application materials, the primary justification for doing so would be an allegation that the application materials contain compelled documents or information contained in such documents, since it is the need to provisionally protect the confidentiality of compelled documents that required development of Rules 11-20 in the first place.

45. Under Rule 17.2, the filing of an objection means that participants and their counsel must continue to treat confidentially the application materials until I rule on the

objection. While that is not an ideal solution because it temporarily limits the public's awareness of commission activities, I am satisfied that on balance it is a necessary restriction to impose until I can rule on whether the application materials include compelled documents or information contained in such documents. The alternative would be to develop a process for redacting from application materials compelled documents and information contained in them (as proposed by the Aquaculture Coalition in its May 25, 2011 submissions). I have given that option careful consideration but have concluded that it would pose an unreasonable burden on commission counsel and the redaction process may itself generate controversy between or among participants.

46. I reluctantly conclude that the 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.

47. 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.

VIII. The confidentiality of these application materials

48. As noted earlier, on April 13th the Aquaculture Coalition sought to have Ms. Morton relieved of her undertaking in relation to 35 compelled documents, so that she could make a report to a federal government agency. Because of objections raised,

commission counsel advised all participants, in accordance with the commission's March 30th policy, that this application and supporting materials, and submissions from other participants would be treated as confidential until I ruled on the matter. Although the substantive application was subsequently withdrawn as moot, the application materials remain confidential, pending my decision respecting them.

49. On April 29th the Aquaculture Coalition brought a second application, for an order on the scope of documents that are caught by the confidentiality undertaking. Again, commission counsel advised all participants that, in accordance with Rule 17.2, the application and supporting materials, and submissions from other participants, would be treated as confidential until I ruled on the matter. As set out above, I have now ruled on the principal issue respecting the scope of documents that are caught by the confidentiality undertaking, but must resolve the question of whether confidentiality should continue to apply to the application materials.

50. With respect to the application materials filed in these two matters, I have concluded that I should be guided by the commission's March 30th policy and the April 20th revised version of the Rules which are, in my view, substantially the same. The March 30th policy was in place at the time of the Aquaculture Coalition's April 13th application, and the April 20th Rule revision was in place at the time of its April 29th application. Thus, I think it is fair to proceed on the assumption that all participants were aware of the Rules when they filed their application materials. Those Rules are clear that application materials are presumptively public. The opening words of Rule 17.2 state: "Application materials referred to in Rules 65-72 are part of the public record. . . ." However, as discussed earlier, the challenge comes in deciding how to treat application materials that include compelled documents or information contained in them.

51. In what follows, I will use the expression "application materials" to include applications brought by a participant, written submissions filed by commission counsel and/or participants, and supporting materials filed by any of them. I distinguish these

application materials from correspondence between or among commission counsel and counsel for participants that are exchanged for the purpose of resolving disagreements or seeking compromise on some matter in dispute. I leave it to counsel to arrange collegially with each other whether those exchanges will be held in confidence.

IX. April 13th application materials

52. The April 13th application materials include a listing of 35 compelled documents. The application letter itself makes reference to the content of those compelled documents and to other matters that, if published, would inform the reader of the nature of the report that Ms. Morton sought to make and the reasons for it. Premature publication of any of that material would defeat the purpose of treating compelled documents confidentially initially.

53. From my review of the application letter and the submissions made by commission counsel and other participants in response to the application, I have concluded that they ought to continue to remain confidential unless and until the compelled documents in question are tendered as exhibits during our evidentiary hearings. Confidential information is so integral to these documents that effective redaction would render the remaining content meaningless to the reader. With this Ruling, the public knows of the application and can understand the general nature of it. I can see no way, at this stage in the commission's proceedings, to provide more detail about the application, without divulging information that, for the reasons discussed earlier, must remain confidential at least temporarily.

X. April 29th application materials

54. With respect to the April 29th application respecting the scope of documents that are caught by the confidentiality undertaking, the application materials filed by commission counsel and participants make little reference to compelled documents or information contained in them, but do include their positions on important policy issues relating to the conduct of public commissions of inquiry. These application materials

include written submissions, as well as affidavits with documents appended to them that were included to support arguments made in the written submissions. From my review of these application materials, I am satisfied that participants and their counsel should be released from their undertakings in relation to the written submissions, once commission counsel has reviewed them and has redacted any references to information drawn from compelled documents. I am satisfied that redaction is an appropriate response in these circumstances, but whether it would be appropriate in other instances will depend on the unique circumstances of each case.

55. This release from undertakings does not extend to affidavits and any materials appended to them, because they serve only to support arguments made in the written submissions and, given the volume of materials involved, it would place an unreasonable burden on commission counsel to review them for redaction purposes.

56. If counsel seeks to have any of these materials released, they can apply for directions.

Dated: June 23, 2011



The Honourable Bruce I. Cohen
Commissioner