

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

**RULING RE: FNC'S APPLICATION PURSUANT TO RULE 65 FOR RELIEF  
FROM UNDERTAKING IN RESPECT OF ITS CLIENTS**

The Honourable Bruce I. Cohen, Commissioner

**I. The Application**

1. This is an application by the participant the First Nations Coalition (the "FNC") pursuant to Rule 65 of the commission's Rules for Procedure and Practice for an order to relieve its counsel and clients from the conditions set out in the November 30, 2011 letter from Commission Counsel (the "November 30<sup>th</sup> letter").

**II. History of this Application and Submissions**

2. From the time that the work of this commission commenced, the commission has required the disclosure of all relevant documents by participants. The documents that were disclosed by this process (the "compelled documents") were kept confidential unless and until a document was put before a witness at an evidentiary hearing. The confidentiality of the documents was maintained by the requirement that all participants and their counsel, including staff and assistants with access to the compelled documents, sign an undertaking to keep the contents of the compelled documents confidential until disclosed publicly at an evidentiary hearing or otherwise made public (the "undertakings of confidentiality").

3. Until recently, the undertakings of confidentiality were largely effective in preserving the confidentiality of the compelled documents unless and until they were entered as exhibits at evidentiary hearings throughout the process.

4. However, in October, 2011, information appeared in the media that seemed to have been disclosed by participants in this commission in breach of their undertakings of confidentiality. Brian Wallace, Q.C., senior commission counsel, by correspondence dated November 1 and 8, 2011, reminded participants of their undertakings and asked the participant who had disclosed the information to the public to identify him or herself. No participant did.

5. Following Mr. Wallace's letters of November 1 and 8, 2011, further compelled documents were circulated to participants, and details from these documents were almost immediately disclosed by the media.

6. Mr. Wallace sent a further letter to counsel for all participants dated November 30, 2011 (the "November 30<sup>th</sup> letter"), in which he advised counsel that compelled documents would be disclosed to counsel only, and only on the condition that counsel give their undertakings that they would not allow copies of documents to be removed from their premises, whether physically or electronically, including to their clients. The only exceptions would be that counsel were permitted to allow participants to inspect the documents by attending at counsel's office, and counsel could discuss the contents of the documents with the participants in person or by phone (collectively, the "November 30<sup>th</sup> restrictions").

7. The FNC brought this application supported by an affidavit of Mr. Ernie Crey, submitting that the November 30<sup>th</sup> restrictions cause it undue prejudice and hardship. The FNC says that because its participant group is geographically dispersed, the November 30<sup>th</sup> restrictions make it practically unable to advise its clients of the content of subsequent document disclosures. This in turn handicaps the FNC's counsel's ability to provide proper representation at the upcoming evidentiary hearings scheduled for December 15, 16 and 19 (the "ISAv hearings"), and is unduly prejudicial to the FNC. The FNC also advises that none of the participants in its group disclosed any information in breach of the undertakings.

8. The Government of Canada ("Canada") and the Province of British Columbia ("British Columbia") made submissions in response to the application. They submit that the November 30<sup>th</sup> restrictions are working in that further leaks of information have not occurred. They also submit that they share the burden of seeking instructions from clients who are geographically remote and who do not have access to the compelled documents.

9. Canada submits that it produced many documents after November 30<sup>th</sup> in reliance on the November 30<sup>th</sup> restrictions to ensure that the content of the compelled documents would remain confidential. It submits that it would be unduly prejudicial to Canada if I were to lift the November 30<sup>th</sup> restrictions given Canada's reliance thereon.

10. The FNC made reply submissions on December 12, 2011. They submitted that Canada and British Columbia asked for safeguards or restrictions to safeguard the confidentiality of the compelled documents, and presumably anticipated the burden that restrictions would have on their ability to obtain instructions. Canada and British Columbia implicitly accepted that the burden that would be imposed by restrictions would be acceptable. The FNC submits that the burden of the November 30<sup>th</sup> restrictions is not equal, as the FNC's funding to participate in this commission is limited, and does not include funding for the FNC's counsel to provide detailed oral or written summaries of the documents to be reviewed by the members of their clients. The FNC is the largest coalition participating in this Inquiry. The impact of the restrictions on the FNC is more significant than it is on the other participant groups.

11. Since the November 30<sup>th</sup> restrictions were imposed, no media reports of information from compelled documents that were distributed by the commission to participants' counsel have been brought to commission counsel's attention.

### **III. Decision**

12. I have considered the submissions of the First Nations Coalition. I appreciate that the participants are constrained in the instructions and advice

they can provide to counsel in preparation for the ISAv hearings, by their geographic dispersion and limited access to information from compelled documents.

13. The situation that I am faced with is not ideal. During the course of the evidentiary hearings to date, it has been useful to have witnesses examined by counsel for each of the interested participants, where counsel have had instructions from their clients based on all the available information. If it were not for the repeated leaks of compelled documents, it would be preferable to allow all participants who have signed the undertakings of confidentiality to examine all of the compelled documents in advance of the ISAv hearings.

14. Commission counsel asked participants whether they had leaked the compelled information prior to putting the November 30<sup>th</sup> restrictions in place. All participants denied being the source of the leaked information. In the absence of having an identification of the source of the leaked information, I agree with commission counsel's decision that he could not impose different restrictions on different participants.

15. Participants are not unable to prepare for the ISAv hearings. Their counsel can review the documents. Local participants can inspect the compelled documents, and counsel can discuss the contents of the compelled documents with their remote clients by phone. Counsel may be able to arrange videoconference for geographically remote clients. Although imperfect, participants are not deprived of an opportunity to understand the contents of the compelled documents prior to the ISAv hearings and to instruct their counsel thereon. While I realize that the November 30<sup>th</sup> restrictions make access to the compelled documents inefficient, I do not agree that there is a denial of access. Because of the different sizes and structures of the participant coalitions, the burden of the November 30<sup>th</sup> restrictions is heavier on some participant groups than others. However, while I acknowledge that the burden of the restrictions is not necessarily equal, I am not satisfied that it is so prejudicial to any participant group that it cannot be justified.

16. Participants' counsel will have unrestricted access to any compelled document used as an exhibit during the evidentiary hearings. Following the ISAv hearings, participants will be permitted to make additional written submissions setting out the conclusions and recommendations that they feel I should draw from the evidence that comes out at the hearings.

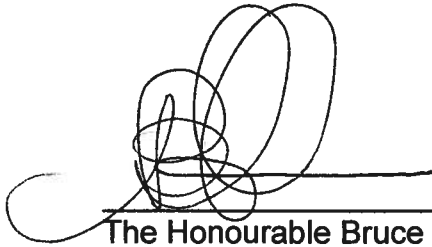
17. Commission counsel bears the responsibility to represent the public interest in this Inquiry. I am confident in commission counsel's ability to bring forward the relevant evidence in the upcoming ISAv hearings. While the perspectives of different participants are of great assistance to me in understanding the issues under consideration, I have had the benefit of extensive participation and voluminous submissions from the diverse groups of participants, and I will have participation from the participants in the ISAv hearings, and additional submissions from the participants thereon.

18. My terms of reference permit me to adopt any procedures and methods that I consider expedient for the proper conduct of this Inquiry. I find that the November 30<sup>th</sup> restrictions pose a reasonable balance between enforcing the commission's protocol for confidentiality and providing for participation by the participants in the ISAv hearings.

#### **IV. Order**

19. This application is denied.

Dated December 12, 2011



The Honourable Bruce I. Cohen  
Commissioner