

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

**RULING RE: RE-OPENING HEARINGS TO RECEIVE NEW
EVIDENCE OF DISEASE IN SALMON IN BRITISH COLUMBIA**

The Honourable Bruce I. Cohen, Commissioner

Background to the application

1. On April 23, 2012 the Aquaculture Coalition made an application to re-open the hearings to receive evidence on the epidemiology and impacts of piscine reovirus (PRV) and heart and skeletal muscle inflammation (HSMI) in salmon in British Columbia.
2. The Aquaculture Coalition refers to developing research into links between PRV and HSMI which indicates that both cause high mortality and appear to be transmissible to wild fish. Reference is also made to sampling for the virus done of fish purchased in local supermarkets, which identified the presence of PVR and indicators of HSMI.
3. The Aquaculture Coalition also says that its application is timely in that as soon as the testing of the fish samples was provided to them, they brought this application. It says that there is a compelling reason to re-open the hearings as an exploration of the new information, considered in light of scientific literature and the experience of other countries, would assist in assessing the potential correlation and causation between PRV and HSMI and the decline of Fraser sockeye, and reviewing DFO's management in relation to the health of Fraser sockeye.
4. The application by the Aquaculture Coalition is supported by the First Nations Coalition, the Cheam Indian Band, and the Conservation Coalition.
5. The First Nations Coalition says that the commission should examine new evidence related to the prevalence of PRV and HSMI in Canadian aquaculture facilities, information regarding the spread of PRV and HSMI to wild salmon,

including Fraser River sockeye, and possible regulatory requirements. The First Nations Coalition also emphasizes that any process to address this evidence should not be allowed to impede the release of my final report by September 30, 2012.

6. The Conservation Coalition submits that the application by the Aquaculture Coalition is timely, in that the testing results on locally purchased salmon were only recently released, and provides a scientific publication relating to the detection of PRV coincident with the course of HSMI which was released on April 9, 2012. A copy of the recent publication was provided with their submissions. The Conservation Coalition submits that the recent evidence of the presence of PRV and HSMI in both farmed Atlantic salmon and wild Pacific salmon could offer a plausible rationale for observations of en route and pre spawn mortality, and says that the hypothesis should be explored before my report is completed.

7. British Columbia opposes the application. Canada and the BC Salmon Farmers Association take no position on the substance of the application, but provide summaries of evidence and submissions already made in relation to the issues of virus and disease.

8. British Columbia opposes the application for two reasons. It says that the issue of re-opening the hearings to address disease was decided in my ruling of February 7, 2012 and the doctrine of *res judicata*/issue estoppel prevents me from acceding to the Aquaculture Coalition's application. It also says that there is no new or compelling information that was not otherwise available when Dr. Marty, Dr. Miller and Dr. Saksida testified, and as such the hearings should not be re-opened. It says that the Aquaculture Coalition relies on a 2010 paper and a 2008 pathology report, both of which were available at the time of the previous hearings. In addition, British Columbia says that the results of the tests on locally purchased salmon is not reliable: the source of the fish is unknown and the fish sampled did not die of disease.

9. Canada notes that during the evidentiary hearings there was evidence, both oral and documentary, of government policies, work, research, and the science pertaining to viruses and diseases. It notes that such evidence was called in the hearings on disease, aquaculture, ISAV, DFO Science, Project 9 Climate Change, Advice to the Minister re: sockeye returns 2009, Project 10 Population Dynamics, and DFO Management panel.

10. In relation to the specific issue of HSMI and its possible effects on fish health, Canada outlines testimony of Dr. Kent, Dr. MacWilliams, Dr. Miller, Dr. Nylund, and Dr. Klotins. In relation to documentary evidence submitted on the topics of PRV and/or HSMI, Canada refers to 15 exhibits.

11. Canada also notes that many participants made submissions on disease in final argument in the fall of 2011 and January 2012.

12. The BC Salmon Farmers notes that HSMI was addressed in exhibits and submissions already filed in this inquiry. It says that the testimony of Dr. Miller and Dr. Garver suggests that the research into PRV is still developing, and more must be done before anything probative can be said about the issue. It also notes that the Aquaculture Coalition had complete access to the Fish Health Database from the BCSFA, as well as databases and fish health reports from the Province, and raised the issue of HSMI in the hearings.

13. The BC Salmon Farmers Association also says that the Aquaculture Coalition is splitting its case and to allow this application would be to unduly prolong the proceedings.

14. Commission counsel made submissions opposing the application. Commission counsel submits that the question for me is whether, with regard to all of the evidence on disease and pathogens and the management response to them, it is necessary to re-open the inquiry to hear this evidence. Commission counsel notes that considerable evidence was called in this inquiry on the topic of disease and its potential impacts on Fraser River sockeye, but that this

commission could not conduct an exhaustive review of the subject. Given the complexity of the subject, disease could alone be its own commission of inquiry.

15. Commission counsel says the new information proposed by the Aquaculture Coalition is at an early and uncertain stage and appears to be evolving. Further, it does not appear that the new information would substantively change the evidence already called on the topic of the role of disease and pathogens.

16. Commission counsel notes that a commission of inquiry is temporary. It is not a permanent institution. As such, developments after the completion of evidentiary hearings are to be expected, and it would be a never ending catch up exercise to stay current.

Analysis

17. In arriving at my conclusion on the application I have reviewed the materials provided, the submissions and my previous rulings. First, with respect, I do not agree with British Columbia's position that I am prevented from acceding to the application by virtue of the doctrine of *res judicata* or issue estoppel. I note that I have not made a final ruling which would preclude my further consideration of the issues raised in this application had I been presented with compelling fresh evidence which had the potential to add clarity to the topic of disease and its relationship to the decline of Fraser River sockeye.

18. However, I am not persuaded by the applicant that the information proposed to be entered into evidence at a re-opened hearing would assist the work of the commission in that it would ultimately advance my understanding of the topic beyond the viva voce or document evidence already entered as part of the inquiry.

19. I am mindful that information and research into the topic of disease and its effects on salmon, both wild and farmed, and the interrelationships between them, which are continually changing and evolving, were explored during the

commission's disease hearings in August-September 2011, and during the ISAv hearings in December 2011. The new information sought to be entered into evidence, in my view, points to some emerging research which at this point in time is far from conclusive. I am satisfied that this new information is not necessary in order for me to complete my mandate.

20. Unlike a court, which has a permanent existence, a commission of inquiry is by definition temporary, and should not assume an ongoing supervision of issues arising in its hearings. I must strike a balance between re-opening the hearings to consider further evidence on an issue that was considered to some degree in the earlier hearings, and the need for finality in the commission of inquiry's investigations.

21. The commission is now in the late stages of its work. The evidentiary hearings concluded last December, more than five months ago, and the drafting of the commission's final report is nearing completion. The commission team is working to a very tight schedule to complete writing, editing, translation and production by the September 30, 2012 delivery date, a date that has been twice extended.

22. For all these reasons I decline the application to re-open the hearings once again to address this topic.

23. Accordingly, the application is dismissed.

Dated

May 16, 2012



The Honourable Bruce I. Cohen
Commissioner