

# CORRIGENDUM

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


### RULING RE: APPLICATION PURSUANT TO RULE 18 FOR THE PRODUCTION OF DOCUMENTS RELATING TO ISAV

The Honourable Bruce I. Cohen, Commissioner

In paragraph 84, reference to paragraph (81) should read paragraph (82).

Dated

Nov. 29, 2011

  
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The Honourable Bruce I. Cohen  
Commissioner

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

**RULING RE: APPLICATION PURSUANT TO RULE 18 FOR THE  
PRODUCTION OF DOCUMENTS RELATING TO ISAV**

The Honourable Bruce I. Cohen, Commissioner

**I. The Application**

1. This is an application by commission counsel for an order for the production of documents by three participants, the Government of Canada ("Canada"), the province of British Columbia ("British Columbia") and the BC Salmon Farmers Association (the "BCSFA") pursuant Rule 18 of the commission's Rules.
2. In ancillary applications, Canada asks to file submissions in sur-reply to commission counsel's reply, and British Columbia seeks to maintain confidentiality over the materials filed herein pending release of my ruling in the principal application.

**II. History of this application**

3. On October 20, 2010, December 8, 2010 and March 17, 2011, I issued rulings ordering the production of documents by Canada, British Columbia and the BCSFA relating to fish health over the period from January 1, 2000 until September 1, 2010 and relating to a broad geographic area and 120 fish farms.
4. Between August 22 and September 8, 2011, this commission heard evidence relating to diseases and to aquaculture, including evidence relating to fish health and salmon farms.

5. Subsequent to the hearings in August and September 2011, on October 17, 2011, the participant Alexandra Morton of the Aquaculture Coalition and Dr. Rick Routledge of Simon Fraser University held a news conference and issued a news release. The news release notified the media that Dr. Routledge's graduate student had sampled Rivers Inlet sockeye salmon smolts from two areas of the province, and sent the samples to a Dr. Kibenge at the Atlantic Veterinary College with the University of Prince Edward Island, and that two of the fish from the sample had tested positive for the Infectious Salmon Anemia virus ("ISAv"), in a test using "real-time reverse transcriptase polymerase chain reaction testing" ("real-time RT-PCR").

6. On October 20, 2011, Canada requested that commission counsel require production of documents from the participant the Aquaculture Coalition, including Alexandra Morton. It sought production of all documents relating to a report made by Dr. Routledge to the Canadian Food Inspection Agency (the "CFIA") on the topic of ISAv. Canada believed that the report was prepared in October, 2011.

7. On October 20, 2011, commission counsel requested pursuant to Rule 12 that the Aquaculture Coalition identify and disclose to the commission documents in its possession or control relevant to the discovery of ISAv in wild Rivers Inlet sockeye. The request related to all documents and included any documentation relating to the storage, dissection, and testing of fish for ISAv.

8. On October 26, 2011, the commission circulated documents that were produced by Canada relating to the ISAv testing (the "October 26 Materials"). Canada was compelled to produce the documents by the commission's rules. The commission provided the October 26 Materials to participants subject to the commission's undertakings of confidentiality. The undertakings of confidentiality require that the signatories keep the nature and contents of the documents confidential until the documents are disclosed at an evidentiary hearing.

9. On Saturday, October 29, 2011, the *New York Times* published an article that reported a test result that had been set out in the October 26 Materials and disclosed to participants two days earlier. Commission counsel expressed the concern to all participants that there had been a breach of the undertakings of confidentiality and asked counsel to determine whether any individual in their participant groups had provided the October 26 Materials or information in the October 26 Materials to any other person. No participant or counsel advised commission counsel that they had provided the materials or information in them to anyone who had not signed the undertaking.

10. On October 28, 2011, the Conservation Coalition, by letter to commission counsel, requested that commission counsel seek records relating to the ISAv in wild fish. The Conservation Coalition requested the following:

Any and all records in the possession of Canada, the Province of BC, and the BCSFA (including its individual members) associated with testing for the presence of Infectious Salmon Anemia virus ("ISAv") in wild fish. These records should include, but not be limited to, the following relevant information:

- (i) The number of occasions that wild fish have been tested for ISAv in B.C.;
- (ii) The source location of the fish tested (where the fish originated);
- (iii) The reason that a test was done (i.e. routine testing; evidence of illness or lesions identified, etc);
- (iv) The respective dates on which sampling and testing occurred;
- (v) The laboratory and personnel who conducted the testing;
- (vi) The specific type and details of testing methods used (e.g. PCR,, RT-PCR, IFAT);
- (vii) The rated sensitivity of the testing method used, the serotype or strain tested for (e.g. European, North American) and the form (e.g., virulent, avirulent);
- (viii) The results of any and all testing related to the presence of ISAv in wild fish;

Any and all records in the possession of Canada, the Province of B.C. and the BCSFA (including its individual members) associated with testing for ISAv of farmed salmonids. These records should include, but not be limited to, the following relevant information:

- (i) The number of occasions that farmed salmonids have been tested for ISAv in B.C.;
- (ii) The source location of the fish tested (specific farm);
- (iii) The respective dates on which sampling and testing occurred;
- (iv) The reason testing occurred (i.e.. routine testing; evidence of illness or lesions identified, etc);
- (v) The laboratory and personnel who conducted the testing;
- (vi) The specific type and details of testing methods used (e.g. PCR, RT-PCR, IFAT);
- (vii) The rated sensitivity of the testing method used, the serotype or strain tested for (e.g. European, North American) and the form (e.g., virulent, avirulent);
- (viii) The results of any and all tested [sic] related to presence of ISAv in farmed fish.

Records [requested] include any and all correspondence between federal and provincial regulators and the aquaculture industry respecting (i) methods of testing/sampling for ISA (or a signature virus); (ii) the results of that testing; and (iii) any concerns regarding obtaining fish for testing for ISA (or a signature virus).

In addition, records should include any and all internal federal and provincial government documents related to the most recent discovery of ISAv in B.C. including, but not limited to: (i) advice to the Minister; (ii) communications strategies; and (iii) potential emergency response plans.

Further the records should include any and all records associated with a fish pathologist finding of "classic lesions associated with ISAv" including with regards to further testing of such fish.

Finally, disclosure should include any and all records associated with the importation of salmonid eggs into B.C., including, but not limited to, the results from any screening tests of egg imports and ISAv related medications.

11. On October 31, 2011, one Don Staniford published information on his website that appeared to be the same documents as the October 26 Materials.

12. On November 4, 2011, commission counsel issued a press release announcing that I had determined that two additional days of hearings would be scheduled in December, 2011, in order to receive evidence that relates to ISAv testing and any results from that testing that may be available and relevant to this Inquiry (the "ISAv hearings").

13. On November 8, 2011, commission counsel advised the Conservation Coalition that in its opinion, the request for documents the Conservation Coalition had asked it to make was overbroad. Commission counsel noted that this request for documents comes after evidentiary hearings are virtually complete. All that remains are the ISAv hearings, which are narrowly focussed on the recent ISAv testing.

14. By letter of November 8, commission counsel requested that Canada, British Columbia and the BCSFA produce the following categories of documents:

1. all documents relating to recent testing for ISAv, since 31 August 2011;
  - a. this request includes what [the Conservation Coalition] seek[s] in ... of [its] letter (internal government documents related to the most recent apparent discoveries of ISAv in BC, including advice to the Minister, communication strategies; and potential emergency response plans);
2. the current laboratory and testing protocols relating to testing for ISAv (correlating to points vi and vii in [the Conservation Coalition's] letter ...);
3. any past testing results, from September 2004 to the present, in which ISAv has been suspected in British Columbia, along with all materials pertaining to such cases; and
4. any past positive test for ISAv (whether PCR, RT-PCR, tissue culture, etc), from September 2004 to the present, in BC, along with all materials pertaining to such cases (irrespective of whether ISA or ISAv was ultimately diagnosed).

We make this request knowing that Canada has already been asked to provide additional documents. While this request overlaps with our earlier request of Canada, to be clear, we maintain both requests.

We make this request in relation to both wild and farmed salmon, in the province of British Columbia. We rely on the broad definition of “documents” in Rule 11.

In addition, we ask counsel for these participants to advise us if, in the course of their previous disclosure to the commission, there were ISA-specific materials that were not produced. If this occurred, we ask for an explanation and for those documents to be identified to us.

15. On November 8, 2011, senior commission counsel wrote to Mr. Staniford advising him that the information and documents that were published on his website appeared to be the same as the October 26 Materials which had been provided to participants pursuant to the undertakings of confidentiality. Commission counsel advised Mr. Staniford of the seriousness of breaching an undertaking of confidentiality and the fact that ongoing breaches may jeopardize the commission’s ability to investigate recent reports of ISAv. He asked Mr. Staniford to advise who had provided him with the information on his website and for a commitment not to publish any further material provided to him in breach of an undertaking.

16. On November 8, 2011, Mr. Staniford replied, expressing the view that he was not bound by an undertaking of confidentiality and advising that he had not received the October 26 Materials “from anyone with standing at the Cohen Commission”. He also stated that he made “the firm commitment to you that I will continue to publish all information which is in the public interest”. He expressed his disagreement with the commission’s practice of maintaining confidentiality over information until its disclosure at evidentiary hearings.

17. By letter of November 10, 2011, commission counsel applied for an order that the documents requested of Canada, British Columbia and the BCSFA be produced in accordance with its letter of November 8, 2011 (the “application”). They specified that participants who opposed the application could make submissions by November 15, 2011, and that they would reply to those submissions by November 16, 2011. In their letter of November 10, 2011, commission counsel maintained their request that document-holding participants provide their information to the commission by November 15, 2011.

18. On November 15, 2011, Canada, British Columbia and the BCSFA (collectively the “respondents”) made submissions in response to commission counsel’s application. The First Nations Coalition (the “FNC”) made submissions in support of commission counsel’s application.

19. On November 16, 2011, commission counsel made submissions in reply.

20. On November 17, 2011, Canada applied for the right to file a sur-reply and filed submissions in sur-reply.

### **III. Submissions of the Participants**

21. The submissions of the participants are organized by issue.

**a. Should an Order for Production of Documents be made having regard to the ISAv hearings?**

*Submissions of British Columbia*

22. British Columbia submits that the commission’s investigation of ISAv and of this application will “go behind” the ultimate findings of the CFIA investigation. The province submits that the commission’s terms of reference only seem to relate to the Department of Fisheries and Oceans (“DFO”) and so the province questions whether the commission has the authority to “go behind” the findings of the CFIA. The province submits therefore that the commission can only view the CFIA’s final report and not examine the evidence that underlies the report. An examination of the evidence supporting the report would be an impermissible collateral attack.

23. British Columbia submits that the test results that have been received to date do not meet the criteria consistent with mortality, clinical and pathological changes that would indicate the presence of ISAv, and it appears that the samples provided from Morton and Routledge do not contain ISAv.

24. British Columbia advises that if documents are ordered to be produced, it will review the documents for public interest immunity or other immunities or



privileges that may apply, and submits that the order should be limited so that it is consistent with my previous orders and with the rules of privilege.

*Submissions of Canada*

25. Canada submits that the commission is not an adjudicative body and it is neither mandated nor equipped to conclusively determine whether ISAv exists in British Columbia. Further, Canada says it is the CFIA's responsibility to make that determination.

26. Canada submits that if I order production of the scope of documents requested by commission counsel then I must order production of a similar scope of documents of other participants as well.

27. Canada submits that I should also order production of documents from Simon Fraser University, Dr. Rick Routledge, the University of British Columbia, Dr. Evgeny Pakhomov, the University of Bergen, Norway and Dr. Are Nyland.

*Submissions of the BCSFA*

28. The BCSFA submits that the commission should not hold the ISAv hearings. It submits that any information that has come to the commission's attention since the close of evidentiary hearings is unreliable and therefore should not be considered. Further, this matter is not relevant to the issues under consideration and the commission's consideration of this matter is jeopardizing international trade.

29. The BCSFA says that it does not have any documents relating to this application within its possession or control, or in the alternative if it does have documents in its possession control, they were produced pursuant to my previous order. It does not have any documents showing a suspected positive test for ISAv.

*Submissions of the FNC*

30. The FNC supports this application for the production of documents. Unless there is a claim of privilege, there is no legal basis upon which Canada, British Columbia or the BCSFA can withhold documents relevant to the ISA virus from the Inquiry or from other participants. The disclosure of the documents sought is essential to ensure the fairness and transparency of the inquiry.

*Submissions of Commission Counsel*

31. The two issues that commission counsel submits I should focus on are: (a) whether the relevance and utility of the scope of the documents sought is appropriate; and (b) whether appropriate safeguards have been put in place to ensure that confidentiality of the documents will not be compromised, having regard to past breaches of undertakings that have occurred. Commission counsel submits that the other issues raised by the respondents are unrelated to this application, are not necessary to decide it and are of no assistance to my analysis.

32. Commission counsel submits that to the extent that the production of documents is opposed on the basis that the commission ought not to hear additional evidence on ISAv, those submissions are not helpful in deciding this application and are not properly directed at this application. This is not an application as to whether to hold additional hearings on ISAv, and no participant has brought an application to cancel the ISAv hearings. Therefore, those submissions should be disregarded.

33. This is a procedural motion, which is not the appropriate forum for arguing whether ISAv exists on Canada's Pacific coast. My consideration is to be directed to the appropriateness, helpfulness, and practicality of obtaining the requested documents, to facilitate the ISAv hearings.

**b. Should an order be made having regard to past breaches of confidentiality?**

34. British Columbia submits that it appears that there was a breach of the undertakings of confidentiality by Alexandra Morton, and that this was the latest

in a series of breaches of undertaking involving the Aquaculture Coalition. Further, it submits that it is clear that Mr. Staniford will continue to publish any commission document or information that he receives, regardless of whether it is the subject of an undertaking. It submits that the commission did not take steps to hold any individual accountable for past breaches of undertakings.

35. British Columbia says it wishes to cooperate with the commission but does not wish to risk documents being leaked that are necessary for the CFIA investigation. It therefore opposes production of the documents unless safeguards can be established to ensure the security of the documents, and protect the ongoing CFIA investigation.

36. Canada submits that it is willing to produce documents if adequate safeguards are put in place to prevent breaches of the undertakings of confidentiality. It says that a term of an order for production should include as a pre-condition to production, agreement by affected participants' counsel to safeguard against breaches of undertakings of confidentiality. Canada advised commission counsel, by letter of November 19, 2011, that it accepts the protocol put into place by commission counsel with the additional condition that Ms. Morton only be allowed to review documents in the presence of counsel, a condition which Canada stated in its letter to have been accepted by the Aquaculture Coalition.

37. The BCSFA submits that it would be premature to make an order for the production of documents in light of the previous breaches of undertakings that it says have occurred, and which commission has repeatedly failed to remedy or address in a meaningful way.

38. In response to these concerns about adherence to the undertakings and the maintenance of confidentiality, in particular by Alexandra Morton, commission counsel notes that safeguards have been put into place that allow Ms. Morton to examine documents that are disclosed, but prohibit her from having unsupervised access to or reproducing documents.

39. Commission counsel submits that this protocol addresses the concerns of the document holders, which concerns should not therefore be used to delay production.

**c. The Scope of an Order for documents**

40. Commission counsel submits that in considering the scope of an order for documents, it is necessary to consider the context.

41. In this application, the context is that the commission has completed evidentiary hearings, with the exception of convening for two days of hearings on the ISAv testing that has occurred since the close of hearings in September.

42. In the lead-up to the evidentiary hearings in August and September, 2011, on the topics of disease and aquaculture, the commission obtained and provided thousands of documents from participants. While ISAv was not central in those hearings, it was considered. To the extent that the Conservation Coalition's document request relates to topics previously considered, commission counsel submits that the scope of documents requested is too broad.

43. As a result commission counsel has narrowed its application to documents that relate to

1. Recent testing for ISAv;
2. Current laboratory and testing protocols for ISAv;
3. Past testing results and materials in which ISAv was suspected; and
4. Past testing results and materials where there was a positive result.

44. Commission counsel notes that points 3 and 4 relate to test results in which ISAv was suspected, or past test results where there was a positive result. They say that point 4 relates to any positive test result, even where the testing was done in the absence of suspected ISAv.

45. This application goes beyond the 120 fish farms identified in my December 2010 order for salmon farms data and beyond sockeye to all species of wild and farmed salmon in British Columbia. Commission counsel says the breadth of the application is appropriate as it seeks evidence as to whether

Fraser River sockeye, who share habitat with other wild and with farmed salmon, may be at risk from ISAv – a virus not previously known to exist off the BC coast – such that DFO should be taking further actions to assess or mitigate that risk.

46. Commission counsel submits that the documents held by the province are relevant to the inquiry because it was the principal regulator of salmon farms until recently, it retains some jurisdiction over salmon farms, including issuing tenures for farm sites and it has emergency response plans pertaining to ISAv. ISAv in wild salmon is relevant to the commission's mandate, which specifically includes disease and aquaculture.

47. Canada submits that an order should anticipate that documents are being created as information becomes available and a deadline for compliance with a disclosure order should not be made in light of the ongoing events.

48. Canada submits that an order should further clarify commission counsel's application of November 10, 2011. It says that if points three and four of commission counsel's request are meant to request old test results arising from instances where ISAv was suspected, then Canada agrees to comply with that part of the request. However, Canada does not interpret points three and four as applying to routine testing that occurred in the absence of suspicion of ISAv, and opposes production of past documents on routine testing, which has already been covered in the previous evidentiary hearings.

49. Canada says that my role is to inquire into the present state of evidence on ISAv and make findings of fact and recommendations based on that evidence and my assessment of what should be done to ensure the future sustainability of the fishery based on that information. Therefore, it says that I need only receive documents and hear evidence regarding recent reports of tests for ISAv and the investigation and testing related to those reports, the testing procedures, protocols and techniques involved and what federal agencies "will do" following the conclusion of the investigation. Canada says that this is a focused set of

documents and evidence that will assist me to understand the current state of knowledge and enable me to make findings of fact and recommendations.

50. In the alternative, if I do not accept Canada's submissions on the restricted scope of my mandate, Canada says that I would need to conduct an inquiry on all aspects of the fish tested. This would require production of documents from many sources, including both participants and outsiders, related to origins and handling of the fish tested, their capture and harvest, transport, storage, dissection, analysis, assessment, custody from time to time, and exposure to contaminants.

51. The BCSFA says that this application for documents is overbroad, and should be limited to all documents related to the recent testing for ISA by Ms. Morton and Dr. Routledge.

52. British Columbia submits that provincial ISAv testing and retesting on its own samples, emergency response plans and advice to the Minister may not be relevant, because the province no longer regulates aquaculture. Further they are not relevant to the ISAv hearings scheduled, given that the only issues that will be discussed at the hearings are the Rivers Inlet and Weaver Creek samples.

53. British Columbia submits that the document requests are overbroad, as my December 8, 2010 order requiring document production in the aquaculture sector related only to 120 farms and to wild Fraser River sockeye salmon, whereas this application seeks an order that would relate to a larger area and other species of salmon.

#### **d. Additional issues**

54. British Columbia seeks a stay on release of these application materials pursuant to Rule 17.2 as these submissions refer to an ongoing CFIA investigation. Commission counsel objects to a stay being ordered on the basis that all of the documents attached as exhibits to the materials filed herein are in the public sphere.

55. Commission counsel declines to seek further document production from the Aquaculture Coalition because it submits that it has no evidence that the Aquaculture Coalition has any relevant documents.

56. Commission counsel declines to seek an order for the production of documents by non-participants as part of the present order. They submit that if another participant believes that any other participant or non-participant should also produce documents, they should make an application to that end. However, that is not properly part of my consideration as to whether to make the present order for the production of documents sought herein.

57. Commission counsel does not agree with the province's contention that the CFIA has sole jurisdiction to deal with ISAv and that therefore this commission should not deal with it.

#### **IV. Decision**

58. In his letter to counsel for all participants dated November 3, 2011, Mr. Brian Wallace, senior commission counsel described the purpose and scope of the ISAv hearings as follows:

[T]esting of samples of Pacific salmon from two areas of the province has indicated the possible presence of the ISA virus in three Pacific salmon. The commission has been advised that further results will be available in about one month. I am writing to advise participants of the process the commission intends to follow to put *new information about the possible presence of the ISA virus in BC* on the record.

(emphasis added)

59. I note that this is not an application by commission counsel to broaden the scope or purpose of the process set out in Mr. Wallace's letter. Rather, the application seeks an order for production of documents that are relevant and necessary for the conduct of the ISAv hearings being convened as an extraordinary measure to address and place on the record new information that has come to light since the close of the evidentiary hearings.

*Whether an Order for the Production of Documents should be made and the appropriate scope of an order*

60. Given the scope of the ISAv hearings, the documents sought by commission counsel in items 1 and 2 of paragraph 14 herein are relevant for the conduct of the ISAv hearings and I find they should be ordered, unless there is a compelling reason not to do so, which I consider below.

61. However, the documents sought by commission counsel in points 3 and 4 of paragraph 14 herein, relating to past test results, in my view raise issues beyond the scope of the ISAv hearings and therefore I find their production should not be ordered.

*Additional arguments raised against ordering production of documents*

62. The second question that I must consider is whether there is any reason not to order production of documents that are relevant to the issues being considered. The respondents to this application have made a number of arguments that I should not grant the order sought.

63. The submissions against making the order sought include the following: (1) the commission has not taken sufficient precautions to protect the confidentiality of documents that would be disclosed pursuant to an order, having regard to past breaches of confidentiality; (2) it is inappropriate to consider the information contained in the documents given that the CFIA is considering and working on a report on the same information; (3) the investigation of the ISAv issue is disrupting international trade; (4) this commission is not properly constituted to make a definitive finding as to whether or not ISAv exists in British Columbia; (5) the evidence of ISAv testing that has come to the commission's attention to date is unreliable and does not warrant additional consideration of this issue; (6) an order for the production of documents by additional participants and non-participants should be made if I make the order sought herein. The province also advised in its submissions that it may make claims of privilege and/or public interest immunity in regard to any document order that I make.



### *1. The Undertakings of Confidentiality*

64. The province and the BCSFA submitted that they opposed an order for the production of documents in the absence of an acceptable protocol to protect against breaches of the undertakings of confidentiality. Neither of these respondents specified what would constitute a sufficient protocol.

65. Further, neither of these respondents submitted any evidence of the harm that would result from a breach of the undertaking with respect to the documents sought in the application. The commission takes the undertakings of confidentiality seriously. They have worked remarkably well given the vast number of documents provided and the large number of participants' representatives who have had access to them pursuant to undertakings.

66. To meet the specific concerns of Canada, the province and the BCSFA, commission counsel has established an additional protocol to prevent breaches of the undertakings of confidentiality by members of the Aquaculture Coalition. The measures will restrict how the Aquaculture Coalition participants' access to the documents in order to protect against unauthorized reproduction or dissemination of the documents. Canada has accepted this protocol.

67. In light of the absence of evidence of particular harm from disclosure of documents sought in the application, or any specific precautionary measures sought by British Columbia or the BCSFA, I find that the protocol established by commission counsel to protect against a breach of the undertaking of confidentiality is sufficient.

*2. The examination of ISAv by the CFIA*

*3. This investigation of ISAv is disrupting international trade.*

*4. This commission cannot make a definitive finding as to whether ISAv exists in British Columbia.*

*5. The evidence of ISAv testing is unreliable.*

68. I have considered these four considerations individually. However, each of these issues relates not to whether I should make an order for the production of documents, but whether the commission should continue to investigate the question of whether ISAv exists in British Columbia.

69. British Columbia submits that because the CFIA is looking into the evidence of ISAv in the salmon that were tested, it would be inappropriate and a collateral attack for the commission to also consider the issue. British Columbia also questions whether my mandate entitles me to “go behind the findings of the CFIA” as it submits that my mandate appears to relate only to DFO.

70. With respect, I disagree with the assertions made by British Columbia. An independent commission of inquiry, by its very nature, is charged with conducting its own independent examination of the issues in its mandate. The commission must conduct an independent examination of the relevant information before it in order to examine the methods used by a government agency to reach a conclusion. In doing so, the commission will by definition engage in examinations that overlap to some extent with the functions of other government agencies. The whole purpose of a commission of inquiry is to examine the way that government agencies are dealing with the issues within its mandate in order to be able to reach conclusions and make recommendations for improvement.

71. My mandate requires me to investigate and make independent findings of fact regarding the causes of the decline of the Fraser River sockeye salmon. Disease is specifically included as one of the possible reasons for decline. A consideration of the evidence that relates to disease and Fraser River sockeye salmon is not removed from my mandate simply because the CFIA may be considering the same information, and may deliver a report on that information, whether for a similar or different purpose.

72. The doctrine of collateral attack has no application here. The commission's examination of evidence relating to ISAv is not undertaken for the

purpose of avoiding the effect of an order by the CFIA by questioning its legitimacy.

73. The BCSFA submits that the consideration of the ISAv issue by this commission is disruptive to international trade. The BCSFA has filed no evidence in support of this submission, nor has it suggested the mechanism of disruption or the severity of harm. As a result, I have given no weight to this submission.

74. The fourth submission is that this commission of inquiry is not an adjudicative body with the mandate to adjudicate the presence or absence of ISAv in British Columbia. The fifth submission is that the evidence which has come forward to date is unreliable.

75. These submissions go to the scope of issues that will come before the commission during the hearings. Participants may make those submissions on the evidence heard then. They are not relevant to an application to produce documents.

*6. I should order the production of relevant documents by other participants and non-participants*

76. I do not have an application before me to seek production of documents from the Aquaculture Coalition, from other participants, or from non-participants such as Simon Fraser University, the University of British Columbia, or any other individuals or entities.

*Privilege or Public Interest Immunity*

77. British Columbia submitted that I should limit my order in accordance with the rules and my previous rulings regarding privilege. In addition, it stated that it will be reviewing any documents ordered produced for privilege and presumably asserting privilege if it applies.

78. My previous rulings on privilege have been in regard to privilege asserted by participants and supported by evidence. If a participant claims privilege over

a particular document, it may make an application in accordance with the procedure set out in my order below. I will rule on any claims of privilege upon examining the document over which privilege is claimed, the basis for the claim asserted, and any evidence in support of the claim.

## **V. Additional Issues**

79. I have considered British Columbia's application to keep the application materials filed in respect of this application confidential pending the release of my ruling herein. In the short time frame from the filing of the materials to the release of this Ruling, confidentiality was effectively maintained.

80. I have considered Canada's motion to enter a sur-reply. Considering that commission counsel's reply materials were substantial, I grant the motion and have considered Canada's sur-reply along with the other submissions.

81. Finally, on November 24, 2011, commission counsel notified me that they had received a letter from the Conservation Coalition dated November 24, relating to certain documents that had been disclosed by Canada on November 22 and forwarded to the participants on November 23. I am advised that the documents relate to testing that had been done at the Pacific Biological Station and elsewhere for ISAv in 2004, and the documents had not been previously made available to the participants. The Conservation Coalition's letter alerts commission counsel that it may be making additional applications to the commission as a result of the disclosure of these documents. I have decided the present application based on the materials that were submitted previously and referred to in paragraphs 3-20 above. I am awaiting commission counsel's advice concerning these recent documents and letter, and this ruling does not relate to the information contained therein.

## **VI. Order**

82. I order that Canada, British Columbia and the British Columbia Salmon Farmers Association provide to the commission all documents in their possession or control described as follows:

1. all documents relating to recent testing of wild or farmed salmon in British Columbia for ISAv, since 31 August 2011, including internal government documents related to the recent apparent discoveries of ISAv in B.C., including advice to the Minister, communication strategies; and potential emergency response plans; and
2. the current laboratory and testing protocols relating to testing for ISAv including the specific type and details of testing methods used (e.g. PCR, RT-PCR, IFAT) and the rated sensitivity of the testing method used, the serotype or strain tested for (e.g. European, North American) and the form (e.g. virulent, avirulent).

83. The deadline for complying with this order is 4 P.M. on November 29, 2011.

84. I further order that if Canada, British Columbia or the British Columbia Salmon Farmers Association wish to assert that any documents referred to in paragraph (81) are exempt from production on the basis that they are privileged or the subject of public interest immunity, that the participant making such assertion provide the document over which privilege or public interest immunity is asserted to the commission in compliance with this order, including the deadline herein, along with documentation describing the claim of privilege, and any evidence in support of such claim.

85. When “documents” are referred to in this order, the definition in Rule 11 applies.

86. If further documents within the scope of this order come into the possession or control after November 29, 2011, I order that Canada, British Columbia and the British Columbia Salmon Farmers Association are under a continuing obligation to produce those documents to the commission promptly.

87. Nothing in this order limits any outstanding requests for documents or obligations to produce documents.

Dated November 24, 2011

  
The Honourable Bruce I. Cohen  
Commissioner