

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

**RULING RE APPLICATION FOR A STAY OF NOVEMBER 24, 2011 RULING
AND APPLICATION FOR DIRECTIONS**

The Honourable Bruce I. Cohen, Commissioner

I. The Application

1. This is an application by the Government of Canada ("Canada") for a Stay and an Order or Direction in respect of my Ruling dated November 24, 2011.

II. History of this application

2. On November 24, 2011 I ordered the production of certain documents in relation to the Infectious Salmon Anemia virus ("ISAv"). The commission has evidentiary hearings relating to ISAv scheduled for December 15 and 16, 2011.

3. The order was as follows:

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 (82) 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.

4. On November 28, 2011, Canada applied for the following relief:

A. Staying the application of paragraph 84 of the Commissioner's Ruling in so far as it requires the disclosure to the commission of documents or portions of documents over which Canada asserts legal privilege until such time as there is a final determination of the applicability of such portion of the Ruling.

B. Clarifying or varying the portion of paragraph 84 of the Commissioner's Ruling dated November 24, 2011, in so far as it requires the disclosure to the commission of documents or portions of documents over which Canada asserts legal privilege, so that Canada is required to produce a list of documents over which legal privilege is asserted, or redacted documents, but not the unredacted documents themselves.

C. In the alternative to paragraph B, an order that Canada provide to the Commissioner in a sealed envelope(s), for his eyes only, those documents over which, in whole or in part, Canada asserts legal privilege so that the Commissioner may inspect them and determine whether legal privilege applies, and:

i. if the documents or portions of documents are found by the Commissioner to be legally privileged they be returned to Canada in a sealed envelope without review by anyone except the Commissioner; or,

ii. if any of the documents or portions of documents are found by the Commissioner to not be legally privileged that they be resealed, having been viewed only by the Commissioner, and retained in sealed form for 14 days or until further order of the Federal Court of Canada.

5. British Columbia made submissions in support of Canada's application. The Aquaculture Coalition made submissions opposing Canada's application.
6. Canada made further submissions in reply.

III. Decision

7. In my Ruling of November 24, 2011, I set out a process for participants to assert claims of privilege over documents that would otherwise be compellable in paragraph 84. The purpose of the process was to allow participants to assert privilege where they believe it to apply, while allowing a timely investigation of those claims.

8. Canada has effectively had the relief that it seeks in paragraph 4A. above, which is a stay of my Ruling of November 24, 2011 until a final determination herein.

9. I see no reason to vary paragraph 84 of my order. Varying the order in accordance with Canada's application set out in paragraph 4B. would cause delay. Further delay would result in any documents over which privilege is claimed being excluded from the evidentiary hearings, whether or not the claim of privilege is substantiated.

10. As the date of the evidentiary hearings approaches, the need for an expeditious way to resolve claims of privilege becomes more urgent.


11. For further clarity, no documents that are subject to a claim of privilege will be circulated to any participants, or generally to commission counsel, until I have ruled on whether the claim is substantiated. If I determine that the documents are privileged, they will be returned to Canada without further disclosure or review.

12. Canada has provided a list of 48 documents over which it asserts privilege. I am not aware of the length of these documents. I may seek the assistance of commission counsel to review documents and to provide advice to me in making determinations on claims of privilege. Any commission counsel who assists me by reviewing documents that I ultimately determine are privileged will maintain the confidentiality of those documents and will not assist with preparing for the hearings related to ISAv, or the writing relating to that issue.

IV. Order

13. I order that Canada comply with paragraph 84 of my Order dated November 24, 2011, forthwith.

Dated December 1, 2011



The Honourable Bruce I. Cohen
Commissioner