

Cohen Commission

Ruling on Application for Standing on Aquaculture and Seeking Extraordinary Circumstances under Contribution Program Terms and Conditions cl. 10(b)9ii Brought by BC Fisheries Survival Coalition and Southern Area E Gillnetters Association

I. The Application

1. The BC Fisheries Survival Coalition and the Southern Area E Gillnetters Association (the “applicants”), in a letter from their counsel dated June 15, 2011, seek rulings for an extension of their grant of standing to include the subject of aquaculture, for a finding of “extraordinary circumstances” to permit funding of three paralegals, and for redistribution of their funding under the terms and conditions of the Privy Council Office’s Contribution Program (the “Program”).

II. The Applicants’ Standing

2. Rule 14 of the Commission’s Rules for Standing and Funding set the deadline for applications for standing by prospective participants at March 10, 2010. On April 14, 2010 I issued my ruling on standing. At paragraph 37 of my ruling I granted the applicants limited standing on the following terms:

The Southern Area E Gillnetters Association and the BCFSC have satisfied me that their substantial and direct interest is in the policies and practices of DFO, in particular fisheries policies and programs, allocation of departmental resources, and fisheries management practices and procedures including monitoring, counting of stocks, forecasting and enforcement.

3. At this time, the applicants have not asserted any reason why they could not have been aware of their interest in aquaculture prior to the deadline. Their counsel simply states that the applicants now wish “to submit evidence on the use of lights in aquaculture operations.”
4. Moreover, at paragraph 15 of my ruling on standing I set out a number of criteria that I considered in determining whether to make a grant of standing to prospective participants and the extent of their standing, as follows:

In order to guide my determination of whether an applicant has a substantial and direct interest in the subject matter of the inquiry, I have reviewed the applications in the context of certain relevant considerations, including those which were set out in the Notice of Standing as follows:

- the nature and extent of the applicant’s rights or interest;

- why standing is necessary to protect or advance the applicant's rights or interest;...
 - how the applicant intends to participate, and how this approach will assist the commission in fulfilling its mandate;
 - whether and how the applicant's participation will contribute to the thoroughness and fairness of hearings;
 - whether the applicant has expertise and experience relevant to the commission's work;
 - whether and to what extent the applicant's perspective or interest overlaps or duplicates other applicants';...
5. In the case of the instant application, the applicants do not assert that they have a substantial and direct interest in the subject of aquaculture and in my opinion the content of their application does not meet the criteria for a finding that their standing should be extended to this subject.
6. Thus, for the reasons stated above, I decline to make a finding that the applicants existing standing should be extended to include the subject of aquaculture.

III. Funding for Brittany Fraser, Phil Eidsvik and Dennis Brown

7. The applicants seek a finding of extraordinary circumstances to permit funding for Ms. Brittany Fraser, a criminologist with paralegal experience, Mr. Phil Eidsvik, who is described by counsel as a client who has been involved in fishery management issues since 1986, and on a full time basis since 1992, and Mr. Dennis Brown, who counsel describes as an expert on the BC fishing industry and is the author of the book entitled, *Salmon Wars: The Battle for the West Coast Salmon Fishery*, published in 2005. Counsel states that all three can be classified as paralegals, and in the case of Mr. Eidsvik also as a law student given that he is enrolled as a law student at the University of London.
8. Clause 10(b)(ii) of the Program provides, as follows:
- Payment of counsel fees under this Program is except in extraordinary circumstances identified by the Commissioner, limited to one senior and one junior counsel per recipient.
9. In a ruling issued by me on September 28, 2010 I dealt with the term "extraordinary circumstances" and said, as follows:
5. The context for determining "extraordinary circumstances" is that grants for funding of legal fees are intended to ensure the "appropriate participation of any person granted standing" (Terms of Reference a.x.). "Extraordinary circumstances" should therefore relate to the funded participant's ability or capacity to participate appropriately in the Inquiry. I read "appropriate participation" to mean participation that effectively allows representation on the interests for which I have granted standing,

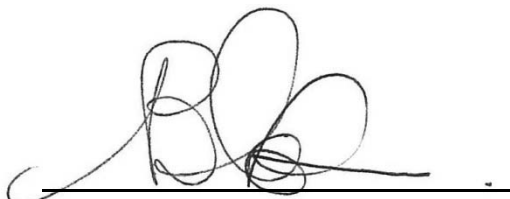
and participation that furthers the Inquiry's investigation in a timely and cost-effective manner.

6. Extraordinary circumstances do not arise because of convenience for a participant, nor because this Inquiry might be considered "exceptional" or different in contrast with other commissions. These are factors that are common to every participant and joint-participant before the Inquiry; they are simply not extraordinary. ...
10. The applicants say there are extraordinary circumstances to justify funding for the three persons they wish to have classified as paralegals. In support they offer the following arguments:
 - a. It was the applicants who pursued the calling of this Inquiry for more than fifteen years and for a variety of reasons cited by them they believe that they have an obligation to participate in the Inquiry at a "higher level" than other participants.
 - b. Canada, a participant with interests adverse to the applicants, has the benefit of many lawyers and experts. Yet, in the case of the applicants, the existing funding model requires them to do as much work as Canada with only one senior and one junior counsel with an allocation of limited hours.
 - c. In their initial application, the applicants anticipated a contribution of \$50,000 from individual fishers towards its overhead to participate in the Inquiry, but efforts to raise this amount have been unsuccessful. They claim that the primary reason for the lack of success stems from controversy in the commercial fishing sector over certain persons associated with the Inquiry.
 - d. The applicants feel that commission counsel have not led evidence that supports their position and that the commission has not addressed the controversies that they feel led to the collapse of the fishery.
 11. In sum, the applicants submit that their requirement to convert hours stems from unanticipated extraordinary circumstances that prevent them from effectively representing their interests within the existing funding model.
 12. In my opinion, the bulk of the assertions raised by the applicants relating to the decision to call the Inquiry, the ability to raise funds to support involvement in the Inquiry and the decision by commission counsel to lead certain evidence at the Inquiry are not necessarily unique to the applicants nor persuasive of a conclusion that they need to participate at a "higher level" than other participants.
 13. Moreover, the comparison of the applicants funding allocation with that of Canada is without merit in that the DFO is a subject of the Inquiry; Canada has standing on all of the subjects mandated to be investigated by the Inquiry; and,

Canada has significant obligations with respect to document production and witness interviews.

14. With respect to the applicants' position on their staffing requirements, I accept that the extensive background and experience of Messrs Eidsvik and Brown may prove invaluable to assist counsel in the review of materials and preparation for the hearings. However, many of the other participant groups have access to clients or consultants with backgrounds and experience to provide such assistance to them in the Inquiry process without receipt of funding for this purpose. Certainly, in the case of Mr. Eidsvik it is part of his role in the Inquiry to provide such assistance to counsel as a client, and the funding of clients is clearly not contemplated by the terms and conditions of the Program.
15. In the result, I find that the applicants have not established that there are extraordinary circumstances that would justify a recommendation from me for funding from the Program for Ms Fraser, Mr. Eidsvik or Mr. Brown.
16. Finally, in view of my decision not to recommend funding for Ms Fraser, Mr. Eidsvik and Mr. Brown, the applicants may wish to reconsider the amount of lawyer funding they seek to redistribute from Mr. David Butcher, Q.C. and Ms Anila D. Srivastava, to Ms Kerry-Lynne Findlay, Q.C., Ms Angiola-Patrizia De Stephanis, Ms Sara Levine, and Ms Jennifer Woodruff. If they wish to do so, the Applicants may provide the commission with a revised estimate of that funding by Tuesday, July 26.
17. Thereafter, I shall provide my recommendation to the Privy Council Office for funding for Ms Kerry-Lynne Findlay, Q.C., Ms Angiola-Patrizia De Stephanis, Ms Sara Levine, Ms Jennifer Woodruff, and advise the applicants in due course of its response.

Dated July 18th, 2011



The Honourable Bruce I. Cohen
Commissioner