

## Appendix 5

### **Cohen Commission Ruling on Application to Vary Standing Brought by Heiltsuk Tribal Council**

#### **I. Background**

1. On 15 April 2010, I released my ruling determining which applicants would be granted standing as “participants” for the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (the “Standing Ruling”). In the case of the Heiltsuk Tribal Council (“Heiltsuk”), I determined they should be part of the same participant group as the Laich-kwil-tach Treaty Society (“LKTS”), James Walkus and Chief Harold Sewid, and the Aboriginal Aquaculture Association (“AAA”). I described this standing group in the Standing Ruling, at para. 78, in these terms:

These applicants applied separately for standing. However, with the exception of the Heiltsuk, they have told me that they are willing to cooperate and share a single grant of standing (although they ask to have separate legal counsel acting together). The Heiltsuk indicate a willingness to join with these applicants on the topic of reserve allotment, but have not yet reached a more formal arrangement.

I went on to observe, in para. 79:

Notwithstanding the fact that the Heiltsuk have not yet agreed, I am satisfied that the interests of these applicants align to such an extent that it is appropriate to direct that they share in a single grant of standing. In so directing, I am mindful of the position taken by the Heiltsuk. If a joint participant concludes it is necessary to seek to participate differently, whether by way of separate submissions or otherwise, that joint participant may apply for directions.

2. The Heiltsuk now bring an application seeking to vary the Standing Ruling, to permit them full participant status in the commission. These are my reasons on the Heiltsuk’s application.

#### **II. The Application**

3. The Heiltsuk seek to vary the Standing Ruling, so as to be afforded full and separate participant status for stewardship issues and aquaculture. They are content to work with the other members of the participant group on the issue of reserve allotment.

However, the Heiltsuk say that there is a direct conflict between themselves and other members of their participant group on the topic of aquaculture. Citing *R. v. Neil*, 2002 SCC 70, they submit no single counsel could represent persons adverse in interest. On the topic of stewardship, they wish “to address historical and modern stewardship through information unique to [the Heiltsuk]”.

4. Other members of the Heiltsuk’s standing group were apprised of this application and offered their input. The LKTS, the AAA and Chief Sewid advised through counsel that they support the Heiltsuk’s application. They suggest that separate standing would make good practical sense and would avoid existing and potential conflicts within the standing group. I am advised that James Walkus has elected not to proceed as a participant despite being granted standing with this group.

### **III. Discussion**

5. I was unaware of the Heiltsuk’s present concern until after my Standing Ruling. The Heiltsuk did not mention their opposition to aquaculture in their detailed original application for standing. They were silent on the topic in that original application for standing, apart from two passing references to fish farms – one in describing research that related to fish farms, and the other in including fish farms in a list of “a range of potential impacts” on salmon stocks. As well, on 26 March 2010, 31 applicants attended a hearing before me, and many indicated their willingness to join together with other applicants for a grant of standing. These applicants recognized that the public interest favours an efficient and workable process, and that serious practical difficulties would have arisen from having 30 or 40 separate participants. I heard from almost all of the 31 applicants attending that session, but did not hear directly from counsel for the Heiltsuk. Mr. Donovan, addressing the commission as counsel for the LKTS, made reference to some opposition to aquaculture among possible co-participants, but it was not clear whether this included the Heiltsuk (Transcript, 26 March 2010, p. 20, ll. 16-26). After the 26 March 2010 hearing, in further written submissions dated 29 March 2010, the Heiltsuk reported having “explored building coalitions with the Council of Haida Nation, the Aboriginal Aquaculture Association and the Musgagmagw Tsawataineuk

Tribal Council”. In that letter, they offered specific submissions on reserve allotment, sport fishing and community impact, but again failed to mention aquaculture as a topic of interest or importance.

6. Leaving this aside, I accept that the Heiltsuk now find themselves in a situation where there is a conflict, and that they genuinely wish to participate with respect to aquaculture. Their position on an important component of this commission — one listed in the Terms of Reference — is directly at odds with that of the AAA. Although it might well be the case that the traditional test involving “adversity in interest” cannot be transposed directly into the public-hearing *milieu*, I accept that in this case, there are diametrically opposed positions that would create a significant difficulty for a single lawyer. In my view, the test for a conflict of interest is met here. Importantly, the conflict is not hypothetical, contingent, or unrealized. It exists, and must be addressed.

7. The question becomes, how can this conflict be addressed in a manner that is both responsive and responsible? As the Heiltsuk indicate in their submission, the real difficulty is that a lawyer may be asked to cross-examine and make submissions on two sides of an issue. The remedy must overcome that situation, and yet not overshoot the objective. The solution, I conclude, is to permit the Heiltsuk to appear by way of separate counsel for the evidentiary hearings which deal specifically with the topic of aquaculture. I will return to the question of the appropriate remedy after I discuss the other aspect of the Heiltsuk’s application.

8. While aquaculture is a present conflict, I am not persuaded that the same may be said of the broad topic of “stewardship issues”. The Heiltsuk refer to stewardship issues and practices, and indicate they have a significant and unique body of information about traditional and modern stewardship. I appreciate and expect that the Heiltsuk’s particular knowledge and experience will inform any submissions they make to the commission; their experiences in dealing with the DFO are certainly relevant. However, I think that knowledge and those experiences — even if distinct and different from those of their joint participants — can be presented alongside the experiences of the other joint participants within their standing group. As contemplated in the original standing

ruling, the participant group's submissions can be supplemented by written submissions on the issues of particular concern to the Heiltsuk.

9. In short, I see the proposed information relating to stewardship as *complementing* rather than conflicting with the participant group's expected approach. Moreover, unlike the topic of aquaculture, any conflict on this topic is, at this juncture, speculative and unrealized.

10. Given these comments, the appropriate remedy is to focus on the particular difficulty arising from the conflict relating to aquaculture. I see no need for a variation in the Standing Ruling to accommodate the Heiltsuk's interest in addressing their stewardship experience.

11. I therefore order that the Heiltsuk may participate by way of separate counsel specifically for the evidentiary hearings pertaining to aquaculture, but that otherwise they remain part of the standing group.

#### **IV. Conclusion**

12. The Terms of Reference for this commission (cl. a(ix)) authorize me to grant, to any person who satisfies me they have a substantial and direct interest in the subject matter of the inquiry, "an opportunity for appropriate participation". I am prepared to vary the Standing Ruling to the extent necessary to overcome the Heiltsuk's conflict with others in their standing group on the aquaculture issue. They may participate by way of separate counsel specifically for evidentiary hearings pertaining to aquaculture. Otherwise, they remain part of the standing group and may participate within that group on all other issues. In my view, this approach overcomes the difficulty raised and provides for the Heiltsuk's appropriate participation in the inquiry's process.

Signed \_\_ May 2010.

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The Honourable Bruce I. Cohen  
Commissioner