

Appendix 11

The Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River

Ruling on Interpretation of Terms of Reference

The Application:

1. By letter dated June 17, 2010, the participants, the Public Service Alliance of Canada and the Union of Environment Workers (“PSAC/UEW”) asked me to interpret the commission’s Terms of Reference. Specifically, the letter requests confirmation that the wording directing me to conduct this inquiry “without seeking to find fault on the part of any individual, community or organization” prohibits me from making a finding of misconduct as the term ‘misconduct’ is defined in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 (“Krever”). In *Krever* at paragraph 40, Cory J. adopted from the Concise Oxford Dictionary (8th ed. 1990) the definition of misconduct as “‘improper or unprofessional behaviour’ or ‘bad management’.”

2. PSAC/UEW requested, and I agreed, to treat their letter as an application. On June 23, 2010, commission counsel distributed a copy of the letter to all of the other participants and asked those who supported the applicants’ position to provide written submissions by July 7; those who had a different position were to provide written submissions by July 21; and any reply submissions were to be filed by July 23.

3. Commission counsel also asked the participants to address in their submissions whether it is appropriate for me to make a ruling on this issue at this stage of the process, and I considered those submissions. The issue raised by this application relates to an important aspect of my jurisdiction and my ruling may provide participants with some guidance in the conduct of the evidentiary hearings. I am satisfied that it is appropriate for me to rule on the application at this stage of the commission’s process.

Appointment

4. On November 5, 2009, the Governor in Council issued an Order in Council setting out the Terms of Reference for the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River. I was appointed Commissioner under Part 1 of the *Inquiries Act*, R.S.C. 1985, c. I-11 (the “Act”).

5. The press release of November 6, 2009 announcing my appointment as commissioner contains the following paragraph: “Justice Cohen has been appointed as Commissioner under Part 1 of the *Inquiries Act*, with all the powers set out in the *Act*, including the authority to hold hearings, summon witnesses and gather evidence needed to conduct the inquiry.”

Terms of Reference:

6. The preamble to the Terms of Reference contains three paragraphs:

Whereas the decline in sockeye salmon stocks in the Fraser River in British Columbia has necessitated the closure of the fishery for a third consecutive year, despite favourable pre-season estimates of the number of sockeye salmon expected to return to the Fraser River;

Whereas that decline has been attributed to the interplay of a wide range of factors, including environmental changes along the Fraser River, marine environmental conditions and fisheries management;

Whereas the Government of Canada wishes to take all feasible steps to identify the reasons for the decline and the long term prospects for Fraser River sockeye salmon stocks and to determine whether changes need to be made to fisheries management policies, practices and procedures – including establishing a commission of inquiry to investigate the matter;

7. The Terms of Reference,

a...

i. direct the Commissioner

A. to conduct the Inquiry without seeking to find fault on the part of any individual, community or organization, and with

the overall aim of respecting conservation of the sockeye salmon stock and encouraging broad cooperation among stakeholders, [emphasis added]

- B. to consider the policies and practices of the Department of Fisheries and Oceans (the “Department”) with respect to the sockeye salmon fishery in the Fraser River – including the Department’s scientific advice, its fisheries policies and programs, its risk management strategies, its allocation of Departmental resources and its fisheries management practices and procedures, including monitoring, counting of stocks, forecasting and enforcement,
- C. to investigate and make independent findings of fact regarding
 - I. the causes for the decline of Fraser River sockeye salmon including, but not limited to, the impact of environmental changes along the Fraser River, marine environmental conditions, aquaculture, predators, diseases, water temperature and other factors that may have affected the ability of sockeye salmon to reach traditional spawning grounds or reach the ocean, and
 - II. the current state of Fraser River sockeye salmon stocks and the long term projections for those stocks, and
- D. to develop recommendations for improving the future sustainability of the sockeye salmon fishery in the Fraser River including, as required, any changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery.

The emphasized language from paragraph a.i.A appears to be unique to this commission.

Submissions in support of the application:

8. The Province of British Columbia (the “Province”) agreed with the position taken by PSAC/UEW. It submits paragraph a.i.A constitutes “sufficient intent to demonstrate”

that I am required to proceed on the basis I will not make findings of misconduct on the part of any person, community or organization, as “misconduct” is used in *Krever*. While the Province acknowledges that, “generally, an inquiry established under the *Inquiries Act* allows the Commissioner to make findings of misconduct”, it is the Province’s position that:

The intent of these provisions, especially (a)(i)(A) by referring to “without seeking to find fault on the part of any individual, community or organization” and the additional wording “and encouraging broad cooperation among the stakeholders” is a clear direction that the Commission should not find fault/misconduct on the part of any individual, community or organization. These words indicate an intention that the Commission is to function as a collaborative process, rather than an adversarial one.

9. The Province supports its submission that I am not to make findings of fault or misconduct by asserting that I have been given the express power to investigate and make findings of fact in paragraph a.i.C of the Terms of Reference “only with respect to scientific issues of ‘causes’ and ‘current’ state and projections.”

Submissions opposing the application:

10. Of the remaining participants, the following filed submissions which took a position different from that of the applicants and the Province: the Government of Canada (“Canada”); the West Coast Trollers Area G Association and United Fishermen and Allied Workers’ Union (“Area G Association” and “UFAWU”); the Conservation Coalition; the Sto:lo Tribal Council and Cheam Indian Band (“STC” and “Cheam”); the Aquaculture Coalition; and the First Nations Coalition.

11. Each of these participants submitted that the wording in paragraph a.i.A does not constrain my ability to make findings of misconduct under the *Act*.

12. Canada approaches the interpretation of paragraph a.i.A by considering the nature of this commission, as reflected in the Terms of Reference. Canada submits the words in English, “without seeking to find fault on the part of any individual, community or organization” and in French “en se gardant de jeter le blâme sur quelque individu,

communauté ou organisation” are there to provide guidance to me that the inquiry should focus on the substantive issues without casting blame.

13. Canada asserts that a “spectrum exists between public inquiries that might be referred to as ‘study inquiries’ and public inquiries that are focused on investigating potential misconduct”. According to Canada, this commission falls “somewhere in the middle of this spectrum” which is demonstrated by the following:

- paragraph a.i.C which directs me to investigate and make independent findings of fact, “which confirms that there is indeed a fact-finding aspect to the Commission”;
- paragraphs a.i.B and a.i.D. which provide that “the Commission is to ‘consider policies and practices’ and to ‘make recommendations’ clearly signal that the Commission is also a ‘study inquiry’”; and
- the fact that this commission is not established under Part II of the *Act*, “which in light of para. 36 of *Krever* suggests that the conduct of individuals is not the predominant purpose of the Commission”.

14. Canada submits:

14. Perhaps most importantly, the Terms of Reference that direct the commissioner to conduct the commission “without seeking to find fault” on the part of any individual, community or organization do not oust the ability of the Commissioner to make [findings of misconduct]. Indeed, this provision does not by its own terms purport to do so. Rather, it provides the Commissioner with guidance as to the nature of the inquiry, namely, that it is a “study inquiry” as much as it is a fact finding inquiry, such that findings of misconduct should not be the predominant purpose of the Commission.

15. Accordingly, depending on the findings of fact that arise throughout the course of the inquiry, it is possible that the Commissioner will determine that a finding of misconduct is warranted. Canada submits that, if such a situation arises, the Commissioner is not prohibited from making a finding of misconduct, provided that procedural safeguards, including those required under section 13 of the *Inquiries Act*, are met.

15. The Aquaculture Coalition referred me to the dictionary definition of “seek” in its submissions:

6. The dictionary definition of “to seek” is to: “try to find, look for ...; make a search or inquiry for, attempt to discover ...” On a plain reading, pursuant to [*Krever*], Term a.i.A directs the Commission to refrain from focusing or aiming the inquiry toward finding fault but does not restrict the Commission from making findings of fault or misconduct, as they arise and are necessary to fulfill the larger purposes of the Inquiry.

16. The submission of Area G Association and UFAWU referred me to paragraph 38 of *Krever*, in which the Supreme Court of Canada, discussing the *Act*, provides some guidance:

Section 13 of the Act makes it clear that commissioners have the power to make findings of misconduct. In order to do so, commissioners must also have the necessary authority to set out the facts upon which the findings of misconduct are based, even if those facts reflect adversely on some parties. If this were not so, the inquiry process would be essentially pointless. Inquiries would produce reports composed solely of recommendations for change, but there could be no factual findings to demonstrate why the changes were necessary. If an inquiry is to be useful in its roles of investigation, education and the making of recommendations, it must make findings of fact. It is these findings which will eventually lead to the recommendations which will seek to prevent the recurrence of future tragedies.

Reply Submission of PSAC/UEW:

17. In their reply submission, the applicants reasserted their position that the only reasonable interpretation and application of the Terms of Reference is one that prevents me from making findings of misconduct. PSAC/UEW responded to the submissions that the words “seeking to find fault” do not prevent “making findings of fault”, arguing that this would allow me “to do by the backdoor what [I] cannot do through the front door.” In the submission of PSAC/UEW, the application of the principles from *Krever* is limited where the commission’s Terms of Reference, as here, contain a direction “to conduct the inquiry without seeking to find fault”:

Certainly section 13 enshrines the right of a person to natural justice before a commission which has the jurisdiction to make findings of misconduct.

That is, it provides that a commission with the authority to find misconduct cannot do so without providing notice and full opportunity to be heard. However, that provision cannot be read to empower each and every commission with the jurisdiction to make findings of misconduct. One must always return to the terms of reference of a commission to see if the Governor in Council bestowed upon the commission that authority.

The Terms of Reference necessarily can and do limit the scope of the Commission as to what it may or may not do.

Certainly one could read ... [*Krever*] to stand for the proposition that, but for an express provision in the terms of reference, a commission appointed pursuant to the *Inquiries Act* has the authority to make findings of misconduct. But, [*Krever*] cannot be read so broadly as stating that regardless of the terms of reference a commission always has the jurisdiction to make findings of misconduct. As stated above, the *Krever* Commission's terms of reference did not expressly restrict that commission from seeking to find fault by any person.

The Terms of Reference of this Commission are best understood as the Governor in Council's direct response to [*Krever*]: that it has decided not to empower the Commission to make findings of fault, including misconduct, against any person unlike the *Krever* Commission which had such power.

Analysis

18. This application calls upon me to interpret the Terms of Reference and, specifically, the wording of paragraph a.i.A.

19. In carrying out my task of interpreting the wording of paragraph a.i.A I am guided by the text, The Law of Public Inquiries in Canada, (Toronto: Carswell, 2010) where the author, Simon Ruel, describes the interpretation of terms of reference of commissions of inquiry at p. 19, as follows:

Commissions of inquiry must act within the confines of the legal authorities creating them. They are captive of their terms of reference. ...

Some rules of interpretation of the terms of reference of commissions of inquiry may be drawn from the case of *Bisaillon c. Keable*: [citation omitted] (1) the preamble of the order in council may be used to circumscribe the scope of an inquiry; (2) the terms of reference should be considered as a whole and portions of the mandate of an inquiry should not be read in isolation; and (3) the terms of reference should be given the benefit of a

reasonable interpretation.

20. Thus, my approach to interpreting paragraph a.i.A is that the Terms of Reference should be read as a whole, and that they should be given a reasonable, and internally consistent, interpretation.

21. There are certain key words contained in the Terms of Reference which I think inform my interpretation of paragraph a.i.A:

- a. the preamble to the commission's Terms of Reference provides, *inter alia*, that the decline in sockeye salmon stocks in the Fraser River has been attributed to the interplay of a wide range of factors, including environmental changes along the Fraser River, marine environmental conditions and fisheries management; and that the Government of Canada wishes to take all feasible steps to identify the reasons for the decline and to determine whether changes need to be made to fisheries management policies, practices and procedures;
- b. paragraph a.i.A, in addition to directing me to conduct the inquiry without seeking to find fault, also directs me to conduct the inquiry with the overall aim of encouraging broad cooperation among stakeholders;
- c. paragraph a.i.B directs me to consider the policies and practices of the Department of Fisheries and Oceans with respect to the sockeye salmon fishery in the Fraser River;
- d. paragraph a.i.C directs me to investigate and make independent findings of fact regarding the causes for the decline of Fraser sockeye salmon including a wide range of factors and to make findings of fact regarding the current state of the fishery and its long term projections;
- e. paragraph a.i.D directs me to develop recommendations for improving future sustainability of the sockeye salmon fishery in the Fraser River, including any changes to policies, practices and procedures of the DFO in relation to management of the fishery.

22. The position of the applicants is essentially that the authorization to carry out my directions under the above-mentioned paragraphs of the Terms of Reference does not include me being able to find fault, meaning misconduct as that term is defined in *Krever*, on the part of any individual, community or organization.

23. With respect, I disagree with the interpretation of paragraph a.i.A submitted by the applicants. That paragraph does not state “without finding fault on the part of any individual, community or organization,” which the Government of Canada could easily have provided. In my opinion, the words “without seeking to find fault” are not tantamount to stating “without finding fault”, particularly when read in the context of the Terms of Reference as a whole.

24. In my opinion, the words in paragraph a.i.A provide me with a clear direction that this inquiry is not to focus on assigning fault to any individual, community or organization, but rather to encourage cooperation among the stakeholders with the overall aim of the inquiry to respect conservation of the Fraser River sockeye salmon fishery. The Terms of Reference when considered as a whole reflect that the Government of Canada recognizes the importance of Fraser River sockeye salmon to the stakeholders in the fishery, and the historical tensions between those with different interests in and perspectives toward the fishery, and the impact on all of the stakeholders arising from the declines in the fishery. An inquiry into the fishery focused on finger-pointing would obviously be counterproductive to achieving the aim of the inquiry.

25. However, in my opinion, the background to my appointment, together with the language used both in the preamble to and the provisions of the Terms of Reference when considered as a whole, also reflect that to the extent the evidence leads me to a conclusion that any individual, community or organization has engaged in conduct which, directly or indirectly, is a factor causing or contributing to the decline of Fraser River sockeye salmon; or that the conduct of any individual, community or organization forms a basis for making recommendations to change policies, practices and procedures in relation to the management of the fishery, then I am authorized to make findings or recommendations based upon that conduct.

26. Moreover, to the extent that any of my findings or recommendations flowing from the Terms of Reference may imply misconduct on the part of any individual, community

or organization, then I am satisfied that if I am considering making such a finding or recommendation I am required to comply with s. 13 of the *Act* which provides:

No report shall be made against any person until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel.

27. Therefore, if in carrying out my mandate I conclude that I may make findings or recommendations which may reflect adversely on any individual, community or organization, then the procedural safeguards provided for in s. 13 will become engaged.

28. Finally, this ruling should not be read as inviting questioning during the evidentiary hearings the sole aim of which is to expose misconduct on the part of any individual, community or organization. On the contrary, I expect participants and their counsel, through their lines of inquiry, to cooperatively strive to assist me in fulfilling my directions under the Terms of Reference. I also expect counsel for the commission and participants to be vigilant in conducting their lines of inquiry to respect the overarching objective of the inquiry which is to identify the causes for the decline of the fishery and to develop recommendations for improving its future sustainability.

Signed 15 September 2010

The Honourable Bruce I. Cohen
Commissioner

[Original signed by Commissioner 15 September 2010]