

Clerk of the Privy Council and
Secretary to the Cabinet



Greffier du Conseil privé et
Secrétaire du Cabinet

Ottawa, Canada
K1A 0A3

October 6, 2010

The Honourable Bruce Cohen
Commissioner
Commission of Inquiry into the Decline
of Sockeye Salmon in the Fraser River
Suite 2800, PO Box 11530
650 West Georgia Street
Vancouver, British Columbia
V6B 4N7

Dear Commissioner Cohen:

I write in response to your letter of September 28, 2010, in which you recommend changes to the participant funding arrangements under the Contribution Program for the Cohen Commission in respect of two participants.

In the first case, the participant group consisting of the Laich-kwil-tach Treaty Society, the Aboriginal Aquaculture Association and Chief Harold Sewid wishes to use two senior counsel rather than one senior counsel. In the second case, the First Nations Coalition has requested that you recommend that it be permitted to retain four senior counsel and four junior counsel rather than the one senior counsel and two junior counsel already approved.

In considering your recommendations, I note that you have come to the reasoned view that the "exceptional circumstances" required under the terms of the Contribution Program have been met, and that the proposals would not increase the total amount of funding to be provided to each of these groups. Accordingly, I am pleased to inform you that your request for changes to the participant funding arrangements is granted.

I trust that this is satisfactory and I wish you well in your continuing work.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Wayne G. Wouters'.

Wayne G. Wouters



September 28, 2010

Via Email

Mr. Wayne G. Wouters
Clerk of the Privy Council and Secretary to the Cabinet
Privy Council Office
Office of the Clerk of the Privy Council and Secretary to the Cabinet
Langevin Block, 80 Wellington Street
Ottawa, Ontario K1A 0A3

Dear Mr. Wouters:

Re: Changes to Participant Funding Arrangements under Contribution Program for Cohen Commission

On 12 May 2010 (as amended 19 May 2010), I recommended that certain standing groups be granted funding for legal fees in order to participate in the Inquiry. On 9 June 2010, you advised that the Government of Canada had granted funding as I had recommended, in accordance with the terms and conditions of the Treasury Board Contribution Program, to a maximum limit of \$3,423,200.

When I made my previous funding recommendations to you, in most cases I recommended funding, as has occurred generally in other federal commissions of inquiry, on the basis that each group would employ the services of one senior and one junior lawyer. I then allocated hours between the senior and junior counsel.

On 17 August 2010, I wrote to you recommending changes in my funding recommendations in respect of two groups. On 27 August 2010 you approved those changes.

I have now received applications from three recipient groups, all seeking findings of "extraordinary circumstances" under cl. 10(b)(ii) of the Terms and Conditions of the Contribution Program, to permit payment of legal fees to more than one senior and one junior counsel for their respective recipient groups. I have determined that in two cases, described below, the applicants have convinced me that extraordinary circumstances do

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exist. I therefore recommend that additional legal counsel be approved for these groups as set out below and indicated on the attached Recipient Funding Checklists. In the third case, I have determined that I do not have sufficient information to find that extraordinary circumstances exist. We will be advising this applicant that further information is required to make its case and we may be in touch further on this matter in the future.

I emphasize that the funding reallocation recommended below does not increase the total amount of funding to be provided to these group. None of these applicants have asked for additional funds, only different distributions of the existing funds over a larger number of lawyers.

I will describe the applications and then provide my analysis and recommendations.

The Applications for Additional Legal Counsel

Laich-kwil-tach Treaty Society ("LKTS"), Aboriginal Aquaculture Association ("AAA") and Chief Harold Sewid

In my Standing Ruling of 15 April 2010, I granted the LKTS, AAA, Chief Sewid and the Heiltsuk Tribal Council (the "Heiltsuk") joint participant status. At a later date, I granted the Heiltsuk separate standing with respect to issues related to aquaculture. Still later, I ruled with regret that the Heiltsuk should be granted separate participant status for the inquiry. I recommended, and the Privy Council approved, a division of the funding between the two newly constituted participant groups: (1) the LKTS, AAA and Chief Sewid (for simplicity, "LKTS/AAA"); and (2) the Heiltsuk. In this split, the LKTS/AAA received 324 senior counsel hours and 586 junior counsel hours.

The LKTS/AAA now apply for a determination that extraordinary circumstances exist to warrant them having two senior and one junior counsel. More specifically, they ask that they be allowed one senior counsel to represent the LKTS/AAA on fisheries related issues, a second senior counsel from a separate firm to represent the LKTS/AAA on aquaculture related issues, and one junior counsel who would work with both senior counsel. They propose a 50:50 split in the senior counsel hours between their two proposed senior counsel.

In support of their application, these participants argue that this Inquiry itself is extraordinary in its scope and in the number of interested participants. As well, they say that their participant (recipient) group is distinct in that it is comprised of two groups—the LKTS and the AAA—both with shared views and interests, yet each with distinct knowledge, expertise and focus. They say the LKTS is uniquely suited within the group to focus on fisheries issues and the AAA is uniquely suited to address aquaculture issues. These participants also submit that they have longstanding, ongoing relationships with separate counsel, and that "the rules that govern the administration of justice should not disturb solicitor-client relationships, whenever a reasonable and effective alternative exists." Finally, they say their proposed model of drawing on senior

counsel most knowledgeable about fisheries or aquaculture issues will make efficient use of funding, and using a common junior counsel will eliminate any potential for duplication of efforts. These participants are prepared to reduce the administrative burden on the commission by billing through one law firm if necessary.

First Nations Coalition

In my original Funding Recommendation of 12 May 2010 (as amended 19 May 2010), I found that the First Nations Coalition had established extraordinary circumstances and I recommended funding for one senior and two junior counsel. (The First Nations Coalition had originally sought funding for two senior and two junior counsel.) I recommended, and the PCO approved, 675 hours for senior counsel, and 1,826 hours divided equally between two junior counsel.

The First Nations Coalition now seeks a determination that extraordinary circumstances exist to apportion the funding granted over a total of eight counsel (four senior and four junior) rather than three. I note that some of the counsel have lower billing rates, according to the Treasury Board Guidelines, than the maximum rates originally contemplated for this file. Apportioning some of this recipient's hours to these additional counsel will therefore result in a cost saving to the Contribution Program.

In support of a finding of extraordinary circumstances, the First Nations Coalition makes the following points. First, it says the willingness of the coalition members to enter into a coalition was contingent on their ability to have multiple counsel represent them before the Inquiry. Second, it says that the complexity of the Coalition's membership means that the Coalition cannot be fairly represented without additional counsel. I note that they have the widest grant of standing of any participant in the Inquiry, and are comprised of the largest number of constituent groups—a total of 13 different groups, nine of which are themselves coalitions of several First Nations. Third, the First Nations Coalition says having multiple counsel will promote efficiency because it will be able to draw on different lawyers' specific knowledge and expertise; it will be able to accommodate the occasional unique representation of some group members on specific issues (I note that under my Standing Ruling they would have to seek my leave in order to have part of their coalition participate separately on a distinct issue); and it will be able to staff different tasks with lawyers who have an appropriate level of experience.

Analysis and Recommendations

The terms and conditions of the Treasury Board Contribution Program, in cl. 10(b)(ii) provide as follows:

Payment of counsel fees under this Program is, except in extraordinary circumstances identified by the Commissioner, limited to one senior counsel and one junior counsel per recipient.

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.

Extraordinary circumstances do not arise because of convenience for a participant, prior counsel-client relationships, 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.

In my view, extraordinary circumstances could arise for two different but related reasons. First, a participant might provide an evidentiary basis to show that, without additional counsel, the participant would have a significantly diminished capacity to participate, so as to reduce the quality of the hearings and/or create an inability to address the issues for which the participant has been granted standing. Second, a participant might present a persuasive argument that significant efficiencies and benefits would accrue to the Inquiry and its hearing process through the recipient's use of additional counsel, making the participant's participation through additional counsel more appropriate. For example, participants might convincingly make the case that additional counsel will facilitate the efficient and cost-effective presentation and examination of issues before the commission.

Applying my view of what constitutes extraordinary circumstances to these applications, I am satisfied that extraordinary circumstances exist in relation to both the LKTS/AAA and the First Nations Coalition to warrant my recommendation for additional legal counsel to be permitted under the contribution agreements.

LKTS/AAA

With respect, I do not consider the circumstances of the Inquiry itself to present extraordinary circumstances for the participation of this applicant group. Nor do I see the long-term relationships of these participants with different counsel as preventing them from jointly hiring adequate legal counsel to represent them on the common issues for which they have received joint standing. I say this bearing in mind the nature of this proceeding; it is a commission of inquiry rather than litigation to determine the legal obligations and rights of parties. In this context, I expect capable counsel would be in a position to represent a number of participants and to obtain sufficient instructions for the purposes of the Inquiry.

However, I do see efficiencies in the LKTS/AAA proposal to use counsel with the most expertise to deal with different subject matter. These participants propose to divide labour between two senior counsel who are most suited to the subject matters they will

tackle on behalf of the whole participant group. They also propose to use a shared junior between the two seniors, providing an assurance of coordination and no duplication of efforts. Essentially, the group as a whole will be represented by two different senior counsel, with each taking the lead on different subject matter. They have also offered to coordinate billing in a way that will reduce the administrative burden on the commission arising from having two law firms representing this recipient. In this context, I am prepared to find extraordinary circumstances and recommend that the funding for senior counsel previously granted to the LKTS/AAA be equally divided among two senior counsel.

For clarity, my finding of extraordinary circumstances for this group does not impact on any rules of the Contribution Program other than cl. 10(b)(ii). In particular, I wish to emphasize that this group is still bound by cl. 10(b)(iii) which provides in part that "Recipients may claim legal costs for only one legal counsel to attend any particular day of hearings unless otherwise authorized by the Commissioner."

First Nations Coalition

I previously found that the number of joint participants within this coalition, the breadth of issues upon which the coalition has standing, and the geographic diversity of the coalition members (from inland terminal areas, to the lower Fraser, to marine areas) constituted extraordinary circumstances (see my funding recommendation of 12 May 2010 (as amended 19 May 2010)). However, at that time, I was not persuaded that more than three counsel were necessary to provide appropriate participation of these participants. I note that the First Nations Coalition initially applied for funding for four counsel. That number has now grown to eight.

I appreciate that the complexities and challenges of coordinating input from a large number of First Nations over such a large and geographically diverse area presents particular challenges that may have become more apparent to the Coalition's lead counsel as work on the Inquiry has progressed. I am also aware that having a team of eight lawyers from multiple firms representing clients within the Coalition may effectively undermine my ruling that these participants have joint standing and are expected to participate as a group. Such a large team may also create additional administrative burdens on the commission staff.

Still, I am now persuaded that extraordinary circumstances do exist for this group, and that additional lawyers are needed to adequately coordinate and represent this large number of clients. I recommend that the eight counsel proposed by the First Nations Coalition be approved, but with the following caveats to ensure that the process remains efficient and the participation remains appropriate. Counsel for the First Nations Coalition must all bill the Contribution Program through one law firm. I am confident that the lawyers involved can work out an arrangement amongst themselves to sort out billing and distribution of the funds. As well, to reiterate my recommendation of 12 May 2010 (as amended 19 May 2010), this group is only entitled to have one senior and one junior counsel appear at any given time during the hearings, unless they have leave

from me, sought in advance, for additional counsel to appear. (Please note that, in my previous funding recommendation I authorized the First Nations Coalition to claim legal costs for two counsel to appear at hearings.) I expect the lawyers working on behalf of the First Nations Coalition to coordinate amongst themselves to ensure no duplication of efforts and efficient use of the funds provided.

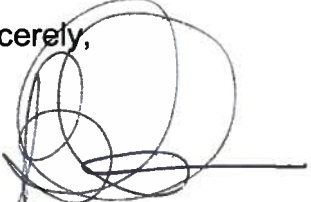
The specific breakdown of counsel hours that I recommend for this standing group is as follows:

Activity	Sr #1 BG	Sr #2 TH	Sr #3 TW	Sr #4 CO	Jr #1 LP	Jr #2 CR	Jr #3 RM	Jr #4 BJ
Preparation for hearings	70	10	10	0	280	100	40	50
Attendance at hearings	230	50	20	0	255	0	25	20
Interviews	30	0	15	0	215	0	10	10
Meetings and other occasions arranged or deemed necessary by commissioner	25	0	0	0	25	0	0	0
Preparation of submissions	45	0	0	0	185	50	0	0
Review of materials	80	20	0	20	200	280	40	40
Application for standing	40	0	0	0	0	0	0	0
Release of interim report	5	0	0	0	0	0	0	0
Release of final report	5	0	0	0	0	0	0	0
TOTAL:	530	80	45	20	1161	430	115	120

Please advise whether the PCO will approve payments based on these modifications to the funding allocations for the LKTS/AAA and the First Nations Coalition. I have attached revised "Recipient Funding Checklists" for these two groups.

I look forward to hearing from you as soon as possible on these modifications to my funding recommendation, so that I may communicate any change in funding status to the participants involved.

Sincerely,



The Honourable Bruce I. Cohen
Commissioner
Enclosures