

CORRIGENDUM

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

RULING RE: RULES 52 AND 53 APPLICATION BY
CONSERVATION COALITION

The Honourable Bruce I. Cohen, Commissioner

In paragraph 23, line 1, the reference to Rule 13 should read Rule 6.

Dated

Sept 16, 2011



The Honourable Bruce I. Cohen
Commissioner

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I. The Application

1. By letter dated May 24, 2011, the participant Conservation Coalition (the "applicant"), seeks two orders pursuant to Rules 52 and 53 of the commission's *Rules for Procedure and Practice* (the "Rules").
2. Specifically, the applicant seeks orders that:
 - 1) five individuals: Otto Langer, John Werring, Doug Chapman, Jeff Hutchings and Gordon Hartman (the first four individuals collectively, the "proposed witnesses"), be called to testify before the commission; and
 - 2) the witness panels for each of the remaining hearings each contain at least one non-governmental witness.
3. On May 24, 2011, commission counsel distributed a copy of the application materials to all of the other participants. Commission counsel asked any participants who wished to respond to the application to submit their responses by May 27, 2011. The applicant was given an opportunity to submit reply submissions by June 1, 2011.
4. Following this application and response, commission counsel decided to call Gordon Hartman to testify. Subsequent to that decision, Mr. Hartman indicated to commission counsel that he no longer wished to testify. This ruling therefore concerns only Messrs. Langer, Werring, Chapman and Hutchings, and references to the "proposed witnesses" do not include Mr. Hartman.

Rules 52 and 53

5. Rules 52 and 53 provide:

52. Participants may propose witnesses to be called as part of the inquiry. Participants will provide commission counsel, in a timely way, the names, addresses, telephone numbers and email addresses if known, of all witnesses they believe the Commissioner ought to hear. If possible, participants will provide statements of the anticipated evidence of the proposed witnesses and copies of the documents relevant to the witness's testimony, including those to which they would refer.

53. Commission counsel may decline to call a witness proposed by a participant. If the participant believes that the witness's evidence is necessary, the participant may apply, in compliance with Part H of these Rules, to the Commissioner for an order that commission counsel call that witness.

II. Submissions of the Applicant

6. The applicant submits that Rule 53 provides that I may issue an order to call a witness to appear before me where commission counsel has declined to call that witness.

7. The present application concerns witnesses that the applicant propose to give evidence on the topic of habitat enforcement and management ("habitat").

8. The applicant says that it has proposed many potential witnesses to commission counsel on various subject-matters during the course of the inquiry. In some instances, the witnesses have been interviewed by commission counsel, and in some cases, they have been called to give evidence.

9. The applicant submits that it has made a considerable effort, through various letters and other communication with commission counsel, to convince commission counsel to include the proposed witnesses in the panels on habitat.

10. Specifically, the applicant submits that:

(i) the proposed witnesses should be called in order to provide a counter point to governmental witnesses from both DFO and provincial government departments. The applicant also says that unless the Commissioner has the opportunity to hear varying viewpoints, the presentation of evidence is one sided and leaves the record incomplete;

(ii) because commission counsel did not call non-governmental witnesses on the topic of habitat, large evidentiary gaps were left in the evidence presented to the commission;

(iii) as a participant with full standing at the inquiry, it has the right to be heard. It claims that the only way to have its views heard by the commission is by way of putting forward evidence through witnesses at hearings, or by way of cross-examination, and that cross-examination alone is insufficient to fully convey its perspective on the issues in question;

(iv) that commission counsel's decision to decline to call the proposed witnesses was in part, because the proposed witnesses "[do not offer] sufficiently relevant and current evidence – as opposed to perspectives...". The applicant submits that commission counsel's assessment of the proposed witnesses is a reviewable error, and that declining to call the proposed witnesses is a denial of fairness and natural justice to the applicant; and

(v) that each of the proposed witnesses is a well-known expert.

11. In summary, the applicant submits that it has the right to have its witnesses called to testify and that the commission should hear from the proposed witnesses in order to provide a balanced viewpoint and to fill in gaps that were left in the evidence by the government witnesses.

12. As a result, the applicant seeks an order that the remaining witness panels each contain at least one non-government witness and argues that it is

particularly necessary to have a non-government witness in areas where the public has expressed the opinion that there are biased views held by the government.

III. Participant Submissions in support of the Application:

13. The Aquaculture Coalition and the First Nations Coalition ("FNC") agree with the position taken by the applicant.

14. The Aquaculture Coalition submits that public inquiries serve the important social function of helping restore public confidence in a particular situation, institution and/or government itself by allowing the public to be apprised of "the conditions pertaining to a worrisome community problem" and providing an opportunity for the public to be part of recommendations for its resolution. It states the instant commission arose in the context of

"public concern regarding ongoing decline of sockeye returns in the Fraser River, and a crisis of confidence in the management of the Fraser sockeye stocks by the Department of Fisheries and Oceans. ... The Commission is directed to inquire into the reasons for the decline, including the policies and practice of the DFO. It is tasked to make recommendations to improve the future sustainability of stocks, including making recommendations for the better management of the fisheries by DFO.

If the Commission primarily provides a forum in which governmental (primarily DFO) witnesses present governmental perspective on its practices, policy and performance, the Commission of Inquiry can neither discharge its broad social function of addressing public concerns, nor fulfil its specific mandate to address and make recommendations regarding the reasons for the decline of the Fraser sockeye stocks.

... [!]t is essential that the Commissioner hear evidence from persons with a range of experience with and knowledge about, amongst other things, the Fraser sockeye fisheries, the practices of DFO, the effects of those practices, and the science that pertains to various issues relating to the sockeye fisheries. This will likely include persons who are more critical of DFO practices or who have a different view of the scientific underpinnings to DFO policy and the causes of the decline that DFO representatives themselves."

15. The FNC supports the applicant's application that the commission call more non-governmental witnesses, and in particular, that the Commissioner direct commission counsel to call non-governmental witnesses for the remaining topic areas. The FNC takes no position on the proposed witnesses.

IV. Submissions opposing the Application

16. Commission counsel opposes the application. The participants, the Government of Canada and the Province of British Columbia, are in agreement with the position taken by commission counsel in opposition to the application.

17. Commission counsel makes five main submissions:

1. Procedurally, Rules 52 and 53 give the Commissioner the discretion to call the necessary and appropriate witnesses. This is not a judicial review, and no duties of administrative fairness or natural justice attach to commission counsel's initial scheduling of the hearings.
2. The applicant has not provided information that indicates that testimony from the proposed witnesses would help fulfill the commission's mandate. Instead of statements of anticipated evidence, the applicant provided biographies of the proposed witnesses, and commission counsel interviewed the proposed witnesses. Neither the biographies of the witnesses nor the interviews with commission counsel demonstrated their knowledge is sufficiently current or relevant on the DFO's current approach that it would be of assistance to the commission in discharging its mandate, in light of the existing evidentiary record of hearings, exhibits and Policy and Practice reports;
3. The commission has terms of reference that cover a broad array of topics and issues, with an ambitious hearing plan and a very limited hearing schedule. The conferring of participant status on an individual or group does not include the right to have that participant's witnesses

called on each topic. If it did, the commission would have to be extended for many more months. As a result, the commission can only call witnesses whose views cannot adequately be reflected by providing information to commission counsel through interviews that informs commission counsel's examination of other witnesses. This necessitates making difficult choices in scheduling witnesses and a less-than-comprehensive selection of witnesses;

4. Commission counsel makes a distinction between "perspective evidence" and "factual evidence". While acknowledging that it is not always a hard distinction, commission counsel submits that when a witness from advocacy or NGO backgrounds provides a critique, that may fairly be considered a "perspective". On the other hand, where a witness is intimately involved on a daily basis with the DFO's operations and the issues addressed in the hearings, they are primarily "factual" witnesses (though with their own perspectives).
5. Regarding the order sought for "non-government" witnesses, commission counsel submits that this is not properly brought under Rule 53, which contemplates orders for specific witnesses, not general directives for "types" of witnesses. Moreover, having a standing requirement to include non-government witnesses for every panel would be unduly restrictive, may waste valuable hearing time, and would fetter commission counsel's ability to make decisions as to the most effective and efficient manner of delivering information and evidence to the Commissioner. Finally, commission counsel has and will continue to put many varied perspectives before the commission, including many non-government witnesses.

18. Canada takes no position the applicant's application to call the proposed witnesses, insofar as the proposed witnesses would give evidence on evidentiary topics that have not already been heard. However, Canada opposes calling any of the proposed witnesses to testify on topics that have already been heard.

Canada says that if any of the proposed witnesses testify, that their evidence should relate to the topic scheduled for that day. It says that "it would be unfair and potentially prejudicial to go back over old topics with new witnesses". It submits that participants have prepared for and questioned witnesses on the evidentiary topics that have already been heard based on the witnesses that were put forward by the commission for those topics, and that counsel would have prepared differently and posed different questions to those witnesses if it was known that other individuals were going to be called to give evidence.

V. The Applicant's Submissions in Reply

19. In reply, the applicant refers to evidence that has been provided by DFO witnesses that it says demonstrates that habitat protection that is undertaken by the DFO is inadequate, and that the DFO does not know the full extent of habitat degradation and loss. The applicant submits that the function of observing, recording and enforcing violations of habitat degradation and loss has been taken over in considerable part by non-government individuals and groups. Therefore these non-government individuals and groups should be permitted to appear before the commission as witnesses.

20. The applicant also submits that the evidence given by DFO witnesses shows that many non-governmental individuals are carrying out functions that were previously done by the DFO. It says that non-government individuals report that the DFO is not meeting its legislative obligations with respect to the protection of habitat, and in some cases that government thwarts attempts by non-government individuals to prosecute habitat infractions. Further, it submits that therefore non-governmental individuals should be called as witnesses to provide evidence on these issues. Further, it submits that the proposed witnesses can give evidence on how the DFO has obstructed non-government individuals' efforts at conservation in the areas of gravel mining, and at prosecuting offenses in the area of municipal wastewater, both areas that are

relevant to habitat. They can also give evidence on how government bureaucrats use scientific uncertainty to foster industrial growth.

21. The applicant says that the commission's trend is to call fewer non-government witnesses and more government witnesses, and that this trend will result in gaps in the evidentiary record which is not in the public interest, particularly on the issue of habitat.

VI. Decision

22. First, my determination of the application is not one of deciding an appeal from a decision of commission counsel. Rather, in marshalling the evidence, organizing and setting the dates for hearings and deciding upon whom to call as witnesses, commission counsel is exercising a purely managerial and not an adjudicative role.

23. Rule 13 in particular provides that I determine on "what terms and in which parts of the Inquiry a participant may participate and the nature and extent of such participation." Thus, I retain my discretion as to the nature and scope of the evidence to be called. Moreover, a grant of standing to a participant does not bring with it a right to have that participant's proposed witnesses called to testify at the hearings.

24. Thus, my consideration of the application will focus not upon whether commission counsel has committed a reviewable error, the approach taken by the applicant, but whether the proposed witnesses should give evidence before the commission on the topic of habitat because I have concluded that their evidence bears upon the public interest and should be brought to my attention.

25. The main thrust of the application is twofold: the applicant notes that the majority of the witnesses called to testify at the hearings on the topic of habitat were government employees and thus the commission did not hear a non-government perspective. The applicant made reference to several general areas where it claimed that the proposed witnesses would provide evidence not elicited

from the government employees. It submitted that the proposed witnesses would “provide their experience and efforts with respect to protecting and conserving fish habitat where the federal government has made an explicit decision not to enforce its own habitat protection laws,” and that the proposed witnesses will “counter the statements by government bureaucrats that habitat loss is being adequately protected by the government.” Second, the applicant claimed that the testimony from the government employees left certain specific evidentiary gaps.

26. Dealing first with the applicant’s assertion that the commission should hear a non-government perspective on the topic from the proposed witnesses relating to evidence elicited from government witnesses, I have concluded, with respect, that I must reject this assertion. I have carefully considered the expertise and brief description of the anticipated evidence of the proposed witnesses supplied by the applicant and I am satisfied that the proposed witnesses should not be ordered to give evidence. In my view, the points raised in support of the applicant’s contention in relation to this body of evidence can be addressed through final submissions.

27. In arriving at my decision I am particularly mindful of the pressures on the commission’s hearing schedule and in this context the fact that commission counsel interviewed the proposed witnesses, in some cases more than once, and concluded that they should not be called for the reasons expressed, but note that commission counsel nevertheless benefitted from the interviews of the proposed witnesses in formulating two Policy and Practice Reports and in preparing questions for the witnesses that were called to testify.

28. However, I have reached a different conclusion with respect to the applicant’s assertion that the testimony of the witnesses left certain specific evidentiary gaps.

29. The applicant’s position is that on two different dates the evidence elicited in direct or cross-examination left a gap in the evidence that should be addressed

by evidence from the proposed witnesses. The applicant made reference to several specific parts of the transcripts of evidence that demonstrated these gaps. I will review these in some detail.

30. First, on April 7, 2011 the panellists were Paul Steele, Randy Nelson and Manon Bombardier. Mr. Steele has worked in the DFO Conservation and Protection program since 1980, in various roles of increasing responsibility, including as director of the Enforcement Branch, until he became Director General of the DFO's Conservation and Protection Branch. Mr. Nelson has worked in the DFO for 34 years in various positions, and the position he held at the time of the hearing was Director of Conservation and Enforcement for the Pacific Region. Dr. Bombardier held various positions as a researcher and biologist. In 2003 she joined Environment Canada's Science and Technology Centre. Beginning in 2006, she held various enforcement roles, until 2010, when she was appointed the National Director of Environment Canada's Environmental Enforcement Directorate.

31. One of the subjects of direct examination was whether the administration of s. 36 of the *Fisheries Act* should revert to the responsibility of DFO from Environment Canada. Commission counsel asked the witnesses whether it would change the amount of resourcing involved to have responsibility for s. 36 moved to the DFO. Mr. Steele testified that his experience with transfers of functions across departments was that they did not always happen effectively because each department had a tendency to hold onto its own jurisdiction. He did note that when the directive came directly from high political authority the transfer happened much more effectively. When Dr. Bombardier was asked for her opinion on the question, she testified that she had no comment because it was beyond her level.

32. Dr. Bombardier was also asked about s. 42 of the *Fisheries Act*, a provision dealing with the government launching a civil suit in order to recover costs that would arise from an unauthorized deposit and whether it is a measure

used much or at all. She replied that to her knowledge it has not been used, but added the proviso that her experience with Environment Canada only dates back to 2006, so that while it may have been used in the past she had no background knowledge to be able to answer the question. Mr. Steele testified that to his knowledge the provision had never been used.

33. The second body of evidence noted by the applicant relates to the evidence from three witnesses who testified on the topic of fisheries monitoring and enforcement on May 11, 2011. They were Robert Houtman, a catch monitoring biologist with DFO since 2002 at its Pacific Biological Station in Nanaimo, Lester Jantz, area chief of resource management for the DFO in the B.C. interior since 2006 and Matthew Parslow, a management biologist with the DFO since 2009 in the lower Fraser area.

34. In cross-examination, counsel for the FNC referred to a document which states that First Nations economic opportunity fishery monitoring will continue to require 100% enumeration. Dr. Houtman testified that he was not sure of all of the reasons but speculated that it had to do with ensuring catch is separated between the economic opportunity fishery and FSC catch. He suggested that Mr. Parslow might be able to explain. Counsel then asked Mr. Parslow why the requirement of data was for 100% enumeration for the economic opportunity fishery in the lower Fraser using gillnet fishing vessels. The witness testified that this was a program that was developed before his arrival. However, he thought it was a different way of getting at an estimate of catch so that there were perhaps other pieces of information which DFO was not collecting in this fishery which DFO would need to incorporate into its program in order to be able to estimate catch based on a subsample of 35%.

35. Mr. Jantz was asked in cross-examination whether the Conservation and Protection reporting had changed to a "full line reporting relationship as opposed to a matrix-management model within DFO." He explained that the changes came about as a result of recommendations from the Williams Report. Counsel

asked the witness about some of the challenges associated with the relationship between the DFO and First Nations. He described how his management coordinates with the Conservation and Protection group in the interior. Mr. Parslow was then asked whether there is coordination in the lower Fraser and he responded by describing the relationship but noted that he could not speak to the time prior to the Williams Report recommendations because he was not with the DFO at the relevant time.

36. To the extent that these witnesses were not able to answer the questions of commission counsel or counsel for the FNC because they did not have a history with either DFO or Environment Canada which would permit them to have knowledge about the topic, I am of the view that it would be appropriate to have Mr. Langer provide limited evidence for the sole purpose of answering these same questions.

37. Dr. Langer holds a Master Degree in fisheries biology. In 1969 he joined the DFO as a habitat protection biologist with his main area of work being in the Fraser Basin. In 1976 he moved to Environment Canada as head of Freshwater Pollution Studies and Contaminants Control and in 1983 he re-joined the DFO as Chief of Habitat Management for the entire Fraser Basin, Northern BC and the Yukon. From 1990 to 2002 he was the Chief of Habitat Planning and Assessment.

38. Given his background, I find that to the extent Mr. Langer is able to provide evidence from his personal knowledge to answer the questions posed to the above-noted witnesses, that he should be permitted to file an affidavit with the commission by not later than September 19, 2011. Commission counsel and participants may pose cross-examination questions by sending their questions in writing to the commission by not later than September 23, 2011. Commission counsel shall circulate the questions to counsel for the applicant and all participants. Mr. Langer will then have until not later than Friday September 30, 2011 to file his affidavit responding to the questions.

39. I wish to stress that in his affidavit Mr. Langer shall depose only to his direct knowledge based on his past employment with the DFO or Environment Canada respecting the questions put the witnesses which they were unable to respond to due to their limited tenure or the scope of their employment with these two government organizations. In all other respects the application is dismissed.

Dated

September 12, 2011.


The Honourable Bruce I. Cohen
Commissioner