

Cohen Commission

Ruling on Application Seeking Exceptional Circumstances under Contribution Program Terms and Conditions cl. 10(b)(ii) Brought by Western Central Coast Salish First Nations

1. The Western Central Coast Salish First Nations (“WCCSFN”) are comprised of the Cowichan Tribes, the Chemainus First Nation, the Hwlitsum First Nation, and the Penelakut Tribe. The WCCSFN shares a grant of standing with the Te’Mexw Treaty Association (“TTA”), which has not applied for funding. In my Funding Recommendation of 12 May 2010 (as amended 19 May 2010), I recommended that the WCCSFN receive funding for one senior counsel (375 hours) and one junior counsel (637 hours).
2. On 17 September 2010, Mr. John Gailus wrote to the commission on behalf of the WCCSFN, seeking a finding of exceptional circumstances under cl. 10(b)(ii) of the Term and Conditions of the Contribution Program, to permit payment of legal fees to more than one senior and one junior counsel for the WCCSFN recipient group. More specifically, the WCCSFN seeks representation through two senior and two junior counsel, with one senior/junior pair representing the Cowichan Tribes and Chemainus First Nation, and the other senior/junior pair representing the Hwlitsum First Nation and the Penelakut Tribe. On 27 September 2010, the commission received a letter from Mr. David Robbins on behalf of the Cowichan Tribes and Chemainus First Nation, specifically adopting the submissions of Mr. Gailus.
3. In support of its application, the WCCSFN notes that the constituent groups applied separately for standing, but once I ruled that they should share a grant of standing, they applied for funding jointly, assuming they could proceed with separate funded counsel. The WCCSFN submits that the “one senior/one junior” restriction on their funding “fails to take into account the unique nature of this inquiry and the fundamental nature of the clients’ right to choose counsel. It also has the potential to expose legal counsel of the WCCSFN to present

and future conflicts of interest.” The WCCSFN does not state what these conflicts might be. The group submits that forcing these First Nations with “divergent interests” to retain “only one counsel is inconsistent with Supreme Court of Canada authority on the duty of undivided loyalty that legal counsel owe to their respective clients.” Finally, it says the representation proposal offered by the group would maintain the smooth functioning of the Commission and ensure that the respective members of the groups are “vigorously represented.”

4. 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.

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. Similarly, I also do not find extraordinary circumstances to arise because of prior counsel-client relationships. 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

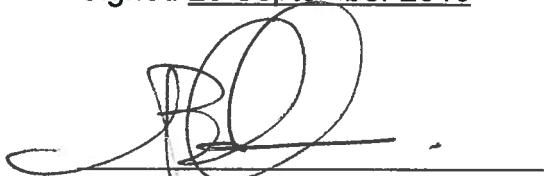
number of participants with shared interests and to obtain sufficient instructions for the purposes of the Inquiry.

7. 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 Inquiry.
8. Applying my view of what constitutes extraordinary circumstances to this applicant group, I regret that I am not able to find extraordinary circumstances for the WCCSFN based on the submissions they have provided to me. This participant group relies on a "right to counsel of choice" argument, and potential, future, unsubstantiated conflicts between participants in the group. The group offers nothing to ensure its appropriate participation through additional counsel, in accordance with its grant of standing, which is shared not only among these four First Nations, but also with the TTA. Instead, the WCCSFN indicates that they want the funding split so that different counsel may separately represent two sub-groupings of this standing group: the Cowichan/Chemanius group and the Hwlitsum/Penelakut group. With respect, this was not the basis on which I granted standing to these participants. They were granted *joint standing*, which means that, unless I grant them leave to do otherwise, members of a standing group are expected to coordinate their efforts and participate jointly, speaking through one voice at the Inquiry. While I appreciate that in other processes, these groups may see their interests as

distinct from one another, I found their interests in the subject matter of this Inquiry to be sufficiently similar to permit them to participate collectively.

9. It may be that the WCCSFN is able to demonstrate that it faces complexities in its representation, real and substantiated conflicts related to its grant of standing that require separate representation for one or more of the members of the participant group on one or more issues, or that efficiencies in its participation could be created through the use of additional counsel. However, I do not have that information before me and cannot, therefore, reach that conclusion. The WCCSFN may reapply to me on this issue if circumstances change. At present, I am not able to make a recommendation to the Privy Council Office for more than one senior and one junior counsel for this recipient.

Signed 28 September 2010

A handwritten signature in black ink, appearing to be 'B. Cohen', written over a horizontal line.

The Honourable Bruce I. Cohen,
Commissioner