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February 18, 2010

Honourable Mr. Justice Cohen
Cohen Commission
Suite 2800, PO Box 11530
650 West Georgia Street
Vancouver, BC V6B 4N7

***** By e-mail @ leo.perra@cohencommission.ca and mail *****

Dear Sir:

Re: Rules for Standing of the Commission
Concerns regarding representation of public interest perspectives

Let us offer our belated congratulations on being named to head the Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (the "Commission"). We believe that the inquiry touches on important matters of public interest to all British Columbians and thus wish to raise an important issue with you, the resolution of which we submit will contribute to the effectiveness and integrity of the proceedings.

We have reviewed the documents entitled Notice for Standing and Funding (the "Notice") and Rules for Standing and Funding (the "Rules") released on the Commission website on February 15, 2010 (collectively the "Documents"). We are formally requesting clarification on how your office intends to treat standing requests by individuals or organizations representing the public's interest in the health of these salmon runs and the ecosystems that support them.

Specifically, the Documents, based upon the Inquiry's terms of reference, limit participant standing to people with a "substantial and direct interest" in respect of the Fraser sockeye. However, the Documents give little direction as to what is meant by this important term and whether that requirement can be met by an individual or group whose interests focus largely on the conservation or ongoing health of the Salmon run or other primarily public concerns.

In our submission, the conduct of the Commission should ensure full participation and standing to groups or coalitions representing the public's broader interest in conservation of the sockeye runs and who are able to advocate for a particular perspective of what that interest requires. This may involve revisions to the Rules or may merely involve clarification of how "substantial and direct interest" will be interpreted. In our submission, a fair inquiry requires that these matters be clarified immediately, so that public interest advocates with relevant perspectives, experience and expertise will not be deterred from applying and so that any public interest groups applying to appear before the Commission know in advance the issues that they need to address.

If you do not feel that it is possible to accommodate this type of public interest standing within your current mandate, then we would encourage you to recommend to the government that your terms of reference be amended.

Concerns arising from the Documents

The Notice and the Rules state in slightly different language that:

> Applicants must demonstrate that they have a substantial and direct interest in the subject matter of the inquiry.[1]

A "substantial and direct interest" test could be seen as restricting standing to those persons who are personally affected by an inquiry into the sockeye stocks, and as excluding those individuals and groups whose interest is to represent what they see as the public good. This is not the only possible interpretation, as discussed below, but there is enough of a suggestion of a narrowed standing test that we feel the need to request this clarification.

The Notice goes on to list a range of "relevant considerations", but it is not clear whether these considerations are relevant in determining whether the applicant has a substantial and direct interest, or whether they are additional factors to be considered in determining whether the Commission will grant standing to someone who has also demonstrated a substantial and direct interest. In other words, does an applicant need to demonstrate that (a) they have a substantial and direct interest *and* that some or all of the relevant considerations favour their being granted standing or (b) merely that they have a substantial and direct interest in light of consideration of the relevant considerations. The relevant considerations, which do not appear in the Rules, are as follows:

- the nature and extent of the applicant's rights or interest;
- why standing is necessary to protect or advance the applicant's rights or interest;
- whether the applicant faces the possibility of adverse comment or criticism with respect to its conduct;
- how the applicant intends to participate, and how this approach will assist the commission in fulfilling its mandate;
- whether and how the applicant's participation will contribute to the thoroughness and fairness of hearings;
- whether the applicant has expertise and experience relevant to the commission's work;
- whether and to what extent the applicant's perspective or interest overlaps or duplicates other applicants'; and

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[1] Notice of Standing and Funding, p. 1, http://www.cohencommission.ca/en/pdf/NoticeForStandingAndFunding.pdf, last accessed February 17, 2010; also Rules for Standing and Funding, para. B. 10, at http://www.cohencommission.ca/en/pdf/RulesForStandingAndFunding.pdf, last accessed February 17, 2010.

- whether the applicant may participate in another capacity — for example, a research body which may be otherwise consulted by the commission, or a witness who may testify — instead of being granted formal standing.[2]

To the extent that these considerations are intended to define who has a substantial and direct interest, the emphasis on the need for participants who "contribute to the thoroughness and fairness of hearings" and "expertise and experience relevant to the commission's work" would seem to support the idea that a knowledgeable public interest advocate might be granted participant standing.

Need for public interest participants

According to the common law, all members of the public have a right to fish in ocean waters.[3] The BC Legislature, to the extent it has jurisdiction to do so, has confirmed or extended this common law right.[4] The Supreme Court of Canada in *Canadian Forest Products v. BC* has affirmed that common law rights in respect of the environment may give rise to a general public environmental right in the conservation of environmental resources.[5] Thus all British Columbians have a legal interest in respect of sockeye salmon and their continued health and protection.

Moreover, the Inquiry was called in large measure due to public demands for an inquiry from conservation organizations and members of the public concerned about the sockeye collapse. The public perspectives that gave rise to these calls for an inquiry need to be fully represented before the Commission.

There are clearly challenges in deciding who is best placed to represent the diverse public interest perspectives and to assist the Commission in examining these issues fully. However, a failure to have some way of recognizing and having full representation at the Commission, of the full range of public perspectives and interests in respect of the health of the sockeye runs would undermine the credibility of the Commission.

We note that the Rules suggest that Counsel for the Commission will bear the "primary" responsibility of representing the public interest.[6] While we have great confidence in the abilities of the lawyers you have on your team, and are sure that they will act fairly to examine all relevant issues, the Commission's staff cannot act as a substitute for participants advocating on behalf of particular public interest perspectives. There is a difference between representing the public's interest in a comprehensive and full public process that examines issues in detail, and representing a particular view of the public's interest. Advocacy by Commission Counsel on

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2 Ibid., pp. 1-2.

3 G. La Forest. *Water Law in Canada. The Atlantic Provinces*. (Ottawa: Information Canada, 1973), pp. 195-199; T. Bonyhady. *Law of the Countryside: the Rights of the Public* (Abingdon, Oxford: Professional Books, 1987), pp. 240-256.

4 *Hunting and Fishing Heritage Act*, S.B.C. 2002, c. 79, s. 1. Given the nature of the province's constitutional authority, this provision would seem to at least extend the public right to fish to inland waters. What, if any, effect it may have on ocean fishing is less clear.

5 2004 SCC 38, paras. 74 to 81.

6 Rules, above, note 1, para. B. 9.

behalf of a particular view of the public interest would undermine the Commission's perceived independence.

We further note that the Notice suggests that the Commission may attempt to allow public interest advocates to participate as witnesses or as a consultant, rather than as participants. While these may well be appropriate ways to involve some concerned organizations or experts, this level of participation is not equivalent to the rights of participants. The process will be weighted against the public interest if commercial and other centralized interests are considered sufficiently "substantial" to warrant full participation, but perspectives on the public's interests are excluded from participation.

We would encourage you to clarify that participants may have an important role in pressing for a particular understanding or vision of the public interest.

Comments on the "substantial and direct interest" test

We are of the view that the "substantial and direct interest" test suggests a narrow approach to standing which may undermine the perception of a balanced Commission process. We are of the view that you are not limited to granting standing only in cases where a "substantial and direct interest" exists, and would encourage you to explicitly adopt a broader approach to standing. However, if you choose to retain this approach to standing, we would encourage you to clarify that you will adopt a broad, rather than narrow, interpretation of this requirement and thereby allow individuals and groups with relevant public interest perspectives and appropriate expertise and experiences to meet the test.

The "substantial and direct interest" standing test does not appear in the *Inquiries Act* under which the Commission is constituted, although section 12 of that Act does allow any person whose conduct is being investigated to have counsel.[7] Rather, the term "substantial and direct interest" appears in the Terms of Reference set for the Commission by the Governor in Council, which:

> (ix) authorize the Commissioner to grant, to any person who satisfies him that they have a substantial and direct interest in the subject matter of the Inquiry, an opportunity for appropriate participation in it…[8]

We would like to make two points regarding the Terms of Reference. First of all, it is not at all clear to us that the federal government has the power to constrain the Commission in this way. The *Inquiries Act* clearly authorizes the Governor in Council to call an inquiry,[9] to define the "matter connected with the good government of Canada or the conduct of any part of the public business thereof" that will be investigated[10] and to appoint a Commissioner to carry out the

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7 *Inquiries Act*, R.S.C. 1985, c. I-11, s. 12. Section 12 also requires a Commissioner to allow people who are charged in respect of the investigation to be represented. This aspect of the provision would not seem to apply here, as the Terms of Reference for the Commission clearly indicate that it is beyond the scope of the Inquiry to seek to assign blame to any particular individual, group or community.

8 Terms of Reference, s. a(ix).

9 Inquiries Act, above, note 7, s. 2.

10 Ibid.

investigation. [11] However, there is no explicit power given to the Governor in Council to prescribe the process to be followed by an appointed Commissioner.

Second, the Terms of Reference also give the Commissioner a general power to "adopt any procedures and methods that he may consider expedient for the proper conduct of the Inquiry ..."[12] In our view, under both the *Inquiries Act* and the Terms of Reference the Commission's primary responsibility is to conduct an inquiry which will credibly and thoroughly examine the collapse of the Fraser River sockeye. To conduct such an investigation requires that conservation groups and other individuals and groups with particular expertise and representing the public's rights in respect of the fishery must be allowed to participate on an equal footing with more traditional direct interests.

In terms of the meaning of "substantial and direct interests," the test seems to work well for investigations of localized or specific problems which affect a limited group. Most of the case law arises in the context of Coroner's inquests in Ontario (since the Ontario *Coroner's Act* uses the "substantial and direct interest" test for standing). In that context, the courts, while cautioning against applying a too narrow private law approach to standing, have nonetheless said:

> Mere concern about the issues to be canvassed at the inquest, however deep and genuine, is not enough to constitute direct and substantial interest. Neither is expertise in the subject matter of the inquest or the particular issues of fact that will arise. It is not enough that an individual has a useful perspective that might assist the coroner. The interest of an applicant for standing in the recommendations of the jury must be so acute that the interest may be said to be not only substantial, but also direct.[13]

When the test has been applied in cases where broader public interests are at stake, Commissioners and the courts have struggled to determine how public perspectives can best be included.

However, at least one judge has held that a Coroner also has a residual authority, notwithstanding the statute's reference to a "substantial and direct interest" test, to grant standing where it is necessary in the public interest to do so.[14]

In one case the French version of the Ontario *Coroner's Act* was relied upon in support of the view that "substantial and direct" should be interpreted as "substantial or direct".[15] On the basis of this interpretation, an advocacy group was granted standing as it had: "demonstrated a substantial interest in the Donaldson inquest by reason of its expertise and community role in the provision of culturally sensitive mental health services."[16] In other cases involving the *Coroner's Act* the courts have recognized the need to include public interest perspectives, but

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[11] Ibid., s. 3.

[12] Terms of Reference, s. a (vi).

[13] *Stanford v. Ontario* (1989), 1989 CarswellOnt 441 (Ont. C.A.), para. 52. See paras. 47 to 65 for a caution against applying a narrow private law approach.

[14] Ibid. per Campbell J., para. 66 to 107. However, Craig J. explicitly declined to rule on this question (para. 113), while the dissenting judge, O'Brien J., expressly rejects it (para. 130-131).

[15] This is not the case in the French version of the Commission's Terms of Reference.

[16] *Black Action Defence Committee v. Coroner*, 1992 CarswellOnt 915 (Ont. C.A.) at para. 60. ("BADC"), at para. 84.

cautioned against turning coroner's inquests into royal commissions, in which public interest perspectives are of more value:

> Public interest advocates have a special role in many inquests. But in every inquest the primary advocate for the overall public interest is the Crown Attorney who acts as counsel for the coroner. ...
>
> While public interest interveners can strengthen the coroners inquest it would be inappropriate for them to dominate the inquest by turning it into a Royal Commission or an advocacy forum to advance the particular views of any group.[17]

Commissioners operating under the Ontario *Public Inquiries Act*, which also uses the "substantial and direct interest" test for standing have also had to grapple with the interests of public interest advocates.

In 1983 the Ontario Court of Appeal considered the test for standing in a Royal Commission on the Northern Environment, noting that the factors in applying the "substantial and direct interest" test would vary considerably depending upon the nature and scope of the inquiry, although even then the Court focussed on the impact of the inquiry on the individual, without examining how public interest perspectives were to be fully included:

> There is very little guidance in the authorities as to the factors to be examined by the Court (or a commissioner) in determining this question. *It does seem as though the subject-matter of the inquiry is of significance*. Obviously, the more general, theoretical and abstract the subject of an inquiry is, the more difficult it would be to find that a person has a substantial and direct interest in it. The more specific, practical and concrete the subject of an inquiry is, the more likely it would be that the property or individual rights of a person are affected, and hence, he would have a substantial and direct interest. The potential importance of the findings and the recommendations to the individual involved would have to be considered; if a particular person would be greatly affected by a recommendation or a finding in relation to him or his interests, then that would be taken into account in deciding whether he had a substantial and direct interest. Obviously, individual property interests have to be taken into account: see *Re Royal Comm. on Conduct of Waste Mgmt.* (1977), 17 O.R. (2d) 207, 4 C.P.C. 166, 80 D.L.R. (3d) 76 (Div. Ct.). *If a person has vital information to give or has made the charges that the Commission is inquiring into, then that person may be considered to have a substantial and direct interest, whereas others might not*: see *Re Shulman*, [1967] 2 O.R. 375, 63 D.L.R. (2d) 578 (C.A.). It seems to us that the value of the potential interest that is being affected would have to be considered in arriving at its conclusion. Similarly, if one person is potentially affected, that might be viewed differently than if 100 or 1,000 or more persons may be affected. *None of these specific items would be controlling; it is necessary to look at all of these factors as well as any others in the context of each inquiry. The decision must be made after examining all of the circumstances. Essentially, what is required is evidence that the subject-matter of the inquiry may seriously affect an individual.*[Emphasis added][18]

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[17] *People First of Ontario v. Regional Coroner of Niagara* (1991), 85 D.L.R. (4th) 174 (Ont. Div. Ct.), at p. 186-6, quoted with approval in BADC, above, note 16, at para. 61.

[18] *Ontario (Royal Commission on the Northern Environment) v. Grand Council of Treaty 9 Bands*, 1983 CarswellOnt 385 (C.A.), at para. 8.

In that case the Grand Council of Treaty 9 Bands were successful in obtaining a declaration that they were substantially and directly affected because they were:

> … not the spokesman for a few citizens who are vaguely interested in the outcome of the commission's inquiry, but rather it represents the majority of the population in the region, a different culture and lifestyle, and a totally different attitude towards the use of land and resources.[19]

However, one year later a group of parents of babies who had died at the Toronto Hospital for Sick Children were held not to have a "substantial and direct interest" in an investigation regarding the prosecution of a nurse for four of the deaths,[20] emphasizing the potential for a narrow application of this standing test.

One of the more useful examples of a Commissioner dealing with this standing test in the context of an inquiry concerning broad questions of public interest is the Walkerton Inquiry, headed by the Honourable Mr. Justice Dennis R. O'Connor, to examine the contamination of water in Walkerton. Commissioner O'Connor, apparently alive to the need to involve public interest perspectives, but constrained by the "substantial and direct" interest test, found two solutions. First, he granted full standing to some parties despite their failure to meet the substantial and direct test where he found that their full participation would make an important contribution to the Inquiry. Second, he fashioned a slightly more restricted "special standing" for parties that he would benefit from hearing, but where there was no reason for full standing.

> There are two types of standing, full and special, in Part I.... I have granted full standing in Part I to persons or groups who have demonstrated that they have a substantial and direct interest in the subject matter of the Inquiry pursuant to section 5(1) of the *Public Inquiries Act*, R.S.O. 1990, c.P.41 (the "Act"). *In some cases I have also granted full standing, on a discretionary basis, even though the party does not have an interest under section 5(1).* I have exercised this discretion on the basis of my assessment of the contribution that such a party will make to the Inquiry. In either case, I have limited full standing to those portions of the Inquiry that are relevant to the party's interests.... I have granted special standing in Part IA to some parties who have been granted full standing in Part IB. Even though these applicants do not have an interest in Part IA under s.5(1) of the Act, *I consider that their involvement through special standing will be of assistance to me*. [Emphasis added].[21]

In addition, Commissioner O'Connor organized his inquiry into two distinct phases – the first focussed on the actual events in Walkerton, the second focussed on the recommendations to be made to protect drinking water in Ontario. This was done in part to allow for a more flexible

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[19] Ibid., para. 11. It seems absurd in a modern legal context that the Commissioner would have even attempted to assert that the affected First Nations did not have a substantial and direct interest. However, in 1983 the case law concerning the legal rights of first nations were much less well developed.

[20] *Parents of Baby Gosselin v. Grange*, 1984 CarswellOnt 783 (Ontario H.Ct.). The parents were held to have a direct and substantial interest in that portion of the inquiry concerning how the deaths had occurred.

[21] B. O'Connor. Ruling on Standing and Funding. Walkerton Inquiry, available at http://www.ontla.on.ca/library/repository/mon/10000/215162.pdf, last accessed February 17, 2010.

and public process in respect of Phase II, but also apparently on the basis that some parties might satisfy the "substantial and direct" test in respect of one phase, but not the other.[22]

Several of Commissioner O'Connor's stated principles in relation to standing are also relevant:

> It is essential that the Inquiry be *full and complete and that I consider all relevant information and a variety of perspectives* on the issues raised in the Order in Council.
>
> Commission counsel will assist me throughout the Inquiry. They are to ensure the orderly conduct of the Inquiry and have standing throughout. Commission counsel have the primary responsibility for representing the public interest, including the responsibility to ensure that all interests that bear on the public interest are brought to my attention. *Commission counsel do not represent any particular interest or point of view. Their role is not adversarial or partisan….*
>
> Parties may be granted special standing in Part IA, rather than full standing, *in order to make the work of the Commission accessible to parties who do not have a substantial and direct interest in the subject matter of Part IA, but who nevertheless represent interests and perspectives that I consider to be helpful to my mandate*. Those parties will be able to participate in the Inquiry in a meaningful way through the provision of documents, the opportunity to suggest evidence and the opportunity to make closing submissions. [Emphasis added][23]

Acting on this basis Commissioner O'Connor granted standing to:

- six parties for all issues in Part I.
- 14 other parties, some of them coalitions, but … limited their participation because of the nature of their interest or perspective.
- at most, 35 applicants in Part II, some of whom I expect will form coalitions.[24]

He explained:

> I have dealt with standing so as to ensure that all the relevant interests and perspectives are fully represented. My first criterion has been to ensure the Inquiry is thorough. When in doubt, I have opted in favour of inclusion.[25]

We urge you to adopt at least as inclusive an approach in considering applications for standing.

Conclusion

The Documents suggest the test for standing will be "substantial and direct interests" which is difficult to reconcile with the public rights in respect of the sockeye, the public's role in pressing for this Inquiry and the broad public interests which you will be examining.

We do not believe that you are so constrained, and would urge you to clarify that persons with particular expertise and experience and a relevant public interest perspective will be considered for full participant standing.

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[22] Ibid., pp. 1-2.

[23] Ibid., pp. 6-7.

[24] Ibid., p. 39.

[25] Ibid.

In the alternative, we would urge you to interpret the "substantial and direct test" in a manner consistent with the public purpose of this Inquiry. It is our submission that, on the basis of the public right to fish, all members of the public have a direct interest in the sockeye salmon and their conservation, but that a level of economic or cultural use, expertise, experience or other factors should be required to demonstrate that the interest of an applicant is also "substantial".

As noted above, it is possible to read the Notice as suggesting such an approach – that the "relevant considerations" will be applied in determining whether an applicant has demonstrated a "substantial and direct interest". If this is, in fact, correct, this should be clarified, as well as being stated and further developed in the Rules.

In the further alternative, if you believe that the inclusion of the "substantial and direct interest" test in the Terms of Reference constrain you to the extent that you cannot grant standing to individuals and groups with an important public interest perspective and relevant information, experiences or expertise, then we would ask you to recommend to the federal government that the Terms of Reference be amended to eliminate this constraint.

Again, it is important that these issues be addressed before your deadline for applications of March 3rd, 2010 and as soon as possible, so that public interest applicants know the rules under which they are applying and will not be unduly discouraged from applying.

We will be posting a copy of this letter to our website so that the public is aware of the issues raised, and we will, of course, also post any response we receive from your office.

Thank you for consideration.

Sincerely,

Andrew Gage
West Coast Environmental Law