

**LOSS OF THE COLUMBIA RIVER FIRST NATIONS FISHERY:
REVIEW OF THE POTENTIAL FOR LEGAL ACTION
AGAINST THE FEDERAL GOVERNMENT**

**Prepared for the Canadian Columbia River
Inter-Tribal Fisheries Commission**

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**Loss of the Columbia River First Nation Fishery:
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1. INTRODUCTION

There is no doubt that the massive hydroelectric developments on the Columbia River have destroyed what was once one of the great salmon producing rivers of the world. There is also little question that the Columbia River First Nations ("CRFN") located on the Canadian side of the 49th parallel used and relied on the annual return of salmon to the northern reaches of the Columbia River and its tributaries.

While there is little doubt the impacts of the Columbia River hydroelectric developments caused a great loss to the CRFN, the question remains as to whether today there exists any legal redress for this loss. This paper's purpose is to analyze the possibility of members of the Canadian Columbia River Intertribal Fishery Commission ("CCRIFC") bringing civil action against the Federal Government for the loss of the CRFN fishery. It also briefly considers possible action through the International Joint Commission ("IJC"). This paper does not consider the possibility of a law suit against the United States or any other American entity.

The CCRIFC has retained the law firm of Ferguson Gifford ("legal counsel") to provide this defined and limited advice. It should be noted that this review is not intended as a final opinion. Rather, it is a preliminary legal analysis. The CCRIFC has also contracted with Shawn Gordon Crane of Labyrinth Archives and Records Research ("LARR") to conduct archival and historical background research to support such a legal analysis.

The law in the area of aboriginal rights is still developing. The set of B.C. Court of Appeal decisions of June, 1993 on aboriginal fishery rights (e.g. *R v. Vanderpeet*)

with the exception of *Delgamuukw v. The Queen*, (1993) 104 D.L.R. (4th) 470 (B.C.C.A.), are now before the Supreme Court of Canada. The analysis in this paper is based largely on law that has not yet reached its final conclusion.

This paper is organized as follows: Section 2 briefly reviews the history of hydroelectric development on the Columbia River. Section 3 analyzes a possible cause of action based on the loss of the CRFN aboriginal right to fish. Section 3(a) considers the establishment of an "Aboriginal Right" of the CRFN to harvest fish for food, ceremonial and commercial purposes from the Columbia River and its tributaries. Section 3(b) assumes there exists an aboriginal right, and considers whether there was an extinguishment of that right. Section 3(c) considers whether there was an infringement of the aboriginal right. Section 3(d) assumes there was an infringement and considers whether the infringement could be justified under the existing test developed in *R v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.) Finally, Section 3(e) considers possible remedies for breach of such right(s). Section 4 then considers an alternative cause of action; whether there exists a fiduciary duty owed by the Federal Government to the CRFN and whether there was a breach of that duty. Section 5 briefly reviews possible application to the IJC. Section 6 considers a possible restitutionary action. Finally, in light of the recent Supreme Court of Canada decision in *R v. Apsassin*, (1996), Section 7 considers whether legal action against the Federal Government has now been ruled out by operation of the *Limitation Act*. Section 8 presents a summary of the paper's conclusions and suggests further courses of action for the CRFN.

LARR prepared a Draft Report of Archival Research (March, 1996) on the Columbia River Fishery which was provided to Ferguson Gifford. In October 1993, Ferguson Gifford also prepared a paper entitled "No Way Up - First Nations' Legal options for loss of the Columbia River fisheries". Both of these papers are relied on in the preparation of this paper.

2. HISTORY OF THE HYDRO DEVELOPMENT ON THE COLUMBIA RIVER

In 1909 Great Britain (on behalf of Canada) and the United States entered into the *Boundary Waters Treaty* (the "Boundary Waters Treaty"). The Boundary Waters Treaty was designed to address the interdependence of the two countries with respect to transboundary waterways. The Boundary Waters Treaty set out the respective rights and responsibilities of Canada and the U.S. The Boundary Waters Treaty also established the International Joint Commission (IJC).

The first dam on the Columbia River was constructed at lower Bonnington Falls and was completed in 1898. Since 1898, a total of 28 major dams have been constructed on the main stem of the Columbia River, 16 of which are located in Canada.

The Grand Coulee dam (the "Grand Coulee"), which has caused the major damage to the Columbia river salmon fishery, was completed in 1942. The Grand Coulee was built without a fish passage and blocked access to more than 1700 kilometers of spawning grounds. It virtually eliminated the entire anadromous fish population of the Canadian Columbia River.

On September 30, 1940 the United States filed an application with the IJC, pursuant to Article IV of the Boundary Waters Treaty, to

"give consideration to such effects, if any, that the construction and operation of the Grand Coulee dam and reservoir, Columbia River, Washington, might have on levels or stages of the said Columbia River at and above the international boundary, and the consequence thereof, and to approve the Grand Coulee dam and the proposed method of operation of the reservoir at the elevation 1200 feet above mean sea level."

After having heard from both parties on December 15, 1941 the IJC issued an Order of Approval for construction of the Grand Coulee.

In 1944, two years after the completion of the Grand Coulee, Canada and the US asked the IJC to consider whether greater use of the Columbia River could be made through further development. This was in the form of a "reference" pursuant to the Boundary Waters Treaty. The IJC was asked to keep in mind: domestic water supply and sanitation; navigation; efficient development of water power; the control of floods; the needs of irrigation; reclamation of wet lands; conservation of fish and wildlife; and other beneficial purposes. The IJC was also requested to consider indemnification for damage to public and private property, the costs of the project and apportioning of any damages.

In March 1959, the International Columbia River Engineering Board, which had been established by the IJC, completed a report setting out alternative engineering proposals for further dam development. The report strongly endorsed the construction of additional dams, emphasizing the benefits to "the three important fields of water power, flood control, and irrigation". In contrast, the Report stated that there was "no urgent need for cooperative development in the fields of domestic water supply and sanitation, navigation, or conservation of fish and wildlife." Finally, the Report concluded an international agreement would facilitate orderly development.

In December 1959, the IJC followed up with a report on principles for apportioning benefits from cooperative use of storage of waters and electrical interconnection within the Columbia River system. This report provided the basis for a common understanding which led to the signing of the Columbia River Treaty in 1961 (the "Columbia Treaty"). The fundamental premise of the Columbia Treaty was that huge increases in power generating capacity at existing dams in the US could be

achieved if additional dams were built in Canada. The Columbia Treaty called for the construction of 3 "treaty dams" in British Columbia (the Duncan, Keenleyside and Mica Dams) and one in Montana (the Libby Dam). The Columbia Treaty dams doubled the storage capacity of the Columbia River Basin and provided increased flood control. In exchange for providing additional water storage the US paid Canada US\$64.4 million (plus bonuses for early completion of the dams) and agreed to provide Canada with one-half of the additional power produced at the American hydro-electric plants. This latter benefit is referred to as the "Canadian entitlement" or the "downstream benefits".

Canada, at the urging of British Columbia, would not ratify the Columbia Treaty until its implementation was further defined through a protocol and arrangements were made to sell the first 30 years of Canada's entitlement to "downstream benefits" to a group of electric utilities in the US for US\$254 million. Under a separate protocol, Canada agreed to assign the downstream benefits to British Columbia. The Columbia Treaty was finally ratified in 1964 by President Johnson, Prime Minister Pearson and Premier Bennett.

The Columbia Treaty does not have an automatic expiry date. Instead, either country may terminate it after 60 years with 10 years notice. This means the earliest the Columbia Treaty can be terminated is 2024 so long as notice is given by 2014. In the meantime, however, negotiations must take place on the downstream benefits. These benefits return to British Columbia on the 30th anniversary of the scheduled completion of the Duncan, Keenleyside and Mica Dams. Accordingly in 1998, British Columbia will become entitled to 9% of the total downstream benefits; in 1999, an additional 46%; and in 2003, the final 45%. The Columbia Treaty calls for the downstream benefits to be delivered at Oliver, British Columbia or as otherwise agreed. Since there are no transmission lines at Oliver at present, an interim agreement was reached in 1992 to deliver this power to existing

transmission lines near Nelson, British Columbia and Blaine, Washington. This agreement expires in 2003 giving the parties time to consider their options. No formal agreement has been reached between B.C. and Washington for the future downstream benefits.

In 1984, British Columbia Hydro and Bonneville Power Administration (BPA) entered a 10 year agreement, referred to as the "Non-Treaty Storage Agreement". The purpose of this Agreement is to coordinate the use of an additional portion of the water stored in the Mica dam reservoir. In 1990, this agreement was extended until 2003. The 1990 agreement more than doubles the amount of water storage covered in the 1984 agreement. The additional power generating capacity will be shared equally by British Columbia Hydro and BPA.

In October 1990, BPA signed a related agreement with the US Columbia Basin Fish and Wildlife Authority, which represents northwest fish and wildlife agencies and 13 Indian tribes. The purpose of the agreement is to ensure that the use of non-treaty storage water will pose no significant risks to fish.

The remainder of this paper focuses primarily on the actions surrounding the approval and construction of the Grand Coulee, the Columbia Treaty Dams and the subsequent impacts. While we recognize there are impacts from developments independent of or only partly related to the Grand Coulee, such as the Okanagan fishery, we are not in possession of sufficient information to properly consider those impacts in detail.

If the CRFN were to commence an action against the Federal Government the CRFN would need to consider consulting a fisheries expert to detail the location, cause and extent of losses to all members of the CRFN. As well, while other losses

may have different factual circumstances the legal analysis herein would be generally applicable.

This paper has not focused on the loss of the resident species, again, because we do not have very much information regarding damage to local species or aboriginal use of such fish.

3. ABORIGINAL RIGHTS

3.1 Establishment of an "Aboriginal Right"

In the B.C. Court of Appeal decision *Delgamuukw v. The Queen* (1993), 104 D.L.R. (4th) 470 (B.C.C.A.) Mr. Justice Lambert (in dissent, but not on this point), relying on *Pasco v. CNR*, [1989] 56 D.L.R. (4th) 404 (BCCA) and the Federal Court decision in *Baker Lake v. Crown Federal*, [1979] 3 C.N.L.R. 17 (Fed. Ct.); set out four elements for establishing aboriginal title:

1. That the aboriginal people and their ancestors were members of an organized society;
2. That the organized society occupied the specific territory over which aboriginal title is asserted;
3. That the occupation was to the exclusion of other organized societies; and
4. That the occupation was an established fact at the time that sovereignty was asserted by England.

Aboriginal rights are somewhat different from aboriginal title (ie. aboriginal title is a particular example of aboriginal rights). While there is no precise definition to describe what an aboriginal right is, as a consequence of the Supreme Court of Canada decision in *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 at 171, there has been a test established. To establish an aboriginal right, a First Nation must show that:

1. the right was exercised by an organized aboriginal society at the time Britain asserted sovereignty over the area (i.e. generally 1846); and
2. the exercise of the right was an integral part of native life and the distinctive native culture.

It is important to note that throughout this paper the CRFN is used in a generic sense to cover all First Nations who may have claims to fisheries losses. It is doubtful that the courts would accept such a general claim. More detailed evidence is required to establish each "organized society". This would involve documentation properly defining first nation groups. It would also be necessary to establish where those groups fished, the times they fished and what use such groups made of the fish in question.

It is important to emphasize that the first part of the *Sparrow* test requires that the rights exercised by the organized society be exercised at the date at which sovereignty was asserted by Europeans. According to Macfarlane, J. in *Delgamuukw*, supra, sovereignty in British Columbia was asserted in 1846, the year in which the *Oregon Boundary Treaty* of 1846 was signed (p.493).

Given the evidence provided by LARR, we do not have sufficient evidence to show that the CRFN meet this time frame. While there is little doubt the CRFN fished the Columbia River and its tributaries, the evidence we have at present does not conclusively establish occupation before 1846, although it does suggest that the Kinbasket and Shuswap Nations settled in the Columbia River area at around the middle of the 18th century and that the Kootenay people appear to have already been there. For the purpose of preparing evidence for a court case, the collection of more evidence is necessary. If written evidence is not available, the CRFN will

need to record oral history from its elders. There may also be archeological evidence available.

Assuming the CRFN can prove occupation prior to 1846, it would still be necessary to show that the use of the Columbia salmon fishery claimed was integral to the CRFN way of life. According to Macfarlane, J. in *Delgamuukw* (pg. 493),

“I pause to observe that not all practices in existence in 1846 were necessarily to be regarded as aboriginal rights. To be so regarded, those practices must have been integral to the distinctive culture of the aboriginal society from which they are said to have arisen.”

While evidentiary proof is important, it is our view the courts are willing to make certain assumptions based on common sense. The Supreme Court of Canada in *Sparrow* has affirmed the existence of an aboriginal right to fish for food and social and ceremonial purposes. There is little doubt this would be extended to the CRFN.

In *Delgamuukw*, at the B.C.S.C., McEachern, C.J., although stating that *Sparrow* should be limited to its context, indicated that the aboriginal right to fish was an unextinguished, obvious and existing aboriginal right (p. 248).

The B.C. Court of Appeal cases *R. Gladstone* and *R. v. Vanderpeet* dealt with the question as to whether there exists a commercial component or aspect to the aboriginal right to fish. The Court established a test which requires First Nations to prove that the commercial aspect of the aboriginal right to fish was an “integral part of the distinctive culture” of the First Nation. This means establishing a market and business-like environment prior to contact. It is doubtful, given the evidence we have seen to date, that the CRFN aboriginal right to fish would include a commercial component. In fact, in our view it will be hard for any First Nation to meet this test. While there does appear to have been trading/bartering conducted by the CRFN, Courts have, to date, shown a reluctance to extend the aboriginal

right to include commercial rights. (It should be noted that these B.C. cases have now gone to the Supreme Court of Canada. That Court could change the law. Unless and until that happens the law remains what these cases have decided.)

Based on the evidence we have reviewed, there appears to be a good case that the CRFN had an aboriginal fishery right for food and ceremonial purposes.

3.2 The Extinguishment of the Aboriginal Right

Assuming there existed an aboriginal right of the CRFN to the salmon of the Columbia River and its tributaries, it is necessary to consider whether there was an extinguishment of that right, prior to 1982 (when Section 35 of the *Constitution Act*, 1982, came into force).

As set out in *R v. Sparrow*, fisheries were not regulated in B.C. until B.C. joined Confederation in 1871. After Confederation, the Canadian Federal Government (the "Federal Government") increasingly regulated the fishery. The Court in *Sparrow* held that such regulation did not amount to extinguishment (pg. 174). The Supreme Court of Canada said that "the sovereign intention must be clear and plain if it is to extinguish an aboriginal right." (pg. 175). The onus of proving either express or implicit extinguishment lies upon the Crown (*R. v. Horseman*, [1990] 1 S.C.R. at 901). In *Delgamuukw*, Macfarlane, J. (pg. 524) said that:

"In my view, the honor of the Crown arising from its role as the historic protector of aboriginal lands, requires a clear and plain intention to extinguish aboriginal title that is express or manifested by unavoidable implication.

Consequently, applying the clear and plain test to extinguishment of aboriginal rights, there can only be extinguishment by necessary implication if the only possible interpretation of the statute is that aboriginal rights were intended to be extinguished.

... However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result.”

It would appear that from the evidence provided by the LARR, the Federal Government did not consult with the CRFN. The CRFN fishery was apparently viewed as insignificant and seemingly not even considered by the Federal Government. Therefore, it can be argued that there was no clear and plain intent to do anything with respect to CRFN rights. The argument of the Federal Government will be that the resulting and inevitable physical destruction of the fish must have been known to the Federal Government, and therefore the Federal Government must have intended to extinguish aboriginal rights with respect to such fish. In our view, however, it cannot be said that by simply ignoring the CRFN interests there was a clear and plain intention, either express or manifested by unavoidable implication, to extinguish the aboriginal right to fish on the Columbia River and its tributaries. Also, much of the destruction was caused by U.S. authorities although the Federal Government acquiesced or actively supported the projects which caused such destruction.

3.3 Infringement of the “Aboriginal Right”

Assuming a CRFN aboriginal right can be established, the CRFN must show a prima facie interference with the right. It is obvious that the Columbia River dams have destroyed the Canadian salmon fishery on the Columbia River. This would constitute prima facie interference as discussed in *R v. Sparrow*, and recently reinforced by the B.C. Court of Appeal in *R v. Jack* (December 1995). However, to establish a case against the Federal Government, the CRFN must show that the destruction of the salmon fishery was due in part to the action or inaction of the Federal Government.

The loss of the CRFN fishery was in effect an expropriation by the United States (and perhaps Canada). It is interesting that there are anecdotal reports that Federal Government Indian agents were offering canned salmon to First Nations at around the time the salmon were cut off by the Grand Coulee. This was probably due to a recognition that the failure of the salmon to show up in Canada directly after the construction of the Grand Coulee caused hardship to the CRFN people.

The Federal Government will no doubt argue that the destruction of the fishery was caused by dams built in the U.S., over which they had no control. The CRFN will need to establish that the Federal Government had the opportunity to protect the CRFN fishery by representing aboriginal interests in the approval stages prior to construction of the dams, particularly in reference to construction of the Grand Coulee. For example, the CRFN will emphasize the Federal Government's response to inquiries from the U.S. government with respect to the existence of a fishery in Canada. It is also important to note that the Boundary Waters Treaty makes provision for indemnification for third party losses which the Federal Government failed to consider or pursue on behalf of the CRFN. From the evidence provided by LARR it would appear that the Federal Government did not take up the opportunity to represent CRFN interests.

An initial question is whether the Grand Coulee and the subsequent Columbia Treaty dams should be considered one overall project or two independent projects. This will impact greatly on the legal analysis. Each scenario has advantages and disadvantages. The scant factual evidence we have to date suggests the projects were dealt with independently by the authorities. Only once the Grand Coulee was in place did planners start to contemplate further projects.

In our view, there are two problems to overcome as regards infringement:

1. whether a failure to act by the Federal Government can constitute prima facie infringement. Here we are focusing on the projects undertaken by the U.S. authorities. Projects (i.e. dams) approved in Canada, in our view, would be considered to have infringed aboriginal rights except that here it is the U.S. project (ie. Grand Coulee) which really caused the damage to the salmon fishery. (As stated we do not have enough information to consider resident species or salmon runs unaffected by the Grand Coulee);
2. the issue of causation; whether the Federal Government's failure to act made any difference (i.e. could the Federal Government have done anything to alter projects undertaken by U.S. authorities).

The first question is one of law. We know of no authority directly on point. Overall, in our view, it is likely that a Court would decide that the Federal Government participated sufficiently in the development as a whole, so as to have become an active proponent.

The second question is primarily one of fact. We do not yet have a clear picture of the attitude of the U.S. authorities in the 1940s to Canadian protest. Perhaps it will not be possible to know for certain what might have occurred to protect the fishery if the Federal Government had attempted to do so. In this type of situation Courts do, sometimes, resolve questions of fact against a party who should have acted differently, and by not doing so, has left it impossible now to ascertain what might otherwise have occurred. In our view, there is a reasonable chance that a Court would decide that something might have been done by the Federal Government to preserve at least part of the fishery.

If the Grand Coulee and subsequent Columbia River dams could be viewed as one overall project, the infringement issue would be stronger from the CRFN's perspective.

3.4 Justification of the Infringement (Applying the test in *R v. Sparrow*, supra)

In order for an infringement of an aboriginal right to be justified there must first be a valid legislative objective behind the infringement. The Federal Government may attempt to argue that the infringement of the CRFN aboriginal right was justified in the circumstances as the benefits of the dams justified the original loss of the fishery. With respect to the Grand Coulee, there was no apparent legislative objective in destroying the CRFN fishery (ie. looking at the Grand Coulee in isolation, that dam does not appear to have been of any benefit to Canada). The loss of the CRFN fishery appears to have not been considered rather than having been balanced against other objectives.

If a valid legislative objective is found, the special fiduciary relationship and responsibility of the government vis-à-vis First Nations is used to determine whether or not the particular infringement can be justified. This is the second level of the *R v. Sparrow* test. The court in *Sparrow* on this point considered further questions as to the circumstances of the infringement and in particular said:

"These include the questions of whether there has been as little infringement as possible in order to effect the desired result, whether, in a situation of expropriation, fair compensation is available and whether the aboriginal group has been consulted." (p.187)

Given that there was no apparent benefit to Canada from the Columbia River dams in the U.S. (i.e. Grand Coulee) again it is difficult to see how the interference could be justified. If the Grand Coulee dam is considered independently, the subsequent

benefits from the Columbia Treaty cannot be used to later justify the loss caused by the Grand Coulee. It is not hard to argue that the CRFN should have been entitled to more consideration and protection from the Federal Government.

On the other hand, if the Grand Coulee and the Columbia River dams are taken together, justification becomes a more difficult issue. Here, the Crown would have a reasonable argument that there was a valid objective (ie. hydro power, flood control, irrigation and down stream benefits). But, even so, it is difficult to see how Canada's actions could pass the second level of the *Sparrow* analysis.

3.5 Remedies

Generally, to date, aboriginal fishing rights have been used by First Nations to avoid conviction under federal fishery regulations (or other regulatory offences, e.g. hunting). An unresolved legal issue is whether aboriginal fishery rights can be used to:

1. ground injunctive relief to protect or mitigate ongoing or potential damage to the fishery resource; or
2. ground an award of damages or compensation for unjustifiable infringement or expropriation.

Another legal hurdle for First Nations, as yet unresolved at law, is whether remedies should flow from unjustifiable breaches of aboriginal rights which occurred before 1982 (ie. before Section 35 of the *Constitution Act*, 1982). Prior to that time the Crown was free to infringe such rights without restriction and the Federal Government was free to extinguish such rights. It is unclear at law

whether infringement of aboriginal rights prior to 1982 will give rise now to a remedy for damages or compensation.

A preliminary factual issue with respect to the protection of the fishery is whether anything can be done at this point to bring back the Columbia River salmon. We do not currently have the scientific studies to comment on this.

If enhancement is possible, the CRFN could ask a Court to order the Federal Government to take whatever reasonable mitigation steps are appropriate. This type of relief was achieved by First Nations with respect to a treaty right to fish in *Saanichton Marines Ltd. et al v. Claxton* (1989), 57 D.L.R. (4th) 161 (BCCA). In that case the First Nation successfully stopped a marine project because it would have damaged the fishery resource. Although it would be a significant step, a Court could conclude that the aboriginal right to fish includes the right, not only to protect the resource, but also to force the Federal Government to mitigate damage it has caused. This issue has been litigated in Washington State but remains unresolved.

As regards damages or compensation, the Court in *Sparrow*, supra, and *Delgamuukw*, supra, both suggested damages should be forthcoming where aboriginal rights are unjustly infringed upon or "expropriated". However, we are not aware of any cases where such damages have been awarded. It is our view that the law should provide some compensation.

Quantifying compensation or loss would depend on many factors such as:

1. the scope of the aboriginal right lost; ie. food and ceremonial purposes only or commercial aspects too;

2. the amount of a reasonable food and ceremonial fishery, given the number of aboriginal people affected;
3. the number of years that the damages are payable from. There is a further legal argument (again unresolved) that, even if damage awards can be based on infringement which occurred prior to 1982, any damages would be payable only for the ongoing loss from 1982, when the protection from aboriginal rights was put in place by Section 35 of the *Constitution Act*, 1982.

We are not in a position to attempt to quantify further the damage or compensation award which might be obtained.

4. THE EXISTENCE AND THE BREACH OF A FIDUCIARY DUTY

This cause of action is based on the argument that the Federal Government owed a fiduciary duty to the CRFN to protect the CRFN fishery. To date, cases where the Crown has been held to owe a fiduciary duty to First Nations have, for the most part, dealt with reserve land. (e.g. *Guerin v. Canada*, (1984), 13 D.L.R. (4th) 321 (S.C.C.)) However, Chief Justice McEachern, in deciding that the Provincial Crown owed a fiduciary duty to affected First Nations with respect to the use of vacant Crown lands, at the B.C. Supreme Court in *Delgamuukw*, stated:

“The relationship between the Crown and Indians is, however, an emerging area of law which is only now starting to be explored, and several recent cases have established that special duties and obligations arise out of such relationships.” (p.247)

(Although McEachern, C.J.’s decision was in part overturned, the Court of Appeal did not deal with the fiduciary duty analysis. Its status is therefore uncertain.)

It should be noted that the cases McEachern, C.J., was referring to were in reference to First Nation interests in land and we are unaware of cases dealing with the loss of specific interests in resources such as the salmon fishery.

In *Sparrow* the Supreme Court of Canada stated that:

“..... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historical relationship.”

Generally, a fiduciary relationship arises out of a relationship where one party (the fiduciary), for whatever reason, has power and control over the interests of the other, such that the law will imply duties of fairness on the fiduciary so as to protect the more vulnerable party.

McEachern, C.J., in *Delgamuukw*, said there should not be a precise justification test in assessing this fiduciary duty and whether the Crown has complied with it but instead suggested that it was more a matter of reconciling competing interests. He developed a number of factors to be considered in the process, four of which may be applicable to the CRFN and the CRFN fishery:

1. The Crown must be free to direct the development of the province and the management of its resources and economy in the best interests of both First Nations and non-First Nations.
2. The province should keep First Nations interests very much in mind and there should be reasonable consultation so that First Nations will know the extent to which their use of Crown lands might be terminated or disturbed.

3. The province should make genuine efforts to ensure that aboriginal sustenance and cultural activities are not impaired arbitrarily or unduly.
4. Whether any proposal or resulting interference offends unduly upon aboriginal activities and brings the honour of the Crown into question will in large measure depend upon the nature of the aboriginal activity sought to be protected and the extent it is ordinarily exercised; the reasonable alternatives available to all parties; the nature and extent of the interference; its duration, and a fair weighing of advantages and disadvantages both to the Crown representing all the citizens and to First Nations. (pp. 252-253)

Sparrow suggests that the Federal Government owes First Nations a fiduciary duty with respect to the aboriginal right to fish. Although the facts in *Sparrow* related to measures designed to regulate and protect the fishery, in our view this could be extended and applied to the destruction of CRFN fishery. It is unclear at law just what duties this "resource based" fiduciary duty would entail. But it should, at minimum, include duties of consultation and consideration of aboriginal rights and efforts to minimize negative impact on such rights.

While the Federal Government was probably aware of the general importance of the salmon fishery to First Nations prior to the construction of the Grand Coulee, it appears to have failed to do anything to attempt to protect the CRFN fishery. This importance is highlighted by a quote from a speech made in the House of Commons in 1927:

"What is essential to the adequate protection of the fisheries must be effected. In the permanent interest of the Indians themselves this is necessary as it is probable that from no other industry is such a large portion of their livelihood made." (Motherwell, 1927, p.1)

At the very least, the Federal Government should have represented the CRFN's interests before the IJC to ensure that the CFRN concerns were considered, and efforts could have been made to enforce the right to compensation. The Federal Government apparently took the position that because there was no significant commercial fishery on the Columbia River in Canada, there was no concern about the CRFN fishery. In our view this was probably a breach of an existing Federal Government fiduciary duty.

The general remedy for a breach of fiduciary duty is an award of damages. One major hurdle here will again be causation. The Federal Government will argue that since Canada could not have prevented the Grand Coulee construction, any breach of duty by the Federal Government did not cause the First Nation fishery any harm. Again, it is not clear that this is so on the facts. As well, a fiduciary in breach of duty generally finds it difficult to succeed in arguing his or her act did not make any difference. However, this would be a hurdle to overcome.

Again, here there exists the same difficulties quantifying the award as discussed under the aboriginal rights analysis.

A second remedy here is an order to prevent further breaches of duty. Possibly this could be used to obtain resource restoration and enhancement measures. We understand that in the United States there is in place programs for designing and implementing restoration and enhancement measures with respect to the Columbia River Fisheries.

A third remedy is "disgorgement of profits". If a fiduciary profits by a breach of duty the Court can order that person to turn over the profits to the party the fiduciary was supposed to be protecting. This might have application to this case

and in particular to the down stream benefits obtained by the Federal/Provincial Government from the Columbia Treaty.

5. BOUNDARY WATERS TREATY 1909 AND THE INTERNATIONAL JOINT COMMISSION

While this paper is not intended to address questions of international law, it is worth noting certain features of the Boundary Water Treaty and the IJC for future consideration.

The Order of Approval, dated December 15, 1941 concerning the Grand Coulee Dam and reservoir, while approving the application by the United States, stated a number of conditions. Of interest are conditions 1 and 2 which provide:

1. That the Applicant make suitable and adequate provision, to the satisfaction of the Commission, for the protection and indemnification of all interests in British Columbia by reason of damage resulting from the construction and operation of the Grand Coulee dam and reservoir.
2. That the Commission expressly reserves and safeguards its right under the aforesaid Treaty further to exercise jurisdiction over such effects on the natural levels or stages of the Columbia River at and above the international boundary as might actually result from the operation of the said Grand Coulee dam and reservoir; and to issue such further order or orders in the premises as the Commission may deem to be appropriate and justified for the protection and indemnification of the Province of British Columbia or of any private or municipal corporation or citizen thereof that might be found by the Commission actually to have sustained damage on account of the raising of the natural levels of the Columbia River at and above the international boundary: Provided, that any such further order or orders shall be issued only after the Commission shall have received and considered formal applications filed by aggrieved parties in accordance with the Commissions' Rules of Procedure.

It would appear there may be recourse for the CRFN through an application to the IJC related to indemnification of the CRFN for damage resulting from the

construction and operation of the Grand Coulee and reservoir. This would not involve legal action against the Federal Government. It may well be possible for the CRFN to make a claim directly to the IJC for such an order. Further directed legal analysis is necessary to evaluate this option.

6. RESTITUTION

This cause of action will be similar in this case to the "disgorgement of profits" remedy referred to under the Fiduciary Duty analysis, above.

There are three elements:

1. one party, the defendant, receives a benefit;
2. another party, the plaintiff, suffers a corresponding detriment or loss; and
3. there is no "juristic" reason to support the benefit but, rather, the enrichment is unjust and should be reversed.

This cause of action is a broad, flexible tool which the Courts use to reverse unjust enrichment when it is equitable to do so. (For example, monies paid by mistake).

With respect to this case, the argument would be as follows:

1. The Crown (either federal or provincial) has received a benefit from having the Grand Coulee and the Columbia Treaty dams in place (namely, hydro power, irrigation benefits, flood control benefits, and of course the down stream benefits from the United States);

2. First Nations have received a "corresponding" detriment (i.e. the loss of the aboriginal rights to fish); and
3. The "unjust" aspect of the analysis would be that the loss was occasioned through a breach of fiduciary duty by the Federal Crown and/or the infringement of the aboriginal rights was unjustified. Again, unfortunately at law, it is not clear whether the CRFN will succeed in arguing that the infringement was unjustified because the infringement took place prior to 1982 and the constitutional protection of aboriginal rights was only created by Section 35 of the *Constitution Act*, 1982. However, it may not be necessary to rely on the "constitutionalization" of the right to gain the remedy.

As can be seen, this cause of action is complementary to the aboriginal rights and fiduciary duty analysis set out above. The advantage it may bring is discussed under the "Limitation Act" analysis, below.

Should the CRFN succeed under this cause of action, it would be entitled to compensation for the detriment suffered up to the value of the benefits received by the Crown.

It is recognized that this cause of action might be a claim principally against the Provincial Crown because under an agreement between the Federal Government and the Provincial Government it was the Province that built the Columbia Treaty dams in British Columbia and then received the down stream benefits from the United States.

7. LIMITATION ACT

Under our system of law there are time limits within which a person must commence a law suit from the date the cause of action arose. If a person does not start the law suit within the set out time period, and there is no ground upon which the time limit can be extended, then the failure to commence the action within the prescribed period will be a complete defence to the claim. Unfortunately, aboriginal claims are vulnerable to this defence because many of the wrongs suffered by First Nations happened a long time ago. With respect to this case, the question of a limitation defence is of sufficient importance that we thought it best to discuss it at the end with respect to all of the causes of action which we have identified. For actions accruing in British Columbia the relevant statute is the *Limitation Act* (British Columbia).

With respect to the law suit proposed by the CRFN there are two relevant limitation periods to be concerned about:

1. Section 3(4) sets out a general six (6) year limitation period in which to start a law suit. This six (6) year limit, however, is subject to confirmation, postponement or suspension of the running of time. Whether or not any of these extensions apply to the CRFN would have to be considered further and would require some detailed analysis of what exactly the CRFN knew and when about the loss of the Columbia River fishery, how it happened and what advice the CRFN has had over the years.
2. In addition, there is a thirty (30) year limitation period set out in Section 8 which is not subject to confirmation, postponement or suspension of the running of time. The thirty (30) year period is, however, subject to Subsection 3(3) of this Act (as is the six year limitation) which states that

limitation periods do not apply to certain types of action and, in particular, to actions:

- (h) to enforce an easement, restricted covenant or profit a prendre;
- (j) for a declaration as to the title to property by any person in possession of that property.

In *Apsassin v. Canada*, the Supreme Court of Canada held that the loss caused by a breach of fiduciary duty by the Federal Government which occurred thirty (30) years before the action by the First Nation was commenced was "statute barred" and as a result that part of the claim was dismissed. This was so even though the First Nation was able to rely on a suspension of the running of time so as to get around the six (6) year limitation period.

On its face, at least, the thirty (30) year limitation period causes significant problems in this case because the Grand Coulee was completed in the 1940s and it is that dam which appears to have caused the major loss of the salmon fishery. Although we do not have the scientific evidence to be sure, it is doubtful whether the three Columbia Treaty dams (constructed in 1968 and subsequently) caused further loss to the salmon fishery as they were all upstream of the Grand Coulee dam which cutoff the Columbia River for salmon.

For this reason, a straightforward breach of fiduciary case will be problematic.

With respect to the breach of aboriginal rights claim, there are a number of arguments to be made which would allow the claim to go ahead. These are as follows:

1. First, it can be argued that the *Limitation Act* was never intended to apply to aboriginal rights. While it seems to us that there can be no limitation restriction on a First Nation claiming for a declaration that it has certain ongoing aboriginal rights (such as aboriginal title), it may be that, with respect to claims for damages or compensation, that a Court will apply the thirty (30) year *Limitation Act* rule. There is simply no case law on this point from which one can draw a conclusion.
2. It could be argued that the aboriginal right or interest is an ongoing interest and that there is a continual infringement of that interest while the dams remain in place. This would be similar to a continuing trespass action. So, although the CRFN would not be able to claim for damages from before 1966, (i.e. 30 years ago) it would have an ongoing claim for the damages ever since caused to them by the existence of the dams in question.
3. It could be argued that the Grand Coulee and the Columbia Treaty dams were really one overall project and therefore were not finished until the construction of the Mica dam in 1973. This analysis would get the CRFN around the thirty (30) year limitation rule. However, as discussed, it is our understanding that the Grand Coulee was relatively independent from the Columbia Treaty and the dams built pursuant to it.
4. There is also a constitutional argument under s. 15 of the *Charter* that the *Federal Court Act* discriminates against aboriginal people of British Columbia (and other litigants). S.39 of the *Federal Court Act* adopts provincial limitations statutes for Federal Court actions. *Limitation Acts* in various Provinces are different and some do not have a thirty (30) year ultimate limitation period. It could be argued that the effect of the *Federal Court Act* is to discriminate against litigants depending on which Province

they reside in. Further, aboriginal claims are most often affected by this problem. If the provisions of the *Federal Court Act* were successfully challenged then the 30 year limitation defense would not be available.

5. As well, it can be argued that the provincial *Limitation Act* should not affect aboriginal rights, because dealing with such rights is an exclusively federal matter (see *Delgamuukw*, B.C.C.A.). One difficulty with this argument is that it is the *Federal Court Act*, which adopts this provincial legislation for Federal Court proceedings. To get around this problem, the CRFN can avoid the *Federal Court Act* by suing in the British Columbia Supreme Court. (In *Apsassin*, a Federal Court case, the British Columbia limitations legislation was not avoided in a breach of fiduciary duty case. However, it can be argued that aboriginal rights ought to be treated differently than fiduciary rights particularly in the provincial court system).

With respect to breach of fiduciary duty, again, there may be ways to characterize this cause of action to avoid the thirty (30) year limitation period. Some ideas are as follows:

1. Again, it could be argued that this was one overall project.
2. Secondly, it could be argued that, at least as far as disgorgement of profits goes, that the case cannot be brought (i.e. the cause of action does not accrue) until the fiduciary has actually profited. In this case, it could be argued that profit in question did not accrue to the Crown (or at least not fully) until after the Columbia Treaty, and within the thirty (30) year limitation period. (In fact, as discussed, the Province is still looking to negotiate further down stream benefits.)

Lastly, with respect to unjust enrichment, there is no doubt that this cause of action does not accrue until the defendant has received an enrichment. Again, it can be argued that this occurred only after the Columbia Treaty.

The general stumbling block, however, is that it is still open to the Crown to argue that all of the harm done to the fishery was caused by the Grand Coulee. The Federal Government would then argue that anything that happened after that could not be a breach of fiduciary duty nor give rise to unjust enrichment because after that point there was no further harm done to the fishery or to the CRFN. Given the attitude of the Supreme Court of Canada in *Apssasin* and of the lower Courts which have dealt with this limitation period issue, we must acknowledge that there is a possibility that any action by the CRFN could be met with the limitation defence.

8. CONCLUSIONS

From our review of the information provided and our knowledge of the existing case law, all three of the proposed causes of action (infringement of aboriginal rights, breach of fiduciary duty and unjust enrichment) are arguable cases and could succeed.

At this point, we could not describe the CRFN's chances of success as stronger than that.

With respect to aboriginal rights, the CRFN should be able to show an aboriginal right to the use of salmon for food and ceremonial purposes. Under the law, as it currently stands, supporting a commercial aspect to such right will be difficult. We doubt that any rights proven have been extinguished. With respect to infringement, the first issue is whether one can consider the Grand Coulee and the

Columbia Treaty dams as one overall project. The evidence indicates that this is not the case. Given that, in considering infringement and justification, it may be necessary to consider these two projects separately. Even so, we do feel, on balance, the Court would find that the Federal Government's involvement (or lack thereof) in dealing with the Grand Coulee to be a prima facie infringement of aboriginal rights. As well, in our view, the Federal Government's involvement with the Columbia Treaty dams would be such an infringement. One caveat here is that if it can be shown that the Columbia Treaty dams did not cause any damage whatsoever to the salmon fishery because it was already destroyed by the Grand Coulee, then the Court could find that the Columbia Treaty dams were not a prima facie infringement of the aboriginal right to fish. Finally, given the existing legal tests, we do not see how the Grand Coulee, viewed independently, could be a justified infringement of aboriginal rights. Even justification of the Columbia Treaty dams would be difficult, given the lack of consultation and efforts to preserve aboriginal rights.

In terms of remedies for breach of aboriginal rights, one problem is that it is not clear that remedies will be available for a breach of aboriginal rights that occurred prior to 1982. This is because only in 1982 did aboriginal rights become constitutionally protected by Section 35 of the *Constitution Act*, (1982). If remedies are available, there is a chance that a Court could order mitigation or enhancement steps to be taken. This would be a difficult legal argument and may also be a difficult scientific argument because, unfortunately, it does not seem likely that much can be done now to bring back salmon fisheries to the Upper Columbia River. We understand this may not be the case with respect to the Okanagan River. If compensation were to be found available, certainly the calculation of it would be complicated but that would not bar compensation being awarded.

In terms of breach of fiduciary duty, overall, it is our view that the Courts should find that the Federal Government owes the CRFN a fiduciary duty with respect to the protection of the food and ceremonial fishery. Assuming that such fiduciary duty is found to exist, there is a good argument that such duty was breached by the Federal Government with respect to the Grand Coulee. Again, the question of whether the fiduciary duty was breached with respect to the Columbia Treaty dams probably depends on whether or not such dams caused any damage to the fishery.

Further scientific evidence is required to document the fishing losses associated with the Columbia Treaty dams.

With respect to remedies, again there is the problem that the Federal Government may not have been able to do anything to prevent the Grand Coulee from going ahead. If that is the case, the CRFN could fail on its claim for damages. Another remedy to keep in mind for breach of fiduciary duty is "disgorgement of profits".

We mention the conditions to the December 15, 1941 IJC Order of Approval which allowed the Grand Coulee dam to go ahead. On its face, at least, there does seem to be a potential remedy for the CRFN through an application to the IJC. This matter should be considered further.

Finally, restitution is also another valid cause of action because the Provincial and Federal Governments have been enriched through the Columbia Treaty dams and such dams have caused a corresponding detriment to the CRFN aboriginal fishery rights.

It seems to us, however, that the biggest hurdles faced by the CRFN are:

1. First, the main damage was caused by activities of the United States in creating the Grand Coulee and there will be questions of causation, i.e.

whether anything that Canada did or didn't do would have made any difference in what happened to the aboriginal fishery;

2. Whether remedies will be available for a breach of aboriginal rights, prior to 1982; and
3. Although there are ways to attempt to characterize this law suit in a manner which will not run afoul of the thirty (30) year limitation period under the *Limitation Act*, (British Columbia), essentially what the CRFN is considering starting a law suit about is the construction of the Grand Coulee, the events surrounding that and the damage that dam caused in the 1940s. There is a potential limitation defence to all of the causes of action discussed above (except the application to the IJC).

It is our view that further research is required before the CRFN considers commencing a civil action against the Federal Government:

1. The CCRIFC should retain a fisheries expert to:
 - (a) detail the location, cause and extent of salmon losses to all individual member groups in the CRFN (including the Okanagan fishery);
 - (b) detail the losses of resident species to all individual member groups in the CRFN (including the Okanagan fishery);
 - (c) provide details on possible remedial measures that may be used to restore the salmon or resident species.
2. The CCRIFC should contract an historical researcher to:

- (a) detail the history of each individual First Nation group of the CRFN. The historical researcher may also be of assistance to the fisheries expert in establishing where the CRFN groups fished, the times they fished, and the use such groups made of the fish in question;
 - (b) record the oral evidence of the elders with respect to where the the CRFN groups fished, the times they fished, the use they made of the fish, and the conduct or actions of the Federal Government towards them in relation to the construction of the Columbia River dams and their aftermath.
3. Retain legal counsel to consider and develop a legal strategy to make a formal claim to the IJC for indemnification for fisheries losses and perhaps mitigation and restoration measures.

We hope you find this review to be useful. We look forward to discussing it with you further.

Yours truly,

FERGUSON GIFFORD

Per:


Dr. Andrew Thompson