International Law, the Pacific Salmon Treaty, and Infringement of Aboriginal Rights[1]

A. Introduction

Canada and the United States signed the Pacific Salmon Treaty ("PST") in 1985, after 15 years of negotiations.[2] The purpose is to cooperate in the management, research and enhancement of Pacific salmon stocks given the transboundary nature of many of these stocks and their importance to both countries. In application, the PST apportions gross aggregate fisheries stocks for each country. It does not address domestic allocations or management.

The 1985 PST included six fishery chapters: Transboundary Rivers; Northern British Columbia and Southern Alaska; Chinook Salmon; Fraser River Sockeye and Pink Salmon; Coho Salmon; and Southern British Columbia and Washington State Chum Salmon. In 2002 the parties added the Yukon River as the seventh fishery chapter. The chapters outline conservation and catch sharing arrangements that guide fisheries in specific areas and for certain species in both countries. Five of these chapters expired in 2008 and the remaining two – the Fraser River and the Yukon River – are slated for renewal in 2010. Canadian departments Fisheries and Oceans Canada ("FOC")[3] and Foreign Affairs are responsible for negotiating with their American counterparts.

The Pacific Salmon Commission ("PSC") is a joint Canada/U.S. body that implements the PST and negotiates future agreements. The commission provides advice to both Parties, but does not regulate fisheries.[4] The Commission has established five panels to address regional issues: the Northern Panel, the Southern Panel, the Transboundary Panel, Fraser River Panel and the Yukon River Panel.[5] Arnie Narcisse and Russ Jones are Canadian First Nations Commissioners on the Pacific Salmon Commission. Each panel also appears to have Canadian First Nations members, for example Chris Barnes and Chief Harry Nyce Sr. are members of the Northern Panel.

The U.S. and Canadian governments agreed to bring the most recent amendments to the PST into effect on January 1, 2009 through to 2018. Some First Nations are concerned with these amendments and the PST in general on two grounds. First, the First Nations assert that the Government of Canada failed to undertake meaningful consultation during the revision process for the PST. Second, the First Nations assert that the PST fails to

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[1] Thanks to former ELC Intensive student Zahra Jimale and Articled Student Jennifer Smith for their research in this area.

[2] History of the Pacific Salmon Treaty, www.pac.dfo-mpo.gc.

[3] Formerly known as the Department of Fisheries and Oceans.

[4] The Pacific Salmon Commission, http://www.psc.org.

[5] Treaty Between The Government of Canada and the Government of the United States of America Concerning Pacific Salmon (Pacific Salmon Treaty), of 1985, Annex I.

differentiate between aggregate stocks as they merge in the ocean and discrete stocks that return to particular rivers where an aboriginal right to fish attach. Aboriginal rights are infringed when the small (e.g. 10 percent of the run) discrete stocks are overfished by the commercial fishery because they return to their rivers at the same time as the aggregate stocks. This situation is perhaps most prominent on the Fraser and Skeena Rivers, but may have implications for all rivers covered by the PST where aggregate stocks are dominated by enhanced runs. The marine commercial fleet fishes these aggregate stocks at exploitation rates that the aggregate enhanced stock can withstand but that overfish and weaken the discrete stocks.

The intent of this Backgrounder is to discuss the PST and set out some of the law that addresses the enforcement of international instruments in preparation for the Associates teleconference on Monday February 9th. The purpose of the teleconference is to generate ideas amongst the Associates on how to use the PST in the context of an aboriginal right to fish to address salmon conservation. In particular, participants will be asked to discuss:

(1) challenging the process of treaty negotiation as an infringement of aboriginal rights (duty to consult);
(2) challenging the domestic implementation of the treaty (Fisheries Act, regulations, policies) as contrary to the principles of the treaty; and
(3) exploring whether a challenge to domestic legislation implementing a treaty can have an impact on the treaty itself.

B. Pacific Salmon Treaty Background

The PST is founded on the principle of conservation and equity, as set out in Article III.[6] Each government is expected to conduct itself to "prevent overfishing and provide for optimum production" (the conservation principle) and "provide each Party to receive benefits equivalent to the production of salmon originating in its waters" (the equity principle). Article III also states that in fulfilling their obligations, "the Parties shall take into account" (a) the desirability in most cases of reducing interceptions; and (b) the desirability in most cases of avoiding undue disruption of existing fisheries.[7]

Extensive renegotiation of the allocation arrangements under the PST took place throughout the 1990's as tension between Canada and the U.S. arose over interpretation of Article III and the dramatic increase of U.S. interception of Canadian salmon during the late 1980s.[8] Canada argued that it had a legal entitlement under Article III (1)(b) of the treaty to receive benefits from the production of its rivers and that the U.S. should decrease its interceptions, particularly in Alaska. Canada argued that "if one side intercepted more of the other side's fish, then it had to pay back by reducing interceptions either in the same fishery or

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7 Pacific Salmon Treaty, supra note 2, Article III (1).
7 Pacific Salmon Treaty, supra note 2, Article III (3).
8 Donald McRae, "The Negotiation of the 1999 Pacific Salmon Agreement," (2001) 27 Can-U.S. L.J. 267.

elsewhere."[9] However, the U.S. did not view Article III (1) as a legal entitlement that provided an automatic reduction in interception to address the interception imbalances.[10] Canada's interception declines were due to stock declines in Washington and Oregon, and Alaska did not agree to reduce interceptions to address concerns that resulted from the failures of Washington and Oregon.[11]

The conclusion of this dispute in June 1999 saw an agreement for abundance-based management where harvest rates for each salmon stock are set relative to stock abundance.[12] The objectives are to: sustain wild stocks; prevent overfishing; set a predictable framework for sharing the burdens of conservation and benefits of stock recovery; to provide cost-effective, responsive fishery management; and establish a common basis for stock assessment, fishery monitoring, and performance evaluation."[13] Some commentators say that this new agreement focuses on conservation and habitat protection rather than division of shared salmon stocks.[14]

Finally, Article XI of the Pacific Salmon Treaty deals with each Party's domestic application of the PST:

> 1. This Treaty shall not be interpreted or applied so as to affect or modify existing aboriginal rights or rights established in existing Indian treaties and other existing federal laws.
>
> 2. This Article shall not be interpreted or applied so as to affect or modify any rights or obligations of the Parties pursuant to other Articles and Annexes to this Treaty.

The parties included Article XI in the Treaty after American tribes and Canadian First Nations expressed concerns about the Treaty and the possibility that it would infringe their rights to salmon in the Pacific Northwest.[15] Article XI plays an interpretive role and attempts to provide a balanced approach to the Treaty's interpretation and application.[16] The responsibility for domestic allocation of salmon still lies with the federal government through FOC.[17] Moreover, part two of the Article limits the provision by stating that this article "shall not be interpreted or applied so as to affect or modify any rights or obligations of the Parties" under the Treaty.

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[9] McRae, *ibid.*
[10] McRae, *ibid.*
[11] McRae, *ibid.*.
[12] This new agreement replaced the 1985 Annex IV and also created new obligations in Chapter 7 of Annex IV.
[13] Daniel A. Waldeck and Eugene H. Buck, **"**The Pacific Salmon Treaty: The 1999 Agreement in Historical Perspective," CRS Congress Report, October 1999.
[14] Waldeck and Buck, *ibid.*
[15] M.P. Shepard and A.W. Argue, "The 1985 Pacific Salmon Treaty: Sharing Conservation Burdens and Benefits," (UBC Press: Vancouver, BC, 2005) at 86.
[16] Sheppard and Argue, supra note 45 at 86.
[17] McRae, supra note 6.

C. ISSUES

1. Aboriginal Fishing Rights & the Duty to Consult

Section 35 of the *Constitution Act, 1982*[18] affirms the existing aboriginal and treaty rights of aboriginal peoples of Canada. These rights include the right to fish for food, social and ceremonial purposes, which take priority over commercial and recreational fishing interests but are subject to conservation measures.[19] The Crown must consult with First Nations where the Crown has real or constructive knowledge of the potential existence of an Aboriginal right or title that can be adversely affected by the Crown's conduct:[20]

> "The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary, the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution."

The duty to consult and accommodate includes meaningful consultation where the Crown provides First Nations with all necessary information in a timely manner, an opportunity to express their interests and concerns, and serious consideration of their representations.[21]

The governments started negotiations for renewing the five chapters in 2007 and completed these negotiations by December 2008.[22] FOC conducted two rounds of domestic discussions: the first round took place from the fall 2006 to December 2007 and the second round to took place in the spring and summer of 2008. In the second round, FOC indicated that it would discuss the draft agreements with First Nations and consult domestic stakeholders.[23] Fisheries and Oceans Canada claims that it has held collective and bilateral meetings with First Nations.[24]

Some First Nations assert that consultation on the 2008 revisions to the PST was inadequate. The Crown did not include them in the consultation from the beginning. They

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[18] *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
[19] *R v Sparrow,* [1990] 1 S.C.R. 1075.
[20] *Haida Nation v. British Columbia (Minister of Forests),* [2004] S.C.J. No. 70 at para. 35.
[21] *Halfway River First Nation v B.C.* [1999]BCCA 470, at para. 159-160.
[22] Personal Communication to Ms. Zahra Jimale, Don Kowal Executive Secretary of the Pacific Salmon Commission, October 30, 2007 and Pacific Salmon Treaty website www. http://www.psc.org/publications_psctreaty.htm.
[23] FOC Fall 2007 Dialogues.
[24] *Ibid.*

had to initiate the consultation process themselves such that their first opportunity to speak with the Crown occurred when the U.S. and Canada had completed most of their renegotiations. The public "Community Dialogue" sessions were general information sessions for both aboriginal and non-aboriginal parties and were not designed for, and were not used for, aboriginal rights consultation. As the report on the 2007 session states in respect of the PST renewal: "This was primarily a DFO information session, bringing participants up to date on the five chapters of the treaty that were expiring." A Community Dialogues Progress Report issued by DFO in the fall of 2007 states: "DFO plans to further engage First Nations and stakeholders on draft amendments to the fishing chapters in the spring of 2008." In a subsequent website posting, DFO invited any aboriginal group to ask for bilateral consultation on the PST.

2. Aggregate Stocks versus Discrete Stocks to which Aboriginal Rights Attach

Canada's position in the renegotiations was to attempt to maximize aggregate salmon returns through conservation, then attempt to maximize allocation *vis a vis* the U.S., and finally to allocate the resulting runs among various Canadian interests, including aboriginal interests. Some First Nations assert that this approach infringes on the rights of those aboriginal groups that depend not on aggregate stocks, but on discrete stocks particular to certain watersheds. They say Canada should consult with each aboriginal group to identify those discrete stocks to which an aboriginal right is attached. Canada should then identify which such stocks may be affected by U.S. interception fisheries and estimate the extent of each such interception. Then Canada should adopt a position that minimizes the interception of such stocks, even though that position may reduce the level of the aggregate that otherwise could have been achieved in the conservation and allocation negotiations.

If, despite Canada's negotiation efforts, there is still a potential US interception of a discrete salmon stock to which aboriginal rights attach, Canada has a duty to reduce its domestic interception to allow the timely recovery of any such stock that has been depleted. Such domestic reductions require two provisions in the PST. First, the PST parties need to establish a protocol to obtain the best possible in-season estimates of the U.S. interception within quantified uncertainty levels. For example, this may require estimates of boundary escapement after the targeted and by-catch take in Alaskan or Washington fishery districts.

Second, there needs to be an assessment of the impact of the negotiated provisions on the aboriginal fishery stocks prior to ratification. This could be achieved by a PST provision similar to the assessment by the U.S. as to whether it has failed to meet the legal requirements of its *Endangered Species Act*, as set out on paragraph 7 of the June 30, 1999, exchange of diplomatic notes.

3. Domestic Law and International Obligations

Treaties ratified by Canada are not directly applicable in Canada and usually cannot form the basis of an action in domestic courts.[25] Treaties must be explicitly incorporated into domestic law in order to found a cause of action.[26] It is the domestic legislation implementing the treaty, rather than the treaty alone, which founds the basis for an action in domestic courts.

The PST's primary goal is conservation and recent case law points to an obligation on the part of Canada to not contravene international agreements when construing domestic law. In *R v. Hape*[27] the Supreme Court of Canada stated that "… courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result…"[28] While the issue before the Court in *Hape* was not about the reception of international law into domestic law, the Court had to address this issue in deciding this case. The court's findings were adopted in the British Columbia Court of Appeal case *R v. Osmond.*[29]

If this new line of cases can be applied in the fisheries context, a potential argument is that domestic allocations under the *Fisheries Act* and regulations contravene the PST because they do not adequately take into account conservation.

4. Judicial Review of Treaty-Making Power

The Royal Prerogative consists of the powers and privileges afforded to the Crown by the common law. It has been called "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown". [30] This prerogative power is a part of the common law because it is the courts that determine the scope of the Crown's prerogative powers.[31] The conduct of Canada's foreign affairs, including treaty-making, continue to be prerogative powers of the Crown. [32] Historically, it was thought that the prerogative powers of the Crown were not subject to challenge via judicial review. This thinking has since changed, at least to some extent.

The courts will determine whether the asserted prerogative power in fact exists, what the limits of its existence are and whether any restrictions on that power have been complied with.[33] The court will also determine whether the prerogative power in question has been

[25] *J.H. Rayner Ltd. v. Department of Trade*, [1990] 2 A.C. 518 at 476-77, 481, 500; *A.G. Can. V. A.G. Ont. et al. (Labour Conventions Case)*, [1937] 1 D.L.R. 673; *Francis v. The Queen*, [1956] 2 S.C.R. 618 at 621. In contrast, customary international law is automatically part of the law of the land unless overridden by statute or judicial in most Commonwealth countries.

[26] *Labour Conventions Case, ibid.*

[27] *R. v Hape*, (2007) SCC 26.

[28] *Hape*, *ibid.*

[29] *R. v. Osmond,* 2007 BCCA 470.

[30] Dicey, *Law of the Constitution* (10th ed., 1965), 424.

[31] *Case of Proclamations* (1611) 12 Co. Rep. 74, 77 E.R. 1352 (K.B.)

[32] Hogg, *Constitutional Law of Canada,* 5th ed. (Scarborough: Thompson Carswell, 2007), 1.9.

[33] Hogg, at 1.9. see also *Burmah Oil Co. v. Lord Advocate* [1965] A.C. 75 (H.L.)

displaced by a statue, in which case it no longer exists.[34] The courts will also determine whether prerogative powers have been properly delegated.[35] The Supreme Court of Canada has held that the exercise of Crown prerogative power must occur in accordance with the Canadian Charter of Rights and Freedoms.[36] As well, it has held that the Crown must exercise its prerogative powers in a manner consistent with constitutional norms.[37] Administrative principles of fairness must also be observed.[38]

The case of *Council of Canadians v. Canada (Attorney General)* involved a challenge to the North American Free Trade Agreement's (NAFTA) establishment of tribunals that are outside the scope of s.96 courts in Canada, and applied some of these principles in a public interest context.[39] The court confirmed that the judicial review of a treaty, or the decision to ratify a treaty, is possible if the terms of the treaty somehow undermine constitutional norms, values or provisions. The applications judge (and confirmed by the Court of Appeal) found that the NAFTA provisions did not violate any principles of constitutionalism, the rule of law, or the *Charter*, because they (1) did not infringe s. 96, (2) cannot invalidate domestic laws or government practices, and (3) must operate in accordance with the rules of international law.

The other interesting aspect of the case is the treatment of possible harm. The court decided that the applicant's worry about Constitutional or Charter violations was premature in the absence of specific harm to an individual Canadian.

A fundamental issue is whether, once the Crown has exercised that authority and a treaty has become international law, a successful judicial review can affect the treaty, the scope of the exercise of the treaty-making power, or simply domestic legislation. To this end, the Court of Appeal in *Council of Canadians* noted the clear and well-known distinction between parliamentary approval of a treaty on the one hand, and incorporation of that treaty into Canadian domestic law on the other. A judicial review would not challenge the treaty itself, but possibly the federal government's decision of how to negotiate the treaty or its acceptance of terms that were in violation of the Constitution.

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[34] *A.G.* v. *De Keyser's Royal Hotel* [1920] A.C. 508 (H.L.). See also *Ross River Dena Council Band v. Canada* [2002] 2 S.C.R. 816, para. 58. In this case Crown prerogative power to create Indian Reserves was found to be "limited but not "ousted by statute. ("*Ross River Dena*")

[35] *Ross River Dena*, at para. 63-64.

[36] *Operation Dismantle v. The Queen* [1985] 1 S.C.R 441. The court held that the prerogative powers of the Crown are, in principle, subject to the Charter: 'Since there is no reason in principle to distinguish between Cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also," at para. 50.

[37] *Air Canada v. B.C.* [1986] 2 S.C.R. 539, at para. 15: 'All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.'

[38] *Council of Civil Service Unions v. Minr. For Civil Service* [1985] 1 A.C. 375 (H.L.).

[39] 277 D.L.R. (4th) 527, 217 O.A.C. 316, 2006 CarswellOnt 7543, 149 C.R.R. (2d) 290 (Ont. C.A. Nov 30, 2006). Leave to appeal refused *Council of Canadians v Canada (Attorney General),* 241 O.A.C. 400 (note), 375 N.R. 395 (note), 2007 CarswellOnt 4945, 2007 CarswellOnt 4946, 156 C.R.R. (2d) 375 (note) (S.C.C. Jul 26, 2007).

C. Discussion

This paper is a modest attempt to identify some of the issues associated with the use of an international treaty to settle overall domestic allocations between Canada and the United States, particularly with regard to the conservation of salmon and ongoing aboriginal rights. To that end, we invite Associates to consider the following questions at our next teleconference on Monday February 9 from 4pm to 6pm:

1. Judicial Review of the PST

Could an aboriginal group sustain an application for a judicial review of the PST on the basis that the treaty infringes its section 35 Constitutional rights and that Canada did not advance a position that would accommodate the rights? If so, who in the Canadian government would be named as respondent to the application? With regard to the issue of parties to an action, the executive branch of government is responsible for treaties: "Parliament, no doubt, as the Chief Justice points out, has constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone."[40]

2. Remedies

Is there a remedy available for Canada or First Nations to ask that the recently negotiated PST provisions be reopened before 2018?

3. Declaration or *Prima Facie* Aboriginal Right

What are the advantages of seeking a declaration of an aboriginal right as opposed to a *prima facie* aboriginal right on such a judicial review?

4. Renewal of the Fraser River Sockeye and Pink Salmon Chapter 2010

What are the implications of this discussion for the renewal of Chapter 4 of the PST (Fraser River Sockeye and Pink Salmon) in 2010?

[40] *A.G. Can. v A.G. Ont. (Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, and Limitation of Hours of Work Act) (Labour Conventions)*, [1937] A.C. 326, [1937] 1 W.W.R. 299, [1937] 1 D.L.R. 673, at p. 347.

For More Information

Pacific Salmon Treaty
http://www.psc.org/pubs/Treaty.pdf

Pacific Salmon Treaty – General Information
http://www.psc.org/publications_psctreaty.htm

Meinhard Doelle and Christopher Tollefson (forthcoming 2009). "Chapter 1 - International Law" in *Environmental Law* (Casebook).

Elisabeth Eid, Treaty Law in Canada: A Few Treats about Treaties (Vancouver: Continuing Legal Education Society, May 2007)

Aaron de Leest, "The 1999 Pacific Salmon Agreement: Will it Work?" (2000) 7 Sw. J. L. & Trade Am. 173.

Donald McRae, "The Negotiation of the 1999 Pacific Salmon Agreement," (2001) 27 Can-U.S. L.J. 267

Karin Mickelson, What is International Law?: Traditional and Current Views (Vancouver, Continuing Legal Education Society, May 2007).

Daniel A. Waldeck and Eugene H. Buck, **"**The Pacific Salmon Treaty: The 1999 Agreement in Historical Perspective," CRS Congress Report, October 1999