

ENVIRONMENTAL CONFLICT RESOLUTION: SUITS

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Contents

1. Introduction
 2. Legal Mechanisms Available to Conserve and Protect Pacific Salmon and Their Habitat
 - 2.1. Lawsuits and international legal obligations to preserve and protect the environment
 - 2.2. Criminal suits pursuant to the Fisheries Act and the Waste Management Act
 - 2.3. Suits by private individuals
 - 2.4. Review of and Appeals from Administrative or Regulatory tribunals
 - 2.5. Suits by First Nations (aboriginal peoples)
 3. Enforcement
 4. Strategic Considerations in Environmental Suits
 5. Thoughts for the future
- Acknowledgements
Glossary
Bibliography
Biographical Sketch

Summary

This article looks at the role of law suits in resolving environmental conflict, in particular in Canada as it relates to the conservation and protection of Pacific salmon and their habitat in the Fraser River. Five different kinds of law suits are analyzed: those related to Canada's international obligations; criminal law suits, civil law suits, administrative law suits and First Nations law suits.

There are both advantages and disadvantages to using law suits to resolve environmental conflicts. The contemplation of using law suits requires several issues to be considered.

For example, legal standing must be granted, the goals and objectives of the suit must be taken into account (e.g. to change public policy and/or to increase political awareness of an issue), and the uncertainty of the outcome and the scope of the decision must be taken into account.

In Canada, law suits have not been very successful in stopping environmental desecration for a variety of reasons. These include a persistent and increasing lack of

sufficiently trained legal and scientific personnel, enforcement and compliance issues, and poor utilization of science in environmental decision-making.

1. Introduction

The protection of the environment and environmental conflict resolution have become major challenges of our time and world-wide phenomena. To meet these challenges, different methods of environmental conflict resolution can and are being used. This article will look at the role and efficiency of one of these methods—law suits—in resolving environmental conflict. Environmental suits in the context of the conservation and protection of Pacific salmon and their habitat in the Fraser River in Canada will be used for illustrative purposes.

Five different kinds of legal mechanisms are touched upon in this article in relation to the conservation and protection of Pacific salmon and their habitat:

1. Law suits in relation to Canada's international obligations
2. Criminal law suits, including private prosecution
3. Civil law suits
4. Administrative law suits
5. Law suits by First Nations (aboriginal people)

The situation of the Pacific salmon in the Fraser River shows that law suits have different characteristics from most other policy influencing instruments (e.g. negotiation, mediation and arbitration or lobbying, advocacy advertising, political contributions or trying to influence public opinion via the news media) for resolving environmental conflict. According to Stanbury, these characteristics include the following:

1. The rules and traditions of the courts and the conduct of legal actions structures all contact between those involved.
2. Those seeking to use suits as a tool to influence public policy always have an adversary present.
3. Communication to a court can only be done through written and oral argument.
4. A judge is independent of those appearing before him or her.
5. Bargaining is not possible with a judicial decision maker.
6. Persuasion is limited e.g. case precedent, interpretation of statutes/regulations and rules governing procedural fairness.
7. The target audience (e.g. judge) is usually passive.
8. An initial court action can be appealed.
9. Procedural matters are generally important and can sometimes derail substantive issues.

The use of suits to resolve environmental conflict appears to have a number of advantages and disadvantages depending on the nature of the conflict and the objective of the parties. Disadvantages to suits include time, cost expense, and risks associated with lawsuits, whereas advantages are the perceived impartiality of the judicial system and the perceived equality where facts and logic really do count.

2. Legal Mechanisms Available to Conserve and Protect Pacific Salmon and Their Habitat

The Fraser River is in British Columbia, on the West Coast of Canada. There are six species of Pacific Salmon (pink, chum, sockeye, coho and steelhead) in the Fraser River. All have immense cultural, symbolic and spiritual value to First Nations (aboriginal people) and environmentalists, over and above their tremendous commercial value.

Pacific salmon originating in the Fraser River have a complicated life cycle that is crucially dependent on the health of both the Fraser River and its estuary. Pacific salmon spend at least the initial part of their life cycle in fresh water, migrate down the Fraser River estuary to the ocean and then return through the same estuary to fresh water to reproduce. As a result, controlling the harvest and protecting the habitat of Pacific salmon is critical to their survival, development and well being.

British Columbia is a province of Canada, a federal state in which the federal and the various provincial governments have jurisdiction over specific subject areas as set out primarily by sections 91 and 92 of the Canadian Constitution Act. The federal government has responsibility for the conservation and protection of all anadromous species of fish, including all species of Pacific salmon, and their habitat. However, since 1937 the federal government has administratively sub-delegated to the province of British Columbia the responsibility for the conservation and management of freshwater fish. The First Nations also have an important evolving role to play as a result of Section 35 of the Constitution. As a practical matter, this means the responsibility for conserving and managing Pacific salmon populations native to the Fraser River is shared between the federal, British Columbia and First Nations (aboriginal) levels of government.

As a result of this mixed system of responsibility, the legal mechanisms which currently exist for the conservation and protection of Pacific salmon and their habitat in the Fraser River and the Fraser River estuary are as follows.

- Lawsuits and international legal obligations to preserve and protect the environment.
- Criminal law suits pursuant to the Fisheries Act and the Waste Management Act.
- Civil law suits by private individuals.
- Review of and appeals from Administrative or Regulatory tribunals.
- Law suits by First Nations (aboriginal people).

2.1. Lawsuits and international legal obligations to preserve and protect the environment

Law suits have had little direct impact on the implementation of Canada's international legal obligations. Although Canada is a party to a wide array of international legal obligations involving environmental matters, the actual domestic legal impact of those international legal obligations is only as good as the extent to which the government enacts and enforces domestic enabling legislation. Canada, as is typical of many countries, has in many instances failed to enact and/or enforce the domestic enabling legislation that would give full force and effect to its international legal obligations (e.g.

the Law of the Sea Convention and the Endangered Species legislation called for by the Biodiversity Convention).

This problem is exacerbated by the fact that the Constitution of Canada does not provide for international treaties to automatically become the supreme law of the land, nor does the Canadian Constitution allow Parliament, through implementation of treaty obligations, to automatically alter the distribution of legislative powers within Canada. Rather, the Canadian Parliament only has the power to implement those aspects of international legal obligations that fall within the federal sphere of constitutional jurisdiction and must call upon the various provincial governments to implement those aspects of the international legal obligations that fall within the various provincial spheres of constitutional jurisdiction. The result is that Canada, like many countries, is in default of a number of its international legal obligations and there appears to be relatively little that domestic lawsuits can do (directly) to alter this situation.

2.2. Criminal suits pursuant to the Fisheries Act and the Waste Management Act

A number of pieces of federal and provincial legislation are particularly important in the context of using suits to conserve and protect salmon and their habitat in the Fraser River and its estuary. The most important of these is the federal Fisheries Act. Pursuant to the federal Fisheries Act, it is an offence for anyone to carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat. It is also an offence under the Fisheries Act to deposit or permit the deposit of any type of “deleterious” substance in water frequented by fish.

In general, the federal Fisheries Act provides a comprehensive federal strategy for the protection of fish habitat and the prevention of pollution backed up by the threat of criminal prosecution. However, as previously noted, any attempt to manage fish habitat in Canada must also acknowledge provincial and First Nations control over land and water resources, and any action by federal authorities to regulate or prevent land or water use activities cannot be seen to be surpassing provincial jurisdiction over these activities unless they can be shown to be directly impinging upon fish stock and fish habitat. As a result, federal and provincial enforcement activities need to be closely coordinated. This has not always been the case. In theory and taken literally, the federal statutory scheme makes a criminal offence of any human activity that disrupts an aquatic environment inhabited by fish. This covers activities in water or on land. In practice, these provisions set the stage for fisheries habitat management in two contexts. First, they provide the authority by which proposed activities can be assessed by the federal Department of Fisheries and Oceans (DFO). In practice, development activities that have the potential to affect fisheries habitat are usually referred to DFO by provincial regulatory authorities. DFO then assesses whether fish habitat will be harmed and if substances deleterious to fish will be discharged. This usually sets the stage for direct negotiations between DFO habitat managers and developers over design modifications and habitat protection measures. Second, although DFO has no official permitting capacity, it can threaten criminal prosecutions should a project proceed and fisheries habitat is damaged. In practice, this drastic action is not usually taken unless there has been willful disregard of the law or a serious environmental incident. The need to exercise discretion over whether to prosecute raises the sensitive question of whether

proscribing criminal law sanctions are the most effective way of protecting fisheries habitat or ensuring environmental compliance. There is an array of defenses that are available under the habitat protection provisions of the Fisheries Act. Key among these is the due diligence defense. Depending on the circumstances, an accused may be able to rely on one or more of the following defenses: abuse of process, acting under a reasonable mistake of fact, officially induced error, sabotage, or the fact that the evidence being used against him was the result of an unconstitutional search (“fruit of the poisonous tree”).

The principal provincial environmental statute in the province of British Columbia is the Waste Management Act. Section 3 of the Act defines waste in a broad manner and prohibits the introduction of waste into the environment in such a manner or quantity to cause pollution. A permit from the regional waste manager is required in order to deposit or discharge waste into the environment. Special approval also is required for collection and disposal of waste.

Penalties under the Act may be substantial. A person with a permit to discharge waste into the environment who fails to abide by the requirements of the permit faces a maximum penalty of \$1 000 000. When a person is found to have intentionally caused damage to the environment or to have shown reckless and wanton disregard for the lives or safety of persons thus creating a risk of death or harm to those persons, the maximum penalty is imprisonment up to three years and a fine of \$3 000 000.

Both federal statutes such as the Fisheries Act and Provincial statutes such as the Waste Management Act may be enforced through private suits (prosecution), which appear to be a mixed blessing. On the one hand, a private prosecution provides citizens with a powerful tool to enforce the law against individuals or corporations. On the other hand, the private prosecution mechanism, while theoretically capable of acting as a useful check of government discretion for prosecuting, can also interfere with the proper exercise of that discretion.

Arguably, a private prosecution can, for example, deprive government officials of control over the timing of prosecutions, forcing government to abandon negotiations prematurely, when less drastic enforcement action might be sufficient to induce compliance. Also, while it is true that the Attorney General has the power to stay private prosecutions launched pursuant to federal or provincial legislation, the unfavorable impression created by governments stopping citizen actions tends to ensure that the stay power is not always used as often as may be warranted.

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Biographical Sketch

Since 2001, **Richard Paisley** has been the Director of the Dr. Andrew R. Thompson Natural Resources Law Program at the Faculty of Law, University of British Columbia. Previously he was a senior research associate (1991 to 2001) at the Westwater Research Centre, Faculty of Graduate Studies, University of British Columbia.

His responsibilities include directing multi-disciplinary research projects, teaching, publishing scholarly papers, supervising graduate students, and fundraising. His recent work includes:

- Advising a Canadian Territorial Government regarding the negotiation of off-shore boundaries with the federal Canadian government (2003).
- Advising the Brace Centre for Water Resources Management, McGill University, Macdonald Campus and the Scientific Information Centre of the Interstate Commission for Water Coordination of Central Asia (ICWC) regarding international water law, negotiation and conflict resolution issues in connection with the Aral Sea basin (2001 ongoing).

- Advising the Mekong River Commission for Sustainable Development Secretariat (MRCS), Phnom Penh, Cambodia, regarding international water law issues, international environmental law issues, negotiations and conflict resolution (1999 ongoing).
- Advising the Water and Energy Commission Secretariat (WECS) of His Majesty's Government, Kathmandu, Nepal, regarding international water law issues, international environmental law issues, negotiations and conflict resolution (1997 ongoing).
- Advising the government of Canada (Department of Fisheries and Oceans) regarding the establishment and maintenance of marine protected areas and ensuring marine environmental quality (1995 to 1999).
- Advising the government of Canada (Departments of Fisheries and Oceans and Environment) regarding strategies for implementing integrated coastal zone management in a Canadian context (1996).

Teaching assignments include directing graduate level seminars and courses in the areas of international natural resources law, including international water law, and natural resources law, including negotiation and environmental conflict resolution.

Additional activities include directing legal research, providing legal opinions and appearing as counsel before various levels of Court and administrative tribunals.