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THE IMPACT OF FEDERALISM AND BORDER ISSUES ON CANADA-U.S. RELATIONS: PACIFIC SALMON TREATY

David A. Colson*

Thank you very much for the invitation to participate in this important annual event sponsored by the Canada-United States Law Institute. I am particularly delighted to have the opportunity to share the podium with my colleague, Professor Don McRae.

The subject is the Pacific Salmon dispute between the United States and Canada with a particular focus on federalism issues. I take it that the reason we want to discuss this subject is to investigate federalism, as practiced by the United States and Canada, within an international treaty context and see what difficulties or advantages might be present.

I begin by reaffirming to myself and everyone else here that I have no intention to re-engage in the debate about Pacific salmon in which I played a part for the United States for more than 20 years. But I do hope that I can shed some light on this problem, which may prove to be instructive. I also should note that while I played a role for the United States side for many years, I had left the United States Government by the time Professor McRae entered the picture for the Canadian side. I understand that his leadership was key to finding ways to overcome differences and difficulties that I was never able to find, and he is to be congratulated. He will be able to address specifically some of the concepts that have recently enabled both sides of the border to find peace on this issue, at least for the time being.

To understand the United States-Canada Pacific Salmon problem you need to have some understanding of the facts about Pacific salmon and geography. You need to understand that there are five species of Pacific salmon. Each of these species has different characteristics that make them more or less valuable to fishermen and more or less abundant. You also need to understand that the United States and Canada both make extensive commitments (relating to costs and economic use) to the protection of salmon re-

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sources and their habitat and, because they do so, each country has an expectation that salmon that spawn in their rivers will return to their waters to be caught by their own fishermen and to reproduce in their own rivers for the benefit of their future generations. The United States and Canada stand together on these basic propositions and that is why we were on common ground when we stood together to develop and negotiate Article 66 of the 1982 United Nations Law of the Sea Convention that to some degree embodies these concepts, and when we opposed salmon fishing on the high seas during the high seas drift net craze.

Unfortunately, however, the migratory pattern of North American Pacific salmon is such that salmon, which Canadians expect to return to Canadian waters, often can be caught first by American fishermen in United States waters. The converse is also true. Salmon which spawn in the United States and are expected to return to United States rivers are often caught first in Canadian waters by Canadian fisherman. We call such catches "interceptions." If life were simple, perhaps one could manage to avoid interceptions, but alas, it is not. Species and runs often intermingle. For instance, Canada's lucrative sport fishery on the west coast of Vancouver Island, which targets Canadian stocks, will also inevitably catch a variety of United States origin species, including endangered chinook species.

For a long time, indeed for most of the 20th century, the United States and Canada talked about the common interest in striking a fair balance concerning these interceptions in the context, as well, of imposing relevant conservation measures. Frankly, when one goes back and looks at early West Coast newspapers of almost one hundred years ago one sees the genesis of the ideas that were finally dealt with, only in 1985, in the United States-Canada Pacific Salmon Treaty.

Throughout the early part of the 20th century, the United States and Canada had a series of West Coast salmon agreements that in general related only to the complex of fisheries associated with Canada's Fraser River. This relationship while successful in the sense that Canada's Fraser River remains one of the great salmon producing systems in the world, had its own shortcomings, including that it did not deal with other salmon runs and species and fisheries coast wide. From about 1974, a fairly intensive diplomatic effort was made to address the salmon interception problem on a coast-wide basis. I got into the issue at this time as a new State Department lawyer.
At that same time, the most recent crisis in the United States-Canada salmon relationship had occurred. In 1974, United States federal judge, Judge Boldt, issued an opinion in a case called *U.S. v. Washington* in which he determined that the 19th century treaties between the United States and certain Pacific Northwest Indian Tribes, which provided that the tribes were entitled to fish "in common" with the non-Indian settlers, meant that United States Treaty Indians were entitled to a 50 percent share of salmon in United States waters. In 1974, this caused a great deal of social difficulty in the United States Pacific Northwest. It also created difficulties in the United States-Canada salmon relationship because, in order to comply with various United States federal court orders, the United States Government, unilaterally had to change the way it went about dealing with Canada in the then existing Fraser River Treaty arrangements. Canada was none to pleased about all of this, making the point that how the United States might want to allocate fish among American fishermen within United States waters might well be United States' business, but that the United States nonetheless had an obligation in a treaty relationship with Canada to adhere to that relationship, notwithstanding the new legal realities in the United States.

The problem with Canada's point was that it denied reality: the option the United States Government faced was either to have no relationship with Canada, by terminating the treaty, or to proceed within the new domestic legal framework within which the United States had to operate. This, however, was just the tip of the iceberg, as one would see a few years later.

In the early 1980s, Professor McRae and I were engaged in the Gulf of Maine maritime boundary dispute between the United States and Canada on the East Coast which, in some ways, also had its genesis in a particular form of United States federalism -- the authorities given to the United States Fishery Management Councils under the 1976 Magnuson Act. At the conclusion of the Gulf of Maine case at the end of 1984, I resumed my normal duties and, much to my surprise, found that in the intervening years a great deal of progress had been made in the negotiations to achieve a coast-wide United States-Canada Pacific salmon treaty. There was no need for me to get back into that game, and I gladly allowed the lawyers on my staff, who had been working on the matter, to continue and they, indeed, were able to assist the negotiators to conclude the 1985 United States-Canada Pacific Salmon Treaty. In the closing moments of those negotiations, I was asked, however, to get back involved. I was not asked to get involved in the negotiations with Canada; instead, I was asked to get back involved to negotiate with the

It had always been understood on the United States side that legislation would be required to establish the rules and the framework that the United States would use in its dealings with Canada under the treaty. It was clear in political terms that there would not be the necessary political support in the United States for the Treaty with Canada unless the interests and concerns of U.S. constituencies were recognized in appropriate legislation. That boiled down to the question of how the United States would make decisions within the Treaty framework.

Consider for a moment the United States' side of the Pacific Salmon puzzle. The fisheries occur in State waters for the most part and three States are involved, Washington, Oregon and Alaska with their various fisheries agency officials, bureaucrats and scientists. I might overly generalize when I say that Alaska is regarded as an interceptor of Canadian salmon, while Washington and Oregon have their salmon intercepted by Canada; that is an overstatement, but you get the point: the interests of the three States are quite different. Then there are the Tribes, there are twenty-four Tribes that have treaties with the United States that concern this matter. While they all share the common interest of protecting their sovereignty against encroachment, it is a mistake to think that they have a common fishery interest. Then there are the users: recreation versus commercial, and there are various commercial gear groups, trollers, seiners, gill netters, etc. Then there are the federal agencies, Interior and Commerce, which have some role -- particularly where the Endangered Species Act is concerned.

It was always contended by the United States in negotiations with Canada, and it was always contended during my time subsequently working on this matter, that Canada entered into the Pacific salmon arrangements knowing that the United States implementation of the Pacific Salmon Treaty would not be a picture of seamless perfection -- because of federalism issues on the United States side. United States State Department lawyers are usually careful about the way that any treaty is drafted to ensure that the commitment made by the United States in the Treaty itself, or within the process it created, is limited to what can be implemented based on pre-existing legal authority or contemplated in a required new statutory scheme to implement a given treaty. In this case, the Treaty itself establishes some principles and commits to a Commission process, things that are not hard for the Executive in the United States to undertake and control. However, the real guts of the
Treaty are contained in annexes which have a limited life, which must be renegotiated from time-to-time, and which contain the specific rules pertaining to catch restrictions. This is where the day-to-day regulatory work falls—largely to State and Tribal authorities. Thus, in the bilateral negotiating context, the issue becomes how does the United States go about reaching agreements with Canada on a fishery-by-fishery basis and commit to Canada that it will abide by those agreements? Let me point out that Canada's complaints, often, at least when I was involved, were less that the United States was in breach of specific commitments, than that the United States was unable to act because of a cumbersome decision process found in the Pacific Salmon Treaty Act.

I remember very well going to Seattle in the spring of 1985 to meet with the United States constituency that was involved with this matter to begin the discussions that would lead to the Act. In Canada, which also has many constituents involved in this matter, and perhaps more today than then, the legal power to make decisions about salmon largely rests with the Department of Fisheries and Oceans in Ottawa. The way the United States system works—the division of authority inherent in our form of federalism on this issue—there is no one person or bureaucracy who can make such decisions for the United States, including the President. He doesn't have the power. The legal power to regulate the United States fisheries that Canada is concerned about almost exclusively reside with the three State governments, Washington, Oregon and Alaska, or with one of the 24 Indian Tribes with which the United States has a treaty relationship. These legal institutions—the States and the Tribes—components of the United States federal system, are the ones that have the legal power to make the decisions on the questions of importance to Canada and, thus, one must look to them to promise that they will abide by any commitment the United States may make to Canada on the international plane. It was clear from the very beginning that any United States agreement to regulate fisheries in a particular way to meet commitments to Canada would need to have the full agreement and support of the States and/or Tribe that would actually have to regulate fishermen.

It was fair enough for Canada to say that that is not necessarily how it needs to be. And Canada did so. Canada argued that by statute the United States Congress could create the legal power within the President's Executive mandate that would trump the power of the States and the United States Tribes in this respect. Constitutionally, on this set of issues, that is probably correct. However, it is a notion that is a political non-starter.
It may be borne in mind that one reason why the United States and Canada went to the World Court about the Gulf of Maine maritime boundary was because a failed treaty negotiated with Canada had not taken account of the institutional concerns in the United States and that there had been an effort by the Carter Administration to override those institutions. In just a few years after those events, it was not likely that the Reagan Administration would try to take regulatory power away from the States and the Tribes and vest it in the Federal Government simply to ensure a Federal official could make and keep promises to Canada about fishing regulations.

Accordingly, in this setting, we had to make sure that the States and the Tribes participated and accepted and were committed to any agreements the Federal Government might make with Canada. If they did so, and then they did not comply, we assumed Congress would, by law, give the Executive the power to enforce compliance with any specific agreement that had been reached, so long as those involved had concurred with the agreement. And this was done in the Pacific Salmon Treaty Act. (*See* 16 USC 3635 re Federal Preemption Authority.)

Once we got into the domestic negotiations, it was clear immediately that the various regulatory jurisdictions in the United States federal system each required at a minimum an equal voice. Nothing else would do, and there was no prospect to pass a law that would allow one group to outvote the other. Thus, the only answer was a consensus decision process.

Just to show you how bad it was, as United States constituents struggled to reach agreement on a United States statute that would allow them to support the new treaty with Canada, there were many debates with the States and the Tribes concerning the decision-making process. The only way it could work was by consensus of the States and the Tribes, but I remember very well some groups arguing that, nonetheless, they were entitled to more than one vote in a consensus process.

The Pacific Salmon Treaty Act sets forth the decision-making process that the United States uses to take action under the Treaty with Canada. This process has been under attack, certainly from Canada, but I doubt the legislative requirements will change. I can attest that it would not have been possible for the U.S.-Canada Pacific Salmon Treaty to be ratified by the United States, with the advice and consent of the Senate, if the consensus decision-making process set forth in the Act had not been concluded. You will be amused to see that the law was even written in such a way that the Federal
Government has absolutely no voting role, meaning no right to participation in a consensus process, in the development of a United States decision within the context of the United States-Canada Pacific Salmon Commission.

When the Treaty entered into force in 1985, I was given the dubious honor of being appointed by the President to be the (non-voting) United States Federal Pacific Salmon Commissioner. This should tell you something about the acrimony /suspicions on the United States side. The political consensus was that the only federal official acceptable, a non-voting one at that, was a State Department lawyer. While I was often put in the position of being the spokesman for the United States side, it was not as a decision maker but more as a neutral spokesman (that is neutral as among the United States constituent interests) who, in some cases, was able to mediate the differences on the United States side so that the United States would at least have a position to bring forward to Canada. In the early years, there were some modest achievements, but as time passed and people and situations changed, I often ended up presiding over stalemate.

I understand very well that this process was frustrating to the Canadian participants. However, I am not sure they were ever any more frustrated than I was. I can understand that Canada believed that the United States ought to treat it differently because we were operating within the context of an international agreement. While I can understand that perspective, it misses the basic point that is that there never would have been a United States-Canada Pacific Salmon Treaty unless it had been done the way we did it.

Before concluding, I do want to note that I have been on the other side of this situation, however, a few times myself. I recall very clearly a situation in the early 1990s where the city of Victoria was pumping raw sewage into the Strait of Juan de Fuca and United States protests to Canadian federal officials were apologetically rebuffed in Ottawa saying there was nothing they could do because the matter at hand was entirely within the legal power of the local community. I have no doubt that the United States' side probably gives Canada more difficulty on these kinds of questions than vice versa. I do not think it is just a one-way street, however.

In conclusion let me ask the question whether we should do anything about these kinds of problems. My answer is no. Setting aside the political reality that it is not possible to create federal legal authority on every conceivable issue that may arise in the United States-Canada relationship, it seems to me that both countries cultures and heritages would be diminished
if not compromised by trying to develop approaches that override our respective federal systems just so that these kinds of issues can be dealt with more smoothly. My own belief is that it is healthy for all of us in North America to have a friendly Canada and a friendly United States that are good friends and that have many common interests and very close relationships, but we are also well-served by occasional reminders that we are different and that we have different institutions and that we do things differently.

I hope that these thoughts have given you something to think about, and I look forward to Professor McRae's presentation and to further discussion.

Thank you.