



Essay • Dissertation

The Law Journal introduces, with this issue, a section designed to accommodate essays either of an instructive or of a reminiscent nature by senior practitioners. Generally, only one manuscript per issue, will appear in this section. — Ed.

Dans ce numéro, la Revue de Droit présente une nouvelle section destinée à mettre en valeur des essais instructifs ou remémoratifs rédigés par les membres ayant le plus d'ancienneté au Barreau. En général, un seul essai sera publié lors de chaque numéro. — N.D.L.R.

The Tobique River Litigation: Is there Equality before the Law?

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The Tobique River is one of the most beautiful rivers in New Brunswick, but its main attraction prior to 1957 was the excellent salmon fishing it afforded. Dr. Frederick Clark has delightfully described it in his *Six Salmon Rivers and Another*.¹ Many Indian artifacts in his collection were found at camping sites on these rivers.

The province of New Brunswick, just prior to 1880, granted large tracts of land to the New Brunswick Railway which was promoted by the first Lord Strathcona. The consideration for these grants was the amalgamation of a group of small railway companies having a total construction length of about 140 miles. About 1906 Lord Strathcona leased for 999 years from the New Brunswick Railway all the salmon fishing on the Tobique River in Victoria County not already granted to

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¹Clark, Frederick, *Six Salmon Rivers and Another* (Fredericton: Brunswick Press, 1977).

private owners. Nearly all grants of land from the provincial government prior to 1882 also included the riparian rights, the most valuable of which was the salmon fishing. The branches of the Tobique are The Little Tobique, The Right Branch, Mamozekel, Serpentine, Gulguac, Sisson and Wapskehegan, all of which offered good spawning grounds for salmon.

During the Second World War most of the lands of the New Brunswick Railway in Victoria County were sold but the salmon fishing was retained by the grand-daughters of the first Lord Strathcona who had erected in 1912 a very attractive lodge about nine miles up-river from Nictau. Some of the more accessible salmon fishing was leased to the Tobique Salmon Club which was organized about 1890 and incorporated by statute.

For some years prior to the Second World War the owners contemplated selling the salmon fishing and in 1935 authorized a sale for a cash price of \$100,000. Their solicitor, the late Hugh H. McLean, K.C. (then Lieutenant-Governor) was authorized to make such sale. Instead, he granted an option to a well-known businessman who resided in the Tobique Valley. The owners, on being informed of this, cancelled the option and dismissed General McLean as superintendent of their property. He then sued the owners, Lady Congleton and The Honourable Mrs. Kitson, for his services over ten years and his lost commission on the sale. The firm of Gilbert & McGloan was asked to defend the action. During the preparation for trial of the action a letter was found in a file of the defendant's solicitors in Edinburgh from the plaintiff dated in 1926 wherein he agreed to supervise the fishing rights "without charge". When this letter, which was signed "Hugh H. McLean, Major General, Lt-Governor" was shown to the late C.F. Inches, Q.C., the plaintiff's solicitor, he seemed startled and in a few days the plaintiff was in the Montreal office of the solicitor of The Royal Trust Company. After the latter telephoned me, the claim was settled for a low nuisance value.

At the conclusion of this futile litigation I was invited by the Edinburgh solicitors of the owners to supervise the fishing rights. This I was glad to do, and the fishing became more profitable to the owners through new leases.

Salmon fishing on the Tobique was usually extremely good in June and July. In August low water conditions sometimes made the fish shy and sluggish. The Little Tobique, with its slower current and deep pools, afforded good fishing during most of the summer. The best pools on the Main Tobique were at Plaster Rock, The Forks, Strathcona Lodge, The Narrows of the Serpentine and the Salmon Hole far upon the Serpentine. When I first went to Strathcona Lodge in 1936 to arrange for guides for the summer's fishing, I had an old rod, very few flies and

little knowledge of salmon fishing. I had the best luck I have ever had — ten salmon between 10 and 25 pounds in weight, all caught on a No. 4 Jock Scott, without losing one.

Between 1948 and 1952 the New Brunswick Electric Power Commission erected dams at the outlets of Trouser and Long Lakes, which were the chief sources of the Right Branch, and on Serpentine Lake which fed the Serpentine River. Only stop-logs were used as gates so that no water could escape when the stop-logs were lowered. Consequently the carelessness of the operators could cause and did cause great mortality to the small parr and smolt below the dams. A power dam was also built at the Tobique Narrows near the St. John River. This dam had the effect of delaying the passage of the salmon several weeks, even after a fishway was constructed. The diminution in the number of salmon in the river above the Tobique Narrows dam immediately became noticeable. The twelve mile deadwater or headpond above the dam delayed the upstream progress of the fish to their spawning grounds. Then the construction of the Beechwood dam had a disastrous effect because it had no fishway, but only a hoist which many fish were too shy to enter, and the new deadwater extended up 18 miles to the Tobique Narrows so as to further delay the upstream migration of the salmon. In addition, the river below this dam became a poacher's paradise. After much persuasion by the Tobique Riparian Owners' Association the federal Department of Fisheries reluctantly permitted that association to try an experiment, namely, the transport of the salmon in tanks on trucks up to the end of the headpond on the Tobique at Arthurette where the fish were dumped into fast water. Soon fishermen were able to catch some fish in the up-river pools. Incidentally, the same system is now being used by the Department of Fisheries in transporting salmon from the Mactaquac dam, but this was only a partial remedy, because large fish can never get down river through the two power dams and even smolt suffer a loss of 23 per cent at the Tobique Narrows dam.

Sportsmen ceased to visit the Tobique; clubs had to reduce their staffs and cease operations; many guides had to seek new employment. The Tobique Salmon Club and others were composed of American citizens as well as Canadians. Soon it became obvious that the fishing rights had been destroyed. Claims were made against the Electric Power Commission and eleven actions were commenced with the consent of the then Attorney General.

The plaintiffs relied upon section 10 of the *Electric Power Act of 1959*² which provided:

The Commission shall make to the owner of property acquired by it or injuriously affected by the exercise of any power conferred by this Act, due

²An Act to Amend the *Electric Power Act*, S.N.B. 1959, c. 43.

compensation for the property acquired and for any damage resulting from the exercise of such powers.³

After the actions, involving nearly \$500,000, had reached the trial stage and were actually entered for trial, a new *Electric Power Act*⁴ was enacted on April 13, 1962 during the last hour of the session of the Legislature. Its effect was not sufficiently explained to members of the Legislature. The former Attorney General said in part in a letter dated July 16, 1962:

I would like to state unequivocally that when this Act was going through the legislature I had no idea that pending actions would be included. I am quite satisfied that had I realized this I would have protested vigorously and, in fact, would have voted against the Act.

The former leader of the Opposition stated in a letter dated July 17, 1962:

In reply to your inquiry concerning passage of Bill No. 178, the *Electric Power Act*, approved at the last session of the legislature, I can state that I was not aware of any pending litigation at the time the matter was before the legislature.

These letters are referred to in order to indicate the impropriety of enacting important legislation without full explanation and prior study. The new statute contained the following clause: —

No action or claim shall be brought, *continued, maintained, enforced* or made against the Commission by way of compensation action for injurious affection to property except as it relates to an injurious affection arising out of and directly caused by the exercise of a compulsory power of the Commission.⁵

Why was such legislation subject to severe criticism as being invalid? The reasons are:

- a) It deprived citizens of United States and Canada of their property rights and access to the Courts.
- b) It was contrary to international fair dealing and honesty in commercial matters.
- c) The Act was in conflict with the Ashburton-Webster Treaty of 1842 and the Act establishing the International Joint Commission of 1911.
- d) It interfered with the policies of the Dominion of Canada respecting the fishing industry.

By sec. 90 of the *B.N.A. Act* of 1867 provision exists for the disallowance of such an Act by the Governor General. In a reference to the Supreme Court of Canada Duff C.J. said in part:

³*Ibid.*, s. 10(1).

⁴*Electric Power Act*, S.N.B. 1961-62, c. 41.

⁵*Ibid.*, s. 32(4).

The power of reservation is subject to no limitation or restriction, except in so far as his discretion in exercising it may be controlled or regulated by the Instructions of the Governor General and it is not suggested that the Instructions contain anything of that character. The conclusion, therefore, is that the power of disallowance and the power of reservation are both subsisting powers, and that the former is subject to no limitations or restrictions and the latter only to the restriction that the discretion of the Lieutenant-Governor shall be exercised subject to the Governor General's instructions.⁶

An attempt was made by the then premier, Honourable Louis J. Robichaud, in a letter dated July 4, 1962, to make it appear that the rights of action of the claimants "were created by an oversight created in the Act of 1959". However, Mr. J.F.H. Teed, Q.C., who had drawn the *Electric Power Act* of 1959, quickly answered this in a statement dated July 26, 1962 to the effect that the 1959 Statute was the result of conferences with the members of the Power Commission and the members of the government.

Steps were then taken by the plaintiff's solicitors, first in the press and later by a petition signed by the many plaintiffs, which was filed in Ottawa and directed to the then Prime Minister, Hon. Lester G. Pearson, with representations to the U.S. Ambassador and the Minister of Justice, asking that the offensive clause, s. 32(4) of the 1962 Act be disallowed. The advice of John J. Robinette, Q.C., Toronto and Gordon MacLaren, Q.C. of Ottawa was also obtained. In early July 1963 the U.S. Consul in Saint John told me that he had been requested to attend upon Premier Robichaud, presumably for a discussion of this matter. He was told: "Your citizens shall have their day in Court".

The *Electric Power Act* was again amended so as to permit all the plaintiffs to proceed with their actions.

The new amendment reads:

1. Section 32 of the *Electric Power Act*, Chapter 41 of 10-11 Elizabeth II, 1961-62, is amended by enacting two new subsections to be subsections 6 and 7 thereof as follows:

(6) Notwithstanding subsections (4) and (5), and subject to subsection (7) any action which had been brought or commenced prior to April 13, 1962 against The New Brunswick Electric Power Commission for damages for alleged injuries caused by work of the said Commission arising out of the construction or operation of the Tobique or Beechwood Power Dams, or by way of compensation action for injurious affection to property arising out of the said construction or operation, may be continued and maintained . . ."⁷

⁶In the *Matter of a Reference Concerning the Power of His Excellency the Governor General in Council under the British North America Act 1867 to Disallow Acts passed by the Legislature of the Several Provinces . . .*, [1938] S.C.R. 71, at 79.

⁷An Act to Amend the *Electric Power Act*, S.N.B. 1963, c. 19.

At the trial in 1963 before the late Mr. Justice Charles J. Jones, twenty-two witnesses testified as to the loss of fishing above the Beechwood Dam and the abnormal increase of fish below that Dam. Jones J. said he was much impressed by the testimony of the guides and property owners of the Tobique Valley and gave judgment in the plaintiffs' favor. The Commission then appealed to the Appeal Division of the Supreme Court of New Brunswick then composed of Messrs. Justices L. McC. Ritchie and A. M. Robichaud of the Supreme Court of New Brunswick and Chief Justice A. J. Cormier of the Queen's Bench Division.⁸

Ritchie J. in an excellent judgment concurred in by Cormier C.J. sustained the judgment of the trial court. Since this judgment was unreported, substantial extracts are included to illustrate how the issues were dealt with.

For conveniences, the 1961-62 enactment will sometimes hereinafter be referred to as 'the new Act'.

Subsection (5) of section 32 of the new Act reads:

(5) No action or claim for damage to land shall be brought, *continued*, made, maintained or enforced against the Commission by way of Compensation Action [*sic*] except as it relates to lands actually entered into or upon under the provisions of section 27 hereof.

The 1963 amendment restored the applicability to this action of section 9(8) of the Act, as enacted in 1952, and thus enabled the Club's action to proceed.

More salmon spawn in the Tobique River and its tributaries than in any other stream included in the Saint John River watershed.

The evidence of the expert witnesses is to the effect salmon usually spawn in shallow rapid water. Eggs spawned in the fall months hatch as 'fry' the following spring, generally in May. In twelve months, those fry which have survived become small, or one year, 'parr'. The following year the then survivors become large, or two year, parr. Third year parr, having attained a length of six to eight inches, become 'smolt' and, in the spring of the year, make their way down river to salt water. After one year in the ocean most, perhaps eighty percent, of the surviving smolt, then known as grilse and weighing from two to five pounds, return to the area of the river in which they were spawned or, more precisely, the area in which were spawned the eggs from which they were hatched. Some of the smolt remain in the ocean for two years and then, as salmon weighing from seven to twelve pounds, return to their spawning area. A few smolt remain in the ocean as long as three years before, as salmon weighing from fifteen to thirty, or more, pounds returning to the river in which they were spawned.

While the Tobique fish ladder had, since its completion, proven efficient, a different type of fishway was chosen for Beechwood. With the approval of the Federal Department of Fisheries, the Commission installed a skip-hoist device. There is no direct testimony as to the precise reason for choosing the skip-hoist type but there is a suggestion such choice was influenced by

⁸*Tobique Salmon Club v. New Brunswick Electric Power Commission* (1966), (unreported judgment) (N.B.S.C., A.D.).

considerations pertaining to the suitability of the foundation available at Beechwood for a fish ladder.

Mr. Beek described the Tobique installation as a standard pool type of fish ladder, similar to many he had seen in Scotland. On the other hand he had not previously seen a fish elevator fishway of the Beechwood type. In respect of the effect of a dead water headpond, Mr. Beek advanced the opinion fish are attracted up river by a clear downward current and that, therefore, any expanse of water which does not have such a current causes delay in the upstream progress of fish. Asked for his opinion respecting the conditions he observed at the Beechwood Fishway on September 15, 1963, the witness said the water was forming whirlpools and coming from different directions so as to create confusion and render it difficult for fish to enter the gallery.

Yearly record of Atlantic salmon passing through Tobique Fishway 1953-1963.

Year	Total	Counting Trap	
		Open	Closed
1953	4,656	May 24	Nov. 8
1954	4,985	May 20	Nov. 16
1955	3,775	May 20	Nov. 21
1956	3,723	May 7	Nov. 26
1957	569	May 19	Nov. 25
1958	2,635	May 14	Nov. 27
1959	945 ¹	May 14	Nov. 28
1960	1,120 ¹	May 19	Nov. 30
1961	747 ¹	June 9	Nov. 30
1962	264	May 24	Nov. 30
1963	2,074	May 27	Aug. 31

¹The Tobique Fisheries Protective Association successfully transported to the Tobique River an additional 742 salmon in 1959, 1,087 salmon in 1960 and 197 salmon in 1961.

Record of Atlantic Salmon angled just below Tobique Power Dam since year of construction.

Date	No. of Salmon
1952	188
1953	281
1954	479
1955	376
1956	No Data
1957	40
1958	10
1959	10
1960	32
1961	51
1962	10
1963	15

B. S. Moore testified . . . the fish just do not go into that elevator as they should. There is a condition there that they do not like. I have stood at the place where they go in through this opening in a dropper, plywood or something, that drops down with a certain type of opening through it for the fish to go in and I have watched them coming in there, watched them from the inside and probably 50% of them that were coming through the last time I was there, last year, they were turning back. They would come in and about half of them would turn back right while they were in sight there. They did not like the water, did not like the situation.

In the 1952-1961 decade, that which saw the completion of both the Tobique and Beechwood Dams, the total kill on Club waters dropped to a total of 2,980, an average of 298 fish per year. In this decade the high was 783 fish landed in 1953, the year the Tobique Dam was completed. In 1957, however, the year of completion of the Beechwood Dam, only 4 fish were caught.

Mr. Moore testified he had seen the stream nearly dry above the Forks because of the natural flow of water from Long Lake, Trousers Lake and Serpentine Lake being blocked by the storage dams. On one occasion he saw the shores and rocks on the bed of the Right Branch covered with a coating of fried mud having a thickness of from one-half inch to one inch. He also testified that, again because of storage dams, he had seen the water above the Forks so low that a salmon could not pass up stream and that in one stretch of ten miles he had found it impossible to float a canoe.

Two tables included in exhibit P-11 show a marked difference between the recorded numbers of salmon angled from the Carleton County section of the Saind John River *below* the Beechwood Dam during the five years prior to its construction in 1957 and the seven ensuing years. That record is:

Five Years Prior To Construction	No. of Salmon Landed
1952	848
1953	986
1954	535
1955	485
1956	523

Seven Years Following Construction	No. of Salmon Landed
1957	1,662
1958	2,121
1959	1,645
1960	1,695
1961	795
1962	367
1963	3,049

The 1963 run of salmon in the Saint John River was well above that of an average year. In that year a total of 4,467 passed over the Beechwood Fishway. The count at the Tobique Fishway, however, was only 2,074. Deducting 15 fish caught below the Tobique Dam in 1963, 2,378 of the salmon that passed over the Beechwood Dam that year are unaccounted for. Mr. Moore says the dead water in the Beechwood headpond is the explanation of the difference between the two counts.

Glenn Lewis, another member of the Plaster Rock Fly Fisherman's Club, also estimated that, prior to erection of the Tobique Dam, an average of roughly three hundred fish had been taken yearly from the pools of that club. As he put it, after the erection of the dam

'you might as well not fish, there are no salmon in the river.'

An interesting extract from Mr. Lewis' testimony is:

Q. Have you done any fishing during the past four or five years?

Yes sir.

Q. And what conditions did you find?

A. Well of course where I fish I have had fairly good luck. I fish below Beechwood. I have had good luck there. Of course I have fished there too and never caught a thing and that happens; but the fishing up on the Tobique River is just no good.

Q. In other words, when we read of so many hundred or thousands of fish going up over the Tobique Dam it still does not make your fishing good at Plaster Rock?

A. No sir.

Q. You said you fish down at Beechwood, why do you go away down there?

A. If you want to fish salmon you must go where the salmon are to fish them. That is the reason I went down there.

Q. And you found salmon down below Beechwood?

A. Yes.

In an attempt to remedy the low water condition, the Strathcona Club bulldozed a channel from Half Mile Pool, about one-half mile above The Forks, to Rocky Point, a distance of four and one-half miles. Bulldozing also was undertaken from about one mile below the lodge to a point about two miles above it. This bulldozing operation allowed fish to move up river and enabled canoes to be navigated."

From 1952 to 1957 inclusive the catches on the plaintiff's waters were:

- 1952 - 633
- 1953 - 783
- 1954 - 418
- 1955 - 287
- 1956 - 318
- 1957 - 4

The fish ladder installed at the Tobique Dam is a far more efficient installation than the Beechwood skip-hoist. Approval of the latter installation by the Conservation and Development Service of the Federal Department of Fisheries was a qualified approval. The evidence does not convince me the erection of a fish ladder at Beechwood was impractical.

The learned trial judge said:

'A great deal of evidence was adduced to show that since the dams were built the fishing on the Tobique had deteriorated and was almost a thing of the past. These witnesses were mostly not disinterested but of a very impressive type and I have no doubt their testimony was true. Does this condition exist as a result of the construction of the dams? Frankly, it would be straining the bound of credulity too far to believe otherwise. Just to what extent is another question.'

I am confirmed in my opinion by the fact that since the Beechwood Dam was built a new pool created just below it has proved a bonanza to the anglers of Carleton County. Far greater numbers of fish are being killed in that part of the river than ever before. It would be idle to assume that had the dam not been there most of the fish would not have gone further up the river and many of them into the Tobique.'

I, unhesitatingly, agree with the common sense view of the learned trial judge. It is very apparent erection of the Tobique and Beechwood Dams did injuriously affect the fishing rights owned by the Club. Those fishing rights constitute an interest in land.

I would go further than the learned trial judge and say such injurious affection was aggravated by:

- a) erection by the Commission of the four 'storage dams' at Long Lake, Trousers Lake, Serpentine Lake and Sisson Lake;
- b) use by the Commission of 'stop logs' to operate the storage dams;
- c) installation by the Commission of a skip-hoist, instead of a conventional type fish ladder, in the Beechwood Dam;
- d) failure by the Commission to make any provision permitting fish to pass upstream throughout the 1957 angling season; and
- e) curtailment of the trucking operation instituted in 1959 and its discontinuance in 1961.

Robichaud J.:

I am satisfied after reading the evidence of the four above-mentioned elderly gentlemen, coupled with that of their younger, but experienced, guiding confreres, as well as from the records of catches filed in Court, that the erection of the Tobique Narrows Dam, in 1952-53, and that of the Beechwood Dam, in 1957, has resulted in greatly reduced catches all over the Tobique River, entailing a general diminution in value of the admitted fishing rights of the Club thereon.

These guides knew every nook and crook of the Tobique; they knew when and where salmon could be angled plentifully prior to the construction of these dams, and they have, in my opinion, satisfactorily explained why fish are no longer there in comparison with the good 'runs' of former years.

At page 2 of his Reasons for Judgment, the learned trial judge made the following finding which reflects the credibility he attached to the evidence of these resident witnesses:

'A great deal of evidence was adduced to show that since the dams were built the fishing on the Tobique had deteriorated and was almost a thing of the past. These witnesses were mostly not disinterested but of a very impressive type and I have no doubt that their testimony was true.'

Dr. Elson, the only Commission witness, said on cross-examination:

Q. And you would not deny, Dr. Elson, first that the Beechwood Dam has the effect of delaying the fish up the St. John River in their migration upstream?

A. I have no good basis for passing judgment on this to form an opinion.

Q. You don't deny it?

A. No, I don't deny it.

Q. So the blocking of the river by the Beechwood Dam in 1957 was the major cause of the lack of fish in the river in 1962?

A. Now . . .

Q. Isn't that so?

A. Is a major cause.

Q. That is because you cannot ignore the effect of these dams?

A. That is correct.

Q. And you will never be able to ignore them as long as they exist on that river?

A. No.

Q. And their effect on the salmon?

A. That is correct.

Q. They will have a damaging effect upon the salmon, won't they?

A. Yes.

The principles therein set out and the effect of the relevant decisions of the English Courts have been tersely summarized in '*Cripps on Compensation*', 6th Ed.⁹ at page 146, in the following words:

"When no land has been taken the words "injuriously affected" or words of similar import are limited to loss or damage under the following heads:

1. The damage or loss must result from an act made lawful by the statutory powers of the promoters.
2. The damage or loss must be such as would have been actionable but for the statutory powers.
3. The damage or loss must be an injury to lands and not a personal injury, or an injury to trade.
4. The damage or loss must be occasioned by the construction of the authorized works and not by their user."

I am of opinion that all the Club had to establish was that *some* damages have resulted to its fishing rights from the construction and operation of such dams.

It must be remembered that the Statute reads "any damage".

After the decision of the Court of Appeal the Commission sought leave to appeal to the Supreme Court of Canada. This was refused in view of the legislation of 1963 which confined the issues to eleven property owners. Thus, the Government had legislated itself out of the court.

The damages were to have been settled by arbitration before Mr. Justice Pichette. However, the solicitor for the Commission had no appetite for further litigation, and proposed a settlement which was eventually agreed upon.

⁹Lawrence, A.T. and The Hon. R. Stafford Cripps, *Cripps on Compulsory Acquisition of Land; Powers, Procedures and Compensation* (6th ed) (London: Stevens, 1922).

This protracted struggle for justice is an example of autocratic abuse of power by a government which had no respect for private property, nor, for the proper administration of justice. Never before in the history of this province, had such conduct been experienced. Never before was legislation of this province altered or amended under the threat of disallowance.

The judgments of the trial judge and those of the Court of Appeal have never been reported, which is the invariable practice of the Court. The inference is that someone ordered that the judgments should not be reported. The lessons taught by this litigation are: few if any governments can be trusted; they will do anything to accomplish their purposes. Equality before the law means very little in a dispute with a government.