Native Affairs Committee Report – 2012

Peacemaking on the Fraser River

In January and February 2011, former BCWF Region 2 President, Ed George and I participated in a successful four day course in ”Participant Driven Collaboration”. The four days of dispute resolution training were facilitated by instructors S. Glenn Sigurdson, Barry Stuart and Jessica Bratty and took place at the Sumas First Nation’s Health Centre. Participants came from various sectors, including First Nations, BCWF, DFO, RCMP, the BC Federation of Driftfishers, the Fraser Valley Salmon Society, Fraser Valley Angling Guides Association and other interested parties both government and non-government.

The titled of the pilot training course was “Making Peace and Decisions in the Salmon Fishery ” The course was designed to build the capacity of fishing interests on the ground (or in this case on the water) to train real people in the fishery to deal with fisheries conflicts that may be impairing effective management of the fishery. By building new skills, relationships and effective communications, the parties hope to be able to improve the decision-making capacity in the fishery in the future. Thanks so much to the organizers and the facilitators for putting on an interesting and valuable course.

Lower Fraser First Nations and sports fishing organizations have already come together to build a trail to protect sensitive reserve lands from being trespassed on while at the same time giving access to the Chehalis River fishing. As well, they have produced the **River Manners** video, available for viewing at http://www.youtube.com/watch?v=eZ8YStwrhy4. The video, well worth watching, illustrates how sharing access to the fishery does not mean inevitable conflict. First Nations and recreational fishers are working cooperatively together to create their own solutions that will endure. Recently funding has been received to build washrooms, boat launches, camping spots, parking and new access trails. These facilities will be well used by participants in the local shared fishery.

Vancouver Island Elk Transplant initiative co-ordinates with First Nations.

At the March 2011 Vancouver Island Region 1 meeting, Kim Brunt from the Ministry of Environment reported that there are elk that could be transplanted on Vancouver Island. Kim suggested that we partner up with some First Nations groups to be able to make the move. He felt we could end up with a better chance of a shared harvest down the road as a result. The Region One members made a motion at the meeting that the Region look at using the Elk Trust Fund in partnership with First Nations subject to approval of the Regional Wildlife Section – Ministry of Forest Lands and Resource Operation to initiate the transplants.

Kim Brunt did get approval from the Gold River area First Nations, as the move was within the traditional use territory of the Mowachaht/Muchalaht FN and from the Guide Outfitters. The successful Elk transplant from the Gold River Golf Course to Houston River took place in January of 2012. Although this has been a long process, Kim Brunt's diligence and planning has paid off. The MOE, Gold River Rod and Gun Club and many volunteers worked on this project. As a result of this transplant it is hoped that the Elk at Houston will be re-stocked and will eventually inhabit the West Coast adjacent to Houston. This should eventually add to B.C .residents viewing and hunting opportunities.

No Appeal in Lake Cowichan Elk Poaching Trial Sentencing

Another notable event in 2011 was the fact that that there was no appeal in the Randy Morris Case – the Lake Cowichan Elk Poaching Trial Sentencing. In March of 2011 it was rumoured that an appeal was being filed in the BC Supreme Court. Eight days were aside for this appeal commencing Sept. 12, 2011.

However in the end the appeal did not proceed. Although the Tsartlips felt they had grounds for an appeal and they waited until the last day that they could appeal, they let it go. This is great news for conservation and wildlife management as it means the conviction in this case stands and becomes part of case law. Now the CO Service will have some assurance that when they lay similar charges there is a reasonable expectation of a conviction.

It also encourages Wilderness Watch members to continue with their valuable program. In the past few years the Lake Cowichan Elk population has increased. Vancouver Island Region Biologist Nanaimo Kim Brunt says that now there is an opportunity for discussion with First Nations in the area for a properly managed food, social and ceremonial purposes hunt. A meeting with Hulqu'mi'num First Nations and the Ditidaht was scheduled for December 13, 2011. This meeting's objective was to establish a "shared harvest" in the North Shore of Cowichan Lake area between FNs and resident hunters. If things go well, the result may be new hunt in 2013 at the earliest.

First Nations have Issues with a Treaty 8 Collaborative Wildlife Agreement in the Peace Region

First Nations bands in the north Peace Region are unhappy with the provincial government as they feel that their two year old Collaborative Wildlife Agreement has not been lived up to. The resulting ongoing dispute may impact our resident hunters. It appears that government is not living up to the agreement in terms of process or investment.

In signing the Collaborative Wildlife Agreement (CWA) the First Nations retain constitutionally protected rights such as rights to hunt and fish for food, social and ceremonial purposes. The government retains the right to enforce statutory regulations or delegated legislative authority. As well, by signing such an agreement, government is not accepting any assertion of

Aboriginal rights or title or claims for compensation that might follow such an assertion. This is left for the Treaty process that follows.

The CWA has positive aspects around inventory management and the ability to create sustainability. However, in the case of the Treaty 8 First Nations CWA with the province, this does not seem to have been implemented. The First Nations are calling the government on several points.

The most important issue is that there is no way to identify what tests the wildlife managers are using when they consider statutory decisions around First Nations rights and wildlife management. Due to government cuts, there is a lack of capacity within the Ministry to do proper inventory assessment and management of fish and wildlife resources. Consequently, fish and wildlife resources are being traded off by FLNRO for other objectives instead of building a regulatory framework using science based information. At the present time because of this ongoing issue, no new regulations, trap lines etc are being processed.

Al Martin, DSI, spoke to Lori Hall ,ADM of the Conservation Officer Service in the Ministry of Environment and was told that there was a high level meeting in March 2012 between Ministers and Treaty * chiefs on the issue. Perhaps there will be progress towards resolving the problems. This is something that we need to monitor and keep on top of.

Meeting with Government

BCWF representatives Al Martin DSI, Rod Wiebe, President and Virginia Persson, Native Affairs Committee Chair met with Charles Porter Assistant ADM for the Ministry of Aboriginal Relations and Reconciliations (MARR) in Early February 2012.
Al Martin acted as spokesperson and outlined the discussion items as follows:

- To look at ways of building relationships with First Nations so that it will be easier to work together on difficult decisions around the sharing of land bases. We need to express our commonality of interests with First Nations
- To get a clearer a understanding on the consultation process around agreements that impact our members
- To find out how the Ministry represents public interests - non First Nations interests following the results of some of the Supreme Court of Canada cases

MARR representatives told the BCWF group that there is a sharing opportunity for stakeholders, native and non-native, in the area of stewardship and conservation of the wildlife resources. Here we may find a common vision and a starting point for a relationship with First Nations groups and the place to start would be with First Nations Leadership.

As far as road blockades go, Charles Porter, ADM, said that MARR is committed to keeping these incidents low key and removing them as quickly as possible. In future, they will try to resolve issues before getting to the confrontation stage.

MARR is interested in dealing with the complicated issues around social policy – the Aboriginal side as well as the economic side. A new strategy, which is BC specific is, "incremental treaty making". This makes resources and agreements available before treaties are in place as well as having conflict resolution built in. It gives access to funds from resources to First Nations and allows projects such as oil and gas or mining to go ahead. BCWF's concern is that there is no way of knowing how non First Nations Interests are being represented through these processes and what impact it will have. The treaty process is now clearly secondary to other methods of addressing First Nations social and economic issues.

As far as recent court cases go, Mr. Porter told the group that the trend in law cases has not been good for the provincial scene. There are legal requirements that mean addressing First Nations concerns and interests and accommodating them. The results of the "Roger William Appeal" are still being waited for. MARR is offering regional contacts information so that stakeholders can contact representatives in their own community. A MARR representative will come, if invited, from the various regions, to a BCWF regional meeting or the BCWF AGM to update our members on local First Nations Issues. The contact list is included at the end of this report.

***Ahousaht* Court of Appeal Decision**

BCWF, as a member of the Fisheries Access Legal Group, had intervener's status in the Ahousaht Appeal. May 18, 2011, the *Ahousaht* Court of Appeal decision was brought down. The results were confusing and complicated to say the least.
The Court of Appeal dismissed the Crown Appeal except for geoduck which was explicitly excluded from aboriginal right. Our lawyer, Keith Lowes said this decision was "messy "because the Appeal came before the original trial was complete. The judge had not addressed all the premises in the case. Core issues have not been addressed. By being specific and excluding geoduck from the aboriginal right the Court of Appeal pushed the trial to the "justification stage". The justification stage is the management stage.

The original trial judge outlined conclusions and came to characterizations and then sent the players off for two years to figure things out themselves. The participants were left to "go away And negotiate a deal". Then the courts would not have to do anything. A deal was not reached. Now we are at the appeal stage.

The Supreme Court of Canada says definition of Aboriginal Rights must be **precise**. Keith Lowes explained that the appeal results would have been clearer if the trial judge had gone to the end of the case to the "justification stage".

The Court of Appeal states that a commercial right for the *Ahousaht* First Nations exists, that it has been infringed and that the infringement as well as any justification will be dealt with either

by negotiation or a continuance of the trial justification stage, later on in the process. There is a lack of theory in the *Ahousaht* case and there are questions still to be answered.

The Supreme Court of Canada decision on *Lax Kw'alaam* will influence the outcome of the *Ahousaht* case either on appeal or if the trial is continued.

Lax Kw'alaam **Court of Appeal Decision**

In a unanimous 7-0 decision, the Supreme Court of Canada ruled on November 10, 2011 that the Lax Kw'alaams First Nations **do not have a right to a commercial fishery**. The northwest coast First Nations claimed to have a right, protected under the Canadian Constitution, to fish halibut, crabs, herring and virtually all species for commercial use. This would have taken in essentially all fisheries resources in their "traditional territory". They based this "right" on practices, traditions and customs pre European contact. The affected region included the estuaries of the Nass and lower Skeena Rivers. If the Appeal had been granted it would have resulted in a "priority position in all fisheries in the area".
The Lax Kw'alaams legal arguments in the case and Appeal included:

a) The fact that proof of pre-contact trade in eulachon was enough to establish an aboriginal right to fish any species of fish.
b) that the potlatch exchange/distribution system in pre-contact society was a commercial type exchange and would justify a right to fish commercially

BCWF lawyer, Mr. Keith Lowes, indicated in 2009, that this Appeal would be important to legal advisors and clients as the judgment was an "application of already established principles to a body of evidence as distinct from a judgment consciously addressing new issues of law."
This case will be of help to legal advisors when dealing with similar cases around claims of aboriginal rights to commercial fishing.

The original trial judge was not convinced that the pre-contact customs, practices and traditions supported the Aboriginal rights claim that they took part in commercial activities other than trade in eulachon grease. Trade was only sporadic, not a full blown commercial endeavor and was not a factor that defined what their society was at that time. In the appeal the Lax Kw'alaams claimed that traditional potlatch exchanges substantiated a right to a limited commercial fishery.
The Supreme Court reasons for denying the commercial fisheries claim are outlined in great detail in the Appeal document that can be viewed online at:

http://scc.lexum.org/en/2011/2011scc56/2011scc56.html .

In denying the Appeal, The Supreme Court of Canada found that the trial judge did **not** err in refusing to make a declaration in relation to "Lesser and Included Rights" around the commercial fishery. If the trade in the pre-contact period was not integral to Coastal Tsimshian society it

would not make any difference if the commercial right sought was a greater or lesser right. The right did not exist.[3] Previous to this decision, the British Columbia Supreme Court and Court of Appeal had already rejected the claim. The Lax Kw'alaams still retain the right to fish for food, social and ceremonial purposes.

In the Ahousaht BC Court of Appeal the judge did not see it as necessary to define the content of Aboriginal Rights precisely. The Supreme Court of Canada is looking for just that. The Lax Kw'alaams case has defined principles. The Court of Appeal in Ahousaht said that a right to commercial fisheries does exist except for geoduck. Now the Lax Kw'alaams Court of Appeal ruling says that you can't be specific. Either the right exists or it doesn't. If the Ahousaht Appeal goes to the Supreme Court of Canada the Lax Kw'alaams decision will impact the results. Mr. Lowes stated in May, that if the Lax Kw'alaams lost the Appeal, the Ahousaht Appeal might be gutted. This remains to be seen. The Ahousaht Appeal may go ahead.

BC Wildlife Federation as part of the Fisheries Access Legal Group had "intervener status" on both these Appeals. We need to be involved in these cases along with the commercial sector. If first Nations win in court this might entrench an aboriginal right to fish within the constitution. There could be a priority right attached to such a right. Then there would be issues re management and accountability, not to mention the changes in access that the public and commercial sector would have to these resources. Further, it advances aboriginal jurisdiction over lands and resources eroding the principle of public ownership. A great deal rides on the outcome of these cases and appeals. Lax Kw'alaams is what our lawyer; Keith Lowes refers to as a "watershed case".

Appeals - Where do we go from here?

The Fisheries Access Legal Group has six members – BC Wildlife Federation, Canadian Fishing Co., Canadian Ground fish Research and Conservation Society, Canadian Sablefish Association, Pacific Prawn Fishermen's Association and the Underwater Harvesters Association.

In January 2012 the group met to discuss strategy with Keith Lowes following the Supreme Court of Canada decision on *Lax Kw'alaams.* This is assuming leave will be given to appeal *Ahousaht et al* to the Supreme Court of Canada (SCC).

Keith walked the group through his analysis of *Lax Kw'alaams* and its implications for *Ahousaht et al.* The decision of the trial judge was that if a full range of rights was not proven then a fully-fledged right to fish commercially also is not proven. As well, in the Lax Kw'alaams' reasons for judgment, it mentions that stakeholder's interests need to be taken into consideration when defining first nation's rights to fish commercially or whether an infringement of rights exists.

Keith Lowes is encouraged by the results in the Lax Kw'alaams case and feels that similar arguments could be used in an Ahousaht Appeal. Leave to appeal in this case will likely be forthcoming with leave also for interveners. Keith noted his key issues for consideration in a

confidential brief that he plans to present to the BCWF board in the future. He feels we need to give some thought to what would be a good decision and how to get there. Keith plans to develop lines of argument on items that he sees as key issues. The Supreme Court of Canada has not announced a decision yet to hear *Ahousaht et al* so there is time for him to prepare his thoughts on the matter.

Just for clarification, "Intervention" is a procedure which allows a "nonparty" or "intervener" to get involved in an ongoing litigation as a matter of right or at the courts discretion. The original litigants do not need to give permission. Intervention is allowed if the outcome of a judgment in the case might affect the rights of the nonparties. Then the nonparties should have the right to be heard.[4]

As a ruling in this case and others similar to it could affect the rights of our members to access recreational fishing and hunting opportunities, it is important that we participate as interveners. It is the role of an intervener to give the court assistance in making a decision that is fair and just. In an appeal, no new evidence is permitted. Arguments relating to flaws or error in the previous Court's judgment are the only ones allowed.

BCWF Lawyer, Keith Lowes did an excellent job on both of these appeals, researching and presenting our arguments in the "Factum of the Intervener" to the courts. It is imperative that we have a person representing BCWF interests who is sharp, experienced in dealing with Constitutional Law and able to present the information and points of view in a manner that is understandable to the parties. Keith Lowes is highly respected by his peers and by the judges to whom he presents. He was present in the Supreme Court of Canada for many of the important landmark First Nations cases such as Sparrow, Vanderpeet, Gladstone and NTC Smokehouse. Without a skilled and committed presenter BCWF would not be able to participate effectively.
Thanks Keith Lowes for a job well done.

BCWF Legal Defense Fund

And now I come again to the BCWF Legal Defense Fund. I know that money is short everywhere. However, when you look at the value we get from promoting and protecting member interests through intervener status in these First Nations Appeals you can't help but notice that it is money well spent. Look no further than the win in the Lax Kw'alaams Appeal.
Thanks to all who have donated in the past. The money has been used wisely. Please consider donating as much as is possible. It is time to build up the Legal Defense Fund. We need to be able to address these legal challenges as they come up.

Respectfully Submitted By:
Virginia Persson, BCWF Native Affairs Committee Chair.

1 Citation: Lax Kw'alaams Indian Band v, Canada (Attorney General) 2011 Scc56, November 10, 2011 Docket 33581

2 Keith Lowes 2009 report

3 Citation: Lax Kw'alaams Indian Band v, Canada (Attorney General) 2011 Scc56, November 10, 2011 Docket 33581

4 Wikipedia Intervention (law)

Attached for information

Ministry of Aboriginal Relations and Reconciliations Regional level offices list of contacts

Regional Office	Contact	Phone Number	Email
Coastal Region	Director: Lindsay Jones (located in Nanaimo)	250 751-3250	Lindsay.Jones@gov.bc.ca
Nanaimo Office	Manager: Luigi Sposato	250 751-7264	Luigi.Sposato@gov.bc.ca
Surrey Office	Manager: Peter Jones	604 586-4427	Peter.Jones@gov.bc.ca
Southern Interior Region	Director: Shane Berg (located in Kamloops)	250 828-4494	Shane.Berg@gov.bc.ca
Kamloops Office	Manager: Greg Perris	250-828-4212	Greg.Perrins@gov.bc.ca
Williams Lake Office	Manager: Mike Gash	250 398-4579	Michael.Gash@gov.bc.ca
Cranbrook Office	Manager: Pam Cowtan	250 489-8587	Pamela.Cowtan@gov.bc.ca
Northern Region	Director: Geoff Recknell (located in Smithers)	250 847-7535	Geoff.Recknell@gov.bc.ca
Smithers Office	Manager: Linda Robertson	250 847-7504	Linda.Robertson@gov.bc.ca
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