SUPREME COURT OF CANADA

CITATION: R. *v.* Kapp, 2008 SCC 41

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BETWEEN:

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky

Appellants

v.

Her Majesty The Queen

Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations

Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 66) McLachlin C.J. and Abella J. (Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ. concurring)

REASONS CONCURRING IN RESULT: (paras. 67 to 123) Bastarache J.

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r. *v.* kapp

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations *Interveners*

Indexed as: R. *v.* Kapp

Neutral citation: 2008 SCC 41.

File No.: 31603.

2007: December 11; 2008: June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Right to equality — Affirmative action programs — Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms — Ambit and operation of s. 15(2) — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether program protected by s. 15(2) of Charter.

Constitutional law — Charter of Rights — Aboriginal rights and freedoms not affected by Charter — Right to equality — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

Fisheries — Commercial fishery — Aboriginal Fisheries Strategy — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether licence constitutional — Canadian Charter of Rights and Freedoms, s. 15.

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per **McLachlin C.J.** and Binnie, LeBel, Deschamps, Fish, **Abella**, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish, that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [16] [37] [40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [44] [48] [50] [57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [30] [57-59] [61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of

aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [63-65]

Per **Bastarache** J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [75] [77] [108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [80-81] [89] [93] [97]

The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture,

territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [103] [105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. [111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginals pursuant to the

pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [116] [119-123]

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S.C.R. 103; *Athabasca Tribal Council v. Amoco Canada Petroleum Company Ltd.*, [1981] 1 S.C.R. 699; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92, rev'd in part (1989), 55 Man. R. (2d) 263; *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, rev'd (1990), 68 Man. R. (2d) 203; *Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196, aff'd (1986), 28 C.C.C. (3d) 154; *Re M and The Queen* (1985), 21 C.C.C. (3d) 116; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

By Bastarache J.

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *R. v. Daoust*, [2004] S.C.R. 217, 2004 SCC 6; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *R. v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187; *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1; *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 D.L.R. (4th) 741; *R. v. Nicholas*, [1989] 2 C.N.L.R. 131; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004

SCC 74; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Mackenzie, Low, Levine and Kirkpatrick JJ.A.) (2006), 56 B.C.L.R. (4th) 11, 271 D.L.R. (4th) 70, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 374 W.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, 141 C.R.R. (2d) 249, [2006] B.C.J. No. 1273 (QL), 2006 CarswellBC 1407, 2006 BCCA 277, affirming a decision of Brenner C.J.S.C. (2004), 31 B.C.L.R. (4th) 258, [2004] 3 C.N.L.R. 269, 121 C.R.R. (2d) 349, [2004] B.C.J. No. 1440 (QL), 2004 CarswellBC 1607, 2004 BCSC 958, lifting a stay of proceedings by Kitchen Prov. Ct. J., [2003] 4 C.N.L.R. 238, [2003] B.C.J. No. 1772 (QL), 2003 CarswellBC 1881, 2003 BCPC 279. Appeal dismissed.

Bryan Finlay, Q.C., *J. Gregory Richards* and *Paul D. Guy*, for the appellants.

Croft Michaelson and *Paul Riley*, for the respondent.

Sarah T. Kraicer and *S. Zachary Green*, for the intervener the Attorney General of Ontario.

Isabelle Harnois and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Richard James Fyfe, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey, for the intervener the Attorney General of Alberta.

Joseph J. Arvay, Q.C., and *Jeffrey W. Beedell*, for the intervener the Tsawwassen First Nation.

Allan Donovan and *Bram Rogachevsky*, for the intervener the Haisla Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations).

Maria A. Morellato and *Joanne R. Lysyk*, for the interveners the Heiltsuk Nation and the Musqueam Indian Band.

F. Matthew Kirchner and *Lisa C. Glowacki*, for the intervener the Cowichan Tribes.

J. Keith Lowes, for the interveners the Sportfishing Defence Alliance, the B.C. Seafood Alliance, the Pacific Salmon Harvesters Society, the Aboriginal Fishing Vessel Owners Association and the United Fishermen and Allied Workers Union.

John Carpay and *Chris Schafer*, for the intervener the Japanese Canadian Fishermens Association.

Kevin O'Callaghan and *Katey Grist*, for the intervener the Atlantic Fishing Industry Alliance.

Ryan D. W. Dalziel, for the intervener the Nee Tahi Buhn Indian Band.

Hugh M. G. Braker, Q.C., and *Anja P. Brown* for the intervener the Tseshaht First Nation.

Bryan P. Schwartz and *Jack R. London, C.M., Q.C.*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

THE CHIEF JUSTICE AND ABELLA J.—

A. Introduction

[1] The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998.

[2] The appellants base their claim on s. 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between s. 15(1) and s. 15(2) of the *Charter*. Specifically, they require this Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination — a possibility left open in this Court's equality jurisprudence.

[3] We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of discrimination must fail. As the communal fishing licence challenged in this appeal falls within s. 15(2)'s ambit — one of its objects being to ameliorate the conditions of the participating aboriginal bands — the appellants' claim of a violation of s. 15 cannot succeed. While the operation of s. 15(2) is sufficient to dispose of the appeal, these reasons, in addition to examining the respective roles of s. 15(1) and s. 15(2), will comment briefly on s. 25 of the *Charter*, in view of the reasons of Bastarache J. on this point.

B. Factual and Judicial History

[4] Prior to European contact, aboriginal groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. It is no exaggeration to say that their life centered in large part around the river and its abundant fishery. In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.

[5] The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing: *R. v. Van der Peet*, [1996] 2 S.C.R. 507. The participation of Aboriginals in the commercial fishery was thus left to individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically, compared to non-Aboriginals. Catching fish for their own tables and ceremonies left many needs unmet.

[6] The government's decision to enhance aboriginal involvement in the commercial fishery followed the recommendations of the 1982 Pearse Final Report, which endorsed the negotiation of aboriginal fishery agreements (*Turning the Tide: A New Policy For Canada's Pacific Fisheries*). The Pearse Report recognized the problematic connection between aboriginal communities' economic disadvantage and

the longstanding prohibition against selling fish — a prohibition that disrupted what was once an important economic opportunity for Aboriginals. Policing the prohibition was also problematic; the 1994 Gardner Pinfold Report addressed the serious conservation issue stemming from a fish sales prohibition "honoured more in the breach than the observance" (*An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy (AFS)*, p. 3). The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[7] The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the umbrella of the "Aboriginal Fisheries Strategy". Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the *Sparrow* decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries (1994 Gardner Pinfold Report). In response to consultations with stakeholders carried out since its inception, the Aboriginal Fisheries Strategy has been reviewed and adjusted periodically in order to achieve these goals. A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences*

Regulations, SOR/93-332 ("*ACFLR*"). The *ACFLR* grants communal licences to "aboriginal organization[s]", defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community". The communal licence cannot be granted to individuals, but an aboriginal organization can designate its use to individuals.

[8] The licence with which we are concerned permitted fishers designated by the bands to fish for sockeye salmon between 7:00 a.m on August 19, 1998 and 7:00 a.m. on August 20, 1998, and to use the fish caught for food, social and ceremonial purposes, and for sale. Some of the fishers designated by the bands to fish under the communal fishing licence were also licensed commercial fishers entitled to fish at other openings for commercial fishers.

[9] The appellants are all commercial fishers who were excluded from the fishery during the 24 hours allocated to the aboriginal fishery under the communal fishing licence. Under the auspices of the B.C. Fisheries Survival Coalition, they participated in a protest fishery during the prohibited period, for the purpose of bringing a constitutional challenge to the communal licence. As anticipated, they were charged with fishing at a prohibited time. In defence of the charges, they filed notice of a constitutional question seeking declarations that the communal fishing licence, the *ACFLR* and related regulations and the Aboriginal Fisheries Strategy were unconstitutional.

[10] The Provincial Court of British Columbia (Judge Kitchen) found that the communal fishing licence granted to the three bands was a breach of the equality rights of the appellants under s. 15(1) of the *Charter* that was not justified under s. 1 of the

Charter. The court stayed proceedings on all the charges under s. 24 of the *Charter*: [2003] 4 C.N.L.R. 238, 2003 BCPC 279.

[11] The Supreme Court of British Columbia (Brenner C.J.S.C.) allowed a summary convictions appeal by the Crown: (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958. It held that the pilot sales program did not have a discriminatory purpose or effect because it did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or as members of Canadian society. Brenner C.J.S.C. lifted the stay of proceedings and entered convictions against the appellants.

[12] The British Columbia Court of Appeal, in five sets of reasons concurring in the result, dismissed the appeal: (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277. Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.

C. Analysis

[13] Section 15 of the *Charter* provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

1. *The Purpose of Section 15*

[14] Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

> To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.

[16] Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

[17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under

s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[18] In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. *Andrews*, for example, was decided on the second of these concepts; it was held that the prohibition against non-citizens practising law was based on a stereotype that non-citizens could not *properly* discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens a privilege, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on *Equality in Employment* (1984), referred to as "attributed rather than actual characteristics" (p. 2). Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds. In this context, he said (at p. 174):

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

[21] At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]

[22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.[1] Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.[2]

[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focuses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of

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[1]Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 *Queen's L.J.* 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 *Can. Bar Rev.* 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law* Test" (2003-2004), 15 *N.J.C.L.* 3; Christopher D. Bredt and Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003), 20 *S.C.L.R.* (2d) 33; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 *McGill L.J.* 627; Daniel Proulx, "*Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles*", [2003] *R. du B.* (numéro spécial) 485; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, « La dignité dans la *Charte des droits et libertés de la personne* : de l'ubiquité à l'ambiguïté d'une notion fondamentale », in *La Charte québécoise : origines, enjeux et perspectives* (2006), numéro thématique de la Revue du Barreau en marge du trentième anniversaire de l'entrée en vigueur de la Charte des droits et libertés de la personne, sous la direction de M^{e} Alain-Robert Nadeau, 143; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol 2, pp. 55-28 and 55-29; Alexandre Morin, Le droit à l'égalité au Canada (2008), p. 80-82.

[2]Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 37; Bruce Ryder, Cidalia C. Faria and Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

[25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

[26] Against this background, we turn to a more detailed examination of s. 15(2) and its role in this appeal.

2. *Section 15(2)*

[27] Under *Andrews*, as previously noted, s. 15 does not mean identical treatment. McIntyre J. explained that "every difference in treatment between individuals under the law will not necessarily result in inequality", and that "identical treatment may frequently produce serious inequality" (p. 164). McIntyre J. explicitly rejected identical treatment as a *Charter* objective, based in part on the existence of s. 15(2). At p. 171, he stated that "the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2)".

[28] Rather than requiring identical treatment for everyone, in *Andrews*, McIntyre J. distinguished between difference and discrimination and adopted an approach to equality that acknowledged and accommodated differences. McIntyre J. proposed the following model, at p. 182:

> [I]n assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

In other words, not every distinction is discriminatory. By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or "reverse discrimination". *Andrews* requires that discriminatory conduct entail more than *different* treatment. As McIntyre J. declared at p. 167, a law will not "necessarily be bad because it makes distinctions".

[29] In our view, the appellants have established that they were treated differently based on an enumerated ground, race. Because the government argues that the program ameliorated the conditions of a disadvantaged group, we must take a more detailed look at s. 15(2).

[30] The question that arises is whether the program that targeted the aboriginal bands falls under s. 15(2) in the sense that it is a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". As noted, the communal fishing licence authorizing the three bands to fish for sale on August 19-20 was issued pursuant to an enabling statute and regulations — namely the *ACFLR*. This qualifies as a "law, program or activity" within the meaning of s. 15(2). The more complex issue is whether the program fulfills the remaining criteria of s. 15(2) — that is, whether the program "has as its object the amelioration of conditions of disadvantaged individuals or groups".

[31] Even before the enactment of the *Charter*, this Court in *Athabasca Tribal Council v. Amoco Canada Petroleum Company Ltd.*, [1981] 1 S.C.R. 699, recognized that ameliorative programs targeting a disadvantaged group do not constitute discrimination. The issue in the case was whether the Energy Resources Conservation Board had jurisdiction to require an "affirmative action" program for the hiring of aboriginal people as a condition of its approval of a tar sands plant. The Court unanimously concluded that there was no such jurisdiction, but Ritchie J., writing for four of the judges (Laskin C.J., himself, Dickson J. and McIntyre J.), addressed the affirmative action aspect of the case, concluding that a program designed to benefit the aboriginal community was not discrimination within the meaning of *The Individual's Rights Protection Act* of Alberta, 1972 (Alta.), c. 2:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited. [p. 711]

[32] The Royal Commission Report on *Equality in Employment*, whose mandate was to determine whether there should be affirmative action in Canada and on which McIntyre J. relied to develop his theories of discrimination and equality, set out the principles underlying s. 15(2), at pp. 13-14:

> In recognition of the journey many have yet to complete before they achieve equality, and in recognition of how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints. While section 15(1) guarantees to individuals the right to be treated as equals free from discrimination, section 15(2), though itself creating no enforceable remedy, assures that it is neither discriminatory nor a violation of the equality guaranteed by section 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means treating them differently.
>
> Section 15(2) covers the canvas with a broad brush, permitting a group remedy for discrimination. The section encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers.
>
> Section 15(2) does not create the statutory obligation to establish laws, programs, or activities to hasten equality, ameliorate disadvantage, or eliminate discrimination. But it sanctions them, acting with statutory acquiescence.

[33] In essence, s. 15(2) of the *Charter* seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups. This interpretation is confirmed by the language in s. 15(2), "does not preclude".

[34] This Court dealt explicitly with the relationship between s. 15(1) and s. 15(2) in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37. The Court, *per* Iacobucci J., appeared unwilling at that time to give s. 15(2) independent force, but left the door open for that possibility, at para. 108:

> [A]t this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However . . . we may well wish to reconsider this matter at a future time in the context of another case. [Emphasis added.]

[35] Iacobucci J. in *Lovelace* perceived two possible approaches to the interpretation of s. 15(2). He believed that the Supreme Court could either read s. 15(2) as an interpretive aid to s. 15(1) (the approach adopted in *Lovelace*) or read it as an exception or exemption from the operation of s. 15(1).

[36] He favoured the interpretive aid approach, while acknowledging that the exemption approach had some support. In particular, he cited Mark A. Drumbl and John D. R. Craig for the proposition that s. 15(2) should defend against a s. 15(1) violation because otherwise the provision becomes redundant and does not encourage the government to combat discrimination pro-actively through ameliorative programs ("Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997), 4 *Rev. Const. Stud.* 80, at para. 102).

[37] In our view, there is a third option: if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all. As discussed at the outset of this analysis, s. 15(1) and s.

15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it. "Under a substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it": P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 55-53.

[38] But this confirmatory purpose does not preclude an independent role for s. 15(2). Section 15(2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

[39] Here the appellants claim discrimination on the basis of s. 15(1). The source of that discrimination — the very essence of their complaint — is a program that may be ameliorative. This leaves but one conclusion: if the government establishes that the program falls under s. 15(2), the appellants' claim must fail.

[40] In other words, once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program

discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

[41] We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point — one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement.

[42] We build our analysis of s. 15(2) and its operation around three key phrases in the provision. The subsection protects "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". While there is some overlap in the considerations raised by each of these terms, it may be useful to consider each of them individually.

a) "Has as its Object"

[43] In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation. The second is whether, in order to qualify for s. 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient.

[44] The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. Michael Peirce defends this view, which he refers to as the "subjective" approach, because it adheres more closely to the language of the provision and avoids potentially inappropriate judicial intervention in government programs ("A Progressive Interpretation of Subsection 15(2) of the *Charter*" (1993), 57 *Sask. L. Rev.* 263). Scholars have nonetheless disagreed about the appropriate approach, often using the "subjective" (goal-based) and "objective" (effect-based) language.

[45] Scholars and judges who have supported judicial examination of the actual *effect* of a program offer one primary argument to defend their view. They express concern that a "subjective" test will permit the government to defeat a discrimination claim by declaring that the impugned law has an ameliorative purpose. Thus, Russell Juriansz states that a "purely subjective test may be too wide" ("Recent Developments in Canadian Law: Anti-Discrimination Law Part I" (1987), 19 *Ottawa L. Rev.* 447, at p. 483). David Lepofsky and Jerome Bickenbach believe that the "better view is that the defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal" ("Equality Rights and the Physically Handicapped", in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the*

Canadian Charter of Rights and Freedoms (1985), 323, at p. 355). They justify this perspective with the argument that "if ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this Act has as its object the amelioration of the conditions of . . . a disadvantaged group'" (p. 355).

[46] In our opinion, this concern can be easily addressed. There is nothing to suggest that a test focussed on the goal of legislation must slavishly accept the government's characterization of its purpose. Courts could well examine legislation to ensure that the declared purpose is genuine. Courts confronted with a s. 15(2) claim have done just that. For example, in *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92 (Q.B.) (rev'd in part (1989), 55 Man. R. (2d) 263 (C.A.)), Simonsen J. explained, at para. 51:

> A bald declaration by government that it has adopted a program which "has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race . . ." does not *ipso facto* meet the requirements to sanctify the program under s. 15(2) of the *Charter*. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory.

[47] In that vein, proponents of the approach that focusses on the ameliorative goal of the program, rather than its effect, argue that doing so will prevent courts from unduly interfering in ameliorative programs created by the legislature. They note that Canadian *Charter* drafters wished to avoid the American experience, whereby judges overturned affirmative action programs under the banner of equality. The purpose-driven approach also reflects the language of the provision itself, which focuses on the

"object" of the program, law or activity rather than its impact. Moreover, the effects of a program in its fledgling stages cannot always be easily ascertained. The law or program may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.

[48] Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach: where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged? In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage. The Manitoba Court of Queen's Bench suggested that it favoured an analysis of this kind in *Manitoba Rice Farmers Association,* at para. 54:

> In order to justify a program under s. 15(2), I believe there must be a real nexus between the object of the program as declared by the government and its form and implementation. It is not sufficient to declare that the object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed toward the cause of the disadvantage. There must be a unity or interrelationship amongst the elements in the program which will prompt the court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage.

[49] Analysing the means employed by the government can easily turn into assessing the *effect* of the program. As a result, to preserve an intent-based analysis, courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.

[50] The next issue is whether the program's ameliorative purpose needs to be its exclusive objective. Programs frequently serve more than one purpose or attempt to meet more than one goal. Must the ameliorative object be the sole object, or may it be one of several?

[51] We can find little justification for requiring the ameliorative purpose to be the sole object of a program. It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme. To prevent such programs from earning s. 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of s. 15(2).

[52] The importance of the ameliorative purpose within the scheme may help determine the *scope* of s. 15(2) protection, however. Consider that an ameliorative program may coexist with or interact with a larger legislative scheme. If only the program has an ameliorative purpose, does s. 15(2) extend to protect the wider legislative scheme? We offer

as a tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.

b) "Amelioration"

[53] Section 15(2) protects programs that aim to "ameliorate" the condition of disadvantaged groups identified by the enumerated or analogous grounds. Although the word does not at first seem liable to misunderstanding, courts have previously understood the term (and s. 15(2)) to apply in surprising circumstances. In *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, the Manitoba Court of Queen's Bench upheld a Winnipeg bylaw that restricted young people under 16 from operating an amusement device without the consent of a guardian or a parent on the grounds that it was protected by s. 15(2). Smith J. declared that the bylaw "is obviously for the benefit of the special needs of young persons" (para. 21). On appeal, the decision was reversed. The Court of Appeal explained: "[T]his legislation does not confer special benefits upon young people, but rather imposes a limitation. Nor is the purpose of the legislation the amelioration of their condition" ((1990), 68 Man. R. (2d) 203, at para. 18). Courts have also used s. 15(2) to uphold provisions of the *Criminal Code* (*Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196 (B.C.S.C.), aff'd (1986), 28 C.C.C. (3d) 154 (B.C.C.A.)) and of the *Young Offenders Act* (*Re M and The Queen* (1985), 21 C.C.C. (3d) 116 (Man. Q.B.)).

[54] These precedents suggest that the meaning of "amelioration" deserves careful attention in evaluating programs under s. 15(2). We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact

that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.

c) "Disadvantaged"

[55] The interpretation of "disadvantaged", explored in *Andrews*, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Law*, and other cases in the context of s. 15(1), requires little further elaboration here. "Disadvantage" under s. 15 connotes vulnerability, prejudice and negative social characterization. Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.

3. *Application of Section 15(2) to this Case*

[56] The appellants have argued they were denied a benefit on the basis of race, a ground enumerated in s. 15 of the *Charter*. As discussed above, once the appellants have demonstrated such a distinction, the government may attempt to show the program is protected under s. 15(2). The government conferred the communal fishing licence valid for

August 19-20 to particular aboriginal bands. Therefore, we are satisfied that the appellants have demonstrated a distinction imposed on the basis of race, an enumerated ground under s. 15.

[57] We have earlier suggested that a distinction based on the enumerated or analogous grounds in a government program will not constitute discrimination under s. 15 if, under s. 15(2), (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. The question is whether the program at issue on this appeal meets these conditions.

[58] The first issue is whether the program that excluded Mr. Kapp and other non-band fishers from the fishery had an ameliorative or remedial purpose. The Crown describes numerous objectives for the impugned pilot sales program. These include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The impugned fishing licence relates to all of these goals. The pilot sales program was part of an attempt — albeit a small part — to negotiate a solution to aboriginal fishing rights claims. The communal fishing licence provided economic opportunities, through sale or trade, to the bands. Through these endeavours, the government was pursuing the goal of promoting band self-sufficiency. In these ways, the government was hoping to redress the social and economic disadvantage of the targeted bands. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. It follows that the Crown has established a credible ameliorative purpose for the program.

[59] The government's aims correlate to the actual economic and social disadvantage suffered by members of the three aboriginal bands. The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian and*

Northern Affairs), [1999] 2 S.C.R. 203, the Court noted "the legacy of stereotyping and prejudice against Aboriginal peoples" (para. 66). The Court has also acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Lovelace*, at para. 69). More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The communal fishing licence, by addressing long-term goals of self-sufficiency and, more immediately, by providing additional sources of income and employment, relates to the social and economic disadvantage suffered by the bands. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.

[60] Mr. Kapp suggests that the focus must be on the particular forms of disadvantage suffered by the bands who received the benefit, and argues that this program did not offer a benefit that effectively tackled the problems faced by these bands. As discussed above, what is required is a correlation between the program and the disadvantage suffered by the target group. If the target group is socially and economically disadvantaged, as is the case here, and the program may rationally address that disadvantage, then the necessary correspondence is established.

[61] We conclude that the government program here at issue is protected by s. 15(2) as a program that "has as its object the amelioration of conditions of disadvantaged individuals or groups". It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*.

5. *Section 25 of the Charter*

[62] Having concluded that a breach of s. 15 is not established, it is unnecessary to consider whether s. 25 of the *Charter* would bar the appellants' claim. However, we wish to signal our concerns with aspects of the reasoning of Bastarache J. and of Kirkpatrick J.A., both of whom would have dismissed the appeal solely on the basis of s. 25.

[63] An initial concern is whether the communal fishing licence at issue in this case lies within s. 25's compass. In our view, the wording of s. 25 and the examples given therein — aboriginal rights, treaty rights, and "other rights or freedoms", such as rights derived from the *Royal Proclamation* or from land claims agreements — suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. If so, we would question, without deciding, whether the fishing licence is a s. 25 right or freedom.

[64] A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights.

[65] These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court.

D. Conclusion

[66] We would dismiss the appeal on the ground that breach of the s. 15 equality guarantee has not been established.

The following are the reasons delivered by

BASTARACHE J. –

1. Introduction

[67] The Minister of Fisheries and Oceans has the task of managing the salmon fishery on the Fraser River. In an effort to enhance the management of this fishery and address a number of issues besetting the fishery, he developed the *Aboriginal Fisheries Strategy*, a component of which in turn is the *Pilot Sales Program*. Under this program, the Minister exercised his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

[68] On August 19, 1998, the Minister issued a licence to the Musqueam, Burrard and Tsawwassen First Nations, permitting them to fish for a period of 24 hours in exclusivity, and to sell their catch. The appellants, who are all commercial fishers, mounted a "protest fishery" during the aboriginal fishery and were charged for fishing during a time when the fishery was closed to them. At their subsequent trial, the appellants did not challenge the law under which they were charged, but asserted that the trial proceedings should be stayed as their rights to equality under s. 15(1) of the *Canadian Charter of Rights and Freedoms* had been violated. They argue that

their right to participate as equals in the public commercial fishery has been breached on the basis of a race-based distinction and that any race-based distinction affects the dignity of the persons subject to discrimination.

[69] The respondent Minister argues that the appellants were not denied any benefit of the law, as they were provided opportunities to fish and, indeed, caught significant quantities of salmon. Moreover, providing aboriginal communities, which have historically been disadvantaged, with access to commercial salmon fishing does not demean the dignity of commercial salmon fishers by treating them as less worthy and valued members of Canadian society. The respondent Minister stated that the policy under the *Aboriginal Fisheries Strategy* was to provide opportunities to fish for food, and for social and ceremonial purposes, and in some cases pilot sales, to aboriginal communities having historical use and occupancy of an area. He explained that approximately 70 fisheries agreements were negotiated annually with aboriginal groups throughout the province. Under these agreements, the groups received communal licences authorizing fishing in accordance with the fisheries agreements. The position of the respondent is that the members of the claimant group, which consists of individuals, cannot properly compare themselves to aboriginal communities, the recipients of the benefit in question. The appellants respond that membership in a band does not constitute a valid proxy in any circumstance that is functionally relevant to the regulation of the public fishery. The appellants add that any cultural significance to fishery activity is dealt with by the doctrine of aboriginal rights and the protection of such rights by s. 35 of the *Constitution Act, 1982*.

[70] With regard to the communal aspect of the fishery, the trial judge, Kitchen Prov. Ct. J., had this to say: "The Department labels the fishery 'communal', but the

individuals designated by the bands to participate are completely on their own and keep all profits for themselves. . . . [T]he pilot sales fishery provides financial assistance to only the individual members of the bands, not the bands generally . . . It is not a communal fishery. . . . [B]and members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial fishing vessels" ([2003] 4 C.N.L.R. 238, 2003 BCPC 279, at paras. 200, 211 and 214).

[71] The *Pilot Sales Program* was not related to the specific aboriginal right to fish for food found in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Rather, according to the respondent, it was designed to reach negotiated solutions to claims for aboriginal commercial fishing rights and to provide economic opportunities to native bands, to support their progress towards self-sufficiency. Minister Crosbie, the Minister of Fisheries and Oceans at the time, explained that unauthorized sale of aboriginal food fish was creating a management problem. He explained that, rather than litigating the issue, the Department sought to reach an agreement with aboriginal groups as to how much fish they could take and sell and to allow the Department to regulate how the fish would be sold. James Matkin, speaking for the Department of Fisheries, explained that the pilot sales are justified as an exercise in policy making of the Minister's authority under the *Fisheries Act* and that they are designated to follow the court's direction to negotiate rather than to litigate.

[72] With regard to the rationale for the pilot project, Kitchen Prov. Ct. J. had this to say:

> It is difficult to discern the real purpose of the pilot sales fishery. . . . Fisheries Minister John Crosbie gave control of poaching as the reason for the program. . . .
>
> [H]e also mentioned that the program was to be an experiment. This is a second justification given for the program. . . .
>
> This literature also asserts that the *Sparrow Case* requires that this type of opportunity be afforded to Aboriginals. This is clearly not the situation. . . .
>
> ... Department literature also mentions the fiduciary duty society has to the Aboriginal community and how this has prompted the Department to move ahead of caselaw . . .
>
> . . .
>
> Most significantly, the Department of Fisheries and Oceans have given economic development and an ameliorative purpose as the reason for pilot sales program. But there is a real suspicion that this is an *ex post facto* justification; . . .
>
> . . .
>
> Even if financial disadvantage were an issue there was no economic study or assessment done prior to or during the pilot sales fishery concerning the economic need of the bands and the financial rewards the fishery would produce. . . .
>
> . . .
>
> Several reasons have been proffered at various times. There has been no consistent rationale for the program. [paras. 186-89, 191, 199 and 210]

[73] The important point to be made here is that the respondent's position is that the *Aboriginal Fisheries Strategy* and the *Pilot Sales Program* were primarily aimed at management of the fishery and did not have as their primary object the amelioration of conditions of disadvantaged groups or individuals. The respondent therefore does not rely on s. 15(2) of the *Charter*. He states that s.15(2) is an interpretative provision and that given this Court's established lines of authority on the proper approach to analysis of the equality claims under s. 15(1), the ameliorative purpose or effect of a program can readily be taken into account under s. 15(1).

[74] Kitchen Prov. Ct. J. held that the *Pilot Sales Program* violated s. 15(1) and was not saved by s. 1 of the *Charter*. The summary conviction appeal judge, Brenner C.J.S.C., allowed the appeal on the basis that the trial judge had identified the claimant and comparator groups too narrowly, that he had failed to properly consider the pre-existing disadvantage of the aboriginal communities that comprise the comparator group, and that he did not give sufficient weight to the fact that the *Pilot Sales Program* did not have a significant impact on the claimant group ((2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958). He concluded that the *Pilot Sales Program* corresponds to the needs, capacity and circumstances of the aboriginal communities and that it is also consistent with the needs, capacity and circumstances of the rest of Canadian society. Although the issue was not dealt with substantially at trial, Brenner C.J.S.C. permitted a number of interveners to argue that s. 25 of the *Charter* applied in this case. He eventually concluded that it did not. The application of s. 25 was fully argued by all parties and most interveners in the Court of Appeal and in this Court.

[75] The five members of the panel in the Court of Appeal of British Columbia were unanimous in dismissing the appeal, but for different reasons ((2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277). Finch C.J.B.C. and Low and Levine JJ.A. held that the appellants had totally failed to establish that they had been denied a benefit and therefore failed to get past the first stage of the *Law* test (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497). They concluded that the aboriginal communal licence was simply part of a broader regulatory framework which provided for various user groups. The Minister in exercising his discretion did not deny the appellants a real benefit since they were provided other opportunities to fish under commercial licences. MacKenzie J.A. held that, assuming the appellants were successful in getting past the first two stages of the *Law* test, they had failed to

establish that the communal licences had a discriminatory purpose or effect. Kirkpatrick J.A. held that the communal fishing licences granted were protected under s. 25 of the *Charter* as "[an]other righ[t] or freedo[m] that pertain[s] to the aboriginal peoples of Canada". She further held that s. 25 was triggered whenever the outcome of a *Charter* challenge might abrogate or derogate from aboriginal rights or freedoms. Since the appellants were seeking to eliminate the *Pilot Sales Program*, s. 25 operated to bar their constitutional challenge under s. 15.

2. Analysis

[76] Like Kirkpatrick J.A., I am of the view that s. 25 of the *Charter* provides a complete answer to the question posed in this appeal. I will initially address the role and effect of s. 25, then outline the scope of the provision. Finally, I will propose an analytical approach to be followed when s. 25 is engaged and apply that approach to the present matter.

[77] There is no need for me to engage in a full analysis of the application of s. 15 of the *Charter*. It is sufficient for me to establish the existence of a potential conflict between the *Pilot Sales Program* and s. 15. This said, I want to state clearly that I am in complete agreement with the restatement of the test for the application of s. 15 that is adopted by the Chief Justice and Abella J. in their reasons for judgment.

2.1 *Role and Effect of Section 25*

[78] The enactment of the *Charter* undoubtedly heralded a new era for individual rights in Canada. Nevertheless, the document also expressly recognizes

rights more aptly described as collective or group rights. The manner in which collective rights can exist with the liberal paradigm otherwise established by the *Charter* remains a source of ongoing tension within the jurisprudence and the literature. This tension comes to a head in the aboriginal context in s. 25.

[79] Most authors believe that s. 25 is an interpretative provision and does not create new rights. B.H. Wildsmith outlines the two modes of interpretation most commonly posited:

> Under one mode of interpreting section 25, the section admonishes the decision maker to construe the Charter right or freedom so as to give effect to it, if possible, without an adverse impact on section 25 rights or freedoms. If it is not possible to so construe the Charter right or freedom so as to avoid a negative impact on native rights, then the force of section 25 is spent. Effect is given to the Charter right or freedom despite the [negative] impact on native rights. Under the second mode of interpreting section 25, the conflict between Charter rights and section 25 rights, if irreconcilable, would be resolved by giving effect to the section 25 rights and freedoms. In short, native rights remain inviolable and unaffected by the rights or freedoms guaranteed by the Charter.
>
> (*Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (1988), at pp. 10-11)

[80] The first mode has been described in the literature as an interpretative prism or a mere canon of interpretation. The second method is most commonly referred to as a shield. Wildsmith provides an example (at pp. 11-12) that is highly reminiscent of the present matter to demonstrate that there is a serious difficulty in finding that s. 25 is a mere canon of interpretation. If a provincial Act were to establish that "no Indian shall fish or hunt except for his own personal consumption unless he has first obtained a licence", and that no treaty or aboriginal right to this exemption existed, then a non-Indian hunter or fisherman would say that the statute violated s. 15(1) of the *Charter*. Indians would have a right to hunt or fish for personal

consumption denied to others. The statutory right given to the Indians would be an "other righ[t] or freedo[m]" under s. 25. The court would then be forced to choose between vindicating the equality right or the right protected by s. 25. If the real effect of s. 25 is to protect native rights and freedoms from erosion based on the *Charter*, the conflict should be resolved by refusing to apply s. 15 in these circumstances.

[81] I agree that giving primacy to s. 25 is what was clearly intended. As will be seen, this is consistent with the wording and history of the provision. It is also consistent with the declarations of the then Deputy Minister of Justice, Roger Tassé, and with those of the Minister of Justice at the time of the 1983 amendment, Justice Minister Mark MacGuigan.

2.1.1 Interpretative Approach

[82] Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context. Consequently, I will examine the manner in which s. 25 addresses the tension between individual and group rights with reference to all of the above.

[83] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 82, this Court stated: "Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a

non-derogation clause in favour of the rights of aboriginal peoples." Clearly, this Court has held that a generous interpretation is mandated.

2.1.2 Textual and Structural Analysis

[84] First, let us consider the terms of s. 25:

> **25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> (*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.
>
> **25.** Le fait que la présente Charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés – ancestraux, issus de traités ou autres – des peuples autochtones du Canada, notamment :
>
> *a*) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;
>
> *b*) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[85] Here we have an Act that is clear in its French version and ambiguous in its English version. Other provisions of the *Charter* provide the statutory context for the interpretation of s. 25. Section 21 provides that nothing in ss. 16 to 20 "abrogates or derogates from any right, privilege or obligation with respect to the English and French languages". Section 29 provides that nothing in the *Charter* "abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".

[86] Most authors have considered the use of the word "construed" as significant in s. 25. In my opinion, the word "construe" is very broad. The *Oxford English Dictionary* (2nd ed. 1989) defines the term as meaning "[t]o analyse or trace the grammatical construction of a sentence; to take its words in such an order as to show the meaning of the sentence" (p. 796). The term accordingly permits the understanding that in constructing and interpreting the scope of *Charter* rights, courts must ensure that they do not abrogate or derogate from an aboriginal right or freedom. As noted above, Wildsmith described the two competing approaches to s. 25 as differing modes of interpretation. I view the expression "shall not be construed" as ambiguous in terms of the effect of the provision.

[87] This said, I view the French version of s. 25 as being considerably more certain. The expression "*ne porte pas atteinte aux*" loosely translates to "without prejudice to" (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique* (1991), vol. I.A., at p. 228) or "will not prejudicially affect" (*Ontario English-French Legal Lexicon* (1987), entry 224). It is also important to note that the French version of s. 25 uses the same terms as ss. 21 and 29 of the *Charter* and that those sections have already been interpreted by this Court. In *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, "*ne porte pas atteinte aux*" in s. 29 was read by this Court, in *obiter dicta*, as constituting a bar to competing rights. The rule of internal consistency would require that the same words used in the same *Charter* (especially in the same section, dealing with general provisions) be interpreted in the same way, militating against finding that the French version does not provide for the most consistent answer to the quest for a common meaning. See *R. v. Daoust*, [2004] S.C.R. 217, 2004 SCC 6; see also *Reference re Bill 30* and *Adler v. Ontario*, [1996] 3 S.C.R. 609.

[88] In any case, like Wildsmith, I do not believe that the difference in wording is decisive. First, s. 25 is very different from s. 27, which is the only general provision in the *Charter* that has been clearly identified as a simple interpretative clause. Second, it creates a priority, which is inconsistent with the idea of weighing one right against another. This Court has considered a similar provision in the *Canadian Bill of Rights*, R.S.C. 1985, App. III, s. 2, which reads: "Every law of Canada shall, ... be so construed and applied as not to abrogate, abridge or infringe ... any of the rights or freedoms herein recognized ...". In *R. v. Drybones*, [1970] S.C.R. 282, Ritchie J. said that a more realistic meaning had to be given to the operative words, meaning that if a law cannot be "sensibly construed and applied" (p. 294) without infringing the right, it must be declared inoperative. This was affirmed in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349. There is no substantial difference in the present case.

[89] It could be argued that to interpret s. 25 as a shield would not be in keeping with the flexible, non-hierarchical approach to *Charter* rights that this Court has espoused. It is certainly true that this Court has in the past acknowledged the difficulty in reconciling rights that often seem to be operating in opposition to each other, particularly in the context of equality claims. Nevertheless, where collective rights are clearly prioritized in terms of protection (as I believe is the case here), individual equality rights have typically given way. In *Reference re Bill 30*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* " si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*,

[1990] 1 S.C.R. 342, at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'". In my opinion, and as argued by J. M. Arbour, s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group ("The Protection of Aboriginal Rights Within a Human Rights Regime: In Seach of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *S.C.L.R.* (2d) 3, p. 60).

2.1.3 Legislative History

[90] The legislative history of s. 25 was set out by Wildsmith, at pp. 5-8. He noted that s. 25 of the *Charter* can be traced back to s. 26 of Bill C-60, presented to Parliament on June 20, 1978. The white paper accompanying the Bill stated that "[t]he renewal of the Federation must fully respect the legitimate rights of the native peoples" (*A Time for Action – Toward the Renewal of the Canadian Federation* (1978)). Section 26 was incorporated as s. 24 in the October 1980 Resolution which followed the First Ministers' meeting of September 1980. Sanders described this section as being designed to protect aboriginal rights from the egalitarian provisions of the *Charter* (see D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in S. M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (1983), vol. 1, 225, at p. 231).

[91] On January 30, 1981, an agreement was reached between representatives of aboriginal organizations and the three national political parties on new provisions concerning native peoples. These provisions were introduced that day to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. A new s. 34 provided that "[t]he aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 24 was also altered by divorcing the native rights issue from the general saving provision created by a new s. 25.

[92] These changes were then incorporated into the Consolidated Resolution of April 24, 1981. Support for the resolution weakened and there were new negotiations between aboriginal representatives and government officials which led to the introduction of a modified s. 25 on November 18, 1981. This section makes no reference to treaty rights or "other rights or freedoms". Negotiations with the premiers resulted in an amendment reflected in the final resolution of December 8, 1981. The text of that resolution was amended again by the adoption of the *Constitution Amendment Proclamation, 1983*, R.S.C. 1983, App. II, No. 46. This modification added s. 35(3) which states: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

[93] The Minister of Justice of the time, the Honourable Jean Chrétien, declared before the Special Joint Committee: "We say that there is nothing in this Charter that will infringe upon the rights of the Natives. . . . [T]he rights of all the native Canadians, either flowing from treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights,

its clause 24" (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 3, November 12, 1980, at pp. 68 and 84). It was made abundantly clear that s. 25 creates no new rights. It was meant as a shield against the intrusion of the *Charter* upon native rights or freedoms. A more comprehensive account of the historical foundation of s. 25 is found in Arbour, at pp. 30-37).

2.1.4 Academic and Judicial Commentary

[94] Practically all authors agree with the fact that s. 25 operates as a shield: see Wildsmith, at p. 23; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983), 8 *Queen's L.J.* 232, at p. 239; N. K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (1983), at p. 46; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *S.C.L.R.* 255, at p. 262; P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 810-11; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314, at p. 321; P. Cumming, "Canada's North and Native Rights", in B.W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1985) 695, at p. 732; N. Lyon, "Constitutional Issues in Native Law", in Morse, 408, at p. 423; K. M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 467, at pp. 471-72; and *contra*: R. H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983), 15 *Ottawa L. Rev.* 431; B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (1985).

[95] Also agreeing are K. Wilkins, "...But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999), 49 *U.T.L.J.* 53; T. Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002), 21 *Windsor Y.B. Access Just.* 431; A. Goldenberg, "'Salmon for Peanut Butter': Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004), 3 *Indigenous L.J.* 61, at p. 90; C. Hutchinson, "*Case Comment on* R. v. Kapp*: An Analytical Framework for Section 25 of the* Charter" (2007), 52 *McGill L.J.* 173, at p. 189. P. Macklem, *Indigenous Difference and the Constitution of Canada* (2001), and T. Dickson, "Section 25 and Intercultural Judgment" (2003), 61 *U.T. Fac. L. Rev.* 141, develop a unique approach based on the distinction between individual and collective rights. It might be noted that none of these authors have applied the rule of interpretation applicable to bilingual legislation.

[96] There is little case law on the issue, but the recent trend has been to see the protective feature in s. 25 as a "shield", as opposed to an "interpretative prism"; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187 (Alta. Q.B.), *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), and *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 D.L.R. (4th) 741 (F.C.A.) held that s. 25 provides a shield. *R. v. Nicholas*, [1989] 2 C.N.L.R. 131 (N.B.Q.B.), is to the same effect but restricts the application of s. 25 to s. 15 rights. In *Campbell*, Williamson J. summarized the case law at that point as showing that "the section is meant to be a 'shield' which protects Aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*": para. 156. He further suggested that a purposive approach to s. 25 should be taken and that "the purpose of this section is

to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*" (para. 158).

2.1.5 Limitations on the Shield

[97] Is this shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality "[n]otwithstanding anything in this Charter". Second, it is restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46, provides guidance in that respect. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives.

[98] There is some uncertainty concerning what rights and freedoms are contemplated in s. 25. Most concerns have been with self-government issues. Are all of the laws adopted by bands under the authority of the *Indian Act*, R.S.C. 1985, c. I-5, protected? Wildsmith suggests that this is possibly the case because their source is in s. 91(24) of the *Constitution Act, 1867*, which is clearly associated with the concept of Indianness (p. 33). He nevertheless says that the power in question would not be unrestrained because the courts would read in the need for "reasonableness" as they did for the exercise of municipal powers, and because the *Canadian Bill of Rights* would continue to apply. (The courts would of course have to deal with the *Lavell* precedent to make this avenue useful.) Wildsmith, at pp. 25-26 suggests that the court may want to apply a proportionality test similar to that in *Oakes* in order to determine whether an Act would truly abrogate an aboriginal right or freedom (*R. v. Oakes*, [1986] 1 S.C.R. 103). He argues at p. 37 that *Charter* rights would still be available

to Indians who would want to attack federal legislation giving preferential treatment to other Indians.

[99] There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. One aboriginal group can ask to be given the same benefit as another aboriginal group under s. 15(1). Sections 2 and 3 of the *Charter* apply to Aboriginals. Macklem, at pp. 225-27, suggests that the courts should distinguish between external and internal restrictions on aboriginal laws that clash with the *Charter* and that in the case of internal restrictions, aboriginal communities should be required to satisfy the *Oakes* test to resist a challenge. It could also be argued that it would be contrary to the purpose of s. 25 to prevent an Aboriginal from invoking those sections to attack an Act passed by a band council. It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25; as Ayelet Shachar notes, individuals can have multiple identities ("The Paradox of Multicultural Vulnerability: Individual Rights, Identity Groups, and the State", in C. Joppke and S. Lukes, eds., *Multicultural Questions* (1999), 87; see also W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at p. 35). Aboriginals are Canadian. The framework of reconciliation is consistent with the need for flexibility in the application of s. 25. This is in line with the approach taken by Binnie J. in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 164.

[100] Some would like the Court to ignore s. 25 because of the uncertainty in its application, particularly with regard to legislative powers contemplated by the *Indian Act*. I think it is unreasonable to suggest that a law should not be applied by this Court because it is too difficult. After all, s. 25 is the only provision in the *Charter* which

makes express reference to aboriginal people, and the *Charter* is now 25 years old. I also think the concerns are overstated. Even under the present justification in a s. 1 analysis, there is much room for government to establish that *Charter* values should not be overstated when dealing with the requirements of substantive equality of native peoples. Legislative powers of bands under s. 81 of the *Indian Act* are subject to disallowance; those that fall under ss. 83 and 85.1 can be addressed by amendments to the *Indian Act* if a serious problem of consistency with *Charter* values occurs. Section 25 rights are not constitutionalized and can be taken away. Parliament can also make a right subject to the same protections as those afforded in the *Charter* by its particular terms. Wildsmith mentions that s. 25 may not even apply to band councils because they may not fall under the definition of s. 32(*a*) of the *Charter* (p. 39), an argument that might find support in the fact that the *Charlottetown Accord* contained a provision that would have provided for the application of s. 25 to aboriginal governments. All this to say we need not resolve every imaginable case in this single decision.

2.2 *Scope of Section 25 Protection*

[101] In this case, what is significant about the scope of s. 25 protection is the meaning of the words "other rights or freedoms". These words are "all-embracive", as mentioned by Lysyk, at p. 472; this indicates that the protection was meant to be very broad. But the rights and freedoms are only those that "pertain to the aboriginal peoples of Canada", those that are particular to them. In French, the Act speaks of "*droits ou libertés ancestraux, issus de traités ou autres des peuples autochtones du Canada*".

[102] The *ejusdem generis* rule indicates that, in an enumeration, the general word must be constrained to persons or things of the same class as those specifically mentioned. In s. 25, the general term "other rights or freedoms" follows the enumerated terms "aboriginal" and "treaty" rights. McLachlin C.J. and Abella J. argue that the rule should apply to limit the rights or freedoms protected to those of a constitutional character. I believe that a broader approach is merited, one more consistent with the interpretative principles outlined above.

[103] I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. As argued by Macklem, s. 25 "protects federal, provincial and aboriginal initiatives that seek to further interests associated with indigenous difference from *Charter* scrutiny": see p. 225. Accordingly, legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny.

[104] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 52, L'Heureux-Dubé J. suggested in *obiter* that the scope of s. 25 was likely greater than that of s. 35 of the *Constitution Act, 1982* and may include statutory provisions. She did qualify this statement by noting that the fact that a statute relates to aboriginal people would not, without more, suffice to bring it within the scope of s. 25. In my opinion, the limitations proposed above are consistent with this statement.

[105] Laws adopted under the s. 91(24) power would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, as mentioned above, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected.

[106] The inclusion of statutory rights and settlement agreements pertaining to the treaty process and pertaining to indigenous difference is consistent with the jurisprudence of this Court. As observed by Kirkpatrick J.A., this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, make it clear that the Crown's duty to consult with and accommodate aboriginal peoples arises prior to the establishment of an aboriginal or treaty right. These were, of course, the two enumerated terms discussed above in the context of the *ejusdem generis* rule. Moreover, this Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186, held that in order to preserve the honour of the Crown, the Crown must be allowed to negotiate in good faith with aboriginal peoples. Finally, in *Sparrow*, this Court urged the Crown to negotiate first prior to litigation. Section 25 reflects this imperative need to accommodate, recognize and reconcile aboriginal interests.

[107] William Pentney raises the concern that if the phrase "other rights or freedoms" is construed broadly to include legislated or common law rights, this will

result in the "undesirable and anomalous result" that the scope of a *Charter*-protected provision can be modified by ordinary legislation: "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*" (1988), 22 *U.B.C.L. Rev.* 21, at p. 57. Another concern often raised is that allowing statutory rights to be protected by s. 25 would elevate them to constitutional rights: see e.g., Hutchinson, at p. 186. Similar concerns have been raised with respect to s. 16(3) of the *Charter*, the principle of advancement for language rights. In *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, at para. 92, the Ontario Court of Appeal addressed these concerns as follows:

> We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in *Jones v. New Brunswick (Attorney General)*(1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to *protect*, not *constitutionalize*, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority.

In my view, the same principles apply to legislative measures protected by s. 25.

2.3 *Approach to Section 25*

[108] One important issue is to determine when s. 25 is triggered. Kirkpatrick J.A. held that it was before any consideration of the *Charter* right; Brenner C.J.S.C., the conviction appeals judge in this case, agreed by adopting the approach taken in the *Campbell* case. This seems to correspond to what was said by L'Heureux-Dubé J. in

Corbiere, at para. 52. In *Campbell*, it was also held that s. 25 is a threshold issue. I agree. This does not mean that there is no need to properly define the *Charter* claim; it simply means that there is no need to go through a full s. 15 analysis, for instance in this case, before considering whether s. 25 applies. What has to be determined is whether there is a real conflict.

[109] I do not think it is reasonable to invoke s. 25 once a *Charter* violation is established. One reason for this position is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, as in this case for instance, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence, is a contextualized interpretation that takes into account the cultural needs and aspirations of natives. Dan Russell (*A People's Dream: Aboriginal Self-Government in Canada* (2000), at p. 100) gives an example of this based on s. 3 of the *Charter*: he says that the right to vote should be reinterpreted in the context of band elections to reflect the particularities of the clan system. This, I believe, is tantamount to saying natives do not have the same rights as other Canadians, rather than saying they are protected like all other Canadians from interference with their individual rights as guaranteed by the *Charter*. W. Pentney (*The Aboriginal Rights Provisions in the Constitution Act, 1982* (1987), takes the same approach by suggesting that the *Charter* be interpreted through a native prism. I do not believe there are distinct *Charter* rights for aboriginal individuals and non-aboriginal individuals, or that it is feasible to take into account the specific cultural

experience of Aboriginals in defining rights guaranteed by the *Charter*. The rights are the same for everyone; their application is a matter of justification according to context.

[110] I also think it is contrary to the scheme of the *Charter* to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 as such because s. 25 does not create rights; to incorporate s. 25 is inconceivable in that context. Section 1 already takes into account the aboriginal perspective in the right case. Section 25 is protective and its function must be preserved. Section 25 was not meant to provide for balancing *Charter* rights against aboriginal rights. There should be no reading down of s. 25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective. It seems to me that the only reason for wanting to consider s. 25 within the framework of s. 15(1) is the fear mentioned earlier that individual rights will possibly be compromised. Another fear that is revealed by some pleadings in this case is that rights falling under s. 25 will be constitutionalized; this fear is totally unfounded. Section 25 does not create or constitutionalize rights.

2.4 *Application in this Case*

[111] There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step

requires a determination of the existence of a true conflict between the *Charter* right and the native right.

2.4.1 The Nature of the Claim

[112] The appellants claim that aboriginal fishers have been given the right to fish in exclusivity, for one day, prior to the opening of the general commercial fishery in which they participate, and that this right gives rise to a benefit that is denied to non-Aboriginals on the basis of race. They argue that the fact that communal licences are given to a number of bands which then authorize specific fishers to fish is irrelevant, membership in bands not being a valid proxy that is functionally relevant to the regulation of the public fishery.

[113] The respondent has presented a number of arguments opposing the claim. He says in particular that s. 15(1) is not breached because the claimants are individual licence holders while the aboriginal licences are communal; there is no valid comparator. He says that there is no denial of benefit because the program allows for sufficient catches under different categories of beneficiaries, some communal, some individual.

[114] It is a finding of fact that the fishery is not communal (findings of Kitchen Prov. Ct. J. are summarized in the factum of the appellants, at para. 22); it is also a finding of fact that many Aboriginals who fish under the communal licences also participate in the general commercial fishery. More importantly, it is admitted that aboriginal fishers are being given a licence to fish that is not available to non-Aboriginals. The fact that the authorization to fish is given by way of band licences

is immaterial; government cannot do indirectly what it cannot do directly. As mentioned in *Van der Peet*, at para. 19, these rights "arise from the fact that aboriginal people are aboriginal" (emphasis deleted). It is also some indication of the true nature of the licence that practically all parties and interveners in this case speak of the "right to fish" afforded by the *Pilot Sales Program*. Even if communal licences were significant, their nature says nothing about the fact that limiting them to natives as a user group may be discriminatory. The fact that the program is race-based is established beyond doubt.

[115] The declarations of Minister Crosbie and government officials explaining the rationale for the program clearly relate to agreements with bands on the regulation and management of the fishery. The very title of the regulations is instructive: *Aboriginal Communal Fishing Licences Regulations*. With regard to the existence of a benefit, here again there is a finding of fact of Kitchen Prov. Ct. J. (a summary is found in the appellants' factum, at para. 25). In any case, it is hard to understand how the respondent can argue that there was considerable benefit to Aboriginals, particularly the Tsawwassen Band which went from 15 to 35 boats (respondent's factum, at para. 43), and increased revenues and employment for Aboriginals (para. 44), with no impact on non-aboriginal fishers, while the catch is limited by allocations adjusted from year to year. What is allocated to bands in exclusivity cannot be allocated to the general fishery.

[116] There is in my view a *prima facie* case of discrimination pursuant to s. 15(1). There is no need to proceed further in the analysis or to invoke s. 1. The potential for conflict is established.

2.4.2 The Native Right

[117] The Minister issued licences to Aboriginals in application of a discretion given by the *Fisheries Act* and the *Aboriginal Communal Fishing Licences Regulations*. The respondent argues that these licences do not constitute a right or freedom as prescribed by s. 25 of the *Charter*. He says that only those rights and freedoms that "are vital to maintaining the distinctiveness of aboriginal cultures within the larger Canadian polity ... have the potential to fall within s. 25" (factum, at para. 131), and adds that "[i]t follows that to be afforded protection under s. 25, an 'other right or freedom' must: (1) be of sufficient magnitude to warrant overriding a *Charter* right or freedom; (2) manifest a strong degree of permanence; and, (3) be intimately related to the protection and affirmation of aboriginal distinctiveness. The licence in question does not satisfy these criteria. The licence permitting sale was simply an exercise of administrative discretion, subject to numerous conditions and of brief duration. It was only effective for twenty-four hours. The agreement entered into with the Musqueam, Burrrard and Tsawwassen bands expressly stated that it did not create any aboriginal rights. The conclusion of Brenner C.J.S.C. that the licence did not create a right under s. 25 was correct" (paras. 137-38).

[118] The first comment that I would make is that the criterion of magnitude is simply inconsistent with the actual terms of s. 25. That section simply speaks of rights that pertain to the aboriginal peoples of Canada, i.e., any rights that advance the distinctive position of aboriginal peoples. The same is true with regard to the criterion of permanence; as mentioned earlier in these reasons, "other rights or freedoms" necessarily refers to statutory rights, which can be abolished at any time. The fact that

the agreements with the named bands stated that they did not create any aboriginal rights is of no moment. Section 25 does not create any rights.

[119] The respondent agrees that the intended scope of "other rights or freedoms" in s. 25 is achieved by applying the *ejusdem generis* rule. At para. 101 of his factum, the respondent speaks of the unique relationship between British Columbia aboriginal communities and the fishery. This should be enough to draw a link between the right to fish given to Aboriginals pursuant to the *Pilot Sales Program* and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions.

[120] Furthermore, the respondent himself argues that these rights were a first step in establishing a treaty right. As noted earlier in these reasons, s. 25 reflects the notions of reconciliation and negotiation present in the treaty process and recognized by the previous jurisprudence of this Court: *Haida Nation*, *Taku River*. Brenner C.J.S.C. discussed the rights and freedoms provided to the aboriginal peoples participating in the *Pilot Sales Program* as well as the significance of the program to the aboriginal peoples of British Columbia (at para. 93):

> The A.F.S. represented an attempt to reconcile this unique relationship with the need for regulation of the fishery by providing for a separately regulated fishery respectful of and sensitive to traditional aboriginal values. This was achieved through the negotiation of such matters as co-management of the fishery, allocation of fish and other matters of importance to aboriginal groups. It also provided an opportunity for communal licencing, which is of particular and unique importance to aboriginal communities.

[121] Finally, in my opinion, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867* which deals with a class of persons, Indians. Here again it is interesting to note the parallel made between s. 93 and s. 91(24) of the *Constitution Act, 1867* by Estey J. in *Reference re Bill 30*, at p. 1206, where he says: "In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others." To argue that according these licences is not a right but an exercise of ministerial discretion is to privilege form over substance. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1. Section 25 is a necessary partner to s. 35(1); it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation.

2.4.3 Potential Conflict

[122] I think it is established, in this case, that the right given by the *Pilot Sales Program* is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. Section 15 of the *Charter* is *prima facie* engaged. The right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the *Pilot Sales Program*. There is a real conflict.

3. Conclusion

[123] Section 25 of the *Charter* applies in the present situation and provides a full answer to the claim. For this reason, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: WeirFoulds, Toronto.

Solicitor for the respondent: Public Prosecution Service of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Tsawwassen First Nation: Arvay Finlay, Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations): Cook, Roberts, Victoria.

Solicitors for the interveners the Heiltsuk Nation and the Musqueam Indian Band: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Cowichan Tribes: Ratcliff and Company, North Vancouver.

Solicitor for the interveners the Sportfishing Defence Alliance, the B.C. Seafood Alliance, the Pacific Salmon Harvesters Society, the Aboriginal Fishing Vessel Owners Association and the United Fishermen and Allied Workers Union: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Japanese Canadian Fishermens Association: Canadian Constitution Foundation, Calgary.

Solicitors for the intervener the Atlantic Fishing Industry Alliance: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Nee Tahi Buhn Indian Band: Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the Tseshaht First Nation: Braker & Company, West Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.