

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

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,
THEODORE 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
(Appellants)

-and-

REGINA

Respondent
(Respondent)

FACTUM OF THE INTEVERNERS
JAPANESE CANADIAN FISHERMENS ASSOCIATION
(Rule 42, Rules of the Supreme Court of Canada)

John Carpay
Canadian Constitution Foundation
235,3545-32 Ave NE, Suite 641
Calgary, AB T1Y 6M6
Phone: (403) 592-1731
Facsimile: (403) 592-1459
Email:
JCarpay@CanadianConstitutionFoundation.ca

Counsel for the Intervener

Chris Schafer
Gowling Lafleur Henderson LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Phone: (613) 786-0221
Facsimile: (613) 788-3636
Email:
Christopher.Schafer@gowlings.com

Agent for the Intervener

ORIGINAL TO: THE REGISTRAR OF THIS HONOURABLE COURT

COPIES TO:

Counsel for the Appellants:

WeirFoulds LLP
The Exchange Tower, Suit 1600
PO Box 480, 130 King Street
Toronto, ON M5X 1J5
Bryan Finlay, Q.C.
Telephone: (416) 365-1110
Facsimile: (416) 365-1876
E-mail: bfinlay@weirfoulds.com

Counsel for the Respondent:

Public Prosecution Service of Canada
PO Box 36, Exchange Tower
3400 – 130 King Street West
Toronto, ON M5X 1K6
Croft Michaelson
Telephone: 416-952-7261
Facsimile: 416-973-3004
E-mail: croft.michaelson@justice.gc.ca

Counsel for Tsawwassen, Intervener:

Arvay Finlay
Barristers and Solicitors
1300 – 355 Burrard Street
Vancouver, BC V6C 2G8
Joseph J. Arvay, Q.C.

Agent for the Appellants:

Gowling Lafleur Henderson LLP
Barristers and Solicitors
2600-60 Elgin Street
Ottawa, ON K1P 1C3
Henry S. Brown, Q.C.
Telephone: (613) 233-1781
Facsimile: (613) 563-9869
Email: henry.brown@gowlings.com

Agent for the Respondent:

Director of Public Prosecutions
2nd Floor, 284 Wellington Street
Ottawa, ON K1A 0H8
François Lacasse
Telephone: 613-957-4770
Facsimile: 613-941-7865
E-mail: flacasse@ppsc-sppc.gc.ca

Agent for Tsawwassen, Intervener:

Lang Michener
Barristers and Solicitors
300 – 50 O'Connor Street
Ottawa, ON K1P 6L2
Jeffrey W. Beedell

Telephone: 604-689-4421
Facsimile: 604-687-1941
Email: jarvay@arvayfinlay.com

Agent for Attorney General of Alberta,
Intervener:

Gowling Lafleur Henderson LLP

Barristers and Solicitors
2600 – 60 Elgin Street
Ottawa, ON K1P 1C3
Henry S. Brown, Q.C.
Telephone: 613-233-1781
Facsimile: 613-563-9869
Email: henry.brown@gowlings.com

Agent for Attorney General of Ontario,
Intervener:

Burke-Robertson

Barristers and Solicitors
70 Gloucester Street
Ottawa, ON K2P 0A2
Robert E. Houston, Q.C.
Telephone: 613-236-9665
Facsimile: 613-235-4430

Counsel for Haisla Nation, Intervener:

Donovan & Company

Allan Donovan
73 Water Street
6th Floor
Vancouver, British Columbia
V6B 1A1
Tel: 604-688-4272
Fax: 604-688-4282

Counsel for Te'mexw Nations,
Intervener:

Cook, Roberts LLP

Robert J.M. Janes

Telephone: 613-232-7171
Facsimile: 613-231-3191
Email: jbeedell@langmichener.com

Agent for Attorney General of
Québec, Intervener:

Noël & Associés

Barristers and Solicitors
111, rue Champlain
Gatineau, QC J8X 3R1
Pierre Landry
Telephone: 819-771-7393
Facsimile: 819-771-5397
Email: p.landry@noelassociés.com

Agent for Attorney General of
Saskatchewan, Intervener:

Gowling Lafleur Henderson LLP

Barristers and Solicitors
2600 – 60 Elgin Street
Ottawa, ON K1P 1C3
Henry S. Brown, Q.C.
Telephone: 613-233-1781
Facsimile: 613-563-9869
Email: henry.brown@gowlings.com

Agent for Haisla Nation,
Intervener:

Gowling Lafleur Henderson LLP

Brian A. Crane, Q.C.
2600-16 Elgin St.
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: 613-786-0107
Fax: 613-788-3500
Email: Brian.Crane@gowlings.com

Agent for Te'mexw Nations,
Intervener:

Gowling Lafleur Henderson LLP

Brian A. Crane, Q.C.

7th Floor-1175 Douglas Street
Victoria, British Columbia
V8W 2E1
Tel: 250-385-1411
Fax: 250-413-3300

Counsel for Heiltsuk Nation and
Musqueam Indian Band, Intervener:

Blake, Cassels & Graydon LLP
Maria A. Moraellato
Suite 2600, Three Bentall Centre
595 Burrard Street, P.O. Box 49314
Vancouver, British Columbia
V7X 1L3
Tel: 604-631-3324
Fax: 604-631-3309
Email: maria.morellato@blakes.com

Counsel for Cowichan Tribes, Intervener:

Ratcliff & Company
F. Matthew Kirchner
500-221 West Esplanade
North Vancouver, British Columbia
V7M 3J3
Tel: 604-988-5201
Fax: 604-988-1452

Counsel for Sportfishing Defence
Alliance, B.C. Seafood Alliance, Pacific
Salmon Harvesters Society, Aboriginal
Fishing Vessel Owners Association and
United Fishermen and Allied Workers
Union, Intervener:

J.Keith Lowes
Suite 406, 535 Howe Street
Vancouver, British Columbia
V6C 2Z4

2600-160 Elgin St.
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: 613-786-0107
Fax: 613-788-3500
Email: Brian.Crane@gowlings.com

Agent for Heiltsuk Nation and
Musqueam Indian Band, Intervener:

Gowlings Lafleur Henderson LLP
Brian A. Crane, Q.C.
2600-160 Elgin St.
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: 613-786-0107
Fax: 613-788-3500
Email: Brian.Crane@gowlings.com

Agent for Cowichan Tribes,
Intervener:

Gowlings Lafleur Henderson LLP
Brian A. Crane, Q.C.
2600-160 Elgin St.
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: 613-786-0107
Fax: 613-788-3500
Email: Brian.Crane@gowlings.com

Agent for Sportfishing Defence
Alliance, B.C. Seafood Alliance,
Pacific Salmon Harvester Society,
Aboriginal Fishing Vessel Owners
Association and United Fishermen
and Allied Workers Union,
Intervener:

Fraser Milner Casgrain LLP
K.Scott McLean
1420-99 Bank Street
Ottawa, Ontario

Tel: 604-681-8461
Fax: 604-638-0116

Counsel for Atlantic Fishing Industry
Alliance, Intervener:

Fasken Martineau DuMoulin LLP

Kevin O'Callaghan
2100-1075 Georgia St. W.
Vancouver, British Columbia
V6E 3G2
Tel: 604-631-3131
Fax: 604-631-3232

Counsel for Nee Tahi Buhn Indian
Band, Intervener:

Bull, Housser & Tupper LLP

Ryan D.W. Dalziel
3000-1055 West Georgia Street
Vancouver, British Columbia
V6E 3R3
Tel: 604-641-4881
Fax: 604-646-2671
Email: rdd@bht.com

Counsel for Tseshah First Nation,
Intervener:

Braker & Company

Hugh M.G. Braker, Q.C.
Suite 1108-100 Park Royal
West Vancouver, British Columbia
V7T 1A2
Tel: 604-926-0601
Fax: 604-926-0611

Counsel for Assembly of First Nations,
Intervener:

Pitblado

Bryan P. Schwartz

K1P 1H4
Tel: 613-783-9600
Fax: 613-783-9690
Email: scott.mclean@fmc-law.com

Agent for Atlantic Fishing Industry
Alliance, Intervener:

Fasken Martineau DuMoulin LLP

Stephen B. Acker
1700-275 Slater Street
Ottawa, Ontario
K1P 5H9
Tel: 613-236-3882
Fax: 613-230-6423

Agent for Nee Tahi Buhn Indian
Band, Intervener:

Gowlings Lafleur Henderson LLP

Brian A. Crane, Q.C.
2600-160 Elgin St.
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: 613-786-0107
Fax: 613-788-3500
Email: Brian.Crane@gowlings.com

Agent for Tseshah First Nation,
Intervener:

Lang Michener LLP

Marie-France Major
300-50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: 613-232-7171
Fax: 613-231-3191
Email: mmajor@langmichener.ca

Agent for Assembly of First Nations,
Intervener:

Lang Michener LLP

Marie-France Major

2500-360 Main Street
Winnipeg, Manitoba
R3C 4H6
Tel: 204-956-0560
Fax: 204-957-0227
Email: bschwar@ms.umanitoba.ca

300-50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: 613-232-7171
Fax: 613-231-3191
Email: mmajor@langmichener.ca

Agent for Attorney General of New
Brunswick, Intervener:

Gowling Lafleur Henderson LLP
Brian A. Crane, Q.C.
2600-16 Elgin St.
Box 466 Station D
Ottawa, Ontario
K1P 1C3
Tel: 613-786-0107
Fax: 613-788-3500
Email: Brian.Crane@gowlings.com

TABLE OF CONTENTS

	Page
PART I _ OVERVIEW AND FACTS	7
PART II _ ISSUES	10
PART III _ ARGUMENT.....	11
1. <i>Separate is not equal: segregation violates section 15(1)</i>	11
2. <i>Multiculturalism requires equality before the law</i>	12
3. <i>The government must justify racial discrimination under section 1</i>	13
PART IV – SUBMISSIONS CONCERNING COSTS.....	15
PART V – ORDER REQUESTED.....	15
PART VI – TABLE OF AUTHORITIES.....	16

PART I – OVERVIEW AND FACTS

1. The Japanese Canadian Fishermens Association (hereinafter "JCFA") submits that the central issue in this appeal is whether government-imposed racial segregation of the workplace is permissible under Canada's Constitution.
2. The JCFA asks the Supreme Court of Canada to reaffirm its 1928 decision¹ disallowing the use of race as a criterion in regulating access to the public commercial fishery.
3. The JCFA asks this Court to hold the federal government to its promise, made in 1988 in the context of an apology to Japanese Canadians for injustices perpetrated during and after the Second World War,² that public policy should apply equally to all Canadians regardless of race, colour, ethnicity, ancestry, language or culture.

Relevant constitutional, social, cultural and historical contexts

4. The Respondent urges the Court to consider "the broader constitutional, social, cultural and historical contexts" relevant to this case. The JCFA agrees, and urges this Court to consider the following contexts:
5. The *constitutional context* in which the B.C. fishery exists is that the non-commercial Section 35 Aboriginal food fishery has always been entirely separate and distinct from the racially diverse and racially integrated⁴ commercial fishery, in which Aboriginal Canadians have never suffered discrimination or barriers to access.⁵

¹ *Reference Re Fisheries Act 1914 (Canada)*, [1928] SCR 457, affirmed: *Reference re: Fisheries Act, 1914 (Can.)*, [1929] J.C.J. No. 1.

² Appellants' Record, Vol. XIV, page 2505.

³ Respondent's Factum, paragraph 104.

⁴ Trial Reasons, paragraphs 86, 148, 162, and 172.

⁵ Trial Reasons, paragraphs 38, 157, and 201; Appellants' Record Vol. XIV at pp. 2557-2560.

6. The social context of the B.C. fishery was one of racial diversity, racial integration and racial harmony, before the federal government introduced the Pilot Sales Program in 1992.⁶

7. The cultural context, for Japanese Canadians, is one of a deep and long-standing attachment to the fishery, ever since the first Japanese immigrants came to British Columbia in the late 1800s. Like Aboriginal Canadians and Canadians of other racial, cultural and ethnic backgrounds, Japanese Canadians and their ancestors have been fishing for thousands of years. No evidence was adduced at trial to support the notion that fishing is more important to Aboriginal Canadians than it is to other Canadians. This notion should be rejected as stereotyping.

8. The historical context relevant to this case is that Japanese Canadians are a disadvantaged group who endured overt and vicious racial discrimination in the 1920s and again in the 1940s.⁷ During the 1920s, the federal government openly pursued a policy of eliminating Orientals from the commercial fishery for the exclusive use of "Whites and Indians" by reducing the number of licenses issued to Japanese Canadians by 25 percent annually.⁸ The federal government also limited the areas where Japanese Canadians could fish, imposed residency restrictions, and prohibited them from using gas-powered boats.⁹ The Department of Marine and Fisheries, as it was then called, issued annual reports¹⁰ on progress made towards the goal of ridding the commercial fishery of what was commonly described as "the yellow peril." In 1942, the federal government removed Japanese Canadians from the B.C. coast and forced them to live in internment camps in the B.C. interior and east of the Rockies.¹¹ The federal government confiscated their homes, fishing vessels and other property without compensation, and

⁶ Trial Reasons, paragraphs 120, 148, 172 and 217.

⁷ Trial Reasons, paragraphs 38, 144, 172 and 235.

⁸ Trial Reasons, paragraphs 144 and 145; Appellants' Record, Vol. XIV, pages 2454, 2456, 2489.

⁹ Trial Reasons, paragraphs 144 and 145; Appellants' Record, Vol. XIII, pages 2442, 2450, 2451.

¹⁰ Appellants' Record, Vol. XIII, pages 2449-2456.

¹¹ Trial Reasons, paragraphs 172 and 235.

Japanese Canadians were not permitted to return to the B.C. coast until more than three years after the Second World War had ended.¹²

9. The constitutional, social, cultural and historical contexts of this case are such that, if any group of Canadians has a basis for claiming access to an ameliorative program in respect to the commercial fishery, it is Japanese Canadians. But in abhorring race-based distinctions in the commercial fishery and other workplaces, the JCFA asks only that federal policies governing the commercial fishery be applied equally to all Canadians, regardless of race, ancestry, ethnicity, culture, or bloodline ties.

Facts

10. The JCFA adopts the facts in the Appellants' **Factum**, and rejects as inaccurate a number of assertions made by the Respondent in its **Factum**. The Respondent's erroneous claims are listed below, along with the corresponding facts found at trial.

Respondent's Factum	Trial Facts and Facts in Evidence
A. The M/T-only fishery is conducted by aboriginal communities and organizations, not by individuals.(Factum paras. 6, 7, 30, 73, 74, 85)	The M/T-only fishery enabled chosen individuals to sell their catch and keep all the profits themselves. (Trial Reasons paras. 200, 211, 214, 217)
B. The appellants were not denied benefits. Their only grievance is not being allowed to fish at the same time as individuals with bloodline ties to the Musqueam and Tsawwassen Bands. (Factum paras. 3, 59, 60, 61, 69, 82, 86)	The Appellants lost income. (Trial Reasons paras. 96, 156, 164, 202, and 217) They were denied "their right to participate as equals in the public commercial fishery," "stripped of their pride and dignity," and did not enjoy access to two commercial fisheries. (Trial Reasons paras. 163, 165, 183, 203, 217) From 1992 to 2001, the catch per vessel in the M/T-only fishery was 36% higher than the Appellants' catch per vessel. For M/T fishermen who fished in both the M/T-only commercial fishery and the general public commercial fishery, their catch per vessel was

¹² Trial Reasons, paragraph 172.

136% higher. (Appendix I, Appellants' Factum)

- | | | |
|----|---|---|
| C. | The Pilot Sales Program has had a positive impact on Aboriginal communities. (Factum paras. 41, 42, 45, 56, 66, 67, 102, 123) | "There was no suggestion anywhere in the evidence that any of the money from the pilot sales fishery went to any type of program intended to deal with any of the real disadvantages actually experienced by the bands." (Trial Reasons paras. 200, 204, 217) |
| D. | The Pilot Sales Program has led to better fisheries management, enforcement and conservation. (Factum paras. 56, 113, 123) | "The Department expressed the hope that the pilot sales fishery would provide stability to the commercial fishery by improving Aboriginal catch data, increasing cooperation in enforcement, and reducing protests and confrontation. The weight of the evidence is that none of this has occurred and the program has been counterproductive in each of these areas. (Trial Reasons para. 213) |
| E. | The M/T commercial fishery only takes place if a public commercial fishery is also conducted. (Factum paras. 29, 59, 60, 61, 120) | In 2001, the M/T enjoyed a commercial fishery but there was no sockeye fishery for the Appellants. (A.R. Vol XII, p. 2120 and 2251) Crown witness Judith Sayers testified that the public commercial fishery was closed for years while the separate fishery was open. (A.R. VIII at p. 1369 and 1434; A.R. VI at 1037-38) |
| F. | Aboriginal Canadians are a "user group" in the fishery. (Factum paras. 1, 60, 76, 77, 78, 83) | The fishery's "user groups" are the commercial sector, the sports and recreation sector, and the non-commercial Section 35 Aboriginal food fishery. The only time that "user groups" in the fishery were determined by race or ethnicity was during the 1920s, until this Court ended the practice with <i>Reference Re Fisheries Act 1914 (Canada)</i> , [1928] SCR 457. |
| G. | Aboriginal Canadians have not always been a major force in the commercial fishery. (Factum para. 15) | Aboriginals are advantaged in the commercial fishery, and their fluctuating participation has always been "well above Aboriginal representation in society." (Trial reasons, para. 201) |

PART II – ISSUES

11. The JCFA submits that the M/T-only commercial fishery violates section 15(1) and cannot be justified under section 1.

PART III – ARGUMENT

Separate is not equal: segregation by bloodline violates section 15(1)

12. The trial judge found that the Appellants lost income as a result of the separate commercial fishery,¹³ and this finding of fact has not been overturned pursuant to the principles of appellate review. However, even if the Appellants have not lost income, the M/T-only commercial fishery would still violate the Charter's equality guarantee in two ways.

13. First, the M/T-only commercial fishery violates section 15(1) by conferring double access on individuals with bloodline ties to the Musqueam and Tsawwassen Bands, who have the right to fish commercially twice¹⁴: first in the Aboriginal-only fishery and again in the general commercial fishery. Regardless of the number of fish caught – or not caught – by individuals, this double access violates section 15(1) because it provides some Canadians with more opportunity than other Canadians.

14. Second, the M/T-only commercial fishery violates section 15(1) by segregating commercial fishermen on the basis of race, or a ground analogous to race, through the creation of a separate commercial fishery reserved for the benefit of individuals with the "correct" bloodline ties. Even if Canadians with bloodline ties to the Musqueam and Tsawwassen Bands were limited to only one commercial fishery, workplace segregation on a ground analogous to race is anathema to sections 15 and 27 of the Charter.

¹³ Trial Reasons, paragraphs 96, 156, 164, 202 and 217.

¹⁴ Trial Reasons, paragraph 165.

15. The Respondent endorses a "separate but equal" policy whereby the government forces fishermen of different ancestry or ethnicity to fish at different times.¹⁵ The JCFA submits that even if the Appellants had not lost any income, racial segregation of the workplace is inherently discriminatory and cannot be justified on monetary or other pragmatic grounds. As held by the trial judge, segregation reinforces stereotypes and creates barriers.¹⁶ Therefore, a "separate but equal" commercial fishery for individuals with bloodline ties to the Musqueam and Tsawwassen violates section 15(1).

16. By repeatedly characterizing the Appellants' complaint as "not being allowed to fish at the same time,"¹⁷ the Respondent agrees that the impugned program does indeed segregate the workplace. The JCFA submits that the creation of a separate commercial fishery violates human dignity and constitutes "unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."¹⁸

Multiculturalism requires equality before the law

17. These arguments above are reinforced by the Charter's section 27, which requires courts to interpret the Charter "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada."

18. The JCFA submits that the creation of a separate commercial fishery for the benefit of some Aboriginal Canadians, to the exclusion of other Aboriginal Canadians and other Canadians generally, neither preserves nor enhances Canada's multicultural heritage. To the contrary, multiculturalism is synonymous with racial integration and with the accommodation of racial, ethnic and cultural differences through laws which apply equally to all Canadians and which provide all Canadians with equal opportunity.

¹⁵ Respondent's Factum, paragraph 82.

¹⁶ Trial Reasons, paragraphs 173, 184 and 217.

¹⁷ Respondent's Factum, paragraphs 3, 59, 61, 82, and 86.

¹⁸ *Law v. Canada (Minister of Employment and Immigration)*, [1999] SCR 497, para. 53.

19. In an industry like the B.C. commercial fishery, which has already achieved an admirable state of equality, diversity, and integration, and in which Aboriginal participation is already very high,¹⁹ government can only create resentment by imposing a racial or analogous preference. The JCFA submits that when government treats Canadians as members of a racial class, government violates the inherent dignity of each individual.

20. In light of its historic disadvantage, and in light of the racism which its members and their ancestors endured in the 1920s through race-based licensing, the JCFA values the multi-ethnic and multicultural nature of the industry. The JCFA does not wish to see divisions among racial, ethnic, linguistic, or cultural groups by the conferring of special or different rights for any of them. The JCFA asks this Court to reaffirm its 1928 decision²¹ and restore one, single public commercial fishery, open equally to all Canadians regardless of bloodline ties.

Government must justify racial discrimination

21. The JCFA submits that distinctions between Aboriginal Canadians and non-Aboriginal Canadians in law, policy or programs must be clearly and expressly based on section 35 or on section 15(2). Apart from sections 35 and 15(2), all government action must apply equally to all Canadians regardless of race, colour, ethnicity or ancestry.

22. The historical record of government-imposed discrimination against fishermen of Japanese ancestry could potentially serve as a basis for an ameliorative program. However, the JCFA submits that in order to justify an ameliorative program on the basis of historical discrimination, the discrimination must also be relevant in the current time. Absent this criterion, historical discrimination will forever provide a basis for a section 15(2) ameliorative program, and will forever pit groups of Canadians against each other on the basis of race or analogous grounds.

¹⁹ Trial Reasons, paragraphs 37, 39 and 201.

²⁰ *Reference Re Fisheries Act 1914 (Canada)*, [1928] SCR 457.

23. An important issue which is highly relevant to the commercial fishery (and some other workplaces) is that the resource to be distributed through an affirmative action program is limited by a total allowable catch of fish in a given area in a given year. The Pilot Sales Program rewards some individuals at the expense of everyone else, because every fish allocated to the included group must be taken from the excluded group.

24. The JCFA submits that racial discrimination in legislation or policy, on the basis of race or an analogous ground like bloodline ties, are "more straightforward cases"²¹ which automatically meet the three-part test set out in Law. The Pilot Sales Program's creation of a separate commercial fishery for some Canadians on the basis of bloodline ties constitutes *prima facie* discrimination which must be justified by the government under section 1 of the Charter.

25. Further, only in the most exceptional circumstances can a government program segregate Canadians according to race or bloodline ties; a presumption of invalidity will always apply to any such program, based on democratic values, fundamental freedoms, multiculturalism and common-law equality values which pre-dated the Charter and are now incorporated into the Charter.

26. Racial, ethnic, or cultural segregation of a workplace is inconsistent with the democratic values and fundamental freedoms of the society that gave life to the Charter. The return to a single, racially diverse and racially integrated commercial fishery for all Canadians is the appropriate way to uphold the values incorporated into sections 15 and 27 of the Charter.

PART V – SUBMISSIONS CONCERNING COSTS

27. The JCFA neither seeks costs nor expects that costs will be awarded against it.

²¹ *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para. 83; *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 83.

PART VI – ORDER REQUESTED

28. The JCFA requests an Order allowing the appeal and declaring that the impugned program violates section 15(1) of the *Charter* and cannot be justified under section 15(2) or under section 1 of the *Charter*.

29. The JCFA also requests leave to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated in the City of Ottawa, Ontario, this 20th day of November, 2007.



Counsel

John Carpay
Canadian Constitution Foundation
235,3545-32 Ave NE
Suite 641
Calgary, AB T1Y 6M6
Phone: (403) 592-1731
Facsimile: (403) 592-1459
Email:
jcarpay@canadianconstitutionfoundation.ca
Counsel for Intervener JCFA

Agent

Chris Schafer
Gowling Lafleur Henderson LLP
Suite 2600
160 Elgin Street
Ottawa, ON K1P 1C3
Phone: (613) 786-0221
Facsimile: (613) 788-3636
Email:
christopher.schafer@gowlings.com
Agent for the Intervener JCFA

PART VI - TABLE OF AUTHORITIES

Cases

Cited at Paragraph(s)

Lavoie v. Canada, [2002] 1 S.C.R. 769.

83

Law v. Canada (Minister of Employment and Immigration),
[1999] SCR 497.

53, 83

Reference Re Fisheries Act 1914 (Canada), [1928] SCR 457.