S.C.C. File No. 31603

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, 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

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(Appellants in the British Columbia Court of Appeal)

AND

REGINA

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PART I - OVERVIEW AND STATEMENT OF FACTS

(A)

OVERVIEW

1. Absent any application of ss. 25 and 15(2), where, as here, the differential treatment is being imposed on the basis of a bloodline, the impugned state action is discriminatory and the analysis should move directly to whether the discrimination can be justified under s. 1. There is no need to engage in the full third stage of the *Law*[1] test to establish whether the action is discriminatory.

2. The full *Law* test is appropriate in cases where the discrimination alleged is complex and needs the special tools provided by *Law*. But the full *Law* test was intended as a guideline and not meant to interfere with the purposeful application of 15(1) which allows a clear case of discrimination to move directly to s. 1 for any justification. This approach is important because in clear cases it shifts the burden to the government and away from the person who has been discriminated against.

3. The discrimination here cannot be justified under any test. The discrimination, which violates the human dignity of the Appellants, has resulted in the segregation of the British Columbia commercial fishery and has led to an invidious breakdown in that fishery.

4. The Appellants ask this Court to restore the findings of the trial judge, to hold that racial segregation of the commercial fishery is a violation of s. 15 of the *Charter* and to restore the judicial stay of proceedings issued by the trial judge. This will be the first step to reunite the British Columbia commercial fishery and ensure that all fishers share common interests in fishery conservation and management and are judged by their ability and character, not their race.

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[1] *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 [hereinafter *Law*].

5. There is no s. 35 Aboriginal or treaty right – nor is there any other right or freedom protected by s. 25 – at issue in this appeal. Nor does the Crown claim that the race-based commercial fishery is an ameliorative program under s. 15(2) of the *Charter*.

6. The Appellants do not challenge the Aboriginal Fisheries Strategy ("**AFS**"),[2] the *Aboriginal Communal Fishing Licences Regulations* ("***ACFLR*s**") in general,[3] or the Minister's authority to allocate fish between various user groups. The Appellants do, however, challenge the legitimacy of a commercial user group to which access is restricted by the irrelevant characteristic of race. The trial judge correctly stated the benefit being withheld from the Appellants: they object to the loss of "their right to participate as equals in the public commercial fishery."[4]

7. Membership in the Musqueam, Tsawwassen and Burrard Bands ("**M/T**"[5]) does not constitute a valid proxy in any circumstance that is functionally relevant to the regulation of the public fishery. Any cultural significance of M/T fishing activity (i.e., fishing for food, social and ceremonial purposes) is dealt with by the doctrine of Aboriginal rights and the protection of such rights by s. 35 of the *Constitution Act, 1982*. However, the distinction by the Minister for purposes of the commercial fishery can be supported neither as proper fisheries management nor proper accommodation of Aboriginal uniqueness. It is a simple arbitrary preference made on the basis of race. Hence, it is discriminatory.

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[2] For background on the AFS, see Department of Fisheries and Oceans, "Backgrounder: Aboriginal Fisheries Strategy" (October 1997), Appellant's Record [hereinafter A.R.] Vol. X, Exh. 3, Tab 13 at 1767-68.

[3] SOR/93-332, as amended. The Appellants do challenge the provisions of the *ACFLR*s to the extent that they permit fishing for the purpose of sale: see para. 137(b) of this Factum.

[4] Reasons for Judgment of Kitchen P.C.J., Provincial Court of British Columbia (28 July 2003), A.R. Vol. I, 2ff, para. 203 [hereinafter Trial Reasons].

[5] *Ibid*., para. 194. The Burrard band does not participate in the pilot sales fishery. Thus the "M/T" rather than "M/B/T."

(B)

THE FACTS

8. In 1992, the Department of Fisheries and Oceans ("**DFO**") created racially-segregated commercial fisheries for fishers with bloodline connections to select Aboriginal bands arbitrarily chosen by DFO. To authorize the separate commercial fishery, DFO employs the *ACFLR*s (see in particular s. 5(1)(l)) which were designed to manage s. 35 Aboriginal fisheries for food, social and ceremonial purposes. A further exercise of the Minister's discretion grants the chosen bands priority access to fishing for commercial purposes, by way of the type of licence at issue in this case[6] which allows the bands to sell their fish commercially.[7]

9. The specific fishery giving rise to this appeal is a commercial gillnet fishery for salmon which DFO restricted to the M/T. It occurs in the tidal waters of the Lower Fraser River near Vancouver. During the M/T-only commercial fishery, fishers licensed only for the public commercial fishery (the Appellants) must stay tied to the dock under threat of DFO arrest and prosecution.

10. Prior to this segregation, Canadians of different races fished together in a single commercial fishery. The courts below noted the extensive participation of Canadians of Aboriginal ancestry in the public commercial fishery both prior to and during segregation, with 47% of salmon seine licences owned by Aboriginals and 35% of salmon gillnet licences designated to fishers of Aboriginal ancestry.[8]

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[6] Aboriginal Communal Fishing Licence FRD-98-CL278/MBT for Musqueam, Burrard, Tsawwassen Indian Bands for Salmon (18 August 1998), issued by Department of Fisheries and Oceans, A.R. Vol IX, Exh. 1, Tab E at 1641 ("Sale of fish caught under this licence is permitted.").

[7] The Fisheries Agreement between DFO and the Burrard, Musqueam and Tsawwassen Bands (15 May 1995), A.R. Vol. IX, Exh. 1, Tab A at 1504, ss. 3.(1), 3.(3) [hereinafter Agreement]; The Fisheries Agreement Amendment between DFO and the Burrard, Musqueam and Tsawwassen Bands (31 May 1996), A.R. Vol. IX, Exh. 1, Tab B at 1560, ss. 3.(1), 3.(3).

[8] *Ibid*., para. 39; Oral Reasons for Judgment of Brenner C.J., Supreme Court of British Columbia (12 July 2004), 92ff, para. 90 [hereinafter S.C.B.C. Reasons]; Reasons for Judgment, Court of Appeal of British Columbia (8 June 2006), A.R. Vol. I, 162ff, para. 34 [hereinafter B.C.C.A. Reasons]; "Summary of Limited Entry Commercial Licences Designated to Aboriginals in British Columbia" (28 January 2003), A.R. Vol. XIV, Exh. 54, Tab 24 at 2557 [hereinafter Limited Entry Licences Summary]; "Salmon Seine Licences Owned or Operated by Aboriginal Persons or Communities – 2002" (28 January 2003), A.R. Vol. XV, Exh. 54, Tab 25 at 2560.

11. The specific event giving rise to this appeal occurred in August 1998 when DFO reopened the M/T-only commercial fishery despite Provincial Court rulings that it was *ultra vires* the *Fisheries Act*.[9] In response, 200 fishers and vessels from the all-citizens fleet protested by peacefully fishing alongside the M/T. Fishery Officers enforced segregation by apprehending or charging 145 fishers including Appellants who belong to other Aboriginal bands, but lack a bloodline connection to the M/T.

FINDINGS OF FACT BY THE TRIAL JUDGE

12. The Appellants rely on the facts found by the learned trial judge.

13. The British Columbia commercial fishery has always been a public fishery (trial judgment excerpts below are cited by paragraph numbers in square brackets).

> [7] . . . the English common law concerning fisheries applied in the colonies and has survived Confederation subject to legislative amendment . . . [11] In 1848, when Vancouver Island was a colony, a committee of the Imperial Parliament rejected a request by the Hudson's Bay Company for exclusive fishing rights in and around Vancouver Island. The result was that every person had equal access to the fishery . . . [170] The community of commercial fishers is keenly aware of these rights . . . They are protective of this right . . .

14. Entry into the British Columbia commercial fishery was unrestricted:

> [157] . . . until licence limitation came in late in the 1960's, the opportunity to fish commercially in British Columbia was completely unrestricted . . . [158] There were virtually no financial restrictions on entering the fishery. "A buck, a boat and a net," was the expression used to describe the entry requirements. Boats and nets seem to have often been abandoned and could be salvaged, or obtained very cheaply . . . even the most financially disadvantaged really had equal opportunity to start in the fishing

[9] *R.* v. *Cummins*, [1998] 2 C.N.L.R. 108, para. 11. Thomas P.C.J. held that the *Fisheries Act*, R.S.C. 1985, c. F-14 [hereinafter *Fisheries Act*] did not contain any provision that authorized the Minister to determine the existence of an Aboriginal right to fish for commercial purposes. See also *R.* v. *Huovinen* (7 August 1998), Surrey 89287-02-C, 95144-02-C, 94451-01, 95344-01 (B.C. Prov. Ct.) (subsequently rev'd (1999), 179 D.L.R. (4th) 567 (B.C.S.C.), reversal upheld 2000 BCCA 427, 146 C.C.C. (3d) 301).

> industry. . . . [159] Nor was there any educational qualification or restriction. Many of the witnesses had a long family tradition of involvement in the industry, but some had absolutely no experience and progressed from being completely ignorant of fishing to being very successful.

15. The British Columbia commercial fishery *was* an inclusive multiracial community that one witness described as one of "unremarkable tolerance" [172]:

> [86] The commercial fishers in this case have very disparate backgrounds but have come together and formed a distinctive community that is well recognisable to others. Membership in the fishing community is relatively long lasting and has its own set of values and lifestyle. [148] . . . they had one very important thing in common - a sincere commitment to their involvement in the West Coast fishery. This commitment is the bond that holds together the commercial fishing community [162] . . . And it is a real community . . . [172] . . . I heard of respect among fishers, regardless of racial background. Crews were integrated. The spirit of camaraderie extended across racial groups.

16. Aboriginal Canadians have always been a major force in the British Columbia fishery:

> [37] . . . By [the late 1800's], Aboriginal Canadians were well established in the fishery as plant workers and fishers. [39] . . . In the last few decades the Aboriginal involvement in the gillnet fishery has been diminishing. But in other areas, such as in seine fishing where in 2002 Aboriginal fishers owned or operated 47% of the seine fleet, there has been an increase in participation. The dynamics of the involvement of the various groups throughout the entire fishing industry are very complicated. [201] . . . Historical statistics show a fluctuating participation in the fishery, always well above Aboriginal representation in society. [About 35% of salmon gillnetters on the British Columbia Coast are Aboriginal.[10]]

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[10] Limited Entry Licences Summary, *supra*, note 8. More than 35% of the Limited Entry Commercial Salmon Gillnetting licences in the BC coast are owned by Aboriginal communities or organizations. This does not include gillnet licences owned by individual Aboriginals or Aboriginal corporations. The heading "Regular" in the chart cited refers to the total amount of Limited Entry Commercial Salmon Gilnetting licences not specifically designated to Aboriginal organizations or persons.

17. Aboriginal Canadians were *not* discriminated against in the commercial fishery:

> [38] . . . Commercial fishing laws have been applied equally to Aboriginal fishers keeping them on the same footing as other Canadians in the commercial fishery. There has been systemic government discrimination from time to time but not involving Aboriginals . . . [157] . . . There had never been limitations on Aboriginals fishing commercially . . .

18. Aboriginals are *advantaged* in the British Columbia commercial fishery:

> [160] . . . The federal government had a licence buyback program that purchased licences at market value and turned some of them over to Aboriginals or Aboriginal groups to remove this financial barrier. [201] . . . if the Department perceived that Aboriginals are at a disadvantage in their abilities to enter the commercial fishery and exercise the general public right to access the fishery, I find this not to be the case . . . Since prior to the pilot sales programs there have been preferential government entry programs, lower licence fees, buy back programs and tax-free income as incentives to Aboriginals not available to the rest of society. This has put Aboriginal individuals at an advantage.

19. The M/T are *not* impoverished and are over-represented in the British Columbia commercial fishery:

> [194] . . . it is unlikely that financial disadvantage is one of their problems . . . both of these bands and their individual members are likely healthy financially. [197] . . . the real estate and personal possessions of the band members, described by the witnesses and evidenced by photographs, are at least of a standard and quality representative of the community at large. There was other less tangible evidence that was consistent in indicating that finances are not a particular problem for band members. [198] . . . With regard to the Tsawwassen Band also I conclude that in some respects they are disadvantaged, but financial disadvantage is not one of the problems. [201] . . . The Musqueam and Tsawwassen Bands in particular are significantly over-represented compared to the population in general in their involvement in the fishery.

20. Fishers of Japanese ancestry *were* discriminated against in the public commercial fishery:

> [38] . . . Oriental fishers have endured various government restrictions, restraints, confiscations, and prohibitions. [144] During the 1920's there had been a Federal government policy to gradually eliminate Japanese ancestry fishers from the commercial fishery. [172] . . . In the early 1900's a rift developed between Japanese fishers on one side, and Aboriginals and whites on the other, with the latter having more political power and succeeding in placing ridiculous restrictions on Japanese fishing. The Japanese fishers overcame this, only to face internment and confiscation of property during World War II, continuing up until 1950. [235] . . . We have had many shameful examples of legislated racial discrimination including laws to keep Orientals from working in the coal mines and on the railways in the early 1900's, legislation to phase out and exclude the Japanese from the commercial fishery in the 1920's, and legislation interning and confiscating the property of Japanese fishers in the 1940's.

21. There are no consistent reasons or rationale for the M/T-only commercial fishery:

> [186] 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. [187] . . . he also mentioned that the program was to be an experiment. This is a second justification given for the program. [188] . . . This literature also asserts that the *Sparrow Case* requires that this type of opportunity be afforded to Aboriginals. This is clearly not the situation. [189] . . . 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 . . . [191] 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 . . . [199] 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. [210] . . . Several reasons have been proffered at various times. There has been no consistent rationale for the program.

22. The M/T-only commercial fishery is *not* a communal fishery:

> [200] . . . 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. [211] . . . the pilot sales fishery provides financial assistance to only the individual members of the bands, not the bands generally . . . [214] . . . It is not a communal fishery . . . band members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial fishing vessels

23. The M/T-only commercial fishery has negative impacts on the public fishery:

> [167] . . . DFO has not kept up with the more complicated enforcement required by the existence of the two different commercial fisheries. [212] . . . that enforcement of the then existing regulations would have been much more effective in dealing with any poaching problem than were the pilot sales programs . . . the program encourages poaching at least as much as was previously the case. [213] . . . 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.

24. The race-based commercial fishery has negative impacts on society:

> [173] . . . For the first time since the fishery began 150 years ago, the Aboriginals have been split off as a group. The witnesses spoke of lack of respect, communication problems, and physical segregation. [184] . . . the program itself has generated further racial discrimination and discord. [217] . . . This has been at tremendous cost to society. There has been a breakdown in the relationship between Aboriginals and the rest of the fishing community. The pilot sales program has generated and encouraged further racial discrimination, beyond its own provisions . . . Respect for the Department of Fisheries and Oceans has completely diminished. [235] The most troubling aspect of this discrimination is that it is government sponsored. The government should be setting an example for the rest of society, but unfortunately, this has not been our history.

25. The race-based commercial fishery has severe impacts upon the Appellants including:

i.
Loss of Self-Respect and Dignity

> [163] That is why, when the defence witnesses complained that they regarded the pilot sales program as an attack on their worthiness as fishers, it certainly rang true. Their recounting that they were "left sitting on the beach" carried a tremendous amount of emotion . . . The witnesses were not exaggerating when they recounted that they felt the pilot sales program created a group of "chosen ones" from which they were excluded, causing them embarrassment. [183] . . . I conclude that the pilot sales program fails to take into account the right of commercial fishers to generally participate in the public fishery and does not respect these rights they have as members of Canadian society. [203] . . . This has the effect of promoting the view that these individuals are less capable, less worthy of recognition, and less valuable as members of Canadian society. It also promotes the view that they are not as equally deserving of concern, respect and consideration as the members of the three bands.

ii.
Loss of Income

> [96] There has also been a considerable financial cost to the commercial fishers. [156] . . . I do accept the evidence of these witnesses that because of the pilot sales program their usual income from Fraser River sockeye gillnet fishing was adversely affected and they had to take steps to compensate for this. [164] . . . I conclude that the Fraser gillnetters truly believe, with good cause, that they are generally getting the leftovers. That would be the same impression in the community at large. [202] . . . The program confers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It therefore is grossly unfair. [217] . . . The Area "E" gillnetters have lost income . . .

iii.
Exclusion from the Benefit of Fishing in Two Commercial Fisheries

> [165] . . . many of the Aboriginal fishers involved in the pilot sales have commercial licences, so that they are able to fish both openings. This doubles the opportunity of these particular fishers,

> giving them a real advantage over the claimant group and further leading to the impression that the Aboriginal group as a whole is being favoured [176] . . . this latter group are withheld opportunities to fish that are afforded the other group, denying them the general equal right of every citizen to participate in the fishery
>
> *iv.*
> *Summary of Burdens and Benefits*
>
> [184] These consequences have been discussed in detail, from financial to emotional. [202] . . . The program confers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It therefore is grossly unfair. [217] . . . But most importantly, the commercial fishers have been stripped of their pride and dignity and feel victimized by government discrimination.

THE CLAIMANT/COMPARATOR GROUPS

26. The two groups afforded differential treatment on the basis of race were accurately defined by the trial judge as follows:

(a) the claimant group includes all members of society, including Aboriginals, but more particularly those individuals who commercially fish for salmon in Area "E" but are excluded from the pilot sales fishery because they lack the bloodline connection. [176] This would include all of Canadian society but, for practical purposes at the present time, is that group of fishers holding Area "E" licences [which includes Aboriginals but not those of the Musqueam, Burrard and Tsawwassen Indian Bands].

(b) the comparator group includes those persons who, as a result of a bloodline connection to the Musqueam, Burrard and Tsawwassen Indian Bands, are eligible to receive designations to participate in the Aboriginal pilot sales fishery. [175]

The attempt by some of the appeal judges to enlarge the comparator group to the broader Aboriginal community[11] does not accord with the evidence, the findings of the trial judge or proper analysis (see paras. 27, 28, 80, 81, 82, 86, 87, 88, 95, 96 and 97 of this factum, as well as page 15:(4)(A)).

[11] See S.C.B.C. Reasons, *supra*, note 8, para. 11; B.C.C.A. Reasons, *supra*, note 8, para. 42, Low J.A.

THE FACTUAL ERRORS OF THE APPELLATE COURTS BELOW

(1)

THEY CONFUSED THE AFS AND *ACFLR*S WITH THE IMPUGNED PILOT SALES PROGRAM

27. Throughout their rulings, the appeal courts badly confused the AFS and the *ACFLR*s with the stand-alone race-based commercial fishery referred to as a Pilot Sales Program.[12] Brenner C.J., for example, cited a Federal Court of Canada ruling which held that the AFS is ameliorative. In the B.C.C.A., Low J.A., for example, held that "DFO claimed that the AFS had improved the stability in the fishery while providing a greater aboriginal role in management and harvesting . . . "[13]

28. The AFS is not the issue before this Court. Only three of the 70 AFS agreements in British Columbia contain provisions permitting the sale of fish. The AFS is a separate program from the race-based commercial fishery established for the M/T.[14] Claimed attributes of the AFS such as communal licensing, Aboriginal involvement and jobs in fisheries management, self-enforcement and negotiations with DFO over s. 35 fisheries issues are the result of the other 67 AFS agreements in British Columbia that do not contain sales provisions. The M/T-only commercial fishery cannot be justified by the AFS. The trial judge did not confuse the challenged program with the AFS or *ACFLR*s:

> That is precisely the problem with the pilot sales fishery. The Department of Fisheries and Oceans has drawn a distinction between two groups on grounds analogous to race . . . I have concluded that the pilot sales fishery is offensive as being analogous to racial discrimination. [175, 234] [emphasis added]

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[12] The program has existed for 15 years; therefore, it is not a "pilot" sales fishery. This factum generally refers to the "M/T fishery", "impugned program" or "race-based commercial fishery" rather than "pilot sales program".
[13] B.C.C.A. Reasons, *supra*, note 8, para. 35.
[14] Trial Reasons, *supra*, note 4, paras. 42, 43.

(2)

THEY MISCONSTRUED THE TRIAL JUDGE'S USE OF THE WORD "PERCEPTION"

29. The appeal courts below misconstrued Kitchen P.C.J.'s use of the word "perception." Brenner C.J. held that the trial judge found that perceptions were "more important than the facts . . . were accorded more weight than the reality" and "played a significant role in the outcome" of the trial ruling.[15] In the court below, Low J.A. held: "the PSP was controversial and gave rise to a variety of perceptions about its impact, perceptions that found their way into the evidence."[16] Mackenzie J.A. held: "The catch statistics do not support the appellants' perception of disadvantage from the different openings" and it "is a fatal flaw in the appellants' position."[17]

30. The trial judge was not convinced that being last in line would not affect the catch rates of the Appellants. He correctly held that DFO created a "perception" of a racial hierarchy by putting the M/T fishery first in line.[18] Perception can be important to human dignity; even if all persons in a line-up receive equal benefit, it still violates human dignity to be forced to the back of the line because of one's race.

31. Rather than a perception of unequal treatment, a priority for the M/T commercial fishery is written into the DFO and M/T agreement. DFO official James Ionson testified that DFO manages all public fisheries, including the Appellants' fishery to give a priority to the M/T commercial fishery.[19]

32. The effect of this, for example, was revealed in the testimony of Ian Todd, the former Chair of the U.S./Canada Pacific Salmon Commission, who testified that, if not for the loss of management flexibility caused by the M/T-only fishery, the Appellants would have

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[15] S.C.B.C. Reasons, *supra*, note 8, paras. 63, 75.
[16] B.C.C.A. Reasons, *supra*, note 8, para. 51, Low J.A.
[17] *Ibid*., para. 109, Mackenzie J.A.
[18] Trial Reasons, *supra*, note 4, para. 164.
[19] Cross Examination of J. Ionson (18 October 2002), A.R. Vol. IV, at 627, l. 15.

enjoyed additional fishing opportunities.[20] This is one among many reasons why the trial judge did not rely solely upon the catch comparison cited by the appellate judges as the means to determine the financial impact of the M/T fishery upon the Appellants to find that there "has been a considerable financial cost to the commercial fishers." [96]

33. In fact, as shown in Appendix I, the cumulative average catch per vessel in the M/T commercial fishery was approximately 35% greater than that of the general commercial fishery. For M/T fishers who participated in both, the average catch would have been more than double that of a general Area "E" vessel.

34. In his other use of "perception," the trial judge did not hold that because the M/T self-enforced their fishery, M/T food fish was laundered into the public fishery. Rather, "[a]gain, what is more important is the perception. The Aboriginals are trusted with self-enforcement. The commercial fishers are not accorded the same respect . . . "[168]

35. The Appellants were not alone in their concern over self-enforcement. In his report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation, Peter H. Pearse concluded that guardians who fished were in an obvious conflict of interest and should not be required to enforce regulations against family members.[21]

36. These concerns about self-enforcement were verified, for example, by DFO officials James Ionson and Jacob Redekopp who testified that M/T officials Joe Becker and Mike Baird were convicted or charged for fisheries offences, yet remained in charge of the enforcement and management of the M/T fisheries because DFO had no authority to remove them. [22]

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[20] Cross Examination of I.Todd (8 April 2003), A.R. Vol. VII, at 1230, ls. 1-27. In his testimony, Ian Todd suggests that the inflexibility that resulted from the AFS pilot sales project led to a denial of commercial openings for fishing.

[21] P.H. Pearse, *Managing Salmon in the Fraser: Report to the Minister of Fisheries and Oceans on the Fraser River Salmon Investigation*, A.R. Vol. X, Exh. 2, Tab 2 at 1733.

[22] Examination in Chief of J. Ionson (17 October 2002), A.R. Vol. III, at 558, ls. 24-35 [hereinafter Ionson]. See also Cross Examination of J. Redekopp (8 October 2002), A.R. Vol. II, at 307-08 [hereinafter Redekopp]; Ionson, *ibid*. at 558, l. 36 – 559, l. 3; see also, *e.g.*, the 28 July 2001 memorandum by Fishery Officer Jordan Point commenting on the specific problem of laundering food fish catches into the commercial fishery, Email from Jordan

37. Kitchen P.C.J. anticipated some exaggeration in the testimony of the defence witnesses (some of whom are Appellants), but rather than dismiss a group of diverse ages, economic, social, racial and historical backgrounds as biased and their evidence as being based on subjective perceptions, the trial judge held that they were generally reliable and just the sort of evidence he should rely upon in making findings of fact (see the trial judges discussion of witness bias at 148-51).

38. In contrast, the appeal courts accepted the evidence of program beneficiary Judith Sayers and dismissed the evidence of the defence witnesses as too subjective and based upon perception,[23] but the Crown was unable to provide a single independent witness to support segregation of the workplace or point to one other example of a segregated workplace in Canada. Even Judith Sayers admitted she would hit the roof if DFO denied her a commercial fishing license on the basis of race.[24] And DFO Fishery Officer supervisor Redekopp hoped that the fishery would be reunited.[25] Musqueam fisher Ron Sparrow was going to join a protest fishery to ensure that he was treated equally when faced with a private commercial fishery for a different Aboriginal group that did not involve the Musqueam.[26]

(3)

THEY MISCONSTRUED THE EVIDENCE IN FINDING THAT THE RACE-BASED COMMERCIAL OPENINGS WERE MATCHED BY PUBLIC OPENINGS

39. The Court of Appeal held that "[i]t is important to note" that the impugned program had a minimal impact upon the Appellants because the agreement between DFO and the M/T required an all-citizens fishery opening for each M/T opening.[27] Words on paper often conflict with reality and non-compliance with agreements under the impugned program has been

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Point to Don Aural and Bert Ionson (28 July 2000), A.R. Vol. XV, Exh. 69, Tab 29 at 2758 [hereinafter Point Email].

[23] B.C.C.A. Reasons, *supra*, note 8, paras. 42, 109; S.C.B.C. Reasons, *supra*, note 8, paras. 63, 67, 94.

[24] Cross-Examination of J. Sayers, A.R. Vol. VIII, at 1412, l. 31 [hereinafter Sayers].

[25] Redekopp, *supra*, note 22 at 331, l. 41.

[26] Examination in Chief of J. Groven (17 April 2003), A.R. Vol XVI, at 2834, l. 30 - 2835, l. 22 [hereinafter Groven].

[27] B.C.C.A. Reasons, *supra*, note 8, para. 44. See also S.C.B.C. Reasons, *supra*, note 8, para. 105.

an issue.[28] In 1998, for example, the trial judge noted [62] that there would have been a third opening for the M/T, but no opening for the Appellants; in 2001, the M/T commercial fishery opened for sockeye, but the Appellants' sockeye fishery never opened.[29]

40. Though there was no finding of fact by the trial court, the appeal courts concluded that the race-based commercial fishery operated differently in Port Alberni. Low J.A. stated, for example, that unlike the Fraser, the segregated commercial fishery opened after the all-citizens fishery.[30] This conclusion is patently wrong. Crown witness Judith Sayers admitted that there were entire years when the public commercial fishery was closed, but the segregated fishery was open.[31]

(4)

THEY MADE ADDITIONAL INCORRECT FACTUAL REFERENCES

	Incorrect Facts in the Appeal Courts	**Trial Court Findings of Fact or Evidence**
A)	Aboriginals participated in the public fishery as <u>individuals</u>. Aboriginals participated in the segregated fisheries as a <u>group</u> [BCSC 61, 66, 93; BCCA 142].	DFO calls the segregated fishery "communal" but it is not – all monies are kept by individual fishers. [Trial Reasons, 200, 214, 217] Further, Aboriginal communities have fished as <u>groups</u> in the public commercial fishery for decades – 22% of all commercial licences in the public fishery are owned by Aboriginal communities or organizations.[32]

[28] See *e.g.* Jordan Point (Fishery Officer) who stated that, "from all indications it would appear that the bands are already in non-compliance of the agreements and the ink isn't even dry." Point Email, *supra*, note 22 at 2756.

[29] Fraser River Panel, Fraser River News Release (7 September 2001), A.R. Vol. XII, Exh. 19, Tab 7 at 2251; "Musqueam V.S. Tsawwassen Historic Salmon Catches 2001-1993" (undated), A.R. Vol. XII, Exh. 18, Tab 89 at 2120 [hereinafter Historic Salmon Catches]. The 2001 Fraser River commercial catch for sockeye salmon in 2001 was zero for Area E fishers, while the commercial catch for the Musqueam and Tsawwassen bands was 48,839 and 21,937 sockeye respectively.

[30] B.C.C.A. Reasons, *supra*, note 8, para. 44.

[31] Sayers, *supra*, note 24 at 1369, ls. 41-47 & 1434, ls. 12-20. See also Examination in Chief of D. Logan, A.R. Vol. VI, at 1037, l. 33 – 1038, l. 5.

[32] Limited Entry Licences Summary, *supra*, note 8 at 2557; Examination in Chief of M. James, A.R. Vol. VII, at 1154, l. 44 – 1156, l. 39 [hereinafter James].

Incorrect Facts in the Appeal Courts		**Trial Court Findings of Fact or Evidence**
B)	The BCSC indicated that the trial judge had found that the segregated fishery created *further* racial discrimination and discord [20(3)(d)], suggesting that racial discrimination existed in the fishery prior to the segregated fishery. (The BCCA did not cite the detrimental effect of segregation on race-relations and the fishing community at large).	There was a "spirit of camaraderie" between Canadians of all races in the fishery prior to 1992 [Trial Reasons, 172]. The "further" discrimination cited by the trial judge referred to discrimination beyond the scope of the segregated fishery [171-73,184, 217].
C)	Brenner C.J. said "Generally, aboriginals have historically been restricted to fishing for food, social and ceremonial purposes for themselves" [14].	Aboriginals were included from the outset "on the same footing as other Canadians in the commercial fishery" [Trial Reasons, 38] and were never restricted to fishing for food and participated as equals in the public commercial fishery. [37-39].
D)	The PSP was for the purpose of ameliorating a disadvantage. The program was aimed in part at providing economic opportunity for Aboriginal people and for enhancing participation in the fishery [BCSC, 98].	Neither the purpose nor the effect of the segregated fishery was to ameliorate a disadvantage [Trial Reasons, 204]. The Crown conceded that the purpose of the M/T fishery was not ameliorative [191].[33]
E)	Much of the financial impact of the impugned program on the claimants was offset by the licence retirement program [BCSC, 104]	The trial judge held that the fishery was "expropriated without compensation." [215] Former DFO official M. James testified that increase in the catch of sockeye in the impugned program was in excess of the sockeye reallocated as a result of the licence retirement program.[34]
F)	The BCSC said the trial judge found that the Musqueam and Tsawwassen were disadvantaged with respect to housing and high rates of poverty [100].	Referring to oral and photographic evidence, the trial judge found that the Musqueam quality of housing was "at least . . . representative of the community at large" and found no evidence of housing problems nor of poverty on M/T lands [197-98] (see pictures at A.R. Vol. XV at 2654 & 2689)

[33] Letter of Crown to Defense Counsel, Re no criteria for pilot sales (28 March 2001), A.R. Vol. XV, Exh. 69, Tab 28 at 2748 [hereinafter Crown Letter].

[34] James, *supra*, note 32 at 1154, l. 9.

Incorrect Facts in the Appeal Courts		**Trial Court Findings of Fact or Evidence**
G)	At 141, Kirkpatrick J. cited Brenner C.J at 92 and 93 who referred to Binnie J.'s comments in *Wewaykum Indian Band* v. *Canada* about historical coastal Aboriginal settlements and involvement in fisheries as justification for a segregated commercial fishery.	The Wewaykum used to be the Campbell River Indian Band - their members fish in the *public* commercial fishery and are excluded from the M/T fishery. They protested vehemently against the impugned program: "We cannot survive with pilot sale programs continuing to destroy our lives . . . This aspect of the Aboriginal Fisheries Strategy is wrong, divisive and destructive"[35] [emphasis added]
H)	Low J.A. seemed to infer that the impact on the claimants was lessened by the reduction in the number of vessels fishing in the public fishery. [36]	Fleet size was reduced in 1996 as part of industry restructuring program [A.R. Vol. III at 596, ls. 27-28] – the entire coast was open to fishers prior to 1996 [A.R. Vol. III at 596, ls. 43-45] but post-96 fishers needed to purchase two additional gillnet licences to fish the coast at a value of about $300,000.[36] This program made Area E fishers especially sensitive to the M/T-only fishery because the rest of the coast was now closed.

[35] Campbell River Indian Band, Press Statement (undated), A.R. Vol. XIII, Exh. 22, Tab 23 at 2338.

[36] Ionson, *supra*, note 22 at 597, ls. 20-25, 39-44.

PART II - THE ISSUES

1: Whether the impugned program violates s. 15(1) of the *Charter;*

2: Whether s. 15(2) applies to the program;

3: Whether the violation of s. 15 is justified by s. 1;

4: Whether s. 25 of the *Charter* applies to the program;

5: Whether the judicial stay granted by the trial judge was an appropriate remedy pursuant to s. 24 of the *Charter*?

[The Appellants make no attack upon the vires *of the impugned program based upon a division of powers argument]*

PART III - ARGUMENT

(1)

RACIAL DISTINCTIONS ARE DISCRIMINATORY WITHIN SECTION 15(1) AND ANY JUSTIFICATION MUST BE FOUND IN SECTION 1

41. The trial judge explained the prosecution of the Appellants as follows:

> During the times when this fishing occurred Area "E" was closed to all fishing except . . . to the Musqueam, Burrard and Tsawwassen Indian Bands under the authority of the Aboriginal Communal fishing Licences Regulations. . . . None of the accused had the necessary designation. They were participating in a protest fishery . . . with the intention of bringing the constitutional challenge in this case . . . following the procedure indicated in the *Law Case*, I conclude that the pilot sales fishery draws a distinction and defines two groups on the basis of whether or not individuals have a bloodline connection to the Musqueam, Burrard or Tsawwassen Bands . . . [37]

42. Protection of human dignity is at the heart of s. 15 of the *Charter*:

> It may be said that the purpose of 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration[38]

43. Human dignity within s. 15(1) has been defined by this Court as follows:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair

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[37] Trial Reasons, *supra*, note 4, paras. 6, 203, see also 175-76.
[38] *Law*, *supra*, note 1, para. 51.

> treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.[39]

44. Throughout world history, race has been used as a dehumanizing marker to justify unequal treatment. Such distinctions violate human dignity by denying the intrinsic value of each person. When one is labelled by a racial marker, the individual's merits, qualities and character are overridden by a set of stereotypical group characteristics. It diminishes psychological integrity and empowerment by predetermining a person's human dignity by an inheritance that cannot be changed. An unjustified government-imposed racial distinction intensifies the sting and burden of a racial distinction and grants official sanction to citizens who believe it acceptable to discriminate against other citizens based on their race.

45. Race is the first ennumerated ground in s. 15 of the *Charter*. These grounds are "the most common and probably the most socially destructive and historically practised bases of discrimination."[40] Though generally calling for increased analysis under s. 15(1), Arbour J. stated in *Lavoie*:

> There are some distinctions made on certain enumerated or analogous ground – I refer again to those made on the basis of race as an obvious example – which a reasonable person could not but view as presumptively, if not unavoidably, discriminatory. The discrimination inquiry may get short-circuited where these kinds of distinctions are at issue, not because it is unnecessary or unimportant but because its outcome will seem all too readily apparent.[41]

46. As stated in *Law*:[42]

> . . . In more straightforward cases, it will be clear to the court on the basis of judicial notice and logical reasoning that an impugned law interferes with human dignity and thus constitutes discrimination within the meaning of the Charter. Often, but not always, this will be the case where a law draws a formal distinction in treatment on the bases of enumerated or analogous grounds,

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[39] *Ibid*., para. 53.
[40] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 175, McIntyre J.
[41] *Lavoie* v. *Canada*, [2002] 1 S.C.R. 769, para. 83, Arbour J. [hereinafter *Lavoie*].
[42] *Law*, *supra*, note 1, para. 83; *ibid*., paras. 47, 48, Bastarache J.

> because the use of these grounds frequently does not correlate with need, capacity or merit . . .

47. These comments reflect an approach shared by courts in other western democracies such as the United States Supreme Court and the European Court of Human Rights: both courts require the equivalent of s. 1 scrutiny. The United Stated Supreme Court has held:

> Classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility . . . . "A racial classification, regardless of purported motivation, is presumptively invalid . . . "[43] [emphasis added]

48. In 2005, when faced with a government justification of prisoner violence, the United States Supreme Court reaffirmed *Brown* v. *Board of Education*:

> . . . The CDC further subdivides prisoners within each racial group. Thus, Japanese-Americans are housed separately from Chinese-Americans, and Northern California Hispanics are separated from Southern California Hispanics . . . The CDC claims that its policy should be exempt from our categorical rule because it is "neutral"–that is, it "neither benefits nor burdens one group or individual more than any other group or individual." In other words, strict scrutiny should not apply because all prisoners are "equally" segregated. The CDC's argument ignores our repeated command that "racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally." . . . Indeed, we rejected the notion that separate can ever be equal – or "neutral" – 50 years ago in *Brown v. Board of Education*, 347 U.S. 483 (1954), and we refuse to resurrect it today . . . [44] [emphasis added]

49. In *Timishev v. Russia* the European Court of Human Rights held that:

> A differential treatment of persons in relevant, similar situations, without an objective and reasonable justification, constitutes discrimination . . . Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination . . . Racial

[43] *Shaw* v. *Reno, Attorney General*, 509 U.S. 630 at 643 (1993).
[44] *Johnson* v. *California*, 543 U.S. 499 at 502, 506 (2005) (internal citations omitted) [hereinafter *Johnson*].

> discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment . . . Once the applicant has shown that there has been a difference in treatment, it is then for the respondent Government to show that the difference in treatment could be justified.[45] [emphasis added]

50. In 1928, this Court rejected DFO's attempt to then segregate the British Columbia commercial fishery by race. The DFO policy was summed up in the *1925-26 Annual Report of the Department of Marine and Fisheries*:

> The department's policy of eliminating the Oriental from the fisheries of the province with a view to placing the entire industry in the hands of white British subjects and Canadian Indians appears to be working out well . . . it is the intention to continue this percentage [reduction in licences] each year until these industries are entirely in the hands of Whites or Canadian Indians.[46]

51. DFO's policy came before this Court in the form of the *1928 Reference Re: Fisheries Act.*[47] The fishers of Japanese ancestry were granted intervener status to argue:

> . . . the Minister has no discretionary authority to grant or refuse a license because the applicant is of Japanese origin or because a Parliamentary committee or Commission has approved the carrying out of a pre-arranged scheme of refusing licenses to British subjects of Japanese origin merely because of their origin.[48]

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[45] *Timishev* v. *Russia*, nos. 55762/00, 55974/00 (13 December 2005), paras. 56-57 (ECHR).

[46] Department of Marine and Fisheries, *Fifty-Ninth Annual Report of the Fisheries Branch* (1925-26), "Reduction in Orientals", A.R. Vol. XIII, Exh. 47, Tab 4 at 2454-55.

[47] *Reference Re Fisheries Act 1914 (Canada)*, [1928] S.C.R. 457 [hereinafter *1928 Reference*], aff'd [1930] A.C. 111 (J.C.P.C.).

[48] *1928 Reference*, *ibid*. (Factum on Behalf of the Fishermen of Japanese Origin in the Province of British Columbia), A.R. Vol. XIV, Exh. 47, Tab 42 at 2501.

52. This Court, applying administrative law principles, struck down this attempt to discriminate:

> No express power is conferred upon the Minister, except to issue licenses, and in my view, it is improbable that it was intended to confer a reviewable discretion, or that, unless by plain legislative direction, discretionary licensing authority would have been granted which could be exercised in a manner which might sanction discrimination.[49]

53. In 1939, Canadians petitioned the Minister urging him not to discriminate against fishers of Japanese ancestry.[50] In April 1949, when the federal government allowed fishers of Japanese ancestry to return to the coast, the fishers union passed a motion which read:

> Whereas: The United Fishermen and Allied Workers' Union is a democratic organization and does <u>not bar anyone from membership because of race, creed, colour or political opinion</u> . . . Therefore it Be Resolved: . . . The Union should not oppose the granting of fishing licences to Japanese Canadians, but when the government decides to issue such licences, <u>our Union should oppose any attempt at segregation of Japanese</u> by limiting them to certain types of fishing or special areas.[51] [emphasis added]

54. The fishers' equality principles were an important step towards a British Columbia commercial fishery in which race was irrelevant. The beneficial effects of inclusiveness and interracial contact were recognized when, fifty years ago, the government stopped discriminating against Canadians of Japanese ancestry. The trial judge found that:

> . . . From that time on the legal framework finally permitted healthier relationships to develop that one witness described as "unremarkable tolerance". From other witnesses I heard of respect among fishers, regardless of racial background. Crews were integrated. The spirit of camaraderie extended across racial groups . . . [172]

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[49] *1928 Reference*, *ibid*. at 477.

[50] Letter to Major J.A. Motherwell (Chief Supervisor of Fisheries) (June 1939), A.R. Vol. XIV, Exh. 47, Tab 34 at 2485-86; Letter to J. Boyd (June 1939), A.R. Vol. XIV, Exh. 47, Tab 34 at 2487.

[51] "Text of Fishermen's Resolution Defining Policy Toward Japanese" *The New Canadian* (6 April 1949), A.R. Vol. XV, Exh. 69, Tab 9 at 2730.

55. Long experience also shows that racial distinctions are incubators for racial hostility:

> . . . Indeed, by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions. By perpetuating the notion that race matters most, racial segregation of inmates "may exacerbate the very patterns of [violence that it is] said to counteract."[52]

56. The trial judge in this appeal confirmed that discrimination breeds discrimination:

> . . . the situation has deteriorated considerably. For the first time since the fishery began 150 years ago, the Aboriginals have been split off as a group. The witnesses spoke of lack of respect, communication problems, and physical segregation . . . There has been a breakdown in the relationship between Aboriginals and the rest of the fishing community. The pilot sales program has generated and encouraged further racial discrimination, beyond its own provisions.[53] [emphasis added]

57. Fish processor Jack Groven testified how the impugned program affected the coastal fleet:

> . . . [T]hese different fisheries that are being granted to Natives, and stuff, have caused hard feelings and guys have got arguments and fights on the boat. And actually, in some cases, fist fights and stuff and now the Native boats are pretty well just Native and the white ones are all white and it's lots of bickering.[54]

58. An immeasurably aggravating factor is that the distinction is used to segregate a public workplace by having separate fishing times for the general commercial fishery and M/T commercial fishery. Appendix II shows further advantages given to the M/T *commercial* fishery as compared to the general commercial fishery.

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[52] *Johnson*, *supra*, note 44 at 507.
[53] Trial Reasons, *supra*, note 4, paras. 173, 217.
[54] *Ibid*., para. 103.

59. In the "more straightforward cases", such as this one, once the discrimination is identified, the analysis should move directly to s. 1. This is because the claims for justification must be subjected to the rigorous analysis required by s. 1 where the state bears the burden. The erroneous factual conclusions of the appeal courts below demonstrate this need. While some of the factual errors are identified above, other examples of the appeal courts' factual errors serve to further demonstrate this need:

(1) Brenner C.J. at para. 95 states that DFO "*believes*" the impugned program assists DFO in its management. At paragraph 111, he restates this *belief* as a finding of fact: "With respect to the claimant group, the impugned program assists D.F.O. in its management of the fishery which in turn benefits Canadian society as a whole."[55] The evidence, however, was to the contrary.

(2) Though not going as far as Brenner C.J., Low. J.A. held that the question of whether the impugned program improved management was "hotly contested"[56] but after hearing weeks of evidence the contest was over and decided – the trial judge had concluded:

> . . . 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. <u>The weight of the evidence is that none of this has occurred and the program has been counterproductive in each of these areas</u> . . . <u>the program encourages poaching at least as much as was previously the case</u>[57] [emphasis added]

(3) Mackenzie J.A. held [111] that the success or failure of enforcement was not relevant in the face of the policy objective of improving the

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[55] S.C.B.C. Reasons, *supra*, note 8, para. 111. See also B.C.C.A. Reasons, *supra*, note 8, paras. 35.
[56] B.C.C.A. Reasons, *ibid*., para. 50.
[57] Trial Reasons, *supra*, note 4, paras. 212-13.

> management of the M/T food fishery. Unfulfilled policy objectives have little chance of passing the s. 1 proportionality test.[58]

60. The Crown's reliance on public policy to justify the impugned program should have been reviewed under s. 1.[59] As Bastarache J. held in *Lavoie*:

> . . . the suggestion that governments should be encouraged if not required to counter the claimant's s. 15(1) argument with public policy arguments is highly misplaced. Section 15(1) requires us to define the scope of the individual right to equality, not to balance that right against societal values and interests or other *Charter* rights. A law is not "non-discriminatory" simply because it pursues a pressing objective or impairs equality rights as little as possible . . . [60]

61. Fisheries management needs may *justify* racial discrimination, but it does not make the discrimination non-discriminatory. The full *Law* test led the courts below to ask the wrong question. The right question is the s. 1 question: Is this discrimination justified?

62. By moving straight to s. 1, the onus shifts to the government. The state then bears the burden and cost of justification. This is a key outcome for disadvantaged or marginalized individuals who are the common targets of discrimination and are usually the most unable to afford litigation. If litigation is unavoidable, the legal burden and greater share of the costs are rightly placed on the party imposing the discriminatory distinction.

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[58] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 889.
[59] For examples of public policy arguments considered by the B.C.C.A., see B.C.C.A. Reasons, *supra*, note 8, paras. 81, 82, 111, 112.
[60] *Lavoie*, *supra*, note 41, para. 48.

In the Alternative, the Appellants meet the full *LAW* test

63. As the first two stages of the *Law* Test are met, only the third stage remains: an analysis of the contextual factors.

(1)

Pre-existing Disadvantage

64. No defence witness claimed disadvantage or asked for advantage. The trial judge correctly held that no member of the claimant group can claim pre-existing disadvantage, stereotyping or prejudice.[61]

(2)

Correspondence between Needs and Capacities

65. DFO made it patently clear that the needs, capacities and circumstances of the Appellants were irrelevant by segregating the fishery solely on the basis of race. DFO did not conduct any economic study or assessment concerning the economic need of the bands and the financial rewards the fishery would produce to help choose which Aboriginal group would be permitted to sell its food fish.[62] The Minister said the rationale for the program was "[t]he Aboriginals have been taking fish and selling the fish illegally in great quantities."[63]

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[61] Trial Reasons, *supra*, note 4, para. 182.
[62] *Ibid*., para. 199.
[63] *Ibid*., para. 47.

(3)

Ameliorative Purpose or Effect

66. The trial judge conducted a careful review and found no ameliorative purpose or effect:

> . . . the evidence demonstrated that both of these bands and their individual members are likely healthy financially. [para 194]
>
> My conclusion is that there may be non-financial disadvantages experienced by the Musqueam and Tsawwassen Bands but there is no rational connection between the preferential treatment given these bands in the fishery, and these disadvantages. The program confers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It therefore is grossly unfair. [para 202]
>
> . . . I conclude it does not serve such a purpose [ameliorative]. Although probably well intentioned, the program was misconceived, illogical, and ineffective in any way in dealing with any disadvantages the three bands may experience. [para 204]

(4)

The Significance of and Effect on the Appellants' Interests

67. The significance of the interest is demonstrated by the fishery protest that gave rise to this prosecution. More than 200 fishing vessels protested against the impugned program by fishing peacefully alongside the M/T in the largest fishery protest in Canadian history.[64] DFO threats that fishers would be "prosecuted to the full extent of the law" and "[e]nforcement action may include seizure of fish caught, the fishing gear used and the vessel involved", and that DFO was considering licence suspensions or cancellations, were all acceptable risks to the fishers to put this matter before this Court[65] despite the fact that Appellants like George Horne had gone his 50 year fishing career without a single violation.[66]

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[64] Redekopp, *supra*, note 22 at 263, l. 42 & 264, ls. 9-11.
[65] DFO Notice to Industry Re Enforcement (8 August 1997), A.R. Vol. XVI, Exh. 24, Tab 15 at 2813.
[66] Transcript of Evidence of G. Horne and S. Shelly, Provincial Court of British Columbia (4 April 2001), A.R. Vol. XIV, Exh. 58 at 2646, l. 9 [hereinafter Horne & Shelly].

68. The specific interests affected by the impugned program are very broad and go beyond the interests in a regular workplace. They include (a) work; (b) the right to fish; (c) community interests, and (d) fishery conservation interests. As held by the trial judge at para. 184, the impugned program has had a severe negative effect on each of these interests.

(a)

Work

69. As repeatedly held by this Court:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect.[67]

70. The trial judge held that commercial fishing is the Appellants' livelihood and identity, their self, their being and their heritage.[68] Their vessels and British Columbia's coastal waters are their workplace. Government-imposed advantage for any group is a natural source of hostility, but preferences for a racial group which one can never join are egregious. The Appellants' interest is working in an industry and communities *not* torn asunder by racial stigma and hostility. Their interest is working and investing in an industry secure in the knowledge that government cannot abuse their racial lineage to exclude them from the commercial fishery.

71. Significantly, the Appellants also have a substantial financial investment at risk[69] in the fishery: the market value of an Appellants' Area E licence is $150,000,[70] plus costs for the

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[67] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368; Trial Reasons, *supra*, note 4, para. 71.
[68] Trial Reasons, *ibid*., para. 169.
[69] *Ibid*., para. 161.
[70] Ionson, *supra*, note 22 at 598, ls. 39-44.

vessel, gear, annual fees paid to DFO and operating costs such as fuel. In psychological and financial terms, this is not a job forgotten at 5:00 PM on Friday.

(b)

The Right to Fish

72. The discriminatory effect of the differential treatment cannot be fully appreciated without evaluating the constitutional and societal significance of the Appellants' public right to fish as protected by the *Magna Carta*. The right is an equality right that predates the *Charter* by eight centuries and is a stand-alone defence to the Crown's imposition of a private commercial fishery for the M/T. It is also an important contextual factor which augments the constitutional significance of the interest affected.[71] The fishery is *not*, as are lands and land-based resources, Crown property; on the contrary, the Crown is the *trustee* of the resource for the public.[72]

73. The findings of fact at trial showed the special significance of the public right to fish in British Columbia. The public fishery is one of British Columbia's fundamental institutions; it has historical and community significance that pre-dates Confederation. In British Columbia, the right was originally a compact between the Crown and settlers and Aboriginals alike. The Colonial Committee of English Parliament, which included Queen Victoria, the Prime Minister and the Lord Chancellor, struck the fishery from the grant of Vancouver Island to the Hudson's Bay Company.[73] This protected Aboriginal fishing rights from extinguishment and it prevented the Hudson's Bay Company, government, industry, professional associations or unions from restricting entry into the commercial fishery.[74] This also allowed the fishery to

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[71] *Law*, *supra*, note 1, para. 74.

[72] *A.G.B.C.* v. *A.G. Canada*, [1914] A.C. 153 (J.C.P.C.); *Comeau's Sea Foods Ltd.* v. *Canada (Fisheries and Oceans)*, [1997] 1 S.C.R. 12, para. 37; *R.* v. *Gladstone*, [1996] 2 S.C.R. 723, para. 67 [hereinafter *Gladstone*]; *Larocque* v. *R.*, 2006 FCA 237, 270 D.L.R. (4th) 552, para. 13; G.V. La Forest, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Dept. of Regional Economic Expansion, 1973) at 197.

[73] Committee of Her Majesty's Privy Council for Trade and Plantations, *Report from the Committee of Her Majesty's Privy Council for Trade and Plantations on the Grant of Vancouver's Island to the Hudson's Bay Company* (31 October 1848), A.R. Vol. XV, Exh. 69, Tab 1 at 2705-06; *Colonization of Vancouver's Island* (London: Durrop and Son, 1849), A.R. Vol. XV, Exh. 69, Tab 3 at 2710.

[74] Commission to Enquire into Certain Matters Relating to Salmon Fishing and Canning Industry in British Columbia, *Final Report of the Special Fishery Commission Appointed to Enquire into Certain Matters Relating to*

become an industry of opportunity for many of British Columbia's most marginalized residents. It prevented government from awarding preferences to powerful political groups at the expense of the weaker. The public right, until 1992, forced Canadians of all races to interact, with the result that personal, family and business relationships developed and lasted for generations. These are some of the reasons why the Appellants are "protective of this right and see the pilot sales program as inconsistent with this general right, giving special rights to a particular racial group."[75]

(c)

The Community Interest

74. Commercial fishing is family-oriented, multi-generational and a community unto itself.[76] Husbands, wives and children play integral roles in fishing operations.[77] The effect of discrimination is witnessed, experienced and endured by their families and spread throughout British Columbia's coastal fishing industry and the community at large.[78]

(d)

Fishery Conservation Interests

75. In the early 1940s, less than 1,000 sockeye spawners returned to the Horsefly River (a Fraser tributary). In 1993, more than 15 million returned.[79] This was the result of decades of cooperative and conservative management by Canada and the U.S. through the Pacific Salmon Treaty and by forgone fishing opportunities by the Appellant group which put more fish on the spawning grounds for future benefit in the form of larger runs.[80] The necessity

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the Salmon Fishing and Canning Industry in British Columbia (Ottawa: The Commissioners, 1918), A.R. Vol. XIV, Exh. 54, Tab 17 at 2526.

[75] Trial Reasons, *supra*, note 4, para. 170.

[76] *Ibid*., paras. 86, 148, 162.

[77] Pictures of life on fishing vessels and the community are at A.R. Vol. XIII, Exh. 46, Tabs 1-5 at 2359-2419 & A.R. Vol. XIV, Exh. 47, Tab 49 at 2514-19.

[78] Examination in Chief of R. Nomura (3 April 2003), A.R. Vol. VI, at 993, l. 31, demonstrating the trouble fishers have explaining the situation to children.

[79] Examination in Chief of M. Forrest (3 April 2003), A.R .Vol. V, at 915, l. 28; Examination in Chief of I. Todd (8 April 2003), A.R. Vol. VII, at 1222, l. 29.

[80] Department of Fisheries and Oceans, *Fraser River Sockeye Salmon* (July 1995), A.R. Vol. XII, Exh. 18, Tab 89 at 2127 (see graph), 2149, 2154.

of a single management authority over a migratory fish stock is a fundamental principle of fishery management.[81]

76. The Appellants, and all Canadians, have an interest in a well-managed fishery that preserves and enhances the stock for future generations. This substantive interest directly corresponds with their desire for a single reunited commercial fishery.

77. The trial judge correctly held that the impugned program:

> . . . confers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It therefore is grossly unfair . . . But most importantly, the commercial fishers have been stripped of their pride and dignity and feel victimized by government discrimination. [202, 217]

(2)

SECTION 15(2) DOES NOT APPLY

78. The Appellants rely upon the trial judge's analysis of any alleged ameliorative effect and s. 15(2) found at paragraphs 191 to 202 of his reasons. They also add the following.

79. In 1979, Kim Nguyen's uncle paid a bribe of seven ounces of gold to a government official to help her escape Vietnam.[82] She was in grade 11, and left her mother and father behind. After a tortuous journey on a refugee ship and months in a Hong Kong refugee camp she landed in Edmonton with no money, no English and no job.[83] By working two jobs and studying English at night, she and her uncle saved enough money to buy a share in a fishing

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[81] B.C.C.A. Reasons, *supra*, note 8, para. 115, Mackenzie J.A. (grasping implications of a balkanized fishery management regime).
[82] Examination in Chief of K. Nguyen (3 April 2003), A.R. Vol. V, at 936, ls. 2-9 [hereinafter Nguyen].
[83] *Ibid*. at 934, l. 26 – 938, l. 31.

vessel in Vancouver.[84] They had never fished, but decided to try because "the fishing business, that's easy for newcomers, people that's coming to Canada, doesn't know how to speak English . . . "[85] Brenner C.J. classified Ms. Nguyen as an *advantaged* person who has "an even greater advantage than the rest of Canadian society" because she has a commercial salmon licence.[86]

80. Musqueam fisher Ron Sparrow is famous as a result of this Court's decision in *R.* v. *Sparrow*.[87] He has owned a valuable seine vessel and licences since the 1970s and is also one of the best fishers on the British Columbia coast.[88] His fishing abilities once earned him an estimated $3 million in a single day of fishing herring and he lives in a house that is far above the standard of most Canadians.[89] Brenner C.J. classified the Musqueam Band, of which Mr. Sparrow is a member, as *disadvantaged* in the commercial fishery.

81. Only by disregarding "an individual's merits and capacities" and relying solely upon a deceptive racial label can the M/T and the Appellants be divided into classes of advantaged and disadvantaged persons.[90] Both groups have advantaged and disadvantaged persons. Though the M/T are already advantaged and over-represented in the public commercial fishery in comparison to their proportion of the general population,[91] the M/T gain a second fishery at the expense of fishers like Kim Nguyen or George Horne (one of the Appellants), a 65-year-old Canadian of Aboriginal ancestry who belongs to a different Aboriginal band. Horne can read a little but cannot write. Nevertheless, he still managed to build a life for himself in the public commercial fishery. Because he is also the wrong race (Aboriginal, but not M/T), he too is left sitting at the dock during the M/T-only commercial fishery.[92]

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[84] *Ibid.* at 938, l. 39 – 940, l. 16.
[85] *Ibid*. at 938, ls. 39-46.
[86] S.C.B.C. Reasons, *supra*, note 8, para. 98.
[87] Groven, *supra*, note 26 at 2835, ls. 6-9.
[88] Picture of Shani Lynne #2 in A.R. Vol. XIV, Exh. 54, Tab 29 at 2588; *ibid*. at 2830, l. 30 – 2831, l. 9.
[89] Groven, *ibid*. at 2831, ls. 12-35; photo in A.R. Vol. XIII, Exh. 46, Tab 7 at 2430.
[90] S.C.B.C. Reasons, *supra*, note 8, paras. 80-83.
[91] Trial Reasons, *supra*, note 4, paras. 38, 160, 201.
[92] Horne & Shelly, *supra*, note 66 at 2642-47.

82. The appeal courts expressly cited the testimony of Crown witness and Hupacasath Band Chief Judith Sayers to distinguish the impugned program in Port Alberni from the M/T Fishery. For example, Brenner C.J. held at para. 94 that a separate fishery allows those members of the specified Aboriginal communities to obtain commercial fishing licences where they would otherwise be unable to enter the commercial fishery. This finding squarely conflicts with the trial ruling and the evidence:[93]

a) Many of the participants in the M/T fishery owned vessels and licences for the public commercial fishery prior to the imposition of the impugned program;[94]

b) In 1989, three years prior to the imposition of the program, Canadians of Aboriginal ancestry owned $292 million worth of vessels and licences in the British Columbia commercial fishery, not counting roe-on-kelp licences;[95]

c) At the time of trial, 22% of all commercial licences in British Columbia were already held by Aboriginal communities – this does not include licences held by individual natives or native-controlled corporations, such as James Walkus who, as one of the largest vessel owners in British Columbia, received a National Aboriginal Achievement Award;[96]

d) Judith Sayers, testified that her tribal council had a special economic development program which provided grants and loans to band members to purchase commercial fishing licences and vessels;[97]

e) Sayers also acknowledged that her tribal council received more than $3.7 million from DFO in commercial halibut, salmon, herring, prawn, rockfish, and salmon

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[93] *Ibid*., paras. 158-60, 201.
[94] *Ibid*., para. 165.
[95] Native Fishing Association, *Economic Impacts of Native Participation in the British Columbia Fishing Industry* (July 1989), A.R. Vol. XI, Exh. 6, Tab 51 at 2054 (third point on list).
[96] Limited Entry Licences Summary, *supra*, note 8 at 2557; B.C. Hydro, "National Aboriginal Achievement Awards", A.R. Vol. XIV, Exh. 54, Tab 28 at 2587.
[97] Sayers, *supra*, note 24 at 1421, ls. 6-24.

licences. She also advised that commercial licences could be obtained in exchange for a reduction in AFS grants from DFO, but her band has not opted to take advantage of that opportunity.[98]

83. The conclusion that segregation is a prerequisite for Aboriginal success is a long outdated stereotype proved false by the history of Aboriginal success in the British Columbia commercial fishery.[99] This Court has held that Aboriginals are a disadvantaged group in Canadian society, yet the disadvantage is in parts of Canada *outside* the British Columbia commercial fishery.

84. In *Lovelace,* this Court held that an under-inclusive s. 15(2) program does not necessarily violate s. 15(1).[100] This is because an under-inclusive program can benefit disadvantaged groups with minimal or no cost to the excluded. The program reviewed in *Lovelace* provided benefits for the status "Indians" at no expense to non-status "Indians". In contrast, the M/T could not build a viable commercial fishery just from fish needed for food purposes, so fish were reallocated from the Appellants and other users to the M/T.

85. Growth of the M/T fishery or expansion of the impugned program to other bands will require further reallocations, but there is not enough fish to go around. Without considering coastal Aboriginal bands, such as the Wewaykum Indian Band cited by the appeal courts, if all Fraser River Aboriginal groups were allocated the same number of sockeye as the M/T reported harvesting under the segregated fishery, the Aboriginal commercial catch would have totalled more than double the harvest of the general Canadian Fraser sockeye commercial fishery in 2000.[101]

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[98] "Fishing Licences Transferred to First Nations as a Result of the Aboriginal Fisheries Strategy", A.R. Vol. XV, Exh. 63, Tab 14 at 2672, 2672a; *ibid*. at 1424, l. 27 & 1426, l. 16.

[99] See also R. Knight, *Indians at Work: An Informal History of Native Labour in British Columbia, 1848-1930* (Vancouver: New Star Books, 1996), excerpted at A.R. Vol. XIV, Exh. 54, Tab 30, 2591 [hereinafter *Indians at Work*]; P. Gladstone, "Native Indians and the Fishing Industry of British Columbia" (1953) 19:1 Can. J. Econ. 20 in AR Vol. XI, Exh. 6, Tab 43, 2001.

[100] *Lovelace* v. *Ontario*, [2000] 1 S.C.R. 950.

[101] Historic Salmon Catches, *supra*, note 29. See Appendix III for detailed calculations.

86. Another important stereotype in the rulings of the appeal courts below was holding that a segregated commercial fishery respects a unique relationship between Aboriginal communities in British Columbia and the commercial salmon fishery.[102] This contrasts with reality. Though eligible, the Burrard Band *chose* not to fish in the M/T commercial fishery.[103] Judith Sayers testified that because her community had different priorities than the commercial fishery, her band built a new longhouse worth $1.8 million rather than invest in vessels and licences.[104] She also testified that if her band did obtain a license for the public fishery it would be contracted out.[105]

87. Commercial salmon fishing is also inconsistent with Aboriginal history in the salmon fishery. The expert witness retained by the Musqueam in the *Sparrow* case concluded:

> . . . it is important to note that this was not a market system. There was no all-purpose money. It was not possible to take a surplus of food and simply peddle it.[106]

88. On the basis of anthropological and historical analysis of the role and cultural significance of fishing to Aboriginal communities, this Court confirmed the expert witness' opinion in its ruling in *R.* v. *Van der Peet* in which it held that the Musqueam's neighbours, the Sto:lo, did not trade, barter or sell fish prior to European contact and that the British Columbia commercial salmon fishery was created by European traders, primarily the Hudson's Bay Company, for export markets.[107] This Court also held in *R.* v. *N.T.C. Smokehouse* that the two Aboriginal groups in Port Alberni have no historical record of sales or trade and barter in salmon prior to European contact.[108] Ms. Sayers testified that the Tseshaht, the other band in the Port Alberni segregated fishery, did not even possess an Aboriginal right to fish for food and

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[102] B.C.C.A. Reasons, *supra*, note 8, paras. 140-43, Kirkpatrick J.A.
[103] Trial Reasons, *supra*, note 4, para. 194.
[104] Sayers, *supra*, note 24 at 1420, ls. 1-46.
[105] *Ibid*. at 1399, ls. 3-25.
[106] Letter from Dr. Wayne Suttles, Opinion re *R.* v. *Ronald Sparrow* (27 November 1984), A.R. Vol. XI, Exh. 6, Tab 47 at 2040.
[107] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, paras. 84, 91 [hereinafter *Van der Peet*].
[108] *R.* v. *N.T.C. Smokehouse*, [1996] 2 S.C.R. 672, para. 26 [hereinafter *N.T.C. Smokehouse*]. The Opetschesaht are now referred to as the Hupacasath.

conceded in cross-examination that her group has no historical evidence of commercial quantities of salmon being traded or sold prior to European contact.[109]

89. Even in the case of a s. 35 commercial Aboriginal right, this Court did not suggest that segregated fishery model is required to give effect to the right. In *R.* v. *Gladstone*, this Court held that granting reduced fee commercial licenses within the public commercial fishery may be way to respect a *proven* Aboriginal right to sell fish.[110]

90. The constitutional function of recognizing and protecting the uniqueness of Aboriginal fishing is performed through s. 35 of the *Constitution Act, 1982*. By appealing to "Aboriginality" in support of a program not connected to "Aboriginality" the Crown and the appeal courts below are simply redrawing the lines meticulously drawn by this Court concerning the relevance of Aboriginality to fishing activities. Not only does this ignore the law, but it undermines the very function of s. 35.

91. The concurring judgment of Binnie J. in *Mitchell v. M.N.R.* gives a helpful description of the concept of "partnership without assimilation". Binnie J. said that Aboriginals "live and contribute as part of our national diversity". He rejected the "separate but equal" model through the metaphor of the "two row wampum". Aboriginals, he said, are not in a separate canoe travelling alongside the ship containing other Canadians. They are in the same ship, pulling together as an harmonious whole, although not assimilated in it. The constitution provides for "merged sovereignty" not "mutual isolation."[111] DFO's intention in this instance is figuratively, and literally, to put Canadians of Aboriginal ancestry in one ship, and all other Canadians in another ship.

92. Recognizing Aboriginal uniqueness outside of activities that were truly distinctive of the pre-contact Aboriginal society, such as encouraging the sale of food fish, undermines public support for special treatment of Aboriginal Canadians in areas where an activity is truly connected to indigenousness, not race. It also promotes a false stereotype that commercial

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[109] Sayers, *supra*, note 19 at 1375, l. 23 & 1370-72
[110] *Gladstone*, *supra*, note 72, para. 64.
[111] *Mitchell* v. *M.N.R.*, [2001] 1 S.C.R. 911, paras. 127-32, Binnie J.

fishing is the natural place for Canadians of Aboriginal ancestry rather than professions, entrepreneurship and work and education outside the fishery.

93. In this instance, the commercial fishery is a common heritage shared by *all* fishers of *all* races who worked together to build it since the Hudson's Bay Company first began exporting barrels of salted salmon to the Hawaiian islands in about 1835.[112]

94. This helps to explain, when asked, why the Tsawwassen needed to fish at a separate time, Crown witness and Tsawwassen Fishery Manager Tony Jacobs, did not refer to Aboriginal uniqueness; he testified that it was because Tsawwassen fishers had small boats and could not safely fish with the public commercial fleet and why Sayers' band promoted education and non- fishing business activities.[113]

95. DFO and the courts below were very focused on the alleged communal aspects of the fishery which they drew from the purpose of the *ACFLR*s. Brenner C.J., for example, held that "[i]ndeed, the communal nature of the licence is one of its most significant characteristics for aboriginals."[114]

96. The trial judge made no such finding and the appeal courts were in error. Both the M/T and the Port Alberni bands had a choice: whether fishery monies would go to the community or individual fishers. Both chose individual economic gain over the community.[115] Though the appeal courts specifically referenced the communal aspect of the Port Alberni fishery, 60% of the harvest is dedicated to individual fishers and 40% is dedicated to the communal seine. Other than food fish which the communal seine provides for elders, the rest of the fish is sold for the benefit of individual fishers.[116]

97. The appeal courts' erroneous conclusion about the communal aspect of the impugned fishery is also a denigrating message to Canadians of Aboriginal ancestry in the public

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[112] *Van der Peet*, *supra*, note 107, para. 84; *Indians at Work*, *supra*, note 99 at 2609.
[113] Examination by the Court of F. Jacobs (15 April 2003), A.R. Vol. VII, at 1272, l. 31; Sayers, *supra*, note 24 at 1420-25.
[114] See *e.g.* B.C.C.A. Reasons, *supra*, note 8, paras. 41-42, Low J.A.; S.C.B.C. Reasons, *supra*, note 8, para. 66.
[115] Trial Reasons, *supra*, note 4, para. 200.
[116] Sayers, *supra*, note 24 at 1350, l. 13; 1357, l. 22; 1409, l. 30.

fishery. The message is that Aboriginal fishers in the public commercial fishery who work for the benefit of themselves and their families are somehow less Aboriginal.

98. In *Sparrow*, this Court referred to the history of Aboriginal peoples' conservation consciousness and interdependence with natural resources in granting constitutional protection to Aboriginal food fisheries.[117] Claimed benefits of a segregated commercial fishery such as accurate catch reporting, a reduction in the illegal sales of food fish or cooperation with DFO in the management of the fishery are the duties of any responsible fisher, and especially fishers with the constitutional right granted by *Sparrow*. The maintenance of minimal conservation standards must not be reliant upon sales of food fish.

99. Finally, the Crown takes the position that the impugned program is not a s. 15(2) program.[118] Therefore, the M/T-fishery is *not* a "program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups." Section 15(2) has no application to these facts, either as a standalone subsection, or to inform the s. 15(1) analysis.

(3)

THE SECTION 15(1) VIOLATION IS NOT JUSTIFIED BY SECTION 1

100. The Appellants rely upon the s. 1 analysis of the trial judge at paragraphs 205 to 218 of the trial reasons.

101. The burden is on the Crown to prove that the infringement of the Appellants' right to equality is justified under s. 1. It is a heavy burden in the case of racial segregation of a public workplace.

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[117] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1110, 1116, 1119 [hereinafter *Sparrow*].
[118] B.C.C.A. Reasons, *supra*, note 8, para. 99.

102. At a program level, DFO's reasons for the impugned program were difficult to discern after six weeks of trial and thousands of pages of evidence. At a participant level, the Crown admits there are no guidelines, criteria or policy regarding the selection of the Bands participating in pilot sales.[119] Low J.A. noted DFO's acknowledgement that the inclusion of a commercial sales component in the AFS was a matter of pragmatism.[120] A *Charter* violation without a clearly discernable objective that results from a government action based on "pragmatism" is not the type of carefully designed program necessary to survive s. 1 scrutiny. This type of entirely unstructured arbitrary licensing discretion must fail.

103. In a recent decision of the United States Supreme Court in which the majority struck down state action involving racial classifications, even the dissent's views on inpermissible context would have proven fatal to the impugned program. Breyer J., for the dissenting Justices Stevens (who also gave separate dissenting reasons), Souter and Ginsburg stated:

> Second, as *Grutter* specified, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." 539 U.S., at 327 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-344 (1960)).
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> . . .
>
> This context [in the case before the Court] is *not* a context that involves the use of race to decide who will receive goods and services that are normally distributed on the basis of merit and which are in short supply. It is not one in which race-conscious limits stigmatize or exclude; the limits at issue do not pit the races against each other or otherwise significantly exacerbate racial tensions. They do not impose burdens unfairly upon members of one race alone but instead seek benefits for members of all races alike. The context here is one of racial limits that seek, not to keep the races apart, but to bring them together.[121]

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[119] Crown Letter, *supra*, note 33 at 2747 (point number 5); see also Trial Reasons, *supra*, note 4, para. 212.
[120] B.C.C.A. Reasons, *supra*, note 8, para. 43.
[121] *Parents Involved in Community Schools v. Seattle School District No. 1 et al.*, 127 S. Ct. 2738 at 2818 (2007).

(4)

THE PROGRAM IS NOT ONE OF THE "OTHER RIGHTS OR FREEDOMS" WITHIN SECTION 25

104. Section 25 has no application in this case because no constitutionally protected Aboriginal rights are at issue. In particular, there are no "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" at issue.

105. This Court has stated that s. 35 of the *Constitution Act, 1982* is an "explicit protection for existing aboriginal and treaty rights" while s. 25 is "a non-derogation clause in favour of the rights of aboriginal peoples".[122] One leading commentator has noted that, while s. 25 is part of the *Charter*, "it does not create any new rights".[123]

106. In *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*,[124] this Court expressly declined to articulate general principles pertaining to s. 25 given that the application of the section in that case had not been made out.[125] Nevertheless, it was noted in *Corbiere* that the section's phrase "other rights or freedoms that pertain to the aboriginal peoples of Canada" suggests the rights included in s. 25 are broader than those in s. 35, and may include statutory rights. Significantly, however, it was also noted that the fact a right is set forth in a statute is not, in itself, sufficient to bring a right within the protection of s. 25:

> [T]he fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the 'other rights or freedoms' included in s. 25 .[126]

107. In seeking to define "other rights or freedoms" regard must be had to the principles of statutory interpretation.

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[122] *Reference Re Succession of Quebec*, [1998] 2 S.C.R. 217, para. 82.

[123] P.W. Hogg, *Constitutional Law of Canada*, 5th ed. supp. (Scarborough, Ont.: Carswell, 2007) § 28.9 at 28-56 (looseleaf updated 2006, release 1).

[124] [1999] 2 S.C.R. 203 [hereinafter *Corbiere*] (*Corbiere* concerned an equality challenge to a provision of the *Indian Act* that restricted voting rights in band elections to those who lived on the band's reserve).

108. By reason of the *principle of associated meaning*,[127] the broad provision "other rights or freedoms that pertain to the aboriginal peoples of Canada" is narrowed by its immediate context. The broad provision is linked by the word "or" to the preceding words, "aboriginal, treaty or . . . ", and the broad provision serves a grammatical and logical function analogous to the preceding words. All the words take colour from one another, and the principle of statutory interpretation points to "other rights" having a meaning analogous to "aboriginal rights" and "treaty rights", both of which have well developed meanings within the Court's jurisprudence.[128]

109. The *presumption against tautology*[129] also provides guidance. If the broad provision "other rights or freedoms that pertain to the aboriginal peoples of Canada" is interpreted to mean that *any* right granted to Aboriginal people – even by an ordinary agreement or a mere licence – is constitutionally protected under s. 25, then the words "aboriginal, treaty . . . " have no role to play in the section. This, however, would be contrary to the presumption against tautology, because it is presumed that a legislature avoids superfluous or meaningless words, and every word is presumed to have a role to play in advancing the legislative purpose. Again, this would point to "aboriginal rights" and "treaty rights" informing and controlling the meaning of the broad provision.

110. In addition to the principles of statutory interpretation, regard must also be had to the structure of the *Constitution Act, 1982*, of which the *Charter* is a part.

111. Part II of the *Constitution Act, 1982* is titled "Rights of the Aboriginal Peoples of Canada". Section 35, the primary provision in Part II, defines "aboriginal peoples of Canada" broadly to include "the Indian, Inuit and Métis peoples of Canada". The section recognizes and affirms the "existing aboriginal and treaty rights" of the Aboriginal peoples of Canada, but also

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[125] *Ibid*., paras. 20, 53.

[126] *Ibid*., para. 52, L'Heureux-Dubé J. on behalf of Gonthier, Iacobucci and Binnie, JJ.

[127] *McDiarmid Lumber Ltd*. v. *God's First Lake Nation*, [2006] 2 S.C.R. 846, paras. 30-35 [hereinafter *McDiarmid*] (the Court was interpreting the *Indian Act*).

[128] In addition, the non-exhaustive examples given in subsections (a) and (b) of s. 25 (the "Royal Proclamation of October 7, 1763" and "land claims agreements") are consistent with "other rights" having a meaning analogous to "aboriginal rights" and "treaty rights". The Royal Proclamation has been referred to as the "Indian Bill of Rights" analogous to the status of the *Magna Carta*: see *R.* v. *Marshall*; *R.* v. *Bernard*, [2005] 2 S.C.R. 220, para. 86 [hereinafter *Marshall*; *Bernard*]. Land claim agreements are a modern version of a treaty.

takes care to make clear that these rights include "rights that now exist by way of land claims agreements" and, significantly, such rights that "may be so acquired" in the future [emphasis added].

112. The structure of the *Constitution Act, 1982*, reflects an intention to grant constitutional status to existing Aboriginal rights which must meet the requirements of the *Van der Peet* test,[130] as well as existing and future treaty rights. It is submitted that these rights, and such rights that are of the same character and stature, or so closely connected and inextricably bound up with them, *so as to be reasonably considered of the same genus*, are the rights included under s. 25 of the *Charter* with the words "other rights and freedoms".

113. The correctness of this approach can be tested by considering the effect if s. 25 were interpreted to constitutionally protect *any* right granted to Aboriginal people, whether it be by ordinary statute, agreement or administrative act (such as the granting of a licence). This would raise even minor matters to the level of constitutionally protected right and create a "ratchet effect": the constitutional rights of Aboriginal people would expand at an exponential rate and, in so doing, thereby seriously curtail the legislative and regulatory powers of governments while, at the same time, progressively circumscribing the rights of other Canadians. This is not what the framers of the *Constitution Act, 1982* intended, and such an interpretation should be rejected by this Court.

114. Drawing upon above analysis, "other rights and freedoms" should possess some of the following characteristics:

(a) communal in nature; they do not attach to any particular individual, but rather to a group, the members of which can exercise the right[131]

(b) pertain to Aboriginals *qua* Aboriginals, particularly with regard to pre-contact culture[132]

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[129] *McDiarmid*, *supra*, note 128, paras. 36-37.
[130] *Van der Peet*, *supra*, note 107.
[131] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 115 [hereinafter *Delgamuukw*].
[132] *Van der Peet*, *supra*, note 107, para. 56.

(c) recognize the status of Aboriginals as original inhabitants of Canada, prior to the imposition of "Western" structures such as democracy or institutionalized commerce[133]

(d) recognize traditional Aboriginal norms and values, such as connection to land and community[134]

(e) the notion of "time immemorial" arises, again associated with the established pre-contact society; Aboriginal rights are long-held, treaties grant rights with a view to permanence; the Royal Proclamation recognized their pre-contact habitation of Canada; land claims agreements are made with a view to recognizing a pre-contact occupation of the land and use of its attendant resources[135]

(f) subject to a high degree of regard and protection; the Crown is held to a high standard of justification to limit an Aboriginal right, and rights and treaties are not easily revoked or changed; there is a clear and solemn intention of both parties to be bound[136]

(g) fact-specific and relate to the particular band, based on historical evidence and practices[137]

115. The impugned program possesses none of these characteristics.

116. First, there is nothing in the previously decided cases, or in the findings of the trial judge grounded in the evidence adduced in this case, to support the position that there exists an Aboriginal right to fish *salmon* for *commercial* purposes. In particular, there is nothing to show that commercial fishing for salmon was: **(1)** "an element of a practice, custom or tradition integral to the distinctive culture" of the Musqueam, Burrard and Tsawwassen bands; **(2)** an activity that developed before "contact", and **(3)** "a central and defining feature" of their society.[138] Accordingly, they had no right to call upon the DFO to issue the licence to them.

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[133] *Ibid*., para. 73.
[134] *Delgamuukw*, *supra*, note 132, paras. 150-51.
[135] *Van der Peet*, *supra*, note 107, paras. 30, 37, 61; *ibid*., para. 84; *Marshall*; *Bernard*, *supra*, note 123, para. 86
[136] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1043-44 [hereinafter *Sioui*]; *Sparrow*, *supra*, note 117 at 1110, 1119.
[137] *Van der Peet*, *supra*, note 107, para. 69.
[138] See *ibid.*, paras. 45, 55, 60-62 & 73 (Aboriginal right to commercially fish salmon not established) and *N.T.C. Smokehouse*, *supra*, note 108 (to the same effect). Contrast *Gladstone*, *supra*, note 72.

117. Second, an Aboriginal treaty involves an exchange of "solemn promises"[139] and is characterized by "a certain measure of solemnity".[140] A treaty (now in modern parlance, a land claims agreement) is solemnly entered into with full understanding that mutually binding obligations with constitutional effect are being created. In contrast, the creation of a constitutionally binding document is not within the contemplation of the parties in the case of an ordinary agreement or mere licence.

118. Third, an Aboriginal right, such as title to land, should have the character of a communal right.[141] However, the character of a communal right is absent from the licence at issue in this case. The trial judge expressly held that the rights and benefits enjoyed under the licence in this case were not being enjoyed by the M/T bands but, rather, were accruing to *individuals* only.[142]

119. Fourth, a key objective of treaties and the negotiation of modern land claims agreements is the *reconciliation* of Aboriginal peoples and other Canadians.[143] To the extent that the program can be seen as a step in an attempt to further this long process of reconciliation, it operated in a manner that was completely inconsistent with the objective and, of even greater concern, did positive damage to the goal.[144] The program imposed a race based system of licensing on what, as found by the trial judge, had been a multi-cultural and integrated industry where Aboriginal commercial salmon fishers worked in large numbers, side-by-side, in harmony with other commercial salmon fishers. The commercial salmon fishery was inherently achieving the important goal of reconciliation to a greater extent probably than even the best designed government program. The impugned program, with its invidious distinctions, is tearing the fishery apart.

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[139] *Simon* v. *R.*, [1985] 2 S.C.R. 387 at 410.

[140] *Sioui*, *supra*, note 137 at 1044.

[141] See *e.g. Delgamuukw*, *supra*, note 132, para. 115 (land held under Aboriginal title is "held communally", and decisions with respect to the land are "made by that community").

[142] Trial Reasons, *supra*, note 4, paras. 200, 211. The appeal courts, however, stated that the M/T licence was communal and appeared to ignore the finding of the trial judge on this point: see *e.g.* S.C.B.C. Reasons, *supra*, note 8, para. 94; B.C.C.A. Reasons, *supra*, note 8, paras. 42, 151.

[143] *Mikisew Cree First Nation* v. *Canada*, [2005] 3 S.C.R. 388, para. 54 ("[t]reaty making is an important stage in the process of reconciliation").

[144] See *e.g.* S.C.B.C. Reasons, *supra*, note 8, paras. 119-21; B.C.C.A. Reasons, *supra*, note 8, paras. 110, 115.

120. It is also key that what was granted to the M/T was a licence – a time-limited *permission* – granted through the exercise of a ministerial discretion. The licence at issue was strictly controlled: a privilege granted subject to alteration in accordance with the terms of the agreement at the discretion of the Minister or his delegates. This is wholly inconsistent with the concept of a constitutionally protected right, incapable of being abrogated or derogated except in accordance with constitutional norms, of the sort that s. 25 was designed to protect.

121. The finding of Kirkpatrick, J.A. in the court below that the time-limited licence granted to the M/T came within s. 25 as an "other right or freedom that pertains to the aboriginal peoples of Canada" warranting constitutional protection,[145] is also inconsistent with the intention of the parties as recorded in the language of the May 15, 1995 fisheries agreement made between the DFO and the M/T pursuant to which the licence was granted. That agreement expressly acknowledged that the parties were *not* establishing Aboriginal or treaty rights by signing the document. The agreement stated in part:

> 1.(3) The Parties agree that this Agreement shall not serve to define or to limit aboriginal or treaty rights and is not intended to be, and shall not be interpreted to be, an agreement or treaty within the meaning of section 35 of the *Constitution Act, 1982*.
>
> 1.(4) The Parties recognize that this Agreement is the result of negotiations conducted within the context of current legislation, jurisprudence and government policy and, as such, does not constitute, and shall not be interpreted as, evidence of the nature or extent of aboriginal or treaty fishing rights and is made without prejudice to the positions taken by any Party with respect to aboriginal or treaty rights or title.[146]

122. The Crown in this case disavowed any Aboriginal rights justification under s. 25 of the *Charter* or s. 35[147] and only one of the seven judges below held that s. 25 afforded an answer to the Appellants' equality challenge.

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[145] B.C.C.A. Reasons, *ibid*., para. 152, Kirkpatrick J.A.

[146] Cited in Trial Reasons, *supra*, note 4, para. 56; copy of the agreement reproduced A.R. Vol. IX, Exh. 1, Tab A at 1490-91 [hereinafter Agreement].

[147] B.C.C.A. Reasons, *supra*, note 8, para. 99, Mackenzie J.A.

123. In summary, s. 25 has no application in this case because there are no constitutionally protected Aboriginal rights at issue.

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(5)

A JUDICIAL STAY OF PROCEEDINGS PURSUANT TO SECTION 24 OF THE *CHARTER* IS THE APPROPRIATE REMEDY

124. The appropriate remedy in this case is two-fold: first, a declaration under s. 52(1) of the *Constitution Act, 1982* that the impugned provisions are constitutionally invalid because they contravene s. 15(1) of the *Charter* on the basis of race and are not justified under s. 1 of the *Charter*; and second, a restoration of the stay of the proceedings against the Appellants granted by the trial judge under s. 24(1) of the *Charter*.

125. A finding by this Court that the impugned legislation discriminates on the basis of race contrary to s. 15(1) of the *Charter*, and is not saved under s. 1 of the *Charter*, justifies a declaration under s. 52(1) of the *Constitution Act, 1982* to this effect.

126. Even if such a declaration is issued, however, the convictions of the Appellants would still stand. The Appellants were charged under s. 78 of the *Fisheries Act* for fishing in Area "E" during a time when commercial salmon fishing was closed to everyone except those authorized to fish under the M/T communal fishing licence. If the M/T communal fishing license is declared invalid, this would not legalize the Appellants' activity. A restoration of the judicial stay of proceedings ordered by the trial judge under s. 24(1) of the *Charter* is therefore also required.

127. Section 24(1) of the *Charter* provides:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

128. The trial judge found that the Appellants were participating in a protest fishery with the intention of challenging the constitutionality of a race-based commercial fishery. He

ultimately concluded: "The only remedy that deals with that issue and effectively condemns the program is a judicial stay of proceedings, which I accordingly enter on this information."[148]

129. As this Court noted in *Canada (Minister of Citizenship and Immigration)* v. *Tobiass*: "A stay of proceedings is a discretionary remedy. Accordingly, an appellate court may not lightly interfere with a trial judge's decision to grant or not to grant a stay."[149]

130. Apart from the deference that must be afforded to the trial judge's determination that a stay of proceedings is an appropriate remedy, this conclusion is the only one that does justice in this case.

131. A stay of proceedings is typically granted to remedy some type of unfairness that has resulted from state misconduct in relation to the conduct of the trial, usually involving procedural rights enumerated in the *Charter*.[150] There is also a residual category of cases where a stay is granted to address "the panoply of diverse and sometimes unforeseeable circumstances" that can cause a criminal prosecution or conviction to damage the integrity of the judicial system.[151]

132. To fall under this residual category two criteria must be met:

> (i) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (ii) no other remedy is reasonably capable of removing that prejudice.[152]

133. Both of these criteria are satisfied in this instance.

134. In short, and quoting from this Court's *per curiam* decision in *Tobiass*, if left to stand the criminal conviction of the Appellants for their actions in bringing a racially

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[148] Trial Reasons, *supra*, note 4, para. 220.
[149] [1997] 3 S.C.R. 391.
[150] *Ibid*., para. 89.
[151] *Ibid*.

discriminatory government-sponsored program before the courts would "continue to trouble the parties and the community as a whole in the future."[153]

135. The outcome of this case should be more than just words on a page. It should result in more than simply the development of Canadian constitutional law. It should have a real effect on the lives of those who are at the heart of the case. The impugned program caused deep divisions within the once racially harmonious British Columbia commercial fishery. The decision in this case should be the first step towards the reunification of the groups that were racially segregated by the M/T fishery, and the healing of the wounds that this ill-conceived program has caused the British Columbia commercial fishery as a whole. A judicial stay of proceedings is necessary to achieve this goal.

PART IV - COSTS

136. No order as to costs is sought.

PART V - NATURE OF THE ORDER SOUGHT

137. The Appellants seek:

(a) an Order allowing this appeal, setting aside the Appellants' convictions and restoring the Order of the Trial Court; and

(b) a declaration that ss. 5(1)(*l*) and 6 (now repealed) of the *Aboriginal Communal Fishing Licenses Regulations,* SOR/93-332, as amended, s. 35(2) of the *Fishery (General) Regulations*, SOR/93-53, as amended, and Licence No. FRD-98-CL278/MBT, to the extent that they permit fishing salmon for the purpose of sale, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* and are of no force and effect by virtue of s. 52 of the *Constitution Act, 1982*.

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[152] *Ibid*., para. 90.
[153] *Ibid*., para. 91.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

_____
Bryan Finlay, Q.C.

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J. Gregory Richards

_____
Paul Guy

Of Counsel for the Appellants

APPENDIX I

(see para. 33 of this Factum)

M/T and Area E Vessel Catch Comparison								
Year	**M/T Food (not incl.)[a]**	**M/T Commercial Catch**	**No. of M/T Vessels**	**Catch per M/T Vessel[b]**	**Area E Catch**	**Number of Area E Vessels**	**Catch per Area E Vessel[c]**	**M/T Vessel Total Catch[d]**
1993	3,849*	136,062	78	**1,744**	2,630,000	1,400	**1,879**	**3,623**
1994	915	140,284	80	**1,753**	1,298,000	1,400	**928**	**2,681**
1995	171	131,543	80	**1,644**	186,000	1,400	**133**	**1,777**
1996	8,196	85,895	80	**1,073**	708,000	650	**1,090**	**2,163**
1997	-	197,680	80	**2,471**	1,315,000	650	**2,023**	**4,494**
1998	41,432	57,892	80	**723**	268,000	400	**670**	**1,393**
1999	23,967	-	80	**"food" only**	1,000	400	**3**	**3**
2000	77,166	22,762	80	**284**	418,000	400	**1,045**	**1,329**
2001	29,873	70,777	80	**884**	-	400	**-**	**884**
Total				**10,576**			**7,771**	**18,347**

*Units are number of sockeye. Figures for M/T catches are rounded down; figures for Area E catches are rounded up. This provides the fairest analysis for the M/T.

a. This number represents the sockeye caught under the M/T food fishery, under licences that do not have a commercial sale provision. It is not included in the commercial calculations.

b. This number is arrived at by dividing the M/T Commercial Catch by the number of M/T Vessels.

c. This number is arrived at by dividing the Area E Commercial Catch by the number of Vessels in Area E.

d. This figure is arrived at by adding the catch per vessel from the M/T commercial fishery to the catch per vessel of the Area E commercial fishery. It represents an approximate average catch per vessel of an M/T Band member who fishes in both the M/T commercial fishery and the Area E commercial fishery. The Musqueam fishery fleet contains vessels that fish in both the M/T fishery and the Area E commercial fishery. See Reasons for Judgment of Kitchen P.C.J., Provincial Court of British Columbia (28 July 2003), A.R. Vol. I, 2ff, para. 165: " . . . many of the Aboriginal fishers involved in the pilot sales have commercial licences, so that they are able to fish both openings."

Data Sources:

(1) M/T Food and Commercial Statistics from "Musqueam V.S. Tsawwassen Historic Salmon Catches 2001-1993" (undated), A.R. Vol. XII, Exh. 18, Tab 89 at 2120.

(2) Area "E" Catch Statistics from Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1993 Fraser River Sockeye and Pink Salmon Fishing Season* (August 1996), A.R. Vol. XI, Exh. 5, Tab 33 at 1931; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1994 Fraser River Sockeye and Pink Salmon Fishing Season* (December 1997), A.R. Vol. XI, Exh. 5, Tab 34 at 1935; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1995 Fraser River Sockeye and Pink Salmon Fishing Season* (March 1998), A.R. Vol. XI, Exh. 5, Tab 35 at 1939; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1996 Fraser River Sockeye and Pink Salmon Fishing Season* (April 1999), A.R. Vol. XI, Exh. 5, Tab 36 at 1944; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1997 Fraser River Sockeye and Pink Salmon Fishing Season* (March 1999), A.R. Vol. XI, Exh. 5, Tab 37 at 1947; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1998 Fraser River Sockeye and Pink Salmon Fishing Season* (August 2000), A.R. Vol. XI, Exh. 5, Tab 38 at 1957; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 1999 Fraser River Sockeye and Pink Salmon Fishing Season* (March 2001), A.R. Vol. XII, Exh. 19, Tab 6 at 2248; Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 2000 Fraser River Sockeye and Pink Salmon Fishing Season* (undated excerpt), A.R. Vol. XV, Exh. 66, Tab 11 at 2702; Pacific Salmon Commission, "2001 Fraser River Panel Sockeye Review" (undated), A.R. Vol. XII, Exh. 19, Tab 7 at 2251. See also Cross Examination of J. Ionson (18 October 2002), A.R. Vol. IV, at 620, ls. 21-25.

(3) Number of M/T Vessels and Area "E" Vessels from Examination in Chief of J. Redekopp (7 October 2002), A.R. Vol. II, at 263, l. 40; Cross Examination of J. Redekopp (8 October 2002), A.R. Vol. II, at 320, ls. 33-34; Cross Examination of J. Ionson (18 October 2002), A.R. Vol. IV, at 607, ls. 43-47; Memorandum of Department of Fisheries and Oceans (25 November 1998), A.R. Vol. XII, Exh. 19, Tab 5 at 2239. The numbers of M/T Vessels are approximations based on the Memorandum of DFO and the Crown witnesses' testimony cited above. The number of Area E vessels are also approximations based on the testimony as cited above.

APPENDIX II: Comparison of Treatment under Licencing Schemes

(*see para. 58 of this Factum)*

	General Commercial Fishery	**M/T Commercial Fishery**
Gillnet Licencing Cost	Market value of vessel licence to enter general commercial gillnet fishery for salmon in Lower Fraser River $150,000 in 1996[154]	M/T Fishers do not need to purchase a vessel licence, but need only receive a designation from the Band[155]
Vessel Licencing Cost	Must pay DFO an annual vessel fee of $430 to $710 (although Aboriginal registered vessels in this fishery pay a lesser fee)[156]	M/T Fishers do not need DFO vessel licences[157]
Personal Licencing Cost	Must pay DFO an annual personal licence fee of $60[158]	M/T do not need DFO licences
Monitors	Required to accept an independent DFO-designated monitor on vessel[159]	Aboriginal Officers and Monitors appointed by Band itself; M/T not required to have a monitor on vessel[160]
Committed Allocation	There is no commitment to deliver a portion of the catch to the general commercial fishery	The Agreement creates a commitment to deliver an allocation of fish to the M/T[161]
Priority	General commercial fishery has no priority over another fishery	M/T Fishery takes priority over the general commercial fishery[162]
Commitment to Issue Licence	The DFO will not commit to issuing a licence to anyone and guards its discretion	Commitment in the Agreement to issue licences for the term of the agreement[163]
Duty to Consult	No obligation to consult	Obligation to consult with the M/T and the parties regularly engage in such consultation[164]
Triggering Event	A fishery in the Fraser River is triggered only by the DFO issuing a variation order for the particular area	An M/T fishery is triggered whenever DFO authorizes a public commercial fishery for Fraser sockeye anywhere on the Coast[165]

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[154] Ionson, *supra*, note 22 at 598, ls. 39-44 [hereinafter Ionson].

[155] Agreement, *supra*, note 7 at 1505-06, Schedule B-1,ss. 5(1), 6(1)

[156] *Pacific Fishery Regulations, 1993*, SOR./93-54, s. 19; Sched. II, Part I: Fees for Registrations and Licences, Item 3 [hereinafter *Pacific Fishery Regulations*].

[157] Agreement, *supra*, note 7 at 1507, 6(7); Ionson, *supra*, note 22 at 566, ls. 5-32.

[158] *Pacific Fishery Regulations*, *supra*, note 152, Sched. II, Part I: Fees for Registrations and Licences, Item 1.

[159] *Fishery (General) Regulations*, SOR./93-53, s. 39

[160] Agreement, *supra*, note 7 at 1514, Appendix II to Schedule B-1.

[161] Ionson, *supra*, note 22 at 625, ls. 5-38.

[162] *Ibid*. at 627, ls. 7-25.

[163] *Ibid*. at 633, l. 3 to 634, l. 3.

[164] *Ibid*. at 628, ls. 10-27 & 631, ls. 24-42.

[165] Examination in Chief of M. Forrest, A.R. Vol. V, at 912, l. 15 – 913, l. 2; Examination in Chief of R. Rezansoff, A.R. Vol. VI, at 1104, ls. 17-36.

APPENDIX III

(see para. 85 of this Factum)

Approximate Aboriginal Harvest of Fraser River Sockeye if the Impugned Program Were Applied to the Entire Fraser River Aboriginal Population

NB: This is by way of example, taking one year only for which we had complete data. These numbers would vary each year, depending on sockeye run size.

	1	2	3	**4**	5	6	7	8	**9**
Year	Total Run Size	Total Number of Fish that Arrive on the Spawning Grounds	Total Catch of Fraser River Sockeye in Canadian Waters	**Total Commercial Catch of Fraser River Sockeye in Canadian Waters**	Total M/T Catch	Number of M/T Persons	Sockeye per M/T Person[a]	Number of Aboriginal Persons on the Fraser River	**M/T Catch Expanded[b]**
2000	5,217,000*	2,354,000	1,872,000	**955,000**	99,928	1,283	77	30,000	**2,310,000**

a. This figure is arrived at by dividing the total M/T catch by the number of M/T persons.
b. This figure is arrived at by multiplying the number of sockeye per M/T person caught in the M/T fishery by the approximate number of Aboriginal persons on the Fraser River. This figure represents the number of sockeye that would be caught in an Aboriginal commercial fishery if all Aboriginal bands on the Fraser River were granted a licence such as that granted to the M/T.

*Units are number of sockeye

Data Sources:

Total Run Size, Total Number of Fish that Arrive on the Spawning Grounds, Total Catch of Fraser River Sockeye in Canadian Waters and Total Commercial Catch of Fraser River Sockeye in Canadian Commercial Waters were reported in Pacific Salmon Commission, *Report of the Fraser River Panel to the Pacific Salmon Commission on the 2000 Fraser River Sockeye and Pink Salmon Fishing Season* (undated), A.R. Vol. XV, Exh. 66, Tab 11 at 2702.

Total M/T Catch was reported in "Musqueam V.S. Tsawwassen Historic Salmon Catches 2001-1993" (undated), A.R. Vol. XII, Exh. 18, Tab 89 at 2120.

Number of M/T Persons was reported in Department of Indian Affairs and Northern Development, *Registered Indian Population by Sex and Residence 2000* (Ottawa: Department of Indian Affairs and Northern Development, 2001), A.R. Vol. XVI, Exh. 7, Tab 53 at 2833-34.

Number of Aboriginal Persons on the Fraser River is approximate number provided by Crown witness James Ionson at A.R. Vol. IV, at 618, ls. 1-7.

See also Mackenzie J.A., B.C.C.A. Reasons, *supra*, note 8, para. 115.

PART VI – TABLE OF AUTHORITIES

Constitution Act, 1982

PART I
CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Equality Rights

Equality before and under law and equal protection and benefit of law

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.

Affirmative action programs

(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.

PARTIE I
CHARTE CANADIENNE DES DROITS ET LIBERTÉS

Garantie des droits et libertés

Droits et libertés au Canada

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

Droits à l'égalité

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Programmes de promotion sociale

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

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.

Recours

Recours en cas d'atteinte aux droits et libertés

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances

Irrecevabilité d'éléments de preuve qui risqueraient de déconsidérer l'administration de la justice

(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.

Dispositions générales

Maintien des droits et libertés des autochtones

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.

PART II
RIGHTS OF THE ABORIGINAL PEOPLES IN CANADA

Recognitions of existing aboriginal treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

PARTIE II
DROITS DES PEUPLES AUTOCHTONES DU CANADA

Confirmation des droits existants des peuples autochthons

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés

Définition de « peuples autochtones du Canada »

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

Accords sur des revendications territoriales

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

Égalité de garantie des droits pour les deux sexes

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.

PART VII GENERAL

Primacy of Constitution of Canada

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Constitution of Canada

(2) The Constitution of Canada includes

(a) the *Canada Act 1982*, including this Act;

(b) the Acts and orders referred to in the schedule; and

(c) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

PARTIE VII
DISPOSITIONS GÉNÉRALES

Primauté de la Constitution du Canada

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Constitution du Canada

(2) La Constitution du Canada comprend:

(a) la *Loi de 1982 sur le Canada*, y compris la présente loi;

(b) les textes législatifs et les décrets figurant à l'annexe;

(c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*).

Modification

(3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

VI. DISTRIBUTION OF LEGISLATIVE POWERS

Power of Parliament

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

12. Sea Coast and Inland Fisheries.

...

24. Indians, and Lands reserved for the Indians.

VI. DISTRIBUTION DES POUVOIRS LÉGISLATIFS

Pouvoirs du Parlement

Autorité législative du parliament du Canada

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

...

12. Les pêcheries des côtes de la mer et de l'intérieur.

...

24. Les Indiens et les terres réservées pour les Indiens.

Aboriginal Communal Fishing Licences Regulations

SOR/93-332

Communal Licences

4. The Minister may issue a communal licence to an aboriginal organization to carry on fishing and related activities.

5. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition set out in paragraph 22(1)(*b*) to (z.1) of the *Fishery (General) Regulations* and any condition respecting any of the following matters, without restricting the generality of the foregoing:

(*a*) the species and quantities of fish that are permitted to be taken or transported;

(*b*) the method of designation of persons and vessels, when and the method by which the licence holder is to notify the Minister of designations, the documents that constitute proof of designation, when, under what circumstances and to whom proof of designation must be produced, and the documents or information that designated persons and vessels must carry when carrying on fishing and related activities;

(*c*) the method to be used to mark and identify vessels and fishing gear;

(*d*) the locations and times at which landing of fish is permitted;

(*e*) the method to be used for landing of fish and the method by which the weight of the fish is to be determined;

(*f*) information that the master of a designated vessel is to report to the Minister or a person specified by the licence holder, prior to commencement of fishing, with respect to where and when fishing will be carried on, including the method by which, the times at which and the person to whom the report is to be made;

(*g*) the locations and times of inspections of the contents of the hold and the procedure to be used in conducting those inspections;

(*h*) the maximum number of persons or vessels that may be designated to carry on fishing and related activities;

(*i*) the maximum number of designated persons who may fish at any one time;

(*j*) the type, size and quantity of fishing gear that may be used by a designated person;

(*k*) the circumstances under which fish are to be marked for scientific or administrative purposes; and

(*l*) the disposition of fish caught under the authority of the licence.

(2) A designation referred to in paragraph (1)(*b*) shall be in writing.

6. In the event of any inconsistency, in respect of fishing and related activities carried on in accordance with a licence, between the conditions of the licence and any other regulations made under the *Fisheries Act*, the conditions of the licence prevail to the extent of the inconsistency.

Permis communautaires

4. Le ministre peut délivrer un permis communautaire à une organisation autochtone en vue de l'autoriser à pratiquer la pêche et toute activité connexe.

5. (1) Afin d'assurer une gestion et une surveillance judicieuses des pêches et de voir à la conservation et à la protection du poisson, le ministre peut, sur un permis, indiquer notamment toute condition mentionnée aux alinéas 22(1)*b*) à z.1) du *Règlement de pêche (dispositions générales)* et toute condition concernant ce qui suit :

a) les espèces et quantités de poissons qui peuvent être prises ou transportées;

b) le mode de désignation des personnes et des bateaux, à quel moment et par quel moyen le titulaire du permis avise le ministre des désignations, les documents attestant la désignation, à quel moment, dans quelles circonstances et à qui les attestations de désignation doivent être produites, et les documents ou les renseignements que les personnes ou les bateaux désignés doivent respectivement avoir sur elles ou à bord lorsqu'ils pratiquent la pêche et toute activité connexe;

c) la méthode de marquage et d'identification des bateaux et des engins de pêche;

d) les endroits et les moments où le poisson peut être débarqué ou amené à terre;

e) la méthode à utiliser pour débarquer ou amener à terre le poisson et celle pour en déterminer le poids;

f) les renseignements que le capitaine d'un bateau désigné doit, avant le début de la pêche, transmettre au ministre ou la personne indiquée par le titulaire du permis quant aux endroits et aux moments où la pêche sera pratiquée, ainsi que le mode et les moments de leur transmission et leur destinataire;

g) les endroits et les moments des inspections du contenu de la cale et la procédure à suivre lors de celles-ci;

h) le nombre maximal de personnes ou de bateaux qui peuvent être désignés pour pratiquer la pêche et toute activité connexe;

i) le nombre maximal de personnes désignées qui peuvent pêcher en même temps;

j) le type, la grosseur et la quantité des engins de pêche que toute personne désignée peut utiliser;

k) les circonstances dans lesquelles le poisson peut être marqué à des fins scientifiques ou administratives;

l) l'aliénation du poisson pris en vertu du permis.

(2) La désignation visée à l'alinéa (1)*b*) se fait par écrit.

6. Les conditions de tout permis l'emportent sur les dispositions incompatibles des autres règlements d'application de la *Loi sur les pêches* en ce qui concerne la pêche et toute activité connexe autorisées par ce permis.

SOR/94-390

3. (1) The portion of subsection 5(1) of the Regulations before paragraph (*a*) is replaced by the following:

5. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition respecting any of the matters set out in paragraphs 22(1)(*b*) to (*z*.1) of the *Fishery (General) Regulations* and any condition respecting any of the following matters, without restricting the generality of the foregoing:

(2) Paragraphs 5(1)(*e*) and (*f*) of the Regulations are replaced by the following:

(*e*) the method to be used for the landing of fish and the methods by which the quantity of the fish is to be determined;

(*f*) the information that a designated person or the master of a designated vessel is to report to the Minister or a person specified by the licence holder, prior to commencement of fishing, with respect to where and when fishing will be carried on, including the method by which, the times at which and the person to whom the report is to be made;

3. (1) Le passage du paragraphe 5(1) du même règlement précédant l'alinéa *a*) est remplacé par ce qui suit :

5. (1) Afin d'assurer une gestion et une surveillance judicieuses des pêches et de voir à la conservation et à la protection du poisson, le ministre peut, sur un permis, indiquer notamment toute condition relative aux points visés aux alinéas 22(1)*b*) à *z*.1) du *Règlement de pêche (dispositions générales)* et toute condition concernant ce qui suit :

(2) Les alinéas 5(1)*e*) et *f*) du même règlement sont remplacés par ce qui suit :

e) la méthode à utiliser pour débarquer le poisson et les méthodes pour en déterminer la quantité;

f) les renseignements que la personne désignée ou le capitaine du bateau désigné doit, avant le début de la pêche, transmettre au ministre ou à la personne indiquée par le titulaire du permis quant aux endroits et aux moments où la pêche sera pratiquée, ainsi que le mode et les moments de transmission et leur destinataire;

SOR/2002-225

14. Sections 6 of the Regulations is repealed.

14. L'article 6 du même règlement est abrogé.

Fishery (General) Regulations

SOR/93-53

Sale of Fish

35. (1) This section does not apply in respect of marine mammals.

(2) Subject to subsection (3), no person shall buy, sell, trade, barter or offer to buy, sell, trade or barter any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing, a licence issued under Part VII or an Excess Salmon to Spawning Requirement Licence issued under the *Pacific Fishery Regulations, 1993*.

(3) Subsection (2) does not apply if the buying, selling, trading or bartering is carried out in accordance with the terms of the Agreement defined in section 2 of the *Western Arctic (Inuvialuit) Claims Settlement Act* or the Agreement defined in section 2 of the *James Bay and Northern Quebec Native Claims Settlement Act*.

Vente de poissons

35. (1) Le présent article ne s'applique pas aux mammifères marins.

(2) Sous réserve du paragraphe (3), il est interdit d'acheter, de vendre, d'échanger, de troquer, d'offrir d'acheter ou d'offrir pour la vente, l'échange ou le troc des poissons à moins qu'ils aient été pris et gardés en vertu d'un permis délivré à des fins de pêche commerciale, d'un permis délivré en vertu de la partie VII ou d'un permis de pêche du saumon en surplus des besoins en géniteurs délivré en vertu du *Règlement de pêche du Pacifique (1993)*.

(3) Le paragraphe (2) ne s'applique pas si l'achat, la vente, l'échange ou le troc est effectué conformément à la convention définie à l'article 2 de la *Loi sur le règlement des revendications des Inuvialuit de la région ouest de l'Arctique* ou la convention définie à l'article 2 de la *Loi sur le règlement des revendications des autochtones de la Baie James et du Nord québécois*.

SOR/93-333

5. Subsection 35(2) of the said Regulations is revoked and the following substituted therefor:

"(2) Subject to subsection (3), no person shall buy, sell, trade, barter or offer to buy, sell, trade or barter any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing, a licence issued under Part VII, a licence issued under the *Aboriginal Communal Fishing Licences Regulations* in which the Minister has authorized the sale of fish or an Excess Salmon to Spawning Requirement Licence issued under the *Pacific Fishery Regulations, 1993*."

5. Le paragraphe 35(2) du même règlement est abrogé et remplacé par ce qui suit :

«(2) Sous réserve du paragraphe (3), il est interdit d'acheter, de vendre, d'échanger, de troquer, d'offrir d'acheter ou d'offrir pour la vente, l'échange ou le troc des poissons à moins qu'ils n'aient été pris et gardés en vertu d'un permis délivré à des fins de pêche commerciale, d'un permis délivré aux termes de la partie VII, d'un permis délivré aux termes du *Règlement sur les permis de pêche communautaires des Autochtones* qui porte la mention que le ministre a autorisé la vente des poissons ou d'un permis de pêche du saumon en surplus des besoins en géniteurs délivré en vertu du *Règlement de pêche du Pacifique (1993)*.»