S.C.C. File No. 31603

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

BETWEEN:

JOHN MICHAEL KAPP, ROBERT AGRICOLA, WILLIAM ANDERSON, ALBERT ARMSTRONG, DALE ARMSTRONG, LLOYD JAMES ARMSTRONG, PASHA BERLAK, KENNETH AXELSON, MICHAEL BEMI, LEONARD BOTKIN, JOHN BRODIE, DARRIN CHUNG, DONALD CONNORS, BRUCE CROSBY, BARRY DOLBY, WAYNE ELLIS, WILLIAM GAUNT, GEORGE HORNE, HON VAN LAM, WILLIAM LESLIE SR., BOB M. MCDONALD, LEONA MCDONALD, STUART MCDONALD, RYAN MCEACHERN, WILLIAM MCISAAC, MELVIN (BUTCH) MITCHELL, RITCHIE MOORE, GALEN MURRAY, DENNIS NAKUTSURU, THEODORE NEEF, DAVID LUKE NELSON, PHUOC NGUYEN, NUNG DUC GIA NGUYEN, RICHARD NOMURA, VUI PHAN, ROBERT POWROZNIK, BRUCE PROBERT, LARRY SALMI, ANDY SASIDIAK, COLIN R. SMITH, DONNA SONNENBERG, DEN VAN TA, CEDRIC TOWERS, THANH S. TRA, GEORGE TUDOR, MERVIN TUDOR, DIEU TO VE, ALBERT WHITE, GARY WILLIAMSON JERRY A. WILLIAMSON, SPENCER J. WILLIAMSON, KENNY YOSHIKAWA, DOROTHY ZILCOSKY and ROBERT ZILCOSKY

Appellants
(Appellants)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

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PART I - STATEMENT OF FACTS

1. The Intervener accepts the Statement of Facts set out in the Respondent's Factum.

PART II - ISSUES ON APPEAL

2. Since the Appellants have abandoned their attack on the *vires* of the Pilot Sales Program, this Intervener agrees that the issues on the appeal are as follows:

i. whether the Pilot Sales Program violates s. 15(1) of the *Charter*;

ii. whether s. 15(2) applies to the impugned Program;

iii. if the Pilot Sales Program is found to violate s. 15(1) of the *Charter* whether the violation is justified by s. 1;

iv. whether s. 25 of the *Charter* applies to the impugned Program; and,

v. whether the judicial stay of proceedings granted by the trial judge was an appropriate remedy under s. 24(1) of the *Charter*.

PART III - ARGUMENT

(1) Claimants Suffer No Disadvantage

5. The test for impairment of human dignity is to be assessed from the perspective of a reasonable person (objective) but one who shares the attributes and circumstances of the claimant (subjective).[1] This test is appropriate for the assessment of disadvantage as well.[2]

6. A reasonable person sharing the attributes and circumstances of the claimants in this case would not conclude that the federal government's allocation of the salmon fishery amongst multiple groups of users resulted in a disadvantage or denial of benefit to the claimants. The claimants were given considerable opportunity to participate in a commercial fishery.

7. In assessing whether the claimants have suffered disadvantage, it is not appropriate to consider the Pilot Sale fishery in isolation. To do so would be to engage in a formalistic or mechanical analysis. As Low J.A. of the court below implies, it is necessary to consider not just the Pilot Sales fishery but the overall scheme by which the Minister allocated the resource among various user groups.[3] When this is done, it is clear that the claimants were not placed at a disadvantage.

8. As the Respondent states,[4] in 1998, the commercial fishery in Area "E" was allocated 21% of the commercial total allowable catch. The total commercial catch of sockeye salmon for that year was in excess of 1.2 million fish, of which Area "E" fishers caught 268,000. The Musqueam, Burrard and Tsawwassen Pilot Sale fishery amounted to only 57,892 fish, less than 5% of the total commercial catch. The catch statistics demonstrate that the claimants were not denied meaningful access to the commercial salmon fishery.

9. In *Auton* v. *B.C.(A.G.)*[5] it was stated by this Court that the medicare scheme in question does not promise that any Canadian will receive funding for all medically required treatment.

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[1] See *Canadian Foundation for Children, Youth and the Law* v. *Canada (Attorney General)* [2004] 1 S.C.R. 76 at para. 53.

[2] P. Hogg *Constitutional Law of Canada* (5th ed.) 2007 at 55-40.

[3] Reasons of Low J.A., Court of Appeal for British Columbia, A.R. Vol. I at p. 191, para. 81.

[4] Respondent's Factum at para. 79.

[5] [2004] 3 S.C.R. 657

All that is conferred is core funding for services provided by medical practitioners, with funding for non-core services left to the province's discretion. The Court went on to conclude that the benefit claimed in that case is not a benefit provided by law.[6] Similarly, in this case the fishery scheme at issue does not promise that all fishers will have exactly the same fishing license. The benefit claimed here, the right of the claimants to the same license as that provided to the First Nations under the Pilot Sales fishery, is not a benefit provided by law.

(2) In the Alternative if the Impugned Law Placed the Claimants at a Disadvantage by Denying Them a Benefit Due to Differential Treatment, the Law Does Not Discriminate.

10. If this Court concludes that the impugned law placed the claimants at a disadvantage by denying them a benefit due to differential treatment, then it is necessary to move to the third stage of the s. 15 inquiry. This stage asks whether a law discriminates in a substantive sense. The Intervener's position is that this law does not discriminate.

11. The purpose of s. 15 is set forth by Iacobucci J. in *Law* v. *Canada*:

> It may be said that the purpose of s. 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.[7]

12. To determine if there has been a violation of essential human dignity, this Court has established contextual factors that must be examined. The relevant point of view is that of the reasonable person, dispassionate and fully apprised of the circumstances as the claimant and possessed of similar traits as the claimant. As Iacobucci J. states:

> Although I stress that the inquiry into whether legislation demeans the claimant's dignity must be undertaken from the perspective of the claimant and from no other perspective, a court must be satisfied that the claimant's assertion that differential treatment imposed by legislation demeans his or her dignity is supported by an objective assessment of the situation. All of that individual's or that group's traits, history, and circumstances must be considered in evaluating

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[6] *Auton*, *supra* at para. 47.
[7] [1999] 1 S.C.R. 497 at para. 51.

> whether a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment has the effect of demeaning his or her dignity.[8]

13. The contextual factors, when considered together, will assist in determining whether substantive discrimination exists. The factors listed by the Court are: 1) pre-existing disadvantage, 2) correspondence with needs, capacity and circumstances, 3) ameliorative purpose or effect and 4) nature and scope of the interest affected.[9]

(i) No Pre-existing Disadvantage

14. As has been consistently recognized by this Court, probably the most compelling factor favouring a conclusion that differential treatment is truly discriminatory will be pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group.[10] The Appellants are not claiming any pre-existing disadvantage.[11] The impugned program does not reflect and reinforce existing inaccurate understandings of the merits, capabilities and worth of the claimant group and does not result in stigmatization of the claimant group.

(ii) The Pilot Sales Program Corresponds to the Needs, Capacity and Circumstances of Those It Affects

15. This factor requires that one examine the relationship between the grounds of the differential treatment and the nature of that treatment. It is claimed that a distinction is drawn on the basis of race. That may be so, but that must be qualified. The distinction relates not merely to race but also to the legal status of First Nations communities. Due to their unique legal status, members of First Nations communities possess needs, capacity or circumstances which distinguish them from other Canadians. In assessing the circumstances of the First Nations communities, it is important to bear in mind that the Pilot Sales Program, as part of the Aboriginal Fisheries Strategy, was simply one component of a much larger program of the Department. This larger program granted individuals such as those in the claimant group ample opportunity to fish. The Pilot Sales Program did however grant a limited commercial right to

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[8] *Law, supra* at para. 60.
[9] *Law, supra* at para. 88.
[10] *Law, supra* at para. 63.
[11] Appellants' Factum at para. 64.

fish to certain First Nations. This licensed right corresponded to the First Nations' circumstances for the reasons articulated by Brenner C.J.S.C. He stated:

> In my view the most fundamental correspondence between the A.F.S. and the needs, capacity and circumstances of aboriginal communities is that it facilitates a commercial component of aboriginal access to the fishery in a manner consistent with and respectful of the unique relationship between British Columbia aboriginal communities and the fishery.
>
> Since before contact aboriginal people in British Columbia have relied upon the fishery to sustain their communities....
>
> The A.F.S. represented an attempt to reconcile this unique relationship with the need for regulation of the fishery by providing for a separately regulated fishery respectful of and sensitive to traditional aboriginal values. This was achieved through the negotiation of such matters as co-management of the fishery, allocation of fish and other matters of importance to aboriginal groups. It also provided an opportunity for communal licencing, which is of particular and unique importance to aboriginal communities.
>
> The impugned P.S.P. went one step further in that it allowed the relevant aboriginal communities an opportunity to negotiate arrangements for the sale of fish caught under the communal licences. This aspect of the A.F.S. addresses the needs of those aboriginal communities by providing economic opportunity, training, jobs and participation in fisheries management. In addition, by being a separate fishery and as explained by Chief Sayers, the P.S.P. allows those members of the relevant communities who are unable to obtain commercial fishing licences and/or who do not have the physical capacity in the way of appropriate fishing equipment and vessels to nonetheless participate in the fruits of the fishery.[12]

16. In assessing the correspondence of the Pilot Sales Program to the circumstances of the First Nations, it is important to note that the Musqueam, Tsawwassen and Hupccasath First Nations, three of the communities that had pilot sales licenses, are among those claiming an aboriginal right to fish commercially.[13] A government is entitled to be proactive in addressing a claimed right.

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[12] Reasons of Brenner C.J.S.C. A.R. Vol. I., p. 132, at paras. 91-94.

[13] Respondent's Factum at para. 17.

17. One of the objectives of the Pilot Sales Program was to test a sales component for possible inclusion in treaties.[14] This will help fulfill an important responsibility of the federal government, which is to negotiate treaties with the aboriginal peoples of Canada.

(iii) Ameliorative Purpose or Effect

18. The Pilot Sales Program has an ameliorative purpose. This is to provide economic opportunities in First Nations communities by increasing First Nation participation in the fishery, creating new jobs and training and generating revenue.[15] First Nations peoples are a disadvantaged group within Canadian society.[16] The Pilot Sales Program addressed the disadvantages that the First Nations experienced and "participation in what is now widely regarded as a legitimate economic activity has increased the sense of self-esteem." [17]

19. As Iacobucci J. states in *Law*:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.[18]

The Pilot Sales Program responds to the different circumstances of the First Nations communities.

20. In assessing the rational connection between the Pilot Sales Program and the disadvantage experienced by the affected First Nations, the learned trial judge applied a standard that was too high. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required.[19]

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[14] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 116, at para. 53.
[15] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 136 at para. 99.
[16] See Respondent's Factum at para. 38-40. See also: *Lovelace* v. *Ontario,* [2000] 1 S.C.R. 950 at para. 69.
[17] See Respondent's Factum at paras. 41-46.
[18] *Law*, supra at para. 72.
[19] *Gosselin* v. *Quebec (Attorney General)* (2002) 4 S.C.R. 429 at para. 55.

(iv) Nature of Interest Affected

21. This factor involves an examination of the seriousness or severity of the consequences of the legislation or program for the claimant group. Here, the consequences were extremely limited. The catch statistics reveal that the impact was modest.[20]

(3) The Relationship Between Sections 15(1) and 15(2) of the *Charter*

22. Section 15(2) is confirmatory and supplementary to s. 15(1).[21] Section 15(2) makes clear that an ameliorative program like the Aboriginal Fisheries Strategy and Pilot Sales Program is contemplated by s. 15(1) and does not violate it, at least here where the other contextual factors in the analysis point to there being no violation. Section 15(2) acts as an interpretive aid to s. 15(1).

(4) If it is Held that s. 15(1) is Breached, the Breach is Justified Under Section 1

23. This Intervener relies on the submissions of the Respondent on this issue.[22]

(5) Section 25 is Not Engaged in This Case

24. Section 25 is only engaged in the event it is first concluded that there is an unjustified violation of a *Charter* right. Here there is no violation.

(6) The Appellants Are Not Entitled to a Remedy As They Have Brought a Collateral Constitutional Challenge to Another Law

25. A stay of proceedings is in no event a proper remedy in this case. The Appellants deliberately elected to violate a law which they are not challenging. They have done so in order to bring a collateral constitutional challenge to another law. They should not be entitled to obtain a stay of proceedings for such a challenge.

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[20] Respondent's Factum at paras. 32-35; Reasons of Low J.A.
[21] *Lovelace*, *supra* at para. 105.
[22] Respondent's Factum at paras. 112-126.

26. In the case of *R.* v. *Armstrong*, a case similar to this one, the trial judge properly concluded that a stay of proceedings is not an available remedy where accused persons deliberately violate a valid law so that they can bring a collateral attack on another provision.[23]

CONCLUSION

27. The Pilot Sales Program is a component of the Aboriginal Fisheries Strategy. When considered in context, it is clear that it does not violate s. 15 of the *Charter*. It has an ameliorative purpose and is consistent with the purposes of s. 15.

[23] *R.* v. *Armstrong,* [2007] B.C.J. No. 513 (B.C.P.C.) at paras. 93-94.

PART IV - SUBMISSIONS AS TO COSTS

28. The Intervener does not seek costs.

PART V - NATURE OF THE ORDER SOUGHT

29. The Intervener requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULL SUBMITTED.

DATED this 20 day of November, 2007.

Robert Normey

Robert Normey
Intervener,
The Attorney General of Alberta

PART VI - TABLE OF AUTHORITIES

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