

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF BRITISH COLUMBIA)

BETWEEN:

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**FACTUM
OF INTERVENER COWICHAN TRIBES**

Rule 42 of the Rules of the Supreme Court of Canada

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FACTUM OF INTERVENER COWICHAN TRIBES

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PART I - OVERVIEW OF POSITION OF COWICHAN TRIBES

A. OVERVIEW OF COWICHAN TRIBES' POSITION

1. The Intervener Cowichan Tribes ("Cowichan") focuses on the section 15(1) *Charter* analysis and, in particular, the third stage of the *Law* test. The Cowichan submit that when the impugned program, the Pilot Sales Program ("PSP"), is considered in light of contextual factors relating to the special position, rights and interests of coastal aboriginal peoples in Canada, it does not discriminate against the Appellants.
2. Fishing, for whatever purpose, is a defining cultural and economic activity for coastal First Nations and has been the subject of aboriginal rights as defined by this and other courts. Programs like the PSP augment the aboriginal rights doctrine as it relates to fishing and help achieve the doctrine's objective of providing cultural security through the maintenance of integral practices. The PSP enhances the culturally-defining activity of fishing by providing practical opportunities for aboriginal individuals to participate in fishing activities together with other members of their aboriginal communities. Greater community participation enables fishing to remain a culturally-defining activity in a modern form and helps provide cultural security to coastal First Nations.
3. The Cowichan submit that when viewed in light of its role in supporting the fundamental objective of aboriginal rights, as well as other contextual factors relating to the special position, rights and interests of aboriginal peoples, the PSP is not discriminatory within the meaning of s. 15(1).

B. POSITION ON THE FACTS

4. The Cowichan support the characterization of the facts by the Respondent at paragraphs 13- 17 of the Respondent's Factum. In particular, the Cowichan emphasize that there has been a significant decrease in the level of participation and success in the fishery by aboriginal people.

PART II - ISSUES

5. The Cowichan restrict their submissions to the first issue stated by the Appellants, that being whether the PSP violates section 15(1) of the *Charter of Rights and Freedoms*. In

particular, the Cowichan focus on the discrimination analysis of the *Law* test and do not address either differential treatment or enumerated or analogous grounds.

6. It is the position of the Cowichan that the PSP does not violate s. 15(1).

PART III - ARGUMENT

A. CONTEXTUAL APPROACH TO S. 15(1)

7. Section 15(1) of the *Charter of Rights and Freedoms* protects substantive equality. Thus, differential treatment will only be discriminatory if it violates essential human dignity.

Reference: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, paras. 39 and 51.

8. To determine whether differential treatment demeans a claimant's dignity, the court must "engage in a comparative analysis which takes into consideration the surrounding context of the claim and the claimant." This is to be done on a subjective/objective basis. Contrary to the Appellant's submission, this analysis must occur in every case, including the present one.

Reference: *Law, supra*, paras. 55 (emphasis added) and 59-61;
Appellants' Factum, paras. 1-2 and 59.

9. The Cowichan submit that in analyzing the context of the differential treatment accorded by the PSP, the Court must consider the unique position that aboriginal people have always held in Canadian society and, in particular, the objective of the doctrine of aboriginal rights to provide cultural security to First Nations.¹

¹ This contextual factor would fall within either the second (correspondence between the ground on which the claim is based and the need, capacity, or circumstances of the claimant) or third (ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society) factors identified in *Law*. However, as set out in *Law* (paras. 62- 75) and affirmed by McLachlin C.J.C. in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 at para. 29, the list of contextual factors outlined in *Law* are neither absolute nor exhaustive and they may overlap. Thus, it may not be necessary to fit the contextual factor advanced by this intervener into one of those categories.

B. SPECIAL POSITION OF FIRST NATIONS IN CANADIAN SOCIETY

10. A contextual analysis for a program like the PSP, which provides unique fishing opportunities to coastal First Nations in British Columbia, must consider the special position of aboriginal peoples in Canadian society.

11. In *R. v. Van der Peet*, Chief Justice Lamer described the distinctive status of aboriginal peoples in the following way:

[T]he doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status. (underlining in original)

Reference: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 30.

12. The Cowichan submit that the PSP affords opportunities that recognize and are consistent with the special position of aboriginal peoples in Canada, particularly in light of the interests, rights and reliance of coastal aboriginal peoples on the Pacific fishery.

13. Further, negotiated agreements under the PSP are consistent with the special relationship between aboriginal peoples and the Crown. In particular, they are in keeping with the duties and the honour of the Crown concomitant with this relationship. The PSP allows for negotiated accommodation, at least on an interim basis, where First Nations have unique rights or interests relating to the fishery. If prohibited from entering into such agreements, the Crown could not fulfill its duties in relation to coastal First Nations.

Reference: *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, paras. 17-20 and 25.

14. Fundamental to the unique position of aboriginal peoples in Canadian society is the doctrine of aboriginal rights which has as its objectives the reconciliation of pre-existing aboriginal societies with Crown sovereignty by providing cultural security and continuity to aboriginal communities. The Cowichan submit and will elaborate below that the PSP enhances

these objectives. The PSP provides “on the ground” support for the doctrine of aboriginal rights by fostering and promoting community involvement in fishing.

C. MAINTAINING FISHING SOCIETIES

1. Fishing Societies

15. This and other courts have frequently acknowledged the importance and very long history of First Nations participation in and reliance on fishing in British Columbia. This history begins long before contact with Europeans and continues to the present. The pre-contact reliance of aboriginal groups on fishing has been recognized in numerous cases, including *R. v. Sparrow*, [1990] 1 S.C.R. 1075 and *R. v. Gladstone*, [1996] 2 S.C.R. 723.

16. Fishing continued to be significant to aboriginal peoples throughout the colonial period and the early history of British Columbia. It factored significantly into the reserve creation process for coastal First Nations. In *Jack v. The Queen*, [1980] 1 S.C.R. 294, a case dealing with the fishing rights of this Intervener, Dickson J. (as he then was) noted, at page 308, that fishing stations were set aside for Indian reserve purposes to ensure the independent economic sustainability of aboriginal communities.² He further observed that:

It is extremely difficult to separate out the fishery from either Indians or the lands to be reserved for Indians.

Reference: *Jack v. The Queen*, *supra*, page 308.

17. In the present case, this long history of the significance of fishing to aboriginal communities was noted by Mr. Justice Low in the court below:

For thousands of years the aboriginal communities on the west coast of this country have relied heavily on fishing for survival. Fishing has also been an integral part of their culture.

Reference: Reasons for Judgment of Low J.A., B.C.C.A. (8 June 2006), para. 27; Appellants’ Record (“A.R.”) Vol. I, p. 172.

² Dickson J. was writing in dissent. The majority did not address this issue.

2. Canada's Regulation of the Fishery

18. The regulatory scheme that applies to the Pacific fishery was imposed on pre-existing aboriginal fisheries. For coastal First Nations, the regulation of the fishery was an acute manifestation of the assertion of Canadian sovereignty over their pre-existing aboriginal interests and cultures.³

19. In 1888, the first Canadian licencing scheme was applied to the west coast. The fishery was divided into different categories of licences. Of particular relevance to First Nations were the establishment of the Indian "food fishery" and the prohibition on Indians selling fish caught under a food fishing permit.

Reference: Reasons for Judgment of Kitchen Prov. Ct. J., B.C.Prov.Crt. (28 July 2003), para. 25; A.R. Vol. 1, p. 14;
Reasons for Judgment of Low J.A., B.C.C.A. (8 June 2006), para. 27; A.R. Vol. I, p. 172

20. First Nations were required to adapt to Canadian management of the fishery. Most continued to rely on fishing to support their communities and individual members successfully entered the commercial fishery.

Reference: *Jack v. The Queen, supra*, pp. 309- 310
Peter H. Pearce, *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, Ex. 2, Tab 1, p. 151; A.R. Vol. IX, p. 1684.

21. In his 1982 examination of the Pacific fishery, Dr. Peter Pearce observed the continuing importance of the fishery to aboriginal people in the new industrial society:

When the modern fishery developed in the last century, the Indians of the Pacific coast adapted to the new technology of fishing and canning much more readily and successfully than they adapted to other industries. The fisheries provided them with an opportunity to participate in the new industrial society, and for a great many, it was the only opportunity. As a result, Indians have held a particularly important place in the Pacific fisheries, and fisheries policy has been moulded, with mixed success, to accommodate their special needs.

Reference: Peter H. Pearce, *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, Ex. 2, Tab 1, p. 151; A.R. Vol. IX, p. 1684.

³ The onset and increase of Canadian regulation of the Pacific fishery, particularly as this regulation affected aboriginal peoples, were briefly reviewed in both *Jack v. The Queen, supra* at pp. 309- 310 and *R. v. Sparrow, supra* at pp. 1095- 1097.

22. Over the last few decades, participation in the fishery has become increasingly expensive. The Appellants note in their Factum (at paragraph 71) the significant investment that is required to participate in even the commercial gillnet salmon fishery. Participants in the aboriginal food, social and ceremonial fishery face similar costs, including boats, nets and other gear, engine maintenance, fuel and investments of time and labour but without the benefit of sales revenue.

23. In the face of high costs for fishing, participation in the commercial fishery by aboriginal people, who have had less ability to remain financially competitive in such an environment, has decreased significantly. Fishing capacity has been lost.

Reference: Peter H. Pearce, *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, Ex. 2, Tab 1, pp. 151-2; A.R. Vol. IX, pp. 1684-5.

24. The loss of capacity has also affected participation in the food, social and ceremonial fishery. In 2004, the Report of the First Nation Panel on Fisheries observed that some aboriginal fishing communities no longer have their people on the water and have resorted to contracting commercial vessels from elsewhere to supply food and ceremonial fish to their villages. This is also the experience of this Intervener.

Reference: First Nations Panel on Fisheries, *Our Place at the Table: First Nations in the B.C. Fishery* (Report of the First Nations Panel on Fisheries) (2004), p. 45⁴

3. Aboriginal Rights and Cultural Security

25. Recognition of distinct, pre-existing and rights-holding aboriginal societies is a foundation of Canadian society.⁵ This recognition was enhanced with the enactment of s. 35(1) of the *Constitution Act, 1982*. As Chief Justice Lamer observed in *Van der Peet* at para. 31:

...[W]hat s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the

⁴ The First Nations Panel on Fisheries was established with funding from the Government of Canada. It served as a parallel First Nation process to the Joint Task Group (Pearse and McRae) that was commissioned by the Governments of Canada and B.C. to report on a vision for post-treaty fisheries. The First Nations Panel was tasked with articulating a vision for future fisheries management and allocation. See *Our Place at the Table*, p. 5.

⁵ In *R. v. Sparrow*, Dickson C.J. and LaForest J. noted that British policy was based on respect for the right of aboriginal people to occupy their traditional territories (*R. v. Sparrow*, *supra*, p. 1103). In *R. v. Van der Peet*, Lamer C.J. affirmed that aboriginal rights existed and were recognized under the common law (*R. v. Van der Peet*, *supra*, para. 28). Other foundational examples of the distinct legal status of aboriginal peoples include the *Royal Proclamation, 1763* and section 91(24) of the *Constitution Act, 1867*.

sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

26. Section 35(1) recognizes and protects the right of aboriginal societies to continue to exist as such. In *R. v. Sappier; R. v. Gray*, this Court emphasized the importance of maintaining aboriginal societies:

Section 35 recognizes and affirms existing aboriginal and treaty rights in order **to assist in ensuring the continued existence of these particular aboriginal societies...** [An aboriginal right] is a right that assists the society in maintaining its distinctive character. (emphasis added)

Reference: *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54, para. 26.

27. The Court further noted that the object of the *Van der Peet* test is “to provide cultural security and continuity for the particular aboriginal society.”

Reference: *R. v. Sappier; R. v. Gray*, *supra*, para. 33.

28. Coastal First Nations, such as the Cowichan, find cultural security through the maintenance and continuation of fishing activities. As Dr. Pearce observed in his 1982 report:

Through all the dislocations and painful adjustments to “white” society, involvement in the fisheries has been essential for the Indians in maintaining their identity and self-respect.

Reference: Peter H. Pearce, *Turning the Tide: A New Policy for Canada's Pacific Fisheries*, Ex. 2, Tab 1, p. 151; A.R. Vol. IX, p. 1684.

4. Aboriginal Fishing Rights

29. The primary legal vehicle through which aboriginal communities are accorded cultural security is s. 35(1). Through aboriginal rights litigation, this and other courts have provided vital recognition and affirmation of aboriginal fishing rights, primarily for food, social and ceremonial purposes. Nonetheless, there remains considerable room and need to further develop the definition and implementation of aboriginal fishing rights to ensure that constitutional protection translates into cultural protection.

30. Specifically, the protection of food, social and ceremonial fishing rights (in cases such as *R. v. Sparrow*) is significant; yet that protection does not necessarily ensure that aboriginal communities have the capacity to maintain their fishing cultures.

31. Food, social and ceremonial fishing rights do not provide the ability to earn a return on fishing activities to finance investments in gear, boats, nets, fuel or time. With the decline of aboriginal participation in the commercial fishery, the opportunities for individual aboriginal community members to participate in fishing, even when constitutionally protected, are fewer. Thus, while aboriginal rights to fish for food, social and ceremonial purposes guarantee access to fish, they do not ensure survival of the activity of fishing at a community level or otherwise.⁶

5. PSP Invigorates Aboriginal Fishing Cultures

32. The Cowichan submit that government programs that provide for negotiated agreements for fishing rights and opportunities assist in advancing the fundamental objectives of the doctrine of aboriginal rights and in developing the legal principles of the doctrine. On-the-ground (or on-the-water) programs can augment court decisions and apply practical solutions that advance the objective of providing cultural security to First Nations. The PSP is such a program.

33. The PSP recognizes not only the historic interest and reliance on fishing for coastal First Nations in British Columbia, but also the contemporary relevance of the ability to earn a return on the investment of time and money into the fishing practice made by individual aboriginal community members.

34. The opportunity to earn a return on fishing makes the activity more viable for individual members of aboriginal communities and, as the facts of this case demonstrate, increases community participation:

- a) The Gardner Pinfold Report, a DFO-commissioned study of the PSP, found a marked increase in community participation in the fishery for PSP communities:

⁶ As the authors of "Fishing Around the Law" observed: "If fish on the dinner table, no matter how it got there, is the only protection of fishing rights that section 35 accords, it is a partial and inadequate protection." Walter, Emily, R. Michael M'Gonigle and Céleste McKay, "Fishing Around the Law: The Pacific Salmon Management System as a 'Structural Infringement' of Aboriginal Rights", (2000) 45 McGill L.J. 263, page 296.

On the positive side, the PSA [PSP] is beginning to generate economic opportunities for native communities that had been legally denied for a century. **The legalization of sales has broadened the base of involvement, with double the number of individuals earning incomes from fishing on the Fraser, the Skeena and in Alberni Inlet.** (emphasis added)

Reference: Gardner Pinfold Report, Ex. 4, Tab 16, p. v, Respondent's Record, p. 157.

- b) The Gardner Pinfold Report also observed broader positive impacts on the communities, including increased self-esteem.

Reference: Gardner Pinfold Report, Exh. 4, Tab 16, p. ii, Respondent's Record, p. 154.

- c) The Matkin Report, which was also commissioned by DFO, noted several First Nation representatives expressing both the importance of the PSP and that increased participation in the regular commercial fishery did not provide a viable alternative for aboriginal communities.

Reference: Matkin Report, Ex. 4, Tab 20, pp. 43- 44, A.R. Vol. X, pp. 1808-1809.

35. At the same time, under the PSP the aboriginal fishery remains fundamentally a communal one as participant First Nations are allocated a specified amount of fish that the community can harvest. It is the community that ultimately decides how that fish will be caught and by whom.

36. Ultimately, greater individual participation in aboriginal community fisheries, combined with community control over the fishery, invigorates fishing cultures of coastal First Nations.

37. Thus the PSP is an innovative program that makes fishing more viable for aboriginal communities. By permitting the sale of fish, the PSP supplements the aboriginal rights doctrine by providing the practical opportunity for individual aboriginal community members to meaningfully participate in the fundamental activity of fishing. By permitting the sale of fish, the PSP gives substance to the aboriginal rights doctrine, providing a real opportunity, as opposed to a theoretical right, for individuals to participate in community fishing.

38. In this regard, the PSP furthers the fundamental objective of providing cultural protection and continuity to aboriginal communities.

D. APPLICATION TO SECTION 15(1)

39. The section 15(1) analysis requires a broad contextual approach to determine whether there has been substantive discrimination. In the present case, the contextual approach necessitates consideration of the special position, rights and interests of aboriginal people in relation to the fishery as well as the objective of providing cultural security to aboriginal communities.

40. Considered in this context, the Cowichan submit that the PSP does not demean the Appellants' dignity and does not discriminate against them. Thus, no violation of section 15(1) should be found.

PART IV - COSTS

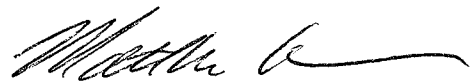
41. This Intervener seeks no order as to costs.

PART V - ORAL ARGUMENT AND OUTCOME

42. The Cowichan respectfully request permission to present oral argument at the hearing of the appeal.

43. The Cowichan respectfully submit that the appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



F. Matthew Kirchner



Lisa C. Glowacki

Counsel for the Intervener Cowichan Tribes.

Dated this 16th day of November, 2007.
North Vancouver, British Columbia

PART VI - TABLE OF AUTHORITIES

CASELAW	PARAGRAPH IN PART III
<i>Gosselin v. Quebec (Attorney General)</i> , [2002] 4 S.C.R. 429, 2002 SCC 84	Ftnt* 1
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 S.C.R. 511, 2004 SCC 73	13
<i>Jack v. The Queen</i> , [1980] 1 S.C.R. 294	16, 20 Ftnts 2 and 3,
<i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497	7, 8, Ftnt 1
<i>R. v. Gladstone</i> , [1996] 2 S.C.R. 723	15
<i>R. v. Sappier; R. v. Gray</i> , [2006] 2 S.C.R. 686, 2006 SCC 54	26, 27
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	15, Ftnts 3 and 5
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	11, 25, Ftnt 5
OTHER REFERENCES	
E. Walter, R. M. M'Gonigle and C. McKay, "Fishing Around the Law: The Pacific Salmon Management System as a 'Structural Infringement' of Aboriginal Rights" (2000) 45 McGill L.J. 263	Ftnt 6
First Nations Panel on Fisheries, <i>Our Place at the Table: First Nations in the B.C. Fishery</i> (Report of the First Nations Panel on Fisheries) (Vancouver, 2004)	24, Ftnt 4

*Footnote