

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

BETWEEN

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RESPONDENT (Respondent)

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. The Interveners Musqueam and Heiltsuk First Nations (“these Interveners”) agree with the Respondent, Her Majesty the Queen (“Crown”) that the appeal ought to be dismissed. However, these Interveners differ with the Crown’s analytical approach regarding the meaning and effect of s. 25 of the *Canadian Charter of Rights and Freedoms* (“Charter”) and the manner in which s. 25 applies in determining the constitutionality of the Pilot Sales Program. Accordingly, these Interveners will confine their submissions to the interpretation and application of s. 25.

2. These Interveners adopt generally the facts set out in paragraphs 5-63 of the Respondent’s Factum, along with the following distinctions and points of emphasis.

3. Musqueam asserts an aboriginal right to barter or sell salmon. The harvesting of salmon has always been an integral part of Musqueam’s society and economy. The Department of Fisheries and Oceans (“DFO”) added a sales component to Musqueam’s food fishery following Musqueam’s urging that the Aboriginal Fisheries Strategy (“AFS”) should include an economic dimension.

Appeal Record (“A.R.”), Vol. I, p. 220-221 (Reasons for Judgment of Kirkpatrick J.A. at paras. 144-145); *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1094 (See Respondents’ Authorities, Tab 33); A.R. Vol. III, p. 56 (J. Ionson, Oct. 17, 2002)

4. The Pilot Sales Program evolved out of Musqueam’s existing food fishery. Fish allocations to Musqueam, Burrard and Tsawwassen First Nations were based on their historical food fish catches in previous years’ harvests. While the allocation of fish under the then new Pilot Sales Program did not exceed the quantity of food fish allocated in previous years, the provision of a sales component was considered to be a step forward given that the aboriginal right to trade or sell fish had been denied.

A.R. Vol. I, p. 116 (Reasons of Brenner C.J.S.C. at para. 5); Respondent’s Record, p. 165; A.R. Vol. X, p. 1711-1712

5. The allocation of salmon under the Musqueam, Burrard and Tsawwassen AFS Fisheries Agreements has been very small compared with the commercial allocation.

Respondent's Factum, paras. 34, 79 -80

6. Following the implementation of the treaty process in British Columbia in the early 1990s, the BC Claims Task Force urged the implementation of "Interim Measures Agreements" to accommodate aboriginal fishing, pending the settlement of outstanding land claims. In June 1992, the Respondent described the AFS, in part, as follows:

Through the Comprehensive Claims Policy, the federal government is seeking to resolve issues of Aboriginal rights to lands and resources by negotiating modern treaties with Aboriginal societies which have not signed treaties and which may have continuing Aboriginal rights.

Part of this process involves negotiating Aboriginal fishing access and economic development through participation in fisheries management.

Fishing issues are of particular importance to claims negotiations in coastal areas.

Respondent's Record at p. 163; A.R. Vol. X, at p. 1759(a) – (b)

PART II: QUESTIONS IN ISSUE

7. In response to the Appellants' questions in issue, these Intervener's submit: (a) the Pilot Sales Program does not violate s. 15 of the *Charter*; (b) the question of whether a violation is justified under s. 1 of the *Charter* does not arise; (c) s. 25 of the *Charter* is relevant to the constitutional validity of the Program; and (d) the question of an appropriate constitutional remedy does not arise.

PART III: STATEMENT OF ARGUMENT

A. SECTION 25 OF THE *CHARTER*

(1) Applicability

8. The scope of the rights protected by s. 25 ("Section 25 Rights") is broader than the existing aboriginal and treaty rights protected by s. 35 of the *Constitution Act, 1982*. In addition to aboriginal and treaty rights, s. 25 also protects "other rights or freedoms" that pertain to aboriginal peoples. This aspect of s. 25 was noted by

L'Heureux-Dubé J. in *Corbiere v. Canada (Minister of Indian Affairs)*, [1999] 2 S.C.R. 203 at para. 52 (See Appellants' Authorities, Tab 5):

Section 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when relief requested under a *Charter* challenge could abrogate or derogate from "other rights or freedoms that pertain to the aboriginal peoples of Canada". This latter phrase indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights.

9. Clearly, s. 25 requires that the provisions of the *Charter* must not be interpreted in a manner which diminishes the protection accorded to aboriginal and treaty rights by s. 35 of the *Constitution Act, 1982*. The Appellants in effect so acknowledge (Appellants' Factum, at paragraphs 114-118, 123). However, Section 25 Rights are not limited to rights protected by s. 35. If they were, then s. 25 would merely state that in the event of a conflict between s. 35 and *Charter* rights, s. 35 rights would prevail.

10. In the submission of these Interveners, the purpose of s. 25 is to ensure that the individual rights guaranteed by the *Charter* do not diminish the unique rights of aboriginal peoples, recognized in law since at least the Royal Proclamation of 1763 ("Royal Proclamation"), which flow from the use and occupation of their traditional lands and resources. Section 25 Rights include, at very least, those legal and constitutional rights (such as those arising from Crown constitutional duties) which flow from reconciling the sovereignty of the Crown with the pre-existing aboriginal occupation of North America.

R. v. Van der Peet, [1996] 2 S.C.R. 672 at para. 31 (See Appellants' Authorities, Tab 24)

11. The Royal Proclamation has long been recognized as a source of a unique relationship between the Crown from which flow special duties owed by the Crown to First Nations. Dickson J. in *Guerin v. Canada* explained that the Crown's *sui generis* fiduciary obligation in respect of Indian lands was rooted in the assertion of sovereignty over aboriginal lands and was acknowledged in the Royal Proclamation. Thus, the principles of the honour of the Crown, fair dealing and protection from exploitation, which have been consistently recognized by this Court as underlying both s. 35 of the

Constitution Act, 1982 and the Crown-aboriginal relationship generally, can be traced back to the fiduciary obligation formally acknowledged in the Royal Proclamation and affirmed by this Court in *Guerin*.

Guerin v. Canada, [1984] 2 S.C.R. 335 at 383-388 (Authorities, Tab 2); *R. v. Sparrow*, *supra*, at 1108 (Authorities, Tab 7); *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 at para. 9 (Authorities, Tab 5); *Wewaykum Indian Band v. Wewaiikai Indian Band*, [2002] 4 S.C.R. 245, 2002 SCC 76 at paras. 78-80 (Authorities, Tab 9); *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, at paras. 16-27 (Authorities, Tab 3)

12. The unique Crown-aboriginal relationship recognized in the Royal Proclamation is the source of many of the underlying principles governing the interpretation of the Constitution, and in particular s. 35 of the *Constitution Act, 1982*. Notably, however, the Proclamation itself is not one of the documents incorporated in the Constitution of Canada by virtue of s. 52(2) of the *Constitution Act, 1982*. Thus, the reference in s. 25 of the *Charter* to rights arising under the Proclamation confirms that “other rights and freedoms” within the meaning of s. 25 of the *Charter*, are not limited to rights and freedoms that are “constitutional” in the sense of being expressly protected by the written text of the Constitution.

13. The unique Crown-aboriginal relationship flowing from prior aboriginal occupation is also the basis of other common law and statutory rights which apply uniquely to aboriginal peoples and which, in the submissions of these Interveners, are included as “other rights and freedoms” within the meaning of s. 25. For example, the protections against taxation and execution found in ss. 87 and 89 of the *Indian Act* have been held to have their source in “the continuation of a policy that has shaped the dealings between the Indians and the European settlers since the time of the Royal Proclamation of 1763”.

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 at pp. 129-130 (Authorities, Tab 6)

14. In particular, the historic responsibility acknowledged in the Royal Proclamation to treat aboriginal peoples fairly and protect them from exploitation is the

source of the duties of consultation and accommodation which were recognized by this Court in *Haida Nation v. British Columbia*, *supra* (at para. 32) (Authorities, Tab 3):

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, **it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over Aboriginal people and de facto control of land and resources that were formerly in the control of that people.** As stated in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 9, “[w]ith this assertion of [sovereignty] arose an obligation to treat aboriginal peoples fairly and honourably, and to protect them from exploitation...” (emphasis added).

[boldface emphasis added]

15. In the submission of these Interveners, the phrase “other rights or freedoms that pertain to the aboriginal peoples of Canada”, in the context of s. 25, must be given a liberal interpretation in light of the purpose of the section. Contrary to the suggestion at paragraph 113 of the Appellants’ Factum, a purposive construction of s. 25 does not entrench “other rights” nor does it pre-empt or arbitrarily curtail legislative or regulatory powers. Rather, s. 25 confirms that the *Charter* itself was never intended to, and must not be “construed” to, abolish distinctions between aboriginal and non-aboriginal peoples that date from, and have their source in, the very origins of the Canadian nation.

16. Therefore, in these Intervener’s submission, at least those rights and freedoms which are rooted in the fundamental principle of Crown-aboriginal reconciliation are shielded by s. 25 of the *Charter*. These include rights pertaining to the unique relationship between the Crown and aboriginal peoples.

17. At stake in the present case are rights of consultation and accommodation with regard to asserted but, as yet, unproven rights. Whether proven or unproven, existing aboriginal rights have their roots in the unique Crown-aboriginal relationship and, therefore, must be taken into account in interpreting s. 15 of the *Charter*. Similarly,

rights which have not yet been recognized but which may be subsequently affirmed, by way of land claim agreements, are protected by s. 25(b). In this regard, a key contextual factor informing the application of s. 25 is that the AFS , including the Pilot Sales Program, was an integral part of the Respondent's efforts in beginning to negotiate modern treaties with coastal First Nations (see para. 6 above).

(2) **Analytical Role**

18. The Respondent Crown argues that s. 25 is to be disregarded in the s. 15 analysis and is to be taken into account only after there is a finding that s. 15 has been violated in a manner that cannot be justified under s. 1 of the *Charter*. These Interveners disagree.

19. First, s. 25 is not expressed in language which is appropriate for a “saving provision” which only comes into play where legislation or governmental action is found to be otherwise unconstitutional (that is, after the application of the test in *Law v. Canada, infra* and s. 1 of the *Charter*). Rather, s. 25 is clearly articulated as a rule of construction. The section provides that the guarantees in the *Charter* “shall not be construed” so as to abrogate or derogate from Section 25 Rights.

Law v. Canada (Minister of Human Resources Development), [1999] 1 S.C.R. 497 (Authorities, Tab 4)

20. Further, the purposive and contextual approach which this Court has mandated with respect to the interpretation and application of the *Charter*, and in particular s. 15 of the *Charter*, is particularly well adapted to accommodating the rule of construction set out in s. 25 (as will be discussed below). Where Section 25 Rights are at stake, their existence and the priority accorded to them by s. 25 are factors which ought to be taken into account during the s. 15 analysis. To ignore Section 25 Rights in that analysis would be inconsistent with the express requirement in s. 25 that *Charter* rights “be construed” so as not to affect Section 25 Rights. Such an approach also disregards this Court's direction in *Law v. Canada* that the larger context of the alleged discrimination must always be taken into account in the s. 15 analysis and would, in turn, fail to recognize the constitutional, legal and societal importance of Section 25 Rights.

Law v. Canada, supra at para. 63 (Authorities, Tab 4)

21. Finally, adopting the Crown's approach would suggest that s. 25 of the *Charter* permits aboriginal peoples, or the government acting on their behalf, to violate constitutional rights in a manner which others are not permitted to do in our society. Such a suggestion does not instil respect for either the constitutional imperatives involved or the aboriginal perspective.

(3) **Interpreting Section 15 of the *Charter***

22. The Court in *Law, supra*, did not suggest that the list of contextual factors set out in that case should be seen as exhaustive; on the contrary, the Court made it clear that no "strict test" was being imposed for the determination of a section 15 violation:

Inevitably, the guidelines summarized here will need to be supplemented in practice by the explanation of these guidelines in these reasons and those of previous cases, and by **a full appreciation of the context surrounding the specific s. 15(1) claim at issue**. It goes without saying that as our s. 15 jurisprudence evolves it may well be that further elaborations and modifications will emerge.

...
It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach is preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.

Law v. Canada, supra, at para. 88 (Authorities, Tab 4)

23. Thus, there is ample scope within the context of the s. 15 analysis to take into account the constitutional priority given to Section 25 Rights. In these Interveners' submission, s. 25 ought to inform the purposive and contextual approach which this Court has held is appropriate in analyzing a complaint of discrimination under s. 15. In particular, where s. 25 arises, the courts ought to take into account the following considerations.

24. First, in the context of our Constitution, any legislation or government action that differentiates between aboriginal and non-aboriginal persons in a manner that is rationally connected to the protection, recognition, enforcement, accommodation, or

reconciliation of Section 25 Rights cannot be characterized as having a purpose or effect that is discriminatory within the meaning of the equality guarantee. To do so would be inconsistent with the very basis of Section 25 Rights: that is, the recognition and protection of the unique historical and constitutional status of aboriginal peoples within Canada, including their unique relationship with the Crown. As Lamer C.J.C. commented in *Van der Peet, supra*, the pre-existing occupation of aboriginal peoples separates them from “all other minority groups in Canadian society”, and thereby justifies the Crown’s unique obligations to aboriginal people, as well as corresponding rights on the part of aboriginal people that are not shared by other members of the population. Differential treatment is legally required of the Crown, and is constitutionally permitted by virtue (*inter alia*) of s. 25.

R. v. Van der Peet, supra, at para. 31 (See Appellants’ Authorities, Tab 24);
A.R., Vol. I, pp. 214-215 (Reasons for Judgment of Kirkpatrick J.A., para. 134);
Reference re Roman Catholic Separate High Schools Funding, [1987] 1
S.C.R. 1148 at pp. 1206-1207 (Authorities, Tab 8)

25. Second, in considering whether a particular form of differentiation is rationally connected to the protection, recognition, enforcement, accommodation, or reconciliation of Section 25 rights, a purposive approach ought be adopted in order to ensure that the process of reconciliation which lies at the heart of Section 25 Rights is not distorted, impeded or undermined. This Court has recognized on more than one occasion that consultation, negotiation and good faith efforts at accommodation are essential to achieve the purposes of s. 35(1) of the *Constitution Act, 1982*:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet, supra*, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

Construing s. 15 in such a manner so as to interfere with the reconciliation process would derogate from Section 25 Rights and would be contrary to s. 25 of the *Charter*.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 at 1123 (Authorities, Tab 1); see also *R. v. Sparrow, supra*, at 1103, 1105 (Authorities, Tab 7); A.R., Vol. I, pp. 215-216 (Reasons for Judgment of Kirkpatrick J.A. at paras. 135-137)

26. In these Interveners' submission, the foregoing considerations are a complete answer to the Appellants' claim in the present case, given the purpose and effect of the impugned legislation, as will be addressed below. Different considerations might arise in other contexts; for example, in cases where the differentiation is not between aboriginal or non-aboriginal persons. In such contexts, where Section 25 Rights are relevant, the s. 15 analysis ought to be adapted to take into account the constitutional priority of those rights.

27. In the present case, the commencement of negotiations which led to the Pilot Sales Programs followed closely upon the decision of this Court in *R. v. Sparrow*, *supra*, in which Musqueam was found to have a right to fish for food and ceremonial purposes in the geographical area of their AFS fishery. Musqueam also asserts a traditional right to sell or exchange salmon, which this Court declined to consider in *R. v. Sparrow* on the basis that it had not been raised in the courts below.

A.R., pp. 130-131 (Reasons for Judgment of Brenner C.J., at paras. 87-88); A.R., p. 220 (Reasons for Judgment of Kirkpatrick J.A., at para. 144); *R. v. Sparrow*, *supra*, at p. 1101 (Authorities, Tab 7)

28. Both Brenner C.J. and Kirkpatrick J.A. in the Courts below agreed that the Pilot Sales Programs were "created in response to the Supreme Court of Canada's urging in *Sparrow* to negotiate issues such as the one at bar."

A.R., pp. 221-222 (Reasons for Judgment of Kirkpatrick J.A., at para. 147)

29. At the time of its negotiations with First Nations, including Musqueam, regarding the Pilot Sales Program, the Crown was aware of the potential existence of aboriginal rights that might be adversely affected by its regulation of the fishery. As a result, the Crown had a legal as well as a moral obligation to engage in meaningful consultation with the First Nations regarding the accommodation of their interests. These negotiations regarding the AFS fishery also occurred within the context of treaty negotiations. Thus, Section 25 Rights were at stake in the negotiations, including rights to be consulted and accommodated as well as, potentially, aboriginal rights protected by s. 35 of the *Constitution Act, 1982*.

Haida Nation v. British Columbia, supra, at paras. 35 (Authorities, Tab 3)

30. A proper construction of s. 25 necessarily embodies the purpose of reconciliation including the right to be consulted and accommodated where indicated. In implementing the Pilot Sales Program, the Crown differentiated between aboriginal and non-aboriginal people on a basis that was rationally and clearly connected to the recognition, accommodation and reconciliation of Section 25 Rights. On a proper interpretation of s. 15, in accordance with s. 25 of the *Charter*, such differentiation cannot be characterized as discriminatory within the meaning of the equality guarantee. Furthermore, the purpose and effect of s. 25 ought not be ignored during any court's assessment of whether differential treatment is discriminatory.

PART IV: SUBMISSIONS CONCERNING COSTS

31. These Interveners do not seek costs against any party, and ask that no order for costs be made against them.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

32. These Interveners request that they be granted the opportunity to make oral submissions at the hearing of this appeal.

33. These Interveners support the Respondent's request that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th DAY OF
NOVEMBER, 2007.



Maria Morellato



Joanne Lysyk

PART VI: TABLE OF AUTHORITIES

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