

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

BETWEEN:

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PART I – OVERVIEW

A. Statement of Ontario’s position

1. The Attorney General of Ontario [“Ontario”] intervenes in support of the constitutional validity of the impugned Pilot Sales Program [“PSP”] and *Aboriginal Communal Fishing Licences Regulations*, S.O.R./93-332 [“ACFLR”].
2. The guarantee of equality in s. 15 of the *Charter* does not provide a basis for non-Aboriginal individuals to challenge the distinct treatment, status and rights of Aboriginal peoples as discriminatory on the basis of race or a ground analogous to race. The framework of the Constitution as a whole, and the jurisprudence of this Court on the meaning of the equality guarantee in the Aboriginal context, provides a robust response to challenges by non-Aboriginal individuals to government action that responds to or affirms the unique historical and constitutional place of Aboriginal peoples in Canada.
3. This appeal affords this Court the opportunity to reaffirm that governments should continue to engage with Aboriginal communities in a manner that advances the reconciliation of Aboriginal prior occupation with the sovereignty of the Crown, and to reject claims of “reverse discrimination” by non-Aboriginals in respect of government action that recognizes and responds to the distinct status of Aboriginal peoples.
4. Ontario submits that this appeal can be dismissed on the basis of s. 15 of the *Charter* alone, and that it is therefore not necessary to consider s. 25 of the *Charter*.
5. In the alternative, should this Court find it necessary to consider s. 25, Ontario submits that s. 25 has no application to this appeal because participation in the PSP is not one of the “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” within the meaning of s. 25. This phrase is intended to capture only the constitutional and other related rights of Aboriginal Canadians, which are necessary to the protection of distinctive Aboriginal societies.

B. Relevant facts

6. Ontario adopts the facts as set out in the Respondent’s factum at paras. 5-63.

PART II – ONTARIO’S POSITION ON THE ISSUES ON APPEAL

7. The issues stated by the Appellants are as follows:
 - a. Whether the PSP violates s. 15(1) of the *Charter*;
 - b. Whether s. 15(2) applies to the PSP;
 - c. Whether the violation of s. 15 is justified by s. 1;
 - d. Whether s. 25 of the *Charter* applies to the PSP; and
 - e. Whether the judicial stay of proceedings granted by the trial judge was an appropriate remedy under s. 24(1) of the *Charter*.
8. Ontario submits that the PSP does not infringe s. 15(1) of the *Charter*, and that s. 15(2) assists in coming to this conclusion. Ontario further submits that it is unnecessary to consider s. 25 of the *Charter* in this case, because the appeal can and should be dismissed on the basis of s. 15 alone. Alternatively, Ontario submits that s. 25 of the *Charter* has no application to this case. No “aboriginal, treaty or other rights or freedoms” are at issue in this appeal.
9. Ontario takes no position on whether any infringement of s. 15(1) of the *Charter* is justified as a reasonable limit under s. 1, or whether the stay of proceedings granted by the trial judge was an appropriate remedy.

PART III – STATEMENT OF ARGUMENT

A. The PSP does not infringe s. 15 of the *Charter*

10. Ontario submits that the Appellants’ s. 15 claim must fail because (1) as individuals, the Appellants cannot legitimately claim a benefit provided by law to communities, such as the Aboriginal communal licences provided under the ACFLR; and (2) in any event, restricting eligibility for the PSP to Aboriginal communities is not substantively discriminatory in the sense that it demeans the human dignity of those excluded from participation.

a. The individual Appellants cannot legitimately compare themselves to the communities eligible for participation in the PSP

11. Since *Andrews*, this Court has consistently held that equality “is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises.” It is well-established that a person asking for equal treatment necessarily does so by reference to other people with whom he or she can legitimately invite comparison.

***Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 S.C.R. 357 at para. 1 [Respondent’s Authorities, Tab 18]**

***Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164 [Ontario’s Authorities, Tab 1]**

***Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 56 [Appellants’ Authorities, Tab 11]**

***Symes v. Canada*, [1993] 4 S.C.R. 695 at 754 [Ontario’s Authorities, Tab 14]**

***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 69 [Ontario’s Authorities, Tab 2]**

***Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at para. 62 [Ontario’s Authorities, Tab 5]**

***Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 at para. 39 [Ontario’s Authorities, Tab 9]**

12. The Appellants seek to compare themselves to the beneficiaries of the PSP. However, the benefit of law provided by the ACFLR is to communities and not to individuals. Section 4(1) of the ACFLR provides that the Minister may “issue a communal licence to an Aboriginal organization to carry on fishing and related activities” (underlining added). “Aboriginal organization” is defined in the ACFLR as including “an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based Aboriginal community.” As in *Lovelace*, the benefit sought in this case is “fundamentally directed to Aboriginal communities” rather than to individuals. The Appellants, as individuals, may not legitimately invite comparison to the communities who are eligible for licences under the ACFLR. Nor is the benefit sought by the Appellants (individual access to commercial fishing) a benefit provided by the ACFLR.

ACFLR, ss. 2 and 4(1)

Lovelace at para. 64 [Ontario's Authorities, Tab 5]

Hodge v. Canada (Minister of Human Resources Development), [2004] 3 S.C.R. 357 at para. 27 [Respondent's Authorities, Tab 18]

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2004] 3 S.C.R. 657 at paras. 26-35 [Respondent's Authorities, Tab 4]

13. Alternatively, even if exclusion from participation in the PSP constitutes differential treatment on the basis of non-Aboriginality, such differential treatment is not discriminatory in the substantive sense that it demeans the human dignity of the Appellants. Ontario adopts the submissions at paras. 84-109 of the Respondent's factum, and adds the following submissions with respect to the correspondence between the PSP and the distinct circumstances of Aboriginal communities, and the ameliorative purpose and effect of the PSP.

b. The PSP corresponds to the distinct circumstances of Aboriginal communities

14. The distinctive historical, cultural and legal status of Aboriginal persons will frequently give rise to different "needs, capacities and circumstances" as compared to non-Aboriginal persons. Where differential treatment between Aboriginal communities and others corresponds to the distinct circumstances of the former, such treatment cannot be equated with stereotypical race-based distinctions. As L'Heureux-Dubé J. noted in *Corbiere*, "the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history." The Appellants' narrow approach to the correspondence factor, which focuses entirely on the economic situation of the Musqueam and Tsawwassen bands, fails to give due consideration to the unique historical and constitutional status of the Aboriginal peoples of Canada.

Corbiere at para. 54 [Appellants' Authorities, Tab 5] and para. 67 [Ontario's Authorities, Tab 2]

Appellants' factum at para. 65

15. Aboriginal distinctiveness is entrenched in the text of the Constitution and in the history and structure of Canadian society. It is recognized by s. 91(24) of the *Constitution Act, 1867*, which authorizes Parliament to legislate, in the words of Estey J. in *Reference re Bill 30*, “for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion vis-à-vis others.” It is affirmed by s. 35 of the *Constitution Act, 1982*, which protects the distinctive cultures of Aboriginal peoples in a manner that promotes reconciliation with Crown sovereignty. Ultimately, Aboriginal distinctiveness arises from the fact that “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 basic fact of prior occupation “which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status.”

Reference re Bill 30, An Act to Amend the Education Act (Ont.), [1987] 1 S.C.R. 1148 at 1206 per Estey J. [Ontario’s Authorities, Tab 13]

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 at para. 1 [Appellants’ Authorities, Tab 14]

R. v. Sappier; R. v. Gray, [2006] 2 S.C.R. 686 at para. 22 [Ontario’s Authorities, Tab 12]

R. v. Van der Peet, [1996] 2 S.C.R. 507 at paras. 30-31 [Respondent’s Authorities, Tab 35]

Reasons for Judgment of Brenner C.J.S.C. at paras. 47-50, Appellant’s Record [“A.R.”], Vol. I, pp. 114-115

See also:

Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 215 [Ontario’s Authorities, Tab 18]

16. The distinctive needs, capacities and circumstances of Aboriginal communities are not limited to those arising from established Aboriginal rights under s. 35 of the *Constitution Act, 1982*. Governments may also take into account unproven assertions of s. 35 rights and the duties that flow from such assertions, as well as the reality of Aboriginal circumstances that result from their historical, legal, social, economic and cultural conditions. For example, in developing the casino program that was at issue in *Lovelace*, the government of Ontario properly took into account the need to regulate on-

reserve gaming, the self-government aspirations of the First Nations, the social and economic conditions of Aboriginal communities, and the land base of reserve-holding bands. All of these considerations have parallels in the instant case.

***Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paras. 10 and 25 [Ontario’s Authorities, Tab 3]**

***Mikisew Cree* at para. 51 [Appellants’ Authorities, Tab 14]**

***Lovelace* at paras. 24 and 74-75 [Ontario’s Authorities, Tab 5]**

17. The PSP had as its objectives to address the unauthorized sale of Aboriginal food fish, to augment Aboriginal participation in enforcement and management, to test Aboriginal commercial fishing for possible future inclusion in treaties, and to create economic opportunities for bands. Moreover, the participant Musqueam and Tsawwassen bands are coastal Aboriginal communities whose historic territory and fisheries lie along the Fraser River. Just as the circumstances of the Ontario bands in *Lovelace* corresponded closely to the design of the casino program, the circumstances of the participant bands correspond closely to the PSP. More fundamentally, the PSP “facilitated Aboriginal access to the fishery in a manner consistent with, and respectful of, the unique relationship between British Columbia Aboriginal communities and the fishery.” As in *Lovelace*, the “very high degree of correspondence between the program and the actual needs, circumstances, and capacities of the bands” is a telling indicator against a finding of discrimination.

Reasons for Judgment of Kitchen P.C.J. at paras. 42-56, A.R. Vol. I, pp. 20-26

Reasons for Judgment of Brenner C.J.S.C. at paras. 93-94 and 99, A.R. Vol. I, pp. 133-136

Reasons for Judgment of Low J.A. at paras. 32-45, A.R. Vol. I, pp. 174-179

***Lovelace* at para. 82 [Ontario’s Authorities, Tab 5]**

18. The PSP, and the Aboriginal Fisheries Strategy more generally, were the product of negotiation between the federal government and Aboriginal communities with respect to the management of the fisheries after the *R. v. Sparrow* decision. As this Court stated in *Lovelace*, policies and programs that are developed through a process of negotiation, consultation and compromise between Aboriginal persons and governments are likely to

be the kind of “partnered” targeted programs that closely reflect the distinctive circumstances of the beneficiary Aboriginal communities. It follows that exclusion from such partnered targeted programs “is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.”

Reasons for Judgment of Kitchen P.C.J. at paras. 35 and 56, A.R. Vol. I, pp. 18 and 25-26

Reasons for Judgment of Brenner C.J.S.C. at paras. 32 and 93-94, A.R. Vol. I, pp. 109 and 133-134

Reasons for Judgment of Low J.A. at paras. 39-46, A.R. Vol. I, pp. 176-179

***R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1110 [Appellants’ Authorities, Tab 23]**

***Lovelace* at paras. 82 and 86 [Ontario’s Authorities, Tab 5]**

19. The Appellants in effect argue that, in the absence of a proven s. 35 Aboriginal right to a separate commercial fishery, no significance should be attributed to the fact that the targeted beneficiaries of the PSP are Aboriginal communities. This restrictive view does not accord with the contextual nature of the discrimination analysis under s. 15 and is inconsistent with this Court’s decisions in *Corbiere* and *Lovelace*. Contrary to the Appellants’ submission, it does not “undermine the function of s. 35” to consider distinctive Aboriginal circumstances beyond those entrenched in s. 35 in determining whether exclusion from an Aboriginal program is discriminatory. The fact that the First Nations Fund beneficiaries in *Lovelace* had not established a s. 35 right to operate a casino did not preclude this Court from considering their distinctive needs, capacities and circumstances in the course of the correspondence analysis.

Appellants’ factum at para. 90

***Corbiere* at para. 54 [Appellants’ Authorities, Tab 5]**

***Lovelace* at paras. 24 and 74-75 [Ontario’s Authorities, Tab 5]**

***R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 30 [Ontario’s Authorities, Tab 11]**

20. Here, the PSP corresponded closely with the distinct circumstances of the participant Aboriginal communities. Accordingly, this factor strongly supports the view

that the Appellants' exclusion from the PSP does not discriminate in the substantive sense contrary to s. 15(1) of the *Charter*.

c. The PSP has an ameliorative purpose and effect on a disadvantaged group

21. The fact that the PSP had an ameliorative effect on a disadvantaged group is another factor indicating that it is not discriminatory within the meaning of s. 15(1) of the *Charter*. In *Law v. Canada*, this Court confirmed that part of the purpose of s. 15(1) is to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society. Accordingly, an ameliorative purpose or effect that accords with the purpose of s. 15(1) “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.” Similarly, this Court has held that the s. 15(2) protection of ameliorative programs is “confirmatory and supplementary to s. 15(1)” in ensuring that substantive and not merely formal equality underlies the discrimination analysis.

***Law v. Canada* at para. 72 [Ontario’s Authorities, Tab 4]**

***Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66 [Respondent’s Authorities, Tab 13]**

***Lovelace* at paras. 94-95 and 105-108 [Ontario’s Authorities, Tab 5]**

22. All Aboriginal peoples have been affected “by the legacy of stereotyping and prejudice against Aboriginal peoples” and that Aboriginal peoples “experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing.” By contrast, the Appellants concede that they do not suffer pre-existing disadvantage, stereotyping or prejudice.

***Corbiere* at para. 66 [Ontario’s Authorities, Tab 2]**

***Lovelace* at para. 69 [Ontario’s Authorities, Tab 5]**

Appellants’ factum at para. 64

Reasons for Judgment of Kitchen P.C.J. at para. 182, A.R. Vol. I, pp. 72-73

23. It is not necessary for a targeted ameliorative program to have as its only or primary purpose the amelioration of conditions of disadvantage in order for it to benefit from this contextual factor in the discrimination analysis. Most government action is the product of multiple and sometimes competing objectives: “Often legislation does not simply further one goal but rather strikes a balance among several goals, some of which may be in tension.” Among the objectives of the ACFLR and the PSP was to create economic development opportunities for the participant Aboriginal communities and to enhance the control of Aboriginal communities over their own affairs. Such ameliorative purposes towards a disadvantaged group in society accord with the purpose of s. 15 and therefore do not violate the human dignity of the more advantaged excluded individuals.

***M. v. H.*, [1999] 2 S.C.R. 3 at para. 100 [Ontario’s Authorities, Tab 6]**

***Law v. Canada* at para. 72 [Ontario’s Authorities, Tab 4]**

Reasons for Judgment of Brenner C.J.S.C. at paras. 97-102, A.R. Vol. I, pp. 135-137

24. Governments should not be required to target only the most desperate cases of disadvantage in order to defend benefit programs on the basis of their ameliorative purpose or effect. As this Court noted in *Lovelace*, the “contextual s. 15(1) analysis transcends the superficiality of a simple balancing of relative disadvantage.” To hold otherwise would be to preclude government from developing ameliorative programs that take advantage of a community’s areas of strength. Ameliorative programs should not be vulnerable to challenge on the basis that they fail to target the most disadvantaged.

***Lovelace* at paras. 58-59 [Ontario’s Authorities, Tab 5]**

25. The learned trial judge erred in requiring a strict relationship between the ameliorative program and the specific cause or nature of the disadvantage experienced by the targeted group. Rather, ameliorative programs should be generously and liberally assessed, in order to provide governments with a broad and flexible ability to develop new and innovative affirmative action programs to alleviate conditions of disadvantage.

Reasons for Judgment of Kitchen P.C.J. at paras. 200-202, A.R. Vol. I, pp. 79-80

Reasons for Judgment of Brenner C.J.S.C. at paras. 97-102, A.R. Vol. I, pp. 135-137

***Lovelace* at paras. 91-92 and 98-100 [Ontario’s Authorities, Tab 5], rejecting *Manitoba Rice Farmers Association v. Human Rights Commission (Manitoba)* (1987), 50 Man. R. (2d) 92 (Q.B.) [Ontario’s Authorities, Tab 7]**

See also:

Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 216-219 [Ontario’s Authorities, Tab 18]

26. This Court held in *Lovelace* that “exclusion from a targeted or partnership program is less likely to be associated with stereotyping or stigmatization or conveying the message that the excluded group is less worthy of recognition and participation in the larger society.” Ontario submits that the Appellants’ exclusion from the PSP does not promote the view that they are less worthy of concern, respect, and consideration as human beings and members of Canadian society.

***Lovelace* at para. 86 [Ontario’s Authorities, Tab 5]**

Reasons for Judgment of Brenner C.J.S.C. at para. 83, A.R. Vol. I, pp. 128-129

B. There is no need to consider s. 25 of the *Charter*

27. Because this appeal can be resolved on the basis of s. 15 of the *Charter* alone, it is not necessary to consider s. 25 of the *Charter*. Where the Appellants fail to establish a Charter right to the relief they claim, there is no need to consider whether such a right, if established, would abrogate or derogate from the rights encompassed by section 25. Accordingly, Ontario submits that this Court should refrain from addressing s. 25 of the *Charter* in this appeal, and leave consideration of s. 25 for a future case where it is necessary for the disposition of the appeal.

***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at 111-112 [Ontario’s Authorities, Tab 10]:**

This Court should not decide issues that are not necessary to the resolution of an appeal. This is particularly true with respect to constitutional issues. ...

The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen.

***Corbiere* at paras. 51-53 [Appellant’s Authorities, Tab 5]**

Reasons for Judgment of Low J.A. at para. 90, A.R. Vol. I, pp. 193-194

C. Alternatively, s. 25 of the *Charter* does not apply to this case

28. It is not necessary for this Court to establish a single analytic order to the application of s. 25 of the *Charter* that would apply in all future cases. Whether the analysis begins with the *Charter* right or with s. 25, the result will be the same. In this case, Ontario adopts the Respondent’s submissions with respect to the proper analytical approach to s. 25 of the *Charter*. Section 25 is engaged where the vindication of a *Charter* right would abrogate or derogate from any “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” Accordingly, before s. 25 is engaged, the Court must find:

- a. A right guaranteed by the *Charter* has been infringed;
- b. An “aboriginal, treaty or other right or freedom” is engaged; and
- c. Vindicating the *Charter* right would abrogate or derogate from the Aboriginal, treaty or other right or freedom.

Respondent’s factum at paras. 141-150

Reasons for Judgment of Low J.A. at paras. 87-89, A.R. Vol. I, pp. 192-193

29. In this case, no *Charter* right has been infringed, with the result that the analysis stops at the first step. In any event, participation in the PSP is not one of the “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” within the meaning of s. 25.

30. The words “aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada” in s. 25 are intended to capture the constitutional and other related rights of Aboriginal Canadians, which are necessary to the protection of distinctive Aboriginal societies.

31. The proper interpretation of the phrase “other rights or freedoms that pertain to the aboriginal peoples of Canada” must take into account the four kinds of rights expressly included in s. 25: aboriginal rights, treaty rights, rights recognized by the Royal Proclamation of 1763, and rights that now exist or may be acquired by way of land claims agreements.

32. “Other rights or freedoms” include the Crown’s constitutionally mandated duty to consult Aboriginal communities, which is rooted in the honour of the Crown and is related to constitutionally entrenched aboriginal and treaty rights.

***Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 at para. 24 [Ontario’s Authorities, Tab 15]**

***Mikisew Cree* at para. 51 [Appellants’ Authorities, Tab 14]**

***Haida Nation* at para. 38 [Ontario’s Authorities, Tab 3]**

33. “Other rights or freedoms” also include rights granted to Aboriginal peoples in constitutional statutes such as the *Natural Resources Transfer Agreements* and the *British Columbia Terms of Union*. These statutes, like the Royal Proclamation of 1763, protect rights that are necessary for the protection of distinctive Aboriginal societies and are related to constitutionally entrenched treaty rights.

***Constitution Act, 1930* [reprinted in R.S.C. 1985, App. II, No. 26]**

***British Columbia Terms of Union* [reprinted in R.S.C., 1985, App. II, No. 10]**

34. “Other rights or freedoms” might also extend to those rights and freedoms related to rights protected by s. 35 of the *Constitution Act, 1982*, that are indispensable to promoting the objective of reconciling the sovereignty of the Crown with the continuing existence of Aboriginal societies. However, no such rights or freedoms are at issue in this case.

35. “Other rights or freedoms that pertain to the aboriginal peoples of Canada” should not include every statutory, common law, customary, administrative or contractual right enjoyed by Aboriginal persons. As L’Heureux-Dubé J. held in *Corbiere*, “the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the “other rights or freedoms” included in s. 25.” Not all legislation or government action granting rights to Aboriginal persons should be automatically exempt from *Charter* scrutiny.

***Corbiere* at para. 52 [Appellant’s Authorities, Tab 5]**

36. To draw the scope of “other rights or freedoms” more widely to include rights that are not necessary to the protection of distinctive Aboriginal societies would overshoot the purpose of s. 25. This would deprive Canadians (including Aboriginal Canadians) of the

important and fundamental protections of the *Charter*, for example by insulating from review federal or provincial enactments, band by-laws, or Aboriginal self-government measures that distribute benefits or burdens among Aboriginal people. The *Charter* (no less than s. 35 of the *Constitution Act, 1982*) is part of the supreme law of Canada, and its application should not readily be ousted. As the Respondent correctly submits in para. 145 of its factum, it would be contrary to our constitutional framework to interpret the scope of “other rights or freedoms” so as to subordinate constitutional rights and freedoms to rights that lack a necessary connection to the protection of distinctive Aboriginal societies.

Respondent’s factum at para. 145

See also:

Thomas Isaac, “The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431 at 453 [Ontario’s Authorities, Tab 17]

37. Not all negotiated arrangements, whether or not in response to an asserted s. 35 claim, will fall within the ambit of s. 25. There is an enormous range of potential outcomes to any process of consultation and negotiation. Many of these outcomes may have little or no connection to the purpose of s. 35. It is unnecessary to preclude the application of the *Charter* to all these arrangements in order to uphold the process of reconciliation and the honour of the Crown. Only those negotiated arrangements that recognize or create rights that are necessary for the protection of distinctive Aboriginal societies and are related to rights protected by s. 35 might be protected by s. 25.

38. There may be far-ranging implications in giving a broad interpretation to “other rights or freedoms” that is not sufficiently related to the purpose and protections of s. 35. The broader the kind of rights included in s. 25, the more varied the circumstances will be in which s. 25 can be invoked to oust the *Charter*. Conflict between *Charter* rights and the “other rights and freedoms” protected by s. 25 could occur in a variety of contexts, for example in a challenge by an internal member of an Aboriginal community, a member of a different Aboriginal community, or a non-Aboriginal person. The impact on the *Charter* right may be serious, and the impact on the other right or freedom may be minor. If s. 25 is given an interpretation that would insulate a wide scope of activities from the

Charter, it may require a justification or balancing element in order to allow the Court to resolve a conflict of constitutional rights in a more nuanced, contextual and purposive manner.

Corbiere at para. 51 [Appellant’s Authorities, Tab 5]

See also:

Thomas Isaac, “The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431 at 445 [Ontario’s Authorities, Tab 17]

Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 225-226 [Ontario’s Authorities, Tab 18]

39. This Court has held that the purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with Crown sovereignty. Section 25 affirms that the *Charter* does not impair this process of reconciliation. At the same time, it should not be foreclosed that the fundamental rights and freedoms guaranteed by the *Charter* may properly be taken into account in considering whether an asserted Aboriginal right is compatible with Canadian sovereignty.

Taku River at para. 42 [Ontario’s Authorities, Tab 15]

Mitchell v. M.N.R., [2001] 1 S.C.R. 911 at paras. 149-154 per Binnie J. [Ontario’s Authorities, Tab 8]

See also:

Jane Arbour, “The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms” (2003), 21 S.C.L.R. (2d) 3 at 44-48 [Ontario’s Authorities, Tab 16]

Thomas Isaac, “The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431 at 448-449 [Ontario’s Authorities, Tab 17]

40. Participation in the PSP is not one of the “other rights or freedoms” within the meaning of s. 25. It was, as the Respondent submits, an exercise of administrative discretion creating conditional and time-limited commercial interests. The objectives of the PSP, as set out above, were to manage the fishery and to promote Aboriginal

participation and economic opportunities. To the extent that participation in the PSP was not directed to or necessary for the protection of the distinctive societies of the participant Aboriginal communities, it does not fall within the ambit of s. 25.

Respondent's factum at para. 138

Reasons for Judgment of Brenner C.J.S.C. at paras. 35-37, A.R. Vol. I, p. 110

41. Section 25 does not insulate the PSP from *Charter* review. However, this does not mean that Aboriginal distinctiveness will be eroded by an undifferentiated approach to s. 15 of the *Charter*. The guarantee of substantive equality properly takes into account the distinctive position of the Aboriginal peoples of Canada and the needs, capacities and circumstances of Aboriginal communities. Government action that advances Aboriginal interests in a manner that corresponds to Aboriginal circumstances promotes substantive equality guarantee and conforms to the *Charter*.

PART IV – COSTS

42. Ontario does not seek costs.

PART V – ORDER SOUGHT

43. Ontario respectfully requests that the appeal be dismissed. Ontario requests permission to present oral argument of 15 minutes' duration at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 22, 2007

Sarah T. Kraicer

S. Zachary Green

Of Counsel for the Intervener,
The Attorney General of Ontario

PART VI – TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph No. Referred to in Factum</u>
<i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 143	11
<i>Auton (Guardian ad litem of) v. British Columbia (Attorney General)</i> , [2004] 3 S.C.R. 657	12
<i>Corbiere v. Canada (Minister of Indian and Northern Affairs)</i> , [1999] 2 S.C.R. 203	11, 14, 19, 22, 27, 35, 38
<i>Eaton v. Brant County Board of Education</i> , [1997] 1 S.C.R. 241	21
<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 S.C.R. 511	16, 32
<i>Hodge v. Canada (Minister of Human Resources Development)</i> , [2004] 3 S.C.R. 357	11, 12
<i>Law v. Canada (Minister of Employment and Immigration)</i> , [1999] 1 S.C.R. 497	11, 21, 23
<i>Lovelace v. Ontario</i> , [2000] 1 S.C.R. 950	11, 12, 16, 17, 18, 19, 21, 22, 24, 25, 26
<i>M. v. H.</i> , [1999] 2 S.C.R. 3	23
<i>Manitoba Rice Farmers Association v. Human Rights Commission (Manitoba)</i> (1987), 50 Man. R. (2d) 92 (Q.B.)	25
<i>Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)</i> , [2005] 3 S.C.R. 388	15, 16, 32
<i>Mitchell v. M.N.R.</i> , [2001] 1 S.C.R. 911	39
<i>Nova Scotia (Attorney General) v. Walsh</i> , [2002] 4 S.C.R. 325	11
<i>Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)</i> , [1995] 2 S.C.R. 97	27
<i>R. v. Pamajewon</i> , [1996] 2 S.C.R. 821	19
<i>R. v. Sappier; R. v. Gray</i> , [2006] 2 S.C.R. 686	15
<i>R. v. Sparrow</i> , [1990] 1 S.C.R. 1075	18
<i>R. v. Van der Peet</i> , [1996] 2 S.C.R. 507	15
<i>Reference re Bill 30 An Act to Amend the Education Act (Ont)</i>	15

[1987] 1 S.C.R. 1148	
<i>Symes v. Canada</i> , [1993] 4 S.C.R. 695	11
<i>Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)</i> , [2004] 3 S.C.R. 550	32, 39
<u>Secondary Authorities</u>	
Jane Arbour, “The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the <i>Canadian Charter of Rights and Freedoms</i> ” (2003), 21 S.C.L.R. (2d) 3	39
Thomas Isaac, “The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431	36, 38, 39
Patrick Macklem, <i>Indigenous Difference and the Constitution of Canada</i> (Toronto: University of Toronto Press, 2001)	15, 25, 38

PART VII – STATUTES AND REGULATIONS AT ISSUE

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Part I, Canadian Charter of Rights and Freedoms

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.

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.

Partie I, Charte Canadienne des Droits et Libertés

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.

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.

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Part II, Rights of the Aboriginal Peoples of Canada

Recognition of
existing
aboriginal and
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
autochtones

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.

Aboriginal Communal Fishing Licences Regulations, SOR/93-332

2. In these Regulations,

"aboriginal organization" includes an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community; (*organisation autochtone*)

...

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

Règlement sur les permis de pêche communautaires des Autochtones, DORS/93-332

2. Les définitions qui suivent s'appliquent au présent règlement.

«organisation autochtone» S'entend notamment d'une bande indienne, d'un conseil de bande indienne, d'un conseil de tribu et d'une association qui représente une collectivité territoriale autochtone. (*aboriginal organization*)

...

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