

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for British Columbia)

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

APPLICANTS
(Appellants)

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, TSAWWASSEN FIRST NATION, HAISLA NATION, SONGHEES INDIAN BAND, MALAHAT FIRST NATION, T'SOU-KE FIRST NATION, SNAW-NAW-AS (NANOOSE) FIRST NATION AND BEECHER BAY INDIAN BAND (COLLECTIVELY TE'MEXW NATIONS), HEILTSUK NATION AND MUSQUEAM INDIAN BAND, COWICHAN TRIBES, SPORTFISHING DEFENCE ALLIANCE, B.C. SEAFOOD ALLIANCE, PACIFIC SALMON HARVESTERS SOCIETY, ABORIGINAL FISHING VESSEL OWNERS ASSOCIATION AND UNITED FISHERMEN AND ALLIED WORKERS UNION, JAPANESE CANADIAN FISHERMENS ASSOCIATION, ATLANTIC FISHING INDUSTRY ALLIANCE, NEE TAHI BUHN INDIAN BAND, TSESHAHT FIRST NATION AND ASSEMBLY OF FIRST NATIONS

INTERVENERS

FACTUM OF THE INTERVENERS SONGHEES INDIAN BAND, MALAHAT FIRST NATION, T'SOU-KE FIRST NATION, SNAW-NAW-AS (NANOOSE) FIRST NATION AND BEECHER BAY INDIAN BAND (COLLECTIVELY THE "TE'MEXW NATIONS"),

Party: Kapp, John Michael

Lawyer	Address
Bryan Finlay, Q.C.	WeirFoulds LLP 1600 - 130 King Street West P.O. Box 480 Toronto, Ontario M5X 1J5 Tele: (416) 365-1110 FAX: (416) 365-1876
Agent	Address
Henry S. Brown, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tele: (613) 233-1781 FAX: (613) 563-9869 E-mail: henry.brown@gowlings.com

Party: Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky

Lawyer	Address
Bryan Finlay, Q.C.	WeirFoulds LLP 1600 - 130 King Street West P.O. Box 480 Toronto, Ontario, M5X 1J5 Tele: (416) 365-1110 FAX: (416) 365-1876
Agent	Address
Henry S. Brown, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario, K1P 1C3 Tele: (613) 233-1781 FAX: (613) 563-9869 E-mail: henry.brown@gowlings.com

Party: Her Majesty the Queen

Lawyer	Address
Croft Michaelson and Paul Riley	Public Prosecution Service of Canada P.O. Box 36, Exchange Tower 3400 - 130 King Street West Toronto, Ontario, M5X 1K6 Tele: (416) 952-7261/(604) 666-0704 FAX: (416) 973-3004/(604) 666-1599 E-mail: croft.michaelson@justice.gc.ca / paulriley@ppsc-sppc.ca

Agent	Address
François Lacasse	Director of Public Prosecutions 284 Wellington Street 2nd Floor Ottawa, Ontario K1A 0H8 Tele: (613) 957-4770 FAX: (613) 941-7865 E-mail: flacasse@ppsc-sppc.gc.ca

Party: Tsawwassen First Nation

Lawyer	Address
Joseph J. Arvay, Q.C.	Arvay Finlay 1350 - 355 Burrard Street Vancouver, British Columbia V6C 2G8 Tele: (604) 689-4421 FAX: (604) 687-1941 E-mail: jarvay@arvayfinlay.com

Agent	Address
Jeffrey W. Beedell	Lang Michener LLP 300 - 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tele: (613) 232-7171 FAX: (613) 231-3191 E-mail: jbeedell@langmichener.ca

Party: Attorney General of Alberta

Lawyer	Address
Robert J. Normey	Attorney General of Alberta 4 th Floor – Bowker Building 9833 – 109 Street Edmonton, Alberta T5J 3S8 Tele: (780) 422-9532 FAX: (780) 422-0307 E-mail: Robert.normey@gov.ab.ca

Agent	Address
Henry S. Brown, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tele: (613) 233-1781 FAX: (613) 563-9869 E-mail: henry.brown@gowlings.com

Party: Attorney General of Québec

Lawyer	Address
Isabelle Harnois	Procureur général du Québec 1200, Route de l'Église 2e étage Ste-Foy, Québec G1V 4M1 Tele: (418) 643-1477 FAX: (418) 646-1696

Agent	Address
Pierre Landry	Noël & Associés 111, rue Champlain Gatineau, Quebec J8X 3R1 Tele: (819) 771-7393 FAX: (819) 771-5397 E-mail: p.landry@noelassociés.com

Party: Attorney General of Ontario

Lawyer	Address
Sarah Kraicer	Attorney General of Ontario 720 Bay Street Toronto, Ontario M5G 2K1 Tele: (416) 329-8517 FAX: (416) 326-4015
Agent	Address
Robert E. Houston, Q.C.	Burke-Robertson 70 Gloucester Street Ottawa, Ontario K2P 0A2 Tele: (613) 236-9665, FAX: (613) 235-4430

Party: Attorney General of Saskatchewan

Lawyer	Address
Graeme G. Mitchell, Q.C.	Attorney General of Saskatchewan 1874 Scarth Street – 18 th Floor Regina, Saskatchewan S4P 3V7 Tele: (306) 787-8385 FAX: (306) 787-9111 gmitchell@justice.gov.sk.ca
Agent	Address
Henry S. Brown, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St P.O. Box 466, Stn "D" Ottawa, Ontario K1P 1C3 Tele: (613) 233-1781 FAX: (613) 563-9869 E-mail: henry.brown@gowlings.com

Party: Haisla Nation

Lawyer	Address
Allan Donovan	Donovan & Company 73 Water Street 6th Floor Vancouver, British Columbia V6B 1A1 Tele: (604) 688-4272 FAX: (604) 688-4282
Agent	Address
Brian A. Crane, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3 Tele: (613) 786-0107 FAX: (613) 788-3500 E-mail: Brian.Crane@gowlings.com

Party: Heiltsuk Nation and Musqueam Indian Band

Lawyer	Address
Maria A. Morellato	Blake, Cassels & Graydon LLP Suite 2600, Three Bentall Centre 595 Burrard Street, P.O. Box 49314 Vancouver, British Columbia V7X 1L3 Tele: (604) 631-3324 FAX: (604) 631-3309 E-mail: maria.morellato@blakes.com
Agent	Address
Brian A. Crane, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3 Tele: (613) 786-0107 FAX: (613) 788-3500 E-mail: Brian.Crane@gowlings.com

Party: Cowichan Tribes

Lawyer	Address
F. Matthew Kirchner	Ratcliff & Company 500 - 221 West Esplanade North Vancouver, British Columbia, V7M 3J3 Tele: (604) 988-5201 FAX: (604) 988-1452
Agent	Address
Brian A. Crane, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3 Tele: (613) 786-0107 FAX: (613) 788-3500 E-mail: Brian.Crane@gowlings.com

Party: Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association and United Fishermen and Allied Workers Union

Lawyer	Address
J. Keith Lowes	Suite 406, 535 Howe Street Vancouver, British Columbia V6C 2Z4 Tele: (604) 681-8461 FAX: (604) 638-0116
Agent	Address
K. Scott McLean	Fraser Milner Casgrain LLP 1420 - 99 Bank Street Ottawa, Ontario K1P 1H4 Tele: (613) 783-9600 FAX: (613) 783-9690 E-mail: scott.mclean@fmc-law.com

Party: Japanese Canadian Fishermens Association

Lawyer	Address
John Carpay	Canadian Constitution Foundation 235, 3545 - 32 Ave NE Suite 641 Calgary, Alberta T1Y 6M6 Tele: (403) 592-1731 FAX: (403) 592-1459 E-mail: jcarpay@canadianconstitutionfoundation.ca
Agent	Address
Chris Schafer	Gowling Lafleur Henderson LLP 160 Elgin Street Suite 2600 Ottawa, Ontario K1P 1C3 Tele: (613) 786-0221 FAX: (613) 788-3636 E-mail: christopher.schafer@gowlingscom

Party: Atlantic Fishing Industry Alliance

Lawyer	Address
Kevin O'Callaghan	Fasken Martineau DuMoulin LLP 2100 - 1075 Georgia St. W. Vancouver, British Columbia V6E 3G2 Tele: (604) 631-3131 FAX: (604) 631-3232
Agent	Address
Stephen B. Acker	Fasken Martineau DuMoulin LLP 1700-275 Slater Street Ottawa, Ontario K1P 5H9 Tele: (613) 236-3882 FAX: (613) 230-6423

Party: Nee Tahi Buhn Indian Band

Lawyer	Address
Ryan D.W. Dalziel	Bull, Housser & Tupper LLP 3000 - 1055 West Georgia Street Vancouver, British Columbia V6E 3R3 Tele: (604) 641-4881 FAX: (604) 646-2671 E-mail: rdd@bht.com
Agent	Address
Brian A. Crane, Q.C.	Gowling Lafleur Henderson LLP 2600 - 160 Elgin St Box 466 Station D Ottawa, Ontario K1P 1C3 Tele: (613) 786-0107 FAX: (613) 788-3500 E-mail: Brian.Crane@gowlings.com

Party: Tseshah First Nation

Lawyer	Address
Hugh M.G. Braker, Q.C.	Braker & Company Suite 1108 - 100 Park Royal West Vancouver, British Columbia V7T 1A2 Tele: (604) 926-0601 FAX: (604) 926-0611

Agent	Address
Marie-France Major	Lang Michener LLP 300 - 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tele: (613) 232-7171 FAX: (613) 231-3191 E-mail: mmajor@langmichener.ca

Party: Assembly of First Nations

Lawyer	Address
Bryan P. Schwartz	Pitblado 2500 - 360 Main Street Winnipeg, Manitoba R3C 4H6 Tele: (204) 956-0560 FAX: (204) 957-0227 E-mail: bschwar@ms.umanitoba.ca

Agent	Address
Marie-France Major	Lang Michener LLP 300 - 50 O'Connor Street Ottawa, Ontario K1P 6L2 Tele: (613) 232-7171 FAX: (613) 231-3191 E-mail: mmajor@langmichener.ca

PART I – STATEMENT OF FACTS	1
PART II – QUESTIONS IN ISSUE	1
PART III – ARGUMENT	1
A. Summary of Position	1
B. Accommodation and Reconciliation	1
C. Crown-Aboriginal Accommodation Agreements are “Other Rights” under s. 25	4
D. The PSP is an “Other Right” Within the Meaning of s. 25	6
E. Section 25 is Integral to the s. 15 Analysis	7
F. Section 15 Analysis in this Case	10
PART IV – COSTS	10
PART V – ORDER REQUESTED	10

PART I – STATEMENT OF FACTS

1. The Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (“Nanoose”) First Nation and Beecher Bay Indian Band (the “Te'mexw Nations”) take no position on the facts of this case, save to the extent that particular facts are cited below.

PART II – QUESTIONS IN ISSUE

2. The Te'mexw Nations agree statement of issues at para. 65 of the Respondent's Factum.

PART III – ARGUMENT

A. Summary of Position

3. The Te'mexw Nations make five main points:

- i) Crown-Aboriginal accommodation agreements are critical to the objective of reconciliation and this Court should confirm the Crown's broad discretion in accommodating the rights and interests of Aboriginal groups.
- ii) Rights flowing from measures that can reasonably be construed as accommodating aboriginal rights should normally be “other rights” within the meaning of s. 25 of the *Canadian Charter of Rights and Freedoms*.
- iii) The Pilot Sales Program (“PSP”) was such an accommodation measure and the rights it conferred should be recognized as “other rights” within the meaning of s. 25.
- iv) Section 25 is designed to reconcile *Charter* rights with the special status of aboriginal people and therefore should be applied as an integral part of the interpretation and application of s. 15, s. 1 and s. 24 of the *Canadian Charter of Rights and Freedoms*.
- v) The PSP was not discriminatory within the meaning of s. 15: the program served to accommodate the claimed and proven s. 35 fishing rights of the participating First Nations, and cannot reasonably be viewed as harmful to the dignity of non-participants.

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, ss. 1, 15, 24, and 25; Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35

B. Accommodation and Reconciliation

4. Reconciliation should be the driving force in the modern relationship between the Crown and First Nations: “The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples in their respective claims, interests and ambitions.”

Mikisew Cree First Nation v. Canada, [2005] 3 S.C.R. 388 at para. 1

5. As this passage from *Mikisew* indicates, Crown-aboriginal reconciliation is not limited to the aboriginal groups' s. 35 rights claims, but may also address their “interests and ambitions.” This

makes eminent sense. The reconciliation of aboriginal peoples and non-aboriginal peoples is an ongoing process aimed at ensuring the continued existence of Canada's distinctive first communities in a world where non-aboriginal land use and occupation has greatly reduced the ability of aboriginal people to carry out their traditional activities and maintain their traditional relationship to the land. Indeed, as Brian Slattery recently noted, the concept of reconciliation is born from the reality that it is no longer possible to simply recognize and respect s. 35 rights:

The dispossession of Indigenous peoples was contrary to the common law and did not extinguish aboriginal title, in the absence of clear and plain legislation to that effect. However, the scope and practical effects of dispossession were so significant that as time passed the situation became increasingly difficult to reverse without severely affecting the interests of innocent third parties and the public at large. In the end, the remedy originally envisaged at common law — the expulsion of individuals who occupied unceded Indigenous lands — was no longer practicable on a large scale. Given this new reality, the common law did not remain idle but adapted to take account of the change in circumstances. The adaptation was shaped by three needs: to ensure the continuity of aboriginal title and its recognition in a modern form; to supply appropriate remedies for the wrongs visited on Indigenous peoples; and to accommodate public and private interests in the lands concerned. These needs gave rise to common law Principles of Reconciliation, which supplemented and modified the traditional Principles of Recognition applying at the time of Crown sovereignty.

B. Slattery, "The Metamorphosis of Aboriginal Title" [2006] 85 C.B.R. 255 at pp. 261-262

6. Crown-aboriginal consultation and, where warranted, accommodation, are essential to the reconciliation process. As this Court affirmed in *Haida*:

[C]onsultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 demands. It preserves the Aboriginal interest pending claims resolution and fosters a relationship between the parties that makes possible negotiations, the preferred process for achieving ultimate reconciliation...

Thus, just as reconciliation may need to address the "claims, interests and ambitions" of First Nations, so may accommodation.

Haida Nation v. British Columbia (Minister of Forests) [2004] 3 S.C.R. 511 at para. 38. See also *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 at para. 186

7. In the case at bar, the claims, interests and ambitions of aboriginal groups relating to the fisheries are particularly relevant. As Low J.A. noted in the Court below, fishing is central to the identity of many British Columbia First Nations: "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."

R. v. Kapp (B.C.C.A.) per Low J. at para. 27

8. Colonial policy in British Columbia initially sanctioned and, indeed, encouraged aboriginal fishing efforts. Crown officials recognized the right of aboriginal peoples to continue to sustain themselves from the land and its natural resources, and wanted to promote the continued self-sufficiency of these groups: *R. v. Van der Peet*. Sir James Douglas entered into the Douglas

Treaties, which guaranteed the Aboriginal signatories the right to “carry on [their] fisheries as formerly.” Subsequently, the Crown located reserves in British Columbia strategically so as to facilitate access by Aboriginal peoples to the fisheries, and it created relatively small reserves for those groups on the assumption that they would continue to sustain themselves by fishing:

Wewaykum, Delgamuukw, Kapp (per Brenner C.J.).

R. v. Jack [1980] 1 S.C.R. 294 at p. 308; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 271-273 (per McLachlin J, in dissent but not on this point); *Saanichton Marina Ltd. v. Tsawout Indian Band* (1989) 57 D.L.R. (4th) 161 at p. 163; *Wewaykum Indian Band v. Canada* [2002] 4 S.C.R. 245 at para. 11; *Delgamuukw v. British Columbia*, (1991) 79 D.L.R. 4th 185 (B.C.S.C.) at p. 359; *R. v. Kapp* (B.C.S.C.) per Brenner C.J. at para 92.

9. First Nations in British Columbia have not litigated their fishing rights in court; at the same time, it is obvious that many of them have reasonable or even strong claims to domestic fishing rights and, in some cases, commercial fishing rights, and that fishing is central to the identity of most west coast aboriginal groups.

10. After British Columbia entered Confederation in 1871, the ability of aboriginal groups in this Province to exercise their s. 35 fishing rights became heavily curtailed: the Department of Fisheries and Oceans (“DFO”) has gradually imposed extensive regulations on the fishing activities of aboriginal groups and other Canadians. These regulations generally purport to prohibit commercial fishing by aboriginal groups outside of the licensing system applicable to all Canadians, and they also restrict their domestic fishing by limiting quantities and species fished, fishing locations and times, and fishing methods. In short, the access of Aboriginal groups to the fisheries is a far cry from their access prior to European contact.

R. v. Sparrow, [1990] 1 S.C.R. 1075 at pp. 1088-1090 and pp. 1095-1097 (per Dickson C.J.)

11. Moreover, First Nations located in or near urban centres, such as those that benefited from the PSP as well as the Te’ mexw Nations, have also experienced a significantly reduced ability to exercise their other s. 35 rights. Colonial settlement and development of their lands has deprived them of the use and control of much of their traditional territories. Thus, the ability of many First Nations to exercise land-based s. 35(1) rights has been seriously compromised.

12. Reconciliation with west coast Aboriginal groups will require addressing their much reduced access to the fisheries, to their traditional territories, and to land-based resources. Commercial fishing opportunities are an highly sensible type of accommodation for these groups, particularly where they help First Nations sustain a deep and longstanding connection to the fisheries.

13. To be clear, although many Aboriginal groups may reasonably claim commercial fishing rights, commercial fishing opportunities may also serve to accommodate any of their other reasonably claimed s. 35 rights.

14. It would be perverse if the Crown's ability to accommodate a s. 35 right were confined to facilitating the exercise of that right. If that were so, the Crown's ability to accommodate would diminish the more seriously the First Nation's ability to exercise the right was already compromised, i.e. in the situation where creative accommodation is most critical to achieving reconciliation. More generally, the purpose of aboriginal law, namely to reconcile the respective claims, interests and ambitions of aboriginal peoples and non-aboriginal peoples, cannot be achieved if the Crown's authority to accommodate is restricted to facilitating the exercise of the particular s. 35 right at issue.

C. Crown-Aboriginal Accommodation Agreements are "Other Rights" under s. 25

15. Section 25 of the *Constitution Act, 1982* protects (i) aboriginal rights; (ii) treaty rights; and (iii) "other rights or freedoms that pertain to the aboriginal peoples of Canada." The Te'mexw Nations submit that Crown-aboriginal accommodations will normally confer "other rights."

16. Appreciating the larger context of Crown-aboriginal relations is essential to understanding why s. 25 is not limited to s. 35 rights. The distinct position of Canada's aboriginal peoples is not embodied in s. 35 rights alone: it is also reflected in a wide range of legislative, regulatory, administrative and contractual arrangements that create a variety of rights for aboriginal peoples.

17. An example of the unique rights and freedoms of aboriginal people is the protection for their lands embodied in the *Royal Proclamation of 1763*, the common law and, in the case of reserves, the *Indian Act*. The *Indian Act* in particular protects reserves because it generally prevents the alienation of reserve land without the free and informed consent of the Band membership. The right of Indian Bands to enjoy certain lands in perpetuity is foundational to the Crown-Aboriginal relationship, yet the *Indian Act* provisions that further this end are not constitutionally protected.

Royal Proclamation of 1763; Indian Act, R.S.C. 1985, c. I-5, ss. 37-40

18. A related body of rights or freedoms is found in ss. 87, 89 and 90 of the *Indian Act*, which protect the entitlement of Indians to their reserves by shielding reserve land and property on reserve from government taxation and general land seizure laws.

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 at pp. 130-131 (per La Forest J.)

19. The modern treaties provide another example of how reconciliation involves rights and instruments that are not protected by s. 35. The Nisga’a Final Agreement, a treaty within the meaning of s. 35, guarantees the Nisga’a fishing rights. However, the actual implementation of those rights – that is, restrictions as to how much, when, where and how the Nisga’a people can fish – is governed by “Annual Fishing Plans”, which are developed by the parties outside of the Final Agreement. Certain aspects of the Nisga’a fishing rights are also addressed through “Harvest Agreements” and licences, which are promised in the Final Agreement but which are not actually part of the treaty and are not intended to be protected by s. 35.

Nisga’a Final Agreement Act, S.B.C. 1999, c.2, Schedule, Fisheries Chapter (Chapter 8), ss. 1-6, 21-27, 84-91

20. Finally, as discussed above, the decisions of this Court in *Sparrow*, *Delgamuukw*, *Haida*, and *Mikisew* have stressed that consultation and accommodation are required to ensure the lawfulness of Crown action and, as discussed above, accommodation agreements will often be essential to reconciliation. Consultation and accommodation outside the modern treaty process therefore represent a further dimension of the unique Crown-aboriginal relationship.

21. Section 25 ensures that the application of the *Charter*, and particularly s. 15, does not undermine the nexus of aboriginal and treaty rights, laws, regulations, administrative arrangements, and accommodation agreements that recognize the distinct position of aboriginal peoples in Canada and, ultimately, further Crown-aboriginal reconciliation.

22. The Te’mexw Nations submit that the Court should enunciate a test for identifying “other rights and freedoms” within the meaning of s. 25, and that this test should reflect the distinct status of aboriginal peoples in Canada and protect measures designed to achieve reconciliation between First Nations and the Crown. It is submitted that “other rights and freedoms” should meet the following three criteria:

- a) the measure in question must be a right or freedom;
- b) the right or freedom must pertain to an aboriginal group and not merely to individuals;
and
- c) the right or freedom must relate to the aboriginal peoples *qua* aboriginal peoples and not merely as ordinary citizens.

23. Assessing whether a matter relates to aboriginal peoples *qua* aboriginal peoples is a delicate task. The analysis of this third question should be flexible and include all relevant considerations, including the following:

- i. Is the measure related to or ancillary to an aboriginal or treaty right (e.g. a settlement of a Treaty Land Entitlement Claim arising out of one of the Numbered Treaties)?
- ii. Does the measure relate to the special status of aboriginal peoples (e.g. a measure provided by the *Indian Act*)?
- iii. Can the right or freedom be reasonably characterized as a measure to accommodate a claimed or proven aboriginal or treaty right, or the infringement of such a right?

24. In our submission, Crown-Aboriginal accommodation measures will normally satisfy criteria a, b, and c (by virtue of satisfying criterion iii), and should therefore be protected under s. 25 as “other rights.”

D. The PSP is an “Other Right” Within the Meaning of s. 25

25. It is submitted that the PSP is an “other right” within the meaning of s. 25. Applying the first branch of the s. 25 test articulated above, the PSP conferred on the beneficiary First Nations the right to fish and sell salmon. This right was conferred to three aboriginal groups, not individuals, thus satisfying the second branch of the proposed s. 25 test.

26. Finally, the PSP related to the aboriginal groups *qua* aboriginal peoples and not merely as ordinary citizens. The PSP was part of a larger policy, the Aboriginal Fisheries Strategy (“AFS”), which is intended to help accommodate the claimed and proven fishing rights of aboriginal peoples. This is confirmed in a policy statement on the *Aboriginal Communal Fishing Licence Regulations*, the Regulations pursuant to which the PSP was established:

The regulations and communal licences will provide a clear and simple regulatory framework for the management of Aboriginal fisheries which will meet the requirements set out in the *Sparrow* decision through accommodating the negotiation of licence terms and conditions. The regulations also will make the management of Aboriginal fishing consistent with the communal nature of Aboriginal fishing rights, provide Aboriginal organizations with new roles in fisheries management and enhance the control of Aboriginal communities over their own affairs. By creating a framework for the regulation of all Aboriginal fishing, these Regulations will promote continued stability in all fishing industry sections, provide the Department of Fisheries and Oceans with the mechanism to ensure conservation of the resource and reduce tensions among fishery users.

Aboriginal Communal Fishing Licence Regulations, S.O.R./93-332 (“ACFLR”). This passage is quoted by Justice Low in *R. v. Kapp* (B.C.C.A.) at para. 39.

27. Similarly, Fisheries Minister Crosbie identified Canada’s desire to reach a negotiated settlement to commercial fishing rights claims:

....we know that for years and years in British Columbia and elsewhere there’s been poaching of fish.... The Aboriginals say they have a right to do it....

We are trying to avoid that by getting so that we know and agree with the Aboriginals, on an experimental basis, how much fish they can take and sell, and we can regulate how it’s being sold...

So in the interests of the whole industry, the commercial and recreational, and stability, and to try to keep the industry profitable, we're trying this as an experiment. Rather than wait for the courts to decide whether you can sell a fish or can't sell a fish, wouldn't it be better for the governments and the groups involved to devise a system that satisfies everyone and that will be reasonable?

This passage is quoted by Justice Kitchen in *R. v. Kapp* (B.C.P.C) at para. 47

28. Thus, the PSP was part of the Crown's accommodation of claimed and proven s. 35 rights. As such, the policy related to the special status of the aboriginal beneficiaries and can reasonably be characterized as a measure that accommodated fishing rights. As discussed above, the fact that one or more of the participating Aboriginal groups may not be able to reasonably claim commercial fishing rights under s. 35 does not preclude the PSP from being a legitimate accommodation of other claimed or proven s. 35 rights.

29. Moreover, the objective of reconciliation is apparent from the above-stated policy goal of "reduce[ing] tensions among fishery users," as well as from Mr. Crosbie's statement that the government's objective was to "devise a system that satisfies everyone." The AFS is intended to secure the acceptance by the participating aboriginal groups of the overall fisheries management regime so that DFO can better manage the fisheries and allow other groups to benefit from this resource. This reconciliatory purpose further confirms that the PSP was an accommodation measure, that it related to aboriginal peoples *qua* aboriginal peoples, and that it fell within the ambit of s. 25.

E. Section 25 is Integral to the s. 15 Analysis

30. This appeal, at core, engages the question of how the unique rights and status of First Nations are to be reconciled with the constitutional vision of equality entrenched in s. 15 of the *Charter*. The Te'mexw Nations submit that s. 25 of the *Charter* plays a critical role in defining this relationship. Properly considered, s. 25 confirms that the recognition of the special rights and status of First Nations in Canadian society is not an exception to equality, but rather an expression of our constitutional understanding of equality.

31. Canada, in its factum, argues that s. 25 essentially provides an "exemption" or "defence" from equality, such that it is engaged only after the court has found an unjustifiable infringement of s. 15 equality rights. With respect, conceptualizing s. 15 in this manner, and legitimatizing what would otherwise be found to be unjustifiable discrimination, sets up a fundamental conflict between equality and the unique rights and freedoms of First Nations. Such a conflict would be

destructive of both our substantive understanding of equality and the ultimate goal of reconciliation between aboriginal and non-aboriginal peoples.

32. By contrast, the Te'mexw Nations submit that a primary role of s. 25 is to affirm a view of equality that embraces, rather than excludes, government initiatives that recognize the unique status of First Nations within Canadian society. In other words, s. 25, like s. 15(2), is best understood as an “interpretive aid to s. 15(1); providing conceptual depth and clarity on the substantive nature of equality” (emphasis added).

Lovelace v. Ontario, [2000] 1 S.C.R. 950 at para. 97.

33. Several reasons support this view of s. 25 as an interpretive aid to s. 15 and other *Charter* provisions. First, the clear language of s. 25 mandates an interpretive role for this provision. Section 25 does not say that s. 15 and other *Charter* rights will not abrogate or derogate from s. 25 rights; instead, the “guarantee of rights in the *Charter*,” must “not be construed so as to abrogate or derogate from” s. 25 rights (emphasis added). The word “construe” strongly suggests that s. 25 is relevant to the interpretation of other *Charter* provisions, and the fact that it is the overall “guarantee of rights in the *Charter*” that must not be construed so as to abrogate or derogate from s. 25 rights suggests that s. 25 may be relevant not only to the s. 15 analysis, but also to any s. 1 and s. 24 analysis.

34. Second, using s. 25 to inform the s. 15 analysis “ensures the internal coherence of the *Charter* as a working statute”. In contrast, treating s. 25 as a “saving” provision, as proposed by Canada, entrenches a basic conflict between two *Charter* provisions.

Lovelace, supra, para. 106; see also *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at para. 54.

35. Third, a role for s. 25 within the s. 15 analysis is consistent with a key purpose of the *Charter*, namely to enshrine a vision of equality that acknowledges and respects fundamental and deeply personal differences between individuals and groups of individuals in Canadian society. This Court recognized that objective in its very first equality decision, *Andrews v. Law Society of British Columbia*:

It must be recognized, however, as well that the promotion of equality under s. 15 has a much more specific goal than the mere elimination of distinctions. If the *Charter* was intended to eliminate all distinctions, then there would be no place for sections such as 27 (multicultural heritage); 2(a) (freedom of conscience and religion); 25 (aboriginal rights and freedoms); and other such provisions designed to safeguard certain distinctions. Moreover, the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2), which states that the equality rights in s. 15(1) do “not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups....” [emphasis added].

36. In this respect, the role of s. 25 has clear parallels to s. 15(2), which clarifies that the equality guarantee in s. 15(1) does not preclude ameliorative government initiatives directed at disadvantaged individuals or groups. In keeping with its focus on “substantive” rather than “formalistic” equality, this Court has ruled that s. 15(2) does not “trump” certain types of discrimination claims but rather assists in the interpretation of s. 15(1) and in the understanding of the equality guarantee: *Lovelace v. Ontario*. In *Lovelace*, Iacobucci J. accepted the concern that “interpreting s. 15(2) as an exemption or defence requires the courts to inappropriately frame equity programs as constituting *prima facie* violations of s. 15(1)” and that “[s]uch a view is inconsistent with the substantive equality analysis and encourages a negative approach to ameliorative programs”.

Lovelace, *supra*, para. 101.

37. Similarly, the fact that an impugned benefit or program is a s. 25 right is relevant to understanding the purpose of the differential treatment and to assessing whether it is truly harmful to the dignity of those excluded from it. It is submitted that, in the vast majority of cases, the differential treatment will not send the message that excluded Canadians are less worthy of dignity and respect. Rather, the benefit or program will normally serve to acknowledge and protect the distinctive identity and status of one or more aboriginal groups within Canadian society. Such differential treatment will typically serve to recognize genuine, and constitutionally-protected, differences in the position of the beneficiary groups relative to other Canadians.

38. This approach to s. 25 extends to the whole *Charter* analysis. Thus if a Court proceeds to a s. 1 or s. 24 analysis, it should consider s. 25 at those stages as well to ensure that the guarantee of rights in the *Charter* does not abrogate or derogate from the rights protected by s. 25. The essential point, however, is that s. 25 at each stage informs and clarifies our understanding of substantive equality enshrined in s. 15(1), rather than suggesting that the rights and freedoms of First Nations are exceptions or defences to the equality guarantee.

39. In light of the above, the Te’mexw Nations respectfully submit that s. 25 must be addressed on this appeal. Applying the *Law* test on this appeal without reference to s. 25 will implicitly deny the crucial role of s. 25 in the interpretation of s. 15, and signal that this provision has no role to play unless unjustifiable discrimination is found on the facts. To avoid the problematic

conflict this creates between the equality guarantee and the rights and freedoms of aboriginal peoples, and to provide guidance to the lower courts, Te'mexw Nations urge this Court to confirm the interpretive role of s. 25 and its relationship to the s. 15 equality guarantee.

F. Section 15 Analysis in this Case

40. The Te'mexw Nations agree with Canada that even without s. 25, the PSP is not discriminatory. However, the proper application of s. 25 in construing s. 15 reinforces that view. Section 25 demands that s. 15 be construed so as to not abrogate or derogate from the "other rights" created by the PSP. It is submitted this is best done at the third stage of the *Law* test, where the Court should recognize that it is not an affront to anyone's human dignity to recognize, respect and accommodate the special status of aboriginal groups and their elevated rights and interests in the fisheries.

Law v. Canada [1999] 1 S.C.R. 497 at paras. 59 and 61

41. It is crucial to recognize that this conclusion does not flow from the historic or present disadvantage of aboriginal peoples. Instead, it flows from the special legal status that Aboriginal groups have due their prior presence on and occupation of the land as well as the objective of Canadian constitutional law to reconcile that inescapable reality with the modern reality of settlement in a just manner.

PART IV - COSTS

42. The Te'mexw Nations make no submissions as to costs.

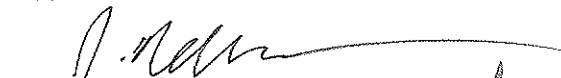
PART V – ORDER REQUESTED

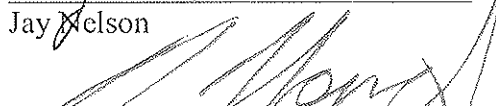
43. The Te'mexw Nations ask that this appeal be dismissed.

DATED THE 16 day of November, 2007

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Robert J.M. Janes


Jay Nelson


Dominique Nouvet

PART VI – TABLE OF AUTHORITIES

LEGISLATION/ACTS

Aboriginal Communal Fishing Licence Regulations, S.O.R./93-332 p. 6

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982,
being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, p. 1, 4, 5, 7, 8, 9

Constitution Act, 1982, being Schedule B to the *Canada Act 1982*
(U.K.), 1982, c. 11 p. 1, 4, 5, 7

Indian Act, R.S.C. 1985, c. I-5 p. 4, 5, 6

Nisga'a Final Agreement Act, S.B.C. 1999, c.2 p. 5

Royal Proclamation of 1763 p. 4

CASES

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 p. 8, 9

Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157 p. 8

Delgamuukw v. British Columbia, (1991) 79 D.L.R. 4th 185 (B.C.S.C.) p. 3

Delgamuukw v. British Columbia [1997] 3 S.C.R. 1010 p. 2, 5

Haida Nation v. British Columbia (Minister of Forests) [2004]
3 S.C.R. 511 p. 2

Law v. Canada [1999] 1 S.C.R. 497 p. 10

Lovelace v. Ontario, [2000] 1 S.C.R. 950 p. 8, 9

Mikisew Cree First Nation v. Canada, [2005] 3 S.C.R. 388 p. 1, 5

Mitchell v. Peguis Indian Band, [1990] 2 S.C.R. 85 p. 4

R. v. Jack [1980] 1 S.C.R. 294 p. 3

R. v. Sparrow, [1990] 1 S.C.R. 1075 p. 3, 5

R. v. Van der Peet, [1996] 2 S.C.R. 507 p. 2, 3

Saanichton Marina Ltd. v. Tsawout Indian Band (1989) 57 D.L.R. (4th) 161 p. 3

Wewaykum Indian Band v. Canada [2002] 4 S.C.R. 245 p. 3

SECONDARY MATERIAL

B. Slattery, "The Metamorphosis of Aboriginal Title" [2006] 85 C.B.R. 255 p. 2