

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

BETWEEN:

JOHN MICHAEL KAPP, ROBERT AGRICOLA, WILLIAM ANDERSON, ALBERT ARMSTRONG,
DALE ARMSTRONG, LLOYD JAMES ARMSTRONG, PASHA BERLAK, KENNETH AXELSON,
MICHAEL BEMI, LEONARD BOTKIN, JOHN BRODIE, DARRIN CHUNG, DONALD CONNORS,
BRUCE CROSBY, BARRY DOLBY, WAYNE ELLIS, WILLIAM GAUNT, GEORGE HORNE,
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(Appellants)

AND:

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

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UNITED FISHERMEN AND ALLIED WORKERS UNION

INTERVENERS

INTERVENER'S FACTUM

**Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters
Society, Aboriginal Fishing Vessel Owners Association and United Fishermen and
Allied Workers Union, the Intervener**
(Pursuant to Rules 37 of the *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

OVERVIEW

1. The individual members of the Musqueam and Tsawwassen bands and the Appellants all have the right in common with the Canadian public to fish for salmon in the Fraser River. For 24 hours, the Minister of Fisheries allowed the former to exercise that common right while the latter were prohibited. The question in this case is whether that distinction is constitutionally permissible.
2. This Intervener emphasizes that the fishery is public as a matter of law as well as fact. The common property nature of the fishery supports and adds a dimension to the Appellants' argument: that the impugned distinction is a clear case of discrimination; alternatively, that the distinction is discriminatory by application of the full test in *Law*¹; and that the discrimination cannot be justified under S. 1 of the *Charter of Rights and Freedoms*.

FACTS

3. This Intervener agrees with the facts, the factual findings by the Trial Judge, and the treatment of the Trial Judge's findings by the Court of Appeal as set out in the Appellants' Factum.

¹ *Law v. Canada* [1999] 1 S.C.R. 497 (SCC)

PART II – ISSUES ON APPEAL

4. In view of the position of the Appellants and the Respondent with respect to the Application of the *Constitution Act, 1867*, this Intervener confines its submission to the following issues:
 - i. Whether the Pilot Sales Program violates S. 15(1) of the *Charter*, and
 - ii. Whether, if so, the violation is justified by S. 1.

PART III – ARGUMENT

THE FUNDAMENTALS

5. At common law fishing is a matter of right. The underlying rights relevant to this case are the public right of fishing and the aboriginal right to fish. The legislative regime, particularly the licensing scheme, regulates the underlying rights.
6. In *Comeau's Seafoods*², the Court articulated the licensing discretion of the Minister in terms of a duty to acknowledge the public right by exercising stewardship over its common property.

Major J stated:

"Canada's fisheries are a "common property resource" belonging to all the people of Canada. Under the *Fisheries Act* it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest (S.43)" (Emphasis added.)

7. This echoes the words of Cory J., who stated in *Nikal*³:

"It is for the Federal Government to ensure that all users who are entitled to partake of the salmon harvest have the opportunity to obtain an allotment pursuant to the scheme of priorities set out in *Sparrow*."

² *Comeau's Seafoods Ltd. v. Canada (Fisheries and Oceans)* [1997] 1 S.C.R. 12 (SCC), par. 37, see also par. 40

³ *R. v. Nikal* [1996] 1 S.C.R. 1013 (SCC), par. 102

8. In *Sparrow*⁴ and *Nikal*⁵, the Court construed the subject legislation as regulating the underlying aboriginal right: the licensing scheme *per se* neither extinguished nor infringed that right.
9. The commercial fishing in issue in this case is the exercise of the public right; the impugned distinction was made in the context of the regulation of that right.
10. The public right of fishery is unique. It is a right of access to the common property of the public; it is public in the true sense: namely, the right of the public as distinct from, rather than as represented by, the Crown. Its source is the recognition and protection by the Crown of the ancient practice of its subjects. The Crown is the steward of the resource for the public; not its owner.⁶
11. The public right of fishery has constitutional implications relevant to this case.
12. It is recognized in *Magna Carta*⁷. By reason of that statute, “. . . no restriction can be put upon that right of the public by an exercise of the prerogative in the form of a grant or otherwise.”⁸ (Emphasis added.) The High Court of Australia has characterized the public right as a burden on the Imperial Crown preventing it from recognizing, on the assertion of colonial sovereignty, aboriginal title inconsistent with it⁹. This Court, in *Gladstone*, has described it as part of the legal context in which S. 35(1) of the *Constitution Act, 1982* is to be applied¹⁰.

⁴ *R. v. Sparrow* [1990] 1 S.C.R. 1075 (SCC), pp. 1095 - 1099

⁵ *R. v. Nikal*, *supra*, par. 89 - 99

⁶ *Attorney General for British Columbia v. Attorney General of Canada* [1914] A.C. 153 (PC), pp. 168 - 172; LaForest G.V.: *Water Law in Canada: The Atlantic Provinces* 1973, pp. 178, 195 - 199

⁷ *Magna Carta*, 9 Hen. III [1225] Cap XVI

⁸ *Attorney General for British Columbia v. Attorney General for Canada*, *supra*, pg. 171. The added emphasis is not meant to imply that the right cannot be regulated, but rather to emphasize the scope of the prohibition and in particular that it is not confined to the creation of a proprietary fishery.

⁹ *The Commonwealth of Australia v. Yarmirr* [2001] H.C.A., par. 59 - 61, 70, 96 - 100

¹⁰ *R. v. Gladstone* [1996] 2 S.C.R. 732 (SCC), par. 67 - 68

13. The public right of fishing also informs the scope of Parliament's legislative jurisdiction. Title to the land in British Columbia and, hence, the proprietary fishery, is held by the Crown in right of the Province. Further, legislative jurisdiction under S. 92(13) extends to matters involving fishing related activity where such matters are in pith and substance in relation to Property and Civil Rights in the Province. As a result, Canada's jurisdiction pursuant to S. 91(12) of the *Constitution Act, 1867*, though broad, is general; it concerns the "... maintenance and preservation of the fishery as a whole. ..."¹¹
14. The public right of fishery also informs the jurisprudence on the scope and application of S. 35 of the *Constitution Act, 1982*. In working out the role of S. 35 in the identification and constitutional protection of aboriginal fishing rights, this Court has focused on their interface with the public right of fishery, both in the process of defining the aboriginal right and in describing the scope of and limits on its protection.
15. At the definitional stage, the Court has effectively drawn the line between the participation of aboriginal fishers in the salmon fishery *qua* aboriginals and their participation in the salmon fishery *qua* Canadians congruent with a line between food and social fishing on the one hand, and commercial fishing on the other; it has denied the requisite aboriginal roots in commercial salmon fishing. Further, it has done so on the basis of historical and anthropological analysis of the role and cultural significance of fishing to aboriginal communities.¹²

¹¹ *Ward v. Canada* [2002] 1 S.C.R. 569 (SCC) at paragraph 34

¹² *R. v. Vanderpeet* [1996] 2 S.C.R. 507 (SCC); *R. v. NTC Smokehouse Ltd.* [1996] 2 S.C.R. 672

16. This is an application of the general principle that because aboriginal rights grant special constitutional protection to one part of Canadian society, their definition demands specificity, and roots in aboriginal practices.¹³
17. At the operational stage, the Court, in *Gladstone*¹⁴, held that the public right to fish and the protection of its integrity provided an appropriate limit to the constitutional protection of an aboriginal fishing right.
18. In the same case, the Court emphasized the obvious: that the absence of an aboriginal right to fish salmon for sale did not imply the absence of a right in individual aboriginal Canadians to fish salmon commercially because, as Canadians, they have equal rights to the public fishery.
19. The point is that the essential constitutional function of recognizing and protecting the aboriginal dimension of fishing, is that of the doctrine of aboriginal rights and their recognition and affirmation in S. 35. At both levels: the definitional and the operational, the Court recognizes and affirms the public right of fishery.

APPLICATION

20. Understanding of the public right of fishery is necessary to understanding the constitutional setting of the *Charter*, and Ss. 15 and 1 in particular. The *Charter* exists as part of a constitution which includes the *Magna Carta*, the *Constitution Act 1867*, S. 35 of the *Constitution Act 1982* and their respective jurisprudence. Ss. 15 and 1 of the *Charter*, in their

¹³ *R. v. Vanderpeet*, *supra*, at paragraphs 18 – 20, and 69

¹⁴ *R. v. Gladstone*, *supra*, par. 67 - 68

treatment of the right of public fishery, should be applied as consistent with, not as compromising, that constitutional context.

21. Out of this context arise two salient points: i.) that all of the individuals involved in this case, when commercially fishing for salmon, are exercising the same underlying right; and ii) that the Minister, in determining who may and who may not exercise that right, is acting as a steward with the duty to manage the resource on behalf of all Canadians. In light of these two propositions, the impugned distinction requires demonstration of its constitutional legitimacy.
22. The Respondent puts forth two general themes in its argument against the charge of discrimination.
23. The first is that the Minister was simply allocating fishing opportunity among “user groups”. This position begs the underlying and substantive issue whether the designation of either the Musqueam and Tsawwassen or “aboriginal organizations” as a “user group” is, itself, discriminatory.
24. The difficulty is that the classification by the Respondent of the “user groups” is not symmetrical; the correspondence between “aboriginal communities” or “aboriginal organizations” on the one hand and “recreational and commercial fishers” on the other is not the same as that between “recreational fishers” and “commercial fishers”. In fact, individual members of “aboriginal communities” or “aboriginal organizations” when engaged in public fishing are members of one or both of the other “user groups”.¹⁵

¹⁵ At a deeper level the Respondent’s use of the term “user group” is conceptually unsound: it wrongly attributes concreteness to the abstract term. Individuals fish for various purposes, targeting various species, in different areas, and by different means; the “groups” are simply license categories created by the Regulations.

25. A distinction between "aboriginal communities" on the one hand and "recreational fishers and commercial fishers" on the other is appropriate and relevant when the subject "fisheries" are the aboriginal right and the public right respectively. The same distinction made in the context of the public fishery, however, gives rise to the very issue in this case; namely, whether distinguishing in favour of "aboriginal communities" in regulating the public fishery is discriminatory.
26. This misunderstanding compounds that of failing to recognize that the statutory regime is the mechanism for the regulation of rights and that ministerial discretion is exercised in furtherance of a duty. A fishing license is not a "benefit" analogous to a Crown franchise or a government pension; it is an instrument to facilitate the proper management of the common property of the Canadian public including the individual members of the Musqueam and Tsawwassen and the Appellants.
27. Reliance on *Huovinen*¹⁶ is misplaced. First, that case dealt with the construction, not the validity, of the *ACFLR*. Second, the construction made in that case is contrary to the reading given the *ACFLR* by this Court in *Marshall*¹⁷. According to that reading, the *ACFLR* are directed at the regulation of treaty (aboriginal) rights and in particular at the food fishery. This Court's reading in *Marshall* is supported by the assertion that the *Aboriginal Fishing Strategy* was a response to the decision in *Sparrow*.
28. The second theme advanced by the Respondent is that the impugned distinction is justified by the relationship between aboriginal peoples and fishing.

¹⁶ *R. v. Huovinen* [2000] 188 D.L.R. (4th) 28 (B.C.C.A.); leave refused [2000] S.C.C.A. No. 478

¹⁷ *R. v. Marshall* [1999] 3 S.C.R. 456 (SCC), par. 63; *R. v. Marshall* (No. 2) [1999] 3 S.C.R. 139 (SCC), par. 34

29. As set out above, the recognition and affirmation of the cultural significance of fishing to aboriginal peoples is primarily the function of the doctrine of aboriginal rights and S. 35(1) of the *Constitution Act, 1982*; further, this Court has devoted substantial effort to developing a jurisprudence which accommodates the aboriginal dimension of fishing in a constitutionally appropriate manner.¹⁸
30. The cultural significance of fishing for aboriginal people, where it exists, could have been, ought to have been (and, according to the reading given the ACFLR in *Marshall*, was) reconciled with the Crown's sovereignty and the Minister's duty to the public by the introduction of a legislative regime recognizing and regulating the "aboriginal fishery" in its true sense: namely, the aboriginal right to fish.
31. By appealing to "aboriginality" in support of the Pilot Sales Fishery, the government and the Respondent are simply re-drawing the lines meticulously drawn by this Court as the parameters of the relevance of aboriginality to fishing activity. In doing so, they are not only ignoring the law, they are undermining the reconciliatory function of S. 35. The anger and demoralization expressed by the Appellants' witnesses demonstrates the prescience and the wisdom of this Court's concern that special treatment by the law be congruent with fishing which is special in fact, and that the limits on such special treatment be as scrupulously drawn and maintained as the rights which actualize it.¹⁹

¹⁸ *Jack et al v. The Queen* [1980] 1 S.C.R. 294; *R. v. Sparrow*, *supra*; *R. v. Vanderpet*, *supra*; *R. v. NTC Smokehouse*, *supra*; *R. v. Gladstone*, *supra*; *R. v. Adams* [1996] 3 S.C.R. 101 (SCC); *R. v. Cote* [1996] 3 S.C.R. 139 (SCC)

¹⁹ *R. v. Gladstone*, *supra*, at paragraphs 71 – 73, and 75

CONCLUSION

32. The distinction (whether between the Musqueam / Tsawwassen and the Area E fishers or between aboriginal organizations and the fishing public) was made in the context of regulation of a public right of access to a common property. Such distinction in such context calls for constitutional scrutiny. Neither the plea of effective fisheries management, nor that of aboriginal difference succeeds in rendering the distinction innocent of discrimination under S. 15 or justifying it under S. 1 of the *Charter*.

PART IV - SUBMISSIONS AS TO COSTS

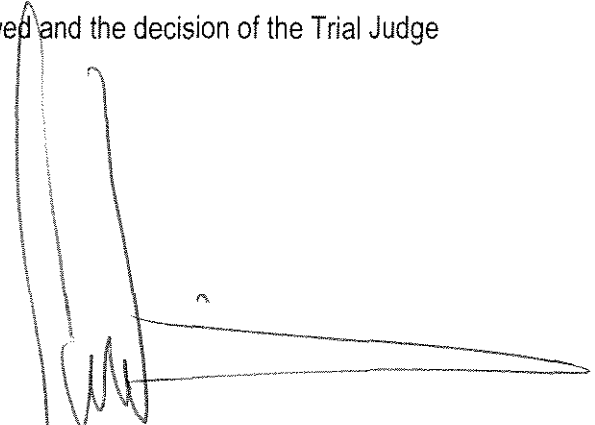
33. The Intervener makes no submissions on costs.

PART V – NATURE OF THE ORDER SOUGHT

34. The Intervener requests that the appeal be allowed and the decision of the Trial Judge restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED this 19th day of November, 2007.



J. KEITH LOWES
Counsel for the Intervener

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<u>Statutes and Regulations</u>	<u>Paragraph # Referred To In Factum</u>
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