S.C.C. File No. 31603

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

B E T W E E N:

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

Appellants
(Appellants)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

- and -

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Interveners

RESPONDENT'S FACTUM
HER MAJESTY THE QUEEN, RESPONDENT
(Rule 36)

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RESPONDENT'S FACTUM
HER MAJESTY THE QUEEN, RESPONDENT
(Rule 36)

PART I – STATEMENT OF FACTS

"…accommodation of differences…is the true essence of equality"[1]

OVERVIEW

1. The Fraser River salmon fishery is an extremely complex fishery, and one of the most difficult to manage. The Minister of Fisheries and Oceans (the "Minister"), who is tasked with managing the salmon fishery for the good of all Canadians, must allocate this scarce resource among a number of different user groups – commercial fishers, aboriginal communities, and recreational fishers – while ensuring that a sufficient number of salmon will reach the spawning grounds to preserve the fishery for the future.

2. In an effort to enhance the management of the Fraser River salmon fishery and address a number of issues besetting the fishery, the Government of Canada developed the Aboriginal Fisheries Strategy, a component of which was the Pilot Sales Program. Under the Pilot Sales Program, the Minister of Fisheries and Oceans exercised the discretion granted by the *Fisheries Act*[2] and *Aboriginal Communal Fishing Licences Regulations*[3] (the "*ACFLR*") and issued salmon fishing licenses to aboriginal communities which permitted them to sell the fish that they caught.

3. On August 19, 1998, the Minister issued such a licence to the Musqueam, Burrard, and Tsawwassen First Nations, permitting them to fish for a period of twenty-four hours and to sell their catch. The Appellants, who are all commercial fishers, mounted a "protest fishery" during the aboriginal fishery, and were charged for fishing during a time when the fishery was closed to them. At their subsequent trial, the Appellants did not challenge the law under which they were charged, but rather asserted that the trial proceedings should be stayed as their rights to equality under s. 15(1) of the *Charter of Rights and Freedoms* (the "*Charter*") had been violated. Although the Appellants were also provided with opportunities to fish for salmon for commercial purposes, they

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[1] Per Sopinka J. in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66, quoting McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at p. 169.
[2] *Fisheries Act*, R.S.C. 1985, c. F-14, s. 7(1)
[3] *Aboriginal Communal Fishing Licences Regulations*, S.O.R./93-332, s. 4 and s. 5(1)(*l*).

claimed that their dignity had been demeaned because they were not permitted to fish *at the same time* as the aboriginal fishers.

4. The Appeal is without merit. As was held by the Court of Appeal for British Columbia, the Appellants were not denied any benefit of law, as they were provided opportunities to fish and, indeed, caught significant quantities of salmon. Moreover, providing aboriginal communities, which have historically been seriously disadvantaged, with access to commercial salmon fishing does not demean the dignity of commercial salmon fishers by treating them as less worthy and valued members of Canadian society. Finally, the Appellants are not entitled to the relief they seek in any event. The primacy of the rule of law in our society requires that the Appellants, who deliberately broke a law in order to launch a collateral *Charter* attack on another law, should be held to account for their actions.

FACTS

5. The Respondent generally accepts that the excerpts from the trial judge's reasons set out in the Appellants' factum have been accurately reproduced. The "facts" set out in paragraphs 26, 28-30, 32-34, and 38-40 of the Appellants' factum are more properly characterized as argument and are not accepted by the Respondent. The Respondent emphasizes and relies on the facts set out below.

The Substantive Allegations

6. On August 18, 1998, the Minister's designate, exercising the discretion conferred under ss. 4 and 5(1) of the *ACFLR*[4], issued an aboriginal communal fishing licence to the Musqueam, Burrard and Tsawwassen First Nations under the Pilot Sales Program. The licence authorized those aboriginal communities to fish for salmon for sale in a specified area of the Lower Fraser River, for a twenty-four hour period commencing at 7:00 a.m. on August 19, 1998.[5] During this period, the Lower Fraser River was closed to

[4] Section 4 of the *ACFLR* provides that the Minister may "issue a communal licence to an aboriginal organization". Section 5(1)(*l)* provides that the Minister may specify conditions respecting "the disposition of fish caught under" such a licence.

[5] Reasons of Low, J.A., A.R. Vol. I, pp. 167 and 175-176, at paras. 13, 38-39; *Communal Fishing Licence*, A.R. Vol IX, p. 1640-1645.

commercial gillnet fishing generally (gillnet fishing for salmon is closed throughout the year unless opened from time to time through a ministerial variation order as part of the management of the resource).[6]

7. On August 20, 1998, the Appellants deliberately contravened s. 53(1) of the *Pacific Fishery Regulations* and fished for salmon with a gillnet during a close time.[7] They did so in order to "protest" the aboriginal communal fishery and challenge the constitutionality of the aboriginal salmon fishery for the purposes of sale. Each of the Appellants held Fisher's Registration Cards and fished from vessels that were licensed for commercial fishing in Area "E", although not all were owners of the vessels.[8] The Appellants were all charged with offences contrary to s. 78 of the *Fisheries Act*, which provides that it is an offence to contravene the *Act* or the regulations.[9]

8. On October 7, 2002 the trial of five of the Appellants[10] commenced. Ten other Informations[11] charging 131 persons, including the remaining Appellants, in relation to the same protest fishery were adjourned pending the outcome of the trial.[12]

9. The Appellants did not assert that the regulation which they had contravened was unconstitutional, nor did they contend that the charging provision under s. 78 of the *Fisheries Act* was unconstitutional. Rather, they sought a stay of proceedings on the basis that the communal fishing license issued to the Musqueam, Burrard and Tsawwassen First Nations and the *ACFLR* violated their rights under s.15 of the *Charter* because they "authorize exclusive commercial fishing by an organization whose

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[6] Reasons of Low, J.A., A.R. Vol. I, pp. 165-167 at paras. 8-9, 12.
[7] Reasons of Low, J.A., A.R. Vol I, pp. 165-167, at paras. 8, 11-12; *Pacific Fishery Regulations*, S.O.R./93-54, s. 53(1).
[8] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 4-6, at paras. 4-6, Admission of Facts, A.R. Vol. IX, pp. 1486-1489 and Commerical Fishing Vessel Registration Certificates, A.R. Vol. IX, p. 1646-1650; Fisher's Registration Cards, A.R., Vo. IX, pp. 1665-1671.
[9] *Fisheries Act*, *supra* , s. 78.
[10] The Appellants Kapp, Bemi, Neef, Leslie Sr, and Bob McDonald.
[11] Information Nos. 108247, 108245, 108327, 108326, 108253, 108252, 108254, 108250, 108249 and 108248, A.R. Vol. II, pp. 230-240; Reasons of Kitchen, P.C.J., A.R. Vol. I, p. 3, at para. 2.
[12] Excerpt from Discussion Regarding Stay of Proceeding, July 28, 2003, A.R. Vol. VIII, p. 1483.

membership is based on race". They also challenged the *vires* of the *ACFLR* and the *Fisheries Act* on several other grounds, which have been abandoned on this appeal.[13]

The Relevant Context

a) Management of the Fraser River Salmon Fishery is a complex task

10. The Fraser River supports all five species of Pacific salmon: chinook, sockeye, coho, pink and chum. Of these, sockeye is the most important species for the commercial and aboriginal fisheries. There are approximately 100 stocks of Fraser River sockeye.[14] After spending two years in the North Pacific, they return to the Fraser River along one of two possible migratory routes. One route is along the west coast of Vancouver Island, the other is through Johnstone Strait, between the east coast of Vancouver Island and the Mainland.[15]

11. Commercial fisheries (including the troll, seine and gillnet fleets), recreational fisheries and aboriginal fisheries are conducted on Fraser River sockeye along both migratory routes.[16] The majority of the fishing effort on Fraser River sockeye occurs before the fish arrive at the mouth of the Fraser River in Management Area 29, the area in which the Area "E" license commercial gillnet fishery and the Lower Fraser River pilot sales fisheries occur. Indeed, about two-thirds of the total commercial catch is taken before the runs reach Area "E".[17]

12. Managing such a complex fishery is a daunting and formidable task, as detailed in a recent report:

> Salmon pose a unique challenge to fisheries managers. They comprise five species and hundreds of stocks, each with its particular life cycles, yield capacity and natal spawning grounds. Many are fished by Americans as well as Canadians, by three sectors of the commercial fleet

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[13] Further Amended Notice of Constitutional Question, A.R. Vol. II, p. 241; Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 3-4, at para. 3.
[14] Reasons of Low, J.A., A.R. Vol I, p. 171 at para. 24; J. Ionson October 17, 2002, A.R. Vol. III, pp. 522, 525-526; and Fraser River Sockeye, Report Exh. 18, Tab 93, A.R. Vol. XII, pp. 2185-2186.
[15] Reasons of Low, J.A., A.R. Vol I, p.171, at para. 24; Fraser River Panel Report, 1998, Exh. 5, Tab 38, A.R. Vol. XI, p. 1953 and Fraser River Sockeye Report, 1994, Exh. 2, Tab 4, A.R. Vol. X, p. 1736.
[16] Fraser River Panel Report, 1998, Exh. 5, Tab 38, A.R. Vol. XI, pp. 1956-1959.
[17] Reasons of Low, J.A., A.R. Vol I, p. 171, at para. 24; Fraser River Panel Reports, 1992-1998, Exh. 5 Tabs 32-38 (see catch summaries), A.R. Vol. XI, pp. 1926-1964; Reasons of Kitchen P.C.J., A.R. Vol. I, p. 17, at para. 33.

> as well as recreational and aboriginal fishers, at sea and in freshwater fisheries extending from the Queen Charlotte Islands to B.C.'s central interior. Knowledge of the abundance of stocks is often uncertain.
>
> Complicating matters, because of the migratory nature of salmon, the government has to apply an order of priority to demands on the fish, opposite to the order in which the fish are encountered. The first priority is to provide for adequate spawners on the spawning grounds in the headwaters and tributaries of rivers; second is the provision for aboriginal food, social and ceremonial needs (aboriginal food fishery), mainly downstream along the rivers and estuaries but also along the coast; and the third is recreational and commercial fishing, mostly at sea.
>
> This means that managers have to plan in reverse, providing for each of the main fishing groups in anticipation of higher priority demands on the fish further along their migratory path. [18]

b) Aboriginal Communities have a long-standing and unique connection to the Fishery

13. For thousands of years, the fishery resource has been of importance to many aboriginal groups on Canada's west coast.[19]

14. Provision for aboriginal food fishing, and a concurrent prohibition on the sale of food fish, was introduced in the *British Columbia General Fishery Regulations, 1888*, and contained in all subsequent Pacific *Fisheries Act* regulations, until 1992.[20]

15. There is conflicting academic opinion with respect to the nature and extent of aboriginal involvement in the commercial fishery following the arrival of European settlers and the opening of the canneries in the 1860s and 1870s.[21] However, many reports document declines in aboriginal commercial fishing.[22] The Appellants are

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[18] Reasons of Low, J.A., A.R. Vol I, pp. 170-171, at para. 22-23; D. McRae and P. Pearse, *Treaties and Transition: Towards a Sustainable Fishery on Canada's Pacific Coast* (April 2004), at pp. 23-24.
[19] Reasons of Low, J.A., A.R. Vol I, p. 172, at para. 27; Matkin Report, Exh. 4, Tab 20, A.R. Vol. X, p. 1774; Suttles Report, Exh. 6, Tab 47, A.R. Vol. XI, p. 2026; and see also historical documents in Exh. 6, Tabs 43, 44, A.R. Vol. XI, pp. 2001-2024.
[20] *Jack et al. v. The Queen*, [1980] 1 S.C.R. 294 at pp. 308-310; *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1095-1097; Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 14-15, at paras. 25-26.
[21] Excerpt from Report of the Royal Commission on Aboriginal Peoples ("RCAP Report"), Exh. 7, Tab 56, Respondent's Record, pp. 179-180; and Excerpt from "Indians at Work", Exh. 54, Tab 30, A.R. Vol. XIV, p. 2591.
[22] Fisheries Bulletin No. 27 (U.S.), Exh. 6, Tab 42, A.R. Vol. XI, p. 1973; Excerpt from "Indians of British Columbia", Exh. 6, Tab 44, A.R. Vol. XI, p. 2021; Pearse Report, 1982, Exh. 2, Tab 1, A.R. Vol. IX, p. 1684.

incorrect in stating that the trial judge found that aboriginal people have always "been a major force" in the commercial fishery.[23] Rather, the trial judge found that aboriginal participation has "fluctuated tremendously" over time, and noted that their participation in the seine fishery has increased recently but their participation in the gillnet fishery has been diminishing over the last few decades.[24]

16. In 1981, Professor Pearse headed a Commission appointed by the Governor General in Council, charged with the task of finding ways to improve the condition of Canada's Pacific fisheries. In the Commission's report (the "Pearse Report, 1982") Pearse described the Pacific fishery as being "at a crisis point". Pearse observed that commercial fisheries were "bleak", the condition of the fish stocks was "precarious", and anxiety among Indians about their traditional fishing rights was increasing. In discussing his policy objectives, Pearse said "I have taken into account the special economic problems of Indians and their unique dependence on fish for nutritional needs and cultural activities".[25] He made a number of recommendations to improve the overall management of the Pacific fishery. Pearse's recommendations relating to the aboriginal fishery included allocating a specific quantity of fish to aboriginal groups (to be determined annually through negotiation) and removing the prohibition on sale of fish in exchange for catch monitoring.[26]

17. Many aboriginal communities in British Columbia assert an aboriginal right to fish "by traditional means", which they maintain includes the right to sell or exchange fish.[27] The Musqueam, Tsawwassen and Hupacasath First Nations, three of the communities that had pilot sales licenses, are among those claiming an aboriginal right to fish commercially.[28]

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[23] Appellants' Factum, at para. 28(b).
[24] Reasons of Kitchen P.C.J. A.R. Vol. I, p. 19, at para. 39.
[25] Pearse Report, 1982, Exh. 2, Tab 1, A.R. Vol. IX, pp. 1673 and 1682.
[26] Reasons of Low, J.A., A.R. Vol I, p. 174, at para 31; Pearse Report, 1982, Exh. 2, Tab 1, A.R. Vol. IX, pp. 1691-1695.
[27] J. Ionson, October 17, 2002, A.R. Vol. III, p. 562; Gardner Pinfold Report, Exh. 4, Tab 16, Respondent's Record, pp. 152-178.
[28] Reasons of Kirkpatrick, J.A., A.R. Vol I, p. 220-221, at paras. 144-145; J. Ionson, October 17, 2002, A.R. Vol. III, p. 562; F. Jacobs, April 15, 2003 A.R. Vol. II, p.1252 and J. Sayers, April 16, 2003 A.R. Vol. VIII, pp. 1349, 1370-1375.

The Aboriginal Fisheries Strategy – an effort to improve management of the Fisheries

18. The Department of Fisheries and Oceans (the "Department" or "DFO") introduced the Aboriginal Fisheries Strategy in June, 1992, following this Court's decision in *R. v. Sparrow*, *supra*. The stated objective of the strategy at that time was that it aimed "to increase opportunities in Canadian fisheries for Aboriginal people while achieving predictability, stability and enhanced profitability for all participants." The cornerstone of the strategy was to negotiate agreements with First Nations "intended to establish cooperative mechanisms for fisheries management; meet the wish of natives for enhanced participation in fisheries management; respond to the direction outlined in the *Sparrow* decision; and create structures to carry out the strategy." Another element of the strategy was to "protect the position and investment of the commercial sector through the purchase and retirement of licenses where allocation of fish changes hands."[29]

19. The Aboriginal Fisheries Strategy was the Government of Canada's response to:

- a long history of conflict with aboriginal peoples over regulation of the aboriginal fishery;
- the Sparrow decision and subsequent court judgments, which found that the Musqueam Indian Band (and by implication perhaps some other aboriginal peoples as well) have constitutionally protected rights to fish for food, social and ceremonial purposes, but left many unanswered questions about the full extent of aboriginal fishing rights;
- the need to improve the economic circumstances of aboriginal communities; and,
- the need to explore and test innovative management arrangements which could be incorporated in treaties and self-government arrangements. [30]

20. In their November, 1992 report, *Managing Salmon in the Fraser*, Pearse and Larkin noted:

> The *Sparrow* decision forced the government to respond to a partly-defined and evolving aboriginal right to fish, protected by the Constitution, without prejudicing the ultimate resolution of the issue through comprehensive claims settlements. A means of achieving effective regulation in this new legal environment was sought in negotiated agreements with native communities. These would meet the

[29] Backgrounder, Exh. 3, Tab 8, A.R. Vol. X, p. 1759; Reasons of Low, J.A., A.R. Vol I, p. 174, at paras. 33-34; Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 20-21, at paras. 44-46.
[30] Reasons of Low, J.A., A.R. Vol I, p. 178, at para. 45; Backgrounder, Exh. 3, Tab 13, A.R. Vol. X, p. 1767; and see S. Farlinger, Respondent's Record, p. 13, l.29 – p. 14, l.24.

> requirement to consult and allow agreed-upon regulations to be enforced.[31]

21. The policy under the Aboriginal Fisheries Strategy was to provide opportunities to fish for food, social and ceremonial purposes (and in some cases pilot sales) to aboriginal communities having historical use and occupancy of an area.[32]

22. Approximately 70 Fisheries Agreements were negotiated annually with aboriginal groups throughout the Province. These groups received communal licenses under the *ACFLR* authorizing fishing in accordance with the Fisheries Agreements. Fisheries Agreements negotiated under the Aboriginal Fisheries Strategy contained some or all of the following:

a) a harvest allocation to the aboriginal group;

b) terms and conditions to be included in the Communal Fishing License (including provisions for catch monitoring, reporting and enforcement);

c) arrangements for the co-management of the aboriginal fishery by the group and the Department;

d) cooperative management projects for improving the management of fisheries generally, such as stock assessment, fish enhancement and habitat management; and,

e) a commitment to provide commercial fishing licenses or other economic development opportunities.[33]

The Pilot Sales Component of the Aboriginal Fisheries Strategy

23. One component of the Aboriginal Fisheries Strategy in British Columbia was the Pilot Sales Program whereby certain bands could sell fish caught under their *ACFLR* license. This Program was not related to the specific aboriginal right to fish for food found in *Sparrow*. Rather, it was designed to reach negotiated solutions to claims for

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[31] Pearse and Larkin Report, 1992, Exh. 2, Tab 2, A.R. Vol. X, p. 1710.
[32] DFO Policy Outline, Exh. 3, Tab 6, A.R. Vol. X, p. 1748.
[33] Reasons of Low, J.A., A.R. Vol I, p. 177 at para. 41; Backgrounder, Exh. 3, Tab 8 A.R. Vol. X, p. 1759; Backgrounder, Exh. 3, Tab 13 A.R. Vol. X, p. 1767; and Matkin Report, Exh. 4, Tab 20, A.R. Vol. X, p. 1773; Reasons of Kitchen P.C.J., A.R. Vol. I, p. 20, at para. 42.

aboriginal commercial fishing rights and to provide economic opportunities to native bands, to support their progress towards self-sufficiency. [34]

24. Minister Crosbie, the Minister of Fisheries and Oceans at the time, also explained that unauthorized sale of aboriginal food fish was creating a management problem. He explained that, rather than litigating the issue, the Department sought to reach an agreement with aboriginal groups as to how much fish they could take and sell and to allow the Department to regulate how the fish would be sold.[35] Minister Crosbie stated:

> …we know that for years and years in British Columbia and elsewhere there's been poaching of fish. We call it poaching. The Aboriginals say they have a right to do it. The Aboriginals have been taking fish and selling the fish illegally in great quantities.
>
> 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?[36]

25. Bert Ionson, who was the manager of the Aboriginal Fisheries Strategy for the Fraser River from 1995 to 2000, testified that another purpose of the Pilot Sales Program was to test new arrangements for aboriginal sales of fish that may be incorporated into treaties in the future.[37] Indeed, he testified that the Aboriginal Fisheries Strategy was seen as "the bridge to treaties".[38]

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[34] Reasons of Low, J.A., A.R. Vol I, p. 178, para. 45; Backgrounder, Exh. 3, Tab 8, A.R. Vol. X, pp. 1759h-1759i.
[35] Minutes of Proceedings of the Standing Committee on Forestry and Fisheries, Exh. 23, Tab 45, A.B. Vol. XIII, pp. 2345-2346; Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 21-22, at para. 47.
[36] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 21-22 , at para. 47.
[37] J. Ionson, October 17, 2002, A.R. Vol. III, p. 535; And see S. Farlinger, October 18, 2002, Respondent's Record, p. 15, l.15 – p. 16, l.34; Reasons of Kitchen P.C.J., A.R. Vol. I, p. 22-23, at para. 48.
[38] J. Ionson, October 17, 2002, A.R. Vol. III, p. 395, l.10-29 and p. 359, l.24-47.

26. In late 1996, James Matkin was asked by the Department to oversee a review of the Pilot Sales Program. He discussed some of the confusion regarding the relationship between the Program and the *Sparrow* decision:

> Because the pilot sales program was introduced in conjunction with this landmark *Sparrow* decision, many believed that the government was justifying pilot sales as a program required under s. 35(1) of the constitution. The DFO on the other hand, argues that this is not the case. Pilot sales are justified as an exercise in policy making of the Minister's authority under the Fisheries Act and they are designed to follow the court's direction to negotiate rather than to litigate. This is an important but subtle distinction that continues to cause much confusion among the fishing community.[39]

27. Pilot sales fisheries were authorized in accordance with Fisheries Agreements which the Department negotiated with aboriginal communities in three areas of British Columbia - the Lower Fraser River, Alberni Inlet on Vancouver Island, and the Skeena River on the North Coast.[40] Pilot sales opportunities were provided under the Aboriginal Fisheries Strategy agreements for aboriginal communities in these areas because of the large aboriginal populations and the significant amount of aboriginal fishing that occurs at those locations.[41]

The Musqueam, Burrard and Tsawwassen Fishery

28. On May 15, 1995, the Department entered into a multi-year Fisheries Agreement with the Musqueam, Burrard and Tsawwassen First Nations. The agreement, as amended in 1996 and 1997, specified a maximum allocation of fish to be harvested, based on each year's run size and the commercial total allowable catch. This allocation was for food, social and ceremonial purposes as well as for sale.[42]

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[39] Matkin Report, Exh. 4, Tab 20, A.R. Vol. X, p. 1796.
[40] Gardner Pinfold Report, Exh. 4, Tab 16, Respondent's Record , p. 153 and see Exh. 5, Tab 29, A.R. Vol. XI, p. 1913 and B. Ionson, October 17, 2002, A.R. Vol. III, p. 534; Reasons of Kitchen P.C.J., A.R. Vol. I, p. 20, at para. 43.
[41] S. Farlinger, October 18, 2002, Respondent's Record, p. 15, l.37 – p. 16, l.24.
[42] Admissions of Fact, Exh. 1, A.R Vol. IX, p. 1486 at paras. 2 and 3; and Fisheries Agreement, Exh. 1, Tab B, A.R. Vol. IX, pp. 1558 and 1573; Reasons of Low, J.A., A.R. Vol I, p. 179, at para. 46; Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 25-26, at para. 56.

29. The agreement provided that fish could be sold only if a commercial fishery was also conducted.[43] The Musqueam, Burrard and Tsawwassen agreed to comprehensive regulation of their fishery, including their food, social and ceremonial fishery. The Fisheries Agreement restricted the species and the quantity of fish which could be harvested, specified the dates, times, gear and locations for fishing and required that all fish be taken to a designated landing site for inspection and counting.[44]

30. No one was permitted to fish in the communal sales fishery, unless they were designated to participate by the Chiefs of the Indian bands.[45] There was some evidence adduced at trial that designations were provided to members of the Musqueam and Tsawwassen bands. There was also evidence that non-members of the Tsawwassen band, including spouses of members or members of the Coast Salish Nation, could be designated to fish as deckhands.[46]

31. The agreement provided for fishing on the Lower Fraser River proximal to the First Nations' reserves and in areas historically used and occupied by the bands[47]. These areas fell within part of the Area "E" commercial fishery.

32. In July, 1998, the following allocations of sockeye salmon were announced for the commercial fisheries, based on forecast run size: the northern fleet was allocated 75,000 sockeye; the West Coast Vancouver Island troll fleet was allocated 16% of the commercial total allowable catch; Gulf trollers were allocated 8%; the Southern Gulf seine fleet was allocated 41%; Johnstone Strait and Vancouver Island gillnetters were allocated 11%; and the Area "E" gillnet fleet was allocated 21%. The Musqueam, Burrard and Tsawwassen pilot sales fishery was allocated 185,000 sockeye, while the Sto:lo pilot sales fishery (located further upriver) was allocated 420,000 sockeye.[48]

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[43] Reasons of Mackenzie, J.A., A.R. Vol. I, p. 203, para. 109; MBT Fisheries Agreement, Schedule B-2, s. 3(1), A.R. Vol. IX, p. 1560.
[44] Admissions of Fact, Exh. 1, A.R. Vol. IX, p. 1486; and Fisheries Agreement, Exh. 1, Tab B, A.R. Vol. IX, pp. 1559-1560; Reasons of Kitchen P.C.J., A.R. Vol. I, p. 26, at para. 57.
[45] Communal Fishing Licence, A.R. Vol. IX, p. 1642.
[46] J. Ionson, A.R. Vol. III, p. 566, l.33 – 567, l.9; F. Jacobs, A.R. Vol VII, p. 1263, l.33-1264, l.27.
[47] Map of Statistical Areas 28 and 29, Appendix "C"; DFO Policy Outline, Exh. 3, Tab 6, A.R. Vol. X, p. 1748.
[48] M. Forrest, A.R. Vol V, p. 965, l.35 – 967, l.34

33. During the summer of 1998, the Musqueam, Burrard and Tsawwassen First nations received two pilot sales licenses and there were two corresponding commercial Area "E" openings for sockeye. A total of 41,175 sockeye were harvested during the pilot sales opening on August 19 and 20, 1998[49], the time when the Appellants conducted their "protest fishery". The Area "E" licensed gill net fleet harvested 136,000 sockeye during the commercial opening the following day.[50] A third pilot sales fishery was planned, but it was cancelled as another "protest fishery" would have jeopardized the escapement goal set for the salmon run and impacted on conservation.[51]

34. The estimated run size and harvesting of Fraser River sockeye salmon for the years 1992 – 1998 was as follows[52]:

Year	Total Fraser River Sockeye Run Size	Total Commercial Catch of Fraser River Sockeye	Total First Nation Catch of Fraser River Sockeye	Total Sport Fishery Catch	Area E - Total Commercial Gillnet Catch of Fraser River Sockeye	MBT Pilot Sales Catch of Fraser River Sockeye
1992	6,493,000	3,528,000	420,000	11,000	257,000	no data
1993	24,195,000	13,747,000	1,033,000	24,000	2,630,000	136,062
1994	17,241,000	10,035,000	1,111,000	38,000	1,298,000	140,284
1995	4,006,000	799,000	924,000	12,000	186,000	131,543
1996	4,519,000	955,000	754,000	15,000	708,000	85,895
1997	16,414,000	8,435,000	1,196,000	76,000	1,315,000	197,680
1998	10,873,000	1,278,000	844,000	18,000	268,000	57,892

35. For ease of reference, the evidence of the places in which the Fraser River sockeye runs were fished in 1998 has been depicted on the following maps, attached as Appendices "A" to "C":

[49] First Nation Sockeye Catches, Exh. 18, Tab 88, A.R. Vol. XII, p. 2119.
[50] Fraser River Panel Report, 1998, Exh. 5, Tab 38, A.R. Vol. XI, p. 1962.
[51] J. Ionson, October 17, 2002, A.R. Vol. III, p. 549
[52] Fraser River Panel Reports, 1992-98, Exh. 5, Tabs 32-38, A.R. Vol. XI, pp. 1926-1964; and MBT Historic Salmon Catches, 2001-1993, Exh. 18, Tab 89, A.R. Vol. XII, p. 2120.

a) statistical Areas in British Columbia depicting the Areas where commercial harvesting of Fraser River Sockeye took place in 1998;[53]

b) statistical Areas 16 to 22, 28, 29 and 121, also known as Area "E"; [54] and

c) statistical Areas 28 and 29 depicting the Musqueam, Burrard and Tsawwassen Reserves, the area open to the pilot sales fishery on August 19-20, 1998, and the area open to the Area "E" commercial fishery on August 20-21, 1998.[55]

The Hupacasath/Tseshaht Fishery

36. The Hupacasath and Tseshaht First Nations, who have reserves near Port Alberni on Vancouver Island, entered into allocation agreements with the Department every year from 1992 to 2001.[56] The 1997-1998 agreement, for example, specified a maximum allocation of fish to be harvested for food, social and ceremonial purposes and for sale.[57] Like the Musqueam, Burrard and Tsawwassen, the Hupacasath and Tseshaht agreed to comprehensive regulation of their fishery.[58] Unlike the Musqueam, Burrard and Tsawwassen agreement, the Hupacasath and Tseshaht agreement provided for specific days when the First Nations would fish with a communal seine, and other days when individuals designated by the First Nations would fish by gillnet, trolling and angling. Sockeye caught by gillnet and seine could be sold. Fishing using power assisted gear commonly used in the commercial fishery was not permitted. [59]

The Impact of the Aboriginal Fisheries Strategy and Pilot Sales

a) Impact on Fisheries Management was positive

37. Prior to the Aboriginal Fisheries Strategy, there was no clear way to assess how many fish were being caught by aboriginal communities or where the fish were being caught. In his 1996 fact-finding review of the Pilot Sales Program, Matkin concluded

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[53] Fraser River Panel Report, Exh. 5, Tab 38, A.R. Vol. XI, p. 1957.
[54] Conditions of License, Exh. 1, Tab G, A.R. Vol. IX, p. 1651; J. Redekopp, October 16, 2002, A.R. Vol. III, pp. 506-508.
[55] Communal License, 1998, Exh. 1, Tab E, A.R. Vol. IX, p. 1650, Variation Order, Exh. 5, Tab 28, A.R. Vol. XI, p. 1904, J. Redekopp, October 16, 2002, A.R. Vol. III, pp. 501-506.
[56] J. Sayers, April 16, 2003, A.R. Vol. VIII, p. 1356; Somass Food and Sale Fishery – 2002 Review, Exh. 62, Tab 6, Respondent's Record, p. 226. The Hupacasath but not the Tseshaht also had a Fishing Agreement in 2002.
[57] Allocation Agreement, Exh. 62, Tab 2, Respondent's Record, pp. 200-203.
[58] Allocation Agreement, Exh. 62, Tab 2, Respondent's Record, pp. 202-207.
[59] Allocation Agreement, Exh. 62, Tab 2, Respondent's Record, p. 204.

that proper management and conservation had been enhanced through monitoring and compliance standards set out in the Aboriginal Fisheries Strategy pilot sales agreements, including the mandatory landing program.[60]

b) Impact on Aboriginal Communities was positive

38. Socio-economic indicators in 1981 and 1991 suggested that Canada's aboriginal population continued to lag behind the non-aboriginal population by a large margin. Unemployment rates among most segments of the aboriginal population increased sharply between 1981 and 1991 and average incomes among the aboriginal population were lower in 1990 than they were in 1980. The gap in average income and in unemployment rates between the aboriginal and non-aboriginal population grew between 1981 and 1991.[61]

39. In February, 1999, it was estimated that only 28% of the Tsawwassen First Nation membership held full-time employment, 8% held part-time employment and 11% held seasonal or temporary employment. The average annual salary of those holding full-time employment was $24,000. The unemployment rate for members of the Tsawwassen First Nation was assessed at 38%, compared to 7.4% in Delta, the community surrounding the reserve, and 9.6% in the Province of B.C., according to 1996 census data.[62]

40. Commercial fisher Robert McKamey, a defence witness, acknowledged that the economic and social conditions on the Musqueam, Burrard, Tsawwassen and Sto:lo reserves were not particularly attractive. He said that the "housing conditions wouldn't be considered very good by most people". Kerry-Lynn Findlay, a lawyer who lived on leased land on the Musqueam reserve and also testified for the defence, expressed the opinion that the Musqueam are not a disadvantaged group, but acknowledged that she had no knowledge of the community's unemployment levels, income levels relative to

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[60] Matkin Report, Exh. 4, Tab 20, A.R. Vol. X, pp. 1786-1787. See also evidence of J. Ionson, who concluded that the fisheries agreements had improved the situation: J. Ionson, October 17, 2002, A.R. Vol. III, p. 558.
[61] RCAP Report, Exh. 7, Tab 58, Respondent's Record, pp. 182-183.
[62] Tsawwassen First Nation Strategic Plan of Independence, Exh. 59, Respondent's Record, p. 191 and p. 192; F. Jacobs, April 15, 2002, A.R. Vol. VII, p. 1257.

other communities, incarceration rates, infant mortality or life expectancy. Ms. Findlay also said that she was aware of problems of alcoholism and sexual abuse on the reserve.[63]

41. A review of the pilot sales fishery in 1994 noted that the broader community impacts were generally positive and that "[p]articipation in what is now widely regarded as a legitimate economic activity has increased the sense of self-esteem."[64]

42. In 1997, it was estimated that the level of fishing and related activity among aboriginal communities with the pilot sales was double the level it would have been without pilot sales. Matkin noted that aboriginal communities benefited from the pilot sales through new job and training opportunities in monitoring, enhancement and guardian functions, as well as direct involvement in the management of their fishery.[65]

43. Prior to the introduction of the Aboriginal Fisheries Strategy there were approximately 15 Tsawwassen boats which participated in fishing for food, social and ceremonial purposes. These boats were mostly small skiffs, only twelve to twenty feet in length, one or two of which were mechanized. At the time of the trial, there were approximately thirty-five Tsawwassen boats participating in the pilot sales fisheries. The fleet was still largely comprised of small skiffs with outboard motors, which were less efficient than the larger boats used by the commercial fleet. There were, however, some larger vessels, approximately eight of which had mechanized drums. One member of the Tsawwassen held an Area "E" commercial salmon license, and the First Nation held three licenses which were retired by DFO from the commercial fleet and re-allocated to the First Nation. The commercial licenses held by the First Nation were distributed annually amongst those members having a mechanized vessel, through a lottery system.[66]

44. In 1993, pilot sales fisheries generated $1,714,000 in net revenue and provided employment for 849 members of First Nations on the lower Fraser River. Pilot sales

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[63] R. McKamey, April 1, 2003, A.R. Vol. IV, pp. 741-742; K. Findlay, April 17, 2003, A.R. Vol. VIII, pp. 1474-1478.
[64] Gardiner Pinfold Report, Exh.4, Tab 16, Respondent's Record, p. 154.
[65] Matkin Report, Exh. 4, Tab 20, A.R. Vol. X, pp. 1793-1794; and Gardner Pinfold Report, Exh. 4, Tab 16, Respondent's Record, p. 154.
[66] F. Jacobs, April 15, 2003, A.R. Vol. VII, pp. 1261, l.32-1263, l.20; R. Nomura, A.R. Vol VI, p. 1011, l.36-40.

fisheries in 1993 provided employment for 196 members of the Musqueam and Tsawwassen.[67]

45. The unemployment rate of the Hupacasath living on reserve near Port Alberni ranged from 20% in summer to 65% in winter. Dr. Judith Sayers, the then Chief of the Hupacasath First Nation, said that the Hupacasath First Nation fish in small, non-mechanized vessels. One member owned a commercial gillnetter, but it could not be used in fishing under *ACFLR* license. Pilot sales fishing contributed to the economic self-sufficiency of the Hupacasath First Nation by creating employment and providing the opportunity for fishers within the community to pursue a livelihood. The Hupacasath First Nation employed between four to eight monitors annually to count fish as it was landed.[68]

46. In addition, all community members were allowed to fish on the community drag seine on communal fishing day, which typically occurred once a week during the validity of the license. Salmon from community fishing days were distributed to community members based on a number of factors including their participation in the fishery and family size and need, and were also distributed to the disabled and elders who were unable to fish.[69]

c) Impact on the Commercial Fishing Fleet

47. In 1992, following consultation with a committee of commercial fishers, DFO implemented a voluntary commercial licence retirement program.[70] Seventy-five licences were retired from the commercial fleet at a total cost of $5.95 million. [71]

48. An average catch capacity of 317,189 sockeye equivalents (a sockeye equivalent is an average catch of all species of salmon converted to sockeye as a means of

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[67] Gardner Pinfold Report, Exh. 4, Tab 16, Respondent's Record, pp. 155-156.
[68] Hupacasath Report on Allocation, Exh. 62, Tab 14, Respondent's Record, p. 236; and J. Sayers April 16, 2003, Transcript Vol. 10, pp. 1412 and 1424-1426.
[69] J. Sayers, April 16, 2003, A.R. Vol. VIII, p. 1350; Justification for an Expansion of Somass Allocation Agreement, Exh. 62, Respondent's Record, p. 232.
[70] Reasons of Low, J.A., A.R. Vol I, p. 175, para. 36; DFO Press Release, Exh. 3, Tab 10, A.R. Vol. X, p. 1760, Gardner Pinfield Report, Exh. 4, Tab 16, Respondent's Record, p. 157; and S. Farlinger, October 18, 2002, Respondent's Record, pp. 18-19.

comparison), representing 1.6% of the total coast-wide salmon catch, was retired. 198,500 sockeye equivalents of the retired catch capacity were allocated through communal licences to aboriginal groups participating in the Pilot Sales Program. The remaining catch capacity was reallocated through the issuance of licences to native bands to participate in the general commercial fishery.[72]

49. As a result of further licence retirements and restructuring of the commercial fleet, by 1998 the commercial fleet fishing in Area "E" had been reduced from 1400 vessels down to 405, less than one-third of its size prior to implementation of the Aboriginal Fisheries Strategy. The number of vessels fishing under the impugned communal licence in 1998 was only 80 vessels.[73]

50. None of the fishers charged on Information 108246 testified at trial. However, the defence called a number of witnesses, each of whom had some connection to the commercial fishing industry. Each of these witnesses expressed opposition to pilot sales, on one or more of the following grounds:

- the Pilot Sales Program created economic hardship for the commercial fleet;
- the Pilot Sales Program negatively impacted management and conservation efforts; and
- it is "offensive" to provide different commercial fishing opportunities to different groups.[74]

51. However, most of the defence witnesses were unaware of the terms of the Musqueam, Burrard and Tsawwassen agreement, and had no idea how many fish were allocated to the Musqueam, Burrard and Tsawwassen bands for pilot sales.[75]

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[71] Gardner Pinfold Report, Exh. 4, Tab 16, Respondent's Record, p. 157; and see S. Farlinger, Respondent's Record, p. 18, l.24 – p. 19, l.9; p. 41, l. 5-13.
[72] Gardner Pinfold Report, Exh. 4, Tab 16, Respondent's Record, p. 157.
[73] Reasons of Low, J.A., A.R. Vol I, p. 175, para. 36
[74] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 38-61, at paras. 87-147.
[75] D. Sonnenberg, A.R. Vol V, p. 829, l.26 – 830, l.10; L. Budden A.R. Vol V, p. 846, l.45-847, l.38; S. McDonald A.R. Vol V, p. 861, l.8-19; R. Gregory A.R. Vol V, p. 876, l.46-877, l.6; K. Nguyen, A.R. Vol V, p. 950, l.2-20; R. Nomura A.R. Vol VI, p. 1032, l.3-8; S. Wilson A.R. Vol VI, p. 1067, l.25-32; L. Salmi, A.R. Vol VI, p. 1032, l.3-8; R. Rezansoff A.R. Vol VI, p. 1117, l.27-41.

Ruling of the trial judge (Kitchen P.C.J.)

52. The trial judge held that the Pilot Sales Program violated the Appellants' rights under s. 15 of the *Charter*. In the course of his analysis of the application of s.15, he concluded that:

a) the Department had drawn a distinction on grounds analogous to race between:

   i) aboriginals who, by "bloodline connection" to the Musqueam, Burrard or Tsawwassen, were eligible to be designated as participants in the pilot sales fishery (the "comparator group"); and,

   ii) the rest of Canadian society, particularly the Area "E" commercial fishers, who were eligible to obtain a license for the Fraser River gillnet salmon fishery (the "claimant group");[76]

b) the Department had subjected the claimant group to differential treatment by denying them their right "to participate as equals in the public commercial fishery";[77]

c) the distinction was discriminatory and thus a violation of s.15, because,

   i) the Pilot Sales Program promoted the view that the members of the claimant group are "less capable, less worthy of recognition and less valuable as members of Canadian society", and are "not equally deserving of concern, respect and consideration";[78]

   ii) although pre-existing disadvantage, stereotyping or prejudice was not a concern for the claimant group, the Pilot Sales Program had no ameliorative purpose or effect as, although the Musqueam and Tsawwassen likely suffered many disadvantages, it was unlikely that financial disadvantage was one of their problems;[79]

   iii) the Pilot Sales Program did not correspond to the circumstances of the claimant group or others because it failed to take into account the right of commercial fishers to participate in the public fishery;[80]

   iv) the Pilot Sales Program had severe consequences to the emotional and financial interests of the commercial fishers, and had generated further racial discrimination and discord.[81]

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[76] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 37-38 and 70-71, at paras. 85, 175, 176 and 179.
[77] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 70-71 and 80, at paras. 175-176 and 203.
[78] Reasons of Kitchen P.C.J., A.R. Vol. I, p. 80, at para. 203.
[79] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 76-81, at paras. 193-204.
[80] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 69 and 73, at para. 183; see also para. 170.
[81] Reasons of Kitchen P.C.J., A.R. Vol. I, p. 73, at para. 184.

53. In reaching these conclusions he relied on the evidence of a number of defence witnesses who were involved in the commercial fishing industry, finding that they were representative of the claimant group, provided an accurate picture of the claimant group's background and experience in the Fraser River gillnet fishery, and were well-placed to make observations about the fishery. On the basis of their evidence he found that:[82]

a) although, for various reasons, there have traditionally been wide fluctuations in income from gillnet salmon fishing, the Pilot Sales Program adversely affected their usual income from Fraser River sockeye gillnet fishing. Many, however, were able to diversify and had been able to at least maintain their general income;[83]

b) the Pilot Sales Program attacked their worthiness as fishers because it created a group of "chosen ones" from which they were excluded. Although there was some evidence that fish runs continue over a period of time and commercial fishers might have at least as many fish available as in the pilot sales fishery, he concluded that would be possible but unlikely. In any event he concluded that what was more important was that the commercial fishers perceived that they were getting the leftovers, creating the impression of a racial hierarchy; and[84]

c) other than for a period when restrictions were placed on Japanese fishers, there was respect between fishers of different racial backgrounds, but since the Pilot Sales Program the situation had deteriorated.[85]

54. The trial judge held that the infringement was not justified under s.1 of the *Charter*.[86] He imposed a stay of proceedings as "the only remedy that deals with [the validity of the PSP] and effectively condemns the program".[87]

The Summary Conviction Appeal (Brenner C.J.S.C.)

55. Brenner C.J.S.C. allowed the Crown's appeal against the stay of proceedings on all 11 Informations.[88] He accepted the trial judge's findings of fact arising from the

[82] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 61-63, at paras. 148-151.
[83] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 63-64, at paras. 153-156.
[84] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 66-68, at paras. 163-168.
[85] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 69-71, at paras. 172-173.
[86] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 84-86, at paras. 210-218.
[87] Reasons of Kitchen P.C.J., A.R. Vol. I, p. 87, at para. 220.
[88] The Crown's appeal proceeded only against some of the accused because not all were served with the Notice of Appeal.

evidence[89], but held that the trial judge had erred in finding a breach of s.15(1) of the *Charter* in that:

a) the trial judge had identified the claimant and comparator groups too narrowly;[90]

b) he failed to assess the claim from the perspective of a reasonable, fully informed and dispassionate person but instead assessed the claim from the viewpoint of a number of defence witnesses from the commercial fishing industry and accorded their subjective perceptions more weight than reality;[91]

c) he failed to properly consider the pre-existing disadvantage of the aboriginal communities that comprise the comparator group;[92]

d) in considering the ameliorative effect of the Pilot Sales Program, the trial judge set too restrictive a standard and failed to consider the impact of the Program on other affected aboriginal communities;[93] and,

e) the Pilot Sales Program did not have a significant impact on the claimant group and was far from the severe consequences needed to establish discrimination under *Law v. Canada*.[94]

56. Brenner C.J.S.C. concluded that:

a) the Pilot Sales Program corresponds to the needs, capacity and circumstances of aboriginal communities by facilitating a commercial component of aboriginal access to the fishery in a manner consistent with and respectful of the unique relationship between British Columbia aboriginal communities and the fishery;[95] and,

b) the Pilot Sales Program corresponds to the needs, capacity and circumstances of the rest of Canadian society, in that the Program: (1) enables the Department to better manage the fishery; (2) facilitates resolution of treaty and self-government issues by testing arrangements for possible inclusion in treaties and self-government arrangements;[96] and, (3) provides that no pilot sales opening shall occur unless there is a corresponding commercial opening.[97]

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[89] Reasons of Brenner C.J.S.C., A.R. Vol I, p. 121, at para. 63.
[90] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 119-122, at paras. 60-69.
[91] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 120-121 and 125, at paras. 63, 75.
[92] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 127-129, at paras. 81-83.
[93] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 136-137, at paras. 100-102.
[94] [1999] 1 S.C.R. 497; Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 137-140, at paras. 103-109.
[95] Reasons of Brenner C.J.S.C., A.R. Vol. I pp. 132-134, at paras. 91-94.
[96] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 134-135, at paras. 95-96.
[97] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 141, at para. 113.

57. Although the issue was not raised at trial, Brenner C.J.S.C. permitted a number of the interveners to argue that s. 25 of the *Charter* applied in this case,[98] but concluded that it did not.[99]

The Reasons of the British Columbia Court of Appeal (Finch, C.J.B.C., Mackenzie, Low, Levine and Kirkpatrick, JJ.A.)

58. The Appellants appealed to the Court of Appeal for British Columbia. The five members of the panel in the court below were unanimous in dismissing the appeal, but for different reasons.

59. Low J.A. (Finch, C.J.B.C. and Levine J.A. concurring) held that the Appellants had wholly failed to establish that they had been denied a benefit and therefore failed to get past the first stage of the *Law* test articulated by this Court.[100] In coming to this conclusion, Low J.A. noted that the agreements with the aboriginal communities provided that there could be no Pilot Sales fishery without a general commercial fishery, and the "real impact of the [Pilot Sales Program] on the non-MBT commercial fishers was that they were simply given the right to fish at different times than were the MBT designated fishers."[101] He further observed:

> The pattern of allocation of fish by DFO to the remaining sectors of the industry (apart from the food fishery) appears to be relatively stable. About two thirds of the total commercial catch of Fraser River sockeye is taken by seiners and trollers before the runs reach Area "E" (of which Area 29 is a part) where the appellants and PSP fishers are licensed. The recreational fishery takes less than one percent of the total commercial catch. In the years 1992 to 1998, the PSP catch has been less than 20 percent of the combined Area "E" commercial and PSP catch, except for the 1994 low-cycle year when it was 41 percent. Overall, the PSP represents less than five percent of the total sockeye harvest.[102]

60. Low J.A. concluded that the aboriginal communal licence was simply part of a broader regulatory framework by which the Minister allocated the salmon fishery among

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[98] Reasons of Brenner C.J.S.C., A.B. Vol. 7, p. 1151-1152, at paras. 25-27.
[99] Reasons of Brenner C.J.S.C., A.B. Vol. 7, p. 1155, at paras. 35-37.
[100] Reasons of Low JA, A.R. Vol I, pp. 190-192, at paras. 80-83.
[101] Reasons of Low JA, A.R. Vol I, p. 178, at para. 44.
[102] Reasons of Low JA, A.R. Vol I, p. 180, at para. 49.

various user groups. The Minister's exercise of discretion did not deny the Appellants any benefit, since they were provided the opportunity to fish under commercial licences:

> The MBT designated fishers were given licensed fishing rights under the *ACFLR* that were not available to the appellants or to other non-MBT Canadians. At first glance it might appear therefore that the appellants and others were denied a benefit provided by law. But that is the kind of "formalistic or mechanical" analysis that is to be avoided. It defies common sense to consider the PSP, the MBT communal licence or the *ACFLR* in isolation from the fisheries management scheme as a whole. Through the exercise of ministerial discretion under regulations other than the *ACFLR*, the appellants were given the right to fish under commercial licence during other openings of the fishery in 1998. The MBT communal licence and the commercial licences under which the appellants fished were both parts of the overall scheme by which the Minister allocated the resource among various user groups. In commencing the s. 15(1) analysis by determining if the appellants were denied a benefit, "the law" to be considered is much broader than just the *ACFLR* or their implementation through ministerial discretion.
>
> After a proper examination of the regulatory scheme as a whole, it is apparent that the appellants were not denied a benefit of the law. The licensing scheme did not constitute unequal treatment of either the appellants or of the MBT. There was no disadvantage to the appellants in the form of a withheld benefit of the law. I agree with the submission of the Crown that this was essentially a policy dispute over the mechanics of providing each of the user groups with access to the resource.[103]

61. Mackenzie J.A. (Finch, C.J.B.C. and Levine J.A. concurring) held that, assuming that the Appellants were successful in getting past the first two stages of the *Law* test, they had failed to establish that the communal licence had a discriminatory purpose or effect. Mackenzie J.A. held that, viewed objectively, the catch statistics did not support the Appellants' perception of disadvantage:

> I do not doubt that the appellants have experienced a subjective sense of having been demeaned. But their s. 15 challenge also requires that they demonstrate that they are objectively disadvantaged by the differential opening in terms of their catch of salmon compared to the MBT fishers. Otherwise there is no disadvantage to vessels fishing under one opening or the other. As Chief Justice Brenner noted there can be no pilot sales fishery without a commercial opening and there was no empirical evidence that the PSP reduced the profitability of the salmon fishery. The appellants do not object to the MBT fishers *per se*, simply that they fish

[103] Reasons of Low JA, A.R. Vol I, pp. 191-192, at paras. 81-82.

> during a different opening. The catch statistics do not support the appellants' perception of disadvantage from the different openings. The catch numbers in the years 1992 to 1998 indicate a generally consistent pattern. About 20 percent of the combined commercial catch is landed under the MBT licence and 80 percent under Area "E" commercial licences. This roughly equates with the proportions of vessels fishing in each category in 1998, 80 to 90 under the MBT licence and 405 commercial vessels. Eighty percent of the catch does not support the appellants' view that they are only getting the "leftovers", and the MBT fishers are "the chosen ones". In my view, that is a fatal flaw in the appellants' position. I agree with Chief Justice Brenner that the trial judge erred in relying too heavily on the subjective perception of the appellants and that he failed to give adequate weight to the underlying facts viewed objectively.[104]

62. Kirkpatrick, J.A. held that the communal fishing licence granted to the Musqueam, Burrard and Tsawwassen bands was protected under s. 25 of the *Charter* as an "other right or freedom that pertains to the aboriginal peoples of Canada".[105] She further held that s. 25 of the *Charter* was triggered whenever the outcome of a *Charter* challenge might abrogate or derogate from aboriginal rights or freedoms. Since the Appellants here were seeking to eliminate the Pilot Sales Program, s. 25 of the *Charter* operated to bar their constitutional challenge under s. 15.[106]

63. The other members of the panel in the court below did not agree with the reasons of Kirkpatrick, J.A.. Finch, C.J.B.C. and Low J.A. were of the view that s. 25 of the *Charter* was not engaged, as the Appellants had failed to establish a *Charter* violation.[107] Mackenzie J.A. did not think that the aboriginal communal licence fell within the protection of s. 25.[108] And Levine, J.A. did not think the case an appropriate one to decide the application of s. 25.[109]

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[104] Reasons of Mackenzie, J.A., A.R. Vol I, pp. 203-204, at para. 109.
[105] Reasons of Kirkpatrick, J.A. A.R. Vol I, p. 223, at para. 152.
[106] Reasons of Kirkpatrick, J.A. A.R. Vol I, pp. 222-224, at paras. 148-153.
[107] Reasons of Finch, C.J.B.C. A.R. Vol I, p. 225, para. 157; Reasons of Low, J.A. A.R. Vol I, pp. 193-194, at paras. 88-90.
[108] Reasons of Mackenzie, J.A. A.R. Vol I, pp. 206-207, at paras. 114-115
[109] Reasons of Levine, J.A. A.R. Vol I, p. 226, at paras. 161-162

PART II - ISSUES ON APPEAL

64. On March 30, 2007, the Chief Justice stated the following constitutional questions:

> 1. Do ss. 5(1)(*l*) and 6 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, s. 35(2) of the *Fishery (General) Regulations*, SOR/93-53 and Licence No. FRD-98-CL278/MBT, to the extent that they permit fishing salmon for the purpose of sale, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
>
> 2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
>
> 3. Are ss. 5(1)*(l)* and 6 of the *Aboriginal Communal Fishing Licenses Regulations*, SOR/93-332, section 35(2) of the *Fishery (General) Regulations*, SOR/93-53 and Licence No. FRD-98-CL278/MBT, to the extent that they permit fishing salmon for the purpose of sale, *intra vires* Parliament pursuant to the *Constitution Act, 1867*?

65. Since the Appellants have abandoned their attack on the *vires* of the Pilot Sales Program, the Respondent agrees that the issues on the appeal are as follows:

> (i) whether the Pilot Sales Program violates s. 15(1) of the *Charter*;
>
> (ii) whether s. 15(2) applies to the impugned Program;
>
> (iii) if the s. is found to violate s. 15(1) of the *Charter* whether the violation is justified by s. 1;
>
> (iv) whether s. 25 of the *Charter* applies to the impugned Program; and,
>
> (v) whether the judicial stay of proceedings granted by the trial judge was an appropriate remedy under s. 24(1) of the *Charter*.

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PART III - ARGUMENT

INTRODUCTION

66. The position of the Respondent is that the Pilot Sales Program does not violate s. 15(1) of the *Charter*. The claimant group, which consists of individuals, cannot properly compare themselves to aboriginal communities, the recipients of the benefit in question. Moreover, any differential treatment did not result in the claimant group being denied a benefit at law. The Appellants' claim fails at the outset, as recognized by the court below. In the alternative, if the issuance of a licence to an aboriginal community permitting that community to fish for salmon for sale somehow resulted in the claimant group being denied a benefit at law, that denial did not denigrate the Appellants' human dignity. Rather, it fostered the ultimate objectives of s. 15(1) by accommodating the different circumstances of aboriginal communities.

67. The Respondent also takes the position that s. 15(2) is an interpretive provision. Although the Pilot Sales Program did not have as its sole or primary objective the amelioration of conditions of disadvantaged groups or individuals, one of the Program's objectives was to provide economic opportunities to aboriginal communities. Such an objective obviously had an ameliorative effect which must be considered in determining whether the impugned Program violates s. 15(1). The Respondent further takes the position that s. 25 of the *Charter* is not engaged on the facts of this case. The communal licence at issue here is not one of the "other rights or freedoms that pertain to the aboriginal peoples of Canada" protected under s. 25. Moreover, s. 25 is only engaged if there is a *prima facie* violation of s. 15(1) which is not saved under s. 1 of the *Charter*.

68. Finally, the Respondent's position is that the Appellants are not entitled to the remedy of a stay of proceedings in any event. The Appellants deliberately chose to violate a law in order to advance a collateral *Charter* attack on another law. The Appellants should have sought to advance their *Charter* challenge through lawful means. The rule of law requires that the Appellants be held accountable for their flagrant violation of the law.

(I) The Pilot Sales Program Does Not Violate Section 15(1) of the Charter

(i) The claimant group cannot compare themselves to aboriginal communities

69. It is now trite law that a claimant, to be successful in establishing that his or her right to equality was violated under s. 15(1) of the *Charter*, must demonstrate (1) differential treatment under the law; (2) on the basis of enumerated or analogous grounds; (3) which constitutes discrimination.[110] The Appellants' claim here fails at the first stage of analysis, as they were not deprived of any benefit of the law on the basis of a personal characteristic.

70. As this Court has repeatedly emphasized, the purpose of s. 15(1) is to prevent the perpetuation of pre-existing disadvantage through unequal treatment and to promote a society where all persons are considered worthy of respect and consideration.[111] The objective of s. 15(1) is not to eradicate differences, or to require that persons be treated identically. Indeed, recognizing and affirming differences between groups in a manner that respects their dignity and difference are not only legitimate, but necessary considerations in promoting substantive equality in our society.[112]

71. In approaching a claim that s. 15(1) has been violated, it is essential that the court properly define both the claimant group and the appropriate comparator group, as the claimants cannot target the benefits of a group whose relevant characteristics are simply not comparable.[113] The definition of the appropriate claimant and comparator group is a question of law.[114] This Court has held that the comparator group must mirror the claimants in every way relevant to the benefit or advantage sought, except for the personal characteristic that is said to be the ground of wrongful discrimination.[115]

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[110] *Law, supra* at para. 30; *Auton v. British Columbia (Attorney General),* [2004] 3 S.C.R. 657, 2004 SCC 78, at para. 22.
[111] *Auton, supra* at para. 25; *Law, supra* at paras. 28 and 51; *Corbiere v. Canada,* [1999] 2 S.C.R. 203, at para. 5.
[112] *Gosselin v. Québec (Attorney General),* [2002] 4 S.C.R. 429, 2002 SCC 84 at para. 21; *Lovelace v. Ontario,* [2000] 1 S.C.R. 950, 2000 SCC 37 at para. 60; *Andrews, supra,* at p. 169.
[113] *Hodge v. Canada (Minister of Human Resources Development),* [2004] 3 S.C.R. 357, 2004 SCC 65, at para. 20.
[114] *Hodge, supra,* at para. 21.
[115] *Hodge, supra,* at para. 1; *Auto, supra* at para. 53.

72. As the summary conviction appeal court judge correctly appreciated, the claimant group in the case on appeal consists of individual members of Canadian society.[116] The only common defining characteristic of the Appellants is that they all desire to participate in the commercial salmon fishery. The commercial salmon fishery is a resource that all individuals in Canadian society can equally claim entitlement to, as all members of Canadian society are equally entitled to enter the commercial fishery. All members of society can acquire vessel licences, and any individual can obtain a Fisher's Registration Card permitting them to fish under the authority of a vessel licence. The claimant group, therefore, consists of all individuals in Canadian society.

73. The benefit in question here, however, was an aboriginal communal licence permitting the fishing of salmon for the purpose of sale. Since the benefit was one that could only be provided under the *ACFLR* to aboriginal organizations, any comparator group relevant to the benefit or advantage sought must necessarily consist of aboriginal organizations, not individuals, as Brenner C.J.S.C. correctly understood.[117] In this regard, this case is similar to *Lovelace v. Ontario,* in which this Court recognized [118] that a benefit conferred on aboriginal communities required that any comparison be between communities rather than individuals.[119] Individuals are not communities, and the Appellants cannot invite comparison to a group whose relevant characteristics are not comparable. The allocation of a benefit based on the fundamental distinction between individual and community does not occasion differential treatment as a result of the invidious and stereotypical application of a personal characteristic. In *Hodge*, this Court discussed the earlier decision of the Court in *Lovelace* and stated:

> …in a government benefits case, the initial focus is on what the legislature is attempting to accomplish. It is not open to the court to rewrite the terms of the legislative program except to the extent the benefit is being made available or the burden is being imposed on a discriminatory basis.
>
> In *Lovelace, supra*, for example, some disappointed aboriginal claimants challenged the distribution of the profits from Casino Rama amongst the First Nations in Ontario. The claimants were non-status

[116] Reasons of Brenner C.J.S.C. A.R. Vol I, pp. 119-120, at paras. 60-61.
[117] Reasons of Brenner C.J.S.C. A.R. Vol I, pp. 121-122, paras. 64-68.
[118] *Lovelace, supra,* at paras. 63-64.
[119] This is not to assert, however, that s.15 rights can be asserted by collectives.

> Indians who considered themselves discriminated against by a provincial government program favouring status Indians. However, the Court held that the Casino Rama fund, for legitimate public policy reasons, targeted aboriginal *communities*, not aboriginal *individuals*. It was not the Court's role to rewrite the policy objectives of a program that were not in themselves discriminatory (i.e., individual versus community).[120] (emphasis added)

74. To put the point differently, the crux of the claim made by the Appellants is that the aboriginal communal fishery established through the exercise of discretion under the *ACFLR* is objectionable because it confers a benefit that excludes non-aboriginals. While the Appellants object to the particular communal licence granted to the Musqueam, Burrard and Tsawwassen bands under the *ACFLR*, the Appellants would similarly object to any communal licence granted by the Minister under the *ACFLR* to an aboriginal organization that permitted salmon fishing for sale without granting the Appellants access at the same time. But the Appellants were required to show that, in every way relevant to the benefit, "they were comparable to those who were favoured" by the impugned Program.[121] The only comparator group that can be said to mirror the claimants relevant to the benefit in issue, except for the asserted ground of wrongful discrimination, is aboriginal *individuals*. However, the benefit conferred under the *ACFLR* is directed to aboriginal *organizations*, not individuals. The claim of the Appellants fails at the outset because they cannot establish that they were denied a benefit given to aboriginal *individuals*.[122] The Appellants are simply not comparable to those favoured by the impugned Program, aboriginal *organizations.*

75. The Appellants claim, therefore, fails at the outset and the appeal must be dismissed.

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[120] *Hodge supra*, at paras. 26-27.
[121] *Hodge, supra*, at para. 34.
[122] The analysis remains the same even if the trial judge was correct in narrowing the comparator group down to individuals with a "bloodline connection" to the Musqueam, Burrard or Tsawwassen bands, since such persons are not able to individually obtain licences under the *ACFLR*.

(ii) The Appellants were not denied any benefit of law as a result of differential treatment

76. Even if the Appellants were subject to differential treatment in comparison to aboriginal individuals, it did not result in them being denied any benefit at law. As the B.C.C.A. correctly held, the issuance of the licence in question was simply one of a number of decisions allocating the resource among a number of user groups.

77. The fishery is a common property resource which embraces a number of competing interests: commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.[123] Management of the Fraser River salmon fishery necessarily entails the allocation by the Minister of a scarce resource among competing user groups. In *Comeau's Sea Foods Ltd.*, this Court recognized that licencing is one of the tools in the arsenal of powers available to the Minister under the *Fisheries Act* to manage fisheries in the interest of all Canadians.[124] The discretionary power given to the Minister by Parliament may be exercised for all types of reasons, including social, cultural or economic goals or objectives[125], and the decision to allocate the resource among competing user groups is a political choice. In *R. v. Huovinen*, the B.C.C.A. stated:

> The discretionary power that has been given to the Minister by Parliament may be exercised for all types of reasons, including the carrying out of social, cultural or economic goals and policies: *Gulf Trollers Association et al. v. Canada (Minister of Fisheries and Oceans) et al.*, [1987] 2 W.W.R. 727 (F.C.A.); leave to appeal to the Supreme Court of Canada refused on March 24, 1987, [1987] 2 W.W.R. ixx. Thus, generally speaking, a decision to grant a license or vary the fishery closure is an allocation of the fishery resource among competing users, a political choice. It is not an adjudication of individual or group rights. In *Gulf Trollers* the allocation was between sports fishers and commercial fishers. In this case, it is between aboriginal fishers and commercial fishers. The fact that aboriginal fishers are involved cannot turn a political choice into an adjudicative decision. Nor can the allocation of the fish among competing users by a Ministerial act be interpreted as a colourable attempt to bypass the *Pacific Fishery Regulations, 1993*.[126] (emphasis added)

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[123] *Ward v. Canada*, [2002] 1 S.C.R. 569, 2002 SCC 17, at para.41.
[124] *Comeau's Sea Foods Ltd.* v. *Canada (Fisheries and Oceans)*, [1997] 1 S.C.R. 12, at para. 37.
[125] *Ward v. Canada*, *supra*, at para.39.
[126] *R. v. Huovinen*, (2000), 188 D.L.R. (4th) 28 (B.C.C.A.) at para. 24; leave ref'd [2000] S.C.C.A. No. 478.

78. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit so long as when the legislature does so it does not offend s.15(1).[127] Applied to the present case, this principle means that the Government may allocate the fishery as it chooses, provided that in doing so it does not differentiate in a way that violates s.15(1). Specifically, the Government is free to allocate the salmon fishery between multiple groups of users and to permit more than one group to sell the fish.

79. As the court below held, the allocation of the salmon fishery among commercial users and the Pilot Sale fishery conducted by the Musqueam, Burrard and Tsawwassen bands did not result in the claimant group being denied any benefit at law. In 1998, the commercial fishery in Area "E" was allocated 21% of the commercial total allowable catch. The total commercial catch of sockeye salmon for that year was in excess of 1.2 million fish, of which Area "E" fishers caught 268,000. The Musqueam, Burrard and Tsawwassen Pilot Sale fishery amounted to only 57,892 fish, less than 5% of the total commercial catch.

80. Similarly, in the year prior, 1997, the commercial total allowable catch was in excess of 8.4 million fish. In particular, Area "E" fishers caught 1.1 million more sockeye salmon than the Musqueam, Burrard and Tsawwassen Pilot Sale fishery, which amounted to 197, 680 fish.

81. The catch statistics demonstrate that the claimant group was not denied meaningful access to the commercial salmon fishery. Moreover, although the Musqueam, Burrard and Tsawwassen Pilot Sales fishery was restricted to a specific geographical location, the members of the claimant group were not so restricted. Members of the claimant group can fish anywhere the commercial fishery is opened – all they need do is obtain the appropriate licence or a Fisher's Registration Card. Indeed, some of the defence witnesses had licences permitting them to fish in other areas.[128]

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[127] *Auton*, *supra*, at paras. 28, 41; *Hodge*, *supra*, at para. 26.

[128] See, for example, L. Salmi, A.R. Vol VI, p. 1030, l.40-1031, l.1; D. Sonnenberg, A.R. Vol V. p. 776, l.7-9; L. Budden, A.R. Vol. V, p. 843, l.18-27; S. McDonald, A.R. Vol. V, p. 860, l.17-32.

82. As the summary conviction appeal court judge appreciated, to the extent that the allocation of the salmon fishery is a zero-sum game, allocation of some of the fishery to the Pilot Sales Program may well have resulted in the claimant group catching fewer fish than they might have, if they had been permitted to fish at the same time in competition with the smaller and less efficient boats used in the aboriginal fishery. But this in itself does not mean that the claimant group was denied a benefit of the law. What the claimants sought was an equal opportunity to participate in the fishery. An equal opportunity to participate in the fishery does not require that the claimant group be provided the opportunity to fish *at the same time* as the aboriginal fishers. The claimants were provided opportunities to fish which provided them with meaningful access to the commercial fishery.

83. As Low, J.A. held in the court below, the allocation of fish between the commercial and aboriginal fishers was simply a policy decision aimed at providing both user groups with access to the resource. The Appellants have failed to establish that they were denied a benefit at law and, for this reason, their appeal must be dismissed.

(iii) In the alternative, if there was a denial of a benefit occasioned by differential treatment, it was not discriminatory

84. If this Court disagrees with the foregoing submissions and concludes that the claimants were denied a benefit of the law on the basis of an enumerated or analogous ground, the Respondent concedes that the analysis moves on to the third stage of the *Law* test, the determination whether the distinction amounted to substantive discrimination. The Respondent's position is that if any distinction was created, it was not discriminatory within the meaning of s. 15(1).

85. The Respondent emphasizes that the appropriate comparison must be between aboriginal individuals and non-aboriginal individuals, since the basis of the Appellants' complaint is that the *ACFLR* and the Pilot Sales Program permitted the Minister to issue licences conferring a benefit on aboriginals. Moreover, the benefit in question was granted to the particular Indian bands, not because they were Musqueam, Burrard or Tsawwassen, but because they were aboriginal organizations. The summary conviction appeal court judge was correct in holding that the trial judge erred in confining the

comparator group to individuals possessing a "blood line connection" to the Musqueam, Burrard and Tsawwassen bands.

86. In order to violate s. 15(1), differential treatment on the basis of an enumerated or analogous ground must have "the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society".[129] The Appellants have failed to establish that being required to fish at a different time demeans their dignity.

87. The Appellants argue that where a distinction is made on the basis of race, the Court should presume a violation of s. 15(1) and require the state to justify the distinction under s. 1. The Appellants are wrong. This Court held in *Corbiere, supra*, that the enumerated grounds set out in s. 15(1) are only indicators of suspect grounds of discrimination, which, if found to exist in a particular case, then trigger a further enquiry to determine whether the decision withholding a benefit or advantage is discriminatory. McLachlin J (as she then was) and Bastarache J stated:

> The enumerated grounds function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making. They are a legal expression of a general characteristic, not a contextual, fact-based conclusion about whether discrimination exists in a particular case. As such, the enumerated grounds must be distinguished from a finding that discrimination exists in a particular case. Since the enumerated grounds are only indicators of suspect grounds of distinction, it follows that decisions on these grounds are not always discriminatory; if this were otherwise, it would be unnecessary to proceed to the separate examination of discrimination at the third stage of our analysis discussed in *Law, supra*, per Iacobucci J.[130]

88. This Court went on further to state, in *Corbiere, supra*, that "conflation of the second and third stages of the *Law* framework is to be avoided."[131]

89. The Appellants reliance on American jurisprudence is misplaced and unhelpful. The structure of the Canadian constitution differs considerably from the American constitution, and little assistance can be obtained from American cases under the

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[129] *Law, supra*, at para. 88.
[130] *Corbiere, supra*, at para. 7.
[131] *Corbiere, supra*, at para. 12.

Fourteenth Amendment. In particular, it is clear from the decisions of this Court under s. 15(1) that distinctions made *in favour of* disadvantaged groups such as aboriginal communities will ordinarily not result in substantive discrimination. Furthermore, in numerous decisions of this Court, the Court has found no substantive discrimination, notwithstanding the claimant successfully established differential treatment on the basis of an enumerated or analogous ground.[132] It is, therefore, essential in every case that the Court consider the third stage of analysis under the *Law* test.

90. The third stage of analysis is flexible and is aided by various contextual factors that, when considered together, may indicate the presence of substantive discrimination. The contextual factors – pre-existing disadvantage, correspondence with needs, capacity and circumstances, ameliorative purpose or effect, and nature and scope of the interest affected[133] - are to be evaluated from the perspective of the claimant, but the inquiry is both objective and subjective. The relevant point of view is that of the reasonable, dispassionate and fully informed person, possessed of similar traits to the Appellants. [134]

91. Thus, the question here is whether the rational, dispassionate and fully informed person, in circumstances similar to the claimants would conclude that the Pilot Sales Program has the effect of demeaning the dignity of these Appellants.[135] As the appellate courts below held, the trial judge fell into serious error when he assessed the claim from the subjective perspective of a number of defence witnesses who were Area "E" fishermen or otherwise involved in the commercial fishing industry, going so far as to find their "perception" more important than the reality.[136]

92. The relevant contextual factors in the case at bar are: a) the claim involves a program and regulations relating to aboriginal people who are a historically

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[132] See for example, in addition to *Law, supra*: *Gosselin, supra*, *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872, and *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625.
[133] *Law, supar*, at para. 88.
[134] *Law, supra*, at para. 61.; *Gosselin, supra*, at para. 25
[135] *Law, supra*, at para. 60.
[136] Reasons of Mackenzie, J.A., A.R. Vol I, p. 204, para. 109; Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 125, at para. 75; Reasons of Kitchen, P.C.J., A.R. Vol. I, pp. 66-69, at paras. 163-170.

disadvantaged group; b) the Pilot Sales Program corresponds to the needs, capacity and circumstances of aboriginal people and to Canadian society as a whole, and; c) the Pilot Sales Program has a minimal negative effect on the interests of the Appellants.

(i) The Impugned Program and Regulations Relate to Aboriginal People

93. As L'Heureux-Dubé J. stated in *Corbiere*[137]:

> …the contextual approach to s.15 requires that 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.

94. It is appropriate then to consider, as Brenner C.J.S.C. did, the continuing historic and cultural value of the fishery to aboriginal people even in the absence of a proven aboriginal right to fish commercially.[138] Further, the distinctiveness of Indians and Inuit people has, since Confederation, been reflected in constitutional provisions including s. 91(24) of the *Constitution Act, 1867*, which grants exclusive legislative authority to Parliament to enact laws relating to Indians and lands reserved for Indians.

95. The most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory is whether the claimant group has experienced pre-existing disadvantage, stereotyping, prejudice or vulnerability.[139] The Appellants, however, acknowledge that the members of the claimant group do not suffer from any pre-existing disadvantage, vulnerability, stereotyping or prejudice.[140]

96. Aboriginal people, on the other hand, have suffered general and historic disadvantage in Canadian society. As this Court observed in *Lovelace, supra*:

> …all aboriginal peoples have been affected "by the legacy of stereotyping and prejudice against aboriginal peoples" (*Corbiere, supra*, at para. 66).

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[137] *Corbiere, supra*, at para. 54.
[138] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 115, at para. 50; See also Pearse Report (1982), Exh. 18, Tab 95, A.R. Vol. IX, pp. 1686-1687; see also Matkin Report, Exh. 4, Tab 20, A.R. Vol. X, p. 1774; Suttles Report, Exh. 6, Tab 47, A.R. Vol. XI, p. 2026; *Jack et al., supra*, at pp. 306-308.
[139] *Law, supra*, at para. 63.
[140] Appellants' Factum, at para. 64.

> Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing…[141]

97. In *Gosselin, supra,* this Court recognized that where the government is responding to certain concerns which appear well-founded, it is legitimate to consider the purpose of the impugned law or program as part of the overall contextual evaluation of the challenged distinction.[142]

98. While the trial judge correctly found that pre-existing disadvantage was not a concern for the claimant group, he failed to properly consider the pre-existing disadvantage of aboriginal communities. As Brenner C.J.S.C. noted, this error arose, in part, because the trial judge unduly restricted the comparator group and his analysis of ameliorative effect to the members of the Musqueam, Burrard and Tsawwassen First Nations. Had he considered the clear relative disadvantage of aboriginal communities and the purposes of the Program, among which were the provision of economic opportunities in the commercial fishery to aboriginal communities, "…it would likely have been very difficult for him to conclude that a separate regime for a disadvantaged group could violate the dignity of members of an advantaged group."[143]

(ii) The Pilot Sales Program Corresponds To The Needs, Capacity And Circumstances Of Those It Affects.

99. Section 15(1) does not require perfect correspondence between a program and the actual needs and circumstances of those whom it affects. Further, in creating a program, the legislator is entitled to proceed on informed general assumptions provided those assumptions are not based on arbitrary and demeaning stereotypes.[144]

100. As the appellate courts below found, the Pilot Sales Program, as part of the Aboriginal Fisheries Strategy, was simply one component of a much larger program of the Department. One of its objectives was to allow the Department to test a sales component for possible inclusion in treaties.[145] Brenner C.J.S.C. also appreciated that,

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[141] *Lovelace, supra,* at para. 69.
[142] *Gosselin, supra,* at para. 27.
[143] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp.128, at para. 83.
[144] *Gosselin, supra,* paras. 55-56.
[145] Reasons of Low, J.A., A.R. Vol I, p. 178, para. 45 and p. 191, at paras. 81-82; Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 116, at para. 53.

although no aboriginal right to fish salmon commercially had been established in court, such rights could be found to exist or could be part of a negotiated treaty at some point in the future.[146]

101. More importantly, as Brenner C. J. stated, "[T]he most fundamental correspondence between the Aboriginal Fisheries Strategy and the needs, capacity and circumstances of aboriginal communities was that it 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."[147] He observed that the importance of the fishery to coastal aboriginal communities is reflected in the Reserve system in coastal British Columbia, where, as noted by Binnie J. in *Wewaykum Indian Band v. Canada*[148], the multiplicity of relatively small reserves "is characteristic of coastal BC where strategic access to plentiful fishing and other resources was thought to be more important than simple acreage".

102. The Aboriginal Fisheries Strategy and the Pilot Sales Program in particular have provided economic opportunities in aboriginal communities by increasing aboriginal participation in the fishery, creating new jobs and training and generating revenue.[149] Such an ameliorative effect is highly relevant, as noted in *Law, supra*:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter 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. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member or society.[150]

103. Brenner C.J.S.C. was correct in holding that the trial judge had erred in considering amelioration only in relation to financial disadvantage, set too strict a standard in requiring a "rational connection" between the program and the disadvantage

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[146] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 130, at para.87-88.
[147] Reasons of Brenner C.J.S.C. A.R. Vol I, p. 132, at paras. 91-94.
[148] *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79 at para. 11.
[149] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 136, at para. 99; see also Sayers, April 16, 2003, A.R. Vol. VIII, pp. 1349-1350.
[150] *Law, supra*, at para. 88.

suffered by the First Nations, and failed to consider the Program's effect on communities other than the Musqueam and Tsawwassen. [151]

104. The trial judge misconstrued the Pilot Sales Program as providing a purely economic benefit and accordingly focused too narrowly on the recipient First Nations' economic circumstances, to the exclusion of the broader constitutional, social, cultural and historical contexts informing both this Court's previous findings of aboriginal disadvantage and the Government's decision to make provision for aboriginal-specific openings in the commercial fishery.

105. Moreover, the trial judge's characterization of the Pilot Sales Program suffered from a fundamental inconsistency. In considering the ameliorative effect of the Program, the trial judge was dismissive of the benefits provided to the aboriginal communities, holding that the Program provided only financial rewards, had insignificant effects on unemployment, and provided only limited openings of the fishery "so it can hardly be said that those participating are developing any sort of career, skill or occupation."[152] Yet, in considering the nature of the Appellants' interests affected by the Program, the trial judge was of the view that the Appellants' interests <u>in the same benefit</u> were profoundly personal, implicating workplace-identity considerations and familial/community values.[153] Having regard to their long-standing relationship to the fishery, it is reasonable to conclude that the intangible benefits to the affected aboriginal communities were at least as great as those enuring to the commercial fishers.

(iii) Effect on the Non-Aboriginal Interests Was Limited

106. As noted in *Law*, *supra*:

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[151] Reasons of Brenner C.J.S.C., A.R. Vol. I, pp. 136-137, at paras. 100-102.
[152] Reasons of Kitchen, P.C.J., A.R. Vol. 1, p. 79, at para. 200.
[153] See Reasons of Kitchen, P.C.J., A.R. Vol. 1, p. 79, at para. 161 " I conclude that commercial fishing is a very distinctive lifestyle…Great pride is taken in financial success and it is regarded as a measure of one's abilities as a fisher…It is clear that, just as in the sports fishing community, attaining status as a fisher is very important." And at para. 163, "…any openings that occur are prized for the financial possibilities and for the opportunity to demonstrate to others that they are still ready, willing and able as fishers." And also at para. 169, "…their most consistent complaint is that they view commercial fishing as part of their heritage…They view commercial fishing as part of their identity which they variously described as their self, their being, and their heritage."

> "the more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of s.15(1).[154]

107. The Appellants are wrong in asserting that the appellate courts misconstrued the trial judge's use of the word "perception", or set aside findings of fact made by the trial judge. Brenner, C.J.S.C. accepted the findings of fact of the trial judge arising from the evidence, but observed that the subjective feelings and perceptions of the defence witnesses about the Pilot Sales Program played a significant role in the outcome of the case, in that the trial judge assessed the Appellant's claim of discrimination from the perspective of the defence witnesses, rather than the dispassionate, fully informed, reasonable observer.[155] Mackenzie, J.A., in the court below, agreed that the trial judge had erred in placing too much weight on the subjective perceptions of the defence witnesses, which were unsupported by an objective assessment of the underlying facts.[156]

108. The appellate courts were correct that the trial judge erred in according the perceptions of the defence witnesses more weight than they were entitled to in light of the objective facts. The defence witnesses may well have believed that the Pilot Sales fishery had an adverse impact on the commercial fishery, yet they were neither dispassionate, nor fully informed. The witnesses knew little to nothing about the terms of the agreement with the Musqueam, Burrard and Tsawwassen bands or about the actual amount of fish allocated to the aboriginal communal fishery. As the appellate courts correctly noted, there was no empirical evidence as to the impact of the Pilot Sales Program on the profitability of the commercial fishery.[157] The catch statistics belie the claim that the Appellants suffered any significant impacts from the implementation of the Aboriginal Fisheries Strategy. The reasonable, fully informed and dispassionate observer, sharing the circumstances of the claimant group, would conclude that the impact of the Pilot Sales fishery on the commercial fishers was minimal and they were not subjected to treatment which had the effect of demeaning their dignity.

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[154] *Law*, *supra*, at para. 88.
[155] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 125, at para. 63 and 75.
[156] Reasons of Mackenzie, J.A., A.R. Vol 1, p. 204, at para. 109
[157] Reasons of Mackenzie, J.A., A.R. Vol 1, p. 203, at para. 109; Reasons of Brenner, C.J.S.C. A.R. Vol I, p. 138, at para. 104.

109. Having regard to all of the contextual factors, the Appellants failed to establish on the balance of probabilities that the Pilot Sales progam treated them as less capable and less worthy of recognition or value as human beings or members of Canadian society. The Appeal must be dismissed.

(II) SECTION 15(2) IS AN INTERPRETIVE PROVISION

110. Nothing arising on the facts of this case calls into question this Court's holding in *Lovelace, supra* that s. 15(2) is an interpretive provision, or justifies a departure from the Court's considered opinion in that case.[158] Section 15(2) is an interpretive provision, and given this Court's established line of authority on the proper approach to analysis of equality claims under s. 15(1), the ameliorative purpose or effect of a program can readily be taken into account under s. 15(1).

111. The position of the Respondent is that the Aboriginal Fisheries Strategy and Pilot Sales Program were primarily aimed at management of the fishery, and did not have as their sole or primary object the amelioration of conditions of disadvantaged groups or individuals. However, among the objectives of the Strategy and the Pilot Sales Program was the provision of economic opportunities in the commercial fishery to aboriginal communities, which has an ameliorative effect that must be considered under s. 15(1).

(III) ANY BREACH IS JUSTIFIED UNDER SECTION 1

112. If, contrary to the Respondent's submissions, this Court finds an infringement of s. 15(1), the infringement is nonetheless a reasonable limit that can be demonstrably justified in a free and democratic society. The *ACFLR* and their implementation in the context of the Pilot Sales Program is a measured response to pressing issues in the management of the fishery, including disputes as to the full nature and extent of aboriginal rights to the fishery, and the disadvantaged circumstances of aboriginal communities. The Government's objectives were pressing and substantial enough to warrant overriding the constitutionally protected right, and the means chosen were proportionate in that the impugned Program was rationally connected to its objective, did

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[158] *Lovelace, supra,* at paras. 105-108.

not impair the *Charter* right any more than was necessary to accomplish the objective, and had benefits that outweighed any deleterious effects on the right.[159]

The Objectives Are Pressing and Substantial

113. The Aboriginal Fisheries Strategy, including the Pilot Sales Program, was aimed at improving the management of the salmon fishery by reducing conflict over the aboriginal fishery, by involving aboriginal communities in fisheries management, and by improving various other aspects of management such as catch monitoring and enforcement procedures.[160] The Program also aimed to facilitate the process of negotiating a resolution of claims by aboriginal people and to assist aboriginal communities, a vulnerable and disadvantaged group with a unique interest in the fishery. Although the Program is not a direct fulfillment of established rights under s. 35 of the *Constitution Act, 1982*, its objectives support the ultimate purpose of s. 35: the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.[161] As Brenner C.J.S.C. observed:

> …the overall strategic objective for both the aboriginal and the non-aboriginal communities in our country is to achieve a reconciliation. The P.S.P. was clearly designed by the D.F.O. as a tactical instrument within the framework of that strategic objective.[162]

The objectives are clearly pressing and substantial and the trial judge erred in concluding otherwise.

The Means Chosen Are Demonstrably Justifiable

a) The Aboriginal Fisheries Strategy, Including the Pilot Sales Program, is Rationally Connected to its Objectives

114. Negotiation of disputes over access by aboriginal communities to the fishery rather than insistence that they be resolved by litigation is both a logical method of resolving such disputes and one that has been repeatedly urged by the courts.[163] Establishing additional methods for catch monitoring, enforcement and other aspects of

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[159] *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC, at paras. 78, 82, 84, 95-96 and 102.
[160] Pearse Report, 1982, Exh. 18, Tab 95, A.R. Vol. IX, p. 1683; Backgrounder, Exh. 3, Tab 13, A.R. Vol. X, p. 1767.
[161] *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at paras. 27-32.
[162] Reasons of Brenner C.J.S.C., A.R. Vol. I, p. 143, at para.119.
[163] *R. v. Marshall*, [1999] 3 S.C.R. 533, at para. 22; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 207.

regulation through negotiated arrangements is also a logical method of improving management of the fishery.

115. Fishing has been important to many aboriginal communities in British Columbia for thousands of years. Therefore, supporting their historic involvement in the fishery is an appropriate and logical way of alleviating their disadvantaged situation.

116. The Government was fully justified in relying upon the Pearse Report 1982 in its assessment of the problems and possible solutions, and in continuing the Pilot Sales Program based on the evaluations conducted in 1994 and in 1997. While the trial judge reached a different conclusion based on the anecdotal evidence of the defence witnesses, he erred in relying on that evidence to conclude that there was no rational connection between the Government's objectives and the means chosen to accomplish them.

117. The proper test is whether the Government had a "reasoned apprehension of harm".[164] Moreover, as this Court recently stated, "[e]ffective answers to complex social problems…may not be simple or evident", and considerable deference should be granted the legislator in deciding which means to adopt. In order to establish a rational connection, the Government need only establish that the means chosen are linked to the Government's objective or objectives. It is sufficient that the means may help bring about the objective.[165]

118. The challenges associated with managing the salmon fishery in an environment characterized by both conflict and uncertainty over the extent and scope of aboriginal rights were such that the Government was reasonably entitled to conclude that doing nothing to address the situation would potentially cause significant harm to the fishery. The means chosen by the Government here were rationally objected to the objectives of the Aboriginal Fisheries Strategy.

b) The Pilot Sales Program Minimally Impairs the s. 15 Right

119. "Minimal impairment" does not require that the government adopt the least restrictive means of achieving its end, nor does it require that the government select the

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[164] *Sharpe, supra*, at para 85.
[165] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, at paras. 40-41.

means best suited to achieve its end. As this Court recently observed in *JTI-Macdonald Corp.*, "on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives". Furthermore, a certain measure of deference is appropriate where the government is crafting a response to a complex social problem.[166]

120. The Aboriginal Fisheries Strategy and the Pilot Sales Program fall within the range of reasonable alternatives. Provision was made to minimize the impact of the Aboriginal Fisheries Strategy and the Pilot Sales Program on the commercial fishery, through retirement of commercial licences and the requirement that no pilot sales fishery take place unless there was a corresponding commercial fishery opening. Furthermore, the commercial allocation of Fraser River sockeye was many times greater than the pilot sales allocation, as the table in paragraph 34 above, illustrates.

121. The trial judge may well have been correct that there were "more sensible alternatives" to the problems besetting the fishery, but that was not the issue before him. He was required to determine whether the solution chosen was within the range of reasonable alternatives. It was, and he erred in holding that the Pilot Sales Program did not minimally impair the rights of commercial fishers.

c) The Benefits Outweigh the Deleterious Effects

122. Finally, the benefits of the *ACFLR* as implemented through the aboriginal communal licence were proportional to any deleterious effects it had on the equality rights of the Appellants.[167]

123. The assessments of the Pilot Sales Program in 1994 and 1997 concluded that management and conservation were improved, and that levels of fishing activity and employment in aboriginal communities increased. By 1998, treaties had not yet been concluded, but the Department had been able to negotiate agreements with the Musqueam, Tsawwassen, Burrard and other aboriginal communities on fisheries issues for several years.

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[166] *JTI-Macdonald Corp., supra,* at para. 43.
[167] *JTI-Macdonald, supra,* at paras. 45-47.

124. These benefits patently outweigh any deleterious effects of the Pilot Sales Program on the equality rights of the claimant group and of the commercial fishers in particular. Those effects were, as the appellate courts below found, minimal.

125. The errors of the trial judge were compounded at this stage. In misconstruing the interest of the commercial fishers, he overestimated the deleterious effects of the Program in concluding that there had been a "tremendous cost" to society.[168] He failed entirely to consider the benefit accruing from reaching negotiated agreements with the aboriginal communities as to the manner and extent of their fishing activities, and he erroneously concluded that, simply because the individuals designated by the aboriginal community were able to keep the fish they caught, there was no financial or other benefit to that community under the impugned Program.[169]

126. Given the importance of the need for the proper and orderly management of the fishery, and the relatively minor infringement of the claimants' rights under s. 15 of the *Charter*, the *ACFLR* and the Pilot Sales Program are a reasonable limit under s. 1.

(IV) SECTION 25 IS NOT ENGAGED IN THIS CASE

127. Section 25 of the *Charter* protects "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada" from impairment in the process of guaranteeing *Charter* rights. The Respondent's position is that S. 25 is not engaged in this case for two reasons: (1) the licence issued to the Musqueam, Burrard and Tsawwassen Bands is not an aboriginal or treaty right, nor was it an "other right or freedom"; and, (2) s. 25 should only be engaged in the event that there is an unjustified violation of a *Charter* right.

(a) THE MBT LICENCE IS NOT AN "OTHER RIGHT OR FREEDOM"

128. There is little jurisprudence regarding the phrase "other rights or freedoms" in s. 25. What little jurisprudence exists and consideration of the common characteristics of the rights or freedoms enumerated in s. 25 lead to the conclusion that there are at least

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[168] Reasons of Kitchen P.C.J., A.R. Vol. I, p. 86, at para. 217.
[169] Reasons of Kitchen P.C.J., A.R. Vol. I, pp. 84, 85 and 86, at paras. 211, 214, 217.

two criteria for "other rights and freedoms." They must (i) play a critical role in the protection of distinctive aboriginal cultures within the larger Canadian polity,[170] and (ii) be entrenched to a similar degree as the rights or freedoms enumerated in s. 25.

129. The criteria for rights that are accorded special constitutional status and protection should be rigorous. Section 25 must be interpreted in the context of the other provisions of the *Charter*.[171] Both the *Charter* rights and s. 25 are part of "the supreme law of Canada" and as such are entitled to a generous and purposive interpretation.[172] Section 1 of the *Charter* establishes a high standard to justify restricting *Charter* rights.[173] It would run counter to the intention expressed elsewhere in the *Charter* if *Charter* rights could be overridden under s. 25 by rights which are peripheral or ephemeral.

130. A purposive interpretation requires that *Charter* provisions be understood in terms of the interests they are meant to protect.[174] A plain reading of s. 25 shows that it is intended to provide a level of protection to certain rights or freedoms of aboriginal peoples when those rights conflict with the guarantee of *Charter* rights and freedoms. However, more is required than that the right or freedom simply be one that relates to aboriginal people. The section is intended to give some level of protection to those rights or freedoms that, in the words of the Federal Court of Appeal in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, "…belong to aboriginal peoples *as aboriginal peoples*."[175]

131. In other words, it is only those rights or freedoms that are vital to maintaining the distinctiveness of aboriginal cultures within the larger Canadian polity that have the potential to fall within s. 25.

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[170] Aboriginal distinctiveness arises from the fact that aboriginal people have historically lived in communities on the land and participated in distinctive cultures. It is this fact, above all others, which separates aboriginal people from all other minority groups in Canada: (*R. v. Van der Peet*, *supra* at para. 30.)

[171] *Gosselin (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 238, 2005 SCC 15, at para. 2; *R. v. Tran*, [1994] 2 S.C.R. 951 at p. 976.

[172] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at p. 344.

[173] *R. v. Sharpe*, *supra*, at para. 78.

[174] *Big M Drug Mart*, *supra*, at p. 344.

[175] *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (1996), 142 D.L.R. (4th) 122 (F.C.A.) at p. 136.

132. This point was emphasized by the Federal Court of Appeal in *Corbiere, supra.*[176] To date, *Corbiere* provides the most definitive guidance on the scope of the phrase "other rights or freedoms." In *Corbiere*, it was argued, *inter alia*, that s.77(1) of the *Indian Act*, which restricts voting rights to those ordinarily resident on the reserve, falls within the "other rights or freedoms" of the band and is protected under s. 25 so as to defeat the non-resident members' equality rights. The Federal Court of Appeal found that s.77(1) is not an "other right or freedom" because the right to exclude off-reserve people is not "integral" to the maintenance of a distinctive form of aboriginal government nor is the voting system "…imposed by the *Indian Act* aimed at protecting and affirming aboriginal difference."[177]

133. On further appeal, this Court expressly declined to articulate general principles pertaining to s. 25.[178] However, L'Heureux-Dubé J., in reasons concurring with the majority, did note that 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.[179]

134. Guidance as to the intended scope of the "other rights or freedoms" in s. 25 is achieved by applying the *ejusdem generis* rule.[180] The rights and freedoms enumerated in s. 25 are: aboriginal and treaty rights; any rights or freedoms that have been recognized by the *Royal Proclamation of 1763*, and; any rights or freedoms that now exist by way of land claim agreements or may be so acquired. The commonality between the rights and freedoms enumerated in s. 25 is (a) their critical role in protecting distinctive aboriginal cultures, and, (b) their constitutional or quasi-constitutional nature.

135. The critical role of aboriginal rights in protecting distinctive aboriginal cultures is beyond question. Similarly, treaty rights, including land claims agreements, are also crucial to protecting distinctive aboriginal cultures; they represent "an exchange of solemn promises between the Crown and the various Indian nations;" they are

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[176] *Corbiere, supra* (F.C.A.) at p. 136.
[177] *Corbiere, supra* (F.C.A.) at p. 136.
[178] *Corbiere, supra* (S.C.C.), per L'Heureux-Dubé J. at para. 53; McLachlin J. (as she then was) and Bastarache J., at para. 20.
[179] *Corbiere, supra,* (S.C.C.) at para. 52.
[180] *Nanaimo (City) v. Rascal Trucking Ltd.,* [2000] 1 S.C.R. 341, at paras. 21-22.

"agreement[s] whose nature is sacred."[181] The *Royal Proclamation*, as stated by La Forest J. in *Delgamuukw v. British Columbia*, "…bears witness to the British policy towards aboriginal peoples which was based on respect for their right to occupy their ancestral lands…".[182]

136. Aboriginal and treaty rights, including those in land claims agreements, are constitutionally entrenched by s. 35 of the *Constitution Act, 1982*. The *Royal Proclamation*, although not similarly entrenched, has been described as the 'Indian Bill of Rights'.[183]

137. It follows that to be afforded protection under s. 25, an "other right or freedom" must: (1) be of sufficient magnitude to warrant overriding a *Charter* right or freedom; (2) manifest a strong degree of permanence; and, (3) be intimately related to the protection and affirmation of aboriginal distinctiveness.

138. The licence in question does not satisfy these criteria. The licence permitting sale was simply an exercise of administrative discretion, subject to numerous conditions and of brief duration. It was only effective for twenty-four hours. The agreement entered into with the Musqueam, Burrard and Tsawwassen bands expressly stated that it did not create any aboriginal rights.[184] The conclusion of Brenner C.J.S.C. that the licence did not create a right under s. 25 was correct.

(b) HAIDA NATION DOES NOT CHANGE THE SECTION 25 ANALYSIS

139. The decision of this Court in *Haida Nation v. British Columbia (Minister of Forests)*[185] does not affect the foregoing analysis. Negotiated agreements that may represent interim accommodations, created as a result of discussions relating to a possible adverse impact on a potential aboriginal right, are not an "other right or freedom" within the meaning of s. 25.

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[181] *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 41.
[182] *Delgamuukw v. British Columbia*, *supra*, at para. 200.
[183] *R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, at para. 86.
[184] See A.R. Vol IX, pp. 1490-1491 and see the Communal Licence at A.R. Vol IX, p. 1640
[185] [2004] 3 S.C.R. 511, 2004 SCC 73.

140. Such an accomodation does not qualify for protection under s. 25 because it is solely the product of a consultative process, regarding the possible adverse impact on a claim to potential aboriginal rights. The objectives of s. 25 and the process mandated in *Haida* of consultation and, if appropriate, accommodation, are different. The purpose of s. 25 is to prevent the guarantee of *Charter* rights from eroding rights and freedoms that are critical to protecting distinctive aboriginal cultures. The objective of the consultative process mandated by *Haida* is to balance aboriginal concerns, the potential impact of Crown actions on the asserted right, and other societal interests until the claim to the aboriginal right is resolved. The process is an interim measure and requires flexibility and compromise.[186] Its character as a *compromise* with other societal interests, which must include *Charter* rights, is at odds with the notion that it would *override* those rights. A commitment to this process also does not impose a duty to agree. Further, interim, evolving compromises do not necessarily have the foundational character contemplated by s. 25.

(c) SECTION 25 IS NOT ENGAGED UNLESS THERE IS A VIOLATION OF THE CHARTER THAT IS NOT JUSTIFIED UNDER SECTION 1

141. In the Court below, Kirkpatrick, J.A. stated that s. 25 is engaged if the outcome of a *Charter* claim "might" result in the derogation or abrogation of rights protected under s. 25.[187] The Respondent disagrees with this approach. To the extent that this statement means that s. 25 requires a court to dismiss a *Charter* claim where there is a *possibility* that guaranteeing a *Charter* right will impair a s. 25 right, it must be incorrect.

142. The decision of Kirkpatrick, J.A. is contrary to that of the Federal Court of Appeal in *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, which held that s. 25 is a "shield" and can only be invoked if a *Charter* violation is established.[188]

143. The Respondent's position is that s. 25 is only engaged if there is a violation of a right under the *Charter*, the guaranteeing of which would derogate or abrogate from a protected s. 25 right. In other words, s. 25 should only be engaged in the case on appeal

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[186] *Haida*, *supra*, at paras. 45-50.
[187] Reasons of Kirkpatrick, J.A., A.R. Vol. 1, p. 223, at para. 150.

if: (1) there is a violation of s. 15(1), and; (2) the violation is not justified under s. 1. A court should not automatically reject a *Charter* claim out of hand after having determined that a s. 25 right may be engaged, for several reasons.

144. First, it cannot be presumed that the outcome of a *Charter* claim will impair the s. 25 right at issue. A *Charter* claim may be unsuccessful in that the applicant fails to establish a violation of a right or freedom. The applicant may establish a violation, yet the government may demonstrate that the violation is nonetheless justified as a reasonable limit under s. 1. Or, the particular remedy granted in order to guarantee the infringed *Charter* right may have no affect on the s. 25 right. It is only after a court has found an unjustified infringement of a *Charter* right or freedom, and is considering the issue of remedy, that one can say that the "guarantee" of the *Charter* right risks impairing the s. 25 right and should therefore be construed in a manner that does not abrogate or derogate from the protected right.

145. Second, the plain intention of s. 25 in the context of the *Charter* as a whole is to restrict the exercise of *Charter* rights no more than is necessary to prevent impairment of s. 25 rights. Both the *Charter* rights and s. 25 are part of "the supreme law of Canada", and as such are entitled to a generous and purposive interpretation. *Charter* rights protect their beneficiaries against government action, and the test under s.1 for justifying restrictions on those rights is stringent. Governments cannot infringe *Charter* rights except to pursue pressing and substantial objectives and by means which have salutary effects that outweigh their deleterious effects.[189] Section 25, which also operates to restrict the exercise of *Charter* rights, must be applied in a manner which ensures that the restriction is no greater than absolutely necessary to enable the exercise of the aboriginal, treaty, and other rights it protects. To override the exercise of a *Charter* right to a greater extent than is necessary to avoid abrogating or derogating from a s. 25 right, overshoots the purpose of s. 25 and deprives *Charter* rights of the benefit of a generous interpretation. Dismissing an applicant's *Charter* claim summarily upon the invocation of s. 25 risks precisely that result.

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[188] *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (2000), 187 D.L.R. (4th) 741 (F.C.A.).
[189] *Sharpe, supra,* at para.78.

146. Third, *Charter* claims, including a claim based on s. 25, must always be analysed in a particular factual context. This Court has repeatedly said that the various provisions of the *Charter* must not be interpreted and applied in the abstract, but with close attention to the facts. For example, *R. v. Mills* involved a challenge to new provisions of the *Criminal Code* dealing with the production of records in sexual offence proceedings on the basis that they violated s. 7 of the *Charter*. McLachlin C.J.C. in considering whether the various rights, full answer and defence, privacy and equality, at play in the case conflicted, said:

> Considered in the abstract, these principles of fundamental justice may seem to conflict. The conflict is resolved by considering conflicting rights in the factual context of each particular case…
>
> …Whether or not all the rights involved are "principles of fundamental justice", *Charter rights must always be defined contextually*. (emphasis added)[190]

This Court made the same point more recently in the *Reference re Same-Sex Marriage*.[191]

147. By the same token, what may appear on the surface to be a conflict between a *Charter* right and a s. 25 right may, when the various rights are analysed in the context of the facts of the case, amount to no conflict or only a partial conflict.

148. A further difficulty with automatically dismissing a *Charter* claim whenever s. 25 is invoked is that s. 25 rights, which are communal rights, are effectively rendered absolute in relation to *Charter* rights, which by and large are individual rights. Rights, even when constitutionally entrenched, are not absolute.[192] Aboriginal and treaty rights are subject to justifiable infringement, even though they are "recognized and affirmed" without express qualification in s. 35 of the *Constitution Act, 1982*.[193] If even the protection that s.35 affords to aboriginal and treaty rights is not immune from governmental incursion, s. 25 cannot reasonably be interpreted as being absolute such that s. 25 rights are immune from the effects of the *Charter* in all situations. The

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[190] *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 63-64.
[191] [2004] 3 S.C.R. 698, 2004 SCC 79, at paras. 49-51.
[192] *R. v. Nikal*, [1996] 1 S.C.R. 1013 at p. 1057 See also s.28 of the *Charter*, which provides that "Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons."
[193] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

purposes of various *Charter* rights and freedoms are very different, as are the purposes served by the various rights embraced by s. 25. The nature and degree of conflict between the two kinds of rights will vary; for example, in one case a remedy for a *Charter* breach might deny the very existence of a s. 25 right, while in another the *Charter* remedy might deny a particular exercise of a s. 25 right. There may also be instances where a clash arises between the *Charter* rights held by aboriginals as individuals and the communal rights held under s. 25. In such circumstances, it is not necessarily obvious that the communal right should invariably take priority over the rights of the individual member of the community, absent some justification.

149. Finally, in the context of equality claims, aboriginal rights and freedoms will often be accomodated within the analytical framework of *Law, supra*. Claimants who assert that their equality rights have been violated under s. 15(1), such as the Appellants here, should not be left with the impression that their rights were trumped by aboriginal rights or freedoms, if there was never any substantive discrimination to begin with.

The Proper Analytical Approach

150. The Respondent's position therefore is that where the potential exists for conflict between an individual right or freedom guaranteed under the *Charter* and a s. 25 right or freedom, a court should undertake the following three step approach:

a) first, establish whether there has been a breach of a *Charter* right that is not justified as a reasonable limit under s. 1. Here, there is no breach of the Appellants' s. 15(1) rights. The present case can and should be disposed of on that basis;

b) second, if there is an unjustified breach of a *Charter* right, determine whether the case engages a right or freedom under s. 25. In this case, even were this Court to find a breach of s. 15(1), the MBT licence does not qualify as a right or freedom protected by s. 25; and,

c) finally, determine whether granting a remedy for the breach of the *Charter* right would, in the particular circumstances of the case, impede or prevent the exercise of the identified s. 25 right, and if so, to what

> extent. The court should deny or tailor a remedy for the *Charter* breach only to the extent necessary to avoid impairing the exercise of the s. 25 right. [194]

Conclusion on Section 25

151. The MBT licence was not an "other right or freedom" within the meaning of s. 25. It was simply not of the same order as aboriginal rights or the other enumerated rights in terms of its importance in protecting distinctive aboriginal cultures within the larger Canadian society, or its permanence. The MBT licence was simply an exercise of administrative discretion, subject to numerous conditions and of very brief duration. Regardless whether it was, or was not, an interim, negotiated accommodation of a claim to aboriginal commercial fishing rights, it was too peripheral and ephemeral to qualify for protection under s. 25.

152. Even if the MBT licence could be considered an "other right or freedom", the Court must still analyse the Appellants' s. 15(1) claim because it is not possible otherwise to ascertain whether guaranteeing the *Charter* right would abrogate or derogate from the s. 25 right. The Respondent's position is that there was no breach of s. 15(1) here, and this case can and should be disposed of on that basis.

(V) THE APPELLANTS ARE NOT ENTITLED TO A REMEDY FOR THEIR FLAGRANT VIOLATION OF A LAW WHICH IS NOT UNCONSTITUTIONAL

153. Should this Court find that the *ACFLR* and the communal licence violate the rights of the Appellants under s.15(1), a stay of proceedings is nonetheless not an appropriate remedy. The Appellants deliberately chose to violate a law which they acknowledge is not unconstitutional. They did so for the sole purpose of launching a collateral constitutional attack on another law. This Court ought not to countenance deliberate violations of a law as a means to seek judicial review of some other law under the *Charter*.

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[194] One commentator has proposed a similar analytical framework. See J. M. Arbour, "*The Protection Of Aboriginal Rights Within A Human Rights Regime: In Search Of An Analytical Framework For Section 25 Of The Charter Of Rights And Freedoms*", (2003), 21 S.C.L.R. (2d) 3 at p. 61.

154. As Low, J.A. stated in the court below:

> On the offence dates the appellants conducted what they call a "protest fishery" which, like "civil disobedience", is a term unknown to the law. They deliberately broke a law in order to attack the PSP on constitutional grounds. Both the trial judge and the appeal judge so found. Even if the law under which the MBT fishers fished on the offence dates was in breach of the equality rights of the appellants, it remained unlawful for the appellants to fish on those dates.
>
> What distinguishes this case from all other criminal cases in which *Charter* rights are raised and with which I am familiar is that the appellants do not challenge the constitutionality of the law they disobeyed. As I have said, they do not claim that either s. 53(1) of the regulations or s. 78 of the statute offends their *Charter* rights. Nor do they challenge any provision in the law (such as a presumption clause or a reverse onus clause) that would have assisted the prosecutor in obtaining a conviction.
>
> There is no point to the airing of a *Charter* issue in a criminal or quasi-criminal proceeding unless resolution of the issue might lead to the end of the prosecution or to the exclusion of evidence. This was the subject of discussion in *R. v. Vukelich* (1996), 78 B.C.A.C. 113, 108 C.C.C. (3d) 193, leave to appeal refused, [1996] S.C.C.A No. 461, and in *R. v. Pires; R. v. Lising*, [2005] 3 S.C.R. 343, 2005 SCC 66 at paras. 33 to 35. In *Pires,* Charron J. said this at para. 35:
>
> > [35] The concern over the constructive use of judicial resources is as equally, if not more, applicable today as it was 15 years ago when *Garofoli*, [1990] 2 S.C.R. 1421, was decided. For our justice system to operate, trial judges must have some ability to control the course of proceedings before them. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court.
>
> I do not wish to elaborate on this point because it was not fully argued before us. But I think the Crown would have been well advised to take the position at the beginning of the trial that, regardless of the merits of the *Charter* equality claims with respect to the *ACFLR* or the PSP, no remedy was available because the appellants deliberately broke a law other than the law they challenge. The lengthy trial in this case might have been avoided on this basis.[195]

155. In *R. v. Consolidated Maybrun Mines Ltd.*, this Court held that penal courts ought not to permit collateral attacks on administrative orders where the legislature has provided a specific forum within which challenges to such orders can be determined.[196] In coming to this conclusion, this Court observed that permitting accused persons to first ignore administrative orders issued under regulatory frameworks, and then to collaterally

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[195] Reasons of Low, J.A., A.R. Vol. I, pp. 194-195, at paras. 92-95.

[196] *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para. 46; and see *R. v. Al Klippert Ltd.*, [1998] 1 S.C.R. 737, at para. 23.

attack such orders in penal proceedings, would encourage conduct tending to undermine the objectives and effectiveness of the regulatory framework.[197]

156. If collateral attacks on administrative orders in penal proceedings are to be generally discouraged where an accused could have challenged the order in another forum, still more so should collateral attacks on laws under the *Charter* be discouraged where the accused is not charged under the impugned law and the constitutionality of that law is irrelevant to the determination of guilt or innocence in the penal proceeding.

157. The Appellants could have sought vindication of their *Charter* rights lawfully, through judicial review or a civil application for a declaration. Instead, they chose to undermine the rule of law by deliberately violating the law. Their objective was to be prosecuted and they succeeded. They should, therefore, be held to account for their actions.

158. As was the case in *Consolidated Maybrun Ltd.*, so too here, the conduct of the Appellants threatened to undermine both the objectives and effectiveness of the *Fisheries Act* and related regulations. The Appellants may well have disagreed with the Minister's decision to permit aboriginal communities to fish salmon for the purpose of sale, but the Appellants' decision to grab fish for themselves in flagrant violation of the closed fishery is simply unacceptable.

159. When citizens commit offences instead of following lawful avenues to challenge government acts, they must be held to account. The trial judge's decision to stay the prosecutions condoned the offence and risked undermining public confidence in the administration of justice. In the recent decision of *R. v. Armstrong*, a case similar to the case on appeal, the trial judge correctly stated that a stay of proceedings is not an available remedy where accused persons deliberately violate a valid law in order to launch a collateral attack on another law:

> In this case the accused knew that they were breaking the law. There is no question, in my view, that their purpose was to protest what they consider to be an improper exercise of Ministerial discretion and what they perceive to be a lack of enforcement of the law against another group; aboriginal fishers. As

[197] *R. v. Consolidated Maybrun Mines Ltd.*, *supra*, at para. 60.

> stated, the accused do not challenge the law under which they were charged. Even if the accused were to succeed in showing a breach of their section 15 equality rights as they allege, it remained illegal for them to fish, to set their gear and to possess salmon caught by them on the dates in question.
>
> As such, I am of the view that a stay of proceedings would not be an available remedy to them under section 24(1) of the *Charter* for any such breach.[198]

160. The Appellants should be held to account for their decision to flagrantly violate the law rather than seek vindication of their rights through the civil process. Their actions not only jeopardized the conservation goals of the fishery, they offended the rule of law, a principle which is central to our free and democratic society.

CONCLUSION

161. The answer to the first constitutional question is "No". There is no need to answer the second or third constitutional questions.

162. The appeal should be dismissed. In light of aboriginal communities' historical disadvantage and their unique relationship to the fishery, pilot sales licenses are simply exercises in the accommodation of differences – the essence of true equality.

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[198] *R. v. Armstrong*, [2007] B.C.J. No. 513 (B.C.P.C.) (Q.L.), at paras. 93-94.

PART IV - SUBMISSIONS AS TO COSTS

163. The Respondent does not seek an order as to costs.

PART V – NATURE OF THE ORDER SOUGHT

164. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED this day of October, 2007.

_____
CROFT MICHAELSON
Counsel for the Respondent

_____
PAUL RILEY
Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

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Other References	
D. McRae and P. Pearse, *Treaties and Transition: Towards a Sustainable Fishery on Canada's Pacific Coast (April 2004)*	**12**
"*The Protection Of Aboriginal Rights Within A Human Rights Regime: In Search Of An Analytical Framework For Section 25 Of The Charter Of Rights And Freedoms*", (2003), 21 S.C.L.R. (2d) 3	**150**

PART VII – STATUTES AND REGULATIONS

Aboriginal Communal Fishing Licences Regulations, S.O.R./93-332

Aboriginal Communal Fishing Licences Regulations
COMMUNAL LICENCES

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

(2) The Minister may designate, in the licence,

(*a*) the persons who may fish under the authority of the licence, and

(*b*) the vessels that may be used to fish under the authority of the licence.

(3) If the Minister does not designate the persons who may fish under the authority of the licence, the aboriginal organization may designate, in writing, those persons.

(4) If the Minister does not designate the vessels that may be used to fish under the authority of the licence, the aboriginal organization may designate, in writing, those vessels.

5. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a licence any condition respecting any of the matters set out in paragraphs 22(1)(*b*) to (*z.1*) of the *Fishery (General) Regulations* and any condition respecting any of the following matters, without restricting the generality of the foregoing:

(*l*) the disposition of fish caught under the authority of the licence.

Règlement sur les permis de pêche communautaires des Autochtones
PERMIS COMMUNAUTAIRES

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.

(2) Le ministre peut désigner dans le permis :

a) les personnes autorisées à pêcher au titre du permis;

b) les bateaux qui peuvent être utilisés au titre du permis.

(3) Dans le cas où le ministre ne désigne pas les personnes autorisées à pêcher au titre du permis, l'organisation autochtone peut les désigner par écrit.

(4) Dans le cas où le ministre ne désigne pas les bateaux qui peuvent être utilisés au titre du permis, l'organisation autochtone peut les désigner par écrit.

5. (1) Afin d'assurer une gestion et une surveillance judicieuses des pêches et de voir à la conservation et à la protection du poisson, le ministre peut, sur un permis, indiquer notamment toute condition relative aux points visés aux alinéas 22(1)*b*) à *z.1*) du *Règlement de pêche (dispositions générales)* et toute condition concernant ce qui suit :

(l) l'aliénation du poisson pris en vertu du permis.

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

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.

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.

Fisheries Act R.S.C. 1985, c. F-14

Fisheries Act
FISHERY LEASES AND LICENCES

Fishery leases and licences

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licences for fisheries or fishing, wherever situated or carried on.

Fisheries Act
OFFENCE AND PUNISHMENT

Punishment not otherwise provided for

78. Except as otherwise provided in this Act, every person who contravenes this Act or the regulations is guilty of
(a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding one hundred thousand dollars and, for any subsequent offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both; or
(b) an indictable offence and liable, for a first offence, to a fine not exceeding five hundred thousand dollars and, for any subsequent offence, to a fine not exceeding five hundred thousand dollars or to imprisonment for a term not exceeding two years, or to both.

Pêches, Loi sur les
BAUX, PERMIS ET LICENCES DE PÊCHE

Baux, permis et licences de pêche

7. (1) En l’absence d’exclusivité du droit de pêche conférée par la loi, le ministre peut, à discrétion, octroyer des baux et permis de pêche ainsi que des licences d’exploitation de pêcheries — ou en permettre l’octroi —, indépendamment du lieu de l’exploitation ou de l’activité de pêche.

Pêches, Loi sur les
INFRACTIONS ET PEINES

Peines dans les cas non spécifiés

78. Sauf disposition contraire de la présente loi, quiconque contrevient à celle-ci ou à ses règlements commet une infraction et encourt, sur déclaration de culpabilité :
a) par procédure sommaire, une amende maximale de cent mille dollars lors d’une première infraction ou, en cas de récidive, une amende maximale de cent mille dollars et un emprisonnement maximal d’un an, ou l’une de ces peines;
b) par mise en accusation, une amende maximale de cinq cent mille dollars lors d’une première infraction ou, en cas de récidive, une amende maximale de cinq cent mille dollars et un emprisonnement maximal de deux ans, ou l’une de ces peines.

Fishery (General) Regulations SOR/93-53

Fishery (General) Regulations
PART IV GENERAL
Sale of Fish

35. (2) Subject to subsection (3), no person shall buy, sell, trade, barter or offer to buy, sell, trade or barter any fish unless it was caught and retained under the authority of a licence issued for the purpose of commercial fishing, a licence issued under Part VII, a licence issued under the Aboriginal Communal Fishing Licences Regulations in which the Minister has authorized the sale of fish or an Excess Salmon to Spawning Requirement Licence issued under the Pacific Fishery Regulations, 1993.

Règlement de pêche (dispositions générales)
PARTIE IV GÉNÉRALITÉS
Vente de poissons

35. (2) Sous réserve du paragraphe (3), il est interdit d'acheter, de vendre, d'échanger, de troquer, d'offrir d'acheter ou d'offrir pour la vente, l'échange ou le troc des poissons à moins qu'ils n'aient été pris et gardés en vertu d'un permis délivré à des fins de pêche commerciale, d'un permis délivré aux termes de la partie VII, d'un permis délivré aux termes du *Règlement sur les permis de pêche communautaires des Autochtones* qui porte la mention que le ministre a autorisé la vente des poissons ou d'un permis de pêche du saumon en surplus des besoins en géniteurs délivré en vertu du *Règlement de pêche du Pacifique (1993).*

Pacific Fishery Regulations, 1993
PART VI SALMON
Salmon Close Times

53. (1) No person shall fish in any waters set out in column I of an item of Part I of Schedule VI for the species of salmon set out in column II of that item with the type of fishing gear set out in column III of that item during the close time set out in column IV of that item.

Règlement de pêche du Pacifique (1993)
PARTIE VI SAUMONS
Périodes de fermeture de la pêche du saumon

53. (1) Il est interdit de pêcher dans les eaux visées à la colonne I de la partie I de l'annexe VI l'espèce de saumon mentionnée à la colonne II, avec un engin du type indiqué à la colonne III, pendant la période de fermeture prévue à la colonne IV.

PART VIII – APPENDICES

I N D E X

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