**R. v. Kapp et al - Reasons for Judgment**
**Citation: R. v. Kapp et al**

**Date:20030728 2003 BCPC 0279**
**File No:108246**
**Registry:Vancouver**

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**
**(Criminal Division)**

**REGINA**
**v.**
**John Michael KAPP, Michael Todd BEMI, Theodore NEEF, Henry LESLIE, William LESLIE SR., Bob M. MCDONALD, Sanh Hoang NGUYEN, Sai TRAN, Van Hai TRAN and Hue Quang TRAN**

**REASONS FOR JUDGMENT**
**OF THE**
**HONOURABLE JUDGE W. J. KITCHEN**

| | |
|---|---|
| Counsel for the Crown: | D. G. Butcher, S. J. Berezowskyj |
| Counsel for the Defendants: | C. Harvey, QC, C. Watson |
| Place of Hearing: | Vancouver, B.C. |
| Dates of Hearing: | April 1 to May 27, 2003 |
| Date of Judgment: | July 28, 2003 |

[1] There are nine accused persons in this matter who are charged that they: On or about the 20th day of August, 1998, in or near Area 29 as defined in the Pacific Fishery Management Area Regulations, in Canadian Fisheries Waters in the Province of British Columbia, unlawfully did fish for salmon with a gillnet during a close time contrary to Section 53(1) of the Pacific Fishery Regulations, 1993, and did thereby commit an offence contrary to Section 78 of the Fisheries Act, R.S.C. 1985, Chapter F-14 and amendments thereto.

[2] There are also 131 other accused persons before this court at this time on other informations charged with the same offence and awaiting disposition of this matter.

[3] At the commencement of this trial, counsel on behalf of the accused filed a Notice of Constitutional Question seeking declarations that:

> (a) Communal Fishing Licence No. FRD-98-CL278/MBT issued to the Musqueam, Burrard, and Tsawwassen Indian Bands, the Aboriginal Communal Fishing Licences Regulations, Sections 8 and 9 of the Regulations Amending Certain Regulations Made Under the Fisheries Act (Miscellaneous Program), SOR/2002-225 (the "Amending Regulation") and the Aboriginal Fishing Strategy in general violate Section 15 of the Charter of Rights and Freedoms in that they authorize exclusive commercial fishing by an organization whose membership is based on race, a prohibited form of racial discrimination;
>
> (b) The Aboriginal Communal Fishing Licences Regulations, Sections 4, 5(1)(b) and 8 in particular, are ultra vires insofar as they constitute an unauthorized subdelegation by the Governor in Council of the authority granted to her by s. 43 of the Fisheries Act to authorize persons to issue licences for fishing;
>
> (c) Section 6 of the Aboriginal Communal Fishing Licences Regulations is ultra vires insofar as it constitutes an unauthorized subdelegation by the Governor in Council of her authority pursuant to Section 43 of the Fisheries Act to amend regulations;
>
> (d) Section 6 of the Aboriginal Communal Fishing Licences Regulations, and Sections 8 and 9 of the Amending Regulations are ultra vires insofar as they purport to dispense with the law, contrary to the Bill of Rights, 1688;
>
> (e) The Aboriginal Communal Fishing Licences Regulations are invalid to the extent that they purport to establish an exclusive fishery or abrogate the public right of fishing without the clear and plain legislative authority of Parliament; and
>
> (f) In the alternative, if the Fisheries Act does authorize the creation of an exclusive fishery or the taking away of a public right of fishing, such purported authorization is ultra vires the Federal legislative power pursuant to Section 91(12) of the Constitution Act 1867.

[4] These constitutional questions are the real issues in this case. Each accused has admitted committing the actus reus charged, with the necessary mens rea, but seeks as a remedy on determination of the constitutional questions a judicial stay of proceedings pursuant to Section 24(1) of the Charter of Rights and Freedoms because of the alleged breach of Section 15, or in the alternative a judicial stay of proceedings at common law because the prosecution amounts to an abuse of process.

Actus Reus

[5] Pursuant to Exhibit 1, Admissions of Fact, filed in these proceedings, I conclude that the following occurred:

(a) At about 12:30 a.m. on August 20, 1998, the accused John Michael Kapp, aboard the fishing vessel "Galaxie" in Area 29, was fishing for salmon with a gillnet. The vessel had a valid Area "E" salmon gillnet licence and Kapp possessed a valid Fishers Registration Card.

(b) At about 12:50 a.m. on August 20, 1998, the accused persons Todd Bemi and Theodore Neef, aboard the fishing vessel "Lacey B" in Area 29, were fishing for salmon with a gillnet. The vessel had a valid Area "E" salmon gillnet licence and each accused possessed a valid Fishers Registration Card.

(c) At about 1:07 a.m. on August 20, 1998, the accused persons William Leslie Sr. and Bob M. McDonald, aboard the fishing vessel "Amanda Reid" in Area 29, were fishing for salmon with a gillnet. The vessel had a valid Area "E" salmon gillnet licence and each accused possessed a valid Fishers

Registration Card.

(d) At about 3:40 a.m. on August 20, 1998, the accused persons Sanh Hoang Nguyen and Sai Tran, aboard the fishing vessel "Hai Ho II" in Area 29, were fishing for salmon with a gillnet. The vessel had a valid Area "E" salmon gillnet licence and each accused possessed a valid Fishers Registration Card.

(e) At about 3:55 a.m. on August 20, 1998, the accused persons Van Hai Tran and Hue Quang Tran, aboard the fishing vessel "No Name" in Area 29, were fishing for salmon with a gillnet. The vessel had a valid Area "E" salmon gillnet licence and each accused possessed a valid Fishers Registration Card.

[6] During the times when this fishing occurred Area "E" was closed to all fishing except that authorized by Communal Fishing Licence No. FRD-98-CL278/MBT issued to the Musqueam, Burrard and Tsawwassen Indian Bands under the authority of the Aboriginal Communal fishing Licences Regulations. This Communal Fishing Licence permitted certain designated fishers to fish for sockeye salmon between 7:00 a.m. on August 19, 1998 and 7:00 a.m. on August 20, 1998. None of the accused had the necessary designation. They were participating in a protest fishery under the auspices of the B.C. Fisheries Survival Coalition with the intention of bringing the constitutional challenge in this case.

**Legal History and Context**

[7] Prior to Confederation, the English common law concerning fisheries applied in the colonies and has survived Confederation subject to legislative amendment. The Magna Carta dealt with the public right to the fishery, protecting it from being supplanted by the King's favourites where the public rights of navigation and fishing had long existed. Post-Confederation cases have confirmed this. In Attorney General for British Columbia v. Attorney General for Canada, [1914] A.C. 153 at page 170, Haldane L.C. made this statement:

> (It) has been unquestioned law that since Magna Carta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away, without competent legislation. ...their lordships entertain no doubt that this is part of the law of British Columbia.

[8] The U.S. Courts, with the same legal heritage, reached a similar conclusion:

> The common right, which one individual of the whole community is entitled to enjoy as much as another, cannot be made by law the exclusive privilege of the people of a certain class or section upon terms and conditions that do not apply to the whole people alike. This right which one individual has in common with every other individual in the community to take and use fish and game, ferae naturae, is one that has existed from the remotest times, and, although at one time in England after the Norman Conquest the right to take fish and game was claimed as a royal prerogative to the exclusion of the people, it was restored to them by the Barons at Runnymede in 1215, and was declared in the great charter which they wrested from King John. 'The rights,' says Green, 'which the barons claimed for themselves they claimed for the nation at large.' These rights... have come down to us from the laws of England and may be regarded as a common heritage of the English-speaking people."
>
> Lewis v. State, (1913) 110 Ark., 204, 161 S.W. 154.

[9] As to legislative amendment of these rights, the Supreme Court of Canada held in Laidlaw v. Municipality of Metropolitan Toronto, (1970) 2. O.R. 515, that express language is necessary to infringe on common law rights. A remedial statute should not be interpreted in the event of an ambiguity to deprive an individual of common law rights unless that is the plain provision of the Statute.

[10] The state of the common law generally was described by Chitty, J. in 1812 as follows:

> "Public fisheries, as a matter of national concern, are of great importance, since they are not only the source of considerable provisions for the population of the country, but constitute a nursery for our seamen. We

therefore find that the common law has, in various instances, particularly protected such fisheries, and that a great variety of statutes have been passed to regulate them...

The right of fishing in these [British Seas] never was vested in the Crown exclusively, and of course is not to be considered as a legal franchise; as a public right belonging to the people, it prima facie vests in the Crown; but such legal investment does not diminish the right of the subject, and is merely reposed in the Crown for the sake of regulation and government." Chitty, J., a Treatise on the Game Laws, and on the Fisheries, (London, W. Clarke and Sons, 1812, pages 239 and 243)

[11] In 1848, when Vancouver Island was a colony, a committee of the Imperial Parliament rejected a request by the Hudson's Bay Company for exclusive fishing rights in and around Vancouver Island. The result was that every person had equal access to the fishery, and this continued after the colony of British Columbia was created and the new Governor, James Douglas, confirmed the public right.

[12] When British Columbia joined Confederation in 1870, section 91(12) of the Constitution Act, 1867 gave the legislative authority to Parliament with respect to fisheries:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> .....
>
> 12. Sea Coast and Inland Fisheries

[13] Any provincial jurisdiction over fisheries would be sourced in Section 92(13) of the Constitution Act, 1867:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> ...
>
> 13. Property and Civil Rights in the Province.

[14] Prior to Confederation, under the unitary governments in each colony, there was no constitutional restraint on legislative authority affecting the fisheries. Since Confederation

the courts have recognized that each legislative body has an area of competence. In A.G. (Canada) v. A.G. (Ontario) et al, [1898] A.C. 700 (P.C.), at pages 712 and 713 Lord Herschell said as follows:

> Their Lordships are of the opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, 'Sea-Coast and Inland Fisheries' in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred.

[15] He concluded, with respect to the issue before him, at page 716:

> ....Their Lordships feel constrained to hold that the enactment of fishery regulations is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of provincial Legislatures...(but) it does not follow that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries.

[16] The provincial legislative authority does appear to be more limited, however. In *A.G. (B.C.) v. A.G. (Canada)*, [1914] A.C. 153 (P.C.), at page 170 Haldane L.C. made the comments quoted above concerning the Magna Carta. He then made these observations with respect to provincial jurisdiction at pages 172 and 175 respectively:

> Neither in 1867 nor at the date when British Columbia became a member of the federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore, when by s. 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal

> waters nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament.
>
> .....
>
> The right to fish is in their Lordships' opinion a public right of the same character as that enjoyed by the public on the open seas. A right of this kind is not incident of property, and is not confined to the subjects of the Crown who are under the jurisdiction of the Province. Interference with [the right to fish] ... cannot be within the power of the Province...

[17] The federal Minister of Fisheries and Oceans has the power under the *Fisheries Act* to issue fishing licences. This was considered in *Re Fisheries Act 1914*, [1928] S.C.R. 457 (P.C.) where Duff J. wrote at page 462:

> In view of the history of the section, there is much to be said for the view that the authority vested in the Minister under it is a discretionary authority. That is to say, that in point of law the Minister is under no legal duty to grant leases or licences, or to grant any particular lease or any particular licence...

[18] And at page 465 he continued:

> Speaking broadly, every subject of His Majesty is entitled to exercise the right of fishing in tidal waters in British Columbia, and a statutory enactment which in a reasonable view of it might expose such rights to oppressive or arbitrary or capricious restrictions, would receive a jealous scrutiny in any court called upon to enforce it. But, on the other hand, the authority to grant leases, give by s. 7, necessarily involves some restriction of the public right, that is to say, the exclusion of the public on a whole, from the waters in which the exclusive right of the lessee prevails... As to lease and exclusive licences, the Minister's power is, of course, necessarily discretionary.

[19] The authority of the Minister in granting licences was further examined in Re Minister of Fisheries & Oceans et al and Gulf Trollers Association, (1986) 32 D.L.R. (4th) 737, (F.C.A.). By Variation Orders the Minister had regulated fishing licences to allow sport fishing but to prohibit commercial fishing. The court held that the power to regulate licences extends beyond the usual reasons such as conservation and includes also socio-economic purposes. At paragraph 15 and 16 Marceau J. wrote:

> I do not think it can be seriously contended that the regulation of open and close times for catching Chinook salmon may constitute legislation falling under a class of subject other than fisheries. Property and civil rights has been evoked, but I fail to see which property or other civil right is being

> regulated by the establishment of restrictions on fishing seasons (if there is something like a right to fish in public waters inherent in every citizen) as suggested by counsel, whether it be a right to fish for commercial purposes or otherwise, it is certainly not a right falling under subsection 92(13); nor has it been suggested that some other provincial head of power is invaded. Of course, it is the pursuit of allocative objectives in the management of the fisheries which is objected to, but such allocation, even if considered independently of any idea of conservation, does not trench on any provincial power.
>
> The power conferred on Parliament in Section 91(12) of the Constitution Act, 1867, is not qualified, in my understanding, by any inherent condition that it be used to pursue some specific objectives and not others. Parliament may manage the fishery on social, economic or other grounds, either in conjunction with steps taken to conserve, protect, and harvest the reserve or simply to carry out social, cultural or economic goals and policies. In fact, in my view, unless and until the party attacking legislation on division of power grounds identifies a possible trespass on a specific law-making power of the other level of government, the purpose for which a piece of legislation was passed is of no concern of the courts.

[20] Leave to appeal the *Gulf Trollers Case* to the Supreme Court of Canada was refused.

[21] More recently, in *Comeau's Sea Foods Ltd. V. Canada (Fisheries and Oceans)*, [1997] 1 S.C.R. 12, the Supreme Court of Canada said that arbitrariness and bad faith are the main limits on the Minister's discretion. At paragraph 35:

> "The Minister's discretion under s.7 to authorize the issuance of licences, like the Minister's discretion to issue licences, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith."

[22] And at paragraph 50:

> Where a Minister of the Crown is required by statute to exercise his or her discretion in reaction to immediate and pressing policy concerns, the Legislature can usually be taken to have intended that he or she be ultimately responsible to political authority...

[23] In *N.T.C. Smokehouse*, (1993) 80 B.C.L.R. (2d) 158 a broad federal jurisdiction was recognized by the British Columbia Court of Appeal. The issue was whether the disposition of fish, which had previously been caught under a federal Indian Food Fish Licence, was a matter of property and civil rights in

the province. It was held by the court that Parliament could regulate this activity if the regulation was necessarily incidental to making laws respecting sea coast and inland fisheries. Wallace J.A. said at paragraphs 22 and 23:

> Regulations 4(5) and 27(5) prohibit the purchase and sale of fish which are not caught on a commercial licence - ie. Fish which are caught pursuant to a Food Fish licence or a Sports Fishing licence. Clearly, (these regulations) are not directed to regulating the commercial trade in fish. If this were the case they would have been directed to fish caught on a commercial licence. Their obvious purpose is to prevent the sale of fish which, pursuant to the overall policy relating to the control and management of the fishing resource, were never intended to reach the commercial market but were expressly intended to satisfy the food fish needs of the licensee. The Food Fish licence restricts the licensee to fishing for salmon for the sole purpose of obtaining food for the licensed Band's consumption or the licensed individual's family consumption, as the case may be. The licence, in conjunction with the regulations, effectively prohibits the sale of fish caught pursuant to such licence. The regulations are, in my view, necessarily incidental to achieving the objective of managing and preserving the resource.

[24] Most recently, the Supreme Court of Canada dealt again with the division of legislative powers in *Ward v. Canada (A.G.)*, [2002] 1 S.C.R. 569. McLachlin C.J. made the following comments at paragraphs 34, 40, 41 and 43:

> [The] preponderance of authority suggests that the fisheries power is not confined to conservation, nor to pre-sale activities, but extends more broadly to maintenance and preservation of the fishery as a whole, including its economic value. In The Queen v. Robertson (1882) 6 S.C.R. 52, Ritchie C.J. described the fisheries power as extending 'to subjects affecting the fisheries generally, tending to their regulation, protection and preservation'. Accordingly, Parliament's power extended to 'all such general laws as enure as well as to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth...
> .....
> Moreover, the courts have rejected the view that the federal power extends only to management of fisheries in their natural state and terminates prior to the point of sale... The rationale is that the federal government may limit sales in order to prevent injurious exploitation of the resource. It therefore appears that no bright line can be drawn at the point of sale for the purpose of defining the scope of federal fisheries power.
> These cases put beyond doubt that the fisheries power includes not only conservation and protection but also the general 'regulation' of the

> fisheries, including their management and control... the fisheries resource includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.
> .....
> ...Whether a matter best conforms to a subject with federal jurisdiction on the one hand, or provincial jurisdiction on the other, can only be determined by examining the activity at stake. Measures that in pith and substance go to the maintenance and preservation of fisheries fall under federal power. By contrast, measures that in pith and substance relate to trade and industry within the province have been held to be outside the federal fisheries power and within the provincial power over property and civil rights.

Legislative Scheme

[25] After Confederation, the first *Fisheries Act* was enacted in 1868, and proclaimed in British Columbia in 1876, five years after British Columbia entered Confederation. The first licensing scheme was applied in British Columbia in 1888. Section 1 of the *British Columbia General Fishery Regulations*, 1888, provided:

> Fishing by means of nets or other apparatus without leases or licenses from the Minister of Marine and Fisheries... is prohibited in the Province of British Columbia. Provided always, that Indians shall, at all times, have liberty to fish for the purpose of providing food for themselves, but not for sale, barter or traffic, by any means other than with drift nets, or spearing.

[26] All subsequent Fishery Regulations have made provision for Aboriginal food fishing. This fishery gradually became more regulated, first by permission being required, then by licence issued by fishery officers, and finally by licences issued by the Minister. See *Jack v. The Queen*, [1980], 1 S.C.R. 294 at 308 and *Regina v. Sparrow*, [1990], 1 S.C.R. 1075 at 1096 for a thorough account of this history. Until 1992, the food fishery regulations prohibited sale of food fish.

[27] The present authority under the *Fisheries Act* for the Minister to issue licences is Section 7(1) of the Act which reads:

> 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.

[28] Section 43 of the *Fisheries Act* authorizes the Governor in Council to make

regulations for carrying out the purposes and provisions of the Act, as follows:

> 43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations
> (a) for the proper management and control of the sea-coast and inland fisheries;
> (b) respecting the conservation and protection of fish;
> (c) respecting the catching, loading, landing, handling, transporting, possession and disposal of fish;
> ....
> (f) respecting the issue, suspension and cancellation of licences and leases;
> (g) respecting the terms and conditions under which a licence and lease may be issued;

[29] The commercial salmon fishery in British Columbia is regulated by the *Fisheries Act*, the Minister's power to license under the Act, and the Regulations enacted pursuant to the Act. Jacob (Herb) Redekopp, the Detachment Supervisor for the Department of Fisheries and Oceans in the district where these charges were laid, gave evidence concerning how the Act and Regulations are enforced.

[30] The licences are issued annually on behalf of the Minister and generally specify species of fish and specific waters where the licences are valid. When fishing pursuant to these licences, the fishers must have with them a valid Fishers Registration Card.

[31] Fishing is controlled by the provision that all fishing at all times is closed, unless express provision has been made otherwise, generally called "an opening". This is provided for in sections 53 and 54 and Schedule VI of the *Pacific Fishery Regulations*, 1993. The former section provides for the general closing, while the latter provides that the statutory close time can be varied by variation orders issued pursuant to Section 6 of the *Fishery (General) Regulations*, which provides:

> 6 (1) Where a close time, fishing quota or limit on the size or weight of fish is fixed in respect of an area under any of the Regulations listed in Subsection 3(4), the Regional Director General may, by Order, vary that close time, fishing quota, or limit in respect of that area or any portion of that area.
> 6 (2) Where a close time or fishing quota for herring or salmon fishing is fixed in respect of an area by the Pacific Fishery Regulations, 1993, a fishery officer may, by order, vary that close time, fishing quota or limit in respect of that area or any portion of that area.

[32] It is an offence to contravene the Act or regulations, as provided for in Section 78 of the

*Fisheries Act*:

> 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:

[33] The waters of British Columbia are divided into Management Areas, which are defined by Section 2 and Schedule H of the Pacific Fishery Management Area Regulations. The area from Mission on the Fraser River to the mouth of the Fraser, and into the adjoining Gulf of Georgia, is known as Area "29". The management area, at the time of these charges, was grouped with other management areas for the purpose of issuing salmon licences with geographical restrictions and this larger group was Area "E". To fish for salmon in this area during an appropriate opening, an Area "E" gill net licence was required.

[34] Herb Redekopp also gave evidence on behalf of the Crown to describe the framework for the implementation of the *Aboriginal Fishing Strategy*. The Department of Fisheries and Oceans currently employ him to supervise the area where these charges were laid. Redekopp confirmed, and the accused admit, that no variation order was issued pursuant to Section 6 of the *Fishery (General) Regulations* respecting Area "29" for the period 0001-1159 hours on August 20, 1998. However, between 1200 on August 20, 1998 and 0800 hours on August 21, 1998, fishing in this area was permitted by those vessels covered by Variation Order 1998-STN-002, issued pursuant to the *Aboriginal Communal Fishing Licenses Regulations*. [hereinafter the ACFLR]

[35] The ACFLR are part of the *Aboriginal Fishing Strategy* of the Department of Fisheries and Oceans. This strategy was adopted following the decision of the Supreme Court of Canada in *Regina v. Sparrow*, [1990], 1 S.C.R. 1075. The Department announced that it was following the directive in that case to negotiate fisheries issues, and to honour the fiduciary duty the government has to the Aboriginal community.

[36] The history of salmon fishing in British Columbia and the Aboriginal involvement in that history is a long and complicated one. According to documentation in Exhibit 18 in these proceedings, the Fraser River has been the largest producer of sockeye salmon in the world and this fishery has been the mainstay of the B.C. fishing industry since the 1930's. The four-year life cycle of the sockeye and various natural and man-made disasters have caused wide variations in the yield from this fishery.

[37] The documentation in Exhibit 54 tells of the tentative beginnings in the mid-1800's of a trade in salted salmon progressing to greater trade with the development of the canning process in the late 1800's. By this time, Aboriginal Canadians were well established in the

fishery as plant workers and fishers.

[38] Aboriginals have had special access to the resource for food fishing ever since. Commercial fishing laws have been applied equally to Aboriginal fishers keeping them on the same footing as other Canadians in the commercial fishery. There has been systemic government discrimination from time to time but not involving Aboriginals; Oriental fishers have endured various government restrictions, restraints, confiscations, and prohibitions.

[39] There were, however, other factors that obviously affected Aboriginal participation in the commercial salmon fishery because over time their participation fluctuated tremendously. There was a high participation in the early history of the fishery and another high during World War II when boats seized from Japanese internees were available at knock-down prices. In the last few decades the Aboriginal involvement in the gillnet fishery has been diminishing. But in other areas, such as in seine fishing where in 2002 Aboriginal fishers owned or operated 47% of the seine fleet, there has been an increase in participation. The dynamics of the involvement of the various groups throughout the entire fishing industry are very complicated.

[40] The ACFLR came into force on June 16, 1993 and continued in force at the time of this charge. The *Regulatory Impact Analysis Statement* filed with the ACFLR in the *Canada Gazette*, states:

> These Regulations will better enable the federal government to implement its Aboriginal Fisheries Strategy which is consistent with the principles set out by the Supreme Court of Canada in the Sparrow Decision... the regulations merely serve as an enabling mechanism.

[41] Section 4 of the ACFLR provides that:

> 4. The Minister may issue a Communal licence to an Aboriginal organization to carry on fishing and related activities.

This was in effect at the time of this charge, but was later amended on June 7, 2002 to provide for the Minister designating who may fish under such licences and what vessels may be used. The amending provision also provides that the Aboriginal organization may make such designations in the event of the Minister failing to do so.

[42] The Department of Fisheries and Oceans has managed these ACFLR through a series of approximately seventy Fisheries Agreements entered into annually with various Aboriginal groups. These agreements generally contain harvest allocations, terms of the communal fishing licences, co-management arrangements, and many other provisions related to the food, social and ceremonial fisheries.

[43] A significant part of the *Aboriginal Fishing Strategy* was the introduction of three pilot sales projects, one of which is the series of annual contracts with the Musqueam, Tsawwassen and Burrard Bands resulting in the issuance of Communal Fishing Licences. The other two pilot projects have been at Alberni Inlet and the Skeena River.

[44] The *Aboriginal Fishing Strategy* was introduced in 1992 and outlined in a June, 1992 Department of Fisheries and Oceans publication, which is in Exhibit 3, Tab 8 in these proceedings. The publication states that the strategy is part of a new social contract including Aboriginals, aimed to increase economic opportunities in Canadian fisheries for Aboriginal people while achieving predictability, stability and enhanced profitability for all participants. An element of the strategy was the protection of the position and investment of the commercial sector through the purchase and retirement of licences where allocation of fish changed hands.

[45] The description in the publication was as follows:

> "The legal sale of fish has long been sought by Native groups in British Columbia. The issue of the Native right to sell fish commercially has been taken to court, and several decisions are pending. In this as in other matters of dispute within the fishery, DFO's preference is to reach negotiated solutions endorsed by all parties.
>
> Interest in selling fish is concentrated on a limited number of watersheds and geographic areas where fish are abundant and Native bands have traditionally harvested large quantities of fish.
>
> These bands see sale as an economic opportunity, and a route to self-sufficiency and independence, objectives which are consistent with the purposes of the Aboriginal fisheries strategy.
>
> For these and other reasons DFO and Native people are implementing controlled and measured demonstration projects this year to test the commercial sale of fish harvested under communal licences by Native groups.
>
> The demonstration projects are designed to neither distort traditional shares among the sectors nor disrupt processing. All transactions will be subject to laws and regulations governing commercial sales.
>
> The sales will take place out of the total catch permitted under negotiated agreements. The agreements will specify numerical limits of fish, within the levels of historical catches and DFO-Native accommodations on harvests in recent years. The negotiated quantities will encompass all uses, including sale and food, social and ceremonial requirements.
>
> Setting limits on the number of fish to be taken permits an important change to be made in fishing patterns. In the past, Native groups 'fished to plans', under which their fishery was open for a period of time and they kept whatever fish they caught during the opening. This led to unpredictable numbers of fish in some cases.
>
> The new agreements will ensure that the fish taken are counted, and that the fishery can be closed when a limit is reached."

[46] The publication concluded with the statement that:

> "The Aboriginal fisheries strategy is designed to provide a stable, predictable, profitable fishery for the benefit of all Canadians."

[47] However, the next year, on May 6, 1993, Fisheries and Oceans Minister John Crosbie, speaking to the Standing Committee on Forestry and Fisheries, gave a somewhat different rationale for the Aboriginal fishing strategy - the prevention of poaching:

> "With respect to these experiments, the three experiments with reference to the sale of fish, they are not dictated by the Sparrow Case. We are not saying that we have to do this because of Sparrow. We're doing this because we think it's the best public policy, because 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. We can know exactly how much fish is being handled that way. It's an experiment to see whether this is a better way to do it, because we don't want the B.C. fishing industry wrecked by years of litigation as we try to prosecute Indians, with confrontation and possible bloodshed that might ensue because the Aboriginals believe that they have a right to take and sell the fish. Many others don't think they do.
>
> 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 governments and the groups involved to devise a system that satisfies everyone and that will be reasonable? That's why we're trying these experiments.
>
> There's a lot of resistance to it in British Columbia, so this year we've got to be cautious. We're not going to expand these experiments. We are going to continue with the three. We may have some small, minor, little experiments. We are going to stick to these three sales arrangements to see if everything works better this year than last year, and then we can consider some expansion in later years. That's where we are. But the situation is very dicey, because there's a lot of misapprehension about it, and fear and worry, which you're familiar with.
>
> Exhibit 23, Tab 45.

[48] Another rationale for the pilot sales projects was put forth by James Ionson, manager of the strategy for the Department of Fisheries and Oceans between 1995 and 2000. He said in evidence:

> **"At that time we were just embarking on a treaty process as well, and the purpose behind the pilot sales was to test elements of the sales of fish that may be incorporated into treaties."**

[49] A document entitled, "Policy on the Management of Aboriginal Fishing", published by the Department of Fisheries and Oceans in 1993, Exhibit 18, Tab 94 in these proceedings, gave an outline of how the strategy would be administered. It provided that Aboriginal Fishing Authorities would be established to designate fishers, monitor and report on fish harvests, and participate in enforcement of all fisheries regulations. Native Guardians employed by the First Nation would facilitate the latter activity.

[50] Significantly, it provided in Section 3 (b):

> ... In a limited number of cases, it also may include fishing for sale under test sales projects negotiated as part of an Aboriginal Fishing Agreement.

[51] The document does not contemplate negotiating with groups other than Aboriginals, but it does undertake to, "... communicate openly with the commercial and recreational fishing sectors and other interested parties, regarding the government's policies..."

[52] The June, 1992 Department of Fisheries and Oceans publication, which is in Exhibit 3, Tab 8 in these proceedings, mentioned a voluntary commercial licence retirement program. This was described in a December 1992 News Release of the Department of Fisheries and Oceans as follows:

> "Full fee licence holders will be invited to submit retirement proposals to a DFO-appointed program administrator. Only licences will be retired. Licensees will retain their vessels and gear.
>
> A Licence Retirement Selection Committee composed of the UFAWU and gear sector representatives from the BCFC and representatives selected by the Aboriginal leadership will advise on proposals and make recommendations on acceptance to the DFO program administrator.
>
> DFO will not be obligated to accept all or any of the proposals received during any period.
>
> There will be no negotiating with applicants. Proposals received during each period will be either accepted or rejected as submitted. Unsuccessful applicants may submit new proposals at any time.
>
> The primary criterion for acceptance of proposals will be lowest cost per sockeye equivalent of licenced catching power retired.
>
> Catching power will be calculated as average annual catch, in sockeye

equivalents, for the gear type and vessel length licenced, over the previous four years.
Secondary criteria, such as length of time in the fishery - with preference for long-term fishermen - may be applied to decide among proposals which are tied on the primary criteria.
Acceptance of proposals may be adjusted to maintain balance in retirement across gear sectors, should this measure be deemed appropriate during the conduct of the program."

Ex. 3, Tab 10

[53] The committee made offers to 87 of the 505 applicants. 75 accepted. The average prices paid were suggested to be slightly above then current market values. See Ex. 4, Tab 16.

[54] The Aboriginal fishery is regulated by the ACFLR. Section 4 permits the Minister to issue communal licences to an Aboriginal organization to fish and carry on related activities. Such a licence, No. FRD-98-CL278/MBT was issued on August 18, 1998 to the Musqueam, Tsawwassen, and Burrard Indian Bands to fish for sockeye salmon and a by-catch of Chinook salmon in Area "29" by use of specified nets from 7:00 a.m. on August 19, 1998 to 7:00 a.m. on August 20, 1998. The bands were to designate fishers who would fish on behalf of the band under these licences. These fishers were "Participants" and were required to possess a Designation Card at the time of fishing, much as commercial fishers are required to carry a Fishers Registration Card.

[55] Licence No. FRD-98-CL278/MBT, similar to other licences issued under the ACFLR, contained the controversial provision which prompted the protest fishery giving rise to this charge:

> "Fish harvested under authority of this licence includes fish for food, social and ceremonial purposes. Sale of fish caught under this licence is permitted." [emphasis added] Exhibit 1.

[56] This licence was issued pursuant to an agreement entered into on May 15, 1995 between the Department of Fisheries and Oceans and the Musqueam, Burrard and Tsawwassen Bands. Section 1 of the Agreement set out its purposes:

1 (1) The purpose of the Agreement is to provide for the management of the Fishery and the involvement of the First Nations in the management, protection and enhancement of fisheries resources and fish habitat in the Area.
(2) The First Nations agree to the provisions with respect to the Fishery and the other provisions set out in this Agreement, for the period of their applicability as set out in this Agreement, for the purpose of ensuring orderly management of fisheries and conservation of fisheries resources.

(3) The Parties agree that this Agreement shall not serve to define or to limit aboriginal or treaty rights and is not intended to be, and shall not be interpreted to be, an agreement or a treaty within the meaning of section 35 of the Constitution Act, 1982.
(4) The Parties recognize that this Agreement is the result of negotiations conducted within the context of current legislation, jurisprudence and government policy and, as such, does not constitute, and shall not be interpreted as, evidence of the nature or extent of aboriginal or treaty fishing rights and is made without prejudice to the positions taken by any party with respect to aboriginal or treaty rights or title.
(5) The Parties acknowledge that the subject matter of this Agreement may become the subject of treaty negotiations between the Federal Crown and a First Nation and that, should this occur, the value of any benefit that has been obtained by the First Nation through this Agreement may be considered in those negotiations and, if the First Nations agree, may be listed in the resulting treaty as partial fulfillment of the Federal Crown's responsibilities under the treaty.
(6) Nothing in this Agreement is intended to, nor shall be interpreted to, affect any aboriginal or treaty rights of any other aboriginal group.
(7) The Parties intend that this Agreement will establish the relationship among the Parties with respect to all matters and issues that this Agreement addresses and will supercede and replace all other arrangements and agreements among the Parties with respect to those matters and issues.

[57] The Agreement and its amendments provided that in 1998 the First Nations could fish for an allocation of sockeye salmon based on run size. This allocation ranged from 48,000 fish on a Fraser River sockeye salmon run size of 1,500,000 fish to 70,000 fish in a run size of 2,500,000 fish. Chinook, chum and pink salmon were each a fixed allocation, whatever the run size. These allocations were the total allocation to the members of the Musqueam, Tsawwassen and Burrard Bands for both food, social and ceremonial purposes and for the pilot sales.

[58] Further provisions of the Agreements mandate that fish caught under the communal licence must be inspected at a designated landing site and a landing slip must be issued within certain time limits. This landing slip must be carried by the person in possession of the fish and presented to a Department of Fisheries and Oceans fishery officer or guardian, or a First Nations fishery officer, upon request. The First Nations are to provide to the Department of Fisheries and Oceans detailed information concerning the fishing and sales of the fish.

[59] In addition to the Act, Regulations and Agreements previously discussed, the Pacific Salmon Treaty between Canada and the United States of America also comes into play in the management of the salmon stocks on the Fraser River. The provisions of the treaty are implemented by a body call the Pacific Salmon Commission which establishes various

panels to make recommendations to the Commission. The Fraser River Panel includes representatives from the Department of Fisheries and Oceans and from the commercial, Aboriginal and recreational fishing sectors. This panel gives advice as to appropriate openings and closures for Fraser River sockeye and pink salmon.

[60] Prior to each season, the Panel recommends a fishery regime and management plan based on abundance and timing forecasts, escapement targets, international allocation goals, domestic allocation goals, management concerns, and general fisheries dynamics. For the 1998 season the Panel gave a sockeye run-size forecast of 11,218,000 fish and a spawning escapement target of 5,770,000 adults. See Ex. 5, Tab 38.

[61] The Panel's plan for 1998 directed the fishery to be taken from the mid-summer run stock, with all fisheries to remain closed until July 27, 1998. The priorities set by the Panel were that fish were to go first to conservation, next to Aboriginal food, social and ceremonial fish, then to international allocations, and finally to domestic allocations which included Aboriginal pilot sales, commercial, and recreational fisheries. The Panel permitted Area "E" gill net licence holders to take 21% of the allocation of Fraser River sockeye that would be made to commercial fishers.

[62] During the summer of 1998, there were two openings for the Musqueam, Burrard and Tsawwassen pilot sales fisheries, each followed by openings for Area "E" commercial gillnetters. The first pair of openings was during the week ending August 9, 1998 and the other pair during the week ending August 23, 1998, when these charges were laid. James Ionson said in his evidence that a third pilot sales fishery had been scheduled but it was cancelled because of concern that escapement goals would be threatened with the taking of additional fish during the protest fishing.

**Section 15 of the Charter of Rights and Freedoms**

[63] The Charter provides in Section 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.
>
> (2) Subsection (1) does not preclude any law, programme 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.

[64] The purpose of Section 15 is described by Iacobucci J. in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at page 529:

"It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has 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. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s. 15(1) where it does not violate the human dignity or freedom of a person or group in this way, and in particular where the differential treatment also assists in ameliorating the position of the disadvantaged within Canadian society."

[65] In *Andrews v. Law Society of B.C.* (1989), 34 B.C.L.R. (2d) 273, at page 172 MacIntyre J. noted this purpose for Section 15:

"Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee."

[66] As to the meaning of discrimination, he discusses several examples, one of which is discrimination in the workplace, at page 173:

"What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Acts and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this Court, in isolating an acceptable definition. In Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 @ 551, discrimination (in that case adverse effect discrimination) was described in these terms: "It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force". It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint."

[67] On the next page he concludes with a general definition of discrimination:

> "I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."

[68] At page 283 he pointed out that differential treatment is not always discrimination:

> "It [equality] is a comparative concept, the condition of which may only be attained or discerned by comparison with the conditions of others in the social and political setting in which the question arises. It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality. This proposition has found frequent expression in the literature on the subject but, as I have noted on a previous occasion, nowhere more aptly than in the well-known words of Frankfurter J. in Dennis v. United States, (1950), 339 U.S. 162 at 184:
>
> > 'It was a wise man who said that there is no greater inequality than the equal treatment of unequals.'"

[69] This view was confirmed by Iacobucci J. in Lovelace v. Ontario (2000), 188 D.L.R. (4th) 193 at 220:

> "For while it is often true that distinction's may produce discrimination, there are many other situations where substantive equality requires that distinctions be made in order to take into account the actual circumstances of individuals as they are located in varying social, political, and economic situations. This is why this Court has long recognized that the purpose of s. 15(1) encompasses both the prevention of discrimination and the amelioration of the conditions of disadvantaged persons."

[70] For differential treatment to be in violation of Section 15 it must be more than a financial issue. It must impact on the claimant's human dignity or self worth. In *Granovsky v. Canada* (M.E.I.), [2000] 1 S.C.R. 703 at 705 it was said:

> "The question therefore is not just whether the appellant has suffered the deprivation of a financial benefit, which he has, but whether the deprivation promotes the view that persons with temporary disabilities are

'less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.'"

[71] The Supreme Court of Canada has recognized the role that work and the workplace may play in the development and maintenance of dignity. In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, at paragraph 91, Dickson C.J. commented in dissent:

"Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self-respect."

[72] In assessing whether there is discrimination, it must be kept in mind that often Parliament must draw a compromise between competing demands. In *Irwin Toy v. Quebec (A.G.),* [1989] 1 S.C.R. 927 at page 993, Dickson J. said:

"When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources... Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function."

[73] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court of Canada set out the process for analyzing Section 15 claims. The inquiry is three-staged:

> (a) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) failto take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(b) Is the claimant subject to differential treatment based on one or more of the enumerated or analogous grounds? And
(c) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human

being or as a member of Canadian society, equally deserving of concern, respect and consideration?

[74] With regard to this last stage, the issues to be examined are:

(a) Pre-existing disadvantage, stereotyping or prejudice;
(b) Correspondence, or lack thereof, between the grounds on which the claim is based and actual need, capacity or circumstances of the claimant;
(c) The ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group; and
(d) The nature and scope of the interest affected by the impugned law.

[75] In *Law v. Canada (Minister of Employment and Immigration)*, the Supreme Court of Canada discussed pre-existing disadvantage at page 537:

"In referring to groups which, historically, have been more or less disadvantaged, I do not wish to imply the existence of a strict dichotomy of advantaged and disadvantaged groups, within which each claimant must be classified. I mean to identify simply the social reality that a member of a group which historically has been more disadvantaged in Canadian society is less likely to have difficulty in demonstrating discrimination. Since Andrews it has been recognized in the jurisprudence of this Court that an important, though not exclusive, purpose of s. 15(1) is the protection of individuals and groups who are vulnerable, disadvantaged, or members of 'discrete and insular minorities'. The effects of a law as they relate to this purpose should always be a central consideration in the contextual s. 15(1) analysis."

[76] It is from these passages in the Law Case that the concept of comparator groups has evolved. The court must define the claimant group seeking the declaration of disadvantage, and the other group to which it seeks comparison. This latter group is often, but not necessarily, the rest of Canadian society.

[77] In *Lovelace v. Ontario* (1997), Ont. C.A., 33 O.R. (3d) 735 (later appealed to the Supreme Court of Canada as noted above), there was discussion of ameliorative purposes at page 754:

"Interpreting it as we do, s. 15(2) must be considered with s. 15(1) in determining whether a claim of discrimination has been established. Moreover, because special programs for the disadvantaged further the guarantee of equality, government action under s. 15(2) should be generously and liberally assessed, consistent with the court's approach to the interpretation of the rights and freedoms in the rest of the Charter. We also think that judicial review of s. 15(2) programs should be limited.

Both the words of s. 15(2) and policy considerations argue for limited judicial scrutiny of these programs. By its terms, s. 15(2) affirms the legitimacy of government laws, programs or activities whose object or purpose is the amelioration of the conditions of disadvantaged groups or individuals. In other words, if the court is satisfied that the target of the government's program is a disadvantaged group and the object or purpose of the program is to ameliorate the conditions of that group, the program fits within s. 15(2). Nothing in s. 15(2) calls on the court, for example, to assess the effectiveness of the program or the means used to achieve the government's ameliorative object or whether a reasonable relationship exists between the cause of the disadvantage and the form of the ameliorative action..."

[78] In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at page 537 ameliorative programs were also discussed:

"At the same time, I would not wish to be taken as foreclosing the possibility that a member of society could be discriminated against by laws aimed at ameliorating the situation of others, requiring the court to consider justification under s. 1, or the operation of s. 15(2). The possibility of new forms of discrimination denying essential human worth cannot be foreclosed."

[79] In *Apsit v. Manitoba Human Rights Commission*, [1988] 1 W.W.R. 629 (Man. Q.B.) at p. 642 the burden of proving whether a program is ameliorative was discussed. Mr. Justice Simonsen reviewed the evidence put forward by the government to show that the program was ameliorative and found it lacking. He held:

I adopt the position that it is not sufficient compliance with s. 15(2) merely to present a government declaration that a program is an affirmative action program designed to assist a particular target group and foster growth in an industry.
A bald declaration by government that it has adopted a program which "has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race" does not ipso facto meet the requirements to sanctify the program under s. 15(2) of the Charter. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily discriminatory. If the approach argued by the intervenor were permitted, the equality guarantees in s. 15(1) would become a hollow shell.

[80] As to the interplay between subsections (1) and (2) of Section 15 with regard to the analysis of an ameliorative purpose, Iacobbucci J. stated the following in *Lovelace v. Ontario (2000)*, 188 D.L.R. (4th) 193 at paragraph 105:

The plain meaning of the language in these subsections is consistent with the view that s. 15(2) is confirmatory and supplementary to s. 15(1). In this respect, it is clear that the s. 15(2) phrase "does not preclude" cannot be understood as language of defence or exemption. Rather, this language indicates that the normal reading of s. 15(1) includes the kind of special program under review in this appeal. [Emphasis in original]

[81] Two cases have analyzed the disadvantage and amelioration required in Section 15(2):

There must be a rational connection between the preferential treatment and the disadvantage. Section 15(2) excuses discrimination under s. 15(1) if the persons in favour of whom the distinction is made are disadvantaged and the object of the discrimination is the amelioration of that disadvantage.
Re MacVicar and Superintendent of Family & Child Services et al. (1986), 34 D.L.R. (4th) 488 (B.C.S.C.), at p. 502.

In any program which is designed to ameliorate the conditions of a disadvantaged group, others will be "disadvantaged" as a result of their non-eligibility for participation. Section 15(2) acknowledges as much. What must be avoided is gross unfairness to others.
R. v. Willocks (1995), 22 O.R. (3d) 552 (Ont. Ct. (Gen. Div.)).

[82] And in Re Schafer et al and Attorney General of Canada et al., (1996), 29 O.R. (3d) 496 at p. 532-23, after reviewing the criteria from other cases, Cameron J. of the Ontario Court (General Division) held that the courts have established the following principles to assist in a s. 15(2) analysis:

(a) There must be a rational connection between the preferential treatment and the disadvantage.
(b) There must be a real nexus between the object of the program as declared by the government and its form and implementation.
(c) The burden of proof under this subsection rests on the party seeking to invoke this subsection to demonstrate its application.

[83] In Corbiere v. Canada (Minister of Indian & Northern Affairs), [1999] 2 S.C.R. 203 at paragraph 60 Madame Justice L'Heureux-Dube discussed claims based on grounds analogous to those outlined in Section 15 of the Charter:

"Various contextual factors have been recognized in the case law that may demonstrate that the trait or combination of traits by which the claimants are defined has discriminatory potential. An analogous ground may be shown by the fundamental nature of the characteristic: whether from the perspective of a reasonable person in the position of the claimant, it is important to their identity, personhood, or belonging. The fact that a

characteristic is immutable, difficult to change, or changeable only at unacceptable personal cost may also lead to its recognition as an analogous ground: Miron v. Trudel, [1995] 2 S.C.R. 418 at paragraph 148; Vriend v. Alberta, [1998] 1 S.C.R. 493 at paragraph 90.

[84] The nature and scope of the interest affected by the impugned law is discussed in the decision of L'Heureux-Dube J. in *Egan v. Canada,* [1995] 2 SCR 513 at paragraph 63 where she explains that the essence of discrimination cannot be understood without looking at its impact in terms of the economic, constitutional, and societal significance of the interest adversely affected by the discrimination (i.e., in this case, the interests of the general mixed-race commercial fishing community). L'Heureux-DubΘ J. stated:

"[T]he nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localised the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the Charter.
Although a search for economic prejudice may be a convenient means to begin a s. 15 inquiry, a conscientious inquiry must not stop here. The discriminatory calibre of a particular distinction cannot be fully appreciated without also evaluating the constitutional and societal significance of the interest(s) adversely affected. Other important considerations involve determining whether the distinction somehow restricts access to a fundamental social institution, or affects a basic aspect of full membership in Canadian society (e.g. voting, mobility). Finally, does the distinction constitute a complete non-recognition of a particular group?

**Defence Evidence of Discrimination**

[85] Having discussed at some length the case law on Section 15 of the Charter of Rights and Freedoms, and before analysing those Section 15 issues in this case, I will summarise the evidence given on behalf of the claimant group. Defence counsel in this case have defined the group claiming discrimination as that group, including the accused, eligible to obtain a fishing licence and participate in the Fraser gillnet salmon fishery. This would include all of Canadian society but for practical purposes at the present time is that group of fishers holding Area "E" licences. The comparator group includes those persons who as a result of a bloodline connection to the Musqueam, Burrard and Tsawwassen Indian Bands are eligible to receive designations to participate in the aboriginal pilot sales fishery.

[86] The Crown takes the position that the claimant group lacks status because it is too disparate and heterogeneous to qualify as such. This was the problem in *Dunmore v. Ontario*, [2001] 3 S.C.R. 1016, where the case was decided on another issue but Major J.

adopted the trial judge's finding that the agricultural workers in that case could not claim to be discriminated against because they lacked sufficient distinctive personal characteristics. But I find that is not a problem in the present case. The commercial fishers in this case have very disparate backgrounds but have come together and formed a distinctive community that is well recognisable to others. Membership in the fishing community is relatively long lasting and has its own set of values and lifestyle. This topic will be developed fully on consideration of the evidence of the members of the claimant group.

[87] None of the accused in this case gave evidence. Some of the witnesses were, however, accused persons on the same charge in parallel proceedings that are still before the court, awaiting the outcome of these proceedings. There are 140 such accused.

[88] Robert McKamey was a witness who gave evidence of his experience as a commercial gillnetter salmon fisher on the Fraser River. He is now 54 years old and has been fishing on the river since he was ten years old. This is in an area where his family has resided for five generations, since the mid-1800's. His great great grandfather married a local Native lady when he came to the area.

[89] McKamey has obtained a degree from BCIT and has maintained full-time employment in addition to his fishing. The fishing income has been less, but allows him to save for retirement and, "... gave him the money to do the things he wanted to do in life." It had been his intention to continually upgrade his boat and to eventually earn a living exclusively through commercial fishing, but he believes that the Aboriginal pilot sales has so limited his income as to affect those opportunities.

[90] It was Mr. McKamey who first informed the court of the expression used on the river describing the requirements to be a commercial fisher - "a buck, a boat, and a net." This was the situation when McKamey fished as a boy on the boats of others, and even applied when he acquired his own boat in 1970 after license limitation had been enacted. As he said, the situation at that time was that, "...you found a boat that was worthless because nobody else wanted it and tried to - and a boat that was licensed to fish probably and started fishing on your own."

[91] McKamey was questioned about the participation of Natives in the fishery. He said that,

> "Everybody was entitled to fish wherever you wanted when fishing was open, and so we fished - we fished with Natives on the river and I did a little bit of, a small bit of fishing what we would call outside, which is out in the ocean, and in those places, too, there was always Native fishermen, very good fishermen, very competitive."

[92] McKamey's description of his fishing was very interesting.

"I've fished all my life within ten feet of where my dad fished all of his career too as a fisherman. Once you've - one you start fishing in a place, and it would normally be close to where you live, you develop a skill in fishing in that area, and you tailor your equipment and your gear to that particular area, and that's where you're gonna have the most chance of catching fish. So you don't move around any. There's almost no movement up and down the river as far as where you go to fish. You fish where you know how to fish and you know how to fish there because that's where your dad fished and that's where your dad's dad fished."

"You never could go above the Mission Bridge and so the reality of it is I guess we are, my family was - fished in the highest drift on the river, which happened to be the Mount Lehman."

[93] McKamey was so consistent in his fishing routines that he had never fished the lower reaches of the river until the protest fishery.

[94] Donna Sonnenberg's career began in 1961 when she was chaperoned by her sister on Wilbert Sonnenberg's boat as a prospective bride and deckhand. She passed both tests and has fished on the coast for the forty years since that time.

[95] Sonnenberg has been involved protesting the Pilot Sales fishery since its inception. She believes that it has been socially disruptive to the fishing community, not only in relationships among fishers, but also within their families, causing dissension and even divorce.

[96] There has also been a considerable financial cost to the commercial fishers. As an example, her son lost his boat because of financial failure consequential on the lost fishing opportunities.

[97] Sonnenberg also objects to the program on principle.

"My feeling about their program they have is that I'm under the understanding that we're all Canadian people and we should all be equal, and I don't understand why the Indians should have their own special commercial fishery. They have their food fishery that I have no problem with whatsoever, providing the food goes to a food fishery. ... We're all Canadians, aren't we? I don't feel like a Canadian any more. I feel like half a Canadian because I feel that I've had my rights removed from me. I don't see us having our own special fishery at certain times with no Indians in them..."

[98] Stewart McDonald is a 36-year-old third generation fisher from Mission. He has been on the boats since he was five years old and fished as a gillnetter near Mission where his father and grandfather fished, as well as on the entire coast. He has also worked for many

years as a fish broker, buying fish from others.

[99] He had the following evidence with regard to the Aboriginal Fishing Strategy:

> "I think that the pilot sales offered a lot of Native people an opportunity to make ... a substantial amount of money fishing, and the effort of the Native people in the fishery increased substantially, and the commercial fishery went in the other direction and our opportunities decreased substantially.
> ...
> "It increased the effort on food fishing, and an explanation would be that it offered a way to launder food fish in great quantities that was difficult before pilot sales because if a Native went out food fishing and he had too many fish, it was too difficult to sell them. [But after pilot sales] the Native people would take their fish to cold storage and freeze them and then when a pilot sales fishery came along, that was an opportunity to launder them all through what they believed was a legitimate pilot sales fishery... People had the opportunity to fish for days on end in the food fishing, when the food fishing was open and take the fish to cold storage and sell it to brokers and say it was caught in the pilot sales.
> ...
> "There's a built in flaw in the system where in pilot sales that the fleet as a whole fishes to a number say of 500,000 for example, so once they reach that number, that curtails their fishery. So it's in their best interest, if they want to keep fishing, to underreport their catch so they still have allocations that they can keep fishing...As far as counting... there's 100 miles of river on both shores and people just unload their fish at will. It doesn't even seem to be an issue.
> ...
> "It's a requirement from every commercial fisherman to fill out a log book itemizing every fish and every specie he caught that fishing day... The fishermen I deal with are long-time professional commercial fishermen with a lot of integrity, and besides that, there's no real incentive not to fill these in. The consequences are severe if you get caught with fish you don't have a fish slip for, so it would be inconceivable to me that somebody wouldn't fill them out.
> ...
> "I can't see any reason whatsoever..." [not to record your full catch in the regular public fishery].

[100] There was evidence that since the Aboriginal Fishing Strategy the usual pattern has been for there to be a Native pilot sales fishery followed by a regular commercial fishery. This had been the case at the time of the charges before the court. When asked in cross-examination what he thought was discriminatory about the fact the Native fishers

were permitted to fish between the 19th and 20th and the commercial fishers were permitted to fish between the 20th and 21st of August, 1998, McDonald said:

"Well, one example. There's plenty of Musqueam, Tsawwassen fishermen that are Area "E" licensed that could participate in both fisheries, and me not being a member of that Band was only permitted to fish in the second fishery. Another example would be that the people that fish first almost always catch a lot more fish than people that come after. There's only so many fish to catch, and any time you get to go first, you've got a distinct advantage. And most of all, that the first fishery is solely dictated on being a member of the Musqueam, Tsawwassen Band in a commercial fishery, which I personally believe to be a discriminatory policy. There's no limitation on the second fishery, the commercial fishery about what your racial background is. ...[I]t's pretty upsetting to see friends I grew up with and people you know out fishing making a living and I'm restricted by government regulation. ... I grew up like a lot of people where your background, your skin colour, or your race wasn't supposed to be an issue in life. ... I'm gonna protest racism wherever I can, wherever I see it, wherever it affects myself and my family."

[101] His conclusion concerning the Aboriginal fishing strategy:

"Well, it certainly soured people's opinion of the Department of fisheries, and it's caused a lot of unnecessary tension and friction in communities and friendships and relations, and it's been absolutely horrible, to be honest with you."

[102] Jack Groven grew up on the coast near Prince Rupert and has for 22 years been the production manager for Bella Coola Fisheries Ltd., a company on the Fraser River. He left school early to become a gillnetter because of financial problems in his family. He pointed out that the Native children in his school did not have to leave school at the same time but were sent at government expense to Lytton and Edmonton to continue their schooling.

[103] Groven made the following observations about the effects of the pilot sales fishery:

"I might mention there is to this day in the Fraser River ... a food fishery and an AFS fishery, and sometimes a commercial fishery. ... So what happened was the food and ceremonial fish would normally get held over until the next day... If it happened to open for commercial fishery say the following day or two days after, a lot of times the AFS fishery and the food fishery would be sold under the commercial licence. ... The reason for that is because everybody's fishing to a number. There's a

TAC for the commercial gillnet fleet...
So if they could get away with doing that ... they could keep their numbers low and bring up the numbers on the commercial fishermen so they would be closed down earlier. The commercial guys would end up with a big number so they'd get closed down earlier. So that was the reason behind it. ...
Natives up in Hell's Gate Canyon, and Native bands all the way up to the Quesnel Lake are participating in illegal fisheries to get their share of sockeye because they don't have an AFS agreement or pilot sales agreement...
So they see their sockeye that goes past their villages being caught under AFS practices in the Lower Fraser. So they're not very happy about that.
... [T]hese different fisheries that are being granted to Natives, and stuff, have caused hard feelings and guys have got arguments and fights on the boat. And actually, in some cases, fist fights and stuff and now the Native boats are pretty well just Native and the white ones are all white and it's lots of bickering.

[104] Groven was asked whether he felt the Musqueam, Tsawwassen and Burrard bands that were signatories to the pilot sales agreements were a disadvantaged group. He stated:

Maybe it's just sour grapes on my part, because I grew up with them. I didn't have the advantage that they had as I grew up...
To be in a village that's surrounded by a city and one and a half million people, or something, that makes the land and everything else valuable and then have access to a million pieces of sockeye in the Fraser River when no one else has the right to fish, coupled with not paying taxes on your earnings, and government grants for your housing and for your children to go to school, and everything else.
I think they had somewhat of an advantage on me.

[105] Stephen Wilson is a fifth generation commercial fisher. He has Native heritage and has relatives who are members of the Squamish, Tsawwassen and Musqueam Bands. Wilson could claim Native status but refuses to do so, even though his father and brothers have registered for such status. His drift on the Fraser River has been at Canoe Pass, near where these charges were laid. Asked about 1992, Wilson said:

"Our fishing time became limited. There seemed to be enough - always seemed to be enough fish in the runs, but DFO didn't see that we were going to get our fishing opportunities. They just seemed to get less and less. ...
The Pilot Sale, like, I couldn't believe that the DFO would come up with a policy like that. They were going to make a separate fishery and exclude non-Natives from it. ...
I just didn't believe in the line that DFO was going with these new policies, that they could create a fishery based on race and take another man's livelihood away. ...

[W]hen the problems started to become worse and worse with AFS and the Pilot Sales a lot of friendships ceased to exist, as far as splitting the community in different ways...
When you're someone that wants a policy to become the norm, and then you have someone like myself that just can't abide by what was gonna be created out of it, you're definitely going to have a conflict of interest. So instead of being able to sit there and being friends and being able to talk about it, one person wants something. The other person's watching their livelihood being destroyed. It's pretty hard to be able to keep friends. ...
I finally had to leave our own net shed after ... over fifteen years ... I spent my whole life on the one wharf and it came to a point when, because of my stance on AFS, I just didn't feel safe to have my boat tied there any more...
I don't believe in the way this has all been created ... for them to be able to get special rights that someone else has to pay for, I just didn't believe in it. All my life I've worked hard to get where I am and I just - I couldn't believe in something like that. I just couldn't do it."

[106] Michael Forrest is a 54-year-old mariner, making a living as a commercial fisher and in the business of log towing, log salvage, beach combing, and rescue work. He is a third generation fisher but at present, as he said, "I'm a fisherman when I'm allowed to be." His explanation of this related to the pilot sales fishery, which he said brought about:

"Well, a lot of changes. I guess, from a personal point of view, the change was that somehow you were eliminated from the fishery. You found that you were on the beach watching other people fish commercially that was based on their ethnic origin and somehow you weren't part of it. To describe the feeling is a difficult item, and I've spoken to many, many fishermen about this because if you grew up in the fishery, and it was part of your heritage, and it was suddenly ripped from you, the feeling that you were something less than a Canadian in the process, or something less than average is welled up pretty much, and it still is repugnant to most of us that I know about. And we have struggled with it since."

[107] After attending university Forrest had fished for a period of time and had been a founder of the Pacific Gillnetters Association in the 1970's. In 1981 Hon. Romeo LeBlanc, then Minister of Fisheries and Oceans, appointed Forrest to the International Pacific Salmon Fisheries Commission. When this Commission was formed into three Panels, he was named to the Fraser River Panel.

[108] Forrest was asked about the impact of the Pilot Sales Fishery on the activities of the Fraser River Panel. He said:

"Major impact in management, in my opinion. From the Fraser Panel point of

view, we had now a new allocation suddenly, or several new allocations based on the pilot sales agreements to deliver in management, and without the ability to have control over that management because they were dealt with directly with DFO.
... And so there was a separate management system that went on. Sometimes in another room in the same hotel, where we were meeting with respect to the Fraser panel, there would be meetings going on in another room making management decisions that we knew nothing about, only to find out later from DFO that certain things had been done, so the complication in management was immense.
... After '92, one of the complicating factors was that we had a shortage in delivery to the spawning grounds. ... Various problems with suddenly a severe shortage above Mission. A new fishery had been adopted above Mission and that was the pilot sales for the Sto:lo community, and that wasn't within our control, and we were very short of numbers a lot of times of what actually got taken from the river.
... The fisheries that were in your control were the commercial fisheries. The fisheries that weren't in your control were the Aboriginal ones.
... The fishery we could open and close was the commercial fishery, as I've said. We couldn't open and close the Aboriginal one."

[109] He concluded:

"There should be one commercial fishery. One manageable commercial fishery instead of two.
...We were part of the fishery. It was part of our heritage. It was what we were going to do in the future. There were reasons to believe, based on "89, and various re-buildings that was going on, we were going to have a future in the resource. And we came into that process in the latter '80's thinking about building boats the same as many other folks did, especially after making some money in '89. We built a $360,000 aluminum twin screw fish boat, state of the art, basically at the time. Since then, 90 percent of the time, maybe 95 percent of its time, it's tied to the dock.
After '92, things changed major. ... But if you go back to the position that some of us have such an ingrained heritage in the fishery. We've got the boats, and we're going to stay in the fishery because that's what is part of our makeup. It is part of our self and our being. And yeah, we spent a ton of money, and tied it to the beach, and it didn't make any economic sense at all to be involved in that fishery, but that's part of us, and we're still here trying to be an active part of it.
...The potential of this overflowing into harvest agreements and being entrenched somehow in the treaties, or being backed up in treaties, and therefore, never being able to be changed even though it started as a pilot program is really scary.

... In my opinion, if we go the way we're going, we're going to get to a scenario, even if we're not there right now, of not being able to manage the stock. ... [T]hat means the potential is that there is a demise of the resource here that is at hand, and we need to be very focused on what we're doing."

[110] Forrest described at length the traditions and relationships in the fishing industry:

"... after preparing boats early on, usually those days were wooden boats, we would have to re-cord them, and we would have to keep them from sinking when they first went in the water where they swell up. And we would all be helping one another on the waterfront, and try to get to the first fishery. In my time that first fishery was any time in the first week of April, way back when, and the issue was to go get a fish to eat. ... You weren't interested in selling those fish. You were interested in having them for your family tradition, which was to get that first fish on the table. ... It's hard to describe because it's part of your history. And a lot of sharing went on sometimes when somebody would get a fish. You'd have other groups of people that you knew in fact were part of the fishery that maybe didn't get one that you would share with, including Aboriginal folks... So it was a very important time for me as a youngster having the ability to go and catch that first fish to eat."

[111] Asked how his relationship with the Aboriginals changed after the implementation of the pilot sales fishery, Forrest said:

"Negatively, for sure. Acrimonious kind of attitude now. Used to be a community. Used to hang nets together. Drag for snags together. Fix boats together. Share fish together at various times. Help one another out on the waterfront. A fair bit of communication in the process in the commercial fishery, and now there is basically zero communication. Non-interaction."

[112] Lawrence Salmi is a commercial fisher of mixed ancestry; he holds a Metis status card. An ancestor came to the area of Fort Langley on the Fraser River in 1835 and married into the Native community. Another ancestor was a Chehalis chief. Salmi himself married into a fishing family and has been in the industry all of his adult life.

[113] He described the pilot sales program as, "a hell of a financial burden," but he did agree that his income has averaged roughly the same over the years, although with more fluctuations. But he added:

> "I feel betrayed by the government, by the Canadian government. It makes me wonder if somebody thinks I'm inferior. ... I'm not allowed to participate in a fishery that I once was. I've been cut out of it."

[114] Salmi was not aware that there had ever been racism experienced by his family but he felt that the pilot sales program had caused a rift between the Native community and the rest of society.

[115] Kim Nguyen, originally from Vietnam, is now a proud Canadian citizen and a commercial fisher. She came to Canada as a refugee under terrible circumstances and worked in Edmonton for a time before she and her uncle came to Vancouver to try the fishing business. They knew nothing about fishing and struggled for a couple of years, but she found a very helpful Fisheries Officer who introduced her into the fishing community in Steveston and she was given the assistance that she needed. In addition, she bought a boat from a retiring fisher of Japanese ancestry who went out with her many times and taught her fishing techniques. She married here and is now partnered with her husband, also a commercial fisher.

[116] In the 1980's Ms. Nguyen and her husband were very successful and had a "very good life." She said that circumstances changed with the advent of the pilot sales programs:

> "In 1992 when the pilot sales coming, we cannot fish. We sit in dock. We see the pilot sales going out and we commercial fishing too but we cannot go out. The fish is our life. We don't have anything else at that time, just when we depend on the fishing. We really worry. We're frustrated. Where the income from if we don't have any fishing. And we have lots of stress for that time, and things changed so quickly we didn't even know that. It's really hard for us. We never think about that. We thought the fishing is our- all our life was spent for the fishing.
> ... When I became a Canadian, I remember when I swear, I obey the law. I have freedom to speak. Equal rights, and everything. I thought that's the - I would have the right to say now. We wants, one fishery do for everybody the same and equal. They can have it; we can have it, too. I got the family; they got the family, too. Really tough to do.
> They fish; we sit. We don't have any other income to get in for our family. How can we live? We come to this country, to freedom. To speak, and everything right, so we want to treat us right, so we can live in this freedom like Canada.
> ... We love fishing. We don't want to leave the fishing business.
> ... [W]e want the government to understand it's our right to say, equal for everybody. Then we can live with Canada, this nation, everybody can come in here as long as they do right, obey the law. They do everything right. They have the right thing to do. That's what we come here for."

[117] Debra Logan is the executive director of the B.C. Beam Trawlers' Association for shrimp trawlers. Previously she was a commercial fisher until she retired her licence under the Aboriginal Fishing Strategy licence retirement program. Her experience with the pilot sales program has been in Alberni Inlet on Vancouver Island.

[118] Ms. Logan's family, however, is from the banks of the Fraser River. Her maternal grandparents were both Aboriginals from the Sto:lo Reserve. And her great-grandfather, also from the Sto:lo Reserve, was the captain of a steamboat on the MacKenzie and Yukon Rivers for the White Steamship Company. Ms. Logan said:

> "Interestingly enough, he made it all the way to first mate on those boats as an Indian. But in order to become a captain the company insisted that he had to disenfranchise. In other words, he had to become not an Indian in order to do that. The rest of the family stayed Indian."

[119] Ms. Logan began fishing in the Banfield area on the West Coast of Vancouver Island where she, her husband, and their children have remained involved in the industry. When asked about developments in 1992, she said:

"That was the year that the Aboriginal Fishing Strategy Pilot Sales Programs were initiated and the fish that we normally had fished every year - in fact, it was regarded as about a third of our fishing season in the Alberni Inlet were reallocated to the pilot sales project. We lost a third of our income that year. That would have been the third that we lived on and paid taxes on...

It was a sad thing to watch. And the reason for that is that it was poorly organized, if organized at all. The commercial fishing fleet at that time was evolving fairly quickly in terms of quality control and quality assurance and sanitary protocols and product handling protocols, and suddenly the fish that was being offered as food from that run had gone back to being the ones that were caught and soaking in the water until it was somebody's idea to go pull the net. Then they were hucked into the bottom of a boat, along with the bilge water and the gas film.

The boats that fish were a rag-tag fleet that ranged from canoes to pleasure boats. Fish came ashore rotten. They were found thrown in ditches when I suppose there was no market available. I guess all I could really say was that it was a "no rule derby". It was, I think, very hard on our reputation for producing quality salmon from British Columbia."

[120] Logan was asked about race relations, which she said had been "unremarkable tolerance" until 1992, when things changed:

"It changed rather dramatically. ... I would have to liken it in some ways to the way that Jewish people used to be singled out in Europe pre-World War II. It was almost like people were researching lineage and saying ... we're not going to give you credit for your successful fishing trip because you probably got it easy because you're Indian. You didn't have to wait and do it ... within the framework of the normal competitive rules.

The whole relationship between Indian fishermen and non-Indian fishermen

spiralled downwards into in some cases outright sabotage, in other cases just ... distaste for what the sight of an Indian in a fishing fleet represented after that date.
...Until the laws diverged and until policy diverged with respect to people who happened to be of Native heritage in the fishery, there was no reason for any fishermen, Indian or not, not to be proud and feel a sense of accomplishment for their fishing efforts, if they had put a serious effort into it and been successful. After that date when an Indian fisherman comes to the harbour with a boatload of fish, there's the automatic assumption that he's gotten it the easy way. He's been allowed to fish in places where no other fisherman is allowed to go. One of the terms that I hear used around the docks is ... "he's one of the chosen ones." I hear that quite a lot.
... They were looked down on, sneered at, demeaned by this assumption that they weren't good fishermen. Didn't need to be to succeed as an Indian fisherman. You don't need to be because government's there to prop you up, and it's been an extremely demoralizing, demeaning thing for Indian fishermen."

[121] Logan herself would have been able to claim status as a Sto:lo and participate in the Sto:lo pilot sales fishery, but she chose not to:

"I don't need government's help. There's nothing wrong with me. I'm quite capable of functioning as a Canadian without special help. ...
You're familiar with that old saying, "Hi, I'm from the government and I'm here to help you," being the death knell of many good things in this country. And that could easily be true of Indian culture, as well. But there are those of us that will do our best to avoid that particular streaming of our cultural preservation. ...
I think probably my most fundamental objection to [the pilot sales program] is that it states in the Canadian Constitution, and I heartily believe that it's right in doing so, that we are all created equal in the eyes of the Lord. And I just don't feel that differentiating in terms of privilege in this country is acceptable. I don't think it's fair to Canadians. I think it's even less fair to Indians. It's created a culture where there are Indians out there that are convinced that they really are disadvantaged and less capable. Government has worked just about 100 years to make sure they think that.
... [I]sn't it sad that within our country, we're ... creating a race with different privileges and rights.

[122] Richard Nomura is third generation Canadian of Japanese ancestry, his family now having been here for close to one hundred years. During this time his parents and grandparents suffered confiscation of all of their property by the Canadian government

and internment in camps in Alberta until 1949. At that time fishing companies in Steveston financed the family's return to the fishing business.

[123] Mr. Nomura went to the University of British Columbia for a time but abandoned that for the family business of fishing and he has been involved since. His best year from fishing alone was in 1988 when his income was about $100,000. After that he suffered a drop in income from fishing, but he has supplemented that with income from making commercial fishing traps so that his income is now higher than ever.

[124] Nomura described what he characterized as the "dramatic change" brought about by the pilot sales fishery:

> "You see, my personal feeling was that I could understand what the government was trying to do. They were trying to give a group of people or people of origin or Native people an opportunity to attain some wealth and perhaps increase their standard of living.
> What they did was they decided that they were going to give them an allocation of fish for them to do that. And what it was was that - I could see the intent of it but what was very disturbing for me was the fact that it was the manner in which they approached the problem. And that they seemed to have very - they had no respect or no regards as to how the impact would be to people that were already in the industry. And the point was that - was that we - you, as an industry or as myself, I've never felt that we were ever treated on an equal footing, and what it was was at first I felt really angry that all of a sudden fish was being allocated to them without proper compensation.
> And after that I felt like - you know, that I was basically betrayed by the government. Because I couldn't understand how this government could allow - you know, like I said. This is an economic benefit, it wasn't an inherent - You know, it was brought in to give Natives an opportunity to make some money. And what they did was, you know, they basically didn't care how they got there, as long as they got there. I felt that - you know, that nobody was standing up for my rights as a Canadian. Like, who was representing me here. Like, I was - I'm a Canadian, right? I mean, my father and mother were born here. ... They were interned. They were - I mean, the point is that in '85 they got an apology from the government that said that they were committed to ... the equality and justice of all people by all races, and then all of a sudden they come back and throw a policy like this, that was race based.
> I know no one likes to hear it but it was race based, and the point was that I just felt like, you know, you say all these things about, you know, what you're going to do, and then all of a sudden you come back and here you're implementing a policy that is race based.

[125] George Horne is a 69 year old commercial fisher who is a member of the East Saanich Indian Band. His evidence in another proceeding was admitted by transcript and is Ex. 58 in these proceedings. He is Aboriginal but his band is not a party to the pilot sales fishery. He said:

> "Like it's hard when you're watching somebody out there fishing when you got a commercial licence and you can't go fishing.
> ... [T]here should only be one fishery and I don't know why they allow them to have another commercial fishery."

[126] Robert Rezansoff is the first commercial fisher in his family. His ancestors were from Russia, known as Doukhobors, and settled in Saskatchewan and Grand Forks, B.C. Later the family moved to New Westminster, where Rezansoff was born.

[127] Rezansoff began fishing at the age of sixteen when he purchased a discarded skiff for five dollars, found an abandoned net that he repaired, and got a tow from another fisher into the river. As he made money, he improved his gear to the point where he is now the owner of a 62-foot $1,275,000 seine boat.

[128] When Rezansoff married, his wife insisted that he also have a regular job. She was the third generation of a Japanese ancestry fishing family and she later relented and encouraged him to pursue fishing more fully. By the late 1980's he was very successful as a fisher and in 1990 he had a superb season. Then in the early 1990's he and the other fishers began a series of briefings with the Department of Fisheries and Oceans. They were advised that:

> "To the best of my recollection the position that they put forward was that the fishery was out of control and that they had to get a grip on it somehow and this was how they were going to do it. That it was a trade-off. In order to legalize the sale of fish that were essentially, I guess, being poached on the river at that time, and sold, ... the Aboriginal sector that was doing that would control the fishery and be limited to specific amounts to catch."

[129] Asked if there was any talk about the pilot sales program helping the Aboriginals as a disadvantaged group, Rezansoff said, "None that I know of."

[130] Rezansoff explained that in the first year of the program, 1992, there was a mysterious disappearance of fish that never made it to the spawning ground after passing the inactive commercial fleet. Since the sockeye are in a four-year cycle, Rezansoff believed the effects would be felt in 1996. As he explained:

> "... I knew I was going to be out of work [in 1996] and if I remember correctly, I was poking the Minister in the chest and kept asking him, "What

am I gonna do in 1996? Answer me." And he kept saying that it wasn't a big deal. It was just a minor setback. And I said, "No, I know what I'm going to do in 1996. I'm out of work. I know right now, today, that in 1996 I will not fish on this cycle because of what you've done this year."
But, you know it's easy enough for a fisherman to understand that cyclical nature of the escapement, but it's quite difficult for the media. So nobody really pounced on that question.
But in 1996 I was out of work."

[131] His experience since the pilot sale program was brought in is that, apart from one good year, his income from salmon fishing has "dropped precipitously".

[132] With his ancestry Russian Doukhobor and his wife's Japanese, Rezansoff was asked about his experience with racial discrimination in the fishing industry. He gave anecdotal evidence of some limited experience with Aboriginal resentment of Japanese fishers and segregation of fishers into camps in the 1960's, but he said:

"... towards the beginnings of the AFS, to all intents and purposes, my viewpoint of the industry was that most of that had dissipated and ... you didn't see that. ... In Prince Rupert it was crowded and Aboriginals, non-Aboriginals, everybody just rafted together and we were fishermen. We were no longer, you know, an Aboriginal, or a Japanese, or a non-Aboriginal type fisherman. So that, for all intents and purposes, had dissipated up to that point.

"[But after the advent of pilot sales] from what I saw ... if we'd be fishing in the northern area and you'd go into the office or the coffee room, where we once had sort of a bantering type of camaraderie that was just, you know, fishermen boasting, talking, whatever, about the week, or what they were doing, the atmosphere became tense, and it would change dramatically, depending on who was in the room. If there were no Aboriginal fishermen in the room we would be grousing about the AFS, or talking about different things. The Aboriginal fishermen that we considered to be normal friends, fishermen like us, would come in the room and the conversation would change. The tension level would go up. It was different - quite different.

[133] He added that he had also seen Aboriginal fishers belittle and use racial terms about the white fishers.

[134] Richard Gregory is the vice-president and last remaining employee of B.C. Packers Ltd., winding up the company's business after 100 years of operation. His career began working on packers while still in school 43 years ago, but he has been full time with the company since 1970 when he obtained his M.B.A from the University of British

Columbia.

[135] Gregory's grandfather began fishing on the Fraser River as an oarsman on a gillnetter in the 1890's and became very well established in the business. Fishing has been in the family since.

[136] Mr. Gregory was asked to give an historical perspective on Aboriginal involvement in the fishing industry. He said,

> " As fish buyers, and particularly during my ten years as a fish buyer and processor, they were basically colour blind. It didn't matter whether you were Norwegian or Japanese or Native or Spanish Basque, or what you may be, we bought fish. With respect to the Natives, their participation in the industry is far in excess of their percentage of the general population. I think the fishing industry, and I'm quite proud of the role that B.C. Packers and some of the other major companies, but particularly B.C. Packers played were our employment of fishermen was, I would say that in my days involved where the Native participation was in excess of a third. And I know for a fact that B.C. Packers' employment of fishermen on our boats was way in excess of that, and in fact our plant in Prince Rupert, formerly Port Edward and then in our Prince Rupert was, I would say, way in excess of 50 percent Native participation. ...
>
> ... we were trying to hang on to our good fishermen, so whether he was a Norwegian or Japanese or Native Indian, we would entice them through equity participation in boats and gear and that to stay on the boats. ... I would just take a list of the top 25 fishermen in B.C. today, same fishermen, and I would say the majority of those would be Native, and that was the case when I was fishing.
>
> "...As we know, there was a great relocation of the Japanese during the war. But after the war, B.C. Packers and some of the other larger fish companies very quietly, because the Japanese themselves that were here were second and third generation, some of these people were some of our better fishermen... went up and brought a lot of these Japanese families back down to the coast, got them re-established in Steveston and other places. Got them into homes. Got them into boats. And they were major players again. You know, they were fishermen who just happened to be of Japanese origin. But they were done an injustice and were dealt with after the war by the industry.

[137] With regard to the Pilot Sales fishery in 1992, he said,

> "... I was a director of the Fisheries Council of B.C. at the time, and we sat in the boardroom down on Robson Street and listened to Rawson and Flumian tell us about this great experiment in social engineering that was going to be a one-year, one-shot deal.

> ... We've always had a concern about poaching and all kinds of stuff going on in the rivers, but it was presented to us as a way of somehow getting a handle on what's being caught and the rest of it, and there was really no use arguing. It was a foregone conclusion, and it was we understand a political decision, and we are ... totally against it. We felt that anything based on race was wrong. We knew that the government had some issues to do with Natives and had to get them sorted out. ... The Section 35 [food fishery] situation was a hard sell, but it had been accepted by all the industry but this was totally different.
>
> It was based on race, and up to this point the industry had been colour blind. It didn't matter whether you were Japanese or Norwegian or Spanish or what you were, you could fish. And to now say that somebody had the opportunity to go out and fish ... because you're Native, and I don't have a chance to become a Native, that's not good enough. .. What it did is it made the industry, it split the industry based on race. I mean, we, you know, I fished with Natives, we used to pool with them. We had them in the canneries. Everybody got along, but what happened was it drove this race wedge between people. It's like saying to somebody, "You can't use that washroom because you're black." - it's unacceptable. ... We had enough problems dealing with the Americans and all the other issues that we had to deal with in the fishery. To be fighting amongst ourselves based on this, it was one thing to have, you know, the different gear battles, but you could always settle that by going and participating in the particular fishery by buying a license or buying a boat in that gear. But this? It was driving a wedge that nobody could get over.

[138] In cross-examination Gregory agreed that his company's president had said in 1969 that there were too many boats out looking for the fish. His company's annual report in 1982 had said that world over-supply of salmon, reduced market prices and disputes with fishers had plagued the industry. In 1992 Gregory had said that the world supply of salmon had doubled in the last decade due to farmed salmon, and by 1994, "...the world is awash in salmon and prices are low." Finally, he agreed that in 2001, commenting on his company's closure, he had said, "The resulting work loss is just a result of that same declining fishing industry... the writing has been on the wall for years. There are too many people trying to make a living in the fishing industry."

[139] Leslie Budden is a fourth generation commercial fisher of Japanese ancestry. Mr. Harvey had her confirm in evidence an extensive history of commercial fishing on the coast of British Columbia, and particularly the involvement of Japanese immigrants.

[140] Ms. Budden was born in 1965 in Steveston, British Columbia and at a very young age she began helping her father making dip nets for seine boats. She married a fisher and the couple was employed together on seine boat crews. Asked about fishing, she said, "I

loved it. I loved being out there and I loved fishing on its own, not just to be with my husband...." She said that she and her husband used to talk about retiring one day with a gillnetter and fishing together on the coast.

[141] The *Aboriginal Fishing Strategy* of the government had intervened in 1992 and her reaction had been,

"Disbelief and shock. We were called to participate in a rally, so I just remember being quite surprised at how moved I was, because I'm not moved by a lot of things, and this just made a big knot in my stomach..... You had the feeling that your livelihood was at stake... I remember feeling some confidence that it just wouldn't go far, it couldn't possibly go as far as it has gone... because it's just so wrong to create these kinds of opportunities based on race."

[142] Ms. Budden said that in her lifetime there was no racial animosity of any kind in the fishing industry, but she confirmed to the court an extensive history of racial problems before her time. She said,

"I think I was in my early teens when I first really became aware of what happened during the war and the struggles before the war. Actually ... that was never really talked about, the racial prejudice against the Japanese before the war... They would open up a little bit about the internment and that whole experience. ...it was kind of like pulling teeth really, and you just kind of felt that it was too painful... trying to get the people you love to go back to relive that kind of thing."

[143] Around the time of the Aboriginal Fishing Strategy implementation in the 1990's Ms Budden did some research into her family background and learned that her grandfather, Rintaro Hayashi, had written a book about his experience as a Japanese ancestry fisher in British Columbia in the early part of the 20th century. It had been published and acclaimed in Japan. The book recounted his involvement in the well known case of Jung Kasawa who won a decision in August, 1929 in the court in Prince Rupert to use a motorboat in the Skeena fishing district. There had previously been only newspaper accounts of this case.

[144] During the 1920's there had been a Federal government policy to gradually eliminate Japanese ancestry fishers from the commercial fishery. According to Rintaro Hayashi the white and Native fishers had lobbied the government for legislation preventing the Japanese ancestry fishers from using gas motor boats. Kasawa had said to himself,

"If I use a motorboat the government will arrest me and bring the case to court, then I can find myself in court without spending money. If I lose the case, I'll be put in jail because I'm single and have no responsibilities in

life. I don't have to consider myself. Justice is my only concern, and whatever happens I will never regret risking imprisonment for it. After all, it isn't all bad if a jail cell becomes my home. Yet if I win..."

[145] With these thoughts in mind Kasawa travelled from the Skeena area to Steveston where he sought the financial support of Budden's grandfather and the other Japanese fishers. He then returned to the Skeena, bought a second-had motorboat and went fishing. He was arrested for breaking the discriminatory law and was taken to jail. According to Hayashi, he said to the judge at his trial,

> "Your Honour, the reason why I'm here is not to defend myself, because I'm aware that I broke the law. I'm here to appeal for justice. We Japanese, like other people, have immigrated to Canada and have become citizens of Canada. Some of us have been born in Canada. Canada is not only your country but also our country. We're all Canadians. But according to the present fishing law, white and Indian fishermen can use motorboats while the Japanese cannot. We are not blind to this racial prejudice against us, Your Honour. My faith is in the principle of Justice upon which this country is founded. If justice is found anywhere on earth it is here in Canada. I want only to see justice done."

[146] Kasawa won the case. Hayashi concluded in his book that, "You can be sure it was not only Kasawa's victory but also Canada's victory. Truly it was a triumph of justice over racial prejudice..."

[147] Ms. Budden's final comments concerning the Aboriginal Fishing Strategy were compelling:

"I think it's a tragedy that what my grandfather believed was they had fought and won. I'm just trying to remember the quote from the front of his book...

"As the words written on the sandy shore are erased by the tides sweeping in and out, so racial prejudice is about to be banished from our minds once and for all."

"I just feel ashamed in this day and age we are reliving the same thing again.

...

I'm opposed to the fact that it is a violation of equality. I think the reason I have such difficulty with this is because I think it's so obvious that it shouldn't require explanation, but I don't understand why based on a person's race we can determine the opportunity to a resource like fisheries."

**Analysis**

[148] That concludes the evidence of the defence witnesses giving evidence as members of the group claiming discrimination. They were as diverse in ancestry, background, involvement in their employment, and political persuasion as much as any group. But I conclude they had one very important thing in common - a sincere commitment to their involvement in the West Coast fishery. This commitment is the bond that holds together the commercial fishing community.

[149] The Crown, in submissions, questioned the bona fides of many of these witnesses because of some similarity in their evidence. A common thread in their evidence was that, "We were left sitting on the [beach/dock/wharf/shore] while they went fishing...." This was repeated many times, but I conclude not because it was fabricated and rehearsed. These people were in fact on the shore together watching the pilot sales fishery and obviously spent considerable time commiserating. It is only to be expected that after long discussions they would articulate their feelings in similar ways. I do not conclude that their opinions were in any way insincere.

[150] I also conclude that these witnesses are representative of the claimant group and provide an accurate picture of the claimant group's background and experience in the Fraser River gillnet fishery. They were generally well placed to make the observations they did concerning the fishing industry. They were articulate and consistent in their evidence.

[151] On the issue of bias, I do conclude that these witnesses generally had an interest in these proceedings. Some of them are charged. All of them have some financial interest in how the fisheries are developed. It is to be expected that there may be some bias in their evidence and I must keep in mind that some of the opinions and feelings will be exaggerated. But even with this awareness I nevertheless conclude that this body of evidence is generally very reliable and just the sort of evidence I should rely upon in making findings of fact.

[152] Based on this evidence, and the body of Crown evidence, I am able to reach many conclusions concerning the history and present state of the salmon fishery in British Columbia.

[153] The salmon fishery on the Fraser River has always experienced wide variations in fish availability, fish prices, and opportunities to fish. Availability has been affected by natural causes and by human intervention. It generally declined after the turn of the 19th century until enhancement brought it back prior to the pilot sales program. Since the pilot sales program the availability of fish is difficult to discern.

[154] Fish prices have been up and down at various times but have been depressed generally since the development of fish farms. To some extent prices are irrelevant because an abundance of fish will provide bountiful income even during depressed prices. And prices are just one of the economic challenges facing the fishers, so there have traditionally been wide fluctuations in the income from gillnet salmon fishing.

[155] In spite of these fluctuations, many fishers had a good income and were able to maintain a comfortable lifestyle from their fishing. Some were tremendously successful. Some had to supplement their fishing income with other employment, and in some cases this other employment was full time. Much of the employment was off-season employment.

[156] No generalization can be made about the income of the group after pilot sales were brought in. There was a consensus that their income suffered as a result of pilot sales, but it is clear that many of the group had to diversify as a result of the pilot sales program and have been able to at least maintain their general income position. I do accept the evidence of these witnesses that because of the pilot sales program their usual income from Fraser River sockeye gillnet fishing was adversely affected and they had to take steps to compensate for this.

[157] I conclude from the evidence of these witnesses that until licence limitation came in late in the 1960's, the opportunity to fish commercially in British Columbia was completely unrestricted. There had been limitations on the opportunities of Japanese ancestry fishers, but those limitations were gone. There had never been limitations on Aboriginals fishing commercially and they also had generally had available the food fishery, which was less regulated than the commercial fishery.

[158] There were virtually no financial restrictions on entering the fishery. "A buck, a boat and a net," was the expression used to describe the entry requirements. Boats and nets seem to have often been abandoned and could be salvaged, or obtained very cheaply. I conclude that even the most financially disadvantaged really had equal opportunity to start in the fishing industry and some of the witnesses were examples of that.

[159] Nor was there any educational qualification or restriction. Many of the witnesses had a long family tradition of involvement in the industry, but some had absolutely no experience and progressed from being completely ignorant of fishing to being very successful.

[160] After licence restriction was brought in, the licences had a market and appreciated considerably. That became a financial barrier for some, but through resourcefulness, such as that shown by the witness Nguyen, one could overcome that. The federal government had a licence buyback program that purchased licences at market value and turned some of them over to Aboriginals or Aboriginal groups to remove this financial barrier. The buybacks preceded the pilot sales programs, and they continue as part of the same Aboriginal fishing strategy at present. These are, however, only of assistance to Aboriginals. There are also other incentives for Aboriginals to enter the fishing industry such as preferential entry programs, lower licence fees and tax-free income.

[161] I conclude that commercial fishing is a very distinctive lifestyle that attracts some, and is of less interest to others. There can be wide fluctuations in income making financial predictability very difficult. Risk takers will find this more tolerable. Great pride is taken

in financial success and it is regarded as a measure of one's abilities as a fisher. Any of the witnesses who were asked to identify the best fishers always had a ready answer and a list of candidates. Their answers referred not only to financial success, but also to size and quality of catches, size of boat, makeup of crew, and other characteristics. It is clear that, just as in the sports fishing community, attaining status as a fisher is very important.

[162] And it is a real community. Even though the coast is a huge area with many people fishing different types of fish with different gear under varied conditions, there is an eager awareness of the reputation of others, particularly those who are successful. There is a lot of communication over the radio channels, through fish buyers, and on the docks during layovers or closures. The topics of discussion generally include one's competence, associates, type of fishing, background and general status in the fishing community.

[163] That is why, when the defence witnesses complained that they regarded the pilot sales program as an attack on their worthiness as fishers, it certainly rang true. Their recounting that they were "left sitting on the beach" carried a tremendous amount of emotion. Openings for fishing have become fewer and fewer over the years and 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. The witnesses were not exaggerating when they recounted that they felt the pilot sales program created a group of "chosen ones" from which they were excluded, causing them embarrassment.

[164] The Department of Fisheries and Oceans have also arranged it so that invariably the pilot sales program has an opening prior to any commerical gillnet opening on the Fraser. This has led further to the impression of a racial hierarchy being created. And as the witnesses said, it is a matter of common sense that those fishing later are getting what fish are left over. The Crown argued, based on some evidence, that the fish runs often continue over a period of time and it may be the case that a run is on the increase, so that the commercial fishers might have at least as many fish available as in the previous pilot sales fishery. Considering the evidence of the fishers, I conclude that would be possible but is unlikely. But what is more important is the perception created. I conclude that the Fraser gillnetters truly believe, with good cause, that they are generally getting the leftovers. That would be the same impression in the community at large.

[165] There is also the consideration that many of the Aboriginal fishers involved in the pilot sales have commercial licences, so that they are able to fish both openings. This doubles the opportunity of these particular fishers, giving them a real advantage over the claimant group and further leading to the impression that the Aboriginal group as a whole is being favoured.

[166] There was evidence that the Aboriginals with commercial licences would intermingle their catches and claim that the fish taken during the pilot sales opening had been taken during the commercial fishery. This would allow the allocation to the Aboriginals to stay below quota so that, even if there were no more pilot sales openings, fish could still be

available during the food fishery. This sort of allegation is of questionable reliability; it could well have happened but might also have been baseless rumor. There is no doubt however, that the regime put in place by the Department of Fisheries and Oceans created a strong temptation to manipulate catches in this way. The witnesses certainly sincerely believed this was happening.

[167] There was also evidence that fish taken on the food fishery were passed off as having been taken during the pilot sales openings, so that they could be sold. Again, this could be more fabrication than reality, but the present system is a real temptation for such conduct. This is particularly the case given that DFO has not kept up with the more complicated enforcement required by the existence of the two different commercial fisheries. I conclude from the evidence I heard that there is very little to prevent this occurring and it is not unreasonable for the commercial fishers to believe that fish taken by the Aboriginals under one auspices are being claimed as having been taken under another. Herb Redekopp, the manager from the Department of Fisheries and Oceans, confirmed this problem with enforcement.

[168] One of the problems with enforcement is that for commercial fishers, enforcement is by the Department of Fisheries and Oceans whereas for the Aboriginal fisheries, enforcement is by Aboriginal enforcement officers. Some of the defence evidence included allegations of lax enforcement and conflict of interest that may not all be based in fact. Again, what is more important is the perception. The Aboriginals are trusted with self-enforcement. The commercial fishers are not accorded the same respect and take this as an affront.

[169] There is no question that the commercial fishers, both Aboriginal and non-Aboriginal, see the provision for the exclusive fishery in the pilot sales program as discriminatory. I have recited several of their concerns, but their most consistent complaint is that they view commercial fishing as part of their heritage and they consider their right to fish as vital as any other rights we have in society. They view commercial fishing as part of their identity which they variously described as their self, their being, and their heritage.

[170] The history of the law relating to the right to fish in the oceans and tidal waters has been described above. Generally, this is a right passed down from English common law that every citizen has equally. This right may be regulated by the government, but not taken away, subject to unequivocal legislation to that effect. The community of commercial fishers is keenly aware of these rights, probably because so much of their activity is regulated and they must spend so much time monitoring these regulatory provisions. They are protective of this right and see the pilot sales program as inconsistent with this general right, giving special rights to a particular racial group.

[171] This has led to real problems with relationships among the different racial groups in the fishery. It is not the first time there have been such problems. We are probably not fully informed as to the situation in the late 1800's, but it would seem that at that time, when

the fishery was just getting established, there were few problems.

[172] As the resource became more valuable, jealousies and greed caused problems. In the early 1900's a rift developed between Japanese fishers on one side, and Aboriginals and whites on the other, with the latter having more political power and succeeding in placing ridiculous restrictions on Japanese fishing. The Japanese fishers overcame this, only to face internment and confiscation of property during World War II, continuing up until 1950. From that time on the legal framework finally permitted healthier relationships to develop that one witness described as "unremarkable tolerance". From other witnesses I heard of respect among fishers, regardless of racial background. Crews were integrated. The spirit of camaraderie extended across racial groups.

[173] The pilot sales program has caused this to change, and the situation has deteriorated considerably. For the first time since the fishery began 150 years ago, the Aboriginals have been split off as a group. The witnesses spoke of lack of respect, communication problems, and physical segregation. These are the sort of problems discrimination causes, and are the reason why discrimination must be resisted. Discrimination feeds on itself, and its symptoms lead to further discrimination.

[174] McIntyre J., in Andrews v. Law Society of B.C. (1989), 34 B.C.L.R. (2d) 273, at page 173 in the passage quoted from Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536 @ 551, defined discrimination as, "...a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities."

[175] That is precisely the problem with the pilot sales fishery. The Department of Fisheries and Oceans has drawn a distinction between two groups on grounds analogous to race. The first group includes those Aboriginals eligible for membership by a bloodline connection in one of the three bands, the Musqueam, Burrard or Tsawwassen bands. Members of this group are therefore eligible to be designated by the bands to fish in the pilot sales fishery.

[176] The other group includes all other members of society, including Aboriginals, but more particularly those individuals who commercially fish for salmon in Area "E" but are excluded from the pilot sales fishery because they lack the bloodline connection. From this latter group are withheld opportunities to fish that are afforded the other group, denying them the general equal right of every citizen to participate in the fishery. This group also has burdens, obligations and disadvantages discussed above that they see as discriminatory.

[177] In the decision cited, McIntyre J. discussed discrimination in the workplace.

"It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force".

[178] The great majority of the commercial fishers are self-employed. It is not illogical to view the Department of Fisheries and Oceans as an employer in this situation, regulating the working conditions of the fishers. As such the Department has imposed restrictive conditions on one group, based upon a prohibited ground, that being discrimination on a ground analogous to race. In the first part of the three-prong test used in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, this is drawing a formal distinction between the claimant commercial fishers and the members of the three bands based on a personal characteristic, a bloodline connection to the three bands.

[179] This is not an enumerated ground in Section 15 of the Charter but is analogous to the enumerated ground of race. On this basis the claimant commercial fishers are subject to differential treatment referred to in the second of the three tests.

[180] The third test is more complicated. It speaks of "stereotypical application of presumed group or personal characteristics." Stereotypes are not a consideration in this case. At least to this point in time, there appear to be no presumed group characteristics that flow from not having the necessary connection to one of the three bands. That sort of stereotyping takes time to develop.

[181] But the test also requires attention to other factors that may have the effect of promoting the view that members of the claimant group are less capable or worthy of recognition or as a member of Canadian society, equally deserving of concern, respect and consideration. I have discussed this at length and how the witnesses articulated this in such a compelling way. Without yet considering the four contextual issues to be examined in this third test, I conclude that the prima facie indications are that this third prong of the Law test has been satisfied.

[182] In Lovelace, Iacobucci J. confirms that there are four contextual factors for organizing the third stage of the Law tests. The inquiry into these factors is both subjective and objective and is to be from the point of view of a similarly circumstanced reasonable person who considers the relevant contextual factors. The first of these is consideration of any pre-existing disadvantage, stereotyping or prejudice. This is not really a concern for the claimant group.

Members of the group, especially those of Oriental or Aboriginal ancestry, may as members of other groups have suffered disadvantage, stereotyping or prejudice, but as members of the claimant group this is not part of their history. Stereotyping and prejudice certainly are factors in the background of the comparator group, just as Iacobucci J. observed was the situation in the Lovelace Case. These are in the category of disadvantages of the comparator three bands and are more appropriately examined when considering the ameliorative purpose if any of the pilot sales program, an inquiry mandated by Section 15(2) of the Charter and by the third of the four contextual factors.

[183] The second contextual factor is an examination of the correspondence, or lack thereof, between the ground on which the claim is based and the actual need, capacity, or circumstances of the claimant, or others. I conclude that the pilot sales program fails to take into account the right of commercial fishers to generally participate in the public fishery and does not respect these rights they have as members of Canadian society. There may be alternative programs, such as buyback programs or the industrial model, that would be more sensitive in this regard. This, too, will be discussed more under the topic of ameliorative programs.

[184] The fourth contextual factor is the nature and scope of the interest affected by the impugned law. This is a consideration of the severity of the consequences of the pilot sales program on the commercial fishers. These consequences have been discussed in detail, from financial to emotional. Of significance is my conclusion that the program itself has generated further racial discrimination and discord. I find that these are definite indications that the pilot sales program is discriminatory.

[185] The third contextual factor, the ameliorative purpose or effects of the impugned law, requires the most analysis. As noted, this inquiry is also explicitly mandated by Subsection (2) of Section 15 of the Charter and it has been held that this should be done in the context of the inquiry under Section 15(1).

[186] It is difficult to discern the real purpose of the pilot sales fishery. In the passage quoted earlier, Fisheries Minister John Crosbie gave control of poaching as the reason for the program. There was a theory that Aboriginals were selling fish taken in the food fishery and that legalizing this would give the Department of Fisheries and Oceans an idea of the number of fish involved, facilitating better management of the resource. Based on the evidence I heard there was little more than rumor that there was such poaching, and no reason to believe that Aboriginals were poaching any more than other fishers. Nor was there any reason to believe that the new regulations would command any more respect than the old; poaching might simply re-define itself in terms of the new regulations, which is exactly what the commercial fishing community believes has happened.

[187] Crosbie confirmed the concern about poaching as the reason for the program in his memoirs, also in evidence in these proceedings, but there he also mentioned that the program was to be an experiment. This is a second justification given for the program.

The Department of Fisheries and Oceans told some of the fishers that the program was to be an experiment for a year. The Department's literature, evidence also in these proceedings, speaks of test projects and demonstration projects.

[188] This literature also asserts that the *Sparrow Case* requires that this type of opportunity be afforded to Aboriginals. This is clearly not the situation. The *Sparrow Case* defines the Section 35 right of Aboriginals to food, social and ceremonial fishing, but includes no right to a commercial fishery.

[189] The Department literature also mentions the fiduciary duty society has to the Aboriginal community and how this has prompted the Department to move ahead of caselaw in according fishery rights to Aboriginals. In this respect, the pilot sales program goes against the trend, if it can be called that. There have been several cases dealing with claims by Aboriginals to an historic commercial fishery. None have succeeded except one related to a case involving a spawn-on-kelp herring roe fishery. The pilot sales program has not moved ahead of the caselaw; it has moved against it.

See: *Regina v. Sparrow*, [1990], 1 S.C.R. 1075
*N.T.C. Smokehouse*, (1993) 80 B.C.L.R. (2d) 158
*Regina v. Van Der Peet*, [1996] 2 S.C.R. 507
*Regina v. Gladstone,* [1996] 2 S.C.R. 723

[190] We must keep in mind that the purpose of the Department in implementing the pilot sales program is a contextual factor in the analysis. The perception of the differential treatment by a reasonable person must be considered. **The courts so far have generally rejected claims of an aboriginal right to a commercial fishery. Treaty negotiations are occurring in which commercial fishing rights are a central issue. The gratuitous granting of these rights by the Department under such circumstances is reasonably perceived to be rash and imprudent.**

[191] Most significantly, the Department of Fisheries and Oceans have given economic development and an ameliorative purpose as the reason for pilot sales program. But there is a real suspicion that this is an ex post facto justification; the control of poaching was the only reason given initially. The Crown, in its submissions before this court, agreed that the pilot sales program was not designed to have an ameliorative effect but it ensued that it coincidentally does have such benefits. However, I conclude that whatever the original reason, it would be valid after the implementation of the program to justify it from a different perspective if it emerged that the program had other benefits.

[192] The real question is, was amelioration involving these three bands necessary, and is the program appropriate in that regard? The Crown has argued that the disadvantaged position of the Aboriginal community is notorious, and the Court should take judicial

notice of it. The defence has argued that this is stereotyping and leads to the wrong conclusion about these particular bands.

[193] I do take notice of the disadvantaged circumstances of Aboriginals generally in Canadian society. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203 at paragraph 66 the court found that there is a, "legacy of stereotyping and prejudice against Aboriginal peoples." Iacobucci J. in the Lovelace Case at paragraph 69 finds that Aboriginal people experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health, and housing. These problems manifest in many ways. Here in the Vancouver Criminal Court there is a considerable overrepresentation of Aboriginals as accused persons as a result of these disadvantages.

[194] It is likely that the Musqueam and Tsawwassen Bands experience many of these disadvantages. The Burrard Band has not participated in the pilot sales fishery and neither Crown nor defence in this case found that band's circumstances to be relevant. But there was evidence, mainly from the defence, concerning the circumstances of the other two bands and from that evidence I conclude that it is unlikely that financial disadvantage is one of their problems. It is clear that disadvantage is not a "race to the bottom", so it is not a comparative test. However, the evidence demonstrated that both of these bands and their individual members are likely healthy financially.

[195] Kerry-Lynn Findlay is a lawyer who leases property from the Musqueam Band. She and others have had a running dispute with the band concerning this lease and have lost a great deal of money as a result, so her objectivity as a witness on matters of opinion was questionable. However, much of her evidence was factual and objective, and included photographs she had taken on the reserve. There was also evidence from other defence witnesses concerning the Musqueam Band that was confirmatory of the evidence of Ms. Findlay. There was a notable absence of witnesses on behalf of the Crown concerning any of these issues.

[196] The defence has asked me to draw an inference against the Crown because there were witnesses available who could give evidence concerning the circumstances of the Musqueam Band, but they were not called, or refused to respond. I do not draw such an inference but it is certainly the case that the evidence is one sided.

[197] From the evidence that was led I conclude that the Musqueam Band is located on a well-situated urban reserve on the outskirts of Vancouver and controls relatively valuable property. This property and other business interests of the band produce a substantial income available to the band for the benefit of the band and its members. As a result, the real estate and personal possessions of the band members, described by the witnesses and evidenced by photographs, are at least of a standard and quality representative of the community at large. There was other less tangible evidence that was consistent in indicating that finances are not a particular problem for band members.

[198] The Tsawwassen Band has a reserve further from the Vancouver metropolitan centre, which is therefore less valuable. The band leases properties and has business ventures however, and there was similar evidence concerning quality of housing and the possessions of band members. The Crown did call a witness regarding the Tsawwassen Band. Frederick Jacobs, former Chief and band councillor, described the band's circumstances. He told of considerable resourcefulness by band members to take advantage of their proximity to the highway and the ocean in developing income-producing properties. It is apparent that there are educational and unemployment problems on the reserve but there was no evidence of housing problems nor of poverty generally. With regard to the Tsawwassen Band also I conclude that in some respects they are disadvantaged, but financial disadvantage is not one of the problems.

[199] Even if financial disadvantage were an issue there was no economic study or assessment done prior to or during the pilot sales fishery concerning the economic need of the bands and the financial rewards the fishery would produce. This was the evidence of Michelle James who was an economist and Senior Policy Advisor for the Department of Fisheries and Oceans from 1982 until 1997. She was there during the time period when the pilot sales program was implemented. Ms. James was responsible for doing such studies. She also designed the buyback programs, but she said there was an economic assessment of these, which she herself did.

[200] Since financial disadvantage is not a consideration with these bands, and if the Department demonstrated no interest in the financial aspects of the pilot sales fishery, it is difficult to understand what other disadvantages the pilot sales program was intended to remedy. I have concluded that it may be that there are other non-financial disadvantages in common with Aboriginals generally that these bands experience but the program would do nothing to remedy them; it produces only financial rewards. The Department labels the fishery "communal", but the individuals designated by the bands to participate are completely on their own and keep all profits for themselves. The openings are very few in numbers so it can hardly be said that those participating are developing any sort or career, skill or occupation. The effects of the pilot sales on unemployment are insignificant. The evidence given concerning the proceeds from fishing, such as that given by Judith Sayers, the Chief of the Hopachisat First Nation on Alberni Inlet which had been part of the pilot sales fishery, mentioned only spending the money on personal items. There was no suggestion anywhere in the evidence that any of the money from the pilot sales fishery went to any type of program intended to deal with any of the real disadvantages actually experienced by the bands.

[201] Finally, if the Department perceived that Aboriginals are at a disadvantage in their abilities to enter the commercial fishery and exercise the general public right to access the fishery, I find this not to be the case. Historical statistics show a fluctuating participation in the fishery, always well above Aboriginal representation in society. The Musqueam and Tsawwassen Bands in particular are significantly over-represented compared to the population in general in their involvement in the fishery. Since prior to the pilot sales

programs there have been preferential government entry programs, lower licence fees, buy back programs and tax-free income as incentives to Aboriginals not available to the rest of society. This has put Aboriginal individuals at an advantage.

[202] My conclusion is that there may be non-financial disadvantages experienced by the Musqueam and Tsawwassen Bands but there is no rational connection between the preferential treatment given these bands in the fishery, and these disadvantages. The program confers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It therefore is grossly unfair.

[203] In summary, following the procedure indicated in the Law Case, I conclude that the pilot sales fishery draws a distinction and defines two groups on the basis of whether or not individuals have a bloodline connection to the Musqueam, Burrard or Tsawwassen Bands. This is analogous to a racial distinction. The group without the bloodline connection is subjected to differential treatment by having a benefit withheld - their right to participate as equals in the public commerical fishery. This has the effect of promoting the view that these individuals are less capable, less worthy of recognition, and less valuable as members of Canadian society. It also promotes the view that they are not as equally deserving of concern, respect and consideration as the members of the three bands.

[204] This disadvantage was not pre-existing; it was caused by the implementation of the pilot sales program, which has been held out as having an ameliorative purpose. I conclude it does not serve such a purpose. Although probably well intentioned, the program was misconceived, illogical, and ineffective in any way in dealing with any disadvantages the three bands may experience. The pilot sales program therefore offends the provisions of Section 15 of the Charter of Rights and Freedoms and violates the rights of the accused thereunder.

[205] This leads to consideration of the provisions of Section 1 of the Charter of Rights and Freedoms which provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[206] In *Regina v. Oakes* [1986] 1 S.C.R. 103, Dickson J. laid out the method for applying the provisions of Section 1, starting at paragraph 63:

> It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured.

Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms -- rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in Singh et al. v. Minister of Employment and Immigration, supra, at p. 218:

> "... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter."

A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

[207] At paragraph 69, he continues:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure

> that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

[208] The discussion in the last paragraph above was qualified by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp*. [1994] 120 D.L.R. (4th) 12 to direct that there must be an examination not just of the objective of the program but of the salutary effects of the measure in comparison to its deleterious effects on fundamental rights.

[209] In summary, the court must determine if the objective of the government in establishing a limit is pressing and substantial. Then there must be an examination to determine if the means are proportional to the objective. There must be a rational connection between the limit and the objective. The limit must impair rights as little as possible. The costs to society must be proportional to the benefits. The burden is on the Crown on all of these issues.

[210] The objective of the government in establishing the Aboriginal Fishing Strategy and the pilot sales fishery has been discussed at length. Several reasons have been proffered at various times. There has been no consistent rationale for the program. This detracts from any argument on behalf of the Department of Fisheries and Oceans that the need for the program was pressing and substantial.

[211] The demand for pilot projects, experiments, and tests in themselves would not be pressing. If *Sparrow* mandated the program it could be seen as pressing, but I have concluded that this was an incorrect assumption. The disadvantages of Aboriginals in Canadian society are a pressing problem but the pilot sales fishery provides financial assistance to only the individual members of the bands, not the bands generally, and I have concluded that financial need is not a real disadvantage of these particular bands. It is certainly not a pressing problem.

[212] Poaching may be a pressing problem for the Department of Fisheries and Oceans, but there was little evidence that Aboriginals were any more involved in this problem than the rest of the community. No program was implemented to deal with non-Aboriginal poaching. Enforcement Officer Redekopp said, and I conclude, that enforcement of the then existing regulations would have been much more effective in dealing with any poaching problem than were the pilot sales programs. The need for any special measures was speculative. The program was poorly designed to deal with the problem, if there was one. Even if the program had some effect in this regard, only a small proportion of Aboriginal fishers in the province participate in the pilot sales program and there was no evaluation process selecting the three bands that were chosen. As I have concluded earlier, the program encourages poaching at least as much as was previously the case.

[213] The literature from the Department expressed the hope that the pilot sales fishery would provide stability to the commercial fishery by improving Aboriginal catch data, increasing cooperation in enforcement, and reducing protests and confrontation. The weight of the evidence is that none of this has occurred and the program has been counterproductive in each of these areas.

[214] If the program is intended to address other disadvantages of the bands, it is poorly designed and ineffectual. It is not a communal fishery. Money in the hands of individual band members is doing nothing for the social and health problems of the community. The evidence was that the band members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial

fishing vessels. **The pilot sales fishery cannot be rationally connected to any attempt to deal with the disadvantages of the bands as Aboriginals**.

[215] On the issue of minimal impairment, I must conclude that the program fails the test. If the government wished to change the mix of commercial fishers for any reason, the buy back program could be utilized so that the present commercial fishers would be compensated rather than effectively having their right to participate in the fishery expropriated without compensation. This would be much less drastic than **racially segregating** the fishers and denying financial compensation to the excluded group.

[216] If the objective was to control poaching, the evidence of Redekopp demonstrates that there were more sensible alternatives. Whatever the objective of the program, it is certainly not the least intrusive means and minimally impairing solution for the problem. The burden is on the Crown on this issue and no evidence was led that alternatives were considered or that there was a reason for choosing this course of action.

[217] I must finally discuss if the costs of the program are proportional to the benefits. There was no evidence from the Crown on this point and the only apparent benefits have been financial reward to individual members of the bands participating in the fishery. This has been at tremendous cost to society. There has been a breakdown in the relationship between Aboriginals and the rest of the fishing community. The pilot sales program has generated and encouraged further **racial discrimination**, beyond its own provisions. The Area "E" gillnetters have lost income and have had to take measures to compensate for this. Respect for the Department of Fisheries and Oceans has completely diminished. But most importantly, the commercial fishers have been stripped of their pride and dignity and feel victimized by government discrimination.

[218] Given the questionable benefits, this is far too great a cost. There is no justification for the existence of the program, based on the Oakes Test.

[219] Under Section 24(1) of the *Canadian Charter of Rights and Freedoms* I am to consider what remedy in my discretion is appropriate and just in order to deal with this infringement of the rights of the commercial fishers.

[220] The accused persons are guilty of knowingly fishing during a closure. The fishery should have been closed to everyone; the purported partial opening was **analogous to being racially discriminatory**. The protest fishery was to get this before the court and that has been the real issue in this case - the validity of the pilot sales program. The only remedy that deals with that issue and effectively condemns the program is a judicial stay of proceedings, which I accordingly enter on this information.

**The Ultra Vires and Invalidity Arguments**

[221] These issues were also raised by the defence in this matter:

1. Are the ACFLR ultra vires insofar as they are an unauthorized subdelegation of authority to issue licences?
2. Are the ACFLR ultra vires insofar as they are an unauthorized subdelegation of authority to amend regulations?
3. Are the ACFLR ultra vires insofar as they purport to regulate a not yet legitimized activity, Aboriginal commercial fishing?
4. Are the ACFLR invalid insofar as they purport to establish an exclusive fishery without clear and plain legislative authority?
5. Are the Pilot Sales ultra vires insofar as they concern Property and Civil Rights in the Province and require at least conjoint provincial legislation?
6. Are the ACFLR ultra vires insofar as they purport to dispense with the law contrary to the Bill of Rights, 1688?

[222] My decision concerning the discrimination argument has determined this case, but these are my comments in obiter dicta, which may be of assistance if these six issues are considered further.

[223] The first issue above may have been determined in favour of the Crown by Regina v. Huovinen, [2000] BCJ No 1365, B.C.C.A. There it was held that the communal licences issued to the bands by the Minister are licences and the designations pursuant thereto are not licences but decisions by the licence holders as to who may fish under the licences. This is consistent with the fact that Aboriginal fishing rights are communal. It is also a similar situation to a corporation holding a commercial fishing licence determining which individuals will fish under the corporate licence.

[224] The issue concerning subdelegation of the power to make regulations is likely moot; the section at issue was repealed on June 7, 2002. The principles in Borowski v. Canada (A.G.), [1989] 1 S.C.R. 342, bar consideration of the matter further.

[225] The accused persons concede that the third issue is determined by Regina v. Huovinen, [2000] BCJ No 1365, B.C.C.A. and reserve the right to raise the matter on appeal.

[226] On the fourth issue I have made sufficient findings of fact to permit determination. This issue is essentially a legal determination of the meaning of "exclusive".

[227] The ultra vires issue concerning whether the pilot sales fishery trenches on the provincial legislative authority over property and civil rights in the province is probably the most contentious and the most difficult of these remaining issues. I have tried to state the law and make findings of fact sufficient to permit consideration of this issue. In addition to the legislative and regulatory scheme, the evidence of Herb Redekopp, James Ionson and Susan Farlinger explains the legal framework. Their evidence was admitted in these proceedings by filing the transcripts from previous aborted proceedings on this same

information. Counsel agreed that this evidence should be accepted at face value. Reference should be made to this comprehensive body of evidence if further evidence on this issue is required.

[228] The final issue concerning the *Bill of Rights, 1688* was likely determined in favour of the Crown in *Regina v. Huovinen*, [2000] BCJ No 1365, B.C.C.A.

**Application to Stay Application of this Decision**

[229] The Crown has applied for an order that I postpone the operation of my finding that the Aboriginal Communal Fishing Licences Regulations, and the Pilot Sales Program of the Aboriginal Fishing Strategy are invalid insofar as they **discriminate** among commercial fishers on the basis of a bloodline connection to three Native bands. The request is that there be a suspension of the effect of such declaration for a period of ten days to allow the Department of Fisheries and Oceans to accommodate the different groups and divergent interests that will be affected by the decision and to develop an appropriate response.

[230] The Crown cites many cases that have followed the Manitoba Language Reference where temporary validity has been granted to an unconstitutional statute. Such orders are made pursuant to the inherent jurisdiction of the court, a jurisdiction that provincial courts do not have. Courts under the authority of the Federal government have been held to have inherited the common law inherent jurisdiction of the court to make orders such as certiorari, mandamus, or injunctions. I have difficulty with the notion that this court has such prospective powers.

[231] The Crown also submits that the Charter contains its own remedy clause, s. 24(1) that empowers the Court to award a wide range of remedies, "as the court considers appropriate and just in the circumstances." I accept that in crafting an order for such a remedy, a transitional period could be included.

[232] The defendants' submissions on the issue make the following points:

1. The DFO has been aware of the questionable validity of the regulations since the first inquiry of the Joint Parliamentary Committee for the Scrutiny of Regulations in March, 1997;
2. The Honourable Judge Thomas of this court rendered a decision on August 7, 1998, in the case of Regina v. Huovinen [supra] that was not stayed, and no "chaos" ensued. The case was, of course, reversed on appeal.
3. The Scrutiny Committee advised the DFO that amendments made to the regulations were inadequate, as of October, 2002;
4. The Honourable Judge Scarlett of this court heard a trial on these same issues and planned to make his ruling in August, 2001. He was unable to

conclude the matter but the DFO should have made contingency plans at that time;

5. The Parliamentary Standing Committee on Fisheries and Oceans called for the program's termination on June 4, 2003, almost two months ago;
6. The program was to be an experimental pilot project but it has gone on for eleven years, in spite of obvious problems.

[233] These points are all valid. There is also the consideration that this case was commenced in October, 2002 before the Honourable Judge Trueman of this court. The parties should have contemplated a decision being made earlier this year. When I continued with the matter in April of this year, I indicated an intention to conclude the matter before this year's salmon runs. It was my hope that that was sufficient notice to prepare for eventualities.

[234] For all of those reasons, and for what I conclude is the most important reason, I decline to stay the effect of my decision. I have concluded that the pilot sales fishery is offensive as being analogous to **racial discrimination**. Racial discrimination in our society takes on many guises. Any racial group may be the victim. The Aboriginal people in Canada have obviously been the victims of racial dynamics and discrimination that have disadvantaged them in many ways. This discrimination has been sometimes subtle, but always insidious. Ameliorative programs are necessary to remedy this, but they must be carefully crafted to balance the interests of all members of society. The pilot sales program has not met this standard; the program was misguided in conception and has been insensitively implemented and maintained.

[235] The most troubling aspect of this **discrimination** is that it is government sponsored. The government should be setting an example for the rest of society, but unfortunately, this has not been our history. We have had many shameful examples of legislated racial discrimination including laws to keep Orientals from working in the coal mines and on the railways in the early 1900's, legislation to phase out and exclude the Japanese from the commercial fishery in the 1920's, and legislation interning and confiscating the property of Japanese fishers in the 1940's. After such a sad history, our governments should be much more sympathetic to these issues than has been the case here. When **racial discrimination** or a semblance of it is identified, any continuance of it should not be permitted. The application is denied, and the charges are stayed, effective immediately.

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The Honourable W.J. Kitchen, P.C.J.