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Aboriginal Fishing Program Unconstitutional **“Program was misconceived, illogical, and ineffective”**

OTTAWA— The Provincial Court of British Columbia in *Regina v. Kapp* struck down special commercial fishing preferences available only to aboriginals as discriminatory, contrary to Section 15 of the *Charter of Rights and Freedoms*.

The discriminatory preferences were contained in the *Aboriginal Communal Fishing Licenses Regulations*, part of the federal government’s Aboriginal Fishing Strategy. These regulations created a special communal license given to bands and administered by them. In the case before the Court, certain bands in British Columbia were able to participate in a separate commercial fishery that excluded non-aboriginal fishermen. It is commonly referred to as the *pilot sales program*.

- The Court noted that the special fishing preferences were contrary to the historic right to fish that treats every citizen equally: “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....” (170)
- I concluded 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.” (183)
- “Of significance is my conclusion that program itself has generated racial discrimination and discord. I find that these are definite indications that the pilot sales program is discriminatory.” (184)
- The judge warned that similar discriminatory practices should not become part of treaties now being negotiated: “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. (190)
- “The program offers an unjustifiable benefit on the individual members of the bands, at the emotional and financial expense of the commercial fishers. It is therefore grossly unfair.” (202)
- “I concluded 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 Musquaem, Burard 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 commercial 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 members of the three bands.” (203)

- “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 well intentioned, the program was misconceived, illogical, and ineffective 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 hereunder. (204)
- “[A DFO Fishery Officer testified] 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 program was poorly designed to deal with the problem. ... As I have concluded earlier, the program encourages poaching....” (212)
- “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.” (215)
- “This has been 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... 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. (217)
- “Given the questionable benefits, this is far too great a cost. There is no justification for the existence of the program...” (218)
- “The fishery should have been closed to everyone; the purported partial opening was analogous to being racially discriminatory.” (220)
- “I have concluded that the pilot sales fishery is offensive as being analogous to racial discrimination. Partial discrimination in our society takes on many guises. Any group may be the victim. ... The program was misguided in conception and has been insensitively implemented and maintained. (234)
- “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. (235)

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Link to Judgment: <http://www.provincialcourt.bc.ca/judgments/pc/2003/02/p03%5F0279.htm>