Supreme Court Approves Affirmative Action Program

On June 27, 2008, the Supreme Court of Canada ruled, in *R. v. Kapp*,[1] that an affirmative action program under the federal government's Aboriginal Fisheries Strategy did not violate section (s.) 15 *Canadian Charter of Rights and Freedoms*.[2] Section 15 states that:

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, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The federal government introduced the Aboriginal Fisheries Strategy in 1992 as a mechanism to promote aboriginal involvement in commercial fishing.[3] The strategy included a pilot sales program.[4] In one instance, the sales program entailed providing a communal fishing license to three aboriginal bands, which afforded the exclusive right to fish from the Fraser River, in British Columbia, and to make a profit during a specific 24-hour period.[5] The appellants, who were mostly non-aboriginal and excluded from fishing during the 24-hour period, protested this aspect of the strategy by fishing during the prohibited time.[6]Consequently, they were charged. At trial, this group argued that the communal fishing license was unconstitutional on the basis that it amounted to racial discrimination under section 15 of the *Charter*.[7] This section of the *Charter* guarantees equal protection and benefit under the law for all persons, but does not preclude ameliorative programs (programs that are designed to correct an existing problem).

The Provincial Court of British Columbia held that granting the license to the three aboriginal bands was a breach of the non-aboriginal appellants' equality rights, and found that the aboriginal bands were neither at a disadvantage, nor did the emotional suffering of the appellants cause a negative impact on their human dignity.[8] The Court chose to stay the proceedings.[9] At the Supreme Court of British Columbia, an appeal by the Crown was allowed. That Court found that the program did not have a discriminatory purpose or effect because it found the non-aboriginal complainants were advantaged in comparison to the aboriginal bands.[10] The stay of proceedings was lifted and convictions entered.[11] The British Columbia Court of Appeal dismissed the next appeal and provided five concurring rationales. Emphasizing the importance of context over form, Justice Low argued that the pilot sales program does not infringe the appellant's section 15 right.[12] Justice Mackenzie pointed to the fact that no discriminatory purpose or effect had been sufficiently

demonstrated by the appellants.[13] Justice Kirkpatrick held that section 25 of the *Charter*, which protects aboriginal rights and freedoms in cases of conflict with other sections of the *Charter*, imbued the scheme with legitimacy.[14] Chief Justice Finch found that section 15 was correctly interpreted by Justices Low and Mackenzie, and did not feel that section 25 needed be addressed.[15] Justice Levine agreed with Chief Justice Finch in regards to the analysis of section 15, but declined to comment on section 25.[16]

On the final appeal, the Supreme Court of Canada took the opportunity to outline a new method of interpreting section 15. The majority pointed out that sections 15(1) and 15(2) work in concert to promote a substantive view of equality.[17] While section 15(1) helps to prevent governments from perpetuating prejudice or inflicting hardships on a group, section 15(2) allows the government to work proactively against discrimination through the creation of affirmative action programs.[18] Traditionally, there have been two ways of approaching a section 15 analysis.[19] The first is to read section 15(2) as an exemption from section 15(1). The second is to read section 15(2) as an interpretive aid. The Court recommended a third approach: if the government can show that a program serves an ameliorative purpose under section 15(2), then the Court should forgo a section 15(1) analysis.[20] The advantage of this approach, the Court stated, is that it avoids the "the symbolic problem of defining a program as discriminatory before saving it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1)."[21]

The Court also stated that the language and the intention behind the provision indicate that the main consideration in discerning whether or not the program fits under the section 15(2) is the legislative purpose.[22] The actual effects of the legislation and whether or not they turn out to be ameliorative are not of primary concern. The Court expressed the view that this approach helps to avoid interference by the courts in the legislative process.[23] A test was then expressed for section 15. A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under section 15, if under section 15(2):

a. the program has an ameliorative or remedial purpose;
b. the program targets a disadvantaged group identified by the enumerated or analogous grounds.[24]

The Court found that the pilot sales program under the Aboriginal Fisheries Strategy is protected under section 15(2) of the *Charter*.[25]The program's purpose is ameliorative because its objectives involve promoting financial self-sufficiency within the aboriginal community and negotiation of solutions to aboriginal rights claims related to fishing.[26] The group was also found to be disadvantaged in terms of income, education, and other indicators. The program was, therefore, said to contribute to the promotion of equality.[27]

Section 25 was addressed briefly in order to note that it is unclear whether or not the provision encompasses a communal fishing license.[28] The Court pointed out that the

wording of section 25 may suggest that only constitutional rights are within its scope.[29] It was suggested that section 25 only be discussed case-by-case, when its application is in question.[30]

Justice Bastarache offered a concurring decision, but gave different reasons. He agreed with the test for the application of section 15, but argued that there is no need for a full section 15 analysis before section 25 becomes applicable.[31] A conflict between the government program and section 15(1) is all that is required to trigger section 25. Justice Bastarache suggested that section 25 is not merely a canon of interpretation.[32] It is an active shield that can be used to protect aboriginal peoples where the *Charter* might otherwise interfere with the distinctive, collective, and cultural identity of an aboriginal group.[33] In the case at hand, there is a conflict between *Charter* rights and aboriginal rights, Justice Bastarache argues, and section 25 applies in the present situation to remedy that conflict.[34]

Additional Reading
Supreme Court
R. v. Kapp, 2008 SCC 41
British Columbia Court of Appeal
R. v. Kapp, 2006 BCCA 277
British Columbia Supreme Court
R. v. Kapp, 2004 BCSC 958
British Columbia Provincial Court
R. v. Kapp, 2003 BCPC 279

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[1]*R. v. Kapp*, 2008 SCC 41.
[2] *Canadian Charter of Rights and Freedoms,*Part I of the *Constitution Act, 1982,* being Schedule B to the*Canada Act 1982* (U.K.), 1982, c. 11, s. 15 .
[3]*Supra* note 1 at para. 7.
[4]*Ibid*.
[5]*Ibid*.
[6]*Ibid*. at para. 9.
[7]*Ibid*.
[8]*R. v. Kapp, 2003 BCPC 279* at para 201-203.
[9]*Ibid*. at 220.
[10]*R. v. Kapp, 2004 BCSC 958* at para. 110.
[11]*Ibid*. at 116.
[12]*R. v. Kapp, 2006 BCCA 277* at para 68 and 82.
[13]*Ibid*. at para. 109.
[14]*Ibid*. at para. 118.

[15]*Ibid*. at para. 157.
[16]*Ibid.* at para. 159-160.
[17]*Supra* note 2 at para. 16.
[18]*Ibid*.
[19]*Ibid.* at para. 35.
[20]*Ibid*. at para. 37.
[21]*Ibid*. at para. 40.
[22]*Ibid*. at para. 44.
[23]*Ibid.* at para. 47.
[24]*Ibid.* at para. 41.
[25]*Ibid.* at para. 61.
[26]*Ibid*. at para. 58.
[27]*Ibid*. at para. 59.
[28]*Ibid*. at para. 63.
[29]*Ibid.*
[30]*Ibid.* at para. 65.
[31]*Ibid*. at para. 116.
[32]*Ibid*. at para. 80.
[33] *Ibid*. at para. 89.
[34]*Ibid*. at para. 122-123.