CASE COMMENT

R. v. Kapp:
A Case of Unfulfilled Potential

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The Supreme Court of Canada's judgment in R. v. Kapp[1] *was a much anticipated decision for followers of equality and Aboriginal rights jurisprudence alike. The following commentary focuses on the Aboriginal rights implications of* Kapp.

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1 *R. v. Kapp* 2008 SCC 41 ("*Kapp*").

I Introduction

Although the Supreme Court of Canada correctly rejected the discrimination challenge mounted against the Pilot Sales Program ("PSP")[2] that was at issue in *Kapp*, its reliance on s. 15(2) of the *Canadian Charter of Rights and Freedoms*[3] ("*Charter*") to reach this conclusion is regrettable. The PSP was primarily implemented as a measure to accommodate Aboriginal fishing rights and to develop a cooperative relationship between Canada's Department of Fisheries and Oceans ("DFO") and some of British Columbia's First Nations. In failing to recognize the PSP as a reasonable accommodation measure, the Court missed an opportunity to confirm the unique relationship that British Columbia's coastal First Nations have to the salmon fisheries, to affirm the Crown's discretion in developing reasonable accommodations of Aboriginal and treaty rights and, more generally, to encourage the Crown-Aboriginal reconciliation process.

This case comment begins with a summary of the facts and history of the *Kapp* litigation. Next is a brief discussion of the significance of the Supreme Court of Canada's decision for Canada's equality jurisprudence. The third and main section of this comment concerns the implications of the *Kapp* decision for Canadian Aboriginal law.

II Facts and History of Case

The *Kapp* case concerns the constitutionality of the PSP, a former component of the DFO's Aboriginal Fisheries Strategy ("AFS"). The DFO developed the AFS shortly after the Supreme Court of Canada rendered its judgment in *R. v. Sparrow*.[4] *Sparrow* confirms the existence of domestic Aboriginal fishing rights for the Musqueam Indian Band—that is, the right, pursuant to s. 35(1) of the *Constitution Act, 1982*,[5] to fish to provide food for the Nation and for the purpose of conducting social and ceremonial activities and events. *Sparrow* also directs that after ensuring that conservation objectives are met, Canada must give priority to Aboriginal food fishing rights when allocating scarce fishery resources.

The DFO has primarily used the AFS to address *domestic* Aboriginal fishing rights. However, the DFO used the PSP to grant certain Aboriginal groups communal fishing licences ("PSP Licences") to engage in *commercial* fishing. The PSP Licences at issue in *Kapp* had been issued to three bands:

2 As discussed below, the PSP was a program whereby the DFO authorized limited commercial fishing by a small number of Indian Bands.

3 Being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11

4 *R. v. Sparrow*, [1990] 1 S.C.R. 1075

5 Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

Musqueam, Tsawwassen and Burrard (a few other Nations held fishing licences under the PSP which allowed them to fish commercially, but those PSP Licences were not at issue in *Kapp*). The PSP Licences allowed these Bands to designate members to fish for domestic and commercial purposes during a 24-hour salmon fishery opening on the Fraser River immediately before the regular commercial opening. It should be noted that the PSP no longer exists, though there remains a commercial fishing dimension to the AFS.[6]

Some commercial fishers (a mostly, but not entirely, non-Aboriginal group) who did not belong to the Aboriginal groups holding PSP Licences protested the advance fishery opening for the Musqueam, Tsawwassen and Burrard Bands. In the opinion of these fishers, it provided unfair preferential opportunities to these Bands, and discriminated against the fishers on the basis of race. They protested by fishing, without licences, during the 24-hour PSP opening. These protest fishers were charged with illegal fishing, and they sought to defend themselves on these charges by arguing that the PSP was unconstitutional because it violated their right to equality under s. 15 of the *Charter*.[7]

Provincial Court Justice Kitchen accepted the discrimination argument, ruled that the PSP violated s. 15 of the *Charter* and stayed the fishing charges.[8] The British Columbia Supreme Court reversed that decision.[9] The British Columbia Court of Appeal[10] and, ultimately, the Supreme Court of Canada both sided with the British Columbia Supreme Court, though these three appeal courts produced a total of eight sets of reasons, some of which diverge significantly. Thus, the resolution of this discrimination claim has by no means been straightforward.

Kapp was also an unusual case in that although it has profound implications for Aboriginal groups with Aboriginal or treaty fishing rights, no First Nation was a party to the litigation. It was the Crown's role to defend the PSP as part of its prosecution of the protest fishers. Although the Court permitted

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6 Most notably, the AFS currently includes the Allocation Transfer Program, whereby the DFO acquires commercial fishing licences from licence-holders, who are willing to sell them, and transfers these licences to First Nations who apply for them.

7 Section 15(1) of the *Charter* states: "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."

The manner in which the Charter argument was raised was unusual: normally, a discrimination argument is made against the law under which the person is charged in order to show that this law, and hence the charge, have no merit. Even if the fishers had succeeded in establishing that the PSP was discriminatory, it is not clear how the invalidation of that law would have excused them from breaching a separate law.

8 2003 BCPC 0279.

9 2004 BCSC 958.

10 2006 BCCA 277.

numerous First Nations and Aboriginal organizations to intervene in *Kapp*, the interveners could not adduce evidence, nor did they have the same opportunity as the parties to frame legal arguments. Therefore, this case proceeded without a full Aboriginal perspective on the issues.

Moreover, by the time *Kapp* reached the Supreme Court of Canada, a new Canadian government had been elected. The new Conservative administration, in addition to not having introduced the PSP, had already taken a strong public stance against "segregated fisheries" or "race-based fisheries."[11]

III Significance of Decision from an Equality Perspective

Although this case comment focuses on the implications of *Kapp* for Aboriginal rights, the significance of *Kapp* for equality jurisprudence should be noted. First, the Supreme Court of Canada diminished its reliance on the concept of "harm to human dignity" when assessing whether differential treatment is in fact discriminatory.[12]

In its 2001 decision, *Law v. Canada (Minister of Employment and Immigration)*,[13] the Supreme Court of Canada emphasized that s. 15 exists, above all, to promote human dignity and that the impact of an impugned provision or measure should be considered in light of its impact on the human dignity of the claimant group. In their majority judgment in *Kapp*, Chief Justice McLachlin and Justice Abella acknowledge criticism that the *Law* case ushered in an overly rigid approach to s. 15 analysis. They also state that the greater emphasis on "human dignity" has effectively placed an extra burden on claimants who have since been expected to establish how their dignity—an elusive concept—is harmed by the differential treatment which they challenge.[14]

While Chief Justice McLachlin and Justice Abella affirm that the promotion of human dignity is the "lodestar" of s. 15 and of *Charter* rights generally,[15] they essentially direct the courts to return to their pre-*Law* line of inquiry and consider whether the measure at issue perpetuates disadvantage to, or stereotyping of, the group experiencing differential treatment.[16] Although I do not think that this changed focus alters the meaning of discrimination under s. 15, it will affect how litigants frame their arguments.

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11 See for example, <http://www.cbc.ca/canada/british-columbia/story/2006/07/12/bc-harper.html> and <http://www.afn.ca/article.asp?id=2798>.

12 Although there were two concurring judgments in *Kapp*, Bastarache J., in his concurring reasons, stated that he agreed with the s. 15 reasoning in the majority judgment, which was written by McLachlin C.J. and Abella J. (para. 77).

13 *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497.

14 *Kapp*, *supra* note 1, para. 22.

15 *Kapp*, *supra* note 1, para. 21.

16 *Kapp*, *supra* note 1, para. 24.

Second, *Kapp* is significant for s. 15 jurisprudence because it speaks to the role of s. 15(2) in *Charter* analysis. Subsection 15(2) states:

> 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.

There has been an outstanding question of whether s. 15(2) can independently shut down a discrimination challenge or whether it simply helps guide the interpretation of s. 15(1) and the determination of whether a particular law is discriminatory. In other words, is it a "shield" or simply an "interpretive aid"?[17] In *Kapp*, the Supreme Court of Canada ruled that s. 15(2) may be either. Litigants may reference s. 15(2) in conducting analysis under s. 15(1), and if the rationale behind impugned differential treatment is to help improve the situation of a group that has historically faced discrimination in Canada, this means that the law in question is not discriminatory. Alternatively, if a litigant establishes that the impugned law falls under s. 15(2), this will in itself defeat the s. 15 challenge.[18]

It seems unlikely that the court's willingness to let s. 15(2) serve as a shield against discrimination claims has much practical significance for the outcome of equality cases; by their very nature, laws that fall under s. 15(2) should not qualify as discriminatory under s. 15(1): either the group that is excluded from the beneficial treatment will not be an "enumerated or analogous group" capable of bringing a s. 15 claim, or the impugned law will not actually be perpetuating any kind of stereotyping or disadvantage with respect to the claimant group. Thus, whether the Crown seeks to defend a law that is genuinely aimed at ameliorating the situation of a disadvantaged group by relying on s. 15(1) or s. 15(2), the result should be the same—that is, the law should be upheld. However, the fact that s. 15(2) can now be dispositive of an equality challenge will presumably affect the structure of s. 15 arguments where s. 15(2) is at issue by encouraging litigants to focus their efforts on establishing or disputing its application.

Third, *Kapp* provides guidance on how to determine whether a program is ameliorative within the meaning of s. 15(2). The Supreme Court of Canada states that the inquiry must focus on the *purpose* of the program rather than its actual *effects*, but that courts need not simply take a government statement as to purpose at face value. Rather, they are also free to consider whether there is

17 The Supreme Court of Canada offered only *obiter* and ultimately open-ended comments on the role of s. 15(2) in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37 at para. 93-1-8.

18 *Kapp*, *supra* note 1, para. 40.

a rational connection between the measures contained in the program and the stated ameliorative purpose.[19]

The Court also states that a program can be characterized as ameliorative even if it has some purposes which are not ameliorative;[20] this makes sense since most government programs are developed to fulfill a number of objectives.

In addition, the majority comments on the distinction between government initiatives that confer benefits versus those that punish individuals or restrict rights. Chief Justice McLachlin and Justice Abella examine lower court cases in which such measures have been found to be "ameliorative" laws under s. 15(2) on the grounds that the measures were adopted for the well-being of disadvantaged groups. Chief Justice McLachlin and Justice Abella say that this goes too far: "We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2)."[21] Thus, to be ameliorative, a law or program must confer a benefit.

IV Significance of Decision from Aboriginal Rights Perspective

Misplaced Reliance on s. 15(2)

The Supreme Court of Canada holds in *Kapp* that the PSP is not discriminatory because it falls under the ambit of s. 15(2) of the *Charter*. The Court thereby characterizes the PSP as a discretionary program designed to provide economic assistance to disadvantaged Aboriginal groups. In my respectful opinion, this characterization misses the mark.

The objectives of the AFS, of which the PSP was one component, are stated by the DFO as follows:

- Facilitate DFO management of the fisheries in a manner consistent with "*Sparrow*" and subsequent court decisions;
- Provide Aboriginal groups with an opportunity to participate in the management of their fisheries;
- Allow Aboriginal groups to improve their skills and capacity to manage the fisheries in which they participate;
- Contribute to the economic sustainability of Aboriginal communities through fisheries-related activities;
- Provide a foundation for the development of treaties and self-government agreements; and,

19 *Kapp*, *supra* note 1, paras 48-49.
20 *Kapp*, *supra* note 1, para. 51.
21 *Kapp*, *supra* note 1, para. 54.

- Allow Aboriginal groups to test innovative fisheries-related economic opportunities, such as aquaculture and studies of markets, processing methods and product quality.[22]

Although one of the objectives of the AFS is to "contribute to the economic sustainability of Aboriginal communities," it is the Supreme Court of Canada's decision in *Sparrow* and subsequent fishing rights litigation that drove the DFO's decision to develop the AFS and the PSP. Aboriginal groups were relying on s. 35 of the *Constitution Act, 1982* in order to bring their long-standing grievances about government interferences with their fisheries to court. Conflicts over fishing rights were escalating, and the DFO's ability to manage the fisheries effectively—its *raison d'être*—was compromised by this conflict. Thus, the DFO established the AFS primarily to provide some recognition of asserted (and in a few cases, established) Aboriginal fishing rights in order to try to develop a more harmonious relationship with coastal First Nations on the waters.[23] These objectives pre-dated *Haida Nation v. British Columbia*[24] and the courts' recognition of the Crown's duty to consult and accommodate; nevertheless, the AFS and the PSP are properly understood as accommodation measures of the kind contemplated by that landmark case.

As many readers will know, the Supreme Court of Canada ruled in *Haida* that where the Crown proposes to make a decision or take an action that has the potential to negatively affect the asserted Aboriginal or treaty rights of an Aboriginal group, it must first provide that group with an opportunity for meaningful consultation. If consultations establish that the Aboriginal group has a reasonable rights claim and that the proposed decision or course of action could have negative effects on those rights, the Crown will likely need to explore with the Aboriginal group reasonable ways of accommodating those asserted rights. The law on the Crown's obligations regarding accommodation is not yet settled as litigation thus far has focused on the prior issues of when consultation is owed and what a consultation process must entail. To date, neither the Supreme Court of Canada nor the lower courts have set limits on what might constitute reasonable accommodations of s. 35 rights.[25]

In my opinion, the PSP can be considered as an accommodation of both asserted domestic and commercial fishing rights.[26] The PSP was developed at a time when various commercial fishing cases were underway and prior to the

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22 These objectives are stated online: the DFO <http://www.pac.dfo-mpo.gc.ca/tapd/afs_e.html>.

23 See the History section of the DFO website, *ibid*.

24 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73.

25 A fuller discussion of accommodation can be found in Jack Woodward, *Native Law*, looseleaf (Toronto: Carswell), Chapter 5, Section C(5).

26 This was the position advanced by the T'Sou-ke, Beecher Bay, Songhees, Malahat and Snaw-naw-as First Nations in their intervention in *Kapp*.

Supreme Court of Canada's decision in *R. v. Van der Peet*,[27] which rejected the existence of a Sto:lo commercial salmon-fishing right. The DFO developed the PSP in anticipation of the reasonable possibility that Aboriginal groups might succeed in proving commercial fishing rights. Chief Justice Brenner recognized this fact in his judgment in the British Columbia Supreme Court:

> At the time of the *Sparrow* decision in 1990, which immediately preceded the development of the A.F.S. and the P.S.P., over 90 bands comprising some 20,000 aboriginal people were obtaining food fish from the Fraser River. Some or all of those bands were claiming aboriginal rights to fish in the Fraser River and some or all of those bands may have had and possibly still could establish rights to fish in the Fraser River, either commercially or for food, social and ceremonial purposes.[28]

Moreover, while *Van der Peet* makes it unlikely that any Sto:lo First Nation could succeed in establishing a commercial fishing right, many other coastal First Nations continue to assert, and sincerely believe, that they possess commercial fishing rights. Given that almost no commercial fishing rights cases have been litigated so far, and that the Supreme Court has emphasized that Aboriginal rights are to be assessed with careful consideration of the history and circumstances relating to the particular Aboriginal group, other Aboriginal groups—including other groups that held PSP Licences—may well have reasonable commercial fishing right claims. Thus, even today, an AFS program providing commercial fishing opportunities could in some cases be considered an accommodation of a reasonably asserted commercial fishing right.

However, even if a court were reluctant to consider the AFS as accommodating commercial fishing rights, the PSP could be viewed as a reasonable accommodation of asserted domestic fishing rights. There is no reason why an accommodation of a s. 35 right must correspond precisely to the right at issue. Where an asserted Aboriginal or treaty right has been severely infringed and it is no longer even possible to properly accommodate the exercise of that right, it would be entirely in keeping with the honour of the Crown for the Crown to provide some alternative accommodation as compensation. Indeed, it would be grossly unjust—and detrimental to the process of Crown-Aboriginal reconciliation—if the most seriously compromised rights were also those which could not benefit from any meaningful accommodation where the Crown proposes to further infringe those rights.

Domestic salmon fishing is an example of just such a severely compromised right. Most British Columbia coastal First Nations subsisted largely on fishing, and on salmon fishing in particular. Traditionally, they harvested

27 *R. v. Van der Peet*, [1996] 2 S.C.R. 507.
28 *Kapp*, *supra* note 1, para. 88

salmon in very large quantities and processed it in a variety of ways for use over the winter and spring; they shared it at feasts and in various ceremonies; they traded surpluses with inland neighbours (and explorers and settlers, as soon as they appeared in these Aboriginal territories); and some fought wars with each other to control particular salmon runs.

The reliance of Aboriginal peoples in British Columbia on the fisheries for sustenance is no secret. It was recognized by government officials who justified providing coastal Aboriginal groups with the smallest per capita reserves in Canada on the basis that they would continue to sustain themselves through fishing rather than agricultural pursuits. Government officials also recognized this strong reliance on the fisheries by establishing numerous tiny reserves for coastal communities in order to protect their traditional fishing spots.[29]

Aside from being one of their staple foods, salmon is integral to many Aboriginal cultures. Many seasonal rounds, ceremonies, social gatherings, legends and much artwork revolve around the salmon and the salmon runs. It is apparent to anyone spending time in any number of coastal Aboriginal communities that their relationship to salmon, and salmon fishing, helps to define them as distinctive peoples and shapes their world view.[30]

Yet today these same Aboriginal groups are severely restricted as to when, how and where they may fish salmon. They cannot fish unless expressly authorized to do so by the DFO, and those openings are limited and highly regulated. Moreover, due to the sad state of the salmon fisheries, most Aboriginal groups can no longer harvest enough salmon to even come close to meeting their domestic needs.

The Aboriginal and Douglas Treaty[31] rights of Aboriginal groups to catch salmon for domestic purposes are therefore severely compromised, and their cultures have also been seriously harmed by their inability to maintain proper ties to the salmon. Given these facts, it is entirely appropriate for the DFO to

29 The Supreme Court of Canada made the following comment in passing in *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 11: "The multiplicity of relatively small reserves is characteristic of coastal British Columbia, where strategic access to plentiful fishing and other resources was thought to be more important than simple acreage." Justice Brenner cited this passage in his decision in *Kapp* and observed that "[s]ince before contact aboriginal people in British Columbia have relied upon the fishery to sustain their communities" (at para. 92).

30 Justice Low recognized both of these facts at the British Columbia Court of Appeal: "For thousands of years the aboriginal communities on the west coast of this country have relied heavily on fishing for survival. Fishing has also been an integral part of their culture" (para. 27).

31 There are 14 Douglas Treaties which cover a small portion of Vancouver Island. They were concluded between Sir James Douglas and various First Nations between 1850 and 1854. The hunting and fishing rights of the signatory First Nations that are recognized in these Treaties are worded as follows: "it is also understood that we are at liberty to hunt over the unoccupied lands, and to carry on our fisheries as formerly."

accommodate asserted or established domestic Aboriginal fishing rights in part with commercial salmon fishing opportunities, as this helps to help protect the unique, enduring relationship between Aboriginal groups and this fish.

My understanding of the AFS and PSP as being driven primarily by asserted or proven s. 35 rights and the unique relationship which many Aboriginal Nations have to the salmon fisheries is reflected in some of the other judgments in this case. As Justice Bastarache of the Supreme Court of Canada noted in his concurring reasons, the Crown's factum acknowledged "the unique relationship between British Columbia aboriginal communities and the fishery."[32] Justice Bastarache also adopted these findings by the British Columbia Supreme Court:

> The A.F.S. represented an attempt to reconcile this unique relationship with the need for regulation of the fishery by providing for a separately regulated fishery respectful of and sensitive to traditional aboriginal values. This was achieved through the negotiation of such matters as co-management of the fishery, allocation of fish and other matters of importance to aboriginal groups. It also provided an opportunity for communal licencing, which is of particular and unique importance to aboriginal communities.[33]

The characterization of the PSP adopted by the majority of the Supreme Court of Canada in *Kapp* may well influence the public's perception of Aboriginal peoples and their relationship to the salmon fisheries. By relying on s. 15(2) and reducing the PSP to a program designed to provide economic assistance to disadvantaged groups, I fear that the Supreme Court of Canada's decision will inadvertently help perpetuate the stereotype held by many Canadians that First Nations live off of social programs and "handouts."

Had the Court instead recognized the PSP for what it really was—a program designed to provide an accommodation of established and reasonably asserted s. 35 fishing rights and to help reconcile Aboriginal and non-Aboriginal interests in the salmon fishery—*Kapp* would have instead served to affirm that coastal Aboriginal groups have a special, constitutionally protected relationship to the fisheries which is appropriately honoured with differential treatment from other fishing groups. Such a ruling might have also encouraged the DFO to continue to develop new ways to accommodate Aboriginal fishing rights and ensure that Aboriginal peoples can maintain their deep connection with the salmon fisheries and fisheries generally.

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32 This was noted by Justice Bastarache at para. 119.

33 *Kapp*, *supra* note 1, para. 120, citing para. 93 of Chief Justice Brenner's decision.

Missed Opportunity to Clarify the Role of s. 25

The *Kapp* case brought into question the applicability of s. 25 of the *Charter*.[34] Section 25 states:

> The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty *or other rights or freedoms* that pertain to the Aboriginal peoples of Canada including
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> (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
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> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. [emphasis added]

Thus, s. 25 is meant to play some kind of role in ensuring that *Charter* rights do not diminish any s. 35 rights "or other rights or freedoms" of Aboriginal peoples. One unresolved issue is whether a right that is protected under s. 25 is altogether immune from *Charter* challenges, or whether s. 25 instead serves to help conduct *Charter* analysis. In other words, as with s. 15(2), the question is whether s. 25 acts as a shield or as an interpretive aid.

A second unresolved issue is whether a program such as the PSP, which existed pursuant to a federal regulation, could qualify as an "other right or freedom" within the meaning of s. 25, thereby benefitting from the application of that provision.

The majority in *Kapp* opted not to address either issue:

> These issues raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians. In our view, prudence suggests that these issues are best left for resolution on a case-by-case basis as they arise before the Court.[35]

It is unfortunate that the majority did not take this rare opportunity to rule on the function of s. 25. The Court's last opportunity to do so was in the case of *Corbiere v. Canada*[36] in 1999, and it may be many years yet before another case squarely raises this issue.

In his concurring reasons, Bastarache J. agreed with Justice Kirkpatrick at the British Columbia Court of Appeal that s. 25 acts as a shield and immunizes any right or freedom that falls under s. 25's ambit from any *Charter* challenges.[37] It remains to be seen whether the Supreme Court of Canada—which no longer includes Justice Bastarache—ultimately accepts this approach.

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34 For articles that provide analysis on s. 25, see Jane Arbour, "The Protection of Aboriginal Rights within a Human Rights Regime: In Search of an Analytical Framework for section 25 of the Canadian Charter of Rights and Freedoms" (2003) 21 Sup. Ct. L. Rev. (2d) 3-71 and Timothy Dickson, "Section 25 and Intercultural Judgment" (2003) 61 U.T. Fac. L. Rev. 141.

35 *Kapp*, *supra* note 1, para. 65

36 *Corbiere v. Canada*, [1999] 2 S.C.R. 203

37 *Kapp*, *supra* note 1, paras. 108 and 123.

The more regrettable silence was with respect to whether the PSP counts as an "other right or freedom" under s. 25. The majority hints that it does not,[38] but ultimately this question remains unanswered. I have argued above that the PSP constituted a reasonable accommodation of commercial and domestic fishing rights within the meaning of the *Haida* framework. In my view, *Kapp* was an ideal opportunity to confirm that reasonable accommodations fall within the ambit of s. 25.

As the Supreme Court of Canada confirmed in *Kapp*,[39] the Crown has a *constitutional* obligation to consult with Aboriginal groups about their proven and asserted Aboriginal and treaty rights. In some cases, it will also have a *constitutional* obligation to seek to reasonably accommodate those rights. Moreover, accommodation agreements are essential to the Crown-Aboriginal reconciliation process, which is the "fundamental objective of the modern law of aboriginal and treaty rights"[40] and s. 35(1) more generally.[41] For all of these reasons, it makes sense to consider reasonable accommodation agreements as "other rights" within the meaning of s. 25 of the *Charter*.

As a concrete example, the *Tsawwassen First Nation Final Agreement*[42] is a comprehensive contemporary treaty which provides the Tsawwassen First Nations with a modern working relationship with the Crown. It is aimed at resolving fundamental disagreements on the parties' respective ownership and control over certain lands and resources, as well as disagreements on their respective jurisdiction over a number of other matters. In essence, this modern treaty is an accommodation agreement of the most ambitious scale. It recognizes certain fishing rights and identifies those rights as "treaty rights" within the meaning of s. 35. However, the commercial fishing rights of the Tsawwassen Nation are addressed in a side agreement which is not protected by s. 35.[43] In my opinion, commercial fishing rights are critical and reasonable components of the overall accommodation of the s. 35 rights of the Tsaw-

38 *Kapp*, *supra* note 1, para. 63. Justice Bastarache would have held that the PSP was an "other right" within the meaning of s. 25 (paras. 117-121).

39 *Kapp*, *supra* note 1, para. 6.

40 *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 at para. 1. This case confirmed that the Crown has a duty to consult before it makes decisions that could negatively affect (without necessarily infringing) established treaty rights.

41 *Delgamuukw v. British Columbia*, [1997] 1 S.C.R. 1010 at para. 186 (per C.J. Lamer). *Delgamuukw* is Canada's seminal case on the nature of Aboriginal title and the test for proving it.

42 *Tsawwassen First Nation Final Agreement*, which may be found online: <http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/final/tfn_fa.pdf>.

43 In the case of *Tsawwassen*, the Harvest Document assigns Tsawwassen a share of the Fraser River commercial salmon fishery: "0.78% of the Canadian Commercial Total Allowable Catch for Fraser River Sockeye Salmon; 3.27% of the Canadian Commercial Total Allowable Catch for Fraser River Chum Salmon; and 0.78% of the Canadian Commercial Total Allowable Catch for Fraser River Pink Salmon." It should be noted that this right may only be exercised when there are general commercial openings. The Tsawwassen Harvest Document may be found online: <http://www.gov.bc.ca/arr/firstnation/tsawwassen/down/harvest_agreement.pdf>.

wassen Nation and of the Crown's reconciliation process with this Nation. Accordingly, they should be recognized as "other rights" under s. 25.

Missed Opportunity to Encourage Crown Actors to Work toward Reconciliation

Starting with *Delgamuukw v. British Columbia*, the Supreme Court of Canada has been consistently urging the Crown to work with Aboriginal groups to settle their conflicting claims and interests:

> Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1)—'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.' Let us face it, we are all here to stay.[44]

Since that landmark decision, the Supreme Court of Canada has played a consistent role in Aboriginal rights law: it has been encouraging the Crown and Aboriginal groups to reconcile their differences, ideally through modern treaties.[45] The Court has been directing the Crown to take established and legitimately asserted s. 35 rights seriously and to recognize these rights in concrete ways in the course of Crown decision-making. At the same time, the Court has stated that aside from a review for any errors of law, courts should assess the adequacy of the Crown's consultation and accommodation efforts on a standard of "reasonableness," which suggests that they will avoid dictating the outcome of Crown-Aboriginal consultations and negotiations.[46] The Supreme Court of Canada has sent clear messages to Aboriginal groups that they also have obligations in the consultation process,[47] and that they normally have no veto over Crown decisions.[48]

Kapp provided the Court with a natural opportunity to acknowledge the DFO's reconciliation efforts on the fishing rights front. While the Court did not

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44 *Delgamuukw*, *supra* note 41, at para. 186.

45 As the Court stated in *Haida*, *supra* note 24, at para. 20*:*

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and '[i]t is always assumed that the Crown intends to fulfil its promises' (*Badger*, *supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation.

See also para. 25 of *Haida*, *supra* note 24.

46 See para. 62 of *Haida, supra* note 24.

47 "Aboriginal claimants … must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached …" (*Haida*, *supra* note 25, para. 42).

48 *Haida*, *supra* note 24, para. 48; *Mikisew*, *supra* note 40, para. 66.

need to endorse the PSP specifically, it could have reiterated that negotiated settlements are the ideal outcome when differences arise between Aboriginal peoples and the Crown in relation to s. 35 rights, and also encouraged the DFO to remain pro-active and creative in its efforts to reach agreements with Aboriginal groups on how to address their fishing rights claims. The Court could have also confirmed the appropriateness of judicial deference when reviewing an accommodation agreement which the Crown and the relevant Aboriginal group have managed to achieve. Confirming that the Crown enjoys a large degree of latitude in fashioning accommodation agreements would encourage at least some Crown officials to be pro-active and creative in the consultation and accommodation process, which would in turn be beneficial to the process of Crown-Aboriginal reconciliation.

Ultimately though, and despite the attempts of numerous interveners to highlight the accommodation and reconciliation dimensions of the PSP, the equality rights aspect of the *Kapp* case completely overshadowed its Aboriginal rights dimension, and *Kapp* did not build on the *Delgamuukw, Haida,* and *Mikisew* line of cases.

V Conclusion

In *Kapp*, the Supreme Court of Canada chose to treat the Pilot Sales Program as an economic opportunity program designed to benefit First Nations who face financial disadvantage rather than as a program stemming from Aboriginal fishing rights. Perhaps the Court disapproved of the PSP or did not perceive it as a genuine accommodation agreement (that is, one relating to Aboriginal rights, and in keeping with the spirit of *Haida*). Alternatively, the Court may have simply been keen to flesh out the meaning and role of s. 15(2) and therefore chose to focus on that constitutional provision instead.

Whatever its reasons, the Court missed an important opportunity to reaffirm its support for the Crown-Aboriginal reconciliation process. It also missed an opportunity to acknowledge that the domestic fishing rights and entire way of life of coastal British Columbia Aboriginal groups has been severely compromised since Canada asserted control over the fisheries. Further, it is entirely in keeping with the honour of the Crown, if not essential to the reconciliation process, that the Department of Fisheries and Oceans adopt measures designed to reconnect Aboriginal groups in some way to the fisheries that have defined them since time immemorial. More than anything stated in the judgment, it is these gaps in *Kapp* that are striking when the reasons are reviewed from an Aboriginal rights perspective.