

# “Salmon for Peanut Butter”: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights

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*The recent case of R. v. Kapp marks a downward turning point in Aboriginal rights law in Canada. At issue was a federal ameliorative program that established an exclusive Native commercial fishery and whether such a program violated non-Native fishers' guarantee of equality under s. 15(1) of the Charter. Judge Kitchen of the British Columbia Provincial Court found that the Native fishery was not a valid ameliorative program under s. 15(2) of the Charter and was "analogous to racial discrimination." While the decision can be easily criticized on the grounds that the wrong s. 15(1) and s. 15(2) legal tests were applied (or that the correct tests were incorrectly applied), it is Kapp's deafening silence on Aboriginal rights and ss. 25 and 35(1) of the Constitution that requires greater attention and creates alarm. A critical analysis of the legal and political context of the Kapp judgment, and of its unspoken assumptions about the nature of Aboriginal rights and struggles for justice, reveals two key issues that could have helped Judge Kitchen reach a more just resolution—recognition of these issues will also help appellate courts deal with the facts of the case in a more satisfactory way. By addressing (1) the possible modes of interaction between Charter equality rights and Aboriginal rights under the Constitution, and (2) the reluctance of courts and Canadians in general to recognize commercially-based Aboriginal rights, this paper offers an alternative lens through which the dispute in Kapp may be examined and resolved. In so doing, it also attempts to shed light on future problems and challenges in Canadian Aboriginal rights litigation more generally.*

## **I INTRODUCTION**

It is a familiar scenario in Aboriginal rights litigation in Canada. A group of Aboriginal fishermen engages in a "protest" fishery to express their frustration over the way in which governments and courts have dealt with Aboriginal rights claims and natural resource allocation schemes. Typically, the protest fishery is performed openly and publicly, and news of the protest fishery is communicated directly to the relevant enforcement authorities. The protest fishery is, therefore, a deliberate attempt by such fishermen to get themselves arrested and in court in

order to bring a constitutional challenge to the statutory schemes that affect the exercise of their rights.

In the recent case of *R. v. Kapp*,<sup>1</sup> all of the above was true except for one fundamental detail: the fishermen were not Aboriginal. Rather, *Kapp* involved a protest fishery by (mostly) non-Aboriginal fishermen who deliberately fished sockeye salmon in violation of Department of Fisheries and Oceans (“DFO”) regulations in order to voice their opposition to a “pilot sales project” that granted special commercial fishing licences to certain First Nations or Bands who had signed agreements with the DFO. One hundred and forty fishermen were arrested for “unlawfully fishing during a close time” (although the fishery remained open to the Bands participating in the pilot sales project), who then filed a discrimination claim as a defence to the charges.<sup>2</sup> That is, the fishermen alleged that the pilot sales project infringed their constitutional guarantee of equality under s. 15 of the *Canadian Charter of Rights and Freedoms*;<sup>3</sup> they alleged that the pilot sales project and the Aboriginal Fishery Strategy (“AFS”) are “race-based” forms of discrimination that deprive them of their dignity by restricting access to the public fishery.

Judge Kitchen of the British Columbia Provincial Court in Vancouver ruled in favour of the accused and stayed the charges against them. He characterized the pilot sales projects as “offensive,” “analogous to racial discrimination” and therefore unconstitutional.<sup>4</sup> Judge Kitchen found that the pilot sales fishery infringed the non-Aboriginal fishermen’s equality rights under s. 15(1)<sup>5</sup> of the *Charter* and could not be saved under s. 1.<sup>6</sup> He also determined that the pilot sales project was not a valid “ameliorative” or “affirmative” program under s. 15(2).<sup>7</sup> In response, the federal government has apparently cancelled existing

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1. *R. v. Kapp*, [2003] B.C.J. No. 1772 (B.C. Prov. Ct.) [hereinafter *Kapp*].
  2. It should be noted at the outset that there were some Native fishermen amongst the group of protestors who were arrested; these Aboriginal fishermen were not members of Bands participating in the pilot sales project and therefore developed an alliance with the non-Aboriginal fishermen who opposed the project sales. For clarity and consistency, I will often refer in this paper to the protest fishers as “non-Aboriginal fishermen,” especially since the reasons in *Kapp* consistently draw a distinction between the categories “Aboriginal” and “non-Aboriginal”; but it should be remembered that some protest fishers were Native.
  3. *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 [hereinafter *Charter*].
  4. *Kapp*, *supra* note 1 at para. 234.
  5. Section 15(1) 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.”
  6. Section 1 states: “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.”
  7. Section 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.”

pilot sales projects and immediate plans for future projects,<sup>8</sup> an unprecedented step in the face of a lower-court judgment that has enraged and shocked many Aboriginal leaders and fishers.<sup>9</sup> The Crown has filed an appeal in the British Columbia Supreme Court.<sup>10</sup>

The uniqueness of this case partly lies in the way it turns conventional *Charter* litigation on its head: in *Kapp*, a “majority” group (non-Aboriginal fishermen, for the most part) alleges discrimination and disadvantage created by government policies that attempt to improve the socio-economic position of a minority disadvantaged group (Aboriginal fishermen).<sup>11</sup> Of course, this is not the first *Charter* case in which an affirmative action program has been challenged for being unfair or discriminatory, nor is it the first such challenge to programs for Aboriginal peoples.<sup>12</sup> It is also not the first case involving a challenge to the AFS or to the pilot sales projects.<sup>13</sup>

Yet the importance of *Kapp* is also bolstered by its timeliness in terms of the legal and political context of frequent debates in Canada (British Columbia in particular, as well as in the Maritimes) over how (and why) Aboriginal and treaty rights are or should be asserted, exercised, protected, limited, infringed or defined. Recent events in B.C. such as the signing of the Nisga’a Treaty and the

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8. See G. Oakes, “Judge Finds Aboriginals-Only Salmon Fishery ‘Grossly Unfair’” *The Lawyers Weekly* 23:14 (15 August 2003); see also R. Mickleburgh, “Native-Only Salmon Fisheries Cancelled” *Globe and Mail* (30 July 2003) A4 [hereinafter “Native-Only Salmon”]. Mickleburgh also notes that the judgment will likely have an effect on treaty talks in B.C., as many agreements included provisions for increased commercial fishing; see R. Mickleburgh, “Judge Declares Native Fishery Invalid” *Globe and Mail* (29 July 2003) A1 [hereinafter “Native Fishery Invalid”]. See also J. Beatty, “Treaty Will Give Natives Fishing Rights: Liberals Opposed to Separate Fisheries, But Have No Choice In Matter” *Vancouver Sun* (9 January 2003) A9. The federal government has, however, affirmed that *Kapp* only affects the pilot sales projects, and does not affect the overall validity of the AFS itself; see Fisheries and Oceans Canada, “Clarification of the Aboriginal Fisheries Strategy” (2003), online: <[http://www.dfo-mpo.gc.ca/media/infocus/2003/20030801\\_e.htm](http://www.dfo-mpo.gc.ca/media/infocus/2003/20030801_e.htm)> (last modified: 19 January 2004).
  9. See “Native-Only Salmon”, *ibid.*
  10. Fisheries and Oceans Canada, “Statement by the Honourable Robert G. Thibault, Minister of Fisheries and Oceans Canada—Appeal by the Attorney General of Canada in the *Kapp* Case” (19 August 2003), online: <[http://www-comm.pac.dfo-mpo.gc.ca/pages/release/Statement/2003/st001\\_e.htm](http://www-comm.pac.dfo-mpo.gc.ca/pages/release/Statement/2003/st001_e.htm)> (last modified: 26 September 2003).
  11. See J. Simpson, “Trolling for Trouble on Fishery Rights—Again” *Globe and Mail* (30 July 2003), online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20030730.simp30/BNStory/National/?query=aboriginal&disp=e&end>>, who notes that the decision “has turned the Charter into a two-edged sword, arguing that any cohesive group, even if comprised of members of a racial or ethnic majority, can use it as a claim for discrimination.” See also E.M. Iacobucci, “Antidiscrimination and Affirmative Action Policies: Economic Efficiency and the Constitution” (1998) 36 *Osgoode Hall L.J.* 293 at paras. 69-70.
  12. See e.g. *Apsit v. Manitoba (Manitoba Human Rights Commission)*, [1987] M.J. No. 553 (Man. Ct. Q.B.) [hereinafter *Apsit*], rev’d on procedural grounds [1988] M.J. No. 577 (Man. C.A.).
  13. See *Alford v. Canada (A.G.)*, [1999] B.C.J. No. 1937 (B.C. S.C.) [hereinafter *Alford*]; *R. v. Cummins*, [1998] B.C.J. No. 125 (B.C. Prov. Ct.) [hereinafter *Cummins*]; and *R. v. Huovinen* (2000), 188 D.L.R. (4th) 28 (B.C. C.A.) [hereinafter *Huovinen*]. The dynamics and implications of these cases will be discussed in further detail in the next section of this paper.

negative political and popular reaction it received,<sup>14</sup> the election of a provincial government with a hardline conservative stance on Aboriginal rights,<sup>15</sup> and the subsequent referendum on the treaty process in B.C.,<sup>16</sup> all gave clear indications of an imminent and catastrophic legal conflict between Aboriginal and non-Aboriginal peoples on the West Coast, a veritable “showdown” between Aboriginal rights on the one hand, and *Charter* equality rights on the other. Such warnings of a coming storm were reinforced by similar events on the East Coast, with a rash of “lobster wars” and “crab wars.”<sup>17</sup> It was as though over 13 years of Aboriginal rights litigation, driven forward by powerful Supreme Court of Canada (“S.C.C.”) decisions,<sup>18</sup> came to a head in 2003.

In *Kapp*, however, this courtroom “showdown” between Aboriginal rights and other non-Aboriginal rights was not as explosive as it could have been. Judge Kitchen restricted himself to a limited analysis of whether the pilot sales project was a valid “ameliorative program” under s. 15(2) of the *Charter* and, therefore, whether it infringed the claimant fishermen’s s. 15(1) equality rights. The judgment contains hardly any references to Aboriginal rights doctrine or to potential conflicts (and solutions to conflicts) between Aboriginal rights and equality rights.<sup>19</sup>

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14. See D. Sanders, “‘We Intend to Live Here Forever’: A Primer on the Nisga’a Treaty” (1999) 33 U.B.C. L. Rev. 103; see also *Campbell v. British Columbia (A.G.)*, [2000] B.C.J. No. 1524 (B.C. S.C.) [hereinafter *Campbell*], a court challenge to the Nisga’a Treaty initiated by Gordon Campbell, then-leader of the provincial opposition Liberal Party and future premier of the province. The British Columbia Supreme Court dismissed Campbell’s application and ruled that the Nisga’a Treaty was constitutionally valid and did not violate the *Charter*.
  15. Gordon Campbell’s Liberal Party was elected to power in May 2001; part of Campbell’s platform was a promise to hold a referendum on the treaty rights process in B.C. and to help curb the authority of courts to recognize and uphold Aboriginal rights and title claims.
  16. The referendum asked the B.C. public to vote “yes” or “no” on a series of principles and guidelines that Campbell’s government believed should govern the treaty process, most of which tended to restrict and limit the size of Aboriginal treaty rights and ensure that non-Aboriginal concerns had a stronger voice at the negotiation table. Despite widespread protests and boycotts, and despite a very poor voter turnout, over 80 per cent of British Columbians who did vote supported the government’s principles and recommendations. The referendum itself does not seem to have affected the treaty process in any material sense, but an important symbolic political point was made.
  17. The fallout of these “wars” was crystallized in the S.C.C.’s decision in *R. v. Marshall*, [1999] 3 S.C.R. 456 [hereinafter *Marshall 1*], but the conflict was renewed after *R. v. Marshall*, [1999] 3 S.C.R. 533 [hereinafter *Marshall 2*]. See also K. Coates, *The Marshall Decision and Native Rights* (Montreal and Kingston: McGill-Queen’s University Press, 2000) for an excellent review of the decision and the often violent events that transpired before and after it, such as the destruction of Aboriginal fishers’ traps and equipment, and the firing of shots between fishing boats. See also E. Walter, R.M. M’Gonigle & C. McKay, “Fishing Around the Law: The Pacific Management System as a ‘Structural Infringement’ of Aboriginal Rights” (2000) 45 McGill L.J. 263 at para. 1 for a brief discussion of the parallels between East and West Coast disputes.
  18. See, amongst others, in chronological order: *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]; *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*]; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]; *Marshall 1* and 2, *ibid.*; and *Mitchell v. M.N.R.*, [2001] S.C.J. No. 33 [hereinafter *Mitchell*].
  19. In fairness, this is only because the parties themselves did not refer to “Aboriginal rights.” The Bands in question were not exercising a “proven” s. 35(1) Aboriginal right to fish commercially, but were acting under government policy. This background role for “Aboriginal rights” is itself problematic, as we shall see.

What is missing from the case is a critical and contextual analysis of the facts that would begin to address two much more fundamental issues that lie beneath the surface of the facts: (1) the possible modes of interaction between *Charter* equality rights and Aboriginal rights under the *Constitution Act, 1982*;<sup>20</sup> and (2) the reluctance of courts and Canadians to recognize commercially-based Aboriginal rights, which is the real source of the fishermen's protest. If these issues remain unresolved, courts will have missed a golden opportunity to clarify (or at least discuss) what new directions Aboriginal rights in Canada should take. The purpose of this paper is to explore alternative ways of interpreting *Kapp* that take account of these issues and to engage in a critical discussion of the relationships between equality rights and Aboriginal rights.

After a brief discussion of the political and legal context of the *Kapp* case, I will attempt to interpret *Kapp* through two lenses. The first is a "narrow" view, which focuses (as did Judge Kitchen's reasons) solely on s. 15(1) and (2) of the *Charter*. I will argue that this narrow lens fails to address deeper underlying issues that go to the core of the conflict itself, such as the nature of Aboriginal rights claims and their inherent vulnerability in a purely equality rights framework. The second, "wider" lens will attempt to fill the gaps created by the first and address the more fundamental problem of hostility towards commercially-based Aboriginal rights. I will then close with a discussion of how the *Kapp* case reveals the conceptual and practical limits of current Aboriginal rights litigation.

## II THE CONTEXT OF *KAPP*: REGULATION, LITIGATION AND POLITICS

As previously mentioned, the *Kapp* case did not arise in a vacuum. It is important to consider the regulatory context of the AFS and the pilot sales projects, the effect of previous court challenges to the AFS, and the role of recent political debates in B.C.

### Regulation: Public Fisheries, Licences and Aboriginal Fisheries

The protest fishermen in *Kapp* acted in defiance of government regulations that closed the salmon fishery on the Fraser River to all persons except members of three First Nations who held a certain type of fishing licence. The effect of these licences was to permit the licence-holders to engage in commercial, for-profit fishing for a 24-hour period while the fishery was closed to other licence-holders.

The federal power to issue fishing licences of any kind is found in s. 91(12) of the *Constitution Act, 1867*,<sup>21</sup> which specifies that "Sea Coast and Inland Fisheries" is a matter of federal jurisdiction. The recent *Ward* case has solidified

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20. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution*]. Section 35(1) reads: "The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed" [hereinafter s. 35(1)].

21. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

the notion that this power is not confined to protecting the fisheries through conservation efforts. Rather, the fisheries power extends to the preservation of the economic value of the public fishery and it “also embraces commercial and economic interests, [A]boriginal rights and interests, and the public interest in sport and recreation.”<sup>22</sup> This confirmed an earlier decision, *Re Minister of Fisheries & Oceans et al. and Gulf Trollers Association*,<sup>23</sup> in which the Federal Court of Appeal noted that “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 carry out social, cultural or economic goals and policies.”<sup>24</sup> Section 43 of the federal *Fisheries Act*<sup>25</sup> codifies this principle by establishing the authority and discretion of the Governor in Council to make regulations dealing with conservation, fishing practices, the issuance and suspension or cancellation of licences, and the terms and conditions of such licences. Following the principles set out in *Gulf Trollers*, the S.C.C. in *Comeau’s Sea Foods v. Canada (Fisheries and Oceans)*<sup>26</sup> stated that the Minister’s discretion in issuing licences is not limited solely by conservation; the true limits on the Minister’s authority are principles of natural justice such as avoiding arbitrariness and acting in good faith.<sup>27</sup>

The regulations dealing with the licences at issue in *Kapp* are the *Aboriginal Communal Fishing Licence Regulations*.<sup>28</sup> Section 4 of the *ACFLRs* permits the Minister of the DFO to issue “communal” licences to an “Aboriginal organization” to “carry on fishing and related activities.” Although the *ACFLRs* do not specify the content and terms of such licences, it would appear that the DFO’s wide discretion in the management of the public fisheries as a whole is also applicable in the Aboriginal context. Licences issued pursuant to the *ACFLRs* may, in some cases, incorporate commercial fisheries. Indeed, the specific licences issued in 1998 to members of the Musqueam, Tsawassen and Burrard Indian Bands contained the following provision, which was the target of the protest fishermen’s actions in *Kapp*: “Fish harvested under authority of this licence includes fish for food, social and ceremonial purposes. *Sale of fish caught under this licence is permitted.*”<sup>29</sup> This licence was issued pursuant to a 1995 agreement between the Bands and the DFO.<sup>30</sup>

The *ACFLRs*, the agreements they foster and the licences issued as a result, including the ones challenged in *Kapp*, are only components of a larger AFS policy adopted by the DFO in 1992. The AFS was adopted as the official DFO policy with respect to Aboriginal fishing rights in response to the 1990 *Sparrow* decision, which established an Aboriginal right to fish for “food, social and

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22. *Ward v. Canada*, [2002] 1 S.C.R. 569 at paras. 34 and 43 [hereinafter *Ward*].

23. (1986), 32 D.L.R. (4th) 737 (F.C.A.) [hereinafter *Gulf Trollers*].

24. *Ibid.* at para. 16.

25. R.S.C. 1985, c. F-14.

26. [1997] 1 S.C.R. 12 [hereinafter *Comeau*].

27. *Ibid.* at para. 36.

28. *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 [hereinafter *ACFLRs*].

29. Quoted in *Kapp*, *supra* note 1 at para. 55 [emphasis added].

30. *Ibid.* at para. 56.

ceremonial purposes” for members of the Musqueam Indian Band.<sup>31</sup> The AFS was intended to “ensure stable fishery management”<sup>32</sup> and to govern relations between Aboriginal groups and the Crown where the DFO manages the fishery in question, and where land claims settlements or litigation have not already resolved the matter. Two of the main goals of the AFS were to provide a regulatory framework for the management of Aboriginal fishing and an opportunity to promote the economic development and self-sufficiency of Aboriginal communities.<sup>33</sup> It was also hoped that the AFS would adequately respond to the S.C.C.’s concerns in *Sparrow* about the need for Aboriginal rights disputes to be resolved by negotiation, rather than litigation, and about the Crown’s overall fiduciary duty with respect to Aboriginal peoples.<sup>34</sup>

The AFS is, in effect, the policy tool that permits the issuance of commercial licences to Aboriginal groups that resulted in the “exclusive commercial fishery” at issue in *Kapp*. A DFO publication issued at the time of the creation of the AFS policy confirms that the DFO notion of a “stable” fishery includes mechanisms by which the federal government can exercise its discretion to increase economic opportunities in Canadian fisheries for Aboriginal people. The document states that Bands signing agreements with the DFO “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.”<sup>35</sup> Similarly, the current DFO website, which lays out the components and history of the AFS, specifies that “[f]isheries agreements negotiated under the AFS could contain ... a commitment to provide commercial fishing licences and/or other economic development opportunities.”<sup>36</sup> Towards that goal, the DFO, through the AFS, instituted a series of “pilot sales projects,” which encouraged certain Bands to negotiate agreements that would allow them to fish commercially, even on certain occasions when a fishery was closed to other commercial fishers.<sup>37</sup> The licences issued to the three Bands in *Kapp* constituted one such “pilot sales project.”

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31. See *Sparrow*, *supra* note 18.

32. Fisheries and Oceans Canada, “Aboriginal Fishery Strategy” online: <[http://www.dfo-mpo.gc.ca/communic/fish\\_man/afs\\_e.htm](http://www.dfo-mpo.gc.ca/communic/fish_man/afs_e.htm)> (last modified: 17 December 2003) [hereinafter “Fishery Strategy”]; see also Standing Committee on Fisheries and Oceans, *The 2001 Fraser River Salmon Fishery: Report of the Standing Committee on Fisheries and Oceans* (House of Commons, June 2003), online: <<http://www.parl.gc.ca/InfoComDoc/37/2/FOPO/Studies/Reports/fopor06/03-cov2-e.htm>> [hereinafter *Committee Report*] at 7.

33. “Fishery Strategy”, *ibid.*

34. *Ibid.*; see also *Kapp*, *supra* note 1 at para. 35.

35. Quoted in *Kapp*, *ibid.* at para. 45.

36. “Fishery Strategy”, *supra* note 32.

37. There is evidence to suggest that the pilot sales projects, though initiated through the AFS, were actually a method of regulating and controlling a problem of illegal sales and poaching of salmon by Aboriginal groups; see *Kapp*, *supra* note 1 at para. 47 and *Committee Report*, *supra* note 32 at 7. As will be discussed further on in this paper, this characterization of “poaching” as the problem and the pilot sales projects as the solution obfuscates some of the deeper underlying issues of the conflict—namely, the reluctance and hostility towards recognizing any kind of Aboriginal right involving commercial trade.



The DFO appears to have intended the pilot sales projects to be temporary and experimental mechanisms for increasing economic opportunities and participation in Canadian commercial fisheries for certain Aboriginal groups, thereby alleviating some of the socio-economic difficulties and disadvantages such communities faced in the fishing industry. As we shall see, it is this “ameliorative” aspect of the pilot sales projects (as well as their temporary nature) that became the focus of the dispute in *Kapp*.

### **Litigation: Previous Court Challenges to the AFS**

As previously discussed, *Kapp* is not the first case to challenge the pilot sales projects. In *Alford v. Canada (A.G.)*,<sup>38</sup> protest fishermen sought a declaration that the AFS was unconstitutional. The Crown’s motion to strike the claim was dismissed and its appeal from that decision was also dismissed.<sup>39</sup> A further Crown motion to seek particulars was partially granted,<sup>40</sup> but nothing has occurred since.

In *R. v. Cummins*,<sup>41</sup> a protest fisherman (John Cummins, a federal Member of Parliament) was convicted of the same offence as the fishermen in *Kapp*, but Judge Thomas of the B.C. Provincial Court ruled that the exclusive Aboriginal commercial licences were “not lawful” and the fishery should, therefore, have been closed to everyone, if an official “close time” was indeed in place. Until *Kapp*, then, *Cummins* represented the strongest judicial condemnation of the pilot sales projects.

In *R. v. Huovinen*,<sup>42</sup> more non-Aboriginal protest fishermen were arrested for fishing during a close time in which certain Native Bands were allowed to fish; they alleged this differential treatment was an “abuse of process” (but not “discrimination”). Judge Thomas this time stayed the proceedings against the fishermen,<sup>43</sup> but an appeal was allowed by the B.C. Supreme Court,<sup>44</sup> and the judicial stay of proceedings was overturned. This was upheld upon further appeal to the British Columbia Court of Appeal;<sup>45</sup> the commercial licences issued to certain Bands were held to be lawful. *Huovinen* thus represents an important authority in support of the legal validity of the *ACFLRs* and the pilot sales projects. It should be noted, however, that *Kapp* was the first legal challenge to the pilot sales projects and the AFS that involved a *Charter* claim. All the above-mentioned cases dealt with the AFS using other doctrines, such as abuse of process, arbitrariness and other administrative law principles. This helps explain why *Huovinen* could not be a binding authority on Judge Kitchen in *Kapp*.

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38. [1997] B.C.J. No. 251 (B.C. S.C.).

39. [1998] B.C.J. No. 2965 (B.C. C.A.).

40. See *Alford*, *supra* note 13.

41. See *Cummins*, *supra* note 13.

42. (1999), 179 D.L.R. (4th) 567 (B.C. S.C.) [hereinafter *Huovinen 1*].

43. Unreported decision mentioned and quoted in the B.C. S.C. decision (see *ibid.*).

44. See *Huovinen 1*, *supra* note 42.

45. See *Huovinen*, *supra* note 13.

Finally, just weeks before the *Kapp* decision, *R. v. Anderson*<sup>46</sup> established many of the key principles and set the tone that Judge Kitchen would later adopt in *Kapp*. In *Anderson*, a group of protest fishermen were convicted of fishing during a close time in different waters, the Johnstone Strait, while certain Bands were allowed to fish commercially pursuant to a pilot sales project. The protest fishermen did not allege a violation of their s. 15(1) *Charter* equality rights, but instead argued that the fishery should not have been closed at all, to anyone. The non-Aboriginal protest fishermen were convicted. In his reasons for sentence however, Judge Saunderson of the B.C. Provincial Court decided that, “in the circumstances,” the protest fishermen were entitled to absolute discharges. He called the pilot sales projects a misguided example of “political correctness” which was really “a lack of courage” on the part of the DFO to “carry out its mandate”; this resulted in a “loss of moral authority” sufficient to order absolute discharges.<sup>47</sup> Judge Saunderson expressed concern at the apparent unfairness created by the pilot sales commercial licences, which effectively allowed a “race-based” fishery. It is easy to see how the tone of this decision and the rhetoric it employed (as in *Cummins*) set the stage for Judge Kitchen’s ruling in *Kapp*.

### **Politics: Racialization of the Rights Debate and Hostility Towards Natives**

In addition to these cases, recent political developments in British Columbia also likely contributed to the hostility and racial tension found throughout the *Kapp* dispute and, ultimately, in Judge Kitchen’s decision. As discussed in the introduction of this paper, the signing of the Nisga’a Treaty, the court challenge to the Treaty, the election of Gordon Campbell’s Liberal Party and the referendum on the treaty process seem to have either triggered (or may simply reflect) a strong anti-Aboriginal rights position amongst many members of the B.C. public. The fear of a “race-based” rights system and government was now at the forefront of all political and popular discussions on the topic of Aboriginal cultures and rights in British Columbia.

This growing “racialization” of the Aboriginal rights debate inevitably found its way into B.C. courts as judges struggled to analyze the issues raised by Aboriginal rights disputes in a racially-charged climate in which allegations of a “race-based rights system” or a “reverse-racism backlash” were frequent.<sup>48</sup> Nowhere was this more evident than in disputes surrounding the AFS. In the aforementioned *Anderson* case, Judge Saunderson made a point of characterizing

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46. [2003] B.C.J. No. 1408 (B.C. Prov. Ct.) [hereinafter *Anderson*].

47. *Ibid.* at para. 13.

48. See *Alford*, *supra* note 13; *Cummins*, *supra* note 13; *Huovinen*, *supra* note 13; see also T. Fiss & J. Carpay, “Tax Immunity Overturned” *National Post* (17 June 2003), online: National Post <<http://www.taxpayer.com/opinioneditorials/nationalpost/June17-03.htm>> as well as J.R. Kesselman, “Aboriginal Taxation of Non-Aboriginal Residents: Representation, Discrimination, and Accountability in the Context of First Nations Autonomy” (2000) 48:5 *Can. Tax J.* 1525, who all discuss the rhetoric of racism in recent court decisions dealing with Aboriginal groups claiming an Aboriginal right to tax exemptions or tax-free status.

the protest fishers’ actions as white “civil disobedience” in the face of state action that drew distinctions “based on race.”<sup>49</sup>

In *Kapp*, the racial divide was expressed in a more subtle fashion. Judge Kitchen, in making “non-membership” in the three Bands who held commercial licences an “analogous ground” of discrimination,<sup>50</sup> indicated that this debate need not be about race. This is bolstered by his insistence that this form of discrimination is “analogous” to racism or “quasi” racism. It is also bolstered by the evidence given at trial by non-white protest fishers, including Vietnamese and Japanese fishermen, and, perhaps not surprisingly, by Aboriginal fishers who were not members of the three Bands and who believed the sales projects to be discriminatory. Such testimony from Native fishermen was clearly calculated to bring some legitimacy to the non-Aboriginal protest fishers’ claims and, presumably, to ward off allegations of racism. And yet, Judge Kitchen reintroduced the racial aspect of the debate by referring to the discriminated group as (potentially) all Canadians who lack a “bloodline connection”<sup>51</sup> to the Musqueam, Burrard or Tsawassen Bands, and by ultimately referring to the pilot sales project as a clear and unacceptable example of “racial hierarchy”<sup>52</sup> and of “racial discrimination.”<sup>53</sup>

The racial undertones of the case were also shaped by the participation of the B.C. Fisheries Survival Coalition (“Coalition”), a group of non-Aboriginal fishers who opposed the “preferential treatment” of Native fishers by the DFO, and who helped finance and direct the litigation in *Kapp* and in many of the other court challenges to the AFS. A brief review of the Coalition’s statements reveals the extent to which it sees the debate as, at least in part, a racial one. Phil Eidsvik, spokesman for the Coalition, has made a number of such comments, calling the AFS “pure racial segregation”<sup>54</sup> and describing the *Kapp* decision as “an end to race-based commercial fisheries.”<sup>55</sup>

The Coalition not only had a strong presence in court and in the media coverage of the *Kapp* case, it also played an important role in Parliamentary debates within the House of Commons Standing Committee on Fisheries and Oceans (“Committee”). A Committee Report was released just weeks before *Kapp*, which considered the main problems of the Fraser River salmon fishery, one of which was identified as the pilot sales projects under the AFS. The Committee tended to adopt the Coalition’s statistics on the number of salmon caught by Native fishers as an unbiased data source equivalent (and sometimes preferable) to the government’s data. The Committee also tended to rely solely on the Coalition’s witnesses to validate the claim of discrimination. Although it

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49. See *Anderson*, *supra* note 46.

50. *Kapp*, *supra* note 1 at para. 179.

51. See *e.g. ibid.* at paras. 85, 175 and 176.

52. See *ibid.* at para. 164.

53. See *ibid.* at para. 235.

54. Quoted in “Native Fishery Invalid”, *supra* note 8.

55. P. Eidsvik, “BC Fisheries Survival Coalition” *The Steelheader Salmon & Trout News* (August 2003), online: <<http://888006.sytes.net:7891/bcfishsrveltn.html>>.

did not explicitly characterize the pilot sales project and the AFS as instituting a racial hierarchy, the Committee did draw the following conclusion:

[The sales project] has not protected the stability and profitability of the commercial fisheries; instead, it has added another layer of complexity ... the livelihoods of Canadians involved in the commercial salmon fishery have been threatened despite the availability of a substantial resource that could have been harvested in a more equitable way.<sup>56</sup>

The Committee recommended a “single commercial fishery for all Canadians,” and recommended that the pilot sales projects be brought to an end.

Although the Report was not discussed by Judge Kitchen in *Kapp*, some journalists commented on the link between judicial and political characterizations of Aboriginal rights disputes.<sup>57</sup> In general, mainstream media reactions to the *Kapp* decision focused on the protest fishermen’s successful “struggle for justice” and tended to implicitly support, through their extensive quoting of Judge Kitchen’s reasons, the view that this decision marks an end to “race-based” fishing rights,<sup>58</sup> making it hard for Canadians to form an unbiased opinion.

### III THE “NARROW” LENS: LIMITS OF EQUALITY RIGHTS DISCOURSE

Having explored the context of *Kapp*, I will now examine the decision through a “narrow” lens, that is, a view based purely on the issues raised in the parties’ arguments and in the judge’s ruling. Ultimately, I argue that these issues, while essential ingredients of the dispute, do nothing to resolve the underlying conflicts and problems at its core.

#### **Ameliorative Programs, Analogous Grounds and s. 15 of the Charter**

The central issue in *Kapp* was whether the protest fishermen’s equality rights under s. 15(1) of the *Charter* were infringed as a result of the AFS pilot sales projects. In answering this question in the affirmative, Judge Kitchen had to consider whether the pilot sales project was a proper and constitutionally protected “affirmative action” policy or “ameliorative program,” which would therefore not violate s. 15(1). The conclusion that such programs do not violate s.

56. *Committee Report*, *supra* note 32 at 32.

57. See *e.g.* “Native-Only Salmon”, *supra* note 8.

58. See, for example, a string of articles in *The Globe and Mail* in the days following the decision: T. Theodore, “Native-Only Fishery Ruled Unconstitutional” *Globe and Mail* (28 July 2003); “Native-Only Salmon” and “Native Fishery Invalid”, *supra* note 8; G. Richards, “Ruling Gives Hope to Third Generation Fisherman” *Globe and Mail* (30 July 2003). The one exception may be J. Richards, “A Can of Worms” *Globe and Mail* (31 July 2003) A19. At the other end of the spectrum is E. Levant, “Apartheid in B.C.: Race-Based Fishing Law Struck Down By Judge” *The Calgary Sun* (4 August 2003), who called the pilot sales projects “race-based fishing privileges” and argued that the AFS “is just as dirty and base as slavery or South African apartheid.”

15(1) of the *Charter* is supported and even mandated by two principles. The first is s. 15(2) of the *Charter*, which “precludes” s. 15(1) claims in the case of a valid program that “has as its object the amelioration of conditions of disadvantaged individuals or groups.” Despite the wording of s. 15(2), which might support its reading as a “shield” against s. 15(1),<sup>59</sup> the S.C.C. has instead determined that s. 15(2) should be used only as an interpretive guide to s. 15(1).<sup>60</sup> That is, one of the factors involved in the discrimination analysis is whether the law or policy was designed to help improve the circumstances of disadvantaged groups or persons. Affirmative action is, therefore, a means of promoting equality where equal treatment would result in injustice. This reasoning is supported by another principle which deems ameliorative programs to be non-discriminatory: the third “contextual factor” in the *Law*<sup>61</sup> test for discrimination. This third factor requires a consideration of “the ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group.”<sup>62</sup>

In *Kapp*, after considering s. 15(2) on its own, and in conjunction with s. 15(1) and the contextual factors under the *Law* test, Judge Kitchen decided that the pilot sales project could not be considered a valid ameliorative program and was therefore open to an s. 15(1) claim. After considering the other contextual factors under *Law*, he then found that the pilot sales project violated the protest fishermen’s right to equality under the *Charter*, notwithstanding its stated ameliorative purpose or effect.

It is possible to criticize *Kapp* based either on Judge Kitchen’s analysis of s. 15(1), s. 15(2) or the *Law* test. Yet a thorough review of the case and its possible distortions or misapplications of the relevant legal doctrines is beyond the scope of this paper and would undermine the wider thesis offered here—that is, that such a case cannot effectively be resolved using only a purely “equality rights” perspective that ignores deeper issues such as the interplay between equality rights and Aboriginal rights, and the judicial and political reluctance to recognize commercial rights.

Nonetheless, two brief points concerning Judge Kitchen’s s. 15 analysis are relevant to this paper and should be discussed in order to clarify the limitations of an “equality” approach. First, Judge Kitchen asserted that ameliorative programs should not have any other objective, a position at odds with many judicial and academic assessments of affirmative action programs.<sup>63</sup> Here, although the sales project was created to reduce the disadvantages of certain

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59. See e.g. M.A. Drumbl & J.D.R. Craig, “Affirmative Action in Question: A Coherent Theory for Section 15(2)” (1997) 4 Rev. Const. Studies 80; see also the discussion on this topic in Iacobucci, *supra* note 11 at paras. 75-76.

60. See *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 [hereinafter *Lovelace*] at paras. 105-108.

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

62. *Ibid.* at paras. 72-73.

63. See e.g. M. Peirce, “A Progressive Interpretation of Subsection 15(2) of the Charter” (1993) 57 Sask. L. Rev. 263, who argues that “the legitimacy of affirmative action as an egalitarian device is not somehow compromised simply because ameliorating conditions of the disadvantaged was not the dominant purpose of a provision,” so long as the scheme as a whole has an ameliorative purpose. See also *Lovelace*, *supra* note 60, and A.I. Anand, “Visible Minorities in the Multi-Racial State: When are Preferential Policies Justifiable?” (1998) 21 Dal. L.J. 92 for a review of the relevant case law.

Aboriginal communities, there was some evidence to suggest that it was also created to curb poaching by Native fishermen.<sup>64</sup> While the dangers of “colourable” objectives must be avoided, the mere mention of “poaching” should not be enough to derail the objective of the legislation.<sup>65</sup> Furthermore, as discussed in greater detail below, the very act of “poaching” is a political assertion of the right to fish—Judge Kitchen’s findings on this issue thus have more to do with hostility towards “commercial” rights than with the proper test for ameliorative programs.

Second, Judge Kitchen seems to have created a new test for determining what are ameliorative programs. He implicitly asserts that the disadvantage suffered by the target group must be of a certain type or extent to qualify for “amelioration.” Although Judge Kitchen took notice of the “disadvantaged circumstances of Aboriginals generally in Canadian society,”<sup>66</sup> he considered the situation of “these particular bands” and concluded (acknowledging that the evidence was not indisputable) that “it is unlikely that financial disadvantage is one of their problems,”<sup>67</sup> based on the limited successes the Bands have enjoyed compared to neighbouring Bands. This reasoning potentially restricts or deters future ameliorative programs. Judge Kitchen also insisted that there be an explicit link or “rational connection” between the type of the disadvantage and the subject matter of the program.<sup>68</sup> In this case, the pilot sales project, according to Judge Kitchen, “produces only financial rewards”;<sup>69</sup> because financial disadvantage is not part of the “disadvantaged circumstances” of the three Bands in question, there is a mismatch of purpose and means. Furthermore, Judge Kitchen implied that ameliorative programs designed for Aboriginal peoples must be of a communal, and not individual, nature in order to comply with the “communal” nature of Aboriginal rights.<sup>70</sup> While this is an interesting theory, it is not and should not be part of the test for establishing the validity of ameliorative programs, as many other ameliorative schemes are available.<sup>71</sup>

These observations introduce the notion that an “equality rights” perspective cannot adequately resolve the underlying conflicts at the heart of *Kapp* and other similar cases. Simply put, the *Law* contextual factors and s. 15(2) of the *Charter* do not provide enough protection for Aboriginal rights when threatened by s. 15(1) claims.

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64. See *Kapp*, *supra* note 1 at paras. 47, 186 and 191; see also *Committee Report*, *supra* note 32 at 7.

65. See Peirce, *supra* note 63.

66. *Kapp*, *supra* note 1 at para. 193.

67. *Ibid.* at para. 194.

68. *Ibid.* at para. 202.

69. *Ibid.* at para. 200.

70. *Ibid.*

71. See *e.g.* Anand, *supra* note 63; see also Peirce, *supra* note 63, who argues that “there is no support for this conclusion in the wording of s. 15(2) .... It is therefore impossible to read s. 15(2) as requiring a connection between the cause of a group’s disadvantage and the means for ameliorating their condition. There is no basis in s. 15(2) for requiring a relationship between a group’s disadvantage, regardless of its cause, and the amelioration of their condition.” It should be noted that Judge Kitchen’s ill-conceived argument was also employed by Simonsen J. in striking down an affirmative action program designed to benefit Manitoba First Nations in *Apsit*, *supra* note 12, a decision later reversed on procedural grounds in the Manitoba Court of Appeal.

### Substantive Equality and the Limits of Equality Rights Discourse

A purely “equality rights” perspective on *Kapp* would likely note that Judge Kitchen failed to interpret and apply sections 15(1) and (2) of the *Charter* in a manner consistent with the theory of “substantive equality,” now arguably the governing principle behind contemporary equality rights theory in Canada.<sup>72</sup> Substantive equality differs from “formal equality” in that the former acknowledges (and even requires) that in order to achieve “true” justice and equality for all persons in a society, unequal treatment is sometimes necessary; difference must be accounted for and respected, and even reinforced through differential treatment where it produces a more equitable result.<sup>73</sup>

The recognition that an ameliorative program is not “discriminatory” reinforces the principle of substantive equality. This does not, of course, imply that all ameliorative programs that seek to remedy or improve the disadvantages suffered by certain groups or individuals will always be non-discriminatory. According to Sharpe and Swinton, when examining ameliorative programs through the lens of s. 15(2), judges will still undertake “scrutiny of such special programs to determine that the group benefited is one that has suffered disadvantage and that the means chosen to redress this disadvantage do not put an undue burden on those excluded.”<sup>74</sup>

There are, however, a number of limits to the notion of substantive equality and equality rights discourse that make the “narrow” lens of *Kapp* and its equally “narrow” critique inappropriate and ineffective in an Aboriginal context. First, despite its claims to the contrary, substantive equality is mired in an unhelpful focus on individuals, rather than groups, especially in its defence of affirmative action—a claim normally made about formal equality. Formal equality does indeed focus on the individual’s right to freedom from discrimination and arbitrary distinctions; substantive equality proponents have correctly pointed out the inadequacies of such a perspective:

[A]ffirmative action provisions give clear direction to adjudicators that if the source of harm to the historically advantaged individual is a special law or program designed to remedy historical and social disadvantage, then it should not violate

72. See e.g. D. Greschner, “Does *Law* Advance the Cause of Equality?” (2001) 27 *Queen’s L.J.* 299; D. Greschner, “The Purpose of Canadian Equality Rights” (2002) 6 *Rev. Constit. Studies* 291 [hereinafter “Purpose of Equality”]; L.E. Trakman, “Substantive Equality in Constitutional Jurisprudence: Meaning Within Meaning” (1994) 7 *Can. J. L. & Jur.* 27; D. Réaume, “Of Pigeonholes and Principles: A Reconsideration of Discrimination Law” (2002) 40 *Osgoode Hall L.J.* 113; C. L’Heureux-Dubé, “Lecture: Conversations on Equality” (1999) 26 *Man. L.J.* 273; P. Hughes, “Substantive Equality, Social Ordering and Constitutional Recognition” (1999) 22 *Dal. L.J.* 5; and S. Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 *Can. Bar Rev.* 299.

73. See Hughes, *ibid.* and L’Heureux-Dubé, *ibid.*

74. R.J. Sharpe & K.E. Swinton, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 1998); it should be remembered, however, that in the subsequent *Lovelace* case, *supra* note 60, the S.C.C. clearly indicated its preference to deal with ameliorative programs under s. 15(1), not s. 15(2). The S.C.C. did not, however, clarify the extent of acceptable and appropriate judicial intervention and discretion in striking down or upholding ameliorative programs created by the state to benefit disadvantaged groups.

equality guarantees since equality for socially disadvantaged groups should take precedence over the maintenance of formal equality between individuals.<sup>75</sup>

However, some of the claims made by substantive equality proponents also tend to focus exclusively on the rights and concerns of the individual as a member of a group, rather than on the needs of the group as a whole. The basic premise of affirmative action as a conceptual tool for substantive equality, for example, is that individuals who suffer from disadvantage rooted in historical discriminatory practices are entitled to differential treatment from the state in order to remedy such disadvantage, on an individual level. The needs of the group to which the individual belongs, and its relations with other groups (advantaged and disadvantaged),<sup>76</sup> disappear from the analysis.<sup>77</sup>

Overall, a narrow equality rights perspective focused on “individuals” misses the mark in that it misinterprets Aboriginal struggles for justice, which represent collective claims,<sup>78</sup> as differential treatment based on, amongst other things, “difference” itself.<sup>79</sup> Trakman’s notion of “equality as fairness,” as an alternative to formal equality and to “amelioration,” makes a similar point. What

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75. C. Sheppard, *Study Paper on Litigating the Relationship Between Equity and Equality* (Toronto: Ontario Law Reform Commission, 1993) at 46, quoted in Iacobucci, *supra* note 11 at para. 84.
76. See e.g. Peirce, *supra* note 63 at Part IV, which notes that the fact that affirmative action schemes technically violate the principle of equality in that they benefit one segment of society to the exclusion of all others “does not refer to the relationship between the disadvantaged group to which an affirmative action program applies and the advantaged group that is excluded from the program.” That relationship may, for example, indicate that there are other disadvantaged groups that have been shut out of the affirmative action program, which would be the real concern with the program, rather than its exclusion of an advantaged group.
77. There are some exceptions: see Trakman, *supra* note 72 at para. 5 where he writes, “substantive equality should be defined relationally, that is, according to the nature of the relationship between the interest groups being compared ... equality should encompass the interests of each group being compared, not one above the other.” See also “Purpose of Equality”, *supra* note 72 where the author states that “the primary purpose of Canadian equality rights is to protect the individual human interest in belonging, simultaneously, to several communities” (at 292) and “distinctions violate equality rights when they are used to demarcate groups as outsiders” (at 321).
78. See e.g. Williamson J.’s comments in *Campbell*, *supra* note 14 at para. 155: “one must keep in mind that the communal nature of [A]boriginal rights is on the face of it at odds with the European/North American concept of individual rights articulated in the *Charter*.” One can therefore see how, as discussed above, Judge Kitchen felt justified in establishing an s. 15(2) test that ensured the benefits of an ameliorative program for Aboriginal peoples must necessarily be “communal” in nature in order to respond to the communal nature of Aboriginal rights.
79. See P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [hereinafter *Indigenous Difference*], who argues that Native rights are justified by the prior occupancy and sovereignty of First Nations, by the signing of treaties and by “cultural difference” itself. See also J. Borrows, “Uncertain Citizens: Aboriginal Peoples and the Supreme Court” (2001) 80 Can. Bar Rev. 15; L.N. Chartrand, “Re-Conceptualizing Equality: A Place for Indigenous Political Identity” (2001) 19 Windsor Y.B. Access Just. 243; K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) 8:2 *Constit. Forum* 33; P. Monture-Angus, *Journeying Forward: Dreaming First Nations’ Independence* (Halifax: Fernwood Publishing, 1999); B. Slatery, “Understanding Aboriginal Rights” (1987), 66 Can. Bar Rev. 727; K. Wilkins, “But We Need the Eggs: The Royal Commission, the *Charter of Rights* and the Inherent Right of Aboriginal Self-Government” (1999) 49 U.T.L.J. 53 [hereinafter “We Need the Eggs”]; K. Wilkins, “Take Your Time and Do It Right: *Delgamuukw*, Self-Government Rights and the Pragmatics of Advocacy” (2000) 27 Man. L.J. 241 [hereinafter “Do It Right”].



is “fair,” Trakman argues, should be “premised upon the *ex posteriori* assumption that a special condition of treatment is justified, *inter alia*, in light of the ethnic, cultural and racial identity of the group affected. That treatment takes account of, but is not limited to, the disadvantaged status historically accorded that group.”<sup>80</sup>

This perspective introduces the second major concern with equality rights discourse in an Aboriginal context: substantive equality, and all equality rights theory, is backward-looking and fails to incorporate socio-economic changes in group relationships. According to Iacobucci, s. 15(2) of the *Charter* “looks to the past in determining the optimal approach to future equality; if there have been historical differences such that a race may face disadvantage ... affirmative action programs may be required.”<sup>81</sup> This focus on “historical disadvantage” undermines the goal of substantive equality over time, as it creates an unstable foundation for differential treatment. Trakman encapsulates this problem in his discussion of ameliorative programs as “rectificatory justice”:

[T]o arrive at equality [through rectificatory justice] is to rectify the imbalance between those who were treated unequally historically and would continue to be so treated, but for the rectified status now accorded them. In effect, the purpose of rectificatory justice is to restore a position of equality to and for all: thereafter, the need for rectificatory justice is deemed no longer to be necessary. Once restored to a status of equality with advantaged groups, the disempowered—no longer being disempowered—lose their special status.<sup>82</sup>

This analysis reveals both the danger of characterizing all government programs for Aboriginal peoples as purely “ameliorative” and the correlative danger of only using ameliorative programs to protect Aboriginal peoples or interests. Equality rights discourse (whether expressed in governments dealing with Aboriginal peoples and claims only through ameliorative programs, or in courts’ characterization of all government programs aimed at Aboriginal peoples as purely ameliorative and nothing more) misinterprets the nature of Aboriginal rights struggles and makes them dependent on the nebulous and easily mutable notion of “historical disadvantage.” If such disadvantage is deemed to be no longer present or is not sufficiently related to a historical form of inequality, then there is no longer a need for government action to remedy the disadvantage.<sup>83</sup>

This has tremendous consequences for the commercial rights of Aboriginal peoples, as we shall see. As Native groups begin to overcome the social and economic disadvantages historically thrust upon them by public and private acts of discrimination and injustice, the disadvantage targeted by ameliorative programs begins to erode. This erosion of the disadvantage in turn threatens to

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80. Trakman, *supra* note 72 at para. 10.

81. Iacobucci, *supra* note 11 at para. 83; see also the discussion of the “rectification principle” that “looks to the past to determine whether a person or group suffered an injustice that demands compensation,” in Anand, *supra* note 63 at Part I.

82. Trakman, *supra* note 72 at para. 9.

83. See Anand, *supra* note 63 at Part I.3.b and at Part IV.1.c, where she argues that “past injustices and current disadvantages render preferential policies morally justifiable.”

undermine the very justification for any differential treatment. A narrow equality rights perspective is not up to the task of protecting Aboriginal rights and properly addressing and responding to Aboriginal claims for justice and fairness. It is therefore necessary to develop a more complete answer to situations like the one in *Kapp*, an answer that fully accounts for the true nature of Aboriginal rights and justifications for their constitutional protection.

#### IV THE “SPARROW” LENS: RECONCILIATION AND COMMERCIAL RIGHTS

The problem in arguing for a wider, “Aboriginal rights” perspective is that such a perspective lies outside the current vision of Aboriginal rights theory espoused by the S.C.C., which only permits the assertion of an Aboriginal right (through its proof in court) in situations where the right is being infringed or denied by government action. That is, current Aboriginal rights doctrine does not permit an Aboriginal group to assert and/or prove an Aboriginal right in anticipating and preventing such infringement.<sup>84</sup> As discussed above, the three Bands who held commercial fishing licences in *Kapp* were not exercising a “proven” Aboriginal right, in the sense of a right asserted in court and affirmed by the judiciary, based on proven historical and testimonial evidence. They were instead acting pursuant to licences granted to them through favourable government policies. It is therefore doctrinally difficult to examine *Kapp* through an “Aboriginal rights” perspective, since no actual Aboriginal right was argued or contested in *Kapp*.

Nonetheless, it is submitted that “Aboriginal rights” do indeed lie in the background of this case or under the surface of its murky waters. This contention is bolstered by three sets of related reasons.

First, as previously discussed, the pilot sales projects at issue in *Kapp* were part of the overall AFS policy, a government plan enacted in response to the *Sparrow* decision and to the prospect of future claims for existing Aboriginal rights, including commercial ones.<sup>85</sup> The AFS and the pilot sales project could therefore be considered part of a more “proactive” approach by the federal government to resolve Aboriginal rights disputes before they officially arise in court. The AFS would also be a response to the S.C.C.’s clear preference for negotiated settlements rather than long, expensive and divisive litigation, as expressed in *Sparrow*<sup>86</sup> and later confirmed in *Delgamuukw*.<sup>87</sup> The pilot sales

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84. It is possible, however, that the government’s “duty to consult” Aboriginal groups when *contemplating* state actions that may infringe likely Aboriginal rights or claims to land (though unproven in court), may provide an exception to this principle; this will be discussed in further detail towards the end of this paper.

85. See Walter *et al.*, *supra* note 17 at para. 75; see also *Kapp*, *supra* note 1 at paras. 44-45; see also *Committee Report*, *supra* note 32 at 7.

86. See *Sparrow*, *supra* note 18 at para. 1105, where the Court affirms that “Section 35(1), at the least, provides a solid constitutional base upon which subsequent negotiations can take place.”

87. See *Delgamuukw*, *supra* note 18 at para. 1123, where the Court again suggests that “it is through negotiated settlements” that the objectives of s. 35(1) should be achieved.

projects in *Kapp* were thus considered to be part of an overall government strategy and policy with respect to Aboriginal rights in general.<sup>88</sup>

Second, the testimony and comments of many Aboriginal fishermen and community leaders in debates over *Kapp* and over the management of the salmon fishery in general reveal the extent to which they too saw the pilot sales projects within a larger Aboriginal rights context. Chief Doug Kelly of the Soowahlie Band, for example, in his reactions to the *Kapp* decision, appeared to establish a clear link between the pilot sales projects and a deeper historical right of Aboriginal communities to fish commercially. Appealing to the sense of history and continuity in the *Van der Peet* test for proving an Aboriginal right, Chief Kelly asserted that Natives "were among the very first commercial fishermen," selling fish to early European settlers in the B.C. interior.<sup>89</sup> Similarly, Arnie Narcisse, Chair of the B.C. Aboriginal Fisheries Commission, announced that the *Kapp* decision was "another attack on Aboriginal rights."<sup>90</sup> In his earlier submissions before the Standing Committee on Fisheries and Oceans concerning the state of the salmon fishery on the Fraser River, Narcisse had also talked about the pilot sales project in the context of a wider Aboriginal rights strategy:

If anything, the pilot sales should be expanded. They should be taken out of pilot sales mode. They should say here's a recognition of your Aboriginal right .... It is based on the assertion of the Aboriginal right and the title that goes along with that right.<sup>91</sup>

Third, the testimony of many non-Native fishers in *Kapp* suggests that their claim of discrimination was not really based on their exclusion from a government affirmative action program. Rather, their claim of discrimination was instead rooted in the perceived unfairness of an Aboriginal right to fish commercially, in light of the general reluctance of courts to recognize commercial rights under s. 35(1) and in light of these rights' potentially drastic re-ordering of non-Natives' fishing rights in determining allocation priorities within the fishery. This issue will be discussed in much greater detail below. As an example, however, consider the following statements from non-Native fishers in *Kapp* and from commentators in news media articles following the decision, carefully crafted to express the apparent logic of an unquestionable distinction between commercial and non-commercial Aboriginal rights:

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88. This remains a valid assumption despite the caveats and limitations found in the terms and conditions of the commercial licences of the three Bands in question, which affirm that the original agreement underlying the licences "shall not serve to define or limit [A]boriginal or treaty rights" and "does not constitute, and shall not be interpreted as, evidence of the nature or extent of [A]boriginal or treaty fishing rights"; see *Kapp*, *supra* note 1 at para. 56. Such disclaimers are typically included in fishing agreements in order to protect both the Crown and Native groups in future litigation or disputes (*i.e.*, the Aboriginal group signing the agreement would not want it to represent their "surrender" of any right).

89. Quoted in "Native-Only Salmon", *supra* note 8.

90. Quoted in T. Beutel, "Native-Only Fishery 'Grossly Unfair'" *Richmond News*, online: <<http://www.richmond-news.com/075203/news/075203nm1.html>>.

91. Quoted in *Committee Report*, *supra* note 32 at 19-20.

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.<sup>92</sup>

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.<sup>93</sup>

We're not talking about an [established] [A]boriginal-rights fishery today. We're not talking about a food fishery .... This fish today being caught ... is being sold.<sup>94</sup>

Few dispute the constitutional right of [N]atives to catch salmon for food, social and ceremonial purposes, but critics argue this should not be extended to special rights to sell the fish they catch.<sup>95</sup>

These comments and observations suggest that an "Aboriginal rights" perspective could have, at the very least, provided some context for a court or a judge to better understand each party's assumptions and assertions in *Kapp*. Critically examining the motivations and expectations of each party, the underlying conflicts over the constitutional status and purpose (or effect) of Aboriginal rights (especially where such rights involve commercial aspects), and the relationships between Aboriginal rights and other rights (namely, *Charter*-based rights), would have moved the discussion away from the somewhat distilled and academic debate on ameliorative programs and equality found in Judge Kitchen's judgment.

### Reconciliation and the Constitutional Protection of Aboriginal Rights

If *Kapp* is truly about the assertion and negotiation of Aboriginal rights and non-Aboriginal reactions to such rights, as suggested above, why does the "narrow" lens of ameliorative programs and substantive equality fail to protect such rights in this case? Why is "equality" per se an inappropriate and incomplete solution to an Aboriginal rights problem?<sup>96</sup>

As previously discussed, ss. 15(1) and (2) of the *Charter* provide inadequate protection and recognition of Aboriginal rights and do not speak to the concerns raised by Aboriginal rights because of the nature of substantive equality rights

92. Donna Sonnenberg, quoted in *Kapp*, *supra* note 1 at para. 97.

93. Richard Gregory, quoted in *ibid.* at para. 137.

94. Phil Eidsvik, quoted in Canadian Broadcasting Corporation, "Native-Only B.C. Fishery Sparks Protest" *CBC News* (4 August 2002), online: <[http://www.cbc.ca/storyview/CBC/2002/08/03/bc\\_fishery020803](http://www.cbc.ca/storyview/CBC/2002/08/03/bc_fishery020803)>.

95. "Native-Only Salmon", *supra* note 8.

96. The answers to these questions, in part, may depend upon a recognition that the non-Native fishermen in *Kapp* likely considered the question in reverse, *i.e.*, whether "Aboriginal rights" are an appropriate vehicle for resolving what is in their eyes an "equality rights" problem. Conflicting perspectives on the nature of the problem, as well as its solution, highlight the fundamental gap that may exist between Aboriginal and non-Aboriginal understandings of Aboriginal claims to justice and fairness, and the uniqueness of these claims relative to other minority groups' claims; see *Indigenous Difference*, *supra* note 79.

theory and the nature of purely “ameliorative” programs. Ameliorative programs are typically (and by their very nature) time-limited and temporary plans to address an issue of inequity or unequal opportunity.<sup>97</sup> The pilot sales projects are no exception; the evidence in *Kapp* and from other sources suggests that the federal government only intended pilot sales to be an “experiment” in extending the existing Aboriginal right to fish for food to situations where the sale of fish might be possible, in keeping with the purpose and objective of that right.<sup>98</sup> Such an exclusive focus on temporary and experimental rights makes them vulnerable to challenge, should the disadvantage at the heart of the ameliorative objective disappear or be remedied through a progressive reduction in socio-economic barriers and inequality.

Furthermore, the basic theory of amelioration as a tool of substantive equality demands that restitution for past injustices must be made to individuals or groups who have suffered historical disadvantages that have led to current inequities, in order to achieve “balance” in society or an “equal playing field” for such groups or individuals. Equality, therefore, even when it is offered and framed in its more substantive forms, is expressed as the creation of a “basic starting point” for all groups and individuals. The goal of s. 15(2) of the *Charter* and all ameliorative or affirmative action programs, then, is one of integration<sup>99</sup> or of creating an “equal playing field.”<sup>100</sup> This is reflected in the case law on affirmative action and amelioration. An early S.C.C. case dealing with an ameliorative or affirmative action employment policy for Native peoples found the Court endorsing the idea of ameliorative programs as a form of integration and equalization, thus enabling disadvantaged individuals to enjoy a higher chance of success and opportunity:

The purpose of the plan ... is not to displace non-Indians from their employment, but rather to advance the lot of the Indians so that they may be in a competitive position to obtain employment without regard to the handicaps which their race has inherited.<sup>101</sup>

Aside from its outdated and inappropriate language, this passage reveals the dangers of the seemingly harmless and well-intentioned discourse of ameliorative programs. For certain groups, and Aboriginal peoples in particular, construing the goal of substantive equality as differential treatment in order to produce sameness in result (that is, an “equal playing field”), misconstrues the very nature of the need or the claim for differential treatment. Such a claim in the Aboriginal context is based not on a desire for integration and sameness in result, but rather on recognition of the unique relationship Aboriginal peoples enjoy with the state, expressed in their constitutionally-protected rights.

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97. See *e.g.* Peirce, *supra* note 63; Anand, *supra* note 63; and Iacobucci, *supra* note 11.

98. See *Kapp*, *supra* note 1 at paras. 47 and 137; see also *Committee Report*, *supra* note 32 at 8.

99. See Anand, *supra* note 63 at Part II.3.b.

100. See Iacobucci, *supra* note 11.

101. *Athabasca Tribal Council v. Amoco Canada Petroleum*, [1981] 1 S.C.R. 699 at 711.

This observation then begs the question: what is the purpose of Aboriginal rights under s. 35(1) of the *Constitution*? The purpose of ameliorative programs seems to be integration and restitution, as discussed above. The purpose of recognizing and affirming Aboriginal rights, in contrast, involves considerations of integration and restitution (as well as equality itself), but ultimately revolves around fundamentally wider and deeper concepts. At least according to the S.C.C., the key to understanding the affirmation and recognition of Aboriginal rights in the *Constitution* is the concept of “reconciliation.” The idea of reconciliation as the fundamental basis of s. 35(1) was made explicit in *Van der Peet* but finds its roots in *Sparrow*.<sup>102</sup> In *Sparrow*, the Court indicated that the purposes of s. 35(1) were “protective and remedial,”<sup>103</sup> and that the words “recognized and affirmed” express and reflect the Crown’s historic fiduciary relationship with Aboriginal peoples.<sup>104</sup> The language of reconciliation emerges in Dickson C.J.’s and LaForest J.’s famous edict that “federal power must be reconciled with federal duty.”<sup>105</sup> This duty was encapsulated in the *Sparrow* test for justifying infringements of Aboriginal rights in the requirement that priority must be given to Aboriginal rights holders when determining resource allocation schemes.<sup>106</sup>

Lamer C.J. seized on this notion of reconciliation in *Van der Peet* and offered his own version. The purpose of s. 35(1), according to Lamer C.J., is to provide a legislative framework with which “the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown”<sup>107</sup> can be achieved. In this way, Lamer C.J. hoped to identify “the basis for the special status that [A]boriginal peoples have within Canadian society as a whole.”<sup>108</sup> Further on, Lamer C.J. goes on to specify that such “reconciliation” addresses the different (and occasionally conflicting) interests that arise from the prior occupation of Aboriginal societies,<sup>109</sup> and that “true reconciliation” will place equal weight on both the “Aboriginal perspective” and the common law non-Aboriginal perspective.<sup>110</sup> Reconciliation thus encompasses both substantive (content) elements and procedural (form) elements, and is generally depicted as a kind of “balancing” between different groups and considerations.<sup>111</sup>

Unfortunately, however, neither Lamer C.J. nor any other member of the Court has specified the precise meaning and content of the reconciliation

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102. K. McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2 *Indigenous L.J.* 1 at 2.

103. *Sparrow*, *supra* note 18 at para. 47.

104. *Ibid.* at para. 59.

105. *Ibid.* at para. 62.

106. McNeil, *supra* note 102 at 3.

107. *Van der Peet*, *supra* note 18 at para. 31.

108. *Ibid.* at para. 27.

109. *Ibid.* at para. 43.

110. *Ibid.* at para. 50.

111. See McNeil, *supra* note 102 at 9.

principle;<sup>112</sup> it remains a rather vague and largely unexamined concept despite its fundamental importance to the purpose and nature of Aboriginal rights under the *Constitution*.<sup>113</sup> From an Aboriginal rights perspective, it is quite clear that reconciliation may have a more negative connotation, implying that an Aboriginal right or a claim to such a right could be rejected or dismissed based on its “incompatibility” with Canadian sovereignty, thus rendering it unable to be “reconciled” with state sovereignty interests.<sup>114</sup> If a right does not advance this objective of reconciliation (in the sense of accommodation or compatibility), courts will generally be reluctant to recognize it under the *Van der Peet* test.<sup>115</sup> A restrictive view of reconciliation also entails the widening of permissible legislative objectives that would justify the infringement or excessive regulation of existing Aboriginal rights under the *Sparrow* test for justifiable infringements, many of which have more to do with satisfying non-Aboriginal and commercial interests than with promoting the protection of Aboriginal rights.<sup>116</sup> Justice McLachlin in her dissenting judgment in *Van der Peet* refers to this use of reconciliation discourse to justify wider and deeper infringements of Aboriginal rights as an “unconstitutional” attempt to achieve “social harmony” or “societal peace.”<sup>117</sup>

In its more positive versions, however, reconciliation (at least in its original formulation in *Sparrow* and in Justice McLachlin’s dissenting judgments in *Van der Peet* and *Gladstone*<sup>118</sup>) can also be employed in the struggle for greater and wider protection and affirmation of Aboriginal rights.<sup>119</sup> This “other” use of reconciliation theory imagines new ways of achieving social harmony and peace

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112. But see McNeil, *ibid.* for an excellent and thorough review of what the S.C.C. has said about different conceptions and versions of the reconciliation concept, especially in the judgments of Justices Lamer and McLachlin. Essentially, while the former generally endorses a restrictive and negative view of reconciliation, one which ultimately seeks to streamline Aboriginal rights until they are compatible and consistent with the goals and concerns of non-Aboriginal Canadians as well as Aboriginals, the latter’s views tend to endorse a more expansive theory of reconciliation which attempts to give more weight to Aboriginal perspectives on their relationship with the Canadian state.

113. It is also a fairly recent concept in Aboriginal rights law and has not yet been fully addressed in the Aboriginal rights literature. Two notable exceptions are L. Dufraimont, “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) 58:1 U.T. Fac. L. Rev. 1, and Borrows, *supra* note 79.

114. This was indeed the driving force behind Binnie J.’s concurring judgment in *Mitchell*, *supra* note 18.

115. McNeil, *supra* note 102 at 5.

116. See e.g. *Delgamuukw*, *supra* note 18 at para. 165, where Lamer C.J.C. indicates that “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims” are valid legislative objectives that “can be traced” to the overall “reconciliatory” purpose of s. 35(1) Aboriginal rights. These views were repeated in *Marshall 2*, *supra* note 17. See also Dufraimont, *supra* note 113 at 13-14; McNeil, *supra* note 102 at 8-9; and T. Dickson, “Section 25 and Intercultural Judgment” (2003) 61:2 U.T. Fac. L. Rev. 141 at 143.

117. See McNeil, *ibid.* at 17 (quoting Justice McLachlin in *Van der Peet* at paras. 302 and 316) and 25.

118. See *ibid.* at 10-16 for a review of Justice McLachlin’s views before she became Chief Justice. Overall, Justice McLachlin tends to focus more on the role of reconciliation at the “justification for infringement” stage, rather than the “rights definition” stage.

119. See Dufraimont, *supra* note 113 at 13 and 15, in her discussion of the *Sparrow* version of “genuine reconciliation.”

that do not involve a “violation of fundamental rights.”<sup>120</sup> After all, reconciliation is a two-way street.<sup>121</sup> It is an interdependent process that should involve the adaptation of mainstream Canadian socio-economic and political systems to create constitutional space for Aboriginal rights, just as much as it appears to involve the accommodation (or in some cases, the denial or the infringement) of Aboriginal rights within the context of state sovereignty and mainstream economic industries. Despite its risks and critics,<sup>122</sup> reconciliation might therefore represent a larger, wider and stronger tool for the protection of Aboriginal rights and interests than the “integration” or “amelioration” objectives of affirmative action programs under s. 15(2) of the *Charter*, or the much celebrated but dubious “substantive equality” claims of s. 15(1). Reconciliation involves more than the “restitution” offered by the rectificatory justice of ameliorative programs, although restitution is an important part of the content of reconciliation. With a bit of creative legal imagination and optimism, instead of conventional legal analysis,<sup>123</sup> reconciliation can be considered a potential mechanism for recognizing and even supporting the unique nature of Aboriginal claims for differential treatment.<sup>124</sup> Reconciliation is ultimately about recognizing and respecting “difference” just as much as it has been used to achieve the “sameness” of integration and compatibility.

The “narrow” view of *Kapp* and its exclusive focus on equality, without a concomitant consideration of Aboriginal rights protected by s. 35(1) and the wider reconciliation principle it supports and expresses, thus paints a distorted picture of the underlying issues at stake in the case, and forecloses the development of creative legal and political solutions that would respond to the need for reconciliation and all that it entails. To continue playing a dominant role in Aboriginal rights disputes in Canada, “equality” must become a version of itself that accounts for both the true nature of Aboriginal claims to differential treatment by the state, and the reconciliation principle upon which such claims are based and through which their constitutional effect is achieved.<sup>125</sup> The recognition of difference at the heart of reconciliation encapsulates the need for a

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120. McNeil, *supra* note 102 at 17.

121. See for example Borrows, *supra* note 79 at 33, who notes that “reconciliation conveys the idea that there is a rift between peoples that needs to be bridged” through the intersection of “[A]boriginal and non-[A]boriginal legal cultures.”

122. See e.g. D. Stack, “The Impact of RCAP on the Judiciary: Bringing Aboriginal Perspectives Into the Courtroom” (1999) 62 Sask. L. Rev. 471 at paras. 62-64; see also Borrows, *ibid*.

123. See e.g. B.H. Wildsmith, “Treaty Responsibilities: A Co-Relational Model” (1992) U.B.C. L. Rev. 324 at para. 1, who argues that “the legal mind is not noted for its imaginings .... The result is a tendency to focus on the uncertainties and what could go wrong. The status quo is reinforced; innovation is dampened.”

124. See Borrows, *supra* note 79 at 33, who, despite grave concerns about the rhetoric and political implications of the language of reconciliation, admits that “the fact that this reconciliation is *sui generis*, means that the situation with Aboriginal peoples is constitutionally unique, and could not be used by other groups in Canada to claim special rights.” See also Stack, *supra* note 122 at para. 52, who argues that, for reconciliation to be effected, “the perspectives of Aboriginals need to be recognized within the Canadian legal system,” including Aboriginal perspectives on the nature of their rights, interests and claims. See also McNeil, *supra* note 102 at 17.

125. See Chartrand, *supra* note 79 for an example of the call for a “re-conceptualized” Aboriginal equality.



unique perspective on equality that transcends the limitations of our current legalistic understandings of the concept: “constitutionally speaking, this means denying that equality has an *a priori* meaning in which all are assumed to agree *ex ante*. It also means reconciling disparate conceptions of equality, as different peoples envisage it.”<sup>126</sup>

The potential for the principle of reconciliation to transform equality rights discourse and the converse potential for equality theory to adopt the positive dimensions of reconciliation are captured by Trakman’s notion of “reconciliatory equality” based on “the recognition of difference in culture, attitude and belief.”<sup>127</sup> Trakman notes that this recognition and affirmation of difference eventually leads to a conception of equality that, as noted above, is relative and flexible in the face of the different values that different groups will attribute to it. This relative and contingent aspect of reconciliatory equality does not, however, imply that it is devoid of substantive content; rather, it should entail that such content “ought not to be defined exhaustively by some, and applied to all equally, in disregard of their differences.”<sup>128</sup>

This last part is arguably and unfortunately an accurate description of Judge Kitchen’s analysis in *Kapp* and its results. The decision refuses to acknowledge that competing views of “equality” can be reconciled within an overarching framework for Aboriginal peoples’ rights and claims for justice and fairness in their relationships with Canadian society as a whole. This insight helps tie both the practical and material implications of an inappropriate and ineffective “equality” lens through which to view the claims of the protest fishermen in *Kapp*, and the political and discursive effects of a dominant and hegemonic version of “equality” that denies difference and the reconciliatory purpose of the constitutional recognition of Aboriginal rights. In the words of Trakman:

The capacity to reconcile disparate conceptions of equality hinges upon the willingness of those who enjoy privileges to share them. It means realizing that, in sharing privileges, privileges themselves cease to be such. Most importantly, it means recognizing that a privileged view of inequality of treatment likely perpetuates that inequality.<sup>129</sup>

Thus the danger of leaving the scope of the analysis in *Kapp* unchanged (whether the result of the decision is upheld or overturned) lies in normalizing its uncritical application of equality theory to the Aboriginal rights context, while simultaneously validating its silence on the principle of reconciliation as the purpose of Aboriginal rights.

A final issue in this discussion of reconciliation is the question of how, precisely, such a reconciliation of rights and interests should be achieved. The jurisprudence and accompanying commentary on the reconciliation principle point out that negotiation, as a distinct mechanism for dispute resolution,

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126. Trakman, *supra* note 72 at para. 37; see also McNeil, *supra* note 102.

127. Trakman, *ibid.* at para. 41.

128. *Ibid.*

129. *Ibid.* at para. 43.

represents the best hope for instituting the reality of reconciliation, in opposition to the more adversarial “zero-sum game” nature of litigation and adjudication.<sup>130</sup> As previously mentioned, the S.C.C. indicated its preference for negotiated solutions to Aboriginal rights disputes early on in its Aboriginal rights jurisprudence. In *Sparrow*, the Court indicated that, in addition to the “reconciliation” of interests it promotes, s. 35(1) “provides a solid constitutional base upon which subsequent negotiations can take place.”<sup>131</sup> Consistent with this perspective is Lamer C.J.C.’s strongly worded hint in *Delgamuukw* that “[u]ltimately, it is through negotiated settlements, with good faith give and take on all sides, reinforced by the judgments of this Court, that we will achieve ... ‘the reconciliation of the pre-existence of [A]boriginal societies with the sovereignty of the Crown.’ Let us face it, we are all here to stay.”<sup>132</sup> Even more than a hope or a preference, the possibility of negotiation as a tool for reconciliation may even be required by the language and implications of s. 35(1) itself.<sup>133</sup> A commitment to negotiated agreements is therefore indicative of a duty to “take steps” towards the fulfilment of Aboriginal rights.<sup>134</sup>

This judicial preference (or directive) for negotiation as the path to reconciliation has received wide support amongst many (but certainly not all<sup>135</sup>) Native rights activists and commentators, for a variety of reasons. First, negotiation helps unburden the courts of their unenviable task of adjudicating Aboriginal rights disputes in an already overtaxed and backlogged legal system.<sup>136</sup> Second, the process of negotiation is less time-consuming and less expensive for all parties, an important consideration given the impoverished resources of many Aboriginal communities and litigants wishing to secure protection of their Aboriginal and treaty rights.<sup>137</sup> Finally, the range and nature of available remedies and solutions under negotiated agreements make them preferable to court-imposed solutions because of their creativity, their non-adversarial nature and their potential for greater legitimacy and mutual self-enforcement or compliance:

Negotiation permits parties to address each other’s real needs and reach complex and mutually agreeable trade-offs. A negotiated agreement is more likely to achieve

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130. See Stack, *supra* note 122 at para. 90.

131. *Sparrow*, *supra* note 18 at para. 53.

132. *Delgamuukw*, *supra* note 18 at para. 186.

133. See for example Stack, *supra* note 122 at para. 105: “For s. 35 to live up to its ‘promise,’ non-Aboriginal society must negotiate a new relationship with Aboriginal peoples ... a duty on non-Aboriginal society to negotiate in good faith with Aboriginal groups is arguably implicit within s. 35(1).”

134. See P. Macklem, “Aboriginal Rights and State Obligations” (1997) 36:1 Alta. L. Rev. 97 at Part III.D [hereinafter “Aboriginal Rights”]; see also McNeil, *supra* note 102.

135. See e.g. Monture-Angus, *supra* note 79.

136. See e.g. S. Lawrence & P. Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult” (2000) 79:1 Can. Bar Rev. 252 at 254.

137. See *ibid.* at 258; see also T. Isaac & A. Knox, “The Crown’s Duty to Consult Aboriginal People” (2003) 41:1 Alta. L. Rev. 49 at para. 85, in their discussion of “consultation” as a key element or expression of a negotiation strategy.

legitimacy than a court-ordered solution, if only because the parties participated more directly and constructively in its creation.<sup>138</sup>

Moreover, negotiation is a particularly appropriate way of achieving the goals of reconciliation and affirmation of difference in an Aboriginal rights context, since it "mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between First Nations and the Crown."<sup>139</sup>

Turning our attention back to *Kapp*, it is likely that the pilot sales projects under the AFS represent an expression of Aboriginal and federal respect for this judicial directive to negotiate, thereby engaging in a preventive, proactive and creative way to resolve disputes related to Aboriginal rights and interests, especially in the context of natural resource use and allocation.<sup>140</sup> The DFO agreements with the Burrard, Musqueam and Tsawwassen bands that served as the basis for the fishing licences at issue in *Kapp* represent a long and difficult process of negotiation over present and future claims to Aboriginal resource rights, and represent, at the very least, a willingness on the part of both Aboriginal and federal leaders to explore negotiated settlements as a more effective process for achieving the reconciliation at the heart of s. 35(1). A more satisfactory resolution of the dispute in *Kapp* would have taken account of the Aboriginal rights dispute underlying the creation of the AFS and its pilot sales projects, and would have placed such government policies within their proper context of the constitutionally-mandated preference to foster reconciliation through negotiation.

### **Modes of Interaction Between Aboriginal Rights and the *Charter***

The contributions of reconciliation theory, however, do not complete the puzzle of *Kapp* and do not yield complete and accurate answers to the problems and questions raised by the case. If, as argued above, *Kapp* really is about Aboriginal rights and non-Aboriginal reactions to Aboriginal rights, how should the case properly be resolved? The answer, if any, to this question lies buried in the larger question of possible interactions between Aboriginal rights and other rights protected by the *Charter*, and in the problem of "how special rights could co-exist with universal rights in Canadian society."<sup>141</sup>

The conflicts and problems raised by the application and scope of the *Charter* in an Aboriginal rights context have barely made an appearance in Aboriginal rights jurisprudence and only a handful of cases have broached the

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138. Lawrence & Macklem, *ibid.* at 258 and 279.

139. *Ibid.* at 258; see also McNeil, *supra* note 102.

140. See M.A. Burnett, "The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations" (1996) 19 *Suffolk Transnational L. Rev.* 389 at 412 and 423-25. It should again be noted, however, that there are conflicting accounts of the federal government's intentions and motivations in creating the pilot sales projects, and whether the state was motivated by a desire for negotiation or by a fear of litigation (which are, of course, different but related issues); see footnote 37 above.

141. Borrows, *supra* note 79 at 32.

topic.<sup>142</sup> Similarly, Aboriginal rights issues have rarely been raised in *Charter* cases.<sup>143</sup> Nor have these questions been completely dissected by theorists and legal scholars, at least to a satisfying degree; certainly, no consensus has yet been reached.

One useful way to examine these issues is to review the various possible modes of interaction between the *Charter* (especially its s. 15 guarantee of equality and freedom from discrimination) and Aboriginal rights doctrines or principles as they arise in various types of fact situations. It is undeniable, for example, that an Aboriginal individual may raise an s. 15(1) discrimination claim against action or legislation by a federal or provincial government that discriminated against him or her on the basis of his or her Aboriginality or membership in a particular Aboriginal political organization or community. Chartrand, for example, notes that s. 15(1) is “a powerful ally of Indigenous people’s efforts towards achieving the goal of individual equality within Canadian society.”<sup>144</sup> It is also equally clear that such commitment to individual equality must continue to protect the dignity and citizenship rights of all Aboriginal peoples as individuals. As previously discussed, however, this aspect of the “equality equation” only addresses one permutation of Aboriginal claims for justice and differential treatment, and ignores the collective nature of such claims, effectively leaving Aboriginal peoples in the same position vis-à-vis the state as other racial or ethnic minority groups.<sup>145</sup> Where s. 15(1) and even s. 15(2) fall short, as in *Kapp*, s. 35 “may be regarded as an equality-enhancing section”<sup>146</sup> that more adequately and properly addresses the nature and context of Aboriginal claims for justice and fairness.

A more complex problem is whether the *Charter* applies to Aboriginal governments and communities; that is, whether an Aboriginal individual could use s. 15(1), for example, to sustain a claim of discrimination with respect to the actions or legislation of an Aboriginal government acting pursuant to the recognition of a self-government right.<sup>147</sup> Academic commentary on this issue has thus far been mixed and varied, and represents a wide spectrum of political and cultural ideas and values.<sup>148</sup> From a practical and consequentialist perspective, the central issue in this debate concerns the extent to which the application of the

142. See especially *Thomas v. Norris*, [1992] 2 C.N.L.R. 139 (B.C. S.C.); *Shubenacadie Indian Band v. Canada (Human Rights Commission)* (1997), 154 D.L.R. (4th) 344 (F.C.T.D.); aff’d [2000] F.C.J. No. 702 (F.C.A.) [hereinafter *Shubenacadie*].

143. See especially *Corbiere v. Canada* (1996), 142 D.L.R. (4th) 122 (F.C.A.); aff’d [1999] 2 S.C.R. 203 [hereinafter *Corbiere*]; *Lovelace*, *supra* note 60.

144. Chartrand, *supra* note 79 at 243.

145. *Ibid.* at 243 and 250-51, where he argues that “section 15 and the legal test adopted by the Supreme Court in *Law*, although sufficient to embrace equality in the liberal individualistic sense, is unsuited to the task of achieving collective equality for Indigenous nations with Canada.”

146. *Ibid.* at 246.

147. *Ibid.* at 253-54.

148. See *e.g. ibid.*; “Do It Right”, *supra* note 79 at para. 39, note 97; and “We Need the Eggs”, *supra* note 79, which provides a thorough review of the different perspectives on this issue. Wilkins’ own conclusion is that the *Charter* should not and likely would not apply to Aboriginal governments exercising inherent self-government rights, though he expresses doubt as to the consistency of this position in the context of “non-inherent” rights, such as those negotiated in contemporary treaties.

*Charter* would undermine the very basis and nature of certain Aboriginal rights, grounded as they are in traditional customs, practices and cultural forms that bear little resemblance to the individualistic legal regime the *Charter* enshrines. Wilkins writes that there is good reason to believe “not only that Charter rights are foreign and unhelpful to many traditional [A]boriginal societies, but that insistence on their enforcement ... would operate to undermine the authority and effectiveness of their customary arrangements.”<sup>149</sup> While consensus is impossible on the issue of whether Aboriginal governments and communities exercising Aboriginal rights would be subject to *Charter* claims from their own members, there is at least some agreement on the parameters and the central issue of the debate, and some certainty concerning the implications of either conclusion.

Perhaps even more problematic and controversial is the question of whether the *Charter* could be available to non-Aboriginal individuals who claim that the actions or legislation of self-governing Aboriginal governments and communities discriminated against them by virtue of their “membership” in “non-Native Canada.”<sup>150</sup> This is certainly the fear of many British Columbians who live in, visit, travel through or conduct business on Nisga’a territory under the Nisga’a Treaty.<sup>151</sup> The essence of the argument underlying such challenges is that non-Aboriginal individuals should not be subject to the laws or policies of Aboriginal governments without recourse akin to that of Aboriginal individuals’ protection against federal or provincial government action under the *Charter*.

Certainly non-Aboriginals who allege discrimination on the part of federal or provincial government action or legislation dealing with Aboriginal peoples could conceivably have their *Charter* rights upheld or at least considered. This situation posits the validity or constitutionality of non-Aboriginal people’s rights vis-à-vis the non-Aboriginal government they elected, to whose actions they are subject, despite the fact that such actions may be targeted towards Aboriginal groups or individuals. Indeed, this would appear to be the case in *Kapp*, as the protest fishermen alleged that their own federal government, which they accept and recognize as the governing authority in their lives and communities, had created and relied on discriminatory practices and policies in designing and implementing the pilot sales projects under the AFS. On a superficial level, at least, the fact that the ameliorative program was directed towards Aboriginal groups did not preclude the application of the *Charter* to the program, as it was created and enforced by federal government departments and officials. The only issue would therefore be whether the ameliorative nature of the program would be sufficiently protected by s. 15(2) of the *Charter* and by s. 15(1) under the *Law* test for discrimination—this is in fact the very approach taken by Judge Kitchen and the parties themselves under the “narrow” interpretation of *Kapp*.

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149. “We Need the Eggs”, *ibid.*

150. This situation is also relevant for Aboriginal individuals and groups who would be affected by the exercise of Aboriginal rights by Aboriginal governments or communities that are not their own; see Sanders, *supra* note 14.

151. See *ibid.*; see also Campbell, *supra* note 14.

As previously discussed, however, the underlying Aboriginal rights framework that lurks beneath the surface of the judicial reasoning in *Kapp* underscores the uniqueness of the dispute and the important role that Aboriginal rights principles and doctrines could, and should, have played in the case. The Aboriginal rights context of *Kapp*, as explored above, renders the case markedly different from other situations in which non-Aboriginal individuals or groups challenge the actions of provincial or federal governments with respect to state policies dealing with Native communities. The fact that the policy in question was created and implemented pursuant to an underlying framework of the constitutional imperative to negotiate Aboriginal rights claims in good faith warrants consideration of alternative conclusions as to the application of *Charter* rights and, in particular, the validity of the protest fishers' s. 15 claim.

Perhaps not surprisingly, such alternative conclusions or approaches come in the form of a seldom-discussed tool in the Aboriginal litigation toolkit: s. 25 of the *Charter*, which states that "the guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any [A]boriginal, treaty or other rights or freedoms that pertain to the [A]boriginal peoples of Canada." Academic discussions of s. 25 are few and far between,<sup>152</sup> and judicial considerations of this important provision are even scarcer.<sup>153</sup> Whenever it is addressed, the central question raised by s. 25 is whether it can be used by Aboriginal rights-bearers as a "shield" against *Charter* rights held or claimed by non-Aboriginal rights-bearers, especially in situations like *Kapp*, where Aboriginal rights (or policies enacted in anticipation of such rights) threaten to discriminate against non-Native individuals or groups who do not hold such rights.

The short answer is a cautious "yes." Wilkins argues that s. 25 implies that "courts are to 'read down' the Charter's rights and guarantees when necessary to avoid reducing the scope of an [A]boriginal right."<sup>154</sup> Wildsmith goes even further and asserts that "in the event of an irreconcilable conflict between Charter rights or freedoms and section 25 rights or freedoms, section 25 rights and freedoms prevail."<sup>155</sup> More recently, within the context of a re-developed and refined theory of "inter-cultural judgment" and multiculturalism in Canadian – Aboriginal disputes, Dickson has argued that s. 25 could serve any number of potentially significant roles in Aboriginal rights disputes, including, on the one hand, its use as a "shield" against challenges to the assertion of Aboriginal rights which

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152. See B.H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: Native Law Centre, University of Saskatchewan, 1988) [hereinafter *Section 25 and Freedoms*]; see also the review of secondary sources on s. 25 in "Do It Right", *supra* note 79 at footnotes 222 and 223; more recently, see Dickson, *supra* note 116.

153. See *Campbell*, *supra* note 14 at para. 158; see also *Corbiere*, *supra* note 143 at 126 in the F.C.A. decision; *Shubenacadie*, *supra* note 142 at 366 in the F.C.T.D. decision; *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs)*, [1997] 3 C.N.L.R. 21 (F.C.A.) at 31-32; and *R. v. Nicholas and Bear*, [1989] 2 C.N.L.R. 131 (N.B.Q.B.).

154. "We Need the Eggs", *supra* note 79.

155. *Section 25 and Freedoms*, *supra* note 152 at 23.

apparently threaten mainstream ideals and institutions<sup>156</sup> and, on the other hand, as an instrument of reconciliation.<sup>157</sup> Dickson ultimately doubts the legitimacy of both these theories and attempts to develop a model of s. 25 focused on the need for “cooperation and choice between jurisdictions”<sup>158</sup> in navigating the simultaneous recognition of individual and group rights in the *Charter* and in s. 35(1) of the *Constitution*, respectively. These academic perspectives and theories have generally been supported or echoed by other commentators and by judicial decisions addressing s. 25.<sup>159</sup> Presumably, then, s. 25 could have been invoked by the federal Crown in *Kapp* to preclude or counter the protest fishers’ s. 15(1) claim on the basis that the impugned government policies—that is, the pilot sales projects—were created and implemented pursuant to the federal government’s constitutional obligation to negotiate and anticipate future Aboriginal rights claims.

### “Commercial Aboriginal Rights” as the Focal Point of the Dispute

Despite its promise, however, s. 25 would likely have failed to provide sufficient protection for the Aboriginal fishing rights at issue in *Kapp*, even if such rights had indeed been argued or claimed by the Bands in question, or by the federal government on behalf of the Bands. This failure is largely explained by the single most important issue hiding in the background or under the surface of *Kapp*: the commercial nature or aspect of the right(s) that would or could have been claimed by the Bands in question. This issue focuses the wider “*Sparrow*” lens for analyzing *Kapp* on the underlying problem of “commercial Aboriginal rights”<sup>160</sup> as the true source of the protest fishers’ frustration and anger, and the

156. See Dickson, *supra* note 116 at 153. Dickson questions and ultimately rejects this “shield” approach because it renders the *Charter* irrelevant to the negotiation and expression of Aboriginal self-government rights, which may be premature and inappropriate.

157. See *ibid.* at 154. Dickson specifies that this reconciliation is also connected to the reconciliatory purpose of s. 35(1) itself, incorporating both “balancing” aspects and “restitution” elements.

158. See *ibid.* at 157.

159. See Chartrand, *supra* note 79 at 255; see also *Campbell*, *supra* note 14 at para. 158, where Williamson J. of the British Columbia Supreme Court concludes that “the purpose of this section is to shield the distinctive position of [A]boriginal peoples in Canada from being eroded or undermined by provisions of the Charter.” It should, however, be noted that the protection s. 25 offers for the recognition and affirmation of Aboriginal rights is still subject to the usual tools and doctrines available to courts when reducing the scope or effect of Aboriginal rights. The S.C.C., for example, in *Corbiere*, managed to hold off an s. 25 challenge to the Native claimants’ allegation of discrimination against their Band governments that prevented off-reserve members from voting in Band elections, citing lack of sufficient evidence; see Chartrand, *ibid.*

160. For the purposes of this paper, “commercial Aboriginal rights” can be defined as those Aboriginal rights either based on an essentially commercial activity (*e.g.* the right to bring items for trade across borders without taxation) or on other elements (such as social, cultural or spiritual practices, or “sustenance”-based activities) with a significant commercial component (*e.g.* the right to fish for trade or sale). Even this distinction, however, is problematic, as many rights apparently based on purely commercial activities (such as the right to cross-border freedom from taxation on goods) may be fundamentally rooted in cultural or social practices and worldviews (in the sense that freedom from taxation when crossing borders may be a fundamental assertion of a wider citizenship or an indication of the social and political relationship between the two neighbouring groups or jurisdictions).

impetus for their challenge to the pilot sales projects. The consequences of *Kapp*'s uncritical examination and silence on this issue have tremendous implications for the future of commercial Aboriginal rights, should the silence persist as the case makes its way through the appeals process to the S.C.C.

### ***Judicial Reluctance to Recognize or Protect Commercial Rights***

A careful review of Aboriginal rights jurisprudence and of academic commentary on the subject clearly demonstrates that there is a general political and judicial reluctance in Canada<sup>161</sup> to recognize, affirm and protect those Aboriginal rights that include a commercial or monetary dimension. The line of S.C.C. cases extending from *Sparrow* to *Mitchell* displays a pattern of increasing judicial "anxiety"<sup>162</sup> over the accommodation and recognition of commercial Aboriginal rights, given the powerful voices of non-Aboriginal opponents of such rights, namely, non-Aboriginal natural resource harvesters and corporations that seek to expand the size and scope of resource extraction areas and allocations for commercial gain. While *Sparrow* dealt with one community's right to fish for "food, social and ceremonial purposes," in *Gladstone* the right was one of trading food for commercial gain (more precisely, the commercial exploitation of herring spawn-on-kelp<sup>163</sup>). Lamer C.J. felt justified (and even obligated) to consider the differences between non-commercial rights (which he saw as possessing an internal limit) and commercial rights (which he considered to be constrained only by external market forces); he also modified the *Sparrow* test for justifying the infringement of Aboriginal rights in light of these differences. Ultimately, Lamer C.J. determined that the fact that commercially-based rights are "without internal limit" mandates a widening of the range of possible valid legislative objectives that could justifiably infringe Aboriginal

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161. International treatment of Indigenous peoples' rights with commercial aspects, especially commercial fishing rights, varies greatly between jurisdictions; see Burnett, *supra* note 140; and M. Tsamenyi & K. Mfodwo, *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues* (ATSIC, 2000), online: <[http://www.atsic.gov.au/issues/land/sea\\_rights/towards\\_greater\\_indigenous\\_participation/default.asp](http://www.atsic.gov.au/issues/land/sea_rights/towards_greater_indigenous_participation/default.asp)>. Both articles note the significant strides the New Zealand government has made in recent years to recognize and protect Maori commercial fishing rights in a more complete and comprehensive manner, compared to developments in Australia and even Canada. In addition, Tsamenyi and Mfodwo's definition of "participation in commercial fisheries," and their suggested range of possible commercial fishing rights for Indigenous peoples, is much wider and broader than my own suggested definition at note 160 above, and certainly much broader than the commercial fishing rights (in terms of exclusive licences) at issue in *Kapp*. Tsamenyi and Mfodwo's notion of "commercial fishing rights" covers a broad spectrum, from Indigenous ownership or use of certain profitable rights (as expressed through special licences, leases and quotas), to ownership of entire marine territories and areas, and rights to all marine resources therein. These differences in conceptual scope and approach suggest that Canada's limited version of "commercial Aboriginal rights" (which Tsamenyi and Mfodwo would likely classify as a mere "bystander status" right, incorporating the right to be "present" and participate in commercial fisheries, with some limited fringe benefits) may be even more stringent and restrictive than is discussed here, when compared to other jurisdictions.

162. To borrow a phrase from "Do It Right", *supra* note 79 at para. 33, note 84.

163. *Gladstone*, *supra* note 18 at para. 24.



rights,<sup>164</sup> and a different notion of what will satisfy the Crown’s fiduciary duty towards Aboriginal peoples.<sup>165</sup> Both the “new” justifiable legislative objectives allowed by Lamer C.J. (the pursuit of economic and regional fairness, the reliance on natural resources by non-Native groups and their participation in public fisheries<sup>166</sup>) and his “new” notion of fiduciary duty (which no longer demands Aboriginal priority or exclusive rights to resource extraction, for example, but which can now be satisfied by mere “consideration” of Aboriginal needs<sup>167</sup>), reveal the extent to which non-Aboriginal needs, claims and interests in economic benefits and resource distribution will trump the exercise of constitutionally protected Aboriginal rights. They also reveal the extent to which a commercially-based right is treated differently by courts, specifically because of the economic nature or dimensions of the right, to the detriment of the Aboriginal claimant.

This trend of discomfort or even hostility towards commercial Aboriginal rights continued (and reached its “absurd extreme”<sup>168</sup>) in *Delgamuukw*, where Lamer C.J. allowed his misgivings about commercial rights to influence the judicial test for proving and justifying infringements on Aboriginal title in two ways. First, the Chief Justice (perhaps unsurprisingly) characterized title to lands as “without internal limit” (and thus akin to a commercial right) and proceeded to severely restrict the scope of Aboriginal title by making it subject to an “inherent” limit. That is, lands claimed under Aboriginal title may not be used in such a way as to destroy the “relationship” of the Aboriginal claimant group with the land in question; Lamer C.J. used strip-mining the land or converting it to a parking lot to illustrate examples of such “unacceptable” uses of title lands.<sup>169</sup> Second, Lamer C.J. used the “non-internally limited” character of title to generate an unprecedented list of “valid legislative objectives” which could justifiably infringe the scope or exercise of title rights, most of which are clearly related to the satisfaction of non-Aboriginal interests: the development of agriculture, forestry, mining and hydroelectric power; general economic development; protection of the environment or endangered species; the building of infrastructure; and the settlement of a “foreign population” to support such activities and industries.<sup>170</sup> Once again, the power and pull of non-Aboriginal economic interests is enlisted to help curb or dampen the economic impact of Aboriginal rights that involve commercial aspects or dimensions.

In *Marshall 1* and *Marshall 2*, the S.C.C. displayed its reluctance to give full protection to commercially-based Aboriginal rights in a more indirect way. When it recognized the treaty right of the Mi’kmaq to trade for “necessaries for sustenance” by trading (up to a reasonable amount, for a “moderate livelihood”) the products of traditional hunting and fishing activities, it insisted on referring to

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164. See *ibid.* at paras. 69-75.

165. *Ibid.* at paras. 62-66.

166. *Ibid.* at para. 75.

167. *Ibid.* at paras. 60 and 62-63.

168. Dufraimont, *supra* note 113 at 8.

169. *Delgamuukw*, *supra* note 18 at para. 128.

170. *Ibid.* at para. 165.

the right as a “right to trade for necessities or sustenance” rather than a “commercial right”<sup>171</sup> and characterized accordingly the right in question as being internally limited by the notions of “sustenance” and “moderate livelihood.”<sup>172</sup> Nevertheless, despite this characterization (which should have triggered the application of the original *Sparrow* test for justifying infringements of Aboriginal rights and its narrow scope of valid legislative objectives), a majority of the Court believed that the commercial or trade aspects of the right warranted the application of a wider range of legislative objectives that could justify infringing the right, as per *Gladstone*.<sup>173</sup> Thus, even where a right is proven and is determined to be a non-commercial right with internal limits, courts may use its commercial aspects to justify limits on its scope or exercise, all in the name of protecting and upholding non-Aboriginal economic interests and claims.

Finally, it should be noted that the commercial aspects of the right claimed in *Mitchell* (the right to bring goods across the Canada – U.S. border for purposes of trade, without taxation) also appear to have affected the S.C.C.’s decision to ultimately reject the claimed right. Although Binnie J.’s concurring judgment, for example, deals mainly with the “sovereignty incompatibility” aspect of the claimed right discussed above, he also expresses concerns about the implications of recognizing a “purely” commercial right, by endorsing the Crown’s arguments that “such a claim goes beyond the sort of economic or cultural activity or land-based interest that the courts have previously recognized under s. 35(1).”<sup>174</sup>

Commercial rights are thus clearly problematic for Canadian courts, forcing them to rethink and adapt their judicial tests for proving and justifying infringements of Aboriginal rights in order to accommodate a wider range of non-Aboriginal economic and political interests. Elsewhere I have written about this reluctance to admit commercially-based rights and its implications for future Aboriginal rights jurisprudence.<sup>175</sup> What should be noted for the purposes of this paper is that the reluctance of Canadian courts to recognize and give full effect to commercial Aboriginal rights relates to the fears of the judiciary over the implications of such rights when they challenge non-Aboriginal economic and political interests or commercial industries. According to Wilkins, “constitutional rights that pose uncontainable threats to basic mainstream institutions or fundamental values would certainly frighten [Canadian judges].”<sup>176</sup> Commercial rights represent such a threat because of non-Aboriginal fears about the impact of increased Aboriginal participation in commercial ventures already dominated by non-Aboriginals.

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171. *Marshall 1*, *supra* note 17 at para. 60.

172. *Ibid.* at paras. 60-61.

173. *Marshall 2*, *supra* note 17 at paras. 41-42.

174. *Mitchell*, *supra* note 18 at para. 72.

175. A. Goldenberg, “‘Surely Uncontroversial’: The Problems and Politics of Environmental Conservation as a Justification for the Infringement of Aboriginal Rights in Canada” (2002) 1:2 *J. of Law and Equality* 278.

176. “Do It Right”, *supra* note 79 at para. 33.

### ***Political Reluctance to Recognize or Protect Commercial Rights***

The hostility towards commercial rights for Aboriginal peoples extends beyond the judiciary into political and popular discourses over the differential treatment of Aboriginal peoples' interests and claims. There is a clear link between public fears about the consequences of recognizing commercial Aboriginal rights and the judicial reluctance to create sufficient constitutional space to protect and uphold such rights. According to Bell, judicial decisions "which are detrimental to existing non-Aboriginal government and economic interests are bound to result in increased public criticism as Canadian citizens feel the impact of Supreme Court decisions in their daily lives."<sup>177</sup> Likewise, Wilkins notes that "[t]he greater the public uncertainty about what such rights might mean ... the less eager the courts are going to be ... to assume the responsibility for locating such rights within the existing Constitution."<sup>178</sup> Judicial concerns over the implications of commercially-based rights are therefore clearly linked to popular debates over the political and economic fallout of constitutional protection for commercial rights.<sup>179</sup>

Public fears over the recognition and protection of commercial Aboriginal rights are most often voiced in areas where Native communities own large tracts of land near or in urban areas, or are claiming particularly large parcels of land as title lands, such as in British Columbia. As discussed in the first part of this paper, the political context of Aboriginal rights disputes in B.C., in large part because of the racialization of such disputes and the common fears of a "race-based" rights system under the treaty process, make Aboriginal commercial interests in that province the subject of heated debate. This is particularly true with respect to two recent developments in relations between Aboriginal peoples and the state: amendments to the federal *Indian Act* that allow some First Nations to levy taxes on property rights within their territories<sup>180</sup> and the creation of "urban reserves," that is, plots of land designated as "reserve lands" under the *Indian Act* in or near major urban centres such as Winnipeg and Saskatoon.<sup>181</sup>

Both developments have attracted widespread criticism and condemnation from non-Aboriginal interest groups, largely representing commercial and

177. C. Bell, "New Directions in the Law of Aboriginal Rights" (1998) 77 Can. Bar Rev. 36 at 65-66, quoted in "Do It Right", *ibid.* at para. 31, note 80.

178. "Do It Right", *ibid.* at para. 37; although Wilkins' comments are in relation to public fears about the recognition of inherent self-government rights, he also draws a useful analogy between the public hostility towards self-government rights and the reluctance to recognize commercially-based rights.

179. Judicial concerns over Aboriginal practices and activities with commercial implications are also typically dealt with, as in *Kapp*, through a discussion of equality rights and ameliorative programs only, rather than Aboriginal rights. The risky "empowerment" overtones of the latter are thus deliberately avoided in favour of the restrictive undertones of the former.

180. Bill C-115, *An Act to Amend the Indian Act (Designated Lands)*, S.C. 1988, c. 23, amending the *Indian Act*, R.S.C. 1985, c. I-5. The new s. 83 of the *Indian Act* permits Indian Bands to tax land or interests in land in a reserve, including rights to occupy or possess or use such land; most Bands taking advantage of this provision have also created tax exemptions for Band members, thus making the taxation of property interests largely a matter of taxing the property interests of non-Aboriginals resident or conducting business on a reserve. See Kesselman, *supra* note 48.

181. See F.L. Barron & J. Garcea, eds., *Urban Indian Reserves: Forging New Relationships in Saskatchewan* (Saskatoon: Purich Publishing, 1999).

economic interests in urban areas. The taxation of non-Aboriginal property interests situated on Aboriginal lands has been criticized for raising the “spectre” of “taxation without representation,” as non-Aboriginal residents in an Aboriginal-owned or controlled territory would be subject to taxes and levies while being unable to run for office in such a jurisdiction or elect its government.<sup>182</sup> The resulting perception is that First Nations enacting such taxation by-laws are “undemocratic,” especially since they typically exempt their own members (and the Band Council itself) from those same taxes.<sup>183</sup> This hostility towards First Nations taxation (and self-exemption) is bolstered by recent judicial debates over the claims of certain First Nations that they enjoy a general treaty right to tax exemption, over and above any such exemption provided for in the *Indian Act*.<sup>184</sup>

Similarly, public opposition to the idea of “urban reserves” has largely been fuelled by the economic and commercial advantages enjoyed by Aboriginal-owned businesses in urban reserves.<sup>185</sup> Because such businesses are technically situated on reserve land, they are exempt from federal income tax and thus can charge lower prices for goods and services, putting them in a much more competitive position vis-à-vis their non-Aboriginal counterparts in the same urban areas. This was, indeed, the major goal or impetus of the creation of urban reserves—that is, the creation of new economic opportunities to increase the competitiveness of Aboriginal businesses. The urban reserve concept has suffered from “frequent backlashes from competing non-Aboriginal interest groups”<sup>186</sup> and businesses, and progress has been slow.

Overall, Aboriginal rights and government-sponsored programs that introduce a “commercial” aspect to the content of Aboriginal rights and claims for justice have been criticized and opposed when such programs threaten the economic status quo of non-Aboriginal commercial industries or interest groups. This public hostility towards commercial Aboriginal rights or claims to such rights will become increasingly explicit and visible as some Aboriginal communities, especially in B.C., have begun to enjoy some (limited) economic success in business ventures and natural resource extraction industries.<sup>187</sup> Eventually, this increase in wealth and economic development created and promoted by substantive equality and ameliorative programs will threaten the popular and political justification or acceptance of concepts like “Aboriginal rights” or “affirmative action.”

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182. See Kesselman, *supra* note 48.

183. *Ibid.* at 1554.

184. See *e.g.* Fiss & Carpay, *supra* note 48.

185. See T. Mountjoy, “Municipal Government Perspectives on Aboriginal Self Government” in J.H. Hylton, ed., *Aboriginal Self-Government in Canada* (Saskatoon: Purich Publishing, 1999) at 321.

186. *Ibid.*

187. See *e.g.* Kesselman, *supra* note 48.

### ***The Reluctance to Recognize Commercial Rights in the Kapp Decision***

This increasing political hostility towards the notion of "commercial" Aboriginal rights and the ensuing judicial reluctance to recognize or protect them are echoed in the *Kapp* decision. As demonstrated above, the rejection of Aboriginal rights with commercial aspects that supposedly "threaten" the livelihood or resource base of non-Aboriginal groups is expressed in testimonial comments from the protest fishers. Such comments tend to imply that while an Aboriginal right to fish for food, social and ceremonial purposes could be tolerated or accepted in some circumstances (albeit with some reluctance and skepticism), an Aboriginal right to fish for trade or commercial purposes "crosses the line." The reluctance to recognize or respect commercially-based Aboriginal rights, and its relationship to perceived increases in Native communities' wealth and economic development is also implicit and explicit in Judge Kitchen's analysis of the protest fishers' s. 15(1) claim. As noted above, Kitchen J. analyzed the evidence before him concerning the "ameliorative" nature of the pilot sales projects under the AFS and concluded that the Bands who held licences permitting the sale of fish under the pilot sales projects did not, in fact, suffer from a historic and structural disadvantage related to discrimination and oppression. It may come as no surprise that Judge Kitchen would come to such a conclusion given that the Musqueam Band, for example, "is located on a well-situated urban reserve on the outskirts of Vancouver and controls relatively valuable property," and that both the Musqueam and Tsawwassen Band members' wealth (in terms of possessions and property interests) and living conditions (in terms of housing) were "at least of a standard and quality representative of the community at large."<sup>188</sup> Although both the premise (that these Aboriginal groups' material wealth and living conditions are *not* "sub-standard") and the conclusion (that these Aboriginal groups have therefore *not* suffered historical discrimination and disadvantage) of this analysis could be challenged, it is clear that the economic status and wealth of First Nations is being used as a barometer to determine an appropriate scope or level of protection for commercial Aboriginal rights or ameliorative programs.

In addition, judicial reluctance to recognize commercial rights is central in Judge Kitchen's discussion of the pilot sales projects within the context of recent Aboriginal rights jurisprudence in Canada. According to Judge Kitchen, "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 spawn-on-kelp herring roe fishery [*Gladstone*]."<sup>189</sup> Further on, he writes that "courts have so far generally rejected claims of an [A]boriginal right to a commercial fishery."<sup>190</sup> Judge Kitchen then appears to use this fact to discount the possibility of any claim to an Aboriginal commercial fishery in this case and also to justify the protest fishers' claim of discrimination. Overall, the decision in *Kapp* represents a condemnation of the pilot sales projects largely based on the

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188. *Kapp*, *supra* note 1 at para. 197.

189. *Ibid.* at para. 189.

190. *Ibid.* at para. 190.

conventional judicial reluctance to recognize and protect commercially-based Aboriginal rights. According to Judge Kitchen, the “gratuitous granting” of exclusive Aboriginal commercial fishing rights by the DFO through the pilot sales licences, especially in such a way that appears to discriminate against non-Aboriginal Canadians, “is reasonably perceived to be rash and imprudent.”<sup>191</sup> This assertion ignores and downplays the strong words and implications of *Sparrow*, *Van der Peet* and other cases where Aboriginal rights have been identified and recognized. The S.C.C. in *Sparrow* clearly indicated that the Musqueam right to fish for food, social and ceremonial purposes applied to a particular community that had claimed and established that right. Likewise, *Van der Peet* established the specific and community-based nature of Aboriginal rights, and indicated that any claim to an Aboriginal right, whether commercial in nature or not, will be analyzed and adjudicated on a case-by-case basis, focusing on the historic practices and customs of the group in question. Aboriginal rights jurisprudence in Canada, therefore, cannot be said to have definitively closed the door on commercial Aboriginal rights, despite the severe restrictions and infringements of such rights made possible by cases like *Gladstone* and *Delgamuukw*.

### ***Sources of the Reluctance to Recognize Commercial Rights***

None of these observations, however, address the underlying sources of the judicial and political reluctance to recognize and give full effect to Aboriginal commercial rights. First, as already noted, a large part of this reluctance reflects public fears about the “threats” that commercial Aboriginal rights might present to existing mainstream economic institutions and political systems. Commercial Aboriginal rights are clearly unpalatable to many non-Aboriginal groups and individuals because they may imply or lead to a radical re-ordering of non-Aboriginal socio-economic and political systems of resource distribution and allocation in order to accommodate notions of “priority” and “exclusivity” mandated by the Crown’s fiduciary duty towards Aboriginal peoples.<sup>192</sup>

Second, commercial Aboriginal rights are often rejected or condemned because of a long-standing cultural myth in non-Aboriginal society that Indigenous systems of resource harvesting and conservation (or a perceived lack thereof) lead to over-exploitation and over-consumption of the resource.<sup>193</sup> When such Indigenous harvesting practices include commercial aspects or are accomplished for commercial purposes, this fear of over-harvesting is magnified because of the supposed absence of any “internal limit” to such practices and the rights they support. A number of commentators have challenged the basis of this

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191. *Ibid.*

192. See e.g. Borrows, *supra* note 79; “We Need the Eggs”, *supra* note 79; *Indigenous Difference*, *supra* note 79; and Burnett, *supra* note 140 at 411.

193. See Goldenberg, *supra* note 175 at 288.

myth,<sup>194</sup> and established the conservationist and environmental success of Indigenous harvesting practices before and after contact with Europeans, which continue to this day.<sup>195</sup> Widespread fears about the potential for Aboriginal resource management practices, especially those with commercial implications, to result in over-harvesting of the resource base are therefore an unjustifiable basis for denying the protection of commercial Aboriginal rights.<sup>196</sup>

The third major explanation for the judicial and political reluctance to recognize and protect commercial Aboriginal rights is that such rights challenge mainstream non-Aboriginal notions of the content and form of Aboriginal "culture" and cultural practices. Many Aboriginal rights advocates, for example, point out that commercial rights are virtually incapable of being recognized in a natural resource harvesting context, since "such rights would be inconsistent with [perceived] Aboriginal environmental philosophies, even where mainstream interpretations of such philosophies are rooted in the hegemonic perceptions of Aboriginal culture."<sup>197</sup> Chapeskie notes that these hegemonic perceptions, created by popular discourses on monolithic and homogeneous visions of Aboriginal culture and endorsed by Canadian courts, foster the harmful notion that "even the [I]ndigenous right to harvest resources to make a livelihood, can only involve 'traditional' practices which do not include 'purely' commercial purposes."<sup>198</sup> The end result is that commercial activities are considered incompatible with the very "nature" (both literally and figuratively) of Aboriginal communities and their cultural practices, as imagined and perceived by the wider non-Native society. Such stereotyping tends to freeze Aboriginal cultural practices in the times and contexts of pre-market economies; despite S.C.C. pronouncements to the contrary,<sup>199</sup> this "frozen rights" approach" denies Aboriginal communities the opportunity (and the necessity) to adapt their cultural practices and goals in response to local, national and global changes in economic structures and

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194. See *e.g. ibid.* at 287 and 289; D.C. Harris, "Territoriality, Aboriginal Rights, and the Heiltsuk Spawn-On-Kelp Fishery" (2000) 34:1 U.B.C. L. Rev. 224 at 229; R. Kyle, "Aboriginal Fishing Rights: The Supreme Court of Canada in the Post-*Sparrow* Era" (1997) 31:2 U.B.C. L. Rev. 293 at 303; and Coates, *supra* note 17 at 130.

195. See *e.g.* A. Chapeskie, *Laws of the Land: Aboriginal Customary Law, State Law and Sustainable Resource Management in Canada's North* (LL.M. Thesis, University of Ottawa, 1992) [unpublished]; and R. Kapashesit & M. Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill L.J. 925.

196. It should be noted that both environmental and economic concerns over the recognition of commercial Aboriginal rights are not unique to Canada; Tsamenyi & Mfodwo, *supra* note 161, observe that Australia's laws and policies also tend to betray a certain hostility towards commercial fishing rights, based largely on fears of over-harvesting by Indigenous groups and the inevitable resource re-distribution that would occur; see also Burnett, *supra* note 140 at 394 and 421.

197. Goldenberg, *supra* note 175 at 292.

198. Chapeskie, *supra* note 195 at 95.

199. See *Van der Peet*, *supra* note 18 at para. 64 (Lamer C.J.).

modalities, and to develop (or sever) wider economic and political relationships with non-Aboriginal society.<sup>200</sup>

### ***Towards a More Satisfactory Theory of Commercial Aboriginal Rights***

If none of these explanations justifiably warrant the denial of commercial Aboriginal rights or the severe restrictions and limitations placed upon them by courts, then we must establish a more coherent and satisfactory basis for the recognition of commercial Aboriginal rights. One way to achieve this goal is to continue to develop arguments about the beneficial aspects of commercial rights for Aboriginal communities. The goal would therefore be to demonstrate to opponents of commercial rights that such rights exist, not for the purpose of discriminating against non-Natives or diminishing their share or their role in resource extraction industries but, rather, to recognize and uphold the unique and historical nature of Aboriginal peoples' relationship with the Crown. Commercial rights also represent an effective and appropriate way to satisfy the underlying interests and concerns of Aboriginal rights claimants (such as the future of their communities and cultures, the continued viability of their economic activities, their role in resource management and conservation, and control over their own lands and resources) in ways that promote economic development and self-sufficiency. Commercially-based Aboriginal rights would, therefore, recognize the Aboriginal interest in economic development and the Aboriginal interest in fostering and maintaining control over means and modes of economic production and resource harvesting, which would ensure the continuity of their traditional values and cultural ideologies.

The recognition and protection of commercial Aboriginal rights should not be subject to doubt and hostility, but should instead be actively encouraged or at least explored as an important tool for achieving economic self-determination and political empowerment. As a result of the "non-internally limited" characterization of Aboriginal rights with commercial dimensions (such as fishing for trade or sale, and Aboriginal title), large-scale commercial enterprises are now prohibited or excluded from constitutional protection as Aboriginal rights. *Delgamuukw* effectively forbids the recognition of title where the use of title lands would be incompatible with the group's relationship to those lands, such as paving or strip-mining the land—both potentially lucrative economic uses of land. And even where a commercial right is recognized and proven as an existing Aboriginal right, its commercial nature may invite the kinds of severe and unwarranted limitations found in *Gladstone* and *Delgamuukw*, which typically favour the interests and needs of non-Natives. By closing the door on large-scale commercial and economic ventures, the S.C.C. is ignoring or denying

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200. "Frozen rights" also foster and perpetuate other myths about Aboriginal society and culture, such as the "noble savage" archetype and other European projections or idealizations in which Indigenous cultures are considered incompatible with larger-scale economic systems of trade and wealth accumulation; see A. Barnard, *History and Theory in Anthropology* (Cambridge: Cambridge University Press, 2000) at 20.



the potential benefits of recognizing and protecting commercial Aboriginal rights.

Even the extreme example of strip-mining, prohibited from constitutional protection by Lamer C.J. in *Delgamuukw*, has been the subject of considerable debate, as many Aboriginal rights activists have pointed out the wide range of benefits (both socio-economic and political/cultural) that strip-mining may yield, despite its apparently destructive environmental effects.<sup>201</sup> The larger and more fundamental point to be made, however, is that judicial and political hostility towards such large-scale commercial endeavours (and the rights that protect them) sends a message that such activities are not considered to be sufficiently "Aboriginal" to be constitutionally protected by s. 35(1). This foreclosure of rights is even more worrisome in that it occurs by imposing dominant views of Aboriginal culture on Aboriginal peoples themselves, without exploring Aboriginal perspectives on commercial Aboriginal rights or practices. Indeed, because of this institutional and widespread reluctance to recognize and validate the commercial or economic dimensions of Aboriginal rights and practices, the S.C.C. seems to have rejected the possibility that using lands or resources to "extract significant amounts of capital and income for purposes of cultural revitalization, political self-empowerment, and even economic self-sufficiency may preserve, if not enhance, the cultural and political significance of the disputed land or resource."<sup>202</sup> The future of Aboriginal rights and communities may well depend on the ability of courts, politicians and commercial industries to make room for Aboriginal notions of traditional practices "integral to [their] distinctive culture"<sup>203</sup> that include commercial activities and practices.

An alternative strategy for ensuring judicial protection and recognition of commercially-based Aboriginal rights is to re-define, or at least critically examine, conventional notions of what, precisely, are "commercial" rights in an Aboriginal context. Wilkins has noted that there are two problematic aspects to commercial rights that create "anxiety" for Canadian courts: (1) the fact that commercial rights are claimed for commercial purposes, that is, for profit; and (2) the fact that commercial rights may be exercised in such a way as to harvest resources in large-scale commercial quantities.<sup>204</sup> This helps explain why an apparently commercial right in *Marshall 1*, a treaty right to trade, was recognized and protected by the S.C.C.; because it was limited to trading for "necessaries" in order to support only a "moderate livelihood," the right in question was deemed

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201. See e.g. M.G. Stevenson, "Indigenous Knowledge in Environmental Assessment" (1996) 49:3 *Arctic* 278 at 285, who notes that mines "have the potential to strengthen [A]boriginal lifestyles by providing [A]boriginal people with much-needed cash income and time off to pursue their traditional land-based activities ... mines can support the skills required to live off the land and help ensure the transfer of [A]boriginal knowledge, customs, values, and traditions to future generations." These benefits may, in some circumstances, far exceed the risk of environmental harm or natural resource depletion. See also S. Matiation, "Impact Benefits Agreements Between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?" (2002) 7:1 *Great Plains Natural Resources J.* 204.

202. Goldenberg, *supra* note 175 at 292.

203. See *Van der Peet*, *supra* note 18 at para. 46.

204. "Do It Right", *supra* note 79 at para. 33.

a “sustenance” right and not a commercial one. This perspective drew support from a critique of the *Gladstone* commercial/non-commercial dichotomy by Madame Justice McLachlin, as she then was, in her dissenting judgment in *Van der Peet*. McLachlin J. analyzed certain trade-based rights by noting that such trade is not accomplished for commercial purposes, but is instead “the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised.”<sup>205</sup> The mere presence of a commercial aspect to the right claimed, according to the current Chief Justice of the S.C.C., is, therefore, an insufficient basis for characterizing a right as properly “commercial” in nature and for treating it differently.

This insight is, in fact, relevant to the situation in *Kapp* if the (unarticulated) “right” to fish for sale under the pilot sales projects is properly contextualized and understood. Despite claims to the contrary by Judge Kitchen, the protest fishers and media commentators, the licences held by the Bands in question did not grant them rights to a “commercial fishery.” Rather, the licences were actually “food fish” licences that merely permitted or allowed the sale of some of the fish caught under the licences.<sup>206</sup> The fishing rights under the pilot sales projects are not “commercial” in the more conventional sense of the word, if they are critically examined and carefully unpackaged. This reinforces the notion that the second aspect of commercial rights (*i.e.*, quantity) is the real driving force behind non-Native opposition to the recognition and protection of commercial rights.

These observations are also consistent with some Aboriginal perspectives on commercial fishing which do not make the assumption that resource harvesting for the mixed purposes of trading and sustenance necessarily implies that the right underlying the harvesting is commercial in nature. In his comments on the *Kapp* decision, *Globe and Mail* columnist Jeffrey Simpson accurately points out that “some [A]boriginals read the Supreme Court’s ruling [in *Sparrow*] about a ‘food’ fishery to mean not just that they could catch salmon to eat, but to earn income from harvested salmon in order to buy other kinds of food .... They didn’t accept, in other words, the more limited definition of ‘food.’”<sup>207</sup> Simpson encapsulates this perspective with an arguably unfortunate choice of words: “salmon for peanut butter, if you like.”<sup>208</sup> This notion that rights involving trade or sale may not be “commercial” at all is echoed in the words of Chief Kelly of the Soowahlie Band following the *Kapp* decision: “Once a fish is caught, who cares whether we eat it or sell it? The fish is gone. It’s not going to spawn. It

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205. *Van der Peet*, *supra* note 18 at para. 278 (McLachlin J.).

206. See Walter *et al.*, *supra* note 17 at para. 75.

207. Simpson, *supra* note 11.

208. *Ibid.* Although intended to convey at least one version of Aboriginal perspectives on “commercial” rights, this expression (“salmon for peanut butter”) may reinforce or reflect a paternalistic and crass interpretation of Aboriginal rights that demeans the spiritual, social and cultural aspects of the right (and of the importance of salmon for many Native cultures) and reduces it to a catch phrase for “trade.” Nevertheless, Simpson’s observation remains valid, even if his choice of language is not ideal.

doesn't matter whether it's my food or your food."<sup>209</sup> A "new" version of commercial Aboriginal rights theory is therefore supported by and consistent with current Aboriginal perspectives on the nature of their rights and practices which have commercial aspects or dimensions.

Likewise, it is possible to use this theory to counter the notion in *Kapp* that the pilot sales projects were implemented not for Aboriginal rights purposes, but rather to curb the illegal sale of fish through widespread poaching by Aboriginal fishers, as discussed earlier in this paper. If we cease to focus on the "illegal" nature of Aboriginal commercial fishing (especially since its illegality is established only by federal regulations that, as demonstrated by the pilot sales projects, can be easily repealed or modified in order to make what was once illegal now legal and even encouraged) and focus instead on the meaning of the political and cultural act of Aboriginal fishing for sale or for trade, we might develop a more sophisticated understanding and respect for the goals and aspirations of Aboriginal fishers and communities. One person's "poaching," after all, is another person's (especially an Aboriginal person's) expression of their claim to a historic right to engage in cultural practices (like fishing for trade) that should be allowed to adapt over time, as all cultural practices do.

This gap in understanding was (perhaps unintentionally) revealed by the federal Minister of Fisheries and Oceans responsible for creating and implementing the AFS and the pilot sales projects, John Crosbie, in his address to the Standing Committee on Forestry and Fisheries in 1993: "We call it poaching. The Aboriginals say they have a right to do it."<sup>210</sup> It should be noted, however, that this cultural gap is at least notionally capable of being resolved (or perhaps only distilled) in court; the "poaching" by Aboriginal fishers in the *Sparrow* case, for example, ultimately became a recognized and protected "right."<sup>211</sup> Yet the reconciliation of such disparate perspectives must, by necessity, involve a deeper understanding of the cultural significance of commercial rights (and of whether such rights are truly "commercial" at all) from an Aboriginal perspective. Such an understanding is needed to transcend the kind of dichotomous thinking that separates "commercial" rights from "sustenance" rights in decisions like *Gladstone*, *Delgamuukw* and *Van der Peet*.

## V THE PROBLEMS AND LIMITS OF ABORIGINAL RIGHTS LITIGATION

This examination of the reluctance to recognize commercial Aboriginal rights as the underlying source of the dispute in *Kapp* does not, however, provide an adequate resolution to the case, nor to the protest fishers' situation in particular. If Judge Kitchen's finding of discrimination is overturned or if the discrimination is justified under s. 1 of the *Charter*, we are faced with a judicial precedent that makes the occasional exclusion of non-Aboriginal users from accessing a

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209. Quoted in "Native-Only Salmon", *supra* note 8.

210. Quoted in *Kapp*, *supra* note 1 at para. 47.

211. I would like to acknowledge the invaluable insight of Professor Sonia Lawrence of Osgoode Hall Law School, my supervisor for this project, in reminding me of this point (and of many others).

resource base the “price to pay” for the recognition and affirmation of Aboriginal rights (or claims to such rights).

This conclusion is arguably just as unsatisfying and problematic as the “narrow” view of the decision which examines the dispute from a purely “equality rights” perspective, without addressing the underlying Aboriginal rights concerns so close to its surface. Part of this dissatisfaction arises from the direct implications and localized consequences of the differential treatment of Aboriginal claims and interests at issue in *Kapp*. While politicians, conservative academics and mainstream news media commentators are fond of reminding Canadian taxpayers of the overall extent of the economic “cost” of Aboriginal rights, and programs or policies that favour Aboriginal communities,<sup>212</sup> the *Kapp* case instead reveals a situation with very real and localized effects on particular individual Canadians—non-Native fishermen. The real meaning of “reconciliation,” then, involves more than mutual accommodation or tolerance. Especially with respect to commercial Aboriginal rights, the concept of reconciliation at the heart of our constitutional recognition and affirmation of Aboriginal rights will often involve a corresponding diminishing or possible infringement of non-Aboriginal rights (or, more appropriately, non-Aboriginal privileges) in resource use and allocation, as is the case in *Kapp*. The fundamental redistribution of land, resources and wealth that would result from a true recognition of Aboriginal rights is not a curious by-product of Aboriginal rights theory. This redistribution may in fact be mandated or required by the power of s. 35(1) of the *Constitution*, especially in the “zero-sum game” of fishing disputes, where the rules are clear: “what one group gains, the other loses.”<sup>213</sup> Any critique of *Kapp*, whether narrow or broad, will not remove the inherent divisiveness and tension underlying the dispute, and the asymmetrical resource distribution it betrays.

Where, then, does this leave the protest fishers in *Kapp*? How should their needs and interests be “reconciled” with those of Aboriginal fishermen who may hold special rights or who may benefit from special government programs? The question itself is not straightforward and any attempt to answer it will surely encounter obstacles and widespread opposition from either side. Yet the plight of the protest fishers in *Kapp* (regardless of the outcome of their criminal charges) highlights an important dimension of litigation involving both Aboriginal rights and equality rights. While Aboriginal rights litigation pits Aboriginal groups and communities against the state in disputes over the distribution of resources or the

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212. See W. Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government* (Toronto: University of Toronto Press, 1998).

213. See Simpson, *supra* note 11; see also Burnett, *supra* note 140 at 393. It should be noted that the “zero-sum game” theory is frequently challenged by many commentators and even by many actors in fisheries disputes themselves. Some Native leaders and fishers in the *Marshall* lobster wars, for example, emphasized that their right to “bring items for trade or barter” need not exclude other resource users and, in many cases, could foster or encourage a mutual sharing of the natural resources in dispute; see Coates, *supra* note 17. As long as proper conservation measures and systems are in place to ensure the continued survival of the resource, one group’s rights need not take away from another group’s rights.

ownership of land, equality rights litigation (in a non-Aboriginal context) pits non-Native individuals against government action and legislation that impedes their right to freedom from discrimination in enjoying socio-economic benefits or participation in social and political life. In cases that potentially involve both types of claims, it is clear that rights claimants on both sides should be addressing their grievances vis-à-vis the state, not against each other. The state is then required to act as a double defendant (or a double target of rights claimants) and the complexities of resource distribution decision-making and priority allocation determinations are accordingly magnified. While the *Constitution* may encourage or even require courts to pay closer attention or give priority to the Aboriginal rights side of the dispute (either through s. 25, s. 35, as discussed above, or through a more contextual application of the s. 15 *Law* test), it might be possible to craft remedies that include a more just resolution for non-Aboriginal equality rights claimants like the protest fishers in *Kapp*.

Such solutions could include a special subsidy or social assistance benefit to non-Aboriginal fishers affected by the pilot sales projects in order to compensate them for their losses and in order to better distribute and spread out the cost of recognizing and protecting Aboriginal rights amongst Canadians in general, to avoid undue hardship on any one group.<sup>214</sup> Another solution would be to open up the fishery to all users for a set number of days, in addition to those days set aside for pilot sales projects licence holders. This would, in fact, more accurately address the protest fishers’ original concerns in *Kapp*; evidence concerning the federal management of the Fraser River salmon fishery in years where non-Native fishers engaged in protest fishing indicates that overly conservative estimates and restrictive conservation measures kept the fishery closed for longer periods than were necessary.<sup>215</sup> The source of the protest fishers’ anger might be more closely tied to the actual closure of the fishery for the majority of the season, rather than to any special accommodations made for Aboriginal fishers.<sup>216</sup> However, a more complete and detailed discussion of possible modes of “reconciliation” in the context of fishery disputes such as *Kapp* lies outside the scope and purpose of this paper, and requires further research and analysis.

What *is* possible within the boundaries of this paper, however, is a final criticism of the *Kapp* decision that may shed some light on future directions in Aboriginal rights theory and litigation. As previously noted, the pilot sales projects at issue in *Kapp* were not an explicit recognition of Aboriginal rights, but rather an attempt to anticipate claims to such rights. This fact is extremely significant; it means the actions of the Aboriginal fishermen were not supported by a constitutionally protected right, but merely by favourable government policy. The Aboriginal groups in question could not, therefore, avail themselves

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214. See *e.g.* McNeil, *supra* note 102 at 17-18.

215. See *Committee Report*, *supra* note 32.

216. This theory is also complemented by Burnett’s observation that protest fishers have for years complained about the “disappearance” of hundreds of thousands of “unaccounted” sockeye salmon because of federal mismanagement of the fisheries, and even because of non-Native fishing operations hiring “token natives” to take advantage of the AFS and the pilot sales projects; see Burnett, *supra* note 140 at 424-25.

of the protection provided by the recognition of a fishing right under s. 35(1) and the protection provided by s. 25 (which could have shielded this right against competing *Charter*-based claims); the pilot sales projects were vulnerable to the protest fishers' s. 15(1) claim and to a rejection of the pilot sales projects as an ameliorative program under s. 15(2).

This model of litigation involving competing Aboriginal and non-Aboriginal claims and rights is troubling in that it reinforces the limitations and problems of current Aboriginal rights theories under s. 35(1) of the *Constitution*, as espoused by the S.C.C. Section 35(1), it would appear, is merely a defensive "shield" against government action (in the form of criminal charges, regulations and other infringements) and cannot be used as an offensive "sword" to secure or establish an Aboriginal right for other purposes (such as bargaining leverage in negotiations with provincial and federal governments or with resource companies; anticipating and preventing non-Aboriginal or government challenges to cultural or economic activities protected by the right; *etc.*).<sup>217</sup> The end result is that Aboriginal groups are only able to engage in constitutionally protected activities if that constitutional protection is obtained and proven in court, following a legal challenge to such activities either from the state, or from non-Aboriginal or other competing Aboriginal groups.<sup>218</sup>

This limited and restrictive view of s. 35(1) has tremendous implications for the future of Aboriginal rights litigation in Canada. It does not, for instance, merely imply that an Aboriginal right does not "exist" until proven in court and that it will not be proven unless the group claiming the right is already acting in contravention of some federal or provincial law or regulation. The restrictive view of s. 35(1) as only a "shield" and, therefore, "out of place" in situations like *Kapp* (which involve ameliorative programs instead of "rights"), also acts as a deterrent for governments to enter into negotiations or other cooperative and participatory solutions with Aboriginal groups in anticipating and preventing Aboriginal rights disputes from becoming protracted and adversarial battles waged through litigation. *Kapp* involved a challenge to federal government policy designed to develop proactive solutions and effective responses to the unique situations, needs and potential rights of many Native communities in B.C.; *Kapp's* rejection of such creative state action (arguably constitutionally mandated by the S.C.C. in *Sparrow*) creates a fear amongst state officials and politicians that any such proactive approach to Aboriginal rights disputes will be vulnerable to *Charter* challenges and restrictive judicial reasoning. Indeed, as mentioned in the introduction of this paper, the far-reaching implications of this

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217. See Stack, *supra* note 122 at para. 112.

218. Note, however, that a line of cases may be creating a significant jurisprudence in favour of recognizing a broad "duty to consult" (and a corresponding Aboriginal right to "be consulted") even in situations where the ultimate right in question (such as title to land) has not yet been proven in court; see the discussion on this point in Lawrence & Macklem, *supra* note 136. This broad duty/right may be considered an "anticipatory" right in that it may be protected and enforced even in the absence of any government or third party interference, or in anticipation of such interference. This may effectively constitute an exception to the "shield, not sword" version of s. 35(1) Aboriginal rights doctrine endorsed by the S.C.C.

fear were evident in the wake of the *Kapp* decision, as the DFO quickly moved to cancel all existing pilot sales projects and upcoming negotiations with participating First Nations.<sup>219</sup> Thus, even the consultation duty and negotiation imperative envisaged by the S.C.C. as the preferable path to reconciliation is "not an independent right held by Aboriginal people, but rather attaches to already existing Aboriginal and treaty rights."<sup>220</sup> Unless those existing rights have been challenged and subsequently proven in court, any negotiations or creative approaches to preserving them or ensuring their safe exercise will be vulnerable, at best; or void, at worst. This inability of Aboriginal groups or the federal government to assert the existence (or potential existence) of Aboriginal rights in situations like *Kapp* creates unsatisfactory and "circular" litigation where "resources are spent developing and managing the section 15 aspect of the case, perhaps at the expense of developing legal arguments supporting substantive Aboriginal rights claims."<sup>221</sup>

If this conventional, conservative and largely unimaginative view of Aboriginal rights doctrine fails to protect Aboriginal groups and communities like those in *Kapp*, we must consider alternative or supplemental interpretations of Aboriginal rights principles that would give "teeth" to s. 35(1) and create scope for using this constitutional provision as a sword and not just a shield. First, there is a logical argument, perhaps even rooted in the very words of s. 35(1), that Aboriginal rights do, in fact, exist even if not yet proven in court. This is reinforced by the daily actions and cultural or economic practices of Native groups who are exercising and acting out the practical implications of these rights in their resource harvesting practices, their cultural activities or their territorial land use and ownership patterns, without having gone to court to win the right to engage in these activities. The reality of Aboriginal rights is therefore not diminished by their fictitious "birth" or "death" in Canadian courts. This argument is also reinforced by the language of s. 35(1), which clearly states that the rights affirmed and recognized under the *Constitution* are already "existing"; whether they are also proven in court is a matter of legal interpretation and evidentiary sufficiency. Indeed, even after a court has denied the existence of an Aboriginal right, it is clear that Aboriginal groups and individuals may continue to exercise the practices they believe are protected by this failed right, even at risk to their own freedom and safety.<sup>222</sup>

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219. See Oakes, *supra* note 8 and "Native-Only Salmon", *supra* note 8.

220. See Isaac & Knox, *supra* note 137 at para. 32.

221. Chartrand, *supra* note 79 at 253; these comments were made in reference to Aboriginal challenges to government action that involve both an s. 35(1) and an s. 15(1) component, but are equally applicable to situations like *Kapp* where s. 15(1) is used to challenge government action favouring Aboriginal groups.

222. Many news reports of the aftermath of the *Kapp* decision indicate that a large number of Native fishers will continue to fish pursuant to the terms of their licences under the pilot sales projects, despite the ruling striking them down; this has been met with equally forceful conviction on the part of the B.C. Fisheries Survival Coalition and other non-Native fishers to prevent this "illegal" sale of fish from occurring. The potential for an explosion of racial violence not seen since the East Coast lobster wars following the *Marshall* decisions is very real and very troubling: see "Native-Only

Second, there is also scope for finding a number of related duties imposed on the Crown that may attach to situations where an Aboriginal right has not yet been proven in court. Lawrence and Macklem, for example, convincingly demonstrate that the duty to consult, as mandated by *Sparrow* and *Delgamuukw*, may give rise to positive obligations. While many judges have chosen to reject the idea that the Crown is under an obligation to consult First Nations when merely contemplating action or legislation that would affect or infringe the exercise of an Aboriginal right, Lawrence and Macklem use the link between the principle of reconciliation and the S.C.C. directive to negotiate in good faith in order to avoid litigation to expand the uses of the duty to consult and the contexts in which it may be invoked. If the duty to consult, they write, “operates to minimize reliance on litigation, as a means of determining the nature and scope of Aboriginal and treaty rights, it must also apply in cases where a First Nation asserts rights that have yet to be formally recognized by a court of law or treaty.”<sup>223</sup> Any other conclusion would threaten the very basis and purpose of s. 35(1).

Likewise, Macklem has elsewhere explored the idea that s. 35(1) may indeed be flexible enough to escape its restrictive “shield” interpretation and to help strengthen Aboriginal rights through the creation of “positive” state obligations towards Aboriginal peoples. Such obligations could arguably include the duty of the state to provide, *inter alia*, economic or social benefits to Native groups and communities. While s. 35(1) rights have traditionally been construed as “negative rights,” in that they “prevent government from interfering with their exercise”<sup>224</sup> (as *Charter* rights generally do), Macklem argues that the “positive dimensions” of s. 35(1) may require the state to provide a wide array of social and economic benefits to Aboriginal peoples in order to achieve the purpose of s. 35(1) and honour the interests it protects.<sup>225</sup> If Aboriginal rights can be considered to reflect dimensions of both civil/political rights (which are typically negative rights) and social/economic rights (which include scope for protecting the fundamentals of economic and social well-being through positive state obligations), then s. 35(1) can be said to mandate positive state action even in the absence of a court ruling that recognizes an s. 35(1) right.<sup>226</sup> Such a perspective could help protect government programs like the pilot sales projects that presently exist in a “rights vacuum” and would counter the resistance to “viewing Aboriginal rights in social and economic terms.”<sup>227</sup> It is hoped that endorsing a positive “sword” model of s. 35(1) will help influence the future course of *Kapp* and other cases like it as they make their way through the appeals process towards the Supreme Court of Canada. Conversely, without such a link between the “sword” theory of s. 35(1) and the commercial dimensions of

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Salmon”, *supra* note 8; “Native Fishery Invalid”, *supra* note 8; and R. Mickleburgh, “Tension Builds After Fisheries Ruling” *Globe and Mail* (31 July 2003) A6.

223. Lawrence & Macklem, *supra* note 136 at 262.

224. “Aboriginal Rights”, *supra* note 134 at Part I.

225. *Ibid.* at Parts I and II.

226. *Ibid.* at Part II.B.

227. *Ibid.* at Part III.



Aboriginal rights, cases like *Kapp* make it clear that Canadian courts and judges will continue to "shy away from constitutionally requiring government to provide social and economic benefits to Aboriginal people."<sup>228</sup>

## VI CONCLUSION

The recent *Kapp* decision has the potential to fundamentally alter, for better or for worse, our understanding of the nature of Aboriginal rights disputes in Canada and how such rights interact with other constitutionally-protected rights in the *Charter*. If an appellate court upholds the ruling and the reasons of Judge Kitchen of the British Columbia Provincial Court, the federal government (and Aboriginal litigants) will be faced with a precedent that inappropriately and incorrectly condemns an affirmative action program without placing it within its proper Aboriginal rights context, including the S.C.C.'s instructions to negotiate rather than litigate the boundaries of Aboriginal rights. Such a narrow view of the case, which relies solely, as did Judge Kitchen, on a narrow interpretation of the contextual factors in the *Law* test for discrimination under s. 15(1) of the *Charter*, and on a restrictive and outdated notion of "disadvantage" when considering the validity of an ameliorative program under s. 15(2), misses the mark completely. Divorced from its Aboriginal rights context, the dispute in *Kapp* is distilled and flattened until it becomes an academic debate over whether the Aboriginal groups in question were sufficiently "disadvantaged" enough to warrant the protection of an ameliorative government program. Furthermore, the addition of a more substantive theory of equality does nothing to solve the underlying problems in the case. Substantive equality is still rooted in inappropriate concepts that fail to account for the unique nature of Aboriginal rights and the purpose of Aboriginal claims for justice and redress, and ultimately threatens to undermine the purported basis for the very existence of equality rights for Aboriginal peoples.

In contrast, a more expansive paradigm that endorses a return to the fundamental concepts of "reconciliation" and respect for cultural and political "difference" found in *Sparrow* and other early S.C.C. jurisprudence on Aboriginal rights, sheds light on the underlying (and well-hidden) issues in the *Kapp* case. The first of these is an accurate and useful understanding of the interaction between Aboriginal rights under s. 35(1) of the *Constitution* and equality rights under s. 15 of the *Charter*. Ignoring or downplaying the role of s. 25 of the *Charter*, and the wealth of potential modes of interaction between Aboriginal rights and equality rights which would protect Aboriginal rights-holders from outside interference, does nothing to advance the goals of reconciliation and restitution mandated by s. 35(1) of the *Constitution*.

The second issue lying under the surface of Judge Kitchen's decision in *Kapp* is the inability of courts and politicians to honestly and meaningfully acknowledge, address and resolve the long-standing Canadian reluctance to

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228. *Ibid.*

recognize and protect commercial Aboriginal rights. The exercise of Aboriginal rights with commercial aspects has been ignored, rejected, curtailed and feared because the cultural, practical and political implications of recognizing these rights, including their fundamental challenge to mainstream understandings of Aboriginal cultural practices, has the potential to drastically alter the economic landscape and the distribution of resources in this country. So long as courts, politicians, the media and the public continue to characterize commercial rights as somehow incompatible with more “traditional” understandings of Aboriginal cultures and claims for justice (which are often rooted in irrational fears and outdated stereotypes), Aboriginal groups and communities seeking to assert their constitutionally-protected rights will face strong challenges and opposition.

The survival and viable future of Aboriginal rights in Canada, especially those involving commercial elements, therefore depends on the ability of courts and state officials, as well as members of the public, to widen their interpretive lens and to critically examine their relatively static and outdated notions of equality, reconciliation and Aboriginal rights. Central to this project of revision and re-examination is the development of legal and political models of s. 35(1) of the *Constitution* which emphasize its positive and creative aspects, and which open the door to the possibility of substantive state obligations to Aboriginal peoples.