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December 15, 2011

E-FILED

Ms. Kirsten Walli, Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street (27TH Floor)
P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli,

Re: EB-2011-0361; EB-2011-0376 -
Preliminary Issues

We enclose herewith a copy of:

Tab 23. *R. v. Kapp, [2008]* 2 S.C.R. 484

Tab 24. *Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011* SCC 53

Tab 25. The Board's Decision dated July 26, 2011 in EB-2011-0040; EB-2011-0041 and EB-2011-0042 (without Appendices)

These Tabs should be added to Goldcorp's Book of Authorities.

Yours truly,

Gardiner Roberts LLP

Ian A. Blue

Enclosures

TORONTO: 284971\1 (96289)

TAB 23

SUPREME COURT OF CANADA

CITATION: R. *v.* Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41 **DATE:** 20080627

DOCKET: 31603

BETWEEN:

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky

Appellants

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations

Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

JOINT REASONS FOR McLachlin C.J. and Abella J. (Binnie, LeBel, Deschamps,

JUDGMENT: Fish, Charron and Rothstein JJ. concurring)

(paras. 1 to 66)

Bastarache J.

REASONS CONCURRING IN RESULT:

(paras. 67 to 123)

R. *v.* Kapp, [2008] 2 S.C.R. 483, 2008 SCC 41

John Michael Kapp, Robert Agricola, William Anderson, Albert Armstrong, Dale Armstrong, Lloyd James Armstrong, Pasha Berlak, Kenneth Axelson, Michael Bemi, Leonard Botkin, John Brodie, Darrin Chung, Donald Connors, Bruce Crosby, Barry Dolby, Wayne Ellis, William Gaunt, George Horne, Hon van Lam, William Leslie Sr., Bob M. McDonald, Leona McDonald, Stuart McDonald, Ryan McEachern, William McIsaac, Melvin (Butch) Mitchell, Ritchie Moore, Galen Murray, Dennis Nakutsuru, Theordore Neef, David Luke Nelson, Phuoc Nguyen, Nung Duc Gia Nguyen, Richard Nomura, Vui Phan, Robert Powroznik, Bruce Probert, Larry Salmi, Andy Sasidiak, Colin R. Smith, Donna Sonnenberg, Den van Ta, Cedric Towers, Thanh S. Tra, George Tudor, Mervin Tudor, Dieu To Ve, Albert White, Gary Williamson, Jerry A. Williamson, Spencer J. Williamson, Kenny Yoshikawa, Dorothy Zilcosky and Robert Zilcosky *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General for Saskatchewan, Attorney General of Alberta, Tsawwassen First Nation, Haisla Nation, Songhees Indian Band, Malahat First Nation, T'Sou-ke First Nation, Snaw-naw-as (Nanoose) First Nation and Beecher Bay Indian Band (collectively Te'mexw Nations), Heiltsuk Nation, Musqueam Indian Band, Cowichan Tribes, Sportfishing Defence Alliance, B.C. Seafood Alliance, Pacific Salmon Harvesters Society, Aboriginal Fishing Vessel Owners Association, United Fishermen and Allied Workers Union, Japanese Canadian Fishermens Association, Atlantic Fishing Industry Alliance, Nee Tahi Buhn Indian Band, Tseshaht First Nation and Assembly of First Nations *Interveners*

Indexed as: R. *v.* Kapp

Neutral citation: 2008 SCC 41.

File No.: 31603.

2007: December 11; 2008: June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for british columbia

Constitutional law — Charter of Rights — Right to equality — Affirmative action programs — Relationship between s. 15(1) and s. 15(2) of Canadian Charter of Rights and Freedoms — Ambit and operation of s. 15(2) — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether program protected by s. 15(2) of Charter.

Constitutional law — Charter of Rights — Aboriginal rights and freedoms not affected by Charter — Right to equality — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether s. 25 of Canadian Charter of Rights and Freedoms applicable to insulate program from discrimination charge.

Fisheries — Commercial fishery — Aboriginal Fisheries Strategy — Communal fishing licence issued under pilot sales program granting members of three aboriginal bands exclusive right to fish for salmon for period of 24 hours — Commercial, mainly non-aboriginal, fishers excluded from fishery at that time alleging a breach of their equality rights on basis of race-based discrimination — Whether licence constitutional — Canadian Charter of Rights and Freedoms, s. 15.

The federal government's decision to enhance aboriginal involvement in the commercial fishery led to the Aboriginal Fisheries Strategy. A significant part of the Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of a communal fishing licence to three aboriginal bands, permitting fishers designated by the bands to fish for salmon in the mouth of the Fraser River for a period of 24 hours and to sell their catch. The appellants, who are all commercial fishers, mainly non-aboriginal, excluded from the fishery during this 24-hour period, participated in a protest fishery and were charged with fishing at a prohibited time. At their trial, they argued that the communal fishing licence discriminated against them on the basis of race. The trial judge found that the licence granted to the three bands was a breach of the appellants' equality rights under s. 15(1) of the *Canadian Charter of Rights and Freedoms* that was not justified under s. 1 of the *Charter*. Proceedings on all the charges were stayed. A summary convictions appeal by the Crown was allowed. The stay of proceedings was lifted and convictions were entered against the appellants. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed. The communal fishing licence was constitutional.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.: The communal fishing licence falls within the ambit of s. 15(2) of the *Charter*, and the appellants' claim of a violation of s. 15 cannot succeed. [3]

Section 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The focus of s. 15(1) is on preventing governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on enabling governments to pro-actively combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs without fear of challenge under s. 15(1). It is thus open to the government, when faced with a s. 15 claim, to establish that the impugned program falls under s. 15(2) and is therefore constitutional. If the government fails to do so, the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory. [16] [37] [40]

A distinction based on an enumerated or analogous ground in a government program will not constitute discrimination under s. 15 if, under s. 15(2): (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. Given the language of the provision and its purpose, legislative goal is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. The program's ameliorative purpose need not be its sole object. [41] [44] [48] [50] [57]

The government program at issue here is protected by s. 15(2) of the *Charter*. The communal fishing licence was issued pursuant to an enabling statute and regulations and qualifies as a "law, program or activity" within the meaning of s. 15(2). The program also "has as its object the amelioration of conditions of disadvantaged individuals or groups". The Crown describes numerous objectives for the program, which include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. The Crown has thus established a credible ameliorative purpose for the program. The program also targets a disadvantaged group identified by the enumerated or analogous grounds. The bands granted the benefit were disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members. It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*. [30] [57-59] [61]

With respect to s. 25 of the *Charter*, it is not clear that the communal fishing licence at issue

lies within the provision's compass. The wording of s. 25 and the examples given therein suggest that only rights of a constitutional character are likely to benefit from s. 25. A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights. Prudence suggests that these issues, which raise complex questions of the utmost importance to the peaceful reconciliation of aboriginal entitlements with the interests of all Canadians, are best left for resolution on a case-by-case basis as they arise. [63-65]

Per Bastarache J.: Section 25 of the *Charter* operates to bar the appellants' constitutional challenge under s. 15. Although there is agreement with the restatement of the test for the application of s. 15 of the *Charter* set out in the main opinion, there is no need to go through a full s. 15 analysis before considering whether s. 25 applies. It is sufficient to establish the existence of a potential conflict between the pilot sales program and s. 15. [75] [77] [108]

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this Charter". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives. [80-81] [89] [93] [97]

The reference to "aboriginal and treaty rights" in s. 25 suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. Legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny. Laws adopted under the power set out in s. 91(24) of the *Constitution Act, 1867* would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" in s. 25 comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected. Section 25 reflects the imperative need to accommodate, recognize and reconcile aboriginal interests. [103] [105-106]

There are three steps in the application of s. 25. The first step requires an evaluation of the

claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right. [111]

Here, there is a *prima facie* case of discrimination pursuant to s. 15(1). The right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. The native right falls under s. 25. The unique relationship between British Columbia aboriginal communities and the fishery should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions. Furthermore, the Crown itself argued that these rights to fish were a first step in establishing a treaty right and s. 25 reflects the notions of reconciliation and negotiation present in the treaty process. Finally, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867*, which deals with Indians. The *Charter* cannot be interpreted as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1 of the *Charter*. Section 25 is a necessary partner to s. 35(1) of the *Constitution Act, 1982*; it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation. There is also a real conflict here, since the right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. Section 25 of the *Charter* accordingly applies in the present situation and provides a full answer to the claim. [116] [119-123]

Cases Cited

By McLachlin C.J. and Abella J.

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By Bastarache J.

Referred to: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *R. v. Drybones*, [1970] S.C.R. 282; *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187; *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1; *Shubenacadie Band Council v. Canada (Human Rights Commission)* (2000), 37 C.H.R.R. D/466; *R. v. Nicholas*, [1989] 2 C.N.L.R. 131; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505.

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Constitution Act, 1867, ss. 91(24), 93.

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Constitution Amendment Proclamation, 1983, R.S.C. 1985, App. II, No. 46.

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By Bastarache J.

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APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Mackenzie, Low, Levine and Kirkpatrick JJ.A.) (2006), 56 B.C.L.R. (4th) 11, 271 D.L.R. (4th) 70, [2006] 10 W.W.R. 577, 227 B.C.A.C. 248, 374 W.A.C. 248, 24 C.E.L.R. (3d) 99, [2006] 3 C.N.L.R. 282, 141 C.R.R. (2d) 249, [2006] B.C.J. No. 1273 (QL), 2006 CarswellBC 1407, 2006 BCCA 277, affirming a decision of Brenner C.J.S.C. (2004), 31 B.C.L.R. (4th) 258, [2004] 3 C.N.L.R. 269, 121 C.R.R. (2d) 349, [2004] B.C.J. No. 1440 (QL), 2004 CarswellBC 1607, 2004 BCSC 958, lifting a stay of proceedings by Kitchen Prov. Ct. J., [2003] 4 C.N.L.R. 238, [2003] B.C.J. No. 1772 (QL), 2003 CarswellBC 1881, 2003 BCPC 279. Appeal dismissed.

Bryan Finlay, Q.C., J. Gregory Richards and *Paul D. Guy*, for the appellants.

Croft Michaelson and *Paul Riley*, for the respondent.

Sarah T. Kraicer and *S. Zachary Green*, for the intervener the Attorney General of Ontario.

Isabelle Harnois and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Richard James Fyfe, for the intervener the Attorney General for Saskatchewan.

Robert J. Normey, for the intervener the Attorney General of Alberta.

Joseph J. Arvay, Q.C., and *Jeffrey W. Beedell*, for the intervener the Tsawwassen First Nation.

Allan Donovan and *Bram Rogachevsky*, for the intervener the Haisla Nation.

Robert J. M. Janes and *Dominique Nouvet*, for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations).

Maria A. Morellato and *Joanne R. Lysyk*, for the interveners the Heiltsuk Nation and the Musqueam Indian Band.

F. Matthew Kirchner and *Lisa C. Glowacki*, for the intervener the Cowichan Tribes.

J. Keith Lowes, for the interveners the Sportfishing Defence Alliance, the B.C. Seafood Alliance, the Pacific Salmon Harvesters Society, the Aboriginal Fishing Vessel Owners Association and the United Fishermen and Allied Workers Union.

John Carpay and *Chris Schafer*, for the intervener the Japanese Canadian Fishermens Association.

Kevin O'Callaghan and *Katey Grist*, for the intervener the Atlantic Fishing Industry Alliance.

Ryan D. W. Dalziel, for the intervener the Nee Tahi Buhn Indian Band.

Hugh M. G. Braker, *Q.C.*, and *Anja P. Brown*, for the intervener the Tseshaht First Nation.

Bryan P. Schwartz and *Jack R. London*, *Q.C.*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. was delivered by

THE CHIEF JUSTICE AND ABELLA J. —

A. Introduction

[1] The appellants are commercial fishers, mainly non-aboriginal, who assert that their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms* were violated by a communal fishing licence granting members of three aboriginal bands the exclusive right to fish for salmon in the mouth of the Fraser River for a period of 24 hours on August 19-20, 1998.

[2] The appellants base their claim on s. 15(1). The essence of the claim is that the communal fishing licence discriminated against them on the basis of race. The Crown argues that the general purpose of the program under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group. These contentions, taken together, raise the issue of the interplay between s. 15(1) and s. 15(2) of the *Charter*. Specifically, they require this Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination — a possibility left open in this Court's equality jurisprudence.

[3] We have concluded that where a program makes a distinction on one of the grounds enumerated under s. 15 or an analogous ground but has as its object the amelioration of the conditions of a disadvantaged group, s. 15's guarantee of substantive equality is furthered, and the claim of

discrimination must fail. As the communal fishing licence challenged in this appeal falls within s. 15(2)'s ambit — one of its objects being to ameliorate the conditions of the participating aboriginal bands — the appellants' claim of a violation of s. 15 cannot succeed. While the operation of s. 15(2) is sufficient to dispose of the appeal, these reasons, in addition to examining the respective roles of s. 15(1) and s. 15(2), will comment briefly on s. 25 of the *Charter*, in view of the reasons of Bastarache J. on this point.

B. Factual and Judicial History

[4] Prior to European contact, aboriginal groups living in the region of the mouth of the Fraser River fished the river for food, social and ceremonial purposes. It is no exaggeration to say that their life centered in large part around the river and its abundant fishery. In the last two decades, court decisions have confirmed that pre-contact fishing practices integral to the culture of aboriginal people translate into a modern-day right to fish for food, social and ceremonial purposes: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. The right is a communal right. It inheres in the community, not the individual, and may be exercised by people who are linked to the ancestral aboriginal community.

[5] The aboriginal right has not been recognized by the courts as extending to fishing for the purpose of sale or commercial fishing: *R. v. Van der Peet*, [1996] 2 S.C.R. 507. The participation of Aboriginals in the commercial fishery was thus left to individual initiative or to negotiation between aboriginal peoples and the government. The federal government determined that aboriginal people should be given a stake in the commercial fishery. The bands tended to be disadvantaged economically, compared to non-Aboriginals. Catching fish for their own tables and ceremonies left many needs unmet.

[6] The government's decision to enhance aboriginal involvement in the commercial fishery followed the recommendations of the 1982 Pearse Final Report, which endorsed the negotiation of aboriginal fishery agreements (*Turning the Tide: A New Policy For Canada's Pacific Fisheries*). The Pearse Report recognized the problematic connection between aboriginal communities' economic disadvantage and the longstanding prohibition against selling fish — a prohibition that disrupted what was once an important economic opportunity for Aboriginals. Policing the prohibition was also problematic; the 1994 Gardner Pinfold Report addressed the serious conservation issue stemming from a fish sales prohibition "honoured more in the breach than the observance" (*An Evaluation of the Pilot Sale Arrangement of Aboriginal Fisheries Strategy (AFS)*, p. 3). The decision to enhance aboriginal participation in the commercial fishery may also be seen as a response to the directive of this Court in *Sparrow*, at p. 1119, that the government consult with aboriginal groups in the implementation of fishery regulation in order to honour its fiduciary duty to aboriginal communities. Subsequent decisions have affirmed the duty to consult and accommodate aboriginal communities with respect to resource development and conservation; it is a constitutional duty, the fulfilment of which is consistent with the honour of the Crown: see e.g. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[7] The federal government's policies aimed at giving aboriginal people a share of the commercial fishery took different forms, united under the umbrella of the "Aboriginal Fisheries Strategy". Introduced in 1992, the Aboriginal Fisheries Strategy has three stated objectives: ensuring the rights recognized by the *Sparrow* decision are respected; providing aboriginal communities with a larger role in fisheries management and increased economic benefits; and minimizing the disruption of non-aboriginal fisheries (1994 Gardner Pinfold Report). In response to consultations with stakeholders carried out since its inception, the Aboriginal Fisheries Strategy has been reviewed and adjusted periodically in order to achieve these goals. A significant part of the Aboriginal Fisheries Strategy was the introduction of three pilot sales programs, one of which resulted in the issuance of the communal fishing licence at issue in this case. The licence was granted pursuant to the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332 ("*ACFLR*"). The *ACFLR* grants communal licences to "aboriginal organization[s]", defined as including "an Indian band, an Indian band council, a tribal council and an organization that represents a territorially based aboriginal community" (s. 2). The communal licence cannot be granted to individuals, but an aboriginal organization can designate its use to individuals.

[8] The licence with which we are concerned permitted fishers designated by the bands to fish for sockeye salmon between 7:00 a.m on August 19, 1998 and 7:00 a.m. on August 20, 1998, and to use the fish caught for food, social and ceremonial purposes, and for sale. Some of the fishers designated by the bands to fish under the communal fishing licence were also licensed commercial fishers entitled to fish at other openings for commercial fishers.

[9] The appellants are all commercial fishers who were excluded from the fishery during the 24 hours allocated to the aboriginal fishery under the communal fishing licence. Under the auspices of the B.C. Fisheries Survival Coalition, they participated in a protest fishery during the prohibited period, for the purpose of bringing a constitutional challenge to the communal licence. As anticipated, they were charged with fishing at a prohibited time. In defence of the charges, they filed notice of a constitutional question seeking declarations that the communal fishing licence, the *ACFLR* and related regulations and the Aboriginal Fisheries Strategy were unconstitutional.

[10] The Provincial Court of British Columbia (Judge Kitchen) found that the communal fishing licence granted to the three bands was a breach of the equality rights of the appellants under s. 15 (1) of the *Charter* that was not justified under s. 1 of the *Charter*. The court stayed proceedings on all the charges under s. 24 of the *Charter*: [2003] 4 C.N.L.R. 238, 2003 BCPC 279.

[11] The Supreme Court of British Columbia (Brenner C.J.S.C.) allowed a summary convictions appeal by the Crown: (2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958. It held that the pilot sales program did not have a discriminatory purpose or effect because it did not perpetuate or promote the view that those who were forbidden to fish on the days when the pilot sales program fishery was open are less capable or worthy of recognition or value as human beings or as members of Canadian society. Brenner C.J.S.C. lifted the stay of proceedings and entered convictions against the appellants.

[12] The British Columbia Court of Appeal, in five sets of reasons concurring in the result, dismissed the appeal: (2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277. Low J.A. concluded that the pilot sales program did not constitute denial of a benefit under s. 15 when the matter was viewed in a contextual rather than formalistic way. Mackenzie J.A. rejected the claim of discrimination on the basis that a discriminatory purpose or effect had not been established, endorsing the view of Brenner C.J.S.C. on the summary convictions appeal. Kirkpatrick J.A. dismissed the s. 15 claim on the basis that s. 25 of the *Charter*, which protects rights and freedoms pertaining to the aboriginal peoples of Canada, insulated the scheme from the discrimination charge. Finch C.J.B.C. concurred with both Low J.A. and Mackenzie J.A. on the s. 15 issue, and found that s. 25 was not engaged. Finally, Levine J.A. agreed with Finch C.J.B.C. on the s. 15 issue, but declined to express a view on whether s. 25 was engaged.

C. Analysis

[13] Section 15 of the *Charter* provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, 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.

1. *The Purpose of Section 15*

[14] Nearly 20 years have passed since the Court handed down its first s. 15 decision in the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. *Andrews* set the template for this Court's commitment to substantive equality — a template which subsequent decisions have enriched but never abandoned.

[15] Substantive equality, as contrasted with formal equality, is grounded in the idea that: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration": *Andrews*, at p. 171, *per* McIntyre J., for the majority on the s. 15 issue. Pointing out that the concept of

equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality, McIntyre J. stated (at p. 165):

> To approach the ideal of full equality before and under the law — and in human affairs an approach is all that can be expected — the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another.

While acknowledging that equality is an inherently comparative concept (p. 164), McIntyre J. warned against a sterile similarly situated test focussed on treating "likes" alike. An insistence on substantive equality has remained central to the Court's approach to equality claims.

[16] Sections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. Section 15(1) is aimed at preventing discriminatory distinctions that impact adversely on members of groups identified by the grounds enumerated in s. 15 and analogous grounds. This is one way of combatting discrimination. However, governments may also wish to combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation. Through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). This is made apparent by the existence of s. 15(2). Thus s. 15(1) and s. 15(2) work together to confirm s. 15's purpose of furthering substantive equality.

[17] The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, established in essence a two-part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? These were divided, in *Law*, into three steps, but in our view the test is, in substance, the same.

[18] In *Andrews*, McIntyre J. viewed discriminatory impact through the lens of two concepts: (1) the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds; and (2) stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant's or group's actual circumstances and characteristics. *Andrews*, for example, was decided on the second of these concepts; it was held that the prohibition against non-citizens practising law was based on a stereotype that non-

citizens could not *properly* discharge the responsibilities of a lawyer in British Columbia — a view that denied non-citizens a privilege, not on the basis of their merits and capabilities, but on the basis of what the Royal Commission Report on *Equality in Employment* (1984), referred to as "attributed rather than actual characteristics" (p. 2). Additionally, McIntyre J. emphasized that a finding of discrimination might be grounded in the fact that the impact of a particular law or program was to perpetuate the disadvantage of a group defined by enumerated or analogous s. 15 grounds. In this context, he said (at p. 174):

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

[19] A decade later, in *Law*, this Court suggested that discrimination should be defined in terms of the impact of the law or program on the "human dignity" of members of the claimant group, having regard to four contextual factors: (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected (paras. 62-75).

[20] The achievement of *Law* was its success in unifying what had become, since *Andrews*, a division in this Court's approach to s. 15. *Law* accomplished this by reiterating and confirming *Andrews*' interpretation of s. 15 as a guarantee of substantive, and not just formal, equality. Moreover, *Law* made an important contribution to our understanding of the conceptual underpinnings of substantive equality.

[21] At the same time, several difficulties have arisen from the attempt in *Law* to employ human dignity *as a legal test*. There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity. As Dickson C.J. said in *R. v. Oakes*, [1986] 1 S.C.R. 103:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. [p. 136]

[22] But as critics have pointed out, human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be.[1] Criticism has also accrued for the way *Law* has allowed the formalism of some of the Court's post-*Andrews* jurisprudence to resurface in the form of an artificial comparator analysis focussed on treating likes alike.[2]

[23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

[24] Viewed in this way, *Law* does not impose a new and distinctive test for discrimination, but rather affirms the approach to substantive equality under s. 15 set out in *Andrews* and developed in numerous subsequent decisions. The factors cited in *Law* should not be read literally as if they were legislative dispositions, but as a way of focussing on the central concern of s. 15 identified in *Andrews* — combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping.

[25] The central purpose of combatting discrimination, as discussed, underlies both s. 15(1) and s. 15(2). Under s. 15(1), the focus is on *preventing* governments from making distinctions based on the enumerated or analogous grounds that: have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping. Under s. 15(2), the focus is on *enabling* governments to pro-actively combat existing discrimination through affirmative measures.

[26] Against this background, we turn to a more detailed examination of s. 15(2) and its role in this appeal.

2. *Section 15(2)*

[27] Under *Andrews*, as previously noted, s. 15 does not mean identical treatment. McIntyre J. explained that "every difference in treatment between individuals under the law will not necessarily

result in inequality", and that "identical treatment may frequently produce serious inequality" (p. 164). McIntyre J. explicitly rejected identical treatment as a *Charter* objective, based in part on the existence of s. 15(2). At p. 171, he stated that "the fact that identical treatment may frequently produce serious inequality is recognized in s. 15(2)".

[28] Rather than requiring identical treatment for everyone, in *Andrews*, McIntyre J. distinguished between difference and discrimination and adopted an approach to equality that acknowledged and accommodated differences. McIntyre J. proposed the following model, at p. 182:

> [I]n assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.

In other words, not every distinction is discriminatory. By their very nature, programs designed to ameliorate the disadvantage of one group will inevitably exclude individuals from other groups. This does not necessarily make them either unconstitutional or "reverse discrimination". *Andrews* requires that discriminatory conduct entail more than *different* treatment. As McIntyre J. declared at p. 167, a law will not "necessarily be bad because it makes distinctions".

[29] In our view, the appellants have established that they were treated differently based on an enumerated ground, race. Because the government argues that the program ameliorated the conditions of a disadvantaged group, we must take a more detailed look at s. 15(2).

[30] The question that arises is whether the program that targeted the aboriginal bands falls under s. 15(2) in the sense that it is a "law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". As noted, the communal fishing licence authorizing the three bands to fish for sale on August 19-20 was issued pursuant to an enabling statute and regulations — namely the *ACFLR*. This qualifies as a "law, program or activity" within the meaning of s. 15(2). The more complex issue is whether the program fulfills the remaining criteria of s. 15(2) — that is, whether the program "has as its object the amelioration of conditions of disadvantaged individuals or groups".

[31] Even before the enactment of the *Charter*, this Court in *Athabasca Tribal Council v. Amoco Canada Petroleum Co.*, [1981] 1 S.C.R. 699, recognized that ameliorative programs targeting a disadvantaged group do not constitute discrimination. The issue in the case was whether the Energy Resources Conservation Board had jurisdiction to require an "affirmative action" program for the hiring of aboriginal people as a condition of its approval of a tar sands plant. The Court unanimously concluded that there was no such jurisdiction, but Ritchie J., writing for four of the judges (Laskin C.J., himself, Dickson J. and McIntyre J.), addressed the affirmative action aspect of the case, concluding that a program designed to benefit the aboriginal community was not discrimination within the meaning of *The Individual's Rights Protection Act* of Alberta, S.A. 1972, c. 2:

> In the present case what is involved is a proposal designed to improve the lot of the native peoples with a view to enabling them to compete as nearly as possible on equal terms with other members of the community who are seeking employment in the tar sands plant. With all respect, I can see no reason why the measures proposed by the "affirmative action" programs for the betterment of the lot of the native peoples in the area in question should be construed as "discriminating against" other inhabitants. The purpose of the plan as I understand it 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. [p. 711]

[32] The Royal Commission Report on *Equality in Employment*, whose mandate was to determine whether there should be affirmative action in Canada and on which McIntyre J. relied to develop his theories of discrimination and equality, set out the principles underlying s. 15(2), at pp. 13-14:

> In recognition of the journey many have yet to complete before they achieve equality, and in recognition of how the duration of the journey has been and is being unfairly protracted by arbitrary barriers, section 15(2) permits laws, programs, or activities designed to eliminate these restraints. While section 15(1) guarantees to individuals the right to be treated as equals free from discrimination, section 15(2), though itself creating no enforceable remedy, assures that it is neither discriminatory nor a violation of the equality guaranteed by section 15(1) to attempt to improve the condition of disadvantaged individuals or groups, even if this means treating them differently.
>
> Section 15(2) covers the canvas with a broad brush, permitting a group remedy for discrimination. The section encourages a comprehensive or systemic rather than a particularized approach to the elimination of discriminatory barriers.
>
> Section 15(2) does not create the statutory obligation to establish laws, programs, or

> activities to hasten equality, ameliorate disadvantage, or eliminate discrimination. But it sanctions them, acting with statutory acquiescence.

[33] In essence, s. 15(2) of the *Charter* seeks to protect efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups. This interpretation is confirmed by the language in s. 15(2), "does not preclude".

[34] This Court dealt explicitly with the relationship between s. 15(1) and s. 15(2) in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37. The Court, *per* Iacobucci J., appeared unwilling at that time to give s. 15(2) independent force, but left the door open for that possibility, at para. 108:

> [A]t this stage of the jurisprudence, I see s. 15(2) as confirmatory of s. 15(1) and, in that respect, claimants arguing equality claims in the future should first be directed to s. 15(1) since that subsection can embrace ameliorative programs of the kind that are contemplated by s. 15(2). By doing that one can ensure that the program is subject to the full scrutiny of the discrimination analysis, as well as the possibility of a s. 1 review. However . . . we may well wish to reconsider this matter at a future time in the context of another case. [Emphasis added.]

[35] Iacobucci J. in *Lovelace* perceived two possible approaches to the interpretation of s. 15 (2). He believed that the Supreme Court could either read s. 15(2) as an interpretive aid to s. 15(1) (the approach adopted in *Lovelace*) or read it as an exception or exemption from the operation of s. 15(1).

[36] He favoured the interpretive aid approach, while acknowledging that the exemption approach had some support. In particular, he cited Mark A. Drumbl and John D. R. Craig for the proposition that s. 15(2) should defend against a s. 15(1) violation because otherwise the provision becomes redundant and does not encourage the government to combat discrimination pro-actively through ameliorative programs ("Affirmative Action in Question: A Coherent Theory for Section 15 (2)" (1997), 4 *Rev. Const. Stud.* 80, at para. 102).

[37] In our view, there is a third option: if the government can demonstrate that an impugned program meets the criteria of s. 15(2), it may be unnecessary to conduct a s. 15(1) analysis at all. As discussed at the outset of this analysis, s. 15(1) and s. 15(2) should be read as working together to promote substantive equality. The focus of s. 15(1) is on *preventing* governments from making distinctions based on enumerated or analogous grounds that have the effect of perpetuating disadvantage or prejudice or imposing disadvantage on the basis of stereotyping. The focus of s. 15(2) is on *enabling* governments to pro-actively combat discrimination. Read thus, the two sections are confirmatory of each other. Section 15(2) supports a full expression of equality, rather than derogating from it. "Under a

substantive definition of equality, different treatment in the service of equity for disadvantaged groups is an expression of equality, not an exception to it": P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 2, at p. 55-53.

[38] But this confirmatory purpose does not preclude an independent role for s. 15(2). Section 15(2) is more than a hortatory admonition. It tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combatting disadvantage to be discriminatory and in breach of s. 15.

[39] Here the appellants claim discrimination on the basis of s. 15(1). The source of that discrimination — the very essence of their complaint — is a program that may be ameliorative. This leaves but one conclusion: if the government establishes that the program falls under s. 15(2), the appellants' claim must fail.

[40] In other words, once the s. 15 claimant has shown a distinction made on an enumerated or analogous ground, it is open to the government to show that the impugned law, program or activity is ameliorative and, thus, constitutional. This approach has the advantage of avoiding the symbolic problem of finding a program discriminatory before "saving" it as ameliorative, while also giving independent force to a provision that has been written as distinct and separate from s. 15(1). Should the government fail to demonstrate that its program falls under s. 15(2), the program must then receive full scrutiny under s. 15(1) to determine whether its impact is discriminatory.

[41] We would therefore formulate the test under s. 15(2) as follows. A program does not violate the s. 15 equality guarantee if the government can demonstrate that: (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. In proposing this test, we are mindful that future cases may demand some adjustment to the framework in order to meet the litigants' particular circumstances. However, at this early stage in the development of the law surrounding s. 15(2), the test we have described provides a basic starting point — one that is adequate for determining the issues before us on this appeal, but leaves open the possibility for future refinement.

[42] We build our analysis of s. 15(2) and its operation around three key phrases in the provision. The subsection protects "any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups". While there is some overlap in the considerations raised by each of these terms, it may be useful to consider each of them individually.

(a) "Has as Its Object"

[43] In interpreting this phrase, two issues arise. The first is whether courts should look to the *purpose* or to the *effect* of legislation. The second is whether, in order to qualify for s. 15(2) protection, a program must have an ameliorative purpose as its sole object, or whether having such a goal as one of several objectives is sufficient.

[44] The language of s. 15(2) suggests that legislative goal rather than actual effect is the paramount consideration in determining whether or not a program qualifies for s. 15(2) protection. Michael Peirce defends this view, which he refers to as the "subjective" approach, because it adheres more closely to the language of the provision and avoids potentially inappropriate judicial intervention in government programs ("A Progressive Interpretation of Subsection 15(2) of the *Charter*" (1993), 57 *Sask. L. Rev.* 263). Scholars have nonetheless disagreed about the appropriate approach, often using the "subjective" (goal-based) and "objective" (effect-based) language.

[45] Scholars and judges who have supported judicial examination of the actual *effect* of a program offer one primary argument to defend their view. They express concern that a "subjective" test will permit the government to defeat a discrimination claim by declaring that the impugned law has an ameliorative purpose. Thus, Russell Juriansz states that a "purely subjective test may be too wide" ("Recent Developments in Canadian Law: Anti-Discrimination Law Part I" (1987), 19 *Ottawa L. Rev.* 447, at p. 483). David Lepofsky and Jerome Bickenbach believe that the "better view is that the defendant must establish that the impugned program has some serious likelihood of achieving its ameliorative goal" ("Equality Rights and the Physically Handicapped", in A. F. Bayefsky and M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), 323, at p. 355). They justify this perspective with the argument that "if ameliorative legislative purpose were the sole test under section 15(2), a legislature could easily circumvent the egalitarian requirements under section 15(1) by including in any potentially discriminatory legislation a clause which provides that 'this Act has as its object the amelioration of the conditions of . . . a disadvantaged group'" (p. 355).

[46] In our opinion, this concern can be easily addressed. There is nothing to suggest that a test focussed on the goal of legislation must slavishly accept the government's characterization of its purpose. Courts could well examine legislation to ensure that the declared purpose is genuine. Courts confronted with a s. 15(2) claim have done just that. For example, in *Manitoba Rice Farmers Association v. Human Rights Commission (Man.)* (1987), 50 Man. R. (2d) 92 (Q.B.) (rev'd in part (1988), 55 Man. R. (2d) 263 (C.A.)), Simonsen J. explained, at para. 51:

> A bald declaration by government that it has adopted a program which "has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race . . ." does not *ipso facto* meet the requirements to sanctify the program under s. 15(2) of the *Charter*. The government cannot employ such a naked declaration as a shield to protect an activity or program which is unnecessarily

discriminatory.

[47] In that vein, proponents of the approach that focusses on the ameliorative goal of the program, rather than its effect, argue that doing so will prevent courts from unduly interfering in ameliorative programs created by the legislature. They note that Canadian *Charter* drafters wished to avoid the American experience, whereby judges overturned affirmative action programs under the banner of equality. The purpose-driven approach also reflects the language of the provision itself, which focusses on the "object" of the program, law or activity rather than its impact. Moreover, the effects of a program in its fledgling stages cannot always be easily ascertained. The law or program may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful. The government may learn from such failures and revise equality-enhancing programs to make them more effective.

[48] Given the language of the provision and its goal of enabling governments to pro-actively combat discrimination, we believe the "purpose"-based approach is more appropriate than the "effect"-based approach: where a law, program or activity creates a distinction based on an enumerated or analogous ground, was the government's goal in creating that distinction to improve the conditions of a group that is disadvantaged? In examining purpose, courts may therefore find it necessary to consider not only statements made by the drafters of the program but also whether the legislature chose means rationally related to that ameliorative purpose, in the sense that it appears at least plausible that the program may indeed advance the stated goal of combatting disadvantage. The Manitoba Court of Queen's Bench suggested that it favoured an analysis of this kind in *Manitoba Rice Farmers Association*, at para. 54:

> In order to justify a program under s. 15(2), I believe there must be a real nexus between the object of the program as declared by the government and its form and implementation. It is not sufficient to declare that the object of a program is to help a disadvantaged group if in fact the ameliorative remedy is not directed toward the cause of the disadvantage. There must be a unity or interrelationship amongst the elements in the program which will prompt the court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage.

[49] Analysing the means employed by the government can easily turn into assessing the *effect* of the program. As a result, to preserve an intent-based analysis, courts could be encouraged to frame the analysis as follows: Was it rational for the state to conclude that the means chosen to reach its ameliorative goal would contribute to that purpose? For the distinction to be rational, there must be a correlation between the program and the disadvantage suffered by the target group. Such a standard permits significant deference to the legislature but allows judicial review where a program nominally seeks to serve the disadvantaged but in practice serves other non-remedial objectives.

[50] The next issue is whether the program's ameliorative purpose needs to be its exclusive objective. Programs frequently serve more than one purpose or attempt to meet more than one goal. Must the ameliorative object be the sole object, or may it be one of several?

[51] We can find little justification for requiring the ameliorative purpose to be the sole object of a program. It seems unlikely that a single purpose will motivate any particular program; any number of goals are likely to be subsumed within a single scheme. To prevent such programs from earning s. 15(2) protection on the grounds that they contain other objectives seems to undermine the goal of s. 15(2).

[52] The importance of the ameliorative purpose within the scheme may help determine the *scope* of s. 15(2) protection, however. Consider that an ameliorative program may coexist with or interact with a larger legislative scheme. If only the program has an ameliorative purpose, does s. 15(2) extend to protect the wider legislative scheme? We offer as a tentative guide that s. 15(2) precludes from s. 15(1) review distinctions made on enumerated or analogous grounds that serve and are necessary to the ameliorative purpose.

(b) "Amelioration"

[53] Section 15(2) protects programs that aim to "ameliorate" the condition of disadvantaged groups identified by the enumerated or analogous grounds. Although the word does not at first seem liable to misunderstanding, courts have previously understood the term (and s. 15(2)) to apply in surprising circumstances. In *R. v. Music Explosion Ltd.* (1989), 62 Man. R. (2d) 189, the Manitoba Court of Queen's Bench upheld a Winnipeg bylaw that restricted young people under 16 from operating an amusement device without the consent of a guardian or a parent on the grounds that it was protected by s. 15(2). Smith J. declared that the bylaw "is obviously for the benefit of the special needs of young persons" (para. 21). On appeal, the decision was reversed. The Court of Appeal explained: "[T]his legislation does not confer special benefits upon young people, but rather imposes a limitation. Nor is the purpose of the legislation the amelioration of their condition" ((1990), 68 Man. R. (2d) 203, at para. 18). Courts have also used s. 15(2) to uphold provisions of the *Criminal Code* (*Re Rebic and The Queen* (1985), 20 C.C.C. (3d) 196 (B.C.S.C.), aff'd (1986), 28 C.C.C. (3d) 154 (B.C.C.A.)) and of the *Young Offenders Act* (*Re M and The Queen* (1985), 21 C.C.C. (3d) 116 (Man. Q.B.)).

[54] These precedents suggest that the meaning of "amelioration" deserves careful attention in evaluating programs under s. 15(2). We would suggest that laws designed to restrict or punish behaviour would not qualify for s. 15(2) protection. Nor, as already discussed, should the focus be on the effect of the law. This said, the fact that a law has no plausible or predictable ameliorative effect may render suspect the state's ameliorative purpose. Governments, as discussed above, are not permitted to protect discriminatory programs on colourable pretexts.

(c) "Disadvantaged"

[55] The interpretation of "disadvantaged", explored in *Andrews*, *Miron v. Trudel*, [1995] 2 S.C.R. 418, and *Law*, and other cases in the context of s. 15(1), requires little further elaboration here. "Disadvantage" under s. 15 connotes vulnerability, prejudice and negative social characterization. Section 15(2)'s purpose is to protect government programs targeting the conditions of a specific and identifiable disadvantaged group, as contrasted with broad societal legislation, such as social assistance programs. Not all members of the group need to be disadvantaged, as long as the group as a whole has experienced discrimination.

3. *Application of Section 15(2) to This Case*

[56] The appellants have argued they were denied a benefit on the basis of race, a ground enumerated in s. 15 of the *Charter*. As discussed above, once the appellants have demonstrated such a distinction, the government may attempt to show the program is protected under s. 15(2). The government conferred the communal fishing licence valid for August 19-20 to particular aboriginal bands. Therefore, we are satisfied that the appellants have demonstrated a distinction imposed on the basis of race, an enumerated ground under s. 15.

[57] We have earlier suggested that a distinction based on the enumerated or analogous grounds in a government program will not constitute discrimination under s. 15 if, under s. 15(2), (1) the program has an ameliorative or remedial purpose; and (2) the program targets a disadvantaged group identified by the enumerated or analogous grounds. The question is whether the program at issue on this appeal meets these conditions.

[58] The first issue is whether the program that excluded Mr. Kapp and other non-band fishers from the fishery had an ameliorative or remedial purpose. The Crown describes numerous objectives for the impugned pilot sales program. These include negotiating solutions to aboriginal fishing rights claims, providing economic opportunities to native bands and supporting their progress towards self-sufficiency. The impugned fishing licence relates to all of these goals. The pilot sales program was part of an attempt — albeit a small part — to negotiate a solution to aboriginal fishing rights claims. The communal fishing licence provided economic opportunities, through sale or trade, to the bands. Through these endeavours, the government was pursuing the goal of promoting band self-sufficiency. In these ways, the government was hoping to redress the social and economic disadvantage of the targeted bands. The means chosen to achieve the purpose (special fishing privileges for aboriginal communities, constituting a benefit) are rationally related to serving that purpose. It follows that the Crown has established a credible ameliorative purpose for the program.

[59] The government's aims correlate to the actual economic and social disadvantage suffered by members of the three aboriginal bands. The disadvantage of aboriginal people is indisputable. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Court noted "the legacy of stereotyping and prejudice against Aboriginal peoples" (para. 66). The Court has also acknowledged that "Aboriginal peoples experience high rates of unemployment and poverty, and face serious disadvantages in the areas of education, health and housing" (*Lovelace*, at para. 69). More particularly, the evidence shows in this case that the bands granted the benefit were in fact disadvantaged in terms of income, education and a host of other measures. This disadvantage, rooted in history, continues to this day. The communal fishing licence, by addressing long-term goals of self-sufficiency and, more immediately, by providing additional sources of income and employment, relates to the social and economic disadvantage suffered by the bands. The fact that some individual members of the bands may not experience personal disadvantage does not negate the group disadvantage suffered by band members.

[60] Mr. Kapp suggests that the focus must be on the particular forms of disadvantage suffered by the bands who received the benefit, and argues that this program did not offer a benefit that effectively tackled the problems faced by these bands. As discussed above, what is required is a correlation between the program and the disadvantage suffered by the target group. If the target group is socially and economically disadvantaged, as is the case here, and the program may rationally address that disadvantage, then the necessary correspondence is established.

[61] We conclude that the government program here at issue is protected by s. 15(2) as a program that "has as its object the amelioration of conditions of disadvantaged individuals or groups". It follows that the program does not violate the equality guarantee of s. 15 of the *Charter*.

4. *Section 25 of the Charter*

[62] Having concluded that a breach of s. 15 is not established, it is unnecessary to consider whether s. 25 of the *Charter* would bar the appellants' claim. However, we wish to signal our concerns with aspects of the reasoning of Bastarache J. and of Kirkpatrick J.A., both of whom would have dismissed the appeal solely on the basis of s. 25.

[63] An initial concern is whether the communal fishing licence at issue in this case lies within s. 25's compass. In our view, the wording of s. 25 and the examples given therein — aboriginal rights, treaty rights, and "other rights or freedoms", such as rights derived from the *Royal Proclamation* or from land claims agreements — suggest that not every aboriginal interest or program falls within the provision's scope. Rather, only rights of a constitutional character are likely to benefit from s. 25. If so,

we would question, without deciding, whether the fishing licence is a s. 25 right or freedom.

[64] A second concern is whether, even if the fishing licence does fall under s. 25, the result would constitute an absolute bar to the appellants' s. 15 claim, as distinguished from an interpretive provision informing the construction of potentially conflicting *Charter* rights.

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

D. Conclusion

[66] We would dismiss the appeal on the ground that breach of the s. 15 equality guarantee has not been established.

The following are the reasons delivered by

BASTARACHE J. –

1. Introduction

[67] The Minister of Fisheries and Oceans has the task of managing the salmon fishery on the Fraser River. In an effort to enhance the management of this fishery and address a number of issues besetting the fishery, he developed the Aboriginal Fisheries Strategy, a component of which in turn is the pilot sales program. Under this program, the Minister exercised his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, and the *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

[68] On August 19, 1998, the Minister issued a licence to the Musqueam, Burrard and Tsawwassen First Nations, permitting them to fish for a period of 24 hours in exclusivity, and to sell their catch. The appellants, who are all commercial fishers, mounted a "protest fishery" during the aboriginal fishery and were charged for fishing during a time when the fishery was closed to them. At their

subsequent trial, the appellants did not challenge the law under which they were charged, but asserted that the trial proceedings should be stayed as their rights to equality under s. 15(1) of the *Canadian Charter of Rights and Freedoms* had been violated. They argue that their right to participate as equals in the public commercial fishery has been breached on the basis of a race-based distinction and that any race-based distinction affects the dignity of the persons subject to discrimination.

[69] The respondent Minister argues that the appellants were not denied any benefit of the law, as they were provided opportunities to fish and, indeed, caught significant quantities of salmon. Moreover, providing aboriginal communities, which have historically been disadvantaged, with access to commercial salmon fishing does not demean the dignity of commercial salmon fishers by treating them as less worthy and valued members of Canadian society. The respondent Minister stated that the policy under the Aboriginal Fisheries Strategy was to provide opportunities to fish for food, and for social and ceremonial purposes, and in some cases pilot sales, to aboriginal communities having historical use and occupancy of an area. He explained that approximately 70 fisheries agreements were negotiated annually with aboriginal groups throughout the province. Under these agreements, the groups received communal licences authorizing fishing in accordance with the fisheries agreements. The position of the respondent is that the members of the claimant group, which consists of individuals, cannot properly compare themselves to aboriginal communities, the recipients of the benefit in question. The appellants respond that membership in a band does not constitute a valid proxy in any circumstance that is functionally relevant to the regulation of the public fishery. The appellants add that any cultural significance to fishery activity is dealt with by the doctrine of aboriginal rights and the protection of such rights by s. 35 of the *Constitution Act, 1982*.

[70] With regard to the communal aspect of the fishery, the trial judge, Kitchen Prov. Ct. J., had this to say: "The Department labels the fishery 'communal', but the individuals designated by the bands to participate are completely on their own and keep all profits for themselves. . . . [T]he pilot sales fishery provides financial assistance to only the individual members of the bands, not the bands generally . . . It is not a communal fishery. . . . [B]and members who were most successful in the pilot sales fishery were those who were also commercial fishers and operated fully equipped commercial fishing vessels" ([2003] 4 C.N.L.R. 238, 2003 BCPC 279, at paras. 200, 211 and 214).

[71] The pilot sales program was not related to the specific aboriginal right to fish for food found in *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Rather, according to the respondent, it was designed to reach negotiated solutions to claims for aboriginal commercial fishing rights and to provide economic opportunities to native bands, to support their progress towards self-sufficiency. Minister Crosbie, the Minister of Fisheries and Oceans at the time, explained that unauthorized sale of aboriginal food fish was creating a management problem. He explained that, rather than litigating the issue, the Department sought to reach an agreement with aboriginal groups as to how much fish they could take and sell and to allow the Department to regulate how the fish would be sold. James Matkin, speaking for the Department of Fisheries, explained that the pilot sales are justified as an exercise in policy making of the Minister's authority under the *Fisheries Act* and that they are designated to follow the court's direction to negotiate rather than to litigate.

[72] With regard to the rationale for the pilot project, Kitchen Prov. Ct. J. had this to say:

It is difficult to discern the real purpose of the pilot sales fishery. . . . Fisheries Minister John Crosbie gave control of poaching as the reason for the program. . . .

. . . he also mentioned that the program was to be an experiment. This is a second justification given for the program. . . .

This literature also asserts that the *Sparrow Case* requires that this type of opportunity be afforded to Aboriginals. This is clearly not the situation. . . .

. . . Department literature also mentions the fiduciary duty society has to the Aboriginal community and how this has prompted the Department to move ahead of caselaw . . . .

. . .

Most significantly, the Department of Fisheries and Oceans have given economic development and an ameliorative purpose as the reason for pilot sales program. But there is a real suspicion that this is an *ex post facto* justification; . . .

. . .

Even if financial disadvantage were an issue there was no economic study or assessment done prior to or during the pilot sales fishery concerning the economic need of the bands and the financial rewards the fishery would produce. . . .

. . .

> . . . Several reasons have been proffered at various times. There has been no consistent rationale for the program. [paras. 186-89, 191, 199 and 210]

[73] The important point to be made here is that the respondent's position is that the Aboriginal Fisheries Strategy and the pilot sales program were primarily aimed at management of the fishery and did not have as their primary object the amelioration of conditions of disadvantaged groups or individuals. The respondent therefore does not rely on s. 15(2) of the *Charter*. He states that s. 15(2) is an interpretative provision and that given this Court's established lines of authority on the proper approach to analysis of the equality claims under s. 15(1), the ameliorative purpose or effect of a program can readily be taken into account under s. 15(1).

[74] Kitchen Prov. Ct. J. held that the pilot sales program violated s. 15(1) and was not saved by s. 1 of the *Charter*. The summary conviction appeal judge, Brenner C.J.S.C., allowed the appeal on the basis that the trial judge had identified the claimant and comparator groups too narrowly, that he had failed to properly consider the pre-existing disadvantage of the aboriginal communities that comprise the comparator group, and that he did not give sufficient weight to the fact that the pilot sales program did not have a significant impact on the claimant group ((2004), 31 B.C.L.R. (4th) 258, 2004 BCSC 958). He concluded that the pilot sales program corresponds to the needs, capacity and circumstances of the aboriginal communities and that it is also consistent with the needs, capacity and circumstances of the rest of Canadian society. Although the issue was not dealt with substantially at trial, Brenner C.J.S.C. permitted a number of interveners to argue that s. 25 of the *Charter* applied in this case. He eventually concluded that it did not. The application of s. 25 was fully argued by all parties and most interveners in the Court of Appeal and in this Court.

[75] The five members of the panel in the Court of Appeal of British Columbia were unanimous in dismissing the appeal, but for different reasons ((2006), 56 B.C.L.R. (4th) 11, 2006 BCCA 277). Finch C.J.B.C. and Low and Levine JJ.A. held that the appellants had totally failed to establish that they had been denied a benefit and therefore failed to get past the first stage of the *Law* test (*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497). They concluded that the aboriginal communal licence was simply part of a broader regulatory framework which provided for various user groups. The Minister in exercising his discretion did not deny the appellants a real benefit since they were provided other opportunities to fish under commercial licences. Mackenzie J.A. held that, assuming the appellants were successful in getting past the first two stages of the *Law* test, they had failed to establish that the communal licences had a discriminatory purpose or effect. Kirkpatrick J.A. held that the communal fishing licences granted were protected under s. 25 of the *Charter* as "another right or freedom that pertains to the aboriginal peoples of Canada". She further held that s. 25 was triggered whenever the outcome of a *Charter* challenge might abrogate or derogate from aboriginal rights or freedoms. Since the appellants were seeking to eliminate the pilot sales program, s. 25 operated to bar their constitutional challenge under s. 15.

2. Analysis

[76] Like Kirkpatrick J.A., I am of the view that s. 25 of the *Charter* provides a complete answer to the question posed in this appeal. I will initially address the role and effect of s. 25, then outline the scope of the provision. Finally, I will propose an analytical approach to be followed when s. 25 is engaged and apply that approach to the present matter.

[77] There is no need for me to engage in a full analysis of the application of s. 15 of the *Charter*. It is sufficient for me to establish the existence of a potential conflict between the pilot sales program and s. 15. This said, I want to state clearly that I am in complete agreement with the restatement of the test for the application of s. 15 that is adopted by the Chief Justice and Abella J. in their reasons for judgment.

2.1 *Role and Effect of Section 25*

[78] The enactment of the *Charter* undoubtedly heralded a new era for individual rights in Canada. Nevertheless, the document also expressly recognizes rights more aptly described as collective or group rights. The manner in which collective rights can exist with the liberal paradigm otherwise established by the *Charter* remains a source of ongoing tension within the jurisprudence and the literature. This tension comes to a head in the aboriginal context in s. 25.

[79] Most authors believe that s. 25 is an interpretative provision and does not create new rights. B. H. Wildsmith outlines the two modes of interpretation most commonly posited:

> Under one mode of interpreting section 25, the section admonishes the decision maker to construe the Charter right or freedom so as to give effect to it, if possible, without an adverse impact on section 25 rights or freedoms. If it is not possible to so construe the Charter right or freedom so as to avoid a negative impact on native rights, then the force of section 25 is spent. Effect is given to the Charter right or freedom despite the [negative] impact on native rights. Under the second mode of interpreting section 25, the conflict between Charter rights and section 25 rights, if irreconcilable, would be resolved by giving effect to the section 25 rights and freedoms. In short, native rights remain inviolable and unaffected by the rights or freedoms guaranteed by the Charter.
>
> (*Aboriginal Peoples & Section 25 of the Canadian Charter of Rights and Freedoms* (1988), at pp. 10-11)

[80] The first mode has been described in the literature as an interpretative prism or a mere canon of interpretation. The second method is most commonly referred to as a shield. Wildsmith provides an example (at pp. 11-12) that is highly reminiscent of the present matter to demonstrate that there is a serious difficulty in finding that s. 25 is a mere canon of interpretation. If a provincial Act were to establish that "[n]o Indian shall hunt (or fish) except for his own personal consumption unless he has first obtained a licence", and that no treaty or aboriginal right to this exemption existed, then a non-Indian hunter or fisherman would say that the statute violated s. 15(1) of the *Charter*. Indians would have a right to hunt or fish for personal consumption denied to others. The statutory right given to the Indians would be an "other righ[t] or freedo[m]" under s. 25. The court would then be forced to choose between vindicating the equality right or the right protected by s. 25. If the real effect of s. 25 is to protect native rights and freedoms from erosion based on the *Charter*, the conflict should be resolved by refusing to apply s. 15 in these circumstances.

[81] I agree that giving primacy to s. 25 is what was clearly intended. As will be seen, this is consistent with the wording and history of the provision. It is also consistent with the declarations of the then Deputy Minister of Justice, Roger Tassé, and with those of the Minister of Justice at the time of the 1983 amendment, Justice Minister Mark MacGuigan.

2.1.1 Interpretative Approach

[82] Our Court has given great importance to the need for purposeful interpretations. In *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, Iacobucci J. gives a detailed explanation of the rules of statutory interpretation, showing that one must first consider the wording of the Act, then the legislative history, the scheme of the Act, and the legislative context. Consequently, I will examine the manner in which s. 25 addresses the tension between individual and group rights with reference to all of the above.

[83] In *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 82, this Court stated: "Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982* included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples." Clearly, this Court has held that a generous interpretation is mandated.

2.1.2 Textual and Structural Analysis

[84] First, let us consider the terms of s. 25:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

25. Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

a) aux droits ou libertés reconnus par la Proclamation royale du 7 octobre 1763;

b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

[85] Here we have an Act that is clear in its French version and ambiguous in its English version. Other provisions of the *Charter* provide the statutory context for the interpretation of s. 25. Section 21 provides that nothing in ss. 16 to 20 "abrogates or derogates from any right, privilege or obligation with respect to the English and French languages". Section 29 provides that nothing in the *Charter* "abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools".

[86] Most authors have considered the use of the word "construed" as significant in s. 25. In my opinion, the word "construe" is very broad. The *Oxford English Dictionary* (2nd ed. 1989) defines the term as meaning "[t]o analyse or trace the grammatical construction of a sentence; to take its words in such an order as to show the meaning of the sentence" (p. 796). The term accordingly permits the understanding that in constructing and interpreting the scope of *Charter* rights, courts must ensure that they do not abrogate or derogate from an aboriginal right or freedom. As noted above, Wildsmith described the two competing approaches to s. 25 as differing modes of interpretation. I view the expression "shall not be construed" as ambiguous in terms of the effect of the provision.

[87] This said, I view the French version of s. 25 as being considerably more certain. The expression "*ne porte pas atteinte aux*" loosely translates to "without prejudice to" (J. Picotte, *Juridictionnaire: Recueil des difficultés et des ressources du français juridique* (1991), vol. I A, at p. 228) or "will not prejudicially affect" (*Ontario English-French Legal Lexicon* (1987), entry 224). It is also important to note that the French version of s. 25 uses the same terms as ss. 21 and 29 of the *Charter* and that those sections have already been interpreted by this Court. In *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, "*ne porte pas atteinte aux*" in s. 29 was read by this Court, in *obiter dicta*, as constituting a bar to competing rights. The rule of internal consistency would require that the same words used in the same *Charter* (especially in the same section, dealing with general provisions) be interpreted in the same way, militating against finding that the French version does not provide for the most consistent answer to the quest for a common meaning. See *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6; see also *Reference re Bill 30* and *Adler v. Ontario*, [1996] 3 S.C.R. 609.

[88] In any case, like Wildsmith, I do not believe that the difference in wording is decisive. First, s. 25 is very different from s. 27, which is the only general provision in the *Charter* that has been clearly identified as a simple interpretative clause. Second, it creates a priority, which is inconsistent with the idea of weighing one right against another. This Court has considered a similar provision in the *Canadian Bill of Rights*, R.S.C. 1985, App. III, s. 2, which reads: "Every law of Canada shall, . . . be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights or freedoms herein recognized . . .". In *R. v. Drybones*, [1970] S.C.R. 282, Ritchie J. said that a more realistic meaning had to be given to the operative words, meaning that if a law cannot be "sensibly construed and applied" (p. 294) without infringing the right, it must be declared inoperative. This was affirmed in *Attorney General of Canada v. Lavell*, [1974] S.C.R. 1349. There is no substantial difference in the present case.

[89] It could be argued that to interpret s. 25 as a shield would not be in keeping with the flexible, non-hierarchical approach to *Charter* rights that this Court has espoused. It is certainly true that this Court has in the past acknowledged the difficulty in reconciling rights that often seem to be operating in opposition to each other, particularly in the context of equality claims. Nevertheless, where collective rights are clearly prioritized in terms of protection (as I believe is the case here), individual equality rights have typically given way. In *Reference re Bill 30*, Wilson J. stated at p. 1197, that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* " si[t] uncomfortably with the concept of equality embodied in the *Charter*", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. It is also instructive to read the reasons of former Chief Justice Dickson in *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 369, where, speaking of the application of s. 15 in the context of minority language rights in education, he said: "[I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to 'every individual'". In my opinion, and as argued by J. M. Arbour, s. 25 serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group ("The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms" (2003), 21 *S.C.L.R.* (2d) 3, p. 60).

2.1.3 Legislative History

[90] The legislative history of s. 25 was set out by Wildsmith, at pp. 5-8. He noted that s. 25 of the *Charter* can be traced back to s. 26 of Bill C-60, presented to Parliament on June 20, 1978. The white paper accompanying the Bill stated that "[t]he renewal of the Federation must fully respect the legitimate rights of the native peoples" (*A Time for Action — Toward the Renewal of the Canadian Federation* (1978)). Section 26 was incorporated as s. 24 in the October 1980 Resolution which followed the First Ministers' meeting of September 1980. Sanders described this section as being designed to protect aboriginal rights from the egalitarian provisions of the *Charter* (see D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada", in S. M. Beck and I. Bernier, eds., *Canada and the New Constitution: The Unfinished Agenda* (1983), vol. 1, 225, at p. 231).

[91] On January 30, 1981, an agreement was reached between representatives of aboriginal organizations and the three national political parties on new provisions concerning native peoples. These provisions were introduced that day to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. A new s. 34 provided that "[t]he aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Section 24 was also altered by divorcing the native rights issue from the general saving provision created by a new s. 25.

[92] These changes were then incorporated into the Consolidated Resolution of April 24, 1981. Support for the resolution weakened and there were new negotiations between aboriginal representatives and government officials which led to the introduction of a modified s. 25 on November 18, 1981. This section makes no reference to treaty rights or "other rights or freedoms". Negotiations with the premiers resulted in an amendment reflected in the final resolution of December 8, 1981. The text of that resolution was amended again by the adoption of the *Constitution Amendment Proclamation, 1983*, R.S.C. 1985, App. II, No. 46. This modification added s. 35(3) which states: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

[93] The Minister of Justice at the time, the Honourable Jean Chrétien, declared before the Special Joint Committee: "We say that there is nothing in this Charter that will infringe upon the rights of the Natives. . . . [T]he rights of all the native Canadians, either flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changed by the adoption of this Charter of Rights, its clause 24" (*Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue No. 3, November 12, 1980, at pp. 68 and 84). It was made abundantly clear that s. 25 creates no new rights. It was meant as a shield against the intrusion of the *Charter* upon native rights or freedoms. A more comprehensive account of the historical foundation of s. 25 is found in Arbour, at pp. 30-37.

2.1.4 Academic and Judicial Commentary

[94] Practically all authors agree with the fact that s. 25 operates as a shield: see Wildsmith, at p. 23; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-1983), 8 *Queen's L.J.* 232, at p. 239; N. K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (1983), at p. 46; K. McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada" (1982), 4 *S.C.L.R.* 255, at p. 262; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 1, at pp. 28-56 and 28-57; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983), 61 *Can. Bar Rev.* 314, at p. 321; P. Cumming, "Canada's North and Native Rights", in B. W. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (1985), 695, at p. 732; N. Lyon, "Constitutional Issues in Native Law", in Morse, 408, at p. 423; K. M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada", in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 467, at pp. 471-72; *contra*: R. H. Bartlett, "Survey of Canadian Law: Indian and Native Law" (1983), 15 *Ottawa L. Rev.* 431; B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (1985).

[95] Also agreeing are 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; T. Isaac, "*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People" (2002), 21 *Windsor Y.B. Access Just.* 431; A. Goldenberg, "'Salmon for Peanut Butter': Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights" (2004), 3 *Indigenous L.J.* 61, at p. 90; C. Hutchinson, "Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the *Charter*" (2007), 52 *McGill L.J.* 173, at p. 189. P. Macklem, *Indigenous Difference and the Constitution of Canada* (2001), and T. Dickson, "Section 25 and Intercultural Judgment" (2003), 61 *U.T. Fac. L. Rev.* 141, develop a unique approach based on the distinction between individual and collective rights. It might be noted that none of these authors have applied the rule of interpretation applicable to bilingual legislation.

[96] There is little case law on the issue, but the recent trend has been to see the protective feature in s. 25 as a "shield", as opposed to an "interpretative prism"; *R. v. Steinhauer*, [1985] 3 C.N.L.R. 187 (Alta. Q.B.), *Campbell v. British Columbia (Attorney General)*, [2000] 4 C.N.L.R. 1 (B.C.S.C.), and *Shubenacadie Band Council v. Canada (Human Rights Commission)* (2000), 37 C.H.R.R. D/466 (F.C.A.), held that s. 25 provides a shield. *R. v. Nicholas*, [1989] 2 C.N.L.R. 131 (N.B.Q.B.), is to the same effect but restricts the application of s. 25 to s. 15 rights. In *Campbell*, Williamson J. summarized the case law at that point as showing that "the section is meant to be a 'shield' which protects Aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*": para. 156. He further suggested that a purposive approach to s. 25 should be taken and that "the purpose of this section is to shield the distinctive position of Aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*" (para. 158).

2.1.5 Limitations on the Shield

[97] Is this shield absolute? Obviously not. First, it is restricted by s. 28 of the *Charter* which provides for gender equality "[n]otwithstanding anything in this Charter". Second, it is restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 46, provides guidance in that respect. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives.

[98] There is some uncertainty concerning what rights and freedoms are contemplated in s. 25. Most concerns have been with self-government issues. Are all of the laws adopted by bands under the authority of the *Indian Act*, R.S.C. 1985, c. I-5, protected? Wildsmith suggests that this is possibly the case because their source is in s. 91(24) of the *Constitution Act, 1867*, which is clearly associated with the concept of Indianness (p. 33). He nevertheless says that the power in question would not be unrestrained because the courts would read in the need for "reasonableness" as they did for the exercise of municipal powers, and because the *Canadian Bill of Rights* would continue to apply. (The courts would of course have to deal with the *Lavell* precedent to make this avenue useful.) Wildsmith, at pp. 25-26 suggests that the court may want to apply a proportionality test similar to that in *Oakes* in order to determine whether an Act would truly abrogate an aboriginal right or freedom (*R. v. Oakes*, [1986] 1 S.C.R. 103). He argues at p. 37 that *Charter* rights would still be available to Indians who would want to attack federal legislation giving preferential treatment to other Indians.

[99] There is no reason to believe that s. 25 has taken Aboriginals out of the *Charter* protection scheme. One aboriginal group can ask to be given the same benefit as another aboriginal group under s. 15(1). Sections 2 and 3 of the *Charter* apply to Aboriginals. Macklem, at pp. 225-27, suggests that the courts should distinguish between external and internal restrictions on aboriginal laws that clash with the *Charter* and that in the case of internal restrictions, aboriginal communities should be required to satisfy the *Oakes* test to resist a challenge. It could also be argued that it would be contrary to the purpose of s. 25 to prevent an Aboriginal from invoking those sections to attack an Act passed by a band council. It is not at all obvious in my view that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25; as A. Shachar notes, individuals can have multiple identities ("The Paradox of Multicultural Vulnerability: Individual Rights, Identity Groups, and the State", in C. Joppke and S. Lukes, eds., *Multicultural Questions* (1999), 87; see also W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995), at p. 35). Aboriginals are Canadian. The framework of reconciliation is consistent with the need for flexibility in the application of s. 25. This is in line with the approach taken by Binnie J. in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33, at para. 164.

[100] Some would like the Court to ignore s. 25 because of the uncertainty in its

application, particularly with regard to legislative powers contemplated by the *Indian Act*. I think it is unreasonable to suggest that a law should not be applied by this Court because it is too difficult. After all, s. 25 is the only provision in the *Charter* which makes express reference to aboriginal people, and the *Charter* is now 25 years old. I also think the concerns are overstated. Even under the present justification in a s. 1 analysis, there is much room for government to establish that *Charter* values should not be overstated when dealing with the requirements of substantive equality of native peoples. Legislative powers of bands under s. 81 of the *Indian Act* are subject to disallowance; those that fall under ss. 83 and 85.1 can be addressed by amendments to the *Indian Act* if a serious problem of consistency with *Charter* values occurs. Section 25 rights are not constitutionalized and can be taken away. Parliament can also make a right subject to the same protections as those afforded in the *Charter* by its particular terms. Wildsmith mentions that s. 25 may not even apply to band councils because they may not fall under the definition of s. 32(1)(*a*) of the *Charter* (p. 39), an argument that might find support in the fact that the *Charlottetown Accord* contained a provision that would have provided for the application of s. 25 to aboriginal governments. All this to say we need not resolve every imaginable case in this single decision.

2.2 *Scope of Section 25 Protection*

[101] In this case, what is significant about the scope of s. 25 protection is the meaning of the words "other rights or freedoms". These words are "all-embracive", as mentioned by Lysyk, at p. 472; this indicates that the protection was meant to be very broad. But the rights and freedoms are only those that "pertain to the aboriginal peoples of Canada", those that are particular to them. In French, the Act speaks of "*droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada*".

[102] The *ejusdem generis* rule indicates that, in an enumeration, the general word must be constrained to persons or things of the same class as those specifically mentioned. In s. 25, the general term "other rights or freedoms" follows the enumerated terms "aboriginal" and "treaty" rights. McLachlin C.J. and Abella J. argue that the rule should apply to limit the rights or freedoms protected to those of a constitutional character. I believe that a broader approach is merited, one more consistent with the interpretative principles outlined above.

[103] I believe that the reference to "aboriginal and treaty rights" suggests that the focus of the provision is the uniqueness of those persons or communities mentioned in the Constitution; the rights protected are those that are unique to them because of their special status. As argued by Macklem, s. 25 "protects federal, provincial and Aboriginal initiatives that seek to further interests associated with indigenous difference from Charter scrutiny": see p. 225. Accordingly, legislation that distinguishes between aboriginal and non-aboriginal people in order to protect interests associated with aboriginal culture, territory, sovereignty or the treaty process deserves to be shielded from *Charter* scrutiny.

[104] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 52, L'Heureux-Dub— J. suggested in *obiter* that the scope of s. 25 was likely greater than that of s. 35 of the *Constitution Act, 1982* and may include statutory provisions. She did qualify this statement by noting that the fact that a statute relates to aboriginal people would not, without more, suffice to bring it within the scope of s. 25. In my opinion, the limitations proposed above are consistent with this statement.

[105] Laws adopted under the s. 91(24) power would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, as mentioned above, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected.

[106] The inclusion of statutory rights and settlement agreements pertaining to the treaty process and pertaining to indigenous difference is consistent with the jurisprudence of this Court. As observed by Kirkpatrick J.A., this Court's decisions in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 SCC 74, make it clear that the Crown's duty to consult with and accommodate aboriginal peoples arises prior to the establishment of an aboriginal or treaty right. These were, of course, the two enumerated terms discussed above in the context of the *ejusdem generis* rule. Moreover, this Court in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186, held that in order to preserve the honour of the Crown, the Crown must be allowed to negotiate in good faith with aboriginal peoples. Finally, in *Sparrow*, this Court urged the Crown to negotiate first prior to litigation. Section 25 reflects this imperative need to accommodate, recognize and reconcile aboriginal interests.

[107] William Pentney raises the concern that if the phrase "other rights or freedoms" is construed broadly to include legislated or common law rights, this will result in the "undesirable and anomalous result" that the scope of a *Charter*-protected provision can be modified by ordinary legislation: "The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982: Part I — The Interpretive Prism of Section 25*" (1988), 22 *U.B.C. L. Rev.* 21, at p. 57. Another concern often raised is that allowing statutory rights to be protected by s. 25 would elevate them to constitutional rights: see, e.g., Hutchinson, at p. 186. Similar concerns have been raised with respect to s. 16(3) of the *Charter*, the principle of advancement for language rights. In *Lalonde v. Ontario (Commission de restructuration des services de santé)* (2001), 56 O.R. (3d) 505, at para. 92, the Ontario Court of Appeal addressed these concerns as follows:

> We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on

> the principle established in *Jones v. New Brunswick (Attorney General)* (1974), [1975] 2 S.C.R. 182, 45 D.L.R. (3d) 583 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to *protect*, not *constitutionalize*, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legislature." Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority. [Emphasis in original.]

In my view, the same principles apply to legislative measures protected by s. 25.

2.3 *Approach to Section 25*

[108] One important issue is to determine when s. 25 is triggered. Kirkpatrick J.A. held that it was before any consideration of the *Charter* right; Brenner C.J.S.C., the summary conviction appeal judge in this case, agreed by adopting the approach taken in the *Campbell* case. This seems to correspond to what was said by L'Heureux-Dubé J. in *Corbiere*, at para. 52. In *Campbell*, it was also held that s. 25 is a threshold issue. I agree. This does not mean that there is no need to properly define the *Charter* claim; it simply means that there is no need to go through a full s. 15 analysis, for instance in this case, before considering whether s. 25 applies. What has to be determined is whether there is a real conflict.

[109] I do not think it is reasonable to invoke s. 25 once a *Charter* violation is established. One reason for this position is that there would be no rationale for invoking s. 25 in the case of a finding of discrimination that could not be justified under s. 1, simply because, in the context of s. 15, as in this case for instance, considerations that serve to justify that an Act is not discriminatory would have to be relitigated under the terms of s. 25. Another reason is that a true interpretative section would serve to define the substantive guarantee. Section 25 is meant to preserve some distinctions, which are inconsistent with weighing equality rights and native rights. What is called for, in essence, is a contextualized interpretation that takes into account the cultural needs and aspirations of natives. Dan Russell (*A People's Dream: Aboriginal Self-Government in Canada* (2000), at p. 100) gives an example of this based on s. 3 of the *Charter*: he says that the right to vote should be reinterpreted in the context of band elections to reflect the particularities of the clan system. This, I believe, is tantamount to saying natives do not have the same rights as other Canadians, rather than saying they are protected like all other Canadians from interference with their individual rights as guaranteed by the *Charter*. W. F. Pentney (*The Aboriginal Rights Provisions in the Constitution Act, 1982* (1987)), takes the same approach by suggesting that the *Charter* be interpreted through a native prism. I do not believe there are distinct *Charter* rights for aboriginal individuals and non-aboriginal individuals, or that it is feasible to take into account the specific cultural experience of Aboriginals in defining rights guaranteed by the *Charter*. The

rights are the same for everyone; their application is a matter of justification according to context.

[110] I also think it is contrary to the scheme of the *Charter* to invoke s. 25 as a factor in applying s. 1. Section 1 does not apply to s. 25 as such because s. 25 does not create rights; to incorporate s. 25 is inconceivable in that context. Section 1 already takes into account the aboriginal perspective in the right case. Section 25 is protective and its function must be preserved. Section 25 was not meant to provide for balancing *Charter* rights against aboriginal rights. There should be no reading down of s. 25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective. It seems to me that the only reason for wanting to consider s. 25 within the framework of s. 15(1) is the fear mentioned earlier that individual rights will possibly be compromised. Another fear that is revealed by some pleadings in this case is that rights falling under s. 25 will be constitutionalized; this fear is totally unfounded. Section 25 does not create or constitutionalize rights.

2.4 *Application in This Case*

[111] There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.

2.4.1 The Nature of the Claim

[112] The appellants claim that aboriginal fishers have been given the right to fish in exclusivity, for one day, prior to the opening of the general commercial fishery in which they participate, and that this right gives rise to a benefit that is denied to non-Aboriginals on the basis of race. They argue that the fact that communal licences are given to a number of bands which then authorize specific fishers to fish is irrelevant, membership in bands not being a valid proxy that is functionally relevant to the regulation of the public fishery.

[113] The respondent has presented a number of arguments opposing the claim. He says in particular that s. 15(1) is not breached because the claimants are individual licence holders while the aboriginal licences are communal; there is no valid comparator. He says that there is no denial of benefit because the program allows for sufficient catches under different categories of beneficiaries, some communal, some individual.

[114] It is a finding of fact that the fishery is not communal (findings of Kitchen Prov. Ct. J. are summarized in the factum of the appellants, at para. 22); it is also a finding of fact that many Aboriginals who fish under the communal licences also participate in the general commercial fishery. More importantly, it is admitted that aboriginal fishers are being given a licence to fish that is not available to non-Aboriginals. The fact that the authorization to fish is given by way of band licences is immaterial; government cannot do indirectly what it cannot do directly. As mentioned in *Van der Peet*, at para. 19, these rights "arise from the fact that aboriginal people are aboriginal" (emphasis deleted). It is also some indication of the true nature of the licence that practically all parties and interveners in this case speak of the "right to fish" afforded by the pilot sales program. Even if communal licences were significant, their nature says nothing about the fact that limiting them to natives as a user group may be discriminatory. The fact that the program is race-based is established beyond doubt.

[115] The declarations of Minister Crosbie and government officials explaining the rationale for the program clearly relate to agreements with bands on the regulation and management of the fishery. The very title of the regulations is instructive: *Aboriginal Communal Fishing Licences Regulations*. With regard to the existence of a benefit, here again there is a finding of fact of Kitchen Prov. Ct. J. (a summary is found in the appellants' factum, at para. 25). In any case, it is hard to understand how the respondent can argue that there was considerable benefit to Aboriginals, particularly the Tsawwassen Band which went from 15 to 35 boats (respondent's factum, at para. 43), and increased revenues and employment for Aboriginals (para. 44), with no impact on non-aboriginal fishers, while the catch is limited by allocations adjusted from year to year. What is allocated to bands in exclusivity cannot be allocated to the general fishery.

[116] There is in my view a *prima facie* case of discrimination pursuant to s. 15(1). There is no need to proceed further in the analysis or to invoke s. 1. The potential for conflict is established.

2.4.2 The Native Right

[117] The Minister issued licences to Aboriginals in application of a discretion given by the *Fisheries Act* and the *Aboriginal Communal Fishing Licences Regulations*. The respondent argues that these licences do not constitute a right or freedom as prescribed by s. 25 of the *Charter*. He says that only those rights and freedoms that "are vital to maintaining the distinctiveness of aboriginal cultures within the larger Canadian polity . . . have the potential to fall within s. 25" (factum, at para. 131), and adds that "[i]t follows that to be afforded protection under s. 25, an 'other right or freedom' must: (1) be of sufficient magnitude to warrant overriding a *Charter* right or freedom; (2) manifest a strong degree of permanence; and, (3) be intimately related to the protection and affirmation of aboriginal distinctiveness. The licence in question does not satisfy these criteria. The licence permitting sale was simply an exercise of administrative discretion, subject to numerous conditions and of brief duration. It was only effective

for twenty-four hours. The agreement entered into with the Musqueam, Burrard and Tsawwassen bands expressly stated that it did not create any aboriginal rights. The conclusion of Brenner C.J.S.C. that the licence did not create a right under s. 25 was correct" (paras. 137-38).

[118] The first comment that I would make is that the criterion of magnitude is simply inconsistent with the actual terms of s. 25. That section simply speaks of rights that pertain to the aboriginal peoples of Canada, i.e., any rights that advance the distinctive position of aboriginal peoples. The same is true with regard to the criterion of permanence; as mentioned earlier in these reasons, "other rights or freedoms" necessarily refers to statutory rights, which can be abolished at any time. The fact that the agreements with the named bands stated that they did not create any aboriginal rights is of no moment. Section 25 does not create any rights.

[119] The respondent agrees that the intended scope of "other rights or freedoms" in s. 25 is achieved by applying the *ejusdem generis* rule. At para. 101 of his factum, the respondent speaks of the unique relationship between British Columbia aboriginal communities and the fishery. This should be enough to draw a link between the right to fish given to Aboriginals pursuant to the pilot sales program and the rights contemplated by s. 25. The right to fish has consistently been the object of claims based on aboriginal rights and treaty rights, the enumerated terms in the provisions.

[120] Furthermore, the respondent himself argues that these rights were a first step in establishing a treaty right. As noted earlier in these reasons, s. 25 reflects the notions of reconciliation and negotiation present in the treaty process and recognized by the previous jurisprudence of this Court: *Haida Nation*, *Taku River*. Brenner C.J.S.C. discussed the rights and freedoms provided to the aboriginal peoples participating in the pilot sales program as well as the significance of the program to the aboriginal peoples of British Columbia (at para. 93):

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

[121] Finally, in my opinion, the right in this case is totally dependent on the exercise of powers given to Parliament under s. 91(24) of the *Constitution Act, 1867* which deals with a class of persons, Indians. Here again it is interesting to note the parallel made between s. 93 and s. 91(24) of the *Constitution Act, 1867* by Estey J. in *Reference re Bill 30*, at p. 1206, where he says: "In this sense, s. 93 is a provincial counterpart of s. 91(24) (Indians, and lands reserved for Indians) which authorizes the Parliament of Canada to legislate for the benefit of the Indian population in a preferential, discriminatory, or distinctive fashion *vis-à-vis* others." To argue that according these licences is not a right but an exercise of ministerial discretion is to privilege form over substance. The *Charter* cannot be interpreted

as rendering unconstitutional the exercise of powers consistent with the purposes of s. 91(24), nor is it rational to believe that every exercise of the s. 91(24) jurisdiction requires a justification under s. 1. Section 25 is a necessary partner to s. 35(1); it protects s. 35(1) purposes and enlarges the reach of measures needed to fulfill the promise of reconciliation.

2.4.3 Potential Conflict

[122] I think it is established, in this case, that the right given by the pilot sales program is limited to Aboriginals and has a detrimental effect on non-aboriginal commercial fishers who operate in the same region as the beneficiaries of the program. It is also clear that the disadvantage is related to racial differences. Section 15 of the *Charter* is *prima facie* engaged. The right to equality afforded to every individual under s. 15 is not capable of application consistently with the rights of aboriginal fishers holding licences under the pilot sales program. There is a real conflict.

3. Conclusion

[123] Section 25 of the *Charter* applies in the present situation and provides a full answer to the claim. For this reason, I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: WeirFoulds, Toronto.

Solicitor for the respondent: Public Prosecution Service of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Tsawwassen First Nation: Arvay Finlay, Vancouver.

Solicitors for the intervener the Haisla Nation: Donovan & Company, Vancouver.

Solicitors for the interveners the Songhees Indian Band, the Malahat First Nation, the T'Sou-ke First Nation, the Snaw-naw-as (Nanoose) First Nation and the Beecher Bay Indian Band (collectively the Te'mexw Nations): Cook, Roberts, Victoria.

Solicitors for the interveners the Heiltsuk Nation and the Musqueam Indian Band: Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Cowichan Tribes: Ratcliff & Company, North Vancouver.

Solicitor for the interveners the Sportfishing Defence Alliance, the B.C. Seafood Alliance, the Pacific Salmon Harvesters Society, the Aboriginal Fishing Vessel Owners Association and the United Fishermen and Allied Workers Union: J. Keith Lowes, Vancouver.

Solicitor for the intervener the Japanese Canadian Fishermens Association: Canadian Constitution Foundation, Calgary.

Solicitors for the intervener the Atlantic Fishing Industry Alliance: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Nee Tahi Buhn Indian Band: Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the Tseshaht First Nation: Braker & Company, West Vancouver.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

[1] Donna Greschner, "Does *Law* Advance the Cause of Equality?" (2001), 27 *Queen's L.J.* 299; Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001), 80 *Can. Bar Rev.* 299; Donna Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291; Debra M. McAllister, "Section 15 — The Unpredictability of the *Law* Test" (2003-2004), 15 *N.J.C.L.* 3; Christopher D. Bredt and Adam M. Dodek, "Breaking the *Law*'s Grip on Equality: A New Paradigm for Section 15" (2003), 20 *S.C.L.R.* (2d) 33; Daphne Gilbert, "Time to Regroup: Rethinking Section 15 of the *Charter*" (2003), 48 *McGill L.J.* 627; Daniel Proulx, "Le concept de dignité et son usage en contexte de discrimination: deux Chartes, deux modèles", [2003] *R. du B.* (numéro spécial) 485; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Christian Brunelle, "La dignité dans la *Charte des droits et libertés de la personne*: de l'ubiquité à l'ambiguïté d'une notion fondamentale", in *La Charte québécoise: origines, enjeux et perspectives*, [2006] *R. du B.* (numéro thématique) 143; R. James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007), 70 *Sask. L. Rev.* 1; Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp. 2007), vol. 2, at pp. 55-28 and 55-29; Alexandre Morin, *Le droit à l'égalité au Canada* (2008), at pp. 80-82.

[2] Sophia Reibetanz Moreau, "Equality Rights and the Relevance of Comparator Groups" (2006), 5 *J.L. & Equality* 81; Daphne Gilbert and Diana Majury, "Critical Comparisons: The Supreme Court of Canada Dooms Section 15" (2006), 24 *Windsor Y.B. Access Just.* 111; Beverley Baines, "Equality, Comparison, Discrimination, Status", in Fay Faraday, Margaret Denike and M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (2006), 73; Dianne Pothier, "Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What's the Fairest of Them All?", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 135. See also Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001), 13 *C.J.W.L.* 37; Bruce Ryder, Cidalia C. Faria and Emily Lawrence, "What's *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions" (2004), 24 *S.C.L.R.* (2d) 103; Mayo Moran, "Protesting Too Much: Rational Basis Review Under Canada's Equality Guarantee", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 71; Sheila McIntyre, "Deference and Dominance: Equality Without Substance", in Sheila McIntyre and Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (2006), 95.

TAB 24

Source: http://scc.lexum.org/en/2011/2011scc53/2011scc53.html

SUPREME COURT OF CANADA

CITATION: Canada (Canadian Human Rights Commission) *v.* Canada (Attorney General), 2011 SCC 53

DATE: 20111028

DOCKET: 33507

BETWEEN:

Canadian Human Rights Commission and Donna Mowat

Appellants

and

Attorney General of Canada

Respondent

- and -

Canadian Bar Association and Council of Canadians with Disabilities

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

JOINT REASONS FOR JUDGMENT: LeBel and Cromwell JJ. (McLachlin C.J. and Deschamps, Abella, Charron and Rothstein JJ. concurring)

(paras. 1 to 65)

CANADA (CHRC) *v.* CANADA (A.G.)

Canadian Human Rights Commission and

Donna Mowat — *Appellants*

v.

Attorney General of Canada — *Respondent*

and

Canadian Bar Association and

Council of Canadians with Disabilities — *Interveners*

Indexed as: Canada (Canadian Human Rights Commission) *v.* Canada (Attorney General)

2011 SCC 53

File No.: 33507.

2010: December 13; 2011 October 28.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial Review — Standard of review — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether standard of reasonableness applicable to

Tribunal's decision to award costs — Whether Tribunal made a reviewable error in awarding costs to complainant — Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 53(2)(c), 53(2)(d).

Administrative law — Boards and Tribunals — Jurisdiction — Costs — Canadian Human Rights Tribunal awarding legal costs to complainant — Whether Tribunal having jurisdiction to award costs — Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 53(2)(c), 53(2)(d).

M filed a human rights complaint with the Canadian Human Rights Commission alleging that the Canadian Forces had discriminated against her on the ground of sex contrary to the provisions of the *Canadian Human Rights Act* ("*CHRA*"). The Canadian Human Rights Tribunal ("Tribunal") concluded that M's complaint of sexual harassment was substantiated in part and she was awarded $4,000 to compensate for "suffering in respect of feelings or self respect." M applied for legal costs. The Tribunal determined that it had the authority to order costs pursuant to s. 53(2)(*c*) and 53(2)(*d*) of the *CHRA* and awarded M $47,000 in this regard. The Federal Court upheld the Tribunal's decision on its authority to award costs. The Federal Court of Appeal allowed an appeal of this decision and held that the Tribunal had no authority to make a costs award.

Held: The appeal should be dismissed.

Administrative tribunals are generally entitled to deference in respect of the legal interpretation of their home statues and laws or legal rules closely connected to them. However, general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise must be reviewed on a standard of correctness. The proper standard of review of the Tribunal's decision to award legal costs to the successful complainant is reasonableness. Whether the Tribunal has the authority to award costs is a question of law which is located within the core function and expertise of the Tribunal and which relates to the interpretation and the application of its enabling statute. This issue is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole falling outside the Tribunal's area of expertise within the meaning of *Dunsmuir*.

The precise interpretive question before the Tribunal was whether the words of ss. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim for . . . any expenses incurred by the victim as a result of the discriminatory practice" permit an award of legal costs. An examination of the text, context and purpose of these provisions reveals that the Tribunal's interpretation was not reasonable. Human rights legislation expresses fundamental values and pursues fundamental goals. It must be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect. However, the intent of Parliament must be respected by reading the words of their provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act. The words "any expenses incurred by the victim" taken on their own and divorced from their context are wide enough to include legal costs. However, when these words are read in their statutory context, they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The Tribunal's interpretation violates the legislative presumption against tautology, makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in those paragraphs. Moreover, the term "costs" has a well-understood meaning that is distinct from compensation or expenses. If Parliament intended to confer authority to confer costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. The legislative history of the *CHRA*, the Commission's understanding of costs authority as well as a review of parallel provincial legislation all support the conclusion that the Tribunal has no authority to award costs. Finally, the Tribunal's interpretation

would permit it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is difficult to reconcile with either the monetary limit of an award for pain and suffering or the omission of any express authority to award expenses in s. 53(3).

No reasonable interpretation of the relevant statutory provisions can support the view that the Tribunal may award legal costs to successful complainants. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engaging in an interpretative process taking account of the text, context and purpose of the provisions in issue. A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **disapproved:** *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32; **referred to:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *M. v. H.*, [1999] 2 S.C.R. 3; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614; *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

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APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and

Layden-Stevenson JJ.A.), 2009 FCA 309, [2010] 4 F.C.R. 579, 312 D.L.R. (4th) 294, 4 Admin. L.R. (5th) 192, 395 N.R. 52, [2009] F.C.J. No. 1359 (QL), 2009 CarswellNat 3405, setting aside a decision of Mandamin J., 2008 FC 118, 322 F.T.R. 222, 78 Admin. L.R. (4th) 127, [2008] F.C.J. No. 143 (QL), 2008 CarswellNat 200. Appeal dismissed.

Philippe Dufresne and Daniel Poulin, for the appellant the Canadian Human Rights Commission.

Andrew Raven, Andrew Astritis and Bijon Roy, for the appellant Donna Mowat.

Peter Southey and Sean Gaudet, for the respondent.

Reidar M. Mogerman, for the intervener the Canadian Bar Association.

David Baker and Paul Champ, for the intervener the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

LEBEL AND CROMWELL JJ. —

I. Overview

[1] The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*" or "Act"), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and "for any expenses incurred by the victim as a result of the discriminatory practice" (s. 53 (2)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for "any expenses incurred by the victim as a result of the discriminatory practice" permits it to order payment of all or a portion of the victim's legal costs.

[2] The Tribunal's decision affirming this authority was reviewed by the Federal Court on the standard of reasonableness and upheld (2008 FC 118, 322 F.T.R. 222). However, the Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and that the Tribunal's decision was incorrect (2009 FCA 309, [2010] 4 F.C.R. 579). The Court of Appeal also was of the view that even if the Tribunal's decision should be reviewed on the reasonableness standard, its decision was unreasonable.

[3] Ms. Mowat did not participate at the Federal Court of Appeal but now appeals to this Court for reinstatement of the Tribunal's award. The Canadian Human Rights Commission, which was not a party before the Tribunal or Federal Court, and intervened before the Federal Court of Appeal, now joins Ms. Mowat as an appellant. (We will refer to Ms. Mowat as the appellant and to the Canadian Human Rights Commission as the Commission.)

[4] The further appeal to this Court raises a threshold question of the appropriate standard of judicial review of the Tribunal's decision and the main question of whether the Tribunal made a reviewable error in finding that it had the authority to award legal costs. We would hold that the Tribunal's decision should be reviewed on the reasonableness standard but that its interpretation of this aspect of its remedial authority was unreasonable. We would therefore dismiss the appeal.

II. Background

[5] The Canadian Forces compulsorily released the appellant, Ms. Mowat, in 1995, following a 14-year career as a traffic technician. Over the course of her time in the military, the appellant had made many formal complaints and grievances against members of her chain of command and others. Many of these were taken to the Chief of the Defence Staff, the highest level in Canadian Forces grievance resolution, and none was substantiated (2005 CHRT 31, 54 C.H.R.R. D/21 (the "merits decision"), at paras. 20, 81-82, 94, 143, 193, 207-8, 216, 218, 231, 236, 286, 294, 297 and 299). The Canadian Forces conducted an internal investigation into comments made by one of the appellant's co-workers which she alleged were sexually harassing. The investigation found that they were (para. 303). The recommendations from several reports on the incidents were implemented by the appellant's Commanding Officer and the employee responsible was disciplined (paras. 83-87).

[6] However, in 1998, three years after leaving the Forces, the appellant filed a complaint with the Canadian Human Rights Commission alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex, pursuant to ss. 7 and 14 of the *CHRA*. The matter was ultimately heard before the Canadian Human Rights Tribunal.

III. Proceedings

A. *Canadian Human Rights Tribunal, 2005 CHRT 31, 54 C.H.R.R. D/21*

[7] The hearing before the Tribunal occupied six weeks and the case record comprised more than 4,000 pages of transcript evidence and over 200 exhibits. The presiding Tribunal member, J. Grant Sinclair, was highly critical of the way in which the appellant Mowat conducted the proceedings. He observed that the complaint was "marked by a fundamental lack of precision in identifying the theory of the . . . case" and referred to the allegations as a "conspiracy theory" and a "scatter-shot complaint with the allegations all over the place" (merits decision, at paras. 4, 357 and 408).

[8] However, the presiding Tribunal member concluded that the appellant's complaint was substantiated in part. He found that her claim of sexual harassment, based on three comments made by a male co-worker, was substantiated and that the military's response had not been adequate or in accordance with its own policies (paras. 42, 47, 49 and 312-22). The rest of her complaint was dismissed.

[9] The Tribunal awarded $4,000 (plus interest, taking the award to the maximum of $5,000, the statutory limit at the time), to compensate the appellant for "suffering in respect of feelings or self respect (para. 7)." It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively (paras. 399-401). It then asked for further submissions regarding her claim for legal costs, which she indicated totalled more than $196,000. At issue was whether the Tribunal's authority to award a complainant "any expenses incurred by the victim as a result of the discriminatory practice" under ss. 53(2)(*c*) and (*d*) of the *CHRA* includes the authority to award legal costs.

[10] In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs (2006 CHRT 49 (CanLII) (the "costs decision")). Without recovery of legal costs, he found, any victory would be "pyrrhic" (para. 29). He then awarded $47,000 in partial satisfaction of Ms. Mowat's legal bills, an

amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest of the unsubstantiated complaints.

B. *Judicial Review — Federal Court of Canada, 2008 FC 118, 322 F.T.R. 222*

[11] The Attorney General of Canada applied for judicial review of the costs decision; the appellant did not participate. Turning first to the standard of review, Mandamin J. applied the four factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and conducted a pragmatic and functional analysis to arrive at a reasonableness *simpliciter* standard. He classified the question as one of law, but noted that the Tribunal was engaged in interpretation of its home statute on a matter at the "core" of its expertise (para. 24). He also relied upon the "human rights policy approach to statutory interpretation" (para. 41), purportedly arising from this Court's decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, to ground his analysis and explain why a one-sided costs regime is permissible. This approach calls for a broad, purposive interpretation of the *CHRA*, commensurate with its remedial goals and special status. He then concluded that the Tribunal's decision about its authority to award costs was reasonable (para. 40). However, Mandamin J. found that the presiding Member had not adequately explained the quantification of the $47,000 award and that this constituted a breach of the principles of procedural fairness. The judicial review judge therefore quashed the decision and sent it back to the Tribunal on this ground. That aspect of the matter has not been appealed and it is not at issue before this Court.

C. *Federal Court of Appeal, 2009 FCA 309, [2010] 4 F.C.R. 579*

[12] The Attorney General of Canada appealed the decision to the Federal Court of Appeal, which unanimously allowed the appeal and held that the Tribunal had no authority to make a costs award. Layden-Stevenson J.A. applied the standard of review principles enunciated by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which had been released after the Federal Court hearing. She applied the correctness standard of review, based primarily on her conclusion that the issue was a question of law both outside the Tribunal's expertise and of central importance to the legal system (para. 42). The Tribunal's human rights expertise was not engaged by the issue, which instead required one clear and consistent answer (para. 47).

[13] The Federal Court of Appeal went on to conclude that the Tribunal's decision to award legal costs was incorrect. After a comprehensive review of the conflicting Tribunal and Federal Court jurisprudence, Layden-Stevenson J.A. turned to the legislative history of the provision in question. In her view, it evinced a clear Parliamentary intent to eschew a costs regime in favour of an active role for the Commission (paras. 65-67 and 88). She noted that the Commission itself, in a Special Report to Parliament, acknowledged that the *CHRA* did not allow for costs recovery (paras. 68 and 90). Further, "costs" is a legal term of art (para. 76), the power to award which must be derived from statute (para. 78). She also relied on a comparative analysis of comparable human rights statutes across Canada, many of which explicitly mention costs jurisdiction in addition to reimbursement of expenses (paras. 70-74 and 84-87). In conclusion, Layden-Stevenson J.A. found that policy considerations and a liberal and purposive approach to interpretation could not be used to override clear Parliamentary intent (paras. 99-100). She reasoned that the decision to provide the Tribunal with the power to award costs is a policy decision best left to Parliament (para. 101). She noted that even on a reasonableness standard, the Tribunal's award of legal costs should be set aside (para. 96).

IV. Analysis

A. *The Issues*

[14] As noted, this appeal raises two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the

interpretation of its power to award legal costs under ss. 53(2)(*c*) and (*d*) of the Act?

2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

B. *The Dunsmuir Analysis*

[15] In *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Court simplified an analytical approach that the judiciary found difficult to implement. Being of the view that the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* was illusory, the majority in *Dunsmuir* eliminated the standard of patent unreasonableness. The majority thus concluded that there should be two standards of review: correctness and reasonableness.

[16] *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review" (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

[17] *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).

[18] *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

[19] Having outlined the principles governing the judicial review analysis, we must now focus on how it should be applied to the decision of the Tribunal. As recommended by *Dunsmuir*, we must first consider how the existing jurisprudence has dealt with the decisions of the Tribunal and of similar bodies tasked with addressing human rights complaints. Over the years, a substantial body of case law about the standards of review of these decisions has developed. Generally speaking, the reviewing courts have shown

deference to the findings of fact of human rights tribunals (P. Garant, *Droit administratif*, (6th ed. 2010), at p. 553). At the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes. It is well known that courts have traditionally extended deference to administrative bodies responsible for managing complex administrative schemes in domains like labour relations, telecommunications, the regulation of financial markets and international economic relations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1339 and 1341, *per* Wilson J., and pp. 1369-70, *per* Gonthier J.). On the other hand, reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex (see A. Macklin, "Standard of Review: The Pragmatic and Functional Test", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 197, at p. 216).

[20] Several examples can be found in the jurisprudence of the Court. In *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, this Court held that absent a privative clause and specialized skill, a human rights commission or tribunal must interpret legislation correctly (pp. 1125-26). In subsequent decisions of this Court, the questions of whether the definition of "family status" as a prohibited ground of discrimination in the federal Act included same-sex couples (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554), or what constituted a service customarily available to the public or "public service" under the provincial human rights legislation (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571) were held to be questions of law in which human rights adjudicators had no particular expertise *vis-à-vis* the courts and which had to be reviewed under a standard of correctness.

[21] But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on the deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness. At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals.

[22] The nature of these tribunals lies at the root of these problems. On the one hand, *Dunsmuir* and *Khosa*, building upon previous jurisprudence, recognize that administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the remedial authority of human rights tribunals or commissions.

[23] There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

[24] In this case, there is no doubt that the Tribunal has the power to award compensation for "any expenses incurred by the victim as a result of the discriminatory practice" pursuant to ss. 53(2)(*c*) and (*d*) of the Act. The issue is whether the Tribunal could order the payment of costs as a form of compensation. Although *Dunsmuir* maintained the category of jurisdictional questions, it took the view that this category

should be interpreted narrowly. Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply (see, for example, *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 28-34). In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

[25] The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). Although the respondent submitted that a human rights tribunal has no particular expertise in costs, care should be taken not to return to the formalism of the earlier decisions that attributed "a jurisdiction-limiting label, such as 'statutory interpretation' or 'human rights', to what is in reality a function assigned and properly exercised under the enabling legislation" by a tribunal (*Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 96, *per* Abella J.). The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal's mandate and expertise to make factual findings relating to discrimination (see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 112, *per* Abella J., *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 76, *per* LeBel J.). As an administrative body that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation — in this case, legal costs — can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.

[26] Subjecting costs to a correctness review would represent a departure from *Dunsmuir*, and from this Court's recent decision in *Smith*. We note, though, that in that case there was a complex and substantial factual background. The issue was whether a tribunal with a mandate to arbitrate disputes relating to mandatory land expropriation and to award "legal, appraisal and other costs" could award costs of related proceedings which, in its view, had been necessary to secure compensation for the expropriation. Fish J., writing for the majority of this Court, concluded that the award of costs was reviewable on the standard of reasonableness since the tribunal was interpreting a provision of its home statute, and "[a]wards for costs are invariably fact-sensitive and generally discretionary" (para. 30). In his view, the tribunal's sole responsibility for determining the nature and the amount of costs was also grounded in the statutory language, and furthermore, involved an inquiry where the legal issues could not be easily separated from the factual issues (paras. 30-32). As the tribunal in *Smith*, the federal Tribunal in this case was interpreting a provision in its home statute that necessitated a fact-intensive inquiry and afforded the Tribunal a certain margin of discretion.

[27] In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

C. *Reasonableness of the Decision*

[28] In *Dunsmuir*, the majority of this Court described reasonableness as

> . . . a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend

themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

[29] Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (Macklin, at p. 205).

[30] The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).

[31] By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

D. *Application — Reasonableness of Tribunal's Interpretation*

[32] The Tribunal held that any authority to award legal costs must come from either ss. 53(2)(*c*) or (*d*) of the Act (costs decision, at para. 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of ss. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim. . .for any expenses incurred by the victim as a result of the discriminatory practice", permit an award of legal costs. The Tribunal decided they did. However, in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

[33] The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Inc. Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

[34] The Tribunal based its conclusion that it had the authority to award legal costs on two points. First, following three decisions of the Federal Court, the Tribunal reasoned that the term "expenses incurred" in ss. 53(2)(*c*) and (*d*) is wide enough to include legal costs: *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26;

Canada (Attorney General) v. Brooks, 2006 FC 500, 291 F.T.R. 32, paras. 10-16. Second, the Tribunal relied on what it considered to be compelling policy considerations relating to access to the human rights adjudication process. For reasons that we will set out, our view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs. When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion.

(1) Text

[35] Turning to the text of the provisions in issue, the words "any expenses incurred by the victim", taken on their own and divorced from their context, are wide enough to include legal costs. This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The contention that they were in our view, ignores the structure of the provision in which the words "any expenses incurred by the victim" appear.

[36] For ease of reference, we reproduce ss. 53(2) and (3) as they read at the time the appellant's complaint was filed:

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may . . . make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that it considers appropriate:

> (*a*) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including
>
> > (i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
> >
> > (ii) the making of an application for approval and the implementing of a plan pursuant to section 17, in consultation with the Commission on the general purposes of those measures;
>
> (*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;
>
> (*c*) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

> (*d*) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.
>
> (3) In addition to any order that the Tribunal may make pursuant to subsection (2), if the Tribunal finds that
>
> (*a*) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or
>
> (*b*) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice, the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

[37] It is significant, in our view, that the phrase "that the person compensate the victim . . . for any expenses incurred by the victim as a result of the discriminatory practice" appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in s. 53(2)(*c*), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(*d*), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term "expenses" had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term "expenses" is intended to mean something different in each of paragraphs (*c*) and (*d*).

[38] The interpretation adopted by the Tribunal makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, "[i]t is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "[i]t is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage." See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

[39] The appellant received an award for pain and suffering under s. 53(3) of the *CHRA*. The Tribunal also expressly disallowed her medical expense claims (merits decision, at paras. 404-6). Unlike ss. 53(2)(*c*) and (*d*), there is in subsection (3) no provision for the reimbursement of expenses. Once again, if the intention had been to grant free-standing authority to award costs, the meaning of this omission in light of the repeated specific provision for compensation for expenses is hard to fathom in the context of compensation for lost wages in paragraph (*c*) and for additional costs of obtaining goods and services in paragraph (*d*).

[40] Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

[41] Finally, in relation to the text of the Act, it is noteworthy that it very strictly limits the amount of money the Tribunal may award for pain and suffering experienced as a result of the discriminatory practice and, as noted, does not explicitly provide for reimbursement of expenses in relation to such an award. At the time of these proceedings, the limit was $5,000. The Tribunal's interpretation permits it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is hard to reconcile with either the monetary limit or the omission of any express authority to award expenses in s. 53(3).

(2) Context

[42] Turning to context, three matters must be considered: legislative history, the Commission's own consistent understanding of the Tribunal's power to award costs, and parallel provincial and territorial legislation. These contextual matters, when considered along with the provisions' text and purpose, demonstrate that the Tribunal's interpretation does not fall within the range of reasonable interpretations of these provisions.

(a) *Legislative History*

[43] The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8).

[44] We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 37). This Court, in *M. v. H.*, [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

[45] The legislative evolution and history of the *CHRA* shed light on two important matters. First, it strongly supports the inference that it is likely that Parliament would have chosen the familiar legal term of art had it been the intention to confer a power to award costs. Parliament is presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended. The history of the enactment of the provisions in issue supports applying that reasonable inference because the legal term of art "costs" was used in some draft provisions but not others. Second, the role envisioned for the Commission explains why the power to award costs was not part of Parliament's intent.

[46] Before the *Canadian Human Rights Act* was enacted in 1977, there was an earlier attempt to

enact similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current s. 53(2). Clause 37(4) of Bill C-72 read as follows:

(4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.

[47] Bill C-72 died on the order paper. When Bill C-25, which ultimately became the *CHRA* in 1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained. In addition, a provision relating to the role of the Commission was inserted which we will discuss in a moment.

[48] This piece of the legislative history of the provision before us strongly suggests that "costs" was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs. It read as follows:

(3) Subsections 53(3) and (4) of the said Act are repealed and the following substituted therefor:

. . .

(6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to

(*a*) a complainant, if the complaint is substantiated and

(i) the commission did not appear before the Tribunal, or

(ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complainant; or

(*b*) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.

Clause 21 (adding s. 48.9(1)(*h*)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.

[49] These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word "costs" was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.

[50] Another aspect of legislative history suggests that the authority to award costs and the role envisaged for the Commission were related subjects in Parliament's view.

[51] We mentioned earlier that the 1975 draft bill which was not ultimately enacted expressly authorized the Tribunal to award "costs of and incidental to any hearing" before it. That express power, as we have noted, was not contained in the 1977 bill that ultimately became the *CHRA*. However, while the power to award costs was removed, a provision relating to the role of the Commission was added. This section currently reads:

51. In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

We agree with the respondent that the clear implication of this chain of events is that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

[52] The 1992 proposed amendments which we have noted earlier are consistent with this view. It is noteworthy that the authority to award costs contemplated by those provisions could only be awarded under this regime if the Commission did not take carriage of the matter. This supports the respondent's contention that an authority to award costs was rejected in favour of an active role for the Commission in presenting complaints to the Tribunal.

(b) *The Commission's Understanding of Costs Authority*

[53] A further element of context is that the Commission itself has consistently understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this respect. Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation, for example, in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915. Binnie J. (in dissent) relied on excerpts from speeches to the Canadian Tax Foundation made by both the Minister of Finance and an employee of Revenue Canada when interpreting an income tax provision. Binnie J. states, "[a]dministrative policy and interpretation are not determinative but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation", at para. 66, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851, at p. 859, *per* de Grandpré J., and *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 37, *per* Dickson J. (as he then was). While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission itself about the meaning of its constitutive statute meets these requirements.

[54] In its 1985 annual report, the Commission asked that the Act be amended to empower the Tribunal to award costs:

The Commission recommends to Parliament that the Canadian Human Rights Act be amended to include a provision to allow a human rights tribunal discretionary power to award costs to parties appearing before it.

The intent of this recommendation is to provide tribunals with a wider discretion in disposing of a complaint where undue hardship may be a factor.

(*Annual Report 1985* (1986), at p. 12 (italics in original))

The Commission made similar recommendations in each of its 1986, 1987, 1988, 1989, and 1990 annual reports to Parliament.

[55] Most recently, in its *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (2009), the Commission stated that "[t]he CHRA does not allow for the awarding of costs" (p. 34). In this respect, the report makes mention of the simplified process that complainants must follow to file a complaint, and the assistance they get from both the Commission and the Tribunal during the investigation and litigation stages, as reasons why complainants do not need to hire lawyers to proceed. The Commission went on to recommend that Parliament amend the Act to allow discretion to award legal costs, but only if the Tribunal finds that one party has abused the Tribunal process.

[56] While, as noted, the Commission's views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case.

(c) *Parallel Provincial and Territorial Legislation*

[57] The respondent also urges us to consider parallel legislation in the provinces and territories and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive: pp. 419-20.

[58] The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5).

[59] In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word "costs" is used consistently when the intention is to confer the authority to award legal costs.

[60] For example, British Columbia allows costs to be awarded if there is "improper conduct" during the course of the complaint (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 37(4)). In Manitoba and the Northwest Territories, the conduct must be "frivolous or vexatious" (*Human Rights Code*, S.M. 1987-88, c. 45, s. 45(2); *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 63). In Alberta, Prince Edward Island, and Newfoundland, (*Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 28.4(6); *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 39(2)), tribunals can make any "appropriate" cost order, in Québec a tribunal may award costs "as it determines", *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 126; and in Saskatchewan it is any "appropriate" cost order but not against the Commission (*Saskatchewan Human Rights Code Regulations*, R.R.S., c. S-24.1, Reg. 1, s. 21(1)). In Ontario, the offending party's conduct must be "unreasonable, frivolous[,] or vexatious or . . . in bad faith" and the Tribunal can make its own rules pertaining to costs awards (*Statutory Powers Procedure Act*, R.S.O.

1990, c. S. 22, s. 17.1(2)). In all provinces, this costs jurisdiction is *in addition to* broad compensatory jurisdiction for expenses incurred; the wording of these expense reimbursement provisions is very similar to the language of s. 53(2) of the *CHRA*.

(3) Purpose

[61] The appellant urges the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which will permit the Tribunal to make victims of discrimination whole. This was the second point relied on by the Tribunal in finding it could award costs.

[62] As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*, at para. 50, *per* La Forest J., concurring.

[63] The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants (R.F., at paras. 47-48). This policy change may have been in response to the Report of the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law (*Promoting Equality: A New Vision* Ottawa: Canadian Human Rights (2000)). Interestingly, this report also acknowledged that the *CHRA* does not provide any authority to award costs. The Report recommended clinic-type assistance to potential claimants (pp. 71-72 and 74-78). The latter recommendation was not acted upon, while the former was. As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs.

[64] In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.

V. Disposition

[65] We would dismiss the appeal without costs.

Appeal dismissed.

Solicitor for the appellant the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitors for the appellant Donna Mowat: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener the Council of Canadians with Disabilities: Champ & Associates, Ottawa.

TAB 25

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2011-0040
EB-2011-0041
EB-2011-0042

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c.I5, Schedule B, and in particular, Section 90 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Ear Falls and the Municipality of Red Lake, both in the District of Kenora;

AND IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1990, c.M.55, as amended; and in particular Sections 8 and 9 thereof;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order approving the terms and conditions upon which the Corporation of the Municipality of Red Lake is, by Bylaw, to grant to Union Gas Limited the right to construct and operate works; to supply gas to the inhabitants of the said municipality; and the period for which such rights are to be granted;

AND IN THE MATTER OF an Application by Union Gas Limited for an Order directing and declaring that the assent of the municipal electors of the Municipality of Red Lake to the by-law is not necessary;

AND IN THE MATTER OF an Application by Union Gas Limited for a Certificate of Public Convenience and Necessity to construct works to supply gas to the inhabitants of the Municipality of Red Lake.

Before: Marika Hare, Presiding Member

Paula Conboy, Member

DECISION WITH RESPECT TO PRELIMINARY QUESTIONS AND FINAL DECISION AND ORDERS

I. Background

Applications

Union Gas Limited ("Union") filed applications with the Ontario Energy Board (the "Board") on February 8, 2011 relating to proposed natural gas facilities and services in the Red Lake area. The applications were filed together and consist of requests for leave to construct a natural gas pipeline (the "Pipeline Project"), a Municipal Franchise Agreement ("MFA") for the Municipality of Red Lake ("Red Lake") and a Certificate of Public Convenience and Necessity ("CPCN") for Red Lake. Construction of the proposed Pipeline Project is divided into two phases: the first phase would run from an existing gas pipeline north of Ear Falls to the intersection of Highway 105/125, where it would serve various existing mine sites (collectively known as the "Red Lake Gold Mines") operated by Goldcorp Inc. ("Goldcorp"). Phase I is approximately 58 km in length consisting of 8 inch and 4 inch diameter pipelines.

Phase 2 would involve the extension of the pipeline constructed in Phase 1 to provide natural gas service to the residents and businesses of several nearby communities. Phase 2 is approximately 46 km in length. The CPCN and the MFA are required to allow Union to provide natural gas service to the communities that will be connected to Phase 2 of the Pipeline Project. Union is prepared to commence construction of Phase 1 immediately. Phase 2, however, would be contingent on additional funding from either the local communities or some other entity.

The Pipeline Project will be constructed almost entirely on existing road allowances or on privately owned land. The Board has assigned to the leave to construct application file number EB-2011-0040; the MFA application file number EB-2011-0041; and the CPCN application file number EB-2011-0042.

The Board's jurisdiction over the approval of natural gas pipelines is found in section 90 of the *Ontario Energy Board Act, 1998* (the "Act"). Section 96(1) sets out the test the

Board is to consider: "If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work."

The Board's authority over the CPCN and the MFA comes from the *Municipal Franchises Act*, sections 8 and 9 respectively.

Procedural steps to date

The Board issued a Notice of Applications and Hearing ("Notice") on March 8, 2011. Union served and published the Notice as directed by the Board. On April 1, 2011 the Board issued its Procedural Order No. 1 which outlined its process for written interrogatories and submissions.

Goldcorp registered as an intervenor in the proceeding in support of the applications and Enbridge Gas Distribution Inc. registered as an observer.

On March 23, 2011 the Board received a letter of support for the proposed Pipeline Project from Goldcorp. On March 24, 2011, Goldcorp filed with the Board 10 letters of support for the proposed Pipeline Project that were forwarded to Goldcorp by the Municipality of Red Lake. The support letters include: The Corporation of the Municipality of Red Lake, Red Lake Margaret Cochenour Memorial Hospital, Ontario Provincial Police Red Lake Detachment, Red Lake Indian Friendship Centre, Red Lake Airport, Sunset Lodge on Red Lake, Chukuni Community Development Corporation, North American Lumber, Red Lake Branch, Two Feathers Forest Products, LP and Red Lake District High School. All of the letters form part of the public record.

On April 1, 2011 the Board issued its Procedural Order No. 1 which outlined its process for written interrogatories and final submissions. Board staff and Union were the only active participants in the proceeding which was completed in accordance with the schedule set in the Procedural Order No. 1 on May 3, 2011 with Union's reply submissions to the Board Staff submissions dated April 29, 2011.

On May 5, 2011 the Board received a letter from the Grand Council of Treaty 3 (the "Grand Council") outlining concerns with the applications. On May 11, 2011 the Board requested that Union file a formal response to the letter. Union filed its response on May

12, 2011. On May 16, 2011 the Board invited the Grand Council to reply to Union's letter. The Grand Council filed its reply on May 30, 2011. The Grand Council's reply expressed concerns relating to the adequacy of the Crown's consultation efforts pursuant to the *Constitution Act, 1982* in respect of the applications.

On June 7, 2011, the Board issued its Procedural Order No. 2 in which it posed three questions relating to the Crown's duty to consult and scheduled written submissions and an oral hearing to address the questions. In submissions and in the oral hearing the Board restricted its consideration to submissions on the appropriate scope of its enquiry into any duty to consult issues in this proceeding. The Board sought submissions on the following questions:

1. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, what is the conduct that the Crown has contemplated that has the potential to adversely impact an Aboriginal right or title? What is the Crown's responsibility with respect to this project, which is being undertaken by a private proponent?

2. To the extent that there are duty to consult issues associated with the project, what is the scope of the Board's power to review them? In particular, should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself (over which it has approval authority), or indirect impacts such as potential expansions to the mine or the town that may be enabled by the pipeline (over which it has no approval authority)?

3. Can the Crown impliedly delegate the duty to consult to a private proponent?

On June 9, 2011 the Board received a request from the Lac Seul First Nation ("LSFN") requesting late intervention status. In Procedural Order No. 3, the Board granted the intervention request to the LSFN, at least for the purposes of making submissions on the preliminary questions. A complete Intervention List is attached as Appendix "A".

On June 10, 2011 the Board issued a Procedural Order No. 3 and set the extended date for filing written submissions on the three questions on the Crown consultation, by the parties and Board staff.

In accordance with Procedural Order No. 3, the following parties provided written submissions on June 17, 2011: Board staff, the Grand Council, LSFN, Union and Goldcorp.

Wabauskang First Nation ("WFN") informed the Board by a letter dated June 17, 2011 that it would appear in the oral hearing on June 20, 2011 and that it intended to make oral submissions. At the oral hearing, the Board allowed WFN to make submissions on the three scoping questions.

In a number of letters to the Board, Union confirmed that it had directly served the Notice of application on a number of potentially impacted Aboriginal groups as directed by the Board, including LSFN, the Grand Council, and WFN. Union also directly served Wabasemoong First Nation, Pikangikum First Nation, the Métis Nation of Ontario and published the Notice in the Wawatay News. All of these Aboriginal groups had received various communications (and in some cases meetings) regarding the Pipeline Project with Union in the months before the application was filed.

The oral hearing was held on June 20, 2011. A transcript of the hearing is available on public record. The following parties participated in the oral hearing: Board staff, the Grand Council, WFN, LSFN, Union and Goldcorp.

II. Analysis and Decision on Preliminary Questions

A. Question 1

1. The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. In the current case, what is the conduct that the Crown has contemplated that has the potential to adversely impact an Aboriginal right or title? What is the Crown's responsibility with respect to this project, which is being undertaken by a private proponent?

The Duty to Consult

The duty to consult, as described in the Supreme Court's *Haida Nation v. British Columbia (Minister of Forests)* ("Haida") decision, arises where the Crown has knowledge, real or constructive, of the potential existence of Aboriginal right or title and contemplates conduct that might adversely affect it. In some cases, the duty to consult may lead to a duty to accommodate. The precise extent of the duty to consult and, possibly, accommodate will vary depending on the facts of each situation.[1] The exact role that tribunals are to play in discharging or assessing the duty to consult has been the subject of some legal debate. The Supreme Court's recent decision in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* [2]("Rio Tinto") decision has helped to clarify some of these issues. Generally speaking, tribunals which have the power to consider questions of law have the concomitant power to consider Constitutional issues, including the duty to consult.[3] Section 19(1) of the Act provides the Board with the power to consider questions of law.

The duty to consult is grounded in section 35(1) of the *Constitution Act, 1982*, ("section 35") which provides:

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

The Pipeline Project

The Board is the sole approval authority for the Pipeline Project as a whole. The Board's power to approve the leave to construct application is found in section 96(1) of the Act: "If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work." A variety of other permits are required from a number of other Crown actors. However, most of these permits are required for discrete elements of the construction (for example, water crossings), and only the Board is charged with considering whether the entire Pipeline

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[1] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 35 and paras. 47-49.
[2] [2010] 2 S.C.R. 650.
[3] Rio Tinto, paras. 66-73; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] S.C.J. No. 54, para. 39; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] S.C.J. No. 34, para. 39

Project is in the public interest. The Board is therefore of the view that it is in the best position to consider the issue of Crown consultation with respect to the Pipeline Project as a whole.

Should the Board conduct consultation itself?

In its letter to the Board dated May 30, 2011, the Grand Council stated: "To be clear, we are in no way suggesting that the Board itself has a duty to consult with the Grand Council." (Emphasis in original). In their letters seeking intervenor status, neither LSFN nor WFN suggested that it was the Board itself that should conduct independent consultation.

As this issue did not appear to be in dispute, the Board did not seek submissions on this issue in Procedural Order No. 2. This issue was raised in oral submissions by WFN, however, so the Board will address it.

Board staff's pre-filed submission contained a short section expressing the view that the Board did not have authority to undertake direct consultation itself, and noted that this point did not appear to be challenged by any party. Board staff quoted the Rio Tinto decision:

> A tribunal has only those powers that are expressly or implicitly conferred on it by statute. In order for a tribunal to have the power to enter into interim resource consultations with a First Nation, pending the final settlement of claims, the tribunal must be expressly or impliedly authorized to do so. **The power to engage in consultation itself, as distinct from the jurisdiction to determine whether a duty to consult exists, cannot be inferred from the mere power to consider questions of law.** Consultation itself is not a question of law; it is a distinct and often complex constitutional process and, in certain circumstances, a right involving facts, law, policy, and compromise. The tribunal seeking to engage in consultation itself must therefore possess remedial powers necessary to do what it is asked to do in connection with consultation.[4]

[4] *Rio Tinto*, para. 60 (emphasis added). See also para. 74.

In its oral submissions, however, WFN argued that the Board may indeed be responsible for conducting consultation itself (WFN did not pre-file any submissions). WFN submitted that the Board may indeed have the remedial powers necessary "to do what it is asked to do in connection with consultation." Specifically, WFN pointed to the Board's powers to approve leave to construct applications (section 96(1) of the Act) and the Board's general power to set conditions to its orders (section 23(1) of the Act). WFN further stated that the *Quebec (Attorney General) v. Canada (National Energy Board)* case[5] ("Quebec"), which had been cited by Board staff, had been superseded by Rio Tinto. WFN also observed that there is no prohibition in the Act against the Board conducting consultation directly.

The Board does not accept that it has an independent mandate to conduct direct consultation itself with Aboriginal groups whose Aboriginal or treaty rights may be adversely impacted by a project subject to Board approval. As discussed below, however, there is significant flexibility in the manner in which the duty to consult can be discharged, and the Board does find that its ordinary hearing processes (including the Environmental Guidelines and Report as described below) can serve to ensure that the duty to consult has been satisfied.

The Board is a quasi-judicial tribunal that owes a duty of fairness to all parties. As the Supreme Court observed in the Quebec case:

> The appellants' argument is that the fiduciary duty owed to aboriginal peoples by the Crown ... extends to the Board, as an agent of government and creation of Parliament, in the exercise of delegated powers. ...
>
> The courts must be careful not to compromise the independence of quasi-judicial tribunals and decision making agencies by imposing on them fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty. Counsel for the appellants conceded in oral argument that it could not be said that such a duty should apply to the courts, as a creation of government, in the exercise of their judicial function. In my view, the considerations which apply in evaluating whether such an obligation is impressed on the process by which the Board

[5] [1994] 1 S.C.R. 159.

> decides whether to grant a licence for export differ little from those applying to the courts. The function of the Board in this regard is quasi-judicial. While the characterization may not carry with it all the procedural and other requirements identical to those applicable to a court, it is inherently inconsistent with the imposition of a relationship of utmost good faith between the Board and a party appearing before it.[6]

Although the case law with respect to section 35 rights has evolved since 1994, nothing in Rio Tinto or any other decision alters this finding, and absent clear instruction through its statute, the Board is not prepared to stray from its traditional role as a quasi-judicial tribunal that hears from parties and makes determinations and orders through the hearing process.

The Board does not accept WFN's submission that its broad general power to attach conditions to its orders qualifies as "remedial powers" as contemplated by the Supreme Court in Rio Tinto. The Supreme Court discussed the nature of the statutory grant of authority necessary to confer the power to actually conduct independent consultations at paragraph 74:

> While the *Utilities Commission Act* conferred on the Commission the power to consider whether adequate consultation had taken place, its language did not extend to empowering the Commission to engage in consultations in order to discharge the Crown's constitutional obligation to consult. As discussed above, legislatures may delegate the Crown's duty to consult to tribunals. However, the Legislature did not do so in the case of the Commission. Consultation itself is not a question of law, but a distinct constitutional process requiring powers to effect compromise and do whatever is necessary to achieve reconciliation of divergent Crown and Aboriginal interests. The Commission's power to consider questions of law and matters relevant to the public interest does not empower it to itself engage in consultation with Aboriginal groups.

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[6] Quebec, paras. 32 and 34-35.

It appears, therefore, that the Supreme Court contemplated something more direct than a simple general power to impose conditions. The Board finds that the statute does not provide the Board with the power to undertake direct one-on-one consultations with Aboriginal groups in the manner that a Crown ministry might. However, as discussed in further detail below, the Board does find that its application process (including the environmental review set out in the Board's Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario (6th Edition, 2011)) ("Environmental Guidelines") can serve to ensure that the duty to consult has been properly addressed. There is significant flexibility regarding the manner in which the duty to consult can be discharged, and consultation need not necessarily be one–on-one discussions between (for example) a Crown ministry and a First Nation.

What is the "Crown conduct" where the proponent is a private body seeking an approval from a quasi-judicial tribunal?

The issue before the Board is a complex one that has not been directly addressed by the Supreme Court. The duty to consult is triggered where the Crown contemplates conduct which has the potential to adversely impact Aboriginal or treaty rights. The proponent of the Pipeline Project is Union, a private corporation. Conduct by Union is not "Crown conduct". Although a variety of Crown ministries have some level of involvement with the Pipeline Project, none have any approval authority for the Pipeline Project as a whole. It is the Board that has approval authority over the Pipeline Project; however as discussed above the Board is not empowered to conduct consultations with Aboriginal groups itself.

Although the recent Rio Tinto decision is helpful in clarifying the role of tribunals with respect to the duty to consult, in that case the proponent was a Crown actor, and there was no dispute that the proponent itself was responsible for actually conducting the consultation. In Rio Tinto, the "Crown conduct" in question was clear and not disputed: "BC Hydro's [i.e. the proponent, and not the tribunal] proposal to enter into an agreement to purchase electricity from Alcan is clearly proposed Crown conduct. BC Hydro is a Crown corporation. It acts in place of the Crown. No one seriously argues that the 2007 EPA does not represent a proposed action of the Province of British Columbia."[7] Under such circumstances, the Court held that the role of the tribunal was to assess whether the Crown conduct in question (i.e. BC Hydro's actions) had a

[7] Rio Tinto, para. 81.

potential adverse impact on Aboriginal or treaty rights, and if so what accommodation might be appropriate.

The question of what (if any) Crown conduct is contemplated where the proponent itself is not the Crown is not addressed in Rio Tinto. This is a distinguishing factor from the case currently before the Board. The Crown conduct being contemplated in Rio Tinto was different from any Crown conduct being contemplated in this case. The tribunal's role in that case was to assess whether the duty to consult had been triggered, and if so if it had been adequately discharged. In the current case the specific party or parties responsible for conducting any required consultation is not as clear.

All parties agree that Union is not the Crown. Union's conduct in planning and proposing (and ultimately, if approved, constructing) the Pipeline Project therefore does not trigger the duty to consult on its own. Several parties took the position, however, that the Board's decision itself is the conduct contemplated by the Crown[8].

The Board is unable to accept this argument. The Board's responsibilities as a quasi-judicial tribunal and the absence of clear empowering language in the statute prevent it from conducting consultation itself. The duty is triggered by the activities and approvals required by other Crown actors that have some oversight responsibility for this project, as discussed in further detail below. As counsel for LSFN observed, it is difficult to accept that more than 100 kilometers of pipeline could be built almost entirely on Crown land (albeit road allowance) without some manner of Crown conduct being involved. The Board's role, as described in Rio Tinto, is to assess the adequacy of the Crown's consultation efforts. As the approval authority for the Pipeline Project as a whole, the Board accepts that it must be satisfied that there has been an adequate process of consultation (and possibly accommodation) for the Pipeline Project as a whole.

The question that remains is by what means should the Board assess the adequacy of consultation through the current process. It was suggested by the participating Aboriginal groups that the Board should await the outcome of certain Crown consultations that may be occurring (or will be occurring) outside the Board's process – for example with respect to certain permits that will be required to build the pipeline. Once those consultations are complete, the Board could review the evidence and make

[8] Oral submissions of the Grand Council, transcript pp. 17-18; Oral submissions of WFN, transcript p. 59. Union also appears to take this view: see transcript pp. 157-158. Goldcorp appears to dispute this point: oral submissions of Goldcorp, transcript pp. 127-128.

a determination on the adequacy of these consultation efforts. Union and Goldcorp argued that the Board's existing process, in particular the environmental review process, already ensures that the duty to consult as it pertains to the Pipeline Project itself is satisfied, and that awaiting the results of any other outside process is unnecessary.

The Board finds that its existing process is the appropriate forum to address all Pipeline Project issues concerning the duty to consult. As explained below, the Board finds that it does not have to await the completion of any additional Crown consultation activities that may be occurring outside of the Board's process.

Case law relating to the duty to consult

The courts have long recognized that the duty to consult can be met through a wide variety of processes. In Haida, the Supreme Court observed that there is no one size fits all approach that would be appropriate in every situation. The Supreme Court held that: "The content of the duty to consult and accommodate varies with the circumstances. Precisely what duties arise in different situations will be defined as the case law in this emerging area develops. In general terms, however, it may be asserted that the scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[9] Discussing instances where a claim to Aboriginal or treaty rights is relatively strong, and potential infringements relatively high, the Court observed: "While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case."[10]

In discussing the standard of review courts should employ in considering appeals relating to the Crown's consultation efforts, the Court made further findings regarding the types of process that can be used to discharge the duty to consult:

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[9] Haida, para. 39.
[10] Haida, para. 44.

> The process itself would likely fall to be examined on a standard of reasonableness. Perfect satisfaction is not required; **the question is whether the regulatory scheme or government action "viewed as a whole, accommodates the collective aboriginal rights in question**: Gladstone at. Para. 170. What is required is not perfection, but reasonableness. As stated in Nikal, at para. 110, "in ... information and consultation the concept of reasonableness must come into play... . So long as every reasonable effort is made to inform and to consult, such efforts would suffice." The government is required to make reasonable efforts to inform and consult. This suffices to discharge the duty.[11]

In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*[12] ("Taku"), an existing environmental assessment process was held to be sufficient to satisfy the duty to consult. Taku involved an approval for a new road through a First Nation's traditional territory. Even though the Supreme Court found that the First Nation's claim was relatively strong, it held that the environmental assessment process provided ample opportunity for its participation: "The chambers judge was satisfied that any duty to consult was satisfied until December 1997, because the members of the [First Nation] were full participants in the assessment process. I would agree. The Province is not required to develop special consultation measures to address [the First Nation's] concerns, outside the process provided for by the *Environmental Assessment Act*, which specifically set out a scheme that required consultation with affected Aboriginal peoples."[13]

The Court concluded:

> On the principles discussed in *Haida*, these facts mean that the honour of the Crown placed the Province under a duty to consult with the TRTFN [i.e. the First Nation] in making the decision to reopen the Tulsequah Chief Mine. In this case, the process engaged in by the Province under the *Environmental Assessment Act* fulfilled the requirements of its duty. The TRTFN was part of the Project Committee, participating fully in the environmental

[11] Haida, para. 62 (emphasis added).
[12] [2004] 3 S.C.R. 550.
[13] Taku, para. 40.

> review process. It was disappointed when, after three and a half years, the review was concluded at the direction of the Environmental Assessment Office. However, its views were put before the Ministers, and the final project approval contained measures designed to address both its immediate and long-term concerns. The Province was under a duty to consult. It did so, and proceeded to make accommodations. The Province was not under a duty to reach agreement with the TRTFN, and its failure to do so did not breach the obligations of good faith that it owed the TRTFN.[14]

The flexible manner in which the duty to consult can be satisfied was again discussed by the Supreme Court in the *Beckman v. Little Salmon/Carmacks First Nation*[15] decision ("Little Salmon"). In this case, the Yukon territorial government had denied there was any duty to consult with regard to a certain decision. Despite this, it agreed to have discussions with the First Nation as a "courtesy". The Supreme Court found that the duty to consult was in fact engaged by the decision in question; however, it held that the process undertaken by the government was sufficient to discharge the duty even though it had not been characterized as consultation:

> Nevertheless, consultation *was* made available and *did* take place through the LARC process under the 1991 Agriculture Policy, and the ultimate question is whether what happened in this case (even though it was mischaracterized by the territorial government as a courtesy rather than as the fulfillment of a legal obligation) was sufficient. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 3 S.C.R. 550, the Court held that participation in a forum created for other purposes may nevertheless satisfy the duty to consult if *in substance* an appropriate level of consultation is provided.[16]

To date, there have been no Supreme Court decisions directly addressing the exact situation currently before the Board – in other words, how is the duty to consult engaged and best addressed where a private proponent seeks an approval from a quasi-judicial

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[14] Taku, para. 22.
[15] [2010] 3 S.C.R. 103.
[16] Little Salmon, para. 39 (emphasis in original).

tribunal? There have, however, been decisions of the Federal Court and the Federal Court of Appeal that are directly on point. In *Brokenhead Ojibway Nation v. Canada (Attorney General)*[17] ("Brokenhead"), several First Nations sought declaratory relief from the Federal Court from a decision of the National Energy Board ("NEB") to approve the construction of certain pipelines. The First Nations argued that the Crown had not met the duty to consult with respect to these projects. In dismissing the case, the court expressed confusion over exactly what the nature of the potential infringements to Aboriginal rights were. It also held, however, that the NEB's ordinary hearing process could be a good forum through which concerns relating to the potential infringement of Aboriginal rights could be addressed:

> In determining whether and to what extent the Crown has a duty to consult with Aboriginal peoples about projects or transactions that may affect their interests, the Crown may fairly consider the opportunities for Aboriginal consultation that are available within the existing processes for regulatory or environmental review. Those review processes may be sufficient to address Aboriginal concerns, subject always to the Crown's overriding duty to consider their adequacy in any particular situation. This is not a delegation of the Crown's duty to consult but only one means by which the Crown may be satisfied that Aboriginal concerns have been heard and, where appropriate, accommodated. The NEB process appears well-suited to address mitigation, avoidance and environmental issues that are site or project specific. The record before me establishes that the specific project concerns of the Aboriginal groups who were consulted by the corporate Respondents or who made representations to the NEB ... were well received and largely resolved.[18]

The Court further observed that the forum provided through the NEB process was preferable to any collateral discussions with Crown actors that were not as directly involved in the approval of the project:

> The Treaty One First Nations maintain that there must always be an overarching consultation regardless of the validity of the

[17] [2009] F.C.J. No. 608.
[18] Brokenhead, paras. 25-26.

> mitigation measures that emerge from a relevant regulatory review. This duty is said to exist notwithstanding the fact that Aboriginal communities have been given an unfettered opportunity to be heard. This assertion seems to me to represent an impoverished view of the consultation obligation because it would involve a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the NEB and not in a collateral discussion with either the GIC or some arguably relevant Ministry.[19]

The Court concluded:

> I am satisfied that the process of consultation and accommodation employed by the NEB was sufficient to address the specific concerns of Aboriginal communities potentially affected by the Pipeline Projects including the Treaty One First Nations. The fact that the Treaty One First Nations may not have availed themselves fully of the opportunity to be heard before the NEB does not justify the demand for a separate or discrete consultation with the Crown. To the extent that regulatory procedures are readily accessible to Aboriginal communities to address their concerns about development projects like these, there is a responsibility to use them. First Nations cannot complain about a failure by the Crown to consult where they have failed to avail themselves of reasonable avenues for seeking relief.[20]

The Federal Court of Appeal arrived at similar conclusions in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*[21] ("Standing Buffalo"). This case also related a review of an NEB pipeline approval decision, and concerns expressed by First Nations that the Crown had not conducted sufficient consultation for the projects. The Court first rejected arguments that a Haida type analysis of the "Crown's" conduct in the case was required, as none of the project's proponents were Crown actors:

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[19] Brokenhead, para. 37.
[20] Brokenhead, para. 42.
[21] [2009] F.C.J. No. 1434. Leave to appeal to Supreme Court of Canada denied, 2010 CanLII 70737.

> In the appeals under consideration, the applications before the NEB were made by Keystone, Enbridge Southern Lights and Enbridge, private sector entities that are not the Crown or its agent. Accordingly, I am of the view that *Kwikwetlem First Nation* does not support the proposition that the NEB is required to undertake the *Haida* analysis before considering the merits of the applications of Keystone, Enbridge Southern Lights and Enbridge that were before it.[22]

The court held, however, that the absence of a Haida type duty did not mean that Aboriginal rights or section 35 could be ignored.

> ...[T]he decision in *Quebec (Attorney General) v. Canada (National Energy Board)* establishes that in exercising its decision making function, the NEB must act within the dictates of the Constitution, including subsection 35(1) thereof. In the circumstances of these appeals, the NEB dealt with three applications for Section 52 Certificates. Each of those applications is a discrete process in which a specific applicant seeks approval in respect of an identifiable project. The process focuses on the applicant, on whom the NEB imposes broad consultation obligations. The applicant must consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements. In my view, this process ensures that the applicant for the Project approval has due regard to existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution. And, in ensuring that the applicant respects such Aboriginal rights, in my view, the NEB demonstrates that it is exercising its decision making function in accordance with the dictates of subsection 35(1) of the Constitution.[23]

All of these decisions point to the flexible manner in which the duty to consult can be met, and recognize that a variety of different types of processes may serve. Considered

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[22] Standing Buffalo, paras. 31-32. The court distinguished *Rio Tinto* on identical grounds – see para. 33.
[23] Standing Buffalo, para. 40.

together the cases present a road map for how the duty to consult can be addressed in the current circumstances.

Haida, Taku and Little Salmon all show that there is significant flexibility with respect to how the duty to consult can be discharged. A tailor-made, stand alone process is not always required to discharge the duty to consult, and pre-existing processes can often serve this function (for example, the environmental assessment process in Taku). In some cases, the Crown may not even have to accept that it is actually conducting consultation (Little Salmon).

Although not formally binding on Ontario tribunals, the Board is also persuaded by much of the reasoning in the Brokenhead and Standing Buffalo decisions. Both deal with situations very similar to the situation before the Board: a private proponent seeking approval from a quasi judicial tribunal to construct a natural gas pipeline.[24]. None of the Supreme Court cases deal directly with this situation. None of the Supreme Court cases conflict with Brokenhead or Standing Buffalo; indeed in the Board's view they are perfectly consistent. Although there was ultimately a private proponent behind the applications in both Haida and Taku, in those cases the Crown actor responsible for granting the approval and the Crown actor responsible for conducting the consultation were one and the same. In Rio Tinto, the proponent itself was a Crown actor. As described in further detail above, the Board finds this to be a key distinguishing feature.

The Duty to Consult and the Board's Process

As discussed above, the Board has found that it cannot be responsible for conducting consultation with Aboriginal groups – the Act does not create such a role and Board's responsibilities to other parties prevent such an approach. Similarly, and as described in further detail below, the Board is not convinced that the appropriate course is for it (and the Applicant) to await some form of separate consultations from some other Crown actors to occur, and then conduct a Haida type analysis to determine if those consultations were sufficient. Instead, it is the Board's view that the procedural elements of the duty to consult have been effectively delegated to Union through the Ontario

[24] The Board does not accept Board staff's submission that Standing Buffalo stands for the proposition that the duty to consult itself may not apply in cases such as this, (even though the underlying section 35 duties remained). Standing Buffalo accepted that the hearing process itself could discharge section 35 and the duty to consult, and therefore a separate Haida type analysis of other Crown actors was not necessary.

Pipeline Coordinating Committee and the Environmental Guidelines, and that the Board is in a position to determine whether consultation efforts have been adequate.

The Board's Environmental Guidelines apply to all natural gas leave to construct applications. The Environmental Guidelines describe the environmental assessment process for constructing hydrocarbon pipelines and facilities and provide comprehensive guidance on how proponents are to assess and mitigate the potential environmental impacts associated with proposed projects. Unlike electricity transmission and distribution projects, for natural gas pipelines no separate Environmental Assessment under Ontario's *Environmental Assessment Act* is required, and the Board is responsible for environmental matters relating to the Pipeline Project. Applicants are required to prepare and file an Environmental Report to demonstrate that all the requirements of the Environmental Guidelines have been met.

The Environmental Guidelines were originally developed in the 1970s, and are currently in their 6th edition. The Environmental Guidelines were developed by the Board in conjunction with the Ontario Pipeline Coordinating Committee ("OPCC"). The purpose of the OPCC is described in the Environmental Guidelines as follows:

> The purpose of the OPCC is to coordinate the Ontario government agencies review of facilities projects in Ontario requiring approval from the Board or the NEB, with the goal of minimizing negative impacts. In effect, the OPCC provides a single contact for identifying provincial
> concerns related to transmission and storage proposals. The OPCC is chaired by a Board staff member and currently includes representation from the following ministries and agencies: Technical Standards and Safety Authority ("TSSA"), Ministry of Environment ("MOE"), Ministry of Agriculture, Food and Rural Affairs ("OMAFRA"), Ministry of Tourism and Culture ("MTC"), Ministry of Municipal Affairs and Housing ("MMAH"), Ministry of Natural Resources ("MNR"), Ministry of Transportation ("MTO") (the "OPCC representatives"). In addition to the OPCC representatives, affected regional and local municipalities, and conservation authorities are involved in the OPCC review.

> The Guidelines have been developed in consultation with representatives of the OPCC. Therefore, the Guidelines are consistent with the mandates of the above ministries and agencies.[25]

The Environmental Guidelines set out express expectations with respect to consultation with Aboriginal peoples:

> 3.3 ABORIGINAL PEOPLES CONSULTATION
>
> For the purpose of these Guidelines, and according to section 35(2) of the Constitution Act, 1982, Aboriginal Peoples are defined as to include the Indian, Inuit and Métis peoples. The proposed projects may potentially affect existing or asserted Aboriginal or treaty rights, as well as Métis' Traditional Harvesting Territories, cultural heritage and traditional activities.
>
> Therefore, it is important that the proponent determine, at the very onset of planning, if there is a potential that these parties are affected. The prospective applicants are expected to initiate consultation with any potentially affected Aboriginal Peoples, early in the planning process. The prospective applicants are expected to continue and maintain this communication, until the preferred alternative is selected and the Environmental Report is completed. It is recommended that the prospective applicant keep a record of communication and consultation and file it as prefiled evidence, together with other materials documenting agency and general consultation conducted during the planning of the project.
>
> The first step is to identify all potentially affected Aboriginal Peoples' groups that will be contacted in respect of the proposed project. It is expected that the prospective applicants gather information such as Traditional Harvesting Territories, significant portage routes, trapping lines and other areas of concern identified through Métis Traditional Ecological Knowledge Studies or other information sources, First Nations treaty rights, any filed and

[25] Environmental Guidelines, p. 7.

outstanding claims or litigation concerning Aboriginal treaty rights, treaty land entitlement or Aboriginal title or rights.

The information gathered and recorded in the ER [i.e. Environmental Report] on Aboriginal consultation should include the following:
i) how the Aboriginal Peoples' groups were identified;
ii) when contact was first initiated;
iii) the individuals within the groups who were contacted, and their position in or representative role for the group;
iv) a listing, including the dates, of any phone calls, meetings and other means that may have been used, to provide information about the project and hear any interests or concerns of Aboriginal Peoples with respect to the project;
v) written documentation of the notes or minutes, that may have been taken at meetings or from phone calls, or letters received from, or sent to Aboriginal Peoples; and
vi) a description of the issues or concerns, that have been raised by Aboriginal Peoples in respect of the project and, where applicable, how those issues or concerns will be mitigated or accommodated.[26]

Union has followed and documented all of the steps established in the Environmental Guidelines.

The Environmental Guidelines require that copies of the Environmental Report be provided to all OPCC members for comment prior to the filing of the application with the Board. In some cases, OPCC members will provide comments on the Environmental Report, for example to recommend changes to the routing, construction procedures or

[26] Environmental Guidelines, pp. 18-19 (citations omitted). It should be noted that the Board sought input from many Aboriginal groups prior to enacting this section of the Environmental Guidelines. Other portions of the Environmental Guidelines could also be relevant to the issue of consultation, for example section 4.3.4 – Cultural Heritage Resources.
The 6th edition of the Environmental Guidelines was released in January 2011, and is the version that applies to this case. The Environmental Report itself, however, was prepared prior to the release of the 6th edition. The sections dealing with Aboriginal consultation in the 5th edition were not as detailed as the 6th edition. However, Union had received drafts of the 6th edition amendments prior to completing the Environmental Report Union took all of the steps required by the 6th edition.

some form of mitigation in relation to a proposed project. In the current case, OPCC members identified no concerns regarding the Environmental Report filed by Union.

Although the Environmental Guidelines are issued by the Board, they are drafted with significant involvement from the OPCC. The OPCC's involvement in the establishment of the Environmental Guidelines sets out (amongst other things) the OPCC's expectations with respect to the activities that should be undertaken by project proponents. The Environmental Guidelines recognize that many different government agencies may have interests and responsibilities pertaining to the construction of a pipeline. The Environmental Guidelines are therefore designed to serve several functions: they ensure that relevant governmental agencies are made aware of all pipeline applications before the Board; they require proponents to undertake certain activities to ensure that impacts associated with the proposed projects (including potential impacts to Aboriginal interests) are identified and, where appropriate, mitigated or accommodated; and they allow the governmental agencies to express any concerns about the impacts of the proposed project to the proponent and, ultimately, the Board.

The Environmental Report was also provided to various Aboriginal groups (including those participating in this proceeding) for comment prior to the filing of the application. Union initially received no comments, though in a March 2011 letter to Union WFN indicated a general concern that their rights and title had not been adequately considered, and that they had not been sufficiently consulted.

The Board finds that the existing process with respect to the preparation of the Environmental Report (in conformity with the Environmental Guidelines) is a suitable process for addressing the duty to consult with respect to any impacts arising from the Pipeline Project as a whole. Although the procedural aspects of the consultation are undertaken by the (in this case private) proponent, these procedural aspects have been in a sense delegated by the OPCC members (who are all Crown actors with some potential oversight role respecting natural gas pipeline projects) to the proponent through the Environmental Guidelines. In reviewing the proponent's draft Environmental Report, the OPCC members are able to satisfy themselves that any of their concerns with respect to the impacts of the project have been addressed. To the extent they have outstanding concerns, the OPCC members will request that the proponent make changes or undertake additional remedial action with respect to the project. In cases where the OPCC members are satisfied that the Environmental Report is complete and addresses all potential impacts of the proposed project in an

appropriate manner, they will not seek any changes. With respect to any potential adverse impacts to Aboriginal or treaty rights arising from a proposed project, OPCC members are able to indicate any concerns they have with respect to the consultations (and potentially accommodation) conducted by the proponent.

To the extent that an Aboriginal group is not satisfied that the duty to consult has actually been discharged, it is given notice of the Board's hearing and offered the opportunity to participate. If an Aboriginal group believes there will be potential adverse impacts to Aboriginal or treaty rights arising from the project that have not been sufficiently accommodated, it can bring those arguments to the Board. In these circumstances the Board is able to perform its role, as described in Rio Tinto, of assessing whether or not the Crown's consultation efforts with respect to the Pipeline Project (as delegated to Union) were adequate. To the extent that the Board finds that there are potential impacts to Aboriginal or treaty rights that have not been adequately accommodated, it can in effect require changes to the project, or reject the application if the changes are not made.

The process established through the Environmental Guidelines addresses the types of issues that are discussed in the case law. In Haida, the Supreme Court determined: "the question is whether the regulatory scheme or government action 'viewed as a whole, accommodates the collective aboriginal rights in question'" Similarly, in Little Salmon the Supreme Court placed the focus on whether the process in substance provided an appropriate level of consultation. The Board finds that its current process meets both of those tests.

In Haida, the Court held that at the most stringent end of the consultation "spectrum", the requirements would typically entail "the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case." Although the Board does not necessarily accept that the current case falls at the most stringent end of the spectrum[27], the process required through the Environmental Guidelines meets these requirements. The Environmental Guidelines required Union to identify all potentially impacted Aboriginal groups and to provide them with detailed information about the Project. Union did this, including providing copies of the

[27] As noted above, almost the entire Project will be built on existing road allowances or private property. The Environmental Report did not identify any significant environmental concerns with respect to the Project.

Environmental Report, in January 2011 to local agencies, municipalities, First Nations and Metis Nation (which was prior to the filing of the application with the Board). Union was required to seek comments from the Aboriginal groups, which it did. Had any concerns been raised with Union, it would have been required to explain how these concerns were to be mitigated or accommodated (or if they weren't, then explain why not).

The Board required Union to provide direct notice of the current proceeding to potentially impacted Aboriginal groups. Those Aboriginal groups were free to intervene in the proceeding, although they did not seek to do so until after the evidentiary phase of the proceeding had closed. Had they intervened when the notice was issued, they would have had every opportunity to file interrogatories on the Union's evidence, including the Environmental Report. They could have filed their own evidence respecting any potential impacts arising from the Pipeline Project. They could have made submissions to the Board with respect to the potential infringement of any Aboriginal or treaty rights. Although they did not avail themselves of these opportunities, that is not a failing of the process that has been established by the Environmental Guidelines.[28]

In Taku, it was held that an existing environmental assessment process, which specifically set out a scheme with respect to Aboriginal consultation, was a suitable vehicle for discharging the duty to consult. The Board finds that the same reasoning applies in this case: the Environmental Guidelines (which serve as the environmental assessment in this case) set out explicit requirements with respect to Aboriginal consultation. To the extent that an Aboriginal group believes that there are outstanding potential impacts to Aboriginal or treaty rights that are not appropriately identified or addressed by the Environmental Report, they are free to respond to the Board's notice and bring these concerns to the Board through the ordinary hearing process. The Board is well placed to assess the adequacy of the consultation, and where appropriate, accommodation.

In addition to the Board's approval, Union requires various permits from various Crown ministries to build the pipeline. Although the relevant approval authorities may undertake some level of consultation with Aboriginal groups in respect of those permits, the Board finds that it is not its role to assess whether any consultation for individual permits is adequate. The Board has approval authority for the Pipeline Project as a

[28] See Brokenhead, para 42 (quoted in full above).

whole. The permits required by Union relate to discrete portions or elements of the Pipeline Project. These permits are required from a number of different ministries, none of whom have authority over the Pipeline Project as a whole. In addition, the Board has no actual authority over these permits (although it is a standard condition to all leave to construct approvals that all necessary permits be obtained prior to the commencement of construction). Although the Board recognizes that the facts situations are not identical, the Supreme Court discussed this issue in Haida. It concluded that the duty to consult is best addressed at a strategic planning level as opposed to the permitting stage. The Board finds that the same logic applies in the current case, and that the process outlined by the Environmental Guidelines is a better forum for addressing the duty to consult for the Pipeline Project as a whole than any process that may be associated with the granting of various individual permits. Any Board review of the permitting process would represent, as stated in Brokenhead: "a repetitive and essentially pointless exercise. Except to the extent that Aboriginal concerns cannot be dealt with, the appropriate place to deal with project-related matters is before the [tribunal] and not in a collateral discussion with either the GIC or some arguably relevant Ministry."[29]

Land Claims

The Board accepts that there are some issues with respect to Aboriginal or treaty rights that cannot be properly addressed through the Board's process. Aboriginal land claims, for example, fall outside the Board's jurisdiction. In Brokenhead, the court came to the same conclusion:

> [The NEB's] regulatory processes appear not to be designed, however, to address the larger issues of unresolved land claims. As already noted in these reasons, the NEB and the corporate respondents have acknowledged that obvious limitation. ... It follows from this that the NEB process may not be a substitute for the Crown's duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.[30]

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[29] Brokenhead, para. 42.
[30] Brokenhead, paras. 27 and 29.

Rio Tinto is also clear that a tribunal's ability to consider duty to consult issues is limited by its jurisdiction. At paragraph 69 of the decision, the Supreme Court observed: "The power to decide questions of law implies a power to decide constitutional issues **that are properly before it** ..." (Emphasis added). The Supreme Court then cited the Conway case with approval: "specialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates."[31] The Board does not, of course, have any power to resolve any land claims. LSFN has advised the Board that it is in the process of filing a specific claim with the federal government relating to lands near Bruce Lake, though it did not yet know if the proposed Project would cross any of those lands.[32] Any concerns with respect to the resolution of underlying land claims cannot lie properly before the Board.

B. Question 2 - To the extent that there are duty to consult issues associated with the project, what is the scope of the Board's power to review them? In particular, should the Board's review be limited to potential impacts arising directly from the proposed natural gas pipeline itself (over which it has approval authority), or indirect impacts such as potential expansions to the mine or the town that may be enabled by the pipeline (over which it has no approval authority)?

The relationship between the Crown conduct in question and the potential adverse impact has been discussed in a number of cases. The Crown conduct in question is the Board's (potential) approval of the Project. The law appears to be settled that the conduct in question must bear a causal connection to the potential infringement. In Rio Tinto, the Court stated: "The question is whether there is a claim or right that potentially may be adversely impacted by the current government conduct or decision in question."[33] The Court continued:

> The respondent's submissions are based on a broader view of the duty to consult. It argues that even if the 2007 EPA will have no impact on the Nechako River water levels, the Nechako fisheries or the management of the contested resource, the duty to consult may be triggered because the 2007 EPA is part of a larger hydro-electric project which continues to impact its rights. The effect of

[31] Rio Tinto, para. 69.
[32] Oral submissions of LSFN, transcript pp. 42-43.
[33] Rio Tinto, para. 49.

> this proposition is that if the Crown proposes an action, however limited, that relates to a project that impacts Aboriginal claims or rights, a fresh duty to consult arises. The current government action or decision, however inconsequential, becomes the hook that secures and reels in the constitutional duty to consult on the entire resource.
>
> I cannot accept this view of the duty to consult. *Haida Nation* negates such a broad approach. It grounded the duty to consult in the need to preserve Aboriginal rights and claims pending resolution. It confines the duty to consult to adverse impacts flowing from the specific Crown proposal at issue — not to larger adverse impacts of the project of which it is a part. The subject of the consultation is the impact on the claimed rights of the *current* decision under consideration.[34]

The suggestion from the First Nations intervenors that the Board must consider potential impacts from different projects that could ultimately be enabled by the gas pipeline is problematic for a number of reasons. The evidence on the record is that the primary purpose of the Project is to reduce energy costs and provide the opportunity for gas driven electric generation at the Red Lake Gold Mines[35]. A secondary purpose to the Project (phase 2, which is contingent on additional funding being obtained) is to provide natural gas service to the communities of Red Lake, Balmertown, Cochenour, and Chukani River Subdivisions[36]. The Board accepts that additional development, whether at the Red Lake Gold Mines or local communities, could be facilitated by the Project; however this does not appear to be the purpose of the Project. Regardless, the possibility of future development would be a very difficult issue for the Board to consider. There are innumerable projects that could in theory be enabled by a new gas pipeline, and such projects could be initiated well into the future. These are not potential impacts from the current decision before the Board. There is no practical manner in which the Board could consider such undefined possible developments in a meaningful way. Potential impacts from such possible developments are too remote to

[34] Rio Tinto, paras. 52-53 (emphasis in original).
[35] Pre-filed evidence, Project Summary, p. 1 of 18.
[36] Pre-filed evidence, Project Summary, p. 1 of 18.

be considered in the current application – in other words there is not a sufficient causal link.

More importantly, the Board would have no jurisdiction whatsoever over such projects. The Board accepts that it has the responsibility to consider the duty to consult relating to matters within its jurisdiction. In Rio Tinto, the Court stated:

> The power to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal's power (*Conway*, at para. 81; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55 (CanLII), 2003 SCC 55, [2003] 2 S.C.R. 585, at para. 39). "[S]pecialized tribunals with both the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates": *Conway*, at para. 6.[37]

The Board's power to consider questions of law comes from section 19(1) of the Act: "The Board has in all matters **within its jurisdiction** authority to hear and determine all questions of fact and law." (Emphasis added). The Board's ability to consider Constitutional issues (such as section 35 issues) is therefore limited to matters that fall within the Board's jurisdiction. The Pipeline Project lies firmly within the Board's jurisdiction. Any possible future development at the Red Lake Gold Mines or in the District of Kenora do not.

For these reasons, the Board finds that the scope of its review in this case is confined to potential impacts from the Pipeline Project itself. The Board will not consider potential impacts from other projects over which the Board has no authority which may some day be served by the Pipeline Project.

C. Question 3 - Can the Crown impliedly delegate the duty to consult to a private proponent?

[37] Rio Tinto, para. 69.

All parties were in agreement that the ultimate responsibility to ensure the duty to consult is satisfied lies with the Crown, although procedural aspects may be delegated to private proponents. Several parties referred to the Haida decision, where the Supreme Court stated:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. ... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[38]

Union filed with the Board a letter a letter dated June 17, 2011, addressed to counsel for the Grand Council and signed by the Ontario Ministry of Natural Resources, the Ontario Ministry of Transportation, and the Ministry of Tourism and Culture (collectively the "Crown Ministries"). In this letter, the Crown Ministries indicated that procedural aspects of the consultation with respect to Project had been delegated to Union through the Board's Environmental Guidelines. The letter further described additional contact the Crown Ministries had had with potentially affected Aboriginal Groups, in particular with reference to certain permits Union had obtained (for example for access to highway rights of way).

Given the Board's findings above, it is not necessary to address Question 3 in additional detail. The Board has held that the duty to consult with respect to the Pipeline Project itself can be addressed through the Environmental Guidelines and the Board's hearing process. Certain procedural aspects of the duty have been delegated to the proponent through the Environmental Guidelines.

D. Need for further process?

The case law is clear that consultation must be between willing participants. It is not open to either the Crown or the potentially affected Aboriginal groups to frustrate good faith attempts at consultation. As the Court observed in Haida:

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[38] Haida, para. 53.

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [Aboriginal] concerns" as they are raised, through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached. Mere hard bargaining, however, will not offend an Aboriginal people's right to be consulted.[39]

Union formally notified the First Nations about the project in October 2010. It later provided the Environmental Report and sought comments. Union made several attempts to follow-up with these requests for comments. To date, none of the First Nations appear to have identified to Union any specific concerns with respect to impacts arising from the Pipeline Project itself (although WFN apparently did contact Union with respect to general concerns regarding a lack of Crown consultation with respect to the Project).

The notice for this proceeding was served directly on the First Nations on March 23, 2011. Not until May 5, 2011 – after the close of the evidentiary phase of the proceeding - did the Grand Council first contact the Board with any concerns about the Project. LSFN and WFN did not seek to intervene until June 9 and June 17 respectively.

The Board recognizes that many First Nations may not have sufficient resources to respond immediately to each and every request for comments or notice that falls across their desks. However, in the current case there seems to be little to no satisfactory explanation for the extended delay. Although LSFN has informed the Board of a pending land claim on Bruce Lake, this was known to LSFN when it received the Environmental Report and the Notice. There seems to be little question that the First Nations were aware of the Pipeline Project by late 2010, and of the Board's proceeding by March of 2011.

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[39] Haida, para. 42 (citations omitted).

The Board is also sympathetic to the concerns of Union and Goldcorp regarding any further delay in this process. Union has followed all of the Board's directions. The Board recognizes that the construction season in the District of Kenora is a short one, and that further delay may mean that construction of the Project cannot commence until 2012. Undoubtedly this would lead to additional expense for Union and Goldcorp.

In addition, the letters of intervention filed on behalf of the First Nations did not identify any specific concerns regarding impacts from the Pipeline Project itself. The First Nations clearly articulate a concern that there has been inadequate Crown consultation with respect to the Pipeline Project; however, given the findings above that the Environmental Guidelines and the Board's process can serve (or could have served) as Crown consultation for the Project, this argument has essentially already been rejected by the Board. The Grand Council in particular also argued in its letter dated May 30, 2011 that potential increased development that could be enabled by the Pipeline Project may have impacts on Aboriginal or treaty rights. Given the Board's findings with respect to question 2, however, any such possible impacts are outside the scope of the Board's review. As discussed in further detail below, the Board is satisfied that the application (in particular the Environmental Report) has demonstrated that there will be little if any significant adverse environmental or socio-economic impacts resulting from the Pipeline Project. The pipeline will be buried, and the great majority of it will be constructed along an existing road allowance - in other words on land that is already disturbed. No specific potential impacts to any existing Aboriginal rights to, for example, hunting, fishing or harvesting have been identified.

The Board has therefore determined that it will not re-open the record and that no additional process is required in this hearing, and will proceed now to consider the evidence on the record and make a determination with respect to the applications.

III. LEAVE TO CONSTRUCT DECISION, MFA DECISION, AND CERTIFICATE DECISION

Pipeline Project Description

The Phase I facilities (also known as the Red Lake Lateral) will commence at Union's existing facilities at the Bruce Lake Mine site located in the Township of Ear Falls, and will proceed for about 43.6 km along the Highway 105 until it reaches the intersection of Highway 105 and Highway 125 called Harry's Corner. From Harry's Corner the NPS 8

pipeline will continue north along Highway 125 for 6.4 kilometres and then continue across Goldcorp land for 1.15 km to connect to the Balmertown mine complex. The pipeline will continue as NPS 4 for about 1.1 kilometres northeast along Highway 125 and run for additional 5.6 km as NPS 4 to the Cochenour Mine Site.

Phase II of the expansion will provide distribution pipe into the Municipality of Red Lake. It will involve constructing distribution pipelines to provide natural gas service to the residents and businesses of Red Lake, Balmertown, Cochenour, Chukuni River Subdivisions. The following distribution pipelines are proposed for the Phase II: about 2 km (1,934 m) of steel NPS 4 pipe; about 60 metres of steel NPS 2 pipe; about 5 km (5,175 m) of plastic NPS 4 pipe; and about 40 km (39, 232 m) of plastic NPS 2 pipe. (As described above, collectively Phase I and Phase II are referred to in this decision as the "Pipeline Project").

The Board approves the proposed routing for Phase I and Phase II and finds that the approval of Franchise Agreement and the CPCN will provide for the Phase II distribution system expansions by Union within the municipal road allowances.

The Board approves the Leave to Construct application, subject to two separate sets of conditions to address the two phases of this project: (i) Phase I conditions and (ii) Phase II conditions. The conditions encompass both standard conditions of approval for Leave to Construct applications as well as project specific conditions associated with unique features of each phase of the project. The Board's Decision with Reasons is set out below.

The Public Interest Test

The leave to construct application is filed under section 90 of the Act. Section 96 of the Act provides that the Board shall make an order granting leave to construct if the Board finds that "the construction, expansion or reinforcement of the proposed work is in the public interest". The Board is further guided by its objectives with respect to natural gas, which are found in section 2 of the Act. When determining whether a project is in the public interest, the Board typically examines the need for the project, the economics, impact on the ratepayers, environmental impacts, the impact on land owners and pipeline design technical requirements. The Board has considered the following issues:

- Is there a need for the proposed pipeline?

- Are there any undue negative rate implications for Union's existing rate payers caused by the construction and operation of the proposed pipeline?

- Are there any outstanding landowner matters for the proposed pipeline routing and construction?

- Is the pipeline designed in accordance with the current technical and safety requirements?

- What are the environmental impacts (which may include Aboriginal issues) associated with construction of the proposed pipeline and are they acceptable?

Board findings on each of these issues are given below.

Project Need

The need for the phased project is two-fold: Phase I need is to serve the mining operations of Goldcorp (owner of Red Lake Gold Mines); and Phase II need is to serve the residents and small businesses of the Municipality of Red Lake.

Union planned and designed the Red Lake Lateral capacity above the demand of the Goldcorp operations alone to provide for the anticipated capacity needed for Phase II of the Project. The capacity of the proposed Phase I facilities is 13,961 m^3/h. It is expected that Goldcorp will use 72% while the residents and small businesses in Red Lake will use 28% of the Phase I capacity after Phase II has been constructed.

For the Goldcorp mining operations, the primary benefit is described as better energy cost-effectiveness as natural gas would be replacing other energy types currently in use. The evidence also describes the benefits of the potential for developing gas-driven electricity generation to serve the mining operations. Other project benefits identified by Union are: reduced air emissions, payment of utility taxes to various levels of government, and the generation of employment opportunities.

Goldcorp and Union entered into two (2) ten-year Northern Gas Distribution Contacts. Also, Goldcorp is committed to paying a significant capital contribution towards the construction of Phase I. In a letter to the Board dated March 23, 2011, Goldcorp confirmed the need for the Project, benefits of energy cost savings at its Red Lake mining operations and asked that the Board expeditiously approve the Project.

With respect to the need for Phase I, the Board finds that there is sufficient evidence supporting the need for the project.

Phase II of the Project will provide gas service to the residents and businesses of Red Lake. Phase II is anticipated to provide lower heating and energy costs for the residential and commercial customer groups. The Red Lake municipal council and several members of the general public have expressed their support for the project.

Red Lake City Council passed the by-law to authorize a franchise agreement between itself and Union Gas Limited (By-Law No. 1409-10). In support of the need for the Phase II expansion, Union cited a September 2010 residential survey conducted by Ipsos Reid that indicated that 60% of residents would likely switch to natural gas heating if available. The current energy sources for heating homes in Red Lake are largely propane, fuel oil and electricity. Union also obtained a survey of commercial facilities in Red Lake from Clow Darling consultants in September 2010. About 65% of the respondents (150 surveys were completed) expressed some interest in converting to natural gas heating systems, mostly within the first 12 months. In addition to these surveys, Union provided in evidence (Schedule 2, page 1) a Phase II forecast of customer attachments. By the end of the tenth year a total of 1,221 residential and 206 commercial customer attachments are forecasted.

With respect to Phase II, the Board is satisfied that there is a need to supply gas to the Red Lake. The Board notes that letters of support for the project are from the Municipality of Red Lake and businesses in the Municipality which would be directly affected by the Phase II of the project.

Project Economics and Financing

The Board finds no undue negative rate implications for Union's rate payers caused by the construction and operation of the proposed pipelines in Phase I and Phase II.

Phase I Economics

The estimated capital cost for Phase I is $27.3 million.

The Phase I Union's discounted cash flow analysis indicates a contribution in aid of construction ("CIAC") is required to allow the Project to reach a profitability index of 1 (PI=1). A PI of 1 means that the Project is economically feasible on a stand-alone basis. It is also an indication that the existing ratepayers of Union will not be negatively financially impacted by the project. The CIAC was calculated at $25.6 million and Goldcorp has committed to make this funding contribution. The relatively large CIAC indicates that Goldcorp is willing to assume most of the Project's associated financial risk. Union's existing ratepayers would be exposed to only Union's portion of funding of $1.7 million. The analysis is appropriately based on the Board's E.B.O. 188 guidance. On a "stand alone basis" Phase I project is feasible [cost effective?](with a PI=1) given the capital contribution by the Goldcorp.

The Board accepts Union's evidence that this amount is not material nor will Union's ratepayers bear any significant financial risks with Phase I.

The Board notes that, according to the evidence, Goldcorp has agreed to provide the full required amount of the CIAC for Phase I construction, with a caveat that an amount of $7.0 million of that contribution be re-paid to Goldcorp by the Municipality prior to Phase II construction.[40]

The Board concludes that the project is economically feasible and poses no significant risk to Union nor will it impose any undue negative rate implications to existing rate payers.

On March 11, 2011, Goldcorp signed two ten year contracts with Union for natural gas service. The first is a Rate 10 contract for the Cochenour Complex and the second is a Rate 20 contract for the Balmertown complex. Both contracts are filed on the record. The Rate 20 contract will be upgraded to a Rate 100 on November 1, 2014 when Goldcorp has all of its new gas generation facilities in place. The contracts outline the

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40 The Red Lake Council Resolution attached by Union in response to IR # 16, contains a statement that the $7.0 million advance payment "is at Goldcorp's risk".

CIAC payment schedule by Goldcorp to Union and set the rate which is the revenue basis incremental to the project.

The Board is aware that the actual costs will not be available until the project is completed and for this reason, the following condition is attached to Board approval of Phase I:

1.6 Within 18 months of the final Phase I in-service date, Union shall file with the Board Secretary a Post Construction Financial Report. The Report shall indicate:

a) the actual capital costs of the project and an explanation for any significant variances from the estimates filed in this proceeding.

b) the actual capital costs for the project borne by Union and the actual costs contributed towards construction by Goldcorp including the method and the actual cost inputs used to determine the final amount of the contribution by Goldcorp.

The complete list of conditions to the Board's approval is attached as Appendix C, Schedules 1 and 2.

Phase II Economics

Phase II has an estimated capital cost of $12 million. The Phase II project requires a CIAC of $4.9 million to elevate it from a PI of 0.64 to a PI of 1 on a stand-alone basis. Red Lake would therefore be required to contribute $4.9 million in addition to the $7.0 million "loan" repayment to Goldcorp for the Phase I CIAC that it made on the municipality's behalf. The Board notes that this means the Municipality must secure a total of $11.9 million in funding contributions in order for Phase II to proceed (i.e., $4.9 plus $7.0). Red Lake in the Resolution of the Council of the Municipal Corporation, filed on the record and dated November 20, 2010, has indicated that it is seeking funds from government sources but did not provide any other details.

For transparency reasons and to complete the evidence and the record, the Board would request that Union file future documentation underpinning the CAIC from Red

Lake to Union. This requirement is reflected in the following condition of approval for Phase II:

1.7 Prior to construction of gas facilities for Phase II and the operation of such facilities, Union shall file with the Board documentation, including a full disclosure of any financial arrangements, including those related to contributions in aid of construction from the Municipality of Red Lake or any other party. Union shall file these documents with the Board at the same time as they are executed.

Union has used a P.I. of 1 in its analysis of the capital contribution required for Phase II. The Board notes that the gas utilities have some discretion under EBO 188 to determine the economic feasibility of individual expansions projects while maintaining a positive investment portfolio. Under EBO 188 a P.I. of 1 is not required for attaching new communities and the minimum profitability threshold for individual projects of this nature may be a P.I. of 0.8.

To ensure that that there is no potential for significant cross subsidy of the Red Lake distribution expansion by its other customers the Board imposes the following condition of approval for Phase II:

1.8 Prior to construction commencement, with respect to Phase II, Union shall file with the Board, as soon as the inputs are available, the Discounted Cash Flow analysis, on stand-alone basis, with Net Present Value and Profitability Index, completed in accordance with the requirements and methodology set in the Ontario Energy Board's EBO 188 Report.

The Board is aware that the actual costs will not be available until the project is completed and for this reason, the following condition is attached to Board approval of Phase II:

1.9 Within 15 months of the final Phase II in-service date, Union shall file with the Board Secretary a Post Construction Financial Report. The Report shall indicate:

a) the actual capital costs of the project Phase II and an explanation for any significant variances from the estimates filed in this proceeding.

b) the actual capital costs for the project borne by Union

and the actual costs contributed towards construction including the method and the actual cost inputs used to determine the final amount of the contributions.

Union requested that there should be no construction start date or termination date attached as a Board condition of approval for either Phase I or Phase II. Board staff did not agree with this request. In Board staff's submission, matters such as Leave-to-Construct new facilities should not be left open-ended because facts and circumstances related to construction projects change over time and for this reason, the Board should issue approvals within a reasonable and certain timing window. Board staff proposed a condition of a 3-year termination date of approval of construction start for Phase II meaning that it would expire on December 31, 2014. The Board agrees with the Board staff proposal and notes that Union did not object to this timeline in its reply submission. Therefore the Board attached the following condition to its approval for Phase II:

1.2 Unless otherwise ordered by the Board, authorization for Leave to Construct Phase II shall terminate on December 31, 2014, unless construction has commenced prior to that date.

Land Matters

Pipelines for both Phase I and Phase II of the Pipeline Project will be located mainly within road allowances except for a few short sections on private lands which require easement agreements with landowners.

The Red Lake Lateral will be constructed within the road allowance of Highway 105 with the exception of a 1.7 kilometre section from the Bruce Lake Mine site to the Highway 105 right-of-way at the starting point of the Red Lake Lateral.

Most of Phase II pipelines will be located within road allowances. Union indicated that due to the physical layout of the Red Lake area, easements may be required on private land as final pipeline running lines are determined.

Pursuant to section 97 of the OEB Act, Union has to satisfy the Board that it "has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board." The Board approves a form of easement that Union that Union filed and that Union will offer to all landowners when negotiating

easement rights for Phase I and Phase II of the project. The Board specified this requirement in the following condition for both Phase I and Phase II.

4.1 Union shall offer the form of agreement approved by the Board to each landowner, as may be required, along the route of the proposed work.

Pipeline Design Specifications

According to Union's evidence the design, installation, and testing of the pipelines will conform to the requirements of *Ontario Regulation* 210/01 under the *Technical Standards and Safety Act 2000, Oil and Gas Pipeline Systems.*

Union confirmed that all steel pipelines will be manufactured by the electric resistance welding process in accordance with the *Canadian Standards Association 2245.1-07 Steel Line Pipe Standard for Pipeline Systems and Materials.* Union also confirmed that all polyethylene pipe and fittings will be manufactured and certified in accordance with the *Canadian Standards Association B137.4-09 Polyethylene (PE) Piping systems for Gas Services.*

The minimum depth of cover to the top of the pipe and pipe appurtenances will be in accordance with the requirements of Clause 4.11 of the *CSA Code 2662-07* for steel piping and Clause 12.4.7 of the *CSA Code 2662-07* for polyethylene piping. Additional depth will be provided to accommodate existing or planned underground facilities, or where greater depth of excavation is warranted.

Union indicated that it will provide inspection staff to enforce Union's construction specifications and Ontario Regulation *210/01* under the *Technical Standards and Safety Act 2000, Oil and Gas Pipeline Systems.*

The Technical Standards Safety Authority ("TSSA") has reviewed and accepted the design and pipe specifications for the Project. A copy of correspondence from TSSA is on the record.

In Board's view Union's evidence demonstrates that the proposed pipelines for both Phase I and Phase II are designed in accordance with the requirements of Ontario Regulation 210/01, Oil and Gas Pipeline Systems, under the Technical Standards and Safety Act, 2008 and the CSA Z662-07 Oil and Gas Pipeline Systems standard. The

Board notes that the TSSA reviewed the pipeline design specification and did not raise any issues regarding the construction and operation of the pipelines. The TSSA is the agency primarily responsible for implementation of pipeline design and safety requirements.

Environmental Matters

An environmental assessment and routing study was completed by Union's Environmental Planning Department with an environmental information report prepared by the independent consulting firm of KBM Forestry Consultants Inc. Union filed its environmental report entitled "Red Lake Pipeline Project, Environmental Protection Plan" dated December 2010 (this report has been defined above as the "Environmental Report") as Schedule 13 in the pre-filed evidence.

The Environmental Report was submitted to the Ontario Pipeline Co-ordination Committee (OPCC) for review on January 21, 2011. Copies of the Environmental Report were also submitted to local agencies, municipalities, First Nations and Métis Nation. Union conducted a community information session on November 25, 2010 at the Heritage Centre in Red Lake as part of the environmental assessment process.

Union confirmed that the Environmental Report covers Phase I and Phase II pipelines and addresses the following areas: watercourse crossings, archaeology, water wells, blasting, environmental protection areas, hazard land, species at risk and mitigation.

There are 32 watercourses associated with both phases of the Project.
Union stated it would adhere to the agreement with the Department of Fisheries and Oceans ("DFO"), Ontario Great Lakes Area, 2008. This agreement allows Union to Union conduct watercourse crossings under a specific set of conditions and mitigation measures without DFO review.

Union indicated that bedrock is located along the proposed routes for both Phase I and Phase II. Union anticipates that blasting will be required during the construction along the most of the length of the pipeline routes for both phases, with mechanical removal methods in some locations. Union included in the evidence as Schedule 12 "Specifications for Rock Excavation" with detailed specifications for blasting.

Union confirmed that it will follow its standard rock removal specifications in Schedule 12 and additional recommendations outlined in the ER for rock removal. The Board

includes a condition for approval of both Phase I and Phase II to address blasting procedures during construction:

1.4 During construction, Union will apply its "Specification for Rock Removal" in Schedule 12 of the pre-filed evidence and any other applicable municipal, provincial, and national regulations or standards applicable to blasting and mechanical rock removal.

The ER includes Union's plan to develop a water well monitoring program in consultation with an independent hydrogeologist. The Board expects Union's full implementation of this program.

As the Phase II construction start can occur within several years Union proposed that it update the ER by completing an environmental screening as set in the EBO 188. The Board agrees that the environmental screening methodology would be appropriate because the Phase II pipelines, in terms of the design, location and size, can be considered distribution system expansion pipelines which are addressed in EBO 188. Accordingly, the Board included the following condition in the Phase II approval:

1.5 Prior to Phase II construction start, Union shall file with the Board a report on the environmental screening conducted pursuant to "Environmental Screening Principles for Distribution System Expansion Projects by Ontario Natural Gas Utilities" as outlined in the Ontario Energy Board's E.B.O. 188 Report.

According to Union's evidence Union will have to obtain all required additional environmental and construction approvals prior to construction of Phase I and Phase II. The Board includes a condition 5.1 addressing this matter, for both Phase I and Phase II, as follows:

5.1 Union shall obtain all other approvals, permits, licences, and certificates required to construct, operate and maintain the proposed project, shall provide a list thereof, and shall provide copies of all such written approvals, permits, licences, and certificates upon the Board's request.

Generally, the Board has no concerns regarding the environmental matters related to Phase I and Phase II given Union's commitment to implementing all the plans and

measures in the pre-filed evidence and its adherence to the proposed conditions of approval for both Phase I and Phase II.

Conclusions

For the reasons presented above the Board finds that leave to construct Phase I and Phase II of the proposed Pipeline Project, the approval of the Municipal Franchise Agreement with Red Lake and the issuance of the Certificate of Public Convenience and Necessity are in the public interest. Further, in all the circumstances, the assent of the municipal electors with respect to the Municipal Franchise Agreement can properly be dispensed with.

The Board's Orders with respect to the Leave to Construct Application, the Municipal Franchise and the Certificate of Public Convenience and Necessity are attached as Appendix C, D and E respectively.

DATED at Toronto, July 25, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary