

## **R v Kapp, 2008 SCC 41**

### **1) Reference Details**

Jurisdiction: Supreme Court of Canada

Date: 27 June 2008

Link to case: <http://scc.lexum.umontreal.ca/en/2008/2008scc41/2008scc41.html>

Case Status: Concluded

### **2) Facts**

The case arose as an appeal against the Canadian Federal government's decision to enhance aboriginal involvement in the commercial fishery, which led to adopting the Aboriginal Fisheries Strategy. The Strategy 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, and who had been 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 Provincial Court of British Columbia found that the communal fishing license granted to the three bands was a breach of the equality rights of the appellants under s. 15(1) of the Canadian Charter of Rights and Freedoms (the *Charter*). The Supreme Court of British Columbia 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. The British Columbia Court of Appeal dismissed the appellants claim. The appellants then brought their claim to the Supreme Court of Canada.

### **3) Law**

- Section 1 of the Canadian Charter of Rights and Freedoms.
  - s. 1: *"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*
- Section 2 of the Canadian Charter of Rights and Freedoms (freedom of conscience and religion, freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association)
- Section 15 of the Canadian Charter of Rights and Freedoms.

- s.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 based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”
- s.15 (2): “Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.”
- Fisheries Act, R.C.S. 1985, c. F-14
- Aboriginal Communal Fishing Licenses Regulations, SOR/93 - 332

#### **4) Legal Arguments**

##### *The appellants*

The appellants claimed that the Aboriginal Fisheries Strategy violated s. 15(1) of the *Charter*. The essence of the claim was that the communal fishing license discriminated against them on the basis of race.

##### *The Crown*

The Crown argued that the general purpose of the programme under which the licence was issued was to regulate the fishery, and that it ameliorated the conditions of a disadvantaged group.

#### **5) Decision**

The Supreme Court of Canada rejected the claim of the appellants and held that the Aboriginal Fisheries Strategy was not discriminatory and did not violate s.15 of the *Charter*.

A majority judgment of McLachlin C.J., Binnie J., LeBel J., Deschamps J., Fish J., Abella J., Charron J. and Rothstein J. was delivered by the Chief Justice and Abella J.

A dissenting opinion was put forward by Bastarache J.

##### *The majority*

The Court’s decision set out from the beginning that the case raised the issue of the interplay between s. 15(1) and s. 15(2) of the *Charter*. More specifically, the case required the Court to consider whether s. 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination.

The Court examined its prior jurisprudence in respect to s. 15. It explained that since the case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. there was a commitment from the Court to interpret s. 15 as guaranteeing substantive equality.

Substantive equality, as contrasted with formal equality, the Court reiterated, 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.”*

The Court underlined that s. 15(1) and s. 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole. The Court opined that s. 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. Moreover, through s. 15(2), the *Charter* preserves the right of governments to implement such programs, without fear of challenge under s. 15(1). Therefore s. 15(1) and s. 15(2) work together to confirm s.15’s purpose of furthering substantive equality.

The Court then went on to consider whether the program that targeted the aboriginal bands falls was a “law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups” as required by s. 15(2). The Court concluded that the program was clearly a law, program or activity within the meaning of s. 15(2). It then went on to examine whether the program fulfilled 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”.

The Court explained that in *Lovelace v. Ontario*, 2000 1 S.C.R. 950, 2000 SCC 37 Iacobucci J. perceived two possible approaches to the interpretation of s. 15(2); (a) s. 15(2) was an interpretive aid to s. 15(1) (the approach adopted in *Lovelace*); or (b) it should be read as exception or exemption from the operation of s. 15(1).

The Court, however, favoured 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. The Court concluded that 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.

Moreover, the Court explained that this confirmatory purpose does not preclude an independent role for s. 15(2). It stated that s. 15(2) tells us, in simple clear language, that s. 15(1) cannot be read in a way that finds an ameliorative program aimed at combating disadvantage to be discriminatory and in breach of s. 15.

The Court went on to formulate a test for s. 15(2), wherein a programme does not violate the section s. 15 equality guarantees 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.

The practical implication of this being that if the government establishes that the program falls under s. 15(2), the appellants' claim must fail.

In applying the test the Court made clear that any analysis should be build around three key phrases of s. 15(2):

- a) has as its object – wherein object should relate to a 'purpose'–based approach rather than an 'effect' based approach and that an ameliorative purpose need not be the sole purpose of a program;
- b) amelioration – wherein laws designed to restrict or punish behavior would not qualify for s. 15(2) protection; and
- c) disadvantage – which under s. 15(2) connotes vulnerability, prejudice and negative social characterization.

Applying this legal test, the Court opined that the Aboriginal Fisheries Strategy did not violate s. 15.

#### *The dissent*

Presenting his dissenting opinion and finding a violation of s. 15 Bastarache J. stated:

*"I think it is established, in this case, that the right given by the Pilot Sales Program (the fishery 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."*