S.C.C. FILE NO. 31603

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

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, THEODORE 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,

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(Applicants)

-and-

REGINA

RESPONDENT
(Respondent)

-and-

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OVERVIEW OF POSITION

1. As one of the communal licence holders under the Pilot Sales Program (the "PSP"), the Tsawwassen First Nation (the "TFN") has a direct interest in this appeal. The TFN supports the Respondent in asking that the appeal be dismissed. However unlike the Respondent, the TFN submits that s. 25 of the *Charter of Rights and Freedoms* provides a complete answer to the Appellants' challenge to the PSP based on s. 15 of the *Charter*.

2. The TFN commends to this Court the reasons of Kirkpatrick J.A. in the Court of Appeal as to the proper interpretation and application of s. 25 and the dispositive role it should play in this appeal. Because of limitations on the length of the factum allowed the Interveners in this Court and in light of the submissions of other Interveners, the TFN will focus on four points: (i) that to give effect to the Appellants' challenge would be to offend the "Basic Rule" that one part of the Constitution (namely s. 91(24)) cannot be abrogated or diminished by another part of the Constitution (namely s. 15)); (ii) s. 25, while not necessary to establish this Basic Rule, is present in the *Charter* to emphasize and confirm the Basic Rule such that the PSP could never be successfully challenged pursuant to s. 15 as "race-based" simply because it affords aboriginal people a benefit not afforded non-aboriginal people; (iii) s. 25 has independent force, apart from the Basic Rule it confirms, in respect of "other rights or freedoms that pertain to aboriginal people," which, on a proper interpretation, includes the PSP, and directs the judiciary not to construe s. 15 in the manner advocated by the Appellants, since to do so would abrogate or derogate from such rights or freedoms; and (iv) on either approach to s. 25, that provision obviates the need for any s. 15 analysis.

PART I: STATEMENT OF THE FACTS

3. The TFN adopts the facts set out by the Respondent but emphasize the following facts.

4. The AFS was introduced by the Department of Fisheries and Oceans ("DFO") in June of 1992, following *R v. Sparrow.*[1] The objective was to facilitate the management of aboriginal fisheries in a manner that DFO saw as being consistent with potential aboriginal rights and

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

consistent with its policy of increasing the role of aboriginal groups in the management of their fisheries. At that time over 90 bands comprising some 20,000 aboriginal people were obtaining food fish from the Fraser River. Most or all of those bands were asserting aboriginal rights to fish in the Fraser River, either commercially or for food, social and ceremonial purposes.[2]

5. In establishing the AFS, DFO acknowledged the importance of the fishery to aboriginal peoples and their unique and traditional relationship to the fishery. DFO saw the AFS and the PSP as responsive to the urgings of the courts to attempt to reach negotiated agreements with the aboriginal communities on fisheries management issues.[3]

6. The PSP is specifically directed at aboriginal organizations as defined in s. 2 of the Aboriginal Communal Fishing Licenses Regulations. Insofar as the PSP generally relates to the fishery, its purpose is directly linked to aboriginal distinctiveness and culture, as well as to test manage arrangements for possible inclusion in treaties and self-government arrangements.[4]

7. Prior to the introduction of the AFS and the PSP, approximately 15 TFN boats (most of which were 12-20 foot skiffs powered by outboard motors, only one or two were mechanized) participated in fishing for food, social and ceremonial purposes. By the time of the trial 35 boats participated in the PSP, including approximately eight larger vessels with mechanized drums.[5]

8. The PSP provides a valuable source of income for the TFN, sustaining families from the fishing season through to the Christmas season, and allows for the purchase of school, clothing and other necessary items. In 1993, the PSP provided employment for 196 members of the Musqueam and the TFN.[6] Fishing is a "vital tradition" of the TFN that represents an important social gathering and activity for the entire TFN community.[7]

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[2] Oral Reasons for Judgment of Brenner C.J. ("BCSC Reasons"), paras. 16, 88, A.R. Vol. I, pp. 99, 130-131
[3] BCSC Reasons, paras. 16, 87, 88;A.R. Vol. I, pp. 99, 130-131
[4] BCSC Reasons, paras. 32, 47, 97, A.R. Vol. I, pp. 109, 114, 135
[5] F. Jacobs, April 15, 2003, Transcript Vol. 9, pp. 1329-1442. A.R. Vol. VII, pp. 1260-1273
[6] F. Jacobs, April 15, 2003, Transcript Vol. 9, p. 1339; A.R. Vol. VII, p. 1270; Gardner Pinfold Report, Ex. 4, Tab 16, A.R. Vol. X, p. 1743-1745
[7] F. Jacobs, April 15, 2003, Transcript Vol. 9, p. 1340, A.R. Vol. VII, p. 1271

PART II: POSITION ON APPELLANTS' QUESTIONS

9. The TFN intervenes on the issue which the Appellants identify as "whether s. 25 of the *Charter* applies to the [PSP]." The TFN say that it does and that it provides a complete answer to the Appellants' s. 15 challenge and one that obviates the need for any s. 15 analysis.

PART III: STATEMENT OF ARGUMENT

A. The Basic Rule of the Constitution

10. There is a "basic rule… that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution"[8] (the "Basic Rule").

11. Section 91(24) is unique amongst the heads of power under the *Constitution Act, 1867*, in that it recognizes an authority to legislate on the basis of a class of persons.[9] The reason is rooted in history and the honour of the Crown. Section 91(24) recognized the Dominion Government as the successor to the Imperial Crown's obligations to the original inhabitants of this country.[10] The drafters of s. 91(24) recognized "Indians" as a separate people,[11] based on the distinguishing fact that, when the Europeans arrived, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.[12]

12. Section 91(24) carried with it the "high, honourable and onerous duties of the guardians of the many races of Indians…which the policy of the British Crown had rendered of paramount

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[8] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House Assembly)*, [1993] 1 SCR 319, at 390

[9] Lysyk, *The Unique Constitutional Position of the Canadian Indian,* (1967) 45 Can Bar Rev 513, at 533-534

[10] *R. v. Secretary of State for Foreign and Commonwealth Affairs ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 C.N.L.R. 86 (C.A.)

[11] The term "Indian" includes various peoples of indigenous blood and culture, including the Inuit but it would be wrong to characterize s. 91(24) (or for that matter s. 35 or 25) as being "race based". While Indians or aboriginal people may be of a particular "race", their race itself is somewhat beside the point and is not what entitles them to unique constitutional protection. Rather it is because they are Canada's indigenous or aboriginal people that they are so entitled. The word "aboriginal" in its primary meaning is not a racial classification; when used as an adjective or noun to describe a people it means "inhabiting or existing in a land from the earliest times or from before the arrival of colonists": *The Concise Oxford Dictionary* (9th ed., 1995); see also *Cambridge Advanced Learner's Dictionary*, 2005, where "aboriginal" (or "aborigine") is defined as "a person or living thing that has existed in a country or continent since the earliest time known to people".

[12] *R. v.Van der Peet,* [1996] 2 S.C.R. 507*,* at para. 30

importance."[13] Under this head of power, the Federal Crown has conferred rights and freedoms which "bears the impress of an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation of 1763."[14]

13. Section 91(24) thus anticipates that the Federal Government will treat "Indians" differently from other Canadians. Its very inclusion in the Constitution was founded on the unique history which separates aboriginal peoples from all other minority groups in Canadian society and mandates their different legal and constitutional status.

14. Section 91(24) is in this way analogous to s. 93, which was founded on the recognition of special and unequal obligations with respect to education for specific religious groups in Canada. Section 93(3) anticipates that Ontario and Quebec will legislate for the benefit of Catholic schools in Ontario and Protestant schools in Quebec, respectively. The parallel between ss. 93 and 91(24) was highlighted by Justice Estey in *Reference re Bill 30*:[15]

> Once section 93 is examined as a grant of power to the province, similar to the heads of power found in s. 92, it is apparent that the purpose of this grant of power is to provide the province with the jurisdiction to legislate in a *prima facie* selective and distinguishing manner with respect to education whether or not some segments of the community might consider the result to be discriminatory. **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**. [emphasis added]

15. In *Reference Re Bill 30,* the Court was urged to find that an Ontario statute which provided full funding for Roman Catholic secondary schools but not other secondary schools contravened ss. 15 and 2(a) of the *Charter.* Justices Wilson and Estey, authors of concurring sets of reasons, agreed that educational rights and privileges conferred on Roman Catholics by the Government of Ontario could not, in light of s. 93, be invalidated by a *Charter* challenge. Justice Wilson endorsed the following statement by the majority of the Ontario Court of Appeal:

> These educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario make it impossible to treat all Canadians equally. The country was founded upon the recognition of special or unequal educational

[13] *Ontario v. Canada* (1909), 42 S.C.R. 1, at 117
[14] *Mitchell v. Peguis Indian Band,* [1990] 2 S.C.R. 85, at 131
[15] *Reference re Bill 30, Reference re Bill 30, an Act to amend the Education Act (Ontario),* [1987] 1 S.C.R. 1148 at para. 80

> rights of specific religious groups in Ontario and Quebec. The incorporation of the *Charter* into the *Constitution Act, 1982*, does not change the original Confederation bargain.[16]

16. Justice Estey wrote:

> Although the *Charter* is intended to constrain the exercise of legislative power conferred under the *Constitution Act, 1867*, where delineated rights of individual members of the community are adversely affected, it cannot be interpreted as rendering unconstitutional distinctions that are expressly permitted by the *Constitution Act, 1867*.[17]

17. Equally, the *Charter* cannot be interpreted as rendering unconstitutional the distinction which underlies the unique status of aboriginal peoples in the *Constitution Act, 1867* and the authority of Parliament under s. 91(24) to legislate for the benefit of Indians.

18. A law which distinguishes between aboriginal and non-aboriginal people in a manner which is consistent with the purposes of s. 91(24) cannot be invalidated on the basis of s. 15 of the *Charter*. Rights and freedoms which the federal Government confers on aboriginal people in a preferential fashion distinct from non-aboriginal people are at the **very core** of the s. 91(24) authority. The *Charter* cannot be applied to invalidate a distinction which is expressly permitted by the *Constitution Act, 1867*. To do otherwise would violate the Basic Rule.

19. This is not to say that every law enacted under s. 91(24) that singles out Indians precludes any *Charter* challenge. For example in the unlikely event Parliament ever again enacted legislation of a sort that was at issue in *R v. Drybones,*[18] s. 91(24) would not preclude a challenge based on s. 15. [19] But in the case of a distinction, which as Justice Estey noted in the *Bill 30*

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[16] *Reference re Bill 30*, *supra*, at para. 64
[17] *Reference re Bill 30*, *supra*, at para. 81
[18] *R. v. Drybones*, [1970] S.C.R. 282
[19] Other distinguishing principles might apply: e.g. in *R. v. Campbell*, [1996] M.J. 603 (M.C.A.) (Q.L.), the Court said: "*Drybones*, it seems to me, can be distinguished from *Canard*, *supra*, in that the prohibition against intoxication off a reserve was **not in pith and substance part of a legislative scheme for the governance of Indians**, but rather a discriminatory law aimed at stopping Indians doing exactly what other Canadians could do without penalty. Prohibiting the intoxication of Indians off a reserve had little to do with the governance of Indians as a class but a lot to do with treating individual Indians as inferior citizens."
Even cases like *Canard v. Canada (Attorney General),* [1976] 1 S.C.R. 170 might be decided differently today: borrowing from the language of the Ontario Court of Appeal in *Re. Bill 30, supra. (*quoted by Wilson J. at para. 65 in the majority judgment of the SCC) it is the **essential Indian nature** which is preserved and protected by s. 91(24) of the *Constitution Act, 1867,* which would suggest only laws that confer **benefits** on Indians are protected as burdens may suggest stereo-typing or prejudice.

case, is for the benefit of aboriginal people but not one given to non-aboriginal people[20], s. 91(24) provides a complete answer.

20. The Appellants say that *any* law which distinguishes between people on the basis of "race" or "bloodline" is a breach of s. 15, and as such the analysis in *Law* is unnecessary and the inquiry jumps immediately to s. 1. On this basis, many provisions of the *Indian Act* and many if not all federal programs for the benefit of aboriginal people would be presumptively in breach of the *Charter* and require justification under s. 1. It was never the intention of the drafters of the *Charter* to open up for challenge the very basis on which Parliament has legislated for the benefit of aboriginal people since 1867.[21]

B. Section 25 Confirms the Basic Rule

21. Section 25 confirms this Basic Rule. The legislative record indicates that the original and sustained intention of the drafters of s. 25 was to ensure that the rights and freedoms rights set out in the *Charter* did not diminish the distinctive rights and freedoms of aboriginal people.[22]

22. This Court has described s. 25 as a "non-derogation clause in favour of the rights of aboriginal peoples" which, together with the explicit protection of aboriginal and treaty rights in s. 35, recognizes not only the ancient occupation of land by aboriginal peoples, but also their contribution to the building of Canada, and the special commitments made to them by successive governments.[23]

What is immune from *Charter* attack are laws that recognize the distinction between aboriginal and non–aboriginal people - as the PSP does - **and are attacked solely on that basis**; such laws are, as such, not "discriminatory" nor need they be "justified".

[20] Laws that distinguish between or amongst aboriginal people based on the enumerated or analogous grounds of s. 15 may not be immunized by the Basic Rule (or s. 25 as confirming the Basic Rule) but might be if s. 25 has independent force as argued below.

[21] *New Brunswick Broadcasting, supra at* 390-93; *Adler*, *supra*, at para. 31-32, 47, 49

[22] Arbour, *The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the Canadian Charter of Rights and Freedoms,* (2003), 21 S.C.L.R. (2d) 3, at 30-37; Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (University of Saskatchewan Native Law Centre, 1988), at 9-14

[23] *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217, at para. 82

23. Section 25 was also an express promise to the aboriginal peoples of Canada at "the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of aboriginal rights."[24] In the words of the then Minister of Justice:

> 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, whether flowing from Treaties or the Royal Proclamation, are assured to remain as they are, and not being changes by the adoption of this Charter of Rights, its clause 24 [now 25].[25]

24. In this way, s. 25 was a companion piece to s. 35 and a component of a new constitutional framework. The significance of that framework extended beyond simply recognizing and affirming existing aboriginal and treaty rights. Sections 35 and 25 provided a constitutional base on which a new relationship could be forged. Section 25, no less than s. 35 "calls for a just settlement for aboriginal peoples."[26]

25. Section 35(1) protects aboriginal and treaty rights from government action, and entrenches those rights in the Constitution. Section 25, in turn, protects government initiatives that seek to fulfill the purposes of s. 35(1) from *Charter* challenge.[27] Section 25 provides government with the necessary constitutional space to reconcile prior aboriginal occupation and existing aboriginal interests with Crown sovereignty.

26. The work of s. 25, however, is not exhausted by protecting s. 35(1) interests. "Other rights and freedoms that pertain to the aboriginal peoples of Canada" are juxtaposed disjunctively with "aboriginal and treaty rights" in s. 25 and must mean something different from s. 35(1) interests. In *Corbiere v. Canada,* Justice L'Heureux-Dubé J. (speaking for the majority on this point) observed that "This latter phrase [other rights and freedoms] indicates that the rights included in s. 25 are broader than those in s. 35, and may include statutory rights."[28]

27. Whatever other matters fall within the scope of "other rights and freedoms," s. 25, by confirming the Basic Rule discussed above, immunizes federal laws which confer rights or

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[24] *Sparrow, supra,* at 1105
[25] Minutes of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, No. 3, at pp. 68, 84 (January 30, 1980), quoted in Wildsmith, *supra*
[26] *Sparrow, supra*, at 1105
[27] Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001), at pp. 224-225
[28] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 52

freedoms on aboriginal peoples from a *Charter* challenge on the basis of an allegation that the law discriminates on the basis of "race" or "bloodline."

28. This approach to s. 25 finds support in the Court's approach to s. 29 of the *Charter*. In *Reference re Bill 30,* Ontario relied on s. 29 as a complete answer to the *Charter* challenge to the funding for Roman Catholic schools. Section 29 is similar to s. 25, and provides that:

> "Nothing in this 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."

29. Justice Wilson, writing for five justices, found that s. 29 was present in the *Charter* "for greater certainty… to render immune from *Charter* review rights or privileges which would otherwise, i.e. but for s. 29 be subject to such review." Justice Wilson concluded that, if the funding at issue could be supported by the rights and privileges for denominational schools which were guaranteed by s. 93(1), the matter would fall squarely within the immunity provided by s. 29. Even if the funding could only be supported by the Province's plenary power in relation to education under the opening words of s. 93, Justice Wilson was of the view that rights and privileges conferred by legislation enacted under that power fell within s. 29. In both respects, however, Justice Wilson found that s. 29 was not required to uphold the funding legislation, since the *Charter* could not be used to invalidate differential treatment which is contemplated by other provisions of the Constitution.[29]

C. Section 25 has Independent Force Beyond the Basic Rule

30. The language of s. 25 is broader than s. 29 and encompasses more than simply confirming the Basic Rule in the context of s. 91(24). While s. 29 protects "rights or privileges **guaranteed** by or under the Constitution," s. 25 extends its protection to "other rights or freedoms that **pertain** to the aboriginal peoples of Canada."[30] Such rights or freedoms could be the product of provincial as well as federal laws.[31] The purpose of this language is to protect rights which "belong to aboriginal people as aboriginal people" and rights which "accommodate

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[29] *Reference re Bill 30*, *supra*, at paras. 61-65; see also *Alder*, *supra*, at paras. 36-39, 141-165

[30] Which would not encompass the law in *Drybones supra*, as there were no "rights or freedoms" being protected.

[31] Which might encompass laws that distinguish between or amongst aboriginal people if otherwise a right or freedom pertaining to aboriginal people.

and affirm aboriginal difference".[32] In *Campbell v. British Columbia*, Williamson J. found that s. 25 encompasses rights which advance the "distinctive position of aboriginal peoples in Canada".[33] Kirkpatrick J.A. concluded that "the phrase 'other rights or freedoms' in s. 25 includes benefits conferred on aboriginals by laws or agreements directed at their special status as aboriginals."[34] Brenner C.J. said it not only arises under s. 91(24) but generally relates to the fishery and as such is directly linked to aboriginal distinctiveness and culture.[35]

31. There could be no more clear case for an application of s. 25. Altogether apart from s. 91(24), the PSP is, as found by Kirkpatrick J.A., "a specific right… conferred on [the participating aboriginal communities] by reason of their special aboriginal status," and falls within the scope of s. 25 on that basis as well.

32. If s. 25 is engaged because the PSP is one of the "rights or freedoms that pertain to aboriginal peoples…" then the PSP cannot be contrary to s. 15 of the *Charter*, since any contrary conclusion would be to construe s. 15 as abrogating or derogating from such right or freedom.

33. Whether s. 25 is confirmatory of the Basic Rule or has independent force, nothing would be served in this case by first conducting the s. 15 analysis as Justice Low suggested in the Court of Appeal,[36] much less the full *Charter* analysis as suggested by the Respondent. Indeed it would be detrimental for so many reasons including the utter waste of time and scarce resources such challenges entail and because an approach that has s. 25 somehow authorizing "unjustifiable discrimination" (which is the upshot of the Crown's position), is hardly a way of reconciling, in a harmonious way, aboriginal and non-aboriginal interests which, on a proper construction of s. 25, it is designed to do.

34. The Appellants mischaracterize s. 25 as a rights provision that gives "constitutional status" to the rights it protects and "thereby seriously curtail the legislative and regulatory powers of governments"[37]. On this basis, the Appellants (and even the Respondent) argue for a narrow interpretation of s. 25 that would essentially reduce its scope to s. 35(1) aboriginal and

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[32] *Batchewana Indian Band (Non Resident Members) v. Batchewana Indian Band* [1997] 1 F.C. 689 (C.A.), para. 25
[33] *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123, at para. 158
[34] BCCA Reasons, para. 151, A.R. Vol. I., p. 223
[35] BCSC Reasons, para. 32, A.R. Vol. I., p. 109
[36] BCCA Reasons, para. 88, A.R. Vol. I., p. 193

treaty rights. The same characterization informed Mackenzie J.A.'s reluctance, in the Court of Appeal, to apply s. 25, because to do so would, in his view, "constitutionalize aboriginal commercial salmon fisheries."[38]

35. The purpose of s. 25 is not to **curtail** any governmental power, (the hallmark of a constitutional right or freedom) let alone render the rights or freedoms referred to as "absolute"[39], but rather to **protect** government initiatives which confer, promote or facilitate the rights or freedoms that are covered by s. 25. Protecting a legislative scheme that confers rights or freedoms on aboriginal people in a preferential way does not "constitutionalize" the statutory right or freedom. Only s. 35 can do that.

36. The Appellants and the Respondent also misapply the statutory interpretation principles of "associated meaning" and *ejusdem generis*. As Kirkpatrick J.A. observed in the Court below, the meaning of "other rights and freedoms" needs to be determined by considering all of s. 25 and the Constitution as a whole.[40] The PSP is "clearly a most significant program for those involved."[41] As a government initiative which confers a preferential benefit to aboriginal people in relation to non-aboriginal people or affirms their distinctiveness in relation to the larger Canadian society, the PSP must receive protection under s. 25 as that is its honourable purpose.

PARTS IV AND V: COSTS SUBMISSION AND ORDER SOUGHT

37. It is respectfully submitted that the appeal be dismissed without costs to the TFN. The TFN also respectfully requests an opportunity to present oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: November 20, 2007

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[37] Appellants' factum, para. 113
[38] BCCA Reasons, at para. 114-115, A.R. Vol. I., p. 206
[39] Respondent's factum, para. 148
[40] BCCA Reasons, para. 124, A.R. Vol. I., p. 210
[41] BCSC Reasons, para 32, A.R. Vol. I., p. 109

PART VI: LIST OF AUTHORITIES

PART VII: STATUTORY PROVISIONS

None.