

FISHING FOR CLARITY:  
The Pilot Sales Program controversy in its theoretical context

by

Caroline Bonny Elliott  
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**Approval**

**Name:** **Caroline Bonny Elliott**  
**Degree:** **Master of Arts**  
**Title of Research Project:** **Fishing for Clarity: The Pilot Sales Program in its theoretical context**

**Examining Committee:**

**Chair:** **Douglas Ross**  
Professor, Department of Political Science

---

**David Laycock**  
Senior Supervisor  
Professor, Department of Political Science

---

**Andrew Heard**  
Supervisor  
Associate Professor, Department of Political Science

---

**Laurent Dobuzinskis**  
External Examiner  
Associate Professor, Department of Political Science

**Date Defended/Approved:** August 18, 2010



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## **Abstract**

This project explores the notion that there are two distinctive theoretical foundations underlying the major opposing policy stances taken on the question of native fishing rights in British Columbia. It is argued that the contrasting issue-specific positions differ on the normative question of whether individual rights for all Canadians are enough to provide a defensible degree of justice, or if group-differentiated rights are necessary in some circumstances. The controversy that erupted as a result of the Pilot Sales Program (1998-2003), which created an exclusive aboriginal-only fishery for a 24-hour period, is a prime example of the broader debate with regard to the appropriateness of group-differentiated rights. Will Kymlicka and Tom Flanagan each take a different theoretical stance on this issue, and as such they provide the theoretical foundation for this project. This research demonstrates that an applied normative analysis offers a revealing approach to understanding a controversial and significant issue.

**Keywords:** Pilot Sales Program; native fishing rights; Aboriginal Fisheries Strategy; group-differentiated rights; group rights; collective rights

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## Chapter 1: Introduction

The issue of unique rights for aboriginals as contrasted with the rights of Canadians as a whole is the subject of much contention. Indeed, the word 'contention' seems too small a term to adequately capture the intense debate, heated words, and raw emotion that surround much of the discourse with regard to this important issue. Emotive words and allegations of 'racism' (Eidsvik, quoted by CBC News, 2002; Grand Chief Edward John, First Nations Summit News Release, 2008), 'discrimination' (Carpay, 2008, p.1; Phil Fontaine, quoted by National Post, 2000), 'ethnocentrism' (Methot, 2000, p.1), and 'civilizationalism' (Murphy, 2009, p. 253) are spat out by opposing sides of the controversy, even as legitimate attempts at understanding the issue are undertaken. It has been virtually impossible for this subject to be discussed without simultaneously witnessing acrimonious accusations of attempts to keep the disadvantaged down, or of favouritism towards some at the expense of others. In the face of such virulence, it is all the more essential to understand both sides of this significant debate in their conceptual contexts. It is only by exploring and elucidating the underlying issues that everyone involved can come to better understand the theoretical beliefs that are at the roots of the controversy.

What follows is an exploration of the notion that there are two distinctive normative theoretical foundations underlying the two major opposing policy stances relating to native fishing rights in British Columbia. Specifically, and in order to provide tangible examples from a recent and controversial situation that highlights the broader question of these rights, the case of the *Aboriginal Fisheries Strategy's* Pilot Sales Program from 1998-2003 is the empirical focus of this analysis. Seeing these policy stances through a normative lens will provide a necessary element in a broader understanding of this conflict and its potential solutions. The opposing issue-specific positions differ on the underlying question of whether or not members of distinctive communities ought to enjoy distinctive rights. It will be argued that the controversy that erupted as a result of the Pilot Sales Program is a prime example of the broader

debate with regard to the validity of group-differentiated rights: are individual rights for all Canadians enough to provide a defensible degree of justice, or are group-differentiated rights necessary in some circumstances?

### *Research Methodology*

This research project takes a theoretical approach to the issue of individual versus group-differentiated rights, through the application of contemporary rights theory to a recent case study. The theoretical aspect will draw heavily on Will Kymlicka's Multicultural Citizenship (1995) and Tom Flanagan's First Nations? Second Thoughts (2008). The case study aspect of this project will draw on primary sources such as the *Canadian Charter of Rights and Freedoms*, on the basis of which the Program was both opposed and favoured by the respective interest groups involved with the issue; the Provincial Court of British Columbia ruling (2003 BCPC 0279) on the case arising from protests against the Pilot Sales Program (*R. v. Kapp*); and the Supreme Court of Canada ruling (2008 SCC 41) on the same case. These rulings are particularly interesting in the theoretical context, as each interprets the *Charter* differently in terms of the question of individual rights versus group-differentiated rights. It should be mentioned that this paper will focus on just two of the four court decisions relating to the Pilot Sales Program. While the rulings of the BC Supreme Court and the BC Court of Appeals are a part of a complete consideration of the legal side of the matter, for the sake of brevity just the first and the last decisions taken on the case will be used to illustrate the contrasting positions on the issue.

A number of additional secondary sources are used to illustrate both the facts of the case study and interpretations of the events. These sources include academic commentary published in articles and books, news releases and commentary from interest groups such as aboriginal and general commercial fisheries organizations such as the BC Fisheries Survival Coalition, and information from popular media articles and government documents such as commissioned reports relating to the issue. Kymlicka's conceptual definitions, and both Kymlicka's arguments for group-differentiated rights



and Flanagan's arguments against such rights, provide the analytical lenses through which the normative import of the issue of native fishing rights in BC can be brought into focus.

### *The Significance of the Issue Today*

This issue is both timely and important in the Canadian context, but most significantly here in British Columbia. Of specific relevance is the fact that "Canada's fishers work in a context of partially and incompletely defined Aboriginal rights," resulting in "an overriding sense of vulnerability about rights of access to fish and the future of long-established ways of life" (Harris and Millerd, 2010, p. 83). Douglas Harris of the Scow Institute, an organization that describes itself as "addressing public misconceptions about issues relating to Aboriginal people and Aboriginal rights" (Harris, 2005, p.2), goes as far as to suggest that "[n]o subject area has been more important to the development of Aboriginal rights, and to an understanding of their nature, than disputes over fishing rights" (Scow Institute, p.1).

As Gordon Gibson writes in a more general context, "British Columbia is the province with by far the most important outstanding aboriginal policy issues in Canada" (Gibson, 2000, p. 13). He explains that while aboriginal social and economic problems are apparent across Canada, in British Columbia "there is a huge additional factor by reason of the lack of treaties covering most of the Indian population and most of the land mass of the province" (Gibson, p. 13). Furthermore, native policy will only become more important as time goes on, in that the aboriginal population is "much younger and growing at a rate two to three times faster than the rest of the Canadian population" (Abele and Prince, 2002, p. 222). Thus, an exercise in applied normative analysis as provided here can show the importance of understanding the issues of native and non-native rights in British Columbia and Canada as a whole in their underlying context. Such an analysis will also facilitate placing the range of potential policy resolutions within a broader, and politically clarifying, normative framework.

In short, this research tests the hypothesis that proponents of the Pilot Sales Program can be characterized as supporting group-differentiated rights in a Kymlickian manner, while opponents can be seen as rejecting Kymlickian theory, and adopting an individual rights approach consistent with Flanagan's theory. In this way, all involved in native rights discourse, including the judicial decisions on the Pilot Sales Program itself by the BC Provincial Court and the Supreme Court of Canada, can be seen as using the theoretical logic and sometimes even the precise language in Kymlicka's and Flanagan's works. More importantly, this research shows that an applied normative analysis offers a particularly revealing approach to understanding a highly complicated, deeply controversial, and significant issue.

In the practical context, the findings of this research lead to a prescriptive approach in terms of policy assessment. Specifically, the need for policymakers to conduct practical and careful 'needs tests' and 'harm tests' prior to enacting group-differentiated rights will be highlighted. It will be recommended that government must ensure that any remedies aimed at ameliorating group disadvantage are legislated directly, and that these remedies are clearly relevant to the enhancement of the target community's societal culture and autonomy. In addition, it is recommended that government's 'harm tests' must ensure that the negative effects of group-differentiated rights on those who are excluded from such rights must not outweigh the benefits provided to the minority group. In this way, the conclusions reached following this applied normative analysis will demonstrate that while our understanding of practical policy debate is furthered by a theoretical understanding, theory, too, benefits from its application to a practical situation. It becomes clear that it is only when the arguments are understood in their deeply-rooted theoretical context that meaningful conclusions can be reached and successful resolutions applied, and it is only when a given theory is assessed in a practical application that its merits and insufficiencies can be properly identified and appropriately remedied.

### *Chapter Outline*

The following chapters aim to establish this conceptual framework, and then go on to test the central hypothesis by situating the debate into the structure. Beginning with a brief literature review, the tendency of authors to view themselves as taking on the established orthodoxy on the debate will be considered, leading to the conclusion that conceptual clarity is invaluable to bringing consistency of terms to all sides of the issue. Next, two normative perspectives on the question of rights will be presented, the first introducing Kymlicka's case for group-differentiated rights, and the second explaining Flanagan's case against such rights, and his preference for individual rights instead. Having expounded the theoretical underpinnings of the debate over fishing rights, the case study itself will be presented, in the context of the normative division the debate entails. A factual background and description of the Pilot Sales Program will then be provided, followed by an overview of the cases made for and against the program in their respective 'Kymlickian' and 'Flanaganian' contexts. The subsequent chapter will go on to consider the outcome of the debate, in terms of the judicial commentary and decisions arising from the court case on the issue. The BC Provincial Court decision will be presented as an argument against group-differentiated rights, while the Supreme Court of Canada ruling will be revealed as an argument in support of such rights. Finally, the conclusion will evaluate some of the more central arguments made by the opposing sides of the debate. This evaluation will lead to a prescriptive approach to future assessments of policy options.

## Chapter 2: Literature Review

Literature addressing the longstanding questions relating to both the sufficiency of individual rights and the controversial advocacy of group-differentiated rights to address the perceived inadequacies of the former is abundant. Well-known theorists such as John Locke, Thomas Hobbes, Jean-Jacques Rousseau, John Rawls, Thomas Paine and more recently Frederick Hayek are just a few of the many influential thinkers who have offered considered perspectives on the issue of rights. Unfortunately, a paper of this short length cannot possibly give adequate consideration to the deep and complex theories outlined by these thinkers. For this reason, the following analysis will instead find its basis in just two modern theoretical works that incorporate many of the foundational underpinnings of the more established, classical theories. The first, arguing in favour of accommodating minorities through what the author calls 'group-differentiated rights,' is Will Kymlicka's Multicultural Citizenship. The second piece, arguing against a minority rights regime and instead advocating for one founded in individual rights, is Tom Flanagan's First Nations? Second Thoughts. These two works were not selected at random, but chosen as modern works that represent each of the two currently contending theoretical views underlying the ongoing debate over native rights. Each of these selected pieces provides a relatively recent perspective on the ever-evolving issue of rights generally and native rights in particular. Both of these sources are products of detailed research by the authors, each providing an excellent modern perspective on a much debated question.

Whichever side they take on the question of aboriginal rights in the context of the rights of Canadians as a whole, there appears to be a tendency among many authors and commentators to view themselves as taking on what they see as a prevailing orthodoxy on the issue. In First Nations? Second Thoughts, Flanagan writes of his realization that he was "confronting... a new orthodoxy, widely and firmly accepted in all circles exercising influence over aboriginal policy" (Flanagan, p.3). In the introduction to her contrasting book, First Nations, First Thoughts (2009), Annis May Timpson considers

how Aboriginal peoples have “challenged prevailing cultural, political, economic, and constitutional ‘wisdom’” (Timpson, p.1). Frances Widdowson and Albert Howard’s Disrobing the Aboriginal Industry (2008) likewise claims to challenge “[t]he overwhelming view of those who are concerned about the terrible social conditions in aboriginal communities” (Widdowson and Howard, p.8). In a final example, Gordon Gibson’s A New Look at Canadian Indian Policy (2009) suggests that “the standard model for thinking about Indian policy is fundamentally wrong” and it “challenges some of the most basic assumptions of established Indian policy” (Gibson, p. v). Each of these publications takes a different stance on the question of rights, yet the suggestion by each author that they challenge the ‘accepted orthodoxy,’ the ‘prevailing wisdom,’ the ‘overwhelming view,’ the ‘standard model,’ or the ‘established policy,’ shows the degree to which those partaking in the debate view the opposing opinions as widely accepted, unwavering, and wrong. This kind of inconsistency in perception of the status quo underscores the value of recognizing the theoretical positions underlying the two major stances in order to clearly understand the issue.

Likewise, conceptual inconsistencies abound with regard to the question of rights. For example, many arguments in favour of group-differentiated rights for aboriginals support, or even found their position in the notion that native people inhabited North America before Europeans arrived. As such, the argument that aboriginals were ‘here first’ plays a central role in any discourse about native rights. As Harris and Millerd write with regard to fishing rights, “[t]he Aboriginal peoples of Canada stand in a different legal relationship to the fisheries than non-Aboriginal Canadians” (Harris and Millerd, p.82). According to the authors, one of the bases for this different relationship is “by virtue of a long history with the fisheries that precedes non-Aboriginal settlement in North America” (Harris and Millerd, p.82), in which “Aboriginal peoples fished and managed their fisheries before others arrived” (Harris and Millerd, p.83). This position is held by many commentators on the issue of native rights, and is prevalent amongst aboriginal people themselves. As Phil Fontaine, former national chief of the Assembly of First Nations asserted, “[t]he fact is, we are a special

people. We were here first” (1998, quoted by Flanagan, p.11). However, inconsistencies in how this information is interpreted are apparent. This is clear in that the notion of ‘being here first’ is far from being accepted by all in the debate as equivalent to being entitled to special rights. While the intent of this project is not to argue that either side of the argument is more convincing than the other, the existence of this conceptual divide must be acknowledged, as it provides the basis for much of the disagreement between the different sides of the rights debate.

Clarity of concepts is therefore of great value to any discussion involving the question of rights. This already complex issue is at risk of becoming additionally mired in misunderstanding on the basis of unclear meanings, misunderstood ideals, and false assumptions amongst those participating in discourse on this subject. For this reason the following section, which outlines the two normative foundations into which this paper hypothesizes the native fishing rights debate can be situated, allocates significant attention to the conceptual differences between the two major theoretical sources. Of specific importance to this paper, the concept of a ‘national minority’ will be discussed in the context of whether this distinction amounts to an entitlement to special rights to accommodate the minority in question. A second, highly important distinction will then be identified, specifically concerning what exactly the goal of rights is to each of the authors. It will become clear that what commentators see as the ultimate goal of individual or group-differentiated rights strongly influences the respective policy prescriptions. In turn, the very concept of what group-differentiated rights actually entail is focused upon in order to gain greater clarity. Finally, while both theoretical works extol the norm of liberalism, differences in concepts lead to disagreement as to whether group-differentiated rights are a means of attaining the ideals of liberalism, or whether they instead serve to contradict and even undermine this normative standard.

### **Chapter 3: Two Normative Perspectives: Group-Differentiated and Individual Rights**

Understanding the conceptual language and theoretical underpinnings of any debate is important to comprehending the fundamental bases of the opposing arguments. It is for this reason that two normative perspectives will be presented here, each taking a stance that is well-argued yet irreconcilable with the other. Will Kymlicka's Multicultural Citizenship will be presented first, calling for the accommodation of minorities through what the author calls 'group-differentiated rights.' The second perspective presented is that of Tom Flanagan, as established in his controversial book, First Nations? Second Thoughts. Flanagan makes an argument in opposition to group-differentiated rights, and instead proposes a regime of individual rights based on a foundation of private property rights. As mentioned, these two pieces were selected as being best representative of the two currently contending theoretical views underlying the ongoing debate over native fishing rights. While acknowledging a fundamental disagreement between the opposing sides of the issue, it will be argued that neither position can be discarded, because each sheds a necessary light on the theoretical underpinnings of the current controversy surrounding the subject of native fishing rights.

#### **Kymlicka's Case For Group-Differentiated Rights**

Will Kymlicka's Multicultural Citizenship is used throughout this project as a representative work in defence of group-differentiated rights. His argument that "minority rights cannot be subsumed under the category of human rights" (Kymlicka, p. 4) is justified by his position that to rely solely on individual rights is to "render cultural minorities vulnerable to significant injustice at the hands of the majority, and to exacerbate ethnocultural conflict" (Kymlicka, p.5). Building upon these assertions, Multicultural Citizenship outlines and defends Kymlicka's premise that it is "legitimate, and indeed unavoidable, to supplement traditional human rights with minority rights" (Kymlicka, p.6). Thus, any multicultural state will include "both universal rights,

assigned to individuals regardless of group membership, and certain group-differentiated rights or 'special status' for minority cultures" (Kymlicka, p.6).

### *Aboriginals as a National Minority*

Kymlicka's basic argument, briefly summarized above, is a result of careful conceptualization and extensive logical development. An important distinction he makes is one between national minorities and ethnic groups. These terms make up what he calls "two broad patterns of cultural diversity" (Kymlicka, p.10). The first of these patterns, national minorities, is one in which cultural diversity comes about from "the incorporation of previously self-governing, territorially concentrated cultures into a larger state" (Kymlicka, p.10). In this way, the notion of being 'here first' is of importance to Kymlicka's discussion of rights. He goes on to assert that national minorities "typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies" (Kymlicka, p.10).

In the second case, according to Kymlicka, cultural diversity arises "from individual and familial immigration," in which such immigrants often come together as loose associations that he identifies as 'ethnic groups.' Kymlicka argues that such ethnic groups "typically wish to integrate into the larger society, and to be accepted as full members of it" (Kymlicka, p.11). In other words, their aim is not to remain a distinctive society, and attain substantial levels of self-governance, as in the case of national minorities, but rather to "modify the institutions and laws of the mainstream society to make them more accommodating of cultural differences" (Kymlicka, p.11). Of significance to this project, Kymlicka clearly identifies aboriginals as a national minority, and refers to Canada as being the product of a "federation of three distinct national groups," identified as the English, French, and aboriginals (Kymlicka, p.12). In Kymlicka's view, "[t]he 'challenge of multiculturalism' is to accommodate these national and ethnic differences in a stable and morally defensible way" (Kymlicka, p.26). As this project



deals specifically with the issue of native rights, Kymlicka's discussion with regard to accommodating national minorities is particularly relevant.

### *Accommodating Minority Rights*

Kymlicka outlines his interpretation of the traditional individual rights doctrine, which helps to differentiate his following theory from the more typical liberal view. According to Kymlicka, those in favour of individual rights alone tend to hold views consistent with the following:

Rather than protecting vulnerable groups directly, through special rights for the members of designated groups, cultural minorities would be protected indirectly, by guaranteeing basic civil and political rights to all individuals regardless of group membership. Basic human rights such as freedom of speech, association, and conscience, while attributed to individuals, are typically exercised in community with others, and so provide protection for group life. Where these individual rights are firmly protected, liberals assumed, no further rights needed to be attributed to the members of specific ethnic or national minorities (Kymlicka, p.3).

He argues that this classical liberal argument, to be discussed in more detail shortly with reference to the 'Flanaganian' argument, is insufficient in its accommodation of minority differences.

Kymlicka goes on to explain what he argues are the deficiencies of the individual rights theory described above. In his view, it is impossible to address minority groups' legitimate needs under the much broader category of human, or individual, rights, as "[t]raditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities" (Kymlicka, p. 4). Such controversial questions highlighted by Kymlicka include what languages ought to be accepted in courts and parliament, whether or not powers ought to be devolved to more local or regional levels, and whether political offices ought to be distributed so as to be more reflective of groups in society. It is important to note that Kymlicka does not argue that an individual rights approach gives the *wrong* answers to these questions and others, but rather that individualist doctrines "often give no answer at all" (Kymlicka,

p.5). As a result, “[t]hese questions have been left to the usual process of majoritarian decision-making” (Kymlicka, p.5). In the face of what Kymlicka sees as the inadequacy of an individual rights approach to providing minorities with a defensible degree of justice, he comes to his main argument that “[t]o resolve these questions fairly, we need to supplement traditional human rights principles with a theory of minority rights” (Kymlicka, p.5).

### *Autonomy as the Ultimate Goal of Rights*

In considering Kymlicka’s argument in relation to the overall question of rights, it is imperative to understand what exactly it is that he is trying to achieve for minorities. In order to accurately answer this question, Kymlicka’s two related concepts of autonomy and societal culture require elaboration here. Individual autonomy, for Kymlicka, is analogous to freedom and equality of the individual. Autonomous individuals are free citizens who are “capable of defining their own identity and goals in life” (Kymlicka, p.34). However, he emphasizes that the issue is not as simple as that. Rather, he goes on to suggest that “[f]or meaningful individual choice to be possible, individuals need not only access to information, the capacity to reflectively evaluate it, and freedom of expression and association. They also need access to a societal culture” (Kymlicka, p.84). Kymlicka thus presents another important concept, where societal culture is defined as one that “provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres” (Kymlicka, p.76).

In this way, Kymlicka draws a link between individual autonomy, societal culture and group-differentiated rights, in the sense that such rights that serve to “secure and promote... access [to societal culture] may, therefore, have a legitimate role to play in a liberal theory of justice” (Kymlicka, p.84). In short, as Kymlicka puts it, “freedom involves making choices against various options, and our societal culture not only provides these options, but makes them meaningful to us” (Kymlicka, p.83). In this way, “[t]he connection between individual choice and culture provides us with the first step

towards a distinctively liberal defence of certain group-differentiated rights” (Kymlicka, p. 84).

*Group-Differentiated Rights: A Means to the Liberal Ideal of Individual Freedom*

At this point a precise definition of group-differentiated rights must be provided, given its centrality to Kymlicka’s work and its significance to understanding the placement of aboriginal fishing rights in its theoretical context. So far, the phrase itself has been used several times throughout this paper. However, without explaining the term, the reader is at risk of understanding the concept as akin to ‘collective rights,’ something Kymlicka goes to great pains to prevent. As he points out, “[t]he category of collective rights is large and heterogeneous... it is important not to lump the idea of group-differentiated citizenship with the myriad of other issues that arise under the heading of ‘collective rights’” (Kymlicka, p.35). Group-differentiated citizenship as promoted by Kymlicka is categorized as ‘external protections’ for minorities, and may include things such as the granting of “special representation rights, land claims, or language rights to a minority” (Kymlicka, p.36). Kymlicka stresses that this is different from other, perhaps better-known kinds of collective rights such as, say, the rights of trade unions or corporations. However, such rights ought never put a minority in a “position to dominate other groups” (Kymlicka, p.36). Rather, group-differentiated rights “can be seen as putting the various groups on a more equal footing, by reducing the extent to which the smaller group is vulnerable to the larger” (Kymlicka, p.37).

To sum up Kymlicka’s complex argument, rights allocated on a group-differentiated basis are distinct from those allocated on a collective basis, in that they are rights held and exercised on an individual level, even though they are allocated by virtue of that individual’s membership in a group. Such rights are necessary for the building of a minority societal culture designed to allow for autonomous self-development while maintaining consistency with the principles of liberalism. Thus, while accepting that “[t]he basic principles of liberalism... are principles of individual

freedom” (p. 75), it must be understood that “[m]inority rights are not only consistent with individual freedom, but can actually promote it” (Kymlicka, p.75).

In this important way, Kymlicka tries to show that group-differentiated rights are not inconsistent with the liberal tenets of much of western society. He suggests that “[a] comprehensive theory of justice in a multicultural state will include both universal rights, assigned to individuals regardless of group membership, and certain group-differentiated rights or ‘special status’ for minority cultures” (Kymlicka, p. 6). Kymlicka argues that rights of this nature, when understood as “the right of a group to limit the economic or political power exercised by the larger society over the group, to ensure that the resources and institutions on which the minority depends are not vulnerable to majority decisions” (Kymlicka, p.7), need not conflict with individual liberty. He writes that it is possible for liberals to “accept a wide range of group-differentiated rights for national minorities ... without sacrificing their core commitments to individual freedom and social equality” (Kymlicka, p. 126).

### **Flanagan’s Case Against Group-Differentiated Rights**

Contradicting Kymlicka’s position, Tom Flanagan’s First Nations? Second Thoughts is referred to here as a representative work in opposition to group-differentiated rights. Flanagan is a proponent of the belief that individual rights anchored in a regime of private property rights provide the basis of the only workable framework for desirable forms of both freedom and equality. In his critique of what he calls the ‘aboriginal orthodoxy,’ the belief that “early residence in North America is an entitlement to special treatment” (Flanagan, back cover), Flanagan reveals a fundamental disagreement with Kymlicka’s central premise. He states that that “[w]hen government sorts people into categories with different legal rights, especially when those categories are based on immutable characteristics such as race and sex, it interferes with social processes based on free association” (Flanagan, 2008, p. 9). Flanagan’s theory of rights is incompatible with the position in favour of group-differentiated rights taken by Kymlicka, and as such each position is an excellent example of the different aspects of modern rights theory,

through which the native fishing rights debate can be normatively analysed and better understood.

### *A Case for Individual Rights*

Flanagan further clarifies his support for individual rights over group-differentiated rights in a report he and Christopher Alcantara prepared for the Fraser Institute's Public Policy Sources (2002, No 60), entitled "Individual Property Rights on Canadian Indian Reserves." In this article, Flanagan and Alcantara point out that long-established Crown policy "has tended to channel Indian property rights in a collective, government-dominated direction" (Flanagan and Alcantara, p.3), to the extent that "[m]any Indian reserves in Canada... have no formalized individual property rights" (Flanagan and Alcantara, p.5).<sup>1</sup> The authors contend unequivocally that in order for aboriginals to participate in the economy and capitalize on their resources, history and economics have shown that "[m]arkets work best when property is privately owned" and that the process "functions most effectively when control over resources is also dispersed" (Flanagan and Alcantara, p.15).

Flanagan and Alcantara argue that land and other resources under the control of aboriginal people "will never yield their maximum benefit to Canada's native people as long as they are held as collective property subject to political management" (Flanagan and Alcantara, p.15). The authors' view can be summed up in their claim that "in the long run, collective property is the path of poverty, and private property is the path of prosperity" (Flanagan and Alcantara, p.16). While notably only discussing property rights, as opposed to group-differentiated rights as a whole, Flanagan reveals an important element of his theoretical underpinnings. He is not arguing that individual rights are merely sufficient, or 'enough,' but rather that such rights are actually *more* suited to benefit distinctive communities than are rights allocated on the basis of group distinction.

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<sup>1</sup> This topic has explored in much greater detail in a recently published book by Flanagan and his colleagues: Flanagan, Tom, Christopher Alcantara, and Andre Le Dressay. 2010. Beyond the Indian Act: Restoring Aboriginal Property Rights. Montreal: McGill-Queens University Press.

*Aboriginals: A Minority, but not a Nation*

Many of the concepts developed by Kymlicka are implicitly rejected in First Nations? Second Thoughts. The very concept of a 'national minority' being deserving of special status, as it pertains to aboriginals in Canada is repudiated by Flanagan, who suggests that native people have no legitimate claim to national minority status. Flanagan draws on historian Philip White in his identification of five criteria that ought to be used when making subjective judgements as to whether a particular group should be referred to as a nationality. The criteria, explained in much more detail in Flanagan's chapter entitled "Bands, Tribes, or Nations?" are: civilization, significance, territory, solidarity, and sovereignty (Flanagan, p.84-7). Flanagan argues that none of these five criteria apply in the case of Canada's native peoples. He addresses each of the criteria in turn, writing that "[a]boriginal peoples in Canada project the concept of a nation backwards onto a pre-civilized past; they have tiny populations; they do not control a contiguous territory; they are internally divided among dozens or hundreds of different collective identities; and they receive support only from scattered intellectuals for their assertions of sovereignty" (Flanagan, p.87). Furthermore, he argues, the projection of words like 'nation' onto Indian bands is not equivalent to the meaningful designation of a group as a 'national minority.' As he puts it, "[c]alling Indian bands First Nations does not change Canada into a genuine multinational state because the objective attributes of Indian bands are far from what nations are generally understood to be" (Flanagan, p.88).

His characterization of aboriginals and Europeans as simply earlier and later waves of immigration, in which each group similarly took control of the land (Flanagan, p. 6), further propels him to his conclusion that "[t]o differentiate the rights of earlier and later immigrants is a form of racism" (Flanagan, p. 6). He suggests that "owing to [the] tremendous gap in civilization, the European colonization of North America was inevitable and, if we accept the philosophical analysis of John Locke and Emer de Vattel, justifiable" (Flanagan, p.6). This point has been labelled 'civilizationalist' by some who see the "ranking of societies on a scale of human development" as wrong (Murphy, p.253). However, despite the contrary opinion of Murphy and others, this argument has

alternately been seen as valuable and as such has been upheld by authors such as Widdowson and Howard. These authors corroborate Flanagan's position, suggesting that his classification of pre-colonial aboriginal life as 'uncivilized' ought not to be seen as a judgement of race, but rather as a subjective assessment of culture, and one that is "verified by scientific anthropology" (Widdowson and Howard, p.251). Right or wrong, Flanagan's stance on this matter lends support to his argument that native people in Canada have no claim to a Kymlickian 'national minority' status.

For the purposes of this paper, Kymlicka's classification of natives as a national minority will be used insofar as it differentiates between more recently immigrated ethnic groups and those minorities that predate European arrival in North America. This concept will also be used in the sense that the aims Kymlicka associates with national minorities (i.e. to maintain themselves as distinct societies and to gain autonomy) are reflective of the demands of aboriginal people in Canada, at least more so than are the aims of ethnic groups (i.e. to integrate into mainstream society). An assessment of which argument is actually more convincing is not central to testing the central hypothesis of this paper, nor is there adequate space to devote the necessary attention to this issue. The intent of this project is limited placing the debate about native fishing rights into its broader theoretical context. As such it is unnecessary to address every aspect of the vast argument with regard to claims of pre-colonial nationhood.

#### *Prosperity, Independence, and Respect: the Goals of an Individual Rights Regime*

As in the Kymlickian case, it is important to understand what Flanagan is hoping to achieve for aboriginals through his support for an individual rights regime. For Flanagan, this goal is found in his repeated references to the ideals of "prosperity, independence, and respect" (Flanagan, p.195). At first glance, these aims are not vastly different from the Kymlickian ideals of the ability to define one's own identity and goals in life, and access to meaningful ways of life across the full range of human activities. However, the difference between the two theorists becomes clear in the means they recommend to achieve their stated ends. Even if it could be argued that the ultimate

goal of autonomy is shared by both Flanagan and Kymlicka, the authors' interpretations of what this goal entails results in respective prescriptions that could hardly be more different. While Kymlicka suggests group-differentiated rights to protect minorities from the majority, Flanagan counters the general concept when he argues that "campaigns to repair injustice, even if the injustices are real, do not produce independence and prosperity" (Flanagan, p.195). Flanagan implicitly rejects the entire notion of group-differentiated rights throughout First Nations? Second Thoughts, and affirms his belief that only individual property rights can support the efforts of the individual. He states that "[i]n a functioning liberal democracy, prosperity, independence, and respect are like an arch built one brick at a time. The bricks are the decisions people make as they pursue their goals of work, family, and community service. Individual effort mortars them into place" (Flanagan, p. 195).

#### *Group-Differentiated Rights as Anathema to Liberalism*

An additional point at which Flanagan obviously disagrees with Kymlicka, very relevant to the question of aboriginal fishing rights, pertains to Kymlicka's claims that minority rights are consistent with liberalism. Flanagan contends that the establishment of aboriginal nations "as privileged political communities with membership defined by race and passed on through descent" is at odds with liberal democracy "because it makes race the constitutive factor of the political order" (Flanagan, p.194). Flanagan expresses a concern that a group-differentiated right such as that of native self-government, for example, "would redefine Canada as an association of racial communities rather than a polity whose members are individual human beings" (Flanagan, p. 194). This is a key contention of Flanagan, and will be seen to be a central point made by those who oppose the Pilot Sales Program. Anticipating criticisms such as Flanagan's, Kymlicka vigorously defends the liberality of group-differentiated rights, as shown previously in his argument that it is possible for liberals to "accept a wide range of group-differentiated rights for national minorities ... without sacrificing their core commitments to individual freedom and social equality" (Kymlicka, p. 126).



In a similar argument, Flanagan also warns about the potential threat to social unity that the encouragement of group differentiation poses to the Canadian nation as a whole. As he puts it, when we encourage aboriginal people to “withdraw into themselves, into their own ‘First Nations,’ under their own ‘self-government,’ on their own ‘traditional lands,’ within their own ‘aboriginal economies...’” (Flanagan, p.195), we are embarking in the wrong direction “if the goal is widespread individual independence and prosperity for aboriginal people. Under the policy of withdrawal, the professional and political elites will do well for themselves as they manage the aboriginal enclaves, but the majority will be worse off than ever” ( Flanagan, p.195). Given its centrality to the general debate, Kymlicka takes time to address what he calls the worry “that group-differentiated rights for minority cultures will inhibit the development of a shared identity necessary for stable social order” (Kymlicka, p.9). To this end, he suggests that group-differentiated rights such as “representation rights and polyethnic rights are consistent with integrating minority groups, and indeed may assist in this integration” (Kymlicka, p.9). Interestingly, Kymlicka highlights a difficulty with self-government rights, writing that while “they do pose a serious threat to social unity, since they encourage the national minority to view itself as a separate people... denying [such] rights can also threaten social unity, by encouraging secession” (Kymlicka, p.9). In this sense, Kymlicka goes so far as to say that “[i]dentifying the bases of social unity in multination states is... one of the most pressing tasks facing liberals today” (Kymlicka, p.9). For both Flanagan and Kymlicka, while they fundamentally disagree over the means of attaining autonomy, it is clear that they do seem to coincide in their identification of the issue of the rights of minorities as one that is extremely important to the healthy functioning of the modern multicultural state.

In short, Flanagan’s fundamental theoretical difference from Kymlicka is that, while both claim to seek some kind of meaningful freedom and prosperity for minorities such as Canadian aboriginals, Flanagan calls for integration into mainstream society, while Kymlicka prescribes rights and entitlements designed to preserve group distinctiveness. Nowhere is this more clear than in Flanagan’s statement that “[i]n order

to become self-supporting and get beyond the social pathologies that are ruining their communities, aboriginal people need to acquire the skills and attitudes that bring success in a liberal society, political democracy, and market economy. Call it assimilation, call it integration, call it adaptation, call it whatever you want: it has to happen” (Flanagan, p.195). Kymlicka, on the other hand, warns that this approach “may appear to be ‘neutral’ between the various national groups. But in fact it can (and often does) systematically privilege the majority nation in certain fundamental ways... [which can] reduce the political power and cultural viability of a national minority, while enhancing that of the majority culture” (Kymlicka, p.51).

## Chapter 4: The BC Pilot Sales Program Case: Policy Debate and Normative Division

### Background and Description of the Pilot Sales Program

The federal Pilot Sales Program of 1998-2003 arose as part of the Government of Canada's *Aboriginal Fisheries Strategy* (AFS). The intent of this strategy was to "enhance aboriginal involvement in the commercial fishery" (2008 SCC 41, p.6), as part of a "new social contract including Aboriginals, aimed to increase economic opportunities in Canadian fisheries for Aboriginal people while achieving predictability, stability and enhanced profitability for all participants" (2003 BCPC 0279, p.10). A significant part of the AFS was the introduction of three pilot sales programs, one of which "involved the issuance of communal fishing licences to aboriginal communities, granted pursuant to the *Aboriginal Communal Fishing Licences Regulations, SOR/93-332*" (Dalton, p. 1). In August 1998, this communal fishing licence was issued by the federal Minister of Fisheries and Oceans to the Musqueam, Burrard and Tsawwassen Indian Bands. Some members of these bands "were also licensed commercial fishers" (Dalton, p. 1) who were now permitted to "fish exclusively for a 24-hour period... for food, social, and ceremonial purposes, and to sell their catch" (Dalton, p.1). Those who were also licensed commercial fishers were then able to participate in the general commercial fishery, as their band membership combined with their commercial licence made it so "they [were] able to fish in both openings" (2003 BCPC 0279, p.34). The sale of the catch was said by the AFS to be "an economic opportunity, and a route to self-sufficiency and independence" (2003 BCPC 0279, p.10) for the three bands. As such, the AFS claimed to be "designed to provide a stable, predictable, profitable fishery for the benefit of all Canadians" (2003 BCPC 0279, p.10). In August 2003, when the Program was found by the BC Provincial Court to be inconsistent with the equality provisions in the *Charter*, the federal government "terminated existing pilot sales agreements on the Somas River and did not enter into agreements on the Lower Fraser River" (James, p.8).

William Stanbury makes note of the significant policy direction change that the *Aboriginal Communal Fishing Licence Regulations* (ACFLRs) entailed, and what the

pursuant Pilot Sales Program embodied. He suggests that “[w]hatever the merits of allowing certain designated aboriginal people to fish at times and places not open to Canadians of all races and places of residence holding commercial licences, the attempt to do so reversed over a century of government fisheries policy “ (Stanbury, 2003, p.42). Hitherto, “[t]he *Fisheries Act* was designed on the basis of law and policy that treated the fishery as a public resource, and thus permitted subordinate legislation only on the basis of equality of access to all Canadian citizens” (Stanbury, p.42). According to Stanbury, the principle of equality of access to public resources derived from “a recognition in pre-Confederation times that the *Magna Carta* restrained the Crown from allocating the fishery in tidal waters to an exclusive group<sup>2</sup>” (Stanbury, p.42). Stanbury contends that equality of access “continued to be DFO’s policy with respect to the commercial fishery until 1992 with the introduction of the ACFLRs, which allowed commercial sales out of the food fishery, i.e., at times and places only open to aboriginal persons” (Stanbury, p.42).

Such a major change in government inclination toward commercial fisheries was bound to be controversial. On August 20<sup>th</sup>, 1998, specified by the ACFLRs to be the day on which aboriginals from the three bands had the exclusive right to fish, a group of mainly non-aboriginal commercial fishers “participated in a protest fishery and were charged with fishing at a prohibited time” (2008 SCC 41, p.6). The intent of the protest was “to bring a constitutional challenge to the communal licence” (Dalton, p.1), and as such, the accused (J.M. Kapp *et al.*) argued at their trial that “the communal fishing licence discriminated against them on the basis of race” (2008 SCC 41, p.6), contrary to their rights under Section 15 of the *Canadian Charter of Rights and Freedoms*. Thus, while admitting “committing the *actus reus* charged” (2003 BCPC 0279, p.2), Kapp and his co-charged protesters filed a Notice of Constitutional Question. Among other things, they sought a declaration that the communal fishing licences issued to the Musqueam, Burrard, and Tsawwassen Indian Bands, the ACFLRs, and the AFS “violate Section 15 of the *Charter of Rights and Freedoms* in that they authorize exclusive commercial fishing

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<sup>2</sup> Stanbury’s point in this regard is supported and elaborated upon by the BC Provincial Court (2003 BCPC 0279, s.7) in their “Reasons for Judgement” in the case of *R. v. Kapp et al.*

by an organization whose membership is based on race, a prohibited form of racial discrimination” (2003 BCPC 0279, p.1).

As the subsequent sections in this paper will make clear, both opponents of the Pilot Sales Program, such as Kapp and his fellow appellants, and proponents of the Pilot Sales Program, such as the government of Canada at the time, can be clearly situated in the broader theoretical context presented above. The issue calls into question the perceived discrepancy between sections 15(1) and 15(2) of the *Canadian Charter of Rights and Freedoms*, which serve to balance the individual rights of Canadians against what could be called the group-differentiated rights of Canada’s native people.<sup>3</sup> To explore this balance between two distinct theoretical stances, the case in favour of the Pilot Sales Program will be described in the context of Kymlicka’s theory of minority rights. In the following section, the case against the Program will likewise be outlined in the context of Flanagan’s argument against such rights.<sup>4</sup>

### **The Case in Support of the Pilot Sales Program in its ‘Kymlickian’ Context**

Cases made in support of the establishment of the *Aboriginal Fisheries Strategy* and the resulting Pilot Sales Program frequently justify the group-differentiated nature of these aboriginal fishing rights based upon the ameliorative effects the policy was intended to have on a disadvantaged group, namely, the members of the Burrard, Musqueam, and Tsawwassen Indian Bands. Supportive arguments further ground themselves in the

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<sup>3</sup> Full text of section 15 of the *Canadian Charter of Rights and Freedoms*:

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.

15. (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.

<sup>4</sup> This analysis focuses on the interplay between subsections (1) and (2) of section 15 of the Canadian Charter of Rights and Freedoms. For a detailed analysis of section 25 as it relates to *R v. Kapp*, see Celeste Hutchinson (2008): “Case Comment on *R. v. Kapp*: An Analytical Framework for Section 25 of the Charter,” *McGill Law Journal* v 52, 173-190.

now-familiar suggestion that aboriginals were 'here first,' as well as on the basis of the assumption that the program served to 'right' past injustices against these disadvantaged groups. These positions are put forward by those who believe that one or all of these assertions justify the reality that "Aboriginal and non-Aboriginal peoples in Canada stand in a different legal relationship to the fisheries" (Harris and Millerd, p.104). These arguments appear in government documents and debate, native commentary, as well as in secondary literature and commentary on the issue. Each of these will be seen to contain strong links to Kymlickian theory, and many will be shown to aim at strongly repudiating Flanagan's position in the debate.

#### *The Federal Government Position at the time of Implementation*

The federal government's justification and support for the *Aboriginal Fisheries Strategy* and the Pilot Sales Program has been documented widely throughout AFS publications, in House of Commons debates relating to the issue, and in the Crown's defence of the policy in *R. v. Kapp*. As mentioned previously, AFS pamphlets at the time clearly stated the aim of the policy as being the enhancement of "aboriginal involvement in the commercial fishery" (2008 SCC 41, p.6), which was to be achieved through the strategy as part of a "new social contract including Aboriginals, aimed to increase economic opportunities in Canadian fisheries for Aboriginal people while achieving predictability, stability and enhanced profitability for all participants" (2003 BCPC 0279, p.10). Furthermore, the Supreme Court of Canada found that "the government was hoping to redress the social and economic disadvantage of the targeted bands" (2008 SCC 41, p.32).

The fact that a major basis for the policy centred around the positive effects it would have on a distinctive, disadvantaged group speaks to what could be called the Kymlickian ideals of those who implemented the Program. It amounts to a defence of aboriginal fishing rights as justifiable beyond the equal-access rights spelled out in public resource law. This reveals a theoretical agreement with Kymlicka's insistence on the

need for supplementing the rights of all citizens with group-differentiated rights to achieve a defensible degree of justice for minority cultures.

A very important Kymlickian distinction can be identified in the fact that these fishing rights were not collective rights, although they have been mistakenly interpreted as such by some authors.<sup>5</sup> Rather, the rights allocated to members of the Burrard, Musqueam and Tsawwassen bands to fish were what Kymlicka would call group-differentiated. For Kymlicka, group-differentiated rights are distinct from those allocated on a collective basis, in that they are rights held and exercised on an individual level, even though they are allocated by virtue of that individual's membership in a group. That the Pilot Sales Program would classify as an allocation of a group-differentiated right, as opposed to a collective right, is supported by the findings of the BC Provincial Court, which states that DFO "has drawn a distinction between two groups... the first group includes those Aboriginals eligible for membership by a bloodline connection in one of the three bands, the Musqueam, Burrard, or Tsawwassen bands. Members of this group are therefore eligible to be designated by the bands to fish in the pilot sales fishery" (2003 BCPC 0279, p.35). The Court goes on to clarify that, while "the Department [of Fisheries and Oceans] labels the fishery 'communal'... the individuals designated by the bands to participate are completely on their own and keep all profits for themselves" (2003 BCPC 0279, p.38). This is one of many examples highlighting how confusion can be avoided by employing Kymlicka's conceptual distinctions, something that can allow all involved to 'speak the same language,' whether they agree or not with the principle itself.

Elected government officials of the time, such as Carole-Marie Allard, Parliamentary Secretary to the Minister of Canadian Heritage, further indicated a Kymlickian perspective on the question of rights. During House of Commons debate, Allard expressed support for the Pilot Sales Program on behalf of the Minister of

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<sup>5</sup> For example, see Mark Milke (2008): Incomplete, Illiberal, and Expensive: A Review of 15 Years of Treaty Negotiations in British Columbia and Proposals for Reform. Studies in Aboriginal Policy: The Fraser Institute, p.43

Fisheries and Oceans, and described the fishing licences as giving aboriginal people “access to fisheries for food, social and ceremonial purposes as well as access to commercial fisheries” (Allard, House of Commons Debates, Oct. 6<sup>th</sup>, 2003). This stance built on the government’s commitment to native fishing rights by appearing to implicitly employ Kymlicka’s notion of a societal culture. It is worth recalling the precise definition of this concept, which emphasizes the need to provide minorities with access to “meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres” (Kymlicka, p.76). The social, ceremonial, and in this case economic aspects of fisheries connected to the ‘societal culture’ of aboriginal people reveal a clear Kymlickian element in the intentions of the federal government at the time of the Pilot Sales Program.

Allard noted that the DFO was working “with British Columbia's first nations to arrive at agreements that will be in the interest of those aboriginal communities who want to reap the economic advantages of fishing, and that will bring more certainty and stability to all aboriginal and non aboriginal participants” (Allard, House of Commons Debates, Oct. 6<sup>th</sup>, 2003). Again, a commitment on the part of government to the ameliorative aspects of the Pilot Sales Program speaks to the view that there is a need to supplement minority rights by providing the economic element to societal culture required for the well-being of distinctive minorities.

The argument pertaining to prior occupation as grounds for differentiated rights was mentioned by Parliamentary Secretary Allard as well, again during House debate. She suggested that the group-differentiated right awarded to aboriginals in the form of the ACFLRs was the product of government’s desire for “aboriginal peoples, the first inhabitants of this country, to have fair economic opportunities” (Allard, House of Commons Debates, Oct. 6<sup>th</sup>, 2003). This remark can similarly be situated in the Kymlickian context in the two senses that there is a special status deserved by those who inhabited the land first, and that there is an onus on the majority to provide fair opportunities on that basis. This can be contrasted with the emphasis on equal access



that previous fisheries law had dictated. This aspect of the government's position will be addressed in more detail in a later section dealing with judicial outcomes, in terms of what the Supreme Court of Canada decision refers to as 'substantive equality' as opposed to 'formal equality.'

### *Secondary Commentary in Favour of the Program*

Secondary commentary in support of the Pilot Sales Program appears to use much of the underlying Kymlickian theory evident in the language used by government officials and documents. This is so with aspects of native discourse on the issue as well. A press release from the First Nations Summit supporting the Supreme Court of Canada's defence of the Pilot Sales Program proposed that "[i]n giving his decision, the Chief Justice said that aboriginal peoples are disadvantaged in Canada and have been subject to historical inequality and prejudice. The Aboriginal Fishing Strategy of DFO has provided an economic opportunity to First Nations" (News Release, June 27, 2008). The fact that the Program provided supplemental rights to a disadvantaged minority group is clearly of importance to the native people represented by this news release.

The supporting notion that the Program is valuable in that it works toward making amends for past injustices is furthered by Harris and Millerd. They point out that their criticism of aboriginal fishing rights in general is based in part on their view that "[t]he food fishery is a legal construct laden with a particular colonial history of dispossession" (Harris and Millerd, p.103). They argue that the fishery "corresponds with a history in which Aboriginal peoples used and managed the fisheries broadly, unencumbered by the characterizations of a colonial state" (Harris and Millerd, p.103). For these reasons, they conclude, against Flanagan's theoretical stance and in agreement with Kymlicka, that "Aboriginal and non-Aboriginal peoples in Canada stand in a different legal relationship to the fisheries" (Harris and Millerd, p.104). They also make this point in their discussion of prior occupancy. To Harris and Millerd, this is an important factor in the debate about native rights, in that proper fisheries management requires the "balancing of the interests of those who came before with those who came

later” (Harris and Millerd, p.102). Flanagan, of course, would counter with his above-referenced argument that “[t]o differentiate the rights of earlier and later immigrants is a form of racism” (Flanagan, p. 6). Thus, a clear conceptual divide is again apparent between those who see prior occupancy as relevant, and those who do not.

The views expressed in the news release, and by Harris and Millerd, evidence an apparent theoretical agreement with Kymlicka. At the same time, they also expose a fundamental disagreement with the theoretical logic of Tom Flanagan. Flanagan identifies this very line of thinking when he writes that “the attainment of land and natural resources [and] bigger budgetary appropriations [are seen as] entitlements – things that Canada owes aboriginal people because they were here first” (Flanagan, p.195). However, rejecting the News Release’s basis, he says “the aboriginal orthodoxy wrongly encourages aboriginal people to see others... as having caused their misfortune and, therefore, as holding the key to their improvement. Most aboriginal advocates define ‘doing better’ as succeeding not by their own efforts, but by getting something from the oppressors” (Flanagan, p.195). This leads him to his previously mentioned conclusion that “campaigns to repair injustice, even if the injustices are real, do not produce independence and prosperity” (Flanagan, p.195). Thus, a clear line in the sand is drawn, one that appears time and again in discourse about native fishing rights. We will see in a later section that Flanagan’s views in this regard support a popular perspective amongst those who oppose such rights.

Kymlicka’s notion of societal culture, while not mentioned specifically in the secondary literature reviewed here, is nevertheless another important element in opinions that express support for the Program. For example, Michael Murphy appears to support the notion of societal culture as an element of true autonomy. This can be seen in his assertion that when aboriginals make demands for self-determination, they are not based on what some might identify as “a kind of racist special pleading or a demand for extra rights that are denied to non-Aboriginal peoples” (Murphy, p.267). Rather, such demands are based on the aboriginals’ “equal right to exercise choices and make decisions that for far too long have been the exclusive privilege of non-Aboriginal

peoples through their control of the modern state” (Murphy, p.267). This raises the related Kymlickian points about the dangers of majoritarian decision-making, which leave minorities in a vulnerable position, while also underscoring the need for minorities not just to make choices, but to be able to make meaningful choices, which requires something like Kymlicka’s notion of societal culture. Again, identifying the underlying conceptual consistencies (or even inconsistencies) allows us to square seemingly unrelated policy stances.

A further consistency between Kymlickian theory and secondary commentary in support of the Program is apparent in Sophia Moreau’s suggestion that the group-differentiated rights promoted through the Pilot Sales Program ought not to be characterized as illiberal, something that Kymlicka argues quite forcefully in Multicultural Citizenship. Moreau argues that the Supreme Court of Canada’s decision in favour of the Program provides a reminder that “ameliorative programs targeting disadvantaged groups are often expressions of equality rather than departures from it” (Moreau, p.283). This point is central to Kymlicka’s theory, and is frequently opposed by adherents to Flanagan’s school of thought. The very name of Mark Milke’s report for the Fraser Institute on related native policies, “Incomplete, Illiberal, and Expensive: A Review of 15 Years of Treaty Negotiations in British Columbia and Proposals for Reform,” underscores the extent to which different rights for distinctive groups are viewed by many as inconsistent with the ideals of liberalism. By speaking in the conceptual terminology provided by the theoretical literature provided by Kymlicka and Flanagan, it is possible to more clearly assess the validity of claims posited by the opposing sides of the debate, whether the conclusions reached by commentators are seen as correct or not.

### **The Case Against the Pilot Sales Program in its ‘Flanaganian’ Context**

Those who argue against the Pilot Sales Program, and against the idea of group-differentiated rights as a whole, also base their position on important underlying theoretical principles. However, unlike supporters of special fishing rights for

aboriginals, those who oppose such rights implicitly reject Kymlicka's theory of minority rights in favour of Tom Flanagan's doctrine of individual rights. Arguments based on this opposing theoretical foundation give prominence to the fact that such programs by their very nature allow one group to benefit while another group is excluded from these benefits. This is seen by opponents as particularly offensive when the basis of that distinction rests on unalterable differences between two groups, such as, in this case, race. Additionally, opponents tend to focus upon the negative effects the policy has on those excluded from the benefits, not on whether it provides amelioration of disadvantage to the included group. Assertions like these appear throughout the case made by Kapp and his co-accused in their case against the Pilot Sales Program, as well as in House of Commons commentary in opposition to group-differentiated fishing rights. These arguments additionally appear in secondary literature aligned against native fishing rights. These sources will be discussed here to more clearly identify the key characteristics of Flanagan's theory, and the abundant criticisms of policies consistent with Kymlicka's theoretical stance.

*The Commercial Fishers' Position as Represented by J.M. Kapp et al.*

The exclusivity of the Pilot Sales Program was claimed by opponents, especially the commercial fishers who were most affected, to be illegal in that it created "race-based commercial fishing licences for selected aboriginal groups" (Stanbury, 2003, p. 26). These protesters argued in court that "the proceedings should be stayed on the grounds that the licences discriminated against them on the basis of race: it drew a race-based distinction and thereby demeaned their dignity, violating their equality rights under section 15(1)" (Moreau, 2008, p.286). This focus on racial discrimination is certainly among the most prevalent arguments against the Pilot Sales Program, and has very strong ties to aspects of Flanagan's individual rights-based theory, especially his assertion that "to differentiate the rights of earlier and later immigrants is a form of racism" (Flanagan, p.6).

As one of the appellants, Stephen Wilson, stated in Provincial Court, his objection to the Program stemmed from his disbelief that the government “could create a fishery based on race and take another man’s livelihood away” (2003 BCPC 0279, p.23). Another of the accused, Donna Sonnenberg, stated that she did not understand “why the Indians should have their own special fishery,” adding that as a result, she felt like “half a Canadian” (2003 BCPC 0279, p.20). A third appellant, Michael Forrest, suggested that those left out of the fishery during the Pilot Sales Program were left on the beach “watching other people fish commercially, [a right] that was based on their ethnic origin” (2003 BCPC 0279, p.23). The Flanaganian position that the group-differentiated fishing rights awarded to the three Indian bands were racist was further posited by John Carpay, representing the Japanese-Canadian fishers in the case of *R. v. Kapp*. He submitted to the Supreme Court that it is “inherently discriminatory to be treated as a member of a racial class” (Milke, p.153).

An additional theme put forward by Kapp and his co-accused centred on the belief that before the implementation of the Pilot Sales Program, the fishing community had enjoyed an undivided and harmonious environment amongst all fishers, regardless of race or group membership. The opinions expressed in court by the commercial fishers and their representatives seem strongly linked to the theoretical language used by Tom Flanagan, particularly those elements that referred to the divisive nature of policies based on the race of its subjects. As Flanagan puts it, when we encourage aboriginal people to “withdraw into themselves, into their own ‘First Nations,’ under their own ‘self-government,’ on their own ‘traditional lands,’ within their own ‘aboriginal economies...” (Flanagan, p.195), we are “embarking in the wrong direction” (Flanagan, p.195).

In this vein, Carpay pointed out during Court proceedings that “the commercial fishery has long been ethnically mixed and thus government intervention which divided it along bloodline was unnecessary [and] divisive” (Milke, p.153). This stance is supported by many of the accused in *R. v. Kapp*. Michael Forrest described the previous fisheries situation as one in which fishers of all races, including aboriginals, would help

and share with each other (2003 BCPC 0279, p.24). The Pilot Sales Program, however, negatively affected the previously good relationship, where instead of the typical cooperation and mutual support, there was now “basically zero communication” between aboriginal and non-aboriginal fishers (2003 BCPC 0279, p.25). This sentiment is corroborated by Lawrence Salmi, a Métis status card-holder and another of the appellants in *R. v. Kapp*. Salmi felt that “the pilot sales program had caused a rift between the Native community and the rest of society” (2003 BCPC 0279, p.25).

The position that the Pilot Sales Program caused a divide in the fishing community appears repeatedly in the testimony by the accused. A situation of what Debra Logan, another of the accused, called “remarkable tolerance” was replaced by circumstances in which “[t]he whole relationship between Indian fishermen and non-Indian fishermen spiralled downwards into in some cases outright sabotage, and in other cases just... distaste for what the sight of an Indian in a fishing fleet represented after that date” (2003 BCPC 0279, p.26). These arguments are also comparable to the theoretical stance taken by Flanagan that “[w]hen government sorts people into different categories with different legal rights, especially when those categories are based on immutable characteristics such as race and sex, it interferes with social processes based on free association” (Flanagan, p.9). While Flanagan is referring primarily to relations among individuals in the marketplace, the sentiment in the defendants’ arguments is comparable. While notably discussing the social process of workplace interaction rather than marketplace relations, similar logic is used to explain why free association was adversely impacted by government-imposed categories.

Debra Logan, interestingly enough, was of Indian ancestry and “would have been able to claim status as a Sto:lo and participate in the Sto:lo pilot sales fishery, but she chose not to” (2009 BCPC 0279, p.27), saying that she did not “need government’s help” and that she was “quite capable of functioning as a Canadian without special help” (2003 BCPC 0279, p.27). This can be contrasted with the Kymlickian notion of a need to put groups on an equal footing in order for them to make meaningful choices. Instead, she takes a more Flanaganian stance, in that she sees her rights as a Canadian, not

supplemented with any additional rights based on her group-distinctiveness, as sufficient. As she puts it quite clearly, “I just don’t think that differentiating in terms of privilege in this country is acceptable. I don’t think it’s fair to Canadians. I think it is even less fair to Indians. It’s created a culture where there are Indians out there that are convinced that they really are disadvantaged and less capable” (2003 BCPC 0279, p.27). This position follows in the footsteps of Flanagan’s theory, whether or not Logan was aware of the theoretical underpinnings involved. Arguing that economic participation and integration will achieve more than getting ‘hand-outs’ from the so-called ‘Eurocanadian’ oppressors, Flanagan quotes Thomas Sowell’s commentary on the United States, saying “emphasis on promoting economic advancement has produced far more progress than attempts to redress past wrongs, even when those historic wrongs have been obvious, massive, and indisputable” (Sowell, quoted by Flanagan, p.195). To exemplify his point, Flanagan cites the cases of Japanese-Canadians and Jewish Canadians as groups that have achieved prosperity and success in Canada through individual effort, despite “a long history of racial discrimination and exclusion” (Flanagan, p.195). The normative stance that individual effort serves as the mortar of success is in this sense put forward by Logan in her opposition to the notion that success can be achieved by ‘special’ treatment of members of certain groups.

#### *Secondary Commentary Against the Program*

The arguments made by Kapp and his fellow protesters at their trial are echoed throughout secondary commentary. Indeed, elected politicians at the federal level who opposed the Pilot Sales Program did so on the grounds that they believed it to be a racist and discriminatory policy. With regard to the *Aboriginal Fisheries Strategy*, Jim Pankiw, Canadian Alliance MP for Saskatoon-Humboldt, stated during House of Commons debate his view that “[i]t is not possible to discriminate in favour of somebody on the basis of their skin colour, race or ancestry without simultaneously and unfairly discriminating against somebody else because of their skin colour, race or ancestry” (Pankiw, House of Commons Debates, Oct. 6<sup>th</sup>, 2003). He claimed that the

Strategy was a “discriminatory, state-sanctioned, segregationist policy which most Canadians find offensive, demeaning and discriminatory” (Pankiw, House of Commons Debates, Oct. 6<sup>th</sup>, 2003).

The perspective expressed by Pankiw is supported by other commentators, such as William Stanbury. In what appears to be agreement with Kapp and his fellow protesters, Stanbury argues that the ACFLRs “flew in the face of the common law, which establishes a public (i.e., non-exclusive) right of fishery in all tidal waters and arguably, in all non-tidal waters insofar as they are navigable” (Stanbury, p.42). He continues in this vein, writing that “[f]or almost a decade the federal government has been able to use a set of illegal regulations to create race-based commercial fishing licences for selected aboriginal groups” (Stanbury, p.26). Stanbury further contends that critics of the policy “provide cogent arguments that the ACFLRs create a race- or ethnicity-based fishery. Only Natives can qualify for these special licences” (Stanbury, p.41). This view is also held by Milke, who refers repeatedly to the “racial divisions” (Milke, p.362) that the Supreme Court of Canada decision in favour of the Pilot Sales Program served to permit.

The arguments made by Pankiw, Stanbury, and Milke provide excellent examples of a commonly employed line of Flanaganian thinking with regard to the issue of native fishing rights. As has been shown earlier, Flanagan takes the position that the establishment of aboriginal nations “as privileged political communities with membership defined by race and passed on through descent” is at odds with liberal democracy “because it makes race the constitutive factor of the political order” (Flanagan, p.194). Flanagan expresses a concern that a group-differentiated right such as that of native self-government, for example, “would redefine Canada as an association of racial communities rather than a polity whose members are individual human beings” (Flanagan, p. 194). This stance is at variance with Kymlicka’s claims to the contrary, when he argues that when it is recognized that group-based disadvantages need to be ameliorated with group-differentiated rights, it is not necessary to reject the rights, purposes, needs and autonomy of individuals. The contrasting claims in this regard will be evaluated in the concluding chapter.



John Carpay provides some interesting secondary commentary as well. In 2003, Carpay was the Canadian Constitution Foundation Director, an organization that describes itself as aiming “to defend the individual freedoms, economic liberty and equality before the law of every Canadian” (Canadian Constitution Foundation website). In a column featured in the National Post, he refers to the Supreme Court of Canada decision in favour of the Pilot Sales Program being a “stamp of approval to racially segregated commercial fisheries in British Columbia” (Carpay, National Post, July 22, 2008). Repeating comments he made in defence of the Japanese-Canadian fishers in *R. v. Kapp*, he suggests that “[t]he program brought an abrupt end to several decades of racial harmony which had been enjoyed by one of the most ethnically diverse workplaces in Canada” (Carpay, National Post, July 22, 2008). Carpay’s assertions are echoed in part by Gordon Gibson, who refers to the Pilot Sales Program as one in which “ordinary commercial fishers have been sacrificed” as they “sit on shore watching Indians taking the only commercial catch available” (Gibson, 2009, p.51). He describes the Program as entailing “discrimination in the fishery on the basis of race” (Gibson, p.52). Again, strong theoretical consistencies with Flanagan are displayed, first in a clear disagreement with race-based rights, and secondly in the sense that such rights can be seen to be divisive of the broader society.

These are just a few examples of the many sources of secondary commentary on the question of native rights. Although brief in summary, it is hoped that with some aspects of Pilot Sales Program dispute displayed here, discourse on this important question can be better understood in the context of their normative foundations. Will Kymlicka’s and Tom Flanagan’s conceptual and theoretical importance to the issue of fishing rights, and the broader rights of aboriginals more generally, will be made additionally clear in the next section, which places the language and decisions in the BC Provincial Court decision and the Supreme Court of Canada decision in terms of their respective theoretical underpinnings.

## Chapter 5: Outcome: Judicial Commentary and Decisions in Context

The clash between the rights of individual Canadians, balanced against the question of the need or appropriateness of group-differentiated rights of aboriginals, was highlighted in the case arising from protests against the Pilot Sales Program. This came first in the 2003 Provincial Court of British Columbia decision and then in the 2008 Supreme Court of Canada ruling in the case of *R. v. Kapp*. These rulings are particularly interesting in the theoretical context, as each of them interprets the *Canadian Charter of Rights and Freedoms* differently on matters of individual rights versus group-differentiated rights. The following sections consider the two rulings from the perspectives put forward by Will Kymlicka and Tom Flanagan, exploring the linkages first between Flanagan's argument and BC Provincial Court ruling, and then between Kymlicka's position and the Supreme Court of Canada decision.

### **The BC Provincial Court Decision as an Argument Against Group-Differentiated Rights**

Claims by protesters that the Pilot Sales Program was unconstitutional were upheld by the Provincial Court, following the judge's ruling that "the pilot sales fishery is offensive as being analogous to racial discrimination" (*R. v. Kapp*, 2003, s.234). The decision points out that "[r]acial discrimination in our society takes on many guises" and notes that "[t]he Aboriginal people in Canada have obviously been the victims of racial dynamics and discrimination that have disadvantaged them in many ways" (2003 BCPC 0279, p.43). While conceding that "[a]meliorative programs are necessary to remedy this" the Court cautions that "they must be carefully crafted to balance the interests of all members of society" (2003 BCPC 0279, p.43). With this in mind, the ruling takes the position that "[t]he pilot sales program has not met this standard; the program was misguided in conception and has been insensitively implemented and maintained" (2003 BCPC 0279, p.43). In its final comments, the judicial decision draws parallels between the Pilot Sales Program and other "shameful examples of legislated racial discrimination" such as laws barring Orientals from working in coal mines and on the

railways in the early 1900's, and laws excluding Japanese-Canadians from the commercial fisheries in the 1920's (2003 BCPC 0279, p.43). The judge concludes that, after such a shameful history, "our governments should be much more sympathetic to these issues" and "[w]hen racial discrimination or a semblance of it is identified, any continuance of it should not be permitted" (2003 BCPC 0279, p.43).

These findings by the BC Provincial Court are consistent in many ways with Flanagan's theory in favour of individual rights. The most obvious parallel is the objection to the policy on the basis of its discriminatory nature on the basis of race. As Flanagan has argued, group-differentiated rights in general are at odds with liberal democracy "because it makes race the constitutive factor of the political order" (Flanagan, p.194). A further, broader comparison is the demonstrated intent of the court to view the issue in the context of the rights of Canadians as a whole, in the sense that not only are the needs of the aboriginal groups considered, but that the effect of these rights on the excluded population weigh heavily in the Court's determination that the Pilot Sales Program was unconstitutional.

In this way and others, it is clear that the Provincial Court based its decision largely on the effect the policy had on non-Indians, as opposed to the ameliorative effects the Program may have had on the native people themselves. In reading the 'Reasons for Judgement,' section of the Court decision, it is apparent that the evidence provided by the excluded commercial fishers was given significant weight, while notions such as prior occupancy and historical grievances are dealt with marginally, if at all. For example, the section titled 'Legal History and Context' focuses upon the equality of access to fisheries guaranteed by the *Magna Carta* and the Constitution Act of 1867, and previous judgements ruling discrimination against ethnic groups as unconstitutional (2003 BCPC 0279, p.3-7). This section notably leaves out any significant discussion of pre-contact native fisheries, something that entails much of the 'Factual and Judicial' section of the Supreme Court of Canada ruling. This can be interpreted in Flanagan's theoretical context, in the sense that prior occupancy, a major basis of native rights to

some, is not identified by the Provincial Court as a fact highly relevant to the allocation of fishing rights on a group-differentiated basis.

It must be acknowledged, though, that the ruling does make mention of the “disadvantaged circumstances of Aboriginals generally in Canadian society” (2003 BCPC, p.37). However, and importantly, it is determined by the court that the fishing rights awarded by the Pilot Sales Program did not result in an amelioration of conditions because “the individuals designated by the bands to participate are completely on their own and keep all the profits for themselves” with the money earned being spent only “on personal items” (2003 BCPC 0279, p.38). The Court noted that “there was no suggestion anywhere in the evidence that any of the money from the pilot sales fishery went to any type of program intended to deal with any of the real disadvantages actually experienced by the bands” (2003 BCPC 0279, p.38). These observations lead to the judgement that “there is no rational connection between the preferential treatment given these bands in the fishery, and these disadvantages. The program confers an unjustifiable benefit on individual members of the bands, at the emotional and financial expense of the commercial fishers. It is therefore grossly unfair” (2003 BCPC 0279, p.38).

These findings by the Provincial Court have a high level of significance in the theoretical context. The fact that the group-based right is exercised by the individual is precisely what Kymlicka argues makes such rights consistent with liberal democracy. Yet it is specifically this point that is the cause of such opposition to the policy by the Provincial Court decision. It seems that had the rights been allocated on a group basis and the rewards shared collectively, this may have lessened the degree to which the Court found the policy in violation of the *Charter*. However, this would also have lessened the degree to which the right could be seen by those who adhere to Kymlicka’s theory as consistent with liberalism. This is an interesting contrast, and one that can only be properly considered in a normative context. Without a theoretical understanding of the issue-specific debate, this dichotomy would be difficult to perceive.

## **The Supreme Court Decision as an Argument in Support of Group-Differentiated Rights**

Both the BC Provincial Court and the Supreme Court of Canada judgements acknowledge that the Pilot Sales Program was a form of discrimination on the basis of race (2003 BCPC 0279, p.43; 2008 SCC 41, p.9). However, the respective interpretations of whether this policy was constitutionally defensible depended on how each Court interpreted the interplay between s. 15(1) and s. 15(2) of the *Charter*. The Supreme Court aptly summarized the task as determining whether the communal fishing licence being discriminatory on the basis of race was justified by the stated purpose of the program, which was to ameliorate the conditions of a disadvantaged group (2008 SCC 41, p.25).

In terms of constitutional interpretation, the Court itself saw its role as the consideration of “whether 15(2) is capable of operating independently of s. 15(1) to protect ameliorative programs from claims of discrimination” (2008 SCC 41, p.18). It 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” (2008 SCC 41, p.18). The implications of the Supreme court ruling have been called far reaching in this sense, in that “a new test has been created that gives interpretive meaning to section 15(2) in advancing *substantive* equality for disadvantaged groups, notably Aboriginal peoples in this instance” (Dalton, p.3).

Importantly, the Supreme Court decision does not deny that 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” (2008 SCC 41, p.9). Furthermore, the Court identifies the very heart of the debate between Kymlicka and Flanagan, when it underscores the fact that “[t]here is a real conflict... 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” (2008 SCC 41, p.9).

Another significant Kymlickian link can be seen in the Supreme Court’s statement that “[p]rior to European contact, aboriginal groups... 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” (2008 SCC 41, p.19). The notion of prior occupancy as a foundation for modern fishing rights can be compared to Kymlicka’s theory of the special status of national minorities, and contrasted with Flanagan’s dismissal of this fact as nothing more than a wave of immigration and therefore not a basis for differential treatment. As has been shown, Flanagan would view rights awarded on that basis alone as “a form of racism” (Flanagan, p. 6). This aspect of the Supreme Court judgement ought to be considered in light of the Provincial Court’s near disregard for the same fact, showing the two court decisions to be theoretically classifiable as Kymlickian and Flanaganian, respectively.

The conclusion that follows the Supreme Court’s opinion about the ‘here first’ argument is of clear theoretical importance, in that the judgement goes on to state that the “modern-day right to fish for food, social and ceremonial purposes... 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” (2008 SCC 41, p.19). This statement, too, has strong undertones of Kymlicka’s theory, with the distinction allowing the policy to fall into the category of a group-differentiated right in that it is awarded on the basis of group-membership, but practiced on an individual basis.

Following this line of thought, an apparent belief in the need for group-differentiated rights, as opposed to the belief that individual rights are enough, is revealed throughout the Supreme Court’s analysis. This is clear in the Court’s strong advocacy of the related concept of ‘substantive equality,’ which the Court described in contrast to formal equality: “equality does not necessarily mean identical treatment and that the formal ‘like treatment’ model of discrimination may in fact produce inequality” (2003 SCC 41, p.21). This can be compared to the Kymlickian stance that simply

awarding the same rights to all individuals is not enough in cases when groups do not have equal access to the societal culture that facilitates choices that individual rights are meant to provide. According to Kymlicka, it is only the provision of autonomy for distinctive groups that can achieve this; in this way, substantive equality can be seen as consistent with Kymlicka's notion of autonomy. As such, the Court's emphasis on substantive equality can be seen as a nod to the need for rights that provide choices for individuals that facilitate enhanced autonomy, but additionally for these choices to be made meaningful to individuals across all societal groups.

The Court's recognition of the concepts posited by Kymlicka leads to its determination that "[s]ections 15(1) and 15(2) work together to promote the vision of substantive equality that underlies s. 15 as a whole," and that while 15(1) combats discrimination in one way, 15(2) preserves the right of governments to "combat discrimination by developing programs aimed at helping disadvantaged groups improve their situation" (2008 SCC 41, p.22). This conclusion is in agreement with much of what Kymlicka's theory aims to advance, especially in that the decision can be seen as speaking to the Kymlickian idea that "minority rights cannot be subsumed under the category of human rights" (Kymlicka, p.4).

Importantly, an additional and very direct link between the Supreme Court of Canada ruling and Kymlicka's theory of minority rights must be underscored here as well. The Supreme Court decision remarks at one point that "it is not at all obvious... that it is necessary to constrain the individual rights of Aboriginals in order to recognize collective rights under s. 25" (2008 SCC 41, p.44). The Court drew a direct connection to Kymlicka's theory by following this point with a reference to page 35 of Multicultural Citizenship, where Kymlicka states that "[i]t is natural to assume that collective rights are rights exercised by collectivities, as opposed to rights exercised by individuals, and that the former contradict with the latter... [but] these assumptions do not apply to many forms of group-differentiated citizenship" (Kymlicka, p.35). Thus, the notion that group-differentiated rights need not contradict liberalism's commitment to the rights of individuals is central to the Supreme Court decision, and the Court draws from Kymlicka

himself to make this point clear. Likewise, a fundamental disagreement with Flanagan is apparent, in that this stance is incompatible with his theory of individual rights.

Ultimately, the Supreme Court's findings serve to "afford greater protection to Aboriginal rights and reconciliation when balanced against the asserted equality rights of the appellants" (Dalton, p. 3). By supporting the theoretically-classified group-differentiated rights specified by the Pilot Sales Program, the Supreme Court of Canada's ruling reveals a Kymlickian approach to rights, in that traditional human rights are supplemented by an acknowledgment of the need for some type of minority rights. The fact that these rights are allocated based on group membership, but exercised by individuals is one important aspect. It is also significant that these rights are seen as necessary to increase substantive equality, which is, according to Kymlicka, required in turn to achieve a higher level of autonomy for members of national minorities.

This normative chain has one more step worth mentioning with regard to the Court's interpretation of the Charter, specifically, that substantive equality and the autonomy it is intended to generate is needed to achieve a higher degree of justice in the relations between the dominant cultural majority and the national native minority. This can be seen as a denial of Flanagan's premise that seeking greater justice through more substantive equality is unlikely to be successful. These are some of the more significant of the many linkages between the Supreme Court of Canada judgement in the case of *R. v. Kapp*, and they allow us to view these normative assumptions and the issue as a whole in their broader theoretical context.



## **Chapter 6: Conclusion and Lessons for the Assessment of Policy Options**

Whatever one's opinion on the controversial issue of the Pilot Sales Program, understanding the conceptual language and theoretical underpinnings of the debate allows a broadened consideration of what the opposing sides are actually trying to say. Will Kymlicka's Multicultural Citizenship and Tom Flanagan's First Nations? Second Thoughts each provide invaluable contributions to clarifying the normative dimensions of a confused, frustrating, and difficult issue. Kymlicka's value is not only in the theoretical stance he takes, but also in his successful effort to clearly conceptualize the question of group rights and the rights of others as a whole. Flanagan's work is likewise of fundamental import, in his commitment to expressing the converse side of the question of rights, and in his application of this rights theory to the native situation. Ultimately, neither position can be discarded, because each sheds a necessary light on the theoretical underpinnings of the current, more practically defined controversy over native fishing rights. This issue has largely been debated in the absence of valuable conceptual definition and normative identification of ideas. However, while both Multicultural Citizenship and First Nations? Second Thoughts are of significant theoretical worth, it is not until the issue is considered from a practical standpoint that each theory may be seen to benefit from its application to a real issue.

### *Practical Problems with the Program*

"It was a wise man who said that there is no greater inequality than the equal treatment of unequals" – J. Frankfurter in *Dennis v. United States*, (1950), 339 U.S. 162, s. 184.

This phrase captures the essence of the theoretical debate between Will Kymlicka and Tom Flanagan, and sides quite clearly with the Kymlickian position. In the practical case of the Pilot Sales Program, however, the aspect of this phrase that remains open to question is the notion that the aboriginals participating in the general commercial fishery are indeed disadvantaged and therefore deserving of distinctive rights in the Kymlickian sense. A look at the 2003 report prepared for the Ministry of Agriculture, Food & Fisheries entitled "Native Participation in British Columbia

Commercial Fisheries” provides some important information in this regard. The report states that “32.2 percent of all commercial salmon licences are currently either held or operated by Natives” (James, 2003, p.5). In terms of employment in the industry, natives make up about 31% of those in the commercial fishery (James, p.26). Of course, licences owned and employment held does not necessarily give an accurate assessment of the value of the fish aboriginals typically catch. To give an idea, from 1999 to 2003, the total landed value of salmon caught by aboriginals as a percent of the value of the catch across all commercial fishers amounted to 41.7% (James, p.12). To put this in perspective, “[a]ccording to the 2001 Census, the number of people identifying themselves as aboriginal in BC was 170,025 or 4.4 percent of the province’s overall population” (James, p.26). As such, it is indubitable that “Aboriginals have enjoyed great success in B.C.’s commercial fishery” (Carpay, p.1).

What the government and the Supreme Court appear to ignore in their attempt to right some kind of disadvantage is the disproportionate participation of aboriginals in the general commercial fishery today, in which they enjoy economic success. In the end, from 1999-2002, the Pilot Sales Program only amounted to an average of 1.2% of the aboriginal catch value (James, p.12). This is a very small achievement when considered against the impact of the Program on those excluded, who felt that their very rights as Canadians were at stake. The fact that native people in the BC salmon fishery are not only not disadvantaged, but in fact enjoy disproportionate success, appears to have been seen as irrelevant by the authors of the policy. In the undertaking of this Program, not only have commercial fishers generally been treated unfairly, they have been treated so in the name of a policy that was not only unnecessary, but relatively unsuccessful when looked at in the context of the much larger stake natives already have in the fishery as a whole. The standing of a minority group in the field a policy is directed at ought to be a major consideration in determining whether group rights are necessary in certain situations, whether Kymlickian theory is accepted or not.

As such, if a Canadian government proposes group-differentiated rights, especially when these rights have an inarguable economic and social psychological

effect on those who are excluded from these rights, it ought to be mandatory for the government proposing the application of this group-differentiated right to offer a careful proof of the policy-relevant disadvantages of the minority group whose members will benefit from the application of this right. These proven needs ought to be specifically related to the field in which supplementary rights are to apply (e.g. the commercial fishery). If such a need were established, the resulting policy cannot be without bounds. It would be far more justifiable to adopt some criteria limiting the scope of the rights allocated, so as to ensure that optimal balance between individual rights and the rights of minorities is achieved. For example, three criteria could be prescribed, having been previously suggested for the governance of the use of subsection 15(2), in the judgement in the case of *Re Schafer et al and Attorney General of Canada et al (1996)*, s.532. These criteria are:

- 1) There must be a rational connection between the preferential treatment and the disadvantage.
- 2) There must be a real nexus between the object of the program as declared by government and its form and implementation.
- 3) The burden of proof under this subsection rests on the party seeking to invoke this subsection to demonstrate its application.

In addition to the recommendation that the three criteria above be adopted, the findings of the research presented here suggest that a fourth criterion ought to be proposed. Such a recommendation could be written as follows:

- 4) Policymakers must conduct practical and careful 'needs tests' and 'harm tests' prior to enacting group-differentiated rights.

This fourth suggestion amounts to a need for government to ensure that any remedies aimed at ameliorating group disadvantage are legislated directly, and that these

remedies are clearly relevant to the enhancement of the target community's societal culture and the group members' eventual autonomy. Significantly, it further recommends that government's 'harm tests' must ensure that the negative effects of group-differentiated rights on those who are excluded from such rights must not outweigh the benefits provided to the minority group. This criterion would allow for some degree of practical reconciliation between the theoretical positions outlined by Kymlicka and Flanagan. This could be achieved in the sense that the latter's concern with regard to the rights of non-minorities, as well as his emphasis on the need for the retention of a strict application of the rule of law, would be indirectly be at least partially addressed when the needs and herms tests are rigorously applied.

In principle, the application of harm tests, as well as the clarification of the needs test, does not eliminate the possibility of group-differentiated rights being applied in future situations. Rather, the recommendations simply, and crucially, raise the bar in terms of which cases warrant such measures. Taken together, these criteria provide a kind of utilitarian *modus vivendi* for a partial reconciliation in reality, even if the theories of Flanagan and Kymlicka themselves are not fully reconciled.

Had these criteria been applied to the case of the Pilot Sales Program, there is some likelihood that it would never have been implemented. Even the Supreme Court Decision in favour of the Program does not defend the Policy on the basis that it successfully ameliorated the conditions of a disadvantaged group, but rather that it was *intended* to do so. This standard is not rigorous enough, and enables a Canadian government to create programs that not only have negative effects on the excluded group, but also may achieve little or nothing for the included group as a whole. When fundamental equality rights of Canadians are at stake, especially in cases where it is not immediately clear that a policy will meet its objectives, the policy should at the very least have a reasonable chance of success.

The failure to meet these minimum criteria for appropriate group-differentiated right applications resulted in characterizations of the Pilot Sales Program as "ineffective and counterproductive [and] apply[ing] to a group that doesn't need it" (Carpay, p.1).

Carpay's opinion that the program was ineffective and unnecessary is validated by the very small (1.2%) increase in the value of the commercial catch that the Pilot Sales Program achieved. This small increase in the overall catch was insignificant when viewed in light of the significant 40% of the commercial salmon fishery value the aboriginals would have continued to achieve in the absence of the policy. That it was socially and economically counterproductive was revealed in the resulting reduction in cooperation between the included and excluded groups after the policy was implemented. Future 'ameliorative' programs may well be better accepted if the four criteria mentioned above are adopted.

#### *Practical Problems with the Theory*

If we can accept that the Pilot Sales Program is an example of a group-differentiated right consistent with Kymlicka's theory, then it follows that both his theory, and the comparable subsection 15(2) of the Charter, have some weaknesses. The lack of specificity is one. Applications of Kymlicka's theory of minority rights must ensure that the ameliorative intent of group-differentiated rights has a reasonable chance of being achieved, and that they also take into account the rights of those who are excluded from the stipulated benefits, as suggested by the addition of the fourth criterion above.

The general intent of a policy may well be a Kymlickian ideal consistent with achieving enhanced levels of autonomy for members of minority groups. However, the broadness of the notion of autonomy, and of the requisite facilitating notion of societal culture, makes it difficult to measure whether or not a particular policy has a reasonable chance of achieving its intended purpose. The answer to the measurement problem may be to look at the intent of a policy in a more narrow sense. In the case of native fishing rights, a policy could be measured in terms of the extent to which it enables group members to make meaningful choices in order to gain autonomy through societal culture. However, a much more basic measure could be proposed for such policies. Because the Pilot Sales Program is of an economic nature, the potential benefits of the

policy could be assessed in advance of implementation in terms of the material difference it would be likely to make in the overall lives of the group members.

Thus, when considering what the Pilot Sales Program achieved in its simplest sense, it becomes clear that the benefits were a measurable entity: 1.2% of the value of the landed catch from 1999 to 2002. While predicting such a specific number might be difficult prior to implementation, it would not have been beyond the capabilities of policy analysts and their political superiors to look at the numbers of the catch from year to year and surmise that the Pilot Sales Program would have amounted to a similar low value. With this information, an assessment of the real difference the policy would make in the lives of group members could have been more accurately considered before enactment of the Program. This method of measurement, however, would admittedly have more effect in the case of programs aimed at the economic aspect of societal culture, as this aspect is by its nature materially measurable.

Other aspects of societal culture, such as religion or education, might be more difficult to assess. That said, assessing a policy's likelihood of achieving the somewhat vague idea of societal culture in the narrower sense of direct practical or material benefits would nonetheless be a productive first step. Once that has been done, considering indirect effects of a policy could, and should, be a secondary consideration in terms of whether a program might achieve what it is intended to achieve. Even this step can be narrowed down with the application of some common sense. The ameliorative intent ought to be specified, whether the benefits of the policy to the group are direct or indirect. As such, if the policy makers want to argue that fishing rights are a necessary step toward the amelioration of educational disadvantage, the linkage between the policy and the targeted aspect of societal culture ought to be tangibly recognizable. This, again, would be a positive movement toward an increase in acceptance of such policies. Where no linkages between the policy and the benefit are made clear, it should be no surprise that objections are made.

A second potential weakness of policy-relevant applications of group-differentiated rights is highlighted by the Supreme Court, when it states that policies like

the Pilot Sales Program create a real conflict, “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” (2008 SCC 41, p.9). There is potential for heightened hostilities whenever the effects of a policy on the rights of those who are negatively impacted are not considered in a comprehensive manner. It could be argued that the native people in question do have a legitimate need for supplementary rights, but what must also be considered is the negative effects of those rights on others. As has been shown, Kymlicka suggests that his theory of minority rights is not at odds with liberalism, because the rights he prescribes are exercised by the individual. However, the Pilot Sales Program has shown that even though these rights are exercised by individuals, the fact that they are supplemental rights beyond those enjoyed by all citizens necessarily reduces the rights of those who are excluded. If there are only so many fish that can be harvested in a certain area, giving one person the opportunity to catch more logically reduces the number of fish another person can catch.

With this in mind, it is important to insist that a careful case needs to be provided in each potential policy application of a group-differentiated right if we are to be comfortable accepting Kymlicka’s position that it is possible for liberals to accept supplemental rights for certain group members “without sacrificing their core commitments to individual freedom and social equality” (Kymlicka, p. 126). Policies like the Pilot Sales Program have been shown through this analysis to put the liberal commitment to social equality to the test. In such situations, it is incumbent on both government and the Court to offer a stronger rationale for the group-differentiated applications than either of them provided in this case. A policy that lacks discussion of both aspects of this reality is bound to be opposed by those concerned with protecting their individual rights of long constitutional duration, and rightly so. A supplemental group-differentiated right may be consistent with liberalism in theory, but until it can be shown to be implemented without infringing on the individual rights of others, it can only be considered as liberal in theory alone. Applying a ‘harm test’ in this scenario is

one way of evaluating the degree to which a policy can be said to be consistent with liberal ideals.

### *A Brief Consideration of Section 25*

In a final criticism, a particular point arising from the Supreme Court decision ought to be alarming to both proponents and opponents of the Program. This point stems from the Court's rather unsettling statement that "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" (2008 SCC 41, p.45). Some commentators, such as Moreau, state that it is 'promising' that the Supreme Court reads section 15(2) "as more than an interpretive aid to section 15(1), allowing that it can insulate certain ameliorative programs from any kind of scrutiny under 15(1)." (Moreau, p.283). However, it must be considered that the more policies come under the scrutiny of the *Charter*, the better for all Canadians, native and non-native alike. As a guarantor of the rights of all individuals, regardless of their differences from one another, the *Charter* is an essential means of protecting the equalities, freedoms, and opportunities enjoyed by the citizenry. To suggest that some programs, because they state that they 'intend' to make things better for a minority, should be able to bypass the very entity that serves to protect the nation's citizens is a bold statement.

By making this statement, the Supreme Court is implying that most legislation aimed specifically at aboriginals would qualify for protection under section 25 of the *Charter*, which refers to the protection of "other rights" for aboriginals beyond the *Charter's* guarantee.<sup>6</sup> While section 25 is not the focus of this research, it is worth

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<sup>6</sup> Full text of sections 25 and 32(1) of the *Canadian Charter of Rights and Freedoms*:

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 on October 7, 1763; and



mentioning that the incautious implication made by the Supreme Court seems to run counter to section 32 of the *Charter*, in which it is stated that the *Charter* applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament.” Indeed, section 25 and section 32 do amount to a level of tension in terms of the intended jurisdiction of the *Charter*, as the term ‘all matters within the authority of Parliament’ could be said to be incompatible in some ways with the idea that treaty and ‘other’ rights of aboriginals ought to be protected beyond the *Charter* as stated in section 25.

However, given that section 32 includes Parliamentary jurisdiction over aboriginals, it could be argued that it is a conceptual inflation to equate the "rights" protected by section 25 with any benefit specifically provided to aboriginals, such as those rights ascribed by the Pilot Sales Program. This is especially the case given that the Program was not directly tied to treaty negotiations nor established aboriginal rights to fish beyond ceremonial purposes. As such, it seems questionable for the judiciary to find ways to ‘shelter’ certain laws from *Charter* scrutiny, when the wording of the *Charter* clearly intends that it apply to all statutes and regulations. In fact, it could be argued that all policies ought to be subject to review in terms of their validity in the constitutional context. Whether the scrutiny amounts to policy reversals or not, the very idea that some policies ought to be ‘immune’ in some way from consideration in terms of the rights of all Canadians ought to be seen as contrary to the liberal democratic tenets of the country. Kymlicka and Flanagan both would likely find themselves in agreement on the need for constitutional consideration of policies like the Pilot Sales Program.

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b) any rights or freedoms that may be acquired by the Aboriginal peoples of Canada by way of land claims settlement.

32(1). This Charter applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters related to the Yukon Territory and Northwest Territories; and
- b) to the legislatures and governments of each province in respect of all matters within the authority of the legislature of each province.

### *Summary*

The theoretical contributions of Will Kymlicka and Tom Flanagan are invaluable to the contentious issue of the rights of aboriginals balanced against the rights of all Canadians. When applied to the case of the Pilot Sales Program, the theoretical approach allows commentators and participants in the debate over the Pilot Sales Program to be seen and comprehended in their respective underlying contexts, something that provides greater clarity and understanding of a complex issue. What has also been seen, however, is that the benefits of this applied normative analysis run in the other direction as well. Applying the theory to the practical situation of native fishing rights has allowed a greater understanding of the theory itself, in that the values and the insufficiencies of each are made more clear in the 'real world' context. As such, this analysis will hopefully serve to provide theorists, commentators, and policymakers alike with a broader understanding of the issue in ways that were not previously apparent.

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