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Dividing the catch

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On June 27, the Supreme Court of Canada gave its stamp of approval to racially segregated commercial fisheries in British Columbia, and it did so in the name of "substantive" equality. In R. vs. Kapp, the court upheld the constitutional validity of a "pilot" sales program introduced in 1992 under prime minister Brian Mulroney. This program created a separate commercial fishery for the private benefit of individuals with bloodline ties to certain Indian tribes, while also allowing these same individuals to fish a second time in the public commercial fishery left over for everyone else. The program brought an abrupt end to several decades of racial integration and racial harmony which had been enjoyed by one of the most ethnically diverse workplaces in Canada.

The court's decision was a slap in the face for Richard Nomura and other Canadians of Japanese origin, whose ancestors faced overt and vicious discrimination in B.C.'s commercial fishery during the 1920s. Starting in 1919, the federal government openly pursued a policy of eliminating "Orientals" from the commercial fishery by reducing the number of licenses issued to Japanese Canadians by 25% annually. The federal fisheries department issued annual reports on progress made toward the goal of ridding the fishery of the "yellow peril," in order to reserve the industry exclusively for "Whites and Indians."

Associations of Japanese-Canadian fishermen challenged these racially discriminatory policies in court. Intervening before the Supreme Court of Canada in 1928 in Reference Re: Fisheries Act, Japanese Canadian fishermen argued that the fisheries minister could not exercise his discretion so as to deny a fishing license on the basis of race. The Supreme Court agreed, ruling that "any British subject residing in the province of British Columbia, who is not otherwise legally disqualified, has the right to receive a license."

In R. vs. Kapp, the Supreme Court of Canada reversed its 80-year-old precedent, ruling that race-based policies and programs do not violate the Charter's section 15 equality rights as long as the government declares that the program is intended to help a disadvantaged group.

The court also ruled that it doesn't matter whether a program is actually effective in helping the disadvantaged group. In R. vs. Kapp, the federal government did not dispute the trial judge's findings that "there was no suggestion anywhere in the evidence that any of the money from the pilot sales fishery went to any of the real disadvantages actually experienced by the bands The [Fisheries] Department expressed the hope that the pilot sales fishery would provide stability to the commercial fishery by improving Aboriginal catch data, increasing co-operation in enforcement and reducing protest and confrontation. The weight of the evidence is that none of this has occurred and the program has been counterproductive in each of these areas." These findings of fact were not appealed. This means that race-based policies and programs, no matter how ineffective, can be justified by a government declaring its good intentions.

Further, the commercial fishery is the last workplace in Canada where aboriginals would need an affirmative action program. Working under rules that apply equally to all Canadians, Aboriginals have enjoyed great success in B.C.'s commercial fishery, and have never faced discrimination in that industry. Aboriginals make up about 4% of B.C.'s population, but more than one third of B.C.'s fishermen, license holders and vessel owners are aboriginal. Aboriginals were among the protesting fishermen who launched the constitutional challenge to race-based fisheries which culminated in the Kapp ruling.

In short, the Supreme Court upheld as constitutional a race-based policy which is ineffective and counterproductive, and which applies to a workplace that doesn't need it. This decision sets a low standard for governments, giving them a free hand to initiate and continue with affirmative action programs that are useless and unnecessary.

On the positive side, nothing in Kapp requires any government in Canada to initiate, or continue with, policies or programs which discriminate on the basis of race or other criteria. One hopes the Harper government will understand the court's decision does not require it to continue with the racial segregation of B.C.'s commercial fishery. Nor does Mr. Harper need the consent of Parliament to restore racial equality there; he can, and should, do this by using his executive power to abolish race-based regulations.