
Case Comment on *R. v. Kapp: An Analytical Framework for Section 25 of the Charter*

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There is a significant void in the jurisprudence and literature regarding section 25 of the *Canadian Charter of Rights and Freedoms*. Consequently, there is no settled interpretation of either when it is triggered or the specific analytical framework that should apply. In *R. v. Kapp*, the British Columbia Court of Appeal provides a groundbreaking analysis of section 25 that addresses both constitutional questions.

The author first reviews the facts of the case, in which ten non-Aboriginal persons accused of unlawful fishing challenged regulations that restricted fishing in an area to members of licensed First Nations bands on the ground that they violated section 15 of the *Charter*. A majority of the British Columbia Court of Appeal dismissed the appeal, finding no infringement of section 15.

While several members of the court declined to consider the section 25 argument, Justices Low and Kirkpatrick provide an in-depth analysis of the section. The author shows how neither decision resolves the debate about whether section 25 should be triggered after a *Charter* right analysis has commenced or as a threshold issue before beginning such an analysis.

Justice Kirkpatrick, however, provides a structured three-part framework for section 25 that the author argues will serve as a starting point for future courts undertaking a section 25 analysis. The author addresses several problems with the framework. Finally, the author notes that the decision does not deal with the potential conflict between an individual Aboriginal right protected by the *Charter* and a collective Aboriginal right protected by section 25.

Un important vide subsiste dans la jurisprudence et dans la doctrine au sujet de l'article 25 de la *Charte canadienne des droits et libertés*. Par conséquent, l'interprétation de cet article demeure incertaine quant à la détermination des critères selon lesquels cet article est susceptible d'être invoqué ainsi qu'au choix du cadre analytique approprié ou pouvant s'y appliquer. Dans l'affaire *R. v. Kapp*, la Cour d'appel de la Colombie-Britannique a arboré une analyse sans précédent de l'article 25 qui aborde ces deux questions constitutionnelles.

En guise d'introduction, l'auteure présente les faits de la cause. Dix personnes non autochtones accusées d'avoir pêché sans autorisation invoquent l'article 15 de la *Charte* afin de contester la constitutionnalité des règlements restreignant toute pêche dans la région aux membres de bandes de premières nations pourvues de permis. La majorité de la Cour d'appel de la Colombie-Britannique a rejeté l'appel refusant ainsi de reconnaître le bien fondé de l'existence d'une violation en vertu de l'article 15.

Bien que plusieurs juges de cette cour aient refusé de considérer les arguments relatifs à l'article 25, les juges Low et Kirkpatrick offriront quant à eux une analyse approfondie de la portée de l'article. L'auteure souligne cependant qu'aucun de ces jugements ne résout le débat quant à savoir si l'article 25 devrait être invoqué après l'initiation d'une analyse fondée sur la *Charte*, ou si un argument invoquant cet article devrait être considéré comme une question de seuil avant qu'une telle analyse ne soit débutée.

L'auteure soutient que le cadre d'analyse en trois parties de l'article 25 développé par le juge Kirkpatrick servira dorénavant de point de départ pour les analyses fondées sur cet article. L'auteure soulève cependant un nombre de problèmes que pourraient susciter l'utilisation de ce cadre d'analyse, et note une lacune importante dans le jugement : celui-ci n'aborde pas la possibilité d'un conflit éventuel entre un droit autochtone individuel protégé par la *Charte* et un droit autochtone collectif protégé en vertu de l'article 25.

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I. Introduction

Since the enactment of the *Constitution Act, 1982*,¹ most Aboriginal claims have been brought before the courts within the context of section 35. As a result, little attention has been given to section 25 of the *Canadian Charter of Rights and Freedoms*.² However, in *R. v. Kapp*³ the British Columbia Court of Appeal provided an analysis of section 25 and its application in relation to the *Charter*. Although a majority of the court held that it was not applicable in this case, Justice Low indicated circumstances in which it may be invoked, albeit in a limited fashion. Justice Kirkpatrick, agreeing in result, went further than the majority by holding that the appeal could be dismissed solely by virtue of section 25.

As there is little reference to section 25 in Aboriginal rights cases, its significance in relation to *Charter* interpretation has been somewhat speculative. *Kapp* provides some insight into the direction the courts may take in its application. The majority in this case followed prior jurisprudence in finding that section 25 is not applicable unless a *Charter* issue arises in the context of Aboriginal rights. However, *Kapp* differs from prior cases in two ways. First, it provides an analysis regarding the point in time at which section 25 is “triggered”. As can be seen in Justice Low’s decision, there is an ongoing debate about whether section 25 is a threshold issue or whether it is to be applied only once a *Charter* analysis has commenced. Second, Justice Kirkpatrick establishes an analytical framework for the application of section 25.

As *Kapp* is one of the first cases to provide such extensive analysis, it is important to look not only at the drafting history of section 25 but also at the jurisprudence that predates it. Both are indicative of the purpose the provision was designed to perform. By critically analyzing the reasoning behind the opinions of Justices Low and Kirkpatrick, difficulties and weaknesses of the proposed framework are exposed, as are possible issues that may arise in the future. While the position of Justice Low may have merit, and while Justice Kirkpatrick’s approach is not without its problems, there is a strong possibility that Justice Kirkpatrick’s more in-depth analysis of section 25 will provide the building blocks for the future application of this potentially valuable *Charter* provision.

I. Facts and Case History

After the decision in *R. v. Sparrow*,⁴ the federal government implemented the Aboriginal Fisheries Strategy (“AFS”) to create increased economic opportunities for Aboriginal people in Canadian fisheries. As part of the policy, Parliament, under the

¹ Being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² Part I of the *Constitution Act, 1982*, *ibid.* [*Charter*].

³ 2006 BCCA 277, [2006] 56 B.C.L.R. (4th) 11, 3 C.N.L.R. 282, leave to appeal to S.C.C. granted, 31603 (14 December 2006) [*Kapp*].

⁴ [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [*Sparrow*].

power granted to it by the *Fisheries Act*,⁵ enacted the *Aboriginal Communal Fishing Licenses Regulations*,⁶ which granted communal fishing licences to three First Nations as part of a Pilot Sales Program (“PSP”).⁷ Those three First Nation bands were the Musqueam, the Burrard, and the Tsawwassen (“MBT”).

Kapp was one of ten non-Aboriginal persons charged with unlawfully fishing for salmon with a gillnet, in or near Area 29, contrary to the *Pacific Fishery Regulations, 1993*,⁸ resulting in an offence under the *Fisheries Act*. The area in which the accused were fishing was closed for a twenty-four-hour period, allowing only designated members of the MBT to fish in the area pursuant to the *ACFLR*.

At trial, Justice Kitchen entered a stay of proceedings due to a breach of subsection 15(1) of the *Charter*.⁹ This decision was overturned by the Supreme Court of British Columbia as the PSPs were not found to have a purpose or effect that was discriminatory under subsection 15(1).¹⁰

The appellant brought two challenges before the Court of Appeal: (1) the licences created exclusive fisheries, which was not within the power of Parliament to delegate, and was therefore ultra vires; and (2) the provisions of the *ACFLR* violated section 15 of the *Charter*. The matter was dismissed by a majority of the court on the non-*Charter* argument regarding the delegation of authority to the minister. Justice Low, in considering Parliament’s delegation of the power to issue licenses and to make regulations with respect to their issuance, held that there was “no basis for concluding that all of this is not regulation properly authorized by Parliament simply because the communal licence was issued to the MBT and was not available to all Canadians.”¹¹

The majority of the Court of Appeal also dismissed the appeal on the *Charter* equality issue. While there were some differences among the members of the court in their analysis of the application of subsection 15(1), a majority found that there was no infringement of the right.¹² Justice Low held that although the regulation may seem discriminatory at first glance, upon further examination “the appellants were given the right to fish under commercial licence during other openings of the fishery ... The MBT communal licence and the commercial licences under which the appellants fished were both parts of the overall scheme by which the Minister

⁵ R.S.C. 1985, c. F-14, s. 43.

⁶ S.O.R./93-332 [*ACFLR*].

⁷ For a more thorough discussion of the historical context and development of the AFS and of PSPs, see André Goldenberg, “Salmon for Peanut Butter”: Equality, Reconciliation and the Rejection of Commercial Aboriginal Rights” (2004) 3 *Indigenous L.J.* 61.

⁸ S.O.R./93-54.

⁹ *R. v. Kapp*, 2003 BCPC 279, [2003] 4 C.N.L.R. 238.

¹⁰ *R. v. Kapp*, 2004 BCSC 958, [2004] 31 B.C.L.R. (4th) 258, [2004] 3 C.N.L.R. 269.

¹¹ *Kapp*, *supra* note 3 at para. 65.

¹² Kirkpatrick J. did not provide a s. 15(1) analysis but rather based her decision solely on a s. 25 analysis.

allocated the resource ...”¹³ Thus “[t]he licensing scheme did not constitute unequal treatment of either the appellants or of the MBT”¹⁴ as required by the first branch of the test set out in *Law v. Canada (Minister of Employment and Immigration)*.¹⁵ Justice MacKenzie, in his concurring judgment, held that the appellant’s section 15 argument failed on the third branch of the *Law* test.¹⁶ He found that although the licensing scheme imposed differential treatment based on an enumerated ground, there was no actual or objective disadvantage realized by the appellants.¹⁷

Although several members of the court found it inappropriate to consider the section 25 argument brought forth by the intervenor Tsawwassen First Nation, Justices Low and Kirkpatrick felt it necessary to address the issue. Justice Low held that section 25 could not be triggered where a *Charter* violation had not occurred. As no infringement or breach of subsection 15(1) had been found, section 25 was inapplicable.¹⁸ Justice Kirkpatrick took an entirely different approach in holding that the application of section 25 is a threshold issue that should be considered prior to a *Charter* analysis.¹⁹ Justice Kirkpatrick went on to provide an analytical framework for the application of section 25, ultimately finding that the appeal should be dismissed as section 25 protected the Aboriginal right to fish commercially, as created under the statutory scheme, from *Charter* challenge.²⁰

For the purposes of this paper, only the section 25 arguments and analysis, and the manner in which they relate to the *Charter*, will be considered.

II. Constitutional Drafting

Before considering the analysis provided by Justices Low and Kirkpatrick in *Kapp*, it is helpful to briefly consider the history of section 25. This history will not only help determine how interest groups, provinces, and Parliament envisioned the section’s role in relation to the rest of the *Charter*, but will help to determine the purpose the section was intended to serve. Section 25 states:

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

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

¹³ *Kapp*, *supra* note 3 at para. 81.

¹⁴ *Ibid.* at para. 82.

¹⁵ [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1 [*Law*].

¹⁶ *Kapp*, *supra* note 3 at para. 98.

¹⁷ *Ibid.* at para. 109.

¹⁸ *Ibid.* at para. 90.

¹⁹ *Ibid.* at para. 139.

²⁰ *Ibid.* at para. 152.

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.²¹

Section 25 was initially introduced to protect the rights of Aboriginal peoples. From an Aboriginal perspective, at the time the *Charter* was being drafted the biggest threat to Aboriginal rights, including treaty and other rights, was section 15 of the *Charter*.²² Section 25 was created to address these concerns. According to the deputy minister of justice at the time, Roger Tassé, the provision was designed as an interpretation clause “[that] comes as a rule of construction for the charter in its application to the rights of aboriginal peoples.”²³ Former Justice Minister Jean Chrétien indicated that section 25 would not create rights for Aboriginal persons but would protect Aboriginal rights in a negative way by preventing infringement of those rights by other provisions of the *Charter*.²⁴ Thus, the entire process leading to the enactment of the *Charter*

suggests that the original and sustained intent of the drafters ... was to ensure that the protection of rights by the Charter would not affect the rights of Aboriginal peoples in Canada. ...

... [The] purpose for section 25 can be stated: to prevent Charter rights and freedoms from diminishing other rights and freedoms of Aboriginal peoples in Canada, whether those rights are in the nature of Aboriginal, treaty, or “other” rights.²⁵

In addition to the expressed intent of the drafters, there are other aids to interpreting the *Charter*, such as the corresponding provisions of sections 26 to 29. These sections coincide with the purpose of section 25, as they indicate that the legislature intended to increase and protect the rights and freedoms of Canadians, rather than restrict them.²⁶

III. Jurisprudence

Prior to any substantial case law on section 25, there was speculation about the potential methods of applying it. William Pentney considered section 25 an “interpretive prism” that was “intended only as an interpretive guide and not as an

²¹ *Supra* note 2.

²² See Jane M. Arbour, “The Protection of Aboriginal Rights Within a Human Rights Regime: In Search of an Analytical Framework for Section 25 of the *Canadian Charter of Rights and Freedoms*” (2003) 21 *Sup. Ct. L. Rev.* 3 at 43.

²³ *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, 32d Parl., 1st Sess., vol. 4, No. 49 (30 January 1981) at 93 [*Special Joint Committee*].

²⁴ See *ibid.*, vol. 1, No. 3 (12 November 1980) at 32-33.

²⁵ Arbour, *supra* note 22 at 36.

²⁶ See *ibid.* at 37.

independently enforceable guarantee of aboriginal and treaty rights.”²⁷ This implied that section 25 was a “mere canon of interpretation” that allowed for interpretive flexibility, and that “the judiciary should choose the interpretation that is the least intrusive on aboriginal rights.”²⁸ However, if the conflict between the Aboriginal right and the *Charter* right could not be reconciled, only the *Charter* right would be given effect.²⁹

In contrast, Bruce Wildsmith suggested that “[t]he balancing of values required by section 1 in other situations is, arguably, part of the process of applying the section 25 preference for native rights as well.”³⁰ He implied that while both a *Charter* right analysis and a section 25 analysis would be required, the courts could possibly work into the provision a justification feature similar to that of a section 1 analysis. As will be seen, neither of these interpretations of section 25 was fully adopted by the courts.

As there has been little dialogue in regard to section 25, interpretation of this provision remains relatively undeveloped. The lack of discussion of section 25 in mainstream constitutional textbooks,³¹ in academic journals, and in case law is indicative of this underanalysis. The lack of jurisprudence in this area has often been attributed to the following: (1) the courts do not find a *Charter* violation and therefore section 25 does not apply, or (2) the courts do not find adequate evidence to support that an Aboriginal, treaty, or “other” right has been affected so as to trigger section 25.³² Nevertheless, to understand the interpretations of section 25 in *Kapp*, it is necessary to consider not only the drafters’ intent, as discussed above, but also its subsequent development and application in case law. Indeed, several cases have provided some comments and direction as to how it is to be interpreted and applied.

The Supreme Court of Canada has clearly indicated that section 25, along with a variety of other provisions, was included in the *Charter* to protect minority rights.³³ While this may raise issues about whether Aboriginal rights should be included within the lump category of “minority rights”, for the purposes of this paper it is only necessary to consider this statement as an acceptance by the Court of the protective purpose intended for the provision. This concept of “protection” has led the courts to

²⁷ William Pentney, “The Rights of the Aboriginal Peoples of Canada and the *Constitution Act, 1982*: Part I—The Interpretive Prism of Section 25” (1988) 22 U.B.C. L. Rev. 21 at 28.

²⁸ Thomas Isaac, “*Canadian Charter of Rights and Freedoms*: The Challenge of the Individual and Collective Rights of Aboriginal People” (2002) 21 Windsor Y.B. Access Just. 431 at 436.

²⁹ See Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 10-11.

³⁰ *Ibid.* at 25.

³¹ See e.g. Peter W. Hogg, *Constitutional Law of Canada*, student ed. (Toronto: Thomson Canada, 2006) at 668-69.

³² See Arbour, *supra* note 22 at 17.

³³ See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 82, 161 D.L.R. (4th) 385 [cited to S.C.R.].

find that section 25 does not create new rights, but rather ensures that rights and freedoms held by Aboriginal peoples are not diminished by the *Charter*.³⁴

More recent cases have described this protective feature in section 25 not as an “interpretive prism” or as a means of “balancing rights”, but as a “shield”. In *Campbell v. British Columbia (Attorney General)*, Justice Williamson summarized prior cases as showing that “the section is meant to be a ‘shield’ which protects aboriginal, treaty and other rights from being adversely affected by provisions of the *Charter*.”³⁵ He proceeded to suggest that a purposive approach to section 25 should be taken, and that “the purpose of this section is to shield the distinctive position of aboriginal peoples in Canada from being eroded or undermined by provisions of the *Charter*.”³⁶ The Federal Court of Appeal came to the same conclusion about the interpretation of section 25 as a shield in *Shubenacadie Indian Band v. Canada (Human Rights Commission)*.³⁷

While section 25 has, in some cases, been held to be a “shield” to protect against the infringement of Aboriginal rights, the courts have been clear that it does not create new rights. In *R. v. Redhead*, Justice Oliphant stated that the “section does not confer new rights upon aboriginal people. It merely confirms certain rights held by aboriginal people prior to the inception of the *Charter*.”³⁸ The fact that substantive rights are not created by section 25 was also addressed in *Campbell*.³⁹ However, Justice L’Heureux-Dubé suggested in her minority judgment in *Corbière v. Canada (Minister of Indian and Northern Affairs)* that although no rights are created by section 25, the rights that are protected by it are broader than those in section 35 of the *Constitution Act, 1982*.⁴⁰

Finally, the case law surrounding the provision refers to the point at which section 25 is “triggered”. As illustrated by the diverging opinions of Justices Low and Kirkpatrick in *Kapp*, however, there has been no definitive determination on the subject. In *Corbière*, the minority held that “[s]ection 25 is triggered when s. 35 Aboriginal or treaty rights are in question, or when the relief requested under a *Charter* challenge could abrogate or derogate from ‘other rights or freedoms that pertain to the aboriginal peoples of Canada.’”⁴¹ The language from *Corbière* was adopted by the Court in *Campbell*.⁴² The interpretation of section 25 in these cases seems to suggest that there need only be a *Charter* claim whose remedy would

³⁴ See e.g. *R. v. Steinhauer* (1985), 63 A.R. 381 at paras. 19, 58, 3 C.N.L.R. 187 (Q.B.) [*Steinhauer*].

³⁵ 2000 BCSC 1123, 189 D.L.R. (4th) 333 at para. 156, 79 B.C.L.R. (3d) 122 [*Campbell*].

³⁶ *Ibid.* at para. 158.

³⁷ (2000), 187 D.L.R. (4th) 741 at para. 43, [2000] 4 C.N.L.R. 275 (F.C.A.) [*Shubenacadie* cited to D.L.R.].

³⁸ (1995), 103 Man. R. (2d) 269 at para. 83, [1996] 3 C.N.L.R. 217 (Q.B.).

³⁹ *Supra* note 35 at para. 156.

⁴⁰ [1999] 2 S.C.R. 203 at para. 52, 173 D.L.R. (4th) 1, [1999] 3 C.N.L.R. 19 [*Corbière* cited to S.C.R.].

⁴¹ *Ibid.*

⁴² *Supra* note 35 at para. 156.

infringe an Aboriginal right for the section to be “triggered”,⁴³ and that therefore section 25 is a threshold issue. As discussed below, this is the line of reasoning embraced by Justice Kirkpatrick in *Kapp*.

Prior to *Corbière*, however, the lower courts often interpreted section 25 so as to consider a section 25 argument only when a *Charter* issue was raised or a *Charter* violation proven.⁴⁴ Since *Corbière*, this interpretation of the section has been maintained in several cases. In *Shubenacadie*, the court held that “[t]he section can only be invoked as a defence if it had been found that the appellant’s conduct had violated subsection 15(1) of the Charter.”⁴⁵ In *Grismer v. Squamish Indian Band*⁴⁶ the court proceeded with the *Charter* analysis first, and upon determining that there was a justifiable infringement of subsection 15(1), held that there was no need to consider the subsection 25 arguments. These cases indicate that section 25 is not “triggered” as a threshold issue, but rather is only invoked once a *Charter* infringement is established or a violation of a *Charter* right proven. As will be seen, Justice Low in *Kapp* preferred this interpretation of section 25.

IV. Approach to Section 25 in *Kapp*

In *Kapp*, the judgments rendered by Justices Low and Kirkpatrick provide some insight as to how section 25 could be interpreted in future cases. Justice Low suggests that there are two ways to approach the provision. First, section 25 could be viewed as a threshold issue, triggered any time a *Charter* breach is claimed *and* an Aboriginal right engaged. Alternatively, he proposes that the provisions’ wording, “shall not be construed”, suggests it should be applied only once a *Charter* breach has been proven, rather than merely claimed.⁴⁷ Justice Low prefers the latter interpretation, though it is unclear whether he intends that the protection should be triggered when infringement of a *Charter* right is established or only after it has been determined that the breach of that *Charter* right is not saved by section 1.⁴⁸

Justice Low is clearly uncomfortable with creating any strict rule of application, saying that he does “not wish to lay down a stringent rule regarding the stage in the overall analysis at which s. 25 must be considered.”⁴⁹ He fears that creating a stringent rule might frustrate the use of section 25 as he is unable to predict all the scenarios in which it could potentially arise: “The proper view might be that the point

⁴³ The issue of remedy sought is addressed in Part V, below.

⁴⁴ See *Steinhauer*, *supra* note 34. See also *Thomas v. Norris*, [1992] 2 C.N.L.R. 139, 31 A.C.W.S. (3d) 558 (B.C.S.C.).

⁴⁵ *Supra* note 37 at para. 43.

⁴⁶ 2006 FC 1088, 146 C.R.R. (2d) 68, [2007] 1 C.N.L.R. 146.

⁴⁷ *Kapp*, *supra* note 3 at para. 87.

⁴⁸ See *ibid.* at paras. 87-88.

⁴⁹ *Ibid.* at para. 89.

at which s. 25 must be considered will depend on the circumstances of the particular case.”⁵⁰

While he does not elaborate further on how section 25 could be applied in relation to either a *Charter* infringement or breach, one could envision issues with either situation. For example, if only an infringement is required before section 25 is applicable, would a section 1 analysis even be required? It has been suggested by some commentators that if section 25 were to act as a complete “shield” to other *Charter* rights, section 1 would be unnecessary and even redundant.⁵¹ That is, any *Charter* right that may “abrogate and derogate” from an Aboriginal right would not be enforced, whether infringement of that *Charter* right were justifiable or not. But, if it is the case that section 1 is unnecessary, why engage in a *Charter* analysis at all? It would seem appropriate that if section 25 were to act as a complete shield, then it should be addressed as a threshold issue.

Conversely, if a complete *Charter* analysis, including a section 1 analysis, is to be undertaken first, further issues could arise. For example, assuming that there is an infringement of a *Charter* right and that the infringement cannot be justified under section 1, where does that leave section 25? It has been suggested that if section 25 is an interpretive clause designed to act as a rule of construction for the *Charter*, it should be applied so as to modify the usual definition or scope of the substantive guarantee. Only after this modification has occurred should the section 1 analysis be undertaken.⁵² Or, in the alternative, it could be argued that the purpose of section 25 should be considered throughout the *Charter* analysis. As Arbour writes, “[S]ection 25 may have a role to play in the section 1 analysis to the extent that it can be seen to be a directive to fully integrate Aboriginal perspectives into the contextual approach.”⁵³ In light of the above issues with Justice Low’s approach and his reluctance to set a specific rule of application, it is difficult to determine how much weight his analysis will be given in future cases.

In contrast to Justice Low’s reluctance in creating a rule of application, Justice Kirkpatrick takes a strong and definitive approach to the interpretation of section 25. She begins by stating that a purposive analysis of section 25 “affords a complete answer to the appellants’ s. 15 equality challenge”⁵⁴ and that accordingly the section 15 argument need not be addressed. Essentially, she adopts the “threshold” application of section 25 that Justice Low has difficulty accepting.

Upon determining that section 25 operates as a threshold issue, Justice Kirkpatrick proceeds to establish an analytical framework for section 25:

⁵⁰ *Ibid.*

⁵¹ See Arbour, *supra* note 22 at 43.

⁵² See Pentney, *supra* note 27 at 57.

⁵³ *Supra* note 22 at 65.

⁵⁴ Kapp, *supra* note 3 at para. 118.

- (a) Is the right or freedom a treaty right, aboriginal right or other right or freedom pertaining to the aboriginal peoples of Canada?
- (b) If the right or freedom is an “other right or freedom pertaining to the aboriginal peoples of Canada”, does it relate to a significant aspect of aboriginal life, culture or heritage, and does it relate to aboriginal peoples as aboriginal peoples?
- (c) Would the remedy sought by way of the *Charter* challenge result in the abrogation of or derogation from the aboriginal right or freedom?⁵⁵

It appears as though the purpose of the first two steps in her analysis is to determine whether an Aboriginal right exists that is sufficient to trigger section 25. Essentially, they serve to incorporate the threshold issue into the framework. Justice Kirkpatrick makes clear that in the context of section 25, the ordinary meaning of “aboriginal peoples” in the provision implies that the rights protected must be group rights.⁵⁶ If no Aboriginal right is found, then section 25 is not invoked and the court should proceed with the *Charter* analysis.

The second step in the framework is based on the reasoning of Justice L’Heureux-Dubé in *Corbière* that section 25 may include statutory rights, but that such rights may not necessarily be within the scope of “other rights or freedoms”.⁵⁷ Justice Kirkpatrick elaborates by holding that

in order for s. 25 to apply, “other rights or freedoms” must relate to a significant aspect of aboriginal life, culture or heritage, and relate to aboriginals as aboriginals. In my view, *it is the content of the right and not the manner in which it is acquired that is significant*, given the obligation on the Crown to negotiate with aboriginal peoples ...⁵⁸

This statement suggests that though rights may be created by statute, such as the right of an Aboriginal member of the MBT to fish under the *ACFLR*, if that right sufficiently relates to the person’s culture and heritage as an Aboriginal person, it is irrelevant whether the right is created by statute, treaty, or some other method. While her focus in the decision is entirely on the meaning of “other rights and freedoms”, she provides little or no elaboration on the meaning or method of interpretation for the specific rights mentioned in the provision—namely, Aboriginal, treaty, and Royal Proclamation rights, and rights by way of land claims. She provides no reason for failing to address these rights, though it could be presumed that the relation of their content to “aboriginal life, culture or heritage” is self-explanatory and therefore requires little discussion. Alternatively, she may not have addressed these rights because they were not at issue in this case.

⁵⁵ *Ibid.* at para. 138.

⁵⁶ *Ibid.* at paras. 124-25. This raises particular issues in regard to individual versus collective rights that are addressed in Part V, below.

⁵⁷ *Supra* note 40 at paras. 52-53.

⁵⁸ *Kapp, supra* note 3 at para. 138 [emphasis added].

The final step in the framework requires section 25 to provide protection based on the remedy that the claimant is pursuing in their *Charter* challenge. While Justice Kirkpatrick does not produce an example of the remedies that would result from an affirmative answer to the final question, she does state that “s. 25 is triggered if the outcome of a *Charter* challenge might abrogate or derogate from aboriginal rights or freedoms.”⁵⁹ As she does not engage in a discussion of the meaning of “abrogate or derogate”, it is difficult to determine what remedies would be prevented by the provision. It seems clear that the remedy sought in this case was to completely eliminate the licences granted under the PSP.⁶⁰ It can therefore be inferred that striking down a provision or statute would qualify as a remedy that abrogates or derogates from Aboriginal rights, and against which section 25 exists to protect.

V. Analysis

Based on the different positions of the members of the court in *Kapp*, the case addresses two overarching issues in regard to section 25: (1) the point at which a section 25 analysis arises in relation to a *Charter* challenge, and (2) the specific analytical framework that should apply to section 25. While each member of the court addresses the first issue, only Justices Kirkpatrick and Levine address the latter.

As can be seen from previous case law, and from *Kapp* itself, there is no clear indication as to when section 25 is triggered. Both approaches taken in this case have their flaws. For example, it could be argued that the reasoning of Justice Low leads to an interpretation of section 25 that is too narrow in that it fails to properly consider the purpose behind the provision. The purpose of section 25 is to *protect* Aboriginal and treaty rights and other rights and freedoms of Aboriginal peoples. As previously indicated, it was intended to function as an interpretive provision, acting as a rule of construction for the *Charter*. The approach suggested by Justice Low, whereby protection of Aboriginal rights are only considered once an infringement of a *Charter* right has been established and the section 1 analysis completed, fails to give the section the weight it was intended to have and fails to consider the function the provision was intended to perform.

Section 25 is the only provision in the *Charter* that refers to the protection of a specific minority group, and is one of the few provisions in the *Charter* that uses the words “abrogate or derogate”. This specific reference to Aboriginal peoples and the use of strong language indicate the importance of the protection of Aboriginal rights. It could be suggested that based on a purposive approach to section 25, other *Charter* rights are irrelevant if an Aboriginal or treaty right, or other right or freedom, can be established. As such, it is only necessary to consider other *Charter* rights if such an Aboriginal right does not exist.

⁵⁹ *Ibid.* at para. 150.

⁶⁰ *Ibid.* (“The appellants’ s. 15 *Charter* challenge seeks to eliminate the PSP. Section 25 exists to prevent such abrogation” at para. 152).

Although Justice Low's approach may be criticized for too narrowly interpreting section 25, Justice Kirkpatrick's interpretation is not without its problems. One problem in her application of section 25 as a threshold issue is that, unlike Justice Low, she provides little or no indication as to why she has taken her approach. Instead, she seems to simply assume that section 25 is raised as a threshold issue, and proceeds immediately with her framework for the interpretation and application of section 25. Should subsequent courts definitively adopt the approach taken by Justice Low, it is therefore difficult to foresee whether this framework would be applicable at all.

In addition to such a "practical" problem with Justice Kirkpatrick's approach, there are conceptual problems. It could be argued that her approach gives too little significance to *Charter* rights. As was indicated in *Reference Re Secession of Quebec*, many of the *Charter* rights were created for the protection of minorities.⁶¹ This general protection of all minorities appears to suggest that while section 25 appears to override certain rights and freedoms guaranteed in the *Charter*, it should not necessarily be granted preference to *Charter* rights in an analysis. The *Charter* right analysis and the section 25 analysis could both be considered. Moreover, the purpose of section 25 would not be lost if the *Charter* right were to be considered first. The protective purpose of the provision could still be fulfilled, though it would just be "delayed" until it was deemed that there was a conflict between the *Charter* right and an Aboriginal right. In addition, the interpretive function of section 25 could be best realized if its protective purpose were incorporated throughout a *Charter* analysis.

While it seems clear that the debate as to when section 25 should be triggered is not resolved in *Kapp*, Justice Kirkpatrick's decision does appear to take a step toward laying down an analytical framework for section 25. Putting aside the practical problems with the framework, it is worthwhile to critically examine its components as they will likely form the basis for analysis in future cases.

The first component of the framework involves identifying an Aboriginal or treaty right, or "other right or freedom". Justice Kirkpatrick spends the majority of her analysis discussing what constitutes "other rights or freedoms". It can only be assumed that she does this because there is already extensive case law on determining the existence of an Aboriginal right or treaty right,⁶² and because the facts in *Kapp* give rise to neither of these.

⁶¹ *Supra* note 33 at paras. 81-82.

⁶² See e.g. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.] (Aboriginal rights); *Sparrow*, *supra* note 4 (Aboriginal rights); *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193; *R. v. Marshall*, 2005 SCC 43, [2005] 2 S.C.R. 220, 255 D.L.R. (4th) 1 (Aboriginal land rights); *R. v. Simon*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390; *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, 259 D.L.R. (4th) 610 (Aboriginal treaty rights).

Her interpretation of “other rights or freedoms” includes statutory rights granted to Aboriginal peoples by Parliament. This is not a new concept. Bruce Wildsmith suggests that these rights “would include all exercises of power that can be attributed to Parliament’s exclusive legislative authority over ‘Indians, and Lands reserved for the Indians’ set out in section 91(24) of the *Constitution Act, 1867*.”⁶³ He later states, “[I]t seems likely that ‘other rights or freedoms’ includes statutory and contractual sources of rights and freedoms that can be attributed to the unique position of the native peoples.”⁶⁴ In finding that statutory rights are included in section 25, Justice Kirkpatrick states that due to the liberal interpretation that should be granted to Aboriginal and treaty rights, “[t]he *ejusdem generis* rule of statutory construction is of limited value when discussing statutes related to aboriginal peoples.”⁶⁵

The problem with allowing statutory rights to be protected by section 25 is that they become elevated to constitutional rights. Such statutory rights could include anything within the power of the legislature to create. Essentially, by including statutory rights under “other rights or freedoms”, Justice Kirkpatrick allows section 25 to achieve indirectly what the drafters denied it from doing directly—namely, the creation of substantive rights. The drafters intended, as indicated by former Justice Minister Chrétien, to protect Aboriginal rights, not create them.⁶⁶ Therefore, this broad interpretation of “other rights or freedoms” by Justice Kirkpatrick seems to fly in the face of what the drafters and previous case law have interpreted section 25 to mean.

However, as indicated by Justice L’Heureux-Dubé in *Corbière*, section 25 rights are meant to be broader than section 35 rights.⁶⁷ To limit “other rights or freedoms” to those that were currently existing at the time section 25 was enacted would be to ignore the intentional exclusion of the word “existing” from the provision.⁶⁸ It is difficult to envision what, if not statutory rights, “other rights or freedoms” could entail.

In light of the above problem, the second component of the framework provides somewhat of a limitation on what initially appears to be a fairly broad interpretation of “other rights or freedoms”. Justice Kirkpatrick states that only those “other rights or freedoms” that “relate to a significant aspect of aboriginal life, culture or heritage,

⁶³ *Supra* note 29 at 33; See also Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 225.

⁶⁴ *Ibid.* at 35.

⁶⁵ *Kapp*, *supra* note 3 at para. 123. The *ejusdem generis* rule arises when a general term follows a list of specific terms, thereby requiring the general term to be interpreted so as to include only items of the same type as those listed. See generally Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough, Ont.: 2000) at 315-20.

⁶⁶ See *Special Joint Committee*, *supra* note 23, vol. 1, No. 3 (12 November 1980) at 32-33.

⁶⁷ *Supra* note 40 at para. 52. While L’Heureux-Dubé J. is writing a concurring minority decision, her statements on s. 25 are not treated by the majority.

⁶⁸ See Brian Slattery, “The Constitutional Guarantee of Aboriginal and Treaty Rights” (1983) 8 *Queen’s L.J.* 232 at 238. See also Arbour, *supra* note 22 at 29; Pentney, *supra* note 27 at 56.

and ... to aboriginals as aboriginals” will be protected by section 25.⁶⁹ This accords with case law in the area of Aboriginal rights, in that the right must have a strong connection to the community that is claiming it. For example, in *Van der Peet*, the Court held that an Aboriginal right “must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”⁷⁰ This second component in Justice Kirkpatrick’s framework therefore appears to serve as a restriction on what constitutes an “other right or freedom”.⁷¹

The final component of the analytical framework suggested by Justice Kirkpatrick considers the remedy that the party claiming the *Charter* right is seeking. This is the most obvious means of determining whether a *Charter* right “might” abrogate or derogate from an Aboriginal right,⁷² as it represents the outcome that would result should the *Charter* right be violated. Two obvious issues arise. First, the use of the word “might” by Justice Kirkpatrick has implications that are not clarified in her decision. It seems to indicate that only a potential violation of an Aboriginal right would be required in order to apply section 25. This again raises issues as to whether Justice Kirkpatrick is placing too little significance on *Charter* rights. If only a potential, and not actual, abrogation or derogation of an Aboriginal right is required, one can imagine a variety of situations in which *Charter* rights would essentially become meaningless. This approach does not allow for reconciliation of the *Charter* right with the Aboriginal right, and therefore appears to undermine the importance of *Charter* rights.

The second issue is what type of remedy would in fact abrogate or derogate from an Aboriginal right. In *Charter* challenges, several remedies may be sought. Based on Justice Kirkpatrick’s analysis in *Kapp*, it seems clear that in most cases, if the party

⁶⁹ *Kapp*, *supra* note 3 at para. 138.

⁷⁰ *Supra* note 62 at para. 46.

⁷¹ The potential significance and impact of “other rights or freedoms” should not be understated. Because of the breadth of these words, the question arises whether an Aboriginal right must be proven to exist in order to engage s. 25—that is, whether the tests for establishing an Aboriginal right under s. 35 in *Van der Peet* and *Sparrow* would always apply or even be necessary in developing a s. 25 argument.

There is a concern that the use of s. 25 might lead to circumventing the strict requirements found in these tests. For example, it could be argued that an Aboriginal interest, which may not hold the status of a right under s. 35, may nevertheless fall within the scope of “other rights and freedoms”. It could therefore be possible for s. 25 to protect such an interest as a “freedom”, thus evading the tests established in *Van der Peet* and *Sparrow*. This could then lead to the further complication of allowing an *interest* to defeat a *Charter* right.

In addition, should s. 25 be interpreted in a wide manner, it may provide protection for Aboriginal self-government in a way that has not yet been recognized under s. 35. While these issues are not addressed in the context of this case, and therefore beyond the scope of this comment, they will likely need to be addressed in future cases. In any case, it seems clear that placing a “limitation” on this broad provision, as suggested by Kirkpatrick J., may play an important function in the development of s. 25 analysis.

⁷² See *Kapp*, *supra* note 3 at para. 150.

seeks to strike down the provision that grants the Aboriginal right, the remedy would be abrogating or derogating from that right and section 25 would serve to protect the right from such a remedy. What is less obvious is how the remedy of “reading in” would affect this framework. If the remedy sought were inclusion of the non-Aboriginal claimant in a statutory scheme rather than elimination of the Aboriginal right altogether, would the protection granted by section 25 still be required? The answer to this would depend solely on the interpretation given to the words “abrogate or derogate”; but, as previously indicated, Justice Kirkpatrick does not provide any guidance as to their meaning. Potentially, a purposive analysis of section 25, the ordinary meaning of the words, the drafter’s intent in using those words, and case law discussing the meaning of the words in other *Charter* provisions (such as sections 26–29) could all be used in applying the framework. In any case, it appears that this matter will need to be decided in future cases.

One last issue not addressed in this case that may arise in the future, and that may or may not create problems for the analytical framework laid out by Justice Kirkpatrick, is how the framework would apply to the interaction between an individual Aboriginal right protected by the *Charter* and a collective Aboriginal right protected by section 25. This issue addresses specific conflicts that may arise in Aboriginal communities. For example, a situation may arise where an Aboriginal person claims a *Charter* right that conflicts with a right held by his or her Aboriginal community. If Justice Kirkpatrick’s interpretation of section 25 were adopted, which right would prevail? For example, what if the collective Aboriginal right threatened an Aboriginal individual’s security of person? This factual scenario arose, to some degree, in *Thomas v. Norris*.⁷³ In that case, an Aboriginal initiation ceremony allegedly involved the assault of an Aboriginal individual. As the case was between private parties, the *Charter* was not applicable. However, if the fact scenario were to be altered slightly so that a *statute* created an Aboriginal right of the community to perform the initiation ceremony, a conflict might arise in which section 7 would potentially be violated and section 25 could then arguably be invoked. It is unclear at this point how the interaction between the two *Charter* provisions would play out based on the framework suggested by Justice Kirkpatrick. The question that would need to be addressed is, should section 25 protect a collective Aboriginal right that may lead to bodily harm of an individual over the Aboriginal individual’s *Charter* right to security of the person?

While this could likely be easily rectified by amending the statute to exclude such circumstances, a more difficult situation would arise in regard to a law passed by an Aboriginal community operating under self-government. If, for example, an Aboriginal person were to claim an infringement of a *Charter* right based on an enactment by an Aboriginal self-government, which right would be protected—the individual *Charter* right or the collective right to self-government? The framework suggested by Justice Kirkpatrick may not properly address this question, as it appears

⁷³ *Supra* note 44.

to focus solely on Aboriginal collective rights in conflict with non-Aboriginal *Charter* rights.

Several commentators have suggested that the need to limit the collective right in favour of an individual Aboriginal right may arise in certain circumstances, and that determining those circumstances may require a “balancing” of the rights.⁷⁴ However, if the courts undertook such balancing, would this not defy the purpose of section 25 as a protective measure, or shield, against *Charter* rights? Other commentators have indicated that “[b]ecause of the constitutional significance of indigenous difference, the judiciary ought to extend a wide margin of appreciation to Aboriginal forms of social and political organization when assessing the constitutionality of an internal restriction,”⁷⁵ but that such restrictions will need to be justified by the Aboriginal community.⁷⁶ While a full analysis of this issue is beyond the scope of this paper,⁷⁷ it seems clear that courts will be left with the responsibility of adapting Justice Kirkpatrick’s section 25 framework to address not only the interaction of non-Aboriginal *Charter* rights with section 25, but also the rights of individual Aboriginal persons in relation to the collective rights protected under section 25.

Conclusion

What seems obvious from the above analysis is that section 25 is more than an interpretive provision. It acts as a shield to protect Aboriginal peoples rights from *Charter* provisions that may “abrogate or derogate” from those rights. Both the legislative and jurisprudential history of section 25 supports this interpretation.

Confusion arises, however, in the case law as to when and how to apply section 25. Until *Kapp*, little had been written on either of these issues. Several cases suggested that in the context of a claimed Aboriginal right, section 25 could only be used once a *Charter* infringement or breach had been established. Other cases have indicated that section 25 could be “triggered” as soon as a *Charter* claim is made. Each of these approaches can be seen in *Kapp*, which implies that the debate remains unresolved. However, the combination of the decisions rendered by both Justices Low and Kirkpatrick provide an analysis of section 25 in greater detail than any court before them.

⁷⁴ See Isaac, *supra* note 28 at 447-48. Isaac also provides an in-depth discussion of the inclusion of the *Charter* in Aboriginal self-government agreements and of the application of *Charter* rights in relation to these governments’ enactments (*ibid.* at 449-51). See also Arbour, *supra* note 22 at 14.

⁷⁵ Macklem, *supra* note 63 at 226 [footnotes omitted].

⁷⁶ This argument appears to suggest a s. 1 analysis adapted to apply only in circumstances where a *Charter* infringement is due to an enactment by an Aboriginal government. While it is an interesting, possibly even viable solution to this particular dilemma, it raises a host of other issues. Most notably, is it just to treat s. 25 as a complete shield from non-Aboriginal *Charter* rights, but not as a complete shield to Aboriginal *Charter* rights?

⁷⁷ For further discussion of this issue, see generally Isaac, *supra* note 28; Macklem, *supra* note 63. See also Timothy Dickson, “Section 25 and Intercultural Judgment” (2003) 61 U.T. Fac. L. Rev. 141.

What is especially significant is the tentative framework suggested by Justice Kirkpatrick. While there are problems with her analysis, she has provided a method by which future courts may approach section 25. Although she had no concurring decision from any other member of the court, Justice Levine did comment that she anticipated that “Kirkpatrick J.A.’s reasons for judgment will form the basis for the development of s. 25 jurisprudence in future cases.”⁷⁸ All this considered, it seems plausible that *Kapp* will become the starting point for future section 25 analysis, possibly securing its place as the leading case on this section of the *Charter*.

⁷⁸ *Kapp*, *supra* note 3 at para. 161.