"Protecting the constitutional freedoms of Canadians through education and public interest litigation."

2007 Annual Report

A Message from the Executive Director

Starting with just one court case in 2005, the Canadian Constitution Foundation (CCF) has experienced phenomenal growth in 2006 and 2007. Since 2005, the CCF has:

- Supported Chief Mountain's fight for his equality rights as a Canadian in the face of an unconstitutional "Third Order" of government created by the Nisga'a Agreement (see page 14);
- Intervened on behalf of taxpayers in *Kingstreet Investments v. New Brunswick*, in which the Supreme Court of Canada adopted the CCF's argument that governments be held accountable for illegal taxation (see page 7);
- Supported the constitutional challenge to Ontario's ban on private health insurance, brought by Shona Holmes and Lindsay McCreith as they assert their right to access essential health care services outside of the Ontario Government's monopoly (see pages 10 and 11);
- Represented the Japanese Canadian Fishermens Association as it intervened before the Supreme Court of Canada in *R. v. Kapp*, a constitutional challenge to race-based commercial fisheries in B.C. (see page 13); and
- Supported Doug Gould's fight for racial equality on the Queen Charlotte Islands (see page 13).

In addition to these court interventions, the CCF released "Judging the Judges" in April of 2007, just prior to the 25th anniversary of the *Canadian Charter of Rights and Freedoms*. "Judging the Judges" assesses Supreme Court of Canada judges in upholding individual and economic freedom, and equality before the law. This study examines cases which have a direct impact on the individual and economic freedom of citizens, and their equality before the law. "Judging the Judges" reveals a wide disparity between Supreme Court judges, some of whom are stronger defenders of individual and economic freedom, while others less are less so. The Supreme Court of Canada has posted a link to "Judging the Judges" on its own website, and the study is available at www.CanadianConstitutionFoundation.ca.

Our law conference in October (see pages 8 and 9) was attended by over 100 law students, lawyers, judges and law professors. Participants took part in the conference's lively and vigorous debate through the question-and-answer sessions following each of the six panels. Law students enjoyed listening to, and asking questions of, Supreme Court of Canada Justice Marshall Rothstein and Harvard Law Professor Charles Fried.

I am grateful to all of our donors. Without your support, none of the activities above would have taken place. With your continued support, the CCF looks forward to working as a voice for freedom in Canada's courtrooms in 2008 and beyond.

John Carpay
Executive Director

Former US Solicitor General Charles Fried, Supreme Court of Canada Justice Marshall Rothstein, CCF Executive Director John Carpay at the "Future of Freedom" Conference.

The Canadian Constitution Foundation

The Canadian Constitution Foundation is a registered charity, independent and non-partisan, with a unique charter which allows it to fund appropriate litigation. We rely on donations to carry out our educational and charitable work, and issue tax receipts for donations received.
Our registered charitable number with the Canada Revenue Agency is 86617 6654 RR0001.

Our Mission

We protect the constitutional freedoms of Canadians through education and public interest litigation.

Our Vision

We envision a Canada where:

- Every Canadian is equal before the law, and is treated equally by governments.
- There is freedom from fear and oppression.
- Canadians have the knowledge and motivation to recognize, protect and preserve their constitutional rights and liberties.
- Individuals control their own destiny as free and responsible members of society.
- Governments are held accountable to our Constitution in making and applying laws, regulations and policies.

Our litigation priorities

Through education and public interest litigation, the Foundation supports:

- Individual freedom – the "fundamental freedoms" in section 2 of the *Charter*:
  - freedom of association;
  - freedom of peaceful assembly;
  - freedom of conscience and religion;
  - freedom of thought, belief, opinion and expression.
- Economic liberty: the right to earn a living, and to own and enjoy property, as part of the *Charter* section 7 right to "life, liberty and security of the person."
- Equality before the law: the *Charter* section 15 should be interpreted to mean equal rights and equal opportunities for all Canadians, special privileges for none.

Our guiding principles for carrying out our mission

- Frugality: We expend donors' funds in the most effective manner.
- Political neutrality: We are non-partisan.
- Honesty: We subscribe to the highest level of probity and sincerity in our words and actions.
- Optimism: We strive to maintain a positive outlook.
- Competence: We strive to carry out our work at the highest professional standard

Our Board of Directors and Advisory Board

The Directors on our governing Board are:

- Monique Beaumont, Calgary community volunteer
- Dr. Ehor Boyanowsky, Simon Fraser University Criminology Professor
- Claus Jensen, West Vancouver businessman
- Dr. Will Johnston, Vancouver family physician
- Lisa La Horey, Toronto lawyer
- Mark Mitchell (Chair), Vancouver businessman
- Christopher Schafer, Ottawa lawyer
- Moin Yahya, University of Alberta Law Professor

Our Advisory Board members are:

- Avril Allen, Toronto lawyer
- Dr. Thomas Bateman, St. Thomas University Political Science Professor
- Gordon Gibson, former BC MLA
- Michel Kelly-Gagnon, President, Conseil du Patronat du Quebec
- Eugene Meehan, Q.C., Ottawa lawyer
- Karen Selick, Ontario lawyer
- Michael Sporer, lawyer and criminal law instructor at Douglas College.

A Special Thank-you to our Donors

The Canadian Constitution Foundation is grateful for all donations received, regardless of the amount. We respect the privacy of donors, and provide public recognition only with their consent. The following individuals, foundations and businesses each donated $1,000 or more in the past year:

Barry Graham

Douglas Gould

Garfield Mitchell

Prof. Kenneth Hilborn

Dr. Michael Walker

Richard Holbrook

Rob Anders

Will Johnston

Atlas Economic Research Foundation

Aurea Foundation

Geophysical Service Incorporated

Lansdowne Equity Ventures Ltd

The B.I. Ghert Family Foundation

The Law Foundation of Ontario

CCF Toronto Advertising Campaign

Activities, Events and Media

Media

- 9 published guest columns in national newspapers, including the *Globe & Mail* and the *National Post*, plus the CCF was mentioned in 38 newspaper articles.
- Over 90 interviews - for print media, live radio and television

CCF advertising campaign in Toronto. Ads were located on buses and at bus stops.

John Carpay, Lindsay McCreith, Sandra McCreith, and Avril Allen at the Ontario Superior Court of Justice.

Future of Freedom Conference, October 2007, Toronto. From left to right: George Macintosh, Lorne Gunter, Russell Brown, Stephen Hazell, Glenn Fox, Bruce Pardy

Speaking Engagements & Debates

In 2007, John Carpay spoke at:

- Fraser Institute policy briefing on the *Chaoulli* decision and future CCF-supported health care litigation. (Toronto; January)
- Fraser Institute student seminar regarding health care policy, the *Chaoulli* decision and future constitutional litigation. (Edmonton; January)
- Frontier Centre for Public Policy, luncheon speech on the *Chaoulli* decision. (Winnipeg; February)
- A meeting of the Ontario Landowners Association regarding public interest litigation and property rights. (Almonte; February)
- News conference to announce Lindsay McCreith's constitutional challenge to Ontario's ban on private health insurance. (Toronto; May)
- Presentation to students and professors at the University of Alberta Faculty of Law on the *Chaoulli* decision. (Edmonton; September)
- A debate with Ottawa lawyer Stephen Shrybman on the merits of the *Chaoulli* decision at the University of Toronto. (Toronto; October)
- A debate with Osgoode Hall law professor Joan Gilmour at York University, Toronto, whether the *Chaoulli* decision should be extended into Ontario. (Toronto; October)
- The University of British Columbia Faculty of Law regarding *R. v. Kapp* and the Japanese Canadian Fishermens Association. (Vancouver; November)
- A debate with Matthew Kirchner, counsel for another intervener in *R. v. Kapp*. (Vancouver; November)

EDMONTON JOURNAL
EDMONTON'S NEWSPAPER SINCE 1903 FRIDAY, JANUARY 12, 2007*

Tax ruling should be a warning to gov't

Lorne Gunter
Friday, January 12, 2007

In the early 1980s, New Brunswick began levying a surcharge on the liquor served by bar and restaurant owners.

On top of the retail price of the liquor, on top of the provincial sales tax, the excise tax hidden in the retail price and, eventually, the GST, the N.B. government began dinging lounge operators and restaurateurs an additional 11 per cent "user charge."

In 1988, Kingstreet Investments began operating several bars and restaurants in Fredericton and Moncton. So, of course, all its liquor purchases were subject to N.B.'s user charge.

In 2001, Kingstreet decided it had had enough and it took the provincial government to court claiming the user fee was nothing more that an indirect tax that the province lacked the constitutional authority to levy.

It won. Sort of.

The trial judge agreed the 11 per cent charge was an unconstitutional tax, but denied Kingstreet's request to be repaid a sum of nearly $1 million, which it calculated was the amount it had paid over the year, plus interest.

Kingstreet has passed on the cost to its customers through higher drink prices, the trial judge found, so it wasn't entitled to reimbursement.

It was a lose-lose judgement. Kingstreet lost its claim to be compensated for all the wrongful tax it had paid. Meanwhile, the provincial government lost a lucrative tax. Shortly after Kingstreet's first trial, N.B. killed its user fee.

Kingstreet appealed, and won, but again it was only a partial victory.

The N.B. court of appeal agreed the regulatory surcharge was just a disguised tax, and on the province lacked the constitutional power to levy.

It also upheld Kingstreet's clam to restitution, but only from the time the company filed its first court application. In other words, since it had not gone to court to fight the tax between 1988 and 2001, it was not entitled to reimbursement for any taxes it paid during those 13 years.

The levy might have been *ultra vires* beyond the province's constitutional authority – yet, since Kingstreet had paid it without complaint for 13 years, it had given the fee its tacit consent.

Therefore, the N.B. treasury only had to pay Kingstreet back those user charges collected from the time they filed their lawsuit in 2001 to the date on which N.B. ended that charge in 2002; a tiny sum.

As the lower court had, the appeal court accepted the "passing-on defence" argued by the province: Kingstreet had no case for being reimbursed.

But in what John Carpay of the Canadian Constitution Foundation has dubbed a major victory for taxpayers across the country (and not just N.B. bar patrons), the Supreme Court on Thursday overturned the lower courts' rulings against repaying Kingstreet and ordered the province to make financial restitution.

There's just one hitch: The government doesn't have to pay for more than the six years prior to the date on which Kingstreet's claim was filed.

Carpay, whose new legal and constitutional think-tank intervened in the case, says the ruling is surprisingly forceful.

In a rare 9-0 ruling, the justices decided that "illegally collected taxes should be returned to taxpayers," Carpay explained. In contradiction to the two lower courts, the Supreme Court decided that when a tax is unconstitutional, it cannot be kept – period – and must be returned to those from whom it was wrongfully taken, even if they didn't file a formal protest against it or were able to pass on the amount.

If the basis of a tax is unconstitutional, governments have no right to the money it brings in in the first place. End of argument.

Mr. Justice Michel Bastarache, writing on behalf of the court, said "When the government collects and retains taxes pursuant to *ultra vires* legislation, it undermines the rule of law. TO permit the Crown to retain an *ultra vires* tax would condone a breach of this most fundamental constitutional principle."

Carpay also paraphrased other important aspects of the decision.

"All manner of taxes, rates, feed and charges should be extracted only under legal authority, pursuant to constitutional principles. And governments should be required to honour the Constitution, facing penalties or other consequences when they don't."

Government's – both federal and provincial – have for many years now exceeded their constitutional limits, both in taxation and policy making.

I am not talking about the income tax being unconstitutional. There is a powerful conspiracy theory that gains momentum from time to time that contends Ottawa has no authority to tax incomes. It is based on a misreading of the constitution. Regrettably, the income tax legislation – excessive, but legitimate.

I am talking about the taxes such as this one, masquerading as a fee to get around the constitution's prohibition against province's imposing indirect taxes.

And I am talking about Ottawa meddling in urban affairs, education and health care, where the constitution gives no role.

Perhaps this decision will force governments to be more aware of their constitutional limitations, or face the consequences.

The Future of Freedom:
Law and Liberty in Canadian Jurisprudence

2007 Conference

"The Future of Freedom" Conference exposed law students and the general public to a wide range of perspectives on freedom, and provided a venue for debates about important current legal issues that are not often presented in law schools.

This was accomplished through an array of 24 panellists speaking on six panels, from Friday night through to Sunday morning. Each of the six panels presented diverse views, which made for lively and thought-provoking debate which is often missing in law schools. Each panel was followed by a question and answer period, allowing participants to engage in the debate.

Students from eleven universities in Ontario, Quebec, Alberta and Nova Scotia attended the conference.

Some of the topics addressed at the conference were:

- the limits of government power in preserving a free and ordered society
- the role of government and the preservation of individual freedom in our post-9/11 world
- the nature of private property rights and whether they should be enshrined in Canada's constitution.

From top left: Stephen Hazell, Sierra Club of Canada; Hon. David Brown, Superior Court of Justice of Ontario; Dr. Janet Epp-Buckingham, Laurentian Leadership Institute; George Macinstosh, Q.C., Farris Vaughn Wills & Murphy LLP; Dr. Margaret Somerville, McGill University; Dr. Moin Yahya, University of Alberta.

"The Future of Freedom" conference saw over 100 law students, lawyers, judges, law professors and opinion leaders discussing and debating the significance of freedom in Toronto, October 12-14, 2007.

Panellists at the 2007 conference included:

Avril Allen - Author and Associate, Boghosian & Associates, Toronto
Hon. David Brown - Superior Court of Justice of Ontario
Russell Brown - Law Professor, University of Alberta
Janet Epp-Buckingham - Laurentian Leadership Institute
Michael Coren - Author, columnist and radio host
Angela Costigan - REAL Women of Canada
Father Raymond de Souza - Columnist, *National Post*
Glenn Fox - Professor, University of Guelph
Lorne Gunter - Columnist, *National Post* and *Edmonton Journal*
Stanley Hartt - Former Chief of Staff to Prime Minister Brian Mulroney
Stephen Hazell - Sierra Club of Canada
Michael Krauss - Law Professer, George Mason University
George Macinstosh, Q.C., Farris Vaughn Wills & Murphy LLP
Gerry Nicholls - Senior Fellow, The Democracy Institute
Bruce Pardy - Law Professor, Queens University
Rob Rainer - Executive Director, National Anti-Poverty Organization
Peter Russell - Political Science Professor Emeritus, University of Toronto
Christopher Schafer - Associate, Gowling Lafleur Henderson, Ottawa
Karen Selick - Lawyer and columnist
Margaret Somerville - McGill University
Ilya Somin - Law Professor, George Mason University
Tom Warner - Coalition for Lesbian and Gay Rights in Ontario
Moin Yahya - Law Professor, University of Alberta

Supreme Court of Canada Justice Marshall Rothstein (*top photo)* spoke about the judicial nomination process, specifically about his experience in front of a Parliamentary Committee.

Charles Fried, Harvard Law professor and former United States Solicitor General (*bottom photo)* presented a riveting and energetic keynote speech on the Saturday evening. A prominent American jurist, Fried presented the ideas in his most recent book, *Modern Liberty and the Limits of Government*, while addressing the topic: "Is Liberty Possible?"

Our next conference will take place **October 17-19, 2008** at the Day's Inn, downtown Toronto.

NATIONAL POST
VOL. 9 NO. 264 FRIDAY, SEPTEMBER 7, 2007 www.nationalpost.com

Suing the government for the right to see and live

John Carpay

Friday, September 7, 2007

Get immediate surgery to treat a brain tumour -- or risk permanent blindness and possibly death. That was the choice presented to 43-year-old Shona Holmes of Waterdown, Ontario. But Ontario's government-run health care system offered her only a waiting list.

Ms. Holmes, a self-employed family mediator and the mother of two children, began losing her vision in March, 2005. She also experienced severe headaches, anxiety attacks, high blood pressure, extreme fatigue and weight gain. In spite of these symptoms -- and an MRI scan revealing the tumour causing them -- Ontario's health system told Shona that she would have to wait four months to see a neurologist and six months to see an endocrinologist.

With her vision deteriorating rapidly, Shona went to the Mayo Clinic in Arizona that June. After extensive testing, several specialists (including one who is a licensed Ontario physician) told Shona that if she did not receive surgery to remove the tumour immediately, she risked going blind or even death.

With the Mayo test results and diagnosis in hand, Shona returned to Ontario, only to be told to wait for more appointments and tests. Having lost half of her vision in her right eye and one-quarter in her left, and unable to expedite appointments with specialists, Shona returned to the Mayo Clinic, where surgeons operated to remove the tumour.

Within 10 days, Shona's vision was completely restored. Visual field testing and a post-operative MRI confirmed that the tumour had caused the vision loss. Nevertheless, the Ontario Health Insurance Plan (OHIP) refuses to reimburse Shona for any of the expenses she was forced to incur in seeking necessary medical care abroad. Shona is back at work, and her husband now works two full-time jobs to pay off the debts they incurred to save her vision.

Shona's ordeal is similar to that which Lindsay McCreith endured in 2006. A retired body shop owner from Newmarket, Ont., Lindsay also had a brain tumour. Ontario's health care system told him he would have to wait more than four months for an MRI. Not willing to risk the growth and spread of what might be cancer, and with private MRIs being illegal in Ontario, Lindsay paid for an MRI scan in Buffalo, N.Y. He also paid for brain surgery in Buffalo to remove the malignant tumour, after having been told he would need to wait for three months to see a specialist in Ontario.

These experiences are not unique. Ontario's health care system routinely offers two waiting lists: one for diagnosis, then another for treatment. This is the result of Ontario's laws, which make it illegal for people of ordinary means to access health care outside the government-run system.

Waiting lists are at the heart of the Supreme Court of Canada's 2005 decision in *Chaoulli vs. Quebec*. The majority of justices in *Chaoulli* ruled that the government's ban on private health insurance creates a "virtual monopoly" over health care by government. The court ruled that this monopoly, through the waiting lists it causes, inflicts physical and psychological suffering on patients, and the risk of irreparable harm (loss of vision or death, for example).

While differing on some details, the justices agreed that a total ban on private health insurance is not necessary to preserve a public health system. Indeed, the presence of a private system can help take pressure off the public system. With parallel private and public systems operating side by side, Austria, Belgium, France, Germany, Japan, Luxembourg and Switzerland all have no waiting lists in their public health care systems.

Freedom of Choice in Health Care

News conference at Queens Park, Toronto, September 5, 2007. From left to right: John Carpay, Shona Holmes,

At a well-attended news conference in September, the Canadian Constitution Foundation announced that plaintiffs Lindsay McCreith and Shona Holmes are suing the Ontario Government for the right to access essential health care services outside the government's monopoly system.

Shona Holmes was told she would lose her vision forever, unless surgeons immediately removed her growing brain tumour. But Ontario's government monopoly health care system told Shona she would have to wait for months just to see specialists and obtain treatment. Not willing to risk permanent blindness, Shona obtained surgery at the Mayo Clinic in Arizona. Within ten days, her vision was completely restored.

Lindsay McCreith's experience with Canada's "wait-care" system is similar. Facing an eight-month delay for surgery to remove a malignant brain tumour, he paid out of pocket for surgery in Buffalo, New York.

Lindsay McCreith

Canada is the only industrialized democracy in the world which outlaws private health insurance for medically necessary services. The *Canada Health Act* – together with provincial laws – prevent Canadians from obtaining essential health care services outside of the government's monopoly. Like other Canadians, Shona and Lindsay are prohibited by law from buying private health insurance to access essential medical services like MRIs, and surgery to remove cancer. In Canada, it's legal to buy health insurance for your pets, but not for yourself or your loved ones.

In their constitutional challenge to Ontario health care legislation, Shona Holmes and Lindsay McCreith rely on the 2005 Supreme Court of Canada decision in *Chaoulli v.Quebec*, explained in the column on pages 10 -11.

"Suing the government..." cont'd

Chaoulli stands for the principle that governments cannot force people to suffer on waiting lists by denying them the opportunity to obtain essential health care services outside of the government-run system. Governments must eliminate waiting lists in the public system, or allow patients to seek care outside of it. Governments cannot prevent citizens from taking charge of their own medical needs.

Unwilling to see their fellow citizens suffer at the hands of a callous and unaccountable government-run monopoly, Lindsay and Shona are taking the Supreme Court of Canada at its word, and are now suing the Ontario government over timely access to health care. Ontario allows people to buy comprehensive health insurance for their dogs and cats. Isn't it about time that Canadians were free to buy comprehensive health insurance for themselves and for their loved ones?

CALGARY EDITION » THURSDAY, OCTOBER 4, 2007 VARIABLY CLOUDY, HIGH 8 LOW -1
THE GLOBE AND MAIL
CANADA'S NATIONAL NEWSPAPER

Still hooked by the fight for a race-free B.C. fishery

Thursday, October 4, 2007, by John Carpay

The Japanese Canadian Fishermens Association is once again asking the Supreme Court of Canada to rule against racist policies in B.C.'s commercial fishery.

This December, Canada's highest court will hear the appeal of John Michael Kapp and other commercial fishermen who were arrested in 1998 for fishing in protest of a private commercial fishery for members of two Aboriginal Bands. This race-based commercial fishery allows individuals with bloodline ties to the Musqueam and Tsawwassen Indian Bands to fish once in a commercial fishery for their individual benefit, and a second time in the public commercial fishery left over for other Canadians. Other fishermen – including Aboriginal Canadians and Canadians of Croatian, Vietnamese, Norwegian and other ancestries – are excluded from the first commercial fishery only because they lack a bloodline tie to these two Bands.

Introduced by Prime Minister Mulroney in 1992, and then continued under Chretien, Martin and Harper, this race-based commercial fishery is radically different from the non-commercial Aboriginal "food fishery." Traditionally, the non-commercial "food fishery" allowed Aboriginals to fish in limited quantities for food, social and ceremonial purposes, without imposing any barriers to participating in B.C.'s commercial fishery. Working under rules that apply equally to all Canadians, Aboriginals have enjoyed great success in B.C.'s commercial fishery. In fact, more than one third of B.C.'s fishermen, license holders and vessel owners are Aboriginal, and Aboriginals are among the 145 protesting fishermen arrested in 1998 who are now asking the Supreme Court of Canada to strike down this policy of segregation by race in *R.* v. *Kapp*.

For fishermen of Japanese ancestry, this race-based commercial fishery is especially painful, as their ancestors were subjected to anti-Oriental fisheries policies during the 1920s. In 1920, the federal government limited the number of fishing licenses issued to Japanese Canadians at 1919 levels, while increasing the number of licenses issued to Caucasian and Aboriginal fishermen. Further, Japanese Canadians were required to reside in the same coastal regions where they fished, while other fisherman could live anywhere they pleased. In 1924 on the Skeena River, a ban on using gas-powered boats was lifted for all but the Japanese Canadian fishermen. As they rowed their boats against the tides, winds and currents, taunts of "Hurry up, Japs!" could be heard from other fishermen speeding past in their motorized boats. These federal policies were part of a deliberate and publicly stated goal of driving the "yellow peril" out of B.C.'s commercial fishery. Approximately one half of Japanese Canadian fishermen were forced out of the industry during the 1920s, while those who remained suffered a significant loss of earnings, not to mention a loss of dignity and respect.

These racially discriminatory policies were challenged by the Japanese Canadian Fishermens Association's predecessors: the Skeena River Fishermen's Association and the Amalgamated Association of Fishermen of B.C. Intervening before the Supreme Court of Canada in 1928 in ***Reference Re: Fisheries Act***, Japanese Canadian fishermen argued that the then 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." These same associations of Japanese Canadian fishermen raised money for Jun Kisawa to buy a gas-powered boat to conduct a protest fishery near Prince Rupert in 1929. Without responsibilities for a wife or children, this young bachelor was willing to risk jail by using a motorized boat to fish alongside Caucasian and Aboriginal fishermen. He was promptly arrested and prosecuted. In a Prince Rupert courtroom he admitted to breaking the law, and successfully asserted his right as a Canadian to be treated equally under the law.

During the Second World War, the federal government confiscated the homes and fishing vessels of these politically voiceless Japanese Canadians, then uprooted them from the B.C. coast and forced them to live in internment camps in the B.C. interior and east of the Rockies. It was not until 1949 that Japanese Canadians were permitted to return to the B.C. coast.

Putting the injustices of the past behind them, Japanese-Canadian fishermen returned to their former livelihood. But, this time, there was just one set of rules for all Canadians: equal opportunity regardless of a fisherman's ancestry, language, race or bloodline ties. For more than four decades, until 1992, B.C.'s commercial fishery was a diverse, colour-blind and racially integrated workplace. This is the commercial fishery that Canadians of Japanese ancestry – and thousands of fishermen from a multitude of racial and cultural backgrounds – are fighting to get back. In *R.* v. *Kapp*, the Supreme Court of Canada has an opportunity to once again affirm racial equality in B.C.'s commercial fishery, as it did in 1928.

Japanese Canadian fishermen fight discrimination in court

The Canadian Constitution Foundation represented the Japanese Canadian Fishermens Association (JCFA) , an intervener before the Supreme Court of Canada in *R. v. Kapp*.

The *Kapp* case concerns the federal government's policy of racial segregation in the commercial fisheries in British Columbia. In 1992, the federal government announced the creation of a separate commercial fishery for individuals with bloodline ties to the Musqueam and Tsawwassen Indians Bands. These same individuals are also permitted to fish a second time during the opening for all other Canadians.

In 2003, B.C. Provincial Court Judge William Kitchen ruled that these race-based commercial fisheries violate the equality rights of the *Canadian Charter of Rights and Freedoms*. He dismissed the charges against the 145 fishermen who were arrested in 1998 for having fished in protest. In 2004, this decision was overturned by the B.C. Supreme Court, and in 2006 the B.C. Court of Appeal affirmed the B.C. Supreme Court decision.

CCF Executive Director John Carpay presented oral argument before the Supreme Court of Canada on December 11, 2007. A decision is expected in 2008.

Fighting for racial equality on the Queen Charlotte Islands

The Canadian Constitution Foundation is supporting Doug Gould's constitutional challenge to a race-based business licensing scheme imposed by Parks Canada.

Doug Gould was born and raised on the Queen Charlotte Islands. He runs a tourism business, Moresby Explorers, taking visitors through the Gwaii Haanas
National Park. Parks Canada requires applicants for business licenses to identify themselves as Haida Indian or as non-Haida. Parks Canada has imposed a limit of 22,000 "user days" on tour operators for conservation purposes, of which 11,000 are available only to Haida Indians. Non-Haida Canadians are limited to 11,000 and cannot expand their businesses, even if the quota for Haidas is not being used, as is now the case.

Doug objects to the government asking people to identify themselves by ancestry, ethnicity, race or bloodline tie, and then using the answer as a criterion in the issuing of business licenses. Doug believes that each Canadian citizen, Aboriginal or otherwise, must be treated as a member of the same human family. People should be free from government-imposed discrimination by reason of immutable personal considerations such as ethnicity and gender.

This case, called *Moresby Explorers Ltd. and Douglas Gould v. Attorney General of Canada*, has profound implications across Canada, because many trades, occupations and livelihoods depend on government licence. Doug is seeking a victory for the principle that government should not consider a person's race or gender or other unchangeable personal characteristic in the issuing of licenses.

In 2008, the Supreme Court of Canada will release its decision as to whether or not it will hear this case.

Chief Mountain: Nisga'a Challenge Revived

On October 9, 2007, the B.C. Court of Appeal released its decision to revive the constitutional challenge to the Nisga'a Agreement brought by Sga'nisim Sim'augit (also known as Chief Mountain and as James Robinson), and Nisga'a matriarch Nisibilada (also known as Mercy Thomas), and other Nisga'a people. Their action had been dismissed in October of 2005 by BC Supreme Court Justice Pitfield on procedural grounds: the Nisga'a plaintiffs had failed to formally provide the Defendant governments with information that was already in the possession of the Defendant governments.

Chief Mountain's constitutional court action commenced in 2000. The action claims that the Nisga'a Final Agreement violates Canada's constitution by creating a semi-independent Nisga'a state whose laws prevail over Canadian law. The Nisga'a government later applied, of its own choosing, to be added as a defendant. The three defendant governments (federal, BC and Nisga'a) have succeeded for more than seven years in preventing this constitutional challenge from going to trial, using numerous procedural delay tactics.

The Nisga'a Agreement has created a Nisga'a government in north-western B.C. with the power to grant or withhold Nisga'a citizenship -- even from individuals of Nisga'a descent. Only Nisga'a citizens are allowed to vote in elections, so that the Nisga'a government can effectively select the voting population. The Nisga'a Agreement expressly states that Nisga'a law prevails over Canadian federal and provincial law in fourteen areas of jurisdiction.

Chief Mountain opposes this "third order" of government created by the Nisga'a Treaty, stating "It hurts our people by taking away our ancestral lands and human rights. It hurts all Canadians by undermining the Canadian constitution. I vow to fight for my people's rights to be Canadian citizens and to be protected by the Charter of Rights. Those rights have been taken away illegally, by the Nisga'a treaty."

Prominent legal experts agree with Chief Mountain that the "third order" of government created by the Nisga'a Treaty violates Canada's constitution. Retired Supreme Court of Canada Justices William McIntyre and the late Willard Estey, retired B.C. Court of Appeal Justice D.M. Michael Goldie, former NDP Attorney-General Alex MacDonald, the late Mel Smith, Q.C., and former B.C. Attorney-General Geoff Plant have all stated publicly that parts of the Nisga'a Treaty are unconstitutional and therefore illegal.

The Canadian Constitution Foundation will continue to push this action towards trial so it can be heard on its merits.

Nisibilada (Mercy Thomas), John Carpay and Sga' Nisim Sim' Augit (Chief Mountain) at the BC Court of Appeal, June 14, 2007.

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