File No. 34986

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

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN,

THE ATTORNEY GENERAL OF ALBERTA,

THE ATTORNEY GENERAL OF QUEBEC,

THE ATTORNEY GENERAL OF MANITOBA,

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1. In their written submissions, the Respondents have raised additional arguments, not relied on in the reasons of the Court of Appeal, for why this Court should deny the Tsilhqot'in a declaration of Aboriginal title to the Proven Title Area. In particular:

a. Canada argues that "[b]y establishing a boundary for Aboriginal title lands that was not advocated by the appellant or referred to by any witness, and by giving the defendants no opportunity to present evidence or argument on this boundary, the trial judge departed from the adjudicative role to such an extent that any findings of fact that he made on the subject cannot be regarded as reliable."[1]

b. British Columbia argues that the "vague and ambiguous descriptions" of the Proven Title Area provided by the Trial Judge "make it impossible to draw any map of the tracts or tract that he believed to be the locus of Aboriginal title".[2]

c. British Columbia argues that the boundaries of the Proven Title Area are "arbitrary" and are not based upon the application of any consistent methodology.[3]

2. These new arguments are without merit, as set out below.

A. The Trial Judge's conclusions as to boundaries of the Proven Title Area are reliable and in keeping with the adjudicative role

3. The Trial Judge delineated the Proven Title Area based on "[t]he entire body of evidence"[4] generated over 339 days of trial. The Parties rigorously contested the location, extent and intensity of Tsilhqot'in occupation throughout the Claim Area. Ultimately, the Trial Judge articulated the Proven Title Area based on the "boundaries that are shaped by the evidence".[5]

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[1] Respondent Attorney General of Canada Factum ("**Canada's Factum**"), para. 69.
[2] Respondent Her Majesty the Queen in Right of British Columbia Factum ("**BC's Factum**"), para. 143.
[3] BC's Factum, para. 143; see also para. 145.
[4] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 ["**Trial Decision**"], para. 959 (AR vol. II, Tab 4 at 125-127).
[5] Trial Decision, para. 958 (AR vol. II, Tab 4 at 125).

4. In making findings of Aboriginal title to a portion of the Claim Area, the Trial Judge did not "depart from the adjudicative role" as alleged by Canada. The Trial Judge heard and reviewed the trial evidence, and then determined to what extent that evidence satisfied the relevant legal test. This is the essential function of a trial judge.

5. Only the Trial Judge can delineate the boundaries of Aboriginal title in this manner, at the conclusion of trial, informed by factual findings drawn from the full evidentiary record. To expect Aboriginal claimants to predict these boundaries in advance – or else be denied Aboriginal title – would impose an impossible burden in most cases. As noted by the Court of Appeal, "[i]t would have been miraculous if the plaintiff, in pleading his case, had fixed upon precisely the same boundary as the trial judge ultimately selected".[6]

6. Moreover, the Court of Appeal confirmed, as a matter of law, that the pleadings in this litigation did not confine the Trial Judge to finding Aboriginal title to either all or none of the Claim Area:

> I do not agree with the trial judge's ruling that the plaintiff's claim was an "all or nothing claim". The claim was sufficiently pleaded to allow the court to find that Aboriginal title had been proven in respect of only part of the Claim Area.[7]

7. Accordingly, there is no merit to Canada's argument that the Trial Judge strayed from his proper judicial role in finding Aboriginal title to a portion of the Claim Area.

B. The Boundaries of the Proven Title Area are Ascertainable

8. The Appellant appended the *Proven Title Area – Visual Aid Map* to his submissions to the Court of Appeal, in exactly the same manner, and in exactly the same form, as the map was filed with the Appellant's Factum in this Court. Notably, the Respondents did not raise any objections to this map before the Court of Appeal.

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[6] *William v British Columbia*, 2012 BCCA 285 ["**Appeal Decision**"], para. 119 (AR vol. III, Tab 9 at 137). See also: Rt. Hon. The Lord Woolf & Jeremy Woolf, *Zamir & Woolf, The Declaratory Judgment*, 3rd ed (London: Sweet & Maxwell, 2002) at 284; *Lau Wing Hong & Others v Wong Wor Hung & Another*, [2006] 4 HKLRD 671, paras. 140-48; *Native Women's Assn. of Canada v Canada*, [1994] 3 SCR 627 at 646-48.

[7] Appeal Decision, para. 117 (AR vol. III, Tab 9 at 136).

9. For the first time, British Columbia now argues that the Trial Judge's "vague and ambiguous boundary descriptions" render the mapping of the Proven Title Area "impossible."[8] Surely such a fundamental objection would have been apparent and pertinent in the court below.

10. In any event, the boundaries articulated by the Trial Judge for the Proven Title Area can be mapped with reasonable precision and certainty.

11. Indeed, many of the "ambiguities" identified by British Columbia (in Appendix "A" to its written submissions) result from British Columbia's own misunderstanding of the Trial Judge's conclusions. In Appendix "A", British Columbia treats the six geographical areas identified by the Trial Judge as if each of these areas were distinct, and then raises concerns that the boundaries *between* these six areas are incomplete or missing.

12. However, the Trial Judge explicitly confirmed that these six geographical areas together comprise a *single, contiguous* Proven Title Area. After describing these six areas (in para. 959), the Trial Judge confirmed that "[t]he foregoing describes a tract of land ..."[9]

13. British Columbia's criticisms about missing or ambiguous boundaries become irrelevant once we focus on the outside boundaries of the Proven Title Area as a whole. The *internal* boundaries as between the six identified areas are irrelevant given that they comprise a single, contiguous tract of land. The *outer* boundaries of the Proven Title Area were clearly delineated by the Trial Judge.

14. If British Columbia is suggesting that a finding of Aboriginal title cannot stand unless it includes a metes and bounds description of the Proven Title Area, with surveyor-like precision, this argument must be rejected on principle: subjecting the test for Aboriginal title to this European system of property demarcation would fundamentally neglect the Aboriginal perspective on the right at issue.[10]

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[8] BC's Factum, para. 143.
[9] Trial Decision, para. 960 (AR vol. II, Tab 4 at 127), (underscore added).
[10] See *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, paras. 147-49 ["***Delgamuukw***"].

15. As the Trial Judge found, the Tsilhqot'in had a strong concept of territoriality even though they did not (and did not need to) define their territorial boundaries with European metes and bounds.[11] It would be fundamentally unjust to require the Tsilhqot'in to delineate their Claim Area on terms that were foreign to their culture in 1846 and that had no bearing on how they conceived of, used, occupied, and defended their lands. Similarly, the Trial Judge could not be expected to delineate Aboriginal title lands using metes and bounds when the Plaintiff's evidence was not and could not be presented in those terms.

16. Challenges demarcating the precise boundaries of Aboriginal title lands are to be expected. As observed by Mr. Justice La Forest in *Delgamuukw*,

> … it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between the aboriginal claimants and the government.[12]

17. If disagreement persists as to the precise boundaries of the Proven Title Area, or if greater precision is required, this should be resolved at first instance through negotiations between the Crown and the Tsilhqot'in Nation, with recourse to the courts only if necessary. The possibility that negotiations and, ultimately, litigation, may be required to conclusively settle the boundaries is hardly a justification for the wholesale rejection of the Trial Judge's findings of Aboriginal title, as British Columbia contends.

18. Finally, for the first time, at para. 143 of its factum, British Columbia raises three specific, and relatively minor, disagreements with the *Proven Title Area – Visual Aid Map*. Upon consideration, the Appellant has no objection to British Columbia's proposed revisions and has amended the *Proven Title Area – Visual Aid Map* accordingly. The revised version of the *Proven Title Area – Visual Aid Map* is included as Appendix "A" to these submissions.

19. As these revisions indicate, disagreements as to the boundaries of the Proven Title Area can and should be resolved through good faith discussions between the Crown and the Tsilhqot'in Nation.

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[11] Trial Decision, paras. 646-649 (AR vol. II, Tab 4 at 29-31).
[12] *Delgamuukw*, para. 195 (*per* La Forest J., concurring).

C. The Boundaries of the Proven Title Area are not Arbitrary

20. British Columbia asserts that "[i]t is not possible to discern a consistent basis for the arbitrary boundaries drawn by the trial judge"[13] and that the Trial Judge "failed to conduct an analysis setting out the basis upon which the particular land in question has met or not met the test for title."[14] A review of the Trial Decision, and in particular Parts 2, and Parts 6-16, shows otherwise.

21. As explained in the Appellant's main submissions, the Trial Judge reviewed this Court's guidance in detail, correctly set out the test of occupation for proof of Aboriginal title, and applied this "high standard"[15] of occupation to the facts before him (facts which are not challenged on this appeal).

22. British Columbia concedes that the Trial Judge correctly set out the test for sufficiency of occupation identified by this Court in *Marshall; Bernard*.[16] However, in Appendix "A", British Columbia purports to show that the Trial Judge nonetheless applied an "inconsistent and arbitrary" approach to identifying the Proven Title Area.

23. British Columbia's submissions in Appendix "A" wholly misrepresent the careful and comprehensive analysis undertaken by the Trial Judge.

24. In particular, British Columbia focuses exclusively on a single section of the Trial Judge's reasons (Part 13), in which the Trial Judge makes factual findings in relation to specific geographical areas. At the same time, British Columbia fails to consider, or even mention, the extensive factual findings from several other sections of the judgment (*e.g.* Parts 7 and 16) or the extensive expert and oral history evidence relied on by the Trial Judge.

25. British Columbia's review of Tsilhqot'in occupation of Xeni (Nemiah Valley) provides an apt example. British Columbia claims the Trial Judge "did not identify any hunting grounds, or other lands within Xeni that were regularly used by the Tsilhqot'in" and that he did not make

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[13] BC's Factum, para. 141.
[14] BC's Factum, para. 145.
[15] Appellant's Factum, paras. 76, 217.
[16] BC's Factum, para. 111.

reference to any "cultivated fields".[17] British Columbia then selectively references *some* of the Trial Judge's findings about Tsilhqot'in occupation of Xeni in Part 13 to suggest that there is little support for the Trial Judge's findings of Aboriginal title.[18]

26. British Columbia's partial review of the evidence omits critical factual findings in Part 13 itself, and in other portions of the Trial Decision, *e.g.*:

a. As found by the Trial Judge, before and at 1846, a resident Tsilhqot'in population occupied winter pit houses at sites situated throughout the Nemiah Valley (*e.g.* at Lhiz Bay, Tl'ebayi, ?Et'an Ghintil, Naghataneqed).[19] As noted by the Trial Judge, the areas associated with such traditional Tsilhqot'in winter dwellings "provided a greater degree of permanency and regular use".[20] Further, "[s]ite selection for construction of winter dwellings was dependent upon a number of factors, including the availability of resources …"[21] The Trial Judge specifically identified Xeni as one of the main winter settlements, where Tsilhqot'in regrouped for the long months of winter.[22]

b. British Columbia fails to mention or consider the Trial Judge's extensive discussion of Tsilhqot'in seasonal patterns of land use (see Part 7(f) of the Trial Decision). In this section, the Trial Judge confirms that, before and at sovereignty, the Tsilhqot'in hunted deer (by snowshoe) in winter "across Xeni".[23] Regular and intensive Tsilhqot'in hunting throughout Xeni was confirmed by oral history evidence, accepted by the Trial Judge (see below).

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[17] BC's Factum, Appendix "A", para. 199.
[18] BC's Factum, Appendix "A", paras. 199-200.
[19] Trial Decision, paras. 772-80 (AR vol. II, Tab 4 at 71-73).
[20] Trial Decision, para. 955 (AR vol. II, Tab 4 at 124). Tsilhqot'in winter dwellings were log post and pole-based lodges dug or set into the ground; for this reason, these structures "were hard to build, and were used 'over and over again, winter after winter'" beginning in November: paras. 365-375 (quote at 374), paras. 382, 404 (AR vol. I, Tab 3 at 134-138, 141, 147).
[21] Trial Decision, para. 376 (AR vol. I, Tab 3 at 138).
[22] Trial Decision, paras. 382-383 (AR vol. I, Tab 3 at 141-142), paras. 783, 953 (AR vol II, Tab 4 at 74, 123-124).
[23] Trial Decision, para. 383 (AR vol. I, Tab 3 at 141-142).

c. The Trial Judge also confirmed that winter dwellings – such as those situated throughout Xeni – "were located conveniently close to good fishing".[24] Multi-seasonal fishing at locations throughout Xeni was confirmed by oral history evidence, accepted by the Trial Judge (see below).

d. The Trial Judge noted that in summer, "sunt'iny (mountain potato or spring beauty) and ?esghunsh (bear tooth or avalanche lily) bloom. Tsilhqot'in people, along with the animals, followed the melting snow line into the higher country to hunt and gather roots and berries on the high mountain slopes".[25] This includes the high mountain slopes that define Xeni. In fact, the central Tsilhqot'in legend of Ts'il?os and ?Eniyud, which is of pre-contact origin,[26] explains how ?Eniyud sculpted the Xeni valley and seeded the mountain potato areas of ?Esqi Dzul Tese?an, ?Esgany ?Anx, Gughay Ch'ech'ed and Tl'egwezbens along the slopes of the mountains that define Xeni.[27]

e. The Trial Judge also accepted extensive oral history evidence establishing regular, pre-sovereignty harvesting of roots, plants and medicines throughout Xeni (see below). Contrary to British Columbia's submissions, the Trial Judge identified such areas as "cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries".[28]

27. Critically, in Appendix "A", British Columbia completely disregards the voluminous oral history record establishing regular, multi-seasonal Tsilhqot'in occupation of Xeni before and at 1846. The Trial Judge specifically accepted and relied on this evidence:

> Oral history evidence provides an understanding of use and occupation [of Xeni] in the nineteenth century. That evidence records use and occupation by the ?Esggidam, living in and about the valley, using the old trails, hunting, fishing and harvesting root and medicinal plants.[29]

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[24] Trial Decision, para. 384 (AR vol. I, Tab 3 at 142).
[25] Trial Decision, para. 387 (AR vol. I, Tab 3 at 142).
[26] Trial Decision, para. 175 (AR vol. I, Tab 3 at 72).
[27] Trial Decision, paras. 662, 667 (AR vol. II, Tab 4 at 35 and 37); see also: Exhibit 0174, Affidavit #2 of Mabel William, at para. 36(iii) (AR vol. V, Tab 31 at 133).
[28] Trial Decision, para. 960 (AR vol II, Tab 4 at 127) (underscore added); see also paras. 683, 959 (AR vol. II, Tab 4 at 43, 125-127).
[29] Trial Decision, para. 783 (AR vol II, Tab 4 at 74).

28. The oral history record for Xeni is vast. The Appellant does not intend to comprehensively reproduce or review this record. It suffices to consider the oral history recounted by a few of many Tsilhqot'in witnesses, describing:

a. regular Tsilhqot'in hunting for deer and other species (e.g. rabbits, lynx, mink, weasel, beaver, mountain goat) throughout Xeni in the summer, fall and winter, before and at 1846;[30]

b. regular Tsilhqot'in trapping in the winter in several areas of Xeni, before and at 1846;[31]

c. regular Tsilhqot'in fishing of the lakes and streams of Xeni, before and at 1846, in the spring, summer, fall and winter;[32]

d. regular Tsilhqot'in harvesting of mountain potatoes in the summer, before and at 1846, on the slopes of ?Esgany ?Anx, Gughay Ch'ech'ed, Tl'egwezbenz and other areas;[33] and

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[30] See. *e.g.*: Exhibit 0174, Affidavit #2 of Mabel William, at paras. 40, 44-46 (AR vol. V, Tab 31 at 135-36); Transcript (Francis Setah), v. 26, pp. 4295:20 – 4297:15 (Supplementary Appeal Record ("**Supp AR**"), vol. I, Tab 5 at 56-58); Transcript (Francis Setah), v. 27, pp. 4584:42 – 4585:23 (Supp AR, vol. I, Tab 6); Exhibit 0094DIG, Francis Setah Digitized Map, polygon "BA" (Supp AR, vol. I, Tab 18); Exhibit 0094LEG, Francis Setah Map Legend, polygon "BA" (Supp AR, vol. I, Tab 19); Transcript (Martin Quilt), v. 6, pp. 1019:16 – 1036:21 (Supp AR, vol. I, Tab 3); Exhibit 003DIG, Martin Quilt Digitized Map, polygon "L1" (Supp AR, vol. I, Tab 13); Exhibit 003LEG, Martin Quilt Map Legend, polygon "L1" (Supp AR, vol. I, Tab 14); Transcript (Norman George Setah), v. 57, pp. 9763:11 – 9764:1 (Supp AR, vol. I, Tab 8 at 75-76); Exhibit 0213DIG, Norman George Setah Digitized Map, polygon "GN" (Supp AR, vol. I, Tab 22); Exhibit 0213LEG, Norman George Setah Map Legend, polygon "GN" (Supp AR, vol. I, Tab 23).

[31] See. *e.g.*: Transcript (David Setah), v. 69, pp. 11840:47 – 11844:41 (Supp AR, vol. I, Tab 11); Exhibit 0259DIG, David Setah Digitized Map, polygons "BQ", "BR", "BS", "BT", "BU", "BV", "BW" (Supp AR, vol. I, Tab 30); Exhibit 0259LEG, David Setah Map Legend, polygons "BQ", "BR", "BS", "BT", "BU", "BV", "BW" (Supp AR, vol. I, Tab 31) [Note the continued use of Setah family customary use areas from at least the early 19th century: Exhibit 0443, Dewhirst Report, at para. 313 (AR, vol. XII, Tab 54 at 28)]; Transcript (Ubill Hunlin), v. 75, 13084:6 – 13094:13 (Supp AR, vol. I, Tab 12 at 101-111); Exhibit 0012, Affidavit of William Setah, para. 4 (Supp AR, vol. I, Tab 15).

[32] See. *e.g.*: Exhibit 0174, Affidavit #2 of Mabel William, at para. 40, 44-46 (AR vol. V, Tab 31 at 135-36); Transcript (Norman George Setah), v. 57, pp. 9761:42 – 9763:10 (Supp AR, vol. I, Tab 8 at 73-75); Exhibit 0213DIG, Norman George Setah Digitized Map, polygon "GM" (Supp AR, vol. I, Tab 22); Exhibit 0213LEG, Norman George Setah Map Legend, polygon "GM" (Supp AR, vol. I, Tab 23); Transcript (Norman George Setah) v. 60, pp. 10338:3 – 10343:3; 10366:30 – 10368:40 (Supp AR, vol. I, Tab 9); Exhibit 0216DIG, Norman George Setah Digitized Map, polygon "IY" (Supp AR, vol. I, Tab 24); Exhibit 0216LEG, Norman George Setah Map Legend, polygon "IY" (Supp AR, vol. I, Tab 25); Exhibit 0217DIG, Norman George Setah Digitized Map, polygons "JM", "JN" (Supp AR, vol. I, Tab 26); Exhibit 0217LEG, Norman George Setah Map Legend, polygons "JM", "JN" (Supp AR, vol. I, Tab 27); Transcript (Martin Quilt), v. 5, pp. 754:13 - 771:14 (Supp AR, vol. I, Tab 2).

[33] See. *e.g.*: Exhibit 0174, Affidavit #2 of Mabel William, at paras. 40-41 (AR vol. V, Tab 31 at 135-36); Transcript (Francis Setah), v. 26, pp. 4287:18 – 4288:10; 4290:24 – 4291:46 (Supp AR, vol. I, Tab 5 at 52-55); Exhibit

e. regular Tsilhqot'in harvesting of other plants and medicines, before and at 1846, throughout Xeni (*e.g.* Denish T'an Natl'ebideni?ah, Chinsdad Gunlin).[34]

29. This represents only a small sample of the oral history record describing ancestral occupation of Xeni. To fully appreciate this evidence, it is necessary to draw upon an even more extensive record describing the age and personal histories of the particular witnesses, their reliability as oral historians, the revered elders that they were raised by and learned from, and their long connection to these lands. To assist the Court, a brief background for each of the elders referenced above is provided as Appendix "B" to these submissions.

30. In addition to oral histories recording pre-1846 occupation of Xeni, there is an even more voluminous record of Tsilhqot'in witnesses' accounts of their <u>own</u> personal and family histories of hunting, trapping, fishing and harvesting roots, plants, berries and medicines throughout Xeni (and beyond).[35] Pursuant to *Delgamuukw*, such evidence constitutes proof of how their Tsilhqot'in ancestors occupied these same lands prior to 1846.[36] Indeed, Mr. Dewhirst's expert report documents the genealogy of modern Xeni Gwet'in families,[37] and confirms the continued use of the customary family use areas associated with their known ancestors in the early 19th century.[38]

31. In short, the Trial Judge's factual findings, as well as the oral history accounts (which he accepted and relied on), clearly demonstrate a Tsilhqot'in population living in permanent winter settlements throughout Xeni, before and at 1846, and regularly exploiting the resources of the valley according to their seasonal availability.

0093DIG, Francis Setah Digitized Map, place numbers 166, 167, 168 (Supp AR, vol. I, Tab 16); Exhibit 0093LEG, Francis Setah Map Legend, place numbers 166, 167, 168 (Supp AR, vol. I, Tab 17).

[34] See. *e.g.*: Transcript (Francis Setah), v. 26, pp. 4388:41 – 4390:6; 4394:46 – 4395:40; 4398:13-24 (Supp AR, vol. I, Tab 5 at 59-64); Exhibit 0093DIG, Francis Setah Digitized Map, place number 180 (Supp AR, vol. I, Tab 16); Exhibit 0093LEG, Francis Setah Map Legend, place number 180 (Supp AR, vol. I, Tab 17); Exhibit 0095DIG, Francis Setah Digitized Map, polygon "CG" (Supp AR, vol. I, Tab 20); Exhibit 0095LEG, Francis Setah Map Legend, polygon "CG" (Supp AR, vol. I, Tab 21).

[35] As one example, see David Setah's identification of his family's hunting grounds, which extend throughout much of Xeni: Transcript (David Setah), v. 68, 11774:38 – 11776:33 (Supp AR, vol. I, Tab 10); Exhibit 0258DIG, David Setah Digitized Map, polygons "AA", "AB", "AC" (Supp AR, vol. I, Tab 28); Exhibit 0258LEG, David Setah Map Legend, polygons "AA", "AB", "AC" (Supp AR, vol. I, Tab 29).

[36] *Delgamuukw*, paras. 143, 152.

[37] The Trial Judge expressly noted his appreciation of the genealogy evidence: "Dewhirst was able to check his oral history and oral tradition sources in his geneology work. His efforts to identify the ancestors of the modern Xeni Gwet'in community was of great assistance to the court." (Trial Decision at para. 160 (AR vol. I, Tab 3 at 68)).

[38] Exhibit 0443, Dewhirst Report, at paras. 313, 341-52 (AR, vol. XII, Tab 54 at 28, 34-37).

32. This is more than simply "seasonal" use of Xeni: the Trial Judge found regular, multi-seasonal Tsilhqot'in occupation of Xeni, with a year-round Tsilhqot'in presence in the valley. (As set out in the Appellant's main submissions, this same high standard of occupation characterizes the Tsilhqox Corridor, which similarly supported a resident Tsilhqot'in population before and at 1846, anchored by winter dwellings along the entire corridor, engaging in regular, multi-seasonal use and occupation with a permanent, year-round presence along the river).[39]

33. This oral history evidence is consistent with the expert opinion evidence which was also considered by the Trial Judge.[40] For example, the Trial Judge accepted the opinion of Dr. Nancy Turner that the extensive Tsilhqot'in names of plant species and knowledge of their use demonstrates Tsilhqot'in occupation of the Claim Area for at least 250-300 years.[41] Dr. Turner affirmed that Tsilhqot'in people have "managed and harvested those plants for generations"[42] through active and long-term "cultivation" and stewardship of these resources.[43] Dr. Turner described specific areas (including the Nemiah Valley, ?Esgany ?Anx, Ts'il?os (Mount Tatlow)) as areas that "the Tsilhqot'in have repetitively used and occupied … for the purposes of gathering and managing plant resources critical to their survival".[44]

34. In Appendix "A", British Columbia also takes issue with the time depth of Tsilhqot'in occupation of Xeni. British Columbia states that the Trial Judge "inferred" the pre-1846 time depth of Tsilhqot'in occupation of Xeni from nothing more than "a limited number of pit house depressions" and the proximity of Xeni to the Tsilhqox Corridor.[45]

35. Again, this completely disregards the oral history evidence, accepted by the Trial Judge, recounting Tsilhqot'in settlement and occupation of Xeni from a time long before contact. It also disregards the archival record which, for example, documents births of Tsilhqot'in ancestors in Xeni prior to 1846 (and their subsequent deaths in Xeni),[46] as well as the description in 1922

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[39] Appellant's Factum, paras. 222-25.
[40] Trial Decision, para. 959 (AR vol. II, Tab 4 at 125-127) [Proven Title Area based on "[t]he entire body of evidence"].
[41] Trial Decision, paras. 675-78 (AR vol. II, Tab 4 at 40-41).
[42] Trial Decision, para. 676 (AR vol. II, Tab 4 at 40-41).
[43] Exhibit 0205, Turner Report, at 3-4 (AR vol. VIII, Tab 44 at 40-41).
[44] Exhibit 0205, Turner Report, at 4-5 (AR vol. VIII, Tab 44 at 41-42).
[45] BC's Factum, Appendix "A", para. 200.
[46] See, *e.g.*, Trial Decision, paras. 239, 257, (AR vol. I, Tab 3 at 91 and 97) and para. 769 (AR vol. II, Tab 4 at 71). See also Appendix "B" to these submissions.

of "several old village sites in the valley",[47] among other references that confirm long-standing Tsilhqot'in occupation of Xeni. It also disregards substantial expert evidence confirming Tsilhqot'in occupation of Xeni prior to 1846, including the opinion of Dr. Turner (discussed above) and a detailed expert report by John Dewhirst documenting genealogical, documentary and oral history evidence establishing a resident Tsilhqot'in population in Xeni prior to 1846.[48]

36. Rather than accepting the careful analysis and findings of fact made by the Trial Judge, which are supported by an extensive evidentiary record, British Columbia selects a small portion from the reasons of the Trial Judge and asks this Honourable Court to consider that portion in isolation. There is no merit to British Columbia's position on these issues.

37. The Appellant has focused on Xeni to illustrate the dangers of British Columbia's invitation to re-litigate a five-year trial on an appeal to this Court. It is not possible or appropriate for the Appellant, on this appeal, to marshal the vast evidentiary record supporting the Trial Judge's findings for each of the other portions of the Proven Title Area challenged by British Columbia in Appendix "A". The same problematic approach is evident throughout Appendix "A". In effect, British Columbia has selectively presented some of the Trial Judge's factual findings to argue that his conclusions are arbitrary and inconsistent, while disregarding other critical findings of fact that provide essential context and support for the Trial Judge's decision.

38. Ultimately, the Trial Judge's delineation of the Proven Title Area was based not only on his specific factual findings in Part 13 (the exclusive focus of British Columbia's criticism) but also his critical factual findings throughout his extensive judgment describing Tsilhqot'in patterns of occupation of the Claim Area as a whole.

39. The problems with British Columbia's approach are further illustrated by the specific examples British Columbia provides in its Factum (at paragraphs 141-142) as proof of the Trial Judge's "arbitrary application" of the test for occupation:

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[47] Trial Decision, para. 767 ["Thus, at the time the reserves were created, Tsilhqot'in people were there living in long-established winter quarters"] (AR vol. II, Tab 4 at 70).
[48] Exhibit 0443, Dewhirst Report, paras. 203-8, 279-405 (AR vol. XII, Tab 54 at 3-4 and 20-52).

a. First, British Columbia says that it was arbitrary for the Trial Judge to exclude the area around Lhuy Nachasgwenguline Biny (Little Eagle Lake) from the Proven Title Area, while including the area around Tsanglen Biny (Chaunigan Lake), although pithouses were identified in both locations.[49] British Columbia fails to point out, however, that the Trial Judge did not conclude there was evidence that the pithouse dwellings (i.e. lhiz qwen yex) at the former were occupied by the Tsilhqot'in, whereas the Trial Judge cited evidence that the pithouse dwellings at the latter had been "occupied by Tsilhqot'in ancestors".[50]

b. Second, British Columbia says it was arbitrary for the Trial Judge to demarcate the Proven Title Area west of Tsilhqox Biny through the middle of an area that he described as "important hunting, trapping and gathering grounds."[51] British Columbia ignores, however, the Trial Judge's prior distinction that the southern portion of this area was high elevation[52] and relatively inhospitable in winter,[53] limiting its primary use to summer and fall.[54] The Trial Judge expressly noted "[t]here was evidence that Tsilhqot'in people stayed at areas in the Western Trapline, transporting dried meat from their dan ch'iz [*i.e.* fall] hunting grounds in the south to the xi [*i.e.* winter] residences in the north" [*e.g.* at Ch'a Biny].[55] Indeed, the Trial Judge also excluded from the Proven Title Area the range of higher elevation mountains in the south of the Claim Area lying east of Tsilhqox Biny.

c. Finally, British Columbia says that it was arbitrary for the Trial Judge to stop at the western boundary of the Trapline Territory because the boundary "was there", while at the same finding Aboriginal title to southern portions of the Tsilhqox Corridor beyond the eastern boundary of the Trapline Territory (and outside the Claim Area).[56] However, as the Trial Judge explained, he provided "boundaries that are shaped by the

[49] BC's Factum, para. 141.
[50] Trial Decision, paras. 827-829, 824 (AR vol. II, Tab 4 at 88 and 87). For context re the issue of pithouse attribution, see paras. 207-209, 365 (AR vol. I, Tab 3, at 82-83 and 134).
[51] BC's Factum, para. 141; Trial Decision, paras. 890-892, 959 (AR vo. II, Tab 4 at 105 and 125-127).
[52] Trial Decision, para. 891 (AR vol. II, Tab 4 at 105).
[53] Trial Decision, para. 50 (AR vol. I, Tab 3 at 31-32).
[54] Trial Decision, paras. 387-393 (AR vol I, Tab 3 at 142-144), para. 865 (AR vol. II, Tab 4 at 97-98).
[55] Trial Decision, para. 392 (AR vol. I, Tab 3 at 144).
[56] BC's Factum, para. 142.

evidence".[57] Unlike the western margins of the Trapline Territory, the pocket of land in the southern Tsilhqox corridor that lies east of the Trapline Territory is essentially surrounded by Claim Area. Moreover, the Trial Judge found that this pocket of land includes much of the Tsilhqot'in village site at Biny Gwechugh (Canoe Crossing).[58] Given these circumstances, as well as the extensive documentary, oral history and archaeological record of Tsilhqot'in occupation throughout the entire Tsilhqox Corridor, it is unsurprising that the Trial Judge was in a position to confidently opine on proof of Aboriginal title beyond the pleaded boundaries of that area. At any rate, the Trial Judge was clear that his opinion as to Aboriginal title to lands situated outside the Claim Area would not bind the Parties,[59] and the Appellant on this appeal does not seek a declaration of Aboriginal title to any lands outside of the pleaded Claim Area.[60]

40. Finally, British Columbia bases its argument that the Trial Judge employed no consistent methodology in delineating the Proven Title Area partly on the fact that the Tsilhqot'in population in the Claim Area in 1846 was no greater than 400, and that "it appears evident that a population of that limited size could not possibly have physically occupied" the Proven Title Area.[61]

41. With respect, this Court should not accept British Columbia's view of what "appears evident" over the clear factual findings of the Trial Judge, amply supported by the record before him.

42. As Chief Justice Lamer directed in *Delgamuukw*,[62] the Trial Judge noted the character of the lands at issue (largely rugged glacial mountains, plateau lands, and narrow transition zones),[63] the manner of life and technological abilities of the Tsilhqot'in (who "lived in a semi-nomadic hunter, gatherer society in a harsh environment"[64]), and the Plaintiff's expert

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[57] Trial Decision, para. 958 (AR vol. II, Tab 4 at 125).
[58] Trial Decision, paras. 753-760 (AR vol. II, Tab 4 at 66-68).
[59] Trial Decision, para. 961 (AR vol. II, Tab 4 at 127-128).
[60] Appellant's Factum, para. 301.
[61] BC's Factum, para. 144.
[62] *Delgamuukw*, para. 149.
[63] Trial Decision, paras. 41-54 (AR vol. I, Tab 3 at 29-33).
[64] Trial Decision, para. 436 (AR vol. I, Tab 3 at 155-156).

demography evidence, uncontested by the Respondents, that the carrying capacity of the Claim Area for the Tsilhqot'in prior to European influence was between 100 and 1000 persons.[65]

43. It is important to recall that prior to 1846, resident Tsilhqot'in (and other Tsilhqot'in) harvested wildlife, fish, plants and other resources from the Proven Title Area not only to meet the substantial sustenance needs of this population, but also for virtually all other necessities of life (*e.g.* clothing, tools, baskets, bedding, blankets, shelter, trade items, medicines, *etc*.).[66]

44. Tsilhqot'in occupation of the Claim Area is further reinforced by the proven capacity of the Tsilhqot'in to control and defend this area. As noted by the Trial Judge, "[t]here is nothing to indicate that Tsilhqot'in populations at any given time were small compared to their neighbours" and, in fact, fur trade records suggest that the Tsilhqot'in population was larger than the neighbouring Carrier.[67]

45. As confirmed by the Trial Judge, the Tsilhqot'in employed scouts and runners to monitor their borders,[68] could rapidly amass a considerable fighting force,[69] effectively extracted "tolls" and "rents" from non-Tsilhqot'in to traverse or settle on Tsilhqot'in lands,[70] and defended their lands so effectively that the archival record is replete with examples of Aboriginal people or guides from other First Nations refusing to enter Tsilhqot'in territory.[71] The Trial Judge held that the Tsilhqot'in exercised exclusive control over the Proven Title Area.[72]

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[65] Trial Decision, para. 711 (AR vol. II, Tab 4 at 53).
[66] See, *e.g.*: Trial Decision, paras. 364-70, 398-417 (AR vol. I, Tab 3 at 134-136, 145-149); Exhibit 0174, Affidavit #2 of Mabel William, at paras. 75-80 (AR vol. V, Tab 31 at 147-49).
[67] Trial Decision, para. 923 (AR vol. II, Tab 4 at 114-115).
[68] Trial Decision, para. 916 (AR vol. II, Tab 4 at 112).
[69] See, *e.g.*: Trial Decision, para. 238 (AR vol. I, Tab 3 at 91).
[70] Trial Decision, para. 917 (AR vol. II, Tab 4 at 112).
[71] Trial Decision, paras. 182, 293, 295-96 (AR vol. I, Tab 3 at 75, 109, 110), 921 (AR vol. II, Tab 4 at 114); Exhibit 0391, Foster Report, at 21-23 (AR vol. IX, Tab 48 at 55-57).
[72] Trial decision, para. 960 (AR vol. II, Tab 4 at 127).

46. In conclusion, there was ample evidence to support the Trial Judge's conclusion that at the time of the assertion of sovereignty (1846), the Tsilhqot'in occupied the Proven Title Area in a manner that grounds Aboriginal title.

All of which is respectfully submitted this 13 day of September, 2013.

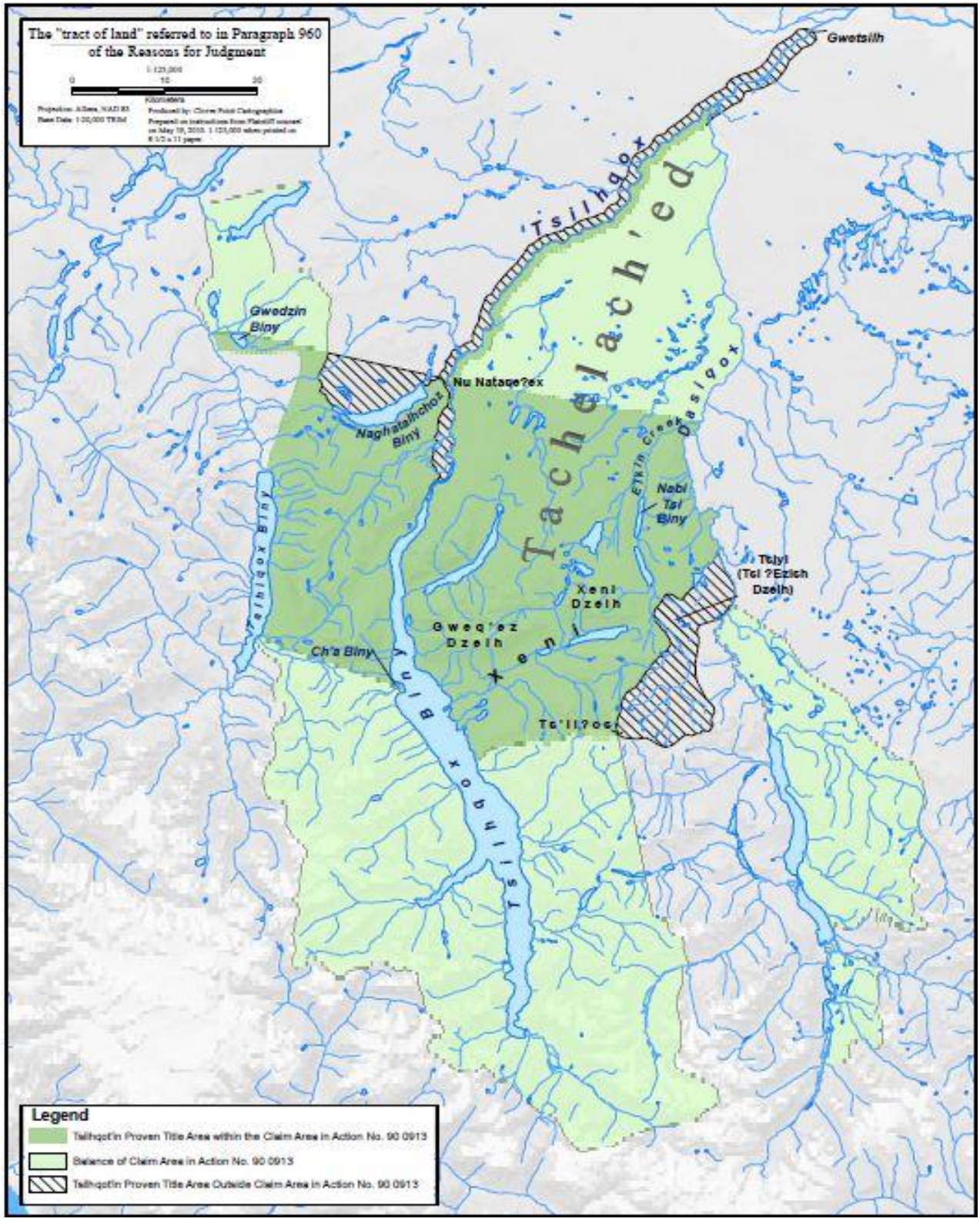
for: **David Rosenberg, Q.C.**

Jay Nelson

Dominique Nouvet

APPENDIX "A"

Revised *Proven Title Area – Visual Aid Map*



APPENDIX "B"
Select Tsilhqot'in Witness Backgrounds

Mabel William

47. Tsilhqot'in elder Mabel William (b. 1918)[73] is the widow of the late Eugene William (b. 1918), son of Sammy and Annie William (a.k.a. Bulyan) and the great-grandson of Sit'ax (Setah) and Nancy.[74] Sammy and Annie William (Bulyan) were both born in the 1890s.[75] According to their death certificates, Sit'ax and Nancy were born in Xeni (Nemiah Valley) circa 1827 and 1845, respectively, and were both buried in Xeni.[76] Sit'ax participated in the Chilcotin War of 1864.[77]

48. Ms. William's recounted oral history sourced to Sammy and Annie William, and Sit'ax and Nancy, describing Tsilhqot'in use and occupation of the Claim Area, including in and around Xeni (Nemiah Valley).

Francis Setah

49. Tsilhqot'in elder Francis Setah (b. 1929)[78] is the son of Little George Setah (b. 1899),[79] the paternal grandson of ?Eweniwen (Johnny Setah) (c.1875-1955), and the paternal great-grandson of Sit'ax (Setah) and Nancy.[80] Mr. Setah had the benefit of his grandfather ?Eweniwen's teachings while growing up. Mr. Setah was, however, raised by his maternal grandmother Daldod (Mary Ann) (b.1866) as his mother died during his infancy.[81] Daldod was the oldest

[73] Exhibit 0173, Affidavit #1 of Mabel William, para. 5 (AR, vol. V, Tab 30 at 89).
[74] Exhibit 0173, Affidavit #1 of Mabel William, para. 22 (AR, vol. V, Tab 30 at 92); Exhibit 0174, Affidavit #2 of Mabel William, at paras. 8-9, 36, 39 (AR, vol. V, Tab 31 at 116-17, 132, 135); Exhibit 0441, Dewhirst Report, 24 (Supp AR, vol. II, Tab 32 at 28).
[75] Exhibit 0441, Dewhirst Report, at 29-30 (Supp AR, vol. II, Tab 32 at 33-34).
[76] Exhibit 0443, Dewhirst Report, at paras. 304-306 (AR, vol. XII, Tab 54 at 26-27).
[77] Exhibit 0443, Dewhirst Report, at para. 308 (AR, vol. XII, Tab 54 at 27).
[78] Transcript (Francis Setah), v. 24, pp. 3997:45 – 3998:2 (Supp AR, vol. I, Tab 4 at 44-45).
[79] Exhibit 0441, Dewhirst Report, at 4, 26 (Supp AR, vol. II, Tab 32 at 8, 30).
[80] Exhibit 0441, Dewhirst Report, at 4, 24; (Supp AR, vol. II, Tab 32 at 8, 28).
[81] Transcript (Francis Setah), v. 24, p. 4006:19-24; 4009:18-25; 4013:12-30; 4014:43 – 4015:32 (Supp AR, vol. I, Tab 4 at 46-50).

daughter of Kahkul and Elizabeth (b. 1846 or earlier),[82] ancestors of the modern Xeni Gwet'in William family.

50. Archival documents and oral history show that the customary use areas of the William and Setah families are primarily around Nemiah Valley and Chilko Lake, and have been continuously used and occupied by William and Setah family members from at least the early 19th c. to the present.[83] Mr. Setah's evidence, including oral history sourced to ?Eweniwen and Daldod, also related to Tsilhqot'in land use of Xeni (Nemiah Valley).

Martin Quilt

51. Tsilhqot'in elder Martin Quilt (b. 1939) is the grandson of Sammy and Annie William (a.k.a. Bulyan) and the great-great-grandson of Sit'ax (Setah) and Nancy.[84] Mr. Quilt's evidence included oral history sourced to his grandfather, Sammy William.

Norman George Setah

52. Tsilhqot'in elder Norman George Setah (b. 1940) is the son of Willie Setah, the paternal grandson of Little George Setah, the paternal great-grandson of ?Eweniwen (Johnny Setah) and the paternal great-great-grandson of Sit'ax (Setah).[85] Norman George Setah's evidence also related to Tsilhqot'in land use of Xeni (Nemiah Valley). It included oral history sourced to the following Tsilhqot'in elders: ?Eweniwen and in turn Sit'ax, Lebusden (Jean Baptiste), Tommy Lulua and Chief Lashaway Lulua, who were the grandsons of Chief Nemiah (born in Nemiah Valley circa 1827),[86] and ?Eskish (Captain George, b. 1883), the son of Chief ?Achig (b. 1863).[87]

[82] Exhibit 0443, Dewhirst Report, at 318, 329 (AR, vol. XII, Tab 54 at 29, 31-32).
[83] Exhibit 0443, Dewhirst Report, at paras. 313, 341-42 (AR, vol. XII, Tab 54 at 28, 34).
[84] Transcript (Martin Quilt), v. 1, pp. 173:5-175:25 (Supp AR, vol. I, Tab 1); Exhibit 0441, Dewhirst Report, at 24, 27 (Supp AR, vol. II, Tab 32 at 28, 31), app. E(1), (9) (Supp AR, vol. II, Tabs 33, 35).
[85] Transcript (Norman George Setah), v. 55, pp. 9374:11-23; 9389:4 – 9390:25 (Supp AR, vol. I, Tab 7); Exhibit 0441, Dewhirst Report, at 24 (Supp AR, vol. II, Tab 32 at 28), app. E(7) (Supp AR, vol. II, Tab 34).
[86] Exhibit 0443, Dewhirst Report, at para. 290 (AR, vol. XII, Tab 54 at 23).
[87] Exhibit 0443, Dewhirst Report, at paras. 347, 352 (AR, vol. XII, Tab 54 at 36-37).

Ubill Hunlin, deceased

53. The late Tsilhqot'in elder Ubill Hunlin (c. 1929-2005) was the widower of the late Amelia Hunlin (nee George) (c. 1925-2004), daughter of Tselxex (Andy George), granddaughter of ?Eskish (Captain George), and great-granddaughter of Chief ?Achig and Tsolouout.[88] Mr. Hunlin testified in this case just before he passed away and gave evidence, including oral history evidence from his wife's grandfather ?Eskish (Captain George), relating to Tsilhqot'in land use of Xeni (Nemiah Valley).

[88] Transcript (Ubill Hunlin), v. 75, pp. 13002:25 – 13004:6 (Supp AR, vol. I, Tab 12 at 98-100); Exhibit 0441, Dewhirst Expert Report, at 38 (Supp AR, vol. II, Tab 32 at 42).

TABLE OF AUTHORITIES

A **Lau Wing Hong & Others** Plaintiffs

and

Wong Wor Hung & Another Defendants

B

(Court of First Instance)
(High Court Action No 1454 of 2003)

C Recorder McCoy SC
22–25, 28–29 August and 20 September 2006

Land law — adverse possession — intention to possess land — in Hong Kong, unlike English law, if squatter in possession had intention to pay rent if owners D *requested, then no intention to possess*

Land law — adverse possession — doctrine of encroachment — was part of Hong Kong law — under doctrine, any encroachment by tenant on unrented land of landlord or third party land was presumptively held for landlord, not tenant — criticism of doctrine applying to land of third parties

E

Civil procedure — relief — pleadings — fact that declaration not specifically sought in prayer for relief did not prevent one being granted — in adverse possession claims, party not required to plead every precise possible variation of boundaries of disputed land — Rules of the High Court (Cap.4, Sub.Leg.) O.15 r.16, F *O.18 rr.15(1), 18(a)*

[High Court Ordinance (Cap.4) s.16(2); Rules of the High Court (Cap.4, Sub.Leg.) O.15 r.16, O.18 rr.15(1), 18(a)]

土地法——逆權管有——管有土地的意圖——根據香港法律，假如擅自佔地 G *者願意在土地擁有人要求下繳付租金，則該佔地者無意管有土地；這情況有別於英國法律*

土地法——逆權管有——"侵佔土地"法則——屬於香港法律的一部份——根據該法則，租客對業主未有租出的土地或第三者土地所作的任何侵佔，均 H *被推定為為業主而非租客的權益而持有——對於該法則適用於第三者土地的一點作出批評*

民事訴訟程序——濟助——狀書——即使濟助請求未有指明尋求法庭作出宣告，法庭仍可作出宣告——在涉及逆權管有的訴訟中，與訟方毋須就受爭議土地界線的每一個可能變化作出申辯——《高等法院規則》(第4章，附屬 I *法例)第15號命令第16條規則、第18號命令第15(1)條規則、第18(a)條規則*

[《高等法院條例》(第4章)第16(2)條；《高等法院規則》(第4章，附屬法例)第15號命令第16條規則、第18號命令第15(1)條規則、第18(a)條規則]

J

Since 1974, D1–2, a mother and son, had pursuant to three successive 10-year tenancy agreements, been in possession of a lot of land in the

landlord does not include the encroachment in the new lease. That is in accordance with *A-G v Tomline (No 3)* (1880) LR 15 Ch D 150 (CA) where the same issue arose. That is also what happened in the present case. In the three agreements to lease the same piece of land was let from 1974–2004; the encroachments were not included in the second and third agreements to lease. This is separately other evidence that also rebutted the presumption that the landlord was annexing the trespassed land to his own title. See also Foa, *General Law of Landlord and Tenant* (8th ed., 1957) pp.712–713.

Specificity in a prayer: Pleading a declaration

140. O.18 r.18(a) of the Rules of the High Court (Cap.4, Sub.Leg.) provides that a counterclaim shall be considered as a statement of claim under O.18 r.15(1). An issue was properly raised by Counsel for the plaintiffs, as to whether, by the modified Declaration now advanced by the defendants, the defendants' case meant that the Court could only grant "specifically the relief or remedy ... claimed" and therefore precluded any Declaration as to a lesser amount of land, if the findings of fact would support such a conclusion. He relied upon two decisions of the English Court of Appeal decided within six weeks of each other: *Harrison-Broadley & Others v Smith* [1964] 1 WLR 465 (Harman, Pearson and Davies LJJ) and *Biss & Another v Smallburgh Rural District Council* [1965] 1 Ch 335 (Harman, Davies and Russell LJJ).

141. In *Harrison-Broadley & Others v Smith* [1964] 1 WLR 465 the Court concluded that a Declaration could be granted although such relief had not been asked for in the statement of claim. That was a case where injunctions only were sought, which the Court of Appeal would not grant. But the Court held it was not hamstrung by the omission and Harman LJ said at p.466 that the approach in *Hulton v Hulton* [1916] 2 KB 642 at p.656 to the equivalent of O.18 r.15(1) entitled the Court "to grant declaratory relief if that be the right thing to do"; see also Davies LJ at p.471. However Pearson LJ at 469 was slightly more circumspect, considering it unnecessary to decide what "the strictly correct practice should be, because it is perfectly plain that this court ought to make some declaratory order", even though none had been pleaded.

142. In *Biss & Another v Smallburgh Rural District Council* [1965] 1 Ch 335, which was a claim for a Declaration that 35 acres of land was an "existing site" under the Caravans Sites and Control of Development Act 1960 [UK], the Trial Judge decided that a small area only had been established. By a cross-appeal, the plaintiffs sought to contend that a larger area of the site should be the subject of a Declaration in their favour. Harman LJ did not accept that the plaintiffs could, without an amendment of the pleadings, seek a Declaration in terms different to that sought at trial. At p.361, he emphasised that relief had to be specifically claimed and stated "a plaintiff ought not to be allowed to

ask the Court to make a Declaration covering whatever area the Court shall after an inquiry conclude ought to be counted ...". He deprecated the plaintiff's approach on appeal which he said "was conducted after the manner of a Dutch auction where the auctioneer starts at the top price and comes gradually down till he finds a bidder. So here various lines of demarcation were suggested, coming down at last to about three acres round the house, and we were treated to a minute review of the evidence ...".

143. By contrast, Davies LJ at p.369G more sympathetically and realistically stated:

> Had the evidence proved that the plaintiffs were entitled to something less than their full claim, it would, I think, have been unfortunate if their failure to make, either originally or by amendment, the appropriate alternative claim should have deprived them of their right to a Declaration. But this question does not in the event arise.

144. It is apparent that the astringent comments of Harman LJ were *obiter* as the Court found no relief in terms of the proposed Declaration was available. Further, the observations were made in circumstances where no amendment of the pleadings had been made cf the present case, where five alternative prayers as to the terms of the Declaration sought exist.

145. The starting point for consideration is s.16(2) of the High Court Ordinance (Cap.4) which provides that the High Court "... shall so exercise its jurisdiction in every cause or matter before it as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined ...". The fact that a Declaration is not specifically sought in the prayer for relief does not prevent one being granted: O.15 r.16 and O.18 r.15(1), *Hulton v Hulton* [1916] 2 KB 642, affirmed *Hulton v Hulton* [1917] 1 KB 813 (CA), *Loudon v Ryder (No 2)* [1953] Ch 423 at p.429 (itself curiously a decision of Harman J) and *Harrison-Broadley & Others v Smith* [1964] 1 WLR 456 (CA). It cannot be overlooked that, in an adverse possession case, the pleaded factual issues may permit of several possible variations and permutations as to the edges or boundaries of the disputed land at the material time. It would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved. It would be like pleading all the results of the peeling of an onion — in which every single layer generates a slightly different and smaller variation of the one before it. The real test is whether there is genuine prejudice caused by this ambulatory approach. Here there was none. It will always be a matter of degree; but the Court should not indulge pedantry as being the same thing as prejudice.

146. It was objected that without absolute precision in the prayer the plaintiffs did not know what they were facing and it was further

contended that the Court would in effect be involved in an action to ascertain boundaries as in *Spike v Harding* (1877–78) LR 7 Ch 871. I cannot agree with this submission. The pleadings set out material facts and legal consequences which are sought to be drawn from those facts. A party is not precluded at the trial from asking the court to draw different legal consequences from the pleaded facts. We are no longer "back in the bad old days" when pleadings had to state the precise legal result: *Re Vandervell's Trusts (No 2)* [1974] 1 Ch 269 at p.321G *per* Lord Denning MR.

147. In *Zamir & Woolf: The Declaratory Judgment* (3rd ed., 2002) p.284, the authors conclude that the *obiter* remarks of Harman LJ in *Biss & Another v Smallburgh Rural District Council* [1965] 1 Ch 335 should not now be regarded as of general application. I agree as the emphasis in *Biss v Smallburgh Rural District Council* was too austere. *Biss & Another v Smallburgh Rural District Council* is also incompatible with the catechism in s.16(2) of the High Court Ordinance. Both O.15 r.16 and O.18 r.15(1) should now be viewed against that imperative. The authors also state:

> In practice it frequently happens that it is only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted. As long as the parties are given an opportunity to address the court on any proposed declaration it is highly desirable that it should retain as wide a discretion as possible as to the precise terms in which a declaration is granted.

148. These pragmatic considerations correctly represent the proper approach in Hong Kong. The position under Australian law, Young, *Declaratory Orders* (2nd ed., 1984) pp.54, 188; Canadian law, Lazar Sarna, *The Law of Declaratory Judgments* (2nd ed., 1988) p.84 and New Zealand law, is to the same effect: *Manga v A-G* [2000] 2 NZLR 65 at p.84.

Gratitude of Court

149. I am sure Mr Lam will not begrudge the Court extending its considerable thanks to Mr Andrew Mak for the careful, thorough and well-researched arguments he skilfully presented and also for the wealth of comparative caselaw he placed before the Court in relation to the novel issues that have fallen for decision.

Disposition

150. The fourth and fifth plaintiffs case for trespass succeeds only in relation to the whole of Lot 136 SB ss1 (the rented land). No aggravated or exemplary damages are established. All questions of injunctive and other relief, including mesne profits are adjourned pending a further hearing. The first, second and third plaintiffs fail in all respects.

Her Majesty The Queen *Appellant*

v.

Native Women's Association of Canada, Gail Stacey-Moore and Sharon McIvor *Respondents*

and

Inuit Tapirisat of Canada and Assembly of First Nations *Interveners*

INDEXED AS: NATIVE WOMEN'S ASSN. OF CANADA *v.* CANADA

File No.: 23253.

1994: March 4; 1994: October 27.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Freedom of expression — Federal government funding four national aboriginal associations alleged to be male-dominated and inviting them to participate in constitutional discussions — Aboriginal women's association not provided with equal funding and rights of participation to express its views — Whether aboriginal women's freedom of expression infringed — Whether federal government obliged under ss. 2(b) and 28 of Canadian Charter of Rights and Freedoms to provide equal funding and participation to aboriginal women's association.

Constitutional law — Charter of Rights — Equality rights — Sex discrimination — Federal government funding four national aboriginal associations alleged to be male-dominated and inviting them to participate in constitutional discussions — Aboriginal women's association not provided with equal funding and rights of participation to express its views — Whether aboriginal women's equality rights infringed — Canadian Charter of Rights and Freedoms, s. 15(1).

Sa Majesté la Reine *Appelante*

c.

Association des femmes autochtones du Canada, Gail Stacey-Moore et Sharon McIvor *Intimées*

et

Inuit Tapirisat du Canada et Assemblée des premières nations *Intervenantes*

RÉPERTORIÉ: ASSOC. DES FEMMES AUTOCHTONES DU CANADA *c.* CANADA

N° du greffe: 23253.

1994: 4 mars; 1994: 27 octobre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Liberté d'expression — Gouvernement fédéral finançant quatre associations autochtones nationales qui seraient à prédominance masculine et les invitant à participer à des discussions constitutionnelles — Association des femmes autochtones ne bénéficiant pas d'un financement et de droits de participation équivalents pour exprimer son point de vue — Y a-t-il eu violation de la liberté d'expression des femmes autochtones? — Le gouvernement fédéral était-il tenu en vertu des art. 2b) et 28 de la Charte canadienne des droits et libertés d'accorder à l'association des femmes autochtones un financement et un droit de participation équivalents?

Droit constitutionnel — Charte des droits — Droits à l'égalité — Discrimination fondée sur le sexe — Gouvernement fédéral finançant quatre associations autochtones nationales qui seraient à prédominance masculine et les invitant à participer à des discussions constitutionnelles — Association des femmes autochtones ne bénéficiant pas d'un financement et de droits de participation équivalents pour exprimer son point de vue — Y a-t-il eu violation des droits à l'égalité des femmes autochtones? — Charte canadienne des droits et libertés, art. 15(1).

Constitutional law — Aboriginal and treaty rights — Constitutional reform — Right of Aboriginal people of Canada to participate in constitutional discussions not derived from any existing aboriginal and treaty rights protected by s. 35 of Constitution Act, 1982.

Courts — Federal Court of Appeal — Jurisdiction — Declaratory relief — Whether Federal Court of Appeal had jurisdiction to grant declaratory relief when applicants sought order of prohibition in Trial Division.

Droit constitutionnel — Droits ancestraux ou issus de traités — Réforme de la Constitution — Droit des peuples autochtones du Canada de participer aux discussions sur la Constitution ne découlant d'aucun droit existant, ancestral ou issu de traités, protégé par l'art. 35 de la Loi constitutionnelle de 1982.

Tribunaux — Cour d'appel fédérale — Compétence — Jugement déclaratoire — La Cour d'appel fédérale avait-elle compétence pour prononcer un jugement déclaratoire alors que les requérantes avaient demandé une ordonnance de prohibition à la Section de première instance?

During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place within the Aboriginal community of Canada. The federal government provided $10 million to fund participation of four national Aboriginal organizations: the Assembly of First Nations ("AFN"), the Native Council of Canada ("NCC"), the Metis National Council ("MNC") and the Inuit Tapirisat of Canada ("ITC"). The Native Women's Association of Canada ("NWAC") was specifically not included in the funding but a portion of the funds advanced was earmarked for women's issues. As a result, AFN and NCC each paid $130,000 to NWAC and a further $300,000 was later received directly from the federal government. The four national Aboriginal organizations were invited to participate in a multilateral process of constitutional discussions regarding the Beaudoin-Dobbie Committee Report. The purpose of these meetings was to prepare constitutional amendments that could be presented to Canada as a consensus package. NWAC was concerned that their exclusion from direct funding for constitutional matters and from direct participation in the discussions threatened the equality of Aboriginal women and, in particular, that the proposals advanced for constitutional amendment would not include the requirement that the *Canadian Charter of Rights and Freedoms* be made applicable to any form of Aboriginal self-government which might be negotiated. This fear was based on NWAC's perception that the national Aboriginal organizations are male-dominated so that there was little likelihood that the male majority would adopt the pro-*Charter* view of NWAC. In response to a letter from NWAC, the Minister responsible for Constitutional Affairs indicated that the national organizations represent both men and women and encouraged NWAC to work within the Aboriginal communities to ensure their views are heard and represented. Despite the fact that they participated in the parallel process set up by the four national Aboriginal organizations, NWAC remained fearful that they would

Durant les discussions sur la réforme de la Constitution qui ont abouti à la signature de l'Accord de Charlottetown, on a tenu des consultations parallèles au sein de la communauté autochtone du Canada. Le gouvernement fédéral a versé 10 millions de dollars en vue de financer la participation de quatre organismes autochtones nationaux: l'Assemblée des premières nations («APN»), le Conseil national des autochtones du Canada («CNAC»), le Ralliement national des Métis («RNM») et l'Inuit Tapirisat du Canada («ITC»). L'Association des femmes autochtones du Canada («AFAC») n'était pas incluse expressément dans le financement, mais une partie des sommes versées était consacrée aux questions touchant les femmes. En conséquence, l'APN et le CNAC ont versé chacun 130 000 $ à l'AFAC, et cette dernière a plus tard reçu une somme supplémentaire de 300 000 $ directement du gouvernement fédéral. Les quatre organismes autochtones nationaux ont été invités à participer à des discussions constitutionnelles multilatérales sur le Rapport du comité Beaudoin-Dobbie. Ces réunions avaient pour but de rédiger des modifications constitutionnelles qui pourraient être présentées au Canada comme un ensemble sur lequel on s'entendait. L'AFAC craignait que son exclusion du financement direct à des fins constitutionnelles et de la participation directe aux discussions ne compromette l'égalité des femmes autochtones et, notamment, que les propositions avancées pour modifier la Constitution ne comportent pas l'exigence que la *Charte canadienne des droits et libertés* s'applique à toute forme d'autonomie gouvernementale autochtone qui pourrait être négociée. Cette crainte de l'AFAC découlait du fait que, selon elle, les organismes autochtones nationaux étaient à prédominance masculine de sorte qu'il y avait peu de chances que la majorité masculine adopte le point de vue de l'AFAC, qui était favorable à la *Charte*. En réponse à une lettre de l'AFAC, le ministre responsable des Affaires constitutionnelles a indiqué que les associations nationales représentaient les personnes des deux sexes et il a encouragé l'AFAC à travailler au sein des

be unsuccessful at putting forward their pro-*Charter* view and commenced proceedings in the Federal Court, Trial Division against the federal government, seeking an order of prohibition to prevent any further disbursements of funds to the four Aboriginal organizations until NWAC was provided with equal funding as well as the right to participate in the constitutional review process on the same terms as the four recipient groups. NWAC alleged that by funding male-dominated groups and failing to provide them with equal funding, the federal government violated their freedom of expression and right to equality. The application was dismissed by the Trial Division. The Federal Court of Appeal also refused to issue an order of prohibition. It made a declaration, however, that the federal government had restricted the freedom of expression of Aboriginal women in a manner that violated ss. 2(*b*) and 28 of the *Charter*.

collectivités autochtones pour s'assurer que ses opinions soient entendues et transmises. Bien que l'AFAC ait participé aux discussions parallèles organisées par les quatre organismes autochtones nationaux, elle a continué de craindre d'être incapable d'exprimer son opinion favorable à la *Charte* et a présenté, devant la Section de première instance de la Cour fédérale, une demande contre le gouvernement fédéral en vue d'obtenir une ordonnance de prohibition empêchant les quatre organismes autochtones de toucher d'autres sommes jusqu'à ce que l'AFAC ait obtenu des subventions équivalentes ainsi que le droit de participer au processus de révision de la Constitution aux mêmes conditions que les quatre groupes bénéficiaires. L'AFAC a allégué qu'en subventionnant des groupes à prédominance masculine et en ne lui accordant pas des subventions équivalentes, le gouvernement fédéral a violé sa liberté d'expression et son droit à l'égalité. La Section de première instance a rejeté la demande. La Cour d'appel fédérale a également refusé de rendre une ordonnance de prohibition. Cependant, elle a prononcé un jugement déclarant que le gouvernement fédéral avait restreint la liberté d'expression des femmes autochtones d'une façon contraire à l'al. 2*b*) et à l'art. 28 de la *Charte*.

Held: The appeal should be allowed and the declaration made by the Federal Court of Appeal should be set aside.

Arrêt: Le pourvoi est accueilli et le jugement déclaratoire prononcé par la Cour d'appel fédérale est annulé.

Per Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.: Although NWAC merely sought an order of prohibition at the Trial Division, the Federal Court of Appeal had jurisdiction in the circumstances to make a declaration. It cannot be said that the appellant was taken by surprise or prejudiced in any way since the declaration granted hinged on the violation of *Charter* rights that was specifically argued at the Trial Division. The inclusion of a "basket clause" requesting "such other relief as to this Honourable Court may seem just" in the prayer for relief permits a court to exercise its discretion to grant a declaration even though it was not specifically pleaded. Moreover, s. 18.1 of the *Federal Court Act* now provides for a uniform procedure of an application for judicial review in order to obtain the remedies available in s. 18 of that Act.

Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major: Même si l'AFAC a simplement demandé une ordonnance de prohibition à la Section de première instance, la Cour d'appel fédérale avait, dans les circonstances, compétence pour rendre un jugement déclaratoire. On ne peut pas dire que l'appelante a été prise au dépourvu ou a subi un préjudice quelconque, puisque le jugement déclaratoire prononcé était fondé sur la violation des droits garantis par la *Charte* qui avait été alléguée expressément devant la Section de première instance. L'inclusion, dans une demande de réparation, d'une «clause omnibus» sollicitant «toute autre réparation que la cour peut estimer juste» permet à la cour d'exercer son pouvoir discrétionnaire de prononcer un jugement déclaratoire même si cela n'a pas été soulevé précisément dans les plaidoiries. De plus, l'art. 18.1 de la *Loi sur la Cour fédérale* prescrit désormais une procédure uniforme de demande de contrôle judiciaire en vue d'obtenir les redressements prévus à l'art. 18 de cette loi.

The federal government's decision not to provide equal funding and participation in the constitutional discussions to NWAC did not violate their rights under ss. 2(*b*) and 28 of the *Charter*, since s. 2(*b*) does not gener-

La décision du gouvernement fédéral de ne pas accorder à l'AFAC un financement égal et un droit de participation équivalent aux discussions sur la Constitution ne violait pas les droits que lui garantissaient l'al. 2*b*) et

ally guarantee any particular means of expression or place a positive obligation upon the government to fund or consult anyone. Even assuming that in certain extreme circumstances, the provision of a platform of expression to one group may infringe the expression of another and thereby require the government to provide an equal opportunity for the expression of that group, nothing in this case suggests that the funding or consultation of the four Aboriginal groups infringed NWAC's equal right of freedom of expression. NWAC had many opportunities to express their views both directly to the government, through the Beaudoin-Dobbie Commission, and through the four Aboriginal representative organizations. No evidence supports the contention that the funded groups were less representative of the viewpoint of women with respect to the *Charter* or that the funded groups advocate a male-dominated form of self-government. Nor was there any evidence with respect to the level of support of NWAC by women as compared to the funded groups. The four Aboriginal groups invited to discuss possible constitutional amendments are all *bona fide* national representatives of Aboriginal people in Canada and, based on the facts in this case, there was no requirement under s. 2(*b*) of the *Charter* to also extend an invitation and funding directly to NWAC.

The refusal to fund NWAC and to invite them to be equal participants at the round of constitutional discussions does not violate their rights under s. 15(1) of the *Charter*. The lack of an evidentiary basis for the arguments with respect to ss. 2(*b*) and 28 is equally applicable to any arguments advanced under s. 15(1).

The right of the Aboriginal people of Canada to participate in constitutional discussions does not derive from any existing Aboriginal or treaty right protected under s. 35 of the *Constitution Act, 1982*. Therefore, s. 35(4), which guarantees Aboriginal and treaty rights referred to in s. 35(1) equally to male and female persons, has no application in this case.

Per L'Heureux-Dubé J.: Although general agreement with Sopinka J.'s reasons was expressed, the outcome of this case should not be interpreted as limiting *Haig*. *Haig* does not establish the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a

l'art. 28 de la *Charte*, puisqu'en général l'al. 2*b*) ne garantit aucun mode précis d'expression ou n'impose au gouvernement aucune obligation positive de financer ou de consulter quiconque. Même en supposant que, dans certaines circonstances extrêmes, le fait d'offrir à un certain groupe une tribune pour favoriser l'expression puisse porter atteinte à la liberté d'expression d'un autre groupe et imposer, en conséquence, au gouvernement l'obligation de fournir à cet autre groupe une chance équivalente de s'exprimer, rien ne porte à croire, en l'espèce, que le financement ou la consultation des quatre groupes autochtones violait le droit de l'AFAC à une liberté égale d'expression. L'AFAC a eu de nombreuses occasions de faire connaître son point de vue tant directement au gouvernement, grâce au comité Beaudoin-Dobbie, que par l'intermédiaire des quatre organismes représentant les autochtones. Aucun élément de preuve ne vient étayer la prétention que les groupes subventionnés étaient moins représentatifs du point de vue des femmes sur la *Charte* ou que les groupes subventionnés préconisent une forme de gouvernement autonome à prédominance masculine. Il n'y avait non plus aucun élément de preuve concernant l'appui que l'AFAC recevait des femmes comparativement aux groupes subventionnés. Les quatre groupes autochtones invités à discuter de modifications constitutionnelles éventuelles étaient tous des représentants nationaux de bonne foi des autochtones du Canada et, d'après les faits de la présente affaire, il n'y avait aucune obligation, en vertu de l'al. 2*b*) de la *Charte*, de lancer également une invitation à l'AFAC et de la financer directement.

Le refus de financer l'AFAC et de l'inviter à participer également aux discussions constitutionnelles ne viole pas les droits que lui garantit le par. 15(1) de la *Charte*. Il n'y a pas davantage de preuve à l'appui des arguments fondés sur le par. 15(1) qu'il n'en existe à l'égard de ceux fondés sur l'al. 2*b*) et l'art. 28.

Le droit des peuples autochtones du Canada de participer aux discussions sur la Constitution ne découle d'aucun droit existant — ancestral ou issu de traités — protégé par l'art. 35 de la *Loi constitutionnelle de 1982*. Par conséquent, le par. 35(4), qui garantit également aux personnes des deux sexes les droits existants — ancestraux et issus de traités — visés au par. 35(1), ne s'applique pas en l'espèce.

Le juge L'Heureux-Dubé: Même si, de façon générale, les motifs du juge Sopinka sont acceptés, l'issue de l'affaire ne devrait pas être interprétée comme limitant l'arrêt *Haig*. Ce dernier arrêt n'établit pas le principe selon lequel le gouvernement n'est pas tenu, en général, de verser des fonds à un individu ou à un groupe, ni de

group. Rather, it stands for the proposition that, while s. 2(*b*) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion. The circumstances in which a government may be held to a positive obligation in terms of providing a specific platform of expression depend on the nature of the evidence presented by the parties. Here, the evidence demonstrates that the NWAC was not prevented from expressing its views and therefore, on its facts, this case does not give rise to a positive obligation analogous to the type referred to in *Haig* since not providing NWAC with the funding and constitutional voice requested did not amount to a breach of its freedom of expression.

Per McLachlin J.: The freedom of governments to choose and fund their advisors on matters of policy is not constrained by the *Charter*. It is unnecessary to determine whether the evidence was capable of demonstrating a violation of NWAC's rights under s. 2(*b*) or s. 15 of the *Charter*.

Cases Cited

By Sopinka J.

Applied: *Haig v. Canada*, [1993] 2 S.C.R. 995; **referred to:** *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Loudon v. Ryder (No. 2)*, [1953] Ch. 423; *R. v. Bales, Ex parte Meaford General Hospital*, [1971] 2 O.R. 305; *Meisner v. Mason*, [1931] 2 D.L.R. 156; *Harrison-Broadley v. Smith*, [1964] 1 All E.R. 867; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Zundel*, [1992] 2 S.C.R. 731; *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R. (3d) 467, aff'd (1983), 8 D.L.R. (4th) 230, leave to appeal refused, [1984] 1 S.C.R. v; *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984); *New Brunswick Broadcasting Co. v. Canadian Radio-television and Telecommunications Commission*, [1984] 2 F.C. 410.

leur fournir une tribune précise pour favoriser l'expression. Il énonce plutôt que, même si l'al. 2*b*) de la *Charte* ne confère aucun droit à un mode particulier d'expression, le gouvernement qui choisit d'en fournir un doit le faire d'une manière conforme à la Constitution. Donc, bien qu'il soit loisible au gouvernement d'accorder un tel avantage à un nombre restreint de personnes, il ne saurait, ce faisant, commettre un acte de discrimination. Les situations factuelles dans lesquelles un gouvernement peut être tenu à une obligation positive de fournir une tribune spécifique sont tributaires de la nature de la preuve présentée par les parties. En l'espèce, la preuve démontre que l'AFAC n'a pas été empêchée d'exprimer ses vues et, par conséquent, à la lumière de ses faits, cette affaire ne donne pas lieu à une obligation positive analogue à celle dont il est question dans l'affaire *Haig*, car le fait de ne pas avoir fourni à l'AFAC le financement et le droit de parole constitutionnel demandés n'a pas porté atteinte à sa liberté d'expression.

Le juge McLachlin: La *Charte* ne restreint pas la liberté des gouvernements de choisir et de financer leurs conseillers sur des questions de politique générale. Il est inutile de déterminer si la preuve était susceptible d'établir l'existence d'une violation des droits garantis à l'AFAC par l'al. 2*b*) ou l'art. 15 de la *Charte*.

Jurisprudence

Citée par le juge Sopinka

Arrêt appliqué: *Haig c. Canada*, [1993] 2 R.C.S. 995; **arrêts mentionnés:** *Procureur général du Canada c. Inuit Tapirisat of Canada*, [1980] 2 R.C.S. 735; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *Loudon c. Ryder (No. 2)*, [1953] Ch. 423; *R. c. Bales, Ex parte Meaford General Hospital*, [1971] 2 O.R. 305; *Meisner c. Mason*, [1931] 2 D.L.R. 156; *Harrison-Broadley c. Smith*, [1964] 1 All E.R. 867; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *R. c. Zundel*, [1992] 2 R.C.S. 731; *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R. (3d) 467, conf. par (1983), 8 D.L.R. (4th) 230, autorisation de pourvoi refusée, [1984] 1 R.C.S. v; *Minnesota State Board for Community Colleges c. Knight*, 465 U.S. 271 (1984); *New Brunswick Broadcasting Co. c. Conseil de la radiodiffusion et des télécommunications canadiennes*, [1984] 2 C.F. 410.

By L'Heureux-Dubé J.

Discussed: *Haig v. Canada*, [1993] 2 S.C.R. 995; **referred to:** *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

By McLachlin J.

Applied: *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984); **distinguished:** *Haig v. Canada*, [1993] 2 S.C.R. 995.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), 15(1), 28.
Constitution Act, 1982, ss. 35(1), (4) [ad. SI/84-102], 37 [now repealed], 37.1 [ad. SI/84-102 & now repealed].
Federal Court Act, R.S.C., 1985, c. F-7 [am. 1990, c. 8], ss. 2(1) "Federal board, commission or other tribunal", (2), 18(1), (3), 18.1(1), (3), (4)(*f*), 52(*a*), (*b*).
Federal Court Rules, C.R.C. 1978, c. 663, r. 1723.
Indian Act, R.S.C. 1970, c. I-6 [now R.S.C., 1985, c. I-5], s. 12(1)(*b*).

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APPEAL from a judgment of the Federal Court of Appeal, [1992] 3 F.C. 192, 146 N.R. 40, 95 D.L.R. (4th) 106, [1992] 4 C.N.L.R. 71, 10 C.R.R. (2d) 268, allowing respondents' appeal from a judgment of the Trial Division, [1992] 2 F.C. 462, 53 F.T.R. 194, 90 D.L.R. (4th) 394, [1992] 4 C.N.L.R. 59, dismissing their application for prohibition. Appeal allowed.

Graham Garton, Q.C., for the appellant.

Citée par le juge L'Heureux-Dubé

Arrêt analysé: *Haig c. Canada*, [1993] 2 R.C.S. 995; **arrêt mentionné:** *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927.

Citée par le juge McLachlin

Arrêt appliqué: *Minnesota State Board for Community Colleges c. Knight*, 465 U.S. 271 (1984); **distinction d'avec l'arrêt:** *Haig c. Canada*, [1993] 2 R.C.S. 995.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 2*b*), 15(1), 28.
Loi constitutionnelle de 1982, art. 35(1), (4) [aj. TR/84-102], 37 [maintenant abrogé], 37.1 [aj. TR/84-102 & maintenant abrogé].
Loi sur la Cour fédérale, L.R.C. (1985), ch. F-7 [mod. 1990, ch. 8], art. 2(1) «office fédéral», (2), 18(1), (3), 18.1(1), (3), (4)*f*), 52*a*), *b*).
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POURVOI contre un arrêt de la Cour d'appel fédérale, [1992] 3 C.F. 192, 146 N.R. 40, 95 D.L.R. (4th) 106, [1992] 4 C.N.L.R. 71, 10 C.R.R. (2d) 268, qui a accueilli l'appel des intimées contre un jugement de la Section de première instance, [1992] 2 C.F. 462, 53 F.T.R. 194, 90 D.L.R. (4th) 394, [1992] 4 C.N.L.R. 59, qui avait rejeté leur demande d'ordonnance de prohibition. Pourvoi accueilli.

Graham Garton, c.r., pour l'appelante.

Mary Eberts and *Julia L. Deans*, for the respondents.

Brian A. Crane, *Q.C.*, for the intervener the Inuit Tapirisat of Canada.

Peter K. Doody and *John Briggs*, for the intervener the Assembly of First Nations.

The judgment of Lamer C.J. and La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ. was delivered by

SOPINKA J. — This case raises the issue of the extent to which the freedom of expression and equality provisions of the *Canadian Charter of Rights and Freedoms* require that government funding be provided to various groups in order to promote the representation of certain interests at constitutional reform discussions. Specifically, where the Government of Canada provides funding to certain Aboriginal groups, alleged to be male-dominated, does s. 2(*b*) in combination with s. 28 of the *Charter* oblige the Government of Canada to provide equal funding to an association claiming to represent the interests of female Aboriginal persons so that they may also express their views at the constitutional discussions? Alternatively, is this result mandated by s. 15 of the *Charter* or s. 35 of the *Constitution Act, 1982*? This case also invites consideration of whether there is any violation of the *Charter* if the Government of Canada refuses to extend an invitation to a group representing the interests of Aboriginal women to come to the table to discuss possible constitutional reform.

Subsidiary issues are also raised concerning the justiciability of the *Charter* matters as well as the jurisdiction of the Federal Court of Appeal to grant the remedy of a declaration when it was not specifically requested at the Trial Division.

Following a review of the facts, I will briefly analyze the issue of the jurisdiction of the Federal Court of Appeal. I will next embark on a discussion of the main focus of this appeal regarding the

Mary Eberts et *Julia L. Deans*, pour les intimées.

Brian A. Crane, *c.r.*, pour l'intervenante l'Inuit Tapirisat du Canada.

Peter K. Doody et *John Briggs*, pour l'intervenante l'Assemblée des premières nations.

Version française du jugement du juge en chef Lamer et des juges La Forest, Sopinka, Gonthier, Cory, Iacobucci et Major rendu par

LE JUGE SOPINKA — Le présent pourvoi porte sur la question de savoir dans quelle mesure les dispositions sur la liberté d'expression et les droits à l'égalité de la *Charte canadienne des droits et libertés* exigent que le gouvernement subventionne divers groupes afin de promouvoir la représentation de certains intérêts lors des discussions sur la réforme de la Constitution. Plus précisément, lorsque le gouvernement du Canada subventionne certains groupes autochtones, qui seraient à prédominance masculine, l'al. 2*b*), conjugué à l'art. 28 de la *Charte*, l'oblige-t-il à verser des sommes équivalentes à une association qui prétend représenter les intérêts des femmes autochtones afin qu'elle puisse aussi exprimer son opinion lors des discussions sur la Constitution? Subsidiairement, ce résultat est-il prescrit par l'art. 15 de la *Charte* ou l'art. 35 de la *Loi constitutionnelle de 1982*? Nous sommes également invités, en l'espèce, à examiner s'il y a violation de la *Charte* lorsque le gouvernement du Canada refuse d'inviter un groupe représentant les intérêts des femmes autochtones à venir discuter de la possibilité de réformer la Constitution.

Des questions subsidiaires sont également soulevées concernant la justiciabilité des questions relatives à la *Charte* et la compétence de la Cour d'appel fédérale pour prononcer un jugement déclaratoire qui n'a pas été demandé expressément devant la Section de première instance.

Après avoir examiné les faits, j'analyserai brièvement la question de la compétence de la Cour d'appel fédérale. J'entamerai ensuite l'étude de l'objet principal du présent pourvoi, soit les préten-

missed at the conclusion of submissions on this point.

(2) Jurisdiction

It is clear that the Federal Court of Appeal had jurisdiction to pronounce a declaratory judgment. Sections 18 and 18.1(3)(*b*) of the *Federal Court Act* confer upon the Federal Court, Trial Division original jurisdiction to grant declaratory relief in an application for judicial review. On an appeal from the Trial Division, pursuant to s. 52(*b*) of the *Federal Court Act*, the Federal Court of Appeal may:

> (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Trial Division should have given or awarded,
>
> . . .
>
> (iii) make a declaration as to the conclusions that the Trial Division should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in light of that declaration. [Emphasis added.]

Thus, it is apparent that the Federal Court of Appeal has the jurisdiction under s. 52(*b*) to grant declaratory relief. This conclusion is further supported by Rule 1723 of the *Federal Court Rules*, C.R.C. 1978, c. 663, which states the following:

> *Rule 1723.* No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed. [Emphasis added.]

This provision contemplates the granting of declaratory relief notwithstanding the fact that no other relief could be claimed.

In fact, this is not disputed by the appellant, nor by the intervener ITC which also made submissions on this issue. Rather, the appellant and ITC both argue that it is inappropriate for the Federal Court of Appeal. La demande de déclaration que le pourvoi a perdu tout intérêt pratique a été rejetée à la fin des plaidoiries sur ce point.

(2) La compétence

Il est clair que la Cour d'appel fédérale avait compétence pour prononcer un jugement déclaratoire. L'article 18 et l'al. 18.1(3)*b*) de la *Loi sur la Cour fédérale* confèrent à la Section de première instance de la Cour fédérale compétence exclusive, en première instance, pour accorder un jugement déclaratoire dans le cas d'une demande de contrôle judiciaire. À la suite d'un appel interjeté contre une décision de la Section de première instance, conformément à l'al. 52*b*) de la *Loi sur la Cour fédérale*, la Cour d'appel fédérale peut:

> (i) soit rejeter l'appel ou rendre le jugement que la Section de première instance aurait dû rendre et prendre toutes mesures d'exécution ou autres que celle-ci aurait dû prendre,
>
> . . .
>
> (iii) soit énoncer, dans une déclaration, les conclusions auxquelles la Section de première instance aurait dû arriver sur les points qu'elle a tranchés et lui renvoyer l'affaire pour poursuite de l'instruction, à la lumière de cette déclaration, sur les points en suspens. [Je souligne.]

Il appert donc que la Cour d'appel fédérale a, en vertu de l'al. 52*b*), compétence pour accorder un jugement déclaratoire. Cette conclusion s'appuie en outre sur la règle 1723 des *Règles de la Cour fédérale*, C.R.C. 1978, ch. 663, dont voici le texte:

> *Règle 1723.* Il ne peut être fait opposition à une action pour le motif que cette action ne vise qu'à l'obtention d'un jugement ou d'une ordonnance purement déclaratoires; et la Cour pourra faire des déclarations de droit obligatoires, qu'un redressement soit ou puisse être demandé ou non en conséquence. [Je souligne.]

Cette disposition prévoit la possibilité de prononcer un jugement déclaratoire même si aucune autre réparation ne peut être demandée.

En fait, cela n'est contesté ni par l'appelante ni par l'intervenante, l'ITC, qui a également présenté des observations à ce sujet. L'appelante et l'ITC soutiennent plutôt qu'il ne convient pas que la

Court of Appeal to award a declaration when the respondents merely sought an order of prohibition at the Trial Division. In other words, the appellant contends granting such relief resulted in prejudice as it changed the focus of the case. In my view, this argument must fail. It is clear that the grounds relied on for an order of prohibition sought at the Trial Division were the alleged violations of the *Charter* and the *Constitution Act, 1982* by the Government of Canada. The argument at trial focused on whether there was a breach of the respondents' freedom of expression or equality or their Aboriginal and treaty rights. Thus, the determination of whether the rights of the respondents were violated was necessarily ancillary to the granting of an order of prohibition. The declaration that was ultimately granted by the Federal Court of Appeal hinged on the violation of *Charter* rights that was specifically argued at the Trial Division. It cannot be said that the appellant was taken by surprise or prejudiced in any way. Nothing different could have been argued by the parties had the declaration specifically been sought.

Cour d'appel fédérale prononce un jugement déclaratoire lorsque les intimées ont simplement demandé une ordonnance de prohibition à la Section de première instance. Autrement dit, l'appelante prétend que le fait d'avoir accordé une telle réparation a entraîné un préjudice étant donné qu'il en a résulté un changement d'orientation de l'instance. À mon avis, cet argument doit échouer. Il est évident que les motifs invoqués à l'appui de la demande d'ordonnance de prohibition adressée à la Section de première instance étaient les violations de la *Charte* et de la *Loi constitutionnelle de 1982* que le gouvernement du Canada aurait commises. Au procès, les plaidoiries étaient axées sur la question de savoir s'il y avait eu atteinte à la liberté d'expression ou aux droits à l'égalité des intimées ou encore à leurs droits ancestraux ou issus de traités. Par conséquent, la réponse à la question de savoir s'il y avait eu violation des droits des intimées était nécessairement accessoire à la délivrance d'une ordonnance de prohibition. Le jugement déclaratoire que la Cour d'appel fédérale a prononcé en fin de compte était fondé sur la violation des droits garantis par la *Charte* qui avait été alléguée expressément devant la Section de première instance. On ne peut pas dire que l'appelante a été prise au dépourvu ou a subi un préjudice quelconque. Les parties n'auraient pu alléguer rien d'autre si le jugement déclaratoire avait été demandé expressément.

I would conclude that, in the circumstances, the Federal Court had jurisdiction to make a declaration which related directly to the matter in dispute between the parties. Although, as pointed out by the appellant and ITC, the respondents did not specifically include a request for a declaration in their pleadings, they did include a "basket clause" requesting "[s]uch other relief as to this Honourable Court may seem just". It has been held that a "basket clause" in the prayer for relief permits a court to exercise its discretion to grant a declaration even though it was not specifically pleaded. In *Loudon v. Ryder (No. 2)*, [1953] Ch. 423, the court considered a rule very similar to that of Rule 1723. Notwithstanding that a declaration was not specifically claimed, it was held that this did not preclude the remedy under the claim to fur-

Je suis d'avis de conclure que, dans les circonstances, la Cour fédérale avait compétence pour rendre un jugement déclaratoire qui se rapportait directement à la question en litige entre les parties. Bien que, comme l'appelante et l'ITC l'ont souligné, les intimées n'aient pas demandé expressément de jugement déclaratoire dans leurs actes de procédure, elles ont inclus une «clause omnibus» demandant [TRADUCTION] «[t]oute autre réparation que la cour peut estimer juste». Il a été statué qu'une «clause omnibus» dans une demande de réparation permet à la cour d'exercer son pouvoir discrétionnaire de prononcer un jugement déclaratoire même si cela n'a pas été soulevé précisément dans les plaidoiries. Dans l'arrêt *Loudon c. Ryder (No. 2)*, [1953] Ch. 423, la cour a examiné une règle très similaire à la règle 1723. Même si aucun

ther or other relief. *R. v. Bales, Ex parte Meaford General Hospital*, [1971] 2 O.R. 305 (H.C.), involved a claim for an order prohibiting the Minister of Labour from appointing a conciliation officer in a labour dispute. Osler J. held that there was no jurisdiction to make an order of prohibition in the circumstances. It was argued that a declaration was not an appropriate remedy as it was not specifically requested. However, Osler J. noted that the notice of motion had a prayer "for such further and other order as this Court may deem meet" and was prepared to make a declaration in the circumstances. *Meisner v. Mason*, [1931] 2 D.L.R. 156 (N.S.C.A.), and *Harrison-Broadley v. Smith*, [1964] 1 All E.R. 867 (C.A.), are also cases in which a declaratory judgment issued notwithstanding the failure to specifically request it.

Moreover, I note that s. 18.1 of the *Federal Court Act*, which came into effect on February 1, 1992, now provides for a uniform procedure of an application for judicial review in order to obtain the remedies available in s. 18. In *Federal Court Practice 1994*, David Sgayias et al. state (at p. 88) the following with respect to the effect of s. 18.1:

> The section expressly sets out the standing requirements, the grounds of review, and the powers of the court on an application for judicial review. As a result, it is not necessary to refer expressly to the prerogative or extraordinary remedies when applying for judicial review. [Emphasis added.]

I conclude from the foregoing that the Federal Court of Appeal did not err in respect of this issue.

B. *Constitutional Issues*

(1) The Applicability of the *Charter*

The appellant argues that the constitutional violation found by the Court of Appeal did not flow

jugement déclaratoire n'avait été demandé expressément, on a jugé que cela n'empêchait pas d'accorder cette réparation en vertu de la demande de toute autre réparation. Dans *R. c. Bales, Ex parte Meaford General Hospital*, [1971] 2 O.R. 305 (H.C.), il s'agissait d'une demande d'ordonnance interdisant au ministre du Travail de nommer un conciliateur dans un conflit de travail. Le juge Osler a conclu à l'absence de compétence pour rendre une ordonnance de prohibition dans les circonstances. Il a été allégué qu'un jugement déclaratoire ne constituait pas une réparation appropriée en raison de l'absence d'une demande expresse en ce sens. Toutefois, le juge Osler a fait observer que l'avis de requête comportait une demande [TRADUCTION] «de toute autre ordonnance que la cour peut juger convenable» et il était disposé à prononcer un jugement déclaratoire dans les circonstances. *Meisner c. Mason*, [1931] 2 D.L.R. 156 (C.A.N.-É.), et *Harrison-Broadley c. Smith*, [1964] 1 All E.R. 867 (C.A.), sont également des cas où un jugement déclaratoire a été prononcé malgré l'absence d'une demande expresse en ce sens.

De plus, je remarque que l'art. 18.1 de la *Loi sur la Cour fédérale*, qui est entré en vigueur le 1er février 1992, prescrit désormais une procédure uniforme de demande de contrôle judiciaire en vue d'obtenir les redressements prévus à l'art. 18. Dans l'ouvrage intitulé *Federal Court Practice 1994*, David Sgayias et ses coauteurs déclarent ceci, à la p. 88, au sujet de l'effet de l'art. 18.1:

> [TRADUCTION] L'article énonce expressément les conditions requises, les motifs de contrôle et les pouvoirs de la cour relativement aux demandes de contrôle judiciaire. Par conséquent, il n'est pas nécessaire de mentionner expressément les recours extraordinaires ou par voie de bref de prérogative au moment de présenter une demande de contrôle judiciaire. [Je souligne.]

J'en conclus donc que la Cour d'appel fédérale n'a pas commis d'erreur relativement à cette question.

B. *Les questions constitutionnelles*

(1) L'applicabilité de la *Charte*

L'appelante soutient que la violation de la Constitution à laquelle a conclu la Cour d'appel ne

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THE DECLARATORY JUDGMENT

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by

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and

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with a section on the Declarator in Scotland
by

The Hon. Lord Clyde
The Rt. Hon. The Lord Clyde, formerly a
Lord of Appeal in Ordinary and Senator of the
College of Justice in Scotland

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(b) whether a contract is valid and subsisting[32];
(c) whether an option has been validly exercised[33];
(d) whether a contract has been breached or not implemented[34]; or
(e) whether a contract has been properly and effectively rescinded.[35]

Where a tenant has failed to pay the rent and the landlord wishes to confirm that the lease has thereby been terminated a declarator is appropriate[36] but may not be formally necessary.[37] A declarator may be readily used to resolve issues in a wide variety of kinds of contract, including sale, hire and employment.

Trusts and succession

8.22 The validity of a will may be tested by an action of declarator. An action may be raised to declare that a testamentary writing of a deceased person is the holograph of that person, that is written and subscribed by him such as is sufficient for the formal validity of a will in Scotland. The action may be raised in the Sheriff Court and may be resolved by the Sheriff after consideration of evidence on affidavits.[38] Beyond that, particular problems regarding the validity may be resolved, such as for example, whether a holograph writing signed "Mum" constituted in its contents and in its subscription a valid testamentary writing[39] or whether a document typewritten by the deceased and signed by him was a valid will[40] or whether a will had been validly executed by a notary.[41] A declarator of trust is a familiar form of action to affirm the existence of a trust.[42] It can also be used to declare the correct terms of a trust.[43] It has also been used to establish that the pursuers were trustees of a fund and entitled to act as such.[44] The action may also be used to determine the validity of a renunciation granted by a beneficiary[45] or the validity and effect of an exercise of a power given by the trust.[46]

[32] *East Kilbride Development Corp.* v. *Pollock* 1953 S.C. 370.
[33] *Stone* v. *Macdonald* 1979 S.C. 363.
[34] *Hoey* v. *Butler* 1975 S.C. 87.
[35] *Gamage* v. *Charlesworth's Trustee* 1910 S.C. 257.
[36] *e.g. Dorchester Studios (Glasgow) Ltd.* v. *Stone* 1975 S.C. (H.L.) 56.
[37] *Duke of Argyll* v. *Campbeltown Coal Co.* 1924 S.C. 850.
[38] The procedure is regulated by an Act of Sederunt, July 19, 1935, S.R. & O. No. 756.
[39] *Rhodes* v. *Peterson* 1971 S.C. 56.
[40] *Chisholm* v. *Chisholm* 1949 S.C. 434.
[41] *Gorries's Trustees* v. *Striven's Executrix* 1952 S.C. 1.
[42] *Pickard* v. *Pickard* 1963 S.C. 604.
[43] *Hudson* v. *St. John* 1977 S.C. 255.
[44] *St. Giles Church Vestry* v. *St. Silas Church Trustees* 1945 S.C. 110.
[45] *Douglas-Hamilton* v. *Duke and Duchess Hamilton's Trustees* 1961 S.C. 205.
[46] *Cuninghame* v. *Cuninghame's Trustees* 1961 S.C. 32.

The actio popularis[47]

8.23 The declarator has been widely used to declare public rights which are under threat or in dispute. In this context the descriptive term "*actio popularis*" has been often used, but that term is not restricted to actions of declarator; it relates to the nature of the rights which are in issue rather than any particular form of action. The expression is used where an action is brought by an individual in his capacity as a member of the public to vindicate or defend a right said to be possessed by members of the public. A declarator may be sought to declare a public right of way, a right of market, of ferry, of harbour and moorings, of navigation, of grazings, of the use of common land, and other such rights. For all such actions any member of the community has a title to raise the action[48] and provided that the pursuer has a sufficient interest to raise the action it will be competent. The consent of the Crown is not necessary. While it may be that at common law the Lord Advocate might bring a civil action in the public interest[49] that is not a course which is adopted in practice.[50] Thus one inhabitant of a burgh may competently seek to vindicate the rights of all the inhabitants.[51] In one case several labourers were put forward to represent the public in raising an action for declarator of a public right of way.[52] In another case several vegetable merchants sought a declarator of a right of market.[53]

4. JUDICIAL REVIEW

General

8.24 It will be evident from what has already been said that the declarator is available in a very extensive variety of circumstances. Among these comes its use in matters of judicial review. But it is of no special or unique importance in that context nor is it the only form of remedy which may be sought or granted in that context. However, since the present volume

[47] *Cf.* Jurisdiction, Chap. 3, para. 3.07, Locus Standi, Chap. 7, paras. 7.28 *et seq.*
[48] McLaren, *Court of Session Practice*, p. 226.
[49] *Magistrates of Buckhaven and Methil* v. *Wemyss Coal Co.* 1932 S.C. 201 at 214.
[50] The Lord Advocate has a statutory power under the Local Government (Scotland) Act 1973, s.211 to take proceedings on behalf of the Secretary of State following on a complaint regarding a local authority and the investigation of that complaint.
[51] *Graham* v. *Magistrates of Kirkcaldy* (1892) 9 R. (H.L.) 91.
[52] *Jenkins* v. *Robertson* (1869) 7 M. 739.
[53] *Blackie* v. *Magistrates of Edinburgh* (1884) 8 M. 1064.