CORAM: Taggart, Lambert, Hutcheon, Macfarlane, Wallace, J.J.A.

Vancouver, B.C.
June 5, 1992.

THE REGISTRAR: In the Court of Appeal for British Columbia, Friday, June 5th, 1992. In the matter of Delgamuukw versus Her Majesty the Queen at bar, my lords.

MR. LOWES: My lords, we have another new face at the counsel table. This is Miss Paula Graham, who will be with me for the balance of the case.

TAGGART, J.A.: You're very welcome.
Yes, Mr. Arvay?

MR. ARVAY: My lords, at the outset this morning I would like to take the opportunity to attempt to answer Mr. Justice Lambert's questions of May 15th, 1992. I believe Mr. Jackson characterized his response as tentative or preliminary, or something of that sort. If what he meant by that was that he was going to follow it with a more considered and final response, that's not what I mean when I say my submissions are tentative. They would be tentative no matter how long I think I had to spend on it, because the questions are very good questions, they are fundamental questions, they are very difficult questions to answer.

And so what I do provide to your lordships is our best attempt, given the time frame that we had to work on the questions, to assist your lordships in addressing these fundamental points, which indeed are at the core of the case, but for which, I confess, there are no easy or simple answers.

We understood Mr. Justice Lambert to ask not two questions, but three questions. And the -- in paragraph one of our written submissions we have distilled those three questions as follows: What makes something a right? What makes something aboriginal? The third question the other counsel did not address but Mr. Justice Lambert did seek information on is what differences, if any, exist between aboriginal rights at common law and section 35 rights? And that is found, if any reference is needed, in Mr. Justice Lambert's question at page 3, line 28 he says:

> "Finally, as an additional problem the answer to the questions that I have asked have to be

1 related to section 35 of the Constitution Act
2 and to the aboriginal rights there referred to,
3 which include rights under land claim
4 agreements, different in their nature perhaps
5 from aboriginal rights generally. The question
6 about whether aboriginal rights apart from
7 section 35 are the same as aboriginal rights
8 under section..."
9
10 Mr. Justice Lambert, there is a typographical --
11 not a typographical error, there seems to be an error
12 or an omission in the transcripts, it says section 5,
13 I understood that to mean section 35.
14 LAMBERT, J.A.: I am sure that's right.
15 MR. ARVAY: So you said:
16
17 "The question about whether aboriginal rights
18 apart from section 35 are the same as
19 aboriginal rights under section 35, and perhaps
20 therefore whether section 35 controls what we
21 must regard as aboriginal rights seem to me to
22 be important also."
23
24 So we have attempted to answer the three
25 questions. We had a great deal of difficulty
26 attempting to answer question one as a distinct answer
27 to question two. It was very difficult to
28 disaggregate the term "aboriginal right" and answer
29 what is a right without thinking about it in the
30 context of aboriginal rights. And, indeed, in
31 fairness to Mr. Justice Lambert, I am -- I think you
32 have appreciated that, because in your question as
33 well, with respect to the first question when you said
34 "what makes something a right?" and I am reading now
35 from page 2 of your -- of the transcripts at line 26,
36 you say:
37
38 "I think my particular problem is two-fold: The
39 first question is what makes an activity,
40 custom, practice or institution into a right in
41 the context of aboriginal rights generally and
42 in the context of section 35 of the
43 Constitution Act? This question asks what
44 makes something a right?"
45
46 So your lordship appreciated, I believe, that it
47 is very difficult to -- it may be possible to answer

the question in the abstract but it may not be very helpful to answer the question in the abstract without regard to the fact that the reason, without regard to the fact that the question arises in a proceeding which is searching for a meaning for aboriginal rights. Your second question is asked, you say this question -- sorry. The second question is:

> "What makes an activity, custom, practice or institution carried on by aboriginal peoples into an aboriginal right? This question asked what makes a right aboriginal?"

As I said, we find it very difficult to provide you with an answer which is going to be very useful by focusing in an abstract way on what makes something a right. We have tried to answer that question in the context of aboriginal rights in section 35 generally.

At paragraph 2 of our response we say that these two inquiries are inextricably intertwined, just as the nature of a right depends on whether it is a contractual right, a constitutional right or a human right, so too with aboriginal rights. The nature of aboriginal rights may be distinct from the nature of other rights, simply because they refer to aboriginal people.

And I cite a quote from Donnelly, Universal Human Rights:

> "From where do we get human rights? The very term 'human' rights points to a source: humanity, human nature, being a person or human being. Legal rights have the law as their source, contractual rights arise from contracts, and thus, apparently, human rights have humanity or human nature as their source."

So we do say that what makes something an aboriginal right is because it is unique to aboriginal peoples. Indeed, we say that the right is unique, it is sui generis, in at least three different ways: It is unique in its source, it is unique in its content, and, most importantly, it is unique in its relationship to the state.

Now, having said that it's very difficult to answer the question in a way which we think would be helpful to your lordships, by just focusing on what makes

1 something a right in the abstract, we have attempted
2 to do that, because Mr. Justice Lambert asked that we
3 perform some analysis of the jurisprudential
4 formulation of the rights.
5 Now, there is a vast body of literature on the
6 jurisprudential formulation of the rights. It would
7 be foolhardy for me particularly to attempt to present
8 to this court a coherent theory of rights that you
9 would accept, or would even purport to settle that
10 question, and so I don't attempt to do it. I confess
11 my limitations in that area, and all I can do for you
12 is to go back to what I understand to be basically the
13 two broad formulations of rights in our -- in the
14 Anglo-Canadian-American legal system, and present it
15 to you in the hope that that will assist in answering
16 the questions before the court. I say, however, that
17 I am not particularly optimistic that that inquiry
18 does assist very much, but I present it to you for
19 what it's worth.
20 And in the written response, at paragraphs six,
21 seven, eight and ten -- you didn't want to see what
22 was in nine -- we simply set out in almost an amalgam
23 form a summary of those two broad jurisprudential
24 formulations of right, which is positivism and natural
25 law. The one article that I really did enjoy, because
26 I understood it, was was an article by Prof. Owen
27 Theissen, who started off by saying that in terms of
28 positivism, is that a positivist is someone who sounds
29 very positive. And that's something that I will be
30 doing when I commence my submissions on remedies. But
31 it's not something that I am going to be doing in this
32 part -- these parts of my submissions.
33 In any event, I don't wish to belabour the point
34 of what are the two basic jurisprudential formulations
35 of rights. I think we all know that positivism is
36 essentially a conception of rights which provides that
37 they are the product of state action. Typically, it's
38 the legislature, but it's also the judiciary, the
39 judiciary can be the source of law, a source of
40 rights. Austin says they are rules established by
41 political superiors.
42 When I was reading a bit of Austin last night, I
43 found it quite amusing that after he got into about
44 three or four pages of his text on jurisprudence, he
45 says that he feared that he was going to be testing
46 the patience of his readers, looking down the line,
47 but he said that they should be cheerful or at least

adopt some tolerance for him because it might be -- it was him that had to perform the task of explaining his theory of rights to them rather than vice versa. I won't test your patience because I am simply going to present to you, in the most summary fashion, what I understand to be these two jurisprudential formulations of rights and then move on.

So in paragraph 6 we summarize positivism as being a legal right which is the product of legislative or judicial action. And in the second jurisprudential school of thought, which is natural law of theory, postulates, I am at paragraph 8, that law is simply not positive actions of the state but includes explicit, normative considerations beyond mere legal pronouncement.

And in paragraph 10 we say that there are different conceptions of natural law. Some find the source of natural law in God. Thomas Aquinas viewed rationality as an expression of natural law which was in turn an expression of God's will. Crucial to his conception of natural law is the notion of "natural inclinations and reason." Kantian scholars see the source of natural law not in some divine source but in self-reflection, in thought, in reason.

Now, the reason that these European conceptions of rights may not be particularly helpful is because it's difficult to transpose them to aboriginal systems, aboriginal beliefs and aboriginal ideas of law. Nevertheless, I try to seek out the source of aboriginal law, using either positive law or natural law conceptions. And so if you wanted to put a sub heading in this written response prior to paragraph 12, you might say "the source of aboriginal rights."

Now, one of the only ways we can determine the answer to the questions is simply to look to see what judges have said about aboriginal rights. And that may not be particularly instructive, unless the judges who have expounded on aboriginal rights have thought about the source in this way, by considering the jurisprudential questions. But, nevertheless, we consider that probably the only way we can determine what makes something a right, an aboriginal right, is to look to see what judges have said about it.

And in paragraph 12 I have referred you to a passage that you have seen many times from Calder, Mr. Justice Judson, he says that this is what aboriginal title means. He says:

1
2 "...the fact is that when the European settlers
3 came the Indians were there, organized in
4 societies, occupying the land their forefathers
5 have done for centuries."
6
7 WALLACE, J.A.: But did he say aboriginal title was synonymous
8 with aboriginal rights?
9 MR. ARVAY: No, that was the word he used, so it's the word I
10 will use now to be not necessarily coterminus with
11 aboriginal rights but certainly a subset of aboriginal
12 rights.
13 And in Guerin, Mr. Justice Dickson looked to
14 Calder, which he said:
15
16 "...recognized that aboriginal title was a legal
17 right which is derived from Indians' historic
18 occupation and possession of their tribal
19 lands."
20
21 He said it was an independent legal right that
22 pre-dated the Royal Proclamation.
23 WALLACE, J.A.: But didn't he say the title pre-dated the Royal
24 Proclamation at 335?
25 MR. ARVAY: Yes, I believe it was Indian title was a -- I think
26 he used the word Indian title was an independent legal
27 right that pre-dated occupation. That's right, my
28 lord. Again, I am not going to, for the purpose of
29 these submissions, make a distinction between Indian
30 title and Indian rights or aboriginal rights.
31 WALLACE, J.A.: But the point I am trying to make is whether a
32 right can exist pre-contact until -- can a right exist
33 until it's recognized by the European community?
34 MR. ARVAY: That's exactly the inquiry.
35 WALLACE, J.A.: And this seems to say it's a pre-existing right,
36 and I don't know how it can be pre-existing a system
37 that recognizes it.
38 MR. ARVAY: Yes. It's our -- at least it's an argument. Again,
39 I am sort of reluctant to cast it as a position,
40 because I think it can only be an argument. The
41 argument is, is that if it was an independent legal
42 right which pre-existed contact, let alone
43 sovereignty, then the source of the right is not in
44 Colonial law, let alone Canadian law, the source of
45 the right must be in aboriginal law. And so the
46 position we take in this paper is that that is a
47 partial answer to my lord's question, which is what

makes a practice a right in terms of an aboriginal right, is the source of the right, is aboriginal law. If it pre-dated contact, it can't find -- and yet we call it a legal right, an independent legal right, it must find its source in aboriginal law.

Now does that mean that the source of aboriginal rights are founded on a conception of positive law or natural law? It can be either. It can be founded on positive law, so long as you're prepared to recognize that aboriginal law, aboriginal systems of law, qualify as being laws in the Austinian conception of rights, as a positive law. And it seems to me you can. It's a bit forced but you can. Likewise, you could probably say that the source of aboriginal rights, given that they pre-date contact and come from a system of law which is very different from, very foreign to European systems of law, that it is founded more on a natural rights conception of the law. Does that make it any less legitimate? Only if you reject natural law as a legitimate source of law and rights. But aboriginal scholars have described their rights in ways which suggest that they are founded on more of a natural rights conception rather than positive law conception. And I have, in paragraph 14 of my written response, a quote from an aboriginal scholar, and he says this. He says:

> "What are aboriginal rights? They are the law of the Creator. That is why we are here. He put to..."

That is obviously wrong. That quote, by the way, is attached to the material you have.

TAGGART, J.A.: I think "he put us to use."

MR. ARVAY:

> "He put us in this land; he did not put the white people here. He put us here with our families, and by that I mean bears, the deer and the other animals. We are the aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfill its responsibility under the law of the Creator. Our forefathers did their part now we

1 have to do ours. Aboriginal rights mean
2 aboriginal responsibility, and we were put here
3 to fulfill that responsibility."
4
5 One might say that that's a natural rights
6 conception of aboriginal law. We say, in paragraph
7 15, that, however, the court should be slow to
8 conclude that in any certain way, because that quote
9 itself suggests that the aboriginal legal systems
10 might collapse a distinction to the extent that their
11 positive laws are expressive of a natural ordering.
12 But we get this far, we look to cases like Guerin
13 and Calder and say that if aboriginal title, Indian
14 title, perhaps a subset of aboriginal rights, is an
15 independent legal right which finds its roots in
16 something that happened before contact, then the root
17 of aboriginal rights is aboriginal law. And I can't
18 tell you what the root of aboriginal law is, because,
19 of course, not only is it because I don't know whether
20 it's positive or based on a positive conception of the
21 law or natural rights conception of the law. We just
22 don't know enough about aboriginal law or aboriginal
23 legal systems. But in order to recognize it as a
24 right in -- in order to recognize an aboriginal
25 practice, rather, as an aboriginal right, we say you
26 don't have to have proof that the practice is
27 authorized or blessed by some aboriginal legal system,
28 it would be very difficult for any aboriginal people,
29 I think, to prove that a particular aboriginal
30 practice is traced to some law, traced to some
31 aboriginal law, so we don't require that proof. Plus
32 it might be very dangerous for our courts to purport
33 to rule on whether something is an aboriginal law or
34 not. There is a real danger, a risk of
35 misinterpretation of their systems. So we say in
36 order to satisfy, in order to answer the question of
37 whether a practice is a right, you have to be
38 satisfied that the practice comes from an organized
39 society, that evidence of the aboriginal people living
40 in an organized society is sufficient evidence that
41 they had some kind, some system of law. And,
42 therefore, that's enough to make a connection
43 between -- that's enough to allow you to conclude that
44 the practice is a right.
45 MACFARLANE, J.A.: It comes from and is recognized by an
46 organized society?
47 MR. ARVAY: Yes, comes from and is organized by an organized

1 society. And I will try to do that again. When you
2 ask what makes a practice into a right in the sense of
3 an aboriginal right, we say it's not just enough that
4 aboriginal people were engaging in this practice, not
5 all practices can be a right. And yet it's too much
6 to ask aboriginal people to prove that there were
7 aboriginal laws which said that this thing that they
8 were doing was a right. So we say that the
9 compromise, and it's a compromise, proof that they
10 lived in an organized society is sufficient to prove
11 that the practices that they engaged in were rights.
12 WALLACE, J.A.: So that analysis turns then on its
13 characterization by the aboriginal society, not by
14 European society?
15 MR. ARVAY: I think we have to be very sensitive to the
16 aboriginal peoples' understanding of what is or is not
17 a right, which practice does or does not qualify as a
18 right. What we -- we add what is really a gloss, I
19 suppose, on what makes an aboriginal practice a right.
20 We say that the practice not only must find its source
21 in some organized society, but it also must be a
22 practice which is integral to their distinctive
23 culture. That may be the best evidence that we would
24 have, that what they were doing is important enough to
25 be characterized as a right, absent proof that there
26 is an aboriginal law out there which says that
27 something we wouldn't think is a right. So when we
28 talk about the source of aboriginal rights, yes, we
29 say the original source is aboriginal law. We can't
30 ignore the fact that judges, courts, are putting
31 glosses on that law and deciding whether and when
32 something is a right, and so the source of aboriginal
33 rights is not only aboriginal law but is the common
34 law. Every time a court opines on aboriginal rights,
35 to some extent that becomes the source of the right.
36 But what we are trying to do is get back to the root.
37 We say the root is probably aboriginal law and the
38 best evidence of the law is the practice. And in
39 order to ensure that the practice, even in the
40 aboriginal society's conception of rights, is a right,
41 we say that the practice must be tied closely,
42 integrally to their distinctive culture. And, yes, we
43 should be sensitive to the aboriginal society's idea
44 of what is integral and what is not.
45 Now, to answer the question, then, what makes an
46 aboriginal practice a right we say it is aboriginal
47 law. And in order to be satisfied that there is an

aboriginal law, we need some proof that the aboriginal people lived in an organized society. And furthermore, the best evidence of whether the aboriginal practice is a right is the practice integral to their distinctive culture.

One wonders what would happen if someone from Mars came to Canada and British Columbia and asked -- and he wanted to know or she wanted to know, what makes something a right in our society, if they didn't land on the lawn of the legislative buildings, or if they landed on the lawns of the legislative buildings in Victoria they might know, it is all there.

MACFARLANE, J.A.: Might never know.

MR. ARVAY: Sorry?

MACFARLANE, J.A.: Might never know.

MR. ARVAY: Might never know. But that would be the obvious source of the right. But they might wander around the community to get a sense of what practices seem to be really important to the culture, and those practices may well be considered rights in our culture. So probably would understand we have a right not to be assaulted and robbed, but other things that we do which are less fundamental wouldn't qualify as a right. To some extent that's what we are doing. It's impossible to go back to pre-contact times in any meaningful way, so we use proxies. And aboriginal practice is our proxy for aboriginal rights.

Now, to answer the question what makes a right aboriginal, and again I appreciate that there is an overlap. Forgive me, I just have a very hard time separating the two questions. But what makes a right aboriginal we say is because it's unique to aboriginal people. And that prompts the next question, well why is it unique to aboriginal people? And to some extent it may be because of the content, the practice, but I don't think that's the complete answer. Because there are also many things that aboriginal people do or did, practices, which non-aboriginal people do or did, the right to hunt and fish, for instance. There may be aboriginal practices which of course are distinctive to aboriginal communities: feasts, potlatches, those things. But I don't think we can limit aboriginal rights to practices which are unique to aboriginal people. And so I say that the -- probably the fundamental reason about why aboriginal rights are -- one of the fundamental reasons why aboriginal rights are unique is in their inter-relationship with the

1 state.
2 It is because aboriginal rights find their source
3 in aboriginal law, something that pre-dated contact,
4 that you cannot find in the right any conception how
5 it inter-relates with the state. The colonial state
6 is foreign to any system of aboriginal law. And so
7 you -- if you ask, if someone says that aboriginal
8 rights create some sort of protection against the
9 colonial state, I say that can't be so if you accept
10 the premise that the source of aboriginal rights is
11 aboriginal law, for the obvious point that the
12 colonial authority wasn't around in pre-contact times
13 when the aboriginal law was created. And so what
14 makes an aboriginal right somewhat unique is in the
15 fact that it doesn't have within it any protection
16 from the state. It doesn't have within it any fetter
17 on state power, on colonial state power.
18 Now, you might say, well, even an aboriginal --
19 even in pre-contact times there were various
20 aboriginal communities, nations, and an aboriginal
21 people or nation may have a law which prevents other
22 aboriginal nations from invading their space, invading
23 their territory. In this particular case, that wasn't
24 proven. But even accepting for the sake of argument
25 that an aboriginal nation does have a law which
26 protects its community, its people from invasion from
27 strange or other aboriginal communities or nations,
28 that doesn't translate into a right which protects an
29 aboriginal community against colonial power, colonial
30 authority. Because once you accept the sovereignty of
31 the colonial authority, which my friends do, you can't
32 accept the sovereignty of the colonial authority and
33 at the same time recognize that the aboriginal right
34 places a fetter on the colonial authority's sovereign
35 power, which seems to me to be a contradiction in
36 terms.
37 Aboriginal nations may have competed on some level
38 of equality. But aboriginal nations do not compete
39 with the colonial authority as sovereign nations. So
40 we say that, and I am at paragraph 19, in paragraph 19
41 of my argument, in the last sentence, aboriginal
42 rights in existence at the time of sovereignty place
43 no or minimal correlative duties on colonial authority
44 -- on colonial authority, and the common law of
45 aboriginal title prior to 1982 reflected this fact.
46 Indeed -- rather not indeed, we call aboriginal rights
47 a right, an independent legal right, because it is

rooted in an aboriginal system of law. But we recognize it, the common law recognizes it as being a legal right in our system. But all that means, in my submission, is that the state is prepared to give some protection to the aboriginal people, to give some recognition to the aboriginal right by ensuring that it receives some protection from the state by the state, when there are any encroachments on that right by third parties, but not the state. In other words, the state, by recognizing it as a legal right, its roots may be in aboriginal law, but it's recognized as a legal right in our system, it's a legal right in our system because its given some protection. But the protection that the aboriginal people enjoy by having an aboriginal right is not protection from the sovereign, from the state, it is protection from third party interests, other aboriginal and non-aboriginal people. And that's the common law. The common law is that aboriginal people can look to the state for protection to endorse their rights, but aboriginal people cannot rely on their rights to fetter sovereign power.

Mr. Bell's interpretation of the Royal Proclamation yesterday, in my submission, is entirely correct. The Royal Proclamation is an example of the state providing protection to aboriginal people, their rights, from the settlers, but not in any way suggesting that the state had somehow fettered its sovereign power to deal with its land or the people or with its subjects.

It may be that the state has imposed through the courts some minimal correlative duty on itself vis-a-vis aboriginal people, and that might find expression in the law of extinguishment. But before the state is to be said to have extinguished aboriginal rights, there must be an expression of the sovereign, which is clear and plain, which is a clear and plain expression of intent to extinguish the aboriginal right.

Chief Justice McEachern, and Mr. Justice Dickson in Guerin as well, found some fiduciary relationship between the state and aboriginal people as being yet perhaps another fetter, to some extent, on the state. But the fundamental proposition is that if the source of the right is the aboriginal law, then we can't find in the aboriginal law any fetters on the colonial power, the sovereign authority. If there have been any fetters placed on the colonial authority, it has

been by the sovereign himself or herself, through the instrumentalities of the state, and as well the courts, and we say that such limits are very minimal.

I find it useful in this part of my submissions, because it ties into what I am going to be saying shortly, to make two -- to make this observation at paragraph 21, that while any correlative duties superimposed on the aboriginal law by the common law state were, therefore, minimal, and I refer to the extinguishment test, the historical record does reveal that "European" states, albeit in varying degrees, attempted to "negotiate" the co-existence of the aboriginal right within the non-aboriginal society by way of treaties. We don't say that this in any way imposed a duty on the state to enter into treaties. Treaty making at all times would be consensual and voluntary by both parties. But it does perhaps give us another idea of how to conceptualize the aboriginal right. It was the right of a collective. It was a right which required co-existence of aboriginal and non-aboriginal society. A treaty was one way of giving expression to the right.

Now, up to this point I say the source of aboriginal rights is aboriginal law, and to some extent the common law. But in 1982 we say something very important happened which altered both the nature of the right, the source of the right, as well as the content of the right. In 1982 the Constitution now added -- is a source of aboriginal rights, notwithstanding the fact that it uses the language of recognizing and affirming existing aboriginal rights, we can't deny that the Constitution is yet another source, another layer of -- another source to the aboriginal right and it affected its very nature in an important way, because it added an external dimension to the right that it didn't enjoy before. It now gave the right some power against the state. It said that the aboriginal right could be used to fetter state power. And that obviously comes out of the Sparrow decision.

As well, I say, because it's going to be apropos what I am going to be dealing with next in paragraph 24, that because the right now has not only a collective dimension but an external dimension, and because the right doesn't fit easily in a non-aboriginal society, the importance of treaty making is heightened, is emphasized. And I say that the

1 inclusion of treaty rights and other rights obtained
2 by land claim agreements in section 35 is a further
3 indication that the interests in section 35 is
4 designed to protect includes this unique mix of
5 communication and negotiation. I will come back to
6 that later.
7 I also add, at paragraph 25, that not only did the
8 constitution affect the nature of the right by giving
9 a collective dimension, it may well have affected the
10 content of the right. And this is apropos your
11 question, Mr. Justice Lambert, about what's the
12 relationship between section 35 rights and common law
13 rights? I am not certain about this, but I think the
14 answer is that there is no longer any need to talk
15 about common law aboriginal rights. Whatever was a
16 common law aboriginal right is now constitutionalized.
17 The only way you would come to an opposite conclusion
18 is if you said that section 35 rights were limited to
19 land based rights. We say aboriginal rights are sui
20 generis rights in respect of land. But they may,
21 section 35 may go beyond that to talk about certain
22 practices, religious practices, for instance. I don't
23 know for sure, and I don't know whether we need to
24 deal with it in this case. If section 35 is limited
25 to land-based rights, then the common law of
26 aboriginal rights still has some place. But if it's
27 not, then the common law has been subsumed into
28 section 35, which is why we call this case, we have
29 characterized this case as a constitutional case,
30 because given the province's very important concession
31 that there has not been a blanket extinguishment of
32 aboriginal rights, it means that any rights that
33 survived to 1982 have now been constitutionalized.
34 Chief Justice McEachern didn't have to worry about
35 section 35 because he said they never made it to 1982.
36 We say they made it to 1982. Exactly where, exactly
37 what the content of which is certainly in dispute, but
38 they in large part made it to 1982. So if section 35
39 is -- now subsumes the common law of aboriginal
40 rights, the other thing the constitution did, it may
41 well have affected the content, not just the nature
42 but the content of the right because the constitution
43 requires us to eschew any static formulation of the
44 right. We have to allow the right to evolve.
45 Now, that's a very difficult question as to how it
46 evolves and at what rate and when evolution turns into
47 transformation. We say an important consideration in

the content and the extent to which it should be allowed to evolve is the extent to which historically it was exercised by -- the practice was one which one was engaged in by an aboriginal people in an exclusive and extensive way.

We say the challenge for the court, indeed the parties, is to find an expression of the right that is true to its historical origin, but at the same time ensures the continued culture and existence of the aboriginal peoples and not just at some bare existence but in an important, in a healthy, strong way. We say that doesn't equate into a constitutional right to use any of the territory in the claim as they see fit. But it might translate into greater freedom to use those areas which historically were used by them exclusively and extensively, then it might, in those parts of the territory where the use was non-possessory, sporadic, which on the evidence seems to be much of the territory.

So in summary, my lords, if you ask me what makes something a right in the context of aboriginal rights, we say aboriginal law, the common law, the constitution at various stages of our history. And in answer to the question what makes a right aboriginal, we say because it's unique to aboriginal people. And to answer the question, well what makes it unique to aboriginal people, we say before 1982 is probably its fragility vis-a-vis the state, and after 1982 is its considerable strength as compared to rights of other cultural and ethnic groups and, indeed, other common law rights.

I don't know if that's been very helpful, my lord, but that's my attempt to answer your question.

TAGGART, J.A.: Thank you, Mr. Arvay. It might be convenient to take the morning break and then you can get yourself organized for more plebian pursuits.

MORNING BREAK

TAGGART, J.A.: Yes, Mr. Arvay?

MR. ARVAY: My lords, for the purpose of my submission, I have adopted the radical idea that I am going to use my factum as my speaking notes.

TAGGART, J.A.: Extraordinary.

MACFARLANE, J.A.: Shocking.

TAGGART, J.A.: We are on the Delgamuukw case, are we?

MR. ARVAY: I am at tab 7 of my factum. I have prepared three

volumes of the called white books, W-5, 6 and 7. There are no exhibits, transcripts references or anything in those three volumes. All there are are the excerpts from the cases that are referred to in this part of the factum, so that you have some -- just for convenience of the court they are at least in three volumes rather than 30 or how many there are. Where I have added a new case I have put in the entire case with a couple of exceptions, because the entire case wasn't added to the general book of authorities.

My lord, my job today is to endeavour to persuade you to decide only part of this case, part of the issues on the appeal, to stop short of completing what otherwise, in an ordinary case, would be your job. But to say to you that you should feel comfortable in doing that because we are not asking you to decide only part of the case and to go home and wash your hands of the case. We are asking you to decide part of the case, to adjourn, and to retain jurisdiction, not necessarily you individually on the bench, but for this court to retain jurisdiction in the event that the parties need to come back to you to have you complete the task.

I will argue, my lords, that what I am asking you to do is a principled approach to constitutional and public law, law making, adjudication. But I confess to you that I do not have any clear precedent to support what we ask you to do.

HUTCHEON, J.A.: It may require a statutory amendment to the Court of Appeal Act.

MR. ARVAY: In my submission, it does not. In my submission, you have jurisdiction to do this and, in my submission, there are strands of authority to support what I am going to ask you to do. All there is not is a case that I can point to which precisely supports our submission.

I was reminded by a quote that I saw some years ago where a judge challenged Rufus Kohape(?), the famous Massachusetts lawyer, to cite a precedent for his argument before the court, and he replied: "I will look it up, your honour, and endeavour to find a precedent if you require it, though it would seem a pity that the court would lose the distinction of being the first to establish so just a rule."

LAMBERT, J.A.: I would like to pursue the point that's just been made by Mr. Justice Hutcheon just for a second.

MR. ARVAY: Sure.

1 LAMBERT, J.A.: There is always the possibility that you might
2 not persuade us that we have the jurisdiction to do
3 that. If there were legislation empowering us to do
4 it then the point would be beyond doubt. But if we
5 were to conclude that we don't have the power to do
6 it, we can't just create such a power out of thin air,
7 then once we have rendered a decision to that effect,
8 the legislation, if legislation were thought
9 desireable, it couldn't affect this case, our decision
10 having already been rendered. I just thought I would
11 mention it in pursuit of the point Mr. Justice
12 Hutcheon has raised.
13 MR. ARVAY: I take your point. But I submit that it's a
14 needless concern. I say that you do have the
15 jurisdiction.
16 Let me start at paragraph 114 of my factum, because
17 I think what I have got in paragraph 114 is still very
18 serviceable of the order that we seek. It may or may
19 not require some refinement, but when I looked at it
20 again last night I thought no, it still works. We
21 seek a declaration that there was not blanket
22 extinguishment. Not a particularly artful or
23 legalistic phrase, but one we now all understand, are
24 the appellants' aboriginal rights. That's something
25 very important the court is being asked to do. And,
26 again, I want to emphasize that we are of the view
27 that the court is being asked to do some very
28 important things in this appeal, even though the court
29 is being asked not to do as much as it could do.
30 The second declaration is that the appellants have
31 existing aboriginal rights with respect to an
32 undefined portion of the territory in question. That
33 is a broad, very general declaration. But in my
34 submission it is an appropriate one for the court to
35 make.
36 Now, in your reasons, I don't see that it's
37 necessary to put this in the order, although it could
38 be put in the order, but in the reasons we would urge
39 you to say both what aboriginal rights are not and
40 what aboriginal rights are. We urge you to say that
41 aboriginal rights are not rights to ownership, as the
42 appellants say they are, ownership of the land, we
43 urge you to say that they are -- do not give the
44 appellants the right to jurisdiction in the sense that
45 they say, although we also recognize that the
46 appellants do have some rights of self-government, but
47 it is a right which is subject to federal and

1 provincial law. We urge you to say that the
2 aboriginal rights are not proprietary, at least not in
3 any common law sense of that word. Even though they
4 may be a sui generis interest with respect to land,
5 they don't carry the baggage of the common law insofar
6 as the idea of a proprietary right is concerned. We
7 urge you to say that the aboriginal rights are defined
8 as a sui generis interest in respect of land which are
9 highly context fact specific, tied to historical use
10 and practice, which is integral to a distinctive
11 culture, the precise scope and content of which will
12 depend upon that historical practice. The extent to
13 which the activity, the practice was exclusive was
14 extensive, recognizing as well that it requires some
15 evolution in keeping with the purpose of the right as
16 is found in the constitution. So we urge you to say a
17 great deal about what aboriginal rights are and what
18 they are not. And that's a very, very important
19 reason for this appeal.
20 At the end of the day you are entitled to, though,
21 because of the province's concession that there has
22 been blanket extinguishment -- sorry, that there has
23 not been blanket extinguishment of aboriginal rights,
24 and because the rights are so context fact specific,
25 you are entitled to say that the appellants enjoy
26 aboriginal rights to an undefined portion or portions
27 of the territory of their claim. That means a great
28 deal, even if it doesn't provide the appellants and
29 the province and the federal government and the
30 intervenors with as much information as perhaps some
31 people would like. It provides enough information.
32 We say, if I go back to paragraph 114, my lords,
33 that the order should simply declare that a temporary
34 transition period exists in the anticipation that the
35 appellants's claim will be resolved and could go but
36 doesn't need to go on to say in the precise locations,
37 scope and content and consequences of their rights be
38 further defined and implemented by the parties through
39 negotiation.
40 I will come back to that, and the reason I would
41 put parentheses around the portion of paragraph (c)
42 about the precise location, scope, et cetera, is
43 because it's not exactly certain what will happen
44 during the transition period. And I will talk about
45 that later.
46 And (d), allow the appeal in part, adjourn the
47 proceedings sine die, and retain jurisdiction over the

1 matter in recognition that should agreement not be
2 reached by the parties, and the court will proceed to
3 address the issues.
4 HUTCHEON, J.A.: This is a change from the two years?
5 MR. ARVAY: The two years is a period of time that the province
6 and the appellants agreed to was a reasonable period
7 of time. Of course, it's in your lordships' decision,
8 judgment, as to what should be the period of time.
9 Speaking for the province, two years is a minimal but
10 acceptable period of time.
11 So, while it may need some further clarification, I
12 say that paragraph 114 still describes the nature of
13 the order that we would request from the court.
14 Now, what we ask the court not to decide is what
15 part or parts of the territory the aboriginal right
16 exists, if any -- well, I shouldn't say if any, just
17 what part or parts of the territory aboriginal rights
18 exist, don't decide that, therefore don't decide the
19 extent of the territory; do not decide the content of
20 the right in any particular place in the territory; do
21 not decide whether the province has the authority to
22 specifically extinguish the aboriginal right in any
23 place in the territory, the constitutional authority.
24 Do not decide the test of specific extinguishment. We
25 say with great confidence that fee simples extinguish
26 aboriginal rights but we say don't decide that, not
27 because we are fearful of your answer or less than
28 confident in our submissions, we are not. We don't
29 need to know. And we say the appellants don't need to
30 know. And that's very important.
31 LAMBERT, J.A.: I would like you to repeat the fourth point that
32 you --
33 MR. ARVAY: The point being that do not decide the test of
34 specific extinguishment.
35 LAMBERT, J.A.: Thank you.
36 MR. ARVAY: And, therefore, do not decide whether there has been
37 any specific extinguishment or diminution of the
38 aboriginal right. And do not decide what, if any,
39 remedy the appellants are entitled to, if there has
40 been an extinguishment or diminution of their rights,
41 either before or after 1982.
42 First, we ask you what to decide then we ask you
43 to stop and not decide those things, but then we say
44 don't go away, at least figuratively. And I know
45 that's a concern of your lordships, but we say that as
46 long as the court is here for the parties it's not
47 necessary that any individual member of this panel be

here for the parties, because it's not necessary that this panel indeed even be seized of the remaining questions to be decided, if necessary.

LAMBERT, J.A.: And you're going to be dealing later in your argument with the powers of the new five or three, who come in in relation to overruling anything that we may say in the areas in which we have said them?

MR. ARVAY: I address that point, my lord. I don't -- I address that point, I don't spend a long time on it. But I will deal with it and I would prefer to deal with it later, if I may.

LAMBERT, J.A.: Of course.

MR. ARVAY: My lord, we say that the remedy is principled primarily because it's consistent with the nature of aboriginal rights. It's consistent with the right, the remedy is consistent with the right and the right should drive the remedy. And your jurisdiction is -- it's clear to give effect to the appellants' aboriginal rights, and therefore you have jurisdiction to fashion a remedy which gives effect to the aboriginal rights. And I will develop that.

I say, this is all by way of summary, it's also consistent with your duty to uphold and vindicate the values in the Constitution, because we are not asking you to dismiss the appeal and send the parties off to negotiate, we are asking you to decide some very important constitutional questions here. We are just saying don't go as far as you might otherwise go.

We are -- we say it is an appropriate remedy because not only is it consistent with your duty to uphold the constitution but it's appropriately sensitive to the legislative and the democratic process to allow the governments an opportunity to fulfill their constitutional duties and responsibilities and otherwise act in the public interest. And this is important, given the fact that, as I understand it, the appellants and the province are in essential agreement with this approach. And there may be some, there may be some differences, and I am not sure what they are. But as I understand it as I am sitting here today, we are in essential agreement with this approach. That makes my job, in my submission, very easy, or at least relatively easy. When we drafted the factum, we drafted it without realizing or believing that we would have had the appellants' concurrence with this approach. We do have their essential concurrence with this approach.

And given that, not only does that make any advocate's job easier, but in the context of this case, the remedy is not only principled because it has regard to the democratic process and the legislative process and the job of governments, but it's respectful of the appellants as First Nation peoples to determine their own destiny as well. Because it's not just the province who wants to have a hand at determining how the appellants and the aboriginal people should co-exist in British Columbia society, but it's the appellants themselves want to have a hand in that. We want to be able to use what the court gives us by way of declaration of general entitlements, base line entitlements, to then fashion a more complete remedy by which the appellants and the province and other interests in the province can find the means to co-exist. And I say that particularly because, although my argument is not dependent upon the consent of the appellants, but because the appellants and the province are essentially ad idem on this approach, the court should be very slow to not give effect to these submissions.

I don't know what the position of the federal government is on this matter, I don't know what the position of the amicus is on this matter. But I would say to your lordships that opposition from either the federal government or amicus, should it come, should not be a reason to frustrate the joint request and wishes of the appellants and the province with respect to this remedy.

My lords, you mention that I should be given an opportunity to reply to the appellants' written submissions on remedy before their reply. It would be my respectful submission that I be given an opportunity to reply only once, but it would be not after receiving the appellants' written submissions but it would be after hearing the submissions of the federal government and the amicus, because I have reason to believe, or suspect at least, that I will find more resistance in -- from the amicus, and perhaps the federal government, than I will from the appellants. And if we are to join issue and assist the court it would be my submission that it would be much more appropriate if you heard from me after the federal government and amicus rather than before.

My lords, what I am proposing is innovative, yes, but, in my submission, it is a model of judicial

1 restraint. It is, I would submit, a -- not a, the
2 just and appropriate remedy in all of the
3 circumstances. And that it hopefully, hopefully, will
4 go a very long way to facilitate a final and just
5 resolution of a dispute which -- between aboriginal
6 peoples and the province, which should have been
7 settled a long time ago, wasn't, but which this
8 attorney-general is committed and this government is
9 committed to settling.
10 So, my lords, I would like to turn then back to the
11 factum, which is paragraph 115, and I suppose
12 paragraph 115 is maybe the most important part of my
13 submission. And that is that constitutional remedies
14 should reflect the nature of the particular
15 constitutional right at stake. And I cite from the
16 Gamble case on the bottom of that page:
17
18 "A purposive approach should, in my view, be
19 applied in the administration of Charter
20 remedies as well as to the interpretation of
21 Charter rights."
22
23 And the Gamble case is not on point in terms of
24 original concerns, it was a case in which the Supreme
25 Court of Canada applied the ancient writ of habeas
26 corpus in a way to give effect and vindicate Charter
27 values, Charter rights, even though at common law it,
28 because it was bound by very technical and restrictive
29 rules, would not have worked. But the passage from
30 Gamble, in my submission, says we all know about the
31 purposive approach in the constitution, that we should
32 give the constitution a purposive approach in order to
33 determine the nature of the right, and the interests
34 that the right is designed to protect. But Gamble is
35 important because it says you have to apply that
36 purposive approach as well to the remedy. And, in my
37 submission, that statement from the Supreme Court of
38 Canada goes a very long way, if not all the way, in
39 establishing that you have the jurisdiction to do
40 whatever you understand to be necessary or proper to
41 give effect to the constitutional right at stake.
42 And, again, I emphasize this is primarily largely a
43 constitutional case, for the reasons I set out before,
44 even though there is obviously considerations of the
45 common law that have to be taken into account.
46 I would like to ask you to turn to the first
47 reference book, W-5 at tab 115, and the second

reference in the second green page in, is the --

TAGGART, J.A.: 115?

MR. ARVAY: 115, yes.

TAGGART, J.A.: Second tab?

MR. ARVAY: It's the Osborne case, Osborne and Canada.

TAGGART, J.A.: My second one is Millar.

MR. ARVAY: Actually, I think it's called that as well.

LAMBERT, J.A.: Yes, Osborne and Miller.

MR. ARVAY: That's right. Again, the facts and the legal -- the law in that case doesn't have anything to do with aboriginal issues, it had to do with the provisions of the Public Service Employment Act, which prohibits public servants from engaging in work for a candidate or a political party. And the court had to decide what to do with a provision which was over-reaching and over-broad. Mr. Justice Sopinka talked about the reading down doctrine and how it was applied in division of powers cases and how it should be applied under the Charter. Division of powers cases he says that courts were engaged in somewhat of an illusory search for the legislative intention, and would attribute to parliament the intention to stay within its constitutional boundaries, and that's the presumption of constitutionality works and division of powers, but that's not a necessary way of applying the Charter. But anyway at page 104 he says:

> "The policy of restraint reflected in the presumption of constitutionality arose out of a traditional respect by the judicial branch for the supremacy of the legislative branch. Interpreting a statute by reading it in accordance with the presumed intention of the legislators was regarded as less of an invasion of their domain by the court. In selecting an appropriate remedy under the Charter the primary concern of the court must be to apply the measures that will best vindicate the values expressed by the Charter and to provide the form of remedy to those whose rights have been violated that best achieves that objective."

Of course, we are not dealing with a Charter right, we are dealing with a constitutional right, but the same, in my submission, applies. Then he goes on to say:

1
2 "This flows from the court's role as guardian of
3 the rights and freedoms which are entrenched as
4 part of the supreme law of Canada. The court
5 is given an express mandate to declare invalid
6 a law which, by virture of s.52 of the
7 Constitution Act, is of no force or effect to
8 the extent of its inconsistency with the
9 Charter. There is no reason to disguise the
10 exercise of this power in the traditional garb
11 of interpretation. At the same time, the court
12 must be sensitive to its proper role in the
13 constitutional framework and refrain from
14 intruding into the legislative sphere beyond
15 what is necessary to give full effect to the
16 provisions of the Charter. In exercising its
17 broad discretion to fashion the appropriate
18 remedy that will achieve these objectives in a
19 Charter case, it is unnecessary to resolve the
20 question as to whether there is a presumption
21 of constitutionality. By reason of the diverse
22 and novel problems which it will be called upon
23 to redress, the court must maintain at its
24 disposition a variety of remedies as part of
25 its arsenal. Reading down may in some cases be
26 the remedy that achieves the objectives to
27 which I have alluded while at the same time
28 constituting the lesser intrusion into the role
29 of the legislature. The same result may on
30 occasion be obtained by resort to the
31 constitutional exemption."
32
33 Again, the constitutional exemption somewhat of a
34 creation of the judiciary by virtue of -- since the
35 enactment of the Charter. It's close cousin is the
36 reading down doctrine. But the constitutional
37 exemption says that even though a law will have clear
38 application in most of -- will be valid in most of its
39 applications, there may be some individuals for whom
40 the law will have no application, and that person or
41 that individual will be entitled to an exemption from
42 the law. That was a fashioning of a remedy that was
43 designed to give effect to the constitution, give
44 effect to the democratic will, and recognize the
45 unique circumstances of some individuals in Canadian
46 society for whom the law ought not to apply. He says:
47

"This remedy was adopted by the Ontario Court of Appeal in R. v. Seaboyer, a case which is pending in this court."

And Seaboyer did not give effect to the constitutional -- did not provide, did not apply the constitutional exemption doctrine in Seaboyer but didn't say it wasn't a doctrine that was worthy of being applied in that case.

"In such circumstances I see no particular virtue in resorting to the language of presumptions in order to disguise what is to all intents and purposes a remedy. When the values of the Charter are not sacrificed thereby, it is preferable to express deference to the legislature as a factor in fashioning the remedy rather than engaging in a fictitious analysis that attributes to the legislation an intention that it did not have."

Then he goes on paragraph f where he says sometimes to give -- well, I will read it:

"In the final analysis, a law that is invalid in so many of its applications will as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole. In these circumstances it is preferable to strike out the section to the extent of its inconsistency with s. 2(b). To maintain a section that is so riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on the role of Parliament."

So we see that the court is always struggling with both its duties to uphold the values in the Charter and the Constitution and at the same time notover step its proper role, to be sensitive to the democratic process. And we see that in Charter cases all the time. And the same applies here, that the court should be vigilant in upholding the values that the Constitution, and particularly section 35, express, but should be careful to not go further than is necessary to give effect to those values. And given that both the appellants and the province are saying

to the court that with the declaration that you give as to what is or is not aboriginal rights, we are saying to the court that that provides enough expression, provides a sufficient account of the constitutional values for our purposes right now. And we would like the court not to, in a sense, deny the province, the aboriginal people, an opportunity to give full expression to the values in the Constitution. Or at least not to deny us an opportunity to try to work out our differences and find a -- find the situation where there is co-existence without further assistance from the court, at least at this time.

My lords, the next few cases in the tab are just other illustrations of how the court has been innovative in providing a constitutional remedy, and yes, these cases are Charter cases, but in my submission they are not limited to the Charter. Section 35 is a new constitutional right, which could have been put in the Charter except it's a right which is very difficult from a Charter right in the sense that it's a collective right. There are also collective rights in the Charter but it's a very different right than ones defined in the Charter but it's not so different that it somehow suggests that the court should be less innovative in fashioning a remedy.

The Rahey decision is a case involving unreasonable delay and what the appropriate remedy should be. And the -- at page 619, rather 618, Mr. Justice Le Dain says that the appropriate remedy when there is a violation of one's right to a trial within a reasonable time, is not a speedy trial but rather it's a stay.

In the Morgantaler case, what the court said what was wrong with section 251, sub (4), was unconstitutional, even though it was somewhat of an exculpatory provision to be a proscription against abortions. It provided for abortions in certain circumstances. The court said the section is unconstitutional, the Attorney-General said just strike out that subsection and leave the rest of section 251 in place, which prohibited abortions, and the court said no. And at page 125 Mr. Justice Beetz said:

> "There is no saving s. 251 by simply severing the offending portions of 251(4)."

I am reading from the second paragraph from the bottom on page 125.

HUTCHEON, J.A.: I am sorry, 125?

MR. ARVAY: Yes. I am sorry.

HUTCHEON, J.A.: I have got 600. Wait a minute. I have gone too far. Thank you.

MR. ARVAY: Third tab in. Second paragraph from the bottom:

> "There is no saving s. 251 by simply severing the offending portions of s. 251(4). The current rule in s. 251, which articulates both Parliament's principal and ancillary objectives, cannot stand without the exception in s. 251(4). The violation of pregnant women's security of the person would be greater, not lesser, if s. 251(4) was severed leaving the remaining subsections of s. 251 as they are in the Criminal Code."

It was a rather common sense answer to the problem, didn't require perhaps the kind of innovation that I am asking the court, but nevertheless it demonstrates a sensitivity to try and fashion the facts to reality.

The Schachter decision at the next tab is a very -- is an example where the court provided a very innovative remedy. And that was the case where the natural parents were not provided the same child care benefits under federal legislation as adoptive parents. It was an equality case. And the Federal Court of Appeal said that that's right, that the law discriminated against natural parents by not providing them the same benefit that was given to adoptive parents. And there was two ways of achieving equality. One might be characterized as equality with a vengeance, which is to strike out the law because it was -- because it discriminated. It's equality with a vengeance because then if would mean that neither natural parents nor adoptive parents would have the benefit. And the court refused to do that. What the court did was extend the benefit to the natural parents. It was an innovative remedy. And I will take you to the text. Then the court coupled that with a temporary, the temporary period.

At page 644, Mr. Justice Heald, the first full paragraph says:

"In the quotation from the Ontario Court of Appeal in the Reference re An Act to Amend the Education Act reference is made to the positive right to equality conferred by s. 15(1). A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to s. 15(1). That positive right can only be guaranteed by the fashioning of a positive remedy. That is precisely what the learned trial judge attempted to do in the decision a quo."

LAMBERT, J.A.: But may I say, I don't have section 24 in front of me, but my understanding is that it says that the court will award the remedy that it considers appropriate. It's an invitation to fashion a remedy to suit the circumstances. And it's a constitutional provision that requires the court to do that. I don't think that the remedies that were being asked, as I see them at the moment, are within the power of section 24. So we don't have that statutory authorization to create remedies.

MR. ARVAY: My answer to that question, my lord, is this: That you don't need -- yes, let me start again.

Section 24 is obviously an important section in the Constitution with respect to the issue of remedies but, in my submission, it is not necessary for the court to have section 24 to do, in this case, or in any other Charter case, to do what it does in Charter cases. Section 24 is essentially an expression of the inherent power of a court which is called upon to apply, interpret and expound a constitutional document to give effect to the rights in that constitutional document. This court is a court of inherent jurisdiction.

LAMBERT, J.A.: No, this court is a court of statutory jurisdiction.

MR. ARVAY: it is a court which finds its source in the Court of Appeal Act, to that extent it's a court of statutory jurisdiction. But the Court of Appeal Act, in my submission, clothes the court with all the powers of the Supreme Court, which is a court of inherent jurisdiction and therefore, for all intents and purposes, you are a court with the same powers of a

1 court of inherent jurisdiction, even though it may be
2 inaccurate to say that you a court of inherent
3 jurisdiction. And maybe I should deal with that point
4 now. If you will just flip back to tab 114, the first
5 tab, first reference is the Court of Appeal Act and
6 section 9(4).
7 MACFARLANE, J.A.: What tab number is that?
8 MR. ARVAY: Tab 114, 114, the first tab in this book. Section
9 9(4) says:
10
11 "The court my exercise any original jurisdiction
12 that may be necessary or incidental to the
13 hearing and determination of an appeal."
14
15 In section 9(9):
16
17 "For all purposes of and incidental to the
18 hearing and determination of any matter and the
19 amendment, execution and enforcement of any
20 order and for the purpose of every other
21 authority expressly or impliedly given to the
22 Court of Appeal, the Court of Appeal has the
23 power, authority and jurisdiction vested in the
24 Supreme Court and, where the appeal is not from
25 the Supreme Court, the power, authority and
26 jurisdiction vested in the court or tribunal
27 from which the appeal was brought."
28
29 In my submission, those are very broad words which
30 clothe this court with the same powers of the superior
31 court, which is a court of inherent jurisdiction.
32 MACFARLANE, J.A.: We can make orders that could have been made
33 in the court below, that's as I understand the
34 section. In the court below there is no problem in
35 hearing part of a case and another judge hearing the
36 other part. But you say that same principle applies
37 here?
38 MR. ARVAY: Did you say there is no problem?
39 MACFARLANE, J.A.: I say there is no problem, as I understand
40 it.
41 MR. ARVAY: That's right. There is no problem.
42 MACFARLANE, J.A.: In other words, the liability issue can be
43 heard by one judge and the issue of damages can be
44 heard by another judge, and the rules of court provide
45 that issues can be segregated and heard by different
46 courts. So your argument, I take it, must extend that
47 jurisdiction to this court?

MR. ARVAY: Yes, indeed.
MACFARLANE, J.A.: But you say we can divide up issues.
MR. ARVAY: Yes. And where your rules are silent the rules of court apply, and furthermore, other examples of splitting issues in constitutional cases is splitting the definition of the right from the section 1 analysis. And you are also, because of 9(4), a court of original jurisdiction, to the extent that that may be necessary to the hearing and determination of the appeal. Insofar as if -- insofar as is necessary to be a court of original jurisdiction. I am not convinced that it is. I think it's sufficient that you have all the powers that a superior court has and could have exercised in this case.

If you turn to the next reference, the next green sheet, there is a case from the Supreme Court of Canada, Societe Des Acadiens Du Nouveau-Brunswick. The case is interesting for two reasons, but on this point it deals with similar language in the New Brunswick legislation. And if you turn to page 430, this is the judgment of Madam Justice Wilson, but it's the -- this portion of the judgment is shared by Chief Justice Dickson and, I believe, I stand to be corrected, on this point this is the decision of the court. Under the heading The Inherent Jurisdiction of the New Brunswick Court of Appeal:

> "Mr. Justice La Forest, as he then was, writing for the New Brunswick Court of Appeal, concluded that the court could, pursuant to its inherent jurisdiction, grant the Association leave to be added as a party for the purpose of launching an appeal."

I thought that was an interesting idea, given at the outset of this case we talked about whether intervenors would have any rights of appeal, even if they were not parties.

> "According to Mr. Justice La Forest the inherent jurisdiction of the New Brunswick Court of Appeal is derived from Section 8(2) of the Judicature Act, which reads as follows: 'The Court of Appeal shall have and exercise appellate jurisdiction, with such original jurisdiction as may be necessary or incidental to the determining of an appeal.'"

Very similar to our 9(2).

"...and shall have all the jurisdiction and powers possessed by the Court of Appeal immediately before September 4, 1979 with appellate jurisdiction in civil and criminal causes and matters, and with jurisdiction and power to hear and determine motions and appeals respecting any judgment, order or decision of any judge of the courts."

Now that's far less a clear statement that the Court of Appeal has an inherent jurisdiction, but what the court did was it traced back the legislation to find out that the Court of Appeal in earlier legislation was given the power of the Court of Chancery, and concluded that, therefore, the court, if you go to page 432, the version of the Judicature Act of 1952, reading from the middle of sub (2), it says:

"...and shall have all the jurisdiction and powers possessed by the Court of Appeal immediately before the commencement of this act, with appellate jurisdiction in civil and criminal causes and matters, and jurisdiction and power to hear and determine motions and appeals respecting any judgment, order or decision of a judge of the Queen's Bench or Chancery Division, and of any judge of the Court of Appeal."

Now it's looking very much like our Court of Appeal Act, giving it the powers of the Court of Queen's Bench and Chancery Division.

The court concluded on page 435, the first full paragraph:

"As may be seen from these statutes, the jurisdiction of the New Brunswick Court of Appeal is, except as modified by legislation, essentially that exercised by the High Court of Chancery in England. Accordingly, it is through an examination of the Chancery practice that the scope of the court's jurisdiction in a particular matter must be determined. The appellant society does not dispute the relevence of Chancery practice. Its position

rather is that the present facts do not fall within the principles laid down by the Chancery courts. Is it correct in this?

The concept of inherent jurisdiction has been described as 'peculiar, amorphous, ubiquitous and pervasive.'.

Then the quote from the Jacob article.

"Moreover, the term 'inherent jurisdiction of the Court' is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision. There is, nevertheless, an important difference between the nature of the inherent jurisdiction of the court and its statutory jurisdiction. The source of the statutory jurisdiction of the court is of course the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law, so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition."

And, Mr. Justice Taggart, you thought we had left the airy-fairy law of jurisprudence, because I guess that's describing a positive and natural law conception of jurisdiction, at least it might be.

At the bottom paragraph:

"Despite the obvious difficulty in determining the limits of the inherent jurisdiction of the New Brunswick Court of Appeal, it is clear, I believe, that it is not unlimited since its invocation requires an exercise of judicial discretion in accordance with accepted principles. These principles may be found in statute or in inherited court practice."

1
2 Now in my submission, this is, this is a complete
3 answer to any question that -- as to your, as to this
4 court's jurisdiction to do what we are asking you to
5 do. And while there may not be cases on point which
6 provide you with clear examples and precedents, there
7 rarely is in any case, otherwise you are not usually
8 in court on any case if there is a clear precedent.
9 There are principles that we can derive from cases
10 which support what I am asking you to do, but most
11 importantly the principle which should guide the
12 exercise of your discretion should come from the
13 constitution. And we say that the constitution, by
14 requiring you to give effect to the values, also
15 requires you to fashion a remedy which is sensitive to
16 those values in other institutions and people, and
17 peoples, who have some role to play in fashioning
18 giving meaning to our constitution. And the
19 declaratory, the power of the court to give
20 declarations, is what is so suitable in that regard.
21 And I will move, I will be getting into that part
22 of my factum later. I wanted to first simply
23 demonstrate why what I was asking you to do is
24 consistent with the right; later I was going to deal
25 with why you have the jurisdiction in a more technical
26 sense. But I have done that to some extent now by
27 pointing out this case, that you are a court with
28 great power and authority, and your discretion should
29 only be -- is limited only by that which is not
30 principled, not because it hasn't been done before.
31 Now, just back to the Schachter case, my lord, I
32 didn't quite finish that, which is tab 115. And I
33 think page 651, we can leave it at that. What Mr.
34 Justice Strayer did in the court below is set out at
35 page 651, first full paragraph:
36
37 "Furthermore, the judgment of the Trial Division
38 merely provides a temporary remedy, leaving it
39 to... 'parliament to remedy the situation in
40 accordance with the Charter, either by
41 extending similar benefits to natural parents,
42 or by eliminating the benefits given to
43 adoptive parents, or by provision of more
44 limited benefits on an equal basis to both
45 adoptive and natural parents in respect of
46 child care.' The remedy given by Mr. Justice
47 Strayer does not in any way impinge on

1 Parliament's preogative to choose amongst
2 constitutionally valid policy options in
3 enacting legislation which conforms to the
4 requirements of the Charter. Since the remedy
5 here is a temporary one, it is unlikely that
6 parliament would find it necessary to rely on
7 section 33 of the Charter."
8
9 So what he did, as I understand it, is he extended
10 to natural parents a remedy which parliament chose
11 only to give to adoptive parents, but then said that
12 remedy is only going to be in place for a temporary
13 period. I thought I read six months, whatever it was,
14 at which time -- it's up to Parliament, but the ball
15 is in Parliament's court, Parliament can decide to
16 keep the law the way it is -- well, Parliament
17 couldn't decide to keep the law the way it is, because
18 the law the way it it is unconstitutional, Parliament
19 could decide to amend the law and extend the benefit
20 to natural parents or repeal the law and give neither
21 type of parent any benefit. So again, it was a very
22 innovative remedy but one which was designed to give
23 effect to the equality right.
24 MACFARLANE, J.A.: I understand that you're not citing these
25 cases because they are right on point but because you
26 do refer to the temporary remedy in this case, that
27 brings back to my mind your 114 (c), declare that a
28 temporary transition period exists and dissipation, et
29 cetera. And I want to be sure about what you're
30 asking. Of course we are not granting any temporary
31 remedies here, we are making some declarations, if we
32 accept your submission, making some declarations and
33 not making other declarations which we would normally
34 make. What you're really asking for is that the
35 appeal be adjourned. Let me put it -- are you asking
36 that we order the parties to negotiate? Because at
37 some time earlier on somebody said that that was the
38 nature of the application?
39 MR. ARVAY: My answer, my lord, is we are not asking the court
40 to order the parties to negotiate. We are asking the
41 court to adjourn to permit the parties the opportunity
42 to settle their differences, if they can, by whatever
43 means they can, in the hope, and to some extent
44 perhaps, using judicial suasion, guidance, urging that
45 the parties do make good use of the time.
46 MACFARLANE, J.A.: Just a minute.
47 MR. ARVAY: But we aren't asking for an order --

MACFARLANE, J.A.: Surely you're not serious in that. I agree that if we should accede to your submissions and adjourn the appeal in anticipation that there will be negotiations, because the parties say they want to negotiate and would like an adjournment for that purpose. If we do that, that's fine. I understand that it's your submission that you could then come back to the court from time to time to resolve other legal issues relevant to the appeal which might arise in the course of negotiations and which have to be settled before you can carry on further with your negotiations. And it's in that sense, I take it, that you talk about the court supervising the negotiations. Because the court surely can't be involved in the negotiations in any sense.

MR. ARVAY: No, I agree with everything you say. And I guess I am a bit taken aback by your opening comment by "surely you can't be serious." What did you understand me to say?

MACFARLANE, J.A.: Well, I am sorry, I tend to be too blunt.

MR. ARVAY: My feelings aren't hurt. I just want to make sure I am communicating and I don't think I am.

MACFARLANE, J.A.: I didn't mean anything more than what I just said, that I didn't think that you were saying to me that the court ought to supervise the negotiations any more than you would be saying that we ought to order the parties to negotiate.

MR. ARVAY: That's right.

MACFARLANE, J.A.: And I understand that what you were saying, what I just said, that if problems arise, you could apply to the court then to settle legal questions which might have arisen which would be relevant to the appeal in any event.

MR. ARVAY: Obviously I should have set out of my position more clearly at the outset.

MACFARLANE, J.A.: Sort of a swinging door application, you're in, you're out, you're in, you're out, you're in.

MR. ARVAY: That's something that I wanted to avoid. In the latter part of the factum I talk about what happens during the transition period and what the role of the court is. The court, in order to maintain its duty, I say, has to retain jurisdiction, at least on some of the issues. It's up to the court to decide what role, if any, it wants to play during that transition period, and whether it wants to, in any way, supervise the negotiation process. We don't ask the court to get involved in any way like that. We do say, though,

that the court may want to let the parties know that it is here if it is needed in order to assist the parties in their task, but perhaps only by way of setting timetables. We can't imagine the court being involved in any way in the negotiations. We wouldn't like to see the court adjourn the proceedings and then allow either party to come back any time they get frustrated at the bargaining table. The court should adjourn the proceedings and indicate that it's not likely open for business for two years. There may be some compelling circumstances where the parties may jointly need to come back to the court for further definition.

MACFARLANE, J.A.: Well, surely -- I was going to say surely you can't be serious again, but we surely can't say to a party that they can't come back to the court whenever they want to, because surely we can't say that we will have nothing more to do with this and wash our hands of it for two years? I mean, if we are retaining jurisdiction then it seems to me that it follows that either party at any time can invoke that jurisdiction.

MR. ARVAY: Well, I suppose, my lord, it follows that any party can at any time come back and make a pitch to the court to be heard. But I say that there is good authority for courts to exercise their discretion to refuse to give a remedy what a party might otherwise be entitled to in law, if there are reasons for so refusing to give relief.

MACFARLANE, J.A.: We don't have to get into that because that's a case by case situation. We deal with it as we saw fit at the time. But the important thing is that what I wanted to say to you is that I feel that it would be open to either party at any time to come back and invoke the jurisdiction of the court. You don't argue with that?

MR. ARVAY: I don't argue with the right of any party to come back and to ask the court to decide more, any party has the right to do that, yes. But what I say is that the court has the right to do in response is because the court is being asked to exercise its discretion in giving declaratory relief, the court has a right to say to a party, as it does in both administrative and Constitutional law cases, the case is not ripe or mature for final adjudication. What I have in mind is the decision that -- certainly your lordships are aware of University of Regina and Harelkin, that's a sort of seminal administrative law case where a party

may well have been aggrieved by some administrative tribunal, the administrative tribunal may well have violated that party's rights to natural justice, but the superior courts have a discretion not to give effect, legal effect, to that party's right if the party has failed to exhaust some other alternative process or remedy in the administrative structure. And the same principles apply in constitutional cases and this court did it, at my behest, in a case, Cecilia Moore and the province -- and I will come back to that later in my argument -- even though the person had perhaps a constitutional right that had been violated by the government, the court said we have a discretion to give effect to your -- that right, and we don't choose to do it right now because you have another remedy out there.

Now, if this court decides to go as far as adjourning, retain jurisdiction in the hope and expectation that the parties will and can settle their differences through the negotiation process, it seems to me that it's appropriate for this court to look very carefully at an application by one of the parties which is made before the two year period expires, to look very carefully at the application to see whether or not this court should invoke its jurisdiction, should exercise its jurisdiction at the behest of that party. I think you have a discretion to say no.

LAMBERT, J.A.: There are some remedies, such as a declaration, such as the prerogative writ remedies that are truly discretionary, and the law has long said they are discretionary. There are equitable remedies that equity is treated as discretionary. But there are some remedies that you are entitled to ask for and if you show that a right has been violated, you are entitled, as a matter of law, to remedy, such as the remedy of damages for the breach of a common law right. And the court has no power to say, yes, your right has been broken, yes you have suffered damages, but we are not going to award any, or we are going to wait for a while. I wouldn't have thought -- I mean, I can certainly see that in all those areas which are traditionally discretionary, then you can invite us to exercise an unusual discretion. But there are some rights to remedies that people have that the courts must grant if the circumstances are made up.

MR. ARVAY: But the remedy that the plaintiffs have sought in this case is declaratory.

LAMBERT, J.A.: Right. And when they come back in six months and say we want you to award us damages, then it may be entirely different, we may have to look at different factors then than the ones you are enunciating now, if the claim is one for a remedy that they have made out and are entitled to.

MR. ARVAY: I take your lordship's point, but I don't think that in the context of this case that the plaintiffs expect anything other than, at most, a declaration of entitlement to damages, not damages. And the plaintiffs' case is pitched, as I understand it, is to seek declaratory relief. The province's counter-claim was likewise for declaratory relief. That's all this court can really be expected to do. And because declaratory relief is necessarily discretionary relief, the court can refuse to give it, if there is good reason.

MACFARLANE, J.A.: Well, I think before we end this discussion I would like to hear what issues really are of a nature that they would come back to this court if they are not settled by negotiations. To mention one, damages, damages were not assessed in the court below and I can't imagine that this court would entertain an application to assess damages. So that would have to go back to the trial court. But that's the most -- beg your pardon?

HUTCHEON, J.A.: A fee simple extinguishment might be -- the province might come back and, as I understood, you told us that.

MACFARLANE, J.A.: I don't understand that.

HUTCHEON, J.A.: Well, we were asked not to make any declaration that the grant of a fee simple extinguishes the rights.

MR. ARVAY: That's right.

HUTCHEON, J.A.: And I could conceive that in six months the province may come back and say, we now want that order.

MACFARLANE, J.A.: That's not my understanding of the argument. I was going to mention that next. I understood the argument to be that there was such a mass of evidence relating to specific extinguishment, and the problems are so complex with respect to those issues, that the problems are so site specific and so fact specific, that this court would be -- it would be impossible -- that was the language used by counsel, I think -- for this court to try and decide those issues, and that they ought to be left for another time, perhaps

another trial. And as I see that particular problem, I see a good example in the Alcan case.

Now, I may be wrong about this but it seems to me that in the Alcan case you have to look at -- you have to look at the specific agreement that there was between the province and Alcan, what flows from that, you have to look at the legislation and the regulations which were put in place in respect of that whole project, and then you have to hear a lot of evidence to determine what are the aboriginal rights in that area which are competing with Alcan's claims? And you have to assess all of that very carefully, in a specific way, before a conclusion can be reached.

I see another situation relating to the claim in the Queen Charlotte Islands. Again, a site specific, factually-based problem with its own legal context in a situation that couldn't be resolved here. The Meares Island case may be another case of the same nature. And so, I had thought that I was being told the other day that we ought not ever to attempt to decide those specific extinguishment issues. And there are so many statutes out there that one has to consider and so many problems. So when I started all this I was really asking you, because I knew we were coming towards 12:30, that you might try and reveal to me what it is that could come back to this court if we give -- if we deal with the declaratory remedies that are now sought.

Now, I mentioned two of them. The other one relates to external and internal boundaries. It seems to me that that's a subject which this court would probably be reluctant to address, but I speak for myself. All right, you have asked us not to define the precise locations, scope, content and consequences of whatever aboriginal rights there are, if you are right, that they haven't made out their ownership rights. Well, again, I understand that that whole subject is one that wasn't -- I was going to say wasn't canvased, of course it was canvassed -- but it wasn't the subject of a careful judgment in the court below. And so, failing that, failing careful analysis in the court below and so on, it seems to me that it might be inappropriate for us to try and settle that one.

Now, I have gone through the things you say don't decide, I think, looking at the list that I made, and I don't see any of those things as things that ought

to come back to this court. So I am beginning to wonder whether what we really ought to be doing is considering what declaratory remedies, declaratory judgments should be made, and not acceding to your submission that you should be allowed to come back, adjourning the trial. I see some difficulties. I was going to say great difficulties, and I think there might be, in having some other panel come back into this whole thing and try to settle some of these questions. But, again, you know, I may be quite wrong about that. I say all of that because I feel that I would like to have answers to some of those questions.

WALLACE, J.A.: I would like to add, since it is lunchtime, if you could also after lunch explain to me the rationale why you ask the court not to make a declaration with respect to the constitutional authority of the province to extinguish aboriginal title. And perhaps, indeed, the test of specific extinguishment, as my notes indicate you asked the court not to decide those.

MR. ARVAY: That's right.

WALLACE, J.A.: I know, and I felt the other declarations would form a basis for your negotiations. And I would have thought the question of whether or not the province had constitutional authority to extinguish might indeed -- got that issue out of the way, it might also be of some assistance in negotiations.

MR. ARVAY: I will answer all of those questions after lunch, if that's okay.

TAGGART, J.A.: Have a nice lunch.

LUNCH BREAK

I hereby certify the foregoing to be a true and accurate transcript of the proceedings herein to the best of my skill and ability.

Wilf Roy
Official Reporter
United Reporting Service Ltd.

Submissions by Mr. Arvay

(PROCEEDING RESUMED 2:00 P.M.)

THE REGISTRAR: Order in court
TAGGART, J.A.: Yes, Mr. Arvay.
MR. ARVAY: Let me start by answering Mr. Justice Macfarlane's questions first. You are quite right, my lord, when -- or insofar as you say that you ought never to be asked and therefore you need not retain jurisdiction to determine whether there has been on the ground either specific extinguishment or diminution of the aboriginal right. So that's not something that this court need ever do, in my submission. However, it may well be your responsibility, if you weren't to give effect to our submission, to do some on the ground analysis of the content of the right, and it may well be that the province as well as the appellants would want you to do that. There was 318 days of evidence, umpteen days of depositions and affidavits, all of which -- or much of which went to the question of what was happening on the ground.

Now, my friends pitched their case in this court on a conception of aboriginal rights which doesn't require, according to them, a detailed on the ground analysis. Their case is pitched that they own the territory based on legal principles and adduces what they say was enough evidence to demonstrate that ownership interest. But if your lordships reject that conception of aboriginal rights and except instead the conception of aboriginal rights that we put to you, which is one which is very much context specific, it may well be that all the evidence which was adduced at trial ought to be looked at for the purpose of determining on the ground wherein the territory the appellants enjoy aboriginal rights and what the content of those aboriginal rights are. Neither the appellants nor the province wish you to do that right now. But it may well be that both parties, and as well as the Federal Government, would have the right to come to this court and say, We haven't been able to sort out our differences, we think there are no aboriginal rights in this part of the territory, or if there are -- or minimal aboriginal rights in that part of territory, and the appellants are saying there are a very rich bundle of rights in the territory, that's evidence on the record, and that's something that this court may have a duty to resolve.

Submissions by Mr. Arvay

1 And so it's not fair to say, I don't think, that
2 beyond deciding the strict legal questions that this
3 court can wash its hands of the evidentiary matters.
4 I don't think that's the case. But -- so we say that
5 if indeed you are going to do that kind of on the
6 ground analysis you probably would need to hear from
7 us as much greater length than you have, it's hard to
8 imagine, but you'd probably need to hear much more by
9 way of submissions in order to do that on the ground
10 analysis. Because right now the way both the parties
11 are pitching their case on the appeal is somewhat
12 to -- at a more abstract level, and we're trying to
13 get the court to decide really what the nature of the
14 right is without asking the court to do any detailed
15 application of that right on the ground. But it may
16 well be that given this -- that the extensive record
17 in this case, and I don't pretend to have any except
18 the most fleeting familiarity with it, that the
19 parties could come back to the court and say, okay
20 decide. We say there are minimal aboriginal rights in
21 this area and the appellants differ, we may have a
22 right to do that. But what -- but there is no way we
23 say that you would ever be required to go the next
24 step and determine how the right relates to various
25 governmental acts because it just -- as I understand
26 it, there is just not sufficient evidence adduced for
27 that purpose. So that's why we say to you, we are
28 content now to have a fairly abstract -- a declaration
29 of rights which is fairly general, fairly abstract,
30 but it may well be that if this court was to complete
31 its task now the court would have to do more than
32 that, and we're saying, don't do more than that right
33 now. Now this --
34 LAMBERT, J.A.: May I interrupt you for a moment. Before you
35 leave this question, if we were to decide that the
36 trial judgment contained an error of principle that
37 affected the question of boundaries, or error in
38 relation to the facts that affected the question of
39 boundaries, then in the ordinary way of the Court of
40 Appeal we are faced with the question of whether
41 having gone to set it aside whether we should
42 substitute our own view or send it back to the trial
43 judge. If we are into any realm which requires much
44 more extensive examination than we are having now,
45 then surely there is something to be said for us
46 exercising the option to send it back to a trial judge
47 to either examine the existing evidence, if that's the

Submissions by Mr. Arvay
1 way the parties want to do it, or new evidence and
2 settle the question.
3 MR. ARVAY: I think that's right, my lord. It may be that you
4 can send it to someone other than the trial judge,
5 maybe you can send it to a master or registrar,
6 someone specially designated for the task, but it
7 strikes me that if you did that at least this court
8 would continue to have jurisdiction, maintain
9 jurisdiction.
10 LAMBERT, J.A.: Not if you send it to a trial judge, but if we
11 sent it to a master, yes.
12 MR. ARVAY: Yes.
13 LAMBERT, J.A.: And it seems to me that you would probably
14 choose the trial judge route over the master, if you
15 were satisfied that there was a clear error made by
16 the trial judge and questions of credibility have to
17 be taken into account in applying the right test.
18 He's seen all the witnesses, he's listened to all
19 their testimony, he's in a much better position than
20 this court would be to assess their credibility in
21 applying the test. But the reason it goes back to him
22 is because he just applied the wrong test in the court
23 below, you give him the instructions as to what the
24 right test is and then he applies it to the evidence
25 as he recalls it. That would be the reason to send it
26 back to the trial judge. But if you are of the view
27 that -- that all those sort of criteria don't apply,
28 and that this court is in as good a position to apply
29 your test to the evidence because you're of the view
30 that credibility is not a central issue or an
31 important issue and yet recognize that you don't want
32 to be spending days and weeks and months doing that
33 kind of on the ground analysis, then it would more
34 likely call for delegating the task to a master, in
35 which case the court would still retain jurisdiction.
36 And it's difficult to know which is the proper course
37 without doing all the -- answering all the questions
38 that are raised by your question, but I think that's
39 an option, yes,
40 MACFARLANE, J.A.: I have a couple more questions before you go
41 on. What about the constitutional power of the
42 province to extinguish by legislation passed during
43 the period 1871 and 1982, do you want us to decide
44 that?
45 MR. ARVAY: That was Mr. Justice Wallace's question.
46 MACFARLANE, J.A.: All right. Well then, you can answer it when
47 you come to him.

Submissions by Mr. Arvay
1 MR. ARVAY: I can answer it right now. I'm ready.
2 MACFARLANE, J.A.: All right.
3 MR. ARVAY: Sure, I'll answer it now.
4 MACFARLANE, J.A.: Could I add another question to it then maybe
5 as part of the same argument? Do you want us to
6 decide what test to apply in relation to
7 extinguishment? That is, whether it must be express
8 or implied?
9 MR. ARVAY: And that I guess is Mr. Justice Hutcheon's question,
10 so let me cover them all right now. To answer the
11 question about the province's constitutional authority
12 to extinguish, clearly the province is of the view
13 that they have the constitutional authority to
14 extinguish, and Mr. Taylor has given extensive
15 submissions in that respect. There is two reasons why
16 that question, we say, shouldn't be answered right
17 now. One is that both the appellants and the province
18 would prefer that it not be answered because it's not
19 necessary to be answered. And the --
20 WALLACE, J.A.: I see a lot of shaking of heads. I don't know
21 whether it's directed to its not being necessary or
22 whether you agree.
23 MR. ARVAY: Well, it's part of our list of --
24 MR. JACKSON: Well, I think Mr. Arvay should not take it to be a
25 fixed position of the appellants.
26 MR. ARVAY: In the list of issues that I was going to take you
27 through at the end of my submissions it is clear that
28 the parties had agreed that all questions relating to
29 specific extinguishment should not be decided by this
30 court, which the parties understand to mean including
31 the authority of the province. If that's not the
32 agreement then I'd like to hear that from the
33 appellants.
34 My first submission is that it has been my
35 understanding until 15 seconds ago that neither side
36 wanted that issue decided right now, and because it
37 was not necessary to decide it, that given normal
38 rules in constitutional litigation courts ought not to
39 decide constitutional questions that are not necessary
40 to be decided. And quite frankly, the reason is --
41 WALLACE, J.A.: They are necessary in the long run, unless you
42 reach an agreement.
43 MR. ARVAY: My lord, there is no question that some other party
44 in some other lawsuit as we speak right now could be
45 arguing --
46 LAMBERT, J.A.: Oh, no, no, we have heard Alfonse and Dick and
47 that issue is squarely raised about whether the

Submissions by Mr. Arvay
1 Wildlife Act extinguishs the aboriginal right to hunt
2 in both of those cases, and we will have to decide the
3 principles and apply them to the hunting situation in
4 order to decide those cases which we have now got on
5 reserve of this very panel.
6 TAGGART, J.A.: And those are site specific, there they are, the
7 facts are there encompassed in the issues of law --
8 MR. ARVAY: Well, you know, not being counsel on Alfonse and
9 Dick I don't know the extent to which what I say here
10 has application to Alfonse and Dick. Obviously we
11 would like the court to be consistent in what it does
12 in this case and what it does in the other cases, both
13 substantively and procedurally.
14 LAMBERT, J.A.: But those are criminal cases that have to be
15 decided, we have got no options about declarations or
16 anything like that in those cases.
17 MR. ARVAY: It may be, my lord -- I guess I'd like to have an
18 opportunity to reflect on how this plays out in
19 Alfonse and Dick and whether you need to hear
20 submissions from the other parties in Alfonse and Dick
21 on this issue. If I could just leave that aside for a
22 moment, I appreciate that's a tough question and I
23 don't have an answer to it. It may well play itself
24 out in another day and another courtroom. That's a
25 big win or big lose question. There is --
26 WALLACE, J.A.: Well, I asked for the rationale for not doing
27 it. Is it -- are you free to enlighten us on that?
28 MR. ARVAY: Well, the -- I guess simply what we are trying to do
29 in this litigation is to even the playing field to
30 some extent. One of the reasons why this litigation
31 is going on is because when the Chief Justice -- and
32 my friends can correct me if I'm wrong, but my
33 understanding is one the reasons that this litigation
34 is going on is when the Chief Justice said that the
35 aboriginal people in this province have no aboriginal
36 rights, at least that are land-based, that it made it
37 impossible for the aboriginal people to come to
38 court -- sorry, for aboriginal people to negotiate in
39 any meaningful and effective way with the Provincial
40 Government or Federal Government. We don't
41 necessarily accept that that's true, but we respect
42 their view.
43 And the whole purpose of Section 35, we say, is to
44 provide a meaningful base, constitutional base, from
45 which aboriginal people can negotiate with province
46 and federal governments. It's a spring board, if you
47 will, to allow them to go into the treaty-making

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1 process, the negotiation process, on some measure of
2 equal footing with the government.
3 WALLACE, J.A.: So you think that knowing the legal position
4 with respect to the provinces right to or authority
5 or -- to extinguish aboriginal title prior to 1982
6 would be an impediment, is that what you're saying?
7 MR. ARVAY: It might be.
8 WALLACE, J.A.: And that's the only reason?
9 MR. ARVAY: That's the reason.
10 WALLACE, J.A.: And is that the same reason that you don't want
11 to know what the test of specific extinguishment is?
12 MR. ARVAY: Yes, that's exactly it. That we believe if we can
13 go to the bargaining table and --
14 WALLACE, J.A.: With neither side really knowing what their
15 rights are.
16 MR. ARVAY: With neither side really knowing how strong a hammer
17 the other one has. And I'm sure my friends are going
18 to say that -- you know, that they can succeed on that
19 issue, and you've heard us that we can succeed on the
20 issue. We both feel very strongly about it. It's
21 clearly a big win or lose issue though, we can't hide
22 that, it is. And we would rather go into negotiations
23 and we believe the appellants would rather go into
24 negotiations, because that's what I understand is why
25 there was agreement on the list, in a position where
26 there is some relative equality of bargaining power,
27 and we think that if the court stops short of
28 answering that question there will be that measure of
29 equal bargaining power. It's as simple as that.
30 WALLACE, J.A.: Thank you.
31 MR. ARVAY: And then I guess to answer Mr. Justice Hutcheon's
32 question and the last one that Mr. Justice Macfarlane
33 asked, we said that we would prefer that the court not
34 determine even the test of specific extinguishment as
35 well as not determine whether or not, for instance,
36 grants in fee simple extinguish. I'm very firm on the
37 latter, that you ought not to decide, for instance,
38 whether a grant in fee simple extinguishes. Again not
39 because we are afraid of the argument, I believe we
40 would win that argument, but I don't think you should
41 decide that argument.
42 It may be more difficult for you to avoid entirely
43 the test, because you're going to run very close into
44 it when you're dealing with the blanket extinguishment
45 part of the case. In order to decide whether there is
46 blanket extinguishment or not, you probably have to
47 determine what the test of extinguishment is, so you

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1 might have to go as far as saying that there can be
2 specific extinguishment if the crown, the sovereign,
3 demonstrates complete adverse dominion by clear and
4 plain intention. You may have to go that far. Maybe
5 not. Maybe you can say, We're satisfied that the
6 trial judge was wrong in saying that there was blanket
7 extinguishment. We don't have to go the next step and
8 determine what constitutes extinguishment because it's
9 not before us. That would be my preference. You may
10 not be able to draw the line there and so you may have
11 to get into whether consent is a requirement or not
12 for extinguishment. That's a point I don't have
13 strong feelings about. And I think probably the
14 appellants will say you have to decide the issue of
15 consent. Fair enough. But I think you can stop at
16 that point and say as little as you absolutely have to
17 which is going to tip the scales one way or the other
18 on the issue of specific extinguishment or diminution.
19 I think that answers all sets of questions, unless
20 there is anything else arising? Oh, sorry, there is
21 another answer to your question about specific
22 extinguishment, and that is this: That much of Mr.
23 Taylor's submission to you on 91.24 was to the effect
24 that whether there is an invasion of 91.24, not so
25 much whether there's been extinguishment of aboriginal
26 rights -- well both, on both counts, whether there's
27 an extinguishment of aboriginal rights and whether
28 there's been an invasion of 91.24, may itself be
29 highly fact intensive.
30 And we talked about the core and we tried to come
31 up with examples. The Supreme Court of Canada in a
32 number of cases have talked about constitutional
33 interpretation being contextual. That courts should
34 avoid if at all possible highly abstract articulation
35 of the rights. Madam Justice Wilson started the
36 debate -- and I can get this material for you if you
37 need it -- in a U of T law journal article, and it was
38 picked up by the court in the Edmonton Journal case,
39 and I think it was picked up by the entire court in
40 the Manitoba Law Society case in Pearlman. These are
41 just cases I'm recalling now, in which the court said
42 you shouldn't decide constitutional cases except in
43 the context of all the facts. And it may be very
44 difficult to even articulate the core doctrine without
45 doing so on the ground, so to speak. Particularly as
46 Mr. Taylor put it, the date of the inquiry when you're
47 determining whether there's been an invasion of 91.24

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1 may be different than the date of inquiry when you're
2 determining whether there's been an extinguishment of
3 aboriginal rights. And it gets real complicated
4 factually. And that's another reason why it may be
5 difficult to answer that question.
6 LAMBERT, J.A.: You made an offer in passing to give us the
7 material on the constitutional questions being
8 determined in a specific situation, in a context, and
9 speaking for myself I would like to take you up on
10 that offer.
11 MR. ARVAY: Yes. And I can tell you as well that in my
12 material, maybe in the -- I have these cases, if
13 you'll turn to Tab 141B -- supposed to be a B,
14 actually there is no B. If you turn to Tab 141 you'll
15 see there is a Tab A -- it's really Tab A. There are
16 three or four cases there which talk about the
17 importance of not deciding constitutional cases
18 without a proper factual underpinning, which is
19 similar to but may be a little bit different than
20 Madam Justice Wilson's approach to interpreting the
21 constitution which she said is contextual, but maybe
22 not very different. But I'll just take you through
23 this very quickly. The John Deere case I thought was
24 useful, it's an old division of powers case. And even
25 there at page 338, it's the Privy Council speaking,
26 the bottom paragraph:
27
28 "The structure of sections 91 and 92, and the
29 degree to which the connotation of the
30 expressions used overlaps, render it, in their
31 lordships opinion, unwise on this or any other
32 occasion to attempt exhaustive definitions of
33 the meaning and scope of these expressions.
34 Such definitions, in the case of language used
35 under the conditions in which a constitution
36 such as that under consideration was framed,
37 must almost certainly miscarry. It is in many
38 cases only by confining decisions to concrete
39 questions which have actually arisen in
40 circumstances the whole of which are before the
41 tribunal that injustice to future suitors can
42 be avoided. Their lordships adhere to what was
43 said by Sir Montague Smith in delivering the
44 judgment of the Judicial Committee in Citizens
45 Insurance Co. vs Parsons case to the effect
46 that in discharging the difficult duty of
47 arriving at a reasonable and practical

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> construction of the language of the sections, so as to reconcile the respective powers they contain and give effect to them all, it is the wise course to decide each case which arises without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand. The wisdom of adhering to this rule appears to their lordships to be of special importance when putting a construction on the scope of the words 'civil rights' in particular cases. An abstract logical definition of their scope is not only, having regard to the context of Sections 91 and 92 of the act, impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases."

The next case is the Rio Hotel case. Interesting case as to whether persons who dance topless are -- enjoy freedom of expression. And at page 83 of the judgment, the last page in that green tab, Mr. Justice Estey says:

> "The record before the courts on this issue is woefully inadequate and cannot serve as a base upon which to build an argument that this law violates the above provision of the charter. The nature of the conduct, said to amount to nude dancing, is not revealed in the record."

I don't know what he needed. I won't say it.

> "There is no description of any such conduct, the extent of the alleged nudity, the nature of the 'expression' in question, or anything else of a factual nature germane to this issue."

The Manitoba -- MacKay and the Government of Manitoba is the next case. It's at page 361, under the heading, "The Essential Need to Establish the Factual Basis in Charter Cases. I'll just read the bottom paragraph:

> "Charter decisions should not and must not be made in factual vacuum."

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1 I know your lordships are aware of these principles.
2 The next case, the Supreme Court of Canada, re Danson
3 and AG of Ontario, same proposition was advanced. So,
4 yes, I will indeed provide you with those other
5 references. There may be something that's added by
6 them.
7 LAMBERT, J.A.: Thank you.
8 MR. ARVAY: So, where was I? Madam Registrar tells me I'm still
9 on my first paragraph. I told Mr. Macaulay I would be
10 finished by noon. My apologies to Mr. Macaulay.
11 Paragraph 116 -- oh, by the way, you might want to
12 note the Manitoba Language case is in the white book
13 at Tab 115, that has tab -- and I put a blank tab
14 there just because I thought we might be referring to
15 it frequently, because I haven't reproduced Manitoba
16 Language every time it's been referred to in the
17 factum. I only reproduced it in its entirety once.
18 LAMBERT, J.A.: As far as that case is authority for the
19 respondents' part of the case and referring it back, I
20 was wondering to what extent that became possible if
21 that case becomes a reference rather than a piece of
22 litigation between parties.
23 MR. ARVAY: I don't think that there is anything in the judgment
24 to suggest that it turned on that at all. Indeed, in
25 the Dixon case, which I'll come to, which was a
26 decision of Madam Justice McLachlin when she was in
27 trial division, she applied Manitoba Language to do a
28 very similar thing and of course that was not a
29 reference, it was an action. So I don't see why it
30 ought to -- there was nothing in the judgment that I
31 recall.
32 LAMBERT, J.A.: No, but the terms of reference could let you do
33 it on a reference.
34 MR. ARVAY: Terms of reference can let you do a lot of things on
35 a reference, that's right, but that wasn't called for
36 by the terms of reference.
37 HUTCHEON, J.A.: The chief justice simply said on the question
38 of jurisdiction which was argued before him he was
39 satisfied we have jurisdiction, so there must have
40 been an argument based upon what jurisdiction they
41 had.
42 MR. ARVAY: May have been, my lord, I don't know the answer to
43 that. If you're asking me to try to find out, I'll do
44 that.
45 HUTCHEON, J.A.: It occurred to me it might be useful to see
46 what that argument was. It may raise what Judge
47 Lambert talks about, the language of the reference,

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1 but in that report we had last -- a year ago in the
2 1990 edition, that's all he said was, in the question
3 of jurisdiction we are satisfied we have jurisdiction.
4 MR. ARVAY: I see. I'll endeavor to get some background
5 information on that. I mean, at one point it was the
6 position of the Attorney General that the court not
7 retain jurisdiction and just say, trust us, we will do
8 it. And the court said, no, no, that would be
9 shirking our constitutional responsibility. So I
10 think the court took jurisdiction. I don't think it
11 was urged upon them, but I'll check into that.
12 116, I make the point that this purposive approach
13 to remedies and an innovative remedy is maybe
14 particularly called for when you're dealing with an
15 unusual right, an unique right.
16 And in paragraph 117 probably by way of summary I
17 say that the remedy that makes declarations concerning
18 the existence of aboriginal rights but relies upon
19 negotiation to give specific content and consequence
20 to these rights accords with the unique nature of
21 aboriginal rights, the text of the constitution, the
22 historical origins of aboriginal rights, the treaty
23 process, and the purpose and interests that those
24 rights are designed to protect.
25 Now, in order to understand that argument, of
26 course, you have to go back and look to -- at what we
27 said about the nature of the rights. And I'm not
28 going to go over ground Mr. Williams went over, but I
29 just ask your lordships to make a note that back in
30 the first part of the factum, at paragraphs
31 essentially starting from paragraph 11, 12, 13, 14,
32 15, 16, 17, 18 and 19, there is a discussion of what
33 aboriginal rights are and the importance of looking at
34 their historical origin.
35 Let me just touch on some of the points made in
36 the first part of that factum. In paragraph 12 and 13
37 you see that other parts of Section 35 demonstrate the
38 importance that the treaty-making process and
39 negotiations with aboriginal peoples have in our
40 society. 35(3) it constitutionalizes rights that are
41 acquired by way of land claim agreements. And in
42 paragraph 13, 35.1 constitutionalizes constitutional
43 compenses to give more content and meaning to the
44 rights. And those are places where people are going
45 to sit around the table and negotiate, negotiate the
46 content of rights.
47 There is no question that historically, as I said

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this morning, that colonial authorities to one extent or another often attempted to negotiate co-existence with aboriginal peoples, and you might -- you may not call that aboriginal rights, but the rights of aboriginal people to co-exist with non-aboriginal societies was done in many cases by way of negotiation.

Now, there is two ways of looking at Section 35 and I think they are both right. I think the key to what -- to this argument is found in the passage in Sparrow which is found at paragraph 17 of the factum. Mr. Williams read this to you, but I think it's critical that it be emphasized. And it's that Section 35(1) provide a solid constitutional base upon which subsequent negotiations can take place. And so its very purpose in the constitution, or an important purpose in the constitution is not to settle once and for all through the judicial process what the rights of aboriginal people are in Canadian society, but to provide them with a base upon which they can engage in meaningful negotiations.

And so that's why when I was talking at the beginning of my submissions on this part about what the purpose of the transition period is, it could be for one of two reasons: One reason is to allow the parties to go off with their bundle of rights, each side knowing what the basic rights of the aboriginal people are, and negotiate a treaty. And the treaty may well be for -- to acquire benefits, responsibilities, duties and what not, that have -- that would never be imposed by a court. In other words, the treaty may give to aboriginal people, impose upon governments rights and responsibilities that would never come from a court. But nevertheless, they then become constitutionalized by virtue of Section 35(3), but they are then special, they are different, they are treaty rights, they are not aboriginal rights. That's one reason for the transition period. It doesn't make the court's job any less legimitate, if that's the reason, because the purpose of Section 35 is to -- is to do that, to allow the aboriginal people to go into negotiations with enough rights to make those negotiations meaningful.

Another reason for the interim period -- and it's the way the order is now framed as I've put it in Tab 7 at first paragraph I read to you, where we say the transition period exists and the anticipation that the

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precise location, scope, content and consequences of their rights will be further defined and implemented, well, it may be that during the negotiations -- and I don't want to second-guess how the negotiations are going or in any way suggest how they should go -- but it's possible that the transition period will be used to not only acquire rights which are not strictly speaking aboriginal rights, but to determine more precisely what their legal rights are, and then come back to the court and either with a joint submission or perhaps not a joint submission, with more information as to what the legal rights of the aboriginal people are or not.

Remember, an important thing about Section 35 which distinguishes it from all the charter rights is that Section 35 has built into it its own Section 1. And -- so to speak. Supreme Court of Canada in Sparrow found in Section 35 the ability of the government to infringe aboriginal rights, so long as it met a certain standard of justification. So the right itself bespeaks reconciliation of both aboriginal and non-aboriginal interests, right in the right there is some balancing has to take place. And it may well be that -- and perhaps too often than not, the part of the process which involves the infringement of the right is done without the aboriginal peoples being involved. It's done in the legislature or it's done in the offices of government, but there is nothing to say that the -- there can't be some negotiation about the nature of laws and regulations and government acts which can or cannot properly infringe the aboriginal right. And that can all -- that can all be happening during this transaction period. And so it may well be that during the transaction period different things are happening, but both of them are entirely legitimate, and the court shouldn't feel in any way uneasy about being party to it. The court should be very proud about being party to this historic and very important process.

I'll move over to -- I'm going to try to pick up the pace a bit if I may, my lord, I probably will have made my point over after over again by now and I'll try not to repeat myself.

Paragraph 118, 119, 120 again I think reflect what I've already said. Remember, in -- under Sparrow the government has some duty to consult with aboriginal

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1 people before there has been a diminution of their
2 rights under Section 35. And we're saying that you
3 can -- once the government now knows clearly that the
4 aboriginal people have rights in this province,
5 contrary to what the Chief Justice said, that the
6 government should be given an opportunity to consult.
7 It should be given an opportunity to do what has to be
8 done to ensure that the rights of aboriginal people
9 are respected before anything is foisted on them
10 through the court process.
11 Paragraph 121 emphasizes why this approach is
12 particularly appropriate where there are generalized
13 claims such as this case.
14 Again, my lord, Mr. Justice Lambert, I -- I'd like
15 to think some more about what we do about cases like
16 Alfonse and Dick where they are not, and it may be the
17 only answer is you may have to do what you have to do,
18 but don't do any more than that.
19 And in paragraph 122 I talk about how, even
20 outside of Section 35, in that case it was Section 7,
21 why there is balancing that takes place in the context
22 of rights.
23 And in 124 I take about the important role that
24 the court has in getting the parties started,
25 overseeing the process only by way of retaining
26 jurisdiction and then finishing the job. And there is
27 a couple of quotes there from the Canadian Bar
28 Association which talk about why, if we really want to
29 have a lasting solution, it should be the parties that
30 are the authors of it rather than something that was
31 visited upon either party by virtue of judicial fiat.
32 Now, the next heading in my factum, the
33 appropriate role of declaratory relief, again goes to
34 the jurisdiction of the court to grant the relief.
35 I've covered quite a bit of the ground in this already
36 in answers to questions from the bench. I start off
37 by saying you have jurisdiction, which is the same as
38 the jurisdiction of the superior court which is very
39 broad. I talk in paragraph 125 about how flexible a
40 remedy declarations are. There is a quote there from
41 Solosky v The Queen:
42
43 "Declaratory relief is a remedy neither
44 constrained by form nor bounded by substantive
45 content which avails persons sharing a legal
46 relationship, in respect of which a 'real
47 issue' concerning the relative interests of

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1 each has been raised and falls to be
2 determined... Once one accepts that the
3 dispute is real and the granting of judgment is
4 discretionary, then the only further issue is
5 whether the declaration is capable of having
6 any practical effect in resolving the issues in
7 the case."
8
9 And we say clearly the -- this declaration would
10 have great practical effect for all the reasons I have
11 set out. You should also take note of the Kelso
12 decision. I'll just ask you to note the Kelso
13 decision at page 9, in which the court talked about
14 issuing a declaration even though they said the
15 declaration may not have practical result. I mean,
16 they took it quite far.
17 Paragraph 126, again more discussion about how
18 declarations can be used as preventative measures,
19 where there may be a cognizable threat to a legal
20 interest. I don't think you have a cognizable threat
21 to a legal interest, but I still think it's forward-
22 looking here, it's designed to deal with the
23 perspective. It's forward-looking, it's perspective,
24 it's designed to assist the parties in reaching the
25 reconciliation of their competing interests in the
26 future as much as it is to address past wrongs.
27 The -- at paragraph 127 we state again fairly
28 obvious propositions, that courts grant declaratory
29 relief against governments all the time, knowing that
30 it doesn't mean that the government must obey, but
31 knowing that -- they do it because they know the
32 government will obey. It's one of our traditions in
33 this country, unlike the United States, where it's
34 virtually unheard of -- there may be some
35 exceptions -- for governments not to give effect to
36 declaratory rulings by courts.
37 And a declaration from this court along the lines
38 that we submit will have a very salutory effect in
39 keeping governments moving in the direction that they
40 should be moving.
41 Paragraph 130 is the reference to the cases that I
42 touched on this morning: Harelkin, Mills, Moore and
43 Badger, all cases in which the courts have declined to
44 give any relief, even though there may be some clear,
45 illegal conduct occurring. Harelkin was an
46 administrative law case, but the Moore case was a
47 constitutional case.

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1 That was the case where Ms. Moore was fired by the
2 provincial government for failing to perform some
3 tasks that she said convened her freedom of religion.
4 I should take you to that one because I think it's
5 quite important. That's Tab 130. I see that three of
6 you are on that panel.
7 TAGGART, J.A.: Are we going to re-visit that?
8 MR. ARVAY: There were a number of issues in the case. One the
9 issues in the case was, was Ms. Moore entitled to a
10 declaration that her charter rights had been
11 infringed, given that she could have gotten her job
12 back or a remedy by seeking -- by going to the Human
13 Rights Commission. And one of the -- I mean, the
14 court said that the fact that the -- I mean, the
15 government was subject to the charter, notwithstanding
16 the fact that the government was acting qua-employer,
17 so there was clearly a charter issue before the court.
18 And Ms. Moore brought a declaration seeking -- rather
19 brought an action seeking a declaration that her
20 charter rights had been violated by the firing.
21 Our position was, and it was acceded to by the
22 court, that she had other remedies available to her.
23 One was to grief her firing through the collective
24 bargaining process, in which case the artibrator,
25 himself or herself, would have the power to take the
26 charter into account. Now, that part of the judgment
27 isn't particularly on point to what I'm saying, but
28 the other part of the judgment which I'll take you to
29 more specifically, is dealing with the -- deals with
30 the Human Rights Act. The court said, You also have a
31 remedy under the Human Rights Act. Now, that wasn't a
32 charter remedy, it was a statutory remedy. And her
33 counsel said, No, but I want my charter rights, I'm in
34 court. And the court said, you have an adequate
35 alternative remedy to pursue through the Human Rights
36 Act. If and only if you don't succeed there, then
37 come before the court.
38 The court is clearly the place where ultimately
39 charter or constitutional rights are vindicated, but
40 it's also the place of last resort. And that's what
41 the Supreme Court of Canada said in the Mills case.
42 So in the Moore case at page 114, Mr. Justice
43 Macfarlane said:
44
45 "At the heart of the question is whether equally
46 effective remedies are available elsewhere.
47 The superior courts have discretion to decline

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1 jurisdiction where just and appropriate relief
2 can be granted by another tribunal, and will
3 exercise jurisdiction only where there is a
4 need to do so."
5
6 And then dealing with the Human Rights Act, that's
7 dealt with at page 117 in the second paragraph from
8 the bottom just above the heading. The court said:
9
10 "Thus I conclude that it was open to Mr. Justice
11 Lander to hold the cause of action of the
12 appellant to be 'unnecessary because an
13 effective remedy is available under the Human
14 Rights Act.' The judge was therefore entitled
15 to exercise his discretion under R.19(24)(b) in
16 striking out the plaintiff's claims."
17
18 And so there is an example of where the courts said,
19 We are not even going to listen. Not that we are
20 going to only decide part-way, we are not going to
21 entertain your application right now.
22 I've heard it suggested that what I'm asking the
23 court for is an interim declaration. I am not asking
24 the court for an interim declaration. I'm asking the
25 court for a final declaration, and one that in indeed
26 could be appealed, although both sides I'm sure would
27 argue that leave shouldn't be granted until everything
28 is finished, but strictly speaking, it's a declaration
29 that is final and could be appealed. It's not an
30 interim declaration, because an interim declaration
31 implies that the court can change its mind, and there
32 is clear authority that the court can't grant interm
33 declarations. This is a final declaration, but it's
34 not as complete as it might otherwise be.
35 There is helpful authority in the language rights
36 cases -- and I'm at paragraph 132 of my factum -- in
37 which the courts have said, it's better to paint in
38 broad brush strokes rather than in fine strokes when
39 dealing with these rights. And the language right
40 cases are helpful because they are collective rights,
41 like aboriginal rights. They are new rights, like
42 aboriginal rights, and therefore caution is in order
43 before courts move to -- before courts decide more
44 than they -- caution is in order to -- so that courts
45 don't decide more than they need to.
46 And thirdly, the third distinction or similarity
47 about language rights is that they really do call upon

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other institutions of government other than the courts to complete the -- in order to give meaning to the rights, that courts alone cannot give meaning to language rights. It requires the cooperation of governments at all levels. Unless courts in Canada want to engage in the kind of detailed supervision of schools and hospitals and penal institutions that is engaged in in the United States, and of course we are not suggesting that at all. So in Canada the tradition so far has been for the court to give rather broad declarations as to what the language rights mean leaving it for the governments to implement the right, apply the declarations and implement the rights.

Let me -- before I read to you from paragraph 132, I'd like to take you back to Tab 114, if I may, in the reference back to the Societe case, because this goes to the similarity between language rights and aboriginal rights. Similarly I think it is warranted. At Tab 114 at page 425 Mr. Justice Stratton says:

> "While legal rights as well as language rights belong to the category of fundamental rights, it would constitute an error either to impart the requirements of natural justice into language rights or vice-versa, or to relate one type of right to the other. Both types of rights are conceptually different. To link these two types of rights is to risk distorting both rather than re-enforcing either.
>
> Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature, because there are rooted in principle. Some of them, such as the one expressed in Section 7 of the charter, are so broad as to call for frequent judicial determination.
>
> Language rights, on the other hand, although some of them have been enlarged and incorporated into the charter, remain nonetheless founded on political compromise.
>
> This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast

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in stone and should remain immune altogether from judicial interpretation, but in my opinion the court should approach them with more restraint than they would in construing legal rights."

Now, I'll come in a moment to the Mahe decision where the court commented on that passage, but I just want to pause there to say that aboriginal rights are similar, not the same, but there are certain similarities between aboriginal rights and language rights, in the sense that -- as Chief Justice Dickson says in Sparrow, they -- Section 35 is a culmination of a long and difficult struggle in both the political forum and the legal forum. And indeed, he said in Sparrow that aboriginal rights for a long time had been ignored in Canadian society, and I don't think that anyone can deny that aboriginal rights are to some extent the result of political compromise. The very fact that they are rights which attempt to reconcile the interest of aboriginal peoples, First Nations, and provincial and Canadian governments, indicates that they are to some extent the result of a political compromise. So I think that that passage is Societe is worth pointing out.

I said I would bring you to the Mahe decision which comments on that.

TAGGART, J.A.: If we are going to get into that subject matter, would it be appropriate to take five minutes?

MR. ARVAY: Certainly.

THE REGISTRAR: Order in court. Court stands adjourned.

AFTERNOON RECESS TAKEN

THE REGISTRAR: Order in court.

TAGGART, J.A.: Yes, Mr. Arvay.

MR. ARVAY: If you could turn to Tab 127, my lords, I think that's in W-5. And there is two blank tabs, the second blank tab -- no -- yes, two blank tabs. The first blank tab is the Dixon case, you might even want to write that in the tab. And the second black tab is the Mahe case.

Again the Manitoba Language, Dixon and Mahe are three very important decisions for the purpose of my submission and so I reproduced them once in their entirety in this book. And specifically pages 84 and 85.

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TAGGART, J.A.: Of Mahe?
MR. ARVAY: Of Mahe. 84 and 85. The court looks back at what was said by Mr. Justice Beetz in the Societe case -- quote that I read to you -- and said at the bottom of page 84, last paragraph:

> "I do not believe that these words support the proposition that Section 23 should be given a particularly narrow construction or that its remedial --"

TAGGART, J.A.: Sorry, page again?
MR. ARVAY: Page 84.
TAGGART, J.A.: Yes.
MR. ARVAY:

> "I don't believe the words should be given a particularly narrow construction or that its remedial purposes should be ignored. Beetz J. makes is clear..."

And on the next page, page 85:

> "Beetz J.'s warning that the courts should be careful in interpreting language rights is a sound one. Section 23 provides a perfect example of why such caution is advisable. The provision provides for a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and form are evidence of the unusual nature of Section 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such as section is wise: However, this does not mean that the court should not 'breathe life' into the express purpose of the section or avoid implementing the possibly novel remedies needed to achieve that purpose."

I think that those words are directly applicable to Section 35.

You can keep Mahe open. If you'll go back to the factum, paragraph 135 where I left off, I have a quote from Mahe which, if you want to go to it in the text, is at page 106. Here again this is a case of where

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the court spoke in rather broad brush terms. At paragraph starting at letter D on page 106 in Mahe, the court says:

> "For these reasons I think it best if the court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under Section 23. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means which by its Section 23 obligations are to be met; the courts should be loath to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right. Once the court has declared what is required in Edmonton, then the government can and must do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under Section 23. Section 23 of the charter imposes on provincial legislatures the positive obligation of enacting precise legislative schemes providing for minority language instruction and educational facilities where numbers warrant. To date, the legislature of Alberta has failed to discharge that obligation. It must delay no longer in putting into place the appropriate minority language education scheme."

Now, the only thing that's different about Mahe and other cases like it from this case is that in those cases the court has gone as far to say that the government has violated the citizen's constitutional rights, but stops short of telling the government how it can act consistent with the citizen's constitutional rights.

In this case, the reason why this case is different is that we are not asking the court --

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1 indeed, we are asking the court not to say that the
2 government violated the appellants' constitutional
3 rights. We are asking the court to say that the
4 appellants have constitutional rights. We are not
5 asking the court to say that the government violated
6 those constitutional rights.
7 I -- I consider it important to point that out,
8 because that's why this case is different from Mahe
9 and it's different from the electoral boundaries case
10 of Dixon which I'll refer to in a moment, and it's
11 different from a number of cases. But nevertheless
12 it's -- the declaration is still consistent with the
13 judicial function, because you are declaring what
14 rights the aboriginal people have without further
15 determining the extent, if at all, to which those
16 rights had been violated. But it's probably a fairly
17 obvious proposition to say that if the aboriginal
18 people have -- if the appellants have aboriginal
19 rights throughout the portions of the territory that
20 they claim, then after 1982 at least there probably
21 will be some interferences with those rights and it
22 may be, I don't know, it may be that some
23 interferences are characterized as undue in the
24 language of Sparrow and it may or may not be that
25 those interferences can be justified.
26 So it says a great deal to say that the appellants
27 enjoy aboriginal rights to an undefined portion of the
28 territory, without conceding for a moment that those
29 rights have been violated by either the Provincial or
30 the Federal Government. But I wish to point out that
31 that's the only difference between this case and Mahe,
32 because in Mahe the court said that the plaintiff's
33 rights had been violated by the facilities that were
34 or were not given to school children in the Province
35 of Alberta, but it left it to the government to come
36 up with a scheme by way those rights could properly be
37 met. Because there is -- to borrow a phrase -- many
38 ways of skinning a constitutional cat.
39 In paragraph 136, from an article by Madam Justice
40 McLachlin in -- written by the learned justice, she
41 said, commenting on Mahe:
42
43 "The court was faced with a choice. Should it
44 itself draft legislation which would meet the
45 constitutional requirements of Section 23, in
46 effect filling the vacuum, or should it leave
47 the legislation temporarily in place, calling

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1 upon the legislature to do what it should have
2 done in the first place? The court chose the
3 second alternative. Mindful of a concern not
4 to infringe on legislative functions, the court
5 sets out factors which they deemed should be
6 taken into account and then issued a
7 declaration to the effect that the legislation
8 should be changed to take into account these
9 concerns. In short, the court instructed the
10 legislators to draft the appropriate law. The
11 use of a general declaration instead of
12 specific instructions, while it may be (and
13 was) criticized as offering insufficient
14 guidance to lower courts, had the merit of
15 allowing the government the flexibility to
16 fashion an appropriate response which may be
17 more sensitive and more appropriate to local
18 concerns than any which a court could fashion.
19 Once again we see a solution predicated on
20 recognition of the complementary roles of the
21 courts and legislatures and on the belief that
22 governments will in good faith comply with
23 court directives."
24
25
26 Now, in paragraph 137 is an example, the Marchand
27 case where the court actually said more than it
28 probably needed to say. And if I can just take you to
29 137 in Marchand. The trial judge found that the
30 plaintiff's rights under Section 23 of the charter
31 were violated. Mr. Justice Sirois made declarations
32 of the plaintiff's entitlement to rights, the
33 corresponding duties of the defendant -- and this is
34 important -- including a mandatory order or injunction
35 against the defendant school board to improve
36 facilities in a particular school. They told the
37 school board to improve the facilities in L'ecole
38 Secondaire Le Caron, so that it complied with the
39 standards of Section 23 of the charter.
40 What happened was that the --in a subsequent
41 motion the same judge held that a different remedy
42 which the school board -- or rather a government body
43 called FLEC, French Language Education Council, had
44 prescribed, which was simply moving the students to
45 another facility was good enough. So -- and he ended
46 up blessing that, saying that meets my concerns.
47 And that's an example how the negotiation process

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may itself shape rights and give content to rights. It's not just courts who do that. Parties, governments, are entitled to play a role in that. Courts are the ultimate arbitor rights, but not the sole player in the constitutional game.

And in paragraph 138 the Marchand case is commented on by Professor Fairly as a example of where negotiated demployment of governmental fiscal resources and the capital resources of the Simcoe Board were accepted and enforced by the court.

Paragraph 139 is the Dixon case. That was the case where Madam Justice Dixon held that the provincial electoral boundaries law contravened Section 3 of the charter because it didn't provide for sufficient portionality of the voting power. She said that the law was in contravention of the charter, but she left it for the legislature to fix the law. And I think I should take you to the Dixon case. That's in that same tab, 127, it's the first tab of 127. If you turn first to page 294 at the bottom of that page, she says.

> "I agree with the Attorney General that it is not the role of the courts to decide which factors and considerations are to be applied to each individual riding and with what degree of relative weight. This task is within the responsibilities of the legislature. However, this court, if called upon, must examine the results of the efforts of the legislature to see whether in individual ridings the deviation from the electoral quota can be justified."

And then likewise at page 311, she says at the second paragraph:

> "The second problem concerns the mechanics of formulating a provision for electoral districting which will satisfy the requirements of the charter. The first step in this process lies in the court's domain."

The first step.

> "It is for the court to articulate an objective and manageable standard by which the legislature can be guided.

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> While the decision is for the legislature, I may be so bold as to suggest it may be aided by the efforts of the Fisher Commission."

And there was already in existence a royal commission that had considered it. Here the process is just slightly different, the time frame is different. What we have is the impending establishment of the Treaty Commission, which will oversee and supervise negotiations with aboriginal people, but I think what this shows is sort of the hand and glove or the close relationship, at least, that courts and other institutions of government have in fashioning, giving shape to constitutional rights.

Now, at page 312 she says:

> "If the legislature acts to adopt a scheme similar to that proposed in the Fisher Commission report within the time specified by the court for amendment of Section 19 of the Constitution Act and Schedule 1, the court's involvement will be at an end. I need not enter on the speculative question of what might happen if remedial legislation were not passed with such time period as may be specified. I confine myself to the general enjoinder that just as the courts have a duty to measure the constitutionality of legislative acts against the charter guarantees, so they are under an obligation to fashion effective remedies in order to give true substance to these rights.
>
> It is my conclusion that this court cannot escape its constitutional obligation to review the validity of Section 19 and Schedule 1 of the Constitution Act, and must declare those provisions to be contrary to the Charter of Rights and Freedoms. Pending submissions on what time period may reasonably be required to remedy the legislation and the expiry of that period, the legislation will stay provisionally in place to avoid the constitutional crisis which would occur should a precipitate election be required.
>
> I add that I am not seized of this matter.

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1 Submissions as to the appropriate period during
2 with the legislation remains valid and any
3 other matters arising from these reasons or the
4 case may be brought before any justice of the
5 Supreme Court."
6
7 And indeed that happened, it was brought back
8 before the Civil Liberties Association, was frustrated
9 the government wasn't moving fast enough and they went
10 back before Mr. Justice Meredith, and -- and he
11 carried on where Madam Justice McLachlin left off.
12 And that decision is referred to in my factum at
13 paragraph 173.
14 So in the Dixon case you see again strands of
15 authority for my submission, not directly on point
16 admittedly but pretty chose. Close enough to
17 demonstrate that what we are asking you to do is
18 consistent with principle. Broad declarations of
19 right leaving it for other institutions to fill in the
20 details, declaring a transaction period, not seized of
21 the matter. Dixon provides, in my submission,
22 comfortable authority for this court.
23 Now, I'm at 141 in my factum, and just before I
24 move to the transaction period I want you to make a
25 note that in Tab 141A of the reference book, there is
26 a case called R v Zelensky, 1978, 2 SCR 940. You
27 don't need to turn to it because when I turned it this
28 morning it didn't have the right page, but that case
29 is one of many cases for the proposition that courts
30 should not decide constitutional issues unless it's
31 necessary to do it.
32 Another authority while I'm thinking of it is Law
33 Society of Upper Canada in Skapinker, one of the very
34 first charter cases.
35 Now, heading C on page 58 of my factum, the
36 transaction period, this is where -- this is of course
37 the -- the course that was set by the Supreme Court of
38 Canada in the Manitoba Language case. That's one of
39 the first cases in which the courts ordered a
40 transition period. And in the Manitoba Language case,
41 which is probably familiar to everybody by now, the
42 transition period was allowed to enable the Manitoba
43 legislature to re-enact all of its laws in both
44 official languages, because as they were written in
45 only English the court said that all of the laws of
46 Manitoba were unconstitutional, and many other things
47 dire may flow from that.

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1 It's clear that the Manitoba Language case
2 presented a situation where a transition period was
3 necessary. I mean, the court there had to give effect
4 to the rule of law. If the transition period wasn't
5 ordered -- it had to say that the laws were
6 unconstitutional, because they were. It had to order
7 a transition period and effectively deem the laws
8 valid during that period, because otherwise there
9 might have been anarchy in Manitoba. But merely
10 because that was a situation that might be
11 characterized as being one where some -- where chaos
12 may have flowed if they didn't act, doesn't mean that
13 in order to order a transition period there has to be
14 that measure of concern.
15 What's interesting about Manitoba Language, my
16 lords, is that the courts did more there than I'm
17 asking you to do. The courts there deemed what is
18 clearly an unconstitutional law valid and effective
19 for a period of time, which meant that the source of
20 the law's validity was no longer the constitution as
21 it should be, but the judiciary. Now, that's, in my
22 submission, an exercise of judicial power and an
23 example of judicial activism, if I can use that not
24 very nice phrase, that is not commonly found by our
25 judiciary. What I'm --
26 LAMBERT, J.A.: It's only found in the Supreme Court of Canada
27 because they are the only people where it can't be
28 said they are wrong. They do it and it's the law.
29 TAGGART, J.A.: Not because they are right, but because they are
30 final.
31 MR. ARVAY: I don't think I want to engage in this debate.
32 MR. HUTCHEON: What's your next point?
33 MR. ARVAY: What I am urging the court calls for much more
34 restraint. Similar innovation but more -- it's on the
35 restraint side rather than the activist side. I'm
36 saying to the court, don't decide that the law is --
37 that there is a situation of unconstitutionality going
38 on in this province, don't decide that, decide that
39 the appellants have rights and stop there. That's a
40 course of restraint, not a course of activism. But
41 the principle of allowing a transition period is, in
42 our case, flows to some extent at least from the
43 Manitoba Language case.
44 Now, in that part of the factum, paragraphs 142 to
45 147, you'll see that transition periods are becoming
46 very fashionable in the Supreme Court of Canada.
47 We can move through my factum fairly quickly on

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this. The Brydges decision at paragraph 145, the court proclaimed a 30-day transaction period in order to allow police departments to respond to the declaration that the right to counsel in Section 10(b) included a right to be informed of the availability of legal aid.

> "This transition period is needed to enable the police to properly discharge their new burden, more specifically to take into account the reality that police officers often use printed cards from which they read the caution given to detainees. In my view a period of 30 days from the date of this judgment is sufficient time for the police forces to react and to prepare new cautions. I note, in passing, that the imposition of a transition period is not unusual. In Mills v The Queen, for example, I stated that a transitional period was appropriate in the context of an application of the principles developed under Section 11(b) of the charter. In addition, in reference re Manitoba Language Rights, this court established a period of temporary validity for the acts of the Manitoba legislature in order to allow for the translation, re-enactment, printing, and publishing of previously unilingual legislation."

Next paragraph, in the Swain case, that was a case which said that the provisions dealing with the detention of mentally ill was unconstitutional, because of the risk of dangerous people acquitting on the ground of insanity being released, otherwise unconstitutional legislation should be given temporary validity for six months and be subject to interim guidelines provided by the court.

Next case, Bain, held that a provision of the Criminal Code provided the Crown with 48 stand-asides in jury selection violated Section 11(d) of the charter and should be declared invalid.

Mr. Justice Cory said:

> "The declaration of invalidity resolves all future problems. However in order to avoid a hiatus the declaration should be suspended for a period of six months. This will provide an

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1 opportunity for parliament to remedy the
2 situation if it considers it appropriate to do
3 so. The suspended declaration does not leave
4 the defence without a remedy during the
5 interim. The accused may always attempt to
6 demonstrate there has been an abuse of the
7 stand-by provisions by the prosecution."
8
9 And I'll remind you again of the Schachter
10 decision, where there was a transition period to allow
11 parliament to consider its position as to what to do
12 with child care benefits, no emergency, it's -- the
13 only question before the court is whether there is a
14 good reason, a principle reason to invoke the -- this
15 idea of a transition period.
16 Now, in paragraph 148 and 149 I refer to some
17 American cases. Now, I'm far from urging upon this
18 court any modeling of what the U.S. courts are doing
19 in the constitution. Because there, rightly or
20 wrongly, the courts have become very much involved in
21 supervising what governments are to do in assuring
22 that they meet their constitutional obligations. They
23 issue structural injunctions to tell prison officials
24 what colour the walls should be in prisons and how
25 many toilets on the floor of a hospital.
26 I don't present those cases for that purpose. I
27 present them for, I guess, two purposes: One is to
28 tell you that in the United States at least the courts
29 are now exercising considerably more caution. I think
30 they see that by moving as fast as they did they
31 caused more problems than they solved. And so it's
32 that lesson that's being learned there that is useful
33 and instructive for our courts. And I think that fits
34 nicely with my main point here, is that the courts
35 should exercise restraint in devising a remedy. But
36 the other purpose of the -- particularly the articles
37 referred to in paragraph 150 of my factum, is to I
38 guess make the obvious point that public litigation is
39 different than private law litigation. And courts
40 should get comfortable in that reality and recognize
41 that what might work in the private litigation model
42 doesn't necessarily work in the public litigation
43 model.
44 I'd ask you to turn to the article at Tab 150 by
45 Professor Chayes, which is sort of a similar article
46 in this field. At page 1282 he talks about -- he
47 gives five reasons why, five ways of describing

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private litigation, civil adjudication. The lawsuit -- page 1282:

> "1. The lawsuit is bipolar. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.
>
> 2. Litigation is retrospective. The controversy is about an identified set of completed events, whether they occurred, and if so, with what consequences for the legal relations of the parties.
>
> 3. Right and remedy are interdependent. The scope of relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty - in contract by giving the plaintiff the money he would have had absent the breach; in tort by paying the value of the damage caused.
>
> 4. The lawsuit is a self-contained episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionly the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement.
>
> 5. The process is party-initiated and party controlled. The case is organized and the issues defined by exchanges between the parties. Responsibility for fact development is theirs. The trial judge is a neutral arbiter of their interactions who decides questions of law only if they are put in issue by an appropriate move of a party."

And then if you move over to page 1302, he provides what he calls "a morphology of public law litigation." He says:

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"1. The scope of the lawsuit is not exogenously given but is shaped primarily by the court and parties.

2. The party structure is not rigidly bilateral but sprawling and amorphous."

To wit.

"3. The fact inquiry is not historical and adjudicative, but predictive and legislative.

4. Relief is not conceived as compensation for past wrong in a form logically derived from the substantive liability and confined in its impact to the immediate parties; instead it is forward-looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees.

5. The remedy is not imposed but negotiated.

6. The decree does not terminate judicial involvement in the affair; its administration requires the continuing participation of the court.

7. The judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome.

8. The subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy."

Now, without taking from that that you ought to do therefore everything that happens in the United States, I don't say that at all. I do say though that the reality is that public litigation does have many of these features and certainly this case has many of these features, and therefore this case does call for

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1 innovative, creative remedy, that otherwise you
2 wouldn't even consider for a moment in a private law
3 case.
4 And as well in that tab is another interesting
5 article by Professor Sturm, "A Normative Theory on
6 Public Law Remedies. And if I could just ask you to
7 note at page 1357, her opening paragraph which is
8 useful.
9 And at paragraph 151 there is a reference to U.S.
10 and Washington. It is a passage from the Canadian Bar
11 Association where they say that they have been
12 impressed by the American judicial experience in
13 combining the power and authority of the court in
14 negotiations to resolve complex details. And they
15 refer to not only well-known desegregation in
16 environmental cases, but the U.S. and Washington Boldt
17 decision in resolving Indians treaty rights to fish in
18 the Pacific Northwest. And portions of that decision
19 are excerpted at Tab 151. Again we find a very
20 activist court there prescribing what should or
21 shouldn't be done in negotiation process. And I'm not
22 suggesting for a moment that you go that far, but it
23 just demonstrates how other courts have wrestled with
24 these difficult problems.
25 And in paragraph 152, another article from Madam
26 Justice McLachlin. She wrote two articles, very
27 similar articles, and they are both referred to in
28 paragraph 152. She says with respect to the Dixon
29 case -- if I could just read from my factum:
30
31 "The courts call to the government to correct
32 the defective legislation was heeded in Dixon,
33 the case with which I was concerned. The
34 government moved to introduce legislation in
35 conformity with the charter and the legislation
36 was promptly passed. The case illustrates how
37 the court and the legislature, each acting
38 within the bounds of its proper responsibility,
39 can efficaciously resolve a difficult issue."
40
41 And in paragraph 154 again is not directly on
42 point but somewhat helpful, the case is the Osborne,
43 Seaboyer and Hunter and other cases dealing with
44 reading-down doctrine, the constitution exemptions
45 that I already read to you. The court struggles with
46 sort of just finding that right place, drawing the
47 line in the right place to balance its duty to uphold

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1 the constitution without intruding too far into the
2 legislative ground.
3 And at Tab 155A I have two cases that you should
4 note. You might want to note it in the factum. 155A
5 has the Erwin Toy case and the McKinney case. Erwin
6 Toy is a case involving a commercial expression
7 advertising and McKinney is the mandatory retirement
8 case. And without taking you to those cases I'll just
9 tell you the page numbers that you might want to make
10 a note of on your factum. For Erwin Toy would be at
11 page 993 and 994. And McKinney would be at page 669.
12 Both of those cases are included just to
13 illustrate the concerns that the courts have when
14 interpreting Section 1 of the charter. Canadian
15 courts have come quite a distance from where they
16 started in early days of charter interpretation. We
17 are still in the early days of charter interpretation,
18 but clearly the courts in the last number of years
19 have seemed to have a greater recognition of the
20 difficulties there are in deciding whether or not
21 legislation meets Section 1 tests or not, and the
22 courts are very sensitive about substituting their
23 judgment on what is a reasonable means of infringing a
24 charter right for that in the legislature. Clearly
25 the courts have the ultimate say, but in cases like
26 Erwin Toy and McKinney they are expressing greater
27 deference, I say, to the legislative process. That's
28 the only reason that those cases are there, because
29 just -- in Section 35 there is, as I say, a Section 1
30 kind of analysis that has to be applied. And in a
31 case of a generalized claim like this case, it would
32 be very, very difficult for the court to ever attempt
33 to reconcile on the ground whether or not provincial
34 laws and government action unduly interfere with
35 aboriginal rights and if so whether there's been a
36 justification. So at least at the outset the courts
37 should be -- allow the government to react and provide
38 a solution to the problem, rather than having the
39 court do so first.
40 And at paragraph 159 I simply say that we have no
41 factual basis to determine the extent of a
42 transitional period during which the implementation of
43 the appellants rights should be left to a consensual
44 process. The transition period should be long enough
45 to allow meaningful negotiation of the content and
46 consequences of the appellants aboriginal rights, but
47 for a limited period in order to allow for the

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1 ultimate judicial enforcement of the appellants
2 rights. The respondents suggest that an appropriate
3 time period might be two years.
4 Now, the next part of the factum deals with
5 retention of jurisdiction. I don't think I need to
6 spend a lot of time on that. Essentially the reason
7 why we say that you must retain jurisdiction is in
8 order to meet your duty as the court, it seemed to us
9 that if on the one hand we're saying only give a
10 partial declaration, it's encumbent upon us to say
11 therefore you must retain jurisdiction to complete the
12 task if the parties come back before you and ask you
13 to do so. The court could only walk away from the
14 matter if in fact it has finished its task, and if the
15 court gives effect to our submissions then the court
16 has not finished its task or may not have finished its
17 task. It may be that at the end of the two-year
18 period, and hopefully it would be at the end of the
19 two-year period, the parties come back to the court
20 and say, thanks but no thanks.
21 In paragraph 162 I refer you to the Supreme Court
22 of Canada decision in Morin, which was one of these
23 Askov II, which was the unreasonable delay case, in
24 which they said there a transition period was not
25 appropriate because it would have constituted a
26 moratorium on the individual's constitutional rights.
27 And there the government was pleading institutional
28 resources as a reason for delay.
29 That case, in my submission, is not in any way --
30 does not create any obstacle for what we are asking
31 this court to do. We are not suggesting that during
32 the period the appellants rights will be defeated or
33 claims were violated or claims will be defeated.
34 Because at this point all that the court can
35 meaningful do is determine that the appellants do have
36 aboriginal rights, not that the government has
37 violated their rights.
38 I obviously feel obligated to bring to your
39 attention the decision of this court in Delgamuukw
40 which is referred to at page 166, which was decided
41 December 5 -- that should say December 5 in the
42 factum, 1986, not March 5.
43 TAGGART, J.A.: The date is incorrect, did you say?
44 MR. ARVAY: The date is incorrect. It should say December 5,
45 1986. In that case the government -- it's in this
46 case the government applied to strike a paragraph in
47 the plaintiff's claim. It's at page 6 of the

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decision, at Tab 166, bottom of page 6, it says:

"In the appeal the plaintiffs seek to amend their Statement of Claim by adding these two paragraphs to the prayer for relief. The declaration that the plaintiffs have a constitutional right to negotiate a land claims agreement with respect to the territory with the defendants, and the defendants are constitutionally obligated to negotiate with the plaintiffs a settlement of the relationship between the plaintiffs and the defendants based on the plaintiff's rights.

A direction that the defendants meet with the plaintiffs forthwith to negotiate a good-faith settlement of the relationship between the plaintiffs and the defendants based on the plaintiffs rights as set out in the declaration 17. Before the judge in chambers paragraph 7 was in a different form and made no reference to an obligation of the defendants to negotiate with the plaintiffs. As far as an agreement that we should consider paragraph seven in the form as set out. I note that paragraph seven looks to the period of time following the judgment. I notice while Mr. Rush who spoke as counsel for the plaintiffs in this part of the appeal acknowledged that paragraph 7 was based upon the success by the plaintiffs in obtaining one or more of the six declarations set out in the prayer for relief. The wide scope of those declarations is illustrated by the first one. That reads:

1. A declaration that the plaintiffs have a right to ownership of the jurisdiction over the territory.

All of the declarations that are sought flow from number one. If the plaintiff is successful then it would follow without more that they would have the right to negotiate a land claims agreement with respect to the territory.

I can find no jurisdiction in law and in my view the Supreme Court has no jurisdiction to

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1 declare that the defendants are obligated to
2 negotiate. No one doubts however that that
3 must of necessity be done. Still as the
4 Supreme Court has the power to direct the
5 defendants to meet with the plaintiffs and
6 negotiate in good faith as sought in paragraph
7 15, prayer for relief.
8
9 If the plaintiffs are successful, the trial
10 judge has available a variety of ways in which
11 to implement the judgment, but I am satisfied
12 that declarations sought in paragraph seven and
13 directions sought in paragraph 15 are not among
14 them."
15
16 Now, we say, my lords, with respect to this case
17 that we are not asking the court to issue any order
18 that the parties have a duty to negotiate. In light
19 of the province's new position and its -- and its
20 willingness to negotiate, we ask the court to invoke
21 its discretionary remedial power to decline to provide
22 full -- I say in paragraph 166 a full or final
23 definition of the scope and consequences of the
24 appellants' right at this time. I think that's right.
25 Certainly to decline to provide a full definition of
26 the scope and consequence of the appellants' rights at
27 this time, as well as the final definition of their --
28 of the scope and consequences. But what you are being
29 asked to decide is final. I want to make that clear,
30 it's not interim, it is final.
31 In paragraph 167 I deal with what happens during
32 the interim period and I think I've already addressed
33 that this morning with my lord, Mr. Justice
34 Macfarlane. And I note in paragraph 168 through to
35 169, 170, that what's happened in the Supreme Court of
36 Canada in the Manitoba Language case, the court has
37 now heard a number of different motions as a result of
38 its initial decision to order the transition period.
39 And each time the court has met there's been a
40 different panel or some members of the panel have been
41 different, indicating that that this panel, in support
42 of my submission that this panel is not necessarily
43 seized of the issues.
44 The rest of this part of the factum simply
45 provides other examples where the court has retained
46 jurisdiction and I leave it to you to read.
47 Paragraph 176 there is an interesting quote from

Submissions by Mr. Arvay
1 Professor Sharp's text on injunctions and specific
2 performance where he relates the court's undertaking
3 and on-going role in private law litigation, which is
4 in principle similar to the kind of role that courts
5 engage in public law litigation and what we are asking
6 the court to do. He says in paragraph one -- I see
7 the time. My lord, I'm very, very close to finishing,
8 but rather than me rush through I would be obliged if
9 I could have probably no more than half an hour at the
10 opening of the next day's section simply to complete
11 my submissions.
12 THE COURT: All right, thank you. We will adjourn now to Monday
13 week, we'll hear you.
14 LAMBERT, J.A.: Just before we go, I raised earlier on today the
15 question of what happens if there is a different group
16 of judges here and you've referred to the Supreme
17 Court of Canada cases where the group has changed, but
18 the situation in the Supreme Court of Canada is very
19 different. They can certainly agree among themselves
20 not to reverse each other and to do it progressively
21 and they can do that in the back room, but this court
22 might have a completely different panel, we are such a
23 big court in numbers, that it would be appropriate to
24 think of a judicial committee working in that way,
25 what's more, the law can change in other provinces and
26 as declared by the Supreme Court of Canada, and the
27 new group will come in, whether they want to or not,
28 may be obliged to change our views. So I'm still
29 interested on the question of how you conceive that
30 our orders made -- the ones you want us to make, could
31 be final rather than merely interlocutory and how that
32 the panel would be bound to continue as if our
33 decisions were locked in stone, when it doesn't seem
34 to me that they would be.
35 I've glanced through the rest of your factum and
36 it didn't see seem to me that those specific points
37 were dealt with and they are certainly continuing to
38 trouble me.
39 MR. ARVAY: I'll address them at the resumption of this hearing.
40 MR. MACAULAY: Before we adjourn can I ask that a time be fixed
41 by which the appellants deliver to the other parties
42 the material concerning the nature of the relief
43 sought?
44 TAGGART, J.A.: I thought we had fixed that. Had we not?
45 LAMBERT, J.A.: Yes, I --
46 TAGGART, J.A.: Close of the registry, I believe, next Friday.
47 Am I not correct in that?

Submissions by Mr. Arvay

MR. JACKSON: That's our understanding, my lord.
TAGGART, J.A.: All right.
THE REGISTRAR: Order in court. Court is adjourned until ten o'clock, Monday, June the 15th.

PROCEEDINGS ADJOURNED 4:05 P.M.

I hereby certify the foregoing to be a true and accurate transcript of the proceedings herein to the best of my skill and ability.

B.M. March,
Official Reporter

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