Native Women's Assn. of Canada *v.* Canada, [1994] 3 S.C.R. 627

Her Majesty The Queen *Appellant*

v.

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

and

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

Indexed as: Native Women's Assn. of Canada *v.* Canada

File No.: 23253.

1994: March 4; 1994: October 27.

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

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Freedom of expression -- Federal government funding four national aboriginal associations alleged to be male-dominated and inviting them to participate in constitutional discussions -- Aboriginal women's association not provided with equal funding and rights of

participation to express its views -- Whether aboriginal women's freedom of expression infringed -- Whether federal government obliged under ss. 2(b) and 28 of Canadian Charter of Rights and Freedoms to provide equal funding and participation to aboriginal women's association.

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

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

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

During the constitutional reform discussions which eventually led to the Charlottetown Accord, a parallel process of consultation took place within the Aboriginal community of Canada. The federal government provided $10 million to fund participation of four national Aboriginal organizations: the Assembly of First Nations ("AFN"), the Native Council of Canada ("NCC"), the

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

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

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

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

The federal government's decision not to provide equal funding and participation in the constitutional discussions to NWAC did not violate their rights under ss. 2(*b*) and 28 of the *Charter*, since s. 2(*b*) does not generally guarantee any particular means of expression or place a positive obligation upon the government to fund or consult anyone. Even assuming that in certain extreme circumstances, the provision of a platform of expression to one group may infringe the expression of another and thereby require the government to provide an equal opportunity for the expression of that group, nothing in this case suggests that the funding or consultation of the four Aboriginal groups infringed NWAC's equal right of freedom of expression. NWAC had many opportunities to express their views both directly to the government, through the Beaudoin-Dobbie Commission, and through the four Aboriginal representative organizations. No evidence supports the contention that the funded groups were less representative of the viewpoint of women with respect to the *Charter* or that the funded groups advocate a male-dominated form of self-government. Nor was there any evidence with respect to the level of support of NWAC by women as compared to the funded groups. The four Aboriginal groups invited to discuss possible constitutional amendments are all *bona fide* national representatives of Aboriginal people in Canada and, based on the facts in this case, there was no requirement under s. 2(*b*) of the *Charter* to also extend an invitation and funding directly to NWAC.

The refusal to fund NWAC and to invite them to be equal participants at the round of constitutional discussions does not violate their rights under s. 15(1) of the *Charter*. The lack of an evidentiary basis for the

arguments with respect to ss. 2(*b*) and 28 is equally applicable to any arguments advanced under s. 15(1).

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

Per L'Heureux-Dubé J.: Although general agreement with Sopinka J.'s reasons was expressed, the outcome of this case should not be interpreted as limiting *Haig*. *Haig* does not establish the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. Rather, it stands for the proposition that, while s. 2(*b*) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion. The circumstances in which a government may be held to a positive obligation in terms of providing a specific platform of expression depend on the nature of the evidence presented by the parties. Here, the evidence demonstrates that the NWAC was not prevented from expressing its views and therefore, on its facts, this case does not give rise to a positive obligation analogous to the type referred to in *Haig* since not providing NWAC with the funding and constitutional voice requested did not amount to a breach of its freedom of expression.

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

Cases Cited

By Sopinka J.

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

By L'Heureux-Dubé J.

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

By McLachlin J.

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

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 2(*b*), 15(1), 28.

Constitution Act, 1982, ss. 35(1), (4) [ad. SI/84-102], 37 [now repealed], 37.1 [ad. SI/84-102 & now repealed].

Federal Court Act, R.S.C., 1985, c. F-7 [am. 1990, c. 8], ss. 2(1) "Federal board, commission or other tribunal", (2), 18(1), (3), 18.1(1), (3), (4)(*f*), 52(*a*), (*b*).

Federal Court Rules, C.R.C. 1978, c. 663, r. 1723.

Indian Act, R.S.C. 1970, c. I-6 [now R.S.C., 1985, c. I-5], s. 12(1)(*b*).

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Canada. *Shaping Canada's Future Together -- Proposals*. Ottawa: Government of Canada, 1991.

Canada. House of Commons. Standing Committee on Indian Affairs and Northern Development. *Minutes of Proceedings and Evidence*, Issue No. 58, September 20, 1982, p. 58:14.

Canada. Parliament. Special Joint Committee on a Renewed Canada. *Report of the Special Joint Committee on a Renewed Canada*. Ottawa: Queen's Printer, 1992.

Sgayias, David, et al. *Federal Court Practice 1994*. Toronto: Carswell, 1994.

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

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

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

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

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

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

SOPINKA J. -- This case raises the issue of the extent to which the freedom of expression and equality provisions of the *Canadian Charter of Rights and Freedoms* require that government funding be provided to various groups in order to promote the representation of certain interests at constitutional reform discussions. Specifically, where the Government of Canada provides funding to certain Aboriginal groups, alleged to be male-dominated, does s. 2(*b*) in combination with s. 28 of the *Charter* oblige the Government of Canada to

provide equal funding to an association claiming to represent the interests of female Aboriginal persons so that they may also express their views at the constitutional discussions? Alternatively, is this result mandated by s. 15 of the *Charter* or s. 35 of the *Constitution Act, 1982*? This case also invites consideration of whether there is any violation of the *Charter* if the Government of Canada refuses to extend an invitation to a group representing the interests of Aboriginal women to come to the table to discuss possible constitutional reform.

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

Following a review of the facts, I will briefly analyze the issue of the jurisdiction of the Federal Court of Appeal. I will next embark on a discussion of the main focus of this appeal regarding the alleged violations of the *Charter*. In light of my conclusion that there was no *Charter* violation in this case, it will be unnecessary to address the issue concerning justiciability. Therefore, for the purposes of this appeal, I will assume that the matters raised herein are justiciable.

I. Facts

I. The respondent Gail Stacey-Moore is the chief elected officer of the respondent Native Women's Association of Canada ("NWAC"). In 1990, she was elected

National Speaker of NWAC. The respondent Sharon Donna McIvor was elected as the executive member for the West Region of NWAC in 1988. She was also the NWAC representative to the Assembly of First Nations Constitutional Commission which participated in the Canada Round of constitutional discussions. Both individuals have been actively involved in advancing the rights of Aboriginal women across Canada.

II. This case arises in the context of the constitutional discussions known as the Canada Round which eventually led to the completion of the Charlottetown Accord. On September 24, 1991, the Government of Canada set out 28 proposals for constitutional reform in a document entitled *Shaping Canada's Future Together – Proposals*. One proposal was to amend the Constitution to entrench a general justiciable right to Aboriginal self-government. A Special Joint Committee of the Senate and the House of Commons (the "Beaudoin-Dobbie Committee") was appointed to inquire into and make recommendations to Parliament regarding the above proposals.

III. During this time, it was decided that a parallel process of consultation should take place within the Aboriginal community of Canada. The Government of Canada provided funding to four national Aboriginal organizations: the Assembly of First Nations ("AFN"), the Native Council of Canada ("NCC"), the Metis National Council ("MNC") and the Inuit Tapirisat of Canada ("ITC"). The Government entered into Contribution Agreements with each of the four Aboriginal organizations in order to provide $10 million to fund participation through the Aboriginal Constitutional Review Program of the Department of the Secretary of State.

IV. NWAC was not specifically included in the Government of Canada funding. However, pursuant to the Contribution Agreements, it was required that part of the $10 million in funding be earmarked for women's issues. As a result, AFN and NCC each paid $130,000 to the respondent NWAC. A further $300,000 was later received by NWAC directly from the Government of Canada under a separate Contribution Agreement entered into on February 4, 1992, in order to fund a study of the *Charter*. The entire funding received by NWAC amounted to 5 per cent of the total funding received by Aboriginal groups for constitutional purposes. The Secretary of State also contributed approximately $457,000 per year to NWAC for the purpose of "core funding" of its operations, although none of this money covered constitutional matters.

V. On March 12, 1992, the Minister Responsible for Constitutional Affairs announced that representatives of the four national Aboriginal organizations (AFN, NCC, ITC and MNC) were invited to participate in a multilateral process of constitutional discussions regarding the Beaudoin-Dobbie Committee Report. The purpose of these meetings was to prepare constitutional amendments that could be presented to Canada as a consensus package. NWAC was not invited to participate in these meetings which took place subsequent to March 12, 1992.

VI. NWAC was concerned that their exclusion from direct funding for constitutional matters and from direct participation in the discussions threatened the equality of Aboriginal women. In particular, NWAC was concerned that the proposals advanced for constitutional amendment would not include the requirement that the *Charter* be made applicable to any form of Aboriginal self-government which might be negotiated. This fear was based on NWAC's

perception that the national Aboriginal organizations, and in particular the AFN, are male-dominated so that there was little likelihood that the male majority would adopt the pro-*Charter* view of NWAC.

VII. As a result, in a letter written February 12, 1992 to the Right Honourable Joe Clark, Minister Responsible for Constitutional Affairs, NWAC made a request for funding and participation equal to the other four national Aboriginal organizations. On March 2, 1992, the Minister responded that the national associations represent both men and women and he encouraged NWAC to work within the Aboriginal communities to ensure its views are heard and represented. The Minister also noted that, in recognition of the need for funding, the Contribution Agreements required that the national organizations specifically direct portions of their funding to Aboriginal women's issues. Furthermore, he stated that the concerns of NWAC would not be rectified through the addition of another seat to the constitutional table.

VIII. Despite the fact that NWAC participated in the parallel process set up by the four national Aboriginal organizations, as demonstrated by the letter of February 12, 1992 to the Right Honourable Joe Clark, NWAC remained fearful that it would be unsuccessful at putting forward its view that the *Charter* must apply to any form of Aboriginal self-government. Primarily, NWAC was worried that AFN would strongly contest the application of the *Charter* to Aboriginal self-government.

IX. On March 18, 1992, NWAC commenced proceedings in the Federal Court, Trial Division against the Government of Canada, seeking an order of

prohibition to prevent any further disbursements of funds to the four Aboriginal organizations, under the 1991 Contribution Agreements until NWAC was provided with equal funding as well as the right to participate in the constitutional review process on the same terms as the four recipient groups. ITC, MNC and NCC intervened in the proceedings. AFN did not intervene until the appeal to this Court.

X. The substance of the complaint is that by financing the four recipient Aboriginal groups with respect to the constitutional renewal discussions, the Government of Canada assisted the propagation of the view that the *Charter* should not apply to Aboriginal self-government. The respondents allege that by funding male-dominated groups and failing to provide equal funding to NWAC, the Government of Canada violated their freedom of expression and right to equality. The respondents' application was dismissed by the Federal Court, Trial Division: [1992] 2 F.C. 462, 53 F.T.R. 194, 90 D.L.R. (4th) 394, [1992] 4 C.N.L.R. 59. The Federal Court of Appeal also refused to issue an order of prohibition. However, the court made a declaration that the Government of Canada restricted the freedom of expression of Aboriginal women in a manner that violated ss. 2(*b*) and 28 of the *Charter*: [1992] 3 F.C. 192, 146 N.R. 40, 95 D.L.R. (4th) 106, [1992] 4 C.N.L.R. 71, 10 C.R.R. (2d) 268.

II. Relevant Statutory Provisions

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Constitution Act, 1982

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

. . .

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Federal Court Act, R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8)

2. (1) In this Act,

. . .

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

. . .

(2) For greater certainty, the expression "federal board, commission or other tribunal" as defined in subsection (1) does not include the Senate, the House of Commons or any committee or member of either House.

18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . .

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

. . .

(3) On an application for judicial review, the Trial Division may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

(4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

. . .

(*f*) acted in any other way that was contrary to law.

52. The Federal Court of Appeal may

> (*a*) quash proceedings in cases brought before it in which it has no jurisdiction or whenever those proceedings are not taken in good faith;
>
> (*b*) in the case of an appeal from the Trial Division,
>
> (i) dismiss the appeal or give the judgment and award the process or other proceedings that the Trial Division should have given or awarded,
>
> (ii) in its discretion, order a new trial, if the ends of justice seem to require it, or
>
> (iii) make a declaration as to the conclusions that the Trial Division should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in the light of that declaration;

III. Judgments Below

Federal Court, Trial Division, [1992] 2 F.C. 462

XI. Walsh D.J. framed the issue as whether the unequal disbursement of funds constituted a violation of the *Charter*. Walsh D.J. also considered whether the court has the jurisdiction to order prohibition against a discretionary administrative decision relating to the disbursement of government funds and if so, whether it should make such an order in the circumstances. Walsh D.J. noted that the application was made on a *quia timet* basis as NWAC sought to attack the disbursement of funding that would assist arguments which might lead to a particular recommendation regarding a constitutional amendment. NCC, MNC and ITC were allowed to intervene since they were in a position to provide factual information of use to the court in deciding the matter.

XII. Walsh D.J. found that, without in any way attempting to predict the outcome of the constitutional discussions, it was clear that the issue of the maintenance of the *Charter* would be discussed and supported by at least some of the Aboriginal participants as well as the Government of Canada. It was accepted that NWAC received a disproportionate amount of the funding made available to the four Aboriginal organizations.

XIII. Walsh D.J. held that NWAC has had and will continue to have many opportunities to express its views to the political authorities, to the public and to the groups which will participate in the constitutional conference, some of whom share NWAC's views on the *Charter*. Thus, it could not be said that NWAC was being deprived of the right to freedom of speech. It would paralyze the process to hold that the freedom of expression encompassed a right for everyone to be present at the discussion table.

XIV. With respect to discrimination under s. 15(1) of the *Charter*, it was held that the disproportionate funding did not result from the fact that the respondents are women. Rather, the Government of Canada was simply unwilling to recognize that NWAC should be considered as a separate group within the Aboriginal community. Walsh D.J. stated that this was not discrimination on the basis of sex.

XV. Walsh D.J. next considered the jurisdiction of the court to issue a writ of prohibition in the circumstances. Although it was unclear who actually made the decision respecting the distribution of funding, *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, was cited for the proposition that there is no immunity for orders-in-council unlawfully made. The decision-maker must

act in accordance with the law and must comply with the rules of natural justice. Having found the jurisdiction to issue an order of prohibition exists, Walsh D.J. concluded that there was no evidence as to how the groups were selected, nor was there any evidence as to what other groups would have been more representative of the Aboriginal people than those selected. Walsh D.J. held there was nothing unfair or contrary to natural justice in the selection of the four groups to represent Aboriginal persons at the conference. The position of the representatives of NWAC had certainly been heard and considered and a decision, right or wrong, is not contrary to natural justice because it does not accept the arguments made.

XVI. Finally, Walsh D.J. stated that NWAC's fear of loss of *Charter* protection was speculative. NWAC would have further opportunities to express its concerns before any proposed amendments became law, if in fact such changes were even recommended. The multilateral discussions were only part of the whole legislative process in which courts should not intervene.

XVII. Therefore, Walsh D.J. dismissed the respondents' application for an order of prohibition.

Federal Court of Appeal, [1992] 3 F.C. 192

XVIII. Writing for the court, Mahoney J.A. stated that the arguments with respect to s. 35 of the *Constitution Act, 1982* were without merit. The right to participate in constitutional review derives from s. 37 and s. 37.1 of the *Constitution Act, 1982* and not from any "existing aboriginal or treaty rights" guaranteed by s. 35(1).

XIX. The threat of losing equality rights if Aboriginal self-governments are created without being subject to the *Charter* was not a present denial of a s. 15 right. The outcome of the constitutional discussions could not be predicted and a "merely hypothetical consequence" was no basis for judicial intervention in the constitutional reform process. Mahoney J.A. held that the law does not give an individual the right to be present at constitutional conferences, nor the right to public funding to communicate one's position. The funding and participation of the four Aboriginal groups could not be said to violate equality rights of any individual under s. 15(1) of the *Charter*.

XX. In dealing with the arguments under s. 2(*b*) and s. 28 of the *Charter*, Mahoney J.A. noted that communicating one's constitutional views to the public and to governments is undoubtedly a form of expression. Mahoney J.A. characterized the issue as whether the organizations advocate male dominated Aboriginal self-governments. Whether the groups themselves are dominated by men was not the proper question since such groups could still advocate gender equality. Mahoney J.A. found that it was in the interests of Aboriginal women that the *Charter* continue to apply to any form of Aboriginal self-government. It was further held that Aboriginal women are not represented by AFN, NCC nor ITC.

XXI. Mahoney J.A. came to the conclusion that (at pp. 212-13):

> . . . by inviting and funding the participation of those organizations in the current constitutional review process and excluding the equal participation of NWAC, the Canadian government has accorded the advocates of male-dominated aboriginal self-governments a preferred position in the exercise of an expressive activity, the freedom of which is guaranteed to everyone by paragraph 2(*b*) and which is, by section 28, guaranteed equally to men and women. It has thereby taken action which has had the effect of restricting the freedom of expression of

> aboriginal women in a manner offensive to paragraph 2(*b*) and section 28 of the Charter. In my opinion, the learned Trial Judge erred in concluding otherwise.
>
> That is not to say that equal funding to NWAC would necessarily be required to achieve the equality required by section 28. The evidence does not permit a concluded opinion as to that. However, the funding actually provided is so disparate as to be *prima facie* inadequate to accord it the equal freedom of expression mandated by the Charter.

It was concluded that a declaration could have a meaningful effect on NWAC's future participation in constitutional discussions.

XXII. Mahoney J.A. next analyzed the availability of a remedy under s. 18 of the *Federal Court Act*, R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8). The court concluded that the decision to invite the four Aboriginal groups to participate in the parallel process and to fund them must have been authorized by an Act of Parliament or an exercise of Crown prerogative. Thus, NWAC was entitled to declaratory relief pursuant to s. 18 of the *Federal Court Act.*

XXIII. Mahoney J.A. also addressed the issue of whether the constitutional review process was subject to judicial scrutiny or whether it was integral to a political process in which the judiciary should not interfere. After reviewing the decision in *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, which indicated that the "formulation and introduction of a bill are part of the legislative process with which the courts will not meddle" (p. 559), Mahoney J.A. opined that this did not include the process of public or private consultation by the government prior to reaching a decision how to legislate on a matter. The formulation of a constitutional resolution was not started by publishing proposals meant for public review by a parliamentary committee. This was merely policy development rather

than implementation. Therefore, Mahoney J.A. concluded that granting declaratory relief would not be interfering in a legislative process.

XXIV. Mahoney J.A. stated that if the Government of Canada chooses to provide funding, it must do so according to the dictates of the *Charter*. However, only one who can show a constitutional foundation for a grievance by reason of being excluded from funding will obtain the court's assistance. Not every interest group can complain that their freedom of expression has been violated. For the reasons above, Mahoney J.A. concluded that NWAC was entitled to make such a claim.

XXV. With respect to the remedy, Mahoney J.A. held that the prohibition sought was unavailable since the evidence did not permit a conclusion that NWAC was entitled to equal funding in order to accord Aboriginal women equal freedom of expression. Secondly, the constitutional process had moved beyond the stage of consultation and the courts cannot interfere with the convening of a First Minister's Conference in order to dictate whom to invite. However, Mahoney J.A. held it was open to the court to declare that the actions of the Government violated ss. 2(*b*) and 28 of the *Charter*.

IV. Issues

XXVI. I will deal with the following issues:

1. Did the Federal Court of Appeal have the jurisdiction to grant declaratory relief given that the remedy sought by the respondents was

an order prohibiting the Government of Canada from disbursing any more funds pursuant to the Contribution Agreements until NWAC was provided with equal funding and rights of participation?

2. Did the Government of Canada violate the freedom of expression of the individual respondents or of Aboriginal women represented by the respondent NWAC, as guaranteed by s. 2(*b*) read together with s. 28 of the *Canadian Charter of Rights and Freedoms*, by funding the four Aboriginal organizations and permitting their participation in the constitutional discussions while not providing an equal right of participation and funding to NWAC?

3. Did the Government of Canada violate the equality rights of the individual respondents or of Aboriginal women represented by NWAC, as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by funding the four Aboriginal organizations and permitting their participation in the constitutional discussions while not providing an equal right of participation and funding to NWAC?

4. Did the Government of Canada violate s. 35 of the *Constitution Act, 1982* by failing to recognize existing Aboriginal and treaty rights, which are guaranteed equally to male and female persons?

V. Analysis

A. *Preliminary Issues*

(1) Mootness

XXVII. The respondents brought an application returnable on the opening of the appeal to declare the case moot. It was submitted that since the constitutional process out of which these proceedings arose had run its course, the matter was academic. The appellant, however, pointed out that an action is outstanding against the Crown for six million dollars based on the judgment of the Court of Appeal. The application to declare the appeal moot was dismissed at the conclusion of submissions on this point.

(2) Jurisdiction

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

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

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

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

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

XXX. In fact, this is not disputed by the appellant, nor by the intervener ITC which also made submissions on this issue. Rather, the appellant and ITC both argue that it is inappropriate for the Federal Court of Appeal to award a declaration when the respondents merely sought an order of prohibition at the Trial Division. In other words, the appellant contends granting such relief resulted in prejudice as it changed the focus of the case. In my view, this argument must fail. It is clear that the grounds relied on for an order of prohibition sought at the Trial Division were the alleged violations of the *Charter* and the *Constitution Act, 1982* by the Government of Canada. The argument at trial focused on whether there was a breach of the respondents' freedom of expression or equality or their Aboriginal and treaty rights. Thus, the determination of whether the rights of the respondents were violated was necessarily ancillary to the granting of an order of prohibition. The declaration that was ultimately granted by the Federal Court of Appeal hinged on the violation of *Charter* rights that was specifically argued at the Trial Division.

It cannot be said that the appellant was taken by surprise or prejudiced in any way. Nothing different could have been argued by the parties had the declaration specifically been sought.

XXXI. I would conclude that, in the circumstances, the Federal Court had jurisdiction to make a declaration which related directly to the matter in dispute between the parties. Although, as pointed out by the appellant and ITC, the respondents did not specifically include a request for a declaration in their pleadings, they did include a "basket clause" requesting "[s]uch other relief as to this Honourable Court may seem just". It has been held that a "basket clause" in the prayer for relief permits a court to exercise its discretion to grant a declaration even though it was not specifically pleaded. In *Loudon v. Ryder (No. 2)*, [1953] Ch. 423, the court considered a rule very similar to that of Rule 1723. Notwithstanding that a declaration was not specifically claimed, it was held that this did not preclude the remedy under the claim to further or other relief. *R. v. Bales, Ex parte Meaford General Hospital*, [1971] 2 O.R. 305 (H.C.), involved a claim for an order prohibiting the Minister of Labour from appointing a conciliation officer in a labour dispute. Osler J. held that there was no jurisdiction to make an order of prohibition in the circumstances. It was argued that a declaration was not an appropriate remedy as it was not specifically requested. However, Osler J. noted that the notice of motion had a prayer "for such further and other order as this Court may deem meet" and was prepared to make a declaration in the circumstances. *Meisner v. Mason*, [1931] 2 D.L.R. 156 (N.S.C.A.), and *Harrison-Broadley v. Smith*, [1964] 1 All E.R. 867 (C.A.), are also cases in which a declaratory judgment issued notwithstanding the failure to specifically request it.

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

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

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

B. *Constitutional Issues*

(1) The Applicability of the *Charter*

XXXIV. The appellant argues that the constitutional violation found by the Court of Appeal did not flow from the Government of Canada's decision to provide funding to the four Aboriginal groups. Rather any *Charter* breach was caused by the subsequent actions of the recipients in failing to equally include NWAC. Therefore, it is argued that the *Charter* does not apply since any violation resulted from the actions of private parties.

XXXV. This argument misapprehends the nature of the claim of the respondents. It is their contention that the decision of the Government of Canada

not to directly fund NWAC to the same extent as AFN, ITC, MNC and NCC and not to invite NWAC to the constitutional discussions violated their rights. I would not, therefore, give effect to this submission.

(2) Sections 2(*b*) and 28 of the *Charter*: Freedom of Expression Guaranteed Equally to Male and Female Persons

XXXVI. The main contention of the respondents is that the Government's provision of funding to NCC, ITC, AFN and MNC, along with the opportunity to participate in the constitutional discussions, required the Government to bestow upon NWAC an equal chance for expression of its views.

XXXVII. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, provides a useful starting point for the analysis of freedom of expression guaranteed by s. 2(*b*) of the *Charter*. In that case, a two-step analysis was established for determining whether a violation of freedom of expression has occurred. First, it is necessary to determine whether the activity which the respondents wish to pursue may properly be characterized as falling within the sphere of conduct protected by s. 2(*b*), namely expressive activity. In this case, the respondents allege that the Government of Canada failed to equally guarantee the right to communicate their constitutional views to the governments at the conferences. I agree with the conclusion of the Court of Appeal that this is unquestionably an expressive activity within the scope of s. 2(*b*) of the *Charter*.

XXXVIII. Once it has been determined that the activity in question is expressive, *Irwin Toy* instructs that one must next conduct an inquiry into "whether the purpose or effect of the impugned governmental action was to control attempts to convey

meaning through that activity" (p. 972). It cannot plausibly be contended that the governmental action in question here had as its purpose the restriction of the respondents' freedom of expression. In fact, it could be said that the decision to provide funding to the AFN, NCC, ITC and MNC and invite the four national Aboriginal groups to the constitutional table had as its very purpose the encouragement of free expression and the exchange of ideas. Therefore, the respondents' position must rely on the effect of the decision of the Government. In this regard, their argument is summarized by the Court of Appeal as follows (at p. 211):

> The [respondents] argue that, by funding and thereby supporting male-dominated aboriginal organizations in that activity, the Canadian government has enhanced their ability to communicate their anti-Charter positions to the virtual exclusion of NWAC's pro-Charter position. Government action has given the male-dominated organizations an ability to communicate effectively which has been denied aboriginal women, thereby abridging the guarantee of section 28 that freedom of expression is equally the freedom of male and female persons.

XXXIX. The respondents argued that the four Aboriginal groups were given something extra from which NWAC was excluded. While it is conceded that s. 2(*b*) does not include the right to any particular means of expression, the respondents contend that if the Government chooses to fund and to offer a voice to anti-*Charter*, male-led Aboriginal organizations, it is under a constitutional duty to do so equitably and in accordance with the *Charter*. Therefore, the Government must also fund and invite participation by NWAC. It is submitted that such a result is mandated by the decision of this Court in *Haig v. Canada*, [1993] 2 S.C.R. 995, as well as by s. 28 of the *Charter* which guarantees the rights and freedoms of the *Charter* equally to male and female persons.

XL. In order to determine whether the assertions of the respondents are valid, it is necessary to consider the scope of the freedom of expression as guaranteed by s. 2(*b*) of the *Charter*. In particular, it must be determined whether there is any positive duty on the Government to provide funding to NWAC in these circumstances. This case does not involve the typical situation of government action restricting or interfering with freedom of expression in the negative sense. Rather, the respondents claim that the *Charter* requires the Government of Canada to provide them with a forum for expression equal to that of the other Aboriginal organizations. In this light, I must also consider whether there is any evidence to support the argument that the funded groups were any less representative of Aboriginal women's views regarding the Constitution such that NWAC was constitutionally entitled to participate in the funding. The argument under ss. 2(*b*) and 28 of the *Charter* depends on a finding that the funding of and participation by NWAC was necessary to provide an equal voice for the rights of women.

(a) *The Scope of Section 2(b)*

XLI. It is beyond dispute that freedom of expression is a guaranteed right and a value of fundamental importance to our society. The essential nature of freedom of expression in a democratic society has been discussed by this Court in numerous cases. (See, for example, *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336.) As McLachlin J. stated in *R. v. Zundel*, [1992] 2 S.C.R. 731, at p. 752, the purpose of s. 2(*b*) "is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment". As such, it has been held that the freedoms contained therein should only be restricted in the

clearest of cases, where urgent and compelling reasons exist: *Edmonton Journal*, *supra,* at p. 1336; *Irwin Toy*, *supra,* at p. 1009 (*per* McIntyre J., dissenting).

XLII. Traditionally, the cases involving s. 2(*b*) of the *Charter* have dealt with situations whereby the government has attempted, in some way, to limit or interfere with one's freedom of expression. In the present situation, the respondents are requesting the Court to consider whether there may be a positive duty on governments to facilitate expression in certain circumstances.

XLIII. Whether freedom of expression includes a positive right to be provided with specific means of expression was recently considered for the first time by this Court in *Haig*. That case involved a somewhat similar fact situation in that the issue arose in the context of a referendum held by the federal government in all the provinces and territories, except Quebec, concerning proposed amendments to the Canadian Constitution. At the same time, Quebec held its own referendum. Due to a change in residence, Mr. Haig did not meet the requirements to be eligible to vote in either referendum. Mr. Haig contended that the order-in-council establishing the referendum, made pursuant to the federal *Referendum Act*, infringed his rights under s. 2(*b*) of the *Charter*. It was not disputed that the casting of a ballot in the referendum was a form of expression. However, Mr. Haig argued that s. 2(*b*) required not only protection from interference, but an affirmative role on the part of the state in providing the specific means of expression.

XLIV. Writing for the majority, L'Heureux-Dubé J. noted that the "case law and doctrinal writings have generally conceptualized freedom of expression in

terms of negative rather than positive entitlements" (p. 1034). Examples of this approach may also be found in *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R. (3d) 467 (N.W.T.S.C.), aff'd (1983), 8 D.L.R. (4th) 230 (C.A.), leave to appeal denied, [1984] 1 S.C.R. v; *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984); *New Brunswick Broadcasting Co. v. Canadian Radio-television and Telecommunications Commission,* [1984] 2 F.C. 410 (C.A.), at p. 426. L'Heureux-Dubé J. makes the following remarks at p. 1035:

> Like its United States First Amendment counterpart, the Canadian s. 2(*b*) *Charter* jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose or effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with s. 1 of the *Charter*.
>
> It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(*b*) of the *Charter* to provide a particular platform to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones. [Emphasis in original.]

XLV. Although the traditional conceptualization of freedom of expression has been concerned with government action that interferes with one's ability to convey meaning, L'Heureux-Dubé J. recognized the possibility that in some situations mere governmental complacency is not enough. That is, "true freedom of expression must be broader than simply the right to be free from interference" (p. 1036). At page 1039 of the *Haig* decision, L'Heureux-Dubé J. posits the following:

> One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.
>
> In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required.

XLVI. However, it was concluded that no positive governmental action was required in order to provide Mr. Haig with a right to vote in the referendum. The *Charter* does not guarantee Canadians a right to vote in a referendum. Furthermore, the referendum actually presented a forum for and encouraged expression. Thus, it could not be said that Mr. Haig's s. 2(*b*) *Charter* rights were violated.

XLVII. The conclusions reached in *Haig* have application to the case at bar. Similar to a referendum, the Government of Canada was engaging in a consultative process to secure the public opinion with respect to potential constitutional amendments. To further this goal, a parallel process of consultation was established within the Aboriginal community. It cannot be claimed that NWAC has a constitutional right to receive government funding aimed at promoting participation in the constitutional conferences. The respondents conceded as much in paragraph 91 of their factum as well as in oral argument. Furthermore, the provision of funding and the invitation to participate in constitutional discussions facilitated and enhanced the expression of Aboriginal groups. It did not stifle expression.

XLVIII. However, the respondents rely on *Haig* for the proposition that the Government cannot provide a platform of expression in a discriminatory fashion or in a way which otherwise violates the *Charter*. They state that this result is clearly mandated by s. 28 of the *Charter*. The following passage from the reasons of L'Heureux-Dubé J., at pp. 1041-42, is relied on:

> In my view, though a referendum is undoubtedly a platform for expression, *s. 2(b) of the Charter does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum.* Nor does it confer upon all its citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.
>
> The following caveat is, however, in order here. *While s. 2(b) of the Charter does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of Charter scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on a ground prohibited under s. 15 of the Charter*.
>
> I would add that issues of expression may on occasion be strongly linked to issues of equality. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the Court said that s. 15 of the *Charter* is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15. It might well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals. However, despite obvious links between various provisions of the *Charter*, I believe that, should such situations arise, it would be preferable to address them within the boundaries of s. 15, without unduly blurring the distinctions between different *Charter* guarantees. [Underlining in original; emphasis in italics added.]

XLIX. Therefore, *Haig* establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group. However, the decision in *Haig* leaves open the possibility

that, in certain circumstances, positive governmental action may be required in order to make the freedom of expression meaningful. Furthermore, in some circumstances where the government does provide such a platform, it must not do so in a discriminatory fashion contrary to the *Charter*. It is this last proposition upon which the respondents rely in conjunction with s. 28 of the *Charter* to support their position that their rights under s. 2(*b*) of the *Charter* were violated in that they did not receive an equal platform to express their views.

L. At this point, I should add that it cannot be said that every time the Government of Canada chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view. Otherwise, the implications of this proposition would be untenable. For example, if the Government chooses to fund a women's organization to study the issue of abortion to assist in drafting proposed legislation, can it be argued that the Government is bound by the Constitution to provide equal funding to a group purporting to represent the rights of fathers? If this was the intended scope of s. 2(*b*) of the *Charter*, the ramifications on government spending would be far reaching indeed.

LI. Although care must be taken when referring to American authority with respect to the First Amendment, the American version of freedom of expression, I find the comments of O'Connor J. of the United States Supreme Court in *Minnesota State Board for Community Colleges*, *supra*, at p. 285, apposite:

> Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard. "There must be a limit to individual argument in such matters if government

> is to go on." [Cite omitted.] Absent statutory restrictions, the State must be free to consult or not to consult whomever it pleases.

LII. And later, at p. 287:

> When government makes general policy, it is under no greater constitutional obligation to listen to any specifically affected class than it is to listen to the public at large.

LIII. With respect to the argument that allowing the participation of one group while not equally permitting the same forum to another group amplifies the former's voice, O'Connor J. remarked as follows (at p. 288):

> Amplification of the sort claimed is inherent in government's freedom to choose its advisers. A person's right to speak is not infringed when government simply ignores that person while listening to others.

LIV. Therefore, while it may be true that the Government cannot provide a particular means of expression that has the effect of discriminating against a group, it cannot be said that merely by consulting an organization, or organizations, purportedly representing a male or female point of view, the Government must automatically consult groups representing the opposite perspective. It will be rare indeed that the provision of a platform or funding to one or several organizations will have the effect of suppressing another's freedom of speech.

LV. Although it appears that the respondents' arguments relate more closely to an equality argument under s. 15 of the *Charter*, the respondents devoted much of their energy addressing s. 2(*b*). In either case, regardless of how the arguments are

framed, it will be seen that the evidence does not support the conclusions urged by the respondents.

LVI. There is no question here of the Government of Canada attempting to suppress NWAC's expression of its point of view with respect to the Constitution. The s. 2(*b*) argument advanced is dependent on a finding that the funding of and participation by NWAC were essential to provide an equal voice for the rights of women. A corollary to this submission is that the funded groups are not representative of Native women because they advocate a male-dominated aboriginal self-government. This is the submission that was accepted by the Court of Appeal and is the foundation of its judgment. A review of the factual record reveals that there was no evidence to support the contention that the funded groups were less representative of the viewpoint of women with respect to the Constitution. Nor was there any evidence with respect to the level of support of NWAC by women as compared to the funded groups. As well, the evidence does not support the contention that the funded groups advocate a male-dominated form of self-government. At this point, a closer examination of the evidence is necessary in order to illustrate my conclusion.

(b) *The Absence of Evidence Supporting a Violation of Section 2(b) of the Charter*

LVII. As the contention of the respondents hinges on the fact that the four funded Aboriginal groups represented a male-dominated point of view and did not represent Aboriginal women, it is necessary to explore the background of AFN, NCC, MNC and ITC as well as NWAC, as revealed by the record. This will assist in determining whether NWAC's position is supportable.

LVIII. NWAC is a non-profit organization incorporated in 1974. It has a board of directors consisting of the National Speaker, four Regional Executive Leaders, four Regional Youth Representatives and thirteen Regional Representatives. The respondent Stacey-Moore deposes in her affidavit that among the objectives of NWAC is to be the national voice for Aboriginal women and address issues concerning Native women. It is the position of NWAC that the retention of the *Charter* to any form of Aboriginal self-government is essential to the interests of Aboriginal women in striving for equality.

LIX. NCC was founded in 1972 as a non-profit organization with the object of advancing the rights and interests of Metis, non-status Indians and off-reserve registered Indians throughout Canada. The affidavit of Ron George, president of NCC, states that it is a national organization consisting of organizations in the provinces and territories. NCC has participated in the process of constitutional review in order to ensure that the Aboriginal and treaty rights of all Metis and Indians are protected under any proposed amendments. In his affidavit, Ron George further states that NCC participated in the First Minister's discussions between 1985 and 1987 to develop draft constitutional amendments that would ensure sexual equality and "in particular to ensure that Charter equality guarantees would be provided for under laws passed by aboriginal government institutions operating under a proposed new provision". NCC also worked actively to remove discrimination against women contained in the *Indian Act*, R.S.C., 1985, c. I-5 (formerly R.S.C. 1970, c. I-6). Finally, the president of NCC states that it "has not advocated and does not support any lessening of the rights enjoyed by all Indian and Metis people, male and female, under the *Canadian Charter of Rights and Freedoms*". However, it is the opinion of NCC that under self-government the

application of the *Charter* should be a matter left to each Aboriginal nation to decide.

LX. MNC was incorporated in 1985 with the object of determining and expressing the rights and aspirations of the Metis people of Canada as they relate to the Constitution. MNC consists of a federation of provincial and territorial organizations representing the Metis people of those regions. According to Ron Rivard, the Executive Director of MNC, it supports the retention of the *Charter* with respect to Aboriginal self-government. MNC also supported the entrenchment of gender equality between Aboriginal men and women contained in s. 35(4) of the *Constitution Act, 1982*. To the best of Ron Rivard's knowledge, NWAC does not speak for, nor represent the Metis women of Canada.

LXI. The president of ITC, Rosemarie Kuptana, took office in 1991. She deposes in her affidavit that ITC is a national organization representing Inuit from the Northwest Territories, northern Quebec and Labrador. Furthermore, NWAC does not represent Inuit women, rather they are represented by their own organization called Pauktuutit. She denies that ITC is a male-dominated organization and points to the fact that the Inuit Committee on Constitutional Issues directing the representation of Inuit interests in the constitutional discussions is composed of seven members, three of whom are women. The president of Pauktuutit is a full participating member of the Committee. ITC is willing to consider the implementation of the *Charter* to any future Inuit self-government. The Vice President of Pauktuutit, Martha Greig, deposes that Inuit women will have a full opportunity to express their views on constitutional reform and Inuit self-government through the ITC Committee on Constitutional Issues and with financial assistance provided by ITC.

LXII. AFN did not intervene at the Federal Court of Appeal and so there is no evidence from AFN as to its structure or objectives. However, the respondent Stacey-Moore deposes in her affidavit that AFN is comprised of all the Chiefs of Indian Bands in Canada. Of the 633 Member Chiefs, only 60 are women. She also deposes that AFN was strongly opposed to the application of the *Charter* to Aboriginal self-government. AFN denies that it was unalterably opposed to the application of the *Charter* to Native self-governments. Rather, AFN rejected "the undemocratic, non-consensual imposition of the *Charter*, without protection for First Nations' languages, cultures, and traditions". The respondents also allege that AFN did not support their goal of repealing s. 12(1)(*b*) of the *Indian Act*, R.S.C. 1970, c. I-6, in order to eliminate the sexual discrimination of that provision. However, the evidence does not support this contention. The *Minutes of Proceedings and Evidence* of the Standing Committee on Indian Affairs and Northern Development, September 20, 1982 (exhibit M to the affidavit of the respondent Stacey-Moore), reveals that AFN favoured the end to all discriminatory aspects of the *Indian Act* and not merely those relating to the sexual discrimination found in s. 12(1)(*b*).

LXIII. I am in complete agreement with the intervener AFN's submissions that there was no evidence before the Federal Court of Appeal, nor before this Court, that AFN or the other funded groups advocated "male-dominated Aboriginal self-governments". Nor was there any evidence to suggest that AFN, NCC, ITC or MNC were less representative of the viewpoint of women with respect to the Constitution. The main argument of NWAC in this regard is that only they were advocating the inclusion of the *Charter* in any negotiated form of Aboriginal self-government. The evidence clearly discloses that of the four funded groups at least MNC also supported its inclusion. Furthermore, NCC did not oppose application

of the *Charter*, rather it desired that each Aboriginal self-government be free to determine the issue for itself. ITC was also willing to consider application of the *Charter*. Thus, it was not exclusively the position of NWAC that the *Charter* be maintained.

LXIV. Furthermore, in a letter dated March 2, 1992 (exhibit A to the supplementary affidavit of Gail Stacey-Moore), the Minister Responsible for Constitutional Affairs wrote the following:

> The national Aboriginal associations do represent both men and women from their communities. I encourage you to work within your communities to ensure your views are heard and represented through those associations.

Thus, in the opinion of the Government of Canada as well, the funded organizations were not perpetuating only a male-dominated point of view. Although this is certainly not determinative, it is indicative that a minister of the Crown who was familiar with the position and views advanced by them regarded the four national organizations as *bona fide* representatives of Aboriginal persons.

LXV. It is evident from the record that NWAC had the opportunity to express its ideas both directly to the Government as well as through the four Aboriginal representative organizations. The trial judge made the following statement regarding NWAC's participation in the process (at pp. 479-80):

> On the facts it is evident that the Native Women's Association of Canada has had and will continue to have many opportunities to express its views, both to the appropriate political authorities, to the public and even to the groups which will participate in the Conference, some at least of whom share the Native Women's Association of

> Canada's concern respecting the continued application of the Charter to aboriginal people. Undoubtedly the more money placed at their disposal the louder their voice could be heard, but it certainly cannot be said that they are being deprived of the right of freedom of speech in contravention of the Charter.

LXVI. An example of NWAC's public participation in the process is found in its submissions to the Beaudoin-Dobbie Committee. The 1992 *Report of the Special Joint Committee on a Renewed Canada* (exhibit 2 on cross-examination of Gail Stacey-Moore) made specific reference to the submissions made by NWAC and incorporated into the report NWAC's recommendation that the *Charter* apply to Aboriginal self-government.

LXVII. The evidence is also indicative of the fact that Aboriginal women, including members of NWAC, did have a direct voice regarding the position of the funded groups with respect to the constitutional discussions. NWAC participated in the parallel process set up by the four national Aboriginal organizations to discuss constitutional reform. For example, the respondent Stacey-Moore and other women secured positions on the Constitutional Working Group of the AFN. The respondent McIvor was the NWAC representative to the AFN Constitutional Commission, while Jane Gottfriedson, President of the British Columbia Native Women's Society (affiliated with NWAC) was appointed to the NCC Constitutional Commission. As well, on March 13, 14 and 15, 1992, an Aboriginal Conference on the Constitution was held in Ottawa. After a sustained effort, NWAC secured eight official seats and four observers out of a total of 184 delegates.

LXVIII. Furthermore, NWAC also received some of the Government funding under the Contribution Agreements, as all four groups were required to direct a portion of the funds received specifically to address women's issues. AFN and NCC each supplied $130,000 to NWAC. ITC contributed $170,000 to its women's organization, Pauktuutit, for research and other work related to constitutional affairs and more funding was expected. Pauktuutit, as the representative of Inuit women, was actively involved in the constitutional process.

LXIX. Rather than illustrate that the funded groups advocated male-dominated Aboriginal self-government, the evidence discloses that the four funded groups made efforts to include the viewpoint of women. As well, there was no evidence to suggest that NWAC enjoyed any higher level of support amongst Aboriginal women as compared to the funded Aboriginal groups.

(c) *Conclusions on Sections 2(b) and 28 of the Charter*

LXX. The freedom of expression guaranteed by s. 2(*b*) of the *Charter* does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. The right to a particular platform or means of expression was clearly rejected by this Court in *Haig*. The respondents had many opportunities to express their views through the four Aboriginal groups as well as directly to the Government, for example, through the Beaudoin-Dobbie Commission. NWAC even took the opportunity to express its concerns directly to the Minister Responsible for Constitutional Affairs and received a response, albeit one that did not satisfy NWAC.

LXXI. Even assuming that in certain extreme circumstances, the provision of a platform of expression to one group may infringe the expression of another and thereby require the Government to provide an equal opportunity for the expression of that group, there was no evidence in this case to suggest that the funding or consultation of the four Aboriginal groups infringed the respondents' equal right of freedom of expression. The four Aboriginal groups invited to discuss possible constitutional amendments are all *bona fide* national representatives of Aboriginal people in Canada and, based on the facts in this case, there was no requirement under s. 2(*b*) of the *Charter* to also extend an invitation and funding directly to the respondents.

LXXII. Although I would hope that it is evident from these reasons, I wish to stress that nothing stated in them is intended to detract in any way from any contention by or on behalf of Aboriginal women that they face racial and sexual discrimination which impose serious hurdles to their equality.

(3) Section 15(1) of the *Charter*: Equality Rights

LXXIII. It seems that the respondents' contentions regarding ss. 2(*b*) and 28 of the *Charter* are better characterized as a s. 15 *Charter* argument. As L'Heureux-Dubé J. stated in *Haig*, *supra*, the allegations that a platform of expression has been provided on a discriminatory basis are preferably dealt with under s. 15.

LXXIV. The respondents contend that the refusal to fund NWAC and invite them to be equal participants at the round of constitutional discussions violated their rights under s. 15(1) of the *Charter* due to the under-inclusive nature of the

Government's decision. Again relying on *Haig* in their factum, the respondents submit that an equality claim may involve the provision of means of expression to certain groups or individuals.

LXXV. I have concluded that the arguments of the respondents with respect to s. 15 must also fail. The lack of an evidentiary basis for the arguments with respect to ss. 2(*b*) and 28 is equally applicable to any arguments advanced under s. 15(1) of the *Charter* in this case. I agree with the Court of Appeal that s. 15(1) is of no assistance to the respondents.

(4) Section 35 of the *Constitution Act, 1982*: Existing Aboriginal and Treaty Rights

LXXVI. I also agree with the conclusions of the Court of Appeal with respect to the inapplicability of s. 35 of the *Constitution Act, 1982* to the present case. The right of the Aboriginal people of Canada to participate in constitutional discussions does not derive from any existing Aboriginal or treaty right protected under s. 35. Therefore, s. 35(4) of the *Constitution Act, 1982*, which guarantees Aboriginal and treaty rights referred to in s. 35(1) equally to male and female persons, is of no assistance to the respondents.

VI. Disposition

LXXVII. I respectfully disagree with the conclusion of the Federal Court of Appeal that the failure to provide funding to the respondents and invite them as equal participants in the constitutional discussions violated their rights under ss. 2(*b*) and 28 of the *Charter*.

LXXVIII. I am, however, in agreement with the Federal Court of Appeal that s. 15(1) of the *Charter* and s. 35 of the *Constitution Act, 1982* have no application in this case.

LXXIX. Therefore, I would allow the appeal, set aside the declaration made by the Federal Court of Appeal and restore the judgment of Walsh D.J. with costs to the appellant both here and in the Court of Appeal if demanded.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. -- This case concerns the freedom of expression and the right to equality guaranteed by ss. 2(*b*) and 28 of the *Canadian Charter of Rights and Freedoms* and further raises the issue of whether these provisions impose upon the state a positive obligation to fund and offer a voice to a specific organization deemed to hold pro-*Charter* views with respect to Aboriginal self-government. More particularly, this Court is being asked whether the free expression of conflicting views, i.e., those of the Native Women's Association of Canada and opposing ones of other organizations, must be equally promoted by the state.

LXXX. Although I am in general agreement with my colleague Sopinka J.'s reasons as well as with the result he reaches, I feel that since he relies in great part on *Haig v. Canada*, [1993] 2 S.C.R. 995, his interpretation of this case mandates some comments on my part.

LXXXI. *Haig* stands for the following proposition (at p. 1041):

> While s. 2(*b*) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on a ground prohibited under s. 15 of the *Charter*. [Emphasis added.]

LXXXII. Consequently, I cannot agree with my colleague when he states that *Haig* "establishes the principle that generally the government is under no obligation to fund or provide a specific platform of expression to an individual or a group" (p. 655). In my view, *Haig* rather stands for the proposition that the government in that particular case was under no constitutional obligation to provide for the right to a referendum under s. 2(*b*) of the *Charter*, but that if and when the government does decide to provide a specific platform of expression, it must do so in a manner consistent with the *Charter*.

LXXXIII. This Court has always fostered a broad approach to the interpretation of s. 2(*b*) of the *Charter*, freedom of expression being an important aspect of the healthy functioning of the democratic process (see, *inter alia*: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927). *Haig* is consistent with this approach in that it underlines the possible consequences of disparate financing of viewpoints and the importance of promoting a variety of views. It is also recognised in *Haig*, at p. 1037, "that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas" (emphasis added).

LXXXIV. The approach in *Haig* is one that in fact affords significant relevance to circumstances, and this is why I am of the view that in certain ones, funding or consultation may be mandated by the Constitution by virtue of the fact that when the government does decide to facilitate the expression of views, it must do so in a manner that is mindful of the *Charter*. In this respect, one must note that the circumstances in which the government may be held to a positive obligation in terms of providing a specific platform of expression invariably depend on the nature of the evidence presented by the parties.

LXXXV. In the present case, the evidence demonstrates that the complainant organization was not prevented from expressing its views, albeit not in the way it would have desired. I would therefore agree that on its facts, this case does not give rise to a positive obligation analogous to the type referred to in *Haig* since not providing the complainant organization with the funding and constitutional voice requested did not amount to a breach of its freedom of expression. However, I cannot resist reiterating that pursuant to *Haig*, had the government extended such a platform of expression to other organizations in a manner that had had the effect of violating the complainant organization's freedom of expression, this would most definitely have amounted to a breach of s. 2(*b*) of the *Charter*. In other words, the outcome of the present case should in no way be interpreted as limiting the proposition for which *Haig* stands for.

LXXXVI. In the result, I would allow the appeal.

The following are the reasons delivered by

MCLACHLIN J. -- I would allow the appeal on the ground that the freedom of governments to choose and fund their advisors on matters of policy is not constrained by the *Canadian Charter of Rights and Freedoms*. In this respect I would adopt the statements of O'Connor J. in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984), cited by Sopinka J. in his reasons for judgment. I would distinguish the policy consultations at issue in this case from a formal electoral vote of the type at issue in *Haig v. Canada*, [1993] 2 S.C.R. 995. I find it unnecessary to determine whether the evidence was capable of demonstrating a violation of the Native Women's Association of Canada's rights under s. 2(*b*) or s. 15 of the *Charter*.

LXXXVII. I would dispose of the appeal as proposed by Sopinka J.

Appeal allowed with costs.

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Solicitors for the intervener the Inuit Tapirisat of Canada: Gowling, Strathy & Henderson, Ottawa.

Solicitors for the intervener the Assembly of First Nations: Scott & Aylen, Ottawa.