SUPREME COURT OF NORWAY

On 9 March 2018, the Supreme Court gave judgment in

HR-2018-456-P, (case no. 2017/860), civil case, appeal against judgment,

I.

Finnmark Estate Agency (FeFo)	(Counsel Kristin Bjella) (Assisting counsel Frode A. Innjord)
Reindeer Grazing District 6/5D (intervener)	(Counsel Anja Jonassen)
Meskelv regional society (intervener)	(Counsel Kristoffer Dons Brøndbo)

v.

Nesseby regional society	(Counsel Brynjar Østgård) (Assisting counsel: Frode Elgesem)

II.

Nesseby regional society	(Counsel Brynjar Østgård) (Assisting counsel: Frode Elgesem)

v.

Finnmark Estate Agency (FeFo)	(Counsel Kristin Bjella) (Assisting counsel Frode A. Innjord)
Reindeer Grazing District 6/5D (intervener)	(Counsel Anja Jonassen)
Meskelv regional society (intervener)	(Counsel Kristoffer Dons Brøndbo)

V O T I N G :

(1) Justice **Bergh:** The case concerns a dispute over the management of a substantial part of the land in the municipality of Nesseby in Finnmark. The issue is whether the inhabitants of the northeast part of Nesseby, in addition to rights based on immemorial usage, have a right to manage the renewable natural resources to which their rights of use relate, or if this right belongs to the Finnmark Estate Agency (FeFo) as the landowner. It concerns in particular the right to manage, among others, the hunting, trapping and fishing activities.

(2) By Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (the Finnmark Act), FeFo was established as a separate legal entity. When the Finnmark Act was implemented on 1 July 2006, FeFo acquired in accordance with section 49 all real property in the county of Finnmark previously owned by the state, Statskog SF, with or without title. This constituted approximately 95 percent of the land area in Finnmark. The Finnmark Act regulated a corresponding takeover of limited rights to real property.

(3) Section 1 of the Finnmark Act reads as follows:

> **"The purpose of the Act is to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of land, commercial activity and social life."**

(4) The Finnmark Act is the outcome of the surveys commenced in the wake of the political dispute regarding the regulation of the Alta-Kautokeino river course in the 1970s. This dispute demonstrated a genuine need for clarification of Sami land rights in Finnmark. The Government appointed the Sami Law Committee in 1980, which issued its first report in 1984, Norwegian Official Report (NOU) 1984: 18 On the Sami legal position. The report was the starting point for the ratification of Act relating to the Sami Parliament and other Sami legal matters (the Sami Act) in 1987. The Norwegian state's obligations towards the Sami population were further manifested by the ratification in 1988 of the provision that is currently article 108 of the Norwegian Constitution – originally article 110a. The first Sami Parliament elections were held in 1989.

(5) In the 1990s, the Sami Law Committee issued another four reports, including NOU 1993: 34 The right to and management of land and water courses in Finnmark and NOU 1997: 4 The natural basis for Sami culture. An overview of these reports are found in Proposition to the Odelsting no. 53 (2002-2003) pages 10-12.

(6) A draft bill was presented in Proposition to the Odelsting no. 53 (2002-2003). The background for the Proposition was NOU 1997: 4 and the statements deriving therefrom.

(7) The central concerns behind the Proposition were described as follows on page 7:

> **"The main purpose of the act is to replace the uncertainty and the dispute over the right to land and waters in Finnmark with security and predictability with regard to the natural basis for Sami culture, for the inhabitants' use of land and a positive commercial development based on sustainable exploitation of the resources.**
>
> **This is done by the implementation of a new land administration system giving the inhabitants the control of and responsibility for the management of the resources while the**

> **state withdraws as landowner in Finnmark. This entails a significant historical shift to local government and is an indisputable act of trust towards all inhabitants of Finnmark, notwithstanding their ethnical or cultural background. It marks the end of the special land management in Finnmark where the state has exercised both authority and property rights without there being a clear distinction between the functions."**

(8) As for the Sami land rights, it was clarified that previous views based on "permitted use" could not be upheld. On page 122 of the Proposition, the Ministry stated the following regarding the draft bill section 5:

> **"Previously, the state used to refer to the inhabitants' use of the land resources as 'permitted use' which could not be counted as a right acquired based on prescription or immemorial usage. The provision makes it clear that such a view cannot be upheld and that the use in question can make basis for acquisition of rights."**

(9) The statements in the Proposition are in accordance with the view previously held by the Supreme Court on these rights, reflected in its rulings Rt-1968-429 (Altevann) and Rt-2001-769 (Selbu), among others.

(10) During the drafting of the bill, the Ministry consulted both the Sami Parliament and Finnmark County Council. This is accounted for on page 35 of the Proposition.

(11) The Sami Parliament and Finnmark County Council were also strongly involved during the legislative process in the Storting. During the preparations, the Standing Committee on Justice had four consultations with the Sami Parliament and Finnmark County Council. Due to the particular circumstances, the Committee's draft recommendation was presented to the Sami Parliament before the Finnmark Act was ratified in the Storting, see Recommendation to the Storting no. 169 (2004-2005).

(12) During the legislative process, there was much attention and debate regarding the draft bill in an international law perspective, with focus on the ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Among the subjects debated were the provisions in the draft bill's section 5 regarding the significance and recognition of already existing rights. The following wording was proposed:

> **"This Act does not interfere with collective and individual rights acquired through prescription or immemorial usage.**
>
> **The rights held by Sami reindeer herders on the basis referred to in the first paragraph or pursuant to the Reindeer Husbandry Act, are not limited by the Act in this respect."**

(13) Upon the request of the Standing Committee on Justice, the Ministry obtained an independent assessment of the draft bill, see Recommendation to the Odelsting no. 80 (2004–2005) page 14. The professors Geir Ulfstein and Hans Petter Graver, both at the Legal Faculty at the University Oslo, presented in the autumn of 2003 the report "Review of the proposed Finnmark Act in an international law perspective", concluding that it did not comply with the ILO Convention article 14 on indigenous land rights. However, this could be rectified by implementing procedures to identify the Sami rights to FeFo's land in Finnmark in line with the Convention article 14 no. 2. In a letter of 6 April 2004, the Ministry of Justice agreed that it might be appropriate to consider supplementary measures to realise "the Convention's goals in terms of identifying acquired individual and collective rights" to land.

(14) In the final, enacted bill, a new section 5 subsection 1 was added:

> **"Through prolonged use of land and water areas, the Sami have collectively and individually acquired rights to land in Finnmark."**

(15) Section 5 subsection 2 of the enacted bill was based on the first and second subsection of the Proposition. As a result of the debate on procedures for identifying acquired rights, a third subsection was added:

> **"In order to establish the scope and content of the rights held by Sami and other people on the basis of prescription or immemorial usage or on some other basis, a commission shall be established to investigate rights to land and water in Finnmark and a special court to settle disputes concerning such rights, cf. chapter 5."**

(16) Detailed provisions for the commission, which was named the Finnmark Commission, and for the special court, which was named the Finnmark Land Tribunal, were included in chapter 5. In section 29, it was established that the investigation of rights was to take place based on applicable national law.

(17) The composition of FeFo's board of directors, consisting of six members, is regulated in the Act's section 7. Finnmark County Council and the Sami Parliament elect three members each, who all must be resident in Finnmark. Among the members elected by the Sami Parliament, at least one must represent the reindeer herders. The board's activities are supervised by a control committee consisting of three members, where each of Finnmark County Council, the Sami Parliament and the King appoint one member, see the Act's section 16.

(18) The Act's chapter 3 regulates FeFo's management of the natural resources on its land and the inhabitants' rights to exploit these resources. Pursuant to section 21, the management must be consistent with the purpose of the Act and the scope of the legislation in general. Section 22 contains provisions on the rights to exploit the resources for persons resident in the municipalities and corresponding rights of reindeer herders for the period during which reindeer husbandry takes place there. Section 23 regulates the rights of persons resident in Finnmark, whereas section 25 regulates rights for the public to FeFo's land. As a starting point, the most extensive rights are given to people with a geographic closeness to the resources. FeFo has wide authority to issue further rules for the exploitation, including deciding that it is subject to licence, fees and limitations in access, see section 27.

(19) The case at hand concerns the Finnmark Commission's investigation of the rights to the land in Nesseby carried out pursuant to the Finnmark Act section 5 subsection 3. The Finnmark Commission decided at a meeting on 30 October 2008 that Nesseby was to be proclaimed as field 2. Then, in accordance with the Finnmark Act section 31, potential right holders received a notification with a request to come forward. In addition, an open mass meeting was held in Varangerbotn on 11 May 2009.

(20) The Finnmark Commission received a total of twelve claims. Among them were the claims from Nesseby regional society and Reindeer grazing district 6/5D.

(21) The claim from Nesseby regional society concerned a collective right of use for the inhabitants of the "traditional harvest area on FeFo's land in Nesseby regional society's area of activity north of the Varanger fjord from Šoaratjohka in the west to the municipal border towards Vadsø in the east, from the slope along the shore to Jakobselvkroken".

The claim from the grazing district concerned rights of ownership and use to all land owned by FeFo in Nesseby.

(22) In connection with the investigation, the Commission obtained a number of expert reports. A report was issued by Norwegian Institute for Cultural Heritage Research on the use of land and natural resources in Nesseby and on the interpretation of the law related to this use. The Commission also appointed an interest group pursuant to the Finnmark Act section 32 subsection 3 and held a number of open consultations in Varangerbotn. In addition, the Commission inspected the area over a period of two days.

(23) On 13 February 2013, the Finnmark Commission issued its report on the land rights, concluding as follows regarding the claim submitted by the Nesseby regional society:

> **"The Commission has concluded that the inhabitants hold an original right of use to various forms of land, acquired irrespective of the Finnmark Act, see chapter 8. This right of use also belongs to the inhabitants of the area comprised by the claim from Nesseby regional society, from Šoaratjohka to the border between Vadsø and Nesseby, and from the steep slopes along the coast to Jakobselvkroken. The regional society's claim for '*recognition of the right to use the traditional areas of the inhabitants of Nesseby*' may thus be deemed granted.**
>
> **The right that is recognised is not an exclusive or special right within the area of the regional society, but a general and original right that can be exercised within the scope of the law, and in such a way that the local use is eligible for legal protection to some extent, see section 8.2.12.**
>
> **The inhabitants have not acquired any *special rights* beyond this."**

(24) As for the claim from the reindeer herders, the Commission concluded as follows:

> "**The owners of siida units in Reindeer grazing district 6/5D have not acquired rights of ownership to the entire or parts of FeFo's land in Nesseby. On the other hand, they have acquired a general right of use for reindeer husbandry based on immemorial usage."**

(25) FeFo reviewed the Finnmark Commission's report at a board meeting held 9 – 10 April 2014. As for the Commission's conclusions regarding the claim submitted by Nesseby, the board decided the following with five votes against one:

> **"FeFo has no comments to the Finnmark Commission's conclusion that the inhabitants of Nesseby hold an original right to various forms of land use, acquired irrespective of the Finnmark Act sections 22 and 23. A right that is not exclusive or special, but a general and original right managed by FeFo within the scope of the Finnmark Act."**

(26) By a writ of summons of 12 August 2014, Nesseby regional society brought an action before the Finnmark Land Tribunal with the following prayer for relief:

> **"1. The inhabitants represented by Nesseby regional society have an exclusive right to use the area marked on the map in the Finnmark Commission's report page 126. The right comprises use, control and management, including income from the sale of hunting and fishing licences.**
>
> **2. There exists no right under private law for the state to control the exploitation of the resources which has now been assigned to FeFo in the areas to which Nesseby regional society holds rights acquired on an independent legal basis."**

(27) The geographic area indicated in item 1 was in accordance with the claim submitted to the Finnmark Commission. In the south, the area reaches the Varanger fjord. Apart from that, the drawing of lines is hardly based on clear topographic demarcations.

(28) During the case preparations, the submission in item 1 was amended by replacing "exclusive right" with "collective rights acquired on an independent legal basis".

(29) In the main hearing before the Finnmark Land Tribunal, Nesseby regional society submitted the following prayer for relief:

> **"1. The inhabitants of Nesseby represented by Nesseby regional society have collective rights acquired on an independent legal basis to use the area marked on the map included in the pleading of 8 September 2016.**
>
> **2. The rights comprise use, control and management, including income from the sale of hunting and fishing licences.**
>
> **3. The state does not have a right under private law – which has now been assigned to FeFo – to control the use of the resources in those areas, and with regard to those rights, included in item 1 above."**

(30) This prayer for relief entailed a westbound extension of the geographic area concerned in the claims, also comprising an area that in the southern part is located between the rivers Šoaratjohka and Meskelva. Following the extension, the disputed area was 470 square kilometres.

(31) Finnmark Land Tribunal gave judgment on 23 January 2017 concluding as follows:

> **"1. Except for the management of the fishing activities in Bergebyelva, FeFo's administrative authority pursuant to the Finnmark Act do not include management of big-game and small-game hunting, fresh-water fishing, collecting of eggs and down, peat extraction for heating and other domestic purposes, cloudberry picking and the management of cattle grazing in an area on the part of FeFo's land where the river Meskelva meets the Varanger Fjord, and from there further north along Meskelva and further along Elijasjohka and Geadgejohka, to where the road from Nyborg crosses Geadgejohka. From there, the demarcation line follows the road northeast to a point northeast of Davitvárri/451 meters above sea level. From there, the area is demarcated by a straight line northeast over Govdoaivi to the border towards the municipality of Tana. From there, the area is demarcated along the border towards Tana northeast and continues along the border between the municipality of Nesseby and the municipality of Vadsø along the river Jakobselva to a point approximately 670 meters west of where the border towards Varanger Peninsula National Park crosses Jakobselva. From there, the area is demarcated by a straight line southeast to a point southwest of the lake Bergebyvannet approximately 460 meters west of the border of Varanger Peninsula National Park. From there, the area is demarcated by a straight line southwest until a point near Coskajeaggi approximately 480 meters south of the border towards Varanger Peninsula National Park. From there, the demarcation continues in a straight line east to Jakobselva near Aldonneset. From there, the demarcation follows the border between Nesseby and Vadsø to the Varanger Fjord. In the south, the area is demarcated by the steep slope along the Varanger Fjord.**
>
> **2. The residents along the way between Meskelva and the border between Nesseby and Vadsø, have an exclusive right to manage their rights of use mentioned in item 1 of the conclusion of the judgment and to dispose over the economic return from the same, until it is established by a legally binding judgment or other legal basis acknowledged under Norwegian law, that such a right is also held, in whole or in part, by others. The right does not include management of fishing in Bergebyelva.**

> **3. The state will pay NOK 2 440 410.70 – twomillionfourhundredandfortythousandfourhundredandten 70/100 - to Nesseby regional society to cover costs incurred in the case. Deducted are prepaid costs of NOK 1 960 148.90 – onemillionninehundredandsixtythousandonehundredandfortyeight 90/100. The remaining NOK 480 261.10 – fourhundredandeightythousandtwohundredandsixtyone 10/100 – will be paid to Brynjar Østgård, counsel to the claimant.**
>
> **4. The state will pay NOK 1 478 409.65 – onemillionfourhundredandseventyeightthousandfourhundredandnine 65/100 - to FeFo to cover costs in the case.**
>
> **5. The state will pay NOK 244 279 – twohundredandfortyfourthousandtwohundredandseventynine to Reindeer grazing district 6/5D to cover costs in the case."**

(32) As it appears, the conclusion of the judgment had a different wording than Nesseby regional society's prayer for relief. The judgment generally supported the regional society's claims. Yet, the conclusion contained certain limitations in terms of which rights are comprised by the inhabitants' management.

(33) Geographically, the conclusion of the judgment implied a westbound border in accordance with the submission by Nesseby regional society. The east part of the disputed area was, however, somewhat reduced compared to what had been submitted. Finnmark Land Tribunal stated the following to explain this reduction:

> **"As mentioned, the Finnmark Commission has concluded that the inhabitants of Vestre Jakobselv have an interest in the general right of use of the land reaching approximately five kilometres from the river Jakobselva into the disputed area as far as the river separates the Nesseby from Vadsø in the north towards Jakobselvkroken. According to the Tribunal's assessment, this common use by the regional societies indicates that the inhabitants of Nesseby have not exercised any dominant use in this part of the disputed area."**

(34) FeFo appealed to the Supreme Court against Finnmark Land Tribunal's procedure, findings of facts and application of the law. Nesseby regional society replied with a derivative appeal concerning the fishing activity in Bergebyelva.

(35) On 20 June 2017, the Supreme Court's Appeals Selection Committee allowed the part of FeFo's appeal that concerned the findings of facts and application of the law. The derivative appeal from Nesseby regional society was also allowed. The Chief Justice then decided that the case should be decided by the Supreme Court in a plenary session, see the Courts of Justice Act section 5 subsection 4 last sentence.

(36) During the hearing, Reindeer grazing district 6/5D and Meskelv regional society have acted as interveners for FeFo. Reindeer grazing district 6/5D acted as intervener also before the Land Tribunal, whereas the regional society did not come forward until the Appeals Selection Committee had allowed the appeals.

(37) In connection with the presentation of evidence before the Supreme Court, the parties have, in addition to documentary evidence and calling of witnesses, obtained expert reports from each of professor Einar Niemi and dr. philos. Steinar Pedersen.

(38) During the hearing, Chief Justice Øie became ill and unable to attend. It was then decided to continue with Justice Matningsdal as the presiding justice, see the Courts of Justice Act

section 8 subsection 2. Justice Ringnes is on a study leave and did not participate in the hearing. Pursuant to the Courts of Justice Act section 5 subsection 5 second sentence, the youngest justice, i.e. the one with the shortest length of service, must step down when necessary to avoid an equal number of justices voting. This implies that Justice Høgetveit Berg will step down at the voting.

(39) The appellant – *the Finnmark Estate Agency (FeFo)* – has mainly contended the following:

(40) Finnmark Land Tribunal has given its judgment on an incorrect basis, both factually and legally.

(41) The Finnmark Act section 5 subsection 2 does not establish any new rights and does not give any guidelines for the interpretation of national property law. The provision merely establishes that rights acquired on an independent basis have precedence over the rules of the Finnmark Act in the event of conflict. The same is set out in the Finnmark Act section 21 subsection 2.

(42) The investigation pursuant to the Finnmark Act section 5 subsection 2 must be carried out according to property law principles in such a way that Sami custom and sense of law are considered. A specific assessment must be made, also taking into account the interference of the state.

(43) It is undisputed that the inhabitants have extensive independent rights of use to the land, acquired irrespective of the Finnmark Act. However, from a property law perspective, the requirements for claiming rights to exclusive control and management of the disputed area are not met.

(44) Established state ownership is a result of ownership control, management and regulation exercised from the 18th century until today. There are no indications of the inhabitants ever having exercised such general control and management as they are now claiming, including a legal right to manage the resources and the economic return through sale of hunting and fishing licenses etc. Also, there are no indications of the inhabitants of the disputed area having exercised such use that it forms a basis for claiming special rights of use before the rest of the Nesseby population.

(45) The transition from a hunting civilisation to a civilisation of agriculture and fishing in the 18th century demonstrates that ancient traditions for management and distribution of land resources had changed when the state took possession. The actions taken by the state, for instance in the form of allotment and leasing of land, have not conflicted with actual patterns of use or custom, but maintained and protected the inhabitants' needs relating to the use, management and control of the resources. The question is not whether the state's possession and management have violated established control rights. The inhabitants have not to date distributed or managed the resources, but exercised an actual use according to their needs in community with others.

(46) Since the habitants' rights under property law do not comprise rights of control and management, there is also no conflict between the rights of use and the control and management ascribed to FeFo under the Finnmark Act. However, the rights must be respected within their scope, which means, for instance, that they must be prioritised in case of shortage of resources.

(47) Provisions of international law, including the ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries, do not give basis for other rights in this case than those deriving from general national property law. It is not necessarily so that the ruling of Finnmark Land Tribunal is more consistent with international law than the system established through the Finnmark Act.

(48) The fact that the rights of control and management belong to FeFo is not in conflict with international law. FeFo is an administrative body representing the Finnmark population, including the Sami. Sami use and influence are safeguarded through the provisions of the Finnmark Act, including the Sami Parliament's election of board members.

(49) The derivative appeal cannot succeed. The inhabitants' rights to fishing in Bergebyelva must be assessed on the same terms as the other rights. As also relied on by Finnmark Land Tribunal, the inhabitants do not have a right to control and manage these rights.

(50) As for the dismissal claim addressed by Meskelv regional society, FeFo submits that Nesseby regional society does not have a legal interest in claiming rights for the inhabitants along the way between Šoaratjohka and Meskelva, see the Dispute Act section 1-4, cf. section 1-3. This part of the action must therefore be dismissed.

(51) FeFo has submitted the following prayer for relief:

(52) In the dismissal claim:

> **"The part of the claim submitted on behalf of the inhabitants along the way between Šoaratjohka and Meskelva is to be dismissed."**

(53) In the main issue:

> **"1. Judgment is to be given in favour of FeFo.**
>
> **2. FeFo is to be awarded costs in the Supreme Court."**

(54) The intervener *Reindeer grazing district 6/5D* has mainly supported the appellant's submissions and pointed out in particular:

(55) Reindeer herders have made extensive use of the disputed area since immemorial times and claimed ownership before the Finnmark Commission. The reindeer herders' use and claimed rights of ownership exclude others from claiming rights of control and management. With the dismissal of the claim for ownership, the management system of the Finnmark Act is the best solution, where the interest of the reindeer herders is protected, among other things, through board representation in FeFo, see the Finnmark Act section 10. The case at hand shows that there are internal conflicts of interest regarding the resources. The system of the Finnmark Act provides balance and predictability and should not be set aside.

(56) Reindeer grazing district 6/5D has submitted the following prayer for relief:

> **"1. Reindeer grazing district 6/5D supports the submission of FeFo in the main appeal, in the derivative appeal and in the dismissal claim.**
>
> **2. Reindeer grazing district 6/5D is to be awarded costs in the Supreme Court."**

(57) The intervener *Meskelv regional society* has mainly argued that Nesseby regional society does not have a legal interest in submitting a claim regarding the rights of the inhabitants along the way between Šoaratjohka and Meskelva, see the Dispute Act section 1-4, cf. section 1-3, and supports FeFo's prayer that this part of the action must be dismissed. It is argued that Nesseby regional society's actual active area does not comprise this area, and that the regional society is thus not a natural representative for the people living in this part of Nesseby.

(58) As for other aspects of the case, the intervener has supported FeFo's submissions and prayer for relief. The inhabitants represented by Meskelv regional society want FeFo to be in charge of the management.

(59) Meskelv regional society has submitted the following prayer for relief:

"Meskelv regional society is to be awarded costs in the Supreme Court."

(60) The appellant – *Nesseby regional society* – has mainly contended the following:

(61) Pursuant to the Finnmark Act section 5 subsection 2, rights of control and management ascribed to Fefo in chapter 3 do not apply to rights of use acquired on an independent basis. FeFo can thus not control and manage these rights. The same follows from section 21 subsection 2, setting out that the rules in chapter 3 do not apply in so far as otherwise established by special legal relations. For the rights concerned in the case at hand, the management system in the Finnmark Act was meant to be a temporary arrangement until the rights had been investigated. This was also the view of the Sami Parliament during the legislative process.

(62) As for the assessment under property law, one must – as done by the Land Tribunal, and which the evidence has demonstrated – take into account that the inhabitants also before the entry of the state had rights of use that comprised control and management of the relevant resources. The state's claimed sovereignty and control over the resources have not been of such a scope and intensity that the inhabitants' original control rights have been supressed. The state has taken actions in the form of public regulation or which have strengthened already existing conditions, for instance when measuring outlaying hayfields. The Supreme Court should be careful about overturning Finnmark Land Tribunal's findings of facts and should rely on its actual conclusions.

(63) The fact that the rights of the inhabitants include control and management is supported by international law, including the ILO Convention no. 169 article 14 and 15, the UN International Covenant on Civil and Political Rights (ICCPR) articles 1 and 27 and International Covenant on Economic, Social and Cultural Rights (CESCR) article 1. The UN's Declaration on the Rights of Indigenous Peoples must also be an important interpretation factor. The Supreme Court must make an independent interpretation of the rules under international law, and there is no reason to show restraint. Sources of international law are significant both for the application of FeFo's control rights and for the assessment under property law of whether the rights of use include control and management. The assessment must be culture-sensitive, and it must be observed that the provisions of the ILO Convention and UN's Declaration on the Rights of Indigenous Peoples are to have a restoring effect. This implies that the state's actions cannot affect the rights.

(64) The right of self-determination in article 1 of ICCPR and CESCR, as well as the UN's Declaration on the Rights of Indigenous Peoples articles 3, 32 and 26, strengthen the view from a property law perspective that the rights of use in this case must comprise rights of control and management. In addition, the right of self-determination will be crucial in the interpretation of the indigenous rights laid down in treaties to which Norway is bound.

(65) The ILO Convention no. 169 article 14 no. 1 first sentence gives a basis for the inhabitants to claim rights of ownership in the disputed area, as it concerns the land that the Sami "traditionally occupy". This means that the inhabitants, at least from a "the greater subsumes the lesser" perspective, have a right to control and manage the land resources in the disputed area. The area has traditionally been subject to common use, and pursuant to article 14, it is the overall Sami use that is crucial. The state's claimed ownership has no significance for the assessment under article 14.

(66) In any case, the inhabitants have a right to control their rights of use, see the ILO Convention no. 169 article 14 no. 1 second sentence and article 15, cf. article 7. They have a right to "participate in the use, management and conservation" of the resources, and a right to a part of the economic proceeds. The right to consultation and participation under the ILO Convention no. 169 is clearly more comprehensive than the rights provided in the Finnmark Act section 18.

(67) The Finnmark Act and FeFo's management do not meet the requirements in the ILO Convention no. 169 article 6 on the duty of consultation and the inhabitants' right to participation in decision-making processes. FeFo's management pursuant to the Finnmark Act chapter 3 does not include the Sami population in Nesseby. The representatives appointed by the Sami Parliament do not represent the inhabitants, and the Sami Parliament itself stated during the legislative process that it cannot represent the rights holders. The management system in the Finnmark Act is thus not suited to involve Sami rights holders, which entails a limitation in the application of the law in such a way that the control rights cannot be exercised, see the Finnmark Act section 3. The flexibility given to the states in article 34 cannot give weaker rights than those set out in the provisions of the Convention.

(68) The application of the Finnmark Act and FeFo's control rights will also entail an infringement of the ICCPR article 27 with regard to the protection of the Sami culture.

(69) As for the derivative appeal, it is held that the fishing rights in Bergebyelva must be assessed in the same way as the other rights of use, which means that they also must comprise control and management.

(70) As for the dismissal claim, Nesseby regional society contends that the Supreme Court must base its ruling on the parties' claims to the rights and the arguments put forward in support of those claims without considering, at this stage, whether they are well founded. The case concerns collective rights that are characterised by common use in the disputed area, including the Meskelv area. The outlaying fields have been mostly shared, while the closer surroundings have been mostly used by their respective inhabitants. The nature of the rights entails that the circle of people is somewhat difficult to identify. Nesseby regional society was – as opposed to Meskelv regional society – operative during the process before the Finnmark Commission and appeared as a natural representative for the inhabitants when the action was brought. Its role as a representative for the interests claimed in the case is further strengthened through the process before the Land Tribunal.

(71) Nesseby regional society has submitted the following prayer for relief:

(72) In the dismissal claim:

> **"Leave to appeal is to be granted".**

(73) In the main appeal:

> **"1. The inhabitants along the way between Meskelva and the border between Nesseby and Vadsø have a collective right of use and exploitation of the renewable natural resources stated in Finnmark Land Tribunals' judgment, item 1 of its conclusion, within the geographic area stated in Finnmark Land Tribunal's judgment, item 1 of its conclusion. The right of use comprise an exclusive right to control and manage these resources and to dispose over the economic return of the same.**
>
> **2. FeFo's management rights under the Finnmark Act do not comprise the rights and resources stated in item 1 of the submission.**
>
> **3. FeFo has not acquired a right based on non-statutory property law to control and manage the rights and resources stated in item 1 or derived such a right from the state.**
>
> **4. The state is to be awarded costs."**

(74) In the derivative appeal:

> **"1. The inhabitants along the way between Meskelva and the border between Nesseby and Vadsø have a collective right - within the geographic area stated in Finnmark Land Tribunal's conclusion of judgment item 1 – to use and exploit the fishing resources in Bergebyelva. The right of use comprises an exclusive right to control and manage these resources, and to dispose over the economic return of the same.**
>
> **2. FeFo's management rights under the Finnmark Act do not comprise the rights and resources stated in item 1 of the submission.**
>
> **3. FeFo has not acquired a right based on non-statutory property law to control and manage the rights and resources stated in item 1 or derived such a right from the state.**
>
> **4. The state is to be awarded costs."**

(75) *My view on the case*

(76) *The extension of the case before Finnmark Land Tribunal*

(77) First, I will comment on the extension of the case that took place during the main hearing before Finnmark Land Tribunal. The prayer from FeFo and Meskelv regional society for partial dismissal has to do with this extension.

(78) Under the Finnmark Act section 36 subsection 1, Finnmark Land Tribunal's jurisdiction is limited to hearing "disputes concerning rights that arise after the Finnmark Commission has examined a field". Pursuant to the Finnmark Act section 38, the summons to the Land Tribunal must contain "the claim for judgment submitted by the party".

(79) Initially, the disputed area was geographically extended westwards. The dispute before the Land Tribunal concerned, after the extension, rights to an area that was not comprised

by the claim submitted by Nesseby regional society before the Finnmark Commission, nor by the claim as it was worded in the summons to the Land Tribunal.

(80) At the same time, the change involved an extension of the group of alleged right holders. This is clearly expressed in the Land Tribunal's conclusion of judgment. Pursuant to item 2 of the conclusion, rights are also ascribed to the inhabitants along the way between Šoaratjohka and Meskelva. Before the Supreme Court, FeFo and Meskelv regional society have submitted that Nesseby regional society cannot represent these inhabitants, see the Dispute Act 1-4. They would rather have FeFo manage the natural resources in accordance with the Finnmark Commission's report.

(81) In my view, it is not clear that the Land Tribunal was competent to accept this extension. I will not address this any further, as I have concluded that there is no basis in any case for giving judgment for the alleged rights.

(82) *The Sami aspects of the case*

(83) In its judgment, the Land Tribunal has accounted for the composition of the Nesseby population. In 2010, the municipality counted 884 inhabitants. It is clear that the Sami population constitutes a large group.

(84) In 1865, there were 1,168 inhabitants, of whom an excess of 70 percent were registered as Sami. Around 20 percent were registered as Norwegians and an excess of five percent as Kven (Finns). It is fair to say that 60 percent of the population in 1960 was of Sami descent. In 2005, 48 percent of the electors, 350 persons, were registered in the Sami census.

(85) The Finnmark Land Tribunal gave the following description:

> **"Compared to other Coast Sami areas, the Sami language and culture have been very well preserved in Nesseby. In the 1950s, it was still customary that entire classes started school without knowing any Norwegian. Both the language and the local way of life, combined by the use of land, fishing and animal husbandry, were upheld until mid-1960s.**
>
> **…**
>
> **Nesseby is still regarded as the least 'Norwegianised' Coast Sami municipality in Finnmark…"**

(86) While the claims submitted in this case concern all inhabitants of the disputed area, including the non-Sami, it is undisputed that the scope of the Sami rights is central when assessing the claims. It will not prevent recognition of rights based on the Sami legal position if the same rights also serve persons with another ethnic background. I refer to the discussions on this issue concerning rights under the ILO Convention no. 169 in NOU 2007: 13 page 229–230.

(87) It has been stated that the reindeer herders in Reindeer grazing district 6/5D are not inhabitants of the disputed area, and have thus not earned any rights by the Land Tribunal's judgment. The fact that the reindeer herders support FeFo in this case rather than Nesseby regional society does not change the fact that the contents of the Sami rights are crucial. I will revert to the significance it has for the specific assessment that the claim for rights of management have not been raised by, and does not include rights for, the reindeer herders, although they also use the area based on established rights of use.

(88) *The protection in the Constitution and international law of the Sami indigenous rights*

(89) The Sami indigenous rights are protected both through provisions of the Constitution and various provisions of international law. I will start by accounting for the provisions that are most relevant in the case at hand.

(90) The basic Norwegian provision concerning Sami rights is the Constitution article 108:

> **"The authorities of the state shall create conditions enabling the Sami people to preserve and develop its language, culture and way of life."**

(91) The provision is a continuation of the previous provision in article 110a. In Document 16 (2011-2012) Report to the Storting's presidency from the Committee on Human Rights in the Constitution, page 215, the Committee described the significance of the provision as follows:

> **"Although the Constitution article 110a is primarily aimed at the Government and the Storting, the principle expressed therein may have significance for the interpretation of acts and in the application of common law rules, for example as a normative provision for the public administration's use of discretion."**

(92) The Constitution article 92 orders the public authorities to "respect and ensure human rights as they are expressed in this Constitution and in the treaties concerning human rights that are binding for Norway". This includes treaties ensuring Sami rights.

(93) It was clarified in the Supreme Court's judgment HR-2016-2554-P (Holship) that the Constitution article 92 does not entail that the treaties to which it refers are to be on par with the Constitution. Article 92 is a directive to the courts and other public authorities to enforce human rights at the level at which they have been incorporated into Norwegian law, see the judgment para 70.

(94) Pursuant to the Human Rights Act section 2 and section 3, certain international human rights conventions "shall have the force of Norwegian law" and "take precedence over any other legislative provisions that conflict with them". Among these conventions are the UN International Covenant on Civil and Political Rights (ICCPR) and the UN International Convention of Economic, Social and Cultural Rights (ICESC). A basic provision on protection of minorities is ICCPR article 27, reading:

> **"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."**

(95) It is undisputed that the Sami are protected by article 27. The further contents of this provision were discussed by the Supreme Court in HR-2017-2247-A paras 117 to 128 and HR-2017-2428-A paras 52 to 76. I will revert to the significance of the provision in this case.

(96) Nesseby regional society has referred to the right of self-determination for "all peoples" in ICCPR article 1 and ICESC article 1. The practical significance of these provisions for indigenous peoples' right of self-determination is uncertain, see Skogvang, *Samerett* [Sami law], 3rd edition 2017, page 107. Due to, among others, the far more specific

provisions in the ILO Convention no. 169, I cannot see that ICCPR article 1 or ICESC article 1 individually may serve as basis for the claims raised in this case.

(97) The UN's Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted at the UN General Assembly in 2007, must be regarded as a central document within indigenous law, as it reflects the international law principles in the field and gained support from a large number of states. In 2014, the states confirmed their support of the Declaration through a General Assembly Resolution (69/2 Outcome document). However, the Declaration does not have direct relevance to the issues at hand. It is not legally binding, and the scope of its provisions does not seem wider than the scope of the provisions in binding conventions, primarily the ILO Convention no. 169.

(98) The ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries was ratified by Norway on 20 June 1990. An extensive report on the contents and meaning of the Convention is provided in NOU 2007: 13 The new Sami law, pages 214-246. The report is partially based on ILO case law.

(99) As I have already addressed, the rights deriving from the ILO Convention no. 169 were central in the making of the Finnmark Act and inspired the wording of section 5 and the provisions concerning the investigation process in chapter 5.

(100) During the legislative process, the Sami Parliament proposed to incorporate the ILO Convention no. 169 in the Finnmark Act and to give it precedence over the Finnmark Act and other legislation. The Storting did not entirely concur, and section 3 concerning the relationship with international law was given the following wording:

> **"The Act shall apply with the limitations that follow from ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Act shall be applied in compliance with the provisions of international law concerning indigenous peoples and minorities and with the provisions of agreements with foreign states concerning fishing in transboundary watercourses."**

(101) The chosen solution and the scope of section 3 first sentence are explained as follows in Recommendation to the Odelsting no. 80 (2004-2005) page 33:

> **"The majority refers to the persistent vagueness in terms of interpretation of the ILO Convention no. 169. In the majority's view, this makes it unsuited for incorporation.**
>
> **The legislature's task is to find good solutions that are also consistent with international law. Incorporated or not, the ILO Convention will be an important source of law in the application of the Finnmark Act. This is due to the presumption principle and Norway's ratification of the Convention and obligation under international law to comply with it.**
>
> **However, the majority recognises that a reference to the ILO Convention no. 169 in a statutory form is important to the Sami Parliament. After thorough deliberations, the majority has thus decided to propose a limited incorporation of the Convention by including a provision in section 3 that the Act is to apply 'with the limitations' that follow from the ILO Convention. This will also demonstrate in a good way that the Act is based on international law.**
>
> **The wording 'with the limitations' implies that the ILO Convention has precedence over the Finnmark Act in the event of conflict. On the other hand, if one should find, based on the ILO Convention, that the Act lacks provisions with a certain content, this would be up to lawmaker to consider. In other words, the court is not to use the ILO Convention to expand**

> **the Finnmark Act. It will be easier to predict the consequences of a limited incorporation than if the entire Convention is given a general priority over all Norwegian legislation."**

(102) Thus, it is a matter of a partial incorporation. In its judgment HR-2016-2030-A para 76 (Stjernøya) the Supreme Court explains it as follows:

> **"The statement that the ILO Convention is not to be used "to expand the Finnmark Act" stresses that the incorporation was meant to be limited to the Finnmark Act's own provisions. Although the Act regulates the procedures for clarifying rights, it does not regulate the *substantive rules* based on which the rights are to be clarified. Moreover, the fact that rights cannot be derived "directly from the ILO Convention" is expressly stated in the majority's comments to section 5 of the Act on page 36 in the Recommendation."**

(103) Furthermore, it follows from section 3 second sentence that the Act is to be applied in compliance with the provisions on international law concerning indigenous peoples and minorities. It is specified in the preparatory works that this obligation applies to all bodies authorised by the Act, see Proposition to the Odelsting no. 53 (2002-2003) page 121. The provision in section 3 second sentence entails that to the extent the ILO Convention is not incorporated by section 3 first sentence, it will still be crucial in the application of the law. This also follows from the general presumption principle, which entails that Norwegian law, as far as possible, must be interpreted in accordance with international law.

(104) I will revert to the submissions made by Nesseby regional society based on the ILO Convention no. 169.

(105) *Are rights of use acquired on an independent basis generally exempt from FeFo's management?*

(106) Nesseby regional society has submitted that since the inhabitants' rights of use, as they are recognised by the Finnmark Commission, are acquired on an independent basis, the Finnmark Act's general provisions on FeFo's control and management do not apply to these rights of use. I read this as a submission that the management of the natural resources to which the rights of use relate, are to be controlled by the inhabitants alone, and that FeFo cannot in any manner manage these resources pursuant to the general provision in the Finnmark Act chapter 3.

(107) I will first examine what the claim for a right to manage the natural resources entails.

(108) As I see it, the claim seems to consist of at least three aspects: First, when it comes to collective rights such as in this case, an internal distribution of the natural resources is required, as well as distribution of the proceeds from the exploitation of the resources, between the rights holders. Second, management must involve the authority to decide to which extent and on which terms others should have access to the resources, and to sanction any violations of the scope determined for the exploitation. Third, management must involve a right, and possibly also a duty, to implement measures to protect and develop the natural resources.

(109) This description of the contents of 'management' corresponds to the description in the Finnmark Act chapter 3 of the management FeFo is to exercise on its land. As mentioned, it has been submitted that FeFo's statutory management authority has lapsed already because of the existence of rights of use acquired on an independent basis.

(110) The Finnmark Act section 5 subsection 1 establishes that the Sami, collectively and individually, have acquired rights to land in Finnmark. The relationship between the law and the acquired rights is regulated as follows in section 5 subsection 2:

> **"This Act does not interfere with collective and individual rights acquired by Sami and other people through prescription or immemorial usage. This also applies to the rights held by reindeer herders on such a basis or pursuant to the Reindeer Herding Act."**

(111) The contents of the provision corresponds to section 5 subsections 1 and 2 of the draft bill in Proposition to the Odelsting no. 53 (2002-2003). Regarding the interpretation thereof, the Ministry stated the following on page 122:

> **"*Subsection 1* establishes that the Act does not interfere with private or collective rights acquired through prescription or immemorial usage. Acquired rights of use and rights of ownership will thus fall outside the administrative system the Act is meant to implement. For instance, if anyone has acquired a right of use, it will not be necessary to receive special exploitation rights pursuant to section 24, cf. the comments to the same provision."**

(112) The wording that acquired rights will "fall outside" the management system may, in isolation, be read to imply that the Act's provisions on management do not apply at all. In my view, however, the submission seems to be that the Act's administrative system does not apply as long as acquired rights *suggest otherwise*. This corresponds to the wording of the Act – no *infringement* of acquired rights is to take place. Such rights are to be respected according to their scope. However, nothing indicates that the general rules of the Act do not apply to the extent they do not involve infringement of the acquired rights and the contents thereof.

(113) I cannot see that the comments to the provision in Recommendation to the Odelsting no. 80 (2004-2005) page 36-37, suggest that acquired rights in general should be exempt from FeFo's management.

(114) My interpretation is also supported by the Finnmark Act section 21 subsection 2, stating that the rules of chapter 3 "shall not apply in so far as otherwise established by special legal relations". The provision was added during the Storting's processing of the bill. It is set out in Recommendation to the Odelsting no. 80 (2004-2005) page 29 that it primarily concerned the special legal relations relating to the river courses of Alta, Tana and Neiden. The Committee on Justice adds, however, that the provision "also covers other special legal relations, including those identified in the investigation process pursuant to chapter 5." In my view, it is clear that the wording "in so far as" means that the general provisions in chapter 3 apply as long as they are not in conflict with existing special legal relations.

(115) Nesseby regional society has submitted that during the Committee on Justice's consultations with the Sami Parliament, it was assumed both by the Sami Parliament and the Committee that the management system in the Finnmark Act was to be temporary and cease to apply after independent rights of use had been acknowledged through the investigation process. I cannot see that such a precondition is clearly expressed in any documentation presented before the Supreme Court. The statements given may be read so as to involve cases where rights of ownership are recognised. In such situations, FeFo's rights of management will certainly lapse.

(116) In any case, there are no indications that the Committee on Justice meant that areas with recognised rights of use would be entirely exempt from FeFo's administration. If such a

precondition existed, it would have been natural to make this clear in the Recommendation, particularly when the Committee pictured that the investigation process to a large extent would result in identification of collective rights of use of use. In this respect, I refer to the following statement in Recommendation to the Odelsting no. 80 (2004-2005) page 28:

> **"The *majority* finds that one should be careful about making statements regarding the outcome of the identification process. This is a legal issue to be finally decided by the courts. However, due to the collectiveness of much of the land use in Finnmark, and the various user groups and methods that are often represented in the same area, the *majority* has good reasons to assume that private, individual rights of ownership will be clarified only to a small extent. In the *majority's* view, various collective rights of use will presumably be dominating."**

(117) Consequently, what in my view determines FeFo's access to exercise its management pursuant to the Finnmark Act chapter 3 are the *contents* of the rights of use acquired on an independent basis. The question will be if, and to which extent, the rights of use as they have been established also comprise a right to management of the natural resources to which the rights relate. To the extent that rights of use have been established which also include rights of management, FeFo's management authority pursuant to the Finnmark Act must be set aside. Thus, the next question is what the contents of the established rights of use are.

(118) *Do the inhabitants concerned in this case have rights of use that also comprise a right to of management of the natural resources?*

(119) It was made clear in the Finnmark Commission's report that the inhabitants of Nesseby have collective rights acquired on an independent basis irrespective of the Finnmark Act. The Commission found that the rights of use are not exclusive, nor have any exclusive rights been identified by the Land Tribunal's judgment. What Nesseby regional society claims is that the rights of use of the inhabitants concerned also include a right of management.

(120) As a starting point, the landowner is entitled to manage the natural resources connected to the property, within the general scope set out by law. The landowner must also respect the existing rights of use with the contents that follow from the basis of establishment. In principle, there is nothing to prevent that a right of use also may comprise a right to manage certain natural resources.

(121) It is set out in the Finnmark Act section 5 subsection 2 that the rights to be recognised are those acquired through prescription or immemorial usage. The prescription rules have no independent relevance in the case at hand. The question is then what are the contents of the rights of use acquired by the inhabitants through immemorial usage.

(122) The rules on immemorial usage are described by the Supreme Court in, among others, Rt-2001-769 (Selbu) and Rt-2001-1229 (Svartskog). In the Selbu judgment on pages 788-789, it is emphasised that acquisition through immemorial usage must meet three conditions: A certain *use* must be exercised, and it must have been exercised for *a long time* and in *good faith*. However, whether or not immemorial usage exists cannot be determined from fixed criteria, but from a broad assessment.

(123) According to both the Selbu judgment and the Svartskog judgment, any application of general national property law to determine Sami rights must be on Sami terms. Emphasis must therefore be placed on Sami sense of justice and Sami custom. In the Svartskog judgment, on page 1252, the justice delivering the leading opinion expressed the following based on the facts of the case:

> **"If a similar use had been exercised by persons with a different background, it would have indicated that they meant to own the area. On the other hand, the Sami, who have constituted the dominating part of the inhabitants of Manndalen with their collective exploitation of the resources, have not traditionally been preoccupied with rights of ownership. Yet, there are examples of them having expressed themselves in a way that suggests that they believe they possess such rights. Should the fact that there are more examples of them having claimed rights of use prevent them from acquiring rights of ownership through immemorial usage, then their control of the land, which is substantially equal to ownership, would constitute an unfortunate special treatment vis-a-vis the rest of the population."**

(124) During the making of the Finnmark Act, it was pointed out that the clarification of the law pursuant to section 5 must be in accordance with the principles expressed in the Selbu and Svartskog judgments. The majority of the Committee on Justice stated the following in Recommendation to the Odelsting no. 80 (2004-2005) page 36:

> **"The majority believes that the findings of facts in recent case law has been satisfactory. Recent Norwegian case law, in particular the Selbu and Svartskog judgments, shows how traditional Sami usage is to be considered as basis for acquisition of rights. They will be important sources of law for the Commission and for the court."**

(125) I also refer to the Supreme Court judgment HR-2016-2030-A para 84 (Stjernøya), where the justice delivering the leading opinion refers to statements in the Proposition that was endorsed by the Committee on Justice. As emphasised in the latter judgment para 85, the application of national law on Sami terms is also in line with the ILO Convention no. 169 article 8 no. 1 that in applying national laws and regulations to the peoples concerned, “due regard shall be had to their customs or customary laws".

(126) I will now turn to the individual assessment in the case at hand.

(127) In its judgment, Finnmark Land Tribunal gives a thorough account of the inhabitants' use of the disputed area from the 16th century until today. The court concludes that the "inhabitants of Nesseby exploited all available resources in the disputed area, at least until the middle of the 20th century". I rely on this conclusion, and find it clear that the established rights of use are based on extensive and comprehensive use.

(128) The next issue is whether the use of the inhabitants of the disputed area has been of such a scope that the inhabitants have also acquired rights to manage the natural resources. As part of its assessment, the Land Tribunal stated the following in its judgment on page 59:

> **"Finnmark Land Tribunal has taken as a starting point that the people living in the disputed area, during the period before the state took possession of the land, had their own internal custom-based rules for distribution of the resources, that they disposed over the resources to which they believed they had exclusive rights, and that they believed that they held such rights of disposal. It is natural to consider this an original right to manage the resources. As competition for the resources grew, changed conditions resulted in a breakdown of the local social system and made it more difficult for the inhabitants to enjoy self-determination. The Norwegian state became increasingly present through exercising control over the land and as a regulatory authority through lawmaking and administration."**

(129) The Land Tribunal has based its assessment on a substantial presentation of evidence. Although the Supreme Court has full jurisdiction, it is a consequence of the procedural system that the presentation of evidence before the Supreme Court is more limited. I find that the evidence presented before the Supreme Court in this case supports the views expressed by the Land Tribunal in what I have quoted.

(130) In NOU 1978: 18 A The Finnmarksvidda plateau – nature – culture on page 192, professor Sverre Tønnesen describes a Sami organisation based on a division into *siidas* until around 1700:

> **"In Finnmark, as elsewhere in Sami land, you find the typical town system (*by-siida-sitpogost*). The starting point is the group's usage and the sense of justice associated with it. *The community* is most important, and the group always acts united, for instance when complaining against a third party's interference.**
>
> **It is obvious that *the town had an exclusive right to exploit the natural resources in its area opposite other groups or individuals*. The uses to which exclusivity was normally claimed were hunting, fishing and grazing. The exclusive rights were enforced. Much of the information in the court protocols on demarcations, border marks and complaints against interference demonstrate this."**

(131) Tønnesen also describes that from around the year 1700, a number of circumstances emerged with the effect that the existing situation as to use and rights were diminished. I refer to NOU 1979: 18 A page 193 and to his doctorate thesis, The right to the land in Finnmark, 2nd edition 1979 page 58. There were changes both in commercial life and in the population structure, which led to a new need for regulations and to changes to the legal relationship between the regional societies at the time.

(132) In accordance with this, and as it appears from what I have quoted, the Land Tribunal finds that the changed conditions made it harder for the community to control the resources. At the same time, the Land Tribunal describes how the Norwegian state became increasingly present. On page 33 of its judgment, the Land Tribunal summarises as follows:

> **"The legislation and the rules reviewed above show that the state disposed over the land and governed the use of crucial resources in Finnmark to an increasing extent from the latter half of the 18th century. The regulations have comprised central land resources and been administered by governmental bodies.**
>
> **The allotment of land [*jordutvisningen*] was administered by the county authorities with their issuance of area certificates from the 1760s and subsequent follow-up of the Land Allotment Decree [*jordutvisningsresolusjonen*] of 1775. The Land Sale Acts of 1863 and 1902 were almost exclusively implemented by public officials, both centrally and regionally. In 1864, rules were implemented governing the tax collector's administration of sales and allotment of land. With the implementation of the Land Sale Act of 1902, a commission became responsible for the transfers. Eventually, the land sale bodies consisting of a land sale board, a land sale chief and a land sale office were established to administer the state's land in Finnmark."**

(133) Before the Supreme Court, substantial evidence has been presented regarding the Land Allotment Decree of 1775 and its significance for the disputed area.

(134) The background for the Decree is described in NOU 1993: 34 page 417. The state wanted to encourage settlement along the coast, and to obtain this, small lands were to be divided off and allotted with necessary resources to groups of three to five families.

(135) Considering the structure of the Decree, I find that it regulates granting of rights and not only registration of already existing rights. Pursuant to section 1, land was to be "assigned". The size would be determined according to a family's general needs and not be based on any existing rights to land. Also the rules in section 4 and 5 on granting of rights to fish and to "birch woods" were clearly associated with such needs, and not based on previously established rights.

(136) The parties seem to agree that the Land Allotment Decree during its first years had most effect in West Finnmark. However, before the Supreme Court, it has been proved, from a review of the church books, that 72 properties were allotted from Vadsø parish from 1779 to 1789. Out of these, 27 were allotted from Nesseby parish locality, central in the disputed area.

(137) The reason why these allotments were registered in the church books was that during the period in question, from 1779 to 1789, there was a condition for marriage stating that the groom, in areas where land had been allotted, had to present a land allotment certificate.

(138) In my view, the registration in the church books demonstrates that the Land Allotment Decree of 1775 became significant also in Nesseby. The material presented before the Supreme Court clearly indicates that the entries in the church books were allotments pursuant to the provisions in the Land Allotment Decree.

(139) In its report, the Finnmark Commission states on page 66 that in 1830, 20 county deeds [*amtskjøter*] were issued to individuals in Varangerbotn. These deeds reflected permanent assignment of property, as opposed to county notes [*amtsedler*]. The Finnmark Commission further states that in the years that followed, a large number of land assignments and measurements were registered in the municipality. Finnmark Land Tribunal also bases its judgment on this, see page 34.

(140) The Supreme Court has seen a protocol from the Land Commission [*Jordkommisjonen*] which in 1879 reviewed properties in Nesseby. This review shows 144 properties with registered serial numbers, many of which were within the disputed area.

(141) The Finnmark Commission has assumed that the state between 1867 and 1920 measured and leased out an excess of 200 outlying hayfields in various parts of Nesseby. Many examples of lease contracts from 1862 until today have been presented to the Supreme Court. It has been substantiated that the pieces of land are spread on a large part of the disputed area.

(142) In general, one must assume that the state from 1775 and throughout the entire 19th century divided off and allotted a large amount of land and rights in the disputed area. I therefore disagree with the Land Tribunal's statement on page 64 that it has "not found traces of the state having been active in the disputed area before the first piece of land was measured in 1872". This statement is also not consistent with other deliberations in the judgment, including in the paragraphs I have previously quoted. If the statement is based on the Land Tribunal's sharp distinction between the activities in the disputed area and the activities in Nesseby in general, I find this approach to be incorrect. Such a distinction cannot be based neither on the former patterns of settlement and use nor on the topographic conditions. From what I have reviewed, the state has also been active within the disputed area.

(143) In its judgment, the Land Tribunal has thoroughly reviewed the inhabitants' exploitation of the natural resources timber, peat, venison, fresh-water fish, eggs and down, cloudberries and cattle grazing land.

(144) As for the exploitation of timber and the fishing in Bergebyelva, the Land Tribunal assumes that a significant degree of management has been exercised by the state, which means that these forms of exploitation are not comprised by the right of management it has ascribed to the inhabitants.

(145) I will not address the individual forms of exploitation any further. The general impression from the Land Tribunal's review is that these resources have been exploited by the inhabitants with little interference from the state, neither as a perceived owner nor as management authority. If the law has contained regulation or allotment rights, they have been exercised only to a small extent. The inhabitants have to some extent distributed the use of the resources between them, primarily by using, in various contexts, different geographic areas. Yet, I cannot see that such a distribution suggests that the inhabitants have exercised management authority in the scope that Nesseby regional society claims.

(146) In its judgment on page 59, the Land Tribunal asks the fundamental question whether "the state, or others, over time has acted contrary to the inhabitants' sense of justice and original, custom-based right to control the land resources, and, if so, whether this must be accepted in such a way that it has established almost as a new custom". I do not find this approach completely adequate, neither legally nor based on the facts of the case.

(147) Whether rights have been acquired through immemorial usage must, as I have pointed out, be decided after a broad assessment. The question is whether rights of management have been acquired. When deciding this, the conduct and perceptions of the inhabitants must be considered against the actions of others, which appear as exercising of rights of management. Thus, one cannot disregard the actions by the state taken on the basis of perceived ownership. This applies even though the assessment is made on Sami terms, and even though the state has acted with the erroneous approach that the Sami exploitation of the natural resources was "permitted use".

(148) As I have pointed out, and as relied on also by the Land Tribunal, from the early 18th century, there was a weakening of the previous local social system. At the same time, the state became increasingly present. In The right to the Finnmark land, 2nd edition 1979, page 66, Sverre Tønnessen states:

> **"The old custom was not useful in terms of distributing resources between the members of the regional society. This was in fact what caused the situation giving rise to the Decree of 1775."**

(149) I have reviewed the state's management in the area, in particular the allotment of land and outlaying hayfields. These transactions have been carried out based on a perceived ownership. The current situation is that FeFo is the landowner, which is also acknowledged by the regional society. My general view is that the inhabitants have not exercised their rights of use in such a manner that the rights acquired through immemorial usage include a right to manage the natural resources..

(150) This is strengthened by the fact that the inhabitants' use of the disputed area, as already pointed out, has not been exclusive. Other groups have also made substantial use of the area.

(151) First, the area has been used by reindeer herders. I quote the following from the Land Tribunal's description:

> **"The disputed area is an old area for reindeer husbandry, as the Varanger siida has moved through it for a long period of time, as submitted by Reindeer grazing district 6/5D.**
>
> **…**
>
> **The winter grazing mainly takes place in the inland on the south side of the Varanger Fjord, while the summer grazing takes place on the Varanger Peninsula in district 6, partially along the coast, but also in Nesseby and in the municipalities of Vardø, Vadsø and Båtsfjord.**
>
> **…**
>
> **The land use of the reindeer herders of the Varanger siida in Nesseby and their legal predecessors appears to be stable and well established. This is particularly the case for the summer grazing, which seems to have been going on the Varanger Peninsula since the 16th century and with relatively large herds since the 17th century. Yet, the disputed area is presumably more commonly used for autumn and late summer grazing and as a nomad area in the spring.**
>
> **According to Iver Per Smuk's statement before the Land Tribunal, the reindeer herders in the district built fences in the disputed area in the 1960s and 1970s for branding and slaughtering of animals. Apart from that, it is assumed that the reindeer herders have used the area for hunting, fishing, berry-picking, extraction of wood for heating and cutting of blister sedge."**

(152) I also assume that the inhabitants living outside the area identified in the Land Tribunal's judgment have exploited, and still exploit, the natural resources in the disputed area. The area does not have a distinct topographic demarcation in any direction, which means that the conditions in this case are different from those in the Svartskog judgment (Rt-2001-1229). Here, it was emphasised on page 1244 that "[s]ince the area is distinctively demarcated, a dispute with the neighbouring regions regarding the exploitation thereof has never arisen".

(153) The rights of use for the inhabitants recognised in the Finnmark Commission's report are not geographically demarcated in accordance with the disputed area in the case at hand. The Land Tribunal assumes on page 71 of its judgment that also other inhabitants of Nesseby may have rights of management corresponding in whole or in part to those awarded in the judgment. This forms the basis for the wording of the conclusion's item 2, where the inhabitants are awarded an exclusive right of management "until it has been established …. that others, in whole or in part, have a corresponding right".

(154) In my view, the fact that also other groups than the one Nesseby regional society is representing have acquired rights of use based on a substantial actual use in the disputed area, clearly suggests that rights that also comprise a right of management have not been established.

(155) *The relationship between FeFo's management authority and the inhabitants' rights of use*

(156) My conclusion thus far is, similar to the conclusion in the Finnmark Commission's report, that the inhabitants of Nesseby have rights of use acquired on an independent basis, but that these rights are not of such character that they set aside the management authority ascribed to FeFo as the landowner pursuant to the rules in the Finnmark Act chapter 3. In its report, the Finnmark Commission gives the following description in section 8.2.12.1:

> **"Because the inhabitants' rights are original, they cannot easily be repealed or limited in a way that is similar to a repeal. The original nature of the rights also implies that the inhabitants of Nesseby are protected in the sense that FeFo must avoid disposing over the resources preventing the local rights holders from enjoying traditional usage and harvesting. This concerns in particular usage that has been – and is still being – enjoyed, originating from local regional societies in the areas where the inhabitants have traditionally exploited the land resources. One of the practical implications thereof is that local users must be prioritised when resources are scarce, but also that others are given access provided this does not unreasonably affect the local usage".**

(157) I note that the Finnmark Commission in its report distinguishes between *independent* and *special* legal basis and states that no "special" legal basis exists in this case. My understanding is that this wording is based on a common land law terminology where a collective right of use is not regarded as a "special right". However, the use of this terminology does not change the fact, as it appears from what I have quoted from the report, that independent and original rights exist in this case, which makes them protected *per se*.

(158) A prioritisation of local users as described by the Finnmark Commission, implies that although the provisions in the Finnmark Act section 23 concerning rights for persons resident in Finnmark and in section 25 concerning access for others, in principle apply to the disputed area, FeFo will, when resources are scarce, be obliged to limit the use by others. This must take place through the authority ascribed to FeFo in the Finnmark Act section 27.

(159) The legal obligation to prioritise the inhabitants with independent rights also applies with regard to persons resident in the municipality who are deriving their rights from section 22. This has been clearly expressed in the report's item 8.2.6.7, where the Commission states the following in its conclusion regarding felling rights:

> **"Felling carried out by the inhabitants in Nesseby that are otherwise comprised by section 22 subsection 1 d, is a result of a statutory right. Such felling must under the circumstances give way for felling with an independent legal basis. Hence, when resources are scarce, FeFo will have to prioritise proximity to the relevant forest resource, so that the exploitation system is not practiced in a way which entails that people with independent felling rights must give way for people without such rights in the relevant area."**

(160) Before the Supreme Court, FeFo has acknowledged that the inhabitants' rights of use will limit FeFo's property rights in Nesseby, meaning among other things that FeFo cannot receive payment from the inhabitants' use beyond what is necessary to cover the management costs. FeFo has further expressed that guidelines would have to be established for how FeFo may safeguard the rights of use, as well as procedures for consultation and cooperation between the inhabitants and FeFo. It has been stated that the dispute at hand is the very reason why guidelines and procedures have not yet been established.

(161) I support this approach. FeFo must of course adjust its management to the Finnmark Act section 27, so that necessary regulations are carried out in accordance with the rights established through the report of the Finnmark Commission. However, the further procedure in this regard is not an issue in this case.

(162) *Is the recognition of the rights of use and the management of the natural resources in accordance with provisions of international law?*

(163) The next question is whether the protection of the inhabitants' rights of use, with the description I have given of the relationship to FeFo's management authority, is in accordance with Norway's obligations under international law.

(164) I find it clear that no violation has been committed of ICCPR article 27. This provision concerns the denial of minorities', including indigenous peoples' right to enjoy their culture. I confine myself to referring to the statement of the UN Committee on Human Rights in *Howard v. Canada* 26 July 2005 para 12.7. Here, the Committee applies the principle that a violation will not have been committed unless the measure entails a "de facto denial of" such a right. When the contents of the rights of use are recognised as set out in the Finnmark Commission's report, I cannot see that FeFo's management authority, as I have described it, means that any right to enjoy one's culture has been denied.

(165) I will now turn to the ILO Convention no. 169.

(166) As I have pointed out, this Convention is partially incorporated by the provision in the Finnmark Act section 3. To the extent the Convention has not been incorporated, it will have significance through the presumption principle. This means that if provisions in the Convention give rights to the inhabitants beyond those I have already described, it will be necessary to reconsider the conclusions I have reached so far.

(167) The ILO Convention no. 169 article 14 regulates indigenous peoples' rights to land and natural resources and the state's obligation to acknowledge such rights. As I have already mentioned, the provisions in the Finnmark Act concerning the investigation of existing rights are worded to comply with the requirements in article 14 no. 2. Nesseby regional society submits that article 14 no. 1 entails that the claim for control and management, as raised in this case, must succeed.

(168) Article 14 no. 1 reads as follows in the English original text:

> **"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."**

(169) Article 14 no. 1 first sentence orders the states to recognise indigenous peoples' rights of ownership and possession "over the lands which they traditionally occupy". The second sentence concerns the protection of rights of use, and its wording contributes to the understanding of the first sentence. What is meant by "traditionally occupy" was discussed by the Supreme Court in HR-2016-2030-A (Stjernøya) paras 80 - 82, with reference to NOU 2007: 13, among others.

(170) There is no absolute requirement that the use has been *exclusive* for the first sentence to be applicable. The use that may make basis for recognition of rights of ownership and possession must, however, be exercised by the group of people asserting the claim. Nesseby regional society has submitted that when assessing the inhabitants' rights, one must also consider the use of the reindeer herders, since the claim submitted concerns recognition of Sami rights. I do not support this. When a claim for certain rights is submitted by the inhabitants of a specific area, it must be these inhabitants' use that could possibly make basis for rights pursuant to article 14 no. 1 first sentence.

(171) If the inhabitants concerned were to succeed in asserting article 14 no. 1 first sentence as basis for a right of management, their use would have had to be exercised in a way that could give them rights of ownership or possession based on the premise "traditionally occupy".

(172) The inhabitants have not asserted any claim for ownership. In my view, such a claim would also have been groundless. I refer to the use of the reindeer herders and the other inhabitants of the disputed area. This use is of such a character that there is no basis for concluding that the disputed area has been "traditionally occupied" by the inhabitants represented by Nesseby regional society. Moreover, when applying article 14 no. 1 first sentence, one must also consider the private-law dispositions of the state in the area. In this regard, I refer to HR-2016-2030-A (Stjernøya) para 105-106.

(173) Nesseby regional society has mentioned the restoring function of article 14 no. 1, meaning that temporary control exercised by the state or others over areas traditionally occupied by indigenous people will not hinder application of the article.. In principle, this view must be correct and is supported by the preparatory works of the ILO Convention no. 169. The issue is discussed in NOU 2007: 13 page 232. However, I will not address this any further considering the circumstances in the case at hand. From what I have seen, both the use of other groups and the state's activities have been going on for hundreds of years.

(174) Consequently, I find that the rights of the inhabitants are rights of use comprised by the ILO Convention no. 169 article 14 no. 1 second sentence.

(175) With such a starting point, Nesseby regional society has argued that the management system in the Finnmark Act does not meet the requirements of the Convention for control over the rights of use and participation in decision-making processes.

(176) According to the wording in article 14 no. 1 second sentence, the rights of use must be safeguarded. This is further explained in article 15 no. 1:

> **"The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources."**

(177) Nesseby regional society has also referred to article 7 no. 1 and article 6. Article 7 no. 1 reads:

> **"The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."**

(178) Article 6 orders the authorities to consult "the peoples concerned" in connection with measures that "may affect them directly". Such consultations must take place in "good faith" and "with the objective of achieving agreement or consent to the proposed measures".

(179) The Sami Law Committee has, in NOU 2007: 13, on page 218, made the following summary of the obligations set out in the ILO Convention no. 169 article 6, 7 and 15:

> **"Consequently, it would be natural to regard indigenous peoples' right to consultation and participation under the ILO Convention article 6, 7 and 15 as an effect of a *joint obligation*, which compels the states to consult their indigenous peoples and ensure that they, through genuine consultations and otherwise, can actively participate in decision-making processes in cases that may directly affect them."**

(180) In the case at hand, the issues concerning the provisions of the Convention are primarily whether the inhabitants' rights of use are adequately safeguarded, and in this regard whether the management system described meets the requirements for participation in decision-making processes. By the Finnmark Commission's conclusions, the rights of use have been protected with the contents I have described earlier. What needs to be considered more closely are the decision-making processes connected to the management of the natural resources pursuant to the provisions of the Finnmark Act, and in that respect the Sami people's participation in the drafting of these provisions.

(181) As I have described, the Sami Parliament played a central role in the making of the Finnmark Act. It cannot be doubted that this process satisfied the requirement in article 6 concerning consultations in good faith. During the legislative process and the consultations with the Sami Parliament, the Committee on Justice was particularly preoccupied with the compliance with international law. In Recommendation to the Odelsting no. 80 (2004-2005) page 15, the Committee's majority stated:

> **"This majority finds that with the supplements and adjustments this majority proposes with regard to the Government's draft bill, the new Finnmark Act will clearly meet Norway's obligations under international law."**

(182) The changes made during the lawmaking process in the Storting are described in the Recommendation on page 15.

(183) In Proposition to the Odelsting no. 53 (2002–2003), it was first proposed that one of the members of FeFo's board of directors be elected by the King. This member was not to have a right to vote, but function as the chair of the board if no other members obtained a majority of the votes in an election. As for the other board members, three were to be elected by the Sami Parliament and three by Finnmark County Council.

(184) During the lawmaking process, the provision stating that one board member had to be elected by the King was removed. The rules on the election of chairman of the board were drafted so that if no one obtained a majority of votes, which of the six members will be chairman and vice-chairman was to be decided by Finnmark County Council in years ending on an odd number and by the Sami Parliament in years ending on an even number, see the Finnmark Act section 7 subsection 6. In the event of a tie vote, the chair has the casting vote, se section 9 subsection 4.

(185) During the consultations, the Sami Parliament expressed that an arrangement withe an equal number of board members elected by the Sami Parliament and the County Council was acceptable, but had to be considered in context with the proposed voting rules in section 10.

(186) The Finnmark Act section 10 regulates changed use of land and also, among others, matters concerning transfer of real property. The provision's subsection 1 reads:

> **"In matters concerning changes in the use of land, FeFo shall assess the significance a change will have for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial**

> **activity and social life. The guidelines of the Sami Parliament pursuant to section 4 shall be followed in the assessment of Sami interests pursuant to the first sentence."**

(187) The provision in the second sentence concerning the Sami Parliament's guidelines pursuant to section 4 was added during the lawmaking process upon the Sami Parliament's wish.

(188) Section 10 subsection 2 sets out that decisions concerning changes in the use of land require the support of at least four board members if the whole minority basis its opinion on concern for the Sami culture, reindeer husbandry, use of land, commercial activity and social life assessed on the basis of guidelines of the Sami Parliament. If the majority consists of four or less, a collective minority may during the board meeting demand that the matter be placed before the Sami Parliament. These provisions entail that the board members elected by the Sami Parliament have a special opportunity to prevent decisions on changes in the use of land affecting Sami interests.

(189) Section 10 subsection 3 concerns changes in the use of land in specific municipalities with high Sami representation, including Nesseby. If a decision regarding changes in the use of land in one of these municipalities is supported by three board members only, three board members may collectively demand that the matter be reconsidered. In such reconsideration, one of the board members elected by the County Council will resign, which means that the board members elected by the Sami Parliament will constitute a majority.

(190) In working document no. 7 from consultations on the Finnmark Act between the Sami Parliament and the Committee on Justice, the Sami Parliament states the following in connection with a proposed provision, referred to as subsection 7, similar to what later became section 10 subsection 3:

> **"Subsection 7 contains rules on the board's voting and must be read in close context with the Sami Parliament's proposed board composition. The proposed section 10 subsection 7 is part of an overall solution proposed by the Sami Parliament with regard to board composition and management, and the fact that the Sami rights of ownership and use have not been identified, see section 5. The Sami Parliament's proposal is based on both the Government's proposal and that of AP [the labour party], and is to be regarded as a compromise between them. Another purpose of our proposition is to meet the requirements in international law. The Sami Parliament has chosen to support the proposition on a general management of the land, provided that the identification issue is solved in a manner acceptable to the Sami people. In addition, this particular admission for the Sami Parliament's appointed representatives to have a final say in matters concerning these crucial Sami areas of use will contribute to bringing the draft bill closer to the requirements in international law.**
>
> **…**
>
> **Hence, the Sami Parliament has stretched far with regard to the requirements in international law, see the analyses by the Sami Law Committee's international law group and Graver/Ulfstein. The solution is preconditioned by the implementation of international law in all other areas of the law, such as the provisions on purpose, area of application, the relationship with international law and existing rights, guidelines, limitations in control, voting rules for certain Sami areas, substantive rules on area protection, appointment and mandate for the commission and special court and appellate body."**

(191) This must imply that the Sami Parliament's view was that the Finnmark Act, as it was worded following the consultations between the Sami Parliament and the Standing

Committee on Justice, met the requirements expressed by the Sami Parliament in my quote.

(192) As I have already mentioned, it cannot be so that it was a condition for the Sami Parliament that FeFo's management was to be temporary pending completion of the investigation process.

(193) What I have reviewed shows that the Finnmark Act's management system gives a considerable Sami representation and sets conditions for Sami support in order for certain decisions to be adopted. The system established by the Act is based on extensive consultations with the Sami Parliament as representative for the Sami people.

(194) Nesseby regional society has mentioned that the management system does not give the inhabitants of Nesseby a right to participate in the management exercised by FeFo. However, I find that the requirements under the ILO Convention in this regard are met with the right of participation for the Sami people in decision-making processes pursuant to the Finnmark Act. The provisions of the ILO Convention cannot be understood so as to require that the inhabitants of any geographic area have a right to participate in decisions concerning the general management of the natural resources in that particular area.

(195) The position of the inhabitants is secured with the recognition of their rights of use and must be respected the way I have described. It will be necessary to carry out consultations between the rights holders and FeFo, as accounted for by FeFo's counsel before the Supreme Court. Moreover, it follows from the Finnmark Act section 18 that FeFo is to give the rights holders of an area prior notice and admission to make a statement before FeFo makes a decision that may have legal or practical consequence for them.

(196) Nesseby regional society has also made submissions before the Supreme Court regarding FeFo's specific management. As I understand it, it is held that the management authority in various contexts is not exercised in accordance with international law. However, the case at hand concerns the clarification of existing rights. Claims concerning FeFo's specific management would have to be submitted through a general civil action.

(197) Consequently, I have concluded that the inhabitants' rights of use have been recognised and safeguarded in accordance with ILO Convention no. 169 and other provisions of international law.

(198) *Final remarks*

(199) Against this background, I have concluded that the appeal has succeeded. Nesseby regional society cannot be supported in its claim for the right of management of the natural resources concerned in the case at hand. With the success of the appeal, the derivative appeal concerning fishing in Bergebyelva can automatically not succeed.

(200) FeFo has submitted a prayer for judgment in favour of FeFo. The effect thereof will be that the conclusions of the Finnmark Commission's report remain unchanged.

(201) Yet, this will be with one exception regarding the inhabitants' elk hunting. On this point, there was dissent in the Finnmark Commission. The Finnmark Land Tribunal endorsed the minority of the Finnmark Commission and stated in its judgment on page 68:

> **"The Finnmark Land Tribunal agrees with the minority of the Finnmark Commission that the elk hunt in the disputed area is comprised by the original right to hunt acquired by the local inhabitants of Nesseby, see the Finnmark Commission, Report Field 2 Nesseby (2013), page 111."**

(202) The Land Tribunal has in item 2 of its conclusion of judgment, in comparison with item 1, given Nesseby regional society a right to "manage big-game hunting". Although elk hunting is not expressly mentioned in the conclusion of judgment, the quote from the Land Tribunal shows that big-game hunting includes elk. This must imply that it has been decided by the Land Tribunal's judgment that the inhabitants' established right to hunt also comprises elk.

(203) I cannot see that FeFo's appeal covers this part of the judgment, which means that the issue is finally settled. Hence, the Supreme Court has not had occasion to consider whether the Land Tribunal's application of the law in this regard is correct. Based on what has been pointed out, the conclusion of the judgment must entail that FeFo has succeeded to the extent the Land Tribunal's judgment has been appealed.

(204) FeFo and the interveners have asked for costs in the Supreme Court. The case concerns issues of principle, and there are weighty reasons for exempting the respondent from liability, see the Dispute Act section 20-2 subsection 3. I note that both interveners are on legal aid.

(205) I vote for this

J U D G M E N T :

1. Judgment is given in favour of the Finnmark Estate Agency to the extent that the Land Tribunal's judgment has been appealed.

2. Costs in the Supreme Court are not awarded.

(206) Justice **Utgård**: I agree with the justice delivering the leading opinion in all material aspects and with his conclusion.

(207) Justice **Tønder**: Likewise.

(208) Justice **Endresen**: Likewise.

(209) Justice **Indreberg**: Likewise.

(210) Justice **Bårdsen**: Likewise.

(211) Justice **Webster**: Likewise.

(212) Justice **Matheson**: Likewise.

(213) Justice **Normann**: Likewise.

(214) Justice **Noer**: Likewise.

(215) Justice **Bull**: Likewise.

(216) Justice **Kallerud**: Likewise.

(217) Justice **Bergsjø**: Likewise.

(218) Justice **Arntzen**: Likewise.

(219) Justice **Falch**: Likewise.

(220) Justice **Berglund**: Likewise.

(221) Justice **Matningsdal:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

1. Judgment is given in favour of the Finnmark Estate Agency to the extent that the Land Tribunal's judgment has been appealed.

2. Costs in the Supreme Court are not awarded.