November 26, 1999

Meeting of Indigenous Bar Association

Plenary Session I -- 9:55 a.m.

THE CHAIRMAN: Part 1(a) is a discussion of the case itself; basically a case brief. It looks at the facts, the issues, and there's a bit of an analysis of the law.

The part that I will focus on is from page 12 to 15 of the paper, if you want to get that in front of you. It's a discussion of the policy implications of *Corbiere* specifically. There will be a bit of an overlap between that and the sections Diane will cover, but that's okay.

I want to make it clear that these are policy implications. Some may be legal implications in that they're related directly to the ratio or the central holding of the case. Some of them may be related or arise out of non-central or the obiter aspects of the case, and some of them may be just using some logic to suggest what the implications are of some of the things the judges are saying.

The first policy implication is that there's a new ground of discrimination which is created in *Corbiere* and it's called aboriginality residence, or off-reserve band member status. That's a clear legal ruling from the case. Section 15 of the Charter lists specific enumerated grounds, but section 15 isn't necessarily limited to just those enumerated grounds; it also allows for analogous grounds. And the court in *Corbiere* found that aboriginality residence or off-reserve band member status is an analogous

ground, and it will forever be now an analogous ground of discrimination. As the court says, it will stand as a constant marker of potential legislative discrimination. Whether the challenge is to a government tax credit, a voting right, or a pension scheme. That is certainly a significant policy implication.

Number (ii) Recognition of the Importance of Aboriginal Identity: A main theme of the case is the issue of culture and cultural identity. It comes through in both aspects and both the minority and majority judgments in the case. To be honest, it's not hard-edged law that is really easy to get a handle on, but it's very important in the case. It goes to the whole question of human dignity, which is sort of an underlying principle in section 15.

The court refers to the Royal Commission on Aboriginal Peoples saying that the assumption has been that once an aboriginal person leaves the reserve he or she gives up her identity, and the court found that to be objectionable. One of the things that occurred to me was -- and if you look at some of the tax cases -- one of the reasons they deny off-reserve tax exemption is that whole mainstream argument. So they seem to be flip-flopping on this point, and I think the court probably deserves some criticism itself for contributing, certainly, and very recently, to that whole issue. The identity factor is certainly an important one.

Number (iii) Recognition that the Crown Played a Significant Role in Creating the Problems Affecting Off-reserve First Nation Members: The court points to past policies, does a bit of a historical analysis, and finds that especially women,

through the effect of previous discriminatory provisions of the Indian Act, were forced away from reserves. The point of this implication is that in fact the Crown played a significant role in this, and there's no disputing that, and therefore there should be, if not a legal, then a moral obligation to provide adequate resources to alleviate these problems.

Number (iv) Off-reserve Residents have Fundamental Interests in First Nation Governance: A central point in both majority and minority decisions. The interests identified were in surrenders of land, the allocation of land to band members, and an interest in governance functions, particularly the by-law making powers. The court even went as far as to say that band councils are the vehicle through which issues like land claims and self-government agreements are addressed and it's through band councils that people participate in organizations like the AFN. So that also is a significant policy issue. Those interests the court identified as affecting all band members, First Nation members, and not just those on reserve.

(v) Off-reserve Residents do not have to be Treated Identically to On-reserve Residents: The court clearly said that there are some things, and most of the things in the Indian Act affect primarily on-reserve band members, and it made it clear that that's specifically the case. Therefore, because their interests are different, it's possible and logical and constitutional to treat off-reserve members differently from on-reserve members.

(vi) Balancing the Interests of On-reserve and Off-reserve Members: Here the court clearly said, in applying the section 15 Charter test, that the problem with the current regime in section 77(1) of the Indian Act is recognizing that there's different interests in off-reserve and on-reserve members. The act goes too far in excluding off-reserve members totally from any participation in on-reserve governance. So the court said what is required is an electoral process that will balance the rights of on-reserve and off-reserve members.

Specifically it suggested two-tiered councils, possibly with reserved seats for off-reserve members, and double majority votes on some issues. Madam Justice L'Heureux Dubé suggested that the solution may be found in the customary practices of aboriginal bands.

Number (vii) -- we went through this last night. Diane doesn't know this system, but (vii) means 7 -- Significance of Aboriginal and Treaty Rights -- Customary Governance. The *Corbiere* case, of course, went through the Trial Division of the Federal Court and the Federal Court of Appeal. One of the problems in this case was *Batchewana* and wasn't there at the trial and they didn't present evidence on the aboriginal and treaty rights issues, which was a little bit unfortunate because those issues wound up not getting ventilated properly in the court. The courts did say, "Sorry, we can't deal with this issue because there wasn't proper argument and there wasn't evidence." But they did leave an opening for aboriginal and treaty rights to be considered in the future, and also section 25 of the Charter.

The majority of the court said that if another band could establish and aboriginal and treaty right to limit voting or restrict voting, that right would simply take precedence over the terms of the Indian Act.

(viii) Priority of Individual Rights over Collective Rights: This applies to the issue of remedy. The remedy that the court chose was a broad national remedy, a general declaration of invalidity of those words in section 77(1), and the Federal Court of Appeal had limited the remedy to *Batchewana* specifically. The court chose to go broadly rather than taking a band-by-band approach on the application of section 15. The reason the Federal Court of Appeal limited the remedy to *Batchewana* was to allow First Nations in the future to raise the issues of aboriginal treaty rights that weren't properly raised in the *Batchewana* case.

One of the implications of that is, I believe, that it gives some priority to individual rights over collective rights, given that First Nations and aboriginal peoples need to prove aboriginal and treaty rights on a band-by-band basis. There seems to be fundamentally, to me, a little bit of unfairness in that.

(ix) First Nation Jurisdiction over Off-reserve Members: Here the court recognized the right and interests of on-reserve or off-reserve members in the governance of First Nations. They talked about an interest in programs and services, and even the salaries of chiefs and councillors. To me, logically this implies that First Nation governments then must have some corresponding responsibility and jurisdiction over off-reserve members.

(x) Administrative Costs and Inconvenience are Unlikely to ever Constitute Justification For Discrimination Against Off-reserve Members: In this case, one of the arguments made regarding the section 1 justification for discrimination that was found in this case was that it will be too expensive and it will be very difficult administratively to implement total across-the-board equality vis-à-vis off-reserve and on-reserve members. The court rejected that, and quite swiftly, I would say.

For one thing, they said, "You really didn't produce proper evidence to establish administrative inconvenience in the costs", so they didn't accept that argument. There was some indication from the court that administrative costs and inconvenience are unlikely to ever be a valid justification for excluding completely off-reserve members. Justice L'Heureux-Dubé specifically rejected as a ground of discrimination the possible failure in the future of the government to provide aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights.

The implication from this is that the federal government will be required to provide adequate resources to enable First Nations to establish the capacity to service off-reserve members and enable them to participate in First Nation elections. Again, this isn't a legal finding. It's not an absolute requirement but, if you put two and two together, it's kind of a logical extension.

(xi) Land Claims and Self-government Agreements: The majority didn't comment on this, but L'Heureux-Dubé made the point that all band members, whether

they live on reserve or off reserve, have an interest in representation in processes such as land claims and self-government negotiations, meaning that it's band councils that represent their people in those negotiations and, in representing those people, they represent not just on-reserve band members but off-reserve band members as well.

The court didn't say, and the minority judgment did not say, that this means off-reserve band members must approve self-government agreements and land claims agreements, but if there are approval processes in place whereby First Nation members are approving such agreements, then I think it would be very difficult to exclude off-reserve members. Again, it's not a specific mandate of the court; it's an implication.

(xii), Consultations on the Implementation of *Corbiere*: The court gave 18 months to allow consultation to ensure that enough time is given to engage in a proper consultation with not just First Nation peoples affected, I believe, but aboriginal peoples generally.

(xii) The Effect of the Declaration of Constitutional Invalidity on Decisions made prior to and during the 18-month Suspension: This has got to be, I think, the most troublesome aspect of the judgment; the declaration of invalidity made by the court in May of 1999. The court suspended the application of the declaration for a period of 18 months, but there is some authority which says that once a piece of legislation or part of a piece of legislation is found to be unconstitutional, then it was always unconstitutional and is null and void and assumed never to have ever been

enacted. In other words, potentially those words in section 77(1) would be wiped out from the date that the Charter equality rights were in effect, which is April 17, 1985.

That's Professor Hogg's view, not on this, but his view as to the effect of a declaration of invalidity; that it's retroactive pretty much. I refer to this in the analysis under remedies in *Corbiere*. Professor Roach, on the other hand, approaches it slightly differently. He calls the remedy a declaration of delayed invalidity and calls it a form of a prospective remedy. In other words, it operates only from a period 18 months from now and, by implication, doesn't go backwards.

I guess the end result is that there's some question as to what the effect of the judgment is. The court isn't clear on it.

In the substantive part of the discussion on *Corbiere* I talk about some of the types of decisions that might be potentially affected by that, and those include elections themselves in which off-reserve members were excluded from voting, potentially; decisions by those elected authorities, potentially; surrenders, potentially; the approval of band membership codes under section 10, potentially.

With regard to the 18-month suspension period, L'Heureux Dubé comments about the status of rights during that period, which also raised some questions. She says that the suspension of the effect of the declaration is not a suspension of non-residence equality rights; decisions must still be made with respect to those rights. So again it creates a bit of uncertainty as to what happens during that

18-month period. I thought it was a suspension of the declaration of invalidity, but maybe not.

So those are the implications directly from *Corbiere*. There may be others. Those are the ones that I could come up with.

Diane will now review the remaining five policy implications regarding elections generally.

MS. CORBIERE: Good morning everyone. My name is Diane Corbiere, for those who don't know me. I'm from the West Bay First Nation on Manatoulin Island. I would like to respond to Dave's comment about the xi and ix. If any of you know Dave, you know that every once in a while you have to throw him a little cookie and let him demonstrate his wisdom. I actually know the difference.

Moving right along, as for as the paper, we've basically extracted our paper from the paper that was prepared for the AFN, so all the footnotes aren't in order. Also, I would like to reiterate what Dave said; this is just a discussion guide and we thought it might assist in the discussions today, so it's fairly open. We just thought this would be a good way to open the meeting.

On aboriginal and treaty rights, you have to look at aboriginal and treaty rights being important from many perspectives. One of them is the federal government because of the fiduciary obligations which arise from these rights, so there's a duty to ensure that its laws and actions do not infringe aboriginal and treaty rights. So the

federal government has something at stake when considering what to do with the *Corbiere* decision and what to do with respect to elections.

It also has an effect from aboriginal peoples' perspectives. It's fairly clear that the Indian Act has fundamentally altered the traditional leadership selection systems that existed within our nations since time immemorial. You have to think of that when we're moving forward and looking at this decision. We've heard expressions in the think tanks that were developed for the AFN-LTS by the people who were participating that one of their preferred approaches is to revive their traditional leadership selection processes, and I think if anyone reads anything that has been done on these studies with respect to election and leadership selection, this has been a statement made by First Nations for a long time. It's not anything new.

The other thing is, it seems to be a ripe opportunity, given the common law and the jurisprudence from the Supreme Court of Canada in Van der Peet when they talk about traditional systems like customs, traditions and practices of First Nations. So, again, for First Nations to revitalize these practices, it seems that there's a message from the Supreme Court of Canada that this is the time to do it. So if there was any uncertainty as to how the Supreme Court of Canada would deal with the aspirations of aboriginal nations, that seems to send a positive message.

Again, the one thing we could say about the *Corbiere* decision with respect to aboriginal and treaty rights is the councils chosen by custom are not, strictly speaking, affected by the *Corbiere* decision because section 77(1) does not apply to

them. This was noted again, as Dave indicated earlier, by both the majority and minority decisions.

However, I'd like to add that there are some uncertainties with respect to those First Nations who have reverted or converted to custom, but that's somewhat debatable.

The next issue is international law. Looking at the developments in the international fora with respect to indigenous peoples and indigenous rights is an important policy consideration. Some of the developments in the international fora are more respectful of the understanding of the rights of indigenous peoples in Canada. So we look at those developments and when we consider policy options we have to inform our clients, whether it be aboriginal reserve-based or urban-based or other aboriginal non-status groups, of what is happening in the international fora. We look at the International Covenant on Civil and Political Rights. There's some debate as to the traditional forms of leadership selection. You think of basic human rights. The requirement of "one vote, one person" in some cases might be not compatible with the traditional leadership selection processes that existed in the past. So these things will have to be dealt with when aboriginal nations or First Nations are thinking of how to address the *Corbiere* decision.

Also, there is the Declaration of Rights Indigenous Peoples. Indigenous peoples have the right of self-determination. This means they can choose their political status and the way they want to develop. That's right in the declaration. So

these things of self-determination and self-government are currently being debated, and quite favourably, for First Nations.

In fact, some people will be aware that recently the Human Rights Committee was very critical of the federal government with respect to self-determination vis-à-vis aboriginal peoples in this country, and that's discussed further in the paper.

Also, there's currently a treaty study, a Martinez study, and some of the conclusions that he's made in his report are very favourable to First Nations as far as the legal relationship between nations within Canada and the federal government in its current Crown state.

The next policy consideration we touched on is self-government, self-determination and nation rebuilding as far as in the domestic sense in Canada. I think the IBA has made representations or a submission to the Senate when we were talking about this concept that RCAP came up with of nation rebuilding, and basically what they were saying is that the federal government should come up with this independent body or source to tell First Nations how they should be reconstituted. This point is being criticized by members of the IBA and other academic authorities because it doesn't seem to be consistent even with the Canadian jurisprudence, which talks about the current constitution of First Nations and the way that the communities are developed is what RCAP said that they shouldn't be, when they were trying to suggest that we should joining nations.

According to RCAP, only nations reconstituted in the manner proposed may exercise rights of self-determination and self-government. So even Paul Chartrand, a former commissioner, at the last conference of the IBA, Building the Momentum, recognized that this is no longer palatable.

Again, you can look at some of the conclusions made in the Martinez study in the international fora with respect to indigenous rights to several government and self-determination, and they seem to be more consistent with what aboriginal nations understand their beginning relationship with the Crown to be, as opposed to the federal government's position on what self-government rights are and self-determination rights are.

Appeals and dispute resolution is a policy consideration for both first nations and the federal government because, first of all, there's an extraordinary number of leadership selection and election disputes in First Nations across the country. We took this out of the paper, but you just have to look at any law book or QuickLaw on-line and look at what is the most jurisprudence and you will see that it has to deal with elections and leadership selection disputes.

Secondly, current mechanisms to deal with appeals and dispute resolution are inadequate. Again, this is heavily documented. If you look at any of the reviews done within the department about the current appeals mechanisms within the Indian Act, they're replete with problems.

I will not go through all of that. I will move on to Fiscal Implications at page 29. In our view, this is probably one of the most important policy considerations. Fiscal implications are critical, key, and undoubtedly drive the decisions of most policy matters, so this is an important detail. I guess we could say that there's some point to be made that the federal Crown, specifically the Indian department, has to bear some considerable responsibility for the fractured and tenuous state of our First Nation governance in Canada. RCAP itself fully documented the department's systematic attack on the governments of aboriginal nations. One point that they make is that, after almost 120 years, the Indian Act has taken its toll, not only in the quality and the basis of the relationship between Indian nations and the Crown, but also with respect to the internal organization of Indian and treaty nations.

In the same way that there was an apology made with respect to the residential school issue, perhaps an apology is owed with respect to the breakdown of the governance in First Nations. Again, you look at any of the research that has been done and you look at what First Nations, urban and on reserve, have said about the breakdown of their traditional systems of governance being one of the biggest violations, and the lack of respect for the governments that existed and their original relationships with federal Crown is probably one of the biggest problems that we face.

Again, as far as fiscal implications, as we have seen from some of the things that Dave was identifying, and I'm sure that you've all read the *Corbiere* decision and started to think that this will be very expensive, and you think about all of

the policy and legal uncertainties that that decision has raised, it is a really big concern of mine that it will be borne on First Nations to have to be fighting this out band by band. It will only cause more internal political strife. Their resources are already put to the max. The message of the Supreme Court of consultation should really be given serious consideration for trying to ensure that the off-reserve and on-reserve members of First Nations are adequately dealt with when we consider the money that it will cost to try to ensure that they will not be in the courts. It's funny to say that as a lawyer, but some of us would really like to keep them out of the courts and this is an opportunity for us to ensure that. A consultation process that includes them all is really important.

We also mention some of the good things that the AFN has been working on with the Department of Indian Affairs, and RCAP has said it as well, talking about the money it will cost. Also, once we start implementing how to address the *Corbiere* decision, the capacity needs with reconciling and re-establishing these governments on First Nations. Things like the aboriginal governance transition centre that was recommended by RCAP is really a must because it will take some time for them to rebuild their communities and to integrate this *Corbiere* decision into those communities.

The other thing is justice and dispute resolution bodies. This would be an important expense to try to keep First Nations and their members out of the court and support them in developing healthier governing systems.

That's basically it. I tried to be brief.

THE CHAIRMAN: I want to elaborate a little bit because maybe we haven't elaborated enough on the aboriginal treaty rights aspect. I'll refer you to page 15 of the bigger document; the last paragraph of page 15 and the first two paragraphs of page 16, aboriginal and treaty rights. Leadership selection and elections find expression as aboriginal treaty rights in two way in a broad right of self-government. In the treaty context, the legal argument is that the right of self-government continues as a residual aboriginal right that hasn't been extinguished by treaty, or, in fact, treaties actually recognize the right of self-government because they were signed as treaties with nations. So that's the treaty aspect.

On the aboriginal rights side, there has been a recognition in the jurisprudence that aboriginal peoples were here as organized societies with their own laws and customs, and thereby kind of an implicit recognition of the right of self-government.

The Supreme Court of Canada, particularly, has not recognized explicitly and definitively a right of self-government. They side-stepped it in the *Gitskan* case, *Delgamuukw*, and they side-stepped it in *Shawanaga*, but in *Sioui* they did recognize that Indian nations that were here were independent nations. So there seems to be a foundation there for that right to be asserted in the future.

The second way in which leadership selection and elections find expression as aboriginal treaty rights is through customs, and this is an area which the

court has accepted in the past. Courts have recognized customs, customary laws. It's quite accepted in the jurisprudence today.

Section 2(1)(b) of the Indian Act recognizes, as well, the existence of councils chosen according to custom, and I guess the point also is that in cases like *Van der Peet*, in recognizing things like fishing rights, they focus more centrally on customs and as to whether or not those customs were integral to the culture of that society. So customs related to leadership thereby then are aboriginal rights.

One case that's noted there is the case of *Bone and Sioux Valley* where Mr. Justice Held held -- he actually said, in referring to 2(1)(b) of the Indian Act that bands exercise inherent power in exercising customary power.

I thought I'd elaborate on that aspect of it because I wasn't particularly explicit on it. That's the aboriginal treaty rights. That aspect of it is of particular interest to me.

Having said that, we're done. Sorry if I we've droned on a little long, but hopefully you have food for thought there now.

(Recess)

Plenary Session II -- 12:10 p.m.

MS. BREWER: I'll try to make this brief. We had some very good discussions around the issues that would arise.

We were dealing with the rights of members. The first question related to what are the implications -- or we sort of defined it in terms of what are the implications of the decision and how did it relate to the members. The first thing that we identified was the issue of equality of treatment. There was sort of a range of opinions on this, but we felt that there was one thing that was very clear and that this is obviously going to ensure that members have equal voting rights. So voting is clear, or we felt it was fairly clear, but then as you can see later we kind of backtracked and clarified that a bit.

There was some discussion around the provision of services. We were not clear whether this would relate to service provision or how that would impact on that. It was kind of a grey area. There were arguments on both sides of that. There was a statement that equality didn't necessarily equate with sameness, and that was supported in the decision where the court talks about the potentially different interests of on- and off-reserve people.

We also discussed the idea that the impact of elections is going to be different depending on the type of election. We identified three kinds of elections that were in the Indian Act and, in addition to that, there was also traditional leadership

selection processes which in fact may fall totally outside of this decision because of section 25.

The three types of elections were section 77; elections which are strictly under the Indian Act; and there are two kinds of custom elections, one which are the conversion to custom elections and one which are the section 2 which have never converted to custom but have always been recognized as custom elections within the Indian Act.

The other impacts would have to do with band council decisions, and there's a variety of decisions which have impacts on off-reserve people. We didn't really get into those. We just sort of generally said there were a number of areas.

There were also, we felt, federal-provincial implications, and we sort of looked at it in terms of what responsibility came from the province and what responsibility came from the federal government. There was discussion about the overall fiduciary relationship of the Crown to First Nations people and issues surrounding that.

There was some discussion about the fact that this decision made a real linkage between membership and representivity government. There was definitely a relationship defined by this decision, or, I don't know whether it was defined, but it certainly talked about rights of members or members of a band and their government, and it talked in terms of membership, not in terms of status.

Then there was issues relating to the standards of services provided to on- and off-reserve people, and there's now sort of a grey area in terms of does aboriginality residence mean that services have to be provided at the same standard on and off reserve.

In terms of custom governments, we sort of had a discussion about that term because it was our sense that custom governments may in fact be aboriginal governments or traditional governments, or in fact they may be the kind of governments that are recognized under the Indian Act as sort of today's standard custom. And we felt there may be a difference in the tests that would apply to each one of these.

I don't really know what that says. Oh, implications may be zero, that was it. If they are in fact seen as traditional governments, it's quite likely that this decision won't have any impact on it. So the question then becomes whether section 15 or 25 will impact on this, and then we started to get into how would you go about proving that. It's sort of the evidentiary question about what is a true custom government or what is a true custom code in accordance with aboriginal and treaty rights standards and the idea of arguing whether it is in fact a custom code, and you'd have to sort of prove that, I guess.

We also talked about whether an evolutionary custom would withstand this decision, so we were sort of getting into the idea of at what point in time do you start to measure a custom. Do you start it after the impacts of the Indian Act have already

been felt? There was some discussion in this decision that would indicate that perhaps that is not really where you would start, that in fact that would not be held up by a section 25 argument. But, on the other hand, there were some that sort of feel that a custom is an evolving thing and, as such, it would withstand arguments like that.

We used some examples regarding hereditary leadership and that would not withstand, probably, a section 15 argument, but it would definitely be a traditional kind of argument, and how would the implications of those sorts of traditional systems which don't fit within the Charter of Rights and Freedoms, or would not stand up to the Charter of Rights and Freedoms, be affected by this?

There was some discussion that there were policy implications because right now custom is defined in policy terms, I guess, within the department, but there was some discussion about the idea that the decision relates to the Indian Act and not to aboriginal and treaty rights, particularly if it's defined in terms of the customs that are recognized by the department or by the federal government.

And then, lastly, we got to a discussion about the mechanics of voting and what are the rights of the individual in terms of some of the rights to access and participate in elections. So how far do you have to go to provide notice, to provide an ability for an individual to participate in the vote. And then we talked about how votes would be collected. I'm not sure what that says.

The next one is equality of access and entitlement, and on that one we felt that there were issues related to whether non-residents would have the same kinds of

entitlements as residents. And again I'm not going to talk too much on that, I'll let my group, because I forget what the discussion was on that one really.

We also talked about how membership and status are distinguished in the act, so status is not dealt with. It is strictly a political association between members and their government as opposed to the idea of status and voting.

Now, the other big implication we found was in terms of the financial implications, which are, of course, right now, status based and don't necessarily reflect membership. And there were also, we felt, potential impacts on service delivery, and I guess that relates back to the first; equal access and that sort of thing.

We also talked about the reverse impact of the on-reserve membership, and this was basically the issue of people on reserve being concerned, particularly where they were outnumbered by people off reserve, that those folks could in fact surrender the reserve land out from under them; basically that sort of fear. There were surrender issues -- that's that one -- and there was also the issue of running for office. For instance, does this decision then mean that the council -- chiefs could always be elected by off reserve -- you could be off reserve, or you could be Nelson Mandela or Jean Chrétien and be chief of the community, but now is the same thing there for council? Do they go hand in hand? Do you have to live on the reserve to be a councillor? That was that issue.

Is there anything else or any clarifications from my group?

MS. NOONAN: We'll have a chance to clarify some of the issues in Q and A.

We have Vina Starr next who will speak to some of the philosophical issues that came from our group.

MS. STARR: Our topic was governance. of the four options that have been presented to us, we applied each of those four in a general haphazard way to the fundamental ratio, which is that the words "ordinarily resident off the reserve" offend section 15. As a preliminary historical fact, I pointed out to my group that, of the 197 bands in this country, or tribes, whatever you call them, First Nations, approximately half or 50 per cent of them are custom election councils. I'm speculating that of that 50 per cent who are custom, probably another 50 per cent have always been custom, like Poundmaker. Poundmaker has never, ever elected a single council under the Indian Act. So that was the first preliminary factual piece of knowledge that we need to know in order to informedly analyze the consequences and ramifications of each of these four options, and that's what we are charged to do, to do it systematically.

The other point that Albert brought out in our group is that, quite apart from the distinction between Indian Act elected council and a custom council, he is a treaty Indian and, despite being a treaty -- well, perhaps because of being a treaty Indian, the Indian Act regulations have never applied to him and he, being Treaty 6, totally discounts the relevance of this decision to his people, treaty people. Albert can

speak for himself when he comes back in. I think his analysis is correct in that respect.

In other words, if Her Majesty needed the alliance of the tribes and secured that alliance through treaty by negotiating, by treating, from one nation to another, then presumably all of the inherent aboriginal rights which adhered to the Indian tribe were maintained under the terms of the treaty after that nation signed with the conquering nation, if that's what we want to call it.

So there are two kinds of Indian governments that we have identified just in the first five minutes to which this problem may not apply, strictly speaking. I say "strictly speaking" because that doesn't mean that the problem has been solved.

For example, in the treaty nations, Mr. Angus and all the other treaty people who take the view that they have retained all of their inherent aboriginal rights in their treaty are going to need to address their electoral regulations under their own jurisdiction and pursuant to their own power to self-govern.

Before I come back to this I want to flesh out an idea that seemed to be coming clearer as we spent that hour in our discussion, and again this idea comes from Albert. In deference to us old ones, I will say that those of us who have been around and practising for a long time often can reach back into our knapsack of experiences and, as lawyers, we often feel that we're charged to come up with innovative solutions, but a lot of times history provides our solutions.

Albert pointed out that in his community -- he's from Thunderchild, but I think he serves a large number of bands, First Nations, tribes, maybe just inside Saskatchewan, but perhaps outside as well. He has been practising now for 15 years and he said that, in his experience, for those bands that are an Indian Act council there may be too much ingrained fear of change in the community, but he used the experience of our communities with Bill C-31 as an example of how to deal with the fear of change in the community.

He said that was just workshops and that all the ordinary folks in the communities would come to these citizenship code workshops and they'd find out what their aboriginal and treaty rights were. These are folks that have grade six, grade seven, great eight, knew what these words were but could never identify an aboriginal right, except maybe fishing or hunting, if they fell over it.

So this kind of a community educational program is one thing that Albert identified would serve to bridge this gap which creates the fear identified in Carolann's group. This is the fundamental fear, I think, that because the majority of our Indian communities have lost their ordinarily resident people because there is no work, the majority of our people are now off the reserve, and the fear on the reserve is going to be that us educated "white Indians", they're going to call us, are going to vote to dispossess them of their land and things like that. This is what has to be bridged.

If we were to take the first option, for example, and do nothing, of course that would only continue to create an injustice to those Indian Act bands, but it doesn't

address the problem of these two inherent jurisdiction groups of people that I call them; the treaty people and the ones who have always had their own custom governments. And perhaps the end solution in this community education exercise is for our people to start seriously thinking about their law and where their law comes from.

Albert, for example, described the idea of what does it mean to be Cree, to belong to Poundmaker, for example. He said why don't we have a preamble, sort of maybe a tribal constitution with a preamble which states what the values of being Cree are.

Any constitution is a plain, straightforward recipe for government; that's all, and it generally only ever has three or four, maybe five, parts. The first part usually says, "We the people, we the Haisla, this is who we are," just like Albert wanted to do in his preamble for Poundmaker. The second part usually says "This is our land, this is what we own." The third party usually says, "These are the laws", and of course I'm using the American model where the people give the power to their leaders.

Now, in many of our traditional governments, and particularly on the West Coast, that was not traditionally true. The power was exercised from the hereditary old women and old men and the people were told what to do.

My mother is 77. She is still imbued with, "If our hereditary chief says this is what we're going to do, we don't question that, that's what we're going to do." Now,

there is a conflict between mother's method and mine, and she helped put that conflict there because she and father insisted that us three kids get an education and think for ourselves. So now I have to say, in the most respectful way to my mom, "But Mom, what if Chief Jasee is wrong? Then what are we going to do? You'll be dead, we'll bury you, but we're going to go on, Mom."

To those lawyers among us who would hang their hat on the test laid down in *Van der Peet* as to what is an aboriginal right worth recognizing in law I say pooh. Aboriginal laws change. That's what the common law is. Why are our laws different?

So, we take Option One and we do nothing, and it will only, in the long run, affect perhaps one-quarter of the 700 tribes and First Nations in our land. If the federal government does delete those offending words, then the logical result, based on the consensus among us, is that there will be the fear that Diane has that there will be an internal fight within the communities between the "offs" and the "ons", and the fear that the "offs" will dispossess the "ons".

My thinking about that is twofold. Firstly, the feds should fess up to the fact that they created this chasm between the "offs" and the "ons", accept 120 years worth of responsibility for this break, and put some money up front to help the people in the communities come together so that they can understand that their aspirations are identical whether they're off or on.

I got to be where I am today because my mom and dad were insistent, just like every one of you, that you were going to have to survive in that outside world, and

we did. Now that we have, we go home and nobody welcomes us back. There's a fear. They look at us and they say, "Why in the world would she come back? She's got it made in the shade. What is there here? We've got nothing. She's going to come and take what we've got."

Whereas, if you had those community workshops and you had the grade sixes and the Ph.D.s from the same community talking about what would you like to achieve; what would you be proud of achieving before you die, both sides, on and off, would say: I want my kids to be proud of being Haisla, or Cree. I want them to have a good education so that they can go anywhere in this world and do anything and be anybody. And if they choose to stay here at home, I still want them to walk like that, and I want them to be able to greet and smile at everybody the way the old people used to, instead of walking like this. And both the "ons" and the "offs" would want exactly the same thing.

I'm an "off". When I go home -- and I do -- I wish that the roads were paved properly and that there were proper sidewalks. I happen to live in Vancouver. We just had a municipal election. I didn't vote -- not that I'm ordinarily resident there -- but I have far more concerns about who is entitled to vote at home than I do about who will be on the Vancouver school board. Maybe that's wrong, but that happens to be the way it is.

Now, when I vote for whoever is ultimately qualified I have just as much interest as my mother to elect people who are going to safeguard and expand what we

already have. There's two kinds of people who do that for us as our leadership; the old wise ones and the young educated ones like us who don't have the wisdom, but we know the white man's law.

So whether we go to a two-tiered electoral system, would, in my opinion, cause more problem than just recognizing the franchise straight across the board of all First Nations people to vote, regardless of where they are, because my feeling is that if the leadership in our communities are forced to confront the alienation of those off, there's a great deal to be gained. Our communities have been described as dysfunctional and hurting, and we need to feel like we belong to the same community again.

Doing a separate set of regulations that would authorize members of tribes to vote on purely property type matters would, I think, be difficult, because it would be hard to know where to cut it off.

I have probably spoken more then 10 minutes.

ANNE NOONAN: Thank you, Vina.

We will have Q and A after lunch.

Next group, please.

MR. EYAHPAISE: I kind of feel like Daniel who was put into the den of lions, except in my case it's put in a den of wolverines, when we got to discussing our issue. It is not that there were any heated arguments or anything like that, but it was a really good broad range of the issue being put across a spectrum. I really enjoyed the

discussion because it brought on certain passions of what should be done in terms of *Corbiere* from the federal perspective. In that sense, we had divergent views.

Our discussion was based on this morning's presentation, and Brad got the discussion rolling in terms of what sort of a fix we should have. His comments in terms of a simple legislative fix in terms of amending the regulations got the ball rolling in terms of what we should be doing. But when we got into the actual discussion is where we got a cross-section of opinions, which I'll try to share with you.

For those of you who are in our group, if you could just help me on that front, because I want to be fair in terms of the different views that we had. We didn't really come up with a definitive recommendation, per se. I think we're leaving that to the options stage for tomorrow, but we wanted to present our different opinions in terms of what would probably be some approaches that we could consider.

When the discussion got under way, we had one set of views saying that we probably shouldn't do anything, or there is a possibility of just letting the time elapse and just saying, "Forget it. Let's just leave it be. We'll let the 18 months pass and what will happen? Will the world end?" What will happen, in reality, as some people were saying, is that I will have the right to vote and I will be able to go on my reserve and do the voting process. That was one side of it.

There was another idea in there where an individual was saying that 18 months is probably not enough time, maybe we shouldn't be focusing on the time itself, that we shouldn't be concerned about that in particular, but we should be focusing on

what has to be done. I guess this is where the views were coming in like we need some sort of a system in place to accommodate the off-reserve residents. And in there Brad suggested maybe we have a 46-cent solution of making accommodations of things like mail-in ballots and information booths outside, that sort of thing, that would kind of give an immediate fix to the situation. The issue there was who will maintain that sort of a process in terms of First Nations keeping up electoral lists.

Then we moved on to the greater extreme where it became a little more complex in terms of us suggesting a process, and in there we were recommending a two-stage process that would involve, first of all, identifying the doabilities within the 18-month period.

This is the two-stage process that one group was recommending that should take place, which is this doability within the 18-month period of correcting the immediate problem, and then the second portion of it would be to have a joint commitment to deal with the longer-term implications. In there, we identified some of the areas in here, some of the considerations that we would have to have. In the doability portion, for instance, we could definitely be facing things like certain constraints, like the time to consult, for instance. A consideration that would be in there would be the parliamentary process itself in terms of you have to have time built in to consider that it has to go through Parliament and several committees and all that stuff.

As well in there, when we started talking about the doabilities, one of the things that was talked about in there was having the consultation process identified, who would be consulted on there, and our focus was really the on- and off-reserve band membership.

There was a suggestion in there that we would probably want to have some sort of a representative mediating group to look at the issue, and we wanted to make it a manageable group that would really represent the different interests of the community. We were talking about, for instance, several different aboriginal organizations.

The role would be that there would be really an advisory body to the federal government, and the reason is that we didn't want to give the impression that the federal government was just off-loading, that they were contracting out their duty to consult.

As well, there was comments in there in terms of some of the doability and I think Brad was -- if you can elaborate on this one -- that we're adding rights to the whole process and this probably does not require the same level of consultation. And the consultations themselves will inform all members of the issues, and arising from that would be specific issues on what we're going to do in the longer term. That's in the doability portion.

In terms of the longer-term implications, there was a discussion in there that it had to be a joint commitment, it wouldn't be just the federal government doing

this, to deal with the longer-term implications on the broader policy and treaty issues, as per RCAP, for example, and that there has to be a very serious commitment and that there has to be a very distinct longer-term plan with a budget, but the budget portion everybody said was really a given.

I think that's all we had in terms of a process. In other words, ours was from a "do nothing" approach to one saying 18 months is a possibility but let's not focus on that, let's maybe do some quick fixes, to a more elaborate structured recommended approach.

Do any members of my group have any comments? It was not a heated discussion, but it was a passionate discussion, to say the least. It's very difficult to try to balance the sense of discussion that we had in terms of a presentation like this. I have tried to balance the various views that were expressed in there.

If I've missed anything, I would really appreciate if you could maybe come back to it and elaborate on your perspective.

(LUNCHEON RECESS)

Plenary Session III -- 2:10 p.m.

THE CHAIRMAN: Our afternoon agenda is kind of a follow-up, or questions and answers from this morning's session, and then sort of a brief review of the options.

Is there any discussion from the reports that came out of this morning's session?

MR. ANGUS: This case really deals with a federal statute. It's a statute that's at issue here, not necessarily the treaty or aboriginal rights jurisdiction area. The underlying concern here, to us in Saskatchewan, anyway, speaking for myself from Treaty 6, that the original relationship between the Crown and treaty Indians was the legal relationship was based on treaty, and in treaties it preserved and in fact recognized the inherent right to governance in Treaty 6.

Now, the whole statutory schemes to regulate Indians really offended the true spirit and intent of treaties, like Treaty 6. There are other treaties which may take the same position. The fact that the statutory provision speaks of a minister ordering First Nations to conform to a statutory scheme is in itself offensive because it immediately attacks the inherent right to self-government, as well as the treaty rights to governance as affirmed in our treaties, at least our interpretation of treaties.

So now we are asked to comment on a statutory scheme to continue to perpetuate the colonial approach to dealing with Indian problems. These are problems

that First Nations didn't create. It was, by and large, the Parliament that created the problems that brought about the *Corbiere* decision. Of course it's there very clear, by both judgments.

What is the remedy? There is some consideration and discussion that there are some First Nations -- perhaps between a one-quarter to one-half of the First Nations in Canada -- which may still want to, out of necessity, continue on the statutory elections scheme until such time as they're ready and have the resources to begin to revert back to their custom jurisdiction and enact their own leadership selection processes.

So what do we do now? Do we try and make recommendations on how to fix the statutory scheme? We also agreed that it's probably not a good idea to do nothing because just removing the words "a resident on a reserve" and throw it wide open might injure some communities, particularly ones which -- again, just to be safe I'll use my own reserve where 66 per cent or so live off the reserve. The ones that live on the reserve are a lot of the older people, and they are the protectors of our culture, our customs, our ceremonies, because most of the ceremonies take place in those communities. Not to blame off-reserve Indians, many of whom have grown up in cities, but they may not understand or have a full appreciation of protecting the identity of those communities by the people who continue to live on the reserve.

So to throw it open may damage, because once legislation is made for you, and it obviously is not going to hit all the important points of a nation and therefore

will influence and will change the colour of your community, or even change an identity that is not the choosing of the peoples themselves. So I don't think that you just let it lapse on November 20 and all of a sudden everybody can vote. There's some people who don't have lands anyways who may be apt to approve a surrender, because at least there might be a per capita distribution resulting from it, as opposed to trying to protect the land base which people who live on the reserve cherish very much. Perhaps they may not have the full appreciation of the interpretation of treaties or aboriginal rights as the ones who are closer to the elders who live on a reserve, to formulate the constitution as it has always been lived by these various First Nations.

My submission to our group was that here is an opportunity where we can open a debate or open the chance for communities to move back to exercising their inherent and treaty rights to go back to their customary base.

I have never been very comfortable with section 77 because of the fact that it was forced upon the Indians in the way that Parliament did, and I think it eroded our fundamental constitutional rights right from day one. There's some bands that are lucky, that have never been ordered to move into the Indian Act. One such reserve is Poundmaker in Saskatchewan. I believe there's about five who survived the ministerial order.

What I would like to see is, if you're going to tinker around with the Indian Act, which is not always a very popular thing to do in Indian politics in any event, but is to remove that ministerial power to order -- or unorder, if you like -- the people, so

that it's free for the people to assume their jurisdiction again, if they so want, would kind of fix that part. And in so far as what should replace residency, I think that there should be an opportunity for people to design their own rather than Parliament designing a scheme; just allow each community to design their own.

It has been my opinion, and I don't know how well I could defend it -- I know that the *Bone* case probably supports the notion -- that when a person wants to reaffirm and exercise their jurisdiction by custom to design their own scheme, and the minister has to approve it, it's not so much as the minister empowering that custom act to come into force; it's a matter of the minister vacating that jurisdiction so that the community legislation will take effect and be enforceable because it's empowered by the people, not by the minister.

I think that should be made clear, if anything is going to be done, because I don't want to see the minister any more assuming jurisdiction in this fundamental area, because the selection of leadership, like land, is so fundamental, and it can change society and break its fundamental identity from that kind of power to remain with the minister.

That's basically what I tried to say. I'm still trying to make myself understood. I don't know if I'm always successful.

MR. YOUNG: The court suspended its decision for 18 months, and also said if you can't decide how you're going to develop these rules, come back to us and we'll give it an effort based on submissions that will be made, which is not acceptable

to me. I think the people have to develop their own rules of -- I'm not necessarily convinced that it's not a reasonable limit if the people decide that I'm not entitled to vote in a community for band government if I'm not there. I'm not convinced that it's not a reasonable limitation of my right if the people in a community decide that, because I don't live there, in that community, I'm not entitled to vote for a band government, but I believe that I'm entitled to vote for certain things that might take place in that community which are so fundamental to everybody, like how money is spent -- Indian moneys I guess you can call it for now, because those are the words used in the Indian Act.

Also, what is done with the small parcel of land we all have now called reservations? At one time, history tells all of us, we used to own this land, and we still do. Aboriginal title is still there. And for chief and council to decide on what is going to happen to reserve land based on their own decision to me is not acceptable, and I think that rules have to be laid down where people have a right to vote on issues like that.

But for band elections, I'm not really convinced that if the community, in its judgment and wisdom, based on good discussion among themselves -- and even if I went home and participated in that discussion, fine. And if they decided that people who don't live here are not entitled to vote, I think I'd have to accept that decision as being the right one for my community. It doesn't matter what the Indian Act might say or what some judge might say, because that's the essence of the right to

self-determination; people deciding for themselves what it is that they want for their community, based on good discussion, debate, and rational judgment.

So maybe we don't have a big problem here. I don't think we do. The government created this, but I think it's up to the people to fix it. And I also believe that the government owes the people some financial consideration to get the job done that has to be done to make things worthwhile living for in those communities, whether we live there or not. I think of the poverty that's there, the unemployment. It all represents a lot of things that are no good for our people -- disease, alcoholism, poor housing.

The government today is talking about a big chunk of money that they have a surplus of and I think that our people are entitled to access to that surplus to do things that have to be done for their people in the communities.

As I said this morning, I'm not getting any younger and I don't necessarily have to be involved in these issues if I don't want to. I can go on my own and make my own living, and I've done it in past, but I care and I want to make a difference in terms of what our people get in the future in terms of making their lives better.

I don't believe that we have a humungous problem here. I think it's something that can be fixed by the people. As I said, if they said I can't vote, fine. It's a decision they have made based on discussion, but certain issues I think I'm entitled to vote on, fundamental issues; money and land.

THE CHAIRMAN: We're at 2:30. We're scheduled to be going into the workshops.

MR. ENGE: There was a community for a period of time that felt that it was in the best interests of the communities as a whole that women not be allowed to vote because the communities themselves decided that that's the way it was going to be. There was a community at one time that said, from 1876, when the first Indian Act was passed, to 1952, that Indians shall not vote in federal elections. There were provincial statutes in 1956, the Alberta Elections Act, that said Indians shall not vote in provincial elections.

We're here in 1999 discussing an issue about a community saying off-reserve Indians shouldn't be allowed to vote. I don't think that we've progressed very far as a community by deciding, as a community, who is eligible to vote and who isn't. If you're a member of a community, you should be allowed the full rights that all members are entitled to and I shouldn't be, as an Indian sitting in a community when there's 500 members, when I'm a member, telling me I can't vote because I don't happen to live there next door or in the same house.

We've been through this many times, through gender relations. Women weren't allowed to vote until 1924 in Canada. The Indian Act excluded Indians from voting in federal elections. Provincial elections acts have excluded Indians, men and women, from voting in provincial elections. In 1999, we now have Indians saying,

"You're a member but you can't vote", even though they know that they're members of that same communities. I don't think it's right.

THE CHAIRMAN: We have to move on and go into the workshops at this stage. Maybe we can get on with this debate in the context of the workshops and when we come back to the plenary.

We will focus on four options, or if there's other options. Like I said at the onset, you're not limited to these options. One of the things that came out of the workshop that we had this morning on the issue of what the federal government should do was the issue of consultation, and it might be useful to have a look at that, if you can. It is a constitutional duty. That doesn't necessarily mean that you have to necessarily agree that there should be anything done. Maybe the best option is to do nothing, but I think it would be useful if we could set out what would be a good way of that consultation taking place. I wouldn't mind if you could focus on that issue and also on the issue of options and the implications of the different options on those two things.

MS. STARR: Consultations and the implications of the various options?

THE CHAIRMAN: The options and the implications; identifying a preferred option, or maybe a set of preferred options. I've heard different things. One of them is do nothing; the other is let's look at the real issues, like treaty rights and self-government as an aboriginal and treaty right. Maybe that's combined with do

nothing on *Corbiere* but let's move on the big issues. That still means we have to do something.

So if you can come up with options or configurations of options that would be most appropriate, and also on consultation.

(Recess)

Plenary Session IV -- 4:35 p.m.

MR. WORME: Our task was to discuss, first, consultations, and second, options. In looking at consultations we thought we might look at -- if I'm going off track at any time I want anybody from the group to jump right in. I see Vina is nodding and I'm assured she will.

We would look at what kind of consultations are required. We would look secondly then at the options and which one or ones would be preferred, and then the implications of the preferred option or options.

The first salvo in the discussion was that consultations must necessarily be funded consultations. There was, as well, a perceived preference that such funding would be on the basis of an acknowledgement by the feds that the harm that has been addressed or identified in the *Corbiere* case has its genesis in federal policy and federal action and, accordingly, the funding would stem as a consequence of that.

The suggestion was that these funded consultations -- we weren't quite certain, incidentally, about the vernacular or terminology "consultation". It may have been misleading us in some degree, because there was a perception that consultation meant that the federal government would come to the First Nations to see what we wanted and then go away and do something, when what I think that we had more in mind was that the consultations would be internal with the primary beneficiaries being First Nations themselves.

So we looked at a process of consultations with that in mind and determined that it may well look like regional consultations which might take many different forms; for example, questionnaires or so on. The findings would then be devolved to individual First Nations for further input and presumably at the end of that there would be some information or data collected that would answer the question of what does membership mean to me at the individual First Nation level.

What option are we consulting on? Well, we looked at it in the sense that this is a consultation highway. Correct me if I'm wrong anybody, but it's a consultation highway that we were engaged in and we determined that, because First Nations are not homogenous and that the governance structures will not be identical, we cannot find a Kentucky fried model that will fit every First Nation.

Accordingly, it was suggested that each of the options that were outlined; the status quo, traditional forms, legislation or self-government agreements, could be perceived as, in essence, off-ramps from the consultation highway, that each First Nation would determine of their own accord which was appropriate for them based upon the consultations that would have occurred internally within the community. We recognize that there are First Nations that would be quite satisfied to continue under the Indian Act provisions, and there are others that will have absolutely nothing to do with them. As such, in order to be true to our visions of self-determination, self-governance, it is necessary for these kinds of options to remain at the First Nation level.

Under each of those options you will note that some of them continue, of course, under the Indian Act or some form of that, traditional forms. There was a great debate about whether that was indeed under the Indian Act or whether it was merely recognized by the Indian Act. I think the answer is neither here nor there at this moment, except suffice it to say that the Indian Act does maintain some presence, whether it's recognition or otherwise, under a traditional form of governance within a community.

The legislation option we were talking about would be either under the Indian Act or under some other legislative creation, and the term used here was "recognition legislation".

The self-government agreements, of course, is self-explanatory. It would not involve the Indian Act but it would set out a structure of governance and, of course, a way of selecting the leadership that will staff that structure.

What kind of consultations are we looking at? Again there was a great deal of discussion and debate that to some degree there may well be long-term discussions. However, it was also felt that the long-term discussions may also be occurring in other fora, including that arising out of the Royal Commission report. It was seen to be useful to not turn our backs necessarily on the Royal Commission report and to encourage government to look at the provisions and the recommendations within that report that might also assist in dealing with the *Corbiere* mandatory requirement.

This process, nonetheless, we would see as short-term consultations that would at the end of the day provide a snapshot of what the First Nations community looks like. The beneficiary of that, of course, would be government so that they can begin to determine what an appropriate response might be, bearing in mind their fiduciary duty. As well, a beneficiary is the community itself so that they can determine the off-ramp they will be getting off on.

Workshops, community education to inform and empower First Nations is seen as an essential kind of activity that needs to be engaged in very quickly within the interim period between now and the 20th of November 2000, if for nothing less than to begin to bring the groups together, that is to say the "offs" and the "ons" to ensure that there is at least a forum available for them to begin to discuss in a reasonable way what their issues are and hopefully craft some solutions along the way in that process.

Options One, Two and Four may co-exist. However, it was also seen as being something that would be pursued is simply removing the section 74 authority, and that is to repeal those orders that have been in place with respect to those First Nations that desire it. And that's along the lines of Albert's comments earlier.

MS. CORBIERE: There was some discussion about the type of consultation and why it's required, so we got into this discussion of the fiduciary responsibility vis-à-vis the communities as well as the individuals off reserve. There was some discussion again determining the scope of consultation. We really started to

come together when we discussed options and we were just brain storming on ideas at this point.

We identified that with consultation it's necessary not to just keep it to Indian Act election bands, that customs that have reverted or converted as well as those that always operated under custom also needed to be aware of this decision.

Then there was some discussion about capacity issues, but when we were bringing all these points in we finally got to the options, and we had a lot of the same conversations after that about funded consultations. We didn't go quite as far as the community consultations, but we were a little wary of the federal government leading the consultations themselves. We wanted to ensure, for those communities as well as the individuals, that there was a serious discussion about the implications of the decisions to First Nations, an education process. So you could take the approach of putting the options to them, and we, too, agreed that no one option is going to fit all First Nations and that you have to respect the integrity of those nations to come up with decision themselves. The people will give the legitimacy in whichever option they choose. That also includes the off reserves. They would have to participate in some way, although we didn't really get into the mechanisms of how they would participate.

We clearly came to a consensus that we as a group wouldn't exclude any of the options. Again, it would be information for those individual nations to choose the

option of their choice and that they would have the advice as to what the implications were.

We also got into some education with respect to the federal government about what the financial implications to them are if they don't do anything. They also need to be in an environment where they know what all the broad implications are and that they also know that First Nations are aware of all the implications.

We also got into a discussion about the range of what is necessary for consultation; the sliding scale to try to convince the feds of the real importance of consultation and why it's necessary in this situation given the decision of *Corbiere*.

I think that's basically it. Does anyone from our group want to add anything? I guess not.

MR. ANGUS: We looked at the options as a basis for our discussion. I must say that we were lucky to have so many individuals in our group with such wide experience that it was difficult to focus on one area. We did learn quite a bit from them.

We thought that Options Two and Four would be worthy of considering, as opposed to the other options. However, there was one variation that probably can be made with respect to Option Two, and that is simply to take the first sentence out. Again, there could be further variations to it, but by and large this would probably be the best option.

We had a brief discussion with respect to section 4 of the Indian Act. I believe there can be declarations made, ministerial ones, and whether or not it would

be appropriate in this case. There is also the danger that removing a section altogether may in itself cause chaos, but that is something that should be considered.

We also thought it may be much easier to analyze the *Corbiere* decision if we were to find some time and resources to scope out the entire decision with all these options: What would happen if, kind of thing. If we could identify all the issues on a check list basis and share that check list with everybody, because everybody would have their take on it based on their own communities, their own treaty rights, their own understanding of aboriginal rights and so forth, it would be helpful because that would also address part of the public education aspect of it.

There would perhaps be issues arising under reasonable limitations or section 25 of the Constitution Act matters. For example, Ken Young is not particularly convinced that it wasn't a reasonable limit, and we discussed about reasonable limits in these kinds of circumstances. I think we all agreed that if Apasqueat (ph) First Nation had allowed the "ons" to vote and the "offs" to vote and the referendum question to say that Ken Young cannot vote any more, and if it passed, I guess that would be a reasonable thing. We got joked around a bit.

However, if there are going to be reasonable limits imposed, so long as off-reserve Indians and on-reserve Indians had a say in the reasonable limit they're agreeing to, I think that would stand a greater chance of being upheld as opposed to before the minister vacates the jurisdiction of elections or selection of leaders. If the minister is satisfied, it usually requires just the on-reserve Indians to vote because that's

their definition of an elector, and it does not require the off-reserve Indians to vote for the minister to vacate where a custom election act can begin to take effect as passed by the people.

Then maybe those reasonable limits will not hold because the off-reserve Indians were not given a chance to participate in the referendum. That's what we were talking about.

Of course, there are existing band election acts, band election codes already, and of course there are some provisions in some land claim settlements, and there are some being negotiated right now, that have links to self-government addressing selection of community leadership.

We thought that if we had a check list of issues that kind of scopes out the entire decision, what it could lead us to, I think it would assist the decision makers to make a decision on what is best for their communities. Of course, I think it's pretty unanimous that each First Nation should decide for themselves what is best, and we have also agreed on that.

We also spent some time talking about resourcing the First Nations who want to develop or improve their election acts. If they're going to vacate Indian Act jurisdiction and go into custom, they will have to be properly resourced in order to develop their own system.

I have some experience where matters were rushed and not properly resourced. Yes, band legislation can pass, but then the people really don't have a

feeling of ownership because it was really pushed on them. It causes confusion because people really didn't understand what they were passing and therefore they disagreed with certain provisions when they later found out. A lot of them didn't know there was even a meeting and all that sort of thing because there was no money. It caused problems.

I'm talking about band membership codes. When there was a deadline of June 28, 1987, everybody was rushed into it and people were passing their own codes. At least there was an amendment formula so they could improve them later, but it caused a lot of problems.

We generally agreed that if there's going to be a development to move from Indian Act to custom elections, the people would have to have enough time, resources and money to have workshops to allow the people to contribute to the development of the legislation so there will be a feeling of ownership and a greater chance that it will be upheld, and there will probably be a greater chance that it will be workable.

On consultation; what would constitute sufficient consultation? I think consultation should be with the communities themselves, the community leaders, in order to satisfy the judgment, the obligation for consultation, because it is those communities who can decide for their own nations how they would like to proceed so as to have their direction properly resourced.

Did I say that right? Is that what we talked about?

MR. OKIMAW: Yeah.

MS. NOONAN: You talked about the case law that surrounds consultation and the fact that consultation is also the responsibility of the community, not just the feds; that the community has to take the initiative as well to consult.

MR. ANGUS: Yes, as it relates to fiduciary duty; where the Crown has a fiduciary duty that it owes to First Nations. There are some areas of fiduciary duty that, once the problem they have created is corrected, I suppose they lessen their fiduciary duty. But if we are locked into forever being beneficiaries of fiduciary duty, the control will always be with the fiduciary, and that may not be a good thing in the long run. So we have to take a look at that and the obligations there, but there were no opinions about it other than to identify that it may be a matter for discussion at another time.

I think that's about it.

MS. CORBIERE: On a point of clarification, why did you want to stroke this out?

MR. ANGUS: Because Moses said we should.

MR. OKIMAW: We thought that trying to reinstitute our traditional systems is quite impossible. We can't go back. So the proper way to say it is to develop our own systems of selecting our own leaders, but based on our values, but trying to reflect the present situation today. The traditional ways of selecting leaders worked because of the conditions that we lived in at the time, and we can't hope to go

back to them. We have to meet the circumstances. I thought just to strike out the first five words before the "leadership selection", keep "leadership selection", and strike out the first sentence. Then the rest describes what was intended, I think.

THE CHAIRMAN: Which part would you strike out?

MR. OKIMAW: The first sentence, "reinstituting" and all that. Just keep "leadership selection".

MR. ANGUS: The key word is "traditional forms". I don't know how far all First Nations want to go to go back to their traditional forms.

MR. ENGE: Traditional forms might be best hunter.

MR. ANGUS: We don't want to create an extreme expectation. It will still, in the end, be the decision of the community. Even our elders today will not quickly support a concept. On my reserve, as I was telling our group, I was chairman and somebody asked from the floor whether we can still go back to lifetime chiefs. We come from a lifetime chiefs treaty area. My elder, Norman Sunchild, was sitting beside me. I switched to Cree and said, "Is it still possible to have a lifetime chief in Thunderchild?" And he said, "Yes, but you've got to keep getting yourself elected every time." Even he was reluctant to say yes, period.

We're living, as Moses says, in a particular environment now. You don't want to create cultural shock in your own community. I think you've got to give time for things to evolve. That's basically what we talked about.

THE CHAIRMAN: What's the wording then?

MR. OKIMAW: I thought if we strike out "reinstituting their traditional forms of" and keep "leadership selection", then strike out the first sentence and keep the rest. Those are my drafting skills.

THE CHAIRMAN: But the basis again is "researching their historic customs". Use the principles but they have to be based on contemporary realities.

MR. OKIMAW: Yes.

MS. CORBIERE: Also, section 74(1) is missing the word "order". We were saying in this option it was remove the section 74 order when the First Nation directs it; not remove section 74 from the act carte blanche.

MR. OKIMAW: That comes when you mention section 4, to make section 74 not applicable to First Nations that have done this, after they have done that.

THE CHAIRMAN: I don't think that's possible though.

MR. OKIMAW: You can't say that.

MS. STARR: Actually, the discussion of section 4 never arose in either of our two groups and the first mention that I've heard of it -- did I say 74 or 4?

THE CHAIRMAN: Four.

MS. STARR: Yes. The first I heard of it was from this group, and it's really something that we should look seriously at, particularly that we're in this desperate time of only 12 months. I know that the official position of Department of Justice about 10 years ago was that the government appeared to have abused the use of

section 4 when it agreed with some bands that had asked for section 4 to be used to override the non-allowance of women who had married, 12(1)(b) women.

THE CHAIRMAN: And 12(1)(a)(iv).

MS. STARR: Or whatever. I guess the feds had been doing that, because there were a number of our communities that insisted that, even though their women married off-reserve, they still be allowed to vote, so it had been used for that. And then somehow or other I came across this opinion of the Department of Justice that they were not going to be using section 4 to exempt any band from any provision of the Indian Act any more because it was -- the reason that they gave was that they were trampling on jurisdiction of Parliament by making law by amending.

Well shoot, I think that we need to relook at that opinion again. The minister had a nice clean opportunity to exempt, under section 4, every band that didn't want the old on reserve to be applied. Who would challenge him?

THE CHAIRMAN: Actually, on section 4 the problem was with the statutory instruments committee of Parliament.

MS. CRAIG: The Standing Joint Committee for the Scrutiny of Regulations. There are 18 proclamations that struck out the words "and is ordinarily resident on the reserve" in 77(1), and the Department of Justice was in agreement. Who is not in agreement with it is Bernier, who was the counsel for the Standing Joint Committee on the Scrutiny of Regulations.

MS. STARR: So let's revisit.

MS. CRAIG: He said, it says "section", it means "section"; you can't exempt them from a part of a section.

MS. STARR: Shoot.

THE CHAIRMAN: You're talking about it in relation to section 74.

MS. STARR: Yes.

THE CHAIRMAN: Use 4 to suspend the operation of section 74 so the minister doesn't have any more power to order bands under Indian Act election.

MS. STARR: Yes.

THE CHAIRMAN: There being no further discussion, we could review a little bit. There seems to be a consensus that it ought to be up to First Nations to decide which option they want to choose, right? I think everybody agrees with that principle.

There seems to be some favour to Option Two. People seem to prefer that as an option, with the wording changed, although, generally speaking, there's some sense that all of those four options might be available.

MS. STARR: That's right.

THE CHAIRMAN: But there's some leaning toward -- we won't say reinstituting traditional forms of government, but recognizing the authority, maybe through custom or councils, to be able to develop their own leadership selection process which is based on historic practices but updated for contemporary circumstances.

Would it be fair to say that?

MS. STARR: Yes. I think there will be quite a few who will choose custom.

THE CHAIRMAN: Consultation ought to be including not just section 77 First Nations but all First Nations?

MS. STARR: Yes.

THE CHAIRMAN: Did you discuss the issue of consultation and funding consultations of organizations at a non-First Nation regional level, national level? Did you get into those?

MS. STARR: I don't know what you mean.

MS. CORBIERE: Who gets funded to do consultations? Not just First Nations but maybe national organizations, provincial.

THE CHAIRMAN: AFN, CAP, NWAC.

THE CHAIRMAN: Do you want to get into that?

MS. CORBIERE: We still have to discuss things tomorrow.

MS. STARR: Let's leave that part for later.

MS. CORBIERE: That seems to be the trickier part, the consultations.

MS. STARR: Let's just focus on what is possible to do first and then, secondly, who is best equipped to do it.

THE CHAIRMAN: Okay, that's it.

(Adjourned at 4:35 p.m.)

I HEREBY CERTIFY THAT the foregoing was taken in stenograph and transcribed therefrom to the best of my skill and ability.

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Lillian C. Purdy, C.S.R.

GRS File No. 99-1244.A

IMPLEMENTATION OF *CORBIERE V. CANADA*

STRATEGIC ASSESSMENT: IMPLICATIONS AND OPTIONS

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MEETING OF INDIGENOUS BAR ASSOCIATION

November 26 and 27, 1999

Novotel Ottawa Hotel

33 Nicholas Street, Ottawa, Ontario

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