November 27, 1999

Meeting of Indigenous Bar Association

Plenary Session -- 9:40 a.m.

THE CHAIRMAN: We have some new faces this morning. We have been graced with the company of Paul Chartrand, Hugh Braker and Wayne Haimila, all esteemed members of the Indigenous Bar.

Good morning.

We talked at the end of the day yesterday about covering two items today. First, because we had not done a real review of the case, Barbara Craig had indicated that maybe she could make a comment about it. She's agreed to doing that, being very careful about her position as an employee of the department but also as a lawyer with a legal opinion. I assured her that we were here as lawyers without prejudice discussing the implications of *Corbiere*, and certainly not to feel that she's going to be cited anywhere for what she said here.

Having said that, she has agreed to make some comments. I will leave it entirely up to her what she intends to say.

The second part of the discussion will be another look at the issue of consultation, because we didn't really finalize that discussion yesterday, and maybe also trying to get an idea of what consensus came out of our workshops and

discussions from yesterday. That would, I suppose, be kind of a wrap-up of our meeting on *Corbiere*.

Mark Stevenson asked whether there would be any follow-up to this session. Nothing had been planned specifically, but that could be part of the discussion this morning, whether there's any kind of follow-up; a report or anything else that might happen. We can engage in that discussion under the wrap-up or under consultation this morning.

We're not going into workshops this morning, right, Anne?

MS. NOONAN: Unless people find it more appropriate to discuss in small groups. We'll leave it to the group to decide if they want do that, but it's plenary.

THE CHAIRMAN: If there are no comments on that, can we assume that we will stay here rather than breaking into smaller groups?

As I don't hear any objections, we'll do it that way.

I'll turn it over to Barbara at this stage.

MS. CRAIG: Good morning. I will start with a very brief overview of the case as the department sees it, and then I thought I would take you through a few things that is the departmental position on what the case doesn't do. I think we can up front agree to disagree; it's the departmental position.

Then I thought I would take you through, if people are interested, what the department has done and what the department sees as immediate next steps.

Some of this is repetition of what Dave said yesterday about the case, but the court found aboriginality residence was an analogous ground of potential discrimination under section 15(1) of the Charter. They said it will stand as a constant marker of potential discrimination. Not all things that make a distinction on the basis of residence will be discriminatory, but they will always be suspect. They found, in the case of section 77(1), in the words "and is ordinarily resident on the reserve", there was actual discrimination, and it was not justified under section 1 of the Charter.

The remedy that they saw for this was the declaration of invalidity of the seven words "and is ordinarily resident on the reserve" in section 77(1). However, they suspended their declaration of invalidity for 18 months, and they said they did this to allow the Crown time to consult with all of the affected parties. It seems like a long time, and it's an unprecedented period of time, but, as we have found already in the government, it's not very much time.

The court also stressed that the suspension of the declaration of invalidity was not a suspension of the equality right, and I'll take you through that. So the view of the department is that this applies, of course, to elections under the Indian Act. We're of the view that it probably applies to custom elections as well, although I don't think that we've stated that publicly, but there are some cases in the court that will guide us on that. However, we think it probably applies.

The position of the government is that, because the case did not speak to program entitlement, the department has not changed its position with respect to

program entitlement of off-reserve members, and also because the case did not speak to jurisdiction, the department has not changed its position with respect to its jurisdiction.

So those are things where, when we get up to what the case isn't, we would get into potential debate, but I'm just stating the department's position. It's not necessarily my own.

One of the challenges for the department has been the consultation part of this; to look at what consultations should look like and when they would start. The decision was made very early on -- and this is a consistent message that has been given by the deputy minister -- that before we started consultations we would have to go to cabinet, and she stated that over and over again. That's still the position. We had hoped to be in a position to make some kind of an announcement at the end of November, but I think there will be some slippage on that. I won't know for sure until Monday, so stay tuned.

We have a process for *Corbiere*. I'm the special advisor on *Corbiere*. I report to the Assistant Deputy Minister of Lands and Trust Services. We have a steering committee made up of ADMs and regional directors general. We have two co-chairs of that committee; one of them is the ADM of Lands and Trust Services. That's Randy Brant who is acting for Bob Watt who is at Harvard. The other is John Sinclair, who is the Senior Assistant Deputy Minister for Policy and Strategic Direction.

We have also set up a departmental working group and we have somebody from every region and all of the sectors and some of the branches of Indian Affairs on that working group. We work with the central agencies, or I try to brief them as regularly as possible. When I started out this process, I was naive, I didn't realize the power of the central agencies, so that was a real education. I have scars.

MS. STARR: What is a central agency?

MS. CRAIG: Central agencies are the Privy Council Office, Treasury Board, Department of Finance. DOJ, I don't consider them. Because I have this hate on for the central agencies I do not put Justice in that pot. They're the nice guys so I don't lump them in together.

It's PCO Social and PCO Aboriginal Affairs who are part of the group. Social, because Indian Affairs submissions go to the Cabinet Committee on Social Union. So that's the side of the house that we have to convince of the rightness of our path, and that's a hard slog sometimes. Treasury Board is even harder.

I have been trying to manage that part of it as well as move the file along and it's been a real challenge.

The decision was made about with whom to consult at the national level, and that is the Assembly of First Nations, the National Association of Friendship Centres, the Native Women's Association of Canada, and the Congress of Aboriginal Peoples. At a regional level that hasn't been decided yet, although it has been decided that there will be national and regional consultation on *Corbiere*.

We were talking yesterday about whether there was a duty to consult. There certainly is case law on that. *Delgamuukw* said that. I don't know and it doesn't really matter if there's a duty to consult as a result of *Corbiere*. It's certainly the department's policy and the court does talk about it.

There are a lot of things that need to be done. It's becoming clear to me, because I've been hearing it over and over again, and we heard it just recently, this week there was a meeting of the managers of Band Governance and Indian Estates, the national meeting. Carolann joined us. What Carolann is hearing -- she shared that with us -- and what the regions are getting is requests for information. People want to know what the decision is all about and there is some confusion, I think, or there's just a general lack of knowledge.

We heard that yesterday. People were talking about public education. One of the things we have to do is to get information out to do some of the public education for First Nations pretty soon. They're asking questions and there is a deafening silence. They're concerned about what their elections will look like on November 20, 2000.

Public education, messages; that's really, I think, the next challenge, and the consultations. The consultations have been causing me -- I mean how you make sure that they're inclusive, how you make sure that you have a good product at the end of it -- all of the things we talked about yesterday are some of the questions that I've been asking myself, so I was really glad to hear David say that we were going to talk

about consultation some more because it's a real challenge for the department and I think probably for First Nations and the national organizations too.

That's all I had to say. If anybody has any questions, I would be glad to try to answer them.

MR. BRAKER: You said there were some cases in the works that are going to perhaps give direction on custom election. What are those cases? Where do they come from?

MS. CRAIG: There are two of them that I'm aware of, Hugh, and somebody mentioned in passing a third one, but I don't know of it. One of them is the *Sark* case and it comes out of the Atlantic, I think out of Nova Scotia.
The other one is the *Hall* case and it's Dakota-Tipi. Both of them are cases in which band members are arguing they should have the right to vote in custom elections where there's a code. Both of those happen to have codes that restrict voting on reserve.

Somebody did mention there was another one.

THE CHAIRMAN: There was one just handed down. It is not quite as clear though. It is the *Sakimay* case. It was just several weeks ago.

MR. TYANCE: There is a Métis settlement case as well where they're arguing *Corbiere*. And the difference between *Hall* and *Sark* is *Hall*, where you didn't have a section 74 repeal order bringing them out. In *Hall* they just weren't under the Indian Act to begin with.

MS. CRAIG: But they have a code.

MR. TYANCE: They have a code but they weren't under the Indian Act, where the other one had a section 74 repeal order, in *Sark*.

MR. HATFIELD: Just to add to the information, the case was handed down on May 20 from the Department of Indian Affairs. On May 21, the day after, Bob Watts, our ADM, wrote to First Nations giving some information about the decision itself. Also, on June 10, I believe, he followed up with another piece of correspondence providing an update. Of course, the AFN, at their AGA, presented a discussion, I believe on *Corbiere* itself. Carolann made that presentation.

So there has been information but there has been a gap, so that's where the silence is deafening at this point and a further update would be required on where we're going.

MS. STARR: I don't understand how this decision could apply to custom. Somebody will have to explain that.

MS. CRAIG: It's because of the equality right. They found that an aboriginality residence is potentially discriminatory, and so probably the same kind of analysis would apply.

MR. BROUGHTON: I don't think it applies directly, though, but the principles could be taken by the courts and applied in those custom.

MS. STARR: That I understand.

THE CHAIRMAN: Subject to sections 35 and 25, and also subject to -- because it isn't clear yet that the Charter even applies to First Nation governments.

MR. TYANCE: That defence is being argued in *Sark*, I know for sure.

MR. HATFIELD: On the custom, when a First Nation under the Indian Act wants to convert back to community election, one of the conditions is adherence to the Charter of Rights, so they would be caught under that. Now, since that decision, there hasn't been a rush by First Nations to run to community elections. There's only been two since then and both of those have extended the vote to off-reserve members, so there isn't --

MS. CRAIG: It wasn't an issue.

MR. HATFIELD: No, it wasn't at all. There was one in Manitoba and the other one was in Alberta recently. That was it.

MS. STARR: And they both allowed off reserve?

MR. HATFIELD: Yes.

MS. STARR: I think there will be quite a few of those, actually.

MS. CRAIG: Those are the first two.

THE CHAIRMAN: Are there any other comments?

MR. MARSDEN: What is INAC's position on two competing academic thoughts that were brought out in David's paper. You have the Hogg perspective talking about that decision being possibly retroactive, and you have the Roach perspective where it's a declaration of invalidity that's sort of suspended. How does INAC view the decision? Would this affect any elections held between 1985 and 1999?

MS. CRAIG: I can't speak to that, Wes, because that was a new twist to me. If one of my Justice colleagues wants to venture into that water, I leave it to them. I thought that was really interesting and my constitutional law scholarship didn't take me that far. We don't have a position.

MR. KONTOS: I think there are arguments either way, but I think Hogg is fairly persuasive and is supported by authority in the Manitoba Language Reference. But I think you have to keep in mind that even if the judgment is retroactive and renders those terms of section 77 invalid as of April 17, 1985, it doesn't necessarily mean that every decision or action taken pursuant to those measures or by band councils that were elected on that basis are necessarily invalid. And we can look to doctrines like the de facto doctrine and the rule of law and other ones that were addressed in the Manitoba Language Reference.

Now, we're getting into a whole other realm of speculation when you start looking at how those might apply in these particular circumstances, but I think there is support for Hogg's position, although at the same time arguments can be made the other way. Nobody can say with any certainty at this point.

MR. ENGE: What is the department's position in respect of individual bands opting for doing nothing about recognizing or granting franchise rights to off-reserve Indians?

MS. CRAIG: The custom election First Nations you're talking about?

MR. ENGE: In either case. Under custom it's whoever they define in their custom code as the electors, and Indian Act election regulations also defines who an elector is. It's a member of a band and that sort of thing. In either case, what is the department prepared to do as far as consequences to those bands that opt to do nothing?

MS. CRAIG: If we're talking about Indian Act elections, we have to wrap it in something. So you have to make an assumption about what the regime would look like after November 20, 2000.

So if we assume, just for conservation, that the seven words are going to drop as a result of the suspension ending, and a First Nation had an election under the Indian Act -- one of the first ones up is out west in Manitoba, I forget the name of First Nation, in late November of that year. If they refuse to allow their off-reserve members to vote, then they would not be compliant with the act. It's just a flip of why we have election appeals now. That would be appealable.

Right now we usually have appeals from somebody arguing -- in fact, 99 per cent of them are arguing that off-reserve people voted. Well, the flip after that would be that they could appeal it if somebody off reserve was refused the opportunity to vote. So that's what the department would be doing then. We would be looking at the appeal in the natural appeal process if everything else was the same and the seven words just dropped. If it was something else, of course, we would have to react to whatever the situation was.

In the custom situation, we don't have any authority over that. Once you go to custom, we say that that's an exercise of community control and you would have to do that in your community. Unfortunately, you would end up with somebody like Mr. Sark and Mr. Hall who are in court forcing their First Nation to react, if they thought it was appropriate.

If they didn't give money the first time a First Nation put their code in place and they're coming back to them for money to do that, I know some of the regions are giving them money to redo their codes. It was a one-shot deal, so if you got it to put it in place the first time, I understand the regions aren't giving it to them a second time. But if they're coming back because they want to add the off-reserve people, they are, in some cases, giving them money to look at their codes do that.

So in terms of positive support -- and you could argue $10,000 isn't enough. Well, $10,000 times 600 First Nations adds up.

So in answer to your question, unfortunately it's an individual problem for the customs, but the election appeal mechanism would apply for an Indian Act election.

MR. ENGE: We can speak in hypotheticals. I don't mean to put you on the spot, I'm just saying hypothetically if this scenario evolved down the road.

MS. CRAIG: Under the Indian Act elections it would be the appeal mechanism. In the other case it would be up to individual members of the First Nation.

MR. STEVENSON: My question is to the Department of Justice. I understand that, as a result of the decision, the operational decisions of bands since 1985 are probably still valid, from what you said, regardless of the Hogg view. But I was just wondering about some of the major decisions that Dave lists in that paper, like land surrender decisions under section 39 of the Indian Act, decision under section 10 involving band control membership, elections of council under the Indian Act, and so forth. Those are different from the operational decisions and I'm just wondering if the department has a view on those types of decisions.

MS. CRAIG: You're talking from 1985 or from May 20?

MR. STEVENSON: Actually both.

MS. CRAIG: I can speak to the May 20 part of it, Mark. Because the suspension was not of the equality rights, the department has been working on amending some of its policies with respect to land designations to make sure that off-reserve people participate in that.

Joe Tyance is here. He could, if you want, update you on that.

I know the first one to come up was Red Pheasant. Have they had their vote yet?

MR. TYANCE: It's ongoing. We are actually working on the Red Pheasant vote. The numbers were quite substantial in that context. In Red Pheasant I think they had 300 on reserve -- it was an Indian Act band -- and 735 off reserve.

We dealt with that situation on a case-by-case basis because initially the chief, according to his legal advisors, say that they want to do on reserve, but in that context regions in Saskatchewan started talking to him and he decided to have on and off reserve.

There's problems with the regulations. It doesn't allow for mail-in ballots and multiple polling stations. So it was a case-by-case situation and a lot of those ideas were based on an interim bulletin, but the department hasn't officially released that interim bulletin yet, so we're doing it on a case-by-case situation. A lot it of depends on how the First Nations want to proceed based on *Corbiere*.

I don't know if that answers your question at all.

MS. CRAIG: So we understand that there's something to do.

MR. STEVENSON: I'm looking for a Justice as opposed to policy.

MR. KONTOS: I would qualify to say I'm not speaking for Justice necessarily, or providing a legal opinion, but just to say, in terms of your distinction as between those particular kinds of decisions and others, it's really a matter of speculation at this point and how those would be affected under application of the de facto doctrine or the rule law or anything else, which is speculation in and of itself. You're looking at equitable discretion in terms of Charter remedies and the court can do what it wants.

In terms of the chronology, it's clear as of May 20th that nobody can rely on the de facto doctrine any more because everybody is on notice as to the concerns at

stake here, and certainly the minority alluded specifically to the notion there's no suspension of equality rights and that decisions taken during the period of the suspension could be challenged of their own right.

THE CHAIRMAN: The de facto doctrine really just justifies or insulates an officer who is apparently acting under authority from being challenged.

MR. KONTOS: Decisions taken by the officer and reliance on those decisions where that officer has actually been appointed as an invalid appointment. Again, that's specifically how it developed at common law, but it has been broadened by the court in the Manitoba Language Reference and sort of subsumed within the broader rule of law doctrine. That was a very specific situation. They were referring to things like legal chaos, et cetera. Arguably you could say that that might well be the result here, as well, but there's not much to go on in how that might be applied in these particular circumstances.

MR. BRAKER: I heard the argument in Vancouver from a chief who was looking at the Supreme Court of Canada's retrenchment explanation -- call it what you will -- of Marshall, saying why can't we make the same thing apply in *Corbiere*. In other words, it's just a small little one-reserve decision, it has nothing to do with the rest of Canada, et cetera. I found that to be an odd argument.

Has the department considered the Crown's position if it allows councils elected under the old system to make decisions on dispositions of land or band assets or allocation of housing? Has the department considered the Crown's position in

respect of trust and fiduciary obligation if it allows bands elected under the old system to continue to dispose of land, allocate housing, et cetera?

MS. CRAIG: I think they have considered that and any place that there's a ratification process we have a difficult position because we have the law, on the one hand, and the regulations that the definition of "elector" is on reserve. But we're caught in the position where we know that the views of the off-reserve people have to be taken into consideration. So there is some cognizance of that.

But when you're speaking specifically of the powers of the band council and the work they're doing, we are of the view that the equality right, they have to take into consideration the off-reserve people. How they're doing that, the message, I'm not sure.

The answer to your question is we've considered it. What's happening with it; how that's being translated; I don't really know. Housing is not part of that. In my working group there's somebody from SEPP and I'm not sure exactly how they're approaching that.

MR. BRAKER: On a related question, has the policy on the allowance or disallowance of band by-laws been affected?

MS. CRAIG: No, it stays the same.

THE CHAIRMAN: Are there any other questions?

MR. ENGE: Has the department perhaps taken a look at amending Indian Act regulations to provide for proxies, mail-in ballots, advance polls, and that sort of thing to perhaps address the Red Pheasant situation?

MS. CRAIG: There would have to be a legislative change, or it would have to be done after November 20, 2000. We're certainly aware that they need to be amended. They're not adequate for the job. They do not allow for any kind of measures to facilitate voting by off-reserve members, so we're aware they have to amended, it's just the when.

MR. LAFLEUR: You cannot do it right now because of the suspension. The regulation can't be inconsistent with the act, so you can't really substantially do it until after November 20, 2000, and then I think we have to, no matter what kind of mechanism. It will have to be changed somehow, in my mind anyways.

MS. BAXTER: You should say "we have to do it!", rather than "we have to do it". The tone that you're using is depressing.

MR. ENGE: Has the department done any costing as to what some of the various alternatives might be as far as implementing *Corbiere* -- implementing the principle of making or creating a vehicle or mechanism for off-reserve electorate to vote?

MS. CRAIG: The costing has not been done. We have had lots of discussions about it. There's certainly an awareness of the pressures. Some of the discussions that I've heard too is let's look at what happens in First Nations where they

already have off-reserve voting; how much is that costing; how much are we putting into that, and we would look to that as a cost containment measure.

There's an awareness that the funding issue is out there but there hasn't been any costing out, that I'm aware of.

MR. HATFIELD: To add to what Barbara has said, we are looking at the current First Nations who have voting off reserve and the mechanisms of how they do that. As well, technology is so advanced that is that a consideration as well? We've had a few inquiries from companies that have the ability to do that, so certainly that's a factor.

On our part, we want to make sure on November 21st that we're able to have that ability to do that, so we're looking at the resource factor there and certainly with what we have now we would not be able to do it.

MS. STARR: In view of the fact that the department hasn't specifically addressed the implication of its current policy for not providing education or health benefits to off-reserve band members --

MS. CRAIG: Just with respect to that, off-reserve, if you're talking about non-insured health benefits, it's not based on residency.

MS. STARR: Oh.

MS. CRAIG: Off-reserve health benefits are available to status Indians regardless of residency.

MS. STARR: Okay.

MS. CRAIG: It's supposed to be furnished as provider of last resort, but... Sorry to interrupt.

MS. STARR: The same with education?

MS. CRAIG: Post-secondary education? It's available wherever, although I do happen to know that some band councils that have control of it do make decisions. They look after the people on reserve first. I know that as a policy some of the First Nations do that, but the program parameters themselves do not limit it to on reserve.

THE CHAIRMAN: Okay. That wasn't too tough.

MS. CRAIG: No, but I can see by some of the expressions and the conversations that go on after I answer questions that they can't believe the government hasn't done more than it has.

MS. STARR: Why hasn't the government done more than it has, Barb?

THE CHAIRMAN: I think a significant part of that -- now I understand -- the deputy thought they should go to the Cabinet first.

MS. CRAIG: Yes.

MS. STARR: I don't understand why they have to go to Cabinet. I know I'm from the woods, but why do they have to go to Cabinet?

MS. CRAIG: Because it would be a government response and government responses are determined by Cabinet.

MS. STARR: Rather than a ministerial response?

MS. CRAIG: Yes.

MS. STARR: So, in other words, we know how far down on the totem pole we are six months later in terms of the concern.

MS. CRAIG: Or maybe we could look at it the other way and we could say how big an issue this is and so it's taking a long time to get the canards lined up. I don't know; it's a bureaucracy.

Somebody insulted me yesterday and told me I was being a good bureaucrat. I don't consider myself a good bureaucrat and I've been really frustrated by the process.

MR. ENGE: I don't think the government perceives a franchise as a very trivial matter. I think it goes to the very core and foundation of democracy and I think it's that important a decision.

MS. CRAIG: I have to agree with you. I think that has been part of the problem -- and when I say "problem", just in terms of the time it's taken.

MR. ENGE: And it has profound implications for band custom elections. They built the mechanism to shield them from democratic forces that really didn't have all that much to do with collective communities, and when you start introducing individual rights where every single person who can demonstrate an attachment or association with the community and are being denied a fundamental constitutional right, I think it may have a profound effect on those custom election communities.

MR. YOUNG: I keep harping on this, but in the end isn't it up to the communities to decide whether they want to exclude someone from voting, or else put

a reasonable limit, like residency requirement, before you can exercise your franchise in that community?

They tell me, for instance, back at OCN: Mr. Young, you can vote if you live here for a period of three months, otherwise you're not entitled to vote. To me that's a reasonable requirement and a reasonable limit on my desire to vote in my community.

However, in other issues like land and money, where my community gets, let's say, a $6 million settlement for a land claim or something, I should be entitled to vote on how that money is spent. I think they shouldn't be allowed to exclude outsiders from voting on issues like that, including how reserve land is managed and how it may be disposed of.

MS. CRAIG: It's the department's view that the case is saying you can't be excluded from that, even now, because equality rights weren't suspended. That's the department's view.

MR. YOUNG: But the other issue is the right of the community, the people, to decide these issues without interference from outside. That, to me, is more fundamental than all of the discussion as to whether or not the courts have made decisions to that effect. It's whether or not the people decide how they want to do things that's, to me, more fundamentally important.

If the Indian Act says something that my community doesn't like and they decide otherwise, they want to do things differently, that's up to the people. It really

boils down to that. I think that this *Corbiere* decision is a molehill and people are creating a great big mountain out of it. I just think it's up to the people, really. I think if we went into a community and talked like this they'd probably tell us to go to hell. I really believe that.

THE CHAIRMAN: Let the record read "go to heck".

It's 10:30. We'll have a coffee break now.

(Recess)

THE CHAIRMAN: We will go until noon with this session and then in the afternoon today and tomorrow we will be talking about the *Delgamuukw* decision and the *Marshall* decision, and also the issue of *Corbiere* more in a summary way.

This three-day session was initially planned to deal just with *Corbiere*, then I was approached by Roger Jones to see if we could maybe deal, in the second half of this meeting with issues affecting those three Supreme Court of Canada decisions. He apparently had discussions with Bob Watts who agreed, I understand, to that part of the session dealing with a piggy-backing of those issues on this meeting.

MS. BREWER: Do you want me to speak to that, Dave?

THE CHAIRMAN: Sure.

MS. BREWER: The idea was to have the first day and a half dealing exclusively with *Corbiere* with the IBA and Justice lawyers and what not. The second

part is more of an Assembly of First Nations think tank on the decisions, so a number of people were invited to this as well as members of the Indigenous Bar Association, but that's why some folks have been advised of this session and some aren't.

THE CHAIRMAN: So we will have some other new people as well?

MS. BREWER: There will possibly be new people as well, and some folks that are here right now won't be here.

MS. NOONAN: It's a closed session?

MS. BREWER: Yes, it is.

MS. NOONAN: That means that there will be no federal employees invited; is that correct?

MS. BREWER: Yes, that's how I understand it.

THE CHAIRMAN: Not to be offended by that, I hope, but apparently that's the situation and it's to discuss some strategic directions that Assembly --

MS. BREWER: To give advice or what not to the National Chief's office.

MS. CRAIG: Just for clarification, those of us who are both federal employees and IBA members are not invited?

MS. BREWER: No. It was basically by invitation.

MR. YOUNG: Federal employees who are IBA members are not invited?

MS. BREWER: No. It's more of a strategy session.

THE CHAIRMAN: That makes it a little uncomfortable.

MR. WORME: But we've been retained.

THE CHAIRMAN: We haven't really been retained. It is an IBA session. It makes me a little uncomfortable too.

MS. BREWER: I know. I wasn't involved in this end of it but that's how I understand it was organized.

THE CHAIRMAN: Those who are federal employees should not be offended. I don't know what else I can say.

I'd suggest we spend maybe half an hour on the issue of consultation, try to wrap that up, and then spend the last part of our meeting, maybe 30 minutes or 45 minutes, going back to the options and try to see if we can come up with some of the clear consensuses that we talked about yesterday, if there can be, or do we need to come out with anything at all?

Consultation is something we didn't fully discuss yesterday. Maybe I can lead off a little bit. The issue was discussed in both workshops yesterday, more specifically in the second workshop. What came out of the discussion, at least the workshop that I attended -- well in fact in all of the workshops -- was that there needed to be consultation, that the consultations needed to be funded, and that the consultations needed to be at the regional level and involve First Nations definitely.

I believe Albert and Vina made the point that the most effective consultations that they have been involved in were the consultations involving the development of First Nation membership codes pre-1985 that had forced people to get together to begin thinking about how they wanted to draft their membership provisions.

Funds were provided to communities in the amount of, I believe, $10,000 per community.

What we didn't discuss yesterday was to what extent there needed to be consultations at levels above the community or regional levels, more specifically dealing with the national organizations. It seems to me to be a fairly key area for organizations to be involved in, certainly on policy matters which have national or broader application.

The other thing that was made clear yesterday on consultations was that the consultations should not be limited to First Nations that are under the Indian Act election system, which I understand is roughly about 50 per cent of communities. Even though custom reverted and original custom First Nations may not be directly affected by *Corbiere*, it was felt that they should be involved in the consultations as well.

Is that a pretty good wrap-up of the consultation issue yesterday?

MS. STARR: Except I don't know if we emphasized enough yesterday that the judgment actually does require the consultations. The headnote here says: "The effect of this declaration should be suspended for 18 months to give Parliament the time necessary to carry out extensive consultations and respond to the needs of the different groups affected."

So I don't think there's an option for the department, or for the government, but to conduct the consultations. The question is how.

THE CHAIRMAN: There is an obligation to consult but there was no obligation that it be funded consultation.

MS. STARR: No, or how.

THE CHAIRMAN: Or how. The other point that's made there is it talks about aboriginal groups affected and not just First Nations, and that would seem to me there was a flagging of the particular impact on native women. Off-reserve peoples are definitely affected and First Nations are definitely affected.

MR. YOUNG: There was comment made this morning that PCO, or the government, have decided that the groups who will be consulted with are AFN, the friendship centres and CAP.

MS. CRAIG: And the Native Women's Association.

MR. YOUNG: No decision has been made with respect to regional or national consultation. That's the position of the government.

THE CHAIRMAN: The decision has been made on regional consultation but not how.

MS. CRAIG: There will be national and regional.

THE CHAIRMAN: But not how.

MR. YOUNG: Not how?

MS. CRAIG: No.

MS. STARR: Is that set in stone?

MS. CRAIG: With the four organizations?

MS. STARR: In terms of the extent of the department's consultations; just the national and the regional?

MS. CRAIG: I guess I would be confused about what other kind there would be besides national and regional.

NEW SPEAKER: Local.

MS. CRAIG: When I say "regional" I just mean that there would be -- my view of regional is that would filter down to the local. When I say "regional", it's just that we're not going to try to do it all from the national perspective.

MS. STARR: When you use the term "regional" you assume there will be --

MS. CRAIG: That's my assumption. When you say "local", to me that's part of the regional consultations; just to give voice to regional differences.

MR. ANGUS: Does the obligation to consult go only to inform people? What about if people want to revert back to custom or improve their custom election acts? Does the consultation continue on to development of election legislation for bands?

THE CHAIRMAN: You're not in a position to answer that?

MS. CRAIG: We talked about that earlier. I know that if a First Nation didn't get $10,000 already to help them develop a code, some of the regions have found some money and are giving them the $10,000.

MR. ANGUS: In order to develop good community legislation, especially like an election act, which is so fundamental to the community, $10,000 isn't enough. You really don't have enough resources to have those band meetings and bring everybody in so that they can participate in developing their own legislation where in the end they could have a feeling of ownership of that legislation. I think you weaken the communities by under-resourcing them and expecting them to pass fundamental legislation only to see it sputter and cause confusion and problems, more than continuing the unity of a community.

I'm just making that pitch because I've seen community legislation rushed through because there's no money for band meetings. For example, on my reserve, 60 per cent live off the reserve in Edmonton, Alberta -- and we're from Saskatchewan -- and Regina and Saskatoon. You have to hold workshops over there and that's expensive. Otherwise, you will have a referendum with just the people on the reserve. It's again a very small minority making big decisions, and that's an on- and off-reserve band members issue right there.

I think $10,000 is so inadequate and it should be addressed.

MR. WORME: I wonder if we can get any advice from the department on any kind of formula funding in that regard, because it seems to me that the last time those funds were offered to do the custom codes it is was just a flat $10,000. Where that came from, I don't know. Maybe that's what consultants charge.

Is there any kind of suggestion that there might be formula funding for large bands like Thunderchild? Albert is saying that clearly $10,000 is insufficient. However, it might be sufficient for a smaller band.

MR. HATFIELD: In terms of the funding for the development of election codes, there wasn't any formula attached to it. It was a straight $10,000. I see it being raised here and I'll write back to Dave on how that was arrived at and see what the results have been and how much has been expended in terms of this area. I'll leave it at that for now, but I'll take the concern that has been raised about additional funding for that. The fact is that some others may be living off reserve in larger numbers, so that certainly is a factor.

MS. CRAIG: It's important to remember that that figure was arrived at when we were only talking about an on-reserve electorate that had to have input into the code. I think that's fair to point out.

MR. ANGUS: Also, for Raymond's response, the requirement that the minister expects is that when election legislation is drafted and is taken to referendum, the minimum is only the members who live on the reserve pass that legislation. In other words, in order for the minister to give his ministerial order, he needs to be satisfied that a referendum took place of the current definition of Indian act electors, which is on reserve only, and they're the ones who pass the legislation for everybody. That causes a big problem. And then all these people who live off the reserve say they don't like this, but they have no say because they're not part of the referendum. That

discourages us from having workshops in the cities where your band members are concentrated.

So therefore the only requirement is to have these little workshops just on the reserve and everybody passes it and it's usually not favourable to the off-reserve Indians, let me tell you that.

THE CHAIRMAN: Speaking as an off-reserve Indian.

MR. ANGUS: Yes.

So I think the minister's minimum requirement may need to be on- and off-reserve Indians to vote at a referendum, and the workshops to be held at those locations. That necessarily has to be so in view of the *Corbiere* decision. That would be my view.

MS. STARR: You're right.

THE CHAIRMAN: As usual, that was brilliant, Albert.

Are there any other comments?

The other thing that was raised yesterday on the issue of consultation was the need to inform people, because they're not aware of the decision. And it seems to me also that, although the decision impacts on groups in a separate way, the solution is really going to be found in consensuses being developed by those groups which are currently, in some cases, not speaking, or not communicating with each other. In some First Nation communities the relationship with off-reserve people is very good; in

some situations, though, I think it's probably not very good. How do you deal with those? That's a tough one.

MR. GOIKAS: I'm one of the facilitators. I want to make one comment about consultations that we haven't talked about yet, and it came out in the group I was in the other day. Aside from the issues we've talked about, when you go back and look at *Corbiere*, if you've read the cases and you know a little bit about Bill C-31 and the problems that it has engendered, *Corbiere* seems to me to represent a unique opportunity to call into question the entire structure of Bill C-31, the post-1985 structure. And I think that people, when they read the cases, can see the tentacles leaching through the entire Indian Act structure. That's what we talked about yesterday.

We have 12 months left in this 18-month period and the question we must ask ourselves about consultations is what are we consulting on. Are we consulting on a narrow reading of *Corbiere* to fix the immediate problem and try and do it within 12 months, even though we can all see that there are other potentially broader issues that are touched by *Corbiere*, or are we talking about what Ken Young and other people were talking about yesterday, a broader, more fundamental kind of consultation process that would touch these other issues that are implicated in *Corbiere*?

Before we can talk about even questions like the need to inform people, we have to know who we are going to inform; on-reserve, off-reserve, or all aboriginal people who might potentially be affected by *Corbiere*; and what are we going to

inform them on? We heard the federal representatives tell us today that they have a lot of knowledge about what *Corbiere* may mean but there are no firm positions that can be communicated yet. So things are being done ad hoc.

Where will we inform people? Will we go to reserves and have people come back to their home communities to be informed or will we contact them wherever they may be? There's cost implications for that. When will we do it? Will we do it in the short term, within this 12-month period remaining, or over a longer period of time? And how will we do it? How will we ensure that everybody gets the information they need?

I just think that all these questions come back to a fundamental question that we haven't really answered yet; that is, what is the purpose of our consultation; what are we trying to achieve? Is it to fix the immediate problem that *Corbiere* has raised or is to do what we can all see needs to be done, to touch some of these other problems that are like a constellation of problems that *Corbiere* takes us to?

The first and obvious one was the custom bands. *Corbiere* doesn't talk about them but we know that that's the next issue that will come forward, and we know there are a number of other issues.

It seems to me that before we can talk meaningfully about consultation we have to talk about 12-month consultations, 12-year consultations.

To add one other thing, I'm a little surprised as well that we have to go to Cabinet to get a mandate to consult. Well, I can see why. I mean there's language in

the case, et cetera, and it is an important issue. It touches, in many ways, the entire Indian policy. But going to Cabinet -- and I'm not going to ask the federal government to expose where we are in the Cabinet process -- but that's going to take a few weeks anyway, even if we have a Cabinet document ready now. Even if it's ready now, that doesn't mean you're going to get in front of Cabinet and get a decision. So we don't really have 12 months, we have less than 12 months, unless we've gone to Cabinet already and I don't see how we could have because, from what I've heard today, we don't have positions to take to Cabinet. So really we're talking about a consultation period that's much less than 12 months.

So I think this group, if we're going to provide any meaningful advice, we have to know what kind of consultations we're talking about; short term or long term. That's what I heard in my group yesterday and those are some of the issues we talked about.

THE CHAIRMAN: Thank you, John.

MR. YOUNG: It would be interesting to find out how many First Nations have even been informed of the existence of this decision that has been rendered by the court. I bet there are quite a few of them.

MS. BREWER: The thing is that when the decision came out the National Chief wrote to every First Nation. So every First Nation was made aware of it initially. We immediately did an analysis and we got work plan to start consultations immediately. The idea was to work with the membership organizations that people off

reserve belong to, or have memberships in, to try to get the information out to as many of the First Nations members that reside off the reserve as possible.

The idea was to work with the federal government, because in fact, as we all know, the idea is and the federal government has the actual responsibility for this, but we were trying to invoke some of the policies that had been declared by the federal government in "Gathering Strength", which their idea is to work in partnership with First Nations and First Nations organizations. So we took the position that we would work with the federal government as well as the other organizations -- the Native Women's Association of Canada and the National Association of Friendship Centres -- and begin a process of, first of all, starting to identify the issues and also to start to discuss mechanics of how voting would occur or how leadership selection processes would occur, how you would deal with appeals; start the process off.

We knew that we had to come to something within -- at that time it was 18 months -- to deal with the voting elements, but we also recognized that there were a whole pile of other issues which, of course, we're discussing right now, which would also have to be discussed.

As you've heard, we have been totally unsuccessful in advancing that approach with the federal government. It seems as if the federal government wants to lead the consultations itself. It does not want to engage or allow First Nations organizations to be the lead in the consultation processes, which, of course, is the same divisive approach that has occurred in a number of areas.

At the point that we're at in terms of the Assembly of First Nations, we've been working with the department on an initiative which has had a certain degree of success wherein we have established regional processes which reaches down to the local level. The matters which we are discussing in that process have been basically those areas which are now in the Indian Act that are governed under the Lands and Trust Services area, one of which is elections. So the idea was to use that process in addition to working with the off-reserve organizations. And in fact we probably will proceed, to whatever degree we can, with that.

From the national perspective, we're facing this. We have a whole pile of regions with different views on the *Corbiere* case and different perspectives in terms of how to include off reserve and whether you want to have people living off reserve participate in your election. There's different views in terms of what constitutes an aboriginal or a treaty right in relationship to political representation.

From our perspective, if we do not have national processes the only one who gets this information on a national basis will be the federal government, because you can bet that although there are regional processes and local processes going on, these will feed into the federal government only. We won't know what's going on from coast to coast unless we have national processes as well.

So that's the perspective that is being advanced by the Assembly of First Nations, certainly, and we have been working with the National Association of Friendship Centres and the Native Women's Association of Canada as well to ensure

that they are informed and, to whatever degree we can, cooperative in a process of consultations on *Corbiere*.

So that's basically where we're at.

THE CHAIRMAN: Thank you, Carolann.

MR. PAUL CHARTRAND: I have a comment about the process of consultation, and I'm somewhat hesitant to make my small comment because I didn't attend yesterday and it may be that you've already fully considered this little point. But I started to reflect on John Giokas's metaphor about the tentacles of invalidity leaching all over the Indian Act, and I was wondering how tentacles can leach. It occurred to me that he probably had in mind octopus tentacles, of course, and it was the ink, but then I figured he probably had another metaphor.

MR. GOIKAS: I'm a poet.

MR. PAUL CHARTRAND: I think in his mind he had lawyer's ink leaching all over the Indian Act sections.

MS. STARR: Was that your little point?

MR. PAUL CHARTRAND: No. That's the preamble to my little point.

My little point proceeds from John's suggestion. I think there are at least two parts for the purposes of consultation. John talked about identification of the subject matter of the consultations, and my little point has to do with the other part; that is, the identification of those with whom consultations ought to be taking place. So it goes on from his suggestion about leaching all through the Indian Act. And my little

point simply is that in thinking about -- I'm addressing the Government of Canada here, through its representatives -- in thinking about the identity of those with whom consultations ought to be carried on, you should be aware of the point that John has made and that there are groups who are aboriginal peoples within the constitutional meaning but who are not recognized within the terms of the act itself who are undertaking legal action to challenge, on the basis of the analysis in *Corbiere*, the definitional section as also being invalid, being discriminatory of particular groups of people.

One thing that comes to mind, one small factor, is the exclusion prior to 1951 up to 1985 -- I can't remember offhand the dates but it's not important. The point is that some persons have been excluded by virtue of the former section 11, and so that has a residual effect in the act today.

On that basis, and other bases, people are gearing up to challenge the government in court regarding some pretty fundamental matters that have the potential to require very important and far-reaching changes in the way that the government purports to implement its policy and to legislate its policy, so if careful thought is not given to the identity of those to be consulted, we might come up again with the absolutely regrettable circumstance that we saw in the *Marshall* case where we have a situation where the government says, in attempting to defend the indefensible, that it does what not even a dog show would probably do; that is, it didn't have a Plan B because they thought they were going to win.

If one took the words of the minister to heart, one would absolutely despair about any prospect of having a reasonable consultation process.

Hopefully people will reflect on the very important issues that John has suggested the tentacles are reaching out to grip.

THE CHAIRMAN: Further on this point, yesterday, John, in our discussion we did distinguish between things that could be done within the remaining less than 12 months and those things that couldn't be done and which required more longer-term consultation. But then we came back and said that there's just been some major consultations on a lot of these things in the Royal Commission process. The problem is many of those things haven't been acted upon. So maybe what's needed is actually a consultation on how to operationalize some of those substantive recommendations.

MR. GOIKAS: To respond to Paul for a minute, I want to clear up any misconceptions. I do not believe Paul was using the word "leech" in conjunction with my status as a consultant in any way that would cast -- well I think you get my point.

MR. PAUL CHARTRAND: Your spelling is terrible though.

MS. STARR: I am listening to, on the one hand, the government's concern about how much this consultation is going to cost and, on the other hand, the clear direction of the court of what is required of the government in order to honour this decision. It looks like it's two parts; "to give Parliament the time necessary to carry out extensive consultations" is the first part.

Now, how about this idea, since we're just brain storming and think tanking. The duty is obviously on the government to consult with us, and "us" is inclusive of all aboriginal First Nations, of the organizations, and so on. And then the second part is, "in order for the government to respond to the needs of the different groups affected".

So what I'm thinking is we have 12 months. If cost is a concern, what about the feds going to the communities with their own team, and presumably AFN, in the best of all possible worlds, to ask the communities what their position is. There will be some who have already made up their mind that they are going to include off reserve anyway, and then there will be the whole spectrum of those who won't and some in between who haven't decided. But at the end of this one year of consultation of the communities and the organizations by the feds, then the government ought to have an idea of which portions of our aboriginal communities are going to need extra funds to put their election acts in place, and that might be the second stage for implementing.

It does seem clear to me that the court anticipated two stages; the consultation with the aboriginal communities, whichever way they're defined, and secondly, after having obtained the information in the consultation, then to address the needs of those particular groups affected, the ones who are ready to go forward, to go ahead.

There will be those who may be immobilized, and there's not much that we can do right now within the year, but the 18 months will come to an end and the feds are going to have to take those seven words out and then everybody will have to sink or swim in order to catch up with the rest of the crowd, at least on the aboriginal community front, and I don't think that there's much more that anybody else can do. Every community is progressing at its own speed given its own resources and its own cultural characteristics. That's my contribution.

MS. BREWER: That's one approach. The concern that I think was identified in the Royal Commission report, as well as certainly the observations that I've had in my experience, is that most First Nation communities don't have the capacity to do the analysis and to look at the breadth of issues that are there. So if the feds walk in there and say to a community, "How do I implement this decision? Do you have any problems with this? What is it?," whatever, they will not be able to respond. They will have to turn somewhere and address that.

From the federal government's perspective, they're looking at it and saying, "If we walk into every community and provide that capacity to respond properly, we will be expending tremendous amounts of resources, and it's not efficient." So how do you balance these two things where you create the capacity within the First Nation communities and also you have an efficient process that can deal with it? That is exactly what we have tried to address from the AFN's perspective.

MR. ENGE: I will play devil's advocate here. I don't know where the foundation is that the communities don't have the capacity. They conduct elections as they already do anyway.

MS. BREWER: You're talking about elections only though. There are a number of issues that arise out of this which are beyond elections. First, custom code elections right now, the appeals that come out of those custom code elections, there's no resourcing for them and the communities are on their own. That is number one.

MR. ENGE: Well, the *Corbiere* decision is merely speaking about who is eligible to cast a ballot. Whatever flows from that is pure speculation. I think the department's position that was already stated; that programs and services do not extend beyond a community holding an election and deciding to increase the number of people who have their names added to the polling list. It's nothing beyond that. The bands themselves are already getting operational administrative annual budgets to administer programs and services based on their band membership lists, is my understanding. If you're going to take a giant leap a say that with 700 people living off reserve suddenly budgets have to be increased to include them for social services or education and things of that nature, I don't think that's a tenable argument.

MS. STARR: That's not what we're saying.

MS. BREWER: No. The other point is that we've been sitting around here discussing for a day and a half now that this is not just about elections. I think that has been pretty clear around here. I think even the federal government realizes that, which

is why this issue has to go to Cabinet. There are a range of issues that arise as a result of this case. The only one that's on point is in relation to election, but the next one that's coming up is custom codes. There's a whole hoard of cases which can arise as a result of this case and I think that is why we're having this discussion and why we want to get a broader discussion going as well.

THE CHAIRMAN: Thank you.

MS. STARR: I'd like to explain to you the scenario that I would see happening in my community, for example, if somebody from the outside -- and that's how they would look at it, somebody from the outside; it doesn't matter whether it's the federal government or AFN -- were to come into the community and offer a one-day workshop or information session to the whole community on the implications of *Corbiere* to them.

Everybody -- at least the councillors and the staff -- will have read one of these letters. They will know that *Corbiere* says off reserve have to vote. They will also know that there's a hiatus. They won't know exactly how long, but they will know that they have some time. They won't know how close they are to it. So that's the community knowledge at nine o'clock in the morning when the door opens.

A hypothetical joint AFN and DIA consultation team will go into that community to consult with that community about how they think they can implement, if they want to implement, *Corbiere*. The community will understand the election part and they will not really argue that the "offs" have to vote now. The first thing that they

will say though is, "Gee, we have this waterfront property that we want to develop into a marina. At the moment, the designation process under the Indian Act requires only the on reserve. If we go ahead and we designate this reserve land for commercial use as a marina, we are going to have to get everybody, all Haisla, regardless of where they live, right?" And we will say -- or whoever it is -- "Right". And then all the other questions will start popping out, slowly, from everybody else, asking, "What about our trust money? We have trust money but we need to maybe borrow from it because we're a million bucks in debt. Do we have to let all those off reserves vote too?" And really the answer at the end of the day has to be yes.

So those are the really far more fundamental implications of equality for First Nations members over and above, and it subsumes the right to vote for chief and council, because if we don't extend that to the off reserve for not just voting for chief and council, then that chief and council will make those decisions about how to spend or not spend the trust money, will still be able to make those decisions about how to indebt the band $5 million or, the reverse of that, if they come into a land settlement of $5 million, how should they invest it? Should they leave it for 25 years; do they want it right now? And those kinds of decisions affect me off the reserve, and my kids.

The fundamental way to understand the concept of membership in a tribe is that when you're born into it, it's like being an equal shareholder to everybody else alive at that time, and the extent that the tribe has money is the extent to which the per capita share of each band member may be calculated. To the extent that the band is in

the hole is the extent to which an equal share of that debt sits on my head personally, regardless of where I live in the world.

MR. STEVENSON: I want to make a couple of observations. It seems to me that there are at least three areas that consultation is required about. The first is the area Brad is talking about, which is a very, very narrow set of manageable issues related to band elections.

The second are the areas you've been talking about, which really relate to the finding that aboriginality residence is an analogous -- whatever.

The third are the sorts of issues that David's been talking about, which is the whole series of issues around RCAP which have been raised which are much broader in the total relationship.

It seems to me that the department is in a real dilemma because they only want to focus on the first set of issues. But even focusing on those issues, the $10,000 or whatever it is is just not sufficient. Take your community, for example. You have to have consultation in Vancouver, consultation in Prince Rupert, consultation in Haisla territory, and consultation in Terrace. So that's not going to do it for those bands.

So, regardless of whether or not you choose to consult on the first set of issues, the second, or the third set of issues, what you have isn't enough.

We have to recognize that there has to be consultation on the whole range of issues, begin dealing with those that are manageable, because you have 12 months

left, and maybe you have your first set of meetings on those issues that are manageable within 12 months, have the second set of consultations which go to the root of the governing structure and how the "offs" get to deal with issues related to trust moneys and issues related to surrenders, and make sure you make a commitment around that at the same time that you go to Cabinet and have everyone fully understand that that second set of consultation will happen. And at the same time you will have to, at some point -- although I don't think it's directly related to *Corbiere* -- you're going to have to deal with the third set of issues as well.

But I don't think you will get buy-in from a whole lot of people unless there's a commitment to do at least that first and second tier of consultation and understanding that you will not get all of that done within the 12 months.

THE CHAIRMAN: Thank you very much, Mark.

We should discuss some of the things we talked about yesterday on non-consultation aspects. For the benefit of those who weren't here yesterday, we spent time looking at the four options that are in that one-page document. The sense that came out of the workshops and the plenary discussion was that basically all of those options may have application -- that was one point -- and that it should be open to First Nations to decide, or communities to decide, or aboriginal peoples to decide which option they choose.

Don Worme described this as sort of a consultation highway where each of these options were off-ramps.

Vina really liked that metaphor.

MS. STARR: Yeah, I really do.

THE CHAIRMAN: So there's four off-ramps there. There was some kind of a leaning toward Option Two. However, there was an acknowledgement that it wasn't reinstituting traditional forms of leadership selection and that title was removed, as well as the first sentence. There was an acknowledgement that probably those older forms of government needed to be brought up into a contemporary circumstances, although they needed to be based on the principles of traditional governance or custom governance.

Some thought that there might be combinations of these different options applying as well to First Nations and aboriginal peoples.

Is that a fair summary on the options? Does anybody think I missed anything on that?

I know Paul has some questions.

MR. PAUL CHARTRAND: Again, I confess the limits that my participation faces here, but I'm interested in what appears to me to be a setting aside of the Royal Commission's approach to this. That's what it appears like to me, although it may not be the intent.

For example, Option Four refers not to new self-government processes but the current process. Option Three is much, much narrower than what was proposed, and quite different in its nature. All of them seem to be quite different from that.

I certainly don't agree with many of the recommendations in the RCAP report, but I thought that the relevant recommendations were good ones, and I still think they are good ones, and by and large the idea here was, if those broad recommendations were followed, these *Corbiere* consultations would have naturally been subsumed under a broader national policy which would have started with consultation at the national level between the first ministers and the national leaders so that you can develop a policy that makes sense and eliminate the haphazard, absolutely unworkable situation that's happening now.

However, rather than trying to reopen the discussion like that, I'd like to suggest one small option that might be worth considering as a tool for managing social change, which I suppose, at a certain level, this is what this is all about; what kind of social change aboriginal people, being a historic moment, first time getting up off the knees and saying, "We exist, we're still here," and Canada says, "Gosh, they weren't eliminated, now we have to find a place for them in the Constitution and institutions of this country, so how do we go about doing that?" It's very difficult because you have a lot of forces working together in a very complex fashion that nobody can quite fathom and certainly can't predict the outcome, and some of these factors work against each other.

For example, there's the move towards change that's desired by leaders, by governments, by others; changes in the law, the Constitution. On the other hand, there's the basic conservatism of all communities that you have to talk about, and I

think some of the comments reflect that. It doesn't matter who it is. All people are essentially conservative and fear change in the status quo. So how to deal with all of that is very, very difficult. So the government is saying, "How do we manage all of this?"

I don't have any ready answers, but perhaps one small tool, one small institution to assist the management of social change, might be the idea of a national aboriginal law and policy institute which might perform some helpful functions. For one thing, it would deal with one factor which is the perceived illegitimacy of government advice, for better or for worse. People say, "I'm from the government and I'm here to advise you on what is good for you." People generally don't like that sort of thing. It's another source of inspiration for policy changes, legal changes, change managing social change.

One of the basic problems is the incapacity that has been discussed here, on the one hand, of small communities to design for themselves changes which might best suit their interests, having not a very good idea, through no fault of their own, what it is that their preferred interests suggest they ought to move toward by way of public institutions. So they have relatively little capacity, as has been suggested, and I accept that wholeheartedly.

At same time, the courts also have an incapacity. The challenges being put to the courts are way beyond -- I think we'll get general agreement on that point, and the courts themselves have said that -- they just don't have the capacity to deal with all

these issues, and I think they're doing a terrible job. My own reflection has always been that one of the worst things you can do to beat up on aboriginal rights is to litigate them through the lenses of the "small l" liberal charter. We can see it happening already, and I've seen some comments in the things I have had a look at. It is a prescription for disaster from the perspective of indigenous people, but I suppose that's why we have a Federal Court Challenges Program focusing on that and nothing for section 35.

However, my main point is that the relative incapacity of the courts might also be assisted by having a national arm's length law and policy institute. It might be a more sensible way to do the kind of thing, in fact, that we're trying to do here to get reflection on options and so on. RCAP was one. It's the same kind of thing; how to get advice to the interested parties and how to manage change. RCAP is a one-shot thing but, as people have pointed out, things change, things move along, so you need sort of an ongoing capacity, and we have ongoing capacity; the courts, the government, and the communities. But my argument has been that they all suffer various kinds of incapacities and it may be that that kind of an institution might help a little bit.

THE CHAIRMAN: Thank you.

MR. BRAKER: I wonder about whether Option One even exists. I don't think for the minister it does. I asked earlier if the minister had been advised in respect of fiduciary duty and trust, because an unknown from *Corbiere* is how this exposes the federal government to potential for lawsuits.

I was just advising some clients on the effect of *Corbiere* in matters such as estates and children's accounts where the minister does have policies that incorporate wording about ordinarily resident on the reserve. What does what mean for those, and can the minister have the luxury of sitting back and doing nothing about changing those policies when it's possibly exposing the government to further litigation? I don't think so.

And then I question whether Option One even exists for First Nations. If you're going to advise that Option One exists for a First Nation, you had better be prepared to advise the potential councillors elected under a status quo system about their potential liability for alienating bands assets; just a simple vote like whether or not Hugh Braker can build a house on this part of the reserve. If I'm a band councillor who has been elected under an old system which disallows the off-reserve people a chance in voting for me or against me and then I make a decision on band council, or somebody does, about where people on the reserve can live and who gets a house this year -- the $30,000 or something like that -- then I had better be advised about what potential liability exists, knowing what the Supreme Court of Canada has said.

So I personally question whether Option One even exists.

THE CHAIRMAN: There are two other points that arise out of our discussion today. First, there seems to be some uncertainty over the impact of the *Corbiere* decision on previous decisions. If the effect of the declaration of invalidity is

retroactive, then it casts doubt on a lot of things that occurred prior, so that may need to be clarified by some type of legislation.

The other thing that occurred to me was, let's assume it's November 20, or whatever the date is, and the government doesn't act, those words get dropped out of the legislation, and you have a situation where you've got two-thirds off reserve, one-third on reserve. Can a member of the one-third on reserve sue, on the basis of section 15, that they're not being treated properly because the legislation hasn't been adjusted to accommodate their interests? I think that's probably a serious issue as well.

MS. CRAIG: The court appears to have raised that possibility in the decision.

THE CHAIRMAN: So the option of doing nothing maybe is not really an option. I suppose the only place where it may be an option is for communities that are under custom. *Corbiere* doesn't really affect them; not directly at least. The policy may be required to be changed, but for custom communities there's implications but not a direct affect.

MS. CORBIERE: When I was thinking about the status quo as being an option, what we discussed yesterday as well, and one of the things that we agreed on was that we weren't comfortable ourselves deciding things for first nations. When we say that the status quo is an option, I think all lawyers would be telling First Nations, "If that's all you're going to do, there are some serious legal issues that you're going to be confronting." You cite one example, but there are many more. Personally I don't

think it is an option, but if the First Nations decide, or the federal government decides just to let the language not be seen any more, that is an option, but I think we all agree that there are some serious legal, political, and social implications to that option.

I think that's why it's raised as an option. Some First Nations, as you said, don't want change, and they may decide that that's all they want done, despite what they're advised by their legal advisors. That's how that was raised.

MS. STARR: To continue on from Diane's observation, if we need a document to come out of this think tank to go to government, and if we're proposing that this one page of four options is one of them, it would be useful to clarify what we mean by putting forward Option One as an option. When I say "clarify", all I mean is that while we put it forward as an option, those seriously considering it ought to be mindful that this will be a follow, this will be a follow, these other three or four things will be natural consequences of doing nothing.

MS. CORBIERE: I'd like to add that, when we were drafting this paper, you look at what the current options are and you hear from some treaty nations -- and I remember Sharon Venne at the RCAP conference -- and when you think about the current policy on reversion to custom within the 18 months, they have to admit that the Charter applies to their governance, they have to admit that the principles of natural justice apply. There are First Nations that will not be doing that. They're not rushing towards that, and they refuse to revert to custom for that reason. They're in a position where some of them don't have a choice right now with the current policies.

MS. STARR: You mean don't have a choice but to follow Option One?

MS. CORBIERE: Until there is something better.

MS. STARR: Because of the current policies?

MS. CORBIERE: That's right.

MR. LARRY CHARTRAND: Alluding to something that Vina Starr said earlier, I was just reading a section of the judgment where it says: "The unique disadvantages or circumstances facing on-reserve band members have to be taken into account." However, in this case there's no evidence that was presented that would suggest that the legislation in purpose or effect ameliorates the position of band members living on reserve. Now, there could be a future case where that argument could be made and the evidence could be presented that the Indian Act and indeed restricting voting to just on-reserve band members may be justified; for example, arguments related to the fact that outside mainstream assimilation pressures and that sort of thing works a disadvantage to the culture and that sort of thing, and this would be one requirement to ensure that that culture is protected.

So that's another option that I don't think we've actually considered. Another case could come forward and try to raise that evidence.

MS. BREWER: I don't think that's really an option because of the whole discussion in the decision about the unique position of women and children; in other words, the impacts of the Indian Act over time. So in fact I would suggest that that wouldn't really be supportable in the case.

MR. BRAKER: I just wanted to comment on that because the questions that the court had to answer were very specific. The court answers the first one about whether or not they contravene section 15(1). They say, yes, in their general application. In other words, the seven words offend the charter in their general application, and that's what the court was deciding. So I don't think that, generally speaking -- and you're not going to be able to do it anyway -- that the option is there for a case, but in respect of specific First Nations and custom elections, then yeah. Is that the point you were making?

MR. LARRY CHARTRAND: Yes, on a case-by-case basis.

THE CHAIRMAN: There was one other option that occurred to me, and it goes back to this theory of whether section 35 is a full box or an empty box. If it's a full box, if there's an existing inherent right to self-government, then that right exists and maybe it should just be asserted in the development of a piece of legislation which addresses it. We didn't put that in. Well, it's sort of there through Option Two, but it isn't specifically there.

MS. STARR: That's an extremely important observation and I think it does qualify to stand on its own two legs as a fifth option, and I take as an example our first nations in British Columbia which have never signed a treaty, and where in *Delgamuukw* it was found that aboriginal title had not yet been extinguished.

So if we start from there and take say my band, or Hugh's, or even Carol's, if each one of those councils were to just start now with their constitution, as we

discussed yesterday, a simple straightforward constitution saying: "This is who we are. This is our land. These are our laws. We empower our government to pass these kinds of laws, and our government needs to measure up to these standards in order to continue to qualify to govern us and, if they don't, then this is the remedy that we have to satisfy ourselves that our governors are governing us properly"; and then proceed to pass their own laws, who needs to approve a tribal constitution? The minister couldn't approve a membership code. The minister technically shouldn't be able to approve a property tax by-law.

The more important observation is that if a tribe or First Nation has not yet given up its aboriginal title, then presumably all of its governing power is intact 100 per cent under that title and can simply start passing its own laws and registering them in this Gazette.

MR. PAUL CHARTRAND: I have a little question that you may have talked about yesterday, and it has to do with what appears to be -- at least in my quick, inadequate reading of the case -- that the court seems to have taken the view that the legislative objectives are valid. Does that worry anybody?

If you look at the assessment of a people in respect to those objectives, one comes up with some unsavoury conclusions. Take an example of Treaty 6. Mr. Musqua was not very happy about having to be put on a reserve; he wasn't very happy about the policy to break up the Cree nation and push them away from the American border where they could ally with their friends and relatives down there. The act

supported the policy of disintegration of nations. John Tobias, for one, has described those objectives of being three-fold: The protection of civilization, which means acculturation or changing the identity, changing the culture, which today the court seems to be saying is not a constitutionally legitimate objective; and the final one is assimilation, which we might draw the same conclusion about. And yet the court here seems to be saying those are legitimate objectives. If that were so, it seems to me that maybe the easy way to do it, or the option, would be to restrict -- if these are indeed legitimate statutory objectives, the easy solution for the government would be to pass legislation to narrow even further the definition of band members and restrict it to people who actually reside on the reserve, because that is consistent with the historical objectives of the legislative policy. So that's the question.

Have you thought about that and talked about it?

MS. STARR: No, we haven't.

THE CHAIRMAN: It's interesting though.

MR. PAUL CHARTRAND: It presents severe obstacles to further arguments later on. I don't know if the court really meant what they said, but there's something interesting about it.

THE CHAIRMAN: Which one are you talking about?

MR. PAUL CHARTRAND: The first part.

MR. STRINGHAM: The first part of the section 1 analysis, pressing and substantial objectives.

MR. PAUL CHARTRAND: The first step in the analysis.

MR. STRINGHAM: I'm looking at the minority decision of L'Heureux-Dubé. I'm sorry, I've got the wrong paragraph numbering. I think it's 100 in the C.J.A. She writes: "In this case Parliament's objective is properly classified as ensuring that those with the most immediate and direct connection with the reserve have a special ability to control its future. This objective, in my opinion, is pressing and substantial."

She's saying that these people have a more important, or a greater interest, if you will, and then of course the court goes on to say but this other group of people who are being excluded also have an interest.

MR. PAUL CHARTRAND: So remove it. But she's in the minority.

MR. STRINGHAM: Touché. I'll find the majority.

THE CHAIRMAN: Pretty much the same.

MR. KONTOS: Paragraph 21.

MR. STRINGHAM: "We are satisfied the restriction on voting is rationally connected to the aim of the legislation which is to give a voice in the affairs of the reserve only to the persons most directly affected by the decisions of the band council."

THE CHAIRMAN: That would seem to me to create a good basis for -- if those words drop out, then on-reserve members could possibly bring a challenge in the future if they're most directly affected and they're out-voted.

MR. STRINGHAM: That's signalled again by the court in the majority in paragraph 23: "We have not overlooked the possibility that legislative inaction may create new problems", and then more clearly by the minority in 120, or 24 in the version I've got. It says: "In ordering this remedy the court does not foreclose the possibility that if Parliament does not act to change the legislation section 77(1) or related sections of the act may be subject to constitutional challenge by on-reserve bands members."

THE CHAIRMAN: Maybe there could be a lawsuit launched against the Supreme Court for dropping those words.

MR. PAUL CHARTRAND: I suppose my point might be restated slightly to say that what might be of concern is that it's difficult -- at least for me it was, and maybe it will be easier once I look at it again -- to find out how the court arrived at a characterization of those legislative objectivities. They seem relatively narrow. They're much less broad than the ones that have been considered by analysts of those legislative objectives in the past. And it might raise concern also to find out how will they characterize those legislative objectivities. This seems to be a very narrow ground related to decision making. It doesn't seem to address the broader historical objectives that drove the enactment of the act in the first place.

THE CHAIRMAN: That's true. That's a good point. They side-stepped it by looking only at the objective of that particular provision.

Well, I guess we're about ready to have lunch. I notice that Paul is back with us to help us close the meeting.

MR. STEVENSON: I'm not clear on what the next steps are. Is this just one of those think tanks that are part of the AFN work plan? We talked yesterday about possibly having an advisory committee ongoing that would have some sort of relationship with the federal government. Are there future steps or is this it?

MS. STARR: I'd like to support Mark's question. I'd like to go a little further back and clarify for myself how we got to be here yesterday and today in the first place. It sounds to me like IBA, or AFN, or somebody, was very concerned about the lack of action in implementing *Corbiere* on the part of the government.

MS. BREWER: It was really both.

MS. CRAIG: I was at the genesis. The birth of it was a comment by Daniel Ricard, who is the Senior General Counsel at DIAND legal services, when we were in the process of talking about a think tank that we had previously. He said that a legal think tank would be a good idea. That was the genesis of it. Bob Watts told Roger Jones that. Roger said that maybe the IBA would be interested in hosting that. So it came from legal services at DIAND.

MS. STARR: What I had thought then is that DIAND had retained IBA to convene this and, if so, then we're required to make some kind of a report to DIAND, aren't we?

THE CHAIRMAN: There is a report required under the contribution agreement. We will have a transcript of this meeting.

MS. STARR: I see. And there's disagreement here that IBA has been retained.

THE CHAIRMAN: That is clear; we haven't been retained by anybody. As I said at the beginning, we're just hosting this as an opportunity for individual members of IBA to participate in a think tank with members of Justice, members of Indian Affairs, members of the AFN.

There seems to be, on the issue that Mark raised, some sense that maybe there ought to be some consideration given to further similar types of activities or follow-up. I certainly note that as the IBA president, and maybe government reps can note it. As I said at the opening of the conference, there has been some discussions about the need for ongoing dialogue or several sessions on difficult issues between Department of Justice lawyers and IBA lawyers, and we do have a mandate from the IBA membership to pursue that. We just hadn't pursued and hadn't had time.

MR. HAIMILA: A little bit of advertising, in a sense. The organization I work with, the Indian Taxation Advisory Board, in conjunction with the Native Law Centre, published this. I don't know if you've all seen it here or there in your travels. It's an idea that was developed, and people thought it was a good idea to have a Gazette. In terms of discussions around *Corbiere* and that sort of thing, it seems appropriate that there be a lot of issues of notification and promulgation as well, that

this kind of an instrumentality might serve. I just thought I'd raise your awareness of it at this meeting. I've got a few order forms. There are good things in it. In this latest edition there is a custom election code that's been promulgated, and there's also various other band laws or First Nation laws that have been passed. That is just for your information.

THE CHAIRMAN: Thank you very much. That's it. Thank you very much everybody for participating.

MR. STEVENSON: What was the answer to the question?

THE CHAIRMAN: You should have been paying attention.

MR. STEVENSON: Okay.

THE CHAIRMAN: There's no way we can resolve that issue. I think there's an acknowledgement that there is an interest and maybe some need for some follow-up. Vina certainly supports you. I think it's probably a good idea. It's noted as a suggestion to the IBA board, for the board members that are here, for myself, and for government, particularly Department of Justice officials that are here. They may want to take it back and indicate that in the reports that they file.

We also have a standing suggestion from Justice that we enter into this dialogue. That's basically what I said. But in terms of the role of the IBA specifically in following up, or this type of group following up on the implementation of *Corbiere*, we really didn't have time to get into that. Maybe we'll leave it for the powers that be to incorporate us if they decide that what they have heard here was useful.

(Adjourned at 12:25 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.B

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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Hugh Braker: Braker and Company

Carolann Brewer: Assembly of First Nations

Al Broughton: Legal Services, Department of Indian Affairs and Northern Development

Larry Chartrand: Law Professor, University of Ottawa

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