INDIGENOUS BAR ASSOCIATION:

--UPON COMMENCING AT 9:20 AM ON OCTOBER 20TH, 2000

MR. DAVID NAHWEGAHBOW: I'm going to turn it over to Elder Chief Harry Wawatie from the Algonquin. If I could ask him to do the opening prayer for us.

OPENING PRAYER BY CHIEF HARRY WAWATIE

(IN HIS NATIVE TONGUE)

MR. DAVID NAHWEGAHBOW: Good morning, ladies and gentlemen. Welcome to this conference on the subject of Globalization: Indigenous Law in the International Context.

I will just give you a few opening remarks. My name is David Nahwegahbow and I'm president of the Indigenous Bar Association, and I'll be chairing the conference for the next several days.

A little bit about the Indigenous Bar Association. The purposes of our organization are generally to advance the causes of Indigenous peoples, to promote public awareness within -- amongst our own people as well as Canadian society generally, and also to promote networking amongst Indigenous lawyers in Canada. I guess the most important object of our organization is to -- is to promote our own laws, Indigenous laws. I remember when we were discussing the formation of the organization, that

was a very important aspect of the -- we saw it as a very important aspect of our work.

And so that's -- we had a number of meetings throughout the years and we have, at different times, focused on the issue of Indigenous laws. And we're again examining the issue of customary law in the context of globalization and international law.

Globalization itself, people who you talk with may be opposed, and you will find those that are in favour of it. Whichever way you look at it, I believe it is a reality. And then I'd like to see it as an opportunity to advance our cause, the cause of Indigenous peoples within Canada and worldwide, by insisting on international standards which are fair, and equitable and just in the eyes of Indigenous peoples, which then states, governments, must adhere to in the context of globalization.

We have great speakers lined up for this conference not only from Canada, but from different parts of the globe. And I look forward to some very good deliberations.

I'm going to give you some -- just a few notes on our agenda, some change, some last minute changes. On page ... The subject to this morning's discussion will be

Indigenous Laws, Customary Laws: Governance and Justice, and that will be followed by workshops at 11:30.

Workshop -- Specific Workshop One: First Nation Law-Making that was to be co-facilitated by Ray Hatfield and Rogers Jones -- Ray Hatfield won't be able to facilitate that. And I believe we're finding a replacement for him.

This afternoon, on the title -- on the subject of Aboriginal Title and Treaties, a panel discussion was to be chaired by Professor Sharon Venne. She'll be replaced by Wilton Littlechild.

Just a note on Sharon. She's a very strong and active member of our organization. And I know this subject is very near and dear to her heart. And she intended to be here, but has taken quite ill. So I just thought I'd pass that on to you.

Workshops this afternoon -- on General Workshop Two: Treaties, of course Sharon Venne was to be the -- was supposed to be facilitating at a workshop. She's going to be replaced by Gerry Morin.

And update on the Marshall and Jay Treaty, that's actually going to be just an update on Marshall. And that's going to be delivered by Bernd Christmas.

I guess our most important -- our major change is

the banquet that's scheduled for this evening. We were to have Mathhew Coon Come, the National Chief, speaking. And he apparently has been held up in Alberta and is not able to be here this evening, but we have the possibility that he may show at the close of our conference. And our trusty MC, Albert Angus, is going to be working strenuously on that.

So that's Day One. I guess without much further adieu I'm going to introduce our first speaker, who really doesn't need a whole lot of introduction. His name is Wilton Littlechild, a Cree lawyer from Hobbema. A copy of his bio is in the materials under tab 3, but just to say a few words about Willy myself.

Again, a very strong supporter of the Indigenous Bar Association. He's always there when we need somebody to call upon, and in fact, when -- which is quite often the case, when speakers like the National Chief don't show, Willy is always ready to fill the -- the gap. And h's most recently been involved, of course, as many of you know, in the international arena. I know that that's one of his favourite subjects, so I'm really looking forward to his presentation.

Anyway, Wilton Littlechild.

WILTON LITTLECHILD: Thank you, very much, Dave,

and good morning, everyone.

First, let me begin by thanking Chief Harry Wawatie for our opening prayer this morning. Thanks also to all of you for being here to indicate your interest at this conference, because we will be deliberating, as Dave said, on some very important international issues.

If I may, I would also like to signal our gratitude to the Indigenous Bar Association executive and its members who chose this year's theme, Globalization: Indigenous Law in the International Context. International law has always been an important element of IBA, as Dave said. In fact, it was likewise for the predecessors, the Canadian Indian Lawyers Association, and before that, the Canadian Indian Law Students Association.

In August this year, at the Halifax annual meeting of the Canadian Bar Association, I had occasion to relate two personal incidents, one as young student at the University of Alberta. The U of A, as you all know, is the home of the Golden Bears and the Pandas -- champions in everything.

(LAUGHTER)

Certainly, also, I had the occasion to relate my

first experience with international law. But as a student, as some of you know, or all of you know, that each fall we had an opportunity to select courses for the upcoming year. And one year I was really having problems with selecting one time slot on the agenda, or timetable, for my courses. And every which way I tried to fill in a course, it didn't work, except for the subject International Law. It kept coming up.

And I had absolutely no interest in international law, nor did I think I would ever use it. But it kept coming up, so finally in frustration I said, "Oh, I guess I have to study it. I guess I have to take International Law.", so I did. Little did I know that from then on, I guess, my career path was going to change.

With regard to that first experience, I remember sitting in a law office back in 1977 in Edmonton and the phone rang and it was one of my colleagues. And she said, "There's a meeting coming up in Sweden and we'd like to ask you to chair one of the sessions, and it's on ILO Convention 107. Could you think about it?".

So I thought about it and I called back a couple weeks later and I said, "Yeah, I would love to go to Sweden, I don't know the chairing thing, but what the heck is ILO 107?". She said, "Don't worry about it. We'll fax

you everything."

(LAUGHTER)

So off I went to that first meeting. Actually, it was a World Conference of Indigenous Peoples meeting in Sweden where they first discussed and analyzed Convention 107.

But then subsequently, I was to attend the first meeting of the United Nations in Geneva in 1977. And actually, it was as a representative of the Canadian Indian Lawyers Association. That, too, was a reasoned decision, because the other four members didn't want to go. So thank you, IBA, for once again giving a profile to four very significant areas which we will, as Dave said, deliberate on for the next three days.

Over the last 20 plus years we've had some very significant and important contributions by outstanding Indigenous and other leaders in the international fora. Thankfully, Mr. Chairman, we're blessed to have many of them here today.

When Denise Lightning asked me some time ago to present this keynote address this morning, she said, "You know, the IBA we want to invite the most intelligent, most handsome, and most famous Indigenous lawyer to speak at their conference, but none of them could make it so we had

to invite you."

(LAUGHTER)

In that regard, I've been asked to perhaps give an overview on the developments in the international fora for Indigenous nations. In doing so, I'm reminded of another's comment that helps me frame my presentation this morning when he said, "You have to know where you came from yesterday, and know who you are today, if you are to know where you're going tomorrow."

As you know, 1977 was a landmark year in the international activities of Indigenous peoples. You'll recall that we couldn't even get into the United Nations building and we only had one international instrument, which was very assimilationist in its approach. There was not one word about treaties with Indigenous Nations anywhere.

So where are we today? Well, perhaps at every turn we are facing, as Indigenous peoples, the challenge of globalization. At a recent NGO meeting in the United Nations in New York, a declaration and an agenda for action was passed for the millennium forum. In part, it stated, and I quote:

"Globalization needs defining. To some it is an inevitable process driven by new technologies in

> electronic communication and transport enabling information, persons, capital and goods to cross borders and reach the most remote corners of the globe at unprecedented speed. It is transforming our world into a global village with consequent political and economic changes that open unprecedented possibilities of prosperity to all its inhabitants. To most, globalization is a process of economic, political, and cultural domination by the economically and militarily strong over the weak."

More specifically for our conference, though, it goes on to say:

> "Indigenous peoples are deeply concerned that the ongoing process of globalization and trade liberalization is in many instances leading to the denial of Indigenous peoples' rights to their ancestral territories and violating their rights to the security of their land tenure, including their spiritual perspective on land and development, their traditional knowledge, their culture, and their political and socio-economic systems."

So the planners of this conference, in setting the agenda,

were very much in keeping with the United Nations initiatives. To present an update on the international developments for Indigenous Nations as a snapshot, it would be as follows -- and here, if I may, I'd like to use the four principle issue areas as outlined in our conference agenda.

First of all, Indigenous Laws, Customary Laws: Governance and Justice. One of our deliberate strategies in the international delegations is to not only promote, but strengthen and enhance Indigenous rights at every level. So when one compares the four existing international instruments on the rights of Indigenous peoples, you will note there's incremental success.

For example, the ILO Convention 107, which was passed in 1957; the ILO Convention 169, which amended 107 was in 1989; the UN Declaration on the Rights of Indigenous Peoples, which was passed for the first time in 1994; all had references to Indigenous custom. But it's not until the proposed OAS declaration -- the Organization of American States Declaration on the Rights of Indigenous Peoples in 1997, that there is a specific article on Indigenous law.

Article 16 says, in subclause 1:

"Indigenous law shall be recognized as a part of

> the States' legal system and of the framework in which the social and economic development of the states takes place.
>
> 2. Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention, and maintenance of peace and harmony.
>
> 3. In the jurisdiction of any State, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of their language."

So it's the first time we've had a specific article on Indigenous law in any international legal instrument.

While the OAS declaration has not yet been passed by the OAS state members, it has been passed by some Indigenous nations's governments and has been used in at least three legal cases -- one in Venezuela, the United States and Canada, by Indigenous peoples.

With regard to governance, specifically, I will remind us of the United Nations Meeting of Experts at Knud, Greenland on September 24th to the 28th, 1991, which concluded with specific recommendations on Indigenous autonomy and self-governance, but particular assistance among all the others is article 12, which sets out the heads of jurisdiction of Indigenous governments.

In the near future, as was announced by High Commissioner of Human Rights, Mrs. Mary Robinson, in Geneva last February, there will be a seminar to address specifically Indigenous justice systems.

On the second topic, Aboriginal Titles and Treaties, there are two relevant United Nations studies worth noting in this area. First of all, the recently concluded Final Report of the United Nations Treaty Study. As you know, thanks to the Special Rapporteur, Professor Miguel Alfonso Martinez and his assistant, Dr. Isobel Shulte-Tankoff, and other contributors worldwide, the report was tabled last year in June.

And we're honoured, as I see, to have the presence of Dr. Martinez in our conference. A tremendous honour.

The report, as you will hear late, I'm sure, makes some very important conclusions after a very detailed nine-year study on the international status of treaties

with Indigenous nations. There are very useful recommendations, which will require follow-up, follow-up by both parties to the treaties, to ensure meaningful implementation of the final report.

Secondly, there's an ongoing but soon-to-be-concluded UN study on Indigenous land by special rapporteur, Dr. Erica Diez. This particular study deals with Aboriginal title, among other issues like the extinguishment policy, and the special relationship that Indigenous peoples have with land.

On our third topic of Trade Issues and Natural Resources, as you know, there have been renewed efforts regionally to promote Indigenous-to-Indigenous trade. For example, there are ongoing joint ventures in the Americas in this regard.

Mention should also be made, though, that both the UN and OAS declarations have clauses that promote these historic trade activities in a way that they do not recognize international borders.

On a different issue, however, is the Indigenous Peoples Seattle Declaration. This was presented to the Third Ministerial Meeting of the World Trade Organization, to express Indigenous concerns over how the WTO is destroying Mother Earth, and the cultural and biological

diversity of which we are all a part.

One of the most important United Nations expert seminars was on the practical experiences regarding Indigenous land rights and claims meeting, at Whitehorse, on the 24th to the 28th of March, 1996. There you will note there are relevant conclusions and recommendations regarding natural resources. When combined with the articles in the ILO Convention and both the UN and OAS declarations, the elements of natural resource ownership, for example, are dealt with extensively.

Fourthly, on Intellectual Property, Traditional Knowledge and Environment, the issues of intellectual property, traditional knowledge and medicines to us are very sensitive. Nevertheless, others have gone on to address these, sometimes with very little input by Indigenous peoples.

The UN has completed a study by Dr. Eric Diez on Indigenous cultural heritage. WIPO, the World Intellectual Property Organization, has also now held two round tables and some regional study tours -- one in Canada, in fact -- on the matter of intellectual property and traditional knowledge of Indigenous peoples.

While the new interest and international focus on these important issues is good, there are still some

concerns as to the Indigenous protocols and their not being respected. An Indigenous Congress statement was presented at WIPO last year on these and other concerns.

While I made mention of the ILO conventions and the UN and OAS declarations, there is also the Convention on Biological Diversity, which has specific articles on Indigenous peoples and traditional knowledge.

Those are the four major issue areas we will be discussing, but I'd like to mention some other international activities, if I may.

While we've spuned (sic) the international instruments and activities in each of these areas, there are some other very recent areas of involvement available to you. I'll make reference to these because some of you may in fact be interested in these areas.

For the first time ever, the World Health Organization held consultations with Indigenous leaders on policy development and as a (inaudible) Declaration on Indigenous Health was presented to WHO for follow-up. The United Nations also held other seminars; for example, on Indigenous education, and the first ever international UN seminar on Indigenous children and youth. There have been resolutions for special rapporteurs -- one on education, and the other very recently on housing.

You also know, I'm sure, about the world conferences. For example, the one human rights, on food. There's one on women. The habitat racism. All are areas for opportunities of involvement for you.

Next week, in fact, there will be Latin American regional consultations to prepare for the World Conference against racism. As you will agree, I think, racism is alive and well in Canada.

Yes, but what does all this have to do with domestic issues? Does it help? This is the subject of another presentation, and I'm sure you'll address it in your expert panels and discussions over the next three days.

The most significant recent decision to date, during this International Decade for Indigenous Peoples, was two months ago when ECOSOC by unanimous resolution, agreed to establish a United Nations Permanent Forum for Indigenous Peoples. While the mandate is only for economic, social and cultural issues, it nevertheless is important in that it gives us equal status at the highest level of the UN.

You will recall I said that in 1977 we couldn't even get into the UN building. But now we have to establish a process to select eight regional

representatives for the 350 million Indigenous peoples globally. This was an important decision after almost ten years of lobbying at the United Nations.

By way of conclusion, Mr. Chairman, let me briefly indicate what are some of the outstanding issues. First of all, the right of Indigenous peoples to self-determination. I believe that the two most recent UN decisions, one by the UN Committee on Economic, Social and Cultural Rights in its concluding observations on Canada in December of 1998, and the UN Human Rights Committee in their decision in April 7th, of 1999. When you combine those two UN decisions, I don't think there's any doubt any more about the UN -- about the recognition internationally of our right to self-determination.

The problem now, though, is the continued attempts by states to qualify our right to self-determination to one that's less than other people's.

Secondly, there's another issue, and that is the ongoing difficulty in getting the Indigenous rights, like treaty rights, recognized as collective rights. As you know, most human rights instruments are designed to protect individual rights. There are others, but the ongoing denial by state members of the UN to recognize us as Peoples, signals a message that we have a ways to go,

as we seek to ensure equal rights for all peoples.

Domestically we need to encourage Canada to support passage of both the UN and OAS Declarations on the Rights of Indigenous Peoples. Also, to ratify ILO Convention 169. And by all means, to support us in our goal to get an unqualified right to self-determination recognized.

Finally, what we do as Indigenous lawyers in this area of developing international law is critical to our future survival. Let us collectively work toward setting high standards to ensure success. What we do during the first decade of this new millennium will set a new direction for the future, but it's one with hope and one that grabs our rightful place in the global family of nations.

Thank you.

MR. DAVID NAHWEGAHBOW: Thank you, very much, Willy. On behalf of the Indigenous Bar Association I'd like to present you with a gift. And also one for Elder Chief Wawatie.

Okay, we're on to our first panel. And I'm going to be able to turn it over, then, to the outstanding IBA member, and scholar and everything else, who we all know of, Paul Chartrand. He's going to be chairing this panel.

I'll give him the opportunity to address -- to introduce all the panellists, but I should introduce the introducer.

Paul Chartrand is a Métis from Manitoba, a former professor specializing in aboriginal law and policy issues, a graduate of Manitoba Teachers College, the University of Winnipeg, Queensland University of Technology, and the University of Saskatchewan. He is a former commissioner on the Royal Commission on Aboriginal Peoples and is author of numerous works, including a book on the Métis land rights. He is a private consultant, currently in Victoria.

So, Paul, I turn it over to you.

For the information of the panellists, we have a mike here. There's also a mike that's able to reach to different parts of the table, if you prefer to speak from a sitting position or a standing position.

I believe we're going to need Tony Wawatie up here, as well, as a translator for Chief Wawatie.

MR. PAUL CHARTRAND: (IN HIS NATIVE TONGUE) Welcome to the first session of the year 2000 Annual General Meeting Conference of the Legal Warriors Association of Canada, otherwise known as the Indigenous Bar Association -- IBA for short.

We are honoured this year to have the privilege of

the participation of some of our Indigenous sisters and brothers from other countries. We're very happy to be able to host them. And I'm sure you'll want me to express our gratitude to Dianne Corbiere and the other active members of the board of the IBA who made all of this possible.

I'd like to get into the spirit of things and so, in accordance with this international flavour that the IBA has decided to put on the conference this year, I thought I'd get along with the theme myself by wearing different countries' rugby shirts during the conference. So today, some of you who are rugby fans might know it's a Canada rugby shirt. Now, it's a small -- it's a small sport in Canada, but it's a very, very big sport in some other countries, particularly Otago, New Zealand where if you want to call -- it comes from. Of course, for many people the Rugby Union is synonymous with the All Blacks team from New Zealand.

I would have liked to wear my All Blacks Rugby Union shirt tomorrow. Sadly, New Zealand lost to France, of all countries, last World Cup, and so tomorrow I'm going to have to be wearing my Australian Wallabies Rugby Union shirt, because the Wallabies kicked butt in the last World Cup, for those of you who know these things.

Anyway I'm privileged also to have some association with other countries and have had the opportunity to live in other countries. In fact, I'm a citizen of Australia as well as Canada. And I'm particular pleased to be able to have this opportunity to chair this, what I'm sure will be a very interesting first session on governance and justice.

Now, within this first session, we're going to hear about customary law, and I understand particularly about the governance aspect of this first theme. It seems to me that this first dialogue on the place of Indigenous peoples within modern nation states faces a number of dilemmas. And I think one of these dilemmas might be the tension in the dialogue between the right and the necessity for recognizing and permitting the forcing of Indigenous peoples autonomy on the one hand, and the duties of protection of the Indigenous peoples. The duties of protection of the ways and the customs of the Indigenous peoples, a duty which is vested by international law and membership in the United Nations in the nation states.

The duty of protection is one that we are quite familiar with in Canada. In Canada, we know about the principles derived from imperial constitutional practice

and law which always vests the duty of protection in the central authority in respect to the rights, the autonomy -- the recognition of the autonomy of the Indigenous peoples. We see a continuation of that active principle today in the federal responsibility in relation to the Crown and its federal manifestation in respect of the duty for protection of Aboriginal peoples.

And the very good reasons for doing that, of course, was to move the responsibility to protect the rights, the resources and the autonomy of Indigenous peoples from the conflict of the immediate interests in their locality. It's always more difficult to offer a regime of protection if you put that duty of protection in the hands of those whose own interests will clash more directly with those of their neighbours, the Indigenous peoples. So you try to put the duty of protection a little further away. First it was in the British government not a the colonial government. And in Canada now it's the federal government, not in the provincial government.

And I think we see that idea manifesting itself in different ways, at the different levels, in the various English-speaking countries that have inherited some of these traditions born from British imperial law, British

colonizing initiatives in Canada, in the United States, in Australia and in New Zealand.

And of course, we can observe that the institutions in these various nation states have developed in unique ways. In Canada, we have a federal system, as we have in the United States and in Australia. And we see there there's a measure of protection within a federal system when there's federal responsibility.

In Australia, it wasn't like that, not for a very long time, because the jurisdiction vested in the states. And it wasn't until there was some measure of federal responsibility perfected as a result of the 1967 referendum, that the Supreme Court was able to bring in norms from international law to permit the federal government to play that protective role.

In New Zealand, of course, the constitutional structures are entirely different -- not a federal system, uni-cameral parliament, which presents, again, some unique difficulties.

But in each of these nations states it seems to me we still see the tension at work between the duty of protection vested in the nation states, on the one hand, and the rights of autonomy, which is mandated also by international law and, I would argue, by the fundamental

principles of the constitutional law, that is upon which the very rights to govern of a nation state themselves is vested. That is, they only have a legitimate right to govern if they respect their duty of protection for the autonomy of Indigenous peoples.

Each of these nations in its constitutional structures otherwise is unique -- each of these nation states. In the same way, each of these Indigenous peoples is unique. Within the space for both of this autonomy one first question that arises is, what is the law of these peoples? And that's what we're going to hear from our distinguished panel this morning. How is it that community decisions are made and bind the members of that community?

Even the IBA legal warriors have a special role to play, to take the norms from this idea of self-determination, which may be expressed in this way. This is the way we do things around here. What is, "this"? What is the way we do things? What are the customary laws? And who is the, "we"? Who are the people? And where is, "here", the homeland, the territory, as I mentioned, of the rights of the people?

We will be hearing about these issues, I expect, this morning. And the legal warriors of the Indigenous

Bar Association, of course, take their information directly from the members of the community, and the bearers of that information about the customs, the laws and ways of our people, the elders.

We are privileged, then, to begin by hearing from some of these elders this morning about the customary laws of the Indigenous peoples. With these introductory remarks it is my privilege now to introduce the first speaker.

Customary Chief Harry Wawatie was born within the traditional territory of Mitchikanibikok Inik, also known as the Algonquin of Barriere Lake First Nation, on March 26, 1934, and has lived there for most of his life. Chief Wawatie has been active in political affairs in his community throughout the course of his life.

Beginning in 1959, he was a councillor for about 17 years. In 1977, based on Chief Wawatie's connection to and knowledge of the land, hereditary entitlement and community support, he became Chief of the Customary Council until 1980. And then was selected Chief of the Customary Council again on March 18th, 1996, to the present time.

Ladies and gentlemen, Chief Wawatie this morning will be assisted by his translator, Tony Wawatie. I now

present to you Chief Harry Wawatie.

CHIEF HARRY WAWATIE (THROUGH TRANSLATOR TONY WAWATIE): (IN HIS NATIVE TONGUE)

Good morning. Did everybody understand that?

(LAUGHTER)

Okay, I'll just try to help to translate from Algonquin to English, or English to Algonquin. The words are different and the meanings are quite different.

Chief Harry Wawatie says good morning to Elders, Chiefs and conference delegates. He addressed that he's the Customary Chief of my First Nation and honoured to speak to you about the issues on customary law, as it is one of the important issues in our community.

He made a point that the reason why he speaks Algonquin, his language, his mother tongue, is the because the spirits around the forest, the animals, the trees, hear what our Chief is saying about how our connection to the land is so important to us. That there is a -- there is a connectedness within how we are structured and how our government system is about.

He asked me to translate this. We are part of an Algonquin Nation community of approximately 600 people and situated in northwestern Quebec approximately three to four hours north of Ottawa.

He stated that he is always happy to share experiences, because it is important to work with one another as First Nation people, so that we may become a thriving, and a healthy nation back where -- back, I guess, years ago.

He will share some of the customs, the origins of our customs on our governance. He briefly said that I will be talking about the experiences that we had in fighting with the federal and the provincial governments to protect our customary governance system. He also wants -- he also briefly talked about the developments of our community, in terms of customary justice and justice system to be revived, because we did have that at one point.

Our Nation has lived and sustained itself upon our traditional territory, in accordance with our customs and traditions, since time immemorial. We are one of the few First Nations that has been fortunate enough to be subjected -- not to be subjected to an Order-in-Council forcing us to be governed under the *Indian Act*. We continue to be governed by our customary system of governance. Our people maintain strong knowledge of the language, customs and traditions.

The Chief talked about his role or how he became

to be a leader. You know, what does it mean to be a customary leader in our First Nation.

In the past, prior to our meeting with the white people, there was no Chief and no Council like there is today. We had our own laws. Our connection to and knowledge of the land was strong.

However, the Customary Council, in its existing form, was promoted by the church. It was a forum we adopted to deal with the European governments at the time. We also used this forum to address other First Nations at our seasonal gatherings.

One of the roles of the Chief was to give and provide guidance and advice to the people. His role was to settle disputes among our First Nations. People had respect for the Chief. The Chief had to lead by example. He could not be too, "big", or too, "small".

The Chief would always consult with his councillors, who were each responsible for managing and allocating portions of our traditional territories. Their job was to look after the land and the people in the areas. They did not own the land, but they were responsible for the monitoring of their area, so that it wouldn't be destroyed.

At our seasonal gatherings the Chief would listen

to the peoples' concerns regarding their territories and ensure that everyone had access to lands and resources. This might mean that families may move to other territories in other directions -- in terms of south, north, west and east -- for specific harvesting times. The councillors in the four directions would ensure that their agreements were followed through.

The Customary Council had other responsibilities, but I just want to tell you about some of our work. The responsibilities of the Customary Council would be at the direction of the people. They change -- they may change depending on what was happening in our traditional territory.

I would briefly like to discuss how the Customary Council is selected. We did have a hereditary system for Chief. The responsibility went from son to son. A son would learn everything from his father and mother about the role of a Chief. The Chief was also a life Chief because we believe that it took a lifetime during to learn how to be a Chief.

However, the quality of Chief was regarded as paramount. If the Chief was not select -- was not suitable or competent, the people would select another leader. Sometimes, a Chief would recognize that his sons

were not suitable and, therefore, would train other people in the community for leadership skills.

Leadership review takes place with extensive community consultations, and at community meetings. The role of the community at these meetings is to choose their leaders, guide the leadership, and to seek consensus on the directions for the community. During this review, a Chief or Councillor may resign or be relieved of other responsibilities.

And Elders have a key role in the selection process. Potential leaders are watched and observed by Elders. They are selected to be future leaders. And they will be monitored for some time. The Elders observe their personality, their behaviour, their knowledge and connection to the land, to the territory, and other qualities to make a strong leader. This usually happens for a three-day period, for the leadership review to happen. The Elders put the potential selected leaders in front of the seat -- in front of the people in a circle format. And they would debate what happened were -- if this person would be suitable to be the leader for Chief or as councillor.

This is what you call (IN HIS NATIVE TONGUE), in our Algonquin customs. That's what you call being,

"blazed". They may take leadership then, or at a later date, depending on the people's support for the existing leadership.

There are some of the basics of our customs -- these are some of the basics of our customs and traditions regarding our governance structure, leadership responsibilities and selection process.

He mentioned to me that, you know, we could go on and on, and take more than just 15 minutes to do it this. So we tried to cut it down as much as possible because there's not enough time. We could take a course on this if we wanted to.

And the way I see some of my responsibilities as acting translator of the Chief with the English, and the knowledge I have with my community and what's happening, you know, he asked me to make some points on the fights and the struggle that we went through.

I am honoured to be here to speak on the importance of customs and traditions on behalf of our First Nation and with my Customary Chief. We did go through some really tough battles to protect our customs from outside interference, and I would like to share some of this with you.

Prior to 1997, our customs were unwritten. We

learned very quickly this made us vulnerable to outside interference. There were many events and external influences that have interfered and still continue to interfere with our customs and traditions. Residential school is one of the things that we experienced.

Another external influence occurred in January 1996 when the Department of Indian Affairs, purporting to act according to our customs, tried to depose our Customary Chief and Council. This created a major crisis in the community.

Relations between DIA and the existing Customary Council at the time were extremely bad. The dispute came to a head when DIA, on January 23, 1996, decided to replace our Customary Leadership.

DIA was asserting to all that would listen that the customs of our First Nation leadership required a petition to replace the Customary Council. You have just heard from our Chief, who is an Elder, who is very knowledgeable on our customs, that this position of DIA on our customs was false. Nevertheless, DIA had much influence on other parties. Our people gathered and agreed that we would fight this move by DIA, no matter what the cost. Our people made huge sacrifices to preserve their customary governance system. During our

fight to protect the system, we lost a lot of things. We lost our income, our jobs, our training, and schooling for our children and much, much more.

We agreed to pursue many foreign processes in order to ensure that the truth about our customs would be respected by outsiders. Mediation and facilitation efforts were undertaken to attempt to resolve the matter outside the courts. In this context, and to protect our customs, we begrudgingly had no choice but to codify our customs to ensure they would not be misinterpreted by outsiders again. I am aware that Elders resented having to discuss this sensitive internal issue in the presence of outsiders.

The Elders complained about the writing down of customs because contrary to our customs. However, we consented to this process only because we saw codification as the only means of ending the leadership impasse. We believe that all First Nations with un-codified customs are vulnerable to interference by the federal government.

Community members continued to pressure the Minister to do something to solve the crisis that DIA had precipitated. Finally, the Minister agreed to mediation and subsequently facilitation.

At the request of our existing Customary Council,

an mediation fact-finding team was set up, which included an Aboriginal judge and two Elders. It was in the context of this mediation that the First Nation codified their customs. The mediation took much time and did not resolve the situation. However, the judge on the mediation team did make a recommendation to the Minister on how to proceed further. He determined that there was no customs on leadership selection by petition as was promoted by DIA. Furthermore, he made the following findings.

Only members who had knowledge of and connection with the traditional land could participate in decisions regarding customs, including leadership selection. And the responsibility for overseeing and supervising leadership selections rested with the Elders in the community.

On the foundation of the finding of the judicial mediator, an independent facilitation process was entered into. This resulted in the customs, as Chief Wawatie discussed briefly, being adopted by a majority of Elders and community members eligible to have a say in the custom. The approach followed in codifying our customs was as follows.

The people of the Mitchikanibikok Inik affirmed that the written codification reflected their historic

customs regarding leadership. The people of the Mitchikanibikok Inik approved a resolution of Elders determining the eligibility of members to participate in decisions regarding customs and leadership. The people of the Mitchikanibikok Inik approved amendments to their customs to adapt their customs to contemporary circumstances. And the people of the Mitchikanibikok Inik confirmed their leadership which they previously selected and DIA refused to be recognized.

The facilitators also commissioned an independent expert opinion on the historic customs, which confirmed the validity of our customs.

The fight to have our customs on leadership selection recognized by the federal and provincial governments led to our Customary Council being re-instituted on April 17th, 1997. Almost a year and a half after Customary Council was no longer recognized by DIA and others. To date, we are currently in negotiations with the federal government to resolve some of the outstanding issues that have arisen from this leadership dispute.

Our experience should assist First Nations who wish to revitalize their customs. It demonstrates the necessity to codify customs and to modify the customs to

reflect the modern circumstances of First Nations. All of this should be done with the participation and approval of the people belonging to the First Nation, who are eligible to participate in the determination of customs. Our First Nations will now undergo a similar process with respect to education, social services and justice.

On the negative side, our experience demonstrates that First Nations may be subjected to further suffering and poverty in order to fight off outsiders from interfering with the customs and traditions of our First Nation, of any First Nation, for that matter, in this country. Our nations are already in impoverished states. It is really hard to focus on the rebuilding of our nations when external influences try to tear apart our governance system.

There is no better example of the violation of customs and traditions of First Nations by the federal government than the residential school experience. For us, the residential school experience took place from 1950 to 1972.

I would like to focus on a few aspects of our report. The main reason we were asked to prepare this report for the Law Commission of Canada was to identify the violations to our customs by residential schools

experience. And to identify how the breaches of our customs should be resolved. We identified violations to our customs which we experienced prior to residential school. The main violation to our customs can be summarized as follows.

The complete lack of respect for the Three Figure Wampum Belt by the church, the English and French, and then Canada and Quebec. And the imposition of Euro-Western education by the church and government which also demonstrates a lack of respect for the Three Figure Wampum Belt.

Some of the violations to our customs by the church and government which resulted during the residential school period can be summarized as follows.

Physical and sexual abuse of our people by persons in authority at residential schools. Lack of respect of our language, our culture and our spirituality by the church and the government, while knowing that we had our own language, culture and spirituality. The intentional attack on our history by the church and government. Interference with our traditional knowledge resulted in negative impacts on our knowledge and connection with our land. Interference with our traditional knowledge resulted in loss of family values. And interference with

our traditions resulted in loss and strain on the customary relationships between and within the different generations.

When members of our community who participated in our report to the Law Commission of Canada were asked how Algonquin customs and traditions could provide a process to resolve the breaches to our customs due to the residential school process, there were three basic views. First, we believed that the original Three Figure Wampum Belt needed to be respect by the federal and provincial governments. Second, we thought that, "individual", remedies could only be appropriately obtained through the Canadian court process. Finally, it was felt that the problems experienced by our First Nation members at residential school could be resolved through a community healing process, not including the government of Canada or religious institutions, which was based on our customs and traditions.

Our First Nation rights and interests in this country stem from our original relationship with our traditional territory and later our relationship with the Crown under the Three Figure Wampum Belt. The current problem of our First Nation faces has much to do with the fact that England, France, and then Canada and Quebec

governments did not and currently do not respect the Three Figure Wampum Belt. Our First Nation experiences with the successive governments demonstrate this point well.

Our treaty with the French and English was broken shortly after it was made. We believe that this is the biggest violation to our customs and led to violations to our customs, which includes the residential school process.

In order for justice to be done in this country, the present day government would have to respect the Three Figure Wampum Belt agreement. However, true respect for the Three Figure Wampum Belt by the federal government at present would not be sufficient to provide the reparation needed to the people affected by the residential school process. The harm and violations to our customs in the past must be addressed in another fora as well.

Presently, we have a binding agreement with Quebec and Canada, our *Trilateral Agreement*. We had to agree to negotiate with respect to a specified area of our traditional territory. This agreement is an effort on our part to maintain our connection with some of our traditional territory. However, this agreement does not

respect the Three Figure Wampum Belt.

We do not believe that the federal government, religious institutions, and perpetrators of abuse of our First Nation members would willingly participate in a community justice system to address the breaches to our custom by the residential school process, nor is it necessary. Some of our Elders believe that what happened in residential school was not in the territory of the Mitchikanibikok Inik, therefore, the European laws would apply. Some think that the people that harmed the children of Barriere Lake should be dealt with under Canada's laws, as the abuse took place outside our First Nation territory.

As stated earlier, our First Nation is currently in the process of codifying our customs respecting justice, which would deal with family laws, management of our territory, dispute resolution and other issues. Our system will be very broad and expansive and will change depending on the issues we are dealing with at the time. This means we will have to adapt our customary justice system to adapt to contemporary circumstances.

All of the participants in the Law Commission of Canada report believed that a community justice process was required within the community, for our community

members only, to support the healing needed because of the harms caused by the residential school process.

We have also discussed the need to re-institute our own justice system subsequent to this report. Recently, our First Nation underwent a community consultation process to discuss our community healing process. Our First Nation members identified many of our current social problems, stemming from total lack of respect for our customs and traditions by outsiders. Some of the examples included.

Our connection to our land has been interfered with by the forestry operations, industry and third parties generally. Our way of life has been affected by forcing our children to attend residential schools. Our basic needs have been affected by forcing our people onto an overcrowded 59-acre reserve. Our way of life is affected by the continued imposition of outside laws and policies.

We believe that many of our experiences in dealing with external influences and changes have contributed to our social problems. We do not -- we, not unlike many First Nations, have many social problems. However, we also know that we will not be able to adequately address these problems until the Three Figure Wampum Belt is

respected and our customs and traditions are respected.

Our customs dictate who we are as Mitchikanibikok Inik. We cannot fulfil our life responsibilities if we do not live according to our customs. Also, the Three Figure Wampum outlined how we would live with outsiders. We need the government in Canada to respect this, as promised, if we are to become a healthy nation. We cannot continue to focus on outside efforts to undermine our development. We need to co-exist -- our nation with our laws and outside governments with their laws.

We appreciate the opportunity to share some of our experiences and our belief in the necessity to respect the customs and traditions of Indigenous peoples worldwide. (IN HIS NATIVE TONGUE)

MR. PAUL CHARTRAND: Thank you, very much, Tony and Chief Wawatie.

I am thrilled to report that the following speaker has assured me that they're trying to comply with the request of the IBA that we complete the session by 11:30. We hope to have some opportunities for discussion with the panellists.

Our next speaker, Elmer Derrick, is a Hereditary Chief of the Fireweed in the Gitksan Nation in

northwestern British Columbia. Yokx -- and I apologize with my pronunciation -- currently serves as negotiator for the Gitksan Nation on federal matters. His life-long responsibility to protect the title and rights of the Gitksan people will be handed down to a nephew or niece when he retires. He is trained as a teacher, both in the Gitksan and Canadian educational systems, and his research interests are in governance and sustainable development.

Ladies and gentlemen, Elmer Derrick.

MR. ELMER DERRICK: I very much appreciated the presentation from Wilton Littlechild earlier. He enlightened us a lot about different things that are going on with respect to other Indigenous nations around the world.

I also appreciated the presentation from the Chair this morning, because it fits the context of what it is we're trying to do up here with our panel.

For those of you that are not familiar with the Gitksan people, we're from northwestern British Columbia. Some of you may have heard of some of the work that we've been doing. There's a court case that came out in 1997 known as the *Delgamuukw* case. A lot of us worked on that court case for about 18 years and we're about a third of our way through the journey of redevelopment that the

leadership saw starting in 1982.

Just as a bit of a background, there were a lot of discussions internally about which Chief would lead our court case. There are some of us that argued for using a name that belonged to one of the (IN HIS NATIVE TONGUE) chiefs. The name that we settled on, *Delgamuukw*, has a great deal of significance, but the name that we -- that some of the radical element in our leadership suggested was (IN HIS NATIVE TONGUE). We wanted to advance a case in the courts known as (IN HIS NATIVE TONGUE) vs. The Queen. Just as a side matter in terms of the name, (IN HIS NATIVE TONGUE), it literally means, "Big Shit".

(LAUGHTER)

Anyway, it would have been interesting to have advanced that particular case under that name. We did not succeed in doing that.

I work out of the Gitksan Treaty Office and I'd like to do some advertising, as well as to let you know that the Treaty Office is set up not to deal with treaties with Canada nor the Crown, but it's established to deal with other Aboriginal nations. We have treaties with nations from South America, Asia. We have a treaty with the Nasi people from China.

And we very much appreciate the presentation from

Willy this morning because we're quite familiar with a lot of the Aboriginal or Indigenous nations around the world, and we have a great deal of contact with the Asian nations. For those of you that realize the numbers that are out there, there are over 90 million Indigenous people in China, out of the billion population.

Before I get into my presentation I want to do some advertising. We have a business treaty with the Six Nations of the Grand River of Ontario. A few years ago we decided to get into the oil and gas business. The Supreme Court justices more or less suggested we get into the parking lot development business, for those of you who have read the decision. But we did not pursue that avenue.

But we have -- about three years ago we got involved in setting up an oil and gas company in Calgary. The oil and gas company has turned over and is now -- and now has a sideline business in the alternative energy business. We've had some success with that company. It's listed under the Canadian Exchange under the ticker TTC. This is where advertising gets in.

We had some private placement situation that we went through over the past year. It took us quite a while to get it through the stock exchange to get them to

release our private placement offers. But before we went into limbo, our TTC -- our (inaudible) shares went upward and they floated around $1.35. Then we raised $3.5 million issuing shares at a dollar apiece. And when they went back on the exchange last month -- or a couple months ago, I think that the shares traded $5.25 and they're now floating somewhere between $8 and $9.

Over the next year we plan to take the -- our alternative energy company to the Nasdaq exchange and we'll probably be issuing private placements for at the $8 range. Hopefully, there's no exchange people present here, but we'll be issuing shares in the $8 range and we hope to reach into the deep pockets of many of your clients, especially those that have an interest in buying lots of shares. We see placement at $120,000. So we believe that the technology we have in that particular company will offer great alternatives to the oil and gas industry, that seems to see no bounds right now.

Anyway, keep an eye out for TTC. We're going through a name change, but TTC comes from Tapicus and Tapicus Resources is a shortened version of, "Take That Custer".

(LAUGHTER)

Anyway, I feel uncomfortable with the way it's set

up here because normally at home when we conduct our feasts -- and that's my only claim to fame, I run a very good feast -- we usually do business at the door and the guests face the door where we do business.

Anyway, many generations of Gitksan chiefs have continued to carry the responsibilities with which they are charged. These responsibilities are both honourable and onerous. The responsibilities are laid out in (IN HIS NATIVE TONGUE), or Gitksan laws.

The *Canada Constitution Act*, 1982 recognizes and affirms the Aboriginal rights of the Gitksan people. Through the *Charter of Rights and Freedoms*, the supreme laws of Canada recognize and protect the rights of Gitksan and other Aboriginal people. These rights include the laws that make the Gitksan unique as a people within this country.

The Supreme Court of Canada ruled in the *Delgamuukw* decision that reconciliation should take place between the Gitksan and the Crown. The reconciliation process, as suggested by the Supreme Court of Canada, has no preconditions. The Supreme Court justices simply state that the challenge is to reconcile the pre-existence of Gitksan society with Crown title. The Supreme Court of Canada saw no reason to burden the undertaking of

reconciliation with non-viable policies that the Crown continues to offer.

The process of conducting negotiations has (inaudible) by the realities. The Crown continues to bring the policies of containment or limitation of rights to treaty tables. The treaty package offered by Department of Indian Affairs also includes a formula that reduces access to resources that Aboriginal people need to sustain themselves.

The other components of recent treaty offers include cash, and health and education programs that normally accrue to other Canadians. A recent so-called modern day treaty in British Columbia includes fiscal arrangements that take away tax benefits that the *Indian Act* provided. There is no thought by the department to comply with the new reality of Canadian law. There has to be a challenge made to the Crown to deal with us, not only in good faith, but with due regard to the evolving laws that the Supreme Court of Canada recognizes.

The Supreme Court, in its wisdom, gave instructions to the Gitksan to reconcile its pre-existence with Crown sovereignty. These instructions have no baggage. In simple terms, the parties that are there to

reconcile should do so without preconditions. The end result should have two parties that do not have any burdens on each other.

The alternative to reconciliation is for the Gitksan to go back into court and seek a declaration on Gitksan title. This course of action has promise, as we have all the evidence that we need to make our title case. The problem that we will encounter is we will end up at the negotiating table where we have to reconcile the relationships that we have with the Crown. How do we get the Crown to be sensible and to develop policies that will enable both parties to reconcile?

The Gitksan are committed to the suggested course of reconciliation. Reconciliation includes accommodating the other party's interests. Finding the ways and means to accommodate the other party can sometimes mean stepping back from set positions and finding out what obstacles are hindering the processes of reconciliation.

The Gitksan term for reaching agreement is (IN HIS NATIVE TONGUE). The term is made up of two concepts. The first part of the term comes from how we describe the principal objective. The second part of the term is applied to doing what is right or doing the right thing. What is implied is to bring a framework that will help the

accommodation of interests of both parties.

The laws of the Gitksan have always accommodated other people's interests. At the time of contact, explorers who came to fill their commercial needs were received as any other guests. They expressed an interest in acquiring different goods for trade and were dealt with civilly by the Gitksan. The Chiefs and their house members traded goods and services as they traded wampum. Trade practices that the parties engaged in was dominated by local laws.

Access to Gitksan territory was determined under the rules that applied to other local people. The skin colour of traders did not matter. Laws of commerce applied equally to all people that wanted to conduct enterprise on Gitksan territory.

It was duly noted by the traders that the Gitksan entrepreneurs did not have unlimited access to any territory or resources. Access to specific resources was determined by existing rules. The people who owned the resources determined harvesting rights or use of the resources. Although the laws of resource and territory ownership was never written down for the traders, it was obvious to them that a system of rules did apply.

It did not matter to the traders how long -- order

was kept, as long as the traded goods came in on a regular basis. The traders did not have direct access to the resources, as they were aware of the penalty that trespass laws indicated. They did not have to be told that breaking trespass laws brought severe consequences.

The Gitksan laws of resources use are oriented to having respect for other living things. The Gitksan are heavily dependent on salmon, which is a renewable resource. There are some absolutes to the manner in which the salmon is dealt. The salmon habitat was never disturbed, especially before and where they were hatched. It was also absolute that all fish species could not be played with. Sport fishing was and is not part of the Gitksan practice.

Respect is extended to the end of the salmon season in the autumn when the rains wash the remains of the salmon downstream, where the carcasses would become part of the cycle which brings life to other living forms that thrive in the ocean.

What were not shared with the traders and missionaries were the intricate laws that helped Gitksan civilization exist. Some of these laws deal with the relationships among the Gitksan and some deal with external matters.

The laws that were important to keeping peace among Gitksan citizens were not as important as the laws that enabled individuals to support the community. The laws of community enabled the Gitksan to reach consensus on issues that potentially could divide and undermine the pillars of Gitksan society.

For example, laws of marriage did not determine precisely whom a person had to marry, but it was difficult to escape certain rules. It was deemed that one could not marry within one's own clan. This law made it impossible to marry into one's own blood line. The possibility of playing tricks with nature and to allow in-breeding was decreased.

I recall the advice that I received from my grandparents about doing background checks on potential mates. So even at a very young age I've had to be conscious of what clan my female friends belonged to and only looked at those that were of the Fireweed Clan, like myself. The further I wandered away from home, the easier it was to go beyond looking.

The Gitksan sometimes overlooked the laws of marriage. Transgressors were dealt with in various ways. Penalties were sometimes severe. People who broke the civil laws were dealt with according to their rank. The

people whose rank did not really matter were sometimes moved into another clan and formally dealt with by the father-in-law. The people who were not taught to know any better and knowingly disregarded the laws of marriage were treated as if they were indeed ignorant. These people were made to sit with each other at feasts, which was shameful because people of the same clan sit together.

The clan of one's mother determined citizenship in Gitksan society. Every Gitksan is a member of his mother's house. The colour of one's skin, or hair, or eyes do not matter. The question arises as to what happens when a Gitksan man marries a woman of another Aboriginal nation or another race. The woman is immediately adopted into the father-in-law's house.

Gitksan citizenship laws are dimensionally opposed to the federal *Indian Act* membership code. The *Indian Act* limits the number of Gitksan people who can be included on the Gitksan Indian register. There are about 7,500 Gitksan that are registered as Indians under the *Indian Act*. There are about 10,000 Gitksan house members. There are a further 3,000 non-house members that are Gitksan as a function of where they currently live. Each of these three categories of Gitksan has rights and responsibilities.

The governing body of the Gitksan involves approximately 250 chiefs. In the *Delgamuukw* case you'll see that approximately 45 Gitksan plaintiffs are listed. These chiefs represent all the Gitksan house groups except for the community of Gitanyow. Each house group has an average of five or six chiefs within its governance structure.

Most of the house groups have two chiefs who can assume responsibility for playing the lead role. This organizational feature accommodates the possibility that nature is not always kind, so fools can be suffered in our governance system. Even though the head Chief in the house can speak and assume full responsibility for his or her action, the practice within the system is clear that all the Chiefs in the house do hold the title for all of the house members.

There is usually only one governing seat that is gender specific. All the others can be occupied by either sex. The only seat that is designated is one that has to be occupied by the clan mother. This person keeps order of the house group. She sometimes exercises her veto power.

The laws of the Gitksan state that the primary responsibility of the Chiefs, both singularly and

collectively, are to protect and defend Gitksan laws. The issue of possibilities are no different from any other civilized governing system. Privy Council members swear allegiance to the Queen and her laws. Gitksan Chiefs hold up and defend all of their symbols before anyone that dares challenge us. The house Chiefs protect and defend their history, their songs, their quests, their territories, their resources, their names, and all of the other important components of what we deem to be Gitksan title.

Gitksan laws apply to the process of decision making within councils. Our uncles and our grandmothers taught us to take into account every house member's view when decisions are being made. It is only when true consensus is reached that citizens can act on a matter that affects community. The Gitksan model of democracy does not allow anyone's rights to get trampled upon. Just because the majority finds favour with an idea does not mean that corrupt action is taken. Gitksan band councils that operate under the authority of the *Indian Act*, for the most part, apply this law to their deliberations as well.

Most observers would think that through this process, that making public policy would take too much

time. We believe that making public policies or laws is so important that time is not the limiting factor in these deliberations.

The Gitksan laws of community apply to individuals through the house system. Each Gitksan house member is responsible for his or her own behaviour. However, a house member is accountable to other members for their civil behaviour. When a house member transgresses any Gitksan or Canadian laws, then the house Chiefs get involved. If any compensation has to be made for the wrong that was committed, then the house is held liable. The house chiefs take corrective action and at a feast the public is advised of what has to be in the public record.

The Canadian justice system uses Gitksan house groups as a part of the administration of justice through the Gitksan (IN HIS NATIVE TONGUE)/ Aboriginal Justice Program. There are many benefits for this joint effort. The significant benefits include the following.

The victims are not forgotten. The transgressors are reminded not only of their rights, but also of their responsibilities. And the cost of rehabilitation is not passed on to the Canadian penal system.

Public accountability is the fundamental law of the Gitksan. All public business is conducted in the

feast. Every transaction between Chiefs, house group members, and house groups has to be declared. Most of the transactions require payment, so these payments are announced to the public. Obligations and transactions of all kinds, including loans, repayment of loans, payments for use of resources and territories, acknowledgement of fathers and their roles, announcements of major undertakings, and many other significant events are all made public.

Transgressions of the payment of compensation to victims has to be taken through a formal process. Part of this process includes bringing closure to the whole matter, so that it will not be brought up again in public.

As stated above, the feast hall is used to conduct business. At the outset of the feast, the speaker opens the feast by stating that Gitksan laws are about to be observed. As each step is taken to conduct business, an announcement is made that another law is about to be observed. Sometimes the law is explained in detail and sometimes it only gets a reference.

Near the end of the feast, when a speaker or host (IN HIS NATIVE TONGUE) states that all business is done, then the guests take the time to acknowledge what has transpired. If the host has conducted the business

incorrectly, then the guests exercise their right to diplomatically advise as to how to correct the mistakes. Protocol also includes saying what the guests do not agree with.

A great deal of money is raised at Gitksan feasts. These funds are used primarily to pay for expenses related to the major events. Whatever food and cash is left is passed around to guests. Money is passed to guests according to rank. People with important names get the higher amount. Whenever feasts are held, those with the important names also bring the most money.

The governing system of the Gitksan has been developed over many generations. The territories that we govern are well defined. The people share a common language. Every citizen has rights and responsibilities that are equal. The Gitksan continue to abide the laws of our community. The *Indian Act* of 1951 has made some impact, but the jurisdiction of band councils is limited to reserve boundaries.

This presentation has not attempted to describe all the Gitksan laws. Only a few have been highlighted. I will now summarize from a personal perspective.

The Trudeau *Charter* protects the laws of the Gitksan, like all laws of other Aboriginal nations. Our

laws are no longer at risk and cannot be overridden by the *Indian Act* or any other legislation. These laws are what make us what we are. The laws provide us the guidance that we need to deal with other people, whether they are citizens of our nation, or they're members of other nations, or they're Canadian citizens. Our laws provide not only the structures that we need for governance, but also provide the framework within which our civilization must and can survive.

Thank you for listening.

MR. PAUL CHARTRAND: (IN HIS NATIVE TONGUE) Elmer Derrick. (Inaudible) informing by sign language that coffee break will happen, grab your coffee as you go into your workshops and we will be getting through everything.

We turn now to the legal warriors. It is my privilege to introduce a speaker from Aotearoa, New Zealand, a Maori lawyer who, in the sphere of Indigenous issues, has been everywhere, done everything, and thinks big thoughts.

Donna Hall, as you will find out, is a dynamic, persuasive, and often diplomatic person, who will be making a fantastic presentation.

As you -- I spent the month of September in Aotearoa and was at a conference where I gave a paper and

Donna Hall gave a paper. And I have already had the opportunity, as I was telling her, to go over it about three times since that time, that is to quote one of the lines from her paper, which is nugget. Talking about governments, she says that, "they mistake good governance with power of maintenance".

I think that's a very good nugget. You should definitely read her paper. She told me she's chopped it down.

But I present to you now a dynamic speaker who will give you the chopped down version of her paper, which is a must-read. Ladies and gentlemen, please welcome, from Aotearoa, Donna Hall.

DONNA MARIE TAI TOKERAU DURIE HALL: (IN HER NATIVE TONGUE) Canada to the culture from the United States, Dr. Marisa Borant and (IN HER NATIVE TONGUE).

I am Donna Hall. I am from New Zealand, Aotearoa, New Zealand. If you don't know where that is, it is the last stop before you hit the South Pole in (inaudible).

I've greeted you today as (IN HER NATIVE TONGUE). That is, the people of the land here of Canada (IN HER NATIVE TONGUE). That is, from out of the land on which you stand comes truth.

Now, I have a paper in the folder that you've got

in front of you. If you turn to section 2, the paper is there. I'd ask you to go to it. You'll see at the top that I have addressed it to the Indigenous Bar Association and to your president today, thank you for the invitation to be here.

You'll see I have stated that I am a lawyer from Ngati Rangiteaorere. This is a small tribe of about 5,000 people, which belongs to a larger configuration of tribes known as the Te Arawa configuration of 100,000 people. And the land base which Ngati Rangiteorere calls its own is an island in the middle of Lake Rotorua, called Mokoia Island. Mokoia Island is the traditional place where I come from.

Now, if we take, "Mokoia" -- and M-O-K-O-I-A is how it's spelt -- Mokoia is the tattooed face. You would have seen (inaudible) with people with full visual tattooed face. They're the Moko. And here is what happened when the chief of the Battle Toolaloo was hit with a putter and it cut his face, the Moko. So Mokoia is the island, the battle is Toolaloo, and Toolaloo were members from (inaudible). So why do I outline this, because today, for this association, I'm wearing the tiki. It is the traditional tiki. Its name is Mokoia Toolaloo Totolo.

I very rarely wear it. The reason I don't wear it very often is because it's a very old piece. Usually it's worn to things like ceremonies or tonguings where people have died, which usually is where you would wear a tiki of this type. You'll find that only women wear tikis. Tikis are a sign of fertility and of (IN HER NATIVE TONGUE), genealogy.

The other thing about this tiki is that I have worn it traditionally to places where we meet with other groups, one instance of which this group is. I wear the tiki to Privy Council, again, there regularly. I wouldn't bother wearing it for the colonial bitches and state government and state courts back in New Zealand because it's a waste of time, and my tiki's too special for them. I wear it here today for you.

The other thing I do, is I'm wearing an earring. It's here. Customary for us is to give gifts at marriages. This is my husband's gift to me. I didn't get a wedding ring like normal people. I got an earring.

And my husband, whose greetings I am bringing to you, president -- he is also a Maori lawyer -- he said to me when he gave it to me, "When you wear this, I want you to promise me that when it's on your ear you're going to listen very carefully to what I say and then you're going

to obey me." So I almost never wear this earring.

(LAUGHTER)

Now, if this was the New Zealand Maori Bar Association, the very next thing I would do after saying where I'm from is that I would go on to say that I'm speaking here to you today on behalf of the sovereign, independent, legal entity and nation state of myself. That means that everything that I say is attributable to no one other than me. And we often go to a lot of trouble to do this because representation of what you say can be quite a critical issue for us.

So I'm just about getting to the paper. In New Zealand, by way of background, we have 600,000 people who are Maori. This comprises approximately 15 percent of the total population. We are a young people aged mainly between 11 to 32 year (inaudible). And of that 58 percent of us Maori live in tenanted accommodation. This is as against 24 percent of the non-Maori population. So 58 percent, well over half, of our non-married compatriots.

Forty-eight percent of Maori have irregular access to telephones. And these two combinations become very serious as you have to plan for a population, the growth spurt starting between seven and living through to eleven

years. This is because 70 percent of Maori children in New Zealand are raised in single family homes. They're raised largely by their mothers. This means that we have single mothers living in tenanted accommodation, raising children on their own. And they do not have access into telephone lines, which will be the access to the internet and to e-mail and to information highways for the future. So things aren't too hot for us, actually.

I'd like now to go to the paper itself, with that background in mind, and to talk about what is law. And to suggest that we need to put aside what has been learnt of western jurisprudence and to think globally. That is, east, west, and even south of Capricorn down to the South Pole.

Law may then be seen as no more than the standards regularly applied by a culture to govern how people relate to each other and to their everyday environment -- the family, work, political or natural environment. And no western test of what is law can apply. No matter how much it is respected and admired, it cannot resolve the question of what is law in a global paradigm.

Law springs from cultural standards. You will recall the Maori saying, truth comes from out of the ground on which you stand. In New Zealand, the dominant

culture is western in its thinking, so maintaining Maori law means first and foremost that Maori must today maintain our own cultural status. In the year 2000, that has its difficulties. I've given you the background of our single mothers position.

I've outlined in the paper a young mother, living on benefit, which means (inaudible), pushing her children through on a trolley, watching all of the other mothers with more money buying things, her children wanting them, and her smacking them and saying, "We don't need it."

That is a very real scenario of what is happening for Maori mothers. When they go through the counter, their children learn that their mother is lying when she says that's all she needs for today. What she really means is that's all she can afford, unfortunately.

So we would say that this mother is mana-kore; that is, she is a person without mana and if she continues to lie to her children in this way, the chances are that her children will grow without money too. What we need to do is to say to our mothers, "Go into the supermarkets. Learn that you cannot afford to buy what others can. Accept this, and then remember that some people can pay the price of everything and they know the value of nothing."

Now, that is mana. That is a mother who can take her children into a supermarket with pride and not apologize that her background is poor.

Mana is the spiritual essence of a person, and all people are born with it. Some will grow to have more than others, and some will lose it, but no person can take it from us. If we lose it, it is because we have done it ourselves.

Mana is associated with a strange mix of humility and power. I recently was involved in a court case where mana was described like this.

When the All Blacks go out and play rugby, their name is known all over the world because they play well and they win. So today we will talk about the All Blacks. What has been given recognition to is that they play good strong sports and rugby. The recognition is the mana that is given to the team.

And mana is the principle determinant of how Maori have maintained and regulated relationships between ourselves. Mana, the respect we give to others and the respect we give others to give to us.

So what has this got to do with law. On page 3, in the middle. Everything, because if we loosen the shackles of western training, we might see that individual

mana enhancement is the key criteria to personal confidence. And that with personal confidence comes respect for others. Or put simply, this will assist with law observance.

Mana comes from genealogy, from (IN HER NATIVE TONGUE), from fertility, from things like my tiki. Every child has a genealogy. It roots the child in time and place. It is a source of pride and identity. It does not depend on proof of achievement or the accumulation of wealth. It is simply an ancestral inheritance that ensures a place for everybody within a kin network.

I'd like to now pose another approach to raising children. It's one we're going to need to look very seriously at in New Zealand. One we all know, where a child comes home from school with an electronic game. You didn't buy it so you ask, "Where did you get it?". The response is, "My friend gave it to me." "Don't lie." Whack. "Where did you get it from?" Another slap.

So what has been taught? I'd say that a lot of western thinking has been taught in that example. What's being taught is the law of crime and punishment.

So consider this as another option: "Where did you get that electronic toy?" "My friend gave it to me." "Well that's a nice friend to have."

What's been taught there? I say Maori law is being taught or, to borrow a phrase from Aristotle, the law of virtue ethics. Virtue ethics puts the focus on brave, honest and noble conduct -- in this case, the virtue of giving, even if the friend is made up and imaginary. The wrong, or theft, is merely implied, leaving it for the child to contrast bad conduct with good. In this process, the mana of the child is left intact. The spiritual essence of a child is too precious to be extinguished.

Another feature of virtue ethics is that Christ called virtue ethics law. The only explanation I can think of for why he did this is that he came from the east, or at least from the Middle East, and was not schooled by western jurists and philosophers. And it is from the east that Maori came some thousands of years ago.

And even as early as today, I hear Indigenous (inaudible) going to east as they get older because of the issue of (inaudible).

Now, I'd like to take a jump straight over to page 5 of the paper, where I have set out what is the problem for Maori. You can read what's there. I'd like just to speak to this.

We have a serious problem in New Zealand of law

adherence and law observance. I quote in my paper that while we comprise only 15 percent of the population, we are approximately 40 percent of those in jail. The 40 percent figure is conservative. I would expect the figures more correctly to be put at 50 percent of those who are in prison in New Zealand being Maori.

Something has gone seriously wrong for us in the area of law and law observance. I think a part of it is that there is a difficulty for a Maori to know what their place is within the law. If you think of it from a Maori point of view, we are brought up on the laws of England. We are taught British precedent. We have Queen's Council, and our judges are Her Majesty's judges.

So, what is the place of the Maori in a system that is structured entirely on customs and laws derived from Britain? We have tried, over the last 25 years we've been talking at conferences, to look at ways to improve Maori performance and adherence to law. And I've come to the view over this number of years that tinkering with the law of the state is now only a part of the answer.

It's just a browning of the process. It's a necessary browning in New Zealand, because the reality is that we Maori must respect the law of the state and we must understand that it is now necessary for current order

in society.

Yet, the question for us, given that the position is so serious -- over 50 percent of our population in prisons are Maori -- is that we have to look at it from a bigger position now. As I see it, for Maori survival within the framework of state law, we must now move to recapturing control of our own value system. The reason we must do that is because trying to fit into the state's rule just isn't working. We are, I think, still the most imprisoned Indigenous race in the world. Maybe the Australians have got the edge on us.

So the real problem facing Maori is how to restore our own values and traditions as a positive way of improving our performance. And the thinking now in New Zealand is if we can teach adherence to Maori law, in a Maori way, if we can reinstate mana, then adherence to state law will automatically follow. This is because the ethics of Maori law are not in conflict with state objectives. We can exist and develop, not because of the state law, but because we have returned to an adherence of our own laws. And once we are confident in our own way, then respect for state law and the organs of state will follow.

So what can this Bar Association to do help this

situation? I think it would help Indigenous peoples, materially, if we can see that systems of law -- there are other systems of law. And they are all valid. And to have this validity acknowledged by the international community. It is all grist for the mill in what we would call mana building.

Indigenous law may be represented as a part of the cultural diversity of the world and as something that is good and necessary in securing peace, and law observance and harmony. But to gain necessary recognition, someone needs to verbalize what Indigenous law is and to set it within a philosophy of law to establish the essential elements, and the reasons for them. We are asking if this Bar Association can assist.

If we were each to develop our understanding of our own traditional law, could the Association market the combined product to an international audience?

I have spoken of only one thread of Indigenous law, that is on personal relationships and behavioral standards. Obviously, there are others, not least that relating to commercial endeavours. To reduce to a nutshell the peculiarities of the Maori commercial order, I would say that the focus is not on the terms of the contract, but on the quality of the relationship between

the contracting parties. Nor is damages for contractual breach the issue.

Mana is the governing factor. The focus is on an honourable conduct in business, or simply on being true to one's promises. The penalty for dishonourable conduct is that no one will do business with you, if your commercial reputation says that you are a person who is mana-kore.

Much of this thinking is evident in New Zealand history. I certainly have seen it myself in operation in Japan. We, I suggest, need to look at developing a jurisprudence of Indigenous law that would start to pull these threads together.

And there are pitfalls to be avoided. Willy is not here, but I personally would advocate avoidance of being drawn into a conflict over individual and group rights, or individual human rights and cultural rights, and would instead say let's concentrate on harmonizing these. There are, after all, elements of both group and individual rights in Maori society, as in any other, and the difference is only one of comparative emphasis.

Human rights law, as with constitutional law, is expressed in broad principles and those principles must inevitably conflict in particular situations. Those who look for conflict will always find it, but those who seek

answers are likely to find the truth. Each principle is valid in its own context. It is not a case of promoting one principle against another, as I see it, but in seeking the right balance for the particular case. To we Maori, that is what Indigenous law is about. We call it, "utu", the steps necessary that must be taken to achieve harmony and balance. (IN HER NATIVE LANGUAGE)

MR. PAUL CHARTRAND: If I interpret our honourable chairman's sign language, he says for those of you who are looking at the timetable, everything has been moved back a half hour block, so that this session can now aim to conclude at noon and you can grab a coffee on the way to the workshops and the lunch will start at one o'clock. That's for those of you who are organizing these logistical things. But I think I've got those signs right, Dave? Okay.

You'll remember -- at least some of the boys will remember -- when you were in the school yard, you'd always try to find out what people's middle names were. In the school yard sometimes middle names were sort of an embarrassment because they were unusual names. Our next speaker is Robert T. Coulter, and I believe that he doesn't fall in that category. Tim does not fall into that particular category.

You will be able to read the long list of accomplishments and qualifications of Tim Coulter. I will draw your attention to the fact that he's a lawyer, a legal warrior, from the Potawatomi Nation and is known particularly for his expertise on Indian law and international law. He is the founder and Executive Director of the Indian Law Resource Centre in Helena, Montana, a well-known figure in the United Nations fora, and a long-standing member of the American Society of International Law.

Ladies and gentlemen, please make welcome Tim Coulter.

ROBERT T. COULTER: Thank you, Paul, and hello to all of you. I'm glad to be back here. I think 12 years ago I was privileged to be at one of the very early meetings of this organization that was held in Calgary. And I'm glad to see many of you again. So many of you I haven't seen in a long time.

And I'm aware that many of you know more about these topics than I do but, nevertheless, I'll try to make a small contribution to the topic of the conference.

My purpose is to discuss the place and the significance of Indigenous customary law in the United States. I hope this will be of some comparative

use to you. I then want to take a few minutes to explore how international human rights law is developing to give some respect and possible protection to this customary law.

I think the term, "customary law", may not be quite what we want to say -- at least it's not quite what I want to say or quite what I want to talk about. I would rather speak of traditional law of Indigenous peoples. That would include customary law, but it would also include other forms of long-held Indigenous law such as orally transmitted law and social norms, religious and cultural laws and other Indigenous law ways, whether or not they were actually developed through customary practice.

I think that's what most people mean when they say, "customary law". Strictly speaking, customary law is something more limited. But nevertheless, that's what I mean to talk about when I say, "customary law", and I hope you'll go along with me. I think it's the best way of describing the topic.

I think it's important because customary or traditional Indigenous law is central to our identity as Indigenous peoples. It's central because usually, not always, but it often embodies and gets us back to the most

important Indigenous values and concepts. What Indigenous societies have long regarded as as important is very likely to be incorporated into traditional or customary law. Customary or traditional law usually describes how we want things to turn out, how we want to do things. or as the Chief said earlier, "how we do things around here".

But how we do things around here is often the most important aspect of an Indigenous society's identity. That is what most fully and most importantly describes the Indigenous people. That is reflected, by the way, in some of the definitions of Indigenous peoples that are being included in international law, and I'll get to that again in a minute, when I get to the ILO Convention 169.

Well, how are things in the United States with regard to traditional law? I think it's fair to sum it up by saying that traditional or customary law of Indigenous peoples is being applied, and being it's recognized and obeyed every day in Indigenous communities in the United States, but it's under serious threat. It's under serious threat for a lot of reasons that I will discuss in just a moment.

Customary law, I think it's useful to notice, can be both constitutional and substantive. That is, it can provide the law about how Indigenous governments and

courts and institutions are shaped, how they are set up, and how they function. But customary law also, in a very different way, provides the substantive rules about how we govern behaviour, how we decide disputes, how we regulate social conduct and personal affairs in the society. It does both things.

Well, in the United States -- and I'm happy to hear that at least sometimes it's true in Canada -- In the United States the United States federal government does recognize traditionally constituted governments. That is, governments constituted through a traditional or customary law only. But it tends to do so very reluctantly and sometimes even with long-standing hostility.

It's fair to say that our Bureau of Indian Affairs carries on warfare against some of these traditional governments, in a long-standing battle, to do away with them and replace them with governments that have written constitutions.

Some of it is pure politics and a desire to reach different outcomes. A lot of the times, though, I think some of the green eyeshade folks in the Bureau of Indian Affairs just want to get rid of these traditional governments, because it's hard to deal with them if you're a bureaucrat. Where are the regulations? Where is the

law? Where is the paper? Without that it's tough for the Bureau of Indian Affairs to deal with them. They don't want to go out in the field and actually try to figure out who is the government and how does it work. But if it's a traditional government, that's really the only way there is to find out.

Well, anyway, the system does work. It doesn't work very well, but there are any number of governments in the United States that are absolutely traditional. I think particularly of some of the governments in New York State, the Six Nations governments. I was just yesterday at the Onondaga Nation. But the Tuscarora Nation, the Tonawanda Band, the Senecas, the Cayuga Nation, the Oneida Nation, all of them have purely traditional governments.

There are also traditional governments in Alaska. you probably know, that function according just to traditional law. Many of the pueblo governments in the southwest are in fact traditional, even though some of them have a written constitution. Sometimes -- this isn't exactly right, but sometimes I think it's more to fool the Bureau of Indian Affairs than anything else. The actual functioning law is traditional and unwritten.

Customary law provides the substantive decision

making authority, in that other sense, mainly in tribal courts, but not exclusively, and mainly for the purposes of certain things, like determining membership in the Indian nation or tribe for purposes of dealing with domestic matters, for questions involving ownership and use of property on the reservation or the territory, in contract matters and personal injury matters that arise on the reservation and so on.

I suppose you could say that customary law is also widely and often applied by tribal courts in the criminal justice system, but as somebody used to say, a lot of times -- I'm sorry to say -- that tribal courts are not much more than an ante room to the tribal jail for alcohol offenses. And whether that's a very meaningful forum in which to apply customary law, I don't know.

Tribal courts in the United States, in the criminal justice area, are limited to very minor crimes. They're very important, nonetheless, and I think they do apply customary and traditional norms every day, but the run of cases is not one that sparks much interest to lawyers. It's mostly dealing with very serious but routine alcohol and domestic violence problems. Now, the domestic violence is a different level of problem, in my estimation, and one that deserves more attention.

I'm afraid I can't give you, right now, any good examples about the application of customary or domestic law, but it is being applied. And I know that because some of the tribal courts, some of the tribal governments, have written non-traditional laws that say we're not going to apply customary law. So they do do it.

Customary law is also relevant and applicable because state and federal courts, using ordinary choice of law principles, also apply Indian customary law where it's applicable in appropriate cases. Proof is through expert witnesses and so on. Nothing too extraordinary about that, but it's worth pointing out that it is respected and it is done.

Some of the reasons customary law remain relevant I've already mentioned, but let me also mention that in the United States, and you probably have analogous doctrines here, In the United States the federal courts have developed a doctrine of exhaustion of remedies, by which the federal courts require that litigants exhaust their remedies or possible remedies in tribal court before they bring cases in the federal court. Thus that a lot of decisions involving Indians or arising on those bases are first subject to tribal court jurisdiction, where customary law is likely to be applied, where appropriate.

We also have a principle of comity, by which state and federal courts give what amounts to full faith and credit to the judgements of tribal courts. It isn't, in fact, technically full faith and credit under our legal system; it's comity. But they do in fact recognize and give effect to tribal court judgments routinely and in the ordinary course, where the court has jurisdiction. And so there, again, we have state and federal courts in fact enforcing judgments rendered by the application of customary and traditional law. And that's a good thing as well.

We also have a federal statute called the *Indian Child Welfare Act* that's kind of a special case. But that statute governs issues of adoption and child custody proceedings involving Indian children. The *Act* serves to protect the jurisdiction of Indian courts, and hence their power to apply customary law, in cases that involve Indian children domiciled on the reservation. The tribal courts have concurrent jurisdiction as well -- concurrent jurisdiction with state courts over custody and foster care questions involving Indian children who are off the reservation.

So this particular federal *Act* also makes traditional and customary law tribal governments relevant,

particularly in the field of -- on questions of child custody and foster care placement.

Some of the threats to customary and traditional law are the *Indian Civil Rights Act*. That's an *Act* of Congress in the United States that puts some limits on tribal governments and tribal courts -- limits what they can and can't do. It was an effort that was, in some ways, well intentioned; in some ways, badly met. It was an effort to protect Indian people from their own governments.

It's not all bad, but the due process requirements of the *Indian Civil Rights Act* means that courts and governments, in all their functionings, are sometimes called upon to reduce laws to writing, to provide written notice, and to do other things that I needn't elaborate, that actually run counter to the maintenance and ordinary use of customary and traditional law. And so it's worth noting that these seemingly salutary things can have the effect of eroding and seriously threatening the traditional law systems.

We also have quite a strong movement afoot right now -- and this has been going on a long time too -- to modernize and improve tribal courts. Basically it means make them more like everybody else's courts. By,

"everybody else", I mean U.S. courts, British common law type courts, like yours in fact. Separation of powers; the idea that the executive branch and the legislative branch shouldn't have too much control over the courts.

Ideas like these, that really aren't Indigenous ideas and that are in some ways incompatible with Indigenous traditional law, are being promoted in Indian country. And many, many Indian governments are working hard to modernize their courts and adopt these features.

Will the results be good or not? I don't know. Indian governments are real democratic, serious governments and have the right to choose for themselves what they're going to do. They're probably going to do a pretty good job. I do regret it sometimes that our federal government so much promotes and provides so much money for this so-called improvement. I sometimes wonder if governments are being led astray, sometimes led away from customary law and toward new problems.

The worst problem we have in the United States is what we call the plenary power doctrine. It's the doctrine that the United States government can simply legislate away practically any right that any Indian government has. There simply are no legal restraints in the United States on the United States government's power

to deal with Indian people, their property and their rights. And so whenever the United States Congress or the U.S. Supreme Court acts, there's virtually no limit on its power to destroy, or alter, or erode customary and traditional law.

In response, for many years, as you know, Indigenous leaders have been seeking protection at the international level, seeking means to establish legal norms that would control the way governments behave, legal ways to change the rules so that Canada, the United States and other countries can't do so much to destroy and undermine Indigenous societies, particularly their customary law.

Willie mentioned, very appropriately, the International Labour Organization -- actually, he mentioned that, he mentioned the International Labour Organization Convention 169, but he also pointed out that the draft OAS American Declaration on the Rights of Indigenous Peoples includes a specific provision that would, if it's adopted, recognize the place of customary law. Actually, the emerging field of the rights of Indigenous peoples in international law is just full of references to and protections for customary law.

The ILO convention is interesting because the

application of the convention is said to be this. This convention applies to tribal people in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status -- this is the good part -- is regulated, wholly or partially, by their own customs or traditions, or by special laws or regulations.

Then in part (b) it says it also applies to peoples in independent countries who are regarded as Indigenous, and so on. And who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

So there again, it's practically part of the definition of being Indigenous, and that is written into the ILO convention. That is international law now, at least applicable in countries where it's been ratified.

Article 2 of the ILO convention says that governments shall have the responsibility for developing, with the participation of the peoples concerned, a coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity. Such action shall include promoting a full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural

integrity, their customs and traditions, and their institutions.

So there again, you see explicit recognition and protection for customary and traditional law.

I could go on and on here with the ILO convention. I could point out, because we're short of time, that the Convention on Biological Diversity, in article 8(j), protects particularly the knowledge, innovations and practices of Indigenous and local communities that are relevant to the preservation of biological diversity.

Now, that sounds like it's pretty far afield, but this provision is being interpreted as a provision that requires governments to protect customary and traditional practices that are in any way linked to environmental protection or the protection of biological diversity. And so this convention, particularly article 8(j), could be a potent means for protecting customary law.

I wish I had more time, but I think we need to move ahead. I should mention perhaps the draft United Nations Declaration on the Rights of Indigenous Peoples. Perhaps I can just limit myself to one article, article 9, that says:

"Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in

accordance with the traditions and customs of the community or nation concerned."

Suffice to say that there are many similar provisions like that one that give recognition and force to traditional and customary law.

Let me wind up by saying I hope that many of you and your clients will be able to participate at the United Nations because we've got to get this draft declaration adopted and we've got to get it adopted in good form without being gutted. We also need your help with the Organization of American States to get that draft convention adopted.

And don't forget to participate in the World Conference Against Racism that's coming up. It's going to kill us, this racism. And it's racism that will kill off our customary and traditional law ways as well.

Thank you.

MR. PAUL CHARTRAND: Do we have an insistent questioner?

(LAUGHTER)

I see none, therefore, we move on.

We have been speaking about governance and we will now be moving to the workshops dealing with other questions, including that of justice.

If I may be permitted a very quick commercial intervention, we at the Aboriginal Justice Implementation Commission in Manitoba will be trying to get the benefit of your views, coming from this conference. And I'll just mention the website, by way of commercial bridge, and you can communicate with us through that website. There's e-mail built in. It's www.ajic.mb.ca.

It's now my final duty to invite our president, David Nahwegahbow, to come up here. His job is to tell you where to go.

MR. DAVID NAHWEGAHBOW: Thank you, very much, Paul, for a fine job in chairing that panel. I'd like also to thank all the panellists for excellent presentations, very well prepared, and covering a broad range of subjects from Canada at the community level, to the nation level and internationally.

I'm going to turn it over to one of our board members, Bernd Christmas, to present some gifts to our panellists.

MR. BERND CHRISTMAS: Thank you, very much, David.

First of all, I'd like, on behalf of the Indigenous Bar Association, its members, its delegates, and of course the board, to thank all the panellists and the chair for the excellent presentations today. We have

some gifts that we'd like to hand out on behalf of everyone here in the room.

First, I'd like to present a gift to Donna Hall, from Maori. I'm going to give her a picture. It's a very nice one. You probably can't see it from there, but there's a great line on it. It says, "We do not inherit the earth from our ancestors. We borrow it from our children." I think this is appropriate to give to Donna. Donna, thank you.

The next gift is for Tony Wawatie from the Algonquins of Barriere Lake.

Tony, thank you, very much.

Thirdly, I'd like to ask Chief Elmer Derrick from the Gitksan to come up and receive this token of our appreciation.

Mr. Coulter, from down south, the United States, the Executive Director of the Indian Law Resource Centre, again a great presentation on the international aspect.

And lastly, and not the least in order, Mr. Paul Chartrand. Again, a great job of organizing, facilitating, and keeping everything on track.

I will give it back to our president, David Nahwegahbow.

MR. DAVID NAHWEGAHBOW: That brings us to the

close of this panel and the start of our workshops. We're running a little behind, but one of the signals that was picked up by the chair of the panel was that we are apparently now going to start the workshops half an hour late, at 12:00 instead of 11:30, which means that the workshop is going to run until 1:00 and lunch will be served at 1:00.

We have four workshop rooms set up. The subjects of the different workshop rooms are indicated in your agenda. General Workshop One is on Customs on Governance in Canada and International Fora, chaired by Dianne Corbiere and Professor Russel Barsh. That's in room Confederation I.

General Workshop Two is on Customs on Justice in Canada and International Fora, facilitated by Professor Larry Chartrand. That's in Confederation II.

Specific Workshop One is on First Nation Law-Making, facilitated by Roger Jones, and that's in Confederation II. Specific Workshop Two is Update on *Corbiere* -- that is the *Corbiere* case, not Dianne Corbiere. That's facilitated by Carolann Brewer, who is the Executive Coordinator of the AFN *Corbiere* Response Unit. That's in Confederation I.

Grab your coffees, as the panel chairman

suggested, and get to the workshop rooms. We come back here at 1:00 for lunch, and the speech this afternoon by the Honourable Judge Marion Buller-Bennett will be in this room. You'll be picking up lunch, however, in the foyer.

Thank you, very much.

(BREAK FOR WORKSHOPS AND LUNCH)

MR. DAVID NAHWEGAHBOW: We're about to get started with our afternoon panel, Aboriginal Title and Treaties. Our chairperson this afternoon will be Wilton Littlechild. Be ready to go in two minutes.

MR. WILTON LITTLECHILD (CHAIRMAN): Thank you, David, you're two minutes are up.

After years of research a group of psychologists and psychiatrists had done a study on seating arrangements in halls like this. And I think it was in about 20 years of study, they discovered that the people who go to church, when they go to a hall like this, they sit in the back. And the people who go to the movies, they always sit in the middle. Guess who sits in the front row? Those who go to the burlesque.

(LAUGHTER)

Any way, we have not only a very interesting and important topic today, but we have a tremendous assembly of panellists for this afternoon on Aboriginal Title and

Treaties. We're going to begin with a little bit of a change in the program and start with Dr. Larissa Behrendt, from the Institute of Aboriginal and Torres Strait Islander -- not Association, but ...

DR. LARISSA BEHRENDT: Institute.

MR. WILTON LITTLECHILD (CHAIRMAN): Institute, I'm sorry, excuse me.

DR. LARISSA BEHRENDT: That's okay.

MR. WILTON LITTLECHILD (CHAIRMAN): She is a post-Doctoral Fellow at the Law Program, Research School of Social Sciences at the Australian National University. And you'll see that the bios are in the back of the binders that you received, as mentioned this morning.

I would also like to point out that she's a graduate of Harvard Law School with both her Masters and Doctorate of Laws. It is a tremendous honour to introduce Dr. Larissa Behrendt.

DR. LARISSA BEHRENDT: Thank you. It's a (inaudible) of our community to acknowledge the tradition of custodians on the land -- of the land on which I'm about to speak for. I wish to pay my respects to the Algonquins and I would also like to thank the conference organizers for extending this invitation to me. I was delighted to return once more to Canada, a place where

I've been made welcome many times before, and it's always a delight to travel so far to be with such treasured friends.

I wrote my paper for today's conference in the afterglow of the Sydney Olympics, and I was reflecting on the fact that -- the Olympics which were held in Sydney, for those of you who didn't know it. The open ceremonies showed a new style of Australian nationalism. One that has actually acknowledged Indigenous presence in Australia -- and on terms set by Indigenous people. In the opening ceremony, our dancing and our music were decided and orchestrated by members of our own community, so it truly reflected an Indigenous expression of our culture. Ironically, the symbolic display of reconciliation was in direct opposition to the view that the Prime Minister, and many other Australians who share his vision, have of our country.

To cite one example of this particular nationalistic vision held by members of the government, I turn to a speech delivered by our Prime Minister, John Howard, during our -- entitled *Native Title Amendment Act*, where the government was seeking to legislate out many of the provisions that were -- or rights that were going to be (inaudible) case. Although there was great

criticism of the lack of consultation with Indigenous people, the property owners, the rights holders, whose rights were at risk during that period, Mr. Howard was very concerned to make sure that other parts of his electorate, other members of his Australian community, were informed and consulted. And so I thought that his address at the Long Ridge Community made in Queensland was revealing of how he actually saw Australians and his relation to Indigenous people.

He began with his ideology, very much a colonial settler mentality of the white man on the land and the rural idyll. I'll just quote from his speech:

> "...although I was born in Sydney and I lived all my life in the urban parts of Australia, I have always had an immense affection for the bush. I say that because in all of my political life no charge would offend me more, than the suggestion that what I have done and what I've believe in has not taken proper account of the concerns of the Australian bush."

Needless to say, when our Prime Minister addressed this community hall at Long Ridge he was talking to white Australians. And there was no such concern for Indigenous people, to whom he didn't feel the same sentimental,

nationalistic ideology.

But then he proceeded to rank the rights of one section of the Australian community over the other. I think that's particularly important because I think it clearly shows the way in which these images and these ideologies, did try to -- right into the way our rights are or aren't protected.

I'll read further from Mr. Howard's speech:

"...the plan the federal government has will deliver the security, and the guarantees to which the pastoralist of Australia are entitled..."

"Because under the guarantees that will be contained in this legislation the right to negotiate, that stupid property right that was given to native title claimants alone, unlike other title holders in Australia, that native title right will be completely abolished and removed for all time..."

"The if there are any compensation payments ordered to be made in relation to the compulsory acquisition or compulsory resumption of any established native title rights anywhere in Australia, that compensation will not be borne by the pastoralists of Australia, it will be borne by

the general body of the Australian taxpayers..."

This was an increase in the property interests of the pastoralists that the Prime Minister was proposing, at the taxpayers' expense. And I thought it was very interesting that, unlike our native title interest, this was not characterized as getting something for nothing.

The right of native title holder to negotiate is dismissed as merely the tool of troublemakers, not a valid property interest, a valid legal right, that is rooted in a cultural, legal and historical relationship.

I'll read further from Mr. Howard's speech:

> "We knew the right to negotiate was a licence for people to come from nowhere and make a claim on your property and then say until you pay me out, we're not going to allow you to do anything with your property. Well let me say I regard that as repugnant, and I regard that as un-Australian and unacceptable and that is going to be removed by the amendments that are already in the Federal Parliament. You won't have to put up with that anymore..."

So John Howard goes to the extreme of even characterizing the protection of Indigenous property rights as simply un-Australian.

With the image of what it means to be Australian so contentious, it's little wonder that legal protections in our country for Indigenous rights are so weak. The legal fiction of terra nullius that held that Australia was vacant was always supported and reinforced by a mindset, a psychological terra nullius, that has remained with Australians long after the 1992 *Mabo* case that found that there was indeed native title interests vested in Indigenous people.

This psychological terra nullius was facilitated by the fact that, as many of you know, there were no treaties signed with any of the Aboriginal or Torres Strait Island nations when the British invaded our land, and so no sovereignty was recognized in Indigenous peoples. We were considered, "wards of the state", until granted citizenship rights, and then only on the same terms as all other Australians. There has never been a legal recognition of our special status as Indigenous peoples and Australia is only recently coming to terms with the fact that we're there at all.

It is perhaps because we've never been acknowledged as a sovereign people that the notion of sovereignty has become so important to us. We use the term, "sovereignty", in a way that has made the word our

own, an expression of the very particular, quite unique way in which we see our future. In answer to the question, "What do you want?", many Indigenous people will reply: "First we have to have our sovereignty recognized."

But when you look closely at the content of the claim to sovereignty -- when you actually ask people, "When you use the term, 'sovereignty', what do you ie,l",

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which is again linked to the recognition of property rights but also an essential prerequisite to the recognition of customary law.

It is also perhaps because we've never been acknowledged as sovereign people that we continue to look towards a treaty at the national level, as a way of promoting our claims to sovereignty and self-determination. At an event called Corroborree 2000, a walk across the Sydney Harbour Bridge sponsored by the Council for Aboriginal Reconciliation, that was held in Sydney on May 27, 2000, the Aboriginal and Torres Strait Islander Commission's Chairperson, Geoff Clark, put Indigenous claims for a treaty back into focus and right on top of the Indigenous rights agenda in Australia. And issue that's actually had a strong part to play in Indigenous rights strategy since the 1970s. But probably left the limelight a little bit because of our focus on native title since the *Mabo* case. But it's still always been part of the undercurrent of the Indigenous political platform.

Indigenous leaders have always look towards a treaty as a way of changing the relationship that Indigenous people currently have with the dominant Australian culture, as well as a lever for the gaining of

recognition and protection for Indigenous rights.

Sovereignty for non-Indigenous Australians has a very different meaning, than the one I just described. They tend to fear the word and, since they don't listen to us when we explain what it means, they put their own meanings onto the term. They see it as a move to create a separate state, a move towards succession. And so the debate over Indigenous empowerment through, "sovereignty", and, "self-determination", has become stymied, even amongst sympathetic parties, through the semantic confusion over the use of the term, "sovereignty", and what the expressions of self-determination might mean. Non-Indigenous Australians have not understood the substance of what is being said, so they have no issue as to what Indigenous people are asking for in their political agenda and have reacted defensively to words like, "sovereignty". You can actually see what -- like how the conversation with people who begin to use the term, "sovereignty", that their eyes glaze over and they're no longer interested in talking to you about what you have to say. So there is a lot of fear planted in this particular word.

I think this fear is actually reflected in the way that the High Court has dealt with the notion of

sovereignty. In the *Mabo* case, the pleadings have been strategically drafted, very cleverly, to separate the notions of land and sovereignty, with the understanding that this important test case would be more likely to succeed if there was a way of avoiding the issue of the acquisition of Australian sovereignty by the British Crown. This tactic proved successful and the High Court was able to recognize a native title right without having to address the issue of the consequences of the overturning of terra nullius in relation to Aboriginal sovereignty.

Those of you familiar with the judgment will also be familiar with Justice Brennan's metaphor for the justification for overturning the doctrine of terra nullius. I'm going to just quote from his judgment.

> "Here rests the ultimate responsibility of declaring the role of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeleton of principle. ... The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity

> with contemporary notions of justice and human rights, but it cannot be destroyed. ... Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning."

I think this metaphor proves to be a telling piece of symbolism. The Colonial Australian law can bent to accommodate Indigenous laws and native title, but only to te extent that such recognition will not injure the skeleton. The white skeleton of Australian law. It can withstand the recognition of native title, but it can't survive the recognition of Aboriginal sovereignty.

Thus, one of the legacies that remain from the High Court's decision in the native title case is the unhooking of the notions of native title and sovereignty. So our land and our inherent right to self-government are conceptualized as separate and unrelated.

With the erosion of the protection of recognized Indigenous rights since the election of the Howard government in 1996 there has been a new awareness of what protection needs to be in place to protect the hard won

steps that we have made.

We've become particularly aware of this in Australia. Our Constitution was framed at a time in which Aboriginal people were believed to have been a dying race. Penned just over a hundred years ago, it remains a document permeated with the ideas of its drafters. It sought to leave the protection of any rights to the legislature and so we have seen the enactment of the *Racial Discrimination Act*. However, if you look towards the *Native Title Amendment Act*, as it was amended by the amendments that John Howard was trying to convince members of the community in (inaudible) weren't going to hurt them, we can see the weakness of the rights approach in Australia. Not only that legislated rights protection such as the *Racial Discrimination Act* are always vulnerable to be overturned or eradicated by the legislature when it obeys the political will to do so. This is often propelled by enormously powerful economic interests.

The argument that the federal government could only use its constitutional power to create laws for the Indigenous people for the benefit was raised by the plaintiff in *Kartinyeri vs. The Commonwealth*, which is now referred to as the *Hindmarsh Island Bridge* case. In that

case, brought in a dispute over development on a site that the plaintiff had claimed was sacred to her, the government sought to settle the matter by simply passing legislation. The legislation was designed to repeal the application of heritage protection laws from upgrading in relation to the plaintiff. Another example of how vulnerable and manipulated Indigenous rights protections are under a legislative scheme.

The plaintiff in that case argued, that when Australians voted to allow the federal government to pass laws in relation to Indigenous people in their 1967 referendum, it was being heard that it was only intended to give them the power to make laws that were beneficial. The court got around having to directly answer that issue because of the way its findings were made. Saying that what the legislation was really doing was repealing legislation, rather then enacting anything else.

But I think the very assertion, or the question mark left because of that particular issue not being definitively answered has been quite troubling. And particularly if you look at way that the government argued that case. I was particularly interested in the exchange that I've extracted in my paper. Where Justice Kirby of the High Court asked the government solicitor if what

their argument was, was that the government had the power to enact Nazi race laws. To which the government solicitor had responded if there was a reason why the High Court could do something about the passing of those race laws, it had nothing to do with the race power.

As I've said, this question has remained unanswered and there are various views as to whether or not laws that aren't beneficial could be passed. But I think that many were shocked to find that Australia's Constitution may offer no protection against racial discrimination, but one need only to look at the intention of the drafters to see why it remains this way. In fact, a non-discrimination clause was proposed for the Constitution when the instruction was being drafted. But it was rejected for two reasons. First of all, it was believed that entrenched rights provisions were unnecessary. And secondly, that it was considered desirable to ensure that the Australian states would have the power to continued to enact laws that discriminated against on the basis of their race.

They wanted to continue to be able to control the lives of Aboriginal peoples through legislation, similar to what people in Canada had to endure under the *Indian Act*. And also, they wanted to continue to control their

immigrant population, which is why the first piece of legislation passed was the White (Inaudible) Policy.

If one is aware of these attitudes held by the drafters of the Constitution, then I think it comes as no surprise that the document today may offer no protection against racial discrimination. It was never intended to do so and the 1967 Referendum, which allowed the Federal government that power, in no way addressed or challenged those fundamental principles that remain entrenched in the document.

A further example of the lack of constitutional protection and rights was seen in the 1997 case of *Kruger vs Commonwealth*. This, "Stolen Generations Case", was the first opportunity for the High Court to consider the legal infringements and remedies resulting from the policy of forcibly removing Indigenous children from their families. The plaintiffs, five children removed from their families under these Northern Territories Ordinance and one parent who'd lost their child under the operation of that law, had south a declaration that the law was invalid. And I think if ever there was a situation where you would think there would be rights to protect, this would be one of them.

The plaintiffs attacked the validity of the

Ordinance on many grounds. Trying to pull out what floor rights there were in the Constitution, such as section 116, freedom of religion. (Inaudible) implied rights into the document. So they relied on an implied right, a freedom of movement, an implied right of due process in the exercise of judicial power and an implied right of legal equality. And the plaintiffs lost on every count.

To me the *Kruger* case highlighted the vulnerability of Indigenous rights because of the inadequacies of our legal system, the racist legacy that permeates it and the absence of a Bill of Rights in legislative or constitutional form. And so we have sought increasingly to rely on international mechanisms.

On March 24, early this year, the Committee on the Elimination of Racial Discrimination issued a report critical of the Howard government's record on human rights that are protected under the Convention on the Elimination of all forms of Racial Discrimination. In particular, the concluding observations by the committee included expressions of concern over the absence of entrenched provisions to ensure protection from racial discrimination; the provisions of the *Native Title Amendment Act* of 1998; the commonwealth government's failure to support a national formal apology for its past

process, past policies, particularly the Stolen Generations policy, and it's refusal to consider monetary compensation for those who were forcibly removed from their families; its mandatory sentencing schemes which target Indigenous people, particularly juveniles; the extent to which discrimination is faced by Indigenous peoples in the enjoyment of their economic, social and cultural rights.

The report drew attention to a wide range of issues that are of concern to Indigenous communities at the present time. So from reconciliation to penal provisions, it covered a whole list of issues that illustrate inherent discrimination and sometimes overt discrimination in our laws and government institutions. Including legislative indifference and judicial complicity. All this contributes to the continuing and profound socioeconomic disparity between Indigenous and non-Indigenous Australians.

Although the report was in no way factually erroneous, the federal government condemned the committee,claiming that it gave too much emphasis into non-governmental submissions and took a "blatantly political and partisan approach", that, "ignored the significant progress made in Australia across the spectrum

of Indigenous policies." This view that the report was based on, "uncritical acceptance of the claims of domestic political lobbies" led the government to establish a review of the its operation of the UN treaty committee system as it affected Australia. The Australian government has been particularly critical of the role played by non-Government organizations at this level, particularly the Aboriginal and Torres Strait Islander Commission and our elected representatives. It has also been scathing of the weight placed upon material provided to various United Nations committees by those non-government organizations.

This reflects an attitude by our government towards the monitoring of Australia's human rights record, that views compliance mechanisms as an unwelcomed, biased interference with our domestic affairs and implies that Australia is better placed to interpret and assess our track record on human rights than any outside body.

There are three points to make about this approach taken by the Australian government towards its monitoring of its human rights record. The first is the irony of claiming to be the best arbiter of our domestic rights situation when we have so few mechanisms within our legal system to ensure that those rights are recognized and

protected. The irony that the government who led the international community into East Timor to prevent human rights abuses complains about the monitoring of its own record by that very same international community is unjustified. And then there's the parallel that can be drawn between the attempt to silence Indigenous people at the international level when they seek to assert their recognized rights and the continual attempt by the same government to erode those rights to negotiate and participate by rights holders within the domestic arena.

We in Australia have often looked enviously across the water to our Canadian brothers and sisters. We see treaties signed, a federal government who is not afraid to say the word, "self-government", a jurisprudence where the importance of oral histories has been emphasized, a developing jurisprudence of fiduciary obligation and a constitutional protection. But as we looking longingly across the ocean, we forget -- and it's only when we actually come and look at the way you live your lives more closely -- that we realize that we're really in the same position.

The more I look at the Canadian legal system and try and think about how to apply it at home, I think the appropriate title to work with is, "Do as I say, don't do

as I do". Colonization has had the same impacts on all the Indigenous nations within our two countries. A stripping away of our sovereignty, a taking away of our land, a taking away of our children, a suppression of our cultural practice, a fierce regulation of every aspect of of our lives. There are the same stereotypes about our women, our men, our children and our elders. The same devaluing of our traditional knowledge and our world views. We are more alike than our legal rules would make it appear.

It has taken us a long time to realize what it is that we, as Australian Indigenous lawyers, can learn from the Canadian experience. We no longer look to your Constitution and jurisprudence simply for the answers to our very similar problems. We also need to understand how a legal system can seem to offer so much on paper, but give so little in practice. We need to understand this lesson well to ensure that all the hopes we have placed in a national treaty do not come to naught when we are confronted with bad faith and lack of political will from governments and powerful economic interests.

Aboriginal sprinter Cathy Freeman provided some of the finest moments of the Sydney Olympic games when she lit the Olympic flame, and when she won the 400 metres

race. Some outside observers knew the stark realities for Indigenous Australians that hide behind the images of the Olympic Games. Few would have realized how contentious and contested those symbols of unity were on our own soil. It is this tension, this unsettled relationship, this, "unfinished business", that we are left to navigate now that the gaze of the international media has turned elsewhere.

Thank you.

MR. WILTON LITTLECHILD (CHAIRMAN): Thank you, very much.

I'm going to take my lead from the previous Chair, who was Paul, and take the liberty of making a comment. There's two words that Larissa mentioned that I have to comment on. One was, "sovereignty", and the other was, "Olympics".

I did a pre-Olympic paper for the Sydney Olympics on the participation of Indigenous women at the Olympics in the last 100 years. And the only suggestions I was going to make was this.

You'll notice in the opening ceremonies as the many nations march in under their flag, but there's sometimes some nations are allowed to march in under the Olympic flag, the IOC flag, and you'll notice this year

that happened. And I was going to suggest that perhaps the team, the people from Indigenous nations should be able to march in under the IOC flag.

So when I got a list of commendations of Indigenous women, I discovered well, you know, there's five Indigenous women competing in Sydney and no men, so I withdrew that suggestion.

(LAUGHTER)

I know, because she works for (inaudible) women's issues as well, so ... Anyway, there were five Indigenous women that competed, and that's not to detract from the very important presentation that we just heard on sovereignty and Aboriginal title.

The next speaker I will introduce is a young person, now and then also I began to watch his development and career both in politics and in the legal profession. Because as a young person, very early on he was involved with the National Indian Youth as president.

Arthur Manuel is the Chief of the Neskonlith reserve and Chairperson of the Shuswap Nation Tribal Council. And spokesman, as you know those of you who -- and I'm sure all of you do -- watch the national political scene every now and then will know, he's the Spokesperson for the Interior Alliance, which is a group of six

British Columbia Nations working to develop an alternative process to the B.C. Treaty Commission process, that does not involve extinguishment of Aboriginal title and rights.

I think back also to my first involvement with international issues. It was a vision of his father, the late George Manuel, to bring together all Indigenous peoples in the world to do work like this. And I'm very sure that he'd be tremendously proud of Art today, in the work that he's doing.

Art. I mean no disrespect, Chief Manuel, sorry.

MR. ARTHUR MANUEL: Thank you, very much. (IN HIS NATIVE TONGUE). First of all, I'd like to thank the Indigenous Bar Association for inviting me here to speak today on an issue that concerns us in south central interior of British Columbia. I think it needs to be said right from the beginning that the nations within the south central interior which are the Bulmunk, the Okanagan, and the Gatmunk, the Stapmiunk, in the south interior, were joined together under the Interior Rights, that our nations own the land, the traditional territory in which we live on.

I think it is important to state that we do not have any treaty with Canada. In that sense, we are unique in the sense that when we talk about our land rights, that

we look at our land rights as owners and not as claimers. It is important to understand that.

And that's a position that the Canadian government really has a very difficult time to accept and to deal with. Because basically the premise of the Canadian government has been assimilation, which means forcing their culture, their language, their way of life, onto our people. And it's basically a psychological type warfare which we've been dealing with under the aspect of -- under this assimilation process of Canada.

They also used physical intimidation. You've seen that in Burnt Church; you've seen that in Oka, you've seen that in Jasminson Lake, we've seen that in Ipperwash, where they actually used physical force to try and keep people in line, so that they can be managed under existing federal and provincial government programs. And they continue to settle and they continue to exploit lands and resources under the auspices of those two approaches.

They want to extinguish the original and fundamental title of Indigenous people. That's their primary objective in this whole psychological and physical intimidation process. And they want to impose the land selection system on us as Indigenous people. The land selection system basically means that they will set side a

reservation and make us live exclusively within that reservation. And become impoverished whilst they exclusively deal with all the lands and resources within our traditional territory, to our exclusion.

And that's how the process has operated, basically, in this country and in North America. Is basically Indian people have been moved to reservations and basically at times, through policy, forced to live just on those reservations while they became wealthy in other areas.

The other issue I'd like to raise is the, "divide and rule", strategy that's presently being implemented by the Canadian government in this country, in terms of some of us are in comprehensive claim policy negotiations and some of us are out. Some of us are in Aboriginal fishery strategies and some of us are out.

And as a community leader, the Chief from the Neskonlith band and the Chairman of the Shuswap Nation Tribal Council, the Chairman of the Interior Alliance, it is my job to work with people and work with the Chiefs at a real local level. These issues come up. They're thorny issues, they're problematic issues, they're divisive issues, but they will not go away if we don't talk about them and deal with those issues.

In terms of the comprehensive claims policy of 1986, that deeply impacts us in British Columbia. That policy is basically designed to extinguish or convert Aboriginal title. That's its express purpose and only purpose. It doesn't recognize that Aboriginal title has been judicially defined in 1997. It doesn't do any of those kinds of things that it should be doing.

It's implemented through regional processes. That's how they implement it. They talk about the B.C. treaty process. I hear they're talking about the Atlantic process. They're talking about a process they're trying to implement in the Algonquin territory.

But the government is always using the fact that we're poor to sell that program in different areas, by

statement in January of this year with the Assembly of First Nations, the Union of B.C. Indian Chiefs, the Interior Alliance and the First Nations Summit. The First Nations Summit is the organization that is negotiating under the British Columbia treaty process.

That they too know that the limitations that that policy make on the federal negotiators produce negotiations or settlements which they have, up to now, been rejecting simply because some of them call them pretty despicable, sort of, offers from the federal government. So anyway, we've decided to reject that.

The other strategy that they use, another divide and rule strategy they use, is the Aboriginal Fishery Strategy. You've seen that problem in Burnt Church this past year, where the people of Burnt Church never got involved in it, but a number of other communities did get involved in it. And you've seen Herb -- the Minister of Fisheries and Oceans use that as an excuse to be able to use violence to try and settle that sensitive treaty issue with the Wigma people. And he uses that strategy of division.

I know in my community, in Esquimalt, we never signed that -- an Aboriginal Fisheries Strategy, nor has Adams Lake or Whispering Pines, but the other Shuswap

bands have signed it. And there are some rewards to it, though. You know, we have a Shuswap Aboriginal Fisheries programs, and they do really good salmon enhancement work. They do a lot of good research in preserving salmon, so there's positives to it.

The real problem with the agreement, though, in terms of in agreement, is that one of the clauses that Fisheries and Oceans requires you to sign is to say that the Department of Fisheries and Oceans, the Minister of Fisheries and Oceans, has exclusive jurisdiction over conservation. That's the big problem with that agreement.

And that's what they use because, as you know, in the *Sparrow* case aboriginal -- fisheries rights was priorized. Conservation was priority number one, Aboriginal fisheries was priority number two and general fisheries was priority number three. So the federal government wants to capture the exclusive authority over priority number one and use that against us as Indigenous people, you know, in respect of our priority number two.

The reason we never signed it is because we believe that you have the right to fish. You also have the responsibility to preserve. And it's the responsibility that we will not give to the federal government because we know all too well that fish in our

rivers have been seriously depleted since the Ministry of Fisheries took responsibility for its conservation. And we won't allow that to happen.

Basically, the Canadian policy, I think, with regard to land and in regard to fish is a corrupt and morally bankrupt strategy, and I think they should be condemned. Because one of the things that they do, in the essence of those policies, is to priorize their human rights as settlers as being superior of us as Indigenous people. And they take advantage of our poverty by forcing us to live on reserves.

Like my reserve, we ran out of natural resources. It's a 7,000 acre reserve. We ran out of resources in 1870. We've been basically living without resources for 130 years. So we're poor, not because we're Shuswap. You know, we were poor because we were denied access to our traditional territories, despite, you know, the fact that we own those territories.

I feel that the Comprehensive Claims Policy of 1986 and the Aboriginal Fisheries Strategy needs to be rejected from our community. And once we reject them, then you'll find the basis for unity amongst our people.

People are frustrated with those policies at the community level and they're asserting their Aboriginal

title in our areas. In our area we went logging earlier -- or last year without a provincial permit. We logged a small cut lot area. The way timber is allocated in B.C., the big companies basically are allocated all of our traditional territory, the large part of it. Like Weyerhaeuser, Interfour, all these multi-national corporations are given these huge areas.

And then you have the thing called the Small Business Program, and another program they call Woodlot Licence. But in the Small Business Program they auction off forest timber resources. Before they could auction off this one timber area, we went in to logging. A number of bands did that. The Westbank band of the Okanagan Nation did that, the Okanagan band did that, and three Shuswap bands -- Spalmachin, Adams Lake and Esquimalt went to logging without a provincial permit.

We're in court right now. One of the -- we haven't set a trial date for the actual trial, but under the procedural issues is one of the things that we did win though. When we wanted to sell the trees, which we have to sell, we went to court. The Crown argued we didn't own the trees. We argued we did and we had the right to sell them, and we won. The judge said that we had the right to sell the trees to recover the cost of logging the area and

the rest of the money in our lawyer's trust account until the trial is settled.

The other thing that we're fighting at the community level is Milwood Creek, which is in a Stockton area. They want to build a new ski resort. We have a camp there preventing there. We also have a camp in the Shuswap area near Sun Peaks, near Kamloops, where we have a camp just set up a few weeks ago. That is to prevent a $70 million expansion of a $230 million ski resort.

So the thing is, I think those are really important. Other areas that we're talking about doing is land use occupancy research. We follow a lot of the examples set by Barriere Lake of the Algonquin Peoples, in terms of the kind of land research work they do there. That provides us with the database that we use in order to argue with the province. We've developed agreements around sacred areas and we also use the data collected there to influence decisions on more forest issues.

Also, we really praise our people in terms of traditional activities. Every time they put deer meat on the table, or fish on the table, huckleberries, kolaco, or any of these things on the table, basically they're exercising their right in terms of Aboriginal title. We really honour those people because they're the ones that

are giving us the jurisdiction and authority to work in our traditional territories.

And we -- one of the -- the big problem areas we have is planning in terms of traditional activity, planning in terms of coming up with our own maps that we can use in order to try and -- in our dialogue with the federal and provincial governments.

The other thing that we've done is we've worked at the Assembly of First Nations in terms of the Delgamuukw Implementation Strategic Committee. This committee was established under an Assembly of First Nations resolution. It's Canada-wide in scope and we do get a lot of people from the Algonquin area and the B.C. area, and some people from the Maritimes, involved in this issue. So it's more Canada-wide in scope.

We uniformly reject the Comprehensive Claims Policy of 1986. And it's really hard to get through to people's thinking. I say this quite frankly. As lawyers, you know that you have law, but you also have policy. And the thing is that the policy is the way -- is the political thinking the government uses to implement the so-called law. It's political thinking.

Like, the Comprehensive Claims Policy of 1986 is the thinking the cabinet had back in 1986, on how to

implement the Aboriginal title land issue. And the thing is that you can't change any thinking in the mentality of the government until you change that policy. It's part of the machinery of government. And the thing is, that a lot of times people look at processes, like the B.C. treaty process, which is to legislate an established process to negotiate, as being the essence of the settlement that's going on in various struggles. But it isn't. It's a process, it's the vehicle. The driver that drives that vehicle is the 1986 claims policy. And you have to change the driver, you know.

And the thing is that a lot of times people don't understand that, but as lawyers that's -- you should be able to understand the essence of that. It's a real serious problem in Indian country, generally, to understand that that policy is really at the crux of the problem. It's been the same thing with the fisheries strategy, is really the crux of the problem that the federal bureaucracy is using to divide and to ruin us -- to rule us. But anyway, that's what we reject.

And one of the things that we did, just to really test the federal government on whether or not they're prepared to abandon extinguishment and recognize Aboriginal title and development, one of the things that

we did is to have a meeting with the federal government some months ago here in Ottawa, And the people there were Fred Caron from the Privy Council. I know he goes to Geneva and talks in Geneva on behalf of Canada. We also had representatives from the Department of Justice and we had representatives from the Department of Indian Affairs. I know Dave Nahwegahbow was there and the National Chief at that time, Phil Fontaine, was there. We had Roberta Jamieson, who was our sort of chairperson. And she negotiated the discussion for the day.

But the key point that we put forward to the federal government there was this panel of experts. And this panel of experts was to be set up by us appointing somebody and they appointing somebody. And the panel of experts' objective was to do a comparative analysis between the Comprehensive Claims Policy of 1986 and the Supreme Court of Canada's decision in *Delgamuukw*, and find out where the policies were congruent or where they were in conflict. And come out with a report.

That proposal was rejected in a letter from Bob Nault to the then National Chief, Phil Fontaine. They weren't prepared to go even an incremental way towards changing the extinguishment policy. So to negotiate under that policy, you know how intransigent the Canadian

government is.

So when you go to the Supreme Court you have Aboriginal title recognized as a collective interest. You then go to the government and try to get them to change the extinguishment policy through some incremental change and they reject that. The only option you have then is to go international, and we've initiated an international campaign regarding this.

And we take a lot of example from the Constitution Express. I don't know if you know a little bit about the history of how the Canadian Constitution was changed, but in 1980 the B.C. Indians were really concerned about the Constitution being patriated and the fact that there was real serious questions about Indians in the Constitution. So they initiated taking a train across Canada in 1980 -- 20 years ago -- and they were in this town at about this time fighting that issue.

They got some movement from the Canadian government, but not quite enough to make the government change their mind. It wasn't until they went, in 1981, on an international Constitution Express, to Europe. And I know by that time a lot of Indian people from across Canada were involved in lobbying -- a lot of money, a lot of energy, a lot of people from every nation went over

there. And finally forced the government to change its mind with regard to issues. And section 35 is the consequence of a lot of people's hard work. And you know how important it is, in terms of protecting our rights.

So I think we need to take example from that kind of thing, in terms of our international campaign. Right now we're engaged in some kind of international market campaign in British Columbia. One is in regard to softwood lumber. We work along with the Grand Council of the Crees on that issue and we go to Washington, D.C. We've been there about four times now lobbying senatorial and congressional members down there, regarding the softwood lumber agreement.

Basically our message to the American people, at least from B.C., is that the lumber that the Canadian government is selling to the United States is stolen lumber, simply because there are no agreements with Indigenous people over there. The Supreme Court of Canada recognizes the we have proprietor interest. Therefore, Canadians shouldn't be selling this in the free trade market and that a quota should be put on it until Aboriginal title is dealt with.

So there's really important issues to talk about Aboriginal title as a trade issue. There's traditional

values in which Indigenous people have been continually paying into the commercial utilization of timber resources. There's also protection of ecology and biodiversity in terms of article 8(j), forcing the Canadian government to deal with them.

Well, I think the main thing is that what we need to talk about in the final analysis is what we want to do with recognition of an Indigenous order of government, co-existence within the Canadian Constitution, but based upon our rights, our title. I think section 35 provides us that jurisdictional base. And I think the *Delgamuukw* decision provides us a land base.

That's all that we talk about. When we talk about the problems of British Columbia, we just talk about jurisdiction, we talk about land. What we talk about is jurisdiction and we talk about land. That's all we do when we're talking about our interests.

Every dollar respecting the enjoyment and benefit of our traditional territories needs to be divided between the three major governments of this country -- 35, Aboriginal and territorial; 91, federal; 92 provincial. I think the federal and provincial governments need to review all land and resource legislation. And we should then agree to amend these laws to accommodate Aboriginal

title and rights. That's the direction we're going.

Thank you.

MR. WILTON LITTLECHILD (CHAIRMAN): Thank you, very much, Chief.

I understand there's a slight change in the program. Regrets and apologies from Dr. Harold Cardinal, who was to be a panel member as well.

In the 20-some years I've been practising law, this is the first time I'm going to lose an articling student to a federal election.

(LAUGHTER)

As you know, we could be going into an election in the next couple of days or so. In any event, regrets and apologies from Dr. Cardinal.

In the time, as I say, that I've worked in the international arena I met another gentleman, who on your program you'll see was born in Havana, Cuba. In 1960 he received a Doctor Juris from the University of Havana and became an Auxiliary Professor at the University of Havana Law School the next year. In 1985, he became a Titular Professor at Cuba's Higher Institute for International Relations.

He has served as a Cuban delegate to 14 sessions of the United Nations Commission on Human Rights and has

been a member of the UN subcommission on the Promotion and Protection of Human Rights since 1984. If I could add to that, he's also been working on the promotion and protection of Indigenous rights since 1984, or before that. He has been the Latin American member of the Subcommittee's Working Group on Indigenous Populations for the past 17 years. And as I mentioned earlier this morning, was the special rapporteur on Treaties between Indigenous Peoples and Nation States. He is a man I've come to respect over the years because it was the first time I've ever seen a special rapporteur who was really able to capture what the Elders had been telling us as we were growing up, and what the Elders had been trying to tell the world at large of what the treaties mean to us in a way that they could understand.

It's a tremendous honour to introduce Professor Miguel Alfonso Martinez.

DR. MIGUEL ALFONSO MARTINEZ: Good afternoon to you all. And thank you for this very touching introduction you have made.

I can tell you only one thing. I consider myself today a better person than I was in 1984 when I had the first opportunity to meet Indigenous people.

I want to thank, first and foremost,

President Nahwegahbow of the IBA for this very kind invitation to participate in the IBA conference. I feel deeply honoured by that and I'm very pleased to be with you here. I also want to thank his staff for all the efforts they have made collectively and individually to make it possible for me to arrive safely and in good shape.

There have been some changes to the program, and I would also suggest, and I hope it will be accepted, a small change in the program. According to the program I have before me, I was supposed to speak on the study on treaties which I finished two years ago. I will deal with this treaty study, but briefly. As a matter of fact, I was surprised by the number of participants that have come to me commenting on the report. So it is has not been read as it is unknown, it is a document that was published, as I said, in 1998 for the first time, and then in the final form in 1999. You can -- do you say, "download" --download from the www site of the High Commission in the internet.

I only want you to read the report, those of you who have not read it. I'm very proud of the report. And I'm very proud because I have not received any critical comment about it from Indigenous organizations or

Indigenous people representatives.

On the governmental side, there is silence. If that is the case, I think what -- I think I have grasped something which struck me during all these experiences that I had visiting Indigenous lands. Every -- first the general, overall situation in which Indigenous peoples have to survive today. Shameless. Wrath at sometimes has come to my spirit, having seen certain situations in Indigenous lands.

I can tell you that I'm proud that I have been able, first, to have the opportunity to listen to the Elders and the wisdom that they have instilled in many aspects of this report. In fact, it's not my report. There are many people who have co-authored its content, and mostly coming from Indigenous sources. Particularly real persons in what is present day Canada, (inaudible), Chile, in present day Chile, and in many other places.

So I think that the only thing I have to stress is that I attach great importance to the conclusions and recommendations. Read it, those of you who have not done so.

And there is something very important for me. Like us try to have a follow-up. That is not the end of the road. It's a step forward and it has to be continued.

What is said there may serve, and should serve, as a new effort to be started, as soon as possible, within the United Nations system.

Let me tell you once again -- and I say, "once again", to those who were present in the specific workshop that we had in the morning. I have very specific ideas about the value of present day and the future work of the United Nations war in human rights issues discussing Indigenous rights. But I think that no soldier has the right to leave the trench to be occupied by somebody else from the other side. So we have to defend, I think, every inch that we have been able to conquer, although understanding the limitations of them.

I want this effort that was established in the subcommission should continue, and should continue by new initiatives and by some other people, not me. Because I have dedicated my time also on issues related to Indigenous questions, but not in this particular field of treaty rights.

Having said this, I said, well, what am I going to speak of? And I have indicated my interest to share with you some thoughts about certain negative trends that I can see developing and gaining weight within the United Nations in the field of Indigenous questions.

If there is no objection, I will proceed in such a way, but I want to put this to the consideration of the planners. I see no objections and I will ...

The first negative trend I see -- and I will go in descending order from the ones I consider to be the most nefarious -- had to do with the adoption -- the eventual adoption -- of the draft Declaration on the Rights of Indigenous Peoples.

Let me mention here that this document was adopted by consensus by the Working Group of Indigenous Populations in 1993, submitted to the consideration of the Commission on Human Rights in early 1994, and we are now in the year 2000. And as far as my information goes -- I believe it is correct -- of the 30, no, 40-odd articles of the draft declaration only three have been adopted.

This is very serious. I think it speaks very clearly of the reticence -- and I am using a diplomatic term -- the reticence of most governments within the Commission on Human Rights and elsewhere to the adoption of this document.

The adoption of this document is very closely linked, in my view, with the second negative trend that I will further explain in a few moments.

The problem with the adoption of the Draft

Declaration apparently resides -- the main problem -- apparently resides in the recognition of the right to self-determination for Indigenous peoples. We are not setting any standard here. We are not creating new international law. We are not discovering the Mediterranean Sea, as we say in Spanish. We are not discovering the wheel.

It so happens that since 1945 the Charter of the United Nations that was drafted and adopted in San Francisco that year clearly recognizes to every people in the world the right to self-determination. And there is no doubt in my mind that we have a great number of Indigenous peoples throughout the world, and each of them has the right that they should recognized by their states in San Francisco -- by the state, not by the peoples, but by the states representing peoples, that's what I said -- recognizing that right to all peoples of the world.

Recently, in those turbulent years at the end of the 1980s and the beginning of the 1990s, when the implosion of the former Soviet Union took place, many governments coming from many states, defended the right to self-determination of the Balkan countries -- of Kajikastan, of Slovakia, the Czech Republic and Croatia later, more recently. They recognized that they had the

right to self-determination and to break away from the Soviet Union, from the -- all the countries in Central and Eastern Europe.

But what the whole thing comes, to go back to the recognition of the right to self-determination of Indigenous peoples. Those very same countries, states and governments say, yes, but not in this case.

When you try to press the issues and go, "What is the difference?", well, you get, in many cases, in most cases, an unintelligible response, a least serious responses.

I think that this problem has been magnified in order to have it as a stumbling block for the adoption of the Draft Declaration. I think that the right to self-determination is inherent to all countries, to all peoples, and it is in the exercise of that particular right that they choose whether or not to become a sovereign state.

In other words, we are confusing the notion of national sovereignty, self-determination, and state sovereignty with the specific intention of trying to have an, "acceptable", excuse for having this documents shelved forever.

I think that one can probably say that not all the

Indigenous peoples that have been discussing this issue want to become a new state -- and that will involve the United Nations -- and have that particular established. What they want is to freely decide in which way they should protect their own interests, and continue to enhance and protect the cultural wealth that each of them have.

Maybe there would be some decision to become an independent state, but the principle of self-determination of course does not belong exclusively to Indigenous peoples. It belongs to all peoples. And I am very proud that Indigenous peoples do not want to have an qualification to the principle of self-determination, because that would be a disservice to the rest of the peoples of the world, not to mention a disservice to Indigenous peoples themselves.

So I think this is a very crucial issue, but it can be -- it's manageable. It can be recognized, and with the expression that it is setting one of the articles of the present rank, that national sovereignty exercised to become a state is one of the expressions, not the only possibility of exercising the right to self-determination. The right to decide how the rights of Indigenous peoples are to develop is an inherent right of each Indigenous

people that they will exercise in the fashion that they deem fit.

I now call your attention to all those of you who I know defend -- and with very good reasons -- the draft that we submitted to the subcommission seven years ago. I want to call your attention about the content of article 33 of the present draft. This article was the subject of the only vote we had to have within the Working Group of Indigenous Populations, as it's called, in 1994.

Article 33 at its present state reads as follows:

"Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices..."

If the draft article would stop here, I think it would be very important and we would have no objections. But somebody within our group insisted on having this amended. I repeat:

"Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices..."

I now come to the addition.

"...in accordance with internationally recognized

human rights standards."

So there we go. We are saying that -- in the context of this seminar, in the context this conference we are saying, "You have the right to have your own legal institutions, your customs recognized, ah, but they have to be consistent with what non-Indigenous bodies have established as internationally recognized human rights standards." Which is a reflection, once again, of this negative trend of saying, "Well, everybody is equal, but some of us are more equal than others." What is applicable to other peoples is not applicable to Indigenous peoples, and that has a very clear end. It is discrimination.

I am not breaking any news to you, but I just want you to know that this is something you perceive easily within the United Nations body, in connection with the treatment of Indigenous rights.

There is something which is a step forward in this connection, because we took two steps backwards three or four years ago when we changed the title of the item in the agenda to the subcommission, which until -- since 1982 until 1997 was Discrimination Against Indigenous Populations -- or Peoples. We used the word, "Peoples". And it was three years ago changed for other things that

eliminated the word, "discrimination".

It was adopted late at night, many of us were not present, and the whole agenda fitted with that. Now, in this common year, the year 2001, the subcommission will deal with the Indigenous issues under the item, "The Promotion and Protection of the Rights of Indigenous Peoples and Minorities". So we have gained a little bit in that, so we have to further continue the trend to stop the present trend.

The second negative element that I see today has to do with the very probably demise of the Working Group on Indigenous Populations, of which Willie Littlechild and I have been a member for the last 16 years. It was established in 1992 with two specific, but at the same time, general tasks. First, to establish new standards for the protection of the rights of Indigenous peoples. And two, review the developments that have taken place from one year to the next in connection with Indigenous people. So we have an ample mandate to cover whatever can happen in this very important field of UN activities.

As Willie explained it -- no, it was somebody else this morning. I mean, it was Time, Tim Coulter said this morning that the working group called the United Nations Permanent Forum for Indigenous People -- without the "s" -

- had been established and the details about its functioning at the moment are being finished -- at this moment finished up at the secretariat in New York.

Well, let me explain to you that this idea of establishing a so-called permanent forum -- and I say, "so-called", because it was adopted in a sense to create the first permanent forum, and in fact the working group has been a permanent forum for Indigenous peoples since 1982. It has been established and with the legitimacy of the support of a number of Indigenous peoples and Indigenous organizations.

I must say from this point, that I have very strong misgivings about the existence of this body. First because two years ago it was for the first time officially proposed that the existence of this permanent forum -- the establishment of this permanent forum -- would sooner or later mean the disappearance of the Working Group on Indigenous Populations. The body that has made it possible, to a great degree, the increasing public awareness in the world public opinion, the international public opinion about Indigenous discrimination.

But if this body could be something with more effectiveness than the one we have had, that would be very good. The problem is that the composition of the body and

the general nature of the mandate it has received, and the fact that it has no possibilities of instrumenting policies, but just recommending policy -- as we do today in the Working Group on Indigenous Populations -- makes me feel that the price to be paid for establishing this new body -- and nobody knows what -- how effective it will be in the future -- is not the most -- it's not wisest way to advance the issue of Indigenous peoples in the United Nations.

I don't think why the two bodies cannot co-exist. Of course, we have been advised since time immemorial that it's hardly -- that we have at the United Nations hardly enough funds for the establishment of one, the one we have at the moment. And maybe that is one of the reasons why the second one has been established, because the two of them probably will not be viable from a financial standpoint and then the preference will be given to the new body.

Nonetheless, I think that the most convenient way to deal with this issue is not to oppose or to obstruct the work of this permanent forum, that probably will be established effectively by the year 2001, but to fight for the maintenance of the two bodies. There is no contradiction between the mandate given to the so-called

permanent forum, the new one, and the ample mandate that has been granted by the Economic and Social Council since 1982.

Many Indigenous people and representatives of Indigenous organizations, that at first were very much in favour of establishing the work -- the permanent forum now have begun to have second thoughts. And they specifically are concerned about how the eight -- eight -- Indigenous representatives that will have the conditions of full members of -- full voting members of this permanent forum will be selected. The task has been given to the President of the Economic and Social Council, who of course is a representative of the government.

In other words, those Indigenous individuals that will be members, full members, voting members of the permanent forum will be selected, without any kind of guidance, but only to have consultations in general, will be -- I insist, will be appointed directly by the President -- the governmental President of the Economic and Social Council.

So imagine at the moment, I am familiar with the, say, fights that are taking place among Indigenous representatives to be included in that group of eight. But the potential disruption to the Indigenous

international movement because of this limitation of only eight, and being in the hands of the President of ECOSOC, is already going on.

I do hope that an agreement can be reached within Indigenous peoples to have their representatives selected, and that this will not create yet another cause of division in the international arena for the Indigenous movement.

The third negative trend I see is the dark side of success. It has to do with the success of the Working Group on Indigenous Populations for having mobilized the international interest in Indigenous issues. As a result of this, and because of the lax rules of procedure of the working group, which admits every Indigenous person and every member of the academic community that would claim an interest in Indigenous issues, to participate freely in our debate and to take an initiative, if they so wish.

Because of the flexibility, I insist, of the proceedings that we follow and the procedures that rule us, many people now claim to be Indigenous and have jumped onto the bandwagon coming from all parts of the world, specifically Africa and Asia.

When Willie was recalling this morning in 1977, in Geneva, Willie recalls who were Indigenous in the sense of

the United Nations. People from the Americas, both North and South, and as well as Central America. People from Australia, from Hawaii, from the Philippines, from specific situations in Japan. Now everybody claims to be Indigenous.

And I might recall here that, "Indigenous", is not an Indigenous term. It is a term of the colonizers. "You are Indigenous, I am the master." It's an exclusivist kind of thing, "I am Indigenous, you are not. I am the colonizer, you are not."

And then many governments from Asia and Africa asked us, "But I am also Indigenous. How come these people from my country now claim that they are Indigenous?" They may claim that they have no rights recognized as a national minority within my country, but Indigenous? I am not Indigenous.

And the result, the net result of this is that many potential allies of the Indigenous movement in the United Nations now are concerned that this will not be used to bring further problems to the Africa and the Asia state.

So this is something we have even people descending from the original creators of apartheid in South Africa, coming to our meetings on the condition of

Indigenous. People from Namibia, people from South Africa, people from Laos who were helping the French and the Americans to fight against the abduction of people in Laos, now they are from the United States where they reside now. The association they have established sends representatives to the working group, and we listen to them. And this creates tensions.

So this is something that we will have to see how we can solve. For the moment it exists, but it is a negative trend because it's undermining, for example, the recognition of human rights to make Asian and African states more amiable to the tests for draft -- of the Draft Declaration.

Finally, trend of the effects of globalization on the Indigenous issues. Globalization means -- first of all, I cannot say I am against or in favour of globalization. Globalization is a fact. Somebody said will it is like fighting the law of gravity. The problem is -- my particular problem is with the present kind of globalization that is taking place. It is not the need for globalization of solidarity with the good causes. It's the globalization of a male, liberal nature, in which we all know -- and we have the examples of Latin America, we have the examples of Africa, we have examples in

North American and in Europe, that the first to see the nefarious effect of this particular type of globalization that exists today are the most vulnerable groups in society. And guess who are in those most vulnerable groups. Of course Indigenous peoples.

So, Indigenous peoples have never been a pet project of the centre for human rights -- never, ever. Now, with the viscosity of funds, and these ideas about which should be priorized within the field of human rights, meaning general is when democracy and whatever they have in mind, those who defend the new male liberal world order, I am afraid that the effects of globalization towards the discussion -- the conceptual discussion of Indigenous rights and all the (inaudible) connection with the financing of activities, for example, for the decade will be very serious in the sense that we will have less funds, less human resources, because of the lack of general resources available, and because of the difficulties for the people who defend this present type of globalization to understand the predicament of Indigenous peoples. In the governmental bodies, I see -- and I think that Russel Barsh was commenting on this too -- there is a retreat of many governments in connection with this, because of the tradition of rejection of the

international discussion of Indigenous problems and because of the new trends with -- vis-a-vis globalization.

I will stop now, and I think that more important than what I have just said, are the concerns that what I have said may have come to your mind.

Thank you, very much.

MR. WILTON LITTLECHILD (CHAIRMAN): Thank you, very much, Professor Martinez, for your usual very candid contributions to our struggle to make these negative trends that are appearing on our horizon and change them to positive advancements. Is there time for questions now, or do we go into workshops?

As usual in our tradition, there are presentations of gifts to our guests. Candice.

MS. CANDICE METALLIC: Good afternoon everyone, and welcome to the Indigenous Bar Association annual conference on globalization and international law. My name is Candice Metallic. I'm on the board of directors of the Indigenous Bar Association and I'm very honoured to present our very distinguished panel with gifts of our appreciation. They have travelled a very long distance to share their experience on Aboriginal treaties, or Aboriginal rights and title and treaties in the domestic and international context. And I'd just like to thank

them.

So, first of all, to Willie.

Secondly, to my dear friend Dr. Larissa Behrendt.

To Chief Manuel, who had wise words to share with us.

Last, but certainly not least, Dr. Alfonso.

We probably have some time to take some questions if there are any. If not, we can just proceed to our workshops.

MR. WILTON LITTLECHILD (CHAIRMAN): As someone said this morning, I see none, so we will go right into the workshops.

Confederation I will be the workshop on Aboriginal Title Canada and International. It will be chaired by Candice Metallic and Dr. Behrendt.

Confederation I also, General Workshop on Treaties, and I believe it's being chaired by Gerry Morin.

Confederation II, Workshop Three is on Aboriginal Title, chaired by Mark Stevenson.

Also in Confederation II, Update on *Marshall* and *Jay Treaty* with Bernd Christmas.

Grab a coffee on the way to the workshop rooms. Thank you, very much, for your kind attention to this panel.

(BREAK FOR WORKSHOPS AND CONCLUSION OF DAY)

WE HEREBY CERTIFY THAT the foregoing was transcribed to the best of our skill and ability, from taped and monitored proceedings.

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G R S / L P / W E C

CONTINUED FROM VOLUME 1 OF 3

---UPON COMMENCING AT 10:00 AM ON OCTOBER 21ST, 2000

MR. DAVID NAHWEGAHBOW: Good morning, everybody. I will invite our Elder Chief Wawatie to give us an opening prayer.

OPENING PRAYER BY CHIEF HARRY WAWATIE:

(IN HIS NATIVE TONGUE)

MR. DAVID NAHWEGAHBOW: We always tend to be a little sparse the morning after a banquet like that. I thought it was excellent. I don't know what everybody else thought about it. The entertainment was great. I don't remember laughing so hard. In fact, I think my jaws are permanently bruised from all that laughing.

Without further adieu, I'd like to introduce our panel chairman, this is Larry Chartrand, also a stalwart IBA supporter and a long-standing member. Larry is a Métis person from northern Alberta and a member of the Paddle Prairie Métis Settlement.

He obtained his Bachelor of Education degree from the University of Alberta in 1986, graduated from Osgoode Hall Law School in 1989, and was called to the Bar of Ontario in 1990 ,after articling with the Native Affairs Directorate and the Attorney General for the Government of Ontario.

From 1991 to 1994, he held the position of Director of the Indigenous Law Program at the University of Alberta. He has been a law professor at the University of Ottawa since 1994 and specializes in research involving Aboriginal rights, Indigenous rights in international law, Aboriginal justice systems and equity issues in the legal profession.

He is a former president of the Indigenous Bar Association, sat as a special advisor on Métis issues for the Senate Committee on Aboriginal Governance in 1998/1999, and is currently a member of the Sahtu Dene and Métis Land Claim Arbitration Panel. He is presently working on his LLM at Queen's University and was recently appointed by the Canadian Bar Association to sit on the Equity Implementation Committee.

Larry will be chairing this morning's session.

I'd also like to remind you, before I turn it over to Larry, that we do have a luncheon speaker today. Yesterday I noticed that there was confusion about the luncheon. Lunch is going to be served out there in the foyer, but please come back in as soon as you get your food, because our luncheon speaker is scheduled to be here at 12:30.

James Prentice is co-chair of the Indian Claims

Commission. The Indian Claims Commission, incidentally, is sponsoring today's lunch, so for sure we've got to be here and attend his very important luncheon speech. He'll be talking about the recent developments -- or the latest developments on the issue of their tribunal or their claims commission, and developments -- or a lack of developments -- in the specific claims process.

So, thank you, very much.

And Larry.

MR. LARRY CHARTRAND (CHAIRMAN): Thank you, David. It's a pleasure to be here this morning to chair this panel of experts on various issues dealing with trade and resources. Trade issues and resource issues, of course, are two things that go hand in hand. When you deal with resources, the next obvious step is what do you do with them, where do you trade them, and what are the implications of undertaking that kind of initiative.

Of course there's an important difference between non-Indigenous peoples and Indigenous peoples when trade of natural resources, of course, are undertaken. When Aboriginal peoples benefit from the trade of natural resources, we do it responsibly, keeping in touch with our traditional teachings, in terms of our relationship to land and resources.

And I would say that that's probably a fundamental difference between Indigenous peoples and non-Indigenous peoples. Our relationship to our land and our understanding of our relationship to land and resources provide an important fundamental and internal check on our activities. A check that has, I think, no parallel when non-Indigenous people attempt to exploit our resources.

With those brief remarks I want to introduce our first speaker, Russell Diabo. Russell is a member of the Mohawk Nation of Kahnawake, Ontario -- I mean, Quebec. Maybe Ontario would like that. He holds a B.A. in Native Studies from Laurentian University and has attended graduate studies at the University of Arizona and Carleton University here in Ottawa. He is a policy analyst specializing in federal and provincial Aboriginal policy, and has worked as an advisor to the Assembly of First Nations on several occasions.

And is currently -- or he was -- or was the research director of a Traditional Use Study prepared for the Adams Lake and -- I'm not sure how to pronounce this properly -- Neskonlith Secwepemc peoples in B.C. and assisted the Algonquins of Barriere Lake in negotiating and implementing the Barriere Lake Trilateral Agreement between his clients, Canada and Quebec. Of course, that

trilateral agreement involved the development of an integrated resource management plan for forests and wildlife, which seeks to protect and incorporate the Algonquins' way of life.

He also sits on the Forestry Stewardship Council, which is involved in the forestry certification for Indigenous peoples in Canada. And I think he will be speaking to that to us today.

With a warm welcome of gratitude, I give you Russell Diabo.

MR. RUSSELL DIABO: Thank you. And good morning to those of you that are strong enough to be here this morning.

I want to thank the Indigenous Bar Association for inviting me. I don't consider myself an expert, but I'm learning now, as I go along, in terms of what I do.

And I guess one of the things I would have to comment on is, in terms of the Chairman's introduction, is I guess traditionally we've used resources responsibly, but as we've had to adapt to the changing circumstances of the modern world, when we get involved in commercial industrial activities such as forestry, as soon as we step off the reserve and conduct those activities, our people do so in accordance with provincial forest acts and

regulations.

And that provincial legislation doesn't take account of basic -- for the most part doesn't take account of basic Aboriginal land use, let alone title or treaty rights. And often the forest practices that are undertaken, even by our own Aboriginal logging companies, there have been conflicts over how they've done it because when you log according to provincial law and regulation you have to do so as they say, under the terms and conditions specified in the contracts, or you can be subject to penalties and fines, including taking away the permit or the licence that you may hold.

So that's one thing I wanted to point out that, you know, there are impacts on our values, our traditional values when we want to go and get involved in commercial industrial activities. And basically, we become part of the system that exploits the resources for profit. And there can be good and bad things to that.

What I wanted to talk about this morning -- the topic is Forestry Certification. And I just wanted to review that basically, in the 1980s, as satellite technology has evolved, there is a greater ability for scientists and planners to start evaluating the changes to the landscape on a global level and to start monitoring

that.

And as that information started to come in, corresponding with that the United Nations had set up a World Commission on Environment Development and that commission issued its final report and recommendations in 1987. It's commonly known as the Brundtland Report, after the chairman, Gro Harlem Brundtland.

And that report -- the overall finding was that development activities of the human species is affecting the biological processes of the planet, to the point where the damage may become irreversible if the environmental consequences of economic development aren't accounted for in the costs of these economic development projects.

The Brundtland Report was instrumental in leading to a conference that was held in Brazil in 1992, where conventions on the biological diversity and climate control started to -- well, were signed on. These international conventions started to set in motion discussions about the issue of resource management in general, in terms of the loss of biodiversity and the effects of global warming.

And a subset of those issues were deforestation -- deforestation and the causes of that. And the impacts on Indigenous peoples and forest-dwelling peoples.

Unfortunately, because of difficulties between various countries, in 1992 there was not an agreement on establishing a forest convention. They did adopt -- I believe it was called non-binding legal principles, a document on forests, but as it says, it was non-binding.

There have been ongoing discussions in international fora since then. And Canada has been a proponent for having global forest conventions. But there is a debate going on amongst various environmental groups and others about whether that is the wisest thing to do, given the concern about the dominance of institutions like the World Trade Organization and the GATT affecting trade in forest products. And how that forest convention may become an instrument which could subvert environmental and other social objectives.

I wanted to refer to a report done by Global Forest Watch, which is an initiative of the World Resources Institute in Washington, D.C. They point out that approximately half of the forests that initially covered our planet have been cleared and another 30 percent have been fragmented, degraded, or replaced by secondary forest. They're saying that urgent steps must be taken to safeguard the remaining fifth located mainly in the Amazon Basin, Central Africa, Canada, Southeast

Asia and Russia.

They specifically came up with some key findings on Canada's forests in a study that they did in an assessment of Canada's forests, in which they point out that 52 percent of Canada's forests are managed as logging tenures. Of ten major forest types in Canada, six have at least two-thirds of their area allocated as logging tenures. Canada maintains its lead as the world's largest timber exporter through logging of old growth and primary forests, which account for 90 percent of the harvest. Clearcuts make up 80 percent of annual harvested area.

Although economically efficient, clearcutting results in quite different disturbance patterns than fires and other natural processes. The ratio of clearcutting area to the area used in partial harvest systems has remained unchanged over the last two decades.

Ninety-five percent of all major forestry watersheds and through roads, mines, settlements and other developments. These pose unqualified checks to watershed protection functions, carbon storage and other ecosystem services provided by forests.

The forest industry generated over $68 billion in total sales in 1996. In addition, it directly employed over 350,000 Canadians in 1998. Canada continues to be

the world's largest exporter of forest products. Canada is also one of the world's top mineral producers, with almost 300 metal, non-metal, and other coal mines. Oil and gas exploration and development is a major activity in western Canada. Other commercial activities including hunting, trapping, fishing and tourism.

Canadian forests provide wood products to many areas of the world, including the United States, Europe and Japan. Houses in the United States are built from Canadian wood, and newspapers are printed on paper from Canada. Oil and gas are exported. Minerals extracted from within Canadian forests provide essential raw materials for products to many countries.

These findings -- or key findings highlight the increasing pressure on forests in Canada and the need for more precision in determining what constitutes sustainable forest management, so that future generations can enjoy what we have.

Now, what is certification? In the early 1990s, many concerned customers chose to avoid buying tropical hardwoods, if they could recognize them, because of the destruction of tropical rainforests and threats to Indigenous peoples who lived in them. This wasn't enough, though, because consumers needed a way to tell where a

piece of wood or paper came from, to determine if they were contributing to poor forest practices or not.

So certification -- to give a definition -- is a system for identifying wood and wood products that come from well managed sources anywhere in the world, backed up by a label that will be clear, unambiguous, and readily recognized. Then consumers can make a well informed choice that would allow them to support good forestry through their wood and paper purchases, and their investments.

As the World Wildlife Fund has noted, the idea of certification was simple enough, but making it a reality was not. International criteria for good forest management had to be set and these then had to be translated into national and regional contexts.

A system of independent forest inspection and certification then had to be established, together with a means of tracking timber through a, "chain of custody", from an inspected forest, across the world through sawmills, factories, warehouses and shops, until it reached the customer.

The timber industry also had to be persuaded that it really wanted to open up its supply chain to us for inspection and audits.

In Canada, there are three certification systems being promoted. And, as the Standing Committee on Natural Resources and Government Operations describes them, they are ISO 14001, which is the International Standards Organization; the CSA, or the Canadian Standards Association system; and the Forest Stewardship Council certification system.

The International Standards Organization 14001 standard is a generic environmental management system standard that can apply to any industry. The company sets the specific indicators and criteria for sustainable forest management. And then a management system is set up in order to help move towards their goals and to monitor improvements.

The company can use the ISO standards in an internal fashion, or it can seek third party certification. There are no performance requirements, no assessment of chain of custody and, therefore, no label. Perhaps as a first step toward more performance-based certification, such as the CSA or FSC systems, the ISO 14001 standard has been relatively well received by industry since its inception in 1996.

Of the 16,440,000 hectares of forests certified in Canada under any system, all but 700,000 hectares is

exclusively ISO 14001 certified.

The CSA standard is sponsored by industrial organizations and it was developed by a wide range of stakeholders. It is based on the management principles of the ISO 14001, but goes beyond them to include specific performance goals.

The principles followed are those approved by the Canadian Council of Forest Ministers, as developed through the Montreal Process of October 1995, which is an international process to develop principles and criteria. The forest values to be sustained and the environmental goals to be achieved by a forest enterprise are arrived at after public consultation and must take into account six criteria and eighty indicators.

Third party certification is compulsory. However, this does not include a chain of custody assessment and no labelling is involved.

One of the CSA system's greatest strengths, as acknowledged by environmental and non-government organizations, is in the openness of the process.

Companies have only recently began applying for CSA certification and so only about 500,000 hectares of forest are certified to the CSA standard in Canada. Many companies, however, are considering or have plans to

become certified to the CSA standard. For example, Weyerhaeuser plans to have all of its Canadian divisions certified to CSA standards by 2003.

But in my view, one of the reasons the forest industry likes the CSA standard is because the criterion regarding Aboriginal treaty rights is quite restrictive, which is not surprising to me given that the Canadian Council of Forest Ministers supports the CSA standard.

CSA criterion 6.1 reads:

> "Extent to which forest planning and management processes consider and meet legal obligations with respect to duly established Aboriginal and treaty rights..."

Formed in 1993 and operational in 1995, the FSC formulated a list of ten principles and fifty-six criteria that need to be met before a forest can be certified. The FSC itself does not directly certify forests, but it gets third party organizations to do the certification based on the FSC principles and criteria.

The certification standard is to be met in each country or region, by interpreting the principles and criteria within the regional, economic, social and environmental context. The working group that exists of equal representation of economic, environmental and social

interests produces the regional standards. Additionally, in Canada Indigenous people's interests are designated as a member of the working group.

Initial certification can occur based on a generic international standard, but once the regional standards are created any further audits will be based on the regional standard.

The FSC certification process is based on the accreditation of the certification bodies, which can then issue FSC endorsed certificates. The basis for accreditation in the FSC is in the FSC accreditation manual, which specifies that a certifying body's system for controlling claims must include a contractual agreement with suppliers for controlling the ways in which the FSC trademark and the certification body's certificate and certification mark may be used. This includes the requirements that all public claims made by the suppliers of the wood or wood product, or referring to their certification must be reviewed and approved by FSC prior to publication. And there is a written procedure for dealing with incorrect references or claims.

The possibility of withdrawal of the certificate, in case of inadequate action for control and unauthorized use of certification, trademark, labels and all claims

must be indicated in the contract.

So, if as standards are developed and a certifier certifies a company, their use of the FSC logo or trademark can be withdrawn if they aren't adhering to the contract that they entered into, or adhering to the principles, criteria and standards that are developed by FSC.

In Canada, as of June 3rd, 2000, 212,189 hectares is certified to the FSC standard, of which 191,000 hectares is the J.D. Irving Blackbrook district in New Brunswick. Worldwide, there are 17,805,042 hectares of forests certified to the FSC standard.

As an example of the range of locations and forest types certified to FSC standard, 9 million hectares is what the FSC defines as semi-natural forest in Sweden. Approximately 650,000 hectares is plantation in Brazil, and 2 million hectares is natural forest in Bode. The United States also has approximately 1,600,000 hectares of natural forest certified.

In Canada, there's a national working group, on which I sit representing Indigenous interests, which oversees the FSC regional standards of development processes occurring in British Columbia, the Great Lakes/St. Lawrence region in Ontario, the Ontario

boreal forest, and the Maritimes. However, one of the biggest challenges in all of these regional processes is accommodating Indigenous people's rights.

FSC principle number three -- there are ten of them. Number three explicitly states that the legal and customary rights of Indigenous peoples to own, use and manage their lands, territories and resources shall be recognized and respected. Along with principle three are the four following criteria:

> "3.1 Indigenous Peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.
>
> 3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.
>
> 3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.
>
> 3.4 Indigenous Peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management

systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence."

In order to assist their regional standard setting process in British Columbia, FSCBC has commissioned a legal opinion on FSC principle number three from Mark Stevenson and Albert Peeling. This opinion is available to this conference here by the organizers. I believe it's on the registration table. I will just point out that opinion concludes, with regard to FSC principle number three:

"To conform to the principles of international law and provide a fair and meaningful interpretation of Principle 3, the regional standards setting process should:

Use an expansive definition of 'lands and territories' that conforms to the definitions in ILO Convention 169 and the UN Draft Declaration on the Rights of Indigenous Populations;

Reflect that Principle 3 sets a higher standard than does domestic law in Canada because it shifts the onus away from Aboriginal peoples to prove their rights;

Ensure that certifiers don't simply assume that

> the existence of a treaty process in British Columbia and a set of elaborate consultation guidelines means that domestic law is being conformed with;
>
> Insist that the BC/MOF consultation guidelines do not be used to establish the threshold for Principle 3;
>
> Require that Indigenous control of their lands and territories be through formal co-management agreements that are not merely elaborate consultation guidelines;
>
> Be vigilant in ensuring the 'informed consent' is actually acquired in order to avoid skulduggery and sharp dealings; and
>
> Be purposive in approach to reflect that the degree of 'control' required or amount of disclosure contemplated for 'informed consent' may vary with the degree of connection to the land."

That opinion is circulating throughout FSC internationally because that is one of the areas that, in the forests that have been certified to date, they have not had to deal with a lot of Indigenous issues so far. There are two Indigenous certified forests in the United States, one on Hopi Reservation in California and one on the Manogani

Reservation in Wisconsin, but those don't reflect the complexities around the, "colle de coeur", Crown lands that we're dealing with up here in Canada.

There is a growing demand for FSC certified products with announcements from Home Depot and other big box stores that -- stating that the FSC standard is the preferred certification system. And as reported by the Certified Forest Products Council, Home Depot has adopted a forest products policy which provides that wherever possible Home Depot will purchase products originated in certified, well managed forests FSC or equivalent, or has been verified through a chain of custody. Home Depot will eliminate purchase of wood products from endangered regions by 2002.

Home Depot will promote the efficient and responsible use of wood and wood products. Home Depot will promote and support the development and use of alternative environmental products. Home Depot expects its vendors and their suppliers of wood and wood products to maintain compliance with laws and regulations pertaining to their operations and the products they manufacture.

Now, following Home Depot's announcement, other stores have also followed suit. So the market is growing

for certified forest products so ... The FSC system hasn't fully understood how to interpret and apply FSC principle number three on the ground.

At present, it appears that the B.C. regional standards process is leading the way in Canada, and perhaps internationally. But there is building pressure on FSC to certify more and more hectares of forests. For Indigenous members of the Forest Stewardship Council, it will become more of a challenge to ensure that Indigenous rights aren't overlooked in the rush to achieve certification.

And I won't go into the organizational structure of FSC, other than to say that it is a voluntary process. But the advantage is getting the label or the certificate to be promoted on the market. With the announcements of Home Depot and that, that is encouraging the FSC label to be used as a known symbol internationally.

But the real problem is how to involve Indigenous peoples in the certification process. Processes like the Forest Stewardship Council certification are very technical and very legalistic. And for our people it's difficult to understand a lot of that. But there is no doubt that it is an important tool for having some control over how forest development occurs on traditional lands.

Because, as I've seen across the country, virtually every provincial jurisdiction has long-term tenure arrangements with forest companies under their legislation and regulations. The way these forestry operations are carried out are having impacts on traditional values on the land.

Critical wildlife habitat is being destroyed, important berry picking areas, cultural sites are being damaged and destroyed and ignored, often. And certification, if applied properly under the FSC standard, I believe has the potential for improving that situation.

And I guess, just in conclusion, I'd point out that there is a brochure also available on the table that gives an overview of the Forest Stewardship Council and principle three. It also lays out the other nine principles -- ten principles in all -- and it gives contact names on the back for more information, if you want to know more about the Forest Stewardship Council.

And also, there's a *Wall Street Journal* article which is just recently published, which is acknowledging that the Forest Stewardship Council is having an impact on global forests and trade.

With that, I thank you for allowing me to give this brief presentation this morning.

MR. LARRY CHARTRAND (CHAIRMAN): Thank you, very much.

I'm going to move into our next speaker and then, hopefully, at the end of our three speakers we'll have some time for questions.

Our next speaker is James Hopkins, who is an Assistant Professor of Law at the University of Alberta and an instructor with the Athabasca University in First Nations Law and Governance. He holds two graduate degrees from Harvard University and a law degree from the University of Toronto. In that academic enterprise he received the ITP Award of Excellence and Research for his graduate research paper entitled, "Democratization by Taxation: Democratic Experimentalism in Aboriginal Canada". Hopefully he will try to explain a little bit about that.

James is a member of the Ontario Bar and of the Weskigan Métis Association of the Pontiac. As a former clerk to the Ontario Clerk (General Division), he has extensive experience throughout Northern Ontario on land claims and economic development issues. He was an instructor at the First Nations Lands Management Program at Cambrian College in Sudbury, and articled at the Toronto law office of Fraser Milner.

He currently lives in Edmonton, Alberta and spends his time researching the intersection between international tax, trade and Aboriginal law.

I think that's certainly an area of research that has probably received very little attention to date and I'm certainly glad James Hopkins is looking into these issues.

I would like to extend a warm greeting to James Hopkins.

MR. JAMES HOPKINS: Thank you for that introduction. It's a real honour to be here. It seems just as I get here, I'm going. And I'm going to be -- just as a preliminary matter, I'm in the process of a career transition.

And I'll be using some overheads. I'll be providing you with my e-mail. That will be the only way you can get in touch with me, but I would like to hear from you. And I'm just in the process of relocating to the U.S. at present, considering the number of native law clinics that are being developed south of the border, to look at this issue that I'm very much interested in.

So with that preliminary matter aside I'll just begin. I'm bearing in mind that discussing the rules of international taxation and treaty clauses for reciprocal

disclosure do not usually invigorate a crowd.

(LAUGHTER)

There isn't a lot of applause in the front row. Coffee tends to be consumed at exponentially greater rates, but I'm keeping in mind that the objective here is to, first and foremost, promote my agenda, which is nation building. And the second is to provide practical insight where we can begin the first step. This is practical insight primarily directed towards practitioners.

Just as a brief side note, my thesis paper, Democratization by Taxation, really looked at a scholar by the name of Robert Unger, who I cite at the beginning of my paper, whose primary concern is Third World development models using public finance, channelling savings, and innovative finance designs into productive investment. So that is where I was coming from in asking myself, from a nation building perspective, from the government's perspective, how do we design models that actually deliver the goods to native people and Aboriginal organizations both on and off reserve.

My nephew asked me, "Uncle, what is an Aboriginal right look like?". And I had to stop and think about that, because my research is concerned about the day-to-day impact of an Aboriginal right and how do you assert

that right. And with that, I will begin my presentation.

So the starting point is nation building and its relationship to international tax. Before I get right into it, I've had reactions from, "I don't understand what you're talking about.", to, "This doesn't necessarily seem applicable.", but what I just want to put down as a precursor is this, that 125 years ago there was no room in the common law for Aboriginal people. It was not considered a sui generis concept.

And I truly believe, as we go forward through this period of Aboriginal rights assertion, in other words, the manifestation of the Aboriginal right in our daily lives, we have a wonderful opportunity to give some real shape and feel to what these rights mean.

So to begin with, I thought I would just quickly talk about the trends, generally. What is international taxation? And generally, you can describe it as the challenge of a nation state to deal with the taxation of inbound and outbound transactions.

Inbound transactions are typically transactions both capital or labour in nature by unknown residents. So foreign investment is probably the easiest example. One of the ways nation states deal with inbound transactions, because the actual holder of the investment, the person

receiving the income, is not within the jurisdiction of the state, is to impose a withholding tax. That's just a standard method used by most OECD nations, including Canada and the United States.

The outbound transaction concerns income earned by a domestic resident. And a classic example is the use of the offshore trust. If you follow tax, you'll know that two or three years ago on your income tax return there was a new box added by Paul Martin to require you to disclose income earned outside of Canada. And again, that is a response to outbound transactions.

Now, in terms of the big picture, what's really happening is with globalization the world has turned into one big shopping mall where you have investors, governments, governmental organizations, with money that can now shop around to different tax jurisdictions effectively to get the lowest yield on their investment.

The challenge for the nation state, particularly the social welfare state, is how do you pay for your social programs in this era of intense, intense competition. One thing I should mention as well, that particular -- or specific to Canada is this exception in international tax. The rule in international tax is capital moves faster than labour. Technology allows

people to switch accounts between different countries.

To make it relevant, consider if you've ever used your bank card outside of Canada. You can actually do that with international finance agreements under the Interac organization. I can go into a grocery store in Denver with my TD Bank card and use money that is converted automatically to pay for my groceries. And I do.

But the point being, is that the rule is that capital was always able to move faster than labour. But what's fascinating as we've entered the second phase, as I believe -- and it's particular to Canada -- and it's this. Labour is moving just as fast as capital. Part of this is due to, again, what I was saying about the international tax competition. Companies lobbying their respective levels of government to lower taxes to attract labour. Countries, nation states, that decide to forgo certain social welfare programs. These types of competitive play-by-plays are now translating into this labour mobility.

Canada obviously, as a signatory to NAFTA, has a special labour mobility provision that really crystallized all prior immigration laws. And under NAFTA it's very, very easy for a Canadian to go into the United States or

Mexico.

So I just wanted to flag that as sort of the current state of things, namely being hyper-competition.

And one last topic, just because it was in the news recently, the OECD has tried to deal with this. They've published a report that blacklisted several non-reporting jurisdictions. We typically think of the Cayman Islands, the Bahamas, places like that, small island countries.

What was interesting is how the OECD produced some results out of this. What they wanted was to cut IMF funding to some of these nations until they entered reciprocal reporting agreements, which is usually the standard way a nation state can monitor outbound transactions. You would have no other way of knowing what your citizens were making outside of the country, but for a treaty with respective countries that would do the same for you. In other words, Canada exchanges information with the U.S. about U.S. income earners in Canada and vice versa.

Canada was actually denied signatory status to the Bahamian treaty, as well as the U.K. I thought, actually, that the Bahamian government was very clever in just signing with the United States, because they would be the

ones who would exert the greatest pressure on the IMF to revoke funding.

So I'm thinking at this point, you know talking about the big trends, you're wondering, "Well, that's great, James, but how many Aboriginal people fall into this?". Well, let me just talk very briefly about a tiny recommendation in the Royal Commission for Aboriginal Peoples under, "Economic Development". The recommendation -- and I don't have the exact number -- spoke about the need for a clearing house, intellectual clearing house for ideas on economic development and trade.

As I go through Indian country and talk to people, the problems are actually -- they're analogous in many respects to what's happening at the international level, particularly when you think of it in terms of nation building.

And so with that, I just briefly wanted to turn to -- I'm going to be showing some overheads and what I'd like to do is just go through them. The topic, obviously, is in relation to the natural resource sector. I should just briefly mention a few key notes about that.

If you look at what's going on across Canada, generally there's not a lot of export by Aboriginal band-owned lumber companies to the United States. That's in

part because the scale of harvesting is really not at the, sort of, super-national level. If you look at a company like McMillan Bloedel versus some of the partnership that Kitsaki has entered into, you're looking at a very, very different economy of scale. But I did want to briefly mention this, because so far I've been talking about the movement of capital and labour.

In terms of the export of natural resources, there's other regimes outside of international tax treaties to deal with this. There's generally just tariff regulation, when you export a natural resource into another country, and of course just common sense things. You're going to run into a whole host of problems, particularly because nation states generally like to protect their home turf. They like to protect their domestic industry. And this is what happened with the Canada/U.S. Softwood Lumber Agreement.

And again, I just wanted to briefly, briefly touch upon it because this is the objective of my presentation. The agreement is poorly misunderstood. And it's poorly misunderstood for one main reason. There's a complicated quota system within the agreement itself. What the U.S. did at the negotiation table was say to Canada, to use an analogy, "You can import a pie. Every year you can import

a pie. It's going to be the same size year after year." And they actually did a very clever thing. They said, "We're going to leave it to you and your provincial signatories to figure out what the slice is going to be between the respective signatory provinces."

What started there was a very complicated, widely misunderstood quota system that varies from year to year and uses a type of credit that makes up for shortfallings in the quota for some provinces but not for others.

I had the opportunity to review the entire Hansard record, both federally and provincially, for all the signatory provinces. And in 1998 and 1999, when you go through it, it's very clear that B.C. had no clue what they signed. They clearly did not realize that they getting the front-end quota in the first year, with a decrease year after year and no subsequent credit. The actual credit went to the other signatory provinces, mainly Quebec.

But this was a serious thing and it actually contributed to the recession that hit B.C. I don't know if you remember reading in the paper about U.S. trade retaliation against softwood importers from Canada.

So if you're in the Aboriginal forestry sector, these are things to consider. That if you're not going to

look at Aboriginal rights in terms of nation building, but enter into the partnerships, the existing partnerships that are out there, you should inform yourself as to the nature of the landscape for the non-Aboriginal exporters and try to get an understanding of the existing trade regime.

My hope is that some day the Aboriginal forestry organizations will move away from this and move into a more autonomous type of venue. And by developing and exploiting the existing definition of Aboriginal rights and teaming that up with other Aboriginal organizations and Aboriginal groups in other countries, we'll truly have this autonomous nation building process going on.

I have a number of diagrams that I just want to go through quickly.

I usually use PowerPoint, but you're going to see why when you see my handwriting. So, so far I have talked about inbound and outbound transactions. Another area that has an interest for Aboriginal people is the recent use of derivative financial instruments, or DFIs.

And what DFIs involve are the gathering of parties to a table to strike some kind of transactional deal that fully utilizes the tax attributes of each person. So it's project specific. It's going to, in each case, give

somebody something that they need relative to their tax position. So if they have other operations somewhere that are doing really well in a high-tax jurisdiction, they're going to be seeking, potentially, a loss, or they're going to be seeking, potentially, income that's going to be taxed at a higher rate, i.e., just income -- straight income as opposed to capital income.

So I just said, "DFIs: mirror mirror on the wall". They're an extremely -- they're a total private, self-help remedy. You know, it's sort of like, "Do not do this at home." You do have to go to a professional tax planner to design these things. But to give you an example, that DFIs are out there. They're all over the place.

Altamira, for example, if you go on the internet, you can find that Altamira has a separate company in the Cayman Islands that sells units in these Cayman Island funds that are linked to the performance of their Canadian-based funds. Probably the most readily used are the RRSP bank link notes. Options, futures and hedges are other financial instrument products.

Just a brief note on the bank link notes because they -- they're a pretty straightforward way to explain it. The Canadian government has a restriction on foreign

investment in your RRSP account. So what the banks did was they teamed up with U.S. mutual fund companies and were able to develop a derivative financial agreement, where the bank in Canada sells bank link notes in a fund to unit holders. It pays income on the account which is non-deductible. It's just straight income, but the advantage, of course, is that it by-passes the foreign investment laws.

However, just to give you an example, I just put in the happy face and sad face. Again, the DFIs try to take into account the tax attributes of the parties and what they're trying to seek. The U.S. investor is happy because they're just getting income on account of capital, i.e., a dividend which is taxed at a lower rate, and you can use deductions against the income earned.

The reason I show this is because there are ways for Aboriginal organizations to set up funds that can attract foreign investors, as a means to raise money that would otherwise not be obtainable. But again, when I say Aboriginal people, we're at a process here of nation building. This assumes that there's a certain type of infrastructure. If you look at the financial service sector in Canada for Aboriginal people, it's small, but it's there. For instance, I'm just thinking of PCL's

trust, for example. This is a type of organization that could get into this type of model.

Given the tax attributes, for instance, of band organizations, i.e., certain tax exemptions, it allows band organizations, in effect, to try to raise money and pay it back at a lower rate. In other words, their borrowing costs are going to be lower than say non-Aboriginals who are looking to raise money.

The analogy is in the U.S. they have tax exempt savings bonds that are issued by states. Because they're tax exempt, it allows states to issue -- sorry, to raise capital at a lower cost. That's just a very straightforward example.

So, I just wanted to briefly talk about a nation building example. I think Russell addressed some of the key concerns about Aboriginal forestry. And ideally, what I would like to see is a move away from that to something that is essentially more sustainable, that is without the intensive capital investment and is, of course, subject to the forestry industry generally, including price fluctuation.

So I have here the First Nations Forestry Program, which is a joint tripartite endeavour. You can find it on the internet. It involves a number of things, including

the creation of ventures between Aboriginal organizations and non-Aboriginal lumber companies, including Weyerhaeuser. A lot of the activity right now, in this forestry sector, is in Saskatchewan, Alberta and B.C.

So in my paper I talk about the move away from reliance on natural resource harvesting and discuss mid-level manufacturing using existing and as-of-yet developed tax laws to take advantage of this international scheme that I've talked about. So in my example you have forestry taking wood at a small scale level, doing manufacturing, i.e., furniture -- you know, assembling furniture, making furniture. The furniture is made by a band-owned corporation. It's exported. You don't get into the GST problems because under the, "Destination", principle you're allowed the rebate -- sorry, the remittance of the GST because it's a good being consumed outside of Canada. The GST is a consumption tax, so you only pay the tax when you consume the good in Canada. So there's a plus.

The Oneida -- this is just off the top of my head here, the Oneida in upstate New York have a website that has an e-commerce boutique. The website is in the paper. You could either lease space on the domain name, you could enter into some sort of profit sharing scheme with

the Oneida.

The Oneida have a very favourable tax position because under both congressional and plenary powers that concern tax exemption on reserve. As well as again the interplay with international tax in the United States, e-commerce is considered advantageous from a tax perspective because the states basically fight one another in this race to the bottom to attract business. So you have Delaware, which has no corporate income tax, and with a Delaware holding corporation you have -- you actually have both native and non-native organizations going into Delaware to set up these corporate subsidiaries to do business there, including e-commerce.

Toys-R-Us, for instance, there was a big case in the U.S. Supreme Court that justified this. Toys-R-Us is just one example. Most big U.S. companies on the internet have their real subsidiary in Delaware.

There's this example, and you export to the U.S. market and there you go. You have a sustainable form of income to help the project of nation building.

I just wanted to briefly talk very quickly about another aspect of international tax, which is transfer pricing. This is a big area for lawyers. If you do have a client that eventually gets into export, you're pretty

much guaranteed that you're going to come into this with Revenue Canada. It concerns export pricing and the issues are very straightforward, although the actual section is not.

Essentially transfer pricing concerns non-arm's length transactions. This is a hot issue now because after the eighties and the age of the conglomerate passed, and we out-sourced everything, you had little mini subsidiaries all over the place doing business with the parent company. And what happens is you have a problem trying to establish fair market value for your price.

So in my example with the First Nations Forestry Program member and the band, there's going to be an issue of what's the price between these two organizations, and what's the price between the band corporation and the Oneida e-commerce corporation. And is it actual fair market value? Does it reflect what the real cost would be had these parties not been non-arm's length?

Okay, non-arm's length is simply what it says, it's a related party transaction. And you could probably imagine what the suspicion of Revenue Canada, is that because you're related you're going to be giving the good over at a lower price.

And it gets very complicated because companies do

a number of deals between each other. There could be leasing provisions that account for the price of a good, et cetera. So I just want to flag that.

I also find that there's no cultural context for this transfer pricing regime. And mainly, for instance, if you look at the Blackfoot confederacy issue where recently the Blackfoot have been talking about raising the confederacy in a concrete way with respect to trade. Well, these people are related and, you know, the -- you know, they didn't find the border; the border found them. The border is irrelevant. And so it's almost carte blanche that you're going to have this non-arm's length test triggered.

By the way, if you trigger it, you end up receiving penalties on the value of the transaction, because it's supposed to be considered a bogus transaction, so they tack on a penalty, a percentage value, that's quite high. So my point is this is an area that's not yet developed and it's one that needs further consideration.

Finally, just about transfer pricing again, when you get into the prosecution of transfer pricing, the OECD has roughly 12 models. You look at other similar transactions, similar industries. It's a very complicated

area because the numbers can be skewed. It turns into a battle of the accountants.

Finally, I just wanted to offer some concluding notes to practitioners. When you're setting up a corporate or business strategy for your client, look at the best practices, call one another, try to find out what's been done recently, look internationally. Also, a given fact, exports by band owned corporations will increase and the U.S. will probably be the biggest market for this. So this issue has not gone away.

Lastly, I've written a whole paper about this, but the *Indian Act* tax exemption, in my view, will eventually hollow out and planners should be innovative in their design with the view to nation building. The problem with the *Indian Act* is that the tax exemption provisions are consistently being narrowed. And in terms of it reflecting an Aboriginal right, the history of that section had nothing to do with an Aboriginal right.

If you -- you should read some literature by Mike Bartlett, who writes a lot about Indian taxation. And the history actually has to do with assimilation. The reason you had property tax exemption on reserve was that a fruit of citizenship is the right to vote. So prior to, I believe it was 1963 with the amendment of the *Elections*

Act, on-reserve native people did not have the right to vote. And the idea was to lure people off reserve.

So the tax exemption was never thought of as some kind of business advantage. And furthermore, if you read the cases on this, if you read the cases on economic Aboriginal rights, generally, you will find that it reflects very much what's in the U.S., which is tribal sovereignty is okay, as long as it doesn't conflict with your status as a dependent nation.

In other words, it gets into silliness. I mean, you have judges reading down the use of an Aboriginal right to say, "It's okay if you use snowshoes, but not a skidoo."

And you know, this is where you get into the use of anthropologists to say, "This is the way the right was exercised then.", but it begs the question. I mean, in the contemporary setting, is a right not allowed to develop and change with the times?

So this is the project that I'm working on and I'll continue to work on it. And by all means, if you have questions, do give me a call at the e-mail address. I'll be at a clinic, eventually, and maybe we can get some great students to help you out on the project and get a paper or something together.

This is what they're doing at the Kennedy School right now, for the Native American Development Program. Joseph Kalt and Steven Cornell document every single project that they do and for, like, seven bucks you can buy a copy of this. You can go to their website, which is -- well, if you find it, it's www.law.harvard.edu, and then just go through the main Harvard menu to get you to the Kennedy School. And again, $7 and you don't have to reinvent the wheel.

So that's the end of my presentation. Thank you so much for listening. Thank you.

MR. LARRY CHARTRAND (CHAIRMAN): Thank you, very much, James. I need to consult with you, I think, about my bank account.

Our next speaker is Garth Nettheim. Professor Nettheim is a Professor Emeritus and holds the degrees of Bachelor of Laws from the University of Sydney, Australia and of Master of Arts in International Relations from the Fletcher School of Law and Diplomacy in the United States. He began teaching law at the University of Sydney in 1963, and in 1971 he moved to the new law school at the University of New South Wales as one of the initial professors in the faculty.

And since then, he has engaged in research,

teaching and public advocacy work on the relationship between the Australian legal system and Indigenous Australians. He was an initial council member for the first Aboriginal Legal Service in Australia. And in 1981 he established the Indigenous Law Centre at the University of New South Wales and has served as its chairman and, throughout most of the period, as Acting Director.

He also assisted in pioneering the teaching of relevant subjects in Australian law schools, and was joint founder of the Indigenous Legal Issues Interest Group of the Australasian Law Teachers' Association. He is a member of the Australian Institute of Aboriginal and Torres Strait Islander Studies and is also a member of the New South Wales State Reconciliation Committee.

I had the pleasure of listening to Professor Nettheim in Toronto in 1986, when I was an Aboriginal law student. I'm really glad that he was able to make it, once again, back to Canada.

So with a warm welcome, Garth Nettheim.

MR. GARTH NETTHEIM: Thank you, Larry. I'd like to begin by acknowledging the traditional (inaudible) and convey my thanks to the Indigenous Bar Association for the invitation to make my first return visit to Canada in

14 years.

And I have also been asked by the president of what is hoped to become the Indigenous Bar Association of Australia to convey their greetings for this Association here.

I'm doing some research on when is the best and when is the worst position to speak at a conference.

(LAUGHTER)

Sometimes I think, well, it's good, probably best to speak fairly early in the piece while people are fresh and then you can just -- then you can relax once you've done it. Sometimes it's advantageous to speak at the very end because you can say, "Well, I would have said this and I would have said that, but that's been covered, so...", usually something very (inaudible). Probably the worst I have talked was after lunch, but I now think probably the worst is after the banquet.

(LAUGHTER)

There is a written paper which is with your folders. And I'll short-circuit that to save some time today.

I'm talking about globalization in the first two senses. One is the sort of sub-globalization that is represented by British imperial policy in its application

to countries like the United States, like Canada, like Australia, and like New Zealand, Aotearoa. And globalization also in another sense of the globalization represented by international law, particularly international human rights law.

As my focus is primarily on natural resources, particularly mining -- mining on actual lands and with the main emphasis on Australia, I won't attempt to translate that into Canada.

As far as I'm speaking about trade, I'm mainly talking about the trade of experiences and jurisprudence between our two countries, Canada and Australia.

I begin my paper talking about the recognition of rights in British settled conquered lands in the lead-up to the 19th century, and in particular into the 19th century. And my general conclusion there is that -- is to make the observation that unlike the situation in North America, unlike the situation in the settlement of Aotearoa, there was no recognition of rights in Australia, no recognition of the rights of Aboriginal peoples, despite the instructions issued to Lieutenant James Cook only five years after the Royal Proclamation in this country, in this North America.

The instructions issued to James Cook indicate

that, should he discover the great south land, he should, with the consent of the natives, serve the country. He did encounter natives when he then discovered Australia, but for various reasons, which I venture to suggest, did not seek or get any consent.

So the history of Australia, the history of European settlement of Australia has proceeded without any recognition of the pre-existing rights of Aboriginal peoples and Torres Strait Islanders until very recent times.

There are a couple of other contrasts to make between the situation in this country and my country. One of those is not only the absence of any treaties, but also the fact that, at the constitutional level, with confederation in Canada, as with federation in the United States, a primary responsibility and power to make laws with respect to Indigenous peoples was vested in the national level of government.

In Australia, it was the other way around. In fact, our constitution from 1901 -- we celebrate the anniversary in September of confederation, next year -- expressly denied to the national parliament any specific power to deal with Aboriginal peoples. And Aboriginal peoples were either not mentioned or mentioned in negative

terms.

It took a constitutional change referendum in 1967 before the national level of legislature was given, not an exclusive but a concurrent power to pass laws for Aboriginal people.

The 1960s was the critical time for the development of Aboriginal rights in Australia, mainly as a result of our struggles by Indigenous peoples, particularly in the Northern Territory. One of our struggles was -- took the form of a walk-off by the Gurindji peoples in the Northern Territory from a British owned vast cattle station, which you call a cattle ranch.

The Gurindji people left in protest about the working conditions in 1966, set up camp on an area of their traditional land, and got a degree of non-Indigenous support for their struggle for recognition of their land rights. And they were ultimately successful.

During the same period, the sixties, in the Northern Territory, Aboriginal people in the Gove Peninsula sought to protest, sought legislative intervention, in decisions by the commonwealth government to grant large areas of their reserve land for bauxite mining. They complained that it was their land, they had not been consulted, no provision had been made for

financial returns to them.

Eventually, their political protest failed and they elected the court. This was the first case ever brought in Australia by Indigenous Australians arguing that the land was theirs, and it failed. They got recognition that they did in fact have a system of law, but on all points Justice Blackburn in the Northern Territory Supreme Court, decided that there was no such doctrine known to Australian law as communal native title.

Now, to that extent he relied to some extent on recent judgments by the British Columbia courts in the *Calder* case, but of course the *Calder* case went on after his judgment to the Supreme Court of Canada. And in that case some of the judges made the comment that Blackburn's propositions in the *Gove* case in Australia were wholly wrong.

So there was no rush back into the court system in Australia. The consequence, the follow-up to *Milirrpum vs Nabalco Property* case happened at the political-legislative level. The Whitlam government established a commission of inquiry under Edward Woodward QC, who came up with a very important report recommending how best to recognize Aboriginal land rights in the Northern

Territory. Under this 1976 legislation, close to half the land mass of the Northern Territory has been returned to Aboriginal ownership.

Land rights legislation was also enacted in various other jurisdictions, not all. As a whole, something like 14.25 percent -- a bit more now -- of Australia has been -- is held by Indigenous Australians under freehold or leasehold titles, or particularly in Western Australia as still continuing reserves. Aboriginal people constitute about 3 percent of Australia's population.

But in the meantime, other land rights legislation was developing and proceeding, not always to the satisfaction of Aboriginal people. They thought that some of the legislature proposals, particularly coming from the States, were insufficient. Work was going on to try to get a reassessment of the correctness of the decision about non-recognition of Aboriginal title. This process benefitted extensively from trade world experiences between Canadians and Australians.

Now, I've mentioned some of these on the visits we had in Australian from Canadian lawyers, from Indigenous leaders, which all helped to build up the basis for trying to get a reassessment of the correctness of the Indigenous

land rights decision.

That attempt got under way in 1981 when several Torres Strait Islanders -- Torres Strait Islands lies between the top right hand corner of Australia, Queensland, Cape York Peninsula and Papua New Guinea. The people say our Malaysian people descend from the Aboriginal peoples of Western Australia.

Several of the Meriam Island people brought proceedings in the -- directly in the original jurisdiction of the High Court of Australia. That commenced in 1982 and was eventually decided in 1992. It took ten years. It was a long haul.

I know that during the course following this litigation, there was a useful exchange of information between the lawyers who were also conducting the *Delgamuukw* litigation in this country.

Eventually the High Court decided, by a majority of six judges against one, that Australian law does recognize a doctrine of what they called native title, what you would call Aboriginal title in this country.

I've summarized the judgment on page seven of my paper. They stated that native title has survived -- may have survived the establishment of the colonies. It was not snuffed out at the time of colonization or the

assertion of sovereignty.

However, following the North American -- and particularly the American -- jurisprudence, they said that native title has been extinguished. There was no basis, after 200 years, for unsettling the land grants to other interests in Australia. So the native title was subject to the loss or surrender, or being extinguished, particularly by inconsistent grants.

The High Court also held, more controversially, by a bare majority, that loss of native title, extinguishment, did not give rise to any entitlement to compensation.

So in these terms, the *Mabo* decision's recognition of native title was highly vulnerable. And states could have proceeded by simply ignoring native title and granting interests, including mining interests, to whoever they wished.

However, here is where the international human rights law comes in, because Australia had ratified the International Convention on the Elimination of All Forms of Racial Discrimination and passed the *Racial Discrimination Act*. We don't have a constitutional guarantee against prejudicial racial discrimination, but the *Racial Discrimination Act*, as a Commonwealth act,

prevails over inconsistent state legislation. And that *Act* and the convention were critical in reaching the result that was reached in the *Mabo* decision.

When the *Mabo* decision was handed down by the High Court, it was a totally knew phenomenon in terms of Australian law and public law. But the first stirrings critical of that decision mainly came from mining companies. Mining companies wanted to know whether it caused any problems for them, and their lawyers eventually said yes.

If governments had granted mining interests since the commencement of the *Racial Discrimination Act* in 1975, those interests might be invalid because of the *Racial Discrimination Act*, because native title holders were not given the procedural rights and the compensation rights which are available to other land holders.

So the mining industry led the campaign against the *Mabo* decision. They wanted the *Mabo* decision to be reversed by parliamentary legislation. There were even proposals -- well there were some. There were even proposals that the *Racial Discrimination Act* should be abolished.

In the long run, however, after an intensely devised debate during 1993, with the enactment of

something called the *Native Title Act* -- and at page 8 I summarize the principal features of the *Native Title Act* -- that *Act* validated those doubtable interests granted by governments between 1975 and the beginning of 1994. It also set out to recognize and protect native title. And to provide a non-discriminatory regime for the future. In other words, for the future any native title rights onshore -- offshore is (inaudible) -- are subject to the same protections as are available to freehold title.

In addition, if governments propose to grant mining interests, exploration permits and things like that, then there is an additional right which native title holders and claimants were given over and above that available to other people in Australia.

Generally the regime in Australia is that most minerals are owned by the Crown. So even if I have freehold title, or a leasehold title, the Crown can grant access to those minerals subject to certain safeguards.

In addition to their standard safeguards, native title holders were given a time limited right to negotiate for any amount of money. And this was controversial with mining companies and with those politicians from jurisdictions which were heavily dependent on mining, particularly Western Australia, Queensland and the

Northern Territory.

Subject to that, the determination of native title was left to a quasi-judicial process involving courts and tribunals. There was some provision, following the experience of Canada, in making some provision for settling these matters through negotiation. And those have been enhanced in 1998 amendments.

So as to natural resources, we can go back to the Woodward report leading to the land rights legislation in the Northern Territory. And Woodward said that:

> "I believe that to deny to Aborigines the right to prevent mining on their land is to deny the reality of their land rights."

And land rights legislation in other parts of Australia have generally given Indigenous Australians some say over mining on their lands. Not -- and mining companies have not been particulary happy about this.

The right to negotiate follows through this principle, but in 1998 -- two years ago -- finally a package of amendments was passed through Parliament, instigated by the current Howard government which came to office in 1996. That is a Conservative government and was permitted to address the changes to the native title legislation, mainly to roll back the rights of Aboriginal

people and Torres Strait Islanders.

So on page 10 of my paper I have referred to its effect on the right to negotiate in regard to mining. Entire categories of lands have been exempted from the right to negotiation. In some situations, states and territories are authorized to substitute reduced procedural rights and other features also roll back a lot of the controls that Indigenous Australians have over mining on their lands.

It is these aspects which have caught the attention of international human rights committees over the past two years. In 1998, unusually, the Committee on the Elimination of Racial Discrimination sent a, "please explain/urgent action/early warning", communication to Australia, asking them to provide information about the amendments to the native title legislation. When Australia did, so too did the Aboriginal and Torres Strait Islander Commission, in a fairly powerful report of about 250 pages.

The Committee on the Elimination of Racial Discrimination then expressed, early last year, its concern about these developments. And then resolved to consider them further when the -- when Australia's periodic reports under those conventions were considered.

On the 16th of August, in 1999, the committee reaffirmed its earlier decision. And the 24th of March this year it published its concluding observations on Australia's periodic reports, which covered a range of matters, including the amendments of 1998.

And some of the jurisprudence here may be of interest to Canadians because they're considered, amongst other things -- and I've got the quotation at the foot of page 11:

> "...that the State party should ensure effective participation by indigenous communities in decisions affecting their land rights, as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of securing the 'informed consent' of indigenous peoples..."

This has been a good year for Australia because our periodic reports have been considered by two other international human rights treaty committees. The Human Rights Committee under the International Covenant on Civil and Political Rights has also been very critical of the 1998 amendments, Including, in particular, the effect on the rights of native title holders in relation to mining and other aspects.

In September this year, last month, the committee on Economic, Social and Cultural Rights also expressed its concerns about those amendments and the effect -- the negative effect which they have on the process of reconciliation in Australia.

The Australian government's response to these reports, particularly the first two, has been, shall I say, petulant. And Australia has decided to review its participation in the work of these treaty committees and to try to push for the reform of these treaty committees.

Larissa Behrendt yesterday had some interesting quotations from the Prime Minister and other ministers of the Australian government about all this. So this is the context in which we're operating in Australia.

All in time we're getting the beginnings of jurisprudence about native title. We've had a number of cases which have now gone through the courts and a couple more which are working their way through the High Court. One of the issues is the question of whether, under the law estimated title quite apart from the extent of the legislation, whether native title holders are entitled to control the natural resources on Indigenous land.

Federal Court judges have divided on those issues at first instance and then on appeal. The High Court of

Australia, in the month before last, granted special leave to appeal in one of the key cases, a case from Western Australia and the Northern Territory. And that is likely to be heard in the next few months in the High Court.

In the meantime, lawyers in Australia who are developing the jurisprudence of native title are drawing quite substantially on the jurisprudence of the Canadian courts. And I hope that some of the jurisprudence which does emerge from the Australian court system will be beneficial and will be of use to Canada, but we'll just have to wait and see how that pans out.

Thank you.

MR. LARRY CHARTRAND (CHAIRMAN): Thank you, very much, for that overview of the Australian experience. I think we can probably all benefit from learning about what's happening there.

I don't know if we have time for a few questions. I see our President shaking his head, although I do have one insistent questioner, so maybe we'll take one question. And then we'll have to break because we're running behind.

MS. ROSALIE McCONNELL: Thank you. It's more a comment than a question. I'm Rosalie McConnell and I'm

with the Canadian Forest Service of Natural Resources Canada. I thank all three presenters for informed presentations.

I have a comment though, if I may, on the presentation on certification, where you mentioned that the Canadian Council of Forest Ministers actually support the CSA approach to certification. And I'd just like to add that the CCFM also supports the FSC approach, in that it sits on technical committees for both of those schemes. In fact, CCFM has publicly stated that it would not endorse one scheme over another, but that would be decided in the marketplace.

You're absolutely right that pressure is mounting for certification schemes in Canada. And consumers are adding to that pressure and are succeeding, much to their credit, in influencing some of the procurement practices of the major, major retailers.

Thanks.

MR. LARRY CHARTRAND (CHAIRMAN): Thank you, very much.

I guess what we'll do is we'll wrap up now. I'd like to thank, on behalf of the IBA, our guest speakers. I think Brian Calliou, who is a member of the board of the IBA, has some gifts to thank our guest speakers.

Thank you.

MR. BRIAN CALLIOU: Thank you, Larry. Indeed, I would like to thank all the speakers for coming today and sharing some expert knowledge with all of us.

Indeed, Russell, you are an expert in your area.

First of all, I'd like to ask Mr. Diabo to come on up. On behalf of the IBA, I thank you.

Mr. Hopkins, as well. Thank you, very much.

Mr. Nettheim, thank you for coming a long way. And I hope you come back (inaudible).

Last but not least, our Chair, Mr. Larry Chartrand. Thank you, very much.

MR. LARRY CHARTRAND (CHAIRMAN): Thank you, Brian.

MR. DAVID NAHWEGAHBOW: I'd also like to thank our chair and panellists. Thank you, very much. Very different from the panels yesterday, but excellent. I'm going to have difficulty remembering all those acronyms -- the NAL, the DFIs or whatever they were.

Again, I want to remind you we have a luncheon speaker today. We're relatively on schedule, so you have a one-hour period for workshops and at 12:30, at the close of the workshops, lunch will be served out there. Bring your lunch in here and we have Jim Prentice speaking from the Indian Claims Commission.

There are four workshops. General Workshop One is on Natural Resources. That will be facilitated by Don Worme. That's in Confederation I.

General Workshop Two is on International Taxation. You can get a full opportunity to talk to James Hopkins, who is facilitating that in Confederation I.

General Workshop Three is on Natural Resources and that is facilitated by Brian Calliou. That's in Les Saisons Room. That's a different room from the workshops yesterday, so you can get directions if you need them.

General Workshop Four is on Indigenous Trade and Resources and that's facilitated by Russel Barsh, and that's in the Confederation I room.

Thank you, very much. Grab your coffee as you're heading to your workshop.

(BREAK FOR WORKSHOPS AND LUNCH)

MR. SAKEJ YOUNGBLOOD HENDERSON (CHAIRMAN): Hello, good afternoon. As I said before, my name is Sakej Youngblood Henderson and I'm the Research Director at the Native Law Centre.

I really want to congratulate you for being hockey players and sticking around for the last session.

(LAUGHTER)

I'm very proud of you. In the old days, this room would have been empty because of the fill we brought in and what they were going to say.

Before I begin, Margaret Froh has a few things that she wants to address to you. And we'll give her some time now while we're working out some technical difficulties with PowerPoint before I come back.

So Margaret.

MS. MARGARET FROH: I just wanted to get a minute to come up here and introduce myself. For those of you who don't know me, my name is Margaret Froh. I'm a Métis from Tall Valley, Saskatchewan and I'm the new Aboriginal Issues Coordinator at the Law Society of Upper Canada. This is an exciting thing. It's the only position that I know of of its kind in any law society in Canada. And there's a lot of stuff happening here in Ontario.

I think it's of particular interest to those of you who are here in Ontario, but also for those of you who are in other jurisdictions. The stuff that we're doing here in Ontario I think is really good stuff to take back to your own law societies and say, "What are you doing for us here?", and, "Let's follow what's happening in Ontario."

There are a lot of initiatives that are going on,

and ultimately what I would like to do is try and encourage those who are in Ontario to contact me at some point in time. There's an advisory group called (inaudible), which is providing supporting and advice to the law society on Aboriginal issues.

We're also doing mentoring programs and I need Aboriginal practitioners who are willing to mentor Aboriginal youth -- law students, university students, and also newly called lawyers.

And there are also other initiatives that we're undertaking right now that you'll be interested in, in terms of advising the Law Society regarding what they need to do to put safeguards in place to protect our communities with respect to our (inaudible) litigation.

We're also going to have a number of events, including a gathering, hopefully which will happen next year, of Aboriginal legal educators from across Canada. A number of them are here today, which is wonderful.

And also, for example, next month, November 15th and 16th we're (inaudible) Ontario and the City of Toronto has put on a number of events to celebrate Louis Riel Day.

But I've left some information on the table out there in the hallway. And you're welcome to pick it up.

I am in the contact information at the end of your

binder. You can give me a call or e-mail me, but I would note that there's a correction to my e-mail address. It's the Law Society of Upper Canada, so lsuc.on.ca, and the first part of it is mfroh@lsuc.on.ca. My cell number is in there as well and I'm dying to hear from all of you, including students.

Whether you're studying in Ontario or you want to write the Bar in Ontario, I'd like to know who you are. There's a lot of supports we're putting in place for students. And I'd like to know who you are, so that we can make sure that we're connected with all of our students.

So, thanks for the time.

MR. SAKEJ YOUNGBLOOD HENDERSON (CHAIRMAN): We have a very esteemed crowd. I'd like to point out our presenters. First, my lovely and talented boss and wife, Dr. Marie Battiste from Mi'kmaq Nation in Canada. Then we have Professor Gabriel Nemogá-Soto -- not bad, but not perfect. He'll be speaking second and I'll be coming up at the end, just because we usually run out of time and we'll be summarizing.

But I also want to introduce to you Tamara Dion-Stout of the Indigenous Peoples Caucus, Biodiveristy, Government of Canada, who is joining us. And she'll be

helping Professor Soto with his presentation.

Let me give you some background on his presentation. It's about intellectual property, his traditional knowledge, and the environment. In other words, it's about everything else we've talked about, but this is the crisis. This is a global crisis, and it's a place that carries the characteristics of all the other problems we've had.

That something terrible happened when the astronauts first voyaged to the moon. They took a picture of the earth, as a blue sphere surrounded by nothingness. From Mastercard, to Visa, to Netscape, every symbol of the earth now carries that blue sphere surrounded by nothingness as the symbol of our decade.

But when they realized that even with the speed of light it would take them generations, if not millennia, to get to the next planet, from the predatory consciousness that we are all so familiar with, came the idea that we need to globalize the planet. And the idea of globalization stems from that one vision that was as dramatic as some of the writings of Christopher Columbus about the new land.

It was the first time in the consciousness of modern society that we came to understand that we've on a

very fragile planet surrounded by nothingness. And for many, many generations there's going to be nothingness.

Now, the old versions were of empire. The old version of colonization were all ex post facto discussions about what people did in the past, or what they dreamed about doing. Well, globalization is different from that situation and it's about what people want to do in the future.

So while in our generation we haven't suffered the ravages of empire. We haven't really suffered -- we're trying to prevent colonization. Globalization is our battle, because when you look at that planet from an Aboriginal perspective, what you see is Aboriginal rights. The planet is filled with Indigenous rights. When they're transnational and the governments look at it, they feel limited because they're limited by national boundaries, and they have to negotiate their existence in other places in the universe into our planet, and even through the continents.

So they needed a mechanism, not only to communicate, but to try and assert some kind of uni-dimensional domination over this entire globe, which in effect means, as was mentioned earlier, when they talk about globalization they're talking about extending malls

to every place on the earth. When we talk about globalization as Indigenous people, we're talking about sustaining our relationship with the planet through many cultures and many diversities.

The whole issue that we get to is a very easy issue. That private laws create intellectual property. It doesn't matter whether they're codified in federal statute or a provincial statute. You're talking about civil liabilities. You're not talking about a criminal code. Of course, we want to assert that there are some acts that are criminal. We haven't been successful in that.

But when we talk about globalization, when we talk about intellectual property, the extending of things to intellectual property, what we're really talking about is imprisoning life to law. In other words, in the end law will control all life, not nature. And that's the supreme paradox that as Aboriginal lawyers we're faced with every day.

Should law, as artificial as it is, seek to control everything in nature, everything in life? Do we have that God-like capacity? Do the transnational corporations have that capacity and, finally, does the UN, with all their initials and misuse of the alphabet, do

they have the capacity?

That's the question that we're dealing with now. And really it comes down to us as the cosmopolitan Aboriginal. We know everything about the history of the European and Canadian society, Australian society, New Zealand society. We know everything about colonization law. And we also know everything about what they don't know about, and that's Aboriginal law and how it works.

So when you get to this private law question, even if it's in public or international statutes, you've got to feel in your heart that this is a choice of law issue, whether we apply Aboriginal law or whether they're going to be allowed to apply artificial law, directed by a majority of electors or diplomats.

So we set out with a system of private intellectual monopoly. Now, these are your patents, your copyrights, your trademarks, your industrial design, and my most favourite of all, your trade secrets. And Aboriginal people have a ton of trade secrets and know-how. So that's our category.

Whether we're going to make them public or shared is a big quandary because our Aboriginal law systems are based on sharing and generosity. And it's got us into

enormous trouble when they took the land, based on the idea that we didn't care. I think we've corrected that in Aboriginal title litigation and other things.

But now we come to our heart, our soul, and our genes. Can the transnationals, which own 95 percent of all the patents -- and don't tell me about the little inventor in his garage. That doesn't work any more. Can they patent our genes, because we are the exotic, the unique? Can they steal our creativity? Can they imprison it and call it their property? Can they take our knowledge of plants, insects, and patent it with just a few modifications? Those are the big issues that we're talking about.

Among the Aboriginal peoples we're very clear about what this is. From our experience with colonization, from the tragedy and suffering we've had with empire, we know what it's all about, and we've coined new words which are maybe too brutal, but they are good words. And we prefer the word, "bio-piracy", and the new word that's coming out that we prefer is, "klepto-ocracy".

(LAUGHTER)

This is the greatest honouring of thievery we've ever seen. And they always say they can do it for the common good of mankind. Of course we're not excluded in

that because we've been shown with undeniable information that we're not human peoples within the meaning of the humans rights covenants. We're reducing the draft declaration into a series of brackets where there used to be rights.

So we're being excluded on the human rights level and we're being excluded on this level. And so this is the second greatest theft. This isn't the theft of our land -- or the alleged theft of our land. This is the theft of us as humanity and the theft of our genes. And it's the theft of all the plants that have nurtured us for centuries and we have relationships with.

So this isn't a little set aside issue of globalization because globalization wants it all. The national governments or the transnational corporations want it all. And they want it all for free. And they want us to consent that they can have it for free. It will get bigger, and bigger, and bigger in your lifetime.

With those introductions and sort of setting the stage, I would like to go to Dr. Marie Battiste to talk a little bit about traditional knowledge. And then I'll go to Professor Nemogá-Soto. I've mispronounced his name 17 times wrong, and every time I get back to it, I do it the same. I've already apologized for doing it the other

times, but as we all know, I'm not good with this gangly language.

And then we'll have some concluding questions and we'll have three workshops. One Professor Battiste will take over on traditional knowledge. One I'll be doing on intellectual property. And one our good friend Tamara Dion-Stout will be conducting.

Professor Battiste, please.

DR. MARIE BATTISTE: Thank you with honour for your warm welcome and indeed for inviting me here. I've been attending IBA meetings off and on over the years, mostly as the wife of Sakej, going to all the wonderful lunches and suppers. And I'm really honoured to have now the opportunity to bring forward both -- under the tutelage, the wonderful tutelage of my husband, who I have to say is still my hero. I've had so (inaudible) very much my hero and all (inaudible).

And so it's been after 26 years or so, we've been together. I've learned a great deal. And indeed, have had many intellectual, growing times with him. And among those times has been our efforts in looking at Indigenous knowledge, Indigenous languages, as I struggle with these particular areas. And as we've begun to -- as we get in our latter years here we finally decided to put something

together as a team. And I shall try to address myself a little bit to something other than trying to thinly disguise my selling of our book.

(LAUGHTER)

For which I have several brochures here.

(LAUGHTER)

But anyway ... I'm also the agent for our book -- no. Indeed it is a great honour.

So I would like to -- as a couple of things that I've done or have been working on is looking at issues of languages, indigenous languages, have worked with First Nations schools across the country, worked with particularly the Mi'kmaw Nation. After I finished getting my degree I went home and I worked with them 10 or 15 years, working in our community schools both as an education director or principal. I was the cook, I was the -- on occasion, was the janitor, and a teacher, and every other possible thing in the school, in order to find out what it is I needed to know and what role I played.

But I think that in -- you know, in my searching for where the impacts on our lives were as well as what things were important it always brought me back to our -- basically to our indigenous languages, to the Mi'kmaw language, to our culture and the importance of saving and

holding onto that which we own. And it's that, you know, Indigenous peoples have, you know, around the world all have political and international contacts acquired in developing and sustaining the relationship that Sakej speaks about within our environments, and passing this knowledge on and experience to all our generations, through our families, through our language, through our cultures, through our communities, through our educations, and most of all through our heritage.

Our acquired knowledge embodies a great deal of wealth, of science and philosophy, oral literature, art, as well as applied skills that have helped sustain Indigenous peoples and in our land for millenniums. We've learned how to heal ourselves with the medicines that have been naturally part of our environment and discovered the patterns in human and animal nature, and how to live and flourish with them.

Our people are dependent upon biological products. In fact we are to the extent that 85 to 90 percent of our livelihood depends upon our food, and fuel, medicines, shelter and transportation that come all from those biological products. In fact, the world's population relies on traditional medicines for their primary health needs, health care needs. These are embodied also all

within our oral traditions, the stories and traditions that are passed on to each of our generations, as deemed essential through our Creator.

The eurocentric education and political systems have severely eroded and damaged our -- our Indigenous knowledge through the process of schooling. The Royal Commission Report, which I'm sure you are all aware of, has illustrated the massive damage to all aspects of our Aboriginal lives. Unravelling the effects of that forced assimilation was a task that the Royal Commission set out to achieve to examine the -- the effects of the generations of exploitation and violence, marginalization, powerlessness, and enforced cultural imperialism on Indigenous knowledges and peoples.

It was a massive mobilization of Canadian scholars. And I often like to remind people just how huge and big that particular momentous task that came about that reflected the -- the distinguished work of 150 Canadian and Aboriginal scholars, the deliberations of 14 policy teams composed of senior officials and diverse specialists in government and politics. The report also has -- was -- there were 76,000 pages of transcripts, 356 research studies and five volumes of the final report. And over 400 recommendations that I see as creating the

post colonial agenda and which has not been taken up by the institutions anywhere. And we need to begin to bring that forward.

The report that has highlighted, notes the false assumptions of settler/invader superiority that positioned Aboriginal students as inherently inferior, contaminating residential schools' objectives and systematically suppressing Aboriginal knowledges, language and culture. It argues that euroethnocentric and demeaning attitudes linger in policies that purport to work on behalf of Aboriginal people. It notes that while these false assumptions are no longer formally acknowledged this does not lessen their contemporary influence and their capacity to generate modern variants. It proposes that the way of the future necessarily requires Canada to dispense with all notions of assimilation and subordination, and to develop a new relationship based on sharing, mutual recognition, respect and responsibility.

Today Indigenous peoples around the world are feeling the tensions created by a modern education system that has taught them not to trust their traditional tribal knowledge, their communities, their parents, and even they -- to not acknowledge the growing eroding environmental base that requires us to rethink ways of

thinking and interacting with the earth and with each other. We're also experiencing a growing awareness of the limitations of technology, of technological knowledge and the possibilities and potential of our knowledge systems, recognizing the nature of the loss and the need for desperate repair of our own systems.

So many times in this talk of globalization we are constantly faced with notions of information, communication, technology, ICTs as they are, and we begin to think that somehow in ICTs we are going to arrive at some awareness of what to do about the globalization problems and issues. When in fact, the ICTs are really driven, 85, 95 percent of what is in information and communication today, is driven by the North with a knowledge base that is toward marketing of the Northern knowledge into the South and, as well, into our communities.

So we're beginning to feel these tensions. And as we do so, we also see the rise in Aboriginal populations, the expected future economy depending upon a smaller number of employed people. As in the case of Saskatchewan, as they begin to wrestle with the fact that somewhere in the next century, in this century anyway, by 2030, the predominant population in Saskatchewan is going

to be Aboriginals.

So the institutions are beginning to feel the pressure of this increasing diversity of the population that they train and begin -- and trying to begin to think about what they must do, but there's more quandaries in that, as tension creates. The issues of diversity, inclusivity and respect are being raised.

And I think that today, you know, what I'd like to do is at least address some of the introductory issues dealing with Indigenous knowledge and its protection. And illustrate that while it is vitally important for us to raise awareness of Indigenous knowledge -- which we all do in the institutions, that -- you know, while we're in there is to centre Indigenous knowledge and bring it into the curriculum. We also have to be constantly aware of the effect that has without bringing the -- similarly and simultaneously, the issues of protection of that knowledge centre with the issues of integration. And so those are what I think are sort of the really important issues.

Indigenous knowledge is something that, of late, has become a regular tension. It's derived from Indigenous people. Over 5,000 Indigenous peoples exist in 70 countries with a world population of over 300 million peoples. Indigenous peoples represent, like the flora and

fauna, a tremendous diversity of peoples, languages, cultures, traditions, beliefs and values. Such diversity at the world level has been even difficult to bring to a definition. The International Labour Organization has defined Indigenous peoples as:

> "Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regarded wholly or partially by their customs, traditions or by special laws or regulations."

All of the products derived from the human Indigenous mind are represented in a wealth of diverse knowledge, which is in constant flux and dependant on the social and cultural flexibility and sustainability of Indigenous people. It represents knowledge of one's place, a survival in that place, the animals and patterns within that space, the skills and talents necessary to survive and sustain that environment, and the knowledge of all the relations with all things and peoples in it. It is a vital and dynamic sphere that is in constant use and change.

Indigenous knowledge flows from the same source. The relationship within the global flux that needs to be renewed, their kinship with each other and other living

creatures and living -- their life energies embodied in their land and their kinship with the spirit world. Their source of knowledge lies within the natural context, within the changing ecosystem, that manifests itself in many forms -- through the stories and art and science, ceremonies and culture, traditions and Indigenous languages.

Within a functional system of community and family the knowledge is constantly shared in the many relationships, that is related -- interrelated, not separate and collectively developed and constituted. And so, Indigenous knowledge embodies several traits. It embodies a web of relationships within a specific ecological context. It contains linguistic categories and rules and relationships unique to each knowledge system. It has localized content and meaning. It has customs with respect to acquiring and sharing of knowledge, although we are well aware that there is still lots of exploitation of that knowledge. It implies responsibility for possessing various kinds of knowledge, so that any kind of knowledge we get we must remember the reciprocal relationship that we need to embody within that.

No uniform or universal Aboriginal perspective on Indigenous knowledge exists, but many do. And although

there are many people and many institutions say, "We would like to have an Aboriginal perspectives in what we do.", and they are not really looking at the fact that there are many perspectives within that as there are many Indigenous peoples.

The diversity of Indigenous knowledge is this unifying concept. Each group holds a diversity that is not like another. One of my dear friends, Gregory Cajete, has offered that there are unifying strands among Indigenous people, of course, beyond the colonizing feature of each. And these related strands, or strands that are related, are again to ecology, to place and to relationships embedded within that place.

To acquire Indigenous knowledge, however, one cannot read books, and all the long anthropological books that have been given and passed down to us, that we use in our courses or we begin to look to, can never create the Indigenous knowledges we can get when we are sitting in front of our Elders, sitting with our community, with people in many places throughout Canada. And all the researchers that have come into our community have but just a small piece of the whole knowledge, and they can only give a dimension of that knowledge and the properties of that particular group.

The fact that these specialists focus on their disciplines around certain dimensions of culture and community limits their capacities to see. Which is why in the disciplines of history and anthropology, and many of these other places, the very paradigm of their discipline limits what they look at. And it is only within the Indigenous perspectives that we begin to see that all of these particular paradigms can be seen, by virtue of looking at it in its totality and wholeness, as opposed to the very limitations within each of the paradigms that they focus on in the disciplines.

While there have been many social scientists that have laboured over discovering the exotic aspects of Aboriginal cultures in the disciplines of anthropology and linguistics, only recently have corporations and multinationals begun to see that those once thought primitive and exotic cultures could get -- could become instrumental to economic and social political growth. Particularly, Indigenous peoples' knowledge of plant and animal behaviour, as well as their self-management of natural resources, has inspired a burgeoning field of involvement and interest among researchers and academicians worldwide.

As a board member for the International

Development Research Centre, IDRC, in Canada I am part of a group of governors who sits on a group that gives money throughout the world to look at the research issues. And I can attest to you, the strength of the issues that by diversity among those groups, but that -- you know, on one hand we are still looking at ways in which we can help Indigenous people capture this for their own benefit and use, but there's still the continuing thrust of the eurocentric framework that often limits that particular area of the benefit that goes to Indigenous peoples.

This interest has been the thrust of the hot button issue dealing with Indigenous knowledge and intellectual and cultural property, that has brought some of us here to talk about. The nation and the international community is again faced with this new form of global racism that threatens Indigenous peoples, a racism in which cultural capital is used as a form of superiority over colonized peoples. Using international and national funds, nation states and multinational corporations have commodified the very productions of their knowledge without their collective consent, knowledge, or without adequate compensation or consideration of the impact on the collective, who have developed this knowledge.

The commodification of knowledge in books, marketing and institution is a most seemingly normal aspect of education. However, the commodification of Indigenous knowledge without consent, consideration or compensation is another form of exploitation and marginalization. And this is a troubling foundation.

While there is some literature that counts medicinal knowledge or botanical knowledge as belonging to traditional ecological knowledge, as it is, knowledge that is being threatened and exploited. There is not the same value put to the breadth of knowledge in language, in songs, in stories, in kinship, as there are elements of culture that are internally threatened for loss of use, but are externally being exploited. The tension is around the boundaries of what counts as knowledge and what does -- what does not count, as the macro terms of knowledge make it difficult to legislate protection for it.

The Working Group on Indigenous Populations is now one of the largest attended gatherings in the United Nations. Dr. Irene Daes, the special rapporteur and chairperson of the Working Group on Indigenous Populations, now is the co-chairperson for this year, reported that the heritage of the Indigenous peoples is

not merely a collection of objects, and stories and ceremonies, but is a complete knowledge system with its own languages, its own concepts, concepts of epistemology, philosophy and scientific and logical validity. The rappatour underscored the central role of Indigenous peoples' own language, through which each people's heritage has traditionally been recorded and transmitted from generation to generation.

And she also then spoke to the legal reforms that must recognize the unique and continuing links to the ecosystem, language and heritage of Indigenous peoples. And she reported to the UN Subcommission on the Prevention of Discrimination and Protection of Minorities that such legal reforms are vital to a fair and legal order, because Indigenous peoples cannot survive or exercise their fundamental human rights as distinct nations and societies without the ability to conserve, and revive, and develop and teach the wisdom they have inherited from their ancestors.

It is from a sociological perspective that, in spite of the fact that all peoples have knowledge, the transformation of knowledge into a political power base has been built on controlling the meanings and diffusion of knowledge. And that's ever so much clearer in the

institutions and the universities everywhere that purports to be providing knowledge to our children, yet in fact is a very narrow, limited eurocentric base of knowledge, for which has since become so changing and difficult for us to be able to connect with our lands. It has -- such has been the controlling agents of education.

I don't want to -- I've written a great -- a lot in -- in this paper and many of you recall, or not all of you, have had this text in your particular books. But I guess, I really don't want to read through the whole thing, but I do want to highlight some of what I felt to be the key issues here.

And I think that, for me, the issues are indeed the ones of the realization of the losses of our Indigenous peoples' cultures, heritage, languages, histories and knowledge. And what we need to do about that and what can be done about that. And we've begun to hear and listen to the kinds of cultural and intellectual property rights that are at the international level. And we need to be able to grasp those particular principles and issues. But I think that what we need to do is begin to think about how are they operating within our own communities. How are they operated in terms of how do we make sure that what it is that we have and what we are

building our -- our communities and knowledges on are going to be there, sustained, for our children thereafter, long after the courts may or may not provide some kinds of things that will protect them.

And so I really begin to think about how we need to begin to think about developing some research. I mean, in particular, issues around developing the principles and guidelines for the protection of Indigenous heritage.

This particular year at the United Nations level, in Geneva, we took the draft Principles and Guidelines for the Protection of Indigenous Heritage that had been formulated at the United Nations level with many Indigenous experts, and scholars, and leaders and so on. And that draft, which had been sent around the world, which had been a topic of many conversations for a very, very long time, were eventually brought forward for some final ratification with Indigenous experts in Geneva, which happened last February. And has now since moved to another forum in which Erica Daes is now taking these principles of protection on to the -- to the subcommission and then to the Commission on Human Rights. And those begin to formulate on a worldwide level some of the key important issues of what we need to do in sustaining and maintaining our particular heritage and culture.

I can't remember whether it was in this book or not, Sakej, whether we ... No, it wasn't in this book. When we sell you the other book ...

(LAUGHTER)

In the book *Reclaiming Indigenous Voice and Vision*, which is a recent publication this year, UBC Press, which was -- came about at a 1996 -- we brought Erica to the University of Saskatchewan, Ted Moses, and we also had a ceremony which provided them with an honourary doctorate degrees, for Erica's work, for Ted Moses' work, as well as for Rigoberto Manchu's work on human rights.

And so we began to think about those issues of colonization, and decolonization and post -- forming an agenda as well. And that is what this particular book is dealing with, *Reclaiming Indigenous Voice and Vision*.

But in there are the draft principles of those guidelines, which have been changed a little bit and made clearer and better and now are made available. And those of you who are interested I can internet, and e-mail those to you if you do not have them. Although Sigfried Wisener and myself are publishing that with *Saint Thomas Law Review* in Florida and will be coming out very shortly in that particular journal, but I can provide those to you.

But I think one of the things in terms of its

practical application, is one that I'd like to address myself to you today. And that is that, you know, last -- it was in -- I think it was in the -- two summers ago that the Grand Captain of the Mi'kmaw nation, Alexander, who, unfortunately, was invited and couldn't come to this conference this weekend, issued a mandate from -- at our annual gathering in Chapel Island. In which he invited several of us to -- to begin to examine the issues of protection of Indigenous knowledge.

And with this small group of people we began to formulate what we felt were some of the essential issues of compensation for protection issues, in order that we could enshrine ethics and responsibilities in the process, to ensure benefits that accrue to the Mi'kmaw people. And that this process that we undertook took several conference calls and then a couple of meetings at which we solidified these. I don't even remember the -- I was hoping that Joe Beattie who might be here will still be here.

We had what we called ourselves -- but it came from Mi'kmaw word which was that in our tradition someone who stood by the door. You know, they stood by the door and -- and was there to make sure that whoever came in and out of that door were appropriate to -- to what they were

doing there. And I can't remember -- it was -- I can't remember the word. It was sort of like (IN HER NATIVE TONGUE), but (IN HER NATIVE TONGUE) is sort of like a warrior. But it is a warrior but also the protector of the door.

And so we framed these particular guidelines -- principles and guidelines around that concept that we were, "protecting the door". And we needed to have some kinds of these guidelines that would do that. And so we set up to -- to find a way in which we could articulate with elders and leaders in the community what we felt were essential protection issues. And we framed those, we looked in these principles and guidelines. And we began to disseminate and work with other Mi'kmaw communities throughout the seven districts of our Mi'kmaw nation.

And in the 00 last summer those particular principles were accepted and ratified with our group at Chapel Island. And so now any work that has to be done without our community, the Mi'kmaw community, dealing with Indigenous knowledge or going out and seeking Indigenous -- in for knowledge from Indigenous elders or people in the community must go through this protection issue and must bring the proposal forward, must address the particular questions that we have raised. And they

must begin to find a way to make sure that the benefits are coming back to our community, as well as we have a way to deal with exploitation of our people.

So I think that those are the most significant things that I wanted to talk to you about. And in the workshop that we have this afternoon, I'm hoping that if there are those who are interested in looking at any of those particular issues, as well as discussing more on the traditional knowledge issues, that we will have a circle to continue on that discussion.

So, with that, I'd like to thank the group here for inviting me this afternoon and wish you very well in the work that you do. Much of this has to be done in an interdisciplinary way and I can't think of any better way than -- than the legal professions and the education professions to come and bring these things together for the benefit of our communities. Thank you, very much.

MR. SAKEJ YOUNGBLOOD HENDERSON: Boy, am I glad I didn't have to tell her, "You only have 10 minutes left." (Inaudible).

(LAUGHTER)

But to translate just a little bit before we move on, is that when we do talk about traditional knowledge we're talking about Aboriginal law. When we talk about

Aboriginal language and preserving Aboriginal language, we're talking about the source of our laws.

We've never developed a code separate from our language. And so every word being used in an Aboriginal context has a law in it, because it's telling you how to behave. That's the leap that lawyers have to understand, is don't go running up to the trees and ask it for all its secrets. It's all in the language of the land, of the place where it's in and it'll tell you how it's positioned, why it's positioned there, and how you're supposed to respect it, and who can use it.

We now have the great honour to have Professor Gabriel Nemoga-Soto from the National University of Colombia to make his presentation. We've got the new smoke signal together? So far we've been getting no signal every time we send it out.

And he's going to be assisted by Tamara Dion-Stout. And she'll be up here and he'll be down there. Do you have a microphone?

MR. GABRIEL NEMOGA-SOTO: Yes.

MR. SAKEJ YOUNGBLOOD HENDERSON: Let's see if it works.

MR. GABRIEL NEMOGA-SOTO: Maximum. Good afternoon. Is that loud enough, or ...

MR. SAKEJ YOUNGBLOOD HENDERSON: Okay, it's just for recording, so I guess we'll have to -- we can take this off? Can we take this off to give it to him?

(PAUSE IN PROCEEDINGS WHILE

MICROPHONES ARE ADJUSTED)

MR. GABRIEL NEMOGA-SOTO: Good afternoon. I am so pleased to be here. I want to express my gratitude to the Indigenous Bar Association for this invitation, for this very exceptional and unique opportunity. I also want to thank my friends here in Canada, for making me easier this has been. You will have to have a little bit of patience with my English because it's my second language. And you will have to use your imagination to guess what I am saying.

(LAUGHTER)

Sakej, your pronunciation of my last name is perfect compared to my English.

MR. SAKEJ YOUNGBLOOD HENDERSON: This is the part of globalization none of us appreciate. It's all wired into a -- a system. We need the microphone also for the recording over there.

(PAUSE IN PROCEEDINGS WHILE

MICROPHONES ARE ADJUSTED)

MR. GABRIEL NEMOGA-SOTO: Sorry for all this, but

it's the only way I could tell you myself, to make it easier so that you will understand what I am saying.

have been presented as a solution to the -- to the present challenge.

So the first part is a presentation of stories about custodianship and ownership over knowledge, plants and human genes. The first story has to do with ownership of our knowledge.

MS. TAMARA DION-STOUT: This story comes from Yukatan, Mexico. A scientist from an American university botanical garden approached a Mexican-Mayan healer, inquiring of her about her medicinal plants which she grows in her garden. The healer promised to share her knowledge with her, since this is what her father had taught her. According to her father, we only on this land for a short period of time and we must share our knowledge, so that it can live on.

The scientist returned several times over a period of six months. The healer would spend many days and evenings with her, in which the scientist would ask many questions concerning the plants in her garden. Over time the scientist's visits became less frequent and after one year the scientist came back to the healer bearing a gift.

This gift was a book containing all the pictures of the plants and the botanical knowledge that she had shared with her about her garden. The authors of the book

were mentioned as only the scientist and another person from her university. In fact, the only recognition the healer got was the fact that she had allowed the scientist to take pictures of the plants.

The healer was so devastated by the lack of the recognition of her knowledge that she had shared, that she could not return to her garden for several months. But eventually she did realize that the plants were not to blame, she had to return to her garden to tend to her plants, but instead, the blame lay with those who stole the knowledge.

MR. GABRIEL NEMOGA-SOTO: So this is a common story, I guess, in many countries. I knew this story in Mexico and the person who you see in the picture is Mrs. Felipa-Sera. She is the person in this story. The second story has to do with ownership of a certain plant, Ayahuasca.

MS. TAMARA DION-STOUT: In November 1999 Indigenous people from over nine -- from nine South American countries won a precedent setting victory when the U.S. Patent and Trade Mark Office cancelled a patent issued to an American citizen for Ayahausca (inaudible). This plant is native Amazon Rain Forest.

This patent was significant because rights had

been patented, but also, one person could claim ownership over a plant that is used by thousands of Indigenous people in the Amazon region for their sacred religious and healing ceremonies. So, this patent had been cancelled through the Indigenous Peoples Advocacy.

MR. GABRIEL NEMOGA-SOTO: The last story, but not the last thing in our storytime, has to do with ownership of a human genes. And it's about the -- in the Indigenous community in Panama. I don't have the picture for that, but I have what is the main actor, which is cows, in this situation.

MS. TAMARA DION-STOUT: In the early 1980s the U.S. National Institute of Health and the U.S. Centre For Disease Control sent medical expeditions out in search of remote human communities that might have variant strains of lymph cells useful in treating diseases such as cancer and AIDS. In 1993 the Guyana General Congress, which is an Indigenous people in Panama, learned that a 26-year old Guyani mother of two had been a subject of the U.S. government patent.

The inside of her mouth had been scraped, some hair follicles had been removed, and blood samples had been taken, taken for an examination, for long-term storage in the U.S. The doctors who had done this had not

mentioned to her, nor to her community, of their patent interest or a potentially bright commercial future. Within Indigenous mobilization against this claim, the U.S. government announced it was dropping the patent application but only after -- but only because, as they say, it was not commercially viable.

MR. GABRIEL NEMOGA-SOTO: Thank you, Tamara. From these three stories there are two which had the happy endings but as most of us know, there are many other stories that are still going on. So with these stories I want to provide a -- there is a common factor is the emergence of biotechnological and chemical industries looking for new genetic material to commercialize, to bring new products into commerce.

The basic emergence of biotechnology presents a challenge to the traditional legal regimes in the way that the traditional notions of honesty cannot fit the particular instances, the specificities of genetic material. Biotechnologies are tools to manipulate and to transfer genetic material and information not only among organisms of the same species, but among different species. And this was the case of genes for peas that was taken to put it into a potato species, to make the potato resistant to frost, being frozen. And there are many

cases like this.

When this situation came into things, there are a diversity of providers and users of genetic material. We have provided, like space, communities and individuals, and we also have different diversity of users, like a preserve institutions, universities and governments. And there is a conflict of interest between providers and users of genetic material and Indigenous knowledge, but additionally, there is additional complexities because this relations put into conflict the diversity of legal systems with different traditions, like the Napoleonic system of civil law and the common law. And there are a lot issues that -- where the notions start, I think, start being contradiction.

I want to emphasize a few characteristics of genetic material to show -- and to discuss why it is so difficult to figure out the legal instrument to claiming ownership. This is a problem for corporations who wants to commercialize genetic material. There is a reason for that, for the development of new instruments, in that we must also know that genetic material is the -- the information that is inside any cells of any living, organism which is transferred one generation to another generation. It identifies the characteristics, the

biological, the physiological characteristics of living organisms.

And some characteristics of the genetic material implies that this material is not -- first, it's non-exclusive. It means that one scientist can be working on a specific fragment of genetic material and that other scientists can be doing the same at the same time, simultaneously. They could. The genetic material is any thing or animal in the same species or in the same organism.

Another characteristic is that genetic material is, it's non-reducibility. It means, what I want to do for this is, the, "use", of genetic material doesn't imply that the availability of genetic material, "decreases". It can be used and reused, and it doesn't decrease because of that use.

The third characteristic is what I call, "intangibility". I am not sure if this word is right in English. However, what I want to explain for this is that genetic material is something that cannot be culled physically. Those who want to exploit it, those who want to get control over genetic material cannot just take it physically and exclude it from usage. So in some ways it is tangible.

And genetic material is also renewable in the sense that it can be reproduced conveniently. If we have the biological and the physical conditions, the genetic material can be reproduced. And these natural characteristics of genetic material represent a challenge for both corporations and for those who want to monopolize this material and to make a business with its commercialization. So there are some solutions and we have seen some solutions to these problems.

In order to establish those monopolies on genetic material, large corporations develop technological means. Like, for example, a hybrid corn where the second and third generation of corn doesn't yield the same as the first one, so the farmers have to go back and buy seeds. Corporations or the large major -- establish these controls having in secret the parental lines -- or controlling the parental lines for producing these hybrids.

And when the technological means doesn't work or when they are not applicable, we have seen how the legal systems work to provide one solution. We can get -- I just want to mention trade secrets, patents and breeder rights. These talk about -- there is a specific form in our later presentation about intellectual property rights,

so I won't go into detail on this.

Now I want to go to the evolution of ownership over genetic material to -- just to see how different moments in our story you have seen different tactics, different concepts being applied to genetic materials, to biological processes, in order to justify this appropriation. We are all familiar with colonialism and regarding natural resources that signified, signifies, the violent plunder and expropriation of natural resources. Invariably the botanical gardens of imperials -- how do you say it, imperial -- they play a very important role for historically in victimizing tropical varieties in order to expand colonization.

After colonialism was over, if it was over -- we see a familiar, another concept on this page. Common heritage of humankind for science and production. Aand in the name of -- under the name of science and production you are -- there was establishment of seed banks and there were -- but specifically by those centres of biological diversity. And they came and formed the Consultative Group for International Agricultural Resources.

And it was one situation where those countries interested in gaining these resources were going to different places, collecting these resources, collecting

this information and using it to make it into commercial products. And at the same time they were protecting these new products through intellectual property rights. So that's a complete imbalance between those who were giving freely these resources and those who were claiming intellectual property rights. And the Organization for Food and Agricultural in the United Nations tactical white paper, I will summarize this by saying that in fact nothing different than -- nothing different that the enforcement of intellectual property rights, what is going on.

Okay, this is just mention of the different instruments of intellectual property rights. I'll go into detail on this.

After colonialism and after this concept of common heritage of humankind, we saw this concept of sovereignty rights on genetic material. And it is in the 1992 Convention on Biological Diversity where this principle was explicitly recognized.

Even though the Convention on Biological Diversity has objectives that look like a concern for sustainable use, and for the preservation of biological diversity, and for fair and equitable distribution of benefits, we'll contend that the main objectives and the main purpose of

this convention has been the legal access to genetic materials. And as a (inaudible) of this convention some countries started to establishing legal regimes on access to genetic resources.

And that's the case of Colombia as part of the Andean Pact, where also Peru, Ecuador, Venezuela and Bolivia are part of this, of this pact, of this agreement but it's mostly commercial. Andean Decision 391, ratify the sovereignty rights on genetic resources, promote the objectives of the Convention on Biological Diversity, and recognize in some ways the intangible components of genetic resources, referring to the Indigenous knowledge and the knowledge of black communities, of parts of Colombian communities, and peasant communities in the Andean region.

It says also that it's to promote regional and national capabilities, but the main -- I would say that the main objectives within the community (inaudible) was to legalize the access to genetic materials for what is called, "bioprospection". But there is a difference between bioprospection or biopiracy.

Bioprospection is the search for genes with a potential use for new industrial and pharmacological products. There is a diversity of users, like large

corporations, governments or university institutions. Bioprospection would be the search for those genes having in mind or taking in account these principles -- the sovereignty rights of the country of origin, the community rights over resources and knowledge, the prior and informed consent, and fair and equitable compensation. But opposed to these is the biopiracy that would be the violation of all these principles, of one of these principles.

So this new situation first to transform the legal framework of most of these countries, rather establishing new legislation of the new judicial decisions. So we have as principle factors, which is the biotechnology industry, pressing for access on genetic material and Indigenous knowledge, we have the adjustment of legal and judicial systems. And they were able to fit the nationality of the sovereignty rights into this legal framework. They haven't be able to fit the Indigenous rights, and there is a contention about how it should be done.

Now I want to go the second part, or the part two, in this presentation to state why in the Colombian case it is very easy to see that the people's lifestyles, the Indigenous peoples, are under a serious state even from this legal framework. Given that biotechnologists are

manipulating genetic material of animals and plans, and even humans. There is also -- they are also releasing genetically modified organisms. And there is also the pressure for a gradual elimination of traditional varieties, as a second and more intense situation, the genetic evolution.

There is also a challenge -- there is also a threat from the new global and regional laws on intellectual property rights, because this is enforcing legal monopolies on animals, plants and human genes. There is a private appropriation of collective resources and knowledge. And there is a threat to community sharing and solidarity.

In the Colombia, in the particular case of Colombia, the judicial system and the legal system declared genetic materials as the state property or public good. It has a lot of implication for the Indigenous people. This legal framework came from the new Constitution in 1992. And the legislation that developed it, the laws that established the Ministry of Environment, the Law 99 of 1993, and the Law 165 of 1994 that ratified the Convention on Biological Diversity, and of course the Andean Decision of 1996.

And the judicial officials worked establishes

clearly that genetic material belongs to the state or is state property through decision of the maximum tribunal in administrative law in 1977 and the Constitutional Court supported it in decisions in 1994 and 1996. And there are implications for Indigenous peoples, exclusion and unprotection.

As you can see the exclusion of Indigenous rights from these -- from this new legal framework had to do with the fact that Indigenous communities have no collective rights over public goods. The protection under breeder rights requires homogeneous, stable and distinct plant varieties but Indigenous practices having by virtue by (inaudible) are not looking for a position is homogeneous, stable and distinct plant varieties. On the contrary they are producing this by biodiversity what is characteristic.

And in many, I will say that it is a growing consensus regarding the idea that intellectual property rights are impracticable for Indigenous people, even though their governments like in the American -- the organization for American states, which established that the Indigenous tribes has intellectual property rights as a way, I would say they were assimilated to the legal framework which is expressed by the biotechnology industry.

And the non-protection of Indigenous knowledge came from an artificial distinction between tangible and intangible components of genetic material. This is an important development in the Andean legislation because it's a way to get rid of -- or protection of Indigenous rights. According to this legislation the tangible components would be the genetic material. And there is -- I believe there is a procedure to follow to get access to those resources. But because traditional knowledge is characterized as an intangible component it doesn't take into these regulations, so it doesn't have any protection at this moment.

And this new legal framework gives rise to three types of contractual relations for access on genetic resources. One, what I want to say here is that in order to get access to genetic resources, taking into account this new legal framework, there are three -- three different legal relations -- or three different types of contract.

One is between the state and the user of genetic material, which would be regulated by public law. And another one would be between the provider of genetic resources and the user of genetic resources. The provider would be the owner of biological organism. It could be a

community, or it could be an individual, or it could be the state.

In this case, even if the state is the owner of genetic resources, many of the things for private law will apply. And that their relationship is between the user of genetic resources and a local community. And this is only regulated by a kind of -- it's not actually a contract, it's an, "annex", it's an appendum, something that has to be shown that there is an agreement with that community and (inaudible) it will be regulated by -- by this law.

So in the last part what I want to talk about is the different perspectives or the different alternatives which are offered, that are alternatives to face this new challenge to the integrity of people -- of Indigenous people. This one proposal, which is the extension of intellectual property rights, this will apply the breakthrough of cultural practices of sharing, crops exchange and community solidarity.

Because as soon as one community starts claiming intellectual property rights, or patents of ownership on genetic resources, there will be a question of why one particulary community or why one particular individual is the owner and can exploit this with more property rights, and what is the role or what is the contribution of that

community. It's also impractical and costly. And for many communities in Third World countries, it will be impossible to pursue this way of protecting the Indigenous rights.

There is also a proposal for establishing a sui generis regime. It will be a formal recognition and protection of collective rights taking advantage of the Article 8(j) of the Convention on Biological Diversity and the regulated intellectual property rights of article 27.3(b). There is a lot of interpretation to be -- to do -- to be done here in order to promote that sui generis regime and there is very opposition in the industrialized countries.

And finally, having presented in the beginning of these issues after the Convention on Biological Diversity, what clearly establishes in the Mataatua Declaration in 1993, I have been presented in the Second International Indigenous Forum on Biodiversity, even in the last one in Madrid in this year, regarding the moratorium on access to genetic resources and knowledge. In Colombia it was, in 1997 there was a proposal for Indigenous representatives, in order to establish this moratorium on access to genetic resources. But the national -- but the congress, the Colombian congress didn't support this initiative.

Additionally, there are local guidelines by the Indigenous organizations, like the National Organization of Colombia, there is your ONIC, regional organizations, like OREWA, where they have -- they started to study like the specific regulation in order to -- to control resources and knowledge in order establish like procedures to allow researchers to go into the community and collect this information. This is an initiative that is in progress. It's not finished yet, but the Indigenous communities are working in that direction.

But those will be the -- like the solution of the different conclusions regarding this topic. I also want to say that this is not only a question of ownership on common things or ownership on information, but there definitely is a question about dignity and about life for Indigenous communities. Thank you, very much.

MR. SAKEJ YOUNGBLOOD HENDERSON: Thank you, very much. I just want to make a few concluding statements and to say that this really important dialogue is going to continue on from 4:00 at working groups. In Confederation I we'll have Marie Battiste speaking about traditional knowledge. I'll be holding some kind of discussion on intellectual property. And the third workshop will be on the environment, with Tamara Dion-Stout leading that up.

And it's a great opportunity.

In relationship to Canada, I would assert -- but I'll have a hard time articulating it in the end -- is that everything indigenous about Canada, from the plants, the rocks, fish and trees is the Aboriginal rights of some Aboriginal people. That sovereignty in Canada can't be asserted over Aboriginal rights, Aboriginal knowledge, and probably some even treaty rights.

So, we're in a very privileged situation. It is that our genetic material, our knowledge of the plants, our knowledge of how to relate to the plants are all constitutionally enshrined.

We have not done much to protect it. Whether we try and protect it by legislation, or we try to protect it by setting up our own corporations and allowing them to work out the details with the people about what exactly they own ... But there's some very poignant examples. We got nothing out of our knowledge of tobacco, ever. We got nothing out of our knowledge of aspirin, from the red willow tree bark that became a standard. There are many discoveries that are based on Aboriginal knowledge and we have yet to receive any compensation.

Under (inaudible) it's clear that not only our Aboriginal title but our Aboriginal rights, if any

government wants to participate involves compensation. Though we're in a very privileged position -- and we have to start working this out as Indigenous lawyers and Indigenous people for the rest of the world, because we have to blatantly say that the world is not for the colonizers, or their theory of empire, or their theory of sovereignty. That it doesn't go to extend to the essential humanity of the world for Indigenous plants or even our genetic material.

A artificial entity was created called the, "state". Artificial entities can't own the world, whether they're a corporation or they're a state. That is incoherent. We're an artificially created institution of legislating power, but you're supposed to deal with the will of the men and women in a society to the extent its own nature without any consideration for the guardians who have protected, nurtured, discovered and know these plants.

The problem we have is our own belief in generosity and our own belief in sharing this Aboriginal knowledge. And Aboriginal lawyers will have to be the mediators of this. I don't know how we're going to decide it, but let me say, why is it so important for them at this point in time to take our blood, to take our genes,

to take our plant knowledge?

It's a terrible answer to this question, is that they plan on destroying us but they need what we have, what we've carried in our body and what we know about the plants, so that they don't have to do the generations of work of discovering what plants heal, or what genetic code we have that protects us against certain diseases. That the rush is a gold rush. And it's like our Elders have always told us, all the answers are within us, and now science confirms that by talking about DNA and genetic material.

But it belongs to a people and it belongs to their knowledge and their heritage. In Canada we can make a very coherent argument and will be making it at certain times, that these are our Constitutional protected rights, and they don't belong to the federal government or the provinces, nor could they get it from the sovereignty of Great Britain. And that every Indigenous plant from sweetgrass to wild rice is held under Aboriginal law by some Constitutional right.

Unfortunately, the rest of the world needs us to start articulating this from a positive example. Now, we have convinced the world intellectual property organizations that the entire issue is not a state

sovereignty, that the entire issue is a private international law. And the question is which law controls a particular plant and the plant's genetic structure.

We've already been able to stop many of the patenting of our bloodstream, our patenting of our DNA, the patenting of plants, because it seems even abhorrent to a civil system for someone other than ourselves to own a monopoly of us. But that's giving away very quickly as the pharmaceutical companies, which created the medical profession to sell their drugs last century, are now creating new conventions with their own concurrence that they actually have access to everything.

One of the most frightening examples is called, "trade related intellectual rights", which is a real nice name for the commercialization of every plant seed in the world. And either every plant seed in the world has to be owned by a transnational corporation, a national government, or some Indigenous sui generis system.

Every farm organization across the world is against this because it basically means they have to buy their seeds every year from some entity. And they can never share the seeds of their crop with the next generation.

There's no way of saying that this is a pretty

picture. And there's no way of saying that us, who are basically powerless and just first generation, should carry the burden of this fight, because it's a fight for life and the qualities of biodiversity itself. But this is our burden as Indigenous lawyers. We're here. We're alive. We've mastered the European legal system.

We have about 19 judges who have mastered it more than most of us. But when the next generation ask us how they lost control of their bodies, how they lost control of the economy, how they lost this battle of biopiracy, we'll have to explain where we stood. And that's our dilemma, our quandary, and our predicament.

If I could now turn this over to our president to make a few administrative remarks. And thank you, very much for your participation (inaudible).

MR. DAVID NAHWEGAHBOW: Thank you, Sakej. Actually, I'm going to invite up one of our board members, Tuma, to come up and make some presentations.

MS. TUMA YOUNG: Well, I don't know about you, but that was a very interesting panel and it has touched me on a number of levels, both a professional and a personal level. And -- and I was just thinking about what everybody was talking about and trying to relate it to me and the struggles that we all pick.

It's a little bit more personal for me because I'm what would be termed, to use Sakej's term that he's taught me the colonizer's language, an, "ethnobotanist", and law was something I was directed to go into, but anyways ... There's one thing -- and in Marie's presentation she was talking about the importance of language. And when I go back home and people call me up to do workshops and presentations on traditional herbal medicines and stuff, the importance of language is very much stressed upon.

People will ask me, "What is the name of that plant?", and I will tell them in Mi'kmaq and they'll say, "No, no, no. What is the name?". "We call it this in Mi'kmaq.", and they'll say, "No, no, in English." I refuse to tell them in English. If you don't know -- if you don't know it in Mi'kmaq, then I'm not going to tell you in English or I just pretend, "I don't know." Or maybe some times what I do is I tell it to them in botanical language, which is Latin.

(LAUGHTER)

And they say, "No, no, in English." And sometimes with some people like that we say, like, "It comes from the potato walking sticknet." And they say, "Ohhh...", but that's's one of the (inaudible) I got from Maria and that's one of the strengths I'm going to keep going with,

is, you know, keep using the language and returning to our plants and not to use colonizers' language.

And, Marie, for that I want to present you, on behalf of the Indigenous Bar Association, with this gift for your wonderful talk.

DR. MARIE BATTISTE: Thank you.

MS. TUMA YOUNG: Now, for our other speaker I'm not going to do what ... I learned my lesson very quickly not to try to pronounce names that I don't know and, again, to reflect back on what Marie was saying, "Use your language." Would Professor Gabriel come up?

I want to say it in my own language, Gabriel. And his presentation was excellent, you know, and it's just we were -- me and Bernie were just briefly speaking about it and I said, "Oh, this means I have more reading to do and more work."

And for Gabriel's assistant, Tamara, on behalf of the Indigenous Bar Association, I'd like to thank you.

And to thank our chairperson and our chair of the panel here, Sakej, for his opening and closing remarks, and all of this. It gives me something to think about and to constantly challenge us, as to where do we want to go and how do we want to approach it. Sometimes, for me, I need some time to digest it and think about it because the

ideas he places in my mind just seem to, "vrrrr", go like this. Well, Sakej, (IN HER NATIVE TONGUE)

MR. SAKEJ YOUNGBLOOD HENDERSON: (IN HIS NATIVE TONGUE)

MS. TUMA YOUNG: I'll hand it back to Dave now.

MR. DAVID NAHWEGAHBOW: Thank you, very much. Just before we send everybody to workshops, and actually we're on time. That's great. We start behind, but we're

be I'ving twore ssions like

Shannin Metatawabin of the Aboriginal Business Canada. That'll take place in the morning.

And our conference will conclude at approximately 11:30, at which time the Indigenous Bar Association will then have our business meeting. Actually -- and that will begin with a discussion amongst Indigenous lawyers on thoughts to formalize some of the things that have been happening here about perhaps a network of Indigenous lawyers. We will be having our annual general meeting, which is the business part of our meeting, at approximately 1:30. And that should carry through the rest of the day, on the more mundane aspects of our existence.

Anyway, again, thank you, very much. I want to thank the panel. It was very, very thought provoking for a guy who usually thinks about more hard-head stuff like land claims, and negotiations on contribution agreements and these kinds of things. It's very important to be reminded about these issues which are very far-reaching. Thank you, very much, Sakej, and the rest of the panel.

So, I guess it's off to the coffee and then on to the workshops.

(BREAK FOR WORKSHOPS AND CONCLUSION OF DAY)

WE HEREBY CERTIFY THAT the foregoing was

transcribed to the best of our skill and ability, from taped and monitored proceedings.

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G R S / L P / C P / W E C

CONTINUED FROM VOLUME 2 OF 3

---UPON COMMENCING AT 10:00 AM ON OCTOBER 22ND, 2000

MR. RUSSEL BARSH: I'm going to just talk from down here because it seems a little bit strange to be up at that thing. It's not like arguing in the High Court.

But what I'd like to start with is an observation from a book I admire very much, Leslie Silko's novel *Ceremony*, written over 20 ne6eNook cong. nat thaa bo,on

institutions for power.

What's been happening, I think, is the world is reorganizing in very important ways, in terms of how power is managed and how those who have power collaborate to use their power. But we are still pursuing the advancement of Indigenous nations' concerns, aspirations, self-determination, as if the world had not changed. The changes have taken place extraordinarily rapidly in the last ten years. We're still using the tools of the 1970s and 1980s, while the world has shifted power around in some important new ways.

Let me give you a very quick overview of the things that I see as being particularly of concern to what we do. First of all, very clearly, at the global level we're seeing a shift in the concerns of nation states from defending ideological positions to encouraging foreign direct investment. From debating interests of state social policy to debating which way to get as much foreign investment as possible and generate as much hard currency as possible.

Indeed, you might even argue that the way the world has changed is that states have moved from defending their social sovereignty, their right to determine the conditions of development within their borders, to opening

up the supermarket.

As a result of this, international institutions such as the United Nations system of institutions, that were designed to deal with the construction of a social consensus -- a consensus about peace, about development, about human rights -- are being marginalized. All the institutions established to deal with the flow of investment in the world -- the Bretton Woods institution, the International Monetary Fund, the World Bank -- the trade institutions -- the World Trade Organization -- and with that I would say also the World Intellectual Property Organization, which for all intents and purposes also is a trade institution.

What it means in practical terms is that governments are no longer paying much attention to what the United Nations says. They're paying a lot of attention to what the trade institutions say. But it gets worse, in my opinion.

We have to be aware of the fact that as long as there was an ideological polarity in the world between East and West, between communism and capitalism and as the protagonists defined their ideological positions, there was also a dynamic tension within the United Nations, which created a lot of space in between the protagonists,

to do diplomacy, to play both sides against the middle. And that dynamic tension is now gone. The United States, for all intents and purposes, dominates what happens in the United Nations. It dominates the budget, controls most of the top level official positions, and establishes, for all intents and purposes, the basic policy framework in which the United Nations works.

So not only is the United Nations system being marginalized by institutions that facilitate trade and health, nation states open up their supermarkets, but the United Nations has also become uni-polar. It has become largely dominated by one nation state's foreign policy objectives.

That doesn't mean that there isn't discussion there. It doesn't mean that people don't complain. It means that when it comes to moving talk into action, things that cost money, that take staff, that involves, as you can see in the papers, the deployment of military forces, one country's foreign policy dominates the agenda.

That seriously undermines the capacity of the United Nations to pursue a conciliatory, multi-lateral, progressive kind of policy of making the world more inclusive, and more socially -- more diverse, more respectful, because that isn't what it's there for any

more. That's not what it's being driven by any more.

Now, there are other things going on in the world that also should be of concern to us, in terms of looking at the prior tool kit that's been used to try to advance international peoples' claims and concerns internationally. One of those phenomenon that I think is very, very important on the positive side is that there has been a very powerful change in the way ordinary people organize and act.

Part of that is a result of the so-called information revolution. Part of that is a result of the slow and still very inequitable improvement in people's living standards. More people have more money to spend, becoming consumers -- perhaps becoming consumers at a very, very low level compared to people in the wealthiest countries, but consumption patterns are generalizing as far as this global process as well. And that means that people not only have some greater access to information, but they're spending more money and they are affecting markets more.

At the same time we're seeing that people who have a lot of money are beginning to think a bit about how they make more money. The rise of so-called ethical or social investing in the West is a very interesting phenomenon,

really of the last 10 to 20 years, with people who are really concerned about making money by doing good things, instead of making money any way they can make money. It's still a small part of the total financial markets in the West. In North America we're figuring that social investment is probably in the order of $15 billion, which sounds like a lot of money if you don't have very much money, but $15 billion is just a small slice of the regional investment market.

However, it's growing. It's enough to make a dent, to get people's attention. And the same thing is happening in Western Europe, very slowly in Japan, very slowly in Southeast Asia. And a gradual increase in people's perception that if you have money as an individual, the way you spend it and the way you invest it matters.

Well, that's quite interesting. As people get more money, ironically, governments become less important, corporations become more important, and individuals become somewhat more sovereign. When government has all the power and all the money, governments get to do a lot and become very important in terms of what happens, what the social outcomes are. When individuals have a lot of money -- like it or not in terms of the rise of culture of

materialism -- but when individuals have a lot of money, individual choices about what we buy and what we invest in becomes very important.

And I would argue that though we can be very worried at a deep philosophical and spiritual level, about the effect on our world of people becoming primarily actors as consumers and as investors, rather than as humans. The reality that we're facing now is that most of the power in the world is becoming individual consumption mediated by corporations. Or more complexly, mediated by financial markets, consumer markets and the corporations that take money out of financial markets and put things into consumer markets. That's where the power is.

Alongside this we've seen the growth of what's now called civil society. And I'd like to make a distinction between what is called civil society and the real power that people have as consumers and investors.

Civil society grew out of the idea that as citizens, as individual citizens of countries, we have the capacity to organize interest groups, lobbying groups, stakeholder groups -- is a term commonly used here in Canada -- and that we can advocate our interests as groupings of shared interests to governments and to international organizations.

And that has been growing. NGOs -- non-governmental organizations -- including Indigenous people's organizations, which are generally classified by international institutions as just another group of NGOs, another group of civil stakeholders, all these organizations are increasing vastly in numbers and vastly in activity.

When I started working around the United Nations system in 1980, there were fewer than 2,000 NGOs that participated in United Nations meetings around the world, that had some form of accreditation to UN bodies. It's now past 7,000, 20 years later, growing fast. And there is, I would argue, an illusion that somehow this is creating a new kind of legitimacy and a new kind of effectiveness in the United Nations system. That there is popular involvement, popular participation.

Unfortunately, I think that it came about 20 years too late. Because what's happening, in my view, is that we are democratizing and popularizing the United Nations system after it has lost its efficacy as an institution. In other words, we're taking over the company that's already failed while other companies, like the World Trade Organization, are off and running, and doing well at really important stuff.

The civil society movement has been extraordinarily successful in beating down doors in the United Nations system -- not so successful in beating down doors in the trade and financial institutions of the world. But there's more of a sympathy, I think, between say Indigenous people's organizations, women's organizations, social justice organizations, church organizations. They feel the same as the kind of ringing praises that you find in the United Nations charter, not the kind of very crass, materialistic things you find in the WTO Charter.

On the other hand, we're in a world which is being driven by money and corporate power, in which controlling the United Nations has less and less usefulness, other than to have a place to complain about the fact that you don't have power. And that's what I do when I go to the United Nations, and governments as well. There are governments, Indigenous people, women's organizations, environmental groups, social justice groups, church groups, sitting in the halls of the United Nations, going to meetings around the year, complaining about not having power.

So where's the power? Again, ironically, the same people, mostly people from relatively wealthy countries,

who populate the meetings of the United Nations complaining about not having power, are people who consume the world's resources -- consume most of the world's resources if they come from Western Europe and North America -- spend most of the world's money, have the most money, have pension funds, you know retirement funds, retirement accounts, have huge amounts of money at their disposal that is being used by corporations to increase their power.

It's very ironic. I've been at some meeting at the UN with a roomful of people complaining about having no power, and a quick straw poll would point out that within that room were people that had literally millions of dollars invested in institutional investors like pension funds and mutual funds. Even if they don't want it, they're instituting it by their benefits packages and their NGOs, ironically.

And so they're financing the very thing that they're complaining is taking away their power. A complete contradiction. But instead of confronting the folks that they're paying to become more powerful, they're in the United Nations complaining about being powerless.

I wanted to talk about that simply to make one fundamental point, that I think is a preface to the more

practical things that I wanted to lay out for you this morning very briefly. And that is that, like it or not, the world has shifted from what I have called the rule of law to the rule of Dow Jones. We're in a different battlefield where governments themselves lack the power to give us what we demand.

If Canada announced tomorrow that it was prepared to recognize Aboriginal land rights in British Columbia, the Prime Minister would hear from Wall Street, and it wouldn't even tumble. And that would be probably more decisive in terms of the fate of that proposal than a decision of the Supreme Court.

We even see that the Supreme Court issues decision, as in the *Marshall* case, Marshall I and Marshall II last year, that government ignores, quibbles with. I would suggest that there's a connection here. The one reason government quibbles with decisions like *Marshall* is because of an awareness that acting fully, faithfully and respectfully of the chain of recent Supreme Court decisions we've had in Canada, beginning with *Gary*, but particularly *Delgamuukw* and *Marshall*, acting faithfully to carry out the spirit of those decisions would bring down the Loonie. And yes, it would.

And who would make that decision? Canadians? No.

Wall Street would make that decision. The people who invest in the forest products industry would make that decision, the people who invest in the mining industry would make that decision. The tourism industry would make that decision.

So if we don't yield to those powers, we actually are making a very, very dangerous assumption that government has the capacity to act on our demands in the world we now live in. We have to deal with the folks who really have the power, because they will still exercise the power and they will bring down any government that fully recognizes the self-determination of Indigenous peoples.

I see a lot of this in recent events in Latin America. Colombia is an interesting example. We heard about Colombia yesterday in relation to its intellectual property rights. It's a country which is being wrecked by civil war, but the civil war has been, in part, energized by the fact that when the Colombian government took measures to recognize land rights, to recognize the rights of poor people and Afro-Colombian communities, the markets didn't like it. It effectively undermined the economy.

A number of countries in Latin America have had

their economies undermined precisely because they took steps to recognize Indigenous people's rights -- to tie up resources, to reduce the flow of foreign direct investment in new exploration and exploitation of interior areas of the country that made their money less worthwhile. You're not going to invest in a country which is tying resources instead of opening the supermarket.

So what is the capacity? We talk about the capacity of countries to engage in independent social policy because of their tying in to the WTO, the world trade system, and now we get the IMF and so on. A country's ability to bring land rights is tied up in the WTO and the IMF, as in the global economy system. And if you don't address those sources of power, then we are asking government to do things that government knows it cannot do.

And they will obfuscate and talk the thing to death. It'll go round, and round, and round because uncertainty is cheaper than a settlement that has a dramatic effect on money markets and employment. So what do you do?

Again, shift the focus of attention from government responsibility, from state responsibility to corporate responsibility. From attacking the reluctance

of government to recognize rights to attacking corporate theft, corporate expropriation of Indigenous people's resources without their consent. Shift the canon from aiming at the government houses, to aiming at the folks that ultimately determine the capacity of governments to enforce their own laws.

Otherwise, we'll be off in a corner and even if the governments all agree, everybody is very happy ... They sit around and say, "Wonderful, this is great." They'll be like many countries in the south already, that have made social compacts that have then been shot down by currency markets or by financial markets, because they've reduced the attractiveness of that country for foreign direct investment. And no one is trying to get the investors to respect the decision to protect people's rights.

Well, how do you do that? That becomes the tactical question. It's not -- how do you go to the United Nations to tell the government off, because the government will still do what it was doing before, even after it's been told off. How do you get the corporations to pay attention?

You've heard over the last couple of days pieces of a strategy, a number of tactical ideas, some of which I

want to reemphasize. And I'll try add a few more.

One thing you've heard about that's very clear and has been used effectively already in Canada is the selective boycott. It's directly punishing companies that benefit from stolen resources by taking away their consumer market. Indigenous people will not buy those products. That was effective when the Crees of Quebec did that in order to cut off the sale of Hydro Quebec power to New England, as a way of preventing the expansion of the Hydro Quebec project in Northern Quebec. It was effective in the Lubicon Lake case, targeting the paper products coming out of the mill in their territory. It's been effective in other parts of the world, when carried out very carefully and selectively.

You can't boycott effectively whole countries or whole industries. You have to boycott particular products coming from particular companies that are directly, physically involved in a disputed territory, like (inaudible). It means the research of tracing where particular companies' products go and learning about the consumer markets where those products go. So that you can effectively engage people in those consumer markets.

Obviously, in some countries people are going to listen to you and say, "That's horrible. We don't want to

buy any toilet paper that's coming from trees that on disputed land.", you know. And it can be as crude as that. I mean, that's something (inaudible). There's a newspaper article.

You get people in some countries who recognize that this is very important and in other countries because of their national culture, the political culture, the nature of consumer culture, the greed and materialism that people have bought into. It may be very difficult to convince them not to buy something because what they're consuming, putting in their mouths, putting on their bodies, whatever, it's coming out of somebody else's livelihood, it's consuming somebody else's future. That's a research question.

Tactically, from the tactical point of view, is that any time the strategy, any time you're looking for a strategy, the issue is looking at the options, checking out which ones are going to work best. But keeping in mind the overall view that one of the few ways that you can actually hurt the people who benefit from a lack of land rights, a lack of respect from the community, is make it impossible for them to sell the stolen goods.

Something related to that, that you heard about from Russ Diabo, was certification schemes which make it

easier for consumers to make other choices. That's what it's about, is having consumers get enough information that they can make their own choices without having to have somebody go out and convince them, and to tell them which products not to buy. It sort of simplifies the process. It's the response of social mores to the increased marketization of the world. If you start labelling things, labelling good products and having consumers get used to the idea that when they pick up something in the supermarket they look at it and see how it was made, who made it, and whether it was made with slave labour, stolen land, anything that's inappropriate.

That's developing slowly in Western markets, North American markets, slowly in Japanese markets. In the areas of the world which consume most of the world's resources, there is some growing awareness that perhaps consumers should educate themselves and show consumer responsiveness to any clearly understood, valid labelling system, whether it's certification under a government scheme -- which could run into WTO problems, by the way. That's another issue. Government certification is not such a good idea because that's GATT, but private certification schemes are not GATT, they don't violate the World Trade Organization.

I think like (inaudible). It was an industry agreement, initially an industry agreement with environmental groups. And when the United States government got involved, it got GATT in there. And it was struck down by the GATT. But as long as it was a private labelling scheme, it went back to being a private labelling scheme, which was okay. Consumers got used to the idea that that label meant something in terms of respect for environmental principles.

Similarly, can we start exploring social labels? Like Indigenous peoples labelling their own products and demanding that the companies that deal in primary commodities, like logs and minerals, label if they have agreements with Indigenous peoples. And when people make agreements with industry and invite industry into your territory, to give them as one of the benefits of working in your territory, with your consent, the right to put your trademark, or label, or certification seal on their products to show that they are operating in conformity with Indigenous peoples' rights to self-determination.

So that the companies that do business with you appropriately get the benefit of being able to market their good behaviour as part of their product. (Inaudible) particularly note the market things that have

high consumer scrutiny. Pharmaceuticals, drugs, food -- food, in particular. People are really nervous about what they put in their mouths. So if it has certification seals on it that say, "This is from your environmentally sound, it comes from Indigenous territories and under Indigenous peoples' supervision...", however you construct it as, as a symbolic market implies good behaviour.

It actually gives companies a big advantage and it gives them an incentive to work with you, rather than work against you. If they work with you, they get to certify their products and label them in a way that makes them very attractive in some consumer markets. If they don't, they don't get to label it and consumers are eventually going to wonder why their products aren't labelled with that kind of insurance, that kind of a, "Good Housekeeping Seal of Approval".

So that's a deeper way of pursuing this. Beyond simply having industry self labelling and government labelling schemes, you have Indigenous nations developing their own labelling, certification, trademarks and other kinds of very simple forms of intellectual property. In some cases, a trademark is a use of intellectual property by using a distinctive name or seal that encourages companies to compete with each other for social justice.

Okay?

If you're just in financial markets it's competition to go down in standards. Without anything else companies compete for the lowest production costs, so that they can have the highest margin when they sell. But if you introduce things like social labelling, companies also compete for consumer confidence. Which can mean that their products might be a little more expensive and they might even have a higher margin, because consumers will pay a little bit more in many markets that deals with buying something that is conscience free. So you introduce a more competitive factor, but it's a good one rather than a bad one, in terms of your impact on territories, on environments and communities.

Similarly, at the other end, we go upstream from the product to the financial markets, the high end of the companies that extract the resources that make the product. What can we do in financial markets? Well, there's been a growth in recent years of something that's called in finance, "social screening". Social screening is simply having a financial analysts routinely inspect their portfolios, to ensure that the companies they have their money in are not doing certain kinds of aggrieves things.

They're not using slave labour, they're not using child labour, they're not making money off of distributing small arms and ammunition, and all sorts of things. No tobacco products, no alcohol. The social screening movement has developed from very simple screens that we used in the 1970s and 1980s, were basically anti-nuke, anti-war, anti-tobacco screening. It's very sophisticated screening procedures now adopted by about -- I'd say now about half of the industry that calls itself, "ethical investing".

Which actually looks at things like labour, labour rights, labour conditions, occupational safety and health, community relations, respect for Indigenous people's rights. That's about $6 billion of that $15 billion that's now screened for Indigenous people's rights and that's just happened in the last 12 months. A very interesting thing is happening that the financial markets are getting a little more sophisticated. And this is not just about being, having nice products, okay. There's a list of financial markets.

Financial analysts are tough, hard cookies. What I hear financial analysts saying, in the long-term, if we look beyond the short-term, day trading type return, if we look at something like mutual funds, and pension funds and

banks that like to hold onto their stock for years, and years and years and get long-term value, long-term capital gains on their holdings in companies. If you look at the long-term, companies that screw around with people, that violate people's rights, that mistreat their workers, are bad investments.

They get into conflicts. They get into lawsuits. People blow up their factories. They keep getting into all sorts of troubles.

And so, if you take a long-term view and you want to invest your money in shares that are going to still retain value 10, 20 years in the future, you want to invest in a company that's very careful not to expose itself to conflict. Particularly not conflict with its hosts, the communities that they work in, and its employees. And that's the growing thinking in the financial -- in the world of financial advocacy.

So let's try to be really careful about whether we're investing in companies that have managers that actually think about these things. And try to keep to the business of doing what they're supposed to be doing, making good products and selling it well, rather than getting into fights, pissing people off, hurting people, abusing people, and wasting money in litigation and

conflict.

So it's in a company's self-interest and an investors' self-interest to screen for social performance. And that is rapidly becoming more the norm in the industry. Now, that's important because we can not only advocate that more screening be done, and help investors develop better screens and give them good information so that they can know more about the companies that they're examining when they do their screening, but it also means that when there is a fight over resources you tell the investors. You go to the banks, and the mutual funds, and the pension funds and give them the information, so that they can choose whether to disinvest or just to call up the corporate president and say, "You know, we have 15 percent of the shares in your company and we're looking very carefully at this part of our portfolio because we hear that you're stealing land. Now, we don't want to get involved in that."

For lawyers there's a nastier side of this and I think we should be doing more. I'm a very strong advocate of both social screening and of aggressive dissemination and part of the dissemination of information about companies that are doing bad things. Dissemination of information to the investors.

But you can also play a little bit of hardball in litigation terms. What about derivative suits? You know, if your community is oppressed by company X, buy 500 shares in company X stock yourself. Become a shareholder and then tie up their annual meetings in shareholders resolutions. And if they don't like that then bring a derivative suite and ask a court to declare that the management is wasting the assets of the corporation by exposing the corporation to the risk of future land claims disputes.

You can tie up a company pretty good at a shareholders meeting and all you need to do is purchase the minimum bundle of stock to qualify you to participate actively in shareholders actions, both within the corporate government structure and to deliver the suits to the court.

There are some social activist investors, including Walton Management is one and some of the church councils, the inter-faith councils, like the ICCR, the Inter-Church Council on Corporate Responsibility, that have made a practice in environmental cases of buying shares and stopping annual meetings. That's what happened in the Home Depot case, that Rus Diabo was talking about yesterday. They disrupted shareholders meetings. Not in

a nasty way, they didn't come in with placards, and screaming and yelling. They went in as shareholders and they started filing resolutions.

That's also what happened in the Uwa case in Colombia. After all those tragedies that happened there, the attempts to mediate the situation, defend people, raise (inaudible) the case was in the United Nations and was being discussed on the human rights side. Occidental Petroleum finally began to back off, after some of the church groups bought stock in Occidental Petroleum and voted it. Twenty percent of the shares of Occidental voted against remaining in Uwa territory. And the management was so upset by that, that they decided to back off. And they physically moved their facilities out of the Reserve, out of the Indian Reserve that they were in. And now there's pressure on them to just leave the country altogether.

So this is effective. It has worked. It's been effective even when triggered by fairly small ethics groups, but it hasn't been used systematically by native lawyers in native rights countries -- native rights education, so that there is a perception in the corporate world that if you mess with disputed territories you can expect trouble like this. You can expect to have a native

organization, or an organization working with Indigenous people, at your next shareholders meeting saying, "We're very pleased to introduce ourselves, Mr. Chairman. We hold 5,000 shares in your stock collectively and represent five percent of your voting shares and we have a few things that we'd like to put on the agenda."

Now, the following is a little bit further, in terms of what can be done to develop a kind of effective corporate, corporate strategy. I spoke yesterday in one of the workshops about the World Trade Organization and trade disputes. I don't want to repeat what I said there -- and those of you who were there yesterday, you'll find it very boring now, I'm sure. Those of you who weren't, I would encourage you to check it out or get in touch with me.

I just want to insert that as one main very interesting but very complex alternative, simply to put it that under the new 1994 agreements on dumping and subsidies, anti-dumping agreements and the Agreements on Subsidies and Countervailing Measures adopted by the parties, the members of the World Trade Organization at the conclusion of the (inaudible) round in 1994. There is pretty good legal foundation for members -- of course, that's governments, remember members only do this at the

request of industry, so, in fact, corporations. Members can challenge other members' subsidization of particular industries or industry groups through such things as -- it's spelled in the SCM, the *Subsidies and Countervailing Measures Agreement* -- through such things as providing preferential prices on goods and services.

So if a government takes their own treaties, their lands, their Indigenous peoples or water power protection of Indigenous people, turns around and donates that, or provides it at discounted rates to private industry, it has subsidized that industry with below value Indigenous resources acquired without Indigenous people's consent. And I believe that is a GATT subsidy.

There is reason to think that that would be taken quite seriously in the light of Canada's civilian aircraft dispute which (inaudible) appellant body (inaudible) because they had defined the subsidy rules in GATT very broadly. And subsidy is any preference, any advantage that's given selectively to a particular industry and has an effect on exports, a significant effect on the across the (inaudible) that's from that country and some measurable impact on the markets in other countries.

At the workshop yesterday we talked about softwood lumber, absolutely. The failure of Canada to settle land

claims and disputes (inaudible) in areas that are being logged, subsidizes the Canadian software lumber industry, which has a significant impact on the U.S. market. There you go, you have your case right there. All you have to do is get some of the U.S. industries, which are already totally furious with Canada, to go ahead and raise this issue with U.S. international trade folks in the Department of Commerce, the International Trade Administration. Which the Interior Alliance is good.

And I think this is a very wise strategy for triggering WTO level litigation, in which the fundamental question raised before the panel is the subsidy effect, the trade distorting effect of stealing Indigenous peoples' land. And the issue is not whether or not it's Indigenous peoples land, so much as whether or not the action has the effect of giving an unfair advantage to a particular industry, a particular export industry, and damaging the exports of other countries.

There's a footnote to that. This may be one of the very few things where we actually can take advantage of some of the things that have happened in the United Nations, because even though the UN has no real enforcement measures for things like the Human Rights Convention, these are basically talking measures, where

the governments report what they're doing and they argue about whether what they're doing is good or bad. But there's a very strong consensus in the human rights (inaudible) of the United Nations, most recently requested in a general -- it's a general recommendation of the Committee on the Elimination of Racial Discrimination, that existing human rights law requires the demarkation and securing of peaceful possession of Indigenous peoples' territories.

They quibble about where the boundaries ought to be, but in terms of saying, "You've got to settle the claims, we've got to settle the claims. You've got to stabilize things promptly." And wherever people actually are and are using things, where they hunt, where they fish, where they gather, you're there and then you're supposed to act promptly.

And that's the law. And that's what the Committee on the Elimination of Racial Discrimination is saying, that's what the Committee on the Application of Standards and the ILO is saying, then can we go to the WTO appellant body and say, "There's no question about the fact that any land that Indigenous people actually occupy or use is their land. And that under the international law, human rights law, the state has responsibility to demarcate it

and to provide legal security for it." And yet what do we see?

In BC, for example, the state is granting concessions to industry to go and remove the resources. And the granting concessions in violation of international law constitutes the subsidy. What you do as a litigator, you work with your clients and get industries in the third country to make a complaint to their government, get their government to file the initial grievance, and then file the supporting documentation. Essentially it's like (inaudible) process. And help pursue the case. Help that state pursue the case and go to the WTO. But win or lose it's going to get a lot of attention.

Let's take it a little further. One more area that I think needs to be considered very carefully, that again is focusing on corporate accountability rather than government accountability per se. In addition to stealing resources corporations, when they do this kind of stuff, cause environmental damage and they damage even health. It's the part of my cases where the theft of resources in Indigenous territories is not also having adverse environmental and health consequences, where it is insanitary, okay. It's usually very dirty.

So in addition to being an issue of theft, it's

also an issue of damage. So what do you do about damages? Well, in national courts you would make court claims, but the problems were two. One very simple problem is national courts here are not taking those claims very seriously. The second problem is that they often don't have effective jurisdiction over the parties you want to reach.

If it's not a Canadian company, if they don't have significant assets in Canada, and if they don't have assets that you can use to hold the company hostage, which is often the case with foreign mining companies, then you've got a problem because the best forum for pursuing the company is in another country. There's been an increasing amount of litigation coming mainly out of the United States working with Indigenous people in other countries. On increasing amount of litigation on trans-boundaries courts on taking into U.S. courts damage claims against companies for damage done to Indigenous peoples' territories somewhere else in the world.

Then the path breaker case would be the case involving (inaudible) Federation in Ecuador against the Texaco Company. And it scared Texaco Company and they settled out of court. A more recent case is the fifth circuit in the States, it's a little bit more debatable,

Freeport and (inaudible). And I worked on that one, at this point in the coalition of environmental groups it's a bad case. That involved New Guinea and the Freeport (inaudible) near the (inaudible) wrecked an entire region of the country. And unfortunately, ironically, the environmental groups, who knew nothing about Indigenous rights law, took the case on genocide and wrote this very big kind of flashy claims, while some of us who were working on that said, "Let me (inaudible) about land rights and universally accepted international standards applicable specifically Indigenous people, Convention 161 (inaudible)."

The courts just didn't understand it, threw it out, but we had enough money to appeal it. So what looks like a bad decision, but I think Freeport and (inaudible) is more an indication that this is a good thing to pursue. Because this company which is one of the biggest mining companies in the world went absolutely ballistic when they got sued, and spent a huge amount of money trying to stop the lawsuit. And to intimidate the lawyers who were bringing it on behalf of the (inaudible) people in New Guinea.

This is a very interesting area. It is untested in the area of -- untested in the direction of bringing

cases in the European community. The European courts are strong, the European court, the regional European court is becoming a very strong appellate body, a very strong principled appellate body in the entire European community. Very, very conscious of human rights issues and a great deal of damage is being done here in -- within the boundaries of the Canadian state, is being done by European corporations.

So if the Canadian courts won't take it seriously and if you can't get effective jurisdiction here, why not assert jurisdiction over the companies' headquarters in Europe. And bring it through the European system. It hasn't been tried, as far as I know.

It's just another kind of lawsuit in a legal system not that different from this one, but one with a greater willingness on the part of judges and appellant bodies to exercise effective jurisdiction and seize assets. And what you want to do (inaudible) is not necessarily expect any of these cases to totally settle the problem. What you're expecting it to do is get this case to cause pain, to cost a company money, to get their shareholders to wonder whether they've invested in the wrong company, to get people in the banking corporations that hold their debt to start calling them up and saying,

"Next time we renegotiate your debt we're going to raise it by 10 points because it's getting to be a riskier investment because of your behaviour."

It'll cost them money. Because if you can expose bad management, bad social practices, that increase political risk, social risk, legal risk, then the investors and bankers are going to charge the company more for their money, it's going to cost them. And it's going to create internal stress and internal pressure to change corporate policies.

Very interesting. You see all sorts of interesting signs within the corporate world, that managers are getting very nervous about the potential for the kind of things that I've been describing as a tool kit for corporate pressure. Shell Oil, which was implicated in Nigeria Delta blow-ups and in the courts in the Nigerian government's execution of activists, including -- what I would like to say here as our colleague (inaudible) as he worked with many of us at the UN Working Group on Indigenous Populations and was one of the casualties of the movement of the working group. The company involved, after getting beaten up by its own shareholders, has adopted corporate standards on the rights of Indigenous people based on the ILO (inaudible).

Whether they'll enforce them depends upon continued pressure. It's interesting to note that should we be fighting to get, for example, the Canadian state to respect its laws or should we be fighting Texaco to respect those rights? Which is a more effective use of resources?

Let me wrap up with -- with an observation about the implications for the kinds of -- the kinds of things that have been discussed at this meeting about lawyers working together and working across different countries, bringing native lawyers from North America, Australia, (inaudible), Latin America, together to work, to co-operate, to exchange information and come to meetings like this. If you move from a state centred strategy, going after the nation state, Canada, to a corporate strategy, going after anyone who steals resources from your -- from your territory without going through you, the remedies available to you depend entirely upon your reach.

The further you can reach internationally across borders, to international bodies, but also to the courts of other countries and to corporate headquarters in other countries and consumer markets in other countries, the further you can reach, the more options you have, the more

power you have potentially. If your reach is limited to the borders of your nation state, you have very little options at all, unless you happen to be lucky enough to be being screwed by a company which has its headquarters down the block. It's very simple.

That means in practical terms that globalization has put us in a position where we need global packets to deal with global networks of capital. And we can only do that with global coalitions of lawyers. That a law firm, even the most brilliant, successful and right-on Indigenous law firm, be it in Ottawa, or Toronto, or Calgary, or Vancouver, can't really use its tool kit effectively in another nation.

With Aboriginal lawyers in Australia, with European lawyers, maybe Saudi lawyers, in the European community, with lawyers in tribal communities in the Philippines, in Malaysia, in India. So that within these wider coalitions of Indigenous lawyers somebody is bound to have an office near the courts you want to go into, the shareholders meeting you want to bust up, the consumer market you want to shut down, the financial market that you want to shut down. To make it actually possible to do these things that I'm talking about.

Without a global coalition, now, you guys, you

know, this concept I'm talking about is incredibly impractical and incredibly expensive. With a global coalition of Indigenous lawyers it starts with as simply picking up the phone or doing an e-mail and say, "By the way, we're sending you a -- we're zipping you over the e-mail 5,000 pages of documentation on a case going on in Nunavut, that we want you to take care of for us in a shareholders meeting in Africa." And those kinds of co-operation would give the Indigenous advocacy process a global reach comparable to the globalization of the enemy.

And I think that's what we need to be thinking about in this new millennium. I'm going to shut up there and take the comments and questions and denunciations. Yes?

PROFESSOR RENEE TAYLOR, UBC FACULTY OF LAW: (IN HER NATIVE TONGUE) I am, in English, Renee Taylor from the a local tribe ---

UNIDENTIFIED SPEAKER: Excuse me, would it be possible for you to (inaudible). We cannot hear.

MR. RUSSEL BARSH: Let me see if I can get -- do you think we can get a microphone? I think we've got enough lead to get to the front.

PROFESSOR RENEE TAYLOR: I thank this man for his wisdom. I'm here to say that the Elders in my nation have

known this for a long time. We've gone -- I'm a Potlatch person. We never stopped Potlatch or went underground. We never lost our language. They didn't like our rocks and so they left us alone. My mother lived in a big house, we call it a (IN HER NATIVE TONGUE), until she was 14. And they didn't like that. They had to make the natives -- they gave them one month to move into little houses.

So they took the big house apart and built them side by side, four feet apart, with doors connecting them together. And that looked like the first Indian condo. And there's little bits of an eagle here, an eye there, a part of a wing. And the Indian agent said, "No, no, no, that's not what we had in mind. You're still eating together, your kids are running back and forth. You'll have to nuclearize yourselves or something."

So our old people hired a lawyer, named Barney Williams, the only one that would defend Indians. And the Indian agents backed off and that's where they left it. So what's the point?

The point is my people have been going to Germany, to Australia, to New Zealand, all over the world. The old people, not us intellectually inclined ones, that don't speak very good English, they're the smartest people I

know. And I'll tell you, those people are helping us a lot.

We have oodles and oodles of money. What we are lacking is resources in terms of people that can put it together. I have defended -- I'm sorry I haven't been here too much. My uncle died the very night I arrived and my father said, "Do you have friends there?", and I said, "Yes I do." And he said, "Stay, because there's a 130 mile an hour gale warning on the north coast and no one can get out of the villages. My 82-year old aunty, my 91-year old aunty cannot go and grieve their brother and my uncle." And so I'm here, sort of.

What I need to say is that we cannot ever think that we are only the ones vested with intellectual intelligence. When I speak Quacola? I think in a different way. When I speak English, I'm a law professor. I have to speak a particular way, otherwise I couldn't keep my job.

So what I mean to say is that one thing happened and this is a danger I think you need to know in alliances. I married a lawyer (inaudible) as intervenors for the (inaudible) Chiefs and managed to prove that we have a legitimate interest in the case as your clients did. But more importantly, I've been defending a people

called (IN HER NATIVE TONGUE). They -- they live in (inaudible) it's called the Great Bear Rain Forest.

Now, it's funny, there is a group called the Forest Action Network. And they decided somehow that they were smarter than the Indians, who -- well, the Indians were defending the trees, and so what they do is just go spike the trees, they go and put all kinds of booby traps, blah, blah, blah. Now, this upset the old people because they knew a lot of those loggers and some of their own cousins were logging. And so I had to go to court to sever us from -- from, "the fans", you know, that's what I called them eventually, "the fans". And said to them, "The old people can speak for themselves and that's why they have translators, to say in English what they've just said from their own nation. They're fully competent to articulate their own interests and you guys are just, you know, on the sidelines. And how on earth do you ever think, you know, anything about us when you have not been here for 30,000 years?"

So beware of eco warriors and some of your friends and go to places far away -- and, I'll tell you, (inaudible) love our masks, they love our dances, our Indian blanks, our copper, blah, blah, blah, whatever it is they love about us, I love the fact that they're giving

us lots of money. Because right now we have three major crises on our coast. And I am angry and I am now going to have to determine because my people want me to go home.

I have a message to this meeting from 17 chiefs on the north coast and from the (IN HER NATIVE TONGUE) Native Brotherhood to say to people here -- I had all these calls. We have a 20-year moratorium on Welland Gas exploration in British Columbia. Now, the British Columbian government has decided to look at a feasibility study of putting in oil reserves right at the north of the Baker Island, which is where I'm from, all the way to (inaudible), as other people would say.

That is where our fish come, everything, (IN HER NATIVE TONGUE), our ancestors, who are whales and walruses and seals. We know about Exxon Valdis, we know about Texas, we know about Ireland. Some of us are well-educated. We've research the feasibility of having this on our land and we're saying no.

The government has also decided Tuana, the inside passage, now, this is upsetting the trade and commerce, which is good. I don't like those guys, but it's good because they've make $36 billion a year indirectly and directly from the offshore cruise ships that come in, then they get the money from far and wide, then the trickle

down effect, and BC gets about $8.1 billion in tourists coming to see walruses, seals, whales, eagles, you know, all the things that live there. So they're upset that there's logging plans to strip the coast.

Now, Alaska they're upset because -- that saves them some money. Let them fight amongst themselves. That's what I think. So, but we'll go the "Indian" with all our blankets and stuff, and that turns a lot of them, they really like people, like, all dressed up like Indians.

The third thing that is really, really, really upsetting us right now is the fact that -- (IN HER NATIVE TONGUE). My heart hurts when I say this one, is the fact that we have, that our fisher people -- all are existence -- and the (IN HER NATIVE TONGUE) is a little tiny fish that it comes in seven-year cycles for so many cycles. For the first time in all of our history, for as long as our people remember, unlike the (IN HER NATIVE TONGUE), who are our allies on the west coast, by Long Beach, we have our family stories. We have the flood story, when they went to the mountains. I think there was flood and I think -- I don't think Jesus is coming back here, but I think that the old people saw that the water was rising, we went into the mountains and we lived there.

But we don't have family stories. But our old people are very, very, very -- their hearts are crying, (IN HER NATIVE TONGUE), is being broken, because our little tiny fish for the first time is not coming back.

So they're moody about that. (Inaudible) Press is really good, media is very good, controlling your own history is really good. And so I need to say here, from my people, a big war is coming on the coast, not on our land, we've kept them off the land, but the Americans come to our territory and say, "Well, we just need 17 eagles for here, this many wolves, that many wolverines." Well, we've managed to kick them off and they have to go to the national park.

The other thing our government is doing is declaring the national park -- 17 -- since the NDP came into power all unclaimed land -- we've already claimed that land, we have our land claims in, now they're all parks, right? Well, there's nothing more alienating to Jane and Joe Blow Canadian than for Indians to say, "Get out of this park." Well, we could say, well, "It's not a park actually. These are our ancestral stones here. These are burial grounds."

And so -- and we have a premier, well, he's not a premier but the attorney general, Joe (inaudible), turned

contempt from a civil action (inaudible) between the company and the Indians into criminal contempt.

So you get these old people, my oldest client is 97, the last round, 97, and my youngest client was 58. And they're all chiefs. And while we were litigating this -- they were chiefs, (inaudible) was third time around. And they just said (inaudible) they're going back, because Esta, the place they're logging is where it came -- the first woman from the beginning of time landed there and laid a river. And out of the river came the children when they were dragged out of a big clamshell. And the Big Strait people we came to that place, that's what they believe.

And -- it's as good a belief as any. Scientists are trying to figure out whether it was a big bang, or a big boom, a little pop, but who cares? We've got our own story, our own history. So we've been up here a long, long time and we're going to be here a long, long time.

And so I say to you from 17 chiefs on the coast and from the head of the Native Brotherhood, which is has decided it has to get strong again, they were starved, just like the (inaudible) for a little while, you know. We're not depending on the government any more, that's the point.

People will never be free unless you free yourselves, you make your own economies, and you feed your own faces. And, in fact, the more you eat of your traditional food the less diabetes you're going to have, the less indigestion. And so, I don't know that this is particularly an intellectual exchange on my part, but it is certainly something I was asked to say and because I am the chief of the (IN HER NATIVE TONGUE) Clan, chief of the (IN HER NATIVE TONGUE) chiefs., I inherited it. I've been asked to say this, and I do, because I do not lead the people, I follow the people. They tell me what to say.

I am able articulate in (IN HER NATIVE TONGUE) and English, which makes me a good speaker and which is why I'm chosen. Beyond that, the oldest person, the most illiterate, the highest speaking (inaudible) person, are the wisest people I know. It is not people who speak good English. (IN HER NATIVE TONGUE). I live in peace. I come in peace. These are the words from my people.

MR. RUSSEL BARSH: If I could momentarily build on a couple of things that you said, that struck me very strongly, one is your -- is your observation about who you make alliances with. Which I think is a very important one.

And what I see is that the environmental

organizations have been pioneering corporate strategies. It's the environmental groups now that are in the shareholders meetings, in the boardrooms, doing a lot of active work, the social screening, the boycotts, the labelling, all of the things I talked about. Environmental groups are doing this and they have that global reach that I was talking about and the resources to pursue global action.

The problem is, their interests are not the same as Indigenous people's. And so we need Indigenous people speaking in the boardrooms, at the shareholders meetings, and with the financial advocacy and such. Not just because it's going to be a different message, but also because I think there's a different relationship that needs to evolve between Indigenous nations and these corporations.

Not one of endless antagonism but one of a choice, of giving the corporations a choice. "Act with respect and you can do business with us. Act with disrespect, we're going to shut you down." The environmentalists can't really offer that. It's either, you know, "Stay out of the territories that we want to hunt and fish and camp in or that we think are very important for nature. Go somewhere else."

But there's no possibility of offering the business world the alternative of doing business well, saying, "Okay, come and convince us that you can work in our territory and not mess everything up." And so, offering companies that choice is something environmental groups can't do as, "ventriloquists", for Indigenous people.

So, I mean, it's very, very important. The other thing that I think is very insightful is that in the cases you described, the cases of resistance to logging on the west coast, that to me is a classic one in B.C., where the government was acting as the front to the corporation. So the company says, "Your job, Mr. Premier, is to protect us from the Indians.", you know.

And this is happening all over the world. In many countries governments get armies called in to break the barricades, to break resistance to the siting of corporate projects. So governments, rather than being the protectors of Indigenous people, are increasingly being pressured by foreign investors, by companies who that are coming in and investing in those countries, to defend the corporate assets from the Indigenous occupants of the territory.

So, you know, should we be fighting the

corporations and saying, "Don't do that. Don't charge us with criminal contempt. You're supposed to our fiduciary.", or you go to the companies and say, "That was a very nasty thing you did, calling on government to hold us in criminal contempt and we're going to see you at your next shareholders meeting and we'll see you in court."

You know, which strategy is more effective? And I think we've been going after the wrong guys. Anyway, but thank you for your words, Renee, because it just -- it adds to (inaudible).

Any others? Yes, Gabriel?

MR. GABRIEL NEMOGA-SOTO: I just want to raise one point that you mentioned, on the Columbia case.

MR. RUSSEL BARSH: Yes?

MR. GABRIEL NEMOGA-SOTO: (Inaudible)

MR. RUSSEL BARSH: Everyone should hear it, so we perhaps we should have you come up and use the microphone.

MR. GABRIEL NEMOGA-SOTO: Professor Russel Barsh?

MR. RUSSEL BARSH: Yes.

MR. GABRIEL NEMOGA-SOTO: Okay. Thank you. The strategy for stopping this exploitation -- exploitation of resources, Indigenous resources, has to do especially in the Uwa case, was a very long and strong struggle for the people for their oil. It's cost the lives of children and

women and even international lives have been given.

I think this is important because if we focus only on the legal issues, we will lose the other part of the story where the people are, I think. And it's even the reason for doing things in the legal arena.

Regarding these meetings that you mentioned, it seems to me that after the meetings of the shareholders, even though they (inaudible) territories well after that meeting. At one time this maybe is information I didn't know. In (inaudible) it was an American state there was territory and a national press conference regarding this point. And one of the things that happened in Colombia, which I think is important to bear in mind, is that the concession of the Uwa people -- they think that oil is the blood of Mother Earth. And the government made some negotiations with the Uwa people so they gave their north territory and in this territory the companies are not going to exploit the oil, but this is at the border.

So they are going to take the oil, the blood of the Earth, and the concern is that the Indigenous people, the Uwa people say, "The only strategy that we have if this happens is to commit collective suicide." So that's part of the situation at this moment.

So I think you are very optimistic what can be

done in the legal arena, but in reality there are other processes and I think we have to build a whole picture (inaudible).

MR. RUSSEL BARSH: I agree. I think that that -- that is an echo of the concern that I've been -- I've been feeling as I've been working around the United Nations system. In my mind the biggest problem that we faced in the last 10 years internationally is trusting the international system to act rather than to talk. And that we now have a situation where Indigenous nations have to act because, while everyone has been talking about Indigenous peoples' rights at the international level since the 1970s, the statistics show that the rate of exploitation, the rate of dispossession, the rate of theft, has increased.

So that at the end of 20 years of international dialogue about the rights of Indigenous people more land has been taken than ever. And that is just a way of -- of agreeing and complementing what you're saying, that this is about action and not about being theoretical.

Now, I think the Uwa case is very interesting because it seems to me that many of the environmental groups that were involved in that wanted to set a precedent, but very few were prepared to stay involved in

the long-term. It seems to me that if corporate strategies are going to be effective you have to stay involved.

You can't just get a corporation to make a press release and say, "We're terribly sorry.", and then walk away and say, "We won.", which seems to be happening in that case. As soon as the company said, "Okay, we will relocate the wells.", many of the activists from outside said, "Okay, we have victory.", and they didn't keep involved to see exactly what was going to be happening next.

The other is that it's not enough to just go after one company, force them to leave, and then declare victory. Because these are more complicated situations than that, as events over the last 20 years in Ecuador have shown, where some companies were beaten up in financial markets and beaten up by activists in shareholders meetings and those companies left Ecuador. In their place came companies that were even worse. There's an oil spill there and the state is still willing to sell the oil.

So we have to be thinking in terms of very sustained strategies, of making it impossible for people to sell stolen resources from certain areas. And to keep

those pressures up until the entire industry is aware that this is a high risk, it's an unacceptably high risk place to do business. If it's just one of these short-term things -- and I think the Ecuador case is a very disturbing one of this -- where the pressure was put on and as soon as Texaco pulled out victory was declare. And it just meant that a company that was worse than Texaco took over the same lease and continued the process of drilling.

So there's a whole Ecuadorian oil industry that needed to be sustained, argued, to get the point across and -- well, this gets back to your point, don't trust the environmentalists. This is something where people who feel connected to the Indigenous people who are threatened, have to be involved so that they don't give up after the first victory, otherwise these strategies are going to fail. If they're short-term they're going to fail.

MS. JEAN TEILLET: I like this, "target the corporations", concept a lot, but what I'm seeing happening with some of the environmental cases that I'm working on right now is that if you target one, the infrastructure under the guise of one corporation -- so, for instance, one mining company will build a long road,

which will open up a whole territory for logging or mining or everything else. So you only target one, but -- and all -- the British Columbia area is a case in point.

Once you open up a road people, the state, have a legal right to maintain access. So one mining company opens up a road and you have a second, in-built legal aspect for 40 other companies loggings who now have a legal right to say, "You can't shut my road or I'll (inaudible) from the government."

So if you only target one company you're not effectively getting at what is actually going on. So it seems to me that when talking about strategies you can't -- I take your point about not going after the -- you know, it's a bit, "Don Quixote-ish", to go after the government and with our judiciary concept waving its hands.

And I take that point, but it seems to me that a strategy of only going after one corporation -- we don't have the resources, because it's not just one, it's 20, and we can't do that. So we have to do both. We can't drop the government because the government is just the face of industry and so we have to do both.

I don't believe -- (inaudible). The derivative action is very interesting because in many of the

communities that I work in the people themselves are split. Some people want the mine because they need the jobs, and they may have a little store and once that road that is built, there will be more people coming to their store and they'll make some money. So some people in the community want the development.

There's no jobs. They see the children leaving to get work. So some people want -- other people in the community don't want it because it destroys the hunting grounds and they see other pictures. But if you're part of that corporation you can make it do it the way you want it to be run.

That's good, but it seems to me that we have to go after all of the -- the strategy that we need to use, it seems to me, is how are we getting money to do all this? Because that's where the root of all the problem is. No Aboriginal people that I know have the money -- I mean, I'm working in the diamond mine back in the Northwest Territories. You want to fight DeBeers? I don't know.

I mean, it's almost easy to fight a local mine company in B.C.. or a logging company in B.C., than it is to fight -- there's no certification for diamonds in this world, as you know. And I don't believe for a minute that DeBeers said they're not getting companies out of -- or,

diamonds out of companies ---

MR. RUSSEL BARSH: (Inaudible)

MS. JEAN TEILLET: Yes. So, you know what's happening, they're just smuggling them out of Sierra Leone and the next company is (inaudible). So we're not -- we're not doing anything effective by swallowing somebody's strategy. We need strategies on how to get funds and that's why we're getting in bed with environmental groups. Not because we want to be there, but because they can raise money from those big -- and it's American, big American (inaudible) which have millions, and millions and millions of dollars. And to them (inaudible) is spare change and they do it.

MR. RUSSEL BARSH: Let me -- I have two reactions to that. Fair enough, I agree. My reaction to this, first of all, I think -- and it goes to what we said. And one of the reasons that we do get stuck into litigating the government is the government finances it. You might wonder why.

MS. JEAN TEILLET: (Inaudible).

MR. RUSSEL BARSH: Why are they paying (inaudible) instead of fighting the company? Because it's a diversionary tactic. They know what the options are going to be. (Inaudible) and very much on point.

The second reflection on it is that maybe one of the things we need to look at is the investment of those financial resources the First Nations already have which -- if you include of course all the monies (inaudible) is some billions of dollars, but (inaudible) banks, liquid assets Indigenous organizations and communities have that's something. Nobody has been looking at how native organizations are banking their own dollars and what investments they're making on that.

Perhaps we should be looking at ways of using the financial capital that is already in the hands of the First Nations, both as a strategic instrument whose investments are going to have an impact on corporate thinking, but also as a way of earning money to engage in tactical (inaudible) markets. They can underestimate how many dollars are in the hands of First Nations people right now.

That means everything, consumer spending, pension funds, tribal accounts, you know, community accounts, sitting around waiting to be spent. We can't use all that money. Where do we invest it? You may be shareholders already in the companies that are oppressing.

Bernd?

MR. BERND CHRISTMAS: I just want to talk about a

point that was mentioned here. I think on the East we've had a different experience, whereby we have stopped (inaudible). There is a concerted effort to ensure that, yes, sure, there's a pipeline, but there's (inaudible) and we were able to successfully do that. And (inaudible) we never partnered up with any environmental groups and there's no need. In our mind there was no need and there still is no need to partner up with environmental groups.

On the issue of funding the way we have done it is there's 35 bands in the region, the Atlantic, and each band contributes to the court case, whether it's through their tribal councils or their bands directly. And we've been doing this now since the 1970s really and we've had some great successes. We've had Simon Gates (inaudible). We've had, we've stopped the Big (inaudible) project by the gypsum company in (inaudible) Lakes, U.S. Gypsum. We've negotiated with (inaudible) Pacific. We have (inaudible) right now by the (inaudible).

There's ways to do it but it does require a lot of participation, firstly, among the lawyers that are working these cases to not be so possessive of the case that they have. Secondly, it requires the organization of the tribal councils and bands to direct their lawyers to work together. And in the development of a strong technical

team which usually consists of environmental consultants, our own -- our own private consultants, as well as the legal counsel and the leadership.

And from what I've seen it has been very successful and yet you have to really strategize at the end of the day. If you allow that one mining road to go through, how many other people are going to get through? So that you're always keeping that in mind. That's part of the strategy, not to allow the road to go. If you've already covered it off in -- in agreements.

I always like to use examples. With Georgia Pacific (inaudible) we've covered up every possible route that we -- we've watched everyone across the country, you've taken all of the good stuff, and all of the mistakes that were made. And we've probably made some mistakes that hopefully others will learn from, and you -- then you make sure everything is covered. It does boil down to organization.

Government dollars, yes there is government dollars involved but those are usually -- now they've, the right word is, "put a cap", on funding cases. You usually don't get funded or return dollars until the Court of Appeal level, so we had to bear those costs to advance it to appeal, and it has been easier for us too. We've won,

so we've always asked for costs.

MR. RUSSEL BARSH: The cases you're bringing up, the Maritimes pipeline case is really an interesting one because, in effect, what, you know, the (inaudible) authorities did was (inaudible).

MS. JEAN TEILLET: Yes, but I think there's a big difference too, that you are 160 miles (inaudible). When you're up North 160 miles in one small band (inaudible). So you don't travel as far to bring all the people together, because it's the way people in the North live. (Inaudible)

MR. RUSSEL BARSH: Yes. Another reason for strategic coalition -- because, I mean, word gets around. If the Mi'kmaw Nation really punch away at the paper industry, like the oil and petroleum, the words gets around.

Particularly if folks know that the Mi'kmaw Nation also talks to people about Uruguay and they talk to people elsewhere. And that they may encounter the same resistance from (inaudible).

And it raises the stakes when it's clear that Indigenous nations are co-operating on these issues. And even small ones may have allies who have already demonstrated the capacity to (inaudible).

MR. BERND CHRISTMAS: Russel, just to further that point exactly, we on the (inaudible) case, for example, we got -- we asked in essence 30 people to go out and get charged. And they got charged. And it started the whole -- our Aboriginal title claims.

So our good friends out in the B.C. Interior Alliance they asked us, "How did you do all this stuff?". And we all flew over, met with them, had a big strategy session for three days and it worked. As you know, in B.C. they started that whole process as well. Not that I take credit for it, it's just that that's how it works.

The Okanagan Nation Alliance they're having problems with B.C. Gas and Southern Cross. The same thing, they asked us for information and we're sharing this information. Those are the things that can happen.

And I think that from our organizational point of view here is that as lawyers I think it's incumbent upon us to, you know, utilize our -- our friendships and our professional alliances. And start talking to each other about some of the things that can occur, whether it's up in the, you know -- defending 79 people up in the Northwest Territories or, you know, 60,000 (inaudible), right? (Inaudible)

MR. RUSSEL BARSH: Well, I hope those strategy

things are discussed among you and this kind of discussion leads (inaudible) because I think it's a tacitly essential precondition for doing this kind of stuff. It can be done. This isn't small legal office stuff. Again, globalization means global active and global alliances, and you have the right.

I have to apologize. I have to run because I have a plane to catch.

MR. DAVID NAHWEGAHBOW: Before you take off, Russel, there's a little presentation for you.

MR. RUSSEL BARSH: Oh, thank you.

MR. DAVID NAHWEGAHBOW: Thank you, very much, Russel. We really appreciate all your valuable input.

MR. RUSSEL BARSH: Thank you.

MR. DAVID NAHWEGAHBOW: I hope you catch your plane. That brings us to the close of this session and, the close to the public part of our meeting.

Our Agenda right now calls for a lunch break and then we'll be starting at 12:30, 1:00 to discuss the possibility for formulating or strengthening some international ties between Indigenous lawyers. And I'm thinking that we can ...

And that'll be followed by this kind of a business meeting of the Indigenous Bar Association.

We've got another room booked around the other side which is called the Quebec Room. We'll convene there at approximately 12:30, 1:00.

Now, to wind up, we've also got this room. So if the other room, I mean, if there's too many of us to be in that room, then we can always come over here. Okay?

Thank you, very much. I hope you all enjoyed the Conference as much as I did. Thank you, very much, for coming.

Oh, one final point, a lot of the work you haven't been able to see has been conducted by students who have been very active participants in the background of this meeting. And I just want to express my gratitude to the students. And I'd like you to all give a great and honourable applause to the students who helped in the organization of this Conference.

(CONCLUSION OF CONFERENCE)

WE HEREBY CERTIFY THAT the foregoing was transcribed to the best of our skill and ability, from taped and monitored proceedings.

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VOLUME 1

THE INDIGENOUS BAR ASSOCIATION

GLOBALIZATION: INDIGENOUS LAW IN THE INTERNATIONAL CONTEXT

12TH ANNUAL CONFERENCE - WESTIN HOTEL

OTTAWA, ONTARIO

FRIDAY, OCTOBER 20TH, 2000

8:30 IN THE FORENOON

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THE INDIGENOUS BAR ASSOCIATION

GLOBALIZATION: INDIGENOUS LAW IN THE INTERNATIONAL CONTEXT

12TH ANNUAL CONFERENCE - WESTIN HOTEL

OTTAWA, ONTARIO

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VOLUME 3

THE INDIGENOUS BAR ASSOCIATION

GLOBALIZATION: INDIGENOUS LAW IN THE INTERNATIONAL CONTEXT

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