

Draft Work plan  
for  
Response to *Corbiere* Decision



PREPARED FOR THE  
ASSEMBLY OF FIRST NATIONS  
ANNUAL GENERAL ASSEMBLY  
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# Background

## The Supreme Court of Canada Decision

### **"Ordinarily Resident" struck out of section 77 of the Indian Act**

On June 21, 1999, the Supreme Court of Canada handed down its decision in the case of *Corbiere v. Canada*. The decision struck out the words "ordinarily resident on a reserve" from section 77(1) of the *Indian Act*, which describes the criteria for eligibility to vote in elections for chief and council. It suspended the ruling for all First Nations except the Batchewana First Nation, which the case was brought against, for a period of 18 months.

All members of the Court concurred on the finding but wrote two reasons for judgement, which diverge only on the technical interpretation of the legal test for violation of s.15. In all other aspects, the Court agrees. The majority decision by McLachlin and Bastarache JJ. is less detailed than the careful and meticulous reasons of L'Heureux-Dubé J., which, in most aspects, is relied on by the majority.

### **Preliminary Analysis**

- *The denial of voting rights when leadership is chosen through a system of democracy affects significant interests members have in band governance.*

This decision is significant on a number of points. In addition to supporting the idea that off-reserve members cannot be discriminated against in relation to their participation in band governance, the court considers the particular areas in which the decisions of the band government may impact on all members, irrespective of their residence.

In particular, while it concedes that some of the matters that the band governments deal with are strictly local in nature, it points out that council's decisions may also have impact on many rights that are not strictly "local". For instance, council exerts powers over access to the reserve, management of the reserve lands, and the expenditure of band money. Since "elector" is a defined term, s. 77(1) also impacts on who can vote on the surrender of band lands. The court found that band council also exerts considerable power over safeguarding, developing and promoting sources of traditional culture and can strongly affect access of off-reserve band members to these sources. It also makes particular reference to the fact that it is through the band council that the Assembly of First Nations represents First Nations.

- *Decades of living under the Indian Act have had the effect of creating inequitable divisions among members*

The judgement does not deal with the constitutionality of Bill C-31, but states that the discriminatory effects of s. 77 have a greater impact on women and other whose ancestors may well have had no choice but to leave the reserve. The reasoning suggests that the court would not be very sympathetic to arguments against Bill C-31, but would likely support First Nations who are unable to properly service their increased membership due to insufficient support from the federal government.

The judgement includes a review of the history of the *Indian Act*, and links the creation of an off-reserve population to the historic policies toward Aboriginal peoples. In so doing, it draws a clear line between the federal government, bands and band members. It refers to access to services, with the clear implication of federal responsibility for off-reserve band members. This raises issues in relation to the need to include First Nations representatives in federal/provincial discussions impacting on expenditures for services, such as social services transfer arrangements.

- *The historical and on-going reasons for members living off-reserve are relevant*

The court appears to confirm RCAP's recommendations in relation to the need for nation rebuilding. L'Heureux-Dubé J. Notes at para. 62 of her decision:

"From the perspective of off-reserve band members, the choice of whether to live on- or off- reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental...because of the lack of opportunities and housing on many reserves, and the fact that the *Indian Act's* rules formerly removed band membership from various categories of band members, residence off the reserve has often been forced upon them, or constitutes a choice made reluctantly or at high personal cost."

It is clear that the court recognizes that neither the community nor the individual controls the options, since many of the factors outlined are beyond the control of either. As such, this lack of real choice supports the argument of federal responsibility for off-reserve members, and for the need for processes to support nation rebuilding.

- *Difficulties in implementing or failure to properly resource will not justify excluding off-reserve members*

Perhaps one of the most significant aspects of this judgment is the court's finding that the difficulties and cost of maintaining an electoral list of off-reserve band members, and setting up a system of governance that balances the rights of on and off-reserve band members were not a justification for up-holding the exclusionary provision of s.77(1). The federal government had advanced this argument. The court states that:

"Change to any administrative scheme so it accords with equality rights will always entail financial costs and administrative inconvenience. The refusal to come up with new, different, or creative ways of designing such a system, and to find cost-effective ways to respect equality rights cannot constitute a minimal impairment of these rights." (McLachlin and Bastarache JJ., para. 104)

It further states that "the possible failure, in the future, of the government to provide Aboriginal communities with additional resources necessary to implement a regime that would ensure respect for equality rights cannot justify a violation of constitutional rights in its legislation." (ibid)

The federal government is therefore obligated to provide the necessary funding for First Nations to address the issue.

- *Rights not dependent on "Indian" status*

Interestingly, the court uses the terminology "Aboriginal band members" or "band members", and does not refer to the status provisions of the *Indian Act* except in reference to Bill C-31. It is also notable that the terminology "Indian" band member is not used either. This decision does not deal directly with Aboriginal rights, nor does it discuss fiduciary obligations of the federal government. It leaves open the possibility for exemptions due to Aboriginal or treaty rights, but appears to rule out the simple remedial action of enacting

customary codes to incorporate the arbitrary exclusion of non-resident members. In addressing this, the majority of the Court indicates at para. 24 that:

"If another band could establish an Aboriginal right to restrict voting ...that right would simply have precedence over the terms of the *Indian Act*..."

At para. 112, L'Heureux-Dubé J states the steps that would be necessary as follows:

"If certain bands can demonstrate an Aboriginal or treaty right to restrict non-residents from voting, this in no way affects the constitutionality of the impugned section of the *Indian Act*. It is the order in council made pursuant to s. 74(1) bringing the band within the application of the *Indian Act*'s electoral rules, which would have to be challenged under such a claim. In analyzing such a case, it would have to be determined whether an Aboriginal right had been proven, whether the legislation as it then stands infringes that right, and whether that infringement is justified."

- *Custom Election Codes enacted to exclude off-reserve members not likely to suffice*

The decision therefore supports the concepts advanced in the RCAP report, which recognize the long-standing impacts of government interference. As noted above, however, First Nations should not assume that merely implementing "custom" provisions to exclude off-reserve members would address the issue. The fact that bands, as they currently exist, are creations of the *Indian Act* and its history make arguments based on Aboriginal and Treaty right difficult. On a more positive note, the decision clears the way for First Nations to re-establish traditional approaches to decision making and leadership selection without prejudicing or prescribing these.

- *Implications for Band Governance*

The suspension of the decision is for the specific purpose of enabling Parliament to consult with the effected groups and redesign voting provisions of the *Indian Act* in a nuanced way that respects the equality rights and all affected interests.

## Key Issues Raised

### Who Is Affected?

In addition to the Batchewana community, the *Corbiere* decision impacts on two main groups:

- off-reserve band members and
- First Nation band governments.

In its narrowest sense, the decision prohibits the exclusion of off-reserve members from voting in band elections. It is clear, however, that the court considered the need for federal consultations with First Nations and distinguished between rights which would require the input of all First Nations members versus those related to local government only. The court points out that the choice by band members to live off the reserve has been strongly influenced by factors beyond their control. These factors are often also beyond the control of the First Nations band council. These factors are the result of federal policy decisions, many of which have had particular impact on First Nations women and their off-spring.

### **What does this impact on?**

It is our position that the implications of this decision are wide-ranging, raising issues relating to governance, membership, elections, accountability and the provision of services. All of these relate directly to the relationship between off reserve First Nation citizens with their government. These are matters that go directly to the heart of rights, responsibilities and obligations which need to be explored generally on a national basis, and specifically in relation to each community.

### **Why should we address it nationally at this time?**

Over the years, we have seen the Supreme Court of Canada direct the federal government to address issues relating to First Nations in forums outside of the courts. In this case, a narrow interpretation may be favoured as the simplest way to deal with the problems raised by the federal government in their arguments before the high court. However, the Court was clearly not impressed by these, observing that administrative difficulty and potential cost implications do not exempt the federal government from its obligations.

Additionally, the issues raised in *Corbiere* are not new. They have, however, never been addressed in a methodical and comprehensive fashion. We see this as necessary, particularly in light of RCAP's observations in support of aboriginal governance and nation rebuilding. Furthermore, it falls squarely within the federal mandate as established in "Gathering Strength". In particular, the federal government committed to include First Nations as partners in design, development of policies and the delivery of programs and services. It has also committed to strengthen Aboriginal governance. Ultimately, this decision is a key opportunity to begin to address some of the most fundamental issues facing both the federal government and First Nations.

## **Potential Stakeholders**

This decision impacts on all First Nation communities and all First Nation individuals, particularly those living off reserve. The degree of impact will vary, depending on the history and circumstances of particular community. It is clear that there are communities that have suffered more severely from the consequences of the *Indian Act* system of leadership selection, while others have had few problems.

The AFN recognizes that First Nations citizens living in urban settings often face difficulty in ensuring that their perspectives are represented within their governments. While many problems are specific to individual First Nations, the AFN has been mandated to undertake work on elections, as well as on urban issues. Through the Urban Task force, the Gender Equality Unit, the Social Services Unit, as well as the AFN Joint Initiative for Policy Development (LTS), the AFN is presently addressing some of the issues raised in *Corbiere*. Despite this, work on broader governance issues which define individual and collective rights in the context of First Nations governance will need to be accelerated.

## Mandate

The AFN is mandated to undertake work on issues facing urban First Nations citizens. Matters relating to roles, responsibilities and obligations have found their way into numerous AFN resolutions over the years.

The AFN has been directed by the Chiefs in Assembly to address the issue of elections and representation of off-reserve First Nations citizens through numerous resolutions over the years. Our mandate as the only legitimate national organization representing First Nation communities is largely undisputed. It is equally noteworthy that the AFN is the only organization referred to in the Supreme Court decision.

While there is no consensus within First Nations communities or among First Nation chiefs about how membership should be dealt with, the focus group discussions demonstrated that the issues and concerns across the country are virtually identical. These relate primarily to the need for communities to be able to define and address the needs of all their members through consensus building processes, the need for support in provision of services to all members, and the need for alternative dispute resolution mechanism in cases of conflict. In addition, there is general agreement that concerns relating to treaty and aboriginal rights, the provision of services and the link between elections or leadership selection and participation in First Nations government need to be addressed with a view to identifying duties, capacities and requirements.

First Nations elections, the administration of which falls to the LTS Sector, has formed part of the Joint Initiative for Policy Development on Lands and Trust Services. The Executive Committee, represented on the Chief's Committee by Vice Chief Tom Bressette would therefore oversee Work under this work plan. In addition, the Joint Technical Committee, in which AFN and INAC technicians participate, will be closely involved in directing the work. As an ex officio member of every committee, the role of the National Chief will be imperative. This work plan and the outcome of all meetings or work on this issue will be presented to the Chiefs in Assembly at Annual General Assembly for their approval.

## Rationale

The AFN is the only organization mandated by representatives of First Nations governments from all across Canada. As noted earlier, the *Corbiere* decision explores the relationship between First Nations governments and First Nations citizens, noting that citizens must have access to the leadership selection processes within their communities. The case impacts on all First Nations governments in Canada. The AFN is therefore best placed to undertake and coordinate work with First Nations on this decision. In addition, AFN has been addressing a variety of matters, including elections, through the Joint Initiative on Policy Development (LTS). In particular, it has

- been working on the election issues and has an established mechanism for coordinated national policy development
- established a working relationship with INAC through its Joint Technical Committee
- is well positioned to coordinate a joint response by building on
  - existing regional processes in each the regions
  - an initial research base

- has an accountability structure in place through the existing Chief's Committee

## Methodology

*"...the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it."*

*Madame Justice L'Heureux-Dubé*

While the Parliament is ultimately responsible for changes to the *Indian Act*, the Supreme Court was clearly concerned that these not be made without proper and adequate input from First Nations and First Nations citizens. As pointed out earlier, most of the issues arising from this decision cannot be resolved externally, but must be addressed by First Nation communities and First Nation people, both on and off the reserve. The Royal Commission on Aboriginal People identified this need for internal "consultations" as "Nation rebuilding".

Legislative change may be necessary to implement policy options. However, the Assembly of First Nations is already working through processes such as the Joint Initiative and other initiatives, to develop policy options on elections. While this work needs to be accelerated and given greater priority, it would be premature to place matters such as this before Parliament until the various options have been fully developed

In order to undertake the activities necessary to develop a range of policy options, the Assembly of First Nations will do the following:

- 1) Develop and Implement a **Communications Strategy** to advise First Nations and First Nations citizens of the decision and its potential implications;
- 2) Work jointly with federal officials and others to develop a **Preliminary Issues Paper** outlining the range of issues and interpretations of the decision, as well as the implications of implementing various options
- 3) Through **National Focus Groups**, bring together First Nations regional and federal participants, as well as other national organizations such as National Association of Friendship Centres and Native Women's Association of Canada for at least two 1-2 day workshop to discuss potential implications and build cooperative working approach;
- 4) Through **Regional Involvement Process**, distribute informational materials, seek grass roots input into policy options, and assist communities in adapting to the ruling and addressing longer range issues;
- 5) Work with **Urban Task Force** or other appropriate forums to inform and obtain input from off-reserve First Nations citizens;

- 6) Produce a report setting out policy options and possible implementation mechanisms.

## **Timeframe**

The decision set out an 18-month timeframe before off-reserve members will be automatically included as electors. Work on ancillary issues may be longer term. In order for legislative change to occur, the federal government will likely have to commence its process by January 1999. The federal government has agreed to provide a timeline setting out the process that would be necessary should legislative proposals be put forward by November 20, 1999.

However, if this is to be a First Nations driven process, it is clear that more time may be required. As such, the potential implications of not proceeding with legislative change will have to be evaluated.

## **What needs to be done?**

### **Immediate Needs**

Certain matters arising as a result of the Corbiere decision require immediate action. As such, the AFN Joint Initiative has taken steps or is in the process of taking steps to do the following:

- Batchewana First Nation

The community that is immediately impacted by this decision has been polarized by the experience. The AFN and INAC have received requests from both the Chief and Council and the off-reserve representatives to assist in implementing the decision. The decision requires the development of a consensus within the community. As a preliminary step, the Joint Initiative has offered to facilitate a meeting of all interested parties to commence discussion to deal with the issues raised by the decision.

- First Nations facing upcoming elections

In the upcoming few months, there will be an increased likelihood of conflicts in band elections as off-reserve members who are not aware of the eighteen-month delay may demand to vote. In order to minimize these events, we will need to identify when First Nations will be holding elections. These communities will then be offered assistance in minimizing the likelihood for confrontation.

- Communication materials

The Joint Initiative will plan a special "AFN Bulletin" to address questions relating to Corbiere. Ideally, this would be completed in time for distribution at the AGA. However, given the timeframe, this may not be possible. Wide distribution of easily understood communication material is clearly needed on an immediate basis, and should include regular Bulletins to First Nations, Friendship Centres, Native Women's and other organizations, Urban organizations and First Nations households.



## **Phase I – Informing First Nations and off-reserve members** July - November

First Nations people, both on and off-reserve, need accurate and consistent information about the *Corbiere* decision and how issues related to elections will be dealt with in the short term. First Nations and First Nations citizens will need information about how INAC plans to address issues in the longer term. Phase 1 is aimed at informing First Nations and First Nations citizens of the implications of this decision.

This will require some degree of initial consensus on the range of legal and policy issues faced nationally, regionally and locally in implementing the *Corbiere* decision. Some of these have already been scoped out within the first stage of the Joint Initiative, so it may in many instances, merely be a matter of drawing on, fleshing out and advancing the discussion. It is important for First Nations, as well as the federal government to consider the potential long-term impacts of the decision and the implications of adopting adversarial positions.

### Activities

The following activities should be undertaken in the first phase:

- *Preliminary Planning Session*
  - intended to coordinate work
  - would include AFN representatives, INAC's Response Team and other government departments.
- *Think Tank on Issues – FN representatives (including off-reserve and women), INAC, PCO and Justice officials*
  - To gain consensus on issues and approach
  - Should include native women representatives, off-reserve service provider organizations , as well as federal officials
- *meetings with urban First Nation citizens*
  - information from Urban Task Force report will inform the process
  - where appropriate, friendship centres and urban service providers will be used to gain the perspectives of urban First Nation citizens
- *Regional Involvement Meetings*
  - these have been on-going within the Joint Initiative, and will continue to serve as a source of informing and gaining input from off-reserve First Nation citizens.
  - to inform First Nations communities and provide support networks
  - to gain community perspective on issues and requirements to implement decision
- *Preparation of Joint Paper on Corbiere – Identify Issues and perspectives of federal government and AFN*
  - provide an overview of issues, considerations and options from all perspectives
  - this would provide a common basis of discussion for participants
  - to be jointly prepared

## **Phase II – Developing Policy Options**

November – April 2000

- *Regional/ Local Meetings on Options*
  - to be led by regional First Nations organizations
  - gain input and obtain consensus on approach
  
- *Joint Meetings re: overcoming barriers and obstacles*
  - working sessions aimed at consensus building
  - to identify key problems and design strategies
  
- *Joint strategies to Implement a range of options*
  - working sessions to put in place implementation plans
  
- *Develop short, medium & long term strategies to assist communities in dealing with issues relating to the representation of off-reserve members*

## **Phase III – Implementation of Policy Options**

April - November 2000

- *Fast track Joint Initiative work on elections*
  - complete research, and other work already underway on elections
  
- *Capacity Building Initiatives*
  - Manuals to assist communities in developing codes
  - develop tools to assist communities in addressing political accountability, leadership selection, and representation of off-reserve
  
- *Dispute Resolution/ Intervention Mechanisms*
  - explore options to assist communities in dealing with election related disputes
  - look at national or regional appeal mechanisms
  
- *Meetings with provincial officials*

## **Communication Plan**

### **Getting the message out**

A key component of the Work plan will be the communication aspect. The potential for conflict within the communities is aggravated by a lack of information. As such, it will be necessary to undertake

activities that will inform both First Nations governments and First Nations citizens, both on and off reserve. A variety of print and multi-media materials should be utilized to reach a broad audience.

The following should be used to inform First Nations:

- PSA/Stories to Community Radio Network
- Pamphlets
- Newsletter – (preferably in time for AGA)
- Articles –
  - For Bulletin, Transition, Intercom and Aboriginal Media
  - Op-ed pieces for the non-Aboriginal media
- Web page
- Presentation Packages
  - Computer
  - Video (distributed to media)
  - Personal Presentations
- Special AFN Bulletin or Bulletin Insert (Post-AGA)

## **Personnel and Financial Commitments**

- Coordination
  - National

A commitment of personnel is required to coordinate the response within AFN and with the federal government. At a minimum, a commitment of personnel to harmonize efforts at a national level is needed. Presently, the work is being undertaken by AFN through the existing personnel of the Joint Initiative on Policy Development on LTS. However, coordination of the work associated with *Corbiere* is very demanding, and has already impacted on the rest of the work within the initiative.

Given the urgency of this matter, consideration should be given to creating, on a temporary basis, a Joint AFN/federal Corbiere Policy Unit with a commitment of personnel for a specified time period, such as 2 years. This may provide a viable means of ensuring the flow of information to the Assembly of First Nations, as well as to the government decision-makers, and would allow for access to adequate resources.

- Regional

Although there are currently regional coordinators for the Joint Initiative in each region, regional involvement relating to *Corbiere* will demand the commitment of additional personnel at a regional level, since First Nations regional organizations or regional coordinators will face increased demands to deal with *Corbiere*-related issues. In particular, it is anticipated that regions will play a pivotal role in assisting First Nations obtain information and resolve disputes.

■ Financial Resources

- There will be considerable financial implications for AFN, both regionally and nationally, associated with fast-tracking the work on elections and implementing this decision. Since the AFN funding agreement imposes certain limitations, the federal government will have to undertake to find ways of resourcing the additional activities. These will be addressed as a separate component in the work plan. As a means of dealing with the resourcing and other limitations, options relating to how to proceed must be fully explored. These could be partially overcome by creating a Joint AFN/federal Corbiere Response Secretariat with a funding commitment from federal departments. Such units have been created with the support of the Privy Council Office to undertake long-term policy and strategic planning in relation to the Millennium.
- Additional financial resources will also be required to undertake the regional involvement component. This should not be directed to the AFN, but should flow directly to the regional organizations.

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## Next Steps

- Following the direction of the Chief's Committee, a joint meeting of technicians will be held to discuss issues and approach.
- A communications strategy will be devised and communication material developed.
- The Work plan will be revised for presentation to the AGA.

