Lands, Revenues and Trusts Review - Phase 2 600

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L.R.T. REPORT

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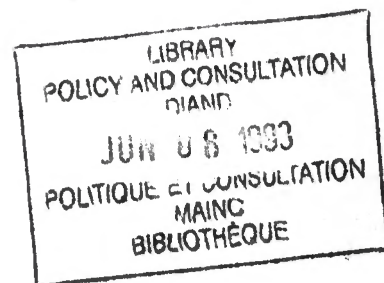
THE MAWIW COUNCIL OF CHIEFS
(BIG COVE, BURNT CHURCH, TOBIQUE)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LANDS, REVENUES AND TRUSTS

REVIEW PROCESS

FINAL REPORT ON THE MAWIW COUNCIL OF CHIEFS LANDS/REVENUES/TRUSTS CONSULTATIVE PROCESS, INCLUDING AN ENUMERATION OF VIEWS FROM THE COUNCIL'S MEMBER BANDS AND AN ASSESSMENT OF FURTHER WORK OR ACTION REQUIRED (prepared pursuant to Clause 2(e) of the Canada-Big Cove Funding Arrangement, June, 1990)

January, 1991

INTRODUCTION

On the 9th day of February, 1989 a political accord was executed by the Chiefs of the three most populous First Nations in New Brunswick. This accord formally established the MAWIW COUNCIL OF CHIEFS. The Council was the brain-child of the three original member Chiefs who saw it as a mutual support group designed to address the problem of a growing insensitivity on the part of the Department of Indian Affairs and Northern Development (D.I.A.N.D.) to the concerns of New Brunswick's larger First Nations. The overall goal of the Chiefs was to see the Council develop into a pro-active agency that would be at the forefront of efforts to change those positions, policies and procedures of the Federal (and Provincial) Government that were seen by the Chiefs as standing in the way of Indian Self-Government and Socio-Economic Development.

Given the Council's sweeping mandate, it could not help but become a participant in D.I.A.N.D.'s Land, Revenues and Trusts (L.R.T.) Review Process, first initiated

in 1986. Despite the decision of other New Brunswick First Nations to boycott the L.R.T. Review Process, the MAWIW group commenced its process-related activities in August of 1990. The centrepiece of those activities was a two-day Chiefs/Advisors Workshop on L.R.T.-related issues held on October 17th and 18th, 1990. The views of specific participants in the Workshop are summarized on the following pages. The current positions of the member MAWIW First Nations re: potential changes in the L.R.T. regime (as developed through subsequent L.R.T. Review Process meetings and through the review of various "drafts" of this Report by member First Nations' Councils) are also set out in capsulized form in this Final Report.

THE OCTOBER 17TH AND 18TH, 1990

LANDS, REVENUES AND TRUSTS REVIEW PROCESS

WORKSHOP

On October 17th, 1990 a major two day meeting on Land, Revenues and Trusts issues was convened at the law offices of Paul & Gaffney in Fredericton, New Brunswick. In attendance were the three MAWIW Chiefs (Paul - Tobique; Dedam - Burnt Church; Levi - Big Cove), MAWIW L.R.T. Project Advisor, Ronald Gaffney, Burnt Church First Nation's Government Advisor, Alex Dedam, Tobique First Nation's Assistant to Chief Paul, Warren Tremblay, and three Burnt Church First Nation's Council Members (Dedam, Somerville and Dedam).

The meeting was the MAWIW Organization's first brush with L.R.T. subject matters, prepared in a "condensed" form: 118 pages of L.R.T. Briefing Notes were placed in front of each of the MAWIW delegations; These notes covered the whole spectrum of L.R.T.-related issues including:

(1) General Observations;

(2) Bands, Band Councils and By-laws;

(3) Land Management;

(4) Land Registry;

(5) Indian Moneys/Individual Accounts;

(6) Estates;

(7) Band Membership;

(8) Elections;

(9) By-laws/Enforcement/Indian Justice System;

(10) Indian Sovereignty.

The October 17th meeting opened with Mr. Gaffney delivering a brief address on the nature of the Federal L.R.T Review Process. Immediately thereafter the Briefing Notes relating to some "General Observations" on the Review Process were discussed by the group.

Chief Stewart Paul (Tobique) stated that he was disturbed by the fact that the Department of Indian Affairs and Northern Development (D.I.A.N.D.) seemed to be focussing on ways and means of changing its relationship with the First Nations without exhibiting any real willingness to radically change the structures which underpin that relationship. It was his opinion that the L.R.T. Review would ultimately result in a significant enhancement in D.I.A.N.D.'s control over, and involvement in, Indian Affairs via a revamped Indian Act. At the same time, while D.I.A.N.D. and/or the Government of Canada generally were attempting, through the L.R.T. Review Process, to make the Indian Affairs/Indian Act system work more efficiently,

the First Nations were poised to push for the total destruction of that very system!! The First Nations' and D.I.A.N.D.'s views seemed to be diamentrically opposed: The First Nations want an end to all forms of accountability to Federal, non-Indian entities; The Government of Canada wants to introduce new forms of accountability. Chief Paul felt that Federal Government Policy was reflected in the fact that the mandate for D.I.A.N.D.'s L.R.T. Review Process did not include an analysis of Indian government "sovereignty" options.

As the MAWIW group moved on to the topic of Bands, Band Councils & By-laws a general discussion ensued over various practical, day-to-day difficulties Indian Bands were encountering in the exercise of their limited (ie. Indian Act) powers. Chief Stewart Paul (Tobique) noted some of the difficulties his First Nation had experienced when acting in its "official capacity" in dealings with non-Indian entities. Most of these difficulties arose out of non-Indian uncertainty about the legal status of Indian Bands. Chief Paul rejected incorporation as a means of "firming up" the legal status of his Band, favoring instead an approach based on the American Indian model wherein First Nations would be recognized by Canada as "sovereign" governments, with all the protections and immunities typically afforded to sovereigns. Chief Albert

Levi (Big Cove) expressed concern that if the "legal status" of Indian Bands were to change, allowing First Nations the unfettered right to contract, borrow funds, etc., then the traditional protections available to Bands, Indians and their Reserve lands (example: protection from attachment and seizure under legal process) might also disappear in the process. A consensus began to emerge among the participants that a fine balance must be maintained by the First Nations in terms of "trading off" their legal protections in return for expanded powers and freedom of action.

The changing nature of Band Administrations was canvassed by the meeting, including the way in which changes in the L.R.T.-related areas might require First Nations to develop more sophisticated administrative apparatus and greater "built-in" protections for the rights of individuals. Chief Wilbur Dedam (Burnt Church) noted several references in the L.R.T.-related Briefing Notes to the potential need for Bands to develop "Conflict of Interest" guidelines. Dedam cautioned that the MAWIW Reserve Communities are so "close knit" that conflicts of interest inevitably arise and that frequently those conflicts cannot be avoided: Dedam noted the case of a C.E.I.C. (ie. Employment & Immigration) contract the Burnt Church First Nation was forced to surrender because a "conflict of

interest" clause contained therein prevented the only qualified individuals in the First Nation's Community from working on the project! Chief Stewart Paul (Tobique) explained that if stringent "Conflict of Interest" guidelines were imposed on his First Nation it would be virtually impossible for a sitting Council to make land allotments to its Band Members.

The MAWIW meeting proceeded to move on to the issue of the sheer volume of "lawmaking" First Nations would have to engage in should their recognized jurisdictions be expanded - provided those First Nations chose to exercise their jurisdictions in full. The Chiefs and advisors were staggered by the variety of lawmaking powers that they might be called upon to exercise. Still, the MAWIW Chiefs were not afraid to state their view that the Powers and the Responsibilities for lawmaking should be left with the respective Chiefs and Councils alone - Ministerial "second-guessing" in the form of powers of disallowance must be totally eliminated. Chief Stewart Paul (Tobique) recommended that Ministerial Disallowance might be replaced by some form of "advisory dialogue" similar to the discussions now taking place between Bands and the Federal Indian Taxation Advisory Board relative to Band Real Property Tax By-laws. Chief Albert Levi (Big Cove) expressed an

interest in the procedures found in Section 85.1 of the Indian Act relative to the approval of intoxicant By-laws without Ministerial Review, and the possibility that such procedures might be extended to other areas of First Nations' by-law making authority. Chief Stewart Paul (Tobique), in turn, questioned the very legality of the Minister alternately allowing, and then disallowing, identical by-laws relating to Band Fishing submitted by two different Bands, respectively (citing specific examples when this occurred).

The MAWIW discussions on the limits imposed by Canada on the exercise of Band powers inevitably led to a discussion of First Nation's "Sovereignty". The MAWIW First Nations' leadership were adamant that imposed "limits" on their exercise of power were illegitimate. Chief Stewart Paul (Tobique) commented that while it would be unrealistic for the MAWIW First Nations to ignore the Indian Act and its limitations, every effort should be made to ensure that, in the future, new legislation devoted to Indian Affairs is drafted in such a manner so that its provisions are "without prejudice" to the First Nations' position on their inherent sovereignty. Chief Paul went on to state that he was forced to admit that his First Nation's acceptance of any legislation similar to the Sechelt Self-Government Act would lead to a vast improvement over the status quo in terms of the exercise of power by his Band - but, at the same time, it would certainly compromise

his views and his First Nation's position on the issue of inherent Indian Rights and Sovereignty.

As the Council continued with its deliberations on the L.R.T. Briefing Notes, Land Issues emerged to dominate those discussions. Chief Albert Levi (Big Cove) identified a need for Band Councils to be able to expropriate allotments made to individual Band Members when the welfare of the Band as a whole demanded the same. Alex Dedam (Burnt Church) cautioned that in situations involving First Nations' Councils making land allotments to sitting Council Members/family members, or in cases involving a need to expropriate individual allotments, referendum provisions should be triggered to serve as a public "check" on such government actions - and on the inherent potential for abuse in such situations. Chief Stewart Paul (Tobique) expressed annoyance with the fact that while First Nations do not have the power to expropriate individual Reserve land allotments for public purposes, neither do they have a clearly recognized power to buy additional and available lands off, but near to, their Reserves and add them to the said Reserves - that is, without Federal (and sometimes Provincial) approval, which is rarely forthcoming.

The scope of the Minister of Indian Affairs' "trust responsibility" as it relates to Indian lands, and

beyond, was also canvassed by the Chiefs, who expressed bewilderment at just what aspects of the First Nations - Federal Government Relationship were embraced by the Minister's Responsibility and/or the Section 91(24) B.N.A. Act "Trust Responsibility". American court decisions which indicate that the "trust responsibility" of Congress vis-a-vis the American Indian Nations includes a duty to "advocate" for Indians and Indian issues/interests received favorable comment from the MAWIW Chiefs.

As the nature of the L.R.T. Review Process began to reveal itself to the Chiefs, each commented that the Review materials prepared for D.I.A.N.D. (ie. Consultant's Reports, Executive Summaries, etc.) seemed to address issues above and beyond those originally mandated by D.I.A.N.D.: The Review appears to have taken on a "life of its own" given that most of the Consultants - like the First Nations - seemed to realize that the Indian Act is not an appropriate foundation upon which to build any new relationship between Canada and Indian Peoples. The Act is beyond redemption; New vehicles for change must be found. Chief Stewart Paul (Tobique) expressed the hope that Ottawa is not so totally blind to the real aspirations of the First Nations that it will convince itself that Indian Act amendments can adequately address the broad spectrum of Indian demands for change in Canada - for if that were to prove to be

the case, many more "Oka"-type situations will emerge across the land, as a direct result of Indian frustrations boiling over due to the lack of substantive changes in the Federal-First Nations Relationship.

Alex Dedam (Burnt Church) indicated that there exists a legitimate area of uncertainty and concern for both the First Nations and the non-Indian governments with respect to "self-government" options for very small First Nations; ie. Is it really in the best interests of Canada and the larger First Nations that resources be devoted to furthering full self-government for all 15 Bands in the Province some of which have only a handful of families as members? Dedam suggested that self-government options for the smaller First Nations might be best explored on a Tribal or District Council basis - ie. that all First Nations would be recognized as exercising a full range of self-government powers but the smaller First Nations could delegate the authority to actually carry out those powers to Tribal or District Council entities.

Frustrated with the overall lack of Federal (and Provincial) Government responses to calls by the First Nations for the negotiation of comprehensive Eastern Land Claims and Treaty Entitlements, Chief Albert Levi (Big Cove) suggested that the only alternative may be to follow

the example of the Maine Indian Nations and launch massive Court challenges aimed at changing the status quo; Simon Dedam (Burnt Church) however, expressed some scepticism with that approach; He noted that until the political will for change emerged on the government side, no Court victories would result in any real, significant change in the situation for the First Nations: Non-Indian governments have far too many instruments of control that they can use to thwart the implications of favourable Court decisions.

The approaching meeting with Assistant Deputy Minister Don Goodwin was the next item discussed at length by the Chiefs: Each speculated on the type of presentation Goodwin might be putting together for the MAWIW group. Given that D.I.A.N.D. had moved into "Phase III" of its L.R.T. Review Process, a number of Chiefs were concerned that the Assistant Deputy Minister might be looking for very substantive proposals from MAWIW on how to change the Federal-First Nations Relationship; But MAWIW was still at the stage of debating many of the philosophical and political concerns related to the L.R.T. Review, with discussions on "substance" yet to come.

Chief Albert Levi (Big Cove) queried if additional resources would be made available by D.I.A.N.D. to MAWIW

in order for the Council to "flesh out" some of the First Nations' more substantive proposals for amendments in the L.R.T. area. Most Workshop participants expressed the belief that D.I.A.N.D. would be prepared to do so. Although detailed proposals for change - in the form of "draft" Indian Act amendments, or the like - might not emerge from the MAWIW Process, the Chiefs expressed their gratitude for being given an opportunity to study L.R.T. issues in some detail, thereby becoming "L.R.T. literate"; But the sheer volume of L.R.T.-related materials, and the enormous amount of time which Chiefs/Councils would have to devote to the subject matter in order to completely grasp its complexities, proved to be of great concern to the Workshop participants: Was this multi-faceted Review Process meant to herald sweeping Indian Act amendments or other significant legislative changes? Were the First Nations on the verge of a serious disruption in their existing relationship with Canada? The Review Process itself might be a "sign" that the Indian World was about to be turned upside-down.

Chief Stewart Paul (Tobique), while bemoaning the complexity of D.I.A.N.D.'s Review Process, and the materials which emerged from the same, took the position that - for better or worse - a shocking change in the Federal-Indian Relationship might be "just what the doctor

ordered". Paul's fear, as expressed to the MAWIW group, was such that "consultative" processes, like the L.R.T. Review, might in fact slow down the First Nations' drive for real change. While refusing to dismiss the possibility that Canada might have a "hidden agenda" lurking in the shadows of the L.R.T. Review Process, Paul stated that the debate over Government/Consultant/Indian issue-specific proposals emerging from the Process could take decades to complete if those same proposals were examined, revised and re-examined by the parties. Paul suggested that MAWIW should be committed to rapid change on a "broad front" - not a "piece by piece" dismemberment and analysis of the Federal-Indian Relationship. In defining "change on a broad front", Paul identified Canadian constitutional change as being the only option which may be acceptable for consideration by the First Nations if they are truly committed to achieving significant change on the basis of their own Agenda.

Alex Dedam (Burnt Church) suggested to the MAWIW group that a proper method for Canada and the First Nations to address the subject matters embraced by the L.R.T. Review would be via Treaties flowing from "broad" Constitutional provisions - ie. a First Nations' "Charter" or "Declaration" of Rights set out in Section 35 of the Constitution Act 1982. This solution - and the great flexibility that it would afford to the very diverse First Nations - found great favor with the MAWIW Chiefs.

But given the reality that Constitutional Change may be many (<u>many</u>) years away, the participants in the Workshop asked themselves the question: "What form should any "interim" solutions take?". <u>Alex Dedam</u> (Burnt Church) noted that many, if not most, First Nations across the Country were not prepared to entertain any "interim" solutions - those Nations want to see acceptable constitutional amendments put into place, or nothing at all. Was this the <u>MAWIW</u> position? Chief <u>Stewart Paul</u> (Tobique) indicated that the "all or nothing" approach had never been the <u>MAWIW</u> way, although there was a good deal of favorable sentiment for that stance among the three Chiefs. Yet Chief <u>Paul</u> noted:

> "Hell, everytime you hold an election [pursuant to the dictates of the <u>Indian Act</u>] you're being co-opted".

Likewise the pressing social problems on the three Reserves rarely allowed the Chiefs to adopt high-minded, but inflexible, approaches to problem solving. The <u>MAWIW</u> position might be best summed-up along the lines of:

> "Aggressively push for the <u>Ideal</u>, but make the <u>Reality</u> work for you as best you can".

The <u>MAWIW</u> Chiefs seemed to agree that past experiences had turned them all into hard-core Realists.

The Chiefs' discussions on the need for Realism brought the Workshop around to a review of some very practical problems faced by the First Nations in the area of First Nations' Elections: The Indian Act's vagueness as to when Band Elections must be called, when a Chief must call his first Council meeting together, and the lack of references in the Act/Regulations to Inaugural or "Swearing-In" Ceremonies were all touched upon. The October 17th MAWIW meeting drew to a close with the Chiefs resolving to continue with their examination of the L.R.T. Briefing Notes the next morning.

The October 18th L.R.T. Workshop session opened with Mr. Gaffney's review of the Land Management subject area: Alex Dedam (Burnt Church) noted problems with the "inflexible" nature of the "C.P." (ie. Certificate of Possession) interest vis-a-vis individual Reserve allotments (ie. inability to grant "easements", etc.). Chief Albert Levi (Big Cove) expressed astonishment at the rigidity of the Reserve land-holding system. He pointed out the irony in the fact that while Indians traditionally had problems with On-Reserve title transfers being recognized by D.I.A.N.D., Canada (and before that, New Brunswick) had few problems when transferring huge blocks of Reserve land out of Indian hands altogether. It seemed that in the past it was much easier to alienate land to non-Indians

than it was to pass "title" between and among Indians. In connection with the discussions on the land alienation question, the Chiefs vented their anger with D.I.A.N.D.'s past practice of issuing "indefinite" permits for non-Indian governments/corporations to occupy and use Reserve lands. Many such permits are in place today and give rise to resentments On-Reserve.

Chief Stewart Paul (Tobique) led a discussion on some specific examples of outright fraud and intimidation being used by non-Indian authorities to acquire Indian lands. Chief Paul commented that he could not think of a single example in the history of the Province of a Reserve land surrender being initiated by Indian People - in nearly all cases non-Indian squatters or governments coveted Indian lands and influenced D.I.A.N.D. (or earlier, Provincial Authorities) to begin alienation proceedings.

A delegation to the First Nations of the Minister of Indian Affairs' administrative authorities in the area of land management was a concept in which the MAWIW Chiefs were greatly interested as a means of ending notorious non-Indian interference in Indian land matters; But Chief Stewart Paul (Tobique) cautioned that if delegation of land management functions to the Bands were in any way to be interpreted as a means of absolving Canada of its

responsibilities for past instances of mismanagement of Indian lands then he wanted no part of delegation. Tobique, he said, would only be prepared to assume full authority over all aspects of land management when Ottawa showed some willingness to rectify the consequences of its past mismanagmeent of the Tobique Indian lands via certain accommodations and the payment of compensation. These same sentiments were echoed by the other member Chiefs. A review of the problem of individual "allotments by custom" On-Reserve ended the Chiefs' analysis of Land Management matters: Lack of recognition by the Act/D.I.A.N.D. of this practice has led to land management chaos on many Reserves where the "C.P." system has either not taken hold or has been rejected by Reserve residents. The MAWIW Chiefs resolved to push for changes in the L.R.T. regime which would allow for the recognition of customary individual land interests.

The distinctions between "Capital" and "Revenue" monies referred to in the Indian Act, and Indian Affairs program dollars which flow to the various Bands pursuant to "contribution agreements" were explained to, and discussed by, the workshop participants. Confusion over how certain funds were "classified" as either "capital" or "revenue" and resentment over what were viewed as outdated and meaningless controls on the accessing/expenditure of such funds dominated the group's discussions.

Moving on from land-related matters, the MAWIW Council returned to an examination of First Nations' Elections (briefly touched upon under the auspices of other subject matter headings). The possibility of utilizing an Electoral "District" or "Section" system to provide for voting by Off-Reserve Band Members was debated by the group: While there was interest in the concept, the Chiefs felt that such a system should only be implemented as part and parcel of a comprehensive reform of the Indian Election System.

The merits of holding "Band Meetings" were discussed by the Workshop participants, who unanimously endorsed the need for membership input vis-a-vis the business of governing First Nations, but noted that Band Meetings were rarely productive, given the lack of regulations on the conduct of such Meetings: some Band Meetings tended to deteriorate into mere "gripe" sessions without a focus.

Lack of election "recount" provisions, provisions relating to Election Financing and provisions respecting Candidate Money "Deposits" were all identified as deficiencies in the current Indian Elections regime. All of the MAWIW Chiefs admitted to being favorably disposed towards their Bands reverting to the practice of "Elections by Custom" so that many of the regulatory "gaps" that now

exist could be closed by the Bands themselves, in their own fashion. Voting by "proxy" was a practice that drew an unfavorable reaction from the Workshop's participants - bad experiences with the practice as carried out by Provincial and National Indian Political Organizations being a key factor.

Chief Albert Levi (Big Cove) spoke of his aversion to the practice of election "appeals", as they have come to be utilized pursuant to the Indian Act: While expressing no difficulty with the concept of election appeals per se, Chief Levi noted that on many Indian Reserves "appeals" have become no more than an instrument of vengeance in the hands of disappointed supporters of losing candidates. Mrs. Wilbur Dedam (Councillor, Burnt Church) suggested that there would be fewer election appeals if individuals were forced to pay filing fees/submit money deposits in connection with the launching of such "appeals" - the fact that the procedure is "free" tends to make it attractive.

Elimination of D.I.A.N.D.'s role in Indian Elections/Appeals was favored by all the MAWIW Chiefs: Arguments to the effect that D.I.A.N.D. maintained its role in the Electoral Process in order to protect the rights of individual Indians were summarily rejected by the Chiefs; Control not Protection was the motive behind D.I.A.N.D.'s participation in Indian Electoral affairs.

Alex Dedam (Burnt Church) brought the MAWIW group around to a debate as to whether Bands should exercise present or future powers *via* Section 81 *Indian Act* "By-laws". Chief Stewart Paul (Tobique) expressed his annoyance with the whole "by-law" concept, as the term implied that Indian laws were subordinate laws, passed by subordinate governments; It was Paul's view that Indian First Nations' governments represent a "third order of government" in Canada, and were on an equal footing with the Federal and Provincial governments: The manner in which Indian law-making authority is exercised must be referrable to the true status of First Nations' governments. Alex Dedam (Burnt Church) noted that any attempt by Canada to arrive at a purely legislative solution to Indian problems would be rejected and subverted by the First Nations because of the stigma of "subordination". First Nations watched in the past as Indian legislation was changed over their strident objections (*ie*. the Bill C-31 "Indian Act" experience): Who is to say that liberal, beneficial Indian Self-Government legislation enacted by a benevolent Canadian Government might not be repealed or amended in a very negative fashion by future Governments? The First Nations are looking for stronger guarantees of their place in the Canadian Federation than legislation can ever hope to offer.

But Chief Stewart Paul (Tobique) questioned whether or not the MAWIW discussions were once again venturing into the realm of the "idealistic". Should the MAWIW First Nations reject each and every recommendation for change made by Canada if those recommendations do not conform to MAWIW's vision of what "ideal" solutions to Indian problems might involve? Obviously the "tug of war" between the First Nations' proposals for Canada's recognition of inherent Indian powers, and solutions put forward by Canada involving powers delegated to the First Nations via legislation, will not soon fade away; But regardless of what the future may hold for the Indian Peoples of Canada, MAWIW is of the opinion that the process of dismantling the Department of Indian Affairs must be accelerated in the coming months. Alex Dedam (Burnt Church) stated his view that D.I.A.N.D.'s Regional Office staff had outlived their usefulness; Chief Albert Levi (Big Cove) noted that there will always be a need for a "Minister of Indian Affairs" - given the special status of Indian Peoples within Canada, and the special relationship that exists between Canada and the First Nations - though in the future D.I.A.N.D.'s overall staff need not be very large.

Chief Stewart Paul (Tobique) added that he is as concerned with eliminating a mentality that exists within D.I.A.N.D. as he is interested in eliminating staff

positions: Paul noted that it has become abundantly clear over the past two or three years that D.I.A.N.D.'s efforts to cater to the needs of the smaller Bands in the region have reached a point where those efforts have undermined the progress of the larger Bands; "Formula Funding" that penalizes the larger First Nations, coupled with the "District Council" concept [from which MAWIW has been excluded] and a refusal by D.I.A.N.D. to pursue policy initiatives with the larger First Nations alone have all contributed to an environment wherein the drive for self-government and economic development by the more populous First Nations has been blunted.

The final workshop session held during the afternoon of October 18th focused on the twin problems of By-Law Enforcement and the need for an "Indian" Justice System. The clash between Indian by-laws/rights and Provincial laws of "general application" was briefly discussed - all of the Chiefs being of the opinion that the inherent jurisdiction of the First Nations should be recognized by Canada/New Brunswick as ousting the application of Provincial laws within Indian territories; But as an "interim" solution, a very liberal, greatly expanded "Section 88" [Indian Act]-type provision should be included in any new Indian legislation proposed by Ottawa.

The MAWIW Chiefs moved on to a discussion of what was meant by the term "Customary Law", and how the "customary laws" of the Mi'Kmaq and Maliseet Nations might acquire standing in Canadian eyes. Chief Stewart Paul (Tobique) expressed no great reservations concerning suggestions that Indian customary laws should be codified - the need for "certainty" in law enforcement outweighing the desire by some First Nations to keep customary law "pure" in terms of its unwritten characteristics. Alex Dedam (Burnt Church) adopted the opposite view, arguing that the "essence" of customary law - ie. resolving community disputes on the basis of tradition and universally accepted past practice - would be stripped away if the law were "codified". Chief Wilbur Dedam (Burnt Church) indicated that today, "customary law" is applied informally in his community to solve minor disputes - and that application has been successful; But if Mi'Kmaq customary law was "codified" differences over "interpretation" of the law would emerge and the whole system would soon break down. Chief Albert Levi (Big Cove) favored some form of codification taking place for the simple reason that Mi'Kmaq customary law was in the process of being lost and should be preserved in written form if the Indian Oral Tradition is fast disappearing.

Chief Stewart Paul (Tobique) headed up a discussion on the link between the preservation of Indian Customary Law and the creation of indigenous Justice Systems - one serving as a vital support for the other. He cautioned the Chiefs that "opting in" to an Indian Justice System must be a matter that the MAWIW First Nations study in depth, for while the non-Indian Justice system has not served Indian needs, is it true that the First Nations are really prepared to try, fine and maybe incarcerate their own people? The responsibilities associated with administering Justice to a Community would be enormous. Chief Paul likened Indian demands for their own Justice System to the old adage:

"Be careful what you wish for,
- it may come true."

Still, Paul maintained, "fear of the unknown" should not paralyze First Nations into inaction on the Justice System question: First Nation's governments once administered Justice to their peoples - and they could do so again. These comments prompted the other Chiefs to endorse an exploration of the Justice System concept - possibly using provisions found in Section 107 of the Indian Act as a "stepping stone" to the creation of a full-blown Tribal Court System patterned on American examples.

On that note MAWIW's two-day Workshop on L.R.T.-related subject matters drew to a close.

MAWIW POSITIONS ON PROSPECTIVE CHANGES

IN SELECT L.R.T.-RELATED AREAS

The MAWIW L.R.T. Review Process meetings, including a November 15th meeting between the MAWIW Chiefs and Assistant Deputy Minister (L.R.T.-D.I.A.N.D.) DON GOODWIN, focussed on the following subject areas:

1. General Observations;
2. Bands, Band Councils & By-Laws;
3. Land Management;) Discussed as one unit
4. Land Registry;)
5. Indian Moneys/Individual Accounts;
6. Estates;
7. Band Membership;
8. Elections;
9. By-laws/Enforcement/Indian Justice System;
10. Indian Sovereignty.

Out of these meetings emerged various "consensus" positions adopted by the MAWIW First Nations, based on a selection of "preferred options".

Technically-speaking, the issue of the recognition by Canada of an inherent First Nation's Right to Self-Government via the Constitution Act 1867 to 1982,

legislation, new "Treaties" or Land Claims Agreements would fall outside of the ambit of the L.R.T. Review Process; But the MAWIW COUNCIL would have been remiss if during the course of its own Review Process it did not indicate to D.I.A.N.D. that the "most preferred option" of the MAWIW First Nations for change in the L.R.T. regime would be a complete realignment of its L.R.T. relationship with Canada along the lines of a new "Government to Government" Relationship. This does not mean, however, that MAWIW would never entertain what might be classified as "interim" sclutions to existing problems in the L.R.T. field, as presented by D.I.A.N.D.: Regardless of the MAWIW First Nations' unshakeable belief in their inherent jurisdiction over the L.R.T. subject matters, those First Nations recognize that they are currently "trapped" within an Indian Act legislative "web" that cannot be easily ignored or dismissed; But MAWIW is bent on finding immediate ways of loosening the "web", and reducing the role of D.I.A.N.D. in the everyday affairs of the member First Nations. Yet suggestions by D.I.A.N.D. and/or their Consultants on how to accomplish that First Nations' goal, though admirable, must be recognized for what they really are: short-term "solutions" for First Nations who are determined to achieve a full recognition of their internal sovereignty. Thus "Recognition" of the MAWIW First Nations' internal

sovereignty is the MAWIW Council's "preferred" method of resolving its L.R.T.-related difficulties with D.I.A.N.D., and that very fact is reflected in the following analysis of MAWIW positions on select L.R.T. subject matters.

The following L.R.T. subject matters are "broken down" into MAWIW perspectives on the preferred method of changing the "government to government" relationship vis-a-vis that particular subject area with other, "less favorably received" options being discussed immediately thereafter. Although the MAWIW positions are quite "general" in nature (given the short time frame established for the Council's Review Project and the fact that it was entering into the overall Federal Review Process at quite a late date) the Council believes that it has, through the enumeration of its various positions, made a substantial contribution to D.I.A.N.D.'s efforts at obtaining concrete First Nations' input on the existing L.R.T. Regime and how to change it.

I. GENERAL OBSERVATIONS

MAWIW'S PREFERRED METHOD OF CHANGING THE FIRST NATIONS-GOVERNMENT RELATIONSHIP AS IT IMPACTS ON THE VARIOUS L.R.T. SUBJECT AREAS:

Express recognition by the Courts, or by the Constitutional Document itself, that Section 35(1) of the Constitution Act 1982 contains the inherent First Nations' Right to, and inherent First Nations' Powers of, Self-Government.

Other Options (in order of preference):

(1) Recognition by Canada via individual "Nation to Nation" Treaties or Land Claims Agreements of inherent First Nations' Rights to Self-Government, supported by complementary Federal and, when required, provincial legislation;

(2) First Nation-Specific Legislation similar to the Sechelt Self-Government Act;

(3) New First Nations' Government legislation similar to the never-implemented Bill C-52, An Act Relating to Self-Government for Indian Nations;

(4) Enactment of new pieces of Indian legislation complementary to an amended, or the existing, Indian Act designed to address specific problem areas; examples: new Indian Land Act, new Indian Family Law Act, etc.;

(5) A significantly amended Indian Act which would allow First Nations to "opt-in" to the exercise of a whole

range of vastly increased, but delegated, powers/authorities;

(6) Substantial amendments to the Indian Act allowing First Nations more flexibility and options in terms of decision-making;

(7) The Status Quo.

II. BANDS, BAND COUNCILS, BY-LAWS

MAWIW'S PREFERENCE

RECOGNITION BY CANADA OF THE INHERENT AND EXISTING POWER OF INDIAN TRIBES AND THEIR SUB-UNITS - THE FIRST NATIONS - TO:

- Adopt and Operate under a form of government of their own choosing;

- Define the conditions of membership in their collectives;

- Exercise Police Powers in Civil and Limited Criminal Areas within and (in certain instances) without Indian Territories, including the right to regulate the conduct of individuals and the domestic relations of members of the collective, levy taxes and regulate property;

- Administer Justice in an Indian fashion;

- Exclude Persons from Indian Territory;
- Organize and Regulate Internal Commerce;
- Establish Rules relating to Sovereign Immunity and Protection of Indian Property from Law Suits.

This recognition could be _via_ the _Constitution Act 1982_ or Negotiated Treaties/Land Claims Agreements and subject to mutually-agreed upon limitations contained therein.

Other Options (in order of preference):

(1) Canada would recognize, in accordance with either First Nations-Specific Legislation _or_ generic Self-Government Legislation allowing for the development of First Nations' governing "Constitutions", and subject to reasonable limitations contained therein, the exercise by First Nations' Councils or other Traditional Governing Bodies of the following powers:

(a) the power to establish criteria for, and regulate membership in, the First Nation;

(b) the power to govern the use of First Nation's property, including rights in relation to expropriation, descent of property and residence;

(c) the power to direct and control the organization and administration of the First Nation's government;

(d) the power to regulate and establish rules with respect to First Nation's elections, the qualification of electors/candidates, and the holding of Referenda, Plebiscites, Initiatives and "Recall" votes;

(e) the power to manage, develop, protect and regulate the First Nation's land, water, fish, wildlife, mineral, timber and other natural resources, including power over environmental protection within Indian Territorial boundaries;

(f) the power to enact laws relating to certain Criminal Offences, Juvenile Crimes, Civil Disputes, Child Custody Proceedings and other Domestic Relations matters;

(g) the power to establish, staff and operate First Nation's Courts and their requisite infrastructures;

(h) the power to appoint First Nation's law enforcement officers, provide for policing and prosecutions, and if need be, correctional facilities;

(i) the power to enact laws respecting public health, hygiene, and safety;

(j) the power to appropriate funds and manage the economic affairs and enterprises of the First Nation;

(k) the power to license trades, businesses, professions, charities and other institutions;

(l) the power to subdelegate the authorities conferred on the First Nation's Council to other Indian bodies;

(m) the power to levy taxes, service charges and user fees;

(n) the power to provide for a system of First Nation's financial accountability;

(o) the power to deal with the encumbrance, assignment and disposal of First Nation's land and other assets, with power to regulate zoning, land use planning and community development;

(p) the power to enact laws relating to public works, community facilities, and the use, repair and destruction of buildings and roads;

(q) the power to design and provide Social Services, Housing and Educational Services to the First Nation;

(r) the power to enter into jurisdictional and other arrangements with non-Indian governments;

(s) the power to legislate generally for the peace, order and good government of the First Nation.

- First Nations would be recognized by Canada as having all of the powers and attributes of "natural persons" including the powers to contract, acquire and dispose of property, expend, borrow or invest moneys, and sue or be sued, subject to various limitations respecting the bringing of actions and the execution of judgments against First Nations.

- With respect to matters involving the amendment of a First Nation's "constitution", land sales by the collective, and the imposition of taxes or other user fees and collective charges, the power of the First Nation's Council, or other governing body, would be restrained by Notice/Publication of Laws requirements, and by some form of approval by a percentage of the electorate.

- In addition to provisions relating to the establishment of a First Nation's <u>Court System</u> with a Civil and limited Criminal Jurisdiction, any new Self-Government <u>Act</u> and resulting First Nation's "constitutions" should provide for the establishment of administrative tribunals in <u>key areas</u> where the need to protect the rights of individuals are most acute (examples: Tax Assessment and Election Appeals).

- Application of Provincial laws to Indian Territories would be made subject to:
  (i) Treaties and Land Claims Agreements;
  (ii) First Nation's Constitutions;
  (iii) Band/Government Jurisdictional Agreements;
  (iv) Indian Customary Law as reflected in laws enacted by the First Nations;
  (v) provisions of First Nations Specific or generic Self-Government Legislation and any other Federal Legislation.

- While Ottawa would have the power to accept or reject "constitutions" as developed by the First Nations (based on an objective process involving the relevant First Nations meeting certain basic and <u>universally accepted</u> criteria), Ottawa would

have no further "veto" power or power of disallowance over First Nations' laws once such "Constitutions" were in place.

- The Federal "Trust" Responsibility as embodied in Section 91(24) of the British North America Act would remain intact, as would the general inalienability of Indian land title (except via a formal and wholly voluntary Surrender) along with its "collective" character: However, all land management functions - ie. granting of "C.P.'s", Permits, Leases - would be carried out at the First Nations' Community level.

- The MAWIW First Nations would ultimately like to see D.I.A.N.D.'s (or a new Federal entity designed to replace D.I.A.N.D.) role reduced to one of providing First Nations with Support Services, ie: Education and Training; Advisory services and Services with respect to the preparation of "model" laws and "constitutions" along with an "advocacy" role vis-a-vis the Provinces. D.I.A.N.D. would also retain a role in the negotiation of Treaties and Land Claims Agreements.

(2) The Indian Act might be amended in order to:

(a) Clarify the legal status of Indian "Bands" in terms of their right to contract, purchase land, borrow funds, etc.;

(b) Define the "Band Council" as the Band's Executive Arm in terms of its exercise of legislative and executive powers;

(c) Provide for the indemnification of Band Councillors when they make decisions and act in "good faith";

(d) Provide Bands with a process whereby the Minister could not disallow by-laws without first providing Bands with Notice of the pending disallowance and an opportunity to be heard;

(e) Provide Bands with the power to subdelegate functions carried out pursuant to their by-law authority to other entities (ie. Health Boards, Family Services Entities, etc.);

(f) Expand the list of S.81 authorities (and make the necessary other amendments to the Act) to include, at least, First Nations' control over:

(i) Health Care;

(ii) Education;

(iii) Social Services, including Child Care Protection and Placement;

(iv) Environmental Protection;

(v) Economic Development;

(vi) Land Management;

(vii) Community Infrastructure;

(viii) Public Order;

(ix) Administration of Justice;

(x) Elections and Election Appeals;

(g) Provide for the investment of Band Capital monies under Band Council direction (via a trust instrument) and provide for full Band Council control over the collection and expenditures of Revenue monies;

III. LAND MANAGEMENT and LAND REGISTRY

MAWIW'S PREFERENCE

THAT CONTROL AND MANAGEMENT OF ALL LAND-RELATED FUNCTIONS WOULD REST AT THE FIRST NATIONS' LEVEL, SAVE FOR FEDERAL INVOLVEMENT IN THE ABSOLUTE SURRENDER OF INDIAN TERRITORY; INDIAN TITLE WOULD, VIS-A-VIS ABSOLUTE SURRENDERS, REMAIN INALIENABLE EXCEPT TO THE CROWN; INDIAN TITLE WOULD REMAIN A COLLECTIVE TITLE; FIRST NATIONS WOULD BE RECOGNIZED AS HAVING THE RIGHT TO PURCHASE LAND OUTSIDE OF THEIR RESPECTIVE TERRITORIES, BUT COULD ONLY BRING THOSE PURCHASES UNDER THEIR SOVEREIGNTY VIA NEGOTIATIONS WITH THE FEDERAL AND PROVINCIAL GOVERNMENTS;

<u>Other Options</u>

(1) Canada would recognize, in accordance with either First Nations-specific <u>or</u> generic Self-Government legislation, the exercise by First Nations' Councils or other traditional Governing Bodies of the following powers:

(a) the power to tax for local purposes real property within Indian Territory;

(b) powers over the use, management and administration of Indian lands;

(c) powers over agriculture, construction, public works, environmental protection, natural resources, zoning and land use planning on Indian lands;

(d) powers with respect to residence on Indian Lands, trespass, rights in property, descent of property and local expropriations;

- First Nations would be recognized as having the status to acquire and hold property, and interests in property and to sell and otherwise dispose of property, subject to restraints on the absolute surrender of lands within the First Nation's territories to non-Indians;

- First Nations would be provided with the Resources and Training to develop indigenous, local "registry systems" tied into a National Registry "clearing house" in Ottawa; These local systems might be patterned on some of the smaller, county-specific deed registry offices located in the Province.

(2) A new Indian Lands Act could be enacted allowing First Nations to "opt in" to the type of full-blown land control and management powers set out in (1) above.

(3) The Indian Act might be amended in order to:

(a) Provide for the grant by Bands to Band Members of interests "less than" the commonly-held "C.P." interest; ie. leases, easements, etc.

(b) Expressly provide that all administrative functions in the land management field now exercised by the Minister can be delegated to Band Councils - with power in the Council to subdelegate to individual appointees;

(c) Provide that Section 69 Bands can collect, as well as control, manage and expend revenue moneys;

(d) Provide that Section 60 of the Act authorizes Band Councils and their delegates to carry out the land management function and collect land revenues;

(e) Provide for Expropriation by a Council and/or revocation by a Council of an individual's "C.P." interest when an expropriation would be in the general Band interest, and subject to the Council's adherence to the rules of Natural Justice;

(f) Provide a mechanism for the recognition of the common Band practice of land allotment by "custom" (ie. absent Ministerial approval).

- The MAWIW First Nations are very interested in accessing Section 60 Land Management Regime funds (ie. $35,000.00 per year per Band for two years of training; $35,000.00 per year per Band ongoing administration subsidy) particularly if D.I.A.N.D., as expected, devotes more financial resources to this function.

IV. INDIAN MONEYS/INDIVIDUAL ACCOUNTS

MAWIW'S PREFERENCE

THAT ALL CAPITAL AND REVENUE FUNDS HELD BY CANADA BE TRANSFERRED TO THE FIRST NATIONS AND BE PLACED UNDER FULL FIRST NATIONS' CONTROL; THAT A SYSTEM OF EQUALIZATION PAYMENT TRANSFERS FROM THE CANADIAN GOVERNMENTS TO THE FIRST NATIONS BE IMPLEMENTED AND CONSTITUTIONALIZED; THAT

THE INHERENT RIGHT OF FIRST NATIONS TO REGULATE INTERNAL COMMERCE, TAXATION, AMUSEMENTS AND GAMING BE RECOGNIZED AS AN ACCEPTABLE BASIS FOR THE DEVELOPMENT OF FIRST NATIONS' ECONOMICS.

Other Options (in order of Preference):

(1) Canada would recognize, in accordance with either First Nations-specific or generic Self-Government legislation, the exercise by First Nations' Councils, or other Traditional Governing Bodies, of the following powers:

(a) the power to provide for a system of financial accountability to First Nations' Members, including audit arrangements and the publication of financial reports;

(b) powers to collect and expend land-related revenues, taxes, user fees, surcharges, fines and penalties;

(c) the power to acquire, by way of agreement with the Government of Canada, funding to carry out the objects of the First Nation's Government, and the power to effect the transfer of all Indian moneys within the meaning of the Indian Act from Canada to the First Nation;

- First Nations would be recognized as having the status to enter into contracts, intergovernmental agreements, expend or invest moneys and borrow funds from any source.

(2) The <u>Indian Act</u> might be amended in order to:

(a) provide for the release of capital moneys by the Minister to a Band on the basis of:

(i) a long-term financial plan;

(ii) certification by independent financial planners of the feasibility of the Band's financial plan;

(iii) establishment of a "Trust" body at the Band-level to oversee the management of the transferred capital dollars; and

(iv) approval by a majority of the Band's electors;

(b) provide for full Band <u>Council</u> control over the collection, management and expenditure of Revenue monies.

V. ESTATES

MAWIW'S PREFERENCE

THAT CANADA RECOGNIZE THAT ALL ASPECTS OF MARRIAGE,

DIVORCE, CHILD WELFARE, ADOPTION, ILLEGITIMACY, THE APPOINTMENT OF GUARDIANS FOR MINORS, ESTATES AND INHERITANCE ARE INTERNAL TRIBAL MATTERS OVER WHICH FIRST NATIONS HAVE AN EXISTING AND INHERENT POWER AND AUTHORITY, AND WHICH ARE SUBJECT MATTERS THAT MUST BE ADDRESSED BY THE FIRST NATIONS IN ACCORDANCE WITH THE CULTURAL DICTATES AND TRADITIONS OF THEIR RESPECTIVE TRIBAL SOCIETIES.

<u>Other Options (in order of preference)</u>:

(1) Canada would recognize, in accordance with either First Nations-specific <u>or</u> generic Self-Government legislation, the exercise by First Nations' Councils, or other Traditional Governing Bodies, of the following powers:

(a) the power to provide for social services, including housing, child care and welfare;

(b) powers over family law including marriage, separation, divorce, legitimacy, adoption, child welfare and guardianship of minors/incompetents;

(c) powers over inheritance, intestacy, Indian Wills, appointment of executors and the administration of estates and the descent and distribution of property;

- A supervisory role over the social services/family law/estates area would be played by Tribal Courts;

- First Nations' powers set out in (a) thru (c) above would be exercisable in respect of all Indian persons resident within First Nations' territory, and, in certain instances, vis-a-vis off-Reserve First Nations' Members when those subject matters had a direct bearing on the <u>status</u> of an individual as a First Nation's member or on property situate within the territory of the First Nation.

(2) A new Indian <u>Family Law and Estates Act</u> could be enacted allowing First Nations to "opt in" to full-blown Family Law, Child Welfare, and Estates regimes; First Nations would be able to draft and adopt their own Estates Rules and Regulations.

- The <u>MAWIW</u> First Nations are mildly receptive to the concept of a "turning over" of the Minister's responsibilities with respect to Indian Estates to a "Public Trustee", <u>provided</u> the Trustee's offices, or sub-offices, were located at the Reserve level.

(3) The Indian Act might be amended in order to:

(a) ensure that the "customary" interests of individuals in Reserve lands are dealt with as part of the administration of Estates;

(b) ensure that all administrative responsibilities relating to Estates that are currently exercised by the Minister can be delegated to Band Councils and/or their appointees;

(c) permit Band Councils to establish their own Estate Rules and Procedures via a By-law, notwithstanding the existence of such rules in the Act/Regulations;

(d) clarify that Indian Estates are exempt from seizure under legal process, and that a tax exemption attaches to the income earned on Indian Estates.

- The MAWIW First Nations maintain that D.I.A.N.D. must continue to provide funding for "pauper" funerals and related expenses; that D.I.A.N.D. continue its "flexible" approach towards administering small Indian estates (ie. allowing minor assets to be distributed via informal agreements among family members; keeping the courts out of any supervisory role; avoiding forced land interest sales, etc.);

- The MAWIW First Nations are very interested in the concept of assuming control over Estates Administration *via* Contribution Agreements, and encourage the creation of a Band Staff-specific training program in the Estates area, and the distribution of overall Estates Administration *Manual* and *Officer's Field Manual* (Estates) to Band Staff.

VI. BAND MEMBERSHIP

MAWIW'S PREFERENCE

THAT CANADA RECOGNIZE THAT IT IS THE MOST FUNDAMENTAL INHERENT RIGHT OF A FIRST NATION TO BE ABLE TO DETERMINE IT OWNS MEMBERSHIP; ALTHOUGH THE DETERMINATION OF WHICH INDIAN PERSONS MAY BE ELIGIBLE FOR SPECIFIC FEDERAL PROGRAMS MAY BE A TOPIC FOR DIALOGUE AND NEGOTIATION BETWEEN FIRST NATIONS AND OTTAWA, ONLY FIRST NATIONS HAVE AN UNFETTERED RIGHT TO DETERMINE WHO IS, AND IS NOT, A MEMBER OF THEIR RESPECTIVE COLLECTIVES.

Other Options (in order of preference):

(1) Canada would recognize, in accordance with either First Nations-specific *or* generic Self-Government legislation, the exercise by First Nations' Councils,

or other Traditional Governing Bodies, of the following power:

(a) the power to establish criteria for, and regulate, membership in the First Nation;

- The MAWIW First Nations find it highly offensive that Canada is intent on insisting:

  (i) that First Nations' Membership "Codes" be set out in full in any First Nations' "Constitutions" developed pursuant to Federal legislation;

  (ii) that it be clearly expressed in Federal legislation that First Nations cannot offend the Canadian Charter of Rights and Freedoms and international covenants on human rights when drafting such "codes"; and

  (iii) that the membership rights of individuals acquired under the Indian Act must be respected by such "Codes".

While the First Nations are not adverse to being held to international standards (or even the principles set out in the Charter) when it comes to developing membership criteria, they do not feel:

(i) that they must parade their compliance with those standards before the world in the form of "Constitutionalized" membership codes,

and

(ii) that they must ensure that membership rights and rules which they had no part in developing - *ie*. *Indian Act* rights to membership - will be unconditionally respected by self-governing First Nations.

- The *MAWIW* First Nations are not opposed to the concept of their *own* citizenry exercising approval/veto powers over any First Nation's Government laws respecting membership.

(3) The *Indian Act* might be amended to:

(a) provide that no person's name may be included on more than one Band List (Department *or* Band - controlled);

(b) to provide for a clear delegation of the Registrar's administrative authorities over Band Lists to the individual Band Councils and/or their delegates;

(c) to provide for the negotiation of Band-Federal Agreements on membership information sharing and the funding of Band List/Indian Register maintenance functions at the Reserve level.

- The MAWIW Chiefs were unanimous in the view that Federal underfunding in areas relating to Membership has been chronic; Funding designed to lessen the negative impact of Bill C-31 Membership changes on the First Nations has been notoriously inadequate; Despite legislatively-engineered increases in the Membership of First Nations and despite natural increases in on-Reserve populations, and despite a vast increase in quality-control, family research and other administrative duties imposed on Band Membership Clerks and despite the legislatively-mandated requirements for First Nations to put Membership review and appeal mechanisms in place, First Nations' Membership Administrations are woefully underfunded. Membership Clerk Training and Family Background Research dollars must be made available to the First Nations. The Formula by which basic Membership Administration dollars are determined and allotted to the respective First Nations must be revised upwards.

- The MAWIW First Nations are very interested in the concept of both Band List and Indian Register administration taking place at the Community level: Burnt Church First Nation has enacted its own membership Code and controls its own Band List; The other two Member First Nations do not.

VII. ELLECTIONS

MAWIW'S PREFERENCE

THAT CANADA APPRECIATE THE FACT THAT THE ANCIENT ENCAMPMENT SITES WHICH NOW HOST THE MAWIW FIRST NATIONS' COMMUNITIES HAVE WITNESSED THE EXERCISE OF INHERENT FIRST NATIONS RIGHTS TO CHOOSE INDIGENOUS LEADERS FOR THOUSANDS UPON THOUSANDS OF YEARS;

THAT TRADITIONALLY THE MAWIW FIRST NATIONS WERE FREQUENTLY REPRESENTED BY SINGLE CHIEFS, AND THEIR ADVISORY COUNCILS, ALL GOVERNED BY THE POPULAR WILL;

THAT POPULAR ELECTIONS HAVE BEEN A FEATURE OF MAWIW FIRST NATIONS' GOVERNMENTS SINCE THE EARLY 1800'S;

THAT CANADA RECOGNIZE THE INHERENT POWER OF FIRST NATIONS TO MAINTAIN OR ADOPT FORMS OF GOVERNMENT AND METHODS OF CHOOSING THEIR LEADERSHIPS THAT BEST SUIT THE RESPECTIVE

FIRST NATION'S CWN PRACTICAL, CULTURAL AND/OR RELIGIOUS NEEDS.

Other Options (in order of preference):

(1) Canada would recognize, in accordance with either First Nations-specific or generic Self-Government legislation, the exercise by First Nations' Councils, or other Traditional Governing Bodies, of the following power:

(a) the power to enact laws respecting the regulation and administration of First Nations' elections, the qualification of electors and candidates, and the holding of Referenda, Plebiscites, Initiatives and Recall/Removal votes within the territory of a First Nation;

- First Nations' "constitutions" could set out the institutions and offices of the First Nation's Government, and the tenure of those offices.

(2) The Indian Act might be amended to:

(a) provide Bands with By-law Powers to formulate their own Election Rules and Appeal procedures, but subject to approval by the electorate (and with resulting amendments to the Act and Regulations);

(b) provide Bands with the options of:

(i) allowing for voting by off-Reserve Members;

(ii) selecting the Chiefs/Councils <u>Term in Office</u> from out of a "range" of years (<u>ie</u>. not less than 2, not more than 5);

(iii) regulating the size of the Band Council and number of Electoral "sections" on a given Reserve;

(iv) regulating the manner in which officers are elected (<u>ie</u>. definitions, establishment of voters' list, polling, "swearing-in", etc.);

(v) regulating the holding/procedures at <u>Band</u> meetings and <u>Band Council</u> meetings;

(vi) removing officers from their positions;

by means of By-law enactment.

(c) provide for a clear delegation of the Minister's and Governor-In-Council's administrative duties vis-a-vis Elections and Appeals to Indian Entities established at the Band-level (consisting of permanent <u>or</u> "election year" independant appointees);

- The MAWIW First Nations generally support, on an interim basis, efforts aimed at amending their By-law powers under the Act to provide for changes in the Chiefs/Councils' Terms of Office and the establishment of First Nations' Election/Appeal Rules and Procedures: However, the Chiefs caution that changes in this regard must be accompanied by an increase in the financial resources needed to address the costs of:
  - training of Election Administrators;
  - administering regular elections, by-elections and supplementary or "forced" elections;
  - creating appeal mechanisms, with their resulting investigative and hearing costs;
  - requisite capital acquisitions (ie. ballot boxes, voter enclosures, etc.).

VIII. BY-LAWS/ENFORCEMENT/INDIAN JUSTICE SYSTEM

MAWIW'S PREFERENCE

THAT CANADA RECOGNIZE THAT, SUBJECT TO ANY EXPRESS LIMITATIONS NEGOTIATED BETWEEN CANADA AND THE FIRST NATIONS, OR ANY LIMITATIONS THAT MAY EXIST AS A RESULT OF THE UNIQUE RELATIONSHIP FORGED BETWEEN CANADA AND THE FIRST NATIONS, THE GOVERNMENTAL POWERS VESTED IN THE FIRST NATIONS,

INCLUDING THE INHERENT RIGHT TO MAINTAIN LAW AND ORDER AND TO ADMINISTER JUSTICE WITHIN INDIAN TERRITORIES, ARE NOT DELEGATED POWERS GRANTED BY EXPRESS ACTS OF PARLIAMENT BUT RATHER INHERENT POWERS OF A SOVEREIGNTY WHICH HAS NEVER BEEN EXTINGUISHED.

Other Options (in order of preference)

(1) Canada would recognize, in accordance with either First Nations-specific or generic Self-Government legislation, the exercise by First Nations' Councils, or other Traditional Governing Bodies, of the following powers:

(a) the power to enact laws respecting the maintenance of public order within the First Nation's territory;

(b) power to enact criminal offences punishable on summary conviction, where the maximum potential term of imprisonment does not exceed six months and the maximum potential fine does not exceed $2,000.00 and which are committed within the First Nation's territory by one Member of the First Nation against the person or property of another Member of the First Nation;

(c) the power to enact laws in, and to exercise a First Nation's jurisdiction over, Juvenile Crimes, Civil Disputes, Indian Child Custody proceedings and other Domestic Relations matters;

(d) power over the administration of justice within the First Nation's territory, including:

(i) the constitution, maintenance and organization of judicial and quasi-judicial bodies with jurisdiction in relation to the laws of the First Nation;

(ii) the establishment of police services, correctional facilities and prosecutions;

(e) the imposition of fines, penalties or, subject to limitations contained in legislation, imprisonment, in connection with the enforcement of any law enacted by the First Nation in relation to any matter coming within the Jurisdiction of the First Nation;

- The MAWIW First Nations are very interested in establishing a full-blown First Nation's Court System within the Province, probably modeled on non-Indian "circuit court" systems (so that docket sizes and fine revenues would clearly be sufficient to help support such a system).

- The First Nations would be prepared to negotiate a limited Criminal Jurisdiction for their Courts and would define criminal offences, juvenile crimes and punishments in accordance with the laws of Canada provided the First Nations' Courts would be "deemed" to be enforcing Indian Law when imposing criminal sanctions and provided court practices, procedures and punishments contained a "flavour" heavily influenced by the First Nations' Cultures and Traditions (ie. emphasis on Victims' Rights, Community Healing and Restitution).

- Any new Legislation should replace the Minister's power of disallowance over First Nations' laws with "checks and balances" provided by Indian "constitutional" restraints - in the form of Notice/Publication procedures vis-a-vis lawmaking, the establishment of Administrative Tribunals with powers in key jurisdictional areas, and some form of significant electorate approval re: any amendment made to First Nations' Constitutions in the areas of:

  : taxation and capital spending;

  : budget approval and long-term borrowing;

  : disposal of land and other key assets to non-Indians/non-Members;

: granting of long-term leases/licenses/permits.

(2) The Indian Act might be amended to:

(a) rename the term "by-law" so that it reflects fewer connotations of "subservience";

(b) establish Notice/Reply provisions which would come into play prior to the exercise by the Minister of his power of disallowance;

(c) ensure that the Governor-In-Council's Regulatory Powers do not overlap (in terms of subject matters) Band By-law-making powers;

(d) ensure that Band Councils become the executive and representative arm of the Band, with power to subdelegate functions to other Indian Institutions;

(e) ensure that Section 81 By-law powers are clarified and expanded, particularly in the areas of Health, Education, Economic Development, Acquisition/Disposal of Band Assets, Control/Management over Indian Moneys, and Joint Undertakings with non-Indian persons and governments;

(f) ensure that Band Councils are able to receive and exercise the maximum amount of administrative authority available to them by way of delegation from the Minister, the Registrar and the Governor-In-Council;

(g) expand the jurisdiction of Section 107 Justices of the Peace to clearly include Band By-Law and Indian Act Regulations enforcement, as well as a larger number of Criminal Code Offences;

(h) provide for the creation of Band Police Forces with a clearly defined jurisdiction linked to the Section 107 Justice of the Peace provisions.

- The MAWIW Chiefs recognize that S.81 By-Law Enforcement (for which they are largely dependant on outside police, prosecutorial and judicial agencies) has been an abysmal failure. Not only must the First Nations' law-making authority be expanded, but the resources and powers needed to establish internal enforcement and adjudication mechanisms must be forthcoming from Ottawa; Likewise Ottawa must serve as the "facilitator" of talks between the First Nations and the Province concerning the First Nations assumption of control over the administration of justice in areas of

particular significance to the First Nations' populations (example: Young Offenders); Ottawa must also undertake efforts at "sensitizing" the Provincial Courts and Enforcement Agencies to the problems associated with by-law enforcement and the current clash of Indian/Non-Indian Values and Cultures in the area of law enforcement.

- The MAWIW First Nations are very interested in:

(i) the concept of creating the "nucleus" around which a full-blown First Nations' Court System might grow, by negotiating the implementation of a Reserve-based or "circuit"-style Section 107 "Justice of the Peace" Court apparatus in favor of the various MAWIW Communities;

(ii) exploring with D.I.A.N.D. the possibility of acquiring resources to hire by-law enforcement Officers at the Reserve-level, and acquiring information (preferably in "manual" form) on procedures involved in by-law enforcement and prosecutions;

(iii) exploring with D.I.A.N.D the creation of Band Police Forces based on By-law provisions, and governed by Reserve-based Police Commissions;

(iv) exploring the possibility of reducing Mi'Kmaq and Maliseet customary laws to writing; ie. codification; and creating internal Civil Dispute Resolution mechanisms involving community Elders.

IX. INDIAN SOVEREIGNTY

MAWIW'S PREFERENCE

THAT CANADA RECOGNIZE THAT THE EXISTING RIGHT OF THE FIRST NATIONS TO GOVERN OVER THEIR MEMBERS AND TERRITORIES FLOWS FROM A PRE-EXISTING SOVEREIGNTY, POSSIBLY LIMITED BUT NOT ABOLISHED BY THE INCLUSION OF THE FIRST NATIONS WITHIN THE TERRITORIAL BOUNDS OF THE DOMINION OF CANADA.

Other Options (in order of preference):

That any First Nations-specific or generic Self-Government legislation be drafted in such a manner so that its "recognition" of First Nations' powers of government are both expansive and wholly "Without Prejudice" to the First Nations' View that such powers are inherent and not delegated; Likewise, the legislation might include a "Saving Clause" to the effect that the rights, powers, authorities and duties enumerated in the Act (or in any

First Nation's "implementing constitutions") are <u>not</u> exclusive, and do <u>not</u> abrogate or derogate from any other First Nation's sovereign rights, powers, authorities and duties that may still exist, including rights retained by the First Nations by way of Treaties or as a result of unresolved land claims.

CONCLUSION AND FOLLOWUP

Those who read this Final Report will note that in exploring the MAWIW First Nations' "preferred options" for change in the L.R.T.-related subject areas, the MAWIW COUNCIL has not proposed very sweeping Indian Act amendments. The reason why this approach was adopted is quite simple: the MAWIW First Nations' leadership believes that the Indian Act itself is "beyond redemption". It would, most certainly, be the height of folly for Canada to attempt to introduce "major" Indian Act amendments in hopes of satisfying the aspirations of the First Nations. Such an attempt would surely ignite a firestorm of Indian protests, the likes of which have not been seen since the "White Paper" onslaught of 1969. The very essence of the Indian Act is, clearly, paternalism, and that "essence" can never be wholly expunged from the Act. As long as the Act represents an attempt by Ottawa to entirely ignore the First Nations' position on "inherent sovereignty", First Nations will be very reluctant to fully utilize the Act's provisions - no matter how favorably disposed they are towards any new grant of

powers and authorities, or any lessening in the Minister's Superintendancy Role. In fact, individual First Nations will actively ignore the dictates of the Act as a tangible sign of their "solidarity" with the First Nations-wide view that limits on Indian Jurisdictions must be negotiated, not imposed.

Yet the MAWIW First Nations have not ignored the possibility that in the future, as in the past, the Government of Canada will look to its own priorities (in terms of fiscal restraint and other extraneous factors) when determining what is "best" for the First Nations, and attempt to impose its will on Indian Communities under the guise of "consultation". Thus, the MAWIW group has prepared a number of "options" relating to legislative change and/or Indian Act amendments which it believes would lessen the "pain" of such an imposition on the larger First Nations in the Atlantic Region. MAWIW has prepared these options unenthusiastically, the way a person prepares his or her family and physical surroundings for an approaching storm: You know that preparations have to be made, nevertheless you hate to have to make those preparations. Not only is MAWIW fearful of the "approaching storm" ie. major Indian Act amendments - which it believes will side-track the First Nations' drive for Self-Government - but it is deathly afraid that legislative change will greatly

expand the First Nations' "jurisdiction" and will impose onerous obligations on the First Nations, without any corresponding expansion in First Nations' financial resources being forthcoming from Ottawa. This was MAWIW's experience with Bill C-31: New membership criteria, and the obligation to provide for mechanisms for reviewing decisions on membership, were not supported by sufficient capital and administrative dollars to support the legislatively-mandated changes.

MAWIW believes that the Canadian Judicial System is now laying the foundations for an "American-style" approach to the recognition of an inherent First Nation's Right to Self-Government. The Sparrow decision's references to Canada having exercised powers to "limit", but not "extinguish", Indian Rights sounds suspiciously like American judicial references to the "plenary" power of Congress to limit, but rarely, if ever, abolish, the extra-constitutional powers of Indian Governments. MAWIW therefore maintains that it is time for D.I.A.N.D., and the Government of Canada as a whole, to recognize that:

(1) the Indian Act may have imposed "limits" upon, but did not abolish, the inherent First Nation's Right to Self-Government;

(2) that the Indian Act should be abolished and any new limits on Indian Sovereignty negotiated between Ottawa and the First Nations on a First Nation-by-First Nation, Province-by-Province or Tribe-by-Tribe basis. New arrangements would be implemented via Treaties and/or Constitutional provisions.

The MAWIW First Nations have long been both amazed and dismayed that primarily on the basis of the following short paragraph, ie:

> "...that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of [land claim] settlement fund income shall not be subject to regulation by the State..."

contained within the provisions of the State of Maine's (U.S.A.) "...Act to Implement the Maine Indian Claims Settlement..." (1980), the Passamaquoddy and Penobscot Indian Tribes of Maine (former allies and close friends of the Mi'Kmaq and Maliseet First Nations in New Brunswick)

have been able to build awesome tribal organizations, indigenous Court systems and elaborate Tribal "constitutional" frameworks, based in part on inherent Indian sovereign powers.

The MAWIW First Nations' amazement is founded upon their witnessing the effective implementation of a reasonable Comprehensive Claims Settlement "package" in Maine and Washington's willingness to extend its recognition of Indian sovereignty to the Maine Tribes. The MAWIW First Nations' dismay is largely based on the fact that it must sit by and watch such positive developments occur just across the international frontier, in favor of their brother Tribes, while Canada still refuses to address the "root" causes of Indian unrest in Eastern Canada - unresolved Comprehensive Land Claims and First Nations' demands that their Inherent Right to Self-Government and their Treaty Rights, be respected by non-Indian governments.

If nothing else, D.I.A.N.D.'s Land, Revenues and Trusts Review Process has prompted the MAWIW First Nations' leadership to start thinking in terms of putting in place a "foundation" upon which real Indian Self-Government can be built. In this respect two L.R.T.-related subject matters, more than any others, have captured the interest of the MAWIW Chiefs, ie:

(1) **Elections** - in terms of the MAWIW First Nations assuming control over their own political processes through by-law enactments (not yet provided for under the Act), selection of new Terms of Offices for Chiefs/Councillors and the drafting of Election Rules/Appeal Procedures;

(2) **By-Law Enforcement** - in terms of the establishment of Section 107 Justice of the Peace Court apparatus on the various MAWIW Reserves. The MAWIW First Nations are very interested in negotiating with D.I.A.N.D. the ways and means of designing and implementing a rudimentary Tribal Court System that can respond to at least a few of the First Nations' grave concerns in the area of the Administration of Justice (both civil and "limited" criminal).

Before the end of January the MAWIW Chiefs will meet to decide in which of the two abovenoted areas they would like to concentrate any "follow up" resources that might flow from D.I.A.N.D. by way of further action on their initial L.R.T. Review Process Project; A proposal for D.I.A.N.D. to consider will be forthcoming in this regard.