

# INDIAN CLAIMS COMMISSION

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## FRIENDS OF THE MICHEL SOCIETY INQUIRY 1958 ENFRANCHISEMENT CLAIM

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## PART I

### INTRODUCTION

This inquiry concerns the question of whether the Friends of the Michel Society (Society), the claimant, has standing to submit a specific claim to the Department of Indian Affairs and Northern Development (DIAND).<sup>1</sup> The Society represents certain descendants and former members of the Michel Band, which was enfranchised in 1958. Enfranchisement refers to the process by which Indian people individually – or bands as a whole – voluntarily or involuntarily lost their registered Indian status and band membership in return for the full rights of Canadian citizenship, such as the right to vote. The notoriously discriminatory enfranchisement provisions<sup>2</sup> were removed from the *Indian Act* in 1985, through what are known as the Bill C-31 amendments. These amendments reinstated Indian status, and in some cases band membership, to most of those people who were enfranchised.

The Society claims that the enfranchisement of the Michel Band in 1958 was invalid, and that various land surrenders, which took place prior to the band enfranchisement, were improper. These matters, however, are not the subject of this inquiry. The purpose of this inquiry is to determine only the preliminary issue of whether the Society has standing to bring a specific claim. Our task is to answer the particular legal question of whether Canada has an obligation to recognize the former members and descendants of the Michel Band as a band within the meaning of the *Indian Act* and the Specific Claims Policy. The Society argues that the Bill C-31 amendments impose such an obligation on Canada. Canada takes the position that the Michel Band ceased to exist as a result of the 1958 enfranchisement, that the Society is not entitled to be recognized as a band under the *Indian Act*, and that it therefore has no standing to bring a specific claim.

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<sup>1</sup> In its submissions to the Commission, the claimant refers to itself as the Michel Band or Michel First Nation, and the officers of the Society refer to themselves as the Chief and council. As the status of the claimant is what is at issue here, we refer to the claimant as either the Society or “the former members and descendants of the Michel Band.”

<sup>2</sup> The discriminatory provisions of the former versions of the *Indian Act* include, for example, the provision that, when an Indian woman married a non-Indian man, she lost her registered status. The concept of enfranchisement and the applicable statutory regime are discussed in more detail in Part II of this report.

## BACKGROUND TO THE INQUIRY

In 1985, certain former Michel Band members and descendants filed a specific claim with Canada alleging the following: (1) that the enfranchisement of various band members in 1928 and the entire Band in 1958 was invalid; and (2) that Canada breached its statutory and fiduciary duties in relation to various surrenders of reserve land obtained from the Michel Band in the early 1900s. Canada took the view that the Specific Claims Policy limited the submission of claims to recognized bands, and refused to consider the alleged impropriety of the surrenders. Canada did agree, however, to review that aspect of the claim involving the 1928 and 1958 enfranchisements, to determine whether the claimants were entitled to be recognized as a band.<sup>3</sup> Following that review, Canada concluded that the Michel descendants were not entitled to such recognition.<sup>4</sup>

The next step taken by the Society was to request that the Minister of Indian Affairs and Northern Development reconstitute the Michel Band pursuant to his discretionary power, under section 17 of the *Indian Act*, to create new bands. Gilbert Anderson and George Callihoo, representatives of the Society, met with the Minister in November 1994 to discuss the matter. In December 1994, the Minister rejected the request.<sup>5</sup>

In 1995, the Society requested that the Indian Claims Commission (the Commission) inquire into the enfranchisement aspect of its claim to determine whether the former members and descendants of the Michel Band were entitled to be recognized as an Indian band, and thus able under the Specific Claims Policy to assert the surrender claims.<sup>6</sup> If the enfranchisement were found to be invalid, the Michel Band would still exist and clearly have standing under the Policy.

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<sup>3</sup> R.M. Connelly, Director, Specific Claims Branch, Department of Indian Affairs and Northern Development (DIAND), to Judith Sayers, Barristers, March 27, 1985 (ICC Documents, pp. 949-51). The Director stated: "since the central claim is that Indian Affairs officials were responsible for the break up of the band, we are prepared, as a first step, to review this aspect of the claim and obtain an opinion from our Department of Justice advisors as to its views of the legality of the enfranchisement of the Michel Band. Should it be determined following this review that the Michel Band was not lawfully enfranchised and should be reconstituted, we can then consider the issues concerning earlier dispositions of reserve lands which you raise in your submission . . ."

<sup>4</sup> Jane-Anne Manson, Claims Analyst, Specific Claims West, to Gilbert Anderson, Michel Claim Committee, Edmonton, 13 January 1992, in DIAND file B8620-209 (ICC Documents, pp. 1053-54).

<sup>5</sup> Ronald A. Irwin, Minister of Indian Affairs, to Gilbert Anderson and George Callihoo, December 18, 1994, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 9).

<sup>6</sup> Gilbert Anderson, Michel Society, to Kim Fullerton, Indian Claims Commission, March 1, 1995 (ICC file 2108-17-01).

Later, in March 1996, the Society asserted that, even if the 1958 enfranchisement was valid, the Bill C-31 amendments to the *Indian Act* imposed on Canada a statutory obligation to recognize members of the Society as the Michel Band within the meaning of the *Act*. Prior to that, in January 1996, seven members of the Society had applied to the Registrar (the DIAND officer who is in charge of the Indian Register and Band Lists maintained in the Department) to be put on the Michel Band membership list pursuant to section 11 of the *Indian Act*.<sup>7</sup> Section 11 is one of the Bill C-31 amendments and provides, in part, that if a person is entitled to be registered as an Indian because he or she was enfranchised involuntarily, for example, by reason of marriage to a non-Indian, that person is *also* entitled to have his or her name entered in a band list maintained in the Department for a band. The Registrar rejected the application, on the basis that the Minister had to confirm the existence of the Michel Band before she could add names to a Michel Band List.<sup>8</sup> Further, the Registrar noted that, as the Minister had already declined to recognize the Michel Band, she could not register Michel Society members on a Michel Band List. Counsel for the Society requested that the Registrar reconsider her decision of February 2, 1996.<sup>9</sup> By letter dated March 28, 1996, the Registrar again indicated that she needed the Minister to confirm that the Michel Band is an Indian Band for the purposes of the *Indian Act*.<sup>10</sup> Again, the Minister refused to do so.<sup>11</sup>

Between the time of the original submission of the claim to this Commission in March 1995 and receipt of final written submissions from both parties by July 1997, the issues in this inquiry were narrowed significantly. At the third in a series of Commission planning conferences, held in May 1997, the parties agreed that the Commission would consider only the issue of whether Canada

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<sup>7</sup> Gilbert Anderson, to Registrar, Indian Registration & Band Lists, DIAND, Ottawa, January 22, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 6)

<sup>8</sup> Terri Harris, Registrar, Indian and Northern Affairs, to Gilbert Anderson, Edmonton, February 2, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 5).

<sup>9</sup> Jerome N. Slavik, Counsel for the Michel Society, to Terri Harris, Registrar, DIAND, March 6, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 3).

<sup>10</sup> Terri Harris, Registrar, Indian and Northern Affairs, to Jerome N. Slavik, Counsel for the Michel Society, March 28, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 2).

<sup>11</sup> Ronald A. Irwin, Minister of Indian Affairs and Northern Development, to Gilbert Anderson, Edmonton, September 10, 1996, Michel First Nation, Supplementary Documents (ICC Exhibit 18, tab 1).

has a statutory obligation under the current *Indian Act* to reconstitute the Michel Band, assuming that the Michel Band ceased to exist in 1958.

The narrow issue was agreed to because the Society was raising new arguments that, arguably, were not properly before the Commission because they had not specifically been rejected by Canada. The new arguments would also require additional research and analysis. In order to make the process more efficient, it was agreed that the parties would pursue only the Bill C-31 issue for the purposes of this inquiry. If the Society prevailed on its Bill C-31 argument, it would not be necessary to address other issues, such as whether the Society should be recognized as a band at common law, or whether the Crown breached any fiduciary obligations in respect of the 1958 enfranchisement.<sup>12</sup> However, if the Society did not prevail on the narrow issue, it was agreed that a request could be made for the Commission to conduct a second inquiry into the broader issues that have been placed in abeyance for the time being.<sup>13</sup>

It is important to appreciate that this inquiry is thus limited to the legal effect of the Bill C-31 amendments in respect of the issue of standing. We will not be making any findings or recommendations in relation to the claims based on the surrenders of reserve land or the legality of the 1928 and 1958 enfranchisements.

#### MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission is to conduct inquiries into specific claims and to report on “whether a claimant has a valid claim for negotiation under the [Specific Claims] Policy where that claim has already been rejected by the Minister . . .”<sup>14</sup> The Specific Claims Policy, outlined in the booklet *Outstanding Business*, seems to contemplate claims by a band or group of bands, rather than individuals or other groups.<sup>15</sup> Guidelines 1 and 2 of the Policy state as follows:

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<sup>12</sup> Planning Conference Summary, May 23, 1997 (ICC file 2108-17-01).

<sup>13</sup> Richard Wex, Counsel, DIAND Legal Services, to Jerome Slavik, Counsel for the Michel Society, June 2, 1997 (ICC file 2108-17-01).

<sup>14</sup> Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 21, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

<sup>15</sup> DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), 20, reprinted in (1994) 1 ICCP 171-85 (hereinafter *Outstanding Business*).

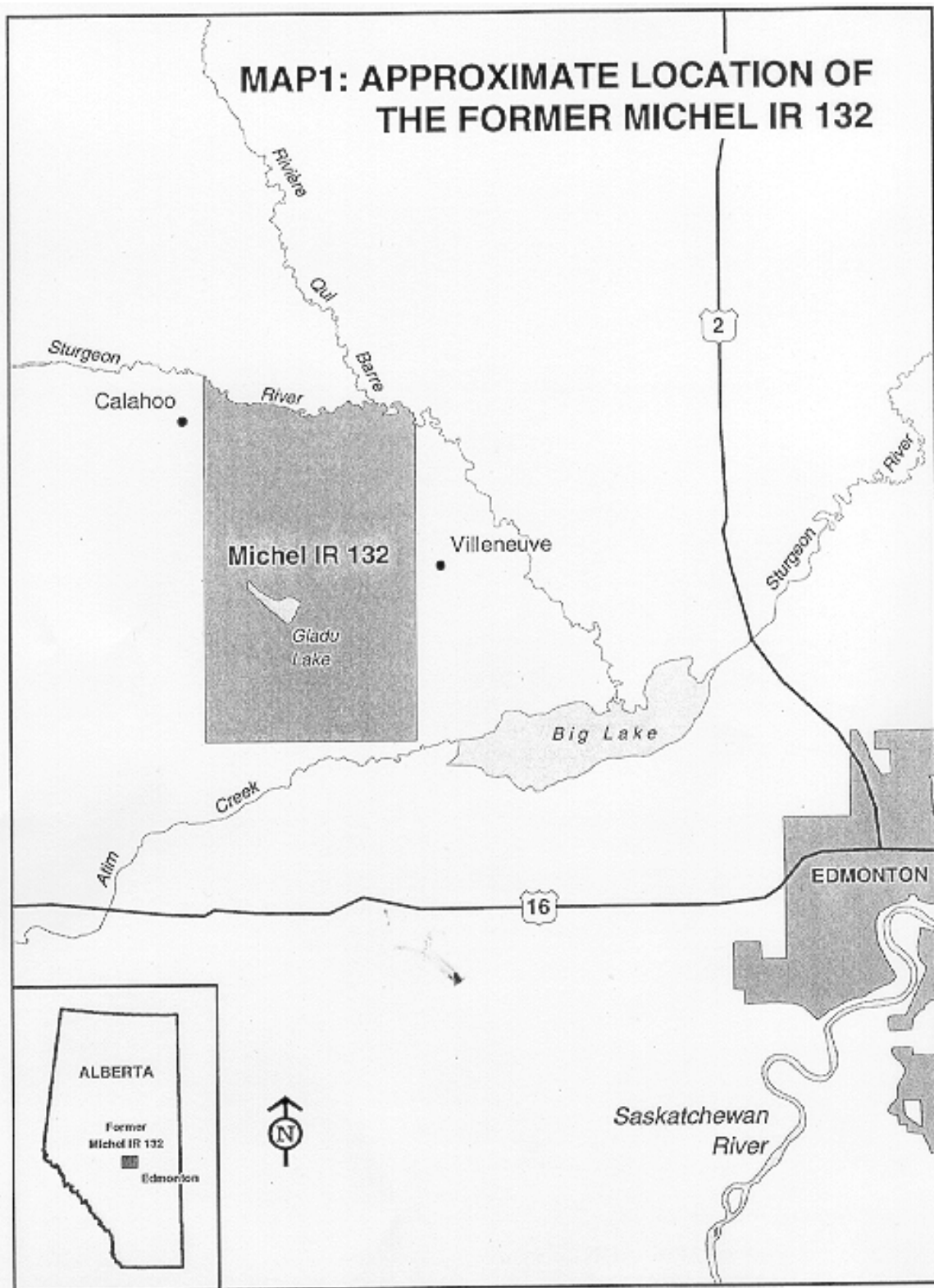
- 1) Specific claims shall be submitted by the claimant band to the Minister of Indian Affairs and Northern Development.
- 2) The claimant bringing the claim shall be the band suffering the alleged grievance, or a group of bands, if all are bringing the same claim.<sup>16</sup>

In the light of the above, and given that the Commission's mandate is defined by reference to the Policy, Canada argued that the Commission has no authority to determine whether the Society is an Indian band as the term is used in the Policy. Canada ultimately agreed, however, not to challenge the Commission's mandate or authority in this inquiry.<sup>17</sup>

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<sup>16</sup> *Outstanding Business*, 30.

<sup>17</sup> François Daigle, Counsel, DIAND Legal Services, to Isa Gros-Louis Ahenakew, Associate Legal Counsel, ICC, October 15, 1996.





## PART II

### HISTORICAL BACKGROUND

Although the question before the Commission is a narrow legal one, it is necessary to set out the background context before embarking on the legal analysis. In this part of the report we examine the statutory regime governing enfranchisement and how that regime evolved from 1857 up to the enactment of the Bill C-31 amendments in 1985. We then outline briefly the facts regarding the Michel Band's enfranchisement that are relevant to this inquiry.

#### ENFRANCHISEMENT

The history of enfranchisement begins in the nineteenth century with the evolution of government "civilization" and assimilation policies regarding Indians. Early efforts to assimilate Indian people into the economic and social structures of mainstream colonial society encouraged Indians to abandon traditional livelihoods based on subsistence hunting, trapping, and fishing in favour of becoming farmers and tradesmen. The first direct legislative expression of enfranchisement as a policy tool to foster assimilation was the 1857 *Gradual Civilization Act*. The significance of that statute is explained as follows in the *Report of the Royal Commission on Aboriginal Peoples*:

[The *Act*] . . . was one of the most significant events in the evolution of Canadian Indian policy. Its premise was that by eventually removing all legal distinctions between Indians and non-Indians through the process of enfranchisement, it would be possible in time to absorb Indian people fully into colonial society.

Enfranchisement, which meant freedom from the protected status associated with being an Indian, was seen as a privilege. There was thus a penalty of six months' imprisonment for any Indian falsely representing himself as enfranchised. Only Indian men could seek enfranchisement. They had to be over 21, able to read and write English or French, be reasonably well educated, free of debt, and of good moral character as determined by a commission of non-Indian examiners. . . . As an encouragement to abandon Indian status, an enfranchised Indian would receive individual possession of up to 50 acres of land within the reserve and his per capita share in the principal of treaty annuities and other band moneys.

. . .

Enfranchisement was to be fully voluntary for the man seeking it. However, an enfranchised man's wife and children would automatically be enfranchised with

him regardless of their wishes, and would equally receive their shares of band annuities and moneys. They could not receive a share of reserve lands.<sup>18</sup>

Thus, the animating idea behind enfranchisement was that, if an Indian could function in mainstream society, he should be able, and indeed encouraged, to do so, since the government's ultimate aim was full absorption of Indian people into Canadian society. This basic policy principle was openly reflected in the *Indian Act* up until the repeal of the enfranchisement provisions in 1985.<sup>19</sup>

The first *Indian Act*, passed in 1876, carried forward the voluntary enfranchisement provisions in the *Gradual Enfranchisement Act* and added new measures in an effort to hasten the assimilation process, given that voluntary enfranchisement had proved unpopular among Indians. For example, section 86 of the *Act* provided for the involuntary enfranchisement of any Indian who became a doctor, lawyer, or clergyman, or who obtained a university degree.<sup>20</sup> Under section 93, an entire band could become enfranchised. In addition, a provision of the 1869 *Gradual Enfranchisement Act*, which stipulated that an Indian woman who married a non-Indian, along with any children of the marriage, would lose their Indian status and band membership, was continued in the first *Indian Act*.

The basic thrust of the enfranchisement policy remained intact through successive *Indian Acts*, although the actual provisions were modified in various ways. The *Act* was amended in 1920 to allow for the compulsory enfranchisement of any Indian or Indians who were "fit for enfranchisement," with fitness determined by a board of examiners appointed by the Superintendent General of Indian Affairs. Compulsory enfranchisement was maintained through a major revision of the *Act* in 1951. Under section 112 of the 1951 *Act*, the Minister was given the power to appoint a committee of inquiry to report on the desirability of enfranchising an Indian or a band, whether or

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<sup>18</sup> Royal Commission on Aboriginal Peoples, *Report*, 5 vols. (Ottawa: Minister of Supply and Services, 1996), vol. 1: *Looking Forward, Looking Back*, 271 (hereinafter the *RCAP Report*).

<sup>19</sup> We are mindful of the criticism that Bill C-31 embodies an assimilationist policy, but in a disguised form. See *RCAP Report*, vol. 1, 304-07.

<sup>20</sup> Note that this provision was changed two years later, through an amendment providing for the *voluntary* enfranchisement of Indians who obtained higher education.

not the Indian or band applied for enfranchisement.<sup>21</sup> In addition, the Governor in Council could enfranchise a band under section III, where the band applied for enfranchisement, was seen as capable of managing its own affairs, and a majority of the electors of the band signified their willingness to become enfranchised. The 1951 *Act* also saw the introduction of compulsory enfranchisement for any Indian woman “who is married to a person who is not an Indian.”<sup>22</sup> This “woman marrying out” clause, section 12(1)(b), became the subject of numerous human rights challenges.<sup>23</sup>

Despite widespread recognition that the government’s enfranchisement policy was blatantly discriminatory and colonial, enfranchisement remained part of the *Indian Act* through various revisions until 1985. Under section 109 of the 1985 *Act*, prior to the Bill C-31 amendments, an Indian person could be voluntarily enfranchised, and an Indian woman would be involuntarily enfranchised if she married a non-Indian:

**109.(1)** On the report of the Minister that an Indian has applied for enfranchisement and that in his opinion the Indian

- (a) is of the full age of twenty-one years,
- (b) is capable of assuming the duties and responsibilities of citizenship, and
- (c) when enfranchised, will be capable of supporting himself and his dependents,

the Governor in Council may by order declare that the Indian and his wife and minor unmarried children are enfranchised.

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<sup>21</sup> The involuntary aspect of section 112 was removed in the 1960-61 version of the *Act*, so that the Minister could appoint a committee of inquiry only where a band had applied for enfranchisement.

<sup>22</sup> Although the first *Indian Act* provided that a woman who married a non-Indian would lose Indian status and band membership, the practice was for bands and federal authorities to overlook their lack of status and for women to retain informal band membership, connection with their communities, even residence on the reserve in many cases, and receipt of treaty annuities. Enfranchisement brought with it not only loss of status, but forced sale or disposal of reserve lands, and a pay-out of the woman’s share of band capital and treaty moneys. For a detailed discussion of how the 1951 *Act* worked to attempt to sever the connection between women who “married out” and their communities, see *RCAP Report*, vol. 1, 300-03.

<sup>23</sup> The loss of status for women marrying out became notorious through the *Lovelace* case. After the marrying out provisions had survived a challenge based on the *Canadian Bill of Rights (Canada v. Lavell*, [1974] SCR 1349), Sandra Lovelace took the fight to the international arena. The Human Rights Committee of the United Nations found that the provisions violated the International Covenant on Civil and Political Rights.

(2) On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage and, on the recommendation of the Minister, may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify.

In addition, sections 112 and 113 set out procedures for band enfranchisement. Section 112 provided as follows:

**112.(1)** Where the Minister reports that a band has applied for enfranchisement and has submitted a plan for the disposal or division of the funds of the band and the lands in the reserve, and in his opinion the band is capable of managing its own affairs as a municipality or part of a municipality, the Governor in Council may by order approve the plan, declare that all the members of the band are enfranchised, either as of the date of the order or such later date as may be fixed in the order, and may make regulations for carrying the plan and the provisions of this section into effect.

(2) An order for enfranchisement may not be made under subsection (1) unless more than fifty per cent of the electors of the band signify, at a meeting of the band called for the purpose, their willingness to become enfranchised under this section and their approval of the plan.<sup>24</sup>

Section 113 provided for the appointment of a committee, where a band had applied for enfranchisement, to inquire into and report to the Minister on the desirability of enfranchising the band, the adequacy of the plan for division of assets, or any other matter relating to the enfranchisement.

Finally, the legal consequences of enfranchisement were set out in section 110 of the 1985 *Act*:

**110.** A person with respect to whom an order for enfranchisement is made under this Act shall, from the date thereof, or from the date of enfranchisement provided for therein, be deemed not to be an Indian within the meaning of this Act or any other statute or law.

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<sup>24</sup>

This provision is essentially the same as section III of the 1951 *Indian Act*.

### **BILL C-31**

Bill C-31 was introduced in the House of Commons in 1985. The bill was designed to remove discrimination in the *Indian Act*, in accordance with the *Canadian Charter of Rights and Freedoms*, through the repeal of all enfranchisement provisions and the reinstatement of many of those Indian people who had lost status. It was also intended to allow band control over membership.

In tabling Bill C-31 for its second reading, David Crombie, then Minister of Indian Affairs and Northern Development, set out the principles underlying the bill:

The legislation is based on certain principles . . . The first principle is that discrimination based on sex should be removed from the Indian Act.

The second principle is that status under the Indian Act and band membership will be restored to those whose status and band membership were lost as a result of discrimination in the Indian Act.

The third principle is that no one should gain or lose their status as a result of marriage.

The fourth principle is that persons who have acquired rights should not lose those rights.

The fifth principle is that Indian First Nations which desire to do so will be able to determine their own membership. Those are the principles of the Bill.

Further in his speech, Minister Crombie said the following:

This legislation also wipes out forever the concept of enfranchisement, which forced many Indian people to give up their status and band membership against their will. Incredibly, in the past some people lost their Indian status simply as a result of the fact that they enlisted in the Armed Forces, received a university education, or became a member of the clergy.

And further:

While there may be other ways to reach these objectives, I have to reassert what is unshakeable for this Government with respect to this Bill. First, it must include removal of discriminatory provisions in the Indian Act; second, it must include the

restoration of status and membership to those who lost status and membership as a result of those discriminatory provisions, and third, it must ensure that Indian First Nations who wish to do so can control their own membership. These are the three principles which allow us to find balance and fairness . . .<sup>25</sup>

Initially, the concept of fairness embodied in the bill involved the reinstatement of status and band membership to women who married out and others who were involuntarily enfranchised on the basis of sex discrimination in the *Indian Act*. But over the course of the debate, it became clear that certain voluntary enfranchisements might also be considered unfair, given the social, economic, and cultural pressures that might have caused an Indian person to apply for enfranchisement. This issue then brought into play the conflict between remedying discrimination and recognizing a band's right to determine its own membership if it so desired. In particular, there was concern that it would not be fair for the government to reinstate band membership for those who had voluntarily enfranchised. For example, on June 10, 1985, Mr Penner, then Parliamentary Assistant to the Minister of Indian Affairs, made the following statements during a debate on Bill C-31:

During the Committee hearings, we recognized that the distinction between voluntary and involuntary [enfranchisement] was a very false one because there were so many social, psychological, economic, and cultural pressures which might cause a person to so-called disenfranchise [sic]. But was that voluntary enfranchisement really voluntary? Did the person really know what he was doing? If the person was married and had children, did he sit down with his family to discuss the implications of this decision? We heard testimony which indicated that that did not occur.

While Bill C-31 says we will allow Indian people to have their status restored, I do not think we can be selective about who will be able to have this opportunity as we were in the first version of Bill C-31. The Committee indicated we should extend this privilege to other persons who were disenfranchised or lost their Indian status so they can apply to the Registrar to have their status restored . . .

In the name of justice, if we are going to extend the right to have status restored to some, we cannot make these artificial distinctions between those who relinquished their status voluntarily and those who relinquished their status involuntarily.<sup>26</sup>

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<sup>25</sup> Canada, House of Commons, *Debates* (March 1, 1985), 2644-46.

<sup>26</sup> Canada, House of Commons, *Debates* (June 10, 1985), 5568.

In the end, the bill was amended to reinstate Indian status to voluntary enfranchisees, but to leave the matter of band membership for those individuals up to the bands that elected to assume control over the administration of their band lists under section 10 of the amended *Indian Act*. Thus, the current *Indian Act*, as amended by Bill C-31, distinguishes between those who were enfranchised because of their sex and whom they married, and those who lost their status for other reasons.

It is useful at this point to examine the status and membership provisions of the *Act*, found in sections 6 and 11:<sup>27</sup>

**6.(1)** Subject to section 7 [*which sets out a list of those who are not entitled to be registered*],<sup>28</sup> a person is entitled to be registered if

- (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
- (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
- (c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv) [*mother and father's mother are not members of a band, known as the "double mother rule"*],<sup>29</sup> paragraph 12(1)(b) [*woman who married a non-Indian*] or subsection 12(2) [*illegitimate child of a non-Indian father*] or under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant

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<sup>27</sup> For ease of reference we have included in square brackets a brief explanation of the provisions that are referred to in section 6; a more detailed explanation is given in a footnote where necessary.

<sup>28</sup> Under section 7, a non-Indian woman who was entitled to be registered under previous versions of the *Act* on the basis of marriage to a registered Indian man, and whose name was deleted from the Indian register, is not entitled to be registered.

<sup>29</sup> Jack Woodward, *Native Law* (Toronto: Carswell, 1989), 26, states that "[t]he 'double mother rule,' stated approximately, provided that when a woman obtained Indian status only by virtue of marriage to an Indian man, her son by that marriage could not pass on that Indian status to his children if he married a non-Indian. (The rule did not apply to the daughters of such marriages, because they had never been able to pass on Indian status unless they married an Indian. As well, the illegitimate children of such daughters could be removed from the list if there was a successful challenge of paternity.)"

to an order made under subsection 109(2) [. . . *by reason of marriage to a non-Indian, including children of women who married a non-Indian*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;<sup>30</sup>

- (d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(1) [. . . *by voluntary application for enfranchisement, including the wife and children of a man who voluntarily enfranchised*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
- (e) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951,
  - (i) under section 13 [*ceased to be member of a band by reason of residence in foreign country*], as it read immediately prior to September 4, 1951, or under any former provision or this Act relating to the same subject-matter as that section, or
  - (ii) under section 111 [*enfranchised because of post-secondary or professional education*], as it read immediately prior to July 1, 1920, or under any former provision or this Act relating to the same subject-matter as that section; or

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<sup>30</sup> The relevant portions of section 12 of the *Indian Act* RSC 1952, c. 149, are as follows:

**12.(1)** The following persons are not entitled to be registered, namely,

- (a) a person who . . .
  - (iii) is enfranchised, or
  - (iv) is a person . . . whose mother and whose father's mother are [not entitled to be registered as Indians] . . ., and
- (b) a woman who is married to a person who is not an Indian.

Section 109(2) of the *Indian Act* RSC, 1970, c. I-6, provides as follows:

**109.(2)** On the report of the Minister that an Indian woman married a person who is not an Indian, the Governor in Council may by order declare that the woman is enfranchised as of the date of her marriage and, on the recommendation of the Minister may by order declare that all or any of her children are enfranchised as of the date of the marriage or such other date as the order may specify.



- (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

(2) Subject to section 7, a person is entitled to be registered if that person is a person one of whose parents is or, if no longer living, was at the time of death entitled to be registered under subsection (1).<sup>31</sup>

Whereas section 6 sets out a list of those persons who are entitled to be registered as Indians, section 11 sets out additional rules governing who is entitled to band membership. It is important to observe that different rules apply where the band has assumed control of the band list from the Department of Indian Affairs. Section 11 states:

**11.(1)** Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

- (a) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;
- (b) that person is entitled to be registered under paragraph 6(1)(b) [*member of a band as declared by the Governor in Council*] as a member of that band;
- (c) that person is entitled to be registered under paragraph 6(1)(c) [*includes women who married a non-Indian; persons excluded by the double mother rule; illegitimate children of non-Indian father; Indian children who were enfranchised because their mother married a non-Indian*] and ceased to be a member of that band by reason of the circumstances set out in that paragraph;

...

(2) . . . where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

- (a) if that person is entitled to be registered under paragraph 6(1)(d) [*ceased to be member of a band by reason of residence in foreign country*] or (e)

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<sup>31</sup> Section 6(2) provides special registration rules for persons who are entitled to be registered where only one of their parents was entitled to Indian status under section 6(1). The effect of this provision is that a person who is registered under section 6(2) has a limited right to pass on Indian status to their children.

[*enfranchised because of post-secondary or professional education*] and ceased to be a member of that band by reason of the circumstances set out in that paragraph; or

- (b) if that person is entitled to be registered under paragraph 6(1)(f) or subsection 6(2) and a parent referred to in that provisions entitled to have his name entered in the Band List . . .

To make sense of these provisions, it is important to appreciate that section 6 outlines those categories of Indians who are entitled to reinstatement of Indian status, and section 11 addresses the separate matter of band membership. Although some involuntary enfranchisees are entitled under Bill C-31 to reinstatement of both status and membership regardless of whether a band has assumed control of its band list, structurally the bill distinguishes between status and membership.<sup>32</sup>

More specifically, section 11(1) provides that a person is automatically entitled to have his or her name placed on a band list (i.e., is entitled to band membership) if that person is entitled to be registered as an Indian under paragraphs 6(1)(b) or 6(1)(c) regardless of whether the band list is maintained by the band itself or by the Department. To paraphrase the text of the statute, paragraph 6(1)(b) provides that persons are now entitled to be registered if they belong to a group that has been declared a band after April 17, 1985, and paragraph 6(1)(c) states that they are entitled to Indian and band status if they were enfranchised involuntarily because they are women who married non-Indians, illegitimate children of a non-Indian father, Indian children enfranchised because their mother married a non-Indian, or their mother and paternal grandmother were not Indians (the “double mother rule”). But if a band has control of its list, under section 11(2) it is up to that band to decide whether people entitled to be registered under section 6(1)(d), (e), or (f), or 6(2) will be placed on its list.<sup>33</sup> Those subsections entitle persons to be registered if they had previously enfranchised voluntarily, if they lost registration because of residence in a foreign country, or if they

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<sup>32</sup> Mr Penner offered the following rationale for this distinction: “I would like to conclude that by drawing this distinction that the Minister drew between status and Band membership because we do not want this to be interpreted as imposing persons upon First Nations without their consent”: Canada, House of Commons, *Debates* (June 10, 1985), 5570.

<sup>33</sup> Section 10 of the *Indian Act* provides that a band “may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section . . .” Under section 9, a band list for each band is maintained in the Department until such time as a band assumes control of its band list.

were enfranchised because they received post-secondary or professional education. The band is free to deny these people membership with the band. Again, only if the band does not have control of the list do these categories of persons have the right to be placed on a band list maintained by the Department.

One final observation is that sections 6 and 11 of the *Act* do not expressly account for those who were enfranchised as part of a band's enfranchisement. The reason for this apparent gap is not clear from the record of parliamentary debates.

Before leaving the discussion of Bill C-31, we wish to comment on our use of extrinsic evidence. Although the parliamentary history of Bill C-31 is set out above by way of background, we are aware that it sets the stage for the statutory interpretation exercise that follows. Another reason for addressing this issue is that Canada objected to the use of parliamentary debates in this inquiry, arguing as a general principle of law that such evidence should not be considered by interpretive bodies in construing a statute.

While we agree that parliamentary debates are generally inadmissible according to the formal rule, an exception to that exclusionary rule is well established: although debates may not be relied on to determine the meaning of a specific provision, they may be relied on to clarify the context for the statute and the "mischief" that the statute was designed to address.<sup>34</sup> Our reliance on parliamentary debate to clarify the context of the adoption of Bill C-31 is well within the confines of this exception. Furthermore, we note that there is a trend towards the admissibility of this kind of extrinsic evidence. As explained by Pierre-André Côté in his text *The Interpretation of Legislation in Canada*:

this exception to the rule excluding extrinsic evidence implies that the rule is being totally abandoned, because in practice it is extremely difficult to distinguish cases where extrinsic evidence is being used "to interpret a statute" and where it is being used solely to establish "the context" of its adoption. The time is coming when we will no longer be concerned with the admissibility of extrinsic evidence, and where the debate will shift to the weight such materials should be accorded.<sup>35</sup>

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<sup>34</sup> P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991), 364-67.

<sup>35</sup> Côté, *Interpretation of Legislation*, 366. Note that a similar view is expressed in another leading statutory interpretation text: see Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), 448-49.

Indeed, in the recent case of *St. Mary's Indian Band v. Cranbrook*,<sup>36</sup> the Supreme Court of Canada expressly referred to parliamentary debate in support of its interpretation of a provision in the *Indian Act*, without any discussion of the propriety of relying on extrinsic evidence. We note that Canada brought the *St. Mary's Indian Band* case to our attention after submitting its written argument.<sup>37</sup>

#### FACTS RELEVANT TO THIS CLAIM

The following paragraphs set out certain facts required for the Commission to address the issue at hand. We set out only facts essential for the purposes of background, and to avoid any examination of the validity of the enfranchisements affecting the Michel Band. (Other questions regarding the validity of the 1928 and 1958 enfranchisements are excluded from the scope of this inquiry by agreement of the parties.) In other words, we are not prepared to make any findings of disputed fact in this inquiry relating to the validity of the enfranchisements.

The Michel Band entered into a treaty with Canada when Chief Michael Callihoo signed an adhesion to Treaty 6 in 1878.<sup>38</sup> In 1880, a 40-square-mile reserve was surveyed as Michel Indian Reserve (IR)132 on the Sturgeon River about eight miles from the Roman Catholic Mission at St Albert, northwest of Edmonton.<sup>39</sup> This reserve was confirmed by Order in Council PC 1151 on May 17, 1889.<sup>40</sup>

Over the years, the Michel Band membership was affected by individuals and families being enfranchised in accordance with the *Indian Act* provisions governing Indian status and band membership. A number of individuals would have been affected by the compulsory enfranchisement

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<sup>36</sup> *St. Mary's Indian Band v. Cranbrook* (1997), 147 DLR (4th) 385.

<sup>37</sup> Richard Wex, Legal Services, DIAND, to Ron Maurice, Commission Counsel, Indian Claims Commission, September 3, 1997 (ICC file 2108-17-1).

<sup>38</sup> *Copy of Treaty No. 6, between Her Majesty the Queen and the Plain and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River, with Adhesions* (Ottawa: Queen's Printer, 1964) (ICC Documents, p. 1).

<sup>39</sup> George A. Simpson, Surveyor, to the Superintendent General, December 1, 1880, in Canada, Parliament, *Sessional Papers*, 1880-81, No. 14, "Annual Report of the Department of Indian Affairs for the Year Ended 31st December 1880" (ICC Documents, pp. 8-9).

<sup>40</sup> Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 64-65).

provisions of the various versions of the *Indian Act*. In addition, in 1928, 10 families were enfranchised pursuant to the recommendation of an Enfranchisement Board appointed by the Department of Indian Affairs under section 110 of the 1927 *Indian Act*.<sup>41</sup> On May 15, 1928, the Governor in Council declared those individual band members enfranchised.<sup>42</sup> Then, in 1958, further to the recommendations of a Committee of Inquiry appointed under section 112 of the 1952 *Indian Act*, the entire Michel Band was enfranchised.<sup>43</sup> Four members who were not considered able to support themselves were not enfranchised with the rest of the Band but were removed from the Michel Band List and transferred to the General List.<sup>44</sup> By 1962, all reserve lands and assets of the Michel Band had been distributed to its enfranchised members.<sup>45</sup>

As a result of the Bill C-31 amendments, approximately 660 individuals who are former members or descendants of the Michel Band have regained Indian status under section 6 of the *Act* and are currently listed on the Indian Register.<sup>46</sup> The evidence suggests that most, if not all, of these people are former members and descendants of those members who were enfranchised before 1958. Those band members and their descendants who were enfranchised with the entire Michel Band in 1958 were entitled to be registered only if they fell within one of the categories listed in section 6 of the *Indian Act*.

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<sup>41</sup> Enfranchisement Board to Commissioner Graham, July 15, 1927, in DIAND file E6015-D32, vol. 1 (ICC Documents, pp. 312-16), and Inspector Morison to Commissioner Graham, July 18, 1927 (ICC Documents, pp. 317-19).

<sup>42</sup> Order in Council PC 35/811, DIAND file 774/20-3-132 (ICC Documents, pp. 384-85).

<sup>43</sup> Order in Council PC 1958-375, March 18, 1958 (ICC Documents, pp. 811-18).

<sup>44</sup> Marginal note on memorandum from H. M. Jones, Director, to Deputy Minister of Citizenship and Immigration, February 21, 1958 (ICC Documents, p. 803).

<sup>45</sup> L.L. Brown, Special Assistant to the Director, to the Public Trustee, Province of Alberta, May 25, 1902 (ICC Documents, p. 874). It should be noted, however, that Mr Jerome Slavik brought forward new information on January 8, 1998, which may have a bearing on this issue. In the event that the Commission's report and recommendations in this inquiry do not lead to a resolution of the standing issue, this new information may become the subject matter of a subsequent inquiry into the validity of the 1928 and 1958 enfranchisements.

<sup>46</sup> Submissions on Behalf of the Government of Canada, July 18, 1997, p. 21. Under section 5 of the *Indian Act*, the Department maintains an Indian Register, which records the name of every person who is entitled to be registered as an Indian under the *Act*.

### PART III

#### ISSUES

The fundamental question before the Commission is whether the descendants and former members of the Michel Band are entitled to be recognized as a band under the *Indian Act*. For the purposes of defining the scope of the inquiry, the parties have agreed on the following assumption and statement of issues:

***Assumption:***

For the purposes of addressing this issue, and on a without prejudice basis or admission of fact, the Michel Indian Band ceased to exist as a Band under the *Indian Act* in 1958 as a result of the (band's) enfranchisement.

***Issue:***

Do the 1985 amendments to the *Indian Act*, when coupled with the other provisions of the *Indian Act*, impose upon Canada a statutory obligation to reconstitute the Michel Band as a Band under the *Indian Act*, providing it with standing to bring a claim under the Specific Claims Policy?

***Sub-Issues:***

- i) Was Canada required as a matter of law to maintain a Band List for the Michel Indian Band after the 1958 enfranchisement?
- ii) As a result of the 1985 amendments to the *Indian Act*, is Canada under a statutory obligation to place the names of some or all of the former members of the Michel Indian Band, or their descendants who have regained Indian status, on the Michel Band List? Does being placed on a Band List constitute being a member of the Michel Band?
- iii) If such a statutory obligation exists, does this reconstitute the Michel Indian Band?
- iv) Is Canada required by law to recognize some or all of the former members of the Michel Indian Band and their descendants who have regained Indian status as now constituting the Michel Band under the *Indian Act* and the Specific Claims Policy?

## PART IV

### ANALYSIS

#### PRINCIPLES OF STATUTORY INTERPRETATION

The parties disagree on the general principles of interpretation applicable to statutes dealing with Indians. Since this inquiry is essentially an exercise in statutory interpretation, it is necessary to address this matter and to make our approach clear from the outset.

The Society argues that the *Indian Act* provisions at issue are capable of more than one interpretation, and, based on *Nowegijick v. The Queen*,<sup>47</sup> that the ambiguity must be resolved in favour of the Indians. Canada submits that there is no ambiguity, and, moreover, that the *Nowegijick* principle does not apply to statutes but only to the interpretation of treaties. For that proposition, Canada relies on *Mitchell v. Peguis Indian Band*<sup>48</sup> and the recent Supreme Court of Canada case of *R. v. Lewis*.<sup>49</sup>

The *Nowegijick* principle is that “treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians.”<sup>50</sup> The principle was refined in *Mitchell*, in which La Forest J identified the differences between treaties and statutes and explained how those differences affect the interpretation exercise. In view of the importance placed on this interpretive principle, it is useful to consider La Forest J’s analysis at some length:

I note at the outset that I do not take issue with the principle that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians. In the case of treaties, this principle finds its justification in the fact that the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples. From the perspective of the Indians, treaties were drawn up in a foreign language, and incorporated references to legal concepts of a system of law with which the Indians were unfamiliar. In the interpretation of these documents it is, therefore, only just that the courts attempt to construe various provisions as the Indians may be taken to have understood them.

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<sup>47</sup> *Nowegijick v. The Queen*, [1983] 1 SCR 29.

<sup>48</sup> *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85.

<sup>49</sup> *R. v. Lewis*, [1996] 1 SCR 921.

<sup>50</sup> *Nowegijick v. The Queen*, [1983] 1 SCR 29 at 36.

But as I view the matter, somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Given this fact, I do not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretative method. As already stated, it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them.

...

At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.<sup>51</sup>

Thus, the principle is not simply that any construction favouring the Indians ought to be accepted, because we still, of course, demand fidelity to the language and purpose of the statute. Statutes relating to Indians should be construed liberally, having regard for parliamentary intent as embodied in the text. It appears, therefore, that the Society's argument may oversimplify the matter somewhat. At the same time, however, Canada's assertion that the *Nowegijick* principle no longer applies in the context of statutory interpretation is clearly overstated.

In *Lewis*, the Supreme Court of Canada summarized the canons of interpretation of statutes relating to Indians, beginning with *Nowegijick* and *Mitchell*. The issue in *Lewis* was whether a band's power under the *Indian Act* to make by-laws for the management of fish "on the reserve" extended to a river immediately adjacent to the reserve. Iacobucci J, for the Court, approached the task by analyzing the wording, context, and purpose of the statutory provision. Making the point that these three elements must be reconciled, he rejected the argument that a broad, purposive construction of the phrase "on the reserve" was justified because the fishery is critical to the economic and cultural well-being of aboriginal people, and the general goal of the *Indian Act* is to

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<sup>51</sup> *Mitchell v. Peguis Indian Band*, [1990] 2 SCR 85 at 143.



protect the “sustaining practices” of aboriginal people. Iacobucci J stated that, although the suggested interpretation “goes further towards achieving Parliament’s objective of protecting and maintaining Indian rights, it is not an interpretation supported on the language or goal of the section.”<sup>52</sup>

In summary, then, while statutes dealing with Indians must be liberally construed, an interpretation that furthers the protection of Indian rights can be accepted only if the language and purpose of the statutory provision can support such an interpretation. This basic principle of statutory interpretation guides the analysis that follows.

We now go on to discuss the main issue in this inquiry, namely, whether the 1985 amendments to the *Indian Act* impose a statutory obligation on Canada to reconstitute the Michel Band as a Band within the meaning of the *Indian Act* and the Specific Claims Policy.

#### **SUB-ISSUE 1 STATUTORY OBLIGATION TO MAINTAIN MICHEL BAND LIST**

##### **Was Canada required as a matter of law to maintain a Band List for the Michel Indian Band after the 1958 enfranchisement?**

The Society argues that Canada is required, under the *Indian Act*, to maintain a band list for the Michel Band even though (we are assuming that) the Band ceased to exist in 1958 and therefore all the names on the list were deleted. The Department has been required since 1951 to maintain a band list for each band and to record all additions and deletions. These requirements are now found in sections 8 and 9 of the *Act*, which read as follows:<sup>53</sup>

**8.** There shall be maintained in accordance with this Act for each band a Band list in which shall be entered the name of every person who is a member of that band.

**9. (1)** Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

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<sup>52</sup> *R. v. Lewis*, [1996] 1 SCR 921 at para. 77.

<sup>53</sup> All relevant statutory provisions are contained in the appendix to this report.

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

According to the Society, there is nothing in section 9 or any other provision of the *Act* that permits the Department to destroy a band list, nor is there any indication that the requirement to maintain a band list does not continue even if all names have been deleted.

Furthermore, the Society points out that the Department does in fact have a list of former Michel Band members, which it needs for administrative purposes. Thus, the existence of a band list in perpetuity makes practical as well as legal sense. Overarching all of these arguments is the principle, advanced by the Society, that any interpretation of section 8 and 9 must further the purpose of the Bill C-31 amendments, which is to “eliminate and remedy the effects of the discriminatory enfranchisement provisions of the *Indian Act* by restoring Indian status and band membership to those individuals who applied to regain these rights.”<sup>54</sup>

Canada argues simply that, where there is no band and there are no members, there is no obligation under section 8 of the *Indian Act* or any of its predecessors to maintain a band list. In support of its position, Canada relies on the wording, context, and purpose of section 8. Beginning with an analysis of the language of the provision, Canada notes that section 8 requires that a band list be maintained “for each band,” not “for each band and any former band.” Section 8 also requires the Department to record the name of “every person who is a member of that band,” not “is or was” a member of that band. Canada asserts, therefore, that the Society’s purposive interpretation cannot be supported by the wording of section 8. In addition, other sections of the *Act* that address band lists and band control over lists, such as sections 10 and 14, presume the existence of a band. The contextual approach to interpretation demands that “band list” be accorded a consistent meaning throughout the *Act*, but the prospect of a band list for a non-existent band makes no sense in the context of the *Act* as a whole.

As to the point that a list for the Michel Band actually exists, Canada submits that an historical or administrative record showing that all of the names of Michel Band members were

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Submission on Behalf of the Michel Society, June 27, 1997, p. 20.

struck out does not amount to a band list within the meaning of the *Act*. Finally, Canada objects to the Society's characterization of the purpose of the Bill C-31 amendments, in that the amendments clearly distinguish between status and membership and provide for certain individuals to be restored only to Indian status without band membership.

Although we think that Canada is correct in saying that Bill C-31 contemplated a distinction between status (section 6) and membership (section 11), depending on enfranchisement category, we agree with the Society that it would be consistent with the purpose of Bill C-31 to reinstate Indian status and band membership to at least those former Michel Band members who were affected by the "woman marrying out" provisions. To further that clear purpose – remedying past sex discrimination – there must be a Michel Band list. The difficulty, however, is that the purposive approach urged upon us by the Society cannot be supported by the wording of section 8.

Section 8 imposes an obligation on Canada to maintain a band list "in accordance with this *Act for each band.*" On our reading of this language, it is apparent that there must be a band in existence for the section 8 obligation to take hold. We agree with Canada that it would have been easy for Parliament to have included former bands in section 8 if it had been the intention to maintain band lists for any band ever in existence. Furthermore, although it is true that there is no provision in the *Indian Act* allowing the Department to destroy or discontinue band lists, in our view the absence of a direct expression of such power does not alter the analysis. A list of deleted names of members of a band that no longer exists simply ceases to be a band list, without any exercise of a positive power of destruction or discontinuance that needs explicit statutory sanction. Finally, we have to agree with Canada that the continued existence for administrative purposes of a list of deleted names of Michel Band members does not mean that a band list, as defined under the terms of the *Indian Act*, exists.

The assumption, for the purposes of this inquiry, is that the Michel Band ceased to exist as a band under the *Indian Act* in 1958; therefore, since 1958 there has been no band on which to predicate Canada's obligation to maintain a band list. Consequently, we conclude that Canada was not required to maintain a band list for the Michel Band after the 1958 enfranchisement. To hold otherwise would be to strain the words of the section to achieve a certain purpose, an approach that is inconsistent with the *Lewis* case.

## SUB-ISSUE 2 STATUTORY OBLIGATION TO PLACE NAMES ON MICHEL BAND LIST

**As a result of the 1985 amendments to the *Indian Act*, is Canada under a statutory obligation to place the names of some or all of the former members of the Michel Indian Band, or their descendants who have regained Indian status, on the Michel Band List? Does being placed on a Band List constitute being a member of the Michel Band?**

Having determined that Canada was not required to maintain a band list for the Michel Band under section 8, we are asked to consider whether section 11 of the *Act* creates an obligation on Canada to place members of the Society on a Michel Band list. Recall that the Bill C-31 amendments entitle certain individuals, such as those in the “women marrying out” group, to reinstatement of both Indian status and band membership. Under section 11, such an individual is “entitled to have his name entered on a Band list maintained in the Department for a band.” The Society submits that those of its members who have had Indian status reinstated under section 6(1)(c) and (d) are therefore *automatically* entitled to be placed on the Michel Band list. It further submits that band enfranchisees fall under section 6 and are entitled to be reinstated as well.

In response, Canada submits that the Society’s argument is circular. Section 11 states that, in certain cases, individuals are entitled to have their names entered on a band list maintained in the Department for that band. But since there is no Michel Band and no Michel Band list, section 11 cannot apply. Canada says that the Society’s argument somehow assumes the creation of a band by application of a section of the *Act* that requires a band to exist in the first place. Furthermore, the assertion that section 11 imposes a duty on Canada to constitute a band list for a band that does not exist is inconsistent with, and undermines, the Minister’s discretionary power under section 17 of the *Act* to create bands and band lists.<sup>55</sup>

What we are being asked to consider here is whether the Bill C-31 amendments should be interpreted so that the Michel Band enfranchisees, and those affected by individual enfranchisement

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<sup>55</sup> Section 17 provides, in part, as follows:

17.(1) The Minister may, whenever he considers it desirable,  
 . . .  
 (b) constitute new bands and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.

prior to 1958, are placed on the same footing as all other Indians who were enfranchised. The problem, in the case of the claimants, is that the Michel Band ceased to exist in 1958 and, as explained above, there is no Michel Band list. Another problem is that the Bill C-31 amendments do not specifically address band enfranchisement; although section 6 explicitly refers to the statutory provisions under which individuals were enfranchised, it contains no reference to the band enfranchisement provisions of the 1951 *Indian Act* or any former *Act*.

The Society maintains that we should approach this problem from the perspective of the purpose of Bill C-31. The mischief that Bill C-31 was intended to remedy was discrimination created by the enfranchisement provisions in the *Indian Act*. Since band enfranchisement grew out of the same assimilationist and colonial policy as individual enfranchisement, the Society argues that fidelity to the purpose of the amendments demands that band enfranchisees not be deprived of the remedy (i.e., reinstatement of Indian and band status) available to others who are similarly situated. And those former Michel Band members and descendants who were enfranchised prior to 1958, and took no part in the band enfranchisement proceedings, should not be deprived of the benefits of Bill C-31 (i.e., reinstatement of status and, in many cases, membership) to which they would otherwise be entitled. The Society also relies on the principle that statutes must be interpreted in a manner consistent with the constitutional values embodied in the *Charter* and section 35 of the *Constitution Act, 1982*.

We are troubled by the prospect of former Michel Band members who were, for example, involuntarily enfranchised by “marrying out” being unable to regain membership in a band, and thus remaining disadvantaged as a result of past discrimination that was intended to be remedied. That result appears to be inconsistent with the overall objectives of Bill C-31. Similar considerations apply to band enfranchisees, who were subject to the same broadly discriminatory policy.<sup>56</sup> Nevertheless, we cannot accept the interpretation of sections 6 and 11 urged upon us by the Society. We recognize that the suggested interpretation advances the purpose of Bill C-31, but we are constrained by the language of the statute.

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<sup>56</sup> If we accept Canada’s argument, the practical impact on the Michel Society members is that (1) those members who were enfranchised as part of the band in 1958 are not entitled to be reinstated as Indians; and (2) some 660 members who were reinstated by virtue of Bill C-31 because they fall within the categories recognized under section 6 are not entitled to be placed on the Michel Band list because there is no band.

Section 11 provides that under certain circumstances “a person is entitled to have his name entered in a Band list maintained in the Department for a band.” The Society’s argument, in essence, is that the creation of a Michel Band list results by necessary implication from the operation of that section. In our view, the creation of a band list, which in turn requires the existence of a band, is simply too significant and complex an effect to be implicit. The act of creating or reconstituting bands or band lists is governed by specific sections of the *Act* and cannot flow from section 11 *per se*.

We are also of the opinion that band enfranchisees do not fall within the ambit of section 6(1), the relevant portions of which are reproduced below for ease of reference:

**6.(1)** Subject to section 7, a person is entitled to be registered if

- ...
- (c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv) [*mother and father’s mother are not members of a band, known as the “double mother rule”*], paragraph 12(1)(b) [*woman who married a non-Indian*] or subsection 12(2) [*illegitimate child of a non-Indian father*] or under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(2) [*. . . by reason of marriage to a non-Indian, including children of women who married a non-Indian*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
- (d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(1) [*. . . by voluntary application for enfranchisement, including the wife and children of a man who voluntarily enfranchised*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
- ...

The Society submits that band enfranchisees do fall within the scope of section 6(1)(c) and (d) by virtue of the emphasized phrase “under any former provision of this Act relating to the same subject matter as any of those provisions.” The argument is that band enfranchisement and individual

enfranchisement relate to the same subject matter – enfranchisement generally – and therefore band enfranchisement is caught by section 6. Canada contends, however, that:

the reference in section 6 to “any former provision of this Act relating to the same subject matter” clearly refers to earlier *Indian Act* provisions dealing with individual (married women and individual application) enfranchisements, such as s. 99 of the *Indian Act*, S.C. 1880, c. 28; s. 82 of the *Indian Act*, S.C. 1886, c. 42; and s. 108 of the *Indian Act*, R.S.C. 1952, c. 148, none of which would have been caught in the absence of that concluding phrase.

If, as is argued by the Society, the concluding phrase had the effect of including band enfranchisements, there would have been no need for paragraph 6(1)(d) or (e) as all aspects of enfranchisement (including all categories of individual enfranchisement and band enfranchisements) would have been caught by the concluding phrase in paragraph 6(1)(c). Thus it is Canada’s position that the purpose and legal effect of the concluding phrase in paragraph 6(1)(c) and 6(1)(d) was not to include every category of enfranchisement but rather to include the married woman/individual application enfranchisements which had taken place under earlier versions of the *Indian Act*.<sup>57</sup>

We agree with Canada’s submissions on this point. As we read it, the emphasized phrase is simply the means by which the legislative drafter avoided having to list every predecessor, in every former version of the *Indian Act*, to the specific sections listed. The phrase does not function to broaden the ambit of the provision to include band enfranchisement. Furthermore, if Parliament had intended to reinstate all categories of Indians enfranchised under the repealed sections of the *Indian Act*, that intention could have been stated clearly and simply without the need to draw the fine distinctions between the categories of enfranchisees that we see in Bill C-31.

It thus appears that there is a gap in the legislation. Although the intention of remedying past discrimination is clear, and former Michel Band members lost their Indian status as part of the government’s policy to assimilate Indians into mainstream Canadian society, it remains that Parliament simply did not account for band enfranchisement (perhaps because there were only two band enfranchisements in the entire history of the *Indian Act*). The actual language of the *Act* is

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<sup>57</sup> See Submissions on Behalf of the Government of Canada, July 18, 1997, pp. 25-26. The emphasis is in the original.

under-inclusive – that is, it is silent on band enfranchisement. Is it possible, then, to fill the gap by adopting a broad and remedial construction of Bill C-31?

Generally speaking, courts are reluctant to add a missing provision to a statute to bring it in line with its purpose.<sup>58</sup> Although it is permissible to go beyond the written words of a statute to render explicit that which is implicit, it is not permissible to interpret a statute so as to usurp the role of the legislature. It would be inappropriate, therefore, for the Commission to interpret the Bill C-31 amendments so as to fill the gap. Moreover, one might contend that in this case there is no real legislative gap, since the band's enfranchisement problem (i.e., an entitlement to membership but effectively nowhere to go since there is no Michel Band or band list in existence) could be dealt with by way of section 17 and the Minister's power to create new bands.

In the end, having considered all of the arguments, we conclude that Canada has no statutory obligation to place the names of all former Michel Band members or descendants who have regained status on a Michel Band list. We also conclude that section 6 does not apply to band enfranchisees.

As for the second prong of this sub-issue, we conclude that being placed on a band list, or being entitled to be placed on a band list under section 6, can constitute band membership only if a band list already exists under the terms of the *Act*. On the basis of that line of reasoning, the definition of "member of a band" in section 2(1) of the *Act* as "a person who is entitled to have his name appear on a band list" does not operate to create a band, as the Society asserts, but is predicated on the existence of a band.

### **SUB-ISSUE 3 MEMBERSHIP AND BAND RECONSTITUTION**

#### **If such a statutory obligation exists, does this reconstitute the Michel Indian Band?**

The *Indian Act* defines "band" in section 2(1) as follows:

2. (1) In this Act  
"band" means a body of Indians

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<sup>58</sup> See Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994), 128, and P.-A. Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville: Yvon Blais, 1991), 333-39.



- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
- (b) for whose use and benefit in common, moneys are held by Her Majesty, or
- (c) declared by the Governor in Council to be a band for the purposes of this Act;

The question we are asked here is whether a statutory obligation to place names on a Michel Band list operates to reconstitute the Michel Band. The starting point of the analysis must be that the Bill C-31 amendments must be read within the context of the *Act* as a whole. If the Bill C-31 amendments operate to reconstitute the Michel Band, they must do so in a manner consistent with the other provisions of the *Act*, including the definition of “band” in section 2(1). In other words, sections 6 and 11 cannot reconstitute the Michel Band if the statutory requirements laid out in section 2(1) are not met.

The Society submits that the former members and descendants of the Michel Band are a band within the meaning of the *Indian Act* because they are a “body of Indians” who had reserve lands set aside for them at one time. In support of its argument, the Society refers to section 2(2) of the *Act*:

2.(2) The expression “band” with reference to a reserve or surrendered land means the band for whose use and benefit the reserve or the surrendered lands were set apart.

The point of raising this section is to demonstrate that a band does not cease to exist under the *Indian Act* simply because it is without reserve land. Furthermore, the Society notes that, if it is ultimately successful in its claim against Canada for, *inter alia*, the illegal surrender of reserve land, Canada will hold moneys and lands in trust for its members, and the definition of “band” will be met through subsection (a) and (b).

Canada’s response to this argument is that the language of section 2(1) “band” (a) plainly demands that a band continue to hold reserve land. The section refers to lands that “have been set apart” not “had been or were set apart.” As Canada points out, the phrase “have been set apart” uses the present perfect form of the verb which indicates a reference to a past event with a continuation in the present. Canada’s position that lands must continue to be set apart for the body of Indians is further supported by the words “lands . . . the legal title to which is vested in Her Majesty” in section

2(1) “band” (a). Moreover, the logical result of the Society’s argument – that any band that ever had reserve land set aside for it will continue to exist as a band under the *Indian Act* – suggests the argument is untenable. The fact of the matter is that bands do cease to exist, for example, through the process of amalgamation.

Having considered the parties’ submissions, we find that the claimants do not satisfy the definition of “band” under the *Act*. Reading the text of section 2(1) “band” in a common sense way, we are of the view that a band is a body of Indians which has had lands set aside and continues to hold those lands. The alternative, expansive approach to interpretation of the section requires that we accept the proposition that bands exist in perpetuity if they ever had reserve lands set aside. We cannot accept that proposition. In addition, we are of the view that section 2(2) does not assist the Society in any way. That provision is engaged only in connection with other provisions of the *Act* dealing with reserves or surrendered lands, and does not alter or conflict with the basic definition of “band” set out in section 2(1). As to the application of section 2(1) “band” (b), we decline to make any finding on whether the Michel Band exists on the basis of a possibility that moneys will be held in trust for the members if their specific claim is successful because the parties agreed that this issue would not be addressed in this inquiry. All of these considerations lead us to the conclusion that the Bill C-31 amendments do not reconstitute the Michel Band.

#### **SUB-ISSUE 4 STATUTORY OBLIGATION TO RECOGNIZE MICHEL BAND**

**Is Canada required by law to recognize some or all of the former members of the Michel Indian Band and their descendants who have regained Indian status as now constituting the Michel Band under the *Indian Act* and the Specific Claims Policy?**

Based on the analysis under sub-issues 1 through 3 above, there is no obligation on the part of Canada to recognize those former Michel Band members and descendants who have regained status as a band under the *Indian Act*. That conclusion effectively determines whether the Society is eligible to bring a claim under the Specific Claims Policy.

As noted at the outset of this report, the Specific Claims Policy contemplates claims by a band or bands, not individuals or other groups. In the *Young Chipeewayan Inquiry*, the Commission concluded that the Policy does not afford individuals or groups of individuals redress unless they are

a band within the meaning of the Policy.<sup>59</sup> The Commission went on to state that “it is the definition of ‘band’ under the *Indian Act* that is most relevant to the Specific Claims Policy.”<sup>60</sup> However, the question of whether the claimants in that case were a band at common law was also considered.

In addition to reasserting its argument that the Michel Band was reconstituted by the Bill C-31 amendments, the Society argues that it is a band at common law and that a broad definition of “band” is contemplated under the Policy. Canada not only rejects that argument but objects to its being raised, since the focus of this inquiry has been Canada’s *statutory* obligation. Canada’s position is that the common law argument represents a departure from the agreed statement of issues and should not be considered in the context of this inquiry.

Our view is that we are constrained by the terms of the agreed statement of issues as well as the lack of evidence and argument on the issue of whether the Society is a band at common law. That leaves only the matter of status determined under the *Act*. Since the Society is not a band under the *Indian Act*, we must conclude that it lacks standing to bring a claim under the Specific Claims Policy.

#### **FAIRNESS IN THE RESULT: THE COMMISSION’S SUPPLEMENTARY MANDATE**

Based on the facts and arguments before the Commission in this inquiry, we have concluded that the Government of Canada is not legally obligated to recognize the Friends of Michel Society as a band under the provisions of the *Indian Act*. However, because we have reservations about the fairness of this result, we have decided to exercise our discretion to make a supplementary recommendation to the Minister of Indian Affairs. In light of the unique and anomalous circumstances in this case, we feel justified in relying on the Commission’s supplementary mandate, which was first described in 1991 by the former Minister of Indian Affairs, Tom Siddon, in the following terms:

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<sup>59</sup> ICC, *The Young Chipeewayan Inquiry Report into the Claim Regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reprinted (1995) 3 ICCP 175 at 196.

<sup>60</sup> ICC, *The Young Chipeewayan Inquiry Report into the Claim Regarding Stoney Knoll Indian Reserve No. 107* (Ottawa, December 1994), reprinted (1995) 3 ICCP 175 at 197.

If, in carrying out its review, the Commission concludes that the policy was implemented correctly *but the outcome is nonetheless unfair*, I would again welcome its recommendations on how to proceed.<sup>61</sup>

In an October 13, 1993 letter to then Chief Commissioner Harry LaForme, the Minister of Indian Affairs, Pauline Browes, reiterated the position taken by her predecessor. Minister Browes's letter makes two key points in relation to the government's proposed approach on how to respond to the recommendations of the Commission:

(1) I expect to accept the commission's recommendations where they fall within the Specific Claims Policy; (2) I would welcome the Commission's recommendations on how to proceed in cases where the commission concluded that the policy had been implemented correctly but the outcome was nevertheless unfair . . .<sup>62</sup>

As mentioned above, our conclusion, based on the narrow legal issue put before us, is that Canada has no legal obligation to reconstitute the Michel Band, and the Society has no standing to bring a claim under the Specific Claims Policy. The consequence of this conclusion, however, is that the Michel Society may have no practical means of recourse to address its claims against Canada, since the obstacles of litigation are often too substantial for this to be a viable alternative. If the Michel Society is correct in its assertions that certain surrenders of reserve land by the Michel Band in the early 1900s were improper and invalid (and we make no findings on these assertions), the Society's lack of recourse would result in manifest unfairness in that it would allow Canada to ignore its legal obligations and not have to account for the damages suffered by the Michel Band and its descendants. The Michel Society expressed the concern in these terms:

Given the purpose of the [Specific Claims] policy and the nature of the relationship between the Crown and aboriginal bands (in the anthropological sense), we submit it is not reasonable or consistent with fair dealing and the honour of the Crown to deny standing to the Michel Band to bring a claim. This is particularly so because the

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<sup>61</sup> Tom Siddon, Minister of Indian Affairs and Northern Development, to Oride Mercredi, National Chief, Assembly of First Nations, November 22, 1991, reprinted in (1995) 3 ICCP 244-46.

<sup>62</sup> Pauline Browes, Minister of Indian Affairs and Northern Development, to Harry S. LaForme, Chief Commissioner, Indian Claims Commission, October 13, 1993, reprinted in (1995) 3 ICCP 242-43.

crown is seeking to rely on the effects of a very discriminatory provision (s. 112) which it has, itself, recognized violates human rights and which is of the same [sic] nature and effect as the enfranchisement provisions which were repealed and ameliorated in 1985. This is also particularly so because the claims which the Michel Band seeks to establish relate to the very event, the 1958 enfranchisement, which Canada is using to bar the Michel Band's claim. The Band has a strong claim based on wrongful enfranchisement, illegal termination of treaty rights and wrongful surrender and disposition of reserve lands and assets in connection with the 1958 enfranchisement. Surely the Crown cannot rely on its own wrongful act to bar the bringing of a claim for redress of that wrong.<sup>63</sup>

The Commission, of course, makes no findings on the merits of these other claims. We do, however, have serious reservations about the fairness of Canada's position that the Michel Society does not have standing to bring a claim under the Policy. Such a decision may, in effect, immunize Canada from the legitimate claims of a group of Indians who contend that they still stand in a fiduciary relationship with the Crown. Furthermore, it is our view that this result, although correct from a technical legal perspective, is unfair because it might allow Canada to benefit from the effect of enfranchisement provisions that were repealed in their entirety in 1985.

Viewed in this light, we think it would be inappropriate for Canada to stand on its technical legal advantage in this case. That advantage is derived from the fact that the Band was enfranchised in combination with the strictures of the Specific Claims Policy and what may be a gap in the Bill C-31 amendments. In our view, Canada should consider the specific claims of the Michel Society on their merits. Such an approach is not only consistent with the thrust of the Specific Claims Policy and the Crown's fiduciary relationship with aboriginal peoples, but it is also consonant with the spirit of the Bill C-31 amendments, which sought to eradicate the concept of enfranchisement and to remedy its discriminatory effects.

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Submissions on Behalf of the Michel Society, June 27, 1997, pp. 37-38.

**PART V**  
**FINDINGS AND RECOMMENDATION**

**FINDINGS**

The Commission has been asked to inquire into and report on whether Canada has a statutory obligation to recognize the Michel Band as a band under the *Indian Act*, providing it with standing to bring a claim under the Specific Claims Policy. For the purposes of addressing this issue the parties agreed to assume, on a without prejudice basis, that the Michel Band ceased to exist as a band under the *Indian Act* in 1958 as a result of the band's enfranchisement. The parties also agreed that the main issue raised four sub-issues.

Our findings on each of the sub-issues are summarized as follows.

**Sub-Issue 1 Statutory Obligation to Maintain Michel Band List**

**Was Canada required as a matter of law to maintain a Band List for the Michel Indian Band after the 1958 enfranchisement?**

Section 8 of the *Indian Act* imposes an obligation on Canada to maintain a band list "in accordance with this Act for each band." In our view, it is apparent from the language of this section that there must be a band in existence for the obligation to maintain a list to take hold. If Parliament had intended to ensure that band lists were maintained for any band ever in existence, it could have easily extended the section 8 obligation to include "each band and any former band." Since the assumption, for the purposes of this inquiry is that the Michel Band ceased to exist in 1958, there is no band on which to predicate Canada's obligation to maintain a band list. We conclude, therefore, that Canada was not required as a matter of law to maintain a band list for the Michel Indian Band after the 1958 enfranchisement.

**Sub-Issue 2 Statutory Obligation to Place Names on Michel Band List**

**As a result of the 1985 amendments to the *Indian Act*, is Canada under a statutory obligation to place the names of some or all of the former members of the Michel Indian Band, or their descendants who have regained Indian status, on the Michel Band List? Does being placed on a Band List constitute being a member of the Michel Band?**

Having determined that Canada was not required to maintain a band list for the Michel Band under section 8, we were then asked to consider whether sections 6 and 11 of the *Indian Act* create an obligation to place members of the Society on a Michel Band list. Section 11 provides that certain individuals reinstated to Indian status under section 6 are entitled to have their names entered on a band list maintained in the Department. The difficulty is that, although many members of the Society are entitled to reinstatement of Indian status under section 6, there is no Michel Band and no Michel Band list on which to enter their names under section 11. Furthermore, section 6 does not list band enfranchisees in the categories of individuals entitled to regain Indian status.

We appreciate that Bill C-31 was intended to remedy discrimination created by the enfranchisement provisions in the *Indian Act*, and if there is no obligation on Canada under sections 6 and 11 of the *Act* to place some members of the Society on a Michel Band list, those members remain disadvantaged as a result of past discrimination. At the same time, however, we are constrained by the language of the statute. Section 11 provides that, under certain circumstances, “a person is entitled to have his name entered in a Band List maintained in the Department for a band.” But if there is no band list, the creation of such a list cannot result from the operation of section 11. The act of creating or reconstituting bands or band lists is governed by specific sections of the *Act* and cannot flow from section 11 *per se*.

If Parliament had intended to reinstate all categories of Indians enfranchised under the repealed sections of the *Indian Act*, that intention could have been stated in clear and simple language without the need to draw fine distinctions between the categories of enfranchisees that we see in Bill C-31. Nor can the Commission fill in this gap with a broad and remedial construction of Bill C-31. Although it is permissible to go beyond the written words of a statute to render explicit that which is implicit, it is not permissible to interpret a statute so as to usurp the role of the legislature.

Therefore, it is our view that Canada has no statutory obligation to place the names of all former Michel Band members, or descendants who have regained status, on a Michel Band list. We also conclude, based on the plain language of the *Act*, that band enfranchisees do not fall within the scope of the Bill C-31 amendments. Finally, we conclude that being placed on a band list can constitute band membership only if a band already exists under the terms of the *Act*.

### **Sub-Issue 3 Membership and Band Reconstitution**

#### **If such a statutory obligation exists, does this reconstitute the Michel Indian Band?**

If the Bill C-31 amendments operate to reconstitute the Michel Band, they must do so in a manner consistent with the other provisions of the *Act*, including the definition of “band” in section 2(1). The relevant portion of that section defines “band” as “a body of Indians for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951 . . .” We find that the Society does not satisfy this definition of “band.” If we read the text in a common sense way, a band is a body of Indians that had lands set aside at some point and that continues to hold those lands. Any other interpretation would mean that bands will exist in perpetuity under the *Indian Act* if they ever had reserve lands set aside. We conclude, therefore, that the Bill C-31 amendments do not reconstitute the Michel Band.

### **Sub-Issue 4 Statutory Obligation to Recognize Michel Band**

#### **Is Canada required by law to recognize some or all of the former members of the Michel Indian Band and their descendants who have regained Indian status as now constituting the Michel Band under the *Indian Act* and the Specific Claims Policy?**

Based on the analysis under sub-issues 1 through 3 above, we conclude that there is no statutory obligation on the part of Canada to recognize those former Michel Band members and descendants who have regained status as a band under the *Indian Act*. Furthermore, since the Specific Claims Policy contemplates claims by a band or bands, not individuals or other groups, the Society is not, strictly speaking, eligible to bring a claim under the Specific Claims Policy.

### **FAIRNESS IN THE RESULT: THE COMMISSION’S SUPPLEMENTARY MANDATE**

As noted above, the mandate of the Commission includes a supplementary mandate to make recommendations to the government where we conclude that the Specific Claims Policy was implemented correctly, from a strictly legal point of view, but that the outcome is nonetheless unfair.



In the light of this supplementary mandate, we offer the following additional comments and recommendation.

Our conclusion, on the narrow legal issue put before us, is that Canada has no statutory obligation to recognize or reconstitute the Michel Band, and the Society has no standing to bring a claim under the Specific Claims Policy. The consequence of this conclusion, however, is that the Michel Society may have no practical means of recourse to address its claims against Canada. If the Michel Society is correct in its assertions that certain reserve land surrenders by the Michel Band in the early 1900s were improper and invalid (again we make no findings on these assertions), this would result in manifest unfairness if Canada were allowed to ignore its legal obligations and not have to account for the damages suffered by the Michel Band and its descendants. Furthermore, it is our view that this result, although correct from a technical legal perspective, is unfair because it would allow Canada to benefit from past discrimination. The Michel Band was enfranchised and ceased to exist under those terms and in that context.

Viewed in this light, we think it would be inappropriate for Canada to stand on its technical legal advantage in this case. That advantage is derived from the fact that the Band was enfranchised in combination with the strictures of the Specific Claims Policy and what may be a gap in the Bill C-31 amendments. In our view, Canada should consider the specific claims of the Michel Society on their merits. Such an approach is not only consistent with the thrust of the Specific Claims Policy and the Crown's fiduciary relationship with aboriginal peoples, but it is also consonant with the spirit of the Bill C-31 amendments, which sought to eradicate the concept of enfranchisement and to remedy its discriminatory effects.

We therefore make the recommendation that follows.

## **RECOMMENDATION**

**That Canada grant special standing to the duly authorized representatives of the Friends of Michel Society to submit specific claims in relation to alleged invalid surrenders of reserve land for consideration of their merits under the Specific Claims Policy.**

**FOR THE INDIAN CLAIMS COMMISSION**

P.E. James Prentice, QC  
Commission Co-Chair

Carole T. Corcoran  
Commissioner

Dated this 27th day of March, 1998

## APPENDIX A

### FRIENDS OF THE MICHEL SOCIETY INQUIRY

1	<u>Request that Commission conduct inquiry</u>	March 1, 1995
2	<u>Planning conferences</u>	July 26, 1995 March 22, 1996 May 22, 1997
3	<u>Decision to conduct inquiry</u>	September 22, 1995
4	<u>Notices sent to parties</u>	September 25, 1995
5	<u>Community session</u>	December 17, 1996

The Commission heard from the following witnesses: Gilbert Anderson, Paul Callihoo, Napoleon Callihoo, Joanne Abbott, Beatrice Calliou, Albert Callihoo, John Calliou, Darlene Cust, Phyllis Hull, Elizabeth Gerlat, Christina Shennan, Nicole Callihoo.

6 Content of the formal record

The formal record for the Friends of the Michel Society Inquiry into the 1958 Enfranchisement Claim consists of the following materials:

- 21 exhibits tendered during the inquiry, including the documentary record (4 volumes of documents with annotated index)
- written submissions from counsel for the Friends of the Michel Society and counsel for Canada
- transcripts from community session (1 volume)

The Report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.

## APPENDIX B

### RELEVANT PROVISIONS OF *INDIAN ACT*, RSC 1985

*Indian Act*, RSC 1985, c. I-5, as am.:

**2. (1)** In this Act

“band” means a body of Indians

- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
  - (b) for whose use and benefit in common, moneys are held by Her Majesty, or
  - (c) declared by the Governor in Council to be a band for the purposes of this Act;
- ...

“Band List” means a list of persons that is maintained under section 8 by a band or in the Department;

...

“member of a band” means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List;

**6.(1)** Subject to section 7 [*which sets out a list of those who are not entitled to be registered*], a person is entitled to be registered if

- (a) that person was registered or entitled to be registered immediately prior to April 17, 1985;
- (b) that person is a member of a body of persons that has been declared by the Governor in Council on or after April 17, 1985 to be a band for the purposes of this Act;
- (c) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iv) [*mother and father’s mother are not members of a band, known as the “double mother rule”*], paragraph 12(1)(b) [*woman who married a non-Indian*] or subsection 12(2) [*illegitimate child of a non-Indian father*] or under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(2) [*. . . by reason of marriage to a non-Indian, including children of women who married a non-Indian*], as each provision read immediately prior to April 17, 1985, or under any former

provision of this Act relating to the same subject-matter as any of those provisions;

- (d) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951, under subparagraph 12(1)(a)(iii) [*a person who is enfranchised . . .*] pursuant to an order made under subsection 109(1) [*. . . by voluntary application for enfranchisement, including the wife and children of a man who voluntarily enfranchised*], as each provision read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as any of those provisions;
- (e) the name of that person was omitted or deleted from the Indian Register, or from a Band List prior to September 4, 1951,
  - (i) under section 13 [*ceased to be member of a band by reason of residence in foreign country*], as it read immediately prior to September 4, 1951, or under any former provision of this Act relating to the same subject-matter as that section, or
  - (ii) under section 111 [*enfranchised because of post-secondary or professional education*], as it read immediately prior to July 1, 1920, or under any former provision of this Act relating to the same subject-matter as that section; or
- (f) that person is a person both of whose parents are or, if no longer living, were at the time of death entitled to be registered under this section.

...

**8.** There shall be maintained in accordance with this Act for each band a Band list in which shall be entered the name of every person who is a member of that band.

**9. (1)** Until such time as a band assumes control of its Band List, the Band List of that band shall be maintained in the Department by the Registrar.

(2) The names in a Band List of a band immediately prior to April 17, 1985 shall constitute the Band List of that band on April 17, 1985.

(3) The Registrar may at any time add to or delete from a Band List maintained in the Department the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.

...

**10.(1)** A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.

(2) A band may, pursuant to the consent of a majority of the electors of the band,

- (a) after it has given appropriate notice of its intention to do so establish membership rules for itself; and
- (b) provide for a mechanism for reviewing decisions on membership.

...

**11.(1)** Commencing on April 17, 1985, a person is entitled to have his name entered in a Band List maintained in the Department for a band if

- (a) the name of that person was entered in the Band List for that band, or that person was entitled to have his name entered in the Band List for that band, immediately prior to April 17, 1985;
- (b) that person is entitled to be registered under paragraph 6(1)(b) [*member of a band as declared by the Governor in Council*] as a member of that band;
- (c) that person is entitled to be registered under paragraph 6(1)(c) [*includes women who married a non-Indian; persons excluded by the double mother rule; illegitimate children of non-Indian father; Indian children who were enfranchised because their mother married a non-Indian*] and ceased to be a member of that band by reason of the circumstances set out in that paragraph;

...

(2) . . . where a band does not have control of its Band List under this Act, a person is entitled to have his name entered in a Band List maintained in the Department for the band

- (a) if that person is entitled to be registered under paragraph 6(1)(d) [*ceased to be member of a band by reason of residence in foreign country*] or (e) [*enfranchised because of post-secondary or professional education*] and

ceased to be a member of that band by reason of the circumstances set out in that paragraph; . . .

. . .

**17.(1)** The Minister may, whenever he considers it desirable,

. . .

(b) constitute new band and establish Band Lists with respect thereto from existing Band Lists, or from the Indian Register, if requested to do so by person proposing to form the new bands.