

TREATY ISSUES OF THE MICHEL CASE

1. Canada extinguished a treaty by declaring one or more members of the Band not to be Indians under the *Indian Act*?

Canada assumes that when it terminated Indian status for most of the members of the Michel Band in 1958, that lawfully extinguished the individual and collective treaty rights of the Michel First Nation. There is no documentary evidence that treaty rights were discussed at the time of enfranchisement. None of the documents created at the time refer to treaty rights. This raises the issue of whether Canada can unilaterally extinguish treaty rights by preserving to itself the discretion to determine who is and who is not an Indian under federal legislation.

Michel's Position. Treaty rights are not dependent upon statutory status under the *Indian Act*. There is nothing in the treaty which indicates that the signatories to the treaty agreed that the treaty would last only for so long as Canada continued to recognize the beneficiaries as "Indians". Termination of a treaty requires the consent of the First Nation who entered into the treaty. Specifically, it requires the consent of the individual members of the Band and the leadership.

2. Does the First Nation exist apart from statutory recognition by Canada?

Canada takes the position that when it no longer recognizes a Band as defined by the *Indian Act*, the aboriginal nation who signed treaty disappears. If this is true, then Canada has a unilateral power to extinguish First Nation's collective treaty rights.

Michel's Position. The Crown entered into treaties with First Nations because they had aboriginal rights which included recognition as organized cultural societies. This was recognized by imperial law. The early treaties were negotiated prior to the existence of an *Indian Act*. Treaty 6 was negotiated the same year as Canada passed its first post-confederation *Indian Act*. If statutory status is required to be a First Nation and entitled to the benefits of a treaty, then many of the early treaties are invalid. This is contrary to Supreme Court of Canada jurisprudence which has held treaties that were negotiated prior to the existence of Indian legislation and prior to the creation of Canada. When the Crown negotiated treaties, it did so with aboriginal nations. Even after the *Indian Act* was passed, a First Nation would not become a "Band" within the meaning of the *Indian Act* until after it had negotiated a treaty. Therefore it must have had status as a Nation and legal status as a party legally capable of entering into contractual relations with the Crown, prior to the creation of statutory "Bands".

3. Is there implied right to self-government and federal recognition in Treaty No. 6?

Canada takes the position *vis a vis* the Michel First Nation, that it has no inherent right to self-government nor is there an implied right to self-government in the treaty.

Michel's Position. The Crown implicitly recognized the political structure and government of First Nations when it negotiated treaties. First Nations entered into treaties by their leadership. Therefore Canada recognized that the leadership had legitimate authority to bind the members of the First Nation to the terms and conditions of the treaty. The treaty also includes provisions for Chief and Headman salaries and a provision of a suit of clothes every three years. This is an explicit recognition of a political structure and organization. This is further confirmed by the *Indian Act* and government practice to incorporate aboriginal customs and practices in determining leadership, for example by recognizing traditional Chiefs.

In the *Delgamuukw* decision, the Supreme Court held that aboriginal title includes the right to determine how the land will be used and to protect the land and exclude others. It also held that a First Nation's interest in their reserve lands is the same as a First Nation's interest in its traditional lands. If this is so, then First Nations must have an inherent power of self-governance over their traditional lands and their reserve lands, which continued after entering into treaty.