THE CONCEPT OF EDUCATION AS A "RIGHT'

OF THE METIS PEOPLE OF MANITOBA

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A. THE IMPORTANCE OF EDUCATION IN SOCIETY

The Metis are a distinct people living within the political boundaries of Canada and Manitoba. The emergence of the Metis as a nation in what now constitutes western Canada is a continuing subject of interest to scholars. (J. Peterson and J. Brown, (ed.) The New Peoples: Being and Becoming Metis in North America, Wpg., The U. of Man. Press, 1985). The existence of the Metis as a people within Canada is expressly recognized by the terms of the Constitution of Canada: (Constitution Act 1982, section 35).

The critical importance of education as a vehicle for cultural awareness, transmission and survival is well-recognized. In Brown v. Board of Education of Topeka, et al 347 U.S. 483 (1954), Warren C.J., speaking for the United States Supreme Court said, at page 493:

> . . . [Education] is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. (emphasis added)

The United Nations Declaration of the Rights of the Child, 1959 recognizes the importance of education as a cultural survival instrument in the following terms:

> Principle 7:
>
> The child is entitled to receive education, which shall be free and compulsory at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

It is apparent, then, that education is important to the Metis people of Manitoba because it is critical in awakening Metis

children to Metis culture, in transmitting that culture, and in promoting the survival of Metis in Manitoba.

B. THE RECOGNITION OF EDUCATION AS A "RIGHT"

Education has received recognition as a right of the child.

In Brown, the U.S. Supreme Court viewed the opportunity of education as "a right which must be made available to all on equal terms". (Brown, supra, at 493).

In Canada, a well-known jurist was moved to proclaim, while sitting as a judge:

> Children have a right to be educated, and school districts and school divisions have no other reason for existence.
> [Sissons, D.C.J. (as he then was) in Henchel v. Board of Medicine Hat School Division No. 4 (1950) 2 W.W.R. 369. (Alta D.C.)].

The Declaration of the Rights of the Child, 1959, has already been noted on the point:

> Principle 7:
> The child is entitled to receive education.

The concept of entitlement connotes a right.

There is, also, in international law, a recognition of a liberty of parents and guardians to determine some of the subjective content of their children's education:

> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
> (Article 18.4 of the International Covenant on Civil and Political Rights.)

In Canada, parental control over their children's education has received strong support in the context of the interpretation of constitutional rights.

Lavigne v. P.G. Quebec [1983] C.A. 370 dealt with the interpretation of section 93 of the Constitution Art, 1982. Malouf, J. expressed this view about education as an appropriate background for the interpretation of the section: (at 376)

> "The authority of parents to determine the religion and education of their children has long been recognized as a basic and fundamental right. It is a right which is respected in most, if not all, civilized and democratic communities. It must not be interfered or tampered with "without the most coercive reason": [Agar-Ellis (In re): Agar-Ellis r. Lascelles, (1878-79) 10 L.R.C.D. 49, 58.] If one keeps in mind this basic and fundamental right, one can easily understand the apprehension of the then local population which led them to prevail on the Fathers of Confederation to include in the Act of the Union a provision guaranteeing the rights and privileges contained in section 93.

Education, then, has been recognized as a right which inheres in the child. There is also support for the proposition that parents have some right to determine the particular cultural or philosophical stamp which shall characterize their children's education.

If the right to education is a compound of children's and parents' rights, what can be said about the nature of this right?

C. THE RIGHT TO EDUCATION AS A HUMAN RIGHT

International law instruments have referred to the right to education within the context of human rights.

So the Universal Declaration of Human Rights (U.N. 10 Dec. 1948) proclaims in Article 26 that:

1. Everyone has the right to education . . .

. . .

3. Parents have a prior right to choose the kind of education that shall be given their children.

In 1960, the General Conference of the United Nations Educational, Scientific and Cultural Organization adopted in Paris the Convention Against Discrimination in Education. The Convention recites the Universal Declaration of Human Rights' proclamation that every person has the right to education and provides, inter alia, in Article 5:

> (b) It is essential to respect the liberty of parents . . . to choose for their children institutions other than those maintained by the public authorities . . .

The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society which cannot be separated from universal human nature. Then existence of human rights does not depend on the will of a state; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a state constitutes the essential element.

> A state or states are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the state is no more than declaratory . . .
>
> . . . Human rights have always existed with the human being. They existed independently of, and before, the state . . .
>
> If a law exists independently of the will of the state, and accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called 'natural law' in contrast to 'positive law'.
>
> Provisions of the constitutions of some countries characterize fundamental human rights and freedoms as 'inalienable', 'sacred', etc. Therefore, the guarantee of fundamental human rights and freedoms possesses super-constitutional significance.
> [Dissenting opinion of Judge Tanaka, South-West Africa Cases (Second Phase), 1966.] (emphasis added)

If the right to education is conceived as a human right that is rooted in 'natural law', it is open to the criticism of falling into the error of natural law dogma. It can also be said that such a right to education is the same for all "minorities" in Canada.

The questions are then, how is the Metis right to education properly founded in Canadian positive law, and how is that Metis right different from the human right to education of all minorities in Canada?

D. THE RIGHT TO EDUCATION AS AN ABORIGINAL RIGHT

The answer to both questions lies in the recognition and affirmation of the aboriginal rights of the Metis aboriginal people in section 35 of the Constitution Act, 1982. (See Appendix)

The Metis, like other aboriginal peoples in Canada, can easily be distinguished, for the purposes of this analysis, from "minorities" in Canada. Minorities are constituted by persons who had accepted to be incorporated within the existing Canadian state. The aboriginal peoples of Canada are distinct peoples requiring self-determination who are only now in the process of determining the particular ways in which their participation within the Canadian polity shall be accommodated.

To understand the answer to the first question, it is necessary to refer to the human rights origins of aboriginal rights as first expounded by international law jurists.

Recent analysts have traced a source of aboriginal rights to Francisco de Vitoria, the Spanish theologian who is gaining recognition not only as one of the fathers of international law, but

also of Aboriginal rights theory: (Aboriginal Peoples and the Law, B. Morse (ed.) Ottawa, Carleton U. Press, 1983, "Aspects of Aboriginal Rights in International Law" by Maureen Davies; ch. 2, p. 16 at 20; Native Rights in Canada (2nd ed.) P.A. Cumming and N.H. Michenberg (ed.) Toronto General Publishing Co. Ltd. 1971, p. 14 ff.)

Writing in 1942, Felix Cohen, the pre-eminent American Indian law jurist, explained:

> [W]e must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law, and that in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the sixteenth and seventeenth centuries, most notably . . . Francisco de Vitoria.
> (Cohen, "The Spanish Origins of Indian Rights in the Law of the United States" (1942) Geo. L.J. 1, at p. 17).

The early international law jurists argued for the rights of aboriginal peoples based on their view that certain rights inhere in men as men. The view was expressed in the Papal Bull Sublimus Deus issued by Pope Paul III in 1537:

> . . . Indians are truly men . . . they may and should, freely and legitimately, enjoy their liberty and the possession of their property.

Vitoria's teaching marks an important step in the expansion of international law into a world system; for it meant that a law which had its rise among the few princes of European christendom was not to be limited to them or to their relations with one another, but was universally valid, founded as it was on a natural law applying equally to all men everywhere. (M. Davies, in Morse, op. cit., at 20, 21).

Much of the modern discussion about aboriginal rights has been concerned with the property aspects of aboriginal title. Although

it is entirely possible to conceive of aboriginal title to land as a concept based in fundamental principles of property common to nearly all property and legal systems [J.C. Smith, "The Concept of Native Title" (1974) 24 U. of Toronto L.J. 1], nevertheless, it has been found to be necessary to refer to natural law concepts of human rights to posit the legal basis of aboriginal title.

So, in analysing the development of a legally enforceable aboriginal title in U.S. jurisprudence, Cohen was moved to comment on recent cases which had the effect of consigning to the dust bins of history the "menagerie" theory of Indian title; the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined: [Cohen, "Original Indian Title", (1947) 32 Minnesota L.R. 28, 58.]

But aboriginal title is only one aspect of aboriginal rights.

International law concepts based on natural law notions of human rights which inhere in men as men provides the basis for asserting the existence of other aboriginal rights.

The United Nations has adopted this approach in the development of notions of universal rights for all peoples. For example, since its inception, that organization has treated self-determination as an essential aspect of human rights belonging to groups that qualify as "peoples", and not merely to political entities that may have come to power by methods that do not reflect the wishes of the people. [J.H. Clinebell and J. Thomson, "Sovereignty and

Self-Determination: The Rights of Native Americans Under International Law" (1978) Buffalo Law Review 669.]

The right to education then, can be posited as a human right which inheres in all "peoples".

References have been made earlier in this paper to the evidence of the recognition of education as a right in international law. This right exists independently of the will of the state; the state has the function, indeed, the obligation, to provide the opportunity for an education.

How then, is this human right to education a part of the positive, domestic law of Canada? The answer is that this 'natural law' right is merged in the positive law recognition and affirmation of "aboriginal rights of the aboriginal peoples of Canada" in section 35 of the Constitution Act, 1982.

Section 35 is drafted in a way which accommodates the natural law notion of universal rights which exist independently of state action. The section does not create or grant rights: it merely confirms their existence and affords them constitutional law protection.

Section 35(2) expressly includes the Metis as an "aboriginal people" of Canada.

Education then, can be conceived as a positive law right which is a right of the Metis people of Manitoba. Education is generally recognized as a fundamental right of the child, subject to a liberty in the parent or guardian to determine its doctrinal and cultural direction. In its nature, education is a human right which inheres in all persons independently of the will of the state. The right of

self-determination is essentially a human right which belongs to groups that qualify as "peoples". This collective right of self-determination includes the collective right to carry on educational activities of the group.

The right to self-determination, and therefore, the right to control a people's educational activities, is also part of the rights of aboriginal people as peoples. This natural law based concept of international law is a part of the positive domestic law of Canada: it is an aspect of the aboriginal rights recognized and protected by section 35 of the Constitution Act, 1982.

The concept of aboriginal rights in Canadian jurisprudence must be sui generis. In its property law aspect, it has received judicial elaboration in the concept of aboriginal title and of the fiduciary position of the Crown vis-a-vis aboriginal peoples.

But the "aboriginal rights" which are entrenched in the Constitution must consist of rights other than aboriginal title. For example, governments in Canada have accepted the existence of an aboriginal right to self-government.

In looking for the substance of aboriginal rights, it is suggested that the field of human rights recognized at international law provides a useful source that coincides with the development of the rationale of aboriginal title.

On this basis, it can be suggested that "aboriginal rights" in section 35 includes at least those human rights which are generally recognized as the rights of "peoples".

It is submitted that education is an appropriate aspect of aboriginal rights which receives protection in Canadian constitutional law.

E. EDUCATION AS A NECESSARY INCIDENT OF THE RIGHT TO SELF-GOVERNMENT

Education is recognized as one of the basic functions of governmental institutions.

In Brown, the U.S. Supreme Court said:

> Today education is perhaps the most important function of state and local governments . . . [Brown v. Board of Education 347 U.S. (1954) 483, 493.]

In Henchel, Sissons J. was concerned with the interpretation of The School Act (RSA 1942 ch. 175):

> I think that the duty 'to provide adequate school accommodation for the purposes of the district' is absolute. Even if these sections were not in the Act, this primary duty would have to be implied. Children have a right to be educated, and school districts and school divisions have no other reason for existence.

Education then, is properly an important incident of the right of self-government. It is a right which is essential for the protection of the interests and continued survival of the aboriginal people concerned. It permits cultural transmission and survival. Its denial by the state involves a denial of the right of existence of the entire group, of the entire people. Such a denial is a form of genocide which shocks the conscience of mankind and results in great losses to humanity. It is contrary to moral law and to the spirit and aims of the United Nations.

F. THE EDUCATION RIGHT OF THE METIS OF MANITOBA

The history of the establishment of the Province of Manitoba reveals discussions and negotiations between representatives of the Metis people of Red River and of the Canadian government for the purpose of determining the basis upon which the Metis of Manitoba

would accept union with the Dominion.

One of the concerns of the Metis was obviously their very survival in the face of an anticipated inflow of immigrants from Canada. The terms of the Manitoba Act, 1870 reveal some of the provisions enacted to promote survival of the Metis, for example:

1) Section 22 respecting denominational schools
2) Section 23 respecting the English and French languages
3) Sections 31, 32 respecting the continuing existence of a Metis land base.

Education as a subject matter of legislation was recognized as within the jurisdiction of the province, and it is true that no 'Metis' school systems received protection. It is to be noted, however, that the guarantees respecting language and a land base were never respected by the government of Manitoba. The legislature became swamped with newcomers who trampled both the language and land guarantees of the Manitoba Act. The language rights of section 23 have only recently been the subject of judicial enforcement; it appears that the land rights will have to follow suit.

If the governments of Manitoba had respected the constitution, it is conceivable that the Metis would have survived as a political force capable of substantially affecting legislative policy. It is a lamentable fact, however, that the Metis land base was eroded and the Metis quickly lost political power after 1870.

Nevertheless, it can be stated that the recognition of a Metis right to education is consistent with the constitutional objects of preservation of the Metis culture.

Further, the needs of the Metis people of Manitoba in 1986 must

be addressed on the basis of circumstances as they exist today. The Manitoba Act provisions for cultural survival have not worked. It is time to take advantage of the protection of Metis aboriginal rights in the constitution of Canada to try to recapture the threads of a culture that has been seriously eroded.

The commitment of the Province of Manitoba to the recognition of a Metis right of education will be a positive and important step in that direction.

The present government of the province has publicly supported the principle of self-government for aboriginal peoples at First Ministers' Conferences. The need for Metis education rights is revealed in the statistics which show that Metis have not benefitted from education on a par with other Manitobans.

The complex difficulties which face Metis people in trying to obtain relief from onerous educational policies affecting their children are amply demonstrated by the Amaranth case.

It is apparent that the right to education is a right of the Metis people of Manitoba. That right requires, not the mere involvement of Metis people in the delivery of existing educational programs, but rather, the establishment of legislative and constitutional structures which permit the Metis to ordain the substance and direction of Metis education.

APPENDIX

CONSTITUTION ACT 1982

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

Subsequent amendments to this section are not relevant to the subject matter of this paper.