"Whenever the Indians of the Reserve Should Desire It": An Analysis of the First Nation Treaty Right to Education

Vic Savino[*] and *Erica Schumacher*[**]

I. INTRODUCTION

ON MARCH 20, 1989, the Honourable Pierre Cadieux, Minister of Indian and Northern Development, announced that First Nation students would no longer have unlimited access to the Post-Secondary Student Assistance Program.[1] The federal government in 1989, while recognizing that "if Indian people are to take control of their own communities and to prosper in Canadian society, then significant numbers of Indian people must attain university-level qualifications,"[2] decided that spending on such education could not continue and that the program would not be further expanded to accommodate the growing number of First Nation students. Prior to the announcement, demands were made by First Nations that the government provide post-secondary education as it is a right guaranteed by Treaty. The Minister rejected their position stating that he could not "believe that references in the treaties to education include post-secondary education."[3]

Following the cuts in the availability of the Student Assistance Program, the Dakota Ojibway Tribal Council, among others, considered filing suit against the federal government, claiming that it had

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[*] Winnipeg practitioner active in the practice of Aboriginal law. Acknowledgement and credit are due to many individuals who have contributed to my education on the subject of First Nations' education. Among them, Kathi Avery Kinew (historical research), Dakota Ojibway Tribal Council (post-secondary education cuts), Sandy Bay Ojibway First Nation and Red Sucker Lake Education Authority (Federal funding policies), Grand Chief Tobonsonakwut Kinew (wisdom and patience) and to the legion of First Nations members who have shared their thoughts and experience with me.

[**] 3rd Year Law Student, University of Manitoba.

[1] Canada, Indian Affairs and Northern Development, *Communique* [Ottawa: Queen's Printer, March 20, 1989].

[2] *Ibid.* at 2.

[3] *Ibid.*

breached both its treaty obligation and its fiduciary duty[4] to provide them with post-secondary education. Under Treaty 1,[5] signed in 1870 at Fort Garry, the Ojibway member First Nations of today's Dakota Ojibway Tribal Council (and others) were promised that the Government of Canada would "maintain a school on each reserve" whenever the people of the First Nations so desired. The words were not limited and could well be interpreted as including post-secondary education.

The Dakota Ojibway Tribal Council came to a settlement with the federal government respecting the short-term funding of post-secondary education, however the question as to what they are fully entitled to under Treaty 1 remains to be decided. Similar education promises were made in all of the numbered treaties and if one Council of First Nations does not bring suit, it is likely that before long, another Council will. With that in mind, we hope that the following may be of help to those attempting to forward the interests of First Nations' education in Canada.

II. Interpretation of Treaties

When the first cases regarding the interpretation of First Nations' Treaties came before the courts, it was held that they should be interpreted in the same manner as any other contract.[6] As a result, the Government of Canada[7] could feel secure in narrowly emphasizing the literal conditions of the various numbered treaties, without regard to the changing times and oral or extrinsic evidence.

More recently however, the courts have clearly set out, in a number of decisions, that treaties are not to be interpreted in a strictly contractual fashion. In *Nowegijick* v. *R.* decided by the Supreme Court

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[4] This argument will not be dealt with in this paper.

[5] As reproduced in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, facsimile reprint of the 1880 ed. (Toronto: Belfords, Clarke & Co., 1991) at 313.

[6] *St. Catherine's Milling and Lumber Co.* v. *R.* (1888), 14 App. Cas. 46 (P.C.). This was the first major land claims case to be brought before the courts, and the last for approximately a century. The courts looked to the words written by the Commissioners of Canada, accepted such notions as Indian cession and surrender of land rights, and called Treaty 3 "a contract." That is perhaps not surprising however, as the First Nation signatories to the treaties were not present as the dispute was a jurisdictional one between the Governments of Canada and Ontario.

[7] Note that it is clear from the case of *Dominion of Canada* v. *Ontario*, [1910] A.C. 637 (P.C.) that the responsibility for fulfilling treaty promises lies with the federal government, and not the provinces.

of Canada in 1983, Justice Dickson, as he then was, wrote: "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[8] *Nowegijick* and later Supreme Court decisions have made it clear that the Treaties between the First Nations and the government must be construed liberally, that is, they must be interpreted "not according to the technical meaning of their words, but in the sense in which they would naturally have been understood by the Indians."[9]

That has especial significance when one remembers that at the time the Treaties were being made, First Nations' people could not read the Treaties as they were being written. The two parties, the First Nations on one side, and the Treaty Commissioners on the other, were from two very different cultures, each speaking their own language and each likely having their own interpretation of what promises were being made.

The view of the Supreme Court in *Nowegijick* was further developed in *R.* v. *Simon* where it was held that "Treaties should be given a fair, large and liberal construction in favour of the Indians."[10] The Chief Justice at the time went on to reject the imposition of "unnecessary and artificial constraints"[11] on Treaty rights in order that they might be "interpreted in a flexible way that is sensitive to the evolution of changes."[12] It would thus appear that when interpreting Treaty rights, the provisions should not be frozen as they were in the nineteenth century at the time the Treaty was signed. Indeed that is not a new view. In the 1935 case of *Dreaver* v. *Canada*, for example, the provision that "a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians ..." was read by the Exchequer Court as meaning that "all medicine, drugs or medical supplies which might be required by Indians ... were to be supplied to them free of charge."[13]

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[8] [1983] 1 S.C.R. 29 at 36, 144 D.L.R. (3d) 193 [hereinafter *Nowegijick* cited to S.C.R.].

[9] *Ibid.* as quoted from *Jones* v. *Meehan*, 175 U.S. 1 (1989).

[10] [1985] 2 S.C.R. 387 at 402, 24 D.L.R. (4th) 390 [hereinafter *Simon* cited to S.C.R.].

[11] *Ibid.*

[12] *Ibid.*

[13] (1935), 5 C.N.L.C. 92 (Ex. Ct.) at 115 [hereinafter *Dreaver*]. A much more limited approach was taken on essentially the same issue, by the Saskatchewan Court of Appeal in *R.* v. *Johnston* (1966), 49 C.R. 203, 56 W.W.R. 565 (Sask. C.A.) as well as in *Ontario (A.G.)* v. *Bear Island Foundation* (1984), 49 O.R. (2d) 353, 15 D.L.R. (4th) 321 (H.C.), aff'd [1989] 2 C.N.L.R. 73 (C.A.) in which it was ruled that words and phrases in Indian

The most recent trend in the Supreme Court of Canada however appears to reflect the more flexible approach endorsed by the Courts in cases such as *Dreaver* and *Simon*. The case of *R.* v. *Sparrow*, a landmark case dealing with s. 35 of the *Constitution Act, 1982*,[14] and decided by the Supreme Court of Canada in 1990, states that "far from being defined according to the regulatory scheme in place in 1982, the phrase "existing aboriginal rights" must be interpreted flexibly so as to permit their evolution over time."[15] The Court adopted the analysis of Professor Brian Slattery[16] stating that the word "existing" suggests that the rights in question are "affirmed in a contemporary form rather than in their primeval simplicity and vigour."[17] The Court went on to specifically reject the concept of "frozen rights."[18]

Further, as stated in *R.* v. *Taylor*, "in approaching the terms of a treaty ... the honour of the Crown is always involved and no appearance of "sharp-dealing" should be sanctioned."[19] It is with the benefit of the Supreme Court's rulings on how one must approach the interpretations of Treaties and First Nation rights that we must look at the "schools" promises of the numbered Treaties.

III. Extrinsic Sources of Evidence Relating to the Education Right of First Nations under the Numbered Treaties

A. Treaties 1 and 2, 1871

Treaty 1, signed at the Stone Fort (or Lower Fort Garry), between the Canadian government and Ojibway member First Nations provided

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Treaties should be interpreted in accordance with their meaning at the time the Treaty was signed. Notably, however, the Ontario Court of Appeal in deciding the case of *R.* v. *Agawa* (1988), 28 O.A.C. 201, [1988] 3 C.N.L.R. 73 did not follow the *Bear Island* approach.

[14] Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

[15] [1990] 1 S.C.R. 1075 at 1093, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.].

[16] "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

[17] *Supra* note 15 at 1093.

[18] *Ibid.*

[19] [1981] 3 C.N.L.R. 114 at 123 (Ont. C.A.) at 315.

that: "Her Majesty agrees to maintain a school on each reserve hereby made whenever the Indians of the reserve should desire it."[20]

The provision is clear and there are no limitations. Treaty number 2,[21] which was based on Treaty 1 and was signed almost immediately thereafter at Manitoba Post, includes the same promise.

The only written record of the negotiation of Treaty 1 is the reporter's summary as published in *The Manitoban* and Alexander Morris' report to the Government of Canada.[22] The negotiation of Treaty 1 is said to have been difficult. After five days of talking about the land and reserves, the two sides had not come close to an agreement.

The Treaty Commissioners negotiated on the basis of a draft Treaty which had been sent to them from Ottawa prior to the assembly at Lower Fort Garry. The draft was modelled after the Robinson Treaties signed at Lakes Huron and Superior in 1850 promising a small cash gratuity and annuity and reserves. There was no mention of schools, schoolmasters, agricultural implements, supplies, animals or other assistance. In short there was nothing included in the draft Treaty which related to the everyday life of the First Nations' people. The suggestion that such things be included was made by one of the First Nation Chiefs. It was on the sixth day of the negotiations that Mis-Koo-Kinew, (Ojibway for Red Eagle) spoke, saying:

> The land cannot speak for itself. We have to speak for it; and want to know fully how you are going to treat our children ... The Queen wishes the Indians to cultivate the ground. They cannot scratch it — work it with their fingers. What assistance will they get when they settle down?[23]

It was only then, when agreements were made with respect to the aid which the First Nations would receive with respect to their daily living and the lives of their children, that an agreement was made. As stated by Professor Jean Friesen in her analysis of the Treaty negotiations:

> The concluding of the treaty and the continued assurance of Indian peace and loyalty was paramount in the Canadian's mind. But to the Indians there was much more at stake. The treaties generally were seen as a form of economic planning. Indian attention

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[20] *Supra* note 5 at 316.

[21] *Ibid.*

[22] *Ibid.*

[23] *The Manitoban* (2 August 1871).

at treaties was focused on the future, on what they could be assured of from the government, and on how they could assure their children and grandchildren's survival.[24]

The final Treaty did include the promise that the Government would "maintain schools." Certain other promises made at the same time, such as the promise that agricultural implements would be provided, were not included in the initial written Treaty and were only officially recognized in 1875 upon the reopening of the Treaty for negotiation. At that time the memo written from Simpson to the government, telling them of the additional promises made to the First Nations, was attached to the original written Treaty. It is important to recognize that fact as it gives credence to the view that the written Treaties were not always an accurate reflection of what was actually promised at the time at which the negotiations took place.

B. Treaty 3, 1873

Treaty 3, as written by the Treaty Commissioners and as marked by the Chiefs in October, 1873, reads as follows:

And further, Her Majesty, the Queen, agrees to maintain schools for instruction in such reserves hereby made as to her Government of her Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it.[25]

Unlike the two previous Treaties, the written text of Treaty 3 includes a watering down of the education clause. According to the written treaty, the First Nations must "desire" the school and the government must deem provision of the school to be "advisable," a rather unusual provision for anyone entering into a bargain to accept as it appears, at least on its face, to give the government an arbitrary form of control over its side of the bargain.

The Privy Council of Canada first commissioned the signing of a treaty with the Ojibway First Nations living in the areas of Manitoba and northwestern Ontario which are now covered by Treaty 3, in 1871. The aim of the government in securing the Treaty was to make the "Dawson route" extending from present day Thunder Bay on Lake Superior to the Northwest Angle of Lake of the Woods secure for the passage of immigrants and for all people of the Dominion generally.

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[24] *Grant Me Wherewith to Make My Living*, (Faculty of Arts, University of Manitoba, 1985) [unpublished] at 68.

[25] *Supra* note 5 at 320.

The Treaty would also allow the government to open suitable land for settlement.[26]

A Treaty was not actually reached until 1873, and even then not until after "protracted and difficult negotiations."[27] As stated by Alexander Morris, the Treaty was:

> one of great importance, as it not only tranquillized the large Indian population affected by it, but eventually shaped the terms of the Treaties, four, five, six and seven, which have since been made with the Indians of the Northwest Territories — who speedily became apprised of the concessions which had been granted to the Ojibway Nation.[28]

The Treaty resulted in the transfer of 55,000 square miles of land to the Canadian and Ontario governments.

The written text of Treaty 3 is but one source of information regarding the agreements and promises that were made between the Ojibway First Nations and the Treaty Commissioners at Northwest Angle in 1873. As with all of the numbered Treaties, there are a number of extrinsic sources which also serve to provide us with insight into the meaning of the written Treaties and what the actual agreements, as understood by the First Nations, entailed.

There are two important sources, aside from the written Treaty itself and the collective memory of the Ojibways, which bear examination. The first, often referred to as "the shorthand reporter's account" of what took place at the negotiations, was first published in the newspaper *The Manitoban* and was later reproduced by Governor Alexander Morris.[29] The second source is the notes which were taken by Simon J. Dawson, also a Treaty Commissioner, during the negotiation of Treaty 3.[30]

Alexander Morris refers to the shorthand reporter's account as "an accurate view of the course of the discussions."[31] The account, which notes that the official who spoke was Morris himself, notes as follows:

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[26] *Ibid.*

[27] *Ibid.* at 45.

[28] *Ibid.*

[29] *Ibid.*

[30] "Notes Taken at Indian Treaty Northwest Angle, Lake of the Woods, from 30th Sept., 1873 to close of Treaty" National Archives of Canada MG29 C67.

[31] *Supra* note 5 at 52.

His Excellency then said — "I told you I was to make the treaty on the part of our Great Mother the Queen, and I feel it will be for your good and your children's ... I want to settle all matters both of the past and the present so that the white and red man will always be friends. I will give you lands for farms, and also reserves for your own use ... *I will also establish schools whenever any band asks for them, so that your children may have the learning of the white man ...*" [emphasis added][32]

There is a further discussion, again recorded by the shorthand reporter. The discussion took place between Treaty Commissioner Alexander Morris and the Chief of Lac Seul who told Morris:

If you give what I ask (some money and farm animals and agricultural implements), the time may come when I will ask you to lend me one of your daughters and one of your sons to live with us, and in return I will lend you one of my daughters and one of my sons for you to teach what is good, and after they have learned, to teach us. If you grant us what I ask, although I do not know you, I will shake hands with you.[33]

And Governor Morris replied:

... What the Chief has said is reasonable, and should you want goods, I mean to ask you what amount you would have in goods ... I wish you were all of the same mind as the Chief who has just spoken. He wants his children to be taught. He is right. He wants to get cattle to help him raise grain for his children. It would be a good thing for you all to be of his mind, and then you would not go away without making this Treaty with me.[34]

Contrary to the written Treaty provision, nothing in the shorthand reporter's account refers to a condition that the Government have to find the establishment of a school to be "advisable."

The point in the negotiations at which the above-quoted conversation took place has been described by Alexander Morris in his official report as "a crisis" in the negotiation. The record of the conversation immediately preceding the above does indeed indicate that the negotiations would have broken down had the Chief from Lac Seul not spoken. It was said by Chief Mawedopenais:

You see all our chiefs before you here as one mind, we have one mind and one mouth. It is the decision of all of us; if you grant us our demands you will not go back sorrowful; we would not refuse to make a Treaty if you would grant our demands.[35]

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[32] *Ibid.* at 58.

[33] *Ibid.* at 63.

[34] *Ibid.*

[35] *Ibid.* at 62–3.

Governor Morris replied:

> I have told you already that I cannot grant your demands; I have not the power to do so. I have made you a liberal offer, and it is for you to accept or refuse it as you please.[36]

However the Chiefs could not be swayed and answered: "Our Chiefs have the same opinion; they will not change their decision."[37] At that point the Council was pronounced to be at an end and it was only then that the Chief of Lac Seul spoke, saying, in effect, that if some money and some farm support were added to the Governor's offer, he would accept the Treaty.

Following the speech of the Chief of Lac Seul, Morris did offer the farming equipment and animals as well as an increase in money which had been requested by the Chief. The offer resulted in the signing of Treaty 3.

Simon J. Dawson noted:

> Governor Morris said, I told you I wanted to make a Treaty with you on account of my mistress the Queen and on your account. That is the reason I am here ... we are all children of the same great spirit and I want to settle all matters so that the white and red man will always be friends. I want to have lands for farms reserved for your own use so that the white man cannot interfere with them ... *I am glad to learn that some of you wish your children to learn the cunning of the white man and on application of a Band, a school will be established* ... [emphasis added].[38]

Again, there is no mention of a condition that the government find the setting up of a school to be "advisable."

Later, in his report respecting the Chief's speech in so far as it concerned education, Morris wrote: "they wished a school-master to be sent to them to teach their children the knowledge of the white man."[39]

Thus, the First Nations' right to education was expressed in various terms and was likely understood in different ways by those attending the negotiations. Given the difference in language and culture between the two parties to the Treaty, that is perhaps not surprising. However, in none of the collateral sources is there any mention of the education rights granted under Treaty 3 being limited to the provision of schools

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[36] *Ibid.* at 63.

[37] *Ibid.*

[38] *Supra* note 30.

[39] *Supra* note 5 at 49.

only when the government found it to be "adviseable." This term seems to have been inserted without the Ojibway's knowledge or consent.

Again, it should be remembered that in *Nowegijick* the Supreme Court ruled that: "Treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[40] Further, one of the cardinal rules of interpretation at work here is that the honour of the Crown is at stake and treaties should not be interpreted so as to bring dishonour upon the Crown.

The above collateral sources of Alexander Morris and Simon J. Dawson, both Treaty Commissioners, do cast doubt on the position that Treaty 3, as written by the Commissioners, accurately represents what was promised to the Indians at Northwest Angle in 1873. Rather, they indicate that a right to education was something that was promised without limitation or condition, in an effort to save the otherwise failing negotiations.

C. Treaties 4 to 8

Treaty 3 formed the basis for treaties four, five, six and seven which were subsequently signed, in total resulting in a transfer of 400,000[41] square miles to the Canadian Governments. If a case can be made, that the promise at Northwest Angle was a promise without limitation, and it is submitted that such a case *can* be made, then a similar case can also be made with respect to the subsequent numbered treaties.

There is strong evidence to suggest that the education right provided in Treaty 3 was never intended by those negotiating the Treaty to be a limited right. The right was first provided as an unlimited right in Treaties 1 and 2, which later served to form the basis for Treaty 3. None of the extrinsic evidence points to that right being limited in Treaty 3. Rather, it would appear more likely that between 1870 and 1873, the fine hand of the Department of Justice inserted wording into the Treaty which was never mentioned by the Treaty Commissioners nor understood by the signatory First Nations.

In addition there is extrinsic evidence surrounding the later numbered treaties also indicating that there was no limit on the education right therein provided. The following examples of such evidence are drawn from the book of Treaty Commissioner Alexander Morris.

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[40] *Supra* note 8 at 36.

[41] See *supra* note 5.

At Qu'Appelle, when negotiating Treaty 4, Morris said

> Whenever you go to a Reserve, the Queen will be ready to give you a school and a schoolmaster"[42]
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> ...
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> The Queen wishes her red children to learn the cunning of the white man and when they are ready for it she will send schoolmasters on every Reserve and pay them.[43]

In a letter to the Minister of the Interior, Morris stated that the agreements made with the First Nations as to schools needed to be fulfilled in accordance with the terms of the Winnipeg Treaty, Treaty #5:

> That the bands at the Grand Rapids, The Pas, and Cumberland are in a sufficiently advanced position to be allowed the grant for their schools.[44]
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> ...
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> The Grand Rapids, Pas, and Cumberland, are in a position to receive at once from the Government the grant allowed for the maintenance of schools of instruction; at the Grand Rapids a large schoolhouse is by this time entirely completed; and at the Pas and Cumberland, schools, under the charge of the Church Missionary Society, have been in existence some years. The Indians belonging to the bands I have named desired that the assistance promised should be given as soon as possible.[45]

Further, it should be noted that with respect to Treaty 8, there is evidence suggesting that the First Nations were dissuaded from insisting on more specific guarantees with respect to education. The official report of the Treaty Eight Commissioners reveals:

> As to education the Indians were assured that there was no need of any special stipulation, as it was the policy of the Government to provide in every part of the country, as far as circumstances would permit, for the education of Indian children ...[46]

From the historical record a consistent picture emerges. The various signatory First Nations to all of the numbered Treaties were invariably told that schools would be provided them. The purpose of those schools was the education of members of the First Nations, so that

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[42] *Ibid.* at 93.

[43] *Ibid.* at 96.

[44] *Ibid.* at 153.

[45] *Ibid.* at 163.

[46] Canada, Indian Affairs and Northern Development, *Treaty no. 8, made June 21, 1889 and Adhesions, Reports, etc.* (Ottawa: Queen's Printer, 1966) at 12.

they would have the learning of the white man. Although the words of the education provision changed between Treaties 1 and 2 and Treaty 3, the oral promises to the signatory First Nations remained the same. There appears to be no reason at all to suppose that the First Nation signatories to the later Treaties had any different understanding of the schools clause than the First Nation signatories to Treaties 1 and 2. That understanding was that schools would be provided whenever and wherever required to put First Nations' children on an even footing with their non-First Nations' counterparts.[47]

IV. The Meaning of the Words "Maintain a School" and "Schools for Instruction"

Even on a literal reading of the Treaty alone, it is entirely arguable that the Government has still not been given an arbitrary discretion to decide whether the establishment of a school is "advisable" or not. Rather, such a discretion only goes as far as to allow the government to refuse unreasonable requests. The standard when determining what is or is not a reasonable request would at the very least be the type of facilities that are available in non-First Nation communities. Thus it would surely be reasonable for the First Nations' people to demand that their children be provided with quality elementary and secondary education.

Based on the view expressed in *Sparrow*, it can also be argued that even if at the time of signing the Treaties, post-secondary education was not envisioned as a part of the promise, that would not mean that it is not included in the right to education as it stands today. In 1870, the First Nations' people would likely not have been familiar with the concept of post-secondary education. Certainly universities and colleges as we know them today did not exist in First Nations' culture at that time. Neither was post-secondary education a common feature of Canadian society at the time. Indeed, the first university in Manitoba was only established in 1877. Today however, a university education is quite common and is often considered the natural step for a person to take upon completing high school. Surely, if the object of the Treaty promise is to put First Nations' children on a competitive footing with the white man the post-Treaty world, it is not unreasonable for the education requirements to keep pace with the changing times.

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[47] Personal communications from many Treaty 1 First Nation leaders and band members to author Vic Savino.

Treaty 1 and the numbered treaties which were subsequently signed all promise that the Government will "maintain a school" or that it will provide "schools for instruction" when desired by the First Nations' people. It is submitted that if one takes a flexible approach, as mandated by the Supreme Court in *Sparrow*, the First Nations may expect that post-secondary schooling, in the form of colleges, vocational schools or universities, be provided to them on or off the reserves. It would then follow that if the government fails to so provide, it is in breach of its Treaty obligation. In some cases, such as that of Yellowquill College, at the Long Plains reserve near Portage la Prairie, the facility is already in existence, but its continued success is dependent on funding from the federal government.

The schools which were promised by the government in 1870, were promised in conjunction with agricultural assistance.[48] The First Nations' negotiators wanted training for their people so that they could adapt to the new way of life that was being brought upon them. The education clause was thus likely understood as ensuring education on the reserve and assistance in technical training for the future. While it may have been agricultural assistance in the nineteenth century, it would more likely be computer training in the twentieth century.

With respect to the extent of the education right, it also bears notice that in *Greyeyes* v. *M.N.R.* the Statement of Agreed Facts filed with the Court by the plaintiff Greyeyes and the respondent federal government stated:

> The said funds received by the Plaintiff were given pursuant to an agreement and treaty between the Plaintiff's Band and Ottawa and specifically pursuant to an agreement to assist band members in their education in compliance with the obligations of the Federal Government under Treaty No. 6.[49]

This express recognition by Canada in a court of law that its Treaty 6 education obligations include post-secondary education can scarcely be said to put the government in a position from which it can argue that post-secondary education is not a Treaty right. To do so would appear to offend both the principle of upholding the honour of the

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[48] Note that in the initial written treaty the right to have agricultural implements provided by the Government was not included. That right was only recognized upon the renegotiation of the Treaty in 1875.

[49] (1978), 2 F.C. 385, 84 D.L.R. (3d) 196 at 196 (F.C.T.D.).

Crown and the principle that there must be "no appearance of sharp-dealing."[50]

Historical research indicates that the education provisions of Treaties 1 and 2 were included in order to enable First Nations to participate fully in the Canadian economy. It could well be argued that post-secondary programs fall within the meaning of the word "schools" as used in Treaty 1. Practically speaking, such an interpretation would make good sense as the alternative for the government is to provide welfare. At the same time, it is recognized that it may not always be feasible to provide post-secondary education in the form desired to First Nations' people on reserves. While that may amount to a *prima facie* breach of the Treaty, it is likely that in such a case some reasonable agreement could be reached to accomplish the objective of the Treaty. It should be emphasized however, that it would be the government's responsibility to come to an agreement with the First Nations with respect to a reasonable alternative, not vice versa. A suitable alternative would likely include the funding of post-secondary education off the reserve at one of the universities or other post-secondary institutions already in existence (such as has occurred for over one hundred years).

V. The Fulfillment (or Non-Fulfillment) of the Treaty Provisions, by the Canadian Government

JUST SIX MONTHS AFTER the signing of Treaty 1 in 1870, Governor Archibald cautioned Ottawa:

> It is impossible to be too particular in carrying out the terms of the arrangements made with these people. They recollect with astonishing accuracy every stipulation made at the Treaty, and if we expect our relations with them to be of the kind which is desireable to maintain we must fulfill our obligations with scrupulous fidelity.[51]

However, the years following the signing of the Treaty were marked by continual petitions, letters, meetings and threats to go to Ottawa by the First Nation Chiefs involved in the negotiations. The promise

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[50] *Supra* note 19 at 123.

[51] D. Hall, "A Serene Atmosphere? Treaty #1 Revisited" [1985] 4 Can. J. Native Stud. 321 at 329.

respecting schools quickly became an issue.[52] On February 26, 1873, for example, Commissioner J. Provencher notified Ottawa of a request for a school for twenty children at Brokenhead. On March 12, 1873 he received a reply from Deputy Superintendant General of Indian Affairs VanKoughnet, stating the Department's policy as follows:

> According to the terms of Treaty #1 a school is to be maintained on each Reserve thereby made — of which there is one — whenever the Indians on the Reserve should desire it. The grants made to the Indian schools at St. Peter's, Fort Alexander and Fairford were $300 ... on condition that each has an attendance of at least 25 pupils. Mr. Provencher states that the Indians of Brokenhead desire an appropriation towards the erection of a school house. No stipulation is made in the Treaty that an appropriation shall be provided for such an effect.[53]

In a further message sent from Provencher to Ottawa, he noted that "it was not in accordance with the usual practice [of the Department] to furnish money for the purchase of school houses,"[54] but he added that the request was

> just one more instance of the misunderstanding that took place at the time of the making of the Treaty. By the obligation of "maintaining a school" assumed by the Government, the Indians misunderstood that all the expenses connected with the school would be supported by the Government.[55]

It is interesting to juxtapose Provencher's observations as to the "Indian misunderstandings" of the Treaty with the Supreme Court of Canada's dictum that the Treaties must be interpreted in the sense that the First Nations' people understood them. Provencher's comment clearly establishes that the First Nations' understanding of the Treaty education right at the time that the Treaty was made was that all First Nations' education expenses were to be borne by the government.

With respect to the numbered treaties signed in 1873 and onward, there were difficulties as well. Throughout the 1880s, continued controversy arose with respect to the setting up of schools on the

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[52] Many of the other disputes involved the "outside" or unwritten promises. Treaty Commissioner Simpson had reported to Ottawa stating that those promises were to be given Treaty status, but "so far as [Ottawa was] concerned, it was the treaty document, and that only, that marked government obligations. In their opinion the treaty waas more generous than they had first intended, and they took a narrowly literal, hard-line approach to its administration." See Hall, *ibid.* at 328.

[53] Public Archives of Manitoba, RG 10.

[54] *Ibid.* RG 3616.

[55] *Ibid.* RG 4520.

Reserves. Although there would appear to have been a general desire on the part of the First Nations' people to have the schools established, the manner in which schools were being provided by the government was generally seen as being unacceptable.

In an effort to cut the cost of providing education to the First Nations, the government allowed religious orders rather than its own government servants to run the schools. By 1881, for example, two mission schools, run by the Church Missionary Society, which was Anglican, were established. One was at Long Sault on Chief Mawedopenais' land and the other at Little Forks under Chief Keejickokai. The First Nations' people discussed the matter at the Grand Council at Assabaskoshing on Lake of the Woods, and Chief Powassin stated that although he knew education was a "great and good thing"[56] he "objected to mission schools being established on their reserves, as they did not wish their children influenced to forsake the religion of their fathers."[57] This led to the disastrous federal policy of the residential schools which resulted in so many abuses being inflicted upon First Nations' children.

When the government did provide its own teachers to go to the Reserves to teach, they were paid approximately half the amount that the provincial teachers were paid. The result of that difference was that provincial schools, which taught primarily white children, enjoyed the benefits of the more highly qualified and competent teachers, while schools on the reserves were staffed by those less qualified. Still today, small communities in the north which are not reserves typically have adequate schooling with adequate budgets, at least for staff, while reserve communities, funded by the federal government, are consistently underfunded for both staff and operations.

The government also insisted that before any teacher would be sent to a reserve, the First Nations' people were to build school houses from which those teachers could operate. This too was discussed at meetings and objected to. McColl wrote the following passage about the objections of Chief Mawedopenais of Long Sault, to the insistence of the government that the First Nations' people provide school houses:

> They are desirous of having a farming instructor as well as a school teacher, supplied them, in order that they may learn to cultivate the soil properly, as well as to learn to

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[56] Canada, Parliament, "Reports of Treaty Commissioner McColl" in *Sessional Papers* (1882) No. 6 at 98.

[57] *Ibid.*

read and write correctly. Chief Neeshotoe wants a plough and harrow. Mawintopenesse, handing me a copy of the Treaty, said that if I could show him where they were required to build school houses that he would give that new house (pointing to a building on the bank of the river) for that purpose, but that if there is nothing about their building school houses in the Treaty, he will never do so as long as the sun courses in the heavens. He spoke very earnestly and said: "My name is Mawintopenesse, the same as when I signed the Treaty, and Mawintopenesse never breaks his word." He will stand by the Treaty and will never agree to anything else.[58]

This exchange is a dramatic example of the First Nations' understanding of the Treaty education right in Treaty 3 (the one that first contained the qualifier of the Government deeming the establishment of a school to be adviseable).

The examples above are illustrative not only of the fact that the government was not living up to its Treaty obligations, but secondly that the leading Chiefs of the time were well aware of the promise that they would be provided with schools and understood it to mean that the provision would be at the government's expense. Moreover, their statements about those schools are inconsistent with any belief that the federal government need only provide them when they deemed that to be adviseable.

Quite apart from the legal arguments surrounding the government's breach of its Treaty education obligations the First Nations have suffered immeasureably from the assimilation and cultural genocide policies of the missionary and residential schools. That in and of itself should result in a generous and honourable approach to Canada's Treaty education obligations.

The government's dishonour in this respect continues to this day. Although the "residential schools" policy is finally over (the last residential school in Manitoba closed in the late 1970s), the government still refuses to provide adequate on-reserve education facilities even at the elementary and secondary levels.

The policy today is to have the First Nations administer their own on-reserve elementary and secondary schools with funding from the federal government. However, that funding is almost universally inadequate and stingily given. One example is the Sandy Bay First Nation on the shores of Lake Manitoba. In 1985 a new school was opened there. It was overcrowded in its first year of operation. Ever since, the Sandy Bay Ojibway First Nation has been trying to make the government live up to its Treaty 1 education promise of a school on the reserve "whenever the Indians shall desire it." The First

[58] *Ibid.* (1883) No. 4 at 131.

Nations' efforts have been met by obstinate refusals and bureacratic shuffling by Ottawa. The "whenever" of the promise is interpreted by Ottawa to mean whenever Ottawa deems the band to be eligible for a "capital allocation" for a school, which for most Manitoba reserves (including Sandy Bay) is many years down the road. In 1990, the Sandy Bay First Nation took action in the Federal Court for breach of the Treaty.

A more recent example is the Red Sucker Lake First Nation. Until 1990, the Department of Indian Affairs operated a school with an elementary and secondary education program on this remote northern Manitoba reserve. More recently, the First Nation has been "granted" the right to operate and administer the school and education program by the federal government.

However, the First Nation education authorities soon learned that they had been handed a "pig in a poke." The reserve school is so run down that Indian Affairs' own engineers have condemned the building. The sewer and water system backs up and floods classrooms and other facilities in the school. The water supply is condemned and not potable. The teachers have filed numerous complaints under Workplace Health and Safety regulations and refuse to work in unsafe conditions.

The Band has "requested" a school. However, Ottawa refuses to "maintain" the school as the Treaty requires. Instead, they again insist that Red Sucker Lake must wait until their number comes up in the Department's "capital allocation." Surely it is time that this flagrant breach of First Nations' rights to a decent education ends.

VI. The Effect of Section 35 of the Charter of Rights and Freedoms[59]

Section 35 of the *Charter* states that "[t]he existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

The definitive case dealing with s. 35 of the *Constitution Act, 1982* is *R.* v. *Sparrow*, decided by the Supreme Court of Canada in 1990. *Sparrow* was the first opportunity for that Court to explore the scope of s. 35 and in deciding the case the Court laid down a number of very important principles. Firstly, it held that the word "existing" means that only rights which were in existence at the time of the signing of

[59] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

the *Constitution Act, 1982* are protected. Extinguished rights are not revived by the *Constitution Act, 1982*. Secondly, it held that a right cannot be extinguished by mere regulation. Rather, the test of whether or not a right has been extinguished is that "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."[60]

The above provision in the *Constitution Act, 1982* has been taken by the courts to mean that in order for a right to be recognized under that provision, the right must have been in existence in 1982, at the time that the *Constitution Act, 1982* was passed. If a Treaty right was in existence in 1982, the *Charter* has the effect of giving that right a status which makes it immune to conflicting federal law.

Further, s. 52(1) of the *Constitution Act, 1982* states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The combined effect of s. 52(1) and s. 35(1) causes any law which is inconsistent with the Treaty rights of First Nations to be of no force or effect to the extent of that inconsistency. However, it should be noted that it remains unclear whether or not the *Constitution Act, 1982* will provide a basis for requiring the performance of Treaty obligations such as the provision of education. The fulfilment of those obligations requires positive action on the part of the government, however there is no enforcement provision respecting s. 35(1) in the *Constitution Act, 1982*. To resolve this issue it would be necessary to analyze the legal character of the Treaties and to seek the appropriate remedy for the breach of the education rights included therein.

Clearly the First Nation signatories to the numbered treaties were provided with a right to education, whatever that right may be found to entail. It follows then that the next question to be asked is whether or not that right was extinguished prior to 1982. The onus of proving that a right has been extinguished lies on the Crown.[61] In order for the Crown to show, on a balance of probabilities, that a Treaty right has been extinguished, it must be shown that there was a clear, direct and express intention to do so. A Treaty right cannot be extinguished by mere regulation.

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[60] *Supra* note 15 at 1099.

[61] *Ibid.* at 1099.

There is no evidence at all that the First Nations' right to education, as expressed in Treaty 1 and the various other numbered Treaties, was ever extinguished. There has been federal legislation regarding First Nations in effect since 1868. Since 1880, that legislation has included references to schooling. In particular, it makes provision for things such as the religious denomination of teachers, the construction and repair of school houses, the compulsory attendance of children at school and the setting up of industrial and boarding schools. These provisions, while regulating the provision of education to a small extent, certainly do not serve to extinguish the right in accordance with the test set out in *Sparrow*. Therefore, it would seem safe to assume that the education right as provided in the treaties has now achieved constitutional status and is thus paramount to any contradictory law.

Under that assumption, we are left with a constitutionally entrenched First Nations' right to education. The issue that remains is the extent of that right to education. The resolution of that issue may very well turn on the meaning given to the words "schools for instruction" and, in the case of Treaties 3 through 7, on the weight given the extrinsic evidence found in the reports of Alexander Morris and Simon J. Dawson.

VII. Relation of First Nations' Education Rights to Minority Education Rights under s. 23 of the *Charter*

Section 23 of the *Charter* provides that certain citizens have the right to receive primary and secondary school instruction in the language of the English or French minority in their province. The case of *Re Education Act (Ontario) and Minority Language Rights* ruled that "where educational facilities are to be provided to assure the realization of rights accorded by s. 23(3)(b), the facilities to be provided must appertain to or be those of the linguistic minority."[62]

It is arguable that the First Nations' right to education is similar to the right of linguistic minorities under s. 23 and that therefore, any facilities provided in pursuance of that Treaty obligation must "appertain to or be those" of the First Nations. Such an interpretation would effectively ensure that First Nations are not placed in a worse position than the French and English linguistic minorities, thus complying

[62] (1984), 47 O.R. (2d) 1 at 38, 10 D.L.R. (4th) 491 (C.A.) [hereinafter *Re Education Act* cited to O.R. (2d)]. See also *Mahe* v. *Alberta*, [1987] 6 W.W.R. 331, 80 A.R. 161 (C.A.).

with s. 15 of the *Charter* which ensures equality before and under the law.

The court in *Re Education Act* went on to say that

> ... minority language children must receive their instruction in facilities in which the educational environment will be that of the linguistic minority. Only then can the facilities reasonably be said to reflect the minority culture and appertain to this minority.[63]

It was further held that the group to whom the educational facilities appertain, must have guaranteed representation on the authority which administers the facilities and in this case, these representatives must have exclusive authority over decisions

> pertaining to the provision of minority language instruction and facilities within their jurisdiction, including the expenditure of funds provided for such instruction and facilities, and the appointment and direction of those responsible for the administration of such instruction and facilities.[64]

The First Nations' Treaty right to education and the s. 23 minority right to education are both constitutionally guaranteed. Both rights were affirmed to groups which are culturally distinct within Canadian society and both rights likely have a similar purpose, namely to provide education while maintaining the cultural entity of the group specified.

It can be argued that by analogy, the cases surrounding s. 23 should be extended and applied to cases of First Nations' education rights. Such an interpretation is further enhanced by virtue of s. 27 of the *Charter*, which states that rights must "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

VIII. CONCLUSION

CLEARLY IT SEEMS, THE First Nations' people of Canada do have a Treaty right to education which has been constitutionally entrenched by virtue of s. 35 of the *Constitution Act, 1982*. The question however, is what that right entails.

The education right as stated in Treaties 1 and 2 is unlimited and clearly could be read as including elementary, secondary and post-

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[63] *Re Education Act*, *ibid.* at 39.

[64] *Ibid.* at 43.

secondary education. While the written text of Treaty 3 and the subsequent treaties based on it include a clause that the government see the provision of schools as being "adviseable," the collateral sources support the position that at the time of the signing of the Treaty there were no such conditions in place and the First Nations' understanding of the Treaty was no different from that of Treaties 1 and 2.

The Supreme Court of Canada has in recent years taken a more purposive view of Treaties between the government and First Nations. Most notably, in *Nowegijick*, the Court ruled that the Treaties must be interpreted liberally and that any doubtful expressions must be resolved in favour of the First Nations. Other cases emphasize that the Treaty rights must be read in a flexible manner which allows the Treaty promises the opportunity to change along with the evolution of time. Those cases suggest that collateral evidence might well be admitted as evidence of the Indians understanding of what was promised to them.

The record of the federal government in honouring those Treaty obligations even at the primary and secondary levels is nothing short of deplorable (the Sandy Bay and Red Sucker Lake cases for example). Neither the efforts of First Nations nor the Report of the Manitoba Aboriginal Justice Inquiry seem to have yet moved the federal government to more honourable conduct in this regard. It will be necessary for Manitoba's First Nations and counsel assisting them to continue to be vigilant and persistent as to Canada's responsibility to First Nations.

Recently, the federal government has limited access to the Post-Secondary Student Assistance Program. This is seen as a violation of the Treaty education rights of First Nations. On the basis of the interpretation principles set out by the Supreme Court, the numbered Treaties ought to be interpreted as including post-secondary education. Education at all levels is a vital aspect of the First Nations hope to once again prosper and it is to be hoped that when the issue does eventually come before the courts, it will be resolved in a manner favourable to the First Nations, in the spirit of the Treaty promises as they were originally made and understood by the Indians.