

# THE HUTTERITES: A CASE STUDY IN MINORITY RIGHTS

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## I

Although the Hutterite colonies in our prairie provinces are quiet and peaceful, their presence there has provoked continuing bitterness. By Alberta's Communal Property Act<sup>1</sup> Hutterites cannot purchase land without government permission. One of the Hutterite's counsel in Alberta, Mr. Percy Davies, Q.C., has remarked that "although Canada as a nation has long since made peace with the German Reich and Japan, Alberta remains 'at war' with it's Hutterites". There has been no war, of course, but there have been occasional warlike threats. In June, 1960, for example, the Warner local of the Farmer's Union of Alberta stated at a hearing that it was prepared "to break civil laws in Canada if necessary" to prevent a Hutterite colony from being established in the area: "We have reached the end of our patience. There is seething resentment which can erupt at any time."<sup>2</sup> Mr. Davies stated that the hearing reminded him of a "kangaroo court in an uncivilized country".

The Hutterites are a peace-loving Anabaptist sect whose strict ways date back four hundred years. On their colonies all things are owned in common, after the description of the early Christian Church in the Book of Acts. They are strict pacifists and will neither vote nor hold public office. They do not participate in the life of the outside community nor do they proselytize. They retain a German culture, speak with a unique German dialect, and

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<sup>1</sup> R.S.A., 1955, c. 52, as am. 1960, c. 16 and 1962, c. 8.

<sup>2</sup> Edmonton Journal, June 2nd, 1960, p. 1, col. 8. We must not assume that the rural population of Alberta is uniformly anti-Hutterite. In fact we do not have any accurate information on the extent and intensity of rural feeling. The Communal Property Control Board has experienced opposition to the Hutterites, in varying degrees, wherever it has gone in the province but this only reflects the views of those who took the trouble to attend a hearing. The only vocal expression has been anti-Hutterite.

wear dark peasant clothing. They are reserved but friendly and have the traditional virtues of piety, economy and productivity.

The rural people in the prairie provinces advance three reasons for opposing Hutterite expansion: (1) Hutterite colonies have economic advantages which make them unfair competitors to the average farmer; (2) Hutterites have detrimental effects on any community of which they become a part; and (3) they threaten to take over vast rural areas if allowed to expand at will. Though these are not necessarily the real reasons for the opposition, they are worth examination.

*Hutterite colonies have economic advantages which make them unfair competitors to the average farmer.* There have been strong feelings that Hutterites have a privileged tax position, and their taxation status is still not clear. At one time a colony was assessed for income tax as a quasi-partnership, and profits were theoretically divided equally among the members. After deducting production costs and individual exemptions, the members were generally not liable to tax. After 1949, net income was treated as the exempt income of a non-profit association. Strong Western representation brought about changed assessment practices beginning with the year 1962, with the result that the colonies are now to be taxed as corporations.<sup>3</sup> Objections to the assessments are presently under review.

Aside from any possible tax advantage, a colony farm has basic economic advantages over the one-family farm. The colony farm is a more efficient economic unit and has minimum labor costs because of the low material standard of living on the colonies. Non-Hutterite farmers fear that they will not be able to compete successfully with Hutterites while maintaining their high living standards. Only an agricultural economist can say whether their fears are justified. But the fears seem to spring more from a feeling of economic insecurity and a dislike of the foreign ways of the Hutterites than from the facts alleged.<sup>4</sup>

<sup>3</sup> Almost all of the colonies in Alberta are incorporated under the Alberta Companies Act as companies limited by guarantee. It has been argued that the Hutterites could nullify the change by paying wages or deeming that wages have been paid: *Hutterites Could Outfox Ottawa's Tax Collectors*, *Financial Post*, December 31st, 1960, p. 12, col. 4. Hutterite leaders have stated, however, that they cannot show payment of wages to members on their tax returns without compromising religious principles.

<sup>4</sup> The Final Report on the Saskatchewan Hutterite Program, by Vernon C. Serl (unpublished and undated) states: "Hutterite economic success is based on a combination of labor supply, diversification and specialization. Because of size they are able to obtain the full benefits of mechanization . . . . Similar advantages are available to cooperative farms

*The Hutterites have detrimental effects on any community of which they become a part.* To take one of the commonest criticisms first, it is argued that Hutterites ruin local business by buying less and buying it from the wholesalers in the larger centers. The present accuracy of this charge is doubtful. In 1960 the City of Drumheller, Alberta, had a report prepared on the spending habits of a typical Hutterite colony. The report concluded that, although Hutterites spend less per capita than individual farmers, the larger colony population makes the total expenditure approximately the same for both Hutterites and non-Hutterites when compared on an acreage basis. The fact that the City of Calgary is fairly close to Drumheller apparently did not diminish Hutterite trade in Drumheller.

There is the additional charge that Hutterites contribute no lawyers, doctors, teachers or other professionals to society. They accept no responsibility in community organizations.<sup>5</sup> They do not contribute to the society which has made their prosperity possible. But of what significance are these facts? Non-Hutterites are free to be poorer citizens than Hutterites will ever be. By certain common standards the Hutterites are poor citizens and their social system ensures a continuing group of poor citizens. But it is not enough to argue simply that since the Hutterites do not accept all the so-called "duties" of citizenship they are not entitled to all the privileges of citizens. What are the "duties" of citizenship? The Hutterites do accept all the compulsory "duties" of citizenship: they pay all taxes levied on them, they send their children to school as required by law. To deprive the Hutterites of some of the privileges of citizenship will do nothing to resolve the problem, except to satisfy some elements of our society that the Hutterites have been punished.

Another reason for community dislike of the Hutterites is based on their refusal to fight. The Canadian Legion opposes the expansion of the colonies and has termed the Hutterites second-class citizens. Yet during the wars the Hutterites contributed to and would be available to farm-village units. Other possibilities undoubtedly exist but it is interesting to speculate on the possibility that Hutterite organization may contain within itself the prototype structure necessary to the solution of rural problems which are often taken to be caused by Hutterite colonization."

<sup>5</sup> It has been argued that the colonies hinder community organization by not participating in school consolidations or rural electrification plans. The farmer's Hutterite neighbours are a social island in the community. Unless the farmer takes the initiative to establish friendly relations none will be established. He will never meet his neighbours at church or any other community organization. They speak a different language and live a different life.

the Red Cross, bought savings bonds (on which they refused to collect interest), and served in substitutional service.

*The Hutterites threaten to take over vast rural areas if allowed to expand at will.* The Hutterites have the highest rate of natural increase of any known population group.<sup>6</sup> While the general trend of young farm people to migrate to urban centers accelerates, the Hutterites keep their sons and daughters on the land. But is the combination of these factors indicative of a future Hutterite take-over of certain rural areas? At the present time the Hutterites own less than one per cent of the total occupied agricultural land in Alberta and there are 15,800,000 acres of unoccupied arable land still available in that province. Citing these figures, the Alberta Legislative Committee in 1959 concluded that there was no immediate basis for apprehension.<sup>7</sup>

## II. *The History of Legislation Dealing with the Hutterites.*

The Hutterites have had a long history of persecution.<sup>8</sup> Their church was formed in 1528, arising directly out of the struggles of the Protestant Reformation. The following year rebaptism, an Anabaptist practice, became a capital offence and the execution of Hutterites without trial was made lawful. In 1536 Jacob Hutter was burned at the stake and thereafter his followers were driven from country to country. Some governments gave the Hutterites guarantees of freedom of religion and freedom from military service, but sooner or later these were always withdrawn. After a period of peace in the Ukraine, their freedom from military service was withdrawn, prompting them to emigrate to the Dakotas in 1874. During the first World War strong feelings against their German culture and pacifism developed in the United States. Some of the men were whipped and two died in camps established for conscientious objectors, as a result of mistreatment.<sup>9</sup> In 1918 twelve Hutterite colonies, having received special guarantees of freedom from military service, moved to Western Canada from South Dakota. The following year the Canadian Government limited

<sup>6</sup> J. W. Eaton and A. J. Mayer, *Man's Capacity to Reproduce* (1954). Alberta's rate of population increase is higher than that of the Hutterites because of immigration.

<sup>7</sup> Report of the Hutterite Investigation Committee, Queens Printers, Edmonton (1959), p. 13.

<sup>8</sup> See generally, Horsch, *The Hutterian Brethren* (1931); Friedmann, *Hutterite Studies* (1961).

<sup>9</sup> Smith, *The Story of the Mennonites* (4th ed., Newton, Kansas, 1957), p. 800. The Hutterites were the only Anabaptist group whose young men stood as a unit against service of any sort in World War I. Some Mennonite and Amish groups approved of non-combatant service.

the guarantees to Hutterites who had already entered the country<sup>10</sup> and in 1919 further immigration was prohibited.<sup>11</sup>

The largest group of Hutterites settled in Alberta, which presently has approximately 6,500 Hutterites on sixty-five colonies. Manitoba and South Dakota, respectively, have the next largest Hutterite populations. Saskatchewan presently has fifteen colonies.

In 1942 the Alberta Legislature passed the Land Sales Prohibition Act which prevented the purchase of land by Hutterites.<sup>12</sup> This statute remained in force until 1947. By that time the Hutterites urgently needed more land, but opposition to their expansion was so strong in Southern Alberta that it was felt prudent to prevent the establishment of any new colonies south of Calgary. Few areas south of Calgary were without at least one colony within a range of forty miles. Working from this figure, a committee of the legislature recommended that new colonies be allowed if they were at least forty miles from an already existing colony, a rec-

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<sup>10</sup> The Canadian Government had given a Hutterite colony in Manitoba specific guarantees of freedom from military and government service by order-in-council 1676, August 12th, 1899 (pursuant to s. 17 of the Militia Act, S.C., 1868, c. 40). After confirming that these guarantees would apply to them, the twelve Hutterite colonies moved to Western Canada in 1918. By order-in-council 768, April 8th, 1919, the guarantees were limited to Hutterites who entered Canada before April 10th, 1919.

<sup>11</sup> Order-in-council 1204, June 9th, 1919, preventing further immigration was revoked by order-in-council in 1922 to permit a second group of Mennonites to emigrate to Manitoba. The 1922 order-in-council was not published in the Canada Gazette. The repeal came after the victory of the Liberals under Mackenzie King in 1921 and a petition from Canadian Mennonites concerning certain Russian Mennonites who were suffering persecution. The immigration of the Russian Mennonites was financed by the Canadian Pacific Railway and continued until 1927 when the Russian Government cut it off. In 1929 a group of 13,000 refugees, mostly Mennonites, had gathered in Moscow. But economic and political conditions had changed in Canada. The depression had struck and political control had been reversed in most of the provinces as well as in the federal government. The newly elected Conservative Premier of Saskatchewan announced that the refugees in Moscow would not be welcome in Saskatchewan. Saskatchewan and Alberta were determined in their attitudes and so only about a thousand were admitted to Canada during 1929 and a few hundred the following year. Some of the Mennonites who were refused admission to Canada settled in Paraguay in an area with Mennonites who had left Manitoba because of a dispute with the provincial government over the use of German in the schools. Smith, *op. cit.*, footnote 9, ch. 14.

<sup>12</sup> S. A., 1942, c. 16. Because the 1942 legislation referred to enemy aliens as well as Hutterites it was disallowed in 1944. In 1944 it was re-enacted with reference to Hutterites alone: S.A., 1944, c. 15. The bills were guided through the legislature by the Provincial Treasurer, the Hon. Solon E. Low, who observed that: "Our boys do not feel like fighting the battle to protect these people who stay at home and prosper at our expense and the feeling is so acute that acts of violence have been threatened. For this reason we felt some prohibition was needed to prevent violence and preserve unity." *Edmonton Bulletin*, Tuesday, March 17th, 1942.

ommendation that was incorporated into the Communal Property Act of 1947.<sup>13</sup> By 1960 the only remaining areas available for new colonies under the forty-mile rule were north of Red Deer. Rather than to establish in less desirable areas which were far from the many colonies of southern Alberta, a number of daughter colonies went to Saskatchewan. In 1960 the Alberta legislation was changed again, this time to provide that an existing colony could increase its land holdings only on permission of the Communal Property Control Board, granted after a hearing. A new colony could only be formed on cabinet authorization, granted after a Board hearing.<sup>14</sup> The Board determines "whether or not it is in the public interest"<sup>15</sup> to permit existing colonies to expand. The Board members judge each application on what might be called its physical merits. That is to say, they attempt to keep colony holdings in one block and prevent any non-Hutterite farm from being enclosed by a colony. If an application meets these limited requirements, the Board feels that the applicant has a right to purchase the land. On the other hand, the Cabinet, in determining when it is in the public interest to authorize a new colony, has regard for the public feeling in the district involved.

The Hutterites originally settled in South Dakota in 1874. The tensions and persecutions of the First World War drove all but one colony to Canada.<sup>16</sup> In 1935,<sup>17</sup> however, a special law, under

<sup>13</sup> S.A., 1947, c. 16. In 1950 the Act was altered so that colonies could only be established, within the statutory limits, with government permission. S.A., 1950, c. 10, s. 1.

<sup>14</sup> S.A., 1960, c. 16. By the 1960 amendments the Board was required to hold a public hearing concerning the establishment of a new colony. In 1962 the legislature removed the requirement that the Board hearing be public: S.A., 1962, c. 8. The 1962 amendments also provided that when permission to establish a new colony had been denied, no further application in respect of the same lands or any portion of them could be made within three years.

Since the Board was established in 1960 and until public hearings were ended in 1962 there were fourteen hearings for permission to establish new colonies. Seven applications were refused, six were allowed, and one was still pending when this information was obtained. Of the six applications allowed, four were for locations south of Calgary. Applications by existing colonies for additional land are numerous and are almost always granted in whole or in part.

Leaving the final decision on the establishment of a new colony with the cabinet invites communities to raise a loud hue and cry against the Hutterites in the hopes of influencing the cabinet decision. The statement of the Warner Local of the Farmer's Union of Alberta, quoted at the beginning of this article, made before a cabinet decision, was potentially very influential. To avoid political issues it would seem wise to vest the decision making power completely in an independent board.

<sup>15</sup> *Ibid.*, s. 9, amending the Communal Property Act, R.S.A., 1955, c. 62, s. 13.

<sup>16</sup> In *State v. Hutterische Gemeinde* (1922), 46 S.D. 189, 191 N.W. 635 the State of South Dakota, in an action in the nature of quo warranto,

For footnote 17, see next page.

which the colonies could incorporate, was enacted to encourage Hutterites living in Canada to return to South Dakota. Six colonies did return from Manitoba. By 1955 there were seventeen colonies in the state. The repeal of the 1935 legislation in 1955 did not affect any group incorporated under the old law, but it barred "the expansion of any activity or power" of any such group.<sup>18</sup> This legislation in 1955 has tended to pacify the groups most vocal in their opposition to the Hutterites. Many in South Dakota are under the illusion that the law now prohibits the establishment of new colonies.<sup>19</sup> But the 1955 legislation merely means that the Hutterites cannot purchase new land as a corporation. Three new colonies, at least, have been established since 1955, but not as corporations. The 1955 amendment was held constitutionally valid by the South Dakota Supreme Court in 1958.<sup>20</sup>

In Manitoba, the practice was followed, in the 1930's, of incorporating the colonies by private bills and thirteen colonies were so incorporated in 1931, 1935 and 1938.<sup>21</sup> In 1947<sup>22</sup> a group of colonies applied for incorporation but was refused by the legislature because of local objections to their rapid expansion. In 1957 an agreement was entered into between the Union of Manitoba and the Hutterites removing the Hutterites corporate charter, apparently on the basis that the incorporation as a religious corporation was improper since the primary goals of the organization were secular.

<sup>17</sup> South Dakota Code of 1939, c. 11.12.

<sup>18</sup> Stat. of South Dakota, 1955, c. 15.

<sup>19</sup> This mistake has reached notable proportions. It was perpetuated by Meryman, *South Dakota's Christian Martyrs*, Harper's Magazine, December 1959, p. 72, and by the South Dakota State Advisory Committee in its report to the U.S. Commission on Civil Rights, printed in *The Fifty States Report* (U.S. Government, 1961), p. 572. The author perpetuated the mistake in two talks on the C.B.C. programme *Speaking Personally*, broadcast September 14th and 15th, 1962.

<sup>20</sup> *State ex rel v. Spink Hutterian Brethren* (1958), 77 S.D. 215, 90 N.W. 2d, 365.

<sup>21</sup> Ten colonies were incorporated in 1931, two colonies in 1935, and one in 1938.

<sup>22</sup> In 1947 a Legislative Committee held public hearings in Manitoba. Their report was made public but never published. It recommended: (1) that standards comparable with public schools be established in Hutterite schools; (2) that sections of the incorporation bills which prevent the individual Hutterite from owning property while living on the colony or taking any portion of the colony assets with him if he left the colony be repealed. A special committee should consider whether appropriate legislation should be enacted to establish a procedure whereby a Hutterite could claim his or her equitable share of the colony assets when he leaves the colony; and (3) no recommendation was made concerning restriction on the Hutterites right to purchase land, which the committee referred to as one of the basic fundamental rights of every person.

The second recommendation was partly implemented by the Act to Amend the Acts of Incorporation of Certain Hutterian Mutual Corporations, S. M., 1948, c. 24, which repealed the sections in all the incorporation Acts preventing an individual Hutterite from owning property or taking a portion of the colony assets with him if he leaves the colony.

toba Municipalities and the Hutterites limiting the amount of land any colony could purchase, the number of colonies that could be established in any municipality, and requiring that colonies be ten miles apart.<sup>23</sup> In 1960 fourteen petitions were filed with the legislature to incorporate colonies. The legislature insisted on including the agreement with the Union of Manitoba Municipalities as a Schedule A in the incorporation bills. The colonies objected to this procedure, and when the Committee on Private Bills refused to delete the agreement from the bills, the colonies requested that the bills be withdrawn. Presently there are at least fourteen colonies functioning in Manitoba which have not been incorporated.

Hutterites first settled in Saskatchewan in 1952. All of the fifteen colonies in that province have come from Alberta. Local opposition was immediate. The Government responded by subsidizing a study of the impact of the first two colonies, conducted by the Saskatchewan Branch of the Canadian Mental Health Association.<sup>24</sup> The study concluded that no critical problem existed then and that future difficulties could be largely avoided by making available to the communities in which colonies were going to establish unbiased information about the Hutterites. A number of articles were printed in local newspapers on the Hutterites after the study, but no continuing organization or program was established. By 1956 opposition had increased and requests for restrictive legislation were made by such organizations as the Saskatchewan Association of Rural Municipalities and the Canadian Legion. The Hon. John H. Sturdy, the Minister of Social Welfare and Rehabilitation, who had been involved in the field of minority relations through his work on the Provincial Indian Affairs Committee, was given the task of formulating government policy. He formed a Committee on Hutterite Settlement which included people from the Adult Education Division who had worked with Mr. Sturdy on the Indian Affairs Committee. Two members of the Adult Education Division were chosen to do a fuller study of the problem. The study which began in October, 1957 concluded that the objective or aim of government policy should

<sup>23</sup> According to the Deputy Provincial Secretary of Manitoba, Mr. Prud'homme, there has been considerable discussion about the legal effect of this agreement. The Hutterites promise to comply with the limitations it imposes on their power to buy land and the Union of Municipalities promises not to oppose any Hutterite expansion which is in compliance with the agreement. The agreement expressly provides that the Hutterites do not surrender any of their future rights.

<sup>24</sup> Saskatchewan Division of the Canadian Mental Health Association, Report, the Hutterites and Saskatchewan (1953).



not be the establishment of co-operative programmes between Hutterites and non-Hutterites, but rather, the development of a dispersed Hutterite settlement pattern, which would free local communities from the fear of being overrun with Hutterites. The Provincial Committee established a liaison officer to work with the Hutterites, to advise and guide them on suitable locations which would create a dispersed pattern of settlement.<sup>25</sup> In 1958, after patient work by the first liaison officer, an agreement was reached and executed between the Lehrer-Leut colonies<sup>26</sup> and the Saskatchewan Government, which obligated the Hutterites to contact the Saskatchewan Government Hutterite Committee when they contemplated settlement in Saskatchewan and consult with the Committee on possible locations. The Lehrer-Leut re-negotiated the 1958 agreement with the Saskatchewan Government in July, 1963, at which time both parties approved in principle:

... the proposition that new colony sites should be distributed throughout suitable agricultural areas of Saskatchewan; that the number of colonies located in any single area should be in a relationship to the size of the population of that area; that new colonies should, if possible, locate near the larger market centers in the said Province.<sup>27</sup>

The Saskatchewan Government undertakes not to regulate land purchases as long as the agreement is honoured. The agreement lasts for five years and is to be renegotiated at the end of its term.<sup>28</sup> The Saskatchewan agreement, unlike the Manitoba agreement, is stated in general terms and contains no acreage limitations or specific requirements for a possible colony site. The Saskatchewan agreement incorporates in it a continuing liaison agent who will facilitate communication between the Hutterites and the Saskatchewan Government. This continuing liaison does not exist in any other jurisdiction. The Alberta Communal Property Control

<sup>25</sup> The first liaison officer was Mr. Vern Serl. The present liaison officer has an office in Calgary, Alberta and works on contract with the Saskatchewan Government through an organization called Group Resources Consultant Service.

<sup>26</sup> There are three kinship groups within the whole Hutterite church. Their identity comes about because they are descendants of one of the three founding colonies in South Dakota. The Darius-Leut, the other kinship group in Alberta, has agreed to abide by the spirit of the agreement, but has not yet agreed to sign it.

<sup>27</sup> Saskatchewan discovered that the Hutterites held the view that the ideal settlement pattern appeared to be the location of colonies at from eighteen to thirty miles from each other. The Hutterites wanted to keep community reaction to the colonies as favorable as possible and prevent inter-colony competition for community markets.

<sup>28</sup> The time limit was necessary since the Hutterite preachers were unwilling to bind themselves indefinitely, as a matter of conscience. They did not want to make any agreement which unforeseen events would force them to break.

Board has no liaison function, although the Alberta Legislative Committee wanted a Board which would do liaison and public relations work. The Saskatchewan approach is certainly the most enlightened and progressive of any jurisdiction.

The Montana House of Representatives passed a bill in 1961 establishing a Communal Property Board with power to authorize the establishment of a colony so long as it did not exceed 6,500 acres and was no closer than forty miles to another colony. The Senate rejected the bill and there is presently no restriction on Hutterite power to buy land in that state.

In 1959 two bills were introduced in Minnesota, each of which would have imposed an acreage limit on "communal corporations", but no limit on the number of colonies. Both bills died in committee.

### III. *The Constitutionality of Alberta's Legislation.*

Essential to a discussion of the constitutionality of the Communal Property Act is a consideration of the nature of this legislation. The Act, on its face, prevents anyone from holding land communally in the Province of Alberta without government permission. But this is a self-conscious device. The Act deals exclusively with the Hutterites by dealing with the type of landholding essential to their religion.<sup>29</sup> The government, in passing the legislation, was not concerned with the Hutterites *per se*, but with the friction that exists between the colonies and the communities in which they are located. The characterization of the legislation which seems most accurate is as community zoning law.

The courts may hold that the Act, at least in one aspect, deals with the practice of religion. How would this conclusion be arrived at? Are we to ask whether the owning of land in a particular fashion, in this circumstance, has a religious value? Or are we to ask whether the legislation treats the Hutterite colonies in a manner transcending legitimate zoning considerations so that it is impinging upon freedom of religion? The courts have dealt with issues similar to the first question in analyzing whether the salutation of

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<sup>29</sup> The present definition of "colony" in the Act is substantially the same as that in the original draft of the 1947 legislation. It was pointed out in the legislature then that this definition would include certain monastic orders. The bill was thereupon amended, at the suggestion of the Attorney General, by the addition of the words "... and includes Hutterites or Hutterian Brethren and Doukhobors, but shall not include any church or other religious organization or congregation ...". The present Act does not exclude these other religious organizations. It would seem that the statute should govern monastery farms.

the flag or formal education could have religious significance.<sup>30</sup> The fallacy of using this approach with the Hutterite legislation is that it would mean treating the Communal Property Act as if it dealt with communal property. There is no doubt that the communal holding of land has religious significance to the Hutterites but this is really irrelevant if the Communal Property Act is a piece of zoning legislation. The Hutterite colonies, like any other religious institution, can legitimately be subject to community zoning law. If the colonies are subject to a unique zoning provision this may simply reflect the uniqueness of the colonies in our society. The critical question is, then, whether the legislation treats the colonies in a manner transcending legitimate zoning considerations so that it must be considered as dealing with the Hutterites freedom of religion. The old Land Sales Prohibition Act prohibited the acquisition of any land by the Hutterites and could not be described as zoning law. The Communal Property Act could be administered so as to completely prohibit the acquisition of land by the Hutterites; but the Act is not being so administered and the motive behind the legislation is not the persecution of the Hutterite church.

The courts may hold that the Act deals with communal property and that communal property has a religious significance, or they may follow the reasoning set out above and conclude that the Act is being administered in a way which transcends legitimate zoning considerations.<sup>31</sup> If a court takes either of these views a second question becomes important: is the protection of the free exercise of religion within the jurisdiction of the federal government? To this question we can provide no satisfactory answer. The ratio of the leading case, the much-discussed *Saumur v. City of Quebec*<sup>32</sup> must be expressed without reference to the question of jurisdiction, although seven of the nine judges voiced an opinion on where jurisdiction lay. The views of the judges and of the leading commentators on this case are well known.<sup>33</sup>

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<sup>30</sup> See *Donald v. Board of Education*, [1945] O.R. 518, at p. 530; *Perepolkin v. Superintendent of Child Welfare* (No. 2), (1958) 11 D.L.R. (2d) 417 (B.C.C.A.).

<sup>31</sup> A number of Hutterite colonies have left Alberta because of the difficulty of obtaining land there. This indicates the possibility of an argument that the administration of the Act has transcended legitimate zoning considerations.

<sup>32</sup> [1953] 2 S.C.R. 299.

<sup>33</sup> The seven judges who decided on the question of jurisdiction were: C. J. Rinfret, Taschereau, Kerwin, Rand, Kellock, Estey, and Locke JJ. The last four judges held that jurisdiction resided with Parliament. That Cartwright and Fauteaux JJ., did not decide on jurisdiction is stated on

Completely apart from the question of freedom of religion there appears to be another basis on which the constitutionality of the legislation could be challenged. The Act has had and will continue to have the effect of putting some pressure on the Hutterites to leave Alberta. All the Hutterite colonies in Saskatchewan and many in Montana have come from Alberta. Few, if any, would have been established outside of the province if the Hutterites could have purchased land freely in Alberta. Legislation with a similar effect was considered by the courts in *Union Colliery v. Bryden*.<sup>34</sup> As amplified and explained by Rand J., in *Winner v. S.M.T.*, the *Bryden* case means that:

... a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there . . . the national status embodying certain inherent or constitutive characteristics of members of the Canadian public . . . can be modified, defeated, or destroyed, as for example by outlawry, only by Parliament.<sup>35</sup>

Though this citizenship doctrine of Mr. Justice Rand's has appeared in a few cases<sup>36</sup> it is insufficiently developed to be relied on with confidence.<sup>37</sup>

#### IV. Approaches to the Hutterite Problem.

There are three types of relationships which could occur between Hutterites and non-Hutterites. We can describe these as co-

p. 387. But for a differing view see Bora Laskin, *Our Civil Liberties* (1955), 41 *Queens Quarterly* 455, at p. 468.

The *Saumur* case is the major freedom of religion case in the series of civil rights cases which take the dictum of Duff C.J., in *Re Alberta Statutes* (the *Press Bill*), [1938] S.C.R. 100, at p. 132, aff'd., [1938] A.C. 117, [1938] 3 W.W.R. 337 as their springboard. The most recent case in this series deals with the right of Trade Unions to contribute to political activity: *Oil, Chemical and Atomic Workers v. Imperial Oil* (1963), 45 W.W.R. 1 (S.C.C.). The main majority judgment, delivered by Martland J., points out that the dictum of Duff C.J. in the *Press Bill* case is a dictum, and that only a minority in *Switzman v. Elbling*, [1957] S.C.R. 285 held the Quebec statute *ultra vires* because it interfered with political liberties. Both of these cases are strongly relied on by the three dissenting judges, Judson, Cartwright and Abbott, J.J.. The *Oil, Chemical and Atomic Workers* case is, in total, less favorable to the civil liberties arguments based on the *Press Bill* case than was the *Saumur* case.

<sup>34</sup> [1899] A.C. 580.

<sup>35</sup> [1951] S.C.R. 887, at pp. 919-920.

<sup>36</sup> *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Switzman v. Elbling*, *supra*, footnote 33; *Winner v. S.M.T.*, *ibid.*

<sup>37</sup> From the wording in the *Winner* case, *ibid.*, it would be necessary to prove that some Hutterites were forced to leave the province. This argument differs from that in footnote 27. There the fact that Hutterites had migrated was seen as possible evidence that the administration of the Act transcended legitimate zoning considerations and impinged on the free exercise of religion. Here legislation forcing people to leave the province is bad *per se*.

existence, accommodation and assimilation. Co-existence refers to the continuing separate existence of the two differing groups within the same geographical area. A situation of accommodation would be where the Hutterites and non-Hutterites remain distinct groups but are able to work together on some occasions and maintain a certain amount of communication with each other. Assimilation refers to the eventual conversion of one group, the Hutterites, to the way of life of the larger group.

What viewpoints are being taken on the Prairies by those in positions of leadership? The Government of Alberta seems to think in terms of co-existence. The Report of the Hutterite Investigation Committee in 1959 spoke constantly of the goal of assimilation, perhaps discounting the possibility of a stable situation of accommodation. The committee wanted the government to aid the process of assimilation, a role the government has not accepted. Certain of the officials closely associated with administering the legislation are of the opinion that assimilation is the only real solution. The view of the studies done for the Saskatchewan government think in terms of accommodation, as does the government. Private groups on the Prairies, who express concern, mainly farm organizations and Canadian Legion Branches, generally feel that assimilation is the only solution to the Hutterite problem.

We must examine two questions: which relationship is in existence or coming into existence, and secondly, which relationship is most desirable?

What likelihood is there of assimilation of the Hutterites? There are indications of change in the colonies. The Hutterites have accepted some of our customs and consumer goods and these are slowly altering their value system. The changes are often minute—the use of coloured rugs, plaid skirts, youngsters wearing cowboy hats, improvised swings for the children, girls using commercial hand lotion and cold cream—but their effects are not to be discounted. Today four or five colonies accept family allowances, one colony allows its children to attend a school with non-Hutterite children, and three colonies in Southern Alberta, whose internal problems dated back a number of years, have abandoned the communal form of organization.

The progress is not all in one direction. The restrictive legislation in Alberta has had the effect of strengthening Hutterite solidarity. The colonies are gradually forming a formal church structure which makes it more difficult for single communities to

deviate from accustomed social practice to any significant degree. The new hierarchy, which could serve the role of liberalizing Hutterite ways, is instead the instrument of reaction.

While there are some indications of change on the colonies there will be no assimilation within the foreseeable future. This fact, and a respect for the wishes of the Hutterites, compel us to reject talk of assimilation and become concerned with the continuing relationship between Hutterites and non-Hutterites.<sup>38</sup>

The proper goal seems clearly to be a relationship of accommodation. Any government has an interest in encouraging friendly co-operation, mutual trust and communication between the various groups within its jurisdiction. Governments may legitimately act towards establishing such relationships. Such a relationship, if established between Hutterites and non-Hutterites, might lead beyond accommodation and finally result in the assimilation of the Hutterian Brethren into the surrounding society. If this assimilation occurs it will be because the Hutterites have chosen, of their own free will, to abandon a tradition too narrow and restrictive in the light of their encounter with our society. But the Hutterites have an intellectual legacy which could remain a stimulating resource even after tremendous changes in colony life. At least one communal organization has been established in this century, inspired by the Hutterian model. We must not think that accommodation will inevitably lead to assimilation.

What is a provincial government to do to ease bitterness and promote a situation of accommodation? Its role seems to lie in regard to (1) education, and (2) the location of new colonies.

### (1) *The role of education.*

Education is often viewed as the magic weapon available to the provincial governments. The schools, the theory goes, can be used to mould the Hutterite children into acceptable citizens. But, because the Hutterites have been publicly threatened with education, the functioning of the colony schools has been impaired. Hutterite leaders are very sensitive about anything which could affect their children.

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<sup>38</sup> There have been suggestions put forward on how to weaken the colonies. One voiced a number of times is the suggestion that legislation be passed permitting a colony member to claim a share of colony wealth when he leaves the colony. This is suggested, not out of concern for individual Hutterites, but in the hope that it will encourage young people to leave the colonies. The legislation proposed in Minnesota did not limit the number of colonies in any area, but would have forced each colony to be very small. I assume the idea was that smaller colony units might be more subject to change.

Schools for Hutterites are handled somewhat differently in each of the three Prairie provinces. By a special agreement with the Alberta Government the Hutterites have been assured of having on-colony public schools exclusively for Hutterite children. When the colonies first arrived in the province, they sent their children to the local one-room school, which was usually within sight of the colony. The neighbouring farmers disliked the idea of having their own children going to school with Hutterites and this was one reason for the beginning of on-colony schools. Later the Hutterites could not accept the idea of sending their children to modern consolidated schools at a distance from the colonies. Hutterite leaders then met with Alberta Government officials and an arrangement was worked out whereby Hutterite children were not to be compelled to attend off-colony schools. Under the arrangement a public school is established on the colony, built by the Hutterites and used by them as their church. The colony provides a teacher's residence. The school division supplies the furniture and school equipment and hires the teacher, who is a non-Hutterite. The colony must pay an additional school tax of from \$500.00 to \$1,500.00 annually to compensate for the cost of maintaining a one-room public school for the small number of students.

In Alberta the colony schools are part of the local school district. In Manitoba a different system was established in 1959. Each colony school is a separate school district. School trustees must be resident rate-payers. Since no Hutterite is classified as a resident rate-payer (the colony owns the land) the department of education appoints an official trustee who assumes all the powers of the Board of Trustees for each of these districts. The official trustee is always the chief inspector of schools for the province. Thus the administration of Hutterite schools is centralized. The chief school inspector and one of his assistants have gained the confidence of Hutterite leaders, more capable teachers have been selected and educational standards have been improved. Numerous problems still remain but some progress has been achieved. A few Hutterite children have begun high school in Manitoba.

In Saskatchewan the Department of Education has suggested to individual Unit Boards, where a colony was being established, that they consider an arrangement similar to that worked out for the first colonies which settled in the province. The colony builds the school and equips it and the Unit Board provides the teaching services. This approach has been followed for all colonies but one. The Leader Unit Board decided not to operate a separate on-

colony school for the Estuary Colony, feeling that the cost per pupil would be unjustifiably high. The Hutterites are distressed about the situation and the ten children involved are presently doing correspondence studies on the colony under the supervision of a Hutterite girl with a grade eight education.

The poor standards in the colony schools are due partly to the schools themselves, but primarily to the environment in which Hutterite children are being raised.<sup>39</sup> The Hutterites, quite justifiably, fear that too much schooling will teach their children to love the ways of the world. One Hutterite leader stated that "we would rather be burned at the stake than go out and live the kind of life now being lived in the world". The Hutterites do not want their children to be taught patriotism which requires involvement in war or personal ownership which would lead to greed and materialism and separate them from the chosen flock. The Hutterite leaders insist on an educational system which teaches distinctive Hutterite social, religious and cultural values, and supplement the public-school instruction with classes of their own. The provincial governments generally neither force colony children to attend consolidated schools nor allow Hutterites to control their own educational system. If a government insisted on a number of immediate changes in the colony schools the Hutterites would be frightened; relations between the colonies and the schools would suffer and the move would be self-defeating.<sup>40</sup> Progress in education on the colonies will only be achieved when the Hutterite parents respect and co-operate with the teachers. Attempts to improve standards can perhaps best be handled on a school district basis, and it is worth noting that certain division superintendents have done good work with the Hutterite schools in their areas.

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<sup>39</sup> The Report of the Hutterite Investigation Committee (1959), gives four reasons for the poor standards in Hutterite schools: inferior teaching; counter-indoctrination; removal of children from school at age fifteen; and parental opposition to their being exposed to our culture. Education Minister Aalborg has pointed out that the Hutterite schools compare favourably with other one room country schools. Inferior teaching is perhaps due to the fact that one room rural schools still survive on the colonies, that Hutterite pupils must learn english at school, and that the teacher has a low status in the Hutterite social system.

<sup>40</sup> Official announcements frighten the Hutterites easily. In 1962 the Minister of Municipal Affairs in Alberta, the Hon. A. J. Hooke commented publicly that the Hutterites were changing and cited two examples: some Hutterites were attending Chamber of Commerce meetings and a new colony was sending its children to a local school with non-Hutterite children. The Hutterite ministers met together shortly afterwards and decided that if these practices constituted change that they should be stopped.

The Hutterites, at least in Alberta, cannot establish private schools without government permission: Department of Education Act, R.S.A., 1955, c. 95, s. 8(3).



(2) *The location of new colonies.*

It seems clear that the provincial governments must assume some type of a role in guiding the settlement patterns of new colonies. The Alberta Government clearly could not permit areas of Southern Alberta to become exclusively Hutterite. But what should a provincial government do to guide settlement? For the last twenty years the Government of Alberta has controlled Hutterite land purchases by the use of its legislative powers. In Manitoba control has come about by an agreement to which the provincial government is not even a party. In Saskatchewan the government worked out an agreement with the colonies, before a crisis arose. In both Saskatchewan and Manitoba there was the acknowledged possibility of restrictive legislation which strengthened the province's bargaining position.

In Alberta, generally speaking, there is official satisfaction with the legislative approach. The 1959 Legislative Committee Report recommended a different approach. It urged the establishment of a board to advise colonies and arrange for the acquisition of suitable land. One of the tasks of the board would have been to educate the Hutterites about the area in which any new colony was to be located and educate the people of the area about the Hutterites (this is now being done in Saskatchewan).

The fundamental criticism of the Alberta government's handling of the Hutterite problem is that the restrictive legislation, which has been more or less forced on the government by rural groups, has been partly self-defeating. The legislation has retarded the move towards friendly co-existence and co-operation since it is interpreted as persecution or punishment. The Communal Property Act will not be repealed for obvious political reasons, but there is no reason why the present board could not be converted into an organization with a continuing liaison function, which discusses colony location problems with the Hutterites as they arise—not after the need has arisen and a possible site has already been chosen.

A few words should be said about the ways in which increased communication could be established between Hutterites and non-Hutterites. The Prairie provinces could insert some information into the public school curriculum about the Hutterites. Provincial publications and perhaps a film could be circulated. The Alberta government has suggested to Hutterite leaders that they join local chambers of commerce and be present at municipal meetings.

Communication alone is not enough. Sometimes it reduces

intergroup tensions, sometimes it does not. Even social contacts between conflicting groups may only serve to intensify the conflict. The possibilities for achieving harmony are greatly enhanced when groups are brought together to work for common goals. What goals do Hutterites and non-Hutterites share? The Hutterites are dedicated farmers and it might be that agricultural co-operatives, district agriculturists and organizations like the 4-H clubs could provide fruitful areas for introductory co-operation between Hutterites and non-Hutterites. Yet it is these farm groups which are most bitterly anti-Hutterite. We cannot tell what role they will play in the future.

There are some hopeful aspects to the whole Hutterite problem. There has been an increase of public awareness and concern, although the attitudes in many rural areas seem unbending. Saskatchewan has established quite a creative programme and Alberta and Manitoba may realize its value and try to copy it. Certainly there are trained and interested people available, at least in Alberta, if the government does decide to take new steps. Time alone will not necessarily solve the Hutterite problem. The provincial governments have a positive role to play.

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