

REVIEW

The Courts and Colonies

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The Courts and the Colonies: The Litigation of Hutterite Church Disputes, by Alvin J. Esau (Vancouver: University of British Columbia Press, 2004), 416pp.

Anabaptism was born in conflict, baptized by the Munster fires of 1535 and matured by centuries of wandering in the wildernesses of central Europe and North America. With such an inheritance, it must be wondered, against Lamarck, whether conflict and an expectation of conflict are inscribed indelibly in the Anabaptist soul. Conflict has certainly been a characteristic of Anabaptist life from the outset, whether with the civil and religious authorities of the host society or within their own communities. Their rhetoric of peace may be just that: there has been no escape from the dynamic nature of earthly life into the eternal peace of the Lord here on earth, no matter how isolated and economically self-sufficient a community has been.

The patterns of conflict characteristic of Anabaptist communities in early 16th century Europe have been replicated in succeeding centuries in host societies in North and South America, so it is unsurprising that the truest heirs of the sectarian and communitarian ideals of Anabaptism, the Hutterian Brethren, should be frequently embroiled in disputes with their host societies and within their own colonies which have erupted into the civil courts. A firm grasp of right and wrong, coupled with a willingness unencumbered by *gelassenheit*, to enforce a position against all comers inevitably leads to conflicts of an intractable and unyielding sort. Given their tiny numbers, Hutterites in Canada have engaged in civil litigation to a far greater extent than even the largest religious group in Canada, the Roman Catholic Church, whose own canon law dispute resolution processes have been much more successful in containing internal disputes; as a result, leaving the state courts to deal largely with criminal matters. But such comparison to the anti-christ must be galling to a Hutterite.

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In his fine study, *The Courts and the Colonies. The Litigation of Hutterite Church Disputes*, Professor Alvin J. Esau explores the legal conflicts which the Hutterites of Western Canada have endured, taking the now famous case of *Lakeside Colony of Hutterian Brethren v. Hofer*,¹ as the centrepiece for his study. Of the twelve chapters in the book, seven are devoted to a detailed chronological account of this litigation and its impact on other Hutterite colonies, on the Schmiedeleut, one of the three Hutterite Leuts, and on their relationship with the Bruderhof, a communal movement begun in Germany in 1920 and modelled on the Hutterian Brethren. In these seven chapters (chapters 5–11), Professor Esau recounts the *Lakeside* litigation and related litigation, relying on various judgments, statements of claim and defence, affidavits, motions, exhibits, discoveries, testimonies in court and personal interviews with the interested parties and their counsel. These chapters are copiously detailed and appear to be carefully researched; in short, a wonderful archive of information about *Lakeside* and related cases, the strategies of the litigation, and the personalities and their dynamic relationships, involved in the litigation. Much *gelassenheit* has gone into the production of these chapters. However, in addition to recounting the *Lakeside* story, Professor Esau also attempts two other goals with this study, to assess what the litigation means for the Hutterites and their understanding of the world and to assess what the conflicts of the Hutterites both internally and externally might mean for religious freedom in Canada.

After the first two introductory chapters in which Professor Esau briefly recounts the history of the Hutterites and of the Bruderhof, respectively, he turns in the third chapter to the Anabaptist understanding of the relationship of Christian communities such as theirs to the host state and society within which they live. As is well known, the Anabaptist position at its purest is one of the strictest separation of the two kingdoms of God and of this world. Anabaptist communities regard themselves as communities of the saved gathered by the Holy Spirit and already entered into the kingdom of God, although still on this side of the grave. Everyone and everything outside their communities are damned and should not be taken seriously by the true believer. Indeed, the true believer should avoid contamination by the world by avoiding the world and by remaining inside the community. To maintain the strictly disciplined life expected of all who live within the gathered community, male elders are endowed with extensive educational and disciplinary authority to set and maintain standards, and are customarily supported by all the baptised male members of the community. Failure to meet required standards is punished by various levels of shunning while living in the community and expulsion is the final sanction. Community disputes are resolved communally internally without recourse to civil courts backed by state sanctioning power.

1 (1992) 97 D.L.R. (4th) 17 (S.C.C.)

However this scenario describes the ideal, or the ideological. At no time in their history have Anabaptists of any stripes been able to isolate themselves so completely as to enjoy freedom from the world. Thus, the Hutterites have been obliged to defend their way of life through litigation, which is the means by which civil and civilized society resolve as peacefully as possible both superficial quarrels and deep value conflicts, rather than by force of arms. Hutterite communities are obliged to have economic ties to their host societies in order to survive economically, so defending contractual and property rights by litigation, if necessary, is inevitable. Hutterite communities have, ironically, chosen to be situated in socialist states such as Canada or in Central Europe, with overmighty, interventionist laws and bureaucracies, and so, like all citizens in such states, are subject to its whims no matter how contrary to the values and beliefs of individuals or religious communities. Inevitably, litigation is required to carve out little exceptions to state policies.

Professor Esau repeatedly expresses puzzlement that Hutterites would engage in civil litigation on the ground that this involves recognition of the violence of the state and of the value systems of the state.² Yet, their other option is to do absolutely nothing and ultimately lose the economic resources required for their very existence. When faced with the choice of survival or disappearance, like every other perfectionist community or ideology, the Hutterites have to take a stand, including a litigation stand, or disappear from the face of the earth. And this is not an option because Christ's commission to his followers is to persist as his Body, the Church, until he comes again at the close of the age.³ In any case, comparatively speaking, Canada has been good to its Anabaptist communities; there has been no physical persecution as was the case in other countries and there is a relatively large degree of economic and religious freedom. And places on earth to run to, are running out.

Even the use of civil courts to resolve disputes among colony members is not that difficult to understand, *contra* Professor Esau. Not only are members who are excommunicated and required to leave a colony without colony assets perceived to threaten the Hutterite way of life, but they are also understood to be no longer Hutterites, no longer among the saved, but among the damned, and so can be treated like all other members of the host society, including if necessary as defendants in litigation to protect a colony's assets and way of life. Once excommunicated, no further religious duty is owed.⁴ From a Hutterite theologi-

2 Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: University of British Columbia Press, 2004). See chapter 3 especially, although expressions of puzzlement are found throughout.

3 Matt. 28: 18-20; John 20: 22-23.

4 *Supra* note 2 at 130-132 (See the evidence of Jacob Kleinsasser).

cal perspective, this makes perfect sense, although it may seem deeply offensive to secular, inclusive minds.

Nor is it as pathological as Professor Esau makes out. In the 16th century, the fragmentation of Christendom resulted in numerous religiously monolithic states: Roman Catholic France, Anglican England, Reformed Geneva, Lutheran Saxony. The religion of the state was the religion of its ruler: *cuius regio eius religio*. Dissent, including Anabaptist dissent, was not permitted, so Anabaptist communities inevitably drifted to the frontiers where they too could reproduce their ideal Christian communities where dissent was not permitted either. Communist and Islamic states today operate on the same monolithic principle. Hutterite colonies are normal by both religious and secular standards throughout the ages; the 20th century addiction to liberalism, tolerance and pluralism is, in the vast sweep of history, pathological.

Professor Esau suggests that the *Lakeside* case is a turning-point in the history of the Hutterian Brethren, not only in Canada but internationally, although he is uncertain as to how to characterize any new direction in which they may be going beyond internal schism in the Schmiedeleut and in some colonies, and a livelier appreciation by the leadership of the perils and possibilities of civil litigation. Whether the future holds abandonment of its communitarian ideals and lifestyle is dubious since a communitarian lifestyle can be lived by any group that so desires in both an agricultural and an urban setting. These communities have suffered much persecution in the past and have always survived. If the Holy Spirit is truly at work among them, their likelihood of survival may be greater than that of the Anglican Church in Canada! However, Professor Esau's account of their recent litigation experiences is surely full of object lessons for their leaders as well as being an excellent historical resource for future scholarship on their history in Canada.

Professor Esau also considers the importance of their litigation for freedom of religion within the Canadian state generally, in the final chapter of his book. This part of his project is limited in scope to the issues in the *Lakeside* and related cases, that is, civil court intervention in matters of property and discipline. These topics may not be good tests for a state's commitment to freedom of religion because common law courts have traditionally expressed deference to internal dispute resolution processes while concurrently emphasizing their constitutional jurisdiction to intervene. The *Lakeside* case was a good example because while the Supreme Court of Canada required natural justice, it sent the resolution of the dispute back to the colony. External expression of religious beliefs when they are likely to offend is a better test for a society's commitment to religious freedom.

In the final chapter, Professor Esau suggests that there are several "models" in the common law for resolving the kinds of disputes the Hutterites have recently brought to the courts:

- (i) “the outside law sovereignty model,” that is, parliamentary sovereignty;
- (ii) (ii) “the outside law abstention model,” that is, acknowledgment by the state that it has no authority over all or certain ecclesiastical disputes;
- (iii) (iii) “the outside law deference and neutrality model,” that is, that state law retains constitutional jurisdiction over ecclesiastical disputes but defers to ecclesiastical dispute resolution processes to adjudicate; and
- (iv) “the model of balancing outside and inside law,” that is, the state retains jurisdiction but the courts attempt to balance outside and inside law on a case-by-case basis.⁵

This taxonomy of “models” is well known in American First Amendment jurisprudence, although only the last three are used in that jurisprudence.⁶ In Canada, they can only be treated as “models” for academic interest because our Anglo-Canadian constitutional settlement of parliamentary sovereignty tempered by federalism and judicial Charter review clearly bestows sovereignty on the state, whether in its legislative or judicial branches, so that all within the Canadian state’s geographical reach are subject to state law. This contrasts with the American constitutional settlement which expressly prohibits absolute state sovereignty over religion in the First Amendment and is reinforced by the checks and balances built into the American constitutional framework. Notwithstanding the complex nature of First Amendment jurisprudence, that fundamental distinction is respected.

Professor Esau’s first “model” is not a model, but the reality of our constitution and has been such since the Tudor revolution in government in the 16th century which placed the Crown-in-Parliament atop both church and state. While the Canadian state has exercised its sovereignty along the lines of the fourth model, as it has the discretion to do, it retains sovereignty over both the “outside” and the “inside” law relating to religion in Canada. When they have resorted to civil litigation, Hutterites have demonstrated their understanding of the absolute power of the Canadian state which they hope will support their desired outcome. Readers of Professor Esau’s final chapter should not be misled into thinking there is room for real debate on this matter within our present constitutional arrangement. There is not, unless Professor Esau is contemplating another constitutional revolution greater than that of the 16th century,

5 *Supra* note 2 at chapter 12.

6 This taxonomy is commonly found in American legal scholarship. Professor Esau’s version of it resembles that published by Kent Greenawalt, “Hand Off! Civil Court Involvement in Conflicts Over Religious Property” (1998) *Colum. L. Rev.* 1843. Professor Esau has published this analysis earlier in “The Judicial Resolution of Church Property Disputes: Canadian and American Models” (2003) 40 *Alta. L. Rev.* at 767.

whereby the Canadian state voluntarily concedes sovereignty over religion in Canada! Even Charter judicial review only amounts to a new apportionment of state sovereignty between the legislative and judicial branches, not a relinquishment as contemplated by “models” two to four.

Professor Esau's preference is for the fourth model in the context of property and discipline issues,⁷ tempered with the hope that in cases such as *Lakeside*, the courts would show considerable deference to internal processes so as to encourage internal dispute resolution. He thinks that contract and trust are the correct common law devices through which to show deference so that the contract and trust at the heart of communal property holding and life should be enforced. But this is to concur with the longstanding approach of the common law to internal disputes within religious institutions,⁸ so it may fairly be concluded that Professor Esau has not come up with a novel approach to these disputes. Indeed, he agrees with the ultimate outcome of a *pro rata* division of colony assets that the Hutterites determined to be the best solution in *Lakeside* and in keeping with their fresh understanding of communal property holding.⁹ But this is to confirm that whether model one or four is preferred, these decisions will always be on a case-by-case basis.

In this regard, it is interesting to note that Professor Esau has characterized me as a proponent of the first model.¹⁰ I am not. As evidence, he relies upon statements in which I describe the constitutional nature of parliamentary sovereignty and its implications for religious institutions.¹¹ However, he attributes to these descriptions a position which I do not hold, and labels me as a proponent of the “subservience” of religious institutions to the state.¹² Subservience is not a word that I have used in my descriptions nor does it characterize my personal views, which are traditional Christian views: I acknowledge the absolute temporal power of the Canadian state but, with the Hutterites, deny its authority over the church, and accept that should a state use its power to coerce a church to conform to state law, the proper Christian response is to resist and suffer the temporal consequences.

7 *Supra* note 2 at 324–331.

8 M.H. Ogilvie, “Church Property Disputes: Some Organizing Principles” (1992) 42 U.T.L.J. at 377.

9 *Supra* note 2 at 330.

10 *Supra* note 2 305–306.

11 *Religious Institutions and the Law in Canada* (Toronto: Carswell, 1996) at ch. 4. Nor do I support a “subservience” model in the second edition (Toronto: Irwin, 2003) published 18 months prior to Professor Esau's book. For his other citations of my works in which I am alleged to have written favourably about the model, see the footnotes to 305–6.

12 *Supra* note 2 at 305. “Subservience” and “subservient” appear 3 times.

However, these concerns do not prevent me from highly recommending this book. While it advances no new approaches to the legal conundrums of the relationships of state, society and religious institution, and is at times is repetitious and circular in its argumentation, it could have been substantially shorter, its core concern, the history of Hutterite litigation in Canada, is set out in an attractive and readable manner, and promises to be of interest to Canadian legal historians for years to come.

