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BOOK REVIEW

Religion and Culture in Canadian Family Law

John Tibor Syrtash
Toronto: Butterworths, 1992

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Toronto family law lawyer John Syrtash's new book has the rare quality of being at one and the same time a useful manual for the busy practitioner and a thoughtful academic commentary. His topic, appropriately described by Professor James McLeod as "one of the more sensitive areas in custody cases today,"[1] is religious freedom and family law.

The book is a concise, well-organized 189 pages and has a comprehensive index. Mr. Syrtash has avoided the pitfall of a poor index that befalls many legal writers. Sir Frederick Pollock used to say that "a man who would publish a book without an index ought to be banished ten miles beyond Hell where the Devil himself could not go because of stinging nettles."

The book is divided into three chapters, each devoted to a single theme.

Chapter one is an exhaustive province-by-province analysis of the developments in custody/access contests involving religious or cultural issues. The author carefully compares the leading trial and appellate decisions in an effort to determine the principles of law and how they are applied.

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1 "Annotation," *Marchand v. Sander* (1989), 22 R.F.L. (3d) 177 (Ont. Dist. Ct.) at 180.

Such analysis is essential, not only because child custody is of provincial jurisdiction, but also because the Supreme Court of Canada, as Syrtash points out, has yet to "put the issue to rest and explain whether the onus will be on the 'religious' parent to show that the particular practice is harmful, or on the other parent to show that it is not."[2] The author laments that the high cost of bringing such cases to the Supreme Court will make it "a long wait before this issue is resolved."

Unfortunately, the author seems unaware that two of the decisions discussed — *Young v. Young*[3] and *Droit de la Famille — 1150*[4] have already been granted leave to appeal to the Supreme Court. Hopefully, the highest court will confront and resolve this thorny area of the law in a practical decision to the benefit of family litigants across Canada. This would clearly fill the need for certainty which Mr. Syrtash ably finds wholly lacking in family law where religion is concerned.

Mr. Syrtash's careful consideration of judgments in each province is outstanding. Of particular note is his well-written comparison of decisions and his frank assessments of the inconsistent application of principles in many provinces.

Minor omissions in a concise work of such broad scope may be forgiven. For example, he fails to note the important Newfoundland judgment of *Barrett v. Barrett*.[5] Bartlett J. refused to consider the religious practices of a Jehovah's Witness in a custody dispute where there was no evidence of harm, a decision which was in line with the most recent law in other provinces. The New Brunswick decision of Larlee J. in *Andrew v. Andrew*[6] is not included, even though it expressly adopts into that province the Nova Scotia case of *Smith v. Smith*[7] and the Ontario decision in *Hockey v. Hockey*,[8] redeeming to some extent the otherwise poor record of trial and appeal courts in that province.

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2 J. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992) at 20.

3 (1990), 50 B.C.L.R. (2d) 1, 29 R.F.L. (3d) 113 (C.A.), leave to appeal to S.C.C. granted (1991), 54 B.C.L.R. (2d) xxxiv (note) (S.C.C.).

4 [1988] R.D.F. 40 (C.S. Qué.), aff'd (1990), [1991] R.J.Q. 306 (C.A.), leave to appeal to S.C.C. granted (1991), 135 N.R. 159 (note) (S.C.C.).

5 (1988), 18 R.F.L. (3d) 186 (Nfld. T.D.).

6 (1989), 104 N.B.R. (2d) 91 (Q.B.).

7 (1989), 92 N.S.R. (2d) 204 (T.D.).

8 (1989), 69 O.R. (2d) 338, 21 R.F.L. (3d) 105 (Div. Ct.).

Of special note are the forthright criticisms of the treatment of religious minorities by the Saskatchewan and New Brunswick courts.

The book discusses the Saskatchewan Court of Appeal decision, *Brown v. Brown*,[9] wherein an access father who was a faithful member of the Plymouth Brethren was restricted from religious activity during access after custody was awarded to his spouse, a former member who was being "shunned." The decision, the author points out, is inconsistent with the application of *Charter* principles in appeal decisions of British Columbia, Ontario and Quebec. He questions "whether the same standards will be applied to children of a 'mainstream' religion, where insularity may also be taught."[10]

The New Brunswick Court of Appeal is also strongly criticized for conforming to the *Brown* principle in *Fougère v. Fougère*.[11] The Court forbade the Jehovah's Witness access father to teach beliefs differing from those of the Catholic mother on the grounds that such a diversity of religious training would harm the child, in spite of expert evidence to the contrary of psychologist Dr. Wallace Rozefort.

The author astutely concludes that "one can suspect that the New Brunswick Court's prejudices lie with mainstream religions."[12] Perhaps the subsequent judgment in *Andrew* has modified this harsh conclusion slightly, at least at the trial level.

On the other hand, the Appellate Courts of Ontario, British Columbia and Quebec established the application of the *Charter* and fair treatment of minorities in family disputes by a series of recent cases also involving Jehovah's Witnesses.

The British Columbia Court of Appeal decision in *Young* is discussed extensively. The only constraint on parental freedom to discuss and practice religion with their child would be, Wood J.A. wrote for the majority, if there was a direct threat of "real" harm.

The Ontario Divisional Court's decision in *Hockey v.*

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9 (1983), 39 R.F.L. (2d) 396 (Sask. C.A.).

10 Above, note 2.

11 (1986), 70 N.B.R. (2d) 57 (Q.B.), rev'd in part (1987), 6 R.F.L. (3d) 314, 77 N.B.R. (2d) 381 (C.A.), leave to appeal to S.C.C. refused (1987), 82 N.B.R. (2d) 90 (note) (S.C.C.).

12 Above, note 2 at 43.

Hockey coincided with the *Young* ratio. A trial Judge on an interim motion had imposed a gag order on a Jehovah's Witness access father. On appeal, the order was struck down. The Court held there must be "compelling evidence" that the restricted activity is "harmful" to children before such restrictions may pass constitutional muster.

Mr. Syrtash did not elaborate on an infamous aspect of the *Hockey* case: for counselling his client to deny access on religious grounds, the lawyer was personally sanctioned with costs.

It is when he discusses the Quebec Court of Appeal that Mr. Syrtash falls somewhat short. Publishing deadlines may have prevented him from incorporating *B. (L.) v. C. (J.)*,[13] in which the Appeal Court ordered a *custodial* mother not to take her child with her to certain religious activities. Perhaps that is also why he does not refer to the leave to appeal granted by the Supreme Court of Canada in *Droit de la Famille — 1150*.

A discussion of these two cases may have balanced out the resulting incomplete analysis of *Droit de la Famille — 955*,[14] in which the author concludes that Malouf J.A. struck down restrictions on a Jehovah's Witness access parent's discussion of religion with his child. In fact, as he points out later, "the court felt that some constraints, for example, not taking the child door to door, were a justifiable intrusion on the father's freedom of religion to protect the child's best interests."[15] But there was no evidential basis for the restrictions that remained, in spite of Malouf J.A. concluding that the trial Judge had gone too far.

While Mr. Syrtash believes the judgment consistent with *Young* and *Hockey*, in fact the Quebec case ignores the condition precedent of proof of harm which both of those decisions required. While admitting that the *Charter* should protect religious liberty, Malouf J.A. left in place an unjustified gag order. In the result, this is an example of judicial illogic that only the Supreme Court can correct.

The Quebec Court of Appeal was long on principle but short on practice; Mr. Syrtash points out that the Court relied on nu-

13 [1991] R.D.F. 610, 91 D.L.R. (4th) 27 (C.A. Qué.).

14 [1991] R.J.Q. 599 (C.A.), leave to appeal to S.C.C. refused (1991), 135 N.R. 78 (note) (C.S. Can.).

15 Above, note 2 at 76.

merous trial judgments involving Jehovah's Witnesses, and states, "Ironically, some of these decisions, as reviewed with approbation by the appellate court, ruled in the exact same unconstitutional manner as the case before the appellate court."[16]

It appears from subsequent decisions like *B. (L.) v. C. (J.)* and *Droit de la Famille — 1150* that the Appeal Court will continue to do so until the Supreme Court settles the law.

Mr. Syrtash also helpfully touches on the recent Pennsylvania case of *Zummo v. Zummo*,[17] which comprehensively reviews the state of American law in this field. Canadians need not feel left behind. The author observes:

> What is remarkable is the similarity of the principles in *Zummo*, which summarize current American legal thought on the issue, with recent Canadian Charter precedents, all of which were decided independently of each other.[18]

The first chapter ends with a review of the prevailing expert opinions of psychologists, sadly in all too brief a discussion. The consensus among leading psychologists in Canada seems to be that exposure to duality of religions is not harmful per se to children. Instead, it appears to be the inflexibility of one parent on that issue that may be harmful. The author concludes that this puts medicine and law in conflict.

Unfortunately, the author suggests that the "Charter or 'stability' considerations should arguably be only one among many factors contributing to a decision,"[19] in child custody. This trite and over-simplistic solution begs the issue. The *Charter* as the "supreme law" of the country may not be subordinated to any judicial object — whether pursuant to a clear law or an ambiguous presumption like the "best interests" standard.

Readers are left wondering if a more careful discussion of the threshold considerations of Wood J.A. in *Young* would not have provided a better answer. Justice Wood did not reject psychological or medical evidence. Nor did he say that constitutionally protected religious activity may never be limited. Rather he carefully established the evidential burden on admitting the medical evi-

16 Ibid. at 77.
17 574 A.2d 1130 (Pa.Super.1990).
18 Above, note 2 at 83.
19 Ibid. at 91.

dence of alleged harm. The author wrongly implies that *Young* and similar cases are categorically opposed to psychological opinion. In fact, they set admissibility tests to be met before a court may entertain demands that infringe liberties.

While his analysis of the decisions is generally good, if there is a fault to be found it is with Mr. Syrtash's conclusions. Perhaps setting down a complete set of principles is difficult in the absence of the Supreme Court's voice, given the cacophony of provincial and intra-provincial decisions. But the author did himself a disservice when after such a careful review of the case law, he attempted a summary of "formal" and "informal" principles.

He misstates the *Young* threshold test, implying that religious or cultural factors may be the focus of a custody/access determination as long as all other factors are equal. To the contrary, the trend in the law he reviews so well is to prevent an inquiry into religious activities in the first place. This properly places a much more onerous burden on the 'intolerant' parent than would result if the issue was merely whether or not restrictions on religious activity could be imposed. It cannot serve the interests of children to grow up in our multicultural society in the absolute custody of an intolerant parent who successfully exploits mainstream prejudices. The "maximum contact" principle protecting access rights is the balance wheel that offsets custodial power.

In the absence of such an approach, it may have been more correct to conclude with the view of family law specialist Jeffrey Wilson, referred to by Mr. Syrtash from an address given in the fall of 1991, that family disputes are ruled by the law of the jungle.[20]

Chapter two, in three parts, provides a short and useful review of the view courts take of customary marriages and religious courts. Family practitioners will want to carefully review Part II, which deals with the interaction between religious courts and alternative dispute resolution. Part III, in a kindness to busy lawyers, contains a brief and succinct review of the principles.

Chapter three is a subject clearly close to the author's heart, and is not so much an original work as what he describes as "an expanded version" of a previously published article on removing

20 Ibid.

the barriers to religious remarriage. The author himself was involved with the preparation and passage of the amendments to the Ontario *Family Law Act* and the *Divorce Act 1985* to allow religious marriage among Jewish persons refused a "get," or certificate of religious divorce.

Some observant Jewish spouses refused to grant a divorce recognized religiously, where the secular divorce had already been granted. In some cases, this prevented remarriage within the Jewish faith unjustly motivated by "reasons that have nothing to do with matters of faith or conscience."[21]

For the general practitioner, the chapter may hold less interest until faced with such a case. When that happens, I and every other family lawyer in Canada will reach first for Mr. Syrtash's book. It is a useful guide not only in its overview of the problem but also by practical precedent letters and affidavits.

Conclusion

The few faults in Mr. Syrtash's book should not outweigh his singular service in cataloguing the revolution in family law over the past 10 years. While he finds that "judicial prejudice against Jehovah's Witnesses and certain Pentecostal Churches in custody and access disputes is particularly disturbing," the author ends on a positive note. Courts, he predicts, "may become increasingly sensitive to the culture in which the children have been raised or into which they are being placed, before applying the judge's own prejudices and 'majority' cultural views in assessing 'best interests.'"[22]

The Supreme Court of Canada has urged family law judges to overcome their social biases and out-moded attitudes toward the family in *Edmonton Journal v. Alberta (Attorney General)*.[23] Given this climate of judicial self-scrutiny, and the up-coming consideration of these issues by the Supreme Court, Mr. Syrtash's excellent book could not be more timely or useful.

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21 Above, note 2 at 113.

22 Ibid. at 180.

23 [1989] 2 S.C.R. 1326, [1990] 1 W.W.R. 577 at 611.