HUTTERITE LITIGATION

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I. INTRODUCTION

I am currently working on a book, *The Courts and the Colonies*, which will focus on the case of *Lakeside Colony v. Hofer* which went through two rounds of litigation, the first right up to the Supreme Court of Canada, and the second through a lengthy trial.[1] One of the themes of the book is that historically Anabaptist groups, including the Hutterites, would have a religious objection to bringing aggressive law suits to court. This would be a violation of both the norm of separation from the world and the norm of nonresistence central to the ideology of the group. For more background on this Anabaptist normative framework, you may wish to review the draft document, *Mennonites and Litigation* included on my web page. The *Lakeside* case is particularly interesting because it deals with a lawsuit launched by the church authorities in an attempt to evict a number of so called "apostates" who refused to leave the colony. Subsequent to the first round of the *Lakeside* case, the Schmeideleut branch of the Hutterite church suffered through a schism leading to a considerable amount of litigation in Manitoba as to conflicts at a variety of colonies over management and control of assets. The book will deal with these matters as well. It is my contention that the Hutterite leaders who launched the lawsuit in *Lakeside,* violated the historic religious norms of the group in doing so.

For now the purpose of this paper is to simply survey previous Hutterite litigation before the *Lakeside* case. Readers should note that this is a first draft and there may well be cases that I will find in subsequent research. The survey is divided into types of litigation which raise different levels of difficulties in terms of conformity with the Hutterite anti-litigation norms. Governmental litigation is the least problematic at one end, while taking internal disputes to court is the most problematic at the other end.

II. HUTTERITE LITIGATION INVOLVING EXTERNAL RELATIONS.

A. GOVERNMENTAL LITIGATION

We find that the Hutterites both in the United States and in Canada have either defended against or initiated lawsuits involving governmental organizations. These lawsuits often involved hostile governmental action against the Hutterian way of life. Indeed, it is interesting to note in this survey that despite the American entrenched Bill of Rights and the absence of such a doctrine in our

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[1] Lakeside Colony v. Hofer [1992] 3 S.C.R. 165, reversing (1991), 77 D.L.R. (4th) 202 (Man. C.A.), and (1989), 63 D.L.R. (4th) 473 (Man. Q.B.). For the second round of litigation, see Lakeside Colony v. Hofer (1994), 93 Man. R. (2d) 161 (Man. Q.B.).

Constitution till quite recently, the Hutterites got no better treatment from the American courts than they received from the Canadian courts. At least from the reported cases, one might even argue that the American Courts have given the Hutterites *less* in regard to claims of freedom of religion than have the Canadian courts.

1. Denial of Corporate Status in United States

Perhaps the most notorious of all of the cases involving Hutterites and the host society occurred while the Hutterites were moving to Canada in response to the hostility toward them in the wake of the First World War. The 1922 case of State ex rel. Chamberlain v. Hutterishe Bruder Gemeinde in the South Dakota Supreme Court[2] is referred to by Peters, as the attempt to exterminate the Hutterites from South Dakota through legal action.[3] While the case did begin in a sinister fashion and contributed to the vast exodus of the Hutterites to Canada, the final outcome on appeal was the denial of corporate status to the Hutterites, while accepting the freedom of religion for the Hutterites to carry on with business as usual, but in an unincorporated form. This begs the question of what was really lost in this litigation. It is important to note, however, that the trial level decision might be classified as horrific and before the appeal was heard most of the colonies had already left South Dakota and moved to Canada in the face of this hostility.

That the motivation for the litigation involved hostility to the Hutterites seems clear. A. A. Chamberlain, State's Attorney General for Beadle County on the request of the State Council of Defense brought action in the circuit court to annul the corporate charter of the passivist Hutterishe Bruder Gemeinde in the Bon Homme district. The corporation had been set up in 1904. The complaint alleged that the corporation was falsely and fraudulently set up as a religious corporation according to its own articles of association when in fact it was primarily engaged in secular business and therefore violating its own charter. Furthermore, Chamberlain claimed that the Hutterites were generally a menace to society. The complaint alleged:

> ..that said corporation and its officers exercise a baneful influence over the members thereof, and, under the guise of religion, maintain and enforce rules and regulations in violation of the laws of South Dakota, and require its members to obey rules and regulations of said corporation, even though the same violate and contravene the laws of the state and the United States, and enforce such rules and regulations to the extent of punishing and expelling members of said corporation for obeying the law of the land, where the law contravenes the rules and regulations aforesaid; ...that the defendant corporation wilfully refuses to contribute in any way toward the defense of the United States...that the existence

[2] (1922) 191 N. W. 635 (S.D.S.Ct.).

[3] Victor Peters, All Things Common (Minneapolis: University of Minnesota Press, 1965) at 45.

of such corporation is a menace to society...[4]

The plaintiff, acting for the State, not only called for the dissolution of the corporation but also that a receiver be appointed to liquidate all the property and that after payment of debts, "that such further or other judgment be rendered as may be just and equitable."[5]

The trial court concluded that the Hutterite corporation had exceeded its charter of incorporation and was engaged in secular pursuits and amassed real estate and assets far in excess of that necessary for the religious purposes of the organization. The trial court also displayed extreme hostility to the Hutterite way of life:

> ..that the members of the corporation ..have refused to take any part in the defense of the United States in its war...that their religious books are printed in the German language; ...that the children are restrained within the colonies and prevented from mingling with the outside world; have not been permitted to attend the State Fair, and have been deprived of such enlightenment as may be acquired by mingling with the outside world and attending institutions maintained by the state; that parents are deprived of the exclusive custody, discipline, and control of their children; that the defendants in living a communistic life.... no stock is provided for in the corporate charter, and no profits, dividends or property of any kind have ever been distributed to the members..[6]

The trial judge ordered the corporation which had assets of over a million dollars at the time to dispose of all of its real estate over the amount of $50,000, amend its by-laws to exclude all secular pursuits, and failing compliance, appointed a receiver to take over and liquidate the property.[7] So much for freedom of religion in 1922 in South Dakota.

As noted, the case was appealed to the South Dakota Supreme Court. The decision of the court may well be read as a blow to the concept of holistic religious freedom in the sense that it did take away corporate status. But on the other hand what is important is that the court overruled all the negative assertions that the Hutterites were "a menace to society." First the court stated that the Hutterites did not violate the law of the state or the United States in anyway:

> So far as the record discloses, the actual or purported refusal of members of the corporation and church to obey law, either state or national, consists solely in a refusal to aid physically or financially in the carrying on of war. They are not shown to have engaged in any unlawful or immoral pursuits or occupations. It is not shown that they have harmed the state, society,

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[4] Supra, n. 2 at 636.

[5] Ibid.

[6] Id. at 639.

[7] This decision is unreported.

> or any human being, unless we assume that they harm themselves, their children, and the state by following the mode of living adopted by them, and which they believe to be in accordance with the teachings of the New Testament.[8]

Quoting both the State Constitution and the First Amendment, the court asserted that religious freedom was at stake and the Hutterites had the right of exemption from combative military service. However, the court then turned to the issue of incorporation. The court held that religious freedom did not include the right to incorporate as a religious organization.

The legal ground for debate over the corporate status of the Hutterites related to Section 7, Art. 17 of the State Constitution which stated:

> No corporation shall engage in any business other than that expressly authorized in its charter, nor shall it take or hold any real estate except such as may be necessary and proper for its legitimate business.

The majority judgment then took the classic narrow approach to religion and asserted that the corporation was violating its charter:

> ..the principal business of the corporation is secular, viz. the engaging in farming and other industrial pursuits for the purpose of the sustenance of its colonies; that next in order the business of the corporation is political, viz. the government of its members; and that lastly and secondarily the objects of the corporation are religious, and, to a very limited degree, educational..[9]

The court found further support for this conclusion in the argument that if the corporation was indeed a religious corporation, as its charter claimed, than it would not be subject to taxation. It was admitted that the corporation had paid its fair share of local, state, and federal taxation.

The effect of the decision on appeal was that the Corporation had to be dissolved. But the point is that while corporate status was denied to the Hutterites of South Dakota, they could continue to hold all their real and personal property communally as before, using trustees for an unincorporated organization. There are advantages to incorporation, particularly in that having property held by individual trustees raises legal difficulties when they die and need to be replaced and the like. The more important point is that the court dealt with the same problem of the scope of religion and the nature of a colony that Canadian courts would later deal with. The majority took a narrow approach while in a dissenting judgment, Smith J. took a holistic approach to religious

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[8] Supra, n. 2 at 641.

[9] Ibid. at 643.

freedom citing State v. Amana Society[10] from Iowa to the effect that you should not separate the colony activities into secular and religious spheres.

2. Income Tax in the United States

The legal effect of the Bon Homme Hutterite corporation became the subject of litigation again. Even though the corporation was dissolved in 1923 as a result of the Chamberlain case, the federal tax returns for the corporation for the 1919 year were reviewed and a deficiency of $1,884.37 was demanded of the colony in 1925. The case came before the United States Board of Tax Appeals in Hutterishe Bruder Gemeinde[11] where the Hutterites claimed tax exemption as a religious organization. The Board, however, noted that the corporation operated nearly 10,000 acres of farm lands and produced a volume of agricultural products far in excess of the needs of its members. Indeed in 1919 it sold products on the market for about $100,000 and after proper deductions showed a net taxable income of about $21,000.

In competing against other producers, why should not the colonies pay federal income tax? The panel concluded:

> The members of the taxpayer have elected, as is their right under the laws of the Republic, to lead a communistic life. They constitute in effect a single family with two principle purposes--the one to lead the sort of religious life that is pleasing and acceptable to them; the other to conduct business operations for the twofold purpose of supplying their own simple physical needs and enlarging their communal possessions. Like every other family living within the law, this taxpayer has the protection and security that is its right under the Constitution and statutes of the United States. Public policy requires that it shall contribute its share of the revenues necessary to sustain the Government which protects it in its rights and privileges.[12]

Another tax appeal followed on the heals of this case in Hutterishe Church v. The United States in the United States Court of Claims.[13] This case involved the Elmspring Colony of South Dakota. In 1917, the corporation sold products to the tune of about $230,000 and had a net income

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[10] (1907) 109 N.W. 894 (Iowa S.C.). The Amana Society, like the Hutterites, was a religious order holding property in common. In this case the State brought an action claiming that the incorporated Society was violating its non-pecuniary charter of incorporation. The court took an expansive view of religion and affirmed that holding property in common could be part of a religious practice and that the acquiring of property by the Amana Society for its own needs did not violate its charter.

[11] (1925) 1 B.T A. 1208 (USBTC).

[12] Id. at 1211-1212.

[13] (1928) 64 Ct. Cl. 672.

of about $146,000. The corporation paid about $14,500 in federal tax and sought a refund on the basis of exemption as a religious organization. After the Chamberlain litigation this corporation also was dissolved in 1923 and the property of the former corporation was now held by trustees for the now voluntary unincorporated association.

The Court of Claims denied the request for a refund on the same basis as the previous case- that the corporation in question was not operating exclusively for religious, charitable, scientific or educational purposes but was in fact operating for the benefit of its members, even within the scheme of communal property where no individual got a share of the property.

In the same year as the Elmspring case another Hutterite case dealing with federal taxation was heard by the United States Board of Tax Appeals in Hutterishe Bruder Gemeinde.[14] Unlike the other cases, however, this case dealt with a valuation issue involving invested capital rather than a claim for exemption. The Hutterite Church in question was successful in the matter.

3. Debtor's Rights in Canada

The first reported case in Canada in the category of host society litigation arose about twenty years after the Hutterites arrived in Canada. While the self-sufficient Hutterite colonies fared much better during the depression than most farmers, some colonies evidently did have trouble. The Barickman Hutterite Colony in Manitoba, consisting of 24 families, filed a debt relief application in 1937 under The Farmers' Creditors Arrangement Act[15]. Some creditors of the colony objected that the colony, being incorporated as a "religious community", was not really a "farmer" as that term was used in the statute. The official receiver under the Act made application to the court for direction on this point. Roy, C.C.J. found in favour of giving the colony the protection of the Act, but this decision was reversed, without any written reasons being given, by the Manitoba Court of Appeal.[16]

On appeal to the Supreme Court of Canada, the Colony was successful.[17] Chief Justice Duff, while asserting that the colony was indeed a religious community, stated:

> The corporation (which takes the place of the former trustees) is simply the legal instrumentality by which this autonomous community of farmers manages under the law its affairs and those of its members (according to the plan of community of property); and I can

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[14] (1928) 14 B.T.A. 771.

[15] S.C. 1934, ch. 53.

[16] See In Re The Barickman Hutterian Mutual Corporation [1938] 1 W.W.R. 777. (Man. C.A.).

[17] See Barickman Hutterian Mutual Corp. v. Nault [1939] 2 D.L.R. 225 (S.C.C.).

> see no impropriety in designating it as a "farmer", as a "person" whose principle occupation is farming.[18]

Kerwin J. asserted that while the colony was a religious community it also had a temporal object which was farming. Cannon J. in dissent asserted that given the religious object of the colony, the principal occupation of the colony could not be farming.

This issue of how to characterize a Hutterite colony is an important one in terms of the topic of freedom of religion. In many of the cases to follow in both categories of litigation the decisions of the courts go one way or the other as to whether the colonies should be viewed primarily as secular commercial enterprises with a view toward the maximization of profits, albeit in communal property form, with the religious motivations for that form being viewed as secondary; or whether, on the other hand, the colonies are primarily religious organizations in which the commercial aspects are secondary and subsumed under the religious umbrella.

On one hand, the Hutterites might be viewed as an example of holistic religion. By this I mean that religious faith shines a light on all of life and the believer is called upon to align all aspects of life into conformity with the exposing truth of that light. There is no fundamental divide of life into a religious sphere and a secular sphere. Of course if freedom of religion in a legal sense is drawn with this holistic scope in mind it will be immediately apparent that the demands of religion could have the potential to conflict with any part of the so called secular legal corpus thereby raising the issue of whether or not the religious claim should be accommodated.

On the other hand, it is not so obvious that the Hutterites currently do embody this holistic approach to religion. Indeed Karl Peter notes that the mindset of Hutterites has changed from the original tradition and that today Hutterites themselves are internally dualistic.[19] For example, Peter claims that Hutterites operate efficient capitalist enterprises utilizing the most advanced technologies and treat these matters as indifferent as regards to spiritual matters.

The majority of the Supreme Court in Barickman wanted to give the Hutterites the benefits that other farmers got in the aftermath of the depression, and to do so they adopted the view that the colony had both a spiritual and a temporal dimension. In this case the spiritual dimension did not thereby detract from receiving the temporal benefit of the law, but obviously in a different case the same argument might be used against Hutterite colonies when the temporal burden of laws, rather than benefits, was at stake. This is precisely what did happen when restrictions against Hutterite land acquisition arose in all three prairie provinces in Canada and also when the courts had to sort out claims for exemptions from income tax. The courts essentially characterized the colonies not as holistic religious orders or charities, but rather as commercial enterprises in communal property form.

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[18] Id. at 227

[19] Peter, The Dynamics of Hutterite Society (Edmonton: U. of A. Press, 1987).

The other point to note in Barickman was that the litigation was not initiated by the Hutterite colony but rather by the official receiver under the statute in question.

4. Communal Property in Canada

During the Second World War the passivist and German speaking Hutterites encountered considerable hostility from the host society. The hostility turned into direct discrimination by the passing of laws to prevent the expansion and proliferation of Hutterite colonies.[20] For example, the Alberta Land Sales Prohibition Act of 1942 prohibited any sale of land to Hutterites.[21] This Act was replaced after the War by The Communal Property Act of Alberta in 1947 which, while not abolishing all sales, severely restricted the ability of Hutterites to buy land.[22] For example, no colony could purchase land within 40 miles of an existing colony or increase its holdings beyond a certain number of acres. In 1960 the Act was further amended to create a Communal Property Control Board and requiring any colony to get approval of the Board to increase colony holdings or purchase land for a new colony. Eventually it became the cabinet itself that had the power to give permission or not for Hutterite land purchases. The Act was finally abolished in 1973.

The discrimination against Hutterites in the form of land purchase restrictions was not confined to Alberta. In both Saskatchewan and Manitoba the restrictions took the form of unlegislated restrictive agreements that the provincial governments formulated with the colonies. The Hutterites were forced to accept these restrictions under threat that legislation would be passed if they did not.[23]

The reasons for hostility against the Hutterites within the host society were numerous, and to a degree continue to this day.[24] Hutterite colonies, once they are established, almost never collapse. The land never goes back on the market. Once established, the colony will amass assets so as to produce a daughter colony. Once a daughter colony is established, the original colony will start the process all over again to amass assets to produce a second daughter colony in due course. Thus the rural host society claims that more and more land is taken over by Hutterites and not available for ordinary farmers.

Another point that fuelled the discrimination related to the perceived negative impact of Hutterite colonies on the overall social health of rural communities. Hutterite colonies were by

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[20] For a full treatment see Janzen, Limits on Liberty (Toronto: University of Toronto Press, 1990) pgs. 60-84.

[21] Land Sales Prohibition Act, SA 1942, ch.16.

[22] Communal Property Act, SA 1947, Ch. 16.

[23] See Janzen, Supra, n. 20 at 64, 78.

[24] See David Flint, The Hutterites: A Study in Prejudice (Toronto: Oxford U. Press, 1975).

definition an isolated separate world within the wider world. Hutterites could not be expected to be actively involved in supporting the community clubs or schools or civic organizations that formed the backbone of the rural town or municipality. Furthermore, the largely self sufficient Hutterites were not big consumers of local commercial enterprises, but rather bought machinery and other goods in bulk from city wholesalers.

The discriminatory feelings against Hutterian expansion continued long after the legal restrictions and informal agreements were lifted. As late as 1982 there was a resolution before the Union of Manitoba Municipalities calling for restriction on Hutterian land purchases.[25] This resolution was hotly debated and overwhelmingly rejected as being discriminatory and contrary to the Charter of Rights.

However while the restrictions against Hutterian land purchases are now unacceptable, they lasted for many decades and they were upheld by the courts. The first reported decision dealing with a challenge to the legislation in Alberta was In Re Hatch and East Cardston Hutterian Colony in 1949.[26] In this case both the attempted vendor of the land and the colony as potential purchaser appealed the decision of the Director under the Act. The Director had refused to allow the sale of the land. The appeal was made to the Alberta District Court according to the statutory appeal provisions in the Communal Property Act[27] itself. However the appeal was not based on an alleged error by the Director under the Act, but rather based on the argument that the statute as a whole was ultra vires. Feir D.C.J. asserted that he did not have jurisdiction to decide this issue by way of proceedings taken under the statutory appeal provisions and thus the decision of the Director refusing the sale was upheld.

However, a proper appeal was eventually brought to the courts by way of a test case after various persons were charged with violating the Act. The Walter case wound its way right up to the Supreme Court of Canada.[28] Not having an entrenched Bill of Rights, the case was litigated on the jurisdictional issue of whether the province of Alberta had the power to pass the Act. The Communal Property Act was upheld at every level as being an Act which in pith and substance was about land tenure and therefore within the legislative authority of the province, and not about religion which would have arguably made the Act ultra vires of the province on the theory that regulation of religion falls within the Federal power.

Even though the Act was passed with only one object in mind, namely to control Hutterite

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[25] See Warren Caragata, "Old Animosity Surfaces Against Hutterites", United Press International News, Nov. 23, 24, 25, and 26, 1982.

[26] [1949] 1 W.W.R. 900 (Alta. D. Ct.).

[27] Supra, n. 22.

[28] See Walter v. A.G. of Alberta (1965) 54 D.L.R. (2d) 750 (Alta. S.Ct.); affirmed (1966) 60 D.L.R. (2d) (Alta. C.A.); affirmed (1969) 3 D.L.R. (3d) 1 (S.C.C.).

expansion, it was drafted to appear as if it had more general applicability. In the definition section "colony": [s. 2 (a)]

> (i) means a number of persons who hold land or any interest therein as communal property, whether as owners, lessees or otherwise, and whether in the name of trustees or as a corporation or otherwise,
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> (ii) includes a number of persons who propose to acquire land to be held in such manner, and
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> (iii) includes Hutterites or Hutterian Brethren and Doukhobors.

Even though there was no evidence of any Doukhobor colony in Alberta, nor any evidence that any persons other than Hutterites had any desire to hold land as communal property, the courts still held that, as stated by McDermid J.A.:

> The true nature of the legislation, in my opinion, is not to suppress the Hutterites' religion, but is to prevent any group from acquiring land as communal property, and as the Hutterites are such a group it so prevents them.[29]

Martland J. who delivered the judgement of the Supreme Court in 1969 said:

> The purpose of the legislation in question here is to control the use of Alberta lands as communal property. While it is apparent that the legislation was prompted by the fact that Hutterites had acquired and were acquiring large areas of land in Alberta, held as communal property, it does not forbid the existence of Hutterite colonies. What it does is limit the territorial area of communal land to be held by existing colonies and to control the acquisition of land to be acquired by new colonies which would be held as communal property. The Act is not directed at Hutterite religious belief or worship, or at the profession of such belief. It is directed at the practice of holding large areas of Alberta land as communal property, whether such practice stems from religious belief or not.[30]

Perhaps the most damaging statement in terms of preventing accommodation for holistic religion in Canada was made by Martland J.A. as follows:

> Religion as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship. But it does not mean

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[29] Id. at 273 in the Court of Appeal.

[30] Id. at 8 in the Supreme Court.

freedom from compliance with provincial laws relative to the matter of property holding.[31]

This case, of course, was decided before the Canadian Charter of Rights and Freedoms came into effect in 1982. We would assume that for purposes of Charter interpretation, Martland's anaemic understanding of the scope of religion would no longer prevail. Living by the tenets of community property is very centrally a religious matter for the Hutterites, and to suggest that laws prohibiting or regulating that form of property holding have nothing to do with religion must be viewed as simply wrong. The Supreme Court in Walter confined "religion", as it were, to the narrow activity of what Hutterites did when they gathered in the schoolhouse for church services and to the freedom of Hutterites to intellectually assent to some beliefs. But religion is a matter of practice and not just belief, and the practice of religion is not something confined to what we do in church but extends to what we do in our house, what we do in our work, what we do in the world generally. To prohibit the expansion of communal property was a direct discriminatory act against the freedom of Hutterites to practice their religion in Canada.

However, even if we assume the courts today would give a much broader scope to the content of religious freedom under the Charter, the courts would still engage in section one balancing where various governmental interests, particularly if they were neutral on their face, might well outweigh the religious freedom right.[32] While I am a largely a sceptic as to the overall reformist value of the Charter of Rights and the judicialization of politics resulting from the Charter, I must conclude against my own Charter scepticism, that the Walter case would likely have been decided differently if Canada would have had an entrenched bill of rights at that time.

While the anaemic understanding of religion prevailed, it must be noted that the courts were not entirely unhelpful to the Hutterites during this shameful period of legislated discrimination against them. For example, In Re Communal Property Act[33] the Castor Colony in Alberta appealed the decision of the Communal Property Control Board which had denied the request of the Colony to expand its arable land holdings by buying a farm that was not immediately adjacent to the colony but was rather a few miles away. The farmer who wanted to sell to the Hutterites also appealed the decision of the Board which had held that the purchase was not "in the public interest". Chief Justice Decore of the Alberta District Court noted that the Board made the decision after receiving three letters from parties opposed to the sale. These letters were not disclosed to the Hutterites or their lawyers and thus in violation of fundamental due process the Hutterites were unable to properly respond to the negative comments. Decore C.J. held that this was a denial of natural justice and he approved of the sale of the land to the Hutterites.

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[31] Id. at page 9

[32] "Canadian Charter of Rights and Freedoms", Constitution Act, 1981. Section One states:
The Canadian Charter..guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[33] (1967) 60 W.W.R. (Alta. D. Ct.).

5. Incorporation in the United States Revisited

That a new round of discrimination against Hutterites resurfaced in South Dakota is evident from the 1958 case of State of South Dakota ex. rel. W. G. Dunker, State's Attorney of Spink County v. Spink Hutterian Brethren.[34] In 1935 South Dakota passed Communal Corporation Laws which accommodated Hutterite colonies. The effect of these provisions was to return to the Hutterites the benefit of incorporation that had been denied in the Chamberlain case of 1922. Then in 1953 some portions of the Communal Corporation Laws were repealed and in 1955, in a new wave of discriminatory feeling, South Dakota repealed the Communal Corporation Laws as to the incorporation of any new colonies, but it left in place the legal rights of those colonies already incorporated, "except that it shall be a bar to the expansion of any activity or power of such society, association, or company..."

The colony in question in the Spink case had been reincorporated properly in 1945. After the 1955 repeal, however, the colony purchased an additional 80 acres of land and the State's Attorney General for Spink County brought action to have the colony's charter of incorporation annulled. The colony argued that the repeal legislation was unconstitutional as a violation of freedom of religion, but the trial court declared it unconstitutional on the ground that it was too vague in terms of what it did or did not save in regard to the powers of existing Hutterite corporations.

On appeal by the State, the Supreme Court upheld the statute. In terms of dealing with the law of corporations and the power of the state to create, regulate, and annul corporations, the court set aside the religious freedom issues. The court stated:

> This chapter provides for communal, not religious, corporations and is equally applicable to atheistic communistic corporations and to Christian communals. Corporations chartered under this chapter, regardless of the purposes and powers stated in their articles of incorporation, and regardless of the beliefs of its members, as stated therein, are secular corporations.[35]

Having thus disposed of religion, the court was of the view that the legislature might have good reasons for denying corporate status, which after all, is a creation of law, to Hutterite groups. For example, said the court:

> Under the purported powers as set forth in the articles of incorporation, any member may be expelled by a majority vote without being permitted to take with him so much as a small coin bearing the motto of this country, "In God We Trust."
>
> Any member bringing suit to secure a right or redress a wrong or to secure a declaratory

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[34] (1958) 90 N.W. 2d 365 (S.D.S.C.).

[35] Id. at 373.

judgment as to the validity and effect of the articles of incorporation, or his right to receive a legacy, would do so at the risk of such expulsion.[36]

The court upheld the decision of the state to stop creating any new communal corporations. It also did not find the so called saving provisions that froze the powers of existing communal corporations too vague. However, as applied to the facts in this case, the court found that the colony in question did not expand its activity by buying the 80 acres. It was shown that the colony had leased the land before 1953, and thus the purchase of the land after not being able to lease it from the owner, did not constitute an unlawful expansion of the activities of the corporation.

6. Canadian Income Tax

In terms of litigation involving the Hutterites and the host society the next series of reported cases involved Income Tax matters. While the Hutterites did pay property and other taxes on their community holdings, the issue arose as to whether Hutterites, who received no wages for the work they did and who did not have any entitlement to a personal share of any colony assets, could claim exemption from paying income tax. If the colony as a corporation or as a trust paid income tax on the profits of the colony, the rate would be very high since the colony paid no wages to the workers, which expense would ordinarily be deducted. The alternative was to have income tax paid on a deemed individual basis where the overall profit of the corporation was proportionally assigned to the adults of the colony. This approach would more fairly accommodate the communal property regime into the income tax law. On the other hand, some Hutterites claimed that no income tax was payable at all, either as a corporation or on a deemed individual basis, because the colonies were religious organizations or charities, not unlike various tax exempt Roman Catholic religious orders.

The Schmeid-Leut and Lehrer-Leut branches of the Church, recognized the need to contribute to the overall development of the host society in which they lived, despite the fact that Hutterites did not utilize many of the welfare programs of the government, and they negotiated an agreement with the Federal Government to pay income tax on a deemed individual basis. It was more advantageous to the Hutterites to pay a deemed individual proportional share of the colony profit, than to pay the corporate rate, because the corporation could not deduct expenses by way of wages, since no Hutterites received wages. But the Darius-Leut branch challenged the payment of any income tax. Thus the issue first came up for determination when various Darius-Leut Hutterites in Alberta appealed their assessments to the Tax Review Board. The Board released a decision in 1972.[37]

The argument on behalf of the Hutterites that they were not subject to income taxation, was summarized as follows:

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[36] Id. at 373-374.

[37] Hofer, Tschetter, Wipf, Wurtz v. M.N.R. [1972] C.T.C. 2275; 72 DTC 1238 (Tax Review Board).

(a) They are an accepted Religious Order.
(b) They are no burden on any level of Government.
(c) They pledge to live in perpetual poverty.
(d) No individual has any personal gain, and derives no monetary benefit or any benefit whatsoever.
(e) All the capital surplus of the Church is donated to the congregation for the support of widows, orphans, sick, weak, poor, aged and preparation for accommodation for the younger generation.
(f) They also come under [Canadian Human Rights Act].[38]

The attempt to characterize the Hutterite colony as similar to various Roman Catholic religious orders was rejected by the Tax Review Board. Again the issue of the legal character of the colony arose. The Board asserted that the Hutterite colony was not exclusively a church or charity, but was also a secular commercial enterprise and members of the colony personally benefited from the enterprise, even if the profits were held communally. Thus the members of the colony were liable to pay income tax in proportion to the collective income of their respective colony.

This decision was appealed unsuccessfully to the Federal Trial Court.[39] Mr. Justice Urie pointed out that the Hutterian Constitutions and Articles of Association frequently declared that all property was held for the common use, interest and benefit of each and all members.[40] On his reading of the situation, each member of the colony in effect was "benefited" by an equal share of the profits of the colony, but these shares were assigned, by contractual agreement and religious conviction, back to the common pot. Thus, even if each individual did not personally receive any wage nor could claim any personal ownership share, the person could still be taxed as if they had a personal share on deposit as it were in the common pot. Further, following the Barickman[41] reasoning, where the Supreme Court of Canada had characterized the colony as engaged in farming, rather than as being a religious organization, so as to grant the benefit of the law to it, so the burden of the law should also logically now flow from that reasoning. The colony was not exclusively a religious order or charity but was viewed in the eyes of the law as being also a secular commercial enterprise subject to income tax.

Finally, in regard to the arguments involving religious freedom, Urie J. stated:

The application of the Income Tax Act in no way imposes any obligation on the Hutterites to accept income. All that has been done is to enact legislation within the powers of the Parliament of Canada requiring the taxing authorities to tax the income earned by all

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[38] Id. at 2276.

[39] Wipf v. The Queen [1973] F.C. 1382 (Trial Div.).

[40] Id. at 1386, 1388.

[41] Supra. n. 17

> Canadians including Hutterites. This does not mean that there has been any deprivation of his freedom to practice the religion of his choice in the manner required by his Church nor that he is thereby forced to infringe any of the tenets of his faith and it does not in any way constitute an infringement of the basic rights given all Canadians in the Bill of Rights.[42]

The Darius-Leut Hutterites appealed further to the Federal Court of Appeal.[43] The Hutterites were successful at this level of appeal, as the Court held that under the present wording of the Income Tax Act, they only needed to pay income tax on the subsistence benefits given to them by the colony, as opposed to paying on the basis of a deemed personal share in the profits of the colony as incorporated or sometimes as held in trust by trustees.

To understand the decision requires a brief note on a leading case that I will deal with in the second category of litigation involving disputes within the Hutterite community. In 1970 the Supreme Court of Canada in Hofer v. Hofer[44] dealt with a situation in which some members of a Hutterite colony joined a different church and after being expelled from membership in the Hutterite colony they sued the colony for a share of the assets. The Court held that they were not entitled to any of the colony property. The view of Urie J. at the Federal Trial court level that the members of the colony were in a sense entitled to a share of the common pot even if they agreed never to take it personally, was held by the Federal Court of Appeal to be inconsistent with the reasoning of the Supreme Court in Hofer. Thus the Federal Court of Appeal stated that Hutterites through their articles of association or trust deeds essentially renounced any claim for shares in the corporation or trust community, other than the right to be sustained on the colony.

This decision was upheld by the Supreme Court of Canada on appeal by the Crown in a one line judgment adopting the Federal Court of Appeal's reasoning.[45] However, the victory by the Darius-Leut was actually more of a defeat. The case just declared that under the current provisions of the Income Tax Act and the legal nature of the communal property regime, the deemed individual approach to income tax of colony profits was not at present legal. That did not, however, stop the government from imposing income tax on a corporate basis. As noted by Dr. Janzen, the government amended the Income Tax Act to allow for the deemed individual approach which was applied to the Schmeid-Leut and the Lehrer-Leut colonies and then the government proceeded to tax the Darius-Leut on a corporate basis, which meant that the Darius-Leut would be paying much higher rates than under the scheme they had successfully challenged in court.[46]

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[42] Supra, n. 39 at 1399-1400.

[43] Wipf v. The Queen [1975] F.C. 162 (Fed. C.A.).

[44] [1970] S.C.R. 958.

[45] The Queen v. Wipf [1976] C.T.C. 57 (SCC).

[46] See Janzen, Supra, n. 20 at 282.

A new round of litigation was started by the Darius-Leut in an attempt to challenge the corporate income tax that threatened to bankrupt their colonies. They could not deduct the market value of the labour of their members as an expense, but rather only the actual expenses such as housing, food, clothing, etc. Since the Hutterites are notorious for living very simply and self-sufficiently in terms of "personal" consumption, the profits to be taxed at the corporate rate were huge. Thus, the litigation now raised both the issue of having to pay any tax at all by claiming that the colony as a whole was a church or charity, and secondly, in the alternative, if a tax was to be paid, the colonies should be allowed to deduct the actual market value of the labour of the members even if they never were paid wages.

These issues first came before Mr. Justice Mahoney of the Federal trial court in 1978.[47] Mahoney J. noted that the amount of tax in dispute from the Darius-Leut colonies from 1968 to 1975 allegedly amounted to 37 million dollars.[48] He ruled against the colonies and they appealed to the Federal Court of Appeal in 1979 which also ruled against them.[49] The Court of Appeal again characterized the colonies as not exclusively religious or charitable and thus not exempt from paying income tax. Even if the members of the colonies were motivated by religion to be farmers and even if the Hutterian religion viewed all of life as forming part of religion, in the eyes of the law the farming enterprise was not a religious or charitable activity. Furthermore, according to the provisions of the Income Tax Act only the actual costs of providing food and shelter and so forth could be deducted and not some deemed market value of labour.

Rather than appealing to the Supreme Court of Canada, the Darius-Leut finally came to an agreement in 1981 to be taxed on a deemed individual basis just as the other two Hutterite conferences had done.[50]

Finally in terms of tax litigation, in Hutterian Brethren Church of Morinville v. Royal Bank[51] the Alta. C.A. held that it did not violate due process for the bank to comply with a demand from the Tax Department to remit the alleged amount of money due for tax from the colony account while the colony was appealing the assessment. In Alberta v. MNR and Hutterian Brethren Church of Smoky Lake[52] on the other hand, the court held that the Federal Tax Department could not garnishee various term deposit certificates of Hutterian colonies held in Provincial Government Treasury Branches. The result hinged on various technical interpretations of the obligations of the bank under

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[47] Hutterian Brethren Church v. The Queen [1979] DTC 5052 (Fed. T.Ct.).

[48] Id. at 5054.

[49]. Hutterian Brethren Church v. The Queen [1980] C.T.C. 1 (Fed. C.A.).

[50] Janzen, Supra, n. 20 at 284.

[51] [1979] 5 W.W.R. 214 (Alta. C.A.).

[52] (1980) 22 A.R. 317 (Alta. C.A.).

the terms of the certificate.

The Income Tax cases illustrate again the two related issues of the legal characterization of the colony on one hand, and the scope of religious freedom on the other. In terms of the character of the colony, why the unwillingness to accept the colony as exclusively a religious organization that would be tax exempt? Perhaps the key to this relates to the fact that the Hutterite colony is very different in terms of economic dynamics as compared to the religious orders and organizations which people join as adults and usually as celibate adults at that. The Hutterite colony is composed of families. Also the courts look at a colony and see a very successful commercial enterprise with profits that seem to be far in excess of that which is necessary for the bare sustenance needs of the members. Yet the courts seem to ignore the fact that the profits are aimed at the establishment of a new colony so that the growing population will have meaningful work to do and so that the colony will not get so large as to raise a host of problems in terms of sustaining interpersonal relationships. One could argue that the personal, religiously motivated claim to live in perpetual poverty is actually no different than that of other religious orders, but for the addition that the colonies are intergenerational.

Another more logical explanation is that religious orders and organizations usually are perceived as gaining tax exemption on the bases that these organizations charitably benefit the society beyond the walls of the organization itself. While Hutterites are good neighbours and are quick to aid others in an emergency situation, and do not look to the state for welfare benefits and so forth, the income made by the colonies is overwhelmingly used internally to support the internal growth of the sect rather than used for any substantial charitable or religious purpose aimed at the wider community.

Furthermore, if exempt from income tax as religious organizations, the colonies would receive an unfair advantage over other agriculture producers who compete in the same markets. The Hutterite colony is not sustained by donations given to it, but rather by selling products to the host society. Furthermore, there is something very artificial about personal vows of poverty in terms of property ownership, in the context of having life long personal usufructuary rights to communal property. Suppose that I am a member of some religious organization which has considerable community assets. I own nothing personally nor am I given a wage, but I am provided with a comfortable apartment by the organization. Suppose that I am provided with a vehicle to use. Suppose that I am provided with expenses by the organization to fly to various locations and while there stay in nice hotels. Suppose that the organization has a good library which I can use at any time. My food and clothing and medical and other needs are provided by the organization. It seems plain that my personal pledge of poverty in no way translates into actual personal poverty. Indeed, the argument could be made that I am very rich. Legal ownership of property is far less important to wealth questions than the right to use property. While my hypothetical conforms to my own desires for travel and reading and such, the point could still be applied to a degree to Hutterite colonies for purposes of how we view taxes on wealth.

While the courts approach to the issue of the character of the colony for income tax purposes does not seem surprising, it should be noted that the issue of religious freedom in terms of income

taxation was not really an issue in these cases. While some arguments were made as to conscientious objection to taxation directly related to support for war by the government, it was established in the litigation that Hutterites did not claim that paying tax to the government as such violated their religious belief or practices.

7. Education in the United States

Arguably the most important case involving Hutterites and freedom of religion in the United States is the litigation over education. Located east of Ipswich, South Dakota, the Deerfield Colony was established in 1971 as a split from the Plainview Colony. For the first year, the school children at Deerfield Colony were bussed to Plainview Colony to attend the public school there. Then the Deerfield Colony was told by the Ipswich Board of Education that the children could no longer go to Plainview for school, but would be bussed into the town of Ipswich.

As anyone who understands Hutterite ideology would know, the Deerfield folks refused to put their children on the bus to town when the buses arrived. At this point in time, most Hutterite colonies in South Dakota, as is the case in Canada, had a public school established on the colony itself. The statutory authority for this was found in S.D.C.L. 13-23-9 (1975):

> If a petition, signed by the persons charged with the support and having the care and custody of fifteen or more students who are eligible to attend an elementary school, all of whom reside not less than four miles from the nearest school but all of whom reside within one mile of each other, is presented to any school board asking for the organization of an elementary school for such children, the board may organize such school and employ a teacher therefor provided a suitable room or building is made available by such petitioners at a proper location...

The Deerfield Colony applied to the Board under this provision but was denied. The Colony brought a class action against the Board in Federal Court seeking a declaration that the Board's action was discriminatory and an injunction to force the Board to establish the school on the colony.

In Deerfield Hutterian Association v. Ipswich Board of Education[53] it was established in 1978 on a motion by defendants to dismiss the case that the Federal Court did have jurisdiction. The strongest ground for this jurisdiction was the Federal Equal Educational Opportunity Act of 1974, 20 U.S.C. section 1703(f) which stated:

> No state shall deny equal educational opportunity to an individual on account of his or her race, colour, sex or national origin by,...
> (f) The failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

[53] (1978) 444 F. Supp. 159 (U.S. District Court for S.D. N.D)

The case therefore went to trial in 1979 with the decision reported as Deerfield Hutterian Association v. Ipswich Board of Education.[54]

Chief Justice Nichol of the U.S. District Court accepted the evidence that the Hutterites are the only people in the world who speak Tyrolean German as their primary language and that children are not exposed to English until they enter school in Grade One. Furthermore, Tyrolean German is an oral language which does not exist in written form. The books and sermons are written in High German. When the children enter school the teacher is unable to communicate with them. In most cases the teacher will utilize the older children in grade seven or eight to translate communications to the little ones.

Furthermore, Nichol C.J. accepted the importance to the Hutterites of limiting exposure to the town where, "they are constantly exposed to worldly goods and temptations."[55] He also noted their distinctive culture of wearing modest clothing and their theological beliefs that only in living communally would a person inherit eternal life.

Despite this, however, the Court found that the School Board had not violated any legal rights of the Hutterites by insisting that their children be taken to town for public education purposes.
Nichol C.J. asserted:

> The evidence shows that a successful bilingual-bicultural program could be established in Ipswich which would be to the benefit of the Hutterite children. Furthermore, education of the children at the Colony is not in the children's best interest. ..The needs of the children could be completely serviced in town. Classroom space could be made available, personnel would find it easier to service the needs of the children, a hot lunch program is available in town. Most importantly, the Hutterite children would not find it any more difficult to adapt to the experience of being educated in town than they would in a colony school.[56]

After examining the famous Yoder case from the United States Supreme Court[57] and the issue of the religious freedom of the Hutterites, Nicol concluded that providing education for Hutterites in town rather than at the colony did not violate freedom of religion. He stated:

> The Court agrees with the plaintiffs that the Hutterites' education should not be and cannot be conditioned upon the abandonment of their religion, the abandonment of their language, the abandonment of their dress, or the abandonment of their fear of worldly values. But the

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[54] (1979) 468 F. Supp. 1219.

[55] Id. at 1224.

[56] Id. at 1226.

[57] (1972) 406 U.S. 205

> Board has not demanded that the plaintiffs abandon their beliefs. It has simply offered to educate them in Ipswich and it has refused to support their education at the Deerfield Colony.[58]

Another point made by Nichol C.J. was that because of the establishment clause, many parents have to pay for private education so as to preserve their religious practices. Why should the state have to pay for what is essentially a separate school because of the religious beliefs of the parents? However, he did not rule on this counter-argument that to establish public schools on Hutterite colonies would violate the establishment clause. Rather he dealt with the free exercise prong. He stated:

> The Yoder case does not stand for the proposition that if a religious group feels strongly about its religious tenets and wishes its children segregated from the world, it can force the state to set up and pay for a separate school for the children....
>
> The essence of Yoder is the Wisconsin compulsory education law which forced the Amish to violate their religious beliefs. There is no comparable law in the present case. The Hutterites are not being forced to violate their religious beliefs. They can, if they wish, educate their children at the colony at their own expense.[59]

Because the Court asserted that there was nothing in this case which triggered the strict scrutiny required under the First Amendment, it turned to the equal protection arguments that the Hutterites were being discriminated against in terms of educational opportunity because of their religion or national origin. In regard to this the court held that education is not such a fundamental right to trigger strict scrutiny. Rather all the state has to show is that the statute has a rational relation to a legitimate state interest and the statute is neutral on its face and has not been applied with an intention to discriminate. The Court stated:

> Plaintiffs could have attempted to show that other non-Hutterite groups had applied to the Ipswich Board of Education and had been granted a school. They did not. Plaintiffs could have attempted to show that individuals who make up the Ipswich Board of Education are hostile to the Hutterites and have acted with prejudice. The plaintiffs failed to do so.[60]

It is probably only a matter of time before this issue of Hutterite education is also litigated in Canada. Is the establishment of publicly funded schools on Hutterite colonies in Canada just a matter of current discretionary practice or is it a right? On the other hand, rather than being a right, perhaps the opposite will be argued. The establishment of public schools on Hutterite colonies should not be permitted because this violates equality provisions in that accommodation for religion

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[58] Supra, n. 54 at 1228.

[59] Id. at 1228-1229.

[60] Id. at 1231.

is being made by the public school system for the Hutterites but is not being made for other religious groups that have to fund their own private schools to meet their religious needs. The key finding in Ipswich that a town education could accommodate Hutterite needs without violating their freedom of religion seems very dubious to me. The key focus should not be on accommodating language concerns, although that is important, but rather on the religious ideology of the Hutterites in terms of their interpretation of what "separation from the world" means. The Hutterites should be accommodated in the provision of public education as a matter of freedom of religion and since Canada does not have an establishment clause, indeed public funding for some religious schools is mandated by our Constitution[61], the argument that government is somehow entangled in the support of religion by making this accommodation should be dismissed. However, the equality provisions of the Charter might serve to complicate the matter as indicated in the large amount of litigation that has already taken place over governmental funding or lack thereof for "private" schooling, religious or otherwise, and the thorny issue of the teaching of religion or the holding of religious exercises in public schools.[62]

8. Municipal Zoning in Canada

While payment of income tax to the host society on the profits of large scale farming operations only seems fair, rather than discriminatory, in terms of disallowing what otherwise would be a significant market advantage of the colonies over against other farmers, the next series of more recent cases raise the issue of direct discrimination against Hutterites, this time played out by way of municipal zoning provisions.

In 1979 in Saskatchewan v. Vanguard Hutterian Brethren[63], the court determined some points of evidence which arose at a trial. The Colony had been charged with violating some interim development controls imposed by the Rural Municipality of Whiska Creek. When the Rural Municipality learned that the Hutterites were buying land in the area, the Municipality proposed passing a zoning by-law which would restrict building to a single-family dwelling per quarter-section and passed an interim resolution banning all developments that would be affected by the proposed bylaw. The colony was charged with violating the resolution. The defence of the colony to this charge was that the orders were ultra vires because they were passed in bad faith solely to discriminate against the colony. The points of evidence related to the colony's attempt to subpoena various government officials and the officials resistance to give such evidence on the basis that to do so would violate crown privilege.

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[61] Section 93 of the Constitution Act, 1867 mandates public funding for Catholic Schools in Ontario.

[62] See Zylberberg (1988) 52 D.L.R. (4th) 577 (Ont. C.A.); Canadian Civil Liberties Association and the Minister of Education (1990) 65 D.L.R. (4th) 3 (Ont. C.A.); Re Adler (1994) 19 O.R. (3d) 1 (C.A.).

[63] [1979] 3 W.W.R. 248 (Sask. Q.B.), appealed to the Sask. C.A. (1979) 97 D.L.R. (3d) 86.

The Saskatchewan Court of Appeal held that various officials of the government could be called upon to give evidence in the case. When the case came back to trial, the charge against the colony was dismissed on the ground, among others, that the by-law was a nullity as it was passed in bad faith for the sole purpose of discriminating against Hutterites. The Crown appealed and in R v. Vanguard Hutterian Brethren, Moore D.C.J. upheld the decision of the trial judge.[64] Moore pointed out that the resolution was passed in bad faith:

> In my opinion the council of the rural municipality ..was simply using the Planning and Development Act as a disguise to keep the Hutterian Brethren out of the municipality....
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> I have no hesitation in holding that the beliefs of the Hutterian Brethren are a religion and their communal style of living is a religious association, and, further, the totality of their religion is their belief and their communal style of living...There is no evidence that the establishment of a colony in the municipality would in any way affect the health, safety or general welfare of the residents. In fact the contrary may well be the situation. The brethren are good farmers, utilizing the land to its full potential, and there is no suggestion they are other than law abiding citizens.[65]

Another case related to municipal matters in Saskatchewan is Re Gallagher[66], where after a very close election for reeve in a rural municipality, the losing candidate applied to have the election voided because members of the Tompkins Hutterian Brethren Corporation were allegedly not qualified to vote. His argument was that the Hutterites and their spouses were not entitled to vote because the colony was not a farming corporation but a religious organization, and further that the individual Hutterites were not "shareholders" as required in the legislation. Moore D.C.J. was not about to disenfranchise the Hutterites however. He said:

> I am satisfied that the relevant sections of the Rural Municipality Act granting the right of franchise must be interpreted liberally and extended as far as language will permit. In so stating I must hold that the members of the Tompkins Hutterian Brethren Corp. and their spouses were entitled to vote in the election in question under the interpretation of the word "shareholder" as it is generally and commonly understood. To hold otherwise would be to deny the right of franchise to a number of individuals who have a substantial interest in the municipality by virtue of their land holdings in their corporation, who reside in the municipality and who undoubtedly have an interest in the management of the affairs of the municipality.[67]

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[64] [1979] 6 W.W.R. 335 (Sask. D.C.).

[65] Id. at 343 and 351-352.

[66] (1981) 11 Sask. R. 215 (Sask. D. Ct.).

[67] Id. at page 234.

The Saskatchewan Court of Appeal has been protective of the Hutterian way of life as illustrated in another zoning case- Hutterian Brethren Church of Eagle Creek[68] After the Hutterite Colony in question had bought land to establish a new colony, it applied for a development permit to construct various buildings: a church, a school, several housing units, a community kitchen, laundry and slaughterhouse. The rural municipal council of Eagle Creek denied the colony the permits citing various provisions of the municipal zoning by-law on the grounds that:

> ..a school is not a use permitted in an agricultural district; a combined laundry and slaughter house is partially non-agricultural and therefore not a use permitted by the bylaw; a community kitchen and residences are not uses permitted in an agricultural district as neither are single family dwellings; and a church, a use permitted only at the discretion of Council, was by resolution of Council denied a permit for construction.[69]

The colony failed in its appeal of this decision to the Municipal Zoning Appeals Board, and to the Provincial Planning Appeals Board, but succeeded at the Saskatchewan Court of Appeal by a margin of 3 to 2.

The majority decision written jointly by Cameron and Tallis J.J.A. noted for starters that freedom of religion was at stake when the municipality refused to accommodate the Hutterites communal life style on the land they had purchased. The Justices quoted section two of the Charter of Rights and stated:

> ..it is obvious that our law does not permit municipal by-laws to be used as instruments of intolerance and oppression. All citizens must have an equal opportunity to live the life they can and want to live, without being hindered by discriminatory practices, as long as their actions are in keeping with their obligations as responsible members of society. It is not the function of municipal councils through the medium of zoning by-laws, or otherwise, to strive to forestall the practices of a particular religious faith.[70]

The court did not find it necessary to strike the by-law down but rather interpreted it in a way that on all points allowed the Hutterite colony to proceed with every building it sought to construct.

Another example of zoning discrimination involves the recent cases of the Hutterian Brethren Church of Starland in Alberta. Twice the Court of Appeal of Alberta reversed the decision of the Development Appeal Board that denied the Colony a development permit to construct a colony on land that had been purchased in the Municipality. In the first case of Hutterian Brethren

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[68] [1983] 2 W.W.R. 438 (Sask. C.A.).

[69] Id. at page 451.

[70] Id. at 457.

Church of Starland v. Starland[71] the Court of Appeal held that the Development Appeal Board had ruled against the Church because the Church had not given the Board sufficient information as to possible negative effects of the operations planned for the Colony. But the Court of Appeal ruled that it was unfair for the Board to not tell the Church specifically what further information was necessary and allow the Church to provide the Board with the information. Thus the matter was returned to the Board for a rehearing.

On rehearing the Board again rejected the development permit. The Board decided that the development posed excessive risks of pollution, and also water-supply problems. On appeal, the Alberta Court of Appeal in Hutterian Brethren Church of Starland v. Starland[72] again sent the case back to the Board for another rehearing this time because the Board had dealt with the matter in a manner that evidenced a reasonable apprehension of bias. Cote J. A. concluded:

> I would order a new (third) hearing, but add this observation. Nothing requires any municipality, even a small one, to staff its Development Appeal Board with municipal councillors.
> ...If the Municipality really wants to get a decision on the merits, and have it stick without risking a third appeal to the Court of Appeal, it might want to see whether there is some legal way to have different more independent people sit on the Development Appeal Board next time.[73]

On the third go round, the Development Appeal Board finally allowed the colony to be established. Now the Municipality and the objectors to the development appealed to the Court of Appeal again. In Hutterian Brethren Church of Starland[74] the court dismissed the appeal. However, this was not the end of the litigation. At the time of this writing the case continues in a fourth round of litigation. In the 1996 case of Starland No. 47 v. Hutterian Brethren Church of Starland[75] the Municipal District went to court to stop the construction that was now going on because the colony had allegedly failed to execute a formal development agreement with the Municipality and was breaching the terms of the permit that they had. Again the court found in favor of the Hutterite Colony and determined that the failure to execute a formal agreement was the fault of the hostile Municipal District that had always been in opposition of the opening of the new colony.

Obviously, given the large scale nature of Hutterian agricultural practices, particularly in terms of livestock, we would expect that various zoning and environmental regulations and the like

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[71] [1991] A.J. No. 495 (Alta. C.A.).

[72] (1993) 9 Alta. L. R. (3d) 1 (Alta. C.A.).

[73] Id. at 16.

[74] [1994] A.J. No. 276 (Alta. C.A.).

[75] [1996] A.J. No. 186 (Alta. Q.B.).

would apply as equally to the colonies as it would to other operators. However, the colonies have been successful in the courts to challenge zoning practices that are discriminatory and in these cases the courts are more likely to characterize the colony as a religious organization and state that religious freedom is an issue.

9. Other Governmental Litigation

For the sake of completion we may briefly note a few other cases. Income tax matters came to the fore again in Kleinsasser v. United States.[76] From this test case we see that as in Canada, at some stage for federal tax purposes each family on the colony was deemed to get a dividend from the colony and then would file individual returns. The tax would be paid by individuals and the corporation would be exempt. According to this case it appears that the corporation itself was treated as a tax-exempt religious organization of a particular kind. The controversy in this case was that individual Hutterites wanted to claim pro rata an investment tax credit on their personal returns for machinery bought for the colony. The trial judge denied the claim as did the U.S.Court of Appeals.

This case seems to hinge on the particular rules in the Internal Revenue Code dealing with tax exempt religious organizations involving deemed dividends. I.R.C. s.48(a) (4) stated that property used by a tax-exempt organization may be treated as section 38 property (investment tax credit) only if the property was used in an unrelated trade or business the income of which is subject to tax. Clearly the machinery at issue here was not used in an unrelated activity but was used by the corporation for farming. The court was reluctant to deny the individual Hutterites their claim but the language of the Code was unambiguous. There was no claim in the case that the peculiar rules in question violated the religious freedom of the Hutterites.

We generally have a view of Hutterite Colonies as hugely successful in economic terms. However, it is not unknown for a colony to have difficulty as is illustrated in the Bankruptcy case of Cloverleaf Farmer's Co-Operative.[77] What makes the case interesting is that simply because so many of the families on the colony were related to each other, the colony actually fit the definition of a family farm as defined in the Bankruptcy Code in regard to its bankruptcy reorganization scheme. The other point to make is that the application for review by the court was not instituted by the colony but by the Small Business Administration as a creditor of the colony.

Hutterites in Canada made submissions to a Public Utility Board as to compensation for loss of colony lands in *Calgary Power* v. *Hutterian Brethren of Pincher Creek* (1961), 35 W.W.R. 227

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[76](1981) 522 F. Supp. 460 (U.S. District Ct.), appealed (1983) 707 F. 2d 1024 (U.S. Court of Appeals, Ninth Circ.).

[77](1990) 114 B.R. 1010 (S. D.).

(Alta. P.U.B.). Also, Hutterites were successful in defending an appeal from the Surface Rights Board fixing compensation for the taking of two well sites and roadways in *Paloma Petroleum* v. *Hutterian Brethren Church of Smoky Lake* (1987), Alta. R. (2d) 288 (CA).

Finally in The Matter of T.K., A Child in Need of Supervision[78] the Supreme Court of South Dakota in 1990 affirmed the judgement of the circuit court that a 16 year old Hutterite boy from a family of Hutterites that had been expelled from a colony was a child in need of supervision and placed him under the supervision of a court services officer for six months.

That a state agency is taking control of a Hutterite youth is highly unusual, if not completely unprecedented before this case. This case is relevant to the issue of disputes arising from the colonies themselves in the background sense that it highlights a dispute at the Bon Homme Colony near Tabor, South Dakota which resulted in a group calling themselves the Arc of the New Covenant coming into conflict with the Colony majority. The decision does not tell us much of anything about the dispute. For the background, we have a few newspaper reports to turn to.

In January of 1990 there was a front page story in The Wall Street Journal entitled "Some Huttterites in South Dakota Fight Over a Corpse."[79] The article notes that the Bon Homme colony was riddled with dissension and that some members had been ousted from the colony. The dispute heated up when these now ex-members insisted on visiting the grave of Joseph Wurtz, a former Minister of the colony, who the dissenters say was the last honest Minister of the colony. The grave is on colony land. The colony eventually got a court order to keep the trespassers off the land but the dissenters violated it. As the article says:

> The issue has become so bitterly contested that three of the dissidents- all descendants of Mr. Wurtz- are in the county jail, serving sentences for contempt of court. Their leader, James P. Wainscoat, just ended a seven-week hunger strike, taking food only after his lawyer won release of two other dissidents- along with Mr. Wainscoat, who was being held in a local hospital. Yet the dispute goes on.
>
> The fact that Mr. Wainscoat isn't a Hutterite at all has made the current feud all the more upsetting to the sect. A decade ago the 48-year-old California native was rebuffed in attempt to join the colony....
>
> ...Mr Wainscoat has lured away from the 105 member colony 20 members of the late Mr. Wurtz's extended family, people who feel they have a legitimate right to visit the grave. The splinter group, with Joseph Wurtz's youngest son, Sam, 37 years old, acting as minister, also has about a dozen members who have forsaken other Hutterite colonies. Their new, 34-person sect calls itself the Ark of the New Covenant and lives in a five-bedroom frame house in

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[78] (1990) 462 N.W. 2d 893 (S.D.S.C.).

[79] R. Gustav Niebuhr, "Some Hutterites" The Wall Street Journal, January 16, 1990.

nearby Tabor.

> From Mr. Wainscoat's standpoint, the colony has become greedy and selfish, it's leadership interested purely in power and money...[80]

In May of 1990 there was also a report in the Winnipeg Free Press headed, "Pleas of Dissident U.S. Family Fall on Elders' Deaf Ears in Manitoba." It was noted that all the Schmied-Leut Ministers were having an annual meeting which was taking place at Senior Elder Jakob Kliensasser's own colony at Crystal Springs near St. Agathe Manitoba. There is a picture in the newspaper of a large family standing beside a school bus parked near the colony and on the bus is a large sign saying, "Ark of the New Covenant". The family is also holding a sign that says, "Stop! Come Let us Reason Together." The account in the paper notes that the Wurtz family was expelled from the Bon Homme colony more than two years ago because they were questioning the conduct and behaviour of colony officials and elders. Their complaints included the charge that various sexual improprieties and excessive drinking had occurred at the colony. Senior Elder Kleinsasser had ordered their expulsion and ordered that no colonies should associate with them. According to the newspaper report, the Hutterite Ministers at the meeting would not speak to them. The Wurtz family consisted of 28 members including seven daughters, the dissident's mother, wife and 3 nephews and their spouses and children.

In the T.K. case appeal, Chief Justice Miller noted that on June 17, 1989 the Sheriff of Bonne Homme County was called to attend at the private Hutterian cemetery at the colony. Upon his arrival accompanied by various elders of the colony he found a group from the Arc of the New Covenant, including the 16 year old boy in question, digging holes in the cemetery ground and attempting to erect a new and separate fence inside the cemetery. He also found that the members of the Arc of the New Covenant had placed a headstone at a gravesite in the cemetery. The colony had a court injunction restraining members of the Covenant from being on colony property.

On August 8, 1989 the Sheriff signed a petition requesting that T.K. be declared a delinquent child for violating a statute which made it a misdemeanour to trespass. The Circuit Court, even though it could not be proven that the child had indeed been trespassing, nevertheless, issued the order that he was in need of protection on the ground that:

> The court further emphasized that T.K. required supervision to prevent him from becoming embroiled, by his parents, in the serious dispute between the members of the Arc of the New Covenant and members of the Hutterian Brethren.[81]

On appeal by the child, Chief Justice Miller affirmed the decision. He stated:

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[80] Id.

[81] Supra, n.78 at 894.

> T.K.'s parents were members of the Arc of the New Covenant. This religious sect was engaged in an ongoing conflict with the Bon Homme Hutterian Brethren Colony in Tabor, South Dakota. Confrontations between the members of these two rival religious factions created a potential for violence which has threatened T.K's welfare. As the trial judge noted, it is inappropriate to permit parents to exploit a child by dragging him into a religious dispute involving civil disobedience.[82]

On the issue of Hutterites going to court, this case does not directly add more strain to the Hutterian theology and practice that it is wrong to initiate litigation against other individuals. The case was initiated by the civil authorities. But nevertheless, it does pose doubts indirectly in terms of the background facts. The colony may have overlooked the first few times that the group came onto the land and sang and prayed at the grave, but eventually they got a court injunction to try to keep the group away. This injunction was backed by the violence of the state. People were thrown into jail because they trespassed to visit the grave of their own father or grandfather. Did the colony follow the norm of nonresistance in getting the court injunction? Was this any different from reporting to police that a crime was committed on the colony and letting the violence of the state proceed? Do we see in this case an example of the slide away from Anabaptist doctrine that would be illustrated again in Lakeside where under the leadership of Jacob Kleinsasser, the Senior Elder of the Schmiedeleut, the colony would run to court to call upon the violence of the state to throw the so called dissenters off the property?

B. NON-GOVERNMENTAL LITIGATION INVOLVING EXTERNAL RELATIONS

Up to this point in the survey, all the cases have dealt with the government at some level or another. When we turn to cases involving law suits with nongovernmental parties it should be noted that there are a few cases in which Hutterite Colonies have been sued by individuals or entities in the host society. It is my contention that defending lawsuits brought against you is less problematic in terms of violating Anabaptist norms as compared to bringing a lawsuit against someone. In the former category, unless a counterclaim is made, you are attempting to argue against the coercive enforcement of the law against you, but in the latter category you are asking for a court order backed by the violence of the state to coerce someone to abide by some rule of law that has allegedly been violated in regard to their behavior in relationship to you. This invocation of state violence is problematic.

1. Hutterites Defending Civil Liability Cases

When we turn to cases involving law suits with non-governmental parties it should be noted that Hutterites, despite nonresistent religious ideology, do not necessarily accept and settle every claim made against them. There are at least ten reported cases in the United States, and about the same number in Canada that I have been able to identify, where the Hutterite colony has gone to

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[82] Id. at 895.

court to *defend* against court actions initiated by members of the host society.[83]

The first of these reported decisions arose in South Dakota when the Hutterites were sued in 1910 for having raised the height of their milldam in 1904 which allegedly then led to flooding and damage to the land of an upstream neighbour. The case went to trial and the Hutterites were ordered to reduce the height of the dam back to the original height that the dam was when constructed by the Hutterites in 1895. The Hutterites unsuccessfully appealed the case.[84] However, in a second case brought by a flooded neighbour, the Hutterites were successful, both at the trial level and on appeal by the upstream landowner, because the plaintiff had missed the special two year limitation period that had been established by the legislature to bring suit for damages against milldam construction.[85] We do not know if the Hutterites made reasonable offers to settle these claims brought against them, but in any event there is still something troubling about the aggressiveness of appealing the first negative verdict, and the use of a technical defence like a limitation period to defeat what otherwise might be a valid complaint.

Several more lawsuits dealing with land transactions were brought against the Hutterites during the great period of upheaval as the Hutterite colonies moved to Canada.[86] In one case a real estate broker successfully appealed trial court decisions denying his claim for commissions for an alleged cancellation of a contract for sale of Hutterite lands.[87] Another case involved action by the purchaser of Hutterite land against the colony which had a lease back arrangement with the new owner for a period of time. The courts upheld the terms of the lease in favour of the Hutterite colony.[88]

There was a long period of time in which there were apparently no further reported cases of defending against non-governmental litigation in either the United States or Canada. A reported case finally arose out of a claim for damages against a Montana colony as a result of an accident in 1951 between the plaintiff driver and a Hutterite driving a truck. It turned out that the Hutterite was a

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[83] Again it is important to remember that there may be more cases that were never reported.

[84] *Shearer* v. *Hutterische Bruder Gemeinde* (1912), 134 N.W. 63 (S. Ct. S. D.).

[85] *King* v. *Hutterische Bruder Gemeinde* (1913), 143 N.W. 902 (S. Ct. S. D.).

[86] There are a couple of unreported cases noted briefly in Ruth E. Baum, *The Ethnohistory of Law: The Hutterite Case*, unpublished PhD thesis, State University of New York, 1977 at 234-235. These are *Cobel* v. *Hutterishe Gemeinde* (1918) in which plaintiffs were awarded title, and *Harris* v. *Hutterishe Gemeinde* (1918) re validity of purported contract for sale of land without authorization of all voting members of the colony. According to Baum this case was dismissed.

[87] *Stablein* v. *Hutterishe Gemeinde* (1920), 177 N.W. 810 (S. Ct. S. D.) ordering new trial, and then successful appeal of second trial in (1922), 189 N.W. 312 (S. Ct. S. D.).

[88] *Blinn* v. *Hutterishe Society of Wolf Creek* (1920), 194 P. 140 (Mont. S.C.).

visitor from a colony in Alberta. Upon receiving the court papers initiating the lawsuit, the leaders of the Montana colony visited the lawyer for the plaintiff and informed him that the truck driver was a visitor, that the truck was not owned by the colony nor was the driver doing any work for the colony, and the driver had never been a member of the colony. Despite having this knowledge, and leaving the impression with the Hutterites that they could ignore the complaint, given the fact that they were the wrong party, the law firm for the plaintiff proceeded to get a default judgment against the colony and then a sum of money was seized from the colony bank account and held by the lawyer for the plaintiff. On appeal to the Supreme Court in 1953 the colony got the default judgment set aside. The dispute then arose over the return of various sums that had been taken under the default judgment, including sums for legal fees. Eventually the court ordered the return of fees taken by the lawyers for the plaintiff out of the colony bank account.[89] To a degree this case might also be classified as one involving Hutterites going beyond defending a suit in court, and rather taking court action and invoking the power of the state to rectify what appears to have been a "theft" of their property. Other more recent cases of American litigation include lawsuits against a Hutterite school board for wrongful dismissal,[90] a land dispute,[91] and a conflict over insurance coverage for damages caused by seeping sewage.[92]

It is of some interest perhaps that despite having the greater population of Hutterites in Canada, there were no reported cases of Hutterites defending against non-governmental litigation filed against them in Canada until very recently.[93] Furthermore, out of the ten or so recently reported cases, all but two probably involve defences brought by the insurance company of the colony. While most claims of damage due to an accident involving a Hutterite colony vehicle will be settled within the context of insurance negotiations, some of these cases have given rise to claims in court against individuals from Hutterite colonies.[94] It is doubtful that these cases should be counted as examples

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[89] *Waggoner* v. *Glacier Colony of Hutterites* (1957), 312 P. 2d 117 and (1953), 258 P. 2d 1162 (Mont. S.C.).

[90] *Wyatt* v. *School District* (1966), 148 Mont. 83, 417 P.2d 221 (Mont. S. C.).

[91] *Cuka* v. *Jamesville Hutterian Mutual Society* (1980), 294 N.W. 2d 419 (S. C. S. D.).

[92] *Grindheim* v. *Safeco Insurance Co.* (1995), 908 F. Supp. 794 (U. S. Dist. Ct. Mont.).

[93] Based on manual search through Western Weekly Reports from 1918 to present, and available provincial law reports in Alberta, Saskatchewan and Alberta.

[94] See for example, *D.S. Scott Transport* v. *Hutterian Brethren of Milford* [1969] S.J. No. 130 (Sask. Q. B.); *Waterman* v. *Waldner and West Raley Colony* [1975] A. J. No. 245 (Alta. S. Ct.); *Tomlinson v. Wurtz and Deerboine Colony and Pine Creek Colony* (1982), 16 Man. R. (2d) 145 (Q.B.)*; Lauder v. Wollman and Hutterian Brethren Chruch of Leask* (1984), 31 Sask. R. 105 (Q.B.)*; Taylor* v. *Hofer and Waterton Hutterian Brethren* [1986] 67 A. R. 279 (Alta. Q.B.), affirmed by (1987), 50 Alta. L. R. (2d) 260 (Alta. C.A.); *Mathison* v. *Hofer and Airport Colony* [1984] 3 W.W.R. 343 (Man. Q.B.); *Baer* v. *Hofer and New Rosedale Colony* [1990] M.J. #557

of Hutterites defending themselves in court, as opposed to insurance companies doing so. The same can be said for a few claims involving fires, or chemical spills that allegedly have damaged a neighbouring property.[95] Again it may be that the insurance companies are behind bringing a defence to court in these cases. Thus, there are just a few Canadian reported cases involving contractual or tort liability where clearly the colony is hiring a lawyer and defending against a claim.[96]

We may conclude that, while the numbers are not many, there is enough evidence to support the proposition that Hutterites have sometimes gone to court to defend against claims made against them by individuals in the host society. The greater challenge to the anti-litigation norm comes from taking aggressive action in court, rather than attempting to avoid the imposition of court judgments backed by the violence of the state.

2. Hutterite Initiation of Lawsuits Against Others.

I will examine with considerable detail in my book the rash of lawsuits in the last two decades initiated by one group of Hutterites, both against other Hutterites and against outsiders. That this embrace of aggressive litigation violates what used to be the "inside law" of Hutterites may be established, not only by doctrinal writings on prohibitions on going to law, but also by establishing the absence of any previous cases of such litigation. However, we have found that there were indeed a few previous reported cases before the recent explosion. Even though we have five cases in the United States and about the same number in Canada, the existence of any cases at all raises the question of whether the norm against litigation was still stable (and these few cases were anomalous), or whether the norm was actually somewhat unstable, or included exceptions within it. Given the multiple business transactions that the Hutterites have engaged in with individuals and entities in the host society, and the extremely small number of lawsuits filed by Hutterites until recently, it is a reasonable conclusion to suggest that historically if wrongs could not be dealt with short of going to court, the Hutterites did suffer the wrong rather than take the person to court. Some of the anomalous cases in this period were probably due to insurance subrogation, while others may have been justified by the Hutterites as actions of resistance to prejudice against Hutterites in land purchase deals.

(Q.B.), [1991] 73 Man. R. (2d) 145 (Man. C.A.); *Johannesson* v. *Mandel and South Bend Colony* (1994), A. R. 53 (Q.B.). A search of the court files in Manitoba indicates a large number of cases like this that never went to trial.

[95] See for example, *Hudson* v. *Riverside Colony* (1981), 5 M. R. (2d) 304 (Man. Q.B.) reversed in part by (1981), 114 DLR (3d) 352 (Man. C.A.) re liability for escaping fire; *Fingas* v. *Summerfeld Colony* (1981), 5 M.R. (2d) 373 (Man. Cty. Ct.) re liability for drifting chemicals while crop spraying.

[96] For example, claim against colony in contract and for unjust enrichment: *East-Man. Feeds* v. *Cypress Colony Farms* (1993), 87 Man. R. (2d) 250 (Man. Q.B.). Claim against colony and other parties for sale of infected hogs: *Modern Livestock* v. *Elgersma* (1989), Alta. L. R. (2d) 392 (QB).

The first anomalous cases of what might be called aggressive, rather than defensive litigation, were American. In the 1930's, some Hutterites brought a claim to court to settle a dispute as to the title to a patch of land which previously had been part of an island, but had been submerged, and then due to accretion and changed river flow, had become attached to the land owned by someone else. The Hutterites brought action to quiet title to the land and also to recover for the destruction of trees on the land. The trial court found for the Hutterites, but the defendant appealed and won at the higher court level.[97]

Land was again the theme in a case brought to court in Montana in 1953.[98] A colony in Alberta bought land in Montana in 1947 by using an agent who did not disclose to the vendor that he was acting for a Hutterite colony. The contract for the sale of the land was assigned to the colony and the colony moved onto the land and commenced operations, but the vendor did not convey the land to the Hutterite colony, presumably due to prejudice against Hutterites. The vendor eventually sued in state court to have the contract cancelled. The colony then sued in Federal court for specific performance of the contract. It is unclear on the record available to me which side sued first. In any event, to avoid the contract, the vendor argued that the colony was a foreign corporation which had failed to comply with various licensing provisions of state law before doing business in the state. There was state law to the effect that contracts made by foreign unlicensed corporations could be voided.

The Federal court found that indeed the Hutterite colony had not registered in Montana for the first five years of being in the United States, and had not paid the corporation licence tax or filed annual reports, the effect of which by Montana law might void the contract. The court also found, however, that the Hutterite colony by this failure to comply with corporate requirements did not have standing to sue in Federal court, and the case was thus remanded back to the state court. We do not know what legal proceedings transpired thereafter, but it would appear that the Hutterites eventually received title to the lands that they had bought and were living on.[99]

Though I could find no reported court decision, it is noteworthy that in 1962 the newly arrived Hutterites in the state of Washington purportedly sued a newspaper for defamation.[100] The ability of the Hutterites to pay more for land than the local farmers caused deep resentment of the new

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[97] *Michael Waldner and others, as trustees for the Hutterische Society and Church* v. *Blachnik* (1937), 65 S. D. 449, 274 N. W. 837 (S. Ct. S. D.).

[98] *Hutterian Brethren of Wolf Creek as a Church of Sterling, Alberta* v. *Hass* (1953), 116 F. Supp. 37 (Mont. D.Ct.).

[99] The contemporary list of Darius-Leut colonies mentions that the Deerfield colony in Montana was established in 1947 as a daughter colony of Wolf Creek, Alberta.

[100] As reported in Vance Joseph Youmans, *The Plough and the Pen: Paul S. Gross and the Establishment of the Spokane Hutterian Brethren* (Boone, North Corolina: Parkway Publishers, 1995) at 78-80.

foreigners who established a colony in the Spokane area. Demands were made for restrictive legislation against communal property and derogatory literature and rumours began to appear against the Hutterites. The *Spokesman-Review* newspaper published various articles including one quoting an opponent describing the Hutterites as:

> ...the world's oldest Communists... They claim religion as their basis... They have registered in the state as a church but have no affiliations or missions with any churches or sects other than their own... Our main objection is that they operate a farm under the guise of religion... They want and get many concessions taxwise that permit them to make more money. They turn around and try to pressure us into selling them our farms... Mrs. Peterson, pointing to the Russian background of the ancient religious sect, calls attention to the fact that the Hutterite land virtually surrounds two Air Force missile sites which are vital components of the Spokane Air Defense Sector. "You wonder if they bought their land close to missile sites by accident or by design."[101]

The colony, on the urging of a lawyer, sued and won a modest settlement for defamation, as well as a public apology in the newspaper.[102]

A fourth American case where Hutterites sued involved the issue of another cancelled land deal. In 1968, the Sand Lake colony made a contract with a North Dakota company to buy over 2000 acres of land in South Dakota owned by the company. The colony paid a $50,000 down payment for the property and expected to take possession at the beginning of 1969. However the colony discovered that portions of the land were subject to oral leases and they were unable to take possession when they needed to, so they rescinded the contract. The litigation arose by way of the colony claiming a return of the $50,000 that had been paid to the defendant vendor. At trial the Hutterites were unsuccessful, but on appeal (with one dissent) they got their money back.[103] The law in relationship to liquidated damages and penalties for failure to perform a contract are not important for our purposes. What is significant is that the colony sued.

A fifth American case involves a colony that lost a huge amount of money to an individual operating a classic pyramid "Ponzi" scheme. There were some issues as to the way that various banks dealt with the accounts and the cheques that were returned for lack of funds. The colony sued the banks but was unsuccessful.[104]

Not surprisingly the first reported cases where Hutterites in Canada took cases to court against

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[101] Quotes from Youmans, Id. at 79.

[102] *Ibid* at 80.

[103] *Hofer* v. *W. M. Scott Livestock Company* (1972), 201 N.W. 2d 410 (N.D.S.C.).

[104] *Warden Hutterian Brethren* v. *Washington Trust Bank and Seattle-First National Bank* (1996), WL 325722 (Washington C.A.).

individuals involved issues arising out of land transactions. In 1962 an Alberta colony successfully sued a real estate agent in Saskatchewan who refused to return money that was left in trust with him.[105] Then in 1982 a Saskatchewan colony sued for specific performance of a land transaction.[106] The colony claimed that it had bought the land for $672,000 and wanted the title to it, but the defendant claimed that the sale was subject to a prior option to buy from another party, which option was exercised. The court found that the colony did have notice of the prior option to purchase, so the Hutterites lost the lawsuit.

There are also a few recent cases involved property insurance where the decision to sue was probably taken by the insurance company with the colony being the nominal plaintiff.[107] However, what complicates matters is that the Schmiedeluet Hutterites at some stage formed their own insurance company. This company has commenced litigation against others, and it might be argued that the Hutterites, through this corporate front, are collectively violating their own anti-litigation norms. For example, there was a protracted litigation over the loss by fire of a feed elevator at a colony, allegedly caused by negligent advice given by the agent of the feed company. The case was settled on the eve of trial.[108] In another case the Hutterite insurance company disputed the amount of loss and also brought a cross-claim against an insurance agency in a case of a power outage leading to a loss of hogs.[109]

Finally, there was also a case where two Hutterite men were helping to load some concrete slabs that their colony had purchased from Barkman Concrete in Steinbach, Manitoba. During the process of loading, one of the slabs slipped off the forklift operated by an employee of Barkman and injured the two Hutterite customers. One of the men was hospitalized for a month and suffered permanent disability. The other man also suffered various less severe injuries. Assuming there was evidence of negligence on the part of the employee, the two men might have a good claim to receive compensation for the injuries, and presumably Barkman would have liability insurance to cover just such claims. But could the two Hutterite men sue to recover damages? Obviously if they were members of a colony, any recovery would be given over to the colony, since they could not have individual entitlement to property. What is interesting in this case is that the two men assigned their claim to a third Hutterite individual (it is unclear as to whether he was also a member of the colony

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[105] *Hutterian Brethren of Red Willow* v. *Bradshaw* [1962] S.J. No. 119 (Sask. Q.B.).

[106] *Hutterian Brethren Church of Hillcrest* v. *Willms and Crossmount Farm Co. Ltd.* (1982), 18 Sask. R. 180 (Q.B).

[107] *Hutterian Brethren Church of Standoff Colony v. Child* (1988), 62 Alta. L. R (2d) 36 (C.A.), re fire spread to colony land from burning vehicle.

[108] *New Rosedale Colony* v. *Carlson Feeds*, Manitoba Q. B., *Case File CI 83-01-011151.*

[109] *Designated Genetics* v. *H. B. Mutual Insurance and Ranger Insurance Brokers*, Manitoba Q. B., *Case File CI 96-01-97288.*

or was living off a colony) and this individual then filed a statement of claim.[110] There was no statement of defence filed and the case was quickly discontinued.[111] Presumably there was a settlement, but we have no information on the matter.

Despite a handful of these cases just noted, it is my contention that the traditional approach of not bringing cases to court against individuals or private entities was until recently a very solid part of the inside law of Hutterites. It must be said that more recently in Manitoba the traditional approach has broken down. As the Hutterites move into manufacturing and marketing of products outside the traditional agricultural products sector, it will be increasingly difficult to turn the other cheek when products are delivered and never paid for, or supplies are purchased that turn out to be faulty, or goods are manufactured and subsequent warranty disputes arise. If it became generally known that the Hutterites never sued in court, there might be opportunity for the unscrupulous to take advantage of them. While these pressures to litigate are understandable, it must be said that the willingness to sue outsiders can also be traced directly to the willingness of Hutterite leaders to sue *insiders* and litigate ecclesiastical disputes. How can the church now claim to have a prohibition on aggressive lawsuits as against outsiders, when the church leaders are willing to go to law as against their own members?

III. HUTTERITE LITIGATION INVOLVING INTERNAL RELATIONS

When we turn to the Hutterite cases in this category we find that, until the *Lakeside* litigation, the previous four cases that we have been able to identify have all dealt with individuals or groups making a claim for some portion of colony assets. A subsidiary issue in some of these cases was the legality of the excommunication of members. Often with regrets about the unfairness of the inside law of Hutterites, the courts in these cases have refused to privatize communal property. It is also noteworthy that in every case the action was initiated by individual Hutterites who had left the colony or had been excommunicated, and not by the colony itself, as was the case in *Lakeside*. Because these cases are relevant to *Lakeside* we need to expand our treatment of them.

1. The *Raley* Case: Privatization Rejected, But Division Ordered.

The first case dealing with a claim for colony assets was decided on December 13, 1920 before Mr. Justice Walsh of the Supreme Court of Alberta, Trial Division.[112] The information in the reported decision is sketchy at best. Apparently the Foster Colony and the Lake Byron Colony of the Darius-Leut were about 20 miles apart from each other in South Dakota. We are not told whether these were two separate colonies established out of the original Darius colony of Wolf Creek, or

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[110] *Waldner* v. *Barkman Concrete*, Statement of Claim, June 6, 1989, Manitoba Q.B. *Case File 89-01-38907.*

[111] Notice of Discontinuance, July 27, 1989.

[112] *Hofer* v. *Waldner* [1921] 1 W.W.R. 177 (Alta. S. Ct., T. Div.).

whether due to a problem with getting contiguous land, there was really only one colony that resided in two locations. At any rate, the trial judge accepted the argument that there were two separate colonies, except that the Foster Colony did not have its own minister to head the colony. Instead, the minister of the Lake Byron Colony, a Mr. Waldner, also served as minister of the Foster Colony. In addition, while the two colonies were separate for most purposes, the land of both colonies was held in trust under the name of the Hutterite Society of Wolf Creek. In 1918, under the leadership of Mr. Waldner, both the Foster Colony and the Lake Byron Colony were sold, and land was bought in Alberta. It was alleged that there was an agreement that two colonies would be established in Alberta. However, instead of establishing two colonies in Alberta, the assets were consolidated and one colony was established called the Raley Colony. Thus the Foster people and the Lake Byron people were brought together in one colony under the leadership of Waldner.

It is interesting to compare this information taken from the judicial decision with the geneological map of Hutterite colonies. Here there is no mention of a Foster or a Lake Byron colony, but rather that a colony called Beadle was established in South Dakota in 1905 as a daughter colony of Wolf Creek and this colony moved in 1918 to a colony in Alberta which was called Raley, according to one map,[113] and West Raley according to another.[114] Perhaps this casts some doubt on the judicial conclusion that there were two separate colonies.

From the few facts given in the reported decision we do not really know any details of the disputes that subsequently arose when the colony or colonies moved to Canada. What is clear, however, is that various members of the so called Foster colony were purportedly placed under some form of church discipline and by the time of the court action they had left the colony. What little can be gleaned from the court decision is that at least three of the four adult men on the Foster side did not like the leadership of Mr. Waldner. These three men and their wives eventually sued Mr. Waldner as trustee for the rest of the colony at Raley, Alberta. The plaintiffs claimed their share in the assets of the Raley colony. That these individuals would bring a lawsuit against their minister and former community was a gross violation of traditional Hutterian norms.

Mr. Justice Walsh firmly rejected the plaintiffs attempt to privatize some portion of the community property of the colony. Walsh affirmed the basic principle that the plaintiffs were not entitled to any *personal* share in the colony. He said:

> When they joined the church they did so upon the distinct understanding that they would have no individual interest in the property which was common to them and all other members of it. They knew and they agreed that so long as they lived and remained members of the church they and their families would be fed and clothed and cared for in sickness and otherwise

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[113] As found in John A. Hostetler, *Hutterite Society*, (Baltimore: Johns Hopkins U. Press, 1974) at 368.

[114] Fold out pages at the back of John Hofer, *The History of the Hutterites* (Altona: Friesen and Sons, Revised ed., 1988).

> provided for to the extent of their actual needs and that upon their death those whom they left behind them would be similarly cared for, but they also knew that no property in the community holdings would ever vest in them and that if they left the church they would go out empty handed. This was a solemn compact between them and those who in like spirit and under the same pledge formed with them the church.[115]

Here we see that the court was upholding the inside law of Hutterites partly by fitting it into an existing outside law concept of contract or covenant. The plaintiffs had made a contract with each other and the defendants not to ever privatize the common property of the group and the court was holding them to the bargain.

While rejecting the plaintiff's claim to privatize the colony, there was one exception that the court accepted. One of the plaintiffs, Mr. John B. Hofer, had married a Prairieleut (non-colony) widow, Barbara Wipf, who had two young sons. When her husband had died, he had left property to Barbara and the two sons in equal shares, and when Barbara married Mr. Hofer, she eventually brought the proceeds of the sale of her former husband's lands and goods and gave them to the colony. Mr. Justice Walsh stated that a convert who brings private property and by contract puts it into the collective pot cannot later take it back out of the collective pot. But the two young sons never had the capacity to agree that the one-third interest that each of them had in their father's estate should now be collective Hutterite church property. Thus as to these two infant plaintiffs, the Raley Colony was responsible to pay out whatever value of their father's estate plus interest was due to them.

However, as to the adult plaintiffs, Walsh J. still found a way to give the plaintiffs what they wanted. During the trial, the plaintiffs were allowed to amend their claim. Rather than characterizing the claim as one involving individual ex-Hutterites suing for a share of the collective after expulsion, the dispute was re-characterized as one involving the claim that there was a contract between members to divide the common property into two colonies rather than having only one. The court was being asked to enforce a contract for the division of community property between Hutterites rather than break a contract prohibiting the privatization of communal property when leaving the Hutterite fold. Walsh J. found as a fact that an oral agreement to sell the two colonies in South Dakota and move to Alberta was premised on the understanding that two colonies would again be established in Alberta. However, Mr. Waldner, as trustee for the assets of both colonies, had established only one colony in Alberta. Thus the plaintiff's were really claiming a breach of trust. The court could grant specific performance of the original agreement. This was not a case of turning communal property into individual privatized shares, but rather a case in which communal property remained communal property, but was being illegally handled by those entrusted with it. In making this finding the court claimed that it was not interfering with the doctrine of the church. It was not interfering with the principle of community of property by enforcing the understanding that there would be two colonies rather than one. On the point that the court should not intervene in what was essentially an ecclesiastical matter, Walsh stated:

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[115] *Supra* note 112 at 179.

> It is not an interference with a matter of purely domestic concern which the authorities of the church should be left to deal with, but one involving property rights which this Court has, I think, jurisdiction to deal with.[116]

The remedy to enforce the trust consisted of a court ordered division of the assets of the Raley Colony into two parts. One part proportional to the assets derived from the Foster Colony and one part proportional to the assets derived from the Lake Byron Colony. Since one of the original Foster Colony males sided with Waldner, he could choose within a month which of the two groups he would go with. If he stayed with the Waldner group, the proportion of the Foster group would be reduced by one-fourth. While colony division here was based on a contract to divide, the argument might be developed that in future cases, even without a contract to divide, a court might order the division of colony property in situations where you have a dispute between one group of Hutterites in schism from another group, as opposed to a dispute involving Hutterites simply leaving the colony, or being expelled on grounds clearly indicating a departure from the faith. Put another way, it is very different for a court to divide community property into two or more community pots, as opposed to changing community property into private property. But then once the property is divided, what happens if one of the groups, having claimed in court that they would be establishing a new colony, promptly then privatizes that pot?

It was noteworthy that Mr. Justice Walsh emphasized that the division of the colony did not mean the privatization of the colony. While the moveable property that the Foster group was now in control of would be held by Mr. John B. Hofer, the leader of the plaintiffs, in trust for that group, Walsh J. noted as to the land that:

> I do not think that I should compel the transfer to him of the lands which will be assigned to him as trustee for himself and the others in the same interest. All that they are entitled to is the use and occupation of these lands and the defendant Waldner's title will be subject to these rights.[117]

The implication here is that a second separate colony would be established within the territory of the present Raley colony rather than at a separate location.

Thus far, the Raley decision, upholding both a contract not to privatize and a contract to divide, seems quite justified, assuming the facts as found by the court. It is at the membership stage that the difficulty arises. If the plaintiffs were excommunicated from the church and colony, even if there was a contract to divide, they would have no rights to the use of the divided colony property. Walsh J. did not give very much of any factual details about the process of discipline in the Hutterite Church and specifically the process used in this case. Walsh treated the plaintiffs as still members of the church, even though the defendants considered them to be excommunicated. Walsh J. stated:

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[116] *Ibid*. at 182.

[117] *Ibid*. at 183.

> The impression left upon my mind by it was that though the plaintiffs had by their conduct in this matter broken the rules of the church and laid themselves open to exclusion from membership in it, nothing to accomplish that end had been done by the authorities and the plaintiffs, though offenders against the discipline of the church, were still regarded as having interests which the authorities always had, and were still willing to, recognize. The frequent form of the expression was that they had not been put out of the church but had put themselves out. I do not think that the forfeiture of all rights incidental to their membership followed automatically upon their commission of this offence, but that some action to that end was necessary on the part of the proper authorities and that action has never been taken. Furthermore their rights as members are expressly recognized and admitted by the statement of defence.[118]

By "offence", Walsh may have been referring to the bringing of the lawsuit, but it is not clear. In any case, this raises some questions. Because the case treated the plaintiffs as still members of the church, the court could uphold the contract to divide the colony, and give the appearance that it was not interfering with the doctrinal autonomy of the Church in regard to the rules of common property. But at the same time, by sliding over the fundamental questions of membership and excommunication, we might surmise that the effect of the judgment was to overrule the disciplinary process of the church. If the plaintiffs were in fact nonmembers as that issue was viewed from within the church, then the effect of the case came full circle back to a violation of the common property doctrine that expelled members have no legal right to receive a share of colony assets. Perhaps the Raley Colony could have subsequently taken whatever formal steps were necessary to excommunicate the plaintiffs and then brought action in court to reclaim the "Foster" colony assets, but the Hutterites, consistent with the anti-litigation norm, never initiated such a lawsuit

Did the plaintiffs establish a Hutterite colony, or did they privatize the common pot that the court gave them? Was a new colony established by the Foster plaintiffs on the Raley land, or elsewhere with assets from the Raley colony? A current list of colonies indicates that a colony now called West Raley was established in 1918 and is still in existence today. According to one geneological map, another colony was established out of this colony in 1922 and then became extinct.[119] If the Foster plaintiffs established this now extinct colony, we might well conclude that the common pot was indeed eventually privatized. On the other hand, the evidence is ambiguous, because another map suggests that the Raley colony split into the New York colony in 1924, which is an existing colony today, and then Raley became extinct when the remaining members moved to the West Raley colony in 1929.[120]

2. The *Felger* and *Big Bend* Cases: Privatization or Division?

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[118] *Ibid.*

[119] Hofer, *Supra* note 114.

[120] Hostetler, *Supra* note113 at 368-369.

Although we have very little information about them, there were at least two other Alberta cases in which Hutterites launched lawsuits so as to receive a portion of the assets of the colony they were leaving. It is entirely possible that the precedent set by Mr. Justice Walsh in 1920 provided the plaintiffs with the leverage they needed. In both cases the plaintiffs received assets, but we do not have any judicial records as to the bases for the awards. For example, we are told that a Hutterite family left the Felger Colony (Darius) in 1938 and commenced an action for compensation. Under a court settlement approved by Mr. Justice Tweedie of the Supreme Court of Alberta on March 1, 1938, George Hofer received $6,000 and his wive Susanna Hofer received $9,000 for herself and her six children, from the Felger Colony.[121] While the Felger colony itself was eventually excommunicated from the church and privatized, we do not know if George and Susanna took their settlement funds into another Hutterite colony that they joined, or whether this situation essentially amounted to the wrongful conversion of community property into private property, and the Felger colony decided not to contest the matter.

Shortly after the Felger settlement, there was apparently another lawsuit launched in Alberta, this time against the Big Bend colony. Again our information is limited. Michael Holzach, a young German news reporter and freelance writer, who in the late 1970's arrived uninvited to a Hutterite colony in Alberta and proceeded to stay with the Hutterites for a year, wrote a fascinating book on the Hutterites and his experiences on a number of colonies.[122] Holzach tells the following story about the Monarch colony, which was a colony that was never accepted into the wider Hutterite church:

> The stories that I have heard about the Monarch community are colourful and contradictory. Only one thing seems to be clear: On November 22 in the year 1938, the first preacher of the Big Ben[d] colony, Jakob Mendel, was taken out of office by the conference of the [Lehrer-Leut] preachers for bearing "false witness." They accused him of having registered and then sold for 600 dollars the patent for a rock-gathering machine which he had constructed himself. Mendel, who believed in acting in his brethren's community's interest, did not accept the judgment but continued to preach to part of the colony, namely his relatives. This constituted a schism within the community. The adversaries did not talk to each other any longer, they ate their meals in separate places, and their children were taught in two different classrooms. Neighbourly love was dead, and the community went to hell. In 1942 Jakob Mendel declared his willingness to split the community's property and to leave with his followers. The other party, however, did not want to give any "heavenly wealth" to the banned preacher. So the ex-preacher went before a worldly court and won: He built the new farm of Monarch next to the road to Lethbridge with 30,000 dollars from the colony's

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[121] As noted in a case dealing with the process of winding up a corporate farm that at one stage had been the Felger Hutterite Colony. See *Hutterian Brethren of Lethbridge* v. *Felger Farming Co.* [1984] A.J. No. 289 (Alta. Q.B.).

[122] Michael Holzach, *The Forgotten People* (Sioux Falls: Ex Machina Publishing, 1993). Originally published in 1980 in German as *Das Vergessene Volk: Ein Jahr bei den deutschen Hutteren in Kanada*.

treasury.[123]

We have no record of a "worldly court" dealing with this, but here again if we take the Halzach story as historically accurate, even though we have a violation of the anti-litigation norm, we have a plaintiff who is seeking assets, allegedly not to privatize them, but rather to establish another Hutterite colony. Perhaps, as in the *Felger* litigation, a settlement was made in the light of the precedent set by Mr. Justice Walsh in 1920. If the Hutterites thought of the Raley plaintiffs as having been excommunicated and yet successfully getting a portion of the colony when they sued, a belief may have developed among Hutterites that the courts would award property to departing members, so long as they established colonies rather than privatized the property? It is quite possible that Hutterite leaders would not know that the *Raley* case, even if it mis-characterized the status of the plaintiffs, was grounded on the finding of a preexisting agreement to divide.

Returning to the Felger situation, many decades later in the 1980's a dispute arose over entitlement and valuation of shares in a corporate farm in Alberta.[124] This corporate farm, now valued at $5,700,000, had at one time been the Felger Hutterite colony. The Felger colony near Lethbridge Alberta was established in 1926 and then in 1927, Felger established the Pincher Creek Colony. Those who remained at Felger gradually rejected their religious heritage. At some stage in the 1940's the colony had been excommunicated from the Hutterian Brethren Church. At the first meeting of Managers of the newly incorporated Hutterian Brethren Church held at Wilson Colony in Alberta in November 1951 the Minutes read:

> The matter of the Felger Colony was discussed and it was duly resolved that the Felger Colony be not at present admitted as a Congregation of the Church, but that the Darius-Leut Conference endeavour to have the Felger Colony fit themselves for membership at a later date.[125]

However, the colony never did come back into the fold.

Various disputes had broken out at the colony between the members of the extended family of Darius Walter I. As noted above, one daughter and her husband had already left the colony in 1938, and then had sued the colony for a share of assets, and money had been paid to the departing family. After the death of the patriarch in 1943, two sons and most of their families left the colony and moved to the Spring Creek Colony in Montana. The last remaining son, Darius Walter II, became the head of the colony and all assets were held by him as a sole trustee. The colony eventually

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[123] *Ibid*. at 182-183.

[124] *Walter's Estate v. Walter* (1986), 75 A. R. 330 (Alta. C.A.). See also on a preliminary issue of notice of winding up and issues to be addressed at trial, *Hutterian Brethren of Lethbridge* v. *Felger Farming Co.*[1984] A.J. No. 289 (Alta. Q.B.).

[125] Minutes of the Hutterian Brethren Church, Exhibit 142 at Lakeside Trial #1. On file with author.

became a partnership of nine members. Much of the business and management of the colony seems to have devolved to a grandson, Jacob Walter Jr., who remained behind when his parents and siblings left for Spring Creek. One of the issues in the subsequent winding up litigation was whether Jacob Walter Jr. (who died in 1984) had over the years diverted funds from Felger colony to Spring Creek colony without the permission of the other members of the Felger partnership.

On application of Darius Walter II for directions as to entitlements to shares and the values of shares, the court determined first that various former members who had left the colony or had received compensation settlements were not entitled to current shares. As to the nine individuals who had remained at the privatized "colony", the court determined that the shares should not be valued on an equal pro rata bases as between the nine individuals, nor on the bases of splitting assets in three parts as between the three extended families of Darius Walter I who had remained at Felger. Rather the court held that the values should reflect the number of years that each person had lived and contributed to the colony-farm. In addition, as to the share going to the estate of Jacob Walter Jr., the amount would be reduced by about $163,000 due to the diversion of assets to Spring Creek. The estate of Jacob Walter Jr. appealed this ruling, but it was upheld by the Court of Appeal.[126]

It is ironic that the payment of funds to the Spring Creek colony was treated by the court as "conversion", when more properly the real conversion occurred when the Felger colony was allowed to privatize church communal property. Although the various Walter family members who remained at Felger and worked the land for many years after leaving the church were surely entitled to reap the financial rewards of their labour, why should some excommunicated Hutterites gain very substantial economic rewards, as indicated by the millions of dollars in the Felger case, while other Hutterites who are excommunicated, have to leave without a penny in their pocket after a lifetime of labour? Hutterite colonies are established by the sweat and capital of the mother colony which gives birth to them, and the mother colony in turn was produced by the sweat and capital of an earlier colony, and so forth. That the current members of any colony could simply renounce their faith and then divide the millions of dollars of assets as between them seems to be a betrayal of the trust of bygone generations, does it not? Is it fair that a group of Hutterites having control over a particular congregation can act together to leave the church or get excommunicated and retain the assets, but when an individual Hutterite or minority group at a colony leaves or gets excommunicated they take nothing with them?

To guard against such conversion, the *Constitution of the Hutterite Church* as formulated in 1950 required that, "no congregation or community shall be dissolved without the consent of all of its members."[127] But it would be relatively easy for a majority of members bent on the privatization of a colony to first take away membership from the dissenting minority and then achieve a unanimous vote to privatize. Thus, when the Hutterite church adopted a new constitution in 1993, the provisions

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[126] *Supra* note 124.

[127] Art. 44, *Constitution of the Hutterian Brethren Church and Rules as To Community of Property*, Aug. 1, 1950. On File with Author.

were tightened so as to state:

> 44. No Colony shall be dissolved without the consent of all the members and in the event of dissolution no individual member shall be entitled to any of the assets of the Colony but such assets shall be distributed and transferred to the Church or as otherwise provided for in the by-laws, rules and regulations of that Colony.[128]

Thus, if a Felger type of situation arose today at a colony, even by a unanimous vote to privatize, subject to the inside law on whether the church should litigate, it would be probable that the larger Hutterian church would have a claim on the assets, even though the titles to colony property are not formally held by the higher branch of the church. Because the more recent *Felger* case essentially dealt with disputes over what had long since become private property, the case is not particularly useful as any sort of precedent dealing with true communal property.

3. The *Bon Homme* Case: **Privatization Refused.**

In 1961 the South Dakota Supreme Court decided the case of *Hofer* v. *Bon Homme Hutterian Brethren.*[129] The plaintiff was born at the colony in 1920 and grew up as a Hutterite. However, at the age of 22 he left the colony. For six years he was in the world, working at various jobs such as being a welder, and then in 1947 he returned to the colony at the age of 28. He remained at the colony for the next 12 years. However, despite indicating in the early period that he wanted to become a member, he never did apply to be baptized into the church so that he would become a formal member of the colony. During the dozen years that he was on the colony he had a two-room apartment of his own in a house where his parents and other members of his family lived. He was given work to do and treated like other members. When he finally left he claimed that the colony owed him about $200 a month for his labour, amounting to about $28,000. He sued the colony on the ground that an implied contract of employment had existed between the colony and himself. The Court rejected this argument. While in theory a colony could hire someone and pay a salary, there was no evidence here that Hofer asked or expected to be treated outside the normal rule, which is that no residents or members of the colony receive individual pay for services rendered. To that degree, this case may be seen as an example of the outside court upholding the inside law of the Hutterites.

4. The *Interlake* Case: Both Privatization and Division Refused.

The *Interlake* case, not to be confused with the subsequent *Lakeside* case, serves as the most important past precedent for the *Lakeside* and other litigation that we will examine in this book. Given the importance of this case, a more detailed examination is necessary. The *Interlake* case went

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[128] Art. 44, *Constitution of the Hutterian Brethren Church and Rules as To Community of Property*, July 21, 1993. On File with Author.

[129] *Hofer* v. *Bon Homme Hutterian Brethren* (1961), 109 N.W. 2d 258 (S.D.S.C).

to trial before Dickson J. of the Manitoba Queen's Bench in 1966,[130] eventually was appealed to the Manitoba Court of Appeal,[131] and then went all the way up to the Supreme Court of Canada in 1970.[132] While the court refused to allow church property to be privatized, the inside law was nevertheless destabilized in the process, as several judges expressed deep regrets at the harshness of the rule, even calling for legislation to overturn it. Furthermore, because the case dealt with a clear example of joining a different church radically different from the Hutterite church, it did not necessarily close the door to the possibility that courts might divide assets in the future, when there is a schism between Hutterites, as opposed to a a situation where Hutterites are clearly changing their religion and leaving colony life.

In 1960, the Rock Lake colony in Manitoba established a "daughter" colony called the Interlake colony near Teulon, Manitoba. The new colony was dominated by the extended families of the siblings of one Hofer family. In the *Interlake* case four brothers eventually sued as plaintiffs, and they brought the case against their other four brothers, two of whom were the main leaders of the colony, and two of whom were not as yet voting members. Another defendant was a cousin of the plaintiffs. At this time the Interlake colony had seven male voting members, six of whom were brothers. All of the seven male voting members had wives and children. At the time of the dispute there were 84 people at the colony.

One of the plaintiffs, Mr. Benjamin Hofer, was the prime player in the scenario. He began to read the magazine, "The Plain Truth" back in 1952 while still a member of Rock Lake. His brother, David Hofer, began to study the magazine in 1960. That these two brothers were studying the magazine of the Radio Church of God headed by Herbert Armstrong of Pasadena California did not go unnoticed within the wider Schmiedeleut Conference of Hutterian Brethren. In 1963 and 1964 there were several occasions where Schmiedeleut ministers met with these two men to counsel them. After an earlier lengthy meeting with 20 ministers, and a grace period of 10 days in which the men were to recant, 24 ministers from various colonies of the Schmiedeleut Conference converged on the Interlake colony to talk with the two Hofer brothers. After much discussion of doctrinal matters, the brothers were asked if they would accept the punishment of "unfrieden", which is a level of shunning. They stated that they would not accept the punishment, but the ministers voted to impose it. A minority of the ministers wanted an even more severe punishment. As stated by Mr. Justice Dickson at trial:

The purpose of the punishment of unfrieden, through the pressure of shunning, is to cause the

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[130] *Benjamin Hofer, John Hofer, Joseph Hofer and David Hofer* v. *Zacharias Hofer, Jacob Hofer and Jacob S. Hofer, as Trustees of the Interlake Colony* (1966), 59 D.L.R. (2d) 723 (Man.Q.B.). It should be noted that only a portion of Dickson's judgment was reported. The whole judgment in the form of 33 single spaced typescript was reproduced by the plaintiffs at the subsequent *Lakeside* case. On file with author.

[131] *Hofer* v. *Hofer* (1967), 65 D.L.R. (2d) 607 (Man.CA).

[132] *Hofer* v. *Hofer* [1970] S.C.R. 958, (1970), 73 W.W.R. 644 (S.C.C).

> deviant to repent. When a member is in unfrieden he is not to associate with any other member, including his wife, nor eat in the public dining room; he is required to sleep alone; he must not leave the farm on business or on visiting trips; he is expected to attend church but to sit by the door and not with the congregation; he is expected to work. It is assumed that if the offender is a brother in spirit the initiative will be taken by him and that he will ask for his penalty and, having served it, which in the case of the shunning experienced in unfrieden may continue for two or three weeks, he will return to the fold.[133]

Since the "unfrieden" in this case was not accepted by the two brothers, a meeting of senior ministers was held and it was decided that two senior ministers should visit the brothers at Interlake again, and if they were still not persuaded to come back into the fold, they would be expelled from the church. This was the penalty of "Ausschluss" which was clearly of much greater severity than "Unfrieden". The senior ministers called a meeting of the voting members of Interlake on June 13, 1964. The two brothers were allowed to attend the meeting, but being in Unfreiden had to stand by the door. The impact of the meeting was outlined by Dickson J. as follows:

> I find that after lengthy discussion they were warned that they could no longer be members unless they changed their minds, to which plaintiff Ben Hofer, after saying that he was getting stronger every day in his religion, added, addressing the Rev. Jacob Kleinsasser, "Jake, it is no use. Do not waste time. I have my conviction. You just prove me otherwise." The Rev. Kleinsasser then said something to the effect, "We have tried so much. We have not been able to change you. But do you know you cannot stay members with us. Consider it." Plaintiffs Ben Hofer and David Hofer would not change. The Rev. Kleinsasser said, "Well, you are making your own decision, you do as you please, and we will have to proceed further."[134]

Thereafter the two dissenting brothers left the meeting and the remaining five male voting members of Interlake voted to expel the two men from membership in the colony. Given that the wives of the two men also supported the Church of God, they would also be expelled.

The two dissenting families had been given the penalty of "Ausschluss" but they did not leave the colony. While living at Interlake, they were baptized in Winnipeg and formally joined the Church of God. Later in 1964 the two brothers travelled to California to visit Ambassador College, where "The Plain Truth" was published. Of greater significance however, was that the two dissenters managed to persuade two more of their brothers to read the magazine, "The Plain Truth". Now John and Joseph Hofer began to read the magazine and although they had originally agreed to put their brothers Ben and Dave under Ausschluss, they were now joining the other side.

The process of discipline in terms of John and Joseph started in 1965. Again various visits to Interlake by senior ministers took place. Eventually, it all boiled down to another meeting of the

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[133] *Supra* note 130, Unpublished portion of Dickson J. opinion. Typescript at 13.

[134] *Ibid*. at 15.

five remaining members of Interlake on March 17, 1965. Joseph chose not to be present, but at this meeting Joseph and John were now also expelled from membership as Ben and Dave had been the previous year. Joseph and John also were subsequently baptized into the Church of God.

Not surprisingly, the dissenters demanded a share of the colony assets before they would be induced to leave the colony, and they were strengthened by the fact that the Church of God faction actually constituted the majority group at Interlake in terms of voting males, even though as a result of differential dates of affiliation, they had been excommunicated by majority vote. After the Hutterian leaders refused any sort of compensation whatsoever, the four Hofer brothers who had renounced their Hutterite religion in favor of Armstrong's Church of God, initiated a lawsuit against the colony. The lawsuit was particularly threatening to the Hutterite church because of the way the plaintiffs framed the case. They wanted the colony to be conceptualized as having two components, a church component from which they had been excommunicated, and a business component in which they had existing partnership rights alongside the other members. Thus they sought a court order to place the colony as a business enterprise into receivership and wind it up so as to receive their proportionate shares. In essence one might argue that they sought the privatization of all Hutterite colonies in Canada should this conception be adopted by the courts.

The colony might have chosen to simply defend the suit under the theory that the court would uphold the principle that the plaintiffs had no right to colony assets and then the plaintiffs would voluntarily leave the colony. But instead of this, the colony brought a counterclaim for a declaration that the plaintiffs had been validly expelled, and that they should therefore vacate from the colony and deliver up possession of any property belonging to the colony. Technically speaking, and we do not know to what degree legal counsel for the colony clarified the meaning of a counterclaim with the colony and church leaders of the Schmiedeleut, the bringing of a counterclaim meant that the church itself was now countersuing and calling on the violence of the State to throw the dissenters off the colony, if they did not obey the court order to vacate.

After presiding at the trial, Mr. Justice Dickson's judgement was released in November 1966. He emphatically rejected the idea that the colony should be viewed as a business enterprise. He stated:

> To a Hutterian the whole life is the Church. The colony is a congregation of people in spiritual brotherhood... I find that the [colony] is a congregation of the Hutterian Brethren Church... The Articles must not be construed in a vacuum but rather in the light of Hutterianism. What is being dealt with here is a church, not a business enterprise. This is clear from the Articles and from the entire evidence. The signatories are not partners. There are no partnership assets, only church assets.[135]

As to the excommunication from the church, Dickson J. reviewed the requirements as outlined in the Articles of Association of the Colony:

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[135] *Supra* note 130 at Typescript 3, 8, and published report 733.

> Any member of the Colony may be expelled or dismissed from the Colony at any General or Special Meeting of the Colony upon a majority vote of all the members thereof...[136]

Mr. Justice Dickson also pointed out that the men had notice of the meetings and had the right to make their views known. More fundamentally, while the Articles of Association of the colony provided for expulsion by majority vote, this was subject to a prior requirement of the Articles of Association, namely that members of the colony had to be members of the Hutterian Brethren Church.[137] Suppose that a majority of the colony left the Hutterian church and then voted out the minority who remained faithful to the church. In fact in this case there was a majority who had been expelled from membership by a minority. Even though a majority at each meeting, 5 to 2 at the first, and 3 to 2 (in effect) at the second, voted to expel, cumulatively the dissidents outnumbered the traditionalists by a margin of 4 to 3.

In answer to this, following the leading precedent from the House of Lords,[138] Dickson J. reasserted the basic principle that, absent a formal church charter or constitution that allows for amending religious doctrine or determining membership by majority vote alone, the property of a religious organization is normally impressed with a trust which requires that the property can only be used for the original purpose for which the organization was established. This may mean of course that a small minority of the organization will get all the assets of the organization if a court determines that the vast majority has fundamentally departed from the theology that is explicit in the constitution of the organization, or implicit in the founding of the organization. Those that dissent are free to leave and form a new congregation, but they are not free to take over the property of the old congregation, even if they are in the majority in terms of a doctrinal schism. As stated in a famous American case:

> The guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may be sleeping in their graves.[139]

Indeed Mr. Justice Dickson went so far as to consider what would happen if all seven members of Interlake joined the Church of God and renounced the Hutterian Brethren Church. Unlike the Felger situation which occurred before this case, Dickson concluded that even though the Articles

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[136] Article 39, *Articles of Association of Interlake Colony*, May 1961. On file with author. [Henceforth *Interlake Articles*].

[137] Article 3, *Interlake Articles*.

[138] *Free Church of Scotland* [1904] A.C. 515.

[139] *Schnorr's Appeal* (1870), 67 Pa. St. R. 138 at 146.

of Association stated that the colony could be dissolved only by unanimous vote,[140] in the circumstances where the members were changing religious affiliation, the colony should not be allowed to privatize the assets:

> In my view, even if all seven of the signatories to the Articles of Association were to abandon the Hutterian faith and unanimously attempt to dissolve the Colony and divide the assets among themselves it would be repugnant to principle and authority to allow this. It appears to me that no other conclusion is possible than that the Rock Lake Colony of Hutterian Brethren established the Interlake Colony of Hutterian Brethren and endowed it with the implied understanding that the Interlake Colony would constitute and continue as a congregation of the Hutterian Brethren Church.[141]

Mr. Justice Dickson pointed out the fundamental differences in the beliefs of the Hutterites as opposed to the beliefs of the Church of God. Some of these included the Church of God's views on Saturday observance, not eating pork, keeping various religious festivals following Old Testament formulations, and not believing in community of property. Of course, Mr. Justice Dickson pointed out that it was not for the court to decide who was right or wrong as a matter of theological truth, but it was perfectly obvious in this case as a matter of fact that the beliefs of the plaintiffs departed substantially from the historic beliefs of the Hutterian Brethren Church. He even noted that:

> All four plaintiffs appeared in court clean shaven, contrary to the custom of the Hutterian men who wear beards. All four plaintiffs appeared in Court in modern dress, contrary to the custom of Hutterian men to wear plain black jackets buttoned to the neck and wide black pants.[142]

Given the earlier *Raley* precedent from Alberta,[143] the plaintiffs at one stage in the trial suggested that they wanted to establish a new colony and practice community of goods even if that aspect was not required by the Church of God, but this assertion did nothing to detract from Dickson's conclusion that the plaintiffs had left the Hutterite faith. An attempt to argue division of common property, as opposed to privatization of common property, will equally fail when the group seeking the division has adopted a contrary religion.

As in the *Raley* case, Dickson also grounded the refusal to privatize on a contract or compact or constitution that the members had made with each other. Dickson pointed out that the Articles of Association, signed by the members, explicitly rejected the plaintiffs claim to be given a share of the

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[140] Article 37, *Interlake Artcles.*

[141] *Supra* note 130 at 730.

[142] *Ibid.* at 17 (Typescript).

[143] *Supra* note 112.

assets.[144] Denying that these principles were void as being contrary to public policy, Dickson ruled against the plaintiffs claim and granted to the defendants the counterclaim sought- an order that the plaintiffs leave the colony with no assets. He did note however, that:

> Counsel for defendants have stated that defendants are willing to assist plaintiffs to move from the Colony, and are prepared to permit their wives and children to remain at the Colony until plaintiffs have established themselves elsewhere.[145]

The plaintiffs appealed to the Manitoba Court of Appeal. About a year later in November 1967, a unanimous five justice panel of the Manitoba Court of Appeal affirmed the judgment of Dickson.[146] The opinion for the court was authored by Justice Freedman. A point that the plaintiffs particularly emphasized on appeal involved a direct assault on the community property regime. They argued that the covenants in the Articles of Association that in effect called for expelled members to leave a colony with only the shirt on their back after a life time of labour, were contrary to public policy and should be held by the court to be unenforceable. To this, Freedman J.A. stated:

> It may be well to add that the position of the plaintiffs is one that excites some sympathy. They are obliged to leave the colony without a right to any share of its property. But if this result appears harsh, it is the consequence of their own voluntary and deliberate acts.[147]

The plaintiffs now appealed to the Supreme Court of Canada and about three years later the final judicial determination in this matter was delivered. In May of 1970 a seven member bench upheld the trial decision and the appeal court decision, 6 to 1.[148] However, while the result in this case was nearly unanimous, there were some comments made by a number of judges that might yet come back to haunt the church.

The majority judgment was authored by Mr. Justice Ritchie, with Justices Martland, Judson and Hall concurring, although Hall added some separate comments. This four person majority judgment upheld the decision of Dickson J. at trial, and the Manitoba Court of Appeal. After affirming that the appellants had been validly expelled according to the Articles of Association of the colony, the majority decision turned to the issue of whether these Articles should be declared void as contrary to public policy. On this point, Ritchie J.A. was emphatic. He stated:

There is no doubt that the Hutterian way of life is not that of the vast majority of Canadians,

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[144] For example, Articles 30, 31, 32, 38. *Interlake Articles.*

[145] *Supra* note 130 at 736.

[146] *Supra* note 131.

[147] *Ibid.* at 620.

[148] *Supra* note 132.

> but it makes manifest a form of religious philosophy to which any Canadian can subscribe and it appears to me that if any individual either through birth within the community or by choice wishes to subscribe to such a rigid form of life and to subject himself to the harsh disciplines of the Hutterian Church, he is free to do so. I can see nothing contrary to public policy in the continued existence of these communities, living as they do in accordance with their own rules and beliefs...[149]

It was this public policy argument that caused Mr. Justice Hall to add a few words to his concurrence. Hall was obviously uneasy with this "freedom to make a harsh contract" argument. In addition to raising questions about the treatment of children and others at the colony who were not as yet formal members, Hall J. turned to the property issue and stated:

> While agreeing that this appeal fails, I must, however, express my abhorrence at the treatment accorded the appellants by their erstwhile co-religionists. The insults and gross indignities inflicted on these men and their families as disclosed in the evidence is foreign to the whole concept of life in Canada, whether lived in a community or not. The rigidity of the law ...which deprives a dissident group, whether large or small, of all rights in the property and assets of a religious community should, I think, be softened by appropriate legislation under which a formula might be devised so as to permit a dissenter and his family to leave a community such as this one in dignity and with a severance adjustment corresponding in some degree to the contribution made by the dissident member in his years of service to the community. As it is, the dissenter, as my brother Pigeon points out, cannot even claim ownership to the clothes he is wearing as he departs.[150]

The second main judgment was written by Chief Justice Cartwright and concurred in by Spence J. While agreeing with the result and much of Ritchie's judgment, the basic disagreement dealt with the nature of the Hutterite colony. In the courts below, and in Ritchie's judgment, the colony as a whole, as a totality, was considered to be a church. However, Cartwright and Spence joined Pigeon in dissent in forming the minority opinion that at the colony level there existed a congregation of the Hutterian Brethren Church, but the colony as a totality was not a church, but rather was a business enterprise made up of a communal farm.

This different characterization of the colony meant that Cartwright and Spence disagreed with the majority that church excommunication alone would translate into automatic removal of membership in the business enterprise, and loss of claims as to business assets. Rather, the plaintiffs would have to be validly expelled from the colony as a business entity in accordance with the Articles of Association which acted as a kind of partnership agreement on these points. For Cartwright and Spence this different characterization made no difference to the final result in this case, however. The Articles of Association, viewed in part as a business contract, nevertheless included the provision that

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[149] *Ibid.* at 657.

[150] *Ibid*. at 658.

a member of the business organization could be expelled from membership for joining a different religious faith, and the Articles made it clear that members could have no claim on the assets when they were expelled for changing religious affiliation. These provisions were not contrary to public policy. So even if the colony was a business organization rather than a church, such an organization could require its members to have a particular faith.

Cartwright's judgment also noted the harshness of the communal property regime for expelled members. He stated:

> It is, I think, a matter of regret that the appellants, whose efforts have no doubt made a large contribution to the assets of the Colony, receive no compensation for their life's work and the learned trial Judge was not guilty of over-statement when he referred to the mistreatment of them and members of their families as strange, repellant and excessive; but the task of the courts is to deal with the rights of the parties according to law.[151]

The third judgment, and the longest, was authored by Mr. Justice Pigeon in dissent. In terms of the legal characterization of the colony and the scope of religion, Pigeon concluded that the colony was not a church, but rather a commercial undertaking. He drew an anaemic picture of what legally could constitute religion. He stated:

> Of course, some small part of the land is used for a place of worship but it is clear that, looking at the matter according to ordinary principles, this is only an extremely minor part.[152]

This reduction of religion to some beliefs you have in your head and some worship practices, rather than the totality of life as encompassed by Anabaptist theology, grants very little protection for religious individuals and collectivities in the face of laws that impose burdens on, or violate religious faith.

Now that the case was re-characterized as a fight over business assets rather than over the property of a church, Mr. Justice Pigeon, like Cartwright, turned to contract law. The difference was that Pigeon, unlike Cartwright, concluded that this contract should be declared void as contrary to public policy. Cartwright thought that business partnerships could still be formed around exclusive religious beliefs and lifestyle codes but Pigeon did not think so. Pigeon got to this point by turning the tables, as it were, on the religious freedom arguments in the case. Rather than affirming the religious freedom of Hutterites to hold and enforce their communal property regime, he focussed on the alleged religious freedom of the individual plaintiffs to switch religions. The shunning and other "indignities" associated with Hutterian discipline, and the harsh consequences of having to leave without a penny of assets, meant that the freedom of religion of Hutterites was being denied by their

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[151] *Ibid*. at 648.

[152] *Ibid*. at 664.

own church. As a matter of striking down the inside law of the Hutterites denying individual property entitlements as being contrary to public policy, Pigeon seemed to conflate freedom *of* religion, as a matter of protection from governmental action that interferes with religion, with freedom *within* religion, which is quite a different matter.

At this level it appears that Mr. Pigeon's brand of religious freedom would involve state regulation of religion, at least in terms of striking down provisions that interfere with freedom to switch religions. But at another level the argument could be made that Pigeon was only calling for state regulation in those areas that were outside of church activities, narrowly defined. A member of a church, for example, might well be denied a share in the church property if he or she was expelled from membership in the church, even if that member had contributed to the church for many years. But at the same time the member of a church might own a business and insist on hiring only co-religionists. This might be deemed contrary to public policy. For example, human rights legislation prohibiting discrimination on the bases of religion might be applied in the commercial sphere of business, as opposed to the sphere of employment within various religious organizations. So the central point for Pigeon in dissent was that the colony and the assets of the colony were not a church, as he narrowly defined it, but rather a commercial organization. Thus, as to the requirement that membership in the commercial enterprise was contingent on membership in the church, Pigeon concluded:

> ..I am of the opinion that such a provision would be unenforceable as contrary to freedom of religion and also contrary to public policy in the context of such an association or partnership as these colonies existing for commercial purposes, as opposed to Church bodies or other religious or charitable organizations that may be subject to the rules applicable to Churches and as to which no opinion is expressed.[153]

While this is a dissenting judgment it illustrates the danger of litigating ecclesiastical disputes. In essence, Pigeon was of the view that the inside religious law of the Hutterites should be overruled by the outside law of the host society. If Pigeon's decision had formed the majority, the effect would have been to privatize every Hutterite colony in Canada, but for the little area of the colony used for worship services. Instead of communal church property, the property of a Hutterite colony would be subject to the rules of business partnerships. Furthermore, even though this was not the view of the majority, many of the judges who sided with the majority nevertheless expressed regrets and disapproval as to the content of the inside religious law of the Hutterites. Such disapproval may well lead to further challenges of the inside law.

In any event, as a result of the majority judgments in the *Interlake* case, the brothers who joined the Radio Church of God were unsuccessful at getting any assets of the colony, and the four families, amounting to 34 people, left Interlake.[154] But as we have just pointed out, this was not

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[153] *Ibid*. at 671.

[154] As reported by Hostetler, *Supra* note 113 at 278.

necessarily a great legal victory for the Hutterite church. About a decade later, when Mr. Justice Dickson had been elevated to the Supreme Court of Canada, he gave a lecture at the University of Toronto where among other topics he reflected on the *Interlake* case. He concluded, "So ended a long, hotly contested, and, in many respects tragic, piece of litigation."[155]

This completes a bare first draft survey of the Hutterite litigation before the many cases that arose out of the Lakeside case and the subsequent schism within the Schmiedeleut.

[155] Brian Dickson, "The Role and Function of Judges" (1980) 14 Law Society of Upper Canada Gazette 138 at 152-154, 171-172,188-189 at 189.