Childhood and the Law

A Review of *Childhood and the Law in Canada: The Family/State Relationship* **by Patrick Joseph Ryan**

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Childhood and the Law in Canada: The Family/State Relationship *provides comprehensive case reviews of six leading Canadian decisions regarding the relationships among children, their parents, and the state. Each chapter provides the facts of the case, places these facts in historical context, and closes with a discussion of the social implications of the law, subsequent statutory reform, and ongoing public debates. The book is intended for use in courses on childhood and the law in the Canadian context and provides exceptionally complete materials for briefing and/or mooting the cases presented. It will be welcomed by instructors, researchers, students, and a wider audience of those interested in children's legal rights and status.*

Childhood and the Law in Canada: The Family/State Relationship (LexisNexis Canada, 2024) by Patrick Joseph Ryan provides comprehensive case reviews of six leading Canadian decisions regarding the relationships among children, their parents, and the state. The book is intended for use in courses on childhood and the law in the Canadian context and provides exceptionally complete materials for briefing and/or mooting the cases presented. Each chapter provides the facts of the case and places these facts in historical context. The legal reasoning of parties, intervenors, and judges is clearly explicated. In each section, long excerpts from the decisions are provided. While these are useful for law students, for other readers they may be distracting. Each chapter closes with a discussion of the social implications of the law, subsequent statutory reform, and ongoing public debates. The areas of law under discussion are *parens patriae,* wardship, and the reproductive rights of the disabled; the best interests of the child and race in parental custody and access; the international system for dealing with intrafamilial child abduction; the constitutional challenge to corporal punishment; children and the law of sexual assault, the development of the duty to report child abuse, and children's evidence in court; and the use of tort law to address the mistreatment of children in care and the role of courts in responding to the harms of Indian residential schools.

The first chapter considers *E. v. Eve* (1986). In 1976, "Eve" enrolled in a training centre in Prince Edward Island. She lived with relatives close to the program during the week and returned to her mother's home on weekends. She was developmentally delayed, and when she started a relationship with a developmentally delayed young man, her mother sought permission for her to have a tubal ligation. The mother did not want to incur responsibility for another child. Her request was denied by the court of first instance. This decision was overturned on appeal, and a 1986 Supreme Court of Canada decision determined that the best interests of dependents "was to be determined without reference to the needs of parents, families, institutions, or social projects" (Ryan, p. 3). This decision set Canada apart from other common law countries, where parental (and other) decision makers have the power to impose sterilization on their dependents. As the author notes, this case emerged at a time in which reproductive rights were being established and immediately after the repeal of the last of Canada's explicitly eugenic legislation.

A comprehensive history of eugenics is provided, although the parallel history of the emergence of reproductive rights is given much less attention. This would have been a useful addition to the chapter. In theory, this case should have ensured that nonvoluntary sterilization would have disappeared in Canada. Instead, "the eugenic pressure on disabled Canadians increased" (p. 39). The case did, however, confirm the individualistic, case-by-case approach of the best interest test for children.

This individualized approach is also evident in the second chapter, which explores *Van de Perre v. Edwards* (2001). A 31-year-old African American star basketball player with the Vancouver Grizzlies (Edwards) had an extramarital affair with a beauty-queen white 21-year-old waitress (Van de Perre). Edwards had little to do with Van de Perre during her pregnancy, and she sought child support. He countered by seeking joint custody. The trial was long, drawn out, and the subject of significant prurient public interest. At the initial trial, both parties accused the other of being motivated by financial concerns, not the well-being of the child. When Van de Perre was awarded custody and significant support payments at trial, Edwards appealed and advanced an argument for full custody, asserting that his wife would care for the boy. His wife was joined with him and together they asserted that the mixed-race child needed to be raised by Black parents. Custody was granted to Edwards and his wife. The Supreme Court reversed and returned custody to Van de Perre, asserting that the court of appeal should not have granted standing to Edwards's wife and that the best interest of the child could not be determined on the basis of race alone. The author notes that thereafter Edwards returned to the US, refused to pay support, and did not involve himself in his child's life. In the wake of this case, courts are required to make decisions regarding race and culture on a case-by-case basis, and "in cases such as these, family law may be unsettled and unsettling due to the gravity of what we are asking the courts to decide, rather than a technical flaw in the way the courts determine the best interests of children" (p. 74). While this is undoubtedly true, more discussion of the sociological data on race, socialization, and the needs of mixed-race children would have been a useful addition to this chapter.

The third chapter analyzes *Ellis v. Wentzell-Ellis* (2010). Laura Wentzell and Jason Ellis met online, married, and subsequently lived and worked in Gibraltar, Spain, and then England. Their marriage was in trouble and Laura returned home with their young child for an extended visit. Jason visited, returned to the UK, and when it became apparent that Laura and their daughter would not be rejoining him, sought custody of the child in a British court. The attorney general of Ontario was notified that Ellis would be applying to have the child returned to him under the *Hague Convention for the Civil Aspects of International Child Abduction.* The author provides a detailed history of the Hague Convention and of its rule that children are to be returned to their country of habitual residence for the determination of custody (if both countries are signatories). Exceptions can be made if children are deemed to be at grave risk of harm if returned. The parties submitted widely contrasting evidence both about how settled they had been in the UK (re: habitual residence) and about Jason's behaviour (re: the risk to the child). Wentzell-Ellis was awarded custody by the court of first instance, but the Ontario Court of Appeal reversed the decision and ordered the child returned to England, strongly affirming the underlying principles of the Convention. The author asserts that provisions under the Convention remain inadequate: "globally, taking mothers have outnumbered taking fathers two or three to one. More than half of the taking mothers report, like Laura, that they are fleeing abusive relationships" (p. 113). While I wholeheartedly agree with this criticism of the Hague system, further evidence regarding coercive control, the extent of abuse generally, and the failure of *all* signatory countries to provide safety to women and children in abusive relationships is needed. Most students will not bring this understanding to the classroom, and an opportunity to educate them about this issue is, sadly, largely missed here.

The fourth chapter explores *Canadian Foundation v. Canada* (2004) and confirms the continuing assertion by Canadian courts that "children's best interests are served by upholding the custodial rights of their parents" (p. 305). The author provides an extensive history of both the law and attitudes towards corporal punishment in

Canada. He then describes the incident that triggered the constitutional challenge to s. 43 of the *Criminal Code*, which makes it lawful for parents to use "force by way of correction." David Peterson publicly spanked his daughter in a restaurant parking lot in London, Ontario. The police were called, and Peterson claimed the protection of s. 43. No physical harm had been done and Peterson admitted that his discipline policy included "administering bare bottom spankings" (p. 125). He was acquitted but the case ignited significant community debate, and a local social worker applied for funding from the Court Challenges Program, teamed up with the Canadian Foundation for Children, Youth, and the Law, and sought a declaration that s. 43 was unconstitutional. The court of first instance rejected this claim based on reasoning suggesting the state itself was always a greater threat than parents, whose rights must thus be protected. The Ontario Court of Appeal upheld this decision. Nine years after the initial incident, the majority of the Supreme Court of Canada upheld s. 43: "The relationship of young people and the state would remain covered by their custodians" (p. 150). Three justices wrote separate, thought-provoking dissenting opinions. The author describes the reasoning of all parties and decisions in detail and concludes with a discussion of the "continuing problem of corporal punishment in Canada" (p. 168). He asserts that social science evidence is now unequivocal that "normative use of corporal punishment is not in their (children's) best interests" (p. 168) and that many other countries have taken steps to prohibit it. Canada, he argues, should do the same.

In the fifth chapter, the author outlines the history of the law defining sex crimes against children, children's ability to give evidence in court, and the statutory duty to report child abuse. This history reveals a 20th-century paradox of providing, or attempting to provide, greater protection for children from sexual crimes while excluding them from giving evidence in court to prove such crimes. The author then explores the difficulty of enforcing the duty to report through the lens of *R. v. Kaija*, a case in which a teacher operated a feeder program for youth basketball to recruit for his high school program. Kaija obstructed the parents who wished to report abuse of a young boy at a tournament by a volunteer coach. In 2006 a court acquitted the alleged assailant, who then moved to Alberta and continued his career as a journalist and his work in local charities. In the case against the supervising teacher, the court found that he only carried a duty to report while he was undertaking his paid duties as a teacher, even when his volunteer duties operated within, and with the consent of, the school. The author is clear that enforcing the duty to report remains challenging and that further improvements in the law are necessary. This chapter presents an enormous amount of important historical and contextual information. It may be overwhelming for some students.

The final chapter, *Blackwater v. Plint* (2005), is used to explore the history of residential schools, liability law, and the issue of cultural loss by Indigenous school residents. A small group of Indian residential school survivors in British Columbia sued both the United Church of Canada and the federal government for sexual abuse they suffered between the 1940s and the 1960s and their subsequent loss of language, identity, and cultural connection. Although the case failed in the attempt to connect liability law to cultural loss, the survivors succeeded on the issue of vicarious liability, and thousands of other students have since also been awarded damages. As the author notes, *Blackwater* would not have been possible without the wider changes explained in Chapter 5 and a growing concern with sexual abuse of children. Importantly, the decision allowed the negotiation of the Indian Residential School Settlement Agreement, which provided compensation for victims, elicited a formal state apology, and led to the creation of the Truth and Reconciliation Commission of Canada. These outcomes, in turn, laid the groundwork for settlements of the "Sixties Scoop" and the Indian day schools. This chapter provides a very important framing of a case that is too often neglected in the history of Indigenous rights in Canadian law. Although the survivors' arguments about cultural loss were not accepted at the time by the court, they have been foundational to all subsequent litigation and to a cultural shift that is essential for any true reconciliation with Indigenous peoples: a recognition of settler responsibility for the current state of Indigenous communities in Canada.

The book is very useful in putting legal disputes into context. It will be an effective tool for teaching these cases

and helping students to understand the underlying legal reasoning of each case and the relationship between foundational legal concepts and current political and cultural debates. It fills a gap in the materials available for teaching about children and the law in Canada and will also be useful to scholars from other jurisdictions who wish to compare their own laws with developments in Canada. In the epilogue, the author asserts that a second volume will explore economic and social issues relating to children, including "the law of contracts, medical consent, voting rights, … equality and the provision of services, freedom of expression and religion, privacy and procedural fairness in schools, and the criminal law's special consideration of youth culpability" (p. 306). Such a volume will be a welcome companion to this excellent work.