CULTURAL DIVERSITY IN CUSTODY DISPUTES

By:

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Blackstone, in his Commentaries, says:

> "The last duty of parents to their children is that of giving them an education suitable to their situation in life; a duty pointed out by reason and of far the greatest importance of any. For as Puffendorf very well observes 'it is not easy to imagine or allow that a parent has conferred any considerable benefit upon his child by bringing him into the world, if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others and shameful to himself'. Yet the municipal laws of most countries seem to be defective on this point by not constraining the parent to bestow proper education upon his children. Perhaps they thought it punishment enough to leave the parent who neglects the instruction of his family to labour under those griefs and inconveniences which his family so uninstructed will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation; since the poor and laborious part of the community when past the age of nurture are taken out of the hands of their parents by the statutes for apprenticing poor children; and are placed out by the public in such a manner as may render their abilities in their several stations of the greatest advantage to the commonwealth. The rich, indeed, are left at their option whether they will breed up their children to be ornaments or disgraces to their family." [1]

The Commentaries give us a perspective of the expectations of medieval English society and its laws with respect to child rearing and the transmission of community values. Canada has inherited the common laws' values as articulated by Blackstone and has attempted to integrate them into its very different society.

Heterogeneous and pluralistic, Canada's society contains numerous cultural groups, each of which maintain distinct and independent traditions as well as the various national and religious institutions required to support these traditions.[2]

Our Confederation was conceived in the nineteenth century within a context of biculturalism and has been expanded during the twentieth century to include multi-culturalism. In describing the Confederation debates, Ramsay Cook writes that:

> ... there can be no doubt that the Fathers, French and English, were intent upon the establishment of a "new nationality". Speaker after speaker in the Confederation debates emphasized this point. But it seems equally true that none of the Fathers intended or expected that the new nation would be culturally and linguistically homogeneous. It was to be a political nation in which cultyral differences were accepted as une chose donnée. [3]

French and English Canadians have maintained, and perhaps strengthened, their independent cultural traditions since these debates. Peoples from numerous cultures have immigrated to Canada without losing their cultural traditions in the acculturation process of adapting to a new country.[4]

Compounded with the empirical fact of our multicultural society is the phenomenon of the continuing growing concern with cultural and familial roots. People of every culture are rediscovering their heritage and reasserting their traditions. This greater consciousness of heritage and, consequently, of Canada's cultural diversity has manifested itself at the national level. The Royal Commission on Bilingualism and Biculturalism perceived that Canadian society could achieve "unity in diversity" by integrating its heterogeneous elements into a harmonious system.[5] In 1971, the Prime Minister, Pierre Elliot Trudeau, reasserted the views of the Bilingualism and Biculturalism Commission by initiating a new multicultural policy:

> National unity if it is to mean anything in the deeply personal sense, must be founded on confidence in one's own individual identity; out of this can grow respect for that of others and a willingness to share ideas, attitudes and assumptions. A vigorous policy of multiculturalism will help create this initial confidence. It can form the base of a society which is based on fair play for all. [6]

This focus upon multiculturalism and cultural diversity is not by accident nor is it a passing fad. It is a consciousness that has fundamental credence. In what is a seemingly paradoxical existence, man is an individual who desires to live in a social world; a fine balance is maintained between our being individuals and our being members of a larger social group. In a society where increased mechanization and mass media reduce man to the common social denominator of anonymity, the balance swings heavily against individualism. Reasserting our cultural diversity is one way in which the balance is maintained; by emphasizing cultural differences the citizen is able to distinguish himself and perceive himself as an individual against the backdrop of Canadian society. Our concern for cultural diversity and identity is as necessary as the empirical fact of our individualism. Cultural diversity is a reality within Canadian society. It is a reality for which there is a legitimate and a necessary basis for consideration by all institutions including the Canadian judiciary.

Within the context of family law, judges must deal with cultural diversity in a number of situations. For example, a court may be asked to determine whether a Native Indian child is in need of protection and should be removed from the parents. To determine if the child is in need of protection, should the judge apply criteria for removal which reflect the values of his culture or should the criteria reflect the cultural values of the Native community? If the Native child is apprehended, should he be removed from the Native community or be temporarily placed with a relative or friend? Should the court go the additional step and allow the child to be adopted by non-Native parents? In other instances, judges may have to determine matters of custody or access in a situation where each parent offers a distinct cultural or religious environment for the child's upbringing. How can the judiciary choose which cultural environment would be best for the child without injecting its own cultural values into the determination?

What is needed and what must be elucidated are a set of guiding principles which enable the judiciary to make consistent and predictable

custodial determinations in as many situations as possible in which diverse cultural values come into contact and conflict. Ideally, such guidelines should be equally applicable to child welfare proceedings and adoptions, as well as to custody or access determinations. In addition, if such a set of principles are to be applicable cross-culturally, then they must attempt to avoid an emphasis of the culture of the Canadian majority or for that matter of one segment of Canadian society. A set of principles to be used within any cultural context has no legitimacy if premised upon the values of one culture only. This goal sets a unique challenge to the Canadian judiciary which has traditionally been composed of upper-middle class men from similar cultural backgrounds.

Such a set of principles may be no more than general guidelines. It would be difficult to prescribe specific, exhaustive criteria for dealing with family law issues which involve cultural conflict. The essence of any culture is its own particular formulation of the family institution. There is no a priori concept of the family; it is defined by those practices of the particular culture with which one is dealing. For example, in one culture the family may be perceived as a fairly small, nuclear unit while in other cultures there may be an extended concept of the family whereby grandparents, aunts, uncles and other relatives or perhaps the whole community are perceived as the family. With cultural values built into the concept of the family itself, it is therefore not surprising that no clearly defined criteria can be described to enable the legislature or the judiciary to deal with cultural diversity in either internal family disputes or disputes between the family and the state.

In dealing with cultural diversity the judiciary has at its disposal a threshold principle of state intervention. At some minimum level, where the child's physical or mental well being is threatened with irreversible damage, it is the state's and therefore the judiciary's role to intervene. Although various cultures tolerate different degrees of physical and mental punishment this is only a reason for setting the threshold of intervention at a high level and not a reason for excluding state interven-

tion.[7] State intervention at some level is grounded in the non-cultural premise that if we are to live in a social world - if we are to have a viable community - society must set minimal standards which protect the lives of its individual members.

Beyond this threshold principle, another fundamental principle or guiding notion is the recognition or consciousness that the judiciary has few absolute values at its disposal when dealing with family law matters within a context of cultural diversity. The bench must struggle with the realization that it is working within the realm of the relative where nothing is self-evident. The task of the court is to recognize and to identify the various cultural values with which it is confronted and to strike a balance between them. Consciousness of this recognition and balancing process was dealt with most explicitly by the United States Supreme Court in Wisconsin v. Yoder (1972), 406 U.S. 205.

Wisconsin v. Yoder is a landmark case with implications for common law jurisdictions which extend well beyond the American border. It acknowledges and pays deference to cultural values other than those prescribed and administered by the state. The respondents were members of the Old Order Amish religion who were convicted for violating Wisconsin's compulsory school attendance law. The statute required children to attend a sanctioned form of schooling until the age of 16. The respondents were removing their children from school after the completion of the eighth grade. The issue for judicial determination was whether the state's interest in educating its youth superseded the constitutional protection given to individuals to exercise their religion freely. Based upon considerable expert evidence, the court, with Chief Justice Burger delivering the majority opinion, found that the Amish religion necessarily encompassed a way of life which would be threatened if children continued their schooling within the public system after grade eight. The values that the children would be exposed to during their formative adolescent years would not be compatible with the way of life of the Old Order Amish community. Compulsory education therefore threatened the Amish religion. The court stated its findings as follows:

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child. (at p. 218)

Having found that the Amish religion would be jeopardized by exposing Amish children to higher education, the court had to decide whether the state's interest in educating its youth still superseded the protection of the Amish religion. The court was highly conscious of the balancing exercise it had to undertake:

> Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of Pierce, "prepare [them] for additional obligations". (at p. 214)

The court found that even though the state had a legitimate interest in enforcing its education regulations, the Amish community had succeeded in providing the necessary education for its children. Indeed, the expert evidence went so far as to show that the Amish;

> ... system of learning-by-doing was an "ideal system" of education in terms of preparing Amish children for life as adults in the Amish community, and that "I would be inclined to say they do a better job in this than most of the rest of us do".
> (at p. 223)

The court concluded that the state's interest in education did not supersede the protection afforded to the Amish religion.

Wisconsin v. Yoder is significant because it deals explicitly with the careful balancing of diverse cultural values or concerns and because it is highly conscious of the fact that there are no absolutes when dealing with such cultural issues. Mr. Justice Burger stated that:

> There can be no assumption that today's majority is "right" and the Amish and others like them are "wrong". A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.
> (at pp. 223-224)

The court cautioned that it must perform its role with the utmost of care:

> This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements.
> (at p. 235)

Wisconsin v. Yoder must be considered from the perspective of the time and the setting that the decision was written. Firstly, it is an American decision dealing with explicit constitutional protections of religious freedom. The court stressed that the Amish way of life is both an outgrowth and aspect of the Amish religion. Wisconsin v. Yoder is a case in which religious freedom was at issue and it is unlikely that such protection would be afforded to secular interests. In addition, the court found that the Amish were providing adequate education, if not better education, for their children. Nor was this a case involving a conflict of constrasting values. The court considered the expert testimony which indicated that the Amish way of life exemplified many of the fundamental values of American society:

> Whatever their idiosyncrasies as seen by the majority, this record strongly shows that the Amish community has been a highly successful social unit within our society, even if apart from the conventional "mainstream". Its members are productive and very law-abiding members of society; they reject public welfare in any of its usual modern forms. (at p. 222)
>
> Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the "sturdy yoeman" who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage. (at pp. 225-226)

Wisconsin v. Yoder was therefore a good, and perhaps easy, case for the U.S. Supreme Court to show deference to the values of another culture. It was also a case which allowed the court to reiterate its commitment to family life, hard work and agrarian values at a time in American history when the Vietnam war and the sixties were threatening a cultural upheaval which was discrediting traditional values. It is not clear that the same result would have been obtained had there been more cultural divergence. Nevertheless, Wisconsin v. Yoder stands for the principle of judicial consciousness of cultural diversity wherein the judiciary both acknowledges and balances various cultural interests.

Mr. Justice William Douglas' partial dissent in Wisconsin v. Yoder should be mentioned because of its recognition of the rights of a third party to the dispute - the Amish children. Douglas agreed with the majority that Amish values were in opposition to the education requirements of schooling beyond grade eight. However, he noted that the majority's analysis treated the dispute as being one between Amish parents and the state and that at no point were the rights of the Amish children considered. Douglas argued that children are "persons" within the meaning of the American Bill of Rights and cited precedents where children had their constitutional interests protected. Even though the Amish children were not parties to the action, Douglas argued that because of their constitutional

rights, the religious exemption for Amish parents could not be granted unless the views and the rights of the Amish children were also considered. Douglas puts his position as follows:

> It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today. (at pp. 245-246)

Douglas therefore directed that the decision be reserved until the various views of the Amish children were elicited. If the Amish children did desire to attend high school then "the state may well be able to override the parents' religiously motivated objections". (at p. 242) Douglas also considered that the majority's emphasis on the law and order record of the Amish people was irrelevant. He argued that any religious group is entitled to protection under the First Amendment.

In Canada, cases dealing with education and religion are sparse and none deal with the issues as directly or thoroughly as Wisconsin v. Yoder.

In Regina v. Wiebe, [1978] 3 W.W.R. 36, Oliver Prov.J. dealt with a factual situation similar to Wisconsin v. Yoder. The accused was a Mennonite charged with contravening the provisions of the School Act. Members of the Mennonite community had withdrawn their children from the public school system on the basis that the system was teaching their children values which were not in accordance with their religious beliefs. The court found that the Mennonite religion was closely linked to education and the education of Mennonite children was given protection under the freedom of religion clause of the Alberta Bill of Rights. The Department of Education Act was rendered inoperative by the Alberta Bill of Rights and the accused was found not guilty. The decision is a reflective discussion of the

principles encountered in Wisconsin v. Yoder and it recognized that:

> ... there exists a plethora of evidence not only of deep religious convictions sincerely held by the accused concerning the manner in which his child should be educated, but also of an unshakeable determination to educate his child in accordance with his religious beliefs. The law of Alberta would, without first permitting him recourse to the courts, penalize him for this on the basis of absolute liability. (at p. 62)

The earlier case of Chabot v. Lamorandiere (1958), 12 D.L.R. (2d) 796 (Que.Q.B., C.A.) also skirted the issue but was more specifically a statement of religious rights in the context of education. There, the court held that a member of a religious sect may compel acceptance of his/her children into the publicly funded schools and may also insist that they be exempted from religious exercises. Pratte J. stated at 803 that there is a right to instruct in one's own religion but not a right to impose it. In this case, the only school available was a Roman Catholic school - no dissident or Protestant school existed in the municipality, as allowed by the legislation. Rinfret J., dissenting, said at 827 that the parents had three alternative under the legislation: to have their children attend the majority (i.e., in this case Roman Catholic) school and follow the curriculum, to declare they were dissidents and set up their own school (this parent was apparently the only Jehovah's Witness), or to have their children attend a school in a neighbouring municipality. The onus is on the parent to show he has no other alternative available.

In Perepolkin v. Superintendent of Child Welfare (1957), 11 D.L.R. (2d) 417 (B.C.C.A.), Sidney Smith J.A. found that the Doukhabours did not constitute a religious sect in the true legal sense and thus there was no infringement of religious freedom by requiring the children to attend public schools. As with the Amish in Wisconsin v. Yoder, the Doukhabours here believed that the public schools were exposing their children to "materialistic influences and ideals".

Limited litigation has left the Canadian case law devoid of depth in analysis of these issues. None of the decisions provide the degree of recognition of diverse and conflicting cultural values that was evident in the United States Supreme Court's decision in Wisconsin v. Yoder.

Outside the education context, the issue of cultural diversity frequently arises within child welfare cases where the courts must determine whether to find a child of another culture in need of protection. Within the Native Indian population of Canada the problem of child apprehension has been acute.[8] Historically, the Native Indian family structure was self-supporting and had its own remedial systems before the imposition of non-Native values upon the Native community. Douglas Sanders described the effect of non-Native values on the Native community in his report to The Law Reform Commission of Canada:

> In the traditional and tribal way, there are no unwanted children. Children are loved and cherished and their parents place the utmost significance in their children's lives because it means the continuation of themselves, of their tribal ways, and of the living earth.
>
> There are no orphans either because in the event that a child's parents die, someone, a brother or sister of the deceased or grandparents or other kin will always take that child as their own. There is always someone and some place for an Indian child to go.
>
> It has only been recently that there have been homeless children: it can be said that this had been a direct result of the Christianization of the Indian people. When Indian people have been forced to acculturate, to have to go away to school, when missionaries imposed the Christian religion upon them, then it was that Indian communities began to fragment. As a result, Indian families which had been close and intact began to fall apart and relationships were not as close as before....

> True, there are some cases of serious neglect of children by Indian parents. The situation of Indians in North America has led to drastic social disorganization in many cases, and often the children are the first to suffer the effects. But often Indian children are taken into foster care through courts simply because social workers feel they will give the children a better opportunity off the reservation. Some social workers dominate Indian communities so much that the Indians no longer feel it worthwhile to protest the frequent removal of children from homes.... 9

With the growing consciousness of cultural preservation within the Native community, programmes have been initiated to keep Native children within the Native culture when it is deemed necessary to remove the child from his family or when the child is in a position to be adopted.

These new programmes, however, need to be complemented by an awareness at the judicial level of the diverse needs and values of the Native communities. It is still the court, composed in most instances of a single judge, which will decide when children are in need of protection and should be removed from the home. It is still the Canadian courts, with few, if any, Native judges, which will oversee all family law matters within the Native community. What principles, then, can a court rely upon when deciding whether to remove the child from the Native family?

A preliminary principle is cautionary in nature. In their recent book, Before the Best Interests of the Child, Goldstein, Freud and Solnit argue that the state should only intervene in custodial and child welfare determinations in a limited number of instances.[10] There is a strong onus upon the courts to show that threshold societal concerns are being violated and that the state can provide a better alternative for the child. Part of the rationale for this limited judicial role lies in the fact that the state is "too crude an instrument to become an adequate substitute for flesh and blood parents".[11] If the state must be cautious about the apprehension of children from its own culture then it must be more

cautious about the apprehension of children from other cultures. If the state is a rough and crude device for supervising the complexity of family relationships then it is even less adequate in supervising and accomodating the family relationship within another cultural context. The courts must therefore exercise caution in determining whether to remove the child from the Native family.

Beyond this cautionary principle it is difficult to ascertain non-culturally biased criteria for the apprehension of children. That there are no absolutes was the lesson of Wisconsin v. Yoder. It follows, then, that if a child is to be removed from his Native family, he should be removed after considering the family situation in the context of the particular Native community, rather than the standards of child care recognized by North American middle class society. Adopting this approach requires a principle of identification to be utilized. Courts must seek to define and elucidate the standards of the community with which they are dealing. Courts must demand that the necessary evidence be presented. An example of this approach is the recent decision of Provincial Judge Moxley in Re E.C.D.M. (1980), 17 R.F.L. (2d) 274 (Sask.Prov.Ct.). The respondent mother was a 24 year old single Indian parent of Cree ancestry with a two year old child. The mother lived in Northern Saskatchewan, had no permanent employment, suffered from alcoholism, and had no permanent residence. The child had previously been found to be in need of protection and had been committed to the temporary care of the Minister of Family Services. The Department subsequently applied for a permanent order of wardship for the two year old child. The mother opposed the application and the matter came on for trial. Judge Moxley adopted an identification principle in defining the standard of state apprehension of children:

> Furthermore, while there is a minimal parental standard for all society, a secondary standard must be established for parents of the age of the parent in question and for the type of community in which the parent resides. A teen-aged parent cannot live up to the standard expected for a middle-aged parent. Similarly, different standards

> of parenting apply to parents of Cree ancestry who reside in a small rural community in Northern Saskatchewan than would apply to white middle-class parents living, for example, in Regina. What is an acceptable standard for the former might be unacceptable to the latter. (at p. 275)

The court went on to describe the cultural and community features of Cree and Chipewyan societies. Noteworthy among these features was the presence of an extended family concept rather than a nuclear family concept as well as an ethic of non-intervention which was extended to the disciplining of children.[12] The court granted a permanent order committing the child to the care of the Minister. The court found that living in crowded conditions in a house owned by a relative, unemployment, lack of skills and problems with alcohol were common factors in the area and were not a significant departure from the community standard. Presumably, a permanent order would not be made on these factors above. However, the court focused upon a number of factors including the mother's lack of interest in her children, her inability to look after her own most basic needs such as her failure to acquire glasses or apply for social assistance payments, and substantial problems with the mother's proposed living arrangements, and concluded that the child was in need of protection. Judge Moxley believed that there was little or no hope of improvement in the immediate future and therefore ordered permanent commitment of the child to the care of the Minister. The Saskatchewan court in this case adopted criteria for state intervention and removal of the child which attempted to take into consideration the cultural standards and living conditions of the society in which the child was born and lived. Thus a cautionary approach and utilization of a principle of identification are two guiding notions with which the court can deal with the apprehension of children from other cultures, especially Canada's diverse and multi-faceted Native communities.

The issue of cultural diversity presents a different problem within the context of custody and access determinations and in the context of cultural adoption. The difficult task for the courts is to choose between

cultures; the court must decide in which cultural environment the child should be raised. Should the child be brought up within the Catholic, rural, French Canadian environment of the mother, or will the child be better off within the more liberal, English, cosmopolitan lifestyle of the father?[13] In another typical situation, should the child be in the custody of the parent who professes little, if any, religious commitment or should custody be given to the parent who is religiously active perhaps to the degree of denying the child important medical services?[14] Within the adoption context, should the court allow a child of one culture or religion to be adopted by parents who have a different cultural lifestyle or religion?[15] What principles can be utilized to enable a judge to make the difficult choice between cultures without the judge being influenced by his own culturally rooted assumptions of what cultural upbringing is best for a child?

The analysis in Before the Best Interests of the Child is of some assistance in seeking an analytical framework for determining custody disputes. The authors argue that stability and continuity in the child's lifestyle are crucial to the child's complete and normal development. It is this need for continuity which in part forms the basis of the authors' strong assertion for parental autonomy in the raising of children.[16] But a child's lifestyle is a function of the cultural environment in which the child develops; a child does not grow up in a cultural vacuum. A child has, in addition to a set of recognizable individuals who surround him, a set of habits, beliefs and perceptions which all reflect the particular cultural climate in which that child is developing. It would seem, therefore, that if stability and continuity are crucial to the healthy development of a child then not only are the parental tie and parental autonomy important but cultural autonomy or the child's tie to his cultural, social or religious environment will be equally crucial in the development of the child. The task for the court, then, is to both ascertain and understand that cultural environment in which children before the court are developing. With all other factors equal, the custodial determination should be significantly

influenced by the cultural, religious or social orientation of the child. This recommendation would fly in the face of such famous custody cases as Painter v. Bannister (1966), 140 N.W. (2d) 152, where the Iowa Supreme Court chose the cultural values of the grandparents over the non-traditional west coast lifestyle of the father. The writer recognizes that all other factors are never equal and that a child's cultural lifestyle will only be one of a multitude of factors before a court in a custody hearing. Nevertheless, the child's link to his culture and background is a guiding principle that must be given careful consideration and not overlooked in attempting to ascertain the best interest of the child.

Support for the principle of cultural continuity can be found in some recent Canadian custody cases. In Gauci v. Gauci (1972), 9 R.F.L. 189 (Ont.S.C.), Lacourcierre J. focused upon the change in the cultural environment that the child would be subjected to if moved from the interim custody of his father to the care and control of his mother:

> The main question in the present action is not one of moral, intellectual or financial advantages, but whether Brian Gauci should continue to develop according to the cultural and spiritual tradition of his father's closely-knit family or whether he should be uprooted and taken to a new environment in an effort to upgrade the quality of his life. I am satisfied that the preponderance of evidence points to the future happiness and welfare of the child continuing to be served in the environment of the Gauci family, with its cultural and religious traditions. (at p. 193)

In the case of Hayre v. Hayre (1973), 11 R.F.L. 188 (B.C.S.C.) the court was squarely confronted with the issue of having to choose between diverse cultural upbringings. The father adhered to the Sikh culture and religion while the mother was a Protestant of Canadian-Irish extraction. McIntyre J. granted custody to the father and in doing so he focused upon the preservation of the child's personal sense of religious and cultural identity.

> This boy is a Sikh; he will always be regarded as a Sikh in this country. It will be well for him to be brought up as a Sikh, to preserve his existing knowledge of the Punjabi language, to be schooled in the religion and traditions of the people with whom he will always be associated. It will, in my view, be possible for him to find a secure personal identity only in the Sikh community. It is the only identity our society will permit him. Let him, then, be a Sikh and be proud of the tradition and accomplishments of a proud and worthy race. No matter how much she loves him, his mother cannot accomplish this. I direct that custody of the boy be given to his father. (at p. 188)

Utilizing a principle of cultural continuity requires the implementation of a two-step process. The court must first acknowledge that between competing cultures, religions or lifestyles, neither is prima facie to be preferred as the setting for the child. This analysis is often complicated because of lack of knowledge by the judiciary of minority lifestyles as well as expressed preferences for the custodial parent or the tender years doctrine. Secondly, the court must invoke the principle of cultural continuity and evaluate in which cultural environment it is appropriate for the child to be raised. Such a two-stage approach was employed in McQuillan v. McQuillan and Salomaa (1975), 21 R.F.L. 324 (Ont.C.A.). The dispute for custody was between the 4-1/2 year old child's natural mother and maternal grandmother. The grandmother had cared for the child much of its life while the mother had spent much of her life wandering and searching for a fulfilling lifestyle. At the time of the trial the mother belonged to the Hare Krishna movement and was attempting to teach its principles to the child. O'Leary J. awarded custody to the grandmother but not before setting out two helpful guiding notions. The court recognized that it was not its function to pass judgment on the principles of the Krishna movement. It stated that:

> The court obviously has no right to dictate to parents the religious philosophy they choose for themselves and their children, let alone the right to deny custody to a parent because of his or her religious beliefs. (at p. 330)

In addition, the court considered the stability and continuity in the child's upbringing and found that life with the mother within the Krishna movement would not be in the child's interest:

> I have no confidence that she will remain in the movement and, even if she does, that she has the maturity to raise her son in the Kirshna movement and give him the stimulation, opportunities and stability necessary for his development. (at p. 330)

The focus was therefore on stability and the mother's inability to provide it rather than a focus on the lifestyle exemplified by the Krishna movement per se.

Some Canadian cases within the child welfare context have also exhibited a concern for cultural continuity. In Re P.S.B. (1978), 15 R.F.L. (2d) 199 (Ont.Prov.Ct., [Family Division]), the child was found to be in need of protection and a temporary wardship order was made. The child had been raised in the Jewish faith and, being fourteen years of age, expressed a preference to be placed in a Jewish home. Judge Moore found:

> Moreover, the evidence disclosed that, in the past, she has been made to feel inferior and inadequate because of her Jewish faith. If this court were to deny a finding of Judaism, we would be perpetuating and reinforcing this sense of inferiority and the child would continue to be ashamed and embarrassed because of her religion. (at p. 202)

Judge Moore ordered that she be placed in the care of a Children's Aid Society and in a Jewish home. The same concern for cultural continuity was echoed in Mooswa et al. v. Minister of Social Services for the Province of Saskatchewan (1976), 30 R.F.L. 101 (Sask.Q.B.), where the mother appealed a Magistrate's order committing the child to the permanent care of the Minister. Johnson J. stated that:

> What is basic in this kind of problem is the right and need of the child to be raised, if possible, by its natural mother in its natural environment and its own cultural surroundings. Although the standard of living provided by that mother and the care given to the child may not be considered acceptable by others, nevertheless if those standards conform to those considered average in the particular class or group to which the parent(s) belong, the court ought not to interfere.
> (at p. 102)

Based on the mother's success in overcoming her alcoholism and her efforts to improve her life, the court awarded custody to the mother where the child would "be given the opportunity to be raised by her natural mother amongst people of her own race and culture". (at p. 102)

Other Canadian cases demonstrate that there is yet no clear understanding of a consistent and predictable formula for dealing with competing cultural interests. Our courts have tended to choose between conflicting cultural values without clarifying or analysing the basis for their decisions. For instance, in Robichaud v. Robichaud (1978), 6 R.F.L. (2d) 232 (Sask.Q.B.), the custody dispute was between the mother and father. The mother belonged to a sect wherein the children were separated from parents and raised within an institutional setting. The two children of the litigants had been living within this institutional scheme. The father, who was found to be an exemplary parent, did not belong to the sect. In awarding custody to the father, MacPherson J. preferred the one-to-one, parent-child relationship over the institutional format of child rearing:

> In matters of child welfare I have always regarded an institution, however good, as something to be used in an emergency only. In a choice between a competent and loving parent, and an institution, however good, I must, and I think our law must, prefer the parent.
> (at p. 234)

While the court's preference may have sound theoretical basis, that justification is lacking. Why is the natural parent to be preferred to the institution? Does the answer lie within an historical prejudice or is it best for the child to have an ongoing connection with the natural parent? The Canadian family is being subjected to increased strains between the concept of natural parenting and the concept of institutional parenting. The gulf between parents and children in a cosmopolitan, technological society is widening and some form of institutional care is often required to fill the gap. Hopefully we share a sophisticated analysis and discussion of these issues.

A similar problem is evident in the recent case of Elbaz v. Elbaz (1980), 114 D.L.R. (3d) 116 (Ont.H.C.J.). The custody dispute was between the father who was born in Morocco of Orthodox Jewish parents and the mother who is Canadian of a French, Roman Catholic background. The wife converted to Judaism before the marriage but was not as devout as her husband. Pennell J. awarded custody to the father and stated that:

> The children have been raised by the parties in the orthodox Jewish way of life. In my judgment, it is in their best interests that they continue to have that upbringing. (at p. 127)

Once again the decision may have merit but it is totally devoid of analysis. Why is it better that the children continue to have an orthodox Jewish upbringing? Does the court's decision rest on the continuing stability of the relationship of the children with the father, or is the court seriously considering the cultural and religious background of the parents? The decision examines the cultural issue relating to custody in a rather cursory fashion and then attempts to construct an access regime which is both unmanageable and unenforceable:

> (1) For the first three week-ends each month from Saturday 1:00 p.m. to Monday 8:00 p.m.; two week-nights each month from 4:00 p.m. to 8:00 p.m., namely, on Wednesday of the week before and the Wednesday after the week-end when the children are

> in the care of the husband, except when the Jewish High Holidays, Rosh Hashanah, Yom Kippur, Succoth, Passover and Shavuot fall on such days, then on such days the husband shall have the care of the children but an equivalent period of time in each case shall be given to the wife in civic holidays....
>
> (6) The wife, whenever the children are in her care, shall ensure that the children eat kosher food and observe as far as reasonably possible the Shabbat, subject to the right to travel with the children on Shabbat with tickets purchased in advance. I use the words "as far as reasonably possible" bearing in mind unusual situations. To illustrate: last summer the wife took the children on a vacation to Prince Edward Island. It happened, as I am advised, that there was no synagogue there. To the orthodox, the history of the Jewish people is not because they contemplate God from an intellectual point of view but because of observance. The wife should therefore avoid exposing the children to influences that are in conflict with orthodox Jewish spiritual values. (at pp. 128-129)

In other Canadian cases, courts have only utilized the first step of what is necessarily a two-step process. Recognizing that no one culture or religion is the touchstone of cultural propriety is not enough to make a proper custodial determination; the courts must go the additional step and determine the focus of stability and continuity in the child's life. For example, in Benoit v. Benoit (1972), 10 R.F.L. 282 (Ont.Co.Ct.), Beardall Co.Ct.J. considered the validity of an access order which prohibited the father, a member of the Jehovah's Witnesses, from discussing religion with the children. The court found that the restriction was not proper, basing its decision on the premise that the court is in no position to decide which is the "right" religion:

> I do not think that any court has the right to decide that one form of religious instruction and belief is the true religion and that some other one is false, or to say that one is better than the other, but that all men are free to select their own religious belief and to practice it without interference by someone else thrusting upon them a religion that they do not care for. (at p. 284)

By lifting the restriction on access the court recognized the limited role it has as an arbiter of family disputes. Where children are involved the court's mandate is to determine the best interests of the child which is primarily a custody determination. This issue was well stated by Litsky Juvenile Ct.J. in Re M.(L. and K.) (1978), 6 R.F.L. (2d) 297 (Alta.Juv.Ct.), a case in which the children were apprehended from parents who belonged to a cult society:

> Freedom of religion is well protected in the province of Alberta through its Alberta Bill of Rights, 1972 (Alta.), c.1, which is almost identical to s.1 of the Canadian Bill of Rights, R.S.C. 1970, App. III. Freedom does not, however, include absolute freedom, especially when it comes to the rights of children, their best interests or welfare. Certainly the religious concern of each person is a personal matter, but the concern for children's upbringing is society's major concern, and it has to be predicated by the court's interpretation. The Alpha and Omega Order has a right to an untrammelled religious belief, but it steps over its bounds when it creates an atmosphere which is not conducive to allowing a child to reach his potential on an individual basis. It cannot be stated too often that it is the child's interests that are at stake, and it should be remembered by members of the legal profession that the rule in neglect cases must be utilized as a protection of the child and not necessarily as a bulwark for the rights of parenthood. (at p. 321)

The concern for the child's interests is the key. Cultural continuity and stability are critical factors of those best interests. To act in the child's best interests the court must take the active second step and identify or protect the source of stability in the child's life.

Conclusion

The author has attempted to discuss some of the difficult issues facing a culturally diverse nation and which confront the courts in child welfare, child custody and access, and in public education situations. Intervention by the courts in custody and child welfare matters is severely circumscribed by the authors of Before the Best Interests of the Child.

Critics of the Goldstein, Freud and Solnit thesis have expressed concern that they emphasize family integrity and parental autonomy to the exclusion of defining the rights of children.[17] Similarly, this author does not wish to ignore the importance of the rights of children and specifically the need for Canadian courts to attempt to determine what is in their best interest. Canadian courts must begin to deal with the difficult issues raised by both the majority and Mr. Justice Douglas in Wisconsin v. Yoder. As Katheryn D. Katz writes in her review of Before the Best Interests of the Child:

> To suggest that the family integrity is a value of such overriding significance that no other interest should be considered is a simplistic resolution to parent-child conflicts. There is a crucial issue raised by this book that is not addressed: in a pluralistic society, how do we foster diversity, plurality and individualism without doing violence to children's interests in autonomy, freedom and dignity? Coercive state intervention has in many instances led to unwarranted and harmful intrusions into family privacy and integrity. The latitude afforded the state must be curbed. However, a rigid doctrine of deference to parental authority will redound to the detriment of children. 18

As discussed above, it is impossible to set a closed set of criteria by which judges could make determinations in situations involving a conflict of cultural values. The concept of the family is amorphous and culturally grounded thus precluding any a-cultural treatment of the concept and similarly preventing any set of a-cultural values that attach to the concept of the family from being defined. In addition, a set of theoretical criteria could not be applied blindly without the benefit of observing those parties who make a claim in the family dispute; family law determinations involve complex factors which cannot be listed as static indicia to be applied by the court. The principles discussed above are, at best, principles of approach or attitude.

The thematic or guiding principle is one of recognition or consciousness of the diverse cultural interests which will often be present in a family law dispute. Dealing with these divergent cultural values is a legitimate and necessary function for the judiciary to undertake. Judges must not mistake their own culturally biased values as *a priori* touchstones of cultural sanctity. Rather, the role of the judiciary must be to balance the competing cultural values that arise.

The second guiding principle is a principle of identification. Judges must define, and demand the necessary evidence to do so, the cultural backgrounds of the parties to the dispute. Only with this information will the court be able to do the kind of delicate balancing of cultural values that was done in *Wisconsin* v. *Yoder* and only with this information will the court be able to identify the standards of a community for the purposes of child apprehension disputes.

The third principle is best described as a principle of deference. A strong onus must be satisfied before the courts can interfere with the autonomy of parental rights and the continuity of the child's cultural life-style. Maintaining the cultural *status quo* is not the only factor in a child custody determination, but it must be recognized as a relevant and important factor.

Faced every day with the fact that Canada is culturally diverse, Canadian courts are becoming attuned to the reality that the parties before them will often seek to assert and preserve values other than those held by the judiciary. If this diversity is to be maintained - if Canadian society is to flourish with the synthesis of ideas and innovations that cultural diversity fosters - then Canada's judiciary must be willing to deal with cultural diversity as a legitimate issue. The judiciary must remain cognizant of the fact that "a prime function of the law is to prevent one person's truth ... from becoming another person's tyranny".[19]

FOOTNOTES

1 Holland, The Law Relating to the Child (London: Sir Isaac Pitman and Sons Ltd., 1914) at p. 60.

2 The academic debate surrounding the usage of the concept of "culture" and "pluralism" is discussed in Barry et al., Multiculturalism and Ethnic Attitudes in Canada (Ottawa: Supply and Services Canada, 1977) at pp. 3-5.

3 Cook, Provincial Autonomy, Minority Rights and the Compact Theory, 1867-1921 (Ottawa: Queen's Printer, 1969) at p. 52.

4 Acculturation is defined as "the process of adaptation to the environment in which an individual is compelled to live as he adjusts his behaviour to that of the community". Canada, Royal Commission on Bilingualism and Biculturalism, volume 4 (Ottawa: Queen's Printer, 1969) at p. 6.

The Commission discussed the process of acculturation in Canada in volume 4 of its report. After noting that some cultures had been integrated into Francophone or Anglophone society, the Commission still found that,

> there are a number of cultural groups in Canada with a clear sense of identity. They want, without in any way undermining national unity, to maintain their own linguistic and cultural heritage. They have their own associations, clubs, parishes, and religious organizations; they maintain their own schools and express their collective views through their own press. Some have formed highly active organizations - for example, the Canadian Jewish Congress and the Canadian Polish Congress. These organizations act as spokesmen for the group, may use the group's ancestral language, and create, as far as possible, a climate propitious to the maintenance of the group's own culture. To deny their existence would be to shut one's eyes to the Canadian reality.

5 Id. at p. 7.

6 Canada. House of Commons Debates, October 8, 1971, at p. 8545.

7 In Regina v. Julia Baptiste and Ira Baptiste, not yet reported, March 11, 1980 (Ont.Prov.Ct.), Cadsby Prov. Ct.J. had to deal with the threshold issue of the acceptable degree of discipline that society would allow. The parents, who had emigrated from Trinidad, had beaten their fifteen year old daughter with a belt and an

extension cord causing abrasions, bruising and disfigurement. At issue was whether the parents had violated the Criminal Code under s.43 by using force which was not reasonable under the circumstances. Counsel for the accused argued that this form of corporal discipline was part of the culture of the accused. The court was unwilling to look at customs beyond the region of Canada since to do so would make a standard of reasonableness under s.43 impossible to define. The court also doubted that corporal punishment was still acceptable in Canadian society. It concluded that "the use of force by way of correction of a fifteen year old girl can seldom be justified". The punishment inflicted went far beyond what was reasonable in the circumstances.

8 For example, the Tenth Report of the Royal Commission on Family and Children's Law: "Native Families and the Law", British Columbia, 1975, stated at p.5 that:

> Not until 1955 was there a policy set regarding the apprehension of Indian children. From 29 Indian children in care in that year, the number swelled to 2,825 in 1973, i.e. forty percent of all children in care, in the province, although only 5% of the children in British Columbia are Indian.

9 Sanders, Family Law and Native People (Law Reform Commission of Canada, 1975) at pp. 8-9.

10 Goldstein, Freud and Solnit, Before the Best Interests of the Child (New York: The Free Press, 1979).

11 Id. at p. 12.

12 The whole discussion of cultural and community differences at p. 276 is noteworthy for its depth of analysis:

> 1. Cultural differences. There are several basic cultural characteristics recognized by sociologists in persons descended from generalist societies such as Cree and Chipewyan. Four of these are:
>
> a) an imprecise concept of time;
>
> b) patience toward the solving of problems and a tendency to let the problems solve themselves;
>
> c) an extended family concept rather than a nuclear family concept; and
>
> d) the ethic of non-intervention, which extends even to the disciplining of children.

2. Acquired community habits. Some northern native communities have acquired habits and customs which, though not directly related to the native ancestry, make them quite different from other communities elsewhere. Two of the most relevant to Family Service Act applications are:

   a) acceptance of widespread drinking and even drunkeness; and

   b) tolerance to violence while drunk.

13 For a case with similar facts see Skubovius v. Skubovius (1977), 1 R.F.L. (2d) 284 (Man.Q.B.).

14 Conflicts between religious beliefs will often be at issue in custody or access determinations. For example, see Robb v. Robb (1977), 2 R.F.L. (2d) 172 (N.S.S.C. [T.D.]), Pentland v. Pentland and Rombough (1978), 5 R.F.L. (2d) 65 (Ont.S.C. [H.C.J.]), Tardif v. Tardif (1975), 24 R.F.L. 282 (Sask.Q.B.) or Benoit v. Benoit (1972), 10 R.F.L. 282 (Ont.C.A.).

15 This issue often arises within the context of adoption of Native children. Reluctance to remove the child from his or her Native environment is demonstrated in the case of Mooswa et al. v. Minister of Social Services for the Province of Saskatchewan (1976), 30 R.F.L. 101 (Sask. Q.B.).

16 The authors (Supra note 10) at p.9 put their argument as follows:

> These complex and vital developments require the privacy of family life under guardianship by parents who are autonomous. The younger the child, the greater is his need for them. When family integrity is broken or weakened by state intrusion, his needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental. The child's need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy in child rearing. These rights - parental autonomy, a child's entitlement to autonomous parents, and privacy - are essential ingredients of "family integrity".

17 This is the main thesis of Katheryn D. Katz in her review of Before the Best Interests of the Child in Katz, Before the Best Interests of the Child: When in Doubt, the Parents Win Out (1981), 45 Albany L.Rev. 525.

18 Id. at p. 534.

19 Supra, note 10 at p. 93.