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Religion and Culture in Canadian Family Law, John Tibor Syrtash

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Religion and Culture in Canadian Family Law

John Tibor Syrtash
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Reviewed by Olivier Fuldauer*

The stated objective of *Religion and Culture in Canadian Family Law* is to trace "what happens when...judges and legislators meet with parties who do not share the same assumptions or laws of the majority culture."[1] The groups discussed by Syrtash include aboriginal Canadians, Jews, minority Christian sects (particularly Jehovah's Witnesses), and to a lesser degree, Muslims and Sikhs. The sense of the "otherness" of the judiciary held by minority Canadians colours their experience of the larger Canadian culture. It also influences how they perceive their own religion or culture. This experience is felt sharply when minority community members confront issues of divorce and child custody. For these reasons, issues of religion and culture are most critical in the sphere of family law.

The effect of the *Canadian Charter of Rights and Freedoms*[2] on family law, particularly the freedom of religion and multiculturalism sections, is a dominant theme of the book. Specifically, the author addresses the question of how the secular courts react to issues of religion and culture. Syrtash also surveys the cases and legislated solutions in the provinces.

The issues of family law discussed in the book are those surrounding child custody and divorce. At the outset, Syrtash says that because of the cost, anxiety, and delay, the courts are "the worst way"[3] to resolve such disputes. Added to this is the unknown factor of how sensitive the court will be to issues of religion and culture:

> Are experts who are appointed to assess custody and access

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[1] J. T. Syrtash, *Religion and Culture in Canadian Family Law* (Toronto: Butterworths, 1992) at x.
[2] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].
[3] *Supra* note 1 at 3.

> disputes truly equipped to empathize with and respect a party's religion or culture? Or are such social workers anti-religious by nature, given that the disciplines of psychology and social work are historically grounded in nineteenth century post-religious positivism?[4]

Recent modifications to Canada's *Divorce Act*,[5] as well as sections 2(a) and 27 of the *Charter* have resulted in greater focus by some courts on religion and culture as they move away from a historical reluctance to allow the access parent to discuss his or her religion with the child. The judiciary has accepted the evidence of psychologists that exposing children to more than one religion is unlikely to cause a child the harm it was once thought to produce.

In assessing the importance of religion or culture the court will generally weigh secular, or mainstream Christian values against minority religious or cultural values. This can be especially relevant when the court assesses a child's best interests in a custody battle. Where religion or culture is found to be a significant factor in this assessment, the sincerity of the parent asserting religious or cultural values becomes significant. The author states that a parent will often use religion or culture only to shift the balance of a ruling in his or her favour:

> On many occasions litigants will use their religion or culture as a "smoke screen" to obscure the more central issue of who is the better caregiver: which parent really blows the child's nose, or ties the shoe laces, on a day to day basis.[6]

In his survey of the case law in all of the provinces, Syrtash leads the reader through regional strengths, biases, and contradictions. In Quebec, for example, the majority of cases dealing with religious conflict involve a Jehovah's Witness custodial parent pitted against a Roman Catholic access parent. Within these cases, the most contentious issue is the accompaniment of the child with the parent in "door to door proselytizing." This central tenet of the Jehovah's Witness faith conflicts with the Roman Catholic sense of propriety. In its assessment of the best interests of the child, the court in *Trembley* v. *Lavoie*,[7] ruled that door to door proselytizing is less harmful to the child than changing parental homes. In the Quebec cases Syrtash stresses, as he does throughout the book, that extracting general principles in family law is a precarious business because the courts base their decisions upon the circumstances of each case. As

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[4] *Ibid.* at 2.
[5] R.S.C. 1985, c. 3 (2nd Supp.).
[6] *Supra* note 1 at 5.
[7] 7 February 1984, Saguenay 240–12–000373–83 (Que. S.C.).

he puts it: "one four-year-old child may be able to deal with the difference in religions better than another."

Like Ontario, Nova Scotia has long disposed of the father's common law right to determine the religion of his children in favour of the custodial parent's right to determine the child's religion. In one Nova Scotia case, the court applied the best interests test to determine which parent would receive custody of the child. The court awarded custody to the girl's Roman Catholic grandparents rather than to her Jewish father, in part because the child was raised a Roman Catholic by her mother.[8] A second Nova Scotia case[9] exhibits a typical bias in the Canadian judiciary in favour of some exposure to religious training. This attitude is manifested in what Syrtash terms a "pantheistic" indifference to which particular religion is being espoused, and may anger atheists as their convictions are apparently devalued.

The policy of Canadian courts with respect to the custody of aboriginal children has begun to move toward applying standards of the aboriginal community. This is mandated by both s. 27 of the *Charter* and the *Canadian Multiculturalism Act*.[10] While courts have had occasion to apply this policy, it is not their only consideration in arriving at a decision. The Supreme Court of Canada in *Racine* v. *Woods*[11] rejected the application of an aboriginal mother for custody of her child against the foster mother. The child had been raised by foster parents for almost all of her six years. The court found that time spent with the child was potentially more important than the fact that the child was aboriginal:

> When the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time.[12]

A number of provincial statutes, including the Ontario *Child and Family Services Act*,[13] specifically address the importance of a child's aboriginal heritage and the values of the aboriginal community. Most significantly, the *Act* recognizes the communal resources that may be available to an aboriginal child:

> Indian or native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and native children and families should be

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[8] *Re A. (P.)* (1969), 1 N.S.R. (2d) 232 (T.D.).
[9] *Smith* v. *Smith* (1989), 92 N.S.R. (2d) 204 (T.D.).
[10] R.S.C. 1985, c. 24 (4th Supp.).
[11] (1983), 1 D.L.R. (4th) 193.
[12] *Ibid.* at 204.
[13] R.S.O. 1990, c. C.11.

> provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.[14]

The issue in a custody dispute for a child with one aboriginal parent and one non-aboriginal parent has been characterized by an Alberta court as a question of weighing the long term interests against more immediate interests. In *Gray* v. *Alberta (Director of Child Welfare)*,[15] the custody of a child was in dispute following the death of his mother. The non-aboriginal father and aboriginal aunt and uncle of the child were competing for custody. The court awarded custody to the aunt and uncle because of the cultural benefits that they could offer him, in spite of what the court characterized as the short-term advantages that his natural father had to offer.

Syrtash argues that Canadian courts are evaluating a child's aboriginal heritage with sensitivity when coming up with a "best interests" assessment. He asserts that unless there is a real threat of neglect, a long period of estrangement, or if the child's stated preference is not to be with his or her aboriginal parent, the courts will place a great deal of weight on the child's aboriginal heritage.

Sections 2(a) and 27 of the *Charter*, which guarantee freedom of religion and the principles of multiculturalism, govern Parliament, the legislatures and the judiciary. The principles of freedom of religion and multiculturalism include the freedom to pursue a religion without fear or constraint, as well as the freedom to express religious beliefs. One result of the guarantee of freedom of religion in the *Charter* is that "gag" orders which restrict an access parent's freedom to speak about his or her religion, will be applied less frequently. Syrtash speculates that women in particular, will feel the impact of such orders:

> Women, who are more often the custodial parent, will likely feel threatened by the access parent's newly established rights. In certain situations, access parents, generally male, who normally may not care much about religion, will suddenly find a way to use this issue and his "rights" to harass the custodial parent with insistent demands that the child be raised in a certain way, eat certain foods, dress in a moral fashion, etc.[16]

Clearly an abusive access parent can manipulate his or her rights to the detriment of the custodial parent. *Charter* guarantees, however, also serve to promote tolerance. Parents who are sincerely religious may find the *Charter* works to their advantage. In fact, as a point of strategy, the parent who is able to demonstrate an attitude of tolerance toward the other parent's religion will likely

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[14] *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 1(f).
[15] (1987), 10 R.F.L. (3d) 162 (Alta. Q.B.).
[16] *Supra* note 1 at 84.

influence the court in his or her favour.

Other biases the courts exhibit include a tendency to grant custody to the parent that the child most closely physically resembles in order to help the child develop his or her "identity." The courts also tend to be biased against religions which adopt an exclusive way of life or cut themselves off from mainstream society. It is for this reason that adherents of "way of life" religions, such as the Jehovah's Witnesses in Quebec, have been less favoured by the courts than mainstream religions. This bias may not survive the guarantees of the *Charter*.

The latter portion of *Religion and Culture in Canadian Family Law* deals with the issue of Jewish divorce. The unique religious requirement for a bill of divorce (the GET), with its accompanying customs, is potentially of great importance to the parties. A divorce is brought about by the man handing a GET to the woman. The bill of divorce must be voluntarily given and voluntarily received to be valid. Without a bill of divorce, a serious social stigma attaches to the undivorced person. Disabilities include the prevention of any future marriage until the divorce is effected. Because the GET is so important it has often been withheld by unprincipled spouses to be used as a bargaining chip in marriage break-up negotiations. The issue of abusing religious custom for personal gain has been recognized in the *Divorce Act*[17] and the Ontario *Family Law Act*.[18] These legislated solutions offer a process of relief by way of an affidavit compelling the obstinate partner to remove any hindrance to the spouse's remarriage in his or her faith. The same law is potentially useful to Islamic women who are being similarly blackmailed by their husband's refusal to grant a divorce.

The space in the book is unevenly allocated, treating various religions or cultures in varying degrees of detail, and some not at all. This imbalance may reflect the degree of sophistication to which the courts and legislatures have applied themselves to questions involving religion or culture. The imbalance is also probably a reflection of an unwillingness by some religious or cultural groups to air their family law disputes in a public forum and subject their religion or culture to evaluation by a Canadian judge.

The author successfully argues that the Canadian judiciary is increasingly

[17] R.S.C. 1985, c. 3, s. 21.1 (2nd Supp.).
[18] R.S.O. 1990, ss. 2(4)–(7).

willing to look intelligently at matters of religion and culture as they relate to family law disputes. The importance of this intersection of religion or culture with the Canadian judiciary has therefore been recognized to be of increasing importance to the proper functioning of our multicultural society. *Religion and Culture in Canadian Family Law* offers an overview of how Canadian courts treat minority religions and cultures, particularly in light of the *Canadian Charter of Rights and Freedoms*. It will inform both the specialist and non-specialist.