

## **Protecting the Vulnerable from the Vulnerable: Child Protection and Diversity**

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### **Abstract**

This paper explores some of the issues encountered by governments and government agencies when they attempt to protect children born into minority communities. The experience of the Ontario government and the agencies of the government in dealing with Aboriginal communities is the main vehicle for considering the issues. The paper provides a guide to the legislation, a history of the Aboriginal communities dealing with children and the government attempts to protect children.

The immigrant communities' experiences with child protection agencies are then considered. The similarity between the Aboriginal experience and the immigrant communities' experience is analysed. Finally the steps needed to begin dealing with the problems experienced by the government, government agencies, Aboriginal peoples and Immigrant communities are outlined.

### **Introduction**

In setting legislation for the protection of children within Ontario the government walks a tight rope; on the one hand it must ensure that children are not subject to abuse or neglect, at the same time it must ensure that concerns regarding the rights of parents and their communities must be respected. This problem is particularly acute when the parents belong to a minority community. In essence, as the title suggests, often the government is protecting vulnerable children from vulnerable communities while protecting both from the dominant community.

Likewise the institutions charged with carrying out the government mandate of protecting children must face the complex interplay between the expectations and rights of the parents and the needs of the child. Where the agency is dealing with children from the dominant community this task is very difficult. Add to this undertaking the need to understand and deal with children, parents and communities whose beliefs and social structure is unfamiliar and the task becomes even more difficult. Finally throw in the fact that the agency employee and opposing parties may speak different languages and the likelihood of misunderstandings and frustration on all sides is increased dramatically.

The courts that oversee the process are in much the same position as the government agencies. Many parents and other parties appear without counsel; the court will often expect the agencies counsel to help understand the situation. Counsel will rely on the child care worker to provide much of the information needed. It should be obvious that this is a less than ideal situation.

Since Canada is considered one of the most multicultural countries in the world and Ontario is one of the most diverse provinces in Canada, the task of balancing these two concerns continues to change and grow. New groups with new views and demands are being added to the already complex mix. Added to this growth in populations from other parts of the world is the growing insistence by the indigenous groups who feel discriminated against by government legislation<sup>1</sup>. The other provinces and territories face similar problems and in some provinces may in fact face similar problems as the population migrates within Canada because of economic and other similar changes.

Each province has its own legislation aimed at protecting children<sup>2</sup>. While the legislative framework for each province is different the substantive laws are almost identical. The similarity in the legislation of the different provinces makes it possible to explore issues and solutions that apply to most if not all provinces and territories. The provinces and territories have similar tests for determining when a child is in need of protection and use similar methods for providing the protection. Therefore, although this paper will focus primarily on the question of government policy in Ontario and the means by which agencies fulfill the mandate given by the government, most of the analysis could equally apply to any province or territory.

The first part of the paper will examine the present legal structure for protecting children in Ontario. Both the question of accommodating the diverse population and the question of ensuring that that accommodation does not allow the government to ignore its obligations to children will be considered. It will also be noted that many of the concerns about the need to consider the culture and religious beliefs of new immigrant communities are just being explored and therefore it will be some time before the extent of the problem and likely solutions are well understood.

## **Claimant Groups**

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<sup>1</sup> Mallea, Paula. 1994. *Aboriginal law: Apartheid In Canada?* Brandon Manitoba: Bearpaw Publishing, 2. Indigenous activism

<sup>2</sup> Bala, Nicholas et. al. 2004 *Canadian Child Welfare Law* 2<sup>nd</sup> ed. Toronto. Thompson educational Publishing Inc. 3.

There are numerous groups in Ontario who have concerns regarding the right of the government to involve itself in their family relationships. The potential claimants include aboriginal peoples, religious groups, the homosexual community, and non-aboriginal race minorities. Some of the claims by the disparate groups are the same, other claims are unique. As well the concerns of some groups are in direct opposition to the position of another. This paper will focus on the claim of Aboriginal peoples and new immigrant groups. Some reference will be made to existing religious groups who have made claims in the past because of the similarity between the claims of some new immigrants and the claims made by religious groups that have been in Canada for centuries.

One issue that will arise is that of the potential for one group within a minority to dominate and subvert the members of the group. Kymlicka discusses this problem in his book *Multicultural Odysseys*<sup>3</sup>. One example of this noted by Kymlicka is a potential for women to have their voices muted by the men in their cultural or religious group because of historic beliefs and customs about the “place” of men and women in society.. Governments must be careful not to in some way reinforce this discrimination through laws meant to recognize cultural diversity<sup>4</sup>.

In the area of child protection there is an added dimension to this problem. It is possible for one or both parents to attempt to overpower the voice of the child because of cultural or religious beliefs. For example, where the voices of women are muted because of cultural, the mother may try to suppress the voice of a daughter without realizing that she is reinforcing a norm which has limited the mother’s rights. The child’s position may in fact be different from both the majority cultural opinion and the opinion of his or her mother and father. The government must therefore struggle with allowing all family members to have an equal voice in matters of protection.

### **The Legal Environment**

The Supreme Court of Canada has stated that interfering in a parents’ right to raise their children is, in legal and emotional terms, the equivalent of sending someone to prison<sup>5</sup>. Lack of protection will harm the child and ultimately the child’s community. Overly aggressive

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<sup>3</sup> Kymlyka, Will. 2007. *Multicultural Odysseys* Oxford, Oxford University Press, 102-103.

<sup>4</sup> Ibid 159-164

<sup>5</sup> *New Brunswick (Minister of Health) v. G. (J.)* [1999] 3 S.C.R. 46 at para. 70 and 76.

intervention will rob the parents of their rights. Either result will likely cause harm to the public view of the justice system; this would likely be most harmful where the minority group comes to the conclusion that our system is not just, whether because a child is exposed to more harm or the parents and their community are treated in a manner that is less than respectful.

The crafting of the laws that are meant to meet to goal of protecting children and respecting family rights is the responsibility of the provinces. Each province establishes a set of criteria for allowing government agencies to interfere in the family. The interference can be classified into two categories, voluntary and court enforced. This paper will focus exclusively on the court enforced process. The voluntary process provides parents with the power to ensure that religious, ethnic and similar matters are fully considered.

The federal government is involved to some degree in child welfare services when aboriginal children become embroiled in the system. Constitutionally the federal government is entitled to govern all child welfare concerns where aboriginal children are involved<sup>6</sup>. Although the federal government does participate in some aspects of the delivery of services to aboriginal communities, it has delegated the legislative power to the provinces<sup>7</sup>.

### **The Ontario Legislation**

The Ontario Child and Family Services Act<sup>8</sup> (herein after CFSA) is the piece of legislation governing child protection. The act is divided into numerous sections dealing with issues as divergent as the licensing of agencies to court procedures. This paper will focus on two major processes encompassed by the legislation. One is the decision to interfere in the family. The other is the care of a child are apprehended by a child protection agency.

An apprehension occurs when a child protection agency removes a child or children from the care of their parents or other care giver. The child may be placed in a foster home, group home

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<sup>6</sup> Bala , *Child*, 216-7

<sup>7</sup> Ibid.

<sup>8</sup> R.S.O. 1990 Chap.11

or treatment facility. The parents or care giver will likely be given access to the child or children<sup>9</sup>.

The Ontario legislature has delegated protection of children to agencies across the province. These agencies are generically known as Children's Aid Societies, although a number of the agencies have chosen names they considered to be less threatening to potential clients. Each agency has a defined geographic jurisdiction. The jurisdiction may be a city or county or several counties. As well several major centers have several agencies within their boundaries. These agencies usually have jurisdiction over a particular religious group or groups of religions; with one exception there are several agencies run by Aboriginal groups<sup>10</sup>.

The government through the CFSA has established two ways in which an agency can become involved with a family. One method is voluntary agreement<sup>11</sup>, which allows a family to make an agreement with the Children's Aid Society (herein after CAS) in their Jurisdiction. The other method is by court order. As noted above the, voluntary system will not be considered since it doesn't create the problem of forcing a family and a child into a system which takes away the right of a parent to make decision about their child.

The Ontario process, like that in other provinces, involves two steps first the CAS must prove that a child is at risk as defined by section 37(2) of the CFSA<sup>12</sup>. In order to do this evidence must be produced to show that harm has already occurred or that there is the likelihood of harm. The harm must be one of those enunciated by this section. Once an agency has established that there is a likelihood of harm, the test for determining the next steps changes from one of harm to the "best interests of the child". The risks which provide the CAS agency with the right to intervene fall into four broad categories; 1. physical abuse, 2. sexual abuse, 3.neglect and 4.emotional harm<sup>13</sup>.

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<sup>9</sup> Bala, *Child*, 18-22

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> CFSA.

<sup>13</sup> Sec 37(2)

Once the CAS agency has decided that there's a risk to a child that requires it to obtain a court order there must be a decision whether the child can be cared for by the parent or someone in the community or whether the child must be taken into care.<sup>14</sup> If the child is not taken into care (apprehended) then usually protection will be provided by a supervision order. A supervision order can require the parties to the order to do certain tasks (such as drug rehabilitation) or to refrain from doing some things (such as using physical discipline).

### **Indigenous People**

The claim of the aboriginal peoples of Canada to special consideration by the government and child protection agencies is considered to be stronger than that of other minority groups. The reason for this has to do with the fact that the Aboriginal people were the first peoples to occupy North America. The Europeans established governments that relegated the Aboriginal people to reserves<sup>15</sup>. The leaders of the white community, both political and religious condemned the Aboriginal culture as uncivilized and savage<sup>16</sup>. Religious groups and governments established residential schools meant to teach Aboriginal children to be civilized and Christian<sup>17</sup>. These schools are now seen to have been abusive. The children in these schools were subjected to sexual and physical abuse as well as neglect<sup>18</sup>. As well there is a recognition that separating the child from family and community was in and of itself traumatic and destructive<sup>19</sup>. This attempt at assimilation is considered by many Aboriginal people to be a source of many problems within their community.

The removal of the children from their families and native communities has been condemned by many modern governments and organizations. Both governments and religious organizations have apologized for their role in this assimilation. As well religious organizations have been forced to pay compensation to the victims of this program. Although there are continuing lawsuits and concerns about his past assimilation process it is clear that the great majority of people consider the process to have been abhorrent.

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<sup>14</sup> Sec. 51

<sup>15</sup> Mallea, *Aboriginal 2*.

<sup>16</sup> Macklem, Patrick. 2001. *Indigenous Difference and the Constitution of Canada* Toronto, University of Toronto Press 57.

<sup>17</sup> *Ibid.*

<sup>18</sup> Bala, *Child* 202-204

<sup>19</sup> *Ibid.*

It is the belief of the aboriginal communities that the present child welfare system does not take into consideration to a sufficient degree the distinct history, philosophy and social context of aboriginal communities. Furthermore they believe that only aboriginal people can possibly understand these matters sufficiently. These beliefs are reinforced by the belief that the dominant culture has mostly harmed Aboriginal children.

It is easy to understand the resistance of aboriginal people to child protection laws. The history of assimilation does not breed confidence in the ability of the dominant white society to successfully protect children. As well aboriginal people believe that the white society created many of the problems with children by destroying the family and community<sup>20</sup>.

Another complicating factor is the fact that Canada is a federal state. Pursuant to the Canadian Constitution Aboriginal peoples come within the jurisdiction of the federal government. However, the federal government has decided not to legislate in the area of child protection, instead it has delegated its responsibility to the provinces<sup>21</sup>. In some situations this creates questions of who ought to pay for the services.

Another fact that has led to the child welfare problems is the poverty and lack of community resources for aboriginal groups. The aboriginal communities in Canada are among the poorest communities in the Western world<sup>22</sup>. There can be little question that this poverty has been brought about, at least in part, by the dominant white society which oversees the governance of the native communities<sup>23</sup>.

The make up of the community itself adds to the problem of protecting Aboriginal children while working with their communities. Aboriginal peoples of Canada speak 52 different languages.<sup>24</sup> There are presently 600 Indian reserves in Canada owned by Aboriginal peoples<sup>25</sup>. Aboriginal

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<sup>20</sup> Hamilton, Hon. A.C. 2001. *A Feather not a Gavel* Winnipeg, Great Plains Publications 137-139.

<sup>21</sup> Bala, *Child*, 216-217.

<sup>22</sup> *Ibid*, 201.

<sup>23</sup> Bala, 218.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

communities on reserves are divided into bands, which are the political unit for an aboriginal group having similar history culture and heritage. Bands range in size from a hundred members to over 20,000 members. As well as the bands there are national organizations which represent aboriginal groups on political matters. All of these facts make it more difficult for governments to negotiate child protection with aboriginal communities.

### *The Aboriginal Position*

It should not come as a surprise that bands do not always agree with one another and therefore the degree to which a band participates in and negotiates child protection issues varies from band to band and from geographic area to geographic area. Further complicating matters is the fact that there are children who are descendents in part from an Aboriginal parent but who are considered non-status by the band because of their non-aboriginal ancestry. There are also numerous Aboriginal people who leave the reserves and move into their urban areas where they are not under the political control of the band. All of these factors have made it difficult to outline the aboriginal position in a manner that is accurate and comprehensive. However there are some demands which common to most aboriginal groups.

Aboriginal groups have a worldview which is different from that of in dominant society. Their view of property is one of communal rights rather than individual ownership. They also have a belief in the connection between people and nature which puts a priority on being in conformity with than would be evident in the dominant white society. Aboriginal groups assert that their philosophy of child-rearing is more grounded in the idea of allowing the child to explore the world in a community which will provide for the needs when necessary<sup>26</sup>. It is their belief that what we see as neglect is simply a philosophical position of not being as controlling of children as in common in the dominant society<sup>27</sup>. They would therefore argue that what we consider neglect is simply a different view of how children learn and grow.

Another complicating factor is the emphasis by Aboriginal communities on the community versus the individual. Aboriginal communities believe that the development of the community

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<sup>26</sup> Bala, *Child*, 209-210.

<sup>27</sup> *Ibid*, 214-215.

as a whole and the retention of their heritage through language culture and religious beliefs is more important than the rights of the individual. This contrasts with Canadian political beliefs which often put the individual rights above those of the community.

There is also an argument that the poverty experienced by many aboriginal peoples whether on a reserve or in a larger community makes it difficult if not impossible for them to provide for children in a way that would be acceptable to the present governments and agencies of governments in Canada. Since the Aboriginal community believes the poverty was caused by the dominant white society, Aboriginal people point to the government as the cause of the problem. Financial support for reserves is presently under the control of the federal government further complicating matters.

#### *The Present Situation of Aboriginal Children*

There is reason to be concerned about the plight of Aboriginal children. There are a disproportionate number of Aboriginal children in the care of child welfare agencies in Canada.<sup>28</sup> Headlines in the newspapers have outlined high rates of addiction, early school leaving and numerous other problems<sup>29</sup>. Furthermore the communities themselves have had difficulties obtaining the basic necessities for community members<sup>30</sup>.

#### *CFSA Special Recognition of Aboriginal People*

At present Ontario child welfare agencies are required to notify an Aboriginal band when a child who is a status member of the band is the subject of a court application by a CAS<sup>31</sup>. It is then the responsibility of the band to determine whether or not the child is in fact a band member. If the child is a band member than the representative from the Aboriginal band can participate in the child welfare procedure<sup>32</sup>. The band can become involved in the placement of the child in a foster home ensuring that the child is placed in an aboriginal home. The band can also make representations in court. They can help establish services for the child and family.

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<sup>28</sup> Ibid, 199.

<sup>29</sup> Ibid.

<sup>30</sup> Mallea, *Aboriginal* 2-7.

<sup>31</sup> CFSA

<sup>32</sup> Ibid.

It must be understood that this participation is limited. The ability of the band to determine what will happen is limited to making submissions at predetermined points in the procedure. The number of aboriginal foster homes is limited and therefore the ability to ensure placement is limited. In a number of situations the band is consulted but can not ensure that their position will carry the day.

Ontario legislation now allows for the development of agencies run by aboriginal people<sup>33</sup>. There are several such agencies in Ontario at this time. It is contemplated that there will be more agencies run by aboriginal is in the not-too-distant future. These agencies are still overseen by the provincial government through the legislative process and regulations.

There have also been a number of initiatives to provide more control of child protection matters by aboriginals through the use of innovative processes. One example of this is a placement process called customary custody. This process requires an agreement between the agency and the aboriginal band involved, establishing guidelines for the care of a child with an aboriginal family. These guidelines must be negotiated by the two groups. There is some question as to the degree of success that has been achieved through this process. One agency which had been entering into such agreements as does continue the practice while their agencies are considering the practice.

The authors of the Chapter on Aboriginals and Child Protection<sup>34</sup> in the book *Child Welfare law in Canada* state that the Canadian solutions to the concerns of Aboriginal people include;

1. Establishment of aboriginal child welfare agencies, operating within the framework of provincial and territorial law; some of these agencies have a full legal mandate, while others are voluntary agencies;
2. Notification and involvement of bands in Child welfare proceedings;
3. Development of community based dispute resolution models for child welfare cases involving aboriginal children:

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<sup>33</sup> Ibid.

<sup>34</sup> Bala, *Child*, 221.

4. Recognition of the importance of cultural and heritage as factors in determining the best interests of the child; and

5. Introduction of laws and policies giving preference to placement of aboriginal children in aboriginal families and communities.

### *Concerns*

One of the concerns with aboriginal child welfare societies is that the child's rights will take second place to that of the community. Given the priority given to community this concern seems real. This conflict between the wishes of the child and the wishes of the community is one that is common in child protection cases not involving a question of diversity as well as those involving diversity. However, when a case involves an issue of diversity this problem becomes even more difficult. The reason for this added difficulty has to do with the fact that many minority groups have review of individual words versus community rights that is in contradistinction to those of mainstream Canadian society. This is particularly true of aboriginal Canadians and their view of the rights of the community versus the rights of the child. Kymlyka has pointed out that writings about diversity have often noted that the effort to accommodate diverse communities may in fact be detrimental to individuals within the community that is involved<sup>35</sup>.

One example of this problem is evident in a child welfare case that occurred a number of years ago in the province of Manitoba. A child who had been living in a home with a non-aboriginal family was returned to the band against the wishes of the child. After the child was returned to the band she was subjected to physical and sexual abuse by band members. The aboriginal child welfare agency chose to ignore the problem. Aboriginal authorities did not want to cause dissention within the band. When the child was finally returned to the non-aboriginal family she was severely psychologically damaged. The child sued the band and was successful<sup>36</sup>.

Aboriginal people will of course point out that children have been harmed while in the care of mainstream Children's Aid Society's. As well, they will look to the harm done by Canadian

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<sup>35</sup> Kymkila.

<sup>36</sup> Doe v. Awasis Agency of Northern Manitoba [1990] M.J. 402(Q.B.)

authorities to aboriginal children in the past. While both of these concerns are well-founded this does not allow for a solution to the problem. The goal must be that of protecting children regardless of whose care they are in, there is no value in pointing at each other's problems unless it is helpful in avoiding future problems. It is important therefore to realize that any time a child's safety is compromised because of the wish to protect the community it is inappropriate.

Another problem that arises with these agencies is that of funding. Although provincial and federal governments have reached agreements to joint funding of the agencies there has been no agreement about funding aboriginal groups in a manner that would allow alleviation of poverty or provision of more services. As noted above, since many of the problems arise from this poverty and lack of services it is difficult to see how simply putting aboriginal communities in charge of the child welfare system will lead to an amelioration of the problem.

There is one example in Canada of a child welfare agency that was operated by an aboriginal band and was not overseen by the provincial government. This was the Spallumcheen band which is located in British Columbia. This band has been successful in operating the child welfare agency without any evident concerns.<sup>37</sup>

### **Metis And Non-Status Children**

As well as the aboriginal peoples who are recognized as being members of bands and therefore have a particular status within our system there are two groups whose position is somewhat more ambiguous. Those groups are Métis and non-status children. These two groups have become somewhat confused. Historically Métis referred to the children of intermarriage between an aboriginal and someone of French heritage. However, today there is not as clear a definition of Métis. The Canadian constitution recognizes Métis as having a special status equivalent to that of aboriginal people.<sup>38</sup> It is not clear however if these rights are to be enforced since the Métis do not have the same kind of structure of bands that is true of aboriginal peoples<sup>39</sup>.

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<sup>37</sup> J.A. McDonald "The Spallumcheen Indian Band By-Law and Its Potential Impact on Native Indian Child Welfare Policy in British Columbia" (1983) Canadian Journal of Family Law 75.

<sup>38</sup> Macklem, *Indigenou*, 9.

<sup>39</sup> Also see *Lovelace v. Ontario* 2000 S.C.C. 37 for a case that seems not to give equivalent status.

As well as the Métis there are children who are considered by the bands to be non-status but who are not considered to be Métis. Often these children are the offspring of aboriginal people living in urban communities who have relationships with non-aboriginal people. These children are left in a situation where their heritage and cultural background are not protected by any band or band wrapped and therefore it becomes the obligation of the agency to try and ensure that they are educated in both their aboriginal heritage and other heritage.

At the present time there is no special accommodation given to Métis people by child welfare agencies. The Métis child will be treated in a manner equivalent to that of a non-aboriginal person. On its face this would seem to offend their status under the Constitution and the legislative requirement in Canada that children be placed according to their heritage and cultural background.

The government of Ontario needs to enter into discussions with the Métis people in order to insure that Métis children are treated in the manner equivalent to that of aboriginal people. This may require some involvement by representatives of the Métis nation and investigation of ways to ensure that the child is aware of heritage and given an opportunity to participate in their cultural community. As often happens when two minorities are competing for resources or power they may in fact it's been more time competing with each other than it spends questioning the dominant white society.

### *Religious Beliefs and Child Protection*

There have been two distinct positions put forward regarding the right of the government to legislate interference in family matters from a religious beliefs philosophy. On one extreme there is the position taken by Richard Dawkins in his latest publication *The God Delusion*<sup>40</sup>. The other attack has been from religious organizations which demand special status when children from their religious organizations are involved in the child welfare system. This special status can involve an exemption from strict adherence to the risk factors outlined in the legislation or accommodation once the child is placed in care.

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<sup>40</sup> Dawkins Richard, 2006 *The God Delusion* United Kingdom, Bantam Books

There are two distinct groups claiming special status pursuant to religious beliefs. The first are the Christian and Jewish groups who have been part of the fabric of Canada since it was established as a country. The second group are eastern religions who, may have been present in Canada for more than a century, but until recently have lacked both the power and the numbers of people to allow them to have a strong voice when it comes to the enactment of legislation or in bringing of lawsuits to enforce their rights.

In his book Mr. Dawkins states that telling a child that they are Catholic, Jewish, or any other religious affiliation is in and of itself a form of the abuse<sup>41</sup>. Richard Dawkins is not the only person to make such an extreme statement. A number of other authors have also started to attack the position of religions within society. Given the approach by these authors and the groups that support them it can be assumed that they would agree with Dawkins view of religion and child protection.

If one is to accept this argument it would presumably come under the general heading of emotional abuse. This assertion lacks credibility. Would it not also be true that telling a child they belong to particular cultural group create exactly the same assertion? Eighth knowing that your heritage is that of Basque who have traditionally tried to separate from the Spanish government may create many of the same concerns about which Dawkins complains. Is there are some believe that we can bring up children with no heritage or other historical knowledge? Evidence would suggest just the opposite. Children seek out their backgrounds whether cultural religious or other. Furthermore, attempts by Communist Russia and other groups to raise children in a known historic background have met with little if any success.

The other problem with the assertion by Mr. Dawkins is the fact that his evidence for the abuse consists of one questionable story. Having accused religious groups of not being willing to provide evidence of their beliefs, he then uses one example as proof of a rather broad based statement. Mr. Dawkins does not make any attempt to show that children who are brought up in a religious faith suffer from a greater number of emotional or psychological problems that would be true of those not raised in such a faith.

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<sup>41</sup> Ibid.

In Ontario a number of parents have argued that their religious beliefs exempt them from some of the provisions of section 37(2) of the CFSA which establishes the grounds on which the society may intervene in the life of a family. One example of this is the use of physical punishment of the child. Physical abuse of a child is one of the main categories allowing for the involvement of a Children's Aid Society in the affairs of the family. The argument enunciated by the religious organizations is that the CAS should not be taking action where the religious beliefs of the family involved requires that the child be disciplined through Finnish physical punishment.

Although the courts have made some conflicting decisions regarding discipline and religion<sup>42</sup> the trend seems to be towards rejecting the idea that a parent can physically discipline a child based on their religious beliefs. The courts have suggested that a minimal degree of physical discipline is acceptable, but anything beyond a minimal amount is not to be condoned.

It must be noted that there is a discussion within Canada about allowing any physical discipline regardless of how minor. Several years ago the Supreme Court of Canada refused to find that a section of the criminal code that allows for physical punishment of children offends charter. However, both those opposed the use of any physical discipline and those in favour of the use of physical punishment continue to push for change. Several fundamental religious groups assert that physical punishment is an appropriate way to discipline the child even when the punishment is not minor. Others groups continuing to assert that physical discipline is abuse regardless of how minor the discipline may be.

Another assertion made by a number of religious groups and cultural groups is that when a child is in care they must be given the ability to participate in their religious and cultural ceremonies. Normally this would be accomplished by having a stay with a family of the same religious beliefs or cultural background.

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<sup>42</sup> *Family and Children's Services of St Thomas and Elgin v. F* 2005 CarswellOnt 912 (Ont. S.C.J.); for case on medical treatment and religion see *B.R. v. Children's Aid Society of Metropolitan Toronto* Feb 10, 1989, Doc. No. York 9141.

One of the concerns with this assertion involves determining both the religion to which the parents belong and establishing what religious rituals are involved. It is also at times difficult to determine the cultural heritage of the child particularly where the child's parents come from different cultural groups. It is often difficult to untangle the question of whether a particular practice is a religious practice or cultural practice and the degree to which it is here adhered to by the majority of those people belonging to either the religious or cultural group. One example is a person of Jewish extract who does not practice their faith. They may still have views and practices that are consistent with the faith but which are not given the same religious significance. When looking for a family to foster such a child is it necessary to find family of Jewish background and if so does it matter whether that family is Orthodox, liberal, radical or non-practicing. There are numerous Christian and Muslim sects who have very different beliefs about how a child ought to be raised and what ceremonies that must be involved in.

Another complicating factor is that many of our beliefs about a person's religious beliefs are based on stereotypes. People may assume that all Muslims have the same beliefs and practices. This is a completely inaccurate view of that religious group. There are numerous Muslim sects some of which have a distinct hatred of other Muslim sects. This requires that a Children's Eight Society dealing with a child of parents who are practicing Moslems must be careful to ensure exactly which sects they belong to and the degree to which they adhere to their sects practices.

The Children's Aid Societies will need to make contact with Religious leaders within the belief community that is making assertions in order to determine what is truly part of the religion in what may be in fact little more than the cultural the belief that has grown up in particular region. Once this has been accomplished the CAS must determine whether or not the resources are available to meet the needs. For example, it is not always possible to find a Muslim child a Muslim foster family because there are not many Muslim homes that are currently licensed to be foster homes.

## **Culture**

Culture is not given the same prominence or degree of deference that would be accorded to religious beliefs. One reason for this is the fact that religious beliefs are protected by the charter

and are presumably therefore held in greater regard than cultural practices which are not so protected. One of the arguments put forward in this hierarchy is the fact that a religious belief can be considered to go to the core of our personalities whereas cultural matters are more peripheral.

However, in Ontario culture is considered to be important when determining the placement of child in care with Foster parents. At the present time the legislation requires that a Children's Aid Society attempt to find a foster home that reflects the cultural background of the child. Where this is not possible attempt should be made to connect the child with groups who will make up for this gap.

Given the above statements about the priority of religion, untangling the true religious beliefs from cultural beliefs would be an important step in ensuring that the religious beliefs are given the necessary regard.

### **Conclusions**

One of the things that should be clear is that in spite of the many detailed differences between aboriginal people, religious groups and others who might assert their right to special treatment under the Children's Aid Legislation in Ontario, the reality is that many of the problems are common to the groups and therefore can be dealt with in similar ways. Although the root of the problem and he wished to have a special status applied is very different they share a common basis for such assertions. The wish to use physical discipline may be rooted in beliefs of what the Bible states, while the root of the aboriginal claim to special treatment comes from their cultural and spiritual history both are claiming a right of community privilege over the child's right to protection. Both would argue that the child is not at risk by virtue of their actions and that in fact their actions are necessary for the full education of the child.

Therefore the approach to the problems can be the same. The government through its legislation has established a set of factors which require an agency to take action. It is incumbent upon the agencies to establish parameters around these risk factors. The first parameter should be an expression of what might be considered a bottom line. That is nonnegotiable evidence of risk

factors. For instance it must be stated that any physical abuse of a child will not be condoned regardless of religious or other beliefs. Therefore, the fact that some communities believe that female circumcision is a religious necessity will not in any way convince society not to act where such a practice is in place.

In order to bring about a better relationship between minority communities and child protection agencies the following steps must be taken:

- 1 It is necessary to build trust between the communities, the government and the agencies involved. Our example in the case of aboriginal peoples because of the history is clear that there is little trust by the aboriginal people of any government or government agencies. Therefore it is necessary to develop a means by which the trust can be reestablished. However, it is also clear that governments and government agencies have little faith in the ability of average or communities to carry out the responsibilities of running an agency. Both sides must begin a long process of learning to trust each other and healing the past ones.
- 2 The next step would be obtaining more accurate information about communities and their beliefs. This is true even with aboriginal communities in spite of the fact that there has been a long history of interaction between Canadian governments and agencies and aboriginal peoples. However, it is even more necessary with new immigrant communities. We in all likelihood have many beliefs which are inaccurate regarding both the culture and religion of the people entering the country. It is not possible to build the trust mentioned in the first step nor is it possible to problem solve without a better understanding of the communities with which we are dealing.
- 3 The next step is coming to an understanding of what can and cannot be accommodated. The government and the agencies must be clear on those matters which are not negotiable. They also must be clear on what matters can in fact be negotiated and establish a way of starting to negotiate in those areas.

- 4 One of the most important pieces will also be that of resources. Once again this is easiest to see when dealing with aboriginal communities. Poverty and lack of community resources have plagued reserves for years and it make it virtually impossible to establish the means necessary to begin counseling and other services necessary to make it possible to properly take care of children. Since many people immigrated to Canada are poor and end up in poor communities is product problems are likely to be part of that concern as well.

In conclusion all parties must be willing to work together to come to an understanding of each other's beliefs and needs and all parties must be willing to compromise in order to ensure that children are protected and are raised within their cultural and religious communities.

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