

Family Dispute Arbitration and Sharia Law

Larry Resnick (2007)

Introduction

The aim of this paper is to develop criteria for evaluating legislation governing family dispute arbitration, with special attention to the feasibility of using Sharia law. Ontario faced this problem a few years ago and resolved it. A review of that process and its resolution is our starting point.

Recent Historical Background

The version of the Ontario Arbitration Act which was in effect in 2003 allowed the use of non-Canadian law. It was open to the parties to choose an alternative law with the proviso that an arbitral ruling which would violate Canadian law would be without force.

In the Fall of 2003 the Islamic Institute of Civil Justice announced that it intended to create an Islamic family dispute arbitration board for Canadian Muslims under the provisions of the Ontario Arbitration Act. In accordance with the Act, decisions of a Sharia arbitrator would be enforceable in Canadian courts, subject to the proviso cited above. There was a veritable tsunami of negative reaction in the national press from organizations of Muslim women and from a wide variety of other rights groups both in Canada and abroad. Their shared belief was that under Sharia law women are systematically deprived of rights guaranteed to them under Canadian law. In defence of the new proposal, Syed Mumtaz Ali, President of the Canadian Society of Muslims and founder of the Islamic Institute of Civil Justice, responded that denying Muslims the right to conduct Sharia-based family dispute arbitrations would be an egregious violation of the Canadian commitments to multiculturalism and religious freedom as enshrined in the Charter of Rights and Freedoms.

In June 2004, the Ontario Attorney General, the Honourable Michael Bryant, and the Minister Responsible for Women's Issues, the Honourable Sandra Pupatello, asked Marion Boyd, a former Attorney General and Minister Responsible for Women's Issues, to conduct a comprehensive review of the use of arbitration in family and inheritance cases.¹

Ms. Boyd's Report was issued in December 2004 after extensive consultation with interested parties. Her conclusions constituted a compromise between the commitment to multiculturalism and the commitment to women's rights. She recommended that:

1. *Arbitration should continue to be an alternative dispute resolution option that is available in family and inheritance law cases, subject to the further recommendations of this Review.*
2. *The Arbitration Act should continue to allow disputes to be arbitrated using religious law, if the safeguards currently prescribed and recommended by this Review are observed.*²

Muslim women's organizations as well as a large number of non-Muslim women scholars and lawyers generally applauded the intent of Ms. Boyd's recommended safeguards but held that they fell short of protecting the rights of vulnerable persons. And they maintained their opposition to the use of Sharia law.

In February 2006, a bit more than one year after Ms. Boyd presented her Report, the Ontario Ministry of the Attorney General announced a change in the Arbitration Act to the effect that family dispute resolutions based on non-Canadian laws and principles, including religious principles, have no legal effect and are not enforceable by the courts. Other significant changes were made to the Arbitration Act and four Acts relating to matters of family law.³

On the one hand, Ontario's solution rested on a prodigious input of legal analyses, but on the other hand, that scholarship flourished in the heat of a sizzling value-laden battle over the nature of justice, women's rights and the meaning of the Charter. It is worth trying to learn lessons from the whole process and its conclusion. In effect, we British Columbians have the rare luxury of hindsight before making any commitments. What can we learn?

Crucial Questions

- What is arbitration?
- Is arbitration suitable for family disputes?
- If not, can it be modified to fit family disputes?
- If it can, should Sharia law family arbitration be an option?
- If not, why not?
- Should BC amend its current arbitration legislation?

The Nature of Arbitration

Agreeing to be bound by the conditions of an arbitration is voluntary; in the absence of a successful appeal, abiding by the arbitrator's decision is compulsory. In effect, an arbitrator is a privately appointed judge. As such, arbitrators' decisions tend to be accorded deference when there is an appeal.

Arbitration has many virtues: it is generally faster, more accessible and cheaper, but just as decisive, as civil courts; it generates very few appeals; it is not open to the public or the media and perhaps best of all, within very broad limits, the parties are free to choose, unfettered by government oversight, the arbitrator, the rules of procedure and the laws which, in their view, are most suitable for determining the correct outcome. As a very free enterprise, it's good for business.

Ideally, the parties to a commercial arbitration are assumed to be independent agents, vying for advantage, competent to protect their own interests on what is, in principle, a level playing field. All parties have access to legal advice and the sophistication to understand it. I repeat, ideally. But I am inclined to say normally. These are the intended clients for whom the BC Commercial Arbitration Act is custom made.

Families do not fit this bespoke legislation. The family is the very antithesis of a set of independent individuals not in a position to exert undue influence on the others. That much is obvious. The deeper truth is that individuals in families have subconscious mechanisms which allow them to suppress and harm vulnerable family members without being conscious of any ill intent. The family can be a breeding ground for rivalry, resentment, repression and revenge. Worse yet, victims sometimes believe the fault lies in them, thereby becoming complicit in their own misfortune.

It seems to follow that commercial arbitration and family arbitration should be classified as different species of the same genus. One aims at speed and efficiency at the cost of minimum judicial oversight. The other aims, or should aim, at the protection of vulnerable persons, requiring rigorous oversight at the sacrifice of speed and efficiency.

Safeguards for Family Dispute Arbitrations

Consider three fundamental requirements for a viable family dispute arbitration process.

1. The parties must understand the rules (laws) of procedure governing the conduct of the hearing, the legal framework to be used by the arbitrator in arriving at a decision and the range of consequences which may result from the decision.
2. The parties must be aware of the alternatives to arbitration and must, of their own free will, agree to the arbitration.
3. The governing legislation (an arbitration act, for example) must be designed to protect the rights of vulnerable persons and to insure that the first two requirements are satisfied.

As a rough approximation, the main difference between commercial and family dispute arbitration is that in commerce the first two requirements [which amount to informed consent] are taken to be unproblematic and the third [legislated safeguards] is taken to be superfluous because it adds complexity without responding to a need; whereas in family dispute arbitration legislated safeguards are taken to be essential because without purpose-designed legislation the appearance of informed consent may be only an illusion hiding an injustice.

Now I want to use this three-part template to see whether Ms. Boyd's proposals to amend the relevant Ontario legislation satisfy the third requirement.

Clearly, under most circumstances independent legal advice would be necessary to meet the need to be "informed". Here is Ms. Boyd's recommendation:

9. The Arbitration Act should be amended to permit a court to set aside an arbitral award in a family or inheritance matter if...a party to it did not have or waive independent legal advice.⁴ (emphasis added)

To be or not to be informed, is that really the question? It would be hard to think of a more defective provision for satisfying the requirement that the parties understand the legal framework. Is it even any better than nothing? Compare Ms. Boyd's recommendation with no requirement at all for legal advice. Her provision for waivers is arguably less advantageous to a vulnerable client than no requirement at all. Think of the basis for an appeal. A signed waiver cuts the ground out from under a claim that the arbitrator's decision should be reversed because the party was not aware of the nature of the agreement. There might be many explanations for waiving independent legal advice including coercion and other forms of undue influence, not being able to afford a lawyer and misunderstanding the serious consequences of the waiver. Surely, among vulnerable persons in family law arbitrations, the number who are so well informed that they don't need legal advice must be very small. If this surmise is correct, most waivers signed by vulnerable persons in an arbitration leave them at a severe disadvantage; uninformed, yet unable to use their ignorance to any good effect in an appeal.

There is a long-standing tradition in the law that legitimates waiving legal advice in lieu of receiving legal advice. In some contexts that makes sense. But it is not suitable for vulnerable persons in a family dispute. Choosing "Caveat Emptor!" as the approved principle for [government sanctioned] family dispute arbitration serves only to create disrespect for the law.

There are other problems with Ms. Boyd's recommendations concerning informed consent in cases where religious law will be used. Consider this set of recommendations:

- 16. Arbitrators who apply religious laws...[must] develop a statement of principles that explains the parties' rights and obligations under the particular form of religious law.*
22...the statement of principles...should [be distributed] to prospective clients... in advance of the clients seeing a lawyer.
*23. ...the Independent Legal Advice Certificate should explicitly state that the lawyer reviewed the statement... and the lawyer is satisfied that the client has sufficient information to understand the nature and consequences of choosing the religious law.*⁵

The lawyer must be satisfied that, 1) the statement contains sufficient accurate information about the rights and obligations under the religious law and presumably, 2) the client understands the statement. However, few Canadian lawyers have the expertise to assess the accuracy or completeness of a statement of the rights and obligations of religious law - or even to venture their opinion on the subject without imperiling their liability coverage.⁶ And what of the parties who have waived independent legal advice? If they choose the religious law option they will receive the statement of the principles of religious law to digest on their own and no information about the nature of Canadian law or the implications of choosing Canadian law arbitration instead. If they choose the Canadian law option they need not receive any legal information. In neither case would there be any credible evidence that their consent was informed.

Where there is a history of domestic violence or other forms of abuse there should be extra attention paid to whether the abused person really has freely chosen to go to arbitration. Here again, Ms. Boyd makes what I consider to be a questionable recommendation.

- 19. Arbitrators ... [should be required] to certify that they have screened the parties separately for domestic violence; that they have reviewed the certificates of Independent Legal Advice or the waiver of Independent Legal Advice, and are satisfied that each party is entering the arbitration voluntarily and with knowledge of the nature and consequences of the arbitration agreement.*⁷

First, one presumes that if the arbitrator is not satisfied that each party meets these conditions, the arbitration will not proceed. Second, it follows that an arbitrator who receives compensation has a conflict of interest in deciding whether the parties do meet the conditions. Third, shouldn't the purveyor of independent legal advice be able to take the screening results into account in providing independent legal advice? According to Ms. Boyd's timetable the screening for domestic violence takes place after the legal advice or the alternative waiver. The sequence she recommends fuels the suspicion that, in her view, the lawyer's role is to impart information about the legal nature of the arbitration, with no account taken of the nature of the dispute itself or the particular circumstances of the party. Such skeletal advice does not meet a reasonable standard for the protection of vulnerable persons. And finally, domestic violence is not the only hallmark of vulnerability.

To be fair, many of Ms. Boyd's recommendations were important and well thought out. For example she proposed to place virtually all important aspects of family dispute arbitration under the protective cover of the Family Law Act. That is a significant step forward and in fact is the centerpiece of the revisions later written into law in Ontario. But I think that Ms. Boyd's critics concluded correctly that some of her recommendations, though also well-intentioned, are simply not grounded in the reality inhabited by vulnerable persons in domestic relationships and, consequently, fail to provide an acceptable framework for family dispute arbitration. There are researchers who can speak to these matters;

- *No amount of training on the part of a mediator [or arbitrator] can make up for the control an abuser has over a battered woman. It is not hard to understand that a woman who has been physically assaulted, demeaned and derided, threatened and isolated would find it impossible to be assertive sitting across the table from her abuser.*⁸

Physical abuse is the most detectable means of coercion, but merely constitutes part of a long sorry continuum which broadens out, affecting more women as it goes past verbal abuse, subtler forms of personal derision and finally, in some cultures, to institutionalized underclass status compatible with all of the above.

Fortunately there are zealous legal scholars committed to improving reality for women in domestic disputes. One scholar unabashedly describes her intention in a paper on the use of Sharia law under Ontario's Arbitration Act as follows:

- *Key sections of the Arbitration Act will be examined and contrasted with the reality of how such clauses are likely to be interpreted to the disadvantage of women.*⁹

What are the fruits of the combination of sensitivity and determination expressed here? What would a good piece of family dispute legislation look like? I am happy to report that it would look quite a lot like the Ontario legislation adopted in 2006.

Salient Points of the Ontario Family Statute Law Amendment Act, 2006

1. Family arbitration must be conducted exclusively in accordance with the law of Ontario or that of another Canadian jurisdiction.
2. The government has the power to regulate the training and qualifications of family law arbitrators, the conduct of family arbitrations and the record-keeping and reporting required for family arbitrations.
3. Parties cannot waive the right to appeal a family arbitration award.
4. All appeals of family arbitration awards are heard in a court with family jurisdiction.
5. Both the Arbitration Act and the Family Law Act apply to family arbitrations, but where there is conflict, the Family Law Act prevails.
6. Arbitration awards should be treated more like other private settlements [e.g., agreements arising from mediation] than like court orders.
7. Family arbitration agreements are considered to be "domestic contracts" under the Family Law Act.
8. Family arbitration awards must be in the best interests of children.
9. Family arbitrations require full and frank financial disclosures and the parties must understand the nature and consequences of the agreement – meaning that the parties must obtain independent legal advice.

For the purposes of this paper I will stipulate that Ontario has created a basically sound legislative framework for family dispute arbitration, assuming that a way is found to provide legal advice to parties unable to afford it. Now the question is, if the 'Canadian law exclusively' provision were to be revised to allow the use of religious law, would the legislation be better, or worse? This seems to me to be a reasonable test – one that could be applied to any proposed alternative to Canadian law. Staying with the Ontario case, consider the proposed use of Sharia Law.

Sharia Family Law in Canada?

The Muslim scholars and jurists who founded the Islamic Institute of Civil Justice and proposed to establish Sharia courts for family arbitration under Ontario's Arbitration Act were forthright in explaining what they wanted, why they wanted it and why they should get it:

- *Muslim Personal Law [which includes family law] is part of the religious structure of Islam and no non-Muslim government has the right to interfere with it.*¹⁰
- *If the governmental authorities and judicial system of a non-Muslim country have in place methods of conflict resolution that are rooted in principles and values that are governed by motives other than to please God or which do not serve the best interests of the Muslim community or which contain less wisdom than do the guidelines which have been given by Allah and His Prophet, then Muslims place their spiritual and social lives in dire peril when they submit to that which is other than what Allah has ordained for those who wish to submit themselves to Him.*¹¹
- *Muslims must ask for and secure their right that Canada live up to the preamble of the Canadian Charter of Rights which stipulates that Canada is founded on principles which recognize the supremacy of God and that the Charter of Rights concerning the freedom of religion is lived up to.*¹²
- *[For Canada] to not do so would be flagrant hypocrisy and denial of rights to its citizens... Canada would be like a rudderless ship unable to steer to its proclaimed destination of treating minorities fairly and equitably.*¹³

There was a widely quoted interview in which Mr. Ali tried to reassure the public.

- *It will be a watered-down Sharia. Only those provisions that agree with Canadian laws will be used. If there is a conflict between the two Canadian law will prevail...arbitrators will be duty-bound to insure that no party is being pressured to take part or to accept a ruling...*¹⁴
- *Once the parties have agreed...they will be committed to it by their prior consent. As a consequence, on religious grounds, a Muslim who would choose to opt out at this stage, for reasons of convenience would be guilty of a far greater crime than a mere breach of contract—and this could be tantamount to blasphemy-apostasy.*¹⁵

Asked why Muslim women would go near Sharia arbitrations when their rights are covered by Canadian law, he reportedly replied,

- *To be a good Muslim you must.*¹⁶

Such pronouncements engendered moral outrage at the very idea of Sharia courts for family disputes with its seemingly bogus sense of “no pressure”. There were calls for the government of Canada to step in to prevent the use of Sharia law in Ontario.

- *...just as it intervenes when a woman refuses to press charges against an abusive spouse. Just as it intervenes when parents abuse their children. Every day, the state intervenes to protect people.... It must do here as well.*¹⁷

It would be a mistake, I think, to dismiss Mr. Ali’s response, “To be a good Muslim you must,” as disingenuous. It would better to begin by admitting that that we don’t fully understand why it isn’t. Then further analysis is in order.

If Sharia law were to be used as the basis of family dispute arbitration what limits, if any, would there be? Mr. Ali says that Canadian law will prevail if there is a conflict. [No stonings in Canada, for example.] But, to take a harder case, what about child custody? It is not illegal in Canada to award custody to the father, but it would be contrary to Canadian law to do so if the grounds were that in Sharia law fathers have an inherently greater right to custody. Canadian law requires that the welfare of the child be used as the primary criterion of suitability for custody. But Sharia law is based on a different conception of what is best for children.¹⁸ In Mr. Ali’s vision of Sharia law arbitration, all family matters – marriage, divorce, inheritance and custody - would be settled in strict accord with Islamic principles as determined by Islamic judges. How does he propose to get around the problem that at least some decisions of a Sharia tribunal would be vulnerable to reversal on appeal because they are either incompatible with Canadian law or are based on a

principle antithetical to Canadian law? His whole point was to allow Canadian Muslims to set aside Canadian family law and to use Sharia law in its place. How is that possible? Mr. Ali proposes a very simple and effective solution to this problem: eliminate the conflict by allowing Muslims to be governed under Islamic law (as an exercise of their freedom of religion) or else incorporate Sharia family law into Canadian law, applicable only to Muslims. Mr. Ali has been actively pressing for such changes for many years.¹⁹ In doing so, Mr. Ali believes himself to be following in the footsteps of the Prophet.

- *The Prophet Mohammad (pbuh)* in his lifetime resolved beautifully the concerns and conflicts of non-Muslim minorities by applying Christian Law to Christians, Jewish Law to Jews, Parsi Law to Parsis, etc. This was done through their own respective separate judicial tribunals appointed by themselves as separate minority groups. Thus, what the Prophet (pbuh) did in this respect was in effect nothing but a judicial translation of an ideological co-existence that goes hand in hand with full integrity for all minority groups living within the Islamic state.*²⁰

It should be conceded that if these same conditions were met in Canada and Muslims here could submit their family disputes to Sharia courts, then they must, according to their religion. This use of religious imperatives surely has a legitimate function in every religion. Mr. Ali speaks as a devout Muslim, not as a duplicitous manipulator. He deserves a “pass” on this particular point. But the two alternative methods he proposes for dealing with the disparities between Sharia law and Canadian law both have serious problems.

The Prophet’s solution (a proliferation of independent minority legal systems) is vulnerable on two grounds: first, as a practical matter. On the practical side, although it would admittedly get high marks for multiculturalism, it would fail the test of precedence. If the same privilege were to be exercised by every eligible minority, we would have a prodigiously unkempt contrariety of legal systems – even before the onset of intermarriage among the minorities. To see that it would also be fundamentally at odds with the Canadian concept of justice, consider the example of intestate inheritance. The Muslim law of inheritance is not gender-neutral. Men get more, women get less. Mr. Ali concedes this much: Sharia law of inheritance conflicts with Canadian law. In consequence, he recommends that Canadian law be changed to allow Muslims to adhere to the family law they believe in. But he cannot escape the fact that, in Canada, the Sharia version would be struck down as inconsistent with the Charter of Rights. It seems indisputable that the protection of civil rights trumps the accommodation of cultural norms which abridge civil rights. Therefore, the Islamic law of inheritance is not reconcilable with the laws of Canada.

Mr. Ali’s alternative solution, to incorporate Sharia inheritance law into Canadian law applicable only to Muslims, is not sufficiently different to escape the same objection. It would be too impractical to implement and legally impossible to implement because it would conflict with the Charter of Rights. Mr. Ali is certainly aware of the conflict, so it appears that his vision is of a Canada in which, for the sake of multiculturalism, some Canadians live under the Charter of Rights but others do not, or alternatively, that the Charter itself gives a higher place to multiculturalism than to equal rights.

However, the Charter itself is crystal-clear on both points:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

* Peace be unto Him

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Since paragraph 28 refers to a protection already included in paragraph 15 (1), I infer that the placement of paragraph 28 is meant as a reminder that multiculturalism in Canada has limits. Placement aside, it is indisputable that unequal rights based on gender are forbidden by the Charter. Nor does the Preamble's statement "Canada is founded on principles which recognize the supremacy of God" provide a fixed point from which to lever Sharia laws into Canadian jurisprudence. Without attempting a precise analysis of its implications, I think it is safe to say that the statement has no force as a legal principle.

Mr. Ali is entitled to believe that Canada would be a more just country if it allowed for a multiplicity of legal systems with differing conceptions of justice, but he is not entitled to the claim that Canada must legitimate Sharia family law on pain of violating its own Charter of Rights.

The Practical Application of Sharia Law

Setting aside questions of principle, it is important to make an assessment of what would actually happen in a Sharia arbitration, given the relevant safeguards incorporated into the Ontario Arbitration Act. How would the differences in law be resolved if the arbitrator's decision in a custody case were determined by a religious conviction that is inconsistent with paragraph 28 of the Charter? The answer is that the Sharia law decision might hold sway. How is that even possible? It is possible and even likely because most of the crucial legislative safeguards will come into play only if there is a legal challenge to the Sharia law verdict.

It is characteristic of any family arbitration that vulnerable persons are the least likely to have the strength, the determination or the resources to challenge a ruling. However, the problem would be magnified under Sharia law. When Sharia law is to be used, great deference would be owed to Muslim authorities regarding the qualifications of the arbitrators. As a retired lawyer, founder of the Muslim Institute of Civil Justice and its first-named arbitrator, Mr. Ali would be an outstanding candidate. He would keep his word that, as an arbitrator, he would not pressure anyone – but as a devout Muslim he might well see a duty to offer religious advice to a party who is having difficulty seeing the correct Muslim path. (There is no irony in these remarks. In my view Mr. Ali's sincerity is as great as his zeal and commitment.) But these very qualities and the nature of his vision of Canadian Muslims under Sharia law give him the means, the motive and the opportunity to deter a fellow Muslim from challenging a Sharia arbitration ruling. And if there are no challenges, the verdict stands. This does not mean that the ruling would be enforced by a court - far from it. However, that would not be necessary to the de facto status of the ruling as a binding resolution of the dispute in the eyes of the parties and the arbitrator.

It is important to keep this in perspective. Within very broad limits, the right of clergy to exert powerful influences on the behaviour of their followers is basic to the freedom of religion - because freedom of religion is both institutional and personal. Accusations of apostasy, threats of excommunication or dire warnings of the Fires of Hell do not violate Canadian law. It is a nice question whether the exercise of this form of religious freedom should be able to play a pivotal role in a government-sanctioned decision procedure.

When there is a challenge to a Canadian law arbitration decision, the grounds are usually duress, undue influence, misrepresentation or unconscionability. Without belabouring the point, it is reasonable to assume that assessments of these characteristics might well exhibit cultural variations. There are also appeals based on a point of law. But which law? Canadian appellate courts are in no position to assess Sharia law; in any case, there is no supreme court for Sharia law and no one body of Sharia case law. More fundamentally, there is no provision in the earlier version of the Ontario Arbitration Act, which allowed the use of Sharia law, stating that appeals arising from non-Canadian law cases are to be adjudicated under the non-Canadian law selected by the parties. This should not come as a surprise, because of the proviso that an arbitral ruling which would violate Canadian law would be without force. Hence,

If a party to arbitration under the Islamic Institute of Civil Justice appeals a pure question of law to a court, it is most likely that a court would evaluate the arbitral award on Canadian law and not any version opted into by the parties. The underlying rationale for this is the principle of universality which requires appellate courts to ensure that the same legal rules are applied in similar situations.²¹

Typically, the parties to any arbitration have conflicting interests, but under Sharia law as described by Mr. Ali, the parties also share an interest, a powerful interest, in not allowing Sharia rulings to be overturned. The unhappy loser in a dispute over marital assets might give serious thought to an appeal only to realize that asking a Canadian court to overrule the Sharia decision would be tantamount to apostasy.

Clearly, proponents of Sharia law would be powerfully motivated to preserve Sharia decisions. These facts have consequences for Canadian justice. To allow Sharia law to be the basis of family dispute arbitrations is, first, to issue a conditional license to render decisions incompatible with Canadian family law but subject to reversal on appeal and second, to allow the arbitration to be conducted subject to powerful religious influences inimical to appeals. Since some protections vital to the welfare of vulnerable persons in an arbitration become available only on appeal, the proclivities described above clash with the requirements of justice. Therefore, in the interests of justice, Sharia-based family dispute arbitration should be disallowed.

Should All Religious Law Family Dispute Resolution Be Disallowed?

In a word, yes. To justify this conclusion it is not necessary to survey all religious laws. It is enough to have reason to believe that the characteristics of Sharia law relevant to its use in family dispute arbitration are likely to be found in other religious legal frameworks. First among them is that the arbitrators chosen will almost certainly be strongly committed religionists and as such, can be expected to have the means and the motivation to exert powerful influences directed at protecting their rulings from being overturned by a Canadian appellate court. Of course, all arbitrators want to avoid having their rulings overturned, but arbitrators conducting religion-based arbitrations have a deeply religious motivation, independent of self-interest. Canadian law is not sacred. Disobeying it is not a sin. Religion-based laws are typically seen to be, if not morally superior, at least of a higher order, and on some accounts, as a reflection of God's Will. All beliefs of this sort work against appeals to a secular court and therefore tend to block Canadian appellate courts from fulfilling their duty as guardians of Canadian law. Consequently, all religious laws relating to family dispute arbitration should be without force in family dispute arbitrations conducted under Canadian legislation.

Where Does This Leave Religious Tribunals?

Canadian law reigns supreme in Canada. That should not be a cause for surprise and certainly not for outrage or disappointment. Religious tribunals' jurisdictions are limited to religious matters. For example, if a Jewish couple is married by a Rabbi and later divorce without benefit of clergy, the divorce will not be recognized as legitimate under Jewish law. The consequence of this illegitimacy is that neither party may be remarried by a Rabbi. If they follow a prescribed religious procedure they will be divorced according to Jewish law. However, the Jewish divorce by itself has no legal force. Similarly, a Catholic with a civil divorce and the intention to remarry may ask religious authorities for an annulment, i.e., a religious ruling that there was no marriage to begin with – but that ruling has no legal force. These restrictions on the scope of religious laws are not to be thought of as anti-religious but rather as a necessary condition of religious freedom for all religions in a democratic society.

Should Family Dispute Arbitrations Be Required to Use Canadian Laws?

One may be tempted to ask, “Why rule out all other secular legal systems in advance? Isn't it possible that some alternative laws are better suited for family dispute arbitration than Canadian laws? It is possible, even likely - but more to the point, it is irrelevant to the question at issue. If the governing legislation allows the use of secular non-Canadian law, then any law fitting that description may be selected. [Think of Maoist family law.] It defies common sense as well as judicial prudence to provide the parties with a vast open range of options for an activity regulated by Canadian law and which, in the end, requires conformity with Canadian law. The cleanest solution is to require family dispute arbitrations to be based on Canadian laws in the first place.

On a more fundamental level it must be recognized that Canadian law is the centripetal force which holds the nation together despite its physical vastness and its rich and varied mixture of cultures, traditions, races and religions. The Charter of Rights celebrates and reinforces the cohesion and universality of Canadian law. Importing a foreign law for a commercial arbitration with cross-border implications sounds reasonable, but sounds distinctly unreasonable for the purposes of family dispute arbitration between Canadian parties in Canada.

If some other country has better laws they should not be imported privately but rather should be entered into the political and legislative processes of Canada where they can be examined, debated and put to a vote, following the path that is customary in a democratic country.

Is Arbitration Suitable for Family Dispute Resolution?

It should be clear by now that the very concept of arbitration for family disputes is afflicted with a genetic defect. By definition arbitration is meant to be an efficient and relatively inexpensive private dispute resolution alternative to civil courts which produces decisions enforceable by civil courts. The arbitration itself can occur behind closed doors, unwitnessed by the public and unsupervised by any judicial authority. Even supposing that rigorous safeguards against injustice are lying in wait in the appellate courts, in the real world they may be of little value because they are passive rather than active. The Ontario Arbitration Act provides for government regulation of arbitrators' training, qualifications and record keeping. Ideally that should markedly improve the conduct of arbitrations and, consequently, the protection of vulnerable parties. But it may not fully address the need some parties have for legal representation over and above the legal information they receive about the nature and consequences of the arbitration agreement. On the one hand, in the absence of legal representation, family dispute arbitration has a chilling potential to disadvantage the already disadvantaged. On the other hand, requiring counsel would seriously

undercut arbitration's claims to efficiency and economy, thereby losing its attraction to prospective clients. This is a dilemma which merits careful consideration.

Recommendations:

My strongest recommendation is to close a nest of loopholes amounting to a yawning chasm in the B.C. Commercial Arbitration Act. As it currently applies to family dispute arbitration the Act is a disaster waiting to happen or, more accurately, a disaster which may be happening without coming to the attention of the courts or the public.

An analysis of that Act is beyond the scope of this paper but consider:

23. An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis. (emphasis added)

35. If, after an arbitration has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 31, 33 and 34, the court has no jurisdiction to make an order under those sections except in accordance with the agreement...

Section 31 deals with appeals based on a question of law where the court may decide "to confirm, amend or set aside the award."

Section 33 deals with appeals based on the claim that the arbitrator's reasons for the award are not sufficiently clear. The court may order that "the arbitrator state the reasons for the award in detail that is sufficient to consider any question of law that arises."

Section 34 deals with questions of law that arise during an arbitration.

Apparently, the Act provides the parties with an open-ended choice (law or "some other basis"), no requirement for legal advice, and the option of excluding the jurisdiction of the court in matters pertaining to the arbitrator's interpretation of the law and the clarity of the arbitrator's reasoning. Furthermore, the Act does not require the arbitration agreement to be in writing, allows the parties to set aside the requirement that the arbitrator's award must be in writing and the requirement that witnesses can be ordered to testify under oath.²² It would be unconscionable to allow any family dispute arbitrations to be conducted under the provisions of this Act. For all that the courts and the public know, such arbitrations have occurred and are continuing to occur in British Columbia.

Recommendation 1. Amend the British Columbia Commercial Arbitration Act forthwith so that the Act does not apply to family dispute arbitrations.*

Recommendation 2. Either bring in new family dispute arbitration legislation with appropriate safeguards, including a ban on the use of non-Canadian law, or rule out family dispute arbitration in BC.

Recommendation 3. If the former, consult with similar jurisdictions, including Ontario, prior to making other determinations about the nature and scope of the legislated safeguards.

Recommendation 4. Decisions relating to Recommendations 2 and 3 should be taken only after careful study of the possible benefits of some form of mediation as a substitute for arbitration.

* The standard language "family dispute arbitrations under the Act have no legal effect and are not enforceable by the courts" will not do because, taken literally, it leaves it open to arbitrate under the Act. The whole point of the change is that the Act, applied to family dispute arbitrations, provides fertile ground for decisions which would not survive an appeal in any case. Therefore the need is to say that legally there is no such thing as family dispute arbitration under the Act.

Acknowledgements: My thanks to the BCCLA for the opportunity to write this paper, to Catherine Morris for encouragement and an armload of very useful materials at the beginning of

the project and to the unofficial Victoria branch of the BCCLA for two useful discussions of earlier drafts.

Endnotes

¹Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (2004), Executive Summary, p.1

² ibid, p.3

³ A.M. Predko, J.D. Gregory, “Overview of the Family Statute Law Amendment Act” (2006) Presentation of the Law Society of Upper Canada (April 3, 2006) p.5

⁴Marion Boyd, op cit, p.4 (emphasis added)

⁵ ibid, pp. 6,7

⁶ Oral report, The Law Society of British Columbia

⁷ Marion Boyd, op cit, p. 6, para. 19

⁸ Georgina Taylor, Jan Barnsley and Penny Goldsmith, *Women and Children Last: Custody Disputes and the Family ‘Justice’ System*, (Vancouver VCASSA, 1996) 29, cited by Natasha Bakht in “Family Arbitration Using Sharia Law: Examining Ontario’s Arbitration Act and its Impact on Women”, *Muslim World Journal of Human Rights*, vol. 1, 2004, p. 3

⁹ Natasha Bakht, op cit, p. 2

¹⁰ Maulana Manzoor Nomani, cited in “Muslim Marriage, Mediation & Arbitration Service”, p. 2

¹¹ Syed Mumtaz Ali, Anab Whitehouse, “The Reconstruction of the Constitution and the Case for Muslim Personal Law in Canada”, p.14

¹² Muslim Marriage, Mediation & Arbitration Service, pp. 3,4

¹³ Syed Mumtaz Ali, Interview: “Muslim Personal/Family Law Campaign” (1995), p. 2

¹⁴“Sharia Tribunals” article in The Toronto Star, May 22, 2004

¹⁵ Maryam Namazie, “Islamic [In]Justice: On the Establishment of an Islamic Court in Canada”, p. 1

¹⁶ “Sharia Tribunals”, op cit

¹⁷Maryam Namazie, op cit, p. 2

¹⁸An Essential Islamic Service in Canada, Muslim Marriage, Mediation & Arbitration Service, (brochure) p. 2

¹⁹ Syed Mumtaz Ali, “The Review of the Ontario Civil Justice System”, The Canadian Society of Muslims (Originally published in 1994), p. 3

²⁰ Syed Mumtaz Ali, Interview, “Muslim Personal/Family Law Campaign”, 1995, p. 3

²¹ Natasha Bakht, op cit, p. 6

²² B.C. Commercial Arbitration Act , Section 44