

# Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion

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## Executive Summary

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## Executive Summary

On June 25, 2004, the Attorney General, the Honourable Michael Bryant, and the Minister Responsible for Women's Issues, the Honourable Sandra Pupatello asked Marion Boyd to conduct a review of the use of arbitration in family and inheritances cases and to examine the impact that the use of arbitration has on vulnerable people, including women, persons with disabilities and elderly persons.

The Review began as a result of public concern expressed in the media and through groups and individuals about the use of Muslim personal law (often referred to as Sharia) in arbitrations. There was significant confusion in the media and public consciousness about a plan by the Islamic Institute of Civil Justice to establish a "Sharia Court" in Ontario. These public concern led to a need to address the issue of the use of arbitration in family and inheritance cases in a comprehensive and constructive way. Ms. Boyd, a former Attorney General, and former Minister Responsible for Women's Issues, was asked to gather and articulate the concerns of Ontarians, and provide recommendations to the government. This report is the result of the Review process, and contains Ms. Boyd's conclusions and recommendations.

There was a high level of consensus about the remedies that respondents proposed to safeguard Ontario's arbitration process and permit the continued use of alternatives to court for family law and inheritance cases. In this context, the report concludes that tolerance and accommodation of minority groups who seek to engage in alternative dispute resolution must be balanced against a firm commitment to individual autonomy. It is important to seek solutions that respect not only the rights of minority groups within Ontario, but also help individuals within that minority exercise their individual rights with ease.

## Arbitration

Arbitration is a dispute resolution method in which people participate only by choice. The court system is the only mandatory dispute resolution process in which people can be compelled to participate without their agreement. The Review heard that arbitrated decisions may be more acceptable to the parties, and more reflective of some elements of the parties' shared values. Religious arbitration can allow the people in dispute to select a shared set of values and rules that may be different than Ontario law. Use of the Arbitration Act by minority communities is a way of engaging with the broader community by formalizing a method of decision-making which currently occurs in an informal manner.

## Family Law

Family law is an area of shared jurisdiction between the federal and provincial governments. Most family law disputes are resolved without court action, but increasingly alternative dispute resolution is used. Arbitration can only resolve disputes that the parties could agree about themselves; it cannot change a person's status by granting a divorce, or by concluding that they are a parent. Domestic contracts, such as separation agreements, are a common means of resolving family law disputes and the law has some built-in safeguards for these types of contracts. The Review heard concerns about polygamy and child abduction, but these issues are not affected by arbitration. Criminal law and child welfare law protect children from abuse, and people have a duty to report children in need of protection.

## The Importance of the Charter

Ontarians believe deeply in the Canadian Charter of Rights and Freedoms' aims of justice, fairness and equality. They do not see multiculturalism to be an unlimited concept, but rather one that must be balanced against individual freedoms. All participants in the Review articulated a desire to protect and enhance access to justice, but took very different perspectives on what this would look like. All participants in the Review had a high level of interest in the Charter, but the application of many of the provisions of the Charter in the context of arbitration is not clear. Nonetheless, the Review did not conclude that the Charter prohibits the use of arbitration for resolving disputes about family law and inheritance.

## Violence Against Women

Exposing and ending violence against women is a pressing public policy concern in most parts of the world. This concern is expressed and supported by the United Nations Declaration on the Elimination of Violence Against Women. Addressing domestic violence is impossible when attitudes and beliefs that condone violence persist. Alternative dispute resolution may provide a venue for continued abuse after the breakdown of a relationship, and therefore safeguards must be in place. Many respondents to the Review recognized the need for the Muslim community to counter traditional attitudes that may condone violence against women.

**Personal Law** Personal law is the law that pertains to an individual's status and membership in a community or family group. Family and inheritance matters fall within a category of personal law that developed primarily from religious sources. Personal law has been used throughout history to allow groups to maintain their cultural identity, by allowing them to continue to control their definitions of family and community. In parts of Europe, the practice of applying the personal law of an individual's country of origin continues until today. For example, the citizenship laws of France and Germany mean that people may not be subject to the laws of their country of residence, but rather their country of origin.

## Themes in the Submissions

There were a number of different themes expressed by those consulted, which were often contradictory. Some thought that arbitration should not be permitted in family law and inheritance cases because it would offend the Charter and perpetuate an imbalance of power in cases of abuse. Others argued that arbitration should be permitted because it is less costly and more effective. Still others submitted that religiously-based arbitration must be permitted because it is protected by freedom of religion, and is integral to a faithful person's life.

In fact, religious arbitration is already being conducted by several different faiths. Although some participants in the Review fear that the use of arbitration is the beginning of a process whose end goal is a separate political identity for Muslims in Canada, that has not been the experience of other groups who use arbitration. As well, Canada's First Nations people are the only minority group that has a defined right to negotiate with the Canadian state about political autonomy.

Canada is a multicultural society and the fundamental tension that must be addressed is between respect for the minority group and protection of a person's individual rights within that minority. The Review found that secular state laws do not treat everyone equally because people's individual backgrounds lead to differences in the impact of these laws. If the state allows cultural groups complete freedom to define family and inheritance matters those groups may trample on the rights of individuals within the group and may discriminate in ways that are unacceptable to Canadian society. The Review concluded that cultural groups should not be permitted to stop people from having access to laws and processes that are available to all.

## Summary of Recommendations

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.

## Legislative

3. Section 51 of the Family Law Act should be amended to add mediation agreements and arbitration agreements to the definition of "domestic contracts" to bring these agreements into the general protections of Part IV of the Act. Therefore these agreements would be required to be in writing, signed by the parties and witnessed.
4. When Part IV of the Family Law Act applies, a mediation agreement or arbitration agreement should be able to be set aside on the same grounds as other domestic contracts.
5. Part IV of the Family Law Act should be amended so that if a co-habitation agreement or marriage contract contains an arbitration agreement, that arbitration agreement is not binding unless it is reconfirmed in writing at the time of the dispute and before the arbitration occurs.
6. The reconfirmation in writing should not be required for an arbitration conducted:
  - a. under a separation agreement;
  - b. as a consequence of an award made in an arbitration that was itself agreed to contemporaneously; or
  - c. as a consequence of a judgment of a court.
7. Section 55 (2) of the Family Law Act should be amended to require prior court approval of a domestic contract entered into by a minor in Ontario.
8. Section 33 (4) of Part III of the Family Law Act, permitting the Court to set aside a domestic contract or paternity agreement for provision of support, should be amended to permit a court to set aside an arbitral award on the same grounds (unconscionability, person owed support is receiving social assistance, or the support is in arrears).
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. the award does not reflect the best interests of any children affected by it;
  - b. a party to it did not have or waive independent legal advice;
  - c. the parties do not have a copy of the arbitration agreement, and a written decision including reasons; or
  - d. applicable, a party did not receive a statement of principles of faith-based arbitration.

The parties should not be able to waive this provision.

10. The Arbitration Act or the Family Law Act should be amended to provide regulation-making powers for family law and inheritance arbitrations and to require the use of regulated forms and procedures.
11. The Child and Family Services Act s. 72 (5) should be amended to explicitly include mediators and arbitrators in the class of professionals who have an enforceable duty to report a child in need of protection.

## Regulatory

12. Regulations in the Arbitration Act or the Family Law Act should require that arbitration agreements in family law and inheritance cases must be in writing and must set out:
  - a detailed list of issues that are submitted to arbitration;
  - whether the arbitration is binding or advisory;
  - the form of law, if not Ontario law, which will be used to decide the dispute, and in the case of religious law, which form of the religious law;
  - if the arbitration is under religious law, an acknowledgement that the party has received and reviewed the statement of principles of faith-based arbitration prior to signing the agreement;
  - explicit details of any waiver of any rights or remedies under the Arbitration Act;
  - an explicit statement that judicial remedies under s. 46 and the right to fair and equal treatment under s. 19 of the Arbitration Act cannot be waived;
  - an explicit statement recognizing that judicial oversight of children's issues cannot be waived and that s. 33 (4) of the Family Law Act continues to apply; and
  - an explicit statement that s. 56 of the Family Law Act applies to the agreement and cannot be waived and therefore a party can apply to set the agreement aside for additional reasons including if it is not in the best interests of any children affected by the agreement, there was not full and frank financial disclosure, or a party did not understand the nature or consequences of the agreement.
13. Regulations in the Arbitration Act or the Family Law Act should require arbitration agreements in family law and inheritance cases to contain either a certificate of independent legal advice or an explicit waiver of independent legal advice.
14. Regulations in the Arbitration Act or the Family Law Act should require mediators and arbitrators in family law and inheritance cases to be members of voluntary professional organizations, or fall into an excluded class defined by the regulation, in order to have their decisions enforced by Ontario courts.
15. Regulations under the Arbitration Act should define the concept of a fair and equal process in the context of family law or inheritance arbitrations.
16. Regulations in the Arbitration Act or the Family Law Act should require that arbitrators who apply religious law in family law and inheritance arbitrations develop a statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law.
17. Regulations in the Arbitration Act or the Family Law Act should require religiously-based arbitrators to distribute their statement of principles of faith-based arbitrations to all prospective clients.
18. Regulations in the Arbitration Act or the Family Law Act should require mediators and arbitrators in family law and inheritance cases to screen the parties separately about issues of power imbalance and domestic violence, prior to entering into an arbitration agreement, using a standardized screening process.
19. Regulations under the Arbitration Act or the Family Law Act should require mediators and arbitrators in family law and inheritance cases to certify that they have screened the parties separately for domestic violence, that they have reviewed the certificates of Independent Legal Advice and, and are satisfied that each party is entering into the arbitration voluntarily and with knowledge of the nature and consequences of the arbitration agreement.
20. Regulations under the Arbitration Act or the Family Law Act should state that if the records required by Recommendations 37, 38 and 39 are not maintained, a party can apply to have an arbitral award set aside.

## Independent Legal Advice

21. The certificate of Independent Legal Advice in family law and inheritance cases should state that the party has received advice about the Ontario and Canadian law applicable to his or her fact situation, the law of arbitration, and the remedies available to both parties under Ontario family and arbitration law.
22. Arbitration services which conduct family law and inheritance arbitrations should distribute the statement of principles of faith-based arbitrations required under Recommendations 16 and 17 to potential clients, in advance of the clients seeing a lawyer.
23. If religious law is chosen under the arbitration agreement in a family law or inheritance case, the Independent Legal Advice certificate should explicitly state that the lawyer reviewed the statement of principles of faith-based arbitration and the lawyer is satisfied that the person has sufficient information to understand the nature and consequences of choosing the religious law.
24. Waivers of Independent Legal Advice in family law and inheritance cases should state that the party has waived the right to receive advice about Canadian and Ontario family law and Ontario arbitration law, and if religious law is chosen should state that the party has received and reviewed the statement of principles of faith-based arbitration required by Recommendations 16 and 17.

## Public Legal Education

25. The Government of Ontario should develop, in collaboration with community organizations and experts, a series of public education initiatives, aimed at creating awareness of the legal system, alternative dispute resolution options, and family law provisions.
26. The initiatives in Recommendation 25 should be linguistically and culturally designed to suit the diverse needs of different communities, as well as any communications challenges faced by members of the community (e.g. blindness, deafness, etc.).
27. Any public education campaign that is developed should include, but not limit itself to, information on the following topics:
  - General rights and obligations under the law;
  - Family law issues;
  - Alternative forms of dispute resolution;
  - Arbitration Act;
  - Immigration law issues; and
  - Community supports.
28. Public legal information programs funded by the government of Ontario should include an overview of the options for resolving a family law dispute, including the arbitration process.
29. Public legal information programs in family law funded by the government of Ontario should be available to all community members who wish to attend, whether or not they have a matter before the court.
30. Family Law Information Centres should provide information that has been developed by and for specific ethno-cultural communities and in community languages about their rights and responsibilities under Ontario and Canadian law.

## Training and Education for Professionals

31. The Government of Ontario should work together with professional bodies to develop a standardized screening process for domestic violence for use in family law and inheritance mediations and arbitrations.
32. The Ministry of the Attorney General, the Law Society of Upper Canada and LawPro should strike a joint task force to examine the use of arbitration in family law and inheritance cases, to develop and deliver continuing education to lawyers about arbitration and Independent Legal Advice, and to examine the insurance and public compensation issues as they impact on the public interest.
33. The Government of Ontario should work with voluntary professional associations for mediators and arbitrators to provide training on issues of power imbalance in family law and inheritance cases, use of the prescribed screening process from Recommendation 18, and the process for an arbitrator to certify the material for a family law or inheritance case as required by Recommendation 19.
34. The guidelines of voluntary professional associations for training, conduct and competence of mediators and arbitrators should clearly explain their professional duty to report children in need of protection.
35. Voluntary professional associations for mediators and arbitrators should require that in family law and inheritance cases, if mediators practise arbitration during mediation sessions, the agreement to arbitrate must precede the commencement of the mediation, and all the obligations of arbitrators under Recommendations 16, 17, 18 and 19 must be met before the commencement of any arbitration.

## Oversight and Evaluation of Arbitrations

36. The Ministry of the Attorney General should work with professional organizations to review existing codes of professional conduct and assess whether they apply when a member of a profession conducts an arbitration or mediation.
37. Decisions of arbitrators in family law and inheritance cases should be delivered to the parties in writing and include a copy of the arbitration agreement, and any attachments required by the regulations. Decisions should include written reasons.
38. The arbitrator in family law and inheritance cases should maintain copies of the decision for a period of at least 10 years.
39. Arbitrators should be required to keep a record of each arbitration in family law and inheritance cases including the names of the parties and their representatives (if any), the arbitration agreement, the certificates or waivers of Independent Legal Advice, any documents filed by the parties, a summary of the facts of the case and the written decision. Copies of these files should be made available to the parties upon request. If an arbitrator does not maintain these files, or make the file available when requested, the arbitral decision may be set aside.
40. Arbitrators of family and inheritance matters should be required to report annually to the Ministry of the Attorney General, the following aggregated and non-identifying information:
  - Number of arbitrations conducted;
  - Number of appeals or motions to set aside and the outcome, if known (e.g. pending, award set aside, court refers back to arbitrator, etc.); and
  - Any complaints or disciplinary actions they are aware of that have been taken against them during that year by their professional body or the courts.
41. Arbitrators in family law and inheritance cases should be required to provide the Government of Ontario with summaries of each decision, free of identifying information, and the Government should make these summaries available upon request for research, evaluation and consumer protection purposes. If in the future arbitrators become a self-regulating profession, the inventory of summaries of decisions should be transferred to the regulatory body for that profession.
42. Voluntary registration organizations should consider failure to make decisions available and file decisions in accordance with Recommendations 40 and 41 grounds for the deregistration of the arbitrator.

## Community Development

43. The Government of Ontario should encourage and fund community organizations who run arbitration services to develop information materials about rights and obligations under religious law.
44. The Government of Ontario should encourage and fund community organizations to work with experienced public legal education providers and the legal community to research and develop effective public information materials which explain rights under Ontario and Canadian law in a way that is likely to be comprehensible to people of diverse backgrounds and culture.

## Further Policy Development

45. The Ministry of the Attorney General should set a long term goal of professional self-regulation of mediators and arbitrators who deal with family law and inheritance cases. The Ministry should work with professional organizations including the Law Society of Upper Canada and voluntary mediation and arbitration organizations to develop a consultation process which will lead to guidelines for conduct and competency for these professionals.
46. The Ministry of the Attorney General should conduct further policy analysis of the legality and desirability of providing a higher level of court oversight to settlements of family and inheritance cases based on religious principles than is available to non-religiously based settlements under Part IV of the Family Law Act in addition to the several additional grounds set out in these recommendations under which arbitral awards may be challenged.