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CIVIL SECTION

FAITH-BASED FAMILY ARBITRATION

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[1] In 1990, the Uniform Law Conference of Canada adopted the Uniform Arbitration Act. The Uniform Act has been enacted in seven provinces: Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Prince Edward Island and Nova Scotia. British Columbia has the Commercial Arbitration Act enacted in 1986, and Newfoundland and Labrador has the Arbitrations Act modeled on the English Act of 1889. Quebec's law is different on the issues discussed in this paper. Federal legislation is not relevant here.

[2] The Uniform Act as implemented in those seven provinces, and the B.C. and Newfoundland and Labrador statutes, all permit the arbitration of family law disputes (despite "commercial" in the title of the B.C. Act.) The Conference considered and rejected limiting the scope of the Uniform Act to commercial disputes, though the primary influence in the development of the policy was the UNCITRAL Model Law on International Commercial Arbitration. The Model Law was the focus of attention of the Alberta Law Reform Institute in its reports and then its submissions to the Conference, but several changes were made to the Model Law to make it more suitable for domestic use.

[3] The Uniform Act allows the parties to choose the law applicable to their disputes. (It does so by allowing the parties to vary or opt out of the applicability and choice of law sections.) The other two provincial statutes do not expressly deal with the applicability or the choice of law in the arbitration. It is likely that the parties in those provinces could also agree that the arbitrator should follow particular legal principles in making the decision. The courts in those provinces have more discretion than under the Uniform Act to refuse enforcement.

[4] In Ontario in the past year and a half the application of the Arbitration Act to family disputes and the choice of law rules have become controversial. The purpose of this paper is to discuss the controversy and review some of the options for dealing with it. Since all of the common law provinces have the potential to have the same issues arise under their legislation, it may be appropriate for the Uniform Law Conference to get involved in a common approach or solution. However, to the extent that the controversy arises out of family law, which is itself not harmonized across the country (except in the calculation of child support and the enforcement of support orders, and divorce under the federal statute), delegates may think that a harmonized approach is not needed. This discussion is offered as a matter of interest in any event.

[5] The controversy was launched by a proposal by a new organization called the Islamic Institute on Civil Justice to offer arbitrations – including family arbitrations – based on Islamic personal law, often referred to (more or less accurately) as "Sharia". The Islamic Institute referred to the Arbitration Act, 1991, Ontario's version of the Uniform Act, and claimed that its arbitral awards would be enforceable under that Act.

[6] A number of groups, notably the Canadian Council of Muslim Women (CCMW), protested against this project, on the ground that they preferred the generally applicable family law and that Sharia discriminated against women. Many women's groups have joined the CCMW and have expanded the objection to family arbitration itself. Family arbitration, it is said, exposes vulnerable women to pressures of unfairness that would not happen in a public forum like a court. Further, public application of family law in the courts is subject to scrutiny and criticism, while what happens in private is not. Private decisions may be prejudicial to the rights of gender equality that women have fought hard to achieve over the past 30 or 40 years. We should not "privatize" family justice, it is said. Family law should not be taken from the reach of the Charter's guarantees of equality.

[7] Some Muslim and Jewish groups have responded that arbitration based on religious faith is an expression of freedom of religion and should be also protected as an expression of multiculturalism under the Charter (section 27). In any event, some have argued, arbitrators here will not make decisions inconsistent with Canadian values and the Charter.

[8] Some other religious groups conduct arbitrations. Some may conduct family arbitrations in which civil issues like property division and support are determined by religious law, though usually religious law is invoked primarily to decide the status of a religious marriage. There appear to be few cases that decide civil issues that might be referred to a court for enforcement under the Arbitration Act.

[9] In June 2004, the Ontario government appointed Marion Boyd, a former Attorney General and former Minister Responsible for Women's Issues, to examine the issues. Mrs. Boyd met with many groups and heard from many individuals directly and by correspondence. She submitted her report in December 2004. The report – 150 pages plus appendices – is on the web site of the Ministry of the Attorney General, in English and in French: http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/ .

[10] Mrs. Boyd made 46 recommendations. The main ones were that family disputes should continue to be arbitrable and enforceable, and that parties to them should continue to be able to choose to have them arbitrated according to their religious principles. These recommendations were subject to the important condition that the other recommendations should also be followed. It is fair to group those recommendations in four groups:

- integrate private dispute resolution by arbitration into the rules for private dispute resolution under the Family Law Act;

- put limits on family arbitration agreements to ensure consent;
- increase the public oversight of family arbitrations;
- provide legal and community support to help people, notably vulnerable women, know their rights under Ontario law, including the law of dispute resolution.

[11] At time of writing this paper, the Ontario government has not announced its response to the Boyd report and to the many submissions on the topic. Women's groups have taken strong positions against faith-based family arbitration and often against any enforcement of family arbitration at all. A recent statement supported by many groups is online: http://owjn.org/issues/mediatio/declaration.htm. Family lawyers in the Ontario Bar Association have been writing to the government supporting family arbitration as essential to accessible family justice, and just as favourable to women as to men. The OBA has not taken a position about faith-based arbitration.

[12] In Ontario, people are allowed to resolve family disputes privately, except for matters of civil status that are a matter of public record, as it were. Thus people cannot agree to be divorced: a court must pronounce the divorce. People cannot agree on who is the parent of a child: the province has a register, and a court order is needed to alter it. On other matters – like division of property and support payments on breakdown of a relationship – spouses or former spouses can agree, and the agreements are enforceable in court, subject to certain conditions.

[13] The enforceability of private agreements in family matters is stated in the Family Law Act, subsection 2(10): "A domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise." A domestic contract includes a pre-marital contract and a separation agreement. The Family Law Act "provides otherwise" in four main ways:

- An agreement not in the best interests of any children can be disregarded.
- The parties must understand the nature and consequences of the agreement (so they almost always get independent legal advice, though this is not a statutory requirement).
- The parties must have made full financial disclosure to one another.
- An agreement about support may be disregarded if it would result in to "unconscionable circumstances", if the recipient has to rely on welfare, or if the payment is in default.

[14] One of the fundamental policy questions is how closely private agreements arrived at directly (or with a mediator's help) should be comparable to private agreements arrived at by use of an arbitrator. There are two main areas of inquiry in this question:

- at the agreement stage
- at the award stage

[15] At the agreement stage, should the existing limits on family agreements (domestic contracts) apply as well to family arbitration agreements, regarding full financial disclosure, understanding of the nature of the agreement (with mandatory independent legal advice, perhaps), and so on? Are there other useful requirements? Marion Boyd recommended that family arbitration agreements should generally have to be entered into after the dispute has arisen, with limited exceptions. If the arbitration were to be conducted under some law other than that of Ontario, or arguably another Canadian jurisdiction, then under her recommendations the arbitrator would have to produce ahead of time a statement of the principles that would govern the arbitration, so potential parties could know what they were getting into.

[16] At the award stage, should the limits on what is enforceable in a domestic contract apply to a family arbitral award too? The Arbitration Act puts tight time limits on the ability of a party to complain, whether about unfair procedure, excess of jurisdiction, or correctness of the decision. Should these be relaxed for family arbitrations? Support orders and some other elements of domestic contracts can be set aside for a material change of circumstances. Is that a good rule for family arbitral awards too?

[17] Also at the award stage, is there a problem with asking Ontario courts (or the courts of any Canadian jurisdiction) to enforce an award based on a different legal regime, particularly one that does not recognize the principles of gender equality that underlie our statutes and that are imposed on government actions by the Charter? There is considerable debate about whether the Charter applies directly to an arbitration because it may be enforced in a court. There is more agreement about the undesirability of state action that might enforce principles or values that are contrary to those of the Charter, regardless of the legal application of the Charter.

[18] The Family Law Act of Ontario (section 58) contemplates the enforcement of domestic contracts made under other laws than that of Ontario, but restricts them in several ways. They have to be made in a way consistent with how an Ontario domestic contract is to be entered into (i.e. with full disclosure, full understanding). They may not be unconscionable. An agreement about custody of or access to children is not enforceable. This reasoning could be a precedent for restrictions on enforcement of family arbitral awards based on foreign law.

[19] The CCMW and its supporters say that many vulnerable women, particularly recent immigrant Muslim women with limited language skills and no social network outside their cultural and religious communities, will not have the knowledge or the strength to resist personal, family and community pressure to submit to an Islamic arbitration if one is available. They risk being ostracized or treated as apostates if they do resist. Thus “consent” to arbitrate will very often be illusory. Further, they will not have the strength to avail themselves of legal protections, either those that now exist or those that might be added under Mrs. Boyd’s recommendations. Therefore the very existence of such arbitral processes is a threat to them.

[20] Some women's groups, including the YWCA, have said that all women in our patriarchal society are so far from real equality that they cannot be said truly to consent to arbitrate. The only decisions that should bind them are those by judges subject to public scrutiny and legal pressures towards equality from the Constitution and the legislation. They conclude that family disputes should not be arbitrated at all.

[21] It appears practically impossible to "ban" any kind of arbitration. It would be very difficult to distinguish between a decision to bind the parties, on the one hand, and firm advice, on the other. It is hard to tell people they may not follow the dictates of their religion. The main tool a government has at its disposition is enforceability. What will the law allow parties to enforce in court? What conditions attach to enforceability?

[22] To summarize the discussion: faith-based family arbitration appears to be legally valid under the arbitration laws of all the common law provinces. It is certainly legally valid under the Uniform Arbitration Act. There are a number of options to respond to the challenges that it presents. All but the first require legislative amendment.

- Do nothing. Allow it to continue. Count on the requirements of the Act for consent, fair procedure, and the limits to enforceability to protect the vulnerable.
- Refuse to enforce family arbitral awards entirely, so all family disputes would have to go to court for resolution, if the parties could not agree and conduct themselves accordingly. (Quebec law expressly forbids arbitrating family matters, along with questions of civil status – questions of civil status are not arbitrable in Ontario either.)
- Refuse to enforce family arbitral awards based on a law other than that of the enacting province (or possibly of that province or another Canadian jurisdiction).
- Refuse to enforce family arbitral awards based on religious principles. There may be constitutional problems with this approach, given the Charter's protection of freedom of religion. Legislating about any one particular religion is out of the question.
- Refuse to enforce family arbitral awards unless they meet the conditions under which other private agreements in family disputes would be enforceable. In other words, integrate family arbitrations and other family dispute resolution.
- Refuse to enforce family arbitral awards unless they meet certain additional conditions (beyond those now in the Arbitration Act and the Family Law Act) as to form and formation, qualifications of the arbitrator, content of the award, and so on.

Different combinations of conditions might be implemented as part of these options. All but the first option involve restricting existing rights to conduct and enforce faith-based family arbitrations.

[23] Marion Boyd was concerned that if faith-based arbitrations were denied enforceability under any condition, that would not be the end of them. Rather, the faith community would conduct them anyway, but completely free of any legal protections that might be provided under the Arbitration Act or the Family Law Act. This is apparently what happens in the United Kingdom. The community pressure to submit to Islamic dispute resolution does not decrease, and the pressure to conform with the result does not decrease. These arbitrations are just not subject to any counter-pressure to provide legal protections with the goal of gaining enforceability of the resulting awards.

[24] It is obvious from this discussion that the government of Ontario is not contemplating for itself or recommending to any other jurisdiction:

- establishing a separate system of family law or court system for Muslims
- imposing on anyone the use of family arbitration
- encouraging anyone to have recourse to faith-based family arbitration
- denying anyone access to the general courts under the general law
- allowing arbitrators to authorize or order parties to an arbitration to commit any crime, such as polygamy, or to ignore any general laws, such as the minimum age for marriage (An arbitrator cannot impose anything on the parties that they could not have agreed on directly between themselves.)
- allowing arbitrators to resolve or impose a sanction for any crime

[25] The Conference may wish to consider if the Uniform Arbitration Act should be amended to increase protections for parties to family arbitrations or to exclude such arbitrations entirely.