UNIFORM LAW CONFERENCE OF CANADA

CIVIL LAW SECTION

FAMILY ARBITRATION IN ONTARIO
RECENT CHANGES

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[1] In August, 2005, Ontario reported to the Civil Section of the Uniform Law Conference on the questions raised by faith-based family arbitration.[1] It outlined how the issue arose, the policy response to it, notably the report of Marion Boyd to the government, the public response to the Boyd Report, and the options open to the government for resolution. No decision had been made at the time of the 2005 meeting of the Conference.

[2] Since that meeting, Ontario has adopted legislation to deal with the issue. The ***Family Statute Law Amendment Act, 2006*** [2] amended the ***Arbitration Act, 1991*** and the ***Family Law Act*** to create a new statutory framework for family arbitrations generally. The Act had Royal Assent in February, 2006, but the family arbitration parts of it are not in force, pending the making of regulations. They are expected to be in place by early fall of this year.

[3] Ontario's amendments do not focus on the use of religious law, but rather on the exclusive use of the law of Ontario or another Canadian jurisdiction. All family arbitrations, to be enforceable, must be conducted exclusively under Canadian law. That rule bars enforcement not only of family arbitrations under religious laws but also of those under the laws of other countries and of those made according to the arbitrator's own notions of fairness. Family dispute resolution processes carried out under such other rules are not prohibited, but they will have no legal effect. They will be the equivalent of advice only.

[4] The government has taken advantage of the occasion to increase the regulation of family arbitration generally. It became apparent during the Boyd review and in discussions after it that other issues should be addressed besides the governing principles of the arbitration itself. Much of the content of the new legislation was inspired by the recommendations of the Boyd Report for increased safeguards in family arbitrations.

[5] Here are the main changes made to both statutes. The guiding principle was to integrate the private resolution of family disputes by arbitration into the general regime of the ***Family Law Act*** for resolving family disputes, privately or publicly. As noted in our report to the 2005

meeting, that Act says that a private resolution prevails over the public provisions of the Act, except as specified in the Act. The Act does so specify in a number of critical areas, ensuring that private agreements ("domestic contracts") are properly made, that support is not unconscionable, and that certain other protections are not waived. The new legislation adds to the mandatory features of such private agreements where arbitration is involved.[3]

Arbitration Act, 1991

[6] The ***Arbitration Act, 1991*** is changed by adding a definition of family arbitration and the corresponding terms "family arbitration agreement" and "family arbitration award", and then excluding family arbitration from several key provisions of the Act. In essence, the content and conduct of a family arbitration will be more constrained than the content and conduct of other types of arbitrations. These are the main provisions:

- The definition requires that a family arbitration be conducted exclusively in accordance with the law of Ontario or that of another Canadian jurisdiction.[4]
- Any purported family arbitration not conducted in accordance with Canadian law has no legal effect, though disputants continue to have the right to seek advice from anyone they choose.[5]
- The right to raise objections to the process of a family arbitration is not lost for failure to raise objections in a timely way.[6]
- The parties may not decide that their family arbitration will not be subject to law.[7]
- The parties are not free to choose any rule of law to govern a family arbitration other than that of Ontario or of another Canadian jurisdiction.[8]
- Parties will not be able to waive the existing right to appeal on a question of law with leave of the court.[9]
- That appeal lies to the Superior Court with family jurisdiction where the decision is made.[10]

[7] The ***Arbitration Act, 1991*** is changed in two other important ways. Enforcement of family arbitration awards must occur under the ***Family Law Act***.[11] Second, regulation-making authority is added to the ***Arbitration Act*** to permit the government to make regulations about the training and qualifications of family law arbitrators, the conduct of family arbitrations and the record-keeping and reporting required for family arbitrations. These are significant changes, particularly for those who conduct arbitrations. Up to now, there have been no regulation or training requirements about who can offer their services to the public as an arbitrator of family law cases. For counsel who represent clients who are arbitrating, the qualification of the arbitrator is key, because the arbitration award will not be enforceable unless the arbitrator complies with any qualification requirements under the ***Arbitration Act.***

[8] The two most discussed topics of regulation are the possible requirement that family arbitrators must belong to a specified dispute resolution organization, and the definite requirement that parties to family arbitrations must be screened for the impact of domestic violence or power imbalances before they are permitted to arbitrate.

[9] Membership in an organization is a surrogate for direct regulation, to a large extent. We have been considering what characteristics such an organization must have in order for membership in it to be an acceptable substitute. Education? Experience? Supervision? A complaints process? Discipline?

[10] Screening for domestic violence can be very important in a family arbitration. Arbitrators themselves would not be the main screeners, since they should not meet parties separately. That would conflict with their judge-like role in deciding cases. However, it is likely that they will be required to obtain training to recognize the impact of domestic violence. Who should do the screening, and their qualifications is debated. Whether the arbitrators should know the results of the screening has provoked serious differences between the ADR community, especially the lawyers, and women's anti-violence advocates.

[11] In addition, family arbitrators will be required to submit reports about arbitrations after they have finished. These reports will for the first time provide information about what is actually happening in the field: how many family arbitrations are there, who are the parties, what

are the issues, and what happens? The precise content of the reports and how accessible they will be are questions under review at the time of writing.

Family Law Act

[12] The changes to the ***Arbitration Act*** are linked to and mirrored in changes to the ***Family Law Act***. A new section of the ***Arbitration Act,*** 1991 say that both that Act and the ***Family Law Act*** apply to family arbitrations, but that where there is conflict the FLA prevails.[12] Similar sections are added to the ***Family Law Act***[13]**.** The ***Family Law Act*** also contains the same definition of family arbitration and related phrases.[14] Family arbitration agreements are added to the definition of "domestic contract". Entire new sections are added that apply specifically to family arbitrations.[15]

[13] The heart of the policy is contained in new sections 59.1 through 59.8. Section 59.3 provides that parties cannot contract out of the protections provided by the remainder of the sections. Section 59.4 provides that parties cannot agree to arbitrate an issue in advance of the dispute arising about that issue. For example, in a marriage contract or co-habitation agreement, the parties cannot have an enforceable agreement that if they have a dispute, it will be submitted to arbitration.[16] Section 59.5 provides that a family arbitration award may be enforced or set aside in the same way as a domestic contract. This provision reflects a policy choice that family arbitration awards should be subject to the same scrutiny and review that separation agreements would endure in an application to set them aside under section 56 of the FLA. Or, put more simply, it reflects a policy choice that family arbitration awards should be treated more like other private settlements in family cases than like court orders. This approach is arguably a step in the direction of the policy in the province of Quebec, giving greater weight to the public policy elements of private resolutions and not permitting them to be converted so easily to court orders.[17] The government recognizes that this is a significant policy change from the approach in many common law jurisdictions.

[14] Section 59.6 sets out the procedural requirements that must be met for an arbitral award to be enforceable. The consequence of adding family arbitration agreements to the definition of "domestic contract" is that all of the protections of sections 55 (formal requirements) and 56 of

the ***Family Law Act*** apply to these agreements. Section 56 is framed as a series of judicial tests that the court must consider when interpreting or setting aside of a domestic contract:

- Domestic contracts must be in the best interests of children, and support provisions must be in accordance with the child support guidelines (or contain other reasonable arrangements).

- Domestic contracts require full and frank financial disclosure and the parties must understand the nature and consequences of the agreement. Understanding the nature and consequences of the agreement may mean different things depending on the sophistication of the parties, but has most commonly been interpreted to mean that the parties must obtain independent legal advice.

- In addition, the agreement cannot be made in consideration of the removal of religious barriers to remarriage.

[15] The requirements of new section 59.6 are added on top of the requirements of sections 55 and 56. These additional requirements are:

- that the agreement complies with any regulations made under the ***Arbitration Act***,

- that the parties receive independent legal advice before making the agreement,

- that the formal requirements for an arbitration award are met (awards must be dated signed, provide reasons and be delivered to the parties) and

- that the arbitrator is qualified to conduct a family arbitration in accordance with the regulations under the ***Arbitration Act.***

[16] Section 56.6 (2) permits the Attorney General to provide a standard form of for a certificate of independent legal advice.

[17] Having created all of these additional protections for family arbitrations, it was difficult to envisage a quick arbitration to resolve a relatively simple dispute, such as the type of decision made by parenting co-ordinators. If the parties have agreed in their parenting plan to use

arbitration when they have an access dispute, is it really necessary to have all of the protections that a regular family arbitration attracts? To remedy this problem, section 59.7 exempts "secondary arbitrations" from the provisions providing for no agreement in advance, independent legal advice going into the agreement, and the formal requirements for the award under the ***Arbitration Act***.

[18] Secondary arbitrations are those "that [are] conducted in accordance with a separation agreement, court order or a family arbitration award that provides for the arbitration of possible future disputes relating to the ongoing management or implementation of the agreement, order or award".[18] Parenting co-ordination was the main type of binding decision that the government would classify as a secondary arbitration, but means of deciding other current issues would qualify as well. For example, issues expected to arise in the ongoing management of a separation agreement, arbitral award or court order, such as variation of child or spousal support, could be resolved by secondary arbitrations if they are mentioned in the original agreement or order. Likewise issues relating to the implementation of an agreement like the mechanism for selling property, or for resolving disputes about valuation of future beneficial interests, could also qualify in the same way. But issues which are not contemplated by the agreement, or which are waived completely, could not be forced to simplified arbitration through a secondary arbitration process.

[19] Enforcement of the family arbitral award raised concerns for several practitioners when the Act was introduced and at the Standing Committee hearings.[19] The ***Arbitration Act*** provides a summary enforcement mechanism[20] that arbitrators and lawyers who use arbitration felt was working well. However, the Bill excluded family arbitrations from this enforcement mechanism. In particular the practising Bar was concerned that having to make a court application in order to enforce an award would reopen the issues between the parties and encourage litigation among people who had chosen not to litigate but to arbitrate. The challenge was to maintain the simplified process and still ensure that all of the requirements of the new sections of the FLA were met. We needed a summary enforcement mechanism even though some of the requirements for enforcement were more substantive than procedural. In the end, the Standing Committee added section 59.8 to the FLA, which is quite similar to the provisions of existing section 50 of

the ***Arbitration Act***. The major difference is that certain documents must be provided to the court to permit the court to assess whether the applicable requirements of both Acts have been met.

Conclusion

[20] The ***Family Statute Law Amendment Act, 2006*** is the Ontario government response to the challenge of faith-based arbitration in family cases, and to policy questions about the role of arbitration as a dispute resolution mechanism for family law cases. The portions of the Act dealing with family arbitrations are not yet in force; the government is currently studying submissions on the development of regulations that will govern the training of arbitrators, the conduct of family arbitrations and records related to these arbitrations. The Act creates demanding requirements for family arbitrations, and will permit review of these arbitrations in a number of circumstances. In many ways, once the Act is implemented, family arbitrations will be more similar to private agreements between family members than to a court proceeding.

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[11] The report is on the ULCC web site: http://www.ulcc.ca/en/poam2/Faith-based_Family_Arbitration_En.pdf
[2] S.O. 2006 c. 1, online: http://www.e-laws.gov.on.ca/DBLaws/Source/Statutes/English/2006/S06001_e.htm
[3] Since there is no Uniform Family Law Act, these changes may be of less interest to the Conference than those to the ***Arbitration Act, 1991.*** However, the latter changes were designed with this integration in mind.
[4] Revised section 1(1) of the ***Arbitration Act, 1991.***
[5] New section 2.2(1) of the Act.
[6] Revised section 3, new clause 2(ii) – no waiver of right to object.
[7] Revised section 3, new clause 2(iii) – no waiver of application of law
[8] New subsections 32(3) and (4), and revised section 3, new clause 2(iv) – no waiver of applicability of choice of law rule in the new subsections.
[9] Revised section 3, new clause 2(v) – no waiver of statutory right of appeal given by section 45. Some of the thinking behind this limit was that if family arbitrations must be conducted under Canadian law, there had to be a mechanism to ensure that this rule has been complied with.
[10] New subsection 45(6) and consequential amendments to the ***Courts of Justice Act***.
[11] New ss. 2.1(1) and (2) and s. 50.1. It is important to note that this set of provisions replaces section 50 of the ***Arbitration Act, 1991***, for the enforcement of an ***award***. The enforcement of a family arbitrator's ***interim orders***, for example under section 25 (requiring the production of documents) or section 29 (requiring witnesses to appear) is not affected by the amendments. Enforcement under the ***Family Law Act*** is further discussed below.
[12] New section 2.1.
[13] New section 59.1 of the ***Family Law Act***.
[14] New provisions of section 51 FLA.
[15] Sections 59.1 through 59.8
[16] There are exceptions to this requirement for secondary arbitrations, a concept discussed below.
[17] Quebec of course does not permit the arbitration of family disputes at all, treating them along with questions of civil status as matters of public order.

[18] Subsection 59.7(2)
[19] The proceedings of the Standing Committee on General Government meetings are online: http://www.ontla.on.ca/hansard/committee_debates/38_parl/session2/GenGov/index.htm, for January 16, 17 and 18, 2006. Those who raised this issue there included the Ontario Bar Association, Lorne Wolfson, Thomas Bastedo and Nicole Tellier, all on January 16th.
[20] Section 50