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COUNCIL ON AMERICAN-ISLAMIC RELATIONS CANADA

REVIEW OF ONTARIO'S ARBITRATION PROCESS AND *ARBITRATION ACT*

WRITTEN SUBMISSIONS TO MARION BOYD

Canadian Council on American-Islamic Relations (CAIR-CAN)

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PART I: WHAT IS CAIR-CAN?

The Canadian Council on American-Islamic Relations (CAIR-CAN) is a national organization with a grassroots membership that empowers Canadian Muslims through community education, media engagement, anti-discrimination efforts and public advocacy. CAIR-CAN attempts to foster an accurate understanding and fuller appreciation of Islam in Canadian society.

CAIR-CAN regularly provides media commentary on issues affecting Canadian Muslims; documents and resolves discrimination and bias-related complaints; offers regular seminars and workshops on Islamic practices and issues of religious accommodation; and offers numerous publications, which include the following: "A Journalist's Guide to Islam," "An Employer's Guide to Islamic Religious Practices," "An Educator's Guide to Islamic Religious Practices," "A Health Care Provider's Guide to Islamic Religious Practices," as well as a succinct "Know Your Rights" pocket guide. These publications are regularly requested by government departments, local and national media, police services, hospitals, schools, private firms and various non-profit groups.

This document is CAIR-CAN's written submission in a meeting with Ms. Marion Boyd on August 10, 2004. A more detailed brief will be presented to the Ministry in late August.

For further information regarding CAIR-CAN, please visit our website: www.caircan.ca.

PART II: PROPOSED MUSLIM ARBITRATION TRIBUNALS

The Islamic Institute of Civil Justice proposes to use the alternative dispute resolution system under Ontario's *Arbitration Act 1991* in order to set up Muslim personal/family Law arbitration tribunals. Our understanding is that such tribunals would be equipped to settle personal disputes regarding wills, inheritance, marriage, remarriage, marriage contracts, and spousal support, according to Islamic personal/family Law. Under the *Act*, both parties to the dispute are required to consent to using this form of alternative dispute resolution and the decisions rendered by the tribunals will be binding upon the parties. The Institute is proposing that the roster of arbitrators for such tribunals consist of lawyers, retired judges, religious scholars and private arbitrators.

PART III: CAIR-CAN'S POSITION

CAIR-CAN supports the principle behind the Institute's proposal. It is our position that the Muslim community in Canada is entitled to use the alternative dispute resolution tools provided under the *Arbitration Act* in order to resolve civil disputes according to Islamic legal principles. Supporting the creation of Islamic family law tribunals, along with those of other faith groups, is a form of accommodating the needs of religious minorities within a multicultural society. Moreover, giving members of religious minority groups the option of resolving civil disputes according to their own religious doctrine within a framework that is respectful of both Canadian law and the *Charter of Rights and Freedoms* is consistent with the *Charter*'s own guarantee of freedom of religion contained in section 2(a).

It is appropriate that the current review of the arbitration processes being carried out by the Ministry of the Attorney General and the Ontario Women's Directorate is not confined to the proposed Muslim family law tribunals, as other faith groups also operate similar alternative dispute resolution systems. Likewise, any recommendations coming out of the present review must apply to all alternative dispute resolution mechanisms. The Ministry of the Attorney General must be vigilant not to subject one faith group to standards that are more onerous than those required of other communities, as to do so would be discriminatory and contrary to the *Charter*'s equality provision.

While CAIR-CAN supports the right of the Muslim community to create its own institutions for civil dispute resolution, it recognizes the current limitations of the *Arbitration Act* and therefore has concerns regarding the implementation of a civil dispute resolution process. Accordingly, CAIR-CAN makes the following recommendations:

PART IV: RECOMMENDATIONS

A) Term "shariah" not to be used

The term shariah refers to a religious code for living covering all aspects of a Muslim's life from prayers, to financial dealings, to family relations, to caring for the poor. It is a comprehensive term that encompasses the private and the public, the individual and the community.

It is inappropriate and misleading to use the word "shariah" to describe an arbitration tribunal that will use Islamic legal principles to resolve a very specific and limited set of civil disputes which may be the subject of arbitration under Ontario's *Arbitration Act*. Moreover, such a tribunal is not a full-fledged Islamic court, as may be inferred by the use of the word "shariah," and its limited jurisdiction stems from the *Act*. The tribunal will, more appropriately, be a form of Muslim dispute resolution consistent with Canadian law and the *Charter* within the flexibility of Islamic normative principles.

B) Ensuring voluntary participation, independent legal advice and education

The arbitration process set out in the *Arbitration Act* is meant to be entered into voluntarily. Much of the public discourse surrounding the creation of "shariah" tribunals has focused on the fear that Muslim women – especially those who are new immigrants to Canada- may feel coerced into participating in binding arbitration according to Muslim family law as opposed to resolving their disputes through the court system. CAIR-CAN recognizes that this is a danger inherent in offering alternate dispute resolution options that is further compounded by a minority group's lack of access to information regarding their rights. However, it is our position that such a risk can most certainly be minimized through building safeguards into the system.

In order to ensure that the parties are entering into binding arbitration voluntarily, a number of proactive measures need to be taken. First, both parties must receive independent legal advice regarding their rights before committing themselves to an alternative form of dispute resolution. Moreover, each institute, organization or firm offering arbitration services must inform participants in writing of their right to appeal the arbitration decision once rendered, and their right to challenge the arbitrator under s.13 of the *Act*. If each party consents, a declaration shall be signed stating that the parties have received independent legal advice, understand their rights under the *Act* and are voluntarily consenting to binding arbitration according to doctrinal law.

In addition, a proactive education campaign, targeting immigrant and minority women, needs to be undertaken. This would involve the distribution of culturally and linguistically accessible literature setting out a woman's rights and options in the case of family law disputes. In developing such education initiatives, partnerships should be forged with the communities being targeted.

Again, CAIR-CAN appreciates that parties may enter into arbitration as opposed to pursuing their rights through the court system due to indirect forms of coercion and a lack of information. Such coercion, however, can also exist within the formal court system or within other contractual settlements. For example, individuals may be coerced to accept an 'out of court' settlement or face similar pressure when parties agree to a marriage contract regarding an unequal separation of marriage assets. It is our position that this potential danger of coercion is not insurmountable if proactive steps are taken by both the Ministry and the minority community to ensure that the parties fully understand their rights and options.

C) Creating qualified and specialized arbitrators

The success of an arbitration system based on Islamic law will largely turn on the arbitrators. CAIR-CAN is confident that arbitrators equipped with the appropriate training and who have an understanding of both the spirit and letter of Islamic family and personal law will render equitable decisions that are consistent with the *Charter of Rights and Freedoms*. Accordingly, it is our position that significant efforts must be taken by the Ministry, in partnership with minority communities, to select and train qualified arbitrators. The status quo of allowing for the creation of private arbitration systems with little to no government involvement in the selection and training of the arbitrators does not adequately protect the interests of individuals who, for religious or other reasons, choose this form of dispute resolution.

It is our position that any institute or organization intending to offer faith based arbitration ought to submit to the Ministry of the Attorney General the resumes of those candidates which the organization intends to appoint as arbitrators. In assessing whether such candidates are qualified to apply

Islamic family law within a Canadian context, the Ministry needs to formally seek the advice of recognized Muslim scholars, leaders and activists within the Canadian Muslim community. Alternatively, the Ministry may turn to a recognized Islamic body within Canada such as the Fiqh Council of North America.

It is also our position that arbitrators must meet minimum qualification standards in mediation and arbitration skills as well as have an understanding of Ontario's family and estate laws. In this regard, arbitrators would be required to obtain a certificate in arbitration and mediation and complete a set of basic Canadian law courses designated by the Ministry.

D) Registry of arbitral decisions

In addition to ensuring voluntary participation and qualified arbitrators, it is important to ensure that participants and their representatives are able to make informed decisions about the decision-maker in their dispute. The *Arbitration Act* allows the parties to specify the individual that will arbitrate their dispute but does not provide for a framework whereby an individual arbitrator's previous decisions can be reviewed and studied. This is particularly troublesome in the case of religious arbitration where the application of religious law can vary widely between religious scholars and schools of jurisprudence.

CAIR-CAN recognizes that one of the advantages of the private arbitration of disputes is the confidentiality of the proceedings and the outcome. Nevertheless, it will only be possible for participants to make informed decisions about particular arbitrators and arbitration centers if there is a mechanism for gaining access to past decisions, which, under the *Arbitration Act*, must be made in writing.

CAIR-CAN recommends the institution of a Registry of Ontario Arbitral Decisions ("Registry"). Essentially, every registered arbitrator would be required to provide a 'sanitized' copy of their decisions to the Registry within 1 month of the decision being rendered. Naturally, all confidential information must have been removed prior to the submission to the Registry. An index to

and the text of the decisions in the Registry would be made available to the public online or in paper form on request.

CAIR-CAN appreciates that the possibility of reviewing previous decisions does not guarantee the selection of an arbitrator that meets the expectations of the parties. It does, however, provide a degree of transparency analogous to that provided by the Courts. It also equips the parties with the information required to make an informed decision about their participation in the arbitral process without compromising the confidentiality of the arbitration.