Section 1: Introduction and Structure

This Review began as a result of developments that came to public attention in the fall of 2003.[1] After more than twenty years of effort, Syed Mumtaz Ali, a retired Ontario lawyer determined to ensure that Islamic principles of family and inheritance law could be used to resolve disputes within the Muslim community in Canada, announced that a new organization, the Islamic Institute of Civil Justice (IICJ), had been established. The Institute would be conducting arbitrations according to Islamic personal law. According to Mumtaz Ali these services would be offered to the Muslim community of Ontario in the form of a "Sharia Court" authorized by the *Arbitration Act, 1991*.

In initial comments to the media in late 2003 Syed Mumtaz Ali, president of the IICJ, stated, "[n]ow, once an arbitrator decides cases, it is final and binding. The parties can go to the local secular Canadian court asking that it be enforced. The court has no discretion in the matter. The…impracticality [not being allowed to use Sharia] has been removed. In settling disputes, there is no choice but to have an arbitration board."[2] His statement went on to suggest that, once the "Sharia Court" was available to Muslims, they would be required, as part of their faith position, to settle disputes only in that forum, if they were to be regarded as "good Muslims." The Institute proposed that it would offer memberships to Muslims, who would then be bound to settle personal disputes only in this forum, without recourse to the courts of Canada and Ontario. However, the statement also emphasized that the "Sharia Court" would be bound by the laws of Canada and Ontario, as it is a requirement for Muslims living in non-Islamic countries to obey the laws of their country of residence.

These announcements, and the subsequent media interviews which discussed the issue of arbitration in the context of family and inheritance law, raised acute alarm throughout Ontario and Canada. In particular, there was intense fear that the kind of abuses, particularly against women, which have been exposed in other countries where "Sharia Law" prevails, such as Afghanistan, Pakistan, Iran, and Nigeria, could happen in Canada.[3] A related fear, expressed by many groups throughout the Review was that the many years of hard work, which have entrenched equality rights in Canada, could be undone through the use of private arbitration, to the detriment of women, children and other vulnerable people.

In these initial statements by the IICJ were born some persistent myths about arbitration in Ontario. Many people had not been aware that the *Arbitration Act* could be used to settle family law and inheritance disputes, or that if an arbitration award were made under the Act, it could be enforced by Canadian courts. Syed Mumtaz Ali's statements, and the statements of members of the Muslim community who took a position supporting the IICJ proposal, suggested that the government had given some form of special permission to the IICJ to undertake its project. The idea that government had

[1] Judy Van Rhijn, 'First steps taken for Islamic arbitration board' *Law Times* (24 November 2003).
[2] Cited in Judy Van Rhijn, 'First steps taken for Islamic arbitration board' *The Toronto Star* (25 November, 2004), online: <www.thestar.com>.
[3] Joanne Lichman (The National, CBC Television, 8 March 2004).

approved the use of Sharia began winding its way into the public consciousness. The mistaken belief that the government had recently made changes to the law on arbitrations was widely disseminated through the public press and electronic media.[4]

The idea that the IICJ legitimately held some form of coercive power which would allow it to force Muslims in Ontario to arbitrate according to Islamic personal law instead of using the traditional court route to resolve disputes was formed as a direct result of the pronouncements of the IICJ. That this declaration appears to have been taken at face value by both the Muslim community and the broader community is particularly troublesome. Further, the IICJ's false contention that arbitration decisions are not subject to judicial oversight was propagated by a misunderstanding of the law on the part of the community, the media, and of course, the IICJ itself. Finally, the IICJ position that "good Muslims" would avail themselves exclusively of Muslim arbitration services effectively may have silenced opposition among those who consider themselves devout.

Media reports which unquestioningly accepted these misunderstandings as self-evident truths did not help to clarify the issue.[5] More accurate, less alarmist reporting was largely marginal to the Canadian mainstream.[6] In fact, no government had made any changes to the *Arbitration Act* since its passing into law in 1992. Prior to 1992 private arbitration was legal in Ontario under the previous *Arbitrations Act*[7] and family matters have been arbitrated based on religious teachings for many years in Jewish, Muslim and Christian settings.

Alarmed by the perceived implications of the IICJ's announcement, a number of Ontarians sought to bring the issue to the attention of the government. In March and April 2004 members of the Canadian Council of Muslim Women (CCMW) and the International Campaign Against Shariah Law in Canada each met with government officials to discuss their concerns. Officials took the position that since the IICJ was using the *Arbitration Act* to provide a framework for voluntary private arbitration, there was no clear role for government to intervene to stop the proposal from proceeding.

Concerns were also brought to the attention of the Law Society of Upper Canada (LSUC), both as the regulator of Ontario's legal profession, and as a group that might speak out about the need for judicial oversight of arbitration decisions. The Access to Justice Committee of the LSUC considered the available information and the issues raised; the Equity and Aboriginal Affairs Committee of LSUC then debated the matter in an effort to determine what action, if any, the Society might take to bring the concerns of

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[4] See for example: Lynda Hurst, 'Ontario Shariah tribunals assailed' *The Toronto Star* (22 May 2004), online: <www.thestar.com>.

[5] Lynda Hurst, 'Ontario Shariah tribunals assailed' *The Toronto Star* (22 May 2004), online: <www.thestar.com>; Lynda Hurst, 'Protest rises over Islamic law in Toronto' *The Toronto Star* (8 June 2004), online: <www.thestar.com>.

[6] Laura Trevelyan, 'Will Canada introduce Shariah law?' *BBC News,* online: < http://newsvote.bbc.co.uk>; Clifford Krauss, 'When the Koran speaks, will Canadian law bend?' *The New York Times* (4 August 2004) A4; Faisal Kutty & Ahmad Kutty, 'Shariah courts in Canada: myth and reality' *The Law Times* (31 May 2004) 7; 'Some Canadians may use Shariah law' *AlJazeera.net, online:* < http://english.aljazeera.net>.

[7] *Arbitration Act* S.O. 1991 c.17.

the legal profession to the attention of government. Groups like the National Council of Women, the National Association of Women and the Law, and the Canadian Federation of University Women Clubs raised their concerns in a variety of ways. At the same time, members of the public, hearing and being concerned about news reports, started contacting their local MPPs, the Attorney General and the Minister Responsible for Women's Issues.

It bears repetition that, in spite of perceptions to the contrary, the government had not amended or introduced any legislation or regulations that allowed the IICJ to conduct arbitrations according to Islamic personal law. Rather, the structure of the *Arbitration Act* itself created this possibility. In fact, the government had never been in contact with or heard of the IICJ until early 2004. Given that the IICJ was simply using the *Arbitration Act* in the manner in which it was intended, as a framework for the provision of private arbitration services, there was no reason for the government to be notified of its intention to set up business in Ontario. The IICJ was proposing to use the *Arbitration Act* in the same manner as it is being used by countless other businesses and organizations in Ontario to arbitrate private disputes.

Nonetheless, the increasingly strong concerns of Muslim women's groups, advocates for women and legal stakeholders about the implications of using the *Arbitration Act* for family law and inheritance matters at all, and in particular, allowing the principles of religious laws to prevail in these arbitrations, led the Premier to ask formally for the advice of the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello, (the Ministers) about this issue. Soon afterward, the Ministers sought my assistance in speaking to affected communities.

In June of 2004 the Ministers gave me a mandate to explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable people. My mandate included extensive consultation with interested parties. In particular, my Review was to include an examination of the prevalence of the use of arbitration in family and inheritance disputes, the extent to which parties have resorted to the courts to enforce arbitration awards, and what differential impact, if any, arbitration may have on women, elderly persons, persons with disabilities, or other vulnerable groups. Finally, based on my consultations, I was asked to make recommendations for addressing some of the central concerns about arbitration of family law and inheritance matters in this province. (See Appendix I) Consequently I set out to meet with as many interested people as I could, hoping to canvass a broad range of views. During the course of the Review I met with close to 50 groups, and spoke with numerous individuals, both in person and by phone. (See Appendix II) From July through September of 2004 I met with representatives from a variety of women's organizations including immigrant organizations and groups dealing with domestic violence, representatives and organizations from the Muslim, Jewish and evangelical Christian communities, legal organizations and family lawyers, public legal education organizations, scholars, religious leaders, and private individuals. As well, I received countless letters and submissions from concerned citizens across Ontario, and beyond, which I read with care. The degree of concern about the use of religious

principles in the arbitration of family law and inheritance cases in Ontario, and the attention this issue has received, in Ontario, in Canada, and around the world, has only served to heighten my awareness of the need to address the issue in a comprehensive and constructive manner. This report represents my best efforts to do so. I am deeply grateful for the time, effort and thoughtfulness so many respondents shared with me and will try to do justice to the concerns they raised and the many suggestions they put forward to address these issues.

I am equally grateful for the invaluable assistance of a number of people, without whom this Review would not have been possible. John Gregory, Juliette Nicolet, Anne Marie Predko, and other staff of the Ministry of the Attorney General have given unstintingly of their expertise, their advice and their wisdom about the issues of family law and inheritance laws, the evolution and provisions of the *Arbitration Act* itself, the appropriate consultation with the legal community and possible changes that might resolve some of the serious concerns raised throughout the Review process. Shari Golberg, Payal Kapur, and other colleagues in the Ontario Women's Directorate facilitated meetings with the women's groups concerned, provided expertise around specific issues such as violence against women, and shared their insights about public and professional education needs with respect to family law and arbitration issues. Finally, I would like to thank Bernie Henry and Sarah Perkins for their technical support and assistance in the creation of this report. While I am deeply indebted to these colleagues for their unfailing patience, vigorous challenges, and hard work, I am solely responsible for this Report and any errors or omissions it might contain.

Structure of the Report

In order to address properly the various issues raised during the course of the Review, I have divided this Report into a number of sections. The first section includes the introduction and outline of the structure of the Report. Section two discusses the *Arbitration Act* itself, as it is clearly central to the Review, being the piece of legislation which enables private disputes to be resolved through arbitration. First, I will discuss the historic use of arbitration in this province and the development of the *Arbitration Act* itself. Next, this section will set out the limitations of arbitration, the basic safeguards provided by the *Arbitration Act*, and the basic principles governing arbitrations in Ontario. Finally it will address the legal, procedural, and substantive limits on the use of arbitration including judicial review of arbitration decisions.

This report would be incomplete without canvassing the family law and inheritance law in Ontario and Canada and section three will deal with these background areas. First I explain the division of responsibility over family law issues between the federal and provincial governments. Since the preamble to the *Family Law Act* contains a clear statement of gender equality in the settlement of relationship breakdown, it merits discussion. Beyond this, the report will look at individual's rights upon separation or divorce, children's custody and access, defining the best interests of the child, international child abduction, polygamy, domestic contracts under Part IV of the *Family*

Law Act, and testate and intestate successions law. Each of these areas must be considered in order to understand the implications of the use of religious principles in family law and inheritance law arbitrations.

Section four will set out the wide variety of opinions and concerns which were expressed by groups and individuals who shared their views during the Review. I will summarize the arguments presented, as providing the full text of each participant's contributions would be much too lengthy for a report of this kind. The section will group the presentations under common themes and concerns. The report will also include an examination of relevant constitutional considerations resulting from contributors' submissions.

In section five, I hope to explain what may be the limits of applicability of the *Charter* and the policy considerations surrounding the freedom of religion, the multicultural and the equality clauses as these have been raised by participants to the Review, and have been understood by the courts and by government.

Making sense of the issue equally requires a considerable degree of analysis of some of the deeper questions that were raised in the Review. These questions go to the core of who we are as a society. As a result, section six of the report is dedicated to examining the following topics:

a) a brief historical overview of religiously based personal law;
b) the notion of separation of church and state, and the meaning this phrase has in Canada on both the legal and social levels;
c) the possible role and impact of identity politics with respect to the issues;
d) the tension between multiculturalism and equality rights including the rights of individuals within minorities;
e) the relation of Ontario's public policy priorities with respect to violence against women and children and the use of private arbitration to deal with family law issues;
f) the potential impact of arbitration decisions on the impoverishment of women and children;
g) the access to justice issues inherent in allowing private legal processes.

Section seven will include concrete suggestions from participants for policy, legislative and regulatory reform. As well, I address the need for public education about the issues raised in the review, among specific religious and political groups as well as the broader community. I explore what the responsibility of the government and the various interest groups involved must be in order for the issues to be understood and the interests of vulnerable people to be addressed appropriately.

The final section will set out my conclusions and recommendations for the Attorney General, Michael Bryant, and the Minister Responsible for Women's Issues, Sandra Pupatello, to address the difficulties raised by the use of arbitrations to resolve matters

of family law and inheritance. These include recommendations for legislative and regulatory change, as well as for non-legislative action, such as increased public and professional legal education.

A brief comment on style and spelling is likely in order. Although the text of the Review Report observes consistent rules of style and spelling, many of the submissions to the Review did not. In an effort to give respondents a recognizable voice, I have not altered the style or spelling in the quotations from the submissions but rather have let them stand as they were presented to me.