Section 4: Summary of Consultations

Methodology

The consultation phase of the Review began in late June 2004 and continued through September 2004. Although the time frame was short and took place over the summer, the Review received numerous submissions. (See Appendix III) The staff of the Ministry of the Attorney General and the Ontario Women's Directorate provided contacts among their stakeholder groups and arranged meetings with those that indicated a desire to participate in the consultation. In addition, I was provided access to the correspondence and submissions that had been made prior to the initiation of the consultation, together with the responses provided by the Ministries. Once the consultations were underway, other groups contacted me and also asked to participate.

As the consultation proceeded, it became clear that there were a number of identifiable themes running through the discussion. Given the volume of the submissions and the repetition of similar concerns, I have decided to summarize the submissions thematically, quoting directly in some instances and paraphrasing in others. Where unique or particularly striking suggestions were made, these have been included with attribution. However, in many cases, the concerns cited and the solutions proposed were so general that specific attribution has not been made.

Theme: Arbitration Should Not Be Used to Determine Matters of Family Law

The Review heard from many strong opponents of the use of arbitration for family law disputes. Until the issue was made public through the declarations of the Islamic Institute of Civil Justice, many of these respondents had been unaware that arbitration was one of the alternate dispute resolution mechanisms available for family law disputes. Many had previously expressed concerns about the effect of mediation on vulnerable people; some view arbitration as even more problematic, given that it does not require supervision by the courts in order to be binding on the parties.

The most direct challenge was from the Muslim Canadian Congress, a national organization that "provides a voice to progressive Muslims who are not represented by existing organizations." Although particularly opposed to religiously-based arbitration, the Muslim Canadian Congress, through its legal representative, Rocco Galati, strongly challenged the legality of the use of the Arbitration Act for family matters at all:

> The Muslim Canadian Congress respectfully submits:
>
> 1. that the Arbitration Act does *not* cover family disputes being resolved within its parameters. Furthermore, that the Family Law Act and the other pieces of legislation covering family law jurisdiction are the sole, exclusive and comprehensive scheme for resolving all family law matters touching on relationships between spouses and their children, including estate and inheritances by

spouses and children. It is therefore our position that none of these matters can be dealt with under the Arbitration Act.

2. that if indeed the government takes the position, as it seems to be doing, that the Arbitration Act can deal with these matters, then the MCC further takes the position that, to that extent, the Arbitration Act is unconstitutional and of no force and effect in that:
    a. It breaches the rights contained in sections 2, 7, and 15 of the Canadian Charter of Rights and Freedoms as enunciated by the Supreme Court of Canada with respect to any differential treatment not specifically set out in the Constitution Act, 1867;
    b. Breaches the unwritten constitutional norms enunciated by the Supreme court of Canada in the Quebec Succession Reference, namely the rule of law, constitutionalism, federalism, and respect for minorities;
    c. Breaches even the common law rights to equality of citizenship as enunciated by the Supreme Court of Canada in *Winner*, and
    d. Is otherwise repugnant to public policy in the *de facto* privatization of the legislative function and duty of parliament, which in fact, has been declared as unconstitutional as being the abandonment and abdication of the legislative function of parliament, as enunciated by the Supreme Court of Canada in *Re Gray* and further endorsed by the Supreme Court in *Hallett* and *Carey.*
3. In light of the fact that this Act exists and the Government states that there is such statutory and constitutional jurisdiction, and in light of the fact that MCC completely rejects and disagrees, we demand, on behalf of not only Muslim-Canadians, but all other Canadians who defend the rule of law and constitutionalism and equality that the matter be referred on a reference to the Ontario Court of Appeal pursuant to Section 8 of the Courts of Justice Act to determine:
    a. Whether the Arbitration Act confers jurisdiction, outside the Family Law Act and other related family law statutes, to determine disputes of property, children, inheritance and estates in the family context.
    b. If the Arbitration Act does confer such jurisdiction, whether it is constitutional.[97]

[97] Submission of the Muslim Canadian Congress (August 26, 2004).

The National Association of Women and the Law (NAWL), in conjunction with the Canadian Council of Muslim Women (CCMW) and the National Organization of Immigrant and Visible Minority Women of Canada, also challenged the constitutionality of using the *Arbitration Act* for family matters, citing Section 15 of the *Charter of Rights and Freedoms* and arguing that it is inherently discriminatory against women to allow the use of other forms of law, for example religious laws, as opposed to Canadian law, to determine family matters, stating:

> …it is necessary to step back and challenge the enabling legislation, the Arbitration Act… It is necessary because in order to invoke a Charter right, one must demonstrate some form of governmental action. The broad legal argument would be [that] the lack of limits in the Arbitration Act that permit family law matters to be arbitrated upon using any legal framework is discriminatory in its effect on women.
>
> The Arbitration Act does not make any direct distinction between individuals. It is a statute that is open to any adult person to use. The argument at this stage of the s. 15 test is that the Act, in not setting any express limits as to the type of civil law under its jurisdiction, disparately impacts women. Specifically, the Act permits the use of family arbitration. Women are negatively impacted because of the possibility that <u>any</u> framework may be used to decide family law issues, even frameworks that hold no recognized principles of equality or statutory criteria under the Family Law Act or the Divorce Act.[98]

The National Council of Women of Canada (NCWC) has adopted a lengthy resolution also opposing the use of arbitration for family matters, stating in part:

> That the National Council of Women of Canada (NCWC) adopt as policy:
>
> a) that the equality for women, embedded in the Canadian Charter of Rights and Freedoms and the convention on the elimination of all forms of Discrimination Against Women (CEDAW), be respected in Family Law;
> b) that binding arbitration be rejected for Family Law disputes; and
> c) that no alternative systems for resolving family law disputes be allowed to compromise the rights of women and children as they presently exist in Federal, provincial and territorial Law; and
> d) the need to find savings in court time and court costs should not compromise the rights of women and children.[99]

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[98] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).
[99] National Council of Women Of Canada *Protecting Family Law Resolution 04.01EI (2004), online:* <http://www.ncwc.ca/pdf/policies_2004.pdf>.

The NCWC resolution goes on to urge both the Government of Canada and the provinces to adopt the same policy position.

NAWL has expressed concerns for many years about the power imbalance between men and women, particularly where domestic violence is a factor, which makes alternative dispute resolution potentially prejudicial to the equality rights of women. The submission points out that these concerns are even greater when family matters are decided by arbitration.

> Arbitration is different from mediation in that the parties agree to have a third person adjudicate their dispute for them in a similar manner that a judge would. …an arbitral award can be filed with a court and then enforced as a court order. Filing an arbitration order with a court is neither mandatory nor does it represent court oversight of an arbitral award. It merely means that a party to the arbitration agreement has recourse to enforcement should another party fail to abide by the arbitrator's decision. Once an arbitration agreement is signed, the parties do not have the option of withdrawing from arbitration. This can be particularly problematic where an agreement to arbitrate is signed at the date of the marriage, but the actual arbitration does not take place until years later, during which time a person may have changed her/his mind about wanting to submit a dispute to arbitration.[100]

Both NAWL and the Canadian Council of Muslim Women (CCMW) argue that Ontario ought to follow the lead of Quebec and prohibit family law issues from being settled by arbitration. The *Civil Code* states:

> Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.[101]

The CCMW submission urged that Ontario follow the same path as Quebec and remove the option of using the *Arbitration Act* with respect to family law matters at all.[102]

Interestingly, the Quebec Code of Civil Procedure calls for mandatory mediation in cases of family law, a policy that NAWL and most interested women's groups opposed in Ontario on the grounds that the power imbalance between men and women makes mediation not only unequal, but downright dangerous if family violence is a factor. Their position seemed to be that, even given this problem, at least the settlements arising out of mediation are supervised by the court and therefore subject to scrutiny.

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[100] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).
[101] Civil Code of Quebec Art. 2639 C.C.Q.
[102] Submission of the Canadian Council of Muslim Women (July 23, 2004).

It is clear that Rabinnical Courts or Beit Din do arbitrate in family matters in Quebec; however, it would appear that these arbitral awards may be treated as advisory, in a similar manner to separation agreements, and require confirmation from the court to be considered legally binding.

Many submissions referred to the "privatization" of family law matters as a negative trend in Ontario and Canada. Alternate dispute resolution mechanisms are seen as taking family matters out of the public sphere where they are subject to public policy imperatives and scrutiny. According to Gaetanne Pharand, President of Action ontarienne contre la violence faite aux femmes,

> Contrairement aux lois en vigueur qui pourraient faire l'objet de réformes ou modifications grâce à la jurisprudence, on ne pourrait avoir d'emprise sur les vicissitudes des décisions prises en arbitrage, puisque celles-ci font partie d'un processus privé. Les lois canadiennes n'étant pas toujours sans failles dans leur élaboration ou leur application, le public dispose au moins d'un recours puisqu'il s'agit d'un processus public. L'utilisation des processus alternatifs dans les cas de garde légale ou de séparation des biens matrimoniaux constituent une privatisation du droit de la famille qui remet en question les principes mêmes de justice.[103]

The NAWL submission further elaborates:

> It is possible to make a general argument about the impact that the privatization of family law is having on women. Indeed, many scholars have written about the dangers of the state washing its hands of responsibility in matters that are "private."
>
>> The ideology of the public/private dichotomy allows government to clean its hands of any *responsibility* for the state of the 'private' world and *depoliticizes* the disadvantages which inevitably spill over the alleged divide by affecting the position of the 'privately' disadvantaged in the 'public' world.[104]

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[103] Letter from Gaetanne Pharand to the Attorney General of Ontario (September 30, 2004) forwarded to the Review.
Translation: "Unlike legislation which is in force and may be subject to reform and variation on the basis of jurisprudence, there would be no control over the vagaries of decisions made under arbitration, since these are part of a private process. While the drafting and application of Canadian laws is not always flawless, at least the public has a means of recourse since the process is public. The use of alternative processes in the case of legal custody or separation of matrimonial assets constitutes a privatization of family law which calls into question the very principles of justice."

[104] Lacey, in Susan Boyd, ed. *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997) at 3 quoted in submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).

Some lawyers who regularly act as arbitrators and support the continued use of arbitration for family law matters, nevertheless expressed some concerns. Alfred Mamo, a London lawyer, wrote,

> One big deficiency with the arbitration process is that it does not need to adhere to the traditional concept of open justice, which ensures a just result through transparency, public scrutiny and accountability. This lack of openness can easily lead to the vulnerable being drawn into a process that is not procedurally or substantively in keeping with the principles of fundamental justice. Given the private nature of the process, especially in cases where there is no appeal from the arbitrator's decision, the process and the substantive result are both immune from scrutiny.[105]

Another lawyer who does arbitrations regularly, A. Burke Doran, also had some reservations about the appropriateness of arbitration in some family law situations:

> The major limitations are that it is probably not appropriate if one or both of the parties are in bad faith or intent on delaying the matter or playing procedural games; there being an advantage to the formality and awe of the court room setting for those cases. Another disadvantage of arbitration is that a matter that requires several days of evidence tends to stumble along over several months because of the time commitments of the lawyers on other matters. A trial judge will start a procedure and continue until it is finished and the lawyers will simply have to drop everything to be there. Theoretically that could happen on an arbitration but an arbitrator is usually reluctant to come down hard on counsel and the parties. Similarly arbitrators are inclined to be overly patient when sometimes that is really not the best approach. It can prolong matters.[106]

Theme: Arbitration Should Continue to Be Allowed in Family Law

The government's position is that arbitration of family law matters is permitted under the *Arbitration Act*, as are all other matters not prohibited by jurisdiction (such as federal jurisdiction over criminal offences or civil divorce) or statute (such as Ontario labour legislation.) Certainly, when the *Arbitration Act* changes were made in the early 1990's, there was a clear understanding that the use of alternative dispute resolution mechanisms, like mediation and arbitration, were being encouraged to promote greater choice and access to justice for those engaged in family law cases and to offer some relief for court backlogs that were causing family cases to drag on over time, thus exacerbating the conflicts. Because the arbitration process was private, and indeed was chosen by many because it kept their personal disputes out of the public limelight, no mechanism was set up to monitor or track the use of arbitrations for these issues. Therefore, the Review was faced with considerable difficulty in determining the extent to

[105] Submission of Alfred Mamo (September 16, 2004).
[106] Submission of A. Burke Doran (September 22, 2004).

which arbitration is used for resolving family law disputes. We had to rely on the reports of lawyers and arbitration practitioners who volunteered to share information with us.

From our consultations, it was clear that arbitration is more common in some court regions than others and most prevalent in Toronto, where heavy court schedules make arbitration an attractive alternative for the timely settlement of issues. However, we also found that arbitration is used across the province in family law cases. It appears that the availability of arbitrators viewed as experts is the most common characteristic determining the level of use, followed closely by the acceptance of alternate dispute resolution by the local legal community.

Of the lawyers we spoke to, those practising family law reported varying levels of trust and reliance on alternate dispute resolution mechanisms of any kind. Some lawyers, particularly those representing vulnerable clients, continue to be sceptical about mediation and the tendency of some non-legally trained mediators to encourage clients to sign mediation agreements without independent legal advice. Some family lawyers are so enthusiastic about ADR that they have entered into the practice of collaborative law, working closely with their client and the opposing lawyer and his/her client to try to reach resolutions without recourse to the courts. Still others encourage the use of mediation with the proviso that the matters that cannot be resolved will go to arbitration, sometimes with the same person acting as the arbitrator, if the arbitration agreement so provides. A number of leading family lawyers themselves provide mediation and arbitration services.

The Review also consulted with a number of different individuals and groups that are currently offering mediation and arbitration services and who strongly support retaining the capacity to arbitrate family law matters. Of those willing to share statistics with the Review, the numbers of arbitrations conducted by each in a year ranged from a high of 60 cases to a low of six cases, with the average being between 30 and 35. We do know that very few arbitrated settlements end up before the courts. Only one respondent reported that any of his decisions had been ever been judicially reviewed; in two cases, the allegation was that he had erred in law and in both cases, the request for review was denied by the court. A search of relevant case law corroborates the reports of these arbitrators and lawyers that these decisions, even when one of the parties to them does not “win,” seem to be accepted by both parties in most cases. Even the enforcement of decisions through the courts seems to be less necessary than in court-based decisions. Those we spoke with suggested that this likely results from the clients feeling as if they have some control over the process, some say in who will judge the case, and some “buy in” to the results.

There are a number of reasons why arbitration has become a frequent, if not a preferred, route for a number of lawyers. Alfred Mamo spoke for a number of other respondents when stating:

> Generally, I believe that the growth in the amount of arbitrations conducted in family law matters is a direct result of the deficiency of the

> public justice system to meet the needs of the consumers. This is the case whether a jurisdiction has a “unified” family court or not. The government’s and the bar’s vision with respect to a holistic unified court with dedicated judges implementing a strong case management system for the benefit of the families involved has been and continues to be diluted.
>
> My concern is that we are seeing the creation of a two tier justice system: those who can afford, in essence, to choose and to hire their own judge to decide their case, create their own private court. Others “languish” in the public system. This phenomenon is made worse by the fact that self represented litigants are on the rise; that slows down all of the cases and gives lawyers and litigants more reason to opt out of the system.[107]

In one consultation, with representatives of the Family Law Section of the Ontario Bar Association and the Advocates Society, the Review was told that removing the option to arbitrate “would be a disaster, pushing the development of family law back thirty years.” During the consultation with the Law Society of Upper Canada, one lawyer made the point that, with arbitration, the parties, with the advice of their lawyers, can choose an arbitrator who is an expert in family law, whereas in court, you get the judge who is assigned, whether or not he or she has expertise in family law matters. This perspective was echoed by prominent family lawyer, Philip Epstein, who also acts as a mediator and arbitrator:

> There are very significant benefits to the parties in this process. First and foremost, I think, the clients believe that they are getting expertise which is not always available in the courts. That is, judges move in and out of family divisions and they are not always experts. By choosing a family law expert and one that is constantly teaching, they get the most current views of the law and the most up-to-date approach to the resolution of problems. Because I am also a practitioner and I am in the business of working out settlements, they get the benefit of creative solutions to solve the problems. These kinds of creative solutions could not be fashioned by a court.
>
> Parties like the idea that the case starts and proceeds at a specific time on a specific date. There is no risk that the court will lose the file and, there is every expectation that the matter will proceed and finish in one day, which is usually the case. Lawyers are able to make appropriate appointments and not waste time waiting outside courtrooms and clients get a settlement within very specific time limits. Although the cost of mediation can be significant, it is virtually always shared and usually dramatically less than the costs of a court dispute.[108]

[107] Submission of Alfred Mamo (September 16, 2004).
[108] Submission of Philip Epstein (September 21, 2004).

The Advocate's Society representative stated that the costs of arbitration are less than proceeding through the courts "100% of the time," lamenting that, by the time the more adversarial process in the court is finished, many clients have diminished the family resources to the point where there are few assets left to be divided. Not surprisingly, all the lawyers consulted recommend that independent legal advice be a requirement in order for family law matters to be arbitrated, although all recognized that the lack of availability of legal aid may prevent some clients who would benefit from arbitration from participating in it. All the lawyer respondents stressed the importance of a written, signed and witnessed arbitration agreement, made at the time of the dispute and laying out the issues to be arbitrated, any waiver of rights, and clarifying whether the arbitrator can also act as a mediator, where appropriate. All the lawyer arbitrators consulted and many of the non-lawyers as well, issue written decisions with reasons within a timeframe outlined in the arbitration agreement.

The Review received a submission from Fathers Are Capable Too (FACT), a self-described equality-seeking support and advocacy group to assist people dealing with divorce and to promote positive child and family outcomes when relationships start to fall apart. This group advocates for an expansion of mediation and arbitration in family matters as a means to reduce the discontinuity and stress that occurs upon marriage breakdown. The submission states:

> Courts and lawyers do not provide non-adversarial venues—they generate stress and adversity. Those cases [that] have gone before the courts, because of a system that encourages or requires courts, are dealt with overwhelmingly in motion courts. In motions court, decisions are imposed on the children after hearing a few minutes of non-expert and non-parental argument by a judge who will turn the decision around in less than 20 minutes—that these decisions will hold for decades. These family courts have become an abusive environment for children and parents. Motion courts do not, and often cannot, consider individual circumstances or individual children's needs in the vast majority of cases. Poor legislation, regulation, rules and bad previous judgements stop effective solutions from being found in a courtroom.[109]

The submission goes on to indicate that the current court system, does not include families in creating the solutions; instead, "it is the lawyers, judges, bureaucratic departments and 'experts' who seek to impose their own cultural norms on the diverse selection of families in Canada."[110] As a result, the submission urges an expansion of alternate dispute mechanisms.

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[109] Submission of Fathers Are Capable Too, ' Parenting Association, The Arbitration Act and Family Law' (September 3, 2004).

[111] Submission of Fathers Are Capable Too, 'Parenting Association, The Arbitration Act and Family Law (September 3, 2004).

> To this end, it is clear that alternate forms of dispute resolution that do not involve the courts are very important and need to be recognized as not victimising children or parents. Dispute resolution mechanisms that provide a healing element of community care and support, become even more important to children and parents to minimise the damage caused simply by the divorce.[111]

FACT opposes any requirement for independent legal advice, claiming that having lawyers involved in the alternate dispute resolution mechanism obviates the benefits of arbitration. The group also would like to see the grounds for court review substantially reduced; in particular, it advocates no court review pursuant to Section 56 of the Family Law Act:

> Section 56 of the Family Law Act allows the courts to come in and alter the income portions of the arbitration agreement, as well as adjusting custody, residency and access. Section 56 does not allow the recomputation of the division of property as agreed upon under the arbitration… An unbalanced rejection of the terms of arbitration causes injustice, an encouragement for opportunism and really makes it impossible to deal in a non-adversarial environment.[112]

FACT believes that the interaction between the *Arbitration Act* and the *Family Law Act*

> …must be aligned properly. The end result is that either family law matters should be removed from the Arbitration Act, thereby closing another reasonable choice for superior results for children and families, and forcing every family through the bilious quagmire called the family court system at great financial expense and social damage. Alternatively a positive acceptance of arbitration should be accepted, and made not easily overturned, to provide children and parents with community-based solutions that provide much better outcomes.[113]

To sum up the point of view of those who support the use of arbitration for family matters, I quote again from the submission of Phil Epstein:

> It would be a significant error, in my view, to prohibit parties from going to arbitration in Ontario to settle family law disputes. It is becoming far more common for parties to resolve their disputes in this way and, coupled with mediation, is an extremely useful tool for reducing conflict and encouraging earlier and less costly settlement. It would be a huge disservice to the public to take away this tool. I say this out of no self-interest factor, since parties will always continue to mediate and I have far more work in that area than I could ever want. I make this point because I think that arbitration is an extremely

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[112] Submission of Fathers Are Capable Too, 'Parenting Association, The Arbitration Act and Family Law (September 3, 2004).

[113] Submission of Fathers Are Capable Too, 'Parenting Association, The Arbitration Act and Family Law (September 3, 2004).

> effective tool and there is a huge cost benefit to the parties. The courts will always be available for those that do not wish to use this process but, arbitration will become more and more popular as parties learn more about it. There is also a significant advantage in arbitration in that it is a confidential process as opposed to the courts and many parties want their problems resolved in a confidential fashion.[114]

Theme: Arbitration should not be based on religious laws, particularly Islamic Personal Law

Religious people who feel bound by their faith to follow its teachings often find themselves in a dilemma when the civil laws of a country do not reflect the principles and practice of their religious beliefs. Religious law serves to determine who is considered a full member of the religious community. Those who do not conform to religious law may find themselves ostracized, disentitled to practice their religion within the community or entirely disowned by the community. Different religious communities have developed mechanisms to decide such matters and the consequences of not complying with the religious laws varies substantially. In most religious traditions, the religious laws that affect their lives the most are those that cover matters such as marriage, divorce, property division, support on marriage breakdown, custody and access of children, and inheritance, which we tend to call family law or personal law. A brief survey of some religious laws may be helpful to the discussion.

The Roman Catholic Church does not recognize divorce, considering marriage a sacrament that requires a lifelong commitment. For many years the Catholic Church used its considerable political power to oppose the liberalization of the divorce laws in Canada and around the world. A Catholic person who does divorce according to civil laws and then wishes to remarry and remain within the church, can only do so if he or she is granted an annulment pursuant to canon law. Once a civil divorce has been obtained, the party seeking the annulment applies to a marriage tribunal, whose function is to annul marriages according to canon law. Catholic marriage tribunals do not deal with custody, access, support or property division issues; these must be resolved by civil process, as the church law does not confer any jurisdiction on the tribunals to deal with these matters. If a Catholic person remarries without obtaining an annulment, the marriage is considered null and void by the Church and the person is refused communion. The status of any children of the marriage may be affected, particularly if the parents wish their children to be educated in the Catholic school system or to marry within the church. "Decisions of the Catholic marriage tribunal have never been the subject of litigation in secular courts and the participants do not avail themselves of the provisions under arbitration legislation."[115]

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[114] Submission of Philip Epstein (September 21, 2004).

[115] Submission of John Syrtash, 'Alternative Cultural Dispute Resolution,' [unpublished, archived with author] (August, 31, 2004) at 6-7.

In the Anglican Church of Canada, a divorced person who wishes to remarry within the church must apply to the bishop in his or her local diocese. The bishop may refer the request for advice from a "matrimonial commission" that meets in each diocese. In some instances, the matrimonial commission may consider the applicant's conduct toward the former spouse and any children of the former marriage, including the consistency with which child support has been provided, before giving advice to the bishop. The implication of this is that the church regards the ability of the person to carry through with obligations in making its decision as to whether or not remarriage in the church is appropriate. If it is not considered appropriate, the person would have to marry either civilly or in another church that does not apply such restrictions. In the Anglican example, the church does not annul marriages or deal with any of the property, support or custody issues that attend marriage breakdown; these are handled by the courts. Again, it appears that the Anglican Church, like the Catholic Church, does not make decisions pursuant to the *Arbitration Act.*[116]

Jewish law, *halakhah,* provides a comprehensive system of rules that apply with respect to marriage and the breakdown of marriage.

> Divorce in Judaic tradition is a simple matter. If a marriage fails, for whatever reason, then the means exists for an end to that contractual relationship. Based on repeated biblical references, the sages developed a system of liberation to release both partners. The purpose of the divorce is to enable both mates to seek new partnerships. Jewish divorce is the regrettable but acceptable solution to an unsuccessful marriage. …If a marriage does not "work", does not fulfill the expectations of the couple nor the ideals of Judaism, then the system sets forth an escape clause. Divorce is a lamentable necessity, no blame or sin is ascribed to the procedure. Divorce allows one the freedom to try again.[117]

In the Jewish faith, both parties must voluntarily agree to the divorce; the man is responsible to give the *get*, as both the document and the process is called, and the woman receives the *get*. The process is not intended to be adversarial in nature. When Jews marry, they sign a contract, called a *ketubah,* which provides for payment of support to women who are divorced or widowed. When *a get* is given and received, the *ketubah* is revoked. If a woman does not receive a *get*, she becomes an *agunah* and she is not free to marry in a religious Jewish ceremony. If she does insist on remarrying without the *get*, then any children from that new relationship will be considered illegitimate *(mamzerim)*: they will not be allowed to participate in religious ceremonies, to marry a Jewish person, or to enjoy full citizenship in Israel.

> A Jewish divorce is issued in a Jewish court, which is called a Beth Din. The Beth Din usually consists of three rabbis, one of whom is a specialist in the laws

[116] Submission of John Syrtash, 'Alternative Cultural Dispute Resolution,' [unpublished, archived with author] (August, 31, 2004) at 7.
[117] Norma Baumel Jospeh, Evelyn Beker Brook, Marilyn Bicher, 'Untying the Bonds' Jewish Divorce: A GET Education Video and Guidebook' (The Coalition of Jewish Women for the Get, 1997) at 5.

> of divorce. **A civil divorce is not sufficient in Jewish law.** The legal requirement for a GET affects Orthodox and Conservative Jews. The Reform movement has determined that a civil divorce is usually adequate. However, the GET requirement is operative throughout the State of Israel. Parties without a GET would usually be unable to remarry in Israel. Thus many Jews are affected either directly or indirectly by these laws.[118]

John Syrtash quotes a study done by Toronto lawyer, Harvey J. Kirsh:

> In his study, Kirsh also demonstrates that "there is no central religious authority in Judaism", no ecclesiastical dignitary who exercises worldwide jurisdiction: "For the most part, each local congregation is independent of the others. But what binds the great majority of congregations together and provides an element of uniformity is the accepted authority of traditional law. The three main sources of Jewish law are the *Torah,* the *Mishna,* and the *Gemara*. The Talmud is essentially a compilation of laws and traditions which have evolved from the *Torah.* The laws of the *Torah* were enunciatory in nature and required a great deal of interpretation by the Rabbis."[119]

In Ontario, the Jewish court is known as the Beis Din. In the vast majority of cases, in the Orthodox, Conservative and Reform traditions of Judaism, parties approach the Beis Din only to give and receive a *get.* However, in about thirty cases a year, the Beis Din deals with all issues of marriage breakdown, such as support, property division, custody and access. In these situations, the Beis Din relies on enforcement through the *Arbitration Act.*

Since the proposal of the Islamic Institute for Civil Justice was impetus for the review, and because it was clear from many of the responses to the Review that the general public knows less about Muslim religious laws than about Jewish or Christian religious laws, I am going to try to provide a bit more information about Muslim religious laws than I did for the other forms. Jews, Christians and Muslims are all rooted in the Abrahamic tradition and rely on their holy texts to provide guidance for the faithful on earth to know how to meet the expectations of a single, all-powerful God. Muslims recognize Abraham, Moses and Jesus as Prophets of the One God.

For Muslims, the Quran is the revealed word of Allah to his last prophet, Muhammad, and lays out the legal, spiritual and theological requirements of Allah. The Quran is supplemented by the Prophet's *sunnah,* the judgements, attitudes and sayings of Muhammad, which were recorded at the time or shortly after the Prophet's death by his close followers, and by the traditions derived from these, called the *hadith*.

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[118] Norma Baumel Jospeh, Evelyn Beker Brook, Marilyn Bicher, 'Untying the Bonds' Jewish Divorce: A GET Education Video and Guidebook' (The Coalition of Jewish Women for the Get, 1997) at 4.

[119] Harvey Kirsch, ' Conflict Resolution and the Legal Culture: A Study of the Rabbinical Court' (1971) 9 Osgoode Hall L.J. 335 at 340 quoted in submission of John Syrtash, 'Alternative Cultural Dispute Resolution,' [unpublished, archived with author] (August, 31, 2004) at 8-9.

> With the death of Muhammad's Companions, as well as the suspect multiplication of oral traditions, the need of systematization of the *hadith* made itself apparent. Unfortunately, people had fabricated and perpetuated oral reports to suit their needs, and before long, by the beginning of the ninth century, a million *hadith*, often contradictory in nature, were being circulated. The complicated sciences of the *hadith* and of law, or *usul al-fiqh,* grew out of the need to utilize them in guiding guidance in a new social and political context. …These sciences evolved slowly but reached their fruition with the compilation of the six canonical books of *hadith* of the *Sunni* rite, and the four canonical books a century later of the *Shi'ia* rite, that is by the mid-tenth and eleventh century. …Traditionally, the authority of these canonical works, although man-made, has been little questioned. But since the eighteenth century, their authority has been re-examined as a result of successive Muslim reform movements and the challenges of modernity that have faced the Muslim world… [120]

The Canadian Council of Muslim Women provided the Review with an impressive resource, a study produced by the group Women Living Under Muslim Laws (WLUML), entitled "Knowing Our Rights: women, family, laws and customs in the Muslim World." Founded in 1984, the WLUML began as an action committee "in response to several specific cases that urgently required attention. In each of these cases, women were being denied rights by those who claimed to be acting in the name of Islam or with reference to 'Islamic' laws." [121] This group undertook a ten-year study of the way in which Muslim law applies to women in various countries across the world. It is clear from the exhaustive comparisons provided, that the same verses of the Quran appear to bring very different results, depending upon the history of the law in the particular jurisdiction.

> Today, most statute laws and even uncodified Muslim Laws applied by courts as 'muslim laws' are derived from an eclectic mixture of provisions from the various Schools. These are added to an acceptance of the principles of modernization (particularly reflected in the need for state regulation of marriage and divorce) and to remnants of customary practices (for example, the refusal of courts in many systems to recognize women's property rights on divorce.) In the W & L research, we also found that frequently judges and communities stated that their application of Muslim laws reflected a particular sect (e.g., Maliki or Hanafi laws), even though people of the same sect elsewhere do things differently.[122]

[120] V. A. Behiery, A.M. Guenther, *Islam: Its Roots and Wings,* (Mississauga: Canadian Council of Muslim Women, 2000) at 11-13.
[121] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World*, (London: Women Living Under Muslim Laws, 2003) at 15.
[122] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World*, (London: Women Living Under Muslim Laws, 2003) at 30.

Obviously this issue struck a chord with many respondents, a sample of comments illustrate that the difficulty of defining exactly what we mean when we talk about the application of Muslim law is a major concern:

> Composition of Canadian Muslim community is very diverse. This diversity is further stretched in to the practices based on Schools of thoughts and certain cultural conventions, codified in some of the Muslim countries and regions.
>
> This could create controversies and problems in applying such varied law/standards/principles with the multi-ethnic, multinational, diverse population in Ontario.[123]
>
> There is no such thing as a monolithic "Muslim Family/Personal Law" which is just an euphemistically racist way of saying we will apply the equivalent to "Christian Law" or "Asian Law" or "African Law."[124]
>
> The history and evolution of Islam, thus, witnessed the growth of different communities of interpretation with their respective schools of jurisprudence. However, whatever the differences between the Shia and the Sunni or among their sub-divisions, they never amounted to such a fundamental a divergence over theology or dogma as to result into separate religions. On the other hand, in the absence of an established church in Islam, and an institutionalized method of pronouncing on dogma, a proper reading of history reveals the inappropriateness of referring to the Shia-Sunni divide, or to interpretational differences within each branch, in the form of an orthodoxy-heterodoxy dichotomy, or of applying the term "sect" to any Shia or Sunni community.[125]
>
> First and foremost there will never be a single, centralized Shariah Tribunal that all Muslims will accept. The differences of opinion within Islam would see to that very quickly. But Islam does not even call for unity of opinion in every single thing and actually, diversity of legal thought is regarded as a "mercy from your Lord." So, Muslims have always had such diverse examples of Shariah, which again shows the flexibility of Islam being able to entertain inclinations of all types. Thus far, we have been using the term, "Shariah Tribunal" as if there is a set model. There is none. Nothing to this effect has been discussed in the Muslim community because there is no central diocese of Islam to legislate such a thing. While most Masjids [mosques] operate in total independence from others, the only unity they possess is on basic beliefs. [126]

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[123] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).
[124] Submission of the Muslim Canadian Congress (August 26, 2004).
[125] Submission of His Highness Prince Aga Khan Shi Imami Ismaili National Conciliation and Arbitration Board for Canada (September 10, 2004).
[126] Submission of Mubin Shaikh, 'Shariah Tribunals and Msjid El Noor: A Canadian Model' (August 24, 2004).

The submission from Dr. Marvin F. Zayed, who is affiliated with the Humanist Association of Canada, explains how the differences in interpretation affect the modern practice of Islamic religious principles in this post-9/11 era:

> Islamic cultures are founded on the Koran and the Hadith (the sayings of Mohammad), as written in the original Arabic. Both the Koran and the Hadith contain many internal contradictions. In the context of modern bloodshed, these are reflected by contradictory Fatwas (religious decree) for or against suicide bombers. The first female suicide bombers presented a problem for Sunni Muslims, as the Hadith forbids killing women in warfare (but taking them as "imah" or slaves is quite acceptable). The al Azhar mosque in Cairo and the European Islamic Council came out with a new Fatwa legalizing these female bombers.[127]

It quickly became clear to me that many of the submissions differed substantially in how they interpreted the notion of Shariah and that these differing interpretations informed the responses in a very real way.

Shariah is based on both the *Quran* and the *sunnah*. As explained to me by many of the Islamic respondents to the review, *shariah* means "the way", or more literally, "the path leading to water." It is the journey of each person who is seeking to accomplish the will of Allah.

> The *shariah,* being a way of life, encompasses general codes of behaviour, the moral categories of human actions, the rules of rituals, as well as all civil, commercial, international and penal law. …[The] principles inherent in the Q*ur'an* were regarded as eternal, while the reasoning and prescriptions (*fiqh*) stemming from them were not, because the legal system is manmade. [128]

Most submissions to the Review were adamant that the term Sharia should not be used to describe the proposed use of the *Arbitration Act* to deal with matters of family law for Muslims. The submission from the Council on American-Islamic Relations Canada (CAIR-CAN) represents these views clearly:

> The term sharia 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

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[127] Submission of Dr. Marvin F. Zayed, 'Critique of the Islamic Sharia' Arbitration Proposal in Canada' (March 2004).
[128] V. A. Behiery, A.M. Guenther, *Islam: Its Roots and Wings,* (Mississauga: Canadian Council of Muslim Women, 2000) at 14.

> 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.[129]

The Islamic Council of Imams—Canada urged:

> These Tribunals should not be allowed to use the word Shariah Court. It remains an ADR Tribunal within the context of Ontario law. Only difference is that the environment is Islamic, i.e. members are all Muslims and the resolution is in the spirit of Islam and the Ontario laws.[130]

The CCMW are concerned that those who are seen to question Sharia may be accused of apostasy or blasphemy. Certainly, this fear is not a paranoid fantasy, given the statements of Aly Hindy, a "self-described fundamentalist" Imam, who told Sally Armstrong in a recent *Chatelaine* article,

> If a person says, "I don't believe in Sharia," he or she is not a Muslim. To go to hell is easy. To go to paradise takes work. Many people who call themselves Muslim are going to hellfire.[131]

Given this sort of pronouncement, the position of groups like the CCMW in refusing to use the term "Sharia" with respect to Muslim faith-based arbitration becomes easier to understand:

> Some Muslims, by using the term Sharia, immediately cause believing Muslims to hesitate in expressing any opposition, as no Muslim wants to be against the Sharia. However, the correct use of the term "Muslim" law opens up the discussion and one can then explore the issues within.[132]

Most respondents, whether against or in favour of allowing religiously based arbitration of personal matters, asked that the term Islamic personal law or Muslim personal law be adopted by the Review to describe the issue accurately. A notable exception was the Muslim Canadian Congress, which maintains,

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[129] Submission of Canadian Council on American-Islamic Relations (CAIR—CAN) (August 10, 2004).
[130] Submission of Islamic Council of Imams—Canada, 'Islamic Arbitration Tribunals and Ontario Justice System' (July 23, 2004).
[131] Sally Armstrong, 'Criminal Justice' *Chatelaine* (November 2004) 152 at 158.
[132] Submission of the Canadian Council of Muslim Women (July 23, 2004).

> In practical and realistic terms, what began as a demand to introduce "Sharia Law" has now dishonestly mutated into the same thorn by any other name and is still offensively unacceptable…[133]

Most of those who urged the Review to recommend against the use of religious principles for arbitrating family law are firmly of the belief that Canadian and Ontario family law is entirely secular in nature. For many, particularly those who have not lived through the major changes to Canadian law which occurred over the past forty years, there is little memory of the extent to which religious principles have informed the laws which we tend now to regard as secular in this country.

It is true that much of the struggle to ensure our laws embody equity principles has been viewed as a struggle to attain secularism over religiously based laws. However, for many individuals who come to this country from other lands, Western laws, rather than appearing to be secular, look patently "Christian" in nature, enshrining as they do such "Christian" values as monogamy in marriage or restrictions around divorce, not to mention official holidays and the defined work week. We should not be surprised when people, who are used to having the personal laws set out by their religion honoured in their country of origin, seek the capacity to apply those personal laws in their new land. We should also expect that, where people have come to Canada to escape the restrictions of such personal laws, they will vigorously oppose any possible re-introduction of those laws into their lives in Canada.

Many of those making submissions to the Review spoke from deep and personal experience with religious laws in other countries, particularly those countries where a comprehensive form of Shariah law prevails. The International Campaign Against Shariah Court in Canada is a coalition of groups and individuals drawn together by Homa Arjomand following the announcement of the Islamic Institute for Civil Justice; its purpose is to fight within Canada and internationally to prevent the use of Shariah law. Many of the active members of the group themselves have escaped from countries ruled by Shariah law; many came to Canada from Iran and Afghanistan. Many of them had been active in their home countries fighting for human rights and equality rights for women; as a result some had been imprisoned and tortured for opposing Shariah. The Campaign submitted a petition with more than two thousand names and conducted an effective letter writing lobby against allowing Shariah law to be used in any way within Canada. In a letter to the Review, Homa Arjomand states in part:

> We wish to state our opposition to the recent move for establishing an "Islamic Institute of Civil Justice in Canada." This move should be opposed by everyone who believes in women's civil and individual rights, in freedom of expression and in freedom of religion and belief. We also wish to emphasize that even the mere suggestion of the Shariah tribunals causes an atmosphere of fear among women who came from "Islamic" countries. If this Institute gains validity, it will increase intimidation and threats against innumerable women and it will open the way for future

[133] Submission of the Muslim Canadian Congress (August 26, 2004).

> suppression. …It is a sad and painful fact that, even in Canada, we still have to talk about the religious oppression of women. Nonetheless, the reality is that millions of women are suffering and being oppressed under Shariah law in many parts of the world. Some of us managed to flee to a safe country, a country like Canada with no secular backlash.[134]

Thirty-five members of the Coalition made presentations to the Review, outlining their own personal experiences under Sharia law in Iran, Saudi Arabia, Pakistan, Kuwait and Iraq. I am grateful for the courage and determination of these women and men in sharing very painful stories to illustrate the oppressiveness of Sharia law where it governs every aspect of people's lives. For most of these respondents, the only way to prevent religious law from destroying people's lives is to refuse to allow its use for any purpose in Canada. Again, quoting from Homa Arjomand's submission,

> We need a secular state and secular society that respects human rights and that is founded on the principle that power belongs to the people and not a God. It is crucial to oppose the Shariah law and to subordinate Islam to secularism and secular states. …One must bear in mind that Shariah is not only a religion; it is intrinsically connected with the state. It controls every aspect of an individual's life from very personal matters such as women's periods to the very public ones such as how to run the state. It has rules for everything. An individual has no choice but to accept the rule of Shariah or face extreme consequences, as non believers are shown no tolerance. …We, the defenders of secularism, believe that the introduction of a Shariah tribunal or a "Shariah court" in Canada would discriminate against the most vulnerable sectors of society: women and children. It would deny them the Canadian values of equality and gender equity.[135]

The Humanist Association of Canada strongly backed the Coalition's view that there should be no religious alternative to the secular laws that govern family law and inheritance matters in Canada, and several correspondents made similar arguments to those of the Coalition. The Review also received many letters from unaffiliated individual Canadians urging that the influence of religious law be reduced rather than enhanced by being allowed under the *Arbitration Act.* One such communication provides a good example of the sorts of concerns being raised:

> Rather than increase the number of religious codes being allowed to operate within Canada's judicial system, please give serious consideration to reducing the control of these religious and community organizations and tribunals. A society divided by law, will further divide, such that the perceived differences of race, religion and gender will also grow. In an attempt to recapture the equality across the board for all Canadians, I

[134] Submission of Homa Arjomand (July 21, 2004).
[135] Submission of Homa Arjomand (July 21, 2004).

> appeal to you not to pass the proposal to allow an increase in religious-based family law, but to establish a proposal to investigate the means to reduce such existing laws and eventually to remove the existing Act.[136]

The Review submissions indicate that the major objection to the use of religiously based arbitration of family law is the inherent inequity between men and women in most religious contexts and the resulting imbalance of power between them when a dispute arises. The submission from the Women's Legal Education and Action Fund (LEAF) points out:

> It is concerning—though not necessarily surprising—that the desire to apply religious principles has arisen in the context of family law, where what is at stake is control and support of women and children. Many of the ideas put to rest through family law reform were originally grounded in religious precepts; it is entirely contradictory, therefore, to permit the potential resurfacing of such ideas in the name of religious freedom.[137]

The Canadian Council of Muslim Women points out that what the many forms of Muslim family law have in common is that they perpetuate a patriarchal model:

> The jurisprudence of fiqh does have some common understandings. It is based on a patriarchal model of community and of the family. It is generally accepted that men are the head of the state, the mosque and the family. The responsibilities outlined for males is that they will provide for their families and because they spend of their wealth, they have the leadership to direct and guide the members of their families, including the women. …Most proponents of Muslim law accept that men have the right to marry up to four wives; that they can divorce unilaterally; that children belong to the patriarchal family; that women must be obedient and seek the male's permission for many things; that if the wife is "disobedient" the husband can discipline the wife; that daughters require their father's permission to marry and she can be married at any time after puberty. A wife does not receive any maintenance except for a period of three months to one year and most agree that the children should go to the father usually at age 7 for boys and 9 for girls. If the wife wants a divorce she goes to court, while the husband has the right to repudiate the union without recourse to courts. Inheritance favours males, [because it is argued that they are responsible for the costs of the family] to the extent that the wife gets only a portion at the death of the husband.[138]

The CCMW balanced this view with the rights of women as they exist in Islamic personal law:

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[136] Submission of Karen Graham (September 22, 2004).
[137] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).
[138] Submission of the Canadian Council of Muslim Women (July 23, 2004).

> In this patriarchal model, women do have rights. The woman keeps her wealth, if she has any; she is provided with a "gift" at the time of marriage (*Maher*, which could be an iron ring, or goats or property or gold or money), she inherits in her own right; in theory she does not have to share in the provision of the household needs, and she keeps her own name. In return, she accepts the patriarchal model and the prescribed roles for herself and her male relatives, including her husband.
>
> The language used by those who espouse these traditional interpretations make a distinction between equity, complementariness and equality. A woman is not equal to a man, she has a role which complements that of a man, and a woman is to be treated with "equity" which means with kindness and gentleness.[139]

Homa Arjomand and her Coalition speak far more bluntly about sexism in Islam:

> Shari'a considers women to be a potential danger by distracting men from their duties and corrupting the community. It therefore suppresses women's sexuality, whilst men are given the rights to marry up to four wives and the right to temporary marriage as many times as they wish. Young girls are forced to cover themselves from head to foot and are segregated from boys. These laws and regulations are now implemented in Canada, but are usually hidden from secular society although, some, such as what happens in Islamic elementary and secondary schools, are visible. According to Shari'a law, a woman's testimony counts for only half that of a man. So in straight disagreements between husband and wife, the husband's testimony will normally prevail. In questions of inheritance, daughters receive only half the portion of sons and in the cases of custody, the man is automatically awarded custody of the children once they have reached the age of seven. Women are not allowed to marry non-Muslim whereas men are allowed to do so.
>
> The message is clear: men dominate, women obey. A woman does not have the right to choose her husband, her clothing, her place of residence, and cannot travel without husband's consent. The danger is that once these tribunals are set up, people from Muslim origin will be pressured to use them, thereby being deprived of many of the rights that people in the west managed to gain.[140]

According to the exhaustive study completed by Women Living Under Muslim Law, marriage in Muslim law is based on a contract, usually negotiated on behalf of a young woman by her father or other male figure, acting as a "marriage guardian." In most traditions, the woman has to agree to the marriage; however, the meaning of consent may not meet any standards recognizable by Canadian law. The Review heard of many instances where women were contracted to marry without their knowledge and then could not invalidate the contract subsequently. In many cases, there is little emphasis on an attraction between the two parties; the more important issue is whether

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[139] Submission of the Canadian Council of Muslim Women (July 23, 2004).
[140] Submission of Homa Arjomand (July 21, 2004).

the match will be advantageous to both the groom's and the bride's family and status. In some traditions, marriage can be forbidden between two parties who are not of the same social status.

In general, Muslim girls are deemed to have reached maturity at the age of puberty; while some more modern Islamic countries enforce age of consent rules with respect to consent to marry, others do not. Many of the respondents to the review spoke of the frequency with which young girls are betrothed at very early ages, often to men many years their senior. In these cases, the woman herself may not have been a direct party to the marriage contract and certainly would not be considered capable of making such a contract under Canadian law. Although in some cases the contract is written, in others it is not. Some versions of Muslim law require that the signatures of the bride and groom be witnessed; others do not.

If arbitration is named as a means for settling future disputes in the marriage contract, a woman may be held to a clause requiring religious arbitration, if the marriage contract is a valid arbitration agreement under Ontario law. Many of these marriage contracts may have been arranged in their country of origin because the parties to the contract are recent immigrants. Also, it is not uncommon for an unwed Muslim from Canada to seek a marriage in his country of origin and then return to Canada with his spouse.

All traditions have some form of *mahr*, or marriage gift, but the conditions under which this is payable vary widely. The *mahr* is a financial protection for the wife, and may be payable only at the point of marriage breakdown. In some traditions only the man can divorce (*talaq*); in others, women may negotiate the right to initiate divorce into the marriage contract or have that capacity because of a lack of conjugal relations, desertion by the husband, or non-maintenance within the marriage.[141]

The Review heard that, because the entire premise on which arbitration rests is that both parties freely choose this method of resolving disputes, the issue of choice for women, given the patriarchal nature of Muslim society, is essential to the argument of those opposed to, or at least skeptical about, the use of religious principles for arbitrating family law:

> LEAF is concerned that arbitration may not be chosen freely in many circumstances. For some women there may be very strong pressures based on culture and/or religion, or fear of social exclusion. These issues may be very real in faith-based communities, where some women may be called a bad adherent to a particular faith or even an apostate if they do not comply with arbitration. Such condemnation would leave such women very alone, shunned in their communities or even their houses of worship, and would only compound feelings of alienation created by a family break-up. In addition, there are many women whose economic lives depend on a close association with their faith-based community or cultural group. This is particularly true of immigrant women who

[141] Women Living Under Muslim Laws, *Knowing Our Rights: Women, family, laws and customs in the Muslim World*, (London: Women Living Under Muslim Laws, 2003).

> find jobs first in their own communities. These women may be particularly vulnerable to community pressure and may lose their jobs if they do not comply with arbitration. Some women may also fear immigration consequences. For other women there may be fear of violence. In some cases it may be a lack of resources or information. When these conditions are present it is not accurate or reasonable to suggest that arbitration is being chosen freely. Education is not enough to overcome these pressures, at least not in the short term, and particularly where women's sources of information are primarily found in local media such as community papers or radio, where there may be little critique of patriarchal points of view.[142]

Many correspondents shared a similar concern:

> Religious leaders (Christian, Jewish or Muslim) and community leaders (in the case of First Nations Canadians) are primarily male, and primarily traditionalists, who hold tightly to outdated beliefs and outdated laws that in some cases withhold the freedoms so held in esteem by Canadians. Traditional culture tends to be male dominated—the concept of women "voluntarily" agreeing to faith-based arbitration will never be an option for many women, especially immigrants and First Nation women with lower levels of literacy and education and reduced self esteem and control over their own lives.[143]

Gila Stoper, writing in the Columbia Journal of Gender and the Law, urges:

> …when examining cases in which the conflict between women's rights and religious and cultural practices arises, we should not concentrate on the question of choice, but on the question of disadvantage, and ask ourselves whether the practice in question disadvantages women. If the answer to this question is affirmative, then the disadvantageous practice should not be allowed unless overwhelming evidence proves that the practice is consented to by all the women involved, out of their own, genuine free choice.[144]

The National Association of Women and the Law make a similar point:

> In the context of battered women and mediation, it has been noted that:
>
> > [t]he reality is that a battered woman is not free to choose. She is not free to elect or reject mediation if the batterer prefers it, nor free to identify and advocate for components essential to her autonomy and safety and that of her children…
>
> This comment is equally relevant to battered women agreeing to arbitration. It is highly unlikely that a battered woman will be capable of negotiating the terms of an arbitration agreement in a way that is fair to her interests. New immigrant

[142] Submission of Legal Education and Action Fund (LEAF) (September 17, 2004).
[143] Submission of Submission of Karen Graham (September 22, 2004).
[144] Gila Stopler, 'Countenancing the oppression of women: How liberals tolerate religious and cultural practices that discriminate against women' (2003) 12:1 Columbia Journal of Gender and Law 154 at 218-9.

> women from countries where Sharia law is practiced are particularly vulnerable because they may be unaware of their rights in Canada. These women may be complacent with the decision of a Sharia tribunal because arbitral awards may seem equal to or better than what might be available in their country of origin. An immigrant woman who is sponsored by her husband is in an unequal relationship of power with her sponsor. It may be impossible for a woman in this situation to refuse a request or order from a husband, making consent to arbitration illusory. Linguistic barriers will also disadvantage women who may be at the mercy of family or community members that may perpetuate deep-rooted patriarchal points of view.[145]

The Muslim Canadian Congress maintains that allowing the use of Muslim law

> …ghettoizes the Muslim community, which otherwise spans five different continents covering 1.3 billion people, in an extensive array of sects languages, cultures, and customs, all into one second-class compartment in the determination of human and family law rights, which are of public importance and domaine…all of this, behind the dishonest guise of religious tolerance and accommodation.[146]

The majority of respondents opposed to the use of religiously based arbitration maintained that women in relatively closed Muslim communities have no way to know what Canadian law is and no idea of the consequences of choosing religious law instead of going through the courts.

It became clear that many of those making presentations did not themselves understand how Canadian law would impact on traditional practices. For example, the Islamic Council of Imams expressed concerns about the impact of Muslim men having more than one wife and family, worrying that women and children could be left destitute. While this is certainly a concern, it indicates that there is a lack of familiarity about support obligations under the *Family Law Act*. Similarly, many respondents seemed very unsure of the division between criminal and civil law in Canada, often having lived in places where both are part of a Shariah regime. This confusion allowed misconceptions about the ability of arbitrators to order penalties such as stoning or beating or public humiliation, if marital infidelity were alleged. Many of these same respondents, however, acknowledged that the lack of knowledge in the courts of the elements of Muslim marriage contracts is also a concern, in that women going through the Canadian courts may not have their entitlement to *mahr* recognized by the courts and may be required to assume support obligations they would not have under Islamic personal law.

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[145] Submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004) citing B. Hart, 'Gentle Jeopardy: the Further Endangerment of Battered Women and Children in Custody Mediation' (1990) 7 Mediation Quarterly 317 at 321.

[146] Submission of the Muslim Canadian Congress (August 26, 2004).

The Review repeatedly heard from those opposed to religious arbitration that women would be disadvantaged if an arbitration decision violates the provisions of the *Arbitration Act*, because they would not be able to take their issue to the court, given the unequal balance of power outlined above. This led many of the respondents to suggest that it was of no use to try to remedy the *Arbitration Act* by allowing additional grounds for judicial oversight, since vulnerable people would have no capacity to go through the court process required to overturn an arbitral decision and would likely be subjected to even more coercion should they try to have a decision overturned by the court.

Homa Arjomand argues:

> While, technically, all Muslim women have access to Canadian laws and courts, and while the Canadian legal system would reject the oppressive decisions made under Shari'a as being contrary to Canadian law, the reality is that most women would be coerced (socially, economically and psychologically) into participating in the Shari'a tribunal. Women are told that the Shari'a Tribunal is a legal tribunal under the Arbitration Act 1991. The women would take that to mean that whatever is decided by the Tribunal would be considered as lawful. Even women who know that Canadian law would not uphold the decisions would not challenge the decisions for fear of physical, emotional, economic and social consequences. Therefore, it is most unlikely that decisions that are contrary to Canadian law would ever come before the courts.[147]

Initially, I found this argument somewhat puzzling since those who argued women's inability to take matters to court were also advocating that all family matters go to court for decision in the first place. As I pointed out earlier in the report, in almost all areas of Canadian law, the affected party must take the initiative to seek a remedy available in law and must be prepared to participate on her own behalf. The law can provide effective tools, but the concerned party must be prepared to use those tools in order to gain the benefit of the law.

However, I came to understand that the argument is as follows: if women are not required to choose between dispute resolution methods but rather are required to go through the court system, there will be no shame to them or to their spouses because the law requires them to take that route. In addition, according to many respondents, the courts will offer women some protection, even if they are not able to argue effectively on their own behalf. This hope, too, is at odds with the complaints made by advocates for vulnerable women whose experiences in Ontario courts do not reflect this protective image. Because of the compounding nature of multiple disadvantages, the experiences of minority women may be particularly difficult. Even so, according to many respondents, women will fare better in the courts than in private arbitration.

Many of those opposed to religious arbitration using Islamic personal law are convinced that establishment of tribunals is merely "the thin edge of the wedge." They believe that

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[147] Submission of Homa Arjomand (July 21, 2004).

those advocating for arbitration of family law issues really have as their ultimate goal the establishment of a full Islamic system of justice within Canada to which all Muslims must submit. The Muslim Canadian Congress states:

> This insidious and discriminatory ghettoization and marginalization, into "out of sight" only plays into:
> i. The hands of the extremist political and ideological agenda of a certain sector of Muslim-Canadian proponents of "Muslim Law" that is antithetical to the Canadian Constitution and values; and
> ii. Equally into the hands of the reactionary, intolerant and otherwise racist segments of Canadian non-Muslim society who want nothing better than to exclude Muslims from the mainstream.[148]

Homa Arjomand agrees that the issue of political identity is at the root of the Islamic Institute of Civil Justice's entry into the arbitration market:

> We strongly believe that Shari'a tribunals will crush women's civil liberties. It will enforce brutal laws and traditions on abused women who are living under the intensive influence of Islam. These tribunals will apply Islamic Shari'a law which will compel abused women to stay in abusive relationship and will give them no choice but to be obedient or attempt suicide… There must be no state within a state. The Islamic advocates argue that, as Mr. Momtaz Ali stated in his proposal, it is their duty as good Muslims to work towards their own state. They also emphasize that there should be no separation between religion and the law.[149]

The Canadian Counsel of Muslim Women asks:

> As the proponents claim that God wants them to live under Sharia/Muslim law, the question then arises as to why are they advocating for only one aspect of Muslim jurisprudence? Why the focus only on family law and not on the whole, total system of laws including criminal? Or will this be the second stage of their demand of religious right?[150]

These fears do have some basis in fact. As early as 1991, in a paper entitled "Oh! Canada—Whose land, whose dream?" Syed Mumtaz Ali, commenting on the issues of sovereignty association as it was envisioned by Quebec, was advocating that Muslim's have control over their own personal law:

> Canada also will not fall apart or into an abyss of chaos if Muslims are permitted to control their own affairs in the realm of Muslim personal/family law. Canadians should look at this matter, not as if they are losing control, but as if they were broadening the mandate of sovereignty, and thereby enhancing the quality of that

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[148] Submission of the Muslim Canadian Congress (August 26, 2004).
[149] Submission of Homa Arjomand (July 21, 2004).
[150] Submission of the Canadian Council of Muslim Women (July 23, 2004).

> sovereignty. In any event, establishing such a system of law is not something that is either impossible or impractical.[151]

Indeed, in the most recent update of Mumtaz Ali's website, he refers to the setting up of his organization, *Darul Qada,* as "the beginnings of a Muslim Civil Justice System in Canada." Although during the consultations, he seemed to accept the reality that using the *Arbitration Act* for a limited number of personal law issues is not the same as having a "system" of justice, he persists in using this language, thus exacerbating the concern that the use of Muslim family law in arbitration is just a starting point in the quest for sovereignty for Muslims within Canada. I will look in more depth at the issues of political identity in Section 6 of the Review Report.

Theme: Arbitration Should be Allowed in Family Law, Using Religious Principles.

Arbitration in family law matters using religious principles is already being done by a number of faith groups. It will be helpful to outline the services offered by a few of these so that the current situation is more clearly understood.

The use of arbitration based on religious law is most familiar in Ontario in the context of the Jewish faith. In Ontario, the Jewish Court in Toronto is called the Beis Din of the Vaad Harabonim, made up of ordained Rabbis who have a higher ordination as Rabbinic Judges. It has been operating for many years. According to the information given to the Review by representatives of the Beis Din, Orthodox Jews are forbidden to bring a lawsuit before secular judges. There is a strong emphasis on helping the disputants to reach an agreed settlement of issues and only if a matter cannot be settled through agreement, will arbitration prevail. Enforcement of arbitration decisions is through the court, pursuant to the *Arbitration Act*. As I pointed out earlier, in the vast majority of family law cases, in the Orthodox, Conservative and Reform traditions of Judaism, parties approach the Beis Din only for a *get*, the religious divorce necessary to satisfy the requirements of Jewish law.

However, in about thirty cases a year the Beis Din may deal with all issues, such as support, property division, custody and access, according to the oral presentation of Rabbi Reuven Tradburks, Secretary of the Beis Din. In such cases, a contemporaneous written arbitration agreement is required, even if arbitration has been agreed to as the method of dispute resolution in a marriage contract. In many cases, although not all, the parties have received independent legal advice. However, even if they have a legal representative, that representative may not argue the case in front of the Beis Din as it is the responsibility of the parties themselves to make their own case. The Beis Din has volunteer members of the community who have expertise in Ontario family law who offer legal advice to the Beis Din when requested to do so. The Beis Din will also accept expert written evidence if that is deemed necessary to the case. The

[151] Syed Mumtaz Ali, 'Oh! Canada—Whose land? Whose dream?'(The Canadian Society of Muslims, 1991, online: < http://muslim-canada.org/ocanada.pdf>.

cost of such arbitrations is deliberately kept as low as possible to ensure that cost does not prevent a Jewish couple from seeking this form of dispute resolution. Custody decisions are in the best interests of children and financial issues are consistent with the principles of Ontario's *Family Law Act*.

Orthodox Jews are strongly encouraged to bring their disputes before the Beis Din. Rabbi Reuven Tradburks has stated: "In this city (Toronto) we actually push people a little to come [to arbitration by Jewish law] because using the *Beis Din* is a *mitzvah*, a commandment from God, an obligation." [152]

Rabbi Tradburks indicated orally in his presentation to the Review that, although community pressure, such as shunning or naming, is rare, the community does occasionally make public the refusal of members to follow the decisions made by the Beis Din as a method of ensuring enforcement of arbitration awards.

Mediation and arbitration are also done by some Christian organizations. The Review received a very thoughtful submission from the Christian Legal Fellowship, a national organization of about four hundred lawyers, law students, professors and other professionals who, "among other things…explore the complex interrelationships between the practice and theory of law and Christian faith." [153] One of the prime objectives of the group is to promote alternative dispute resolution:

> There are important reasons why communities of faith may wish to resolve disputes within the tenets of their faith, rather than through the secular system of lawyers and courts. Many of these communities may feel that their core values, including the sanctity of the nuclear family are threatened by having their disputes resolved outside of their faith community by persons having no familiarity with their belief system. In order to protect against further erosion of these values, many wish to resolve disputes in accordance with the teachings of their holy books and laws with the assistance of a mediator or arbitrator from within their faith community. Not only may this be the preference of the parties, it is often a requirement of their faith teachings.[154]

A representative of the Salvation Army spoke about resolving marital issues between Army officers who have made commitments to a way of life upon becoming full-fledged officers and sometimes seek release or dispensation from these commitments as a result of marital breakdown. Although every effort is made to mediate in such situations, arbitration panels may be necessary to resolve matters that cannot be agreed upon by the parties. Similarly, representatives of evangelical groups suggested

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[152] Lynne Cohen, 'Inside the Beis Din' *Canadian Lawyer* (May 2000) at 30 quoted in submission of the National Association of Women and the Law, Canadian Council of Muslim Women, and the National Organization of Immigrant and Visible Minority Women of Canada, Natasha Bakht, 'Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and its impact on women' (September 13, 2004).
[153] Submission of Christian Legal Fellowship (August 27, 2004).
[154] Submission of Christian Legal Fellowship (August 27, 2004).

that arbitration may be a useful means of resolving issues if there is a breakdown in the growing number of "covenant" marriages being contracted within those faith groups.

There are mediation and arbitration services that are currently being offered within the Muslim community and that made presentations to the Review about their services. All emphasized that resolving disputes peacefully is a major goal within the Muslim faith. This is expressed most succinctly in the submission from the Ismaili National Conciliation and Arbitration Board for Canada, which states in its preamble to the "Rules of Arbitration" governing the Board:

> …when differences of opinion or disputes arise between them, these should be resolved by a process of mediation, conciliation and arbitration within themselves in conformity with the Islamic concepts of unity, brotherhood, justice, tolerance and goodwill.[155]

The Shia Imami Ismaili Muslims (Ismailis) have developed a model of conciliation and arbitration that is the most sophisticated and organized structure in the Muslim community to date and I am going to spend considerable time outlining its origins and activities, as it was mentioned many times by other respondents as an example of what is possible under religiously-based mediation and arbitration.

Unlike the Sunni Muslims, who hold that each individual is responsible for his or her own interpretation of the will of Allah, the Shia recognize the authority of hereditary Imams:

> The essence of Shiism lies in the desire to search for the true meaning of the revelation in order to understand the purpose of human existence and its destiny. This true, spiritual meaning can never be fettered by the bounds of time, place or the letter of its form. It is to be comprehended through the guidance of the Imam of the time, who is the inheritor of the Prophet's authority, and the trustee of his legacy. A principal function of the Imam is to enable the believers to go beyond the apparent or outward form of the revelation in search of its spirituality and intellect. …The Shia thus place obedience to the Imams after that to God and the Prophet by virtue of the command in the Quran for Muslims to obey those vested with authority.[156]

The Ismailis recognize the authority and the hereditary succession of His Highness Prince Karim Aga Khan, the 49th Imam in a direct lineal descent from the Prophet Muhammad through his daughter Fatima and son-in-law Ali. He leads Ismaili's settled throughout twenty-five countries in both the developing world and the industrialized world.

[155] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).
[156] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

> Under the leadership of Aga Khan IV, thus, the institutions of the Imamat have expanded far beyond their original geographical core and scope of activities. Many new humanitarian, social, cultural and economic development institutions have been founded reflecting, and responding to, the changing global situation and the present complexity of the development processes which call for an integral multi-programmatic approach to issues of development. With their own mandates in their respective spheres, these institutions, therefore, work together within the overarching framework of the AKDN [Aga Khan Development Network], so that their different pursuits interact and reinforce each other. An autonomous initiative under the leadership of the Ismaili Imamat, their main source of support is the Ismaili community with its tradition of philanthropy, voluntary service and self-reliance, and the material underwriting of the hereditary Imam and Imamat resources. [157]
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> By tradition, the hereditary Imam—spiritual leader—of the time ordains a constitution for the social governance of the community and its relationship to other communities. The constitution is periodically revised in light of changing needs and circumstances. …The constitution ordained in 1986 established a well-defined institutional framework for the Ismaili community through which to address, for example, the health, education, economic and social welfare aspects, as well as the religious aspects, of the daily lives of Ismailis. This institutional framework includes a dispute resolution system. …The Constitution established National Conciliation and Arbitration Boards for each of the jurisdictions specified in the Constitution. [158]

The Ismaili Conciliation and Arbitration Boards (CABs) operate in fourteen jurisdictions around the world. In Canada, there are five Regional CABs and a National CAB. The National CAB develops policies and programmes and the cases are dealt with mainly in the Regional CABs. There are formal rules for both conciliation and arbitration, which were adopted in 1990; the full text of these rules can be found in Appendix IV and Appendix V respectively.

All CAB members are volunteers, appointed by the Aga Khan for three year terms, and comprising lawyers, social workers, businesspersons, other qualified professionals and past senior community members. The membership, currently 34, is gender balanced, with 16 of the members being women.

> The primary objective of the Ismaili CAB system is to resolve disputes in an equitable, speedy, confidential, cost effective and constructive manner in a culturally sensitive environment with due regard to the interests of all parties. The system seeks to maintain harmony between parties and thus within the

[157] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

[158] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

community ("no winners or losers") and to minimize acrimony and emotional damage as well as to minimize the financial costs of conflict for all parties.

In light of these objectives, the CAB system in Canada is guided by the following principles:

- Before mediating or arbitrating on any dispute, the CABs must first satisfy themselves that the parties to the dispute have come to the CABs voluntarily and out of their own free will and desire to have their disputes resolved through the CAB system;
- The mediation and arbitration processes are conducted by CAB members who have received appropriate training to ensure their competent and equitable handling of the matter;
- The processes are conducted in accordance with rules that are intended to assist in assuring the appropriate standard of operation;
- The duty of confidentiality to the parties to a dispute must be absolutely respected.[159]

Women and men have accessed the CAB process in equal numbers. The services are free, although the parties are responsible for the costs of preparing their case and obtaining legal or financial advice. The CABs save both time and money, not only for the participants, as the Submission points out, but also for the court system.

The Submission provided a summary of the number of cases and the success of the process for the period 1998 – 2003 which appears below:[160] It is important to note, when looking at "success rates," that in this model parties may opt out of the arbitration process at any time.

Number of Cases	**769**
- Number of Region Specific Cases	661
- Number of Inter-Regional and International Cases	108
Nature of Cases	
- Matrimonial	63%
- Commercial	29%
- Other (including inheritance cases)	8%
Success Rate	**69%**

The Submission concludes:

> The Ismaili CAB system is rooted in tradition, yet its modern infrastructure interfaces comfortably with the national legal systems within which it functions. The CAB system is grounded in the ethics of the faith and complies with the laws

[159] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).
[160] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).

> of the various lands where the Ismaili community live. In addition, the community context of the CAB system makes it a system that goes beyond pure dispute resolution, addressing also dispute prevention and the possibility of wider support for parties to a dispute.
>
> The Ismaili CAB system in Canada serves the Ismaili community well and has demonstrated its value and effectiveness as an ADR system. It operates in a manner that keeps at the forefront the need for equity among parties whatever their gender, financial resources or relative positions. The system respects the parameters of the Ontario Government's Arbitration Act, 1999 [sic] which recognizes the value and contribution of ADR systems and encourages resolution of disputes outside of the legal system in a fair and equitable manner within the confines of the law of the land.[161]

Another example of an arbitration service that operates under Muslim law is that provided through the Masjid El Noor in Toronto, a Sunni mosque. Led by its director and chief mediator, Mubin Shiakh, the delegation to the Review from Masjid El Noor argued passionately against the negative perspective on Muslim family law provided by such groups as the Coalition Against Sharia Court in Canada and the Canadian Council of Muslim Women. Formally since 1982 and informally prior to that, the Masjid El Noor has offered a continuum of counseling, mediation and arbitration services to its community; these activities are carried out from a pastoral care point of view. Often called upon by the family courts to mediate and sometimes arbitrate, it has won the respect and confidence of the court in its ability to resolve disputes within the Muslim context, according to letters provided to the Review.

Masjid El Noor's mediation board consists of seven people, one of whom is an imam and the rest of whom are divided equally between men and women. Each hearing panel consists of one man, one woman and the Imam. Most of the mediators are professionals who donate their time as part of their volunteer service to the community. The hearings take place on Sundays between 11 A.M. and 5 P.M. Most hearings last approximately an hour and the process is confidential. Mediations and arbitrations are strictly voluntary, and each party must sign the arbitration agreement. Notes are kept of the proceedings. Mediation and arbitration emphasize the availability of the courts to all clients; parties are provided with the pamphlet, "Family Law in Ontario" and Masjid El Noor has provided translations in Gujurati and Urdu to those who need services in other languages. [162]

Masjid El Noor labeled the concerns of the opponents of religiously based arbitration as "fear-mongering and fabrication."

[161] Submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board of Canada (September 10, 2004).
[162] Submission of Masjid El Noor (August 24, 2004).

> Masjid El Noor has dealt with many cases and none of what was said would happen, happened. …In fact not a single case has been appealed to the Ontario Court even though as a rule, we give that option to disputants at the outset.[163]

These two examples show that Muslim family law has been and is being used now to resolve disputes successfully in both Shia and Sunni contexts. The Review heard from many groups that similar sorts of services are available through other mosques and Islamic Community Centres throughout Ontario; these services may be more or less formally structured, and may be organized as mediation or conciliation rather than binding arbitration. One of the concerns expressed by respondents is the lack of uniformity in structure and policies, so that it is difficult for those seeking assistance to know exactly what the legal status of the dispute mechanisms available to them really are. Certainly, the Review heard of situations where Imams and other leaders in the community, who do not have knowledge of Canadian family law and who may not even have much formal training in Muslim law, are deciding disputes for Muslims who believe they are required to follow the decisions, because they emanate from their faith community and they want to be obedient to their faith.

In many cases, the decisions are based on cultural traditions and may be in direct contravention of Ontario and Canadian law. The Review heard of instances where girls, well below the age of consent, were being forced into marriages and bearing children while still adolescents themselves. The Review also heard that some Imams and leaders continue to celebrate polygamous marriages, even though such actions are clearly against the *Criminal Code of Canada*. Aly Hindy, Imam of the Alaheddin Mosque, is quoted as saying:

> The *Qur'an* says a man is limited to four wives. Canadian Law doesn't allow it—God does, so I marry them myself. …If your wife doesn't like sex, you can take another wife. If she can't give you children, you can take another wife. If a man is financially capable and a woman doesn't have a husband, you can marry her as well.[164]

It is in this context that the Canadian Society of Muslims, represented by Syed Mumtaz Ali, has advocated for a more formal establishment of Muslim mediation and arbitration services over many years. The group made a presentation to the Ontario Civil Justice Review Task Force in 1994, advocating the following changes to Ontario law:

1. Appropriately amend the Practice Direction re court-based ADR Pilot Project to permit as an option private arbitration for determination of matrimonial matters. Where both parties are Muslim, they may be permitted to enter into an arbitration agreement to have matters determined in accordance with the principles of Islamic law.
2. Matters of Muslim intestate succession be permitted to be settled in similar fashion. Changes to the law will have to be made, if needed.

[163] Submission of Mubin Shaikh, 'Shariah Tribunals and Masjid El Noor: A Canadian Model' (August 24, 2004).
[164] Sally Armstrong, 'Criminal Justice' *Chatelaine* (November 2004) 152 at 158.

3. In cases of uncontested joint petition for divorce, Marriage Officers appointed under the Ontario Marriage Act be empowered to solemnize and register Muslim divorces following procedures similar to the procedures of the Marriage Act.
4. In case of uncontested joint petition for divorce, both Muslim spouses be permitted to waive the mandatory one-year separation requirement and/or abridge the time for finalizing the divorce proceedings.
5. As an alternative to private arbitration under a court-based ADR system, when dealing with divorces where both parties are Muslim, an independent, private arbitration system managed by local Muslims could be put in place on lines similar to those followed by Muslim Marriage and Divorce Act of Trinidad and Tobago.
6. As a further alternative, fully incorporate Muslim personal/family law into the regular Ontario civil justice/family law system, thereby taking control of the whole administration and enforcement of Muslim family law provisions.
7. Extend the unified family court system to the whole of the province of Ontario.[165]

This vision resulted in the fall of 2003 in a convention called to form the Islamic Institute of Civil Justice. An elected committee of thirty members was formed and given a mandate to incorporate and develop by-laws to govern the Institute. The Letters Patent of Incorporation #1579565 were granted as of the 15th of January 2004. Elections for officers (3), Executive Council (6) and General Council (30) were completed in February 2004. The name "Darul Qada—Muslim Court of Arbitration" was registered under the *Business Names Registration Act*, and the announcement of the establishment of the Institute was made in March 2004. The Institute incorporated as a business and is seeking clients to participate in mediation and arbitration under its auspices. According to Mumtaz Ali, "arbitration cannot apply those provisions of Muslim law/Shariah, which do not agree with Canadian laws or Canadian value system." However, he says in the same paper, after holding forth on the superiority of Muslim law,

> The Quran tells us about the root-source of every action. Every act, deed, or movement of a Muslim must consequently be in accord with Muslim law/Sharia injunctions. A Muslim cannot be a Muslim without obeying Muslin law in its totality.[166]

A group which had originally been affiliated with the Islamic Institute of Civil Justice broke away from that organization just prior to its incorporation as a business. According to its submission to the Review,

> Our group first began to organize as the Islamic Institute of Civil Justice. However, some friends who were with us created confusions by using terms such as Sharia Courts and political efforts, etc. Their confusion caused a vast reaction and some unfounded fears. We separated our organization and

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[165] Syed Mumtaz Ali, 'Islamic Institute of Civil Justice and Muslim Court of Arbitration' (Muslim Society of Canada, 2003).
[166] Syed Mumtaz Ali, News Bulletin, (Canadian Society of Muslims, August 2004) at 2, 6.

> registered as Dar-ul-Qada (Canada) Inc. …a non-profit organization…which seeks to provide humanitarian services to the Muslim community in Ontario. …as outlined…our aims and objectives include setting up facilities for the destitute children, men and women affected by family disputes, set up psychological clinics and mediation centres and all other related activities to serve the community. The Organization also seeks to provide an alternative dispute resolution forum in which trained Muslim professionals will be able to mediate, arbitrate and resolve civil and family disputes among Muslim citizens residing in Canada under Muslim traditions, to the extent permitted by Canadian legislation.
> …the misapplication of Sharia has caused numerous human rights violations in several countries around the world. We wish to inform you that, in addition to operating under Canadian and human rights legislation, the Organization's goal is to operate under Islamic Legal Principles which include: social justice, equality of human beings including gender equality, security of life, liberty and property among many other such rights. We inform you that part of the social mandate of the Organization includes taking steps to address the cultural oppression of women, children and any other kinds of social injustice. Our position is that the Organization is fully committed to addressing the cultural issues of social injustice which led to the misapplication of the Sharia in the past. [167]

Every submission we received from those advocating for the continued use of religiously based arbitration stressed the importance for people of faith to have the opportunity to live in the world according to their beliefs, even if those choices affect their material well being. A couple of those eloquent arguments are worth repeating here:

> By choosing to utilize a system of religious arbitration the parties are doing two things: adhering to their faith; and resolving the dispute on the basis of their religious law, rather than the secular civil law. So long as the choice to do so is a free, informed and voluntary one, and there is no contravention of the Charter of Rights, not only should they be permitted to do so, they have a right to do so as part of the expression of their freedom of religion.
>
> Simply stated, a secular court or tribunal bases its decision on all of the applicable state law. The religious-based system treats the tenets of the faith as paramount in reaching its decision. The conscious and voluntary decision to participate in the faith-based systems includes a knowledge that in doing so, rights that exist in the secular system may be given up. Using a Christian as a specific example, by choosing to have a Christian arbitrator and instructing that the decision is to be resolved according to Biblical principles, it is more important to that individual that the dispute is resolved Biblically than that the outcome be in his or her favour.[168]

[167] Submission of Husain Bhyat for Dar-Ul-Qada (August 27, 2004).
[168] Submission of Christian Legal Fellowship (August 27, 2004).

> …one can easily understand that the reason why a Muslim chooses to go to a Muslim Court of Arbitration instead of a secular Canadian court, is that he or she must bring in a spiritual dimension and let this spiritual consideration play a determining role. A Muslim, consequently, makes their decision in this respect not because they are likely to get the same or better rights or material benefits from a Canadian Court or the Muslim Court. …a Muslim must take their dispute for settlement so as to be a good Muslim.[169]

Other submissions based their arguments on the *Charter* right to freedom of religion. While this is not the position of the Review, the Submission from B'nai Brith Canada explains this view most clearly:

> It is B'nai Brith Canada's view that under the Canadian Constitution (Constitutional Act, 1982), Jews and indeed all faith based or religious groups are guaranteed the right to contractually operate their own courts of arbitration in family law and other matters, so long as the participants do so voluntarily and with due process and fairness. Specifically, Section 27 of the Canadian Charter of Rights and Freedoms, 1982, provides that the Charter "will be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" [*emphasis added].* This provision determines that Canadian society will be an open and pluralistic society that must accommodate different religious practices. …B'nai Brith supports the integrity of the freedom of choice of any individual, who, for religious reasons, wishes to participate by reason of his or her own conscience in such religious courts and thereby consult his or her own religious traditions, so long as it is done consensually or voluntarily. It is the right of all those residing in Canada to be treated equally, no matter what their religious background, as set out in Section 15 of the Canadian Charter of Rights and Freedoms, 1982.[170]

The Masjid El Noor submission made a number of points not articulated in written submissions from other respondents but mentioned by many during the oral consultations:

> The first and foremost reason is because it is an Islamic tribunal and presided over by trained community leaders, giving it the credence it needs within the Muslim community. This ingredient offers the legitimacy factor of the equation. Its importance is clear when decision in favour of women are made against men who are ignorant of the rights of women afforded in Islam. The authority of the Tribunal will prevent a disputant from accusing it of ignoring their Islamic values—a claim frequently made against the secular system. Through this authority, the community will pressure the wrongdoer to conform to the norm and encourage him/her to cease their sinful behaviour. Finally, it will ensure that justice is administered by holding the person accountable to the very Deity he/she worships—an extremely powerful deterrent against non-compliance.

[169] Syed Mumtaz Ali, News Bulletin, (Canadian Society of Muslims, August 2004) at 6.
[170] Submission of B'nai Brith, 'Review of the Arbitration Process in Ontario' (August 31, 2004).

> …This is valuable to the discourse on the compatibility of Islam with democracy. Far from being a signal to the despots of the world that misuse Islam, it is a loud cry against them and a solid proof that Islam is flexible enough to work within the current Western systems. This point should be a very important one to consider because it gives the state direction as to how it will proceed with its Muslim population—a clash of civilizations or an embrace. ...It allows the Muslim community to be able to engage their problems from within and not imposed upon them from unauthorized external agents [*Note: Here, secular courts are referred to as "unauthorized" from the religious standpoint.*] [171]

It was interesting that this issue of decisions being more enforceable was raised with respect to non-religiously based family law arbitration as well. There seemed to be a general consensus among those favouring the use of arbitration that taking part in the decision, rather than having it imposed from the outside, helped recalcitrant parties to comply even with decisions they did not like.

One submission, from Fathercraft Canada, compared the use of religiously based mediation and arbitration as inherently more fair and equitable than the court system:

> Sharia "law" is a faith-based approach to dispute resolution. It is useful to look at the history of faith, spirituality and religion in the settlement of disputes. While religion has been used by opportunists and extremists to enflame conflicts and justify violence, it has a long history of thought and efforts by enlightened men of faith to resolve conflict. It could be argued that Jewish law, Christianity, Sharia law, native healing circles and religions in general are, in essence, non-violent or violence-reducing conflict resolution systems. The adversarial court system arises from the concept of each side hiring a warrior to fight a battle on their behalf, so is inherently violent in origin. We argue that faith-based arbitration and mediation are superior to the adversarial court system because of the following:
>
> - The two sides mutually agree upon the arbitrator which they respect, whereas they do not have any choice of the judge and usually one party is dragged into court against his or her will (family law judges and lawyers are the least respected and most hated in the legal system).
> - Arbitrator has more invested in finding a comprehensive, permanent solution (otherwise the problem to return to the arbitrator, whose reputation is reduced), while judges ignore failed solutions, passing responsibility on to appeals courts or other judges.
> - Rules of fairness, openness and explaining decisions underlie arbitration, whereas in family court, mothers and fathers complain of money, process, false accusations and opaque procedures being used to manipulate the court into incomprehensible or incomplete decisions.
> - The beliefs of the arbitrator are clear and motives generally altruistic, while judges may be motivated by political, careerist or stereotyping motives.

[171] Submission of Mubin Shaikh, 'Shariah Tribunals and Msjid El Noor: A Canadian Model' (August 24, 2004).

- Mediators can appeal to common values, beliefs and principles, while judges generally cannot.

Many of the Muslims who responded to the Review, talked about how severely stressed their community has been since the terrorism attacks of 9/11 and the subsequent incidents that have arisen from security measures taken by the Canadian government. Some spoke of increased fear of discrimination against their community in the court system. Many are very aware of the criticisms raised in the Cole/Gittens Report on Systemic Racism in the Criminal Justice System[172] and made the point that similar issues of discrimination have been experienced in the civil justice system, particularly in family courts. This fear of discrimination in the mainstream society may make private arbitrations under Muslim law seem more attractive and safer, especially to younger people seeking to establish their identity as a minority within a larger community that is seen as hostile. The submission from Moulana Habeeb, Director of United Muslims expresses some of the defensiveness felt by Muslims given the portrayal of the dangers of religiously based arbitration:

> The fear of women being treated unequal is more of an unstudied phobia more than the educated position. Does equal mean sameness? Is separated washrooms inequality? Could we claim a shut down to law and order when women continue to be abused and innocent people are apologized to for serving sentences in non Islamic societies? Rather we should become the gateways to solutions, as is genetic of Western societies rather than being parley to the crisis. While the Quaran is vast in its interpretations, none can disclaim the universal principles it compels in civil laws. About divorce it instructs the husbands: "Then keep them in all decency or part them decently. It is not lawful to take anything you have given them." Whatever school of thought a person follows then Arbitration procedures must allow him the choice of his schools' scholar. Only then justice would have been served. Similarly women must be seated in the panel as the classical jurist Abu Hanifa, has legislated the presence of women judges. Do we also object to those that opt for Muslim produced foods and clothing, schools and telecommunications as being anti Canadian? If no, then opting for one's personal matters to be settled by leaders that are mutually respected in the family, most of the times the Imam, is only a continuation of such acceptable trends. No one is reprimanded or isolated because they don't deal in interest-free banking. So too is the continued culture of having the value-added choice of Muslim Personal Law Board recourse.[173]

Another point that was raised was the difficulty of honouring community or family obligations within Ontario family law, since this regime tends to apply only to two adult persons in a relationship and any children that may arise from it. In many communities, extended families are the norm, not the exception, and other members of the family or

[172] Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, (Queen's Printer for Ontario, 1995) (Co-chairs: David Cole and Margaret Gittens).
[173] Submission of Moulana Habeeb, United Muslims (September 2, 2004).

the household may be affected by property rights which our law defines more narrowly. The Christian Legal Fellowship provided the following example:

> Suppose a married couple purchased a home and registered title only in the husband's name for liability purposes. The couple continued to reside there with the wife's parents who contributed something toward groceries and a few bills. All of the mortgage, taxes and major expenses were shared by the couple in proportion to their incomes. The couple then separated.
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> Under Ontario law [the Family Law Act] the home would be considered a matrimonial home and could not be disposed of by the husband without the wife's consent. Any interest the wife's parents might have would not be considered. The value of the home would be shared equally by the husband and wife, to the exclusion of the parents.
>
> If the matter were mediated or arbitrated in a Christian setting, consideration would normally be given to the interests of the parents—both morally and legally. The husband and wife would have to consider where the parents would live if the home was sold, how that would be paid for, as well as the legal rights and obligations between the spouses to fairly divide their property.[174]

Similarly, some women advocating for arbitration under Muslim law, pointed out that under the *Family Law Act*, they would be held accountable for supporting a spouse and children, if they were the breadwinner of the family. According to Muslim law, if a woman contributes to the support of the family, she is doing it voluntarily and it is a blessing to her, not an obligation. Indeed, some women argued that they would be financially better off under Muslim family law than under Ontario law and believed that the use of Muslim arbitration would enable them to maintain that advantage.

All of the arguments raised earlier in this report in favour of mediating and arbitrating family law disputes earlier, were raised as well with respect to religiously based ADR. In particular, most of the religious organizations stressed the lower cost of dealing with family matters in the religious forum, since most of the proponents offer services either free or at very low cost. Most religious organizations underwrite the cost of services by using volunteer mediators or arbitrators or by raising community funding to support the services. In most cases, any charge is minimal and intended only to cover hard costs of the process itself. The timeliness with which matters can proceed was also considered a major benefit, especially in the Muslim community, where the period of time from the decision to divorce to the freedom to remarry is considerably less than that allowed by law in Canada, and much less than that required to obtain a divorce through the court system in many cases.

Most religious groups were adamant that they all be treated equally with respect to their right to provide religiously based arbitration and with respect to any new restrictions that

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[174] Submission of Christian Legal Fellowship (August 27, 2004).

the Review might propose. Some, however, had reservations about other groups, even while advocating on their own behalf. The Christian Legal Fellowship points out:

> It is much more difficult to balance competing rights of religious freedom and equal treatment under the law when a religious community does not believe that all members of the community are to be treated equally (for example if women are considered less worthy.)[175]

Many of those writing independently to the Review were clear that they were only opposed to allowing Muslim family law to be used. Some of these submissions were explicitly racist in content. However, other respondents were very clear about the difficulty of allowing one form of religiously based arbitration, and not others. As Philip Epstein stated,

> I am very concerned about the introduction of Sharia law to Ontario but I also recognize that Jewish law is applied now under Jewish tribunals and one can obviously not discriminate between different racial or cultural groups.[176]

Virtually all of the respondents favouring religiously based mediation and arbitration advocated for additional safeguards to be applied where family law matters are to be arbitrated in order to prevent the kind of discrimination and inequity most feared by the opponents.

[175] Submission of Christian Legal Fellowship (August 27, 2004).
[176] Submission of Philip Epstein (September 21, 2004).