



# The Great Debate 2006

## ARBITRATION IN A RELIGIOUS CONTEXT A STEP FORWARD OR A STEP BACK?

### Summary

In April 2006, OJEN held a Great Debate on faith-based arbitrations under the Ontario Arbitration Act processes.

Nuzhat Jafri from the Canadian Council of Muslim Women (CCMW) and Andrée Côté from the National Association of Women and the Law (NAWL) presented some of the concerns about faith-based arbitrations. Professor Anver Emon, from the University of Toronto Faculty of Law presented the advantages of faith-based arbitrations.

The Hon. Marion Boyd, chair of the provincial review and recommendation committee analyzed the pros and cons of the government's decision to remove faith-based arbitrations from the Ontario Arbitration Act processes.

The DVD includes 10-minute clips of each speaker followed by question and answer session with the audience.



### *Classroom Activities*

For completion prior to viewing The Great Debate DVD

## A Closer Look at Dispute Resolution

- Ask students to brainstorm in small groups different ways in which disputes can be resolved (i.e. courts, mediation, arbitration, etc). Make a class list.
- Have students use the Internet, their textbook, or other library resources to research different dispute resolution processes. Students should record their findings in the chart on page 4.

## Family Arbitration

- a) Using the Arbitration Background Sheet and Timeline on pgs. 5-8, introduce students to family arbitration and faith-based family arbitration.
- b) Read the arbitration scenario below and discuss the following questions with students.

**Scenario:** Mr. and Mrs. Sternberg have been married for 8 years and have three young children. They have recently separated and agreed to use family arbitration to resolve the custody dispute over their three children. They agree to have their Rabbi act as their arbitrator. Rabbi Katz has been arbitrating family disputes for 15 years and has recently been trained in arbitration procedures certified by the Ministry of the Attorney General. Mr. and Mrs. Sternberg have had the same family lawyer throughout their marriage and prior to the arbitration, Mr. Sternberg consults this lawyer for advice. Mrs. Sternberg cannot afford to consult a lawyer so instead she talks to a friend who has recently gone through a family arbitration and was pleased with the outcome. Their arbitrator decides that Mr. and Mrs. Sternberg should share custody of their children, a decision that Mrs. Sternberg is very unhappy with. She is considering taking the case to court to try to gain sole custody.

- What are some reasons why Mr. and Mrs. Sternberg might have chosen family arbitration?
- Outline the family arbitration process that the Sternbergs went through. How does this process compare with the court system?
- What details would the court take into consideration in deciding if the arbitration is binding? What do you think the courts would decide?
- Do you think the arbitration process impacts children differently than the court process? Why or why not?

---

## What is your view?

Using one of the methods below, have students express their relative points of view about the opinion statements on page 9.

- a) **Value Line:** Read out a statement and have students form a line in the classroom with one end representing Strongly Agree and the other representing Strongly Disagree. Give students time to discuss their reasoning with their neighbours and then fold the line in half so that students can discuss their opinions with those of opposing viewpoints.
- b) **Put Yourself on the Line:** This activity follows the same structure as the Value Line but this time have students line up along a piece of masking tape and write their name on the tape where they are standing. Complete the same exercise again after viewing the DVD and have them compare their place along the line.

- 
- c) **Four Corners:** Label the four corners of the room with Strongly Agree, Strongly Disagree, Moderately Agree, and Moderately Disagree. Read out a statement and have students move to the corner of the room that best represents their point of view. Give students time for discussion and then have a spokesperson from each group present their case to the class. Give students the opportunity to move to a different corner if their opinion changes.



## Dispute Resolution Processes

	Court System	Arbitration	Mediation
Description			
Rules of Procedure			
People Involved			
Advantages			
Disadvantages			
Cost/Timeline (if available)			



## Family Arbitration Background Sheet

### What is arbitration?

Arbitration is an alternative dispute resolution procedure whereby the parties in dispute agree to have an independent third party, an arbitrator, make a decision about their case. The decision of the arbitrator, unless otherwise agreed upon, is binding and may be enforceable in court.

### Deciding to arbitrate

Source: Ministry of the Attorney General – Family Arbitration: <http://www.attorneygeneral.jus.gov.on.ca/english/family/arbitration/>

Both sides to the dispute must agree to arbitrate before any arbitration can start.

A family arbitration agreement can be binding only if:

- The agreement is in writing
- The agreement is made after the dispute has arisen
- The agreement spells out how the award may be appealed
- The arbitration is conducted exclusively under the law of Ontario or another Canadian jurisdiction
- Both sides certify they have received independent legal advice
- The arbitrator certifies that both sides have been screened for domestic violence or power imbalances and that the arbitrator has considered a report of the screening
- As of April 30, 2008, the arbitrator must also be able to say that he or she has had appropriate training approved by the Attorney General.

If these conditions are not met, the arbitrator's decision may not be enforceable in court.

Parties also run the risk that their family arbitration agreement will be set aside by the court if one of them is found to have failed to make relevant financial disclosure or did not understand the nature or consequences of the agreement.

It is important to spell out in the arbitration agreement the questions that the arbitrator is to decide. The arbitrator has no power to make decisions on issues he or she is not asked to decide.

### What happens at a family arbitration?

Arbitration is a process where each side tells his or her side of the dispute to the arbitrator and asks for a specific decision. Each side may present witnesses and documents as evidence to support their facts, and make arguments to support the decision they want. Both sides should speak to lawyers or an arbitrator to find the procedure that works best for them. Usually the lawyers for each side (or the disputing people themselves) and the arbitrator work out details of the procedure to be followed. If they don't, the arbitrator decides the procedure in accordance with Ontario's Arbitration Act, 1991. Often people prefer a process that is less formal and rigid than a courtroom.

The law allows a lot of choice as to the appropriate procedure. However, the procedure must be fair to both sides.

An arbitrator cannot decide anything that people could not have decided for themselves. The arbitrator only has the power given to him or her in the arbitration agreement. An arbitrator cannot allow or order either side to break the law.

Exactly what the arbitrator is being asked to decide should be set out in an arbitration agreement. An arbitrator can be asked to resolve several issues, or specific topics such as division of property, support, and custody of or access to children.

All arbitration decisions involving children **must** be decided in their best interests.

An arbitrator **cannot** change official family status: he or she cannot grant a divorce, annul a marriage or declare someone to be or not to be someone else's child. Only a court can make that kind of order.

### **Faith-based (religious) family arbitration**

Nothing in Ontario law prevents people from turning to a religious official or someone knowledgeable in the principles of their religion to help them resolve their family dispute. However, if that person made a decision based on religious principles, the decision would not be a valid family arbitration award under the law. Both spouses could comply with the decision voluntarily, but the decision would not be enforceable if one of the people involved took it to court. The court may only enforce awards made in arbitrations conducted exclusively under Canadian law.

A religious official can conduct a family arbitration under Ontario law if that person is properly qualified to do so. To be qualified one has to have completed the required training and otherwise conduct the arbitration under the statutes and regulations. An award from such an arbitration would then be enforceable like any other arbitration.



## Faith-Based Family Law Arbitration in Ontario: A Timeline

**Historical** – Ontario laws are based in the English common law and are framed by the combined influence of the Judeo-Christian and the enlightenment traditions, which focus on the individual. For many years family matters have been arbitrated based on religious teachings in Jewish, Muslim and Christian settings. Ontario's Arbitration Act, in force since the late 1800's, always permitted parties to choose to arbitrate family matters based on any form of law they could agree to use.

**1990** – The Uniform Law Conference of Canada, a federal-provincial-territorial law reform and harmonization body, adopted a Uniform Arbitration Act. Ontario was among the first of seven provinces and territories to adopt the Act.

**1992** – *Arbitration Act, 1991* passes into law (this is a version of the Uniform Arbitration Act). This new legislation reduces the discretion of the court in supervising arbitrations following an evolution in attitudes towards arbitration (attitudes include an increased perception of the legitimacy of arbitration as a method of dispute resolution and greater trust in the ability of arbitrators to make a range of decisions). Disputes among family members are often matters of personal sensitivity that the disputants make an effort to resolve privately. The law does not prevent them from making private arrangements to do so.

**2003** – Retired Ontario lawyer, Syed Mumtaz Ali, announces the establishment of the Islamic Institute of Civil Justice (IICJ), an organization that will be available to the Muslim community of Ontario to conduct arbitrations according to Islamic personal law.

**March/April 2004** – Representatives from the Canadian Council of Muslim Women (CCMW) and the International Campaign Against Shariah Law in Canada meet with government officials to discuss concerns following the IICJ announcement. Many organizations were concerned that the use of arbitration in family law matters threatened to reduce women's equality (their concerns were brought to the forefront by the IICJ announcement, however, the use of arbitration in family law matters has already been in place for many years). Government officials take the position that since the IICJ is using the *Arbitration Act* to provide a framework for voluntary private arbitration, there is no clear role for government to intervene.

The Premier of Ontario asks formally for the advice of the Attorney General and the Minister Responsible for Women's Issues about the implications of using the *Arbitration Act* for family law and inheritance matters.

**June 2004** – The Honourable Marion Boyd is given a mandate to explore the use of private arbitration to resolve family and inheritance cases, and the impact that using arbitrations may have on vulnerable people. Consultations are conducted with a variety of

---

organizations and individuals, including the Canadian Council of Muslim Women, B'nai Brith Canada, the National Association of Women and the Law, the Canadian Jewish Congress and the Ontario Federation of Indian Friendship Centres.

- December 2004** – Release of the Boyd Report, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion,” which includes 46 recommendations. The Report concludes that the Review did not find any evidence that women were being systematically discriminated against as a result of arbitration of family law issues, and therefore recommends that the *Arbitration Act* continue to allow family law and inheritance disputes to be arbitrated, using religious law if the parties agreed to do so. This recommendation is contingent on the proviso this kind of arbitration should take place only if the safeguards prescribed in the Report are observed. These safeguards include having arbitration included under Part IV of the Ontario Family Law Act, widening the availability of appeals of arbitration decisions, regulation of the process and the qualifications of arbitrators, and ensuring that public legal education on family law be made accessible to all communities.
- 2005** – Various organizations, including the National Association of Women and the Law, respond to the recommendations outlined in the Boyd Report and lobby the government not to institute the Boyd Report recommendations and to amend the *Arbitration Act* to preclude religious-based family law arbitration and, indeed, to end the use of arbitration in family and inheritance matters..
- 2006** – Ontario passes the *Family Statute Law Amendment Act, 2005*, which mandates that all family law arbitrations in Ontario are to be conducted only in accordance with Canadian Law. Under this legislation, resolutions based on other laws and principles, including religious principles, will have no legal effect and will not be enforceable by the courts.





## Opinion Statements

- Freedom of religion should override *Charter* values in certain cases.
- True believers of a religion should opt for faith-based conflict resolution mechanisms (e.g. religious arbitrations) over government mechanisms (e.g. courts).
- There should be a separation of church and state and governments should not interfere with faith-based arbitrations.
- Government intervention is necessary in resolving family conflicts [to ensure fairness].
- Since marriage is a civil matter rather than a religious one, the courts should be responsible for resolving marital disputes.
- Government control of faith-based arbitrations is necessary to ensure that religious authorities follow due process, exercise the principles of natural justice, or adhere to the Canadian *Charter of Rights and Freedoms*.
- Religions both adequately protect men and women in the family law context.



## *Classroom Activities*

For completion during viewing of The Great Debate DVD

---

### The Great Debate 2006

Using the Jigsaw strategy outlined below, have students complete the worksheets on pages 15-18 while viewing the The Great Debate 2006 DVD. Viewing notes are available on pages 11-13.

- a) Divide students into 4 groups and have them number off from 1 to 4 within their group. Appoint one student from each group as the leader.
- b) Assign each student in the group one of the four worksheets. Each student should be responsible for learning about a different speaker.
- c) View the DVD and have students complete the worksheets.

After viewing the DVD:

- d) Ask students to form temporary 'expert groups' by joining with other students who learned about the same speaker.
- e) Distribute the chart on page 19 for students to record their answers in. Give the expert groups time to compare answers, discuss the main points of their speaker, and fill in the chart. They can rehearse the presentations they will make to their jigsaw group.
- f) Bring the students back into their four jigsaw groups and ask students to teach their respective groups about the speaker they have become experts on. Students can record what they learn in the remaining spaces in the chart on page 19.



## Viewing Notes

### Nuzhat Jafri – Canadian Council of Muslim Women (CCMW)

(7:40-19:20)

1. CCMW background information
  - CCMW history, why it was formed, past issues addressed by the organization, its role as a voice for many diverse groups of Muslim women, and the guiding principles of the organization
2. Religious Arbitration, the Sharia Tribunal, and the CCMW
  - How CCMW became involved
  - The focus of the tribunal: Muslim family law
  - CCMW's reasons for opposing the proposal - offensive extreme religious statements and lack of female adjudicators
3. Key points of CCMW's opposition to the Sharia tribunal proposal
  - Conducted research on faith-based arbitration and found that:
    - The tribunal proposal could have a detrimental effect on Muslim women
    - Interpreters of Muslim family law are male and in Canada, most are not trained in Islamic jurisprudence, mediation, arbitration, or in alternative dispute resolution
  - CCMW's main concerns:
    - Selection process of tribunal arbitrators
    - Impact on Muslim women
    - No need for a separate parallel system of justice
4. Discussion on religious arbitration difficult but necessary for the CCMW
  - Did not want to heighten negative image of Islam
  - Firsthand experience with the use of Sharia to mistreat women and girls
  - CCMW approached the issue from a human rights and women's rights perspective, not a legal or religious perspective
  - Concern for equality rights of women

### The Honourable Marion Boyd

(19:40 –29:45)

1. Background to the review of the Ontario *Arbitration Act, 1991*
  - Marion Boyd, former Attorney General of Ontario, was asked to conduct a review of the Ontario *Arbitration Act, 1991* by Premier Dalton McGuinty and make recommendations on the removal of religious arbitrations from the Act
  - The effects of the passage of the *Family Law Statute Amendment Act, 2005* which provides that religious arbitrations have no effect in law

2. Summary of the pros of the passage of the *Family Law Statute Amendment Act, 2005*
3. Summary of the cons of the passage of the *Family Law Statute Amendment Act, 2005*
4. Recommendations on how to ameliorate the unintended effects of the *Family Law Statute Amendment Act, 2005*

**Andrée Côté - Director of Legislation and Law Reform, National Association of Women and the Law (NAWL)**  
(29:53-40:40)

1. Relationship between living in a multicultural society and protecting religious freedom
  - What extent should religious freedom be accommodated in a diverse multicultural society?
2. There are four elements to look at when deciding whether religious tribunals should be allowed in Canada:
  - The impact it will have on the affected groups
  - The impact it will have on the vulnerable people in those groups, particularly women in this case
  - The impact on women in general in society
  - The impact on society in general
3. The impact on the group
  - NAWL considered the impact of religious arbitration in general, not just in the Sharia law context
  - Côté argued that it would be better to reform the justice system rather than create parallel systems of justice to address oppression of minorities
4. The impact on vulnerable group members - women in this context
  - Women may be pressured by religious authorities or family to consent to religious arbitration
  - There is an increased risk of incertitude and arbitrary decisions since there is no central authority for religious arbitrations
  - The decisions of arbitrators could be discriminatory against women
  - NAWL concluded that religious arbitrations would threaten the equality of women
5. What is the impact on Canadian women in general?
6. What is the impact on society in general?
  - Allowing parties to choose the rules and norms of religious arbitration inhibits the evolution of democracy and contravenes the separation of church and state
  - Religious arbitration will create segregation rather than integration within society

Professor Anver Emon, University of Toronto Faculty of Law  
(40:46-51:02)

1. The concept of multiculturalism in Canada
  - Section 27 of the *Charter*, inclusion and exclusion, understanding who we are and who is the other
2. Discussion of the “Muslim woman”
3. What is Islamic law? What could have happened as an alternative to removing religious arbitrations from the Ontario *Arbitration Act, 1991*?
4. What is Islamic family law?
  - The evolution of Islamic law from a diversity of interpretations in the past to a system of rules or a “tyranny of rules”
  - Transition of Islamic family law in the late 19th and 20th century into a code that did not reflect traditional diversity, context, theory, or jurisprudence
  - Prof. Emon disagrees with the interpretation of Sharia law. He proposes that contemporary Sharia law is based on British colonial interpretations
5. Alternatives to removing religious arbitrations from the Ontario *Arbitration Act, 1991*
  - The variability in Muslim law could benefit the “consumer” by allowing different Muslim groups to “market” their arbitration or mediation models within the protective values of the *Charter*
  - He challenges Muslim groups to come up with new models of arbitration based on the variety of interpretations of the Islamic code of law
  - There is room to create new Muslim organizations that apply Islamic law and make these interpretations available to the community
  - Because laws are regulated and fall within the *Charter*, there is a level playing field for different Muslim groups to communicate, dialogue, and debate with one-another, and with the greater society



## Online Resources

Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion, Report prepared by Marion Boyd, December 2004

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>

National Association of Women and the Law - Faith-Based Arbitration

<http://www.nawl.ca/ns/en/is-wmnfam-fba.html>

No Religious Arbitration Coalition

[http://www.ywcatoronto.org/advocate\\_change/arbitration\\_intro.htm](http://www.ywcatoronto.org/advocate_change/arbitration_intro.htm)

The No Religious Arbitration Coalition's submission to the Standing Committee regarding Bill 27, Family Statute Law Amendment Act, 2005

[http://www.ywcatoronto.org/assets/pdf/advocate\\_change/policy\\_papers\\_deputations/2006/060116\\_ccmw\\_bill27.pdf](http://www.ywcatoronto.org/assets/pdf/advocate_change/policy_papers_deputations/2006/060116_ccmw_bill27.pdf)

The Reception Of Muslim Family Law In Western Liberal States by Pascale Fournier

<http://www.ccmw.com/documents/Pascalepaper.doc>

Arbitration, Religion and Family Law: Private Justice on the Backs of Women by Natasha Bakht

[http://www.nawl.ca/ns/en/documents/Pub\\_Report\\_ReligArb05\\_en.rtf](http://www.nawl.ca/ns/en/documents/Pub_Report_ReligArb05_en.rtf)



## Speaker Resources

Nuzhat Jafri – Canadian Council of Muslim Women

[www.ccmw.com](http://www.ccmw.com)

The Honourable Marion Boyd

[www.marionboyd.net](http://www.marionboyd.net)

Andrée Côté – Director of Legislation and Law Reform, National Association of Women and the Law

[www.nawl.ca](http://www.nawl.ca)

Professor Anver Emon – University of Toronto Faculty of Law

[http://www.law.utoronto.ca/faculty\\_content.asp?itemPath=1/3/4/0/0&profile=78&cType=facMembers](http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&profile=78&cType=facMembers)

Moderator Sonia Ouellet – Executive Director, Association des juristes d'expression française de l'Ontario (AJEFO)

[www.ajefo.ca](http://www.ajefo.ca)





## Nuzhat Jafri - Canadian Council of Muslim Women

1. When did the Canadian Council of Muslim Women (CCMW) get started and why?

---

---

---

2. What are some of the guiding principles of the CCMW?

---

---

---

---

3. What did the CCMW find alarming about the Islamic Institute for Civil Justice's proposal for a Sharia tribunal?

---

---

---

4. After undertaking research on faith-based arbitration, what were the main concerns of the CCMW?

---

---

---

---

---

5. Why was the discussion on faith-based arbitration a difficult one for the CCMW to engage in? Why did they choose to do so anyway?

---

---

---

---



## The Honourable Marion Boyd

1. What was the purpose of Ms. Boyd's review of the Ontario *Arbitration Act, 1997*?

---

---

---

2. What were some of the effects of the passage of the *Family Law Statute Amendment Act, 2005*?

---

---

---

---

3. Name three pros that Ms. Boyd gives for passage of the *Family Law Statute Amendment Act, 2005*?

---

---

---

---

4. Name three cons that Ms. Boyd gives for passage of the *Family Law Statute Amendment Act, 2005*?

---

---

---

---

5. What recommendations does Ms. Boyd give to ameliorate, or offset, the unintended effects of the Act?

---

---

---

---





## Andrée Côté – National Association of Women & the Law

1. How does Ms. Côté describe the relationship between living in a multicultural society and protecting religious freedom?

---

---

---

2. Ms. Côté identifies four elements that should be considered when deciding to what extent the government should accommodate religious minorities. What are they?

---

---

---

3. Ms. Côté suggests that there is a better way to address the oppression of minorities than religious arbitration. What is it?

---

---

---

---

4. Identify three effects that Ms. Côté says religious arbitration could have on women.

---

---

---

---

5. What impact will religious tribunals have on society in general, according to Ms. Côté?

---

---

---

---



## Prof. Anver Emon – University of Toronto Faculty of Law

1. What does Prof. Emon suggest will help to define the boundaries of multiculturalism?

---

---

---

2. How does Prof. Emon describe pre-modern Islamic law?

---

---

---

3. According to Prof. Emon, what happened to Islamic family law in the late 19<sup>th</sup> and 20<sup>th</sup> century and why is this important?

---

---

---

4. What does Prof. Emon mean by a “marketplace of ideas” within in the Muslim community?

---

---

---

5. How does government regulation and the *Charter* provide an equal playing field for different Muslim groups to communicate and debate with one another? How is this beneficial to Muslim Canadians according to Prof. Emon?

---

---

---

---

---



## The Great Debate 2006

Name and Organization	Involvement in the Debate (i.e. why were they included?)	Position	Key Supporting Arguments
Nuzhat Jafri - Canadian Council of Muslim Women			
The Honourable Marion Boyd			
Andrée Côté - National Association of Women and the Law			
Prof. Anver Emon - University of Toronto Faculty of Law			



## Classroom Activities

For completion after viewing of The Great Debate DVD

### General Discussion Questions

- Describe the Canadian Council of Muslim Women (CCMW) (When did it begin? Why was it formed? What are some of the past issues addressed by the CCMW? Does it represent Canadian Muslim women?)
- Why was the Honourable Marion Boyd asked by the Ontario government to conduct a review of the Ontario *Arbitration Act, 1991*?
- What are the pros and cons of passage of the *Family Law Statute Amendment Act, 2005*, which incorporated most of the recommendations of the Boyd Report?
- What is Islamic family law?
- What could have happened as an alternative to removing religious arbitrations from the Ontario *Arbitration Act, 1991*?
- How do Canadian or Ontario family laws dealing with matrimonial property, divorce, or support and custody affect women?
- What are the differences between Canadian or Ontario family law and family laws in other countries?
- What other religions have dispute resolution processes that have been incorporated into Canadian law?

### Inner and Outer Circle

Have students line up to form an inner and outer circle facing each other. Ask students to share key learning insights from the Debate with the person across from them. After a few minutes, instruct the inner or outer circle to slide X number of spots to the left or the right so they have someone new facing them. You can repeat the same activity or have students discuss the following questions with a new partner:

- How do *Charter* values of freedom of religion and equality conflict in the debate?
- How should the conflict between freedom of religion and equality be resolved?
- To what extent should we accommodate religious freedom in a diverse, multicultural society?
- What changes in family law have been brought about by changes in attitudes and societal values? Predict possible future developments in family law.

---

## What is your view?

Have students repeat the opinion activities they completed prior to viewing the DVD (refer to pgs. 2 and 9). Ask students to discuss the extent to which their opinions did or did not change.

---

## Reflecting on the Issues

Write a 1-2 page opinion paper answering the following question. Make reference to the family law context, as well as an example from a different context. Give reasons to support your view.

*To what extent should diverse religious practices be accommodated in a multicultural society?*