No Religious Arbitration - Frequently Asked Questions (FAQs)

What is the Issue?

The Arbitration Act in Ontario and similar legislation in other provincial jurisdictions, (with the exception of Quebec) allowed for religious laws to be applied in settling family disputes. Under the Arbitration Act, faith based and privately arbitrated decisions were legally binding. This was of primary concern to CCMW and its allies because although the right of appeal existed, our research found that it was nearly impossible for individuals to exercise it without incurring tremendous personal and financial hardship. We understood that faith, communities, and families are powerful forces in the lives of believing people and felt that it would be very difficult for some Muslim women to go against these forces if religious justification was offered as the preferred alternative in legal matters. More notably it was our belief that the religious arbitration debate was not about singling out or stigmatizing any specific religious community for its beliefs but was instead a matter of a poorly constructed piece of legislation being used inappropriately by certain segments of society.

Accordingly CCMW in conjunction with the No Religious Arbitration coalition advocated for one set of laws to be applied to all Ontarians- regardless of faith, ethnicity, race or culture, under the existing family law legislation. It was our belief that the use of religious based private arbitration violated the hard won equality rights guaranteed under the Canadian Charter of Rights and Freedoms, and created a two tiered, fractured justice system.

What are the concerns regarding the use of the Arbitration Act for family matters?

Based upon consultation with members of the Muslim, the legal and social work community as well as our research including Natasha Bakht's analysis of family arbitration and shariah law, we found a number of troubling practices and trends when it came to religious arbitration:

a) Once the process of arbitration starts, an individual cannot withdraw from the process.

b) The arbitrator can be anyone and does not require any training, legal or otherwise.

c) The arbitration agreement [award] is legally binding and can only be overturned through the use of a court challenge.
d) Past experiences have demonstrated that the courts tend to defer to the arbitrator's decision and rarely have any cases been overturned.

e) The nature of a private agreement (outside the civil court system) is such that it does not lend itself to government intervention, thus deflecting sensitive cases from any form of public scrutiny.

f) The financial, time and emotional costs of a court challenge are enormous and few can proceed to this step.

g) The problematic section of the Arbitration Act which has been used by proponents of the practice and which establishes that other laws could be utilized in arbitration—specifically related to a commercial dispute between the province of Ontario and an American State and was never intended to deal with family arbitration.

h) No other province has allowed its Arbitration Act to be used in family matters.

Legally Binding Arbitration versus Mediation- What is the difference?

Legally binding arbitration is a dispute settlement mechanism that is recognized and enforced by the Canadian courts. Occurring outside of the court setting, arbitration involves the selection of a third and impartial party (arbitrator) by the disputing individuals. These individuals then proceed to participate in a hearing, where they are able to submit evidence and provide testimony, agreeing to observe the arbitrator's final ruling in the matter.

Conversely religious based mediation involves informal community based counseling from religious leaders and not legal professionals and is similar to “good advice” which disputing parties may accept or reject. As the option to opt-out or reject advice is given in mediation, the repercussions on family and finance are not as devastating when compared to egal arbitration. CCMW does not oppose religious mediation and respects the choice of some individuals in the Muslim community to go to elders and religious institutions for advice and counseling. We believe these forms of mediation should continue to happen, but that they should not be backed by the power of the state to make them legally binding.
Is there a difference between Religious Laws versus Religious Principles?

These are very different concepts and these terms should not be used interchangeably or confused as being one and the same, which has unfortunately been the case with the media's coverage of the debate as well as proponents. Islamic Principles refer to the values the Islam as a religion promotes and which Muslims are meant to adhere to and practice. These include values such as equality, social justice and compassion which are outlined in the Quran and the hadith (teachings of the prophet). These principles are also articulated in the Canadian Charter of Rights and Freedoms, which protects the rights of all Canadians and which should not be viewed as something that is incompatible with Islam's overarching principles.

Conversely, religious laws or Fiqh (Islamic jurisprudence) are historically specific legal rulings, developed over the course of the religion's historical trajectory by means of human interpretation of Islam's religious texts. Often these interpretations have come from the perspective of men and are gendered, failing to take into consideration the standpoint and experiences of women. There are currently various initiatives within the Muslim community which seek to achieve more equitable interpretations of the Quran and hadith and CCMW is encouraged by these progressive developments taking place in the area of Muslim family law. However we believe that this is still a legal area needing more development and dialogue within the Muslim community. Understood simplistically, Fiqh is too vast and complex of a subject to be introduced into Canada's legal system with fair results for all of the parties involved.

What is the Boyd Report?

The government of Ontario appointed Marion Boyd to review the Arbitration Act in the summer of 2004 of which CCMW submitted its own recommendations (link to document of recommendations). The report was made public in December of 2004 and outlined 46 recommendations (not requirements) for the Arbitration Act. CCMW and its allies were not pleased with report. The Ontario Institute of Dispute Resolution, Ontario Association for Family Mediation and Family Mediation Canada established that Boyd's recommendations would not protect vulnerable people and were troubled with some of her recommendations/conclusions. This included her belief that arbitrators did not require training that legal aid was not necessary and that women were able to give up their right to
legal advice. More importantly, Boyd herself noted that as these private agreements did not possess any written records—it was very difficult to assess the impact that they had on vulnerable peoples (women and children).

What was the official decision?

On September 11th 2005 Premier Dalton McGuinty announced that there will no longer be religious laws used in arbitration and that “One law will apply to all citizens and that is Ontario and Canadian law.” Since then the government of Ontario has introduced Bill 27 in the Fall of 2005 which passed its third reading on Feb 14 2006 with Royal assent being granted in March 2006. The introduction of the Family Statute Law Amendment Act, 2005, amends a number of other legislations and the changes include:

- Family arbitration agreement must be in writing.
- Arbitrators must keep records and submit reports to the Attorney General.
- There is to be regulation for family law arbitrators and they must undergo training.
- Each party must receive independent legal advice before entering an agreement.
- The right of appeal cannot be waived.
- No one can be committed in advance to arbitration.
- Agreements have to consider the best interests of the children.
- Funds are to be provided for public education and outreach.

If other communities were using religious arbitration already, then shouldn’t the Muslim community be able to also?

Our research found that other religious groups were not using religious arbitration as much as it has been presented by proponents of the practice. We have found no Christians making use of it. The Muslim Ismaili community has relied on Canadian Law and the Jewish Beis Din only utilize it for their religious divorces called “get.” Only a small segment of the Jewish community, including the Hasidic and (some) Orthodox members use the Beis Din. In 2005 only two cases in Ontario used the Arbitration Act to settle family matters. Based upon these trends the Premier’s decision is fair and just as it does not allow religious arbitration for any religious community in Ontario.
Who was involved in the campaign?

CCMW with the help of many others groups created a coalition of 50 groups who endlessly campaigned against religious arbitration and although there were many differences amongst us, all pulled together for the same principles. Furthermore, prominent Canadians agreed to a joint letter which was published in the Globe and Mail on Saturday Sept 10/06. Politicians also played a prominent role, especially the Liberal Women's Caucus, at both the federal and provincial level who became allies in our battle. We also received support from international partners such as Women Living Under Muslims Laws and are most grateful to Rights and Democracy for bringing these lawyers, scholars and activists to Canada.