

## **DON'T THROW OUT MY BABY! WHY DALTON MCGUINTY WAS WRONG TO REJECT RELIGIOUS ARBITRATION**

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On September 11, 2005, Ontario Premier Dalton McGuinty informed the Canadian Press that his government would act to remove the arbitration of family law disputes from the operation of the province's *Arbitration Act*.<sup>1</sup> McGuinty said religious arbitration could not be part of a cohesive multicultural society and from that point forward there would be "one law for all Ontarians".<sup>2</sup> In so doing, McGuinty sought to end debate on whether Ontario should continue to accept binding arbitration of family law disputes. This debate was sparked by publicity surrounding a new Islamic tribunal in Toronto that proposed to arbitrate Muslim family disputes on faith-based principles.

McGuinty's choice rejected the recommendations made by former Ontario Attorney General Marion Boyd, whom he had commissioned to examine the issue, and did so by relying on either (1) classic liberal conceptions of absolute shared citizenship, or (2) feminist critiques of multiculturalism. The former justification is offensive to some of Canada's founding principles. The latter, while a valid criticism of private arbitration of family disputes, should have led the premier to implement the Boyd Report. Instead, he intends to throw out the baby with the bath water.

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<sup>1</sup> S.O. 1991, c. 17.

<sup>2</sup> "McGuinty rules out use of sharia law in Ontario" *CTV News* (12 September 2005), online: CTV.ca  
<[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217\\_26/?hub=TopStories](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1126472943217_26/?hub=TopStories)>.

## The Baby: Why Arbitration of Family Disputes Is Good

Binding arbitration of family disputes has been available in Ontario since the nineteenth century.<sup>3</sup> It is enabled by government legislation that compels the courts, with some exceptions, to enforce the decisions of private arbitrators on application by the “winning” party. Arbitrators are appointed by the disputing parties in an arbitration agreement, which functions like a private contract. In 1992, Ontario adopted the new *Arbitration Act* to further limit the courts’ discretion to refuse or vary awards.<sup>4</sup> A “losing” party has a statutory right to appeal, but it may be waived. A losing party also has a right to seek to invalidate an award on the rules of contract law or on application for judicial review, but the latter option is limited. In family disputes, judicial review will likely only arise because of a breach of procedural fairness,<sup>5</sup> or because the award engages the courts’ common law *parens patriae* jurisdiction to interfere for the best interests of children.<sup>6</sup>

There are two justifications for binding arbitration of family disputes: efficiency and freedom of choice. Boyd reports that arbitration and other alternative dispute mechanisms “offer some relief for court backlogs that [are] causing family disputes to drag on over time, thus exacerbating the conflicts”.<sup>7</sup> Indeed, as recently as September 2004, current Ontario Attorney General Michael Bryant called arbitration

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<sup>3</sup> Marion Boyd, “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion” (20 December 2004), online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>> at 11.

<sup>4</sup> *Boyd*, *supra* note 3 at 11.

<sup>5</sup> *Hercus v. Hercus*, [2001] OJ No. 534 (S.C.) at paras. 77, 130 and 135.

<sup>6</sup> *Duguay v. Thompson-Duguay*, [2000] OJ No. 1541 (S.C.) at paras. 31-32.

<sup>7</sup> *Boyd*, *supra* note 3 at 34.

“the invaluable way in which we’re achieving justice in the province”.<sup>8</sup> So binding arbitration provides an alternative venue for speedier resolution of family disputes. This usually means fewer costs for the parties involved and always means less cost for the justice system.

The stronger justification is freedom of choice. Arbitration offers citizens the benefit of resolving disputes away from the formal courtroom environment, with an arbitrator of their choice and, within limits, according to the principles they choose.<sup>9</sup> To a cultural minority, arbitration is of additional utility because they can use it to resolve family disputes according to their own values, which may differ in important respects from those held by the dominant community. So long as these intra-group resolutions do not violate baseline rights guaranteed by individual Canadian citizenship, this flexibility creates what Will Kymlicka envisioned as multicultural citizenship, and may provide a minority community with better resolutions to family disputes than are available to them in a court system that is generally blind to cultural differences.

Kymlicka largely agrees with classic liberalism on the importance of the liberty for each person to pursue their own individual good and the resulting just society.<sup>10</sup> However, he adds, a just society may require that members of minority communities be able to exercise group-specific rights in addition to their individual citizenship rights.<sup>11</sup> This is because (1) one’s culture provides context for determining one’s good, and its exercise is therefore a basic source of self-actualization and fulfillment;<sup>12</sup> and (2) the laws and policies of the dominant culture, even if applied equally, will often be experienced

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<sup>8</sup> John Jaffey, “AG Promises Family Law Update to Reflect Changing Society” *The Lawyers Weekly* 24: 19 (24 September 2004).

<sup>9</sup> *Supra*, note 1, s. 32(1) of the *Arbitration Act* allows arbitrations to be run according to rules of law designated by the parties.

<sup>10</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, Clarendon Press, 1995) at 80-82.

<sup>11</sup> *Ibid.* at 96-97.

<sup>12</sup> *Ibid.* at 106-107.

negatively by minorities.<sup>13</sup> For instance, intestate succession in Ontario follows rules set out in the *Succession Law Reform Act* that distribute the estate in a hierarchy.<sup>14</sup> Some aspects of this, like favouring independent children over independent parents, are arbitrary choices that reflect the dominant culture's presumption of the nuclear family as the basic social unit. When a minority community does not share this presumption they may experience intestacy as a restriction on their liberty to exercise their culture. Thus Kymlicka's just society might defer to the minority community on certain intestacy laws.

Of course, some of Ontario's intestacy laws are policy-driven choices directed at reducing the feminization of poverty by ensuring that spouses have priority rights to the deceased's estate. Deference that sacrificed these rights at the altar of minority group rights would be undesirable because it would amount to a step backward in ensuring women's equal capacity to pursue their good. It would also therefore be a violation of the primacy of individual rights that underlies Kymlicka's theory of the just society.

So, in my view, arbitration may be beneficial to family law in Ontario because (1) it is more efficient for both citizens and the justice system, (2) it provides citizens with greater freedom of choice in how they resolve family disputes and (3) it may allow minority groups to exercise their cultural values in the resolution of family disputes, so long as they do not violate individual rights.

## **The Bath Water: Why Arbitration of Family Disputes Causes Problems**

Kymlicka's theory does not go unassailed. Its critics argue that the reality of state-sanctioned group rights in a multicultural society is (1) balkanization of ethnicities, cultures and religious groups and (2) the hidden oppression of women within patriarchal minority cultures and religions.<sup>15</sup> The paucity of McGuinty's statements leaves the

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<sup>13</sup> *Ibid.* at 108-109.

<sup>14</sup> R.S.O. 1990, c. S.26, ss. 44-47.

<sup>15</sup> Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies" (2005) 50

impression that he has rejected family arbitration out of a fear that recognition of group rights will lead to entrenched legal pluralism and erosion of a cohesive civil society. But Canada's very foundation is legal pluralism. It is a compromise founded on federalism: a regional legal pluralism specifically intended, among other things, to accommodate a cultural and religious minority: French Canadians.<sup>16</sup> Further, although we tend to ignore this, Aboriginal title in Canada is premised on the pre-existing authority of Aboriginal systems of law.<sup>17</sup> Outside of rights ceded through treaty, Aboriginal legal systems continue to operate in concurrence with Canadian law.<sup>18</sup> First Nations are also subject to a distinct legal regime under the *Indian Act*. Finally, religious arbitration of family disputes has carried on in Ontario for some time and the province is not, as a result, a haven of ethnic ghettos and internecine dispute.<sup>19</sup>

Thus it would be absurd to reject religious arbitration of family disputes in fear of legal pluralism, and I cannot imagine McGuinty did so. It is far more likely that he rejected arbitration on the basis of the feminist critique of multiculturalism. Supporting this inference, on September 8, 2005, three days before McGuinty's announcement, Attorney General Michael Bryant wrote: "there will be no binding

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McGill L.J. 49. Shachar also notes civic-republicanism and ethnoculturalism as other critiques of multiculturalism but these theories have not, I think, played a role in the arbitration debate.

<sup>16</sup> *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217 at paras. 43-44.

<sup>17</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 114.

<sup>18</sup> See *Connolly v. Woolrich* (1867), 11 L.C. Jur. 197, 17 R.J.R.Q. 75 (C.S. Que.), where the Court found that a marriage between a white man and Cree woman conducted in accordance with Cree law was binding on the parties under Quebec law.

<sup>19</sup> Boyd, *supra* note 3 at 55-61. Boyd notes in particular the Toronto Jewish community's Beis Din arbitration tribunals, the Ismaili Muslim National Conciliation and Arbitration Board, and the El Noor Mosque in Toronto. All have been arbitrating since before the 1992 enactment of the present *Arbitration Act*.

family arbitration in Ontario that uses a set of rules or laws that discriminate against women”.<sup>20</sup>

Ayelet Shachar and Natasha Bakht, employing the feminist critique in separate papers, argue that women in minority communities are the frequently unheard victims of state efforts to accommodate group rights, and of minority group efforts to express their cultural values.<sup>21</sup> This problem frequently plays out in family law because (1) the continuing public/private divide encourages state regulation to keep out of much of what occurs in the family and (2) minority groups, like everybody, feel the shape and management of the family is an important locus of cultural expression.<sup>22</sup> Thus family arbitration, and particularly faith-based arbitration, is a model example of minority cultures seeking to exercise greater control over family law because it is a major venue for expression of their values, while the state is prone to accommodate because the family is still the “private” sphere, albeit to a lesser extent than in the past.

Because minority communities frequently retain more patriarchal values than wider Canadian society, the critique continues, and women in minority communities who resolve family disputes through arbitration will be robbed of the benefits of legal reforms available in the courts, such as mandated divisions of matrimonial property and statutory guarantees of spousal and child support.<sup>23</sup> They may also be denied the benefits of screening for abuse that (ideally) takes place when family disputes enter the legal system.

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<sup>20</sup> Michael Bryant, “Statement by Attorney General on the Arbitration Act, 1991” (8 September 2005), online: Ontario Ministry of the Attorney General  
<<http://www.attorneygeneral.jus.gov.on.ca/english/news/2005/20050908-arb1991.asp>>.

<sup>21</sup> Shachar, *supra* note 15 at para. 6. See also Natasha Bakht, “Arbitration, Religion and Family Law: Private Justice on the Backs of Women” (March 2005) online: National Association of Women and the Law  
<<http://www.nawl.ca/Documents/Arbitration-Final-0305.doc>> at 40.

<sup>22</sup> Bakht, *supra* note 21 at 39.

<sup>23</sup> Shachar, *supra* note 15 at para. 22. Bakht at 40.

These women are unlikely to protest this unequal treatment because (1) they are unable to claim their individual rights due to language, culture and socioeconomic barriers, (2) they fear abuse and alienation from their community, or (3) they are unwilling to claim these rights because they do not wish to undermine their minority culture.<sup>24</sup> Thus the effect of allowing family arbitration is to further marginalize the very women who were meant to enjoy greater fulfillment and self-actualization via enhanced freedom of choice and cultural expression. The freedom of the minority community begets a cultural prison for the minority woman—no doubt a step backward in Canada's efforts to ensure substantive equality.

Bakht also argues that secular women from the dominant community are similarly vulnerable to the disadvantages of private arbitration.<sup>25</sup> Although not subject to faith-based arbitration, these women may find systemic gender discrimination influences arbitration to a greater extent than the courts because arbitration lacks statutory standards and procedures. And while not subject to the same barriers of language, culture and threatened alienation, they may be similarly likely to accept unjust arbitral awards if they are abused or do not have the socioeconomic resources to do otherwise. In this way family arbitration may pose the same threats to women from the dominant community as it does to women from minority communities.

## **Keep the Baby, Toss Most of the Bath Water: The Boyd Report**

Despite these critiques, the Boyd Report concluded that Ontario should attempt to retain the benefits of arbitration. In my view this conclusion reflects a realistic appraisal of Ontario's options and a conviction that there is an acceptable balance to be found between the benefits and dangers of private arbitration.

The key question is whether private resolutions of family disputes should be upheld by the courts and, if so, under what conditions. It is not about whether or not private resolutions to family disputes should take place. Critics acknowledge that even abolishing binding family arbitration will not stop individuals, particularly those in religious

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<sup>24</sup> Bakht, *supra* note 21 at 41, 64-65.

<sup>25</sup> Bakht, *supra* note 21 at 63.

minority communities, from resolving disputes by private contract and faith-based tribunals.<sup>26</sup> A comparative study indicates that Muslims in Britain, polled in 1989, were twice as likely to resolve family disputes in faith-based tribunals even though the decisions held no legal authority in the courts.<sup>27</sup> Granted, ending binding arbitration will almost surely eliminate its use amongst secular Ontarians who will see little incentive to undertake a process the courts will disregard. But for members of a religious community, the decisions of a faith-based tribunal will continue to carry substantial authority on the basis of community, culture and religion. The feminist critique's primary concern in private arbitration is vulnerable women, those who are unable or unwilling to seek judicial remedy of their unjust treatment, and who will continue to abide by the private resolution of family disputes in faith-based tribunals after binding arbitration is gone.

A second point is that the critique relies on the assertion that the benefits of Kymlicka-style accommodation are theoretical while the actual effect of accommodation is the oppression of women. However this has yet to be established. Boyd did not find any evidence to suggest that women are being systematically discriminated against in family arbitration, faith-based or not.<sup>28</sup> Bakht is correct to argue that this conclusion does not mean that discrimination is not happening.<sup>29</sup> It is quite likely that some women are unable or unwilling to appeal arbitral decisions, apply for judicial review or come forward about unjust treatment. It is equally plausible that some women are unaware that this treatment is unjust relative to their individual rights. Nevertheless, in this total absence of evidence it would be rash to

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<sup>26</sup> Bakht, *supra* note 21 at 65. See also Jean-Francois Gaudreault-DesBiens, "The Limits of Private Justice?: The Problems of State Recognition of Arbitral Awards in Family and Personal Status Disputes in Ontario" (2005) 16:1 World Arbitration and Mediation Report 23.

<sup>27</sup> Pascale Fournier, *The Reception of Muslim Family Law in Western Liberal States* (30 September 2004), online: Canadian Council of Muslim Women <<http://www.ccmw.com/Position%20Papers/Pascale%20paper.doc>> at 25.

<sup>28</sup> Boyd, *supra* note 3 at 133.

<sup>29</sup> Bakht, *supra* note 21 at 57.

eliminate the benefits of arbitration without first trying to quantify and remedy its likely weaknesses.

So the practical result of prohibiting family arbitration in Ontario will be (1) loss of the benefits of efficiency, freedom of choice and multicultural accommodation, (2) continued use of private resolutions of family disputes by at-risk women in minority communities and, (3) the only ostensible benefit, the virtual elimination of arbitration amongst at-risk secular women—all on the basis of a reasonable suspicion of unverifiable injustice.

By contrast, implementing the Boyd Report would allow the existing benefits of binding arbitration to continue while alleviating some of the problems of unregulated private arbitration. Boyd's recommendations propose to do this in three ways: (1) better oversight of family arbitration, (2) more avenues for the courts to interfere with or revoke arbitral awards and (3) more opportunities for women to opt out of arbitration.

First, Boyd recommends making private arbitration of family law a regulated arena. She suggests the formation of a self-regulating industry much like a provincial bar association.<sup>30</sup> She would require that, in every instance, arbitrators certify in writing that they have screened the parties for abuse.<sup>31</sup> All arbitrators would also be required to maintain written records of arbitral awards and to submit summaries, free of identifying information, to a branch of the provincial government or, upon its formation, to the self-regulating professional association.<sup>32</sup> Over time, these records would constitute actual evidence that could be used to conduct real policy research into the incidence of unjust treatment and appropriate responses. Ideally, in the event that evidence shows a particular arbitrator or tribunal is systematically discriminating against women, or they refuse to submit records, the professional association could remove their license to

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<sup>30</sup> Boyd, *supra* note 3 at 135-136. Recommendation 14.

<sup>31</sup> Boyd, *supra* note 3 at 136. Recommendations 18 and 19.

<sup>32</sup> Boyd, *supra* note 3 at 140-141. Recommendations 38, 39 and 41. Additionally, in Recommendation 20, Boyd suggests that a court could set aside an award if the required documents for the arbitration were not maintained; at 137.

practice. This would result in legal sanctions were the impugned tribunal to continue to practice—an option not available against faith-based tribunals if binding arbitration is prohibited altogether.

Second, Boyd recommends increasing the courts' avenues to interfere with arbitral awards. Boyd recommends that arbitral awards be included in the class of domestic contracts the courts may vary under the protections of s. 56(4) of the *Family Law Act*.<sup>33</sup> This recommendation would effectively add three grounds to the existing bases for judicial review: if a party to the arbitration is receiving social assistance, if a party fails to disclose assets or liabilities, or if a party does not understand the nature and consequences of the arbitration.<sup>34</sup> Classifying arbitration awards under s. 56(4) would also make them subject to the courts' right to review the validity and fairness of domestic contracts.<sup>35</sup>

Third, Boyd makes suggestions aimed at improving the prospects that at-risk women would either opt out of arbitration or exercise their rights to appeal and judicial review. Boyd recommends that an arbitration award be invalid without prior signed certificates of independent legal advice or signed waivers of independent legal advice.<sup>36</sup> She also recommends that arbitration agreements that form part of a marriage contract must be reconfirmed in writing at the actual time of the dispute but before arbitration begins.<sup>37</sup>

## Conclusion

Of course problems remain. A self-regulating professional association is unlikely to gain powers of coercion over arbitrators for quite some time. Women may continue to experience injustice while the government gathers and analyzes factual evidence. Expanded judicial review does not mean vulnerable women will be any more empowered to exercise the option. Boyd's recommendations continue

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<sup>33</sup> R.S.O. 1990, c. F.3.

<sup>34</sup> Boyd, *supra* note 3 at 133-134. Recommendations 3 and 8.

<sup>35</sup> See *Miglin v. Miglin*, [2003] 1 S.C.R. 303 at para. 51.

<sup>36</sup> Boyd, *supra* note 3 at 134 and 137. Recommendations 9(b) and 21 to 24.

<sup>37</sup> Boyd, *supra* note 3 at 134. Recommendation 5.

to allow parties to entirely waive their rights to appeal and independent legal advice. However, some of these shortfalls are Boyd's concessions to the benefits of efficiency in arbitration. Were McGuinty so inclined, he could strengthen the recommendations, at some cost to efficiency, for greater protections against the risk of injustice. He could make independent legal advice mandatory and eliminate the ability to waive appeals on questions of law.

Unfortunately, women made vulnerable by the intersection of disadvantage in gender, class, religion and language will continue to be exposed to the risk that they may be treated unjustly in private arbitration. The Boyd recommendations can only address this peripherally. But the truth is these same women will be exposed to this risk even if arbitration is prohibited, and the injustice is unlikely to register in any public record. By regulating private arbitration of family disputes, faith-based or otherwise, Ontario can gain a better understanding of whether systemic discrimination is occurring and address the problem without a needless sacrifice of the flexibility of arbitration. There is a balance to be found here.

## Postscript

On February 14, 2006, several months after I set this argument out, the Ontario legislature passed the *Family Statute Law Amendment Act*<sup>38</sup> to give effect to McGuinty's promise that there would be one law for all Ontarians. Instead of prohibiting family arbitration altogether, the *Act* implements all the safeguards of the Boyd Report I highlighted above, including mandatory certificates of independent legal advice and an unconditional right to appeal.

Despite this invigoration of judicial and policy oversight of family arbitration, the *Act* nonetheless mandates in ss. 1(2) and 5(10) that family arbitration must be conducted exclusively in accordance with the law of Ontario to have any legal effect, thus banning faith-based arbitration. This seems unnecessarily parochial and destined for challenge under the *Canadian Charter of Rights and Freedoms*.<sup>39</sup>

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<sup>38</sup> S.O. 2006, c. 1.

<sup>39</sup> Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

As Tarek Fatah of the Muslim Canadian Congress asserted after the amendments were passed, it may be that the nascent Islamic Tribunal that sparked the debate was indeed an attempt by Islamic fundamentalists to make headway via Canadian multiculturalism.<sup>40</sup> And clearly it is not desirable to facilitate hermetic mini-theocracies within Canada. But McGuinty's blunt response of total prohibition ignores the examples of success Boyd found in the Jewish Beis Din, the Ismaili Muslim National Conciliation and Arbitration Board, and the El Noor Mosque in Toronto.<sup>41</sup> It also remains the case that at-risk women in minority communities will continue to feel the authority of faith-based tribunals, whether they are part of the province's arbitration regime or not.

In my view it would still be best to make these bodies subject to the newly enacted powers of judicial and policy oversight. Even if Tarek Fatah is right about the influence of fundamentalist Islam, are not the new powers of judicial oversight a better remedy than no oversight at all? And is this manifestation of Islam so completely insidious that its control demands a total ban on all faith-based arbitration? In the context of the *Charter* it is arguable this blanket prohibition is not a demonstrably justifiable and reasonable limit on freedom of religion under s.1. Although there is a rational connection between the ban on religious arbitration and the protection of at-risk women in minority communities, the prohibition is not a minimal impairment of the religious freedom in question. As such I question whether it is not sure to draw *Charter* challenge from those communities who were arbitrating on faith-based principles prior to the controversy.

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<sup>40</sup> Lee Greenberg, "Ontario Bans Religious Arbitration, Legal Since 91" *CanWest News Service* (15 February 2006), online: Canadian Jewish Congress<<http://www.cjc.ca/template.php?action=itn&Story=1645>>.

<sup>41</sup> See Shachar, *supra* note 15.