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FAMILY ARBITRATION: ONE STEP FORWARD, TWO STEPS BACK

SHELLEY MCGILL*

RéSUMÉ
La réglementation introduite récemment en Ontario en matière d'arbitrage familial représente une rupture importante avec la politique existante sur l'arbitrage. Le nouveau cadre comporte un mécanisme compliqué de freins et de contrepoids visant à prévenir les parties vulnérables contre des accords pouvant intervenir avant l'arbitrage. Il remet en question les principes bien établis en matière d'arbitrage que sont l'autonomie des parties, la finalité, et la confidentialité. Cet article passe en revue les nouvelles exigences en matière d'arbitrage familial en vertu de la Loi de 2006 modifiant des lois en ce qui concerne des questions familiales et établit une comparaison avec les recommandations de Marion Boyd, ex-procureure générale de l'Ontario, contenues dans son rapport intitulé Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion (« Résolution de conflits dans le droit familial : protéger le choix, promouvoir l'inclusion »). Les forces et les faiblesses du nouveau cadre d'arbitrage familial sont discutées, ainsi que les implications pour les politiques, et la pratique, de l'arbitrage.

INTRODUCTION
The passage of the Family Statute Law Amendment Act, 20061 introduces a new specialized category of arbitration to the ever-expanding arbitration field that already includes domestic arbitration, commercial arbitration, consumer arbitration, and international commercial arbitration. Family arbitration2 is being regulated in

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2. Family arbitration is a new defined term under s. 1 (1) FSLAA. It includes arbitration of matters that could be covered in a domestic contract and are resolved using Ontario or Canadian law. No other criteria will qualify as family arbitration.
response to concerns over the use of faith-based tribunals for family dispute resolution. The major concerns were that religious principles could be inconsistent with Canadian principles of equality, the religious tribunal process may lack transparency, and the lack of free and informed consent to the choice of a faith-based tribunal could result in domination over vulnerable parties. The new Act represents a well-intentioned legislative attempt to protect the vulnerable, but severely erodes existing arbitration policy that prioritizes a party's right to select the process, the expert, and the applicable law.

Family arbitration will be a separate process regulated by both the Ontario Arbitration Act, 1991 and the Family Law Act. The new process outlined in the Family Statute Law Amendment Act, 2006 departs from arbitration policy and undermines the traditional advantages associated with the choice of arbitration. The result will be a reduction in the number of family disputes resolved this way. Historically, disputants chose arbitration because of the speed with which it can be completed using a process and an expert of their choice. The resulting award is private and final. Family arbitration represents a second recent departure from a longstanding Ontario policy in favour of arbitration and the enforcement of arbitration agreements. The break with policy is even more severe than the recommended changes proposed by Marion Boyd's report on faith-based arbitration. This paper will review the new requirements for family arbitration and assess the impact of the changes on arbitration advantages and policy.

THE BOYD RECOMMENDATIONS AND THE FAMILY STATUTE LAW AMENDMENT ACT, 2006

In December 2004, after months of studying the use of private arbitration to resolve family and inheritance disputes and the impact of religious tribunals on the vulnerable, Marion Boyd, former Attorney General of Ontario, released a report entitled Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion, containing forty-six recommendations. The Boyd recommendations proposed many of the requirements that now appear in the new legislation, including independent legal advice, regulation of family arbitrators, and adoption of domestic contract status and protections for family arbitration agreements. However, the new Family Law Statute Amendment Act, 2005 (FSLAA) rejects the most fundamental and underlying

5. Ontario adopted a new arbitration policy with the introduction of the Arbitration Act, 1991. This policy is outlined later in this paper. See notes 25 and 28.
premise of all the Boyd recommendations: retention of the right to choose religious principles as a choice of law.

The Boyd scheme respected party autonomy and retained a party's right to choose any law for use in family arbitration, including faith-based principles. In an effort to retain this fundamental advantage of arbitration, the report recommended an elaborate scheme aimed at creating informed consent to faith-based choices through the use of a statement of faith-based principles and independent legal advice.\(^8\) It recommended expanded government and court oversight of faith-based outcomes to ensure compatibility with fundamental Canadian principles.\(^9\)

The concerns expressed by critics of faith-based tribunals were that some religious principles may discriminate against women, may not respect the principle of the best interests of the children, may not respect equality principles, and may not be compatible with Ontario family law.\(^10\) There was also fear that vulnerable parties may feel compelled by their religious community to choose a religious tribunal, despite the fact that it was not in their best interests. In this circumstance, the party could not make a free and informed choice. Despite the fact that Boyd found no evidence of systemic discrimination against women involved in family arbitration, opposition to the use of religious principles in family arbitration remained high, even after the release of the Boyd report.\(^11\) It was suspected that abuses may not come to light in the private forum of arbitration. Boyd's elaborate process designed to provide free and informed consent would ensure that unfair results would be binding on women. The FSLAA responds to these concerns by eliminating religious principles as an available choice of law in family arbitration.

The FSLAA did not take the most drastic position possible: a complete ban on family arbitration, as has been done in Quebec.\(^12\) Instead, it amends the Family Law Act and the Arbitration Act, 1991 to specifically create a new category of arbitration: family arbitration. This new category is allowed only a very narrow choice of law. Family arbitration is defined as an arbitration that deals with any matter that could be cov-

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8. Boyd, supra note 6, Recommendations 2, 16, 17, 22, 24, & 46.
9. Ibid., Recommendation 34, 40, 41, & 46. For a more complete discussion of the Boyd recommendations, see McGill, supra note 7.
12. Article 2639, Civil Code of Quebec, S.O. 1991, c. 64; Quebec has also passed a resolution opposing the establishment of Islamic tribunals. This opposition is not restricted to family dispute resolution. Quebec National Assembly, 37th Legislature, Session 1, Motion 26 May 2005, online: National Assembly <http://www.assnat.qc.ca/eng/37legislature1/Pv/PA20050526.pdf>.
This definition excludes much more than just religious principles as potential choices of law. Legal principles from any other jurisdiction are excluded, for example, from the United States, the United Kingdom, or Australia. The use of the word “exclusively” restricts the application of any other consideration in even a minor way. Comparisons with American or English jurisprudence would be blocked. Any arbitration of family matters that is not determined using Canadian law is not considered a family arbitration; the award has no legal affect; and it cannot be enforced through the courts. It is considered advice only.

It would have been possible for the amendments to stop at this point, having eliminated the risks associated with the choice of religious principles. However, the legislation goes on to incorporate many of the protections recommended by Boyd now being applied to protect the vulnerable for a more general purpose. The result is a far more controlled process for family arbitrations than any other type of arbitration. The protections have a slightly narrower application than Boyd recommended. The new legislation makes no mention of inheritance disputes, as Boyd did. Only those limited spousal election areas that could be dealt with in domestic contracts will be covered by the new protections. In addition, many of the Boyd recommendations covered both mediation and arbitration. The FSLAA makes no reference to mediation or mediation agreements except to amend the Child and Family Services Act to include arbitrators and mediators as professionals required to report a child in need of protection.

An agreement that calls for family arbitration is now a domestic contract governed by the Family Law Act. It may be set aside for the same reasons as any other domestic contract, as well as for failure to comply with the Arbitration Act, 1991, or its regulations. The rules relating to the form of the agreement and the process for entering into the agreement are split between the two acts. The Arbitration Act, 1991 is given the power to regulate the form of family arbitration agreements including standard clauses and awards. Boyd's recommendation number 12 included detailed suggestions about the contents of an arbitration agreement, including explicit statements outlining available remedies under all legislation. The FSLAA regulations are not yet in place. The Family Law Act requires writing, signatures, witnessing, and complete financial disclosure. This disclosure will be necessary even though the dispute may involve only custody and access. It is required for the validity and enforceability of the agreement; it is not tied to the substantive issue in dispute.

13. Sections 1 and 2.2 of the Arbitration Act, 1991, S.O. 1992, c. 17 as am. by ss. 1 (1) & (2) FSLAA; Section 51 of the Family Law Act, R.S.O. 1990, c. F. 3, as am. by s. 5 (7) FSLAA; Section 32 of the Arbitration Act, 1991, S.O. 1992, c. 17, allows parties involved in other domestic arbitration to designate any rule of law to be applied by the arbitrator. This section no longer applies to family arbitration.

14. Section 72 (5) sub. para (b.2), Child and Family Services Act, R.S.O. 1990, c. C. 11, as am. by s. 2 FSLAA.

15. Section 51, Family Law Act, R.S.O. 1990, c. F. 3, as am. by s. 5 (6) FSLAA, supra note 1.
Unlike other domestic contracts, a family arbitration agreement must be entered into after the original dispute arises and with independent legal advice. Boyd did not ban pre-dispute agreements, but called for a reconfirmation of the choice of arbitration after the dispute arose. The result would have been a less extreme departure from the traditional advantages of arbitration. Critics argued that this trapped the vulnerable party once the pre-agreement steps were complied with.

The independent legal advice requirements contained in the FSLAA go further than the Boyd recommendations. There is no opportunity to waive the requirement of obtaining independent legal advice prior to entering into the agreement, as the Boyd report allowed. An award arising from an agreement entered into without independent legal advice is automatically unenforceable without the application of the principles of undue influence or unconscionability. Interestingly, this is not the case for other domestic contracts. There is an exception made for secondary arbitrations; these are continuing disputes leading to multiple arbitrations where a separation agreement contains the original arbitration agreement. Any subsequent arbitration is considered as arising from a post-dispute agreement and is exempt from any further independent legal advice requirement.

Boyd placed additional responsibilities on mediators and arbitrators to assess free and informed consent with specific consideration for domestic violence and power imbalances. The Arbitration Act, 1991 is amended by the FSLAA to give the power to regulate arbitrators on this issue and to prescribe mandatory training in this type of screening. As previously stated, compliance with the regulations is necessary before enforcement under the Family Law Act can take place. It is hard to assess the impact of yet unwritten regulations, but there is a concern arising from the enforcement prohibition for non-compliance with the regulations. Many of the regulatory topics deal with arbitrator qualifications and administrative record-keeping. These regulations may result in an innocent party being unable to enforce an otherwise acceptable award as a result of an unknown administrative breach by the arbitrator.

The yet unknown qualifications required of a family arbitrator may be the subject of regulations under the Arbitration Act, 1991. The regulatory power is permissive and not mandatory. Boyd recommended mandatory membership in an approved

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18. Boyd, supra note 6, Recommendations 13, 21, 22, 23, & 24; s. 59.6 (1) & (2) Family Law Act, R.S.O. 1990, c. F. 3, as am. by s. 5 (10) FSLAA, supra note 1.
professional organization and speculated that a self-regulating profession should be the goal. This objective hardly seems necessary any longer. If the only choice of law is the law of a Canadian jurisdiction, it seems that the various law societies are the only organizations in a position to determine who has the requisite expertise to apply the respective legal principles. It is possible that other organizations such as the ADR Institute of Ontario will be marginalized. An arbitrator's need for training in screening for domestic violence and power imbalances may also be the subject of future regulation. Concern has been raised about imposing the responsibility for screening on the arbitrator. This will require an arbitrator to meet separately with each party and consider information that is not supplied to the other party. This is a concern for fair and equal process. Presently, we do not know who will be considered qualified to arbitrate family disputes or what screening tasks they will be required to complete. The missing regulations are a key element in arbitrator qualification.

Family arbitration is now more controlled than other domestic arbitration. The legislation made no attempt to define the existing requirement of a "fair and equal process" as was suggested by the Boyd report. However, the FSLAA does adopt the screening obligations associated with power and violence. If this becomes the responsibility of the arbitrator, valuable neutrality and impartiality will be lost. The process is also changed by enshrining the right to appeal an award to the Family Court or the Superior Court of Justice and dispensing with the deemed waiver of defects that arises from participation in any other domestic arbitration. The existing waivable appeal right applies only to matters of law unless the agreement allows appeals on fact. The new unwaivable appeal right will lengthen the process. The FSLAA amends the Children's Law Reform Act to clearly articulate the "best interests of the child" as the standard to be applied in determining custody and access issues. Section 24 provides a non-exhaustive list of factors and a limitation on the use of past conduct. Violence against members of the family or household is now a mandatory consideration.

A family arbitration award may be enforced under the Family Law Act only after compliance with all of the legislative and regulatory requirements of the Arbitration Act, 1991. This means the existing arbitration requirement that awards be written, reasons be given, and copies be provided to the parties has new teeth, since non-compliance will prevent enforcement. The permissive regulatory powers of the Arbitration Act, 1991 hint that the Boyd recommendations relating to government

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22. Section 59 (6), Family Law Act, R.S.O. 1990, c. F. 3 as am. by FSLAA.
oversight, reporting, and arbitrator record-keeping will be adopted.\textsuperscript{24} Again, administrative record-keeping errors will block enforcement of an otherwise acceptable arbitration award. Boyd recommended that this type of infraction be grounds for removal from the professional association. In addition to being subject to an unwaivable right to appeal, an award may be set aside for all of the same reasons as a domestic contract. No mention is made of interlocutory or interim awards. Currently, these are enforced through s. 50 of the \textit{Arbitration Act, 1991}. Moving enforcement entirely to the \textit{Family Law Act} makes the \textit{Arbitration Act, 1991} process unavailable for this purpose. The \textit{FSLAA} makes no specific mention of interim awards but adopts s. 50 language for enforcement under the \textit{Family Law Act}.

The enforcement mechanism set out in s. 59.8 of the \textit{Family Law Act} allows for swift access to the courts upon the filing of a copy of the award, the agreement, and the certificate of independent legal advice. The court is obligated to enforce the award along the same lines as set out in s. 50 of the \textit{Arbitration Act, 1991}, provided the appeal period has passed. One phrase borrowed from s. 50 could lead to complications in enforcement. A court may replace the remedy granted in an award with one of its own choosing if the court finds that the remedy in the award is one that the court "would not grant in a proceeding based on similar circumstances." It is possible that this entitles the court to conduct a review on the merits prior to enforcement. Traditional forms of enforcement are still available through s. 59.6 of the \textit{Family Law Act}, which allows a family arbitration award to be enforced in the same way as a domestic contract. Presumably, this means through a breach of contract action.

Generally, the \textit{Family Statute Law Amendment Act, 2006} presents a tightly controlled process. The responsibilities and requirements are inefficiently split between the \textit{Family Law Act} and the \textit{Arbitration Act, 1991}, and parties will have to consult both pieces of legislation to ensure that the resulting award is enforceable. Many of the most important details, particularly of interest to the arbitration profession, have been left to the regulations and are still unknown.

\textbf{Effects on Traditional Advantages Associated with Arbitration}

Traditional advantages of the choice of arbitration as a dispute-resolution mechanism include party autonomy, process design, choice of adjudicator, privacy, finality, speed, and low cost. The volume delays in the public system are eased when more disputes are resolved privately. There is a cost saving to the public, and research indicates that parties have increased satisfaction and higher compliance rates when they

\textsuperscript{24} Boyd, \textit{supra} note 6, Recommendations 38–41; Section 58, \textit{Arbitration Act, 1991}, \textit{supra} note 3.
have more control over the process.\textsuperscript{25} The new rules for family arbitration diminish the value of each of these advantages.

Party autonomy is usually identified with the parties' ability to design a process that meets their specific needs and preferences. Parties electing family arbitration will now have significantly less opportunity to modify the process than was previously available to them under the \textit{Arbitration Act, 1991}. The most fundamental change will be the inability to choose any law other than the law of a Canadian jurisdiction. This eliminates much more than just faith-based principles and ensures that the outcome will mirror a court result. All custody issues must be decided using the best interests of the child as a standard, and the legislation includes a list of factors. If the parties want to use any other substantive criteria for determining their dispute, the arbitration will not meet the new definition of a family arbitration.\textsuperscript{26} Any resulting award will be unenforceable.\textsuperscript{27} There is an expanded list of process requirements that parties may not contract out of, including the right to an appeal, the obligation to obtain independent legal advice, and mandatory contents of a family arbitration agreement. In short, family arbitration is now tightly controlled, with limited opportunity for parties to fit the process to their needs and less likelihood that the result will be anything other than what a court would do.

The use of an adjudicator who has particular expertise, experience, or sensitivity to the parties needs has been one of the most valued advantages of arbitration. The selection of a family arbitrator will now be limited to adjudicators who meet the yet unknown regulatory requirements. So far, the requirements may include membership in an approved professional organization and mandatory training in screening for domestic violence and power imbalance. Parties will be restricted to those adjudicators who have expertise in Ontario law or another Canadian legal jurisdiction. The parties may still seek advice from other experts, but their opinions will be of no legal effect. One has to assume that this will significantly limit the pool of family arbitration professionals to lawyers and retired judges.


\textsuperscript{26} Section 1 (1), \textit{FSLAA, supra} note 1.

\textsuperscript{27} \textit{Ibid.} s. 1 (2).
Parties can no longer ensure that an arbitration award is final. An unwaivable right of appeal to either the Family Court or Superior Court applies to all family arbitration awards. Participation in the process will not be considered a waiver of any prior defect or non-compliance with either act. The opportunities to set aside or enforce a family arbitration award are altered to mirror a party’s right to set aside or enforce a domestic contract. This will include imperfect financial disclosure. There is no doubt that the advantage of finality is lost.

If the regulatory power under the Arbitration Act, 1991 is exercised, the ability to keep a family arbitration award private and confidential will be reduced. Arbitrators may be required to submit a copy of every award to a designated government official. This copy is to have names and other identifying information removed, but high-profile parties may still be identifiable even after these precautions are taken. Family arbitrators will be required to keep a record of each arbitration for a prescribed period of time. The existence of an unwaivable appeal right will mean any party can move the process to the public court system. It is likely that the advantage of privacy is lost.

All of the new requirements will have an impact on the cost of arbitration and the time it will take to complete. The regulation of family arbitration professionals will come at a cost. A reduced pool of arbitrators, licensing, insurance requirements, membership, training, and record-keeping will all affect the bottom line. The parties will bear an additional cost for independent legal advice and power screening. Since the agreement must be entered into after the dispute arises, it is less likely that entering into a family arbitration agreement will be quick and easy. The many new opportunities to attack the agreement and set aside or appeal the award will undoubtedly slow the process and increase the costs.

As a result of all of the foregoing, family arbitration under the new regime bares little resemblance to the arbitration available to family disputants prior to the Family Statute Law Amendment Act, 2005. It does not offer any of the traditional advantages associated with arbitration. In its new form, family arbitration is hardly an alternative to the court process at all, when lawyers and retired judges apply Ontario law to come to a result that may be appealed to an Ontario Court on a question of law.
**A Retreat from the Policy in favour of Arbitration**

When Ontario enacted the *Arbitration Act, 1991*, it proclaimed a new policy in favour of arbitration, party autonomy, and enforcement of arbitration agreements. The fundamental principles behind this legislation are:

1. Parties who enter into valid arbitration agreements should be held to those agreements (strict enforcement of arbitration agreements).
2. Parties should have broad freedom to design the arbitral process as they see fit (party autonomy).
3. The process should be fair to both parties (fair process).
4. Arbitration awards should be readily enforceable, subject to only limited review for a specific list of fatal flaws of form or procedure (no appeal on the merits).²⁸

Parties were given the right to design their own process and to limit the right of appeal. It expanded the right to choose the substantive criteria for determination of a dispute and it allowed parties to enforce an award through the courts. The court’s power to set aside an agreement or an award was restricted. A court’s power to intervene was allowed only for the purposes of assisting the arbitration, ensuring adherence to the arbitration agreement, preventing unfair or unequal treatment of parties, and enforcing the awards. A stay of a court action was mandatory when a valid arbitration agreement existed.²⁹

Courts embraced the new policy and routinely stayed court actions in favour of the arbitration process.³⁰ The *Arbitration Act, 1991* was interpreted as encouraging parties to choose arbitration as a method to resolve disputes; enforcing arbitration over court processes when parties selected arbitration; and encouraging parties to stay with arbitration once commenced.³¹

Arbitration agreements were interpreted broadly to cover as many disputes as could reasonably be contemplated, and when more than one interpretation was possible, the interpretation that favoured arbitration was taken.³²

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When arbitration policy clashed with other legislative agendas, the policy in favour of arbitration prevailed. A recent example of the application of this priority came in the Ontario Superior Court decision of Kanitz v. Rogers Cable Inc.\textsuperscript{33} Arbitration policy conflicted with consumer protection and class actions policies when a mandatory arbitration clause was inserted in a standard form consumer contract. The court upheld the clause and stayed the uncertified class action citing the primacy of arbitration policy over class action policy.

In the summer of 2005, the Ontario government made its first departure from arbitration policy in the area of consumer arbitration and the recognition of arbitration agreements. The \textit{Consumer Protection Act, 2002},\textsuperscript{34} which was proclaimed in force on 31 July 2005, creates a distinction between pre-dispute and post-dispute arbitration agreements for consumer disputes. Pre-dispute consumer arbitration agreements are no longer enforceable. This was done in reaction to Kanitz. Post-dispute arbitration agreements remain regulated by the \textit{Arbitration Act, 1991}, in the same way as other domestic arbitrations.

The regulation of family arbitration as a separate category marks Ontario's second and most drastic departure from existing arbitration policy. The \textit{FSLAA} moves pre-agreement requirements, form, avoidance, and enforcement of family arbitration agreements and awards to the \textit{Family Law Act}. It makes family law principles paramount over arbitration principles if there is conflict between the two. It adopts the pre-dispute and post-dispute distinction that was created in the \textit{Consumer Protection Act, 2002} and renders pre-dispute agreements and resulting awards unenforceable. This amounts to a retroactive change for parties who have already entered into marriage contracts electing arbitration as the method to resolve disputes. A new post-dispute agreement will need to be made. The new enforcement regime also has retroactive impact for those arbitrations that have already been completed but the resulting awards have not been enforced through the courts. The \textit{FSLAA} does not expressly state retroactive application but the result is to render previously unenforced awards no longer enforceable.\textsuperscript{35}

The effect of the new hybrid family arbitration process is a departure from all four founding principles: parties have greater opportunity to avoid family arbitration agreements once made; parties have less opportunity to design their own process;


\textsuperscript{34} \textit{Consumer Protection Act, 2002}, S.O., c. 30, Sch. A [CPA].

\textsuperscript{35} The general presumption against retroactivity is applied to substantive not procedural legislation. Unless enforcement has been commenced prior to the proclamation of the \textit{FSLAA}, the procedural steps necessary for enforcement will block prior non-compliant awards from access to the new enforcement regime. \textit{Interpretation Act}, R.S.O. 1990, c. J. 11; Temelini v. Wright, (1999), 44 O.R. (3d) 609 (ON C.A.); Angus v. Sun Alliance Insurance Co., [1988] 2 S.C.R. 256 at 262.
the process may lack fairness and equality if the arbitrator neutrality is compromised by screening requirements; and there are expanded opportunities for court review or appeal and reduced opportunity for enforcement.

Each legislative exception to the fundamental principles behind arbitration erodes the general policy in favour of arbitration. Two such departures in a six-month period appears to be a shift in legislative policy away from encouraging parties to choose arbitration as a method to resolve disputes or holding them to it once the choice is made.

**REDEEMING FEATURES OF THE NEW FAMILY ARBITRATION SCHEME**

The new family arbitration process is not a complete repudiation of arbitration. In Ontario, unlike Quebec, family disputants may still choose arbitration. Quebec removed arbitration entirely from family law disputes and will also ban religious principles as a choice of law for other arbitrations. Ontario's new process does not restrict the use of religious tribunals in any area other than family law. Arbitration remains available to family disputes, even if it is in a hybrid form. The restrictions have more narrow application than the Boyd recommendations, which applied to both family and inheritance disputes and both mediation and arbitration processes. Even in the area of family disputes, awards obtained with the use of non-Canadian law are only unenforceable or of no legal effect. Parties are specifically empowered to seek such advice. Two willing parties could agree to use a faith-based tribunal and abide by its outcome. The new amendments would not prevent this, provided no enforcement was necessary. In this way, the new scheme still respects a party's right to choose an alternate forum.

The new choice of law provision is likely to survive a *Charter of Rights and Freedoms* challenge because it does not single out religious principles as a restricted choice, nor does it set special requirements for the use of religious principles as the Boyd recommendations did. Instead, Canadian law is named as the only acceptable standard, which excludes much more than just religious choices. This limits a *Charter* argument based on religious freedom because the express provision is of general applica-

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37. Section 1 (2) and s. 5 (10), *FSLAA*, *supra* note 1.
tion and the effect of the choice of law provisions will not be disproportionately felt.\textsuperscript{40} There is no other comparison group with a greater choice of law. One cannot dismiss the \textit{Charter} argument entirely because the impetus for the legislation came from the use of religious tribunals; a court may identify this purpose as infringing the \textit{Charter} or find that it adversely affects those whose religion requires them to resolve disputes using religious principles.\textsuperscript{41} However, it is likely that declaring Canadian law paramount in family disputes would be considered justifiable and reasonable in accordance with s. 1 of the \textit{Charter}, and that a policy goal of protecting vulnerable parties including children would be considered sufficient to override religious freedom.\textsuperscript{42} The Supreme Court has overridden the religious freedom of the parents where the best interests of the child are concerned.\textsuperscript{43} Finally, those parties whose religion requires them to resolve disputes through the application of religious principles may still adhere to this practice. They have lost only the ability to enforce the resolution through the public courts. If enforcement is necessary, it would appear that one party no longer subscribes to the practice and should be afforded that freedom.

The public has an interest in the resolution of family disputes and the protection of vulnerable persons, especially children. In the past, some have lamented the privatization of family law and the loss of public scrutiny of family dispute resolution.\textsuperscript{44} Protecting the vulnerable is a worthy goal. Independent legal advice and screening requirements will help to accomplish this goal. Restricting the choice of law to Canadian alternatives will ensure that arbitration outcomes parallel what a public court would yield. The reporting and record-keeping requirements may strike a balance between the continued availability of private family arbitration and the


need for public scrutiny. Therefore, the public interest may be served by the new amendments.

**CONCLUSION**

The introduction of separate restrictions on family arbitration represents a departure from the existing Ontario policy in favour of arbitration and the enforcement of arbitration agreements. The change in policy is more drastic than that recommended by the Boyd report. The new restrictions undermine the advantages of choosing arbitration as a dispute resolution process and will likely make such a choice less attractive to disputants. Family arbitration is not without redeeming features, and protecting the vulnerable is a worthy goal; however, the cost to arbitration policy is high. Just how high remains to be seen.\textsuperscript{45}

\textsuperscript{45} After the release of this paper but before its publication, the Ontario Government filed the regulations relating to family arbitration.(O. Reg. 134/07) The regulations include standard provisions for all arbitration and mediation agreements, mandatory approved training for family arbitrators, and arbitrator record keeping and reporting obligations. The regulations come into force on April 30, 2007.