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Résumé

The recent proposal of sharia tribunals1 has initiated a debate centred on principles in alternative dispute resolution (ADR), family law, and possible modifications to the Ontario Arbitration Act, 1991. In the report Protecting Choice Promoting Inclusion, released in December 2004, Marion Boyd, former attorney general of Ontario, attempts to balance these concerns. Forty-six recommendations propose sweeping change and standardization to mediation and arbitration practice. Although many of these recommendations relate only to the areas of family and inheritance law, one cannot ignore the implications for arbitration practice as a whole.

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1. The Canadian Society of Muslims has introduced an arbitration panel called Islamic Institute of Civil Justice & Muslim Court of Arbitration. See <http://www.muslim-canada.org/DAR-LQADAMS/SHAH2.html>.
INTRODUCTION
The existence of sharia tribunals raises a blend of policy and legal issues. The sharia tribunals are created pursuant to the Ontario Arbitration Act, passed in 1991. This Act allows the use of arbitration as a means of resolving disputes using anyone as an arbitrator and any law as the criterion for resolution. The resulting award may be enforced through the court system without government scrutiny. The availability of arbitration to the Muslim community means that Muslims could comply with one of the tenets of their religion, which is to resolve disputes using sharia law.

Section 32(1) of the Arbitration Act requires an arbitration tribunal to “apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances”. The argument has been made that sharia law may be inconsistent with some principles of Ontario family and inheritance law, or principles of equality of women, generally. Therefore, some are concerned that the arbitration awards resulting from the application of sharia law may disadvantage women.

An additional concern is that parties may not voluntarily choose this forum but may feel forced to choose it by their religious community. One of the hallmarks of the ADR movement is the voluntary choice afforded to disputants in selecting the forum. Finally, the private nature of arbitration means that abuses may not come to light. In Canada, freedom of choice, equality, freedom of religion, and support of multiculturalism are both legal and public policy principles; the existence of religious tribunals affects all of these principles.

This is not the first religious tribunal to use the Arbitration Act, nor is it the first time the Ontario Government has had to wrestle with the issue of ADR in the family law context and the resulting risks to women. For many years, the Jewish community has operated religious tribunals applying Jewish law. To date, little concern has been raised, but potential revisions to the Arbitration Act would certainly affect their continued existence. In 1998, Ontario adopted mandatory mediation as part of the court process for most case-managed civil lawsuits. A great debate ensued over whether family law


3. In this paper, the term sharia law refers to traditional Islamic law. The writer acknowledges that the term has broad meaning, varied uses, and applications not restricted to religious, family, or inheritance principles. This paper does not deal with the details of sharia law. For a discussion of sharia law generally, see <http://en.wikipedia.org/wiki/Sharia>.

matters should be among those covered by mandatory mediation. Much of current mediation practice was pioneered in the family law discipline. The concept of mandatory mediation may be illogical, in any event, since central to most ADR forums is the free choice to use an alternative process. It was ultimately decided that this process should not be forced on parties in a family dispute. The driving reason for this decision was the potential for the process to disadvantage some women who may be less powerful, less sophisticated, less educated, or abused. This is an important precedent, given that a mediated result requires consent of the parties to both the process and the outcome, while arbitration results in a binding adjudicated award imposed on the parties.

**Government Reaction**

At the request of the Ontario Government, Marion Boyd embarked on 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." She received submissions from many stakeholder groups including the Canadian Council of Muslim Women (opposed) and B'nai Brith Canada (in support). Before turning to the Boyd recommendations, it is necessary to look at the four possible courses of action and their ramifications. Generally, the Government has four alternatives, and Ms. Boyd clearly favours the fourth.

1. It can do nothing (make no changes to either the *Arbitration Act* or the *Family Law Act*) and allow the current checks and balances in the Acts to handle issues of inequality, incapacity, unfairness, and discrimination.
2. It can isolate particular types of disputes based on substantive criteria and prohibit the use of arbitration as a means of resolving these disputes (e.g. family law).
3. It can identify particular rules of law and prohibit the use of these principles as criteria available to decide outcomes under s. 32 of the *Arbitration Act* (e.g. religious principles).


4. It can modify the current process outlined in the *Arbitration Act* to enhance the existing checks and balances rather than relying on the party-initiated review remedies after the fact. Changes could include:
   a. threshold requirements to be met prior to accessing the arbitration process (independent legal advice),
   b. escape opportunities after entering into an agreement to arbitrate but prior to the commencement of the process,\(^8\)
   c. mandatory review requirements to ensure compliance with Ontario law, or
   d. review as a mandatory requirement of those arbitration awards, seeking to use the Court enforcement provisions.\(^9\)

1. **Issues Arising from the Status Quo**

Maintaining the status quo would be an affirmation of the fundamentals of arbitration. The cornerstones of ADR are the choice, privacy, speed, and affordability it offers disputants; empowering parties to design the process leads to general satisfaction and willingness to comply with the outcome.\(^10\) The purpose of arbitration is not to mirror the outcome of a court but rather to allow parties to design their own process and an outcome that suits them. Arbitrations are private and do not create a precedent in recognition of this party-specific focus. The current process is not without basic protection. Biases of the arbitrator, fraud, incapacity, and inequality or unfairness in the process are all reasons that a court may set aside an arbitration award.\(^11\) In addition, appeals based on questions of law maybe made to the courts if the agreement permits. In terms of enforcement, the court will enforce only those awards that are within its jurisdiction to grant or it would have granted in similar circumstances.\(^12\) A wide range of safeguards are already in place.

However, critics identify voluntary choice of process as impossible if a religion requires its members to use a religious tribunal. In arbitration, the outcome is not voluntary, only the choice of process, so free and informed consent to the choice of process becomes even more important than in mediation, where the outcome is agreed upon.

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8. Section 5(4) of the *Arbitration Act*, S.O. 1991 c. 17 upholds agreements requiring arbitration prior to court action known as *Scott v. Avery* clauses.

9. Section 50 of the *Arbitration Act* allows a judgment to be granted on the basis of an arbitration award, provided there is no pending appeal or application to set aside.


11. Supra note 2 at s. 46.

12. Supra note 2 at s. 50(7).
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Critics are not content with the current remedies, since they are after the fact and depend on party initiative to bring the matter forward, within the prescribed time limit. The concern is that the disadvantaged party will not be aware of the disadvantage or the available remedy. In addition, there seems to be a general unwillingness of courts to interfere in arbitration awards, agreed-upon settlements in family law, and religious-based awards or agreements. Finally, an appeal to a court based on something other than Ontario law would be unlikely to proceed.

There cannot be a debate about the appropriateness of any piece of legislation without involving the Charter of Rights and Freedoms. Although no named group is discriminated against by the current Arbitration Act, critics argue that the application of the Act by religious tribunals would result in discrimination against women and therefore would violate section 15. Section 27 could be argued as justification for such discrimination in that it supports multiculturalism. Similarly, freedom of religion can be argued in support of the status quo, as it is not the application of the Arbitration Act that discriminates but the application of religious principles.

It is clear from the forty-six recommendations that Marion Boyd rejects the status quo, and her reasons are reflected in the following passage:

Ontarians are open to allowing minority groups a considerable degree of cultural and religious independence, so long as harm is not perceived to be done to the larger community and its values of tolerance, accommodation and individual autonomy.

2. Issues around a Ban on Arbitration for Family Disputes

Is arbitration or ADR, in general, appropriate for family disputes?

The relevance of the risks of using an ADR process in family disputes depends on the position of women and children in society, and whether family conflicts are seen as a private matter best dealt with between the parties, or whether the public has a stake in the resolution of these private disputes. Scholars have lamented the privatization of family law specifically, and justice generally, claiming that it is not in the interests of public policy that family issues be decided in private. The state has an interest in

15. The definition of discrimination includes circumstances where an already disadvantaged group is affected by the legislation in a way different from the general public. Law v. Canada (Minister of Employment and Immigration), [1991] 1 S.C.R. 497 at para. 39.
17. Boyd, supra note 6 at page 89.
18. Boyd, supra note 6 at 3; Ayelet Schachar, Group Identity and Women’s Rights in Family law: The
the safety and custody of children. The Office of the Children's Lawyer is in place so that the interests of the children may be independently represented. The state has an interest in ensuring that children are supported by their parents rather than the government. Women and children living in poverty become a burden on the state. Property rights and support rights may be private, but they have a very public impact. The introduction of child support guidelines by the Canadian government underlines the public character of child support. Spousal support guidelines are under review. Arbitration may be a commercial dispute-resolution practice that is now being too generally applied to matters of public importance.

The dynamics of power in a spousal relationship are complicated, to say the least. An important concern is that a woman who has been dominated during the relationship may continue to be dominated during an ADR process, and this influence may affect the fairness of the outcome. Power imbalances stem from a variety of sources including a lack of resources, history of abuse, lack of education or employability, and cultural background. Naturally, these factors often mean that women have less power in the relationship than men. The resulting risk of domination may be greater in mediation, where the outcome is negotiated and the dynamics between the parties play a greater role than they do in arbitration outcome. However, the choice of arbitration, which laws and which arbitrator, certainly affect the outcome. If placed in a tribunal setting where their rights are not protected or monitored, women may be disadvantaged by these choices and be powerless to avoid them. In Ontario, mandatory mediation has excluded family law. Parties are free to use mediation if they choose, but this process will not be forced upon them. A review of the rationale behind this choice is contained in the Civil Justice Review Supplemental and Final Report. Quebec has a ban on arbitration in family law disputes and has recently passed a resolution opposing the establishment of Islamic tribunals. British Columbia is currently looking at mandatory mediation in family disputes. At present, no province imposes mandatory mediation in family law disputes.

Conversely, it can be argued that the forgoing is an overly paternalistic view, which may deny women freedom of choice of forum. People negotiate separation agreements that do not mirror a possible court outcome all the time. The Family Law Act allows

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19. Office of the Children's Lawyer is a law department in the Ministry of the Attorney General that represents the interests of children in custody and access and child protection cases, and approves settlements in civil litigation. See "More about What We Do," online: Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp>.
the creation of domestic contracts and allows for their enforceability through the court system.\textsuperscript{23} The current court infrastructure could not handle the volume of family cases if alternative resolution processes were not available and encouraged.\textsuperscript{24}

Marion Boyd's first recommendation supports the continuation of arbitration in the areas of family and inheritance law. The review did not find any evidence of systemic discrimination against women in family law arbitration. Ms. Boyd's reasoning is reflected at page 75 of the report:

\begin{quote}
I believe that arbitrations under the Arbitration Act are an area where the state should refrain from preventing private parties from making contractual arrangements about a variety of disputes, including family law and inheritance. There is no question that there are serious concerns that should be addressed by strengthening protections for those identified as vulnerable through legislative, regulatory or other means.
\end{quote}

3. **Excluding Choices of Law under Section 32 of the Arbitration Act**

In implementing this alternative, the government would have to ban all religious standards as a choice of law. What is a religious standard, versus a choice of law, by jurisdiction or culture? These are difficult distinctions to draw, given that some religions involve an entire way of life. A religious ban would affect all other user groups, such as the Jewish community. It would catch a wider group of disputes beyond just family issues. The proposed sharia tribunals are not restricted to family law.

Naturally, section 15 of the *Charter of Rights and Freedoms* would be raised to argue discrimination based on religion. It would be argued that a ban would violate freedom of religion when one of the religious principles was to resolve disputes using religious laws. It is arguable that the public policy interests rooted in family law and the discrimination against women would be seen as justification under section 1 of the *Charter*.\textsuperscript{25} However, this view may undermine multiculturalism as a policy goal.

Religion and family law are often intertwined. There is a long history of family counselling in almost every religion. Section 57(5) of the *Family Law Act* anticipates the religious influence on domestic agreements and the potential for conflict with Ontario law. It allows such an agreement to be set aside when faith-based barriers have been used as a factor.

Boyd's second recommendation supports the continued use of religious law as an available choice of law for arbitrations, provided that the appropriate safeguards are put in place:

\begin{enumerate}
\item R.S.O. 1990, c. F.3, ss. 51–60 (Part IV).
\item For settlement, speed, and satisfaction see the *Report on Mandatory Mediation 2001*, supra note 10.
\item *Charter*, supra note 14 at s. 27.
\end{enumerate}
People are entitled to make choices that others may perceive not to be correct, as long as they are legally capable of making such choices and the choice is not prohibited by law. 26

4. **Changing the Process to Improve Current Checks and Balances**

Should there be confirmation of capacity or free and informed choice before parties may access arbitration?

Many submissions to the Boyd review suggested that requiring a certificate of independent legal advice (ILA) prior to selecting a religious tribunal would ensure that the choice was voluntary and informed. Two issues remain: timing and expertise. Timing of the ILA certificate is pivotal. If ILA is required at the time of making the agreement to arbitrate, then it will likely be years before the arbitration actually takes place. Many domestic contracts are entered into prior to marriage. The women may have a change in belief after marriage breakdown but be powerless to undo the previous decision if it was made with ILA. There will likely be a significant change in the assets of the parties between the ILA and the use of the process. If the ILA is acquired at the time of the process, it will be more relevant. Currently, section 5(4) of the *Arbitration Act* upholds the enforceability of “pre-dispute” arbitration clauses that require arbitration as a condition precedent to a court (*Scott v. Avery* clauses 27). Such clauses are routinely included in domestic contracts entered into at the outset of the relationship. The combination of section 5(4) of the *Arbitration Act* and ILA would defeat the ability to withdraw from such an agreement at the time the dispute arises.

Effective ILA means abolishing the *Scott v. Avery* exception in section 5(4) of the *Arbitration Act* when dealing with family law disputes, so that the choice of a religious tribunal is made using current opinions and beliefs, not those formed at the outset of a relationship. A review of the provisions in the *Family Law Act* discloses a number of topics that cannot be determined in a domestic contract, and choice of forum could easily be added. This would have an impact broader than religious tribunals and, therefore, may result in many more family disputes bypassing ADR and ending up in the courts. All the reasons for encouraging ADR would then be undermined. This is an unlikely position for the Government to take, given the enthusiasm of the *Mandatory Mediation Report of 2001*. 28 Recent changes to mandatory mediation mean that timelines will be relaxed, and it will now be a requirement of cases involving less than $50,000. 29

The content of the independent legal advice is another area of concern. Expertise in Ontario family law should not be a problem for an Ontario lawyer, but finding a lawyer...
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with expertise in sharia law, as well, may be. The role of ILA is to ensure an informed choice, so expertise in only one area of the choices of law may not satisfy the requirement.

**Should the Court Wait for the Party to Ask for a Review?**

Mandatory substantive review would involve a review of the contents of arbitration awards relating to family matters to ensure compliance with principles of equality, fairness, and Ontario family law. This would be a mammoth undertaking requiring a large resource allocation. If it were done for just religious tribunals, the Charter issue of discrimination based on religion would be obvious. However, it does address the problem of individual women not being aware enough to access the existing review and appeal provisions. It addresses the public versus private issue of family law and resolves an issue of unequal representation expertise at the tribunal hearing. In contrast, it undermines any alternative choice of rule of law and turns arbitration into nothing more than a pre-trial. Only parties who want to follow the outcome would be obligated to do so, unless it complied with Ontario law. What standard for assessment would be used? Family awards are very fact-based, and credibility-based factual findings would not be lightly overturned. Review would amount to mandatory appeal, while determining compliance would be virtually impossible, provided the result was one that was possible in Ontario.

A less onerous possibility would be mandatory review of only those awards seeking access to court enforcement provisions. This would be consistent with the court's position in *Kaddoura v. Hammond*, where it refused to enforce an agreement that had a religious purpose. It supports the concept that once the court is involved in enforcing the award, it must meet Ontario law, and this point acknowledges that the court may have a higher duty when it enforces the award. It respects the free choice of individuals who are content and complying with an award. The Family Law Act takes the more proactive approach in section 56(5), where an agreement may be set aside if faith barriers to remarriage are included as part of the agreement. Additional clauses on chastity and possession of the matrimonial home are unenforceable, the suggestion being that this may not be real consideration or appropriate bargaining. Mandatory review takes the teeth out of arbitration and reduces it to mediation where the outcome is honoured if the parties agree with it.

**Boyd Recommendations**

Marion Boyd recommends modifying the current system to increase the protection available to vulnerable individuals by ensuring free and informed consent and standardizing the system so problems may come to light. She falls short of recommending mandatory review of arbitration awards and instead suggests that the government, not

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the courts, should have a right to evaluate the outcomes. Ms. Boyd puts more emphasis on regulating the arbitrator than reviewing the award.

In this contest (multiculturalism) I believe it is important to seek solutions that attempt not only to respect the rights of minority groups in the larger cultural and political context of Ontarian society, but also to ensure that individuals within that minority, as citizens of this province, are able to exercise their rights as individuals with the greatest of ease and with minimal cultural and personal risk.\textsuperscript{31}

When reviewing the forty-six Boyd recommendations it is clear that they go beyond the issue of religious tribunals and arbitration. Six of the first twenty recommendations cover both arbitration and mediation. Changes in recommendation 7 will apply to minors in all domestic contracts. Many if not most of the recommendations relate to all arbitrations in family or inheritance matters, not just those that choose religious tribunals. This report represents sweeping change to family and inheritance arbitration specifically and probably foreshadows change in the arbitration of all disputes.

Recommendation 3 suggests that a domestic contract, as defined and regulated under the \textit{Family Law Act}, should include a mediation and arbitration agreement. No limit is included here to apply to only those mediation or arbitration agreements that relate to family matters. This recommendation would expand the opportunity for review and avoidance of all arbitration agreements for the same reasons now offered to domestic contracts. Surely it should be confined to those agreements relating to family and inheritance matters.

\textbf{INFORMED AND VOLUNTARY CONSENT: A TWO-STAGE PROCESS}

The recommendations address free and informed consent through a standardized two-stage process:

1. Threshold requirements to be met prior to accessing the arbitration process (Independent Legal Advice).
2. Escape opportunities are available after entering into an agreement to arbitrate but prior to the commencement of the process.

Standardization of the process of family and inheritance arbitration would be affected by regulating forms and procedures through either the \textit{Family Law Act} or the \textit{Arbitration Act}.\textsuperscript{32} This standardization is where the Boyd recommendations seek to handle the issue of informed consent. The contents of arbitration agreements would include a description of the protections existing in the \textit{Family Law Act} and the \textit{Arbitration Act}, independent legal advice certificates or waivers, and acknowledgment of understanding of the religious principles to be used (if any).\textsuperscript{33} In order to accomplish the last, organizations offering religious tribunals would be obligated to produce a state-

\begin{itemize}
\item \textsuperscript{31} Boyd, \textit{supra} note 6 at page 94.
\item \textsuperscript{32} \textit{Ibid.} Recommendation 10 at 134.
\item \textsuperscript{33} \textit{Ibid.} Recommendation 12 & 13 at 135.
\end{itemize}
ment of faith-based principles that must be distributed to all prospective clients. The client must then take this statement to the independent legal advice appointment so that a lawyer can review the statement and determine that the party has sufficient information to understand the implications of the choice. This process, combined with a massive public education campaign, is designed to create informed consent.

One major problem with this proposal is that it gives the lawyer the responsibility of ensuring that the parties have enough information in the statement of religious principles to “understand the nature and consequences of choosing the religious law.” A lawyer cannot know this unless he or she is also an expert in the religious law. The lawyer will not know if a pertinent piece of information is missing. Recommendation 21 requires independent legal advice to be given on Ontario and Canadian family, inheritance, and arbitration law and remedies. It does not require that the advice come from a lawyer, nor does it mention expertise in religious law. A lawyer cannot fulfill the responsibilities set out in Recommendation 23 unless he or she is also an expert in the religious law being chosen. Expertise remains an issue under the Boyd plan.

Recommendation 5 recognizes the timing problem when the choice of arbitration is made well in advance of any dispute arising. Such a choice would now require a confirmation at the time of the dispute, and before arbitration is commenced, in order for arbitration to be binding. Reconfirmation as well as the original choice would all be done in writing. Separation agreements would be an exception to the confirmation requirement, presumably on the basis that the parties are already in dispute by the time they enter into the separation agreement. However, the recommendations relating to independent legal advice do not address the reconfirmation. Independent legal advice is tied to the agreement, not the reconfirmation. Since the agreement is not binding unless reconfirmed and a considerable amount of time could elapse between the original agreement and reconfirmation, it seems logical that ILA is necessary at the time of reconfirmation as well, or in the alternative. For independent legal advice, the timing, the contents, and the expert are all problem areas still remaining after the Boyd recommendations.

In addition to the legal advice and the previously mentioned public education campaign, the issue of voluntary consent is addressed through the arbitrators and mediators. Arbitrators and mediators would be required to screen each party separately for issues of power imbalance and domestic violence, using a standardized test developed by the Ontario government with the help of existing professional organizations. The

34. Ibid. Recommendations 16 & 17, at 136.
35. Ibid. Recommendations 22 & 23 at 137. The Ontario Association for Family Mediators already has a policy on domestic abuse, which includes a presumption against mediation in cases of domestic abuse. See <http://www.oafm.on.ca/mediators/abusepolicy.html>. Note that domestic abuse is different from domestic violence.
36. Ibid. Recommendations 22 & 23 at 137.
37. Ibid. Recommendations 18 & 31 at 138, 139.
timing is again tied to the arbitration agreement and not any subsequent reconfirma-
tion and suggests that the choice of mediator or arbitrator would be known at the time
of agreement rather than dispute. The arbitrator or mediator would then be required
to "certify" that he or she is satisfied that the parties are entering into the arbitration
voluntarily and with the knowledge of the nature and consequences of the arbitration
agreement. This is a new and undetermined liability issue for the mediator and
arbitrator. One would presume that if domestic violence has existed in the past,
relationship mediation is not an appropriate forum to resolve the dispute. This cannot
automatically be said of arbitration. The implications of domestic violence on volun-
tary consent may vary. If it is a prohibition to accessing arbitration, then this point
needs to be spelled out. The issue of power imbalance is more complicated. On the
other hand, power is a factor in almost all relationships, whether it stems from abuse,
wealth, education, or employability. An arbitrator or mediator will be hard-pressed to
find a relationship that has a completely equal power balance. The finding of an
imbalance would not normally rule out the choice of arbitration as a forum. The
judgment assessments that the arbitrator will be called upon to make are the source
of unknown liability issues, despite the fact that training in these areas is recom-

38. Boyd has placed the responsibility for free and informed consent on the

Regulation of the Profession

In an effort to ensure that mediators and arbitrators making these certifications are
equipped to do it, sweeping changes are proposed to arbitration and mediation practice.
Boyd shows a preference for supervising the quality of the arbitrator rather than the
quality of the award. Individual family and estate mediators and arbitrators would have
to be members of a professional organization with codes of conduct in order to have
their awards enforced. Annual statistical reports, including the number of appeals and
complaints, would be sent to the government by the arbitrator as a way of monitoring
competency. The natural progression of these recommendations lead to Recommen-
dation 45, which calls for professional self-regulation of mediators and arbitrators in the
family and inheritance areas. It calls upon the government to study conduct and
competency issues with existing professional organizations and the Law Society of Upper
Canada. The ADR Institute of Canada, Inc., has membership criteria and chartered
designations that are the groundwork for a competency assessment. It has a code of
conduct and a structured arbitration process set out in its National Arbitration Rules.41

38. Ibid. Recommendation 33 at 139.
39. Ibid. Recommendation 14 at 135. Most organizations such as Ontario Family Mediators Asso-
ciation and ADR Institute of Ontario have codes of conduct and membership requirements. The
ADR sections of the Ontario and the Canadian Bar Association also have codes of conduct.
40. Boyd, supra note 6, Recommendation 40 at 140.
41. "National Arbitration Rules," online: ADR Institute of Canada <http://www.adrontario.ca/na-
tional_arb_rules.html>.
It is not the choice of law or the award that Boyd seeks to regulate but rather the arbitrator and mediator. The alternative nature of arbitration and mediation lies in the free choice of professional and the alternative skills these professionals bring to the forum. Regulation and standardization strike at the heart of these alternatives.

Broad implications also come from the recommendations that seek to address the private nature of arbitration and the party-driven remedies currently available. Privacy is a hallmark of the mediation and arbitration forums that is about to be eliminated. Mandatory record-keeping will require arbitrators to keep records including exhibits, ILA, and summary of the facts and reasons for a period of ten years. It is unclear whether the summary of the facts refers to the summary of facts that would naturally be contained in the written decision, or the private notes of the arbitrator. There is no transcript of the proceeding, so these are the only two sources of such a summary. A summary of the decision would be sent to the government and available to the public. Apparently it would be a non-identifying copy, but one would have to remove much more than the name of the parties in order to prevent the public or the media from determining the identity of the parties. The purpose of such a summary is research, evaluation, and consumer protection. Evaluation is a vague term that implies some assessment of quality without reference to a criterion, process, or input from the arbitrator. One would assume that the evaluation is being made by the government and not the courts, since that is where the summary is to be sent. The report suggests evaluation may be made in order to detect patterns. As mentioned earlier, failure to comply with these recommendations would allow the award to be set aside and result in loss of the arbitrators’ membership in the professional organization.

The final recommendation opens the door for a mandatory court review of settlements in family or inheritance cases where religious principles were applied but falls short of recommending it. This review would appear to apply beyond mediation and arbitration to any settlement in the family or estate area involving religious principles. No criteria for review are suggested, but they would likely be broader than those already contemplated by the Family Law Act or the Arbitration Act where the result is outside the jurisdiction of the court. This is a proposal for study only, as resource and charter issues are considerable barriers to such a system.

**CONCLUSION**

In an effort to address the issues raised by religious tribunals while respecting an individual’s right to choose such a forum, the Boyd recommendations alter many of the basic tenets of alternative dispute resolution. The Boyd recommendations propose a standardized system regulating contents of the agreement, forms, screening, and

42. Boyd, *supra* note 6, Recommendation 38 at 140.
44. *Ibid.* Recommendations 42 & 20 at 141, 137.
independent legal advice, choice of professional, and structure of both the mediation and arbitration professions as a whole. They sacrifice the private nature of arbitration by requiring mandatory record retention and reporting to the government. Summaries of decisions would be available to the public and for unknown "evaluation" purposes. The recommendations shift the responsibility and risk for the choice of a religious tribunal to the lawyers, mediators, and arbitrators through broad ILA and screening requirements. These changes strike at the very heart of ADR processes. It is hard to imagine that such sweeping changes could be contained to the family arbitration and mediation profession. Professionals at large in alternative dispute resolution should expect to be embraced by a new regime.

**POSTSCRIPT**

After the release of this paper but before its publication, the Ontario Government made two statements indicating that it will reject the Boyd recommendations in their entirety.

On 8 September 2005, the attorney general issued a written press release saying that there would be “no binding family arbitration in Ontario that uses rules or laws that discriminate against women.”46 This statement makes no reference to faith-based or religious principles. It contemplates a substantive assessment of any choice of law to determine if it discriminates against women.

Almost immediately, on 11 September 2005, the premier of Ontario made the following oral statement to the press: "There will be no sharia law in Ontario. There will be no religious arbitration in Ontario. There will be one law for all Ontarians."47 Contrary to the attorney general’s press release, this statement contemplates an absolute ban on any “religious” choice of law without a substantive assessment of the discriminatory nature of the principles. If there is to be one law for all Ontarians, then there will be no choice of law what so ever. This change removes more than just religious principles. This would be a major change in arbitration policy. The comments are general in nature, but the entire context of the premier’s remarks suggests that these restrictions would apply to family arbitration only.

Since the two statements take different approaches, it is difficult to determine exactly what changes will appear in the draft legislation expected in the fall of 2005.

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