

Arbitration of Family Law Disputes in British Columbia

Paper prepared for the Ministry of Attorney General of British Columbia

**by Catherine Morris, BA, LLB, LLM
July 7, 2004**

Arbitration of Family Law Disputes in British Columbia
Paper prepared for the Ministry of Attorney General of British Columbia
by Catherine Morris, BA, LLB, LLM
July 7, 2004

Table of Contents

Executive Summary	iv
1 Introduction	1
1.1 Terms of Reference	1
1.2 Methodology	1
2 Why consider family arbitration?	2
2.1 What is arbitration and how does it differ from mediation?	2
2.1.1 Mediation	2
2.1.2 Arbitration	2
2.1.3 Non-binding arbitration	3
2.1.4 Mediation-Arbitration	3
2.1.5 Arbitration-Mediation (Arb-med)	3
2.1.6 History of arbitration in Canada	3
2.1.7 Jurisdiction of arbitrators	4
2.2 When might people consider using family law arbitration?	4
2.2.1 Hypothetical reasons: And some realities	5
2.2.1.1 Avoids adversarial proceedings?	5
2.2.1.2 Mediation and arbitration avoid delays and rigours of the court process?	6
2.2.1.3 Mediation and arbitration keep costs down?	6
2.2.1.4 Mediation and arbitration preserves privacy?	6
2.2.1.5 Mediation and arbitration provide procedural and evidentiary flexibility?	6
2.2.1.6 Mediation and arbitration provide a choice of mediator or arbitrator who reflects the values of the disputants?	6
2.2.1.7 Mediation and arbitration are final and binding?	7
2.3 What the Canadian cases show about who actually uses arbitration	7
2.3.1 Arbitration Clauses in Separation Agreements	7
2.3.2 Mediation agreements with arbitration clauses (“mediation-arbitration” agreements, or “med-arb”)	8
2.3.3 Parenting issues: Visitation, weekend access, holidays, education	8
2.3.4 Religious tribunals	8

3	Legal and policy issues	9
3.1	Qualitative differences between commercial disputes and family law disputes that affect the utility of the <i>Commercial Arbitration Act</i> for family law disputes	9
3.1.1	Legal and logistical complexity	9
3.1.2	Family conflict is relational not transactional	9
3.1.3	Power	10
3.2	Applicability of the BC <i>Commercial Arbitration Act</i> to family law disputes	10
3.3	Enforcement of arbitration awards in family law cases	12
3.3.1	Court enforcement in BC	12
3.3.2	Day-to-day practicalities	13
3.4	Court supervision of arbitration processes and outcomes	14
3.4.1	Lawyers' concerns	15
3.4.2	How do courts' view family arbitration?	17
3.4.2.1	Disputes about family property	18
3.4.2.2	Spousal support disputes	20
3.4.2.3	Child support, custody and access disputes	21
3.4.2.3.1	Custody arbitration awards and agreements are reviewable and not binding on courts	22
3.4.2.3.2	Child support and custody not arbitrable at all?	25
3.4.2.3.3	Canadian cases in which child custody arbitration agreements and awards have been found to be binding on the courts without reservation	26
3.4.2.3.4	Discussion: Competing principles of family autonomy and state control through <i>parens patriae</i> jurisdiction	27
3.4.2.4	Mediation/arbitration agreements (Med/Arb)	28
3.4.2.5	Courts' views of arbitration statutes	32
3.4.2.6	General Summary	32
3.5	Other policy considerations	33
3.5.1	Private judgements on issues of public importance	34
3.5.2	Coercion and unequal power	36
3.5.4	What is "law" and who decides what law applies?	39
3.6	Competence	40
3.6.1	Competence of lawyers in drafting arbitration clauses and representing clients in arbitration	40
3.6.2	Competence of arbitrators	42
3.6.3	Liability	44
4	Models and policy options	45
4.1	Policy goals	45
4.2	Mandatory models	45

4.2.1	Mandatory arbitration pursuant to individual statutes	45
4.2.2	Court reference under the <i>Commercial Arbitration Act</i> , s. 36.	46
4.2.3	Notice to Arbitrate	46
4.2.4	Court annexed non-binding financial, and parenting assessments	46
4.2.5	Graduated approach	46
4.3	Increasing the use of voluntary arbitration	47
4.3.1	Law reform	47
	4.3.1.1 Revised commercial arbitration legislation	47
	4.3.1.2 Family dispute resolution act	47
	4.3.1.2.1 North Carolina <i>Family Law Arbitration Act</i>	48
	4.3.1.2.2 Australia	48
4.3.2	Policy concerns related to competence in family arb and med arb	49
	4.3.2.1 Schemes for developing competence	49
	4.3.2.2 Measuring success: Building evaluation criteria into policy and program design	49

Arbitration of Family Law Disputes in British Columbia
Paper prepared for the Ministry of Attorney General of British Columbia
by Catherine Morris, BA, LLB, LLM
June 15, 2004

Executive Summary

Terms of Reference

This paper examines legal and policies issues in British Columbia regarding arbitration of family law disputes, including the use of arbitration as part of mediation processes (mediation-arbitration). Included in the terms of reference are the applicability of the BC *Commercial Arbitration Act* to family law disputes, some practical and policy concerns relevant to family arbitration and mediation-arbitration, and several policy options. See section 1.1 of this paper for more detail.

Methodology

Research methodology for this project has included examination of relevant legislation, case law and literature from Canada, the United States, Australia and the UK. Also included were discussions or correspondence with selected experts in BC, Ontario, Alberta and Australia. See section 1.2 of this paper for more detail.

History of arbitration in Canada

In 1986, Canada acceded to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the federal government and the provinces passed new arbitration legislation incorporating the Convention, and UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The province of British Columbia passed the current *Commercial Arbitration Act* which contemplated commercial transactions, not family law matters. Very little arbitration is conducted in family law cases in British Columbia. Slightly more arbitration is conducted in Ontario and Alberta. There is little Canadian case law and literature. See section 1.2.6 of this paper for more detail.

Advantages and disadvantages of family law arbitration

People may wish to use arbitration for some of the following reasons:

- avoidance of adversarial proceedings
- avoidance of delays and the rigours of the court process
- reduction of costs
- preservation of privacy

- procedural and evidentiary flexibility
- choice of mediator or arbitrator who reflects the values of the disputants
- finality of a binding decision

These purported advantages can all break down if the arbitration is resisted by one or both parties, becomes protracted, or ends up being reviewed by a Court. For more detail, see section 2 of this paper.

Current uses of family arbitration in Canada

- arbitration clauses in separation agreements
- mediation agreements with arbitration clauses (“mediation-arbitration” agreements)
- parenting issues: visitation, weekend access, holidays, education
- religious tribunals, such as Jewish Rabbinical Tribunals and a proposed Islamic Court of Civil Justice in Ontario.

For more detail, see section 2.3 of this paper.

Legal and policy issues

The BC *Commercial Arbitration Act* is designed for commercial disputes not family law disputes:

- Commercial disputes while often complex, are generally transactional whereas family law disputes are essentially relational conflicts with interdisciplinary complexity including legal, emotional, psychological and parenting issues intertwined with property, financial, pension, estate planning, tax issues. Sometimes these are complicated by interjurisdictional concerns.
- Complex emotional and economic interdependencies in families may create power dynamics that can be more complex and subject to power-abuse than the dynamics between commercial disputants.
- Family law disputes may rightly require more court supervision than is envisaged by the *BC Commercial Arbitration Act*.

For more detailed discussion, see section 3 of this paper.

Applicability of the BC *Commercial Arbitration Act* to family law disputes

Section 2 (2) of the Act is unclear and has created an impression among BC lawyers that the Act does not apply to family law disputes at all, however cases indicate that the Act does apply to family law arbitration. Other family law statutes in BC and the *Divorce Act* are silent about arbitration. BC statutes for enforcement of family law orders or agreements do not provide for

enforcement of arbitration awards. (See section 3.2 of this paper for more detailed discussion.)

Enforceability of arbitration awards in family law cases

If family arbitration is to be used in BC, lawyers require a statutory framework that is hospitable to family law arbitration. A hospitable statutory framework would provide:

- finality and enforceability;
- predictability and certainty in the law (regarding how arbitration agreements and awards will be viewed by courts);
- clear limits on judicial involvement by way of appeal;
- clear time limits for appeals or reviews including harmonization with other relevant statutes;
- clarity and simplicity as to procedure for appeal or review of awards;
- organization of courts to avoid confusion concerning jurisdiction for appeal/review or enforcement of awards, and to provide relatively uniform access to services throughout the Province;
- remedies that apply to all persons in family relationships whether married or cohabiting;
- more uniformity across provinces concerning arbitration legislation and enforcement.

For more detailed discussion, see section 3.4.1 of this paper.

How do courts view family arbitration?

On the question of certainty and finality, there are insufficient cases to answer this question for BC. The following summary could be applied to the current situation in Canada regarding the finality of arbitration awards:

- Property division: almost always final and binding, with limited review and appeal rights;
- Spousal support: almost always final and binding, with limited review and appeal rights;
- Child support: sometimes final and binding with review and sometimes de novo review, and limited appeal rights;
- Access and visitation: sometimes final and binding with review and sometimes de novo review;
- Custody: rarely final and binding.

It is probable that Canadian courts will:

- balance support for alternatives to litigation (ADR) with concerns about finality, fairness and open courts;
- in cases that are clearly arbitrable, interpret arbitration agreements liberally based on identification of their objectives but will not “read in” jurisdiction that is not reasonably provided by an arbitration agreement or statute and will avoid enforcing awards that go beyond the scope of arbitration agreements and relevant statutes;

- keep the jurisdiction that relevant statutes allow them to keep, particularly in cases involving children;
- consider family matters as arbitrable, including child custody, support and visitation matters, but will maintain their *parens patriae* jurisdiction in all matters concerning children;
- not enforce awards obtained by patently unfair arbitral processes or where there are breaches of natural justice. Most judicial concern about family arbitration pertains to natural justice in mediation-arbitration processes, particularly during the transition from mediation to arbitration phases.
- reduce unnecessary costs incurred in arbitration.

For more detailed discussion, see section 3.4 of this paper.

Other policy considerations

See section 3.5 of the paper for discussion of the following policy concerns:

Concern about private judgements on matters of public importance

While judges are publicly appointed and accountable, private arbitrators are one step removed from public accountability. Arbitrations in Canada are assumed to be private unless they end up contested in the courts. Policy questions have been raised about how private and confidential arbitration should be.

Coercion and unequal power

The policy concerns around contractual freedom and decision making autonomy are particularly alive in family law disputes. ADR processes have been implicated in concerns about coercion and family violence. Problems of unequal power and coercion have been a major issue in the development of policy about family law dispute resolution. Several concerns include the following:

- Lawyers drafting arbitration agreements and arbitrators accepting them may not all be competent to screen and address issues of domestic violence during arbitration.
- Arbitrators have limited authority, and domestic violence creates a need for violence protection orders which an arbitrator does not have authority to provide. This could create danger, delay and fractured case disposition if courts and arbitrators must each deal with different aspects of a case.
- In the absence of a statutory amendment to the arbitration legislation, the courts in Canada may not have authority to decide the threshold question of the validity of an arbitration agreement, which is within the jurisdiction of the arbitrator to decide. This means judges cannot decide whether, e.g., a pre-nuptial or other arbitration agreement was coerced. This policy may be suitable for commercial cases, but probably not for

family law cases. North Carolina's *Family Law Arbitration Act* and Australia's 2000 amendments to their *Family Law Act* provide that courts should decide the threshold question of the validity of an arbitration agreement.

Same sex couples

Private family law arbitration may be a possible interim answer to problems experienced by same-sex couples where current laws do not reflect their needs upon family breakdown.

What is "law" and who decides what law applies?

Under the *Commercial Arbitration Act* in BC, an arbitrator "must adjudicate the matter... by reference to law..." (Section 23) but the Act does not specify the laws of BC or Canada. Arbitrators in BC may, with the consent of the parties, apply the laws of another jurisdiction or religious laws, but only after the arbitration has commenced. This feature of the BC Act provides flexibility and choice of law as well as a procedural safeguard to ensure that the default law for arbitration is the relevant law of BC and Canada, and that other laws are only used with informed consent *at the time of a dispute* (as opposed to the time of the drafting of an arbitration agreement).

Concerns about "boutique law" have also been raised: Should every minority group have its disputes decided according to its own traditions, or should everyone living in Canada be required to have disputes adjudicated according to BC and Canadian law? The right to individual and group autonomy needs to be weighed against important public policy issues for the protection of vulnerable persons.

Competence of lawyers and arbitrators for family law arbitration

A number of the court cases involve issues of competence of lawyers. The major area of concern is lack of clarity of arbitration agreements submitted to arbitration. Lawyers also require competence in representing clients in arbitration and med-arb, and competence in managing issues of enforceability to prevent parties from incurring exorbitant costs. The competence of arbitrators is important to assure party satisfaction with awards which is a major factor in finality and enforceability. The major court criticisms of family law arbitrators in Ontario have been in mediation-arbitration processes where there have been *ex parte* communications between the parties and the mediator-arbitrator. This is the major source of party perceptions of a process that is less than fair and transparent.

Liability

It is well settled that arbitrators are not liable in tort or in contract. However, the courts will test to see whether a case is properly an "arbitration" and if not, the third party will not have the protection that is applied to arbitrators. See section 3.6.3 of this paper.

Models and policy options

Policy goals

Policy goals for dispute resolution in family disputes include the following: economical and expeditious processes, fairness, promotion of finality, predictability of result, protection of vulnerable persons. Some of these policy goals may be in tension with one another. Some policy options include the following:

- Mandatory arbitration schemes pursuant to individual statutes;
- Encouragement of arbitration by court reference under *Commercial Arbitration Act*, s. 36;
- Notice to Arbitrate;
- Expansion of court annexed non-binding financial, and parenting assessments;
- A graduated approach that includes mediation, then impartial custody assessment and valuation opinions, then binding arbitration with the assistance of the mediator's assessment and valuation reports;
- Increasing the use of voluntary arbitration through revised arbitration legislation, including the following possible options:
 - ▶ Revision of the BC *Commercial Arbitration Act* to make it clear whether it applies to family law cases or not. If it is desired that the BC *Commercial Arbitration Act* not apply to family cases, Section 2(2) should be revised to make this clear. If it is desired that the Act apply to family law cases, section 2(2) needs to be replaced with clauses that provide appropriate guidance to courts in family law cases;
 - ▶ Specialized family dispute resolution act with clear policy guidelines for appropriate balances between court supervision, family autonomy, safeguards for those entering into family arbitration agreements, and safeguards for vulnerable persons. Possible models include the North Carolina *Family Law Arbitration Act* and the Australia *Family Law Reform Act* plus a trained arbitrator roster;
- Schemes for developing competence of family arbitrators including development of family arbitrator rosters with training and experience requirements, fostering and funding the development of course modules in mediation-arbitration and arbitration for both lawyer-arbitrators and non-lawyer arbitrators.

Policy goals and options are discussed in more detail in section 4 of the paper.

Measuring success

Whatever policy is chosen, it should have clearly defined goals including definitions of success. Questions about "success" in improvements may differ and may include speed, low cost, enforceable outcome, quality of outcome, client autonomy, a respectful process or social equality and justice. Some of these goals may not be entirely compatible. Clear evaluation criteria could be built into the design in order to prevent anecdotal reports becoming the source of policy decisions. See section 4.3.2.2 of this paper.

Arbitration of Family Law Disputes in British Columbia

Paper prepared for the Ministry of Attorney General of British Columbia

by Catherine Morris, BA, LLB, LLM

July 7, 2004

1 Introduction

1.1 Terms of Reference

This paper examines legal and policies issues in British Columbia regarding arbitration of family law disputes, including the use of arbitration as part of mediation processes (mediation-arbitration or “med-arb”). The terms of reference of this paper include the following:

- the applicability of British Columbia’s current arbitration legislation to family law disputes, and what legislative changes might be necessary to appropriately support or supervise family arbitration or mediation-arbitration;
- potential practical or policy concerns relevant to the use of arbitration or mediation-arbitration and the enforcement or supervision of arbitration awards in various types of family law disputes, including property, family maintenance and child custody disputes;
- the interface between mediation and arbitration, particularly in the case of “med-arb,” including any issues related to contemplated Notices to Mediate or mandatory mediation options, and any practice or training issues related to availability and competence of persons who might conduct family arbitration and mediation-arbitration;
- implications and policy considerations regarding the use of traditional family arbitration or mediation-arbitration mechanisms used by minority populations in British Columbia;
- reasons BC lawyers may or may not favour arbitration or mediation-arbitration as an option.

1.2 Methodology

Research methodology for this project has included:

- examination of current arbitration legislation of British Columbia, and selected other Canadian jurisdictions, including Ontario and Alberta;
- analysis of relevant case law in Canada, the United States, Australia and the UK;¹

¹ No Australian or UK cases concerning family arbitration were found or noted in the relevant Australian or UK literature.

- review of literature from Canada, the United States, Australia and the UK.² During the course of research, it was discovered that there is also a relevant report from New Zealand³ which is discussed in the section on privacy of arbitration (section 3.5.1);
- Discussions or correspondence with selected experts in British Columbia, Ontario and Alberta.

2 Why consider family arbitration?

For the past two decades “ADR” in family law matters in British Columbia has usually meant mediation, since that is the most common ADR process used in civil disputes, including family law disputes. Use of arbitration for family law disputes in BC is rare. Arbitration is more frequent in other parts of Canada, particularly in Ontario and Alberta, but family arbitration is not commonplace anywhere in Canada. When arbitration is conducted, it is often part of mediation-arbitration processes. There is a growing body of cases and literature on family arbitration and mediation-arbitration, emanating for the most part from Ontario. There are increasing numbers of proponents of family arbitration who say that the public courts are not the best places to address family law disputes even in cases where mediation has broken down.

2.1 What is arbitration and how does it differ from mediation? Some definitions

2.1.1 Mediation

In the context of this paper, mediation is defined as a consensual process in which an impartial third-party mediator acts to facilitate a negotiated agreement between the parties. The intended outcome is a negotiated agreement that will be binding on the parties and enforceable by the courts as a contract.

2.1.2 Arbitration

Arbitration is an adjudicative process. In this paper, “arbitration” is defined as a binding process. The impartial arbitrator's role is to make a decision for the parties which is intended to be final, binding and enforceable.

There is still considerable public confusion about the differences between mediation and

² Very little literature have emerged from the UK in which family law arbitration is not practiced, because it does not bind the family courts. There are proposals to consider the Australian experience. See David Hodson. "Family Law Arbitration" (2002) 32 *Family Law* 694.

³ New Zealand Law Commission. *Te Aka Matua o te Ture: Improving the Arbitration Act*. Wellington: New Zealand Law Commission, 1996.

arbitration. This is reflected in newspaper reports that confuse arbitration with mediation.⁴ Part of this confusion stems from some alternative dispute resolution (ADR) processes which are similar to adjudication, except that they are not binding. If the so-called “arbitrator’s” recommendation does not result in settlement, the parties usually go on to trial. The non-binding nature of this process means that it is not “arbitration” within the meaning of the term as used in this paper.

2.1.3 Non-binding arbitration

Non-binding arbitration can take various forms. It can be a mediation with recommendations, or it can be a more formal hearing with evidence and arguments with recommendations. The result is not binding on the parties.

2.1.4 Mediation-Arbitration

A mediation-arbitration process starts with mediation, and if it does not result in an agreement, the process shifts to binding arbitration. In most mediation-arbitration processes in family law matters in Canada, the mediator and the arbitrator are the same individual who shifts roles from mediation to arbitration when mediation breaks down. Often a mediation-arbitration process is engaged by way of an arbitration agreement that incorporates mediation as a first stage.

2.1.5 Arbitration-Mediation (Arb-med)

In arb-med there is an arbitration hearing with evidence and arguments. The arbitrator writes a confidential award and places it in a sealed envelop on the table. She or he then switches roles and mediates the dispute. If settlement occurs, the envelope and award are destroyed. If settlement does not occur within an agreed time, the decision sealed in the envelop becomes the binding award. This process is outlined in an Australian journal article by John Wade.⁵ No references to this practice were found in Canada.

2.1.6 History of arbitration in Canada

Prior to 1986, arbitration in Canada was conducted under antiquated English legislation. In 1986, Canada acceded to the UN *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. The provinces passed legislation incorporating the Convention and the UN Commission

⁴ Heather Mallick "Boutique law: It's the latest thing." *Globe and Mail* (May 15), F3.
<<http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20040515/MALLICK15/>>

⁵ John Wade. “Arbitration of Matrimonial Property Disputes” (1999) 11:2 *Bond Law Review* 395 396.

on International Trade Law (UNCITRAL) *Model Law on International Commercial Arbitration*.⁶ Provinces also passed domestic arbitration statutes to modernize their legislation. The BC *Commercial Arbitration Act* is a product of this process. The BC statute was designed with commercial transactions in mind, not family law matters, as is discussed later in this paper.

2.1.7 Jurisdiction of arbitrators

An arbitrator's jurisdiction is strictly determined by the construction of the agreement or statute which confers arbitral status.⁷ In British Columbia, the *Commercial Arbitration Act*, section 1(b) provides that "arbitral error" includes "exceeding the arbitrator's powers." The Supreme Court of Canada has recently considered the issue of an arbitrator's mandate:

"...an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities."⁸

This case also suggests that an arbitration agreement will be interpreted liberally "based on identification of its objectives."⁹ However, as discussed later, courts generally construe the authority of an arbitrator's jurisdiction fairly narrowly and will not "read in" jurisdiction that is not reasonably provided by an arbitration agreement or statute.¹⁰

2.2 When might people consider using family law arbitration?

It appears that very little arbitration is conducted in family law cases in British Columbia. Anecdotal information received from several arbitrators from Ontario indicates that there is an increasing amount of family arbitration happening there, but no current estimates of numbers

⁶ See the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, online: <<http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>>, and see the UNCITRAL *Model Law on International Commercial Arbitration* at <<http://www.uncitral.org/english/texts/arbitration/ml-arb.htm>>.

⁷ R.H. McLaren & E.E. Palmer, *The Law and Practice of Commercial Arbitration* (Scarborough: Carswell, 1982) 13.

⁸ *Desputeaux v. Éditions Chouette* (1987) inc. [2003] 1 S.C.R. 178.

⁹ *Ibid.*.

¹⁰ *Britt v. Britt* [2000] O.J. No. 527 (Ontario Superior Court of Justice).

were found.¹¹ Anecdotal information from a senior lawyer-mediator-arbitrator in Alberta suggests there are about 10 or 12 senior lawyers in Calgary who practice family law arbitration in property and support cases, and 3 or 4 psychologists who conduct med-arb in custody cases. In cases that have been in litigation for a long time, this lawyer does not recommend mediation alone, but rather suggests med-arb processes. About a third of this particular lawyer-mediator-arbitrator's cases proceed to the arbitration phase. Of these, very few end up in court, and those that do are rarely appealed successfully. As will be seen later in this paper, very few cases have emanated from Alberta. Fewer than a handful of persons in BC are known to practice family arbitration. While several BC arbitrators believed to be practising family arbitration were contacted, none had responded to research inquiries at the date of this paper. Therefore, no anecdotal or other information from BC is available concerning frequency of family law arbitration.

A small number of Canadian articles examine arbitration in family law cases. No literature about family arbitration was found in British Columbia. In the absence of empirical research investigating the use of family arbitration in British Columbia, the low number of cases probably means that arbitration is not frequently used in family law disputes, although some commentators have suggested it could be because cases are usually resolved without further recourse to courts.¹² The literature envisions that couples whose negotiations break down might consider arbitration for some of the same reasons they consider mediation.

2.2.1 Hypothetical reasons: And some realities¹³

2.2.1.1 Avoids adversarial proceedings?

The goal of avoiding adversarial proceedings is said to favour the idea of both mediation and arbitration. Arbitration, however, is not necessarily consensual (non-adversarial) by the time parties are involved in it. Arbitration can be every bit as bitter and contentious as litigation as the case law (discussed later) illustrates. There has been a good deal of litigation by parties attempting to avoid arbitration agreements they entered earlier, and also to overturn outcomes of arbitration.

¹¹ William Riley, interviewed by the *Lawyers Weekly* in 1993, reported that he was one of about 10 senior lawyers in Ottawa doing family arbitration, and he was doing about 4 per year at that time. See "Arbitration is Faster, Cheaper Way to Resolve Family Disputes" *Lawyers Weekly* 13:15 .

¹² Norman Fera. "The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law" (1995-1996) 13 *Canadian Family Law Quarterly* 313.

¹³ The advantages and disadvantages of arbitration are rehearsed in most articles. See e.g. Allan R. Koritzinsky & Robert M. Jr. Welch. "The Benefits of Arbitration" (1992) 14:4 *Family Advocate* 45.

2.2.1.2 Mediation and arbitration avoid delays and rigours of the court process?

Hypothetically speaking, mediation and arbitration can both be accomplished relatively quickly. Both processes, when used effectively, can conceivably be completed in a matter of weeks as compared to months or years of litigation. While this is the best-case scenario, arbitration can end up delaying outcomes if parties resist arbitration or the results become the source of further litigation. Case law examples are discussed later in this paper.

2.2.1.3 Mediation and arbitration keep costs down?

If mediation or arbitration are commenced early in the proceedings, the chances are good that costs will be a fraction of what they can be in extended litigation. This benefit is lost if the arbitration becomes protracted, or is followed by further litigation.

2.2.1.4 Mediation and arbitration preserves privacy?

Privacy is a key concern of some persons, and particularly those whose business interests will be jeopardized by public disclosure of company documents, such as financial projections.¹⁴ Privacy will be achieved only if the matter turns out to be final. Otherwise the parties could end up in public court. Also, privacy is considered a detriment for those, particularly feminists, who are working to move family life from the “private” sphere where anything can happen, including coercion and abuse, to the “public” sphere where there is more social accountability. The issue of privacy of arbitration is discussed in section 3.5.1 of this paper.

2.2.1.5 Mediation and arbitration provide procedural and evidentiary flexibility?

In both mediation and arbitration there is choice of time and place for the hearing, and reduction of formality and avoidance of an adversarial atmosphere. In arbitration, the rules of evidence can be more relaxed, and discovery procedures may be waived or made less formal. Procedural flexibility may also be seen as a disadvantage, as the parties are not protected by formal discovery rules and sanctions. Lack of formal rules of evidence means that evidence of varying quality can be admitted by the arbitrator. In fact, arbitrators are more likely to admit hearsay and other evidence that does not adhere to strict rules of evidence for fear that to decline to hear relevant evidence may be later viewed as an arbitral error.

2.2.1.6 Mediation and arbitration provide a choice of mediator or arbitrator who reflects the values of the disputants?

In consensual mediation or arbitration agreements, parties may choose their own mediator or

¹⁴ Personal communication with a Canadian lawyer-arbitrator, June 15, 2004.

arbitrator. However, if the parties cannot agree on an arbitrator, an arbitrator may be appointed pursuant to the rules of the applicable arbitration act or rules. Also, parties are not necessarily content with their choice of arbitrator after the arbitration commences or the award is given.

2.2.1.7 Mediation and arbitration are final and binding?

The promise of mediation is that it is faster, cheaper, less adversarial and otherwise better. Included in these promises is the promise of finality. In property and spousal support matters, finality may be achieved, but this may not be seen as an advantage by the losing party. In matters of child custody or support, arbitration awards are not necessarily final or binding as the case law discussed later illustrates. If the award needs to be enforced or appealed, parties must go to court.

2.3 What the Canadian cases show about who actually uses arbitration

Despite the purported advantages, few Canadians use arbitration to resolve family law disputes. This may be partly because of the expense of arbitration – while it is purported to be cheaper, the parties must pay for the full services of both of their lawyers plus the arbitrator. While parties pay for only a fraction of the costs of the public justice system; they pay all the costs of private justice. The comments of one lawyer-arbitrator suggest that arbitration may be more often used in what he termed “high end” cases, meaning cases involving a lot of family assets, where the desire for confidentiality is a high motivator for the use of binding arbitration or mediation-arbitration.¹⁵ Another high motivator might be religion, which may provide strong family, congregational and cultural pressure for parties to use a religious tribunal.¹⁶ In the absence of empirical research, the following information is primarily drawn from cases in Canadian courts in which judges have considered arbitration of family law disputes. Thus, the sample is skewed in that it shows only examples where arbitration was contested, reviewed, appealed or required contested enforcement in the courts. However, the following list likely reflects the most common uses of arbitration.

2.3.1 Arbitration Clauses in Separation Agreements

Most of the cases involve disputes about arbitration clauses in separation agreements to address any disputes which might arise after the signing of the agreement. Most of the Canadian case law on family arbitration arises out of this use of arbitration. Some of these clauses are in mediation-arbitration agreements developed during family law disputes as a way to resolve them, however,

¹⁵ Personal communication with a lawyer-arbitrator, June 15, 2004

¹⁶ See Elliot Scheinberg, “Arbitration in Custody and Visitation Issues” (2003) 229 *New York Law Journal* 2; Lynda Hurst, “Ontario sharia tribunals assailed Women fighting use of Islamic law but backers say rights protected.” *Toronto Star* (22 May 22, 2004), online Canadian Council Of Muslim Women: <<http://www.ccmw.com/In%20The%20Press/ShariainCanada/Ontario%20sharia%20tribunals%20assailed.htm>>

some are arbitration clauses in separation agreements or ante-nuptial agreements.

2.3.2 Mediation agreements with arbitration clauses (“mediation-arbitration” agreements, or “med-arb”)

Some cases involve mediation-arbitration agreements that provide for both mediation and arbitration. The arbitration clause is intended to come into effect if mediation is not successful.

2.3.3 Parenting issues: Visitation, weekend access, holidays, education

Some parents make provisions in separation agreements for the use of mediator-arbitrators or arbitrators to resolve issues such as child education, vacation and weekend visits.

2.3.4 Religious tribunals

Some people are opposed to using the public courts for religious or cultural reasons. Mediation, mediation-arbitration or arbitration by a tribunal reflective of the parties’ cultural or religious values may be seen as a satisfactory alternative to avoid the courts and allow selection of an arbitrator with similar beliefs. Some of these processes may be med-arb processes.¹⁷ Examples of religious tribunals include Rabbinical Tribunals, a proposed Islamic Court of Civil Justice¹⁸ in Ontario, and Christian conciliation and mediation services.¹⁹ A fair number of cases in the courts of the United States and Canada emerges from Jewish Rabbinical tribunals. Some of the case law and public policy issues are discussed later in more detail.

¹⁷ Islamic Court of Civil Justice, online: <<http://muslim-canada.org/DARLQADAform2andhalf.html>>

¹⁸ *Ibid.*

¹⁹ Some Christians feel bound by biblical injunctions not to use the courts, particularly in disputes involving other Christians. This might be a particular concern in family disputes. See Lynn R. Buzzard & Laurence Eck, *Tell It To The Church: Reconciling Out of Court* (Elgin, IL: David C. Cook Publishing Co., 1982); Ken Sande, *The Peacemaker: A Biblical Guide to Resolving Personal Conflict*. (Grand Rapids, Michigan: Baker Book House, 1991). There may be particular concerns about the well-being of women and children in such situations if the parties and the mediator or arbitrator espouse or practice women’s subordination using some interpretations of the bible.

3 Legal and policy issues

3.1 Qualitative differences between commercial disputes and family law disputes that affect the utility of the *Commercial Arbitration Act* for family law disputes

3.1.1 Legal and logistical complexity

While it is not intended to detract from the complexity of some commercial disputes, a relatively routine family law case may be quite complex from a legal and logistical point of view. There may be property, spousal support and parenting issues involved, and these issues may be intertwined. There may be significant issues involving complex financial, business and commercial complexities, and matters concerning pensions, estate planning and taxes²⁰ not to mention issues concerning spousal and child well-being. There may be significant interjurisdictional issues to consider in the short, medium and long term. While many family lawyers are equipped to deal with these issues, most are not trained as arbitrators. Arbitration is more complex procedurally than most lawyers realize until they begin practising it. Arbitration is also procedurally different from mediation. When one adds to these factors to the complexity of mediation and mediation-arbitration in a highly conflicted case, one can see that there may be relatively few people equipped to practice in this area.

3.1.2 Family conflict is relational not transactional²¹

The BC *Commercial Arbitration Act* was designed for commercial disputes. Commercial disputes are essentially transactional, although one cannot dismiss the relational issues within many commercial disputes, particularly those involving longstanding business relationships. While there are important financial and transactional issues in most family law disputes, the conflicts are essentially relational, not transactional, in nature. Decisions by divorcing couples are not like deteriorating commercial partnerships that were originally “inspired by a consensus view born of mutual self-interest.”²² There is more at stake than a commercial arrangement gone wrong. According to a US commentator:

“Society’s treatment of divorcing people as a legal entity... is merely an artificial way of measuring emotional loss in financial terms. Whereas money is the real

²⁰ *Roy v. Canada* [2002] T.C.J. 20 (Tax Court of Canada). Note that in *Schultz v. Shultz* [2000] A.J. 1395 it was not considered an arbitral error to fail to consider tax implications when no evidence of same was placed before the arbitrator.

²¹ Thomas E. Carbonneau. “A Consideration of Alternatives to Divorce Litigation” (1986) 1986:4 *University of Illinois Review* 1119, at 1154.

²² *Ibid.*, at 1155.

object of disputes between merchants, it is a mistaken symbol for divorcing spouses, manifesting their pain, humiliation, anger, and latent psychological conflicts.”²³

While this statement is important to point out the emotional content of divorce situations, the statement may also reflect a middle-class, masculinist approach. While it is important not to discount the importance of emotional and psychological well-being of families, it is important not to underestimate the central importance of practical financial issues and the economic well-being of the parties and children in family law disputes.

3.1.3 Power

Complex emotional and economic interdependencies in families create power dynamics that can be more complex and more subject to power-abuse than the dynamics between commercial disputants. Courts in Canada and the United States will supervise family law arbitration cases and treat them with considerably more caution than they do commercial cases. Family law disputes may rightly require more court supervision than is envisaged by the BC *Commercial Arbitration Act*.

3.2 Applicability of the BC *Commercial Arbitration Act* to family law disputes

There has been discussion among lawyers as to whether the BC *Commercial Arbitration Act* applies to family law disputes at all.²⁴ This question arises because of section 2 which states:

2 (1) This Act applies to the following:

- (a) an arbitration agreement in a commercial agreement;
- (b) an arbitration under an enactment that refers to this Act, except insofar as this Act is inconsistent with the enactment regulating the arbitration, or with any rules or procedure authorized or recognized by that enactment;
- c) any other arbitration agreement.

2 (2) A provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* (Canada) or the *Family Relations Act* has no effect.

While Section 2(1) makes the Act apply beyond commercial arbitrations to “any other arbitration agreement,” Section 2(2) has been read by some lawyers as excluding family arbitration. The

²³ *Ibid.*.

²⁴ Personal communication with family lawyer, mediator and arbitrator in BC, April 7, 2004

1987 case of *Merrell v. Merrell*²⁵ said in *obiter dicta* that Section 2 of BC *Commercial Arbitration Act* “preserves the jurisdiction of the Court” in family law cases. No other case has been located that suggests family law cases are not arbitrable under this BC statute. An examination of other BC cases has found that courts have applied the BC *Commercial Arbitration Act* to family law arbitrations.²⁶ While a review of the cases indicates that courts will apply the Act, the language of the Act is confusing and acts as a deterrent to the use of arbitration.

Consideration was given to the arbitration needs of parties who live across international borders. The BC *International Commercial Arbitration Act* applies only to international commercial arbitration, and does not appear to have any provisions that would allow its use for family law disputes.

Family law statutes in BC are silent about arbitration, including the *Family Relations Act*²⁷ the *Division of Pensions Regulation*,²⁸ the *Family Maintenance Enforcement Act*²⁹ and the *Interjurisdictional Support Orders Act*³⁰ The *Divorce Act* is also silent about arbitration, although it does encourage mediation (Section 9(2)).

²⁵ *Merrell v. Merrell* (1987) 11R.F.L. (3d) 18 (BCSC).

²⁶ See e.g. *S.M.R. v. R.S.B.* [2003] B.C.J. 1640 which considers the issue of a stay under S. 15 of the *Commercial Arbitration Act*.

²⁷ *Family Relations Act*, 1996 [RSBC 1996] CHAPTER 128, online:
<http://www.qp.gov.bc.ca/statreg/stat/F/96128_01.htm#section5>

²⁸ *Division of Pensions Regulation B.C. Reg. 77/95 O.C. 196/95* Deposited March 3, 1995, effective July 1, 1995 under the *Family Relations Act*, online: <http://www.qp.gov.bc.ca/statreg/reg/F/FamilyRelations/77_95.htm>

²⁹ *Family Maintenance Enforcement Act* [RSBC 1996] Chapter 127, online:
<http://www.qp.gov.bc.ca/statreg/stat/F/96127_01.htm>

³⁰ *Interjurisdictional Support Orders Act*, [SBC 2002] Chapter 29, online:
<http://www.qp.gov.bc.ca/statreg/stat/I/02029_01.htm>

3.3 Enforcement of arbitration awards in family law cases

3.3.1 Court enforcement in BC

The *Family Relations Act*,³¹ the *Division of Pensions Regulation*,³² the *Family Maintenance Enforcement Act*,³³ and *Interjurisdictional Support Orders Act*³⁴ discuss court enforcement of orders or agreements, but none mention arbitrators' awards. Is an arbitrator's award an "order" or an "agreement"? The *BC Commercial Arbitration Act* says:

29 With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.³⁵

Thus, an award cannot be enforced as an "order" without leave of the court.³⁶ This means that for an award to be enforced under any of the family law Acts or Regulations, it would likely have to be converted into an order, either by consent or through an application to the Supreme Court.

Note that a 2002 case in the Tax Court of Canada found that a "binding mediation" decision (which, on examination of the decision, appears to refer to an arbitration award) was *not* a court order, and therefore the child support award was not subject to the tax rules for inclusion and exclusion of court ordered maintenance.³⁷

Turning an award into an order is also important for interjurisdictional enforcement. The

³¹ *Family Relations Act*, 1996 [RSBC 1996] CHAPTER 128, online:
<http://www.qp.gov.bc.ca/statreg/stat/F/96128_01.htm#section5>

³² *Division of Pensions Regulation B.C. Reg. 77/95 O.C. 196/95* Deposited March 3, 1995, effective July 1, 1995 under the *Family Relations Act*, online: <http://www.qp.gov.bc.ca/statreg/reg/F/FamilyRelations/77_95.htm>

³³ *Family Maintenance Enforcement Act* [RSBC 1996] Chapter 127, online:
<http://www.qp.gov.bc.ca/statreg/stat/F/96127_01.htm>

³⁴ *Interjurisdictional Support Orders Act* [SBC 2002] Chapter 29, online:
<http://www.qp.gov.bc.ca/statreg/stat/I/02029_01.htm>

³⁵ *Commercial Arbitration Act* [RSBC 1996] Chapter 55, online:
<http://www.qp.gov.bc.ca/statreg/stat/C/96055_01.htm>, section 29.

³⁶ If the arbitrator is appointed by the court under Section 36, the report or award of the arbitrator is "equivalent to the verdict of a jury." (Subsection 36(2))

³⁷ *Roy v. Canada* [2002] T.C.J. 20 (Tax Court of Canada).

Interjurisdictional Support Orders Act makes no reference to arbitration awards, but refers to “orders,” and in Section 1, the definition of “support order” includes reference to a “written agreement.”

Converting an award into an order in BC appears to necessitate an application to the Supreme Court.³⁸ An Ontario practitioner³⁹ suggests conversion of an award to an order can possibly be done in Ontario by way of application for a consent order even though an arbitration process itself has been contested, since the parties will have made an arbitration agreement as part of a separation agreement or a pre-nuptial agreement.⁴⁰ Once an arbitration award is incorporated by consent into a court order, it will no longer be appealable,⁴¹ therefore, it seems doubtful that a court would allow a process of applying for a desk order within an appeal period under the BC *Commercial Arbitration Act*. Note that if parties desire that an agreement to arbitrate future disputes is to survive a subsequent order under the *Divorce Act*, the arbitration agreement itself should be incorporated into the order.⁴²

3.3.2 Day-to-day practicalities

Even if parties are both willing to comply with an award, it may be essential to have the award converted into a court order so that it will be in an acceptable form for use with schools, doctors and other professionals who prefer to see an order, and who may be confused by an arbitration award that looks like neither an order nor a separation agreement. Pension administrators may similarly want to see an order rather than an arbitrator’s award.⁴³

³⁸ *Merrell v. Merrell* (1987) 11 R.F.L. (3d) 18; *Divorce Act* R.S., 1985, c. 3 (2nd Supp.); <<http://laws.justice.gc.ca/en/D-3.4/48948.html#rid-49024>>

³⁹ Personal communication from an Ontario lawyer dated March 1, 2004, communicated to the author June 1, 2004, on file with the author.

⁴⁰ *Commercial Arbitration Act* [RSBC 1996] Chapter 55, online: <http://www.qp.gov.bc.ca/statreg/stat/C/96055_01.htm>

⁴¹ *Turgeon v. Turgeon* [1997] O.J. No. 4269 (Ontario Court - General Division). Note that the order in this case was not in fact turned into a consent order; but the judge said “If the Arbitration Award had been incorporated in a consent judgment of the Ontario Court (General Division) [now the Superior Court] as provided for under the Arbitration Agreement, it could not be appealed to a judge of this Court.”

⁴² See *Merrill v. Merrell* [1987] B.C.J. No. 2329; 11 R.F.L. (3d) 18.

⁴³ Personal communication from an Ontario lawyer dated March 1, 2004, communicated to the author June 1, 2004, on file with the author.

3.4 Court supervision of arbitration processes and outcomes

No literature was found that discusses family law arbitration in British Columbia. The available Canadian literature discusses the Ontario legislation. In BC, there are limited grounds for review of arbitration processes and awards. All reviews are by the Supreme Court (section 1).

An arbitrator can be removed by the Court on application of a party for “arbitral error” (section 18) which includes corrupt or fraudulent conduct, bias, exceeding the arbitrator’s powers, or failure to observe the rules of natural justice (section 1). The Supreme Court may set aside an arbitrator’s award or remit it back to the arbitrator for reconsideration if it has been “improperly procured or an arbitrator has committed an arbitral error.”(Section 30 (1))

The Act provides that:

“30(3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

Errors of law may not be appealed without consent of the parties to arbitration,⁴⁴ or with leave to appeal. The court may grant leave to appeal only:

“31 (2) ... if it determines that

- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
- (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
- c) the point of law is of general or public importance.”

Section 32 of the Act makes it clear that orders, rulings or awards of arbitrators are not to be “questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.”

Unlike the Ontario *Arbitration Act* (Section 3), and the Alberta *Arbitration Act* (Section 44 (1)) the BC *Commercial Arbitration Act* says nothing about review on a matter of mixed fact and law. The wording of section 30 (3) of the BC Act does not seem to provide room for parties to agree to an appeal on the grounds of mixed fact or law. The Act provides for confirmation, amendment or setting aside of awards (Section 31), or in some cases for remitting back to the arbitrator for reconsideration. (Section 30), but there is no provision for a hearing *de novo*.

⁴⁴ This effectively means that a clause to this effect would need to be included in the arbitration agreement.

The “hands off” approach of the *BC Commercial Arbitration Act* was designed to make BC more hospitable to commercial arbitration by creating more finality of awards. The Act was not designed for family law matters, and may not be seen as providing sufficient supervision for family matters for several reasons, discussed below. A review of specific procedures, forms and rules to be used for enforcement or appeal is beyond the scope of this project.⁴⁵

3.4.1 Lawyers’ concerns⁴⁶

Currently lawyers in BC use arbitration very little. It has been suggested that BC lawyers might use arbitration in family law cases more often if the *BC Commercial Arbitration Act* were less ambiguous about its applicability to family law disputes.

There is no published literature from BC, and the few unpublished opinions tend to argue that family law arbitration is better than the courts for family law cases, using the arguments discussed above. People wishing to promote the use of family law arbitration in BC will point out the few BC cases in which courts have applied the *BC Commercial Arbitration Act* to family law arbitration cases.⁴⁷

More literature emerges from Ontario. The authors are generally experienced Ontario family lawyers who assume that arbitration is expeditious, less arduous than courts, and final. Some literature explains how to make arbitration binding and enforceable, or how to appeal arbitration awards. The Ontario *Arbitration Act* appears to be more hospitable to family arbitration than BC

⁴⁵ For detail about Ontario procedures for appealing or reviewing arbitration awards in family law cases, see Norman Fera. “The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law” (1995-1996) 13 *Canadian Family Law Quarterly* 313.

⁴⁶ These points are drawn from the papers and articles cited individually as well as other papers including Diane Carr, “Back to the Basics: Arbitration Awards” (8th Annual Institute of Family Law, County of Carleton Law Association, May 29 1999) [unpublished]; William C.V. Johnson, “Practice and Procedure in Arbitration” (5th Annual Solicitors’ Conference, County of Carleton Law Association, November 14-15, 1997) [unpublished]; Julien D. Payne. Family Dispute Resolution: Several Options (1996) [unpublished]; Julien D. Payne. Family Conflict Management and Family Dispute Resolution on Marriage Breakdown and Divorce: Diverse Options. 2001 [unpublished]; Julien D. Payne & Marilyn A. Payne, “Family Conflict Resolution” in *Dealing with Family Law* (Toronto: McGraw-Hill Ryerson Limited, 1993); Stephen J. Lautens, “A Procedural Guide to Family Arbitrations” (Family Law: Doing More and More with Less and Less, 1994 Institute of Continuing Legal Education, January 29 1994) [unpublished]; Nancy M. Mossip, “Arbitrations: What Are We Afraid Of?” (Family Law: Doing More and More with Less and Less, 1994 Institute of Continuing Legal Education, January 29 1994) [unpublished]. Note that the scope of this current paper does not permit a detailed discussion of practice points for lawyers drafting arbitration agreements or arbitrators conducting arbitrations.

⁴⁷ E.g. *S.M.R. v. R.S.B.* [2003] BCCA 412 (BCCA) (stay of court proceedings pursuant to an arbitration agreement concerning spousal support); *Gilchrist & Co. v. McGinn* [2001] B.C.J. No. 332 (BCSC) (application for review of lawyer’s costs in an arbitration case).

legislation. If BC wishes to amend its legislation, it is useful to consider the points that Ontario lawyers and courts raise as concerns about their own legislation, including the needs for:

- finality and enforceability⁴⁸
- predictability and certainty in the law⁴⁹
- clear limits on judicial involvement by way of appeal which limitations in the Ontario Act are seen as “broad and bold.”⁵⁰
- clear time limits for appeals or reviews including harmonization with other relevant statutes;⁵¹
- clarity as to procedure, e.g. appeal, or judicial review or both?
- organization of courts to avoid confusion over jurisdictions and provide relatively uniform access to services throughout the province⁵²
- remedies that apply to all persons in family relationships whether married or cohabiting.
- more uniformity across provinces concerning arbitration legislation.⁵³

Anecdotal information from a senior lawyer-mediator-arbitrator in Alberta suggested that from his perspective as an arbitrator and counsel for parties using arbitration for family law issues, the Alberta *Arbitration Act* is both hospitable and suitable for family arbitration, as it is flexible enough to provide a good balance between enforceability and court supervision.⁵⁴

⁴⁸ Norman Fera. “The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law” (1995-1996) 13 *Canadian Family Law Quarterly* 313 13; Andrea Himel. “Mediation/Arbitration Agreements: The Binding Comes Undone” (2002) 20 *Canadian Family Law Quarterly* 55.

⁴⁹ Norman Fera. “The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law” (1995-1996) 13 *Canadian Family Law Quarterly* 313; Andrea Himel. “Mediation/Arbitration Agreements: The Binding Comes Undone” (2002) 20 *Canadian Family Law Quarterly* 55.

⁵⁰ Norman Fera. “The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law” (1995-1996) 13 *Canadian Family Law Quarterly* 313 315; Andrea Himel. “Mediation/Arbitration Agreements: The Binding Comes Undone” (2002) 20 *Canadian Family Law Quarterly* 55.

⁵¹ Norman Fera. “The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law” (1995-1996) 13 *Canadian Family Law Quarterly* 313 321.

⁵² See T.G. Bastedo, “The Mediation and Arbitration of Family Law Disputes in Ontario: A Practitioner's Perspective” (International Bar Association Conference, October 2002) [unpublished] 2., who comments on the confusion in Ontario which “has been in the throes over the last decade of a major reorganization of the court system so as to appoint and constitute courts which are dedicated solely to family law dispute resolution. However, not all of the population is served by these courts...”

⁵³ *Ibid.*, 3.

⁵⁴ Personal communication of a lawyer-arbitrator from Alberta, June 15, 2004.

3.4.2 How do courts' view family arbitration?⁵⁵

Courts and policy makers do not always see things the way lawyers do. How much supervision over family arbitrations do courts wish to exercise? This section reviews cases from Canada in comparison with cases from the US. The purpose of this section is not provide a legal opinion about what might be “good law” in BC. In the absence of a good deal of consistent case law in Canada and in the light of the variety of provincial arbitration statutes, this may be premature. Rather, this review of judicial opinion is intended to provide a survey of some issues that would need to be addressed by policy makers if it is seen as desirable to encourage more family arbitration or med-arbitration in BC.

First it should be noted that the court cases, by their nature, review only arbitrations that have not been acceptable to at least one party. This project did not include empirical research to learn how much family arbitration is being conducted in Canada in comparison to the number of court cases about family arbitration. However, to get a rough sense of how much family arbitration and med-arbitration is happening in BC and across Canada and the perceptions of Canadian lawyers and arbitrators about family arbitration, methodology for this project included writing emails to persons listed in several Canadian online dispute resolution directories whose areas of dispute resolution practice appeared to include family arbitration. Included were the online directories of the ADR Institute of Canada and the BC Mediator Roster, a search on ADRweb.ca for arbitrators with profiles mentioning family law, and a request for contact which the BC Mediation and Arbitration Institute forwarded to its members.⁵⁶ This search was by no means exhaustive and also lacked methodological rigour. While scores of emails were sent, and a number of people responded with interest, only a handful of people responded who have any substantial experience with family arbitration. Overall, it seems appropriate to speculate that little family arbitration is taking place anywhere in Canada, particularly in British Columbia.

Similarly, the court cases are few, and most are from Ontario. Ontario lawyer Norman Fera suggests that the fact that there are few cases in the Ontario courts “is a tribute to and confirmation of the fact that voluntary ADR has found its place and those who experience it are

⁵⁵ This section draws on the following literature: Melissa Douthart Philbrick. “Agreements to Arbitrate Post-Divorce Custody Disputes” (1985) 18 *Columbia Journal of Law and Social Problems* 419; Kenneth Rigby. “Alternative Dispute Resolution” (1984) 44 *Louisiana Law Review* 1725; E. Gary Spitko. “Reclaiming the “Creatures of the State”” Contracting for Child Custody Decisionmaking in the Best Interests of the Family” (2000) 57:4 *Washington and Lee Law Review* 1139; Robert Coulson. “Family Arbitration - An Exercise in Sensitivity” (1969) 3 *Family Law Quarterly* 22; Janet Maleson Spencer & Joseph P. Zammit. “Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents” (1976) *Duke Law Journal* 911.

⁵⁶ The listing of Family Mediation Canada mediators provided no online information concerning members who practice family arbitration.

generally satisfied.”⁵⁷ Another Ontario lawyer mediator-arbitrator finds that of the mediation-arbitration he experiences or leads, “very few cases... actually proceed to arbitration.”⁵⁸

The next section breaks down court cases on the basis of subject matter, since courts treat cases differently depending on whether they involve property, spousal support, or child support and custody issues.

3.4.2.1 Disputes about family property

Courts in Canada tend to require that couples keep their agreements to arbitrate property disputes. In the case of *G. v. G.*, the Alberta Court of Queens Bench denied an application for a stay of court proceedings concerning property division, and instead required the parties to abide by an arbitration clause in their pre-nuptial agreement. The court declined to rule on the validity of the pre-nuptial agreement which contained the arbitration clause, but rather stated that the arbitrator could rule on this threshold matter under sections of Alberta’s *Arbitration Act* which allow the arbitrator to rule on his or her own jurisdiction (section 17(1)).⁵⁹ The court allowed that the wife had an arguable case concerning coercion of the pre-nuptial agreement but that further evidence would need to be called.⁶⁰ This case cites a Supreme Court of Canada case which points out that the person opposing a stay of arbitration proceedings has the onus to prove that a case is *inappropriate* for arbitration.⁶¹ The cases relied on by the court on this point involved arbitration agreements in commercial settings.

While there is no fully analogous case law in BC, it seems likely that BC courts would use reasoning similar to other Canadian courts, subject to any relevant differences in BC legislation.

Arbitration awards in property matters are likely to be upheld if they are decided in keeping with judicial standards of consideration at trial. In the Ontario case of *Robinson v. Robinson*, the

⁵⁷ Norman Fera. “The Procedural Map From the Arbitration Table to the Court room Door - The Road Away from ADR in Family Law” (1995-1996) 13 *Canadian Family Law Quarterly* 313 323.

⁵⁸ T.G. Bastedo, “The Mediation and Arbitration of Family Law Disputes in Ontario: A Practitioner's Perspective” (International Bar Association Conference, October 2002) [unpublished] 15.

⁵⁹ *G. v. G.* [2000] ABQB 219 (ABQB). While there is no comparable section in the BC *Commercial Arbitration Act*, all arbitrators must necessarily make decisions concerning the extent and limits of their jurisdiction under the arbitration agreement under which they are appointed.

⁶⁰ This paper does not discuss the law of pre-nuptial contracts, which according to *G. v. G.* require “utmost good faith” in terms of financial disclosure. *Ibid.*.

⁶¹ *Ibid.*, citing *Stokes-Stephens Oil Co. v. McNaught* [1918] 2 W.W.R. 122 (SCC) and *Top Notch Const. Ltd. v. Western Irrigation Dis. Bd. Of Dir.* (1991) 78 Alta. LR (2d) 341 (Q.B.)

arbitrator decided issues of equalization of net family property and costs. The judge dismissed the husband's appeal of the award, saying that the arbitrator "did not act on the basis of wrong principle, disregard material evidence or misapprehend the evidence. Accordingly there was no basis to interfere with the awards."⁶²

This case outlines the standard of review to be used to review an award by an arbitrator, citing the standards of appellate review of trial cases outlined by the Supreme Court of Canada in *Moge* (which was not an arbitration case). The Supreme Court applied the following principles quoted from the Ontario case of *Harrington*:

"As far as the applicable standard of appellate review is concerned I am of the view that we should not interfere with the trial Judge's decision unless we are persuaded that his reasons disclose material error and this would include a significant misapprehension of the evidence, of course, and, to use familiar language, the trial Judge's having "gone wrong in principle or (his) final award (being) otherwise clearly wrong": *Attwood v. Attwood*, [1968] P. 591 at p. 596. In other words, in the absence of material error, I do not think that this Court has an "independent discretion" to decide afresh the question of maintenance and I say this with due respect for decisions to the contrary"⁶³

Note that these principles approved in *Moge* and *Harrington* (a case of the Manitoba Court of Appeal) were used to construe the amount of latitude of an appeal court under the appeal provision of the *Divorce Act* in section 21. Note also that both the *Moge* and *Harrington* cases were maintenance cases, but that they were applied to an arbitration of a matrimonial property case in *Robinson*. See also the cases of *Ross v. Ross*,⁶⁴ *Seneviratne v. Seneviratne* (Alberta),⁶⁵ *Willick v. Willick* (Alberta),⁶⁶ *Bruneau v. Bruneau* (Alberta)⁶⁷ and *Koziol v. Smith* (Nova Scotia).⁶⁸

⁶² *Robinson v. Robinson* [2000] O.J. No. 3299

⁶³ *Moge v. Moge* [1992] 1 S.C.R. 813, quoting with approval the statement of Wilson J.A. in *Moge* at the Manitoba Court of Appeal, who in turn quoted Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154.

⁶⁴ *Ross v. Ross* [1999] 46 O.R. 3d 216 (Ontario Superior Court of Justice)

⁶⁵ *Seneviratne v. Seneviratne* [1998] 435 (Alberta Court of Queen's Bench)

⁶⁶ *Willick v. Willick* [1993] A.J. 593 (Alberta Court of Queen's Bench)

⁶⁷ *Bruneau v. Bruneau* [1993] A.J. 793 (Alberta Court of Appeal)

⁶⁸ *Koziol v. Smith* [1996] N.S.J. No. 390.

Awards have, of course, been set aside when arbitrators' behaviour has given rise to a reasonable apprehension of bias⁶⁹ and exceeding jurisdiction.⁷⁰ However, the Nova Scotia case of *Koziol v. Smith*⁷¹ shows that an arbitration agreement regarding property matters may be given a great deal of latitude. This case preceded amendments to the Nova Scotia *Arbitration Act* in 1999, but the amendments are not particularly relevant to the case. The *Koziol v. Smith* case involved a couple who had a cohabitation agreement which named a friend as arbitrator. The wording of the agreement also waived the right to be fully informed of the other side's submissions. Later Mr. Koziol complained that the arbitrator was biased. The judge pointed out the waiver in his judgement, and said that the applicant "had no right to waive bias by choosing a personal friend, and then argue that because the decision so overwhelmingly supported the respondent, it was biased." The court upheld the award, giving a great deal of latitude to the parties' arbitration agreement and to the arbitrator's conduct. Note that this appeal was not the end of the matter. Mr. Koziol proceeded to fraudulently convey property to his parents, which resulted in another case to enforce the terms of the arbitration agreement. Mr. Koziol was unsuccessful in this case, too. The point of mentioning this is to show that arbitration does not always fulfil its promise of being "faster, cheaper and better" than court.

Even where a spouse was suffering a mental illness, the Ontario court held that she was sufficiently rational and had been represented in a Rabbinical Court in New York and that there was "no evidence" before the judge "that the judgement of the Rabbinical Court was improvident."⁷² Note that this case was heard before the new Ontario *Arbitration Act* was passed.

3.4.2.2 Spousal support disputes

Arbitrations of spousal support disputes are treated similarly to arbitrations of property disputes. In BC, the case of *S.M.R. v. R.S.B.* the parties were required to abide by the terms of their family arbitration agreement related to spousal support.⁷³ In *O'Connor v. O'Connor*,⁷⁴ an Ontario Family Court judge stayed a wife's application for variation of spousal support in a separation agreement pending arbitration as per the agreement. Anecdotal information from Alberta suggests that courts usually require couples to comply with their agreements to arbitrate spousal

⁶⁹ *Turpin v. Wilson* [1995] O.J. No. 3488 (Ontario Court of Justice – General Division).

⁷⁰ *Magee v. Osheski* [1995] O.L. No. (Ontario Court of Justice – General Division).

⁷¹ *Koziol v. Smith* [1997] N.S.J. No. 259 (Nova Scotia Supreme Court)

⁷² *Weidberg v. Weidberg* [1991] O.J. No. 3446

⁷³ *S.M.R. v. R.S.B.* [2003] B.C.J. No. 1640; [2003] BCCA 412 (BCCA)

⁷⁴ *O'Connor v. O'Connor* [1990] O.J. No. 2693 (Ontario Family Court)

support (as well as property issues).⁷⁵

In *Jordan v. Hope*,⁷⁶ *Newnham v. Newnham*⁷⁷ and *Nagoda v. Nagoda*,⁷⁸ Ontario courts denied an appeal of an award after courts found no errors of principle or application of law to facts. In an appeal and cross-appeal of an arbitrator's award, an Ontario court in the case of *Hunter v. Hunter* reviewed an arbitrator's award, but dismissed both the appeal and the cross-appeal because the arbitrator

“... did not act on the basis of a wrong principles, did not disregard material evidence and did not misapprehend the evidence... The evidence before the arbitrator and the conclusion he reached was very consistent with the case law...”⁷⁹

The arbitrator was also found to have considered relevant sections of the *Divorce Act*.

Note, however, the 1987 Supreme Court of BC case of *Merrell v. Merrell* in which the Court found that an arbitration clause for use in variation of maintenance had been abandoned, since the arbitration clause was not incorporated with the rest of the clauses in the agreement into the divorce decree.⁸⁰ The court insisted on retaining its jurisdiction.

3.4.2.3 Child support, custody and access disputes

This section considers the diverse court treatment of arbitration agreements and awards concerning child custody and support. Canadian courts have been reluctant to give up their *parens patriae* jurisdiction to arbitrators, however, some Canadian courts may stay court proceedings pending compliance with arbitration agreements even in matters of child support.⁸¹

⁷⁵ Personal communication with lawyer-arbitrator in Alberta, June 15, 2004.

⁷⁶ *Jordan v. Hope* [1997] O.J. No. 4993 (Ontario Court of Justice – General Division)

⁷⁷ *Newnham v. Newnham* [1993] O.J. No. 3193 (Ontario Court of Justice – General Division)

⁷⁸ *Nagoda v. Nagoda* [1992] O.J. No. 136. Note that this case does not refer to spousal support per se, the issue in the case was whether the parties' separation agreement had been voided by a 90-day voiding clause. The arbitrator's determination was upheld on the basis that the court found no error on the face of the record or in the arbitrator's interpretation of the relevant clause in the separation agreement.

⁷⁹ *Hunter v. Hunter* [2001] O.J. No. 4582 (Ontario Superior Court of Justice)

⁸⁰ *Merrill v. Merrell* [1987] B.C.J. No. 2329; 11 R.F.L. (3d) 18.

⁸¹ *Kolada v. Kolada* (2000) 6 R.F.L. (5th) 288 (Alberta Q.B.)

There are very few Canadian cases, but they tend to fit into the following three approaches.⁸²

3.4.2.3.1 Custody arbitration awards and agreements are reviewable and not binding on courts

The typical approach in Canadian decisions is that arbitration agreements and awards regarding child support, custody and visitation will be considered but are not seen as binding on the courts. The Ontario Superior Court of Justice case of *Duguay v. Thompson-Duguay*⁸³ dismissed the father's application to enforce an award concerning child support and access, and said that neither the arbitration agreement (in the form of unwitnessed minutes of settlement) nor the arbitration award were binding. The court treated the arbitration agreement as a domestic contract, which if it dealt with "matters governed by the Family Law Act or the Children's Law Reform Act had to be in writing and signed by the parties and witnessed, or it was unenforceable. If it dealt with custody and access, the Court was free to disregard the terms if the best interests of the child were not served by the contractual terms."⁸⁴

Canadian judicial reasoning is similar to that of some US courts. A well-cited US case is *Sheets v. Sheets*⁸⁵ in which the court stated that "there seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and the incidents thereto, i.e., choice of schools, summer camps, medical and surgical expenses, trips and vacations."⁸⁶ The court in *Sheets* pointed out that a court will enforce such an agreement provided that the agreement is in the best interests of the child and extended this thinking to custody arbitration. The *Sheets* case suggests that this will result in a *de novo* look at the issues regarding child custody, and could render the arbitration process duplicative.

There are too many US cases to do an exhaustive review. Some leading cases reviewed in commentaries were considered. A leading case, *Crutchley v. Crutchley*,⁸⁷ a 1982 case in the

⁸² This section uses the very helpful typology developed by Spitko in his analysis of US arbitration cases involving child custody and support. E. Gary Spitko. "Reclaiming the "Creatures of the State"" Contracting for Child Custody Decisionmaking in the Best Interests of the Family" (2000) 57:4 *Washington and Lee Law Review* 1139.

⁸³ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice)

⁸⁴ *Ibid.*. headnote summary

⁸⁵ *Sheets v. Sheets* (1964) 254 N.Y.S.2d 323.

⁸⁶ *Sheets v. Sheets* (1964) 254 N.Y.S.2d 323, quoted in E. Gary Spitko. "Reclaiming the "Creatures of the State"" Contracting for Child Custody Decision-making in the Best Interests of the Family" (2000) 57:4 *Washington and Lee Law Review* 1139, at 1162.

⁸⁷ *Crutchley v. Crutchley* 293 S.E.2d 793 (N.C. 1982).

Supreme Court of North Carolina, found in *obiter dicta*:

“While there also exists no prohibition to the parties settling the issues of custody and child support by arbitration, the provision of an award for custody or child support will also be reviewable and modifiable by the courts. ...”⁸⁸

This case was discussed and clarified by the North Carolina Court of Appeal in *Rustad v. Rustad* which stated that the courts always retain “ultimate authority to review and modify arbitration awards involving custody.”⁸⁹

Other leading US cases include the following:

Faherty v. Faherty,⁹⁰ a 1984 New Jersey case, found that an arbitrator’s award of child custody would have to be reviewed *de novo* “unless it is clear on the face of the record that the award would not adversely affect the substantial best interests of the child.”

In *Lieberman v. Lieberman*,⁹¹ a 1991 trial court in New York gave weight to the parties’ agreement to arbitrate child custody issues before a religious court (Beth Din), but stated that it retained its *parens patriae* jurisdiction over child custody arrangements in separation agreements and arbitrators’ awards, and would intervene if it was shown that an award might “be adverse to the best interest of the child” but not if the award merely affected the child. The court limited the scope of its review and did not require a *de novo* hearing.

Spencer v. Spencer,⁹² a 1985 case of the District of Columbia Court of Appeals, saw arbitration as desirable for reasons of speed, economy and substantial finality. The court found that its supervisory role may be more limited than it would be in interpreting a separation agreement but said that “the court may not delegate its duty in all respects... provisions concerning custody and child support would continue to be within the court’s jurisdiction despite pre-litigation or mid-litigation arbitration or agreement.”

⁸⁸ *Ibid.*, at 797.

⁸⁹ *Rustad v. Rustad*. (1984) 314 W.E.2d. 275 (N.C. Ct. App)

⁹⁰ *Faherty v. Faherty* (1984) 477 A.2d 1257 (N.J.)

⁹¹ *Lieberman v. Lieberman* (1991) 566 N.Y.S.2d 490 (Sup. Ct.)

⁹² *Spenser v. Spenser* 494 A.2d 1279 (D.C. 1985), at 1284.

Kelm v. Kelm,⁹³ a 1992 case of the Ohio Appeal Court, compelled the parties to abide by an ante-nuptial child custody arbitration agreement. The court stated that it believed the best interests of the child could be protected in arbitration, but retained the principle that a court should intervene to oversee arbitration of spousal and child support.

Miller v. Miller,⁹⁴ a 1993 case of the Superior Court of Pennsylvania, stated that a court is not bound by an arbitrator's determination on child custody; rather the court must determine whether an arbitral award is “adverse to the best interests of the children.”

Kovacs v. Kovacs,⁹⁵ a 1993 case of the Court of Special Appeals of Maryland, involved an appeal of a Beth Din arbitration award (according to Jewish law) of custody of two children to the mother and four children to the father. The trial court upheld the award, and the mother appealed. The Appeal court upheld the trial court decision that parties could engage in arbitration that does not meet the standards of the Maryland arbitration statute (the Beth Din court), assuming “standards of basic fairness.” But the court vacated the trial court’s decision on child custody and support because the trial court had failed to exercise *independent* judgement about the best interests of the children.

It seems clear from the Canadian cases that Canadian courts will supervise arrangements for child custody and support, but the degree of supervision is not consistent in the cases. In BC in 1987, even when there was no contest, a BC judge second-guessed an award of an arbitrator. In chambers, Mr. Justice McEachern used Section 11(1)(b) of the *Divorce Act*, 1985 as a reason to insist on an inquiry into how the four children of the marriage were being supported when the arbitration award provided for only \$65 dollars per month per child (a total of \$260).⁹⁶

In a custody application in Manitoba, the Court of Queen’s Bench made equivocal statements about the desirability of a mediation/arbitration agreement between spouses “to deal with the issues relating to their children including but not limited to the issues of communication and setting out rules of conduct.”⁹⁷ The judge said “I have concerns about this process working without the father first recognizing the need for individual counselling and then pursuing it.” The couple was highly conflicted. However, the judge did say that the referral to the

⁹³ *Kelm v. Kelm*, 597 N.E.2d 535 (Ohio App. 1992)

⁹⁴ *Miller v. Miller* (1993) 423 Pa.Super. 162, 172, 620 A.2d 1161 (Superior Court of Pennsylvania)

⁹⁵ *Kolada v. Kolada* [2000] 6 R.F.L. (5th) 288 (Alberta Queens Bench)

⁹⁶ *Webb v. Webb* [1987] B.C.J. No. 221 (BCSC).

⁹⁷ *McDougall v. McDougall* [2002] M.J. No. 93; 2002 MBQB 70 (Manitoba Court of Queen's Bench – Family Division)

mediator/arbitrator “certainly can’t hurt.” This appears to be an *obiter* statement, since the decision does not make an actual ruling concerning a mediation-arbitration agreement. This case may be worth following to see if any further litigation emerges from the mediation/arbitration agreement.

3.4.2.3.2 Child support and custody not arbitrable at all?

As previously noted, the BC *Commercial Arbitration Act* provides no mechanisms for appeals on grounds of mixed fact and law, and no provisions for de novo review. This means that it would be difficult for BC Courts both to use the Act and to exercise *parens patriae* jurisdiction to review custody and child support awards, since they generally involve a mix of fact and law in assessing the best interests of the child. Does this mean that issues involving children are not arbitrable at all under the BC *Commercial Arbitration Act*?

The US cases following this line of reasoning are worth reviewing. The New York case of *Glauber v. Glauber*⁹⁸ suggests that an arbitration agreement (and award) will be given the same type of deference accorded to a separation agreement but will always be subject to the *parens patriae* jurisdiction of the courts to ensure protection of the child’s best interests. *Glauber v. Glauber* found that child custody and visitation disputes are “on [their] face’ . . . inappropriate for resolution by arbitration”⁹⁹ and that an arbitration agreement that binds parents to submit a custody issue to an arbitrator is not binding on a court. The court relied on the dominant judicial approach which is that the child’s best interests always supercede separation agreements, which are never enforceable *per se*. The judge in *Glauber* disapproved of the idea that child custody matters should first go to the arbitrator for award, and after that the award be reviewed to ensure it was in the best interests of the child. The court found that this would result in delay and duplication of time, expense and effort which process was not in the interests of the child. An appeal case in Indiana in 2003 made a similar finding, however, the court’s findings turn on the view that such arbitrations would be non-reviewable by the courts, and therefore would be void as inconsistent with sound public policy.¹⁰⁰

Other US cases following this line of reasoning include the following; In *Biel v. Biel*,¹⁰¹ a 1983 case in the Wisconsin Court of Appeal, the court struck down an order directing that arbitration

⁹⁸ *Glauber v. Glauber* (1993) 600 N.Y.S.2d. 740.

⁹⁹ E. Gary Spitko. “Reclaiming the “Creatures of the State”“ Contracting for Child Custody Decisionmaking in the Best Interests of the Family” (2000) 57:4 *Washington and Lee Law Review* 1139, quoting *Glauber v. Glauber* (1993) 600 N.Y.S.2d. 740, at 742.

¹⁰⁰ *Marriage of Cohoon* (2002) 770 N.E.2d 885 (Indiana Appeal)

¹⁰¹ *Biel v. Biel* (1983) 336 N.W.2d. 404 (Wis. Ct. App. 1983), at 406.

of child custody and visitation issues be conducted by a social worker. The judge said that “custody and visitation determinations must be made by the court and cannot be delegated by it to any other person.” The court in *Detwieler v. Miller*,¹⁰² a 1992 Pennsylvania case, found that a parental agreement for binding arbitration to determine child custody was void. However, in *Rakoszynski v. Rakoszynski*,¹⁰³ a 1997 case in the New York Appeal Division, the court concluded that child support is subject to arbitration but child custody and visitation is not.

3.4.2.3.3 Canadian cases in which child custody arbitration agreements and awards have been found to be binding on the courts without reservation

The occasional court in Canada has considered itself bound by the strict terms of an arbitration agreement or an arbitration statute concerning child custody issues. In the Ontario case of *Lalonde v. Lalonde*,¹⁰⁴ the court reviewed an arbitration award of custody and found that the arbitration agreement allowed for appeal on law, law and fact, or fact where there was a clear error with a significant effect on the decision. The court expressed concern that the arbitrator had not obtained a custody assessment prior to her award of custody, but found that it was not his place to substitute his decision for that of the arbitrator but “rather, determine whether the arbitrator has made an error in law in not ordering such an assessment, an error in law which would justify the setting aside of her award.” He dismissed the appeal on the grounds that the arbitrator had not erred. (Readers will recall that the Ontario *Arbitration Act* allows appeals on mixed fact and law, but the BC *Commercial Arbitration Act* does not.)

There are also such minority positions in the United States, where in the 1995 case of *Dick v. Dick*¹⁰⁵ a Michigan court found that the terms of the Michigan *Arbitration Act* at that time provided that “all persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which may be the subject of a civil action...”¹⁰⁶ In this case, an arbitration award had already been incorporated into a divorce decree, but Mr. Dick wanted to start over again in the courts. The judge said that because the statute did not prohibit arbitration of family law cases, “binding arbitration is an acceptable and appropriate method of dispute resolution in cases where the

¹⁰² *Detwieler v. Miller* (1992) 60 Bucks Co. L. Rep. 51 (Bucks Co, pa, 1992)

¹⁰³ *Rakoszynski v. Rakoszynski* (1997) 663 N.Y.S.2d 957 (App. Div. 1997)

¹⁰⁴ *Lalonde v. Lalonde* [1994] O.J. No. 2556 (Ontario Court of Justice– General Division)

¹⁰⁵ *Dick v. Dick* [1995] 534 N.W. 2d 185 (Michigan Court of Appeal)

¹⁰⁶ *Ibid.*, citing Mich. Comp. Laws § 600.5001 (1968)

parties agree to it.”¹⁰⁷ This case is considered to be anomalous and eccentric and has been criticized in the literature.¹⁰⁸

3.4.2.3.4 Discussion: Competing principles of family autonomy and state control through *parens patriae* jurisdiction

The Charter of Rights needs to be considered in the light of these differing approaches to family arbitration. In the case of *R.B. v. Children's Aid Society of Metropolitan Toronto*,¹⁰⁹ the Supreme Court of Canada provided guidance concerning the balancing of parental rights and the exercise of state control through the *parens patriae* jurisdiction of the court. This was not a case involving arbitration, but the principles are worth setting out. According to the Court, the Charter right in Section 7 upholding freedom of the individual “must, in any organized society, be subjected to numerous constraints for the common good.”

“The right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of the parent. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. This recognition was based on the presumption that parents act in the best interest of their children. Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters... while focussing on the best interests of the child, favour minimal intervention... [I]n practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold, but in doing so it is limiting the constitution rights of parents rather than vindicating the constitutional rights of children.”

While they have the *parens patriae* jurisdiction do so, Canadian courts generally do not interfere with separation agreements or mediated agreements made by separating or divorcing parents. The decision to intervene in parental decisions to submit their parenting disputes to an arbitrator seems to be based on the idea that the absence of consensus raises questions as to parents' capacity to act in the best interests of their children in the appointment of an arbitrator. Thus, in

¹⁰⁷ *Ibid.*, 190-91, quoted in E. Gary Spitko. “Reclaiming the “Creatures of the State”“ Contracting for Child Custody Decisionmaking in the Best Interests of the Family” (2000) 57:4 *Washington and Lee Law Review* 1139, at 1165.

¹⁰⁸ Barbara E. Wilson. “Who's Watching Out for the Children? Making Child Custody Determinable by Binding Arbitration: *Dick v. Dick*” (1996) 1996:1 *Journal of Dispute Resolution* 225.

¹⁰⁹ *R.B. v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 (SCC)

contentious processes, the courts will exercise their *parens patriae* jurisdiction in Canada to scrutinize decisions made by an arbitrator to ensure that they are in accordance with the best interests of the child.

The few jurisdictions that have passed arbitration legislation for family law matters, for example, the North Carolina *Family Law Arbitration Act*¹¹⁰ and Australia's *Family Law Reform Act 1995*¹¹¹ have restricted the scope of arbitration to family property and spousal support matters.

3.4.2.4 Mediation/arbitration agreements (Med/Arb)

Most of the concern about family arbitration pertains to mediation-arbitration processes. In particular, there is a question about whether the same person should ever serve as arbitrator in a dispute that she or he has been mediating. Research of Pruitt *et al*¹¹² in a community justice centre in the United States during the 1980s suggested that med-arb with the same person produced more settlements than mediation alone or med-arb where there was a different arbitrator. Other commentators say that “in no event should the mediator ever serve as arbitrator, because the possibility that the mediator might later become the arbitrator” would tend to make the parties “less open and candid during mediation.”¹¹³ Some go farther and say that in med/arb (same mediator as arbitrator) there are concerns about bias, particularly if caucusing¹¹⁴ or other *ex parte* communications with parties have occurred during mediation (or arbitration).

The case law from Ontario shows that a mediator/arbitrator is subject to possible charges of bias if there are private communications with one party in the absence of the other. Such private communications jeopardize med-arb processes as they move from mediation into the arbitration

¹¹⁰ *North Carolina Family Law Arbitration Act*, 1999, Chapter 50-41, Article 3, online: <http://www.ncleg.net/Statutes/GeneralStatutes/HTML/ByChapter/Chapter_50.html>

¹¹¹ *Family Law Reform Act 1995* (as amended), available online at <<http://scaletext.law.gov.au/html/pasteact/0/229/top.htm>>. See the *Family Law Regulations* (as amended), available online at <<http://scaletext.law.gov.au/html/pastereg/0/58/top.htm>>

¹¹² Dean Pruitt *et al.*, “The Process of Mediation: Caucusing, Control, and Problem Solving” in M. Afzalur Rahim ed., *Managing Conflict: An Interdisciplinary Approach* (New York: Praeger Publishers, 1989) 201

¹¹³ See Janet Maleson Spencer & Joseph P. Zammit. “Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents” (1976) *Duke Law Journal* 911, at 934 (footnote number 92).

¹¹⁴ Caucusing is a process used occasionally during mediation in which the mediator meets privately and separately with each party. The purpose of caucusing is to help move difficult sessions toward agreement. A discussion of the merits of caucusing can be found in Dean Pruitt *et al.*, “The Process of Mediation: Caucusing, Control, and Problem Solving” in M. Afzalur Rahim ed., *Managing Conflict: An Interdisciplinary Approach* (New York: Praeger Publishers, 1989) 201

phase. The cases that discuss this issue are from Ontario where the *Arbitration Act, 1991*,¹¹⁵ discourages med-arb processes in prohibitive language in a section that may be waived by the parties:

35. The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially. (1991, c. 17, s. 35)

The language of this section is grammatically unclear as to whether it prohibits mediation and conciliation by an arbitrator altogether, or whether it prohibits such processes that “might compromise or appear to compromise” impartiality. Not all mediation processes would compromise the impartiality of the arbitrator who uses them. For example there may be no problem of bias from mediation (in the absence of other factors) if the mediator held all sessions face to face, with no caucuses or other ex parte communications.¹¹⁶

If parties do want mediation-arbitration, they may waive section 35.¹¹⁷ It is probably fair to say that in the absence of a clause in an arbitration agreement that specifically ousts this section, an arbitration process that includes mediation would be impugned.

The Alberta *Arbitration Act*¹¹⁸ encourages conciliation and mediation as an appropriate and desirable part of the arbitration process:

35(1) The members of an arbitral tribunal may, if the parties consent, use

¹¹⁵ *Arbitration Act, 1991*, Ontario S.O. 99, Chapter 17 (1991), Section 35 online: <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm#P408_30384>

¹¹⁶ Ex parte communications in either the mediation or arbitration phases put med-arb procedures at risk in terms of acceptability to parties and acceptability to courts who review arbitration and med-arb processes and awards. Ex parte meetings do not necessarily create apprehension of bias nor do they automatically lead to impugning of an arbitration process. Many mediators commonly conduct pre-mediating screening meetings and caucuses without compromising the parties' sense of their impartiality, and med-arbitration agreements can be tailored to ensure the parties' consent to separate meetings. However, courts will look carefully at the mediation phase of the process if the parties have complained about bias during the arbitration phase. It may be unrealistic in family law issues to rule out separate meetings altogether, because it is now commonly held that an important part of family mediation includes separate screening meetings with parties to ensure the parties can participate in mediation without fear, coercion, or abuse.

¹¹⁷ *Arbitration Act, 1991*, Ontario S.O. 99, Chapter 17 (1991), online: <http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm Cite Ontario arbitration agreements>

¹¹⁸ *Arbitration Act, 2000*, Alberta RSA, 2000, Chapter A-43, online: <http://www.qp.gov.ab.ca/documents/Acts/A43.cfm?frm_isbn=077972755X>

mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute.

(2) After the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification.

1991 cA-43.1 s35

Similarly, the Manitoba *Arbitration Act* allows for mediation and conciliation.¹¹⁹ This Act has not been judicially reviewed in a family law arbitration case. The Nova Scotia *Arbitration Act* has not been judicially reviewed in a family arbitration case.¹²⁰ The Nova Scotia *Matrimonial Property Act* specifies that relevant arbitrations are to be conducted under the *Arbitration Act*.¹²¹ Since 1999, Nova Scotia has in addition had a *Commercial Arbitration Act*¹²² which applies to all arbitration agreements unless specifically excluded in an arbitration agreement or other legislation. The *Commercial Arbitration Act* provides for mediation and conciliation, but the *Arbitration Act* is silent on this topic. Other arbitration statutes from Canadian jurisdictions were not reviewed.

The *BC Commercial Arbitration Act* is silent concerning mediation or conciliation, however, the rules of the BC International Commercial Arbitration Centre (which according the Act apply in the absence of party agreement on other rules) provide as follows:

35. Settlement

(1) The arbitration tribunal may encourage settlement of the dispute and, with the written agreement of the parties, may conduct mediation, conciliation, facilitation or other appropriate procedure(s).

(2) If the parties settle the dispute during the arbitration proceedings, the arbitration tribunal shall terminate the proceedings and, if requested by the parties and acceptable to the tribunal, record the settlement in the form of an arbitration award.¹²³

¹¹⁹ *Arbitration Act* (Manitoba), 1997, C.C.S.M. c. A120 Arbitration Act, C.C.S.M. c. A120 (1997)

¹²⁰ *Arbitration Act* (Nova Scotia), Revised Statutes, 1989 Chapter 19 Amended 1999, C. 5, S. 61, online: <<http://www.gov.ns.ca/legi/legc/statutes/arbitrat.htm>> (unofficial)

¹²¹ *Matrimonial Property Act* (Nova Scotia), 1995, R.S. 1989, Chapter 275, as amended 1995-96, c. 13, s. 83

¹²² *Commercial Arbitration Act* (Nova Scotia), 1999, Acts of 1999 Chapter 5 available online at <<http://www.gov.ns.ca/legi/legc/statutes/comarbit.htm>> (Unofficial)

¹²³ The British Columbia International Commercial Arbitration Centre. *Domestic Commercial Arbitration Rules of Procedure* (As amended June 1, 1998), online: <<http://www.bcicac.com/cfm/index.cfm?L=133&P=112>>

While the research of Pruitt *et al* favoured med-arb (using the same person) in terms of numbers of settlements, Pruitt *et al* do note that this result was not statistically significant in that a lot of agreements were reached no matter which model of mediation was used. Pruitt *et al* also note that the research focussed on the mediator portion of the process and did not look at the arbitration process. Pruitt *et al's* research focussed on small claims and neighbourhood disputes, so their applicability to family disputes remains to be tested empirically. Empirical research on this point was not part of the terms of reference of this project. It is not known how many med-arb processes in Canada are successfully concluded and implemented without recourse to the Courts to enforce them or overturn the results.

The Ontario case of *Duguay v. Thompson-Duguay*¹²⁴ discussed the relationship between mediation and arbitration in a mediation-arbitration agreement. The arbitration agreement was limited to the issue of access, and provided for “open mediation”¹²⁵ followed by an arbitration if no agreement was reached in mediation. The father invoked the arbitration clause, but the mother refused to take part in arbitration because she could not afford it, and “she had lost confidence in the arbitrator’s impartiality and fairness.” The arbitrator continued the arbitration without her, and the father received everything he wanted in the arbitration award. The father asked the court to enforce the award and order the mother to reimburse him for half the arbitrator’s fees. As discussed above the court dismissed the father’s application. The *Duguay* case is discussed further in the section 3.6.2 on arbitrator competence.

There are some confusing aspects of the decisions concerning med-arb. The court in *Hercus v. Hercus*¹²⁶ (which followed *Duguay*) suggested that if the arbitrator is aware that one party repudiates a mediation-arbitration agreement and rejects further mediation, “it is incumbent on him to reach a new agreement with the parties before he proceeded to arbitrate.” The practical consequences of this dictum are at odds with the very idea of med-arb in that a party could avoid the arbitration any time she or he likes, simply by withdrawing from mediation.

Most of the cases in which arbitrations find themselves reviewed unfavourably in the Ontario courts have been mediation-arbitration processes. This problem is discussed later in this paper.

¹²⁴ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice)

¹²⁵ “Open mediation” usually refers to a process in which the mediator prepares a report of the results of mediation and may make recommendations to a court. Thus, in contrast to “closed mediation” an open mediation is not considered confidential.

¹²⁶ *Hercus v. Hercus* [2001] O.J. No. 534 (Ontario Superior Court of Justice). See commentary on *Hercus* by Andrea Himel. “Mediation/Arbitration Agreements: The Binding Comes Undone” (2002) 20 *Canadian Family Law Quarterly* 55; Malcolm C. Kronby. *Litigation - Family Law: Recent Developments of Importance. Lexpert Articles on Recent Legal Developments*, 2001.

3.4.2.5 Courts' views of arbitration statutes

Duguay v. Duguay, followed in *Hercus v. Hercus*, says that the Ontario *Arbitration Act*'s enforcement clauses "are not framed particularly for family law, and still less are they drawn for custody and access matters."¹²⁷ This comment would also apply to BC's *Commercial Arbitration Act*. As previously discussed, in family matters, courts are unlikely to take the "hands off" approach suggested by the Act, except perhaps in property disputes and possibly spousal support cases.¹²⁸ They will read the Act in the light of other Acts designed specifically for family law disputes, including the *Divorce Act*, the *Family Relations Act* and other relevant statutes and cases.

3.4.2.6 General Summary

In BC, lawyers answer the question: "Should I use arbitration in a family law matter?" with a fairly resounding "no" because of the perceived uncertainty created by Section 2(2) of the *Commercial Arbitration Act*. However, experience from other jurisdiction indicates that this is merely a threshold question. On the question of certainty and finality, the following summary could be applied to the situation in Canada:¹²⁹

- Property division: almost always final and binding, with limited review and appeal rights;
- Spousal support: almost always final and binding, with limited review and appeal rights;
- Child support: sometimes final and binding with review and sometimes *de novo* review, and limited appeal rights;
- Access and visitation: sometimes final and binding with review and sometimes *de novo* review;
- Custody: rarely final and binding.

In summary, Canadian courts may:

- balance support for alternatives to litigation¹³⁰ with concerns about finality, fairness and

¹²⁷ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice)

¹²⁸ T.G. Bastedo, "The Mediation and Arbitration of Family Law Disputes in Ontario: A Practitioner's Perspective" (International Bar Association Conference, October 2002) [unpublished] 16.6

¹²⁹ This section is indebted to Koritzky et al for a similar summary they created to reflect the US position. Allan R. Koritzinsky & Robert M. Jr. Welch. "The Benefits of Arbitration" (1992) 14:4 *Family Advocate* 45.

¹³⁰ *Desputeaux v. Éditions Chouette* (1987) inc. [2003] 1 S.C.R. 178.

- open courts;¹³¹
- in cases that are clearly arbitrable, interpret arbitration agreements liberally based on identification of their objectives but will not “read in” jurisdiction that is not reasonably provided by an arbitration agreement or statute¹³² and will avoid enforcing awards that go beyond the scope of arbitration agreements and relevant statutes;¹³³
- keep the jurisdiction that relevant statutes allow them to keep, particularly in cases involving children;¹³⁴
- consider family matters as arbitrable, including child custody, support and visitation matters, but in supervising arbitration agreements and awards will maintain their *parens patriae* jurisdiction in all matters concerning children;¹³⁵
- not enforce awards obtained by patently unfair arbitral processes or where there are breaches of natural justice.¹³⁶

3.5 Other policy considerations

3.5.1 Private judgements on issues of public importance

A common argument against mediation schemes is also applied to binding arbitration. While judges are publicly appointed and accountable, arbitrators are one step removed from public accountability.¹³⁷ Arbitrations in Canada are assumed to be private unless they end up contested in the courts. While the BC, Ontario, Alberta and Nova Scotia arbitration statutes are silent on the subject of confidentiality, the promise of privacy may be one reason for parties to choose it over public courts. This is particularly so in family law cases involving property and financial matters of clients for whom open courts would jeopardize business interests through potential

¹³¹ 887574 *Ontario Inc. v. Pizza Pizza Ltd.* [1994] O.J. 3112 (Ontario Court of Justice – General Division)

¹³² *Britt v. Britt* [2000] O.J. No. 527 (Ontario Superior Court of Justice).

¹³³ *Desputeaux v. Éditions Chouette* (1987) inc. [2003] 1 S.C.R. 178.

¹³⁴ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice); *Hercus v. Hercus* [2001] O.J. No. 534 (Ontario Superior Court of Justice).

¹³⁵ *R.B. v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315 (SCC); *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice); *Hercus v. Hercus* [2001] O.J. No. 534 (Ontario Superior Court of Justice).

¹³⁶ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice); *Hercus v. Hercus* [2001] O.J. No. 534 (Ontario Superior Court of Justice).

¹³⁷ Anne Argiroff. “Binding Arbitration and the Problem of Protecting the Survivor of Domestic Abuse” (1997) July-August 1997 *Clearinghouse Review* 141.

disclosure of publicly sensitive financial projection or other sensitive matters.

Consensual ADR processes like mediation are, generally speaking, confidential, either through contractual or statutory protection. Arbitration is not so protected. Should it be? While Canadian courts have acknowledged the importance of ADR processes, “when the matter comes to court the philosophy of the courts is openness...” except where there are compelling public policy reasons to do so,¹³⁸ including where public release would reveal trade secrets or inventions, or where the well being of children is concerned. Even so, courts generally use initials to protect children’s privacy rather than create secrecy.¹³⁹ The principle of open justice is articulated in *Scott v. Scott*¹⁴⁰ in which Lord Shaw of Dunfermline stated that “publicity is the very soul of justice.” Open courts guard against corruption and ensure that judges are held to account.

In the UK in 1991, the English Court of Appeal found in the case of *Dolling-Baker v. Merrett*¹⁴¹ that there was an implied duty of confidentiality between parties to arbitration as a matter of law. Prior to this decision, courts had not found arbitration to be confidential *per se* (as distinct from private). In 1995, the High Court of Australia in the case of *Esso Australia Resources Ltd. v. Plowman*¹⁴² acknowledged that arbitrations are usually held in private (that is, not open to the public) “in the absence of some manifestation of a contrary intention.” In the *Esso* case, one of the issues was whether the Victoria (Australia) government (one of the parties) could disclose information arising out of the arbitration to the responsible Minister. The court in *Esso* found that confidentiality was *not* imposed on parties as *an implied* term of the arbitration agreement, and rejected the idea that confidentiality is an essential characteristic of arbitration.

This decision created concern in the commercial arbitration community which considered that this would negate a key advantage of arbitration and make Australia unattractive for commercial arbitration.¹⁴³ In 1996, New Zealand passed an amendment to its *Arbitration Act*¹⁴⁴ which states

¹³⁸ *887574 Ontario Inc. v. Pizza Pizza Ltd.* [1994] O.J. 3112 (Ontario Court of Justice – General Division)

¹³⁹ See, e.g. *I.H. v. D.M.* [2002] O.J. No. 2838 (Ontario Superior Court of Justice)

¹⁴⁰ *Scott v. Scott* [1913] AC 417 (HL)

¹⁴¹ *Dolling-Baker v. Merrett* [1991] 2 All ER 890 (CA)

¹⁴² *Esso Australia Resources Ltd. v. Plowman* (1995) 128 ALR 391 (HCA)

¹⁴³ New Zealand Law Commission. *Te Aka Matua o te Ture: Improving the Arbitration Act* (Wellington: New Zealand Law Commission, 1996).

¹⁴⁴ *New Zealand Arbitration Act* 1996, as amended 1998, online:
<http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=919072091&infobase=pal_statutes.nfo&record={E2659E71}&hitsperheading=on&softpage=DOC>

as follows:

- 14.(1) Subject to subsection (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings.
- 2) Nothing in subsection (1) prevents the publication, disclosure, or communication of information referred to in that subsection—
- (a) If the publication, disclosure, or communication is contemplated by this Act; or
- (b) To a professional or other adviser of any of the parties.

Since then, the New Zealand Law Reform Commission has recommended that this section contravenes the principle of open court, and that the general policy should be changed so that proceedings arising from arbitration be heard in open court. The NZ Commission has also recommended amendment of Section 14 to provide that (in summary), subject to any agreement of the parties to the contrary:

- arbitration hearings should take place in private,
- arbitrators and parties should not disclose pleadings, evidence, documents or the award except when compelled by a court, subpoena or to a professional or other advisor to the parties,
- that the parties may apply to the arbitrator for a ruling that they may disclose information with an automatic right of appeal on such a ruling to the High Court.¹⁴⁵

Another argument has been made against the privacy of ADR processes: Private dispute resolution processes do not contribute to the development of jurisprudence, and its widespread use may undermine the development of the common law. This argument is particularly compelling in human rights cases or issues of women's or children's rights which in common law jurisdictions have relied largely on the courts for the development of rights and the creation of pressure on legislatures for reform. The New Zealand Law Reform Commission answers this by suggesting that "there was no reason why parties freely contracting should be obliged by public policy to make a compulsory contribution to the worthy cause of coherent evaluation of commercial law."¹⁴⁶ Should members of families be so obliged when commercial parties should not?

¹⁴⁵ New Zealand Law Commission. *Te Aka Matua o te Ture: Improving the Arbitration Act* (Wellington: New Zealand Law Commission, 1996), at 20.

¹⁴⁶ *Ibid.*, at 32-33.

3.5.2 Coercion and unequal power

The policy issue of contractual freedom and decision making autonomy is particularly alive in family law disputes where ADR processes have been implicated in concerns about coercion and family violence. Problems of unequal power and coercion have been a major issue in the development of policy about family law dispute resolution. Family law mediator organizations in North America are, over time, becoming increasingly firm and vigilant in their insistence on education and standards for screening of family mediation clients. Inherent in family conflict is a high degree of interdependence of the parties, particularly where there are dependent children and where the parties' property and financial matters are deeply intertwined. Parties may hold one another "hostage" over children and symbolic property and chattels. Mediation, arbitration and adjudication all take place in this context of complex power dynamics.

The problem of coercion is particularly worrisome in cases of domestic abuse.¹⁴⁷ One concern is whether lawyers drafting arbitration agreements and arbitrators accepting them are equipped to screen and address issues of domestic violence during arbitration. Another concern is that arbitrators have limited authority. If an issue of domestic violence creates a need for protection orders, an arbitrator is unlikely to have authority to provide them. This could create additional danger, delay and fractured case disposition as courts become involved to address issues of protection while an arbitrator must continue with the substantive issues handed to him or her in the arbitration agreement. These factors are complicated by the very nature of arbitration as a private process with limited public scrutiny, and the fact that arbitration statutes in Canada are not designed with such needs in mind. Groups involved in protection of women from domestic violence have consistently suggested that the courts are the most appropriate venue for addressing family law disputes of abuse victims.

No Canadian cases were found on the issue of arbitrability of cases involving domestic violence. However, the case of *G. v. G.*¹⁴⁸ suggested that triable allegations of coercion of a pre-nuptial agreement were not sufficient to allow a party to avoid arbitration. The judge pointed out that the arbitrator would decide the question of the jurisdiction of the arbitrator.

By contrast, a New York case of *S.W. v. T.W.*, reported in the *New York Law Review* in 1995,¹⁴⁹ discussed a separation agreement that provided that all disputes were to proceed to a religious arbitration panel (Beth Din). The husband had applied for a stay of court proceedings involving

¹⁴⁷ Anne Argiroff. "Binding Arbitration and the Problem of Protecting the Survivor of Domestic Abuse" (1997) July-August 1997 *Clearinghouse Review* 141.

¹⁴⁸ *G. v. G.* [2000] A.J. No. 399; 2000 ABQB 219 (ABQB)

¹⁴⁹ *S.W. v. T.W.* [1995] July 15, 1995. *New York Law Journal* 25 (Supreme Court IA Part 11 Justice L. Friedman).

domestic violence and for a direction that the wife comply with a summons to appear before the Beth Din. In contrast to the hands off approach of the Alberta court in *G. v. G.*, the New York court ruled that the separation agreement (calling for arbitration) may not have been voluntary, and denied “in its entirety” the husband’s application for a stay of proceedings. Instead, the judge stayed the arbitration proceedings. This was a case in which there had been multiple claims of domestic violence. The court expressed that it was “deeply troubled by the history of these proceedings, from court to court, arbitrator to arbitrator, without resolution.”

If a case such as *G v. G* had involved allegations of outright violence, would the decision have been same? Would a Canadian judge rule that a religious arbitration panel favoured by the husband (be it a panel of a Jewish, Islamic, Christian, Hindu or some other religious group) rule on its own jurisdiction to decide the very issue on which the husband is alleged to have been coercive? If such a tribunal is privately constituted, the answer to this question may never come to light.

It seems clear that policy review is needed to determine the appropriate approach for family law issues involving power abuse or coercion or inequality. There is a good deal of merit in the clauses of the North Carolina *Family Law Arbitration Act* and Australia’s 2000 amendments to their *Family Law Act* which provide that a court should decide the threshold question of the validity of an arbitration agreement when challenged by a party.

Another public policy concern is raised by Canada’s approach to multiculturalism. Canada has large immigrant populations from many countries where traditionally it has been seen as appropriate to subordinate the wishes of women and girls. Women’s groups all over the world have long pointed out the problems of coercion and unfairness that can take place in informal consensual dispute resolution processes where spoken or unspoken assumptions of inequality are prevailing norms.¹⁵⁰ The risks of coercion and family violence perceived in mediation could be

¹⁵⁰ The literature on feminist critiques of ADR is voluminous and is not cited here. For a review of the North American literature up to approximately 1993, see Barbara Landau, “Qualifications of Family Mediators: Listening to the Feminist Critique,” in *Qualifications for Dispute Resolution: Perspectives on the Debate*, edited by Catherine Morris and Andrew Pirie, 27-49. Victoria, BC: UVic Institute for Dispute Resolution, 1994. Also see the report of the Multiculturalism and Dispute Resolution Project of the University of Victoria Institute for Dispute Resolution which reports findings from immigrant groups that where “traditional conflict resolution methods have been identified, the parties may not wish to use them, nor to participate in processes into which they have been incorporated, because the methods are often not compatible with Canadian practices and values. Examples include the traditional male, elder-driven processes used in some cultures... there is a need to find processes which will respect the values of disputants without importing features of processes they cannot now accept.” Brishkai Lund, Catherine Morris, and Michelle LeBaron. *Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project* (Victoria: University of Victoria Institute for Dispute Resolution, 1994), 33. See also Scott Brown, Christine Cervenak, and David Fairman. *Alternative Dispute Resolution Practitioners Guide*. Cambridge, MA: Conflict Management Group, 1998, online: <www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacp335.pdf>. See “Bangladesh Case

exacerbated in binding arbitration processes, particularly if conducted in religious tribunals where the norms favour traditional customary gender-based understandings of family entitlements and obligations.

One American commentator has promoted the incorporation of arbitration clauses in ante-nuptial agreements as a possible strategy to overcome the presumption that family disputes must be resolved in the legal system.¹⁵¹ This potential use of arbitration clauses is worrying when one considers cases in which women may be urged to sign ante-nuptial arbitration agreements that specify traditional religious or culture-based dispute resolution processes or that name particular arbitrators who hold these values. Women in conflict may also be urged to participate in informal dispute resolution processes without fully autonomous consent.¹⁵²

In the United States case of *Kelm v. Kelm*, an Ohio court found that an ante-nuptial arbitration clause was binding on the parties.¹⁵³ Also, as previously noted, current case law concerning Canadian arbitration indicates that the person opposing arbitration has the onus to prove that a

Study.” See also Sarah Leah Whitson. “Neither Fish, nor Flesh, nor Good Red Herring’ Lok Adalats: an Experiment in Informal Dispute Resolution in India.” *Hastings International and Comparative Law Review* 15 (1991-1992): 391-445.

¹⁵¹ Daniel J. Guttman. “For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation” (1996) 12:1 *Ohio State Journal on Dispute Resolution* 175 185.

¹⁵² The concerns raised about “sharia” courts in Canada may be inappropriately inflammatory and some take anti-Islamic tone (see e.g. Heather Mallick “Boutique law: It’s the latest thing” *Globe and Mail* (May 15), F3. <<http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20040515/MALLICK15/TPFocus/>>.. However, there are some serious issues to be considered with respect to many religiously-based arbitration processes. See Alia Hogben “The laws of the land must protect all of us, irrespective of gender or religion” *The Toronto Star* (June 1). <<http://www.cmw.com/In%20The%20Press/ShariainCanada/The%20laws%20of%20the%20land%20must%20protect%20all%20of%20us.htm>>; Haroon Siddiqui “Battling Phantoms on Sharia Law” *Toronto Star*. <http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1086819009712&call_pageid=968256290204&col=968350116795>; Faisal Kutty, “Canada’s Islamic Dispute Resolution Initiative Faces Strong Opposition” *Washington Report on Middle East Affairs* (May) 70, <http://www.wrmea.com/archives/May_2004/0405070.html> who comment on the proposal for Islamic-based arbitration. See Elliot Scheinberg. “Arbitration in Custody and Visitation Issues” (2003) 229 *New York Law Journal* 2 for a stinging comment on Jewish Beth Din processes, which are often among the cases reviewed both favourably and unfavourably in US courts, and occasionally (for the most part favourably) in Canadian courts. No doubt similar arguments could be marshalled concerning arbitration tribunals set up by various conservative cultural or religious groups including Christian groups.

¹⁵³ *Kelm v. Kelm* (1992) 597 N.E.2d 535 (Ohio App. 1992)

case is inappropriate for arbitration.¹⁵⁴ While this approach may be suited to commercial disputants, it may not be suited to the family context where arbitration clauses may not be fully consensual at the time of a dispute and where power may easily be abused. While public policy should avoid paternalism, it may be that more public safeguards for vulnerable parties are required for arbitration in family law contexts.

3.5.3 Same sex couples

Private family law arbitration is seen by Spitko¹⁵⁵ as a possible interim answer to problems experienced by same-sex couples where current laws do not reflect their needs upon family breakdown.

3.5.4 What is “law” and who decides what law applies?

Under the *Commercial Arbitration Act* in BC, an arbitrator “must adjudicate the matter... by reference to law...” (Section 23) but the Act does not specify the laws of BC or Canada. Would an arbitrator be able to apply the laws of another jurisdiction or religious laws? It seems this would be possible in BC with the consent of the parties. Section 23 contemplates that *after the arbitration has commenced* the parties may agree “that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.” It is important to note that this could only happen after the arbitration has commenced. This procedural safeguard ensures that the default law for arbitration is the relevant law of BC and Canada, and that other laws are only used with informed consent *at the time of a dispute*. Parties may try to stipulate arbitration on grounds of conscience, religious laws, or laws of another jurisdiction when they are drafting an arbitration clause in a pre-nuptial agreement. However by the time the arbitration clause is invoked the parties will be in conflict and may wish to revert to BC and Canadian law. The BC statute ensures that parties must elect and agree after the commencement of arbitration if they wish to be bound by principles other than law. This is an important safeguard for parties who may in pre-nuptial settings agree to proceedings and laws of other jurisdictions or religious laws, but who may need the protection of BC and Canadian law at the time of an actual dispute.

There have been public concerns raised about “boutique law”¹⁵⁶ in which minority groups may

¹⁵⁴ *G. v. G.* [2000] ABQB 219 (ABQB), citing *Stokes-Stephens Oil Co. v. McNaught* [1918] 2 W.W.R. 122 (SCC); *Top Notch Const. Ltd. v. Western Irrigation Dis. Bd. Of Dir.* (1991) 78 Alta. LR (2d) 341 (Q.B.)

¹⁵⁵ See the discussion by E. Gary Spitko. “Reclaiming the “Creatures of the State”“ Contracting for Child Custody Decision making in the Best Interests of the Family” (2000) 57:4 *Washington and Lee Law Review* 1139.

¹⁵⁶ Heather Mallick “Boutique law: It's the latest thing” *Globe and Mail* (May 15), F3. <<http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20040515/MALLICK15>>. Please also see the author’s letter to the editor to *Reporting Canada* in which Ms. Mallick’s inflammatory tone is addressed, online: <<http://www.crnetwork.ca/reportingcanada/listletters.asp>>. The concerns are none the less important to consider.

have their disputes decided according to their own traditions. For example, Islamic women's groups have raised concerns about the possible application of *sharia* law in arbitration.¹⁵⁷ In this regard it is also important to note the concerns of women's groups about indigenous forms of dispute resolution.¹⁵⁸

The right to individual and group autonomy needs to be weighed against important public policy issues for the protection of vulnerable persons. It should be noted that the *Charter of Rights* provides some safeguards regarding the quality of law or other principles applied in arbitration. However, it should be noted that the BC *Commercial Arbitration Act*, apart from rules concerning natural justice, etc., does not contain provisions, such as contained in the Ontario *Arbitration Act*, that allow courts to intervene to "prevent unequal or unfair treatment of parties to arbitration agreements." (Section 6 (3)) There are no specific safeguards for the signing of arbitration agreements. Would BC courts ensure informed, non-coerced consent to arbitration agreements? Possibly not, if the Alberta case of *G. v. G.* is used as guidance.¹⁵⁹

3.6 Competence

3.6.1 Competence of lawyers in drafting arbitration clauses and representing clients in arbitration

While issues of competence in ADR processes often focus on the competence of the third party, in the case of arbitration a number of the court cases raise issues of competence of lawyers. The major area of concern is lack of clarity of submissions to arbitration. This means that lawyers have drafted arbitration agreements or arbitration clauses in separation agreements that are inadequate to guide the arbitrator. Judges have subsequently had to construe these

¹⁵⁷ Please read Marina Jimenez "Islamic Law in Civil Disputes Raises Questions: Judicial Tribunal Based on Sharia to Decide Disagreements among Ontario Muslims" *Globe and Mail* (December 11), A1. <<http://www.theglobeandmail.com/servlet/ArticleNews/TPStory/LAC/20031211/SHARIA11/>>. Also read Faisal Kutty, "Canada's Islamic Dispute Resolution Initiative Faces Strong Opposition" *Washington Report on Middle East Affairs* (May) 70, <http://www.wrmea.com/archives/May_2004/0405070.html>; Haroon Siddiqui "Battling Phantoms on Sharia Law" *Toronto Star*. <http://www.thestar.com/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type1&c=Article&cid=1086819009712&call_pageid=968256290204&col=968350116795>.

¹⁵⁸ See, e.g. Mavis Henry, "Resolving Differences Within Aboriginal Communities and Public Governments," in *Making Peace and Sharing Power: A National Gathering on Aboriginal Peoples and Dispute Resolution, April 30-May 3, 1996, Victoria, BC* (Victoria: UVic Institute for Dispute Resolution, 1997), 185

¹⁵⁹ *G. v. G.* [2000] ABQB 219 (ABQB),

agreements.¹⁶⁰

Another problem is that lawyers may not know how to ensure enforceability of agreements and awards. For example, in one Ontario case, only some parts of a separation agreement, *excluding* the arbitration clause, were included in an order, thus leading the judge to decide that the arbitration agreement had been abandoned.¹⁶¹ This might have been an oversight on the part of both lawyers, or it might have been a tactical decision on the part of one lawyer whose client might not want arbitration in the future. If the latter, the other lawyer failed to consider his client's interest in having the arbitration agreement upheld in the future.

Lawyers may also require significant expertise in arbitration when they draft med-arb or arb-med agreements. In *Duguay v. Thompson Duguay*¹⁶² the court dismissed the father's application to enforce an award concerning child support and access and said that the parties had never signed the arbitration agreement (in the form of unwitnessed minutes of settlement). Lawyers also need competency in managing the enforceability of awards, e.g. by ensuring they are converted to appropriate orders.

Lawyers also require competence in representing clients in arbitration and med-arb processes which are different from litigation and require different knowledge and skills. One example of a BC arbitration "horror story" involves the case of *Gilchrist*¹⁶³ in which the lawyer for the plaintiff was found to have wasted an inordinate amount of time in a lengthy arbitration (following two days of mediation). The process was of benefit to her client and the BC Supreme Court Registrar denied a good part of her fees. The judge attributed the length of time in arbitration as attributable to the inexperience of both the arbitrator and plaintiff's counsel in arbitration with an unknown amount of experience of the defendant's counsel with arbitration.

¹⁶⁰ Arbitration agreements need to consider the following: rules of arbitration, rules about how costs are to be shared or awarded, number and selection process of arbitrators, qualifications of arbitrators, stipulations about governing law including whether amicable composition is to be applied, rules of evidence to be applied and other matters depending on the issues and relevant arbitration legislation. Thomas E. Carbonneau. "A Consideration of Alternatives to Divorce Litigation" (1986) 1986:4 *University of Illinois Review* 1119, at 1156. A good deal depends on the local arbitration legislation, which can change from time to time.

¹⁶¹ *Merrill v. Merrell* [1987] B.C.J. No. 2329; 11 R.F.L. (3d) 18.

¹⁶² *Duguay v. Thompson-Duguay* (2000), 7 R.F.L. (5th) 301, [2000] O.T.C. 299 [2000] O.J. No. 1541, 2000 Carswell Ont 1462 (Ont. Fam. Ct.).

¹⁶³ *Gilchrist & Co. v. McGinn* [2001] B.C.J. No. 332 (BCSC)

3.6.2 Competence of arbitrators

It has been claimed by some commentators that the real reason that courts want to supervise arbitration awards is that they do not have confidence in arbitrators. That point may be arguable, but it is fair to say that there are important public policy issues involved in any increasing movement toward binding arbitration of very important rights and interests of family members, particularly children. Children are not parties and may not be represented in arbitration proceedings, but they are nevertheless vulnerable affected persons. The competence of arbitrators is important.

In the Ontario cases, family law arbitrators are rarely criticized, but sometimes there has been criticism of med-arbitrators in the shift between processes, such as in *Duguay*¹⁶⁴ and *Hercus*¹⁶⁵ which present concerns about natural justice.

The cases of *Duguay* and *Hercus* also present reasons for careful screening of parties before accepting an arbitration case. Some parties may spend a lot of time and use up a lot of money in arbitration with little benefit to themselves or their children.

Moving from mediation to arbitration in a mediation-arbitration process appears to be a problematic part of the process to manage. Bastedo points out that in the shift from the mediation phase to the arbitration phase “it is important to gain the parties confidence that that process can take place and that the mediator has the capacity to disassociate himself from the mediative process, turn himself into an arbitrator, and commence a hearing in the usual way.”¹⁶⁶ This is particularly so in cases where the mediation phase has used a “shuttle” style of mediation.

Most of the arbitration cases that find themselves in the courts later involve mediation-arbitration processes in which there have been *ex parte* communications between the parties and the mediator-arbitrator. This is the major source of party perceptions of a process that is less than fair and transparent.

In the Ontario case of *Hercus v. Hercus*¹⁶⁷ the court found that the arbitrator had failed to treat the parties equally and fairly when he failed to inform the wife about a letter he had received from the husband. The arbitrator also relied on an abuse allegation and failed to wait for the outcome

¹⁶⁴ *Duguay v. Thompson-Duguay* [2000] O.J. No. 1541 (Ontario Supreme Court of Justice)

¹⁶⁵ *Hercus v. Hercus* [2001] O.J. No. 534 (Ontario Superior Court of Justice)

¹⁶⁶ T.G. Bastedo, “The Mediation and Arbitration of Family Law Disputes in Ontario: A Practitioner's Perspective” (International Bar Association Conference, October 2002) [unpublished]

¹⁶⁷ *Hercus v. Hercus* [2001] O.J. No. 534 (Ontario Superior Court of Justice)

of an independent investigation. The arbitrator also acted outside his jurisdiction when he apportioned the quantum of his fees between the husband and the wife. This was a mediation-arbitration agreement in which the mediator became the arbitrator when mediation broke down.

In *Duguay* (a case involving the same mediator-arbitrator as in *Hercus*) the arbitrator notified the Children's Aid Society about a possible child abuse incident, which turned out to be unsubstantiated. The mother had been "having great difficulty" with the son, as had the father. The mediator-arbitrator subsequently assisted the parties to negotiate a move of the son from the mother's to the father's house. Subsequently, the mediator-arbitrator drew up a mediation-arbitration agreement, but the parties were not asked to approve or sign it, but they used the mediator-arbitrator's services after they were given the document. This mediation-arbitration agreement provided that the mediator-arbitrator may "... communicate with either of them [parties], separately or together, with or without counsel, in order to explore the resolution of any issue..." and stipulated that "the fact that the mediator-arbitrator has mediated in the matter may not serve as a the basis of a challenge to the arbitration."¹⁶⁸ (The agreement contained a footnote reference to Section 35 of the *Arbitration*). The parties made frequent use of the mediator-arbitrator's services, and the mother accused the father of running up hours inappropriately to a bill of \$10,800. An issue of Christmas access arose in December, 1998. The mother and daughter were unhappy with the result and refused to participate further with the mediator-arbitrator. In April, 1999, the father unilaterally reduced the mother's support to \$224 a month. In September, 1999, the father sought a change in weekend access arrangements, and approached the mediator-arbitrator. The mother refused to participate, and the mediator-arbitrator said he would go ahead without her and decided in the father's favour. The mother did not try to appeal the award until the father sought to enforce it at which point the court became involved.

In *I.H. v. D.M.* a judge reviewed an arbitrator's award concerning a matter of child access during a Bar Mitzvah weekend, and said that the test that should be applied is "whether the arbitrator's decision was in the best interests of the son or the children." He found that it was. The judge also considered the arbitrator's conduct, which had included separate discussions with the parties and with an assessor. The judge was equivocal about this conduct, but decided there was

"... no irreparable harm either way, no clear balance of convenience. There is risk of emotional harm to the son either way. There is financial risk to the parties either way. The sums at risk are not such as to put either party in financial peril." Also, the court said the "on procedural grounds alone, including bias, there is not enough reason for me to exercise my equitable discretion to stay the part of the award of which the mother complains. Certainly not enough that I would exercise

¹⁶⁸ The full text of the mediation-arbitration agreement is set out in the *Britt v. Britt* [2000] O.J. No. 527 (Ontario Superior Court of Justice) which may be found on Quicklaw at <<http://ql.quicklaw.com/qltemp/C1XeOSWaTFSgadnb/00003ojre-00060589.htm>>

it in the absence of a determination that the son's or the children's best interests require my intervention."¹⁶⁹

Who is qualified to provide support, continuing education and oversight of family arbitrators (other than the courts)? Are Canadian commercial arbitrator organizations equipped to evaluate competence for arbitration and med-arb in the family law arena? Are Canadian family mediation organizations equipped to evaluate competence for med-arb? Arbitration and mediation organizations do not appear to have considered these issues, likely because of the relative rarity of family law arbitration.

3.6.3 Liability

Arbitrators are not liable in tort¹⁷⁰ or in contract.¹⁷¹ This law appears to be well settled.¹⁷² However, it is important to note that the courts will test to see whether a case is properly an "arbitration"¹⁷³ and if not, there will be no immunity. McLaren and Palmer outline some criteria to determine whether a process is an arbitration, e.g.:

- there must be an existing dispute;
- there must be an agreement or a statute conferring arbitral status and defining the jurisdiction of the arbitrator;
- the type of dispute must be within the scope of that for which private arbitration does not offend public policy (e.g. a criminal prosecution would not be arbitrable).¹⁷⁴

There is a good deal of case law on the issue of what constitutes an arbitration (e.g. a valuation is not an arbitration, and an expert giving an opinion may or may not be an arbitrator. It will depend on the facts of each case.¹⁷⁵

¹⁶⁹ *I.H. v. D.M.* [2002] O.J. No. 2838 (Ontario Superior Court of Justice)

¹⁷⁰ *Chambers v. Goldthorpe* [1901] 1 K.B. 624 (Q.B.)

¹⁷¹ *Pappa v. Rose* (1872) LR 7 C.P. 525 (Ex Ch.)

¹⁷² See the Supreme Court of Canada's discussion of the definitions of arbitration and mediation, including discussion of civil immunity of arbitrators, in *Sport Maska Inc. v. Zittler* [1988] 1 S.C.R. 564 (SCC)

¹⁷³ *Ibid.*

¹⁷⁴ R.H. McLaren, and E.E. Palmer, *The Law and Practice of Commercial Arbitration* (Scarborough, ON: Carswell, 1982), 1.

¹⁷⁵ *Ibid.*, 3.

4 Models and policy options

4.1 Policy goals

Models developed to either encourage or discourage family arbitration depend on policy goals. Policy goals for dispute resolution in family disputes include the following: economic and expeditious processes,¹⁷⁶ fairness,¹⁷⁷ promotion of finality,¹⁷⁸ predictability of result,¹⁷⁹ protection of vulnerable persons.¹⁸⁰ Some of these policy goals may be in tension, and models may place their emphasis on one or another policy goal. In the case of family dispute resolution, models need to strive for an appropriate balance the public needs of cost-efficiency with the policy goals of individual autonomy, parental autonomy, fairness to parties, and the paramount safety and best interests of children and other vulnerable persons. Several options are considered below.

4.2 Mandatory models

4.2.1 Mandatory arbitration pursuant to individual statutes

Mandatory arbitration models are not recommended for several reasons including concerns about appropriate levels of judicial review and issues regarding appointment and qualifications of arbitrators, diversity of arbitration panels,¹⁸¹ and appropriate court supervision of arbitrator conduct, processes and outcomes.¹⁸² Also, if the goal is durability of outcomes so as to reduce the use of litigation, it is difficult to see how compulsory arbitration panels would assist. Research does seem to indicate that consensual processes like mediation yield higher rates of compliance

¹⁷⁶ Thomas E. Carbonneau. "A Consideration of Alternatives to Divorce Litigation" (1986) 1986:4 *University of Illinois Review* 1119, at 1155

¹⁷⁷ *Ibid.* at 1155

¹⁷⁸ *Ibid.* at 1155

¹⁷⁹ *Ibid.* at 1155

¹⁸⁰ Barbara E. Wilson. "Who's Watching Out for the Children? Making Child Custody Determinable by Binding Arbitration: *Dick v. Dick*" (1996) 1996:1 *Journal of Dispute Resolution* 225; Anne Argiroff. "Binding Arbitration and the Problem of Protecting the Survivor of Domestic Abuse" (1997) July-August 1997 *Clearinghouse Review* 141.

¹⁸¹ Brishkai Lund, Catherine Morris & Michelle LeBaron. *Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project*. Victoria: Institute for Dispute Resolution, University of Victoria, 1994, 36

¹⁸² Thomas E. Carbonneau. "A Consideration of Alternatives to Divorce Litigation" (1986) 1986:4 *University of Illinois Review* 1119, at 1158

and user satisfaction than do adjudicated outcomes.¹⁸³ There may also be concerns about whether mandatory private arbitration would be permissible under Canada's Charter of Rights. However, there are many compulsory specialist administrative tribunals in many areas of law, federally and provincially, so with adequate procedural safeguards and judicial review a specialized family arbitration tribunal may be a viable option. This option raises issues of adequacy of supporting legislation, regulations, qualifications and competence of arbitrators or mediator-arbitrators, and adequate resources.

4.2.2 Arbitration by court reference under the *Commercial Arbitration Act*, s. 36.

The BC *Commercial Arbitration Act* already provides for court references to arbitration which could be used to support references to a court-annexed or government-appointed quasi-judicial family dispute resolution body, or possibly to private arbitrators.

4.2.3 Notice to Arbitrate

The "Notice to Mediate" approach could be extended so that there is a "Notice to Arbitrate." This may be seen as inappropriately depriving people of autonomy and depriving them of their right to a public court hearing. Also of concern would be the availability of qualified lawyers, issues of competence and supervision issues.

4.2.4 Court annexed non-binding financial, and parenting assessments

This approach may already be in place in the Family Courts. Could it be extended? This would require financial resources and highly qualified personnel.

4.2.5 Graduated approach

It may also be useful to consider a comprehensive scheme of dispute resolution that includes a graduated scheme of mediation, then impartial custody assessment and valuation opinions, then binding arbitration with the assistance of the mediator's assessment and valuation reports.¹⁸⁴ This would be essentially a mediation-arbitration scheme using the same person as mediator, assessor and arbitrator. Alternatively, a graduated approach could use different persons for each of the mediation, non-binding assessment and arbitration processes. This option raises issues of

¹⁸³ See Catherine Morris, ed. *Resolving Community Disputes: An Annotated Bibliography About Community Justice Centres* (Victoria: University of Victoria Institute for Dispute Resolution, 1994) 6, citing evaluative research in North America, including Peter Adams *et al.* Evaluation of the Small Claims Program, Vol. 1. Victoria: Ministry of Attorney General, Province of British Columbia, 1992. See also Thomas E. Carbonneau. "A Consideration of Alternatives to Divorce Litigation" (1986) 1986:4 *University of Illinois Review* 1119, at 1159.

¹⁸⁴ See Rudolph J. Gerber. "Recommendations on Domestic Relations Reform" (1990) 32 *Arizona Law Review* 9, citing Dean Pruitt *et al.*, "The Process of Mediation: Caucusing, Control, and Problem Solving" in M. Afzalur Rahim ed., *Managing Conflict: An Interdisciplinary Approach* (New York: Praeger Publishers, 1989) 201

adequacy of supporting legislation, regulations, resources and qualifications/competence of arbitrators or mediator-arbitrators.

4.3 Increasing the use of voluntary arbitration

This option would require relatively modest resources. It would involve legislative reform to create a more hospitable and safe environment for voluntary family arbitration plus creation of more competence in the pool of available family arbitrators and mediator-arbitrator.

Currently there is little or no confidence in the BC *Commercial Arbitration Act* to support family law arbitration or mediation-arbitration. Thus, if private family law arbitration is seen as a potentially useful approach, changes to the arbitration legislation of the province would be required. This is the approach taken by Australia and North Carolina.

4.3.1 Law reform

Law reform is required to create a more hospitable framework for private arbitration in BC.

4.3.1.1 Revised commercial arbitration legislation

It should be noted that a *Revised Uniform Arbitration Act*¹⁸⁵ was suggested by the National Conference of Commissioners on Uniform State Laws in 2000. It updates the 1955 model arbitration act on which many US arbitration statutes are based. The commentary to the revised model law makes reference to the fact that courts in the US have found that arbitration agreements have been vacated by the courts in some family law cases for public policy reasons, including child custody and visitation cases. This model legislation had been passed in few US jurisdictions. However it does not seem to consider family law cases, except in a few footnotes.

If it is desired that the BC *Commercial Arbitration Act* not apply to family law cases, this should be made clear. However, if it is desired that the BC *Commercial Arbitration Act* apply to family law cases, section 2(2) would need to be repealed and replaced with more detailed clauses that provide good guidance in family law cases.

4.3.1.2 Family dispute resolution act

Alternatively, there could be a specialized family dispute resolution act which would include

¹⁸⁵ National Conference of Commissioners on Uniform State Laws. Uniform Arbitration Act (Last Revisions Completed Year 2000), Approved and Recommended for Enactment in all the States at Its Annual Conference Meeting In Its One-Hundred-And-Ninth Year, St. Augustine, Florida, July 28 - August 4, 2000 , online: <<http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>>

clear policy guidelines for appropriate balances between court supervision, family autonomy, safeguards for those entering into family arbitration agreements (consent), and safeguards for vulnerable persons. Possible models include the following:

4.3.1.2.1 North Carolina *Family Law Arbitration Act*¹⁸⁶

This statute makes arbitration agreements valid, irrevocable and enforceable in all cases arising out of a marital relationship except for an actual divorce, or child support or custody. The statute also clarifies that the court has jurisdiction to summarily determine whether a valid arbitration agreement exists. No recommendation is made regarding the merits of this statute; further study is recommended to learn how this model is working.

4.3.1.2.2 Australia *Family Law Reform Act* plus a trained arbitrator roster

Australia's *Family Law Reform Act* 1995 (as amended) and *Family Law Regulations* passed in 2000,¹⁸⁷ provides for a system of arbitration, either court referred (with consent of both parties only)¹⁸⁸ or private, on matters of property¹⁸⁹ and spousal maintenance and variation.¹⁹⁰ Awards are reviewable by the Family Court or the Federal Magistrates Court on a question of law. Awards may also be set aside on certain grounds including awards obtained by fraud, or where the award is void, voidable or unenforceable.¹⁹¹ There is a system by which people can choose

¹⁸⁶ *North Carolina Family Law Arbitration Act*, 1999, Chapter 50-41, Article 3, online: <http://www.ncleg.net/Statutes/GeneralStatutes/HTML/ByChapter/Chapter_50.html> (date accessed July 7, 2004)

¹⁸⁷ *Family Law Reform Act* 1995 (as amended), available online at <<http://scaletext.law.gov.au/html/pasteact/0/229/top.htm>>. See the *Family Law Regulations* (as amended), available online at <<http://scaletext.law.gov.au/html/pastereg/0/58/top.htm>>.

¹⁸⁸ Note that the legislation removed non-consensual arbitration, which according to the Law Council was not in keeping with the Australian constitution, citing a case of the Australian High Court, *Brandy v. Human Rights and Equal Opportunity Commission* [1994] 69 ALJR 191. See Jennifer Boland. Arbitration in Family Law (Letter to Attorney General, Australia). 1998. Ms. Boland's letter is online at <<http://www.law.gov.au/www/flcHome.nsf/0/66DD8D642E86CE83CA256B440016534D?OpenDocument>>

¹⁸⁹ "Developments and Events" (2001) 15 *Australian Journal of Family Law* 7.

¹⁹⁰ Ian Kennedy. "Private Judging - Arbitrating Family Financial Disputes in Australia" (2002):November *International Family Law Journal* 152.

¹⁹¹ Stephen Bourke. "Developments and Events: Recent Legislative Developments in Family Law" (1999) 13 *Australian Journal of Family Law* 1. Bourke, at 20; Aust news 2001, 7-8. See the relevant sections of Australia's *Family Law Reform Act* 1995 (as amended), available online at <<http://scaletext.law.gov.au/html/pasteact/0/229/top.htm>>. See the *Family Law Regulations* (as amended), available online at <<http://scaletext.law.gov.au/html/pastereg/0/58/top.htm>>.

and engage arbitrators who have met certain requirements prescribed by the Law Council¹⁹² which keeps a list of the arbitrators.¹⁹³ The requirements include specialization in family law and attendance at arbitration training. The Law Council of Australia asked the Dispute Resolution Centre at the School of Law, Bond University, Queensland to develop a three-day course for family law arbitrators.¹⁹⁴ Essentially this fosters voluntary arbitration using a family arbitration roster. No recommendation is made regarding the merits of this statute; further study is recommended to learn how this model is working.

4.3.2 Policy concerns related to competence in family arb and med arb

4.3.2.1 Schemes for developing competence

There are various schemes for developing competence, listed in John Wade's 1999 article.¹⁹⁵ The Law Council of Australia requires the arbitrators on its list to be experienced family law practitioners with three days' training in arbitration. Other options include fostering and funding the development of course modules in mediation-arbitration and arbitration for lawyers and others who might arbitrate. A key issue in arbitration is the threshold level of family law knowledge, arbitration law knowledge and process knowledge required for competence as a family law arbitrator or drafter or arbitration clauses for family law disputes.

4.3.2.2 Measuring success: Building evaluation criteria into policy and program design

Whatever model is chosen, it would need to have clearly defined goals including definitions of success. Questions about "success" in improvements may differ and may include speed, low cost, enforceable outcome, quality of outcome, client autonomy, a respectful process or social equality

¹⁹² Daryl Williams. "Pathways to Reform of the Family Law System" (2002) 16 *Australian Journal of Family Law* 1, 13-14. See also Colin Kaeser. "The Emergence of Arbitration in Family Law in Australia" (2003) 6:7 *ADR Bulletin* 125.

¹⁹³ Family Law Section Law Council of Australia, "Find an Arbitrator," <<http://www.familylawsection.org.au/arbitration/index.htm>>.

¹⁹⁴ An interesting article about this training was written by John Wade, in which he discusses an educational exercise in the course in which 240 family lawyers were asked to write awards on an identical set of facts. The decisions varied dramatically in their outcomes. John Wade. "Arbitral Decision-Making in Family Property Disputes -- Lotteries, Crystal Balls, and Wild Guesses" (2003) 17 *Australian Journal of Family Law* 224.

¹⁹⁵ *Ibid.*

and justice.¹⁹⁶ Some of these policy goals may not be entirely compatible. There is much speculation that mediation and arbitration and various combinations of these processes will improve the court system. Wade has pointed out that the questions of success of particular processes are too often “answered by vague and inaccurate gossip.”¹⁹⁷ Clear evaluation criteria should be built into the design in order to prevent anecdotal reports becoming the source of policy decisions.

¹⁹⁶ Robert A. Baruch Bush. “Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments” (1989) 66 *Denver University Law Review* 335; John Wade. “Arbitration of Matrimonial Property Disputes” (1999) 11:2 *Bond Law Review* 395.

¹⁹⁷ John Wade. “Arbitration of Matrimonial Property Disputes” (1999) 11:2 *Bond Law Review* 395, at 400.