ALTERNATE DISPUTE RESOLUTION:
BALANCING PUBLIC POLICIES AND PRIVATE INTERESTS

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In the last decade, but especially in the last two or three years, there has been explosive growth in the use of mediation and arbitration (often called “alternate dispute resolution,” or “ADR”) rather than litigation in family law matters. While ADR has longer history of use in commercial disputes, throughout this paper the discussion of ADR should be understood in a family law context. Of necessity, the discussion will not have universal application, because of statutory or customary differences in various jurisdictions. Thus the legal context herein is the laws of Canada and the Province of Ontario.

ADR is a dispute resolution method in which parties participate voluntarily and by agreement, except in a few cases where the courts have the power to order mandatory mediation (not arbitration). Mandatory or voluntary mediation may narrow issues or encourage agreement, but, unlike arbitration, will not inevitably bring the parties to an enforceable result.

This raises a number of questions and issues in balancing public policies and private interests:

I. What are the differences between mediation and arbitration?

II. Can mediation and arbitration be combined?

III. What processes or failures in the public litigation system encourage the use of ADR?

IV. What are the benefits and detriments to the parties in the use of ADR?

V. What are the benefits and detriments to the public when parties choose ADR?

VI. To what extent can the parties adopt their own legal regime in ADR. For example, can the parties adopt sharia^{1} law to the exclusion of secular law in their arbitration?

VII. What are the duties, responsibilities and potential liabilities of a mediator/arbitrator?

The Province of Ontario commissioned a report by a former attorney-general, delivered in December, 2004, entitled “Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion.” The Report, which ignited serious controversy (see below: “The Response to the Boyd Report”) examines the above issues and questions, among others. In the paper for the ISFL, I propose to review the background of ADR in Ontario and deal with the recommendations in the Report, none of which have yet been enacted, and to relate the ADR

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^{1} In this paper, I will use the spelling “sharia” rather than shari’a or Sharia except where the term is in a direct quote or a title.
process to my own experience as a long-time family law practitioner now engaged as a matter of choice mostly as a mediator and arbitrator.

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Mediation

Mediation is in most cases a voluntary process where the parties, with or without counsel, before or during litigation, meet with a person of their choice who is engaged to facilitate settlement, or at least narrow the issues. A successful mediation results in some sort of agreement, for example, a Separation Agreement or Minutes of Settlement, which may be enforced by the courts in the event of default or non-compliance. One or both parties may terminate mediation at any time; there is no process to compel them to remain in mediation.

In some situations in Ontario, the court may impose mediation on the parties. Under section 3 of the Ontario Family Law Act, in the context of an application under the FLA, on motion the court may appoint a person whom the parties have selected to mediate any matter the court specifies. The court shall only appoint a person who has consented to act as mediator and has agreed to file a report with the court within the period of time specified by the court. Thus there are consensual elements to appointment of a mediator under the FLA. In more than forty years of practice I have never seen or heard of such a motion. If the parties want mediation, they simply arrange for it.

Another example arises under the Rules of the Ontario Superior Court of Justice in contentious estate matters. The court may direct a mandatory mediation session, or may entertain a motion by a party to be exempted from mandatory mediation. The parties have thirty days to agree on a mediator, and if they don’t, the court will select one.

A type of quasi-mediation may arise when the parties by their agreement, usually at an early stage of marriage breakdown and without counsel, consult a person for the purpose of assessing their rights and obligations in a non-binding way. We call it “neutral evaluation.” This can be very expeditious and cost-effective. A neutral evaluation usually results in a memo from the mediator setting out his view of the entitlement of the parties. The mediator may, at the request of the parties, draft a separation agreement that each of them can take away for independent legal advice.

Mediation can be “open” or “closed.” In open mediation, anything that is said may later be used as evidence, and the mediator may be called as witness. Usually mediation is closed, so that anything said is “off the record” and without prejudice, and the mediator may not be called as a witness. This promotes frank discussion and disclosure.

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2 The subject matter of an application under the FLA would likely be equalization of net family property (more or less like a community property division) and/or spousal and child support.

3 Double pronouns are clumsy. In this paper I will mostly use the masculine pronoun, to be understood as “gender-neutral,” so to speak.
Arbitration

Arbitration is the process where parties, by agreement, select a person to act as their private judge. The parties opt out of the litigation system. The arbitrator usually is given all of the powers of a judge under the Rules of the court to conduct a hearing with *viva voce* evidence, and with all the ancillary powers to order production of documents, examinations for discovery and directions as to the conduct of the hearing. The process is governed by the *Arbitration Act (Ontario)*. The parties may agree to have a right of appeal from the arbitrator’s award, or that there be no right of appeal. They may agree to have, or not to have, a verbatim reporter at the hearing. The arbitrator must conduct the hearing in accordance with natural justice. Even if there is no right of appeal, there is a statutory right of judicial review, in the event that the arbitrator misconducts himself or exceeds the jurisdiction granted to him by the agreement of the parties.

In family law matters, we often use a hybrid form of ADR, under a mediation/arbitration agreement (“med-arb”). This empowers the mediator/arbitrator to conduct mediation of the matters in dispute, and if mediation fails to produce an agreement, to arbitrate the matters. This calls for a specific agreement for this procedure because of section 35 of the *Arbitration Act* (q.v.). Since the person acting as mediator may hear things in discussion that would not be admissible evidence or that a party reveals confidentially, the parties and their counsel must have trust in the person chosen to separate the processes in his mind. The majority of my ADR matters are under a med-arb agreement. It is an effective way to resolve family law problems. The parties and their counsel know that if they cannot come to a settlement, the arbitrator will impose a result on them, so that most cases actually are settled without arbitration. Even if they have to proceed to the arbitration stage, the parties may choose not to present evidence. They may agree that the designated person, in his role as mediator, has already heard and seen everything necessary to formulate an arbitration award.5

An arbitration award is made in writing and states the reasons on which it is based, and must be delivered within thirty days of the hearing. An arbitration award may be enforced by motion to court for judgment in accordance with the award, but this is infrequently needed.

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4 The full text of the *Arbitration Act* is at [www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/91a17_e.htm)

5 Appendix 1 is a generic form of mediation-arbitration agreement.
The Process

Any person may be a mediator or arbitrator. There are now no formal requirements or certification, but this may change as a result of the Boyd Report, discussed below. Parties and their counsel will select a mediator or arbitrator based on the person’s perceived experience and integrity.

There are no procedural rules in a mediation. When selected to mediate a case, typically I conduct a conference call to record the vital statistics, and to make sure everyone understands and agrees what the issues are. We set a time and date for the mediation. I ask the parties to deliver to the other and to me a few days before the scheduled mediation a position paper of some sort, with whatever documents they feel are relevant. Each side must be satisfied that sufficient financial disclosure has been made; effective mediation demands nothing less. The fact is that if they choose mediation, both parties have a mind-set and commitment to get the case settled, so there is usually an atmosphere of open co-operation.

At the mediation I usually bring the parties and their counsel together around a table. I ask each side to tell me anything he or she wants to say about the issues, without interruption by the other side. Then I hear the other side. After that I usually separate the parties each in his or her own room, and caucus with one side at a time to express my recommendations and get a sense of each side’s settlement position. This enables me to shape an offer of settlement, and to present it, shuttling between the parties. I make it clear that nothing that is said to me in caucus will be conveyed to the other side unless I am specifically instructed to do so.

Why ADR?

The growth of and need for ADR are driven by several factors:

8. The cost of litigation as compared with ADR. In Ontario, the average cost to take a contested case to trial is about $30,000-50,000 for each side, but it may be much more. The cost is driven by cumbersome and duplicative procedures, delays in the litigation process, and insufficient court facilities and staff. Although the parties pay the mediator/arbitrator whereas they do not pay the judge, the additional cost is more than made up by the efficiencies of the ADR process.

9. In Ontario, a contested matrimonial case will likely take not less than one year to get to trial. It may take much longer depending on the complexity of the case. We have a rule that a trial estimated to take more than two weeks must be assigned to a “long trial list” currently scheduling trials for 2008! ADR can usually be completed in less than ninety days, including all mediation sessions and/or the arbitration hearing and delivery of the award. Court cases often do not take place as scheduled, and there is a lot of waiting

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6 Divorce - dissolution of marriage - is often severed leaving the other issues to be dealt with at trial. There is power to make whatever interim orders may be needed for custody, access, spousal and child support, possession of property, and to deal with procedural matters.
around. A judge who is assigned to the case may suddenly be reassigned. ADR is by appointment, so it happens when it supposed to happen and there is no waiting around.

10. If it starts on time a typical court work day starts at 10:00 a.m.; takes a morning break around 11:30 for a nominal fifteen minutes (often much longer); lunch at 1:00 p.m. until 2:15 or 2:30; an afternoon break for a nominal fifteen minutes at 3:30; and adjournment at 4:30. The result may be four hours of actual court time. ADR sessions usually start at 9:30 and go until 5:30 with a maximum of an hour for lunch. We also stay longer if needed, and schedule ADR for evenings and weekends if necessary.

11. We have a generalist bench. This means that judges who have little if any experience in family law matters may be assigned to motions and trials. Given a choice, parties and especially their counsel may prefer to select as the mediator/arbitrator - their private judge - a senior and experienced family law specialist.

The Boyd Report

The government of Ontario commissioned a report by a former Attorney-General, Marion Boyd, on the interaction of family law and faith-based issues. The Boyd Report was concerned about the use of faith-based legal systems in arbitration.7

Boyd was asked to conduct a review of the use of arbitration in family and inheritances cases and to examine the impact that the use of arbitration has on vulnerable people, including women, persons with disabilities and elderly persons. As set out in the Executive Summary “The Review began as a result of public concern expressed in the media and through groups and individuals about the use of Muslim personal law (often referred to as Sharia) in arbitrations. There was significant confusion in the media and public consciousness about a plan by the Islamic Institute of Civil Justice to establish a 'Sharia Court' in Ontario.”

Boyd spoke with about one hundred and seventy interested parties or spokespeople, and received another forty-two or so written and oral submissions. The problem as often expressed in the public hearings is that sharia rights and obligations may be diametrically different from the secular laws, and that adherents to the faith (frankly, meaning women) may not have the freedom to refuse a sharia-based determination.

The Report was delivered in December, 2004. Whether some or all of Boyd's recommendations are adopted in legislation and regulation, arbitrators who hear family law cases should pay attention to the problems addressed by the public hearings that led to the Report and the solutions it suggests. While the Report is aimed at addressing potential conflicts between the application of religious law and laws of Ontario and Canada, the protections that are suggested in the Report have far-reaching implications for arbitrators.

7 The full text of the Boyd Report is at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/fullreport.pdf.
The Executive Summary is at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/executivesummary.pdf
The Boyd Report recognizes that arbitration is a useful method for resolving family law disputes, and rejects the idea that arbitration has no role to play in family law. The Report rejects any suggestions that family law cases should go exclusively through the courts, thereby precluding the application of principles that may differ from the standards set in the Family Law Act (Ontario), Children’s Law Reform Act (Ontario), and Divorce Act (Canada). However, the Report recognizes the need for safeguards that should be considered by all arbitrators whether the Report is implemented or not. These protections apply to the arbitrators themselves, to participating parties, and to their children. The recommendations are presented in a series of topical categories.

12. **Formality**

   The Report suggests that all arbitration agreements should be treated in the same way as domestic contracts, such as marriage contracts, cohabitation agreements and separation agreements. Arbitration agreements should be in writing, fully executed, and properly witnessed, possibly a redundant recommendation since it is difficult to imagine arbitration under a parole agreement.

13. **Protection**

   1. The Report suggests that any arbitration agreement may be set aside on the same grounds as other domestic contracts. For example, failure to provide full financial disclosure or address the best interests of the children may result in an agreement being set aside.

   2. If a cohabitation agreement or marriage contract contains an arbitration provision, then a party would not be bound by this unless there is written reconfirmation of that choice at the time of the dispute.

   3. Any arbitration agreement involving a minor party would require court approval.

   4. In the event that an arbitration deals with issues related to spousal or child support, the protections of Section 33(4) of the Family Law Act would apply as it would in regard to any other domestic contract, permitting the court to set aside awards on grounds of unconscionability, results leading to a party being on social assistance, or as a result of accumulation of arrears of support.

   5. Any arbitration agreement or award may be set aside if it does not address the best interests of the children, if there has been no appropriate independent legal advice or no properly obtained waiver of independent legal advice, if copies of the arbitration agreement and the decision with reasons are not available, or if a statement of principles with respect to faith-based arbitration (see below) have not been provided. There would be no opportunity for waiver of these provisions.
6. The Report recommends standardized regulations and procedures that are uniform. This might present a problem in that many arbitrations are conducted on an informal basis, in order to save time and fees.

7. Arbitrators will have a statutory duty to report to the appropriate authorities a child in need of protection pursuant to the provisions of the *Child and Family Services Act*.

8. The arbitration agreement should clearly state the issues to be determined, whether the determination is to be binding or advisory, and set out the law which is to be applied in determining the issues. For example, it might be the law of Ontario, some other jurisdiction, or a faith-based set of principles. If the determination is to be faith-based, then there must be a statement of those principles that explains the rights and obligations of the parties in regard to the various issues, and that information must be provided in advance of the process. The parties must be given the opportunity to understand the differences between the rights and obligations under the laws of Canada and those which would be applicable using religious concepts. The Report recommends that parties cannot waive rights to judicial remedies and fair and equal treatment under the law.

9. Every arbitration agreement must have a Certificate of Independent Legal Advice, or a waiver with appropriate admonitions.

10. All arbitrators must be members of recognized voluntary organizations, or excluded categories such as members of The Law Society of Upper Canada. Unless they are members of such organizations, then their reports will not be binding. This is designed to ensure that members of tribunals subscribe to the standards and requirements of organizations which are dedicated to ensure a high level of competence and equal and fair treatment of parties.

11. The Report recommends a screening for power imbalance, domestic violence, and other concerns that might indicate duress or lack of voluntariness, prior to the initiation of the process. The recommendation suggests that the arbitrator should be meeting with each of the individuals in advance. This may create some difficulties, leading to concerns about bias or unfairness of the arbitrator. The question is whether an arbitrator can meet with a party separately, in advance, and make enquiries on issues which would most certainly impact on determinations later, such as child custody. There is some suggestion that there would be a standardized screening process, but one doubts whether such would be applicable and useful given the varied demographics of the Province of Ontario. In any event, the Report does highlight the problem of determining voluntariness in certain circumstances as well as confirming that the parties understand the process and options. The concern may lie in power imbalances within a family situation, or the problem may be more complicated, involving pressures within a community within which the party is a member.
12. The recommendations call for a recording of the proceeding, including a summary of the evidence, or transcripts, reasons for the decision, findings of fact, and exhibits. The maintaining of a record is an important consideration, both for the protection of the parties and for the benefit of any subsequent appeals or judicial interventions, and for the benefit of the arbitrator.

13. The concept of independent legal advice is highlighted, as well as the complexities associated with it. There should be independent legal advice prior to the initiation of the arbitration, in order to ensure that the party understands the process. The party must understand the differences between the application of Canadian law and faith-based principles. The party must understand the nature of the law of arbitration that is applicable and the availability of appeals for further determinations later. Further, the arbitrator must be satisfied that the parties have received explanations as to the implications of proceeding with faith-based process. This leads to considerable responsibility on the part of the arbitrator, and the lawyers advising the parties may or may not have the expertise necessary to provide all of this information. In religious law situations, the lawyer must review the statement of principles so that the client is aware of the differences between the two or more legal systems that may be available.

14. There is a serious problem with respect to waivers. Under the recommendations, parties can still waive their rights to independent legal advice. This may lead to a whole host of difficulties. The arbitrator must satisfy himself that the party understood the nature of the waiver, which leads to a feedback circle of considerations.

14. Education

The recommendations contain a variety of suggestions to make the community better aware of family law processes, alternate dispute resolution options, and the legal system. They recognize the need to provide for various approaches to appeal to the diverse needs of the community. There is an emphasis on public education to meet isolated sections of the community who may be in need of such information.

15. Training and Education of Professionals

1. The recommendations strongly suggest that there must be some standardization of skills and training for arbitrators across the province. This ensures that tribunals hearing these cases have some commonality with respect to background qualifications and the responsibility to ensure that parties entering into the process are properly informed of their options.

2. There should be standardized processes for screening for and understanding power imbalances and domestic violence. This presents a very serious challenge as discussed above.
3. The Report recommends continuing education of various organizations such as the Law Society, the bar associations, and various voluntary groups. This is to ensure a high quality of independent legal advice and standards for arbitration.

4. The recommendations suggest training for arbitrators to recognize circumstances where children may be in need of protection.

5. The Report recommends that if there is to be mediation and arbitration as part of one process, then agreement with respect to arbitration must be entered into beforehand.

16. Oversight and Evaluation of Arbitrators

1. Codes of professional conduct should be reviewed.

2. The parties must receive the decision in writing (already a provision of the Arbitration Act), with written reasons for the decision and a copy of the arbitration agreement.

3. Arbitration decisions should be kept for ten years. These should include information including the names of the parties and their representatives, all independent legal advice or waiver certificates, documents filed, summary of the evidence, and the decision. If these are not kept, then the arbitration may be set aside.

4. In addition to the above, the Report suggests annual reports to the Attorney General including numbers of arbitrations conducted, results of appeals or motions to set aside, other information such as details of any complaints or disciplinary action taken as a result of any arbitrations. Reports to the AG are intended for research, evaluation and consumer protection. This raises certain questions of privacy. It may be vitiate some of the desiderata of arbitration.

17. Community Development

The Report recommends working closely between government and various community groups, in order to develop principles which would be applied in faith-based determinations. Having a code of standards that would be applicable in determining faith-based arbitrations will assist greatly in allowing parties to choose between laws of Canada and Ontario and other systems.

There is much to commend in the recommendations of the Boyd Report. The Report calls for high common standards of approach in the determination of family law matters. The formality in the creation of arbitration agreements and ensuring voluntariness and understanding before the process begins makes considerable sense. On the other hand, some of the recommendations may turn arbitrations into more complicated proceedings than those that are court-based. This may
eliminate some of the advantages that previously existed, including confidentiality, expedited determination and cost savings.

The Report is focussed on rights of the disadvantaged, including children and women. If arbitration is to remain a viable alternative to determine family law matters, these protections must be paramount.

On the other hand, parties often choose to have their rights and obligations determined according to standards other than those that apply in the *Family Law Act*. The concept of marriage contracts and separation agreements recognize the right to choose, and to have rights and obligations determined, under different standards. However, if we do choose other standards of determination, then we might be removing from our courts the rights to ensure fairness and equality. These are delicate issues that must be carefully balanced.

**The Response to the Boyd Report**

Traditionally parties in arbitration may choose any legal system they want. For many years we have seen arbitrations using halachic, Ismaeli or aboriginal laws. While the Boyd report supported the use of faith-based principles in arbitrations, the response was immediate, polarized and vehement.

The counsel for The Canadian Council of Muslim Women labelled the report “naive” in its assumptions that Muslim women would have the same choices as other women. She said that many of them are recent immigrants who might not speak English and are not given a true choice of law. She said, “This is a dangerous direction. It is the thin edge of the wedge. This has to be stopped now.” A spokesman for the Muslim Canadian Congress said that Boyd has given credibility to a system of law that has disadvantaged women in Muslim countries for centuries, but went on to say, “What exactly are these Muslim principles? For [Boyd] to come here and lecture Muslims as to what Muslim family law is, and *sharia* is, is despicable and racist.” A lawyer for the Islamic Institute for Civil justice said he was “delighted” with the Report: “It’s a model for the whole world to see how *sharia* law can be used in a Western society....Canadian laws prevail, *sharia* law takes a backseat.” The head of the International Campaign to Stop *Sharia* Courts in Canada said, “We just hope that the attorney-general freezes the report until a proper investigation is done.”

On May 26, 2005, the Quebec National Assembly, as a response to Ontario’s Boyd Report, voted unanimously to reject the introduction of *sharia* in marital or other disputes in the Muslim community. The motion was introduced by a woman member of the Assembly who is a non-practising Muslim. She said that *sharia* would discriminate against women, and that fringe Muslim religious groups are seeking to use the Canadian *Charter of Rights and Freedoms*, which can be seen as permitting free choice of a private legal system, to impose religious values that undermine Canada’s democratic institutions. The motion, which was adopted without public hearing or debate, drew immediate condemnation from Muslim organizations. The president of the Muslim Council of Montreal said, “This is shocking, truly shocking. It is total bigotry or total ignorance of what Islam is. Taking such action is tantamount to religious bigotry and discrimination against a religious minority. Muslims are being excluded from rights other
religions have. And this exclusion is very dangerous because that is exactly what Hitler did to the Jews.”

On May 28, 2005, the Toronto Globe and Mail, Canada’s most influential and “national” newspaper, in a lead editorial characterized the Quebec decision as “a warning to observant Muslims: Discard your extreme religious notions and be Canadian. Like everyone else.” The editorial goes on to say that the decision is unfriendly to Muslim believers, is poorly thought out and lacks respect for religious faith and pluralism, and is “un-Canadian.” The editorial also notes that strict application of sharia in some countries has “been full of horrors for women.” The editorial tautologically doubts that a sharia remedy that has an unconscionable or criminal result under Canadian law would have legal validity.

A letter to the Globe (May 30, 2005) from the communications director of the Muslim Canadian Congress welcomes the Quebec decision but says it should apply to all religious groups.

On June 13, 2005, Shirin Ebadi, the Iranian Noble laureate and human rights advocate, was awarded an honorary degree at Concordia University in Montreal. She supported the Quebec decision and opposed the introduction of Islamic tribunals in Canada, warning that they open the door to potential rights abuses. She said, “I’m against having several courts and separate laws. One country, one legal code, one court - for everybody. Because there are many interpretations of the same Islamic teachings and laws. It’s not clear what interpretation will be used. Often a lot of the interpretations are anti-democratic and against human rights. That is my main concern.”

There is a simple solution. As Boyd said immediately after the release of her Report, “We’re being very clear: This is not law. This is Muslim religious principles within Canadian law.” She said her report avoided the term sharia because, as practised in Middle East countries, it combines criminal and civil law, and allows the death penalty for adultery. She said,“We’re talking about arbitration based on certain religious principles....similar to our Charter values of equality, freedom and justice. To be enforceable, any decision arising from faith-based arbitration should be in fundamental compliance with rights and obligations under the laws of Canada and Ontario.

June, 2005

Malcolm C. Kronby, Q.C.
Toronto, ON, Canada
Appendix 1  Generic Mediation -Arbitration Agreement

IN THE MATTER OF THE *ARBITRATION ACT*,
S.O. 1991, c. 17

B E T W E E N:

X

(herein called ""),

and

Y

(herein called "")

MEDIATION/ARBITRATION AGREEMENT

X and Y wish to mediate or arbitrate certain issues as set out in this Agreement and have agreed to submit those issues designated in this Agreement to Malcolm C. Kronby, as Arbitrator.

SUBMISSION

18. This document constitutes a submission to arbitrate pursuant to the provisions of the *Arbitration Act*, S.O. 1991, c. 17 and amendments thereto.

SUBSTANTIVE ISSUES

19. The following issues are submitted for final determination:

(a) Equalization of net family property;
(b) Terms of possession or sale of the matrimonial home;
(c) Ownership and possession of other property;
(d) Quantum and duration of spousal and child support; and
(e) Costs of the arbitration.

CONFIDENTIALITY

20. The proceedings and the record thereof shall be private and confidential, subject only to their being produced in proceedings for judicial review.

SUPPORT

21. Issues related to spousal support shall be determined in accordance with the provisions of the *Divorce Act*, R.S.C. 1991 c. D-3.4 (2nd Supp.) and the Child Support Guidelines as amended, as may be applicable.
DRAFT PAPER: The author retains full legal copyright and ownership of the intellectual property rights of this draft paper; this paper may not be used or copied without express permission of the author.

WAIVER OF RIGHTS TO LITIGATE IN COURTS
22. By submitting to arbitration those issues designated in paragraph 3 above, the parties hereby waive any right to further litigate those issues in Court, whether pursuant to the Family Law Act, R.S.O. 1990, c. F.3, as amended; the Divorce Act, R.S.C. 1991, c. D-3.4 (2nd Supp.), as amended; or any other statute or law, subject to the right of judicial review of the arbitration award.

MEDIATION
23. The parties will first attempt to resolve the issues through mediation, with Malcolm C. Kronby as mediator. On , 2005, at a.m., the parties and their counsel will meet with the mediator to explore the issues and the process herein. Thereafter the parties may continue in mediation at a date and time to be arranged. If the mediation does not achieve a resolution of the issues, the mediator may declare the mediation ended, and an arbitration will take place as set out below.

PROCEDURAL ISSUES IN RESPECT OF ARBITRATION HEARING
7. **Time and Place:** The hearing shall take place at the offices of Epstein Cole LLP, Suite 2200, 393 University Avenue, Toronto, Ontario, M5G 1E6, at a date and time to be arranged in the event that mediation does not achieve a resolution of the issues.

8. **Arbitrator:** The Arbitrator shall be Malcolm C. Kronby.

9. **Procedure on Hearing:** The procedure shall be similar to court procedure wherever possible, and in particular:
   (a) all witnesses shall be sworn or affirmed and shall be subject to examination in chief and cross-examination and re-examination;
   (b) all usual rules for the admissibility of evidence in court proceedings will apply as will the Rules of Civil Procedure.

10. At least seven days before the scheduled date for arbitration, each party shall provide the other party with a Position Statement of no more than ten (10) typewritten (double-spaced) pages setting out his/her position in respect of the above issues, including reference to all relevant documents.

11. The arbitration proceedings shall [not] be recorded by a verbatim reporter.
REPORT OF ARBITRATOR FOLLOWING THE ARBITRATION HEARING

12. After the evidence has been received and submissions on the law have been made the Arbitrator shall deliver an Award on all issues submitted for determination.

AWARD

13. Subject to the right of judicial review, the Arbitrator's Award shall be final and binding upon the parties and shall be incorporated in a consent Order or Judgment, as the case may be, of the Ontario Superior Court of Justice (General Division)

ARBITRATOR’S FEES AND DISBURSEMENTS

14. The Arbitrator’s fees shall be $ per hour for the hearing, any pre-arbitration conference, interim arbitration, preliminary meetings, mediation, arrangements, preparation for the hearing, preparation of a report and any follow-up, plus disbursements and GST.

15. The parties shall forthwith provide the Arbitrator with a total retainer of $ this retainer to be refreshed from time to time as the Arbitrator shall direct.

COSTS

16. As the issue of costs is submitted to the Arbitrator pursuant to paragraph 2 above, the Arbitrator’s discretion regarding costs shall include the power to require one party to pay more than one-half, or all of the Arbitrator’s fees and disbursements.

MEDIATION AND ARBITRATION

17. The parties agree that the Arbitrator can mediate all issues in dispute and the participation of the parties and/or their counsel and the Arbitrator in the mediation process shall not disqualify the Arbitrator from arbitrating the issues in dispute; and the parties waive the provisions of s. 54(6) of the Arbitration Act.

WAIVER OF ARBITRATOR’S LIABILITY

18. The parties hereby waive any claim or right of action against the Arbitrator arising out of these proceedings.

DATED: