

# Muslims call for Mediation in Canadian Courtrooms

Changes to include mandatory mediation in  
Canada's legal system give Muslims  
more religious freedom to practise Islamic Law

by Rosemarie Ruccella

Conflicts between Islamic and Canadian laws can now be resolved outside of the courtroom through mediation sessions. This alternative to trial is what the Canadian Society of Muslims has been working for since 1986.

In early 1997, the province announced that all civil cases (non-family) had to be referred to a three-hour mediation session. The mediation program has been in Toronto since last June, and is currently being phased in across the province.

Fundamental aspects of Islam require Muslims to act according to specific laws in the Qur'an, the holy Muslim scriptures. Islam teaches followers to act according to specific laws of the Qur'an regarding individual responsibilities. These laws are known as personal law and deal with questions concerning marriage, divorce, inheritance and child guardianship. Personal law is part of Muslim law and deals with matters that affect the individual directly.

President of the organization, Syed Mumtaz Ali appeals to the Charter of Rights to defend his claim for recognition of Muslim law. The Shariah (Muslim law) says that Muslims living in non-Muslim countries such as Canada, must observe the laws just like all other members of the religion.

"Not being able to live by Muslim law," explains Ali, "means you can not exercise freedom of religion guaranteed under the Charter. It's an integral part of the religion. Muslims have no choice but to follow it and obey it."

The society's campaign was attempting to legitimize

Muslim law in Canada. In 1986, the organization began pressuring the province of Ontario to include Islamic personal law in the judicial system. The society made recommendations to the Ontario Courts Inquiry, and in 1989 a report containing some of these recommendations was published.

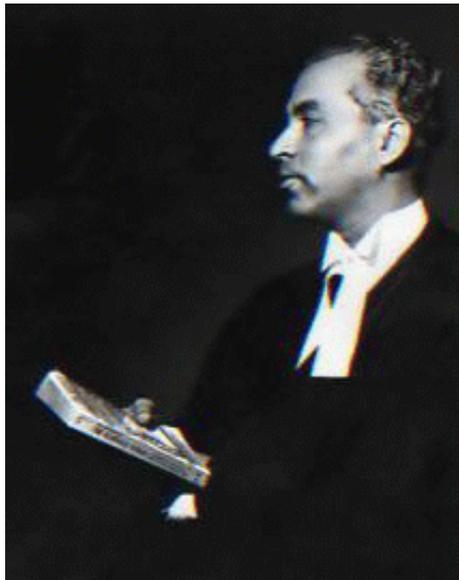
The report suggested the Ontario courts adopt a system of "Alternative Dispute Resolution" 'Alternative' meaning cases are settled out of court through mediation and arbitration, and idea central to Muslims.

In 1994, the Ontario government set up the Civil Justice Review Task Force, to which the society also submitted suggestions. One of the task force's recommendations to the province was a system of alternative dispute resolution. These recommendations paved the way for the implementation of mandatory mediation that is currently being brought in across the province.

An alternative to court settlements is an important issue for the Muslim community because it gives them the freedom to practise Islamic law without conflict.

Ali feels the organization's campaign efforts contributed to the government's decision. "We hope our campaign had some impact," says Ali. He looks at the decision with a "sense of pride. It was our time and effort, it wasn't just for religion, it's [a system that is] beneficial to everyone."

The idea behind alternative dispute resolution is that it allows people involved in legal proceedings to resolve problems without the court. The process involves meeting with an agreed upon mediator to negotiate



**Syed Mumtaz Ali was called to the bar in 1962**

settlements.

By introducing this element into the judicial system, the Muslim Society argues that it reduces the burden on the courts for people of Muslim and non-Muslim backgrounds. But it's particularly important for Muslims because it allows them to resolve legal disputes according to Islamic teaching without the interference of the court.

There's a difference in the way that Muslims and [non-Muslim, secular] Canadians interpret the meaning of adoption. Because of this, there are times when the court rulings on a Muslim adoption case violate the principles of Islam.

According to the Islamic tradition, adoption doesn't really exist according to the Canadian definition. In Canada, adoption severs all connections it has with its biological parents. Birth record in Canada only record the child's adopted name. According to Canadian law, the child is legally entitled to collect an inheritance from its adoptive parents upon their death.

The Muslim tradition recognizes guardianship as the equivalent of adoption in Canada. Here the child retains its relation with its natural parents and as a result, the child's guardians are not permitted to leave the child an inheritance. *[Instead of "inheritance" the guardians are permitted to leave no more than one-third of the total estate by way of legacy in favour of the child under this guardianship – Editor]*

"Through arbitration, these problems could be resolved easily," Ali says. "Both laws could be satisfied through negotiations involving both the biological and adoptive parents in order to meet the necessary requirement to provide for the child."

In the past, the recognition of Muslim marriages and divorces has been a problem in secular law countries. According to Ali, "Marriage doesn't pose a problem because the Canadian law accepts Muslim marriages here, unlike in the United States and the United Kingdom."

For Muslim couples wanting to marry according to Muslim tradition, the Canadian marriage requirements are easily combined into the Islamic ceremony.

Ali explains that Muslim couples living in Canada, simply need to get a marriage licence available from any city hall. In Canada, [generally] an Islamic wedding consists of two parts which are performed simultaneously in the presence of the Muslim religious leader, an Imam. *[who is also authorized by the provincial government to solemnize marriage under Canadian Law – Editor]*

The Muslim tradition consists of one partner offering him or herself in marriage and the other accepting. In order to comply with Canadian requirement, the bride and groom are then expected to file the marriage licence,

[documents] signed by themselves, witnesses and the Imam with the Registrar of Marriages.

Problems arise however, when a Muslim couple want to divorce, "Muslim divorce is a simple thing," says Ali, "Philosophically marriage and divorce take place in the same way and the state has no business complicating it."

According to Muslim tradition, the authority of who can initiate a divorce is determined in a prenuptial agreement. For Muslims, this agreement does not have to be in writing, but Ontario courts refuse to recognize these type of agreement as legitimate.

In the prenuptial contract either partner can be given the power to divorce. But if there is no contract, according to Muslim law, the husband is given the power to terminate the marriage at his sole discretion.

"We want to live according to these provisions," says Ali. "We don't want the bother of the court, or to live at the whim of judges, we want to live according to our own religious laws."

According to the Qur'an, married couples wanting a divorce must first attempt to solve the conflicts themselves. If this attempt is unsuccessful, a member of both the husband's and wife's family is asked to act as an arbitrator to help the couple. Once the couple has gone through these first two steps, and a resolution has not been reached, only then is divorce permissible in the Islamic faith.

The introduction of the mandatory mediation in Ontario civil court cases gives Muslims the opportunity to follow these provisions of the Qur'an more closely. Society president, Ali established The Muslim Marriage Mediation and Arbitration Service to help Muslim couples resolve marital conflicts. The service acts as the appointed mediator in cases remanded by the courts for mediation. *[with a clear understanding that this will not include "legal advise" which only a practising lawyer can provide – Editor]*

The service tries to follow Muslim tradition by helping couples to resolve problems themselves. The service also provides arbitrators to umpire discussions, or act as judges and make final arbitration decisions. Finally, if these attempts at reconciliation fail, the service will help couple filing for legal divorce to finalize the procedure.

The marriage arbitration service is still in its formative stage. "In the not too distant future, we hope to help a lot of people settle matrimonial problems," says Ali. "So far the people that come to us have come too late. They're already divorced."

Ali, who has been married for 34 years, says the success of the service will depend on people's eagerness to follow Muslim law.

The introduction of mediation in Ontario courts is a first step. The Canadian Society of Muslims wants to see mediation included in cases of family law as well as civil disputes. "It's coming," say Ali. "It is approved in principle, and judges sometimes refer cases to arbitration [*mediation*] on an informal basis. The courts are working on it." [Mediation has since been made mandatory for **all** civil cases including family law.-- May 1999]

Ideally the Society asks for more than mediation from the courts; they want the power to arbitrate legal proceedings. The difference, explains Ali, is that mediation has to be referred to the courts for final approval.

"In arbitration, one does not necessarily have to go to the courts either to initiate arbitration for the final solution," says Ali. "It's a private settlement, done by applying Islamic laws."

Ali doesn't see the campaign as, "just a religious issue," but as one that will improve the justice system for all Canadians, both Muslim and non-Muslim. At the moment, Ali is content with the progress that has been made.

For the retired attorney, it's not the first time that he's set a Canadian legal precedent. In 1962, two years after Ali emigrated from England, he broke Canadian tradition when he swore his oath of office on the Qur'an. It was the first time in Canada that the Islamic holy scriptures had been used by a lawyer in his call to the bar.