Recognition of Islamic Marriage, Divorce, and Ancillary Issues: The Canadian Perspective

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Has Canadian law taken notice of its expanding Muslim Population?

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Introduction

The Muslim community in Canada is almost as old as the nation itself. Four years after Canada's founding in 1867, the 1871 Canadian Census found 13 Muslims among the population. Interestingly enough, the first Mosque built in Canada was the Al Rashid Mosque built in 1938 in Edmonton, Alberta, which is located 300 kilometres from the writer's city of Calgary.

According to Canada's 2001 Census, there were 579,645 Muslims in Canada, just under 2% of the population. In 2006 the Muslim population was estimated to be 800,000, or about 2.5%. In 2010, estimates were 900,000 of which 65% were Sunni, while 15% were Shia. Some Muslims are non-practising.[1]

[1] www.wikipedia.org/wiki/Islam_in_Canada; http://www12.statcan.gc.ca/english/census.01/products/standard/popdwell/Table-PR.cfm;http://www12.statcan.ca/english/census01/products/standard/themes/ca/census/recensement/2006/; http://www.statcan.gc.ca/pub/91-2/5-x/2011000+002-eng.htm

Statistics Canada projects that the majority of the foreign-born population will grow "four times faster than those who are Canadian born over the next 20 years". Almost one in three newcomers will follow a non-Christian religion two decades from now, and more than three-quarters will have a mother tongue that's neither French nor English."[2]

Islam in the Global Context

The Islamic faith has been a source of considerable international interest and debate in the latter part of the twentieth century. Today, Muslims make up one fifth of the world's population and Islam is presently the fastest growing religion in the world.[3]

Khan maintains the media's portrayal of Islamic law as being restrictive of individual rights, patriarchal and demeaning to women is constantly shrouded by inherent bias and fear that Islam will threaten the current global power structure.[4]

Shari'a, the Arabic word for Islamic law, literally means "the way to follow." The Shari'a developed as a universal system of law and ethics in the second and third centuries of Islam.[5]

[2] Cultural Factors in the Law, Lana K.L. Li, University of British Columbia Law Review (2011) 44 UBC L Rev 111-148.
[3] Islamic Human Rights: Islamic law and International Human Rights Standards, Isha Khan, Appeal: Review of Current law and Law Reform (1999) 5 Appeal 74-85
[4] Khan, supra; Runnymede Commission on British Muslims and Islamophobia, the Runnymede Trust 1997, London.
[5] The Prophet Mohammed began to propagate the Islamic faith in approximately 560 AD, Khan, supra.

Islamic law derives from four main sources. These include the Qur'an, the literal and final word of God; the Sunna, or the traditions based on the life of the Prophet Muhammad which describe model behaviour; the qiyas, or juristic reasoning by analogy; and ijma, or consensus of Muslim scholars. These sources work in conjunction with one another to create a comprehensive moral and legal ordering.[6]

Historical evidence affirms that the Shari'a disposed of the practice of infanticide and blood feuds which were prevalent in the 6th century, and relatively improved the status of women. For example, in pre-Islamic times the dower was owed to the father, but the Qur'an changed things by mandating that the dower be paid to the bride thus through the concept of Mahr, a woman became the subject of a contract rather than an object of it. When the British applied their law to Muslims in place of shariah, as they did in some colonies, the result was to strip married women of the property that Islamic law had always granted them – hardly progress towards equality of the sexes. [7]

Muslim law in the West has been marginalized by the fact that the typical modern Western legal system…..tends to view and treat the Shari'a value system as suspect in terms of effective human rights protection. Muslim law is thus, often portrayed

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[6] Khan, supra; Noel J. Coulson, The History of Islamic Law, [1964], Edinburgh University Press

[7] Noah Feldman, "Why Sharia," New York Times, http://nytimes.com/2008/03/16/magazine/16shariah-t.html; Abdur Rahman I. Doi, Shariah: The Islamic Law, 1997, 1997, http://muslim bookmark.com, pages 158-164.

as diametrically opposed to the values of the majority community and incompatible with modern concepts of human rights. The most prominent examples cited are the unilateral talaq and the male privilege of polygamy.[8]

Pearl and Menski maintain that Muslims in the West have not abandoned Islam and Muslim law, nor will they do so in the future. A Muslim wherever she/he may be remains subject to the main principle of Islam, total and unqualified submission to the will of Allah.

How has Canada responded to its increasing Muslim population?

The Canadian Perspective

The Concept of Mahr (Dower) in Islamic Law

The Mahr forms an essential part of Muslim family law and is practised universally by all Muslims, Sunni or Shi'a.[9] The origin of mahr is in the Qur'an (S4 v.4)[10] A mahr or maher is a mandatory gift given by the groom to the bride upon marriage that sets out how much the groom will give to the bride as compensation or payment in the event of a marriage breakdown. Often a husband refuses to pay the money on a number of grounds, e.g., the wife is already being catered for

[8] Muslim Family Law, 3rd Edition, Pearl and Menski, Sweet & Maxwell,

[9] The Concept of mahr (Dower) in Islamic Law: The Need of Statutory Recognition by English Law, by Mohamed Jindani, Article from his PhD thesis "The Concept of Dispute Resolution in Islamic Law". HeinOnline-11 Y.B. Islamic Middle E.L. 221 2004-2005 at page 220.

[10] Jindani, supra at page 221.

under the law of the land, or mahr is part of a potentially polygamous marriage and therefore not justifiable. One of the first cases dealing with a mahr was heard in England.[11] Justice Winn in the Shahnaz case held that the fact that no such claim [mahr] had previously been recognized by the English courts was not a sufficient reason why the Courts should not accept jurisdiction. He went on to say that as a matter of policy, in view of the large number of Mohammedans resident in England, the law should help women who come here as a result of a Mohammedan marriage by enforcing the husband's contractual promise.

The concept of mahr has been enforced in British Columbia, Canada: see Nathoo v Nathoo,[12] Amlani v Hirani,[13] and NM M v NSMM.[14] The court in Nathoo stated as follows:

- **The parties chose to marry within the Ismaili tradition. They knew full well that provision for Maher was a condition of so doing. I find the parties discussed the quantum to be provided and, after taking advice from elders within their community and negotiating with each other, agreed on the sum of $20,000. Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define**

[11] Shahnaz v. Rizwan (1965) 1 Q.B.D. 390
[12] [1996] BCJ No 2720 (SC)
[13] (2000) BCSC 1653
[14] (2004) BCSC 346

> **various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold the provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law.[15]**

In Amlani, the court characterized the mahr contract as "other property" as set in section 61 of the Family Relations Act.[16] The amount of the mahr was allowed as it was provided for by contract in addition to the division of family assets under the Family Relations Act. This was because the terms of the marriage agreement or mahr were not considered unfair considering the factors in section 65.

In other provinces, however, the mahr as a separate contract has not been universally upheld. In Kaddoura v Hammoud,[17] the court decided that the enforcement of a mahr was a religious obligation and as such was not appropriate to be adjudicated by the civil courts. Concern was expressed that deciding such a matter would be outside its area of expertise and potentially outside it's constitutionally granted authority. The court stated as follows:

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[15] Nathoo, supra note 10 at paras 24-26.

[16] Amlani, supra note 11 at para 23.

[17] (1998), 168 DLR (4th) 503, 44 RFL (4th) 228 (Ont Ct J (Gen Div)), additional reasons 1999 CarswellOnt 191 (Ct J (Gen Div)).

- **The Mahr and the extent to which it obligates a husband to make payment to his wife is essentially and fundamentally an Islamic religious matter. Because Mahr is a religious matter, the resolution of any dispute relating to it or the consequences of failing to honour the obligation are also religious in their content and context. While not, perhaps, an ideal comparison, I cannot help but think that the obligation of the Mahr is as unsuitable for adjudication in the civil courts as is an obligation in a Christian religious marriage, such as to love, honour and cherish, or to remain faithful, or to maintain the marriage in sickness or other adversity so long as both parties live, or to raise children according to specified religious doctrine. Many such promises go well beyond the basic legal commitment to marriage required by our civil law and are essentially matters of chosen religion and morality. They are derived from and are dependent upon doctrine and faith. They bind the conscience as a matter of religious principle but not necessarily as a matter of enforceable civil law.[18]**

The court concluded:

- **In my view, to determine what the rights and obligations of [the husband] and [the wife] are in relation to the undertaking of Mahr in their**

[18] Ibid at 510-511.

> **Islamic marriage ceremony would necessarily lead the Court into the "religious thicket", a place that the courts cannot safely and should not go.[19]**

The trend in Ontario has changed from the Kaddoura case in 1998. A very recent case from the Ontario Court, Ghaznavi v. Kashif-Ul-Haque[20] has moved toward recognition of the mahr. In the Ghaznavi case the parties were observant Sunni Muslims that entered into an Islamic marriage contract in July 2009, just before their wedding. The Husband was a US citizen and the Wife was Canadian. They commuted between their two residences. The Husband argued that the mahr is religious in nature and not a legal contract and therefore unenforceable. The Court relied on Ontario legislation and held the mahr met the requirements of the Family Law Act and was therefore binding and enforceable. The court referred to an Ontario Court of Appeal decision that also upheld the enforcement of a mahr in the Khanis v. Noormohamed case.[21]

Nine years after the Kaddoura case, the Supreme Court of Canada did go into the "religious thicket" in Bruker v Marcovitz.[22] There, the court stated clearly and succinctly that even though a dispute may have a religious aspect, it does not necessarily mean that it is non-justiciable. In the Bruker case, the husband refused for 15 years to give a

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[19] Ibid at 512.
[20] (2011) O.J. No. 3023
[21] (2011) OJ No. 667.
[22] 2007 SCC 54, [2007] 3 SCR 607.

get, a Jewish divorce, to the wife. A wife could not obtain a _get_ unless her husband agreed to it. Without a _get_, which takes place before three rabbis in a rabbinical court, the wife is not free to remarry and any children she would have on civil re-marriage would be considered illegitimate under Jewish law. The Supreme Court of Canada recognized the difficulties this situation would pose for a Jewish woman in Canada who is free to re-marry upon divorce under civil law but remains married to her former husband under Jewish law. Madam Justice Abella, writing for the majority, began by stating the following :

- **Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the Canadian Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.**
- **The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are**

compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.[23]

Getting quickly to the main issue, Madam Justice Abella continued:

- **For an observant Jewish woman in Canada, this presents a dichotomous scenario: under Canadian law, she is free to divorce her husband regardless of his consent; under Jewish law, however, she remains married to him unless he gives his consent. This means that while she can remarry under Canadian law, she is prevented from remarrying in accordance with her religion. The inability to do so, for many Jewish women, results in the loss of their ability to remarry at all. The vast majority of Jewish husbands freely give their wives a get. Those who do not, however, represent a long-standing source of concern and frustration in Jewish communities . . . . The issues in this appeal, as mentioned earlier, are whether this obligation constitutes a**

[23] Ibid at paras 1-2.

> **valid and binding civil obligation under Quebec law and, if it does, whether Mr. Marcovitz is exonerated from liability for failing to perform his obligation on the basis that it violated his freedom of religion. Unlike my colleague Justice Deschamps, with great respect, I see this case as one properly attracting judicial attention. The fact that a dispute has a religious aspect does not by itself make it non-justiciable.[24]**

The court went on to list examples where cases have been decided by the courts even though there was a religious aspect to the dispute. The court determined that the husband had in fact failed to comply with his obligations under a Quebec Civil Order requiring him to provide his former wife with a get. The court upheld the trial judge's decision to award the wife damages of $47,500 to compensate her for the many years she was not able to remarry.

Although the Supreme Court of Canada came to a "just" conclusion, there are those who still criticize it. Benjamin L Berger in "The Cultural Limits of Legal Tolerance"[25] suggests that Madam Justice Abella failed to adequately reflect the deeper more complex reality of the interaction between law and religion. He suggests that the Bruker case reflects legal tolerance insofar as the law trumps religion (because of its views on the ability of a Jewish

[24] Ibid at paras 5-6, 40-41.
[25] (2008) 21 Can JL & Jur 245.

woman to remarry within the Jewish faith).[26] The law will not tolerate or let religion trump the law if it views any aspect of the religion or culture as areas that violate the values of Canadian law it is required to protect.

Of course any acceptance of a mahr or any other marriage contract within a particular culture must be examined closely to determine whether it is enforceable using Canadian concepts of contract law. In Khan v Khan,[27] the issue was whether a Pakistani marriage contract called a Nikah-Nama, which prevents a woman from claiming support upon marriage breakdown, was an enforceable contract under Ontario law. The court examined the Nikah contract and the differing opinions offered by the parties, including letters from Islamic scholars who were experts in Islamic law. The marriage ceremony took place in Pakistan. Family members were involved to discuss the issues that may arise from a possible marriage breakdown and the parties were advised that the Nikah was a binding pre-nuptial agreement. However, upon reviewing the terms of the Nikah contract, the court concluded that it was "too vague"[28] to be enforceable and the wife "did not have a clear understanding or appreciation of the implications of the agreement or of the rights and obligations".[29] The marriage was arranged and she did not have an opportunity to freely negotiate the terms of the Nikah. She did not have real independent legal advice and

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[26] See ibid at 275-76.

[27] 2005 ONCJ 155, 15 RFL (6th) 308 [Khan].

[28] Ibid at para 48.

[29] Ibid at para 49.

may not have understood the agreement. Though the court recognized that the wife's "lack of choice . . . in signing this marriage agreement may have more to do with the cultural traditions and social customs of her community than it does with any specific oppression",[30] the court nevertheless examined the agreement from the Canadian law perspective and held that the Nikah did not prevent her claim for spousal support. In conclusion, the court stated:

- **The court also notes that deference should be given to the religious and cultural laws and traditions of all groups living in Canada. If, however, cultural groups are given complete freedom to define family matters, they may tread on the rights of individuals within the group and discriminate in ways that are unacceptable to Canadian society.[31]**

The Khan case illustrates the kinds of difficulties the court may experience in recognizing that within a particular culture, the practice may differ widely within it. Specific evidence should be led by the plaintiff of the specific customs and that plaintiff's individual loyalty or adherence to that custom.

Even when the marriage agreement was not reflected in a written agreement but was an oral contract, Madam Justice Andrea Moen of the Alberta Court of Queens

[30] Ibid at para 51.
[31] Ibid at para 52

Bench in Nasin v Nasin[32] held "I have found that the Mahr in this case is a contract. While it was not in writing, it was an exchange of promises intended by the parties to be binding…..It was a pre-nuptial agreement which must be addressed under the Matrimonial Property Act.[33] However, the Court found that the pre-nuptial agreement met none of the requirements of the Matrimonial Property Act, as there were no certificates of acknowledgment that the parties received independent legal advice. The Alberta court reviewed the British Columbia decisions, the Ontario concerns, and the Supreme Court of Canada's decision in Bruker v Marcovitz. There was no uncertainty in the husband's mind at the time that he would pay $10 thousand upon a marriage breakdown. In the end the Court stated "Therefore, even though the Mahr is a pre-nuptial contract, it is unenforceable. As to the religious aspects of the Mahr, if parties enter into pre-nuptial agreements in a religious context, they will be enforced if they meet the requirements under the Matrimonial Property Act and the courts do not find the contracts invalid for other reasons."[34]

It appears clear that whenever possible, a marriage contract made in the traditions and cultures of other groups will be respected by the courts of Canada unless the terms of the contract offend or discriminate contrary to the laws of Canada. The mahr contract, for example, if

[32] (2008) A.J. No. 390 Madam Justice Moen
[33] Ibid at para 14
[34] Ibid para 23 and 24

enforceable under Canadian law, will be respected by the courts and the husband will be required to pay the amount of the mahr in addition to whatever family law obligations he has under the applicable provincial family law legislation. Legislation in the provinces of Canada also provide for either or both spouses in a marriage to claim support so those marriage contracts which prima facie prevent a claim for support may well be declared invalid.

Aside from marriage contracts, the courts will consider cultural factors when considering the best interests of a child. In many statutes in the provinces of Canada, the definition of a child's "best interests" includes consideration of the child's emotional, cultural, physical, psychological, and spiritual needs. The court strives to balance the interests of a child in having equal access to the culture and religion of both parents.

The courts are consistent in saying that if the parents are from separate cultures, no one culture is "better" than the other in considering the best interests of the child. In addition, the cases show that while the issue of race or culture are important factors, they do not supersede or trump other considerations relating to a child's best interest.[35]

A Few Words About Custody

[35] The writer wishes to acknowledge the excellent article by Lana K.L. Li, Cultural Factors in the Law, University of British Columbia Law Review (2011) 44 UBC L Rev 111-148, that factored greatly in the section dealing with the enforceability of the Mehr.

To illustrate the classic example of a mixed religious marriage, the Court in Nova Scotia had before it an Ismaili Muslim husband and a Christian wife. They had entered into a Separation Agreement that provided that both parents would have joint custody, but that the daughter was to be raised as an Ismaili Muslim as to religion. When an issue arose about religion the Judge held:

> **"….the child may be raised by the [father] as an Ismaili Muslim, but subject always to the child's right to be in the care and control of the [mother] without religious restriction or interference."[36]**

The Court viewed the bi-religious heritage as relevant to the assessment of the best interests of the child. The Supreme Court of Canada has directed that any arrangement adopted must favor maximum contact between the child and each of the parents. The Court was not concerned with preferring one religion over another, but the court did consider it to be in the best interests of the child to direct compliance with the agreement that the child be raised an Ismaili-Muslim. The Judge went on to say that the father could not use the provision about religion to control his wife's conduct on the occasions when she had the child. It was for the father to instill Islamic values not the mother who had little knowledge about Islam.

Recently an Alberta Court had to make a determination regarding *forum conveniens* between the courts in the UAE

[36] Langille v. Dossa [1995] N.S.J. No. 354 (N.S.S.C.)

and Alberta. In the L.C.M. V. J.N.S.[37]case a Canadian born mother met a Lebanese born father in the U.A.E. The father had both Canadian and Lebanese citizenship. The parties married in Lebanon and resided in the UAE throughout the marriage. The mother returned to Canada to give birth to their child. The parents and the child returned to the UAE after the child's birth. Then, without notice to the father, the mother left the UAE with the child and returned to Alberta where she had family. The Court noted that the UAE was not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction.[38] As neither parent was Muslim or a UAE national, the law to be applied by a UAE Court would be foreign law-in this case-Canadian law. The Alberta Court was asked to deal with jurisdiction-should the case be heard in the UAE or Alberta where the child was taken by the mother. Justice McMahon of the Alberta Court of Queen's Bench considered the fact that the UAE is a non-Hague Convention signatory and that for Alberta to surrender jurisdiction over the child to a Court in the UAE, it would have to be in the child's "best interests" to do so. The Court concluded that sending the case back to the UAE where Shariah trained Judges would have to apply Canadian law to determine custody between non-Muslim non-UAE national residents, would not be in the child's best

[37] [2008] A.J. No. 1117 (Alberta Queen's Bench)

[38] Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session. Hereinafter referred to as The Hague Convention.

interests. The Court considered the difficulty in proving Canadian law in the UAE Courts, the location of witnesses, and the costs in general in the UAE as opposed to Alberta where there were Canadian Judges available to deal with Canadian law.

Recognition of Foreign Divorce

The English law of marriage, which was the basis of the law of Canada, had an explicitly Christian foundation. While the Old Testament accepts polygamy without critical comments, homosexual acts were condemned. Although polygamy is not condemned in the New Testament, major Christian faiths came to accept marriage to be monogamous and only to be between a man and a woman. Some liberal faiths have accepted same – sex marriage, but the issue of the performance of same –sex marriage is prohibited in the Catholic Church and in Islam.[39]

Islam permits but does not require polygamy as an accepted practice to provide care for widows and orphans or men who died in battle:

> **"If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; but if you fear that you shall not be able to deal justly, then only one.(4:3)[40]**

[39] Nicholas Bala, Why Canada's Prohibition of Polygamy is Constitutionally Valid and Sound Social Policy (2009) 25 Can. Journal Family Law 165-221 at page 3.
[40] Ibid, page 5.

In Hyde v. Hyde[41] it was held that the parties to a polygamous or even potentially polygamous marriage, even if it is valid by the *lex loci celebrationis* are not entitled to the remedies or relief of the matrimonial law of England. In a very well known English case on the subject Qureshi v. Qureshi[42]the issue before the court was whether to recognize the pronouncement of divorce [talaq] made in England, purporting to dissolve a marriage celebrated in England between a Husband and Wife, both of the Muslim faith, resident in England. The Court stated by ancient Islamic law, marriages have a limited polygamous potential. But the marriage in this case having taken place in England, where monogamy is the rule, must be regarded as monogamous to invoke the Court's jurisdiction. Had the Husband been domiciled in England, the talaq would not have been recognized. The point of this case as enunciated by Sir Jocelyn Simon, was that the fact that there has been no judicial intervention or even presence is irrelevant if the purported divorce is effective by the law of the domicile to terminate the marriage in question. It should then be recognized unless the result would be offensive to the conscience of the English Court. In the end the Court declared the talaq divorce valid and awarded the wife her dower. This line of case authority was overturned by a provision enacted under the Domicile and Matrimonial Proceedings Act 1973 of England.

[41] (1866) L.R. 1 P. & D. 130 (England)
[42] [1971] 2 W.L.R.. 518 (UK)

However Justice Lord of the British Columbia Supreme Court in Sara v. Sara[43]found that because the marriage was no longer polygamous the barrier raised by the Hyde case and followed in Canada[44]no longer existed in this case. The law in Canada has been that our courts have no jurisdiction to adjudicate upon matrimonial laws affecting a polygamous marriage unless a ruling is required on succession or legitimacy.

In a very recent British Columbia case Sangi v. Sangi[45]an Iranian Divorce was found to be valid and effective in Canada. The Husband was ordinarily resident in Iran in the relevant year leading up to the divorce there[46]and therefore the divorce should be recognized for all purposes of determining the marital status of the parties in Canada. The Wife chose the forum in Iran and was now estopped from challenging that forum. Also, the Court found there was no fraud or collusion regarding the obtaining of the divorce.

Recognition of Divorce can have repercussions to Immigration issues. In Canada (Minister of Citizenship and Immigration) v. Hazimeh[47] the parties had married in Lebanon. Husband A sponsored the Wife to Canada. One month after the Wife's arrival to Canada in 1983, she underwent a religious 'talaq' divorce before the Ontario Supreme Shiite Islamic council. She could not apply for a legal divorce in Ontario [Canada's Divorce Act requires one

[43] [1962] B.C.J. No. 106
[44] Lim v. Lim [1948] 2 D.L.R. 353
[45] [2011] B.C.J. No. 779 (British Columbia Supreme Court)
[46] Section 22(1) of the Canadian Divorce Act requires this.
[47] [2009] F.C.J. No. 482 (Federal Court of Canada)

year of residence for jurisdiction]. Six years later [1999] the Wife registered her talaq divorce in Lebanon. She then married Husband B in Lebanon on August 22, 1999. She returned to Canada and petitioned the Ontario Court for a Divorce from Husband A, which was granted July 2001. In August 2001 the Wife sponsored Husband B. The application was refused. The recognition and registration of the Canadian talaq divorce in Lebanon did not produce a divorce granted pursuant to a law other than Canadian law. The court stated that simply registering the talaq divorce in Lebanon which was granted in Canada, did not meet the requirements of the Canadian Divorce Act, for recognition.

The present provision in the Criminal Code, section 293, prohibits not only participation in a polygamous marriage ceremony, but also makes it an offence to enter into "any form of polygamy" or live in "any kind of conjugal union with more than one person at the same time."[48]

While the primary focus of media and legal concern at the moment in Canada is on fundamentalist Mormon polygamous marriages, there are some Muslim and North African immigrant polygamist families in Canada. Media reports indicate that some Muslim imams in Canada are performing polygamous marriage ceremonies in this country.[49]

[48] Ibid supra footnote 38 at page 7.
[49] Ibid supra footnote 38 at page 11.

Only fundamentalist Mormons can claim that their religion requires them to practice polygamy, or at least considers it a preferred practice in some situations. Islam permits polygamy but clearly does not require their adherents to practice polygamy, making any freedom of religion arguments by Muslims much weaker. The fact that predominantly Muslim countries like Tunisia and Turkey have prohibited polygamy reveals that such a prohibition is not inconsistent with Islam.[50]

An Ancillary Issue Relating to International Child Abductions

The 1980 Hague Convention binds only forty percent of the world's countries through accession . According to Schnitzer – Reese (2004:5):,it has been ratified by less than one sixth of the world's countries and only eight of these are non European . Schnitzer Reese also maintains that of the eighty countries , only five (Turkey , Bosnia , Burkina Faso , Turkmenistan and Uzbekistan) have a Muslim population over twenty percent and only one (Turkey) is located in the North African /Middle Eastern region.[51]

According to a leading Hanafi imam scholar in the UK (Shahid Raza Naimi), cross border International Parental Child

[50] Ibid supra footnote 38 at page 12.

[51] Keshavjee M "Cross –Border Child Abduction Mediation in Cases concerning Non –Hague Convention Countries " in Paul/Kieswetter(Ed.) Cross –BorderFamily Mediation,International Parental Child Abduction, Custody and Access cases" (2011,.pp99) Frankfurt am Main;Wolfgang Metzner Verlag..I am thankful to Dr Keshavjee for sharing his earlier drafts and thoughts with me on this important subject.

Abduction is a misfeasance not known in the various fiqh manuals of Muslim communities, though Islamic law recognizes kidnapping, which is known as ughwa, as a crime. However, ughwa, according to him may not extend to either abducting parent that raises the defence of acting in the child's best interest. The mother could argue she was protecting the child, and a Muslim father vis a vis a non-Muslim mother could easily argue defence of duty and the obligation to bring up his child as a Muslim.[52]

Closing Comments

There is no doubt that Canada's Muslim population is increasing. Statistics Canada confirms as much. Consequently, Canadian law will intersect more in the future with members of the Islamic faith. Lawyers, members of the Judiciary, mediators, and other contributors to the Canadian legal system would be well advised to learn more about the Islamic faith and the cultural concerns of its adherents. I have found the writing of this paper while a challenge most rewarding.

Max Blitt

[52] Ibid supra footnote 51.