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National Conciliation and Arbitration Board for Canada**

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1.0 Introduction

This paper is the submission of His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board for Canada (“**NCAB Canada**”) to a review panel appointed by the Government of Ontario and led by Mrs. Marion Boyd, to examine the use of private arbitration (including religious based arbitrations) to resolve family and inheritance cases and the impact that such arbitration may have on the vulnerable, including women, persons with disability and the elderly.

This paper describes the Conciliation and Arbitration Board system (the "**CAB System**") within the Ismaili community in Canada, including its mandate, operation and experience to date.

2.0 Summary

1. The primary objective of the CAB system is to resolve disputes in an equitable, speedy, confidential, cost effective and constructive manner and in an environment that is culturally sensitive. Our processes are designed to operate in an equitable manner (equity being a paramount Islamic ethical value) and are thus entirely consistent with Canadian legal principles, such as natural justice. Moreover all CABs are required to operate in accordance with their local law.
2. The environment in which our CAB system seeks to resolve disputes is one that encourages equity not only in relation to processes but also in relation to outcome. The aim is to minimise acrimony and emotional damage and to encourage a fair result which enables all parties to continue with dignity.
3. Our system is voluntary. Parties come to our system only if they are willing to. There is no compulsion. Parties are encouraged to obtain full understanding of their legal position, so that they have a proper appreciation of their options. There is also no community enforcement mechanism. Ultimately enforcement depends on the Canadian legal system, e.g. through the contractual enforceability of a settlement agreement or court enforcement of an arbitral award.
4. Our CAB system is gender balanced in terms of its members. The members are volunteers but they carry the respect of being part of a formal constitutional institution. The system is confidential and available at no cost. It is therefore highly accessible, including to those of limited financial means. Although volunteers, CAB members benefit from extensive training to provide them with the necessary skills to ensure their competence and fairness.
5. In addition to pure dispute resolution, the community dimension of our CAB system enables it to make some further valuable contributions.
 - If it becomes apparent during the course of a matter that other institutions could provide support to any party, this can be suggested (it is up to the party to decide whether or not to accept the suggestion, not least to preserve confidentiality). In this way the support provided, including assistance in moving forward post resolution, is potentially a much larger support than many dispute resolution systems, particularly courts, are able to provide.

- There is post settlement follow up. In a community context, the CAB system can follow up with parties say 6 months after settlement; partly this is a "satisfaction survey" designed to evaluate whether the parties are satisfied with the conduct of their matter and to learn from that; it is also to see whether the parties' settlement is being implemented, and if not whether further assistance can be given and again to identify whether other support within the community would be valuable to any of the parties.
- There is also dispute prevention. The CABs analyze the causes of disputes that come before them. To the extent preventative measures may be possible, other institutions into whose domain this falls are advised so that they may implement appropriate programmes (e.g. where business disputes are caused by the lack of initial documentation, members of the community setting up in business can be encouraged to put in place proper documentation at the outset).

3.0 The Ismaili Community

By way of context for the work of NCAB Canada, we begin with a brief background on the Ismaili community. The Shia Imami Ismaili Muslims, generally known as the Ismailis, belong to the Shia branch of Islam. Annex 1 gives an overview of the community's historic and contemporary profile within the pluralism of Islam, each of whose two main branches – Shia and Sunni - embraces a diversity of civilizations, cultures, legal and interpretive traditions, social, spiritual and psychological dispositions and political entities. Islam's final revelation, the Holy Quran, defines a framework of unity for all Muslims, a quarter of the globe's population, founded on the belief in the Oneness of God, the affirmation of Prophet Muhammad (peace be upon him), as the last and final Divine Messenger, and the ethical commandments that permeate noble conduct. Like the Muslim Ummah as a whole, Ismailis are culturally diverse. Settled across the globe, mostly as a minority, in more than 25 countries, in South and Central Asia, the Middle East and sub-Saharan Africa, the Ismailis also have a substantial presence, established over recent decades, in North America and Western Europe. In Canada, they number some 75,000, settled mainly as professionals and entrepreneurs, and are well known for their ethic of self-help, voluntary service and support for humanitarian causes.

By tradition, the hereditary Imam – spiritual leader – of the time ordains a constitution for the social governance of the community and its relationship with other communities. The constitution is periodically revised in light of changing needs and circumstances. In 1986, His Highness the Aga Khan, the present and 49th hereditary Imam of the Ismailis, ordained the current Constitution which, for the first time, brought the social governance of the worldwide Ismaili community under one aegis, with flexibility to take account of regional differences. Served by volunteers, the Constitution functions as an enabler to harness individual creativity to promote common wellbeing. Like its predecessors, the Constitution is founded on each Ismaili's spiritual allegiance to the Imam of the time, which is separate from the secular allegiance which he or she owes as an individual citizen to his or her nation.

4.0 The Conciliation and Arbitration Boards in Canada

4.1 History

The Constitution ordained in 1986 established a well-defined institutional framework for the Ismaili community through which to address, for example, the health, education, economic and social welfare aspects, as well as the religious aspects, of the daily lives of Ismailis. This institutional framework includes a dispute resolution system.

Like many other communities, the Ismailis have a tradition, which in our case stretches back to the earliest days of Islam, of resolving disputes within the community. The inspiration for this is in the Holy

Quran and the traditions of Prophet Muhammad (peace be upon him), whose life is filled with examples of mediated solutions to human conflicts.

The Constitution established National Conciliation and Arbitration Boards for each of the jurisdictions specified in the Constitution. Larger jurisdictions also have Regional Conciliation and Arbitration Boards (Regional CABs). In addition, there is an International Conciliation and Arbitration Board.

4.2 Mandate

The Constitutional mandate of the CABs in Canada provides for them:

- (a) to assist in the conciliation process between parties in differences or disputes arising from:
 - i) commercial, business and other civil liability matters,
 - ii) domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession; and
- (b) to act as an arbitration and judicial body and accordingly to hear and adjudicate upon:
 - i) commercial, business or other civil liability matters; and
 - ii) domestic and family matters including those relating to matrimony, children of a marriage, matrimonial Property, and testate and intestate succession.

The CABs are required to operate subject to the law of the land in their jurisdiction.

4.3 The CAB Organizational Structure

NCAB Canada is part of a global CAB system. The CAB system operates in 14 jurisdictions around the world. The structure in Canada comprises the National CAB and five Regional CABs, respectively domiciled in Vancouver, Edmonton, Calgary, Toronto, and Montreal. In practice the majority of disputes handled by the CAB system in Canada are dealt with by the Regional CABs.

All disputes between parties residing in the same region are brought before the local Regional CABs. Where the parties reside in different regions of Canada, the relevant local Regional CABs cooperate in seeking a resolution. Cases involving disputes between Ismailis residing in different national jurisdictions are dealt with by the relevant Canadian CAB in cooperation with the appropriate CAB local to the non-Canadian party.

In addition to its casework, NCAB Canada develops policies and programmes for itself and the CABs falling within its national jurisdiction, for example planning and implementing training for CAB members in Canada.

At the international level, the Constitution provides for an International Conciliation and Arbitration Board (the “International CAB”). The International CAB deals with disputes that are international in scope. In addition to its casework, the International CAB co-ordinates the global CAB system, developing policies and programmes for it and seeking to identify and share best practices across the CAB system.

The CABs have formally adopted Rules for Conciliation and Rules for Arbitration Proceedings, copies of which are included as Annex 2 and Annex 3. These underline the importance of the Islamic ethical values of equity and justice and, indeed, the principle of natural justice, itself a concept that is comparable to the concepts of equity and justice emphasized in Islam.

Under the Rules for Arbitration Proceedings, unless the parties otherwise agree, in an arbitration, appeal lies from the Regional CAB to the National CAB and from the National CAB to the International CAB.

All CAB members are volunteers who are appointed by His Highness the Aga Khan for a three-year term. The membership of NCAB Canada and the Canadian Regional CABs currently comprises lawyers, accountants, social workers, businesspersons, other qualified professionals and past senior community leaders. The membership is gender balanced. Of the total current Canadian membership of 34, 16 are women (of whom one is a sitting Provincial Court judge in British Columbia). The immediate past chairperson of NCAB Canada was a woman lawyer who served as the chairperson of the Canada Immigration and Refugee Board for several years and currently serves as the Senior Advisor on Diversity to the Public Service Of Canada.

The membership also reflects the plurality of the Ismaili community. New immigrants from Afghanistan and Tajikistan constitute some 10% of the Ismaili community in Canada. To respond to the needs of this group, the membership of the CABs in Canada includes individuals originally from these countries. These members also have an understanding of the Canadian legal system and are uniquely placed to make the new immigrants aware of their rights under the Canadian legal system. Certain CAB information materials detailing with CAB processes are also produced in the language of origin of these new immigrants.

5.0 Operation of the CABs

The primary objective of the Ismaili CAB system is to resolve disputes in an equitable, speedy, confidential, cost effective and constructive manner in a culturally sensitive environment with due regard to the interests of all parties. The system seeks to maintain harmony between parties and thus within the community ("no winners or losers") and to minimize acrimony and emotional damage as well as to minimize the financial costs of conflict for all parties.

In light of these objectives, the CAB system in Canada is guided by the following principles:

- Before mediating or arbitrating on any dispute, the CABs must first satisfy themselves that the parties to the dispute have come to the CABs voluntarily and out of their own free will and desire to have their disputes resolved through the CAB system;
- The mediation and the arbitration processes are conducted by CAB members who have received appropriate training to ensure their competent and equitable handling of the matter.
- The processes are conducted in accordance with rules that are intended to assist in assuring the appropriate standard of operation.
- The duty of confidentiality to the parties to a dispute must be absolutely respected.

6.0 Training and Mentoring

NCAB Canada has a well developed training and mentoring program to ensure all CAB members have the necessary skills to conduct mediations and arbitrations. Any arbitral panels are usually chaired by a lawyer who is well versed in arbitration proceedings. A member who is not a trained mediator must undergo at least 40 hours of formal mediation training provided by recognized trainers and be assisted by a mentor before conducting a mediation. Such training is mostly externally sourced.

Regional CABs also organize their own training and mentoring programs. Members dealing with family issues are required to familiarize themselves with the Family Laws in the jurisdiction in which they reside. In addition to the formal training, NCAB Canada provides continuing learning opportunities at least twice a year at its meetings on topics such as arbitration procedures and the rules of natural justice, advanced mediation techniques and dealing with issues such as anger management, grieving parties and power imbalances.

The training available to CAB members includes familiarisation with the federal and provincial legislation that applies to matrimonial and commercial disputes.

7.0 The Processes and Safeguards

Members of the Ismaili Community are encouraged to use the CAB system through an awareness or communications strategy. However, the process is entirely voluntary. If one party wishes to seek resolution through the CABs but the other party does not, the CABs cannot compel the other party to use the CAB system nor are there any sanctions for not using the system. The community has a good understanding of the CAB services and processes and is aware that these services are accessed on a voluntary basis.

Practically all of the CABs' workload in Canada is mediation. For a mediation process to be systematically effective, the parties and prospective parties need to be confident that their rights will not be compromised and that a fair resolution of their dispute can be achieved.

Each party is required to sign a submission form to indicate consent to the mediation process. The CABs seek to ensure that all parties to the dispute are made aware of other ADR services and of the effects of litigation before they consent to the CAB process. The CABs also ensure that all parties are advised of their right to obtain legal or technical assistance prior to and during the CAB proceedings, if they wish to do so.

Under NCAB Canada's mediation process, a mediator assists the parties to a dispute in reaching their own settlement. The mediator does not have authority to make a binding decision on the parties. As the process is entirely voluntary, the parties may withdraw from the process at any time. In some exceptional circumstances, the mediator may withdraw from the case if he or she determines it is not appropriate to continue. In some 30% of all mediation cases handled by the CABs in Canada, the parties do not arrive at a resolution satisfactory to them and the process is terminated. This demonstrates that the parties, themselves, ultimately control the outcome of the process.

Where a case is successfully mediated, the settlement is evidenced by Minutes of Settlement. The parties are strongly and formally advised to obtain Independent Legal Advice (ILA) before signing this legally binding document. The CABs do not provide legal advice.

The parties that choose the CAB arbitration process also do so voluntarily and (unless such an agreement already exists between the parties) they are asked to sign an arbitration agreement at the outset. In an arbitration, the parties are usually represented by Canadian qualified legal counsel.

The CABs' experience of causes of conflict is played back in a generic format to the other social governance institutions of the community that are responsible for the socio-economic wellbeing of the community to bring about an understanding within those institutions of the root causes of disputes so that those institutions may take appropriate dispute prevention measures.

As mentioned at the outset, both during and after a matter, consideration is given to other institutional support that could be valuable to any of the parties.

8.0 Performance and Experience

Table 1 below is a summary of the numbers of cases handled by the CAB system in Canada for the period 1998 – 2003, the nature of those cases and the proportion in which a resolution was achieved.

Table 1

Number of Cases	769
- Number of Region Specific Cases	661
- Number of Inter-Regional and International Cases	108
Nature of Cases	
- Matrimonial	63%
- Commercial	29%
- Other (including inheritance cases)	8%
Success Rate	69%

As indicated above, the CABs in Canada have mediated in close to 800 cases over the past 6 year period. In close to 70% of the successfully mediated cases, considerable savings in time and money, both for the members of the community as well as for the judicial system were realized. The emotional damage, inevitable in an adversarial litigation process, will also have been contained.

Experience shows that the CABs' services are accessed equally by men and women. CAB services are free (except for any out of pocket expenses), although the parties may themselves incur costs such as for obtaining their own legal or financial advice or for preparation of documents. Nevertheless the service makes it possible for members of the community to access this dispute resolution system, irrespective of their financial situation.

A formal post-settlement evaluation process also exists to determine the parties' levels of satisfaction with the CAB services and also the parties' compliance with their settlement agreements. All surveys conducted to date indicate a high level of satisfaction with the CAB services.

9.0 Conclusions

The Ismaili CAB system is rooted in tradition, yet its modern infrastructure interfaces comfortably with national legal systems within which it functions. The CAB system is grounded in the ethics of the faith and complies with the laws of the various lands where the Ismaili community live. In addition, the community context of the CAB system makes it a system that goes beyond pure dispute resolution, addressing also dispute prevention and the possibility of wider support for parties to a dispute.

The Ismaili CAB system in Canada serves the Ismaili community well and has demonstrated its value and effectiveness as an ADR system. It operates in a manner that keeps at the forefront the need for equity among parties whatever their gender, financial resources or relative positions. The system respects the parameters of the Ontario Government's Arbitration Act, 1991 which recognizes the value and contribution of ADR systems and encourages resolution of disputes outside of the legal system in a fair and equitable manner within the confines of the laws of the land.