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PRUTSCHI: No comeback, just contracts, for Shariah law in Ontario

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The phrase “Shariah law” conjures in many Canadians visceral feelings of revulsion and concern.

Disney hit a nerve in its original *Aladdin* cartoon blockbuster when the film opened with a Middle Eastern ditty chanting about its setting, “Where they cut off your ear if they don’t like face, it’s barbaric but hey it’s home!” The subsequent uproar and accusations of cultural insensitivity saw the lyrics changed in later releases, but it did little to assuage those who felt comfortable painting an entire swath of civilization with the brush of barbarism.

That inclination remains strongly felt and appears at the root of my fellow columnist Tarak Fatah’s critique of a recent Ontario case in which the headline proclaims “Shariah law makes comeback in Ontario.”

I share the understandable concern that Canada stand firm against the introduction of such devastating practices as female genital mutilation, honour killings, or enforced dress codes. These actions are antithetical to the Canadian conception of a free and equal society and have no place in Canadian courtrooms except when the subject of a criminal charge.

Though I am a lawyer, I claim no expertise in Shariah law. I do, however, have a more than passing familiarity with the case Fatah is concerned about – I was the lead defence counsel.

Contrary to Fatah's assertion, the decision of Superior Court Justice Jane Ferguson was not premised on a validation of aspects of Shariah law but rather the application of traditional Canadian criminal law concepts – the presumption of innocence, proof beyond a reasonable doubt, and the requirement that all criminal acts contain an intention to break the law – to basic Canadian contract law.

My client, Omar Kalair, was the founder of UM Financial, a company serving the financing needs of devout Muslims by providing Shariah-compliant loans to those who believed their faith prohibited conventional interest-bearing mortgages. What, to an outsider, might have appeared to be religious hocus-pocus was in fact a carefully crafted contract providing funding on the basis of partnership between Kalair's company and the Muslim homeowner. A joint venture partnership then existed between Kalair and a local credit union which forwarded the funds necessary to facilitate residential home purchases.

Canadian law in no way requires Shariah-compliant mortgages for any home purchaser, but Canadian law does recognize the right of parties to freely organize their own contractual affairs. UM's clientele had a need for financing that respected their unique religious requirements. Without the intervention of a company like UM, the vast majority of religiously devout Muslims would be permanently frozen out of the housing market, unable to participate in the Canadian dream of home ownership.

Kalair and UM ensured that home ownership and religious adherence were no longer incompatible. But when the credit union funding the project unilaterally changed the terms, the venture began to collapse. Home owners were at all times shielded from financial loss, but the expenses of the venture had to be paid. What the crown attorney alleged was theft, fraud and money laundering, our defence presented as compliance with the rules surrounding the winding down of a joint venture under Shariah law – rules we argued the credit union had always understood and agreed to.

This case sets an important precedent for those who rely on contracts of faith or conscience. Is Shariah law really making a comeback in Ontario? Only for parties who jointly choose financial contracts governed by the rules of a particular faith. Canadian judges do not apply Shariah law in their reasoning, but a contract is a contract in Canada – even if that contract demands compliance with Islamic financial principles.

– ***Edward Prutschi is a Toronto criminal lawyer with www.CrimLawCanada.com.***

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