

Standing Committee on
Social Development



Report on Bill 48: *Arbitration Act*

19th Northwest Territories Legislative Assembly

Chair: Ms. Caitlin Cleveland

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SPEAKER OF THE LEGISLATIVE ASSEMBLY

Mr. Speaker:

Your Standing Committee on Social Development is pleased to provide its *Report on Bill 48: Arbitration Act* and commends it to the House.

A handwritten signature in black ink, appearing to read "Caitlin Cleveland". The signature is written in a cursive, flowing style.

Ms. Caitlin Cleveland
Chair, Standing Committee on
Social Development

STANDING COMMITTEE ON SOCIAL DEVELOPMENT

REPORT ON BILL 48: *ARBITRATION ACT*

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**STANDING COMMITTEE ON SOCIAL DEVELOPMENT
REPORT ON
BILL 48: *ARBITRATION ACT***

INTRODUCTION

Bill 48: *Arbitration Act* (Bill 48) was referred to the Standing Committee on Social Development (Committee) for review on March 30, 2022.¹ A Plain Language Summary for Bill 48 was tabled on the same day.²

Bill 48 proposes replacing the existing Northwest Territories (NWT) *Arbitration Act* (*Arbitration Act, 1988*) with a more modern law modelled after the *Uniform Arbitration Act (2016)* (the Model Act).^{3,4} The proposed new NWT arbitration governance includes updates on:

1. How to begin and conclude arbitral proceedings.
2. The composition of arbitral tribunals and the appointment and removal of arbitrators.
3. The jurisdiction of arbitral tribunals.
4. The matters of evidence and procedure, including the issuance of subpoenas and the giving of evidence by experts and other witnesses.
5. The granting of enforcement and interim measures and preliminary orders.
6. The making of arbitral awards and the awarding of costs.
7. The termination of arbitral proceedings.
8. The enforcement of arbitral awards, including awards made in other jurisdictions in Canada.
9. Recourse against arbitral awards, including appeals.
10. The confidentiality of arbitral proceedings.

The Committee reviewed Bill 48 and accepted the new legislation without proposing changes. The Committee did not receive any written or verbal submissions on Bill 48.⁵

¹ [Bill 48: *Arbitration Act*](#).

² [Plain Language Summary for Bill 48: *Arbitration Act*](#). TD 622-19(2), Tabled March 30, 2021.

³ Northwest Territories [Arbitration Act](#) (1988).

⁴ [Uniform Arbitration Act \(2016\)](#), Uniform Law Conference of Canada. As adopted December 1, 2016.

⁵ Recordings of the [Public Hearing](#), held on October 5, 2022, and the [public clause-by-clause review](#) held on October 11, 2022, are available on the NWT Legislative Assembly YouTube channel.

BILL 48: ARBITRATION ACT

Bill 48 is based on the *Uniform Arbitration Act (2016)*, referred to as the Model Act in this report. The Model Act was prepared by the Uniform Law Conference of Canada, an organization promoting uniformity of legislation in Canada.⁶

The goal of the Uniform Law Conference of Canada is that jurisdictions adopt uniform or model acts to harmonize laws across the country through various forms of enactment: with changes related to drafting style, with substantially the same wording, with modifications, or in part. The perception is that the closer a jurisdiction adheres to the model act, the greater the harmonization of law will be among Canadian jurisdictions.

Background

Previous national initiatives to align arbitration legislation reach back to the 1980s when Canada adopted the United Nations model law on international commercial arbitration. All Canadian jurisdictions except Quebec adopted the model law, including the NWT's *International Commercial Arbitration Act*.⁷

In 2011, the Uniform Law Conference of Canada took on the task of reforming existing domestic arbitration legislation. This led to the development of the Model Act in 2016.

The *Uniform Arbitration Act (2016)*

The policy goal of the domestic Model Act is to increase the consistency in arbitration legislation across the country. Arbitration legislation recognizes the choice to arbitrate as a choice to participate in alternative dispute resolution in substitution for court litigations. Choosing alternative dispute resolution was not intended to replicate court processes or to be a precursor to court proceedings.

Since the publication of the Model Act on December 1, 2016, British Columbia adopted its arbitration statute in 2020 based on the Model Act. Domestic legislation of other jurisdictions predates the Model Act. The NWT would be the second Canadian jurisdiction to adopt modern domestic arbitration legislation.

⁶ The [Uniform Law Conference of Canada](#) (ULCC) was founded in 1918 and is Canada's oldest law reform organization. It considers criminal and civil law issues from a broad national and policy perspective, and drafts model legislation for adoption by jurisdictions.

⁷ [International Commercial Arbitration Act](#), Northwest Territories.

Proposed Changes to the NWT *Arbitration Act* (1988)

Bill 48 replaces the existing *Arbitration Act* (1988) and is more specific, with 76 sections (or 45 pages) compared to 41 sections (or 11 pages). Key changes in Bill 48 include the following subject areas.

- **Commencing Arbitral Proceedings:** Bill 48 provides a clear procedure for starting proceedings, if not specified in the arbitration agreement.
- **Direct Evidence of Witnesses:** Bill 48 requires that witnesses' direct evidence be written, unless otherwise agreed by the parties or directed by the arbitrator.
- **Interim Orders:** Bill 48 provides a procedure for obtaining and enforcing interim measures and a specific procedure for obtaining preliminary orders without notice to other parties.
- **Appeals:** Bill 48 provides the right of appeal to the Supreme Court of the NWT; it details where a Supreme Court decision cannot be appealed and where a decision of the Supreme Court may be further appealed to the Court of Appeal (e.g., ss. 25(3) jurisdictional decision; Awards), and that parties may opt out of appeal rights.
- **Confidentiality:** Bill 48 expressly prohibits the disclosure of confidential information.
- **Expanded Powers and Duties of Arbitrators:** Bill 48 provides that arbitrators must consider equitable rights and defences in addition to legal principles and gives express power to arbitrators to make cost awards where conduct has increased the costs.
- **Enforcing Arbitral Awards from other Canadian Jurisdictions:** Bill 48 provides that parties may apply to the NWT Supreme Court to recognize and enforce arbitral awards made in another Canadian Jurisdiction.

COMMITTEE CONSIDERATIONS

The Committee noted that Bill 48 did not adopt all proposed wording of the Model Act. Considering that the purpose of a Model Act is to enable legislation in all jurisdictions to be alike, Members inquired with the Department of Justice (Department) on the reasons for the divergences.

After deliberating on multiple sections of Bill 48, the Committee understands that the reasons leading to variation from the Model Act include NWT drafting preferences and circumstances, and the adoption of several changes to the Model Act made by British Columbia when their legislature considered the Model Act.

Including a Purpose Clause

Committee noted that the purpose clause contained in the Model Act was not implemented in Bill 48. Section 1 of the Model Act states the broad purpose of arbitration as an alternative to court proceedings, the principles that parties are free to agree on most procedural matters, and that courts should not intervene except as described in the legislation.

On the one hand, purpose clauses may express the intent of a statute and intend to bridge a gap between policy and law. On the other hand, inserting purpose clauses may have risks by raising expectations or creating ambiguities. Where wording is short, it may not provide enough clarity; where wording differs from the wording in the body of the Act, it may expand judicial intervention.

Bill 48 expresses the purpose and principles of arbitration in the provisions, and the Committee understands that it is unnecessary and undesirable to include a purpose clause.

Defining "Award" and "Give"

Section 2 of the Model Act explains the meaning of words to remove ambiguity. The definitions for the words "award" and "give" were not adopted by Bill 48. An "award" in the Model Act means a final decision of an arbitral tribunal, and "give" is meant in relation to a record and includes the meaning to deliver or to serve.

The Committee understands that not defining "award" allows case law to be applied rather than attempting to condense a large body of case law into what constitutes an "arbitral award." The province of British Columbia arbitration legislation also does not define "award."

The Committee recognizes that not defining "give" in Bill 48 is a drafting choice that aligns with the drafting style followed by the Government of the Northwest Territories (GNWT). Other sections of Bill 48 speak of "delivering" a notice rather than "giving" a notice and are consistent with other NWT legislation.

Restricting the Altering of Provisions

Bill 48 did not adopt section 4(2) of the Model Act. Section 4(1) of the Model Act allows parties to contract out of the non-mandatory provisions. Section 4(2) lists sixteen conditions that parties would not be permitted to remove or modify in an arbitration agreement.

The Committee appreciates the Department's drafting style of not mirroring section 4 of the Model Act. Instead, Bill 48 treats each provision independently and includes the words "unless otherwise agreed by the parties" before any section that the parties may alter.

This approach is considered to be 'cleaner' because it avoids the need to cross-reference a list and flip back and forth through different sections in Bill 48. This decision also follows the approach taken in British Columbia.

The Committee noted that reducing internal referencing contributes to the clarity of the legislation.

Adding Security Requirements for Interim Measures

Paragraph 1(e) of Bill 48, permitting security for costs as an interim measure, was added to the definition of "interim measure" to clarify whether an arbitral tribunal may order security for costs. The Committee welcomed this alteration to the Model Act and noted that British Columbia made this same alteration.

Exempting Certain Government-to-Government Agreements via Regulations

Bill 48 contains a section not provided in the Model Act. Section 3(5)(b) allows the Executive Committee to prescribe agreements to which the Act should not apply. This is limited to agreements entered into by the GNWT or the Government of Canada and a government of another jurisdiction. This provision is not found in the Model Act.

The Committee deliberated on the type of arbitration agreements this exemption would address. The Committee sought clarification from the Minister during its clause-by-clause review of the Bill.

The Committee learned that certain agreements between provinces and territories might be exempt from Bill 48 because they would contain arbitration provisions and would not have the arbitration legislation from any jurisdiction apply. This exemption can be used for agreements between jurisdictions and includes national and international agreements.

The Committee learned the NWT is following British Columbia, which added this regulation-making power to its arbitration legislation. The province enacted regulations prescribing several agreements exempted under its arbitration legislation, including multiple free trade agreements and the Bid Protest Mechanism applied in the Western Provinces of Canada.

Committee members acknowledged that the NWT wants the flexibility to create regulations exempting certain agreements in appropriate cases.

Defining Government

The Committee observed that Section 3(5)(b) of Bill 48 does not define "government of another jurisdiction". The Committee noted that Indigenous governments were not specifically referenced, as they have been in other NWT legislation, such as the *Access to Information and Privacy Protection Act* and the *Mineral Resources Act*.⁸

The Committee asked for clarification from the Minister on whether Indigenous Governments could be included under "the government of another jurisdiction." The Department confirmed there would be no reason Indigenous Governments could not be included.

Committee Members were satisfied with the response.

Choosing an "Opt-out" Approach to Appeals on Questions of Law

Section 61 of Bill 48 provides the right to appeal on questions of law directly to the courts unless their agreement expressly prohibits such appeals. This is different from the Model Act's section 65, which allows appeals only if the arbitration agreement provides for such appeals.

The Model Act assumed that appeals on questions of law would be permitted on an "opt-in" basis, whereas in Bill 48, appeals are allowed unless the parties "opt-out".⁹

Committee members understand adopting the "opt-out" was a deliberate policy decision and that it followed the British Columbia legislation. The Committee understands and accepts that this approach is an appropriate balance for the NWT.

Applying Bill 48 to Family Law

Following the Model Act, Bill 48 proposes to be a law of general application. Committee members wanted to know if Bill 48 could apply to family law in the NWT.

The Committee appreciates that the nature of Bill 48 is that it is more likely to be used in commercial matters; however, we note that arbitrations may, in the future, be a valuable way of dealing with family law matters. The Committee understands that if the NWT were to proceed to use arbitration to address family law matters, consultation would occur with the family law bar, and specific arbitration provisions for family law may be desirable.

⁸ Section 49.11 of the NWT [Access to Information and Privacy Protection Act](#); NWT [Mineral Resources Act](#).

⁹ *Uniform Arbitration Act* (2016), Commentary to section 65, page 37.

Reflecting Circumstances of the Northwest Territories

The Department expects that Bill 48 will have applications outside of a commercial context. For example, it can be used in the context of labour arbitrations.

Further, the Department is aware that the Department of Finance is working on changes to the *Public Service Act*. Should it be considered that more specific default arbitration rules are necessary to respond to circumstances in the NWT concerning labour arbitrations, the Committee understands that the *Public Service Act* could set out these rules. For example, British Columbia's Labour Relations Code sets arbitration rules and makes the province's *Arbitration Act* inapplicable.

Engaging in the Development of Bill 48

Committee members asked whether the Department had engaged with professional mediators, arbitrators, or associations of mediators or arbitrators working in the NWT and industries such as construction, exploration, and mining.

The Minister advised that the Department had consulted with the Law Society of the Northwest Territories, the Canadian Bar Association (NWT Branch), and the Judiciary.

CLAUSE BY CLAUSE REVIEW

The clause-by-clause review of Bill 48 was held on October 11, 2022.

CONCLUSION

Following the clause-by-clause review, a motion was carried to report Bill 48: *Arbitration Act* as ready for consideration in the Committee of the Whole.

This concludes the Standing Committee on Social Development's review of Bill 48.