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2 rue Carlton Street, Suite 1307  
Toronto, ON M5B 1J3

FONDS D'ACTION ET D'ÉDUCATION JURIDIQUES POUR LES FEMMES

Telephone: (416) 595-7170

Facsimile: (416) 595-7191

Website: [www.leaf.ca](http://www.leaf.ca)

## **THE APPLICATION OF RELIGIOUS LAW IN FAMILY LAW ARBITRATION ACROSS CANADA**

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Prepared for LEAF by  
Polly Dondy-Kaplan  
and Natasha Bakht<sup>1</sup>

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# Table of Contents

	Page
INTRODUCTION .....	1
I. HISTORY OF ARBITRATION IN CANADA.....	1
II. PROVINCIAL AND TERRITORIAL LEGISLATION.....	2
Alberta.....	2
Arbitration Law.....	2
Family Law.....	3
Summary.....	4
British Columbia.....	4
Arbitration Law.....	4
Family Law.....	6
Summary.....	7
Manitoba.....	7
Arbitration Law.....	7
Family Law.....	8
Summary.....	9
New Brunswick.....	10
Arbitration Law.....	10
Family Law.....	11
Summary.....	12
Newfoundland and Labrador.....	12
Arbitration Law.....	12
Family Law.....	13
Summary.....	13
Northwest Territories.....	14
Arbitration Law.....	14
Family Law.....	14
Summary.....	15
Nova Scotia.....	16
Arbitration Law.....	16
Family Law.....	17
Summary.....	18

Nunavut.....	18
Arbitration Law.....	18
Family Law .....	19
Summary .....	20
Ontario .....	20
Arbitration and Family Law.....	20
Family Law .....	21
Summary .....	22
Prince Edward Island .....	22
Family Law .....	23
Summary .....	24
Quebec .....	24
Saskatchewan.....	24
Arbitration Law.....	24
Family Law .....	26
Summary .....	27
Yukon.....	27
Family Law .....	28
Summary .....	29

# The Application of Religious Law in Family Law Arbitration Across Canada

## Introduction:

This paper provides an examination of the arbitration acts and the family law legislation across Canada to determine whether the religious arbitration of family law matters is possible. The paper has been written as an information piece and it describes the landscape of religious arbitration in the family law context in all of the jurisdictions across Canada. The examination of the law in the different provinces and territories is presented in alphabetical order. A brief background of the history of arbitration in Canada is also provided.

## I. History of Arbitration in Canada:

The use of arbitration in Canada first developed in the commercial context. In the introduction to his book, *International and Domestic Commercial Arbitration*, Brian Casey writes that arbitration was attractive to merchants because an arbitrator was more specialized than the courts.<sup>1</sup>

Until 1985, no federal legislation existed on arbitration. The laws in place provincially were based on the English Arbitration Act of 1889.<sup>2</sup> In 1985, the United Nations Commission on International Trade Law (UNCITRAL) created a Model Law on international commercial arbitration. While the Model Law was designed for international commercial arbitrations, some provinces used it as the basis for their domestic arbitration acts.<sup>3</sup>

By 1986, both the provinces and the federal government had adopted arbitration acts for the purpose of foreign commercial transactions.<sup>4</sup> At this date, most provinces also had adopted separate Arbitration Acts for private non-labour arbitrations. These acts were still based on the 1889 English Act.<sup>5</sup> Today, there is uniform adoption of international commercial arbitration laws, but the domestic arbitration legislation differs slightly from province to province.<sup>6</sup>

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<sup>1</sup> J. Brian Casey, "International and Domestic Commercial Arbitration: An Introduction" (April 1994) 13 *Advocates' Soc. J. No.1*, 11-15. Note citations are to the Quicklaw version.

<sup>2</sup> *Ibid.*, at 2; W.H. Hurlburt, "A New Bottle for Renewed Wine: The Arbitration Act, 1991" (1995) 34 *Alta. L. Rev.* 86 at 2. Note, citations are to the Quicklaw version.

<sup>3</sup> *Supra*, note 1 at 4.

<sup>4</sup> *Ibid.*, at 3.

<sup>5</sup> Hurlburt, *Supra*, note 2 at 3.

<sup>6</sup> *Ibid.*

## II. Provincial and Territorial Legislation:

### Alberta

#### *Arbitration Law*

Nothing in the Alberta *Arbitration Act*<sup>7</sup> prohibits the application of the Act to family law matters. The *Arbitration Act* of Alberta states that the Act applies to arbitration conducted under an arbitration agreement unless “the application of this Act is excluded by an agreement of the parties or by law.”<sup>8</sup> Neither the Alberta *Matrimonial Property Act*<sup>9</sup> nor the *Alberta Domestic Relations Act*<sup>10</sup> prohibits or even mentions the use of arbitration. Unless the parties exclude the application of the Act, then, it applies to any arbitration without regard to the matter being arbitrated.

Parties are allowed to choose the law to be applied to their arbitration. Section 32(1) of the *Arbitration Act* discusses conflicts of laws and states, “In deciding a matter in dispute, an arbitral tribunal shall apply the law of a jurisdiction designated by the parties or, if none is designated, the law of a jurisdiction it considers appropriate in the circumstances.”<sup>11</sup> This allows parties to choose to apply religious laws to their arbitration if they so choose.

If there is a conflict between the *Arbitration Act* and another Act, the other Act prevails.<sup>12</sup> As arbitration is not mentioned in any of the family law acts of Alberta, the *Arbitration Act* does not conflict with these Acts. While there is a list of Acts to which the *Arbitration Act* does not apply, no family law act is on the list.<sup>13</sup> The Acts included are the Cancer Programs Act<sup>14</sup>, the Labour Relations Act<sup>15</sup>, Police Officers Collective Bargaining Act<sup>16</sup>, Post Secondary Learning Act, Public Service Employee Relations Act<sup>17</sup>, and “any other enactment set out in the regulations.”<sup>18</sup>

There are methods of limiting the application of the *Arbitration Act*. One way to limit its application is through a pronouncement of the Lieutenant Governor. The Lieutenant Governor has the power to “make regulations prescribing enactments to which the

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<sup>7</sup> *Arbitration Act RSA 2000, c.A-43*

<sup>8</sup> *Supra*, note 7 at s.2(1)(a)

<sup>9</sup> *Alberta Matrimonial Property Act, RSA 2000, c.M-8*

<sup>10</sup> *Domestic Relations Act, RSA 2000, c.D-14.*

<sup>11</sup> *Ibid* at s.32(1).

<sup>12</sup> *Supra*, note 7 at s.2(2).

<sup>13</sup> *Ibid.*, at s.2(3).

<sup>14</sup> *Ibid.* at s.2(3)(b).

<sup>15</sup> *Ibid.*, at s.2(3)(d).

<sup>16</sup> *Ibid.*, at s.2(3)(e).

<sup>17</sup> *Ibid.*, at s.2(3)(f).

<sup>18</sup> *Supra*, note 8 at s.2(3)(i).

*Arbitration Act* does not apply.”<sup>19</sup> While the application of the Act to family law matters is not prevented at the moment, this section provides a means of enacting a limitation if the political will to do so existed.

A second way in which to limit the application of the *Arbitration Act* is through the courts. Section 6 of the *Arbitration Act* outlines when courts are allowed to intervene in arbitration. It states that courts cannot intervene except (a) to assist the arbitration process, (b) to ensure that arbitration is carried on in accordance with the arbitration agreement, (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement and (d) to enforce awards.<sup>20</sup> It appears that if it could be argued that one party was treated manifestly unfairly in the arbitration, something that many argue will happen with certain forms of religious arbitration, a court could intervene.

Finally, the *Arbitration Act* states, “an arbitral tribunal shall treat the parties equally and fairly.”<sup>21</sup> This section could be used to try to challenge any arbitrations that utilize discriminatory codes of conduct. It would have to be argued that even though both parties agreed to the use of arbitration, the values used in arbitration did not treat the parties equally and fairly and the arbitration should be overridden. This argument could either occur on a case-by-case basis or by arguing that when certain principles are used in arbitration the parties will never be treated equally or fairly. The difficulty in making this argument will be combating ideas of choice. If the parties both “choose” religious arbitration, courts may be reluctant to accede to the idea that arbitration was unfair and more likely to call the choice an exercise in freedom of religion.<sup>22</sup>

### *Family Law*

The *Alberta Matrimonial Property Act* does not mention arbitration. Under the Act, spouses can make agreements<sup>23</sup> and the requirements for those agreements are detailed under the Act.<sup>24</sup> However, arbitration in particular is never mentioned in the Act.

The *Alberta Domestic Relations Act* does not directly discuss arbitration either. However, the Act does discuss agreements relating to spousal support.<sup>25</sup> An agreement prevails over the section of the Act regulating support orders made by the court.<sup>26</sup> A

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<sup>19</sup> *Supra*, note 7 at s.2(4).

<sup>20</sup> *Ibid* at s.6.

<sup>21</sup> *Ibid* at s.19(1).

<sup>22</sup> In part, this reaction is illustrated through Marion Boyd’s report entitled “Dispute Resolution in Family Law: Protecting Choice, Promoting inclusion.” (Prepared for Attorney General of Ontario Michael Bryant: 2004). For an examination of choice in recent Supreme Court of Canada cases, see Diana Majury, *Women are Themselves to Blame: Choice as a Justification for Unequal Treatment*, on file with LEAF. Ayalet Shachar has done some interesting work on women and multiculturalism that could be useful in deconstructing an argument about choice. See Ayelet Shachar, *Religion, State and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies* (2005 50 McGill L.J. 49-88); *Reshaping the Multicultural Model: Group Accommodation and Individual Rights* (January, 1998) 8 W.R.L.S.I. 83.

<sup>23</sup> *Supra* note 9 at s.37

<sup>24</sup> *Ibid.*, at s.38.

<sup>25</sup> *Ibid.*, at s.17(1).

<sup>26</sup> *Ibid.*, at s.27(1).

court can disregard support provisions of an agreement if the court believes that the agreement would be inequitable and if any of the following apply:<sup>27</sup> if either party entered into the agreement without legal advice,<sup>28</sup> if a consideration in making the agreement was the removal of barriers preventing remarriage within that spouse's faith,<sup>29</sup> if the two people who entered into the agreement subsequently married<sup>30</sup> or if one person is on social assistance without "reasonable support" from the other person.<sup>31</sup> If any of the above apply and a court is of the opinion the agreement is inequitable, a court can set aside a support provision of an agreement. As nothing in either Act indicates that an arbitration award could not be viewed as an agreement, it is possible that an arbitration award could fall into this category and be subject to the possibility of court intervention.

### *Summary*

The *Arbitration Act* of Alberta allows for parties if they agree to arbitration to choose the law they would like to govern the arbitration. Religious principles can be used if the parties both agree to their use. Nothing in the *Arbitration Act* or in the Acts governing family law limits the use of arbitration in family law matters, though the power to so limit is available in the *Arbitration Act*. There is a possibility under the *Arbitration Act* of setting aside an agreement if it is not fair or equitable. As the parties will have chosen to use religious arbitration, the idea of choice will have to be examined and deconstructed in order for this argument to succeed.

### British Columbia

#### *Arbitration Law*

Arbitration in British Columbia is governed by the *Commercial Arbitration Act*.<sup>32</sup> The Act applies to: a) commercial arbitration b) arbitration that refers to the Act unless it is inconsistent with the Act and c) any other arbitration agreements.<sup>33</sup> Section 2(2) of the *Commercial Arbitration Act* reads, "a provision of an arbitration agreement that removes the jurisdiction of a court under the *Divorce Act* (Canada) or the *Family Relations Act* has no effect."<sup>34</sup> This appears to indicate that family law matters can be arbitrated upon, but that courts will retain their jurisdiction to amend or set aside portions of the agreement that are not in accordance with the *Divorce Act* and the *Family Relations Act*. The court's jurisdiction however, will only be invoked where an arbitral award is brought to the court in order to be enforced.

<sup>27</sup> *Ibid.*, at s.27(2).

<sup>28</sup> *Ibid.*, at s.27(2)(a).

<sup>29</sup> *Ibid.*, at s.27(2)(b).

<sup>30</sup> *Ibid.*, at s.27(2)(c).

<sup>31</sup> *Ibid.*, at s.27(2)(d).

<sup>32</sup> *Commercial Arbitration Act, RSBC 1996, Chapter 55*

<sup>33</sup> *Ibid* at s.2(1).

<sup>34</sup> *Ibid* at s.2(2).

The British Columbia Attorney General stated in 2004 that he had no intention of changing the law to allow for religious arbitration.<sup>35</sup> The current Attorney General (same government) has not issued any kind of statement on the matter.

Catherine Morris, who in 2004 prepared a paper for the Ministry of Attorney General of British Columbia on the arbitration of family law disputes in that province,<sup>36</sup> writes that section 2(2) of the *Commercial Arbitration Act* has generated some disagreement amongst lawyers. Some read the section as prohibiting the use of arbitration in family law matters, yet others point to s.2(1) which makes it applicable to other arbitration agreements. Morris cites one case that stated, in obiter, that section 2 of the *Commercial Arbitration Act* “preserves the jurisdiction of the Court” in family law cases.<sup>37</sup> On the other hand, she also points out that courts have used the *Commercial Arbitration Act* in family law matters.<sup>38</sup>

The *Commercial Arbitration Act* allows for the use of religious arbitration through section 23. This section stipulates that an arbitrator must adjudicate the matter before them “by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.”<sup>39</sup> This section, either through “grounds of conscience” or “some other basis” allows for religious principles to be used by an arbitrator.

An arbitration award is final and binding on all parties.<sup>40</sup> Additionally, with leave of the court an award can be enforced as if it were a court order.<sup>41</sup> Appeals are possible, though, if all parties consent or if the court grants leave to appeal.<sup>42</sup> When the court is considering whether to grant leave to appeal, it must consider whether “the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,”<sup>43</sup> whether the point of law at issue “is of importance to some class or body of persons of which the applicant is a member”<sup>44</sup> or whether the legal issue is one of “general or public importance.”<sup>45</sup> This section granting the court the ability to grant an appeal on the grounds that it is important to a class of people or an issue of general public importance may enable a challenge to religious arbitration.

<sup>35</sup> [http://vancouver.cbc.ca/regional/servlet/View?filename=bc\\_shariah20040908](http://vancouver.cbc.ca/regional/servlet/View?filename=bc_shariah20040908).

<sup>36</sup> Catherine Morris, *Arbitration of Family Law Disputes in British Columbia* (2004: Paper prepared for the Ministry of Attorney General of British Columbia) at 11.

<sup>37</sup> *Merrell v. Merrell* (1987) 11 R.F.L (3d) 18 (BCSC) cited in Morris, *Ibid.*

<sup>38</sup> Morris, *Ibid.*

<sup>39</sup> *Supra* note 32 at s.23.

<sup>40</sup> *Ibid.*, at s.14.

<sup>41</sup> *Ibid.*, at s.29.

<sup>42</sup> *Ibid.* at s.31.

<sup>43</sup> *Ibid.*, at s.31(a).

<sup>44</sup> *Ibid.*, at s.31(b).

<sup>45</sup> *Ibid.*, at s.31(c).



In addition to granting leave to appeal an award, a court can set aside an award or remit it back to the arbitrator for reconsideration if it has been “improperly procured or an arbitrator has committed an arbitral error.”<sup>46</sup> A court does not have to set aside the award even if an error has been committed if that error is purely technical<sup>47</sup> or if refusing “would not constitute a substantial wrong or miscarriage of justice.”<sup>48</sup> A court cannot set aside or remit an award because of an error of fact or law on the face of the award.<sup>49</sup> The only exception to this is if all parties consent or a court grants leave.<sup>50</sup>

### *Family Law*

According to Morris, very little arbitration is conducted in family law cases in British Columbia.<sup>51</sup> However, she did not base this conclusion on empirical research into the use of arbitrators.<sup>52</sup> Instead, her conclusions were based on the fact that few family law arbitration awards were challenged in the courts. The low number of family law arbitration cases that make their way to the courts does not necessarily indicate that arbitration in family law is not occurring, it simply demonstrates that those cases are not being brought to court. Because the numbers in British Columbia, as in many provinces, are unknown, and because it seems that there is a slight controversy over what the *Commercial Arbitration Act* does and does not allow in terms of arbitration in family law, it is important to explore the *Family Relations Act* in greater detail.

The British Columbia *Family Relations Act* does not mention arbitration.<sup>53</sup> The *Family Relations Act* defines a marriage agreement as an agreement between a man and a woman that is entered into before or during their marriage and that concerns the management of family assets and property during marriage<sup>54</sup> or concerns the division of family assets and property during or on the breakdown of the marriage.<sup>55</sup> In order to be valid a marriage agreement must be in writing, signed by both parties and witnessed by at least one other person.<sup>56</sup> If the court believes that the division of property under the marriage agreement is unfair, the court can redivide the property accordingly.<sup>57</sup> In determining what is unfair a court can consider the duration of the marriage,<sup>58</sup> the length of time the spouses had lived separate and apart,<sup>59</sup> the date when the property was bought or sold,<sup>60</sup> how the

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<sup>46</sup> *Ibid.*, at s.30(1)(a) & s.30(1)(b).

<sup>47</sup> *Ibid.*, at s.30(2)(a).

<sup>48</sup> *Ibid.*, at s.30(2)(b).

<sup>49</sup> *Ibid.*, at s.30(3).

<sup>50</sup> *Supra* note 42.

<sup>51</sup> *Ibid.*, at 4.

<sup>52</sup> *Ibid.*, at 5.

<sup>53</sup> *Family Relations Act, RSBC 1996, Chapter 128*

<sup>54</sup> *Ibid.*, at s.61(2)(a).

<sup>55</sup> *Ibid.*, at s.61(2)(b).

<sup>56</sup> *Ibid.*, at s.61(3).

<sup>57</sup> *Ibid.*, at s.65(1).

<sup>58</sup> *Ibid.*, at s.65(1)(a).

<sup>59</sup> *Ibid.*, at s.65(1)(b).

<sup>60</sup> *Ibid.*, at s.65(1)(c).

property was acquired,<sup>61</sup> the needs of each spouse in order to become or remain economically self sufficient and independent<sup>62</sup> and “any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of the property or the capacity or liabilities of a spouse.”<sup>63</sup> The result of this section is that if an argument can be made that an arbitration award is a marriage agreement then it is reviewable if a court determines it to be unfair.

If an arbitration award is not considered to be a marriage agreement, the Supreme Court still may, on application, “make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses.”<sup>64</sup>

### *Summary*

The wording of British Columbia’s *Commercial Arbitration Act* does not appear to explicitly exclude arbitration in family law matters. However, s. 2(2) of the *Act* provides an important safeguard to vulnerable individuals by ensuring that family arbitrations can not remove the jurisdiction of a court under the *Divorce Act* or the *Family Relations Act*. The *Family Relations Act* provides important mechanisms for the review or the setting aside of an arbitral award.

As far as LEAF knows, at the moment there is no lobbying to allow religious arbitration in family law in British Columbia.<sup>65</sup>

## Manitoba

### *Arbitration Law*

Manitoba’s *Arbitration Act*<sup>66</sup> applies to arbitration that is conducted under an arbitration agreement unless the application of the Act is excluded by law.<sup>67</sup> There is nothing in the *Arbitration Act* itself that prohibits the application of the Act to family law matters nor is there anything in the family law statutes of Manitoba that prohibit arbitration in family law matters.<sup>68</sup> Section 32(1) of Manitoba’s *Arbitration Act* provides that an arbitral tribunal can decide a matter according to “the law of a jurisdiction designated by the

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<sup>61</sup> *Ibid.*, at s.65(1)(d).

<sup>62</sup> *Ibid.*, at s.65(1)(e).

<sup>63</sup> *Ibid.*, at s.65(1)(f).

<sup>64</sup> *Ibid.*, at s.68(2).

<sup>65</sup> Email from Alison Brewin, program director of Westcoast LEAF July 25, 2005.

<sup>66</sup> *Arbitration Act CCSM c.A120*.

<sup>67</sup> *Ibid.*, s.2(1)(a).

<sup>68</sup> See analysis under *Family Law*, below.

parties.”<sup>69</sup> This provision permits the use of religious principles by allowing parties to select the jurisdiction of their choice.

If there is a conflict between the *Arbitration Act* and another Act that requires arbitration, the other Act prevails.<sup>70</sup> However, nothing in the *Arbitration Act* addresses conflicts between the *Arbitration Act* and other Acts that do not require arbitration. If the method of deciding a matter under the *Arbitration Act* conflicts with the method of deciding that matter under a family law statute, no resolution is stipulated.

The arbitral tribunal has the authority to rule on its own jurisdiction to hear the matter in question.<sup>71</sup> The arbitral tribunal is also empowered to determine questions of law.<sup>72</sup> The result is that if there was a challenge to the jurisdiction of an arbitration tribunal, the tribunal itself would rule on the matter.

The *Arbitration Act* does provide for possibilities of intervention. Similar to other provincial Arbitration Acts, in Manitoba’s *Arbitration Act* there is a section that states that “an arbitral tribunal shall treat the parties equally and fairly.”<sup>73</sup> In addition, the Act states that a court can intervene in an arbitration to prevent unfair or unequal treatment of a party to an arbitration agreement.<sup>74</sup> The right to appeal an award is contingent on the matter being a question of law and leave being given by the Court of Appeal.<sup>75</sup>

### *Family Law*

There are two relevant family law acts in Manitoba: the *Family Property Act*<sup>76</sup> and the *Family Maintenance Act*.<sup>77</sup> There is no provision in the *Family Property Act* that addresses arbitration, but there are some provisions in the *Family Maintenance Act* that could be applied to arbitration.

Section 2(1) of the *Family Maintenance Act* states, “in all proceedings under this Act the best interests of the child shall be the paramount consideration of the court.”<sup>78</sup> Thus, if an arbitration of a family law matter is considered a proceeding under the *Family Maintenance Act* it would be subject to the best interests of the child. An arbitration award that is the result of a written agreement, may fall under the *Family Maintenance Act*.

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<sup>69</sup> Section 32(1) of Manitoba’s *Arbitration Act* states: “In deciding a matter in dispute, an arbitral tribunal shall apply the law of a jurisdiction designated by the parties or, if none is designated, the law of a jurisdiction it considers appropriate in the circumstances.”

<sup>70</sup> *Supra*, note 66 at s.2(2).

<sup>71</sup> *Ibid.*, at s.17(1).

<sup>72</sup> *Ibid.*, at ss. 8(2), 17(2).

<sup>73</sup> *Ibid.*, at s.19(1).

<sup>74</sup> *Ibid.*, at s.6(c).

<sup>75</sup> *Ibid.*, at s.8(3). The provision reads, “The court’s determination of a question of law may be appealed to The Court of Appeal, with leave of that court.”

<sup>76</sup> *Family Property Act CCSM c. F25.*

<sup>77</sup> *Family Maintenance Act CCSM c. F20.*

<sup>78</sup> *Ibid.*, at s.2(1).

Under the *Family Maintenance Act*, there are only limited circumstances in which a court will intervene where there has been a written agreement involving support and maintenance. Section 9(2) states:

Where spouses or common-law partners have separated by mutual agreement, and one of them has agreed in writing to release the other from liability for support and maintenance or to accept from the other specified periodic amounts for support and maintenance, no order shall be made under this Act for the support and maintenance of the spouse or common-law partner who has so agreed.<sup>79</sup>

Section 9(3) relaxes this rule somewhat, but only for very specific cases of default, inadequate support, or when one spouse has a need for public assistance. It reads:

Subsection (2) does not apply in the case of a separation agreement

- (a) Where the spouse or common-law partner who is required by the agreement to provide support and maintenance is in default thereunder; or
- (b) where the support and maintenance that a spouse or common-law partner agreed therein to provide was inadequate having regard to the circumstances of both spouses or common-law partners at the date of the agreement; or
- (c) where the spouse or common-law partner who in the agreement released the other from liability for support and maintenance or agreed to accept from the other specified periodic amounts for support and maintenance has become a public charge or a person in need of public assistance.<sup>80</sup>

### *Summary*

In Manitoba, the use of arbitration in family law matters is not mentioned by either the *Arbitration Act* or the family law statutes of the province. This implicitly allows the use of arbitration in family law matters. Section 32(1) of the *Arbitration Act* is a choice of law provision that permits parties to select the jurisdiction of their choice which could include the use of religious law. A restriction on arbitration is the requirement that the parties must be treated equally and fairly. For an analysis of challenging an arbitration agreement on these grounds, see the discussion above, on Alberta.

Under the *Arbitration Act*, if arbitration does occur in a family law matter a court is only allowed to hear the appeal if it is on a question of law. Under the *Family Maintenance Act*, if the arbitration agreement is an “agreement in writing” then it would only be

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<sup>79</sup> *Ibid.*, at s.9(2).

<sup>80</sup> *Ibid.*, at s.9(3).

reviewable under the *Family Maintenance Act* if one party was in default, if the award was inadequate, or if one party was a public charge or in need of social assistance.

As of yet, there has been no examination of Manitoba's use of arbitration in family law. According to one account, the use of arbitration in family law may be gaining ground<sup>81</sup> but further research should be done in this area in order to determine the extent and results of its use, if it is occurring.

## New Brunswick

### *Arbitration Law*

The New Brunswick *Arbitration Act*<sup>82</sup> applies to any arbitration conducted under an arbitration agreement unless "the application of this Act is excluded by the agreement or by law."<sup>83</sup> Section 2(2) states that the *Arbitration Act* "applies with the necessary modifications to an arbitration conducted in accordance with another Act, unless that Act provides otherwise."<sup>84</sup> The same section also provides that if there is a conflict between the *Arbitration Act* and another Act, the other Act will prevail.<sup>85</sup> Nothing in the Act precludes arbitration of family law matters and nothing in the family law acts of the province precludes the use of arbitration. For this reason, family arbitration is allowed.

Religious arbitration is permitted under the *Arbitration Act*. The parties are allowed under the Act to designate the rules of law they would like to apply to the proceeding. If the parties do not designate the rules of law, then the tribunal is able to apply the rules of law it considers "appropriate in the circumstances."<sup>86</sup> This choice of law provision opens the door to the use of religious arbitration. The arbitral tribunal has the power to determine questions of law that arise during arbitration<sup>87</sup> and an arbitral tribunal can rule on its own jurisdiction to conduct the tribunal.<sup>88</sup>

The power of courts to intervene in matters being arbitrated under the Act is limited.<sup>89</sup> Arbitration agreements may contain provisions that state a party can appeal the award on a question of law, a question of fact or a question of mixed law and fact.<sup>90</sup> A party is allowed to appeal an award to a court on a question of law if the court gives leave and is

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<sup>81</sup> Email on file with LEAF.

<sup>82</sup> *Arbitration Act Chapter A-10.1*

<sup>83</sup> *Ibid.*, at s.2(1)(a).

<sup>84</sup> *Ibid.*, at s.2(2).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, at s.32(1). Section 32(1) states: "In deciding a dispute, an arbitral tribunal shall apply the rule of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances."

<sup>87</sup> *Ibid.*, at s.8(2).

<sup>88</sup> *Ibid.*, at s.17.

<sup>89</sup> *Ibid.*, at s.6.

<sup>90</sup> *Ibid.*, at s.45(2) and s.45(3).

satisfied that “the importance to the parties of the matters at stake in the arbitration justifies an appeal” as well as that a “determination of the question of law at issue will significantly affect the rights of the parties.”<sup>91</sup>

Equal treatment of the parties is addressed in the *Act per* s.19(1) which states that “in an arbitration, the parties shall be treated equally and fairly.”<sup>92</sup> Each party is also required to be given an opportunity to present their case and respond to the other parties’ case.<sup>93</sup>

Section 7 governs when a court can stay a proceeding that a party has begun while the same matter is being arbitrated. Section 7(1) gives the court the power to stay the court proceeding if the other party wishes.<sup>94</sup> However, courts can refuse to stay the proceedings for reasons outlined in s.7(2) of the *Act*, including the reason that the subject-matter is “not capable of being the subject of arbitration under New Brunswick law.”<sup>95</sup> Additionally, a court can set aside the proceedings if, among other reasons, the subject matter was not capable of arbitration<sup>96</sup> or the applicant was not treated equally and fairly.<sup>97</sup>

If someone participates in arbitration and is aware that the arbitration does not comply with certain provisions of the Act, but does not object within the time limit provided, then they are deemed to have waived their right to object.<sup>98</sup> However, there are certain provisions of the Act that may not be varied or excluded.<sup>99</sup>

### *Family Law*

There is no mention of arbitration in the *Marital Property Act*<sup>100</sup>, the *Married Woman’s Property Act*<sup>101</sup> or the *Family Services Act*.<sup>102</sup> As there is no prohibition in these acts, and there is no prohibition in the *Arbitration Act* itself against arbitrating family law matters, the arbitration of family law matters is allowed in New Brunswick. Because the parties can choose the rules of law to apply to their arbitration, it is possible for parties to choose to have their family law matters arbitrated using religious precepts.

The New Brunswick *Marital Property Act* has a section on domestic contracts. To be valid, a domestic contract must be in writing, signed by the two parties and witnessed.<sup>103</sup>

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<sup>91</sup> *Ibid.*, at s.45(1)(a&b).

<sup>92</sup> *Ibid.*, at s.19(1).

<sup>93</sup> *Ibid.*, at s.19(2).

<sup>94</sup> *Ibid.*, at s.7(1).

<sup>95</sup> *Ibid.*, at s.7(2)(c).

<sup>96</sup> *Ibid.*, at s.46(1)(e).

<sup>97</sup> *Ibid.*, at s.46(1)(f).

<sup>98</sup> *Ibid.*, at s.4

<sup>99</sup> *Ibid.*, at S.3(a-g). These provisions involve treating parties equally and fairly and appealing, enforcing, setting aside and invalidating awards.

<sup>100</sup> *Marital Property Act Chapter M-1.1, 1980.*

<sup>101</sup> *Married Woman’s Property Act, Ch. M-4.*

<sup>102</sup> *Family Services Act, Chapter F-2.2.*

<sup>103</sup> *Supra* note 100 at s. 37(1).

If there is a conflict between the domestic contract and the *Marital Property Act*, the contract prevails.<sup>104</sup> There are two exceptions to this rule. The first is that a court has the power to disregard provisions of a domestic contract dealing with child support, custody or access if they are not in the best interests of the child.<sup>105</sup> The second exception is that if a party entered into a contract without independent legal advice and the court believes that the provision “would be inequitable in all the circumstances of the case” then the court can disregard the provision.<sup>106</sup> Thus, if an arbitration award is considered to be a domestic contract under the *Marital Property Act*, the rules governing domestic contracts under the Act apply and these rules grant a few limited protections to the parties.

### *Summary*

Under the *Arbitration Act*, a tribunal has the power to decide matters of law as well as jurisdictional questions. Parties can designate what rule of law they want applied to their arbitration, thus allowing for religious arbitration. However, the possibility of an appeal exists if one party can demonstrate they were not treated equally and fairly. What a judge would consider unfair and unequal treatment is unknown. If an arbitration award is considered a domestic contract there are limited protections afforded to it under the *Marital Property Act*. In most cases, though, a contract will prevail over the Act.

Currently, no one seems to know if religious arbitration is occurring in family law matters in New Brunswick. The provincial Department of Justice does not track arbitration.<sup>107</sup> The Department of Justice in New Brunswick has also stated in an email that unless there is a problem that needs fixing they do not plan any law reform projects.<sup>108</sup>

### Newfoundland and Labrador

#### *Arbitration Law*

The *Arbitration Act* of Newfoundland and Labrador<sup>109</sup> does not mention family law. This Act is less specific than other arbitration acts and does not state to whom the Act applies.

Submissions made under the Act are irrevocable except by leave of the court and have the same effect as court orders.<sup>110</sup> A court has the power to stay court proceedings that have also been submitted to arbitration if there “is no sufficient reason why the matter

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<sup>104</sup> *Ibid.*, at s.40.

<sup>105</sup> *Ibid.*, at s.38(1).

<sup>106</sup> *Ibid.*, at s.4(b).

<sup>107</sup> Email on file with LEAF

<sup>108</sup> *Ibid.*

<sup>109</sup> *Arbitration Act* RSNL1990 Chapter A-14

<sup>110</sup> *Ibid.*, at s.3.

should not be referred to arbitration.”<sup>111</sup> What constitutes a significant reason is not elaborated upon.

The court has the power to set aside an award if “an arbitrator or umpire has misconducted himself or herself, or an arbitration or award has been improperly procured...”<sup>112</sup> There is no definition provided of what constitutes improper conduct or improper procurement. Other than the above provision, “the award made by arbitrators or an umpire is final and binding on the parties and persons claiming under them.”<sup>113</sup> Unlike some arbitration acts, this Act does not contain an equality or fairness provision.

### *Family Law*

The *Family Law Act*<sup>114</sup> of Newfoundland and Labrador does not mention arbitration. The *Family Law Act* does have a section that discusses the use of mediation in family law,<sup>115</sup> but there is no mention of arbitration.

Section 33 of the Act states that “a person may enter into an agreement under this Part to vary or exclude the application of this Part and Part I.”<sup>116</sup> Part I covers the matrimonial home and Part II covers matrimonial assets. It is unclear whether an agreement could include an arbitration award. If it does, then it could exclude the application of Parts I and II of the *Family Law Act*.

Domestic contracts are also discussed in the *Family Law Act*. Provisions of a domestic contract concerning support or maintenance can be enforced as if they were a court order if they are filed in the proper manner.<sup>117</sup> To be enforceable, domestic contracts have to be in writing, signed by the parties and witnessed.<sup>118</sup> Domestic contracts are subject to the best interests of the child.<sup>119</sup>

### *Summary*

The arbitration of family law matters is legal in Newfoundland and Labrador. Because the *Arbitration Act* does not have a choice of law provision, the presumption is that the only law applicable is the law of the jurisdiction of Newfoundland and Labrador or the law of Canada where appropriate. To the extent that the common law can accommodate diverse perspectives or encompass foreign law in family arbitration, religious principles may be applicable. The *Arbitration Act* does not have a provision, found in the arbitration acts of other provinces, that mandates the parties should be treated equally and

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<sup>111</sup> *Ibid.*, at s.4(2)(a).

<sup>112</sup> *Ibid.*, at s.14(1).

<sup>113</sup> *Ibid.*, at s.36.

<sup>114</sup> *Family Law Act RSNL 1990 Chapter F-2*.

<sup>115</sup> *Ibid.*, at s.4.

<sup>116</sup> *Ibid.*, at s.33.

<sup>117</sup> *Ibid.*, at ss.42(1) & 42(2).

<sup>118</sup> *Ibid.*, at s.65(1).

<sup>119</sup> *Ibid.*, at s.66.



fairly. Should an arbitration agreement be characterized as a domestic contract, the only protection offered by the *Family Law Act* is that support, custody and access provisions be subject to the best interests of the child.

## Northwest Territories

### *Arbitration Law*

The *Arbitration Act*<sup>120</sup> of the Northwest Territories applies to all arbitrations that occur under any Act except if the *Arbitration Act* is inconsistent with the other act. If it is, the other act prevails.<sup>121</sup> Once a submission is made under the *Arbitration Act*, it is irrevocable unless “a contrary intention is expressed in a submission or a judge allows a submission to be revoked.”<sup>122</sup>

Unless the parties agree otherwise in their submission,<sup>123</sup> the award made by an arbitrator or umpire is final and binding.<sup>124</sup> A party can only appeal an award if it has been agreed upon in the submission that appeals are allowed,<sup>125</sup> if “an arbitrator or umpire has misconducted himself or herself”<sup>126</sup> or if “an arbitration or an award has been improperly procured.”<sup>127</sup> There is no guidance given as to the meaning of these terms in the Act.

The *Arbitration Act* does not contain a choice of law provision thus, the only applicable law in family arbitrations is the law of the Northwest Territories or the law of Canada where appropriate. Religious principles could only be utilized to the extent that the common law can accommodate diverse perspectives.

### *Family Law*

The *Family Law Act* of the NWT<sup>128</sup> does not explicitly mention arbitration, though it does have a section on mediation.<sup>129</sup> The *Family Law Act* does address domestic contracts. If an arbitration agreement is considered a domestic contract then the *Family Law Act* applies.

Section 7(1) of the *Family Law Act* states “a domestic contract, including an agreement to amend or rescind a domestic contract, is unenforceable unless it is made in writing,

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<sup>120</sup> *Arbitration Act RSNWT 1988, c.A-5.*

<sup>121</sup> *Ibid.*, at s.3.

<sup>122</sup> *Ibid.*, at s.4(1).

<sup>123</sup> *Ibid.*, at s.27(1)

<sup>124</sup> *Ibid.*, at s.26.

<sup>125</sup> *Supra* note 123.

<sup>126</sup> *Ibid.*, at s.28(1)(a).

<sup>127</sup> *Ibid.*, at s.28(1)(b).

<sup>128</sup> *Family Law Act S.N.W.T. 1997, c.18.*

<sup>129</sup> *Ibid.*, Section IV.

signed by the parties and witnessed.”<sup>130</sup> This would indicate that for an arbitration award to be considered a valid domestic contract under the *Family Law Act*, it must be made in writing, signed by each party and witnessed, even though the *Arbitration Act* does not require this of arbitration agreements.

The *Family Law Act* addresses ways in which provisions in domestic contracts can be set aside. All contracts are subject to the best interests of the child.<sup>131</sup> A domestic contract or provisions of a domestic contract can be set aside when parties do not disclose assets or debts to the other party,<sup>132</sup> “where a party did not understand the nature or consequences of the domestic contract or provision”<sup>133</sup> or according to other rules of contract.<sup>134</sup> This section applies “notwithstanding any agreement to the contrary.”<sup>135</sup> Additionally, a court can set aside provisions in a contract if the provisions result in an unconscionable circumstance,<sup>136</sup> if the provision involves a spouse qualifying for public assistance<sup>137</sup> or if there has been at least a three month default in support payments.<sup>138</sup>

The section on domestic contracts also states that a domestic contract that deals with a matter dealt with in the *Family Law Act* prevails unless the *Act* provides otherwise.<sup>139</sup> Again, if an arbitration award is considered a domestic contract, the award would prevail over the *Act* unless the *Act* provides otherwise.

### *Summary*

If an arbitration award fits the profile of a domestic contract, then, as demonstrated above, there are regulations that apply through the *Family Law Act* to any matter covered under the *Family Law Act*. These protections however small are important given the minimal protection afforded under the *Arbitration Act*. The *Arbitration Act* does not appear to allow for religious arbitration in family law matters because the *Act* does not have a choice of law provision.

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<sup>130</sup> *Ibid.*, at s.7(1).

<sup>131</sup> *Ibid.*, at s.8(1).

<sup>132</sup> *Ibid.*, at s.8(4)(a).

<sup>133</sup> *Ibid.*, at s.8(4)(b).

<sup>134</sup> *Ibid.*, at s.8(4)(c).

<sup>135</sup> *Ibid.*, at s.8(5).

<sup>136</sup> *Ibid.*, at s.19(a).

<sup>137</sup> *Ibid.*, at s.19(b).

<sup>138</sup> *Ibid.*, at s.19(c).

<sup>139</sup> *Ibid.*, at s.10.

Nova Scotia

*Arbitration Law*

The *Arbitration Act*<sup>140</sup> of Nova Scotia states “this Act shall apply to every arbitration to which Her Majesty is a party, as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the enactment regulating the arbitration or with any rules or procedure authorized or recognized by the enactment.”<sup>141</sup> The *Arbitration Act* applies when one of the parties to the arbitration is the government or the matter relates to an area that falls within federal jurisdiction such as maritime law, whereas Nova Scotia’s *Commercial Arbitration Act*<sup>142</sup> is the applicable law for arbitrations between individuals. The *Arbitration Act* does not apply to an arbitration conducted under Nova Scotia’s *Commercial Arbitration Act*.<sup>143</sup>

The *Commercial Arbitration Act* is fairly detailed with specific sections on the conduct of an arbitration including the use of experts, statements of the parties, notices, oaths, and evidence. This paper will only note those aspects of the Act most relevant to family arbitration.

Where there is a conflict between the *Commercial Arbitration Act* and another Act the other Act prevails.<sup>144</sup> A court may only intervene in matters governed by the Act to assist the arbitration process, to ensure that arbitration is carried out in accordance with the arbitration agreement, to prevent manifestly unfair or unequal treatment of a party and to enforce awards.<sup>145</sup> Once appointed, a party cannot revoke the appointment of an arbitrator.<sup>146</sup> However, a party may challenge an arbitrator if circumstances exist that give rise to a reasonable apprehension of bias or the arbitrator does not possess qualifications that the parties have agreed are necessary.<sup>147</sup> The Act provides that an arbitral tribunal shall treat the parties equally and fairly<sup>148</sup> and that each party shall be given an opportunity to present a case and to respond to the case presented by the other parties.<sup>149</sup>

Section 35(1) of the Act states that in deciding a matter in dispute, an arbitral tribunal “shall apply the law of a jurisdiction designated by the parties.” This provision permits parties to select the jurisdiction of their choice, including a jurisdiction that utilizes religious laws.

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<sup>140</sup> *Arbitration Act R.S.N.S. 1989, c.19.*

<sup>141</sup> *Ibid.*, at s.3.

<sup>142</sup> *Commercial Arbitration Act S.N.S. 1999, c. 5.*

<sup>143</sup> *Arbitration Act, supra* note 140 at s.3A.

<sup>144</sup> *Commercial Arbitration Act* at s. 4(2).

<sup>145</sup> *Ibid.*, at s. 8.

<sup>146</sup> *Ibid.*, at s. 14.

<sup>147</sup> *Ibid.* at s. 15(1).

<sup>148</sup> *Ibid.*, at s. 21(1).

<sup>149</sup> *Ibid.*, at s. 21(2).

Section 39(1) of the Act permits parties to adjourn the arbitration and refer any or all matters in dispute to mediation. If the mediation is unsuccessful or where either party withdraws from the mediation, the arbitration shall re-commence at a time to be set by the arbitral tribunal.<sup>150</sup>

An arbitral award is binding unless the award is set aside or varied by the court. On an application by a party, the court may set aside an award on any of the following grounds:

(a) a party entered into the arbitration agreement while under a legal incapacity; (b) the arbitration agreement is invalid or has ceased to exist; (c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement; (d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement; (e) the subject-matter of the arbitration is not capable of being the subject of arbitration pursuant to the law of the Province; (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to the case of another party or was not given proper notice of the arbitration or of the appointment of an arbitrator; (g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement; (h) an arbitrator committed a corrupt or fraudulent act or there is a reasonable apprehension of bias; and (i) the award was obtained by fraud.

Unless the parties otherwise agree, there is no appeal of an arbitral award. Where an arbitration agreement provides for an appeal, a party may appeal an award to a court on a question of law, on a question of fact or on a question of mixed fact and law.<sup>151</sup>

A party may have their award enforced like any other judgment by filing the award in a court.<sup>152</sup>

### *Family Law*

The *Matrimonial Property Act*<sup>153</sup> of Nova Scotia explicitly mentions arbitration. Section 30(1) reads, “parties to a marriage contract or separation agreement may, where both persons consent, refer any question as to their rights under this Act or the contract or agreement for determination by arbitration and the Arbitration Act then applies.”<sup>154</sup> An arbitration award under the *Matrimonial Property Act* is then considered to be a court order and is enforceable in the same manner as a court order.<sup>155</sup>

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<sup>150</sup> *Ibid.*, at s. 39(3).

<sup>151</sup> *Ibid.*, at s. 48(1).

<sup>152</sup> *Ibid.*, at s. 53.

<sup>153</sup> *Matrimonial Property Act amended 1995-96, c.13, s.83 R.S.N.S. 1989, c.275.*

<sup>154</sup> *Ibid.*, at s.30(1).

<sup>155</sup> *Ibid.*, at s.30(2).

Courts also have power, though limited, to intervene in matters relating to spousal support, child support, child custody or child access under the *Maintenance and Custody Act*.<sup>156</sup> The *Maintenance and Custody Act* states that courts can consider but are not bound by agreements surrounding spousal support, child support and child custody or access if the court is of the opinion that the agreement is not in the best interests of the child or the party.<sup>157</sup>

### *Summary*

As the *Matrimonial Property Act* explicitly provides for the use of arbitration and the *Commercial Arbitration Act* does not prohibit the use of arbitration in family law matters it is allowed. Because the *Commercial Arbitration Act* contains a choice of law provision, religious arbitration is also permitted, so long as the arbitration rules are followed. Parties who agree to use arbitration to determine matters that fall under the *Matrimonial Property Act* can file their arbitral awards with a court and have it enforced as an order. Parties can also invoke the expertise of the court by explicitly stating in their arbitration agreement a right to appeal. By not making an explicit provision for appeals, the arbitral award becomes final and the parties can lose recourse to judicial intervention. However, relying on the *Maintenance and Custody Act*, courts have the power to intervene in matters of spousal support, child support, custody and access irrespective of an agreement made by the parties if in the opinion of the court the agreement is not in the best interests of the child or party.

One family law lawyer in Nova Scotia had not heard of religious arbitrations occurring in that province, but it appears that there is no legal impediment for such arbitrations. More research should be done before accepting this assessment as a definitive conclusion.<sup>158</sup>

### Nunavut

#### *Arbitration Law*

The *Arbitration Act*<sup>159</sup> of Nunavut applies to every arbitration conducted under any Act unless the *Arbitration Act* is inconsistent with that other Act.<sup>160</sup> This section does not discuss whether arbitration is disallowed under certain Acts.

Submissions made under the *Arbitration Act* are irrevocable<sup>161</sup> and awards made under the *Arbitration Act* are final and binding.<sup>162</sup> This section is subject to two exceptions.

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<sup>156</sup> *Maintenance and Custody Act*, R.S.N.S. 1989, c.160.

<sup>157</sup> *Ibid.*, at s.31.

<sup>158</sup> Email on file with LEAF.

<sup>159</sup> *Arbitration Act R.S.N.W.T. 1988, c.A-5.*

<sup>160</sup> *Ibid.*, at s.3

<sup>161</sup> *Ibid.*, at s.4(1).

The first is that a submission can specify that there is a right to appeal an award.<sup>163</sup> The second is that even if the submission does not provide for an appeal, a judge can set aside an award if “an arbitrator or umpire has misconducted himself or herself”<sup>164</sup> or “an arbitration or award has been improperly procured.”<sup>165</sup> Definitions of how this would occur are not provided.

Nunavut’s *Arbitration Act* does not have a choice of law provision. Thus, the only applicable law for family arbitrations would be Nunavut’s family law regime and the law of Canada where applicable.

### *Family Law*

The *Family Law Act* of Nunavut<sup>166</sup> does not mention arbitration, though it does have a section on mediation.<sup>167</sup> Like the Northwest Territories, the Nunavut *Family Law Act* has many regulations surrounding domestic contracts. If an arbitration agreement could be considered a domestic contract, then the protections surrounding domestic contracts would also apply to arbitration.

If a couple is married or intend to marry they can enter into an agreement respecting their rights and obligations in marriage, separation, annulment, dissolution of the marriage or death.<sup>168</sup> The parties may not limit one spouse’s right to custody or access to their children.<sup>169</sup> The same provisions apply to people who are cohabitating or intend to cohabit.<sup>170</sup> To be enforceable, a domestic contract must be in writing, signed by both parties and witnessed.<sup>171</sup>

A court can disregard any provision of a domestic contract that is not in the best interests of the child.<sup>172</sup> A court can also set aside a domestic contract or a provision in a domestic contract if the parties do not disclose all assets and debts, if a party did not understand the nature or consequences of the contract, if a party did not understand the nature and consequences of a provision in the contract or according to the principles of contract law.<sup>173</sup> This ability of a court to set aside a domestic contract applies even if the parties agree to the contrary in a contract.<sup>174</sup> A court also has the power to set aside a provision in a domestic contract regarding support for a spouse if the provision results in

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<sup>162</sup> *Ibid.*, at s.2

<sup>163</sup> *Ibid.*, at s.27(1).

<sup>164</sup> *Ibid.*, at s.28(1)(a).

<sup>165</sup> *Ibid.*, at s.28(1)(b).

<sup>166</sup> *Family Law Act (Nunavut) S.N.W.T. 1997, c.18.*

<sup>167</sup> *Ibid.*, Part V.

<sup>168</sup> *Ibid.*, at s.3(1).

<sup>169</sup> *Ibid.*, at s.3(2)

<sup>170</sup> *Ibid.*, at s.4(1) & s.4(3).

<sup>171</sup> *Ibid.*, at s.7(1).

<sup>172</sup> *Ibid.*, at s.8(1).

<sup>173</sup> *Ibid.*, at s.8(4).

<sup>174</sup> *Ibid.*, at s.8(5).

unconscionable circumstances,<sup>175</sup> the provision surrounds a spouse who qualifies for public money<sup>176</sup> or the other party is in default of three or more months in making a payment under the domestic contract.<sup>177</sup>

### *Summary*

Arbitration in family law is not prohibited in either the *Arbitration Act* or the *Family Law Act*. Because there is no provision in the *Arbitration Act* specifying that the parties may select the law of their choice, religious arbitration in family law matters is not permissible.

If an arbitration award can be considered a domestic contract there are ways for the court to set it aside. In addition, the fact that under the *Arbitration Act* an award is final and binding would not be conclusive because, in a conflict, the *Family Law Act* would prevail. Arbitration awards are generally final and binding. Such awards can only be subject to appeal if the parties agreed so before hand, if an award was improperly procured, or if there was misconduct on the part of an arbitrator.

### Ontario

#### *Arbitration and Family Law*

Until recently, s. 32(1) of Ontario's *Arbitration Act*<sup>178</sup> permitted parties to choose the legal framework by which their civil disputes, including family law matters, would be settled. Parties were free to adopt any "rules of law" to govern their arbitrations, so long as the results were not prohibited by law or purported to bind people or institutions that had not agreed to the process. In other words, the Act opened the door to utilizing any code including religious principles for resolving civil matters in Ontario.

The Act provided few safeguards for equality. While s. 19(1) of the Act guarantees that parties shall be treated equally and fairly, this section has primarily been understood as a procedural guarantee.<sup>179</sup>

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<sup>175</sup> *Ibid.*, at s.19(a).

<sup>176</sup> *Ibid.*, at s.19(b).

<sup>177</sup> *Ibid.*, at 19(c).

<sup>178</sup> *Arbitration Act*, S.O. 1991, c. 17 ("the Act").

<sup>179</sup> Some case law suggests that courts have been willing to interpret sections of the Act to include guarantees as to the substance of the arbitral award. In *Hercus v. Hercus* [2001] O.J. No 534 [QL] [*Hercus*] at paras. 96-97, Templeton J. held that there was nothing in the *Arbitration Act* that limits the concept of "fairness" in s. 19(1) to mere procedural fairness. Rather, she felt that s. 19(2) of the Act more specifically addressed the concept of procedural fairness by ensuring that each party be given the opportunity to present a case and respond to the other parties' case.

In response to concerns that women would be pressured to participate in religious family arbitration and that private dispute resolution produces unfair results for women, feminist groups lobbied the government in a campaign to prohibit religious arbitration in Ontario. On February 23<sup>rd</sup> 2006, the government of Ontario acquiesced and introduced the *Family Statute Law Amendment Act*.<sup>180</sup> The new amendments provide that only family law arbitrations conducted exclusively in accordance with the law of Ontario or another Canadian jurisdiction will have the force of law.<sup>181</sup> Other third-party decision-making processes in family law matters will have no legal effect.

The new amendments also provide that both the *Arbitration Act* and the *Family Law Act* apply to family arbitrations and in the case of a conflict between the two statutes, the *Family Law Act* governs.<sup>182</sup> Family arbitration agreements must now be in writing and each party must receive independent legal advice prior to making the arbitration agreement.<sup>183</sup> The act does not contemplate the funding of such independent legal advice.

The amendments provide the power to make regulations under the *Arbitration Act*, which will likely govern the conduct, training and report/record-keeping of arbitrators in family law proceedings.<sup>184</sup>

#### *Family Law*<sup>185</sup>

The *Family Law Act*<sup>186</sup> and the *Children's Law Reform Act*<sup>187</sup> govern family law matters in Ontario.

The *Family Law Act* contemplates that couples will privately resolve their marital affairs by virtue of a domestic contract which can include arbitration. Where couples seek an alternative means of dividing their property than the equal division delineated in the *FLA*,<sup>188</sup> a court can intervene to determine whether the arbitration order failed to consider undisclosed significant assets, whether a party understood the nature or consequences of the arbitration agreement and any other matter in accordance with the law of contract.<sup>189</sup> A court will consider similar factors in determining whether to set aside an arbitration order that dealt with spousal support between married, common law spouses or same-sex partners.<sup>190</sup> If an agreement produces unconscionable results or will force family dependants to seek public assistance or if the terms of the arbitration

<sup>180</sup> *Family Statute Law Amendment Act*, S.O. 2006, c.1 [*Family Law Amendments*].

<sup>181</sup> Section 2.2 *Arbitration Act*, *Family Law Amendments*.

<sup>182</sup> Sections 2.1(1) and 2.1(2) *Arbitration Act*, *Family Law Amendments*.

<sup>183</sup> See s. 59.6(1) *Family Law Act*, *Family Law Amendments*.

<sup>184</sup> Section 58 *Arbitration Act*, *Family Law Amendments*.

<sup>185</sup> This section of the paper has drawn heavily from Natasha Bakht, "Arbitration, Religion and Family Law: Private Justice on the Backs of Women" (March 2005), online: National Association of Women and the Law <<http://www.nawl.ca/Documents/Arbitration-Final-0305.doc>>.

<sup>186</sup> *Family Law Act*, R.S.O. 1990, c. F.3, [*FLA*].

<sup>187</sup> *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

<sup>188</sup> *FLA*, *supra* note 9 at s. 5(1).

<sup>189</sup> *Ibid.* at s. 56(4).

<sup>190</sup> *Ibid.* at s. 33.



agreement were being breached, a court may grant an order respecting spousal support that overrides the terms of the arbitral award.

The law does not enforce certain kinds of agreements, as contrary to public policy, such as that women remain chaste as a condition of separation.<sup>191</sup> In addition, some rights cannot be waived in advance, such as the right to occupy the matrimonial home.<sup>192</sup>

As child support falls under the joint jurisdiction of the provinces and the federal government, an arbitrator will be unwise to stray far from the Child Support Guidelines.<sup>193</sup> Section 56(1.1) of the *FLA* additionally provides that a court may disregard any provision of a domestic contract where the child support provision is unreasonable having regard to the child support guidelines. The Court retains its inherent *parens patriae* jurisdiction to intervene in arbitral awards where necessary in the “best interests of the children.”<sup>194</sup>

### *Summary*

To have the force of law, family arbitrations in Ontario must now be conducted in accordance with the family law regime in Ontario or another Canadian jurisdiction. The government’s failure to fund independent legal advice may seriously undermine many couples’ ability to partake in legally enforceable family arbitrations. Despite the government’s insistence that the amendments prohibit religious arbitrations, religious arbitrators can simply conform to the amendments and perform religious arbitrations consistent with a family law jurisdiction in Canada.

Judges retain their *parens patriae* jurisdiction to intervene in arbitral awards involving children such as custody, access and child support. Judges’ ability to set aside arbitral awards in matters relating to property and spousal support is also possible, but in a more limited way.

### Prince Edward Island

*The Arbitration Act*<sup>195</sup> of Prince Edward Island stipulates that it applies to any arbitration “to which Her Majesty is a party”<sup>196</sup> as well as any arbitration under any Act unless the Act is inconsistent with the *Arbitration Act*, in which case the other Act prevails.<sup>197</sup> There is no mention of arbitration in family law matters suggesting that family matters

<sup>191</sup> *Ibid.* at s. 56(2).

<sup>192</sup> Section 52(2) of the *FLA*, *ibid.* provides that “A provision in a marriage contract purporting to limit a spouse’s rights under Part II (Matrimonial Home) is unenforceable.”

<sup>193</sup> See s. 15.1(3) of the *Divorce Act*, R.S., 1985, c. 3 and s. 33(11) and s. 56 (1.1) of *FLA*, *supra* note 9.

<sup>194</sup> See *Hercus*, *supra* note 2 at para. 76. See also *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 at s. 69 and *FLA*, *supra* note 9 at s. 56(1).

<sup>195</sup> *Arbitration Act*, R.S.P.E.I. 1998, c.A-16.

<sup>196</sup> *Ibid.*, at s.2.

<sup>197</sup> *Ibid.*, at s.3.

are arbitrable. The absence of a choice of law provision in the *Arbitration Act* implies that the only applicable law in family arbitration is that of Prince Edward Island and the law of Canada where applicable.

A submission made under the *Arbitration Act* is irrevocable unless a contrary intention is expressed in the submission.<sup>198</sup> If it is agreed in the submission that there can be an appeal, the appeal is to the Appeal Division.<sup>199</sup> When an appeal is heard at the Appeal Division from an arbitration award, the appeal is subject to the rules of the Appeal Division.<sup>200</sup> When there are no provisions in the submission regarding a right to an appeal, it is implied that the award is final and binding.<sup>201</sup>

### *Family Law*

The *Family Law Act* of Prince Edward Island<sup>202</sup> addresses mediation but not arbitration.<sup>203</sup> Like family law acts of many other provinces, Prince Edward Island's *Family Law Act* has many provisions surrounding domestic contracts<sup>204</sup> which prevail over the *Family Law Act*.<sup>205</sup>

Even if a domestic contract excludes the application of the *Family Law Act*, a court can set aside support and parental agreements in certain circumstances.<sup>206</sup> A court can also disregard provisions in domestic contracts that concern the education, moral training, custody or access to a child when it is in the best interests of the child to do so.<sup>207</sup> Courts can disregard child support provisions if it is in the opinion of the court that the provision is unreasonable having regard to the child support guidelines.<sup>208</sup> Finally, a court can set aside a contract or a provision in a contract if a party did not disclose significant debts or assets,<sup>209</sup> if a party did not understand the nature and consequences of a domestic contract,<sup>210</sup> or for other reasons in accordance with the laws of contracts.<sup>211</sup> These sections on setting aside a contract or a provision apply "despite any agreement to the contrary."<sup>212</sup>

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<sup>198</sup> *Ibid.*, at s.4.

<sup>199</sup> *Ibid.*, at s.21(2).

<sup>200</sup> *Ibid.*, at s.21(3).

<sup>201</sup> *Ibid.*, at the Schedule, number 11.

<sup>202</sup> *Family Law Act, R.S.P.E.I. 1988, c. F-2.1.*

<sup>203</sup> *Ibid.*, at s.3

<sup>204</sup> *Ibid.*, at ss.51(1), 52(1), 53(1).

<sup>205</sup> *Ibid.*, at s.2(6)

<sup>206</sup> *Ibid.*, at s.33(4). S.33(4)(a) relates to unconscionable circumstances, s.33(4)(b) relates to public money and s.33(4)(c) relates to defaults payments.

<sup>207</sup> *Ibid.*, at s.55(1).

<sup>208</sup> *Ibid.*, at s.55(1.1).

<sup>209</sup> *Ibid.*, at s.55(4)(a).

<sup>210</sup> *Ibid.*, at s.55(4)(b).

<sup>211</sup> *Ibid.*, at s.55(4)(c).

<sup>212</sup> *Ibid.*, at s.55(5).

## *Summary*

Like many other provinces, PEI's *Arbitration Act* does not exclude its application to family law matters. Likewise, the *Family Law Act* does not address arbitration. As a result, arbitration of family law matters is allowed in Prince Edward Island. However, the only applicable law in family arbitrations is the family law of Prince Edward Island and the law of Canada. .

If an arbitration agreement is considered to be a domestic contract, or if the arbitration results in a domestic contract, then the rules governing domestic contracts would apply. However, if the arbitration award is not considered a domestic contract and thus does not fall under the *Family Law Act*, an appeal from the award will be difficult. Unless the parties stipulated before hand that there be a right of appeal from an arbitration award, an award is final and binding.

## Quebec

The *Civil Code of Quebec* does not permit the use of arbitration in family law matters. The *Civil Code of Quebec* stipulates that “disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.”<sup>213</sup> Additionally, the National Assembly unanimously vetoed a motion that would have allowed for the use of sharia in family law matters.<sup>214</sup>

## Saskatchewan

### *Arbitration Law*

The Saskatchewan *Arbitration Act*<sup>215</sup> applies to any arbitration unless the application of the *Arbitration Act* is excluded by law.<sup>216</sup> The *Arbitration Act* also “applies with any necessary modification, to an arbitration conducted in accordance with another Act unless that Act provides otherwise.”<sup>217</sup> The *Arbitration Act* specifies that if there is a conflict between the *Arbitration Act* and another Act requiring or authorizing arbitration then the other Act prevails.<sup>218</sup> Neither of the family law acts in Saskatchewan discuss arbitration, thus, if family law arbitration were conducted it would likely fall under the *Arbitration Act*.

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<sup>213</sup> *Civil Code of Quebec S.Q.1991, c.64.*

<sup>214</sup> <http://montreal.cbc.ca/regional/servlet/View?filename=qc-sharia20050525>.

<sup>215</sup> *Arbitration Act, 1992 S.S. 1992, c. A-24.1.*

<sup>216</sup> *Ibid.*, at s.3(1)(a).

<sup>217</sup> *Ibid.*, at s.3(2)

<sup>218</sup> *Ibid.*, at s.3(3)(a).

The arbitral tribunal has the power to rule on its own jurisdiction<sup>219</sup> and also has the power to determine questions of law that arise during arbitration.<sup>220</sup> Additionally, the arbitral tribunal must apply the laws of a jurisdiction designated by the parties. If the parties do not designate the jurisdiction then the tribunal is to apply the laws of the jurisdiction it deems appropriate.<sup>221</sup> This choice of law provision allows for the application of religious principles in arbitration.

The arbitral tribunal is required to treat all parties “equally and fairly.”<sup>222</sup> All parties are also to be given the opportunity to present their case and to respond to the case against them.<sup>223</sup>

Under the *Arbitration Act*, courts are not allowed to intervene except to assist in conducting arbitrations,<sup>224</sup> to ensure that the arbitration is conducted pursuant to the arbitration agreement,<sup>225</sup> to prevent unequal or unfair treatment of the parties,<sup>226</sup> or to enforce awards.<sup>227</sup> A court can set aside an award if the award focuses on a subject that is not capable of being the subject of arbitration,<sup>228</sup> or if a party was not treated equally and fairly in the arbitration.<sup>229</sup>

There are two manners in which to appeal an award. First, if the parties stipulate in their arbitration agreement that there is a right to an appeal, then any party can appeal an award on a question of law, fact or mixed law and fact.<sup>230</sup> Second, if there is no provision surrounding appeals in an arbitration agreement, a party can appeal an award on a question of law by leave of the court if the court is satisfied that “the importance to the parties of the matters at stake in the arbitration justifies an appeal”<sup>231</sup> and “determination of the question of law at issue will significantly affect the rights of the parties.”<sup>232</sup> If neither of these two methods are applicable, then the award binds the parties.<sup>233</sup>

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<sup>219</sup> *Ibid.*, at s.18(1).

<sup>220</sup> *Ibid.*, at s.18(2).

<sup>221</sup> *Ibid.*, at s.33(1).

<sup>222</sup> *Ibid.*, at s.20(1).

<sup>223</sup> *Ibid.*, at s.20(2).

<sup>224</sup> *Ibid.*, at s.7(a).

<sup>225</sup> *Ibid.*, at s.7(b).

<sup>226</sup> *Ibid.*, at s.7(c).

<sup>227</sup> *Ibid.*, at s.7(d).

<sup>228</sup> *Ibid.*, at s.46(1)(e).

<sup>229</sup> *Ibid.*, at s.46(1)(f).

<sup>230</sup> *Ibid.*, at s.45(1).

<sup>231</sup> *Ibid.*, at s.45(2)(a).

<sup>232</sup> *Ibid.*, at s.45(2)(b).

<sup>233</sup> *Ibid.*, at s.38.

## Family Law

The *Family Maintenance Act*<sup>234</sup> and the *Family Property Act*<sup>235</sup> are the applicable family law acts in Saskatchewan. Under the *Family Maintenance Act*, an agreement is defined as an agreement made around a matter dealt with in the *Family Maintenance Act* that is made in writing and signed by the parties.<sup>236</sup> Under this Act, an agreement that includes child or spousal support can be filed with the Court of the Queen's Bench. If this is done, it can be enforced as if it were an order of the Queen's Bench.<sup>237</sup> This holds true despite any agreement to the contrary.<sup>238</sup> It appears that this wording would permit an arbitration award dealing with child or spousal support to be enforced as if it were an order of the Queen's Bench if it is filed properly.

The *Family Maintenance Act* further stipulates that there is a right of appeal from any order made pursuant to the Act.<sup>239</sup> Therefore, if an award is considered an agreement and filed correctly so that it is enforced as if it were a court order, it is appealable. However, awards do not have to be filed. If they are not, then they would not be appealable under the *Family Maintenance Act*.

The *Family Property Act* regulates the division of family property. The stated purpose of the Act is:

to recognize that child care, household management and financial provision are the joint and mutual responsibilities of spouses, and that inherent in the spousal relationship there is joint contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities that entitles each spouse to an equal distribution of the family property, subject to the exceptions, exemptions and equitable considerations mentioned in this Act.<sup>240</sup>

The Act provides for the equal division of property<sup>241</sup> unless equal division would be unfair.<sup>242</sup> In making an order dividing property, the court should have regard for written agreements between the spouses.<sup>243</sup> If property was addressed in a spousal contract then it is exempt from the Act,<sup>244</sup> unless the court is of the opinion that the contract when entered into was "unconscionable or grossly unfair."<sup>245</sup>

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<sup>234</sup> *Family Maintenance Act*, 1997 S.S. 997, c. F-6.2.

<sup>235</sup> *Family Property Act* S.S. 1997, c. F-6.3.

<sup>236</sup> *Ibid.*, *Family Maintenance Act* at s.2(a) & s.2(b).

<sup>237</sup> *Ibid.*, s.11(1) & s.11(2).

<sup>238</sup> *Ibid.*, s.11(3).

<sup>239</sup> *Ibid.*, s.25(1).

<sup>240</sup> *Supra* note 235 at s.20.

<sup>241</sup> *Ibid.*, at s. 21(1).

<sup>242</sup> *Ibid.*, at s.21(2).

<sup>243</sup> *Ibid.*, at s.21(3)(a).

<sup>244</sup> *Ibid.*, at s.24(1).

<sup>245</sup> *Ibid.*, at s.24(2).

## Summary

As the use of arbitration in family law matters is excluded in neither the *Arbitration Act* nor any of the family law acts of Saskatchewan, family arbitration is permissible. The choice of law provision in the *Arbitration Act* also permits the possibility of religious arbitration in family law matters. An arbitration award can be challenged if it is unequal or unfair. It is also appealable if it is important and determines a question of law that will significantly affect the rights of the parties. Under the *Family Maintenance Act*, if an award fits the definition of an agreement and if it is filed correctly it can become an order of the Queens Bench. If it concerns spousal or child support it is then appealable. If an award is considered to be a spousal contract, then the *Family Property Act* applies and the court may vary a contract that it believes is unconscionable or grossly unfair.

## Yukon

The Yukon *Arbitration Act*<sup>246</sup> “applies to every arbitration under any Act whenever passed as if the arbitration were pursuant to a submission, except insofar as this Act is inconsistent with the Act regulating the arbitration or with rules or procedure authorized or recognized by that Act.”<sup>247</sup>

Submissions made under this Act are irrevocable and have the same effect as a court order.<sup>248</sup> An arbitration award is final and binding.<sup>249</sup> The only exception to this is that the parties in their submission could stipulate that there be a right of appeal.<sup>250</sup> If a submission does not provide for an appeal, a party can apply to a judge to set aside an award if an arbitrator or umpire has acted inappropriately<sup>251</sup> or if an arbitration or award “has been improperly procured.”<sup>252</sup> In these instances, a judge can dismiss the application or set aside the arbitration award.<sup>253</sup> What is considered inappropriate or improper is not defined.

The Yukon *Arbitration Act* does not include a choice of law provision. Thus, family arbitrations conducted in the territory would have to utilize the family law jurisdictions of the Yukon and Canada where applicable.

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<sup>246</sup> *Arbitration Act R.S.Y. 2002, c.8.*

<sup>247</sup> *Ibid.*, s.2.

<sup>248</sup> *Ibid.*, s.3(1).

<sup>249</sup> *Ibid.*, s.25.

<sup>250</sup> *Ibid.*, s.26.

<sup>251</sup> *Ibid.*, at s.27(1)(a).

<sup>252</sup> *Ibid.*, at s.27(1)(b).

<sup>253</sup> *Ibid.*

## Family Law

In the *Family Property and Support Act*,<sup>254</sup> marriage contracts and separation agreements prevail over the provisions of the *Family Property and Support Act*.<sup>255</sup> There are a few exceptions to this rule.

One exception is that if a provision in a domestic contract limits the jurisdiction of a court “to determine the extent to which subsection (1) applies in respect of the contract” it is void.<sup>256</sup> Second, any provision in a marriage contract that limits rights in Part 2, which concerns the family home, is void.<sup>257</sup> Three, if a court believes that a spouse agreed to any provision in a domestic contract because of undue influence exerted by the other spouse, a court has the power not to give effect to the provision.<sup>258</sup> Four, there are three circumstances where a court can set aside a support agreement or waiver. This is true even if the contract excludes this provision.<sup>259</sup> The three instances are if support or waiver of support results in unconscionable circumstances,<sup>260</sup> if support or waiver of support concerns someone qualifying for public assistance,<sup>261</sup> and if there has been a default in paying support under the contract or agreement.<sup>262</sup>

Under the *Family Property and Support Act*, there are also provisions that discuss cohabitation agreements. People who are cohabitating and not married can enter into an agreement surrounding property, support and other matters.<sup>263</sup> If they marry, the cohabitation agreement becomes a marriage contract.<sup>264</sup> The agreement reached through a cohabitation agreement prevails over the Act, except as otherwise provided.<sup>265</sup> However, in order to be valid, a contract must be in writing, signed by both parties and witnessed by an independent third party.<sup>266</sup> The one matter that may not be settled by this kind of contract is child support. A court can disregard any child support provision of a domestic contract if the support is not reasonable when taking into account the child support guidelines as well as other child support provisions.<sup>267</sup>

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<sup>254</sup> *Family Property and Support Act R.S.Y. 2002, c.83.*

<sup>255</sup> *Ibid.*, s.2(1).

<sup>256</sup> *Ibid.*, s.2(2).

<sup>257</sup> *Ibid.*, s.2(3).

<sup>258</sup> *Ibid.*, s.2(4).

<sup>259</sup> *Ibid.*, at s.34(3).

<sup>260</sup> *Ibid.*, at s.34(3)(a).

<sup>261</sup> *Ibid.*, at s.34(3)(b).

<sup>262</sup> *Ibid.*, at s.34(3)(c).

<sup>263</sup> *Ibid.*, at s.60(1).

<sup>264</sup> *Ibid.*, at s.60(2).

<sup>265</sup> *Ibid.*, at s.60(4).

<sup>266</sup> *Ibid.*, at s.61(1).

<sup>267</sup> *Ibid.*, at s.64.

## Summary

Because the *Family Property and Support Act* is consistent with the *Arbitration Act*, the *Arbitration Act* applies to any arbitration conducted in a family law matter. Religious arbitration is not permissible per se because of the absence of a choice of law provision in the *Arbitration Act*, and awards are final and binding unless they are inappropriate or improper. If arbitration awards can be considered domestic contracts, they prevail over the *Family Property and Support Act* except in the cases of undue influence, cases where unconscionable circumstances result or cases where an agreement concerns someone on public assistance or who is in default of their payments. In the event that an arbitration award is not considered to be a domestic contract, the only way to appeal an award is through the *Arbitration Act*.