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Latitude only goes so far for self-represented: court

Man didn't participate and reasons 'remain unexplained'

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Self-represented parties participating in an arbitration proceeding aren't entitled to any special rules of procedure, the Court of Appeal for British Columbia has found.

While natural justice principles require arbitrators to act with procedural fairness, which may result in some latitude being granted to self-represented parties who are unfamiliar with process requirements, that doesn't amount to a duty on the part of the arbitrator, according to the court.

"In short, an arbitrator does not have any special obligations to a self-represented party beyond the natural justice requirements owed to any party. The overarching test is fairness," wrote Justice Daphne Smith in a unanimous decision in *0927613 B.C. Ltd. V. 0941187 B.C. Ltd.*, [2015] BCCA 457.

The case involved two companies who entered into a joint venture agreement for the development of a townhouse complex. When a dispute arose over the financial contributions of the company 09027613 B.C. Ltd., the parties entered arbitration.

After the process began, the sole officer, shareholder and director of the company, Jaswant Singh Sangha, became self-represented and ceased to participate in the proceedings.

Following the arbitrator's judgment that he had failed to submit payments required by the agreement, Sangha successfully petitioned to have the award set aside based on arbitral error, claiming the arbitrator had failed to follow natural justice requirements.

While the chambers judge in that proceeding found that "natural justice in an arbitral setting must include some special consideration of the unrepresented," the Court of Appeal found he failed to consider evidence that Sangha had been given every opportunity to participate in the process but chose not to.

"What I hear the court saying is that there's only one set of rules here. The integrity of the process requires that everybody plays by the same rules, and it's for the arbitrator to administer those.

Jeffrey Hand
Lawyer

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Patrick Williams
Clark Wilson LLP

"(Sangha) knew what was required of him during the arbitration process but after discharging his counsel, chose not to participate for reasons that to this date remain unexplained," noted Justice Smith.

"In these circumstances, I am unable to find any breach of natural justice obligations or duties of procedural unfairness toward the respondent…The arbitrator had no further obligation to the respondent after he chose not to participate."

While not making any new law, the ruling is timely and helpful given the increasing numbers of self-represented parties appearing in arbitration, said Vancouver lawyer Jeffrey Hand, a certified mediator and arbitrator who teaches alternative dispute resolution to University of British Columbia law students.

"What I hear the court saying is that there's only one set of rules here," he said. "The integrity of the process requires that everybody plays by the same rules, and it's for the arbitrator to administer those."

Despite that, Hand says procedural fairness requires arbitrators ensure self-represented participants aren't disadvantaged simply because they don't understand the process.

He recalls a recent arbitration where a self-represented appellant stood up during closing submissions to admit that he wasn't certain what he was to do. After Hand took a few minutes to explain the purpose and procedures of the submissions, he says the individual was able to adequately participate in the process.

"Having that person not sure what they were supposed to do and possibly not taking full advantage of the opportunity to make a submission, that would be unfair," he said.

He adds that lawyers involved in proceedings with self-represented litigants typically recognize that minor procedural indulgences offered by arbitrators don't reflect any bias or partiality toward the unrepresented party.

Patrick Williams, a partner with Clark Wilson LLP and president of the British Columbia International Commercial Arbitration Centre, agrees managing cases involving an increasing number of self-represented litigants requires arbitrators to walk a fine balancing line in ensuring fairness to both parties.

"The arbitrator really becomes nearly a pseudo-counsel to the self-represented party, to the extent of making sure they aren't compromised or disadvantaged because they don't understand the rules of procedure," he said.

But while arbitrators need to ensure everyone understands the process, they also need to be "aggressively strict" in maintaining compliance, to avoid unnecessary delays or the perception that one party has been given an unfair advantage.

"What makes an arbitration successful is the ability of the arbitrator to be the manager of the process," Williams says.

Self-represented parties are "the wave of the future," he adds, pointing to such initiatives as B.C.'s Civil Resolution Tribunal Act, which will soon require small claims and strata (condominium) disputes to be heard in forums that will exclude lawyers.

"The future will see a significant number of adjudications outside the courtroom in which lawyers will not be involved."

Guidance for managing the increasingly frequent cases featuring self-represented parties facing off against lawyers is valuable to have, says Hand.

"It's a pressing timely issue because unrepresented parties are popping up more and more. It's a good reminder to the arbitration community about how to conduct a hearing with that sort of power imbalance."

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