SELF REPRESENTED PARTIES IN AN ARBITRATION PROCESS

One of the perceived advantages of arbitrations as compared to the court system is that the due to the potentially expedient resolution that arbitrations offer, the cost can be less. Regardless, there is no doubt that arbitrations can be expensive, and a good part of that expense is due to representation by legal counsel. It is not a stretch to assume that self-represented parties in the arbitration process is on the rise.

One of the challenges facing an arbitrator is ensuring that a self-represented party is not at a disadvantage. The arbitrator walks a fine line, since there could be a perception that the legally represented party is at a disadvantage due to the latitude afforded the self-represented party.

A recent case is very instructive. The decision in *0927613 B.C. Ltd. v. 0941187 B.C. Ltd.* (2015 BCCA 457) was handed down November 6, 2015. This appeal concerned the application of the principles of natural justice to arbitrations involving self-represented litigants. The judge in the underlying proceeding found that "natural justice in an arbitral setting must include some special consideration of the unrepresented". In his opinion, an arbitrator had a duty to provide guidance and assistance to a self-represented party that included explaining to that party "the procedural situation" he might find himself in. In this case the judge found that the arbitrator, in failing to do so, had failed to comply with the duties of procedural fairness and natural justice, that his breach of those obligations were not technicalities or irregularities, and that a miscarriage of justice would result unless the arbitral award was set aside.

The self-represented party (the "SRP") was represented at one point, but before a pre-hearing conference was conducted counsel terminated the retainer due to the SRP not being able to afford counsel (or at least that was the allegation). The SRP did not attend the pre-hearing conference, nor did he attend the scheduled arbitration hearing. The arbitrator, Mr. John Sanderson, QC, made his award in the absence of the SRP, who at all times was had been notified of the dates. Upon the successful party attempting to specifically perform pursuant to the Award, the SRP appealed the Award on the basis of arbitral error and miscarriage of justice, pursuant to s. 30 of the *Arbitration Act*. The petition came on for hearing before a chambers judge, who granted the respondent's application under s. 30 of the *Act.* The judge addressed only the application to set aside the Awards based on

arbitral error. He granted the order based on what he found to be a failure by the arbitrator to meet "a number of procedural obligations", including: (i) a duty to consult with both parties before setting the hearing dates; (ii) a duty to give the respondent full opportunity to present its case and strive to achieve a determination of the proceeding on its merits; and (iii) a duty to explain to the respondent's self-represented principal "the procedural situation in which he found himself." He concluded the arbitrator failed to meet the legal obligations of natural justice and procedural fairness that he held were required for a self-represented litigant in an arbitration proceeding, and that failure "would constitute a substantial wrong or miscarriage of justice" to the respondent unless the Awards were set aside.

The successful party at the arbitration hearing appealed the chambers judge's ruling. The Appellant was successful. The Court of Appeal in detail discusses the manner in which self-represented litigants must be treated in an arbitration. The Appellate Court found that the SRP had been given every opportunity to present his case – he was even granted an extension of time to file his Statement of Claim and Submissions in advance of the hearing. He had in fact commenced the arbitration. He chose not to participate and provide no evidence why. The Court of Appeal found that if a party chose not to participate after receiving notice of a proceeding, that party cannot later be said to have been denied natural justice or procedural fairness.

A couple of paragraphs from the judgment are worth reproducing.

[64] There are no special rules of procedure for a self-represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration: an impartial arbitrator, procedural fairness of notice, and a fair or reasonable opportunity to make submissions and to respond to the other side's case. As this Court noted in Burnaby (City) v. Oh, 2011 BCCA 222 at para. 36, self-represented litigants do not have "some kind of special status" that allows them to ignore rules of procedure. In Murphy v. Wynne, 2012 BCCA 113 at para. 16, Madam Justice Neilson, relying on comments of Mr. Justice Chiasson in Stark v. Vancouver School District No. 39, 2012 BCCA 41 (in Chambers) and Shebib v. Victoria (City), 2012 BCCA 42 (in Chambers), observed that "[w]hile it is important unrepresented litigants have a full opportunity to avail themselves

of our court processes, all litigants must keep within the bounds of those processes." These comments in my view apply equally to an arbitration forum that has been chosen by the parties for the resolution of their dispute.

[65] In the context of a court proceeding, the Canadian Judicial Council in its Statement of Principles on Self-Represented Litigants and Accused Persons, (Ottawa: Canadian Judicial Council, 2006) mandates fairness so as to ensure "equality according to law" in the sense of giving every litigant a fair opportunity to present their case. It also, however, imposes an obligation on self-represented parties to be respectful and familiarize themselves with the relevant practices and procedures of the court process. These principles, in my view, apply equally to the arbitration process. While some latitude is to be given to self-represented parties who may not understand or be unfamiliar with the arbitration process, an arbitrator, like a judge, is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so. 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. (emphasis added)

The Appellate Court referred to the Rules of BCICAC by operation of s. 22(1) of the Arbitration *Act* (para. 66). *In this case, the evidence established that the arbitrator followed the Rules set out by the Centre. He ensured that: (i) each party received notice of the arbitration proceeding; (ii) each party was given the opportunity to present their case by imposing dates for the parties to exchange their respective Statements of Position and Submissions; (iii) he consulted with both parties in setting a timely hearing for the determination of the dispute on the merits; (iv) he acted within the jurisdiction accorded to him under the Rules by deciding the matters remitted to him for determination; (v) the respondent was aware of the issues to be determined which he had outlined in his petition; (vi) the respondent was notified in writing of the hearing date after Mr. Sangha had failed to attend the second case management conference; (vii) his reasons for the Awards were based on the evidence presented; and (viii) the Awards were delivered to each of the parties in a timely way.*

The Court of Appeal noted that the leave to appeal before the chambers judge was not easily met and referred to *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53. Once more this Supreme Court of Canada decison has been applied in the British Columbia courts. In overturning the trial judge's decision, the Court of Appeal held that the process had been fair to the SRP and the arbitrator had no further obligation to the SRP after he chose not to participate.

What can we learn as arbitrators from this decision? There are no special rules of procedure for, or special obligations to, a self-represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration: an impartial arbitrator, procedural fairness of notice, and a fair or reasonable opportunity to make submissions and to respond to the other side's case.

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