

The Rights and Responsibilities of Self-Represented Parties in Arbitrations

John-Paul E. Boyd
October 2018

You are a “self-represented party” if you are involved in an arbitration and are not represented by a lawyer. There is no rule that requires you to have a lawyer to represent you in an arbitration. You have the right to represent yourself.

This information is about your rights and your responsibilities as a self-represented party involved in an arbitration in Canada, and what you should expect from the arbitrators and lawyers you will meet along the way. It is based on an earlier paper of mine about the rights and responsibilities of people without lawyers who are involved in litigation.

I. LAWYERS

1. You should expect to be treated with respect and courtesy by the other party's lawyer.

All Canadian lawyers are members of their province's or territory's law society. Each law society has a written code of conduct that describes the minimum standards of behaviour expected of their members. In general, these codes of conduct require lawyers to treat opposing parties who are not represented by counsel politely and in the same courteous manner as they would treat a fellow lawyer.

These rules apply to lawyers whether they are representing someone in court or before a tribunal, in mediation or in arbitration.

Of course, arbitration can be difficult and emotional at times, and you must remember that the lawyer's job is to represent his or her client, not you, and to advocate for his or her client's interests, not your interests. Don't mistake a lawyer's position on behalf of his or her client as rudeness or incivility.

2. You should expect to have your emails, letters and telephone calls to the other party's lawyer returned reasonably promptly.

The law societies' codes of conduct require lawyers to respond to communications reasonably promptly. This doesn't mean right away or even the same day, but in general you should expect the lawyer to reply to your letter,

email or telephone call within two or three weeks, and sooner if the issue is urgent.

It is possible that a lawyer may insist on communicating with you only in writing. Lawyers usually want to restrict communication like this because they want to keep a written record of everything that is said and make sure that there are no misunderstandings.

You should not expect the lawyer to answer legal questions or give you legal advice. The lawyer is the lawyer for the other party, and law society rules prevent the lawyer from giving you legal advice. The lawyer can, and in some cases should, give you legal information. Any legal information the lawyer provides to you should be factual, correct and unbiased.

3. You should expect the lawyer to keep his or her word.

The law societies' codes of conduct require lawyers to act in good faith and to do the things they have told you or the arbitrator they would do. Although circumstances may change and it may become impossible or inappropriate for the lawyer to carry out a promise, the requirement to act in good faith means that the lawyer cannot promise to do something knowing that it can't be done.

Lawyers may also make special promises called undertakings. A lawyer who gives or accepts an undertaking is required to fulfill that undertaking. The law societies take lawyers' breaches of undertakings very seriously.

4. What happens if the lawyer doesn't do what he or she is supposed to do?

Law societies say who can and cannot work as a lawyer and have the power to discipline their members. You have the right to complain to the lawyer's law society if you believe that the lawyer has behaved improperly. You do not need a lawyer to make a complaint and there are no fees charged to make a complaint.

Law societies' primary purpose is to protect the public. They are not the lawyer's ally and will not automatically take the lawyer's side. Law societies take complaints seriously.

II. ARBITRATORS

1. You should expect the arbitrator to treat you with respect and courtesy.

The job of the arbitrator is to manage the steps in an arbitration fairly and to make fair decisions when decisions are required.

Fairness means, among other things, that the arbitrator must listen to you carefully, follow the rules of the arbitration, and not treat you substantially differently than the arbitrator treats the other party or the other party's lawyer.

Because the arbitrator must also be fair to the other party and ensure that everyone has the opportunity to present their evidence and their arguments, the arbitrator may have to limit the time you have or the questions you ask. The arbitrator may also ask questions to help you get to the legal issues involved in your case. Don't mistake the arbitrator's wish to keep the hearing on track, understand your position, or help you or the other party as rudeness or incivility.

If your arbitrator is a lawyer, your arbitrator will be a member of his or her province's or territory's law society. Each law society has a written code of conduct that describes the minimum standards of behaviour expected of their members. These rules apply to lawyers whether they are representing someone or serving as an arbitrator.

2. You should expect to have your emails, letters and telephone calls to the arbitrator returned reasonably promptly.

The law societies' codes of conduct require lawyers to respond to communications reasonably promptly. This doesn't mean right away or even the same day, but in general you should expect a lawyer who is serving as your arbitrator to reply to your letter, email or telephone call within one or two weeks, and sooner if the issue is urgent.

Your arbitrator may insist on communicating with you only in writing, and may require that all communications are copied to the other party or the other party's lawyer, whether your arbitrator is a lawyer or not. Arbitrators usually want to restrict communication like this because:

- a) the arbitrator wants to keep a written record of everything that is said; and,
- b) the arbitrator wants to make sure that each party knows exactly what the other party has said to him or her.

If you have not copied your communication to the other party, you may also find that the arbitrator will forward a copy to the other party. The arbitrator will not keep your communication secret.

3. You should expect the arbitrator to give you information about arbitration when you need it.

Fairness also means that the arbitrator must give you information about arbitration processes and procedures so that you understand the rules of the arbitration and the steps in your arbitration. Although the arbitrator will not give you legal advice or tell you how to manage your case, the arbitrator will usually give you enough information to help you can present your case as best you can.

You must not count on the arbitrator to help you present your case. That is your job, and the arbitrator cannot compromise his or her independence and impartiality. It is your responsibility to present your evidence and your arguments.

4. You should expect the arbitrator to follow the rules of arbitration and the principles of fundamental justice.

The rules of arbitration govern every step of your arbitration and the arbitrator must manage your arbitration as those rules require. The arbitrator must also follow the principles of fundamental justice. These principles require that the procedure used in an arbitration is fair, that both parties are treated equally and that each party has the opportunity to present their side of the case as best they can.

The rules give the arbitrator the discretion to adapt the rules to special situations and make exceptions to the rules to make sure that the arbitration is fair to everyone. The principles of fundamental justice may require the arbitrator to make exceptions to the rules of arbitration, and to the rules of evidence, from time to time, in order to ensure that everyone is heard and has had the chance to present their cases, and that the arbitration is as fair as possible.

5. You should expect the arbitrator to give you a fair hearing.

The arbitrator must hear your case, your evidence and all that you and the other party or the other party's lawyer have to say without bias and without favouring either you or the other party. Although the arbitrator may decide to give you some leeway in how you follow the rules of arbitration, arbitration procedures and rules of evidence, the arbitrator must apply the rules equally to you and to the other party, whether the other party has a lawyer or not.

Depending on the circumstances and the nature of the case, the arbitrator may:

- a) provide you with information about the law and the rules of evidence applied in the arbitration;

- b) change how evidence is presented and the order of any witnesses; and,
- c) question you, the other party and the witnesses.

Because the arbitrator must also be fair to the other party and to the witnesses who are being asked to give evidence, and take into account the cost and length of time an arbitration takes, the arbitrator may have to limit the time you have to present your evidence or your arguments. Don't mistake the arbitrator's need to manage your hearing as efficiently as possible as unfairness.

6. What happens if the arbitrator doesn't do what he or she is supposed to do?

Arbitrators who are lawyers must follow their law society's Code of Conduct, and can be disciplined by their law society. Arbitrators who are members of other regulated professions, such as psychologists and social workers, must follow their governing organizations' expectations about their members' behaviour and professional practices, and may be disciplined by their governing organization.

Arbitrators who are members of professional arbitrators' associations, may also be subject to oversight and discipline by those associations. These associations have expectations of how their members will conduct themselves and their arbitrations, and may have the power to discipline their members.

You have the right to complain to your arbitrator's governing organization, and to any arbitrators' association to which your arbitrator may belong, if you believe that your arbitrator has behaved improperly. You do not need a lawyer to make a complaint and there are no fees charged to make a complaint.

However, it is important to know that you do not have the right to complain to these organizations about the arbitrator's decision. If you are unhappy with the result of an arbitration, you may be able to appeal the decision to the court or take some other step to challenge or try to change the decision. Arbitrators' governing organizations and arbitrators' associations are not able to change the decisions of their members.

III. YOUR RESPONSIBILITIES

1. You have the obligation follow your participation agreement and to learn about and follow the rules of arbitration.

Everyone who is involved in an arbitration must follow the terms of the participation agreement governing the arbitration and the rules of the arbitration. The participation agreement, which may also be called an arbitration

agreement, governs the legal relationship between you, the other party and the arbitrator during the arbitration. The rules govern how the arbitration is managed.

Different arbitrations use different rules. It's important that the rules you are learning about are the rules that apply to your arbitration. Your arbitrator will provide you with a copy of the rules if you don't have one.

The rules of arbitration apply to you and to the other party, whether you have a lawyer or not, and there can be serious consequences if you don't follow the rules. It is your responsibility to learn the rules that apply to you and your arbitration. If you do not, you may lose the right to make or defend an argument, or you may lose the right to present certain kinds of evidence at your arbitration hearing.

2. You should learn about the law that applies to your legal dispute.

You should familiarize yourself with the law and the legal principles that govern the issues in your arbitration. You will be expected to prepare and present your own case at your arbitration.

It can be difficult to learn about the law that applies to your legal dispute, however you can usually get a good introduction to the applicable law and legal principles by meeting with a lawyer through a pro bono organization or through a lawyer referral service, or through a paid consultation with a private lawyer.

Whether you are able to get legal advice or not, the laws of the federal government and the governments of each province and territory are available online, and university law libraries and most courthouse libraries are open to the public, although they may have restricted business hours. Many websites offer public legal information about the law, however you must make sure that the website you are reading provides information that applies to your province or territory.

3. You have the obligation to do as the arbitrator directs.

The arbitrator is responsible for managing and deciding your arbitration, and is required to make orders and directions as may be necessary for these purposes. You agreed to comply with the arbitrator's directions when you signed your participation agreement. As a result, you must obey the arbitrator's orders and directions, whether you think they're fair or not. If you don't, the arbitrator may resign and quit the arbitration, or the other party may go to court to get an order enforcing the arbitrator's orders and directions and may ask that you pay his or her court costs.

You must also obey the arbitrator's final decision at the end of the arbitration. You agreed to be bound by the arbitrator's decision when you signed the participation agreement. If you do not obey the arbitrator's decision, the other party may go to court to enforce the decision and may ask that you pay his or her court costs.

If you don't like the arbitrator's orders, directions or final decision, you may be able to appeal the decision to the court or take some other step to challenge or try to change the decision. But don't just refuse to comply with it.

IV. HEARINGS

The cases that follow only concern people who were involved in litigation; they are included because the principles these cases stand for also apply to people involved in arbitration. Arbitrators have many of the same responsibilities as judges, including the duty to provide a hearing process that is procedurally fair and the duty to remain impartial and unbiased.

A. Fairness

The role of the arbitrator is to listen your case and your evidence in a neutral, impartial manner. Fairness may require the arbitrator to give you assistance and information about arbitration procedures, and to accommodate the fact that you are representing yourself.

1. You have the right to a fair hearing.

"Trial judges have a responsibility, particularly when dealing with unrepresented litigants, to strike a balance between the desire to resolve matters expeditiously, and the need to adjudicate cases in a principled manner that employs a fair process and preserves the appearance of justice."

Wagg v. Canada, [2003 FCA 303](#)

"Fundamental to any concept of procedural fairness must be a judicial duty to do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons."

Seminatore v. Banks, [2006 NBCA 110](#)

2. What does fairness mean?

"Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather it demands that he have a fair opportunity to present his case to the best of his ability. ... It does require that the trial judge treat the litigant fairly and attempt to accommodate the unrepresented

litigants' unfamiliarity with the process so as to permit them to present their case."

Davids v. Davids (1999), [125 OAC 375](#)

3. You have the right to be told about arbitration procedures.

"A trial judge is required to ensure that a self-represented litigant has basic information about the procedure before the court."

Graylake Holsteins Ltd. v. Kzam Farms Ltd., [2004 ABQB 828](#)

"Self-represented parties are entitled to receive assistance from [the judge] to permit them to fairly present their case on the issues in question. This may include directions on procedure, the nature of the evidence that can be presented, the calling of witnesses, the form of questioning, requests for adjournments and even the raising of substantive and evidentiary issues."

Kainz v. Potter (2006), [33 RFL \(6th\) 62](#) (Ont. S.C.)

"Judges must give appropriate [information] and instruction at each stage of the trial ... this duty also applies to judges dealing with interlocutory matters."

CT Comm Edmonton Ltd. v. Shaw Communications Inc., [2007 ABQB 473](#)

B. The Rules of Arbitration

The rules of arbitration govern how the arbitration is managed. They describe the processes and forms that must be used, they set out due dates and timelines for different processes, and they describe how hearings run. The rules of arbitration apply to both parties.

1. You have the obligation to comply with the rules of arbitration.

"While self represented parties may be granted more leniency in terms of the amount of time and number of opportunities they are given to comply with the Rules of Court, they are required to comply after being given a reasonable opportunity. There must be a fairness and an equal application of the law to both parties."

Ferstay v. Dywidag Systems International, [2009 BCSC 833](#)

2. The arbitrator may decide to exercise some latitude in how he or she applies the rules of arbitration to you, but this latitude is not limitless.

"The imperatives of the Rules may be mitigated somewhat ... by the Court's judicious exercise of the discretion to excuse compliance, but these are remedial measures and not a license for non-compliance."

Nowoselsky v. Canada, [2004 FCA 418](#)

“While self represented parties may be granted more leniency in terms of the amount of time and number of opportunities they are given to comply with the Rules of Court, they are required to comply after being given reasonable opportunity. There must be fairness and an equal application of the law to both parties.”

Ferstay v. Dywidag Systems International, [2009 BCSC 833](#)

C. Presenting Your Case

You are responsible for preparing and presenting your case to the best of your ability. The arbitrator may, in the interests of fairness, provide you with limited help in presenting your case, however the arbitrator may not give you legal advice and the arbitrator must remain impartial and unbiased.

1. You have the right to basic help with procedure from the arbitrator.

“A judge dealing with an unrepresented litigant has a responsibility to explain the proceedings and provide appropriate assistance.”

Staples v. Barnes, [2008 NLCA 9](#)

“A trial judge may intervene to clarify witness testimony in order to understand the evidence. A trial judge may assist litigants by directing them away from irrelevancies and indicating what issues are determinative of the matter, or by asking the litigant to focus their questioning of witnesses on legally relevant factual issues.”

Jimenez v. Azizbaigi, [2008 BCSC 1465](#)

2. The arbitrator will decide how much procedural help is fair to give you.

“An unrepresented litigant has the right to a fair trial and a trial judge has a duty to take reasonable steps to assist a self-represented litigant.”

Smith v. Doucette, [2005 NSSC 327](#)

“It is difficult for a judge to conduct a trial when one of the parties is self-represented. Two competing interests must be balanced. First the judge obviously cannot be an advocate for a party. At the same time the trial must be run as efficiently and fairly as possible. This may require the judge to offer guidance to a self-represented party. The appropriate balance falls within the judge’s discretion.”

Murphy v. Wulkowicz, [2005 NSCA 147](#)