

Corporate Self-Representation in Arbitrations

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This article discusses a recent Alberta Court of Appeal decision prohibiting corporations from self-representing in court, and whether the decision impacts the ability of a corporate party to represent itself in arbitration proceedings.

“Absolutely not” in Court says Alberta

On July 4, 2016 the Alberta Court of Appeal held that a corporation cannot be represented in the superior courts by a non-lawyer. Justice Rowbotham’s decision in *Park Avenue Flooring Inc v EllisDon Construction Services Inc*¹ (*Park Avenue*), concerned a Park Avenue appeal that included an application for an order permitting Deborah Miller, a director and officer of Park Avenue, to represent it for the appeal. Ms. Miller is not a lawyer, but had represented Park Avenue at trial pursuant to a 2007 Court of Queen’s Bench order (the *Order*).

The *Order* was granted prior to the new Alberta *Rules of Court* (the **New Rules**) coming into force. Under the old Alberta *Rules of Court* (the **Old Rules**), the court had discretion to permit a corporation to be represented by an agent other than a lawyer. However, the New Rules do not provide for that discretion, and Rule 2.33 specifically states that the limited assistance that may be provided to a party by a non-lawyer must not contravene section 106(1) of the *Legal Profession Act* (the *LPA*). That section prohibits non-lawyers from “commencing, carrying-on, or defending an action on behalf of any other person.”

Regardless of the *Order*, the Alberta Court of Appeal could not permit Ms. Miller’s representation as it would contravene the *LPA*. This case makes it clear that pursuant to the New Rules and the *LPA*, the court has no discretion to permit a corporation to be represented by a non-lawyer.

The prohibition against corporate self-representation in Alberta may extend to other jurisdictions in Canada. The comparable legislation in some provinces provides an even broader definition of the practice of law than the Alberta *LPA*. For example, in British Columbia, appearing as counsel, or *advocate*, is the practice of law, and only lawyers are permitted to engage in such activity. Corporations do not fit into one of the enumerated exceptions in the British Columbia *LPA*. Ontario has similar legislative provisions.

International commercial arbitration

International commercial contracts frequently contain clauses submitting future disputes to arbitration. By doing so, the parties take the resolution of their disputes outside the scope of the courts and into a private regime. In their arbitration agreement, the parties may even exclude representation by lawyers.

The United Nations Commission on International Trade Law (**UNCITRAL**) Model Law (1985) on International Commercial Arbitration (the **Model Law**) provides the framework for international arbitration legislation in Canada. Each province and territory has enacted legislation governing international arbitration, generally by incorporating the Model Law as a schedule to the relevant act.

¹ 2016 ABCA 211, leave to appeal to a panel refused, 2016 ABCA 327.

The procedure of an international arbitration is determined by agreement, or by the arbitrator, and not by provincial or federal civil rules of procedure. Article 19(1) of the Model Law (adopted in each province) provides that the parties are free to agree on the procedure to be followed by the arbitral tribunal. In other words, parties drafting an arbitration agreement may explicitly include or exclude the possibility for a corporation to self-represent during the proceedings.

International arbitration in Alberta

Regardless of what the arbitration agreement provides with respect to the involvement of counsel, parties should consider whether section 106 of the *LPA* applies to arbitration in Alberta. There are no cases which cite the *LPA* in respect of whether an arbitration constitutes “commencing, carrying-on, or defending an action”.

“Action” is traditionally defined as meaning any civil proceeding commenced by writ or in any other matter prescribed by the *Rules of Court*.² While an arbitral hearing may not fit into the traditional definition of an “action”, the activities carried on in an arbitration are similar to those found in a civil action. Essentially, an arbitration is a proceeding by which one party seeks to enforce some right against, or to restrain the commission of some wrong by, another party – two scenarios analogous to civil proceedings.

The Ontario Court of Appeal recently found that the Ontario *LPA* prohibits a non-lawyer agent from representing individuals in administrative proceedings before the Landlord and Tenant Board. Appearing “as a paid representative to make submissions, examine witnesses, and cross-examine witnesses is quintessentially legal... work” and thus constitutes the practice of law.³

Although an arbitral tribunal is not a “court of civil... jurisdiction” referred to in the *LPA*, like administrative proceedings, arbitrations generally involve making submissions, examining witnesses and arguing legal issues. In the wake of *Park Avenue*, it may be that such activities cannot be carried on by a non-lawyer representing a corporation in arbitration, as they constitute the activities of a barrister and solicitor.

The decision in *Park Avenue* does not, however, limit lawyers from other Canadian jurisdictions from appearing in court and acting as counsel in arbitrations in Alberta.⁴

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² *Royal Canadian Legion Norwood (Alberta) Branch 178 v Edmonton (City)*, [1994] AJ No 40 (CA).

³ *Law Society of Upper Canada v Chiarelli*, 2014 ONCA 391.

⁴ Also, at least some involvement by non-Canadian lawyers may be allowed under *LPA* Section 106(2)(m), which is one of the exceptions to the prohibition against practicing as a barrister or solicitor: “a person holding professional legal qualifications obtained in a country outside Canada in respect of services permitted to be provided by that person in accordance with the rules in giving legal advice respecting the laws of that country.”