

Paralegal Rights of Appearance at Arbitration in Ontario

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Updated June 2015. This article is legal information, not legal advice. Useful links are at the end.

The author invites and welcomes feedback including a critical analysis.

This article focuses on whether or not a paralegal in Ontario can represent a party at an arbitration conducted pursuant to Ontario's *Arbitration Act, 1991* (the "*Arbitration Act*").

Executive Summary

Can a paralegal represent a party in an arbitration pursuant to the *Arbitration Act*?

While it appears the answer to this question is yes and that paralegals can represent parties where more than \$25,000 is at stake, there is no concrete answer.

Answering this question may not even matter as there are strong policy arguments in favour of paralegal representation in arbitrations.

Hassell Arbitration recommends the Law Society of Upper Canada update its by-laws to confirm that paralegals can appear at arbitrations pursuant to the *Arbitration Act*.

Background

More and more often, clients are asking for alternatives to litigation and they are turning to ADR including arbitration. Recent growth in demand for arbitration has caused arbitration to emerge as an attractive practice area for paralegals.

Paralegal representation in arbitration is a significant contributor to access to justice. This raises at least 2 significant questions for the Law Society of Upper Canada in terms of facilitating access to justice on one hand and protecting the public interest on the other hand:

Can a paralegal represent a party in an arbitration?

If so, can a paralegal represent a client in an arbitration where the claim is for more than \$25,000?

The author is not aware of any case law in Ontario that directly answers these questions. They are therefore left to statutory interpretation.

Analysis of Whether a Paralegal can Represent a Party in an Arbitration

Subsection 6(2) of by-law 4 under the *Law Society Act* outlines the scope of activities in which a paralegal may engage. This includes representing a party before “a tribunal established under an Act of the Legislature of Ontario”.

According to the Paralegal Rules of Conduct, the definition of “tribunal” includes “arbitrators”.

Subsection 1(1) of the *Law Society Act* defines an “adjudicative body” to include at clause (b) “a tribunal established under an Act of Parliament or under an Act of the Legislature of Ontario” and at clause (d) “an arbitrator”. Although there appears to be a distinction in this subsection, one or more arbitrators form an arbitral tribunal. The question becomes whether or not that arbitral tribunal is established by an Act of the Legislature of Ontario.

The *Arbitration Act* is an Act of the Legislature of Ontario and deals with arbitral tribunals including issues such as the composition, jurisdiction and conduct of arbitral tribunals as well as awards, enforcement and appeals of arbitral tribunal decisions.

An arbitral tribunal exercises statutory powers in decision-making. For example, pursuant to subsection 17(1) of the *Arbitration Act*, an “arbitral tribunal may rule on its own jurisdiction”. As a further example, section 31 of the *Arbitration Act* states that an “arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies”.

Since the *Arbitration Act* is an Act of the Legislature of Ontario and the *Arbitration Act* addresses fundamental issues (composition, jurisdiction, conduct, awards, enforcement and appeals) and an arbitral tribunal exercises statutory powers in decision-making, it appears that an arbitral tribunal meets the definition of by-law 4 of being “a tribunal established under an Act of the Legislature of Ontario”.

In light of the foregoing, it appears that paralegals can represent clients in arbitrations.

Consensual versus Compulsory Arbitration

One counterargument to paralegals being entitled to act in arbitrations is based on a notion of consensual arbitration versus compulsory arbitration. Arbitrations pursuant to the *Arbitration Act* are consensual based on an arbitration agreement. Compare this

with arbitrations at the Financial Services Commission of Ontario, which are not consensual and before which by-law 4 is clear that a paralegal can appear.

This counterargument may be based on a historic viewpoint pre-dating the *Arbitration Act*. Prior to the *Arbitration Act*, it appears that parties in Ontario were at will to form any arbitration agreement they wanted to subject to the common law.

Regulates versus Establishes

Another counterargument suggests that the *Arbitration Act* regulates arbitral tribunals as opposed to establishing them. The tribunal must be established by an Act of the Legislature of Ontario for a paralegal to be able to provide representation.

As outlined above, the *Arbitration Act* addresses fundamental issues (composition, jurisdiction, conduct, awards, enforcement and appeals) and an arbitral tribunal exercises statutory powers in decision-making.

Furthermore, it is interesting to have a look at the *Statutory Powers and Procedures Act (SPPA)*, which at subsection 3(1) explains the *SPPA* applies to, among other things, “to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature”.

Arbitrations pursuant to the *Arbitration Act* would be captured by the *SPPA* if it weren't for subsection of the *SPPA* 3(2) which says the *SPPA* does not apply to arbitrations pursuant to the *Arbitration Act*. Interestingly enough, section 21 of the *Arbitration Act* states that sections 14, 15 and 16 of the *SPPA* concerning witnesses and evidence apply to arbitrations.

Private versus Public Arbitration

There is another counterargument that arbitrations pursuant to the *Arbitration Act* are private whereas arbitrations before other tribunals may be public. It is not clear that this distinction is all that helpful as the “regulates versus establishes” distinction discussed above seems more relevant to by-law 4.

Analysis of Whether a Paralegal can Represent a Client in an Arbitration where the Claim is for more than \$25,000

The \$25,000 Small Claims Court limit is specific to the Small Claims Court pursuant to subsection 1(1) of Ontario Regulation 626/00 of the *Courts of Justice Act*.

At the Landlord and Tenant Board, there is a \$25,000 limit, but this limit is tied to the Small Claims Court limit pursuant to various sections of the *Residential Tenancies Act*.

Paralegals can and do represent clients before tribunals where there is no monetary limit. For example, the Human Rights Tribunal of Ontario has no monetary limit.

There is no monetary limit in the *Arbitration Act*.

As a \$25,000 limit is specific to the Small Claims Court and the Landlord and Tenant Board due to legislation and regulations and there is no monetary limit in the *Arbitration Act*, it appears that paralegals can represent clients in arbitrations where more than \$25,000 is at stake.

Policy Considerations

There are many strong policy arguments as to why paralegals ought to be entitled to represent clients before arbitral tribunals. Paralegals and arbitration are extremely important in terms of access to justice.

In terms of protecting the public interest, paralegals already represent clients in Court (Small Claims Court and the Ontario Court of Justice) and before a large number of different tribunals. Paralegals are highly regulated by the Law Society of Upper Canada and owe duties to their clients and tribunals

One of a paralegal's duties to clients in the Paralegal Rules of Conduct is competence. Paralegals who take on arbitration cases, including where more than \$25,000 is at stake, must ensure they are competent. Familiarity with the applicable arbitration rules and the *Arbitration Act* is important.

As indicated above, the definition of "tribunal" in the Paralegal Rules of Conduct includes "arbitrators". According to the Paralegal Rules of Conduct, Paralegals owe duties to tribunals and therefor to arbitrators.

With exceptions, arbitration is usually a voluntary forum for dispute resolution. Even when a contract mandates arbitration, contracts are formed voluntarily. In other words, the parties to most arbitrations have voluntarily decided to arbitrate. Arbitrating parties should also be able to decide whether to self-represent or have a paralegal or lawyer represent them, subject to any clauses in the arbitration rules agreed upon.

Paralegals' Duties to Clients Relating to Arbitration

Rule 3.02(12) of the Paralegal Rules of Conduct states that paralegals “shall consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options, and, if so instructed, take steps to pursue those options”. This seems to reflect the strong policy arguments in favour of ADR, including arbitration.

Rule 3.01(4)(c)(vi) suggests that in order to be a competent paralegal, a paralegal must be able to implement alternative dispute resolution. Paralegal educational programs generally have mandatory ADR courses with a focus on mediation and arbitration.

Conclusion

As the law is now, it appears that paralegals can represent clients in arbitrations and there is no monetary limit restricting a paralegal's representation.

There may be conflicting views on whether a paralegal can represent a client in an arbitration, however, such a debate may be moot provided the Law Society of Upper Canada updates by-law 4 in relation to this emerging issue.

Because paralegal regulation is relatively new and because of recent growth in demand for ADR including arbitration, Hassell Arbitration recommends that the Law Society of Upper Canada consider clarifying paralegal rights of representation in arbitration proceedings.

More specifically, Hassell Arbitration's recommendation is to clearly delineate in section 6 of by-law 4 that paralegals can represent clients before arbitral tribunals to which the *Arbitration Act* applies.

Paralegals can already appear before Courts, tribunals and arbitrators alike. They have the right knowledge, skills and abilities. Paralegals are obliged by the Rules of Conduct to consider and implement arbitration. Arbitration as an area of ADR is growing in popularity as a litigation alternative. Having paralegals involved in arbitration would further access to justice.

There is a wonderful and exciting opportunity here to facilitate ADR across Ontario with an amendment to section 6 of by-law 4 that will illuminate the capabilities of paralegals and arbitration combined.

Useful Links

Law Society Act

<http://www.ontario.ca/laws/statute/90l08?search=law+society+act>

By-Law 4

<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485805>

Paralegal Rules of Conduct

<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147486158>

Arbitration Act, 1991

<http://www.ontario.ca/laws/statute/91a17?search=arbitration+act%2C+1991>

SPPA

<http://www.ontario.ca/laws/statute/90s22?search=statutory+powers>

Small Claims Court Jurisdiction

<http://www.ontario.ca/laws/regulation/000626?search=o+reg+626%2F00>

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