



SURVEY OF ARBITRATORS AND MEDIATORS

The 7 most common mistakes made by unrepresented parties

October 2007

This list was compiled with the collaboration of 19 arbitrators and mediators from the SDRCC. We wish to sincerely thank those who have taken the time to respond to our survey and we hope that their wisdom and experience will serve you well.

Being unrepresented in either mediation or arbitration can have serious consequences on the outcome of the process. We have asked the SDRCC arbitrators and mediators what they thought were the most frequent mistakes made by unrepresented parties. Below is the result of our survey. To complement the text of David Bennett's article above, each mistake is accompanied by comments and by some advice on how to avoid them, this time focussing more on the context of arbitration rather than mediation.

1

Fail to clarify what the real issues at stake are

Unrepresented parties often misunderstand the issues and do not focus on the relevant ones. Before engaging into the process, you should clearly specify what you hope to accomplish with it or what questions you want the arbitrator/mediator to address. You must also remember to submit all the issues in your original application to allow the other parties to be informed/prepared to address these issues.

2

Do not present facts and issues properly

Unrepresented parties fail to present facts that are relevant to the issues and to do so clearly and completely. They often let emotions blur the facts when explaining their position and tend to eagerly talk without really listening. Instead, you should prepare to summarize the facts, to bring out only those that are relevant to the issues, and to show how the impugned decision was based on the correct/wrong principles or criteria.

3

Misunderstand the powers (jurisdiction) of the Tribunal

Unrepresented parties often misunderstand the role of the arbitrator/mediator. They may have unrealistic expectations about what the arbitrator/mediator can do. For example, they think that the arbitrator/mediator will provide independent legal advice or will gather and prepare the relevant documentation. In arbitration, the parties, not the arbitrator, are responsible to meet the standard of proof. In mediation, a mediator will not render a decision; instead, the parties must come to an agreement.

4

Mishandle cross-examination of the witnesses

Unrepresented parties unfortunately argue with witnesses when they do not agree with their replies. They often become unnecessarily accusatory and personal. Instead of asking questions in cross-examination, they sometimes make comments, observations and submissions to the witnesses. During testimonies or cross-examinations of witnesses, it is important for you to listen carefully to the responses and to take detailed notes to better prepare to raise your own arguments at a later stage.



5

Lack knowledge of their rights at law and the legal procedures

Unrepresented parties fail to take advantage of the resources available to assist them in understanding the rules applicable to their situation and applying those rules to get the desired result. Because they do not know their rights at law, they may insist on too much or accept too little. Make sure that you research your rights, the applicable rules, and the procedures to take full advantage of them when the time comes. In arbitration, you must present the text of the rules against which you believe the decision should be made.

6

Fail to prepare adequately

Unrepresented parties are often simply ill-prepared to handle the case on their own. They leave out essential information and documentation, they fail to bring forward the best available evidence in a coherent, integrated way, and their presentation of facts/ events is often disorganized in chronology. When participating in proceedings unrepresented, you must ensure that you have researched the legislation and/or the jurisdiction under which your case falls. You should also gather and prepare all the documentation in a logical order for a more efficient presentation.

7

Confuse submissions, evidence, and arguments

Unrepresented parties often mingle evidence and arguments throughout their case or present what is essentially testimony when making legal arguments. Consequently, they miss the opportunity to present facts in evidence; because if they wait until final arguments to do so, it is already too late. When preparing your case, you should recognize that all submissions must be made before the hearing. The presentation of evidence is at the heart of the hearing while the arguments will form its conclusion. []