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Can an Arbitrator conduct his or her own Research?

This topic can be divided into two parts - research of the facts and research of the law. This comment will focus on whether an Arbitrator can conduct independent research of the facts outside of the evidence presented at the Arbitration.

The British Columbia Court of Appeal has recently addressed this issue in a criminal case, R. v. Bornyk 2015 BCCA 28. I believe the Court's findings are instructive for arbitration as well. In this case, the trial judge did his own reading of expert articles on the reliability of finger print evidence, which was key to the finding of guilt or innocence and concluded that the expert evidence presented by the prosecution was not reliable. The Appeal Court admonished the trial judge for doing so and overturned the not guilty verdict. The Court noted that ' It is basic to trial work that a judge may only rely upon the evidence presented at trial, except where judicial notice may be taken…" (which can only arise in exceptional circumstances where there is indisputable accuracy of the assertion, such as January 1, 2015 fell on a Thursday). The Court went on to state:

> *"[11] By his actions, the judge stepped beyond his proper neutral role and into the fray. In doing so, he compromised the appearance of judicial independence essential to a fair trial. While he sought submissions on the material he had located, by the very act of his self-directed research, in the words of Justice Doherty in R. v. Hamilton (2004), 189 O.A.C. 90, 241 D.L.R. (4th) 490 at para. 71, he assumed the multi-faceted role of 'advocate, witness and judge'."*

As noted in the passage above, even where the trier of fact gives the parties an opportunity to make submissions on the factual findings made by relying on extrinsic evidence that is not sufficient as it ultimately for the trier of fact to ensure a fair trial, in this case not introducing evidence on his own initiative.

The Arbitrator must also conduct a 'fair hearing." One distinction between an arbitrator and a trial judge is that Arbitrators are often chosen because of their particular knowledge or expertise in an area and it may be reasonably expected by the parties that the Arbitrator will not ignore this expertise. However, general knowledge of the industry is not a substitute for the requirement that evidence on a specific matter ought to be expected to be presented by one or other of the parties so the other party has an opportunity to test the proposition on cross examination or respond with their own evidence. Given the requirement to conduct a fair hearing and to avoid being the "advocate, witness and judge", it is best practice, in my view, for the Arbitrator to tread carefully on assumptions he or she makes based on their "general knowledge" of an industry and when in doubt, offer the parties the opportunity to address the issue if they choose to do so by the parties presenting evidence.

One area that an arbitrator can initiate a process is to order a view or inspection of property (see Section 29 (1) (d) of the BCICAC Rules). Thus if the Arbitrator concludes, as an example, where value is in issue, that he or she wishes to view a real property after hearing evidence in connection with the same, the appropriate practice, in my view, is for the Arbitrator to give notice to the parties of his or her desire to view or inspect the property. At that point an Order should be made to that effect, notice of the date and time of attendance given to the parties so that the parties and their representatives may be present, and given an opportunity to provide comments when the view or inspection takes place.

Herb Silber, Q.C. brings a strong combination of experience, knowledge and empathy to the arbitration process as Arbitrator or counsel. Herb's approach creates the positive, respectful atmosphere critical to a successful arbitration process.

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