

ACTIVE ADJUDICATION OR ENTERING THE
ARENA:
HOW MUCH IS TOO MUCH?

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ACTIVE ADJUDICATION OR ENTERING THE ARENA:
HOW MUCH IS TOO MUCH?¹

If a judge should himself, conduct the examination of witnesses ‘he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict’”

- **Lord Denning in *Jones v. National Coal Board***²

A. Introduction

In the context of administrative adjudication, one of the key issues consistently raised is the role of the adjudicator and the appropriate role of counsel where an adjudicator takes an overly interventionist role in the proceedings. A recent trilogy of cases from the Ontario Court of Appeal provides important guidance: *Canadian Colleges of Business and Computers Inc. v. Ontario (Private Career Colleges Act, Superintendent)* in the administrative context,³ *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)* in the civil context,⁴ and *R. v. Stucky* in the criminal context.⁵ In this paper we review the key principles relevant to the issue of “descending into the arena.” We also review particular challenges involving self-represented litigants.

¹ This paper was originally presented at the Ontario Bar Association Conference, March 8, 2011, “Current Issues in Tribunal Adjudication: An Update for Advocates and Members.” The research assistance of Sharon Naipaul, student at law, Cavalluzzo, Hayes, Shilton, McIntyre & Cornish, is gratefully acknowledged.

² [1953] J. No. 136 2 Q.B. citing *Yuill v. Yuill*, [1945] P. 15, 20; 61 T.L.R.

³ [2010] O.J. No. 5435 (C.A.) [*CCBC*].

⁴ [2010] O.J. No. 212 (C.A.) [*Chippewas*].

⁵ [2009] O.J. No. 600 (C.A.) [*Stucky*].

B. The Key Cases

1. *Chippewas of Mnjikaning First Nation*

This case was a civil appeal from the dismissal of an action brought by the Chippewas of Mnjikaning First Nation's (CMFN) against the provincial Crown, the Ontario Lottery and Gaming Corporation, the Chiefs of Ontario and the Ontario First Nations Limited Partnership. The essence of the issue was whether arrangements that had been made with regard to a plan for the CMFN to host Casino Rama had also led to an agreement to engage in a profit-sharing plan.

The CMFN raised an reasonable apprehension of bias argument based on the judge's interventions during trial. The allegations were that the judge assumed the role of counsel when he asked witnesses questions, inappropriately commented on evidence to be expected from CMFN, exhibited impatience and gave the impression that he had pre-judged issues of fact and credibility. Overall, the CMFN complained that there was an appearance of unfairness.⁶ They claimed that the judge intervened in the trial on an extraordinary number of occasions and the cumulative effect of those interventions indicated that he was receptive to the respondents' case and dismissive of the appellant's.⁷

In his assessment of the allegations made by the CMFN, the Court analyzed the issue on the basis of the test set out in *Committee for Justice and Liberty v Canada (National Energy Board)*:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

⁶ *Chippewas*, *supra* note 3 at paras. 225-228.

⁷ *Ibid.* at para. 225.

...

The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience."⁸

The assessment is a fact-specific inquiry, in the context of the facts and circumstances of a particular trial. The test is to be applied objectively, not subjectively. The trial record has to be assessed in its totality and "the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial."⁹

The Court acknowledged that there are many "proper reasons" why a trial judge could or would intervene by making comments, giving directions or making comments.¹⁰

The reasons include:

- the need to focus the evidence on matters in issue;
- to clarify evidence;
- to avoid irrelevant or repetitive evidence;
- to dispense with proof of obvious or agreed matters, and;
- to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.¹¹

The Court also agreed with the principle that advocates and the public can expect judges to maintain control of courtroom proceedings. When judges do have to take a more active role in the proceedings to ensure control of the process it is important that they not appear to have adopted a position on the facts, issue or credibility.¹²

⁸ *Ibid.* at para. 229.

⁹ *Ibid.* at para. 230.

¹⁰ *Ibid.* at para. 231

¹¹ *Ibid.* at para. 233.

¹² *Ibid.* at paras. 235-236 and 238.

The Court also recognized that appellate courts are reluctant to intervene on the basis that the trial judge “entered the arena.” Appellate courts operate with a strong presumption that judges have conducted themselves fairly and impartially.¹³

The Court applied the reasonable apprehension of bias test¹⁴ on an objective basis while considering the other principles articulated in the judgement. The Court ultimately concluded that all of the judge’s interventions were reasonable in the context of the trial, and there was no reason for the court to intervene on that basis.¹⁵

2. *Canadian College of Business and Computers Inc.*

The respondent in this case, Mr. Kannuthurai, was the principal (and owner) of the Canadian College of Business and Computers operating under the power of the *Private Career Colleges Act*. The Superintendent sought to have his license revoked. Both the College and Mr. Kannuthurai were unrepresented before the License Appeal Tribunal.

The Licence Appeal Tribunal adjudicator intervened on a number of occasions when the respondent Mr. Kannuthurai was cross-examining his chief witness, and when he himself was being examined. The adjudicator commented to Mr. Kannuthurai that he was “misleading the court” and also questioned him at length about his alleged involvement with the Tamil Tigers. That issue had come up previously and it was clear that Mr. Kannuthurai denied any involvement. That issue was also deemed to be irrelevant by the adjudicator only the day before.

The CCBC’s license was ultimately revoked, and Mr. Kannuthurai applied for judicial review of the decision to the Divisional Court where, for the first time, he raised

¹³ *Ibid.* at para. 243.

¹⁴ *Ibid.* at para. 229.

¹⁵ *Ibid.* at para. 264

the issue of bias. The Divisional Court granted the judicial review application, which was upheld by the Court of Appeal.¹⁶

The Court of Appeal analyzed the issue of intervention applying the classic reasonable apprehension of bias test, from *Committee for Justice and Liberty v Canada (National Energy Board)*:

“...what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.¹⁷

On the issue of adjudicative intervention specifically, the Court applied the test as articulated in *Chippewas*:

The test is an objective one. Thus the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial.¹⁸

The Court found that the adjudicator’s comment that Mr. Kannuthurai was “misleading the court”, made during his cross-examination of the Superintendent, would lead a reasonable observer to conclude that the adjudicator had pre-judged Mr. Kannuthurai’s credibility. Context was critical to this finding, since the hearing involved allegations of dishonesty, financial improprieties and conduct akin to fraud.¹⁹

On the issue of the adjudicator’s questioning of Mr. Kannuthurai on his alleged terrorist activities the court held that because this took place on the second day of questioning, after the subject had been thoroughly canvassed in examination the day before, it could not be seen as an attempt to clarify the evidence or to bring the rules of

¹⁶ *CCBC*, *supra* note 2 at para. 4.

¹⁷ *Ibid.*, at para. 23 citing *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394.

¹⁸ *Ibid.* at para. 25.

¹⁹ *Ibid.* at para. 34.

evidence to the attention of a self-represented litigant. The Court concluded that this was also a pre-judgement of Kannuthurai's credibility.²⁰

The Court did not accept the argument that the line of questioning regarding Mr. Kannuthurai's alleged terrorist activity was benign questioning. The adjudicator had already told the litigants that the line of questioning regarding Mr. Kannuthurai's alleged terrorist involvement was time-consuming, irrelevant and a red herring. For the adjudicator to then return to that line of questioning unprompted suggested that she disbelieved his truthfulness. Because Mr. Kannuthurai's credibility and integrity were at issue the questions could not be seen as trivial or inconsequential.²¹ Overall, the court found that the high threshold for establishing a reasonable apprehension of bias was established.²²

In terms of remedy, the Court determined the breach of fairness could only be cured by a new hearing, before a different adjudicator.²³

3. *R. v. Stucky*

The accused was convicted of making false or misleading representations to the public, contrary to the *Competition Act*, in relation to a direct mail lottery ticket business. On appeal, the accused alleged that the trial judge's numerous sarcastic comments suggested he had pre-judged the credibility of the accused, and that the trial judge had vigorously cross-examined the accused and some of his expert witnesses in a dismissive manner. Further, the accused alleged the trial judge relied on this evidence in his reasons for decision.²⁴ The accused argued that the judgement should be set aside and a new trial ordered because the excessive interventions at trial undermined the appearance of fairness.²⁵

²⁰ *Ibid.* at para. 41.

²¹ *Ibid.* at para. 46.

²² *Ibid.* at para. 49

²³ *Ibid.*

²⁴ *Stucky*, *supra* note 4 at para. 96.

²⁵ *Ibid.* at para. 59.

In analyzing the issues, the Court of Appeal stated that the role of the trial judge is often very demanding but “notwithstanding the length and complexity of a particular trial, a trial judge must exercise restraint and maintain impartiality so as to act within the scope of his or her neutral role.”²⁶ Certainly, asking questions is a permitted intervention, but this power is not unqualified or limitless. Three situations in which questions put to a witness by a judge would be justified are:

- to clear up ambiguities and call a witness to order;
- to explore some matter which the witnesses’ answers have left vague, or;
- to put questions which should have been asked by counsel in order to bring out some relevant matter but which were nonetheless omitted.²⁷

In the third type of situation, it is important that the judge not “leave his or her position of neutrality as a fact-finder and become the cross-examiner.”²⁸

Using these principles, the Court applied the following test to the facts to determine whether the trial judge’s interventions compromised the appearance of trial fairness:

The ultimate question to be answered is not whether the accused was in fact prejudiced by the interventions but whether he might reasonably consider that he had not had a fair trial or whether a reasonably minded person who had been present throughout the trial would consider that the accused had not had a fair trial.²⁹

The Court notes that the appearance of fairness and the corresponding duty to remain neutral is especially critical when the accused takes the stand. Because a criminal trial is an adversarial process between the prosecution and defence, and not an

²⁶ *Ibid.* at para. 61.

²⁷ *Ibid.* at para. 64.

²⁸ *Ibid.* at para. 65.

²⁹ *Ibid.* at para. 68 citing *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.) leave to appeal refused, [1986] 1 S.C.R. xiii at p. 232.

investigation by the trial judge, the examination of witnesses is the responsibility of counsel. The trial judge must be careful not to usurp the role of counsel.³⁰

The Court of Appeal applied the test having regard to the “unique facts and circumstances”³¹ of the trial and ultimately agreed that the interventions by the judge crossed the line.³² They found that the trial judge assumed the role of counsel for the Crown through his cross-examination of defence witnesses, including the accused, and appeared to pre-judge the credibility of the accused. This undermined the appearance of fairness leading to a “miscarriage of justice.”³³ When the record was considered in its entirety the Court did not find the trial judge’s conduct came within the ambit of permitted judicial conduct.³⁴

We should note here that counsel working in the areas of professional discipline should take particular note of criminal cases that deal with the issue of excessive interventionism by a judge. The two leading professional discipline cases, *Law Society of Upper Canada v. Cengarle*³⁵ and *Solicitor “X” v. Nova Scotia Barristers Society*³⁶ have both stated explicitly that the standards of judicial conduct in criminal trials apply in the professional discipline context. *Cengarle*, which is a very recent case, makes reference to *Stucky* on the issue of a trial judge questioning witnesses. In *Solicitor X*, the court makes reference to the case *Kane v. British Columbia*³⁷ to articulate the proposition that a very high standard of justice is required where the right to continue in one’s profession is at stake. As a rule of thumb when working in the professional disciplinary context, if this issue arises, current criminal law standards on this topic should be consulted.

C. General Jurisprudential Principles

³⁰ *Ibid.* at para. 69.

³¹ *Ibid.* at para. 70.

³² *Ibid.* at para. 100.

³³ *Ibid.* at paras 59-60.

³⁴ *Ibid.* at para. 100.

³⁵ [2010] L.S.D.D. No. 61 [*Cengarle*].

³⁶ [1998] N.S.J. No. 428 [*Solicitor X*].

³⁷ [1980] 1 S.C.R. 1105.

1. Statutory Powers

The administrative adjudicator must determine whether the statute and regulations or applicable rules, policies and guidelines may create a different context with respect to scope for adjudicator intervention. For example, in *Hansen v. Toronto (City)*³⁸ there was an allegation of abuse of process on the grounds of adjudicator activism. The Vice-Chair held that there was no abuse of process because “the Tribunal has the ability to engage in active adjudication and hearing management pursuant to the *Human Rights Code* and its Rules.”³⁹ This power can be found under the Human Rights Tribunal Rules of Procedure, Rule 1.7 where the Tribunal is empowered to:

- a) lengthen or shorten any time limit in these Rules;
- b) add or remove a party;
- c) allow any filing to be amended;
- d) consolidate or hear Applications together;
- e) direct that Applications be heard separately;
- f) direct that notice of a proceeding be given to any person or organization, including the Commission;
- g) determine and direct the order in which issues in a proceeding, including issues considered by a party or the parties to be preliminary, will be considered and determined;
- h) define and narrow the issues in order to decide an Application;
- i) make or cause to be made an examination of records or other inquiries, as it considers necessary;
- j) determine and direct the order in which evidence will be presented;
- k) on the request of a party, direct another party to adduce evidence or produce a witness when that person is reasonably within that party’s control;
- l) permit a party to give a narrative before questioning commences;
- m) question a witness;
- n) limit the evidence or submissions on any issue;
- o) advise when additional evidence or witnesses may assist the Tribunal;
- p) require a party or other person to produce any document, information or thing and to provide such assistance as is reasonably necessary, including using any data storage, processing or retrieval device or system, to produce the information in any form;
- q) on the request of a party, require another party or other person to provide a report, statement, or oral or affidavit evidence;

³⁸ [2010] O.H.R.T.D. No. 22 [*Hansen*].

³⁹ *Ibid.* at para. 9.

- r) direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;
- s) make such further orders as are necessary to give effect to an order or direction under these Rules;
- t) attach terms or conditions to any order or direction;
- u) consider public interest remedies, at the request of a party or on its own initiative, after providing the parties an opportunity to make submissions;
- v) notify parties of policies approved by the Commission under s. 30 of the Code, and receive submissions on the policies;
- v.1) make such orders or give such directions as are necessary to prevent abuse of its processes and ensure that the conduct of participants in Tribunal proceedings is courteous and respectful of the Tribunal and other participants; and
- w) take any other action that the Tribunal determines is appropriate.⁴⁰

On the other hand, even a broader scope for investigative inquiry will not protect adjudicators who engage in a partisan fashion when intervening. In Decision No. 186/94 a Tribunal Panel consisting of three members conducted Ontario Worker's Compensation Board hearing regarding a worker's entitlement to Worker's Compensation for a shoulder disability.⁴¹ Based on the conduct at the hearing, the employer accused the Chair of the Panel of descending into the arena. The Chair posed particular questions to a witness that, counsel argued, indicated that the Chair was partisan. The matter was appealed to the Ontario Workers' Compensation Appeals Tribunal.⁴²

The Appeals Tribunal held that it was normal for the Tribunal Panel to take an active role in questioning witnesses, in accordance with their statutory mandate to fully investigate and consider matters in the same way as in civil cases.⁴³ The Appeals Tribunal went on to hold, however, that even though the Panel was statutorily empowered to take an active role in the adjudication of claims, the tone and content of the Chair's comments were partisan, and struck those particular questions from the record.⁴⁴

⁴⁰ See the Ontario Human Rights Tribunal Rules: <http://www.hrto.ca/hrto/?q=en/node/42>.

⁴¹ [1996] O.W.C.A.T.D. No. 1425 [186/94].

⁴² *Ibid* at para. 12.

⁴³ *Ibid.* at para. 18.

⁴⁴ *Ibid.* at para. 20.

2. Test for Bias and the Applicable Presumption

The test regularly applied in this context is set out in *Chippewas*:

The test is an objective one. Thus the trial record must be assessed in its totality and the interventions complained of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the trial.⁴⁵

The test does an excellent job of harmonizing the disparate elements that have been applied in the jurisprudence on this issue. The key principles are:

- the clear presumption of impartiality;⁴⁶
- the test is objective;⁴⁷
- the perspective is that of the “reasonable” or “right-minded” persons;⁴⁸
- the apprehension cannot be based only on surmise or conjecture;⁴⁹
- the grounds for the apprehension must be substantial.⁵⁰

(a) **When the Standards and Principles Apply**

The standards and principles that apply in the context of excessive intervention apply to interactions with witnesses, not counsel. This is clear from the professional discipline case, *Cengarle*, as well as *Chippewas*. The focus is on interactions with witnesses, not counsel, because interactions with counsel are less likely to cause unfairness.⁵¹ Thus, generally “a trial judge’s willingness to debate with counsel over relevant factual and legal issues should not serve as the basis for a reasonable apprehension of bias.”⁵² This is not to say that there will never be circumstances where

⁴⁵ *Chippewas*, *supra* note 3 at para. 230.

⁴⁶ *Ibid.* at para. 243.

⁴⁷ *Ibid.* at para. 230.

⁴⁸ *Solicitor X*, *supra* note 35 at para. 17.

⁴⁹ *Ibid.* at para. 15.

⁵⁰ *Chippewas*, *supra* note 3 at para. 229.

⁵¹ *Cengarle*, *supra* note 34 at para. 31.

⁵² *Chippewas*, *supra* note 3 at para. 243.

interactions with counsel will not lead to an apprehension of bias. It is simply that in the context of active adjudication specifically, debating with counsel will not form the necessary basis for that apprehension.

These principles are critical when the accused takes the stand. As noted in *Stucky*: “the appearance of fairness and the judge’s corresponding duty to exercise restraint and remain neutral is especially critical when the accused takes the stand.”⁵³ This caution will similarly apply in the professional disciplinary context and indeed, whenever the “subject” of a proceeding testifies.

(b) Context

Context is as another critical factor in the analysis. There is no “bright line” between principles to be applied in administrative proceedings versus court proceedings. Rather, what is called for is a contextual approach. For example, *Solicitor X* cites the standard contrast traditionally made between administrative tribunals and courts⁵⁴ but adopts the analysis set out in *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*.⁵⁵ Even though fairness applies to all administrative bodies, the procedural protections required will depend on the nature and function of the particular tribunal. Those that are primarily adjudicative in function are held to the same standards as the courts.⁵⁶

The contextual analysis applies at the micro level as well as at the macro level. *Chippewas*’ holds that “the inquiry is fact specific and must be assessed in the context of the particular trial.”⁵⁷ Furthermore, the trial record must be assessed in its totality. The interventions that a party complains of must be evaluated cumulatively rather than as

⁵³ *Stucky*, *supra* note 4 at para. 69.

⁵⁴ *Solicitor X*, *supra* note 35, at para. 16 citing *Old St. Boniface Resident’s Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170.

⁵⁵ [1992] S.C.R. 623.

⁵⁶ *Solicitor X*, *supra* note 35 at para. 16.

⁵⁷ *Chippewas*, *supra* note 3 at para. 230.

isolated occurrences, from the perspective of a reasonable observer throughout the trial.⁵⁸ The only time an appellate court will be justified in intervening is if they are satisfied that the interventions, considered in the context of the entire trial or hearing, create a reasonable apprehension of bias or other lack of fairness.⁵⁹ As already noted above, *Stucky* is clear that the effect of intervention must be assessed in relation to the unique facts and circumstances of the particular trial.⁶⁰

This principle makes perfect sense from a practical perspective. For example 100 interventions in a 60-day trial might be reasonable. The same number of interventions in a 3-day trial, however, would raise greater concerns. It is for this reason that decisions on appeal or judicial review often refer to the number of pages of transcript a judge or adjudicator's interventions take up when measured against the length of the entire transcript.

(c) Grey Areas

(i) Controlling vs. Descending

What is the difference between proper control of proceedings, and problematic descent into the arena? To assist in making that determination, the principles outlined in *Stein (Litigation Guardian of) v. Sandwich West (Township)*,⁶¹ are of assistance:

- *Jones v. National Coal Board* – to clear up any points that were overlooked or obscure, to ensure that lawyers behave in a seemly manner, to keep to the rules, to exclude irrelevancies and discourage repetition, to ensure the trier of fact understands the points counsel is making and to discern where the truth lies. Anything beyond this is assuming the role of an advocate;
- *Phillips v. Ford Motor Co. of Canada Ltd.* – there is a right to intervene for

⁵⁸ *Ibid.* at para. 230.

⁵⁹ *Ibid.* at para. 243.

⁶⁰ *Stucky*, *supra* note 4 at para. 70.

⁶¹ [1995] O.J. No. 423 (O. C.A.) at paras. 21-25.

clarification of the evidence, particularly where the case is highly technical, in which case interventions may be more frequent;

- *Yuill v. Yuill* – the role that a judge ought to take while witnesses are giving their evidence is up to the discretion of the judge;
- *Majcenic v. Natale* – it is not only necessary, but sometimes desirable that a judge intervene for the purpose of clarification of the evidence.

Some additional principles are outlined in *Stucky*:

- A trial judge must exercise restraint and maintain impartiality so as to act within the scope of his or her neutral role;⁶²
- A trial judge may intervene, and must intervene where justice requires it, but with limits. Judges should confine themselves as much as possible to their own responsibilities and leave counsel to theirs;⁶³
- As previously outlined, permitted interventions include:
 - To clear up ambiguities and call a witness to order;
 - To explore some matter which the witnesses' answers have left vague;
 - To put questions which should have been asked by counsel in order to bring out some relevant matter but which were omitted.⁶⁴

There is no question that “a trial judge has an inherent authority to control the court’s processes and in exercising that authority, a trial judge will be required to intervene in the proceedings.”⁶⁵ The fine line that exists between controlling and descending is demonstrated in *Campbell (Re)*.⁶⁶ On the facts of that case, a bias allegation was brought against a referee hearing an *Employment Standards Act* matter. The referee

⁶² *Stucky*, *supra* note 4 at para. 61.

⁶³ *Ibid.* at para. 63.

⁶⁴ *Ibid.*

⁶⁵ *Chippewas*, *supra* note 3 at para. 231.

⁶⁶ [1996] O.E.S.A.D. No. 296 (ON M.O.L. – Office of Adjudication) [*Campbell*].

ruled on various occasions throughout the cross-examination of the claimant that questions being asked by the employer were irrelevant and directed the claimant not to answer them. The employer then accused the referee of bias.⁶⁷

The referee determined that the issue fell to be decided on whether there was a reasonable apprehension of bias, or whether her actions could properly be characterized as an attempt to control the proceeding. The referee held it was properly an attempt to control the proceedings and would not constitute bias to an informed bystander.⁶⁸

(ii) Manner of Questioning vs. Questioning Itself

Another grey area is the direct questioning of witnesses by the adjudicator. It is by no means forbidden: “the inquiry must also begin with the recognition that there are many proper reasons why a judge may interview by making comments, giving directions of asking questions during the course of a trial.”⁶⁹ *Chippewas* indicates that adjudicators and judges “may need to ask questions of witnesses, but if they do they have to use care to not create the impression of having adopted a position on the facts, issues or credibility.”⁷⁰ This principle is in keeping with everything discussed so far.

The issue at the heart of over-active adjudication, in general, is that it has the potential for a party to believe a judge has “sided” with a party, so it would make sense that this applies to questioning in particular as well. As a purely practical matter, *Chippewas* notes that if a judge does have questions for witnesses, it’s often better to wait until counsel has completed their line of questioning or when the witness’s evidence is complete.⁷¹ An opportunity should always be given to counsel to ask further questions if the adjudicator’s questions raise new issues.

⁶⁷ *Ibid.* at para. 7.

⁶⁸ *Ibid.* at para. 11.

⁶⁹ *Chippewas*, *supra* note 3 at para. 231.

⁷⁰ *Ibid.* at para. 238.

⁷¹ *Ibid.* at para. 239.

In *Parkdale Focus Community Project v. Group of Employees*,⁷² the Tribunal noted that they would have questioned two affiants except that PFCP counsel objected vigorously that they would be “descending into the arena” if they did so. Although the Tribunal did not question the affiants, they did make the point in response to counsel’s objections, that it is not normally the fact that a trier of fact questions witnesses but rather the manner in which they are questioned which gives rise to concerns about descending into the arena and losing impartiality.⁷³

In another case, *Guermache v. Canada (Minister of Citizenship and Immigration)*⁷⁴ the reviewing court ultimately decided that because that questions from the member were more like a “police interrogation” than a hearing before a tribunal, a reasonable person would conclude that the decision maker was biased. Surprisingly the Court also found that the numerous interventions were not tied to evasive answers by the applicant or his failure to cooperate. In this case the court ordered another hearing in front of a differently constituted panel.⁷⁵

(iii) Limits on the Role of Adjudicator

(1) Facilitation/Mediation

There are also risks when an adjudicator or tribunal acts as a facilitator or mediator in certain circumstances. In *Yukon (Workers’ Compensation Appeal Tribunal) (Re)*,⁷⁶ the Workers’ Compensation Health and Safety Board applied for judicial review of a decision of the Worker’s Compensation Appeal Tribunal. The Board alleged the Appeal Tribunal had “descended into the arena” in offering to assist the parties in negotiating and developing a vocational rehabilitation training plan, which would be entering the arena of conflict.

⁷² [2000] O.P.E.D. No. 4 (On. Pay. Eq. Trib.) [*Parkdale*].

⁷³ *Ibid.* at para. 11.

⁷⁴ [2004] F.C.J. No. 1058 [*Guermache*].

⁷⁵ *Ibid.* at para. 13.

⁷⁶ [2006] Y.J. No. 7 (Y.T. Sup. Ct) [*Yukon*].

The Court found, however, that although it would have been an error for the Tribunal to act as a facilitator or mediator between the worker and the Board, the Tribunal did not seek to develop the training plan but said they would leave it to the parties to establish. The Court concluded that the Appeals Tribunal was not attempting to descend into the arena with the parties but was simply preserving the option of making further submissions if either party found it necessary.⁷⁷

(iv) Motions

Another area of potential concern is when adjudicators raise issues of their own motion. In *Hanley v. Eden*,⁷⁸ the issue arose when the coroner, of his own motion, raised a concern about a conflict of interest and directed that a lawyer for one of the parties disclose information about another retainer that the coroner believed raised a conflict.⁷⁹ The coroner proceeded with this motion even though he was informed that the issue had already been canvassed at a pre-inquiry meeting and it had been determined that the issue was so narrow that not even a theoretical conflict would occur.

Although the Court does not comment on whether a tribunal or panel proceeding on its own motion was “descending into the arena,” the Court held that the coroner did not have sufficient material information to order the lawyer to disclose information about a solicitor/client relationship, and was unreasonable. The court set aside those portions of the coroner’s reasons.⁸⁰

(v) Demeanour

⁷⁷ *Ibid.* at paras. 22-23.

⁷⁸ [2005] O.J. no. 55 (On. Sup. Ct. J. Div. Ct.) [*Hanley*].

⁷⁹ *Ibid.* at para. 43.

⁸⁰ *Ibid.* at para. 48.

The guidelines around demeanour are fairly clear, if difficult to apply in practice. When triers of fact intervene they must do so in a judicious manner. Specifically, that means that they should avoid expressions of annoyance, impatience and sarcasm.⁸¹ However, “isolated expressions of impatience or annoyance by a judge as a result of frustrations...do not of themselves create unfairness.”⁸² In other words, it would appear that it is not a question of kind, but of degree. It is also a long-standing principle that “there is no place for intimidation, contempt and offensive innuendo, nor for harshness or inappropriate language.”⁸³

(vi) Examination of Witnesses`

One of the most important issues that arises is constraints on intervention during the examination of witnesses. The Court of Appeal in *Stucky* comments on cross-examination and the role of the judge in the context of criminal trials. Similar principles apply in the administrative realm. The Court in *Stucky* notes that “since a criminal trial is an adversarial process between the prosecution and defence, and not an investigation by the trial judge, examination and cross-examination are the responsibility of counsel for the most part.”⁸⁴ The case gives specific examples of judicial conduct that has resulted in the quashing of criminal convictions:

- Questioning an accused in a way that gives the impression that the judge has placed the authority of his or her office on the side of the prosecution and giving the impression that he or she disbelieves the accused or witness;
- Interventions which have made it impossible for defence counsel to perform his or her duty in advancing the defence; and
- Interventions which preclude the accused from telling his or her story in his or her

⁸¹ *Chippewas*, *supra* note 3 at para. 240.

⁸² *Ibid.* at para. 243.

⁸³ *Guermache*, *supra* note 72 at para. 5.

⁸⁴ *Stucky*, *supra* note 4 at para. 69.

own way.⁸⁵

In *Solicitor X*,⁸⁶ the court relies on *Golumb v. College of Physicians and Surgeons*⁸⁷ for guidelines on questioning and the role of a judge:

- When the intervention is to such an extent that it seems more like a chief or cross examination in a way that would cause any injustice to either party, then such intervention becomes an interference, and it is improper;
- Judges/adjudicators do have the right, even duty, to obtain evidence in addition to what is brought out by counsel, but this is only to be adjectival, to clear up, to add to what counsel has raised in their own examinations;
- When a judge/adjudicator intervenes in examinations in such a way that he or she projects him or herself into the arena, he or she adopts a position inimical to one of the parties;
- The right to intervene is one of degree so there is no precise line of demarcation, but if anything an adjudicator does usurps the role of counsel, they have gone too far.

In the case of *Solicitor X*, the Court found that the questions asked by the adjudicator did bring him into the arena, “cast with the demeanour of prosecutors”⁸⁸ and as a result the decision was void *ab initio*.⁸⁹

A similar result was reached in *Cengarle*. In that case, the original Law Society of Upper Canada Hearing Panel hearing intervened on 56 occasions with a total of 214 questions. Mr. Cengarle alleged bias and appealed to the Law Society of Upper Canada

⁸⁵ *Ibid.* at para. 70.

⁸⁶ *Supra* note 35 at paras. 18-20.

⁸⁷ (1976), 68 D.L.R. (3d) 25 (On. Div. Ct.).

⁸⁸ *Solicitor X*, *supra* note 35 at para. 21.

⁸⁹ *Ibid.* at para. 22.

Appeal Panel. The appeal panel did not find that the interventions and questions supported an apprehension of bias.⁹⁰

However, they did find that 16 questions asked by the Panel indicated that the members had descended into the arena. This was because the Panel departed from the neutral fact-finding role.⁹¹ The Panel also relied on information from these 16 questions in their reasons.⁹² The appeal in this case was allowed.⁹³ This guideline, that questions must be neutral and for the purpose of fact-finding is a more easily applicable rule of thumb. Counsel and adjudicators both can use these criteria to determine if questions have gone too far.

(vii) Waiver

CCBC is significant in creating has created a new approach to the issue of waiver in bias cases, particularly when there has been an overly interventionist adjudicator and the individual is self-represented. In *CCBC*, the Superintendent argued that Mr. Kannuthurai had waived the right to raise any issue of bias since he did not raise it at the actual hearing. The Court agreed that normally allegations should be put to the decision maker at the earliest possible moment so that the decision-maker can set out its position and a reviewing court can have the benefit of a complete record.⁹⁴

However, the court found that Mr. Kannuthurai did not waive the right to raise the bias issue. The fact that he was self-represented was a key factor in that holding. The Court held that Mr. Kannuthurai was not aware that he could raise the issue, and he raised it at the first possible moment at the Divisional Court hearing, after he had retained counsel. In *Cengarle*, for example, the reviewing body found that the failure of counsel to object to the unfair interventions by the tribunal was not determinative⁹⁵ (although this

⁹⁰ *Cengarle*, *supra* note 34 at para. 22.

⁹¹ *Ibid.* at para. 24.

⁹² *Ibid.* at para. 30.

⁹³ *Ibid.* at para. 32.

⁹⁴ *CCBC*, *supra* note 2 at para. 51.

⁹⁵ *Cengarle*, *supra* note 34 at para. 20.

is not quite the same as the point made in *CCBC*). In any case, this is a good example of the increasingly important role self-representation plays in these proceedings. This is an issue further addressed later in this paper.

3. **Remedy**

Whenever an adjudicator acts in such a way as to enter the arena the remedy is almost universally to order a new hearing before a different adjudicator.⁹⁶

On occasion, courts go even further. In *Kumar v. Canada (Minister of Employment and Immigration)*⁹⁷ the court specifically declined to determine the issue of bias, but found on the basis of the repeated interventions by the Chair of the Immigration Appeal Board that Mr. Kumar was denied a fair hearing. The court ordered that a new hearing be heard with a differently constituted panel. However, Mr. Kumar had already been deported. The court ordered that Mr. Kumar be served with an international summons to re-attend a hearing, and that if he chose to attend (it was not mandatory) then the Minister of Employment and Immigration would have both the obligation and authority to pay his expenses. The court also ordered the Deputy Attorney General of Canada to report back to the court on the action taken to ensure the judgment was given effect, and reserved its jurisdiction to ensure the judgment's effectuality.⁹⁸

Even though a new hearing is the appropriate remedy at law, the difficulty with this remedy is that it puts the parties to great expense and significant delay, through no fault of their own. It may be that this is an issue courts, tribunals and legislators should re-examine. Should the parties be forced to bear the costs of adjudicator activism?

D. Self-Represented Litigants

⁹⁶ *CCBC*, *supra* note 2 at para. 60.

⁹⁷ [1987] F.C.J. No. 1015 (F.C.A.) [*Kumar*].

⁹⁸ *Ibid* at p. 4.

In *Barrett v Layton*,⁹⁹ a judge who was dealing with allegations of “entering into the fray” quoted this passage from a speech made by then Chief Justice McMurtry at the ceremony marking the opening of the Ontario Courts on January 6th, 1999:

In conclusion, I should like to spend a moment or two in relation to the continuing challenges facing the fundamental principle of access to justice. If the daily calls to my office are representative, there can be no doubt but that many of our fellow citizens simply do not have access to needed legal advice. It is highly unlikely that any government will ever be able to provide the financial resources for legal aid for the many who, for want of a better expression, simply ‘fall between the chairs’. Judges are also seeing more and more unrepresented litigants in our courts. I, therefore, believe that the major challenge facing the justice system in the next millenium will be the absence of adequate legal advice and legal representation to our society’s increasing numbers of disadvantaged.¹⁰⁰

As many legal practitioners can attest, this prediction has certainly turned out to be true. Both administrative and civil law cases that demonstrate the key points that lawyers need to be keenly aware of when dealing with a party on the other side of the administrative process who is unrepresented including the issue of language.

1. No Bias

In *Tricin Electric Ltd.*¹⁰¹ the Vice-Chair, of his own motion, ruled on restrictions to be placed on the documentation required of ten potential witnesses at a Labour Board hearing. The union objected that doing so was an act that amounted to the Board entering the arena as a litigant, and losing necessary objectivity and distance.¹⁰² The Vice-Chair rejected this argument citing the fact that the witnesses were self-represented. They had no recourse to legal advice and yet would be subject to a process that would be intrusive

⁹⁹ *Barrett v Layton* 2004 CanLII 32185 (ON S.C.) [*Barrett*].

¹⁰⁰ *Ibid.* at p. 9.

¹⁰¹ [2004] O.L.R.D. No. 4423 (O.L.R.B.) [*Tricin Electric*].

¹⁰² *Ibid.* at para. 10.

on sensitive personal matters.¹⁰³ Because of this, the Board was of the view that the restrictions were required given its duty to be fair to the witnesses.¹⁰⁴ The Vice-Chair ultimately concluded that in that context, the Board had not become a litigant or departed from the role of adjudicator.¹⁰⁵

There are other cases where a great deal of assistance is offered by a judge, but no bias on the basis of intervention is found. In *Wehbe v. Wehbe*¹⁰⁶ a judge offered the following assistance to an unrepresented litigant:

- explaining the trial processes to the self-represented litigant;
- explaining the order of witnesses;
- explaining the requirement of proof;
- explaining the hearsay rule;
- explaining the rule in *Browne v. Dunne*;
- explaining the difference between testimony and questioning;
- from time to time, taking a recess to allow the party to consider her position and to think about whether she had any further questions to ask.

Despite all of this assistance, contrary to the objections of the other party, the judge ruled no reasonable apprehension of bias was created.¹⁰⁷

Finally, in *Barrett v. Layton*¹⁰⁸ it was alleged that a judge had descended into the arena when he offered some assistance to an unrepresented party in a civil case disputing

¹⁰³ *Ibid.* at para. 14.

¹⁰⁴ *Ibid.* at para. 15.

¹⁰⁵ *Ibid.* at para. 18.

¹⁰⁶ [2007] O.J. No. 1053 (Ont. Sup. Ct. J.) [*Wehbe*]

¹⁰⁷ *Ibid.* at para. 17.

¹⁰⁸ *Barrett, supra* note 97.

monies flowing from the sale of a house, purchased jointly by the plaintiff and defendant. Shortly before the trial, the defendant's lawyer withdrew. She chose to continue without counsel rather than seeking an adjournment. The judge analysed whether his actions in assisting the unrepresented defendant crossed the line.¹⁰⁹ He cited a number of criminal decisions about unrepresented litigants that he viewed as indicative of the standard he had to meet:¹¹⁰

- a judge is required to assist an unrepresented accused and guide them through the trial process;
- although it is a matter of discretion, there is a minimum level of assistance that should be provided the unrepresented litigants to ensure the defendant receives a fair trial; and,
- this advice should not extend to providing the kind of advice counsel would provide.¹¹¹

The judge ruled that a trial judge has the jurisdiction to elicit evidence not otherwise led, by questioning witnesses, stating: “prompting an unrepresented party to have regard for the issues pleaded on her behalf by counsel, either when eliciting evidence by means of cross-examination, as she sees fit, or in presenting evidence in chief, as she sees fit, cannot be beyond the discretion of a trial judge.”¹¹² She noted that it would be a backward step to stop a judge from putting questions to obtain the

¹⁰⁹ *Ibid.* at p. 7 citing *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, (1992) 1 S.C.R. 623 at p. 636.

¹¹⁰ These cases include *Regina v. Gibbon*, (1988), 45 C.C.C. (3d) 334 (ON C.A.) at p. 347, *Regina v. Tran*, (2001), 55 O.R. (3d) 161 at para. 31 and *Regina v. Taubler* (1987), 20 O.A.C. 64 (ON C.A.) at p. 71.

¹¹¹ *Barrett*, *supra* note 97 at pp. 10-11.

¹¹² *Ibid.* at p. 12.

information that he or she wants, and that it was not inappropriate in another case for a judge to call back another two witnesses to question them on the issue of damages.¹¹³

The plaintiff in this action also argued that by drawing aspects of the statement of defence to the defendant's attention, the judge demonstrated an "interest" in the outcome suggesting a pre-judgement of the issues. The judge held that a reasonable person, knowing that the duty of the trial judge is to ensure fairness and that they also have a duty to elicit relevant evidence would not see that prompting an unrepresented person to consider whether they want to elicit further testimony based on the contents of their statement of defence, was inferring a premature decision.¹¹⁴ The judge concluded that summarizing the procedure and process, and drawing aspects of the statement of defence to the self-represented defendant's attention were not outside the bounds of what was reasonable or could cause a reasonable apprehension of bias.¹¹⁵

Finally the judge rejected the notion that all of the foregoing indicated that she had entered into the fray and was no longer impartial, citing the proposition that "judges are no longer required to be as passive as formerly. Judges are entitled to intervene in the adversarial debate and it is sometimes essential that they do so for justice to be done."¹¹⁶ The judge concludes by stating that, because it is the job of the parties to direct their efforts towards winning, it is the job of the judge to ensure a fair trial.¹¹⁷

2. **Bias Due to Excessive Intervention**

In *Lennox v. Arbor Memorial Services*,¹¹⁸ Arbor alleged that the trial judge had interfered in the conduct of the trial to such an extent that the "image of judicial impartiality was destroyed," which denied Arbor a fair trial. The plaintiff was an

¹¹³ *Ibid.* at pp. 12-13 citing *Connor v. The Township of Brant* (1914) 31 O.L.R. 274 (C.A.) and *French v. McKendrick*, (1931), 1 D.L.R. 696 (ON C.A.).

¹¹⁴ *Ibid.* at pp. 14-15.

¹¹⁵ *Ibid.* at p. 14.

¹¹⁶ *Ibid.* at p. 15 citing *Regina v. Brouillard* (1985), 1 S.C.R. 39.

¹¹⁷ *Ibid.* at p. 16.

¹¹⁸ 2001 CanLII 4868 (Ont. C.A.) [*Lennox*].

unrepresented litigant. The allegations were that the trial judge re-directed the plaintiff's line of questioning when he thought it was strategically ill-advised, engaged in extensive cross-examination of two of Arbor's witnesses and challenged their credibility, required production of documents that were not part of the pleadings and sought further explanation and clarification on these documents from Arbor witnesses.¹¹⁹

The Court of Appeal held that "trial judges are entitled to intervene in the trial where there is need for clarification. However, there is a point at which judicial 'intervention becomes interference and is improper.'"¹²⁰ The Court ultimately concluded that the trial judge's interventions exceeded the acceptable limits, particularly because they were entirely directed at assisting the unrepresented party.¹²¹

In a 2009 Divisional Court case, *Cicciarella v. Cicciarella*,¹²² a divorce proceeding, Mr. Cicciarella was the unrepresented litigant. It was clear when he appeared in court that he was vastly underprepared, showing up with a box of papers organized in no particular order or fashion and without key relevant documents that he had undertaken to have prepared for trial. The judge did a number of things that Mrs. Cicciarella found objectionable including that he:

- granted Mr. Cicciarella procedural leeway;
- made no comment about the fact that necessary information that Mr. Cicciarella was supposed to give to the court was not available;
- cut off Ms. Cicciarella's counsel during cross, saying that relevant information was irrelevant;
- interrupted counsel's opening statement;
- questioned the Mr. Cicciarella for 15 pages of transcript before he was sworn, and accepted it as formal evidence;

¹¹⁹ *Ibid.* at para. 12.

¹²⁰ *Ibid.* at para. 13, citing *Majcenic v. Natale* (1967), 66 D.L.R. (2d) 50 at 64 (On. C.A.).

¹²¹ *Ibid.* at para. 16.

¹²² 2009 CanLII 34988 (On. Sup. Ct. J. Div. Ct.) [*Cicciarella*]

- used Mrs. Cicciarella’s affidavit from her confidential case conference brief, when handed up by Mr. Cicciarella, and;
- conducted Mr. Cicciarella’s entire cross-examination.¹²³

The reviewing court noted that the “increase in the number of litigants who appear without legal representation can pose special challenges for busy trial judges. Leeway is allowed for a self-represented party, especially as it relates to procedural matters.”¹²⁴ On the other hand “there is a line to be drawn...the judge cannot descend into the arena from the bench and advocate for the self-represented litigant.”¹²⁵ The judge has to ensure that even though there should be some assistance given to the unrepresented litigant, that shouldn’t go so far as to *disadvantage* the represented litigant.¹²⁶ Though leeway may be allowed to the self-represented litigant, the judge must not go so far as to become an advocate for that party.

The Divisional Court found that the constant interruptions and the active role the judge assumed with regard to Mr. Cicciarella’s case “gave the appearance that he was assisting the Respondent to the detriment of the Appellant.”¹²⁷ The judge went beyond the allowable bounds of assistance and the decision was overturned.¹²⁸

3. English as a second language as an additional factor

In *Toronto City v Ng (c.o.b. Cantonese Stir Fry Restaurant)*¹²⁹ the city of Toronto sought to have the licenses of a number of restaurants operating in a Dundas and Spadina mall revoked. The Licensing Tribunal operating under the *Municipal Act* held a hearing and, on the basis of evidence given at the hearing, chose not to revoke the licenses. The

¹²³ *Ibid.* at para. 46-55.

¹²⁴ *Ibid.* at para. 36 citing *Manitoba (Director of Child and Family Services) v. A.(J)* (2004), 247 D.L.R. (4th) 490, 2004 MBCA 184 at para. 32.

¹²⁵ *Ibid.* at para. 37.

¹²⁶ *Ibid.* at para. 41. The reviewing court also makes reference to the 2006 Canadian Judicial Council’s “Statement of Principles on Self-Represented Litigants and Accused Persons.” This statement can be found at: < www.cjc-ccm.gc.ca/.../news_pub_other_PrinciplesStatement_2006_en.pdf > and see paras. 42-44.

¹²⁷ *Ibid.* at para. 64.

¹²⁸ *Ibid.* at para. 79.

¹²⁹ [2007] O.J. No. 1127 (On. Sup. Ct. J. Div. Ct.) [*Cantonese Stir Fry*].

City of Toronto sought review of this decision based on, amongst other things, the fact that the Tribunal asked a number of questions throughout the hearing, suggesting they were descending into the arena. The Divisional Court held that on review of the transcripts, it appeared that the Tribunal was asking questions because the restaurant owners had difficulty understanding English and they were unrepresented.

The Divisional Court's conclusion on this issue was that administrative tribunals were meant to be less formal, and tribunals were entitled to take an active role in inquiring about matters, in order to clarify information to make an informed decision. The Divisional Court noted that the manner of questioning was not extreme or excessive, did not interfere with the City's ability to make its case and did not raise a reasonable apprehension of bias. It could not be said there was "intervention amounting to interference in the conduct of a trial" which would normally destroy the image of judicial impartiality and deprives the court of jurisdiction.¹³⁰

By contrast, in another civil case, *Tran v. Financial Debt Recovery Ltd*,¹³¹ the judge rendered assistance to an unrepresented litigant who had difficulty with the English language, but was held to have overstepped the boundaries and descended into the arena. The actions of the judge included ruling that the statement of claim disclosed two causes of action, even though they had not been pleaded, introducing the unrepresented party's documents into evidence herself without giving defence counsel an opportunity to review them first, conducting the entire examination in chief of the plaintiff and the plaintiff's one witness, and amending the plaintiff's statement of claim for damages from \$15,000 to \$25,000. The judgment was set aside and a new trial ordered as the Divisional Court held that this exceeded the limits of the type of involvement a judge could properly engage in.¹³²

E. Conclusion

¹³⁰ *Ibid.* at para. 19, also citing *Lennox v. Arbor Memorial Services Inc.* (2001), 56 O.R. (3d) 795 (C.A.) which was citing *Majcenic v. Natale*, [1968] 1 O.R. 189.

¹³¹ [2001] O.J. No. 4103 (Ont. Sup. Ct. J. Div. Ct.) [*Tran*].

¹³² *Ibid.* at para. 4.

In all areas of the law, the issue of overly interventionist adjudication has the potential to adversely affect the fairness of a proceeding. The issue of unrepresented litigants has also served to further complicate the landscape. In the administrative realm, where efficient and accessible justice is a goal, there may be a particular temptation to take control – to ensure that relevant matters are pursued with expeditiousness. However, all adjudicators must avoid descending into the arena.

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