Active Adjudication or Entering the Arena: How Much is Too Much?

Freya Kristjanson and Sharon Naipaul[*]

A central concern in administrative hearings is whether and how the adjudicator's conduct may affect the fairness of that proceeding. This article reviews jurisprudence in the civil, administrative and criminal contexts, which illustrates the limits of adjudicator participation. The adjudicator's appropriate role in controlling proceedings is contrasted with the kinds of interventions that may be perceived as descending into the arena. A central concern is action that raises a reasonable apprehension of bias, generally in relation to partisanship, or pre-judgment as to facts, evidence or credibility. Particular attention is paid to the challenges of dealing with unrepresented litigants in the administrative realm, where efficient and accessible justice is a goal.

Le principal problème lié aux instances administratives consiste à déterminer si la conduite de l'arbitre a eu une incidence sur l'équité des procédures, et dans l'affirmative, dans quelle mesure. Le présent article traite de la jurisprudence en droit civil, administratif et criminel qui porte sur les limites de la participation d'un arbitre. Le rôle approprié de l'arbitre dans le déroulement des procédures est comparé aux types d'intervention qui peuvent être perçus comme n'étant pas neutres. Le principal problème concerne la demande qui soulève un doute raisonnable de partialité, généralement associé à de la partisanerie ou à un préjugé quant aux faits, à la preuve ou à la crédibilité. Les auteurs portent une attention particulière aux défis que posent les parties non représentées par avocat dans une instance administrative où l'accessibilité à la justice et son efficacité constituent les buts ultimes.

---

* Freya Kristjanson is a partner at Cavalluzzo, Hayes, Shilton, McIntyre and Cornish, practicing in the areas of administrative law, pensions and civil litigation. Sharon Naipaul is an associate at the same firm. This article is based on a paper originally presented at an Ontario Bar Association Conference, "Current Issues in Tribunal Adjudication: An Update for Advocates and Members" (March 8, 2011).

> 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*[1]

1. INTRODUCTION

Administrative proceedings are generally more flexible, accessible, expeditious and informal than court proceedings. As part of the delivery of administrative justice, decision-makers may adopt streamlined proceedings, and engage the parties more directly than judges. As a result, an important issue in the area of administrative law is the limit on "active adjudication" — at what point will the interventions by or participation of an adjudicator be seen as descending into the arena and compromising the fairness of a proceeding? The major concerns are adjudicator conduct raising a reasonable apprehension of bias, based on the appearance of taking the "side" of one of the parties, or pre-judging facts, evidence or credibility.

We first review three significant cases from the Ontario Court of Appeal that establish a contextual approach to the issue of adjudicator conduct. We then review general jurisprudential principles applicable in the administrative context, including the importance of the statutory scheme and the tribunal's rules, and the test for reasonable apprehension of bias based on adjudicator conduct. Finally, we examine particular challenges in dealing with unrepresented litigants. Ultimately, this review should offer guidance to both decision makers and legal practitioners as to the acceptable parameters of active adjudication.

2. THE KEY CASES

A recent trilogy of cases from the Ontario Court of Appeal provides important guidance on the limits of intervention by adjudicators in the course of proceedings. We discuss below *Canadian College of Business & Computers Inc. v. Superintendent, Under The Private Career Colleges Act*[2] in the administrative context; *Chippewas of Mnjikaning First Nation v. Ontario (Minister Responsible of Native Affairs)*[3] in the civil context; and *R. v. Stucky*[4] in the criminal context. Together, these cases set out a principled and coherent approach to the issue of active adjudication.

(a) *Chippewas of Mnjikaning First Nation*

In this case, the Chippewas of Mnjikaning First Nation ("Chippewas First Na-

---

1 (1957), [1957] 2 All E.R. 155, [1957] 2 Q.B. 55 (Eng. C.A.), citing *Yuill v. Yuill* (1944), [1945] 1 All E.R. 183, [1945] P. 15 (Eng. C.A.).

2 (2010), 2010 ONCA 856, 2010 CarswellOnt 9555 (Ont. C.A.) [*CCBC*].

3 (2010), 2010 CarswellOnt 273, [2010] 2 C.N.L.R. 18 (Ont. C.A.); leave to appeal refused (2010), 2010 CarswellOnt 4919, 2010 CarswellOnt 4920, 409 N.R. 396 (note) (S.C.C.) [*Chippewas* cited to Ont. C.A.].

4 (2009), 2009 CarswellOnt 745, 303 D.L.R. (4th) 1 (Ont. C.A.) [*Stucky*].

tion") appealed the dismissal of their action brought 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 Chippewas First Nation to host Casino Rama had also led to an agreement to engage in a profit-sharing plan.

In this appeal, the Chippewas First Nation raised a reasonable apprehension of bias argument based on the judge's interventions during the trial. The specific allegations were that the judge assumed the role of counsel when he asked witnesses questions, inappropriately commented on evidence to be expected from Chippewas First Nation, exhibited impatience, and gave the impression that he had pre-judged issues of fact and credibility. The Chippewas First Nation raised the appearance of unfairness.[5] They claimed that the cumulative effect of the trial judge's interventions indicated that he was receptive to the respondents' case and dismissive of the appellant's.[6]

In the assessment of the allegations made by the Chippewas First Nation, the Court of Appeal analyzed the issue on the basis of the reasonable apprehension of bias test set out in *Committee for Justice & 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."
>
> . . . . .
>
> 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."[7]

The assessment is a fact-specific inquiry, in the context of the circumstances of a particular trial. The test is to be applied objectively, not subjectively. Finally, 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."[8]

The Court of Appeal noted that there are many "proper reasons" why a trial judge could or would intervene by giving directions or making comments.[9] The reasons include:

- the need to focus the evidence on matters in issue;

---

5 *Chippewas*, *supra* note 3 at paras. 225–228.

6 *Ibid.* at para. 225.

7 *Ibid.* at para. 229.

8 *Ibid.* at para. 230.

9 *Ibid.* at para. 231.

- 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.[10]

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, issues or credibility.[11]

Additionally, the Court also recognized that appellate courts are generally reluctant to intervene on the basis that the trial judge "entered the arena". This is because appellate courts operate with a strong presumption that judges have conducted themselves fairly and impartially.[12]

The Court applied the reasonable apprehension of bias test[13] on an objective basis while considering the other principles articulated in the judgment. The Court ultimately concluded that all of the judge's interventions were reasonable in the context of the trial, and the interventions did not create an appearance of unfairness such that an objective observer would conclude that the trial judge had made up his mind. For these reasons the Court chose not to intervene.[14]

(b) *Canadian College of Business and Computers Inc.*

In this case, the respondent, Mr. Kannuthurai, was the principal (and owner) of the Canadian College of Business and Computers ("CCBC") operating under the power of the *Private Career Colleges Act*. The Superintendent sought to have Mr. Kannuthurai's license for the CCBC revoked and both parties went before the License Appeal Tribunal (LAT) to have the matter adjudicated. Both the College and Mr. Kannuthurai were unrepresented before the LAT.

During the course of the hearing the Licence Appeal Tribunal adjudicator intervened on a number of occasions when the respondent Mr. Kannuthurai was cross-examining his chief witness, and when Mr. Kannuthurai 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 been raised previously and it was clear that Mr. Kannuthurai denied any involvement. That issue was also deemed to be irrelevant by the adjudicator when it had come up in the hearing before.

The CCBC's license was ultimately revoked, and Mr. Kannuthurai applied for judicial review of the decision to the Divisional Court. He raised the issue of bias for the first time (and not before the original adjudicator). The Divisional Court

---

10 *Ibid.* at para. 233.

11 *Ibid.* at paras. 235-236 and 238.

12 *Ibid.* at para. 243.

13 *Ibid.* at para. 229.

14 *Ibid.* at para. 264.

granted the judicial review application, which was upheld by the Court of Appeal.[15]

The Court of Appeal, as in *Chippewas*, analyzed the issue of intervention applying the classic reasonable apprehension of bias test, from *Committee for Justice & Liberty v. Canada (National Energy Board)*.[16] On the issue of adjudicative intervention specifically, the Court applied the objective test as articulated in *Chippewas*, on the basis that the trial record must be evaluated in its totality and interventions must be evaluated cumulatively.[17]

The Court of Appeal found that a reasonable observer would conclude that the adjudicator had pre-judged Mr. Kannuthurai's credibility, based on the adjudicator's comment that Mr. Kannuthurai was "misleading the court". The adjudicator's comment was made during Mr. Kannuthurai's cross-examination of the Superintendent. Context was critical to this finding, since the hearing involved allegations of dishonesty, financial improprieties, and conduct akin to fraud.[18]

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 evidence to the attention of a self-represented litigant. The Court concluded that this was also a pre-judgment of Mr. Kannuthurai's credibility.[19]

The Court did not accept the argument that the line of questioning regarding Mr. Kannuthurai's alleged terrorist activity was benign. The adjudicator had previously 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 Court held that the questions could not be seen as trivial or inconsequential.[20] The Court found that the high threshold for establishing a reasonable apprehension of bias was established.[21] On remedy, the Court of Appeal determined the breach of fairness could only be cured by a new hearing, before a different adjudicator.[22]

(c) *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

---

15 *CCBC*, *supra* note 2 at para. 4.

16 *Ibid.*, at para. 23, citing *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 1976 CarswellNat 434, 1976 CarswellNat 434F, [1978] 1 S.C.R. 369 (S.C.C.) at 394 [S.C.R.].

17 *CCBC*, *supra* note 2 at para. 25.

18 *Ibid.* at para. 34.

19 *Ibid.* at para. 41.

20 *Ibid.* at para. 46.

21 *Ibid.* at para. 49.

22 *Ibid.*

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 that the trial judge then improperly relied on this evidence in his reasons for decision.[23] The accused argued that the judgment should be set aside and a new trial ordered because the excessive interventions at trial undermined the appearance of fairness.[24]

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."[25] 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 that the witnesses' answers have left vague; or
- to put questions that should have been asked by counsel in order to bring out some relevant matter, but which were nonetheless omitted.[26]

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."[27]

Using these principles, the Court applied the following restatement of the *Committee for Justice* 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*.[28]

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 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.[29]

The Court of Appeal applied the test having regard to the "unique facts and circumstances"[30] of the trial and ultimately agreed that the interventions by the

---

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

24 *Ibid.* at paras. 59.

25 *Ibid.* at para. 61.

26 *Ibid.* at para. 64.

27 *Ibid.* at para. 65.

28 *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 (note) (S.C.C.) at 232 [C.C.C.].

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

30 *Ibid.* at para. 70.

judge crossed the line.[31] The Court found that the trial judge had 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".[32] When the record was considered in its entirety, the Court found that the trial judge's conduct did not come within the ambit of permitted judicial conduct.[33]

The application of these principles in administrative proceedings will vary, depending on whether the proceedings are adversarial, and the degree to which they approach the "quasi-judicial" end of the spectrum. Counsel in professional discipline cases should take particular note of criminal cases that deal with the issue of excessive interventionism by a judge. The two leading professional discipline cases dealing with interventionist adjudication — *Law Society of Upper Canada v. Cengarle*[34] and *Solicitor "X" v. Barristers' Society (Nova Scotia)*[35] — have held that the standards of judicial conduct in criminal trials apply in the professional discipline context.

3. GENERAL JURISPRUDENTIAL PRINCIPLES

A review of *Chippewas*, *CCBC*, *Stucky* and other jurisprudence reveals a number of general principles related to overly active adjudication. These principles will be addressed under three broad categories: statutory powers; the applicable test for determining the reasonable apprehension of bias and when and how it applies; and remedy.

(a) Statutory Powers

The administrative adjudicator and counsel must determine whether the statute and regulations or applicable rules, policies and guidelines may create a broader scope for adjudicator intervention. The flexibility of administrative law, following a *Baker* analysis, indicates that there may well be scope for increased adjudicator activism, particularly where a Tribunal's rules and policies make provision for this.[36] For example, in *Hansen v. Toronto (City)*,[37] 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."[38] The power to engage in active adjudication can be found under the Human Rights Tribunal Rules of Procedure, Rule 1.7, where the Tribunal is empowered to,

---

31 *Ibid.* at para. 100.

32 *Ibid.* at paras. 59-60.

33 *Ibid.* at para. 100.

34 2010 ONLSAP 11, [2010] L.S.D.D. No. 61 [*Cengarle*].

35 (1998), 1998 CarswellNS 436, 171 D.L.R. (4th) 310 (N.S. C.A.) [*Solicitor X*].

36 *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 1999 CarswellNat 1124, 1999 CarswellNat 1125, [1999] 2 S.C.R. 817 (S.C.C.).)

37 2010 HRTO 13, [2010] O.H.R.T.D. No. 22 [*Hansen*].

38 *Ibid.* at para. 9.

among other things:

> 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;
>
> r) direct that the deponent of an affidavit be cross-examined before the Tribunal or an official examiner;
>
> 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.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.[39]

On the other hand, even a broad scope for inquisitional procedures will not protect adjudicators who engage in a *partisan* fashion when intervening. In a Workers' Compensation Board case, a Tribunal Panel consisting of three members conducted a hearing regarding a worker's entitlement to Workers' Compensation for a shoulder disability.[40] Based on the conduct at the hearing, the employer accused the Chair of the Panel of descending into the arena. In particular, the Chair posed questions to a witness that, counsel argued, indicated that the Chair was partisan or biased. The matter was appealed to the Ontario Workers' Compensation Appeals Tribunal.[41]

The Appeals Tribunal held that it was normal for the Tribunal Panel to take an

---

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

40 [1996] O.W.C.A.T.D. No. 1425 (Ontario Workers' Compensation Appeal Tribunal) [*186/94*].

41 *Ibid.* at para. 12.

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.[42] 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 and their answers from the record.[43]

Generally these cases indicate that active adjudication may be challenged for bias, but if statutorily empowered to do so, procedural fairness may still be preserved. However, even where an adjudicator is statutorily empowered to actively adjudicate, appearing to take a position as between the parties will not be protected. The next key piece that should be examined is the test that is applied when bias on the basis of descending or entering into the arena is raised.

(b) Test for Bias and the Applicable Presumption

The test regularly applied in the context of active adjudication 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. . . ."[44]

This 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;[45]
- an objective test;[46]
- the perspective is that of the "reasonable" or "right-minded" persons;[47]
- the apprehension cannot based only on surmise or conjecture;[48]
- the grounds for the apprehension must be substantial.[49]

(i) When the Standards and Principles Apply

The issue of excessive intervention generally arises when an adjudicator is interacting 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.[50] 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 ap-

---

42 *Ibid.* at para. 18.

43 *Ibid.* at para. 20.

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

45 *Ibid.* at para. 243.

46 *Ibid.* at para. 230.

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

48 *Ibid.* at para. 15.

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

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

prehension of bias."[51] While interactions with counsel may lead to a reasonable apprehension of bias, even heated questioning of counsel will rarely form the necessary basis for that apprehension.

These standards and principles are of critical importance when the "subject" of the administrative proceeding testifies. 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."[52] While there is no accused in an administrative proceeding, this caution will similarly apply in the professional disciplinary context and indeed, when dealing with the person whose rights, privileges or interests will be affected by the disposition.

(ii) Context — How the Test Applies

Context is another critical factor in the analysis. There is no "bright line" between principles to be applied in administrative proceedings as opposed to 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 courts,[53] but adopts the analysis set out in *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, an administrative law case.[54] In *Newfoundland*, even though the Supreme Court recognized that fairness applies to all administrative bodies, the procedural protections required would still depend on the nature and function of the particular tribunal. Those that are primarily adjudicative in function are essentially held to the same standards as the courts.[55]

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."[56] Furthermore, the hearing record must be assessed in its totality. The interventions that a party complains of must be evaluated cumulatively rather than as isolated occurrences, from the perspective of a reasonable observer throughout the hearing.[57] Thus, the analysis is not only applied at the level of the overall functioning of the administrative decision-maker (quasi-judicial end of the spectrum vs. more informal administrative proceeding), but also to the individual questions or interventions made by the adjudicator(s) and the cumulative impact of the interventions. 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 hearing, create a reasonable apprehension of bias or other lack of pro-

---

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

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

53 *Solicitor X*, *supra* note 35, at para. 16, citing *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)* (1990), 1990 CarswellMan 383, 1990 CarswellMan 235, [1990] 3 S.C.R. 1170 (S.C.C.).

54 [1992] S.C.R. 623.

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

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

57 *Ibid.* at para. 230.

cedural fairness.[58]

In attempting to demonstrate the cumulative impact of interventions, the length of a hearing is an important factor. For example, 100 interventions in a 60-day trial might be reasonable. The same number of interventions in a three-day hearing, 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 that reflect an adjudicator's interventions, in the context of the length of the entire transcript.

(iii) Grey Areas

While the test is clear, the application of the test in a particular proceeding may be challenging. There are a number of "grey areas", where an adjudicator must be particularly careful with respect to interventions that may cross the line. We discuss a number of these areas below, including the difficulties in determining the line between controlling the proceedings and descending into the arena; the manner of questioning; and particular aspects of the adjudicative role including facilitation/mediation, own motions, adjudicator demeanour, and the examination of witnesses.

(A) Controlling vs. Descending

What is the difference between proper control of proceedings, and problematic descent into the arena? The principles outlined in *Stein v. Sandwich West (Township)*[59] assist in making that determination through a review of relevant jurisprudence:

- *Jones v. National Coal Board* — to clear up any points that were overlooked or obscured, 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 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.

Additional principles are outlined in *Stucky*:

- a trial judge must exercise restraint and maintain impartiality so as to act

58 *Ibid.* at para. 243.

59 (1995), 1995 CarswellOnt 160, [1995] O.J. No. 423, 25 M.P.L.R. (2d) 170 (Ont. C.A.) at paras. 21–25 cited to O.J.

within the scope of his or her neutral role;[60]

- 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;[61] and
- permitted interventions include:
    - to clear up ambiguities and call a witness to order;
    - to explore some matter that the witnesses' answers have left vague; and
    - to put questions that should have been asked by counsel in order to bring out some relevant matter but which were omitted.[62]

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."[63] Administrative decision-makers must similarly control the proceedings before them, and often in a context that lacks the formality of a court and poses particular problems in relation to control. The fine line that exists between controlling and descending is demonstrated in *Campbell (Re)*.[64] In that case, a bias allegation was brought against a referee hearing an *Employment Standards Act* matter. The specific conduct being impugned included alleged interference in the cross-examination of the claimant (the referee 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); granting the claimant party status and thereby exempting her from the order excluding witnesses; and admonishing the employer for making insulting comments while failing to admonish the claimant for a comment she had directed toward the employer. The employer then alleged that there was a reasonable apprehension of bias on the basis of the referee's actions.[65]

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 when compared with other jurisprudence where a reviewing court had ruled that similar behaviour was controlling the proceeding, not descending into the arena.[66]

---

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

61 *Ibid.* at para. 63.

62 *Ibid.*

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

64 [1996] O.E.S.A.D. No. 296 (Ontario Ministry of Labour — Office of Adjudication) [*Campbell*] at paras. 2 and 8.

65 *Ibid.* at para. 7.

66 *Ibid.* at para. 11.

(B) 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 or asking questions during the course of a trial."[67] *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."[68] The issue at the heart of over-active adjudication, in general, is that it has the potential for a party to form a reasonable belief that a judge has "sided" with a party, which applies to the form and content of questioning by adjudicators.

As a purely practical matter, *Chippewas* notes that if a judge does have questions for witnesses, it is often better to wait until counsel has completed their line of questioning or when the witness's evidence is complete.[69] The adjudicator should then clearly offer counsel the opportunity to ask further questions arising from the adjudicator's questions.

Administrative decision-makers should not refrain from questioning, however, where it is important to the disposition of the case. In *Parkdale Focus Community Project v. Group of Employees*,[70] 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.[71]

In another case, *Guermache v. Canada (Minister of Citizenship & Immigration)*,[72] the reviewing court ultimately decided that because questions from the tribunal member were more like a "police interrogation" than a hearing before a tribunal, a reasonable person would conclude that the decision maker was biased. 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.[73]

(C) Limits on the Role of Adjudicator

Facilitation/Mediation:

---

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

68 *Ibid.* at para. 238.

69 *Ibid.* at para. 239.

70 [2000] O.P.E.D. No. 4 (Ontario Pay Equity Tribunal) [*Parkdale*].

71 *Ibid.* at para. 11.

72 (2004), 2004 CarswellNat 1853, 2004 CarswellNat 3999, 21 Admin. L.R. (4th) 37 (F.C.) [*Guermache*].

73 *Ibid.* at para. 13.

There are also risks when an adjudicator or tribunal attempts to act as a facilitator or mediator in the course of a hearing, unless the parties have specifically consented or the Tribunal's rules so provide. In *Yukon Territory (Workers' Compensation Health & Safety Board), Re*,[74] 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 the Board alleged would be entering the arena of conflict.

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.[75]

Motions:

Another area of potential concern arises when adjudicators raise issues of their own motion, particularly where the parties do not wish to pursue the issue. In *Hanley v. Eden*,[76] this problem 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 was concerned created a conflict.[77] 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.[78]

Demeanour:

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

---

74 (2006), 2006 YKSC 4, 2006 CarswellYukon 7 (Y.T. S.C.) [*Yukon*].

75 *Ibid.* at paras. 22-23.

76 (2005), 2005 CarswellOnt 67, 249 D.L.R. (4th) 447, [2005] O.J. No. 55 (Ont. Div. Ct.) [*Hanley* cited to O.J.].

77 *Ibid.* at para. 43.

78 *Ibid.* at para. 48.

sarcasm.[79] However, "isolated expressions of impatience or annoyance by a judge as a result of frustrations . . . do not of themselves create unfairness."[80] In other words, it would appear that it is not a question of kind, but of degree. The Court in *Guermache* held that it is also a long-standing principle that "there is no place for intimidation, contempt and offensive innuendo, nor for harshness or inappropriate language."[81]

Examination of Witnesses:

One of the most sensitive areas is interventions during the examination of witnesses. The Court of Appeal 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."[82] The case gives specific examples of judicial conduct that have 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 that have made it impossible for defence counsel to perform his or her duty in advancing the defence; and,
- interventions that preclude the accused from telling his or her story in his or her own way.[83]

In *Solicitor X*,[84] the Court relies on *Golomb v. College of Physicians & Surgeons (Ontario)*[85] for guidelines on questioning in the professional discipline context:

- 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;

---

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

80 *Ibid.* at para. 243.

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

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

83 *Ibid.* at para. 70.

84 *Supra* note 35 at paras. 18–20.

85 (1976), 1976 CarswellOnt 819, 12 O.R. (2d) 73 (Ont. Div. Ct.) [cited to O.R.].

- 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, he or she has gone too far.

In the case of *Solicitor X*, the Court found that the questions asked by the adjudicator brought him into the arena, "cast with the demeanour of prosecutors"[86] and as a result the decision was void *ab initio*.[87]

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 a reasonable apprehension of bias and appealed to the Law Society of Upper Canada's appeal panel. The appeal panel did not find that the interventions and questions, *on the basis of sheer volume alone*, supported an apprehension of bias.[88]

However, they did find that 16 questions asked by the Panel indicated that the Panel members had descended into the arena. The Panel departed from its neutral fact-finding role when, for example, the members attempted to extract admissions that were clearly contrary to the accused's theory of defence.[89] The Panel then relied on information from these 16 questions in their reasons.[90] Ultimately, the appeal in this case was allowed.[91] This guideline, that questions must be neutral and for the purpose of fact-finding, provides a practical guideline for determining whether the adjudicator's questions have gone too far.

(D) Waiver

CCBC is significant in creating 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 in the normal course allegations should be put to the decision maker at the earliest possible moment so that the decision-maker could set out their position and a reviewing court could have the benefit of a complete record.[92]

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

---

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

87 *Ibid.* at para. 22.

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

89 *Ibid.* at paras. 24 and 25.

90 *Ibid.* at para. 30.

91 *Ibid.* at para. 32.

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

not determinative[93] (although this 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.

Once the test and the contours of the applicability of the test and grey areas are considered, it is natural to turn to a discussion of the remedy courts will award where a reasonable apprehension of bias, on the basis of overly interventionist adjudication, has been established.

(c) Remedy

Whenever an adjudicator acts in such a way as to enter the arena, the remedy is generally to order a new hearing before a different adjudicator.[94]

On occasion, courts go even further. In *Kumar v. Canada (Minister of Employment & Immigration)*,[95] 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 a new hearing before 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), 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.[96]

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. Whether parties should be forced to bear the costs of excessive adjudicator activism is another interesting aspect of this issue.

4. UNREPRESENTED LITIGANTS

With respect to all of the issues discussed above, in some senses the "litmus" test for the application and determination of the issue is in cases that involve unrepresented litigants. Unrepresented litigants pose particular challenges for adjudicators because of the burden of ensuring that procedural fairness is maintained when at least one of the parties may not be familiar with even basic principles of evidence and argument, and the interests at stake are clearly personal.

The importance and prevalence of unrepresented litigants is best reflected in *Barrett v. Layton*,[97] where a judge who was dealing with allegations of "entering

---

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

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

95 (1987), 1987 CarswellNat 214, 1987 CarswellNat 214F, [1988] 2 F.C. 14 (Fed. C.A.) [*Kumar*].

96 *Ibid.* at para. 4.

97 (2003), 2003 CarswellOnt 5602, 69 O.R. (3d) 384, 2004 CanLII 32185 (Ont. S.C.J.) [*Barrett*, cited to CanLII].

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 6, 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.[98]

In the decade since the Chief Justice made these comments, courts and tribunals alike have grappled with the challenges associated with interventions — often designed to explain the process, or "even the playing field" — that may be perceived as providing an unfair advantage to the unrepresented party. On the other hand, these interventions may be seen by the unrepresented litigants as undue and unfair constraints placed upon her case. The cautions above, about form, manner and content of intervention are particularly important in this context.

(a) No Bias

In this section, we discuss a number of examples that illustrate acceptable participation by adjudicators, appropriately controlling the proceedings. In *I.B.E.W. v. Tricin Electric Ltd.*,[99] 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.[100] 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 on sensitive personal matters.[101] Because of this, the Board was of the view that the restrictions were required given its duty to be fair to the witnesses.[102] The Vice-Chair ultimately concluded that in that context, the Board had not become a litigant or departed from the role of adjudicator.[103]

There are other cases where a great deal of assistance is offered by a judge, but no reasonable apprehension of bias on the basis of intervention is found. In *Wehbe*

---

98 *Ibid.* at para. 32.

99 (2004), 2004 CarswellOnt 6329, [2004] O.L.R.D. No. 4423 (Ont. L.R.B.) [*Tricin Electric* cited to O.L.R.D.].

100 *Ibid.* at para. 10.

101 *Ibid.* at para. 14.

102 *Ibid.* at para. 15.

103 *Ibid.* at para. 18.

v. Wehbe,[104] 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; and
- 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.

Contrary to the objections of the other party, the judge ruled no reasonable apprehension of bias was created.[105] The interventions were primarily directed to explaining the process and basic principles of evidence, as an aspect of controlling the proceedings.

Finally, in *Barrett v. Layton*,[106] it was alleged that a judge had descended into the arena in a civil case disputing 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 analyzed whether his actions in assisting the unrepresented defendant crossed the line.[107] He cited a number of criminal decisions about unrepresented litigants that he viewed as indicative of the standard he had to meet:[108]

- 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 to 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.[109]

The judge ruled that a trial judge has the jurisdiction to elicit evidence not otherwise led, by questioning witnesses, stating: "prompting an unrepresented party

---

104 2007 CarswellOnt 1664, [2007] O.J. No. 1053, 156 A.C.W.S. (3d) 130 (Ont. S.C.J.) [*Wehbe* cited to O.J.].

105 *Ibid.* at para. 17.

106 *Barrett*, *supra* note 97.

107 *Ibid.* at 7, citing *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* (1992), 1992 CarswellNfld 179, 1992 CarswellNfld 170, [1992] 1 S.C.R. 623 at 636 (S.C.C.).

108 These cases include *R. v. McGibbon* (1988), 1988 CarswellOnt 1047, 45 C.C.C. (3d) 334 at 347 (Ont. C.A.); *R. v. Tran* (2001), 2001 CarswellOnt 2706, 55 O.R. (3d) 161 (Ont. C.A.) at para. 31; and *R. v. Taubler* (1987), 1987 CarswellOnt 800, 20 O.A.C. 64 at 71 (Ont. C.A.).

109 *Barrett*, *supra* note 97 at 10-11.

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."[110] She noted that it would be a backward step to stop a judge from putting questions to obtain the 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.[111]

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 wish to elicit further testimony based on the contents of their statement of defence, was inferring a premature decision.[112] 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.[113]

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."[114] 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.[115]

(b) Bias Due to Excessive Intervention

The preceding section provided examples of appropriate assistance that may be provided by the adjudicator when dealing with an unrepresented party. In this section, we review cases in which the interventions have crossed the line. The central focus is actions that may compromise the appearance of impartiality or constitute undue interference with the presentation of a litigant's case.

In *Lennox v. Arbor Memorial Services Inc.*,[116] Arbor Memorial Services alleged that the trial judge had interfered in the conduct of the trial to such an extent

---

110 *Ibid.* at 12.

111 *Ibid.* at 12-13, citing *Connor v. Brant (Township)* (1914), 31 O.L.R. 274 at 276 (Ont. C.A.) and *French v. McKendrick* (1930), [1931] 1 D.L.R. 696, 66 O.L.R. 306 (Ont. C.A.).

112 *Barrett*, *supra* note 97 at 14-15.

113 *Ibid.* at 14.

114 *Ibid.* at 15, citing *R. v. Brouillard* (1985), 1985 CarswellQue 7, 1985 CarswellQue 793, [1985] 1 S.C.R. 39 (S.C.C.).

115 *Barrett*, *supra* note 97 at 16.

116 (2001), 2001 CarswellOnt 4248, 56 O.R. (3d) 795, 2001 CanLII 4868 (Ont. C.A.) [*Lennox*, cited to CanLII].

that the "image of judicial impartiality was destroyed", which denied Arbor Memorial Services a fair trial. The plaintiff was an 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 Memorial Services' 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 Memorial Service's witnesses.[117]

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.'"[118] 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.[119]

In the 2009 Divisional Court case, *Cicciarella v. Cicciarella*,[120] Mr. Cicciarella was the unrepresented litigant. He was underprepared when he appeared in court, 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 the former Mrs. Cicciarella found objectionable. She alleged that the judge:

- granted Mr. Ciciarella procedural leeway;
- made no comment about the fact that necessary information that Mr. Cicciarella was required to provide to the court was not available;
- cut off Mrs. Cicciarella's counsel during cross-examination, saying that relevant information was irrelevant;
- interrupted counsel's opening statement;
- questioned Mr. Cicciarella for 15 pages of transcript before he was sworn, and accepted it as formal evidence;
- 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.[121]

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

[117] *Ibid.* at para. 12.

[118] *Ibid.* at para. 13, citing *Majcenic v. Natale* (1967), 1967 CarswellOnt 179, [1967] O.J. No. 1111, 66 D.L.R. (2d) 50 (Ont. C.A.).

[119] *Lennox*, *supra* note 116 at para. 16.

[120] (2009), 2009 CarswellOnt 3972, 72 R.F.L. (6th) 319, 2009 CanLII 34988 (Ont. Div. Ct.) [*Cicciarella*, cited to CanLII].

[121] *Ibid.* at paras. 46–55.

procedural matters."[122] 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."[123] The judge has to ensure that even though there should be some assistance given to the unrepresented litigant, it should not go so far as to *disadvantage* the represented litigant.[124] Put another way, 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."[125] The judge went beyond the allowable bounds of assistance and the decision was overturned.[126]

(c) English as a Second Language as an Additional Factor

In *Toronto (City) v. Ng*,[127] 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 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.[128]

---

[122] *Ibid.* at para. 36, citing *Manitoba (Director of Child & Family Services) v. A. (J.)* (2004), 2004 MBCA 184, 2004 CarswellMan 522, 247 D.L.R. (4th) 490 (Man. C.A.) at para. 32.

[123] *Cicciarella*, *supra* note 120 at para. 37.

[124] *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 online at: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf> and see paras. 42–44.

[125] *Cicciarella*, *supra* note 120 at para. 64.

[126] *Ibid.* at para. 79.

[127] (2007), 2007 CarswellOnt 1761, [2007] O.J. No. 1127, 62 Admin. L.R. (4th) 229 (Ont. Div. Ct.) [*Ng* cited to O.J.].

[128] *Ibid.* at para. 19, also citing *Lennox*, *supra* note 116, which was citing *Majcenic v. Natale*, *supra* note 118.

By contrast, in another civil case, *Tran v. Financial Debt Recovery Ltd.*,[129] 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 in which a judge could properly engage.[130]

These two cases can easily be reconciled based on the theme of appearing to taking sides, or pre-judging facts, evidence or credibility that are continually raised in the cases. It is clear that in *Ng*, the reviewing Court could not find evidence that the Tribunal had descended into the arena by taking the side of one of the parties, whereas the reviewing Court found evidence in *Tran* that the judge could appear to have taken sides from their actions.

5. CONCLUSION

Both courts and tribunals struggle with the balance between appropriate control of proceedings and descending into the arena. The adjudicator's conduct will generally be determined on the traditional reasonable apprehension of bias test, specifically whether a decision maker appears to have either taken sides or prejudged facts, evidence or credibility. The focus is generally on interactions with witnesses and interference with the ability of parties to fairly state their case. Interventions must be evaluated contextually, taking into account the statutory framework and rules that may provide a particular framework for adjudicative engagement. Moreover, an adjudicator's conduct will be evaluated on the totality of the record. The form of an adjudicator's participation is important, and the purpose underlying her interventions. Where a reasonable apprehension of bias or other failure of procedural fairness is identified, the matter will generally be remitted back to a different adjudicator or differently constituted panel.

Particular challenges arise in the administrative context where parties are unrepresented. Administrative justice is meant to be accessible. Adjudicators should help ensure accessibility by providing unrepresented parties with information about the hearing process, and their obligations in meeting the case. However, adjudicators cannot offer assistance that crosses the line — that appears one-sided, or disadvantages the represented party. Where the unrepresented party persistently fails to comply with the tribunal's rules or rulings, persists in pursuing irrelevant questions, or attempts to introduce evidence improperly, the adjudicator must strive to maintain a calm demeanour and a careful hand over the proceedings.

In the end, the concern in administrative hearings is the fairness of the proceeding. In the administrative realm, where efficient and accessible justice is a

---

129 (2001), 2001 CarswellOnt 8246, [2001] O.J. No. 4103, 40 C.C.L.T. (3d) 106 (Ont. Div. Ct.) [*Tran*, cited to O.J.].

130 *Ibid.* at para. 4.

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.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.