# Effective Hearing Management

BCCAT Annual Conference

November 5, 2024

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## Topics for this session:

- Your overall goals and obligations in managing a hearing
- Adversarial versus inquisitorial adjudication
- What is active adjudication? Why is it encouraged? What are its goals?
- An important rationale: Self and under-representation
- The active adjudication toolkit
- Best practices to manage difficult behaviour
- Balancing benefits & concerns: appropriate limits & maintaining impartiality



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## What are your overall goals and obligations in a hearing?

- maintain neutrality
- ensure fairness and a chance to be heard
- ensure that all parties can effectively participate
- make sure that hearing time is proportionate and efficient; use limited resources
- make sure you have the information you need to make a decision
- ensure incivility does not negatively affect the administration of justice

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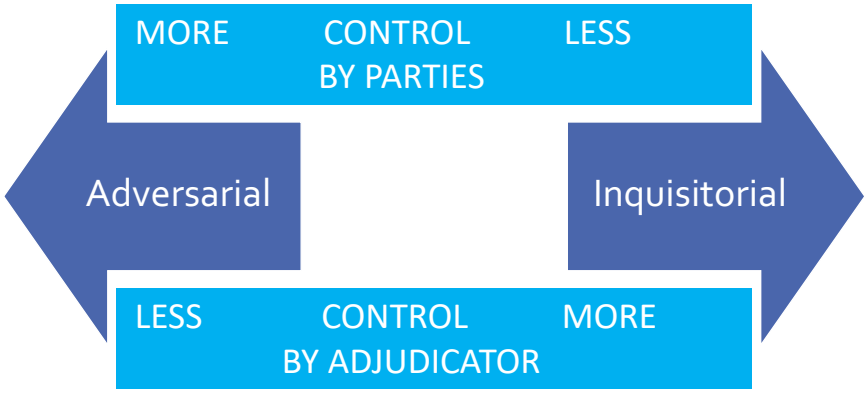
## The adjudication spectrum

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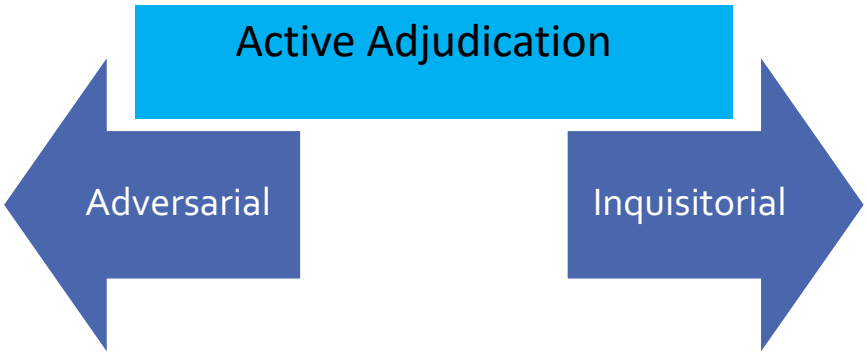
## Active adjudication on the spectrum

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## What is active adjudication?

| PASSIVE ADJUDICATOR: | ACTIVE ADJUDICATOR: |
|---|---|
| Leaves it to the parties to define the issues | Helps to clarify and narrow the issues |
| Leaves it to the parties to call what evidence they choose | Engages the parties to ensure all/only relevant evidence is heard |
| Doesn't engage the parties – makes rulings as required | Engages to narrow and focus the proceeding |
| Is mostly reactive | Is more often proactive |

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## Active adjudication at all stages

| | Adversarial | **Active** | Inquisitorial |
|---|---|---|---|
| Issues<br>Scope of proceeding | Determined by parties | **Determined by parties**<br>Clarified by adjudicator | Determined by adjudicator |
| Evidence | Called by parties<br>Broad scope | **Called by parties**<br>Scope/manner may be limited by adjudicator | Called by adjudicator<br>Scope/manner determined by adjudicator |
| Questioning | By representatives of parties | **By representatives/ parties & adjudicator** | By adjudicator |
| Submissions | By representatives of parties | **By reps/parties**<br>Scope/manner may be limited<br>Questioning **by adjudicator** | By reps/parties as permitted by adjudicator |

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## Why active adjudication?

- Efficient processes: ”proportionality”
- Effective processes: fair, focused, orderly
- Better decisions

For self or under-represented parties, participation by the public:

- Access to justice
- Equality of opportunity (“levelling the playing field”)



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## Proportionality in the courts: "affordable and efficient justice"

*"…the time and and expense devoted to a proceeding ought to be proportionate – that is,* ***relative – to what is at stake….***

*The unfortunate truth is that if the adversarial process is left to itself, it often actively discourages proportionality. There is always one more issue that can be raised or one more expert who can be consulted in an attempt to vanquish the other party."*

The Honourable Warren K. Winkler, former Chief Justice of Ontario, *The Advocates' Journal,* March 2009

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## Goals:

- Focus issues
- Ensure evidence relevant
- Use time efficiently
- Reduce costs
- Improve decision-making
- Ensure finality

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## Efficiency, effectiveness & better decisions

- Focus issues
- Ensure evidence relevant **+ get evidence you need to decide issues in dispute**
- Use time efficiently
- Reduce costs
- Improve decision-making
- Ensure finality

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## Other rationales: access to justice and equality of opportunity

- Traditional adversarial system not designed for self-reps/public
- Designed for parties who are professionally represented by counsel who know the rules

Active adjudication important to "level the playing field" for self-represented parties

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## The experience of representing yourself

The National Self-Represented Litigants Project (NSRLP)

Video: Self-Represented Litigant Kelly



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## Access to justice for self-represented parties

- Ability to ***meaningfully*** present your case
- With dignity and respect
- Way that doesn't cause harm: not "horrifying, isolating, broke me in every way…."
- Ensure that case is judged on the merits, not on quality of representation



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## Canadian Judicial Council Statement of Principles on Self-representation

Principle: Promoting Equal Justice

Access to justice for self-represented persons requires all aspects of the court process to be, as much as possible, open, transparent, clearly defined, simple, convenient and **accommodating**.

- Providing the required services for self-represented persons is also necessary to enhance courts' ability to function in a **timely and efficient manner.**

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## Canadian Judicial Council Statement of Principles on Self-representation

When one or both parties are proceeding without representation, **non-prejudicial and engaged case and courtroom management** may be needed to protect the litigants' **equal** right to be heard. Depending on the circumstances and nature of the case, the presiding judge may:

(a) explain the process;

(b) inquire whether both parties understand the process and the procedure;

…

(d) provide information about the law and evidentiary requirements;

(e) modify the traditional order of taking evidence; and

(f) question witnesses

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## Caselaw on obligation to apply these principles:

- Supreme Court endorsed the CJC principles in *Pintea v. Johns*, 2017 SCC 23
- Since then multiple cases have referenced the *Pintea* decision and the CJC principles
- In some cases appeal courts have overturned trial judges for failing to apply them
- Ontario Court of Appeal: "Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options…[Judges] may explain the relevant law in the case and its implications, before the self-represented person makes critical choices." (*R. v. Tossounian,* 2017 ONCA 618)

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## How may self-represented parties come to a hearing?

- Lack of familiarity with legal process, legal language and legal concepts
- Unrealistic expectations
- Emotionally caught up in the matter

But may also face:

- Cultural differences related to communication, dispute resolution
- Low literacy
- Other vulnerabilities: disability, mental health problems

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## Under-representation

- Quality of professional and non-professional representation can vary widely
- Representatives can be ill-equipped to represent:
  - Lack of experience in tribunal setting
  - Lack of familiarity with statute, rules, caselaw
  - Lack of litigation experience
- Can be overwhelmed by requirements of the process and ”out-gunned” by expert counsel
- That can impact their conduct and that of the person they are representing

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## Self and under representation: Potential impacts for a hearing

- Time:
  - Process not followed
  - Need to explain process, principles, which takes time
- Lack of focus (harder to get to the merits):
  - Too much irrelevant information
  - Lack of important relevant information
  - Problems complying with key principles of evidence
- Behaviour:
  - Extreme positions
  - Inappropriate informality

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## What does active adjudication look like? examples of processes adopted

- Immigration and Refugee Board: rules provide that member will go first in questioning.
  - Approved by Federal Court – *Thamotharem v. Canada 3 FCR 168 2006*
- Independent Residential Schools Adjudication Secretariat: no cross examination permitted except with consent of the adjudicator
- Ontario Labour Relations Board: rules provide for "consultations" for certain proceedings; no evidence may be called without consent of the adjudicator
  - Approved by the Divisional Court - *I.B.E.W. v. Guild Electric Ltd.*, 2007 CanLII 23340

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## Rules and policies:

- Where a tribunal or regulator adopts innovative techniques, important that rules make that clear
- Manages parties' expectations

Example: *Human Rights Tribunal of Ontario* Rule 1.7 – The Tribunal may:

> 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:
>
> j) determine and direct the order in which evidence will be presented;
>
> l) permit a party to give a narrative before questioning commences;
>
> m) question a witness;
>
> n) limit the evidence or submissions on any issue;

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## Active adjudication toolkit:

1. Pre-proceeding preparation and management: to ensure that ready to actively adjudicate
2. Assistance to understand process and legal requirements: explain legal standards, evidentiary requirements, etc.
3. Hearing management: active intervention to organize, focus and shorten proceeding; to narrow the issues and get evidence needed to determine facts in issue
4. Adjudicator questioning: of witnesses, parties, counsel
5. Time management: time-limits on evidence or submissions

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## 1. Prepare for active adjudication

Don't passively review material – review in order to develop a plan for effective hearing management:

- What are the issues?
- Are there other questions that may have to decide (preliminary, evidentiary problems, etc.)?
- What facts are in dispute?
- What about the case or a party's position needs to be clarified?
- Make notes and checklists

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## 2. Clarify legal and evidentiary expectations:

"…self-represented parties are entitled to receive assistance from an adjudicator to permit them to fairly present their case on the issues in question.

This may include directions on procedure, the nature of the evidence that can be presented, the calling of witnesses, the form of questioning, requests for adjournments and even the raising of substantive and evidentiary issues." [65]

Kainz v. Potter (2006), 2006 CanLII 20532(ONSC)

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## 3. Manage the hearing to narrow and focus the issues and evidence:

- As a tribunal adjudicator you have a statutory mandate to fulfill
- May need to get the evidence required to resolve disputes:
  - Sometimes too much evidence, unfocused
  - Sometimes missing evidence that is necessary
- Need to get clear understanding of the issues to reach a good decision
- Shouldn't waste hearing time on unnecessary evidence and issues that are not determinative

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## Techniques to narrow and focus:

- Ask for clarification about what in dispute, starting with opening
- Where no apparent dispute, ask whether can agree on facts/issues
- Ask why evidence that seems unrelated is being called
- Ask whether are going to hear evidence on issue that appears to be in dispute
- Ask follow-up questions if you aren't sure about relevance, etc.

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## 4. Ask questions: for what purpose?

- Proper reasons to intervene to ask questions or make comments include those approved for trial judges:
  - 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
  - to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the proceeding

*Chippewas of Mnjikaning First Nation v. Chiefs of Ontario*, 2010 ONCA 47 (CanLII)

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## Questions: limits & best practices

- Ensure that parties understand that you will ask questions & why
- Always demonstrate respect
- Do not engage in vigorous cross-examination
- Be sensitive to the expectations of the parties and their representatives
- Do not ask questions that the parties would not be permitted to ask
- Avoid appearance you have adopted a position on the facts, an issue or credibility

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## Questions: timing & process

- Often adjudicators will wait until after direct and cross-examination, before any re-exam
- BUT: May be appropriate to ask at the time, when clarifying something you don't understand
- Questions should be open-ended, not leading (but can relate to questions asked earlier)
- Should not suggest your view of the evidence
- After asking your questions, ask parties whether have questions arising

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## Questions: self-represented parties

- In some cases, it may be most effective for an adjudicator to take the lead questioning a self-represented party
- Make sure all participants understand why you are doing this
- Ask open-ended questions following up with more direct and specific questions
- Don't cross-examine: form & tone of questions
- Before closing the evidence, give the party being questioned time to consider whether everything relevant has been covered

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## Innovations: questioning self-represented parties

Other techniques can be helpful when questioning self-represented parties and/or witnesses they call:

- Model the questioning on conversation
- Use active listening techniques: repeat, reframe, check in
- Swear or affirm self-represented party at start of proceeding so that everything they say may be considered evidence
- Ask them to swear or affirm to the truth of written materials filed and/or their notes
- When they finish giving evidence, ask whether they have anything else to say that relates to the case

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## 5. Manage hearing time

- Use time estimates: must advise in advance if going to enforce
- At lunch and end of day, review and discuss estimates, witnesses
- Express concerns early
- "Chess clock" : (notionally) give parties a total amount of time based on their estimates; everything they do (direct, cross, submissions, objections) is deducted from their "clock" to encourage them to manage their time efficiently

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## How active? considerations

- Who are the parties?
- Self-represented?
- Under-represented?
- What are the issues in this case?
- Culture of the tribunal
- Tribunal rules

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## Concerns about active adjudication

- Compromise procedural fairness?
- Compromise perception of impartiality?

ACTIVE ADJUDICATION ⟷ CONCERN ABOUT FAIRNESS/ IMPARTIALITY

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## The limits of assistance

| | | |
|---|---|---|
| Explain how the game is played | **NOT** | How to play the game |
| Explain the rules | **NOT** | How to win |
| *Example:* *The batter hits the ball with the bat* | ***NOT*** | *You should aim for right field because that player is not paying attention* |

ACTIVE ADJUDICATION ⟷ CONCERN ABOUT FAIRNESS/ IMPARTIALITY

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## Best practices to strike the right balance:

**How** do we balance benefits and risks?

- Adopt best practices to manage difficult behaviour
- Respect appropriate limits
- Maintain the perception of impartiality



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## Adopt best practices to manage difficult behaviour

1. Use empathy to gain insight
2. Set the right tone
3. Set & manage expectations
4. Use effective communication tools
5. Bring attention to your own reaction
6. De-escalate in stages

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## Why do some people behave unreasonably?

- Attitudes – dissatisfaction
- Unmet needs and expectations – in life generally and/or in this process
- Emotions and personalities – anger, frustration, disappointment, entitlement
- Aspirations – justice, fairness, matter of principle
- Vindication – prove are right or justified
- Revenge or retribution – against those who have caused harm and/or stand in way

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## Why do some people behave unreasonably?

A growing problem:

- Disinformation and misinformation about government and legal processes
- Encourage beliefs that law doesn't apply to individual, system is corrupt, etc.
- Example: "Organized Pseudolegal Commercial Argument (ONCA)" litigants – freemen on the land, sovereign citizens, etc.
- See *Meads v. Meads* 2012 ABQB 571

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## Why do some people behave unreasonably?

Behaviour may intersect with identity, experience and health:

- Attitudes may relate to culture – about authority, conflict resolution, trust in legal systems
- Misinterpretation – cultural behavioural traits and communication styles that differ from those of staff/adjudicators
- Mental illness, cognitive or developmental disability, literacy
- Trauma – related or not to current problem

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## 1. Use empathy to gain insight

- As you prepare to hear a case, consider what the materials (and the case itself) tell you about the participants, their experiences & motivations
- Understanding the participants helps you control the process while maintaining fairness
- Remember what it is like on the other side of the table ie. anxiety
- *But caution:* we don't have the training or information to assess and diagnosis participants

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## Influences on self-represented parties' behaviour may include:

- Importance of the process to them
- Not knowing what is expected of them
- ANXIETY!
- Cultural differences/expectations
- Mental health disabilities
- Anger and/or do not want to move past their dispute
- Mistrust of the tribunal/government/authority
- Influence of American courtroom dramas
- Misplaced internet research: ie. guides from OPCA "gurus" (see *Meads v. Meads*, 2012 ABQB 571)

*Credit: David Wright, Ontario Physicians & Surgeons Discipline Tribunal*

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## Influences on representatives' behaviour may include:

- Unfamiliarity with the context
- Nervousness
- Poor training
- Client instructions
- Desire to delay or distract for advantage
- An aggressive style

*Credit: David Wright, Ontario Physicians & Surgeons Discipline Tribunal*

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## 2. Set the right tone through your own words & actions

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## What should your demeanour project?

- Authority
- Neutrality
- Open-mindedness
- Fairness
- Empathy
- Preparation
- Knowledge
- Expertise

***What else?***

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## 3. Set and manage expectations

- How you introduce the hearing sets the tone, and sets parties' expectations
- Include behavioural expectations
- Explain why: *"if you interrupt me then you can't hear me, and won't know what I'm asking…", "to decide your case I will need some particular information so answering my questions will help me to understand what I need to know to help"*
- Reinforce those expectations frequently
- Thank participants for their cooperation

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## Opening may include:

- Your overall role and its limits (mandate, remedies):
- Roles of each participant, including yours
- Why you may do particular things during the hearing: ask questions, make rulings, issue directions, etc.
- Order of proceeding: what will happen at each stage, who goes first, etc.
- The need to focus the hearing time on the information that will assist you to make the best decision

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## Opening may include:

Ground rules – will be best received when delivered neutrally at the outset:

- Waiting to be called upon ("you will have your turn")
- Not interrupting each other
- How to interject politely if necessary
- Need to focus comments on the issues before the Tribunal
- Importance of relevance so may have to limit what information will be shared

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## Reinforce expectations regularly

- Try to anticipate and deter problems before they occur
- But don't make assumptions/act prematurely: focus on specific, observable conduct
- State expectations neutrally, at least until there are real problems ie. don't target anyone
- Model the behaviour you expect: "tone from the top"
- Use breaks strategically

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# 4. Use effective communication tools

Non-verbal (about 55% of our effectiveness):

For in-person or video proceedings:

- Eye contact
- Posture
- Gestures

For phone proceedings:

- Tone and pitch of voice
- **TIME**

➢Don't give a non-verbal message that contradicts what you intend to communicate

➢You are being watched more closely than you realize and participants take their cues from you

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# Clear & effective communication

Para-verbal (37%):

- Tone
  - Not about the explicit content of our words
  - Audience is measuring the emotional subtext, mood: frustration? Anger? Boredom?
  - Not always conscious

- Engagement:
  - Use active listening tools: repeat, rephrase, ask questions to clarify
  - Adapt communication to audience: English as a second language, disability, degree of anxiety

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## Clear & effective communication:

Verbal (7%):

- Simple/informal NOT complex/formal:
  - Assume no familiarity with tribunal
  - Avoid/explain legal terminology
  - Very simple vocabulary
  - Avoid metaphors, jargon
  - Simple and short sentences
  - Speak to a grade 8 level

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## Stressful environments make communication – and cooperation - more difficult

- The environment and format influences the communication process
- The environment and format will affect what is heard and remembered.
- Complex messages and messages with an emotional component delivered in an intense environment are often heard partially and only in bite-sized pieces.

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## What produces stress?

**NUTS**

NOVELTY

UNPREDICTABILITY

THREAT TO THE EGO

SENSE OF LOSS OF CONTROL

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## Use communication tools borrowed from mediation

- Because emotions are involved, many parties will have difficulties communicating well in dispute resolution.
- Mediation tools are designed to help de-escalate conflict and allow parties to find common ground
- Try them out in adjudication where unreasonable conduct and/or conflict need to be de-escalated

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## Helpful engagement & de-escalation communication tools

- **Paraphrasing**: repeating in your own words so person knows their message has been received ("*what I hear you saying is…*")
- **Summarizing**: condensing a speaker's message while including all relevant points; useful when person shares a lot of information in a disorganized way ("*so let me see if I understand...*" followed by review of points)
- **Reframing**: restating to provide a more positive/productive tone, trying to reveal common ground ("*I think what you are saying is that you want to tell me your side of the story the way it happened to you, without being interrupted*")

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## When people are distressed, try reflective listening

Provide feedback that shows that the speaker's perspective and/or emotions have been recognized and acknowledged ("validation")

- Must not downplay or understate feelings - reflection should match the intensity of feelings expressed
- Understatement will cause frustration, anger and annoyance
- *Example: "It sounds like you are very frustrated and angry with your former employer."*

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## 5. Bring attention to your own reaction

"***You are in charge of how you react***"

- Be conscious of your own reaction
- Take a breath or a break if you need to
- Try to project impartiality, respect, calm, even compassion
- Slow down and reserve judgment

*Credit: David Wright, Chair, Ontario Physicians & Surgeons Discipline Tribunal*

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## Use mirroring to bring calm

"Because of the mirroring neurobiology of our brains, one of the best ways to help someone else become calm and centered is to calm and centre ourselves first – and then just pay attention."

Bruce D. Perry, M.D., PhD.

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## Try "killing them with kindness"

- Be deliberately polite as participants are less polite
- If possible, acknowledge their concerns before addressing their conduct
- Use active listening – paraphrasing, repeating back, etc.
- Can provide validation and a sense of being heard
- This can defuse hostility

*Credit: David Wright, Chair, Ontario Physicians & Surgeons Discipline Tribunal*

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## 6. De-escalate in stages

Reinforce expectations

- Remind them of the ground rules you have set
- Clearly explain the behaviour that is and is not acceptable
- Provide positive options: you can do this but you CAN'T do this
- Permit retreat – don't force someone to maintain an unreasonable position through your own response

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## Provide warnings & make orders or directions as required

- Start with explaining impact on the process if conduct doesn't improve (delay, may have to break, etc.)
- If no improvement, warn that will need to make orders or directions if not resolved
- Consider getting advice or support from your legal department
- Ultimately make orders or directions:
  - Limit time for evidence, questioning, submissions
  - Limit form of participation: material in writing, who can speak
  - Change the form of the hearing
  - Adjourn with clear statement that cooperation required if reconvene

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## Best practices to strike the right balance:

**How** do we balance benefits and risks?

- Adopt best practices to manage difficult behaviour
- Respect appropriate limits
- Maintain the perception of impartiality



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## Respect appropriate limits

Consider whether your own behaviour may be contributing - avoid:

- Overly aggressive questioning
- Assuming the role of a prosecutor
- Appearing to favour one side
- Pre-judging facts, issues and credibility
- Questioning on irrelevant, extraneous or improper matters
- Interfering with counsel's ability to present case
- Precluding a party from telling story his/her own way

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## Maintain the perception of impartiality

- Leading SCC case on apprehension of bias
- Argued on two bases:
  - Membership and activism in the francophone community in Alberta (case was about francophone minority language rights)
  - **Conduct and comments of the judge during the trial**

*Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25

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## Assessing conduct during the hearing: Principles listed by the SCC

- Contextual and fact-specific
- Comments must not be viewed in isolation
- Intervention, asking questions, calling witnesses to order is acceptable
- Must thoroughly examine the proceeding to determine the cumulative effect of the judge or adjudicator's actions

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## Concerns in Yukon Francophone School Board v. Yukon

- disparaging remarks about counsel including threat to award costs against counsel
- making decisions on preliminary issues without hearing submissions
- not allowing reply factum on costs
- not allowing an ill witness to testify by affidavit

Finding: Reasonable apprehension of bias

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## Active Adjudication: benefits

"The excellent, experienced and educated member is the member who has the confidence to not just sit back and let the adversarial process unfold with lengthy questioning and arguments. A member who knows where the line of natural justice is drawn will be able to be more active in intervening with a party or counsel, re-directing them or even cutting them off. Assuming it is done properly, such an approach will mean a more responsive and effective decision maker, and shorter, more relevant hearings."

Gary Yee, Fomer Chair Licence Appeal Tribunal, Ontario

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