

WORKSHOP #3:
THE ROLE OF TRIBUNAL COUNSEL INTERNALLY AND EXTERNALLY

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The role of tribunal counsel has been described as being akin to “whispering in the monarch’s ear.” Every tribunal counsel has his or her own view of their role, and each counsel wears a variety of hats, depending on the responsibilities and demands of the particular board. The following very experienced counsel engaged in a spirited discussion (with equally lively audience participation) on their roles as viewed “through the looking glass.”

Margaret Leighton is currently part-time counsel to the Chair of the Alcohol and Gaming Commission (Ontario). Prior to this position, she was an adjudicator in the refugee branch of the Immigration and Refugee Board (Canada). Before her appointment to the IRB, Margaret spent ten years as counsel to the Pay Equity Hearings Tribunal (Ontario) and the Human Rights Tribunal of Ontario. At the AGCO, the position of counsel to the Chair is a new one. Until this position was created, the Registrar had counsel who advised on licensing and prosecution matters. The Chair and Board members did not have independent in-house counsel.

Leonard Marvy has been a solicitor at the Ontario Labour Relations Board for four years. Prior to joining the Board, he was senior counsel at the Legal Services Branch of Management Board of Cabinet. There are four elements to the position of counsel to the OLRB: advocacy (before courts or other tribunals, on behalf of the OLRB); advice (to the Board, labour relations officers, adjudicators and administrative staff); writing (decision summaries, OLRB Reports, the Board’s website); and training (all levels of board staff).

David Jacobs is in private practice at Watson, Jacobs, McCreary, specializing in administrative, labour and professional regulation law. A lawyer for 23 years, he also acts as general counsel to the Health Professions Appeal and Review Board, and has appeared on behalf of the Consent and Capacity Board. The HPARB hears reviews of decisions of the complaints committees of the colleges of all regulated health professionals, as well as applications for admission to the health professions and appeals regarding hospital privileges for doctors. As counsel, David advises hearing panels, develops policy, drafts or reviews Board publications, appears as advocate; advises on employment matters; and participates in training and education, amongst other things.

All counsel play a key role in establishing their Board’s policies and procedures, authoring rules, drafting forms, participating in discussions of draft decisions.

Counsel and their Boards facilitate the introduction and implementation of amendments by guiding the institution and its decision-makers in interpreting legislation once it has been passed.

At the HPARB, there is a statutory requirement that any advice given to decision-makers on particular matters must be shared with the parties. The other Boards do not have a similar provision. Nonetheless, if a decision-maker is going to make a ruling relying on case law that was not presented by the parties, the jurisprudence may be circulated for comment.

At the OLRB, decision-makers might approach counsel to be reminded of the proper test to be applied in a given matter. Counsel does not generally participate in hearing preparations.

Sometimes counsel acts as firefighter, dealing with hearing room emergencies (like educating or refreshing a decision-maker on the rule in *Browne v. Dunn*, assisting with some other procedural ruling).

When reviewing draft decisions, counsel must be sure that the adjudicators have made up their own minds, having heard the evidence and arguments of the parties. This is a tricky role for Board solicitors: to ensure that the legal tests are correct, and supported by the law and jurisprudence, without actually becoming the decision-maker.

In some tribunals, the institution's expertise lies in the professional backgrounds of the decision-makers. The expertise may not be legal. Counsel must advise on legal aspects, but defer to the specific profession of the adjudicator in other aspects.

If counsel reviews a draft decision and sees that the interpretation is incorrect, s/he can approach the decision-maker, or in some instances, s/he has an obligation to advise the Chair of the Board of the matter. There was a consequent animated discussion (with audience participation) of the role of counsel *vis à vis* the institution: to whom does counsel report? The Board *qua* Board is an institution, but it is not a corporation and it does not dispense or receive advice. Advice is given to staff members and decision-makers. A Board Solicitor is not counsel to the Chair, but to the institution as a whole.

At HPARB, there may be ways of imparting general advice to the decision-makers (through educational forums with the Board, etc), without turning the information into case-specific advice that needs to be disclosed to the parties.

Counsel must be careful to advise on legal issues, and not stray into evidentiary findings or conclusions to be drawn from the evidence.

At the PEHT, there was a written policy that if counsel saw difficulties with a draft decision, s/he was obliged to bring them to the Chair's attention.

There are tribunals that have two different kinds of lawyers. Examples are the Workplace Safety and Insurance Tribunal and the Ontario Securities Commission. One set of lawyers appears at the hearings and acts as a friend of the tribunal, case presenter, or prosecutor; another set of lawyers is called "counsel to the Chair," and these provide advice as solicitors to the tribunal. There are figurative "walls" between the two kinds of lawyers.

At WSIAT, if counsel to the Chair learns of a decision proposing a divergence from existing case law, s/he advises the Chair of this, and also brings the divergence to the decision-maker's attention.