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The Role of Independent Counsel to the Tribunal: Advising the Tribunal

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1. Introduction

Tribunals are retaining independent counsel with increasing frequency. Independent counsel act as advisers directly to tribunals, particularly during hearings, acting independently of the parties to the hearing. They can provide valuable assistance to tribunals facing objections or motions with conflicting submissions of law. Independent counsel are retained most frequently by tribunals who do not contain legally trained members with litigation experience. They are also often retained by tribunals holding particularly formal hearings such as discipline proceedings.

The job of independent counsel, from the perspective of their client, is to prevent the tribunal from making errors that will result in unnecessary and expensive appeals. Independent counsel are, in essence, an ounce of prevention. Recently, however, it is the conduct of independent counsel that has generated many of the appeals tribunals were hoping to avoid.

The role of independent counsel to tribunals has really received judicial scrutiny only in the last five years. Before 1989, there were only a few general pronouncements primarily to the effect that counsel could not write the reasons for decisions of the tribunal. However, since then, a number of important cases have commented in detail upon the possible appearance of bias created by independent counsel, the appropriate role of independent counsel during the hearing itself and how counsel can properly assist in the drafting of reasons. Many issues have not yet been the subject of judicial comment and remain unresolved.

Perhaps one reason for the recent litigation is that independent counsel are unusual legal creatures. They are not parties nor are they part of the tribunal. They are not even one half of the adjudicative team like a judge is in a jury trial. Independent counsel to tribunals are unique to administrative law.[1] Courts

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1 Professor David Mullan makes an analogy between independent legal counsel and clerks to the

are, therefore, only now beginning to define the proper role of independent counsel.[2] Courts are concerned that independent counsel accomplish their job of preventing unnecessary appeals in a legitimate manner. Inappropriate intervention by independent counsel can jeopardize the result of the hearing even where the tribunal's findings are fully supported by the evidence.

2. Role Before the Hearing

(1) Orientation for the Tribunal

Perhaps the best, and most overlooked, opportunity for independent counsel to do their job is before any hearing starts. At this point, there is no concern that the questions asked and advice given will form part of the record on an appeal. There can be an open and free discussion. A tribunal orientation can also provide a comprehensive overview of the principles and procedures for conducting hearings. This comprehensiveness is impossible in a hearing context. Also, during a tribunal orientation, independent counsel can initiate discussion of recurring problems. As discussed below, there are significant difficulties with independent counsel initiating advice during a hearing.

In my experience, lay tribunals do not learn well through lecture or even by watching a mock hearing. It is just too difficult to transfer concepts and general principles to the actual hearing. The most effective method of orientation is "learning-by-doing", similar to some advocacy courses for lawyers. The tribunal role plays the recurring issues that arise in its proceedings. After each role play, the participants discuss what was done and why. Often the role play is then repeated. The learning-by-doing method can also be employed to teach tribunals how to write reasons for decisions. In our office, we have developed a curriculum and written materials for orientation sessions of tribunals we advise.

Comprehensive orientation sessions are most appropriate whenever new members are appointed to a tribunal. This enables the senior members of the tribunal to assist in the orientation of the new members. The senior members can also raise questions about recurring problems they have observed. Also, the fresh perspective of the new appointees can provide an opportunity to rethink the habits of the tribunal.

It is also useful to have a debriefing session periodically after hearings to deal with questions by tribunal members and observations by tribunal's counsel while they are still fresh in everyone's mind.

Written manuals are helpful for many tribunals. The tribunal's manual could contain the following:

1. a copy of the legislative materials applicable to the tribunal such as its

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Justices of the Peace in England; see "The Role of Lawyers to Professional Discipline Bodies" (December 1994), *Advocates Society Journal* 10 at 11.

2 Mullan argues that the concept of independent legal counsel is a recent development because of the relatively recent emergence of the judicial model for some administrative hearings; *ibid.* at 11-13.

enabling legislation, the *Statutory Powers Procedure Act*, the *Evidence Act* and the *Charter of Rights and Freedoms*;
2. the introductory speech read out by the chair to commence the hearing;
3. the form of oath and affirmation used by the tribunal; and
4. a checklist for the order of proceeding at the hearing.

Some manuals also contain internal policies and procedures of the tribunal, a copy of leading court cases, precedents and written opinions received from independent counsel in the past. This additional material raises the issue of whether the manuals must then be disclosed to the parties at each hearing. The answer will depend on the nature of the additional material contained in the manual. However, if one party, such as the prosecutor, already has access to the manual it would seem unfair not to disclose it. Also, disclosure might be necessary if the tribunal is going to rely upon any of the additional material in a particular hearing.[3]

The new amendments to the *Statutory Powers Procedure Act*[4] provide for tribunals to establish their own rules of procedure. These amendments will provide an excellent opportunity for tribunals to streamline their procedures and to rethink how they conduct hearings. Independent counsel can have a significant role in developing these rules of procedure.

(2) Preparation for a Specific Hearing

(a) What can the Independent Counsel Know About the Case Beforehand?

At a minimum, independent counsel is entitled to know as much about the case as the tribunal before the hearing. For example, the tribunal's counsel should obtain a copy of the notice of hearing. This will enable him or her to know the identity of the parties to determine whether there is a conflict of interest with his or her firm. The notice of hearing will also contain the allegations which will permit independent counsel to bring the appropriate statutory material to the hearing and to consider any obvious issues of law. Independent counsel should also try to learn who the lawyers for the parties will be to determine whether there is a conflict of interest.

There are no cases, to my knowledge, that discuss whether independent counsel can know more about the upcoming hearing than the tribunal does. A conservative approach is to assume that, as counsel to the tribunal, any information given to independent counsel is imputed to have been given to his or her client.

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3 In *Re French* (1982), 39 O.R. (2d) 666 (Div.Ct.), the tribunal's counsel advised the tribunal before the hearing and in the absence of the parties that the proceedings were brought under the correct statute. This jurisdictional issue was later fully argued at the hearing. On appeal, it was argued that the tribunal likely prejudged the issue. The Divisional Court rejected this argument and found that the advice given was correct in law in any event. However, this case illustrates the problems that can occur where the tribunal considers advice received before the hearing that relates to an issue to be decided during the hearing.

4 R.S.O. 1990, c. S.22, as amended by Bill 175. [The SPPA as amended and the amending legislation are reproduced, respectively, in Appendices I and II. Ed.]

Under that approach, independent counsel should not receive any information that cannot also be given to the tribunal. In my view, however, this approach is unduly restrictive. Independent counsel does not determine any of the issues, but rather provides advice on issues of law and procedure. Independent counsel is retained to be an adviser to, not an advocate for, the tribunal and is not expected to inform the tribunal of everything he or she learns related to the hearing. It is understood that independent counsel will only communicate appropriate information to the tribunal.

In my view, it is appropriate for independent counsel to contact counsel for the parties before the hearing to inquire as to whether any issues of law, procedure or evidence are anticipated to arise at the hearing. Independent counsel can then review the law on those issues beforehand and bring the appropriate material to the hearing. He or she would not normally tell the tribunal about these issues in case they do not arise and to prevent any predetermination of them.

Independent counsel can also assist counsel who have not appeared before the tribunal previously as to its usual method of proceeding. For example, independent counsel could tell counsel for a party how a tribunal usually prefers to deal with preliminary motions. Tribunal's counsel can even help arrange the scheduling of a preliminary motion. He or she is then acting as an administrative officer for the tribunal.

(b) Bias Issues

Independent counsel, as the name suggests, must be neutral. Where the tribunal's counsel has an inappropriate connection to one of the parties, an appearance of bias exists that could nullify the proceedings.

In *Hutterian Brethren Church of Starland v. Starland No. 47 (Municipal District)*,[5] the Alberta Court of Appeal considered a hearing before the Development Appeal Board in a planning matter. The Court found that the municipality actively opposed the development. The municipality's lawyer had filed a factum on a prior appeal in the case opposing the Church's position. The municipality's lawyer and engineer then acted as advisers to the Board at the hearing. The lawyer gave advice to the Board on procedural issues contrary to the position of the Church. In fact, he objected to the presence of the Church's court reporter using a shorthand machine unless the Church undertook not to use the transcript for any court purposes. The engineer gave opinions to the Board contrary to those of the Church's expert. The Board decided against the Church.

The Court of Appeal considered whether the involvement of the lawyer and the engineer was appropriate. The court reasoned as follows:

> . . . it is suggested that at the second D.A.B. [Board] hearing, Mr. A [the municipality's lawyer] only went into procedural matters, and never addressed the planning merits of the development. That surely is irrelevant. The procedural questions were to be decided by the D.A.B., not by any other body. It had to avoid bias in deciding

5 (1993), 14 Admin. L.R. (2d) 186 (Alta. C.A.).

> them as much as it did in deciding the planning merits. Those issues could win the game just as much as could the planning merits. And we are investigating Mr. A's neutrality for the purpose of seeing whether the D.A.B. appeared biased.[6]

The issue for the Court was the appearance of bias of the tribunal, not of the adviser himself or herself. It stated:

> A long well-known line of cases holds that the tribunal cannot seem to admit to its decision-making process one of the parties, or someone too closely connected with one of the parties. The classic case (cited here) is *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256, 93 L.J.K.B. 129 (D.C.). There the acting Clerk to the Justices retired with them when they decided a criminal case, as was the custom. But the acting Clerk was also a solicitor in private practice, and his partner was acting for the other side in the civil suit arising out of the same set of facts. Of course the acting Clerk may not have known of the connection, or thought of it. And his legal advice was non-existent: in fact, he said nothing. This was the precise context in which the court gave the famous statement that "it is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done."[7]

The test for bias was whether a reasonably informed fair bystander would conclude that the tribunal might well have been influenced in its decision, whether or not it actually was.[8] The Court concluded that the test had been met.

A similar result occurred in *Mitchell v. Institute of Chartered Accountants (Manitoba)*.[9] Lawyer B helped a client of Mitchell to sue Mitchell and to prepare a complaint against him to the Institute. The complaint led to a discipline hearing against Mitchell. The Discipline Committee used C as its independent counsel. C was a partner of B at all relevant times including during the hearing. To complicate matters further, the prosecutor in the case was A, who was a former partner of B and C at the time that B's client was engaged in litigation against Mitchell. Mitchell was found guilty of misconduct and appealed the decision.

On the appeal, the Manitoba Court of Queen's Bench found that there was ample evidence to support the findings. However, a new hearing was required because C's connection to B and A raised a perception or apprehension of bias. The Court cited *MacDonald Estate v. Martin*[10] as to the importance of the appearance of conduct by legal counsel. It also cited *Sawyer v. Ontario (Racing Commission)*[11] for the proposition that the test for apprehension of bias is whether the circumstances create a reasonable basis from which a suspicion of bias might be raised in others, including Mitchell.[12] The Court also found that the statutory

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6 *Ibid.* at 193.
7 *Ibid.* at 196.
8 *Ibid.* at 198.
9 [1994] 3 W.W.R. 704 (Man. Q.B.), affirmed [1994] 10 W.W.R. 768 (Man. C.A.).
10 [1990] 3 S.C.R. 1235.
11 (1979), 24 O.R. (2d) 673 (C.A.).
12 *Mitchell, supra*, note 9 at 711.

requirement that the legal adviser be "independent of the parties" had not been complied with.

Also, in *McQueen v. University Hospital Board*,[13] the Court found a reasonable apprehension of bias where independent counsel had previously participated in adversarial proceedings *against* one of the parties.

Despite the broad language used in some of these cases it is not yet clear whether independent counsel will be held to the same degree of impartiality as an actual member of the tribunal itself. Tribunal's counsel, after all, does not make the decision. Independent counsel are generally required to disclose their legal advice to the parties with a further opportunity for the parties to comment on that advice. Surely, in those circumstances, tribunal's counsel should be held to a lower level of neutrality than the members of the tribunal itself. While the decisions in the above cases appear correct, one might question the breadth of the language used in them.

An example of a less strict approach is found in *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*.[14] There the British Columbia Court of Appeal dealt with a case in which the independent counsel, who was a private practitioner, had been retained by the Attorney General. The Attorney General was also a party at the hearing. Independent counsel was paid by the Attorney General and was required to follow the billing procedure of the department. Otherwise, he was directed to receive his instructions only from the tribunal. A majority of the Court held there was no apprehension of bias in these circumstances.[15]

(c) What Should Independent Counsel Bring to the Hearing?

I am sometimes surprised how counsel to the parties fail to bring a copy of important cases or statutes that they will be relying upon to the hearing. Once the hearing is in progress, there is often significant, albeit subtle, pressure to get on with the hearing. Decisions are often made on the basis of counsel's recollection of the applicable authorities.

In order to achieve the goal of preventing the tribunal from making errors that will result in unnecessary and expensive appeals, independent counsel should bring a copy of the following to the hearing:

1. all enabling legislation including regulations applicable to the time period covered by the allegations;
2. for Ontario tribunals, a copy of the *Statutory Powers Procedure Act*;
3. the *Charter of Rights and Freedoms*;
4. for Ontario tribunals, the *Evidence Act* and any other statute frequently cited at the hearings;
5. a current textbook on evidence; and, possibly,

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13 (1987), 6 A.C.W.S. (3d) 287 (Sask. C.A.).

14 (1993), 85 B.C.L.R. (2d) 85 (C.A.), leave to appeal to S.C.C. refused (1994), 91 B.C.L.R. (2d) xxxvi (note) (S.C.C.).

15 *Ibid.* at 92-93.

6. the Rules of Civil Procedure to compare how civil courts handle an issue.

It might also be prudent to collect a copy of the cases frequently cited before the tribunal for ease of reference.

3. Role During the Hearing

(1) Right of the Tribunal to Obtain Independent Legal Advice

It is now generally accepted that tribunals are entitled to retain independent counsel even if their enabling legislation does not expressly provide for it. In *Omineca*, the majority stated:

> I am satisfied that the retainer of Mr. Webster [independent counsel] is a procedural as opposed to a jurisdictional matter, and, accordingly, a matter within the discretionary power of the Board; that there is nothing in the statute which limits that discretion; and that, therefore, this ground of appeal fails.[16]

Many enabling statutes now provide for the obtaining of independent legal advice by tribunals.[17]

(2) Nature of the Role of Independent Counsel During the Hearing

Independent counsel's role is to provide advice to the tribunal. He or she should not act as if he or she were a member of the tribunal or its chair. Neither should he or she participate in the proceedings as if he or she were a party. Otherwise the principle of *audi alteram partem* may be breached. It may appear that someone other than the duly appointed tribunal is deciding the matter or, worse, that a party is facing another adversary who is closely associated with the tribunal.[18]

Brett v. Ontario (Board of Directors of Physiotherapy)[19] involved a judicial review of a discipline hearing. The Court of Appeal of Ontario and the Divisional Court concluded that an appearance was created that Ms. Brett was being tried by counsel to the Board. That impression was created by the cumulative force of the following factors:

1. independent counsel sat in the midst of the tribunal immediately beside the chair;

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16 *Supra*, note 14 at 92. See also *Gilliss v. Barristers' Society of New Brunswick* (1986), 68 N.B.R. (2d) 165 (C.A.); *Jackman v. Dental Board (Newfoundland)* (1990), 82 Nfld. & P.E.I.R. 91 (Nfld. T.D.).

17 See, *e.g.*, *Regulated Health Professions Act*, S.O. 1991, c. 18, Schedule 2, s. 44 (Health Professions Procedural Code).

18 *Brett v. Ontario (Board of Directors of Physiotherapy)* (1993), 104 D.L.R. (4th) 421 (Ont. C.A.), affirming (1991), 77 D.L.R. (4th) 144 (Ont. Div. Ct.); *Omineca*, *supra*, note 14 at 99-101, *per* McEachern C.J.B.C. dissenting.

19 *Supra*, note 18.

2. independent counsel participated in the proceedings without being asked to do so by anyone;
3. independent counsel interfered with the cross-examination of witnesses by counsel for Ms. Brett, alerted the prosecutor when to object to questions asked by counsel for Ms. Brett and supplied witnesses with the right answer from the point of view of the prosecution;
4. independent counsel appeared to argue as counsel favourable to the prosecution; and
5. independent counsel appeared to take over the running of the hearing and to have been the *de facto* chair of the tribunal by, for example, making some of the rulings.[20]

The Divisional Court cited two earlier cases in which the primary concern was that independent counsel appeared to assume the mantle of chair or as the spokesperson of the tribunal to the extent that the tribunal's counsel rather than the tribunal seemed to be making the decision.[21]

More recently, in *Adair v. Ontario (Health Disciplines Board)*,[22] the Divisional Court again commented on the conduct of independent counsel during the hearing. In *Adair*, independent counsel intervened by questioning a party's counsel about the legality of the strike action of her clients. Tribunal's counsel eventually made known his strong view that the action by the nurses was illegal and therefore constituted dishonourable, unprofessional and disgraceful conduct, a position that was not taken by any other party. The Court said:

> Solicitors advising boards have been told more than once by this court and by the Court of Appeal that when they descend into the arena, the impression may be left that the person facing discipline charges is not just being judged by the body appointed by the legislature, but, as well, perhaps even chiefly by a solicitor hired to give advice to the board. Such conduct by the solicitor creates the appearance of unfairness.[23]

In view of these decisions, prudent independent counsel will strive to act only as, and to maintain the appearance of acting only as, advisers to the tribunal. To the extent possible, independent counsel should do the following:

1. sit apart from the tribunal;
2. as a general rule, give advice only after being requested to by the chair;
3. refrain from acting as the presiding officer of the hearing;
4. refrain from interfering with the examination of witnesses;
5. refrain from arguing with parties, but rather address his or her advice to the tribunal; and
6. give advice and not appear to make a ruling when giving advice.

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20 *Brett, supra*, note 18 at 147 (Div. Ct.).

21 *Venczel v. Ass. of Architects (Ontario)* (1989), 74 O.R. (2d) 755 (Div. Ct.); *Matthews v. Ontario (Board of Directors of Physiotherapy)* (1990), 44 Admin.L.R. 147 (Ont. Div. Ct.).

22 (1993), 15 O.R. (3d) 705 (Div. Ct.).

23 *Ibid.* at 707.

It is impossible to follow these guidelines at all times. Independent counsel cannot sit by and watch the tribunal make a major procedural error (e.g., forgetting to ask a party to make closing submissions) or fail to intervene when an unrepresented party is being taken advantage of by another party (e.g., by the asking of highly improper questions). Nor do the cases suggest that every breach of the guidelines is improper. Where counsel depart from the guidelines only rarely and in circumstances in which fairness demands intervention, no inappropriate appearance will be created.

Some tribunals have developed the practice of requesting, at the beginning of the hearing, that independent counsel intervene whenever he or she observes a procedural error occurring. In my view, this sort of statement will do little to justify an inappropriate level of participation by tribunal's counsel.

(3) Advising the Tribunal

(a) Content of the Advice

Assuming that independent counsel frames his or her advice as advice rather than as a ruling, how far can he or she go in suggesting to the tribunal what its decision should be? If the advice amounts to an expression of opinion as to what the decision of the tribunal should be, does that detract from the principle that the decision must be made by the tribunal? The courts have provided little guidance on this issue.

The answer probably depends on the type of question for which the advice is given. For example, independent counsel should not provide advice suggesting how the tribunal should decide the merits of the case. In the *Adair*[24] case, independent counsel's advice went to the merits of the entire proceeding. The greater the effect that the advice will have on the outcome of the proceeding itself the less conclusive should be the advice of the independent counsel.

Another criterion is suggested in *Ziderman v. General Dental Council.*[25] In that case, the Discipline Committee faced the issue of the proper use of prior convictions in assessing the penalty against the dentist. The legal assessor to the Discipline Committee advised that the Committee was entitled to consider the prior convictions but did not comment on what weight should be given to those convictions. The Privy Council concluded that the legal assessor had acted appropriately. His advice was confined to a question of law, which he was entitled to advise on, and did not address issues of weight which were to be decided by the Committee alone.[26] In my view, there are limits to the issue of law versus issue of weight distinction but it does provide useful guidance in many cases.

The issue of how directive the advice of independent counsel should be becomes more acute when dealing with procedural or evidentiary issues. It is on these points that most tribunals wish to have the clear assistance of counsel. A

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24 *Supra*, note 22.

25 [1976] 2 All E.R. 334 (P.C.).

26 *Ibid.* at 337.

convoluted discourse on the principles for and against the position of each party will not be well received, particularly by a lay tribunal. While the practice of counsel differs on this point, the following approach might be suitable:

1. where the appropriate ruling is clear as a matter of law, rather than as an exercise of a discretion, independent counsel should say so;
2. otherwise, as much as possible, tribunal's counsel should state the applicable legal principles and where appropriate summarize the factors that may be taken into account; and
3. when independent counsel goes further and suggests how the tribunal might apply the principles to the case before it, he or she should remind the tribunal that the decision is for the tribunal to make and that it is free to reject the advice.[27]

Most independent counsel do not feel constrained to restricting their advice to the authorities or arguments made by the parties. So long as the advice given is responsive to the question in issue, independent counsel may advise as to the law as he or she sees it. The parties will ordinarily have an opportunity to comment on the authorities or principles stated by tribunal's counsel.[28]

Some independent counsel tend to act as mediators. They attempt to cajole and persuade the parties to come to an agreement on the issue or to accept a compromise solution. On occasion, such intervention may prevent the tribunal from having to make a difficult and potentially appealable decision. However, if the intervention is excessive, tribunal's counsel risks creating the appearance of descending into the arena and interfering with the adversarial process.

(b) Form of the Advice to the Tribunal

The authorities are not consistent as to whether independent counsel can advise the tribunal in the absence of the parties. The Chief Justice of British Columbia, in the dissenting opinion in *Omineca*,[29] concluded that private consultation with the tribunal or, as he called them, submissions made *ex parte*, undermine the principle of *audi alteram partem*. However, in *Jackman*, the Newfoundland Supreme Court stated that consultation with independent counsel in the absence of the parties is perfectly acceptable and, further, that the nature of counsel's advice need not be disclosed to the parties because of solicitor-client privilege.[30]

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27 See E. Cronk, *Objections and Rulings, and the Role of Independent Counsel to Administrative Tribunals*, presented to the Advocates' Society Fall Convention 1994, at 14-17.

28 *Ibid.* at 12-14.

29 *Supra*, note 14 at 101.

30 *Jackman v. Dental Board (Newfoundland), supra*, note 16. See also *Liwiski v. Manitoba Pharmaceutical Assn.* (1990), 65 Man. R. (2d) 184 (Q.B.), at 189-190, where the Court held that private association between independent counsel and the tribunal during deliberations was natural; and see *Jennifer's of Nova Scotia Inc. v. Clark* (1994), 136 N.S.R. (2d) 110 (C.A.) where a written opinion by independent counsel not disclosed to the parties on a point fully argued by the parties was found to be acceptable.

The majority in *Omineca* was probably closer to the mark when it concluded that it is not improper, in and of itself, for independent counsel to meet privately with the tribunal. In the absence of evidence to the contrary, one can assume that the consultation dealt with appropriate issues such as the options available to the tribunal or the administrative or housekeeping consequences of the tribunal's proposed decision.[31]

The concerns about independent counsel meeting privately with the tribunal include the possibility of aggravating an appearance and undermining of bias, compromising the independence of the tribunal and its decision-making, each party's right to know the case made against him or her and each party's right to present his or her own case.[32] For example, it might be imprudent for independent counsel to sit with the tribunal during the entire time it is deliberating. That could suggest that counsel is participating in the making of the decision. However, it would probably be appropriate for independent counsel to be called in for a short time during deliberations to answer a specific question and then to leave.

The approach required by section 44 of the *Health Professions Procedural Code*[33] is probably appropriate for any tribunal holding a hearing. It reads as follows:

> If a panel obtains legal advice with respect to a hearing, it shall make the nature of the advice known to the parties and they may make submissions with respect to the advice.

Whenever legal advice is given to the tribunal by independent counsel in the absence of the parties, he or she should advise the parties of the nature of the questions asked and the advice given and ensure that the parties have an opportunity to comment on that advice, if desired, before the tribunal makes its decision. Where everyone is present, it is often more efficient for the tribunal to ask its question and to receive advice from its counsel and to hear submissions on that advice from the parties in the hearing room.

(c) Final Address to the Tribunal

Some tribunals have developed the habit of asking their independent counsel to address them at the conclusion of the case just before the members retire to deliberate. Often the closing submissions of the parties are more rhetorical than systematic; they are intended to persuade rather than explain. Also, closing submissions often contain conflicting arguments on legal issues.

The final address by tribunal's counsel can be similar to, but not identical to, a jury address by a trial judge. Certainly, a systematic review of the issues to be decided by the tribunal and the order in which they are to be decided can be most helpful. For inexperienced tribunals, a reminder of basic principles such

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31 *Supra*, note 14 at 95. See also *Liwiski*, *supra*, note 30.

32 *Khan v. College of Physicians & Surgeons (Ontario)* (1992), 9 O.R. (3d) 641 (C.A.) at 672.

33 *Regulated Health Professions Act*, S.O. 1991, c. 18, Schedule 2.

as a description of the burden of proof and the need to confine its findings to the allegations raised in the notice of hearing is important. Independent counsel can also identify the issues, particularly the legal issues, upon which the parties agree and do not agree. Tribunal's counsel can provide advice on the legal issues raised by the closing submissions. However, at this stage, independent counsel should not comment on matters of weight or discretion that are for the tribunal to decide.

After the tribunal's counsel gives his or her closing address, the parties should be given a final opportunity to comment on the points covered in it.

4. Role After the Hearing — Assisting with the Tribunal's Reasons and Drafting the Formal Order

It is generally accepted by practitioners that independent legal counsel should not participate, or even be present, during the deliberations by the tribunal.[34] Rather, the issue that has received the most litigation in recent years is the proper role of independent counsel in the drafting of the tribunal's reasons.

The leading case is the decision of the Ontario Court of Appeal in *Khan v. College of Physicians and Surgeons of Ontario*.[35] It set out the concerns of participation by tribunal's counsel as follows:

> The rationale underlying this principle is self-evident. In discipline proceedings the parties are entitled to know, and if so inclined challenge on appeal the Committee's decision. Someone else's explanation for or rationalization of that decision is no substitute for the Committee's reasons. Without the reasons of the Committee, a party cannot know why the decision was made, or who made the decision. The right of appeal also becomes illusory.[36]

The tribunal must retain ultimate responsibility for the authorship of its reasons. However, this can be accomplished even if the tribunal obtains the assistance of its counsel. There have been a number of cases holding that tribunals are entitled to obtain outside assistance in the drafting of their reasons[37] and there is no reason why their own counsel cannot be one of those sources of assistance. The Court of Appeal went on to say:

> The ultimate aim of the drafting process is a set of reasons which accurately and fully reflects the thought processes of the Committee. To the extent that consultation with counsel promotes that aim, it is to be encouraged. The debate must fix, not on

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34 Professor Mullan, however, argues that this issue has not been addressed by the courts and there are some policy grounds for permitting some involvement by counsel in the deliberations themselves: *supra*, note 1 at 17.

35 *Supra*, note 32.

36 *Ibid.* at 671.

37 *Spring v. Law Society of Upper Canada* (1988), 64 O.R. (2d) 719 (Div. Ct.); *Consolidated Bathurst Packaging Ltd. v. I.W.A., Local 2-69*, [1990] 1 S.C.R. 282; *Tremblay v. Quebec (Commission des Affaires Sociales)*, [1992] 1 S.C.R. 952.

> the Committee's entitlement to assistance in the drafting of reasons, but on th acceptable limits of that assistance. . . .
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> There is no single formula or procedure referrable to the drafting process tha can be uniformly applied across the very broad spectrum of decision-making, wher determining whether the involvement of the non-decision-maker in the drafting process compromised the fairness of the proceedings or the integrity of the process. The nature of the proceedings, the issues raised in those proceedings, the composition of the tribunal, the terms of the enabling legislation, the support structure available to the tribunal, the tribunal's workload, and other factors will impact on the assessment of the propriety of procedures used in the preparation of reasons. Certainly, the judicial paradigm of reason writing cannot be imposed on all boards and tribunals . . . .
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> It must also be recognized that the volume and complexity of modern decision-making all but necessitates resort to "outside" sources during the drafting process. Contemporary reason-writing is very much a consultive process during which the writer of the reasons resorts to many sources, including persons not charged with the responsibility of deciding the matter, in formulating his or her reasons. It is inevitable that the author of the reasons will be influenced by some of these sources. To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing.[38]

In *Khan*, the first draft of the reasons was prepared by the chair of the tribunal. Independent counsel commented on the draft. He described his comments as journalistic and administrative assistance rather than legal advice. Changes were made and circulated to the entire tribunal who approved the final draft. The Court concluded that this type of assistance was appropriate:

> Nothing in this record suggests that counsel's involvement in the writing of the reasons compromised the independence or impartiality of the Committee. Counsel for the Committee was the servant of the Committee and was totally independent from the College or Dr. Khan. His involvement in the writing of the reasons was not mandatory, and was entirely under the control of the Committee. Counsel's assistance could not have had any coercive effect on the Committee.
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> I am also satisfied that counsel's involvement in the drafting process did not undermine Dr. Khan's ability to know the case made against him or to present his own case. There is no evidence that counsel assumed the role of an advocate, advancing one position over another during the drafting process, or that he presented any new facts, arguments or legal issues for the Committee's consideration during the drafting process. He merely assisted in the preparation of an intermediate draft. The reasons released by the Committee reflect the evidence heard, the arguments made, and the legal advice given at the hearing. On this record, it would be sheer speculation to hold that during the drafting stage, counsel led the Committee outside of the confines of the evidence heard, the arguments made and the legal advice given at the hearing, so as to deny Dr. Khan a fair hearing and a proper adjudication.
>
> In my opinion, no legitimate concerns as to the fairness of the proceedings arise from counsel's very limited involvement in the reason writing process.
>
> I am also persuaded that counsel's involvement in the drafting process did not

38 *Supra*, note 32 at 672-673.

impair the integrity of the discipline proceedings. The drafting process followed by the Committee maintained the responsibility of authorship with the Committee and avoided any inference that counsel had co-opted or had delegated to him the reason-writing function.[39]

The assistance given by independent counsel might include the following:

1. editing the reasons for grammar and style;
2. commenting on possibly erroneous references to the evidence or including additional relevant references to the evidence; and, more questionably,
3. informing the tribunal of previous cases decided by the regulator that may be inconsistent with the proposed decision; and
4. raising the policy implications of the reasons.[40]

In light of these principles, a useful method of obtaining appropriate assistance might be as follows:

1. the first draft of the reasons should be written by the tribunal with no assistance at all;
2. comments might be in the form of questions rather than suggested changes to reduce the chance of improper influence (e.g., Are you aware of the *Smith* case that also dealt with that point? Have you considered the privacy interests of the patients in those records? Could you give an example of why you found that witness to be credible? Where do you explain why you do not accept the evidence of witness X? Have you dealt with the alibi defence?);
3. any changes should be written by the tribunal itself; and
4. the final draft of the reasons should be approved by every member of the tribunal subscribing to them.

Drafting of reasons is different from drafting a formal order based upon the decision and reasons of the tribunal. It is common practice for independent counsel to draft the formal order to ensure that it is expressed with legal precision. Only if the order adds to the decision and reasons need it be circulated to the parties first.

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39 *Ibid.* at 674.

40 *Ibid.* at 671; *Tremblay, supra,* note 37 at 969-971; *Consolidated-Bathurst, supra,* note 37 at 326-328; *Bovbel v. Canada (Minister of Employment & Immigration)* (1994), 113 D.L.R. (4th) 415 (Fed. C.A.), at 420-424, leave to appeal to S.C.C. refused (1994), 115 D.L.R. (4th) vii (S.C.C.); *Weerasinge v. Canada (Minister of Employment & Immigration)* (1993), 17 Admin. L.R. (2d) 214 (Fed. C.A.) at 220.