KEEPING CURRENT

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Star Chamber v. Equity: Politicians Beware

By Gavin Tighe & Stephen Thiele

As Canadians head to the election polls in October to cast ballots in the federal election, one of the issues that will likely be on their minds is the recent finding of the Integrity Commissioner that Prime Minister Justin Trudeau improperly sought to influence the decision of his former Attorney General, Ms. Jody Wilson-Raybould, in connection with the current criminal proceedings against SNC-Lavalin. In his decision, the Integrity Commissioner found that Prime Minister Trudeau had violated section 9 of the federal *Conflict of Interest Act*, which prohibits a public office holder from using their position to seek to influence a decision of another person so as to further their own private interests or those of a relative or friend, or, as applied to SNC-Lavalin, to improperly further another person's private interest.

While the decision of the Integrity Commissioner carries no penalty or sanction, it will no doubt have a political impact on the Prime Minister and his party as opposition parties call for either a police investigation into the affair, ask for additional public hearings, or, at the very least, demand that the Prime Minister actually apologize for his conduct. Meanwhile the Prime Minister will continue to counter-punch with a message that throughout the discussions involving the prosecution of the Quebec-based construction giant he was only trying to protect Canada's economic interests and the jobs of innocent employees and pensioners.

This debate will rage on beyond the election and will likely be the topic of heated discussions in political science and law school classrooms for years to come as every passage of the Integrity Commissioner's report is analyzed and dissected. Scholars will carefully and comprehensively examine the *Criminal Code* provisions which permit prosecutors to enter into remediation or deferred prosecution agreements and the legal doctrine (the Shawcross doctrine) that Integrity Commissioner Dion found the Prime Minister to have breached.

However, there is another interesting procedural aspect of the Integrity Commissioner's decision which should not be overlooked. This aspect involves

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the process used by Integrity Commissioner Dion which essentially disclosed to Prime Minister Trudeau the case he had to meet during the investigation.

We have represented politicians in integrity commissioner investigations conducted by both the City of Toronto integrity commissioner and the Ontario integrity commissioner. During those investigations, unlike the process adopted by Integrity Commissioner Dion, the politicians who were the object of those inquiries and subject to potential sanction were not provided with either documentary disclosure or the transcripts of witness testimony.

In our view, it is remarkable that in this modern era the processes used by the various integrity commissioners to investigate complaints are not uniform and that where no disclosure is made they can sometimes resemble a 'Star Chamber' with the accused politician receiving very little information about the case he or she needs to meet and walking virtually blind into compelled interrogations about their alleged wrongdoing.

In a country where a person under criminal investigation is entitled to full disclosure of all relevant information in the possession or control of the Crown, it is surprising that integrity commissioners are entitled to withhold relevant evidence from a politician who is under investigation and whose political career and reputation can be at risk from a negative ruling. Indeed, even civil procedure entails extensive pre-trial disclosure in the form of documentary and oral discovery to ensure fairness.

In our view, principles of equity, fairness and fundamental justice are of particular significance and ought to prevail in the highly-charged atmosphere of political ethics investigations. To withhold relevant evidence from a person under investigation is contrary to administrative law and contrary to the legal and equitable principles such as, for example, those enshrined in the seminal case of *Browne v. Dunn*.

The Rule in *Browne v. Dunn*

The rule in *Browne v. Dunn* provides that where a party intends to impeach the credibility of a witness through the calling of independent evidence, that party must confront the witness with such evidence first so that the witness has the opportunity to respond. In other words, the rule prevents a witness from being "ambushed".

In *R. v. Dexter*, Justice Weiler explained:

> The rule is a rule of common sense. By enabling the trial judge to observe and assess the witness when he or she is confronted with contradictory evidence and given an opportunity to explain his or her position, the rule promotes the accuracy of the fact-finding process. In doing so, it enhances public confidence in the justice system.[1]

By analogy, it is difficult for a politician or the public to have confidence in an integrity commissioner investigation where the party under investigation is kept in the dark about relevant evidence before being interviewed or making submissions in connection with an allegation of conflict of interest. To keep a politician in the dark turns the investigation into nothing more than an arbitrary process by which an accountability officer can abuse his or her powers to make unjustified or dubious findings of wrongdoing.

General disclosure provided

In our experience, the complaint process to both municipal and provincial integrity officers affords the accused politician with initial disclosure of the allegation made against him or her.

The complaint, usually in the form of an affidavit, is provided to the politician and the politician is given an opportunity to respond.

However, where the integrity officer commences an investigation or inquiry, the politician, in general, is not provided with any other relevant information or the evidence of witnesses who are asked to testify before the relevant integrity commissioner, and a politician under investigation is afforded neither the right to cross-examine a potentially adverse witness nor the opportunity to hear that evidence before being compelled to give evidence themselves.

This makes it difficult and unfair for a politician to answer when an integrity commissioner asks: "Witness A said Y. What do you have to say in response?" Worse still, is where the politician is not provided the opportunity to deny or refute the evidence at all. There is currently no requirement for an integrity commissioner to even put the adverse witness' testimony to the accused politician.

Prior disclosure of Witness A's evidence would at least provide the politician with an understanding of the case that he or she is being asked to respond to and to adequately prepare that response rather than being ambushed on the spot in an interview.

As explained by Sara Blake in her leading text on administrative law,[2] fairness requires that a party who will be affected by a decision must be informed of the case to be met. Although the extent of disclosure may vary along a spectrum, in cases of a serious nature, which in our view include those involving ethics and conflict of interest investigations of public office holders, advance written notice of the nature of the decision to be made and the essential facts upon which it will be based should be provided, along with the disclosure of evidence that has been presented to the investigator.

Ms. Blake states: "At the far end of the spectrum, the party may be entitled to review all relevant information in the files of tribunal staff (except privileged information) including material which will not be submitted to the decision maker."[3]

Integrity Commissioner Dion's process

To his credit, Integrity Commissioner Dion did not seek to ambush Prime Minister Trudeau during his investigation. At page 4 of his report, Mr. Dion explained that during his investigation he conducted interviews with six witnesses, including Prime Minister Trudeau. Prime Minister Trudeau was provided with the transcript of his own interview and was provided with excerpts of the transcripts of interviews from the six witnesses interviewed and the relevant documentary evidence that the Integrity Commissioner had received from all 14 witnesses who had provided productions to him before he was required to give evidence.

In our view, this process conformed to the standards of equity and fairness.

Other Integrity Commissioner processes

In contrast, during the investigation of alleged conflict of interest on the part of Premier Doug Ford during the hiring of a new Ontario Provincial Police Commissioner in 2018, the Ontario Integrity Commissioner's process did not include the disclosure of any witness testimony to the Premier or documents that had been produced by those witnesses.

As well, although the Premier was completely vindicated of any conflict of interest, the Premier was never provided with a copy of the draft report or a draft of the facts upon which Integrity Commissioner Wake was relying upon before the final version of the report was made

public. While this is similar to many judicial or quasi-judicial proceedings, unlike a proceeding like a trial, the object of the inquiry is generally not permitted to hear the witnesses or cross-examine them.

The Ontario Integrity Commissioner's process, however, was timely and provided sufficient opportunity to prepare for the Premier's interview and to comply with documentary disclosure.

Similarly, the City of Toronto Integrity Commissioner's process does not provide for disclosure of either witness transcripts or statements or documentary disclosure of documents collected during an investigation. Where an investigation is conducted without the filing of a formal complaint in the form of affidavit, this lack of disclosure makes it virtually impossible for a politician under investigation to know the case he or she has to meet.

In the Toronto Integrity Commissioner's recent decision involving the Toronto Parking Authority's aborted purchase of 1111 Arrow Rd. and allegations of conflict of interest on the part of former Councillor Giorgio Mammoliti, the manner by which the investigation was conducted into his conduct, over an almost 2-year period, raised concerns about a reasonable apprehension of bias on the part of the accountability officer conducting the investigation and about procedural fairness.

As disclosed in correspondence that now form part of the public record, a request for disclosure of pertinent information in connection with the investigation was denied by the City's Integrity Commissioner. Instead an aggressive and clearly adversarial approach was taken by the City's Integrity Commissioner in connection with her efforts to compel former Councillor Mammoliti to appear for an interrogation.
An adversarial approach by an integrity commissioner is particularly troubling given that he or she assumes the roles of investigator, prosecutor and the ultimate arbiter of the facts.

Also, the City's Integrity Commissioner never provided the former councillor with a copy of a draft report or the final version of the report before it was tabled before City Council. This denied, at every stage of the proceeding, the ability of the individual who was the object of the investigation to know and respond to the allegations. This was compounded by the inability to make any submissions as to the appropriateness of the integrity commissioner's findings. Arguably such a process offends basic principles of fundamental justice on a number of levels.

However, under The Office of the Integrity Commissioner: Complaint and Application Procedures, where a public office holder is found to have breached a Code a Conduct a draft report must be provided to him or her for comment. Where no breach is found, as in the case of former Councillor Mammoliti, the Integrity Commissioner is still required to provide the public office holder with a copy of the report.

In the case of former Councillor Mammoliti, the conduct of the integrity commissioner led to complaints about procedural unfairness to the City Clerk, the City of Toronto Ombudsman and the Ombudsman for Ontario. However despite the alleged lack of fairness and equity in the investigation process, absolutely nothing, short of potentially bringing a costly court application, could be reviewed by the Ombudsman for Ontario until after the City's Integrity Commissioner completed her investigation.[4]

A call for reform

Accountability officers occupy an increasingly important position in our political system.

There is obvious value in conflict of interest legislation aimed at preventing politicians from either misusing or abusing their public office or acting in a conflict of interest.

However, accountability officers should not have the ability to freely wield their authority and conduct their investigations without adhering to fundamental principles of natural justice, fairness and equity. After all, equity is our highest legal principle, even trumping, as set out in s. 96(2) of the *Courts of Justice Act*, the common law.

In our experience with integrity commissioner investigations there is need for legislative reform to expressly require integrity commissioners to provide documentary disclosure to politicians under investigation and to provide the delivery of witness transcripts before a politician is subjected to an interview.

Politicians, like any other person subject to a serious charge of ethical misconduct, have the right to know the case they must meet and should not be kept in the dark.

A Star Chamber-like approach to an integrity commissioner investigation has no place in Canadian society.

Integrity Commissioners across Canada should learn from the process used by Integrity Commissioner Dion and build upon it to ensure that the next politician under investigation by such an accountability officer is afforded procedural fairness and equity throughout.

Without any legislative reform, politicians must beware that whenever someone files an ethics complaint against them, they could be at the disadvantage of having to respond to facts, evidence and allegations without being given a reasonable opportunity to understand the case they have to meet.

Integrity investigations must, above all, be conducted with the utmost integrity.

About the authors

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Gavin and Stephen have represented former Mayor Rob Ford, Premier Doug Ford and former Councillor Giorgio Mammoliti in connection with various integrity commissioner investigations.

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1 2013 ONCA 74 at para. 19
2 Administrative Law in Canada, 4th ed. (2006: LexisNexis)
3 Ibid., at p. 36
4 Ombudsman Act, R.S.O. 1990, c O.6, s. 14(4.3)