

Academic Freedom and the Power of University Donors: Dogs That Don't Bark and Other Reflections on the Cromwell Report at the University of Toronto

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*Executive Summary*

The Canadian Association of University Teachers (CAUT) has voted to censure the University of Toronto for breaches of academic freedom. This essay helps to explain why CAUT has done this.

Academic freedom depends in crucial respects on limiting how power is exercised and by whom. Donors to universities should not have the power to block administrative or academic appointments within universities, but sometimes they succeed in doing so. This sort of power is sometimes exercised indirectly by inducing university actors not to take otherwise reasonable steps to pursue a qualified candidate whom the donors oppose.

One instructive example of this disturbing practice occurred recently at the University of Toronto Faculty of Law. The basic narrative is this: The law school was searching for someone to fill the position of director of the school's International Human Rights Program (IHRP). The search committee unanimously agreed on their choice of the top candidate, a non-citizen. In mid-August, an oral offer was made and tentatively accepted, pending acquisition of a work permit, although no written contract had yet been sent or signed. On September 4, the Friday of Labour Day weekend, the Dean of the law school learned that a judge who was an important donor to the university had talked to university officials, expressing concern "that the appointment would be controversial with the Jewish community and cause reputational harm to the University." (Cromwell report, p. 48) (The candidate had published scholarship about the international law of occupation, especially in the context of Israel/Palestine. Her academic references, who included Israeli and Jewish professors of international law, affirmed that her work was excellent and fell squarely within the mainstream of international legal scholarship.) The Dean had previously delegated responsibility for this search. Now, he became involved. Over the weekend he contacted two senior university officials about the issue. Within two days he notified the faculty member serving on the search committee that he planned to terminate negotiations with the committee's chosen candidate. The justification that he offered for this action was that it would take two to three months for the candidate to get a Canadian work permit, that it was essential for a new director to start work within a few weeks, and that the path that the committee had been pursuing to enable the candidate to work while abroad, an independent contractor agreement, was not viable.

On September 11, the faculty member resigned from the search committee and from her position as chair of the Faculty Advisory Committee of the IHRP. On September 14, the Dean informed the faculty of the law school that he was shutting down the search for a new director of the IHRP this year. On September 16, the three remaining members of the faculty advisory council for the IHRP resigned as did a Research Associate who had also been a member of the search committee and who sacrificed a paid position by resigning.

These developments led to public debate and criticism. In response, the university hired Thomas Cromwell, a former justice of the Canadian Supreme Court, to review what had happened and to determine if there had been any improper influence. Cromwell issued a lengthy report providing a detailed narrative account and analysis of the case. His key conclusion was “I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate.” (p. 6) This essay is a critical response to the Cromwell report.

Cromwell says at the outset of his report that he accepts two premises in his discussion. The first is that the candidate chosen by the search committee was highly qualified and that no one within the university had argued otherwise. The second is that both the university and he accepted “the view that terminating a candidacy of a qualified candidate for this position on the basis of outside pressure would be improper.” (p. 6) My discussion also adopts these premises.

Cromwell’s justification for his conclusion of no improper influence relies almost exclusively on what the Dean says he thought and what the Dean presents as the reasons for his actions. On Cromwell’s account, it seems, if the Dean did not deliberately lie about why he did what he did, there was no improper influence.

This is far too narrow a framework of analysis. The Dean (and other university officials) did not do things that one would expect people in their positions to do if they really wanted to hire the (highly qualified) candidate chosen by the search committee. From September 4 onward, the Dean and other university officials knew that hiring the candidate whom the search committee had chosen would make important donors unhappy. From that point on, the trajectory of the effort to hire the candidate changed radically. Minor problems became seen as major obstacles, and the Dean and senior officials failed to explore ways that administrators typically use to address these problems, rushing precipitously to the conclusion that the problems could not be solved. Cromwell appears not to have asked the Dean and other university officials why they failed to pursue alternatives that would be obvious and desirable in the absence of concerns about donor reactions, and he offers no reflection on these failures. Thus, he fails to explore the evidence in his own account that points to improper influence.

Here are the key points. None of them depends upon claims that the Dean or anyone else consciously and deliberately yielded to external pressure, but they do show that improper external influence played an important role in the outcome of the process.

1) The Dean learned of the donor concerns on September 4. He then interrupted the holiday weekends of two senior university officials to discuss the case with them. There is no indication in the Cromwell report that these senior officials criticized the donor’s intervention or offered the Dean advice about how to overcome any obstacles to hiring the committee’s chosen candidate or alerted the Dean to the need to take steps to avoid the appearance of improper influence if he decided not to hire the candidate. The Cromwell report does not ask why.

2) Timing is a key issue and Cromwell misrepresents it. Cromwell gives the impression that the Dean acted when he did only because that was when he learned about problems with the independent contractor route. In fact, the Dean paid almost no attention to this recruitment effort prior to the donor’s intervention. He began to treat the case as a matter of concern only after that intervention and only then learned that there were questions about the independent contractor approach.

3) The Dean exaggerated the problems with the independent contractor approach and made no effort to explore alternatives. Cromwell simply accepts at face value the Dean's implausible account of the independent contractor problems and the limitations on alternatives, ignoring facts that his own narrative reveals to do so.

4) The Dean exaggerated the importance of having a director in place in the fall and overestimated his ability to achieve that in a satisfactory way, given that he was proposing to interview candidates whom the Committee had previously interviewed and rejected. Again, Cromwell accepts at face value the Dean's assessment, ignoring facts in his own narrative.

5) The Cromwell report fails even to mention the September 16 resignations or to discuss the significance of these resignations in protest together with the earlier one by the faculty chair. The report spends a great deal of time discussing the importance of confidentiality and criticizing leaks of information about the search process. It fails entirely to discuss the possibility that confidentiality might be used to conceal improper influence and the need for norms and mechanisms to protect against that risk.

6) The Dean told the faculty on September 14, before this issue had appeared in public media, that he was terminating the search for a director for the IHRP this year. This action eliminated the only justification offered for terminating negotiations with the committee's chosen candidate, i.e., the need to have an IHRP director in place in the fall. Why did not the Dean then resume the effort to recruit that excellent candidate? The Cromwell report does not ask this obvious and important question.

That final question is still relevant for the law school today. The Cromwell report does not dispute the excellence of the committee's chosen candidate, and the position of director is open. If the committee's candidate were offered the position, however, those who have been seeking to exercise improper influence would be very unhappy. If the university and the law school really want reconciliation, as the Cromwell report urges, the path is clear. Hire Valentina Azarova.

## **Overview (Duplicates the first six paragraphs of the executive summary)**

Academic freedom depends in crucial respects on limiting how power is exercised and by whom. Donors to universities should not have the power to block administrative or academic appointments within universities, but sometimes they succeed in doing so. This sort of power is sometimes exercised indirectly by inducing university actors not to take otherwise reasonable steps to pursue a qualified candidate whom the donors oppose.

One instructive example of this disturbing practice occurred recently at the University of Toronto Faculty of Law. The basic narrative is this: The law school was searching for someone to fill the position of director of the school's International Human Rights Program (IHRP). The search committee unanimously agreed on their choice of the top candidate, a non-citizen. In mid-August, an oral offer was made and tentatively accepted, pending acquisition of a work permit, although no written contract had yet been sent or signed. On September 4, the Friday of Labour Day weekend, the Dean of the law school learned that a judge who was an important donor to the university had talked to university officials, expressing concern "that the appointment would be controversial with the Jewish community and cause reputational harm to the University." (Cromwell report, p. 48) (The candidate had published scholarship about the international law of occupation, especially in the context of Israel/Palestine. Her academic references, who included Israeli and Jewish professors of international law, affirmed that her work was excellent and fell squarely within the mainstream of international legal scholarship.)

The Dean had previously delegated responsibility for this search. Now, he became involved. Over the weekend he contacted two senior university officials about the issue. Within two days he notified the faculty member serving on the search committee that he planned to terminate negotiations with the committee's chosen candidate. The justification that he offered for this action was that it would take two to three months for the candidate to get a Canadian work permit, that it was essential for a new director to start work within a few weeks, and that the path that the committee had been pursuing to enable the candidate to work while abroad, an independent contractor agreement, was not viable.

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These developments led to public debate and criticism. In response, the university hired Thomas Cromwell, a former justice of the Canadian Supreme Court, to review what had happened and to determine if there had been any improper influence. Cromwell issued a lengthy report providing a detailed narrative account and analysis of the case. His key conclusion was "I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate." (p. 6) This essay is a critical response to the Cromwell report.

In my opinion, the facts provided in the Cromwell report, along with some facts that Cromwell knew but chose not to include, provide clear and convincing evidence that in the absence of what Cromwell calls the "Alumnus' inquiry," the Preferred Candidate would have received a formal job offer which she

would have accepted, and she would now be the Director of the International Human Rights Program at the University of Toronto. There was improper influence, and it had its desired effect.

Cromwell says at the outset of his report that he accepts two premises in his discussion. The first is that the candidate chosen by the search committee was highly qualified and that no one within the university had argued otherwise. The second is that both the university and he accepted “the view that terminating a candidacy of a qualified candidate for this position on the basis of outside pressure would be improper.” (p. 6) My discussion also adopts these premises.

### **What Facts Are Relevant?**

Cromwell says that he will provide an account of the relevant facts and consider what inferences can be drawn from those facts. But what facts are relevant? As in the case of the dog that did not bark in the night in the famous Sherlock Holmes story, the fact that something does not occur when it normally would is sometimes a highly relevant fact. It can be an important piece of evidence.

If a person claims to be acting on the basis of a particular concern but then does not do something which a person with that concern would normally do, one may sometimes reasonably infer that the concern was not actually playing as important a role in the person’s actions as the person had asserted. This need not entail the view that the person in question is deliberately lying. We are frequently not fully conscious of our own motivations, and our actions may reveal things about our goals and relative priorities of which we are not aware ourselves.

It is a striking feature of the Cromwell report that it draws no inferences at all from what anyone did not do. This omission of omissions is crucial. There are several key points at which the Dean (and others) did not do things that one would expect people with their responsibilities and announced concerns to do. In some instances, the report provides factual information that enables us to see what the Dean (and others) failed to do, even though the report does not draw attention to the significance of those failures to act. In other instances, the report actually leaves out facts that are relevant to the question of what someone with such responsibilities and announced concerns would be expected to do.

I will show that it is reasonable to infer from the facts that the decision to terminate the negotiations with the Preferred Candidate was influenced inappropriately by the “Alumnus’ inquiry.” I make no claim about whether the Dean or others were conscious of this influence or not. I will also show that there are many places in which someone with Cromwell’s mandate could reasonably have been expected to ask questions that Cromwell does not ask. I make no claim about whether Cromwell himself was conscious of these omissions or not, although I do think that there are troubling aspects to the ways in which Cromwell constructs his report. I will draw attention to some of these issues as I proceed.

### **Puzzles about the Dean’s Consultations with High University Officials**

Cromwell’s report focuses on facts about the Dean, and so I will as well. At some points, however, the report also gives us facts about other key actors, and we should consider what (if anything) we can infer from those facts. Let’s start with some of those.

Sometime during the Labour Day weekend, the Dean contacted the Vice-President and Provost, the highest university official after the President, to discuss this issue of the search for a new director of the IHRP. They talked for a while and the Provost then directed the Dean to the Vice-President for Human

Resources and Equity (VPHR) “because the matter concerned a staff position that fell under her authority and not that of the Provost.” (p. 37) The Dean and the VPHR then discussed the matter over the weekend.

Cromwell does not ask what prompted the Dean to contact these officials. Cromwell’s failure to ask this question might itself be taken as an example of a dog that did not bark when one would expect it to do so. Cromwell says that the facts show that the Dean decided to terminate negotiations with the Preferred Candidate simply because he learned that the independent contractor arrangement for enabling the Preferred Candidate to start work in September would be illegal, that there was no viable alternative, and that it was essential that the new director start in September.

If that is the whole story, however, why did the Dean feel the need to contact the Provost and the VPHR over Labour Day weekend? Isn’t that an obvious question? After all, the director of the IHRP at the law school was a relatively low level administrative appointment in the university as a whole, and, on Cromwell’s account, the Dean was making a routine decision for entirely justifiable reasons. Normally, such a decision might be communicated by an email or a report in a file, if it was communicated at all, and it would almost certainly not be brought to the attention of senior university officials, much less be seen as a rationale for interrupting their holiday weekend.

What warranted such urgent, high level attention? The answer seems obvious: the Alumnus’ inquiry. So, clearly, the Dean did not think at this point that this inquiry was something that he could simply ignore or even that it would be sufficient to send these senior officials an email noting that he had received the Alumnus’ inquiry but was ignoring it because it was irrelevant to his decision. Indeed, he did not even think that it would be a wise idea to wait until normal business resumed after the holiday to discuss this.

What can we infer from this fact? At the least, we can infer that it would be misleading to say that the Alumnus’ inquiry played no role in the Dean’s decision-making process, even if one wants to claim that it did not affect the final outcome of the decision. In the absence of the Alumnus’ inquiry, he would not have talked with the Provost and the VPHR about this issue and he would not have received their input.

What can we infer from the facts that Cromwell provides about what input the Provost and the VPHR provided to the Dean? Surprisingly little. For the most part, Cromwell reports what these officials say that the Dean said to them, not what they said to the Dean. The Provost said that the Dean “referred to a “complicating factor” resulting from the Alumnus’ communication.” (p. 37) Cromwell does not say if the Provost asked the Dean what he meant when he described the Alumnus’ communication as creating a “complicating factor” or what she said in response. Cromwell’s task, as he describes it, was to identify the basis of the Dean’s decision. Given that goal, it would seem to be very important to seek some clarification about what the Dean meant in talking about a “complicating factor.” Did Cromwell ask the Provost and the Dean about this, and, if not, why not? Again, a dog that does not bark.

Cromwell also tells us that the Provost told him “that she realized from the Dean’s account that he was in a “no-win” situation in that whatever decision he made there would be people who would be very upset.” (p. 37) This is a puzzling formulation. It sounds quite different from the strong announcement at the outset of the report that “the University clearly and unequivocally is of the view that terminating a candidacy of a qualified candidate for this position on the basis of outside pressure would be improper.” (p. 6) Given this commitment, why was it relevant from the Provost’s perspective that some people would be “very upset” if the Dean went ahead with the plan to hire the Preferred Candidate, a decision

that had emerged from a normal and proper university process? To describe this as a “no-win” situation is implicitly to grant legitimacy or at least relevance to considerations that are supposed to be out of bounds.

If it is reasonable to infer that the Alumnus’ inquiry was what motivated the Dean to contact the Provost and the VPHR, then we might ask, what did these officials say to the Dean about that inquiry and what did they do, if anything, after learning about it? Again, these seem like obvious questions given the goals of Cromwell’s inquiry, but he does not ask them.

Did these senior officials say anything about the propriety of an alumnus making such an inquiry or about the importance of ignoring it? We are told at many points that the Dean regarded the information transmitted by the inquiry as irrelevant to his decision. Indeed, he is reported to have shut off communication about this topic with one or more advancement officials. So, it seems as though the Dean himself saw the inquiry from the Alumnus as improper. Did he express that view to the Provost and the VPHR, as opposed to saying simply that he would not take the concerns expressed by the Alumnus into account in making his decision? If not, why not? If so, what, if anything, did they say in response?

### **What is Improper Influence?**

We cannot assume that it is self-evident what should count as improper influence. Cromwell himself draws a sharp distinction between the view expressed in the Alumnus’ inquiry and the view expressed in a communication from an unnamed professor to an unnamed organization which was passed on to the Alumnus and prompted the Alumnus’ inquiry.

According to Cromwell, the professor wrote, “The hope is that through quiet discussions, top university officials will realize that this appointment [i.e., the appointment of the Preferred Candidate] is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising.”(p. 32) Cromwell is explicit about his rejection of such an approach: “The sort of “quiet discussions” with “top university officials” contemplated by the professor in the email to the Organization that I have described earlier have no place in a merit-based recruitment process.” (p. 65) At another point, he says that it is accurate to describe the professor’s communication as “external interference, as “outside political pressure”, and as an “attempt to block the appointment.” (p. 48)

On the other hand, Cromwell says that these terms do not apply to the Alumnus’ inquiry, because, as Cromwell sees it, “the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.” (p. 48). Cromwell’s characterization of the Alumnus’ inquiry mirrors the description of that inquiry provided by the development official (the AVP) who talked with the Alumnus and passed on his concerns.

the Alumnus indicated that as a judge he could not become involved but that he wanted to alert the University that if the appointment were made it would be controversial and could cause reputational harm to the University and particularly to the Faculty of Law. He wanted to ensure that the University did the necessary due diligence. (p.32)

It is not clear why Cromwell regards this as a benign communication. As he himself notes, the Dean took various steps (some of them unsuccessful) to cut off communications back to the Alumnus. It seems hard to see what purpose would be served by the Alumnus’ sharing “the view that the appointment

would be controversial with the Jewish community and cause reputational harm to the University” other than to attempt to discourage the hiring of the Preferred Candidate. And if the Alumnus were not interested in having an effect upon the process, why would he express appreciation to the AVP when she offered to follow up and “close the loop” and why would he offer to get additional information if needed? (p. 35) If the terms used above (“external interference,” “outside political pressure,” and “attempt to block the appointment”) are appropriate in describing the professor’s message about “quiet discussions,” I can see no reason why they do not also apply to the Alumnus’ effort at informal, back channel communications through the development office.

Someone might object that the Alumnus was only requesting that the university exercise “the necessary due diligence,” but one could also say that the professor was only objecting to the “academically unworthy” character of an appointment of the Preferred Candidate. Cromwell clearly sees the latter as code words but does not explain why we should not interpret a request for due diligence through the same lens. And the Alumnus thinks that his intervention can “ensure” due diligence. He expects to have an impact on the process.

I have spent time here in a discussion of the character of the Alumnus’ inquiry in part to draw attention to why it matters so much what the senior officials said (and did not say) to the Dean. Did senior officials of the university share Cromwell’s view of the sharp distinction between the character of the communication from the professor and the character of the communication from the Alumnus? The answer to that question is clearly crucial to the issue of what would or would not count as improper influence. Did the senior officials criticize the communication from the Alumnus in their discussions with the Dean or not? If they did, what did they say? If they did not, what message did that send to the Dean? Did the senior officials criticize the transmission of the Alumnus’ inquiry by development officials to the Dean? If they did, what did they say? If they did not, what message did that send about the relationship between external donors and internal decisions?

Of course, these are just questions. We do not know the answers to these questions because Cromwell failed to ask them. Nevertheless, there is no evidence of which I am aware that the meetings between the Dean and the senior officials led to public discussions and policy changes that would reduce the likelihood of attempts at external influence like that of the Alumnus and so render less necessary meetings like the ones the Dean requested. Cromwell’s report and President Gertler’s endorsement of it do suggest that these topics will now be given explicit attention, but whether a satisfactory approach to these issues emerges from that attention remains to be seen.

### **What Explains Failures to Act?**

One final point about the senior officials with whom the Dean conferred. In an earlier communication about this matter, I said that, as an experienced administrator, the Dean should have anticipated that if he terminated the candidacy of the Preferred Candidate after he had learned about the inquiry from the Alumnus, and if people learned about that sequence, many people would infer that he had done so because of the inquiry, whatever his actual motives. I suggested that there were various steps he could have taken that would have made such an inference much less plausible and asked why he had not taken those steps.

I have never received an answer to my question about the Dean, but one can make the same observation about the senior officials with whom he consulted on Labour Day weekend and ask the



same questions, even more sharply, about them. These were experienced senior university officials, familiar with the ways in which issues become matters of public controversy. Did they not see what the public reaction would be if the Dean terminated the candidacy of the Preferred Candidate and if the prior inquiry from the Alumnus became public knowledge? And if they did see this, why would they not try to help the Dean find a solution that would avoid this potential negative public reaction?

Here is just one example of how they could have done so. If it was clear that the Preferred Candidate was an excellent choice for the position and that the only problem was that a delay in her arrival until December would create some administrative burdens and complications at the law school during the fall, they could have offered to provide some assistance from the Centre where funding and experienced administrators would be available to help the law school bridge the gap between the beginning of school and the Preferred Candidate's arrival as the new director. It would be easy to think of other possibilities as well. Why did they not offer such solutions?

One possible answer to that question is that this sort of solution would only address one problem, i.e., the negative public reaction if the Alumnus' inquiry and the subsequent termination of the negotiations with the Preferred Candidate were revealed. By contrast, as the Alumnus' inquiry had communicated, if the university found a way to make it possible to appoint the Preferred Candidate, there would be a negative public reaction from some members of the Jewish community and from some powerful donors. (Recall the Provost's comment about a no-win situation.) So, perhaps the senior officials were not unskilled or unable to anticipate a possible negative public reaction to the termination of negotiations with the Preferred Candidate or unimaginative about solutions, but simply preferred a risk of one sort of negative public reaction to the certainty of another. If that is the case, however, what should we say about the question of improper influence upon them? Perhaps if Cromwell had pursued his inquiry a bit more fully, we would have answers to these questions.

### **How Time Matters in Assessing What Influenced the Dean's Decision**

Let's turn back to a focus on what the Dean decided and why.

Cromwell spends 40 pages laying out a factual narrative of the case and then 10 pages considering what he thinks can and cannot be inferred from these facts. Here is one key fact that is visible in the Cromwell narrative but that he does not use as a basis for any inference. In fact, he denies its relevance. Before September 4, the Dean had no deep interest at stake in who was chosen for the position of director of IHRP beyond the generic interest he had as Dean that the person be suitable and meet the needs of the institution (which had several dimensions including the timing of when the new Director would start). After September 4 the Dean knew that appointing one particular person would create a problem with an important source of donations to the law school and the university. Not appointing that person would avoid this problem. So, it is a simple fact that the Dean's interest with respect to who was appointed had changed as a result of the information that he received on September 4. This does not establish that the Dean's decision about the appointment was influenced by this interest, but it should lead us to consider that possibility. One way to do that is to compare how the Dean behaved before he acquired this knowledge and the related interest, and how he behaved after.

Cromwell does recognize that the question of timing is crucial, and he seeks to show that a careful examination of the timing supports the Dean's claim to have been motivated only by concern about the problems with getting the Preferred Candidate to start work promptly:

The timing of the Dean's intervention shortly after the Alumnus' inquiry has been said to support the inference that his decision was based on that inquiry. This overlooks the fact that on September 3 and 4, the University through the Assistant Dean, received the advice from external counsel in Germany that the independent contractor arrangement was illegal. (p. 48).... Moreover, the advice about the illegality of the independent contractor approach was only received orally on September 4 and conveyed to the Dean on September 5th. As noted earlier, the Dean understood that the independent contractor arrangement was the only way the University could begin paying the Preferred Candidate to work for the University remotely from outside Canada without a Canadian work permit.

These aspects, and particularly the timing of the receipt of this advice and the Dean's reaction to it take away much of the force of the inference of improper influence based on the timing of the Alumnus' inquiry and the making of the decision. (p. 49)

Cromwell's discussion here misrepresents a key aspect of the timing of the Dean's intervention, precisely the aspect that leads people to infer that the Alumnus' inquiry had an impact. Cromwell alludes to information about problems with the independent contractor arrangement reaching the university on September 3 and 4. So, one can easily come away with the impression that the Dean decided to terminate negotiations simply because he learned about these problems and the timing of his decision was affected only by the timing of the arrival of this information. It had nothing to do with the inquiry by the Alumnus. Indeed, the final sentence in the passage just quoted from page 49 of the report makes that claim explicitly. But the evidence that Cromwell himself provides leads to a different conclusion.

The key question is not when information reached the university but when it reached the Dean. What did the Dean know and when did he know it? If, in fact, the Dean had learned about the independent contractor problems on September 3 and had decided then to terminate negotiations with the Preferred Candidate, the benign account might appear plausible as Cromwell suggests. From that perspective, the Dean had wanted to hire the Preferred Candidate, but he discovered a problem that made that impossible.

That is not how it happened, however. On Cromwell's own account, the Dean learned of the concerns expressed by the German lawyers only on September 5, whereas he learned of the Alumnus' inquiry on September 4. The sequence is crucial because what might appear only as a problem on September 3, i.e., an obstacle to hiring someone the Dean wants to hire, becomes a solution to a problem on September 5, i.e., a justification for the Dean not to hire someone whom key donors do not want him to hire, but a justification that makes no reference to these donors and so can be presented publicly (and perhaps experienced personally) as unrelated to their concerns.

It is also important to note that the Dean learned about the German comments on the independent contractor arrangement only because he was trying to learn more about the Preferred Candidate, and he was trying to learn more about the Preferred Candidate as a direct result of his being informed about the Alumnus' inquiry. That is an explicit fact in Cromwell's report. On September 4, when the Dean learned about the Alumnus' inquiry, he said that he had not even known the name of the candidate until he heard about this inquiry. "He had no personal knowledge at that time about the Preferred Candidate or why her appointment would be controversial." (p. 34) But now the Dean wanted to find out more. He asked for the first time on September 4 to be sent the Preferred Candidate's cv and he arranged to have

further conversations about her recruitment the next day with the Assistant Dean. So, a topic in which he had relatively little interest before, i.e., the recruitment of the Preferred Candidate for director of the IHRP, suddenly became a topic of great urgency and one on which he wanted to be briefed over the course of a holiday weekend.

Can we draw any inference from this fact? One might say that this is more like a dog that barks unexpectedly than one that fails to bark when it would normally do so. If all that the Dean cared about was following proper process in appointing the IHRP director and if he cared so little about the substance of this issue that he had not bothered previously to learn the Preferred Candidate's name or to look at her cv, why would he devote time on a holiday weekend to this? The Assistant Dean had already scheduled meetings with the immigration lawyer and the university employment lawyer for September 8, the first normal workday after the holiday weekend. She had already sent the communications from the German lawyers to the university employment lawyer. The Dean already had his regularly scheduled biweekly meeting with the Assistant Dean on his calendar for September 8 and the hiring of a new director for the IHRP was already on the agenda. Why not wait a few days to learn more about the issues and to try to sort out options? Remember, at this point on September 4 when the Dean was scheduling meetings over the weekend, he did not yet even know that there was a plan to pursue an independent contractor path, much less that there appeared to be problems with that path. There is no plausible account of the urgency with which the Dean was treating this issue on September 4 that separates it from the Alumnus' inquiry. Cromwell's account, quoted above, obscures this fact, and it is a fact that is directly relevant to the question of whether the Alumnus' inquiry had an impact on the Dean's decision.

This takes us back to the question of why Cromwell chose to present his account of the timing issue in such a misleading way. Above all, why would he say, "the timing of the receipt of this advice and the Dean's reaction to it take away much of the force of the inference of improper influence based on the timing of the Alumnus' inquiry and the making of the decision." One possibility is that he simply missed the significance of the details about when the advice reached the Dean, although it seems like a very obvious point in a report that otherwise appears highly attuned to the significance of details. Another possibility, however, is that Cromwell, perhaps unconsciously, saw his role not as an impartial adjudicator but as an advocate for the university that had asked him to prepare the report. Advocates are, of course, selective in the sorts of information they acquire and the ways in which they present information. If we view Cromwell's report from that perspective, this way of presenting the information makes more sense, as does his failure to ask some obvious and important questions that might challenge the behaviour of university officials. As we shall see, this advocate's perspective seems to make sense of other aspects of his presentation as well.

Finally, it would have been appropriate for the Dean to contact Committee Member 1 (who was also the academic chair of the IHRP) and to arrange to meet with her early in the following week to discuss how best to move forward because the Assistant Dean knew (and presumably told the Dean) that Committee Member 1 knew about the Alumnus' inquiry and was upset about it. The Dean could simply have reassured Committee Member 1 that he would not allow himself to be subject to this improper influence and that he would meet to discuss options. Again, however, this dog did not bark, at least not in quite that way.

## The Context of the Dean's Decision

The Cromwell report sets the Dean's decision in the context of the following facts (which are not in dispute): (1) The immigration lawyer hired by the university told the Assistant Dean on August 19 "that it was reasonable to expect that the Preferred Candidate could have a work permit in two to three months after applying." (pp. 15-16) (2) With the help of university employment lawyers, the Assistant Dean explored the possibility of creating an independent contractor arrangement with the Preferred Candidate to enable her to be paid to work on some of the tasks of the IHRP director while she was still living in Germany during the period before her Canadian work permit was approved. (pp. 18-20) (3) As part of the process of exploring that option, on August 27 the Assistant Dean sent a draft of a proposed independent contractor agreement to German employment lawyers for them to assess any possible conflicts with German rules and regulations (p. 25) (4) The German lawyers sent an email to the Assistant Dean on September 3 (which she did not read until the next day) in which they expressed "concerns that this relationship is not a true independent contractor relationship" but also noted that "the likelihood that the relationship will be challenged either by the governmental authorities or by the individual is likely quite low (especially considering its short length), so the University may be willing to take that risk." (p. 28) (5) The Assistant Dean informed the Dean about this communication from the German lawyers on September 5.

In a key passage (pp. 41-42), Cromwell offers the following account of what he calls the Dean's "understanding" in the course of explaining why he would not infer that any sort of improper external influence had affected the Dean's decision to terminate negotiations with the Preferred Candidate:

At the point that the Dean made the decision to terminate the candidacy, his understanding of the situation, so far as I can determine, was as follows.

First, he understood that it was essential for the new Director to begin work no later than the end of September. From his point of view, this was not only important for the IHRP, but also for the Assistant Dean. He noted that she was already overburdened with trying to start the term in the midst of a pandemic and that it would be inappropriate to expect her to have the sort of hands-on role that she would need to have with the IHRP if no Director were in place in the fall.

Second, he understood that the independent contractor arrangement was the only way that the Preferred Candidate would be able to start work, albeit remotely, within the necessary timeframe.

Third, he understood that the legal advice was that the independent contractor agreement was illegal and could potentially expose the University to liability.

Fourth, he understood that even as of September 8, there was a good chance of finding a qualified Canadian to fill the position before the end of the month or at least in the fall.

Cromwell's account of the factual context and of the content of the Dean's "understanding" is supposed to show both that the Dean's view of the situation was not influenced by the inquiry from the Alumnus and that, given his view, it was reasonable for the Dean to terminate negotiations with the Preferred Candidate.

This is too narrow an approach to the facts and what one can infer from them. Even if we take Cromwell's description of what the Dean thought to be factually accurate, we can still ask whether a reasonable person in the Dean's situation and with the information that the Dean had would come to the same "understanding" and take the same actions. And in thinking about what such a reasonable person might think and do, it may be helpful to distinguish two different perspectives. The first is the perspective of someone who cares about a program and who has found an excellent person to run that program but who is encountering some obstacles to bringing that person on board in a timely manner. The second is the perspective of someone who finds himself on a path to hiring someone whose arrival he thinks will create a problem but who cannot simply abandon the effort to hire that person without some justification unrelated to the problem the person's arrival would create. If we take the first perspective, we will expect a reasonable person to consider ways to overcome the obstacles that have arisen, to look with others for creative solutions, to explore whether the obstacles were connected to misplaced priorities within the search, and so on. And if we take this approach, there are many things that are deeply puzzling about what the Dean thought and did and failed to do. If we take the second perspective, the puzzles disappear.

Let's consider each of Cromwell's four claims in turn.

### **Was there a September 30 Deadline?**

This question matters because the Dean's public justification for terminating negotiations with the Preferred Candidate was that she could not meet the law school's "timing requirements," and these timing requirements were later explained to be that the new director had to start work by September 30. What evidence is there in the Cromwell report that this was an actual, important deadline throughout the process and what evidence is there that this deadline only became important after the Alumnus' inquiry?

Everyone agrees that January 1 was a hard deadline. The new IHRP director had to be in Canada with a legal ability to work by then. All of the committee members explicitly affirmed that understanding, as did the candidate herself. This condition was to be written into the formal offer of employment that was to be extended to her and was reflected in various written and oral communications among committee members. (For the former, see pp. 23-24)

By contrast, according to Cromwell, two of the three committee members and the candidate herself deny that anyone had ever said or otherwise indicated to them that September 30 was a hard deadline so that if the chosen candidate could not begin her work as IHRP director by that date, the offer of employment would be withdrawn. They all agreed that it would be desirable for the chosen candidate to start her work in the fall if possible, and she expressed her willingness to do so if it could be arranged, but these three explicitly said that starting work by September 30 was NOT a necessary condition of employment in their view of the process. There is no evidence of any sort in the Cromwell report that challenges these assertions.

Cromwell says, however, that the third committee member, the Assistant Dean, believed from the outset that starting by September 30 was a necessary condition of employment for the new director and that the Dean simply relied upon communications from the Assistant Dean on this point. (p. 52) The claim that the Assistant Dean had this view depends entirely on her own recollection of her attitudes and beliefs at a moment well after the events themselves had taken place and when she knew that the

defense of the Dean's actions would depend in important respects upon her having had this view of the September 30 date from the outset. It is a familiar point that our interests can affect our memories, and so it is always helpful to look at how people behaved at a given time to see whether their behaviour fits with their later memories of what was in their heads at the time.

In her interview with Cromwell, the Assistant Dean,

indicated that it was hard for her to say whether the other members of the selection committee knew that September was a hard stop and that they never discussed what would happen if the Preferred Candidate could not start working in September. As the Assistant Dean put it, this was clear in her mind, but she is not sure that the other members "connected those dots." (p. 22)

Did the Assistant Dean have any reason to believe that her colleagues on the committee understood the situation as she did? If not, did she not have a responsibility to make her own understanding explicit, given that it entailed an additional constraint on the process? Given the enthusiasm of the search committee for the Preferred Candidate and (at the very least) what the Assistant Dean knew was their lack of enthusiasm for any of the Canadian candidates, would it not have been reasonable for the Assistant Dean to expect resistance from her fellow committee members to connecting the dots in this way? In short, if the committee "never discussed what would happen if the Preferred Candidate could not start working in September" but the Assistant Dean thought that what was going to happen was a termination of the recruitment effort, wasn't the failure to make that explicit a significant failure of communication and contingency planning, the responsibility for which lay with the Assistant Dean?

Cromwell offers no written evidence whatsoever in which the Assistant Dean or the Dean explicitly indicates, prior to the *Alumnus'* inquiry, that if the Preferred candidate cannot meet a start date of September 30 it will be necessary to look for a candidate who can start by then. He cites a few passages from emails written by the Assistant Dean to other actors in the recruitment process (e.g., the immigration lawyer, the human resources consultant) in which the Assistant Dean uses the word "need" in relation to September 30, but it is implausible to treat these as communications about a strict requirement. (For discussion of these passages see my marginal comments on pp. 51-52 of the Cromwell report.) There is no indication in these passages or in any other source that the Assistant Dean herself contemplated any contingency plans for recruiting another candidate if the effort to get the Preferred Candidate started by September 30 failed, even when there were only a few weeks left before that date. In short, if the Assistant Dean really thought that September 30 was a strict deadline, she did not behave as if it were that sort of deadline and she told only the Dean and no one else about its critical character.

What about the Dean himself? What indications are there of his views of this deadline? The text provides two limited sources of data on this question. First, how urgent did the date seem to the Dean when he decided to terminate negotiations with the Preferred Candidate and to look instead at Canadian candidates who had already been interviewed and rejected by the committee. According to Cromwell himself, "Based on the information that the Dean had [on September 8], it was not inconceivable that a new Director could be in place in the fall." (p. 54)

This formulation clearly implies that, at least from Cromwell's perspective, the Dean had some flexibility with respect to the September 30 start date. It seems reasonable to ask how much flexibility there was, although Cromwell does not ask this. Remember that the immigration lawyer had said that the law school could reasonably expect a work permit for the Preferred Candidate within two or three months,

and they had already begun work on the submission of the “significant benefit” route. So, the Preferred Candidate herself was going to have her work permit sometime “in the fall,” perhaps not much more than a month after the September 30 deadline. The immigration lawyer was confident that she would have her work permit before January, which everyone agreed was extremely important.

On the other hand, there was a noticeably greater element of risk and uncertainty associated with the timeline of a search for a qualified Canadian, as the Dean clearly recognized in his understanding that there was “a good chance” of finding a qualified Canadian “before the end of the month or at least in the fall” or at least “not inconceivable” that they could do so. How much risk is there in “a good chance” or in something that is “not inconceivable”? The idea that it might be possible to have a new director in place by September 30 seems extremely optimistic, given that on September 8 the law school had not even scheduled interviews. Not impossible, perhaps, but highly unlikely. Keep in mind, moreover, that the search committee had examined all of the Canadian applicants, had interviewed the six whom they regarded as most promising, and had not deemed any of them good enough to list as an acceptable alternative to the Preferred Candidate at the point at which they had concluded their search process at the end of July. That had been over a month before. There was no way to know on September 8 whether any of those candidates were still available or whether they would accept an offer if one were extended or how much time they might need to extricate themselves from their present positions if they had one.

Is it reasonable to jettison a highly qualified candidate who will definitely accept a position but who will start a bit later than one would like in favour of, at best, a “good chance” of finding someone who might or might not be able to start earlier and who will clearly be inferior to the first candidate (at least from the perspective of the committee that has conducted the systematic search)? Of course, what is “reasonable” depends on your goals? If your goal is to hire the best person for your program, what is reasonable may be one thing. If your goal is to have an excuse not to hire that person, what is reasonable may be another.

There is one other indicator of how much weight the Dean did or did not put on the September 30 deadline. On August 17 the Dean was briefed on the progress of the search for a new IHRP director by the Assistant Dean. According to Cromwell, the briefing included information about the Preferred Candidate’s non-Canadian status and the fact that “the selection committee was working to determine whether the candidate could obtain a work permit by the September deadline to meet the Faculty’s timing requirements.” (p. 14) The Dean was an experienced administrator who had been involved in the recruitment of many non-Canadians. He ought to have known, even if the Assistant Dean did not at this point, that it would not be possible to acquire a work permit for a non-Canadian within a few weeks. That is a process that usually takes a few months, as the immigration lawyer explained two days later to the Assistant Dean. At this point, the independent contractor possibility for the fall was not even on the table.

The fact that the Dean did not raise any immigration questions during the conversation with the Assistant Dean on August 17, at least according to Cromwell’s account of the conversation, is one of those examples of a dog that did not bark. It indicates either that the Dean did not really care about the September deadline (even if the Assistant Dean did) or that he did not care enough about the search process to raise an obvious question about timing. After September 4, however, the “September deadline” and the question of when the director could start suddenly became matters of great concern

to the Dean, one might even say matters of overriding concern. By contrast, there is no indication that when the Dean shut down the effort to recruit the Preferred Candidate, he was paying attention either to the sacrifices that this course of action entailed with respect to the quality of the new director or to the risks and uncertainties it generated with respect to when an alternative candidate could start, if one could even be found.

As we have seen before, the puzzles raised by the Dean's approach disappear if what he cared most about, consciously or unconsciously, was terminating negotiations with the Preferred Candidate.

### **Limited alternatives**

Consider now the second claim, i.e., that "the independent contractor arrangement was the only way that the Preferred Candidate would be able to start work, albeit remotely, within the necessary timeframe."

Cromwell does not explain why the Dean thought that the independent contractor arrangement was the only option. Here, as elsewhere, the Dean's lack of effort to explore alternatives, once the need for them arises, seems puzzling if the goal is to find a way to hire the Preferred Candidate, as does Cromwell's failure to ask questions about that lack of effort.

Why did the Dean think that this was "the only way that the Preferred Candidate would be able to start work ... within the necessary timeframe"? The Assistant Dean only learned of the possibility of an independent contractor arrangement in a meeting with the immigration lawyer on August 19 (after the initial job offer had been made and accepted orally). She learned then that it would take 2-3 months for the Preferred Candidate to get a Canadian work permit. The Assistant Dean met with the university employment lawyers on August 21, and they seemed optimistic that it would be possible to use an independent contractor arrangement to enable the Preferred Candidate to take up some of the director's responsibilities while working abroad before the Canadian work permit came through. That seemed to the Assistant Dean like a good solution, and the other committee members responded positively when she informed them about this idea. There is no indication that she mentioned the plan to the Dean. Nobody suggested any alternative to the independent contractor approach at this point, but why would they since the relevant university officials thought this was likely to work?

The Dean only learned of the independent contractor arrangement at the same time that he learned of the German lawyers' response to that plan. Let's assume for the moment that the German lawyers offered a decisive objection to this plan and that this path had to be abandoned (although I will challenge that assumption in a moment). Why did the Dean assume that there was no alternative? He had not previously turned his mind to this topic. He was not an expert either in immigration law or in employment law. Yet when Committee member 1, who was an expert in immigration law, suggested in their phone conversation that there might be other immigration possibilities, he dismissed the idea out of hand, a dismissal that Cromwell endorses.

Again, this is a puzzling stance to take. If the Dean really wanted to hire the Preferred Candidate but also thought it essential that she start work in September, why wouldn't he seek to explore alternatives for bringing this about? The Assistant Dean, quite reasonably, had simply followed the first and most obvious path that had been suggested to her. Now there were obstacles on that path. Why not encourage her to look for other paths and to get help from others in doing so? Why not encourage



those most deeply involved with the IHRP program, including the other committee members, to search for alternatives?

It is sometimes possible to come up with creative solutions to a problem when one tries. After all, the committee thought that the Preferred Candidate was an exceptional find for the program and the Assistant Dean had already invested a lot of time and energy in trying to arrange for her to come. Why give up so easily on this wonderful opportunity and waste all of the Assistant Dean's efforts without at least trying to find an alternative path?

Again, if one takes the perspective of someone who cares about the program and really wants to hire the Preferred Candidate, shutting down the effort to recruit her in the middle of Labour Day weekend without investing any time or energy in exploring alternatives seems deeply puzzling. But if one takes the perspective of someone who does not want to hire the Preferred Candidate because of the way it will affect potential donors but wants a different public, and perhaps even a different internal, rationale, then the lack of exploration is no longer puzzling.

### **Illegality**

Let's turn to the third point, the claim that the Dean "understood that the legal advice was that the independent contractor agreement was illegal and could potentially expose the University to liability."

To describe the independent contractor agreement as "illegal" creates an expositional dilemma for Cromwell, at least if he wants to avoid casting aspersions on the University of Toronto. On the one hand, if the independent contractor agreement was in fact clearly "illegal," as Cromwell says the Dean thought, the Dean did have a good reason not to go along with the agreement. On the other hand, if this independent contractor agreement was "illegal," why wouldn't the same label apply to all of the other independent contractor agreements which university officials had accepted and which were arranged by the same university employment lawyers who were trying to arrange this one? If the Dean was behaving in the only possible responsible way in this matter, would that not imply that other university officials, including the university employment lawyers, were behaving irresponsibly in entering into such agreements?

Perhaps not, if there was some basic difference between the proposed agreement with the Preferred Candidate and the other independent contractor agreements. For example, perhaps this sort of independent contractor arrangement was illegal under German rules but not illegal in other jurisdictions. If there was such a difference, however, Cromwell provides no evidence of it. Indeed, he makes no claim that there was such a difference. That remains a troubling aspect of his exposition.

Cromwell's report never suggests that there was anything problematic about the other independent contractor agreements in which the university was engaged and yet he also manages to give the impression that it was perfectly reasonable for the Dean to say that there was "no way" that he would agree to the proposed agreement with the Preferred Candidate because it was "illegal. How does he manage to combine these two positions without offering a substantive basis to differentiate the other independent contractor arrangements from the one proposed for the Preferred Candidate?

The answer lies in Cromwell's decision to use different language in different contexts and perhaps his hope that readers will not notice this rhetorical move. Earlier in his report, when he is talking about the proposed independent contractor agreement with the Preferred Candidate in a context in which it is

associated with other such agreements that university officials have accepted, he speaks only of the “legal risk” of such contracts, and he actually avoids saying anything about the legal risk associated with the proposed agreement with the Preferred Candidate. (See pp. 19-20) Later, in talking about the Dean’s reasons for not agreeing to this way of enabling the Preferred Candidate to begin work before arriving in Canada, Cromwell repeatedly uses the language of “illegality” and the language of legal risk drops out except for one important exception which I will discuss. (See pp. 36 ff)

Cromwell introduces the general topic of independent contractor agreements in his narrative of the Assistant Dean’s recruitment efforts. When the Assistant Dean spoke with the university employment lawyers on August 21, they proposed that the law school enter into an independent contractor agreement with the Preferred Candidate as a way to enable her to begin her work as director of the IHRP before her Canadian work permit came through. Cromwell then explains that for pandemic related reasons the university had found it necessary in the past year to use independent contractor arrangements more than in the past, and he tells us that the level of legal risk in such cases was affected by what the person was doing. (pp. 19-20) The university lawyers explained to Cromwell that in cases of somewhat higher risk, “it was up to the relevant academic administrator in consultation with counsel to decide whether to accept the risk in each particular case.” (p. 20)

What is the legal risk to which the university lawyers and Cromwell are referring? The text does not say explicitly, but it seems clear from the context that the main risk is that local authorities will decide that the relationship is not a true independent contractor relationship but an employment relationship. Is it acceptable for university officials to take such a legal risk? According to Cromwell’s account of what the university lawyers said, the university thinks that it is acceptable to take such a risk, so long as the risk is sufficiently low, but the university will not require individual administrators to enter into such agreements if it makes them feel uncomfortable.

In this early section, Cromwell says nothing about what the university lawyers told the Assistant Dean about their perception of the legal risks associated with using this independent contractor route for the Preferred Candidate, but we have to assume that they thought that there would be some legal risk since all of these agreements seemed to carry some legal risk, even if the risks were low. We have to assume also that they thought the level of risk would probably be acceptable from the university’s perspective or they would not have given the Assistant Dean guidance in pursuing this route. Did they ask the Assistant Dean about what level of legal risk the Dean of the law school might be willing to bear? The Cromwell report does not say. The report does cite various communications from the Assistant Dean to other university officials after her meeting with the university lawyers that make her sound very optimistic that this approach would make it possible for the Preferred Candidate to begin her work in September. On the other hand, she never talks about the legal risk that the use of this approach entailed or the possibility that the process might uncover a serious objection to this approach, at least not in anything that Cromwell cites.

As part of the standard practice of determining the legal risk associated with any particular independent contractor agreement, the university employment lawyers arranged for the university officials seeking to enter into that agreement to get in touch with employment lawyers in the jurisdiction where the individual who was the subject of the agreement was currently living. Again, it might have been instructive to learn what, if anything, the university employment lawyers said to the Assistant Dean about the risks associated with this stage of the process. If they did say anything, she did not pass that

along to her fellow committee members or, it would seem, to the Dean. The Preferred Candidate was a German resident, and so the Assistant Dean wrote to some German employment lawyers who had been chosen by the university's employment lawyers. The German lawyers sent an email to the Assistant Dean on September 3 (which she only read the next day), and they spoke with her on the morning of September 4. What did they say?

If one reads the Cromwell report quickly, one might well come away with the impression that the German lawyers said that the proposed independent contractor agreement was illegal and that that was why the Dean called it illegal and refused to pursue it. The report uses the term "illegal" or "illegality" ten times in connection with the proposed agreement, at first attributing that characterization to the Dean's interpretation of what the German lawyers said but later apparently treating it as a factual description of what the German lawyers said.

If you look at the Cromwell report more carefully, however, you come away with a different impression. The report is not clear enough about the content of the German lawyers' communication to make a definite statement, but it does provide us with three reasons to doubt that the communication from the German lawyers said explicitly that the proposed agreement was illegal: (1) what the report says the German lawyers did and did not say; (2) what the report says the Assistant Dean thought and did or did not do; (3) what the report says about what the university employment lawyer said. Because the language of illegality plays such a crucial role in the Dean's public justification of his decision and in the rhetoric of the Cromwell report, it is worth examining more closely whether the use of that language was really justifiable. Consider in turn each of the three reasons to doubt that.

What did the German lawyers say? Starting on page 30 and throughout the rest of his report, Cromwell says that the German lawyers communicated the view that 'that the independent contractor agreement was "illegal" under German law.' It is not clear whether the quotation marks around the word "illegal" on page 30 are intended to cite a specific word used in the German written or oral communications, and, if so, what the context is in which the word appears. Perhaps they are scare quotes. There are no direct quotations from the German communications after page 30. It is instructive, however, to go back to the passage on page 28 where the email is first described, and there we find a brief direct quotation:

In the covering email, the German employment lawyers noted that they had "concerns that this relationship is not a true independent contractor relationship." They added that "the likelihood that the relationship will be challenged either by the governmental authorities or by the individual is likely quite low (especially considering its short length), so the University may be willing to take that risk."

This passage is a lot less stark than the claim that the proposed arrangement is "illegal." In this account, the Germans have concerns about whether the proposed agreement is a true independent contractor relationship, but the term "concerns" places the issue in the grey area of uncertainty. The authorities might view the relationship as a true relationship and might not. It is important to see that the German lawyers do not say that they are certain that it is not a true independent contractor relationship, at least not in the passage quoted by Cromwell. If they thought that this was clearly not a true independent contractor relationship, then I do not see how they could have gone on to say that the university might be willing to take the risk simply because the chances of it being challenged were quite low. Lawyers are not supposed to write to clients: "This is illegal, but you may want to do it because the chances of your getting caught are small."

Did the German lawyers offer any estimates of the probabilities that the authorities would find the agreement not to be a true independent contractor relationship? Cromwell does not say. Did they make any suggestions about how the description of the tasks or other aspects of the wording of the contract might be changed to make the agreement more acceptable under German law? Cromwell does not say. This is, however, the sort of advice and information that lawyers routinely offer in such cases. If they did offer such advice, it would be much harder to describe the arrangement simply as something “illegal,” which could be rejected out of hand as an option.

Now consider the Assistant Dean. Her reactions after she read the email and document notations from the German lawyers and talked with them on the morning of September 4 are not consistent with the view that their communications constituted a decisive development. That would presumably have been the case if they had clearly declared the proposed path to be illegal. The Assistant Dean was also a lawyer, and even if she were not, she would know that the university would not want the law school to do something illegal to enable the Preferred Candidate to start work.

If the Assistant Dean had thought that the German communications meant that the independent contractor path was illegal and so no longer viable, what would she have done? Well, she might have immediately sent emails to her fellow committee members to say that these communications from the German lawyers posed a serious obstacle to hiring the Preferred Candidate and that it was necessary to explore alternatives. (She had previously sent emails to the committee members updating them on developments in the recruitment process.) In fact, however, when the Assistant Dean spoke with Committee Member 1 a few hours after her conversation with the German lawyers, she did not even mention what they had said, focusing exclusively on the information about the Alumnus’ inquiry. If she thought that the German communications had made it no longer viable to pursue the Preferred Candidate, why would she not have said something about that in her conversation with Committee Member 1? Finally, in a passage worth quoting at length, the Assistant Dean told Cromwell that when she briefed the Dean about the case over Labour Day weekend, a day or two after talking with the German lawyers,

She recalls explaining that the selection committee’s consensus was that the Preferred Candidate was very strong and had “great experience” and that she (i.e. the Assistant Dean) was enthusiastic about the candidate until she received the advice from the German employment lawyers on the morning of September 4 about the problems with the independent contractor agreement. However, it was still her intention to make an offer to the Preferred Candidate if the timing issues related to the work permit could be resolved. She provided the Dean with a summary of her conversations with the Preferred Candidate, the immigration and work permit timing advice that she had received from the immigration lawyer and that she had been exploring the independent contractor route. She also explained that the September start date was critical.

So, because of the German communications, she was no longer quite as enthusiastic as she had been before, but she was still planning to offer a formal contract in the next week if the timing issues could be resolved. While there seems to be some tension between different elements of the Assistant Dean’s presentation (if Cromwell has reported it accurately), it seems very clear that the Assistant Dean saw the German lawyers’ communications as creating a complication that needed to be overcome rather than a decisive objection to proceeding with the recruitment of the Preferred Candidate. Again, that would

make no sense if she interpreted the German lawyers' communication as saying that the independent contractor path was illegal.

Finally, consider the reaction of the university employment lawyer to the decision to end the effort to create an independent contractor agreement. Cromwell describes this reaction as supporting the view that the independent contractor agreement was clearly illegal. In fact, it points in the opposite direction.

Cromwell notes that the Dean has been criticized for acting precipitously in terminating the recruitment process over the holiday weekend rather than consulting with the employment lawyer about the implications of the German communications, Cromwell says,

So far as I know, no one has suggested that the proposed independent contractor arrangement would survive scrutiny or has cast doubt on the correctness of the advice received on September 3 and 4 from the outside German employment lawyers. The failure to obtain further legal advice does not support any adverse inference. The advice that was already in hand was accurate. During my discussions with University Employment Lawyer #2, she advised me that risk tolerance was a decision for the Dean and she would not have discouraged the decision that he made had she been consulted. (p. 55)

First, what does "survive scrutiny" mean in this context? Presumably, if the arrangement could not survive scrutiny, the university lawyer would have found the proposed independent contractor arrangement so legally problematic, after receiving the advice from the German lawyers, that she would herself have advised against pursuing it. But what did the university employment lawyer actually say when Cromwell asked her about this case? She did not say that in light of the German messages it was clear that the arrangement was illegal and should be dropped. Instead, she said, "that risk tolerance was a decision for the Dean and she would not have discouraged the decision that he made had she been consulted."

To say that she would "not have discouraged the decision" because "risk tolerance was a decision for the Dean" is very different from saying that the proposed arrangement was illegal and that the Dean's decision was the only correct choice from a legal perspective. Deferring to the risk tolerance of the relevant academic administrator was standard policy in cases of independent contractor agreements. That is why she says she would not have discouraged the Dean, not because she herself saw a problem with the agreement. If the employment lawyer thought that this proposed arrangement was "illegal" in the decisive negative sense in which the Dean seems to use the term and in the way Cromwell seems to want the reader to understand it as well, she would have had a responsibility to advise against it, not to leave the decision to the "risk tolerance" of the Dean.

So, contrary to Cromwell's suggestion, the university lawyer's response provides no basis for concluding that the proposed arrangement would not "survive scrutiny." Of course, we do not know, because Cromwell does not tell us, whether or not the university employment lawyer had ever read the communications from the German lawyers since the Dean's decision to terminate negotiations had ended the process that made an assessment of those communications relevant. If she had read them before talking to Cromwell, either out of curiosity or perhaps because she read them before she received the message about the termination of the recruitment effort, her response to Cromwell should be read as a strong challenge to the claim that the German communications showed that the proposed arrangement was illegal.

It would have been (and still would be) very instructive to hear from the university employment lawyer how the advice from the German lawyers resembled or differed from the advice received from lawyers in other jurisdictions whom the university had consulted or how the rules in Germany resembled or differed from the rules in other jurisdictions. In other words, how did the risks in this case compare with the risks of independent contractor arrangements that the university had approved?

Recall my earlier question about the possible negative implications for other university officials of the Dean saying that he would not pursue this path because it was illegal. If the German advice was actually much more skeptical about and critical of the proposed arrangement than advice about such arrangements in other countries, that would provide a strong basis for distinguishing this case from the others in terms of illegality. On the other hand, if the advice in other cases was similar, that would eliminate the basis for the distinction. The Dean could still say that he did not want to run a legal risk that other university officials were willing to run, but his approach would seem somewhat less righteous (or the university's approach somewhat more dubious) than if the advice were markedly different.

In any event, Cromwell's defense of the Dean's decision to act over Labour Day weekend rather than to wait to consult with the university employment lawyers is unpersuasive. It seems obvious that it would have been prudent to have a conversation with the university employment lawyers to get their perspective on the advice from the German lawyers. They had been working in this area and had detailed and specialised information about such legal arrangements. The Assistant Dean's draft had not been reviewed by them before it went out to the German lawyers, and it is possible that they could have recommended revisions to address the German concerns. The Dean of the law school should certainly have recognized that legal details sometimes matter a great deal. Perhaps the expertise of the university's lawyers would have been useful in deciding what to do. In fact, the Assistant Dean had scheduled a meeting for just that purpose on the first working day after the holiday weekend, and Cromwell's description of her views at the time make it clear that she was still hopeful that something could be worked out.

Cromwell offers no explanation for why the Dean acted so precipitously. He merely claims that no one has yet challenged the Dean's claims about the illegality of the arrangement. I hope that I now have at least raised questions about that, questions that should have occurred to an experienced lawyer like Cromwell.

### **Tradeoffs**

Consider now the final claim, i.e., that, as the Dean understood the situation, "even as of September 8, there was a good chance of finding a qualified Canadian to fill the position before the end of the month or at least in the fall."

Notice first how this framing, along with the other three claims, entirely sets aside questions about the relative quality of different candidates for the position of director of the IHRP. Suppose we bring the question of relative quality into view as one important consideration to be traded off against others.

On the one hand, it is very clear from the Cromwell report that the search committee, including the Assistant Dean, regarded the Preferred Candidate as a person of exceptional quality. (She had strong personal reasons for wanting to live in Toronto, and that is part of the reason why she was available for this position.)

On the other hand, the prospects of attracting a very good Canadian candidate at such a late date were clearly very small. Two of the committee members said explicitly when asked by Cromwell that they did not regard any of the Canadian candidates as qualified and they thought there had been a consensus within the committee on that point. The Assistant Dean had a different memory. She seemed to think that at least one of the candidates whom the committee had not endorsed was “qualified,” although she did not claim that the other committee members shared her view and she clearly agreed with the rest of the committee that the Preferred Candidate was much better.

It seems very puzzling that the Dean would start down the path of trying to recruit a Canadian without at least having a conversation with all of the committee members. They had spent months assessing the candidates. Their input about the likelihood of success in a revived search should have been important. The Dean’s confidence that he could find a qualified Canadian candidate was based on his review of a few resumes of applicants who had been already interviewed. It should not have been surprising that they appeared qualified on the basis of their resumes. Those paper credentials were precisely the reason why the search committee had selected them for interviews, but the committee had found them not be suitable as a result of the interviews. Indeed, the Human Rights consultant wrote to the Dean on September 10 about the candidates the Dean had selected to interview, noting “that the feedback from the [previous] “interviews of these individuals was “underwhelming”, and they were not strong candidates.” (p.44)

In the previous year, the law school had searched for a director of the IHRP program, and that search ended in failure when the chosen candidate dragged out the process and ultimately declined the offer. So, success in the search was far from certain, and the Dean should have been able to see that.

To summarize, even within the constraints of Cromwell’s description of the Dean’s understanding, the Dean was faced with a situation in which it was highly unlikely that any course of action could meet a September 30 deadline to have a new director in place. One way to characterize the situation would be to say that he was faced with a choice. On the one hand, he could continue to pursue the Preferred Candidate who was acknowledged to be excellent, who had agreed in principle to accept the position, and who would almost certainly be available to start work in December and with luck well before that. On the other hand, he could start interviewing Canadian candidates who would face no immigration questions and who might be able to start sometime in the fall but who would be very unlikely to be excellent or even very good, based on the information already acquired in the search process. If he pursued this path, he faced a real risk of finding no one at all who was competent and who would be willing to take the job. So, instead of a director arriving in December, much later than desired, he might have no director at all.

Is there any evidence about how the Dean himself viewed this choice? The choice involved tradeoffs, risks, and uncertainties, as choices often do. Is there any evidence that the Dean was even aware of these tradeoffs, risks, and uncertainties or how and why he weighed them, if he was aware? Once again, we see an overall course of action that makes little sense if the goal is to hire a highly qualified administrator for the IHRP program, but one that makes a good deal of sense if the goal (conscious or not) is to avoid hiring that person regardless of the cost to the program.

## Missing Facts and Missing Actions

In discussing the aftermath of the Dean's decision to terminate negotiations with the Preferred Candidate, Cromwell mentions that the Dean received communications on September 11 and 12 warning of impending media discussions of the case. With respect to the second of these communications, he says:

a faculty member emailed the Assistant Dean to advise that he knew an alumnus contacted the law school about the Preferred Candidate's candidacy and that, unless the Dean reversed the decision, there would likely be very negative media for the law school and perhaps an ethics investigation for the Alumnus. (pp. 44-45)

The concluding paragraph of Cromwell's narrative timeline follows immediately after this:

The media attention started shortly thereafter, with the first article published by the Toronto Star on September 17. The initial account refers to communications written by Selection Committee Members 1 and 2 as well as a letter from two past directors of the IHRP. Several other media reports followed. Ultimately, it was decided, as a result of the controversy, to cancel the search. (p. 45)

Notice what this concluding discussion of the timeline leaves out. The email on September 12 came from a faculty member on the IHRP Advisory committee who requested a meeting and suggested the possibility of reopening negotiations with the Preferred Candidate. The email explicitly avoided accusations, focused on what would be good for the law school and the IHRP, and suggested that if the Preferred Candidate were hired no one would remember that there had been bumps in the road in the process. The Dean chose not to respond. Instead, having decided over Labour Day weekend that it was so urgent that someone be in place for the program by September 30 that he ended the negotiations with the Preferred Candidate and began efforts to search for a suitable Canadian, he unilaterally announced the termination of the search process altogether at a faculty meeting on September 14. This was before any media reports had appeared. So, the final sentences in Cromwell's account which clearly imply that the cancellation of the search followed the media reports are, at best, highly misleading. And this concluding timeline makes no mention whatsoever of one of the facts that I regard as crucial to the case, i.e., the resignation of three members of the Faculty Advisory Committee for the IHRP on September 16 (which, again, preceded the media reports).

These are crucial events in this narrative, and their absence from the Cromwell report is deeply troubling. First, the fact that the Dean was prepared to shut down the search for a director altogether rather than to reconsider his decision to terminate negotiations with the Preferred Candidate is a fact that is highly relevant to the question of the basis for his decision. If the Dean had really decided to terminate negotiations with the Preferred Candidate only because of timing issues, i.e., the negative effect on the program of her inability to work as director in the fall, why would he shut down the search for a director altogether? Having no director was clearly worse for the program than having a director arrive somewhat later than would be ideal. And if Cromwell was trying to understand the basis of the Dean's decision to terminate negotiations with the Preferred Candidate, why did he not ask the Dean about the reasons for his decision to terminate the search altogether rather than reopen negotiations with the Preferred Candidate? Why did he not ask about the Dean's reasons for not responding to the faculty member's April 12 email?



Second, resignations in protest at the university are rare. What one thinks about these resignations and the Dean's reaction to them can affect how the Dean's actions in this case are to be interpreted overall. Why did Cromwell's narrative leave out any mention of the events of September 16?

Finally, the fact that stories about the case had not yet appeared in the media and almost certainly would not have appeared at all if the Dean had reversed course and reopened negotiations with the Preferred Candidate is an important fact. The Cromwell report's final summation makes it appear that the decision to close the search altogether was a reaction to public pressure. That pressure was indeed on the horizon, but it had not yet appeared, and it would not have appeared if the Dean had reversed course and hired the Preferred Candidate.

In sum, the misrepresentation of the final timeline, the omission of important events, and the failure to ask questions about the Dean's reasons for key actions constitute serious and perplexing flaws in the Cromwell report.

### **Confidentiality and Whistleblowing**

The Cromwell report discusses concerns about confidentiality at a number of points, including the final section which makes a number of recommendations in this regard. As Cromwell said, everyone agrees that confidentiality is essential to the recruitment process. People must be able to have frank and open conversations about the strength and weaknesses of candidates without worrying that these communications will be disclosed to the candidates or to the wider public. On the other hand, as everyone also knows, confidentiality can be, and often has been, used as a mechanism to conceal wrongdoing and abuse of power. Consider, for example, the ways in which confidentiality has been used at times to conceal racist and sexist practices. Confidentiality can be, and in some cases has been, used to hide improprieties in recruitment processes. I find no discussion of this concern in the Cromwell report (or, for that matter, in President Gertler's response to the Cromwell report). Again, this is a surprising omission, especially in the section which aims to provide guidance for future action.

In a previous reflection on this case, I said why I thought that the resignations of Committee Member 1 and later of the three faculty members of the IHRP advisory board were so important. (I should have mentioned also that Committee member 2 also resigned and gave up his job as part of that action, suffering personal financial harm.) This is already a long essay, and so I will not repeat here in detail what I said there about the importance of taking seriously such resignations in protest. I will note again, however, that such resignations are rare. In my 35 years at the University of Toronto, I cannot recall another case in which four faculty members resigned in protest in connection with a search process. So, it is troubling that Cromwell pays almost no attention to these resignations in his discussion.

Important as these resignations were, resignations by themselves cannot be the only means of challenging and revealing improprieties. No discussion of the best way to protect confidentiality within university processes will be complete without a complementary discussion of the best way to protect against confidentiality serving as a screen for improper actions, whether the impropriety is conscious or not. There should be no discussion about the reform of processes within the university without public discussion of what is required to create a culture of integrity, which must include both mechanisms and norms to protect whistleblowers.

## The Path Forward

The fundamental justification offered by the Dean and by other university officials for not proceeding with the hiring of the Preferred Candidate was that it would not be possible to do so and to meet the “timing requirements” of the law school. As I have noted above, those timing requirements were eliminated when the search was canceled. So, the obvious question, and it is one that has been asked publicly by others, is why not offer the job to the Preferred Candidate now?

The university’s response to this question, as previously reported in the media and now mentioned in the President’s letter to the faculty, is that the interim director of the IHRP is preparing a report on the future of the program and that when that report has been received and discussed, a new search for a director will be launched and the Preferred Candidate is welcome to apply. If the analysis offered in this essay is at all persuasive, it should be apparent why this is an entirely unsatisfactory approach. It is a process that offers no reasonable prospect of rectifying the injustice that was done to the Preferred Candidate.

Even if we leave aside what seems now in late April like the very real possibility that such a search would be launched so late that it would preclude hiring the Preferred Candidate because of the challenges of “cross-border hiring difficulties,” how can anyone imagine that a conventional search for a new director would not be affected by what has happened and what everyone knows? Among other considerations, the fact that there is strong opposition to the Preferred Candidate from important groups within the Jewish community and from important donors is something that is known by anyone who has read the Cromwell report or even heard about the case. What steps could the university take to ensure that members of a new search committee would not be affected by this knowledge? Given the multiple examples from the discussion above about the conflict between claims about the irrelevance of the Alumnus’ inquiry and the actions actually taken or not taken by university officials, why would anyone simply accept at face value an assertion that this search would be neutral and impartial, based only on the merits? Perhaps the plans outlined by the President to insulate future searches from donor influence will be effective, but there is no way now to insulate consideration of the Preferred Candidate in a new process from the effects of what happened in the last one.

What is the alternative? The same alternative that has been out there for months: offer the job of director to the Preferred Candidate. Keep in mind that she was initially chosen as the result of a months long search process that was genuinely designed to hire a Canadian if a suitable one could be found, a search process that had no agenda or hidden motive in selecting the Preferred Candidate. There is no indication that the members of the selection committee had any concern except to find the person who would be best for the IHRP, and they unanimously agreed that they had found that person in the Preferred Candidate. Cromwell himself says at the outset that she

was the strong, unanimous and enthusiastic first choice of the selection committee after an international search resulting in over 140 applications and after two interviews and conversations with references. Moreover, no decision-maker in the University has at any point to my knowledge justified or attempted to support the decision not to proceed with the Preferred Candidate’s recruitment on the basis of the candidate’s qualifications. In short, the selection committee found that she was highly qualified and the University has never suggested otherwise. (pp. 5-6)

Here and there in the Cromwell report, the Dean did express concerns of one sort or another about the Preferred Candidate, somewhat undermining Cromwell's opening affirmation, but, in the end, the Dean asserted repeatedly that the timing issue was the crucial factor. I do not think it makes sense here, in an already long essay, to review the Dean's specific concerns, but it would be easy to show both that these concerns never rose to the level of providing reasons by themselves not to pursue the Preferred Candidate and that some of them had been taken into account by the committee in what we know from the Cromwell report about the committee's own thinking. Apart from the timing constraint, the enthusiasm of the committee for the Preferred Candidate only increased over the course of the August discussions and negotiations. Consider, for example, what the Assistant Dean said in her September 2 email to the HR consultant both with respect to the interest that the Preferred Candidate had expressed in spending some time during the summer in Europe and with respect to her overall assessment of the Preferred Candidate:

I had a very good call with [the Preferred Candidate] yesterday.

She understands that we require her to be in residence in Toronto for at least 9 months of the year, and definitely during term time ... After a lengthy discussion about the nature [of] that work (will benefit the IHRP and our students), and that we can't guarantee that amount of time that she will work remotely every year (she understands that), I am feeling [sic] much more comfortable with moving ahead with her candidacy...

I find her to be candid and reasonable in our phone calls. She also comes across as extremely interested in the position. She would like to get started with the independent contractor agreement right away, and will provide everything we need for the work permit routes we discussed.

I understand that this is a bit of a risk, but on balance, one worth taking. She will bring much more to the table than we have ever had before at the IHRP. (pp. 25-26)

What about the review of the IHRP now being conducted by the interim director? Isn't that a relevant factor that warrants a delay in the hiring process? No. Professor Cook is a highly respected and thoughtful scholar who will undoubtedly come up with some good ideas for improving the IHRP, but it is implausible to imagine that she will come up with reforms that would so transform the program that the experience and expertise of the Preferred Candidate would no longer be relevant. Indeed, it would undoubtedly be beneficial to involve the new director from the outset in discussions about how the program should be changed and improved.

What if somebody suggests that the university might face difficulties and complications in hiring the Preferred Candidate at this point, perhaps because the original search was too long ago? I don't know if anyone will suggest this, but, having spent 35 years at the University of Toronto, I am confident that the university can find a way to make this happen, if it really wants to do so. The university has a sophisticated and creative staff that is almost always successful in enabling the university to make an offer to someone whom the university regards as particularly talented and whom it wants to hire. The university manages to do that well within the constraints of whatever rules and regulations govern hiring practices. It can do so in this case as well, if it has the will.

For those who want still more details about this issue, I have made marginal comments on the Cromwell report, and I will post that document on the Ultra Vires IHRP website (<http://ultravires.ca/2020/09/ihrp-director-hiring-controversy-resource-page/>) under the heading “Carens comments on Cromwell report.” You can find a clean, unmarked copy of the Cromwell report on the same website. You can find many other documents relevant to the controversy on that site as well.