

## An Analysis of the Cromwell Report - Executive Summary

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In August 2020, Dr. Valentina Azarova was in advanced negotiations with the University of Toronto about becoming Director of the International Human Rights Program (IHRP). On September 4, the Dean of Law was advised that a prominent alumnus objected to the hire based on Dr. Azarova's scholarship on Israel/Palestine. On September 6, the Dean decided to terminate the hire. Former Supreme Court Justice Thomas Cromwell was asked, *inter alia*, to review these events to provide "a comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy." Cromwell says "the inference of improper influence is not one that I would draw." (pp. 46, 47, 56, 58)

President Gertler has praised the report, for its "full review of all the information" and for providing the "analysis needed to clarify and settle key aspects of this controversial matter." He implicitly validates Cromwell's characterization of an undenied external intervention into a confidential hiring process as a friendly 'heads up' about likely controversy, not as a warning about what like-minded people and donors would do if Dr. Azarova were hired.

In commissioning this review, U of T declined the 'best practice' proposal by several Law faculty to appoint a panel representing different constituencies with a neutral chair. The Terms of Reference were set by the University, and Cromwell decided on his own process without explanation or consultation.

Cromwell was asked *what the basis was for* the decision to discontinue negotiations with Dr. Azarova. He chose to adopt this constraint on his inquiry: it "is not one that is suitable for making of findings of credibility...My task has been to construct a comprehensive factual narrative, not to resolve points on which memories differ. *I will accordingly limit myself to setting out the facts about which there can be no serious dispute* and putting them in the full context of unfolding events." (p. 46) However, key facts in the Dean's explanation of his decision are disputed. If Cromwell had avoided relying on any of these disputed factual claims in crafting his narrative, he would not have been unable to say much at all. One cannot decide what reasons or motives were probably operating without deciding whether factual claims relied on are probably true. Instead, at each point of material disagreement he proceeds as though the Dean's account is true.

At least four claims that Cromwell treats as true are, in fact, disputed. In fact, Cromwell slides silently from declining to assess credibility to simply accepting the Dean's own account, however contested or implausible. Cromwell's analysis is essentially this:

- The Dean and the Assistant Dean recount a version of the facts that is mostly consistent with the Dean's insistence that he acted for reasons unrelated to a donor's intervention.
- Cromwell presumes that the Dean honestly believed he acted for reasons unrelated to a donor's intervention, despite evidence challenging or undermining his claim.
- Cromwell concludes that he would not infer improper influence.

The Dean's *sincere subjective belief* that he was not influenced is equated to the *objective absence* of actual influence. This method of 'finding facts' bears no relation to fact-finding in any legal or scholarly setting; it does not produce a meaningful, reliable, or authoritative factual narrative.

More than an inquiry into sincerity is needed to determine what actually happened, especially when there are conflicting stories, and particularly when the ultimate question is motives for action. The inability to recognize or acknowledge to oneself (much less others) that one acted for improper motives is familiar. A sincerely held falsehood does not by dint of its sincerity become true. A person's assertion about what was in their mind is only one piece of evidence, even with respect to sincerity. According to Cromwell, a finding of improper influence requires no less than that the Dean consciously understood himself to be influenced by the external objections, and *deliberately* concocted pretextual reasons for terminating the hire (p. 52).

This defies legal principle and common sense. Credibility is a function of both consistency and plausibility. A story full of contradictions is probably not true, but a perfectly consistent story may still be untrue. A story that requires us to believe a claim that doesn't make sense, or seems farfetched calls into question its veracity, even though we may believe the speaker sincere.

Cromwell only considered consistency (and even then, ignored a critical contradiction); he did not probe the plausibility of pivotal claims. This approach is flawed. In Labour Law and Discrimination Law it has long been understood that the ability to tell a consistent story does not, by itself, entitle one to be believed. If an employer denies firing someone because of their race, it does not conclusively settle the issue that the employer previously complained about the employee's tardiness and boasted about being 'the least racist person in the company'.

Further, a report about one's own motives is insufficient proof. It is not simply that people may deliberately manufacture a legitimate explanation in order to disguise other factors. The issue is that our own motivations may be opaque to us, especially when one has an incentive not to see how one might be influenced by an improper factor. Training against unconscious bias is based on this familiar fact of human psychology. Cases in which officials are improperly influenced are often cases where people lack self-awareness rather than conscious pandering to external pressure. People may actually be influenced even when they sincerely think they are not.

Yet not only does Cromwell base his narrative on what the Dean believed his own motives to be, he even chastises those who doubted the Dean for giving inadequate weight to the Dean's self-report. (p. 47) He should, instead, have asked whether it was likely that Dean Iacobucci was actually influenced by outside pressure irrespective of his avowed beliefs. Although Cromwell did not have the benefit of a full fact-finding process, there is enough information in the record to have actually addressed the issue set out by the terms of reference – what was the basis for the decision to discontinue Dr. Azarova's candidacy.

Cromwell's failure to explore the points of disagreement in the record with a critical eye left him with nothing except the Dean's earnest assertion that his motives were legitimate. A closer look reveals that the Dean unreasonably, implausibly and peremptorily converted ordinary administrative matters into insurmountable obstacles.