

February 28, 2022

Former Minister of Justice Attempted to Interfere with the Administration of Justice: Kent Report

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Matter Commented On: The [Kent Report](#) (February 15, 2022)

On February 25, the Premier issued a brief [statement](#) announcing that former Minister of Justice, Kaycee Madu, was being shifted to Minister of Labour and Immigration, and that the former Minister of Labour and Immigration, Tyler Shandro, is now the Minister of Justice. This Friday afternoon swap was in response to the findings of retired Justice Adèle Kent in her investigation into a phone call made by Minister Madu to the Edmonton Chief of Police on the morning of March 10, 2021, concerning a traffic ticket issued to him that very same morning. As we discuss at the end of this post, this investigation seemingly only occurred because CBC news reporter Elise Von Sheel revealed the making of the call in a [news story](#) published on January 17, 2022. Several hours after the CBC broke the news, Premier Kenney announced on Twitter that Minister Madu was temporarily stepping aside from his ministerial duties while an independent investigation reviewed whether the call amounted to an interference with the administration of justice. The [Kent Report](#) concludes that the call (1) was an attempt to interfere with the administration of justice and (2) created a reasonable perception of an interference with the administration of justice. In this post, we summarize and comment on the findings of the Kent Report.

At the time of these events, Minister Madu held the office of Minister of Justice. Under Schedule 9 of the *Government Organization Act*, [RSA 2000, c G-10](#), the Minister of Justice is also, by virtue of that office “Her Majesty’s Attorney General in and for the Province of Alberta” (section 1(1)). And under section 2 of Schedule 9, the Minister must *inter alia* (b) “ensure that public affairs are administered according to law” and (e) “exercise the powers and is charged with the duties attached to the offices of the Attorney General and Solicitor General of England by law or usage insofar as those powers and duties are applicable in the Province of Alberta.”

The person holding the office of Minister of Justice in Alberta thus has a unique role. That role “combines, on the one hand the obligation to act on some matters independently, free of political considerations, with, on the other hand, the political partisanship that is otherwise properly associated with other ministerial offices.” That quotation comes from the New Zealand webpage for the [Law Officers of the Crown](#), but it is equally applicable in Canada and specifically in Alberta.

Premier Kenney, in his statement, recognized “the unique role of the office of the Minister of Justice and Solicitor General.” The same overall message is embodied in [Anne McLellan’s report to Prime Minister Trudeau](#) following the SNC Lavalin matter. Ms. McLellan was asked to report on whether the offices of the Minister of Justice and Attorney General should be held by different

persons. Ms. McLellan concluded that that would not be necessary, but she did emphasize the importance of the independence of the person holding that joint office when exercising the functions of the Attorney General. Indeed, Ms. McLellan went on to say, “[t]he personal integrity of the Attorney General is ... essential; indeed, it is probably the most important element in a system which protects the rule of law” (at 29).

The Kent Report

There is no legal framework for Ms. Kent’s investigation. The investigation was not conducted pursuant to the *Conflicts of Interest Act*, [RSA 2000, c C-23](#), although it perhaps could have been under section 3 (re: using the Member’s office or powers to influence or to seek to influence a decision to be made by or on behalf of the Crown to further a private interest of the Member). At common law, the conduct of a Minister will normally be considered immune from legal scrutiny, absent an egregious act such as abuse of discretion, bad faith, improper purpose, or malfeasance in public office (for a discussion of this immunity in the context of an attorney general and law society discipline see Andrew Flavelle Martin, “The Immunity of the Attorney General to Law Society Discipline” (2016) 94:2 *Canadian Bar Review* 413 ([2016 CanLIIDocs 153](#))).

The terms of reference for the investigation are stated as follows at outset of the Report:

In considering both the content and context of the Phone call, whether:

- a. In making the Phone Call, Minister Madu interfered or attempted to interfere with the administration of justice; or
- b. The Phone call created a reasonable perception of an interference with the administration of justice.

These terms of reference were presumably set by Premier Kenney, who undoubtedly chose the words carefully.

Fact-finding for the investigation consisted of interviews and documentary review (at paras 1 – 3). Ms. Kent interviewed Minister Madu, Edmonton’s Police Chief Dale McFee, and the constable (unnamed in the Report) who issued the traffic ticket. Ms. Kent also reviewed documents concerning the phone call, including handwritten notes by Chief McFee on what was discussed during the phone call, the traffic ticket, an email from the constable to Chief McFee, and phone logs showing the time and duration of the calls.

The absence of a legal framework for the investigation meant that Ms. Kent had to establish a standard of review for the investigation. Ms. Kent determined that each question required a unique standard. On the question of ‘interfere or attempt to interfere with the administration of justice’, Ms. Kent employs a presumption of innocence and that a finding of interference, or attempting to interfere, on the evidence must be on the balance of probabilities. On the question of whether the call created ‘a reasonable perception of interference’, Ms. Kent adopts the legal test for reasonable apprehension of bias which is applied to statutory decision-makers who are accused of being impermissibly partial towards a particular outcome in adjudicative proceedings: What would an

informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? (at para 6)

The selection of impermissible bias as the basis for the standard of review here is a bit curious given the factual circumstances in this matter: there is no question here of a predisposition on the part of a decision-maker. However, Ms. Kent does observe that the common law test for unlawful bias is particularly helpful in this case because it incorporates the question of ‘perception.’ The test for unlawful bias is not whether a decision-maker was *in fact* partial to a particular outcome, because it is impossible to establish on the evidence the actual mindset or thinking process of a decision-maker. Rather, the test for unlawful bias is met where the evidence establishes that an informed observer would perceive that the decision-maker was predisposed to a particular outcome. Perhaps this matter was more in line with cases that concern institutional, rather than individual, bias. For instance, cases where the structure of an institution fails to implement appropriate divisions or separations between its investigative, policy, and enforcement departments, which leads to undue influence in the administration of justice (for a thorough assessment and application of institutional bias see *Alberta (Securities Commission) v Workum*, [2010 ABCA 405 \(CanLII\)](#)).

Another reason why the test for unlawful bias is helpful here is because of its contextual application. In other words, what constitutes a perception of bias is dependent on the circumstances of the decision. So, for example, the common law has a much higher tolerance for the perception of partiality by a decision-maker who is considered to be exercising more of a policy-laden function (e.g., a municipal official), in contrast to a very low tolerance in relation to an adjudicative process where a decision will have an impact on recognized legal rights or interests.

Ms. Kent sets out the most significant bit of context here, being that Minister Madu was serving as the Minister of Justice and Solicitor General at the time of the phone call to Chief McFee, which, consistent with our comments above, demands a higher standard of conduct (at para 8). The relevant institutional context is that the Minister of Justice and the Chief of Police maintain close relations on a variety of policy, legislative, and operational matters concerning policing and the enforcement of justice (at para 12c).

The phone call made by Minister Madu to the Edmonton Chief of Police on the morning of March 10, 2021, concerned a traffic ticket issued to the Minister by the unnamed constable under the *Traffic Safety Act*, [RSA 2000, c T-6](#), for holding a mobile phone while driving. Ms. Kent does not identify the section contravened by the Minister, but based on the facts set out we can safely assume that section 115.1 was contravened, which prohibits a person from holding a mobile phone while operating a vehicle. Ms. Kent describes the constable’s observation of the offence as follows:

In his rearview mirror he saw a blue F150 approaching. He activated his radar unit and noted that the truck was not speeding. He said that in accordance with his practice, as the vehicle approached, he looked into the vehicle to note any possible infractions involving things like seatbelts or cellphones. When the two vehicles were side by side as the truck was passing him, he noted that there was a dark- coloured cellphone in the driver’s hand. The driver had his left hand at the 9 o’clock position on the steering wheel and he was holding the cellphone at approximately the 3 o’clock position. The screen was facing the driver and the driver’s

face was to the right and looking down. He was able to observe this for about 3 seconds. He decided to pull out and stop this vehicle. He attempted to move up beside the truck to get another look but could not. He slowed, moved in behind the truck and activated his lights and siren. (at para 14)

According to Ms. Kent, “there is nothing about the stop that could lead a reasonable person to conclude that Minister Madu was racially profiled. It was an ordinary day of a police officer doing his work in a school zone. He made observations which led him to conclude that an offence has occurred. He issued a ticket to the driver” (at para 31). We pause to note here that according to [Distracted Driving and the Traffic Safety Act](#), the offence of holding a mobile phone while driving is indeed a commonly enforced distracted driving offence in Alberta. [Statistics](#) collected by Alberta Transportation indicate that between March 2020 and March 2021, 9902 convictions were entered under section 115.1.

Several additional findings by Ms. Kent from the constable’s interview in relation to the traffic stop are also relevant:

- Minister Madu initially denied that he was holding a phone while driving (at para 15)
- Minister Madu told the constable he was the Minister of Justice 3 or 4 times (at paras 15 and 20)
- Minister Madu told the constable “. . . that he was the Minister of Justice and that he would never do anything to break the law.” (at para 15)

In his interview with Ms. Kent, Minister Madu stated he only told the constable he was the Minister of Justice once (at para 22).

The phone logs reviewed by Ms. Kent confirm that the Minister called Chief McFee at 9:45 am on March 10, 2021 (at para 24). Ms. Kent does not set out how much time passed between the issuance of the distracted driving ticket and the call, however, we do know from the facts that the constable arrived at the location at 8:45am that morning (at para 13), so we can infer that the phone call must have occurred shortly after the ticket was issued. Ms. Kent describes Chief McFee’s recollection of the call as follows:

The Chief characterized the first couple of minutes as small talk. Then the Minister started to talk about having just received a ticket for distracted driving in a school area. He seemed ‘concerned’ and ‘frustrated’. He raised the issue of the Lethbridge police force and the possibility that there was racial profiling in relation to the ticket. The Chief described the points that the Minister was making at this point as ‘jumbled’ and the Minister seemed worked up. The Chief responded by saying that he was not going to talk about the Minister’s traffic ticket. He said that there were two choices – to pay it or go to court. He also said that no one was going to racially profile the Minister over a traffic ticket. Chief McFee said that by the time the call ended, the Minister had calmed down. He said there was a marked difference in the Minister’s demeanour by the end of the call. The Chief interpreted the remarks made by the Minister about Lethbridge and racial profiling as relating to his receipt of a ticket. The Minister never asked him to do anything with the ticket. (at para 25)

In his interview with Ms. Kent, Minister Madu explained that the reason for the phone call was a concern over racial profiling:

Minister Madu said he called Chief McFee for two reasons. He wanted assurance from Chief McFee that he was not being illegally surveilled as had happened to MLA Phillips in Lethbridge and that he was not being racially profiled. Both of those issues were top of mind, he said, because of the work he had been doing on both. That day, he was on his way to a press conference about the Lethbridge investigation, and two evening before, he had had an earful from racialized Albertans about racial profiling. He said that the traffic ticket was not the point of the call. It was the trigger that caused him to be concerned about illegal surveillance and racial profiling. He repeated that the ticket was the trigger but it was never about the ticket. He admitted that he was angry.

He knew that the Chief had no ability to do anything about a ticket that had already been issued. He said that it would be unprecedented for the Minister of Justice to ask the Chief to do anything about a ticket and he would not do so. He said that he has received tickets in the past which he has quietly paid because that is the right thing to do. (at paras 27, 28)

As noted above, Ms. Kent finds that the evidence given in the investigation did not support the Minister's assertion that he was racially profiled by the constable (at paras 31 - 35). Ms. Kent does accept that the motivation for the call was the Minister's concern about racial profiling (at paras 36 - 38).

Ms. Kent concludes that the phone call did not constitute an actual interference with the administration of justice because the Minister did not ask Chief McFee to do something about the ticket (at para 36). However, Ms. Kent finds that the phone call constituted an attempt to interfere with the administration of justice:

Did Minister Madu attempt to interfere with the administration of justice? He did. The Minister said that the call was not about the ticket but the ticket was the trigger. He said that he was looking for assurance from the Chief that the traffic stop was not motivated by illegal surveillance or racial profiling. The logical next step would mean that he expected the Chief to respond to his concerns about his ticket. There is a process that the Minister knows well to address questions of police conduct. It does not start with a phone call to the Chief of Police. The very fact that the purpose of the call was to obtain assurance that the police were acting properly rather than going through appropriate channels is an attempt to interfere with the administration of justice. (at para 37)

Ms. Kent also finds that the phone call generated a reasonable perception of an interference with the administration of justice. Here is where the contextual circumstances matter, and the Minister of Justice must be held to the highest of legal standards. The mere fact of making a phone call to the Chief of Police to discuss the traffic ticket constitutes a failure by the Minister to meet that standard and inappropriately exploits a position of influence for personal gain (at para 39). This conclusion, according to Ms. Kent, was "simple" and "elementary" (*ibid*).

In sum, Ms. Kent made three separate findings. First, she concluded that Minister Madu did not actually interfere with the administration of justice because he did not explicitly ask Chief McFee to do anything about his ticket. Second, Ms. Kent concluded that Minister Madu *did* attempt to interfere with the administration of justice. And third, Ms. Kent concluded that there was a reasonable perception that Minister Madu interfered with the administration of justice.

Importantly, in announcing the change in Minister Madu's portfolio, Premier Kenney failed to disclose all three of Ms. Kent's conclusions. Specifically, he failed to mention that Minister Madu was found to have attempted to interfere with the administration of justice. A person reading the Premier's Statement could be forgiven for thinking that Ms. Kent had only delivered a mild rebuke to Minister Madu. Nothing could be further from the truth. In concluding that Minister Madu *did* attempt to interfere with the administration of justice, Ms. Kent has concluded that the chief law officer of the Crown in Alberta, the person responsible for ensuring "that public affairs are administered according to law", attempted, by his actions and for his own self-interest, to interfere with those very rules that he was charged with upholding.

It is hard to imagine a more stinging rebuke.

Rearranging the Deck Chairs

This brings us to Minister Madu's replacement as Minister of Justice, Tyler Shandro. On February 18, 2022, just days before Premier Kenney's announcement, the [Law Society of Alberta announced](#) that it would be holding a virtual hearing to investigate three sets of allegations against Tyler Shandro, QC, namely:

1. It is alleged that Tyler Shandro, QC attended the private residence of a member of the public, behaved inappropriately by engaging in conduct that brings the reputation of the profession into disrepute, and that such conduct is deserving of sanction;
2. It is alleged that Tyler Shandro, QC used his position as Minister of Health to obtain personal cell phone numbers, contacted one or more members of the public outside of regular working hours using that information, and that such conduct is deserving of sanction; and
3. It is alleged that Tyler Shandro, QC responded to an email from a member of the public addressed to his wife by threatening to refer that individual to the authorities if they did not address future correspondence to his office as Minister of Health, and that such conduct is deserving of sanction.

The Law Society has yet to rule on these matters. As things stand, it will need to do so while Minister Shandro holds the title of the chief law officer of the Crown with the responsibility to uphold the rule of law. Premier Kenney should not have put the Law Society, a statutory body, in this invidious position and, in the circumstances, Minister Shandro should have declined the appointment. Premier Kenney has not only misrepresented to the public the substance of the Kent

Report, but he has also demonstrated his disrespect for the processes of a professional disciplinary body, a body that also plays an important role in maintaining the rule of law in Alberta.

Some Answers, More Questions

Overall, the Kent Report provides important insight into a matter of considerable public interest, and stands in marked contrast to another recent Alberta inquiry (the Allan Inquiry into so-called “anti-Alberta energy campaigns”) that was plagued by missteps and irregularities. Nevertheless, we find that it also leaves important questions unanswered (perhaps due to the confined terms of reference).

First and foremost, and as alluded to at the outset of this post, we find it extremely concerning that no one in a leadership position saw fit to initiate an investigation into this matter until after the story was broken by the media. As noted by Ms. Kent, the impropriety here was obvious – it was the only reasonable conclusion (at para 31). This obviously applies to the various persons that Chief McFee contacted (see para 26, including the Chair of the Police Commission).

Second, it is entirely unclear when Premier Kenney learned about Minister Madu’s phone call. This was not a part of Ms. Kent’s terms of reference, but it is surely an important outstanding question to which the public deserves an answer.

Third, the Kent Report avoids directly addressing the very troubling findings concerning how Minister Madu conducted himself when approached by the constable: initially denied that he was holding a phone while driving (at para 15); told the constable he was the Minister of Justice 3 or 4 times (at paras 15 and 20); and told the constable “. . . that he was the Minister of Justice and that he would never do anything to break the law” (at para 15).

The first question above could possibly be the subject of an independent inquiry under section 32 of the *Police Act*, [RSA 2000, c P-17](#).

Getting an answer to the second question will likely be elusive, and this is perhaps the most significant detriment to having the terms of reference for the Kent Report established by the Premier himself in this case.

The third question would seem to be another one for the Law Society of Alberta. As a member of the Law Society, Minister Madu (like Minister Shandro), is subject to the disciplinary supervision of the Society. Section 49 of the *Legal Profession Act*, [RSA 2000, c L-8](#), provides that conduct of a member that is incompatible with the best interests of the public or of the members of the Society, or tends to harm the standing of the legal profession generally, is conduct deserving of sanction. In this regard, we note Rule 7.4 of the [Law Society Code of Conduct](#) which speaks directly to lawyers who hold public office:

7.4 The Lawyer in Public Office

Standard of Conduct

7.4-1 A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

In the commentary for this section, the *Code* notes that it “applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government” (at [1]), and is concerned with “conduct in office that reflects adversely upon the lawyer’s integrity or professional competence” (at [2]). It is certainly arguable that Minister Madu’s repeated invocation of his role as Minister of Justice while at the receiving end of a traffic ticket fell below this standard.

This post may be cited as: Shaun Fluker, Nigel Bankes & Martin Olszynski, “Former Minister of Justice Attempted to Interfere with the Administration of Justice: Kent Report” (February 28, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/02/Blog_SF_NB_MO_Kent_Report.pdf

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