



ADMINISTRATIVE INVESTIGATIONS

A SOLID FOUNDATION FOR ADMINISTRATIVE INVESTIGATIONS

Introduction

Is it time for the implementation of standards, including proper training and oversight, as it pertains to the conduct of “administrative investigations”? It could be argued that administrative investigations are purely “administrative” in nature and as such there is no requirement for an enhanced capability. However, it can also just as easily be argued that these types of investigations can have a very negative impact on the lives of those being investigated, including the potential loss of their livelihood. They also bring with them a large degree of “personal and institutional liability” on the part of those individuals conducting the investigations and the organizations for which they are employed.

Discussion

It is important to start this discussion by defining “administrative investigation”. Although there are a variety of different definitions available across the sphere of private and various government (at both the provincial and federal level) organisations they all have common themes. The definition used by the Treasury Board of Canada Secretariat encompasses many of these common themes:

“In the context of labour relations, an administrative investigation refers to an enquiry into or examination of the circumstances surrounding a situation, incident, event, occurrence, issue, matter, complaint, etc. in order to determine all relevant facts and establish a documented basis upon which a decision can be taken.”¹

A much simpler definition is:

“An administrative investigation...is any investigation that is not a criminal investigation. The line between criminal, administrative and oversight investigation is often blurred.”²

¹ <http://www.tbs-sct.gc.ca/tou/pmc-dgr/docs/inv-enq-eng.asp>

² Conducting Administrative, Oversight and Ombudsman Investigations, Gareth Jones, Canada Law Books, 2009, Page one

The federal government has a vast suite of policies and directives that in some manner refer to the conduct of “administrative investigations” for various issues or incidents, the most prevalent being:

- *Financial Administrative Act*
- *Policy on Government Security*
- *Directive on Departmental Security Management*
- *Directive on Losses of Money or Property*
- *Public Servants Disclosure Protection Act*

As part of these policies and directives, the Treasury Board Secretariat website provides a basic “checklist” for the conduct of administrative investigations; however it does not provide an all encompassing directive on the conduct of investigations. It is interesting to note that in 2004 a review was conducted as it pertains to “non-compliance” with the *Financial Administration Act*³. This review’s final report highlighted several areas of concern as it pertained to the issue of administrative investigation processes. Many of this report’s findings are as relevant in 2011 as they were in 2004 and include:

- Managers trained in the conduct of investigations or qualified investigators are not always available. This is particularly an issue outside of large urban areas or within smaller operations;
- Staff relations personnel and investigators called upon to perform administrative investigations do not always have sufficient training or uniform guidelines;
- It is not uncommon to have either criminal and administrative investigations occurring simultaneously or one occurring immediately after the other. This leads to confusion about the rights and responsibilities of managers in regard to the administrative investigation;
- Investigations are not always carried out in a timely manner, in part because of the other reasons outlined here;
- Investigators and managers do not always have access to or knowledge of the findings of other government entities examining the same events (internal audits, various ombudsmen, the Auditor General of Canada, security investigations, disclosure officers,

³ Federal Administration Act, Responding to Non-compliance, Treasury Board of Canada Secretariat, 2005

etc.), nor are all the players equally knowledgeable about each other's role and methods; and

- Perhaps the biggest shortcoming in the area of administrative investigation is the unequal access to investigators trained in the conduct of administrative investigations and knowledgeable about the Public Service. Many departments rely on managers to conduct complex investigations. Others rely on investigators who have been trained as police officers and who are not familiar with the particular nature of administrative investigations.

The conduct of administrative investigations brings with them a high degree of “personal and institutional liability”. As it pertains to institutional liability, it is incumbent upon the Manager or Director to ensure that the individual they are appointing to conduct an investigation has all of the training and experience required to conduct it appropriately. It is also clearly the responsibility of the individual to ensure that they are properly prepared to carry out a lawful and professional investigation. The importance of conducting proper and professional investigations is underlined by a number of wrongful dismissal cases such as *Bhasin V Best Buy Canada Ltd*⁴ and *Paulich V Westfair Foods Ltd*⁵. An employer that fails to properly investigate a complaint of discrimination could be liable to the victim of that discrimination for failure to meet its obligations under human rights legislation. On the other hand, if an employee is improperly accused and dismissed due to allegations of wrongdoing, the employer may be compelled by court action for a substantial financial payment.⁶ There are several factors that require appropriate risk management considerations to be made during the course of an investigation. At all times, it is crucial for the assigned investigator to keep the concept of “due diligence” in mind. Due Diligence is a term used for a number of concepts involving either the performance of an investigation of a business or person prior to signing of a contract, or the performance of an act with a certain standard of care. It can be a legal obligation, but the term will more commonly apply to voluntary investigations.⁷

This brings us to the question as to “What can government and private organizations do to ensure that they are applying the right amount of due diligence to the conduct of administrative investigations”?

Administrative investigations can have a very negative impact on the reputation and livelihood of the individual being investigated and they can bring a large amount of liability to both the institution that directed the investigation take place as well as the individual assigned with carrying out the investigation. The following recommendations are provided to assist in building

⁴ [2005] O.J. No. 5282 (Sup. Ct. J.).

⁵ 2000] A.J. No. 138.

⁶ Workplace investigations: Avoid Acting First and Asking Questions Later, Federated Press Paper, Andrea York and Iris Fischer, Blake, Cassels and Graydon LLP

⁷ http://en.wikipedia.org/wiki/Due_diligence

a solid framework for your organization's administrative investigations and thereby minimizing the risk that comes with them:

- Develop clearly articulated administrative investigation policies and procedures and ensure that employees are aware of those rules and adhere to them;
- Ensure that any individual assigned to conduct administrative investigations has undergone appropriate training and holds the required skills and personal attributes to conduct professional investigations; and
- Ensure that appropriate oversight and audit procedures are in place to review administrative investigations and develop "lessons learned" to constantly update the policies and procedures.

Conclusion

It is extremely important for all organizations to ensure that they have the proper strategies in place to minimize the risk to their core business functions and their employees. Ensuring that administrative investigations are conducted in a professional and focused manner is one of those strategies.

About the Author



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W.H. (Bud) Garrick has more than 30 years of experience in the realm of police and security operations both domestically and internationally. He served with the Canadian Forces Military Police for 27 years, retiring as a Lieutenant Colonel and Commanding Officer of the Canadian Forces National Investigation Service, upon retirement he assumed the position of Deputy Director General for Criminal Intelligence Service Canada. He is currently the Vice President of Presidia Security Consulting.

Additional Articles from Presidia Security⁸

Assessing and Tracking Threats - Protecting Your Employees and Your Company

Recent incidents of violence in the workplace in Canada tragically illustrate what happens when threats materialize into actions; they serve as a stark reminder to businesses across the country of their responsibility to protect their employees in the spirit of “due diligence” and “due care and attention.” Rarely, if ever, do these violent situations manifest themselves without some sort of prior indicators. This underscores the importance of having proper procedures in place to track and assess threats to your employees. Take the time to review the following recommendations to determine whether your company is prepared to address threats to employees.

Executive Protection Considerations

In today’s fiscally challenged business environment it may be difficult to justify providing an Executive Protection Program for an organization’s key executives. However, in making this important decision one also has to consider what the cost would be to the organization’s bottom line and, perhaps more importantly, to its reputation should a key member of the senior leadership team be the target of an act aimed at harming or embarrassing the individual and the organization.

Due Diligence Investigations

If asked, many companies would say that they have “due diligence investigation” processes in place; however, these processes are often designed to review the financial and operational affairs of a particular company and fail to closely inspect the background of the main principals or executives of the company. In addition, many companies do nothing more than cursory checks on individuals they are about to hire. The lack of a robust background investigation can result in wasted time and can cause legal and financial problems. There is an abundance of legal findings across Canada, as well as internationally, that clearly articulate the liability facing companies who do not carry out appropriate due diligence investigations. In order to inspect this issue closer one must first begin with a definition and understanding of what “due diligence” consists of.

Take a Moment to Celebrate Success

Take a moment today to think about the successes you have had and the team that got you there. It is well worth it.

⁸ Available online at our website: www.presidiasecurity.com/library.html

Marine Port Security - Published in FrontLine Magazine

"Since 9/11, marine port security has been the subject of increased scrutiny as it is clear that contraband flows - undetected and uninterrupted - through access and egress points of both Canada and the United States. Numerous reviews initiated by the United States Government Accountability Office (GAO) and the Canadian Standing Senate Committee on National Security and Defence have clearly articulated that ports are a haven for criminal activity and organized crime, as well as targets for potential terrorist activity. Both these reviews demand an increase in the level of intelligence sharing among partner agencies focused on policing and security of marine port operations."

Setting up an Intelligence Hub - Published in FrontLine Magazine

Intelligence in some form is in use today across a broad spectrum. No longer just the purview of Government entities, business intelligence is a common term and practice among corporations. Today, in the internet age, there is an abundance of readily accessible information about any given topic, organization or person. The immense growth of social networking in recent years has added to a rich information bank that is readily accessible to anyone with an internet connection. The challenge today is to sift through vast quantities of information to uncover and piece together the information you require into an intelligence picture that supports your operations. The value of your own information can increase exponentially when combined with open source research and information from other entities with whom you are willing to share.

Security Policy

"Policy writing: next to cleaning the coffee break area, doing personnel assessments or wrestling a hungry grizzly bear, it is probably one of the least desirable tasks in any organization. Its mere mention can send employees scrambling over desks and seeking cover in the hopes of being spared the mind---numbing drudgery of documenting the company's rules, procedures and practices. There is a good reason for this: writing is hard work – and writing clearly, concisely and meaningfully is even harder still. When it comes to communicating an effective security policy, capturing that policy on paper (or, in today's digital environment, electronically) is only the first – albeit most critical – step. Disseminating the policy and ensuring compliance are close second and third priorities, followed by periodic reviews to ensure the aforementioned policy continues to meet your organization's requirements. "

Travel Security

"Media reports continue to include stories about company executives, oil field workers and regular travellers who have been the victims of kidnappings, armed robberies and murder while visiting foreign countries. Recent events have seen a Canadian woman kidnapped in northern Nigeria and her captors demanding \$136,000 for her release. This woman was a financial advisor who was in Nigeria with other Canadians as part of an exchange program and she was kidnapped as she was entering a house after attending a social event. There are also ongoing reports of oil workers being kidnapped by rebels in South America and Africa; it would appear that these types of incidents are increasing rather becoming a thing of the past. "

Duty of Care

"The dynamic threat environment that persists in today's business climate demand constant vigilance and discipline. Under the Canadian Criminal Code, companies owe a duty of care to their employees. This means businesses must take "reasonable steps" to protect workers, whether they are in Canada or working internationally. If companies do not meet this duty of care, they can be found criminally and financially liable under the Criminal Code. In the most extreme cases, the company can face hefty fines and the executives can be prosecuted and potentially jailed. In addition to the criminal prosecution, individuals can also face personal civil litigation. "