

# Internal Investigations

*“Before conducting an independent investigation, organizations should consider whether the benefits of creating a privileged relationship with the investigator outweigh the risk.”*

## What was the most interesting development of 2024, and why?

In [Toronto Metropolitan Faculty Association v Toronto Metropolitan University](#), an arbitrator held that investigations conducted by external legal counsel, where the terms of counsel’s retainer create a solicitor-client relationship with the retaining organization, cannot comply with an organization’s investigatory obligations under the Ontario Human Rights Code, the [Occupational Health and Safety Act](#), and, in the particular case before the arbitrator, the organization’s Collective Agreement and internal policies.

Two faculty members at Toronto Metropolitan University filed complaints regarding investigations they were subject to. They claimed that the investigator could

reasonably be perceived as biased because the agreement between the investigator and the University suggested a lawyer-client relationship. The arbitrator found that, although the retainer agreements said that the investigators were being retained to conduct “independent investigations,” they also expressly created a “legal services relationship” to preserve privilege. This was sufficient to create a solicitor-client relationship or, at the very least, a reasonable perception that one existed.

The arbitrator held that serving a dual role as an organization’s lawyer and its independent investigator created an inherent conflict of interest, giving rise to a reasonable apprehension of bias, because:

- A lawyer’s duty of loyalty and commitment to their clients causes conflicts with the fairness and neutrality required of an independent investigator.
- A lawyer’s duty of candor conflicts with an investigator’s interest in accommodating witnesses’ reasonable requests for confidentiality or anonymity.

The arbitrator concluded that the duties of a lawyer “are antithetical to the fulfillment of the impartial, unbiased, independent, and objective role” of an independent investigator, and declared that the investigations in this case violated the terms of the University’s Collective Agreement and its obligations under the Human Rights Code and the *Occupational Health and Safety Act*.

## What’s the primary takeaway for businesses from the past year?

This decision could have significant implications for how statutory investigations are conducted in Ontario.

The result of the decision, if endorsed by the courts, is that organizations who retain external counsel to conduct investigations to comply with statutory obligations under the *Occupational Health and Safety*

*Act* or the Human Rights Code should ensure that:

1. The retainer is not framed as a solicitor-client retainer (and that the organization is not otherwise in a solicitor-client relationship with the lawyer); and
2. The organization is aware that privilege will not apply to their communications with the investigator.

While the arbitrator clarified that an organization can always choose to retain external counsel to investigate under the umbrella of solicitor-client privilege, such an investigation will not meet the organization’s requirements to conduct an impartial, fair, and reasonable independent investigation.

The arbitrator held that employees of an organization can perform independent and fair investigations, as they are not subject to the same professional obligations as lawyers. While the arbitrator did not address the issue of whether in-house counsel could properly conduct an independent and fair investigation, the natural implication of his decision is that they cannot. That would be unfortunate, as internal counsel are often well-placed to conduct procedurally fair investigations, because of their training.

It remains to be seen whether the arbitrator’s analysis will be adopted by courts. In the meantime, before conducting an independent investigation, organizations should consider whether the benefits of creating a privileged relationship with the investigator outweigh the risk of an eventual adverse finding that the investigation did not comply with its statutory obligations.

Organizations should also consider whether their collective agreements or internal policies call for “independent” investigations, and whether their practices are consistent with that requirement if the arbitrator’s interpretation were to be adopted by courts.



## Rebecca Jones

PRACTICE GROUP LEADER  
416-865-3055  
rjones@litigate.com



## Mackenzie Faulkner

ASSOCIATE  
416-865-3091  
mfaulkner@litigate.com

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