Court File No. T-1005-21

FEDERAL COURT

B E T W E E N:

NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN, ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES, AND CANADIAN MUSLIM LAWYERS ASSOCIATION

Applicants

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

CERTIFIED TRIBUNAL RECORD

July 13, 2021

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INDEX

Court File No.: T-1005-21

FEDERAL COURT

BETWEEN:

NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN, ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES, AND CANADIAN MUSLIM LAWYERS ASSOCIATION

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

CERTIFIED RECORD
(Rule 318)

I, Josée Gauthier, Registry Officer, of the Canadian Judicial Council, in Ottawa, Ontario, certify that the documents attached to this certificate are true copies of the relevant material that was in the possession of the Vice-Chairperson and the Review Panel which is the subject of this application for judicial review.

DATED at Ottawa, Ontario, this 12th day of July 2021

Josée Gauthier

From: Les Green
To: info; David.Lametti@parl.gc.ca
Subject: A judicial ethics matter
Date: September-16-20 7:19:48 PM

From: Les Green Sent: 16/09/2020 7:19:45 PM

The Canadian Judicial Council, and
The Hon David Lametti, Minister of Justice, Canada

Dear Minister:
Dear Council Members:

I understand that the press will shortly report a controversy at the University of Toronto Faculty of Law. One aspect of this may involve the integrity of a sitting judge in the Tax Court. This letter is in the nature of an alert. If the facts are confirmed, I will register a complaint.

I have no first-hand knowledge of the facts. The Canadian legal academic community is a small one and rumours, but also factual information, circulate quickly. If well-founded, these ones raise issues that will require your attention.

An offer of employment in the Faculty's International Human Rights Programme was made to Dr. Valentina Azarova and she accepted that offer in August. I understand that she was the unanimous choice of the academic members of the search committee.

The offer was later rescinded by Dean Iacobucci. I have been told that between the acceptance of the offer and its withdrawal, a sitting judge in the Tax Court made personal contact with the Faculty in respect of the wisdom of that offer.

The committee Chair was, I believe, advised that the Judge contacted the Faculty to express concern about Dr. Azarova's academic research on the operation of international law in the context of Israel's occupation of the Palestinian Territories. Shortly thereafter, Dr. Azarova's offer was rescinded.

In my opinion, the judge reported to have made this approach, though a distinguished and well-respected member of our Jewish community, has no expertise on the law of belligerent occupation, or on the politics of the Palestinian Territories. It is inconceivable that any law faculty would approach her/him for an opinion or reference about someone s/he does not know in a field of which s/he has no knowledge.

It will shortly be made public that all academic members of the Advisory Committee of the Institute have, as a result of this, resigned.

If it is true that a judge made such an approach in attempt to influence an academic appointment, and on such grounds, any reasonable person would think it a violation of the high standards of personal and professional integrity that our judiciary must meet.

I am following this matter with grave concern.

I would be grateful for a simple acknowledgment that this email was received and read.

yours truly,

HYPERLINK "https://law.queensu.ca/directory/leslie-green"Leslie Green
Professor & Distinguished University Fellow
Faculty of Law, Queen's University
Macdonald Hall
128 Union Street, Kingston, ON, Canada K7L 3N6

From: Les Green
To: info
Subject: Letter of complaint attached
Date: September-17-20 4:39:05 PM
Attachments: CJC-20-09-17.pdf

From: Les Green Sent: 17/09/2020 4:38:49 PM
Dear Sir or Madam:

I attach a letter of complaint addressed to the Canadian Judicial Council.

Yours truly,

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Professor & Distinguished University Fellow
Faculty of Law, Queen's University
Macdonald Hall
128 Union Street, Kingston, ON, Canada K7L 3N6

FACULTY OF LAW
Macdonald Hall, Union Street
Queen's University
Kingston, Ontario, Canada K7L 3N6
Tel 613 533-2220

17 September 2020

The Canadian Judicial Council
Ottawa
By email

Dear Council Members:

I write in complaint about the reported conduct of a judge in Canada's Tax Court.

It is reported today that a sitting member of the Court attempted to influence the outcome of the search for a new Director of the distinguished International Human Rights Program (IHRP) at the University of Toronto's Faculty of Law.

The judge has not been publicly identified. A name circulates in electronic correspondence and social media.

The *Globe and Mail* for 17 September 2020 reports:

'**In an e-mail to law dean Edward Iacobucci on Sept. 12, two former directors of the program allege that the school made an offer to [Dr Valentina Azarova] , and that in mid-August she accepted it. But when a judge on the Tax Court of Canada pressed him on the matter, Mr. Iacobucci rescinded the offer, says the e-mail, which The Globe and Mail obtained. It does not state the name of the judge.**
The Globe attempted to reach the Tax Court in repeated e-mails and telephone calls to its media representative but received no response.'

The *Toronto Star* for 17 September 2020 reports:

'**Several national and international scholars wrote to the university to express their consternation that the reversal came after reports of pressure from a sitting judge — a major donor to the faculty. He reportedly expressed concerns in private over Azarova's past work on the issue of Israel's human rights abuses in Palestine. All the letters mentioned here have been seen by the Star.**'

It is further reported that, as a result of what the Advisory Board of the IHRP regarded as a failure of procedure and lack of transparency, its Chair and all academic members of the Board resigned.

In the published reports, neither the University of Toronto nor Dean Iacobucci has clearly denied:

(a) that a judge on the Tax Court knew or was told which candidates were under consideration for this appointment;
(b) that there were private discussions between a judge on the Tax Court and members of the Faculty of Law regarding this appointment;
(c) that a judge on the Tax Court attempted to influence, or did in fact influence, the outcome of the appointment.

Kelly Hannah-Moffat, Vice-President of Human Resources & Equity is reported as saying **'Personnel searches at the University of Toronto are confidential and bound by policies and applicable privacy legislation.'**

Dean Iacobucci is reported as saying: **"The uninformed and speculative rumours have reached such a level that, no offer of employment having been made, the University has decided to cancel the search for a candidate at this time."**

These statements do not answer the legitimate concerns of the public:

(1) The reports suggest that the search was not confidential to a member of the Tax Court.
(2) Whether any offer of employment was made is irrelevant. It would be wrong for a judge to attempt to influence a university appointment in this way, no matter in what direction or with what outcome.
(3) It is irrelevant whether the published allegations are 'uninformed and speculative'. What is relevant is whether they are true.

The reports further allege that the interference may have been motivated by a judge's disapproval of Dr Azarova's research on Israeli occupation of Palestinian lands.
If that were so, it would be very troubling. It would put the integrity and impartiality of the Court in jeopardy. Any party or lawyer before it who is Palestinian, Arab, or Muslim could reasonably fear bias.

I respectfully request that Council investigate this matter and, if necessary, take appropriate action.

Yours truly,

Leslie Green, D.Phil.
Professor of Law and Distinguished University Fellow*

*Writing in a personal capacity. Affiliation for identification purposes only.

From: Les Green
To: info
Subject: Re: CJC File 20-0254
Date: September-30-20 2:53:23 PM
Attachments: CJC 20-09-29 Annexes.pdf
CJC-20-09-29.pdf

From: Les Green Sent: 30/09/2020 2:53:10 PM
Thank you for your reply to my letter of 17 September, and for the opportunity to add information to my complaint. I attach a further letter of 29 September as a supplement to that and some supporting documents in a separate Annex.

I would be grateful for an acknowledgment of receipt of these documents.

yours truly

HYPERLINK "https://law.queensu.ca/directory/leslie-green"Leslie Green
Professor & Distinguished University Fellow
Faculty of Law, Queen's University
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128 Union Street, Kingston, ON, Canada K7L 3N6

———

From: info <info@cjc-ccm.ca>
Sent: Monday, September 28, 2020 4:26 PM
To: Les Green <leslie.green@queensu.ca>
Subject: CJC File 20-0254

Good afternoon,

Thank you for writing to the Canadian Judicial Council. Please be advised that your correspondence will be reviewed in accordance with the Canadian Judicial Council Procedures for the Review of Complaint or Allegations (Review Procedures).

The Council seeks to complete its review of complaints within 3 to 6 months of receipt and achieves this objective in most instances. Once the review of your complaint is completed, the Acting Executive Director will communicate with you.

If you wish to add any information to your complaint file (CJC File: 20-0254), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: HYPERLINK "mailto:info@cjc-ccm.ca"info@cjc-ccm.ca.

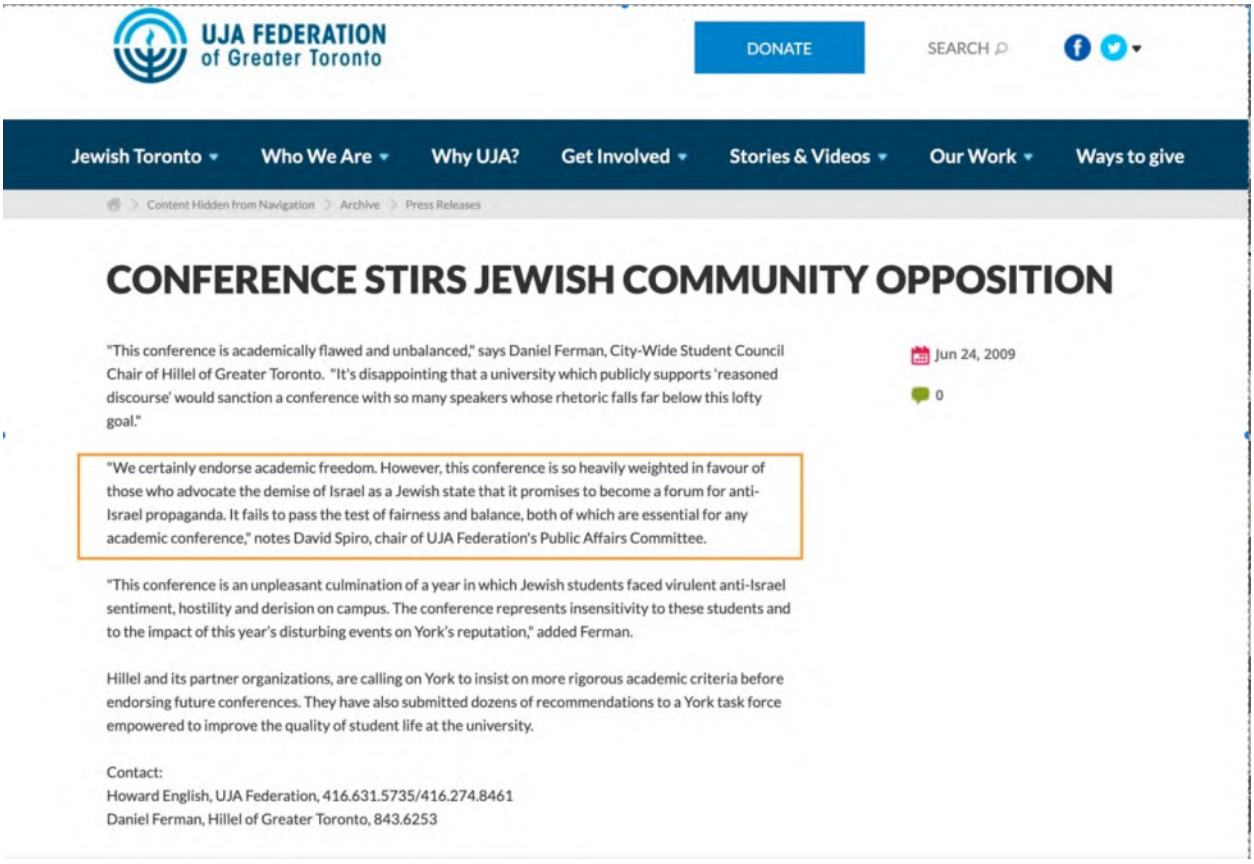
Information about the Council's mandate with respect to complaints can be found the Council's web site HYPERLINK "https://can01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.cjc-ccm.ca%2F&data=02%7C01%7Cleslie.green%40queensu.ca%7C3ce113baaac84755665508d863ecd9c9%7Cd61ecb3b38b142d582c4efb2838b925c%7C1%7C1%7C637369216215215642&sdata=E%2BBFkQ0ldGRbchmYPUy8iewrbnciPdVCeUfZ71XcpeE%3D&reserved=0"http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /
Agente de soutien de registre et de communication
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

ANNEX A
CJC File: 20-0254



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CONFERENCE STIRS JEWISH COMMUNITY OPPOSITION

Jun 24, 2009

0

"This conference is academically flawed and unbalanced," says Daniel Ferman, City-Wide Student Council Chair of Hillel of Greater Toronto. "It's disappointing that a university which publicly supports 'reasoned discourse' would sanction a conference with so many speakers whose rhetoric falls far below this lofty goal."

"We certainly endorse academic freedom. However, this conference is so heavily weighted in favour of those who advocate the demise of Israel as a Jewish state that it promises to become a forum for anti-Israel propaganda. It fails to pass the test of fairness and balance, both of which are essential for any academic conference," notes David Spiro, chair of UJA Federation's Public Affairs Committee.

"This conference is an unpleasant culmination of a year in which Jewish students faced virulent anti-Israel sentiment, hostility and derision on campus. The conference represents insensitivity to these students and to the impact of this year's disturbing events on York's reputation," added Ferman.

Hillel and its partner organizations, are calling on York to insist on more rigorous academic criteria before endorsing future conferences. They have also submitted dozens of recommendations to a York task force empowered to improve the quality of student life at the university.

Contact:
Howard English, UJA Federation, 416.631.5735/416.274.8461
Daniel Ferman, Hillel of Greater Toronto, 843.6253

Annex B

THE STAR

OPINION

Scandal-hit U of T law school internal emails contradict dean's new email to staff over key hiring decision

By **Shree Paradkar** Race & Gender Columnist

Fri., Sept. 18, 2020 | 4 min. read

Article was updated 16 hrs ago

The fallout of bombshell accusations that University of Toronto's Faculty of Law gave in to external pressure on a key hiring continues to grow after a new email from the dean raises fresh contradictions and questions.

On Thursday the Star reported on allegations that the law school rescinded a job offer to respected scholar Valentina Azarova after a sitting judge — and major donor to the faculty —expressed concerns over her academic work on Israeli settlements on Palestinian territories.

The job was for the position of director of the law faculty's prestigious International Human Rights Program (IHRP). Azarova, who is based in Germany, declined to speak to the Star. The Star attempted to contact the judge's court Friday but did not get a response.

The university told the Star Friday it was standing by the Dean's email to staff. "The hiring process for the IHRP director, which is a managerial staff position — not a faculty one — was confidential, and the university is continuing to do its best to maintain confidentiality, notwithstanding insinuations and the selective disclosure of information, including emails, that have been published out of context," said Kelly Hannah-Moffat, vice-resident of human resources and equity.

The entire faculty advisory board has resigned over the hiring decision and on Thursday, a member of the hiring committee quit his job at U of T. Official complaints have been filed with the Canadian Judicial Council, which has the authority to investigate and discipline judicial misconduct if necessary.

After the story broke Thursday, Dean Edward Iacobucci sent an email, obtained by the Star, to all the law professors at 6:34 p.m: "Let me say at the outset that assertions that outside influence affected the outcome of that search are untrue and objectionable," he wrote. "University leadership and I would never allow outside pressure to be a factor in a hiring decision."

But he did not mention if an outside judge attempted to influence the decision. Nor did the university in its response to the Star's specific questions on this.

Queen's University law professor Leslie Green sought precise clarification in his complaint to the judicial council: Did a judge know who were the shortlisted candidates? And if so, how? Did a judge speak with the dean or others in the faculty about the merits of any

candidate? Did a judge attempt to influence the outcome?

"These are not complicated questions," he told the Star.

The university said while "exploratory discussions occurred with one candidate," it backed the assertion by Iacobucci in his email that, "No offer of employment was made because of legal constraints on cross-border hiring that meant that a candidate could not meet the Faculty's timing needs."

However, this statement contradicts internal emails between the three hiring committee members that show they unanimously backed Azarova as the best candidate. Vincent Wong, who was on that committee, shared the emails with the Star.

One email from assistant dean Alexis Archbold on Aug. 21 to Audrey Macklin and Wong says in part: "Spoke to the UT employment lawyers today and they confirmed that we can hire Valentina as an independent contractor and roll her into the permanent position when she has her permit in hand. Valentina is happy with this."

As for the faculty's timing needs, another email from Archbold to Macklin and Wong on Aug. 20 says, "In a nutshell, we are hoping to work out a way for Valentina to start work for us before she has a Cdn work permit in hand ... Valentina is willing to start working remotely immediately. She plans to move to Canada by December."

In his resignation letter, Wong said, "The director search process has not been handled with objectivity, fairness, and transparency. The withdrawal of Valentina's offer raises serious concerns about the abuse of process, improper external influence, and academic freedom ... If I am to be completely honest, I feel like trust has been irrevocably broken."

Wong told the Star on Thursday that "Everything was sunshine and rainbows ... and suddenly it was, we're going to revoke. If the main issue was, she couldn't come in time — we're all working remotely anyway."

Samer Muscati, IHRP's most recent permanent director, told the Star it was not as if someone without those cross-border constraints could have begun teaching right away. The semester started Sept. 8 and "we never offer the clinic course mid-semester," he said. The next session for anyone to start teaching was in January. While working remotely, Azarova could have worked on developing the curriculum, done outreach with students and worked on partnerships for the legal clinic, Muscati said.

U of T law professor Mohammad Fadel blasted the dean's email as "self-serving" in a note to colleagues Friday.

"Given that the search committee was authorized from the beginning to consider international candidates, and that the Dean knew that the top two candidates on the short-list were non-Canadians, it is hard to believe that we were suddenly blindsided by immigration law at the last second," he wrote.

Iacobucci said in the email to law professors that, "Even the most basic of the conjectures that are circulating in public, that an offer was made and rescinded, is false."

However, an email, seen by the Star, from assistant dean Archbold to Macklin and Wong on Sunday Aug. 9 said: "I have a meeting booked with Robyn tomorrow to discuss our offer to Valentina. I plan to get in touch with Valentina first thing Tuesday morning."

Sources tell the Star the university made an oral offer to Azarova on Aug. 11, which she accepted.

Muscati says whether or not an offer was made is immaterial. "Even if no offer was made yet, it would still be unacceptable to have a judge intervene in the process. This is the scandal."

Shree Paradkar *is a Toronto-based columnist covering issues around race and gender for the Star. Follow her on Twitter: @ShreeParadkar*

Read more about: Israel

More from The Star & Partners

ANNEX C
(complete transcription of notes by Professor Audrey Macklin)

Chronology of Events Relating to IHRP search process

1. The committee met, reviewed applications, developed a 'long list'

2. Week of July 11:
    - Conducted 8 initial interviews, including 6 Canadian citizens/PRs
    - one Cdn disqualified by Human Resources because they did not have an undergraduate law degree
    - Drew up a short list of 3
        - Valentina Azarova (VA)
        - US candidate
        - Canadian PR candidate (overseas)

3. Week of July 20
    a. Second interview of 3 shortlisted candidates
    b. VA selected as first choice
    c. US candidate second choice, no further options identified if neither available (ie. failed search)

4. 21 August
    a. Assistant Dean: "Continuing to have positive discussions with Valentina"
    b. Trying to sort out immigration/employment issues; [I had earlier recommended spousal sponsorship] – university proposes hiring her as independent contractor until work permit sorted out

5. 01 September
    a. Assistant Dean contacts me: VA would like to be physically absent for part of summer (after students leave for internships) to be in Europe (professional/personal connections)
    b. I said that I didn't have a problem with it as long as summer interns are fully supported – may lead to more projects for IHRP – but if we agree to it, should only be for one year – try it out and see how it goes

6. 04 September
    a. Assistant Dean contacts me: the director of alumni/advancement (I think Jennifer Lancaster but I'm not sure) received a call from an alum about VA, regarding VA's Israel/Palestine work
    b. The alum is a tax judge, and told the alum/advancement staff member that he intended to call Ed
    c. I expressed my alarm, asked how alum would have learned about this – Assistant Dean didn't know

7. 06 September
    a. Ed contacts me to inform me that hiring cannot go ahead

b. Explains his concerns re: employment/immigration issue and VA's request to be absent during summer

1. Ed: University proposed hiring AV as independent contractor as bridge until immigration status secured – this was improper, no way this could be done (he consulted with VP Human Resources & Equity etc.)
   Me: could address immigration issue via spousal sponsorship b/c her husband is Canadian (even under COVID she can enter as his spouse); there are other means of solving immigration issue; Not VA's fault if University proposing something that is inappropriate – can find another solution

2. Ed: no way she can have 80% contract and be absent in summer – it is a staff position requiring 100% presence,
   Me: if absence is unacceptable, just take it off the table --tell her and let her decide
   Ed: I am offended that she even asked for it plus this suggests she is not committed to the position and may be more interested in academic position
   Me: people often put out a wish list during negotiations and ask for things they don't get– you can just say no to partial contract – if it is a deal breaker for her, she will walk away
   Ed: And she has many publications – not really willing to take an admin position
   Me: we made very clear in interview that this is not academic position and she was not troubled by this; can't hold against her the fact that she also has academic publications

3. Me: concerned that her work on Israeli occupation is an issue here – her Israel/Palestine work is well within zone of legitimate, professional, international legal analysis regarding the occupation; references include Israeli int'l legal scholar
   Ed: "it is an issue, but given the other 2 reasons, I don't need to get to the 3rd issue"

4. Ed: need to hire Canadian so someone can start right away
   Me: only eligible Canadian was disqualified by HR; other Canadians are not viable – did not even make the short list;

5. Me: are you informing me of your decision or seeking my views?
   Ed: both

8. 9 September
   Ed communicates decision by email, citing immigration as the reason

9. 11 September – I resign

Annex D

(Toronto Sun)

MOSTYN: U of T was right to rescind but wrong to offer controversial appointment

Author of the article:
Michael Mostyn
Publishing date:
Sep 24, 2020 • Last Updated 6 days ago • 3 minute read

Michael Mostyn, CEO, B'nai Brith Canada. Photo by Supplied photo /B'nai Brith Canada
A controversy has erupted over a decision not to hire Valentina Azarova, a "human-rights scholar," at the University of Toronto law school.

Several media reports over the past week indicate that a gross injustice had been done to her given that a purported offer to head the law school's International Human Rights Program (IHRP) had been withdrawn, allegedly under outside pressure.

That pressure was related to what was described as Azarova's "scholarship" on Israel's "occupation of the Palestinian territories." However, no questions were asked about her "scholarship" or about how she came to be chosen as the lead candidate to head the IHRP program.

Azarova has a long history of uniform one-sided critiques of Israel. Did that make her an appealing candidate to begin with?

She has reportedly said that the rescinding of the offer was because of her work on the subject of the Israeli occupation. Yet Azarova herself told one media outlet: "I had no intention of doing Palestine work at U of T, in fact. It was not the work I presented in the interview. In fact, it's a fraction of the work I've done in the past few years. I do work on immigration and supply-chain accountability."

The fact is, Azarova's body of work is overwhelmingly devoted — arguably obsessively committed — to "Palestine work." She is affiliated with the University of Manchester, which lists her publications. Nearly nine in 10 deal with Israel and Palestinian issues. There appear to be no publicly available references to her claimed work on "immigration and supply-side accountability."

Even if Azarova didn't raise her "Palestine work" to the advisory board, where was the hiring committee when it came to probing her?

It's stretching credulity to imagine that she had "no intention" of doing "Palestine work" at the law school's department devoted to international human rights.

There's a disconcerting conformity in Western academic circles in polemics against Israel — so strong that it violates the value of academic freedom and which has long created a hostile environment for Jewish and other pro-Israel students on campus.

Far from being an impartial academic, as she is often portrayed, Azarova is actively devoted to using a wide variety of platforms to promulgate anti-Israel advocacy.

She's been involved with anti-Israel organizations such as Al-Haq which, cloaked in the language of human rights, calls for "the inalienable right of Palestinian refugees" now numbering close to 6 million, according to the UN, "to return to their homes" in present-day Israel. Such a "return," which doesn't exist in international law, would result in the destruction of Israel as a Jewish State. Al-Haq also has ties to the Popular Front for the Liberation of Palestine (PFLP), a listed terrorist entity in Canada — headed by a former senior PFLP operative and convicted terrorist.

Azarova has participated in extreme anti-Israel platforms including the Electronic Intifada, Al Majdal Quarterly (Badil), and the Ireland Palestine Solidarity Campaign.

Preventing her from becoming director of the IHRP program at one of the world's most prestigious law schools was a sound decision that likely has pre-empted a multitude of problems. The question remains: How was this individual recommended by U of T faculty for such a role in the first place?

Azarova has proved, with her anti-Israel obsessions, that she is far more devoted to indoctrination than education — and that amounts to a denial of genuine academic freedom.

U of T students deserve far better.

— Michael Mostyn is the CEO of B'nai Brith Canada

FACULTY OF LAW
Macdonald Hall, Union Street
Queen's University
Kingston, Ontario, Canada K7L 3N6
Tel 613 533-2220

29 September 2020

The Chief Justice, as Chair of
The Canadian Judicial Council
Ottawa, K1A 0W8
By email

Dear Chief Justice,

Re: CJC File: 20-0254

On 29th September I received acknowledgment of my complaint to the CJC, sent electronically twelve days earlier. It asks whether I wish to add information to my complaint. The following may be helpful.

(1) The Tax Court judge described in my letter is now reported to be **The Honourable David E. Spiro.**

(2) Judge Spiro is a distinguished lawyer, judge, and alumnus of the Faculty of Law at the University of Toronto. He is a generous donor to the University of Toronto, as are his extended family. Judge Spiro was a donor to the Faculty of Law Building Campaign Donors and Campaign for Excellence without Barriers campaign, in the $25,000-$99,999 donor category.

(3) Judge Spiro holds, or once held, that for university professors to research or advocate, for example, a 'One-State Solution' to the Israel/Palestine conflict is to **'advocate the demise of Israel as a Jewish State'** and that any academic conference predominantly advocating that view would be a **'forum for anti-Israel propaganda.'**(24th June 2009). (Annex A)

It is a fact that in Canada as in Israel it is lawful and well within the bounds of academic freedom and freedom of speech to: advocate (solely) for a 'One-State solution', to condemn the belligerent occupation by Israel of Palestinian lands, to investigate human rights abuses within Israel, and to teach, advocate, research, publish, and organize conferences on any of these or related subjects.

(4) Judge Spiro holds, or held, very restrictive views of academic freedom and the right of free inquiry. In the same statement, he stated that university conferences should be subject to '**the test of fairness and balance, both of which are essential to for any academic conference**.' (Annex A). This view, like the view that university professors

must not be '**one-sided'** in their research and must be **'impartial,'** is gravely in error. (Annex D) Those are duties of *judges*, not researchers, who are fully entitled to advocate, within the law, for any position they find convincing.

The so-called 'balance' test is repugnant to academic freedom and is repudiated by the CAUT and all serious research institutions. That test requires that if one perspective is represented in research, at a conference, or in a publication then a conflicting perspective must also be represented to 'balance' it. That would require a conference on covid-19 to include covid-deniers, and a conference on freedom for Tibet to include voices from the Chinese government. No Canadian university, scholarly association, or granting body has ever accepted a 'balance' or 'impartiality' test. Academic freedom includes the freedom of advocacy and it secures diversity *among*, not *within*, research programmes, conferences, or publications.

(5) In the summer of 2020, the University of Toronto Faculty of Law began a search of a Director of its International Human Rights Programme. Vice-President Kelley Hannah-Moffat, Vice President later stated, "**The hiring process for the IHRP director…[is] confidential, and the university is continuing to do its best to maintain confidentiality**." (Annex B)

(6) On or before 3rd September, Judge Spiro or a surrogate sought, or was given, the identity of candidates under consideration in that strictly confidential process, including Dr Valentina Azarova, the unanimous choice of the search committee with whom the Faculty of Law had already discussed what it described as its "offer" to her of a position. (Annex C)

Dr Azarova had not named Judge Spiro as a professional reference or consented to his intervention. The IHRP committee did not approach Judge Spiro for an opinion on her research, nor would any university. Judge Spiro is a distinguished lawyer, litigator, and jurist in the area of tax law and policy. He has no academic qualifications, peer-reviewed publications, or research on the Israel/Palestine conflict, on human rights, on freedom of expression, or on academic freedom. He may have, and is fully entitled to have, private commitments on such matters. According to a Department of Justice news release (17th April 2019) "**Justice Spiro has held a number of significant volunteer leadership responsibilities within the Jewish community."** He is often praised in the community for this work and for his strong commitment to Israel. This, too, is fully permissible as an aspect of his private life.

(7) By September 4th Judge Spiro or a surrogate had contacted staff of the Alumni /Advancement office at Faculty of Law, or others, to express concern about the impending appointment of Dr Azarova. (Annex B) The grounds of concern were based on the character and quantity of her research into the Israel/Palestine conflict: Judge Spiro had made his own views on that conflict clear in his public statements of June 2009. (Annex A) Others in Toronto's Jewish community shared his views and pressed people to act on them in this very case. (Annex D)

(8) On September 4th, the Assistant Dean contacted Professor Audrey Macklin, as Chair of the search committee and Advisory board, and alerted her to Judge Spiro's objections. Professor Macklin writes, "**the director of alumni/advancement (I think Jennifer Lancaster but I'm not sure) received a call from an alum about VA [Valentina Azarova], regarding VA's Israel/Palestine work. The alum is a tax judge, and told the alum/advancement staff member that he intended to call Ed [Dean Iacobucci]"** (Annex C)

(9) On September 6th, Dean Iacobucci met with Professor Macklin to inform her that he had decided not to proceed with the appointment of Dr Azarova and to cancel the search, leaving the IHRP without a Director. Iacobucci stated the following as possible reasons for refusing to appoint Azarova:

a) complications in her immigration status,
b) the fact that she would need to be working remotely for a period
c) the fact that Azarova's research on Israel/Palestine had become "**an issue**" for an alumnus. (Annex C)

(10) In reply to an expression of concern from Professor Macklin about the improper influence of consideration (c), Dean Iacobucci said "**it is an issue, but given the other two reasons, I don't need to get to the third issue.**" Dean Iacobucci was thus alert to the judge's opposition but would exclude it from consideration and rely instead only on the other putative reasons. (Annex C)

(11) On September 11th, Professor Macklin resigned in protest from the committee owing to the lack of transparency in the process and Dean Iacobucci's willingness to entertain, if not rely on, an alumnus's political opposition to the appointment. She was followed by the entire Advisory Board of the IHRP. (Annex C).

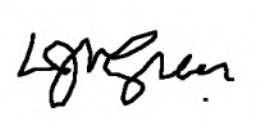
Shortly thereafter, comity and collegial self-governance in the Law Faculty broke down, as the Dean's conduct, and that of the judge, became matters of grave public concern in Canada and abroad. It is for the University of Toronto to deal with any allegations of breach of contract, discrimination on grounds of creed, defamation, and---importantly—violations of academic freedom and breach of norms of university governance. But it is for the Canadian Judicial Council to investigate the matters touching the personal integrity and impartiality of the judiciary, to record its findings of fact, and to take such action as it deems just and appropriate in the circumstances, having regard to the gravity of the published allegations.

(12) The following people have personal knowledge that bears directly on the matters discussed in this letter. I respectfully request that the Investigator(s) interview each of them:

Dr Valentina Azarova
President Meric Gertler, University of Toronto
Vice-President Kelley Hannah-Moffat, University of Toronto

Dean Edward Iacobucci, Faculty of Law, University of Toronto
Assistant Dean Jennifer Lancaster, Faculty of Law, University of Toronto
Assistant Dean Alexis Archbold, Faculty of Law, University of Toronto
Professor Audrey Macklin, Faculty of Law University of Toronto,
Mr Michael Mostyn, CEO, B'nai Brith Canada
Mr Howard English, CAF Canada, formerly of UJA Federation, Toronto
Mr Daniel Ferman, Toronto, formerly of Hillel of Greater Toronto

Yours truly,



Leslie Green, D.Phil.
Professor of Law and Distinguished University Fellow

From: Craig Martin Scott
To: info
Subject: Letter to Chairperson of CJC, copied to Executive Director - Matter of an unnamed Tax Court judge
Date: September-20-20 1:47:39 AM
Attachments: 2020 09 20 - Letter to CJC - C Scott - FINAL.pdf

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From: Craig Martin Scott Sent: 20/09/2020 1:47:36 AM
Dear Sir/Madam,

Please find attached a letter to the Right Hon. Richard Wagner, PC, Chief Justice of Canada in his capacity as Chairperson of the CJC. It is copied to Executive Director Sabourin. I am writing in my intertwined 'capacity' (for lack of better word) as citizen, member of the legal profession, and member of the legal academy. By the attached letter, I join myself to the letter of September 17 of Professor Leslie Green and, as such, ask to be considered a "complainant." The second purpose of the letter is to present arguments why the CJC should, under its rules, make an effort to determine the name of the as-yet-unnamed judge in the matter to which Professor Green refers.

I trust that this letter will be conveyed directly to Chief Justice Wagner, and not delayed by any gatekeeping by whomever monitors this general email or by the Executive Director. In that regard, I re-emphasize that the letter is addressed to the Chief Justice and constitutes in part a request to reverse any decision as may have been made solely by the Executive Director in the exercise of screening functions, without conveying the Green complaint to the Chief Justice. If the Green complaint was formally conveyed to the Chief Justice, then it is simultaneously a request to him that he reconsider any decision not to proceed for the reason that the precise identity of the judge alleged to have been involved in inappropriate conduct is not set out in the complaint.

Yours sincerely,

Craig Scott (he/him),

Professor of Law, Osgoode Hall Law School;

Director, Graduate Program in Law

York University, 4700 Keele St, Toronto ON M3J 1P3

Email: HYPERLINK "mailto:cscott@osgoode.yorku.ca"cscott@osgoode.yorku.ca

Faculty profile: https://www.osgoode.yorku.ca/faculty-and-staff/scott-craig-m/

Osgoode Digital Commons – Research: https://works.bepress.com/craig_scott/

SSRN: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=114299

OSGOODE
OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

Craig Scott

Professor of Law
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Academic Director, International & Transnational Law Intensive Program

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YORK UNIVERSITÉ UNIVERSITY

The Right Honourable Richard Wagner, P.C.,

Chief Justice of Canada

in his capacity as Chairperson
of the Canadian Judicial Council,
Canadian Judicial Council
Ottawa (Ontario) K1A 0W8

Via Email

September 20, 2020

Dear Chief Justice Wagner,

RE: Request to proactively seek the name of the subject of a complaint in accordance with the Canadian Judicial Council's *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges*

I write to you in your capacity as Chairperson of the Canadian Judicial Council (CJC) to ask that you inquire into and reverse, or reconsider, any decision that may have been made not to consider a complaint filed on September 17, 2020, by Leslie Green with respect to an as-yet-unnamed judge of the Tax Court of Canada. I adopt Professor Green's complaint as my own for purposes of this letter, so kindly consider his letter incorporated by reference and me thus also as a "complainant" for purposes of the CJC procedures.

A report in today's *Globe and Mail* by Sean Fine states: "The judicial council told The Globe it cannot undertake an investigation into a complaint unless it has the name of the judge in question." Section 4(c) of the *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* provides: "If the Executive Director determines that a matter warrants consideration, the Executive Director must refer it to the Chairperson…" It is unclear from the report in today's *Globe* whether Professor Green's letter was filtered out by the Executive Director without passing it on to you. Therefore, I address the present letter to you directly and frame the issue as one of a possible reversal by you of the Executive Director's decision not to proceed *or* as one of you reconsidering your own decision.

The preliminary screening criteria for the Executive Director in section 5 do not include any reference to a judge's name needing to be known if enough information has been provided for the CJC to make inquiries in order to proactively seek out and determine the name, if the rest of the complaint reveals conduct that presumptively is problematic under the *Judges Act* and the *Principles of Judicial Ethical Conduct*. Section 5 reads as follows:

> Early Screening Criteria
>
> For the purposes of these Procedures, the following matters do not warrant consideration:
>
> (a) complaints that are trivial, vexatious, made for an improper purpose, are manifestly without substance or constitute an abuse of the complaint process;
> (b) complaints that do not involve conduct; and
> (c) any other complaints that are not in the public interest and the due administration of justice to consider.

If the Executive Director assumed authority to reject the complaint at this stage without referring to you, then I am asking for a reversal of that decision based on the information I ask to be considered later in this letter. If, on the other hand, the matter was indeed referred to you as Chairperson, I most respectfully request that you reconsider and change your own decision. Here I note that section 6 sets out your own screening role:

> Screening by Chairperson
>
> The Chairperson must review a matter referred by the Executive Director and may
>
> (a) seek additional information from the complainant;
> (b) seek the judge's comments and those of their chief justice; or
> (c) dismiss the matter if the Chairperson considers that it does not warrant further consideration.

Nothing in section 6(a) requires that the name of the judge be known for "additional information from the complainant" to be sought. The earlier substantive-jurisdiction clause (section 3) is not phrased in a way that precludes a proactive role of the Council to determine a judge's name once a complaint has brought problematic conduct to the Council's attention. Here, we have a complaint about a known but as-yet-unnamed judge of a court with a very limited number of judges. Section 3.1 reads: "Any person, including a member of the Council, may make a complaint about *a judge*." It does not say a "named" judge.

Obviously, I understand that a full investigation of "a judge" requires the name at some point; indeed, I publicly messaged earlier this week that, once the name is clear, the CJC would need to investigate (assuming a complaint is in hand), by which I mean through the interactive roles of the Chairperson, an investigator and a Panel. Indeed, one cannot get to the second screening criterion in section 6(b) without that name. However, I would respectfully suggest that a purposive interpretation of the role of the CJC (a) in ensuring unethical judicial conduct does not go unaddressed and (b) in maintaining the integrity of the judiciary should both mean the Executive Director cannot screen out a complaint solely due to a lack of a name and that you as Chairperson have full authority to "seek additional information from the complainant" preliminary to either going on to section 6(b) – assuming that the complainant has been able to provide information that allows you to determine the name or make further inquiries to determine the name – or to section 6(c) to dismiss for lack of a name at that point.

I would further point out section 9 which, again read purposively, can be interpreted to allow you as Chairperson to engage an investigator. Section 9 does not require that this investigator only be hired once a judge's name is known and appears open to the interpretation that an investigation can be used within section 6(a) in order to try to determine a name. Section 9 reads:

> Information Gathering
>
> 9.1 The Chairperson may instruct the Executive Director to retain an investigator to gather further information about a matter and prepare a report. In that case, the Executive Director must inform the judge and their chief justice.
>
> 9.2 The investigator is to gather relevant information. They may conduct confidential interviews if necessary and may provide assurances of confidentiality to those who provide information.
>
> 9.3 Before finalizing the report, the investigator must provide the judge with an opportunity to comment on the information obtained by the investigator. The judge's comments

> must be included in the investigator's report.
>
> 9.4 Where information is obtained in confidence, the investigator must include in the report written reasons for having provided the assurance of confidentiality.

Section 9.1 refers to gathering information about "a matter", which is more than broad enough to include a complaint that there are good grounds to believe that a judge on a named court (here the Tax Court) has engaged in inappropriate conduct. This permits, under section 9.2, the investigator to determine the name of the judge and then, under both sections 9.2 and 9.3, conduct further investigations and interviews once that name is determined.

Having constituted myself as a complainant in the first paragraph, I now provide information that would allow you to determine who the Tax Court judge is. I have reliable and solid reason for believing, including belief based on the news reports cited in Professor Green's letter, that the following persons have first-hand knowledge of the name of the Tax Court judge and the timing and recipients of one or more communications to the University of Toronto Faculty of Law in relation to the appointment of the Director of the International Human Rights Program. If contacted, I assume that every one of them would feel ethically and possibly legally obliged to answer the questions of an investigator truthfully, even as they may, for different reason, have decided not to speak to reveal such information to journalists. They are:

1. Edward Iacobucci, Dean of Law, Faculty of Law, University of Toronto
2. Audrey Macklin, Professor of Law, Faculty of Law, University of Toronto
3. Alexis Archbold, Assistant Dean, Faculty of Law, University of Toronto
4. Jennifer Lancaster, Assistant Dean (Advancement), Faculty of Law, University of Toronto

I am quite certain that at least one of these persons would see it as her or his duty to provide the name if the CJC asked.

Each one of these persons should be approached. I would also suggest that the Chief Justice of the Tax Court should be consulted in case he has first-hand knowledge from the judge that he or she did indeed seek to influence an appointment in the way and context alleged. The Chief Justice may well know which judges have associations with the Faculty of Law of the University of Toronto, and – out of concern for the reputation and integrity of the Tax Court – taken the initiative to approach those judges and ask

them to confirm or deny whether they were involved. He may have learned, first hand, the name of the relevant judge for this complaint.

I would also indicate that I do not have my own first-person knowledge of the name of the judge, although I do know the name that is circulating of a judge who is believed to be the judge. The legal status of a letter to the CJC and its contents is unclear to me. However, as a matter of absolute or qualified privilege, I would be in a position to pass on that name to an investigator, if asked, on the understanding that the investigator or CJC would not reveal that name publicly until the appropriate moment within its own procedures. The intent would be for the investigator to then determine, via one or more of the above persons, if this is indeed the judge. I include the possibility that the CJC will determine the judge did not contact the law school and thereby decide not to reveal the name publicly. I would not reveal the name until it is properly public.

If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School;

Graduate Program Director, Research LLM and PhD

Cc: Norman Sabourin, Executive Director and Senior General Counsel

From: Craig Martin Scott
To: info
Subject: Re: CJC File 20-0260
Date: September-25-20 12:18:38 PM

From: Craig Martin Scott Sent: 25/09/2020 12:18:36 PM
Thank you for clarifying that the Chairperson of the review committee is not also the Chairperson of the Council. I did not check the committee membership list and did not see s2.2 that would have alerted me to check the list, and incorrectly assumed the Council Chairperson headed that committee and not just Council.

Thank you for redirecting to the committee Chairperson who is not also CJC Wagner. That said, my letter stands as also intended for CJC Wagner in his general capacity as it is not entirely clear what role the Chairperson (of the committee) has in reviewing any exercising of screening by the Executive Director that results in the committee chairperson not seeing a complaint. I wanted the Chair of Council to be aware if a complaint had not been passed on beyond the Executive Director screening. If the complaint has now been passed on, and your email does confirm that, then the need to ask CJC Wagner to consider the question is moot as the committee chairperson has seen the letter now.

Thank you,

Craig

Craig Scott, Professor of Law
Osgoode Hall Law School
York University
4700 Keele St.
Toronto ON M3J 1P3
Email: cscott@osgoode.yorku.ca
Faculty profile: https://www.osgoode.yorku.ca/faculty-and-staff/scott-craig-m/
Osgoode Digital Commons – Research: https://works.bepress.com/craig_scott/
SSRN: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=114299

———

From: info <info@cjc-ccm.ca>
Sent: Friday, September 25, 2020 11:59:12 AM
To: Craig Martin Scott <CScott@osgoode.yorku.ca>
Subject: CJC File 20-0260

Good afternoon,

Thank you for writing to the Canadian Judicial Council. Please be advised that your correspondence will be reviewed in accordance with the Canadian Judicial Council Procedures for the Review of Complaint or Allegations (Review Procedures).

The Council seeks to complete its review of complaints within 3 to 6 months of receipt and achieves this objective in most instances. Once the review of your complaint is completed, the Acting Executive Director will communicate with you.

Please note that Chairperson in the Review Procedures refers to the Chairperson and Vice Chairpersons of the Judicial Conduct Committee (s. 1), not the Chairperson of Council. S. 2.2 provides that the Chairperson of Council does not participate in the consideration of complaints. Your letter of complaint will be processed as provided in the Review Procedures.

If you wish to add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: HYPERLINK "mailto:info@cjc-ccm.ca"info@cjc-ccm.ca.

Information about the Council's mandate with respect to complaints can be found the Council's web site http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /
Agente de soutien de registre et de communication
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

dessus. Toute autre personne est par les présentes avisée qu'il lui est strictement interdit de le diffuser, de le distribuer ou de le reproduire. Si le destinataire ne peut être joint ou vous est inconnu, nous vous prions d'en informer immédiatement l'expéditeur par courrier électronique et de détruire ce message et toute copie de celui-ci

From: Craig Martin Scott
To: info
Subject: 2nd follow-up RE: CJC File 20-0260
Date: September-25-20 12:57:48 PM

From: Craig Martin Scott Sent: 25/09/2020 12:57:46 PM
Hello again,

With respect to my response below, I may have wrongly assumed that the letter has already been sent on to the Chairperson (of the Judicial Conduct Committee). After more closely reading your reply, it is not fully clear to me whether the letter of complaint has now been screened by the Executive Director (Acting Executive Director?) and is now being treated as a valid complaint to be sent or already sent to the Chairperson of the Judicial Conduct Committee. Please confirm: is it still at the Executive Director screening stage?

If it has not been passed on to the Chairperson of the Judicial Conduct Committee, I would ask that it indeed be passed on both to that Chairperson and still to the Chairperson of Council (CJC Wagner) as the original sole addressee. I ask for this because my letter is not simply a substantive complaint (incorporating by reference the concerns of Professor Leslie Green in his letter of complaint) but is also a form of 'request for review' or 'appeal' on the issue of rejecting complaints for lack of a specified name. If that decision (i.e. to reject for lack of name) has been made by the Executive Director or may still be made, then I would like the Chairperson of the Judicial Committee to know that a complaint-letter has not been forwarded and to deal with the issue of whether lack of a name is sufficient reason to screen out. And I also would like CJC Wagner as the Chairperson of Council as a whole to receive my letter because the review procedures are unclear (at least to me) on whether the Chairperson of the Judicial Conduct Committee can review and override a screening decision of the Executive Director – and indeed whether a letter like mine requesting review/override is even in order; in the event the Chairperson of the Judicial Conduct Committee cannot intervene, it is doubtful whether the Chairperson of Council can – but in that case, the matter becomes one of the need to revisit and reform procedures.

If, however, my complaint-letter has been confirmed as a complaint and has passed the Executive Director screening stage, and thus is in the hands of or on the way to the Chairperson of the Judicial Committee, it is less important that CJC Wagner also see the letter. I say this because the Chairperson of the Judicial Conduct Committee will be in a position to consider the substantive question of whether a name is needed and, where there is not a name, whether an investigation to discover the name is within that Chairperson's powers. On these two issues, my letter contains some interpretive arguments to consider.

I know this was a bit complex, but, to reiterate, the threshold question is whether my letter of complaint only has the status of a "complaint file" at the moment and not of complaint that has passed first screening and had been forwarded to the Chairperson of the Judicial Conduct

Committee. Please let me know if it is still at the Executive Director screening stage.

Thank you,

Craig Scott

From: Craig Martin Scott <CScott@osgoode.yorku.ca>
Sent: September 25, 2020 12:19 PM
To: info <info@cjc-ccm.ca>
Subject: Re: CJC File 20-0260

Thank you for clarifying that the Chairperson of the review committee is not also the Chairperson of the Council. I did not check the committee membership list and did not see s2.2 that would have alerted me to check the list, and incorrectly assumed the Council Chairperson headed that committee and not just Council.

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Thank you,

Craig

Craig Scott, Professor of Law

Osgoode Hall Law School

York University

4700 Keele St.

Toronto ON M3J 1P3

Email: HYPERLINK "mailto:cscott@osgoode.yorku.ca"cscott@osgoode.yorku.ca

Faculty profile: https://www.osgoode.yorku.ca/faculty-and-staff/scott-craig-m/

Osgoode Digital Commons – Research: https://works.bepress.com/craig_scott/

SSRN: https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=114299

———

From: info <HYPERLINK "mailto:info@cjc-ccm.ca"info@cjc-ccm.ca>
Sent: Friday, September 25, 2020 11:59:12 AM
To: Craig Martin Scott <HYPERLINK "mailto:CScott@osgoode.yorku.ca"CScott@osgoode.yorku.ca>
Subject: CJC File 20-0260

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Information about the Council's mandate with respect to complaints can be found the Council's web site http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /

Agente de soutien de registre et de communication

Canadian Judicial Council /

Conseil canadien de la magistrature

Tel: 613-288-1566

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From: info@cjc-ccm.ca
To: info
Subject: Website - Complaint form
Date: September-21-20 6:22:39 PM
Attachments: CJC_September 21_final.pdf

From: info@cjc-ccm.ca Sent: 21/09/2020 6:22:38 PM
First name:
Mustafa

Last name:
Farooq

Email:
mfarooq@nccm.ca

Phone number:
6134062525

Address:
116 Albert Street 300
Province:
Ontario

City:
Ottawa

Postal code:
K1R0B7

Judge name:
Justice David Spiro

Type:
New complaint

Court name and location:
Tax Court of Canada

Date of action:
2020-09-17

Complaint description:
See attached.

September 21, 2020

The Canadian Judicial Council

VIA EMAIL

Dear Council Members:

I write to request an investigation into the reported conduct of a judge who sits on the Tax Court of Canada.

Troubling allegations have been brought that indicate that a judge engaged in inappropriate conduct by allegedly seeking to influence, manipulate, critique, or interfere in a hiring decision that was being made at the University of Toronto Faculty of Law in regards to the appointment of a new director at the International Human Rights Program (IHRP), as reported in the *Globe and Mail,* the *Toronto Star,* as well as an increasing number of international news outlets.

Allegedly, the Faculty of Law made an offer to Valentina Azarova, a renowned scholar in the field of international human rights. However, when a judge in the Tax Court of Canada expressed concerns about Azarova, in relation to Azarova's work on human rights abuses in the occupied Palestinian territories by the Israeli government, Dean Edward Iacobucci allegedly rescinded the offer.

Furthermore, unproven and potentially spurious allegations, both on social media and amongst various members of the University of Toronto community, have been made that Justice David Spiro, who sits on the Tax Court of Canada, and is publicly listed as a donor to the University of Toronto, was the judge responsible for engaging in such inappropriate conduct.

Importantly, it must be stressed that at this point, these allegations are not yet grounded in independently-verifiable fact. Dean Iacobucci has firmly stated that, "assertions that outside influence affected the outcome of that search are untrue and objectionable".

The fact that such allegations are being made, without an independent process to investigate whether or not such allegations are grounded in fact, casts a negative light both on the legal profession, austere institutions such as the University of Toronto Faculty of Law, and the integrity of our judiciary.

NATIONAL COUNCIL OF CANADIAN MUSLIMS

Your Voice. Your Future.

The administration of justice in Canada lies in the integrity of our judiciary, which must remain strong, independent, neutral, and non-partisan. Years of jurisprudence, as well as clear guides for judges, have made it clear that taking political positions on issues such as the Israel-Palestine conflict is inappropriate. Both in their personal lives and in their decorum on the bench, the conduct of judges in Canada is expected to convey the highest levels of integrity, professionalism, and courtesy.

This is precisely why the independent investigatory duty of the Canadian Judicial Council is needed. The CJC can appropriately investigate the allegations that have been made by members of the public in writing on social media, and privately amongst faculty and students at the University of Toronto, in relation to the alleged interference by a judge at the Tax Court of Canada into hiring decisions at the University of Toronto.

In the last week, we at the National Council of Canadian Muslims have heard complaints from:

- Canadian Muslim academics, who feel that the incident demonstrates that judges may routinely engage in interfering in hiring decisions, which ultimately may restrict their academic freedom in terms of being able to take positions on certain subjects;
- Canadian Muslim law students at the University of Toronto, who feel that the incident sends a clear message about how to represent yourself if you would like to clerk at various levels of court in Canada; and
- Canadian Muslim, Arab, and Palestinian lawyers, some of whom appear in front of the Tax Court, and are reasonably concerned about the apprehension of bias.

Given that, and given the thus-far unproven allegations being made, we feel it is necessary for there to be an independent and thorough investigation by the Canadian Judicial Council.

Regards,

Mustafa Farooq

CEO of the National Council of Canadian Muslims

JD, LLM

From: info@cjc-ccm.ca
To: info
Subject: Website - Complaint form
Date: September-25-20 2:31:16 PM

From: info@cjc-ccm.ca Sent: 25/09/2020 2:31:16 PM
First name:
Dania

Last name:
Majid

Email:
dania_majid@hotmail.com

Phone number:
4165573189

Province:
Ontario

City:
Toronto

Judge name:
Justice David Spiro

Type:
Additional information to an existing complaint

Court name and location:
Tax Court of Canada

Complaint description:
The Arab Canadian Lawyers Association, with others, would like to join the complaints regarding the conduct of Justice Spiro filed by Les Green and Craig Scott. We will file the details of our complaint by the end of next week.

From: Dania Majid
To: info
Cc: Corey Balsam; Meghan McDermott
Subject: Re: CJC File 20-0275 (UPDATED Complaint re Justice Spiro)
Date: October-13-20 9:47:02 AM
Attachments: CJC complaint re Justice Spiro ACLA IJV BCCLA.pdf
Importance: High

From: Dania Majid Sent: 13/10/2020 9:46:55 AM
Dear Madam/Sir;

On behalf of the Arab Canadian Lawyers Association, Independent Jewish Voices Canada and BC Civil Liberties Association, please find our UPDATED complaint regarding the alleged conduct of Justice Spiro, adding the BCCLA as a co-signer to the complaint.

As noted in our earlier email, we request to join the other complaints filed by Leslie Green (CJC File 20-0254) and Craig Scott (CJC Complaint filed September 20, 2020).

If you require any additional information from us please do not hesitate to contact us.

Sincerely,

Dania Majid

_____

From: info <info@cjc-ccm.ca>
Sent: September 28, 2020 3:49 PM
To: dania_majid@hotmail.com <dania_majid@hotmail.com>
Subject: CJC File 20-0275

Good afternoon,

Thank you for writing to the Canadian Judicial Council. Please be advised that your correspondence will be reviewed in accordance with the Canadian Judicial Council Procedures for the Review of Complaint or Allegations (Review Procedures).

The Council seeks to complete its review of complaints within 3 to 6 months of receipt and achieves this objective in most instances. Once the review of your complaint is completed, the Acting Executive Director will communicate with you.

If you wish to add any information to your complaint file (CJC File: 20-0275), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: HYPERLINK "mailto:info@cjc-ccm.ca"info@cjc-ccm.ca.

Information about the Council's mandate with respect to complaints can be found the Council's web site http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /
Agente de soutien de registre et de communication
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

ACLA Arab Canadian Lawyers Association

Independent Jewish Voices Canada / Voix juives indépendantes Canada

BC CLA BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Canadian Judicial Council
Ottawa, ON K1A 0W8

October 10, 2020

Dear members of the Judicial Conduct Committee;

Re: CJC File 20-0275 – Joint Complaint regarding the alleged conduct of Justice David Spiro

On behalf of the Arab Canadian Lawyers Association (ACLA), Independent Jewish Voices (IJV) and BC Civil Liberties Association (BCCLA), we are writing to complain about the alleged conduct of David Spiro, a sitting judge of the Tax Court of Canada. Although this alleged conduct does not relate to any active court case, it appears to have breached several of the Ethical Principles for Judges promulgated by the Canadian Judicial Council ('CJC Ethical Principles'). We request that this complaint be joined to those filed by Professors Leslie Green and Craig Scott regarding the conduct of Justice Spiro. This complaint adds to the record by:

- providing context about anti-Palestinian racism as it is practiced in Canada
- explaining the harms caused by Justice Spiro's alleged conduct on the communities most directly affected, specifically Palestinian-Canadians and those who work on issues related to Palestine.

As you have been made aware, two national newspapers have named Justice Spiro as the judge who allegedly interfered in an internal hiring process at the Faculty of Law, University of Toronto (Law School) in September 2020.[1] According to reports, the interference that took place appears to be racially motivated by anti-Palestine and anti-Palestinian views.

Anti-Palestinian Racism

Anti-Palestinian racism is insidious and thrives in many sectors, including the legal profession. In one of its most dangerous forms, anti-Palestinian racism consists of attempts to deny the history and ongoing suffering of the Palestinian people. It also aims to paint those who are critical of Israel's treatment of Palestinians as anti-semitic and unfit for employment.

[1] Paradkar, Shree. "Pressure mounts on U of T law faculty as Amnesty, National Council of Canadian Muslims seek investigations into alleged inappropriate influence", (22 September 2020), online: *Toronto Star* <https://www.thestar.com/opinion/star-columnists/2020/09/22/pressure-mounts-on-u-of-t-law-faculty-as-amnesty-national-council-of-canadian-muslims-seek-investigations-into-alleged-inappropriate-influence.html>; Fine, Sean. "Tax Court judge accused of pressuring U of T law school not to hire human-rights scholar identified", (24 September 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/canada/article-tax-court-judge-accused-of-pressuring-u-of-t-law-school-not-to-hire/>

Those who experience or witness this form of racism include those early into their careers, precariously employed or lack a strong support network and therefore fear retaliation if they were to file a complaint.

As a result, the targeting of Palestinians and those who work on Palestine creates a deep chill for this community. As reported to ACLA, examples of this chill include: the belief they have to hide their identity or work; they must always be on alert for an attack, smear campaign or harassment; and their views are not welcome or may result in punitive treatment in the legal and justice sector. This retaliation contributes to silencing and erasure of Palestinian voices and limits their valuable contributions in the legal sector and justice system.

The lobbying against Palestinians and those who address Israel's violations of Palestinian human rights has resulted in a reduced understanding of Palestinian experiences and perspectives and made it easier to negatively stereotype human rights advocates and scholars as violent and/or prone to be critical of Israel out of anti-semitism.

The Alleged Misconduct Subject to this Complaint

In their reports, the journalists for the *Toronto Star* and *Globe and Mail* attested to reviewing documents they cited in their reports that strongly suggest an offer of employment was made to Dr. Azarova, which she duly accepted, followed by the summary withdrawal of that offer by the Law School. One such document was a chronology of these events prepared by a senior Law School faculty member Prof. Audrey Macklin, Chair of the hiring committee and of the International Human Rights Program (IHRP)'s Faculty Advisory Committee. In her account, Prof. Macklin uses the initials "DS" to identify the judge who contacted the Law School, and notes his objections in the hiring of Dr. Azarova over her scholarship on Palestine/Israel.[2] This account corresponds with a letter drafted by the former directors of the IHRP that the drafters of this complaint obtained and reviewed (see Appendix A).

In summary, despite the internal IHRP hiring process being confidential (and this, on the public assertion of the University), Justice Spiro is alleged to have somehow learned that the program offered Dr. Azarova, a renowned international law scholar, the position of director of the IHRP. Justice Spiro is alleged (by members of the hiring committee and two former IHRP directors) to have contacted a member of the faculty's fundraising team to express his strong objections over Dr. Azarova's hiring. The reasons for his admonishment, as outlined in the documents that have been furnished to you by Professor Green and in media reports, was his apparent disapproval of Dr. Azarova's critical scholarship on Israel's occupation of Palestinian territory.

Justice Spiro is a graduate of the Law School (class of 1987), he is a donor to it in the $25,000-$99,000 category, and his extended family has reportedly donated tens of millions of dollars to

[2] *Ibid*, (Globe and Mail).

the university.[3] Dr. Azarova is a respected expert in international law and has held several high profile positions. Justice Spiro has no apparent or reported expertise in international law or Dr. Azarova's areas of expertise. However, he does appear to have a deep and long standing interest in matters related to Palestine and Palestinians, at least as they involve criticism of Israel.

Justice Spiro is the former Toronto co-chair of the Centre for Israel and Jewish Affairs (CIJA), an advocacy organization co-founded by Larry Tannenbaum, Justice Spiro's uncle. CIJA is a registered lobby whose primary mandate includes increasing support for Israel.[4] Much of this pro-Israel activity is directed at suppressing Palestinian advocacy on campuses.[5]

It appears that Justice Spiro's alleged communications with the Law School were significant enough to prompt the Faculty of Law to rescind the offer of employment to Dr. Avaroza. Even if they were not, the mere fact that Justice Spiro may have communicated with the Law School at all on this matter is of great concern. Neither the Law School nor the University have denied that Justice Spiro made attempts to interfere with Dr. Azarova's employment prospects but have instead maintained that Dr. Azarova was not hired for reasons unrelated to such lobbying. Various sources, including individuals close to the hiring process, have questioned the veracity of these claims.[6]

Judge Spiro's Alleged Conduct Undermines Public Confidence in the Judiciary

> *Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary*[7]

Judges are expected to act with integrity inside and outside of the courtroom. Their conduct can influence public perceptions of the judiciary and ultimately undermine public confidence in the rule of law. "Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality and good judgment."[8]

If the allegations made against him are true, Justice Spiro's conduct fails to meet the standard of integrity required of a judge for several reasons. First, if the allegations are true, he sought to use his power, status and influence to undermine the rights of an unsuspecting individual using backdoor conversations. This fact alone gives Palestinian-Canadians reason for serious concern.

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[3] *Ibid.*
[4] "CIJA at a Glance", (31 August 2017), online: *UJA Federation of Greater Toronto* <https://jewishtoronto.com/news-media/what-we-do/cija-at-a-glance>
[5] *Ibid*. Snapshot (reported in 2017): $150,000 worth of Israel advocacy programming supported by CIJA this year; 20,000 pro-Israel products distributed by CIJA on Canadian university campuses this year through partnership with Hillel; 12,000 Ontarians mobilized to contact their MPPs in support of anti-BDS motion at the Ontario Legislature in 2016; 7 successful anti-BDS initiatives launched on Canadian university campuses in 2016 in partnership with Hillel.
[6] *Supra*, note 1. See also Appendix A.
[7] *Ethical Principles for Judges*, ed (Ottawa, Ontario: Canadian Judicial Council, 2004), online: CJC <https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf> See "Integrity" Commentary.
[8] *Ibid*, Integrity, Commentary para 1.

This incident has created significant anxieties in our communities where people are wondering whether merely speaking up for the human rights of one's own people will mean risking one's livelihood or other opportunities. For this reason alone, Palestinian-Canadians and those who support equal rights for Palestinians will be closely watching whether and how the Canadian Judicial Council addresses this issue.

Second, we note that, if the allegations are true, Justice Spiro failed to meet the standards of judicial integrity because he acted without regard for the significant consequences of his actions upon others, particularly Dr. Azarova whose employment, reputation and well-being have been harmed as a result of the secretive communications that he is alleged to have made. Indeed, the allegations suggest that Justice Spiro exhibited animus, and not mere disregard, for Dr. Azarova, a woman who he appears to have never met but whose politics seem not to align with his own. Again, this sends the message to Palestinian-Canadians that their human rights are not important to members of the Canadian judiciary and it sends the message to anyone who speaks in favour of Palestinian human rights that their willingness to speak in favour of the equal worth and dignity of all carries risks in Canada.

Finally, if the allegations are true, Justice Spiro failed to meet the standards of integrity required of a judge because he did not consider the consequences of his actions on the judiciary itself. "The judge should exhibit respect for the law, integrity in his or her private dealings and generally avoid the appearance of impropriety."[9] Judge Spiro appears to have understood that the Law School was involved in employment negotiations with a candidate whose political views seem to have displeased him. It appears that he contacted the Law School precisely to interfere with those negotiations. Moreover, Justice Spiro appears to have objected to Dr. Azarova's hiring notwithstanding the fact that the views that she expressed are consistent with both international and Canadian law. By allegedly seeking to undermine Dr. Azarova's employment prospects, Justice Spiro therefore displayed a disregard for the law and the rule of law. If the allegations are true, he sought to circumvent the law by using his status and privilege to deny an unsuspecting individual of her rights and the good faith that was owed to her throughout the negotiation process. The rule of law is intended precisely to avoid such abuses of power.

While our complaint is intended to highlight the importance of this issue from the perspective of Palestinian communities in Canada, we also wish to emphasize that we believe that this matter carries significance beyond that community. In no way can Justice Spiro's alleged conduct, which has not been denied by the Law School, be said to be above reproach in the view of reasonable, fair minded and informed persons outside of the Palestinian-Canadian community. The fact that several newspapers have reported on the University of Toronto's treatment of Dr. Azarova and, eventually, in Justice Spiro's alleged role in the termination of employment bid attests to the import of this issue for the Canadian public.[10] Public confidence in and respect for Justice Spiro, the Tax Court of Canada and in the Canadian judiciary more broadly have been put at serious risk by the alleged conduct.

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[9] *Ibid,* Integrity, Commentary para 3.
[10] *Supra*, note 1.

Perception of Impartiality has been Irrevocably Compromised

> *Judges must be and should appear to be impartial with respect to their decisions and decision making.*[11]

The impartiality of the judiciary is the central foundation of the judicial system. It is expected that the conduct of judges, "both inside and outside of court, maintains and enhances confidence in their impartiality and that of the judiciary."[12]

When judges lack or are perceived to lack impartiality, the administration of justice is compromised. The right to an impartial hearing forms the foundation of any legal system, and is binding on all members of the Canadian judiciary as both a matter of domestic and international law.[13]

There are reasonable grounds to believe that Justice Spiro may have been motivated by negative views towards Palestine and Palestinians when he allegedly interfered in a fair and robust hiring process and caused the unanimous job offer to be rescinded summarily and for discriminatory reasons. As noted above, Justice Spiro is not an international law scholar and is not qualified to opine on the quality of Dr. Azarova's academic work. Even if he had expertise in this area, he was not a part of the hiring process and allegedly interfered in that process for improper motives - to stifle criticisms of Israel that might arise out of well documented concerns for Palestinian human rights.

If the allegations made against him are true, Justice Spiro established to the public that he holds anti-Palestine views and is willing and able to act on them to the detriment of others. Accordingly, Palestinian-Canadians, Arab-Canadians, and those who work on issues related to Palestine and Palestinians have reasonable grounds to believe that an appearance before Justice Spiro may result in a negative decision based on their identity or the subject matter of their claim.

Pursuant to the CJC's Ethical Principles, members of the judiciary should always "exhibit respect for the law, integrity in their private dealings, and generally avoid the appearance of impropriety."[14] The duty to act with integrity is rooted in the need for judges to be and be seen as impartial at all times. The independence of the judiciary relies on it. Put simply, a lack of judicial integrity and impartiality is corrosive of judicial independence because a judiciary that is seen as lacking integrity and impartiality cannot convincingly argue for its independence.

The duty of the judiciary to act with integrity and impartiality are foundational principles that are universally recognized, so much so the international legal community have collectively come together to enshrine these principles into international law. Both the CJC's Ethical Principles and

[11] *Supra*, note 7, CJC Ethical Principles, "Impartiality".
[12] *Ibid*, Impartiality Principle A (General), para 1 (emphasis added)
[13] *Canadian Charter of Rights and Freedoms*, s. 7 and 11(d); *Universal Declaration of Human Rights*, art. 10; International Covenant on Civil and Political Rights, art. 14.
[14] *Supra*, note 7, Integrity Commentary para 3.

various international instruments link judicial conduct with the independence of the judiciary.[15] The CJC's Ethical Principles are reinforced by international standards. Indeed, the Ethical Principles concerning integrity and impartiality echo the *Bangalore Principles of Judicial Conduct*[16]. Other international principles make link between the conduct of a judge and the independence of judicial institutions. [17]

In light of the above, the complainants, as reasonable, fair minded and informed persons, have lost confidence in Justice Spiro's ability to carry out his judicial duties in an impartial manner.[18] If the allegations against him are found to be accurate, Justice Spiro's alleged activities demonstrate that he publicly holds anti-Palestinian views and, if these allegations are true, would be willing to act upon those views, without regard to the harm his actions will inevitably cause – and in fact did cause – to faculty[19], students[20], the university, Palestinian-Canadians, the judiciary and the administration of justice as a whole.

Conclusion

Justice Spiro's alleged conduct adds to an increasing number of incidents related to censorship on Palestinian human rights and international law. The Palestinian-Canadian community and those working on Palestine are closely watching how the CJC handles this matter. The CJC has an important role in assuring the public that judges ensure their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary at all times. This necessarily requires that the CJC provides that there is no place for partiality or racial bias within the judiciary and that judicial institutions are committed to upholding the dignity, freedom of expression and procedural fairness for all under the law. Without a strong and public response to Justice Spiro's alleged conduct, others with negative views on Palestinian human rights and international law will be further emboldened to act on their prejudices.

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[15] *Ibid,* Purpose, Principles 1 and 3; Part 2: Judicial Independence, Principles 1-4 and Commentary; Impartiality (Political Activity) and Commentary (General and Political Activity);

[16] In its 59th Session on 23 April 2003, the United Nations Commission on Human Rights passed Resolution 2003/43 in which it noted the *Bangalore Principles of Judicial Conduct* and brought those principles to the attention of the United Nations Member States, the relevant United Nations organs and intergovernmental and non-governmental organizations for their consideration. The text of the *Bangalore Principles of Judicial Conduct* is available online at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

[17] See for example *The Basic Principles on the Independence of the Judiciary,* U.N. A/Res/40/32 November 29, 1985 and U.N. A/Res/40/146 December 13, 1985 and *The Universal Declaration on the Independence of Justice* Available at https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf. See especially par. 2.10.

[18] The 1982 comments of the Canadian Judicial Council in the Berger matter stated that judges should not speak on controversial political matters that do not directly affect the operation of the courts.

[19] *Supra*, note 1. See also, Fine, Sean & Joe Friesen. "U of T law school under fire for opting not to hire human-rights scholar after pressure from sitting judge", (17 September 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/canada/article-u-of-t-law-school-under-fire-for-opting-not-to-hire-human-rights/>

[20] Paradkar, Shree. "'I was very, very mad': U of T law school students feel powerless amid hiring fiasco", (29 September 2020), online: *Toronto Star* <https://www.thestar.com/opinion/star-columnists/2020/09/29/i-was-very-very-mad-u-of-t-law-school-students-feel-powerless-amid-hiring-fiasco.html>.

ACLA, IJV and BCCLA request that the CJC exercise, to the fullest extent, its investigative and disciplinary powers and sanction Justice Spiro's alleged conduct, including referral to the Inquiry Committee.[21] If warranted, Justice Spiro should also be immediately required to provide a public apology, undertake anti-racism/oppression training that addresses anti-Palestinian racism with a fully qualified expert that holds the confidence of the Palestinian-Canadian community, and be prohibited from hearing any cases related, directly or indirectly, to Palestine/Israel. The seriousness of Justice's Spiro's alleged conduct also warrants a review into his fitness for the bench.

We are happy to provide further information for your investigation or answer any questions you may have.

Yours truly,

Arab Canadian Lawyers Association

Per: Dania Majid, Founder and President

Independent Jewish Voices Canada

Per: Corey Balsam, National Coordinator

British Columbia Civil Liberties Association

Per: Meghan McDermott,
Interim Policy Director & Senior Staff Counsel

[21] "Complaint review procedures", online: *Canadian Judicial Council* <https://cjc-ccm.ca/en/what-we-do/review-procedures>

Appendix A - Letter by the Former Directors of the IHRP Program

September 12, 2020

Professor Edward Iacobucci,
Dean University of Toronto Faculty of Law
78 Queens Park Toronto, Ontario
Canada

Via email

Dear Dean Iacobucci:

We write as former Directors of the International Human Rights Program at the Faculty of Law. On Friday, we learned that Professor Audrey Macklin had resigned her position as chair of the IHRP's Faculty Advisory Committee and of the circumstances giving rise to her resignation.

As the human rights community in Canada and elsewhere have been acutely aware, the IHRP has been without a permanent director for over a year. During that time, the Faculty of Law has initiated two searches for a Director with the international human rights background and expertise necessary to steer the program. As a result of the most recent search, the hiring committee, chaired by Professor Macklin, identified two viable candidates for the position. The hiring committee advised the Faculty that should neither of these candidates accept the position, there were no further options from the current pool and it would be a failed search.

Happily, Dr. Valentina Azarova – the hiring committee's top candidate – accepted the Faculty's offer in mid-August. Dr. Azarova's human rights practice in domestic and international settings over the past 15 years has been wide-ranging and impressive. She has carried out strategic litigation, legal advocacy, and legislative reform. She has worked to establish human rights enforcement mechanisms in Europe and beyond, and has regularly advised and consulted for United Nations fact-finding missions and mandateholders, governments, and civil society. She has taught international law and international human rights law since 2009, and established and taught clinical offerings since 2012. She holds a doctoral degree from the Irish Centre for Human Rights at NUI Galway, and has lived and worked in the Middle East and Africa.

The IHRP's most recent Director, Samer Muscati, immediately began working to help Dr. Azarova understand the duties of the Director and the foci areas of the IHRP to date. In the meantime, the Faculty of Law put Dr. Azarova in touch with immigration counsel to advise her on her options for securing a permit to work in Canada, and Dr. Azarova began planning to move with her partner from Germany to Toronto, where her stepchildren reside. In early September, however, Professor Macklin was advised that the Faculty had been contacted by a judge of the Tax Court of Canada, who had expressed concern about Dr. Azarova's scholarship on the operation of international law in the context of Israel's occupation of the Palestinian Territories. Shortly thereafter, Dr. Azarova's offer was rescinded by the Faculty. It is now our understanding that starting this week, you will be interviewing candidates already deemed by the hiring committee as unsuitable for the position of IHRP Director.

We recognize that it is the Dean's prerogative to make the ultimate decision with respect to hiring at the Faculty of Law. We expect, however, that such decisions be made in good faith. We are therefore alarmed by the sequence of events, which strongly suggests improper external interference by a member of the

judiciary in the hiring of the IHRP Director as well as a serious breach of confidentiality in the hiring process. Given that the essential nature of international human rights practice is to hold the powerful to account, any IHRP Director and their work will unavoidably be the subject of criticism from some quarters. As a staff appointment, the position of IHRP Director does not confer academic freedom. The IHRP Director's security of tenure is particularly vulnerable, and the Faculty of Law should stand as a bulwark against external pressures to the IHRP's work. Instead, the facts suggest that your office has caved to political pressure.

If the Faculty of Law chooses to install a new IHRP Director from a pool of candidates that the hiring committee has already rejected as unsuitable and unqualified for the position, it will send the message that the University of Toronto's law school has little interest in providing a serious experiential learning program in international human rights practice, at a time when the need for lawyers committed to preserving and advancing fundamental freedoms at home and abroad is greater than ever. Such a step would diminish the reputation of the Faculty of Law and irrevocably damage the reputation of the IHRP and all those associated with it.

Instead, we urge you to renew the Faculty's offer to Dr. Azarova, whose breadth of practice and depth of expertise would be a tremendous contribution to the student experience, and whose reputation and networks in the global human rights community would bring credibility to the IHRP and the University of Toronto. We understand that her immigration status may result in some delay before she can formally start at the IHRP. However, we believe that after a 12-month search and the interests at stake, she is worth a few months' wait.

Sincerely yours,

Carmen Cheung and Samer Muscati

From: info@cjc-ccm.ca
To: info
Subject: Website - Complaint form
Date: October-08-20 10:16:09 AM
Attachments: The Canadian Judicial Council complaint_8 October 2020.pdf

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From: info@cjc-ccm.ca Sent: 08/10/2020 10:16:09 AM
First name:
Imtenan

Last name:
Abd-El-Razik

Email:
contact@camwl.ca

Phone number:
6475325324

Judge name:
David E. Spiro

Type:
New complaint

Court name and location:
Tax Court of Canada

8 October 2020

The Canadian Judicial Council
Ottawa
By Webform

Dear Council Members,

The Canadian Association of Muslim Women in Law (**CAMWL**) and the Canadian Muslim Lawyers Association (**CMLA**), which together support over 300 lawyers, law students, and scholars across Canada, write in complaint about the conduct of Judge David E. Spiro of the Tax Court of Canada.

On September 17, 2020, the Toronto Star reported that the Dean of the University of Toronto's Faculty of Law, Edward Iacobucci, rescinded an offer to Dr. Valentina Azarova, a prominent international academic, to direct the Faculty's International Human Rights Program (IHRP):

> "The reversal came after reports of pressure from a sitting judge and a major donor to the faculty. He reportedly expressed concerns in private over Azarova's past work on the issue of Israel's human rights abuses in Palestine."

On September 23, 2020 the Globe and Mail reported that the judge was Justice David E. Spiro:

> "He [Justice Spiro] is alleged to have contacted a member of the law school's fundraising team about the hiring of a director for the International Human Rights Program.
>
> The allegation is contained in a chronology prepared by law professor Audrey Macklin, chair of the hiring committee for the position. The chronology, obtained by the Globe,

> says Justice Spiro expressed concern about the committee's first choice, Valentina Azarova over her 'Israel/Palestine work.'"

If this is true, Justice Spiro would have improperly interfered with the hiring process at an independent and publicly funded university in furtherance of his private political views concerning the rights of a particular ethnic group (Palestinians).

This is alarming to the members of CAMWL and the CMLA on multiple levels.

First, as we represent hundreds of officers of the court, we have a direct stake in the reputation of the Canadian judicial system. The Canadian judiciary has always regarded itself as neutral, impartial and independent. Clandestine attempts at influencing the hiring decisions of a public institution harken to the practices of corrupt, judicially compromised regimes. Ironically, these are the very types of practices -- especially the furtherance of private political positions concerning the rights of particular ethnic groups -- that often attract the study and scrutiny of the IHRP.

Secondly, if proven, the allegations concerning the judge in question will taint him with the permanent spectre of bias or perceived bias for many litigants. Islamic charities, Arab charities, organizations advancing the rights of Palestinians, Muslim religious organizations, and Palestinian cultural and religious organizations, can never again expect fair treatment before this judge. In fact, this behaviour is cause for concern for others that similarly rely on or promote international human rights law -- including Canadian Indigenous groups, who may appear before the Federal Tax Court.

We also want to stress to the CJC that its actions in the disposition of this issue will directly determine the extent to which confidence in the judiciary is affected. Should the CJC be seen to be acting diligently in investigating and reporting what happened, it will sustain the community's confidence. On the other hand, if the complaints are dismissed without a full investigation, the impression will be that the alleged actions are unremarkable and common, unworthy of concern. Without official information, the community will continue to speculate on the identity of the judge in question, their exact conduct, and whether the alleged actions are common and tolerated in the judiciary. The reputation of the Justice Spiro, the Tax Court bench, and the judicial system as a whole are all at stake.

We request that the CJC investigate the actions and report publicly on its findings as soon as possible. Osgoode Hall Professor Craig Scott has written a letter to Chief Justice Richard Wagner setting out the names of individuals that had first-hand knowledge of the situation including:

1. Edward Iacobucci, Dean of Law, Faculty of Law, University of Toronto;
2. Audrey Macklin, Professor of Law, Faculty of Law, University of Toronto;
3. Alexis Archbold, Assistant Dean, Faculty of Law, University of Toronto; and

4. Jennifer Lancaster, Assistant Dean (Advancement), Faculty of Law, University of Toronto.

It is imperative that the CJC deploy all the investigative tools at its disposal including compelling the production of relevant documents to determine the facts and to maintain public confidence in the judiciary.

Your consideration is highly appreciated, and we look forward to hearing from you.

Sincerely,

The CAMWL Steering Committee: contact@camwl.ca
The CMLA Board of Directors: info@cmla-acam.ca

Canadian Judicial Council
Conseil canadien de la magistrature

Confidential

CJC Files: 20-0254, 20-0256,
20-0260, 20-0261,
20-0268, 20-0271,
20-0274, 20-0275

30 September 2020

The Honourable E.P. Rossiter
Chief Justice
Tax Court of Canada
200 Kent Street
Ottawa, ON K1A 0M1

Dear Chief Justice Rossiter:

In accordance with section 8.1 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations*, I enclose for your attention a copy of eight complaints involving Justice David E. Spiro. Associate Chief Justice Kenneth G. Nielsen has directed that comments be sought from the judge in respect of the complaint. A copy of my letter to the judge requesting his comments is enclosed.

Associate Chief Justice Nielsen would also appreciate receiving your comments, as Chief Justice, in order to assist him in considering the complaint.

In keeping with the *Review Procedures*, I would ask that you provide written comments, if any, within 30 days. Kindly reply to the Council office by regular mail: Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by email: info@cjc-ccm.ca.

Thank you for you attention to this matter.

Yours sincerely,

Original signed

J. Michael MacDonald
Acting Executive Director

Encls.

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0254, 20-0256,
20-0260, 20-0261,
20-0268, 20-0271,
20-0274, 20-0275

30 September 2020

The Honourable D.E. Spiro
Tax Court of Canada
200 Kent Street
Ottawa, ON K1A 0M1

Dear Justice Spiro:

At the request of the Honourable Kenneth G. Nielsen, Associate Chief Justice of Alberta and Vice Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council, I am writing pursuant to section 8.1 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations* (*Review Procedures*) regarding eight complaints. These complaints concern an alleged conversation you had with a member of the law school about the potential hiring of Dr Valentina Azarova as Director of IHRP. Copies are attached for your ready reference.

As you will appreciate, it is difficult to consider a complaint in its full and proper context without comments from the judge in question. Therefore, in order to address this complaint in accordance with the *Review Procedures*, Associate Chief Justice Nielsen requests that you provide any comments you may have which concerns this matter. It would be important that you confirm, if that is the case, the alleged communication with a member of the Faculty and that this person be identified. Associate Chief Justice Nielsen asks that you detail the alleged conversation and its intent, and invites you to provide any comments you may consider pertinent.

In keeping with the *Review Procedures*, I would ask that you provide written comments, if any, within 30 days. Kindly reply to the Council office by regular mail: Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by email: info@cjc-ccm.ca. Also note that a copy of the complaints will be transmitted to Chief Justice Rossiter for comments.

.../2

After considering all available information, including any written comments you may wish to make, Associate Chief Justice Nielsen will decide to proceed in one of four ways, in keeping with the provisions of the *Review Procedures*:

> -dismiss the matter on the basis that no further measures need to be taken (in such circumstances, concern may be expressed about your conduct where necessary);
> -hold the matter in abeyance to pursue remedial measures in consultation with you and your Chief Justice;
> -ask an investigator to gather further information to assist in considering the matter;
> -refer the matter to a Panel, in accordance with subsection 2(1) of the Canadian Judicial Council Inquiries and Investigations By-laws, 2015 ("By-laws"), on the basis that the matter may be serious enough to warrant your removal from office.

Please note that the Vice Chairperson, may in reviewing this matter, consider the disposition of any past complaint against you.

Allow me to bring to your attention that, in some cases, Council finds it very helpful to provide to the complainant, in whole or in part, the judge's response to the complaint.

Information on the Canadian Judicial Council, and the text of the *Review Procedures*, can be found on the Council's web site at www.cjc-ccm.gc.ca. If I can provide any additional information in that regard, please do not hesitate to contact me.

Thank you very much for your attention to this request.

Yours sincerely,

Original signed

J. Michael MacDonald
Acting Executive Director

Encls.

cc. Chief Justice Rossiter

Rec'd. Oct 27/2020 JC.

Tax Court of Canada

Ottawa, Canada
K1A 0M1

Cour canadienne de l'impôt

The Honourable Eugene P. Rossiter
Chief Justice

L'honorable Eugene P. Rossiter
Juge en chef

October 23, 2020

J. Michael MacDonald
Acting Executive Director
Canadian Judicial Council
Ottawa, ON
K1A 0W8

Dear Chief Justice MacDonald:

Re: CJC Files: 20-0254, 20-0256, 20-0260, 20-0261, 20-0268, 20-0271, 20-0274 and 20-0275

I am in receipt of your correspondence of September 30, 2020 and the enclosures therein.

Justice David Spiro is the newest Judge on the Court, having been appointed on April 15, 2019. We were very pleased to have Justice Spiro come to the Tax Court of Canada as he is very knowledgeable in tax law and also has litigation experience.

Since his appointment, I was able to notice Justice Spiro is a very collegial individual and well appreciated by the Judges at the Court. He is respectful, engaging and very communicative and is devoted to being an engaged and empathic Judge.

From his appointment, he was able to take on high technical tax work with enthusiasm and ease. I, as Chief Justice, and Associate Chief Justice Lamarre have complete trust in his skills and abilities related to his judicial functions.

Justice Spiro has been very active since his appointment on a variety of projects for the Tax Court of Canada. He is one of two Judges on our Continuing Legal

Education Committee and he is a member on a Judge's committee which is reviewing procedural issues and amendments associated with the *Income Tax Act*, the *Excise Tax Act*, the Canada Pension Plan, Old Age Security and *Employment Insurance Act*, as well as the *Tax Court of Canada Act*.

Justice Spiro is very well thought of in the Bar and the tax community. He is a person who brings people together and has been an active participant in the advancement of pro-bono services for lay litigants before the Tax Court of Canada prior to his appointment.

While I do not have direct knowledge of the events related to the complaints filed against Justice Spiro, I understand that the facts do not appear to be those reported by the media. I understand Justice Spiro has explained what transpired in his reply to you. He readily understands his role as a Judge and I have reinforced with him the dos and don'ts of a person in a judicial role, the importance of not only conflicts of interest but also perceived conflicts of interest and bias. He indicated appreciating the advice that has been provided to him and I have no doubt that this is a one-off incident that will not occur again.

The Court has taken the initiative, for perception purposes, of having all files that have been assigned to Justice Spiro, whether these be trials or duty judge files, reviewed by the Associate Chief Justice of the Tax Court of Canada to ensure that to the best of the Associate Chief Justice's assessment, in accordance to the information on the file, no files upon which he will adjudicate would have, as parties, or agents or counsel, anyone who could be thought as being of Muslim or of the Islamic faith. Further, Justice Spiro will recuse himself from any file at any time in which it appears to him that either the counsel, representative of any litigant or a litigant is a Muslim or is of the Islamic faith immediately. In such circumstance, the file will be reassigned to another Tax Court of Canada Judge. This process will allow for any concern related to a potential perceived bias from Justice Spiro to be removed.

I advise that both I and the Tax Court of Canada Associate Chief Justice have the utmost faith in Justice Spiro's ability to act impartially and without bias on litigation that comes before him. We believe he has and will continue making a

valuable contribution to the Canadian public in his role as a Justice of the Tax Court of Canada.

All of which is respectfully submitted.

Eugène P. Rossiter
Chief Justice
c.c. Associate Chief Justice Lamarre

Tax Court of Canada

Ottawa, Canada
K1A 0M1

Cour canadienne de l'impôt

The Honourable Justice David Spiro

L'honorable juge David Spiro

October 26, 2020

J. Michael MacDonald
Acting Executive Director
Canadian Judicial Council
Ottawa, Ontario
K1A 0W8

Dear Mr. MacDonald:

Re: Complaints to Canadian Judicial Council

Thank you for your letter of September 30, 2020. I appreciate the opportunity to provide a full and proper context for Associate Chief Justice Nielsen's consideration of the complaints that accompanied your letter and the subsequent complaints forwarded to me by Ms. Gauthier on October 20, 2020.

I begin by acknowledging that I raised a controversial matter with an official of the University of Toronto on September 4, 2020 in respect of an appointment, or prospective appointment, at the Faculty of Law. In doing so, I made a mistake. I deeply regret that mistake.

My contact with that official led to unintended consequences including raising a question about my absolute commitment to impartiality toward all litigants and counsel who appear before me in the Tax Court of Canada. I deeply regret that as well.

I shall respond in detail to your requests for information below. In summary, it would appear that the complaints are largely based on speculation and misleading media reports that are, in some respects, inaccurate. At no time did I attempt to exert pressure or influence the hiring decision referred to in the media reports. At no time did I communicate with Dean Edward Iacobucci of the Faculty of Law about the matter. Dean Iacobucci has stated publicly that any implication that he was influenced in any way by anyone outside of the University is untrue and objectionable.

I did have a conversation with an official of the University, Ms. Chantelle Courtney, in which I mentioned that I had learned (from Ms. Judy Zelikovitz, a staff member of the Centre for Israel and Jewish Affairs ("CIJA")) that a candidate for the position of Director of the International Human Rights Program ("IHRP") at the Faculty of Law had written articles and associated herself with a particular set of positions on the politically

fraught Israel-Palestine conflict that may be considered by some to be one-sided and provocative.

I did not tell Ms. Courtney, or anyone else at the University, that the candidate, Dr. Valentina Azarova, should not be appointed. I expressed no opinion, political or otherwise, on the merits of her scholarship or the political positions she had advocated. I did express the hope that sufficient due diligence would be done in advance of any such appointment to enable the University of Toronto and the Faculty of Law to respond effectively if and when criticism arose as a result of the candidate's appointment. I mentioned the matter to Ms. Courtney, at the end of a personal telephone conversation that she had scheduled with me, because I cared deeply about the University and its law school.

Although Ms. Zelikovitz suggested that I speak to Dean Iacobucci about the matter, I did not think it appropriate to do so and I did not do so. Nor did I ask Ms. Courtney to communicate with the Dean.

Any implication in the complaints that litigants or counsel who appear before me have reason to fear that I am, or may appear to be, biased against them based on their race, religion, ethnic origin, or political views is groundless. As discussed below, prior to my appointment I devoted a great deal of time to helping build bridges of understanding and trust between Israelis and Palestinians as well as Jews and Muslims.

Having said that, I wish to assure you and the members of the Council that the media reports and the complaints that Council has received have heightened my awareness of the necessity to exercise the highest degree of caution in all of my communications in order to avoid any perception, accurate or otherwise, that persons who appear before me may have reason to fear that I may approach my judicial responsibilities based on anything other than scrupulous attention to the facts of the case and the applicable law.

Background

Since 1984, when I entered the Faculty of Law at the University of Toronto as a first-year student, I enjoyed a close relationship with the law school. I have always considered myself fortunate to have learned from scholars such as Professor Stephen Waddams, Professor Robert Sharpe (now the Hon. Robert Sharpe), and Professor Michael Trebilcock.

Since graduation, I have kept in touch with the tax professors at the law school. Those professors included Arnold ("Arnie") Weinrib who taught me tax in the mid-1980s, and, more recently, Ben Alarie, and Emily Satterthwaite who teach tax at the law school. I saw them when I returned to the law school to attend tax policy workshops where tax scholars would present their draft papers. I enjoyed those events as they allowed me to catch up on a casual basis with faculty members and students.

I cared deeply about the students at the law school in a number of ways. I wanted to ensure that they had the best physical facilities. I worked with Dean Mayo Moran to get the new law school building off the ground. I gave money and raised money from others (including the firm at which I was then counsel, Fraser Milner Casgrain LLP) to make the new law building, the Jackman Law Building, a reality.

I also wanted to ensure that those from less financially privileged backgrounds would have the opportunity to attend law school at U of T. Many prospective students were born outside Canada, or their parents were born outside Canada, and their financial circumstances were such that they were unable to afford the high cost of a legal education. I became deeply involved in the campaign to raise the capital necessary to fund additional bursaries for students in financial need (the Campaign for Excellence without Barriers). Once again, I gave money and raised money from others, including from our family foundation.

Finally, I wanted to create opportunities for students at the Faculty of Law to gain valuable courtroom experience and assist taxpayers who would otherwise be unrepresented before the Tax Court of Canada. In 2011, I helped establish a *pro bono* program to do exactly that. It started at the Faculty of Law and spread to law schools across the country. I received a volunteer service award (an Arbor Award) from the University of Toronto in 2011 in recognition of my work on that program.

The Incident

During the Excellence Without Barriers Campaign I worked closely with Ms. Courtney, who was then Assistant Dean of Advancement at the Faculty of Law. I became what was called a "campaign advisor" along with a handful of other alumni. Most of our work consisted of meetings where we reviewed lists of alumni from whom we might solicit gifts. Over time, Ms. Courtney and her husband became close personal friends.

Before the Excellence Without Barriers Campaign concluded, Ms. Courtney was promoted within the University to Assistant Vice-President, Divisional Relations, Division of University Advancement. Her job is to coordinate the advancement efforts of various faculties and departments. Ms. Courtney worked for the "central administration" of the University. She was no longer affiliated with the Faculty of Law but continued to take an active interest in it. We continued to stay in touch.

When I was appointed to the Tax Court of Canada in April, 2019 I resigned all of my outside board positions, namely, my positions on the boards of the Canadian Opera Company, the Canadian Opera Foundation, and CIJA. I also resigned as a campaign advisor to the Excellence without Barriers campaign at the Faculty of Law.

On August 30, 2020 Ms. Courtney sent me an email suggesting that we catch up, as we had not spoken over the course of the summer. Over the following few days we exchanged emails with news about family and work and how we were coping during the COVID-19 pandemic. On September 1, 2020 we arranged to speak by telephone the

following Friday morning, September 4. The conversation was not arranged so that we could discuss the appointment, or potential appointment, of a Director of the IHRP as I was unaware of any such appointment at that time.

On September 3, I learned from Ms. Judy Zelikovitz, a member of the CIJA staff, of the appointment, or potential appointment, of Dr. Azarova as Director of the IHRP. I understood from her that the appointment would likely be followed by loud and public protests. I felt that such protests might harm the reputation of the University of Toronto in general and the Faculty of Law in particular.

In particular, Dr. Azarova was described to me by Ms. Zelikovitz as an anti-Israel academic crusader, and an activist who had written polemical articles focused on accusations against Israel in respect of the politically fraught Israel-Palestine conflict. I was not personally familiar with Dr. Azarova's writing and advocacy and did not know whether those characterizations were fair. It was apparent to me, however, that the appointment would likely be controversial and that the University and law school should be prepared for the protests that were likely to ensue.

On the morning of September 4th Ms. Courtney called me as arranged. We caught up on each other's lives since we last spoke. She told me in general terms about future fundraising initiatives at the University of Toronto and at the Faculty of Law.

At the conclusion of our conversation, I told Ms. Courtney that I had learned that Dr. Azarova was either being considered for appointment or had been appointed (but not yet announced) as Director of the IHRP. I also told Ms. Courtney that the appointment of Dr. Azarova would likely be protested and criticized for the reasons set out above. I did so because I did not want the University of Toronto, or the Faculty of Law, to be embroiled in controversy without having prepared themselves to deal with it. She told me that she knew nothing of that particular appointment, but assured me that the University would, as usual, do its due diligence. As I did not know the status of the appointment, I asked her to let me know whether the appointment had been made (but not yet announced) or whether it had not been made. She said that she would follow up.

I did not tell Ms. Courtney that I intended to call the Dean, as I had no such intention; nor did I ask Ms. Courtney to communicate with the Dean.

At no time during our conversation did I express any personal complaint, concern, disapproval, or displeasure in respect of Dr. Azarova's scholarship. My only concern was that the University and Faculty of Law should be prepared for what I had been told by Ms. Zelikovitz would likely be an adverse and highly public reaction.

To the extent that I described to Ms. Courtney the sources of such a reaction, it is possible that she understood me as expressing my own personal views. In retrospect, I should have made it clear to Ms. Courtney that I was not expressing my own personal views in describing the reaction that I feared might ensue.

Ms. Courtney sent me an email message later that day saying that Dean Iacobucci had told her that no decision had been made. I left it at that as I had accomplished my objective, namely, to provide Ms. Courtney with advance notice of what appeared to be a potentially contentious appointment that I understood was likely to lead to controversy for the University and its law school.

At no time did I speak, or communicate in any way, with any of the following individuals named by Professor Scott, the Canadian Association of Muslim Women in Law, or the Canadian Muslim Lawyers Association in their complaints:

1. Edward Iacobucci, Dean of Law, Faculty of Law, University of Toronto
2. Audrey Macklin, Professor of Law, Faculty of Law, University of Toronto
3. Alexis Archbold, Assistant Dean, Faculty of Law, University of Toronto
4. Jennifer Lancaster, Assistant Dean (Advancement), Faculty of Law, University of Toronto

Any suggestion that I attempted to exert pressure on the Dean, or any other individual involved in the hiring process, or attempted to interfere with integrity of the hiring process, is inaccurate.

Although I am confident that the conversation referred to in the media reports and the complaints is the one I had with Ms. Courtney, in the interest of full disclosure I should add that I had one other telephone conversation on September 4, 2020, with someone whom I have known for over 35 years, Arnold ("Arnie") Weinrib. I told Arnie what I had told Ms. Courtney earlier the same day. Arnie has been retired from the Faculty of Law for several years now. He and I have lunch together every few months and have done so for decades. He is a close friend, mentor and confidant. After receiving Ms. Courtney's email message that no decision had been made, I sent Arnie a quick email message to that effect along with a brief memo that Ms. Zelikovitz had sent me covering the same ground as I mentioned earlier. At no time did I ask Arnie to speak with the Dean or anyone else involved in the appointment process.

As mentioned above, Dean Iacobucci has confirmed in a public statement, dated September 18, 2020, that political considerations were not involved in the decision not to proceed with further discussions about the position with Dr. Azarova. He wrote that "[a]ssertions that outside influence affected the outcome of that search are untrue and objectionable. University leadership and I would never allow outside pressure to be a factor in a hiring decision." He also wrote that "no offer of employment was made because of legal constraints on cross-border hiring that meant she could not meet the Faculty's timing needs. Other considerations, including political views for and against any candidate, or their scholarship, were and are irrelevant."

Response to Your Letter and Complaints

The complaints forwarded to me appear to be based on speculation and misleading media reports that are, in some respects, inaccurate.

As will be apparent from the account set out above, the conversation that has given rise to the media coverage and the complaints was not with the Dean of the Faculty of Law or with anyone else involved in the hiring process. I learned of Dr. Azarova's appointment, or potential appointment, from a staff member of CIJA and mentioned it to Ms. Courtney, as part of the telephone conversation recounted above.

I did not express to Ms. Courtney, or anyone else, any personal position or opinion on any of the following matters:

(a) the operation of international law in the context of Israel's occupation of the Palestinian Territories, the law of belligerent occupation, or the politics of the Palestinian Territories (Professor Green's first complaint);
(b) Dr Azarova's research on Israeli occupation of Palestinian lands (Professor Green's second complaint);
(c) Dr. Azarova's work on human rights abuses in the occupied Palestinian territories by the Israeli government (the NCCM complaint);
(d) Dr. Azarova's support for a state of Palestine (Mr. Fernando's complaint);
(e) Dr. Azarova's past work on the issue of Israel's human rights abuses in Palestine (the CAMWL and CMLA complaints);
(f) Dr. Azarova's Israel/Palestine work (the CAMWL and CMLA complaints);
(g) Dr. Azarova's scholarship on Palestine/Israel (the ACLA, IJV, and BCCLA complaints); or
(h) Dr. Azarova's critical scholarship on Israel's occupation of Palestinian territory (the ACLA, IJV, and BCCLA complaints).

I agree with the NCCM that taking political positions on issues such as the Israel-Palestine conflict is inappropriate. That is not what I have done. Nor did I exhibit any animus towards Dr. Azarova as alleged by the ACLA, IJV, and BCCLA in their complaints.

I do not harbour any views that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim. I have never made any statements, public or private, that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim. In fact, as detailed below, I devoted a great deal of time before my appointment to enhance my understanding of the Israel-Palestine conflict and to build bridges between the parties and the faith communities involved.

For example, while I served on the board of CIJA I travelled to Israel with my fellow board members. We met in East Jerusalem (on an off the record basis) with the internationally respected economist and former Prime Minister of the Palestinian Authority, Dr. Salam Fayyad, and with Ambassador Husam Zomlot, who has served as Head of the Palestinian Mission to the United Kingdom, Head of the PLO Mission to the United States of America, and Strategic Affairs Advisor to the President of Palestine. The purpose of these meetings was to better understand and appreciate the Palestinian position with respect to ways in which the conflict between Israelis and Palestinians might be resolved.

Attached for your information is an article I wrote in early 2017 for CIJA members and supporters, reflecting on the CIJA board mission to Israel. It demonstrates no bias against any racial, religious, or ethnic group, but rather an open mind interested in listening to all perspectives on the conflict and considering the possibilities for peace in the region.

There are other examples as well. Attached is an email exchange arising out of a lunch meeting that I organized at the Faculty of Law in early 2018 featuring a visiting Fulbright scholar (J.R. Rothstein) and a scholar in Islamic Law (Shaykh Ibrahim Hussain). We explored one of the many intersections between Judaism and Islam by focusing on the ancient rule of law, common to both legal traditions, prohibiting usury.

Throughout my career at the Bar I worked closely with lawyers of many different races, religions, and ethnic origins, without any suggestion of bias. I would encourage the CJC to interview the following lawyers who, though I have not told them I am making this suggestion to you, I am confident would assure you that I have always treated them, and everyone else, fairly without regard to race, religion, or ethnic origin:

1. Ms. Bhuvana Rai, Borden Ladner Gervais LLP, Ottawa. I served as mentor to Ms. Rai while she was a student at the University of Toronto Faculty of Law. She later served as a law clerk to the judges of the Tax Court of Canada.
2. Ms. Zahra Nurmohamed, KPMG Law LLP, Toronto. I practiced with Ms. Nurmohamed when I was counsel at Fraser Milner Casgrain LLP.
3. Mr. Jehad Haymour, Bennett Jones LLP, Calgary. I practiced with Mr. Haymour when I was counsel at Fraser Milner Casgrain LLP.
4. Mr. Alnasir ("Al") Meghji, Osler Hoskin and Harcourt LLP, Toronto. Mr. Meghji was a colleague at the Department of Justice. He then acted for taxpayers while I remained at the DOJ. Finally, we were colleagues at the bar acting for our respective clients before the courts.

The allegations that there are reasonable grounds to believe that I may have been motivated by negative views towards Palestine and Palestinians, that I personally hold anti-Palestine views, and that I am willing and able to act on those views to the detriment of others are untrue (page 5 of the ACLA, IJV, and BCCLA complaint).

Similarly, the allegations that I publicly hold anti-Palestinian views and would be willing to act upon those views and that I personally hold negative views on Palestinian human rights and international law (page 6 of the ACLA, IJV, and BCCLA complaints) are similarly untrue.

Since reviewing the complaints that accompanied your letter of September 30, 2020, I have learned that Professor Leslie Green has written a third complaint to the CJC (addressed to Chief Justice Wagner in his capacity as Chair of the Council). Professor Green's third letter is dated September 29, 2020. It was evidently released to the University of Toronto Faculty of Law independent student publication and website www.ultravires.ca, where it is reproduced.

In his letter of September 29, Professor Green expands his first two complaints by quoting selectively from a letter I signed in June 2009 (ten years before I was appointed to the Tax Court of Canada). I have not seen that letter for some time, but as I recall the letter protested the lack of balance at an upcoming conference concerning the Palestinian-Israeli conflict at York University. Professor Green's implication seems to be that I was expressing my own personal views in that letter and that those personal views motivated me to mention the prospective appointment of Dr. Azarova as Director of the IHRP in my conversation with Ms. Courtney eleven years later.

This implication is wrong for at least three reasons.

First, I wrote the June 2009 letter in a representative capacity. The views expressed in the letter were those of the UJA Federation of Greater Toronto. I would have signed it in my capacity as Chair of UJA Federation's Committee on Public Affairs. The letter would not have expressed my own personal views. It was UJA Federation's letter, not my own personal correspondence.

Second, the purpose of the letter was not to attempt to suppress academic freedom, as Professor Green suggests. It was to protest that the conference was in danger of becoming one-sided and (as, in fairness, Professor Green observes) to suggest fairness and balance, qualities that Professor Green acknowledges are essential in a judge.

Third, as detailed above, my motivation in mentioning to Ms. Courtney Dr. Azarova's potential appointment was to alert her to the controversy that I understood would likely result upon her appointment. I hoped that the Faculty of Law and the University would be ready to respond to the backlash as I cared deeply about both.

The June 2009 letter from UJA Federation must also be considered in the context of the controversy surrounding the York University conference. The UJA Federation was hardly alone in expressing concerns. In fact, the conference was so controversial that the President of the University, Dr. Mamdouh Shoukri, appointed retired Supreme Court of Canada Justice, the Hon. Frank Iacobucci, to review what had occurred and to make recommendations for future conferences.

Mr. Iacobucci reported that in the months leading up to the conference the President's office received between 400 and 500 emails a week pertaining to the conference, mostly from members of the Jewish community alleging that the conference was anti-Semitic and demanding that action be taken. B'nai Brith issued a community alert on its listserv.

Professor Ed Morgan of the University of Toronto's Faculty of Law, a former President of the Canadian Jewish Congress (now Justice Morgan of the Ontario Superior Court of Justice) had agreed to serve on the conference organizers' Advisory Committee but withdrew because of concerns with the direction that the conference was taking. Similarly, Professor Howard Adelman withdrew from the conference citing concerns with the inclusion in the conference of papers from "unequivocal Israel bashers".

Herschel Ezrin of the Canadian Council for Israel and Jewish Advocacy (a predecessor of CIJA) wrote that "events like this should not have the sanction of the University".

A presenter at the conference reported to Mr. Iacobucci that he was disappointed that the conference was devoid of moderate, thoughtful debate. He said he was embarrassed when he realized that it served only to bolster a specific political position rather than to make any valuable contribution to bridging gaps between divergent positions. Some attendees felt the conference simply became the latest in a line of conferences in which the same group of anti-Israel activists came together for a political purpose.

Mr. Iacobucci emphasized in his 64-page report that his mandate was not to affix blame to anyone involved in the conference. He wrote that academic freedom is important but added that "it is wrong to assume academic freedom is unlimited. It does not give a licence to speak or teach whatever one wants but rather it grants the freedom to pursue a scholarly profession according to the norms and standards of that profession....In other words, the concept of academic freedom, like that of freedom of expression, entails not only rights but also responsibilities."

Conclusion

While I certainly respect the views of each of the complainants, they are unfortunately ill-informed, as they are based on speculation and misleading media reports that are, in some respects, inaccurate.

I would like to assure the Council that the media attention and complaints arising out of my conversation with Ms. Courtney - which was a mistake that I deeply regret - have heightened my awareness of the need for me to avoid saying anything that might lead to a perception, accurate or otherwise, that persons who appear before me may have reason to fear that I may approach my judicial responsibilities based on anything other than scrupulous attention to the facts of the case and the applicable law.

I have learned that words spoken outside the courtroom by a judge, even if not intended for publication, may create the wrong impression about the judge's integrity and impartiality thereby having the potential to diminish the confidence of Canadians in the administration of justice.

In particular, I ought to have resisted the temptation to provide advance notice to the University of Toronto of the controversy that I feared would result from the appointment of Dr. Azarova. I do not owe a duty to the University of Toronto or its law school. However, I do owe a duty to members of the public to ensure that I am completely objective and impartial in my work as a judge and that I am seen to be completely objective and impartial in that work.

Finally, I regret any embarrassment or concern that the media reports arising from my conversation with Ms. Courtney have caused to my colleagues on the Tax Court of Canada and the Canadian judiciary as a whole.

Should you require any further information with respect to this matter, please do not hesitate to contact me.

Yours sincerely,

The Honourable D. E. Spiro
Encls.
cc. Chief Justice Rossiter

Reflections on our CIJA Board Mission to Israel

February, 2017

This year's CIJA board mission was exceptional. Not only because it occurred at a turning point in how we think about the "peace process", but because it featured an outstanding array of speakers who represented a cross-section of perspectives on the issues currently facing Israel and Israelis today.

Although it is difficult to generalize, the tone of our discussions was cautiously optimistic. For example, resolution of the Israeli-Palestinian conflict continues to be elusive but, at the same time, a range of new approaches is being considered and discussed. The "two-state solution" no longer appears to be the only way forward, though it remains the preferred policy approach. For example, Adv. Gilead Sher elucidated what a classic "two-state solution" might look like and how it might be achieved.

We had the privilege of meeting with leading politicians at the Knesset, with the exception of Prime Minister Netanyahu who was on his way to Washington, D.C. to meet with President Trump. Isaac Herzog, Leader of the Official Opposition, and Yair Lapid, Leader of Yesh Atid, spent time with us as did a number of ministers and deputy ministers as well.

Dan Shapiro, the former U.S. Ambassador to Israel provided a personal perspective on the U.S.-Israel relationship during the Obama years. His behind the scenes insights enhanced our understanding of the dynamics of this unbreakable alliance over those trying years which included an ill-fated effort by Secretary of State John Kerry to broker a peace agreement between Israel and the Palestinians in 2013/2014.

Our lunch session with the new Canadian Ambassador to Israel, Deborah Lyons, was among the most inspiring and encouraging experiences of our mission. She is smart, personable and energetic and is genuinely interested in hearing our community's perspective on a wide variety of issues ranging from trade to diplomacy. This remarkable openness was also reflected in our discussion with Canada's representative to the Palestinian Authority, Scott Proudfoot. We were struck by his frank assessment of the precarious position of President Abbas in particular and the Palestinian Authority in general. Many Israelis are waiting to see what's next on the Palestinian side and are reluctantly putting their hopes for a peace agreement on hold in the interim.

It was the "people to people" initiatives that most impressed, and touched, our board members. The Kids4Peace initiative brings together young people from Jewish and Palestinian communities in and around Jerusalem to play and learn together, fostering mutual respect and understanding and serving as a beacon of hope for the next generation.

The tireless efforts by many Israeli citizens to assist victims of the Syrian civil war is awe-inspiring as well. Dr. Nir Boms coordinates efforts on the ground and related to us what one Syrian told him: "We were always taught that the Jews and Israelis wanted to

kill us and that the Russians and Iranians were our friends. Now the Jews and Israelis are saving our lives and it is the Russians and Iranians who are killing us." The grassroots response of ordinary Israelis to this massive humanitarian crisis has been heartwarming – everything from clothing and food drives to raising funds through crowdsourcing and, of course, treating those with life-threatening injuries in Israeli hospitals. This is, in many respects, Israel at its finest.

We heard from representatives of the Arab sector whose voices have, too often, been forgotten. For example, Mohammad Darawshe is a leading spokesman for the Arab community who received a great deal of criticism for leading a school trip to Auschwitz several years ago. He noted that at the outset of the Second Intifada (2000), as Palestinian violence threatened to spill over into Israel, the Israeli Arab community distanced itself from the Palestinians and charted its own course. Though not entirely comfortable with the national anthem (which speaks of a "Jewish soul") and the flag (which lacks any Arab symbol), he remarked that the vast majority of Israel's Arab population are proud to be citizens and feel fortunate to live and work in the State of Israel.

With respect to the evolving role of Haredim (the ultra-orthodox) in Israeli society, we visited Intel Jerusalem that has a special program for Haredi women who are often the sole breadwinners in their families and who have gone back to school specifically in order to qualify for these demanding positions. Special workplace accommodation is made for their needs and they are incredibly proud of their role as productive members of Israeli society. On the men's side, we heard from the former commander of the Haredi Battalion of the IDF, Yonatan Branski, who noted that the unit is not only a source of tremendous pride for the Israeli army but is also a means of encouraging young Haredi men to engage with Israeli society and to enjoy opportunities for personal development and career advancement that have not been available to them.

Whether it was seeing two young Members of Knesset, one from Likud (Sharren Haskel) and the other from the Zionist Union (Stav Shaffir) discussing the challenges and opportunities for women in Israeli politics, or a representative of Peace Now (Yariv Oppenheimer) and the Mayor of Efrat (Oded Revivi) discussing radically different visions for peace, or a journalist (Haviv Gur) and a conservative intellectual (Dror Eydar) vigorously debating the mission and destiny of the Jewish people in Israel and the Diaspora, we were struck by the mutual respect that Israelis have for one another and the civility that they display even in the midst of their most passionate disagreements – an excellent example for us all!

This extraordinary mission would not have been possible without the hard work of CIJA's Israel Office, namely, David Weinberg, Franck Azoulay and Miray Shabbetai along with Shimon Fogel, Sara Saber-Freedman and, of course, our Board Chair David Cape who spent countless hours planning and implementing a mission that has given us important insights into the past, hope for the future and a fresh perspective on the critical issues facing Israel and the Jewish People.

David E. Spiro

From: **Ibrahim Hussain** shaykhibrahim@madinaseminary.ca
Subject: Re: Introduction
Date: January 11, 2018 at 4:35 PM
To: David Spiro [redacted]
Cc: J.R. Rothstein jrrothstein428@gmail.com

Likewise David it was my honour to meet you. God almighty keep us connected and enable us to work towards goodness!

Ibrahim Hussain
Imam & Executive Director
www.madinaseminary.ca

> On Jan 10, 2018, at 11:45 PM, David Spiro [redacted] wrote:
>
> Dear Shaykh Ibrahim:
>
> It was my honour and privilege to meet you. I look forward to many more opportunities to continue and enhance the dialogue between us.
>
> Many thanks to J.R. for bringing us together and very best wishes for continued success.
>
> David Spiro

From: **Ibrahim Hussain** shaykhibrahim@madinaseminary.ca
Subject: Re: CIJA Marks Anniversary of Québec City Mosque Shooting
Date: January 29, 2018 at 12:58 PM
To: David Spiro [redacted]
Cc: jrrothstein428@gmail.com

Dear David,

God bless you.
Thank you.
Regards,

Ibrahim Hussain
Imam & Executive Director
www.madinaseminary.ca

On Jan 29, 2018, at 12:43 PM, David Spiro <[redacted] wrote:

> Dear Shaykh Ibrahim:
>
> On this sad anniversary, the Canadian Jewish community mourns with you and stands with you. May we never again know such sorrow in this country or anywhere.
>
> David Spiro
>
> Begin forwarded message:
>
> **From:** CIJA <info@cija.ca>
> **Date:** January 29, 2018 at 11:57:00 AM EST
> **To:** David Spiro [redacted]
> **Subject: STATEMENT: CIJA Marks Anniversary of Québec City Mosque Shooting**

CIJA Canadian. Jewish. Advocacy. MEDIA RELATIONS

FOR IMMEDIATE RELEASE

Monday, January 29, 2018

STATEMENT: CIJA Marks Anniversary of Québec City Mosque Shooting

Montreal, QC - Today is the one year anniversary of the shooting at the Islamic Cultural Centre of Québec City. CIJA issued the following:

> "We mourn the loss of six innocent Muslim Canadians who were murdered while at prayer one year ago. We remain horrified by this incident and extend our deepest condolences to the families of the victims as they remember and honour their loved ones. We also send our thoughts and prayers to those who were injured and who remain on the challenging road to recovery."

-David J. Cape, National Chair, CIJA

> "The Jewish community joins all Québécois in marking this painful anniversary and calls on all to strengthen efforts to build a society where acceptance and tolerance prevail. The Jewish community stands with our fellow Muslim citizens in the fight against anti-Muslim bigotry. On this

solemn occasion, we reaffirm our collective commitment to combating hatred and discrimination in all its forms."

-Rabbi Reuben Poupko, Co-Chair, CIJA-Québec

-30-

The Centre for Israel and Jewish Affairs (CIJA) is the advocacy agent of the Jewish Federations of Canada.

Information:

Adir Krafman
416-634-3081
akrafman@cija.ca

Lundi, le 29 janvier 2018

COMMUNIQUÉ : Le CIJA souligne l'anniversaire de la fusillade à la mosquée de Québec

Montréal, QC – Aujourd'hui marque le premier anniversaire de la fusillade au centre culturel islamique de Québec. Le CIJA a fait la déclaration suivante :

> « Nous pleurons la perte de six musulmans canadiens innocents qui ont été assassinés alors qu'ils priaient. Nous demeurons horrifiés par cet incident et nous offrons nos plus sincères condoléances aux familles des victimes alors qu'elles se souviennent de leurs proches et qu'elles les honorent. Nos pensées et nos prières accompagnent également ceux qui ont été blessés et qui sont sur la difficile voie de la guérison. »

- David J. Cape, président national, CIJA

> « La communauté juive se joint à tous les Québécois pour souligner cet anniversaire difficile et elle demande à tous de redoubler d'efforts pour bâtir une société où règne l'acceptation et la tolérance. La communauté juive appuie ses concitoyens musulmans dans la lutte contre l'intolérance anti-musulmane. En cette occasion solennelle, nous réaffirmons notre engagement collectif à combattre toute forme de haine et de discrimination. »

- Rabbin Reuben Poupko, coprésident, CIJA-Québec

-30-

Le Centre consultatif des relations juives et israéliennes (CIJA) est le porte-parole des Fédérations juives du Canada (UIA).

Information :

David Ouellette
514-294-4420
douellette@cija.ca

Canadian Judicial Council
Conseil canadien de la magistrature

Confidential

CJC Files: 20-0254, 20-0256,
20-0260, 20-0261,
20-0268, 20-0271,
20-0274, 20-0275,
20-0305

18 November 2020

The Honourable E.P. Rossiter
Chief Justice
Tax Court of Canada
200 Kent Street
Ottawa, ON K1A 0M1

Dear Chief Justice Rossiter:

I enclose for your attention a copy of correspondence received by Council from complainants as followup to their complaints in respect of Justice David E. Spiro. These documents were not included in our previous request for comments on your part. In accordance with section 8.1 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations*, Associate Chief Justice Kenneth G. Nielsen has directed that comments be sought from the judge in respect of these documents, if any. A copy of my letter to the judge requesting his comments is enclosed.

Associate Chief Justice Nielsen would also appreciate receiving your comments, if any, as Chief Justice in order to assist him in considering the complaint.

In keeping with the *Review Procedures*, I would ask that you provide written comments, if any, within 30 days. Kindly reply to the Council office by regular mail: Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by email: info@cjc-ccm.ca.

Thank you for you attention to this matter.

Yours sincerely,

Original signed

J. Michael MacDonald
Acting Executive Director

Encls.

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0254, 20-0256,
20-0260, 20-0261,
20-0268, 20-0271,
20-0274, 20-0275,
20-0305

18 November 2020

The Honourable D.E. Spiro
Tax Court of Canada
200 Kent Street
Ottawa, ON K1A 0M1

Dear Justice Spiro:

I enclose for your attention a copy of correspondence received by Council from complainants as followup to their complaints. These documents were not included in our previous request for comments. At the request of the Honourable Kenneth G. Nielsen, Associate Chief Justice of Alberta and Vice Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council, I am writing pursuant to section 8.1 of the *Canadian Judicial Council Procedures for the Review of Complaints or Allegations* (*Review Procedures*) regarding these followup correspondence.

In order to address these complaints in accordance with the *Review Procedures*, Associate Chief Justice Nielsen requests that you provide any comments you may have as a result of these new correspondence.

In keeping with the *Review Procedures*, I would ask that you provide written comments, if any, within 30 days. Kindly reply to the Council office by regular mail: Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by email: info@cjc-ccm.ca. Also note that a copy of these correspondence will be transmitted to Chief Justice Rossiter for comments.

I wish to remind you that after considering all available information, including any written comments you may wish to make, Associate Chief Justice Nielsen will decide to proceed in one of four ways, in keeping with the provisions of the *Review Procedures*:

.../2

-dismiss the matter on the basis that no further measures need to be taken (in such circumstances, concern may be expressed about your conduct where necessary);
-hold the matter in abeyance to pursue remedial measures in consultation with you and your Chief Justice;
-ask an investigator to gather further information to assist in considering the matter;
-refer the matter to a Panel, in accordance with subsection 2(1) of the Canadian Judicial Council Inquiries and Investigations By-laws, 2015 ("By-laws"), on the basis that the matter may be serious enough to warrant your removal from office.

Please note that the Vice Chairperson, may in reviewing this matter, consider the disposition of any past complaint against you.

Allow me to bring to your attention that, in some cases, Council finds it very helpful to provide to the complainant, in whole or in part, the judge's response to the complaint.

Information on the Canadian Judicial Council, and the text of the *Review Procedures*, can be found on the Council's web site at www.cjc-ccm.gc.ca. If I can provide any additional information in that regard, please do not hesitate to contact me.

Thank you very much for your attention to this request.

Yours sincerely,

Original signed

J. Michael MacDonald
Acting Executive Director

Encls.

cc. Chief Justice Rossiter

Tax Court of Canada

Cour canadienne de l'impôt

Ottawa, Canada
K1A 0M1

The Honourable Justice David Spiro

L'honorable juge David Spiro

November 23, 2020

J. Michael MacDonald
Acting Executive Director
Canadian Judicial Council
Ottawa, Ontario
K1A 0W8

Dear Mr. MacDonald:

Re: Complaints to Canadian Judicial Council

I am writing in response to your letter of November 18, 2020. I appreciate the opportunity to respond to the correspondence received from two of the complainants following up on their earlier complaints.

With respect to Professor Scott's correspondence, his complaint incorporates by reference Professor Green's complaint. I understand that his procedural concerns have been resolved, so I will not deal with his correspondence specifically.

With respect to Professor Green's correspondence, I was aware of the contents of his letter of September 29, 2020 when I wrote to you on October 26, 2020 but at that time I did not have the Annexes to which he refers in that letter. Even without the Annexes, I attempted to respond to Professor Green's letter of September 29 in my letter of October 26, beginning at the last paragraph at page 7 of my letter and continuing through the second full paragraph at page 9.

Now that I do have the Annexes, though, I will specifically address each of the paragraphs in Professor Green's letter of September 29, 2020:

1. Correct.

2. Correct, though I am not sure that my gift to the Faculty of Law Building Campaign was quite as generous as Professor Green suggests.

3. It is unclear on what basis Professor Green asserts that I hold, or once held, a particular set of personal beliefs. Annex A is a press release issued by the UJA Federation of Greater Toronto in June of 2009 (ten years before my appointment to the Tax Court of Canada) in respect of a controversial conference that was soon to convene at York University. I chaired the Public Affairs Committee of the UJA Federation of Greater Toronto at that time and was quoted in the press release in that capacity. I did not issue

that, or any other, press release on my own letterhead. It is clear from the context of the press release that I was speaking in a representative capacity on behalf of the Public Affairs Committee which, at that time, was the advocacy arm of the UJA Federation of Greater Toronto.

4. Professor Green speculates that I hold or held "very restrictive views of academic freedom and the right of free inquiry". The press release issued by UJA Federation of Greater Toronto simply argues in favour of fairness and balance at the upcoming conference at York University. That was the essence of the advocacy effort undertaken by the UJA Federation at that time – to recommend a fair and balanced conference that would offer more than one perspective on the conflict and more than one way in which it might be resolved. At the end of this letter, I include a link to the report of the Honourable Frank Iacobucci that sheds additional light on the circumstances surrounding the conference as well as the conference itself.

5. No one at the University of Toronto or the Faculty of Law told me who was under consideration for the position in question. Annex B appears to have been attached to Professor Green's letter to confirm the confidentiality of the hiring process. I have no reason to question that the process was anything but confidential.

6. As noted at the top of page 4 of my letter of October 26, 2020, it was Ms. Zelikovitz of CIJA who told me about the appointment, or potential appointment, of Dr. Azarova. I did not seek the identity of any candidates under consideration from the University of Toronto or the Faculty of Law nor was I aware that Dr. Azarova was the unanimous choice of the search committee.

   I cannot comment on the accuracy of Annex C other than to note the following in respect of point 6:

   a. At no time did I call or communicate with Jennifer Lancaster, Assistant Dean, Advancement at the Faculty of Law.

   b. At no time did I express to anyone any intention to call Dean Ed Iacobucci. I never had any such intention.

   c. As noted at the top of page 4 of my letter of October 26, 2020, I learned about the matter from Ms. Zelikovitz of CIJA.

7. A number of errors should be corrected. First, I did not contact any of the staff of the Alumni/Advancement office at the Faculty of Law. Second, I did express concern, but my concern was about the University of Toronto and the Faculty of Law being unprepared for the reaction which I feared would arise following the appointment of Dr. Azarova. The particulars are recounted at page 4 of my letter of October 26, 2020. In that regard, I would draw your attention to the last paragraph at the bottom of that page:

> To the extent that I described to Ms. Courtney the sources of such a reaction, it is possible that she understood me as expressing my own personal views. In retrospect, I should have made it clear to Ms. Courtney that I was not expressing my own personal views in describing the reaction that I feared might ensue [following the appointment of Dr. Azarova].

Third, Professor Green speculates about my views on the Israel-Palestine conflict based on an unfortunate misreading of the 2009 UJA Federation press release. My own personal views are reflected in material not referenced by Professor Green, namely, my personal reflections on the CIJA board mission to Israel in 2017 attached to my letter to you of October 26, 2020, and discussed at pages 6 and 7 of that letter.

Fourth, with respect to Annex D, I have no idea whether Mr. Mostyn, CEO of B'nai Brith Canada, shares my views as I have never discussed any of my views with him. I do not know Mr. Mostyn at all. It is unclear why Professor Green references that organization in connection with his complaint about my conduct except to imply, without any foundation, that I share the views that have been publicly expressed by B'nai Brith Canada in the opinion piece attached to his letter as Annex D.

8. I was not privy to the conversation and, therefore, cannot comment on it other than to reiterate that I never expressed any intention to call Dean Ed Iacobucci as I never had any such intention.

9. I was not privy to the conversation and, therefore, cannot comment on it.

10. I was not privy to the conversation and, therefore, cannot comment on it.

11. I cannot comment on the accuracy of Annex C other than to reiterate the observations in paragraph 6 above.

12. I did not speak to any of the individuals listed by Professor Green in respect of Dr. Azarova's appointment or potential appointment.

Much of Professor Green's letter of September 29, 2020 - and his speculation about my personal views - is based on a 2009 UJA Federation press release in respect of a controversial conference to held at York University. As mentioned at pages 7 to 9 of my letter to you of October 26, 2020, that conference generated a great deal of controversy and led York University to retain the Honourable Frank Iacobucci to prepare a report on how York University should move forward. As I did not attach a copy of that report to my letter of October 26, 2020, I am taking the liberty of providing a link to that report: http://www.yorku.ca/acreview/iacobucci_report.pdf

My discussion with Ms. Courtney on September 4 2020 was an isolated incident from which I have learned a great deal. As I noted at page 9 of my letter to you of October 26, 2020:

> I have learned that words spoken outside the courtroom by a judge, even if not intended for publication, may create the wrong impression about the judge's integrity and

impartiality thereby having the potential to diminish the confidence of Canadians in the administration of justice.

In particular, I ought to have resisted the temptation to provide advance notice to the University of Toronto of the controversy that I feared would result from the appointment of Dr. Azarova. I do not owe a duty to the University of Toronto or its law school. However, I do owe a duty to members of the public to ensure that I am completely objective and impartial in my work as a judge and that I am seen to be completely objective and impartial in that work.

I reiterate my sincere regret about the entire incident. I should not have raised the matter of the hiring, or potential hiring, of Dr. Azarova with anyone at the University of Toronto. It was a mistake on my part to have done so. Such an incident will not happen in the future.

Should you require any further information with respect to this matter, please do not hesitate to contact me.

Yours sincerely,

The Honourable D. E. Spiro

cc. Chief Justice Rossiter

Tax Court of Canada

Ottawa, Canada
K1A 0M1

Cour canadienne de l'impôt

The Honourable Eugene P. Rossiter
Chief Justice

L'honorable Eugene P. Rossiter
Juge en chef

November 24, 2020

J. Michael MacDonald
Acting Executive Director
Canadian Judicial Council
Ottawa, ON
K1A 0W8

Dear Chief Justice MacDonald:

Re: Complaints to Canadian Judicial Council

Further to your recent correspondence inquiring if we would have additional submissions in relation to the complaints involving Justice David Spiro of our Court as a result of additional information provided, please be advised we have nothing further to add to our initial correspondence on this matter.

I thank you in advance for your cooperation.

Yours very truly,

Eugene P. Rossiter
Chief Justice
c.c. Associate Chief Justice Lamarre

CJC
CCM
Canadian
Judicial Council
Conseil canadien
de la magistrature

Reasons
for the referral of a complaint
to a Panel
in the matter of
the Honourable David E. Spiro
of the Tax Court of Canada.

Per the Honourable Kenneth G. Nielsen
Associate Chief Justice of the Court of Queen's Bench of Alberta
Vice-Chair of the Judicial Conduct Committee

5 January 2021

Introduction

In various correspondence that began on 16 September 2020, Professor Leslie Green of the Faculty of Law, Queen's University alleged that an unidentified judge interfered in the hiring of Dr Azarova as director of the International Human Rights Program (IHRP) of the Faculty of Law (the Faculty), University of Toronto (U of T) over concerns about her previous work on Israel human rights abuse in Palestine. Several other complaints were subsequently received. Mr Justice Spiro was identified as the judge in question.

Upon my initial review of the complaint, I sought Justice Spiro's comments, as well as those of Chief Justice E.P. Rossiter, Chief Justice of the Tax Court of Canada. A further review revealed that a few of the documents received from the complainants had not been disclosed to Justice Spiro. These documents were provided to Justice Spiro for further comments. Chief Justice Rossiter had nothing to add to his previous comments.

Having reviewed the complaints with their attachments, as well as the comments from Justice Spiro and Chief Justice Rossiter, I have concerns significant enough to require the establishment of a Judicial Conduct Review Panel.

Background

Multiple individuals and advocacy groups have complained in nine distinct complaints in respect of Justice Spiro about the same alleged incident. You will find in an attachment to these Reasons a document entitled "Glossary and Who's Who" to assist you with the various acronyms, initialisms and names.

The position of Director of the IHRP of the Faculty, U of T became vacant some time ago. Prof. Audrey Macklin chaired the Faculty's selection committee for this position. During the week of 20 July 2020, the committee selected Dr Valentina Azarova as their first choice. Dr Azarova, originally from Russia, lives in Europe and has researched and published articles in legal journals about, *inter alia*, Israel's occupation of the Palestinian Territories. Two issues arose in discussions with Dr Azarova: her immigration/employment status and her request for permission to work from Europe during the summer of the first year. Dr Azarova later told the media she was offered the position on 11 August 2020, and accepted it on 19 August 2020, but this was not confirmed.

In September 2020, *The Globe and Mail* and the *Toronto Star* reported that a judge from the Tax Court intervened in the hiring process of Dr Azarova, but did not identify Justice Spiro specifically. It was alleged that he contacted a member of the Faculty's fundraising team to object to the hiring of Dr Azarova over concerns about her critical work as regards Israel and

the occupation of Palestine, and that these concerns would have been conveyed to the Dean of the Faculty.

Subsequently, the Dean of the Faculty, Edward Iacobucci, is reported as commenting that "no offer of employment having been made, the University has decided to cancel the search for a candidate at this time."

Justice Spiro is an alumni of the Faculty, a donor and, prior to his appointment to the Bench, a fundraising advisor to the Faculty. Justice Spiro is also a former member of the board of directors of the Centre for Israel and Jewish Affairs (CIJA), an advocacy group. On their website, CIJA is introduced as "the voice of the organized Jewish and pro-Israel communities of Canada...". Justice Spiro was at one time the Chair of the Committee on Public Affairs of CIJA. Justice Spiro resigned his board position on CIJA upon his appointment to the Bench in April 2019.

The complaints to Council were largely based on articles in *The Globe and Mail* and the *Toronto Star*. The journalists spoke with various individuals and obtained the personal notes of the now former Chair of the Faculty hiring committee, Prof. Macklin. These notes are entitled "Chronology of Events Relating to IHRP Search Process" and a copy is attached to complaint 20-0254.

According to Prof. Macklin's notes, on 6 September 2020, Dean Iacobucci informed her that Dr Azarova could not be hired as a result of the issues on employment/immigration and absence in summer time. In a separate conversation, the Dean advised Prof. Macklin that Dr. Azarova's work on Israel occupation is an issue: "It is an issue, but given the other 2 issues, I don't need to get to the 3rd issue." In a later communication to the Faculty, the Dean stated that no job was offered to Dr Azarova, and that it was "untrue and objectionable" to assert that outside interference played a role in decision-making on the directorship.

There has been quite a negative reaction to this incident both locally and internationally that has been documented by *The Globe and Mail* and the *Toronto Star*. News reports indicate that the Chair of the selection committee and one of its members resigned, and that a three-member advisory board to the program also resigned. There has been negative reaction from several advocacy groups. There has also been negative coverage about Council's initial response, that is that a review could not be done unless the complainant identifies the judge.

The U of T announced on 14 October 2020 that it will conduct an investigation into this matter. Prof. Bonnie Patterson, former President and Vice-Chancellor of Trent University, will conduct the investigation and her report should be issued in January 2021. The result will be made public.

All of the complainants based their complaint on news reports, hearsay and speculation. No one had direct involvement or knowledge of the events. The complainants expressed concerns about: the interference of Justice Spiro with the IHRP selection process while he had no expertise in this area; about the independence and impartiality of Justice Spiro; about the administration of justice generally; about a clear bias against Palestinians, Arabs and Muslims; and, about improper use of judicial status and abuse of office.

Complaints

Complaint 20-0254

The complaint of Prof. Leslie Green, Faculty of Law, Queen's University consists of emails dated 16, 17 and 30 September 2020, letters dated 17 and 29 September 2020 attached to the emails and 4 annexes attached to the letter of 29 September 2020. The annexes are: a press release from the United Jewish Appeal Federation (UJA) dated 24 June 2009, an article from the *Toronto Star* dated 18 September 2020, a copy of the notes by Prof. Macklin and, an article from the *Toronto Sun* dated 24 September 2020.

Prof. Green did not identify the judge in his first communication to Council. Prof. Green alleges that a judge who is a major donor to the law school interfered in the hiring of Dr Azarova over concerns about her previous work on Israel human rights abuse in Palestine.

Complaint 20-0256

The complaint of Mr Dan Snyder of Vancouver consists of one email dated 17 September 2020 with an attachment. Mr Snyder expresses the same concerns as Prof. Green.

Complaint 20-0260

The complaint of Prof. Craig M. Scott, Faculty of Law and Director of the Graduate Program of Law, Osgoode Hall, York University consists of three emails dated 20 and 25 (2) September 2020 and a letter dated 20 September 2020. Prof. Scott asks to be listed as a complainant and adopts Prof. Green's complaint as his own. He also made an argument about Council's duty to investigate the matter and the role of the Chief Justice of Canada.

Complaint 20-0261

The complaint of Mr Mustafa Farooq, CEO of the National Council of Canadian Muslims (NCCM), consists of one email dated 21 September 2020 and one letter of the same date. This complaint is first about the allegation of interference in the hiring process by Justice Spiro, and second about the necessity for Council to conduct an investigation.

Complaint 20-0268

The complaint of Mr Wayne Adlam consists of one email dated 24 September 2020. In a few unflattering words, the complainant provides his opinion about Justice Spiro and Council.

Complaint 20-0271

The complaint of Mr Viresh Fernando, a lawyer from Toronto, consists of one email dated 24 September 2020. He refers to the *Toronto Star* for his complaint and alleges misuse of office and abuse of authority.

Complaint 20-0274

The complaint of Ahsan Jafri consists of one email dated 25 September 2020. The complainant alleges corruption and provides an opinion.

Complaint 20-0275

The complainants are Ms Dania Majid on behalf of the Arab Canadian Lawyers Association (ACLA), Mr Corey Balsam on behalf of the Independent Jewish Voices of Canada (IJV) and Ms Meghan McDermott on behalf of the British Columbia Civil Liberties Association (BCCLA). This complaint consists of emails dated 25 September 2020, 8 and 13 October 2020 and letters dated 8 and 10 October 2020 and an annex. The annex is a copy of a letter dated 12 September 2020 by Carmen Cheung and Samer Muscati, both former directors of IHRP, to Dean Iacobucci.

The complainants allege lack of integrity and provide their analysis in the context of anti-Palestinian racism and on the impact of Justice Spiro's alleged conduct on public confidence in the judiciary.

Complaint 20-0305

Ms Imtenan Abd-El-Razik complains on behalf of the Canadian Association of Muslim Women in Law (CAMWL) and the Canadian Muslim Lawyers Association (CMLA). Her

complaint consists of one email dated 8 October 2020, and one letter of the same date. These two organizations complain about the actions of Justice Spiro.

Comments from Justice Spiro

I requested comments from Justice Spiro, which he provided in a ten-page letter dated 26 October 2020. Part of the letter describes Justice Spiro's background and involvement with the community both before and after his appointment to the Bench. Part of the letter details the events factually and Justice Spiro explains his actions and intent. And part of the letter is a response to specific complaints or allegations. Throughout, Justice Spiro reiterates his commitment to impartiality.

Justice Spiro describes the events in chronological order as follow:

1. On 30 August 2020, he received an email from Ms Chantelle Courtney. The U of T website indicates that Ms Courtney is the Assistant Vice-President, Divisional Relations, Division of University Advancement, U of T since March 2019. Between February 2014 and March 2019 she was the Assistant Dean of Advancement, Faculty of Law. Justice Spiro, Ms Courtney and her husband developed a friendship while working on various Faculty projects and fundraising. Ms Courtney suggested in her email they catch up with their lives as they had not spoken to each other for a few months.

2. On 1 September 2020, both agreed to a telephone call on 4 September 2020.

3. On 3 September 2020, Justice Spiro "learned" from Ms Judy Zelikovitz, a staff member of CIJA, about the appointment or potential appointment of Dr Azarova as Director of IHRP. He "understood from her" that the appointment would likely be followed by loud and public protests which might harm the reputation of the U of T and the Faculty. Ms Zelikovitz described Dr Azarova to him as "an anti-Israel academic crusader, and an activist who had written polemical articles focussed on accusations against Israel in respect of the politically fraught Israel-Palestine conflict." Justice Spiro did not know of or about Dr Azarova prior to this contact. There is no indication as to the nature of the contact (in person or telephone or email), nor about who initiated it.

4. On 4 September 2020, in the morning, Justice Spiro spoke with Ms Courtney over the phone. He told her what he had learned about Dr Azarova and his fears about the reputation of the Faculty. He asked her to let him know whether the appointment had been made. Justice Spiro states that "it is possible that she [Ms Courtney] understood me as expressing my own personal views."

5. Later on the same day, Ms Courtney advised Justice Spiro by email that Dean Iacobucci "had told her that no decision had been made." Justice Spiro writes (top of page 5):

> I left it at that as I had accomplished my objective, namely, to provide Ms. Courtney with advance notice of what appeared to be a potentially contentious appointment that I understood was likely to lead to controversy for the University and its law school.

6. On the same day, Justice Spiro had a telephone conversation with Prof. Arnold Weinrib, former professor at the Faculty. Prof. Weinrib is a personal friend of Justice Spiro. Justice Spiro told Prof. Weinrib "what I had told Ms. Courtney earlier the same day." Later on, he sent Prof. Weinrib an email message which Justice Spiro describes as follows (middle of page 5):

> After receiving Ms Courtney's email message that no decision had been made, I sent Arnie a quick email message to that effect along with a brief memo that Ms. Zelikovitz had sent me covering the same ground as I mentioned earlier.

Justice Spiro states he never intended to contact the Dean, nor did he ever contact him about Dr Azarova.

In his second letter of comments dated 23 November 2020, Justice Spiro confirms that he learned about Dr Azarova being considered for the IHRP position from Ms Zelikovitz, and that no one from the U of T or the Faculty informed him of who was under consideration. He also states he was not aware Dr Azarova was the unanimous choice of the search committee. He did not communicate with Ms Lancaster, Assistant Dean Advancement, as some speculated. And he did not express the intention to call the Dean, and never had such intention. Justice Spiro points out that Professor Green's comments about Justice Spiro's personal views are entirely speculative and mostly erroneous. He insists that his intention was "to provide advance notice to the University of Toronto of the controversy that I feared would result from the appointment of Dr Azarova."

Justice Spiro states this is an isolated incident on his part which he regrets, and from which he learned a great deal.

Comments from Chief Justice Rossiter

In his letter of 23 October 2020, Chief Justice Rossiter states he has no direct knowledge of the events, and at the time of writing his letter, it appears that he had not read Justice Spiro's letter of 26 October 2020. He understood that the events were not as reported by the media.

Chief Justice Rossiter speaks well of Justice Spiro and expresses his trust in him.

Chief Justice Rossiter goes on to advise as follows:

> The Court has taken the initiative, for perception purposes, of having all files that have been assigned to Justice Spiro, whether these be trials or duty judge files, reviewed by the Associate Chief Justice of the Tax Court of Canada to ensure that to the best of the Associate Chief Justice's assessment, in accordance to the information on the file, no files upon which he will adjudicate will have, as parties, or agents or counsel, anyone who could be thought as being of Muslim or of the Islamic faith. Further, Justice Spiro will recuse himself from any file at any time in which it appears to him that either the counsel, representative of any litigant, or a litigant is a Muslim or is of the Islamic faith immediately. In such circumstances, the file will be reassigned to another Tax Court of Canada Judge. This process will allow for any concern related to a potential perceived bias from Justice Spiro to be removed.

Decision to refer to a Review Panel

The selection of Dr Azarova was, or should have been, confidential. Vice-President Hannah-Moffat, Human Resources and Equity, U of T told the media the process was confidential. While it was confidential, several individuals were made aware as steps had been taken to facilitate Dr Azarova's coming to the U of T. See for example the letter of Carmen Cheung and Samer Muscati (former directors of IHRP) in Annex A of Complaint 20-0275. Nevertheless, one of the main concerns raised by Prof. Macklin and others is the breach of confidentiality of the selection process.

On 3 September 2020, Ms Zelikovitz, a staff member of CIJA, knew about the potential selection of Dr Azarova, about her academic work, and about her position as regards Israel. Ms Zelikowitz conveyed that information on that date to Justice Spiro. CIJA, on its website, defines itself as a non-partisan advocacy group that promotes Israel.

Justice Spiro indicates he later received a "brief memo" from Ms Zelikovitz about Dr Azarova, which he forwarded to Prof. Weinrib on the following day. The nature of the contact with Ms Zelikowitz is unknown, nor the reason she forwarded a "brief memo," the content of the memo and the reason it was shared with Prof. Weinrib. The memo was not provided by Justice Spiro in his responses to my requests for his comments.

Justice Spiro states he did not know of, or about, Dr Azarova and her academic work before his communication with Ms Zelikowitz.

On the morning of 4 September 2020, Justice Spiro conveyed the information he received from Ms Zelikovitz to Ms Courtney. He "asked her to let me know whether the appointment had been made (but not yet announced) or whether it had not been made. She said that she would follow up." (page 4 of the letter of 26 October 2020)

During that conversation, Justice Spiro mentioned that Dr Azarova's appointment would likely be "protested and criticized" for the reasons given by Ms. Zelikovitz, namely, that Dr Azarova is "an anti-Israel academic crusader, and an activist who had written polemical articles focussed on accusations against Israel in respect of the politically fraught Israel-Palestine conflict." Justice Spiro concedes that this may have been interpreted by Ms Courtney as his own opinion, although he denies knowing anything about Dr Azarova before his contact with Ms Zelikovitz.

The selection process was not completed as yet - no final decision had been made according to the Dean - and it was largely confidential. The question remains as to the purpose of Justice Spiro's statement to Ms Courtney that Dr Azarova's appointment would likely be "protested and criticized". Justice Spiro asserts that his intent was to prepare the Faculty and the U of T for such as he did not want them to be "embroiled in controversy".

On 4 September 2020, Ms Courtney advised Justice Spiro by email that she had communicated with Dean Iacobucci, and reported he had told her the appointment had not been made as yet.

On the very same day, Assistant Dean Archbold, JD Program of the Faculty, spoke to Prof. Macklin as reported in the latter's notes. Ms Archbold told Prof. Macklin that the Director, Advancement (at the time Ms Lancaster) contacted the Dean about a phone call she received from an alumni, who was a tax court judge, regarding Dr Azarova. Ms Courtney was the former Director of Advancement and that may explain the apparent confusion between Ms Lancaster and Ms Courtney.

One may infer that the Dean communicated to Ms Archbold about Ms Courtney's phone call with Justice Spiro.

According to the media, various professors have resigned their function over the breach of confidentiality and integrity of the process. There has been pressure for the Dean to resign. An investigation has been commissioned.

At this point in time, it is not known whether Dean Iacobucci's decision not to hire was influenced by Justice Spiro's phone call. The Dean publicly denied it, and nothing indicates bad faith. But it remains that the Dean was aware of Justice Spiro's phone call with Ms Courtney and of his concerns.

The conduct at issue is that Justice Spiro received information from a staff member of CIJA, an advocacy group, about their concerns over the selection of Dr Azarova as director IHRP, and that he immediately conveyed this information to an executive of the U of T, despite the fact he had no personal knowledge of or about Dr Azarova and her academic work. While speaking to the executive, Justice Spiro admits that the executive might have been under the impression that he was conveying his own views. Justice Spiro asked this executive to determine and report to him whether Dr Azarova had been selected as yet. All concerned knew Justice Spiro was a judge.

It is my view that Justice Spiro indicated a lack of integrity and departed from his duty of impartiality when he:

1. received information from a staff member of CIJA, an advocacy group, about their concerns over the selection of Dr Azarova as Director IHRP;
2. immediately conveyed this information to an executive of the U of T, despite the fact he had no personal knowledge of or about Dr Azarova and her academic work;
3. failed to clarify with the executive that the views he expressed were not necessarily his;
4. as a follow-up, asked the executive to inquire as to whether the selection had been made; and
5. conveyed the information he had obtained through his actions to Prof. Weinrib.

It is my view that Justice Spiro's conduct puts at risk public confidence in the integrity, impartiality and independence of the judiciary.

Conclusion

Justice Spiro's conduct in relation to the appointment of Dr Azarova and his lack of insight into the inappropriateness of his conduct at the time raise serious concerns about the fitness of Justice Spiro to hold office as a judge.

My conclusion, therefore, is that the allegations contained in the complaints to Council and the full record show that the judge's conduct might be serious enough to warrant his removal from office. In accordance with subsection 2(1) of the *Inquiries and Investigations By-Laws* , I have therefore decided to establish a Judicial Conduct Review Panel to decide whether an Inquiry Committee should be constituted in accordance with subsection 63(3) of the *Judges Act*.

The Honourable Kenneth G. Nielsen
Vice-Chair
Judicial Conduct Committee

CJC
CCM
Canadian
Judicial Council
Conseil canadien
de la magistrature

Addendum
to the referral of a complaint
to a Panel
in the matter of
the Honourable David E. Spiro
of the Tax Court of Canada

Per the Honourable Kenneth G. Nielsen
Associate Chief Justice of the Court of Queen's Bench of Alberta
Vice-Chair of the Judicial Conduct Committee

5 February 2021

On 5 January 2021, I referred a number of complaints in respect of the Honourable David E. Spiro to a Panel. These complaints have been filed as 20-0254, 20-0256, 20-0260, 20-0261, 20-0268, 20-0271, 20-0274, 20-0275, 20-0305.

On 19 January 2021, Mr David Matas, Senior Honorary Counsel for the B'nai Brith, forwarded to Council the submission of B'nai Brith Canada to the *Review of the University of Toronto Search for an International Human Rights Program Director* (the "*Review*"). He requested that the submission be provided to the Panel for their consideration. Their request was filed under 20-0474. The B'nai Brith defines themselves as "a grassroots human rights advocacy group of the Jewish community." (2nd paragraph of Introduction of the submission)

The *Review* is conducted by the Honourable Thomas Cromwell, who replaces Professor Patterson. The submission of B'nai Brith addresses concerns about the University and its processes. There is however a brief discussion about Justice Spiro and on whether it was appropriate for him to do what he allegedly did. The B'nai Brith do not take a position on what occurred, and indeed do proffer they have no knowledge of the exact events.

As this matter is now before a Panel, the correspondence from the B'nai Brith is attached for the attention of the Panel. I take no position on whether this submission is or is not relevant, and if it is, on the weight it should be given, if any.

A copy of the correspondence from Mr Matas is being forward to Mr Justice Spiro.

The Honourable Kenneth G. Nielsen
Vice-Chair
Judicial Conduct Committee

From: dmatas@mts.net

Sent: Tuesday, January 19, 2021 12:57 PM

To: info

Subject: Review Panel in the matter involving the Honourable D.E. Spiro

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Canadian Judicial Council

Ottawa

info@cjc-ccm.ca

B'nai Brith Canada made a submission in December 2020 on The University of Toronto Search for an International Human Rights Program Director which, at pages 11 and 12, addresses the alleged behaviour of Mr. Justice Spiro relevant to the the University of Toronto search. The B'nai Brith Canada submission can be found at this link.

https://drive.google.com/file/d/17vHdVii3ix3GRyqsAgUd74p-8B90jvvQ/view

We note that the Canadian Judicial Council has constituted a Review Panel in the matter involving the Honourable D.E. Spiro. See

https://cjc-ccm.ca/en/news/canadian-judicial-council-constitutes-review-panel-matter-involving-honourable-de-spiro

In light of the constitution of this Review Panel, we draw the relevant component of our submission to the University of Toronto to the attention of the Panel.

Sincerely

David Matas

Senior Honorary Counsel

B'nai Brith Canada

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THE UNIVERSITY OF TORONTO SEARCH FOR AN INTERNATIONAL HUMAN RIGHTS PROGRAM DIRECTOR

A SUBMISSION OF B'NAI BRITH CANADA TO THE SEARCH REVIEW

DECEMBER 2020

B'NAI BRITH CANADA

League for Human Rights of B'nai Brith Canada
Ligue des droits de la personne

The University of Toronto search for an International Human Rights Program Director

A submission of B'nai Brith Canada to the Search Review[1]

December 2020

Introduction

The University of Toronto announced that they have engaged former Supreme Court of Canada Justice Thomas Cromwell to provide a narrative of events on the Search Committee process for a new Director of the International Human Rights Program, a staff position and the basis for the decision to discontinue the candidacy of the three-person Search Committee's preferred candidate, Valentina Azarova. Justice Cromwell has also been asked to provide his conclusions on whether existing University policy and procedures were followed in this search.[2]

This document is a submission by B'nai Brith Canada to the search process review on the specific issue whether existing University policy was followed in the search for the IHRP director. B'nai Brith Canada is a grassroots human rights advocacy group of the Jewish community. The organization has advocated for Canadian Jewry and championed the cause of human rights since 1875. B'nai Brith Canada is dedicated to combating antisemitism and other forms of bigotry at home and around the world.

The International Human Rights Program assists in placing students in international legal summer internships at institutions such as the International Criminal Court in The Hague, the United Nations High Commissioner for Human Rights, and others. The Program runs an in-house clinic for law students throughout the school year. The Director makes decisions relating to, among other things, student placements in internships and clinics, and approval and amount of funding for students to complete unpaid international legal internships.[3]

It is our view that existing University policies were not followed by the Search Committee in recommending Valentina Azarova as the new Director of the International Human Rights Program and by the University in making the decision to discontinue the candidacy of Ms. Azarova. The policies not followed were those on academic freedom[4], freedom of expression[5] and freedom of speech.[6]

The policies

The University of Toronto Statement on Freedom of Speech provides "of necessity there are limits to the right of free speech" and that the purpose of the University "depends upon an environment of tolerance and mutual respect", where "every member should be able to work, live, teach and learn in a University free from discrimination and harassment."

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[1] The primary authors are B'nai Brith Canada Senior Honorary Counsel David Matas and Sarah Teich
[2] https://www.theglobeandmail.com/canada/article-leader-of-inquiry-into-aborted-hiring-at-university-of-toronto-law/
[3] https://www.theglobeandmail.com/canada/article-leader-of-inquiry-into-aborted-hiring-at-university-of-toronto-law/
[4] https://governingcouncil.utoronto.ca/secretariat/policies/faculty association memorandum agreement governing council and university, Article 5
[5] https://www.president.utoronto.ca/statement-on-free-expression
[6] https://share.utorcsi.utoronto.ca/sites/gc/Governing%20Council/All%20Policies/F/Statement%20on%20Protection%20of%20Freedom%20of%20Speech.docx

The University of Toronto Statement on Freedom of Expression provides:

> "the University will act swiftly and resolutely to protect and support its community. Speech or acts that silence or demean individuals or groups are also gravely concerning. Indeed, such behaviour stands in direct opposition to free speech and subverts the contest of ideas at the heart of the University's mission. It is worth remembering, particularly in strident and impassioned confrontations, that respect, civility, diversity, and inclusion, are not in tension with free expression. On the contrary, they enable it."

The Article on academic freedom in the Memorandum of Agreement between The Governing Council of the University of Toronto and The University of Toronto Faculty Association states in part that

> "In performance of these collegial and administrative activities, faculty members shall deal fairly and ethically with their colleagues, shall objectively assess the performance of their colleagues, shall avoid discrimination, shall not infringe their colleagues' academic freedom, and shall observe appropriate principles of confidentiality."

The context

The process of recommendation of Valentina Azarova as a preferred candidate for the position of Director of the International Human Rights Program has to be placed in the context of two factors. One is the problems that Jewish students are facing at many universities as a result of a global anti-Zionist campaign to delegitimize and demonize Israel as the expression of the right to self-determination of the Jewish people and to demonize Jews everywhere as actual or presumed supporters of this supposedly “demonic” state. The second is the activism and overall scholarship of Valentina Azarova.

i) Antisemitism on campus

On university campuses, antisemitic incidents are widespread, and specifically linked to anti-Israel activities. A number of reports have shown direct links between Israel bashing at universities and harassment of and physical attacks on Jewish students on campus.[7]

In August 2020, Hillel International, a global Jewish student organization, reported[8] that they had

> "measured 178 antisemitic incidents in the past academic year on the North American campuses it serves, an all-time high, even with months of campuses being physically closed due to COVID 19. Online harassment of Jewish students and antisemitic vandalism has continued in recent months, even with campuses closed. This dangerous trend has been surging for several years."

In response Hillel launched a Campus Climate Initiative which would

> "fit within an overarching diversity, equity, and inclusion commitment already shared by universities to confront racism, discrimination, and harassment on their campuses and maintain positive campus climates that allow students to feel comfortable engaging and identifying with Judaism and Israel."

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[7] https://www.insidehighered.com/news/2020/09/09/antisemitismrisenewsemesterstart; https://www.adl.org/resources/reports/schooled-in-hate-anti-semitism-on-campus

[8] https://www.hillel.org/about/news-views/news-views---blog/news-and-views/2020/08/10/hillel-launches-new-initiative-to-support-train-university-administrators-to-address-antisemitism-on-campus

The Anti-Defamation League released[9] a report[10] in May 2020 which stated:

> "Jewish students, many of whom consider Zionism an essential part of their Jewish identities, faced a steady stream of rhetoric vilifying Zionism in 2019. These students had to contend with claims from both fellow students and professors that their Zionist identities rendered them irredeemably racist and no different from white supremacists. Such empty claims are baseless at best and slanderous at worst but are ultimately divorced from the facts. ...
>
> It wasn't just student groups who brought inflammatory anti-Israel rhetoric to campus; professors and guest speakers also perpetrated these tropes ...
>
> In a significant number of instances, anti-Zionist students expressed their belief that Zionists and supporters of Israel should not be welcome on campus. Both Zionist and pro-Israel individuals and groups were named as being unworthy of a place in the academic and social community. Whether or not intentional, anti-Israel activists essentially were calling for the disenfranchisement of most Jewish students. In most cases, support for expelling or excluding Zionists and pro-Israel students from campus life was expressed openly and unapologetically in public forums, including social media."

The website Inside Higher Education posted an article in September 2020 stating

> "As reports show harassment and attacks on Jewish students at an all-time high, advocates are calling on university administrators to forcefully condemn antisemitism and work more aggressively to address and prevent it."[11]

One of the persons quoted in the article is Rose Ritch. Rose Ritch, in an August 2020 statement[12] resigning as vice-president of the Undergraduate Student Government of the University of Southern California, wrote:

> "I have been harassed and pressured for weeks by my fellow students ... because I also openly identify as a Zionist, a supporter of Israel's right to exist as a Jewish state. ... I have been told that my support for Israel has made me complicit in racism, and that, by association, I am a fascist. ... This is antisemitism and cannot be tolerated at a University that proclaims to 'nurture an environment of mutual respect and tolerance'....
>
> Nearly 95 percent of American Jews support Israel as the Jewish state, inherently connected to our religious history and communal peoplehood. An attack on my Zionist identity is an attack on my Jewish identity. .... The sad reality is that my story is not uncommon on college campuses. Across the country, Zionist students are being asked to disavow their identities or beliefs to enter many spaces on their campuses."

ii) Canadian universities and B'nai Brith Canada

In 2016, Professor Anthony Hall of the University of Lethbridge was suspended after B'nai Brith Canada exposed his appearance in online Holocaust denial videos and his promotion of antisemitic conspiracy theories in the

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[9] https://www.adl.org/news/press-releases/adl-calls-on-university-administrators-to-take-further-action-to-protect-jewish
[10] https://www.adl.org/resources/reports/antisemitism-and-the-radical-anti-israel-movement-on-us-campuses-2019
[11] Greta Anderson "Responding to Rise in Campus Anti Semitism" September 9, 2020 https://www.insidehighered.com/news/2020/09/09/anti-semitism-rise-new-semester-starts
[12] https://www.facebook.com/photo.php?fbid=3529155723772255&set=pcb.3529165573771270&type=3&theater

classroom, such as the claim that Israel and U.S. Jews staged the September 11, 2001 terrorist attacks. Professor Hall was briefly reinstated in July 2018, and then removed from the classroom yet again in August 2018, amid an ongoing internal investigation.[13] He permanently resigned shortly thereafter.

In June 2020, B'nai Brith Canada called on York University to ensure that Faisal Bhabha, an associate professor at York's Osgoode Hall Law School, be disqualified from teaching a human rights course, after he told viewers of an online debate that "Zionism isn't about self-determination, it's about Jewish supremacy". When Bhabba was challenged by another panelist, he doubled down on this point and stated, "I'm equating white supremacy with Jewish supremacy." Bhabba also stated in the debate that "accusing Israel of exaggerating the Holocaust could be, for some, a plausible argument." Incomprehensibly, Bhabba remains a professor at York's Osgoode Hall Law School.

iii) The scholarship of Valentina Azarova

The research of Valentina Azarova has focused primarily on arguing that the State of Israel has systematically committed gross violations of international human rights.[14] Her "scholarly" work is substantially centered on demonization, delegitimization and double standards when it comes to the State of Israel. Her professional associations include a multitude of extreme anti-Israel organizations including Al-Shabaka,[15] HaMoked,[16] Al-Haq,[17] the Mattin Group,[18] and Diakonia.[19] Al Haq has direct ties to the Popular Front for the Liberation of Palestine (PFLP) - a listed terrorist entity in Canada - and is headed by Shawan Jabarin, a former senior PFLP operative.[20] Ms. Azarova has consistently participated in some of the most hard-line anti-Zionist platforms and propaganda activities such as Electronic Intifada, Al Majdal Quarterly (Badil), and the Ireland Palestine Solidarity Campaign.

Ms. Azarova spoke at an April 2015 symposium, hosted by the University of Southampton in the UK, questioning the right of Israel to exist. NGO Monitor referred to Dr. Azarova in this context as "affiliated with radical anti-Israel groups" and as having promoted boycotts, divestments and sanctions against Israel.[21]

Ms. Azarova also spoke at a November 2017 conference, hosted by the European Parliament, which was called out as "Propaganda-Based Advocacy for Israel's Isolation".[22] Ms. Azarova herself was called out as holding "a history of consulting and advising NGOs that promote 'lawfare' against Israel".[23] Lawfare is the continuation of warfare against a target by means of law. NGO Monitor described that in her presentation at this conference, Ms.

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[13] https://www.bnaibrith.ca/alberta_professor_booted_from_the_classroom_again
[14] https://cdn.ku.edu.tr/resume/vazarova.pdf
[15] https://al-shabaka.org/profiles/valentina-azarov/ "Al Shabaka rhetoric includes accusations of 'ethnic cleansing,' 'apartheid,' 'genocide,' 'collective punishment,' and 'war crimes,'" https://www.ngo-monitor.org/ngos/al_shabaka_the_palestinian_policy_network/
[16] HaMoked: Center for the Defence of the Individual is an Israeli human rights organization with the main aim of assisting Palestinians of the disputed territories whose rights are allegedly violated due to Israel's policies. http://www.hamoked.org/home.aspx; Regularly petitions the High Court of Justice and makes inaccurate and inflammatory allegations of Israeli 'apartheid,' 'deportations,' 'torture,' 'collective punishment,' 'forcible transfers,' and the 'ghetto ization of the West Bank.'" https://www.ngo-monitor.org/ngos/hamoked_center_for_the_defense_of_the_individual/.
[17] "Leader in anti Israel 'lawfare' and BDS (boycotts, divestments and sanctions) campaigns" https://www.ngo-monitor.org/ngos/mattin_group/.
[18] "Primary activity: Leadership in lobbying against EU Israel relations:" https://www.ngo-monitor.org/ngos/mattin_group/.
[19] "Diakonia has provided funding to a number of highly biased and politicized NGOs active in the Arab Israeli conflict" https://www.ngomonitor.org/funder/diakonia/#:~:text=Sweden,Activity,for%20its%20work%20in%20Israel
[20] https://www.gov.il/BlobFolder/generalpage/terrorists_in_suits/en/De-Legitimization%20Brochure.pdf
[21] https://www.ngomonitor.org/reports/university_of_southampton_s_symposium_on_israel_s_right_to_exist_speaker_profiles_and_ngo_connections/
[22] https://www.ngo-monitor.org/reports/european-parliament-event-propaganda-based-advocacy-israels-isolation/
[23] https://www.ngo-monitor.org/reports/european-parliament-event-propaganda-based-advocacy-israels-isolation/

Azarova "went as far as to question Israel's right to self-defence, arguing that "[Israel was] 'precluded from lawfully availing [itself] of the tactical measures of legitimate occupying powers'".[24]

Her presentation was characterized as "part of ongoing, broader efforts to escalate international hostility towards Israel and turn Israel into a pariah state".[25] In her presentation, she refrained from advocating "for dialogue and/or negotiations between Palestinians and Israelis".[26]

The University process

The purpose of the Review is to consider process only and not substance. Its mandate is not to consider whether Ms. Azarova should have been recommended or not by the Search Committee, but whether the process followed by the Search Committee was proper. Nor is it to consider whether the decision to discontinue the candidacy of Ms. Azarova was the right or wrong decision, but the basis for the decision.

The purpose of the University review and this submission is not to consider the scholarship of Ms. Azarova as such, but rather the search process. Nonetheless the scholarship of Ms. Azarova is relevant. Her academic work and professional associations raise a number of questions. Both the Search Committee in making its recommendation and the University in not accepting it ignored the issues that the candidacy of Ms. Azarova posed.

1) Would Ms. Azarova's history of relentless, indeed obsessive, anti-Israel activism and specifically her "scholarly" efforts to demonize, delegitimize and employ a double standard in the case of Israel, if selected as Director of the Clinic and head of the Program, compromise the University of Toronto community?

2) Would the selection of Ms. Azarova as Director lead to discrimination in students' placements in internships and clinics by the International Human Rights Program against organizations which support the right of Israel to exist and in favour of anti-Zionist organizations?

3) Would the selection of Ms. Azarova as Director create a reasonable apprehension of bias in her work as Clinic Director and head of Program in selecting placements for students?

4) Would the continuation by Ms. Azarova while Director of Program of the extreme anti-Israel work to which she has primarily dedicated her professional life contribute to the creation a hostile atmosphere for Jewish and pro-Israel students and faculty at the University of Toronto?

What is disturbing about the search process and the recommendation in favour of Ms. Azarova is not the answers given to these questions, since there were no answers. Rather what we find disturbing and ask the Review to find improper is—from what we can see from publicly available information—that these questions were never addressed.

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[24] https://www.ngo-monitor.org/reports/european-parliament-event-propaganda-based-advocacy-israels-isolation/
[25] https://www.ngo-monitor.org/reports/european-parliament-event-propaganda-based-advocacy-israels-isolation/
[26] https://www.ngo-monitor.org/reports/european-parliament-event-propaganda-based-advocacy-israels-isolation/

Ms. Azarova herself acknowledges that the work that she had done "on Palestine" was not presented or discussed at her University of Toronto Law search interview. She presented instead her work on immigration and supply chain accountability. Professor Vincent Wong, a member of the Search Committee, confirmed that the Search Committee had not discussed her work on "the Israel Palestine issue" and instead looked only at her work on the supply chain and corporate accountability for harm and abuse.[27]

Both Ms. Azarova and Mr. Wong present what Ms. Azarova calls her work on Palestine, what Mr. Wong wrongly calls her work on the Israel-Palestine issue, and what we would call works which continually sought to demonize and delegitimize the existence of the State of Israel as one issue, and supply chain and corporate accountability for harm and abuse, as a separate issue. However, if one looks at publicly posted works of Ms. Azarova, they are almost entirely one and the same issue.

These are her works on supply chain and corporate accountability for harm and abuse set out in a CV posted in August 2016:[28]

1) "Domestic Regulation of Transnational Corporate Wrongs: The Legal Consequences and Risks of Business Activities in Israeli Settlements." (forthcoming)

2) "Towards Domestic Regulation of Extraterritorial Corporate Wrongdoing: The Legal Consequences and Risks of Business in Israeli Settlements", in Taming Power in Times of Globalisation: What Role for Human Rights, Conference, NUI Galway, November 2015.

3) "A Paradigmatic Shift in Corporate Accountability? Insights from European 'Divestment' from Israeli Settlements."

4) "Operationalizing Home State Regulation of Corporate Involvement in International Law Violations: The Case of European Divestment from Israel's Internationally Unlawful Activities in Palestinian Territory", Second Regional Annual Conference on Corporate Social Responsibility in the Middle East, Istanbul, 29 30 May 2014.

5) "Criminal Venture or 'Business as Usual'? Corporate Accountability for Violations of International Law in the Occupied Palestinian Territory", Human Rights Project, Bard College, NY, on 8 February 2011; Center for Human Rights and Global Justice, New York University Law School, 9 February 2011.

6) "Corporate and Third State Accountability, ICC Jurisdiction and the Goldstone Report: A Perspective from Al Haq's Work", "Brown Bag" Talk, Open Society Foundations, NY Offices, 4 February 2011.

This is not a selective identification of a few articles on supply chain and corporate accountability for harm and abuse which Ms. Azarova had written up until August 2016. This is the sum total of all posted articles and presentations Ms. Azarova had written on the subject up until then. Every single one of these articles is directed against Israel!

[27] Sean Fine and Joe Friesen "U of T law dean denies offering scholar job, caving to Tax Court judge's pressure" Globe and Mail September 18, 2020.
[28] https://cdn.ku.edu.tr/resume/vazarova.pdf

There is a more recent article posted on another website which is generic in nature:[29] "The Bounds of (Il)Legality: Rethinking the Regulation of Transnational Corporate Wrongs" Ekaterina Yahyaoui Krivenko (ed), Human Rights and Power in Times of Globalisation (Brill 2017). If one matches that article with her previous publication history and asks what are the wrongs which she has in mind, what are the bounds of illegality, the answer has to be corporate dealings with Israel.

It is remarkable and inexcusable for a Search Committee for a directorship of a human rights program at a law school and the directorship of its clinic that is to train students in human rights activism, to recommend hiring someone without even consideration of the core of their academic work and their activism and associations, all set out in great detail in a publicly posted CV, and to justify that incomprehensibly blinkered approach by claiming that only a generic aspect of their actual work was all that was considered. Yet that is what—at least according to both the candidate, Ms. Azarova, and one member of the Search Committee, Mr. Wong—happened in the recommendation in favour of the hiring of Ms. Azarova.[30]

What happened was either intentional or accidental. The issue here is not necessarily whether Ms. Azarova herself did anything wrong in the search process, though she did claim that her work for the IHRP would not be on “Palestine”, but rather only “on supply chain and corporate accountability for harm and abuse.” We know, as we have shown, that in the past, the two seemingly separate themes and concerns were, in fact, basically one and the same. If so, she was certainly not accurate or revealing. If, however, we give her every benefit of the doubt, then the issue the University Review has to consider is the work of the Search Committee and the University reaction to that work.

Either the Search Committee knew who Ms. Azarova is and did not care, or they did not know. If they knew who she is, but gave it no consideration in the search process, something which both Ms. Azarova and Mr. Wong claim to be the case, they failed to address relevant University policy. If they knew and they, nonetheless, recommended the appointment as the Director of a human rights program of someone who has sought to suppress the academic freedom of a scholar who disagreed with her views (see below “Eugene Kontorovich”), and who has obsessively sought to demonize and delegitimize a democratic state – Israel – and who has relentlessly promoted BDS, that would be nothing short of Orwellian.

If they did not know that ignorance, in light of the publicly available information about Ms. Azarova, they should have known. If the Search Committee did not do their work properly, those responsible for deciding whether or not to take the advice of the Search Committee should have done theirs. It was wrong for the University, in reacting to the recommendation of the search community, to attempt to ignore or sidestep the substantive issues the candidacy of Ms. Azarova posed.

As this experience has shown, it is impossible to avoid controversy in this area. Attempts to avoid controversy generate even more controversy than addressing the issues directly. The University would have been better served to address the issues raised by the candidacy head on rather than avoiding them.

[29] https://manchester.academia.edu/ValentinaAzarova
[30] https://cdn.ku.edu.tr/resume/vazarova.pdf; https://manchester.academia.edu/ValentinaAzarova

The linkage to University policies
i) Larry Summers

Larry Summers, a former president of Harvard University, dealt with the intersection of academic freedom and freedom of speech when addressing aggressive campus anti-Zionism this way:

> "the American academic community is being implicated in uniquely persecuting the world's only Jewish state for sins that even on the least sympathetic reading are small compared to those of many other nations. ... When errors happen, they should be called out. ... it can be argued, apparently persuasively, that academic leaders should avoid creating controversy by not speaking out on these issues. Appealing as it may be at any particular moment, I believe this approach if maintained over time represents a real threat to academic freedom. If zealous minorities, no matter how well intentioned, are able to hijack the prestige and resources of the academy in pursuit of objectives that are parochial and bigoted, why should the broader society refrain from seeking to set the academy's agenda. The right to say, advocate, or propose anything must always be protected. But it must come with the right or even obligation of others to call out words and deeds that threaten the community and the values of moral concern and rational inquiry for which it stands."[31]

Was the candidacy of Ms. Azarova the effort of a zealous minority to hijack the prestige and resources of the University of Toronto International Human Rights Program in pursuit of objectives that are parochial and bigoted? That is a question, in light of the history of Ms. Azarova, which had to be asked and answered both by the Search Committee in the process of making its recommendation and by the University in deciding whether or not to accept it. There was an obligation to do so and to decide whether or not to call out the words and deeds of Ms. Azarova as potentially threatening the University of Toronto community and the values of moral concern and rational inquiry for which it stands. Yet, that obligation was not met, either by the Search Committee in recommending Ms. Azarova or by the University when discontinuing her candidacy.

ii) James Keegstra and Malcolm Ross

The Supreme Court of Canada has addressed the issues of hate speech and freedom of expression in a learning environment in the cases of James Keegstra[32] and Malcolm Ross.[33] The cases involved schools, not universities. The case involved also the Canadian Charter of Rights and Freedoms and not institutional polices on freedom of speech. Nonetheless much of the analysis in these two cases is relevant to the interpretation of the University of Toronto policies on academic freedom, freedom of speech and freedom of expression.

In the James Keegstra case, the Supreme Court upheld Canada's hate speech laws as a justifiable limit on the right to freedom of expression. In the Malcolm Ross case, the Supreme Court relied on Keegstra to find that the Human Rights Commission of New Brunswick was right to order the School Board to order the termination of Malcolm Ross for creating a poisoned environment for his Jewish students.

Malcolm Ross was a math teacher at a New Brunswick school who engaged in Holocaust denial work outside of school hours. Even though this work was done outside of school, the Supreme Court held that the conduct of

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[31] Lawrence H. Summers "Academic Freedom and Antisemitism" ISGAP Policy Paper Series March 2015 https://isgap.org/wp-content/uploads/2015/03/Summers_Academic_Freedom_and_Antisemitism.pdf
[32] R. v. Keegstra, [1990] 3 S.C.R. 697
[33] Ross v. New Brunswick School District No. 15, 1996 CanLII 237

Ross "poisoned the education environment" and "created an environment in which Jewish students were forced to confront racist sentiment".

The Court held that the "continued employment" of Ross "compromised [the school's] ability to provide discrimination free educational services". The Court recognized that Jewish people are a "historically disadvantaged group that has endured persecution on the largest scale" and that the Charter right to freedom of expression should not be used to "roll back advances made by Jewish persons against discrimination".[34] The Court further held that "the school environment must be one where all are treated equally" and that "teachers must ensure that their conduct transmits this message of equality to the community at large".[35]

iii) Definition of antisemitism

Also relevant to the present situation is the definition of antisemitism. Both the Government of Canada[36] and the Government of Ontario[37] have adopted the working definition of antisemitism endorsed by the International Holocaust Remembrance Alliance (IHRA). At least thirty universities in the United Kingdom, including University of Cambridge, have adopted this definition.[38] All the German universities have adopted the definition.

There is a tendency for anti-Zionists to deflect criticism that they are antisemitic by asserting that all they are doing is criticizing the actions of the Israeli government and that no government should be immune from criticism. The International Holocaust Remembrance Alliance endorsed working definition of antisemitism helps to sort out those assertions, to distinguish criticism of the behaviour of Israel from antisemitism. The University would be well advised to adopt this definition itself as a guide in dealing with situations like that presented by the candidacy of Ms. Azarova.

The definition sets out a general principle and eleven examples. Several of the examples address this very issue, the distinction between criticism of the behaviour of Israel and antisemitism.

The general principle in the definition is this:

> "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."[39]

IHRA makes clear that

> "Manifestations [of antisemitism] might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic."

The examples which point to a distinction between criticism of the actions of the Government of Israel and antisemitism are these:

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[34] Paragraph 86
[35] Paragraph 100
[36] https://www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html
[37] https://www.ontario.ca/orders-in-council/oc-14502020
[38] https://jewishjournal.com/news/worldwide/322348/1-in-5-british-universities-have-adopted-ihra-definition-of-anti-semitism-survey-says/
https://www.telegraph.co.uk/politics/2020/09/29/one-five-universities-has-adopted-anti-semitism-definition-despite/
[39] https://www.holocaustremembrance.com/resources/working-definitions-charters/working-definition-antisemitism

5. "Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
6. Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
7. Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavour.
8. Applying double standards by requiring of it [Israel] a behaviour not expected or demanded of any other democratic nation.
9. Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
10. Drawing comparisons of contemporary Israeli policy to that of the Nazis.
11. Holding Jews collectively responsible for actions of the state of Israel."

The definition of antisemitism endorsed by IHRA has itself come under criticism. It would take us too far afield to address those criticisms here. We have produced a detailed analysis of those criticisms available on request.

Natan Sharansky has produced a useful short cut for distinguishing between legitimate criticism of Israel and antisemitism in an anti-Israel guise, what he calls the three "ds" - demonization, delegitimization and double standards.[40] Any form of racism can exist by impact or effect as well as intent. Even if the intent is not there, discourse can still be antisemitic if that is its effect. The issue the candidacy of Ms. Azarova posed was whether, objectively, whatever her intent, she was engaged in the demonization and delegitimization of Israel, imposing on Israel standards she imposed on no other country.

Allegations against a judge

There are allegations that Tax Court Judge David Spiro advised the Dean of the Law school Edward Iacobucci against acceptance of the candidacy of Valentina Azarova. The allegations state that the Judge had in the past provided fundraising advice to the University and that his extended family had donated millions.[41]

We have no direct or indirect knowledge of the truth of these allegations. We have no personal contact with the Judge or anyone on his behalf. We nonetheless are aware that, legally, those in a relationship of proximity to a person or institution in danger have a duty to warn that person or institution of the danger.[42]

If we assume that the alleged facts are true, it is our view that what the judge did was defensible. The appointment of Ms. Azarova as Director of the International Human Rights Program would have been disastrous for the University for it would have been the antithesis of protecting academic freedom and free speech.

There is a legitimate argument to be made, and the judge may well have made it, that the appointment of Ms. Azarova would have meant, to use the words of former Harvard President Larry Summers, the hijacking of the prestige and resources of the University of Toronto International Human Rights Program in pursuit of objectives that are parochial and bigoted. This hijacking, if it occurred, could, as former President Summers has warned,

[40] https://www.jcpa.org/phas/phas-sharansky-f04.htm
[41] Joe Friesen "Teachers group begins process to censure U of T over hiring affair" Globe and Mail October 16th, 2020.
[42] Rivtow Marine Ltd. v. Washington Iron Works, 1973 CanLII 6 (SCC), [1974] SCR 1189 Margaret Isabel Hall, "Duty to Protect, Duty to Control and the Duty to Warn", 2003 82 3 Canadian Bar Review 645, 2003 CanLIIDocs 87.

lead to an effort from broader society to set the agenda for the University of Toronto, undermining its academic freedom.

There is nothing wrong, from our perspective, for the judge to warn the University of this danger. His prior relationship with the University gave him sufficient proximity to impose on him, arguably, a duty to do so.

Academic Freedom
i) Valentina Azarova

The University of Toronto academic freedom policy applies only to faculty and librarians who are part of the University of Toronto. It does not apply to those who are not already faculty or librarians and are only at the stage of applying to join a University of Toronto faculty or library. Faculty, for the University of Toronto, are defined as persons appointed under the Policy and Procedures on Academic Appointment or the Policy and Procedures on Employment Conditions of Part-time Academic Staff.[43]

The policy on academic freedom for the University of Toronto does not apply to every employee of the University. The University of Toronto divides its employees into different groups. One group is academics and librarians. Another group is professionals and management.[44] The University of Toronto policy on academic freedom applies, as one might expect, to the employee group academics and also librarians. It does not apply to the employee group professionals and management.

The job as Director of the International Human Rights Clinic at the University of Toronto falls within the professionals and management category, not the academics and librarians category.[45] Accordingly, the University of Toronto policy on academic freedom does not apply to the Director of the International Human Rights Clinic.

To be specific, the policy on academic freedom at the University of Toronto did not apply to Valentina Azarova as a candidate for a position at the University. Moreover, even if Ms. Azarova had been successful and been employed as Director of the Clinic, the University of Toronto policy on academic freedom would still not apply to her. Consequently, there could not have been and there could not be any possible violation of the University of Toronto policy on academic freedom in relation to Ms. Azarova.

ii) David Noble

David Noble distributed at York University a pamphlet he had written claiming that the York University Foundation was "biased by the presence and influence of staunch pro-Israel lobbyists, activists, and fundraising agencies," and that the Foundation was "the tail that wags the dog that is York University." York University issued in response a media release in which the University President condemned the pamphlet as "highly offensive material, which singles out certain members of the York community on the basis of their ethnicity and alleged political views." The media release called the pamphlet a "type of bigotry."

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[43] See footnote 4
[44] https://web.archive.org/web/20200618030948/https://utoronto.taleo.net/careersection/10000/jobdetail.ftl?job=2001027
[45] https://ohrh.law.ox.ac.uk/international-human-rights-program-director-job-posting-university-of-toronto/

The York University Faculty Association filed a grievance in support of David Noble claiming that his academic freedom had been infringed. Arbitrator Russell Goodfellow found that the academic freedom of David Noble had been violated because the University, before it issued its statement, did not consult with David Noble or the Faculty Association to advise of its concerns; it did not investigate the matter, or indicate what it was contemplating.[46]

Again, the situation with Valentina Azarova is quite different. Here there was no public statement by the University critical of Ms. Azarova without an opportunity to respond before it was released.

This arbitration award affirms and applies a standard legal principle in a University context. When academic freedom is at issue, the duty of fairness requires the raising of concerns before a decision is reached.

That principle was violated in the process relating to the search for the Director of the International Human Rights Clinic. But the victim was not Valentina Azarova.

The victims were rather the Jewish and other student supporters of Israel who would potentially be disfavoured if she were in charge of students' placements in internships and clinics. They were also Jewish and other students and vulnerable faculty members in the University generally who potentially could become victim to a hostile environment at the University Ms. Azarova could potentially help to create once she joined the University community.

Ms. Azarova, certainly, had a right to answer those concerns if they had been raised. The trouble here is not that she was denied that right. The trouble rather is that, despite the fact that these concerns jump out from her cv, the Search Committee never raised them. And neither did the University either, after the Search Committee had made its recommendations. When someone hands you a hot potato, don't drop it. But that, in effect, is what the University did.

iii) Eugene Kontorovich

Eugene Kontorovich, a Professor at the Antonin Scalia Law School at George Mason University in Virginia, was invited to speak at an academic conference on "The International Legality of Economic Activity in Occupied Territories", hosted by the Asser Institute in the Hague in October 2018. A number of participants in the conference, including Valentina Azarova, opposed the inclusion of Eugene Kontorovich in the program because of the views he had put forward in his research, which are sceptical of the claimed illegality of business activity in the West Bank.

The invitation to Professor Kontorovich was not withdrawn and he spoke at the conference shortly before Ms. Azarova. Ms. Azarova at the conference prefaced her own remarks by stating "participation in the workshop does not constitute an acceptance of the unconditional invitation to Eugene Kontorovich".[47]

[46] York University v York University Faculty Association (2007), 167 LAC (4th) 39 (OLAA)
[47] https://www.thej.ca/2020/11/18/university-of-toronto-law-school-hiring-controversy-continues/

Academic freedom includes presumably the right to argue against academic freedom. But Ms. Azarova was doing more than that. She was an activist against academic freedom, a person working to frustrate it and disassociating herself publicly from any attempts to protect it.

It is startling that a University Search Committee would recommend such a person even for a non-academic post. It is even more startling that they would do so without even exploring her antipathy towards academic freedom and her activist bent to realize that antipathy. Once again the University, by passing over this omission when addressing the Search Committee recommendation, was asleep at the switch.

Perhaps most amazing of all is the clamour in the name of academic freedom over the fact that the blinkered recommendation of the Search Committee in favour of Ms. Azarova was not realized. Why would anyone in the name of academic freedom advocate for a candidate who is publicly opposed to it and actively seeks to undermine it?

The answer is, like the answer for the Search Committee itself, that these advocates either did not know or did not care. One can understand ignorance, which is as vast as knowledge, and then some. But why would people not care? The answer presumably is that, for all too many, demonization and delegitimization of Israel come first. Academic freedom is a distant second.

iv) The Search Committee and the Advisory Board

Vincent Wong resigned from the University of Toronto and the Advisory Board of the Clinic resigned their advisory functions on the basis that their academic freedom had been violated. The claim of violation of their academic freedom was based on a self-constructed narrative of events - that the recommendation of the Search Committee was not accepted because a sitting judge and major donor had expressed concerns about the academic work of the nominee, Valentina Azarova, that the Search Committee had recommended.

This narrative varies from the official narrative. The League for Human Rights of B'nai Brith Canada does not know whether a sitting judge and major donor had expressed concerns about the academic work of Ms. Azarova. Moreover, even if this happened, we have no reason to believe that there was any other justification for the decision of the University not to act on the recommendation of the Search Committee than the official reason given.

One has to presume good faith on the part of all parties. The presumption is rebuttable. But it can not be rebutted by the reasoning post hoc ergo propter hoc, (after that, therefore because of that). That reasoning is a logical fallacy.

As well, as explained earlier, there would have been nothing improper, in our view, for a sitting judge and major donor to have expressed concerns about the publication and professional history of Valentina Azarova, given that the Search Committee, by the admission of Vincent Wong and Valentina Azarova herself, did not canvass them. Indeed, given the dereliction of the Search Committee, anyone would have been doing the University a favour to raise those concerns.

While we have no reason to accept the narrative of the Advisory Board and Vincent Wong which, as we noted, appeared based on a logical fallacy, let us assume that an investigation could establish that, in fact, the Dean was acting in bad faith, and that the real reason that he did not act on the recommendation of the Search Committee was the warnings from a well-meaning judge and donor. That assumption would nonetheless not absolve the Search Committee from not having done its job nor resolve the issue of academic freedom.

This assumed narrative involves a second fallacy, the equivalence between an academic position and the position of Director of the International Human Rights Clinic. The issue here is not academic research and publications. The issue is rather whether the appointment as a director of an international human rights clinic of a person who has no patience with Zionist views, who believes that they should not be protected by academic freedom and who makes decisions relating to, among other things, students' placements in internships and clinics, and approval and amount of funding for students to complete unpaid international legal internships is proper. Whatever one's conclusion about academic freedom of people in academic positions, that conclusion could not determine this issue.

There is yet a third fallacy in this hypothetical and, to date, unsubstantiated narrative of Vincent Wong and the Advisory Committee. This narrative appears to be adopting the position that anti-Zionists should have complete academic freedom and Zionists should have none. As the case of Eugene Kontorovich shows, that is the view of Valentina Azarova.

Barring ignorance of who Valentina Azarova is, that must also be the view of Vincent Wong and the Advisory Committee. There is no other explanation for the indifference that Vincent Wong and the Advisory Committee have shown to the obstacles to academic freedom that the appointment of Valentina Azarova would have presented to the University.

In principle it is impossible to argue that the academic freedom of students and vulnerable faculty members Jewish or not who support Israel does not matter. Yet that is the position that those who endorse the unsubstantiated narrative accusing the Dean of bad faith appear to be taking.

Our position

B'nai Brith Canada takes the position that the Search Committee should not have recommended Ms. Azarova for the position of the Director of the International Human Rights Program at the University of Toronto because she was an unsuitable candidate. She was, we say, unsuitable because of her long past history of focus on Israel virtually alone, her extreme, one-sided published criticisms of alleged human rights violations by Israel and her prolonged professional, active, visible association with a variety of anti-Zionist organizations. That history would have inevitably created a reasonable apprehension of bias in the work she had to do as Director in students' placements in internships and clinics, and approval and amount of funding for students to complete unpaid international legal internships.

Moreover, it is reasonable to assume that, if chosen, she would at the University of Toronto continue the work that she had done in the past. It is reasonable to assume that at the University of Toronto, she would continue to focus on Israel virtually alone, to produce obsessive one-sided criticisms of alleged human rights violations of

Israel and that she would continue to associate professionally, actively and visibly with extreme anti-Zionist organizations.

To have such a person as Director of the International Human Rights Program would distort the Program in appearance as well as in potentially in reality. It would also create a hostile environment for Jewish students and vulnerable faculty members supportive of Israel and pose a threat to their academic freedom and freedom of expression.

Once Ms. Azarova was recommended by the Search Committee, the University should have rejected that recommendation. The University should have done so regardless of other considerations for the very reasons we say that the Search Committee should not have recommended her.

Recommendations

Our recommendations to the Review are these:

1) The Review should find that the Search Committee, in considering the candidacy of Ms. Azarova, should have addressed the issues raised by her focus on Israel to the virtual exclusion of all other countries, her extreme one-sided history of seeking to delegitimize and demonize Israel over alleged Israeli violations of international human rights and her professional, active and visible association with a multitude of virulently anti-Zionist organizations.

2) The Review should further find that, once the Search Committee proposed the candidacy of Ms. Azarova without addressing these matters, the University, when discontinuing her candidacy, should have definitely done so.

3) The Review should propose that the University adopt the IHRA working definition of antisemitism as a guide to the application of its policies on freedom of expression, freedom of speech and academic freedom, to assist the University in addressing situations of the sort the candidacy of Ms. Azarova presented.

4) The Review should propose that, in the future, any Search Committee faced with issues similar to those posed by the candidacy of Ms. Azarova should address them squarely and openly.

5) The Review should propose that the University itself in addressing a recommended candidacy from a Search Committee which raise the issues similar to those posed by the candidacy of Ms. Azarova should also address them squarely and openly.

B'NAI BRITH CANADA

League for Human Rights of B'nai Brith Canada
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CANADIAN JUDICIAL COUNCIL

(CJC Files 20-0254 et al.)

SUBMISSIONS ON BEHALF OF JUSTICE DAVID SPIRO

February 8, 2021

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WRITTEN SUBMISSIONS TO THE JUDICIAL CONDUCT REVIEW PANEL ON BEHALF OF THE HONOURABLE JUSTICE DAVID SPIRO

February 8, 2021

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Introduction

1. We have been retained by the Honourable Justice David Spiro to make submissions on his behalf to the Judicial Conduct Review Panel that has been formed to consider whether this matter should be referred to an Inquiry Committee on the ground that Justice Spiro's conduct may justify his removal from office.

2. We have reviewed the Reasons of Associate Chief Justice Nielsen dated January 5 2021 and the materials provided to Justice Spiro with those Reasons. These materials include the complaints received by the Canadian Judicial Council, Justice Spiro's letters to the Council dated October 26 and November 23 2020, and a letter from Chief Justice Rossiter of the Tax Court of Canada dated October 23 2020.

3. These submissions are being filed with (a) a further letter from Justice Spiro dated February 8 2021, in which Justice Spiro has elaborated on his account of the events in question as a result of his review of Associate Chief Justice Nielsen's Reasons,[1] and (b) letters to the Review Panel from Robert Prichard,[2] Emeritus Professor Arnold Weinrib,[3] Mary Holland Feltman,[4] Paul Malette, Q.C.,[5] and former Chief Justice Gerald Rip.[6] Chief Justice Eugene Rossiter's letter[7] of October 23 2020 is also reproduced for ease of reference.

4. In our respectful submission, Justice Spiro's conduct cannot justify his removal from office and, therefore, an Inquiry Committee should not be constituted. The Review Panel should remit this matter to the Chair or Vice-Chair of the Judicial Conduct Committee to determine whether any further measures should be taken.

The Facts

5. The Review Panel's decision must be based on an objective consideration of the known facts, not based on speculation in media reports that are repeated in complaints to the Council. As Associate Chief Justice Nielsen has correctly pointed out: "All of the complainants based their complaint on news reports, hearsay, and speculation."

Justice Spiro's communications with the University of Toronto regarding a potential appointment

6. On September 3 2020 Justice Spiro was approached by a staff member of the Centre for Israel and Jewish Affairs (CIJA), on whose Board of Directors he had served until he resigned upon his appointment to the Tax Court of Canada in April 2019. The CIJA staff member, Judith Zelikovitz, expressed concern about a prospective appointment at the

[1] Reasons for the referral of a complaint to a Panel in the matter of the Honourable David E. Spiro of the Tax Court of Canada, dated January 5 2021.
[2] Letter from Robert Prichard, dated February 4, 2021, Submissions on behalf of Justice David Spiro, dated February 8, 2021 [Submissions], Tab 3.
[3] Letter from Emeritus Professor Arnold Weinrib [Weinrib Letter], Submissions, Tab 6.
[4] Letter from Mary Holland Feltman, dated February 1, 2021 [Feltman Letter], Submissions, Tab 5.
[5] Letter from J. Paul Malette, Q.C., dated January 21, 2021 [Malette Letter], Submissions, Tab 4.
[6] Letter from former Chief Justice Gerald Rip, dated February 2, 2021 [Former CJ Rip Letter], Submissions, Tab 7.
[7] Letter from Chief Justice Eugene Rossiter, dated October 23, 2020 [CJ Rossiter Letter], Submissions, Tab 8.

University of Toronto Faculty of Law, namely of Dr. Valentina Azarova to the position of Director of the International Human Rights Program (IHRP). Ms Zelikovitz sent Justice Spiro a brief memorandum concerning the candidate's scholarship which the author of the memorandum (Professor Gerald Steinberg of Bar Ilan University in Israel), characterized as one-sided and anti-Israel. The truth or merit of the contents of the memorandum were unknown to Justice Spiro, but the very fact that the memorandum had been written and was being circulated indicated to him that the appointment was bound to be controversial. Ms. Zelikovitz suggested that Justice Spiro communicate with Dean Edward Iacobucci about the matter. Justice Spiro considered that it would be inappropriate for him to communicate with Dean Edward Iacobucci about the matter and he did not do so (nor did he ever threaten to do so).

7. The next day, September 4 2020, Justice Spiro had a telephone conversation with Chantelle Courtney, a friend who was a University of Toronto fundraiser with whom Justice Spiro had worked prior to his appointment. Justice Spiro's conversation with Ms. Courtney had been arranged as an opportunity for the two friends to catch up, before he learned of the potential appointment of the candidate, Dr. Azarova, about whom Ms. Zelikovitz had expressed concern. At the end of their call, Justice Spiro told Ms. Courtney about the concern that had been raised with him by Ms. Zelikovitz (without naming her), and asked Ms. Courtney whether she knew anything about the status of the appointment or potential appointment (she did not). He did not ask her to contact Dean Iacobucci.

8. Justice Spiro mentioned the concern to Ms. Courtney because he wished to alert the University, and the Faculty of Law in particular, to the fact that if the appointment were made it appeared likely that it would result in public protests that would be harmful to the University and the Faculty of Law, given Professor Steinberg's memorandum. Justice Spiro wanted the University and its Faculty of Law to be ready for the anticipated controversy if the appointment were made because he had been active at the University and the Faculty of Law in many ways for decades, and he cared deeply about protecting their reputations.

9. Justice Spiro was a student at the Faculty of Law from 1984 to 1987 and has been an extraordinarily active and accomplished alumnus and supporter of the Faculty since his graduation. His volunteer activities (which for the period 2011 and following are detailed in Appendix E of his letter to the Review Panel of today's date) have included among many other things fundraising and financial support, founding a bursary in Emeritus Professor Arnold Weinrib's honour, and initiating a program at the Tax Court of Canada for unrepresented, low-income taxpayers to be represented *pro bono* by students. He was honoured in 2011 with an Arbour Award in recognition of his volunteer contributions to the University, having been nominated by the Faculty of Law.

10. Justice Spiro has continued to support and communicate with the Faculty of Law since his appointment to the Tax Court of Canada. For instance, on August 23 2020 (only a few weeks before his conversation with Ms. Courtney) he wrote to Dean Edward Iacobucci from his Tax Court of Canada email account to ask whether the Court would be able to use the Faculty's Moot Courtroom from time to time, and to inquire what could be done to

encourage graduates interested in tax law to clerk at the Court (see Appendix D to Justice Spiro's letter to the Review Panel of today's date).

11. Later on September 4 2020, the same day as they spoke, Justice Spiro learned from Ms. Courtney that no appointment had been made. He relayed that information to Ms. Zelikovitz.

12. Justice Spiro spoke the same day to Emeritus Professor Arnold Weinrib of the Faculty of Law, with whom he had been friendly for many years, to ask whether he knew anything about the matter. Emeritus Professor Weinrib had retired in 2006, though he continued to teach part time. He had no role in the administration of the Faculty of Law or in the appointment process. Justice Spiro sent Professor Steinberg's memorandum to Professor Weinrib for his information. Professor Weinrib told Justice Spiro that he was unaware of the potential appointment, or indeed that a search for a Director of the IHRP was underway. As Justice Spiro expected and intended, Emeritus Professor Weinrib did not pursue the matter with anyone, even to the extent of not replying to Justice Spiro's email attaching Professor Steinberg's memorandum.

13. After learning from Ms. Courtney that no appointment had been made, Justice Spiro had no further involvement in the matter. He did not follow up with Ms. Courtney or communicate with the Dean or anyone else involved in the search or hiring process. The suggestion by the complainants that he "pressured" Dean Iacobucci to "rescind" the appointment of Dr. Azarova is incorrect.

14. As Associate Chief Justice Nielsen has mentioned, in a public statement dated September 15 2020 Dean Iacobucci has confirmed that outside interference played no role in his decision not to accept the recommendation of the search committee. Dean Iacobucci added that suggestions to the contrary are "untrue and objectionable".[8]

15. Moreover, although Justice Spiro made it clear when speaking to Ms. Courtney why this would not be a routine appointment but would likely generate a great deal of controversy, he at no time made any statements whatsoever about any of the ethnic or religious groups to which Dr. Azarova's scholarship relates, nor did he do or say anything that could in any way be considered racist or derogatory.

16. Associate Chief Justice Nielsen has observed that the process of the search committee was intended to be confidential. By September 3 2020, when Justice Spiro learned of the concern, a professor in Israel had learned of the appointment or prospective appointment of Dr. Azarova and had passed on the information to the CIJA, who had passed it on to Justice Spiro. By the time Justice Spiro learned of the matter the information was no longer confidential; it was known to a number of people. Justice Spiro said nothing to anyone outside the University community; other than Ms. Zelikovitz, who with her colleagues was of course aware of the appointment or prospective appointment, Justice Spiro

[8] Edward Iacobucci retired as Dean as of December 31 2020, having announced his intention to do so in February of that year.

communicated only with Ms. Courtney and Professor Emeritus Weinrib. Responsibility for any breach of confidentiality cannot be visited on Justice Spiro.

17. Justice Spiro has learned from this incident and has repeatedly apologized. He recognizes that it was a mistake for him to have discussed with Ms. Courtney the concern expressed by Professor Steinberg, which was, in turn, conveyed to him by Ms. Zelikovitz. He has written to the Council about how the media coverage of his involvement in the incident has heightened his awareness of the need for him to avoid saying anything that may lead to a perception, accurate or otherwise, that persons who appear before him may have reason to fear that he may approach his judicial responsibilities based on anything other than scrupulous attention to the facts of the case and the applicable law. Justice Spiro has also written to the Council that he has learned that words spoken outside the courtroom by a judge, even if not intended for publication, may create the wrong impression about the judge's impartiality, thereby having the potential to diminish the confidence of Canadians in the administration of justice. As Associate Chief Justice Nielsen has observed, Justice Spiro has reiterated his commitment to impartiality throughout.

Justice Spiro is dedicated to building bridges between, rather than dividing, the faith communities associated with the Israel-Palestine conflict

18. Justice Spiro has assured the Council that he does not harbour any views that are anti-Palestinian, anti-Arab, or anti-Muslim, and that he has never made any statements, public or private, that are anti-Palestinian, anti-Arab, or anti-Muslim. In fact, he devoted a good deal of time before his appointment to enhance his understanding of the Israel-Palestine conflict and to build bridges between the parties and the faith communities involved.

19. For example, while he served on the board of CIJA he travelled to Israel with his fellow board members. They met in East Jerusalem (on an off the record basis) with the internationally respected economist and former Prime Minister of the Palestinian Authority, Dr. Salam Fayyad, and with Ambassador Husam Zomlot, who has served as Head of the Palestinian Mission to the United Kingdom, Head of the PLO Mission to the United States of America, and Strategic Affairs Advisor to the President of Palestine. The purpose of these meetings was to better understand and appreciate the Palestinian position with respect to ways in which the conflict between Israelis and Palestinians might be resolved.

20. Justice Spiro authored an article in early 2017 for CIJA members and supporters, reflecting on the CIJA board mission to Israel. The article, which is attached to Justice Spiro's letter of October 26, demonstrates that he harbours no bias against any racial, religious, or ethnic group, but rather maintains an open mind interested in listening to all perspectives on the conflict and considering the possibilities for peace in the region.

21. Justice Spiro also organized a lunch meeting at the Faculty of Law in early 2018 featuring a visiting Fulbright Scholar, J.R. Rothstein, and a scholar in Islamic Law, Shaykh Ibrahim Hussain. At the meeting the speakers explored one of the many intersections between Judaism and Islam by focusing on the ancient rule of law, common to both legal traditions, prohibiting usury.

22. Justice Spiro is a devout Jew. His father is a Rabbi, as was his paternal grandfather. Justice Spiro was taught by them, by his family, and by his teachers to respect his fellow human beings regardless of their race, religion, or ethnicity. He was taught, and firmly believes, that all adherents of the three great monotheistic religions are children of Abraham. Religious Jews consider themselves descendants of Abraham's son Isaac while religious Muslims consider themselves descendants of Abraham's son Ishmael. Justice Spiro considers all Christians (including Arab Christians), and all Muslims (including Arab Muslims), to be his spiritual cousins. He bears no animus against anyone, including atheists or members of non-monotheistic religions. He firmly believes that each human being is worthy of dignity and respect; as the Talmud teaches, to save one life is to save the entire world.

23. Israel is a fundamental part of Justice Spiro's religious belief. He is proud to be pro-Israel. At the same time, he is "pro" anyone who believes in peace, tolerance, and co-existence and who does not believe that violence is an appropriate way of accomplishing one's objectives or settling one's disputes.

24. Arabs constitute about one-fifth of the population of Israel and play leading roles in all aspects of Israeli life. Arab citizens are judges who serve on Israeli courts (including the Supreme Court), doctors who hold senior positions in Israeli hospitals, professors who hold senior positions in Israeli universities, politicians who hold seats in the Israeli Parliament (the Knesset), and officers who hold senior positions in the Israel Defense Forces. In addition to its earlier peace treaties with Egypt (1979) and Jordan (1994), Israel has recently entered into normalization agreements with four Arab countries (United Arab Emirates, Bahrain, Morocco and Sudan). Justice Spiro welcomes those agreements as public reflections of the familial relationship between Israel and her Arab neighbours. Justice Spiro looks forward to additional agreements in the future including a final-status agreement with Israel's closest neighbours, the Palestinians.

25. Justice Spiro bears no animus towards any Palestinian taxpayers or counsel who may appear before him, and indeed is not interested in whether a taxpayer or counsel appearing before him is Palestinian. Even if he were interested in the ethnic or religious identity of those appearing before him, however, he would have no way of knowing whether they were Palestinian unless he asked a series of questions designed to determine that fact and to elicit from them their political beliefs and views with respect to Israel. Such matters are none of his concern and are entirely irrelevant to any proceedings before him. They would play no role in his decision making. Neither Palestinians nor anyone else should have any reason to fear appearing before Justice Spiro. As Mr. Prichard states in his letter, the suggestion that he would not be perceived as being able to fairly adjudicate disputes from members of certain communities because he would be perceived as having a bias "seems to me to be farfetched in the extreme."

Justice Spiro's consistent record of integrity and fairness

26. Justice Spiro's well-intentioned but ill-advised conversation with Ms. Courtney on September 4 2020 was an isolated incident in an accomplished and unblemished career. While at the bar he received the highest rating (AV) for ability and ethics from *Martindale-*

Hubbell in 2012, a rating he continued to receive annually until he accepted his judicial appointment in 2019. There has been no suggestion of impropriety since he became a judge of the Tax Court of Canada.

27. Chief Justice Rossiter of the Tax Court of Canada has written to the Council to attest to Justice Spiro's work on the Court. He wrote that: "I can advise that both I and the Tax Court of Canada's Associate Chief Justice have the utmost faith in Justice Spiro's ability to act impartially and without bias in litigation that comes before him. We believe he has and will continue making a valuable contribution to the Canadian public in his role as a Justice of the Tax Court of Canada."[9]

28. The letters that accompany this submission from Robert Prichard, Emeritus Professor Arnold Weinrib, Mary Holland Feltman, Paul Malette, Q.C., and former Chief Justice Gerald Rip.[10] similarly attest to Justice Spiro's character. All of the authors have known Justice Spiro well both personally and professionally for 30 years or more and are well-situated to comment on his character meaningfully.

29. Mr. Malette was Justice Spiro's section head and manager for 13 years while Justice Spiro practiced tax litigation with the Department of Justice. He has written that Justice Spiro is a person of integrity, and he never exhibited a prejudice against parties because they were of a certain racial or ethnic group. He added that such behaviour would have been unacceptable and would have come to Mr. Malette's attention. Mr. Malette supported Justice Spiro's application for a judicial appointment because he knew that, in addition to his technical knowledge, he would treat everyone who appeared before him fairly.

30. Mary Holland Feltman is a court reporter who has known Justice Spiro professionally since 1991. She has worked with him on hearings in the Tax Court of Canada and on pre-trial examinations both while Justice Spiro was with the Department of Justice and while he was in private practice. After commenting on Justice Spiro's "fairness, thoughtfulness, passion, and compassion" toward everyone involved in the litigation process she added that: "Not once in these 30 years has David said anything disparaging or even slightly negative about any person or group or place or position."

31. Emeritus Professor Weinrib taught Justice Spiro tax law when Justice Spiro was a student at the University of Toronto's Faculty of Law. He and Justice Spiro became friends. They have regularly had lunch together, three or four times a year for over 30 years. Professor Weinrib retired from the Faculty of Law in 2006 and has taught part time since then. About five years ago Justice Spiro founded a bursary in Professor Weinrib's name in honour of his 50 years teaching at the Faculty of Law.

32. Professor Weinrib has written that Justice Spiro telephoned him last September to ask whether he knew anything about the potential appointment of Dr. Azarova. Professor Weinrib did not know that there was a search for a Director of the IHRP, and had never heard of Dr. Azarova. As a courtesy, Justice Spiro sent Professor Weinrib a follow up message later the same day to say that he had learned that no decision on the appointment

[9] CJ Rossiter Letter, Submissions, Tab 8.
[10] Submissions, Tab 3-7.

had been made. Justice Spiro attached to his message Professor Steinberg's memorandum about Dr. Azarova's writings. Professor Weinrib did not reply, and has not discussed with Justice Spiro the controversy that has ensued.

33. Professor Weinrib wrote that: "In all the time I have known Justice Spiro, there was never a time when I thought I knew anyone of better character than his." He added that: "His good character and empathy for people made him an excellent choice for the Court."

34. Robert Prichard was Dean of the Faculty of Law while Justice Spiro was a student there. He was appointed President of the University of Toronto thereafter, a position in which he served from 1990 to 2000. He is at present President Emeritus of the University and Professor Emeritus of the Faculty of Law.

35. Mr. Prichard has counted Justice Spiro as a friend for over 30 years. He has written: "I knew he would be an excellent judge. He is a person of complete integrity with a powerful commitment to fairness. He is principled, thoughtful and committed to justice—just the sort of person we want on the bench. In the more than 30 years I have known David, I have never heard a single ill-word spoken about him in any context. He is widely respected and admired for his quiet, modest and principled approach to life."

36. Mr. Prichard has also written about the context in which the present controversy has arisen. He asserts that active engagement of the profession and the judiciary makes the law school far stronger and helps the school remain relevant to its many constituencies. He has written that: "Alumni are welcome to express their views on a whole range of topics. Indeed, they are encouraged to do so. But those opinions cannot compromise our decisions with respect to admissions, appointments or anything else that relates to the core academic values of the school. No academic should or would countenance any improper influence on our academic decisions. It is the duty of the Dean and other officers of the Faculty to uphold the University's principles of governance and decision-making. They do so not by insulating and isolating themselves from advice, information and opinions from those beyond the law school, but by their fidelity to self-governance and principled decision-making."

37. Mr. Prichard added that: "As I understand it, Justice Spiro passed on information gathered by others about an administrative staff appointment to a university fundraiser who was a personal friend, not because he was attempting to influence the decision to accord with his personal preferences, but because of a concern for the reputation of the law school and to ensure the law school was aware of potential controversy. At the law school we welcome this kind of frank feedback from our stakeholders. On the other hand, I do not believe this information would have any impact of the decision-making at the law school, since doing so would be inconsistent with the school's independence in making appointments."

38. Similarly, Emeritus Professor Weinrib wrote that he is glad that Justice Spiro is an active participant as an alumnus in the life of the law school. He added that it is beneficial for the Faculty of Law to have the benefit of the views of lawyers and judges about the school and the profession though it is of course the responsibility of the Dean and other administrators to make decisions in the best interest of the community.

39. Mr. Prichard concluded as follows: "Nothing that has occurred has caused me to believe Justice Spiro's ability to serve with honour as a judge has been compromised….My confidence in him and his character is unimpaired in any way."

The Standard to be Applied by the Review Panel

40. Subsection 65 (2) of the *Judges Act* provides that: "Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of…(b) having been guilty of misconduct…or (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office, the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office."[11]

41. In *Re Therrien*,[12] the Supreme Court of Canada held that conduct that may lead to a Judge's removal from office is conduct that is "so manifestly and totally contrary to the principles of impartiality, integrity, and independence of the judiciary that the confidence of individuals appearing before the judge, or the public in the administration of justice, would be undermined, rendering the judge incapable of performing the duties of his office." In 2017 this standard was applied in the Report of the Review Panel in respect of complaints involving the Honourable F.J.C. Newbould,[13] and in 2020 the Federal Court reaffirmed this standard in its decision considering a complaint involving the Honourable Justice Patrick Smith.[14]

Ethical Principles for Judges

42. The Council's publication titled *Ethical Principles for Judges* recognizes the desirability of judges remaining in touch with the communities they serve.

43. Commentary 4 of Chapter 3 (Integrity) provides that: "Judges of course have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well-served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, judges should, consistent with their special role, remain closely in touch with the public…".

44. Similarly, Commentary C2 of Chapter 6 (Impartiality) provides that: "The judge administers the law on behalf of the community and therefore unnecessary isolation from the community does not promote wise or just judgements." The Commentary quotes the Right Honourable Gerald Fauteux: "[there is no intention] to place the judiciary in an ivory

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[11] Judges Act, R.S.C., 1985, c. J-1, ss 65(2).
[12] *Re Therrien*, [2001] 2 S.C.R. 3 at paragraph 147 [*Re Therrien*].
[13] Report of the Review Panel constituted by the Canadian Judicial Council Regarding the Honourable F.J.C. Newbould, dated February 8, 2017, at para 36.
[14] *Smith v. Canada (Attorney General)*, 2020 FC 629 at para 134.

tower and to require it to cut off all relationship with organizations that serve society. Judges are not expected to live on the fringe of society of which they are an important part. To do so would be contrary to the effective exercise of judicial power which requires exactly the opposite approach."

45. Commentary C6 of the same Chapter provides that: "Judges are at liberty…of course, to exercise freedom of religion…".

46. Chapter 6 of the *Ethical Principles* provides that: "Judges must and should appear to be impartial *with respect to their decisions and decision-making*." (emphasis added). Principle A2 of the same chapter provides that: "Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases."

47. The emphasis in the *Ethical Principles'* treatment of conflicts of interest is on the risk of disqualification in particular cases, not on the risk of removal from office. Principle E2 of Chapter 6, under the heading "Conflicts of Interest" provides that: "Judges should disqualify themselves in any case in which they believe that a reasonable, fair-minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest …and a judge's duty." Commentary E3 to Chapter 6 quotes the Honourable J. O. Wilson in *A Book for Judges* that "a judge's disqualification would be justified by…the judge having expressed views evidencing bias regarding a litigant."

Relevant Prior Decisions of the Council

48. The test required in order to strike a Review Panel in subsection 2 (4) of the *Canadian Judicial Council Inquiries and Investigations By-Laws* is much less stringent than the standard required in order to constitute an Inquiry Committee. Subsection 2 (1) of the By-laws provides that the Chair or Vice-Chair may establish a Review Panel "if they determine that a complaint or allegation <u>on its face might be serious enough</u> to warrant the removal of the judge" (emphasis added).

49. Subsection 2 (4) of the By-Laws provides that: "The Judicial Conduct Review Panel may decide that an Inquiry Committee is to be constituted <u>only</u> if it determines that the matter <u>might be serious enough</u> to warrant the removal of the judge." (emphasis added)

50. In its Guide for Chief Justices the Council has stated that: "In the vast majority of cases, Panels have not recommended that an Inquiry Committee be constituted but rather closed the file, either because the allegations were unfounded, or because the matter was not serious enough to warrant removal." An Inquiry Committee has been constituted on only nine occasions.

51. The Council's Guide for Chief Justices also provides helpful guidance with respect to the key factors a Review Panel should consider. These include:

(1) The absence of bad faith;

(2) The judge's Chief Justice's opinion on the judge's fitness and overall ability; and

(3) The absence of similar conduct in the past.

52. Three decisions of the Council over the last decade provide relevant guidance to the Review Panel in the present case. All resulted from complaints that raised analogous issues. In none of these cases was a Review Panel, let alone an Inquiry Committee, constituted.

53. The first case is the decision of Chief Justice Richard Scott, then Chair of the Council's Judicial Conduct Committee, dated April 5 2012, in respect of a complaint involving the Honourable David Near of the Federal Court.[15] The complaint alleged that Justice Near was in a real or apparent conflict of interest and should have recused himself from a case in which the federal government was a party because of his professional experience with the federal government.

54. Chief Justice Scott dismissed the complaint. There was no evidence of improper motive. He pointed out that questions of conflict of interest and recusal are legal issues and are not usually questions of judicial conduct. He stated that parties who have concerns in regard to real or perceived conflict on the part of a judge should raise those questions in court.

55. Chief Justice Scott also pointed out that judges bring to the bench varied and extensive experience from both the public and private fields. Some judges may have served within government while others may have some association with a political party or other organization. This does not automatically create conflicts of interest.

56. The second case is the decision of Chief Justice Christopher Hinkson, then Vice-Chair of the Council's Judicial Conduct Committee, dated April 10 2018, in respect of four complaints involving the Honourable Kristine Eidsvik of the Court of Queen's Bench of Alberta.[16] In a guest lecture to law students Justice Eidsvik had said that her initial reaction was nervousness when she walked into a judicial dispute resolution room occupied by "big dark people".

57. Chief Justice Hinkson dismissed the complaint without constituting a Review Panel. He stated that Justice Eidsvik's comments were injudicious and expressed concern about the effect of her comments on the public's perception of the judiciary. In dismissing the complaint without further action he considered that Justice Eidsvik had apologized and attempted to make amends and learn from the incident. He found that Justice Eidsvik's actions, taken in context, made clear that she did not harbour racist views. Chief Justice Hinkson concluded that the incident that gave rise to the complaint was an isolated incident and that it was not necessary to take further action.

58. The third case is the decision of Chief Justice Hinkson, then Chair of the Council's Judicial Conduct Committee, dated April 28 2020 in respect of a complaint involving the Honourable Colleen Suche of the Court of Queen's Bench of Manitoba.[17] Justice Suche submitted to the Minister of Justice and Attorney General of Canada a list of persons whom

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[15] Decision made in a complaint against the Honourable David Near, dated April 5, 2012 [*Near*].
[16] Canadian Judicial Council completes its review of complaints against the Honourable Kristine Eidsvik, dated April 10, 2018 [*Eidsvik*].
[17] Letter closing the matter involving Justice Suche, May 4, 2020 [*Suche*].

she considered to be suitable candidates for judicial appointment. The list was identical to a list submitted by her husband, the Honourable Jim Carr, a Cabinet Minister in the Liberal Government.

59. Chief Justice Hinkson stated that Justice Suche had involved herself in an arena in which she should not have been involved, having direct contact with the political branch of government. Justice Suche accepted that it is important to preserve the necessary separation between the judiciary and other branches of government to preserve the institutional integrity of the judiciary and maintain public confidence in it.

60. At the request of her Chief Justice, Justice Suche agreed to refrain from discussions and communications with respect to judicial applications as long as her husband is in government, an undertaking Chief Justice Hinkson considered appropriate. He concluded that Justice Suche's conduct could only lead a reasonable and fair minded and informed member of the public to the conclusion that she has been acting as an advisor to those holding public office, in particular the Minister of Justice of the Government of Canada and her husband, another Cabinet Minister. This threat to judicial independence was not serious enough to strike a Review Panel let alone an Inquiry Committee.

61. Chief Justice Hinkson directed that the file be closed, as he concluded that the complaint did not warrant further consideration by Council.

The Presumption of Impartiality and the High Threshold for Overcoming that Presumption

62. In *R v RDS*,[18] a 1997 decision of the Supreme Court of Canada, the Court discussed at length the presumption of impartiality accorded to judges in the exercise of their role. The issue in *RDS* was whether a Black youth court judge in Nova Scotia who had acquitted a Black teenager had demonstrated a reasonable apprehension of bias. The judge held that she had preferred the evidence of the accused to that of the white police officer involved in the interaction—but her reasons went on to generalize about police interactions with non-white youth and about how police officers sometimes mislead the court in describing these interactions, none of which generalizations were premised in the evidence before her.

63. A six-judge majority of the Supreme Court upheld the decision of the youth court judge and found that the high threshold for demonstrating a reasonable apprehension of bias had not been met. Writing for the plurality, Justice Cory discussed the presumption of judicial impartiality as follows:

> In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence…
>
> Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining

[18] *R v RDS*, [1997] 3 S.C.R. 484 [*RDS*].

moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

Courts have rightly recognized that there is a presumption that judges will carry out their oath of office….This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with "cogent evidence" that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias….The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial….

The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. (Canadian Judicial Council, Commentaries on Judicial Conduct (1991), at p. 12.).[19]

64. Justices McLachlin and L'Heureux-Dubé, who concurred with Justice Cory in the result, elaborated on the presumption of impartiality as follows:

As Cory J. notes at para. 92, the scope and stringency of the duty of fairness articulated by de Grandpré, J., depends largely on the role and function of the tribunal in question. Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because judges "are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": United States v. Morgan, 313 U.S. 409 (1941), at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England, Book III, cited at footnote 49 in Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995), 18 Dalhousie L.J. 408, at p. 417, "the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea". Thus, reviewing courts have been hesitant to

[19] *RDS* per Cory J at paras 107, 116-119.

make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect.[20]

65. More recently, in *Cojocaru v British Columbia Women's Hospital and Health Centre*,[21] the Supreme Court of Canada held as follows:

> Judicial decisions benefit from a presumption of integrity and impartiality -- a presumption that the judge has done her job as she is sworn to do. This reflects the fact that the judge is sworn to deliver an impartial verdict between the parties, and serves the policy need for finality in judicial proceedings….
>
> The threshold for rebutting the presumption of judicial integrity and impartiality is high. The presumption carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.…
>
> There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced. The onus is on the person challenging the judgment to rebut the presumption with cogent evidence showing that a reasonable person apprised of all the relevant circumstances would conclude that the judge failed to come to grips with the issues and decide them impartially and independently.…
>
> The presumption of judicial integrity and impartiality is a high one, which can be rebutted only by cogent evidence.[22]

Application of the Applicable Standard and Principles to the Facts of this Case

66. As mentioned above, the mandate of a Judicial Conduct Review Panel in deciding whether to constitute an Inquiry Committee differs from that of the Chair or Vice-Chair of the Judicial Conduct Committee in deciding whether to strike a Review Panel. The Review Panel "may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant the removal of the judge" (emphasis added). The Chair or Vice-Chair of the Judicial Conduct Committee may establish a Review Panel "if they determine that a complaint or allegation on its face might be serious enough to warrant the removal of the judge" (emphasis added). The absence of the "on its face" language means that the task of the Review Panel is to look beneath the surface—to not be satisfied with the way that events were alleged to have occurred, but rather take a hard look at what actually occurred—and to make a determination on that basis.

67. Where the complaints are all based exclusively on "news reports, hearsay, and speculation" (in the words of Associate Chief Justice Nielsen), and the Review Panel has the benefit of a credible and comprehensive account from the judge of what occurred, the Review Panel should not be satisfied with an "on its face" review.

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[20] *RDS* per McLachlin and L'Heureux-Dubé JJ, concurring, at para 32.
[21] *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 [*Cojocaru*].
[22] *Cojocaru* at paras 15, 20, 22 & 27.

68. In considering whether the conduct in issue might be serious enough to warrant the removal of the judge from office the Review Panel must apply the test in *Re Therrien*, where the Supreme Court of Canada held that conduct that may lead to a Judge's removal from office is conduct that is "so manifestly and totally contrary to the principles of impartiality, integrity, and independence of the judiciary that the confidence of individuals appearing before the judge, or the public in the administration of justice, would be undermined, rendering the judge incapable of performing the duties of his office."[23] Constituting an Inquiry Committee to determine whether a judge should be removed from office is a drastic measure that has rarely been taken by a Review Panel.

69. The key factors a Review Panel should consider, as specified in Council's Guide for Chief Justices, are (1) the absence of bad faith, (2) the judge's Chief Justice's opinion on the judge's fitness and overall ability, and (3) the absence of similar conduct in the past. We will deal with each of these factors in turn.

70. Justice Spiro acted in good faith, motivated by a genuine desire to protect the Faculty of Law at the University of Toronto from reasonably anticipated reputational harm. Contrary to the speculation in the complaints, he at no time "pressured" Dean Iacobucci not to hire Dr. Azarova, nor attempted or even threatened to do so. Dean Iacobucci has confirmed that he did not and would not allow outside interference to influence a hiring decision.

71. Justice Spiro at no time made any statement expressly or by implication that could remotely be construed as racist or in any way inappropriate. Justice Spiro's conduct does not reflect adversely on his integrity in any way. Nor does it give rise to any legitimate concern about his ability to impartially adjudicate disputes as a judge of the Tax Court of Canada.

The Chief Justice's Opinion on the Judge's Fitness and Overall Ability

72. Justice Spiro's Chief Justice has unequivocally assured the Council that: "both I and the Tax Court of Canada's Associate Chief Justice have the utmost faith in Justice Spiro's ability to act impartially and without bias in litigation that comes before him. We believe he has and will continue making a valuable contribution to the Canadian public in his role as a Justice of the Tax Court of Canada."[24] The Honourable Gerald J. Rip, former Chief Justice of the Tax Court of Canada, echoed this sentiment in his letter to the CJC.[25]

The Absence of Similar Conduct in the Past

73. There has been and could be no suggestion that Justice Spiro's involvement in the present controversy was anything but an isolated incident.

74. Five people who have known him well for at least 30 years each have persuasively attested to Justice Spiro's high ethical standards. The authors of these letters have written that they

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[23] *Re Therrien*, at para 147.
[24] CJ Rossiter, Submissions, Tab 8.
[25] Former CJ Rip, Submissions, Tab 7.

"never did see him exhibit a prejudice against parties because they were of a certain racial or ethnic group";[26] that never did Justice Spiro say "anything disparaging or even slightly negative about any person or group";[27] that "there was never a time when I thought I knew anyone of better character than his";[28] and that "I have never heard a single ill-word spoken about him in any context".[29]

75. As the passages from the *Ethical Principles for Justices* referred to above make clear, it is highly desirable that judges remain engaged in the community to the extent that doing so does not conflict with their judicial responsibilities. They not only should do so but should be encouraged to do so.

76. As both Mr. Prichard and Emeritus Professor Weinrib have written, it is in the interest of law schools that alumni and members of the legal profession and judiciary participate in the life of the Faculty of Law and express their views on matters affecting the law school, while accepting that it is of course the responsibility of the Dean and administrators of the Faculty to make decisions in the community's interest.

77. The dividing line between appropriate and inappropriate involvement with one's alma mater is not a bright one, as Justice Spiro's involvement in the present controversy illustrates. He had communicated with the Faculty of Law and the University in both his capacities as a judge and as an alumnus. Notably, all of his email correspondence with Ms. Courtney and Professor Weinrib (and with Ms. Zelikovitz) was conducted from and directed to his personal email address, not his Tax Court of Canada email address. When he intended to communicate with the University of Toronto in his capacity as a judge (for example, when he inquired about whether the Tax Court would be able to use the Faculty's Moot Courtroom from time to time, and inquired what could be done to encourage graduates interested in tax law to clerk at the Court), he did so from his Tax Court of Canada email address.

78. Justice Spiro's interactions with Ms. Zelikovitz, Ms. Courtney, and Emeritus Professor Weinrib were not intended by him to occur in his capacity as a judge, but in his capacity as a friend and a member of the community. At no time did he use his position as a judge to further his objective which was, as already set out, to protect the reputation of the Faculty of Law and the University.

79. At the same time, as Justice Spiro's apologies show, he recognizes that one's position as a judge must always be kept in mind as that is the way that others may very well perceive anyone who is a judge regardless of the context. Therefore, caution should be exercised when interacting with others, even if they have known the judge for many years in another capacity.

80. The Review Panel should also consider seriously Justice Spiro's apologies and his personal assessment of his conduct. Justice Spiro has acknowledged that he has learned a valuable

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[26] Malette Letter, Submissions, Tab 4.
[27] Feltman Letter, Submissions, Tab 5.
[28] Weinrib Letter, Submissions, Tab 6.
[29] Prichard Letter, Submissions, Tab 3.

lesson as a result of this incident. He recognizes that it was a mistake for him to have discussed with Ms. Courtney the concern expressed by Professor Steinberg and conveyed to him by Ms. Zelikovitz. He has written to the Council that the media coverage of his involvement in the incident has heightened his awareness of the need for him to avoid saying anything that may lead to a perception, accurate or otherwise, that persons who appear before him may have reason to fear that he may approach his judicial responsibilities based on anything other than scrupulous attention to the facts of the case and the applicable law. Justice Spiro has also written to the Council that he has learned that words spoken outside the courtroom by a judge, even if not intended for publication, may create the wrong impression about the judge's impartiality, thereby having the potential to diminish the confidence of Canadians in the administration of justice. As Associate Chief Justice Nielsen has observed, Justice Spiro has reiterated his commitment to impartiality throughout.

81. Justice Spiro has assured the Council that he does not harbour any views that are anti-Palestinian, anti-Arab, or anti-Muslim, and that he has never made any statements, public or private, that are anti-Palestinian, anti-Arab, or anti-Muslim. The record fully corroborates his assurance. In fact, Justice Spiro devoted a good deal of time before his appointment to enhance his understanding of the Israel-Palestine conflict and to build bridges between the parties and the faith communities involved.

82. The Council's dispositions of the *Eidsvik* and *Suche* cases, discussed above, strongly suggest that the constitution of an Inquiry Committee cannot be justified in the present case. In *Eidsvik*[30] the judge, unlike Justice Spiro, uttered a racist statement. In *Suche*,[31] the judge communicated inappropriately with the political branch of the Government of Canada, in which her husband was a Cabinet Minister, and the Chair of the Judicial Conduct Committee concluded that the judge's actions could only lead a reasonable and fair minded and informed member of the public to the conclusion that she had been acting as an advisor to those holding public office. Both judges apologized and took measures to acknowledge or make amends for their conduct, as Justice Spiro has. Neither case resulted in a referral to the Review Panel, let alone the constitution of an Inquiry Committee.

83. The *Near* case is important for a different reason. In it, the complaint alleged that the judge was in a real or apparent conflict of interest and should have recused himself from a case in which the federal government was a party because of his professional experience with the federal government. The Chair of the Judicial Conduct Committee dismissed the complaint without referring it to a Review Panel, and pointed out that questions of conflict of interest and recusal are legal issues and are not usually questions of judicial conduct. He stated that parties who have concerns in regard to real or perceived conflict on the part of a judge should raise those questions in court.

84. This is consistent with the passages from the *Ethical Principles for Judges* quoted above, which also suggest that potential conflicts of interest may give rise to disqualification motions based on the particular facts of the case. Even if there were a compelling argument

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[30] *Eidsvik*
[31] *Suche*

that Justice Spiro's conduct may (as some of the complainants allege) cause litigants or counsel of certain religions or countries of origin to feel uncomfortable appearing before him—and we emphasize that there can be no such suggestion on this record—the proper venue to raise that argument would be the courtroom in a particular case, not the Canadian Judicial Council. In his letter to Council, Justice Spiro makes clear that he appreciates and will respect the appropriate process if he is faced with the suggestion that he ought to recuse himself stating, "I would not hesitate for a moment to recuse myself should I become concerned – or should a party raise the concern before me – that I may not be able to decide the case strictly on the basis of the facts and the law." Former Chief Justice Rip's letter corroborates Justice Spiro's assertion.

85. In the *Near* case the Chair of the Judicial Conduct Committee also pointed out that judges bring to the bench varied and extensive experience from both the public and private fields. Some judges may have served within government while others may have some association with a political party or other organization. This does not automatically create conflicts of interest. If a motion were brought to disqualify Justice Spiro based on his prior involvement with CIJA and his brief involvement in the incident that gave rise to the present complaints, he would be entitled to the strong presumption of impartiality established by the Supreme Court of Canada in the *RDS* and *Cojucaru* cases discussed above. He is entitled to the same presumption before the Review Panel.

86. Certain of the complainants have expressed concern about whether Palestinian, Arab, or Muslim taxpayers or counsel could appear before Justice Spiro without fearing that they would not be dealt with fairly. These complaints and concerns are premised on speculation in media reports that do not accurately reflect Justice Spiro's character, temperament or conduct, the facts of which are detailed above. When considered in the context of what actually happened, such concerns (as Mr. Prichard has written) are farfetched in the extreme. Justice Spiro has assured the Council that he does not harbour any views that are anti-Palestinian, anti-Arab, or anti-Muslim, and that he has never made any statements, public or private, that are anti-Palestinian, anti-Arab, or anti-Muslim. In fact, he devoted a good deal of time before his appointment to enhance his understanding of the Israel-Palestine conflict and to build bridges between the parties and the faith communities involved.

87. Justice Spiro bears no animus towards any Palestinian taxpayers or counsel who may appear before him, and indeed is not interested in whether a taxpayer or counsel appearing before him is Palestinian. Even if he were interested in the ethnic or religious identity of those appearing before him, however, he would have no way of knowing whether they were Palestinian unless he asked a series of questions designed to determine that fact and to elicit from them their political beliefs and views with respect to Israel. Such matters are none of his concern and are entirely irrelevant to any proceedings before him. They would play no role in his decision making. Neither Palestinians nor anyone else should have any reason to fear appearing before Justice Spiro.

88. Finally, we wish to comment on Associate Chief Justice Nielsen's Reasons briefly. According to the Reasons, Justice Spiro demonstrated a lack of integrity and departed from his duty of impartiality when he:

(a) Received information from Ms. Zelikovitz regarding concerns about the selection of Dr. Azarova as Director of the IHRP at the Faculty of Law.

(b) Conveyed that information to the University of Toronto during a telephone conversation with Ms. Courtney.

(c) Failed to adequately clarify with Ms. Courtney that the views he was conveying to her were not necessarily his own.

(d) Asked Ms. Courtney to let him know whether the appointment had been made.

(e) Informed Emeritus Professor Weinrib that no appointment had yet been made.

89. According to the Reasons, Justice Spiro's conduct described above puts at risk public confidence in the integrity, impartiality and independence of the judiciary.

90. The Reasons conclude that Justice Spiro's conduct described above and his lack of insight into the appropriateness of his conduct at the time raise serious concerns about his fitness to hold office as a judge.

91. We will address each of the five particulars specified by Associate Chief Justice Nielsen in turn:

(a) Receiving Information

92. Justice Spiro did not solicit any information from Ms. Zelikovitz. He was not fishing for information about potential new staff at the Faculty of Law. He was presented with the information, as is clear from the email messages from Ms. Zelikovitz.

93. There is nothing inherently wrong with a judge receiving information. Judges receive information all the time and should welcome such information as it makes them more aware of the world around them. When judges speak to friends, family, neighbours, colleagues, and others they may become aware of information they consider to be important. As an alumnus of the University who continued to care about the Faculty of Law community deeply, Justice Spiro considered the information in respect of the appointment or potential appointment of Dr. Azarova to have been important.

94. Justice Spiro was then faced with a decision whether to keep that information to himself or to share it with his alma mater, but the mere receipt of the information is neutral. Had he kept the information to himself, there would have been no issue. The receipt of information, without having solicited it, does not constitute judicial misconduct.

(b) Conveying Information

95. Justice Spiro conveyed the essence of the information he learned from Ms. Zelikovitz to his friend Ms. Courtney at the end of a telephone call that had been scheduled so that he and she could catch up on each other's lives during the pandemic. He has acknowledged that this was a mistake.

(c) Failing to adequately clarify with Ms. Courtney that the views he was conveying to her were not necessarily his own

96. Justice Spiro has acknowledged that he should not have mentioned the concern that had been raised with him with Ms. Courtney at all. He raised it only because he was concerned that the University and the Faculty of Law could be subjected to criticism and protests and wanted the University to be prepared for that. Ms. Courtney would naturally have assumed, correctly, that Justice Spiro was speaking with her as a friend and an alumnus, not as a judge. Ms. Courtney's relationship with Justice Spiro had been established over the five years before his appointment (2014-2019). When he intended to deal with the University as a judge, he made it clear that he was dealing with the University as a judge.

97. In attempting to explain why such protests might occur, Justice Spiro regrets that he did not make it clearer to Ms. Courtney that he did not know whether the concerns were well-founded, but the fact that such a memo had been written at all and was circulating told him that the University should be prepared for trouble.

(d) Asking Ms. Courtney to let him know whether an appointment had been made

98. This was a reasonable question for an alumnus of the Faculty of Law to ask. To ask the question is not judicial misconduct.

99. A critical point should be carefully considered by the Review Panel as it requires going beyond the "on its face" standard. Having been informed that no appointment had been made, Justice Spiro did not contact the Dean or anyone else at the University or the Faculty of Law to lobby or advocate against Dr. Azarova's appointment. That is the most clear and compelling reason why there is no basis for the allegation of any "interference" in respect of the appointment.

100. This is critically important, as the press release announcing the establishment of a Review Panel in this case makes it clear that the basis of the CJC's review of the complaints is Justice Spiro's alleged interference in the appointment of Dr. Azarova. The press release states: "In this instance, the Honourable Associate Chief Justice Kenneth G. Neilsen, Vice-Chair of the Judicial Conduct Committee has decided to constitute a Review Panel in respect of complaints filed relating to the judge's alleged interference in the appointment of a Director of the International Human Rights Program at the University of Toronto." To put it simply, there was no interference.

(e) Informing Emeritus Professor Weinrib that no appointment had been made

101. Justice Spiro let Emeritus Professor Weinrib know that no appointment had been made as a courtesy, after having spoken with him by phone. He also let Ms. Zelikovitz know. That information is factual and neutral. Either the appointment had been made or it had not. He did not expect or ask Emeritus Professor Weinrib to pursue the issue, and Emeritus Professor Weinrib did not do so.

102. None of this constitutes judicial misconduct, let alone the type of serious judicial misconduct that warrants the constitution of an Inquiry Committee.

Conclusion

103. For these reasons, we respectfully submit that the Review Panel should find that Justice Spiro's conduct cannot justify removal from office and, therefore, an Inquiry Committee should not be constituted. We ask that the Review Committee remit the matter to the Chair or Vice-Chair of the Judicial Conduct Committee to determine whether any further measures should be taken.

Dated at Toronto this 8th day of February 2021.

Gavin MacKenzie

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Tax Court of Canada

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The Honourable Justice David Spiro

L'honorable juge David Spiro

February 8, 2021

Judicial Conduct Review Panel
Care of Ms. Odette Lalumière
Acting Executive Director
Canadian Judicial Council
Ottawa, Ontario
K1A 0W8

Dear Members of the Review Panel:

Re: CJC Files 20-0254 et al.

Introduction

In Ms. Lalumière's letter of January 7, 2021, she invited me to provide any written comments I may wish to make to the Review Panel, including on whether an Inquiry Committee should be constituted under section 63 of the *Judges Act.*

I have reviewed the Reasons of Associate Chief Justice Nielsen for referring the matter to a Review Panel (the "Reasons"). The Reasons illuminated certain areas of concern that I will address in this letter by elaborating on the information provided in my letters of October 26 and November 23, which are appended to Ms. Lalumière's letter.

In light of the seriousness of the matter I have retained counsel, Mr. Gavin MacKenzie of Toronto, to advise and represent me. Mr. MacKenzie has written to you directly on my behalf, and this letter accompanies his submission. I would be grateful if the members of the Review Panel would carefully consider Mr. MacKenzie's submissions that an Inquiry Committee should not be constituted.

In this letter I wish to address in additional detail two factual matters raised by the Reasons.

The first is how I learned of the appointment or potential appointment of Dr. Azarova.

The second is the unusual depth of my connection to the Faculty of Law at the University of Toronto.

I also wish to correct certain mistaken facts and impressions that have been repeated in media reports and commentary on which the complaints to the Council are based.

In my earlier correspondence, I did not elaborate on my personal background and views. In light of the seriousness of the matter, I thought that I would share them with you in the event that you find them relevant.

Finally, I wish to repeat the apologies I have expressed in my previous correspondence with the Council.

How I Learned of the Appointment or Potential Appointment of Dr. Azarova

In my earlier correspondence I briefly described how I learned of the appointment or potential appointment of Dr. Azarova and the information provided to me by Ms. Zelikovitz. As a result of my review of the Reasons, I wish to provide some additional detail.

I attach all relevant email correspondence with Ms. Zelikovitz (**Appendix "A"**), Ms. Courtney (**Appendix "B"**), and Professor Arnold Weinrib (**Appendix "C"**).

All of my email correspondence with Ms. Zelikovitz, Ms. Courtney, and Professor Weinrib was conducted from and directed to my personal email address, not my Tax Court of Canada email address.

When I intended to communicate with the University of Toronto as a judge, I did so from my Tax Court of Canada email address. For example, on August 23 and 24 2020 I exchanged email messages with Dean Edward Iacobucci of the Faculty of Law inquiring about whether the Faculty of Law would permit the use of its Moot Courtroom by the Court and what could be done to arrange clerkships at the Court for students at the Faculty of Law who were interested in tax. This exchange of correspondence is attached as **Appendix "D"**.

My telephone conversation with Ms. Zelikovitz on September 3, 2020, was initiated by her via email. I could have (and should have) declined to speak with her, but as the matter related to my alma mater, I agreed to speak with her. After she told me what she was concerned about, I asked Ms. Zelikovitz about the source of her information. She told me that the source was Professor Gerald Steinberg of Bar Ilan University in Israel, who had provided a brief memorandum to her about Dr. Azarova's work.

I asked Ms. Zelikovitz how Professor Steinberg had learned of the appointment or potential appointment of Dr. Azarova. She told me that it had been through a posting on a bulletin board (an electronic one, I assume) for housing in Toronto. Presumably, Dr. Azarova had been looking for accommodation in the neighbourhood of the University.

I agreed to receive the brief memorandum that had been prepared by Professor Steinberg as I knew nothing about Dr. Azarova. I had not heard her name before. I reviewed the brief memo. It was consistent with what Ms. Zelikovitz had told me over the phone. The truth and merits of the contents of the memorandum, however, were unknown to me. But the very fact that the memorandum had been written and was being circulated indicated to me that that the appointment was bound to be controversial.

My concern was that this may simply be treated as a routine appointment without consideration of, or preparation for, the fallout that appeared likely to occur. I was concerned about the potential for controversy in light of the strong feelings on both sides of the Israeli-Palestinian conflict, particularly on campus.

Ms. Zelikovitz told me that she did not know whether the appointment had been made, so during the course of an earlier-arranged call with my friend Ms. Courtney, I asked Ms. Courtney whether she knew. Ms. Courtney inquired and learned that no appointment had been made. She told me this later the same day, and I passed that information on to Ms. Zelikovitz.

The same day, before learning from Ms. Courtney that no appointment had been made, I also telephoned my friend Emeritus Professor Arnold Weinrib to ask him whether he knew anything about the matter. He did not. I sent him Professor Steinberg's memorandum for his information as we had frequently exchanged articles and opinion pieces in the past. Emeritus Professor Weinrib had retired in 2006 and though he continued to teach at the Faculty of Law part time thereafter he had no involvement in the administration of the Faculty or in the appointment process. I did not ask him to pursue the matter and I did not intend or expect him to do so. As I expected, he did not follow up, even to the extent of not replying to my email attaching Professor Steinberg's memorandum.

Having been informed that no appointment had been made, I did not contact the Dean or anyone else at the University or the Faculty of Law to advocate or lobby against Dr. Azarova's appointment. There is no basis for the allegation of "interference" by me in respect of the prospective appointment.

The Unusual Depth of my Connection to the Faculty of Law at the University of Toronto

I wish to elaborate on the extent of my connection with the University of Toronto' Faculty of Law in response to the following question posed in the Reasons (page 8):

> The question remains as to the purpose of Justice Spiro's statement to Ms Courtney that Dr Azarova's appointment would likely be "protested and criticized". Justice Spiro asserts that his intent was to prepare the Faculty and the U of T for such as he did not want them to be "embroiled in controversy".

My purpose and intent are described in my earlier correspondence and above. It may be the case, however, that my earlier correspondence did not provide sufficient background information to demonstrate the extraordinary depth of my longstanding relationship with the University of Toronto Faculty of Law.

With a view to providing more detailed information about that relationship, I attach a document that outlines many of the touch points that I had with the Faculty of Law since 2011, both before and after my appointment to the Tax Court of Canada (**Appendix "E"**).

My love of tax law began in Professor Weinrib's tax class at the Faculty of Law. As a result, I started writing case comments for the *Canadian Tax Journal* in the summer after my second year

and litigated my first case in the Tax Court of Canada during my articling year. I ended up devoting more than a decade to public service at the Department of Justice and the rest of my career as a lawyer litigating on behalf of taxpayers. It all started at the Faculty of Law. For that, I will always be grateful.

I have been a part of the law school community for 36 years, since 1984. For the first 35 of those years, I was not a judge. The law school community did not get to know me as a judge; they got to know me as a member of the Class of '87 who was enormously proud of his alma mater, its faculty and students, and their remarkable achievements.

In particular, Ms. Courtney knew me as an alumnus, volunteer, and donor. Of course, she knew that I had been appointed to the Tax Court of Canada (she attended my swearing-in ceremony), but during the period in which I worked closely with her as a volunteer (2014-2019), I was not a judge.

The Faculty of Law has always felt like my second home. The faculty who taught there felt like family. I kept in touch most frequently with Professor Arnold Weinrib but saw former Deans Robert Prichard and Robert Sharpe from time to time and was always delighted to see and speak with my other professors at social events, including class reunions.

I mentored students at the Faculty of Law and raised money to build a modern law school building for them. I worked hard to ensure that financial aid was available to students who needed it most and spent countless nights and weekends writing letters and making calls to alumni to raise the necessary funds. I gave six students each year the experience of litigating on behalf of otherwise unrepresented low-income taxpayers in the Tax Court of Canada and helped prepare them for their first courtroom experience. I joined the students often at tax policy workshops and kept in touch with the next generation of tax law teachers at the Faculty of Law.

As I noted in my previous correspondence, my overarching purpose and intent in passing along the information to Ms. Courtney (in a call we had arranged before Ms. Zelikovitz called me) was that the University in general and the Faculty of Law in particular should be prepared for controversy. I knew that anything having to do with the Israeli-Palestinian conflict, particularly on campus, is potentially fraught.

Correcting Mistaken Facts

As correctly noted in the Reasons, the complaints received by the Council are based entirely on media reports and commentary. Unfortunately, those media reports include some serious errors.

For example, the media has reported that it is alleged that I "pressured" Dean Iacobucci to "rescind" the appointment of Dr. Azarova because I personally disagreed with, or disapproved of, her research and views concerning the Israeli-Palestinian conflict. Certain complainants have expressed concern about my presiding in proceedings in which taxpayers or counsel are Palestinian, Arab, or Muslim.

I exerted no pressure, expressly or by implication, on the Dean or on anyone else in relation to the appointment of Dr. Azarova, much less to "rescind" her appointment (which had not been made). As mentioned in my letter of October 26, in a public statement he released on September 18 Dean Iacobucci confirmed that: "Assertions that outside influence affected the outcome of [the search in question] are untrue and objectionable." Dean Iacobucci added that Dr. Azarova was not appointed for sound reasons unrelated to political considerations or her scholarship.

Neither my involvement in this matter nor anything in my history would give rise to a reasonable apprehension that I would not deal fairly and equitably with litigants and counsel of all races and faiths. In addition to the facts set out in my letter of October 26 concerning my desire to better understand the perspective of each side of the Israeli-Palestinian conflict, I would encourage the Review Panel to review the letters of former Dean (and former President of the University of Toronto) Robert Prichard, Mr. Paul Malette QC, Professor Emeritus Arnold Weinrib, and former Chief Justice Rip, which are attached as appendices to Mr. MacKenzie's submission. All of the authors know me well and are well situated to comment meaningfully on whether I have dealt with others fairly and equitably, without bias, throughout my career.

In summary, while I respect the views of the complainants and have no doubt about their sincerity, I do believe that the concerns they have expressed, through no fault of their own, are not well-informed.

My Personal Background and Views

I am a devout Jew. Every morning, I pray for the wisdom to strike an appropriate balance between righteousness and judgment on the one hand and lovingkindness and mercy on the other (Hosea, 2:19).

My father is a Rabbi and my paternal grandfather was a Rabbi. I was taught by them, by my family, and by my teachers to respect my fellow human beings regardless of their race, religion, or ethnicity.

I was taught, and firmly believe, that all adherents of our three great monotheistic religions are children of Abraham. As religious Jews, we consider ourselves descendants of Abraham's son Isaac while religious Muslims consider themselves descendants of Abraham's son Ishmael.

I consider all Christians (including Arab Christians), and all Muslims (including Arab Muslims), to be my spiritual cousins. I have no animus against anyone, including atheists or members of non-monotheistic faiths. I firmly believe that we are all created in the image of God and that every human being is worthy of dignity and respect. As the Talmud teaches, to save one life is to save the entire world.

Israel is a fundamental part of my religious belief. Although I do not particularly care for labels, I am proud to be pro-Israel. At the same time, I am "pro" anyone who believes in peace, tolerance, and co-existence and who does not believe that violence is an appropriate way of accomplishing one's objectives or settling one's disputes.

Arabs constitute about one-fifth of the population of Israel and play leading roles in all aspects of Israeli life. Arab citizens are judges who serve on Israeli courts (including the Supreme Court), doctors who hold senior positions in Israeli hospitals, professors who hold senior positions in Israeli universities, politicians who hold seats in the Israeli Parliament (the Knesset), and officers who hold senior positions in the Israel Defense Forces.

In addition to its earlier peace treaties with Egypt (1979) and Jordan (1994), Israel has recently entered into normalization agreements with four Arab countries (United Arab Emirates, Bahrain, Morocco and Sudan). I welcome those agreements as public reflections of the familial relationship between Israel and her Arab neighbours. I look forward to additional agreements in the future including a final-status agreement with Israel's closest neighbours, the Palestinians.

Even if I were interested in whether a taxpayer or counsel appearing before me were Palestinian (which I am not) and even if I had any animus toward Palestinian taxpayers or counsel (which I do not) I would have no way of knowing whether they were Palestinian unless I asked a series of questions designed to determine that fact and to elicit from them their political beliefs and views with respect to Israel. Such matters are obviously none of my concern and are entirely irrelevant to the proceedings before me. Even if I knew what those views were, they would play no role in my decision making. Neither Palestinians nor anyone else should have any reason to fear appearing before me.

Having said that, I would not hesitate for a moment to recuse myself should I become concerned – or should a party raise the concern before me – that I may not be able to decide the case strictly on the basis of the facts and the law. That is a situation confronted by every judge from time to time.

Conclusion

As I stated in my previous correspondence, I have learned from this unfortunate incident. I should not have mentioned to Ms. Courtney the concerns that came to my attention. It would have been the right call, in light of my judicial role, not to have mentioned the information I had received to anyone at the University of Toronto. Doing so was a mistake for which I have apologized in my earlier correspondence. I reiterate those apologies today.

Yours truly,

Justice David E. Spiro

cc: Chief Justice Eugene P. Rossiter

Appendix "A"

Judy Zelikovitz
Re: U of T pending appointment of major anti-Israel activitst to important law school position
September 3, 2020 at 10:43 AM
Shimon Fogel
David Spiro

Thanks Shimon. David, if you're able to discuss this, I can be reached on mobile. I have some additional information. Thank you.

Judy Zelikovitz
Vice President, University and Local Partner Services
The Centre for Israel and Jewish Affairs (CIJA)

O: 416 849 1008 / M: 416 272 6779 / T: @JMZelly
CIJA.ca / twitter / facebook / instagram

From: Shimon Fogel <sfogel@cija.ca>
Date: Thursday, September 3, 2020 at 10:41 AM
To: "jzelikovitz@cija.ca" <jzelikovitz@cija.ca>
Cc: David Spiro [redacted]
Subject: Re: U of T pending appointment of major anti-Israel activitst to important law school position

I think you can approach him. He is friends with the Dean, Ed Iacobucci. I a copying him on this, as I don't think his reaching out to Ed compromises his judicial position. If I am wrong, David will so advise.

Shimon

Shimon Koffler Fogel
CIJA
www.cija.ca

From: Judy Zelikovitz <jzelikovitz@cija.ca>
Date: Wednesday, September 2, 2020 at 1:44 PM
To: David Cooper <dcooper@cija.ca>, Shimon Fogel <sfogel@cija.ca>
Subject: Re: U of T pending appointment of major anti-Israel activitst to important law school position

I've removed Gerald.

Is this something we can ask David Spiro about? Gayle may also have some ideas.

Judy Zelikovitz
Vice President, University and Local Partner Services
The Centre for Israel and Jewish Affairs (CIJA)

O: 416 849 1008 / M: 416 272 6779 / T: @JMZelly
CIJA.ca / twitter / facebook / instagram

From: gerald steinberg <steinberg@ngo-monitor.org>
Date: Wednesday, September 2, 2020 at 1:24 PM
To: David Cooper <dcooper@cija.ca>, "jzelikovitz@cija.ca" <jzelikovitz@cija.ca>, Shimon Fogel <sfogel@cija.ca>
Subject: U of T pending appointment of major anti-Israel activitst to important law school position

CONFIDENTIAL
I am writing regarding reports of a pending U of T appointment for one of the nastiest anti-Israel academic crusaders -- Valentina Azarova -- to head the human rights program in the law school. Azarova is a hard core activist who works with many of the leading BDS and lawfare NGOs as well as Michael Lynk -- her academic work is almost entirely focused on promoting the Palestinian narrative, the Israel "apartheid" theme, war crimes, etc.
From the faculty member who found out about this and informed me, it appears that the internal appointment process in the law school has been completed. We do not know whether it has gone through the broader university approval process.
If someone could quietly find out the current status, and confirm Azarova's pending appointment, that would be very helpful.
The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising.
I am preparing a short briefing sheet and would be happy to talk about this.

Regards
Gerald

Prof. Gerald M. Steinberg
President, Institute for NGO Research
10 Yad Harutzim, 4th floor
Jerusalem, Israel 9342148
Tel: 972 (0)2 5661020

https://www.facebook.com/gmsteinberg
@GeraldNGOM

Judy Zelikovitz
U of T pending appointment of major anti-Israel activist to important law school position
September 3, 2020 at 6:24 PM
David Spiro

David, as discussed. Thank you.

Judy Zelikovitz
Vice President, University and Local Partner Services
The Centre for Israel and Jewish Affairs (CIJA)

O: 416 849 1008 / M: 416 272 6779 / T: @JMZelly
CIJA.ca / twitter / facebook / instagram

Memo_
Valenti...).docx

Draft: September 3, 2020

Memo on Reported Appointment of Valentina Azarova to head Univ of Toronto's International Human Rights Program

If, as reported, Valentina Azarova has been selected to head the University of Toronto's International Human Rights Program, a number of concerns should be raised immediately, and before the appointment is confirmed.

Dr. Azarova's career is clearly devoted to anti-Israel advocacy, and the evidence indicates that she will use the position to promote her political agendas and a discriminatory focus on Israel, while ignoring other human rights concerns.[1] The double standards and claims that deny the Jewish people the right to self-determination, (including claiming that the existence of a State of Israel is a racist endeavor) are examples of antisemitism, as declare in the IHRA working definition. .

From the outside, it is not possible to examine the decision making process of the appointments committee for this position, but from the available evidence, her academic record does not appear to be remarkable, and many of her publications are blatantly polemical and focus exclusively on accusations against Israel.

In parallel, and throughout her career, she has worked for numerous agencies and NGOs that are among the leaders in campaigns that promote the double standards used to demonize Israel, and specifically BDS and lawfare. These NGOs include Al Haq, Diakonia, Amnesty, GLAN, and Al Shabaka. She has also participated in antisemitic platforms and propaganda activities such as Electronic Intifada, Al Majdal Quarterly (Badil), and the Ireland Palestine Solidarity Campaign.

Her academic writings refer to publications (UN, for example) that she wrote or was involved with, as sources without noting her own involvement in the process.

Academic Record:
Azarova's academic publications (journal articles and book chapters) consistently present a one-sided, myopic characterization of the Isareli-Palestinian conflict, while erasing the historical and security context. These polemical publications include numerous statements of opinion and repeat the claims of antisemites such as John Dugard and Richard Falk.

The main theme in all of her writings is that Israel is deliberately and systematically violating international law by attacking blameless indigenous Palestinian victims. (Her history begins in 1967). Some of her writings erase the Jewish religious and historical connections to the region, portraying Jews as a foreign presence. She systematically erases evidence of Palestinian terror, and the basic right of self-defence.

In The Pathology of a Legal System: Israel's Military Justice System and International Law (2017), Azarova invokes the term "pathology" to refer to Israel's military justice system. This term is an antisemitic canard, ascribing "causes and effects of diseases" to the behavior of the Jewish State. Throughout history, Jews have been accused of being psychologically variant or "pathological".

Her publications repeatedly imply denying the legitimacy of Israel and the nation state of the Jewish people. And in her review of "Is There A Court For Gaza?," (*Journal of International Criminal Justice*, C Meloni & G Tognoni, 2013) Azarova suggests that Israel's entire existence is counter to international law, highlighting a contributor's claim that "'a serious attempt to secure the accountability of a state that has for too long been allowed by the West to behave in a lawless manner," and then noting that another contribution "puts such

[1] For example, although much of her work involving the Israeli-Palestinian conflict is couched in the legal framework of

lawlessness in historical context, recalling Palestine's relegation to the periphery of international law by the 1947 UN Partition Plan, which was issued in disregard of well-acknowledged Palestinian claims to rights in international law." The comments not only reveal her opinion regarding Israel, but her lack of knowledge (or willful omission?) of the history of the region.

In "UNESCO, Palestine and Archaeology in Conflict," Azarova and her co-author assert, "For more than a century, Palestinian cultural heritage and property has been the subject of capture and destruction by other states. Palestine's accession to various UNESCO conventions testifies to the effect that **no other sovereign controls its cultural heritage and property."** In contrast, they claim that "archaeology has been used by Israel 'as a pretext to gain territorial control'." Similarly, Azarova systematically erases the repeated destruction of the Jewish cultural heritage, including destruction in the past decades by the Waqf of Jewish sites such as at the Temple Mount). She relies on clearly biased and politicized UNESCO resolutions to support her claims, and suggests that Palestinians take legal action to seize the Dead Sea Scrolls from Israel. As Azarova condemns Israel, she is intellectually "looting" and "laundering" Jewish antiquities and cultural sites by erasing their heritage, and ascribing them as "Palestinian".

Azarova uses demonization terms in reference to Israel, suich as "apartheid". For example, in "Palestine's Day in Court? The Unexpected Effects of ICC Action" (Birzeit, 2015):
The Prosecutor could also investigate whether a regime of **apartheid** results from the establishment of settlements and their ensuing effects ...the Prosecutor might consider an **apartheid** prosecution to be excessively novel, challenging, and politically charged. Since the crime of **apartheid** is comprised in the main of sub-sets of war crimes, the Office might view investigating and prosecuting the latter crimes as a sounder legal and political strategy, and less resource-intensive, than a case that Israel's illegal regime in Palestinian territory amounts to **apartheid.**

According to Human Rights Voices, Azarova supportes a "Palestinian 'right to return' including 'Palestinian refugees in the Diaspora with a territorial link to Israel.' In other words, she advocated a legal right to abolish a Jewish state. She also supported the "BDS" (boycott, divestment and sanctions) campaign against Israel, pushing third states and international actors to adhere to 'the duty of non-recognition, non-aid or assistance...the same goes for private entities like businesses.'"

NGO and related advocacy

Al Haq, Who Profits, HRW etc

Guest Post: On Business and Human Rights in Illegal Territorial Regimes
Valentina Azarova | Opinio Juris | January 28, 2016
On 19 January 2016, Human Rights Watch (HRW) released Occupation, Inc.: How Settlement Businesses Contribute to Israel's Violations of Palestinian Rights, a report detailing the involvement of foreign and Israeli business in settlements and their support for unlawful Israeli acts. The report is an important piece of one-stop-shop documentation that brings together the work of Who Profits and others on the involvement of foreign businesses in the occupation through financing, servicing, or trading with Israeli settlements.

Amnesty International:

According to her CV, Azarova claims she assisted Amnesty on three of its publications relating to the 2014 Gaza War. These reports lack methodological rigor and are replete with false or highly distorted legal and factual claims. They also routinely erase the context of combat and the terror affiliations of casualties.

These publications declare that areas of intense or widespread damage in Gaza were the result of indiscriminate or disproportionate targeting by the IDF, rather than considering other explanations, such as a large concentrations of targets in one area or targets located in or near civilian structures. Sometimes, damage caused by an attack might be as banal as a technical weapons failure or a simple mistake (tragic

casualties is consistently attributed to extreme reckless disregard or malicious intent on the part of Israel to harm civilians.

They also purport to rely on 'military experts' but these experts are not named, and Amnesty fails to disclose what photos and videos were shared, or their provenance (were they taken by Amnesty field workers? residents? journalists? Hamas members?). Amnesty also does not disclose what steps it took to authenticate the materials and whether it provided information from the IDF to its 'experts'.

Amnesty provides only partial information as to the context of incidents, and does little to clarify the target, location of combatants, and intelligence known to military commanders regarding the presence of civilians. All of these additional factors are essential to assessing whether a particular military action constitutes an IHL violation.

These reports do not disclose why specific examples were selected as opposed to others, and do not provide data that could demonstrate the opposite of their contentions (as required under the principle of falsifiability). For example, in the Gaza war, there were thousands of Israeli targeting decisions that did not result in civilian harm. In contrast, Amnesty selected a small percentage of cases in order to 'prove' a pattern of deliberate intent to attack civilians (a clear example of selection bias). Cases (and there were many) where the IDF chose to cancel an attack are not included in a comprehensive way, which is also attributable to the substantial gaps in the information that Amnesty draws upon. In some cases, civilians in Israel were reportedly harmed (even killed) because of IDF decisions to limit harm to Palestinian civilians. Again, these are not mentioned.

Additional NGO and UN employment (based on a 2016 CV):

June 2016 – Sept 2016, Diakonia IHL programme, Jerusalem
Aug 2014 – June 2015 Research Consultant, Amnesty International, International Secretariat
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July 2012 – Oct 2012 Research Consultant, Diakonia IHL programme, E.Jerusalem, Palestine
May 2011 – Aug 2011 International Federation for Human Rights (FIDH), Paris
June 2010 – Dec 2011 Senior Legal Researcher, Al-Haq Ramallah
June 2008 – Mar 2010 Legal Researcher, HaMoked:
July – Sept 2007 Legal Research Intern, HaMoked: Centre for the Defence of the Individual

Conflicts of Interest:

There is also a lack of transparency in some of her writings. For instance, in 'Israel's loopy logic of exoneration', *Open Democracy*, 3 May 2013, she writes,

"Both the UN Committee of Independent Experts examining the domestic investigations as a follow-up to the Fact-Finding Mission Report on the Gaza Conflict of 2008/9 (also known as Israel's Operation Cast Lead) and the Israeli government's Turkel Commission have held that operational debriefings are inadequate as a fact-finding mechanism and do not constitute a proper investigation under international law." Yet, she doesn't disclose she worked on the UN follow-up report (see https://cdn.ku.edu.tr/resume/vazarova.pdf

In "Is There A Court For Gaza?," book review, she also cites to the UN follow-up report, but again fails to disclose her association with it.

Appendix "B"

David Spiro
Re: Hello!
September 4, 2020 at 2:20 PM
Chantelle Courtney

Many thanks, Chantelle.

I look forward to closing the loop as well.

If you need any further information on this matter, please don't hesitate to let me know.

Best regards.

David

> On Sep 4, 2020, at 2:01 PM, Chantelle Courtney <chantelle.courtney@utoronto.ca> wrote:
>
> Thanks David!
>
> Quick update - understand from Ed that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w me next week. I look forward to closing the loop w you.
>
> Talk soon, Chantelle
>
> Ps lunch at the Ritz will be lovely in the future...and my turn to host:)
>
> > On Sep 4, 2020, at 1:22 PM, David Spiro [redacted] wrote:
> >
> > Great speaking to you as well, Chantelle. Not quite lunch at the Ritz-Carlton, but almost as good!
> >
> > Please feel free to call any time. Over Sabbath it will go to voicemail, but I should otherwise be available.
> >
> > Looking forward to receiving all of the material we discussed and I promise not to be shy in sharing my thoughts.
> >
> > Have a great long weekend!
> >
> > Best regards.
> >
> > David
> >
> > > On Sep 4, 2020, at 1:02 PM, Chantelle Courtney <chantelle.courtney@utoronto.ca> wrote:
> > >
> > > Thank you so much David for connecting this morning. I was very happy to hear your voice and to reconnect on many important topics.
> > >
> > > FYI - I've put in a call to Ed re the last item raised and will follow up ASAP. If I get an answer over the weekend do you want me to ring you?
> > >
> > > I'll follow up with the information on the Michael Trebilcock initiative, and also look forward to sharing the broader university priorities when they are in strong draft form. Know you'll both be interested and have interesting guidance!
> > >
> > > Enjoy the long weekend,
> > > Chantelle
> > >
> > > > On Sep 1, 2020, at 12:37 PM, David Spiro [redacted] wrote:
> > > >
> > > > Wonderful! My Toronto cell is [redacted]
> > > >
> > > > Best regards.
> > > >
> > > > David
> > > >
> > > > > On Sep 1, 2020, at 12:09 PM, Chantelle Courtney <chantelle.courtney@utoronto.ca> wrote:
> > > > >
> > > > > Thanks David - please remind me of your cell # and I'll call you then.
> > > > > For your contacts, my cell is [redacted]
> > > > > Speak Friday! CC
> > > > >
> > > > > Chantelle Courtney, B.A., LL.B.
> > > > > Assistant Vice President, Divisional Relations
> > > > > Division of University Advancement

Division of University Advancement
Tel: 416-978-2485

On 2020-09-01, 9:38 AM, "David Spiro" [redacted] wrote:

Friday should work just fine, Chantelle. Looking forward!

Best regards.

David

> On Sep 1, 2020, at 8:25 AM, Chantelle Courtney <chantelle.courtney@utoronto.ca> wrote:
>
> Thank you so much David,
> It's wonderful to hear that Adina and her family were able to stay with you through the summer. That must have been a pleasure for them, especially given the environment in NYC over the summer.
>
> Are you available to chat at 10am either this Wed or Friday? If not I can send more options for next week. We're in the midst of a series of meetings with Principals and Deans and so my schedule is less flexible than usual:) Excited to catch up this week or next!
>
> Best, Chantelle
>
> > On Aug 30, 2020, at 7:52 PM, David Spiro [redacted] wrote:
> >
> > Many thanks for your thoughtful note, Chantelle. Congratulations on a most successful campaign. You deserve a great deal of credit for everything you've done for the Faculty of Law and its students.
> >
> > Adina, Phil, Sarah, and Daniel drove back to NYC today after spending the summer at my place in Toronto. They enjoyed their spending time here with me and my parents, though there were a few weeks when I had to be back in Ottawa.
> >
> > We started in-person sittings again mid-August (no remote hearings) but with a regional focus so as to minimize travel. My two main cities are Toronto and Vancouver until the end of the year.
> >
> > I am sitting in Toronto this week and back in Ottawa the week after catching up on reserves. Happy to chat with you next week by phone (during the day) or Zoom in the evening.
> >
> > Best regards.
> >
> > David
> >
> > > On Aug 30, 2020, at 1:08 PM, Chantelle Courtney <chantelle.courtney@utoronto.ca> wrote:
> > >
> > > Hi David,
> > >
> > > I hope you're doing well and enjoying this beautiful weekend! I've thought of you often these summer months, and wondered how you and your family are doing.
> > >
> > > What is the plan for Court come the Fall? Will you sit remotely/via video? How are your parents? We are doing well in the Furnish/Courtney household. Matthew has gone back to Queen's to live in his house on campus and try to get back to some normality. Ben is looking forward to grade 10 - RSGC has done a good job developing a back to school plan. Starbuck's is keeping Peter busy, and there are many exciting irons in the fire at U of T 😊
> > >
> > > I would love to catch up soon, even if via video. It was sad that we did not have the opportunity to celebrate the Law Campaign for Excellence in person together. I thought the online stewardship communications were excellent, and kudos to Ed and Jennifer. However, an in person celebration would have been phenomenal.
> > >
> > > Thank you again for all of your leadership to make the Campaign a huge success.
> > > You were an integral, early strategic leader and donor - the Law school and U of T are fortunate to have your wisdom and support. I personally am very grateful for all of the time, advice, friendship and support you provided to me as the Advancement lead.
> > >
> > > I really look forward to hearing back and to scheduling a time to connect when you have time.
> > >
> > > Warm regards, Chantelle

Appendix "C"

David Spiro
With respect to the matter we discussed this morning...
September 4, 2020 at 2:16 PM
Arnold Weinrib

Dear Arnie:

I understand that no decisions have been made.

Memo_
Valenti...).docx

Best regards.

David

Draft: September 3, 2020

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From the outside, it is not possible to examine the decision making process of the appointments committee for this position, but from the available evidence, her academic record does not appear to be remarkable, and many of her publications are blatantly polemical and focus exclusively on accusations against Israel.

In parallel, and throughout her career, she has worked for numerous agencies and NGOs that are among the leaders in campaigns that promote the double standards used to demonize Israel, and specifically BDS and lawfare. These NGOs include Al Haq, Diakonia, Amnesty, GLAN, and Al Shabaka. She has also participated in antisemitic platforms and propaganda activities such as Electronic Intifada, Al Majdal Quarterly (Badil), and the Ireland Palestine Solidarity Campaign.

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The main theme in all of her writings is that Israel is deliberately and systematically violating international law by attacking blameless indigenous Palestinian victims. (Her history begins in 1967). Some of her writings erase the Jewish religious and historical connections to the region, portraying Jews as a foreign presence. She systematically erases evidence of Palestinian terror, and the basic right of self-defence.

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NGO and related advocacy

Al Haq, Who Profits, HRW etc

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casualties is consistently attributed to extreme reckless disregard or malicious intent on the part of Israel to harm civilians.

They also purport to rely on 'military experts' but these experts are not named, and Amnesty fails to disclose what photos and videos were shared, or their provenance (were they taken by Amnesty field workers? residents? journalists? Hamas members?). Amnesty also does not disclose what steps it took to authenticate the materials and whether it provided information from the IDF to its 'experts'.

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These reports do not disclose why specific examples were selected as opposed to others, and do not provide data that could demonstrate the opposite of their contentions (as required under the principle of falsifiability). For example, in the Gaza war, there were thousands of Israeli targeting decisions that did not result in civilian harm. In contrast, Amnesty selected a small percentage of cases in order to 'prove' a pattern of deliberate intent to attack civilians (a clear example of selection bias). Cases (and there were many) where the IDF chose to cancel an attack are not included in a comprehensive way, which is also attributable to the substantial gaps in the information that Amnesty draws upon. In some cases, civilians in Israel were reportedly harmed (even killed) because of IDF decisions to limit harm to Palestinian civilians. Again, these are not mentioned.

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June 2010 – Dec 2011 Senior Legal Researcher, Al-Haq Ramallah
June 2008 – Mar 2010 Legal Researcher, HaMoked:
July – Sept 2007 Legal Research Intern, HaMoked: Centre for the Defence of the Individual

Conflicts of Interest:

There is also a lack of transparency in some of her writings. For instance, in 'Israel's loopy logic of exoneration', *Open Democracy*, 3 May 2013, she writes,

"Both the UN Committee of Independent Experts examining the domestic investigations as a follow-up to the Fact-Finding Mission Report on the Gaza Conflict of 2008/9 (also known as Israel's Operation Cast Lead) and the Israeli government's Turkel Commission have held that operational debriefings are inadequate as a fact-finding mechanism and do not constitute a proper investigation under international law." Yet, she doesn't disclose she worked on the UN follow-up report (see https://cdn.ku.edu.tr/resume/vazarova.pdf

In "Is There A Court For Gaza?," book review, she also cites to the UN follow-up report, but again fails to disclose her association with it.

Appendix "D"

From: Spiro, David [redacted]
Sent: August 23, 2020 1:33 PM
To: Deans Office Law <deansoffice.law@utoronto.ca>
Subject: The Rosalie Silberman Abella Moot Courtroom/Clerkships at the Tax Court of Canada

Dear Dean Iacoubucci:

I was wondering if you might have some time to discuss the possible use of The Rosalie Silberman Abella Moot Courtroom by the Tax Court of Canada as well as an issue related to clerkships at the Tax Court of Canada.

With respect to the former, we need an additional courtroom in Toronto from time to time and thought that the Abella Moot Courtroom might be well-suited to that purpose.

With respect to the latter, I note that the 2020-2021 and 2021-2022 law clerk cohort at the Tax Court of Canada do not include any graduates of the University of Toronto Faculty of Law. This is of some concern to me as well as to the Chief Justice as we know the quality of your graduates and that a number of them are interested in tax.

I would welcome your thoughts on both of these topics and, as always, look forward to catching up.

Please feel free to call or write at your convenience. Many thanks.

Best regards.

The Honourable Justice David E. Spiro
Tax Court of Canada / Cour canadienne de l'impôt
200 Kent Street
Ottawa, Ontario
K1A 0M1
[redacted]

From: Edward Iacobucci <edward.iacobucci@utoronto.ca>
Sent: August 24, 2020 10:18 AM
To: Spiro, David [redacted]
Cc: Deans Office Law <deansoffice.law@utoronto.ca>
Subject: FW: The Rosalie Silberman Abella Moot Courtroom/Clerkships at the Tax Court of Canada

Dear Justice Spiro,
Thanks for your note. Happy to discuss both topics but here are my quick reactions. On the first, I would very much support having the Tax Court use the Abella Moot Court Room from time to time, especially if we could use it as an opportunity for students to observe/learn. The challenge is timing. During these covid times, it's our go-to classroom: with social distancing, it has a capacity of 50 (ordinarily >200) so is in heavy use for the in-person sections that we are putting on. In ordinary times (may they quickly arrive!), there will be more opportunities, but during term time, it would be hard to block it off for a full day (during the week – weekends are flexible, but I assume that doesn't help much). That said, it might be possible during term on the occasional Friday, when the room is used less, or outside of term time. I'm happy to chat more about this, or I could arrange a conversation with our facilities manager, Jen Colvin, who has the task of overseeing the rental of our space.

On the second, while I would be very happy to talk, it might be most helpful to arrange a conversation with the head of our careers office, Neil Dennis. He would have better insight than I about the best ways to get the terrific opportunity of clerking at the Tax Court in front of students.

Just let me know how you'd like to proceed, whether by a phone call with me, and/or Neil and/or Jen.
Thanks!
Ed

From: Edward Iacobucci <edward.iacobucci@utoronto.ca>
Date: Monday, Aug 24, 2020, 10:47 AM
To: Spiro, David [redacted]
Subject: RE: The Rosalie Silberman Abella Moot Courtroom/Clerkships at the Tax Court of Canada

Will do!
Ed

From: Spiro, David [redacted]
Sent: August 24, 2020 10:27 AM
To: Edward Iacobucci <edward.iacobucci@utoronto.ca>
Cc: Deans Office Law <deansoffice.law@utoronto.ca>
Subject: RE: The Rosalie Silberman Abella Moot Courtroom/Clerkships at the Tax Court of Canada

Dear Dean Iacobucci:

Many thanks for this.

It would be great to speak with Jen to explain the Court's schedule of hearings, etc. and perhaps to put her in touch with one of the staff at the Court who could follow up with her.

A chat with Neil would be much appreciated as well. That might also require some follow up, this time with the tax professors who are teaching this semester.

In any event, if you could set up an "e-introduction" for me with each of those two individuals, I would be most grateful.

Best regards.

The Honourable Justice David E. Spiro
Tax Court of Canada / Cour canadienne de l'impôt
200 Kent Street
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K1A 0M1
[redacted]

From: Edward Iacobucci <edward.iacobucci@utoronto.ca>
Date: Monday, Aug 24, 2020, 10:54 AM
To: Neil Dennis <neil.dennis@utoronto.ca>
Cc: Spiro, David [redacted]
Subject: tax court of canada clerkships

Hi Neil,
Hope all's well with you. I'd like to introduce you to Mr Justice David Spiro of the Tax Court of Canada, cc'ed. Justice Spiro is an alum who knows our Faculty well, and has been a great supporter of our students. He and his Chief Justice noticed with some disappointment that the '20-21 and '21-22 cohorts of Tax Court clerks did not include a U of T student, and are wondering whether there might be a better way to connect with our students. As I'm sure you know, for anybody with even a passing interest in tax (and others, besides), clerking at the Tax Court would be a great opportunity. I know that you are very busy, but I'm hoping that perhaps you and he could find some time to have a conversation about this. Thanks very much!
Ed

From: Edward Iacobucci <edward.iacobucci@utoronto.ca>
Date: Monday, Aug 24, 2020, 11:04 AM
To: Jennifer Colvin <jen.colvin@utoronto.ca>
Cc: Spiro, David [redacted]
Subject: Abella Moot Court room

Hi Jen,
Hope all's well in our first week of in-person activities. I'd like to introduce you to Mr Justice David Spiro of the Tax Court of Canada, cc'ed. He is an alum and terrific friend of the law school. The Tax Court sits all over Canada, including Toronto, and is wondering whether it might be possible for them to have access to the Rosalie Silberman Abella Moot Court Room on occasion for hearings. I noted that, especially during covid, the room is in high demand for our academic program, but that in principle I would very much support having the Tax Court sit in the Abella Moot Court Room, especially if we can offer students learning opportunities associated with their presence. I mentioned that you are responsible for renting out our space, and suggested to Justice Spiro that you and he connect. I can imagine that you are very busy these days, but if you could find some time to connect with him, that would be terrific. Thanks very much!
Ed

Appendix "E"

Examples of personal touch points with the University of Toronto Faculty of Law

Justice David Spiro

2011 to 2020

<u>After Appointment to the Tax Court of Canada</u>

2020 - Wrote a warm remembrance of Arthur R.A. Scace that was published on the Faculty of Law website.

2020 – Wrote a note to Professor Martin Friedland, former Dean of the Faculty of Law, congratulating him on the publication of his latest book entitled "Searching for W.P.M. Kennedy: The Biography of an Enigma".

2020 – Wrote a note to Professor Michael Trebilcock on his retirement from the Faculty of Law. In her email correspondence with me in the summer of 2020, Ms. Courtney made reference to a fund to be named for him in support of the law and economics program at the Faculty of Law.

2020 – Attended the Swearing-Out ceremony for Justice Robert J. Sharpe of the Ontario Court of Appeal, former Dean of the Faculty of Law, who was my Civil Procedure teacher. When we had lunch following my appointment, he inscribed my copy of his most recent book entitled "Good Judgment: Making Judicial Decisions". I have relied on his advice in that book many times.

2019 – Attended the ceremony at the Faculty of Law at which Justice Rosalie Abella received her Distinguished Alumni Award.

2019 – Hooded Justice Michael Moldaver as he received an honourary degree at the Faculty of Law Convocation and joined a small group of invited guests at a luncheon following the ceremony.

2019 – Received a warm note from former Dean Robert Prichard on my appointment. He wrote in his email (attached): "Your friends and your alma mater are very proud of you."

Occasional attendee at Tax Policy Workshops at the Faculty of Law (when I was in Toronto and not sitting).

Lunches several times a year with Professor Emeritus Arnold Weinrib.

<u>Before Appointment to the Tax Court of Canada</u>

Frequent attendee at Tax Policy Workshops at the Faculty of Law.

Lunches several times a year with Professor Emeritus Arnold Weinrib.

2018 – Invited to a Special Convocation at U of T at which Justice Elena Kagan received an honourary degree and joined a small group of invited guests at a luncheon following the ceremony.

2018 – Volunteered as a Campaign Advisor to the Campaign for Excellence Without Barriers at the Faculty of Law, writing numerous letters and emails and meeting with alumni to raise funds for the Campaign to increase the amount of financial aid the Faculty of Law was able to offer students in financial need.[1]

2018 – Organized a luncheon at the Faculty of Law where a scholar in Islamic Law (Shaykh Ibrahim Hussain) and a scholar in Jewish Law (J.R. Rothstein) discussed how the Muslim and Jewish legal traditions dealt with their common prohibition on usury. Shaykh Ibrahim wrote in his email (attached): "The greatest blessing was to meet David."

2017 – Attended the 30th Reunion of my graduating class at the Faculty of Law. I skipped the traditional Friday night Sabbath dinner at home and had it, instead, with the rest of my class at a restaurant near the law school.

2015 – Established the Arnold Weinrib 50th Anniversary Bursary at the Faculty of Law to help support students on the basis of financial need and to celebrate Professor Emeritus Arnold Weinrib's 50th year of teaching.[2]

2011 – Attended the Faculty of Law Building Campaign launch and helped secure a gift from Fraser Milner Casgrain LLP where I was counsel at the time.

2011 – Received an Arbor Award from the University of Toronto after having been nominated by the Faculty of Law. The nomination form states that the Arbor Awards "recognize U of T volunteers who, through their exemplary generosity, make sustained and valuable contributions to the experience of U of T students, faculty, staff and alumni. This award is the highest honour given to U of T volunteers." The citation states:

> David Spiro, who graduated from the Faculty of Law in 1987, is the lead volunteer in a pilot project providing representation to low-income individuals in the Tax Court of Canada. David has developed the project with Pro Bono Students Canada, which provides law students with meaningful experience in the community.[3] He has also coached students preparing for the Bowman Tax Moot.

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[1] In this context "Campaign Advisor" does not mean that I was "advisor" to the Faculty of Law on fundraising as some have speculated. I was among a small group of volunteers who met regularly with Ms. Courtney during the Campaign to review lists of fellow alumni whom we might approach for gifts.

[2] I was delighted to receive a recent report from the University informing me that last year's income from the bursary fund had been allocated to support Gavin Lee, a 3rd year JD student.

[3] See the attached article which describes the *pro bono* program in detail.

Prichard, Rob
Re: Save the Date - June 13
April 24, 2019 at 10:39 PM
David Spiro

David,

That is fantastic news. Warmest congratulations. Such an honour and achievement. Your whole family must be thrilled. Judge David!

Sadly I will be in Newfoundland on June 12 part way through a holiday with Ann and friends so I will not be able to attend your swearing in.

It will be a wonderful moment in your life. Savour it. Your friends and your alma mater are very proud of you.

Best, rob

J Robert S Prichard
Chair
Torys LLP
rprichard@torys.com<mailto:rprichard@torys.com>
Tel: (416) 865-7341
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Asst: Judy Wong-Chin
jwongchin@torys.com<mailto:jwongchin@torys.com>
Tel: (416) 865-0040 ext. 4213

[redacted]
Sent: April 24, 2019 10:29 PM
To: rprichard@torys.com
Subject: Save the Date - June 13

*****NOTICE: This message came from an external webmail source. Please use caution when clicking links or opening attachments.******

Dear Rob:

I'd be honoured if you would attend my swearing-in ceremony as a judge of the Tax Court of Canada on June 13 in Toronto.

I expect that the ceremony will begin at about 3:00 p.m. but I will keep you posted.

Best regards.

David Spiro
[redacted]

Ibrahim Hussain
Re: Introduction
January 10, 2018 at 5:42 PM
J.R. Rothstein
David E. Spiro

Thank for your kindness J.R.

It was lovely to listen to your amazing research and to benefit from the wisdom of the leaders present yesterday.

The greatest blessing was to meet David.

Looking forward to connecting further and working together towards goodness!
God bless you both.

Regards,

Ibrahim Hussain
Imam & Executive Director
www.madinaseminary.ca

> On Jan 10, 2018, at 3:17 PM, J.R. Rothstein [redacted] wrote:
>
> Shaykh Ibrahim,
>
> David -
>
> You both added so much to the presentation yesterday and I am happy to introduce you to one another. I hope you two will have many fruitful meetings.
>
> All the best,
>
> --
> J.R. Rothstein
> [redacted]
> www.jrrothstein.com

Ibrahim Hussain
Re: Introduction
January 11, 2018 at 4:35 PM
David Spiro
J.R. Rothstein

Likewise David it was my honour to meet you. God almighty keep us connected and enable us to work towards goodness!

Ibrahim Hussain
Imam & Executive Director
www.madinaseminary.ca

> On Jan 10, 2018, at 11:45 PM, David Spiro [redacted] wrote:
>
> Dear Shaykh Ibrahim:
>
> It was my honour and privilege to meet you. I look forward to many more opportunities to continue and enhance the dialogue between us.
>
> Many thanks to J.R. for bringing us together and very best wishes for continued success.
>
> David Spiro

NEWS

Projects are for taxpayers in trouble

DONALEE MOULTON

Access to justice is a taxing issue for Canadians. Now, two pilot programs are breaking new legal ground in Canada by providing free legal services for the first time to unrepresented litigants at the Tax Court of Canada and the Ontario Securities Commission.

"It's hard to say the system is fair if people don't understand how it works and the legal issues," said Nikki Gershbain, national director of Pro Bono Students Canada, which is based at the University of Toronto.

Under the guidance of tax lawyers at Fraser Milner Casgrain (FMC) LLP in Toronto, six pro bono students will represent low-income individuals before the Tax Court of Canada during a two-week period in March. Letters have already been sent to eligible individuals asking them if they would like to have support moving forward with their case.

"My guess is there will be no shortage of people who want to take advantage of this," said Gershbain.

David Spiro, legal counsel with FMC in Toronto, also anticipates a positive response. "There are many individuals out there who are intimidated by tax in general and court in particular," he said. "This creates a great deal of anxiety. Any assistance is useful."

Another pilot project designed to provide some peace of mind for unrepresented litigants is underway at the Ontario Securities Commission in Toronto. Conceived and developed by James Camp, a lawyer with Gowling Lafleur Henderson (Gowlings) LLP, Gillian Dingle, a lawyer with Torys LLP, and Usman Sheikh, a member of the OSC Enforcement Branch, the one-year program will enable unrepresented respondents appearing before the commission on certain enforcement matters to apply for legal advice from counsel with expertise in securities litigation. Five volunteer lawyers trained by the Advocates Society, a Toronto-based provider of advocacy skills courses, will represent select respondents in three areas: prehearing, settlement conferences, and sanction and cost hearings. "These three areas are relatively self-contained and give the most bang for our buck," said Camp.

"OSC proceedings tend to be quite complex," he added. "It's not possible for the lawyers to do liability hearings."

An increasing numbers of unrepresented litigants is the impetus behind the new Litigation Assistance Program. In

Camp

Spiro

Gershbain

2010, Camp noted, "about 70 per cent of all people named in OSC cases didn't have a lawyer represent them. That number has expanded significantly over the last five years."

At the Tax Court of Canada, 35 per cent of respondents are unrepresented when they appear, noted Gershbain. "The value of the claims of those unrepresented individuals is about $12,000."

Understanding the law and legal processes can be tough for newcomers, and tax law is especially challenging, she added. "Tax law is technical and difficult. It's particularly difficult for individuals to navigate the system."

That rocky reality was emphasized by the Honourable Gerald Rip, chief justice of the Tax Court,

> "About 70 per cent of all people named in OSC cases didn't have a lawyer represent them. That number has expanded significantly over the last five years."
>
> James Camp, Gowling Lafleur Henderson (Gowlings) LLP

in *Pytel v. The Queen* 2009 TCC 615. The appellant in the case was Edward Pytel, an independent contractor in Edmonton, who represented himself in an appeal of a tax assessment. "He has had no business training. He has a grade 10 education and has attended trade school," Justice Rip stated in the opening paragraphs of his 11-page decision.

Later he noted that, "The courtroom is not familiar territory to Mr. Pytel and he was no doubt nervous in that setting. He resented being questioned on cross-examination. He was wary of the questions asked him. He was explained that cross-examination is a normal step in the trial process. He continued to be suspicious of the process in which he found himself an unwilling participant. He did nothing wrong—he relied on an accountant—and was in a battle he had difficulty comprehending."

At the conclusion of his decision favouring Pytel, Chief Justice Rip addressed the issue of unrepresented litigants in tax court. "A need for taxpayers to be better prepared for their appeals before this court is obvious," he said. "Dealing with a government bureaucracy, the CRA, for example, and then with a court is very stressful even on the most experienced persons. Unjust tax assessments may cause strain on the family relationship and ought to be challenged with public support when appropriate."

Chief Justice Rip identified how the legal system could help. He urged legal aid programs to consider extending their assistance to taxpayers, law firms to assist low-income taxpayers pro bono, and law schools to encourage students interested in tax and litigation to have programs offering assistance to taxpayers contesting an assessment.

"The court would be happy to co-operate with firms and law schools interested in assisting low-income tax appellants," Chief Justice Rip wrote in his 2009 decision.

That spirit of co-operation was evident last year when the chief justice approached the University of Toronto's law school about the possibility of a clinical placement in the court. That preliminary discussion led to the establishment of the FMC/Pro Bono Students Canada pilot project.

Plans are already in the works to expand this program and the OSC Litigation Assistance Program. "The goal will be to increase the number of students we recruit and the number of clients we serve as well as to expand to other centres where Pro Bono and FMC have offices," said Gershbain. "Ideally a few years from now we'll be running this program across the country."

Fraser Milner Casgrain would also like to see the initiative expand to other law firms. FMC, Spiro noted, will "establish the model and duplicate it in its offices across the country. If others wish to do the same, so much the better."

The pilot project at the OSC will be monitored and assessed throughout the year. "The next step is to expand by adding more lawyers," said Camp.

Research indicates that lawyers up their game when other lawyers are involved in a case, said Gershbain. "When individuals came unrepresented, lawyers came unprepared. [Helping unrepresented individuals] has raised the level of advocacy. We expect that will be a benefit of this project." ■

We want to hear from you!
Email us at: comment@lawyersweekly.ca

Helping unrepresented litigants

In 2006, the Canadian Judicial Council adopted a "Statement of Principles on Self-represented Litigants and Accused Persons," which identified the roles and responsibilities for all players in the legal system. Here is what it says lawyers should be doing.

- Members of the Bar are expected to participate in designing and delivering legal aid and pro bono representation to persons who would otherwise be self-represented, as well as other programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers.
- Members of the Bar are expected to be respectful of self-represented persons and to adjust their behaviour accordingly when dealing with self-represented persons, in accordance with their professional ethical obligations. For example, members of the Bar should, to the extent possible, avoid the use of complex legal language. Members of the Bar may be guided by the Canadian Bar Association's Code of Professional Conduct and the codes of each jurisdiction... and references therein.

J. ROBERT S. PRICHARD

[redacted]

February 4, 2021

Judicial Conduct Review Panel
Care of Odette Lalumiere
Acting Executive Director
Canadian Judicial Council
Ottawa, Ontario
K1A 0W8

Dear Sirs/Mesdames:

I write as requested by Mr. Gavin Mackenzie to comment on the character of Mr. Justice Spiro. I also comment on the context of his conduct which is the subject of the CJC's review.

By way of introduction, I was Dean of the Faculty of Law at the University of Toronto from 1984-1990 and then served as President of the University of Toronto from 1990 to 2000. I am now Professor of Law Emeritus and President Emeritus. I am also a member of the Advisory Board of the International Human Rights Program at the University of Toronto (https://ihrp.law.utoronto.ca/page/advisory-board). However, this board has not been involved in or consulted on the matters that are the subject of the CJC's review.

I have known Mr. Justice Spiro since his time as a student at the law school when I was Dean. I have counted him as a friend since and was invited to his swearing in as a judge but was unable to attend. I liked and admired David from the beginning. He was a good and serious student and he had an active interest in the life of the law school. He stood out not just for his ability but for his character. He was a serious and principled student who was grateful for the opportunity to study at the law school and took full advantage of it. He was engaged and a good contributor. I attended a small event to celebrate his graduation and experienced his parents' pride in David's success.

Since law school, David stayed in touch periodically and I encountered him from time to time at law school events. I watched with admiration as his career developed and was delighted by his appointment to the Court. I knew he would be an excellent judge. He is a person of complete integrity with a powerful commitment to fairness. He is principled, thoughtful and committed to justice – just the sort of person we want on the bench. In the more than 30 years I have known David, I have never heard a single ill-word about him in any context. He is widely respected and admired for his quiet, modest and principled approach to life.

David maintained an active interest in the law school after graduating and has been a strong supporter of the school. He maintained contact with various of his professors and was active in the work of the law school. The law school actively encourages this sort of continuing involvement with the alumni. The alumni association is a vital part of the law school and its strength. The law school communicates frequently with its graduates and involves them in the life of the law school. The alumni – lawyers and judges alike - contribute by teaching, mentoring, judging moot courts, creating

internships, hiring clerks and much more. Indeed, three members of the current Supreme Court of Canada (Justices Moldaver, Abella and Brown) serve as members of the editorial board of the University of Toronto Law Journal (as do I). The active engagement of the profession and judiciary makes the law school far stronger and helps the school remain relevant to its many constituencies.

The law school also depends on its alumni for financial support to make possible the financial aid, chairs, building projects and other initiatives that help provide a margin of excellence at the law school that would not be possible with public funds alone. Lawyers and judges have been involved not just as donors (like David) but also in some cases as leaders of the fundraising efforts. Indeed, while I was Dean, both Chief Justice Dickson and Chief Justice Dubin served as patrons of the campaign to build the Bora Laskin Law Library.

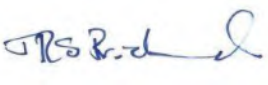
As Dean, I encouraged and welcomed a rich dialogue with the profession and the judiciary about the law school. My successors have done the same. This dialogue makes the law school stronger, more relevant and more responsive. However, there is a strong distinction between engaging with our numerous constituencies and abandoning our commitment to the law school as a self-governing collegial institution deeply committed to academic freedom. Alumni very much including judges are welcome to express their views on a whole range of topics. Indeed, they are encouraged to do so. But those opinions cannot compromise our decisions with respect to admissions, appointments or anything else that relates to the core academic values of the school. No academic should or would countenance any improper influence on our academic decisions. It is the duty of the Dean and other officers of the Faculty to uphold the University's principles of governance and decision-making. They do so not by insulating and isolating themselves from advice, information and opinions from those beyond the law school, but by their fidelity to self-governance and principled decision-making.

As far as I understand it, Justice Spiro passed on information gathered by others about a potential administrative staff appointment to a university fundraiser who was a personal friend, not because he was attempting to influence the decision to accord with his personal preferences, but because of a concern for the reputation of the law school and to ensure the law school was aware of potential controversy. At the law school, we welcome this kind of frank feedback from our stakeholders. On the other hand, I do not believe this information would have any impact on the decision-making at the law school, since doing so would be inconsistent with the school's independence in making appointments. Dean Iacobucci has repeatedly stated that this is the case.

Nothing that has occurred has caused me to believe Justice Spiro's ability to serve with honour, integrity and impartiality as a judge has been compromised. The suggestion that he would not, for example, be perceived as being able to fairly adjudicate disputes from members of certain communities because he would be perceived as having a bias, seems to me to be farfetched in the extreme. My confidence in him and his character is unimpaired in any way.

I would be pleased to answer any questions you may have.

Sincerely,



J. Robert S. Prichard

J. Paul Malette, Q.C.
[redacted]

January 21, 2021

Judicial Conduct Review Panel
Care of Ms Odette Lalumière
Acting Executive Director
Canadian Judicial Council
Ottawa, Ontario
K1A 0W8

Dear Members of the Review Panel,

Re: Justice David E. Spiro

I first met David Spiro in 1991 when I hired him to work as a counsel in the Tax Law Services Division of the Department of Justice (Canada), Toronto office. David left the employ of the Department in 2004. Since that time we have remained in touch and I have gotten to know him very well on a personal level.

By way of background, I became a member of the Law Society of Ontario in 1975. I primarily practiced tax litigation with the Department. I was David's manager throughout his time with the Department. As such, I frequently engaged with David and oversaw his work. I retired from the Department and the practice of law in 2017.

As his manager, I came to know David as a person of integrity who is forthright in his dealings. He always exhibited the highest level of ethics. Never did I see him exhibit a prejudice against parties because they were of a certain racial or ethnic group. Such behaviour would have been unacceptable and would have come to my attention.

After David left the employ of the Department in 2004, our relationship developed into a friendship. Our conversations have encompassed a broad range of topics. Not once, have I heard David disparage a racial or ethnic group.

When David applied for a judicial appointment, I wholeheartedly supported his application. I did so because not only was David technically sound but I knew he would deal with the parties before him with an open mind, with impartiality and evenhandedly. If I would have had any doubt whatsoever that he would not act in this fashion, I would not have supported his application.

In conclusion, I say without any reservation whatsoever that Justice Spiro will adjudicate based on the merits of the case. He would do so with an open mind, with impartiality and evenhandedly.

Yours Truly,

J. Paul Malette

J. Paul Malette, Q.C.

[redacted]

MHFeltman Verbatim Reporting
[redacted]

1 February 2021

Judicial Conduct Review Committee
c/o Odette Lalumiere, Acting Executive Director
Canadian Judicial Council
Ottawa, Ontario K1A 0W8

Dear Ms. Lalumiere:

RE: Judge David E. Spiro

Thank you for the opportunity to share my knowledge and opinions regarding Judge David Spiro.

My first encounter with David was in 1991. He was employed with the Department of Justice in Toronto and I was the court reporter at the Tax Court of Canada. Almost immediately, David came forward to introduce himself to court staff. This is not common practice. In those roles, David and I worked together that day and on many days that followed both in Tax Court and on pre-trial discoveries. In 1995, I left the Tax Court. David and I continued working together in pre-trial discoveries and cross-examinations while he was at the Department of Justice and, following 2004, while David was in private practice.

Without hesitation I can say that David represented his clients, on both sides, with fairness, thoughtfulness, passion and compassion. That is true for his clients and, as well, that is the case with the many interactions I have witnessed with counsel and clients from the opposing side. At no time has David exhibited anything but kindness and acceptance for all people. To say otherwise does not seem believable to me.

Not once in these 30 years has David ever said anything disparaging or even slightly negative about any person or group or place or position. (I cannot say that about myself.)

It would be a pleasure to amplify or to answer any questions regarding what I have written here. I am extremely comfortable saying Justice Spiro is an asset to the country and has been a delight and a privilege to know.

Sincerely,

Mary Holland Feltman

Judicial Conduct Review Committee
c/o Odette Lalumiere,
Acting Executive Director
Canadian Judicial Council
Ottawa ON K1A 0W8

Dear Ms. Lalumiere,

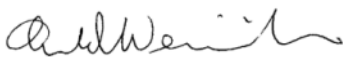
I am writing on behalf of Justice David Spiro, whom I have known since he was a student at the University of Toronto Faculty of Law. He graduated in 1987 and has been an active alumnus and supporter of the Faculty. I retired from the Faculty in 2006 and have continued to teach here on a part time basis since then. This is my fifty-fifth year at the Faculty. About five years ago, Justice Spiro initiated a bursary fund for student aid in my name to honour the fifty years I taught at the Faculty. I am grateful that students we admit to the law school are helped by the bursary fund to meet our tuition fees and that Justice Spiro thought to mark my history of teaching at the Faculty of Law.

In the roughly thirty years since Justice Spiro was called to the Bar, I have seen and spoken him many times about law, especially tax law and administration, legal history and the law school. We have had lunch together, I would estimate, about three or four times a year. He called me in early September 2020 and asked if I knew anything about the appointment of a new Director for our International Human Rights Program. I did not know there was a search for one. Later that day he emailed me to say no decision about the position had been made, along with an attachment about the writings of Dr. Azarova. I had never heard of her and did not reply to him. I have not spoken to him about the controversy which ensued. He emailed me on January 19 to say that his counsel would like to speak to me. I agreed to write a letter on behalf of Justice Spiro and I am happy to do so.

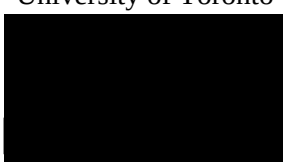
In all the time I have known Justice Spiro, there was never a time when I thought I knew anyone of better character than his. Nothing he ever said to me, or any of his actions that I know about, would cast doubt on his character. I was extremely proud, both for the Faculty of Law and him, when he was sworn in as a Judge of the Tax Court of Canada, and not only because I taught him. It was a well-deserved appointment of a lawyer who was a tax specialist and litigator for his entire legal career. His good character and empathy for people made him an excellent choice for the Court. From his description to me of his early days as a judge, it is obvious that he makes every effort to see that all parties, including unrepresented litigants, are treated with dignity and respect.

Justice Spiro is an active participant as an alumnus in the life of the law school and I am glad he is. It is beneficial for the Faculty of Law to have the benefit of the views of lawyers and judges about the school and the profession. Of course, it is the responsibility of the Dean and other administrators to make decisions in the best interest of our community.

Yours truly,



Arnold Weinrib
Faculty of Law
University of Toronto



Hon. Gerald J Rip

[redacted]

February 2, 2021

Judicial Conduct Review Panel,

Canadian Judicial Council,

Ottawa On, K1A 0W8

Dear Sir or Madam:

This letter is in support of Justice David Spiro ("Spiro") in the complaint against him to the Canadian Judicial Council.

I am a retired Chief Justice of the Tax Court of Canada. I was appointed to the Court as a *puisne* judge in 1983 and a few years later Spiro started appearing before me as a member of the Department of Justice representing the Crown. In fact, he told me that I was the judge who presided over his first case. At all times that he appeared before me he was the epitome of what a Justice lawyer ought to be: considerate, compassionate and sympathetic to individual self-represented taxpayers, assisting them when either he or I realized the taxpayer did not understand the assessment in issue; transparent with evidence he intended to produce; fair in his analysis of the evidence; respectful to the court and its employees; civil to opposing lawyers; courteous to the presiding judge. Not once did I hear any of my colleagues say anything negative about Spiro. Indeed, the judges thought him to be a most kind and respectful lawyer and human being.

In later years Spiro was a member of the Canadian Bar Association/Tax Court of Canada Bench and Bar Committee and it was at this time that I would meet with Spiro in a less formal atmosphere at meetings of the Committee and lunch and dinners attached to the Committee meetings. I also met him at various times during conferences of the Canadian Tax Foundation. My impression of him in such social settings did not vary from my impression of him in court room. He was and is a decent person.

All people have biases and judges are no exceptions. When a judge believes he or she is biased in favour of or against a party to the litigation before the judge, the judge will recuse him or herself. Spiro's ethical character does and will guide him in determining whether any bias he has may influence a potential decision and in such a situation I am confident he would recuse himself. In my 32 years as judge I recused myself – or tried to recuse myself – from cases I was assigned because I feared I was biased for or against a litigant or I otherwise had a conflict. Spiro would do the same in similar circumstances. That someone may accuse him of presiding at a trial while prejudiced against a party says more about them than about Spiro.

Courts look for judges who have high ethical and moral human standards combined with compassion and respect for the litigants and reverence for the law. Based on my experience talking, meeting and working with Spiro over the years, he is such a person.

Yours truly,

Gerald J Rip

Rec'd. Oct 27/2020 JC.

Tax Court of Canada

Ottawa, Canada
K1A 0M1

Cour canadienne de l'impôt

The Honourable Eugene P. Rossiter
Chief Justice

L'honorable Eugene P. Rossiter
Juge en chef

October 23, 2020

J. Michael MacDonald
Acting Executive Director
Canadian Judicial Council
Ottawa, ON
K1A 0W8

Dear Chief Justice MacDonald:

Re: CJC Files: 20-0254, 20-0256, 20-0260, 20-0261, 20-0268, 20-0271, 20-0274 and 20-0275

I am in receipt of your correspondence of September 30, 2020 and the enclosures therein.

Justice David Spiro is the newest Judge on the Court, having been appointed on April 15, 2019. We were very pleased to have Justice Spiro come to the Tax Court of Canada as he is very knowledgeable in tax law and also has litigation experience.

Since his appointment, I was able to notice Justice Spiro is a very collegial individual and well appreciated by the Judges at the Court. He is respectful, engaging and very communicative and is devoted to being an engaged and empathic Judge.

From his appointment, he was able to take on high technical tax work with enthusiasm and ease. I, as Chief Justice, and Associate Chief Justice Lamarre have complete trust in his skills and abilities related to his judicial functions.

Justice Spiro has been very active since his appointment on a variety of projects for the Tax Court of Canada. He is one of two Judges on our Continuing Legal

Education Committee and he is a member on a Judge's committee which is reviewing procedural issues and amendments associated with the *Income Tax Act*, the *Excise Tax Act*, the Canada Pension Plan, Old Age Security and *Employment Insurance Act*, as well as the *Tax Court of Canada Act*.

Justice Spiro is very well thought of in the Bar and the tax community. He is a person who brings people together and has been an active participant in the advancement of pro-bono services for lay litigants before the Tax Court of Canada prior to his appointment.

While I do not have direct knowledge of the events related to the complaints filed against Justice Spiro, I understand that the facts do not appear to be those reported by the media. I understand Justice Spiro has explained what transpired in his reply to you. He readily understands his role as a Judge and I have reinforced with him the dos and don'ts of a person in a judicial role, the importance of not only conflicts of interest but also perceived conflicts of interest and bias. He indicated appreciating the advice that has been provided to him and I have no doubt that this is a one-off incident that will not occur again.

The Court has taken the initiative, for perception purposes, of having all files that have been assigned to Justice Spiro, whether these be trials or duty judge files, reviewed by the Associate Chief Justice of the Tax Court of Canada to ensure that to the best of the Associate Chief Justice's assessment, in accordance to the information on the file, no files upon which he will adjudicate would have, as parties, or agents or counsel, anyone who could be thought as being of Muslim or of the Islamic faith. Further, Justice Spiro will recuse himself from any file at any time in which it appears to him that either the counsel, representative of any litigant or a litigant is a Muslim or is of the Islamic faith immediately. In such circumstance, the file will be reassigned to another Tax Court of Canada Judge. This process will allow for any concern related to a potential perceived bias from Justice Spiro to be removed.

I advise that both I and the Tax Court of Canada Associate Chief Justice have the utmost faith in Justice Spiro's ability to act impartially and without bias on litigation that comes before him. We believe he has and will continue making a

valuable contribution to the Canadian public in his role as a Justice of the Tax Court of Canada.

All of which is respectfully submitted.

Eugène P. Rossiter
Chief Justice
c.c. Associate Chief Justice Lamarre

GIBVANERTLAW
Public law and civil litigation

31 March 2021

BY EMAIL

Gavin MacKenzie
<gavin@mackenziebarristers.com>

Dear Mr. MacKenzie:

Re: Canadian Judicial Council File Number 20-0254 et al.

We have been retained by the Canadian Judicial Council to provide assistance in the above-noted matter. Thank you for your letter dated 30 March 2021, which enclosed the following:

- *Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law*; and
- President Gertler's Response.

By reply to this letter, please confirm that you would like your 30 March 2021 letter and its two enclosures included as an addendum to your written submissions to the Review Panel.

Yours truly,

Gib van Ert

Cc. Jacqueline Corado, Canadian Judicial Council

Ottawa 148 Third Ave Ottawa K1S 2K1 tel 613 408 4297 fax 613 651 0304

Vancouver 1550-1185 West Georgia St V6E 4E6 tel 604 644 5845 fax 613 651 0304
BC practice conducted through Gib van Ert Law Corporation

gib@gibvanertlaw.com

Subject: Canadian Judicial Council File Number 20-0254 et al.
Date: Wednesday, 31 March 2021 at 9:36:06 PM Eastern Daylight Time
From: Gavin MacKenzie
To: Gib van Ert
CC: Jacqueline Corado
Attachments: image001.png

Good evening, Mr. van Ert, and thank you for your letter of today's date.

Yes, we ask that the Review Panel consider my letter of March 30, with the report of the Honourable Thomas Cromwell and the statement of University of Toronto President Gertler, as addenda to my written submissions on behalf of Justice Spiro.

Yours truly,

Gavin MacKenzie
MacKenzie Barristers Professional Corporation
gavin@mackenziebarristers.com
T: 416-304-9293 F: 416-304-9296
www.mackenziebarristers.com

MACKENZIE BARRISTERS

From: Gib van Ert <gib@gibvanertlaw.com>
Sent: Wednesday, March 31, 2021 9:06 PM
To: Gavin MacKenzie <gavin@mackenziebarristers.com>
Cc: Jacqueline Corado <Jacqueline.Corado@cjc-ccm.ca>
Subject: Canadian Judicial Council File Number 20-0254 et al.

Dear Mr. MacKenzie,

Please see attached.

Regards,

Gib van Ert

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March 30, 2021

Odette Lalumière
Canadian Judicial Council
Ottawa, ON
K1A 0W8

Dear Ms. Lalumière:

Re: CLC Files 20-0254 et al.

We would be grateful if you would bring this correspondence to the attention of the members of the Review Panel who are considering the matter.

Yesterday a report by the Honourable Thomas Cromwell to the President of the University of Toronto was released. Mr. Cromwell was mandated to conduct an independent and impartial investigation into the search process that resulted in controversy in the media, and to make recommendations concerning relevant University policies. Mr. Cromwell conducted a comprehensive investigation that included interviews with all University officials who had been involved and a review of emails and other documents generated at the material time.

A number of Mr. Cromwell's findings are relevant to the issues the Review Panel is considering. For that reason we consider it important that the Review Panel have an opportunity to review and consider Mr. Cromwell's report before arriving at its decision. It is attached, as is a statement issued by the President of the University, Meric S. Gertler.

In the attached statement President Gertler thanks Mr. Cromwell for his "very thorough work and detailed report, which has fully addressed the Terms of Reference". He observes that despite the voluntary nature of the review Mr. Cromwell was successful in securing the participation of all those involved in the search process. Having assembled all the facts that can be ascertained, President Gertler points out, Mr. Cromwell "determined a comprehensive chronological narrative and factual account of events leading to the controversy, which has been missing until now." He adds that Mr. Cromwell makes a compelling case for his conclusions.

Those conclusions, to the extent they are relevant to the Review Panel's mandate, include that: "I would not draw the inference that improper outside influence played any role in the decision to discontinue the candidacy of [Dr. Azarova]." (page 75, restating the conclusion at page 56).

More importantly for the purpose of the Review Panel's mandate, Mr. Cromwell wrote as follows (referring to Justice Spiro as "the Alumnus" throughout):

> "Based on my review, it appears that ***the nature of the Alumnus' inquiry has been misunderstood in much of the public discussion.*** It has at various points been described as an 'objection' to the candidacy, as 'external interference', as a 'complaint' about the candidacy, as 'outside political pressure', as an 'attempt to block the appointment.'
>
> Those descriptions adequately convey the intent of the professor's [Professor Gerald Steinberg's] approach to the Organization [CIJA] that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, ***my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.***
>
> ***This would hardly be news to anyone who had taken a moment or two to look on the internet***. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evident 'as soon as [Dr. Azarova's] name was announced'." (page 48. Emphasis added).

Mr. Cromwell explains the disparity between the media reports that triggered the controversy (and which, in turn, informed the complaints to the Canadian Judicial Council) on the well-founded basis that "none of the critics or participants expressing concerns have had the benefit of a full review of all of the information with which I have been provided." (page 46).

We hope the Review Panel will find this additional information helpful. If we can be of further assistance we would of course be pleased to hear from you.

Yours truly,

MacKenzie Barristers P.C.

Per:

Gavin MacKenzie

Gavin MacKenzie

Encls.

cc Chief Justice Rossiter

Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law

The Honourable Thomas A. Cromwell C.C.

March 15, 2021

Contents

FOREWORD

I have conducted my independent review of the search process for the directorship of the International Human Rights Program ("**IHRP**" or "**the Program**") at the University of Toronto Faculty of Law. The Review addresses the three main subjects specified in the Terms of Reference attached to your December 7, 2020 statement:

1. A comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy of the search committee's Preferred Candidate;
2. Whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process; and
3. Any pertinent guidance or advice for your consideration relating to any matters arising out of the processes that were involved in this search.

There are three preliminary matters that I bring to your attention before turning to the substance of my Review: privacy concerns, the existence of other processes, and topics that I need not address in detail.

A. PRIVACY CONCERNS

You have indicated your intention to make my Review public, subject to "the privacy of individual candidates."[1] I am also aware that the University's obligations to protect personal privacy may place other constraints on the release of information in this Review. In an effort to avoid the need for redaction and to ease the public release of the Review, I have referred to all individuals and groups by descriptors including, for the sake of consistency, those whose involvement is already in the public domain. I am providing you alone with an appendix that contains a concordance of the names corresponding to the descriptors that I have used (see Appendix "A").

[1] Terms of Reference, December 7, 2020.

B. OTHER PROCESSES

My Review occurs in a complicated and sensitive context as a result of other ongoing processes arising out of the same events. There are complaints pending before the Canadian Judicial Council about the conduct of a federally appointed judge "relating to the judge's alleged interference in the appointment of a Director of the International Human Rights Program at the University of Toronto."[2] The Council of the Canadian Association of University Teachers has passed a motion to censure the University as a result of the Association's understanding of the facts.[3] Within the University, grievances have been filed by the University of Toronto Faculty Association alleging various breaches of the *Memorandum of Agreement between the Faculty Association and the University*, the University's *Statement of Institutional Purpose*, the *Statement on Freedom of Speech* as well as any other relevant policy, procedure, practice, or law.

I have done my best to address fully the points referred to me in the Terms of Reference without commenting unnecessarily on matters that are central to the resolution of these other processes.

C. MATTERS NOT ADDRESSED IN DETAIL

I must refer to two matters in order to clarify the scope of my Review.

First, my Terms of Reference do not ask me to opine on the qualifications of the Preferred Candidate. That individual was the strong, unanimous and enthusiastic first choice of the selection committee[4] 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

[2] "Canadian Judicial Council constitutes a Review Panel in the matter involving the Honourable D.E. Spiro" Canadian Judicial Council Press Release (January 11, 2021), online: https://cjc-ccm.ca/en/news/canadian-judicial-council-constitutes-review-panel-matter-involving-honourable-de-spiro

[3] "CAUT Council passes motion of censure against the University of Toronto", CAUT News Release (November 20,2021), online: https://www.caut.ca/latest/2020/11/caut-council-passes-motion-censure-against-university-toronto

[4] The material that I have refers to this group by various names, including the "hiring committee", the "search committee" and the "hiring panel". I have used the term "selection committee" with the understanding that the final "selection" of the person to be hired was to be made by the Dean.

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. I have therefore not engaged with unsolicited submissions made to me about the Preferred Candidate's suitability for the position. To do so would be outside my Terms of Reference. It would also be inappropriate and presumptuous given the deliberations of the selection committee and the University's position.

Second, I do not need to explore the precise contours of academic freedom in the context of recruitment for this position. Whatever those contours may be, 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. The University's public statements have been that the candidacy was discontinued on the basis that "legal constraints on cross-border hiring meant that a candidate could not meet the Faculty's timing needs" and that "assertions that outside influence affected the outcome of [the] search are untrue and objectionable. University leadership and [the Dean] would never allow outside pressure to be a factor in a hiring decision."[5] Moreover, as I will discuss in detail, having reviewed all of the relevant facts as fully as I can, I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate. The inference that such influence played a role in that decision is the basis of the concern about academic freedom but, as I see it, that inference is not justified.

[5] Dean's letter to faculty September 17, 2020.

PART I: FACTUAL NARRATIVE AND BASIS FOR DECISION OF SEARCH COMMITTEE PROCESS

A. FACTUAL NARRATIVE

1. Introduction to the Program and the Position

The search process for the Director of the IHRP in 2020 began when the advertisement was posted during the last week of April and concluded when the Dean decided in early September to terminate the recruitment of the selection committee's Preferred Candidate. I am not aware of any concerns about how this search unfolded up until the morning of September 4, 2020. However, to provide the "comprehensive factual narrative" as required by my Terms of Reference, I must set out a thorough review of the recruitment process.

(a.) The International Human Rights Program

The IHRP was established in 1987 with summer internships and student volunteer working groups and expanded in 2002 to include what I understand to be Canada's first international human rights clinic.[6] The Program's mission is to advance the field of international human rights law through advocacy, knowledge exchange, experiential learning and capacity-building. It has an expansive understanding of "advocacy", reaching beyond traditional client representation and litigation to include, for example, drafting fact-finding reports and making submissions to international bodies. A "central and unique goal" of the Program is to facilitate experiential learning opportunities by exposing students to the theory and practice of international human rights law emphasizing intellectual rigour and professionalism.[7]

What one person described to me as the "flagship" element of the IHRP is the clinical course that consists of a seminar and clinical projects. The seminar meets once per week for three hours and is structured around skill-building sessions, case-studies, thematic analysis and weekly discussion of projects. The clinical projects involve, for example, students formulating theories and

[6] University of Toronto, Faculty of Law, International Human Rights Program, *Advancing the Field of International Human Rights Law: Strategic Plan 2011 updated 2014,* online: https://ihrp.law.utoronto.ca/utfl_file/count/HOME/IHRP%20Strategic%20Plan%202014%20update.pdf.

[7] Ibid. p 7.

advocacy strategies, conducting legal research, legal drafting, carrying out fact-finding field work and creating public legal education materials.[8]

It was clear from the submissions to me and from my interviews that the IHRP has committed alumni and alumnae who place tremendous value on their personal experience in the Program and who view those experiences as both the highlight of their time in law school and a cause of transformational thinking about their role in the legal profession. They have in the past expressed concern about what they perceive to be inadequate support of the Program by the Faculty of Law and they have raised with me their deep concerns about the Program's future in light of the controversy that led to my Review.

(b.) The Director's Position

The Director, working under the direction of the Assistant Dean, provides clinical, educational and administrative leadership and support to the IHRP.[9] The position is in the "Professional/Managerial" Group at the "PM 4" level and falls within the category of "administrative staff" as defined in the *University of Toronto Act, 1971*. The position has been treated consistently as not falling within the positions addressed by the *Memorandum of Understanding between the Governing Council of the University of Toronto and the University of Toronto Faculty Association*. Selection Committee Member 1 and the Assistant Dean advised me, and I have no reason to doubt, that it was made clear to the Preferred Candidate in the recruiting process that this is neither an academic position nor a pathway to one.

A number of people to whom I spoke questioned whether the Professional/Managerial classification is apt for this position given the importance of the clinical training component and their perceived need to have stronger protections for the person occupying the position. The Director of a human rights program is "in the business" of tackling controversial issues and taking positions that may well be objectionable to some. I received several eloquent explanations about why the Director and the Program need protection from critics who do not like its positions on various issues. I will

[8] "Excellence in Clinical Legal Education", IHRP (undated), online: https://ihrp.law.utoronto.ca/page/overview-0

[9] Job Posting (Job #2001027).

return to this issue in the final section of my review.

Two of the requirements for the Director's position are an LLB or JD degree and a licence to practice law in Ontario with consideration to be given to applicants licensed to practice in other jurisdictions. From the perspective of the University's human resources specialists, the requirement to be a practising lawyer is an essential aspect of maintaining the job classification and relaxing that requirement would risk lowering the job classification to a lower salary level. In previous searches, the University required that candidates be licensed to practice in Ontario but, with considerable effort, the Faculty of Law received permission to modify this requirement to permit consideration of candidates licenced to practice in other jurisdictions.[10]

Although not specified in the job posting, timing was an important aspect of the Director search. The IHRP had not had a permanent Director since the previous Director left for another position in September of 2019. The recruiting process at that time failed when the candidate decided in December 2019 not to accept the position. The IHRP operated under an Interim Director for the 2019 – 2020 academic year, but that individual had committed to another position beginning in the summer of 2020. The hope was to have someone in place for the opening of the fall semester in early September of 2020 but, as the search progressed, it was recognized that this might not be possible.[11]

As I will discuss later, there are different recollections among the members of the selection committee as to the importance of having the Director in place in September. It was clear to everyone, however, that the new Director needed to be physically present in Toronto and ready to teach the clinical course at the beginning of January 2021.

2. The Search Process

(a.) The Process Up to the Selection of the Preferred Candidate

I have not been able to locate any written policy on how the selection committee is to be established, its composition, the procedures to be followed or terms of reference. There is some lack of clarity

[10] Email July 15, 2020 number 68; Email July 16 number 70.

[11] Email July 6 2020 number 39.

about the decision-making process. The HR consultant assigned to the process thought that the Assistant Dean, to whom the Director reports, had the final say. However, the members of the selection committee were of the view that their function was advisory and that the Dean was the ultimate decision-maker to whom they would provide their advice.

As far as I can tell, there was no discussion of the confidentiality of the search process among the selection committee and the HR Consultant did not address it expressly. However, all understood that the search process was to remain confidential. I was told that in other recruitment processes, such as for a dean, members of the search committee must sign confidentiality agreements.

The position was not posted until the third week of April with a closing date of June 17, 2020. The posting was delayed to obtain an exemption from a University-wide hiring freeze and to loosen the requirement that the Director be licenced to practice law in Ontario. The posting was widely distributed, including internationally, and resulted in 146 applications.[12]

The HR Consultant and the Assistant Dean reviewed all applications and produced a "long list" of over 20 candidates that was provided to the selection committee on July 6, 2020. The selection committee members were asked to send their selection of the top 10 candidates with no more than three or four candidates outside Canada who would require work permits.[13] The committee agreed on their "short list" of eight, two of whom would require work permits, on July 9.[14] However, one of the short-listed candidates advised the HR Consultant that he could not begin work until "January/February 2021." Committee members agreed that this was a "problem"[15] or a "major issue"[16] and the person was dropped from the short list.

Interviews started the second week of July 2020. Following the first six interviews on July 14 and 15, the Assistant Dean proposed that the committee broaden the pool. Three additional names were added to the first

[12] Email June 25, 2020 number 28.
[13] Email July 6, 2020 number 39.
[14] Email July 9, 2020 number 49.
[15] Email July 11, 2020 number 51.
[16] Email July 11, 2020 number 52.

round interview list, including the person who became the Preferred Candidate.[17]

Following the first round of interviews, the committee selected three candidates, including the Preferred Candidate, for second interviews that occurred on July 30. Two of the three individuals were international candidates while the third was a Canadian permanent resident working abroad. Each candidate was asked when they would be available to start and advised that the University term was to begin on September 7. The Canadian permanent resident was available at the end of the August; the timing of the others' availability depended on immigration approval.

Following the interviews, the Preferred Candidate was identified and, with the candidate's permission, references were checked. They were glowing.

All members of the selection committee recall that the Preferred Candidate was their unanimous first choice. However, recollections differ on the selection committee's views on the remaining two candidates. Selection committee Members 1 and 2 recall that in addition to the Preferred Candidate, one other candidate of the three finalists was identified as a viable option but that if neither of those two were available, there would be a failed search. The Assistant Dean recalls that the committee identified two candidates from the second round as the leaders but does not recall any consensus that if neither were available there would be a failed search.

On August 4, the Assistant Dean advised the HR Consultant she "would like to move forward to make an offer to the [Preferred Candidate] asap when [the Assistant Dean] return[ed] [from vacation] next week".[18] On August 9, the selection committee members exchanged emails on the status of the process. The Assistant Dean advised that she had a meeting scheduled with the HR Consultant on August 10 "to discuss our offer" to the Preferred Candidate[19] and scheduled a Zoom meeting with the Preferred Candidate for August 11 "to discuss the IHRP Director position."[20]

[17] Email July 15, 2020 number 65.
[18] Email August 4, 2020 number 100.
[19] Email August 9, 2020 number 102.
[20] Email August 10, 2020 number 103.

(b.)Negotiation with the Preferred Candidate August 11 – September 2, 2020

On August 11, the Assistant Dean had a meeting with the Preferred Candidate after which she reported to the HR Consultant that she had "just finished a very nice call with [the Preferred Candidate]. She seems very receptive to receiving an offer, but we agreed that the immigration/work permit issue is a very important part of the conversation."[21] Later that same day the Assistant Dean was in touch with the HR Consultant again looking for some "basic immigration policy information that would apply in this situation."[22] She noted that the Preferred Candidate "understands that we need her to be able to start the position no later than Sept 30" but that she was not required "to be in Toronto until the first week back in Jan 2021."[23]

The Preferred Candidate's recollection of the August 11 meeting was provided in a written chronology that she prepared. We discussed her recollection of the meeting during my interview with her. The chronology reads that she received an offer of employment during this meeting on August 11. In my interview with her, she indicated that she was told that the Faculty wanted her to be the Director if the terms could be worked out and that the big "if" was immigration and whether it could happen on time.

There has been a good deal said in the public domain about the University withdrawing an accepted offer. As I see it, no offer and acceptance in the strictly legal sense of those words were ever exchanged. It was clear on August 11 that the immigration issues needed to be resolved before there could be any formal offer and, as we shall see, the subsequent communications show that negotiations about the terms of employment continued into early September. However, it was also clear that the University wanted to hire the Preferred Candidate and that she wanted the position. As far as I can tell, this is a situation in which advanced negotiations were abruptly halted, not a situation in which an accepted offer was rescinded.

On August 12, the HR Consultant contacted the Assistant Dean, noting that the in-house immigration specialists at

[21] Email August 11, 2020 number 106.
[22] Email August 11, 2020 number 106
[23] Email August 11, 2020 number 108.

the University had raised some questions about why a foreign national was being selected rather than a Canadian. She noted that the Preferred Candidate would be "ineligible to work from outside of the country until she obtains a valid work permit."[24]

On August 14, the Assistant Dean emailed the HR Consultant hoping to discuss the immigration information for the Preferred Candidate and noting that she "had another call with her on Monday [i.e. August 17] at 11 am during which I am hoping we will come to a decision about whether she wants the position and [if] the timing will work."[25]

Also on August 14, the Assistant Dean was in touch with an immigration lawyer whom the University retained to seek advice regarding the Preferred Candidate's immigration situation. The Assistant Dean advised the immigration lawyer that they had "… a new candidate to whom we would like to make an offer" noting, however, that she wished to first obtain advice in relation to obtaining a work permit.[26] In that email, the Assistant Dean told the immigration lawyer that "[w]e need the candidate to start the position no later than September 30, 2020, although we don't need her to move back to Toronto until the start of January."[27]

I note that this is the second of several occasions (before any controversy had arisen) that the Assistant Dean stated in writing that the Preferred Candidate would have to start in September or at least before the end of the two to three month period that it would likely take to get a work permit.

The Assistant Dean met with the immigration lawyer (via Zoom) on August 19 and 21 and arranged for the Preferred Candidate to meet with the immigration lawyer directly on August 24th.

A call had been scheduled with the Preferred Candidate for Monday, August 17 to discuss her "questions and thoughts".[28] However, because the Assistant Dean was waiting for additional information regarding the immigration process, she proposed that the meeting be postponed. The Preferred Candidate

[24] Email August 12, 2020 number 108. I am not sure that this statement is completely correct, but it was the advice received by the Assistant Dean.
[25] Email August 14, 2020 number 114.
[26] Email August 14, 2020 number 130.
[27] Email August 14, 2020 number 130.
[28] Email August 12, 2020 number 113.

agreed, noting that she had "spent much of the weekend thinking about your very exciting offer and discussing it with colleagues (including my referees)" and that she was "very enthusiastic about being able to accept [the] offer" but that she did "have a couple of questions […] first". [29]

Around the same time, the outgoing acting Director of the IHRP inquired about the status of the hiring process for transition purposes. She was advised by the Assistant Dean that the Preferred Candidate had been informed that the outgoing acting Director would like to meet her before August 21, and that the Assistant Dean would be in touch when they were further into the contract offer discussions.[30]

On August 17th, the Assistant Dean had her regular bi-weekly meeting with the Dean. Her memory of the meeting, which is consistent with the Dean's less detailed recollection, is that she told the Dean that: the selection committee had unanimously selected a Preferred Candidate; the Preferred Candidate had impressive legal clinic administrative experience, lived in Europe, had a PhD, and had worked as an instructor at European law schools; and 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.

The Dean expressed concern that the candidate's background as an academic may not be a good fit for the administrative IHRP Director role, and asked whether there was a risk that she was interested in the role because she hoped that it would turn into an academic one. The Assistant Dean responded that the search committee had made it very clear to the Preferred Candidate that the role was administrative and not a pathway to an academic appointment.

She and the Dean agreed to speak again when she had more information about the timing of the work permit. Neither the Dean nor the Assistant Dean recall any discussion during this meeting about the details of the potential immigration routes that were being explored.

Email exchanges between the Assistant Dean and the HR Consultant around the

[29] Email August 12, 2020 number 121.

[30] Email August 12, 2020 number 109.

same time provide some insight as to why the Assistant Dean felt it was realistic to have an international hire in the position with a work permit by September. The previous failed IHRP search had selected a U.S citizen who had the benefit of favourable immigration rules that exist with the United States. Leading up to the Assistant Dean's meeting with the immigration lawyer, the HR Consultant wrote to the Assistant Dean asking "can you please confirm who it was that advised you that a Labour Market Assessment would not be required for this role? I recall we had this discussion earlier this year but immigration [referring to internal immigration resources] is now advising that this may be a problem." The Assistant Dean indicated in response that she had received that advice from the University Retained Immigration Lawyer (presumably during the last search). On the morning of August 17, 2020 the Assistant Dean indicated to the HR Consultant that "I think one of the main issues here is that last time we were governed by NAFTA provisions, which are very favourable. This time, no."[31]

The initial email to the University Retained Immigration lawyer contained basic information about the Preferred Candidate including the position for which she was being hired, her citizenship, her current country of residence (Germany) and that she was married to a Canadian citizen. The email referred to her plan to make a permanent move back to Canada, the family connections in Canada and the University's timing requirements which was for the candidate to start no later than September 30 (although she would not have to be in Toronto until the start of January). The immigration lawyer agreed to meet with the Assistant Dean on August 19th and asked for a copy of the Preferred Candidate's CV. He pointed out in the email that the IHRP candidate from the prior search was an American and they had been considering a work permit as a "NAFTA Professional." He indicated that this would not be a consideration for the current Preferred Candidate.[32]

On August 19th, the Assistant Dean met with the immigration lawyer who advised that it was reasonable to expect that the

[31] Emails August 14 to August 17, 2020 number 129.

[32] Emails August 17, 2020 number 130.

Preferred Candidate could have a work permit in two to three months after applying. The Assistant Dean recalls being dismayed that it would take that long and the immigration lawyer mentioned the possibility that the Preferred Candidate might be able to begin working as an independent contractor to "bridge the gap" between September and December.[33] He suggested that the University could "check that out", but of course his advice was limited to immigration matters and did not extend to employment law.[34]

In my conversation with the immigration lawyer, he recalled that the University had apparently been under the impression that a non-Canadian could not be employed by a Canadian employer without a work permit while living outside of the country. That understanding is consistent with the email from the HR Consultant to the Assistant Dean on August 12 which I referred to earlier.[35] The immigration lawyer told me that, from an immigration law perspective, this is not correct: there is no immigration issue about a non-Canadian working for a Canadian employer provided that the non-Canadian is not working in Canada. There are, however, other difficulties from an employment law perspective in having an employee working outside Canada who is not eligible to work in Canada. My understanding is that those difficulties make such employment impractical for the University and that it is something that it would not do. These employment law issues were not matters on which the immigration lawyer gave advice.

With respect to the work permit for the Preferred Candidate, the immigration lawyer suggested two paths forward, each of which could make possible the hiring of a non-Canadian citizen or permanent resident.

One of the pathways involved a Labour Market Impact Assessment ("**LMIA**") which required the University to advertise the position for 30 days and demonstrate that no Canadian or Permanent Resident suitable for the position had applied. The concern about this route was the timing

[33] Chronology Item 132.
[34] Interview with Immigration Lawyer February 8, 2021.
[35] Email August 8, 2020 number 108.

of the advertising for the position, as I will discuss below.

The other pathway was a "substantial benefit" application with the objective of establishing that hiring the Preferred Candidate would bring a substantial benefit to Canada. For that route, it was not necessary to show that there was no suitable Canadian applicant.

I should add a word about the immigration implications of the fact that the Preferred Candidate's spouse is a Canadian citizen. In some of the public discussion of this controversy, it has been suggested that this fact provided a more rapid path to a work permit. The information that I have received from the immigration lawyer is that this is not the case. While marriage to a Canadian eases the path to entry to Canada and to permanent residency and may positively affect the outcome of an LMIA application (because the non-Canadian is expected to become a Canadian), it has no impact on the time that it will likely take to obtain a work permit. Based on what I have been told by immigration counsel, speculation that the work permit could have been obtained more quickly because the Preferred Candidate is the foreign spouse of a Canadian is erroneous.

After receiving the advice from the immigration lawyer, the Assistant Dean was in touch with the HR Consultant to advise (on August 19) that she now had "a clear sense of what needs to happen."[36]

The Assistant Dean and the Preferred Candidate met on August 19 and 21. Their recollections of the conversations differ in some respects. Before I set out their recollections, I will place those conversations in the context of what else was happening at around the same time.

The Assistant Dean contacted University Employment Lawyer 1 and requested a meeting to discuss the "specific details and explore what might be possible."[37] She advised that "after a very extensive search, we discovered that the strongest candidates are not Canadian citizens" and that "[w]e need [the Preferred Candidate] to start working before she will be realistically able to obtain a Canadian work permit. She will be working remotely … until December

[36] Email August 19, 2020 number 132.

[37] Email August 20, 2020 number 135.

when she will relocate to Toronto …". In a subsequent email, the Assistant Dean indicated that the timing for hiring this individual was "as soon as possible".[38] University Employment Lawyer 1 advised that he and his colleague (University Employment Lawyer 2) had "consulted with external counsel on these types of issues at some length recently."[39] A meeting with University Employment Lawyer 2 was scheduled for August 21. I note that here again the Assistant Dean indicated in writing before any controversy arose that the Preferred Candidate needed to start work before the time frame within which she could likely obtain a work permit.

The Assistant Dean updated the other members of the selection committee by email on August 20. She wrote: "Just letting you know that I am continuing to push this forward. I have spoken with [the Preferred Candidate] 3x since we decided to go with her. She seems to get more excited each time I speak to her. I spoke to an immigration lawyer yesterday and I will be speaking to the UT employment lawyers tomorrow. In a nutshell, we are hoping to work out a way for [her] to start work for us before she has a Cdn [sic] work permit in hand. The immigration lawyer is estimating that she could have one in 2 – 3 months. <u>We need to bridge the time between now and then</u>. [The Preferred Candidate] is willing to start working remotely immediately. She plans to move to Canada by December"[40](emphasis added).

In response to this email, Selection Committee Member 1 said "wonderful" and Selection Committee Member 2 said "[o]ptimistic that we can find some work arounds to bridge the time gap."[41] I note that the Assistant Dean referred, in writing and before any controversy had arisen, to the "need" to bridge the time gap between "now" and two to three months from now when the Preferred Candidate was likely to have a permit to work in Canada.

The Assistant Dean met with University Employment Lawyer 2 (and others) on August 21. The lawyer's notes of the meeting indicate that the immigration lawyer's advice was that the Preferred Candidate would not have a work permit in hand "any sooner than 3 months from

[38] Email August 20, 2020 number 135.
[39] Email August 20, 2020 number 134.
[40] Email August 20, 2020 number 136.
[41] Email August 20, 2020 number 137.

now" and that it was indicated (presumably by the Assistant Dean) that "we cannot wait that long." The Preferred Candidate could start remotely immediately but that she understands that she has to be in Toronto not later than the end of the calendar year because she is required to teach in person in January. The plan agreed to at this meeting was that they would: explore an independent contractor route, find out if the Preferred Candidate was interested in that option, work with HR on an offer, and then the Assistant Dean and HR would prepare an independent contractor agreement to be reviewed by German counsel (since the Preferred Candidate was a resident of Germany). The concept was to provide an offer of employment that would be revocable if she was not able to get to Toronto by December 31 and an independent contractor agreement that could be terminated on 2 weeks' notice.

As University Employment Lawyer 2 explained to me, the University had recently received general external advice about options for a Canadian employer to legally employ someone who would need to work in a foreign jurisdiction. She explained that the employment of an employee working in a foreign jurisdiction would be governed by the laws of that jurisdiction including tax, payroll and workplace laws. Accordingly, the options for a legal entity such as the University that does not have a business presence in the foreign country would be to register a business in that country in compliance with applicable local laws, or contract with a registered business or professional employer organization in that country that could hire the employee on their payroll in compliance with applicable local laws and arrange a secondment to the Canadian employer. She advised that these are not practical options for the University.

University Employment Lawyer 2 told me about circumstances in which the University had entered into independent contractor arrangements with a small number of foreign nationals who had been offered and accepted faculty positions. These were generally people who were eligible to receive Canadian work permits upon arrival in Canada but who could not come to Canada as a result of COVID-19 related travel restrictions. In those cases, until they were able to come to Canada to work as faculty members, they contracted to

provide limited services such as independent research, which is part of the duties of faculty members but is not subject to the direction or control of the University. These arrangements were viewed as having an acceptably low legal risk to the University. In a few cases, the duties also included some remote teaching. As I understand it, these were considered to carry somewhat more legal risk and it was up to the relevant academic administrator in consultation with counsel to decide whether to accept the risk in each particular case. University Employment Lawyer 2 said that she was consulted on the general structure of these arrangements and advised on template engagement letters.

On the same day, August 21, the Assistant Dean wrote to the Preferred Candidate indicating that she "had great meetings with employment and immigration lawyers and am keen to update you."[42] The Assistant Dean also emailed the immigration lawyer to provide him with an update and request his availability in order to put him in contact with the Preferred Candidate. She advised that "it looks like we can proceed with hiring our candidate as an independent contractor effective immediately and simply roll her into a permanent position as soon as she receives her Canadian work permit." She added "… this scenario will work for the law school only if she receives her permit before Dec 31 2020 (she is required to be onsite to teach a course starting Jan 4 2020)."[43] She indicated that she had spoken with the Preferred Candidate that day and that "we both agreed that getting greater certainty about the immigration/work permit timeframe will be necessary before we can determine whether our strategy is realistic."[44] She proposed that the immigration lawyer speak directly to the Preferred Candidate and he scheduled that meeting for August 24 (discussed below).

In his email to the Assistant Dean confirming that he would meet with the Preferred Candidate directly, the immigration lawyer provided some high level information about the LMIA and the significant benefit routes. In response to this, the Assistant Dean replied, in part "As we discussed, our strong preference

[42] Email August 21, 2020 number 142.
[43] Email August 21, 2020 number 144.
[44] Email August 21, 2020 number 144.

would be to not go down the LMIA route."[45]

The Assistant Dean also wrote to update the other members of the selection committee, indicating that she "was continuing to have positive discussions with [the Preferred Candidate] and others. [That she] [s]poke to the UT employment lawyers today and they confirmed that we can hire [the Preferred Candidate] as an independent contractor and roll her into the permanent position when she has her permit in hand. The [Preferred Candidate] is happy with this. The next step is to connect her with the employment [sic – I believe that this should read "immigration"] lawyer directly to make sure the 3 month timeframe that he gave me is in fact realistic in her circumstances."[46]

The Assistant Dean and the Preferred Candidate met on August 19 and 21. Their recollections of these discussions, particularly in relation to what the Assistant Dean viewed as the critical nature of the September start date, do not coincide.

The Assistant Dean's recollection of the meetings with the Preferred Candidate on August 19 and 21 is that she (i.e. the Assistant Dean: (i) reiterated the vital importance of a September start date and that the Preferred Candidate could not have the job if she could not start in September 2020; (ii) relayed the advice from the immigration lawyer that it would take approximately two to three months to get a work permit; (iiI) advised that it may be possible to use an independent contractor agreement to bridge the gap between September and December (when she was likely to receive a work permit); and (iv) offered to connect the Preferred Candidate directly with the immigration lawyer to receive advice about obtaining a work permit and making an application for Permanent Residency.

As the Assistant Dean recalls it, the Preferred Candidate advised that she continued to be interested in the position; she was prepared to work with the Assistant Dean to investigate whether she could meet the timing deadline; and that she would consider entering into an independent contractor agreement to

[45] Email August 21, 2020 number 153.

[46] Email August 21, 2020 number 146.

bridge the time between September and December, when she would likely obtain a work permit.

The Assistant Dean noted in her written chronology of events that, in her view, the other two members of the selection committee were "very clear" that it was critical that the new Director be in place in September, that it was a "clear requirement and firm understanding" that she needed to start in September.[47] However, in my interview with the Assistant Dean, she 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."

The Preferred Candidate's recollection is that on August 19, she accepted the offer made to her on August 11. She recalls being told in these meetings with the Assistant Dean that it would take approximately three months to obtain her Canadian work permit. In the interim, the University proposed to hire her as a foreign consultant, starting immediately, so that she could prepare for her role as Director. She would then obtain her work permit on arrival in Canada before her work on campus was set to begin at the beginning of January 2021. The Assistant Dean advised her that this arrangement had received the necessary approvals from the University's in-house lawyers and Human Resources department. The Preferred Candidate understood that the University viewed it as important to get someone into the job fast and the idea of working remotely as a consultant (i.e. an independent contractor) originated with the University.

The Preferred Candidate told me that she indicated to the Assistant Dean that she was willing to do the required course preparation for her teaching in January without getting paid before January as she had experienced preparing to teach with no extra remuneration in the past. She was aware that there were activities that the University wanted to have happen in the fall and they needed someone to be in the job in the fall. However, she also understood that the

[47] Interview with Assistant Dean, February 12, 2021.

University had selected an international candidate, knowing the immigration requirements that would be involved. She did not understand that an arrangement to begin work remotely no later than the end of September was a condition of proceeding with the recruitment.

The other members of the selection committee do not seem to have appreciated what, to the Assistant Dean, was the critical nature of the September start date. Selection Committee Member 2 told me that it was not a "major issue" if the new Director could not start in September, although the Member had noted in earlier email correspondence that the fact that the earliest another candidate could start was "January/February 2021" had been a "major issue" at that time.[48] Selection Committee Member 1 told me that there was no moment at which it was said that the recruitment could not proceed because the person could not begin in September.[49] When I asked about the perception that it was "indeed a problem" that another candidate could not start until "January/February 2021," Selection Committee Member 1 explained that that timing meant that the person would not be able to teach the clinical course starting in January and that they were optimistic at the early point in the process when this exchange occurred about finding someone who could start sooner.[50]

I cannot assess whose recollections are more accurate. However, it is clear that the Dean's source of information about this recruitment process was the Assistant Dean and that it was clear in her mind (and consistent with what she had stated in writing before any controversy arose) that it was critically important to get the candidate started working before the end of the two to three month time period that it would likely take to get a work permit.

The immigration lawyer and the Preferred Candidate spoke on August 24. In the meantime, the Assistant Dean wrote to the HR Consultant saying that "it would be great to get a draft employment contract to [the Preferred Candidate] for her review. This would include the top hiring range salary plus language about it

[48] Email July 11, 2020 number 52.
[49] Interview Selection Committee Member 1 February 10, 2021.
[50] Interview Selection Committee Member 1 February 10, 2021.

being conditional on her being able to work in Canada."[51]

The HR Consultant requested more details in order to prepare the draft, namely whether they had received confirmation from the immigration lawyer that three months would be sufficient time for the Preferred Candidate to obtain her work permit, and whether the document would be provided as a draft offer for the time being.[52] The Assistant Dean advised that she would work on the independent contractor agreement, that the permanent employment contract would commence on January 4, 2021 and that they should prepare a draft offer for the Preferred Candidate's consideration "to give her something to base a discussion on." The HR Consultant suggested that both the employment and the independent contractor agreements be provided to the Preferred Candidate at the same time.[53]

Later that day, the Assistant Dean sent the HR Consultant a copy of the draft independent contractor agreement that the Assistant Dean had prepared, clarifying that it would have to first be sent to an international law firm to ensure compliance with German law.[54] The HR Consultant recommended some changes to the draft to better reflect an independent contractor relationship, rather than an employment relationship.[55]

On the same day (August 24), the Preferred Candidate provided an email update and summary of her conversation with the immigration lawyer. In my interview with the immigration lawyer, he confirmed that her email was a fair summary of their conversation.

The plan was to submit two different applications simultaneously and as soon as possible in order to obtain a work permit by December. The first would be via the LMIA process based on a market assessment and inability to find a suitable Canadian candidate and the second on the basis that the Preferred Candidate's employment would make a substantial contribution to Canada. To the extent that the latter option worked, the former could be abandoned. The Preferred Candidate also expressed support for starting the process for the

[51] Email August 24, 2020 number 160.
[52] Email August 24, 2020 number 166.
[53] Email August 24, 2020 number 166.
[54] Email August 24, 2020 number 168.
[55] Email August 24, 2020 number 169.

application for permanent residency. However, she noted some complexities and likely COVID-related delays in relation to collecting the necessary information and asked whether the University would be willing to contribute to the costs of her lawyer related to this permanent residency application.

The Preferred Candidate concluded that she was "a bit fuzzy on our/my next step(s) aside from those that [the immigration lawyer] will be taking with the university (contingent on [the Assistant Dean's] approval?)."[56] The Assistant Dean indicated that she would be in touch with the immigration lawyer and the Preferred Candidate regarding concrete next steps.[57]

The draft independent contractor agreement was subsequently shared with the German employment lawyers on August 27.[58] It was not shared with the University employment lawyers before being sent to the German lawyers.

On September 1, the Assistant Dean requested the HR Consultant to provide a summary of the offer that they intended to make to the Preferred Candidate "in case it makes sense to send [it] to [her] this week."[59] This timing corresponds with the Preferred Candidate's recollection that she expected to receive a written offer the week of September 7.[60] The Assistant Dean also spoke to the Preferred Candidate on September 1. During this discussion, the Preferred Candidate raised the possibility of her working from Europe for the summer. In an email the next day (September 2), the Assistant Dean summarized the call for the HR Consultant and provided her views about the path forward. She wrote, in part:[61]

> 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 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 feeing much more comfortable with moving ahead with her candidacy…

[56] Email August 24, 2020 number 170.
[57] Email August 25, 2020 number 171.
[58] Email August 27, 2020 number 186.
[59] Email September 1, 2020 number 194.
[60] Interview with Preferred Candidate February 9, 2021.
[61] Email September 2, 2020 number 200.

> 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.
>
> Here are the next steps:
>
> - I connect with the international law firm to get the independent contractor agreement back and send to [the Preferred Candidate]
> - [The HR Consultant] sends me the point form summary of employment contract terms; I send to [the Preferred Candidate]
> - Work with [the immigration lawyer] to initiate work permit routes; [The HR Consultant] and I to discuss how to manage the job posting issue. Ideally, she will be able to start work as soon as we sort out the independent contractor agreement (ideally September 14th).

The "job posting issue" referred to in this email relates to the LMIA route to a work permit. There was some lack of clarity about whether the advertising for the position was timely for the purposes of the LMIA application. If it was not, then the position would have to be reposted for 30 days before the LMIA application could be submitted. It was as a result of this concern that the immigration lawyer had advised proceeding on both the LMIA and the substantial benefit tracks. If the advertising turned out to have been timely, the substantial benefit track (which was viewed as the less likely to succeed of the two) could be abandoned. If, on the other hand, the advertising was timely for the LMIA route, then it might well succeed and the substantial benefit track could be abandoned.

After the meeting with the Preferred Candidate on September 1, the Assistant Dean advised the immigration lawyer that they would be moving forward with the two proposed paths for obtaining a work permit for the Preferred Candidate and that she would get started on the significant benefit letter.[62]

The Assistant Dean also spoke with Selection Committee Member 1 on September 1. Selection Committee Member 1's recollection of the discussion was that it centred on the Preferred Candidates request to be away for two

[62] Email September 1, 2020, number197.

months in the summer to return to Europe. Selection Committee Member 1 was not concerned by the request as long as the work of the IHRP was getting done. The Assistant Dean recalls that she also provided an update on work permit and timing issues.

(c.) September 3 and the morning of September 4

A number of immigration and employment law developments occurred on September 3 and 4 and the inquiry from the alumnus occurred on September 4. That date was the Friday before the Labour Day long-weekend and a few days before the opening of the Law Faculty fall term in the midst of the COVID-19 pandemic.

On September 3, the Assistant Dean emailed the Preferred Candidate thanking her for their meeting earlier in the week and writing: "[a]s we discussed, I am taking several steps at this end to move things forward including: following up with the international law firm about the independent contractor agreement, drafting a summary of the terms of what would be included in a subsequent employment contract, and working with [the University-retained immigration lawyer] to start the special contribution and LMIA processes to obtain your work permit. I have been in touch on all of these fronts and am waiting to hear back. I hope to be in touch to update you very soon."

As of September 3, the intent was to proceed with the LMIA process that involved the University convincing the authorities that there was no qualified Canadian available for the position. This was noted in the Preferred Candidate's summary of her conversation with the immigration lawyer on August 24 and which was provided to the Assistant Dean that day.

On September 3 at 12:22 pm the German employment lawyers sent the Assistant Dean a marked up copy of the draft independent contractor agreement. The Assistant Dean advised me during her interview that she did not read the document or the covering email until the next day when there was a call with German employment lawyers sometime in the morning after 10 am.[63]

[63] Email September 3, 2020 number 202.

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.[64]

In the annotations to the draft agreement, the German employment lawyers commented that if the Preferred Candidate were found to be an employee rather than an independent contractor under German law, "[t]his can have rather severe consequences, first and foremost the employer's duty to pay social security contributions and the risk of criminal charges if this is omitted."[65]

At 1:11 pm on September 3 the Assistant Dean forwarded the email received from the German employment lawyers to University Employment Lawyer #2. The Assistant Dean noted, in part, that she had "received the attached comments back" and invited University Employment Lawyer #2 to join a meeting the next day at 10 am.[66]

On September 4, the Assistant Dean emailed University Employment Lawyer #2 again on this issue at just after 6 am asking for a meeting to discuss the matter the week of September 8.[67] University Employment Lawyer #2 was on vacation and not available for a meeting until the next week as indicated by her out of office automatic email reply.

As of the morning of September 4, the University's employment lawyers had not provided comments on the proposed draft independent contractor agreement which, in accordance with their usual practice, had been referred out to the local (in this case German) employment lawyers.

Around the same time (September 4 around 6 am), the Assistant Dean emailed the HR consultant asking for an update on the status of the IHRP Director employment contract language and indicated that she would "like to send this to [the Preferred Candidate] asap." She noted that she had the independent

[64] Email September 3, 2020 number 202.
[65] Annotated draft independent contractor agreement number 203.
[66] Email September 3, 2020 number 203.
[67] Email September 4, 2020 number 205.

contractor agreement and referred to a future meeting to discuss it with University Employment Lawyer 2.[68]

She then sent a follow up email to the University retained immigration lawyer advising that: they would be moving forward to provide the Preferred Candidate with an independent contractor agreement "next week", that they would like to get started on the work permit routes, and asking how he would like to proceed.[69] A meeting to discuss the matter was subsequently confirmed for Tuesday, September 8.[70]

Later on the morning of September 4, just before 9 am, the immigration lawyer advised the Assistant Dean that in order to pursue the LMIA route for the Preferred Candidate, it would be necessary to re-advertise the position for a 30 day period. They were not able to pursue the LMIA academic stream (which would have avoided re-publication) because it would require the position to be a predominantly academic one with only corollary administrative and managerial duties. The immigration lawyer recommended that the University "move ahead immediately with respect to an application for an LMIA-exempt work permit based on 'significant benefit' while preparing for another round of advertising for the position. [His] hope [was] that we will get an approval on the "significant benefit" application before the ads for an LMIA application need to be placed in the media."[71]

This was the first time the Assistant Dean had been told that republication – something she hoped to avoid – would definitely be required in order to pursue the LMIA route. The Assistant Dean responded at 9:09 am that this "sounds like a great plan" and the she would "get started on the significant benefit letter."[72]

The Assistant Dean then, in an email sent at 9:13 am, enlisted the assistance of Selection Committee Member 1 in drafting that letter. The latter prefaced her suggestions for language for the letter with this: "Thanks so much for all of your hard work, patience and [d]iplomacy in managing all of this."[73] This email was received by the Assistant Dean at 10:48 am.

[68] Email September 4, 2020 number 204.
[69] Email September 4, 2020 number 206.
[70] Email September 4, 2020 number 213.
[71] Email September 4, 2020 number 208.
[72] Email September 4, 2020 number 209.
[73] Email September 4, 2020 number 215.

Notwithstanding the Assistant Dean's email instructions to the immigration lawyer to pursue both immigration routes, she explained to me that in her mind the LMIA route was not a viable option because of the requirement to repost the position for 30 days and because in her mind there were qualified Canadians. Her focus was on the significant benefit route. She advised me that, in her view, if that did not work, the Faculty would have had to decline to offer the position to the Preferred Candidate and repost. So far as I can tell, this belief was not communicated to the Preferred Candidate, the immigration lawyer or the other members of the selection committee.

The Assistant Dean advised me that she had scheduled a further meeting with the immigration lawyer on September 8 to "dig into the details" of the immigration issues. She felt that once they had a further discussion, it would have been clear that only the special benefit route would have been a viable option.

The Assistant Dean spoke to the German employment lawyers around 10:30 am on September 4. (University Employment Lawyer #2 did not attend the meeting). According to the Assistant Dean, the German lawyers reiterated the advice provided by email the previous day (but which the Assistant Dean told me she had not read until that morning) that the independent contractor agreement was "illegal" under German law and likely under Canadian law as well. There was some discussion of the risk of detection which was considered to be low.

Around the same time, at 10:19 am, the Assistant Dean received an email from the HR Consultant attaching a document containing high level details that would be incorporated into a future employment agreement. The details included only the anticipated start date in Canada (January 2), salary, links to University benefits, pension and policy information and that a performance/merit review would be conducted annually.[74]

(d.) The inquiry by the alumnus on September 4

An inquiry by an Alumnus was made on September 4 of the Assistant Vice President ("**AVP**"). The inquiry was made around the same time that the Assistant

[74] Email September 4, 2020 number 214 and attachment 214.1.

Dean was engaging in the various emails and discussions referred to earlier although she would not learn of the inquiry until later in the day, as noted below. I obtained the recollection of both parties to the original conversation by means of an interview with the AVP and, at my suggestion, a written account from the Alumnus through counsel.

The telephone conversation between the AVP and the Alumnus was a pre-scheduled stewardship call initiated by the AVP. The Alumnus had, before appointment to the bench, worked with the AVP in her previous role with the Faculty of Law on a successful fundraising campaign. The call was scheduled for 10:00 am on September 4 by an email exchange that began on August 30 with the AVP inviting the Alumnus to have a call to catch up. The AVP described the call as a normal "reach out" to donors. The AVP entered (on September 6) a summary of the call into her Major Gifts plan for the Alumnus. It reflects a wide-ranging conversation of roughly an hour's duration about various aspects of the University. Her summary contains no mention of the directorship of the IHRP.

According to the AVP, towards the end of the call the Alumnus raised the matter that led to the controversy that occasioned my Review. The conversation was brief. But first, some background.

The Alumnus advised me that prior to the call, on September 3, he learned of the potential appointment of the Preferred Candidate as Director of the IHRP. This information was relayed to him by a staff member of an Organization of which the Alumnus had been a director until his appointment to the bench. The staff member asked if the Alumnus could contact the Dean about the potential appointment. The Alumnus declined to approach the Dean being of the view that it would be inappropriate for him to do so. The staff member also asked whether the Alumnus could find out whether the appointment had been made or was still under consideration and provided him with a memorandum that a professor from a university outside Canada had sent to the Organization.

The professor stated in his email attaching the memorandum that he had learned of the potential appointment from a faculty member, who is not identified by

name or institution. The Organization staff member told the Alumnus that the potential appointment had come to light as a result of a posting seeking housing for the Preferred Candidate in Toronto. (The Preferred Candidate told me that this is unlikely and I cannot otherwise verify this information.) The Alumnus, through counsel, has provided me with the email chain and the attached document.

The professor's email and memorandum are well-summed up in the email's subject line: "U of T pending appointment of major anti-Israel activist to important law school position." The email states that "[f]rom the faculty member who found out about this and informed me, it appears that the internal appointment process in the law school has been completed." It adds, "[i]f someone could quietly find out the current status, and confirm [the Preferred Candidate's] pending appointment, that would be very helpful. The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising."[75]

As was previously mentioned, towards the end of the conversation on the stewardship call with the AVP, the Alumnus raised the appointment of a new IHRP Director. Their respective recollections of the conversation are consistent on the essential points.[76]

The Alumnus asked the AVP whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered that 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.

It is unclear to me exactly what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred

[75] Email September 2, 2020.

[76] The account is based on my interview with the AVP on February 3, 2020 a detailed account provided by counsel for the alumnus and copies of email and documents provided by both.

to the Preferred Candidate's published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern.

So far as I can determine, the AVP in fact did not communicate directly with the Dean about this conversation, although a later email implies that she did. Rather, she communicated with the Assistant Dean Alumni and Development in the Faculty of Law.

The Assistant Dean Alumni and Development received a call (which based on the email exchanges must have been about noon) on September 4 from the AVP. The latter mentioned the name of the Preferred Candidate and the name of the Alumnus. The AVP recalled flagging the importance of due diligence on the IHRP file. The Assistant Dean Alumni and Development recalls that the AVP told her that the message had been relayed that the Jewish community would not be pleased by the Preferred Candidate's appointment and that she wanted to have more information about the search.

The first that anyone involved in the search heard about the inquiry from the Alumnus was shortly afterwards and, again based on the emails, likely between 12:00 pm and 12:30 pm.

The Assistant Dean received a call from the Law Faculty's Assistant Dean Alumni and Development who indicated that she had received an inquiry from her boss, the AVP, about the IHRP Director recruitment. The Assistant Dean Alumni and Development advised the Assistant Dean that an alumnus, a federally appointed judge, had inquired about the search process, naming the Preferred Candidate and indicating that there was concern in the Jewish community about her potential appointment. The Assistant Dean confirmed that the named person was the Preferred Candidate, that no decision had yet been made and expressed concern that the candidate's name was apparently known outside the circle of people involved in the recruiting process.

The Assistant Dean asked the Assistant Dean Alumni and Development to brief the Dean which she did by telephone

after emailing him at 12:29 pm requesting a call.[77]

The information about the state of the search was relayed to the AVP and in turn to the alumnus as noted below.

The Assistant Dean Alumni and Development's recollection of the call with the Dean is that she told the Dean that the Alumnus had passed on concern about hiring the Preferred Candidate. The Dean expressed concern about the fact that the name of the candidate was known and indicated that he should "get up to speed" on the search.[78] The Dean recalls that this is the first time he had heard the Preferred Candidate's name and that he understood from the conversation that the Alumnus had indicated that the appointment would be controversial in the Jewish community.[79] He had no personal knowledge at that time about the Preferred Candidate or why her appointment would be controversial. He gave instructions that he would have no engagement with Advancement on the matter and the Assistant Dean Alumni and Development was to advise the AVP that there would be no further follow up on the matter.

In the meantime, the Assistant Dean had a telephone conversation with Selection Committee Member 1 sometime shortly after 12:30. Their respective recollections of the conversation are largely consistent. The Assistant Dean relayed both the Alumnus' name and that he had expressed concern about the appointment because of the Preferred Candidate's Israel/Palestine work.[80] The Assistant Dean was unsure how to interpret this information and in particular did not understand how the Alumnus knew about the search or the candidate or why the candidacy was controversial.[81]

Selection Committee Member 1 followed up with an email (at 3:02 pm) setting out what she suspected was going on and noting the possibility of a link among the Alumnus, the Organization and another entity on the website of which she had found material relating to the Preferred Candidate's scholarship. She noted that "I still don't know how they got [the Preferred Candidate's] name but it hardly

[77] Email September 4, 2020.
[78] Interview with Assistant Dean Alumni and Development.
[79] Interview with Dean.
[80] Selection Committee Member 1 chronology.
[81] Assistant Dean interview February 12, 2021.

matters because as soon as her appointment was announced, it would've happened anyway." She concluded by raising concerns about the involvement by a judge "engaging with the law school in this way."[82]

The Assistant Dean and the Dean spoke briefly by telephone in the early afternoon. It was agreed that the Assistant Dean would send him the Preferred Candidate's CV (which she did at 6:38 pm that evening) and that they would talk again over the weekend.

Later the same day (at 2:01 pm on September 4), the AVP followed up with the Alumnus by email, writing: "Quick update – understand from [the Dean] that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w [*sic*] me next week. Look forward to closing the loop w [*sic*] you."[83] Notwithstanding what this email suggests, the AVP did not speak to the Dean about the matter at this point and in fact their only communication on this subject occurred when the Dean was in contact with the AVP to tell her to "back off" any involvement in the recruiting process.

The Alumnus responded to the AVP (at 2:20 pm) "I look forward to closing the loop as well. If you need any further information on this matter, please don't hesitate to let me know."[84]

(e.) Events September 5 - 8

The Assistant Dean and the Dean had a regular bi-weekly meeting scheduled for an hour on Tuesday September 8. At that meeting, she planned to brief the Dean and seek his approval to make the offer to the Preferred Candidate. As a result of the events of the 4th, however, she provided information to him over the weekend on Saturday the 5th and Sunday the 6th.

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

[82] Email September 4, 2020 number 219.
[83] Email September 4, 2020 page 12 of Alumnus response.
[84] Email September 4, 2020 page 12 of Alumnus response.

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.

She provided the Dean with a summary of the legal advice received from the German employment lawyers and referred to the Preferred Candidate's request to have summers (roughly about 20% of her time) away from the campus in Europe.

As an aside, the Preferred Candidate explained to me that part of the reason that this option interested her was that she wanted to see if she could get part of the benefit of being a faculty member and that she was interested in "semi-quasi" faculty treatment.

As the Assistant Dean recalls the meetings, the Dean had quickly looked at the Preferred Candidate's CV and concluded why her scholarship might be controversial in the eyes of some. But in her recollection of the meetings, the Dean thought that the potentially controversial nature of the scholarship did not matter and he was focused on the legal advice from the German lawyers concerning the independent contractor arrangement. He was clear that there was "no way" he would approve entering into an "illegal" independent contractor agreement. He was also concerned that the request to be away from the campus reflected a mis-alignment with the position, referring to his concerns (referenced earlier) about this being an administrative, not an academic position.

As the Assistant Dean recalls it, there was discussion that the timing was unfortunate and that the breach of confidentiality of the search process was troubling, but that the Dean's focus was on the "illegality" of the proposed independent contractor arrangement and the request to be away from campus. As the Assistant Dean presented the matter to him, the September start date was also critical. It appears that, consistent with what the HR Consultant had noted in the August 12th email referred to above, the Assistant Dean was operating on the understanding that the independent

contractor route was the only path to having the Preferred Candidate in the role (albeit remotely) in September. For practical purposes, that understanding was correct.

It is important to note what, according to the independent recollection of the Dean and the Assistant Dean, was not discussed in detail with the Dean. The Dean was not briefed by the Assistant Dean on the specifics of the LMIA route to obtain a work permit. In particular, the Dean was not told, by the Assistant Dean or otherwise, that it would require the University to indicate that there was no qualified Canadian.

Also over the weekend, the Dean spoke to the Vice President and Provost ("**Provost**") and to the Vice President Human Resources and Equity ("**VPHR**"). The Provost recalls that the Dean was concerned about the search and steps taken by the committee. In his view, the search committee had moved forward in a way that was not expected of a body that was "advisory" and that he had been advised late in the day. He expressed concern about the proposed independent contractor arrangement and that the Preferred Candidate was an academic coming into a staff role, reflected by her request for 20% of her time to be spent off campus. He also referred to a "complicating factor" resulting from the Alumnus' communication as described above.

The Provost referred the Dean to the VPHR because the matter concerned a staff position that fell under her authority and not that of the Provost. The Provost told me 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. She was concerned that someone outside the search process had found out about the selection process because confidentiality in such processes is very important. She noted that in decanal searches, participants sign confidentiality agreements.

The VPHR recalls that the Dean called her to discuss the situation. He was concerned about the legality of the proposed independent contractor arrangement. The VPHR was aware that the University had brought people in on an independent contractor basis and knew that University Legal Counsel 2 would have been consulted and had

experience with such matters. She also was aware that if there was no independent contractor arrangement it would be hard to pay the individual.

The Dean also raised the Preferred Candidate's wish to be away from campus 20% of the time and the VPHR indicated that this was a staff position and was "100% full-time equivalent." As a practical matter this meant that the person was expected is to be in the position in Toronto full time. The VPHR was a bit taken aback by the Dean's reluctance about the independent contractor arrangement because she knew in general terms that the University had entered into independent contractor arrangements in other situations.

The Dean then mentioned that the VPHR should be aware of the information relayed by the Alumnus although it was not relevant to his decision-making. In her perception, his main concerns were wanting somebody in the position now but that, in his view, the risk of going the independent contractor route was too great. Her view was that if the person was not in Canada and not eligible to work in Canada, there was a problem. The Dean's preoccupation was with the independent contractor approach not being right.

On Sunday, September 6, the Dean and Selection Committee Member 1 spoke on the telephone, at the Dean's request.[85] Selection Committee Member 1 made notes about a week after the conversation that form part of the "chronology" that was ultimately given to the *Globe and Mail,* although not by her. She recalls that they discussed five main topics.[86]

First, the Dean expressed his concern about the independent contractor agreement as a bridge until the work permit was obtained. His view was that this was improper and could not be done and that he had consulted with the VPHR about this. Selection Committee Member 1 suggested that the immigration issue could be addressed by spousal sponsorship and that it was not the Preferred Candidate's fault if the University was proposing something that was inappropriate. (As noted earlier, the spousal sponsorship route would not,

[86] Documents received from Selection Committee Member 1

according to the immigration lawyer, change the likely time frame for obtaining the work permit.)

Second, the Dean indicated that there was no way that the Preferred Candidate could be absent in the summer given that it was an administrative position. He also raised his concern that the Preferred Candidate really wanted an academic position. Selection Committee Member 1 responded that if the absence was unacceptable the University could "take it off the table" and that it had been made very clear to the Preferred Candidate that this was not an academic position.

Third, Selection Committee Member 1 raised her concern that the Preferred Candidate's work on Israel/Palestine was an issue but that her work was "well within the zone of legitimate, professional, international legal analysis." The Dean responded that given the other issues, he did not need to get to that one. Selection Committee Member 1 recalls that the Dean said "it [i.e. the Preferred Candidate's work on Israel/Palestine] is an issue, but given the other two reasons, I don't need to get to the third issue."

Fourth, the Dean indicated that they needed to hire a Canadian so someone could start right away. Selection Committee Member 1 had indicated in her chronology that the only eligible Canadian was disqualified by HR and that other Canadians were not viable and did not even make the short list." I noted in our interview that a Canadian permanent resident who was available to start at the end of August received a second interview. Selection Committee Member 1 advised that her note contained a small error in that it should have read "qualified" not eligible. She advised that in the view of the selection committee the Canadian permanent resident who received a second interview was not "qualified."

Finally, Selection Committee Member 1 recalls asking whether the Dean was seeking her views or informing her of his decision and that the Dean replied "the former, well, both."

The Dean recalls that the purpose of the conversation was to ensure that he had not missed something. His decision to discontinue the candidacy was, in fact, made over the weekend and into the early part of the week. He recalls that it

was he who first raised the subject matter of the Alumnus' inquiry (because he knew that Selection Committee Member 1 knew of it) and told Selection Committee Member 1 that any controversy was "irrelevant" and that the inquiry by the Alumnus played no role in his thinking. He recalls that Selection Committee Member 1 defended the Preferred Candidate in light of the controversy and that he said that this was irrelevant. He was certain that he was clear that the cross-border - timing issue was the threshold issue and that he had serious reservations about the 20% request and that because of those two reasons, the controversy was irrelevant.[87]

Following the call, Selection Committee Member 1 had a telephone conversation with the Assistant Dean.[88] The Assistant Dean's recollection of the call is that Selection Committee Member 1 told her that the Dean called her to seek her input on the hiring issue. She advised the Assistant Dean that she was concerned that the Dean appeared to be leaning towards discontinuing the Preferred Candidate's candidacy. The Assistant Dean recalls that Selection Committee Member 1 was very bothered, upset and concerned about this development. Based on what she heard from the Dean, she also thought that not all of the immigration options had been considered. In response, the Assistant Dean briefly summarized the legal advice that the immigration and German employment lawyers had provided.

Selection Committee Member 1 remembers aspects of the call differently. She recalls telling the Assistant Dean that she would have to resign if they did not proceed with the Preferred Candidate and that it was not fair to pull the rug out from under her at this point. The Assistant Dean confirmed the advice received from the German employment lawyers but that Selection Committee Member 1 thought that there were other immigration routes to consider. The Assistant Dean recounted the advice that they had received and that it "didn't tally" with the suggestion that there were other routes.

The VPHR also had a brief conversation with Selection Committee Member 1 who expressed her concern about the

[87] Interview with the Dean.

[88] September 6, 2020, number 220.

Alumnus' call. The VPHR advised that the Director needed to start right away, that it was the Dean's decision. The VPHR reiterated that the Alumnus' information was not part of the Dean's decision.

In the evening of Sunday, September 6, 2020, the Assistant Dean forwarded to the Dean the application letters and resumes of two Canadian applicants who had received interviews as well as the most recent email (received September 4) from the Preferred Candidate.[89] The idea was to arrange interviews with the Canadian applicants including the Canadian permanent resident who had received a second interview. [90] These interviews were ultimately cancelled as a result of the cancelling of the search. As of this point, the Preferred Candidate had not been notified that any issues had arisen.

There are two issues that appear not to have been discussed with the Dean or considered by him.

The first was that the immigration plan for the Preferred Candidate involved making an application based on the LMIA process. That process required the University to indicate that there was no suitably qualified Canadian available for the position. That state of facts is consistent with the recollection of both Selection Committee Members 1 and 2 that if neither of the two non-Canadian applicants who had received second interviews could be hired, then no one else was appropriate for the position.

Second, University Employment Lawyer 2, with whom the independent contractor route had been discussed, had not been consulted again since the advice had been received from the German employment lawyers that there were concerns about the draft independent contractor agreement (which had been prepared by the Assistant Dean and the HR Consultant).

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 that the end of September. From his point of view, this was not only important for

[89] IHRP Emails and Attachments received from Dean dated September 6, 2020..

[90] Email September 10, 2020 document 233.

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.

On September 8, the Dean sent a draft email to the Assistant Dean for her review. The draft email was addressed to the Assistant Dean and Selection Committee Member 1 and indicated that he would not be proceeding with the recruitment of the Preferred Candidate. It read as follows:

> Thanks for the conversations, both of you. Even setting aside my considerable misgivings about the fact that [the Preferred Candidate] asked to be away 20% of the year, after speaking with you two, and with [the VPHR] I don't see a viable path to hire a non-Canadian. I'm hoping that we can quickly choose from the Canadians that remain in the mix. … [W]e've re-confirmed with HR that we can't hire someone without a law degree that would entitle her to practice somewhere – not only is that offside [of] our advertisement, but it presents insurmountable challenges from a collective bargaining perspective. Frustrating but not surprising – I'm used to dealing with undesirable constraints when it comes to HR matters.
>
> I understand that there were two Canadians in the long-ish list who meet the ad's requirements, one of whom had a second interview and one of whom didn't. I'm open to interviewing them both again if you are, and I'll join the interviews this time. Or I'm happy just on my own to have a conversation with one or both candidates, as I did with our previously unsuccessful search that landed on a non-Canadian, if you prefer not to be involved in more interviews.[91]

[91] Email September 8, 2020 document 222.

On September 8, the Assistant Dean met with the Dean to discuss how to proceed with the IHRP Director search. According to the Assistant Dean, they discussed interviewing strong candidates from the first and second interview rounds who were Canadian citizens and therefore might be able to start the positon by, or very close to, the September deadline.

The next day, September 9, the draft email was sent.[92] The same day, the Assistant Dean advised University Employment Lawyer 2 that they would not proceed with the offer to the Preferred Candidate.[93]

Also on September 9, the Assistant Dean Alumni and Development emailed the Assistant Dean requesting a call for a quick update.[94] She sent a further email requesting a phone call after having connected with the AVP in the afternoon.[95] This email chain was forwarded by the Assistant Dean to the Dean, advising that the AVP was pressing for an update about the hiring of the Candidate so that the AVP could share this with the alumnus. As the Assistant Dean recalls the matter, the AVP had also suggested during their September 9 telephone call that they canvass other alumni for their views on the Preferred Candidate. The Assistant Dean stated in her email to the Dean that she was unsure why the AVP would continue to be involved in a confidential HR matter and expressed some concerns about where this could go.[96]

The Dean was then in touch with the AVP to tell her that they would not engage with Advancement on this matter.

The Preferred Candidate was advised the following day (September 10) during a Zoom meeting with the Assistant Dean that the University would not be proceeding with the candidacy The Preferred Candidate recalls the meeting as being quite short and that the Assistant Dean advised that the consultancy agreement (i.e., the independent contractor agreement) would not work because they had advice that there were legal risks and that the Faculty could not wait the two – three months for the Preferred Candidate to get the work permit. The Preferred Candidate recalls asking the Assistant

[92] Chronology prepared by the Assistant Dean.
[93] Email September 9, 2020 document 223.
[94] Email September 9, 2020 document 226.
[95] Email September 9, 2020 document 228.
[96] Email September 9, 2020 document 229.

Dean if the decision was based on the "ongoing negotiations" in relation to her request to spend the summers in Europe and that the Assistant Dean said it was not.

In a letter dated September 11 (but sent by email at 9:59 pm on the 10th) Selection Committee Member 1 resigned from the Faculty Advisory Committee for the IHRP citing the Dean's decision to "overrule the hiring committee's decision" as the reason for her resignation.

Additional interview arrangements were subsequently made with the assistance of the HR Consultant to be conducted by the Assistant Dean and the Dean.[97] The HR Consultant noted that the feedback from the interviews of these individuals was "underwhelming", and they were not strong candidates. She advised that she understood why they were proceeding in this manner, but asked if the Dean was aware of the interview feedback, and asked whether other candidates should be considered.[98]

In the days that followed the Assistant Dean received emails from different individuals regarding the position and the growing controversy. On September 10 Selection Committee Member 2 (who had not been involved in any of the discussions on September 4 – 6) emailed the Assistant Dean for an update about the process and was informed that the Candidate's "immigration situation turned out to be more complicated than we thought, and the tools at our disposal to address it were fewer than we hoped. As a result, after conferring with senior HR leaders, we concluded yesterday that we cannot proceed with her candidacy."[99]

A former IHRP director informed the Assistant Dean during a September 11 meeting that he was aware that an Alumnus had contacted the law school about the Preferred Candidate and that he indicated that things would "get very bad" for the law school if the Dean's decision was not reversed. The next day, 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

[97] Email September 10, 2020 document 233.
[98] Email September 10, 2020 document 234.
[99] Email September 10, 2020 document 239.

perhaps an ethics investigation for the Alumnus.[100]

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.

[100] Email September 12, 2020 document 230.

B. BASIS OF THE DECISION TO TERMINATE THE CANDIDACY

1. Introduction

My Terms of Reference require me to address the basis for the Dean's decision to discontinue the candidacy of the selection committee's Preferred Candidate. The concern is that external intervention by the Alumnus played a role in the decision.

Much of the concern about this hiring process has arisen because of the view that the Dean's stated reasons for his decision were pretextual and that improper influence, contrary to his public statements, should be inferred from the facts.

The process that I have been engaged to undertake is not one that is suitable for making findings of credibility. Virtually none of the safeguards that exist in contexts in which such findings are made are present in this process. 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. I note that none of the critics or participants expressing concerns have had the benefit of a full review of all of the information with which I have been provided.

My conclusion is that the inference of improper influence is not one that I would draw.

2. The stated reasons

In his email of September 9 to the Assistant Dean and Selection Committee Member 1, the Dean wrote, "[e]ven setting aside my considerable misgivings about the fact that [the Preferred Candidate] asked to be away 20% of the year, after speaking with you two, and with [the VPHR], I don't see a viable path to hire a non-Canadian."[101]

In his letter to Faculty on September 17, the Dean stated that "no offer was made because of legal constraints on cross-border hiring that meant that a candidate

[101] Email September 9, 2020 document 231

could not meet the Faculty's timing needs. Other considerations, including political views for and against any candidate, or their scholarship, were and are irrelevant. … As the Dean's advisory committee leading the search understood – and as was stressed to me on several occasions by the non-academic administrator to whom the director would report – the timing needs existed because of the absence of a director at the moment, and the hope that a new director could mount a full clinical and volunteer program for students this academic year."[102]

In my interview with the Dean, he indicated (as detailed earlier) that his understanding was that timing was of the essence and that the selection committee was "aware and agreed" that "we were determined to have someone in place as close to the start of term as possible." He also understood on the basis of the legal advice received by the Assistant Dean that the only way to meet the "timing needs" was to enter into an independent contractor agreement with the Preferred Candidate. He had learned (on the same day that be became aware of the by inquiry by the Alumnus) that the Assistant Dean had been advised that the Independent Contractor Agreement arrangement was illegal or at least likely illegal.

It has been suggested to me that a number of the facts support an inference that the Alumnus' inquiry factored into the decision to terminate the Preferred Candidate's candidacy. While of course drawing an inference from known facts is not an exact science, I would not be ready, based on the materials that I have reviewed and considered, to draw the inference that some others have. I will explain.

First, some of the facts said to support the inference are erroneous. Second, there are a number of facts that do not support the inference. Third, the willingness to draw the inference gives no weight to the Dean's insistence that external influence played no role in his decision. As with any review, I am obligated to see well-founded evidence before I can reasonably draw the inference that someone has been untruthful. That is not an inference that I

[102] Dean's letter to Faculty September 17, 2020.

could reasonably draw on the information available to me.

I will first turn to the points that others have alluded to in support of the inference and will then consider the other facts that are not supportive of that inference. Of course, when reviewing the facts I have not looked at individual facts in a piecemeal manner. In reviewing the facts, I have considered their cumulative effect.

Based on my review, it appears that the nature of the Alumnus' inquiry has been misunderstood in much of the public discussion. It has at various points been described as an "objection" to the candidacy, as "external interference", as a "complaint" about the candidacy, as "outside political pressure", as an "attempt to block the appointment."

Those descriptions adequately convey the intent of the professor's approach to the Organization that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.

This would hardly be news to anyone who had taken a moment or two to look on the internet. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evident "as soon as [the Preferred Candidate's] name was announced."[103]

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.

In addition, the University was advised just before 9 am on September 4 that the LMIA route would require the University to re-advertise the position for 30 days. This was a step that the Assistant Dean had hoped to avoid throughout her discussions with the University's

[103] Email September 4, 2020 document 219.

immigration counsel. This requirement to re-advertise meant that the LMIA route, even if otherwise viable, put in doubt the ability of the Preferred Candidate to be in place in Toronto at the beginning of January, something that everyone agreed was critical.

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.

It has been said that the Dean was "entirely negative" about the Preferred Candidate. Whether or not "entirely negative" is a fair characterization, there is no doubt that the Dean expressed reservations about the candidacy at a meeting with the Assistant Dean on August 17th which was well before the Alumnus' inquiry on September 4. It does not appear that those reservations were relayed back to the rest of the search committee by the Assistant Dean and of course by that point, the selection committee had completed its role of identifying the Preferred Candidate.

As noted earlier in Part I of my review, the Dean was concerned that the candidate was really looking for an academic position which the Directorship was not and that this in turn gave rise to a concern that the candidate's interests and the position were mis-aligned. The Dean's concern in that regard was not a new concern that surfaced only after the alumnus' inquiry. He had expressed it to the Assistant Dean in mid-August. Moreover, the concern was not unfounded in light of information that I have learned.

The Preferred Candidate explained to me that her interest in working from Europe for the summers was in part that she wanted to see if she could get part of the benefit of being a faculty member and

that she was interested in “semi-quasi” faculty status.

Some have referred to the fact that the VPHR acknowledged that she and the Dean discussed the Preferred Candidate’s scholarly work as evidence that supports the inference of improper influence. I do not agree.

It would have been clear to the Dean that the appointment would be controversial in some quarters. I do not find it surprising that the Dean, realizing this, decided to alert the senior administration of the University to a potential public controversy involving University decision-making.

Moreover, I have spoken at length to the VPHR and her recollection (reflected in her public statements) was that the Dean simply advised her that she should be aware of the Alumnus’ inquiry but that the Dean told her that it was not relevant to his decision-making. Rather the Dean’s preoccupation seemed to her to be that the independent contractor route was not right in light of the legal advice.

The VPHR’s recollection of the brief conversation with Selection Committee Member 1 was that the VPHR advised that the Alumnus’ call had nothing to do with the decision.[104]

It is suggested that the Dean “admitted” that the substance of the Preferred Candidate’s scholarship was “an issue” for him. However, the notes of the conversation, made about a week after it occurred, in which this alleged admission occurred indicate that the Dean also said that in light of the independent contractor and 20% request, he did not need to consider that third “issue.”

Moreover the Dean has a different recollection as set out in detail above. The key point is that he recalls being clear that any controversy about the Preferred Candidate’s scholarship was irrelevant to his decision. Whether this was an issue that did not need to be considered (according to Selection Committee Membership 1’s recollection) or was irrelevant (according to the Dean’s recollection), the exchange provides no support for an inference that the inquiry played a role in the decision-making.

[104] Interview with VPHR February 4, 2021.

It has also been suggested by a number of sources that the "timing needs" were not a plausible explanation for the decision to not proceed with hiring the Preferred Candidate.

I do not think that a full understanding of the facts supports this inference.

It is true that the Assistant Dean acknowledged that it might not be possible to have someone in the position for the beginning of September. In an email of July 6, she wrote that "my fervent hope is that we will have someone in the role by Sept 7, but I accept that this might not be possible."[105] Three days later, the Assistant Dean wrote to the members of the Selection Committee commenting that "[r]emember that, if we are not happy with the first list [ie the first group of interviews] we can decide later if we need to interview more candidates (although this will mean that we won't have someone until later in the fall)."[106]

There are several points to note from these emails.

First, neither of them is inconsistent with wanting to have the Director in place in the fall.

Second, there are at least five occasions before the controversy arose on which the Assistant Dean indicated that the Director had to be in place before the end of September or at least before the work permit would likely be obtained.[107]

1. On August 11, the day on which she had a meeting with the Preferred Candidate, the Assistant Dean wrote to the HR Consultant that "[the Preferred Candidate] understands that we need her to be able to start the position no later than Sept. 30. I don't require her to be in Toronto until the first week back in January 2021."[108]

2. On August 14, the Assistant Dean wrote the immigration lawyer that "we need the candidate to start the position no later than September 30, 2020 although we don't need her to move back to Toronto until the start of January."[109]

[105] Email July 6, 2020 number 39.
[106] Email July 9, 2020 number 46.
[107] Email August 14, 2020 number 130.
[108] Email August 11, 2020 number 108.
[109] Email August 14 2020 number 130.

3. In an August 20 email to University Employment Lawyer 1, the Assistant Dean wrote that "[w]e need her [i.e. the Preferred Candidate] to start working before she will be realistically able to obtain a Canadian work permit."[110]

4. Also on that date, the Assistant Dean wrote to the members of the selection committee, noting that "we are hoping to work out a way for [the Preferred Candidate] to start work for us before she has a Cdn [*sic*] work permit in hand. The immigration lawyer is estimating that she could have one in 2 – 3 months. We need to bridge the time between not [*sic*] and then."[111]

5. On September 2, the Assistant Dean wrote to the HR Consultant that "[i]deally she [i.e. the Preferred Candidate] will be able to start work as soon as we sort out the independent contractor agreement (ideally Sept 14)."[112]

Third, and most importantly for the purposes of drawing an inference about the basis of the Dean's decision based on timing, the Assistant Dean advised the Dean that having someone in the position by the end of September was critical and the Dean thought that was the case.[113]

The strength of the inference of improper influence depends on the timing issue being a pretext. For the purposes of evaluating the strength of this inference, whether the Assistant Dean's view of the importance of timing was realistic and whether that was adequately communicated to the other members of the selection committee and to the Preferred Candidate are not the issue. There is no doubt that the Assistant Dean viewed this as a requirement well before the controversy arose; it was not a pretext developed after the fact.

There is also no doubt that the Assistant Dean communicated this requirement to the Dean who, as a result, thought that it was critical to the recruitment process. On his understanding, this was a requirement of the position, not a pretext developed after the fact.

It has also been said that the selection of the Preferred Candidate and the August

[110] Email August 20 number 135.
[111] Email August 20 number 136.
[112] Email September 2 number 200.

11 offer were not contingent on her being available at the beginning of September and that it would have been irrational to impose such a condition on an international candidate.

Putting aside that no offer in the legal sense of the word was made on August 11, recollections differ about whether the importance of the September start date was communicated to the Selection Committee or to the Preferred Candidate. However, as I have reviewed earlier, it is clear that the Assistant Dean spoke of this as a requirement of the job to both the immigration lawyer and the HR Consultant in emails before any controversy arose and that she recalls briefing the Dean on this requirement at their meeting on August 17.

It has also been suggested that the illegality of the independent contractor arrangement could not have been the true reason for the decision. This line of thinking proceeds as follows.

The immigration advice was that the Preferred Candidate could likely have a work permit in time to be in Toronto to start teaching the clinical course in time for the beginning of the January term; the independent contractor arrangement was proposed by the University and the fact that it was not possible did not leave the IHRP in a worse position. The Preferred Candidate was still likely to be available to mount the full IHRP program starting in the winter of 2021.Thus, the reasoning goes, the illegality of the independent contractor position was not a true reason for terminating the candidacy.

However, as discussed above, there is no doubt that a fall or no later than September 30 start date was viewed as critical by the Assistant Dean and that this view was communicated to and relied on by the Dean in making his decision. The Dean's understanding was that the independent contractor arrangement was the only way that the start date (i.e. the Faculty's timing requirements) could be met. And that understanding, so far as I am able to determine, was correct. On the Dean's understanding of the situation, without the independent contractor arrangement, the timing requirement could not be met.

It has also been suggested that the timing issue was a pretext because there were other immigration options that could have resulted in an earlier work permit.

As discussed earlier, my understanding based on information provided by the immigration lawyer is that this is not the case.

It has been said that the Dean's decision to look for a qualified Canadian was a sham because the selection committee had found no eligible and qualified Canadian candidates for the position and declared a failed search if the top two candidates were not available.

As discussed in Part I, recollections on this point differ. But the key point as I see it is that the Dean's source of information was the Assistant Dean and her advice to him was that there were qualified Canadian candidates, a view with which he concurred after having looked at some of the resumes of Canadian applicants.

The Dean told me that he had not been consulted about and had not approved resort to the LMIA process and that after looking at the resumes of some of the Canadian applicants, he would not have approved proceeding by that route as in his opinion there were qualified Canadians.

It is also suggested that the Dean's statement that the candidacy was terminated so as to allow the Faculty "to mount a full clinical and volunteer program for the students this academic year" does not make sense. This line of thinking is that by the time the candidacy was terminated it was already too late to get a Director in place in the fall.

However, I am far from sure that, as the Dean understood the situations, this was the case. There was a Canadian permanent resident who received a second interview and who had indicated an availability to start work at the end of August. I understand that Selection Committee Member 1 and 2 were of the view that there was no suitable Canadian candidate and that Selection Committee Member 1 alluded to this in a conversation with the Dean after the Alumnus' inquiry. However, the Dean understood from the Assistant Dean that there was a reasonable chance of filling the position with someone who could start virtually right away. Based on the information that the Dean had, it was not inconceivable that a new Director could be in place in the fall.

Some of those who believe that the timing and independent contractor issues were not the true or only bases for the Dean's decision point to the fact that

there was no indication that the Dean consulted with the immigration or employment lawyers, the Faculty Advisory Committee or the Research Associates about how the needs of the program and the students would be best served. I do not find this line of reasoning persuasive.

With respect to legal advice, the Assistant Dean had up to the minute advice from the German employment lawyers and the immigration lawyer as of September 4 which she shared with the Dean.

Moreover, when Selection Committee Member 1 suggested on September 6 that there were other immigration routes that might be explored, the Dean reviewed the options with the Assistant Dean and concluded that no other routes would lead to the granting of a work permit more quickly than the time-frame cited by the immigration lawyer. The information that I received from the immigration lawyer confirms that view was correct.

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.

With respect to consultation, it would have been better, with the benefit of hindsight, had the Dean met with the members of the selection committee and fully explained the reasons for his decision. The members of the committee were all within the cone of confidentiality that applied to the search process and the Dean would have been able to share information in that context which he would not be able to share more broadly. However, I would not draw from this absence of consultation an inference of any improper motive affecting the decision.

Finally, some found that the University's muted and undetailed response to the allegation of improper influence

suggested that something had indeed been amiss. This chain of reasoning, however, fails to take into account the legal constraints relating to confidentiality and protection of privacy under which the University operates. The Dean wanted to provide more detailed information to the IHRP Faculty Advisory Committee. But the legal advice that he received – and which I have reviewed -- discouraged him from doing so on grounds of confidentiality and protection of privacy.[114]

Looking at all of the fact as I understand them, I would not draw the inference that the Dean's decision was influenced by improper considerations resulting from the Alumnus' inquiry.

[114] Legal counsel advice to Dean in email exchanges on September 15 and 16, 2020.

PART II: WHETHER EXISTING UNIVERSITY POLICIES AND PROCEDURES WERE FOLLOWED

A. INTRODUCTION

The second element of my Terms of Reference requires me to "consider whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process**."**[115]

This aspect of my mandate can be addressed quite briefly. I will develop three main points.

First, there is no suggestion that I am aware of—and I have seen no evidence—that there was any failure to observe "existing University policies and procedures" in this search up until about noon on September 4th, 2020. It is only at that point that concerns about academic freedom and confidentiality arise. That said, my view is that the University's policy and procedure framework for this search was unclear and not well known by some of the participants.

I will set out what I understand to be the governing policies and offer some suggestions for clarification.

Second, while a great deal of concern has been expressed about academic freedom, it has been the conventional thinking at the University that the existing formal protections in the University for academic freedom apply to faculty members and librarians but not to positions in the "Professional/ Managerial" classification. There are distinct hiring policies and the *Memorandum of Agreement between the University and the Faculty Association* refer to the policies governing academic appointments and appointments of librarians, but not to the policy relating to professional/managerial staff. The Director's position in the IHRP is so classified.

However, the central concern with this search process is that outside influence played a role in over-ruling the merit-based assessment by the selection committee of the Preferred Candidate.

[115] *Terms of Reference* at p. 3 (December 7, 2020).

No one in the University administration, to my knowledge, has ever suggested that this would be appropriate. Quite the opposite as set out in the Foreword, above, Section "C." Given the apparent consensus on this point coupled with my conclusion that I would not draw the inference that improper outside influence played a role in the decision and the current parallel processes by the Canadian Association of University Teachers and the University of Toronto Faculty Association, it seems to me that it would be imprudent for me to do anything more than to provide you with a few general thoughts on this subject in the context of the third element of my Terms of Reference: to provide "any pertinent guidance or advice" for the University's consideration "relating to any matters arising out of the processes that were involved in this search."

Third, there were several instances in which the confidentiality of the search process was not respected. However, my review of the relevant University policies has led me to think that the nature and extent of the obligation of confidentiality in the search process need clarification and emphasis. Moreover, the nature of the University's obligations to protect personal information and how that affects the conduct of those working on its behalf, and the constraints it imposes on administrators (particularly in this case, the Dean), need to be better understood by the University community.

I should also address a point that was of great concern to many of the individuals who were in touch with me in connection with my Review. Several members of the University community are of the view that this controversy is at least in part the result of a failure of collegial governance within the Faculty of Law. While I appreciate the thoughtful submissions that I have received, this is a broad and important subject that is far beyond my Terms of Reference. However, I will offer one modest suggestion touching on an aspect of collegial governance in the final section of my Review.

B. POLICIES AND PROCEDURES GOVERNING THE SEARCH PROCESS

1. *University of Toronto Act, 1971*

The University is constituted under the *University of Toronto Act, 1971*. The *Act* outlines the composition of the Governing Council and its Executive Committee, and describes the powers of the Council.

Central to this Review, the *Act* outlines different types of staff within the University. This nomenclature is adopted by supplemental University policies (as described later). The *Act* defines "administrative staff" as "the employees of the University, University College, the constituent colleges and the federated universities who are not members of the teaching staff thereof."[116] "Teaching staff" is defined as follows:

> …employees of the University, University College, the constituent colleges and the arts and science faculties of the federated universities who hold the academic rank of professor, associate professor, assistant professor, full-time lecturer or part-time lecturer, unless such part-time lecturer is registered as a student, or who hold any other rank created by the Governing Council and designated by it as an academic rank for the purposes of this clause.[117]

The *Act* authorizes the Governing Council to appoint, promote, suspend and remove the members of the teaching and administrative staffs of the University.[118]

2. Statement of Institutional Purpose

In addition to the *Act*, the *Statement of Institutional Purpose,* implemented by the Governing Council, serves as the University's lodestar. It defines, among other things, the University's mission, purpose, and objectives in the areas of research and teaching.[119] In particular, the University's mission is identified as "committed to being an internationally significant research university, with undergraduate, graduate and professional programs of excellent quality."[120]

The *Statement of Institutional Purpose* describes the University as being "dedicated to fostering an academic community in which the learning and scholarship of every member may flourish, with vigilant protection for individual human rights, and a resolute commitment to the principles of equal opportunity, equity and justice." In this context, the *Statement of Institutional Purpose* states:

> …the most crucial of all human rights are the rights of freedom of speech, academic freedom, and

[116] *The University of Toronto Act, 1971*, s 1(1) ("interpretation").
[117] *Ibid* at s 1(1)(m).
[118] *Ibid* at s 2(14)(b).
[119] *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992.
[120] *Ibid*.

> freedom of research. And we [the University] affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.[121]

Underlying these broad objectives, the *Statement of Institutional Purpose* outlines that the University is committed to four principles:

- Respect for intellectual integrity, freedom of enquiry and rational discussion;
- Promotion of equity and justice within the University and recognition of the diversity of the University community;
- A collegial form of governance; and
- Fiscal responsibility and accountability.[122]

3. University Hiring Policies

As previously stated, the Director of the IHRP is a PM-4 "administrative/managerial", non-academic position. The Assistant Dean and Selection Committee Member 1 indicated that it was made clear to the Preferred Candidate that this was an administrative/managerial role, and not an academic position or a pathway to one. The Preferred Candidate also advised me that she understood that this position had the status of administrative staff. While I understand that some members of the University community and beyond are concerned that this classification is not apt having regard to the nature of the Director's duties, no one to whom I spoke thought that the position as currently classified was anything other than a PM-4 administrative position.

The "Job Description" of the Director that was publicly advertised sets out seven major activities: planning and policy development, advocacy, experiential education delivery, external relations and communications, development, administration and human resources management. The advocacy activity includes selecting approximately 10 students for the clinic, developing seminars and workshops and mentoring students by applying legal background

[121] *Ibid*.

[122] *Ibid*.

and practicing experience, supervising all advocacy initiatives undertaken by students and analyzing recent case studies, scholarship, law and applying the highest professional standards. The experiential education delivery activity includes providing experiential learning opportunities for students by applying legal background and practicing experience and developing clinical legal education programs, courses, material and case studies based on knowledge of relevant scholarship, law, professional standards, and the Faculty of Law requirements.

4. Policies for Professional and Managerial Staff

The PM-4 classification is a mid-range managerial role under the direct supervision of the Assistant Dean. PM-4 has an assigned salary range being the fourth of the 11 pay bans within the PM classification (I.e. PM1 – PM11).

The *Policies for Professional and Managerial Staff* (in this section, the "Policies") states the goals of hiring "the best qualified candidate in accordance with the policies of the University" and providing "opportunities for career development of Professionals/ Managers…".[123] The *Policies* set out the rights and responsibilities of "administrative Professionals/ Managers," covering a broad array of issues including but not limited to short-term disability leave, pension, performance review, pregnancy leave, and termination.[124]

With regard to the hiring process, the *Policies* address the process for advertising positions and the requirement for written applications. Most importantly for present purposes, they provide that the selection "will be based on the best qualified candidate for the position taking into account factors such as the candidate's qualifications, skill, education, training, previous related experience, ability and potential, and the requirements of the position."[125]

I am advised that the *Polices* are supplemented by a series of guidelines and documents that speak to best practices throughout the recruitment process for human resources recruiters, available on the HR SharePoint Portal and a number of which have been

[123] *Policies for Professional and Managerial Staff*, effective March 5 2012, section II.

[124] *Ibid* at sections II.

[125] *Ibid* at sections II (see "Selection").

provided to me at my request. These guidelines and documents are recommended for use by divisional human resources representatives who assist divisions in professional and managerial searches. There is, for example, a "Hiring Manager's Toolkit" that sets out how the various steps of a recruitment process ought to be conducted. In this case, the Assistant Dean was the "hiring manager".

The "Toolkit" provides that every job competition is to result in selecting the individual "who is demonstrably the most qualified for the position."[126] It goes on to provide that "[t]he determination of the most qualified candidate must be based on merit, determined through an evaluation of the candidate's education, experience, skills, knowledge and abilities in relation to the selection criteria." The Toolkit notes that while this is a matter of judgment "on the part of the selection committee", it is a judgment to be reached "taking into account all the information that has been collected throughout the recruitment process: [t]he written application; [t]he interview(s); [r]esults of any tests or assessments; and Reference checks."[127]

5. Other Hiring Policies

The University also has a policy on "academic administrators." The *Policy on Appointment of Academic Administrator* provides that "[a]cademic administrative positions should be held by teaching staff who are willing to assume, for a time, special responsibility for the harmonious and effective functioning of their respective divisions or departments."[128] The term "teaching staff" used in this policy is presumably intended to have the same meaning as the definition of that term in the *University of Toronto Act, 1971*.

This policy governs faculty members who take on additional administrative functions within the University. In so doing, it details the process for appointing deans and principals of colleges and associate deans. It is not applicable to the position of the Director of the IHRP.

6. Policies on the Selection Committee

I was not able to locate any policy documents relating expressly to the

[126] Hiring Manager's Toolkit.
[127] Hiring Manager's Toolkit.

[128] Policy on Appointment of Academic Administrators, October 30, 2003.

constitution, appointment or terms of reference of what I have called the selection committee. (There are of course the "Toolkit" resources noted earlier.) However, I have not heard any objection or adverse comment on the way the selection committee in this case was assembled or how it went about its work of reviewing applications, establishing a short list, conducting interviews or selecting their Preferred Candidate. It also appears to be generally accepted that the selection committee is advisory to the Dean with the Dean being the final decision-maker.

7. Resources for Hiring International Candidates

The Division of Human Resources and Equity at the University has a number of resources in relation to the hiring of international applicants. The most relevant aspects covered are these:

- Staff who come to the University as foreign nationals require work permits under Canadian immigration law;
- In order to get a work permit for working in Canada, foreign nationals will need a positive LMIA from Employment and Social Development Canada;
- A positive LMIA will only be granted if Employment and Social Development Canada, among other things, reaches the following conclusions:
  - There is no Canadian worker available to do the job;
  - There is a need for the temporary foreign worker ("TFW") to fill the job;
  - Hiring a TFW will not negatively affect the Canadian labour market; and
  - There is a plan in place to transition the work in question to the Canadian workforce within a reasonable period of time.[129]

I obtained further information on this aspect from the immigration lawyer. I was advised that the LMIA process requires the employer to demonstrate "that no Canadian worker or permanent resident is available or qualified to do the job."

It ought to have been clear that the LMIA route would require the University to show that there was no Canadian available or qualified to do the job.

[129] "Criteria to Hire a Foreign National", University of Toronto, Human Resources and Equity (undated).

So far as I can determine, the immigration resources do not address the "substantial benefit" route that was being considered for the Preferred Candidate.

8. Confidentiality in the hiring process

Everyone in the University community to whom I spoke understands that the hiring process is confidential. In response to my request to be referred to all relevant University policies, the Chief Human Resources Officer noted that "[i]t is axiomatic in Human Resources best practices that the personal information about candidates that is supplied as part of a search, and the deliberations of the search committee itself, are strictly confidential." However, I was not able to find this best practice expressly reflected in any University policy that applies to recruitment for this position.

There is a 2006 memorandum by former President Naylor to University administrators to assist in search processes for academic and senior non-academic administrators in which it was stated that "[c]onfidentiality is mandatory in order to ensure frank discussion and to respect the input and participation of everyone involved in each phase of the committee's work. This requirement will ensure that the qualifications and appropriateness of individual candidates can be discussed openly within the committee, and that none of these discussions, even in part, will be disclosed. Members are committed to upholding the highest standards of confidentiality with respect to the committee's activities."[130] I doubt that this memorandum applies to the recruitment of the IHRP Director as the position is neither an academic nor a senior non-academic appointment.

Similarly in a 2002 memorandum, then Vice-Provost Goel instructed university administrators that "material [submitted by an applicant] should remain confidential to the members of the duly constituted search committee."[131] Materials can be circulated more broadly to members of the department when the consent of the author is obtained. This memorandum is silent with respect to whom it applies, although it appears to

[130] Search Committee Principles & Practices (Memorandum), dated November 3, 2006.

[131] Confidentiality of Search Committee Records (Memorandum), January 8, 2002.

provide general guidance on best practices for hiring processes generally.

9. Alumni and Donor Input into University Decision-making

The University has some policies touching on aspects of its relationship with alumni and donors. For example, the *Provostial Guidelines on Donations* provide that the "University values and will protect its integrity, autonomy, and academic freedom, and does not accept gifts when a condition of such acceptance would compromise these fundamental principles."[132]

Virtually everyone to whom I spoke in the University community recognized that donors and alumni should not have any inappropriate role in hiring decisions. That said, there is no formal policy speaking expressly to the question of if and to what extent alumni and donors may appropriately be involved in the University's hiring decisions.

There are doubtless instances, particularly in professional faculties, in which input from the broader community may be valuable and ought to be welcomed. However, any such input into hiring decisions should occur only in the context of the established hiring process and must be consistent with the goal of identifying the most highly qualified candidates based on objective criteria. 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.

There ought to be express University policy reflecting this view and providing guidance to those to whom such approaches are made.

C. ANALYSIS

1. Academic Freedom

The current understanding is that the existing formal protections in the University for the foundational principle of academic freedom do not apply to positions in the "Professional/Managerial" classification such as the Director's position in the IHRP. That said, academic freedom, as the University's policies recognize, is central to the proper functioning of a university and more broadly the search

[132] *Provostial Guidelines on Donations*, April 30, 1998.

for the truth. The concern with the search process in this case was that external actors considered the Preferred Candidate's scholarship objectionable and that this external influence played a role in the decision not to proceed with the recruitment.

In my interviews with members of the University administration and community, no one has suggested that such outside intervention is appropriate. On the contrary, I heard multiple times from University administrators and interested parties that permitting those outside of the University to play a determinative role in University hiring runs afoul of the principles for which the University stands. This understanding is reflected in the University's public statements concerning this controversy.

For example, in an email to Faculty of Law members, the Dean stated that "'[l]et me say at the outset that assertions that outside influence affected the outcome of that search are untrue and objectionable. University leadership and I would never allow outside pressure to be a factor in a hiring decision."[133] The VPHR also , stated that "[t]o assert that external views, from any individual or organization, either for or against the potential hiring of a particular candidate were a factor in the decision not to proceed with an offer of employment, is false."[134]

Giving effect to such outside influence would of course be inconsistent with the fundamental policy of selecting the candidate that is most highly qualified based on objective criteria as assessed through the selection process.

As I noted in the introduction, given (i) the apparent consensus on this point; (ii) the fact that I would not draw an inference that external influence played a role in this case and (iii) the current ongoing parallel processes by the Canadian Association of University Teachers and the University of Toronto Faculty Association, it would be imprudent for me to do anything more than to provide you with a few thoughts on this subject in the context of the third element of my Terms of Reference, namely to offer "any pertinent guidance or advice" for the University's consideration "relating to any

[133] Email from Dean to the Faculty of Law.

[134] Email from VPHR.

matters arising out of the processes that were involved in this search."

2. Confidentiality

As noted, there is a surprising gap in the University's written policies with respect to the requirement of confidentiality in the recruiting process. However, virtually everyone to whom I spoke in the University community recognized and accepted that requirement.

There are sound reasons for this. First, candidates will often have to provide confidential information in order to place a full picture of their candidacy before the selection committee. Their candour ought to give rise to a corresponding duty to keep that information confidential and to use it only for the purposes of evaluating the candidate's application.

Second, a robust recruiting process requires a full and frank exchange of views among the selection committee members who, in a sense, are deliberating among themselves in order to find the most highly qualified candidate. As in many other settings, confidentiality fosters the sort of candid exchange which ought to characterize those deliberations and that is vital to finding the best candidate.

Finally, the University is under statutory obligations to protect the privacy of personal information.[135]

There is no doubt that confidential information about the search process was disclosed outside the selection committee's deliberations. Information about the state of the search was shared with the AVP and relayed to the alumnus. Selection Committee Members 1 and 2 shared information outside the selection process circle. A chronology prepared by Selection Committee Member 1 was provided to the *Globe and Mail,* although so far as I can determine not by the Selection Committee Member. Selection Committee Member 2 tweeted copies of emails that had been exchanged relating to the search process once the matter was in the public domain as a result of press coverage following the Dean's announcement at a faculty meeting that the search was being cancelled. Some

[135] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31.

of the participants in the initial meeting with Selection Committee Member 1 shared what they had learned and the Preferred Candidate herself shared information about the search process with others.

The fact that this information came to be in the public domain put the University in a difficult position. It had legal advice to the effect that it could not release more information than the brief statements that it issued. But in the eyes of some, this rather general and brief response to the various allegations reinforced the view that the Alumnus' information was the true basis for, or at least a contributing factor to, the decision not to continue with the Preferred Candidate's recruitment.

In the concluding section of my review, I will have a number of suggestions for your consideration in relation to the confidentiality of recruitment processes.

3. Conclusion

The concern in this case is that external influence was inappropriately brought to bear on a hiring decision. There is no doubt that this, if it occurred, would be contrary to University policy that applies to the recruitment of Professional/Managerial Staff. However, as discussed at length above, I would not draw the inference that external influence had an impact on the decision-making in this case. Given the broad consensus about the impropriety of such influence playing any role and my conclusion that it did not, and given the existing processes involving the Canadian Association of University Teachers and the University of Toronto Faculty Association, I do not think it prudent for me to say more about the parameters, if any, of academic freedom in this situation.

With respect to confidentiality, there were several instances in which the confidentiality of the search process was not observed. However, I found there to be significant gaps in the University's policy framework in this regard.

PART III: PERTINENT GUIDANCE FOR YOUR CONSIDERATION

A. INTRODUCTION

The third and final element of my review addresses your request that I provide "any pertinent guidance" for your consideration "relating to any matters arising out of the processes that were involved in this search." I have several suggestions that I hope may be helpful to the University. I will address five main aspects: (i) the basis of recruiting decisions; (ii) the recruiting process; (iii) confidentiality; (iv) protections for clinical instructors; and (v) reconciliation.

B. THE BASIS OF RECRUITING DECISIONS

As I have explained at length earlier, I do not think it prudent to embark on an extended discussion of academic freedom and issues such as whether it applies at all to professional/managerial staff and if so how it applies with respect to candidates during the recruiting process.

However, at the root of the concerns expressed to me about academic freedom is the basic point that the University must be clear that external pressure cannot play a role in its recruiting decisions.

I suggest that it would be timely for the University to re-affirm a fundamental principle: attempts by anyone – including lobby groups, corporations and donors – to attempt to block, prevent or disqualify an applicant in a merit-based hiring process on the basis of the candidate's religious or political views, their scholarly or other public work or their social activism must be firmly rejected unless the matter raised can be demonstrated to be evidence of unfitness for the duties of the position.

In addition, it should be made explicit that "input" of this nature is not to be made through "back channels", such as "quiet discussions" with "top university officials."

This suggested re-affirmation is consistent with the commitment to justice and equity in the *Statement of Institutional Purpose* and with the principle that the best qualified person should be hired as set out in the *Policies for Professional and Managerial Staff*. Specifically, the *Statement of Institutional Purpose* recognizes that "the most crucial of all human rights are the rights of freedom of speech, academic

freedom, and freedom of research."[136] In so doing, the *Statement of Institutional Purpose* commits the University to cultivating a culture of equal opportunity. Similarly, the *Policies for Professional and Managerial Staff* seek to, among other things, "foster excellence in the work place and contribute to the achievement of the mission of the University through hiring the best qualified candidate."[137] An express prohibition of outside interference is entirely consistent with and promotes the values of the University.

In the same vein, it would be helpful for the University to develop explicit policies or protocols as to how to handle any inquiries made by an alumnus or others regarding a recruitment process. There are many ways these policies or protocols could be formulated. One approach to consider would be to stipulate that the University should respond to these sorts of inquiries by indicating that: (a) recruiting processes are confidential; (b) decisions are made on the basis of the material obtained during the recruiting process; and (c) only concerns put in writing and that will be shared with the candidate will be received. If a policy along these lines had been in place and observed at the time of the alumnus conversation with the AVP, this whole unfortunate controversy would likely have never arisen.

C. THE RECRUITING PROCESS

There are several aspects of the recruiting process that would benefit from a more explicit policy framework.

1. The Constitution and Role of the Selection Committee Should be Specified

I was not able to locate any terms of reference or other written policy that addressed how the selection committee for this position should be constituted or what its role should be. There has been no objection to this aspect of the process in this case and what was done was, so far as I can tell, consistent with past practice. I did note, however, that the HR Consultant thought that the Assistant Dean was the decision-maker while everyone I have heard from in the Faculty of Law understood that the committee's role was advisory to the Dean who was the ultimate decision-maker. There is

[136] *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992.

[137] *Policies for Professional and Managerial Staff*, effective March 5 2012, section II.

certainly excellent guidance available, as noted earlier, in the Hiring Manager's Toolkit, but that material is not routinely available to members of selection committees.

My understanding is that Hiring Managers and selection committees look to the HR Consultant for guidance on questions of process. No doubt that is appropriate and wise. However, I suggest that it would be helpful for there to be explicit written guidance provided to members of selection committees about the process that they are to follow as well as written Faculty or other procedures to address the composition and appointment of members of a selection committee for PM positions.

2. All Requirements of the Position Should be Made Explicit

All requirements should ideally be specified in the advertisement or at least made explicit at the time that interviews are conducted. The problem with not doing this is apparent from looking at what happened in this case.

It appears that there was a misunderstanding within the selection committee with respect to the timing for entry into the position. As discussed in Part I, the Assistant Dean understood throughout that it was essential that someone be in the role in the fall, while the other members of the selection committee thought that the crucial date was the beginning of January. If the position requires that the person start work by a certain date, that should be specified in the advertisement and, if not specified there, it should at least be made clear to candidates no later than at the time that interviews are conducted. If timing is flexible within certain limits, this too should be specified or made clear in the same way.

3. Key Decisions Should be Recorded

Key decisions by a selection committee should be put in writing. This practice would have prevented an apparent serious misunderstanding in this case. Two members of the selection committee recalled that the committee had unanimously agreed that if neither of two candidates could be hired, there would be a failed search. The third member did not share that recollection. My suggestion is not that there be any elaborate minutes or formal record kept. All I have in mind is a succinct email confirming key decisions.

4. Immigration Advice Should be Obtained Early in the Process

The selection committee and the hiring manager should have more detailed immigration information earlier in the process when they embark on an international search. It is a significant step for the University to represent that there is no Canadian applicant suitable for the position. The timing implications of the process, both in relation to the timing of advertising and in terms of how long it will likely take to obtain required approvals should be understood at the beginning, not at the end of the process.

5. Recommendations to the Decision-maker From the Selection Committee Should be in Writing

Where, as in this case, the selection committee is advisory, it should report to the decision-maker in writing. This need not be an elaborate document, but it should set out the key elements of the committee's recommendation and the reasons for it. This could take the form of a brief email, composed while all the members of the committee are present, at the conclusion of their deliberations.

6. The Decision-maker Should Meet with the Selection Committee Before Departing from their Recommendation

Collegial governance is one of the four principles to which the University is committed.[138] As I see it, where a decision-maker feels unable to accept the recommendation of a selection committee, the principle of collegial governance supports full consultation and discussion before a final decision is made. This approach has the benefit of ensuring that there are no information gaps or misunderstandings between the committee and the decision-maker and it also allows for a full airing of differences of view within the cone of confidentiality before a final decision is made.

D. CONFIDENTIALITY

While everyone to whom I spoke understood that confidentiality is important in the hiring process, I was not able to find much in the line of explicit policy on this topic or much consensus about the details.

There are several aspects of confidentiality that arose in this case:

[138] *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992, see section on "The University Community".

- First, was it appropriate for an advancement professional to agree with an alumnus to find out the state of a particular hiring process?
- Second, was it appropriate for a recruiting manager to share information about a recruiting process with a peer in the same faculty?
- Third, was it appropriate for that peer to share the information with her boss, the advancement professional?
- Fourth, was it appropriate for the advancement professional to pass on the information received to the alumnus?
- Fifth, was it appropriate for a member of the selection committee to brief concerned colleagues on the details of the selection committee's decision-making and to provide notes of that process to others?
- Sixth, was it appropriate for a member of the selection committee to tweet emails concerning the process?
- Seventh, was it appropriate for someone to provide a copy of the selection committee member's notes to the press?
- Eighth, should an adverse inference be drawn when a university official respects the obligation to keep personal information confidential?

In my view, the answer to all of these questions is "no." But one would look in vain for express, written University policy that provides clear answers to any of these questions. That, in my view, ought to change.

I suggest that there ought to be written confidentiality guidelines for PM recruitment processes. The guidelines should address specific examples of what the obligation of confidentiality entails in that context. The obligation of confidentiality ought to include at least the identity of candidates, their personal information and the deliberations of the selection committee. In addition, members of selection committees ought to be required to sign written confidentiality agreements spelling out the obligations of confidentiality which they are accepting. Finally, it should be clear that under no circumstances are details of a recruitment process to be shared with anyone not directly involved except for the purposes of checking references or obtaining necessary legal advice.

In addition, members of selection committees and members of the University community in general ought to be provided with practical summaries of the University's obligations under privacy legislation.

E. PROTECTIONS FOR CLINICAL INSTRUCTORS

I will not engage with the debate about how the principle of academic freedom relates to the employment of professional/managerial staff at the University. I do wish to comment, however, on what to me is a broader, valid point raised by many who were in touch with me.

Clinical instructors, especially in human rights and public interest law clinics are literally "in the business" of taking on controversial and unpopular causes. One can think of issues about allegations of human rights abuses or environmental damage committed by Canadian companies abroad, the plight of asylum seekers, or the alleged mistreatment of minority groups by foreign powers. All of these, and many other issues, are likely to be controversial and cause discomfort to some powerful people, groups and institutions.

These clinical instructors need courage to fearlessly advance unpopular positions and to advocate on behalf of the powerless. But they deserve to know that the University "has their back" as they do so. I suggest that the University examine the protections for clinical instructors and similar positions whose duties require them to tackle topics likely to arouse controversy and to take steps to ensure that their efforts will be supported so long as they meet the highest professional standards.

F. RECONCILIATION

This controversy has left deep wounds in its wake. I believe that everyone involved in the University community acted in good faith, although undoubtedly there were things that, at least with the benefit of hindsight, ought to have been done differently. The question, though, is how should the Faculty of Law and University move forward?

I suggest that you, in consultation with the current Dean of the Faculty of Law, explore the possibility of engaging in a reconciliation process, both internally and with the Preferred Candidate. I am sure that there is much more that unites all of these people than divides them. I sense a widely-shared and profound

commitment to the values that the University seeks to embody. A process that helps to refocus the community on those values and acknowledges the harm done to the Preferred Candidate has the promise of helping to bring together colleagues who share these important values, even though those values may have led them to very different stances on this controversy.

CONCLUDING REMARKS

I have provided a comprehensive factual narrative of the recruitment process for the IHRP. I have concluded that I would not draw the inference that improper outside influence played any role in the decision to discontinue the candidacy of the Preferred Candidate.

In light of that conclusion and of ongoing processes within and beyond the University, I have thought it imprudent to opine on the role, if any, of academic freedom in the recruitment process for this PM-4 position.

Finally, I have offered a number of suggestions for changes to or clarifications of University policy and practice and suggested that consideration be given to instituting a reconciliation process within the Faculty of Law and with the Preferred Candidate who has been seriously victimized by the this controversy.

I hope that I have fully responded to the task that you asked me to undertake and I hope that what I have provided will be of assistance.

APPENDIX A – CONFIDENTIAL CONCORDANCE FOR PRESIDENT GERTLER ONLY

[redacted]

APPENDIX B – LIST OF SUBMISSIONS RECEIVED

Although this was not a public review or process, a number of individuals, groups of individuals and organizations took the time to write to me to provide their insight into the subject matter of my review and the underlying events. Below is a list of submissions received.

1. Submission of B'Nai Brith Canada dated December 2020.
2. Letter from Professor Abigail Bakan dated January 20, 2021.
3. Email from Professor Emeritus Joseph Carens dated January 21, 2021.
4. Email from Professor Judith Taylor dated January 21, 2021.
5. Submission received from Associate Professor Vincent Chiao, Professor Patrick Macklem, Professor Anver Emon, Professor Denise Réaume, Professor Mohammad Fadel, Professor Kent Roach, Associate Professor Ariel Katz, Professor David Schneiderman, Professor Trudo Lemmens, Associate Professor Anna Su, and Professor Jeffrey MacIntosh (all tenured faculty at the University of Toronto Faculty of Law) dated January 22, 2021.
6. Letter from seven Israeli scholars and practitioners of international and human rights law, dated January 28, 2021.
7. Submission received from Associate Professor Ralph Wilde and Professor GM Scobbie dated January 29, 2021.
8. Submission received from the Arab Canadian Lawyers Association and Independent Jewish Voices Canada dated February 2, 2021.
9. Submission received from the Canadian Association of University Teachers dated February 8, 2021.
10. Email and documentation sent on behalf of the University of Toronto Faculty Association dated February 9, 2021.

11. Letter from Karen Bellinger, Carmen Cheung, Associate Professor Vincent Chiao, Samer Muscati, Cheryl Milne, and Professor Kent Roach dated February 10, 2021.

12. Letter from Professor Reem Bahdi and Dr. Ardi Imseis dated February 15, 2021.

13. Letter from Professor Michael Lynk and Dr. Ardi Imseis dated February 24, 2021.

14. Letter from 86 Faculty Members and Librarians in the Social Sciences and Humanities at the University of Toronto, received March 3, 2021.

UNIVERSITY OF TORONTO

OFFICE OF THE PRESIDENT

Meric S. Gertler, CM, FRSC, FBA, FAcSS
President

PRESIDENT'S RESPONSE

**to the Independent Review of the Search Process
for the Directorship of the International Human Rights Program
at the University of Toronto, Faculty of Law,
by the Honourable Thomas A. Cromwell, C.C.**

March 29, 2021

> "…having reviewed all of the relevant facts as fully as I can, I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate. The inference that such influence played a role in that decision is the basis of the concern about academic freedom but, as I see it, that inference is not justified."
>
> – Hon. Thomas Cromwell, Independent Review, p. 6.

1. Background

In the Fall of 2020, very serious concerns arose within and beyond the University of Toronto's Faculty of Law regarding the search process for a new director of its International Human Rights Program. The process had been discontinued at a late stage. Apparent breaches of confidentiality fostered a public narrative that led many members of the community to question the integrity of the search. In particular, many were concerned that inappropriate external influence had been allowed to interfere with the search process, and that academic freedom had been violated.

These allegations were deeply troubling to all members of the University community, since we hold the principles of merit-based hiring and academic freedom as fundamental to our mission and ethos.

In December 2020, I commissioned the Honourable Thomas Cromwell, C.C., to conduct an independent and impartial review of the search process, in which he would:

1. provide a comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy of the search committee's preferred candidate

2. determine whether University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process

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3. provide any pertinent guidance or advice for my consideration relating to any matters arising out of the processes that were involved in this search

The review was non-disciplinary, and participation was voluntary. Mr. Cromwell submitted his report to me recently, and I am releasing it to the public now as promised, along with this response.

I would like to thank Mr. Cromwell for his very thorough work and detailed report, which has fully addressed the terms of reference. I would also like to take this opportunity to thank all those who participated in and contributed to his review. Despite the voluntary nature of the review, Mr. Cromwell was successful in securing the participation of all those involved in the search process.

Mr. Cromwell's report reflects his conversations with those individuals involved in the search process and other relevant individuals, as well as all relevant documents and correspondence. Having assembled all the facts that can be ascertained, he has determined a comprehensive, chronological narrative and factual account of events leading to the controversy, which has notably been missing until now.

Significantly, on the basis of the complete body of information available to him, Mr. Cromwell's report concludes that, while negotiations relating to the appointment were at an advanced stage, no formal offer of appointment in the legal sense of the term had been made or accepted, and thus no offer was rescinded.

Furthermore, having reviewed the evidence, he is not prepared to draw the inference that external influence played any role in the decision to discontinue the candidacy of the preferred candidate.

Additionally, the report makes clear that the key factors influencing this decision did indeed include those that had been cited publicly by both the then-Dean and the Vice-President, Human Resources & Equity, pertaining to the significant challenges of overcoming immigration-related obstacles in a sufficiently timely manner to meet the requirements of the appointment. Moreover, Mr. Cromwell's analysis demonstrates why these obstacles were in fact quite material and could not be readily overcome.

Mr. Cromwell's report also provides advice on how to avoid similar problems in the future and to assist members of the U of T Law community in achieving reconciliation after this very divisive and difficult experience. Finally, it expresses concern about the harm done to the preferred candidate in the search process, and the need to find a means of acknowledging that.

Having read and reflected on Mr. Cromwell's report, I believe it provides the factual comprehensiveness and analysis needed to clarify and settle key aspects of this controversial matter. It also reaffirms the common values that unite rather than divide us, and that will enable us to move forward, leading the University of Toronto's Faculty of Law from strength to strength in the years to come.

2. Conclusions and Guidance from the Independent Review

To that end, I encourage all concerned to read the Independent Review, in which Mr. Cromwell makes a compelling case for his conclusions. In particular, I would like to draw to your attention the key passages quoted below, in which he articulates his conclusions regarding the matters raised in the terms of reference.

Terms of Reference, 1

Mr. Cromwell was asked to provide a "comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy of the search committee's Preferred Candidate". In my view, the following quotes from his Independent Review capture the most significant findings and conclusions:

- "…having reviewed all of the relevant facts as fully as I can, I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate. The inference that such influence played a role in that decision is the basis of the concern about academic freedom but, as I see it, that inference is not justified." (p. 6)

- "As I see it, no offer and acceptance in the strictly legal sense of those words were ever exchanged…. As far as I can tell, this is a situation in which advanced negotiations were abruptly halted, not a situation in which an accepted offer was rescinded." (p. 12)

- "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. I note that none of the critics or participants expressing concerns have had the benefit of a full review of all of the information with which I have been provided. My conclusion is that the inference of improper influence is not one that I would draw." (p. 46)

- "It has also been suggested by a number of sources that the 'timing needs' were not a plausible explanation for the decision to not proceed with hiring the Preferred Candidate. I do not think that a full understanding of the facts supports this inference." (p. 51)

- "…some found that the University's muted and undetailed response to the allegation of improper influence suggested that something had indeed been amiss. This chain of reasoning, however, fails to take into account the legal constraints relating to confidentiality and protection of privacy under which the University operates." (pp 55-56)

I would like to acknowledge the difficult position in which Professor Iacobucci, the former Dean, found himself throughout the controversy. As Mr. Cromwell observes in his report, because of Professor Iacobucci's and the University's obligation to maintain confidentiality, he was not free to respond fully to the concerns that were raised, by correcting erroneous or mistaken inferences that were based on less-than-complete information.

Terms of Reference, 2

Mr. Cromwell was asked to determine whether University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process. Once again, let me draw attention to what I believe to be the most significant passages from the Independent Review:

- "…my view is that the University's policy and procedure framework for this search was unclear and not well known by some of the participants." (p. 57)

- "…it has been the conventional thinking at the University that the existing formal protections in the University for academic freedom apply to faculty members and librarians but not to positions in the 'Professional/Managerial' classification. There are distinct hiring policies and the *Memorandum of Agreement between the University and the Faculty Association* refer to the policies governing academic appointments and appointments of librarians, but not to the policy relating to professional/managerial staff. The Director's position in the IHRP is so classified." (p. 57)

- "…there were several instances in which the confidentiality of the search process was not respected. However, my review of the relevant University policies has led me to think that the nature and extent of the obligation of confidentiality in the search process need clarification and emphasis. Moreover, the nature of the University's obligations to protect personal information and how that affects the conduct of those working on its behalf, and the constraints it imposes on administrators (particularly in this case, the Dean), need to be better understood by the University community." (p. 58)

- "...the Director of the IHRP is a PM-4 'administrative/managerial', non-academic position. The Assistant Dean and Selection Committee Member 1 indicated that it was made clear to the Preferred Candidate that this was an administrative role, and not an academic position or pathway to one." (p. 60)

- "It also appears to be generally accepted that the selection committee is advisory to the Dean with the Dean being the final decision-maker." (p. 63)

- "...there is no formal policy speaking expressly to the question of if and to what extent alumni and donors may appropriately be involved in the University's hiring processes. There are doubtless instances, particularly in professional faculties, in which input from the broader community may be valuable and ought to be welcomed. However, any such input into hiring decisions should occur only in the context of the established hiring process and must be consistent with the goal of identifying the most highly qualified candidates based on objective criteria. 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. There ought to be express University policy reflecting this view and providing guidance to those to whom such approaches are made." (p. 65)

- "The concern in this case is that external influence was inappropriately brought to bear on a hiring decision. There is no doubt that this, if it occurred, would be contrary to University policy that applies to the recruitment of Professional/Managerial Staff. However, as

> discussed at length above, I would not draw the inference that external influence had an impact on the decision-making in this case. Given the broad consensus about the impropriety of such influence playing any role and my conclusion that it did not, and given the existing processes involving the Canadian Association of University Teachers and the University of Toronto Faculty Association, I do not think it prudent for me to say more about the parameters, if any, of academic freedom in this situation." (p. 68)

In light of Mr. Cromwell's analysis, it is clear that in certain aspects of the search process, including the need to maintain confidentiality, the University's current best practices were not consistently observed. In other instances, it is apparent that the University had not clearly articulated or conveyed its policies. I will expand on these points in my comments below, regarding implementation of Mr. Cromwell's guidance or advice.

However, given the concerns expressed by some that issues of academic freedom were central to the decision not to appoint the preferred candidate, it is important to emphasize Mr. Cromwell's finding that he would not draw the inference that external influence had any impact on this decision – and that accordingly the concern about academic freedom was not based on a justified inference.

Terms of Reference, 3

Mr. Cromwell was asked to provide any pertinent guidance or advice for my consideration relating to any matters arising out of the processes that were involved in this search. He has made several recommendations, which he has organized into five categories: the basis of recruiting decisions, the recruiting process, confidentiality, protections for professional staff who supervise clinical programs and placements, and reconciliation (see pp. 69-75 of the Independent Review).

We accept and will implement all of Mr. Cromwell's recommendations.

The University officials bearing primary or joint responsibility for implementing them – including the Vice-President & Provost, the Vice-President, Human Resources & Equity, the Vice-President, Advancement, and the Dean of the Faculty of Law – will be immediately invited to do so. While some of the recommendations will be implemented immediately, others will be addressed following due consultation.

Here I would like to elaborate on a few particular points, relating to several of the recommendations, as a first step in our process of implementation.

Regarding the basis of recruiting decisions, Mr. Cromwell advises that "the University must be clear that external pressure cannot play a role in its recruiting decisions" (p. 69). Accordingly, let me re-affirm on behalf of the University a fundamental principle which he stated as follows:

"Attempts by anyone – including lobby groups, corporations and donors – to attempt to block, prevent or disqualify an applicant in a merit-based hiring process on the basis of the candidate's religious or political views, their scholarly or other public work or their social activism must be firmly rejected unless the matter raised can be demonstrated to be evidence of unfitness for the duties of the position." (p. 69)

Moreover, we will review and, where necessary, enhance existing policies and protocols to articulate more clearly and explicitly that any representative of the University who receives an inquiry related to an active search from sources external to the University's established hiring processes, including alumni, donors and external organizations, should respond that recruiting processes are confidential, and that they cannot share any information about the search.

In addition, the University will review all existing policies related to its advancement activities and clarify them as necessary to address explicitly the issues noted in Mr. Cromwell's report. We will also ensure that our advancement professionals and other professional/managerial staff are aware of the relevant policies and fully understand their implications in practice.

Regarding confidentiality, the report offers a number of recommendations in response to the breaches that occurred during this search, and I accept them all, including the articulation of clear, written confidentiality guidelines for PM recruitment processes, and the use of confidentiality agreements signed by all selection committee members.

Regarding protections for professional staff who supervise clinical programs and placements, the report notes repeatedly that these staff members are included in the Professional/Managerial (not the academic) employment category. Nonetheless, the report notes that such professional staff may be in a position of "taking on controversial and unpopular causes" that may "cause discomfort to some powerful people, groups and institutions" (p. 74). In light of this, I agree that it would be helpful for the University to examine appropriate forms of protection for professional staff in such positions – whether in the Faculty of Law or elsewhere across the University where similar conditions for professional staff exist. We commit to addressing this issue, recognizing the unique circumstances, including standards of professional practice, that warrant further careful consideration.

I wholeheartedly endorse Mr. Cromwell's recommendations on promoting reconciliation. Under the leadership of Professor Jutta Brunnée, Dean of the Faculty of Law, and with the support of the University, the Faculty will soon engage in a series of internal conversations with students, faculty and staff about Mr. Cromwell's report. The goal of these conversations will be to promote reconciliation, focusing on the values that unite the U of T Law community.

Regarding Mr. Cromwell's recommendation that we also pursue reconciliation with the search committee's preferred candidate, I have written to her today to apologize on behalf of the University for the fact that confidentiality was not maintained in the search process. We regret very much that the process did not adhere to the University's high standards in that regard, and we are deeply sorry for any harm she experienced as a result.

3. Moving forward together

In closing, I wish to thank the Honourable Thomas Cromwell for undertaking this review, and for his detailed and insightful report. I also wish to acknowledge that this experience has been profoundly divisive for the Faculty of Law, straining relations between colleagues in that community. While those involved in the search acted in good faith, we can all agree that certain things should have been done differently. At the same time, I would like to emphasize my confidence in the power of the community's shared values and the goodwill that motivates its members to achieve the reconciliation we all desire.

The University of Toronto's Faculty of Law makes an indispensable contribution to legal scholarship and education, and ultimately the cause of justice, in Canada and around the world. And every day, through the work of its faculty, staff, students and alumni, the Faculty makes a difference for the better in the lives of so many individuals and communities in our society. I encourage all members of the U of T Law community to embrace Mr. Cromwell's review as a turning point, and to participate in the process of reconciliation as an opportunity to move forward in fulfilling the Faculty's vital mission.

Meric S. Gertler
President

Canadian Judicial Council
Conseil canadien de la magistrature

Judges Act, R.S.C., 1985, c. J-1
Canadian Judicial Council
Inquiries and Investigations By-laws,
SOR/2015-203

REPORT OF THE REVIEW PANEL CONSTITUTED BY THE CANADIAN JUDICIAL COUNCIL REGARDING THE HONOURABLE D.E. SPIRO

I. Overview

[1] In reasons dated 5 January 2021, Associate Chief Justice K.G. Nielsen, as Vice-Chair of the Judicial Conduct Committee of the Canadian Judicial Council ("CJC") referred a complaint concerning Justice D.E. Spiro of the Tax Court of Canada to a Judicial Conduct Review Panel (the "Panel"). The Panel was constituted under the CJC's *Inquiries and Investigations By-Laws 2015* ("By-Laws").

[2] The referral was based on a number of distinct complaints concerning the alleged conduct of the judge in respect of the potential appointment of Dr. Valentina Azarova to the position of Director of the University of Toronto Faculty of Law's International Human Rights Program ("IHRP").

[3] The task of the Panel is to determine whether an Inquiry Committee is to be constituted to inquire into the conduct of the judge. By s. 2(4) of the By-Laws, the Panel may do so:

> only if it determines that the matter might be serious enough to warrant the removal of the judge.

[4] The test for removal of a judge from office is properly a stringent one. It has been articulated in a number of cases. The Supreme Court of Canada's formulation of the test in *Therrien (Re)*, 2001 SCC 35 at para. 147, is often cited:

> before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office.

[5] Based on the record before the Panel, which we detail below, we cannot conclude that the judge's conduct in this matter "might be serious enough to warrant" his removal from office.

[6] The judge, as we will relate, has properly recognized the mistakes he has made in this matter. These errors are serious but in the end do not, in our view, warrant the imposition of the ultimate penalty for judicial misconduct.

[7] These are our reasons for so concluding.

II. Detailed Background

[8] Before turning to the background, it is important to discuss the process undertaken by a Judicial Conduct Review Panel under the By-Laws. It begins with the consideration of a complaint or allegation concerning the conduct of a federally appointed judge by the Chairperson or Vice-Chairperson of the CJC's Judicial Conduct Committee.

[9] By s. 2(1) of the By-Laws, they may constitute a Judicial Conduct Review Panel if they determine that the complaint or allegation "on its face might be serious enough to warrant the removal of a judge".

[10] The Chairperson or Vice-Chairperson is primarily concerned with a facial inquiry based on the complaint before them. It is informed by the particulars of the complaint or allegation and any response received from the judge and their Chief Justice. But it is not a reflection of any fact-finding by the Chairperson or Vice-Chairperson. That individual is concerned with determining only if "on its face" the matter "might be" serious enough to warrant removal of the judge.

[11] The Judicial Conduct Review Panel in turn is also concerned with the threshold that the matter "might be serious enough" to warrant removal of a judge. However, under s. 2(4) of the By-Laws, the Judicial Conduct Review Panel may only direct an inquiry committee if it so "determines".

[12] The Chairperson or Vice-Chairperson is concerned with reviewing the matter "on its face"; the Judicial Conduct Review Panel must go further and make a determination that the matter "might be" serious enough to warrant removal.

[13] This suggests a more searching inquiry by the Judicial Conduct Review Panel into the matter. However, even here the Judicial Conduct Review Panel is constrained by the record placed before it. It does not hold a hearing, witnesses are not examined or cross-examined before it; it may not undertake investigations or gather new information: *In the Matter of the Honourable Gérard Dugré of the Superior Court of Québec*, CJC File 18-0318, 30 August 2019; *In the Matter of the Honourable F.J.C. Newbould*, CJC File 2015-203, 8 February 2017.

[14] The Judicial Conduct Review Panel does not make findings of fact. That said, in making a determination as to whether the matter might be serious enough to warrant the removal of the judge, it is necessary for the panel to weigh the evidence in the record before it to see if the case as presented reaches the "might be" threshold. How high a probability is "might be"? That is not stated anywhere but it surely reflects a threshold higher than "slim to none" but short of "on a balance of probabilities". The "might be" threshold must reflect the very significant seriousness of the remedy of removal; the "crime" must fit the "punishment".

[15] In addition to the various complaints we have received, we have reviewed submissions from the judge and a brief from his legal counsel and a submission from the judge's Chief Justice (the latter is very favourable to the judge). The judge has also put before us the *Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law*, 15 March 2021, prepared by the Honourable Thomas A. Cromwell C.C. ("Cromwell Report"). The Panel specifically avoided reviewing the Cromwell Report and media articles concerning it until it was formally tendered to us by counsel for the judge.

[16] It is instructive to now relate the background of the matter in the context of the essential complaints received by the CJC.

The Essential Complaints

[17] The various complaints received by the CJC were largely based on newspaper and media accounts surrounding the alleged withdrawal of an offer to appoint Dr. Azarova as Director of the IHRP. It was essentially said that the judge improperly interfered in the appointment process. In the words of one complainant:

> An offer of employment in the Faculty's International Human Rights Programme was made to Dr. Valentina Azarova and she accepted that offer in August. I understand that she was the unanimous choice of the academic members of the search committee.
>
> The offer was later rescinded by Dean Iacobucci. I have been told that between the acceptance of the offer and its withdrawal, a sitting judge in the Tax Court made personal contact with the Faculty in respect of the wisdom of that offer.
>
> The committee Chair was, I believe, advised that the Judge contacted the Faculty to express concern about Dr. Azarova's academic research on the operation of international law in the context of Israel's occupation of the Palestinian Territories. Shortly thereafter, Dr. Azarova's offer was rescinded.

[18] This complainant further submitted:

> The reports further allege that the interference may have been motivated by a judge's disapproval of Dr. Azarova's research on Israeli occupation of Palestinian lands. If that were so, it would be very troubling. It would put the integrity and impartiality of the Court in jeopardy. Any party or lawyer before it who is Palestinian, Arab, or Muslim could reasonably fear bias.

[19] These sentiments are reflective of the concerns expressed by other complainants.

The University of Toronto Appointment Process

[20] The facts surrounding this process are somewhat complicated and detailed. Here we will endeavour to restrict our recital to the essential facts on the record before us necessary to give context for the determination we must make. A very comprehensive review of the process can be found in the Cromwell Report.

[21] In the summer of 2020 the Faculty of Law was in a search to fill the Director's position. The search committee had by late summer focussed on a preferred candidate – Dr. Valentina Azarova.

[22] Dr. Azarova is not a Canadian citizen herself although her spouse is. She currently lives and works in Germany and her ability to work for the University either remotely from Germany in the last quarter in 2020 and in person in Canada as of January 2021 became a central issue in the appointment process.

[23] We will restrict the background details to the involvement of the judge.

[24] The judge was a former student of the Faculty of Law. After graduation he has maintained a close relationship with the Faculty and has undertaken very significant fundraising efforts on behalf of the Faculty. By all accounts he is a very engaged alumnus and he has done much good work in supporting the law school financially and professionally. This financial support, both personally and through the judge's larger family, has been very significant. One could surmise that it was this background as distinct from the judge's judicial position that prompted the approach to him that we detail below.

[25] In this context through his work on funding campaigns, he became friends with Chantelle Courtney, the Assistant Vice-President Divisional Relations, Division of University Enhancement. Justice Spiro maintained contact from time to time with Ms. Courtney and on 30 August 2020 she emailed the judge asking for a social “catch up”.

[26] Prior to his appointment to the bench, Justice Spiro was on the Board of Directors of the Centre for Israel and Jewish Affairs (“CIJA”). According to its website CIJA is the “advocacy agent of Jewish federations across Canada” dedicated to “protecting Jewish life in Canada”. One of its priorities is “educating Canadians about the important role Israel plays in Jewish life”. The Vice-President, University and Local Partner Services for CIJA is Ms. Judy Zelikovitz. She of course came to know the judge through his work as a Director of CIJA.

[27] Rumours were apparently surfacing in at least Israel that Dr. Azarova was imminently to be appointed as Director of the IHRP. Dr. Azarova’s professional work and scholarly writing is felt by some in the larger community to be that of a “major anti-Israeli activist”. This possibility prompted Professor Gerald M. Steinberg, the President Institute for NGO Research (centred in Jerusalem) to start an email thread with a number of CIJA officials in Toronto including Ms. Zelikovitz.

[28] Professor Steinberg’s first email to, among others, Ms. Zelikovitz was sent on 2 September 2020 at 1:24 p.m. (we presume if it matters that these are Toronto times).

[29] Professor Steinberg noted his view that Dr. Azarova was “anti-Israel” whose academic work “is almost entirely focussed on promoting the Palestinian narrative, the Israel “apartheid” theme, war crimes, etc.” Professor Steinberg suggested a course of action in this email:

> If someone could quietly find out the current status and confirm Azarova’s pending appointment, that would be very helpful.
>
> The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising.
>
> I am preparing a short briefing sheet and would be happy to talk about this.

[30] At 1:44 p.m. on 2 September 2020, Ms. Zelikovitz emailed two other recipients of the Steinberg initiating email inquiring:

> Is this something we can ask David Spiro about?

[31] At 10:41 a.m. the next day, one of the recipients of the Steinberg email and the Zelikovitz email responded:

> I think you can approach him. He is friends with the Dean, Ed Iacobucci. I a [*sic*] copying him on this, as I don't think his reaching out to Ed compromises his judicial position. If I am wrong, David will so advise.

[32] Because the entire email thread was included in Justice Spiro's brief filed with the Panel by his counsel and because each email, including that culminating in the "cc: David Spiro" of 3 September 2020, included Professor Steinberg's original subject line "re: U of T pending appointment of major anti-Israeli activist to important law school position", we assume that Justice Spiro received the entire thread including Professor Steinberg's originating email outlining his proposed strategy for dealing with the matter – "The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising."

[33] We also assume that Ms. Zelikovitz provided the judge with the memo Professor Steinberg promised in his originating email describing the objections to Dr. Azarova's appointment. A draft of what we would assume to be that memorandum is attached as the last page to Appendix "A" to the judge's brief filed with the Panel. It very critically reviews Dr. Azarova's professional background in some depth and it states:

> Dr. Azarova's career is clearly devoted to anti-Israel advocacy, and the evidence indicates that she will use the position to promote her political agendas and a discriminatory focus on Israel, while ignoring other human rights concerns.

[34] Coincidentally, Ms. Courtney and the judge had arranged their "telephone catch-up" for 4 September 2020. That call was made and the parties apparently chatted about various matters affecting the faculty.

[35] According to Justice Spiro in his written response to the complaints dated 26 October 2020, he turned the conversation to the Azarova matter. In his words:

> I did not tell Ms. Courtney, or anyone else at the University, that the candidate, Dr. Valentina Azarova, should not be appointed. I expressed no opinion, political or otherwise, on the merits of her scholarship or the political positions she had advocated. I did express the hope that sufficient due diligence would be done in advance of any such appointment to enable the University of Toronto and the Faculty of Law to respond effectively if and when criticism arose as a result of the candidate's appointment. I mentioned the matter to Ms. Courtney, at the end of a personal telephone conversation that she had scheduled with me, because I cared deeply about the University and its law school.

[36] Justice Spiro continued later in his response:

> At no time during our conversation did I express any personal complaint, concern, disapproval, or displeasure in respect of Dr. Azarova's scholarship. My only concern was that the University and Faculty of Law should be prepared for what I had been told by Ms. Zelikovitz would likely be an adverse and highly public reaction.
>
> To the extent that I described to Ms. Courtney the sources of such a reaction, it is possible that she understood me as expressing my own personal views. In retrospect, I should have made it clear to Ms. Courtney that I was not expressing my own personal views in describing the reaction that I feared might ensue.

[37] We consider this distinction between giving voice to a concern that a pending appointment might cause adverse publicity for the faculty, and active lobbying against the appointment based on a personal disapproval of the candidate, is of some importance. The former characterization suggests loyalty to the faculty and love of the institution as a motivation, the latter rather goes beyond that and suggests one immersing oneself in the political, social and cultural controversy. In drawing the distinction, we do not mean to suggest that while the latter characterization would clearly not be acceptable conduct, the former is. We will return to this point below.

[38] We have not had the benefit of any input from Chantelle Courtney. Mr. Cromwell did. We reproduce this substantial portion of the Cromwell Report (at p. 32) (the AVP is Ms. Courtney, the Alumnus is the judge):

> As was previously mentioned, towards the end of the conversation on the stewardship call with the AVP, the Alumnus raised the appointment of a new IHRP Director. Their respective recollections of the conversation are consistent on the essential points.
>
> The Alumnus asked the AVP whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered that 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.

> It is unclear to me exactly what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred to the Preferred Candidate's published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern.

[39] Justice Spiro did not have any contact with Dean Iacobucci. He specifically declined to approach the Dean. Justice Spiro at the same time as the Courtney conversation was speaking with another professor in the faculty with whom he had a close relationship. Justice Spiro raised the potential Azarova appointment and forwarded the Steinberg memorandum to this professor. This professor apparently did nothing with the information.

[40] Ms. Courtney learned that the Azarova appointment had not been finalized and so advised Justice Spiro. This appears to be the sum total of the judge's involvement in the matter. For her part, Ms. Courtney relayed the information from the judge to the dean of the faculty. The Cromwell Report suggests that the dean became more actively involved in the process thereafter.

[41] Of his conduct, the judge at his first opportunity in his letter to the CJC of 26 October 2020 acknowledged his mistakes and expressed his remorse. He said:

> I begin by acknowledging that I raised a controversial matter with an official of the University of Toronto on September 4, 2020 in respect of an appointment, or prospective appointment, at the Faculty of Law. In doing so, I made a mistake. I deeply regret that mistake.
>
> My contact with that official led to unintended consequences including raising a question about my absolute commitment to impartiality toward all litigants and counsel who appear before me in the Tax Court of Canada. I deeply regret that as well.

[42] On 6 September 2020 Dean Iacobucci advised the search committee that Dr. Azarova's appointment would not go ahead.

[43] The Cromwell Report concluded that on the basis of the materials Mr. Cromwell had reviewed and considered, he could not draw the inference that Justice Spiro's inquiry "factored into the decision to terminate the Preferred Candidate's candidacy" (p. 47).

[44] We said earlier that the distinction between actively campaigning against Dr. Azarova's appointment and on the contrary expressing concern that the appointment might subject the faculty to adverse criticism and publicity was of some importance. In confirming that the latter

characterization is the appropriate one on the facts here, the Cromwell Report is again useful. Mr. Cromwell stated (at p. 48) (the "Alumnus" is the judge, the "professor" is Professor Steinberg and the "Organization" is the CIJA):

> Based on my view, it appears that the nature of the Alumnus' inquiry has been misunderstood in much of the public discussion. It has at various points been described as an "objection" to the candidacy, as "external interference", as a "complaint" about the candidacy, as "outside political pressure", as an "attempt to block the appointment."
>
> Those descriptions adequately convey the intent of the professor's approach to the Organization that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.
>
> This would hardly be news to anyone who had taken a moment or two to look on the Internet. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evidence "as soon as [the Preferred Candidate's] name was announced.

III. Analysis

[45] The complaints can be viewed as having at least two aspects. First it is felt to be serious misconduct for a judge to actively join with campaigners whose strategy is to prevent the appointment of a person to an influential position who is actively promoting interests at variance with those of the campaigners.

[46] Second, to the extent that joining such a campaign reflects on the personal beliefs of the judge, it encourages the view that the judge could not in the exercise of their judicial duties free themselves from the bias such personal views, it is argued, suggest.

[47] Dealing first with the issue of perceived bias, and to be specific it would be seen to be a bias against Palestinian, Arab or Muslim interests, nothing in the career of David Spiro or his work supports such a suggestion. The supporting letters we have received from persons of undoubted reputation and credibility speak of the judge as a highly ethical man of moderate views, of empathy for people of all backgrounds.

[48] One esteemed commentator said this of Justice Spiro:

> I watched with admiration as his career developed and was delighted by his appointment to the Court. I knew he would be an excellent judge. He is a person of complete integrity with a powerful commitment to fairness. He is principled, thoughtful and committed to justice – just the sort of person we want on the bench. In the more than 30 years I have

> known David, I have never heard a single ill-word about him in any context. He is widely respected and admired for his quiet, modest and principled approach to life.

[49] The finding of bias in the context of judging depends on this test:

> … what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly
>
> *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394.

[50] In our view right thinking persons apprised of the conduct of Justice Spiro over his career and extending even to this affair – apprised in accurate terms, as opposed to the "facts" suggested in earlier media coverage of this matter, could not conclude that the case for the judge being biased as suggested has been made out. This is important because s. 65(2)(d) of the *Judges Act*, R.S.C. 1985, c. J-1, is forward looking. The subsection reads:

> (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of
>
> …
>
> (d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,
>
> …
>
> the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.

[51] It will be seen that a judge's current predicament may have a forward looking disability associated with it: where it has placed the judge in a position "incompatible with due execution of that office". It is here where a current perception of bias may effectively prevent the judge from functioning in the future. Indeed that is a concern expressed by a number of the complainants. How can a Palestinian, Arab or Muslim have faith that the judge would deal with their issues free of bias?

[52] But that fear, we conclude, is based on misinformation and speculation that in fact is inaccurate as we have discussed. The conduct of Justice Spiro is not as originally characterized in the record before us.

[53] It is true that Justice Spiro held the position before his appointment as a Director of CIJA but most, if not all, appointees to judicial office have backgrounds that include similar associations or active community, religious or cultural involvement. How could it be otherwise?

[54] All judges carry the burdens of their past on appointment to office. We take a serious oath to effectively subordinate our personal views to the rule of law.

[55] *Yukon Francophone School Board Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, was a case involving French language education rights. The trial judge was involved as a governor of a philanthropic francophone community organization in Alberta. The Supreme Court of Canada did not view this fact by itself as contributing to a reasonable apprehension of bias:

> [61] Membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise. We expect a degree of mature judgment on the part of an informed public which recognizes that not everything a judge does or joins predetermines how he or she will judge a case. Canada has devoted a great deal of effort to creating a more diverse bench. That very diversity should not operate as a presumption that a judge's identity closes the judicial mind.

[56] The following observations by the court are apposite here:

> [33] Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences not close his or her mind to the evidence and issues. There is, in other words, a crucial difference between an open mind and empty one. Bora Laskin noted that the strength of the common law lies in part in the fact that
>
> > the judges who administer it represent in themselves and in their work a mix of attitudes and a mix of opinions about the world in which they live and about the society in which they carry on their judicial duties. It is salutary that this is so, and eminently desirable that it should continue to be so.
>
> ("The Common Law is Alive and Well — And, Well?" (1975), 9 *L. Soc'y Gaz.* 92, at p. 99)
>
> [34] The reasonable apprehension of bias test recognizes that while judges "must strive for impartiality", they are not required to abandon who they are or what they know: *S. (R.D.)*, at para. 29, per L'Heureux-Dubé and McLachlin JJ.; see also *S. (R.D.)*, at para. 119, per Cory J. A judge's identity and experiences are an important part of who he or she is, and neither neutrality nor impartiality is inherently compromised by them. Justice is the aspirational application of law to life. Judges should be encouraged to experience, learn and understand "life" — their own and those whose lives reflect different realities. As Martha Minow elegantly noted, the ability to be open-minded is enhanced by such knowledge and understanding:

> None of us can know anything except by building upon, challenging, responding to what we already have known, what we see from where we stand. But we can insist on seeing what we are used to seeing, or else we can try to see something new and fresh. The latter is the open mind we hope for from those who judge, but not the mind as a sieve without prior reference points and commitments. We want judges and juries to be objective about the facts and the questions of guilt and innocence but committed to building upon what they already know about the world, human beings, and each person's own implication in the lives of others. Pretending not to know risks leaving unexamined the very assumptions that deserve reconsideration.
>
> ("Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors" (1992), 33 *Wm. & Mary L. Rev.* 1201, at p. 1217)

[57] In our view, the future fear of bias concern is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee in this matter.

[58] Turning to the first aspect, the spectre of misconduct associated with actively taking part in a campaign whose strategy was to prevent the appointment of Dr. Azarova, it is based on the inaccurate premise that Justice Spiro did so and indeed did so in direct contact with Dean Iacobucci. That did not occur on the record before us, a record again made much stronger and definitive with the addition of the Cromwell Report.

[59] What instead we have is an active, generous alumnus who has historically and admirably supported his law school, expressing concern that a potential faculty appointment will subject the institution to unwanted controversy and harsh publicity. It was, however, a serious mistake for the judge to pursue this course and he has admitted that in the strongest possible terms. In our view, however, it does not represent misconduct justifying the constitution of an Inquiry Committee.

[60] The CJC has provided guidance for Judicial Conduct Review Panels in *Judicial Conduct: A Reference Guide for Chief Justices*.

[61] In declining to send a matter to an Inquiry Committee, the Guide suggests (at 16):

> Panels have also considered absence of bad faith as a key factor. Other relevant factors have included: an expression of confidence on the part of the judge's Chief Justice; a long and distinguished career; the absence of any similar conduct in the past.

[62] All of these factors favour the judge before us. In our view, it cannot be said on the record before us that, in the language of *Therrien*, the judge's conduct was:

> … so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of his office…

[63] More to the point, in the words of s. 2(4) of the By-Laws, we cannot conclude:

> that the matter might be serious enough to warrant the removal of the judge.

[64] We believe that the judge's acknowledgment of his mistakes and his sincere expression of remorse mean that further remedial action by the CJC or his Chief Justice is not required. We so advise the Vice-Chairperson.

Dated this 13th day of April, 2021

Original signed

_____

The Honourable R.J. Bauman, Chief Justice of British Columbia

Original signed

_____

The Honourable M.D. Popescul, Chief Justice of the Court of Queen's Bench for Saskatchewan

Original signed

_____

L'honorable Manon Savard, Juge en chef du Québec

Original signed

_____

L'honorable Denis Jacques, Cour supérieure du Québec

Original signed

_____

Dr. Jennifer N. Davis, Ph.D.

From: Craig Martin Scott
Sent: Tuesday, April 20, 2021 8:29 PM
To: info
Subject: Pressing follow-up re CJC File 20-0260

April 20, 2021

Josée Gauthier
Registry Officer /
Greffière
Canadian Judicial Council /
Conseil canadien de la magistrature

Dear Ms. Gauthier,

I am returning to your April 6, 2021, response to my query on the status of Complaint CJC File 20-0260.

Despite being a complainant, I have not heard from the Review Panel to invite a submission. Unless such an invitation is planned but has not yet been sent, I am assuming this must mean that CJC procedural rules do not require such an invitation at the Review Panel stage (as contrasted with a public inquiry committee).

If this is so, I am writing to ask whether the Review Panel will exercise a discretion to receive a communication from me as one complainant. Because the names of the Panel members have not been provided and are not on the CJC website, I cannot write to the Panel directly, and thus am writing through you.

I would like an opportunity to make a submission with respect to the findings of former Justice Tom Cromwell in a report produced for the University of Toronto, in which the extent of Justice Spiro's interventions were made clearer. I wish to offer observations as to how those findings relate to the code of judicial ethics to which Justice Spiro is bound. In the course of the submissions, I will attempt to demonstrate that Mr. Cromwell adopted an approach to assessing evidence that falls far short of reliability and normative and inferential reasoning that fails to sustain key conclusions he draws related to the appropriateness and impact of Justice Spiro's conduct.

I say this with much respect to Mr. Cromwell -- who taught me the Law of Evidence – but it would be a serious problem if the Review Panel were to somehow take his reasoning and conclusions as a starting point, an even more serious problem were they to be endorsed by the Panel, and a major mistake were the Cromwell report to cause the Panel not to determine that a public inquiry committee is required. For this reason, I hope that the Panel agrees to hear from me.

I would appreciate an answer as immediately as possible.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School

From: info <info@cjc-ccm.ca>
Sent: April 6, 2021 2:20 PM
To: Craig Martin Scott <cscott@osgoode.yorku.ca>
Subject: RE: CJC File 20-0260

Dear Mr. Scott,

Thank you for writing to the Canadian Judicial Council (Council).

Your complaint was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council. Associate Chief Justice Nielsen has determined that the matter should be referred to a Review Panel.

In accordance with the *Canadian Judicial Council Inquiries and Investigations By-laws 2015* ("By-laws"), the "senior member" of the Judicial Conduct Committee, Chief Justice G.D. Joyal has designated the five members of the Review Panel who will review this matter.

Once the Review Panel has reviewed this matter, Council will advise you accordingly.

I trust this will be of assistance to you.

Yours sincerely,

Josée Gauthier
Registry Officer /
Greffière
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

From: Craig Martin Scott <cscott@osgoode.yorku.ca>
Sent: Monday, April 5, 2021 7:00 PM
To: info <info@cjc-ccm.ca>
Subject: RE: CJC File 20-0260

Hello again,

As six months (referenced in the email below) has passed, I just wanted to check whether I should be in receipt of any further communications from the CJC with regard to CJC File: 20-0260?

Yours sincerely,

Craig

From: info <info@cjc-ccm.ca>
Sent: September 25, 2020 11:59 AM
To: Craig Martin Scott <CScott@osgoode.yorku.ca>
Subject: CJC File 20-0260

Good afternoon,

Thank you for writing to the Canadian Judicial Council. Please be advised that your correspondence will be reviewed in accordance with the Canadian Judicial Council Procedures for the Review of Complaint or Allegations (Review Procedures).

The Council seeks to complete its review of complaints within 3 to 6 months of receipt and achieves this objective in most instances. Once the review of your complaint is completed, the Acting Executive Director will communicate with you.

Please note that Chairperson in the Review Procedures refers to the Chairperson and Vice Chairpersons of the Judicial Conduct Committee (s. 1), not the Chairperson of Council. S. 2.2 provides that the Chairperson of Council does not participate in the consideration of complaints. Your letter of complaint will be processed as provided in the Review Procedures.

If you wish to add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: info@cjc-ccm.ca.

Information about the Council's mandate with respect to complaints can be found the Council's web site http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /
Agente de soutien de registre et de communication
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

From: Craig Martin Scott
Sent: Thursday, April 22, 2021 12:37 AM
To: info
Subject: Submission from Craig Scott rE: CJC File 20-0260
Attachments: 00-2021 04 21 - re Complaint CJC File 20-0260 - C Scott - Follow-up Letter to CJC Review Panel.pdf; 0-2021 04 20 Request by C Scott to submit to Review Panel.pdf; 1-Report-of-the-Hon-Thomas-A-Cromwell-CC-–-March-15-2021.pdf; 2-U of T Faculty Members Letter to President on Cromwell report-hilit.pdf; 3-Denise Reaume-Analysis of Cromwell Report w Exec Summary.pdf; 4-Emon-Cromwell and Philanthrophy.pdf; 5-Katz-Confidentiality and Privacy in Justice Cromwell Report.pdf; 6-Moon-Response to Cromwell Report-Published on Blog of Ryerson University.pdf; 7-Carens-Executive Summary-Response to Cromwell.pdf; 8-Wong-Cromwell Report and Privilege in Canadian Legal Institutions-Opinio Juris.pdf

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Dear Ms Gauthier,

Following my request yesterday to receive an invitation to make a submission to the Review Panel in CJC File 20-06-, I decided it is best not to wait for such an invitation.

After reviewing earlier correspondence from the Registry, I am writing on the basis of what I now take to have been a generic earlier invitation from the Registry contained in its September 25, 2020, response to my September 20, 2020, complaint. The Registry noted at that time that, "[i]f you wish to add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: info@cjc-ccm.ca."

While this was outside the context of a Review Panel later being formed (almost four months later), and while it does not specifically make clear that a Review Panel would look at anything I add to the file, I am trusting this September 21, 2020, general invitation is sufficient for the Registry to bring this letter and its attached documents to your immediate attention. I also trust that the Review Panel will find it essential to consider the letter and attached documents closely before making any determination as to whether a public inquiry committee should be formed in the case of CJC File 20-0260 (Spiro).

The first document is the letter. The subsequent attachments are as referred to in the letter.

In a second email, I will send the letter and the documents as one consolidated PDF, should that format be found more or equally useful by some Review Panel members.

Yours sincerely,

Craig Scott

From: info <info@cjc-ccm.ca>
Sent: April 6, 2021 2:20 PM
To: Craig Martin Scott <cscott@osgoode.yorku.ca>
Subject: RE: CJC File 20-0260

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I trust this will be of assistance to you.

Yours sincerely,

Josée Gauthier
Registry Officer /
Greffière
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

From: Craig Martin Scott <cscott@osgoode.yorku.ca>
Sent: Monday, April 5, 2021 7:00 PM
To: info <info@cjc-ccm.ca>
Subject: RE: CJC File 20-0260

Hello again,

As six months (referenced in the email below) has passed, I just wanted to check whether I should be in receipt of any further communications from the CJC with regard to CJC File: 20-0260?

Yours sincerely,

Craig

From: info <info@cjc-ccm.ca>
Sent: September 25, 2020 11:59 AM
To: Craig Martin Scott <CScott@osgoode.yorku.ca>
Subject: CJC File 20-0260

Good afternoon,

Thank you for writing to the Canadian Judicial Council. Please be advised that your correspondence will be reviewed in accordance with the Canadian Judicial Council Procedures for the Review of Complaint or Allegations (Review Procedures).

The Council seeks to complete its review of complaints within 3 to 6 months of receipt and achieves this objective in most instances. Once the review of your complaint is completed, the Acting Executive Director will communicate with you.

Please note that Chairperson in the Review Procedures refers to the Chairperson and Vice Chairpersons of the Judicial Conduct Committee (s. 1), not the Chairperson of Council. S. 2.2 provides that the Chairperson of Council does not participate in the consideration of complaints. Your letter of complaint will be processed as provided in the Review Procedures.

If you wish to add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: info@cjc-ccm.ca.

Information about the Council's mandate with respect to complaints can be found the Council's web site http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /
Agente de soutien de registre et de communication
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

From: Craig Martin Scott
Sent: Thursday, April 22, 2021 12:40 AM
To: info
Subject: 2nd of 2: Submission from Craig Scott rE: CJC File 20-0260
Attachments: 00-2021 04 21 - re Complaint CJC File 20-0260 - Consolidated -C Scott Letter w 9 attachments.pdf

---

Dear Ms Gauthier,

Per the last email (see below), I now attach the consolidated PDF, containing the letter and its attachments – which were sent in the first email each as separate documents.

Sincerely,

Craig Scott

From: Craig Martin Scott
Sent: April 22, 2021 12:37 AM
To: 'info' <info@cjc-ccm.ca>
Subject: Submission from Craig Scott rE: CJC File 20-0260

Dear Ms Gauthier,

Following my request yesterday to receive an invitation to make a submission to the Review Panel in CJC File 20-06-, I decided it is best not to wait for such an invitation.

After reviewing earlier correspondence from the Registry, I am writing on the basis of what I now take to have been a generic earlier invitation from the Registry contained in its September 25, 2020, response to my September 20, 2020, complaint. The Registry noted at that time that, "[i]f you wish to add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: info@cjc-ccm.ca."

While this was outside the context of a Review Panel later being formed (almost four months later), and while it does not specifically make clear that a Review Panel would look at anything I add to the file, I am trusting this September 21, 2020, general invitation is sufficient for the Registry to bring this letter and its attached documents to your immediate attention. I also trust that the Review Panel will find it essential to consider the letter and attached documents closely before making any determination as to whether a public inquiry committee should be formed in the case of CJC File 20-0260 (Spiro).

The first document is the letter. The subsequent attachments are as referred to in the letter.

In a second email, I will send the letter and the documents as one consolidated PDF, should that format be found more or equally useful by some Review Panel members.

Yours sincerely,

Craig Scott

From: info <info@cjc-ccm.ca>
Sent: April 6, 2021 2:20 PM
To: Craig Martin Scott <cscott@osgoode.yorku.ca>
Subject: RE: CJC File 20-0260

Dear Mr. Scott,

Thank you for writing to the Canadian Judicial Council (Council).

Your complaint was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council. Associate Chief Justice Nielsen has determined that the matter should be referred to a Review Panel.

In accordance with the *Canadian Judicial Council Inquiries and Investigations By-laws 2015* ("By-laws"), the "senior member" of the Judicial Conduct Committee, Chief Justice G.D. Joyal has designated the five members of the Review Panel who will review this matter.

Once the Review Panel has reviewed this matter, Council will advise you accordingly.

I trust this will be of assistance to you.

Yours sincerely,

Josée Gauthier
Registry Officer /
Greffière
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

From: Craig Martin Scott <cscott@osgoode.yorku.ca>
Sent: Monday, April 5, 2021 7:00 PM
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Subject: RE: CJC File 20-0260

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Craig

From: info <info@cjc-ccm.ca>
Sent: September 25, 2020 11:59 AM
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Subject: CJC File 20-0260

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Please note that Chairperson in the Review Procedures refers to the Chairperson and Vice Chairpersons of the Judicial Conduct Committee (s. 1), not the Chairperson of Council. S. 2.2 provides that the Chairperson of Council does not participate in the consideration of complaints. Your letter of complaint will be processed as provided in the Review Procedures.

If you wish to add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: info@cjc-ccm.ca.

Information about the Council's mandate with respect to complaints can be found the Council's web site http://www.cjc-ccm.ca.

Regards,

Registry and Communications Support Officer /
Agente de soutien de registre et de communication
Canadian Judicial Council /
Conseil canadien de la magistrature

Tel: 613-288-1566

OSGOODE
OSGOODE HALL LAW SCHOOL
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YORK UNIVERSITÉ UNIVERSITY

Members of Canadian Judicial Council
Review Panel constituted to consider
CJC Complaint File No. 20-0260 (Spiro)

Via Email to Registry

April 21, 2021

Dear Members of CJC File 20-0260 Review Panel,

RE: Follow-on submission pursuant to complaint of September 20, 2020 with respect to the conduct of a Tax Court of Canada judge

Preliminaries

I am writing on my present assumption that Review Panels are not required to invite submissions from complainants for a file that they are considering. This assumption arises from the fact that the Canadian Judicial Council announced that a Review Panel was being constituted on January 11, 2021, but I have not been contacted about a submission, even as I am one complainant in CJC File 20-0260 (see letter dated September 20, 2020).

I am writing to you collectively as members of the panel and without addressing you by name because the names of the Review Panel members have not been provided to me and I also cannot find them on the CJC website. As I am not able write to the Panel directly, I am writing through the Registry.

I wrote yesterday to the Registry to ask the Review Panel to use its discretion to invite a submission from me; see **the attached query dated April 20, 2021 as the PDF document starting "0-…".** I would prefer to be invited to make a submission and thus know that the Review Panel is actively seeking such input, but I now worry that such an invitation may come too late for my input to assist the Review Panel in making its decision on whether or not a public inquiry committee should be established. My worry arises in part from the fact that, after I sent a query on the status of the complaint on April 4, 2021, a Registry Officer informed me: "*Once* the Review Panel has reviewed this matter, Council will advise you accordingly." (my emphasis)

As such, and upon reviewing earlier correspondence, I am writing on the basis of what I now take to have been a generic earlier invitation from the Registry contained in its September 25, 2020, response to my September 20, 2020, complaint. The Registry noted at that time that, "[i]f you wish to

add any information to your complaint file (CJC File: 20-0260), you may so do by sending your supporting documents to the Canadian Judicial Council, Ottawa, ON, K1A 0W8 or by e-mail: info@cjc-ccm.ca." While this was outside the context of a Review Panel later being formed (almost four months later), and while it does not specifically make clear that a Review Panel would look at anything I add to the file, I am trusting this September 21, 2020, general invitation is sufficient for the Registry to bring this letter and its attached documents to your immediate attention. I also trust that the Review Panel will find it essential to consider the letter and attached documents closely before making any determination as to whether a public inquiry committee should be formed in the case of CJC File 20-0260 (Spiro).

To be clear, I intend now to write in two stages: (1) this letter and its accompanying nine documents; (2) a second letter connecting the dots between the specific judicial-ethics obligations of a federally appointed judge and the recital of facts in the report made to the University of Toronto by former Justice of the Supreme Court of Canada, the Hon. Thomas A. Cromwell. That report is attached as **document "1-…":** ***Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law*** **(March 15, 2021).**

I am sending (1) today in advance of (2) because of my concern that, given that three months has passed since the formation of a Review Panel was announced, the Review Panel may be on the cusp of making a decision. As time may thus be pressing, I wanted at least to get you the materials I reference in this letter alongside my contextualization of those materials in the present letter.

Note finally, by way of preliminaries, I am sending each of the nine referenced documents as separate attachments to this email, alongside the PDF of this letter as the first attachment. My assumption is that having each document as a stand-alone document will be most useful, as it can easily be found by reference to each document number listed below in this letter. However, in case it is easier for some Panel members to have the letter and the nine documents all in one PDF, I will also send by way of separate email a consolidated PDF. So that this letter works both in relation to the separate attachments and in relation to the consolidated PDF, my overview of each attached document will also mention in parentheses the page at which the same document can be found in the consolidated PDF.

The Cromwell Report and Its Value in Relation to a CJC Review Panel Making Determinations About Justice Spiro's Conduct

The Cromwell report is a relevant document for what it reveals as uncontested facts about Justice Spiro's conduct as regards the U of T hiring process. These facts should alone, in my view, be enough for the Review Panel to decide a public inquiry committee is needed.

However, a major problem arises with respect to what the report then does

with those uncontested facts in terms of characterizing their meaning and and effects. The Panel may be presented with arguments that seek to have the Review Panel in effect adopt the Cromwell report's surprising conclusions: that Justice Spiro's intervention was not (at all) a factor in the hiring decision at the Faculty of Law and that, indeed, Justice Spiro had not even attempted to interfere improperly in the hiring process. Of course, such arguments can acquire purchase only if the report is somehow authoritative for the work of the Canadian Judicial Council. It is not. The terms of reference, applicable norms, and the assigned role of Mr. Cromwell are different from the mandate, norms and role that structures the Review Panel's work. I urge the Panel to make its own findings and apply the specific norms of ethical judicial conduct that it is charged with upholding, and not allow an inapposite process to steer your own.

That said, you may have been asked to consider the facts as revealed through, or presented in, that report to assist you in your own fact-finding. Thus, I turn to the second purpose of this letter, which is to ensure that the Review Panel is aware that the Cromwell report made choices and used methodologies that compromise the value of conclusions reached in that report. The long and short of it is that the Cromwell report purported to construct a comprehensive and authoritative factual narrative without resolving disputed facts, including but not limited to consistency, plausibility and credibility. No fact-finding process, and no inference-drawing exercise, can lay claim to reliability in the absence of these basic elements. In addition, other lines of reasoning in the report are not well sustained, to such an extent that the quality of the overall report has to be treated with be approached with caution – for example, the manner in which Justice Spiro's breach of confidentiality and privacy is not treated as disqualifying his conduct while whistle-blowing by members of the U of T Faculty of Law community with the consent of the affected job applicant somehow gets characterized as an inappropriate affront to confidentiality and privacy values.

For these reasons, I hope that the Panel will closely consider the attached seven analyses of the Cromwell report, which demonstrate in detail the critique outlined in the preceding paragraph. They are attached with the following numbering scheme, following **"0-…" and "1-…"** which were already referenced above **("0" is at p.7** in the consolidated PDF and **"1" at p.9).**

"2-…" (p.87 in consolidated PDF) – Letter to U of T President Gertler of April 20, 2021, by seven U of T Faculty of Law professors (Amon, Fadel, Katz, Lemmens, MacIntosh, Réaume, and Schneiderman), wherein they explain, in overview, the problems with the Cromwell report and the University's reliance on it. I have highlighted in yellow the passages that summarize some of the problems directly related to the conduct of Justice Spiro – whose conduct the Review Panel is measuring against the code of judicial ethics. I do this so that you can see, in a very summary form, the kinds of problems that are addressed in more detail in the subsequent attached documents.

"3-…" (p.94 in consolidated PDF) -- "An Analysis of the Cromwell Report" by Professor Denise Réaume, one of the seven signatories to letter in "2-…" and an expert on matters of university governance as it relates to both freedom of expression and academic freedom. There is a two-page executive summary preceding the full analysis, which fleshes out aspects addressed in the letter by the seven. It carefully shows clear problems of evidentiary and normative reasoning in the Cromwell report that I am concerned that the Review Panel not embrace.

"4-…" (p.109 in consolidated PDF) – "On the Cromwell Report: Spiro and External Influence", an analysis by Professor Anver Emon, also one of the seven signatories of "1…". Most particularly, this analysis should be read for how it seeks to demonstrate that, "[c]onsidering the nexus of private philanthropy at the UofT, CIJA's express interests in curtailing the hiring of Azarova, and Spiro's known connections to both institutions, Cromwell's [exculpatory] conclusions [vis-à-vis Spiro] simply do not make sense."

"5-…" (p.115 in consolidated PDF) – "Confidentiality and Privacy in Justice Cromwell's Report: Uses and Misuses", an analysis (posted today) by Professor Ariel Katz, another the seven signatories of "1…". This analysis concerns whether the Cromwell report correctly handled issues of breach of confidentiality and privacy, on multiple fronts. It is relevant for several reasons. One, Justice Spiro not only intervened in a manner inappropriate for a judge in contravention of one or more principles of the code of judicial ethics. He also intervened inappropriately in a process that he knew or ought to have known was *confidential,* and thereby infringed the privacy interests of Dr. Azarova. His acknowledgement, reported in the Cromwell report, that it would be inappropriate to directly contact the dean about his objections to Dr. Azarova only reveals his intention to do indirectly (communicate his objection to the dean via the advancement office) what he acknowledges he could not ethically do directly.

Two, Katz argues that the Cromwell report engaged in faulty legal reasoning on this front; as such, it does give pause to anyone who would too quickly credit the quality of reasoning in the rest of the report. This is important given that, for many in the lay world and even some in the legal world, the basic fact of stature – that he is a former Supreme Court of Canada judge – can cause people instinctively to assume that his legal analysis must be irreproachable.

Three, the Cromwell report's approach to confidentiality in relation to whistle-blowing participants in the process is of one piece with the other outcomes of the report. By outcomes, I mean firstly that the report adopted a methodology whereby he took what the former dean told him to be true without question – thus axiomatically absolving the former dean from any errors or faults. And, secondly, the Cromwell report also stepped over into Canadian Judicial Council territory when it articulated what appears to be an alumni-donor-opining-even-when-they-are-also-a-judge-in-their-day-job exception as a permissible form of external activity in relation to

university hiring – thus exculpating Justice Spiro in advance of the CJC considering and interpreting its own code of ethics. 296

Consider these two exculpatory outcomes alongside the outcome on which Professor Katz focuses: how the Cromwell report appears to have misinterpreted or, at the very least, strained legal and associated ethical principles to find fault with the members of the process who sought to blow the whistle on the Spiro involvement and on what they very reasonably suspected was an impact on the hiring process.

"6-…" (p.126 in consolidated PDF) – "Bad Times at a Great University and Its Law School", an analysis published today by Professor Richard Moon (Professor of Law, University of Windsor Faculty of Law) on the website of the Centre for Free Expression of Ryerson University. Professor Moon is one of Canada's foremost authorities on the law of freedom of expression and also freedom of religion. (He is also, as he states up front, Prof. Macklin's spouse, and was a witness to an important conversation). His column provides a useful chronology of events, including his account of a critical (and disputed) telephone conversation between the Dean and Prof. Macklin where he was present. As with the Réaume analysis, it shows up a range of implausibilities in the Cromwell report's handling of evidence relevant to your Spiro file.

It is also helpful in pointing out the Cromwell report's tendentious application of the term "illegality" to an independent-contractor contract under German law – when it is far from clear that this terminology fairly captures what German lawyers had opined. Professor Moon's column furthermore draws attention to a lapse in judgment on the part of Mr. Cromwell, in deciding to be a speaker at an event of the very organization that was involved alongside Justice Spiro in their mutual efforts to influence the hiring process – in the same period during which he was finalizing his report.

"7-…" (p.132 in consolidated PDF) – Executive Summary of a paper entitled "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" by a Professor Emeritus of U of T, Professor Joseph Carens, a widely respected political scientist and theorist. This is another analysis that comes to similar conclusions about the Cromwell report's hard-to-fathom use of evidence and conclusions in relation to whether or not Justice Spiro "improperly" sought to influence a hiring process and whether or not Justice Spiro's inquiries were likely a factor in the hiring decision. The entire analysis by Professor Carens may later be provided as an attachment if I manage to provide my second submission before the Review Panel makes its decision.

"8-…" **(p.135 in consolidated PDF)** – "**What the IHRP Hiring Scandal Tells Us About Intersectional Privilege in Canadian Legal Institutions", an analysis published by *OpinioJuris.org* several weeks ago soon after the Cromwell Report came out by Vincent Wong,** who is presently a PhD candidate at Osgoode Hall Law School and who, on moral grounds, resigned his paid position with the U of T International Human Rights Law Program – and spoke out, only to be criticized for this by the report. This is a must-read structural analysis of how exculpation and condemnation appear to follow lines of societal privilege quite closely. It is an analysis that also bears reading for its value in urging special attention to the potential influence of in-group predispositions in contexts of institutional judging.

***

I end by observing that my criticisms of the Cromwell report are akin to criticisms of a judgment that does not hold together, as happens even with judgments penned by leading appellate jurists. I write from a position of great respect for former Justice Cromwell – who taught me the Law of Evidence close to 35 years ago and who (I have said far and wide for decades) was the best classroom teacher I had across all my law degrees. However, a report written by a person in their capacity as a lawyer is no different from a judgment written in their former capacity as a judge: if it suffers from serious flaws, those flaws must be pointed out, regardless of who has written it.

The Cromwell report is indeed flawed in salient ways, both in its handling of empirical evidence and in its normative – including legal – reasoning. It has no authoritative relationship to the mandate and task of the Review Panel, but to the extent the Panel is inclined to consider it, it would be, in my respectful opinion, a mistake were the Cromwell report to lead the Panel to determine that a public inquiry committee is not required with respect to the conduct of Justice Spiro.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School;

Graduate Program Director, Research LLM and PhD

April 20, 2021

Josée Gauthier
Registry Officer /
Greffière
Canadian Judicial Council /
Conseil canadien de la magistrature

Dear Ms. Gauthier,

I am returning to your April 6, 2021, response to my query on the status of Complaint CJC File 20-0260.

Despite being a complainant, I have not heard from the Review Panel to invite a submission. Unless such an invitation is planned but has not yet been sent, I am assuming this must mean that CJC procedural rules do not require such an invitation at the Review Panel stage (as contrasted with a public inquiry committee).

If this is so, I am writing to ask whether the Review Panel will exercise a discretion to receive a communication from me as one complainant. Because the names of the Panel members have not been provided and are not on the CJC website, I cannot write to the Panel directly, and thus am writing through you.

I would like an opportunity to make a submission with respect to the findings of former Justice Tom Cromwell in a report produced for the University of Toronto, in which the extent of Justice Spiro's interventions were made clearer. I wish to offer observations as to how those findings relate to the code of judicial ethics to which Justice Spiro is bound. In the course of the submissions, I will attempt to demonstrate that Mr. Cromwell adopted an approach to assessing evidence that falls far short of reliability and normative and inferential reasoning that fails to sustain key conclusions he draws related to the appropriateness and impact of Justice Spiro's conduct.

I say this with much respect to Mr. Cromwell -- who taught me the Law of Evidence – but it would be a serious problem if the Review Panel were to somehow take his reasoning and conclusions as a starting point, an even more serious problem were they to be endorsed by the Panel, and a major mistake were the Cromwell report to cause the Panel not to determine that a public inquiry committee is required. For this reason, I hope that the Panel agrees to hear from me.

I would appreciate an answer as immediately as possible.

Yours sincerely,

Craig Scott, Professor of Law, Osgoode Hall Law School

From: info <info@cjc-ccm.ca>
Sent: April 6, 2021 2:20 PM
To: Craig Martin Scott <cscott@osgoode.yorku.ca>
Subject: RE: CJC File 20-0260

Dear Mr. Scott,

Thank you for writing to the Canadian Judicial Council (Council).

Your complaint was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice Chairperson of the Judicial Conduct Committee of the Canadian Judicial Council. Associate Chief Justice Nielsen has determined that the matter should be referred to a Review Panel.

In accordance with the *Canadian Judicial Council Inquiries and Investigations By-laws 2015* ("By-laws"), the "senior member" of the Judicial Conduct Committee, Chief Justice G.D. Joyal has designated the five members of the Review Panel who will review this matter.

Once the Review Panel has reviewed this matter, Council will advise you accordingly.

I trust this will be of assistance to you.

Yours sincerely,

Josée Gauthier
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Conseil canadien de la magistrature

Tel: 613-288-1566

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Yours sincerely,

Craig

Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law

The Honourable Thomas A. Cromwell C.C.

March 15, 2021

Contents

FOREWORD

I have conducted my independent review of the search process for the directorship of the International Human Rights Program ("**IHRP**" or "**the Program**") at the University of Toronto Faculty of Law. The Review addresses the three main subjects specified in the Terms of Reference attached to your December 7, 2020 statement:

1. A comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy of the search committee's Preferred Candidate;
2. Whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process; and
3. Any pertinent guidance or advice for your consideration relating to any matters arising out of the processes that were involved in this search.

There are three preliminary matters that I bring to your attention before turning to the substance of my Review: privacy concerns, the existence of other processes, and topics that I need not address in detail.

A. PRIVACY CONCERNS

You have indicated your intention to make my Review public, subject to "the privacy of individual candidates."[1] I am also aware that the University's obligations to protect personal privacy may place other constraints on the release of information in this Review. In an effort to avoid the need for redaction and to ease the public release of the Review, I have referred to all individuals and groups by descriptors including, for the sake of consistency, those whose involvement is already in the public domain. I am providing you alone with an appendix that contains a concordance of the names corresponding to the descriptors that I have used (see Appendix "A").

[1] Terms of Reference, December 7, 2020.

B. OTHER PROCESSES

My Review occurs in a complicated and sensitive context as a result of other ongoing processes arising out of the same events. There are complaints pending before the Canadian Judicial Council about the conduct of a federally appointed judge "relating to the judge's alleged interference in the appointment of a Director of the International Human Rights Program at the University of Toronto."[2] The Council of the Canadian Association of University Teachers has passed a motion to censure the University as a result of the Association's understanding of the facts.[3] Within the University, grievances have been filed by the University of Toronto Faculty Association alleging various breaches of the *Memorandum of Agreement between the Faculty Association and the University*, the University's *Statement of Institutional Purpose*, the *Statement on Freedom of Speech* as well as any other relevant policy, procedure, practice, or law.

I have done my best to address fully the points referred to me in the Terms of Reference without commenting unnecessarily on matters that are central to the resolution of these other processes.

C. MATTERS NOT ADDRESSED IN DETAIL

I must refer to two matters in order to clarify the scope of my Review.

First, my Terms of Reference do not ask me to opine on the qualifications of the Preferred Candidate. That individual was the strong, unanimous and enthusiastic first choice of the selection committee[4] 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

[2] "Canadian Judicial Council constitutes a Review Panel in the matter involving the Honourable D.E. Spiro" Canadian Judicial Council Press Release (January 11, 2021), online: https://cjc-ccm.ca/en/news/canadian-judicial-council-constitutes-review-panel-matter-involving-honourable-de-spiro

[3] "CAUT Council passes motion of censure against the University of Toronto", CAUT News Release (November 20,2021), online: https://www.caut.ca/latest/2020/11/caut-council-passes-motion-censure-against-university-toronto

[4] The material that I have refers to this group by various names, including the "hiring committee", the "search committee" and the "hiring panel". I have used the term "selection committee" with the understanding that the final "selection" of the person to be hired was to be made by the Dean.

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. I have therefore not engaged with unsolicited submissions made to me about the Preferred Candidate's suitability for the position. To do so would be outside my Terms of Reference. It would also be inappropriate and presumptuous given the deliberations of the selection committee and the University's position.

Second, I do not need to explore the precise contours of academic freedom in the context of recruitment for this position. Whatever those contours may be, 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. The University's public statements have been that the candidacy was discontinued on the basis that "legal constraints on cross-border hiring meant that a candidate could not meet the Faculty's timing needs" and that "assertions that outside influence affected the outcome of [the] search are untrue and objectionable. University leadership and [the Dean] would never allow outside pressure to be a factor in a hiring decision."[5] Moreover, as I will discuss in detail, having reviewed all of the relevant facts as fully as I can, I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate. The inference that such influence played a role in that decision is the basis of the concern about academic freedom but, as I see it, that inference is not justified.

[5] Dean's letter to faculty September 17, 2020.

PART I: FACTUAL NARRATIVE AND BASIS FOR DECISION OF SEARCH COMMITTEE PROCESS

A. FACTUAL NARRATIVE

1. Introduction to the Program and the Position

The search process for the Director of the IHRP in 2020 began when the advertisement was posted during the last week of April and concluded when the Dean decided in early September to terminate the recruitment of the selection committee's Preferred Candidate. I am not aware of any concerns about how this search unfolded up until the morning of September 4, 2020. However, to provide the "comprehensive factual narrative" as required by my Terms of Reference, I must set out a thorough review of the recruitment process.

(a.) The International Human Rights Program

The IHRP was established in 1987 with summer internships and student volunteer working groups and expanded in 2002 to include what I understand to be Canada's first international human rights clinic.[6] The Program's mission is to advance the field of international human rights law through advocacy, knowledge exchange, experiential learning and capacity-building. It has an expansive understanding of "advocacy", reaching beyond traditional client representation and litigation to include, for example, drafting fact-finding reports and making submissions to international bodies. A "central and unique goal" of the Program is to facilitate experiential learning opportunities by exposing students to the theory and practice of international human rights law emphasizing intellectual rigour and professionalism.[7]

What one person described to me as the "flagship" element of the IHRP is the clinical course that consists of a seminar and clinical projects. The seminar meets once per week for three hours and is structured around skill-building sessions, case-studies, thematic analysis and weekly discussion of projects. The clinical projects involve, for example, students formulating theories and

[6] University of Toronto, Faculty of Law, International Human Rights Program, *Advancing the Field of International Human Rights Law: Strategic Plan 2011 updated 2014,* online: https://ihrp.law.utoronto.ca/utfl_file/count/HOME/IHRP%20Strategic%20Plan%202014%20update.pdf.

[7] Ibid. p 7.

advocacy strategies, conducting legal research, legal drafting, carrying out fact-finding field work and creating public legal education materials.[8]

It was clear from the submissions to me and from my interviews that the IHRP has committed alumni and alumnae who place tremendous value on their personal experience in the Program and who view those experiences as both the highlight of their time in law school and a cause of transformational thinking about their role in the legal profession. They have in the past expressed concern about what they perceive to be inadequate support of the Program by the Faculty of Law and they have raised with me their deep concerns about the Program's future in light of the controversy that led to my Review.

(b.) The Director's Position

The Director, working under the direction of the Assistant Dean, provides clinical, educational and administrative leadership and support to the IHRP.[9] The position is in the "Professional/Managerial" Group at the "PM 4" level and falls within the category of "administrative staff" as defined in the *University of Toronto Act, 1971.* The position has been treated consistently as not falling within the positions addressed by the *Memorandum of Understanding between the Governing Council of the University of Toronto and the University of Toronto Faculty Association*. Selection Committee Member 1 and the Assistant Dean advised me, and I have no reason to doubt, that it was made clear to the Preferred Candidate in the recruiting process that this is neither an academic position nor a pathway to one.

A number of people to whom I spoke questioned whether the Professional/Managerial classification is apt for this position given the importance of the clinical training component and their perceived need to have stronger protections for the person occupying the position. The Director of a human rights program is "in the business" of tackling controversial issues and taking positions that may well be objectionable to some. I received several eloquent explanations about why the Director and the Program need protection from critics who do not like its positions on various issues. I will

[8] "Excellence in Clinical Legal Education", IHRP (undated), online: https://ihrp.law.utoronto.ca/page/overview-0

[9] Job Posting (Job #2001027).

return to this issue in the final section of my review.

Two of the requirements for the Director's position are an LLB or JD degree and a licence to practice law in Ontario with consideration to be given to applicants licensed to practice in other jurisdictions. From the perspective of the University's human resources specialists, the requirement to be a practising lawyer is an essential aspect of maintaining the job classification and relaxing that requirement would risk lowering the job classification to a lower salary level. In previous searches, the University required that candidates be licensed to practice in Ontario but, with considerable effort, the Faculty of Law received permission to modify this requirement to permit consideration of candidates licenced to practice in other jurisdictions.[10]

Although not specified in the job posting, timing was an important aspect of the Director search. The IHRP had not had a permanent Director since the previous Director left for another position in September of 2019. The recruiting process at that time failed when the candidate decided in December 2019 not to accept the position. The IHRP operated under an Interim Director for the 2019 – 2020 academic year, but that individual had committed to another position beginning in the summer of 2020. The hope was to have someone in place for the opening of the fall semester in early September of 2020 but, as the search progressed, it was recognized that this might not be possible.[11]

As I will discuss later, there are different recollections among the members of the selection committee as to the importance of having the Director in place in September. It was clear to everyone, however, that the new Director needed to be physically present in Toronto and ready to teach the clinical course at the beginning of January 2021.

2. The Search Process

(a.) The Process Up to the Selection of the Preferred Candidate

I have not been able to locate any written policy on how the selection committee is to be established, its composition, the procedures to be followed or terms of reference. There is some lack of clarity

[10] Email July 15, 2020 number 68; Email July 16 number 70.

[11] Email July 6 2020 number 39.

about the decision-making process. The HR consultant assigned to the process thought that the Assistant Dean, to whom the Director reports, had the final say. However, the members of the selection committee were of the view that their function was advisory and that the Dean was the ultimate decision-maker to whom they would provide their advice.

As far as I can tell, there was no discussion of the confidentiality of the search process among the selection committee and the HR Consultant did not address it expressly. However, all understood that the search process was to remain confidential. I was told that in other recruitment processes, such as for a dean, members of the search committee must sign confidentiality agreements.

The position was not posted until the third week of April with a closing date of June 17, 2020. The posting was delayed to obtain an exemption from a University-wide hiring freeze and to loosen the requirement that the Director be licenced to practice law in Ontario. The posting was widely distributed, including internationally, and resulted in 146 applications.[12]

The HR Consultant and the Assistant Dean reviewed all applications and produced a "long list" of over 20 candidates that was provided to the selection committee on July 6, 2020. The selection committee members were asked to send their selection of the top 10 candidates with no more than three or four candidates outside Canada who would require work permits.[13] The committee agreed on their "short list" of eight, two of whom would require work permits, on July 9.[14] However, one of the short-listed candidates advised the HR Consultant that he could not begin work until "January/February 2021." Committee members agreed that this was a "problem"[15] or a "major issue"[16] and the person was dropped from the short list.

Interviews started the second week of July 2020. Following the first six interviews on July 14 and 15, the Assistant Dean proposed that the committee broaden the pool. Three additional names were added to the first

[12] Email June 25, 2020 number 28.
[13] Email July 6, 2020 number 39.
[14] Email July 9, 2020 number 49.
[15] Email July 11, 2020 number 51.
[16] Email July 11, 2020 number 52.

round interview list, including the person who became the Preferred Candidate.[17]

Following the first round of interviews, the committee selected three candidates, including the Preferred Candidate, for second interviews that occurred on July 30. Two of the three individuals were international candidates while the third was a Canadian permanent resident working abroad. Each candidate was asked when they would be available to start and advised that the University term was to begin on September 7. The Canadian permanent resident was available at the end of the August; the timing of the others' availability depended on immigration approval.

Following the interviews, the Preferred Candidate was identified and, with the candidate's permission, references were checked. They were glowing.

All members of the selection committee recall that the Preferred Candidate was their unanimous first choice. However, recollections differ on the selection committee's views on the remaining two candidates. Selection committee Members 1 and 2 recall that in addition to the Preferred Candidate, one other candidate of the three finalists was identified as a viable option but that if neither of those two were available, there would be a failed search. The Assistant Dean recalls that the committee identified two candidates from the second round as the leaders but does not recall any consensus that if neither were available there would be a failed search.

On August 4, the Assistant Dean advised the HR Consultant she "would like to move forward to make an offer to the [Preferred Candidate] asap when [the Assistant Dean] return[ed] [from vacation] next week".[18] On August 9, the selection committee members exchanged emails on the status of the process. The Assistant Dean advised that she had a meeting scheduled with the HR Consultant on August 10 "to discuss our offer" to the Preferred Candidate[19] and scheduled a Zoom meeting with the Preferred Candidate for August 11 "to discuss the IHRP Director position."[20]

[17] Email July 15, 2020 number 65.
[18] Email August 4, 2020 number 100.
[19] Email August 9, 2020 number 102.
[20] Email August 10, 2020 number 103.

(b.)Negotiation with the Preferred Candidate August 11 – September 2, 2020

On August 11, the Assistant Dean had a meeting with the Preferred Candidate after which she reported to the HR Consultant that she had "just finished a very nice call with [the Preferred Candidate]. She seems very receptive to receiving an offer, but we agreed that the immigration/work permit issue is a very important part of the conversation."[21] Later that same day the Assistant Dean was in touch with the HR Consultant again looking for some "basic immigration policy information that would apply in this situation."[22] She noted that the Preferred Candidate "understands that we need her to be able to start the position no later than Sept 30" but that she was not required "to be in Toronto until the first week back in Jan 2021."[23]

The Preferred Candidate's recollection of the August 11 meeting was provided in a written chronology that she prepared. We discussed her recollection of the meeting during my interview with her. The chronology reads that she received an offer of employment during this meeting on August 11. In my interview with her, she indicated that she was told that the Faculty wanted her to be the Director if the terms could be worked out and that the big "if" was immigration and whether it could happen on time.

There has been a good deal said in the public domain about the University withdrawing an accepted offer. As I see it, no offer and acceptance in the strictly legal sense of those words were ever exchanged. It was clear on August 11 that the immigration issues needed to be resolved before there could be any formal offer and, as we shall see, the subsequent communications show that negotiations about the terms of employment continued into early September. However, it was also clear that the University wanted to hire the Preferred Candidate and that she wanted the position. As far as I can tell, this is a situation in which advanced negotiations were abruptly halted, not a situation in which an accepted offer was rescinded.

On August 12, the HR Consultant contacted the Assistant Dean, noting that the in-house immigration specialists at

[21] Email August 11, 2020 number 106.
[22] Email August 11, 2020 number 106
[23] Email August 11, 2020 number 108.

the University had raised some questions about why a foreign national was being selected rather than a Canadian. She noted that the Preferred Candidate would be "ineligible to work from outside of the country until she obtains a valid work permit."[24]

On August 14, the Assistant Dean emailed the HR Consultant hoping to discuss the immigration information for the Preferred Candidate and noting that she "had another call with her on Monday [i.e. August 17] at 11 am during which I am hoping we will come to a decision about whether she wants the position and [if] the timing will work."[25]

Also on August 14, the Assistant Dean was in touch with an immigration lawyer whom the University retained to seek advice regarding the Preferred Candidate's immigration situation. The Assistant Dean advised the immigration lawyer that they had "… a new candidate to whom we would like to make an offer" noting, however, that she wished to first obtain advice in relation to obtaining a work permit.[26] In that email, the Assistant Dean told the immigration lawyer that "[w]e need the candidate to start the position no later than September 30, 2020, although we don't need her to move back to Toronto until the start of January."[27]

I note that this is the second of several occasions (before any controversy had arisen) that the Assistant Dean stated in writing that the Preferred Candidate would have to start in September or at least before the end of the two to three month period that it would likely take to get a work permit.

The Assistant Dean met with the immigration lawyer (via Zoom) on August 19 and 21 and arranged for the Preferred Candidate to meet with the immigration lawyer directly on August 24th.

A call had been scheduled with the Preferred Candidate for Monday, August 17 to discuss her "questions and thoughts".[28] However, because the Assistant Dean was waiting for additional information regarding the immigration process, she proposed that the meeting be postponed. The Preferred Candidate

[24] Email August 12, 2020 number 108. I am not sure that this statement is completely correct, but it was the advice received by the Assistant Dean.
[25] Email August 14, 2020 number 114.
[26] Email August 14, 2020 number 130.
[27] Email August 14, 2020 number 130.
[28] Email August 12, 2020 number 113.

agreed, noting that she had "spent much of the weekend thinking about your very exciting offer and discussing it with colleagues (including my referees)" and that she was "very enthusiastic about being able to accept [the] offer" but that she did "have a couple of questions […] first". [29]

Around the same time, the outgoing acting Director of the IHRP inquired about the status of the hiring process for transition purposes. She was advised by the Assistant Dean that the Preferred Candidate had been informed that the outgoing acting Director would like to meet her before August 21, and that the Assistant Dean would be in touch when they were further into the contract offer discussions.[30]

On August 17th, the Assistant Dean had her regular bi-weekly meeting with the Dean. Her memory of the meeting, which is consistent with the Dean's less detailed recollection, is that she told the Dean that: the selection committee had unanimously selected a Preferred Candidate; the Preferred Candidate had impressive legal clinic administrative experience, lived in Europe, had a PhD, and had worked as an instructor at European law schools; and 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.

The Dean expressed concern that the candidate's background as an academic may not be a good fit for the administrative IHRP Director role, and asked whether there was a risk that she was interested in the role because she hoped that it would turn into an academic one. The Assistant Dean responded that the search committee had made it very clear to the Preferred Candidate that the role was administrative and not a pathway to an academic appointment.

She and the Dean agreed to speak again when she had more information about the timing of the work permit. Neither the Dean nor the Assistant Dean recall any discussion during this meeting about the details of the potential immigration routes that were being explored.

Email exchanges between the Assistant Dean and the HR Consultant around the

[29] Email August 12, 2020 number 121.

[30] Email August 12, 2020 number 109.

same time provide some insight as to why the Assistant Dean felt it was realistic to have an international hire in the position with a work permit by September. The previous failed IHRP search had selected a U.S citizen who had the benefit of favourable immigration rules that exist with the United States. Leading up to the Assistant Dean's meeting with the immigration lawyer, the HR Consultant wrote to the Assistant Dean asking "can you please confirm who it was that advised you that a Labour Market Assessment would not be required for this role? I recall we had this discussion earlier this year but immigration [referring to internal immigration resources] is now advising that this may be a problem." The Assistant Dean indicated in response that she had received that advice from the University Retained Immigration Lawyer (presumably during the last search). On the morning of August 17, 2020 the Assistant Dean indicated to the HR Consultant that "I think one of the main issues here is that last time we were governed by NAFTA provisions, which are very favourable. This time, no."[31]

The initial email to the University Retained Immigration lawyer contained basic information about the Preferred Candidate including the position for which she was being hired, her citizenship, her current country of residence (Germany) and that she was married to a Canadian citizen. The email referred to her plan to make a permanent move back to Canada, the family connections in Canada and the University's timing requirements which was for the candidate to start no later than September 30 (although she would not have to be in Toronto until the start of January). The immigration lawyer agreed to meet with the Assistant Dean on August 19th and asked for a copy of the Preferred Candidate's CV. He pointed out in the email that the IHRP candidate from the prior search was an American and they had been considering a work permit as a "NAFTA Professional." He indicated that this would not be a consideration for the current Preferred Candidate.[32]

On August 19th, the Assistant Dean met with the immigration lawyer who advised that it was reasonable to expect that the

[31] Emails August 14 to August 17, 2020 number 129.

[32] Emails August 17, 2020 number 130.

Preferred Candidate could have a work permit in two to three months after applying. The Assistant Dean recalls being dismayed that it would take that long and the immigration lawyer mentioned the possibility that the Preferred Candidate might be able to begin working as an independent contractor to "bridge the gap" between September and December.[33] He suggested that the University could "check that out", but of course his advice was limited to immigration matters and did not extend to employment law.[34]

In my conversation with the immigration lawyer, he recalled that the University had apparently been under the impression that a non-Canadian could not be employed by a Canadian employer without a work permit while living outside of the country. That understanding is consistent with the email from the HR Consultant to the Assistant Dean on August 12 which I referred to earlier.[35] The immigration lawyer told me that, from an immigration law perspective, this is not correct: there is no immigration issue about a non-Canadian working for a Canadian employer provided that the non-Canadian is not working in Canada. There are, however, other difficulties from an employment law perspective in having an employee working outside Canada who is not eligible to work in Canada. My understanding is that those difficulties make such employment impractical for the University and that it is something that it would not do. These employment law issues were not matters on which the immigration lawyer gave advice.

With respect to the work permit for the Preferred Candidate, the immigration lawyer suggested two paths forward, each of which could make possible the hiring of a non-Canadian citizen or permanent resident.

One of the pathways involved a Labour Market Impact Assessment ("**LMIA**") which required the University to advertise the position for 30 days and demonstrate that no Canadian or Permanent Resident suitable for the position had applied. The concern about this route was the timing

[33] Chronology Item 132.
[34] Interview with Immigration Lawyer February 8, 2021.
[35] Email August 8, 2020 number 108.

of the advertising for the position, as I will discuss below.

The other pathway was a "substantial benefit" application with the objective of establishing that hiring the Preferred Candidate would bring a substantial benefit to Canada. For that route, it was not necessary to show that there was no suitable Canadian applicant.

I should add a word about the immigration implications of the fact that the Preferred Candidate's spouse is a Canadian citizen. In some of the public discussion of this controversy, it has been suggested that this fact provided a more rapid path to a work permit. The information that I have received from the immigration lawyer is that this is not the case. While marriage to a Canadian eases the path to entry to Canada and to permanent residency and may positively affect the outcome of an LMIA application (because the non-Canadian is expected to become a Canadian), it has no impact on the time that it will likely take to obtain a work permit. Based on what I have been told by immigration counsel, speculation that the work permit could have been obtained more quickly because the Preferred Candidate is the foreign spouse of a Canadian is erroneous.

After receiving the advice from the immigration lawyer, the Assistant Dean was in touch with the HR Consultant to advise (on August 19) that she now had "a clear sense of what needs to happen."[36]

The Assistant Dean and the Preferred Candidate met on August 19 and 21. Their recollections of the conversations differ in some respects. Before I set out their recollections, I will place those conversations in the context of what else was happening at around the same time.

The Assistant Dean contacted University Employment Lawyer 1 and requested a meeting to discuss the "specific details and explore what might be possible."[37] She advised that "after a very extensive search, we discovered that the strongest candidates are not Canadian citizens" and that "[w]e need [the Preferred Candidate] to start working before she will be realistically able to obtain a Canadian work permit. She will be working remotely … until December

[36] Email August 19, 2020 number 132.

[37] Email August 20, 2020 number 135.

when she will relocate to Toronto …". In a subsequent email, the Assistant Dean indicated that the timing for hiring this individual was "as soon as possible".[38] University Employment Lawyer 1 advised that he and his colleague (University Employment Lawyer 2) had "consulted with external counsel on these types of issues at some length recently."[39] A meeting with University Employment Lawyer 2 was scheduled for August 21. I note that here again the Assistant Dean indicated in writing before any controversy arose that the Preferred Candidate needed to start work before the time frame within which she could likely obtain a work permit.

The Assistant Dean updated the other members of the selection committee by email on August 20. She wrote: "Just letting you know that I am continuing to push this forward. I have spoken with [the Preferred Candidate] 3x since we decided to go with her. She seems to get more excited each time I speak to her. I spoke to an immigration lawyer yesterday and I will be speaking to the UT employment lawyers tomorrow. In a nutshell, we are hoping to work out a way for [her] to start work for us before she has a Cdn [sic] work permit in hand. The immigration lawyer is estimating that she could have one in 2 – 3 months. <u>We need to bridge the time between now and then</u>. [The Preferred Candidate] is willing to start working remotely immediately. She plans to move to Canada by December"[40](emphasis added).

In response to this email, Selection Committee Member 1 said "wonderful" and Selection Committee Member 2 said "[o]ptimistic that we can find some work arounds to bridge the time gap."[41] I note that the Assistant Dean referred, in writing and before any controversy had arisen, to the "need" to bridge the time gap between "now" and two to three months from now when the Preferred Candidate was likely to have a permit to work in Canada.

The Assistant Dean met with University Employment Lawyer 2 (and others) on August 21. The lawyer's notes of the meeting indicate that the immigration lawyer's advice was that the Preferred Candidate would not have a work permit in hand "any sooner than 3 months from

[38] Email August 20, 2020 number 135.
[39] Email August 20, 2020 number 134.
[40] Email August 20, 2020 number 136.
[41] Email August 20, 2020 number 137.

now" and that it was indicated (presumably by the Assistant Dean) that "we cannot wait that long." The Preferred Candidate could start remotely immediately but that she understands that she has to be in Toronto not later than the end of the calendar year because she is required to teach in person in January. The plan agreed to at this meeting was that they would: explore an independent contractor route, find out if the Preferred Candidate was interested in that option, work with HR on an offer, and then the Assistant Dean and HR would prepare an independent contractor agreement to be reviewed by German counsel (since the Preferred Candidate was a resident of Germany). The concept was to provide an offer of employment that would be revocable if she was not able to get to Toronto by December 31 and an independent contractor agreement that could be terminated on 2 weeks' notice.

As University Employment Lawyer 2 explained to me, the University had recently received general external advice about options for a Canadian employer to legally employ someone who would need to work in a foreign jurisdiction. She explained that the employment of an employee working in a foreign jurisdiction would be governed by the laws of that jurisdiction including tax, payroll and workplace laws. Accordingly, the options for a legal entity such as the University that does not have a business presence in the foreign country would be to register a business in that country in compliance with applicable local laws, or contract with a registered business or professional employer organization in that country that could hire the employee on their payroll in compliance with applicable local laws and arrange a secondment to the Canadian employer. She advised that these are not practical options for the University.

University Employment Lawyer 2 told me about circumstances in which the University had entered into independent contractor arrangements with a small number of foreign nationals who had been offered and accepted faculty positions. These were generally people who were eligible to receive Canadian work permits upon arrival in Canada but who could not come to Canada as a result of COVID-19 related travel restrictions. In those cases, until they were able to come to Canada to work as faculty members, they contracted to

provide limited services such as independent research, which is part of the duties of faculty members but is not subject to the direction or control of the University. These arrangements were viewed as having an acceptably low legal risk to the University. In a few cases, the duties also included some remote teaching. As I understand it, these were considered to carry somewhat more legal risk and it was up to the relevant academic administrator in consultation with counsel to decide whether to accept the risk in each particular case. University Employment Lawyer 2 said that she was consulted on the general structure of these arrangements and advised on template engagement letters.

On the same day, August 21, the Assistant Dean wrote to the Preferred Candidate indicating that she "had great meetings with employment and immigration lawyers and am keen to update you."[42] The Assistant Dean also emailed the immigration lawyer to provide him with an update and request his availability in order to put him in contact with the Preferred Candidate. She advised that "it looks like we can proceed with hiring our candidate as an independent contractor effective immediately and simply roll her into a permanent position as soon as she receives her Canadian work permit." She added "… this scenario will work for the law school only if she receives her permit before Dec 31 2020 (she is required to be onsite to teach a course starting Jan 4 2020)."[43] She indicated that she had spoken with the Preferred Candidate that day and that "we both agreed that getting greater certainty about the immigration/work permit timeframe will be necessary before we can determine whether our strategy is realistic."[44] She proposed that the immigration lawyer speak directly to the Preferred Candidate and he scheduled that meeting for August 24 (discussed below).

In his email to the Assistant Dean confirming that he would meet with the Preferred Candidate directly, the immigration lawyer provided some high level information about the LMIA and the significant benefit routes. In response to this, the Assistant Dean replied, in part "As we discussed, our strong preference

[42] Email August 21, 2020 number 142.
[43] Email August 21, 2020 number 144.
[44] Email August 21, 2020 number 144.

would be to not go down the LMIA route."[45]

The Assistant Dean also wrote to update the other members of the selection committee, indicating that she "was continuing to have positive discussions with [the Preferred Candidate] and others. [That she] [s]poke to the UT employment lawyers today and they confirmed that we can hire [the Preferred Candidate] as an independent contractor and roll her into the permanent position when she has her permit in hand. The [Preferred Candidate] is happy with this. The next step is to connect her with the employment [sic – I believe that this should read "immigration"] lawyer directly to make sure the 3 month timeframe that he gave me is in fact realistic in her circumstances."[46]

The Assistant Dean and the Preferred Candidate met on August 19 and 21. Their recollections of these discussions, particularly in relation to what the Assistant Dean viewed as the critical nature of the September start date, do not coincide.

The Assistant Dean's recollection of the meetings with the Preferred Candidate on August 19 and 21 is that she (i.e. the Assistant Dean: (i) reiterated the vital importance of a September start date and that the Preferred Candidate could not have the job if she could not start in September 2020; (ii) relayed the advice from the immigration lawyer that it would take approximately two to three months to get a work permit; (iiI) advised that it may be possible to use an independent contractor agreement to bridge the gap between September and December (when she was likely to receive a work permit); and (iv) offered to connect the Preferred Candidate directly with the immigration lawyer to receive advice about obtaining a work permit and making an application for Permanent Residency.

As the Assistant Dean recalls it, the Preferred Candidate advised that she continued to be interested in the position; she was prepared to work with the Assistant Dean to investigate whether she could meet the timing deadline; and that she would consider entering into an independent contractor agreement to

[45] Email August 21, 2020 number 153.

[46] Email August 21, 2020 number 146.

bridge the time between September and December, when she would likely obtain a work permit.

The Assistant Dean noted in her written chronology of events that, in her view, the other two members of the selection committee were "very clear" that it was critical that the new Director be in place in September, that it was a "clear requirement and firm understanding" that she needed to start in September.[47] However, in my interview with the Assistant Dean, she 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."

The Preferred Candidate's recollection is that on August 19, she accepted the offer made to her on August 11. She recalls being told in these meetings with the Assistant Dean that it would take approximately three months to obtain her Canadian work permit. In the interim, the University proposed to hire her as a foreign consultant, starting immediately, so that she could prepare for her role as Director. She would then obtain her work permit on arrival in Canada before her work on campus was set to begin at the beginning of January 2021. The Assistant Dean advised her that this arrangement had received the necessary approvals from the University's in-house lawyers and Human Resources department. The Preferred Candidate understood that the University viewed it as important to get someone into the job fast and the idea of working remotely as a consultant (i.e. an independent contractor) originated with the University.

The Preferred Candidate told me that she indicated to the Assistant Dean that she was willing to do the required course preparation for her teaching in January without getting paid before January as she had experienced preparing to teach with no extra remuneration in the past. She was aware that there were activities that the University wanted to have happen in the fall and they needed someone to be in the job in the fall. However, she also understood that the

[47] Interview with Assistant Dean, February 12, 2021.

University had selected an international candidate, knowing the immigration requirements that would be involved. She did not understand that an arrangement to begin work remotely no later than the end of September was a condition of proceeding with the recruitment.

The other members of the selection committee do not seem to have appreciated what, to the Assistant Dean, was the critical nature of the September start date. Selection Committee Member 2 told me that it was not a "major issue" if the new Director could not start in September, although the Member had noted in earlier email correspondence that the fact that the earliest another candidate could start was "January/February 2021" had been a "major issue" at that time.[48] Selection Committee Member 1 told me that there was no moment at which it was said that the recruitment could not proceed because the person could not begin in September.[49] When I asked about the perception that it was "indeed a problem" that another candidate could not start until "January/February 2021," Selection Committee Member 1 explained that that timing meant that the person would not be able to teach the clinical course starting in January and that they were optimistic at the early point in the process when this exchange occurred about finding someone who could start sooner.[50]

I cannot assess whose recollections are more accurate. However, it is clear that the Dean's source of information about this recruitment process was the Assistant Dean and that it was clear in her mind (and consistent with what she had stated in writing before any controversy arose) that it was critically important to get the candidate started working before the end of the two to three month time period that it would likely take to get a work permit.

The immigration lawyer and the Preferred Candidate spoke on August 24. In the meantime, the Assistant Dean wrote to the HR Consultant saying that "it would be great to get a draft employment contract to [the Preferred Candidate] for her review. This would include the top hiring range salary plus language about it

[48] Email July 11, 2020 number 52.
[49] Interview Selection Committee Member 1 February 10, 2021.
[50] Interview Selection Committee Member 1 February 10, 2021.

being conditional on her being able to work in Canada."[51]

The HR Consultant requested more details in order to prepare the draft, namely whether they had received confirmation from the immigration lawyer that three months would be sufficient time for the Preferred Candidate to obtain her work permit, and whether the document would be provided as a draft offer for the time being.[52] The Assistant Dean advised that she would work on the independent contractor agreement, that the permanent employment contract would commence on January 4, 2021 and that they should prepare a draft offer for the Preferred Candidate's consideration "to give her something to base a discussion on." The HR Consultant suggested that both the employment and the independent contractor agreements be provided to the Preferred Candidate at the same time.[53]

Later that day, the Assistant Dean sent the HR Consultant a copy of the draft independent contractor agreement that the Assistant Dean had prepared, clarifying that it would have to first be sent to an international law firm to ensure compliance with German law.[54] The HR Consultant recommended some changes to the draft to better reflect an independent contractor relationship, rather than an employment relationship.[55]

On the same day (August 24), the Preferred Candidate provided an email update and summary of her conversation with the immigration lawyer. In my interview with the immigration lawyer, he confirmed that her email was a fair summary of their conversation.

The plan was to submit two different applications simultaneously and as soon as possible in order to obtain a work permit by December. The first would be via the LMIA process based on a market assessment and inability to find a suitable Canadian candidate and the second on the basis that the Preferred Candidate's employment would make a substantial contribution to Canada. To the extent that the latter option worked, the former could be abandoned. The Preferred Candidate also expressed support for starting the process for the

[51] Email August 24, 2020 number 160.
[52] Email August 24, 2020 number 166.
[53] Email August 24, 2020 number 166.
[54] Email August 24, 2020 number 168.
[55] Email August 24, 2020 number 169.

application for permanent residency. However, she noted some complexities and likely COVID-related delays in relation to collecting the necessary information and asked whether the University would be willing to contribute to the costs of her lawyer related to this permanent residency application.

The Preferred Candidate concluded that she was "a bit fuzzy on our/my next step(s) aside from those that [the immigration lawyer] will be taking with the university (contingent on [the Assistant Dean's] approval?)."[56] The Assistant Dean indicated that she would be in touch with the immigration lawyer and the Preferred Candidate regarding concrete next steps.[57]

The draft independent contractor agreement was subsequently shared with the German employment lawyers on August 27.[58] It was not shared with the University employment lawyers before being sent to the German lawyers.

On September 1, the Assistant Dean requested the HR Consultant to provide a summary of the offer that they intended to make to the Preferred Candidate "in case it makes sense to send [it] to [her] this week."[59] This timing corresponds with the Preferred Candidate's recollection that she expected to receive a written offer the week of September 7.[60] The Assistant Dean also spoke to the Preferred Candidate on September 1. During this discussion, the Preferred Candidate raised the possibility of her working from Europe for the summer. In an email the next day (September 2), the Assistant Dean summarized the call for the HR Consultant and provided her views about the path forward. She wrote, in part:[61]

> 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 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 feeing much more comfortable with moving ahead with her candidacy…

[56] Email August 24, 2020 number 170.
[57] Email August 25, 2020 number 171.
[58] Email August 27, 2020 number 186.
[59] Email September 1, 2020 number 194.
[60] Interview with Preferred Candidate February 9, 2021.
[61] Email September 2, 2020 number 200.

> 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.
>
> Here are the next steps:
>
> - I connect with the international law firm to get the independent contractor agreement back and send to [the Preferred Candidate]
> - [The HR Consultant] sends me the point form summary of employment contract terms; I send to [the Preferred Candidate]
> - Work with [the immigration lawyer] to initiate work permit routes; [The HR Consultant] and I to discuss how to manage the job posting issue. Ideally, she will be able to start work as soon as we sort out the independent contractor agreement (ideally September 14th).

The "job posting issue" referred to in this email relates to the LMIA route to a work permit. There was some lack of clarity about whether the advertising for the position was timely for the purposes of the LMIA application. If it was not, then the position would have to be reposted for 30 days before the LMIA application could be submitted. It was as a result of this concern that the immigration lawyer had advised proceeding on both the LMIA and the substantial benefit tracks. If the advertising turned out to have been timely, the substantial benefit track (which was viewed as the less likely to succeed of the two) could be abandoned. If, on the other hand, the advertising was timely for the LMIA route, then it might well succeed and the substantial benefit track could be abandoned.

After the meeting with the Preferred Candidate on September 1, the Assistant Dean advised the immigration lawyer that they would be moving forward with the two proposed paths for obtaining a work permit for the Preferred Candidate and that she would get started on the significant benefit letter.[62]

The Assistant Dean also spoke with Selection Committee Member 1 on September 1. Selection Committee Member 1's recollection of the discussion was that it centred on the Preferred Candidates request to be away for two

[62] Email September 1, 2020, number197.

months in the summer to return to Europe. Selection Committee Member 1 was not concerned by the request as long as the work of the IHRP was getting done. The Assistant Dean recalls that she also provided an update on work permit and timing issues.

(c.) September 3 and the morning of September 4

A number of immigration and employment law developments occurred on September 3 and 4 and the inquiry from the alumnus occurred on September 4. That date was the Friday before the Labour Day long-weekend and a few days before the opening of the Law Faculty fall term in the midst of the COVID-19 pandemic.

On September 3, the Assistant Dean emailed the Preferred Candidate thanking her for their meeting earlier in the week and writing: "[a]s we discussed, I am taking several steps at this end to move things forward including: following up with the international law firm about the independent contractor agreement, drafting a summary of the terms of what would be included in a subsequent employment contract, and working with [the University-retained immigration lawyer] to start the special contribution and LMIA processes to obtain your work permit. I have been in touch on all of these fronts and am waiting to hear back. I hope to be in touch to update you very soon."

As of September 3, the intent was to proceed with the LMIA process that involved the University convincing the authorities that there was no qualified Canadian available for the position. This was noted in the Preferred Candidate's summary of her conversation with the immigration lawyer on August 24 and which was provided to the Assistant Dean that day.

On September 3 at 12:22 pm the German employment lawyers sent the Assistant Dean a marked up copy of the draft independent contractor agreement. The Assistant Dean advised me during her interview that she did not read the document or the covering email until the next day when there was a call with German employment lawyers sometime in the morning after 10 am.[63]

[63] Email September 3, 2020 number 202.

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.[64]

In the annotations to the draft agreement, the German employment lawyers commented that if the Preferred Candidate were found to be an employee rather than an independent contractor under German law, "[t]his can have rather severe consequences, first and foremost the employer's duty to pay social security contributions and the risk of criminal charges if this is omitted."[65]

At 1:11 pm on September 3 the Assistant Dean forwarded the email received from the German employment lawyers to University Employment Lawyer #2. The Assistant Dean noted, in part, that she had "received the attached comments back" and invited University Employment Lawyer #2 to join a meeting the next day at 10 am.[66]

On September 4, the Assistant Dean emailed University Employment Lawyer #2 again on this issue at just after 6 am asking for a meeting to discuss the matter the week of September 8.[67] University Employment Lawyer #2 was on vacation and not available for a meeting until the next week as indicated by her out of office automatic email reply.

As of the morning of September 4, the University's employment lawyers had not provided comments on the proposed draft independent contractor agreement which, in accordance with their usual practice, had been referred out to the local (in this case German) employment lawyers.

Around the same time (September 4 around 6 am), the Assistant Dean emailed the HR consultant asking for an update on the status of the IHRP Director employment contract language and indicated that she would "like to send this to [the Preferred Candidate] asap." She noted that she had the independent

[64] Email September 3, 2020 number 202.
[65] Annotated draft independent contractor agreement number 203.
[66] Email September 3, 2020 number 203.
[67] Email September 4, 2020 number 205.

contractor agreement and referred to a future meeting to discuss it with University Employment Lawyer 2.[68]

She then sent a follow up email to the University retained immigration lawyer advising that: they would be moving forward to provide the Preferred Candidate with an independent contractor agreement "next week", that they would like to get started on the work permit routes, and asking how he would like to proceed.[69] A meeting to discuss the matter was subsequently confirmed for Tuesday, September 8.[70]

Later on the morning of September 4, just before 9 am, the immigration lawyer advised the Assistant Dean that in order to pursue the LMIA route for the Preferred Candidate, it would be necessary to re-advertise the position for a 30 day period. They were not able to pursue the LMIA academic stream (which would have avoided re-publication) because it would require the position to be a predominantly academic one with only corollary administrative and managerial duties. The immigration lawyer recommended that the University "move ahead immediately with respect to an application for an LMIA-exempt work permit based on 'significant benefit' while preparing for another round of advertising for the position. [His] hope [was] that we will get an approval on the "significant benefit" application before the ads for an LMIA application need to be placed in the media."[71]

This was the first time the Assistant Dean had been told that republication – something she hoped to avoid – would definitely be required in order to pursue the LMIA route. The Assistant Dean responded at 9:09 am that this "sounds like a great plan" and the she would "get started on the significant benefit letter."[72]

The Assistant Dean then, in an email sent at 9:13 am, enlisted the assistance of Selection Committee Member 1 in drafting that letter. The latter prefaced her suggestions for language for the letter with this: "Thanks so much for all of your hard work, patience and [d]iplomacy in managing all of this."[73] This email was received by the Assistant Dean at 10:48 am.

[68] Email September 4, 2020 number 204.
[69] Email September 4, 2020 number 206.
[70] Email September 4, 2020 number 213.
[71] Email September 4, 2020 number 208.
[72] Email September 4, 2020 number 209.
[73] Email September 4, 2020 number 215.

Notwithstanding the Assistant Dean's email instructions to the immigration lawyer to pursue both immigration routes, she explained to me that in her mind the LMIA route was not a viable option because of the requirement to repost the position for 30 days and because in her mind there were qualified Canadians. Her focus was on the significant benefit route. She advised me that, in her view, if that did not work, the Faculty would have had to decline to offer the position to the Preferred Candidate and repost. So far as I can tell, this belief was not communicated to the Preferred Candidate, the immigration lawyer or the other members of the selection committee.

The Assistant Dean advised me that she had scheduled a further meeting with the immigration lawyer on September 8 to "dig into the details" of the immigration issues. She felt that once they had a further discussion, it would have been clear that only the special benefit route would have been a viable option.

The Assistant Dean spoke to the German employment lawyers around 10:30 am on September 4. (University Employment Lawyer #2 did not attend the meeting). According to the Assistant Dean, the German lawyers reiterated the advice provided by email the previous day (but which the Assistant Dean told me she had not read until that morning) that the independent contractor agreement was "illegal" under German law and likely under Canadian law as well. There was some discussion of the risk of detection which was considered to be low.

Around the same time, at 10:19 am, the Assistant Dean received an email from the HR Consultant attaching a document containing high level details that would be incorporated into a future employment agreement. The details included only the anticipated start date in Canada (January 2), salary, links to University benefits, pension and policy information and that a performance/merit review would be conducted annually.[74]

(d.) The inquiry by the alumnus on September 4

An inquiry by an Alumnus was made on September 4 of the Assistant Vice President ("**AVP**"). The inquiry was made around the same time that the Assistant

[74] Email September 4, 2020 number 214 and attachment 214.1.

Dean was engaging in the various emails and discussions referred to earlier although she would not learn of the inquiry until later in the day, as noted below. I obtained the recollection of both parties to the original conversation by means of an interview with the AVP and, at my suggestion, a written account from the Alumnus through counsel.

The telephone conversation between the AVP and the Alumnus was a pre-scheduled stewardship call initiated by the AVP. The Alumnus had, before appointment to the bench, worked with the AVP in her previous role with the Faculty of Law on a successful fundraising campaign. The call was scheduled for 10:00 am on September 4 by an email exchange that began on August 30 with the AVP inviting the Alumnus to have a call to catch up. The AVP described the call as a normal "reach out" to donors. The AVP entered (on September 6) a summary of the call into her Major Gifts plan for the Alumnus. It reflects a wide-ranging conversation of roughly an hour's duration about various aspects of the University. Her summary contains no mention of the directorship of the IHRP.

According to the AVP, towards the end of the call the Alumnus raised the matter that led to the controversy that occasioned my Review. The conversation was brief. But first, some background.

The Alumnus advised me that prior to the call, on September 3, he learned of the potential appointment of the Preferred Candidate as Director of the IHRP. This information was relayed to him by a staff member of an Organization of which the Alumnus had been a director until his appointment to the bench. The staff member asked if the Alumnus could contact the Dean about the potential appointment. The Alumnus declined to approach the Dean being of the view that it would be inappropriate for him to do so. The staff member also asked whether the Alumnus could find out whether the appointment had been made or was still under consideration and provided him with a memorandum that a professor from a university outside Canada had sent to the Organization.

The professor stated in his email attaching the memorandum that he had learned of the potential appointment from a faculty member, who is not identified by

name or institution. The Organization staff member told the Alumnus that the potential appointment had come to light as a result of a posting seeking housing for the Preferred Candidate in Toronto. (The Preferred Candidate told me that this is unlikely and I cannot otherwise verify this information.) The Alumnus, through counsel, has provided me with the email chain and the attached document.

The professor's email and memorandum are well-summed up in the email's subject line: "U of T pending appointment of major anti-Israel activist to important law school position." The email states that "[f]rom the faculty member who found out about this and informed me, it appears that the internal appointment process in the law school has been completed." It adds, "[i]f someone could quietly find out the current status, and confirm [the Preferred Candidate's] pending appointment, that would be very helpful. The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund-raising."[75]

As was previously mentioned, towards the end of the conversation on the stewardship call with the AVP, the Alumnus raised the appointment of a new IHRP Director. Their respective recollections of the conversation are consistent on the essential points.[76]

The Alumnus asked the AVP whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered that 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.

It is unclear to me exactly what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred

[75] Email September 2, 2020.

[76] The account is based on my interview with the AVP on February 3, 2020 a detailed account provided by counsel for the alumnus and copies of email and documents provided by both.

to the Preferred Candidate's published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern.

So far as I can determine, the AVP in fact did not communicate directly with the Dean about this conversation, although a later email implies that she did. Rather, she communicated with the Assistant Dean Alumni and Development in the Faculty of Law.

The Assistant Dean Alumni and Development received a call (which based on the email exchanges must have been about noon) on September 4 from the AVP. The latter mentioned the name of the Preferred Candidate and the name of the Alumnus. The AVP recalled flagging the importance of due diligence on the IHRP file. The Assistant Dean Alumni and Development recalls that the AVP told her that the message had been relayed that the Jewish community would not be pleased by the Preferred Candidate's appointment and that she wanted to have more information about the search.

The first that anyone involved in the search heard about the inquiry from the Alumnus was shortly afterwards and, again based on the emails, likely between 12:00 pm and 12:30 pm.

The Assistant Dean received a call from the Law Faculty's Assistant Dean Alumni and Development who indicated that she had received an inquiry from her boss, the AVP, about the IHRP Director recruitment. The Assistant Dean Alumni and Development advised the Assistant Dean that an alumnus, a federally appointed judge, had inquired about the search process, naming the Preferred Candidate and indicating that there was concern in the Jewish community about her potential appointment. The Assistant Dean confirmed that the named person was the Preferred Candidate, that no decision had yet been made and expressed concern that the candidate's name was apparently known outside the circle of people involved in the recruiting process.

The Assistant Dean asked the Assistant Dean Alumni and Development to brief the Dean which she did by telephone

after emailing him at 12:29 pm requesting a call.[77]

The information about the state of the search was relayed to the AVP and in turn to the alumnus as noted below.

The Assistant Dean Alumni and Development's recollection of the call with the Dean is that she told the Dean that the Alumnus had passed on concern about hiring the Preferred Candidate. The Dean expressed concern about the fact that the name of the candidate was known and indicated that he should "get up to speed" on the search.[78] The Dean recalls that this is the first time he had heard the Preferred Candidate's name and that he understood from the conversation that the Alumnus had indicated that the appointment would be controversial in the Jewish community.[79] He had no personal knowledge at that time about the Preferred Candidate or why her appointment would be controversial. He gave instructions that he would have no engagement with Advancement on the matter and the Assistant Dean Alumni and Development was to advise the AVP that there would be no further follow up on the matter.

In the meantime, the Assistant Dean had a telephone conversation with Selection Committee Member 1 sometime shortly after 12:30. Their respective recollections of the conversation are largely consistent. The Assistant Dean relayed both the Alumnus' name and that he had expressed concern about the appointment because of the Preferred Candidate's Israel/Palestine work.[80] The Assistant Dean was unsure how to interpret this information and in particular did not understand how the Alumnus knew about the search or the candidate or why the candidacy was controversial.[81]

Selection Committee Member 1 followed up with an email (at 3:02 pm) setting out what she suspected was going on and noting the possibility of a link among the Alumnus, the Organization and another entity on the website of which she had found material relating to the Preferred Candidate's scholarship. She noted that "I still don't know how they got [the Preferred Candidate's] name but it hardly

[77] Email September 4, 2020.
[78] Interview with Assistant Dean Alumni and Development.
[79] Interview with Dean.
[80] Selection Committee Member 1 chronology.
[81] Assistant Dean interview February 12, 2021.

matters because as soon as her appointment was announced, it would've happened anyway." She concluded by raising concerns about the involvement by a judge "engaging with the law school in this way."[82]

The Assistant Dean and the Dean spoke briefly by telephone in the early afternoon. It was agreed that the Assistant Dean would send him the Preferred Candidate's CV (which she did at 6:38 pm that evening) and that they would talk again over the weekend.

Later the same day (at 2:01 pm on September 4), the AVP followed up with the Alumnus by email, writing: "Quick update – understand from [the Dean] that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w [*sic*] me next week. Look forward to closing the loop w [*sic*] you."[83] Notwithstanding what this email suggests, the AVP did not speak to the Dean about the matter at this point and in fact their only communication on this subject occurred when the Dean was in contact with the AVP to tell her to "back off" any involvement in the recruiting process.

The Alumnus responded to the AVP (at 2:20 pm) "I look forward to closing the loop as well. If you need any further information on this matter, please don't hesitate to let me know."[84]

(e.) Events September 5 - 8

The Assistant Dean and the Dean had a regular bi-weekly meeting scheduled for an hour on Tuesday September 8. At that meeting, she planned to brief the Dean and seek his approval to make the offer to the Preferred Candidate. As a result of the events of the 4th, however, she provided information to him over the weekend on Saturday the 5th and Sunday the 6th.

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

[82] Email September 4, 2020 number 219.
[83] Email September 4, 2020 page 12 of Alumnus response.
[84] Email September 4, 2020 page 12 of Alumnus response.

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.

She provided the Dean with a summary of the legal advice received from the German employment lawyers and referred to the Preferred Candidate's request to have summers (roughly about 20% of her time) away from the campus in Europe.

As an aside, the Preferred Candidate explained to me that part of the reason that this option interested her was that she wanted to see if she could get part of the benefit of being a faculty member and that she was interested in "semi-quasi" faculty treatment.

As the Assistant Dean recalls the meetings, the Dean had quickly looked at the Preferred Candidate's CV and concluded why her scholarship might be controversial in the eyes of some. But in her recollection of the meetings, the Dean thought that the potentially controversial nature of the scholarship did not matter and he was focused on the legal advice from the German lawyers concerning the independent contractor arrangement. He was clear that there was "no way" he would approve entering into an "illegal" independent contractor agreement. He was also concerned that the request to be away from the campus reflected a mis-alignment with the position, referring to his concerns (referenced earlier) about this being an administrative, not an academic position.

As the Assistant Dean recalls it, there was discussion that the timing was unfortunate and that the breach of confidentiality of the search process was troubling, but that the Dean's focus was on the "illegality" of the proposed independent contractor arrangement and the request to be away from campus. As the Assistant Dean presented the matter to him, the September start date was also critical. It appears that, consistent with what the HR Consultant had noted in the August 12th email referred to above, the Assistant Dean was operating on the understanding that the independent

contractor route was the only path to having the Preferred Candidate in the role (albeit remotely) in September. For practical purposes, that understanding was correct.

It is important to note what, according to the independent recollection of the Dean and the Assistant Dean, was not discussed in detail with the Dean. The Dean was not briefed by the Assistant Dean on the specifics of the LMIA route to obtain a work permit. In particular, the Dean was not told, by the Assistant Dean or otherwise, that it would require the University to indicate that there was no qualified Canadian.

Also over the weekend, the Dean spoke to the Vice President and Provost ("**Provost**") and to the Vice President Human Resources and Equity ("**VPHR**"). The Provost recalls that the Dean was concerned about the search and steps taken by the committee. In his view, the search committee had moved forward in a way that was not expected of a body that was "advisory" and that he had been advised late in the day. He expressed concern about the proposed independent contractor arrangement and that the Preferred Candidate was an academic coming into a staff role, reflected by her request for 20% of her time to be spent off campus. He also referred to a "complicating factor" resulting from the Alumnus' communication as described above.

The Provost referred the Dean to the VPHR because the matter concerned a staff position that fell under her authority and not that of the Provost. The Provost told me 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. She was concerned that someone outside the search process had found out about the selection process because confidentiality in such processes is very important. She noted that in decanal searches, participants sign confidentiality agreements.

The VPHR recalls that the Dean called her to discuss the situation. He was concerned about the legality of the proposed independent contractor arrangement. The VPHR was aware that the University had brought people in on an independent contractor basis and knew that University Legal Counsel 2 would have been consulted and had

experience with such matters. She also was aware that if there was no independent contractor arrangement it would be hard to pay the individual.

The Dean also raised the Preferred Candidate's wish to be away from campus 20% of the time and the VPHR indicated that this was a staff position and was "100% full-time equivalent." As a practical matter this meant that the person was expected is to be in the position in Toronto full time. The VPHR was a bit taken aback by the Dean's reluctance about the independent contractor arrangement because she knew in general terms that the University had entered into independent contractor arrangements in other situations.

The Dean then mentioned that the VPHR should be aware of the information relayed by the Alumnus although it was not relevant to his decision-making. In her perception, his main concerns were wanting somebody in the position now but that, in his view, the risk of going the independent contractor route was too great. Her view was that if the person was not in Canada and not eligible to work in Canada, there was a problem. The Dean's preoccupation was with the independent contractor approach not being right.

On Sunday, September 6, the Dean and Selection Committee Member 1 spoke on the telephone, at the Dean's request.[85] Selection Committee Member 1 made notes about a week after the conversation that form part of the "chronology" that was ultimately given to the *Globe and Mail,* although not by her. She recalls that they discussed five main topics.[86]

First, the Dean expressed his concern about the independent contractor agreement as a bridge until the work permit was obtained. His view was that this was improper and could not be done and that he had consulted with the VPHR about this. Selection Committee Member 1 suggested that the immigration issue could be addressed by spousal sponsorship and that it was not the Preferred Candidate's fault if the University was proposing something that was inappropriate. (As noted earlier, the spousal sponsorship route would not,

[86] Documents received from Selection Committee Member 1

according to the immigration lawyer, change the likely time frame for obtaining the work permit.)

Second, the Dean indicated that there was no way that the Preferred Candidate could be absent in the summer given that it was an administrative position. He also raised his concern that the Preferred Candidate really wanted an academic position. Selection Committee Member 1 responded that if the absence was unacceptable the University could "take it off the table" and that it had been made very clear to the Preferred Candidate that this was not an academic position.

Third, Selection Committee Member 1 raised her concern that the Preferred Candidate's work on Israel/Palestine was an issue but that her work was "well within the zone of legitimate, professional, international legal analysis." The Dean responded that given the other issues, he did not need to get to that one. Selection Committee Member 1 recalls that the Dean said "it [i.e. the Preferred Candidate's work on Israel/Palestine] is an issue, but given the other two reasons, I don't need to get to the third issue."

Fourth, the Dean indicated that they needed to hire a Canadian so someone could start right away. Selection Committee Member 1 had indicated in her chronology that the only eligible Canadian was disqualified by HR and that other Canadians were not viable and did not even make the short list." I noted in our interview that a Canadian permanent resident who was available to start at the end of August received a second interview. Selection Committee Member 1 advised that her note contained a small error in that it should have read "qualified" not eligible. She advised that in the view of the selection committee the Canadian permanent resident who received a second interview was not "qualified."

Finally, Selection Committee Member 1 recalls asking whether the Dean was seeking her views or informing her of his decision and that the Dean replied "the former, well, both."

The Dean recalls that the purpose of the conversation was to ensure that he had not missed something. His decision to discontinue the candidacy was, in fact, made over the weekend and into the early part of the week. He recalls that it

was he who first raised the subject matter of the Alumnus' inquiry (because he knew that Selection Committee Member 1 knew of it) and told Selection Committee Member 1 that any controversy was "irrelevant" and that the inquiry by the Alumnus played no role in his thinking. He recalls that Selection Committee Member 1 defended the Preferred Candidate in light of the controversy and that he said that this was irrelevant. He was certain that he was clear that the cross-border - timing issue was the threshold issue and that he had serious reservations about the 20% request and that because of those two reasons, the controversy was irrelevant.[87]

Following the call, Selection Committee Member 1 had a telephone conversation with the Assistant Dean.[88] The Assistant Dean's recollection of the call is that Selection Committee Member 1 told her that the Dean called her to seek her input on the hiring issue. She advised the Assistant Dean that she was concerned that the Dean appeared to be leaning towards discontinuing the Preferred Candidate's candidacy. The Assistant Dean recalls that Selection Committee Member 1 was very bothered, upset and concerned about this development. Based on what she heard from the Dean, she also thought that not all of the immigration options had been considered. In response, the Assistant Dean briefly summarized the legal advice that the immigration and German employment lawyers had provided.

Selection Committee Member 1 remembers aspects of the call differently. She recalls telling the Assistant Dean that she would have to resign if they did not proceed with the Preferred Candidate and that it was not fair to pull the rug out from under her at this point. The Assistant Dean confirmed the advice received from the German employment lawyers but that Selection Committee Member 1 thought that there were other immigration routes to consider. The Assistant Dean recounted the advice that they had received and that it "didn't tally" with the suggestion that there were other routes.

The VPHR also had a brief conversation with Selection Committee Member 1 who expressed her concern about the

[87] Interview with the Dean.

[88] September 6, 2020, number 220.

Alumnus' call. The VPHR advised that the Director needed to start right away, that it was the Dean's decision. The VPHR reiterated that the Alumnus' information was not part of the Dean's decision.

In the evening of Sunday, September 6, 2020, the Assistant Dean forwarded to the Dean the application letters and resumes of two Canadian applicants who had received interviews as well as the most recent email (received September 4) from the Preferred Candidate.[89] The idea was to arrange interviews with the Canadian applicants including the Canadian permanent resident who had received a second interview. [90] These interviews were ultimately cancelled as a result of the cancelling of the search. As of this point, the Preferred Candidate had not been notified that any issues had arisen.

There are two issues that appear not to have been discussed with the Dean or considered by him.

The first was that the immigration plan for the Preferred Candidate involved making an application based on the LMIA process. That process required the University to indicate that there was no suitably qualified Canadian available for the position. That state of facts is consistent with the recollection of both Selection Committee Members 1 and 2 that if neither of the two non-Canadian applicants who had received second interviews could be hired, then no one else was appropriate for the position.

Second, University Employment Lawyer 2, with whom the independent contractor route had been discussed, had not been consulted again since the advice had been received from the German employment lawyers that there were concerns about the draft independent contractor agreement (which had been prepared by the Assistant Dean and the HR Consultant).

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 that the end of September. From his point of view, this was not only important for

[89] IHRP Emails and Attachments received from Dean dated September 6, 2020..

[90] Email September 10, 2020 document 233.

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.

On September 8, the Dean sent a draft email to the Assistant Dean for her review. The draft email was addressed to the Assistant Dean and Selection Committee Member 1 and indicated that he would not be proceeding with the recruitment of the Preferred Candidate. It read as follows:

> Thanks for the conversations, both of you. Even setting aside my considerable misgivings about the fact that [the Preferred Candidate] asked to be away 20% of the year, after speaking with you two, and with [the VPHR] I don't see a viable path to hire a non-Canadian. I'm hoping that we can quickly choose from the Canadians that remain in the mix. … [W]e've re-confirmed with HR that we can't hire someone without a law degree that would entitle her to practice somewhere – not only is that offside [of] our advertisement, but it presents insurmountable challenges from a collective bargaining perspective. Frustrating but not surprising – I'm used to dealing with undesirable constraints when it comes to HR matters.
>
> I understand that there were two Canadians in the long-ish list who meet the ad's requirements, one of whom had a second interview and one of whom didn't. I'm open to interviewing them both again if you are, and I'll join the interviews this time. Or I'm happy just on my own to have a conversation with one or both candidates, as I did with our previously unsuccessful search that landed on a non-Canadian, if you prefer not to be involved in more interviews.[91]

[91] Email September 8, 2020 document 222.

On September 8, the Assistant Dean met with the Dean to discuss how to proceed with the IHRP Director search. According to the Assistant Dean, they discussed interviewing strong candidates from the first and second interview rounds who were Canadian citizens and therefore might be able to start the positon by, or very close to, the September deadline.

The next day, September 9, the draft email was sent.[92] The same day, the Assistant Dean advised University Employment Lawyer 2 that they would not proceed with the offer to the Preferred Candidate.[93]

Also on September 9, the Assistant Dean Alumni and Development emailed the Assistant Dean requesting a call for a quick update.[94] She sent a further email requesting a phone call after having connected with the AVP in the afternoon.[95] This email chain was forwarded by the Assistant Dean to the Dean, advising that the AVP was pressing for an update about the hiring of the Candidate so that the AVP could share this with the alumnus. As the Assistant Dean recalls the matter, the AVP had also suggested during their September 9 telephone call that they canvass other alumni for their views on the Preferred Candidate. The Assistant Dean stated in her email to the Dean that she was unsure why the AVP would continue to be involved in a confidential HR matter and expressed some concerns about where this could go.[96]

The Dean was then in touch with the AVP to tell her that they would not engage with Advancement on this matter.

The Preferred Candidate was advised the following day (September 10) during a Zoom meeting with the Assistant Dean that the University would not be proceeding with the candidacy The Preferred Candidate recalls the meeting as being quite short and that the Assistant Dean advised that the consultancy agreement (i.e., the independent contractor agreement) would not work because they had advice that there were legal risks and that the Faculty could not wait the two – three months for the Preferred Candidate to get the work permit. The Preferred Candidate recalls asking the Assistant

[92] Chronology prepared by the Assistant Dean.
[93] Email September 9, 2020 document 223.
[94] Email September 9, 2020 document 226.
[95] Email September 9, 2020 document 228.
[96] Email September 9, 2020 document 229.

Dean if the decision was based on the "ongoing negotiations" in relation to her request to spend the summers in Europe and that the Assistant Dean said it was not.

In a letter dated September 11 (but sent by email at 9:59 pm on the 10th) Selection Committee Member 1 resigned from the Faculty Advisory Committee for the IHRP citing the Dean's decision to "overrule the hiring committee's decision" as the reason for her resignation.

Additional interview arrangements were subsequently made with the assistance of the HR Consultant to be conducted by the Assistant Dean and the Dean.[97] The HR Consultant noted that the feedback from the interviews of these individuals was "underwhelming", and they were not strong candidates. She advised that she understood why they were proceeding in this manner, but asked if the Dean was aware of the interview feedback, and asked whether other candidates should be considered.[98]

In the days that followed the Assistant Dean received emails from different individuals regarding the position and the growing controversy. On September 10 Selection Committee Member 2 (who had not been involved in any of the discussions on September 4 – 6) emailed the Assistant Dean for an update about the process and was informed that the Candidate's "immigration situation turned out to be more complicated than we thought, and the tools at our disposal to address it were fewer than we hoped. As a result, after conferring with senior HR leaders, we concluded yesterday that we cannot proceed with her candidacy."[99]

A former IHRP director informed the Assistant Dean during a September 11 meeting that he was aware that an Alumnus had contacted the law school about the Preferred Candidate and that he indicated that things would "get very bad" for the law school if the Dean's decision was not reversed. The next day, 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

[97] Email September 10, 2020 document 233.
[98] Email September 10, 2020 document 234.
[99] Email September 10, 2020 document 239.

perhaps an ethics investigation for the Alumnus.[100]

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.

[100] Email September 12, 2020 document 230.

B. BASIS OF THE DECISION TO TERMINATE THE CANDIDACY

1. Introduction

My Terms of Reference require me to address the basis for the Dean's decision to discontinue the candidacy of the selection committee's Preferred Candidate. The concern is that external intervention by the Alumnus played a role in the decision.

Much of the concern about this hiring process has arisen because of the view that the Dean's stated reasons for his decision were pretextual and that improper influence, contrary to his public statements, should be inferred from the facts.

The process that I have been engaged to undertake is not one that is suitable for making findings of credibility. Virtually none of the safeguards that exist in contexts in which such findings are made are present in this process. 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. I note that none of the critics or participants expressing concerns have had the benefit of a full review of all of the information with which I have been provided.

My conclusion is that the inference of improper influence is not one that I would draw.

2. The stated reasons

In his email of September 9 to the Assistant Dean and Selection Committee Member 1, the Dean wrote, "[e]ven setting aside my considerable misgivings about the fact that [the Preferred Candidate] asked to be away 20% of the year, after speaking with you two, and with [the VPHR], I don't see a viable path to hire a non-Canadian."[101]

In his letter to Faculty on September 17, the Dean stated that "no offer was made because of legal constraints on cross-border hiring that meant that a candidate

[101] Email September 9, 2020 document 231

could not meet the Faculty's timing needs. Other considerations, including political views for and against any candidate, or their scholarship, were and are irrelevant. … As the Dean's advisory committee leading the search understood – and as was stressed to me on several occasions by the non-academic administrator to whom the director would report – the timing needs existed because of the absence of a director at the moment, and the hope that a new director could mount a full clinical and volunteer program for students this academic year."[102]

In my interview with the Dean, he indicated (as detailed earlier) that his understanding was that timing was of the essence and that the selection committee was "aware and agreed" that "we were determined to have someone in place as close to the start of term as possible." He also understood on the basis of the legal advice received by the Assistant Dean that the only way to meet the "timing needs" was to enter into an independent contractor agreement with the Preferred Candidate. He had learned (on the same day that be became aware of the by inquiry by the Alumnus) that the Assistant Dean had been advised that the Independent Contractor Agreement arrangement was illegal or at least likely illegal.

It has been suggested to me that a number of the facts support an inference that the Alumnus' inquiry factored into the decision to terminate the Preferred Candidate's candidacy. While of course drawing an inference from known facts is not an exact science, I would not be ready, based on the materials that I have reviewed and considered, to draw the inference that some others have. I will explain.

First, some of the facts said to support the inference are erroneous. Second, there are a number of facts that do not support the inference. Third, the willingness to draw the inference gives no weight to the Dean's insistence that external influence played no role in his decision. As with any review, I am obligated to see well-founded evidence before I can reasonably draw the inference that someone has been untruthful. That is not an inference that I

[102] Dean's letter to Faculty September 17, 2020.

could reasonably draw on the information available to me.

I will first turn to the points that others have alluded to in support of the inference and will then consider the other facts that are not supportive of that inference. Of course, when reviewing the facts I have not looked at individual facts in a piecemeal manner. In reviewing the facts, I have considered their cumulative effect.

Based on my review, it appears that the nature of the Alumnus' inquiry has been misunderstood in much of the public discussion. It has at various points been described as an "objection" to the candidacy, as "external interference", as a "complaint" about the candidacy, as "outside political pressure", as an "attempt to block the appointment."

Those descriptions adequately convey the intent of the professor's approach to the Organization that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University.

This would hardly be news to anyone who had taken a moment or two to look on the internet. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evident "as soon as [the Preferred Candidate's] name was announced."[103]

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.

In addition, the University was advised just before 9 am on September 4 that the LMIA route would require the University to re-advertise the position for 30 days. This was a step that the Assistant Dean had hoped to avoid throughout her discussions with the University's

[103] Email September 4, 2020 document 219.

immigration counsel. This requirement to re-advertise meant that the LMIA route, even if otherwise viable, put in doubt the ability of the Preferred Candidate to be in place in Toronto at the beginning of January, something that everyone agreed was critical.

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.

It has been said that the Dean was "entirely negative" about the Preferred Candidate. Whether or not "entirely negative" is a fair characterization, there is no doubt that the Dean expressed reservations about the candidacy at a meeting with the Assistant Dean on August 17th which was well before the Alumnus' inquiry on September 4. It does not appear that those reservations were relayed back to the rest of the search committee by the Assistant Dean and of course by that point, the selection committee had completed its role of identifying the Preferred Candidate.

As noted earlier in Part I of my review, the Dean was concerned that the candidate was really looking for an academic position which the Directorship was not and that this in turn gave rise to a concern that the candidate's interests and the position were mis-aligned. The Dean's concern in that regard was not a new concern that surfaced only after the alumnus' inquiry. He had expressed it to the Assistant Dean in mid-August. Moreover, the concern was not unfounded in light of information that I have learned.

The Preferred Candidate explained to me that her interest in working from Europe for the summers was in part that she wanted to see if she could get part of the benefit of being a faculty member and

that she was interested in "semi-quasi" faculty status.

Some have referred to the fact that the VPHR acknowledged that she and the Dean discussed the Preferred Candidate's scholarly work as evidence that supports the inference of improper influence. I do not agree.

It would have been clear to the Dean that the appointment would be controversial in some quarters. I do not find it surprising that the Dean, realizing this, decided to alert the senior administration of the University to a potential public controversy involving University decision-making.

Moreover, I have spoken at length to the VPHR and her recollection (reflected in her public statements) was that the Dean simply advised her that she should be aware of the Alumnus' inquiry but that the Dean told her that it was not relevant to his decision-making. Rather the Dean's preoccupation seemed to her to be that the independent contractor route was not right in light of the legal advice.

The VPHR's recollection of the brief conversation with Selection Committee Member 1 was that the VPHR advised that the Alumnus' call had nothing to do with the decision.[104]

It is suggested that the Dean "admitted" that the substance of the Preferred Candidate's scholarship was "an issue" for him. However, the notes of the conversation, made about a week after it occurred, in which this alleged admission occurred indicate that the Dean also said that in light of the independent contractor and 20% request, he did not need to consider that third "issue."

Moreover the Dean has a different recollection as set out in detail above. The key point is that he recalls being clear that any controversy about the Preferred Candidate's scholarship was irrelevant to his decision. Whether this was an issue that did not need to be considered (according to Selection Committee Membership 1's recollection) or was irrelevant (according to the Dean's recollection), the exchange provides no support for an inference that the inquiry played a role in the decision-making.

[104] Interview with VPHR February 4, 2021.

It has also been suggested by a number of sources that the "timing needs" were not a plausible explanation for the decision to not proceed with hiring the Preferred Candidate.

I do not think that a full understanding of the facts supports this inference.

It is true that the Assistant Dean acknowledged that it might not be possible to have someone in the position for the beginning of September. In an email of July 6, she wrote that "my fervent hope is that we will have someone in the role by Sept 7, but I accept that this might not be possible."[105] Three days later, the Assistant Dean wrote to the members of the Selection Committee commenting that "[r]emember that, if we are not happy with the first list [ie the first group of interviews] we can decide later if we need to interview more candidates (although this will mean that we won't have someone until later in the fall)."[106]

There are several points to note from these emails.

First, neither of them is inconsistent with wanting to have the Director in place in the fall.

Second, there are at least five occasions before the controversy arose on which the Assistant Dean indicated that the Director had to be in place before the end of September or at least before the work permit would likely be obtained.[107]

1. On August 11, the day on which she had a meeting with the Preferred Candidate, the Assistant Dean wrote to the HR Consultant that "[the Preferred Candidate] understands that we need her to be able to start the position no later than Sept. 30. I don't require her to be in Toronto until the first week back in January 2021."[108]

2. On August 14, the Assistant Dean wrote the immigration lawyer that "we need the candidate to start the position no later than September 30, 2020 although we don't need her to move back to Toronto until the start of January."[109]

[105] Email July 6, 2020 number 39.
[106] Email July 9, 2020 number 46.
[107] Email August 14, 2020 number 130.
[108] Email August 11, 2020 number 108.
[109] Email August 14 2020 number 130.

3. In an August 20 email to University Employment Lawyer 1, the Assistant Dean wrote that "[w]e need her [i.e. the Preferred Candidate] to start working before she will be realistically able to obtain a Canadian work permit."[110]

4. Also on that date, the Assistant Dean wrote to the members of the selection committee, noting that "we are hoping to work out a way for [the Preferred Candidate] to start work for us before she has a Cdn [*sic*] work permit in hand. The immigration lawyer is estimating that she could have one in 2 – 3 months. We need to bridge the time between not [*sic*] and then."[111]

5. On September 2, the Assistant Dean wrote to the HR Consultant that "[i]deally she [i.e. the Preferred Candidate] will be able to start work as soon as we sort out the independent contractor agreement (ideally Sept 14)."[112]

Third, and most importantly for the purposes of drawing an inference about the basis of the Dean's decision based on timing, the Assistant Dean advised the Dean that having someone in the position by the end of September was critical and the Dean thought that was the case.[113]

The strength of the inference of improper influence depends on the timing issue being a pretext. For the purposes of evaluating the strength of this inference, whether the Assistant Dean's view of the importance of timing was realistic and whether that was adequately communicated to the other members of the selection committee and to the Preferred Candidate are not the issue. There is no doubt that the Assistant Dean viewed this as a requirement well before the controversy arose; it was not a pretext developed after the fact.

There is also no doubt that the Assistant Dean communicated this requirement to the Dean who, as a result, thought that it was critical to the recruitment process. On his understanding, this was a requirement of the position, not a pretext developed after the fact.

It has also been said that the selection of the Preferred Candidate and the August

[110] Email August 20 number 135.
[111] Email August 20 number 136.
[112] Email September 2 number 200.

11 offer were not contingent on her being available at the beginning of September and that it would have been irrational to impose such a condition on an international candidate.

Putting aside that no offer in the legal sense of the word was made on August 11, recollections differ about whether the importance of the September start date was communicated to the Selection Committee or to the Preferred Candidate. However, as I have reviewed earlier, it is clear that the Assistant Dean spoke of this as a requirement of the job to both the immigration lawyer and the HR Consultant in emails before any controversy arose and that she recalls briefing the Dean on this requirement at their meeting on August 17.

It has also been suggested that the illegality of the independent contractor arrangement could not have been the true reason for the decision. This line of thinking proceeds as follows.

The immigration advice was that the Preferred Candidate could likely have a work permit in time to be in Toronto to start teaching the clinical course in time for the beginning of the January term; the independent contractor arrangement was proposed by the University and the fact that it was not possible did not leave the IHRP in a worse position. The Preferred Candidate was still likely to be available to mount the full IHRP program starting in the winter of 2021.Thus, the reasoning goes, the illegality of the independent contractor position was not a true reason for terminating the candidacy.

However, as discussed above, there is no doubt that a fall or no later than September 30 start date was viewed as critical by the Assistant Dean and that this view was communicated to and relied on by the Dean in making his decision. The Dean's understanding was that the independent contractor arrangement was the only way that the start date (i.e. the Faculty's timing requirements) could be met. And that understanding, so far as I am able to determine, was correct. On the Dean's understanding of the situation, without the independent contractor arrangement, the timing requirement could not be met.

It has also been suggested that the timing issue was a pretext because there were other immigration options that could have resulted in an earlier work permit.

As discussed earlier, my understanding based on information provided by the immigration lawyer is that this is not the case.

It has been said that the Dean's decision to look for a qualified Canadian was a sham because the selection committee had found no eligible and qualified Canadian candidates for the position and declared a failed search if the top two candidates were not available.

As discussed in Part I, recollections on this point differ. But the key point as I see it is that the Dean's source of information was the Assistant Dean and her advice to him was that there were qualified Canadian candidates, a view with which he concurred after having looked at some of the resumes of Canadian applicants.

The Dean told me that he had not been consulted about and had not approved resort to the LMIA process and that after looking at the resumes of some of the Canadian applicants, he would not have approved proceeding by that route as in his opinion there were qualified Canadians.

It is also suggested that the Dean's statement that the candidacy was terminated so as to allow the Faculty "to mount a full clinical and volunteer program for the students this academic year" does not make sense. This line of thinking is that by the time the candidacy was terminated it was already too late to get a Director in place in the fall.

However, I am far from sure that, as the Dean understood the situations, this was the case. There was a Canadian permanent resident who received a second interview and who had indicated an availability to start work at the end of August. I understand that Selection Committee Member 1 and 2 were of the view that there was no suitable Canadian candidate and that Selection Committee Member 1 alluded to this in a conversation with the Dean after the Alumnus' inquiry. However, the Dean understood from the Assistant Dean that there was a reasonable chance of filling the position with someone who could start virtually right away. Based on the information that the Dean had, it was not inconceivable that a new Director could be in place in the fall.

Some of those who believe that the timing and independent contractor issues were not the true or only bases for the Dean's decision point to the fact that

there was no indication that the Dean consulted with the immigration or employment lawyers, the Faculty Advisory Committee or the Research Associates about how the needs of the program and the students would be best served. I do not find this line of reasoning persuasive.

With respect to legal advice, the Assistant Dean had up to the minute advice from the German employment lawyers and the immigration lawyer as of September 4 which she shared with the Dean.

Moreover, when Selection Committee Member 1 suggested on September 6 that there were other immigration routes that might be explored, the Dean reviewed the options with the Assistant Dean and concluded that no other routes would lead to the granting of a work permit more quickly than the time-frame cited by the immigration lawyer. The information that I received from the immigration lawyer confirms that view was correct.

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.

With respect to consultation, it would have been better, with the benefit of hindsight, had the Dean met with the members of the selection committee and fully explained the reasons for his decision. The members of the committee were all within the cone of confidentiality that applied to the search process and the Dean would have been able to share information in that context which he would not be able to share more broadly. However, I would not draw from this absence of consultation an inference of any improper motive affecting the decision.

Finally, some found that the University's muted and undetailed response to the allegation of improper influence

suggested that something had indeed been amiss. This chain of reasoning, however, fails to take into account the legal constraints relating to confidentiality and protection of privacy under which the University operates. The Dean wanted to provide more detailed information to the IHRP Faculty Advisory Committee. But the legal advice that he received – and which I have reviewed -- discouraged him from doing so on grounds of confidentiality and protection of privacy.[114]

Looking at all of the fact as I understand them, I would not draw the inference that the Dean's decision was influenced by improper considerations resulting from the Alumnus' inquiry.

[114] Legal counsel advice to Dean in email exchanges on September 15 and 16, 2020.

PART II: WHETHER EXISTING UNIVERSITY POLICIES AND PROCEDURES WERE FOLLOWED

A. INTRODUCTION

The second element of my Terms of Reference requires me to "consider whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process**."**[115]

This aspect of my mandate can be addressed quite briefly. I will develop three main points.

First, there is no suggestion that I am aware of—and I have seen no evidence—that there was any failure to observe "existing University policies and procedures" in this search up until about noon on September 4th, 2020. It is only at that point that concerns about academic freedom and confidentiality arise. That said, my view is that the University's policy and procedure framework for this search was unclear and not well known by some of the participants.

I will set out what I understand to be the governing policies and offer some suggestions for clarification.

Second, while a great deal of concern has been expressed about academic freedom, it has been the conventional thinking at the University that the existing formal protections in the University for academic freedom apply to faculty members and librarians but not to positions in the "Professional/ Managerial" classification. There are distinct hiring policies and the *Memorandum of Agreement between the University and the Faculty Association* refer to the policies governing academic appointments and appointments of librarians, but not to the policy relating to professional/managerial staff. The Director's position in the IHRP is so classified.

However, the central concern with this search process is that outside influence played a role in over-ruling the merit-based assessment by the selection committee of the Preferred Candidate.

[115] *Terms of Reference* at p. 3 (December 7, 2020).

No one in the University administration, to my knowledge, has ever suggested that this would be appropriate. Quite the opposite as set out in the Foreword, above, Section "C." Given the apparent consensus on this point coupled with my conclusion that I would not draw the inference that improper outside influence played a role in the decision and the current parallel processes by the Canadian Association of University Teachers and the University of Toronto Faculty Association, it seems to me that it would be imprudent for me to do anything more than to provide you with a few general thoughts on this subject in the context of the third element of my Terms of Reference: to provide "any pertinent guidance or advice" for the University's consideration "relating to any matters arising out of the processes that were involved in this search."

Third, there were several instances in which the confidentiality of the search process was not respected. However, my review of the relevant University policies has led me to think that the nature and extent of the obligation of confidentiality in the search process need clarification and emphasis. Moreover, the nature of the University's obligations to protect personal information and how that affects the conduct of those working on its behalf, and the constraints it imposes on administrators (particularly in this case, the Dean), need to be better understood by the University community.

I should also address a point that was of great concern to many of the individuals who were in touch with me in connection with my Review. Several members of the University community are of the view that this controversy is at least in part the result of a failure of collegial governance within the Faculty of Law. While I appreciate the thoughtful submissions that I have received, this is a broad and important subject that is far beyond my Terms of Reference. However, I will offer one modest suggestion touching on an aspect of collegial governance in the final section of my Review.

B. POLICIES AND PROCEDURES GOVERNING THE SEARCH PROCESS

1. *University of Toronto Act, 1971*

The University is constituted under the *University of Toronto Act, 1971*. The *Act* outlines the composition of the Governing Council and its Executive Committee, and describes the powers of the Council.

Central to this Review, the *Act* outlines different types of staff within the University. This nomenclature is adopted by supplemental University policies (as described later). The *Act* defines "administrative staff" as "the employees of the University, University College, the constituent colleges and the federated universities who are not members of the teaching staff thereof."[116] "Teaching staff" is defined as follows:

> …employees of the University, University College, the constituent colleges and the arts and science faculties of the federated universities who hold the academic rank of professor, associate professor, assistant professor, full-time lecturer or part-time lecturer, unless such part-time lecturer is registered as a student, or who hold any other rank created by the Governing Council and designated by it as an academic rank for the purposes of this clause.[117]

The *Act* authorizes the Governing Council to appoint, promote, suspend and remove the members of the teaching and administrative staffs of the University.[118]

2. Statement of Institutional Purpose

In addition to the *Act*, the *Statement of Institutional Purpose,* implemented by the Governing Council, serves as the University's lodestar. It defines, among other things, the University's mission, purpose, and objectives in the areas of research and teaching.[119] In particular, the University's mission is identified as "committed to being an internationally significant research university, with undergraduate, graduate and professional programs of excellent quality."[120]

The *Statement of Institutional Purpose* describes the University as being "dedicated to fostering an academic community in which the learning and scholarship of every member may flourish, with vigilant protection for individual human rights, and a resolute commitment to the principles of equal opportunity, equity and justice." In this context, the *Statement of Institutional Purpose* states:

> …the most crucial of all human rights are the rights of freedom of speech, academic freedom, and

[116] *The University of Toronto Act, 1971*, s 1(1) ("interpretation").
[117] *Ibid* at s 1(1)(m).
[118] *Ibid* at s 2(14)(b).
[119] *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992.
[120] *Ibid*.

> freedom of research. And we [the University] affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.[121]

Underlying these broad objectives, the *Statement of Institutional Purpose* outlines that the University is committed to four principles:

- Respect for intellectual integrity, freedom of enquiry and rational discussion;
- Promotion of equity and justice within the University and recognition of the diversity of the University community;
- A collegial form of governance; and
- Fiscal responsibility and accountability.[122]

3. University Hiring Policies

As previously stated, the Director of the IHRP is a PM-4 "administrative/managerial", non-academic position. The Assistant Dean and Selection Committee Member 1 indicated that it was made clear to the Preferred Candidate that this was an administrative/managerial role, and not an academic position or a pathway to one. The Preferred Candidate also advised me that she understood that this position had the status of administrative staff. While I understand that some members of the University community and beyond are concerned that this classification is not apt having regard to the nature of the Director's duties, no one to whom I spoke thought that the position as currently classified was anything other than a PM-4 administrative position.

The "Job Description" of the Director that was publicly advertised sets out seven major activities: planning and policy development, advocacy, experiential education delivery, external relations and communications, development, administration and human resources management. The advocacy activity includes selecting approximately 10 students for the clinic, developing seminars and workshops and mentoring students by applying legal background

[121] *Ibid*.

[122] *Ibid*.

and practicing experience, supervising all advocacy initiatives undertaken by students and analyzing recent case studies, scholarship, law and applying the highest professional standards. The experiential education delivery activity includes providing experiential learning opportunities for students by applying legal background and practicing experience and developing clinical legal education programs, courses, material and case studies based on knowledge of relevant scholarship, law, professional standards, and the Faculty of Law requirements.

4. Policies for Professional and Managerial Staff

The PM-4 classification is a mid-range managerial role under the direct supervision of the Assistant Dean. PM-4 has an assigned salary range being the fourth of the 11 pay bans within the PM classification (I.e. PM1 – PM11).

The *Policies for Professional and Managerial Staff* (in this section, the "Policies") states the goals of hiring "the best qualified candidate in accordance with the policies of the University" and providing "opportunities for career development of Professionals/ Managers…".[123] The *Policies* set out the rights and responsibilities of "administrative Professionals/ Managers," covering a broad array of issues including but not limited to short-term disability leave, pension, performance review, pregnancy leave, and termination.[124]

With regard to the hiring process, the *Policies* address the process for advertising positions and the requirement for written applications. Most importantly for present purposes, they provide that the selection "will be based on the best qualified candidate for the position taking into account factors such as the candidate's qualifications, skill, education, training, previous related experience, ability and potential, and the requirements of the position."[125]

I am advised that the *Polices* are supplemented by a series of guidelines and documents that speak to best practices throughout the recruitment process for human resources recruiters, available on the HR SharePoint Portal and a number of which have been

[123] *Policies for Professional and Managerial Staff*, effective March 5 2012, section II.

[124] *Ibid* at sections II.

[125] *Ibid* at sections II (see "Selection").

provided to me at my request. These guidelines and documents are recommended for use by divisional human resources representatives who assist divisions in professional and managerial searches. There is, for example, a "Hiring Manager's Toolkit" that sets out how the various steps of a recruitment process ought to be conducted. In this case, the Assistant Dean was the "hiring manager".

The "Toolkit" provides that every job competition is to result in selecting the individual "who is demonstrably the most qualified for the position."[126] It goes on to provide that "[t]he determination of the most qualified candidate must be based on merit, determined through an evaluation of the candidate's education, experience, skills, knowledge and abilities in relation to the selection criteria." The Toolkit notes that while this is a matter of judgment "on the part of the selection committee", it is a judgment to be reached "taking into account all the information that has been collected throughout the recruitment process: [t]he written application; [t]he interview(s); [r]esults of any tests or assessments; and Reference checks."[127]

5. Other Hiring Policies

The University also has a policy on "academic administrators." The *Policy on Appointment of Academic Administrator* provides that "[a]cademic administrative positions should be held by teaching staff who are willing to assume, for a time, special responsibility for the harmonious and effective functioning of their respective divisions or departments."[128] The term "teaching staff" used in this policy is presumably intended to have the same meaning as the definition of that term in the *University of Toronto Act, 1971*.

This policy governs faculty members who take on additional administrative functions within the University. In so doing, it details the process for appointing deans and principals of colleges and associate deans. It is not applicable to the position of the Director of the IHRP.

6. Policies on the Selection Committee

I was not able to locate any policy documents relating expressly to the

[126] Hiring Manager's Toolkit.
[127] Hiring Manager's Toolkit.

[128] Policy on Appointment of Academic Administrators, October 30, 2003.

constitution, appointment or terms of reference of what I have called the selection committee. (There are of course the "Toolkit" resources noted earlier.) However, I have not heard any objection or adverse comment on the way the selection committee in this case was assembled or how it went about its work of reviewing applications, establishing a short list, conducting interviews or selecting their Preferred Candidate. It also appears to be generally accepted that the selection committee is advisory to the Dean with the Dean being the final decision-maker.

7. Resources for Hiring International Candidates

The Division of Human Resources and Equity at the University has a number of resources in relation to the hiring of international applicants. The most relevant aspects covered are these:

- Staff who come to the University as foreign nationals require work permits under Canadian immigration law;
- In order to get a work permit for working in Canada, foreign nationals will need a positive LMIA from Employment and Social Development Canada;
- A positive LMIA will only be granted if Employment and Social Development Canada, among other things, reaches the following conclusions:
  - There is no Canadian worker available to do the job;
  - There is a need for the temporary foreign worker ("TFW") to fill the job;
  - Hiring a TFW will not negatively affect the Canadian labour market; and
  - There is a plan in place to transition the work in question to the Canadian workforce within a reasonable period of time.[129]

I obtained further information on this aspect from the immigration lawyer. I was advised that the LMIA process requires the employer to demonstrate "that no Canadian worker or permanent resident is available or qualified to do the job."

It ought to have been clear that the LMIA route would require the University to show that there was no Canadian available or qualified to do the job.

[129] "Criteria to Hire a Foreign National", University of Toronto, Human Resources and Equity (undated).

So far as I can determine, the immigration resources do not address the "substantial benefit" route that was being considered for the Preferred Candidate.

8. Confidentiality in the hiring process

Everyone in the University community to whom I spoke understands that the hiring process is confidential. In response to my request to be referred to all relevant University policies, the Chief Human Resources Officer noted that "[i]t is axiomatic in Human Resources best practices that the personal information about candidates that is supplied as part of a search, and the deliberations of the search committee itself, are strictly confidential." However, I was not able to find this best practice expressly reflected in any University policy that applies to recruitment for this position.

There is a 2006 memorandum by former President Naylor to University administrators to assist in search processes for academic and senior non-academic administrators in which it was stated that "[c]onfidentiality is mandatory in order to ensure frank discussion and to respect the input and participation of everyone involved in each phase of the committee's work. This requirement will ensure that the qualifications and appropriateness of individual candidates can be discussed openly within the committee, and that none of these discussions, even in part, will be disclosed. Members are committed to upholding the highest standards of confidentiality with respect to the committee's activities."[130] I doubt that this memorandum applies to the recruitment of the IHRP Director as the position is neither an academic nor a senior non-academic appointment.

Similarly in a 2002 memorandum, then Vice-Provost Goel instructed university administrators that "material [submitted by an applicant] should remain confidential to the members of the duly constituted search committee."[131] Materials can be circulated more broadly to members of the department when the consent of the author is obtained. This memorandum is silent with respect to whom it applies, although it appears to

[130] Search Committee Principles & Practices (Memorandum), dated November 3, 2006.

[131] Confidentiality of Search Committee Records (Memorandum), January 8, 2002.

provide general guidance on best practices for hiring processes generally.

9. Alumni and Donor Input into University Decision-making

The University has some policies touching on aspects of its relationship with alumni and donors. For example, the *Provostial Guidelines on Donations* provide that the "University values and will protect its integrity, autonomy, and academic freedom, and does not accept gifts when a condition of such acceptance would compromise these fundamental principles."[132]

Virtually everyone to whom I spoke in the University community recognized that donors and alumni should not have any inappropriate role in hiring decisions. That said, there is no formal policy speaking expressly to the question of if and to what extent alumni and donors may appropriately be involved in the University's hiring decisions.

There are doubtless instances, particularly in professional faculties, in which input from the broader community may be valuable and ought to be welcomed. However, any such input into hiring decisions should occur only in the context of the established hiring process and must be consistent with the goal of identifying the most highly qualified candidates based on objective criteria. 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.

There ought to be express University policy reflecting this view and providing guidance to those to whom such approaches are made.

C. ANALYSIS

1. Academic Freedom

The current understanding is that the existing formal protections in the University for the foundational principle of academic freedom do not apply to positions in the "Professional/Managerial" classification such as the Director's position in the IHRP. That said, academic freedom, as the University's policies recognize, is central to the proper functioning of a university and more broadly the search

[132] *Provostial Guidelines on Donations*, April 30, 1998.

for the truth. The concern with the search process in this case was that external actors considered the Preferred Candidate's scholarship objectionable and that this external influence played a role in the decision not to proceed with the recruitment.

In my interviews with members of the University administration and community, no one has suggested that such outside intervention is appropriate. On the contrary, I heard multiple times from University administrators and interested parties that permitting those outside of the University to play a determinative role in University hiring runs afoul of the principles for which the University stands. This understanding is reflected in the University's public statements concerning this controversy.

For example, in an email to Faculty of Law members, the Dean stated that "'[l]et me say at the outset that assertions that outside influence affected the outcome of that search are untrue and objectionable. University leadership and I would never allow outside pressure to be a factor in a hiring decision."[133] The VPHR also , stated that "[t]o assert that external views, from any individual or organization, either for or against the potential hiring of a particular candidate were a factor in the decision not to proceed with an offer of employment, is false."[134]

Giving effect to such outside influence would of course be inconsistent with the fundamental policy of selecting the candidate that is most highly qualified based on objective criteria as assessed through the selection process.

As I noted in the introduction, given (i) the apparent consensus on this point; (ii) the fact that I would not draw an inference that external influence played a role in this case and (iii) the current ongoing parallel processes by the Canadian Association of University Teachers and the University of Toronto Faculty Association, it would be imprudent for me to do anything more than to provide you with a few thoughts on this subject in the context of the third element of my Terms of Reference, namely to offer "any pertinent guidance or advice" for the University's consideration "relating to any

[133] Email from Dean to the Faculty of Law.

[134] Email from VPHR.

matters arising out of the processes that were involved in this search."

2. Confidentiality

As noted, there is a surprising gap in the University's written policies with respect to the requirement of confidentiality in the recruiting process. However, virtually everyone to whom I spoke in the University community recognized and accepted that requirement.

There are sound reasons for this. First, candidates will often have to provide confidential information in order to place a full picture of their candidacy before the selection committee. Their candour ought to give rise to a corresponding duty to keep that information confidential and to use it only for the purposes of evaluating the candidate's application.

Second, a robust recruiting process requires a full and frank exchange of views among the selection committee members who, in a sense, are deliberating among themselves in order to find the most highly qualified candidate. As in many other settings, confidentiality fosters the sort of candid exchange which ought to characterize those deliberations and that is vital to finding the best candidate.

Finally, the University is under statutory obligations to protect the privacy of personal information.[135]

There is no doubt that confidential information about the search process was disclosed outside the selection committee's deliberations. Information about the state of the search was shared with the AVP and relayed to the alumnus. Selection Committee Members 1 and 2 shared information outside the selection process circle. A chronology prepared by Selection Committee Member 1 was provided to the *Globe and Mail,* although so far as I can determine not by the Selection Committee Member. Selection Committee Member 2 tweeted copies of emails that had been exchanged relating to the search process once the matter was in the public domain as a result of press coverage following the Dean's announcement at a faculty meeting that the search was being cancelled. Some

[135] *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31.

of the participants in the initial meeting with Selection Committee Member 1 shared what they had learned and the Preferred Candidate herself shared information about the search process with others.

The fact that this information came to be in the public domain put the University in a difficult position. It had legal advice to the effect that it could not release more information than the brief statements that it issued. But in the eyes of some, this rather general and brief response to the various allegations reinforced the view that the Alumnus' information was the true basis for, or at least a contributing factor to, the decision not to continue with the Preferred Candidate's recruitment.

In the concluding section of my review, I will have a number of suggestions for your consideration in relation to the confidentiality of recruitment processes.

3. Conclusion

The concern in this case is that external influence was inappropriately brought to bear on a hiring decision. There is no doubt that this, if it occurred, would be contrary to University policy that applies to the recruitment of Professional/Managerial Staff. However, as discussed at length above, I would not draw the inference that external influence had an impact on the decision-making in this case. Given the broad consensus about the impropriety of such influence playing any role and my conclusion that it did not, and given the existing processes involving the Canadian Association of University Teachers and the University of Toronto Faculty Association, I do not think it prudent for me to say more about the parameters, if any, of academic freedom in this situation.

With respect to confidentiality, there were several instances in which the confidentiality of the search process was not observed. However, I found there to be significant gaps in the University's policy framework in this regard.

PART III: PERTINENT GUIDANCE FOR YOUR CONSIDERATION

A. INTRODUCTION

The third and final element of my review addresses your request that I provide "any pertinent guidance" for your consideration "relating to any matters arising out of the processes that were involved in this search." I have several suggestions that I hope may be helpful to the University. I will address five main aspects: (i) the basis of recruiting decisions; (ii) the recruiting process; (iii) confidentiality; (iv) protections for clinical instructors; and (v) reconciliation.

B. THE BASIS OF RECRUITING DECISIONS

As I have explained at length earlier, I do not think it prudent to embark on an extended discussion of academic freedom and issues such as whether it applies at all to professional/managerial staff and if so how it applies with respect to candidates during the recruiting process.

However, at the root of the concerns expressed to me about academic freedom is the basic point that the University must be clear that external pressure cannot play a role in its recruiting decisions.

I suggest that it would be timely for the University to re-affirm a fundamental principle: attempts by anyone – including lobby groups, corporations and donors – to attempt to block, prevent or disqualify an applicant in a merit-based hiring process on the basis of the candidate's religious or political views, their scholarly or other public work or their social activism must be firmly rejected unless the matter raised can be demonstrated to be evidence of unfitness for the duties of the position.

In addition, it should be made explicit that "input" of this nature is not to be made through "back channels", such as "quiet discussions" with "top university officials."

This suggested re-affirmation is consistent with the commitment to justice and equity in the *Statement of Institutional Purpose* and with the principle that the best qualified person should be hired as set out in the *Policies for Professional and Managerial Staff*. Specifically, the *Statement of Institutional Purpose* recognizes that "the most crucial of all human rights are the rights of freedom of speech, academic

freedom, and freedom of research."[136] In so doing, the *Statement of Institutional Purpose* commits the University to cultivating a culture of equal opportunity. Similarly, the *Policies for Professional and Managerial Staff* seek to, among other things, "foster excellence in the work place and contribute to the achievement of the mission of the University through hiring the best qualified candidate."[137] An express prohibition of outside interference is entirely consistent with and promotes the values of the University.

In the same vein, it would be helpful for the University to develop explicit policies or protocols as to how to handle any inquiries made by an alumnus or others regarding a recruitment process. There are many ways these policies or protocols could be formulated. One approach to consider would be to stipulate that the University should respond to these sorts of inquiries by indicating that: (a) recruiting processes are confidential; (b) decisions are made on the basis of the material obtained during the recruiting process; and (c) only concerns put in writing and that will be shared with the candidate will be received. If a policy along these lines had been in place and observed at the time of the alumnus conversation with the AVP, this whole unfortunate controversy would likely have never arisen.

C. THE RECRUITING PROCESS

There are several aspects of the recruiting process that would benefit from a more explicit policy framework.

1. The Constitution and Role of the Selection Committee Should be Specified

I was not able to locate any terms of reference or other written policy that addressed how the selection committee for this position should be constituted or what its role should be. There has been no objection to this aspect of the process in this case and what was done was, so far as I can tell, consistent with past practice. I did note, however, that the HR Consultant thought that the Assistant Dean was the decision-maker while everyone I have heard from in the Faculty of Law understood that the committee's role was advisory to the Dean who was the ultimate decision-maker. There is

[136] *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992.

[137] *Policies for Professional and Managerial Staff*, effective March 5 2012, section II.

certainly excellent guidance available, as noted earlier, in the Hiring Manager's Toolkit, but that material is not routinely available to members of selection committees.

My understanding is that Hiring Managers and selection committees look to the HR Consultant for guidance on questions of process. No doubt that is appropriate and wise. However, I suggest that it would be helpful for there to be explicit written guidance provided to members of selection committees about the process that they are to follow as well as written Faculty or other procedures to address the composition and appointment of members of a selection committee for PM positions.

2. All Requirements of the Position Should be Made Explicit

All requirements should ideally be specified in the advertisement or at least made explicit at the time that interviews are conducted. The problem with not doing this is apparent from looking at what happened in this case.

It appears that there was a misunderstanding within the selection committee with respect to the timing for entry into the position. As discussed in Part I, the Assistant Dean understood throughout that it was essential that someone be in the role in the fall, while the other members of the selection committee thought that the crucial date was the beginning of January. If the position requires that the person start work by a certain date, that should be specified in the advertisement and, if not specified there, it should at least be made clear to candidates no later than at the time that interviews are conducted. If timing is flexible within certain limits, this too should be specified or made clear in the same way.

3. Key Decisions Should be Recorded

Key decisions by a selection committee should be put in writing. This practice would have prevented an apparent serious misunderstanding in this case. Two members of the selection committee recalled that the committee had unanimously agreed that if neither of two candidates could be hired, there would be a failed search. The third member did not share that recollection. My suggestion is not that there be any elaborate minutes or formal record kept. All I have in mind is a succinct email confirming key decisions.

4. Immigration Advice Should be Obtained Early in the Process

The selection committee and the hiring manager should have more detailed immigration information earlier in the process when they embark on an international search. It is a significant step for the University to represent that there is no Canadian applicant suitable for the position. The timing implications of the process, both in relation to the timing of advertising and in terms of how long it will likely take to obtain required approvals should be understood at the beginning, not at the end of the process.

5. Recommendations to the Decision-maker From the Selection Committee Should be in Writing

Where, as in this case, the selection committee is advisory, it should report to the decision-maker in writing. This need not be an elaborate document, but it should set out the key elements of the committee's recommendation and the reasons for it. This could take the form of a brief email, composed while all the members of the committee are present, at the conclusion of their deliberations.

6. The Decision-maker Should Meet with the Selection Committee Before Departing from their Recommendation

Collegial governance is one of the four principles to which the University is committed.[138] As I see it, where a decision-maker feels unable to accept the recommendation of a selection committee, the principle of collegial governance supports full consultation and discussion before a final decision is made. This approach has the benefit of ensuring that there are no information gaps or misunderstandings between the committee and the decision-maker and it also allows for a full airing of differences of view within the cone of confidentiality before a final decision is made.

D. CONFIDENTIALITY

While everyone to whom I spoke understood that confidentiality is important in the hiring process, I was not able to find much in the line of explicit policy on this topic or much consensus about the details.

There are several aspects of confidentiality that arose in this case:

[138] *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992, see section on "The University Community".

- First, was it appropriate for an advancement professional to agree with an alumnus to find out the state of a particular hiring process?
- Second, was it appropriate for a recruiting manager to share information about a recruiting process with a peer in the same faculty?
- Third, was it appropriate for that peer to share the information with her boss, the advancement professional?
- Fourth, was it appropriate for the advancement professional to pass on the information received to the alumnus?
- Fifth, was it appropriate for a member of the selection committee to brief concerned colleagues on the details of the selection committee's decision-making and to provide notes of that process to others?
- Sixth, was it appropriate for a member of the selection committee to tweet emails concerning the process?
- Seventh, was it appropriate for someone to provide a copy of the selection committee member's notes to the press?
- Eighth, should an adverse inference be drawn when a university official respects the obligation to keep personal information confidential?

In my view, the answer to all of these questions is "no." But one would look in vain for express, written University policy that provides clear answers to any of these questions. That, in my view, ought to change.

I suggest that there ought to be written confidentiality guidelines for PM recruitment processes. The guidelines should address specific examples of what the obligation of confidentiality entails in that context. The obligation of confidentiality ought to include at least the identity of candidates, their personal information and the deliberations of the selection committee. In addition, members of selection committees ought to be required to sign written confidentiality agreements spelling out the obligations of confidentiality which they are accepting. Finally, it should be clear that under no circumstances are details of a recruitment process to be shared with anyone not directly involved except for the purposes of checking references or obtaining necessary legal advice.

In addition, members of selection committees and members of the University community in general ought to be provided with practical summaries of the University's obligations under privacy legislation.

E. PROTECTIONS FOR CLINICAL INSTRUCTORS

I will not engage with the debate about how the principle of academic freedom relates to the employment of professional/managerial staff at the University. I do wish to comment, however, on what to me is a broader, valid point raised by many who were in touch with me.

Clinical instructors, especially in human rights and public interest law clinics are literally "in the business" of taking on controversial and unpopular causes. One can think of issues about allegations of human rights abuses or environmental damage committed by Canadian companies abroad, the plight of asylum seekers, or the alleged mistreatment of minority groups by foreign powers. All of these, and many other issues, are likely to be controversial and cause discomfort to some powerful people, groups and institutions.

These clinical instructors need courage to fearlessly advance unpopular positions and to advocate on behalf of the powerless. But they deserve to know that the University "has their back" as they do so. I suggest that the University examine the protections for clinical instructors and similar positions whose duties require them to tackle topics likely to arouse controversy and to take steps to ensure that their efforts will be supported so long as they meet the highest professional standards.

F. RECONCILIATION

This controversy has left deep wounds in its wake. I believe that everyone involved in the University community acted in good faith, although undoubtedly there were things that, at least with the benefit of hindsight, ought to have been done differently. The question, though, is how should the Faculty of Law and University move forward?

I suggest that you, in consultation with the current Dean of the Faculty of Law, explore the possibility of engaging in a reconciliation process, both internally and with the Preferred Candidate. I am sure that there is much more that unites all of these people than divides them. I sense a widely-shared and profound

commitment to the values that the University seeks to embody. A process that helps to refocus the community on those values and acknowledges the harm done to the Preferred Candidate has the promise of helping to bring together colleagues who share these important values, even though those values may have led them to very different stances on this controversy.

CONCLUDING REMARKS

I have provided a comprehensive factual narrative of the recruitment process for the IHRP. I have concluded that I would not draw the inference that improper outside influence played any role in the decision to discontinue the candidacy of the Preferred Candidate.

In light of that conclusion and of ongoing processes within and beyond the University, I have thought it imprudent to opine on the role, if any, of academic freedom in the recruitment process for this PM-4 position.

Finally, I have offered a number of suggestions for changes to or clarifications of University policy and practice and suggested that consideration be given to instituting a reconciliation process within the Faculty of Law and with the Preferred Candidate who has been seriously victimized by the this controversy.

I hope that I have fully responded to the task that you asked me to undertake and I hope that what I have provided will be of assistance.

APPENDIX A – CONFIDENTIAL CONCORDANCE FOR PRESIDENT GERTLER ONLY

[redacted]

APPENDIX B – LIST OF SUBMISSIONS RECEIVED

Although this was not a public review or process, a number of individuals, groups of individuals and organizations took the time to write to me to provide their insight into the subject matter of my review and the underlying events. Below is a list of submissions received.

1. Submission of B'Nai Brith Canada dated December 2020.
2. Letter from Professor Abigail Bakan dated January 20, 2021.
3. Email from Professor Emeritus Joseph Carens dated January 21, 2021.
4. Email from Professor Judith Taylor dated January 21, 2021.
5. Submission received from Associate Professor Vincent Chiao, Professor Patrick Macklem, Professor Anver Emon, Professor Denise Réaume, Professor Mohammad Fadel, Professor Kent Roach, Associate Professor Ariel Katz, Professor David Schneiderman, Professor Trudo Lemmens, Associate Professor Anna Su, and Professor Jeffrey MacIntosh (all tenured faculty at the University of Toronto Faculty of Law) dated January 22, 2021.
6. Letter from seven Israeli scholars and practitioners of international and human rights law, dated January 28, 2021.
7. Submission received from Associate Professor Ralph Wilde and Professor GM Scobbie dated January 29, 2021.
8. Submission received from the Arab Canadian Lawyers Association and Independent Jewish Voices Canada dated February 2, 2021.
9. Submission received from the Canadian Association of University Teachers dated February 8, 2021.
10. Email and documentation sent on behalf of the University of Toronto Faculty Association dated February 9, 2021.

11. Letter from Karen Bellinger, Carmen Cheung, Associate Professor Vincent Chiao, Samer Muscati, Cheryl Milne, and Professor Kent Roach dated February 10, 2021.

12. Letter from Professor Reem Bahdi and Dr. Ardi Imseis dated February 15, 2021.

13. Letter from Professor Michael Lynk and Dr. Ardi Imseis dated February 24, 2021.

14. Letter from 86 Faculty Members and Librarians in the Social Sciences and Humanities at the University of Toronto, received March 3, 2021.

UNIVERSITY OF TORONTO
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Dear President Gertler,

We are writing this letter to you in our capacities as professors in the University of Toronto Faculty of Law in response to the Cromwell Report, and your letter embracing its conclusions. This letter does not reflect all our comments on the Report, but provides an overview of some of the key concerns we have with the Report and with the University's public statements embracing it. Particularly troubling to us are the failures to (1) acknowledge the fundamental limitations in Justice Cromwell's findings, (2) address the shocking institutional weaknesses the Report disclosed, (3) reject Justice Cromwell's conclusion that the actions of Justice Spiro were not improper, and (4) dismiss outright two of Justice Cromwell's recommendations that would both reduce the scope for legitimate faculty criticism of administrative actions *and* invite further third-party interventions in confidential hiring processes.

1. Factual Background

After a lengthy and confidential international hiring process, a Selection Committee unanimously chose Dr. Azarova, a non-Canadian resident of Germany, as their preferred candidate to be director of the Faculty of Law's International Human Rights Program ("IHRP"). (The alternative choice was also a non-Canadian). She was offered the position on August 11, pending acquisition of a work permit, which was reasonably expected to take about 2-3 months to obtain. On Friday September 4, the Friday of the long Labour Day weekend, the Dean of the Faculty of Law, Edward Iacobucci, actively inserted himself into the process for the first time. Dean Iacobucci intervened only after Justice David Spiro, a sitting judge on the Tax Court of Canada, an alumnus and, along with his extended family, a major donor to the University of Toronto and the University of Toronto Faculty of Law, advised the University of objections to her hire based on her scholarship on Israel's occupation of the Palestinian Territories. Justice Spiro specifically alleged that hiring her would cause "reputational damage" to the Faculty of Law, controversy with the Jewish community, and negatively affect fundraising. Justice Spiro learned of her prospective hire, despite the confidentiality of the hiring process, from the Centre for Israel and Jewish Affairs ("CIJA"), a group that, among other things, lobbies governments and universities on behalf of what it perceives to be pro-Israel positions. CIJA itself learned of the offer to Dr. Azarova from an academic based outside of Canada. The Cromwell Report does not explain how that person obtained knowledge of the imminent hire of Dr. Azarova. Approximately 48 hours later, the Dean decided to terminate the hire.

In the meantime, Professor Audrey Macklin, who had chaired the search committee, resigned as Faculty Chair of the International Human Rights Programme. Three faculty members who were not directly involved in the search also resigned from the Programme's advisory committee. They had failed to obtain a response from the Dean to their questions for further information about the interference by a judge and a clarification about the cancellation of the appointment.

News of what happened became public after the Dean announced cancellation of the search, and many observers suspected that the Dean terminated the hire due to pressure from Justice Spiro. In response to these concerns, you commissioned former Justice Thomas Cromwell of the Supreme Court of Canada to review the matter.

The Cromwell Report on its surface seems to exonerate the former Dean from any wrongdoing in connection with the termination of the hiring process for the Director of the IHRP and chooses to accept the former Dean's assertations that it was complications related to her immigration status that forced his hand, not pressure from Justice Spiro. The University immediately released a letter claiming vindication. We believe, however, that the claim that the Cromwell Report vindicates the former Dean and the University is not borne out by a review of the evidence actually revealed in the Report. Indeed, the Cromwell Report, despite its conclusions, raises more questions than it answers.

We offer here a sample of our concerns with the Report that we shared with the current Dean of the Faculty of Law.

2. Because of Mr. Cromwell's self-imposed limitations, his conclusions are not entitled to deference

Mr. Cromwell states repeatedly that he would not resolve disputed facts or judge credibility. Therefore, the only permissible conclusion that can be drawn from the Report is that the Dean *repeatedly declared* that immigration issues were the sole reason for terminating the hiring process for the IHRP. Any further inference as to whether the former Dean's declarations of his motives for action, or whether any particular statements of fact made by him were true or sincerely believed (mistakenly or not), contradicts Mr. Cromwell's starting premise. Mr. Cromwell, throughout the Report, simply treated as true whatever the Dean says he sincerely believed to be true, instead of seriously considering what was most likely true or reasonably believed in light of all available evidence. Since we already knew that the Dean claimed he was uninfluenced by anything other than the technicalities of meeting immigration requirements by a given deadline, Mr. Cromwell's decision to credit the former Dean's statements – without systematically addressing the contrary evidence assembled in the Report – adds nothing of value to the former Dean's own statements.

Far from establishing that there was *no basis* for concern that donor interference was *a factor* in the Dean's reasoning, the information Mr. Cromwell assembled from different sources, provides additional reasons why reasonable persons could conclude that donor interference was at least *a factor*, even the *predominant factor*, in the former Dean's decisionmaking. Indeed, even the Dean is described as having admitted to the Provost, in a conversation over the Labour Day weekend, that Justice Spiro's communication was a "complicating factor" in the decision. The Provost, in turn, recognized the delicate situation the Dean found himself in as a result of Justice Spiro's intervention, noting the Dean was now in a "'no-win' situation in that whatever decision he made there would be people who would be very upset (p. 37)"

The Dean's account of his decisionmaking relied on several hotly contested points that Justice Cromwell declined to resolve. An example is that the Dean claimed an honest belief that September 30 was a hard starting date (for an offer made to an international candidate on August 11), and since Dr. Azarova could not start work by September 30, her offer had to be terminated. But the Dean contradicts himself by also telling Mr.

Cromwell that he hoped to find a Canadian candidate to arrive by September 30 or sometime in the fall. Justice Cromwell put it this way:

"Fourth, [Dean Iacobucci] 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 (p. 42)."

Yet, no one contested the opinion of the University's immigration lawyer that Dr. Azarova could obtain her work permit and arrive sometime in the fall. Cromwell ignores this contradiction. In addition, others with direct involvement in the IHRP denied that September 30 held any significance for the programme or the hiring process. The candidate denied being told of a hard September 30 starting date. Nor did the Dean mention this deadline when he spoke to Professor Audrey Macklin on September 6 about the problems he saw in hiring Dr. Azarova. Similarly, the Dean claimed that he thought it was feasible to find a qualified Canadian candidate (based on CVs of rejected candidates), but others who interviewed those candidates told him there were none. Indeed, it would have been improper to have selected Dr. Azarova if there had been qualified Canadians in the pool in the first place.

Accepting the truth of the Dean's account turns on both the consistency and the plausibility of his explanation. This is the standard approach in all legal contexts involving differing accounts of an event. We respectfully believe the former Dean's claim that September 30 was a hard deadline is implausible for several reasons: The only source in support of the Dean's belief that September 30 was a hard deadline is the Dean himself and the Assistant Dean's oral account to Mr. Cromwell. Nothing in the emails exchanged among the participants in the IHRP search independently corroborates the Dean and the Assistant Dean's claim that September 30 was a hard deadline. All things being equal, written evidence, created in real time and before any controversy has erupted, ought to be given more weight than exculpatory testimony taking place several months after the events took place and after controvery has erupted.

Moreover, and given that the second choice of the committee was also a non-Canadian, who would also need a work permit, it is inconceivable that an offer would be first made on August 11, conditioned on a hard requirement of starting work by September 30, when it would be even more difficult for the back up candidate to secure a work permit by the same date should negotiations fail with the first choice. This gives us the choice of either believing that the former Dean authorized an international search with parameters designed to produce a failed search, or that the claim of a hard September 30 deadline is unfounded. Because we find it inconceivable that the former Dean would approve parameters for an international search that would be bound to fail, we must conclude that the former Dean and Assistant Dean are mistaken in their belief that September 30 was a hard deadline.

Finally, even if one accepts that the former Dean sincerely believed that Justice Spiro's intervention in the process did not influence his decision, such a belief does not prove that he was not actually influenced. As we know, people may not be fully conscious of the factors and motivations animating their decisions. In the absence of other reasonable ground for cancellation of the appointment, the potential impact of unconscious influence becomes a more plausible explanation.

We therefore see no good reason for us, or any objective third party, to accept Mr. Cromwell's conclusions regarding the motivations of the Dean's conduct in terminating abruptly the hiring process for Dr. Azarova. Our skepticism is especially warranted in light of the extensive external effort to derail her hire, and the abject failure of University officials to protect the integrity of the hiring process. The institutional failures of the University and the Faculty of Law are further described below.

3. The Cromwell Report inexplicably minimizes interference in a confidential hiring process

Although the report emphasizes that external influence in the hiring process is inappropriate, and that no external persons ought to have known about the candidate selected, the Report whitewashes the coordinated efforts of third parties to undermine the IHRP appointment process, Justice Spiro's willingness to further this effort, and its successful aftermath. It is shocking that Mr. Cromwell minimizes, and in the end, even exonerates such interference and gives the greenlight for similar interventions in the future.

The Cromwell Report confirms that CIJA, an organization for which Justice Spiro had served as a director, expressly sought to interfere in the hiring of Dr. Azarova because her academic work was critical of Israel. It is equally incontrovertible that within 48 hours CIJA got exactly what it wanted. The Cromwell Report confirms that upon hearing from Justice Spiro that some members of the Jewish community (including donors like him) would object to hiring Dr. Azarova, three senior University personnel, one working in the University's President's Office, another in the Faculty of Law's Advancement Office, and the Assistant Dean of the Faculty of Law, cooperated fully with him. Not only did they fail to rebuff Justice Spiro's attempt to interfere in what was supposed to be a confidential hiring process, but they unhesitatingly aided and abetted his intervention by communicating his concerns to the former Dean. They even assured Justice Spiro that he would be kept informed — and he was kept informed, despite the claim that the Assistant Vice President of Development was told to "back off". Justice Spiro even offered his ongoing assistance in providing further information to tar the candidate.

It takes a remarkable degree of naivete – or wilful blindness – in the face of these uncontested facts to conclude that Justice Spiro did not attempt to interfere in the hiring process but was merely sharing his views to encourage "due diligence." But *even if this were true*, such sharing of views would amount to a gross interference in a confidential job search and is indisputable evidence of egregious violations of University hiring procedures.

These newly uncovered facts raise more questions and concerns than were apparent at the outset of this controversy in September 2020, questions that remain unanswered. Why, for example, did senior University and law school administrators pass on Justice Spiro's concerns if they understood that such interference was completely unacceptable, as the University and the law school claim to be the case? Why did the Assistant Dean provide confidential information to advancement staff, knowing it would be shared with Justice Spiro? Why did she ask the advancement staff to "brief" the Dean about Justice Spiro's reservations (p. 33)? Why would Justice Cromwell approve a carveout to confidentiality protections in hiring decisions that would authorize politically

interested third-parties such as CIJA to interfere in hiring decisions on alleged grounds of a canditate's "fitness"?

4. Confidentiality and privacy cannot be used as a shield against accountability

Mr. Cromwell explains the Dean's refusal to engage with colleagues, including members of the faculty advisory committee to the programme, as resulting from "legal counsel advice to the Dean in e-mail exchanges". Remarkably, the Cromwell Report fails to explain the legal grounds for these claims. A Dean, the University's administration, or an independent reviewer should not be able to avoid accountability by merely invoking conclusory claims of confidentiality and privacy without explaining their basis in law.

First, faculty advisory committee members have been previously involved in the discussions around the hiring of a new director for the IHRP. Privacy law does not prohibit such discussions and University policy explicitly authorizes disclosing such information "to a University officer, employee, agent or consultant, who needs the personal information for the performance of his/her duties, if the disclosure is necessary and proper in the discharge of the University's functions."[1] Clearly, sharing information about the hiring process with members of the advisory committee of the IHRP and with members of Faculty Council is necessary and proper for the discharge of their functions. Even in the absence of that policy, privacy law includes a public interest justification and other principles that justify sharing information with members of the faculty advisory committee, and even all faculty members.

While the law can impose a duty not to disclose confidential information provided by a third party, the law does not prohibit anyone from disclosing their own information. It is not clear whose confidentiality legal counsel considered and on what grounds, and whether they considered relevant public interest exceptions. The invocation of unspecified and conclusory confidentiality grounds hampered efforts of colleagues to press concerns affecting the credibility of the IHRP in national and international circles.

In any event, the most directly interested party, Dr. Azarova, would have given permission for sharing of relevant personal information. Who else's interests were at stake? Those of employees who funnelled donor concerns to the Dean's office? The alumnus who intervened? Surely, the public had a right to know that CIJA and Justice Spiro acted in concert to subvert a confidential hiring process and that senior university personnel, instead of resisting such efforts, aided and abetted them.

A bare invocation of privacy is insufficient to excuse refusal to discuss in a timely fashion matters of shared concern and potentially involving the public interest.

5. The Report misunderstands the proper scope of confidentiality requirements

Members of the IHRP search and advisory committees resigned out of basic respect for the integrity of their professional role as faculty members and commitment to the values of the institution. Faced with impending serious damage to the integrity and credibility of the IHRP programme, they could not fulfill that role without basic information that the former Dean refused to provide them.

Rather than recognizing the validity of these concerns, Mr. Cromwell proposes that members of search committees henceforth sign strict confidentiality agreements.

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[1] University of Toronto, FIPPA - General and Administrative Access and Privacy Practices (2011).

This would preclude sharing any information to anyone outside a search committee, even when there are reasonable public interest grounds to do so. Mr. Cromwell not only accepts everything the former Dean says as true, he apparently thinks we should always be *required* to accept Decanal and University administrators' assertions as true. His recommendation, if adopted, would further undermine the ability of faculty to ask questions, stifle whistleblowing, reduce public accountability, and suppress the disclosure of controversies related to internal wrongdoing. Implementing this recommendation will not only be against the public interest, but will also render hollow the University Statement on Freedom of Speech, which includes the right to criticize the University. How can one criticize the University without disclosing the details that underly the criticism?

The message from the Cromwell Report and from the University's endorsement of the Cromwell Report is that, when faced with evidence of possible outside pressure or interference in a hiring process, we must trust that individuals in positions of power in our institution always act appropriately. Smoke can never mean fire at the University of Toronto. Nor does it seem independently important to avoid the *appearance* of financial or political interference in decision making.

Only if we had reason to believe that the University is immune from the sort of human and institutional failings that good rules and processes are designed to prevent could we accept Mr. Cromwell's report. That is too much to ask of citizens in a democracy, to say nothing of law professors who on a daily basis teach their students to be sceptical of the claims of the powerful.

We are therefore profoundly disappointed to see the University embrace Justice Cromwell's recommendations without qualification. The complicity of the University and the Law Faculty's Advancement Offices in aiding and abetting the breach of the hiring process for the director of the IHRP, and the ineffectual institutional response to that breach, conclusively proves that much work remains to be done at the central administration level as well as at the Faculty of Law to insulate sensitive academic processes from external interfence and to assure collegial governance.

6. Reconciliation?

The Cromwell Report concludes by urging all sides in this divisive controversy to reconcile based on shared values of the University. We are also keen on using Mr. Cromwell's findings as a basis for reconciliation, but we start from his undisputed findings, not his controversial conclusions.

First, it is uncontested that third parties, opposed to Dr. Azarova's appointment to head up the IHRP because of her work on Israel's conduct in the Occupied Palestinian Territories, acted in concert with Justice Spiro to prevent her from being hired.

Second, it is undisputed that Justice Spiro used his position as a privileged donor to raise concerns about Dr. Azarova that were unrelated to her qualifications for her position in order to discourage the Faculty of Law from hiring her.

Third, it is undisputed that senior University personnel working in the University's and Faculty of Law's Advancement Offices, instead of rebuffing this attempt to interfere, cooperated fully with Justice Spiro, faithfully and without hesitatition communicating his concerns to the former Dean. It is undisputed that senior

administrators in the Law Faculty obliged by furnishing confidential information to be relayed back to Justice Spiro.

Fourth, it is undisputed that the former Dean "abruptly terminated" what Mr. Cromwell called "advanced negotiations" with Dr. Azarova after being informed of Justice Spiro's concerns.

Fifth, it is also undisputed that Dr. Azarova was the best qualified candidate for the position of Director of the IHRP.

It is virtually indisputable that, regardless of the former Dean's motives, Justice Spiro's improper intervention was the "but for" cause for the termination of negotiations with Dr. Azarova. Accordingly, and based on the undisputed facts of the Cromwell Report, the easiest path forward to effect reconciliation – if that is indeed the desire of the University and the Faculty of Law – is simply to offer Dr. Azarova the position of Director of the IHRP. The only way to rectify the undeniable harm done to her is to offer her this position promptly. Only by offering her the position will the University and the Faculty of Law unequivocally repudiate the still lingering suspicion, which the uncontested facts of the Cromwell Report have only served to strengthen, that the failure to give Dr. Azarova the directorship of the IHRP was a result of improper donor influence.

We are of course prepared to meet with you to discuss respectfully our concerns with the Cromwell Report and our recommendations on how to move forward in the best interests of the University and the Faculty of Law.

Anver Emon

Anver M. Emon, Professor of Law

Jeffrey MacIntosh

Jeffrey MacIntosh, Professor of Law

Mohammad Fadel, Professor of Law

Denise Réaume

Denise Réaume, Professor of Law

Ariel Katz

Ariel Katz, Associate Professor of Law

David Schneiderman

David Schneiderman Professor of Law

Trudo Lemmens, Professor of Law

An Analysis of the Cromwell Report - Executive Summary

Denise Réaume
Faculty of Law, University of Toronto
Visiting Professor, University of Oxford

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.

An Analysis of the Cromwell Report

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I INTRODUCTION

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At least four claims that Cromwell treats as true are, in fact, disputed (these are analyzed in more detail below):

- that the Dean acknowledged the donor's intervention to Selection Committee 1 at the outset, but described it as 'irrelevant' rather than as 'an issue that it was unnecessary to get to',
- that the starting date was September 30, 2020 rather than 'before the January 2021 term',
- that the independent contractor arrangement necessary to permit Dr. Azarova to start by September 30 was not feasible, and
- that there were qualified Canadian candidates.

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.
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reveals that the Dean unreasonably, implausibly and peremptorily converted ordinary administrative matters into insurmountable obstacles.

II CHRONOLOGY

1. The Selection Committee consisted of the Assistant Dean (a non-academic administrator who reports to the Dean) the Chair of the Faculty Advisory Committee to the IHRP (a faculty member who is the Chair in Human Rights Law) and a Research Associate (lawyer/human rights defender) working at the IHRP since 2019. The IHRP had been without a permanent Director since September 19; the Interim Director departed in August 2020.

2. Dr. Azarova was the "strong, unanimous and enthusiastic first choice" of the Selection Committee arising out of an international search and confidential hiring process that received 140 applications. References, including from Jewish and Israeli law professors were "glowing". (p. 5, 6, 11).

3. August 11: provisional offer made to Dr. Azarova, conditional on obtaining a work permit in time to teach in January 2021; favourable reply by Dr. Azarova on August 17.

4. August 17: Assistant Dean briefed the Dean about the candidate, the offer and the need to arrange work permit.

5. August 19: Immigration Lawyer advises that work permit will take 2-3 months to obtain; it would likely be received sometime in November or December. Immigration Lawyer alerts Assistant Dean to the possibility that Dr. Azarova may be able to begin working remotely as an independent contractor until work permit issued.

6. In early Sept, parties figuring out logistics of hiring Dr. Azarova, and addressing immigration hurdles. Assistant Dean scheduled to meet with Dean on Tuesday, Sept 8 where "she planned to brief the Dean and seek his approval to make the offer". (p35) Until this point, Dean was not involved. (p. 35)

7. Fri Sept 4 AM: Assistant Dean working on completing work permit application, contacts immigration lawyer to advise that "they would be moving forward to provide [Dr. Azarova] with an independent contractor agreement 'next week'". (p28-29)

8. Fri Sept 4, 'around the same time'(p. 30): Assistant Vice President of Alumni Relations has a "normal 'reach out' to donors" call with Justice Spiro (the Donor) . Summary of call filed in Spiro's "Major Gifts plan". (p31) During the call, Spiro says that he had just been asked by Centre for Israel & Jewish Affair to inquire about appointment of Dr. Azarova; CIJA sent Spiro a memo detailing objections to Dr. Azarova, (p31), describing her as a "major anti-Israeli activist" about to be appointed to a "major law school position". The memo then suggests:

> If someone could quietly find out the current status and confirm [Dr. Azarova's] pending appointment, that would be very helpful. The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy and that a public protest campaign will do major damage to the university, including fundraising" (p. 32)

9. Sept. 4, PM: Assistant VP undertakes to find out current status of confidential hiring process, contacts law school Assistant Dean of Alumni and Development, who obtains information

from Assistant Dean confirming identity of candidate and status of hire; Assistant Dean, Alumni and Development briefs the Dean on Justice Spiro's objection to Dr. Azarova; Dean instructs Assistant Dean, Alumni and Advancement to advise [AVP] that he would not engage with Advancement further. Later that day, AVP contacts Justice Spiro to say "…understand from [the Dean] that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w [*sic*] me next week. Look forward to closing the loop w [*sic*] you"; Justice Spiro replied "If you need any further information on this matter, please don't hesitate to let me know."[1] (p. 35)

10. Sept. 4: Dean asks Assistant Dean for Dr. Azarova's CV, says he knew nothing about her until then, despite August 17 briefing; reviews dossier, status of work permit, independent contractor agreement, request to be absent from campus for part of summer

11. Sept. 5: Dean speaks with Provost and VP Human Resources and Equity; raises donor concern as "complicating factor", but says it is irrelevant, expresses concern about legality of independent contractor agreement

12. September 6: Dean informs Selection Committee Member 1 of his intention to terminate hire and appoint Canadian from list of applicants rejected by Selection Committee

13. Sept. 9: Dean emails formal decision to terminate hire

14. Sept. 9: Assistant VP follows up with inquiry about status of hiring decision so she can update Donor; suggests distributing Dr. Azarova's dossier to other alumni to canvass their opinions about candidate; Dean declines further contact with Assistant VP (p. 43)

III CROMWELL'S ANALYSIS

A. Donor Intervention

1. 'Sharing Views'?

In the interest of privacy, Cromwell uses the labels "The Organization" and "the Alumnus" to refer to the Center for Israel Jewish Affairs (CIJA), and Justice David Spiro of the Federal Tax Court and former director of CIJA. Anonymizing these actors precludes a contextual understanding of the narrative and enables Cromwell to downplay the significance of the CIJA/Spiro intervention. This lends plausibility to the Dean's claim that it played no role in his thinking.

Justice Spiro's conversations were with an "Assistant Vice President," (AVP) likely Chantelle Courtney, an official within the Division of University Advancement. Previously, she was Assistant Dean, Advancement at the Faculty of Law[2] and would have reported to Dean Iacobucci. Courtney was familiar with the Faculty of Law's fundraising culture as set by Dean Iacobucci. She has also been a practicing lawyer.

Justice Spiro is a major donor to the university, as are members of his extended family. In this capacity, he received a pre-arranged stewardship call from the AVP. He is a former director of the Centre for Israel and Jewish Affairs (CIJA), a pro-Israel advocacy organization that focuses

[1] Cromwell notes that the AVP did not speak to the Dean directly (p. 35).

[2] Ms. Courtney's LinkedIn account indicated she served in this role from February 2014-March 2019. Edward Iacobucci's became Dean on January 1, 2015.

particularly on campus issues. CIJA provided Justice Spiro with a memo about Dr. Azarova, asking him to raise the subject of Dr. Azarova's hire.

Cromwell recounts the conversation between Justice Spiro and the AVP as follows:

> The AVP … remembered 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. It is unclear to me what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred to [Dr. Azarova's] published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern. (pp. 32-33)

We also learn that CIJA officials prompted Spiro to make the inquiry:

> The Alumnus advised me…he learned of the potential appointment of the [Dr. Azarova] as Director of the IHRP. This information was relayed to him by a staff member of an Organization [CIJA] of which the Alumnus had been a director until his appointment to the bench. The staff member asked if the Alumnus could contact the Dean about the potential appointment. The Alumnus declined to approach the Dean being of the view that it would be inappropriate for him to do so. The staff member also asked whether the Alumnus could find out whether the appointment had been made or was still under consideration and provided him with a memorandum that a professor from a university outside Canada had sent to the Organization" (pp. 31-32)

CIJA hoped that "through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fundraising." (p. 32).

In Cromwell's view this conversation did not reflect Justice Spiro's own objection or amount to an attempt to block the appointment. Instead, Cromwell concludes "that 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)

Decontextualizing the exchange obscures its nature. An outside organization (CIJA) attempted to influence a hiring decision at the UofT. The University delivered exactly what CIJA wanted within two days. Understanding the nexus of money, power, and influence involved casts doubt on Cromwell's finding that Justice Spiro's aim in the conversation with the AVP was purely informative, and not an attempt to trade on his extensive relationship to the Faculty in the service of an external organization's point of view. In 2005 David Noble raised a similar alarm:

> This is not about Jews. It is not about race, ethnicity or religion. It is about power. The new Israel lobby in Canada — the Canadian Council for Israel and Jewish Advocacy (CIJA) — has enormous power, derived from abundant resources, corporate connections, political associations, elaborate and able organization and a cadre of dedicated activists. Since its inception several years ago, this hard-line lobby has used its power, first, to gain political hegemony and impose ideological conformity on the matter of Israel within a heretofore diverse Jewish community, and second, to influence government decisions and shape public opinion regarding Israel — ostensibly in the name of all Canadian Jewry. From the outset, a

> primary focus of this lobby's attentions has been the university campus, alleged centre of anti-Israel sentiment, conveniently construed as anti-Semitism.[3]

Recall that Justice Spiro was once director of CIJA, "the advocacy agent of Jewish Federations across Canada."[4] CIJA was founded in late 2003 under the auspices of the United Israel Appeal at the instigation of what was then called the Israel Emergency Cabinet, "a nationwide group of committed volunteers [acting] in response to emerging world trends and the continuing crisis in Israel."[5] CIJA's creation coincided with an increase in public criticism of Israel's ongoing occupation of Palestinian territories under then Prime Minister Ariel Sharon. The founders of CIJA include prominent members of the Canadian Jewish community, including Larry Tanenbaum (Toronto Maple Leafs and Toronto Raptors). Justice Spiro is part of the extended Tanenbaum family, who are generous donors to University of Toronto. Although CIJA claims to speak on behalf of Canadian Jewry, this claim has been publicly rejected by members of the Jewish community. [6] Yet Justice Spiro represented CIJA's concern as that of "the Jewish community."

CIJA's original founders include several people who have been generous donors to the University of Toronto and to the Faculty of Law. It is not hard to understand that University officials would be reluctant to alienate them.

Moreover, recall that the AVP involved in this discussion had been the Assistant Dean of Advancement at the Faculty of Law under then Dean Edward Iacobucci. She would have known or been closely engaged with donors like Justice Spiro. Indeed, the AVP was concerned to reassure him that his concerns were communicated, making a series of promises to get back to him with information. The Assistant Dean fully cooperated in this by confirming Dr. Azarova's identity and providing information about the stage of the process.

Justice Spiro's intervention elicited an immediate and anxious response from the AVP, the Assistant Dean of Alumni and Advancement (Law), the Assistant Dean and the Dean himself. The AVP was eager to share confidential hiring information with Justice Spiro, to keep him apprised about the progress and outcome of a confidential hiring process, to attempt to gather more information for him, and to even suggest that the Law Faculty canvass other alumni donors about their views regarding Dr. Azarova.

Given all this, should we believe that it is more likely that

Justice Spiro meant and was understood to be merely passing along information,

Or

Justice Spiro attempted to use longstanding philanthropic ties to exert influence and his intervention was so understood and acted upon?

2. The Dean Denies that he was Influenced

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[3] David Noble, "The New Israel Lobby," *Canadian Dimension,* 1 November 2005, online: https://canadiandimension.com/articles/view/the-new-israel-lobby-in-action-david-noble

[4] https://www.cija.ca/about-us/

[5] "Our new advocacy organization. What it means for Canadian Jewry," *Canadian Jewish News,* 6 October 2003, 20.

[6] Andrew Cohen, "Unelected, Unaccountable, Untroubled: CIJA Says What it Wants, Then Says it Speaks For Us," *Canadian Jewish Record,* 16 December 2020, online: https://canadianjewishrecord.ca/2020/12/16/unelected-unaccountable-untroubled-cija-says-what-it-wants-then-says-it-speaks-for-us/ (accessed April 6, 2021).

The Dean insisted that Justice Spiro's objections did not influence him; he said he directed Advancement to 'back off.' These claims must be assessed in light of his actions: upon being briefed about Justice Spiros objections, he immediately examined Dr. Azarova's file, over the course of the Labour Day weekend, for the first time in the entire process. He did this only because he has been warned that she was controversial. He was scheduled to meet the Assistant Dean on September 8 to review and approve an offer, yet he urgently began to review the file on Sept. 4.

The Dean raised Justice Spiro's objections in each meeting with senior university administration over the weekend and described it as a 'complicating factor' before turning to other concerns. He did not explain, nor did Cromwell ask, why it was necessary to brief senior administrators at all about routine immigration or timing issues that were allegedly his sole motives for action.

By Sunday, he informed Selection Committee Member 1 of his decision to terminate the offer due to irresolvable problems that he identified between Friday and Sunday: that he objected to the independent contractor arrangement and that Dr. Azarova's request to spend part of the summer away from her office at the law school offended him. The Selection Committee Member suggested solutions to the immigration issue (which included waiting for the work permit to be issued) and suggested rejecting the proposed summer absence if it was unacceptable.

According to Selection Committee Member 1, she then raised her concern that another issue was in play, namely the subject matter of Dr. Azarova's scholarship. She assured the Dean that she and the Assistant Dean had done their "due diligence" and vetted Dr. Azarova thoroughly. Her references (including Israeli and Jewish law professors) confirmed that her scholarship on Israel/Palestine was of high quality and well within the range of mainstream international legal scholarship on the law of occupation. The Dean responded that the subject matter of her work "was an issue, but given the other two reasons, I don't need to get to the third issue". According to the Dean, he was the one who raised the 'controversial' nature of her work. He told Cromwell he had said it was irrelevant (pp. 39-40).

This is the first point on which conflicting accounts emerged. Cromwell deals with it by saying "Whether this was an issue that did not need to be considered (according to Selection Committee Membership 1's recollection) or was irrelevant (according to the Dean's recollection), the exchange provides no support for an inference that the inquiry played a role in the decision-making." (p. 50)

This is mysterious. If the Dean did not raise the issue (though he did with senior university officials), but responded to Selection Committee Member 1 by saying Dr. Azarova's scholarship was 'an issue' this might pull in the direction of thinking he was influenced. Raising it himself, only to say it is irrelevant, may pull in the opposite direction. Based on his own ground rules, Cromwell should have presented the conflict and said nothing more. Denying that the conflict supports an inference against the Dean treats the Dean's version as the default.

In fact, the Dean's behaviour overall does indeed support an inference of influence. If he truly believed outside interference was inappropriate, we might have expected him to let the Assistant Dean carry on her work on the administrative details. Instead, he quickly concluded that insurmountable hurdles unrelated to an important donor's objections nevertheless mandated the result sought by the donor: terminate the hire. This might well make one think that the Dean was influenced by these objections even if he did not believe himself to be.

Cromwell also does not consider how we should expect university officials to proceed when an important donor had attempted to influence a confidential hiring process, especially given their professed abhorrence of such interference. As far as we are told, the Dean did not ask that the central administration bring its advancement arm under control. We are not told how the Dean reacted when told that his Assistant Dean conveyed confidential information to the Assistant Dean of Alumni and Advancement (Law) to be passed on to the AVP and then to Justice Spiro. We don't know if anyone told the AVP to stop encouraging Justice Spiro. These omissions contribute to an inference that the Dean was affected by considerations other than the administrative feasibility of the appointment.

Given all this, should we believe that

Despite his view that outside interference is improper, the Dean interrupted the process at the last minute, urgently discussed the matter with senior university officers, brushed off solutions to the problems he had found, and concluded they were insurmountable

Or

Ordinary details were turned into major obstacles, consciously or unconsciously, to allow the administration to avoid the consequences threatened by Justice Spiro?

B. Stated Reasons for Terminating Hire

If we are unpersuaded thus far that the Dean was not influenced by Justice Spiro's concerns, we need a convincing account that there were other reasons for the decision to put suspicion to rest. The Dean and Assistant Dean provide the following explanation for terminating the offer:

1. The offer was conditional on Dr. Azarova's availability to start working on September 30.
2. Because the independent contract arrangement was illegal, Dr. Azarova could not begin working by the required date.
3. Other qualified Canadian candidates were available who could begin by September 30

Here, too, there are important disputes about the facts which should have blocked Cromwell's conclusion. Furthermore, many parts of the record Cromwell amassed raise serious credibility questions about the Dean's explanation.

1. Hard Starting Date of September 30

Dr. Azarova was approached on August 11, 2020. Having decided to interview international candidates, the Selection Committee knew that it was very unlikely that a new Director could begin in time for the start of the fall term on September 8. (p. 51) For this reason, no IHRP course was planned in the fall term, nor would students be supervised. Two Research Associates (one of whom was Selection Committee Member 2), would continue to perform the work of the IHRP in the fall.

According to Selection Committee Members 1 and 2 the consensus in the Committee was that the Director had to be in place to teach in the January 2021 term. A work permit would be secured so that she could enter sometime in the fall and prior to January. The Immigration Lawyer retained by the University affirmed that Dr. Azarova could obtain a work permit in two to three months, and therefore arrive sometime in the fall in time to begin teaching in January.

The Assistant Dean (Committee Member 3) told Cromwell she believed that Dr. Azarova had to start work by September 30. She claimed that the other Members were "very clear" (p. 22) that the new Director had to begin in September, that there was a "clear requirement and firm

understanding" to this effect.[7] Selection Committee Member 1 denied that a September start date was raised with her at any time (p. 23). No correspondence with the Selection Committee supports the Assistant Dean's claim. The Assistant Dean ultimately admitted to uncertainty about whether the other Committee members shared her understanding that September 30 was a deadline. (p. 22)

The Assistant Dean also claimed, but Dr. Azarova denied, that a September 30 start date was a condition of the offer discussed on August 11. As Dr. Azarova explained to Cromwell, when she started work depended not on her own willingness, but on immigration matters out of her control.

Cromwell simply states that he "cannot assess whose recollections are more accurate" (p. 23). Again, in the face of a direct dispute over the facts, Cromwell, according to his own rules, should have refused to decide what the Assistant Dean and the Dean believed. Either there was a consensus in the Committee or there wasn't. If the former, it is implausible to think the Assistant Dean could have misinformed the Dean. Ignoring the dispute, Cromwell accepts the Assistant Dean's professed belief as proof of its truth.

But the plausibility of the Assistant Dean's account is open to question. In its support, Cromwell notes that she raised the September date as early as August 11 internally with other university staff. The Assistant Dean may have genuinely wanted to have Dr. Azarova start on September 30 and may have pressed her administrative colleague (the HR Consultant) act expeditiously to that end and proposed it to the immigration lawyer. That does not prove she imposed the September 30 date on the candidate. In fact, she had no authority to unilaterally set an earlier starting date than the Committee agreed to, much less a date barely six weeks after Dr. Azarova was approached.

On August 11, the Assistant Dean had not yet spoken to the Immigration Lawyer retained by the University for his expertise in this area. It would make no sense to settle on September 30 before consulting him about work permit timelines. Although she told him on August 14 that "we need the candidate to start the position no later than September 30", he informed her on August 19, that Dr. Azarova could likely obtain a work permit within 2-3 months, which would enable her to start in January. He suggested exploring an independent contractor arrangement to bridge the gap – an option that the Assistant Dean did not know about until then.

The offer was provisionally accepted on August 17, before the idea of working remotely as an independent contractor was introduced. If contract negotiations begin with an international candidate (or even to a domestic one) on August 11, expecting them to start by September 30 would be completely unrealistic.

Furthermore, September 30 had no practical significance. As the Assistant Dean knew, there were no program activities scheduled requiring the Director's presence at the end of September.

There are, therefore, reasons to doubt the Assistant Dean's account. However, Cromwell accepts that the Assistant Dean told the Dean that having someone in post by the end of September was key, and finds that the Dean so believed and inquired no further. Whether this is plausible turns on whether it is likely that the Associate Dean would have told him that September 30 was crucial.

More tellingly, the Dean's account of what he believed is contradicted by his own evidence and conduct. In his call with Selection Committee Member 1, he did not mention a September 30 start

[7] The evidence offered in support of this is an August 20 email from the Assistant Dean about how the independent contractor arrangement 'needs' "to bridge the time from now until a work-permit is issued". (p. 28). 'Need' refers to the function of the independent contractor arrangement – it would last until a work permit was in hand.

date. In subsequently deciding to look for a Canadian candidate, the Dean he said he believed there was a good chance of finding someone to fill the position "before the end of [September] *or at least in the fall*" (p. 42, 54). But it was clear that Dr. Azarova would herself obtain a work permit and arrive "*in the fall*". Either the Assistant Dean did not, in fact, tell the Dean that there was a hard starting date of September 30, or the Dean did not, in fact, accept that limitation. Cromwell ignores this direct contradiction from the Dean himself that September 30 was a hard deadline.

The only justification offered (by the Dean) for the September 30 start date was that it would reduce the Assistant Dean's workload. Yet the Dean discussed with no one the costs and benefits of letting Dr. Azarova start a month or two later, when she obtained her work permit. Does it make sense that a candidate repeatedly extolled for her excellence by the Selection Committee (including the Assistant Dean) should be passed up to save the Assistant Dean some work over a one- or two-month period? The Assistant Dean's comment on September 1 that "[Dr. Azarova] will bring much more to the table than we have ever had before at the IHRP," (p. 26) suggests not.

Given all this, should we believe that:

The Assistant Dean, alone, adopted a wholly unrealistic September 30 deadline unnecessary to the program, without consultation with the Committee or counsel, that she told the Dean this date was crucial, that he believed it was necessary to lighten her workload even though he was prepared to have a Canadian candidate start later,

Or

A reasonable desire to have the Director start as soon as possible turned into a firm September 30 deadline, consciously or unconsciously, to allow the administration to avoid the consequences threatened by Justice Spiro?

2. Independent Contractor

The Dean claimed that Dr. Azarova could only meet the requirement to start by September 30 if she could start as an independent contractor while outside the country. This option arose after the provisional offer was made, even after it was favourably received on August 17. It was intended to bridge the time until receipt of a work permit. Another factual dispute arises over this issue.

The Assistant Dean consulted German lawyers about this option because Dr. Azarova was then resident in Germany. She described having received their advice on September 3 and 4 that the proposed agreement was "illegal" under German and possibly Canadian law. (p.30) She recalled that the Dean said on September 5 that "there was "no way" he would approve entering into an "*illegal*" independent contractor agreement." (p. 36) Although Cromwell never directly attributes this characterization to the Dean, he treats it as part of his reasons for terminating the hiring process and thereafter repeatedly refers to the option as "illegal". (p. 47, 48) Yet, Selection Committee Member 1 recalls that the Dean referred, on September 6, to the proposed arrangement as "improper" or "unethical". (p. 38) 'Illegality' was not mentioned when the Assistant Dean spoke to Selection Committee Member 1 on September 6.

Thus, Cromwell takes the Dean to have thought the independent contractor arrangement was illegal. On the other hand, Selection Committee Member 1 was not informed of this serious impediment. In fact, she thought the independent contractor option was unnecessary, a mere bonus that would allow Dr. Azarova to make some start in the position even before she was able to acquire a work permit. She was also unaware of an alleged September 30 starting date because neither the Dean nor the Assistant Dean ever raised it.

This lack of transparency might itself incline one to doubt the reliability of the Assistant Dean's and Dean's account. Instead of confronting these differences, Cromwell consistently simply echoes the "illegality" language, adopting the view he attributes to the Dean.

However, was it plausible for the Dean to have treated the arrangement as *illegal*? An independent contractor is distinguished in law from an employee. The German lawyers consulted signaled their concern that the proposed relationship could be viewed as employment under German law, though they said the risk of challenge to the contract was "low." And if this low risk materialized, the University would be required to remit social security payments to the German government for the short length of the contract or face penalties (p. 28). When the Assistant Dean received this advice on September 3, she set up a call with the University employment lawyer to discuss the matter on September 8 (the following Tuesday). We can infer that she did not yet think this problem was insurmountable.

The University employment lawyers told Cromwell that having recently "consulted with external counsel on these types of issues at some length," (p. 18) the legal risks were considered acceptable by the University especially if the independent contractor does not teach during this period. (Dr. Azarova would not have been teaching in the fall.) The University had most recently relied on these agreements for foreign nationals hired abroad who could not enter due to COVID restrictions. The VP Human Resources and Equity confirmed that the university was comfortable using independent contractor agreements. (p. 38) Working out such arrangements is a routine task for an international research university such as the University of Toronto.

The Dean did not consider consulting the University employment lawyer as scheduled on Tuesday September 8 before deciding for himself that the contract was 'illegal'. The Dean's legal training makes this behaviour more, not less, curious. He should understand the value of expert legal advice. Importantly, the Assistant Dean drafted the contract sent to the German lawyers without the benefit of input of University employment lawyers. Alternative language might solve the problem had the employment lawyers been asked. The Dean knew the University had assumed the risks involved with such arrangements in similar circumstances. There is no support for the Dean's assertion that the contract was indeed "illegal" and/or that the flagged issues were irresolvable. The employment lawyer does not affirm the Dean's view, and states only that "risk tolerance was a decision for the Dean," (p. 55) taking the usual lawyer's stance: such decisions lie with the client, not counsel.

Given all this, should we believe that:

An experienced administrator honestly trying to solve a problem would have hastily decided an arrangement was "illegal" without advice from expert counsel and without alerting Selection Committee Member 1 to his stark characterization,

Or

A small legal risk turned into an insurmountable obstacle, consciously or unconsciously, to allow the administration to avoid the consequences threatened by Justice Spiro?

3. Qualified Canadian Candidates

Selection Committee Members 1 and 2 stated that it was the Committee's unanimous view that if neither the first nor second choice (both foreign nationals) were available, the search would have failed. The Committee's process was consensus-based. Yet the Assistant Dean stated that she did

not recall any consensus on this point. (p. 11) This can only mean she thought there was no consensus, but it makes no sense to leave such an important matter hanging.

This is the fourth factual dispute: two members of the Selection Committee claimed there were no qualified Canadian candidates; the Assistant Dean says she thought there were and told the Dean so. However, Selection Committee Member 1 told the Dean on September 6 that there were no eligible, qualified Canadians. It is possible that the Dean took the Assistant Dean's view over that of the Chair of the Selection Committee, but there is good reason to doubt that the Assistant Dean gave this advice to the Dean or that he believed it.

Cromwell notes that one of two pathways to a work permit required that there be no qualified Canadians. The Associate Dean understood that both routes would be pursued, in the alternative, relying on whichever could be approved most quickly. One pathway requires an employer to show that there are no qualified Canadians. Cromwell observes that

> That state of facts is consistent with the recollection of both Selection Committee Members 1 and 2 that if neither of the two non-Canadian applicants who had received second interviews could be hired, then no one else was appropriate for the position. (p. 41).

It seems incredible that the Assistant Dean would nonetheless advise the Dean that there were qualified Canadians when she was engaged in immigration applications, one of which required the University to certify otherwise.

The HR staff person, who the Assistant Dean worked closely with, ultimately affirmed the weakness of the Canadian candidates when the Dean took over the search process (p. 44). It is hard to believe that her judgment was unknown or discounted.

Instead of addressing these weaknesses in the account, Cromwell claims "…the key point as I see it is that the Dean's source of information was the Assistant Dean and her advice to him was that there were qualified Canadian candidates, a view with which he concurred after having looked at some of the resumes of Canadian applicants." (p. 54)

Given all this, should we believe that:

Despite the Assistant Dean's active efforts to apply for a work permit, she advised the Dean that there were qualified Canadians and he concurred the basis of reading CVs of candidates whom Selection Committee Member 1 told him had already been interviewed and rejected

Or

The hope of finding a Canadian turned into a reason, consciously or unconsciously, that would allow the administration to avoid the consequences threatened by Justice Spiro?

IV CONCLUSION

At each step in the narrative Cromwell constructs the consistency and plausibility of material claims may be questioned.

All in all, we should ask which is the most plausible story:

a) **that a minor technical difficulty resulting at worst in a minor administrative inconvenience was seen by the Dean as so insurmountable as to derail this process,**

or

b) that he was sufficiently concerned about the controversy threatened by the donor that he exaggerated, even unconsciously,

i. the administrative problems remaining to be resolved, and
ii. the feasibility of avoiding them altogether by appointing a Canadian

The answer is clear. Experienced administrators expect problems, and their job is to try to solve them. The Dean put no effort into assessing the severity of the problem or finding solutions. A very plausible explanation is that treating the technical difficulties as insurmountable would obviate a serious political difficulty. It is reasonable to conclude that the Dean was influenced by the donor's threat of repercussions if Dr. Azarova were hired.

In saying repeatedly that he "would not draw" an inference that the Dean had taken improper considerations into account, Cromwell merely registers his inclination to simply take the Dean's word about his motives. He reverse-engineers the evidence to this end. President Gertler portrays this as 'clarifying and settling key aspects of this controversial matter.' At best, the narrative only tells the reader what they must believe in order to conclude that the Dean was not influenced by improper factors. Yet, by minimizing the significance of the Justice Spiro's intervention, and by refusing to resolve critical and disputed factual claims, Cromwell gives the reader no reason to accept this account as true or even probable. And as the foregoing indicates, there is ample reason not to accept it.

On the Cromwell Report: Spiro and External Influence

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Among the various issues Cromwell examined was whether there was external influence in the Dean's decision to terminate the search for the IHRP director. In the interest of privacy considerations, Cromwell uses the labels "The Organization" and "the Alumnus" to refer to the Center for Israel Jewish Affairs (CIJA), and Justice David Spiro of the Federal Tax Court and former director of CIJA. This decision to anonymize these actors precludes a robust, contextual understanding of the narrative. In particular it enables Cromwell to downplay the significance of the CIJA/Spiro intervention.

Cromwell's Account

Beginning on page 30, Cromwell narrates Spiro's inquiry about the IHRP hiring process. At all relevant times, Spiro's conversations were directed to an "Assistant Vice President" (AVP) arising out of a pre-arranged stewardship call initiated by the Assistant Vice President. The AVP is an official within the Division of University Advancement, and answers to the Vice President of University Advancement, David Palmer. A review of current AVPs in the Division of University Advancement suggests the AVP in question was Chantelle Courtney. Before her current role, she was Assistant Dean, Advancement at the Faculty of Law[1] and would have reported to the Dean, who since January 2015 was Edward Iacobucci. Even in her new university-wide role, Courtney would maintain familiarity with the Faculty of Law and its fundraising culture as set by then-Dean Iacobucci.

Cromwell recounts the conversation between Spiro and the AVP as follows:

> The Alumnus [Spiro] asked the AVP [Courtney] whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered 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. It is unclear to me what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred to the Preferred Candidate's published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern.[2]

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[1] Ms. Courtney's LinkedIn account indicated she served in this role from February 2014-March 2019. Edward Iacobucci's first term as Dean began on January 1, 2015.
[2] Cromwell Report, 32-3.

We also learn that officials at CIJA prompted Spiro to make the inquiry of the AVP, because they somehow learned that the IHRP director was someone whose writings were unfavorable to Israel:

> The Alumnus advised me…he learned of the potential appointment of the Preferred Candidate [Azarova] as Director of the IHRP. This information was relayed to him by a staff member of an Organization [CIJA] of which the Alumnus had been a director until his appointment to the bench. The staff member asked if the Alumnus could contact the Dean about the potential appointment The Alumnus declined to approach the Dean being of the view that it would be inappropriate for him to do so. The staff member also asked whether the Alumnus could find out whether the appointment had been made or was still under consideration and provided him with a memorandum that a professor from a university outside Canada had sent to the Organization" 31-2

CIJA learned of the appointment from professors outside Canada, who sent an email in the hopes that "through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fundraising." (32).

Taking Spiro's representations (as relayed through legal counsel) on their face as sincere, Cromwell gives an innocent interpretation of this exchange: "my conclusion is that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputation harm to the University. This would hardly be news to anyone who had taken a moment or two to look on the internet."[3]

Cromwell in other words concludes that Spiro's conversation with the AVP did not amount to an attempt at external influence, and moreover, even if it were, the Dean did not rely on it to make his ultimate decision. Other memoranda from my colleagues will address the conclusions about what the Dean presumably relied upon as rationale to terminate the hiring process..

Contextualization: CIJA, the UofT and Canadian Philanthropy

Cromwell decontextualizes the entire exchange, and therefore preclude a more critical insight into the nature of that conversation with university advancement personnel.

Most troubling is the express evidence that an outside organization (CIJA) attempted to influence a hiring decision at the UofT. Nor is it debatable that over the course of the Labour Day long weekend, the Dean of the Faculty of Law delivered exactly what CIJA wanted. This memo

[3] Cromwell Report, 48. Importantly, Cromwell did not provide any URLs to websites that would have existed prior to the controversy erupting across social media to indicate what he meant by his last remark. We can only infer that he might mean websites like NGO Monitor, an Israeli NGO that monitors and castigates other NGOs for their advocacy of issues viewed as contrary to the interests of Israel.

casts doubt on Cromwell's finding that Spiro's aim in the conversation with the AVP was purely informative, and was not an attempt to trade on his extensive relationship to the Faculty in the service of an external organization's point of view. Doubt arises from a series of intersectional issues: Spiro's institutional networks, and the nexus of that network to philanthropists to both the UofT and CIJA, a pro-Israel charity. This is not the first time such a nexus between money, power and influence in the service of a CIJA's pro-Israel advocacy has been criticized. In 2005 David Noble pointed out similar criticisms when writing about the "New Israel Lobby in Action":

> This is not about Jews. It is not about race, ethnicity or religion. It is about power. The new Israel lobby in Canada — the Canadian Council for Israel and Jewish Advocacy (CIJA) — has enormous power, derived from abundant resources, corporate connections, political associations, elaborate and able organization and a cadre of dedicated activists. Since its inception several years ago, this hard-line lobby has used its power, first, to gain political hegemony and impose ideological conformity on the matter of Israel within a heretofore diverse Jewish community, and second, to influence government decisions and shape public opinion regarding Israel — ostensibly in the name of all Canadian Jewry. From the outset, a primary focus of this lobby's attentions has been the university campus, alleged centre of anti-Israel sentiment, conveniently construed as anti-Semitism. Over the last two years, the lobby has by various means attempted to pacify these campuses and bring them into line, particularly Concordia and York.[4]

Recall that Spiro was once director of CIJA. CIJA is "the advocacy agent of Jewish Federations across Canada."[5] CIJA was founded in late 2003 under the auspices of the United Israel Appeal at the instigation of what was then called the Israel Emergency Cabinet, "a nationwide group of committed volunteers [acting] in response to emerging world trends and the continuing crisis in Israel."[6] On the emergency cabinet were some of Canada's wealthiest business people, "including Gerald Schwartz (Onex), Larry Tanenbaum (Toronto Maple Leafs and Toronto Raptors), Stephen Reitman (Reitmans clothing) and Brent Belzberg (Harrowston and Torquest Partners). It also included the late Izzy Asper (CanWest Global)"[7] as well as Heather Reisman of Indigo.[8] The need for CIJA was explained straightforwardly: "CIJA is a response to the need for expanded, targeted, coordinated Canadian Jewish advocacy, Israel's situation in a dramatically changed world and new Canadian demographic trends."[9] The timing for CIJA's creation coincided with an increase in public criticism of Israel's ongoing occupation under then Prime Minister Ariel Sharon

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[4] David Noble, "The New Israel Lobby," *Canadian Dimension,* 1 November 2005, online: https://canadiandimension.com/articles/view/the-new-israel-lobby-in-action-david-noble

[5] https://www.cija.ca/about-us/

[6] "Our new advocacy organization. What it means for Canadian Jewry," *Canadian Jewish News,* 6 October 2003, 20.

[7] Paul Lungen, "CIJA takes over: umbrella agency sets new course," *Canadian Jewish News,* 4 December 2003, 1, 38.

[8] Harold M. Waller, "The Americas," *The American Jewish Year Book, 2004,* 104 (2004: 231-267, 252. On that emergency cabinet sat Israel Asper. Though not a donor to the Faculty of Law, his son, David Asper donated $7.5 million to establish the David Asper Center for Constitutional Rights

[9] "Our new advocacy organization."

CIJA obtains its core funding from "Jewish Federations across the country through Jewish Federations of Canada – UIA [United Israel Appeal] (JFC-UIA)."[10] While the UIA is a registered charity with the CRA, CIJA acts as its "advocacy agent" that carries out activities that advance education and relieve poverty, including encouraging and expressing "appreciation for policies and decisions that recognize the importance of the land of Israel to members of the Jewish community."[11] Notably, there are other Federations across Canada with fundraising campaigns that include an envelope for CIJA.

Not everyone in the national Jewish community was happy about CIJA's creation. More recent criticisms come from Andrew Cohen, writing for the Canadian Jewish Record: "why should anyone care what CIJA thinks? Its officers are unelected, unaccountable and untroubled by criticism, which it reliably ignores or dismisses. Sustained by the Federation, which is sustained by tax-deductible donations, CIJA says what it wants – and then says it speaks for us…Some say it was the product of a hostile takeover of the Canadian Jewish Congress, engineered by wealthy conservative Jews with the blessing of the governing Conservatives."[12] In other word, at least a segment of the Jewish community does not think that CIJA speaks for them, and yet Spiro represented CIJA's concern as that of "the Jewish community."

CIJA's origins as a vocal proponent of Israel in Canada, overseen by influential wealthy donors, is relevant in considering Spiro's conversation with the AVP at the UofT. CIJA's original founders include several people who have been generous donors to the University of Toronto and to the Faculty of Law. It is not hard to understand that University officials would be reluctant to alienate such people.[13] Many of those people use family foundations to support UofT programming and CIJA.

Analysis

Considering the nexus of private philanthropy at the UofT, CIJA's express interests in curtailing the hiring of Azarova, and Spiro's known connections to both institutions, Cromwell's conclusions simply do not make sense:

- Spiro's call was with an advancement officer at the UofT as part of a "stewardship" discussion, which pertains directly to management of donor relations with the University.
- Spiro's discussion about Azarova was prompted by an officer at CIJA, on whose board of directors Spiro has sat.

[10] https://www.cija.ca/faq/

[11] T3010 Registered Charity Information Return, Schedule 7 for (United Jewish Appeal Canada, BN 134593391 RR 0001), for fiscal period January 1, 2019-December 31, 2010. Available online: https://apps.cra-arc.gc.ca/ebci/hacc/srch/pub/t3010/v24/t3010Schdl7_dsplyovrvw (accessed April 3, 2021).

[12] Andrew Cohen, "Unelected, Unaccountable, Untroubled: CIJA Says What it Wants, Then Says it Speaks For Us," *Canadian Jewish Record,* 16 December 2020, online: https://canadianjewishrecord.ca/2020/12/16/unelected-unaccountable-untroubled-cija-says-what-it-wants-then-says-it-speaks-for-us/ (accessed April 6, 2021).

[13] Financial information was obtained through the Charities List at the Canada Revenue Agency online portal. All information is drawn from the list of qualified donations made for reported fiscal periods.

- CIJA obtains core funding from a number of funding programs across Canada. UofT's enjoys a series of major gifts (some annual/recurring) from donors with considerable and known ties to CIJA, either directly or through close family relations.

Common sense tells us that it is at least plausible that Spiro's communication with the AVP, and how she heard it, may have been an attempt to use longstanding philanthropic ties to exert influence.

Moreover, recall that the AVP involved in the incident was at an earlier date the Assistant Dean of Advancement at the Faculty of Law under then Dean Edward Iacobucci. She would have known or been closely engaged donors like Spiro. Indeed, the AVP was concerned about maintaining Spiro's confidence, making a series of promises to get back to him with information.

Afterword

There is one further matter related to CIJA and its attempt to influence the outcome of a hiring process at the University of Toronto. A simple internet search alerted us to the fact that during the course of his review, and prior to issuing his report, Cromwell was scheduled to give the keynote address to a CIJA sponsored conference "The Rule of Law in Times of Crisis" in February 2021 with admission tickets costing $150.[14] Cromwell did not withdraw from the conference. We have no information about any honorarium or payment he may have received for giving the keynote address. President Gertler's office and senior counsel were alerted by email (see Appendix A) to Cromwell's scheduled appearance as potentially damaging the impartiality (and appearance of impartiality) of Cromwell's review and report. No response was received.

[14] https://jewishtoronto.com/event/rule-of-law-in-times-of-crisis

Appendix A

Monday, December 21, 2020 at 3:26 PM

Hello President Gertler and Mr. [Steve] Moate

I've since learned that Justice Cromwell will be speaking at this event around the same time he is presumed to be submitting his report on the IHRP investigation:

https://jewishtoronto.com/event/rule-of-law-in-times-of-crisis

I'm sure the conference is a fine conference; indeed it features speakers with whom many at UofT will know and work with. However, it's important to note that this is a conference co-sponsored by CIJA, the political advocacy group with which Justice Spiro was once connected. As you know, Justice Spiro allegedly interfered in the IHRP hiring process of our executive director for reasons consistent with CIJA's political advocacy. Under Justice Cromwell's mandate, I presume that this allegation falls under his investigatory mandate.

This link is now being widely shared among the university community. I am not sure it has reached your inbox.

I don't know Justice Cromwell, and have never had the pleasure of meeting him. I'm sure he is well aware of his obligations to act independently. Moreover, I am keen to support our incoming dean with the best chance to rebuild the otherwise fractured community at the law school, and its damaged integrity and reputation. Nonetheless, I recall the first-year law school adage that justice is to be both done and seen to be done.

I leave this in your able hands to manage.

Yours fondly,
Anver Emon

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Confidentiality and Privacy in Justice Cromwell's Report: Uses and Misuses

Ariel Katz Posted on April 21, 2021 Posted at https://arielkatz.org/archives/6774

Issues of confidentiality and privacy feature prominently in Former Justice Cromwell's Report on the search process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law. They appear in four separate contexts:

1. In the context of the improper disclosure, during the search and appointment process, of Dr Azarova's identity to CIJA and in the direct and indirect communications between Justice Spiro and the Administration about Dr Azarova's candidacy and hiring process;
2. In criticizing members of the Search Committee and another unidentified person for disclosing information related to their concerns about the reasons for the Dean's decision to terminate Dr Azarova's appointment with other colleagues, individuals from outside the university, and the media; and
3. As explanation and justification for the Dean's refusal to engage with colleagues who expressed their concerns about the reasons for the Dean's decision to terminate Dr Azarova's appointment.
4. As a recommendation that strict confidentiality requirement be imposed on those involved in hiring.

Each of these contexts raises different questions about the nature and scope of privacy interests and confidentiality obligations, which I discuss below. As I explain, while Mr Cromwell was correct in finding breach of privacy and confidentiality in the first of those contexts, his analysis of privacy and confidentiality in the other three is misguided.

Privacy law, in this context, concerns the personal information of the candidate and the duty of the University to protect that privacy was a duty owed to the candidate. In the University context, privacy matters are governed primarily by Ontario's Freedom of Information and Protection of Privacy Act (FIPPA), and policies implementing it.

A duty of confidence is distinct from a privacy law's limitation on the disclosure and use of *personal* information and may apply to all sorts of information. In general, the source of such duty may be a binding policy or a non-disclosure agreement, but none existed in this case. Alternatively, it may arise from the common law, reflecting the principle that a person who has received information in confidence shall not take unfair advantage of it.

While keeping the candidate's identity confidential protects both the interests of the candidate and of the University, the interests are distinct: the privacy interests are those of the candidate; the confidentiality interest in the integrity of the hiring process is that of the University, as well as of the individuals who participate in it.

When the Assistant Vice President and two Assistant Deans at the Faculty of Law disclosed, directly or indirectly, the identity of Dr Azarova and details about the status of her appointment to Justice Spiro, they breached both privacy law's limitations on the disclosure of personal information, as well as a duty of confidence they owed to the University. However, Mr Cromwell also invokes privacy and confidentiality as grounds justifying evasion of accountability, to shield the University from criticism, and to allege impropriety by those who disclosed to colleagues and later to the media details about a matter of public importance.

Importantly, however, privacy law does not present any obstacle for sustaining norms of collegial governance within the University and for maintaining accountability to the public at large. And a duty of confidentiality does not mean a duty not to disclose any information that the University would prefer to conceal.

These distinctions will be discussed below in relation to each of the four contexts described above.

1. Privacy and confidentiality during the search and hiring process

Unless and until an appointment was made and announced, privacy law treats the identity of candidates as personal information that the University should not, without the consent of the candidate, disclose to anyone not involved in the search and hiring process. Neither identity nor other personal information about the candidate can be used for purposes that are not reasonably connected to the search and hiring process without the consent of the candidate (unless the disclosure or use are permitted under FIPPA). The duty to maintain the privacy of such personal information may continue even after the identity of the successful candidate is announced (or, in the case of unsuccessful candidates, even if information about their unsuccessful candidacy becomes known by that candidate or a third party).

The University may have several legitimate reasons to maintain confidentiality of information pertaining to certain aspects of the search and hiring process: one is to foster frank and open deliberation about matters such as candidates' suitability, or the pros and cons of choosing one candidate over another. Another is to protect against external undue influence on the selection process, to ensure that the decisions are made on the basis of relevant considerations by those responsible for considering, recommending, or appointing candidates. Since some qualified candidates may be reluctant to apply if that information were not kept confidential, maintaining the confidentiality of such information encourages more qualified candidates to apply.

The legitimate interest in maintaining the confidentiality of information pertaining to certain aspects of the search and hiring process does not in itself create a duty on others to maintain such confidentiality. Therefore, it does not follow that any disclosure of such information constitutes a breach of confidence.

A breach of confidence occurs when (1) the information conveyed was confidential (that is, information that is not already public domain, or information that the public has no legal or

practical ability to obtain); (2) the information was communicated in confidence; and (3) the information was misused by the party to whom it was communicated. In addition, the law recognizes that the disclosure of some information may be required in the public interest, in which case there is no duty to keep it secret.

Leaking the identity of the candidate to CIJA and the subsequent communications between Justice Spiro and the administration about the candidate and the hiring process breached both the privacy of the candidate and the integrity of the hiring process. They breached Dr Azarova's privacy because they involved the disclosure of personal information about her to persons who were not entitled to receive it, and for purposes that are not reasonably connected to the search and hiring process but antithetical to it.

These actions also involved breach of confidence because the individuals who obtained internal information about the hiring process and disclosed it to CIJA and Justice Spiro misused it. They disclosed the information to promote or aid in promoting objectives that are antithetical to the purpose for which the information was shared with them. They disclosed information whose confidentiality was necessary for protecting the integrity of the hiring process and used it to undermine this very integrity. There is no question that those who were involved in the initial leak and in the subsequent communications with Justice Spiro acted inappropriately. Mr Cromwell's same conclusion is well founded.

2. Privacy and confidentiality after the termination of Dr Azarova's appointment process

The same conclusions about inappropriate actions do not necessarily follow in the context of events and actions that occurred *after* the termination of Dr Azarova appointment process, because at this point, the privacy and confidentiality interests are quite different.

Mr Cromwell characterizes as inappropriate three acts of disclosure that occurred after the Deans decision to terminate Dr Azarova's appointment process: (a) Prof Macklin's "brief[ing of] concerned colleagues on the details of the selection committee's decision-making and [providing her] notes of that process to others"; (b) Vincent Wong's "tweet[ing of] emails concerning the process"; and (c) giving a copy of Prof Macklin's notes to the press by an unknown individual.

Mr Cromwell asserted that those actions were inappropriate, but he never explained why. Therefore, let us consider whether those action breached any protected privacy or confidentiality.

None of these actions infringed Dr Azarova's privacy. Prof Macklin initially informed the remaining members of the IHRP Faculty Advisory Committee of her resignation from the IHRP Faculty Advisory Committee, and then later described the facts leading up to her resignation because these other members wanted to know why she resigned. She responded to inquiries from other faculty members who contacted her *after* they had learned directly or indirectly from Dr Azarova that the process of her appointment had been terminated. Prof. Macklin did not

initiate contact with these colleagues. Any personal information about Dr Azarova that Prof Macklin discussed with colleagues was information that Dr Azarova had already disclosed, and which she obviously was fully entitled to disclose.

Likewise, the Twitter disclosures by Vincent Wong and the sharing of Prof Macklin's notes with the press did not violate any privacy right of Dr Azarova because any personal information so disclosed had been disclosed with her consent. Moreover, those latter disclosures were made only after the story broke in the media, at which point, the information was already public. Prof Macklin did not share the identity or any other personal information about other candidates.

Did the sharing of that information breach the privacy of anyone else (e.g, the Assistant Dean, the Dean, Justice Spiro)? The answer is no, because none of the disclosed communications contained personal information of those individuals or information with respect to which that they had a reasonable expectation of privacy. Moreover, none of those who shared the information had any obligation under privacy law to protect it from disclosure.

Did any of the actions by Prof Macklin, Mr Wong, and the third individual breach a duty of confidence? Even if some of the information they disclosed had been communicated to them in confidence, their actions could only amount to a breach of confidence if the information they disclosed was still confidential at the time they disclosed it. Even then, the disclosure would not amount to misuse if there was a public interest justification for the disclosure.

Let's consider the disclosure by Prof Macklin first. According to Mr Cromwell, she acted inappropriately by sharing information about the hiring process with concerned colleagues and sharing with them the notes about the process she had taken down. The nature of the information she disclosed and the timing of these disclosures are crucial for assessing the propriety of those disclosures.

With respect to timing of these disclosures, they occurred *after* the Dean's decision to terminate Dr Azarova's candidacy, which, as Mr Cromwell's Report documented, followed serious breaches of confidence by several administrators from the President's office and the Dean's office. These prior breaches of confidentiality undermine the claim that Prof Macklin subsequent disclosure of information about the aborted hiring constituted a breach of confidentiality. By the time Prof Macklin disclosed the information that Dr Azarova had been the candidate, that information was no longer confidential; its confidentiality had already been compromised a week earlier by administrators from the President's office and the Dean's office. Nor did Prof Macklin disclose confidential information when she discussed the termination of Dr Azarova's appointment with the members of the IHRP Advisory Committee and with other colleagues who reached out to her. Prof Macklin did not initiate contact with these colleagues about the events in question; the colleagues reached out to Prof Macklin after learning about the termination of Dr Azarova's hire from Dr. Azarova herself or from people who learned about it from her.

Nor did Prof Macklin breach a duty of confidence when she shared with the colleagues who contacted her what she knew of the events leading to her resignation from the Selection Committee and from the IHRP Advisory Committee. And obviously, it was appropriate for her to explain to the IHRP Advisory Committee the reasons for her resignations.

Obviously, Prof Macklin did not owe any duty of confidence to Justice Spiro and to those who aided and abetted his interference in the hiring of Dr Azarova. If anything, as a colleague and former member of the Selection Committee and the IHRP Advisory Committee, she had a duty to alert her colleagues about the interference and explain the reasons for her resignation.

Even if some of the information that Prof Macklin shared with colleagues was still confidential, breach of confidence occurs only when the information is misused. Whether disclosure amounts to misuse depends on the whether its disclosure could undermine the legitimate objectives that confidentiality was designed to protect: in this case, fostering frank discussion and collegiality among those involved in the hiring process and avoiding undue interference in it. The Dean's decision to terminate Dr Azarova's hiring and to proceed with interviewing candidates that the search committee considered unsuitable, made abruptly and without prior discussion with the search committee undermined the first objective; and Justice Spiro's interference, aided by University administrators, had already compromised the second.

The disappearance of the interests that confidentiality was meant to promote changed the calculus. When Prof Macklin shared her concerns about what had happened, and disclosed information necessary to explain and support her concern, she did not do that to undermine the collegiality and integrity of the hiring process, nor could she—the process had already been compromised.

Furthermore, the termination of Dr Azarova's appointment, which, at the very least, coincided with Justice Spiro's interference, introduced a new consideration that affects the analysis—the public interest. The law recognizes that the disclosure of some information may be required in the public interest. There is no question that concerns about politically motivated interference in a hiring process at a university, by a sitting Justice no less, and the question of whether that interference played a role in the Dean's decision, were matters of great public interest. Colleagues, other members of the University community and the public at large had interest in finding out the truth about what had happened and no interest in keeping the facts secret. Maintaining confidentiality would not have served the public interest, only the interest of those who would have preferred to avoid scrutiny.

The University's reaction to the concerns raised, first internally and then publicly, further changed the equities of the matter. Instead of addressing the concerns in a transparent manner, the University's initial reaction was complete dismissal, describing the concerns as "uninformed and speculative rumours". And after the story broke in the media, the University insisted that "no offer of employment was made, nor accepted or rescinded" and mischaracterized the stage of the negotiations with Dr Azarova, as merely "exploratory discussions". This

mischaracterization the University's unwillingness to provide any meaningful information about the attempted interference, only increased the public interest in having the information disclosed.

This was the point when Mr Wong made his disclosures and the unknown individual shared Prof Macklin's notes with the media. These disclosures were made in response to the University's public representations. At this point, the issue was already a subject of controversy on a matter of great public interest. The University publicly disclosed some information about the hiring process to support its own account of the events. Those who thought the University's statement was partial and misleading and were entitled to challenge it and disclose the contradictory information they had to support their claims.

Regarding the third, unknown, individual: without knowing the identity of the individual who provided Prof Macklin's notes to the press, Mr Cromwell had no basis to conclude that a duty of confidentiality had been breached because there was no basis to determine that such a duty existed in the first place.

In sum, when Prof Macklin, Mr Wong, (and a third individual) shared information with colleagues and then with the public, the confidentiality of the hiring process had already been compromised by the University and the objectives animating a duty of confidentiality no longer existed. In addition, the public interest outweighed any remaining claim of confidentiality in any of the details subsequently disclosed.

It is regrettable and surprising that instead of highlighting the differences between the initial breaches of confidentiality by University administrator and the justified subsequent disclosures by Prof Macklin, Mr Wong (and the third individual), Mr Cromwell chose to draw false equivalence between them, and described all as inappropriate.

Mr Cromwell reached those conclusions without providing any legal analysis. But as shown above, while the disclosures by administrators from the President's office and the Dean's office constituted breach of privacy and breach of confidence, the disclosure by Prof Macklin, Mr Wong, and the third individual did not. If by labelling those actions as inappropriate Mr Cromwell was not making a legal statement but an ethical one, his conclusion is also deficient because he did not provide any reason to support a conclusion that those actions were unethical. Nor can one be easily found.

3. Confidentiality and privacy as an explanation and justification for the Dean's refusal to engage with colleagues who expressed their concerns

Mr Cromwell invoked confidentiality and privacy as justifications for the for the Dean's refusal to engage with colleagues who expressed their concerns. He explains that the Dean wanted to provide more detailed information to the IHRP Faculty Advisory Committee, but that legal advice he received "discouraged from doing so on grounds of confidentiality and protection of privacy." Mr Cromwell noted that he saw the email exchange containing that advice but he

provided no detail about its content. It is hard to assess the soundness of such legal advice, but as the earlier analysis shows, when members of the Advisory Committee shared their concerns with the Dean, there were neither privacy concerns nor confidentiality grounds that could have prevented the Dean from explaining his action to the Advisory Committee. In any event, nothing prevented the Dean from discussing those matters with members of the Advisory Committee in confidence. It should also be noted that according to Mr Cromwell, the legal advice that he saw only "discouraged" the Dean from providing more detailed information; he does not say that the Dean received legal advice according to which it would have been illegal for him to provide more detailed information.

As noted above, any personal information about Dr Azarova that the Dean would have disclosed to members of the Advisory Committee would have already been communicated to them by Dr Azarova, or from others who obtained it from her and with her consent. In any event, even if Dr Azarova still had a protected privacy interest at that point, if the Dean wished to have an open-minded discussion about his decision with members of the Advisory Committee, privacy would not preclude him from disclosing the relevant personal information necessary for such deliberation.

In fact, relevant University Policy contemplates and authorizes this kind of disclosure. For examples, it states:

Personal information may be disclosed as necessary within the University on a need-to- know basis according to the "Need-to-Know Principle", which provides that:

Personal information may be provided to a University officer, employee, agent or consultant, who needs the personal information for the performance of his/her duties, if the disclosure is necessary and proper in the discharge of the University's functions.[1]

With respect to confidentiality, a duty to maintain confidentiality applies only to confidential information that a person has received in confidence from a third party. There is no duty not to disclose one's own information. Mr Cromwell does not explain why a discussion between the Dean and the Advisory Committee would breach a duty of confidentiality, to whom such a duty was owed, and on what basis. But as the analysis in the previous section shows, no such a duty seems to exist or remain when the members of the Advisory Committee shared their concerns with the Dean.

It seems that Mr Cromwell (and the legal advice he mentioned) confused the University's existing self-interest in not disclosing information about its own actions with a non-existent duty to maintain confidentiality of information owed to someone else. In the absence of a duty to someone else, citing unspecified "confidentiality grounds" as an impediment for explaining one's actions may amount to no more than a circular argument: "I will not explain my actions because explaining them would require me to disclose information that I do not wish to share with you because I do not wish to explain my actions." Labelling one's own information

"confidential" does not necessarily make it so and does not provide sufficient grounds for failing to disclose it.

If accountability and good governance require the disclosure of information, then the Administration's interest in suppressing the information is not a sufficient reason not to disclose it. The Dean might be excused if he followed clear instructions by his superiors not to engage, but this would not excuse his superiors. In any event, Mr Cromwell makes no such finding, only a finding that the Dean was "discouraged" from engaging on the basis on vague grounds.

Last, Mr Cromwell's own Report belies the claim that privacy and confidentiality grounds prevented the Dean from being transparent about his actions. Mr Cromwell did not write his report in any judicial or quasi-judicial capacity, but was appointed by the Administration to provide a "factual narrative". If it is lawful for him to disclose the details that his Report discloses, it would have been equally lawful for the Administration to disclose them earlier.

4. The recommendation that strict confidentiality requirement be imposed on those involved in hiring

Mr Cromwell makes several recommendations about confidentiality. While there is merit in some of those recommendations, his overall approach is ill conceived and some of its aspects are highly problematic. He confuses privacy with confidentiality and ignores myriad of circumstances where disclosure of information within and without the University will be legitimate, useful, and lawful.

His first recommendation is to have a written confidentiality guidelines for professional and managerial recruitment processes. Such guidelines should address specific examples of what the obligation of confidentiality entails in that context. The obligation of confidentiality ought to include at least the identity of candidates, their personal information and the deliberations of the selection committee.

The fourth recommendation is similar. Mr Cromwell recommends that members of selection committees and members of the University community in general ought to be provided with practical summaries of the University's obligations under privacy legislation.

In general, these recommendation seems benign, but it is not clear why they is necessary, as policies, such as FIPPA – General and Administrative Access and Privacy Practices (2011), already exist.

Moreover, there is no indication that members of the Selection Committee were not aware of the duty to maintain confidentiality of their deliberations or the personal information of candidates. The problem was that the Assistant Dean, who served as Chair of the Selection Committee provided confidential information to another Assistant Dean and the Assistant Vice President in response to an inquiry by Justice Spiro. The organizational culture within the President's office

and the Dean's office might have played a greater role in precipitating the breach than the lack of any specific additional written policy.

The second and third recommendations are highly problematic. Mr Cromwell recommends that members of selection committees be required to sign written confidentiality agreements spelling out the obligations of confidentiality which they are accepting, and he emphasizes that under no circumstances are details of a recruitment process to be shared with anyone not directly involved except for the purposes of checking references or obtaining necessary legal advice.

These recommendations are overbroad and fail to distinguish between justified and unjustified disclosure. There are many circumstances in which it would be legitimate and useful to share details about a recruitment process not only for checking external references or obtaining legal advice, but in order to receive valuable input and insights from colleagues. There are circumstances where sharing of information will be justified to ensure accountability and transparency. It is entirely possible to maintain collegiality and accountability while complying with all privacy or confidentiality obligations. Preventing the disclosure of information with those who wish to interfere with the University's collegial processes can be ensured without undermining those collegial processes, and the need to protect the integrity of hiring processes should not result in immunizing those who undermine it.

Requiring members of search committees to sign confidentiality agreements is problematic for similar reasons. Requiring members of the selection committee to sign confidentiality agreement could not have prevented Assistant Vice President and the Assistant Dean Advancement and Development (who were not members of the Selection Committee) from discussing the candidacy of Dr Azarova with Justice Spiro and from requesting information about the appointment from the Assistant Dean. The Assistant Dean, who served as Chair of the Selection Committee not only provided them the information, which she knew was confidential, but also requested that they relay Justice Spiro's concerns to the Dean. It is not clear that a confidentiality agreement would have deterred the Assistant Dean, but it could have deterred the other members of the selection committee from sharing their concerns after they learned about the breach that had already happened. None of the problems that Mr Cromwell identified would have become known if those members of the Selection Committee did not speak up.

Moreover, while the Assistant Dean's actions breached her duty of confidence—a duty she owed even without a written non-disclosure agreement—the disclosure of information by the other members of a Search Committee was lawful and in the public interest. Therefore, to the extent that Mr Cromwell's recommendation is intended to prevent members of search committees from disclosing their concerns about problems in the hiring process, it seeks to impose new obligation beyond those existing in law. Implementing this recommendation will not only be against the public interest, but it will also render hollow the University Statement on Freedom of Speech, which includes the right to criticize the University. How can one criticize the University without disclosing the details that underly the criticism?

Furthermore, implementing the recommendation to sign confidentiality agreements will hinder collegial governance. While members of selection committees should be informed about the legal obligations applicable to them, they should not be required to agree to additional and unnecessary obligations. The exercise of their right to participate in the governance of the University should not be conditioned upon willingness to assume liability that would not otherwise exist.

It is far from clear that the privacy and confidentiality breaches documented in Mr Cromwell's Report occurred because those who committed them were not aware of their duties. Two of the three administrators who participated in the breach are legally trained. All three have many years of experience in the University's administration. It is hard to believe that they disclosed confidential information to a donor, and communicated the donor's disapproval of a pending candidate to the Dean, without knowing or considering that there was something wrong with that. Rather, it seems more likely that the problem was not lack of knowledge but an institutional culture and a set of incentives that motivated them to prioritize the wishes of a donor over their duties to and the values of the University.

When the University announced the appointment of the Assistant Vice President, it provided a glimpse into this culture. The announcement mentions her previous job, the Assistant Dean, Advancement for the Faculty of Law, and indicates that for the past five years at that job, she had "consistently been among the top advancement performers at U of T" and "Under her leadership, Law's advancement programs achieved significant gains in fundraising and alumni relations, organizational capacity, communications, volunteer relations, and donor relations."[2]

This announcement suggests that the University ranks advancement officers on an annual basis, based on their "performance", which probably means the amount of money they bring in. It is also likely that their compensation is tied to "performance". If this is the case, then the University established a system that aligns the private interests of advancement officers with those of donors and thus incentivizes them to prioritize the interests of donors over the values of the University.

The University did not ask Mr Cromwell to look into this issue and he didn't. But if this is the system that the University has created for maintaining its relationships with donors, then solemn statements about the values of the University and stricter rules on confidentiality may do very little to prevent donors from interfering, and will only reduce accountability and increase the University's collegiality deficit.

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[1] University of Toronto, FIPPA – General and Administrative Access and Privacy Practices (2011).

[2] Announcement of Chantelle Courtney as Assistant Vice-President, Divisional Relations, Division of University Advancement (PDAD&C #53), February 5, 2019

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Bad Times at a Great University and Its Law School

Posted April 21, 2021
By Richard Moon

When one looks more carefully into the controversy at the University of Toronto Law School over the hiring of a director for the International Human Rights Program (IHRP) and the university's attempt to extradite itself, the picture only gets bleaker.

Part 1: The IHRP Scandal at the University of Toronto

I should begin by acknowledging that I am married to Audrey Macklin, one of the individuals involved in the events described below.

In August 2020 after a long and careful search, the selection committee for a new director of the International Human Rights Program (IHRP) at the University of Toronto law school unanimously decided that the directorship should be offered to Dr. Valentina Azarova, a prominent international human rights lawyer, who is currently based in Germany. The 3 person committee (Professor Audrey Macklin, Chair of the Faculty Advisory Committee to the IHRP, Vincent Wong, Research Associate at the IHRP, and Alexis Archbold, Assistant Dean at the law school) had decided that only two of the candidates they had seen were qualified and that Azarova was the strongest of the two. Neither of these candidates was Canadian. The committee members also agreed that, if neither of the candidates was available, the search would be "failed", and the process would have to begin again. The committee knew that because Azarova was not a Canadian citizen or permanent resident (although her husband is a Canadian citizen), she would not be able to start work at the IHRP until she had been granted a work permit, a process that would take 2 to 3 months. This was not a big concern, since the IHRP had been operating for some time without a permanent director, and arrangements had already been made so that the incoming permanent director would not begin teaching until January 2021.

The Assistant Dean (an administrator who reports to the Dean of the law school) let the Dean, Edward Iacobucci, know of the committee's decision and with his go-ahead began contract discussions with Azarova. After the position had been offered to Azarova, someone in the university administration suggested that she might be able to start work remotely (in advance of receiving a work permit) if the university were to engage her as an "independent contractor". Apparently, the university had done this in other cases. The hiring committee saw this as a plus, but its decision to appoint Azarova was not based on her being temporarily engaged on this basis, in advance of the issuance of a work permit.

At the end of August, the process was moving along well. The Assistant Dean had consulted with the university's lawyers about the independent contractor plan and was preparing to submit the application for Azarova's work permit in early September. Azarova and her family were at this time making plans to move to Canada.

However, on the Friday before the start of the Labour Day weekend, the Assistant Dean contacted Macklin to let her know that an important donor to the law school, David Spiro (a judge on the Tax Court) had spoken to an Assistant Vice-President (AVP) at the university (who deals with fund-raising and donor relations) to ask whether an offer had been made to Azarova and to express his concerns about her advocacy and writing relating to Israel/Palestine. The Assistant Dean also told Macklin that Spiro's

concerns had been, or would be, communicated to the Dean. Macklin was taken back by this but imagined, or at least hoped, that the law school would give Spiro's concerns no oxygen. Following this call from the Assistant Dean, Macklin checked the various pro-Israel websites that list the names of critics of Israeli policy and found Azarova's name on one of them. (In the course of checking Azarova's references in late July, Macklin had contacted an Israeli academic, who confirmed that Azarova's writing on the Israel/Palestine question was entirely within the mainstream of human rights discourse both within and outside Israel).

Two days after the judge's call (the Sunday of the Labour Day Weekend), the Dean called Macklin. Here I have a brief cameo in the story. Macklin and I were driving back from a family member's cottage and had pulled over to get gas when the Dean's call came. I was sitting beside Macklin in the car and overheard the call. In the call, the Dean expressed a number of concerns about Azarova's hire. He said he was concerned about the independent contractor arrangements, which he thought were "unethical." Macklin replied that she was aware that such arrangements were being used by the university to enable foreign nationals who could not enter Canada because of COVID19 restrictions to begin or carry on working for university. She pointed, however, that because Azarova was married to a Canadian, she could enter Canada at any time (even under COVID) and could start work as soon as she received her work permit.

The Dean was also concerned that Azarova had asked, in the negotiations, if she could be absent from Toronto for the summer months. Macklin said she did not see this as a problem as long as Azarova was available to speak to the IHRP students, who would be engaged over the summer in internships around the world. She also said that if the Dean was troubled by this request, he could simply take it off the negotiating table. Macklin reminded the Dean that people often ask for things in job negotiations that they do not get.

Finally, the Dean noted that Azarova had a doctorate and a substantial publication record and expressed concern that what she really wanted was an academic position. Macklin told the dean that each candidate interviewed for the position had been told very clearly that the directorship was an administrative position, and that Azarova had understood this. Macklin said that there was no reason to question Azarova's acknowledgment of this.

After listening to the Dean's concerns, Macklin said to him – "I feel like the real issue here is her scholarship on Israel/Palestine" to which the Dean replied, "It is an issue, but I don't have to get to it, because of the first two issues." The Dean indicated that he would not be proceeding with the hiring of Azarova and would look instead into interviewing Canadian candidates. Macklin explained to the Dean that the selection committee had unanimously agreed that none of these candidates were qualified for the position. (As noted in the Cromwell report, a member of the university's human resources department later said the same thing to the Dean).

In the hope that the Dean's mind might be changed, Macklin spoke to Kelly Hannah-Moffat, Vice-President of Human Resources and Equity at the university. The Dean had told Macklin that he had spoken to Hannah-Moffat over the weekend about his concerns regarding the Azarova hire. Hannah-Moffat told Macklin that she had not understood from her conversation with the Dean that he was intending to cancel the hire. She acknowledged that the Dean had mentioned his concerns about Azarova's Israel/Palestine scholarship but that he had spoken to her mostly about the independent contractor issue.

On Wednesday, September 9, the Dean informed Macklin in an email that he would not be proceeding with the hire of Azarova. Two days later, Macklin wrote to the Dean, resigning from her position as

faculty advisor to the IHRP. The Dean did not reply to, or even acknowledge, Macklin's resignation letter. Macklin informed the other members of IHRP Faculty Advisory Committee of her resignation. The committee members then wrote to the Dean, asking him to reconsider his decision. After receiving no reply, they submitted their resignations. Azarova's references (who had learned from Azarova that the hire had been cancelled) also wrote to the Dean and to the University President expressing their concerns. On Monday, September 14, the Dean informed the entire Law Faculty that there would be no attempt to find a new IHRP director for this year. (You would not be wrong to wonder why then it was not possible to hire Azarova). A few days after the Dean's announcement, the issue became public.

The university, embarrassed by the public criticism of the Dean's actions and the possibility of a censure from the Canadian Association of University Teachers, decided to appoint an independent investigator to determine what had occurred and whether there had been improper conduct by any member of the university community. The university announced that Bonnie Patterson, former President of Trent University, would conduct the investigation. However, concerns were raised about her independence and the university then invited retired Supreme Court of Canada judge Thomas Cromwell to serve as the investigator.

Part 2: The Cromwell Report on the IHRP Scandal

In February 2021, Thomas Cromwell, the investigator appointed by the university, interviewed the principal parties and reviewed email correspondence related to the Dean of Law's decision to cancel the hire of Valentina Azarova as director of the IHRP. Cromwell's report was submitted to the university in early March and was made public a week later. In his report, Cromwell decided that the Dean's decision to terminate the hiring of Azarova had not been influenced by Judge David Spiro's call to the university.

Cromwell had said during his investigation, and affirmed in his report, that he would not be making any determinations about the credibility of the parties involved in the controversy: "My task has been to construct a comprehensive factual narrative, not to resolve points on which memories differ." It is difficult, though, to understand how an investigator could make factual determinations without assessing the credibility of the claims made by the different parties.

Apparently, this meant that Cromwell would accept without question everything the Dean said about his actions and motivations, even when the Dean's account was contradicted by others. For example, the Dean told Cromwell that it was he and not Macklin who raised the matter of Azarova's scholarship on Israel/Palestine in their telephone conversation on the Labour Day weekend and that he also told Macklin that Azarova's work on this issue was "irrelevant" (in his decision not to move ahead with the hire). As I noted earlier, I heard Macklin raise the matter with the Dean, and I heard the Dean's reply that Azarova's work was "an issue", but he didn't have to get to it "because of the other two issues" (independent contractor and partial absence). (Immediately after the call, when we began driving again, Macklin and I discussed what had been said).

I know that the Dean's account of the call with Macklin is untrue. The best that I can say about this is that the Dean mis-remembered. Cromwell was told I had been a witness to the conversation, but declined to contact me, presumably because he was not going to make findings of credibility. In his report, Cromwell said that he did not think that anything turned on the differences between the two accounts of this conversation, since both confirmed that the Dean's decision was not based on Azarova's scholarship.

There are many things that could be said about this, and it is surprising they did not occur to Cromwell. First, Azarova's scholarship was clearly in the Dean's mind, even on his own account of the conversation, since he says he raised it with Macklin - an odd thing to do if it was, as he claimed, "irrelevant". If this

matter was in the forefront of the Dean's mind, as it seems to have been, it might well have affected his decision, particularly given the flimsiness of the formal reasons he gave for terminating the hire. Second, whether or not the Dean was telling the truth mattered. If the Dean's account was found by Cromwell to be untrue (which I know it was) Cromwell might then have asked himself why the Dean thought it necessary to give a false account. Did the Dean realize that a truthful account of the conversation might suggest impropriety on his part? Or if the Dean's account of this conversation was found to be untrue, would that not raise reasonable doubts about his other statements, particularly when they often seemed to be unreasonable or implausible.

Cromwell accepted without any hesitation the Dean's account of the reasons for his decision to end the hire. The Dean claimed that:

- the new director had to be in place by Sept 30
- since a work permit would take 2-3 months, the only way to have Azarova on the job by September 30 would be to engage her as an independent contractor but,
- such an independent contractor arrangement would be "illegal".

What is surprising is not just how easily the Dean's claims can be refuted, but that Cromwell's report provides all the information needed to do so.

First, as the Cromwell report shows, the Sept 30 date was pulled out of thin air. It certainly came as news to the selection committee. When the committee decided to offer the position to Azarova, they knew that her work permit would take a few months and so she would not be able to start work until later in the fall. The Sept 30 date made no sense as a deadline since the term would already have begun by then and the director would not be teaching until January. The centre had been operating already for many months without a permanent director and contingency plans had already been made for the fall term. It seems possible that the Assistant Dean invoked this date in her email correspondence with the university's human resources department in an attempt to speed up the independent contractor process within the university. The Dean himself, according to Cromwell, talked about finding a director who could be in place by Sept 30 "or sometime in the fall". Yet, Azarova would have had no difficulty in obtaining a work permit that would have allowed her to be on the job no later than mid-late fall. Moreover, if this date was so critical, why did the Dean respond to the internal criticism of his decision not to hire Azarova, by deciding in mid-September that there would be no attempt for the time being to find a new director, thus leaving the IHRP without a permanent director for another 7 months and counting.

Second, Cromwell accepted the Dean's claim that the independent contractor arrangement would be "illegal". This claim, though, is easily undermined by the facts set out in Cromwell's report. First, though, it is important to recall that this arrangement was proposed by the university only after the offer to Azarova had been made. This arrangement would have enabled Azarova to start working before she obtained her work permit later in the fall. The university's lawyers had approved the use of independent contractor plan. Indeed, as earlier noted, the university had done this with other individuals, who were awaiting work permits or were unable to enter Canada because of Covid restrictions. The Assistant Dean had also consulted with German lawyers (since Azarova was based there) who said that this arrangement was possible but that there was a small risk that Azarova might be viewed as an employee (rather than an independent contractor) under German law. The lawyers informed the Assistant Dean that if the German authorities decided that Azarova was an employee of the university (which again they said was a low risk), the university would be required to pay German social security charges and that failure to do so (if required) would be unlawful. Yet Cromwell, following the Dean's lead, refers to this arrangement as illegal, when the only illegality would have been the refusal to pay if required to do so by the German authorities.

Cromwell's report is most revealing in its account of Judge Spiro's intervention. Cromwell provides information about Spiro's call including how it came about and how it was received in the university. How much more Cromwell learned about the intervention we don't know, but there are large gaps in his account. Either he was not given all the relevant information, or he decided not to include it in his report.

What the Cromwell report tells us is that on the Friday before the Labour Day weekend Spiro spoke to the Associate Vice-President (AVP) (who oversees fundraising and donor relations) in a pre-scheduled call, during which they discussed the Azarova appointment.

Spiro told Cromwell that he learned of Azarova's (potential) hire from a staff member of the Centre for Israel and Jewish Affairs in Toronto (CIJA) of which Spiro had previously been a director. The staff member asked Spiro to contact the Dean about the potential appointment of Azarova. According to Spiro, he told the staff member that he would not directly contact the Dean, since that would be inappropriate. (But as we will see Spiro was happy to have his concerns about the hire passed on to the Dean and to be kept in the loop about the process). The CIJA staff member "provided [Spiro] with a memorandum that a professor from a university outside Canada had sent to [CIJA]". Apparently, the unnamed professor from abroad had learned of Azarova's potential hire from an unidentified Canadian faculty member – presumably someone at the University of Toronto.

Cromwell tells us that the unnamed professor's email and memorandum raised concerns about the university's "pending appointment of major anti-Israel activist to [an] important law school position." The professor asked CIJA staff to see if they "could quietly find out the current status and confirm [Azarova's] pending appointment" with "[t]he hope … that through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fund- raising."

According to the AVP, her conversation with Spiro was "wide-ranging" and the Azarova appointment was only one of many things they discussed. Her summary of the call did not mention the directorship of the IHRP (even though, as we will see, she thought it important enough to immediately pass Spiro's concerns on to the law school administration and to report back to him, on the same day). Cromwell gleans from the accounts of Spiro and the AVP (which he tells us are consistent on the essentials) that: "Spiro asked the AVP whether she knew anything about the potential appointment [of Azarova] …. The AVP replied that she did not. She remembered that [Spiro] 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. … The AVP recalls that [Spiro] referred to [Azarova's] published work on Israel ... [but] did not provide the AVP with the source of his information or go into any further details about the nature of the concern."

According to Cromwell, the AVP immediately communicated to the Assistant Dean of Alumni and Development in the Faculty of Law, informing her that Spiro had said "that the Jewish community would not be pleased by [Azarova's] appointment and that she [the AVP] wanted to have more information about the search."

This message was then conveyed to the Assistant Dean (Archbold), who confirmed to the AVP that Azarova had been selected but that "no decision had yet been made". (It is not clear whether this information was passed on to the AVP, either before or after the Assistant Dean spoke to the Dean). The Assistant Dean passed the information about Spiro's call on to the Dean. Up until this point, the Dean had had no involvement in the hiring process. He told Cromwell that he did not even know the candidate's name until he learned of Spiro's call. The Dean had left it to the Assistant Dean (who reports to him) to

negotiate with Azarova and take all the necessary steps to bring about the hire. The Dean now asked the Assistant Dean "to send him Azarova's CV (which she did at 6:38 pm that evening)" and said, "that they would talk again over the weekend."

Still on Friday September 4, after she received information about the status of the Azarova hire, the AVP (breaching confidence) sent Spiro the following email: "Quick update – understand from [the Dean] that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w [*sic*] me next week. Look forward to closing the loop w [*sic*] you." The AVP sent this message even though the Dean claimed to Cromwell that he had told the AVP to "back off" any involvement in the hiring process. Spiro immediately responded to the AVP "I look forward to closing the loop as well. If you need any further information on this matter, please don't hesitate to let me know." All this occurred in a single day, suggesting that everyone involved thought that the matter was urgent and serious. Spiro's question was answered – Azarova had not yet been hired. Before the long weekend was over, the Dean had decided to cancel the hire.

In the two days following Spiro's call – during the Labour Day Weekend – the Dean spoke to the Provost and the Vice- President Human Resources. By Sunday he had decided to cancel the hire of Azarova, apparently unwilling to wait for a scheduled meeting with the university lawyers at the start of the week to discuss the independent contractor arrangement and other matters.

Cromwell concludes that Spiro did not seek to intervene improperly in the hiring process and "simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University." In other words, according to Cromwell, Spiro was just giving the university a heads-up and suggesting it do due diligence. Cromwell also says that he could not "draw the inference that external influence played any role in the [Dean's] decision to discontinue the recruitment of [Azarova]."

Both the intervention and Cromwell's framing of it are deeply troubling. Indeed, I would venture to say that Cromwell's willingness to discount the significance of the judge's intervention undermines the credibility of his entire report. Cromwell shows a complete lack of understanding of the way influence works in institutional settings such as the university. It is even harder to fathom Cromwell's absolution of the Dean – when we know from Cromwell's report that on the day the Dean learned that a significant donor to the law school had expressed concerns about the hiring of Azarova, he suddenly became interested in a hire in which he had previously shown no interest and decided, two days later, that the hire should not go ahead, offering only empty reasons for his decision.

There is much more that could be said about this, none of which reflects well on the Dean (now the former Dean) or on Cromwell. The university seeks to move past this controversy by pointing to this report, from a former Supreme Court of Canada judge, as absolving the administration of any impropriety. Surely, insists the university, no one would question the findings of such an eminent figure. But if anyone still thinks that we should simply defer to findings of a former judge of Supreme Court of Canada, consider this: Cromwell delivered the keynote address at a CIJA run conference, while he was in the process of writing his report. Remember it was a CIJA staff member who asked Spiro, a former director of CIJA, to contact the university about Azarova. How could a former Supreme Court of Canada judge not recognize the necessity of avoiding such a conflict?

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

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 reality 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 Canadian 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 spoken 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 chair of the search that he planned to terminate negotiations with the committee's chosen candidate. The subsequent public justification offered by the Dean for this decision was that "legal constraints on cross-border hiring … meant that a candidate could not meet the Faculty's timing needs." (p. 6)

On September 11, the faculty member resigned from the search committee and from her position as academic chair 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 an IHRP 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 the claim 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 dangers of the appearance of improper influence. The Cromwell report does not ask why.

2) The timing of the Dean's decision 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. The donor's intervention, Cromwell says, was irrelevant to the timing of the Dean's actions. 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 unresolved 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 evidence that his own narrative reveals about both.

4) The “timing needs” in the Dean’s public justification for his decision amount to the claim that it was necessary to have a new director in place by September 30. This claim does not stand up to scrutiny. It is clear from Cromwell’s report that having the candidate in Canada with a work permit by January 1 was a hard deadline, and that the immigration lawyer was confident that candidate would meet that deadline. There is no comparable support in the report for the claim that September 30 was a hard deadline for the new director to be at work. Cromwell’s effort to show that it was is unpersuasive, as a careful examination of his report makes clear. In fact, the idea that the Dean himself saw September 30 as a strict deadline is contradicted by Cromwell’s own presentation of what the Dean thought when he decided to terminate negotiations with the committee’s chosen candidate on September 8 and to begin a search for an alternative: “Based on the information that the Dean had, it was not inconceivable that a new Director could be in place in the fall.” (p. 54) The qualifiers “not inconceivable” and “in the fall” are not compatible with a strict September 30 deadline. Moreover, the Dean was proposing to interview candidates whom the search committee had previously interviewed and rejected.

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 mechanisms and norms to protect against that risk. President Gertler’s response to the Cromwell report reflects the same omission.

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 that had been offered for terminating negotiations with the committee’s chosen candidate, i.e., the need to have an IHRP director in place in the early 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.

The full essay provides evidence to support these questions and challenges, drawing on the Cromwell report itself.

What the IHRP Hiring Scandal Tells us About Intersectional Privilege in Canadian Legal Institutions

opiniojuris.org/2021/04/06/what-the-ihrp-hiring-scandal-tells-us-about-intersectional-privilege-in-canadian-legal-institutions/

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Photo credit: University of Toronto

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In their seminal sociolegal text, *Dealing in Virtue*, Yves Dezalay and Bryant Garth describe how an elite group of transnational lawyers constructed the autonomous legal field of international commercial arbitration that gave them a central and powerful role in the global marketplace. Tracing the field's history, Dezalay and Garth describe the central role of the "Grand Old Men": a closed group of lawyers, trusted for their wisdom and judgment, whose social prestige and professional office served as a guarantee of their independence and impartiality. As the latest saga of the University of Toronto (UofT) hiring scandal demonstrates, the Grand Old Men paradigm remains appropriate today in revealing existing power structures and governing logics within the Canadian legal profession, academia, and the judiciary.

On March 15, 2021, former Supreme Court of Canada (SCC) Justice Thomas Cromwell completed his report on the aborted hiring of Dr. Valentina Azarova for directorship of the International Human Rights Program (IHRP) at the University of Toronto (UofT) Faculty of Law. The hiring was derailed by the then-Dean of the law school Edward Iacobucci, only several days after he had been made aware of concerns about Dr. Azarova's work on Israeli issues raised by a sitting judge, alumnae, and donor – identified by media as Justice David E. Spiro of the Tax Court of Canada and former director at the Centre for Israel and Jewish Affairs (CIJA), an advocacy group.

Cromwell was originally hired by the President of the UofT, Meric Gertler, to review the hiring incident. It since come to light that Cromwell was the opening keynote speaker at CIJA's annual legal conference on 9 February 2021, while he was putting the finishing touches on the report. It is unclear why he did not recuse himself given his role as an investigator of alleged external influence from CIJA.

As for me, I write this article from the perspective of an insider – to an extent. From June 2019 until my resignation in September 2020, I worked as a Research Associate for the IHRP and taught a clinical course on media freedom and international human rights. During the summer of 2020, I was asked by Assistant Dean Alexis Archbold if I could help with the hiring committee for the new director. Fatefully, I accepted the request.

Like most people affected by the scandal, I decided to voluntary participate in Cromwell's review process in hopes that it would shed more light on exactly what happened. On this point, the report surely delivered. A close reading of details uncovered by Cromwell reveal an almost surreal story of what went on behind the scenes with Dean Iacobucci, the funding offices at UofT, Justice Spiro, and the CIJA, who found out about Dr. Azarova's candidacy and explicitly set out to put the brakes on it.

The Additional Details Revealed by the Report

Among other things, we now know that:

> On the morning of September 4th, 2020, the first person who received Justice Spiro's concerns about Dr. Azarova's published work on Israel was an Assistant Vice President (AVP) responsible for donor stewardship calls, who presumably is Chantelle Courtney, former Assistant Dean of Advancement at the law school, according to contacts familiar with UofT organizational structure. The AVP was aware that Spiro was a federally appointed judge. Spiro asked the AVP whether she knew anything about the candidacy, raised concerns about Dr. Azarova's work on Israel, and "wanted to ensure that the University did the necessary due diligence" (pp 32-33).
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> Justice Spiro himself was tipped off about the name and background of Dr. Azarova by a staff member of an organization he was director at until his appointment to the bench, presumably CIJA. CIJA for its part had been tipped off by a professor from a university outside of Canada (p 31).
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> The CIJA staff member wrote Spiro, wondering whether "someone could quietly find out the current status" of the job search, hoping that "through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fundraising" (p 32).
>
> Rather than communicating to Spiro that hiring decisions were confidential and strictly internal affairs, the AVP relayed Spiro's concerns to the law school's Assistant Dean of Alumni and Development, Jennifer Lancaster (p 33).
>
> Rather than communicating to the AVP that hiring decisions were confidential and strictly internal affairs, Lancaster relayed Spiro's concerns to the law school's Assistant Dean of the JD Program (and IHRP hiring committee member) Alexis Archbold (p 33).
>
> Rather than communicating to Lancaster that hiring decisions were confidential and strictly internal affairs, Archbold divulged to Lancaster sensitive information that indeed Dr. Azarova was the preferred candidate and that no final decision had been made. She also expressed concern that Dr. Azarova's name had been leaked to parties external to the recruitment process (p 33).
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> Archbold told Lancaster to relay this information to Dean Iacobucci and subsequently called the final member of the hiring committee, Professor Audrey Macklin, about the situation (p 34).

> Cromwell reports that Dean Iacobucci "gave instructions that he would have no engagement with Advancement on the matter and [Lancaster] was to advise the AVP that there would be no further follow up on the matter" (p 34). Yet somehow the AVP was successfully able to update Spiro anyway. The report seems to be silent on exactly how this occurred. At 2:01 pm, the AVP sent an update email to Spiro, writing: "Quick update – understand from [the Dean] that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w[sic]me next week. Look forward to closing the loop w [sic] you" (p 35).
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> At the time Spiro's concerns first came to him, Dean Iacobucci admitted that he "had no personal knowledge at that time about [Dr. Azarova] or why her appointment would be controversial" (p 34). In other words, he had no involvement in the hiring process until he got the call from Lancaster. Up until that point, the university and Dr. Azarova were amicably exploring different options with respect to her work permit and a potential bridging employment contract. (This accords with my own experience that the Dean has very little involvement with IHRP matters. During my entire tenure at the IHRP, I have never met Dean Iacobucci nor have we exchanged any direct correspondence.)
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> The following events up until the disqualification of the candidacy are well documented and ultimately grounded on the argument that Dr. Azarova couldn't get to Toronto quick enough given the work permit situation, as well as the Dean's apprehensions about the possibility of whether she could return to Europe during the summers. The Dean holds onto these as the reasons he rejected the candidate and not the concern about her work on Israel.
>
> What we are left with is that over the long weekend, from September 4th – when he first heard about Azarova – to September 8th, Dean Iacobucci made the final decision to disqualify her candidacy, overriding the unanimous decision of the IHRP hiring committee.

In other words, putting the inferences/conclusions aside, the facts themselves are incredibly damning. And thanks to the report, we know much more about what happened behind the scenes than before.

The Inference and What it Says About Intersectional Power and privilege in the Legal Field

Despite this mountain of contextual evidence, Cromwell states upfront that he "would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate" (p 6).

Joyously, UofT President Meric Gertler places this development front and centre of his response to the review. Gertler also makes a point to effectively praise Dean Iacobucci, acknowledging "the difficult position" in which he "found himself". He implies that Dean

Iacobucci did the right thing, by respecting confidentiality, and allowing Cromwell to correct "erroneous or mistaken inferences that were based on less-than-complete information".

A close examination of how Cromwell chose not to make the inference of external influence in the disqualification of Azarova's candidacy, as well as of how Gertler is attempting to treat this decision as an exoneration of Dean Iacobucci, speaks volumes about the logics that work create a powerful presumption of innocence for elite white males in the Canadian legal field.

Cromwell's refusal to conclude that external influence was part of Iacobucci's hiring decision confuses concluding that the donor issue was a *factor* in the decision with concluding that it was *the primary factor*. That confusion is reminiscent of many human rights cases in which, for instance, sexism or racism cannot be pointed to clearly as the primary factor motivating a decision (e.g. because there was no admission, no direct slur, no "smoking gun") but all the contextual factors, read as a whole, point to discriminatory treatment.

At bottom, Cromwell simply "takes the Dean's word for it" that the external influence was not a factor, by pointing to the Dean's denial and regurgitating his stated concerns. But this also begs further questions about what Dean Iacobucci even means when he says it was not a factor: given that the Israel issue was something he had in his mind when he decided and was raised in numerous discussions about Dr. Azarova from when he first got involved in the hiring process on September 4th until he made the decision to terminate her candidacy on September 8th. The eagerness of Cromwell to accept the Dean's denial at face value rings very hollow.

Cromwell states that the process of the review "is not one that is suitable for making findings of credibility", citing lack of safeguards, and that his task is to "construct a comprehensive factual narrative, not to resolve points on which memories differ". However, given that there are essentially two different sides of the story here with respect to whether Spiro's concerns played a role, *de facto* credibility assessments are nevertheless made.

The showdown between competing stories ultimately reaches a climax with the fateful September 6th call between Dean Iacobucci and Professor Audrey Macklin. Dean Iacobucci informs Macklin of his decision to disqualify Dr. Azarova, citing concerns about the immigration timing and Azarova's inquiry about the possibility of returning to Europe in the summer. Macklin asks if the Israel concerns were an issue, citing that Azarova's work was well within the zone of professional international legal analysis. Here is where their stories differ:

Macklin recalls that Iacobucci admitted that the work on Israel "is an issue", but said that given the other two reasons, there was no need to address it (p 39). Dean Iacobucci, for his part, states that he was clear to Macklin that this issue "was irrelevant". In refusing to draw an inference despite all of the countervailing contextual evidence, Cromwell at the end of the day simply accepts Dean Iacobucci's denial at face value. He even goes as far as to cover Iacobucci by saying that even if Macklin's recollection was accurate, the Dean already said to

her that the Israeli issue was irrelevant because he could rely on the other two grounds. What accounts for this apparently superhuman ability imputed by Cromwell to Dean Iacobucci to compartmentalize the very concerns that first alerted the Dean to review Dr. Azarova's candidacy – a candidacy of which he admitted he knew nothing about only two days prior?

The Grand Old Men Redux

Ultimately, the discrepancy between the damning facts and Cromwell's refusal to find an inference of external influence on Dean Iacobucci's decision cannot be explained without an analysis of the operation of intersectional power and privilege that continues to govern the legal academy, the legal profession, and the judiciary in Canada. It speaks volumes that this episode first related to improper conduct and influence by a powerful white male judge (Justice David Spiro), was bumped up to and decided upon by a powerful white male Dean of Law (Dean Ed Iacobucci, son of former SCC judge Frank Iacobucci), was mediated through another powerful white male investigator (former SCC judge Thomas Cromwell), and was then whitewashed by a powerful white male University President (President Meric Gertler) while all other voices have been sidelined. This is exactly the danger with a formal, legalistic analysis absent an analysis of power. You can reach whatever conclusion you want with the right phrasing and inferences. The result is a nakedly political process obscured by legal rhetoric.

Yet intersectional vulnerabilities are not simplistic identitarian claims; they are explanations of the multiple dynamics at play. An intersectional framework helps us understand why, despite the opportunity for discretion on framing and findings, the most generous interpretations are applied to the conduct of these powerful white men. Grossly inappropriate meddling by a sitting judge is described as "due diligence" (pp 32-33). Denial that improper external influence played a factor is simply accepted at face value, despite the fact that it flies in the face of a mountain of countervailing contextual evidence.

Page 73 of the report gives us another entry point to peel back the veneer of objectivity and examine the operation of intersectional power and privilege more closely. Through eight pointed paragraphs, Cromwell effectively chastises individuals whose behaviour is deemed to fall short of the necessary standard. The first four paragraphs relate to the three aforementioned women within the UofT administration who passed information back and forth between Spiro and Dean Iacobucci. The fifth paragraph refers to Professor Audrey Macklin. The sixth is reserved for me – after Dean Iacobucci issued his blanket denial and (what I perceived to be) misleading responses, I resigned and went public with the relevant information that I knew. I am unclear as to the identity of the individuals named in the seventh paragraph.

However, the lone badge of honour in paragraph eight is reserved for Dean Iacobucci – for strictly obeying confidentiality by offering no information other than denial when pressed. As mentioned earlier, President Gertler hooked onto this seal of approval from Cromwell to thank Dean Iacobucci for his fidelity to confidentiality. This despite the fact that the person

who confidentiality most aimed to protect – the preferred candidate, Dr. Azarova – was the person most harmed by the leak and most harmed by Iacobucci's abrupt and procedurally dubious decision to bar her candidacy.

The conduct of the three women within the UofT administration are not faultless, but it seems to be consistent with what is normally done for powerful donors: to pass requests and concerns along the chain to those with decision-making power in order to keep them happy. In this case, the donor's concerns were successfully passed on to the Dean and the result he and CIJA was looking for came to fruition. The folks who attempted to bring up concerns (all of whom were not white men), first internally, and then as whistleblowers to the media, are chastised in the report as if there was any hope that Cromwell's investigation and the improper practices it revealed would have happened at all without our going public (p 73). Later in that same page, Cromwell also spells out a recommendation that, in his view, would have been helpful: ensuring that Professor Macklin and I as members of the selection committee signed written confidentiality agreements, presumably so the University could better hold us legally liable if we went public with information about wrongdoing we perceived to be in the public interest.

Finally, the consequences speak for themselves: Dr. Azarova has still lost her job; I as a person of colour have lost my job in order to truthfully bring details of this incident to light; Palestinian rights and international law with respect to the Israel/Palestine situation are now demonstrably a taboo subject in the law school; and the powerful white men who are at the heart of this impropriety have thus far escaped any sort of formal accountability. Meanwhile, the three female administrators, Professor Macklin, myself, and the former IHRP directors who raised concerns to Iacobucci have been sacrificed at the altar to uphold the unimpeachable integrity that seemingly adheres to the Grand Old Men of the Canadian legal profession as an inherent right. Intersectionality allows us to ask hard questions regarding the likely outcomes of this unspoken governing logic: which groups bear the disproportionate consequences when there is impropriety? Which groups can expect to be exonerated so long as they follow a steady diet of denial and stonewalling?

The unassailable power of elite whiteness at UofT law is to interpret, teach, and create the law but never be seen as violators of it. Even when you physically walk into UofT law's space, you are consistently bombarded with images and busts of almost exclusively white male lawyers and judges, who are honoured and revered as paragons of virtue, justice, and knowledge. Since these manifestations of whiteness are presumed innocent, a system that is designed to protect them must also be innocent. For those who understand and witness that power on a day-to-day level, who have witnessed denial of systemic racism as the winning electoral issue for our current governing slate of provincial law society benchers, who have seen a nearly 150-year streak of unbroken whiteness at our nation's highest court, none of this comes as a surprise.

With respect to what can be done moving forward, if we take the law school at its word that ideology and Dr. Azarova's work draws no concerns, then they should apologize to her and offer her the position (if she wants it) tomorrow. The bottom line is that a breach occurred, an attempt to interfere took place, and the appointment of a highly qualified person was derailed. If the university is genuinely not concerned about lobbyists and donors, there is no reason for them not to hire her now. I hope that the pressure continues until redress is done for all of those harmed, but particularly her. Until then, it is impossible to move forward and the reputation of the IHRP and the law school more broadly remains in tatters.

We will see what our new Dean Jutta Brunnée decides to do. But at this moment, I continue to feel a strong sense of shame and embarrassment to be a UofT law alumnus.

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CJC Files: 20-0254, 20-0256, 20-0260, 20-0261, 20-0268, 20-0271, 20-0274, 20-0275, 20-0305, 20-0474

May 19, 2021

The Honourable David Spiro
Tax Court of Canada
200 Kent Street
Ottawa, ON K1A 0M1

Dear Colleague:

I am writing in regard to several complaints from multiple individuals and organizations following media reports on your alleged interference with the selection process of the Director of the International Human Rights Program (IHRP) of the Faculty of Law, University of Toronto. A Judicial Conduct Review Panel (the Review Panel) was convened and determined that your conduct was not such that it might be serious enough to warrant your removal from office, although it found that your conduct was a serious mistake. Under s. 2(5) of the *Inquiries and Investigations By-laws*, 2015 (the *By-laws*) of the Canadian Judicial Council (Council), I am now tasked with deciding on the most appropriate way to resolve these complaints.

I have decided that no further action by Council is necessary in regard to these complaints.

In making that decision, I have considered your sincere regrets and remorse and your early recognition that you had made a mistake in discussing the appointment of a candidate as the Director of IHRP with an Executive of the University of Toronto and in expressing your concerns. I have also considered the support of your Chief Justice and have had particular regard to the Report of the Review Panel and its determinations.

At the same time, I feel it necessary to, by this letter, issue an expression of concern in accordance with s. 8.3 of the *Review Procedures* of Council. My reasons are as follows.

It is my view that your conduct did put at risk public confidence in the integrity, impartiality and independence of the judiciary and thereby risked diminishing confidence

in the administration of justice. Media reports and the concerns expressed by the complainants, some of whom are law professors and others various lawyers' organizations, are a testimony to the perception of the public and of the impact of your conduct. As you acknowledged in your letter of October 26, 2020, your conduct raised questions about your commitment to impartiality toward all litigants and counsel who appear before you. Further, you stated that you learned, quite rightly, that words spoken outside the courtroom by a judge may create the wrong impression about the judge's integrity and impartiality. At all times, judges should ensure that their conduct, both in and out of court, will sustain and contribute to public respect and confidence in their integrity, independence, impartiality and judgment.

I hope my comments, offered in a constructive spirit, will be of some assistance to you in your continuing judicial responsibilities. In this regard I wish you the best.

Yours sincerely,

The Honourable Kenneth G. Nielsen
Vice-Chairperson, Judicial Conduct Committee

cc. Chief Justice Rossiter

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0254

May 20, 2021

Mr. Leslie Green

By email: leslie.green@queensu.ca

Dear Mr. Green:

I am responding to your emails of September 16, 17 and 30, 2020 in which you make a complaint in respect of the Honourable David E. Spiro of the Tax Court of Canada (the Tax Court).

In your correspondence to the Canadian Judicial Council (Council), you complain about the alleged interference of Justice Spiro in the appointment process in relation to the Director of the International Human Rights Program (IHRP) of the Faculty of Law (the Faculty), of the University of Toronto (the University). The conduct of Justice Spiro is alleged to put the integrity and impartiality of the Tax Court in jeopardy, and cause any party or lawyer before the Tax Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The mandate of Council in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations in which a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

In accordance with the *Review Procedures* of Council, your correspondence was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice-Chair of the Judicial Conduct Committee. Upon review, Associate Chief Justice Nielsen referred your complaint and other related complaints to a Judicial

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Conduct Review Panel (the Review Panel) for consideration. The Review Panel has now completed its review.

Section 4 of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015 (the *By-laws*) provides that a Judicial Conduct Review Panel "may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant removal of the judge." The Review Panel in the matter of Justice Spiro determined that the judge's conduct was not such that it might be serious enough to warrant his removal from office.

Before his appointment to the judiciary, Justice Spiro was a member of the Board of Directors at the Centre for Israel and Jewish Affairs (CIJA). On September 3, 2020, Justice Spiro learned from a staff member of CIJA about the appointment or imminent appointment of Dr Azarova as the Director of IHRP, and of concerns about her academic work and position on Israel's occupation of the Palestinian Territory. Justice Spiro was asked whether he could approach the Dean of the Faculty to relay these concerns, and if he could determine whether the appointment had been made.

Justice Spiro declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a "telephone catch-up" on the following day with an official from the University. During their conversation, Justice Spiro mentioned the potential appointment of Dr Azarova as the Director of IHRP and commented about the controversial nature of this appointment from the perspective of the Jewish community and the potential damage to the reputation of the University. He sought information about whether the candidate had been appointed as yet. Justice Spiro did not contact the Dean of the Faculty, and specifically declined to approach him.

Throughout the years and before his appointment to the judiciary, Justice Spiro had been a very engaged alumnus who supported the Faculty financially and professionally and who had been active in fundraising campaigns. For the Review Panel, it was this background as distinct from the judge's judicial position that prompted Justice Spiro's discussion with the official from the University. The Review Panel was of the view that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against Dr Azarova's appointment. Part of Justice Spiro's concern was whether the University had done its due diligence in its selection process.

Before his appointment to the judiciary, Justice Spiro devoted a great deal of time to enhance his understanding of the Israel-Palestine conflict and to build bridges between the

parties and the faith communities involved. He stated “I do not harbour any views that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim.” The Review Panel concluded that nothing in the career of Justice Spiro or his work supports the suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.

The Review Panel concluded that right thinking persons apprised in accurate terms of the conduct of Justice Spiro over his career and in relation to this matter could not conclude that the judge is biased against Palestinian, Arab or Muslim interests. The fear of bias on the part of Justice Spiro is based on misinformation and speculation that is inaccurate. The fear of bias in the future is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee.

The Review Panel found that it was an error for Justice Spiro to raise such concerns in the manner he did. The judge properly recognized the mistakes he made and expressed remorse. The Review Panel found this error serious but in the end, it was not such as to warrant removal of Justice Spiro from office.

Section 2(5) of the *By-laws* specifies that if the Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Vice-Chairperson of the Judicial Conduct Committee to make a decision on the most appropriate way to resolve the matter.

Associate Chief Justice Nielsen considered the circumstances of this case. Justice Spiro acknowledged his mistakes and expressed remorse. In a letter to Council dated October 26, 2020, Justice Spiro wrote it was a mistake for him to discuss such a controversial matter with an official of the University, which he deeply regrets. Justice Spiro acknowledged that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him. He stated he learned that words spoken outside the courtroom by a judge may create the wrong impression about the judge’s integrity and impartiality.

Judges should strive to ensure that their conduct, both in and out of Court, will sustain and contribute to public respect and confidence in their integrity, impartiality and judgment, and thereby contribute to confidence in the administration of justice. It was a serious error for Justice Spiro to discuss the appointment of the Director of IHRP, one that he regrets and that he states he has learned from.

Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter.

In view of all of the circumstances, Associate Chief Justice Nielsen is satisfied that Justice Spiro is acutely aware of his duty to the public, as a judge, to not only ensure he is impartial, but to be seen as being impartial. In the light of the above, Associate Chief Justice Nielsen instructed me to close this complaint. He thanks you for raising your concerns with Council.

Yours sincerely,

Jacqueline Corado
Acting Executive Director

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0260

May 20, 2021

Mr. Craig Scott

By email: CScott@osgoode.yorku.ca

Dear Mr. Scott:

I am responding to your emails of September 20 and 25, 2020 and April 20 and 22, 2021 in which you make a complaint in respect of the Honourable David E. Spiro of the Tax Court of Canada (the Tax Court).

In your correspondence to the Canadian Judicial Council (Council), you complain about the alleged interference of Justice Spiro in the appointment process in relation to the Director of the International Human Rights Program (IHRP) of the Faculty of Law (the Faculty), of the University of Toronto (the University). The conduct of Justice Spiro is alleged to put the integrity and impartiality of the Tax Court in jeopardy, and cause any party or lawyer before the Tax Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The mandate of Council in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations in which a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

In accordance with the *Review Procedures* of Council, your correspondence was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice-Chair of the Judicial Conduct Committee. Upon review, Associate Chief Justice Nielsen referred your complaint and other related complaints to a Judicial

Conduct Review Panel (the Review Panel) for consideration. The Review Panel has now completed its review.

Section 4 of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015 (the *By-laws*) provides that a Judicial Conduct Review Panel "may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant removal of the judge." The Review Panel in the matter of Justice Spiro determined that the judge's conduct was not such that it might be serious enough to warrant his removal from office.

Before his appointment to the judiciary, Justice Spiro was a member of the Board of Directors at the Centre for Israel and Jewish Affairs (CIJA). On September 3, 2020, Justice Spiro learned from a staff member of CIJA about the appointment or imminent appointment of Dr Azarova as the Director of IHRP, and of concerns about her academic work and position on Israel's occupation of the Palestinian Territory. Justice Spiro was asked whether he could approach the Dean of the Faculty to relay these concerns, and if he could determine whether the appointment had been made.

Justice Spiro declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a "telephone catch-up" on the following day with an official from the University. During their conversation, Justice Spiro mentioned the potential appointment of Dr Azarova as the Director of IHRP and commented about the controversial nature of this appointment from the perspective of the Jewish community and the potential damage to the reputation of the University. He sought information about whether the candidate had been appointed as yet. Justice Spiro did not contact the Dean of the Faculty, and specifically declined to approach him.

Throughout the years and before his appointment to the judiciary, Justice Spiro had been a very engaged alumnus who supported the Faculty financially and professionally and who had been active in fundraising campaigns. For the Review Panel, it was this background as distinct from the judge's judicial position that prompted Justice Spiro's discussion with the official from the University. The Review Panel was of the view that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against Dr Azarova's appointment. Part of Justice Spiro's concern was whether the University had done its due diligence in its selection process.

Before his appointment to the judiciary, Justice Spiro devoted a great deal of time to enhance his understanding of the Israel-Palestine conflict and to build bridges between the

parties and the faith communities involved. He stated “I do not harbour any views that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim.” The Review Panel concluded that nothing in the career of Justice Spiro or his work supports the suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.

The Review Panel concluded that right thinking persons apprised in accurate terms of the conduct of Justice Spiro over his career and in relation to this matter could not conclude that the judge is biased against Palestinian, Arab or Muslim interests. The fear of bias on the part of Justice Spiro is based on misinformation and speculation that is inaccurate. The fear of bias in the future is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee.

The Review Panel found that it was an error for Justice Spiro to raise such concerns in the manner he did. The judge properly recognized the mistakes he made and expressed remorse. The Review Panel found this error serious but in the end, it was not such as to warrant removal of Justice Spiro from office.

Section 2(5) of the *By-laws* specifies that if the Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Vice-Chairperson of the Judicial Conduct Committee to make a decision on the most appropriate way to resolve the matter.

Associate Chief Justice Nielsen considered the circumstances of this case. Justice Spiro acknowledged his mistakes and expressed remorse. In a letter to Council dated October 26, 2020, Justice Spiro wrote it was a mistake for him to discuss such a controversial matter with an official of the University, which he deeply regrets. Justice Spiro acknowledged that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him. He stated he learned that words spoken outside the courtroom by a judge may create the wrong impression about the judge’s integrity and impartiality.

Judges should strive to ensure that their conduct, both in and out of Court, will sustain and contribute to public respect and confidence in their integrity, impartiality and judgment, and thereby contribute to confidence in the administration of justice. It was a serious error for Justice Spiro to discuss the appointment of the Director of IHRP, one that he regrets and that he states he has learned from.

Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter.

In view of all of the circumstances, Associate Chief Justice Nielsen is satisfied that Justice Spiro is acutely aware of his duty to the public, as a judge, to not only ensure he is impartial, but to be seen as being impartial. In the light of the above, Associate Chief Justice Nielsen instructed me to close this complaint. He thanks you for raising your concerns with Council.

On April 22, 2021, you forwarded submissions to the Review Panel concerning your complaint and the *Cromwell Report*. On that date, the Review Panel had already made its determination in this matter. The *Review Procedures* and the *By-laws* do not provide an opportunity for a complainant to make submissions to a Review Panel, and Review Panels do not seek such submissions. Nevertheless, Associate Chief Justice Nielsen commented he did review your submissions of April 22, 2021 when making his decision on the most appropriate way to resolve this complaint.

Yours sincerely,

Jacqueline Corado
Acting Executive Director

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0261

May 20, 2021

Mr. Mustafa Farooq

By email: mfarooq@nccm.ca

Dear Mr. Farooq:

I am responding to your email of September 21, 2020 in which you make a complaint in respect of the Honourable David E. Spiro of the Tax Court of Canada (the Tax Court).

In your correspondence to the Canadian Judicial Council (Council), you complain about the alleged interference of Justice Spiro in the appointment process in relation to the Director of the International Human Rights Program (IHRP) of the Faculty of Law (the Faculty), of the University of Toronto (the University). The conduct of Justice Spiro is alleged to put the integrity and impartiality of the Tax Court in jeopardy, and cause any party or lawyer before the Tax Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The mandate of Council in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations in which a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

In accordance with the *Review Procedures* of Council, your correspondence was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice-Chair of the Judicial Conduct Committee. Upon review, Associate Chief Justice Nielsen referred your complaint and other related complaints to a Judicial

Conduct Review Panel (the Review Panel) for consideration. The Review Panel has now completed its review.

Section 4 of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015 (the *By-laws*) provides that a Judicial Conduct Review Panel "may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant removal of the judge." The Review Panel in the matter of Justice Spiro determined that the judge's conduct was not such that it might be serious enough to warrant his removal from office.

Before his appointment to the judiciary, Justice Spiro was a member of the Board of Directors at the Centre for Israel and Jewish Affairs (CIJA). On September 3, 2020, Justice Spiro learned from a staff member of CIJA about the appointment or imminent appointment of Dr Azarova as the Director of IHRP, and of concerns about her academic work and position on Israel's occupation of the Palestinian Territory. Justice Spiro was asked whether he could approach the Dean of the Faculty to relay these concerns, and if he could determine whether the appointment had been made.

Justice Spiro declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a "telephone catch-up" on the following day with an official from the University. During their conversation, Justice Spiro mentioned the potential appointment of Dr Azarova as the Director of IHRP and commented about the controversial nature of this appointment from the perspective of the Jewish community and the potential damage to the reputation of the University. He sought information about whether the candidate had been appointed as yet. Justice Spiro did not contact the Dean of the Faculty, and specifically declined to approach him.

Throughout the years and before his appointment to the judiciary, Justice Spiro had been a very engaged alumnus who supported the Faculty financially and professionally and who had been active in fundraising campaigns. For the Review Panel, it was this background as distinct from the judge's judicial position that prompted Justice Spiro's discussion with the official from the University. The Review Panel was of the view that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against Dr Azarova's appointment. Part of Justice Spiro's concern was whether the University had done its due diligence in its selection process.

Before his appointment to the judiciary, Justice Spiro devoted a great deal of time to enhance his understanding of the Israel-Palestine conflict and to build bridges between the

parties and the faith communities involved. He stated “I do not harbour any views that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim.” The Review Panel concluded that nothing in the career of Justice Spiro or his work supports the suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.

The Review Panel concluded that right thinking persons apprised in accurate terms of the conduct of Justice Spiro over his career and in relation to this matter could not conclude that the judge is biased against Palestinian, Arab or Muslim interests. The fear of bias on the part of Justice Spiro is based on misinformation and speculation that is inaccurate. The fear of bias in the future is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee.

The Review Panel found that it was an error for Justice Spiro to raise such concerns in the manner he did. The judge properly recognized the mistakes he made and expressed remorse. The Review Panel found this error serious but in the end, it was not such as to warrant removal of Justice Spiro from office.

Section 2(5) of the *By-laws* specifies that if the Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Vice-Chairperson of the Judicial Conduct Committee to make a decision on the most appropriate way to resolve the matter.

Associate Chief Justice Nielsen considered the circumstances of this case. Justice Spiro acknowledged his mistakes and expressed remorse. In a letter to Council dated October 26, 2020, Justice Spiro wrote it was a mistake for him to discuss such a controversial matter with an official of the University, which he deeply regrets. Justice Spiro acknowledged that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him. He stated he learned that words spoken outside the courtroom by a judge may create the wrong impression about the judge’s integrity and impartiality.

Judges should strive to ensure that their conduct, both in and out of Court, will sustain and contribute to public respect and confidence in their integrity, impartiality and judgment, and thereby contribute to confidence in the administration of justice. It was a serious error for Justice Spiro to discuss the appointment of the Director of IHRP, one that he regrets and that he states he has learned from.

Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter.

In view of all of the circumstances, Associate Chief Justice Nielsen is satisfied that Justice Spiro is acutely aware of his duty to the public, as a judge, to not only ensure he is impartial, but to be seen as being impartial. In the light of the above, Associate Chief Justice Nielsen instructed me to close this complaint. He thanks you for raising your concerns with Council.

Yours sincerely,

Jacqueline Corado
Acting Executive Director

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0275

May 20, 2021

Ms. Dania Majid

By email: dania_majid@hotmail.com

Dear Ms. Majid:

I am responding to your emails of September 25 and October 8 and 13, 2020 in which you make a complaint in respect of the Honourable David E. Spiro of the Tax Court of Canada (the Tax Court).

In your correspondence to the Canadian Judicial Council (Council), you complain about the alleged interference of Justice Spiro in the appointment process in relation to the Director of the International Human Rights Program (IHRP) of the Faculty of Law (the Faculty), of the University of Toronto (the University). The conduct of Justice Spiro is alleged to put the integrity and impartiality of the Tax Court in jeopardy, and cause any party or lawyer before the Tax Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The mandate of Council in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations in which a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

In accordance with the *Review Procedures* of Council, your correspondence was referred to the Honourable Kenneth G. Nielsen, Associate Chief Justice of the Court of Queen's Bench of Alberta and Vice-Chair of the Judicial Conduct Committee. Upon review, Associate Chief Justice Nielsen referred your complaint and other related complaints to a Judicial

Conduct Review Panel (the Review Panel) for consideration. The Review Panel has now completed its review.

Section 4 of the *Canadian Judicial Council Inquiries and Investigations By-laws*, 2015 (the *By-laws*) provides that a Judicial Conduct Review Panel "may decide that an Inquiry Committee is to be constituted only if it determines that the matter might be serious enough to warrant removal of the judge." The Review Panel in the matter of Justice Spiro determined that the judge's conduct was not such that it might be serious enough to warrant his removal from office.

Before his appointment to the judiciary, Justice Spiro was a member of the Board of Directors at the Centre for Israel and Jewish Affairs (CIJA). On September 3, 2020, Justice Spiro learned from a staff member of CIJA about the appointment or imminent appointment of Dr Azarova as the Director of IHRP, and of concerns about her academic work and position on Israel's occupation of the Palestinian Territory. Justice Spiro was asked whether he could approach the Dean of the Faculty to relay these concerns, and if he could determine whether the appointment had been made.

Justice Spiro declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a "telephone catch-up" on the following day with an official from the University. During their conversation, Justice Spiro mentioned the potential appointment of Dr Azarova as the Director of IHRP and commented about the controversial nature of this appointment from the perspective of the Jewish community and the potential damage to the reputation of the University. He sought information about whether the candidate had been appointed as yet. Justice Spiro did not contact the Dean of the Faculty, and specifically declined to approach him.

Throughout the years and before his appointment to the judiciary, Justice Spiro had been a very engaged alumnus who supported the Faculty financially and professionally and who had been active in fundraising campaigns. For the Review Panel, it was this background as distinct from the judge's judicial position that prompted Justice Spiro's discussion with the official from the University. The Review Panel was of the view that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against Dr Azarova's appointment. Part of Justice Spiro's concern was whether the University had done its due diligence in its selection process.

Before his appointment to the judiciary, Justice Spiro devoted a great deal of time to enhance his understanding of the Israel-Palestine conflict and to build bridges between the

parties and the faith communities involved. He stated “I do not harbour any views that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim.” The Review Panel concluded that nothing in the career of Justice Spiro or his work supports the suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.

The Review Panel concluded that right thinking persons apprised in accurate terms of the conduct of Justice Spiro over his career and in relation to this matter could not conclude that the judge is biased against Palestinian, Arab or Muslim interests. The fear of bias on the part of Justice Spiro is based on misinformation and speculation that is inaccurate. The fear of bias in the future is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee.

The Review Panel found that it was an error for Justice Spiro to raise such concerns in the manner he did. The judge properly recognized the mistakes he made and expressed remorse. The Review Panel found this error serious but in the end, it was not such as to warrant removal of Justice Spiro from office.

Section 2(5) of the *By-laws* specifies that if the Review Panel decides that no Inquiry Committee is to be constituted, it must send the matter back to the Vice-Chairperson of the Judicial Conduct Committee to make a decision on the most appropriate way to resolve the matter.

Associate Chief Justice Nielsen considered the circumstances of this case. Justice Spiro acknowledged his mistakes and expressed remorse. In a letter to Council dated October 26, 2020, Justice Spiro wrote it was a mistake for him to discuss such a controversial matter with an official of the University, which he deeply regrets. Justice Spiro acknowledged that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him. He stated he learned that words spoken outside the courtroom by a judge may create the wrong impression about the judge’s integrity and impartiality.

Judges should strive to ensure that their conduct, both in and out of Court, will sustain and contribute to public respect and confidence in their integrity, impartiality and judgment, and thereby contribute to confidence in the administration of justice. It was a serious error for Justice Spiro to discuss the appointment of the Director of IHRP, one that he regrets and that he states he has learned from.

Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter.

In view of all of the circumstances, Associate Chief Justice Nielsen is satisfied that Justice Spiro is acutely aware of his duty to the public, as a judge, to not only ensure he is impartial, but to be seen as being impartial. In the light of the above, Associate Chief Justice Nielsen instructed me to close this complaint. He thanks you for raising your concerns with Council.

Yours sincerely,

Jacqueline Corado
Acting Executive Director

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0305

May 20, 2021

Ms. Imtenan Abd-El-Razik

By email: contact@camwl.ca

Dear Ms. Abd-El-Razik:

I am responding to your email of October 8, 2020 in which you make a complaint in respect of the Honourable David E. Spiro of the Tax Court of Canada (the Tax Court).

In your correspondence to the Canadian Judicial Council (Council), you complain about the alleged interference of Justice Spiro in the appointment process in relation to the Director of the International Human Rights Program (IHRP) of the Faculty of Law (the Faculty), of the University of Toronto (the University). The conduct of Justice Spiro is alleged to put the integrity and impartiality of the Tax Court in jeopardy, and cause any party or lawyer before the Tax Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The mandate of Council in matters of judicial conduct is to determine whether a recommendation should be made to the Minister of Justice, after a formal investigation, that a judge be removed from office by Parliament. The reasons for removal are set out in the *Judges Act* and address situations in which a judge has become incapacitated or disabled from performing the duties of a judge. This can be as a result of age or infirmity, misconduct, a failure to execute the duties of the position, or being in a position incompatible with the functions of a judge. In certain cases, Council may recommend remedial measures or express concern about a judge's conduct.

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Justice Spiro declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a "telephone catch-up" on the following day with an official from the University. During their conversation, Justice Spiro mentioned the potential appointment of Dr Azarova as the Director of IHRP and commented about the controversial nature of this appointment from the perspective of the Jewish community and the potential damage to the reputation of the University. He sought information about whether the candidate had been appointed as yet. Justice Spiro did not contact the Dean of the Faculty, and specifically declined to approach him.

Throughout the years and before his appointment to the judiciary, Justice Spiro had been a very engaged alumnus who supported the Faculty financially and professionally and who had been active in fundraising campaigns. For the Review Panel, it was this background as distinct from the judge's judicial position that prompted Justice Spiro's discussion with the official from the University. The Review Panel was of the view that Justice Spiro was voicing his concerns about the potential impact of the appointment and associated controversy on the University and the Faculty, as opposed to actively campaigning or lobbying against Dr Azarova's appointment. Part of Justice Spiro's concern was whether the University had done its due diligence in its selection process.

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parties and the faith communities involved. He stated “I do not harbour any views that are anti-Palestine, anti-Palestinian, anti-Arab, or anti-Muslim.” The Review Panel concluded that nothing in the career of Justice Spiro or his work supports the suggestion of perceived bias on his part against Palestinian, Arab or Muslim interests.

The Review Panel concluded that right thinking persons apprised in accurate terms of the conduct of Justice Spiro over his career and in relation to this matter could not conclude that the judge is biased against Palestinian, Arab or Muslim interests. The fear of bias on the part of Justice Spiro is based on misinformation and speculation that is inaccurate. The fear of bias in the future is not well-founded and cannot form the basis for directing the constitution of an Inquiry Committee.

The Review Panel found that it was an error for Justice Spiro to raise such concerns in the manner he did. The judge properly recognized the mistakes he made and expressed remorse. The Review Panel found this error serious but in the end, it was not such as to warrant removal of Justice Spiro from office.

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Judges should strive to ensure that their conduct, both in and out of Court, will sustain and contribute to public respect and confidence in their integrity, impartiality and judgment, and thereby contribute to confidence in the administration of justice. It was a serious error for Justice Spiro to discuss the appointment of the Director of IHRP, one that he regrets and that he states he has learned from.

Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter.

In view of all of the circumstances, Associate Chief Justice Nielsen is satisfied that Justice Spiro is acutely aware of his duty to the public, as a judge, to not only ensure he is impartial, but to be seen as being impartial. In the light of the above, Associate Chief Justice Nielsen instructed me to close this complaint. He thanks you for raising your concerns with Council.

Yours sincerely,

Jacqueline Corado
Acting Executive Director

Canadian Judicial Council
Conseil canadien de la magistrature

Personal and Confidential

CJC File: 20-0254 et al.

May 20, 2021

The Honourable D.E. Spiro
Tax Court of Canada
200 Kent Street, [redacted]
Ottawa, ON K1A 0M1

Dear Justice Spiro:

I am writing in respect of the complaints made against you by multiple individuals and organizations and referred to a Judicial Conduct Review Panel pursuant to the provisions of the *Canadian Judicial Council Inquiries and Investigations By-laws, 2015* (SOR/2015-203).

The Review Panel has now issued its report; attached is a copy. The Review Panel has determined, pursuant to s. 2(5) of the *By-laws,* that the matter is not serious enough so that it would warrant your removal from office. I also attach a private communication to you and your Chief Justice from Associate Chief Justice Nielsen.

After reviewing the Report of the Review Panel, Associate Chief Justice Nielsen has decided that no further measures need to be taken in relation to this matter and has accordingly directed me to close the file. Copies of my letters to the complaints closing Council's files in this matter are enclosed.

Please be advised that Council will issue a press release concerning the decision of the Review Panel.

Your sincerely,

Jacqueline Corado
Acting Executive Director

Encls.

cc: Chief Justice Rossiter
Mr. Gavin MacKenzie