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Letter of April 21, 2021, from Craig Scott to Canadian Judicial Council Review Panel in Justice David Spiro Proceeding (CJC File 20-0260) Concerning the Reliability of the University of Toronto Cromwell Report & “For the Record”, Cover Note on Letter of April 21, 2021, and on May 20, 2021, Canadian Judicial Council Disposition in Justice David Spiro Proceeding (CJC File 20-0260) (April 21, 2021 & June 2, 2021)

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**Letter of April 21, 2021, from Craig Scott
to Canadian Judicial Council Review Panel
in Justice David Spiro Proceeding (CJC File 20-0260)
Concerning the Reliability of the University of Toronto Cromwell Report
&
“For the Record”, Cover Note on Letter of April 21, 2021, and on May 20, 2021,
Canadian Judicial Council Disposition
in Justice David Spiro Proceeding (CJC File 20-0260)**

Craig Scott¹
(April 21, 2021; June 2, 2021)

Cover Note: For the Record

At page 9, the present document reproduces a letter I wrote on April 21, 2021, [emailed and received on April 22] to a Review Panel of the Canadian Judicial Council in a proceeding (CJC File 20-0260) with respect to the conduct of a judge of the Tax Court of Canada. The letter included nine appendices; in the present reproduction of the letter, the appendices have been replaced with hyper-links as all the appendices can now be found online.

Before reproducing the letter, I have written this cover note by way of scene-setting how I came to write the letter and what followed its submission. I have then added four annexes, noted below in the footnotes.

**

Complaints to Canadian Judicial Council, September 2020

On September 20, 2020, I joined myself to a complaint filed with the Canadian Judicial Council by Professor Les Green.² The complaint concerned revelations of the interference by a yet-to-be-publicly-named judge of the Tax Court of Canada into a University of Toronto Faculty of Law hiring process for a new director of its International Human Rights Program. Apart from seconding the Green complaint, my letter focused on media reports that the Canadian Judicial Council would not act on the complaint because it was insufficient to know that a Tax Court judge had allegedly engaged in unethical conduct; before they could investigate, a CJC spokesperson told the media that it needed a name to be supplied by a complainant.

In my September 20, 2021, letter, I explained why, in my view, this was a misreading of the CJC’s own rules and how those rules appeared to provide for investigative authority to make inquiries

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² My September 20, 2020, letter is **Annex A** in the present document.

so that the CJC could discover the name and then proceed with further investigation – at least, investigative authority if the matter made its way past the gatekeeper role played by a CJC official. I directed that letter to the Chief Justice of Canada, Richard Wagner, as the Chair of the Canadian Judicial Council primarily because there is no specific provision in the *By-laws* for a higher body to overturn a gatekeeping decision (and because I was initially under the mistaken assumption that Wagner, CJC, also headed up the Judicial Conduct Committee of the CJC). In any event, the press was very soon making the name of the judge known, such that Professor Green’s and my complaints were then sent on to the Judicial Conduct Committee alongside any others that were received. The judge in question was Justice David Spiro.

The events that led to the compromising conduct of Justice Spiro can be gleaned from the following “[International Human Rights Program] Director Hiring Controversy: Resource Page” of the student newspaper of the University of Toronto Faculty of Law, *Ultra Vires*.³ In a nutshell, in September 2020, evidence had emerged that a Tax Court of Canada judge (later revealed to be Justice Spiro) had received confidential information about the name of a candidate for the directorship of the University of Toronto Faculty of Law International Human Rights Program and made at least one call to the University to convey certain concerns related to the academic work and views of the candidate with respect to international law and Israel/Palestine. The candidate, Dr. Valentina Azarova, had been recommended by the hiring committee to the Dean of Law and the Dean had initiated the process to hire her. Shortly after Justice Spiro’s communication to the University of Toronto (news of which reached the Dean of Law, it would later be confirmed), a decision was made not to hire Dr. Azarova; immigration and timing issues were later presented by the University of Toronto as the reason the hiring committee’s recommendation was not acted on.

Review Panel Constituted

Four months after the lodging of complaints, in January 2021 the CJC issued a press release saying the Judicial Conduct Committee had decided there was sufficient cause to strike a body called a Review Panel. No complainants were informed of this directly; instead, they learned of the decision in news reporting. In accordance with CJC practice and the CJC’s interpretation of its own rules, complainants are only contacted once before a final disposition – namely, by way of a form email acknowledging receipt of their complaint and indicating the complainant could keep sending information as he, she or they wish. Thereafter, apart from sending information into a void, complainants have no opportunity to make submissions of any sort – for example, an argument in response to any facts that the judge in question may assert to the Review Panel. Rather, the judge in question has the only right to make submissions; complainants are in the dark as to what the judge has represented as the facts, his motivations, and so on, and as to what stage a Review Panel process is at.

³ At <http://ultravires.ca/2020/09/ihrp-director-hiring-controversy-resource-page/>. See also: <https://censureuoft.ca/faq/>.

The Cromwell Report

Meanwhile, the University of Toronto had tasked a former justice of the Supreme Court of Canada, Justice Thomas Cromwell, with compiling a report on the events and reasons for Dr. Azarova's non-hire. The Cromwell Report was released on March 15, 2021.⁴ The uncontested facts set out in the report were damning with respect to how Justice Spiro came to know about the hiring process and what led him to contact the University of Toronto; in a nutshell, he was approached by a staff member of a political advocacy and community organization, the Centre for Israel and Jewish Affairs [CIJA], and asked to intervene. However, the interpretations of those facts by Mr. Cromwell exonerated Justice Spiro, portraying him as nothing more than an interested alumnus simply conveying concerns of how others would react; page 33 of the Cromwell Report refers to the fact that a "message had been relayed [by Justice Spiro] that *the* Jewish community would not be pleased by the Preferred Candidate's appointment" (my emphasis added).⁵

It took some time for a fulsome reading and analysis of a long report and a disentangling of its considerable problems. As a result, it was only by around mid-April that a critical mass of commentaries was emerging and putting pen to paper to show how unreliable the reasoning in the report was. By the end of a busy academic term, I had only had the chance to look carefully at the report myself in mid-April, and came to realize that – given the CJC process' secrecy and *ex parte* nature (i.e. only the judge was involved in the process launched by the complaints) – there was some likelihood that either Justice Spiro would have pointed to the Cromwell Report's minimization of his conduct or the Review Panel might have read it on their own accord anyway, notwithstanding no opportunity for others to comment.

I was concerned about the effect this third-party (Cromwell Report) view might have on Review Panel understanding, given the lack of any countervailing submissions from anyone else. Having written the CJC on April 4 asking for an update on the process in view of the fact I had heard nothing and having been informed by return email on April 6 that I would be told what had been decided once it had been decided (basically what I had been told after my letter of complaint of September 20, 2020), I was now inescapably aware that there was no practice of Review Panels reaching out to complainants to ask them for their views on factual information as it was being presented to the panel let alone to ask them if they wished to make submissions on how the facts (as the complainants viewed them) connect to the ethical duties in the CJC's *Ethical Principles for Judges*.⁶ Thus, I wrote a short email on April 20 to ask the Registrar to ask the Review Panel if they would invite me to make submissions as to why the Cromwell Report was unreliable and as to

⁴ The Cromwell Report is referred to as Document 1 in my April 21, 2021, letter; there is a hyperlink to the report in the present version of the letter.

⁵ See footnote 10 below on the problematic of nature of making, or being understood as making, claims about the views or feelings of an entire community, especially when it is a judge doing so in an effort to exercise influence in a politicized way or context.

⁶ The principles can be found here: https://cjc-ccm.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

how the facts as I understood them from the report led to no other conclusion than a breach of the judge's ethical obligations.⁷

Letter of April 21, 2021, to Review Panel

A day later, on April 21, I had second thoughts about the wisdom of asking for advance welcoming of a submission. I decided that the chances of the Review Panel actively welcoming a submission were slim and that, if I waited for a reply to my April 20 request, the chances of the Review Panel deciding the matter without the benefit of any counter-view on the Cromwell Report would grow with each passing day. So, I put together the first part of what I would have liked to submit – namely, an overview of the reasons the Cromwell Report was unreliable, with inclusion of a range of the written commentaries that showed how problematic the Cromwell Report's method and reasoning were. I sent this as the letter of April 21 that is the document reproduced immediately after this Cover Note. I indicated I still intended to submit the second part of what I would like to submit, namely, an analysis of how the facts relate to the ethical obligations of the judge, should I manage to do so before the Review Panel had made its decision.⁸

Other duties kept me from finalizing this follow-on submission to my letter of April 21, as the month of May passed.

Canadian Judicial Council Disposition and References to the Cromwell Report

As it turned out, finishing the second part of my submission would have been fruitless: in a letter dated May 20 (emailed May 21), the CJC informed me that the Spiro case was closed and that my letter of April 26 had arrived after the Review Panel had already made its determination that Justice Spiro had committed a "serious error" but not "serious enough to" warrant an Inquiry Committee (that would be charged with deciding whether he should be removed from the bench).⁹ The difference between "serious" and, per the CJC *By-laws*, "serious enough" to lead to an Inquiry Committee removal proceeding appears to have lined up in the Review Panel's reasoning with interpretations with some similarities to the conclusions of the Cromwell Report although, with its "serious error" conclusion, not going so far as to reproduce Cromwell's more or less unqualified absolution of Justice Spiro.

In terms of what the Review Panel found to have been the basic facts of what Justice Spiro did and how he came to do it, the letter to me states:

Before his appointment to the judiciary, Justice Spiro was a member of the Board of

⁷ These April 4, 6 and 20 emails are **Annex B** in this document.

⁸ This letter is the document immediately following this cover note.

⁹ The May 20, 2021, letter from the CJC to me is **Annex C** in this document.

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.¹⁰

Following these findings, the Review Panel went on to make the "serious error" appear less serious. First, it emphasized that Justice Spiro was acting *qua* alumnus and not *qua* judge.¹¹ The

¹⁰ As with the earlier quotation from the Cromwell Report (at footnote 5), my emphasis has been added with respect to the use of "the" in the phrase "the perspective of the Jewish community." Not "some in the Jewish community", not "many in the Jewish community", "not those in the Jewish community who believe CIJA speaks for them," but *the* Jewish community *en masse*. Such apparent assumption that one is speaking for an entire community or has a kind of positional authority to speak for all as if a homogenous one is not just an unfortunately presumptuous and careless way of speaking – of which we can all be guilty at different times. It can also be a dangerous linguistic sign of a Manichean way of conceiving of the social world. Referencing community identities and values in monolithic terms feeds into the kind of us/them dynamics that does not just foster absolutism and othering vis-à-vis people or groups 'outside' the demographic marker of one's own group: it also generates toxic claims about who is real or true or loyal to a group by virtue of a given sub-group and its organizations actively projecting their own interests, experiences and perspectives onto "the" group or community as a whole. Speaking of "the" community – whether the Jewish community, or the 2SLGBTQ+ community, or the Canadian Catholic community, or any like reference group – may generally be an acceptable shorthand way of speaking, but only when it is truly clear that one is not actually claiming to speak for everyone and when there is no danger that the persons to whom you are making representations feel like you expect them to accept your or your organization's view as truly the voice of an entire community.

It is problematic enough when social or advocacy organizations engage in discourses that deepen and seek to tactically mobilize a monolithic approach to identity and voice that is antithetical to diversity within a community. It is still more problematic when the claimant to positional authority is a judge who must maintain as much open-mindedness and political impartiality as humanly possible. Whatever affront to judicial integrity is caused by reinforcing us/them othering as between members of different communities if a judge seeks to use influence in a context of fraught political relations, it is arguably as serious a politicization when that judge tries to exert influence in a way that denies the diversity of perspective within "the" very community that they purport to represent.

¹¹ "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

Panel then characterizes Justice Spiro as “*voicing his concerns* about the potential impact of the appointment and associated controversy on the University and the Faculty” (my emphasis) – presumably, the serious error that the Panel ruled had occurred – “as opposed to *actively campaigning or lobbying* against Dr Azarova’s appointment” (my emphasis) – quite possibly, serious enough to warrant an Inquiry Committee if the Panel had concluded that is what he had been doing.¹²

In accordance with CJC *By-laws*, the matter had been passed back from the Review Panel to the Vice-Chair of the CJC’s Judicial Conduct Committee for final disposition. The Vice-Chair decided that a private expression of concern by him to Justice Spiro sufficed for his “serious error.” In a single-sentence paragraph, the letter states: “Associate Chief Justice Nielsen has expressed concerns to Justice Spiro as to his conduct in this matter.”

This measure – if it can be called that – followed on from various observations in the letter’s narrative that appear to have either helped mitigate the seriousness of the “serious error” or reduced the need for a more vigorous remedial measure. These include Justice Spiro’s “express[ion of] remorse”, his “deep[] regrets”, his “acknowledge[ment] that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him”, his “state[ment] he has learned from” his serious error, and the Vice-Chair’s “satisf[action] 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”. It may be noted that all these verbal and psychological actions – whether by Justice Spiro or by the Vice-Chair – took place in private; while the fact they occurred was reported in the letter (and, per below, a public Press Release), their specific content is not

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.” There is much to be said about this line of reasoning. Suffice for now to note with interest how the first sentence starts its own paragraph so as to create a separation from two paragraphs earlier when the CJC describes how Justice Spiro had been asked by CIJA staff to intervene. The worrisome result is that the second sentence appears, stunningly, to be saying that he was “prompted” by his “very engaged alumnus” status to intervene and not (or not also) by having received confidential information from CIJA and an associated request by CIJA to intervene at the university.

One might very charitably read “this background” in the second sentence to reach back two paragraphs – leapfrogging the paragraph that describes how he interfered – to include CIJA amongst the prompting causes. Indeed, CIJA as prompting cause (either alone as the most proximate cause or as co-prompt alongside an alumnus’ concern for the university’s reputation amongst a social group) is in fact *the only* rational reading of what in fact occurred and, indeed, of what the Review Panel itself already said, two paragraphs before, had occurred. Yet it remains that, in normal compositional English, the antecedent for “this background” would be taken by readers to be the contents of the sentence before it that started the paragraph, especially since the CIJA-as-proximate-cause paragraph is two paragraphs earlier not just one.

I hope that this structuring of reasons by the CJC does simply represent just poor drafting and that the Review Panel (or the drafter of the letter) did not deliberately wish to promote the idea – for example, for external quotation by newspapers and the like – that Justice Spiro’s alumnus status was the (sole) proximate cause of his interference versus simply the opportunity for him to interfere in response to the CIJA information and request.

¹² The possible significance of the word “actively” will be left to a later analysis of the CJC’s reasoning.

known and the public itself has not been the direct addressee of any statement (e.g., of remorse or acceptance of a breach of ethical obligation) by Justice Spiro.

The May 20 letter to me from the CJC paralleled a Press Release of the CJC that had the same content as my letter, except for two interesting and significant differences. First, the Press Release states that the Review Panel had, as I had worried, considered the Cromwell Report, without stating what use had been made or conclusions shaped by it:

In arriving at their conclusions, the Panel reviewed Justice Spiro's response to the complaints, various letters of support received, and the report produced by former Justice Thomas Cromwell for the University of Toronto.¹³

This Press Release sentence does not appear in the letter to me and may not have appeared in any letter to any complainant, as it also was not included in the letter dated May 20 sent by the CJC to Professor Green.

Secondly, the CJC letter had a final paragraph not found in the Press Release and directed to me (and no other complainant) due to the fact I had sent the April 26 letter to the Review Panel. That final paragraph stated that my letter had arrived after the Review Panel had ended its deliberations, explicitly confirmed that in any case a complainant had no right to make a submission or have one considered by a Review Panel, and that the Vice-Chair had nonetheless read the letter before closing the case:

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, [Vice-Chair of the Judicial Conduct Committee] 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.

Just as the Review Panel does not explain what it made of the Cromwell Report, the Vice-Chair of the Judicial Conduct Committee similarly left unelaborated what difference (if any) my letter made to his post-Review Panel deliberations.

**

The above is intended primarily as a descriptive record, albeit with some preliminary elements of commentary on the CJC's disposition of the Justice Spiro case having made their way into the

¹³ The May 21, 2021, CJC Press Release is **Annex D** in this document. Note another, more minor, difference is that the Press Release additionally named the heretofore anonymous members of the Review Panel – notwithstanding my letter of April 21 specifically pointed out fact the Panel members were anonymous and that I thus had to address my letter to them generally as “the Review Panel” and not by name.

narrative here and there (notably in the thoughts found in footnotes 10 and 11). I intend later to write or co-write other commentaries: on the substantive and procedural dimensions of the CJC's decision; and on what lessons this case has for the just-tabled Bill S-5 that seeks to reform aspects of the process for dealing with complaints about judicial conduct.¹⁴

¹⁴ See S-5, *An act to amend the Judges Act*, introduced by Senator Marc Gold and given First Reading on May 25, 2021: <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=11356136>

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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 to 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 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.

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,

A handwritten signature in black ink, appearing to read 'Craig Scott', with a stylized flourish at the end.

Craig Scott, Professor of Law, Osgoode Hall Law School;
Graduate Program Director, Research LLM and PhD

ANNEX A

Letter from Craig Scott to Canadian Judicial Council

September 20, 2021

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*

OSGOODE

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

Craig Scott

Professor of Law

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Graduate 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,

A handwritten signature in black ink, appearing to read 'Craig Scott', with a long, sweeping horizontal stroke extending to the right.

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

ANNEX B

Emails between Craig Scott and Canadian Judicial Council

April 4, 6, and 20

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

ANNEX C

Letter from Acting Executive Director of the Canadian Judicial Council to Craig Scott

Dated May 20, 2021; sent May 21, 2021

Letter conveying disposition of CJC File: 20-0260 (Justice David Spiro)



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,

A handwritten signature in black ink, appearing to read 'Jacqueline Corado', with a stylized flourish at the end.

Jacqueline Corado
Acting Executive Director

ANNEX D

Canadian Judicial Council, Press Release

May 21, 2021

“Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro”

Press Releases

Ottawa, May 21 2021

Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro

Canadian Judicial Council

A Judicial Conduct Review Panel, constituted by the Canadian Judicial Council to review a matter involving the Honourable David E. Spiro, has concluded that while the judge made serious mistakes, these were not serious enough to warrant a recommendation for his removal from office.

The Review Panel was constituted at the direction of the Honourable Kenneth Nielsen, Associate Chief Justice of the Court of Queen’s Bench of Alberta and Vice-Chair of the Judicial Conduct Committee, following complaints filed with the Council relating to Justice Spiro’s alleged interference in the appointment of a Director of the International Human Rights Program (IHRP) of the Faculty of Law at the University of Toronto. The conduct of Justice Spiro was alleged to have put the integrity and impartiality of the Tax Court of Canada in jeopardy, and cause any party or lawyer before the Court who is Palestinian, Arab, or Muslim to reasonably fear bias.

The Review Panel was comprised of Chief Justice Robert Bauman (Chairperson), Chief Justice Martel D. Popescul, Chief Justice Manon Savard, Justice Denis Jacques, and Dr. Jennifer N. Davis, Ph.D. In arriving at their conclusions, the Panel reviewed Justice Spiro’s response to the complaints, various letters of support received, and the report produced by former Justice Thomas Cromwell for the University of Toronto.

The Panel noted that 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 imminent appointment of a person as Director of IHRP, and of related concerns. Justice Spiro was asked whether he could approach the Dean of the Faculty to relay these concerns.

Justice Spiro specifically declined to approach the Dean of the Faculty as he found it to be inappropriate. He had made arrangements earlier for a general “telephone catch-up” on the following day with an official and friend from the University. During their conversation, Justice Spiro 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.

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. 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 the 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. 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 reasonable 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. Further, the Panel observed that any 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 did find, however, 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 that it did not warrant removal of Justice Spiro from office.

Associate Chief Justice Nielsen considered all the circumstances of this case, including Justice Spiro's remorse and acknowledgment that his conduct raised questions about his commitment to impartiality toward all litigants and counsel who appear before him.

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 one from which he states he has learned.

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 light of the above, Associate Chief Justice Nielsen directed that the matter be closed.

Contact:

Johanna Laporte Director of Communications info@cjc-ccm.ca