Federal Court  Cour fédérale

Date: 20220309

Docket: T-1005-21

Citation: 2022 FC 324

Ottawa, Ontario, March 9, 2022

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

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

and

CANADIAN JUDICIAL COUNCIL

Intervener

and

CENTRE FOR FREE EXPRESSION AND CANADIAN ASSOCIATION

OF UNIVERSITY TEACHERS

Proposed Intervener

and

B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS

Proposed Intervener

ORDER AND REASONS

[1] This Order addresses two motions for leave to intervene pursuant to Rule 109 of the *Federal Courts Rules*, SOR/98-106. The Centre for Free Expression [CFE] and the Canadian Association of University Teachers [CAUT] jointly seek leave to intervene. B'nai Brith of Canada League for Human Rights [B'nai Brith] also seeks leave to intervene.

[2] The underlying proceeding is the application for judicial review with respect to the May 20, 2021 decision of the Canadian Judicial Council [CJC] with respect to complaints made regarding the conduct of Justice David Spiro of the Tax Court of Canada [the Application]. The CJC decided, in accordance with its *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* [*Review Procedure*s], that it would not constitute an Inquiry Committee to further investigate the complaints and that the complaints should be closed. The CJC provided its decision and reasons to each of the complainants.

[3] The decisions are identical, with the exception of the decision in response to Professor Scott's complaint, which added a short paragraph acknowledging submissions sent by Professor

Scott after the Judicial Conduct Review Panel [the Review Panel] had made its determination. Given that all the decisions are the same, the "decision" will be referred to in the singular.

[4] For the reasons that follow, the CFE and CAUT are granted leave to jointly intervene on the terms set out in this Order. CFE and CAUT are not granted leave to file an expert affidavit. In addition, B'nai Brith is granted leave to intervene on the terms set out in this Order.

I. The Background

[5] To provide the context for the determination whether leave to intervene should be granted, it is necessary to briefly describe the nature of the complaints, the CJC's decision, the issues raised by the Applicants, and the submissions of the proposed interveners regarding why they should be granted leave to intervene.

[6] The events underlying the complaints made to the CJC concern the involvement of Justice Spiro and his communications in early September 2020 with an executive of the University of Toronto regarding the possible appointment of Dr. Valentina Azarova [Dr. Azarova], a scholar who is known for her academic criticism of Israel for human rights abuses in Palestinian territories, as Director of the International Human Rights Program in the Faculty of Law. Dr. Azarova was ultimately not appointed. As noted below, Justice Spiro acknowledged that his contact with the executive of the University of Toronto was a serious mistake.

[7] Once word spread within the University community that Dr. Azarova would not be appointed, media reports followed that suggested this was due to the involvement of a judge.

[8] Several complaints were soon submitted to the CJC regarding the communication by a judge (subsequently identified as Justice Spiro) with the University of Toronto:

- Professor Leslie Green (Faculty of Law, Queen's University) first emailed the CJC to express concern, based on reports in the media, that a sitting judge of the Tax Court had interfered with a confidential academic appointment process. He then submitted an official complaint, expressing the concern that the integrity and impartiality of the Court would be damaged by allowing a sitting judge to interfere with academic freedom. He also alleged that parties or counsel who are Palestinian, Arab or Muslim could reasonably fear bias. He alleged that Justice Spiro had interfered in the hiring of Dr. Azarova due to his concerns about Dr. Azarova's work on Israel's human rights abuse in Palestine.

- Professor Craig Scott (Osgoode Hall Law School, York University) reiterated and adopted Professor Green's complaint.

- The National Council of Canadian Muslims [NCCM] relayed concerns of Muslim academics that this incident reflects a broader trend of judicial interference in hiring decisions and with academic freedom. The NCCM also expressed concern about the reasonable apprehension of bias for those appearing before the Tax Court.

- The Arab Canadian Lawyers Association, Independent Jewish Voices and the British Columbia Civil Liberties Association jointly complained expressing concerns about the harm to affected communities, specifically, Palestinian Canadians. The complaint noted the impact of anti-Palestinian racism and how this silences Palestinians from expressing their solidarity and labels those who defend Palestine as antisemitic. The complaint also alleges a lack of integrity and the impact on public confidence in the judiciary.

- The Canadian Association of Muslim Women in Law and the Canadian Muslim Lawyers Association jointly complained and highlighted the perceived bias that Justice Spiro's conduct created for Muslims and Palestinians who appear before the Tax Court.

II. The Decision Under Review

[9] In accordance with the CJC's *Review Procedures*, the Executive Director reviewed the complaints and referred them to the Vice-Chair of the Judicial Conduct Committee, Associate Chief Justice of the Alberta Court of Queen's Bench, Kenneth Nielsen [the Vice-Chair].

A. *The Decision of the Vice-Chair to Refer the Complaints to the Judicial Conduct Review Panel*

[10] The Vice-Chair reviewed the complaints and the submissions from Justice Spiro and from Chief Justice Eugene Rossiter of the Tax Court of Canada [TCC]. The Vice-Chair had concerns significant enough to require the establishment of a Judicial Conduct Review Panel.

[11] In the reasons for the decision, dated January 5, 2021, the Vice-Chair set out the several complaints, noting that all were based on news reports and hearsay as none of the complainants had any direct involvement. The Vice-Chair summarized the nature of the complaints, noting that they raised concerns about the interference of Justice Spiro in the academic selection process while he had no expertise in international human rights; the independence and impartiality of Justice Spiro; the administration of justice more generally; bias against Palestinians, Arabs and Muslims; and the improper use of judicial status and office.

[12] The Vice-Chair also noted, among other things, that Justice Spiro was an alumnus of and donor to the University of Toronto and had been involved, prior to his appointment to the TCC,

with the Centre for Israel and Jewish Affairs [CIJA]. In addition, the Vice-Chair set out Justice Spiro's account of the events giving rise to the complaint.

[13] The Vice Chair's view was that Justice Spiro indicated a lack of integrity and departed from his duty of impartiality by: receiving information from the CIJA about their concerns over the selection of a candidate to the position at the University of Toronto; conveying this information to an executive at the University of Toronto; failing to clarify that the views he expressed were not necessarily his own views; asking the executive to make inquiries regarding the status of the selection process; and conveying the information to another person.

[14] The Vice-Chair stated that in his view, "Justice Spiro's conduct puts at risk public confidence in the integrity, impartiality and independence of the judiciary" and concluded that his lack of insight into the inappropriateness of his conduct raises concerns about his fitness to hold office as a judge.

B. *The Judicial Conduct Review Panel Decision*

[15] The Vice-Chair referred the complaints to the Review Panel in accordance with subsection 2(1) of the CJC's *Inquiries and Investigations By-Laws 2015* [the By-Laws], which provides that the Chair or Vice-Chair 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."

[16] The Review Panel considered the complaints and issued the reasons for its decision on April 13, 2021.

[17] The Review Panel's reasons include descriptions of the process for addressing complaints; the distinction between the role of the Chair or Vice-Chair of the Judicial Conduct Committee and that of the Review Panel; the complaints and their context; the submissions to the Review Panel on behalf of Justice Spiro; the relevant jurisprudence; and the Review Panel's analysis.

[18] The Review Panel noted that its task is to determine whether an Inquiry Committee should be constituted to inquire into the conduct of the judge. The Review Panel noted that in accordance with subsection 2(4) of the By-Laws, it may do so "only if it determines that the matter might be serious enough to warrant the removal of the judge."

[19] The Review Panel concluded that the fear of bias by Justice Spiro in the future is not well founded and cannot form the basis for constituting an Inquiry Committee. The Review Panel also concluded that although Justice Spiro made a serious mistake in expressing his concerns to the University of Toronto about a proposed appointment, he did so as a concerned alumnus and that this course of action did not "represent misconduct justifying the constitution of an Inquiry Committee."

[20] The Review Panel found that although Justice Spiro made serious errors, which he recognized, it could not conclude that Justice Spiro's conduct might be serious enough to warrant his removal from office. In accordance with subsection 2(5) of the By-Laws, the Review Panel remitted the matter to the Vice-Chair to decide how to resolve the complaints. The Vice-Chair concluded that no further remedial action by the CJC was required. The decision, communicated

to Justice Spiro by letter dated May 19, 2021, provided the Vice-Chair's comments to Justice Spiro, including the view of the Vice-Chair that Justice Spiro's "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."

III. The Issues Raised in the Application for Judicial Review

A. *The Applicants' Submissions*

[21] The Applicants set out the various complaints to the CJC in the same manner as described above.

[22] The Applicants argue that the decision of the Review Panel not to constitute an Inquiry Committee is unreasonable on several grounds.

[23] First, the Applicants argue that the decision is internally incoherent. Among other arguments, the Applicants submit that the decision lacks a rational chain of analysis because it does not evaluate the seriousness of Justice Spiro's error in engaging in discussions with the University of Toronto about the appointment of Dr. Azarova against any legal standard or test, but rather concludes that this intervention was not sufficiently serious to warrant removal and, as a result, no Inquiry Committee would be constituted. The Applicants further submit that the Review Panel dismissed concerns of bias without addressing the allegation of anti-Palestinian bias and its impact on the administration of justice as distinct from anti-Arab or anti-Muslim bias.

[24] Second, the Applicants submit that the decision is not justified by the facts and the law. Among other arguments, the Applicants submit that, contrary to the Review Panel's finding, there is ample evidence to give rise to a reasonable apprehension of bias.

[25] Third, the Applicants submit that the CJC failed to comply with its own mandate and with the common law principles of judicial independence and impartiality. The Applicants note that the CJC's Ethical Principles for Judges focus on judicial impartiality and public confidence in the administration of justice. They submit that the decision is contradictory to these principles. The Applicants add that the decision is not supported by the facts, in particular, the interim course of action taken by the Chief Justice of the TCC to ensure that until the resolution of the complaints, Justice Spiro would not preside over matters in which Palestinian, Arab or Muslim lawyers or litigants might appear.

[26] The Applicants submit that "[t]his case involves racism and stereotyping about Arabs and Muslims generally and Palestinians in particular." The Applicants also argue that the focus of the CJC's investigation should be on the judiciary as a whole and the public's perception of the judiciary in light of Justice Spiro's conduct.

[27] The Applicants argue that by dismissing the complaints, the CJC condoned or ignored discriminatory behaviour, racial profiling or stereotyping of identifiable groups by members of the judiciary.

[28] The Applicants also allege that the duty of procedural fairness owed to them was not met, and as a result, the CJC's decision is void. Among other arguments, they submit that they should have had an opportunity to address the submissions made to the Review Panel before it rendered its decision.

B. *The Respondent's Submissions*

[29] The Attorney General of Canada [AGC] submits that the decision of the Review Panel is reasonable. The AGC submits that the Review Panel identified and applied the correct legal standard in accordance with the By-Laws. With respect to the allegations of bias, the Respondent submits that the Review Panel, guided by the jurisprudence, considered the possibility of future bias or the reasonable perception of future bias based on the facts. The AGC submits that the Review Panel reasonably rejected suggestions of future bias arising from Justice Spiro's involvement in the Jewish community, noting the guidance in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 [*Yukon Francophone*], that an association with race, religion, nationality or language, on its own, is not a basis for concluding that a perception of bias can reasonably be said to arise.

[30] The Respondent further submits that the Review Panel's conclusions about the seriousness of Justice Spiro's conduct are reasonable, informed by the relevant factors and supported by the record.

C. *Submissions of the CJC as Intervener*

[31] The CJC was granted intervener status by Order of Prothonotary Milczynski dated October 25, 2021, for the purpose of addressing issues of procedural fairness. The CJC generally submits that its processes and procedures for receiving and determining complaints are fair and, more specifically, that it met any duty of procedural fairness owed to the complainants.

IV. The Proposed Interveners

A. *Centre for Free Expression and Canadian Association of University Teachers*

[32] The CFE and CAUT seek leave to intervene jointly and to file an expert affidavit to provide the Court with details on the meaning and scope of academic freedom, how issues relating to academic freedom arise in this Application, and how the CJC failed to consider academic freedom.

[33] The CFE is described as a non-partisan research, public education and advocacy centre that, among other things, provides resources to the public on current and ongoing issues relating to free expression and works with other organizations to promote understanding of the importance of freedom of expression in a democratic society. The CFE highlights that academic freedom is part of freedom of expression and vice versa.

[34] CAUT is described as a federation of academic staff associations or unions and as the voice of college-and university-level academic personnel. CAUT promotes the interests of

teachers, librarians and researchers in Canadian universities and colleges, advances the standards of the academic profession and seeks to improve the quality of post-secondary education. CAUT notes that one of its primary mandates is to defend academic freedom.

[35] The CFE and CAUT focus on their genuine interest in the Application, the different insights that they will bring and how the interests of justice will be served by their intervention.

[36] The CFE and CAUT submit that their joint participation will assist the Court by providing different and valuable insights on the scope of academic freedom and how it arises in this Application, and note that no other party or potential intervener has their history or knowledge on this issue.

[37] The CFE and CAUT further argue that it is in the interests of justice to grant them leave to intervene because the CJC's failure to consider academic freedom raises significant public interest concerns.

[38] The CFE and CAUT state that if granted leave to intervene, they will confine their arguments to issues of academic freedom, the impact on academic freedom of Justice Spiro's intervention in the selection process at the University of Toronto and the impact on academic freedom of the failure of the CJC to consider this issue. They will argue that the CJC's failure to consider the impact of Justice Spiro's conduct on academic freedom was a fundamental error rendering the CJC's decision unreasonable and incorrect. They will also argue that Justice

Spiro's intervention in the hiring process has broad implications for academic freedom, including on hiring, retention and promotion, and creates a risk of "academic chill."

[39] The CFE and CAUT also seek leave to file an expert affidavit describing the principles and history of academic freedom. They argue that this evidence will provide general background and should be accepted as an exception to the general rule that judicial review is based on the record before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20 [*Access Copyright*]).

B. *B'nai Brith of Canada League for Human Rights*

[40] B'nai Brith submits that a theory underlying this Application is that Justice Spiro, given his known support for the State of Israel and his efforts to combat antisemitism, cannot impartially adjudicate matters involving Palestinians, Muslims or Arabs. B'nai Brith suggests that this theory draws on misconceptions that it will address through its intervention.

[41] B'nai Brith submits that its intervention is in the interests of justice, it has a genuine interest as a key representative of the Jewish community, and it will advance a perspective distinct from that of the parties, given its expertise in educating on the issue of antisemitism and its role in combatting racism of all kinds.

[42] B’nai Brith submits that the complaints and the Application raise the issue of whether a Jewish judge who has expressed public support for Israel is inherently biased against Palestinians, Arabs and Muslims.

[43] B’nai Brith submits that the complaints to the CJC, and the Applicants’ Notice of Application and Memorandum of Fact and Law, all raise the issue of bias by Justice Spiro, which arises, in part, from his Jewish faith, support for Israel and his efforts to combat antisemitism. B’nai Brith points to the complaints that refer to a statement made by Justice Spiro in 2009 in his capacity as chair of the United Jewish Appeal Federation’s Public Affairs Committee and his role with the CIJA. B’nai Brith also points to the Applicants’ arguments—that the CJC erred in finding that nothing in Justice Spiro’s career or in relation to the issue before it supports the suggestion of perceived bias against Palestinians, Muslims or Arabs and that the CJC failed to consider unconscious bias—as demonstrating that this Application is also about concerns that Justice Spiro’s Jewish faith can lead to such bias. B’nai Brith submits that this issue is related to “dual loyalty,” which refers to misperceptions that Jews are more loyal to Israel than to their own nations.

[44] B’nai Brith argues that as a representative of the Jewish community it has a genuine interest in this Application and will be directly affected, because it is concerned about “how this Court will address allegations of bias against a sitting judge because of his race, religion and his views on the State of Israel.”

[45] B’nai Brith further submits that the extent to which judges’ views on geopolitical conflicts can lead to a perception of bias is an issue of interest to the public and transcends the interests of the parties.

[46] B’nai Brith notes that the Applicants state that this Application involves racism and stereotyping about Arabs, Muslims, and more particularly, Palestinians, all of whom face discrimination. B’nai Brith does not dispute this historic and current discrimination, but notes that Jewish people also continue to face discrimination. B’nai Brith adds that standing up against antisemitism does not demonstrate a reasonable apprehension of bias against others.

[47] If granted leave, B’nai Brith proposes to make the following submissions:

1. The suggestion that someone of the Jewish faith who supports Israel is biased against Palestinians, Arabs or Muslims because of his or her support for Israel is pernicious and is the manifestation of a long-standing antisemitic concept of dual loyalty; and
2. The fact that a judge is of a particular faith, ethnic group and/or takes a view about a geopolitical dispute cannot and should not mean that they are unable to adjudicate claims in a Canadian court.

C. *The Applicants’ Opposition to B’nai Brith’s Motion for Leave to Intervene*

[48] The Applicants “consent” to the motion by CFE and CAUT for leave to intervene, but strongly oppose the motion by B’nai Brith.

[49] The Applicants submit that B'nai Brith mischaracterizes the Application and misunderstands the core issues. The Applicants submit that the Application is not about Justice Spiro's faith or beliefs, but is only about his unethical conduct in interfering with an academic appointment, and in turn, about the CJC's decision not to establish an inquiry into that conduct.

[50] The Applicants submit that B'nai Brith's role in combatting antisemitism and advocating for Jewish causes and for the State of Israel are irrelevant. The Applicants suggest that B'nai Brith's intervention will provide a platform to raise politicized arguments by focussing on antisemitism.

[51] The Applicants note that the initial complaints focussed on interference in an academic appointment by an unnamed and unknown judge. The Applicants state that the later allegations of an apprehension of bias were raised to the extent that this was relevant to the CJC's decision to investigate Justice Spiro. In addition, the TCC raised this concern on its own by taking interim measures.

[52] The Applicants assert that this Application is not about allegations of bias based on faith but only about allegations of improper judicial interference in an academic hiring process. They submit that the only facts that are relevant to this Application are Justice Spiro's interference in the hiring process, the complaints resulting from this interference and the CJC's decision that no further action is warranted. The Applicants add that the AGC as Respondent will defend the reasonableness of the CJC's decision, which they state "is the only issue before this Court."

D. *B'nai Brith's Response to the Applicants' Opposition to Their Motion for Leave to Intervene*

[53] B'nai Brith responds that its intervention is intended to ensure that the Court does not unwittingly employ a stereotype when assessing the reasonableness of the CJC's decision about a Jewish judge.

[54] B'nai Brith clarifies that it is not suggesting that the initial complaints about Justice Spiro were motivated by antisemitism, but rather that antisemitic views persist in the public consciousness. They add that there is a risk that—consciously or unconsciously—certain myths or stereotypes will make their way into judicial reasoning and decision-making.

[55] B'nai Brith argues that the Applicants are asking the Court to infer a reasonable apprehension of bias on the part of Justice Spiro against Palestinians, Arabs and Muslims. They submit that this inference draws on an antisemitic narrative and the dual loyalty misperception.

[56] B'nai Brith submits that its perspective will ensure that the outcome of the Application is not influenced by antisemitism.

E. *The AGC's Response to the Proposed Interveners*

[57] The AGC does not oppose the granting of leave to intervene by CFE, CAUT or B'nai Brith.

[58] However, the AGC opposes the request by CFE and CAUT to file expert evidence. The AGC submits that an intervener takes the proceeding as they find it (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 174 at paras 54–56 [*Tsleil-Waututh*]). The AGC further submits that *Access Copyright* does not support the submission of CFE and CAUT that, as interveners, they should be allowed to submit an expert affidavit providing general background on academic freedom. The AGC notes that *Access Copyright* addressed the exceptions for an applicant, not an intervener, to supplement the record before the Court on judicial review.

[59] The AGC adds that filing new evidence would delay the hearing of the application and would require that the agreed upon timetable be amended to permit responding evidence and cross-examination.

V. The Test for Leave to Intervene

[60] Rule 109 of the *Federal Courts Rules* provides:

109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding. **(2)** Notice of a motion under subsection (1) shall **(a)** set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and **(b)** describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the	**109 (1)** La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance. **(2)** L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir : **a)** précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant; **b)** explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision

determination of a factual or legal issue related to the proceeding.	sur toute question de fait et de droit se rapportant à l'instance.
(3) In granting a motion under subsection (1), the Court shall give directions regarding	**(3)** La Cour assortit l'autorisation d'intervenir de directives concernant :
(a) the service of documents; and	**a)** la signification de documents;
(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.	b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

[61] The factors set out in *Rothmans, Benson & Hedges Inc v Canada (Attorney General)* (1989), [1990] 1 FC 74, 1989 CarswellNat 594 (TD) [*Rothmans*] continue to guide the Court in determining whether to grant intervener status. The guidance subsequently provided by the Federal Court of Appeal further informs the Court's consideration of the factors and their application to the particular circumstances. The *Rothmans* factors ask:

> (1) Is the proposed intervener directly affected by the outcome?
>
> (2) Does there exist a justiciable issue and a veritable public interest?
>
> (3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> (4) Is the position of the proposed intervener adequately defended by one of the parties to the case?
>
> (5) Are the interests of justice better served by the intervention of the proposed third party?
>
> (6) Can the Court hear and decide the cause on its merits without the proposed intervener?

[62] In *Sport Maska Inc v Bauer Hockey Corp*, 2016 FCA 44 [*Sport Maska*], the Federal Court of Appeal clarified that the *Rothmans* factors are not exhaustive and are to be approached flexibly; not all will apply in a given case, and the weight accorded to each should vary with the circumstances (paras 41–42).

[63] In *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 [*Council for Refugees*], Justice Stratas noted that Rule 109, which requires proposed interveners to describe how their intervention will assist in the determination of the factual or legal issues (i.e., the usefulness of the proposed intervention), governs and the tests established in the jurisprudence are explanations of the Rule (at para 5). Justice Stratas incorporated the guidance in *Sport Maska*, built upon the test set out in *Canada (Attorney General) v Kattenburg*, 2020 FCA 164 [*Kattenburg*], and articulated the test as follows (*Council of Refugees* at para 6):

> I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:
>
> (a) What issues have the parties raised?
>
> (b) What does the proposed intervener intend to submit concerning those issues?
>
> (c) Are the proposed intervener's submissions doomed to fail?
>
> (d) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?
>
> II. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

III. It is in the interests of justice that intervention be permitted.

[64] The jurisprudence on the factors that guide whether leave to intervene should be granted is consistent that the overarching questions in determining a motion to intervene are whether the proposed intervention would be in the interests of justice and whether the proposed intervener will bring different and useful perspectives to the Court that will assist it in determining the issues at hand: see e.g. *Gordillo v Canada (Attorney General)*, 2020 FCA 198 at paras 9, 14, 18 [*Gordillo*]; *Kattenburg* at para 8; *Sport Maska* at para 42; *Council for Refugees* at para 6*; Air Passenger Rights v Canada (Attorney General)*, 2021 FCA 201 at para 34.

VI. Should Leave Be Granted to the Proposed Interveners?

A. *General Comments*

[65] With respect to the Applicants' submissions in response to the motions of the proposed interveners, the Applicants cannot "consent" to the intervention of the CFE and CAUT. They can only support, oppose or take no position. It is for the Court to determine whether to grant leave to an intervener (*Gordillo* at paras 5–6).

[66] The Applicants strongly oppose the intervention of B'nai Brith; however, some of their objections are inconsistent, as the same objections could apply to the intervention by CFE and CAUT, which they support. For example, the Applicants submit that the AGC as Respondent will defend the reasonableness of the CJC's decision, which they state "is the only issue before this Court." By that same reasoning, the intervention of others is not required, because the Applicants will take the other view and argue that the decision is not reasonable.

[67] The Applicants assert that this Application is not about Justice Spiro's race, religion, views on the Israeli-Palestinian conflict or community contributions, nor is it about antisemitism. They submit that the only relevant facts are Justice Spiro's interference in the hiring process, the complaints resulting from this interference and the CJC's decision that no further action is warranted.

[68] However, the Applicants have raised Justice Spiro's support for Israel in their submissions that the Review Panel erred in finding that there was no reasonable apprehension of bias. For example, the Applicants refer to the fact that Justice Spiro was involved in the CIJA and had expressed his opinion that advocating for a "One State solution" to the Israel-Palestine conflict is to advocate for the demise of Israel as a Jewish state. The Applicants also point to Justice Spiro's 2009 letter expressing concern that a proposed York University Conference could be a forum for anti-Israel propaganda.

[69] The Applicants also argue that the Review Panel dismissed concerns of bias without addressing anti-Palestinian bias as distinct from anti-Arab or anti-Muslim bias. The Applicants clearly stated, "[t]his case involves racism and stereotyping about Arabs and Muslims generally and Palestinians in particular."

[70] The Vice-Chair also characterized the complaints as raising concerns about the independence and impartiality of Justice Spiro, and bias against Palestinians, Arabs and Muslims.

[71] The Applicants also appear to seek to broaden the issue by arguing that the Review Panel's decision shows that the CJC condoned or ignored discriminatory behaviour, racial profiling or stereotyping of identifiable groups by members of the judiciary (i.e., beyond the specific conduct complained of against one judge).

[72] Although the issue before the Court should be, as the Applicants state, only about Justice Spiro's conduct with respect to the academic selection process at the University of Toronto, the Applicants have noted Justice Spiro's affiliations and support for Israel, which appear to raise, at least indirectly, his faith.

[73] B'nai Brith's goal in intervening, to ensure that the outcome of the Application is not influenced by antisemitism, is based on the view that antisemitism underlies the complaints. I do not agree that there is any suggestion in the complaints to the CJC, the decision or the submissions of the parties that antisemitism is an issue. However, B'nai Brith's suggestion that the allegations of bias or the perception of bias against Justice Spiro are based, in part, from his affiliations and his faith cannot be dismissed.

B. *The Rothmans Factors*

[74] Turning to the consideration of the relevant *Rothmans* factors as they have been elaborated on in the jurisprudence, some do not support the proposed interventions. However, other factors favour intervention in the circumstances including: the genuine interests of the proposed interveners; the usefulness of the proposed interventions in bringing a different

perspective related to the underlying context of the complaints; and, the interests of justice, including the public interest as represented by the proposed interveners.

[75] Despite their submissions, the proposed interveners are not "directly" affected by the outcome of this Application. The Application will determine whether the CJC's decision not to constitute an Inquiry Committee and to close the complaints against Justice Spiro is reasonable and/or whether the CJC's process was procedurally fair to the Applicants. Justice Spiro will be directly affected by the outcome. The impact on academic freedom, which is the key concern of the CFE and CAUT, has been addressed in other fora and could continue to be addressed in other ways. The suggestion in some of the complaints and in the submissions of the CFE and CAUT that there is interference by the judiciary more generally, or that there could be such interference, in academic freedom is not supported by anything on this record.

[76] Similarly, I am not convinced that the outcome of this Application will have a direct impact on B'nai Brith. I do not agree with B'nai Brith's characterization that there is "an antisemitic narrative at the heart of this case." As noted, none of the complaints or submissions suggest any antisemitic tone.

[77] With respect to whether the positions of the proposed interveners are adequately defended by the parties, the CFE and CAUT seek to focus on academic freedom and the failure of the CJC to appreciate the seriousness of Justice Spiro's conduct in terms of its impact on academic freedom. The Applicants address this issue, but not to the same extent as highlighted by the CFE and CAUT.

[78] The Respondent, AGC, does not elaborate on the issue of academic freedom, although the AGC acknowledges the context for the complaints.

[79] B’nai Brith proposes to focus on the issue of whether a Jewish person who supports Israel is perceived to be biased against Palestinians, Muslims and Arabs, or more broadly, whether a judge of any faith or with views about geopolitical conflicts can impartially adjudicate claims.

[80] This issue is addressed more generally by the Respondent, including by referring to the jurisprudence, for example, *Yukon Francophone*, where the Supreme Court noted, among other comments on the issue, that judicial impartiality does not mean that a judge must have no associations with the interests of a particular race, nationality or religion (at para 61). However, the Respondent does not propose to address the more specific issues raised by B’nai Brith.

[81] As B’nai Brith notes, all the complaints to the CJC, and the Applicants’ Notice of Application and Memorandum of Fact and Law, raise the issue of bias by Justice Spiro. B’nai Brith suggests that the bias allegations arise—at least in part—from Justice Spiro’s Jewish faith and support for Israel.

[82] There is also a public interest in the determination of this Application. The academic community and the public, as represented by the several organizations that have made complaints to the CJC, are clearly interested. Other members of the public may also be more generally interested in the outcome of any proceeding regarding judicial conduct.

[83] The CFE and CAUT and B’nai Brith have all established their genuine interest in the matter before the Court and have the knowledge and experience on the issues they propose to address in their submissions (*Council of Refugees* at para 6).

[84] As Justice Rennie explained in *Gordillo* at para 12, there must be a connection between the issue to be decided and the mandate and objectives of the proposed intervener. A genuine interest may be established through the expertise, experience, or unique perspective a proposed intervener brings to an issue. There must be more than a “jurisprudential” interest in the legal question alone.

[85] The connection between the CFE and CAUT—with their focus on academic freedom—and the issue of the reasonableness of the CJC’s decision is the context underlying the complaints. The Applicants argue that the CJC minimized the seriousness of the impact of Justice Spiro’s conduct on academic freedom. The CFE and CAUT have a perspective and experience on academic freedom, which is the context for the conduct underlying the complaints.

[86] The connection between B’nai Brith—with its focus on the issue of the apprehension of bias based on affiliation—and the issue of the reasonableness of the CJC’s decision is also related to the context for the conduct underlying the complaints. All the complaints raised the issue of bias or the reasonable apprehension of bias and the Applicants argue that the CJC erred in its determination on this issue. B’nai Brith has a perspective on particular aspects of the issue.

[87] In assessing the usefulness of the proposed intervention, as required by Rule 109, I have considered the questions identified by Justice Stratas in *Council of Refugees* at para 6.

[88] The CFE and CAUT will provide their insight and perspective and will elaborate on the issue of academic freedom and the impact of judicial interference as raised by the Applicants. It is premature to make any findings on whether the submissions of CFE and CAUT will assist in the determination of the actual issues in the proceeding.

[89] B'nai Brith proposes to focus its submissions on antisemitic myths and stereotypes, which, in my view, is not the issue before the Court. However, B'nai Brith can provide a perspective on the issue of bias and perceived bias based on faith and other affiliations as it arises in the circumstances of this Application. Again, it is premature to make any findings about whether B'nai Brith's submissions will assist the Court in the determination of the issues before it.

[90] In any event, the proposed intervention by CFE, CAUT and B'nai Brith will bring additional and unique perspectives regarding the underlying context for the complaints addressed by the CJC.

[91] With respect to the interests of justice, in *Gordillo* at para 18, Justice Rennie set out a non-exhaustive list of the considerations that are relevant to this factor:

> [The relevant considerations] can include whether the moving party intends to work within the current proceedings, whether they intend to add anything to the evidentiary record, whether they were involved in earlier proceedings, whether the issues before the

> Court have a public dimension which can be illuminated by the perspectives offered by the interveners, whether any terms should be attached to the intervention, whether the intervention was timely or whether it will delay the hearing and prejudice the parties.
>
> [References omitted.]

[92] Justice Stratas provided a similar list of considerations in *Council of Refugees* at para 9. With respect to the public dimension, Justice Stratas articulated the consideration as, "[h]as the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?"

[93] As noted above, the Application has raised issues regarding academic freedom and apprehension of bias that are part of the underlying context and which have a more public dimension and could be illuminated by the proposed interveners. However, the submissions of the interveners must remain tethered to the issues in the Application and on the record before the Court, and should not be used to advance positions that are otherwise not relevant to the Application. The issues before the Court are the reasonableness of the CJC's decision not to constitute an Inquiry Committee to further investigate the complaints and the procedural fairness of the CJC's process.

[94] The proposed interveners undertake not to delay the proceedings and have proposed possible terms for their intervention, including limiting the length of their written and oral submissions. The proposal by CFE and CAUT to file additional evidence is rejected as explained below.

[95] In conclusion, I find that the proposed interveners have a genuine interest in the Application and that the interventions by the CFE and CAUT jointly and by B'nai Brith are in the interests of justice. The interveners' knowledge and different perspectives will shed light on the context underlying the issues in this Application.

VII. CFE and CAUT Cannot Introduce Expert Evidence

[96] CFE and CAUT submit that their proposed expert affidavit should be accepted as an exception to the general rule because it will provide background to assist the Court to understand the impact of the CJC's failure to consider the seriousness of Justice Spiro's conduct.

[97] I do not agree and do not grant leave to CFE and CAUT to file expert evidence on the principles and history of academic freedom. The intervention of CFE and CAUT must be confined to the record before the Court and the issues before the Court. The proposed submissions on academic freedom will provide context, but this Application will not make any determinations about academic freedom. The CFE and CAUT have ably articulated their concerns about academic freedom in their submissions on this motion and will have an additional opportunity in their submissions on the Application. No expert or other further evidence is needed.

[98] Moreover, the exceptions to the general rule that the Court determines an application on the record before the decision-maker have been developed for parties to the proceedings, not for interveners, and are not at play in any event. In addition, the introduction of new evidence will

lead to cross-examination and would have an impact on the orderly progression of this Application. It is not in the interests of justice.

[99] In *Tsleil-Waututh* at para 54, Justice Stratas noted:

> In this Court, an intervener is not an applicant: *Tsleil-Waututh Nation*, above. An intervener cannot introduce new issues or claim relief that an applicant has not sought. Instead, an intervener is limited to addressing the issues already raised in the proceedings, *i.e.*, within the scope of the notices of application. As well, an intervener cannot introduce new evidence. See generally *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686.
>
> [Emphasis added]

[100] In *Canada (Attorney General) v Canadian Doctors for Refugee Care*, 2015 FCA 34 at para 19, Justice Stratas made the similar point:

> Notices of application and notices of appeal serve to define the issues in a proceeding. Existing parties build their evidence and submissions around those carefully defined issues. An outsider seeking admission to the proceedings as an intervener has to take those issues as it finds them, not transform them or add to them. Thus, under Rule 109(2)(*b*) a proposed intervener must show its potential contribution to the advancement of the issues on the table, not how it will change the issues on the table.
>
> [Emphasis added]

[101] In *Access Copyright*, Justice Stratas explained the rationale for the general rule and identified exceptions taking into account that rationale and the distinction between the role of the decision-maker and the role of the Court on judicial review (paras 19–20). The "general background" exception was explained at para 20:

> Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, *e.g.*, *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.

[102] Even if the exceptions to the general rule were extended to interveners, the proposed expert affidavit is not needed by the Court to understand the context underlying the issues in the Application and risks going beyond the issue that is before the Court regarding the CJC's decision.

ORDER in T-1005-21

THIS COURT ORDERS that:

1. The motion of the Centre for Free Expression [CFE] and the Canadian Association of University Teachers [CAUT] for leave to intervene is granted on the following terms:

    - The CFE and CAUT may file a joint memorandum of fact and law not to exceed 15 pages, exclusive of the cover pages and list of authorities, on or before March 28, 2022;
    - The joint memorandum of fact and law should be confined, as proposed by CFE and CAUT, to issues of academic freedom, the impact on academic freedom of Justice Spiro's intervention in the selection process at the University of Toronto and the impact on academic freedom of the failure of the CJC to consider this issue;
    - The CFE and CAUT may appear and make oral submissions at the hearing of the Application not to exceed 15 minutes;
    - Any documents served on any party must also be served on the CFE and CAUT; and
    - CFE and CAUT shall not seek costs and no costs shall be ordered against them.

2. The motion of B'nai Brith Human Rights League [B'nai Brith] for leave to intervene is granted on the following terms:

    - B'nai Brith may file a memorandum of fact and law not to exceed 15 pages, exclusive of the cover pages and list of authorities, on or before March 28, 2022;

- The memorandum of fact and law should focus on the issue of how a judge's affiliations or positions on geo-political conflicts may or may not affect their impartiality, as these issues arise in the circumstances of this Application;
- B'nai Brith may appear and make oral submissions at the hearing of the Application not to exceed 15 minutes;
- Any documents served on any party must also be served on B'nai Brith; and
- B'nai Brith shall not seek costs and no costs shall be ordered against them.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1005-21
STYLE OF CAUSE:	NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN, ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES AND CANADIAN MUSLIM LAWYERS ASSOCIATION v THE ATTORNEY GENERAL OF CANADA AND CANADIAN JUDICIAL COUNCIL AND CENTRE FOR FREE EXPRESSION AND CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	KANE J.
DATED:	MARCH 9, 2022

WRITTEN REPRESENTATIONS BY:

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