Federal Court

Cour fédérale

Date: 20220725

Docket: T-1005-21

Citation: 2022 FC 1087

Ottawa, Ontario, July 25, 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, CENTRE FOR FREE EXPRESSION, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, AND B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS

JUDGMENT AND REASONS

[1] The Applicants, individuals and organizations, who made complaints to the Canadian Judicial Council [CJC] regarding the conduct of Justice David Spiro, seek judicial review of the decision of the CJC that ultimately concluded that the conduct complained of did not warrant the establishment of an Inquiry Committee to determine whether to recommend removal from judicial office. The CJC issued a formal expression of concern and closed the complaints.

[2] The Applicants argue that the decision is unreasonable on several grounds and seek a declaration that it be quashed and remitted to the CJC for reconsideration. The Applicants further argue that the CJC's procedures are unfair and should be reviewed, and more particularly, that the CJC breached the duty of procedural fairness owed to the complainants and, as a result, the decision cannot stand.

[3] On October 25, 2021, the CJC was granted leave to intervene in order to explain the statutory provisions and process for reviewing complaints, and to make submissions regarding the scope of the duty of procedural fairness owed to complainants within that process.

[4] On March 9, 2022, the Centre for Free Expression [CFE] and the Canadian Association of University Teachers [CAUT] were granted leave to jointly intervene to make submissions regarding the impact of Justice Spiro's conduct on academic freedom and the CJC's alleged failure to consider this issue.

[5] Also on March 9, 2022, B'nai Brith of Canada League for Human Rights [B'nai Brith] was granted leave to address the issue of how a judge's affiliations or positions on geopolitical conflicts may or may not affect their impartiality, to the extent that these issues arise.

[6] For the reasons that follow, I find that the decision of the CJC is reasonable. The CJC considered the jurisprudence that has established the test for a recommendation that a judge be removed from office and applied that test to the facts before it. The CJC did not misapprehend the impact of Justice Spiro's conduct on academic freedom nor overlook the complaints regarding an apprehension or perception of bias. The CJC acknowledged that Justice Spiro made a serious mistake; however, based on the consideration of all relevant factors, including the factual account of the conduct at issue, Justice Spiro's acknowledgment of his conduct, early expression of remorse, and the letters of support attesting to his reputation and integrity over the course of his career, the CJC reasonably found that on a go-forward basis there was no reasonable apprehension of bias.

[7] In addition, I find that the duty of procedural fairness owed by the CJC to the complainants in the present circumstances is at the lower end of the spectrum of procedural rights and the CJC did not breach the duty owed.

I. **Background**

[8] The Applicants filed complaints with the Canadian Judicial Council concerning Justice David Spiro of the Tax Court of Canada. The complaints alleged that Justice Spiro had interfered in an appointment process at the University of Toronto [U of T] Faculty of Law. In accordance with the CJC's *Procedures for the Review of Complaints or Allegations About Federally Appointed Judges* [*Review Procedures*] and the *Canadian Judicial Council Inquiries and Investigations By-laws*, SOR/2015-203 [*By-laws*], the Vice-Chair of the Judicial Conduct Committee referred the complaints to a Judicial Conduct Review Panel [the Review Panel]. The Review Panel considered whether Justice Spiro's conduct might be serious enough to warrant his removal from judicial office and determined that it was not. The Review Panel expressed the belief that further remedial action was not required and remitted the matter to the Vice-Chair. The Vice-Chair issued a formal expression of concern to Justice Spiro, pursuant to section 8.3 of the *Review Procedures*, and the complaints were subsequently closed.

[9] The Executive Director of the CJC wrote to each complainant on May 20, 2021 to advise them of the outcome of the CJC's review of their complaints.

[10] The events underlying the complaints made to the CJC concern Justice Spiro's communication with an executive at the U of T regarding the possible appointment of Dr. Valentina Azarova as Director of the International Human Rights Program [IHRP] in the Faculty of Law. The background as described below is derived from the information provided to the CJC that is on the record.

[11] The Faculty of Law at U of T established a search committee to oversee the hiring process for a new director for its IHRP. In August 2020, the search committee identified Dr. Azarova as their preferred candidate. Dr. Azarova is an international human rights scholar, who resided in Germany. There was ongoing correspondence between Dr. Azarova and members of the hiring committee regarding the details of her appointment, including with respect to her immigration status and whether she would be able to return to Europe in the summers.

[12] Although the hiring process was intended to be confidential, persons outside the university, including members of the Centre for Israel and Jewish Affairs [CIJA], became aware of the potential appointment of Dr. Azarova. The CIJA is an advocacy organization with the stated mission of protecting the quality of Jewish life in Canada.

[13] On September 2, 2020, Professor Gerald Steinberg, based in Jerusalem, corresponded by email with his contacts at the CIJA, expressing his view that Dr. Azarova is an "anti-Israel academic crusader" whose scholarship "is almost entirely focused on promoting the Palestinian narrative, the Israel 'apartheid' theme, war crimes, etc." Professor Steinberg suggested that the appointment would be "academically unworthy" and that representatives of the CIJA could pursue "quiet discussions" to determine the status of Dr. Azarova's appointment. Professor Steinberg shared a more detailed memo with the CIJA setting out his concerns and objections to Dr. Azarova's possible appointment.

[14] Judy Zelikovitz, Vice-President, University and Local Partner Services at CIJA, received Professor Steinberg's email and memo and inquired of others within CIJA whether this concern

could be raised with Justice Spiro, a former Director of the CIJA and alumnus of the U of T Faculty of Law.

[15] Justice Spiro had resigned from his role with the CIJA upon his appointment to the Tax Court. Justice Spiro had been active in U of T Faculty of Law fundraising campaigns and he and members of his family have made donations.

[16] Another CIJA member, who received Professor Steinberg's email, forwarded their email exchange with Ms. Zelikovitz to Justice Spiro, which stated:

> I think you can approach him. He is friends with the Dean, Ed Iacobucci. I [am] copying him on this, as I don't think his reaching out to Ed compromises his judicial position. If I am wrong, David will so advise.

[17] On September 3. 2020, Justice Spiro spoke by phone with Ms. Zelikovitz. Justice Spiro recounts that Ms. Zelikovitz relayed the concerns about Dr. Azarova's potential appointment. Justice Spiro agreed to receive Professor Steinberg's memo.

[18] On September 4, 2020, Justice Spiro spoke by phone with Chantelle Courtney, Assistant Vice-President of Divisional Relations at the Division of University Enhancement, U of T. Ms. Courtney had previously occupied a position at the Faculty of Law. Justice Spiro and Ms. Courtney became friends due to their collaboration on fundraising campaigns. Email exchanges in the record indicate that Ms. Courtney initiated contact with Justice Spiro on August 30, 2020, suggesting that they catch up, and they had arranged to do so by phone the following week, on September 4, 2020.

[19] Justice Spiro recounts that he asked Ms. Courtney to find out the status of the appointment process. Ms. Courtney made inquiries, learned that the appointment of Dr. Azarova had not been finalized, and advised Justice Spiro by email that same day. She advised she had passed along the points they had discussed to the Dean.

[20] In his submissions to the CJC, Justice Spiro described his phone call with Ms. Courtney as follows:

> I mentioned that I had learned (from Ms. Judy Zelikovitz, a staff member of the [CIJA]) that a candidate for the position of Director of the [IHRP] at the Faculty of Law had written articles and associated herself with a particular set of positions on the politically fraught Israel-Palestine conflict that may be considered by some to be one-sided and provocative.
>
> I did not tell Ms. Courtney, or anyone else at the University, that the candidate, Dr. Valentina Azarova, should not be appointed. I expressed no opinion, political or otherwise, on the merits of her scholarship or the political positions she had advocated. I did express the hope that sufficient due diligence would be done in advance of any such appointment to enable the University of Toronto and the Faculty of Law to respond effectively if and when criticism arose as a result of the candidate's appointment. I mentioned the matter to Ms. Courtney, at the end of a personal telephone conversation that she had scheduled with me, because I cared deeply about the University and its law school.
>
> Although Ms. Zelikovitz suggested that I speak to Dean Iacobucci about the matter, I did not think it appropriate to do so and I did not do so. Nor did I ask Ms. Courtney to communicate with the Dean.

[21] On September 4, 2020, Justice Spiro also spoke with Professor Weinrib, a retired U of T professor. Justice Spiro advised Professor Weinrib that, according to Ms. Courtney, the appointment of Dr. Azarova was not confirmed.

[22] Over the course of September 4 and the days that followed, the Dean of the Faculty of Law was made aware of the status of the search process and expressed concerns about Dr. Azarova's potential appointment on a number of grounds. On September 9, he informed the search committee that Dr. Azarova's appointment would not proceed, citing the need for the selected candidate to be available soon and the immigration obstacles encountered. The Dean explained that this decision had not been influenced by either political considerations or external pressure.

[23] Members of the search committee reacted negatively and the IHRP's faculty advisory committee later resigned.

[24] In December 2020, the U of T commissioned the Honourable Thomas Cromwell to conduct an independent and impartial review of the selection process for the Director of the IHRP, to determine whether university policies were followed, and to provide guidance for the future. His report, titled "Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law" [the Cromwell Report], was issued on March 15, 2021.

II. The Complaints

[25] Although the U of T's process for the appointment of the Director was supposed to be confidential, it became known that Dr. Azarova was a candidate, and it became known, particularly among some academics, that Dr. Azarova would not be appointed. Media reports followed, reporting allegations of judicial interference in the IHRP search process.

[26] Between mid-September and mid-October 2020, several groups and individuals filed complaints with the CJC, including the Applicants:

- Professor Leslie Green of the Queen's University Faculty of Law emailed the CJC on September 16, 2020, to express concern that a judge of the Tax Court (unnamed at the time) had allegedly interfered with a confidential academic appointment process. He wrote again the following day to submit an official complaint, urging that if the allegations of interference were well founded, it would jeopardize the integrity and impartiality of the Tax Court and would give reason to any party or lawyer appearing before it who is Palestinian, Arab or Muslim to fear bias.
- Professor Craig Scott of Osgoode Hall Law School subsequently wrote to reiterate and adopt Professor Green's complaint.
- The National Council of Canadian Muslims [NCCM] complained, requesting an investigation into the reported conduct. The NCCM acknowledged that the allegations were unproven and "not yet grounded in independently verifiable fact," but explained why an investigation was called for. The NCCM noted that the allegations called into question the integrity of the judiciary. The 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 filed a joint complaint to provide context about how anti-Palestinian racism silences Palestinians and their allies. The complaint added that Justice Spiro's alleged conduct failed to meet the standard of integrity required of a judge and undermined public confidence in the judiciary. The complainants reiterated concerns about Justice Spiro's impartiality or the public perception thereof.
- The Canadian Association of Muslim Women in Law and the Canadian Muslim Lawyers Association also filed a joint complaint raising concerns about Justice Spiro's impartiality and independence.

III. <u>The CJC's Response to the Complaints</u>

A. *The Initial Screening of the Complaints*

[27] The CJC acknowledged each of the complaints by email, noting that the complaints would be reviewed in accordance with the CJC's *Review Procedures* and that once the review was completed, the Acting Executive Director would communicate with the complainants. The email further noted that if the complainant wished to add information to their complaint, this information could be sent to the email address provided. A link to the website of the CJC was also provided for further information on the complaints process.

[28] On September 30, 2020, in accordance with the CJC's *Review Procedures* and following the initial screening of the complaints, the Acting Executive Director of the CJC [the Executive Director] wrote to Justice Spiro and to the Chief Justice of the Tax Court, Eugene Rossiter, to invite a response.

[29] On October 23, 2020, Chief Justice Rossiter responded, attesting to Justice Spiro's good character and his contribution to the Tax Court. Chief Justice Rossiter expressed his opinion that this was a one-off event and that he was confident in Justice Spiro's ability to judge impartially and without bias. The Chief Justice indicated that the Tax Court had taken the initiative of requesting that Justice Spiro recuse himself from any files in which parties or counsel appeared to be Muslim or of the Islamic faith to "allow for any concern related to a potential perceived bias from Justice Spiro to be removed."

[30] On October 26, 2020, Justice Spiro responded. He acknowledged that he had made a mistake in communicating with the U of T regarding the appointment process and expressed regret for his actions and the consequences for public confidence in the judiciary. He explained that he had not attempted to exert pressure or to influence the hiring decision, nor to express any personal disapproval of Dr. Azarova's scholarship. He stated that his only concern was to prepare the U of T and the Faculty of Law for what he anticipated would be an adverse and highly public reaction. He added that he harbours no anti-Palestinian, anti-Arab or anti-Muslim sentiment and has devoted significant time throughout his career to better understanding the Israel-Palestine conflict and to building bridges between the communities involved.

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

B. ***Reasons for Referral by the Vice-Chair of the Judicial Conduct Committee***

[32] The Vice-Chair reviewed the complaints and the responses of Justice Spiro and Chief Justice Rossiter. On January 5, 2021, the Vice-Chair issued written reasons for finding that he had concerns significant enough to require the establishment of a Judicial Conduct Review Panel.

[33] The Vice-Chair considered the information and submissions received to date. The Vice-Chair stated that the question remained as to the purpose of Justice Spiro's comment to Ms. Courtney that the appointment was likely to generate backlash, noting Justice Spiro's assertion

that his intent was to warn the Faculty of the likely controversy. The Vice-Chair expressed the view that Justice Spiro had indicated a lack of integrity and departed from his duty of impartiality when he received information from the CIJA about their concerns about the selection of Dr. Azarova; conveyed this information to an executive at the university; failed to clarify that the views he expressed were not necessarily his own; asked the executive to make inquiries regarding the status of the selection process; and conveyed that information to another person. 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, together with Justice Spiro's lack of insight into the inappropriateness of his conduct, raised concerns about his fitness to hold office as a judge.

[34] The Vice-Chair referred the complaints to the Review Panel in accordance with subsection 2(1) of the CJC's *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."

C. ***The Report of the Review Panel***

[35] On April 13, 2021, the Review Panel issued its 14-page report. The Review Panel noted that its task was to determine whether an Inquiry Committee should be constituted to inquire into Justice Spiro's conduct. In accordance with subsection 2(4) of the *By-laws*, the Panel may do so "only if it determines that the matter might be serious enough to warrant the removal of the judge."

[36] The Panel noted the various complaints received and the concerns raised therein. The Panel also described the background giving rise to the complaints and as described above.

[37] The Review Panel noted the distinction between its role and that of the Vice-Chair, with reference to subsections 2(1) and (4) of the *By-laws*, and added that this distinction suggests a more searching inquiry by the Review Panel.

[38] The Review Panel noted that it did not make findings of fact; rather, it weighed the evidence on the record to determine whether the conduct meets the "might be" threshold in subsection 2(4) of the *By-laws*. The Panel noted that this threshold "surely reflects a threshold higher than 'slim to none' but short of 'on a balance of probabilities.'" The Panel added that the "'might be' threshold must reflect the very significant seriousness of the remedy of removal; the 'crime' must fit the 'punishment.'"

[39] The Review Panel noted two aspects to the complaints. The Review Panel first considered the issue of perceived bias, noting that "to be specific, it would be seen to be a bias against Palestinian, Arab or Muslim interests." The Panel determined that an informed person, apprised of the conduct of Justice Spiro over the course of his career and including this matter, could not conclude that Justice Spiro would be unable to decide cases impartially. The Panel considered that the fear of bias expressed in the complaints was based on misinformation and speculation regarding the true extent of Justice Spiro's interference. The Panel noted that like Justice Spiro, who was formerly a director of CIJA, most, if not all, judges have backgrounds

involving similar community, religious, or cultural associations, and that such affiliations are not themselves sufficient to establish a perception of bias.

[40] The Review Panel concluded that the future fear of bias was not well founded and could not form the basis for directing that an Inquiry Committee be constituted.

[41] The Review Panel then considered the allegation of serious misconduct by actively aiding a lobby group attempting to prevent the appointment of a person whose views are at odds with those of the lobby group. The Review Panel noted the distinction between voicing concern about the publicity that may arise from the appointment and actively lobbying against the appointment based on disapproval of the candidate.

[42] The Review Panel found that the appropriate characterization of Justice Spiro's conduct was an expression of concern that the appointment might subject the Faculty of Law to adverse criticism and publicity. The Review Panel noted that the Cromwell Report was confirmatory of this characterization. The Cromwell Report concluded, based on detailed accounts, "that the Alumnus [Justice Spiro] simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University."

[43] The Review Panel also cited the conclusion in the Cromwell Report that it could not be inferred from the facts gathered that Justice Spiro's communication with Ms. Courtney had factored into the decision to terminate Dr. Azarova's candidacy.

[44] The Review Panel noted that the concern about active lobbying or advocacy was based on the inaccurate premise that Justice Spiro had acted in furtherance of CIJA's aim of preventing Dr. Azarova's appointment and had done so in contact with the Dean. The Review Panel determined that this was not the case, and that Justice Spiro was rather "an active, generous alumnus who has historically and admirably supported his law school, expressing concern that a potential faculty appointment will subject the institution to unwanted controversy and harsh publicity."

[45] The Review Panel explained that the test for removal is stringent, citing the test established by the Supreme Court of Canada in *Therrien (Re)*, 2001 SCC 35 at para 147 [*Therrien*] and subsection 2(4) of the CJC's *By-laws*. The Panel could not conclude that Justice Spiro's conduct "might be serious enough to warrant" his removal from office. The Panel noted that Justice Spiro has recognized his mistakes, adding, "These errors are serious but in the end do not, in our view, warrant the imposition of the ultimate penalty for judicial misconduct." In light of Justice Spiro's remorse and acknowledgment of his mistakes, the Panel recommended that no further remedial action by the CJC or the Chief Justice of the Tax Court was required. The Review Panel referred the matter back to the Vice-Chair in accordance with subsection 2(5) of the *By-laws*.

[46] On April 22, 2021, after the Review Panel had issued its Report and referred the matter to the Vice-Chair for disposition, but prior to its public release, Professor Scott sent further submissions to the CJC. Professor Scott noted the passage of several months and his concern that the CJC had not solicited further submissions from him. Professor Scott's submissions focussed

on his criticism of the Cromwell Report and urged the Review Panel to make its own findings. Professor Scott attached several articles and letters that were also critical of the process and findings in the Cromwell Report.

D. ***The Vice-Chair's Decision***

[47] On May 19, 2021, the Vice-Chair wrote to Justice Spiro to inform him that the Review Panel had determined that his conduct was not such that it might be serious enough to warrant removal. The Vice-Chair noted that his task was to decide the "most appropriate way to resolve the complaints." The Vice-Chair stated that in deciding that no further action was necessary, he had considered Justice Spiro's sincere regret and his early recognition of his mistake, the support of his Chief Justice and the Report of the Review Panel. However, the Vice-Chair found it necessary to issue a formal expression of concern, in accordance with section 8.3 of the *Review Procedures*.

[48] The Vice-Chair stated that Justice Spiro's conduct had put public confidence in the integrity, impartiality and independence of the judiciary at risk and also risked diminishing confidence in the administration of justice. The Vice-Chair noted that his comments were offered in a constructive spirit. The Vice-Chair addressed the media reports and the concerns expressed by the complainants, including those of law professors and various lawyers' organizations, noting that these "are a testimony to the perception of the public and of the impact of your conduct." The Vice-Chair added, "At all times, judges should ensure that their conduct, both in and out of court, will sustain and contribute to public respect and confidence in their integrity, independence, impartiality and judgment."

E. *The Executive Director's Letters to the Complainants*

[49] On May 20, 2021, the Executive Director wrote to each complainant to inform them of the review procedures that had been undertaken, the conclusions of the Review Panel, and the key facts and reasons for the Review Panel's conclusion. The Executive Director also explained the basis for the Vice-Chair's decision to issue a formal expression of concern, noting the Vice-Chair's view that 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," but 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."

[50] The Executive Director stated that the Vice-Chair had instructed her to close the complaints.

[51] The letters to each of the complainants were identical, with the exception of an additional paragraph in the letter to Professor Scott, which noted his additional submissions. That letter stated, "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 [the Vice-Chair] commented he did review your submissions of April 22, 2021 when making his decision on the most appropriate way to resolve this complaint."

F. *The CJC's News Releases*

[52] On January 11, 2021, the CJC issued a news release, “Canadian Judicial Council constitutes a Review Panel in the matter involving the Honourable D.E. Spiro,” noting that the Vice-Chair had referred the matter to the Review Panel.

[53] On May 21, 2021, the CJC issued a news release, “Canadian Judicial Council completes its review of the matter involving the Honourable D.E. Spiro.” The news release provided a similar summary to that sent to the complainants.

[54] On October 12, 2021, the CJC issued a news release entitled “Report of the Review Panel Regarding the Honourable D.E. Spiro,” which provided a link to the Report.

IV. The Issues and Standard of Review

[55] This application raises two issues.

[56] The first is whether the CJC’s ultimate decision—to close the complaints without constituting an Inquiry Committee and with a formal expression of concern and no further remedial action—is reasonable. As described below, the Applicants challenge the reasonableness of the decision on several grounds.

[57] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 85, 102, 105–07 [*Vavilov*]). A decision should not be set aside unless it contains “sufficiently serious

shortcomings … such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[58] In *Portnov v Canada (Attorney General)*, 2021 FCA 171 at para 33 [*Portnov*], the Federal Court of Appeal confirmed that as in pre-*Vavilov* jurisprudence, the Court may look beyond the decision to determine its reasonableness:

> In conducting reasonableness review, this Court is entitled to look at the reasons offered by the decision-maker, associated documents that shed light on the reasoning process, any submissions made to the decision-maker, and the record before the decision-maker. Reasons can be express or implied. See generally *Mason* at paras. 30-42 and the citations to *Vavilov* therein.

[59] In *Girouard v Canada (Attorney General)*, 2020 FCA 129 [*Girouard*], regarding a decision of the CJC, the Court of Appeal found that, although the decision under appeal had been rendered before the Supreme Court of Canada's decision in *Vavilov*, it respected the *Vavilov* principles.

[60] In *Girouard*, the Court of Appeal stated, at para 42,

> Ultimately, the onus is always on the applicant to demonstrate that a decision is unreasonable, and reasonableness must be assessed taking into account both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov*, at paras. 75 and 87). Reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision-makers (*Vavilov*, at paras. 75 and 82). In other words, the role of a reviewing court is to consider the reasonableness of the decision made, not to assess that decision against the decision it would have made:
>
> It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of

> courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.
>
> *Vavilov*, at paragraph 83.

[61] The second issue is whether the CJC breached the duty of procedural fairness owed to the complainants in the circumstances of this case. The Applicants also raise the more general issue of whether the CJC's complaint review procedures, including the lack of an opportunity for complainants to make further and responsive submissions, are unfair.

[62] Where an issue of procedural fairness arises the Court must consider whether the procedure followed by the decision-maker was fair having regard to all of the circumstances, including the *Baker* factors: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 [*Baker*]; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. Where a breach of procedural fairness is found, no deference is owed to the decision-maker.

V. <u>The Applicants' Submissions</u>

[63] The Applicants submit that the decision is not reasonable. The Applicants also submit that the CJC's process for reviewing complaints is not procedurally fair and, in particular, that the CJC breached the duty of procedural fairness owed to them as complainants.

A. *The Decision*

[64] The Applicants characterize the letters sent by the Executive Director to the complainants on May 20, 2021 as the decision that is subject to judicial review. The Applicants note that they had nothing more than these letters on which to seek judicial review of the decision. The Applicants add that they only received other documents upon receipt of the certified tribunal record [CTR] from the CJC after they filed this application.

B. *Reasonableness of the Decision*

[65] The Applicants submit that the decision is not reasonable; the decision letters fail to explain the basis for the decision and do not provide any link to the reasons of the Review Panel or the reasons of the Vice-Chair for closing the complaints. The Applicants generally submit that the decision does not meet the reasonableness standard established in *Vavilov*; it is not transparent, justified and intelligible.

[66] The Applicants argue that the CJC erred in two respects: the Review Panel erred by not finding that the complaints should be referred to an Inquiry Committee, and the Vice-Chair erred in finding that no further action was warranted. The Applicants submit that given that the CJC

agreed that Justice Spiro's conduct was a serious mistake, the conclusion that no further remedial measures were required is unreasonable.

[67] The Applicants explain that the heart of the complaints is that Justice Spiro improperly interfered in an academic appointment on behalf of an advocacy group after his appointment to the bench. The Applicants clarify that they are not focussing on Justice Spiro's personal beliefs or his advocacy prior to his appointment.

[68] The Applicants submit that the CJC failed to appreciate that the complaints raised two distinct issues: whether Justice Spiro's improper interference in an academic appointment for the benefit of an advocacy organization by relying on his past contacts amounted to misconduct; and whether this conduct raised a reasonable apprehension of bias.

(1) **Lack of a rational chain of analysis**

[69] The Applicants submit that the decision lacks internal coherence and a rational chain of analysis for several reasons.

[70] First, the Applicants submit that the Review Panel's report lacks a rational chain of analysis because it fails to articulate a legal test or standard against which to determine whether Justice Spiro's conduct was serious enough to warrant removal.

[71] Second, the Applicants submit that the Review Panel made an incomprehensible and unexplained distinction between Justice Spiro's conduct as voicing concern about the negative impact of Dr. Azarova's appointment rather than actively campaigning against it.

[72] The Applicants point to several events, which they submit demonstrate that Justice Spiro's involvement was more than simply voicing his concern and that his conduct amounted to advocacy on behalf of the CIJA. The Applicants point to:

- Professor Steinberg's email to the CIJA attaching his memo setting out concerns about Dr. Azarova's work and requesting that the CIJA find out the status of the appointment process, which led to CIJA reaching out to Justice Spiro.
- Justice Spiro's email with Ms. Courtney and their telephone conversation in which he raised the issue of Dr. Azarova's appointment.
- Justice Spiro's acknowledgment that it would not be appropriate for him to contact the Dean.
- The concern that although Justice Spiro did not ask Ms. Courtney to contact the Dean, Justice Spiro would have known that she would raise the issue with the Dean, given the email exchange, which reflects that Ms. Courtney undertook to advise Justice Spiro of the status and Justice Spiro suggested she contact him if she needed further information.
- The concern that Justice Spiro shared the memo prepared by Professor Steinberg, who described Dr. Azarova as "one of the nastiest anti-Israeli academic crusaders" and a "hard core activist," with Professor Weinrib (a retired U of T prof).

[73] Third, the Applicants submit that the decision failed to address the fundamental complaint that Justice Spiro acquiesced to the request of a lobby group, the CIJA, which shows that he continued his advocacy for the CIJA after his appointment to the bench.

[74] Fourth, the Applicants submit that the decision fails to address the perception of bias and the issue of confidence in the administration of justice arising from this perception. The

Applicants add that the CJC failed to specifically address the complaints of anti-Palestinian bias and conflated anti-Palestinian racism with anti-Muslim and anti-Arab racism in a manner that reinforces the marginalization of Palestinian Canadians. The Applicants note that the Chief Justice of the Tax Court acknowledged the concerns about bias, yet the Review Panel ignored them.

[75] Fifth, the Applicants submit that the decision fails to explain why the Vice-Chair determined that closing the complaints was the most appropriate resolution of the matter, given the availability of other remedial measures. They also criticize the Vice-Chair for not explaining how Justice Spiro's remorse mitigated the seriousness of his conduct.

(2) **Lack of justification on the facts and the law**

[76] The Applicants also submit that the decision is unreasonable because it is not justified in the light of the facts and the law.

[77] First, the Applicants argue that the facts do not support the finding that "no right thinking person" would conclude that there was a reasonable apprehension of bias. The Applicants submit that there was ample evidence of a reasonable apprehension of bias, pointing to Justice Spiro's previous involvement with CIJA, views he previously expressed regarding "anti-Israel propaganda," and his interference in this appointment process, which is argued to demonstrate ongoing advocacy on behalf of CIJA since his appointment to the bench. The Applicants again submit that the measures taken by the Chief Justice of the Tax Court to remove Justice Spiro from certain files—which shows the Chief Justice's concern about a reasonable apprehension of

bias—should have signalled to the CJC that Justice Spiro's conduct raised concerns of integrity, impartiality and independence. Yet, the CJC unjustifiably found that no reasonably informed person would conclude that there is bias or a perception thereof.

[78] Second, the Applicants argue that the decision is not justified because the Review Panel ignored the Vice-Chair's reasons for referring the complaint. The Applicants note that the Vice-Chair identified five instances demonstrating Justice Spiro's lack of integrity, all of which put confidence in the independence of the judiciary at risk, yet the Review Panel reached a different conclusion on the same facts. The Applicants acknowledge that the Review Panel had additional information, but argue that this did not provide any explanation for Justice Spiro's conduct to justify the Review Panel reaching a different conclusion. They allege that the facts were the same before the Vice-Chair and the Review Panel and the findings should, therefore, have been the same.

[79] More generally, the Applicants contend that the decision failed to uphold the mandate of the CJC and the principles of judicial impartiality and independence. They argue that the CJC simply concluded that Justice Spiro was aware of his duty to the public without regard to the very real perceived bias arising from his actions. They submit that the establishment of an Inquiry Committee is required to ensure public confidence in the integrity of the judiciary and in the administration of justice. The Applicants further argue that Justice Spiro's conduct must be examined in the broader context of historical and ongoing discrimination against Arabs, Muslims, and Palestinians in particular, and with a focus on the public's perception of the judiciary as a whole and judges' privileged position in society.

C. *Fairness of the CJC's Processes and of the Procedure Followed*

[80] The Applicants generally assert that the policies and procedures of the CJC are unfair to complainants. The Applicants suggest that this Court should declare that the CJC's procedures are unfair and should provide a greater role for complainants.

[81] The Applicants also allege that the CJC made its decision in breach of the duty of procedural fairness owed to the complainants. The Applicants contend that the complainants were kept in the dark about the status of the review of the complaints. They submit that the process favoured Justice Spiro, who had several opportunities to respond to the allegations, and was unfair to the complainants, who did not.

[82] The Applicants note that procedural fairness generally requires knowing the case "being made against them." They submit that this extends to require that a complainant know the response to their complaint—i.e., that they should receive disclosure of the information the decision-maker intends to consider and rely on and should have an opportunity to make submissions in response.

[83] The Applicants submit that more information should have been shared with the complainants, including: the letter from the Chief Justice of the Tax Court dated October 23, 2020; the reasons of the Vice-Chair to refer the complaint to a Review Panel; the establishment of the Review Panel; Justice Spiro's submissions to the Review Panel; the provision of the Cromwell Report to the Review Panel by counsel for Justice Spiro; and the Report of the Review Panel.

[84] The Applicants acknowledge that the content of the duty of procedural fairness in any given case varies depending on the context and can be determined with reference to the factors set out in *Baker*. The Applicants point to the importance of the CJC's decision to the complainants, to the communities they represent, and to the public more broadly, which has an interest in protecting the right to a fair hearing before an impartial tribunal. The Applicants also point to paragraph 6(a) of the *Review Procedures*, and submit that they had a legitimate expectation that they would participate in the process, including providing follow-up information or receiving communications from the CJC before a final decision was rendered.

VI. The Respondent's Submissions

[85] The Respondent submits that the decision is reasonable; it shows a rational chain of analysis and is justified on the facts and the law.

[86] At the outset, the Respondent disputes the Applicants' characterization of the letters from the Executive Director to the complainants as constituting the decision and reasons. The Respondent notes that the Executive Director is not the decision-maker; her role is to advise complainants of the outcome of the review of the complaint and provide a summary.

[87] The Respondent submits that the Applicants' arguments largely ignore the reasons set out in the Report of the Review Panel and the reasons set out in the Vice-Chair's letter to Justice Spiro—both of which must be considered in assessing the reasonableness of the decision, along with the record as a whole.

[88] The Respondent submits that after the screening by the Vice-Chair to assess whether the complaint "on its face" might be serious enough to warrant removal, the Review Panel is required to conduct a more searching inquiry and make a determination on the record before it, which is broader than the record before the Vice-Chair at that initial stage. The Report of the Review Panel set out the reasons for remitting the matter to the Vice-Chair for disposition. The Vice-Chair then provided reasons for issuing a formal expression of concern and concluding that no further action would be taken.

A. ***Clarification of Facts***

[89] The Respondent disputes that the CJC made findings based on a misapprehension of the facts, including regarding academic freedom concerns. The Respondent instead notes that the Applicants may have misstated some facts, including about the Cromwell Report.

[90] The Respondent explains that counsel for Justice Spiro provided the Cromwell Report to the Review Panel late in their review, on March 30, 2021. The Review Panel considered the Cromwell Report only to the extent of confirming facts already established on the record.

[91] The Respondent notes that the Cromwell Report recounts Ms. Courtney's recollection of her conversation with Justice Spiro in the same way that Justice Spiro described this conversation in his correspondence to the CJC: that his concern was that Dr. Azarova's appointment would affect the reputation of the University of Toronto.

[92] The Respondent also submits that, contrary to the Applicants' suggestion that Justice Spiro did more than voice his concern, including that he knew that Ms. Courtney would provide the email chain to the Dean, there is no such evidence on the record that Justice Spiro shared the email from Professor Steinberg with Ms. Courtney.

B. ***Reasonableness of the Decision of the Review Panel***

[93] The Respondent submits that the Review Panel reasonably determined that it could not conclude that Justice Spiro's conduct "might be serious enough" to warrant his removal from office and did not justify the establishment of an Inquiry Committee. The Respondent notes that the Review Panel described the threshold and the correct legal test as established in *Therrien* at para 147, which is a prospective test, and applied it reasonably.

[94] The Respondent submits that the CJC was alive to the issue of and impact on academic freedom. The Respondent agrees that conduct interfering with academic freedom could meet the *Therrien* test in other circumstances, but Justice Spiro's conduct did not meet this test.

[95] The Respondent notes that the determination whether to recommend the removal of a judge (i.e., with the first step being to constitute an Inquiry Committee) is assessed prospectively from the perspective of the public, informed of the facts. The perception of judicial bias is also assessed from the perspective of a reasonable, fair minded and informed person (*Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20–24 [*Yukon Francophone*]). The Respondent submits that the Review Panel's reasons and decision reflect this approach; the Panel considered the possibility of future bias or the

perception of future bias based on the facts. Accordingly, the Review Panel considered the motivations for Justice Spiro's conduct.

[96] The Respondent also submits that the Review Panel reasonably rejected the suggestion of future bias based on Justice Spiro's past involvement in the Jewish community, noting the guidance of the SCC in *Yukon Francophone* at para 61.

[97] The Respondent submits that, contrary to the Applicants' submissions, the Review Panel drew a distinction between actively campaigning and voicing concerns**,** particularly in the context of assessing the potential for future bias. The Respondent submits that loyalty to the U of T does not give rise to future bias concerns; the intention and motivation of the judge is relevant and was considered by the Review Panel.

[98] The Respondent submits that the CJC reasonably found that Justice Spiro did not actively advocate on behalf of the CIJA to thwart Dr. Azarova's appointment. The Respondent notes that nothing contradicts Justice Spiro's submission that he did not express any opinion about Dr. Azarova's scholarship and did not take any other action beyond his call with Ms. Courtney.

[99] The Respondent submits that based on the record and the law, the Review Panel was entitled to consider Justice Spiro's professional background, reputation, motivation and his expression of remorse in determining that his conduct did not give rise to a reasonable apprehension or fear of future bias.

[100] The Respondent further submits that the Review Panel's conclusions on the seriousness of Justice Spiro's conduct are reasonably justified on the basis of the factual record—including the circumstances surrounding his communications with Ms. Courtney, his motivations for raising concerns, and his prompt recognition of his error. The Respondent submits that the Review Panel reasonably determined that Justice Spiro's relationship to the Faculty of Law was consistent with a good-faith concern for its reputation and that he had not intervened due to personal disagreement with Dr. Azarova's scholarship. Given the Review Panel's determination that Justice Spiro was not acting with the intent to prevent Dr. Azarova's appointment, the Review Panel's conclusion that Justice Spiro's conduct does not give rise to a fear of future bias that would justify the establishment of an Inquiry Committee reflects a rational chain of analysis.

[101] The Respondent disputes that the Review Panel ignored or conflated the concerns about anti-Palestinian bias raised in the complaints. The Respondent submits that the Review Panel did not fail to appreciate the distinct allegations of bias, but rather reasonably concluded that the allegation of bias was not supported.

C. *Reasonableness of the Vice-Chair's Conclusion*

[102] The Respondent characterizes the Vice-Chair's issuance of a formal expression of concern as a significant consequence.

[103] The Respondent submits that the Vice-Chair's issuance of a formal expression of concern, on the basis of Justice Spiro's conduct, his ready acknowledgment of his mistake, his

further submissions, his Chief Justice's support, and the Review Panel's recommendation, was reasonable; it is consistent with the legal framework and justified on the facts.

VII. The Intervener CJC's Submissions

[104] The CJC's intervention responds to the Applicants' argument that the CJC's process is not procedurally fair to complainants in general and was not procedurally fair to the complainants in this matter. The CJC submits that its process and its policies for the receipt and review of complaints are fair and were followed.

[105] The CJC generally submits that the Applicants' position that complainants should be granted the same level of procedural fairness as the judge who is subject to the complaint would be a significant departure from the *Judges Act*, RSC 1985, c J-1, the *By-laws* and the *Review Procedures*, and the jurisprudence.

[106] The CJC notes that it is open to Parliament to change the process for the review of complaints regarding judges, including the role of a complainant, but at the present time, the role of the complainant is limited to making a complaint and being informed of the outcome.

[107] The CJC suggests that the Applicants' arguments are based on a flawed understanding of the complaint and review process. The CJC notes that the process is not adversarial; it is not a dispute between the complainant and the judge in question—rather, the CJC engages in an investigative process, beginning at the screening stage. The complainant's role in a disciplinary

matter is as a representative and member of the public and the role of the CJC is to ensure that the profession's standards of conduct are met.

[108] The CJC argues that the Applicants seek a level of procedural fairness that goes well beyond the statutory scheme; nothing in the *Review Procedures* or the *By-laws* indicates that complainants have a right to dictate investigative steps to be taken, to review every document to be considered by the CJC, to be interviewed or to make representations addressing adverse information.

[109] The CJC submits that the level of procedural fairness owed to complainants is at the lower end of the spectrum: a complainant's only legal right is to make a complaint, which triggers the investigative process. In contrast, the complaints review process directly and substantially affects the rights of the judge whose conduct has been impugned and a higher duty of fairness is owed to the judge.

[110] The CJC further submits that its *Review Procedures* and *By-laws* are procedurally fair. Together, these clearly set out the process upon receipt of a complaint, the review of the complaint, the discretion to be exercised in reviewing a complaint, the rights of the judge who is subject to the complaint, and the information to be provided to complainants.

[111] The CJC explains that it followed the appropriate procedure in responding to the complaints and the process was fair to the complainants. In accordance with the *Judges Act*, *By-laws* and *Review Procedures*, the CJC received the complaints, investigated the complaints and

advised the complainants of the outcome of the review of the complaints. The CJC provided an overview of the relevant provisions, noting that some notifications to a complainant are mandatory and others are permissive. For example, paragraph 6(a) of the *Review Procedures* is permissive; the decision to seek additional information from complainants is in the discretion of the Vice-Chair.

[112] The CJC disputes that the complainants had any legitimate expectations for greater participation given the clear provisions of the *Review Procedures*, which do not require that information be disclosed to complainants or that they be interviewed or afforded an opportunity to make additional submissions, and which require only that the final decision be provided.

[113] The CJC submits that given its substantial expertise in matters of judicial ethics, judicial independence, and the interpretation of the *Judges Act* and the *By-laws*, it is entitled to some deference in its choice of procedure to review complaints.

[114] The CJC notes that the courts have held that although the CJC's *Review Procedures* are not binding, there is an expectation that they will be followed unless there is a reason to depart from them (*Douglas v Canada (Attorney General)*, 2014 FC 299 at para 10).

[115] The CJC points to *Tran v College of Physicians and Surgeons of Alberta*, 2017 ABQB 337 at paras 16–24 [*Tran*], where the Court dealt with the judicial review of a decision of the College of Physicians and Surgeons regarding a complaint made about a doctor pursuant to Alberta's *Health Professions Act*. While acknowledging that the underlying statute differs, the

CJC submits that the Court's findings regarding the role of a complainant in a disciplinary process are analogous; there is no *lis* [legal action or dispute] between the complainant and the subject of the complaint, and a person who complains to a regulatory body has the same interest as any member of the public to ensure that members of the profession meet the standards set by the governing body.

[116] The CJC also notes that in *Slansky v* Canada *(Attorney General)*, 2013 FCA 199 [*Slansky*], the Federal Court of Appeal noted, at paras 164–65, that the duty of procedural fairness to a complainant is at the low end of the spectrum and the limited duty of disclosure is only to inform the complainant of the disposition of the complaint.

[117] The CJC submits that the jurisprudence relied on by the Applicants does not support finding that complainants are entitled to a higher degree of procedural fairness.

VIII. <u>The Interveners CAUT and CFE's Submissions</u>

[118] The CFE and CAUT submit that the CJC failed to appreciate the importance of academic freedom, despite ample evidence on the record, and as a result, failed to appreciate the seriousness of Justice Spiro's conduct. They submit that Justice Spiro's role in receiving information and conveying it to university officials was overlooked.

[119] CFE and CAUT emphasize the importance of academic freedom to the functioning of post-secondary institutions and their role in Canadian democracy. They explain that academic freedom includes freedom from internal and external interference in academic matters, without

which self-censorship or self-restraint on the part of academics could undermine the critical role of universities as institutional embodiments of free expression and thought. They note that the core rationale for academic freedom is to protect the integrity of the university.

[120] The CFE and CAUT submit that external interference played a role in the termination of Dr. Azarova's candidacy. The interveners acknowledge that the Dean cited two other reasons, but contend that the concerns about Dr. Azarova remained a factor.

[121] The CFE and CAUT argue that Justice Spiro's actions amounted to a "classic case" of outside interference, by a member of the judiciary, who brought pressure to bear in a university hiring decision, which ultimately impaired the academic freedom of both Dr. Azarova and other academics within the university through a chilling effect. The CFE and CAUT submit that such interference, unaddressed, presents serious risks to academic freedom.

[122] The CFE and CAUT submit that whether the decision under review is the series of letters sent to the complainants or the reasons of the Review Panel, the decision and reasons do not address the issue of academic freedom at all, despite that this issue was clearly raised in the complaints. The interveners add that the Vice-Chair noted the issue in the referral of the complaints to a Review Panel, but it was not further addressed.

[123] The CFE and CAUT submit that the CJC's failure to address the impact of Justice Spiro's intervention on academic freedom amounts to a fundamental gap in its reasoning. They submit that this calls into question whether the CJC was sufficiently alive to the gravity of Justice

Spiro's conduct. They argue that in order to provide the proper oversight essential to public confidence in the judiciary, the CJC must ensure that reviews of judicial conduct properly appreciate the consequences of judicial interference in decision-making at public institutions.

[124] The CFE and CAUT point to the record—including the complaints, Justice Spiro's acknowledgment that he was concerned for the reputation of the University, the Vice-Chair's reference to Dr. Azarova's scholarship in his reasons to refer the complaint to the Review Panel, the memo shared by CIJA criticizing Dr. Azarova's publications and views, the Cromwell Report, and articles criticizing the Cromwell Report—as all supporting the view that Justice Spiro's conduct impaired academic freedom.

[125] In response to the Court's question whether the CJC is an appropriate body to inquire into academic freedom, as called for by the CFE and CAUT in order to protect the integrity of the University, the CFE and CAUT appear to agree that although the CJC would not have such expertise, it should remain concerned. They submit that the impact on academic freedom is essential context for the CJC's review of the complaints and assessment of the seriousness of the conduct.

IX. <u>The Intervener B'nai Brith's Submissions</u>

[126] B'nai Brith notes that the Applicants contend that the only relevant facts are Justice Spiro's interference in the hiring process, the complaints and the CJC's decision. B'nai Brith agrees. However, B'nai Brith argues that the Applicants' submissions stray beyond these relevant facts and highlight Justice Spiro's faith, involvement in the Jewish community and past

advocacy for Israel in support of their allegations of bias against Palestinians, Arabs and Muslims.

[127] B'nai Brith acknowledges that the Applicants did not dwell on Justice Spiro's previous involvement in Jewish causes in their oral submissions, as they did in their written submissions.

[128] B'nai Brith submits that it is impossible to discern bias except through inferences, but that no inferences can be drawn that Justice Spiro's support for the state of Israel raises a perception of bias against Palestinians, Arabs or Muslims. B'nai Brith argues that such an inference draws on stereotypes and runs contrary to the jurisprudence that religion and other associations are not a basis for lack of impartiality. B'nai Brith submits that a person can advocate for Israel without being biased against Palestine.

[129] B'nai Brith submits that to the extent that the Applicants continue to rely on Justice Spiro's past affiliations to support their position that the CJC failed to address the allegations of a perception of bias, this runs contrary to established principles regarding the meaning of impartiality, which recognize the value of a diverse judiciary whose members have a range of backgrounds and espouse varying views on religious, political, and social issues. B'nai Brith argues that a judge's opinion about a geopolitical conflict—and public expression of and advocacy for that position prior to appointment—cannot ground a claim that the judge is biased against individuals who do not share that opinion (*Yukon Francophone* at para 36).

X. <u>The Context: The Statutory Provisions and Jurisprudence</u>

[130] Public confidence in the judiciary is essential to the effectiveness and proper functioning of the justice system. As noted in *Girouard* at para 26:

> The objective guarantees of judicial independence—security of tenure, financial security and administrative independence—are intended to promote public confidence in the administration of justice and to ensure the rule of law and the separation of powers. As stated by the Supreme Court in *Conférence des juges de paix magistrats*, ". . . judicial independence belongs not to judges, but to the public" (at para. 33). Similarly, this Court stated the following in *Cosgrove v. Canadian Judicial Council*, 2007 FCA 103, [2007] 4 F.C.R. 714 at paragraph 32 [*Cosgrove*]:
>
> . . . judicial independence does not require that the conduct of judges be immune from scrutiny by the legislative and executive branches of government. On the contrary, <u>an appropriate regime for the review of judicial conduct is essential to maintain public confidence in the judiciary</u>: *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at paragraphs 58-59.

[131] In *Therrien*, at paras 110–11, the Supreme Court of Canada emphasized that judges—whose personal qualities, conduct, and image affect those of the judiciary as a whole—"must be and must give the appearance of being an example of impartiality, independence and integrity." The Court also cited *The Canadian Legal System* (1977), where Professor G. Gall noted that the expectation placed on judges to be "almost superhuman in wisdom, in propriety, in decorum and in humanity" is accompanied by the judge's "certain loss of freedom" upon appointment.

[132] The CJC's *Ethical* Principles *for Judges* (2021) [*Ethical Principles*] provide guidance to federally appointed judges in the exercise of their duties and explain these fundamental concepts. Impartiality means that judges approach each case with an open mind, without prejudice or bias,

actual or perceived: *Yukon Francophone* at paras 22–24, citing *Valente v The Queen*, [1985] 2 SCR 673 at 685, 1985 CanLII 25 [*Valente*], and *R v S (RD)*, [1997] 3 SCR 484 at para 49, 1997 CanLII 324. This requires judges to avoid conduct that may give rise to a reasonable perception of bias, including, for instance, publicly expressing support for particular positions or viewpoints, especially on matters of public controversy: *Ethical Principles* at 40, 42–43. Independence means that judges carry out their judicial functions without external interference or influence: *Valente* at 685–86; *Beauregard v Canada*, [1986] 2 SCR 56 at 69–70, 1986 CanLII 24; *Ethical Principles* at 13–15. Judges are advised to "avoid all communications with anyone external to a case that might raise reasonable concerns about judicial independence" and to "firmly reject improper attempts to influence their decisions": *Ethical Principles* at 15. Integrity requires judges to act both inside and outside the courtroom in a manner that is above reproach in the eyes of reasonable and informed persons. This includes avoiding abuse or improper use of judicial authority or status, including in service of private interests: *Ethical Principles* at 18.

[133] The CJC is responsible for overseeing the conduct of federally appointed judges; the CJC both educates judges regarding their ethical duties and investigates complaints of misconduct. As explained below, based on the investigation of a complaint, the CJC may recommend various measures to restore public confidence where necessary, including recommending the removal of the judge in the most serious instances.

[134] The jurisprudence and *Ethical Principles* reflect the very high standard of conduct imposed on and expected of judges. However, not all deviations from the *Ethical Principles* will

result in the most severe sanction that could be imposed by the CJC, which is a recommendation that the judge be removed from office.

[135] The CJC's Review *Procedures* and the *By-laws* govern how complaints are processed and reviewed. The Executive Director of the CJC conducts a preliminary screening of each complaint to determine whether it warrants consideration—i.e., whether it involves judicial conduct and is not trivial, vexatious, or manifestly without substance (*Review Procedures*, sections 4.1, 5). The Executive Director forwards all complaints that warrant consideration to the Chair or Vice-Chair of the Judicial Conduct Committee, who conducts a further screening (*Review Procedures*, section 4.3). The Chair or Vice-Chair <u>may</u> seek additional information from the complainant, as well as comments from the judge and the judge's chief justice (*Review Procedures*, sections 6, 8). If the Chair or Vice-Chair determines that a complaint on its face might be serious enough to warrant the removal of the judge, the Vice-Chair may refer the complaint to a Review Panel for further examination (*By-laws*, subsection 2(1); *Review Procedures*, section 8.2(d)).

[136] Where the Review Panel conducts a further examination and determines that an Inquiry Committee is not warranted, it advises the Chair or Vice-Chair who will resolve it in the manner they deem appropriate (*By-laws*, subsection 2(5)). The Chair or Vice-Chair may hold the matter in abeyance pending the pursuit of remedial measures, such as training or counselling, or may dismiss the complaint if they conclude no further measures need be taken (*Review Procedures*, section 8.2).

[137] Where the Review Panel determines that the conduct might be serious enough to warrant the removal of the judge, it may constitute an Inquiry Committee to further investigate the allegations and prepare a report setting out its conclusions about whether or not to recommend the judge's removal (*By-laws*, subsections 2(4), 8(1)). Upon conclusion of any Inquiry, the CJC provides a final report to the Minister of Justice and may recommend the judge's removal (*Judges Act*, section 65).

[138] The test for recommending the removal of a judge is set out in subsection 65(2) of the *Judges Act* and is guided by the jurisprudence. The *Judges Act* provides:

65 (2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of	**65 (2)** Le Conseil peut, dans son rapport, recommander la révocation s'il est d'avis que le juge en cause est inapte à remplir utilement ses fonctions pour l'un ou l'autre des motifs suivants :
(a) age or infirmity,	**a)** âge ou invalidité;
(b) having been guilty of misconduct,	**b)** manquement à l'honneur et à la dignité;
(c) having failed in the due execution of that office, or	**c)** manquement aux devoirs de sa charge;
(d) having been placed, by his or her conduct or otherwise, in a position incompatible with the due execution of that office,	**d)** situation d'incompatibilité, qu'elle soit imputable au juge ou à toute autre cause.
the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office.	

[139] In *Therrien*, the Supreme Court established the test that guides whether to recommend that a judge be removed, noting at para 147, "[T]he question to be asked is whether the conduct

for which [the judge] is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of [their] office."

[140] The *Review Procedures* and *By-laws* provide that notice may be given to the complainant at certain stages of the review process and must be given at other stages. Section 12.5 of the *Review Procedures* states that the Executive Director <u>may</u> inform the complainant when the matter is referred to a Review Panel. The Executive Director <u>must</u> inform the complainant if the Review Panel determines that an Inquiry Committee should be established (*By-laws*, subsection 2(6)). The Executive Director must inform the complainant if the complaint is dismissed or concluded by the Chair or Vice-Chair, and must indicate the basis on which the matter was dismissed or concluded (*Review Procedures*, section 12.1). The CJC is not required to send a copy of the Review Panel's reasons to the complainant.

XI. <u>The Decision Is Reasonable</u>

A. ***Preliminary Issue—What Is the Decision?***

[141] Several of the Applicants' arguments in support of their position that the decision is not reasonable are based on their characterization of the letters from the Executive Director to the complainants as constituting the decision and reasons. However, despite this characterization, the Applicants argue that the "decision" of the Review Panel—that an Inquiry Committee is not justified—is not reasonable, and that the "decision" of the Vice-Chair—to issue only an

expression of concern—is not reasonable. In their Notice of Application, the Applicants sought various relief against these “decisions.”

[142] The Applicants’ submission that the only basis they had for filing their Notice of Application were the letters from the Executive Director, and hence the letters must be the decision, overlooks that this is typical of many decisions of boards or tribunals where the decision is communicated by letter and the more extensive reasons are conveyed once the CTR is provided—as occurred in this case.

[143] The Executive Director must inform a complainant if the complaint is dismissed or concluded and set out the basis for the conclusion (section 12.1 of the *Review Procedures)*. This is exactly what the Executive Director did. The Executive Director’s May 20, 2021 letters to the complainants provided a summary of the findings and the outcome and stated that the Vice-Chair had “instructed” her to close the complaints.

[144] The CJC also posted a news release on May 21, 2021 conveying the same information as set out in the letters to the complainants.

[145] Moreover, the Applicants were not thwarted in any way in pursuing their application for judicial review. They filed a Notice of Application, received the CTR and set out their arguments in their Memorandum of Fact and Law with the benefit of their review of the CTR.

[146] The decision for the purpose of this application for judicial review is the decision of the CJC's Judicial Conduct Committee—in other words, the end result with respect to the complaints against Justice Spiro, as informed by the Report of the Review Panel and the reasons set out in the letter of the Vice-Chair for issuing an expression of concern and closing the complaints. Regardless of whether judicial review is sought by those who made the complaint (in this case, the Applicants) or by the judge who is subject to the complaint (which would have been Justice Spiro, had he pursued judicial review) it is the same decision at issue.

[147] The reasons of the CJC for the overall decision include the reasons set out in the Report of the Review Panel and the reasons of the Vice-Chair of the Judicial Conduct Committee. The Court considers whether the decision is reasonable "taking into account both the outcome of the decision and the reasoning process that led to that outcome" (*Girouard* at para 42) and with regard to the record before the CJC (*Portnov* at para 33).

B. *The Decision and The Reasoning Process are Reasonable*

(1) **Summary**

[148] In Vavilov, at para 101, the Supreme Court of Canada identified two types of fundamental flaws that will render a decision unreasonable: "The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it." Although the Applicants assert both flaws, I have not found that there are any fundamental flaws in the decision that are "sufficiently central or significant" (*Vavilov* at para 100).

[149] Contrary to the Applicants' submission that the Review Panel failed to appreciate that two distinct issues were raised in the complaints, the Review Panel clearly identified the distinction and addressed both. The Review Panel referred to "two aspects" of the complaints: first, the allegation that it is serious misconduct for a judge to actively join with campaigners to prevent an appointment of a person with interests at variance with those of the campaigners; and second, the allegation that, to the extent that joining such a campaign reflects on the personal beliefs of the judge, it encourages the view that the judge could not exercise their judicial duties free from the bias that such personal views suggest.

[150] As further explained below, I find that the CJC's overall decision is reasonable, as is the reasoning process. The Applicants challenge both the Review Panel's determination that the establishment of an Inquiry Committee was not warranted and the Vice-Chair's conclusion to issue a formal expression of concern and close the complaints. Both the Review Panel's and the Vice-Chair's reasons are clear and justified by the facts. As explained below, the reasons show a rational chain of analysis leading to the ultimate conclusion. In brief, the Review Panel considered the two aspects of the complaints; the Review Panel considered the evidence before it, identified the correct legal test and reasonably applied it; the Review Panel then determined that although the conduct was serious, it was not so serious as to meet the standard to recommend the removal of Justice Spiro and therefore no Inquiry Committee would be constituted. The Vice-Chair's reasons also show a rational chain of analysis. The Vice-Chair considered the conduct, the complainants' allegations of a perception of bias and the concerns that such a perception raised, but in consideration of several factors, including Justice Spiro's

early acknowledgment of his conduct, his expression of remorse and the support of his Chief Justice, reasonably chose to issue a formal expression of concern and close the complaints.

[151] I also find, as further explained below, that the overall decision is justified on the facts and the law. While the Applicants and CFE/CAUT stress that the seriousness of this conduct should have resulted in a different outcome, their submissions amount to a request to the Court to reweigh the evidence, which is not the role of the Court. As noted, the Review Panel identified and applied the governing legal tests with respect to the recommendation whether to remove a judge and the assessment of a reasonable apprehension of bias, considered the evidence, noting that the complaints were, at least in part, based on misinformation in media accounts, which was not the same information provided to the Review Panel. The Vice-Chair has discretion with respect to the nature of any remedial measures imposed, and exercised this discretion reasonably. The issuance of an expression of concern is a sanction, contrary to the Applicants' suggestion that the complaints were closed with nothing more.

[152] As noted above, judges are bound to observe the *Ethical Principles for Judges* and the CJC's role includes educating judges about those principles and ensuring, through the investigation of complaints about judicial conduct, that the principles are upheld. However, not every complaint that calls into question a judge's adherence to the *Ethical Principles* will result in the most severe sanction. The Review Panel found that the conduct was not as initially reported and although the Review Panel still characterized this as a "serious mistake," the CJC reasonably concluded that an expression of concern was the appropriate outcome.

(2) **The CJC’s decision does not lack internal coherence and a rational chain of analysis**

(a) *The Review Panel did not fail to articulate a legal test or standard against which to determine whether the conduct was serious enough to warrant constituting an Inquiry Committee*

[153] Contrary to the Applicants’ submissions, the Review Panel identified the tests and made the distinction between the role of the Vice-Chair and its own role. Each fulfilled their respective roles based on the appropriate legal test and the information before them.

[154] In its consideration of the conduct at issue, the Review Panel cited and applied the test in *Therrien,* at para 147, which asks

> whether the conduct for which [the judge] is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of individuals appearing before the judge, or of the public in its justice system, would be undermined, rendering the judge incapable of performing the duties of [their] office.

[155] The Review Panel noted that its task was to determine whether an Inquiry Committee should be constituted to inquire into Justice Spiro’s conduct. In accordance with subsection 2(4) of the *By-laws*, the Review Panel may do so “only if it determines that the matter might be serious enough to warrant the removal of the judge.” The Review Panel acknowledged that the “might be serious enough” threshold is undefined, but falls somewhere between a probability of “slim to none” and a “balance of probabilities.”

[156] In other words, the Review Panel is required to determine whether there is some (even slim) chance that an Inquiry Committee would find the judge's conduct so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that public confidence would be irreparably undermined. The Review Panel noted that this distinction in role suggests that it conducts a more searching inquiry than the Vice-Chair. Its Report reveals that it did conduct a more searching inquiry.

[157] The Review Panel also cited the *Therrien* test and subsection 2(4) of the *By-laws* in concluding that while Justice Spiro made a serious mistake, he had not committed misconduct justifying the constitution of an Inquiry Committee.

(b) *The Review Panel addressed the distinction between voicing concern and lobbying or advocacy*

[158] As noted above, the Applicants submit that the CJC made an incomprehensible distinction between advocacy and concern and failed to address the fundamental complaint that Justice Spiro acquiesced to the request of a lobby group, which shows that he continued to be involved in that lobby group.

[159] The Review Panel noted the distinction between advocacy and voicing concern. The Review Panel acknowledged that voicing concern was not necessarily acceptable; rather, it depends on the facts. The Review Panel stated:

> We consider this distinction between giving voice to a concern that a pending appointment might cause adverse publicity for the faculty, and active lobbying against the appointment based on a personal disapproval of the candidate, is of some importance. The

> former characterization suggests loyalty to the faculty and love of the institution as a motivation, the latter rather goes beyond that and suggests one immersing oneself in the political, social and cultural controversy. In drawing the distinction, we do not mean to suggest that while the latter characterization would clearly not be acceptable conduct, the former is.

[160] I find that the Review Panel reasonably found that Justice Spiro's conduct did not go so far as to advocate on behalf of the CIJA against the appointment of Dr. Azarova, but rather that he voiced his concerns as an alumnus and donor to the U of T. The Review Panel explained its finding that Justice Spiro's conduct reflected his expression of concern that the appointment might subject the Faculty of Law to adverse criticism and publicity based on the Review Panel's assessment of the evidence before it. The Review Panel cited the Cromwell Report as confirmatory, but based its finding on the evidence on its own record.

[161] The Review Panel noted the Cromwell Report's finding that Ms. Courtney's account of her conversation with Justice Spiro was the same as Justice Spiro's account and its conclusion that no inference could be drawn that Justice Spiro's inquiry had "factored into the decision to terminate the Preferred Candidate's candidacy."

[162] The Review Panel noted that it had avoided reviewing the Cromwell Report and the media articles about that report until it was tendered by counsel for Justice Spiro.

[163] The Review Panel pointed to the chronology of events and the accounts of Justice Spiro and Ms. Courtney in finding that Justice Spiro's conduct was not motivated by his disagreement with Dr. Azarova's scholarship but by his concern as an active alumnus for the reputation of the

U of T. The Review Panel found that the facts on the record were not consistent with the complainants' account or characterization that Justice Spiro intervened because of his personal disagreement with Dr. Azarova's views and scholarship.

[164] The Review Panel noted that Justice Spiro did not approach the Dean of the Faculty of Law, and had declined to do so. The Review Panel also considered that, although Justice Spiro shared the memo from Professor Steinberg with Professor Weinrib, Professor Weinrib did nothing with this information. Ms. Courtney relayed information from Justice Spiro to the Dean and later advised Justice Spiro that the appointment had not been finalized; the Review Panel found, however, that Justice Spiro did not initiate his call with Ms. Courtney for this purpose and once Ms. Courtney advised him that the appointment had not been finalized, Justice Spiro did not take any other action. All of these findings are reasonable based on the Review Panel's assessment of the evidence before it.

(c) *The CJC's decision does not fail to address the allegations of a perception of bias and its impact on the administration of justice*

[165] The Review Panel and Vice-Chair did not err by failing to specifically address the allegation of anti-Palestinian bias, and did not conflate anti-Palestinian racism with anti-Muslim and anti-Arab racism. Based on its assessment of the evidence and the jurisprudence that establishes the test for a reasonable apprehension of bias, the Review Panel found that there was no reasonable apprehension of bias at all in the circumstances.

[166] As noted by Respondent, the determination whether to recommend the removal of a judge (i.e., with the first step being to constitute an Inquiry Committee) is assessed prospectively.

Where an allegation of bias or perception of bias is the conduct underlying the complaint, the perception of judicial bias is also assessed prospectively and from the perspective of a reasonable, fair-minded and informed person (*Yukon Francophone* at paras 20–24).

[167] The Review Panel first properly identified the test for a reasonable apprehension of bias, citing the long-standing test in *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369 at 394, 1976 CanLII 2, which asks whether an informed person would "think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[168] The Review Panel stated that "right thinking persons apprised of the conduct of Justice Spiro over his career and extending even to this affair—apprised in accurate terms, as opposed to the 'facts' suggested in earlier media coverage of this matter, could not conclude that the case for the judge being biased as suggested has been made out." The Review Panel also referred to the test for removal in the *Judges Act*, noting that it has a forward-looking aspect. The Review Panel squarely asked itself, "How can a Palestinian, Arab or Muslim have faith that the judge would deal with their issues free of bias?"

[169] The Review Panel also found that Justice Spiro's past affiliation with CIJA could not alone give rise to a reasonable apprehension of bias: *Yukon Francophone* at para 61. The Review Panel cited the Supreme Court's comments at paragraph 33: "Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they

require that the judge's identity and experiences not close his or her mind to the evidence and issues."

[170] The Review Panel also considered that all judges have past affiliations and take an oath to "effectively subordinate our personal views to the rule of law."

[171] The Review Panel reasonably found based on the evidence on the record, including the letters received that described Justice Spiro as "a highly ethical man of moderate views, of empathy for people of all backgrounds," that Justice Spiro's conduct did not give rise, in the eyes of a reasonable and informed person, to a fear that Justice Spiro would not decide the cases before him fairly.

[172] While the Panel did not address anti-Palestinian bias separately from the issue of anti-Arab and anti-Muslim bias, the Review Panel acknowledged that all were raised. The Review Panel considered the issue of bias collectively, which is not an error, and concluded that there was no reasonable perception of bias.

[173] The Review Panel's determination that "right thinking persons" would not conclude that there was an apprehension of bias or a perception of bias does not mean that the complainants are not "right thinking," but rather reflects the test set out in the jurisprudence and suggests that the complainants were not aware of all the same information as the Review Panel.

[174] As noted below, the Vice-Chair also addressed the allegations of a perception of bias.

(d) *The Vice-Chair's reasons explain why a formal expression of concern was issued and the complaints were closed*

[175] The Applicants' submissions suggest that the Vice-Chair closed the complaints with nothing more, which is not the case.

[176] The issuance of a formal expression of concern is a sanction. It appears that nothing short of constituting an Inquiry Committee leading to a possible recommendation for removal would be accepted by the Applicants or the CFE and CAUT—who regard Justice Spiro's conduct as very serious and as reflecting an apprehension of bias—as a reasonable outcome.

[177] The Vice-Chair's reasons convey why the Vice-Chair issued a formal expression of concern. The Vice-Chair has broad discretion regarding how to resolve complaints and did not err by not explaining why other remedial measures were not recommended.

[178] The Vice-Chair's reasons explain that the Vice-Chair considered both the nature and impact of Justice Spiro's conduct, including as articulated by the complainants, and Justice Spiro's acknowledgment of this impact, his early recognition of his mistake and his sincere regret. These factors led the Vice-Chair to issue the formal expression of concern, and to take no further remedial action.

[179] Contrary to the Applicants' submission, the Vice-Chair explained how Justice Spiro's acknowledgement and his remorse were factors in deciding that no other remedial action was required. However, the Vice-Chair's decision to issue an expression of concern and provide

constructive comments also reflects the Vice-Chair's view that Justice Spiro's conduct was not condoned. In my view, the Vice-Chair's conclusion demonstrates a balanced approach. The Vice-Chair found that Justice Spiro's conduct put public confidence in the integrity, impartiality and independence of the judiciary at risk; however, Justice Spiro's early acknowledgment of his conduct, his remorse, and the Review Panel's Report, which canvassed the facts and noted the letters attesting to Justice Spiro's integrity, as well as the support of the Chief Justice of the Tax Court, led the Vice Chair to conclude that an expression of concern was sufficient.

(3) **The CJC's decision is justified in the light of the facts and the law**

[180] The Applicants raised similar arguments in support of their more general submission that the decision is not justified in light of the facts and the law.

[181] The Applicants assert that the underlying facts do not support the Review Panel's finding that "right thinking persons" would not conclude that there is a reasonable apprehension of bias. The Applicants point to Justice Spiro's previous involvement in the CIJA, his liaison with contacts at the U of T, the measures taken by the Chief Justice of the Tax Court pending the resolution of the complaints, and Justice Spiro's own acknowledgment that his communication was a mistake, as "ample evidence."

[182] The Review Panel did not overlook or misapprehend the evidence. The Applicants' argument that there was enough evidence to support finding a reasonable apprehension of bias is basically a request to this Court to reweigh the evidence and come to a different decision. It is not the role of the Court to reweigh the evidence and remake the decision: *Vavilov* at para 125.

[183] As noted, the Review Panel found that Justice Spiro's communication with his contacts at the U of T was not lobbying or advocacy, and that his past involvement in the CIJA was, as for other judges with their own affiliations, a recognized reality that did not support a reasonable apprehension of bias. The Review Panel is presumed to have considered all the evidence, including the Chief Justice of the Tax Court's interim measures. As noted above, the Review Panel applied the forward-looking test for bias from the perspective of a reasonably informed person.

[184] The Review Panel noted the factors set out in the CJC publication *Judicial Conduct: A Reference Guide for Chief Justices*, which guide Chief Justices and the CJC in declining to constitute an Inquiry Committee. The factors include the absence of bad faith as a key consideration, the expression of confidence from the judge's Chief Justice, a long and distinguished career, and the absence of similar conduct in the past. The Review Panel found that all of these factors favoured Justice Spiro. This finding is supported by the record, including Justice Spiro's submissions, the support of the Chief Justice of the Tax Court and the other letters of support attesting to Justice Spiro's integrity and good reputation.

[185] Also as noted above, the Review Panel addressed whether Justice Spiro's conduct was—as alleged by the Applicants—actively aiding a lobby group attempting to prevent the appointment of a person whose views are at odds with those of the lobby group. The Review Panel found that this aspect of the complaint was based on a misapprehension of the facts, which is supported by the information on the record before the Review Panel, and some of which is also confirmed in the Cromwell Report.

[186] The Applicants' argument that the decision is not justified because the Review Panel ignored the Vice-Chair's reasons for referral—and his view that Justice Spiro's conduct put public confidence in his integrity at risk—overlooks that the Review Panel has a different screening role than that of the Vice-Chair. The Applicants' submission that the Review Panel should have reached the same conclusion as the Vice-Chair also suggests that there is no role for the Review Panel, which is contrary to the *By-laws* and *Review Procedures*.

[187] The Vice-Chair referred the complaints to the Review Panel based on finding that the complaints "on their face" showed a lack of integrity and impartiality on the part of Justice Spiro. At that time, the Vice-Chair had only the complaints, Justice Spiro's initial response, and the letter from the Chief Justice of the Tax Court regarding the interim measures. The Vice-Chair noted Justice Spiro's receipt and transmission of information and his failure to clarify that the views shared with Ms. Courtney were not his own. The Vice-Chair also noted Justice Spiro's lack of insight.

[188] The Review Panel had additional evidence before it, including more extensive submissions from Justice Spiro. Although the Applicants argue that the additional evidence did not change the facts, this is not a proper characterization of the evidence and again, suggests that the Court should reweigh or reassess that evidence. As noted above, the Review Panel considered all the evidence and found that the complaints were based on some speculation and misinformation.

[189] The Review Panel's more "searching inquiry" was informed by all the evidence and a more probing examination of the circumstances. As noted, the Review Panel did not find that Justice Spiro engaged in lobbying. In addition, the Review Panel noted the letters of support from the Chief Justice of the Tax Court and other letters of support attesting to Justice Spiro's reputation as a highly ethical and empathetic man.

[190] With respect to the Applicants' submissions that the Review Panel and Vice-Chair did not address Professor Scott's submissions, which attached many articles and letters criticizing the findings and outcome of the Cromwell Report, it is not the role of the CJC to second-guess the conclusions in the Cromwell Report. The Cromwell Report was commissioned by the U of T for a different purpose. The CJC's focus is on the conduct of the judge, whatever the context. The CJC referred to the Cromwell Report regarding the conversation between Justice Spiro and Ms. Courtney, but that same information was on the record before the CJC; the two accounts were consistent regarding Justice Spiro's communications with Ms. Courtney.

[191] With respect to the CFE and CAUT's submission that Justice Spiro's actions amounted to a "classic case" of outside interference with an academic appointment, and some of the complaints, which suggested that there may be a broader trend of judicial interference in hiring decisions and with academic freedom, there is no such evidence on the record. The CJC focussed on a single complaint regarding Justice Spiro. Nothing in the record suggests that there is any trend that the CJC should address or that would not be otherwise addressed in the *Ethical Principles* that guide judicial conduct.

XII. <u>The CJC Did Not Breach the Duty of Procedural Fairness Owed to the Complainants</u>

[192] The issue on this application is whether the CJC breached the duty of procedural fairness owed to the complainants in the circumstances. While this entails consideration of the CJC's procedures more generally, the Applicants' submission that the CJC's procedures are unfair to all complainants (and their request that the Court issue such a declaration) is not the Court's focus. Any broad review or revision of the CJC's procedures is best left to Parliament, in accordance with the *Judges Act* and its delegation of authority to the CJC to enact by-laws, and should be informed by a range of policy considerations, beyond those raised in the current scenario. Of note, Bill C- 9, *An Act to amend the Judges Act*, introduced on December 16, 2021, proposes to change the process for review of allegations of misconduct, including allegations that are not serious enough to warrant a judge's removal from office and those that are.

[193] The Applicants' submission that the complainants are entitled to "know the case to meet" overlooks that it is the complainants' own allegations that establish the "case to meet" by the judge who is implicated. The Applicants' submission is really a request for greater participatory rights, including disclosure of all information considered in the course of the CJC's review and an opportunity to rebut that information. Although, as the CJC notes, this goes far beyond the current *Review Procedures*, *By-laws* and the jurisprudence, the issue for the Court is, as stated in *CPR* at para 54,

> whether the procedure was fair having regard to all of the circumstances, including the *Baker* factors. A reviewing court does that which reviewing courts have done since *Nicholson*; <u>it asks, with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was followed.</u>

[Emphasis added.]

[194] I find that, first, the duty of procedural fairness owed to the complainants is at the lower end of the spectrum, but that is not to say that there is no duty owed. Second, the CJC met the duty owed in the circumstances; the complainants had the opportunity to submit their complaints, which were detailed, the CJC conducted an impartial review in accordance with its *By-laws* and *Review Procedures*, and the complainants were informed of the outcome. In addition, the CJC's website informed the public that the complaint had been referred to a Review Panel, reported the outcome of the CJC's investigation and provided a link to the Report of the Review Panel.

[195] There is no precise measurement for the duty of procedural fairness as the duty and its elements will vary with the circumstances. In the present case, both the *Baker* factors and the jurisprudence support finding that the duty of procedural fairness owed to the complainants in the CJC's investigative process is at the lower end of the spectrum or range and is not comparable to the duty owed to the judge who is the subject of the complaint and the investigation.

A. ***The Baker Factors***

[196] In *Baker*, the Supreme Court of Canada emphasized that the scope of the duty of procedural fairness is variable and must be determined in the specific context of each case. The factors that inform the scope of the duty include the nature of the decision, the nature of the statutory scheme, the importance of the decision to the person affected, the legitimate expectations of that person and the choice of procedure made by the decision-maker.

[197] Although the *Baker* factors are more often relied on to determine the scope of the duty of procedural fairness owed to a person who does have a "case to meet," the factors can be adapted to inform the scope of the duty of procedural fairness owed to complainants in the CJC review process. The Supreme Court emphasized that procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair and impartial and open process "appropriate to the statutory, institutional, and social context of the decision" (*Baker* at para 28).

[198] The first factor is the nature of the decision and the process followed in making it. *Baker* guides that the more the process resembles judicial decision-making, the more likely it is that procedural protections closer to the trial model will be required (*Baker* at para 23).

[199] The review of complaints about judicial conduct is an investigative, not an adversarial, process. The Review Panel does not make findings of fact or hear evidence. The decision not to constitute an Inquiry Committee and to issue a formal expression of concern is an administrative decision. The process does not resemble the judicial process even though the decision is made by judges.

[200] With respect to the nature of the statutory scheme, greater procedural protections will be required when no appeal procedure is provided within the applicable statute, or when the decision is determinative of the issue and further requests cannot be submitted (*Baker* at para 24). In the present case, there is no internal appeal process; however, complainants could request

reconsideration and could bring additional complaints, if warranted. In addition, the decision may be the subject of an application for judicial review to this Court by the judge, or as in the present case, by the complainants.

[201] The importance of a decision to the individuals affected is a significant factor affecting the content of the duty. The more important the decision and the greater the impact on the persons affected, the greater the procedural protections required (*Baker* at para 25). The decision to either constitute an Inquiry Committee or take other measures, such as issue an expression of concern, is of high importance to the judge as it has an impact on their judicial and legal career and their reputation more generally. The establishment of an Inquiry Committee could ultimately lead to a recommendation for their removal from office. While not to diminish the importance of the decision to the complainant, given that the complaints process is investigative, the personal interests of the complainant are not adversely affected in the same way.

[202] However, the decision is clearly important to the complainants. The complainants took the initiative to bring the complaints and clearly articulated why they were concerned about the conduct at issue. In addition, as the Court of Appeal noted in *Taylor v Canada (Attorney General)*, 2003 FCA 55 [*Taylor*], there is an important public interest—represented by the complainants—in protecting the right to a fair hearing before an impartial tribunal (para 79). The CJC's role in addressing judicial conduct, including through the complaints process, enhances public confidence in the administration of justice.

[203] The legitimate expectations of the person challenging the decision also informs the procedures required by the duty of fairness in particular circumstances. If the person has a legitimate expectation that a certain procedure will be followed, the duty of fairness requires that procedure (*Baker* at para 26).

[204] The Applicants' submission that the complainants had a legitimate expectation that they would be updated and could make further submissions is not well founded. The Applicants' reliance on paragraph 6(a) of the *Review Procedures* may be based on their misreading of that provision, which states that the Chair or Vice-Chair may seek additional information from the complainant. There is nothing in the *Review Procedures* or *By-laws* to provide a legitimate expectation of disclosure of information or greater participation, nor did the email from the CJC acknowledging the receipt of the complaint suggest any greater procedural rights than those accorded. That email provided a link to the CJC's website for information about the complaints process, just as described above.

[205] The fifth *Baker* factor guides that the choice of procedure made by the decision-maker should be taken into account and respected, particularly when the statute leaves it to the decision-maker to choose its own procedure, or when it has an expertise in determining what procedures are appropriate in the circumstances (*Baker* at para 27). Paragraph 61(3)(c) of the *Judges Act* authorizes the CJC to make by-laws regarding the carrying out of inquiries and investigations into judicial conduct, which reflects Parliament's intent that the CJC be able to determine its own procedures. As elaborated on above, the CJC's complaint review process is set out in the *By-laws* and the *Review Procedures,* which provide some procedural rights for complainants; some are

permissive, others are mandatory. In accordance with its own procedures, the CJC is not required to solicit further submissions from the complainant after the complaint is made; the CJC is not required to inform the complainant that the matter has been referred to a Review Panel; the CJC is not required to disclose the submissions of the judge at issue to the complainant or to invite any type of response or rebuttal from the complainant. The CJC is not required to advise the complainant of the status of the review or that a decision is imminent, but must inform the complainant if a complaint is dismissed or has concluded, or if a Review Panel recommends that an Inquiry Committee be established.

[206] In addition, the CJC has significant expertise in the review and investigation of complaints of judicial conduct.

[207] In the present context, consideration of the relevant *Baker* factors supports the conclusion that the duty of procedural fairness owed to the complainants in the CJC's review process—which in this case pertains to the initial screening and intermediate screening process for complaints—is at the lower end. In other circumstances, for example, where an Inquiry Committee is constituted, other factors may lead to a different result. To summarize: the initial screening by the Executive Director, the Vice-Chair, followed by the Review Panel and the ultimate disposition of the Vice-Chair (following the determination that an Inquiry Committee is not warranted) is an investigative process, not judicial decision making; although there is no internal appeal process within the CJC, judicial review is available; the complainants had no legitimate expectation of a different process; the CJC has the authority, in accordance with the *Judges Act*, to make by-laws governing inquiries and investigations into judicial conduct, and

has done so; and the CJC's choice of procedure is clearly set out in their *By-laws* and *Review Procedures*.

[208] The importance of the decision to the complainants, on its own, does not support finding a higher level of procedural fairness than that provided.

B. ***The Jurisprudence***

[209] The jurisprudence also supports finding that the duty of procedural fairness owed to the complainants in the CJC's investigation of their complaints is at the lower end of the spectrum.

[210] The jurisprudence relied on by the Applicants regarding the complaints or disciplinary processes in other professions does not support their argument that the CJC's process is unfair or that greater procedural rights should have been provided to the complainants in this context.

[211] In *Tran*, the Court dealt with the judicial review of a decision of the College of Physicians and Surgeons regarding a complaint made about a doctor pursuant to Alberta's *Health Professions Act*. Pursuant to that statute, the complainant had a right of appeal to the administrative decision-maker. However, the Court's description of the role of a complainant in a professional disciplinary matter provides guidance. The Court reviewed the jurisprudence that establishes that there is no *lis inter partes* between the complainant and the subject of the complaint; the parties are the disciplinary body and the subject of the complaint. The complainant is not seeking a personal remedy, but has the same interest as any member of the public to ensure that members of the profession meet the standards set by the governing body.

[212] *Figueiras v (York) Police* Services *Board*, 2013 ONSC 7419 [*Figueiras*], relied on by the Applicants, dealt with complaints against police officers. The Court's conclusion that the complainant had the same procedural rights as the officer who was the subject of the complaint was based on the provisions of the *Ontario Police Services Act*, which granted full party status to complainants at later stages of the review process. *Figueiras* does not support broader procedural rights for complainants in other disciplinary processes.

[213] In *Taylor*, the CJC dismissed a complaint regarding a judge who had refused to permit Mr. Taylor to wear a kufi in the courtroom. Among other arguments on judicial review, Mr. Taylor argued that the dismissal of his complaint, which alleged bias against the trial judge, gave rise to a reasonable apprehension of bias on the part of the decision-maker, i.e., the Chair of the Judicial Conduct Committee.

[214] In *Taylor*, at para 77, the Court of Appeal acknowledged that the prevailing jurisprudence supported the view that the CJC did not owe a duty of fairness to a complainant in exercising its power to close a complaint. The Court of Appeal accepted the reasons for this as advanced by the Respondent (at paras 75–76), which included that a complainant is not seeking to vindicate any right or personal interest; that the role of the CJC is to decide whether a judge's conduct is so serious as to merit removal; and that the filing of a complaint draws to the attention of the CJC a possible instance of judicial misconduct, which the CJC must dispose of in "one of the statutorily prescribed ways."

[215] However, the Court of Appeal noted that complainants should not be denied procedural fairness as this could frustrate the ability of the CJC to investigate complaints and thereby enhance public confidence. The Court of Appeal explained, at paragraphs 78–79:

> While the closing of a file may not adversely affect a personal interest of the complainant, more is at stake than accurate decision-making. To deny a complainant the right to procedural fairness is apt to frustrate the ability of the Council to perform its statutory function of improving the quality of judicial services by thoroughly and impartially investigating complaints in order that it may take appropriate action, and thereby enhance public confidence in the judiciary.
>
> … [I]t would be inimical to the sensitive role of the Council in enhancing the administration of justice in Canada to impose the duty of fairness to protect the independence of the judiciary, as well as the private interest of judges in their reputations and livelihood, but not to impose it to protect the equally important public interest in ensuring that judicial misconduct is accurately identified and appropriately dealt with. In a sense, a complainant may be seen as the self-appointed representative of the public interest in protecting "the right of persons who come before the courts to a fair public trial by an impartial tribunal," to borrow words from *Moreau-Bérubé*, at para. 45. The fact that the By-laws confer participatory rights on the judge who is the subject of the complaint, but only provide that the complainant be advised when a file is closed, does not, in my view, preclude the imposition of the duty of fairness in favour of a complainant.

[216] In *Taylor*, the complainant also argued that it was unfair that a letter written by the judge to the CJC, which was considered by the Chair, was not disclosed to him prior to the rendering of the decision. The Court of Appeal noted that it could think of no good reason to not disclose the letter. However, the alleged breach of procedural fairness in *Taylor* was the lack of impartiality or bias; the issue was not whether the non-disclosure of the letter was a breach of procedural fairness and the Court made no such finding (see para 105).

[217] Contrary to the Applicants' submissions, I do not regard *Taylor* as establishing a principle that complainants are entitled to disclosure of the information considered by the CJC or that they are owed a higher level of procedural rights than set out in the *By-laws* and *Review Procedures* or as supported by the application of the *Baker* factors. *Taylor* supports the view that complainants should not be denied procedural fairness, which is not disputed. The issue is the scope or level of the duty. As noted, complainants have some procedural rights, but not to the same extent as the judge who is the subject of the complaint.

[218] In *Slansky*, the Federal Court of Appeal considered whether the CJC should have disclosed a report of an investigator retained by the CJC to the complainant. In addressing the reasons for non-disclosure, Justice Mainville, in concurring reasons, explained the distinction between the procedural rights of the judge and those of the complainant, at paras 164–65:

> Confidentiality is somewhat limited vis-à-vis a judge who is the subject of the inquiry and who is directly affected by its outcome. The judge is entitled to notice of the subject-matter of the investigation, and he must be provided sufficient information about the material evidence gathered: *Judges Act*, s. 64 and *Complaints Procedures* of the Council at section 7.2. In investigating a complaint against a judge, the Council is in effect determining whether the judge's conduct could amount to an abuse that merits a further inquiry to determine whether the judge should be removed from office. <u>Since the rights of the judge may be directly and substantially affected by the ultimate outcome, the Council owes the judge a high duty of procedural fairness throughout the process so as to afford the judge an effective opportunity to respond.</u>
>
> However, since the complainant's only legal right is to make a complaint, the content of any duty of fairness that the Council may owe to the complainant in dismissing the complaint is at the low end of the spectrum: *Taylor v. Canada (Attorney General)*, 2001 FCT 1247, [2002] 3 F.C. 91 at paras. 50 to 52; *Hon. Lori Douglas v. Canada (Attorney General)*, 2013 FC 451 at paras. 20 to 22; see by analogy *Jacko v. Ontario (Chief Coroner)* 2008, 247 O.A.C. 318, 306 D.L.R. (4th) 126 at para. 18. The limited duty of disclosure owed under the Council's *Complaints Procedures* is

> simply to inform the complainant of the disposition of the complaint. This was amply discharged in this case. The Council owes no further duty of disclosure to Mr. Slansky.
>
> [Emphasis added.]

[219] The jurisprudence establishes that the CJC's complaints review process is investigative (*Slansky*). There is no dispute or *lis* between the complainant and the judge against whom the complaint is made. The complaint sets the investigative process in motion. The role of the CJC is to seek the truth, through its own research and with information provided by the complainant and the judge whose conduct is under review: *Girouard* at para 36, citing *Therrien* at para 103 and *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267 at paras 72–73, 1995 CanLII 49.

C. ***The Process Followed by the CJC***

[220] In this case, the complainants submitted complaints about Justice Spiro's conduct based on information available to them at the time, which some complainants acknowledged were based on media accounts, and noted their concerns, with considerable detail, about the impact of that conduct. This constitutes an opportunity to make some submissions. The email reply by the CJC to the complaints stated that the complainants could submit further information but did not suggest that complainants would be asked to do so, and clearly stated that the complainants would be contacted when the review of the complaint was completed. The *Review Procedures* provide that the Executive Director may inform the complainant when a matter is referred to a Review Panel (section 12.5), but there is no requirement to do so.

[221] Professor Scott attests that the complainants received only a standard-form response from the CJC indicating, with no cut-off date, that they could submit further information to the CJC and would receive further communication once the review of the complaints was complete. Professor Scott states that the CJC did not initiate any follow-up with any of the complainants, who were not otherwise invited to provide further submissions, informed of the stages of the review process, nor afforded an opportunity to respond to comments made by Justice Spiro. All this is true, but does not demonstrate any breach of procedural fairness.

[222] The duty of procedural fairness owed to the complainants did not require the disclosure to them of the letter from the Chief Justice of the Tax Court to the CJC, the reasons of the Vice-Chair for referral of the complaint, or Justice Spiro's submissions to the Vice-Chair or Review Panel so that they could make submissions in reply. As noted above, CJC proceedings—especially at the preliminary stages—do not pit the complainant against the judge. The CJC's role is to investigate the complaint and search for the truth.

[223] The Applicants submit, more generally, that the complainants were "kept in the dark," including that they received only the letters from the Executive Director and did not receive the Review Panel's decision in a timely way, that Professor Scott's submissions were not sought or addressed, and that they were not advised that the Cromwell Report was provided to the Review Panel.

[224] Contrary to the Applicants' submissions that they were not even aware that a Review Panel had been established, the CJC's news release in January 2021 announced that the

complaint had been referred by the Vice-Chair to a Review Panel. While this is not a personal communication to the complainants, it was accessible information. In addition, the complainants' receipt of the letters from the Executive Director on May 20, 2021, which provided a summary of the decision, was followed on May 21, 2021 with the News Release providing similar information.

[225] The Applicants' submission that the public would never have known of the judicial conduct complained of or of the CJC's resolution of the complaints but for this Application overlooks the several news releases on the CJC website, including from January 2021, May 2021 and October 2021 (with a link to the Report of the Review Panel).

[226] In conclusion, as noted, the duty of procedural fairness owed by the CJC to the complainants in the circumstances is at the lower end of the spectrum. The CJC met the duty owed; the complainants had the opportunity to submit their complaints, which were detailed; the CJC conducted an impartial review and investigation in accordance with its *By-laws* and *Review Procedures*; and, the CJC followed its *By-laws* and *Review Procedures* with respect to the role of complainants, including to inform the complainants of the outcome.

JUDGMENT in file T-1005-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No costs are ordered.

"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
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 25, 2022
ORDER AND REASONS:	KANE J.
DATED:	JULY 25, 2022

APPEARANCES:

Alexi N. Wood, Laura MacLean and Sameha Omer	FOR THE APPLICANTS
Michael H. Morris, Andrew Law, Elizabeth Koudys and Samantha Pillon	FOR THE RESPONDENT
Christopher D. Bredt, Ewa Krajewska and Veronica Sjolin	FOR THE INTERVENER CJC
Andrew Bernstein, Yael Bienenstock and Adrienne Oake	FOR THE INTERVENER B'NAI BRITH
David Wright, Rebecca R. Jones, Sarah Godwin and Immanuel Lanzaderas	FOR THE INTERVENERS CFE AND CAUT

SOLICITORS OF RECORD:

St. Lawrence Barristers LLP Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
Borden Ladner Gervais LLP Toronto, Ontario	FOR THE INTERVENER CJC
Torys LLP Toronto, Ontario	FOR THE INTERVENER B'NAI BRITH
Ryder Wright Blair & Holmes LLP Toronto, Ontario Canadian Association of University Teachers Ottawa, Ontario	FOR THE INTERVENERS CFE AND CAUT