

FEDERAL COURT

BETWEEN:

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

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN JUDICIAL COUNCIL

Intervener

and

**CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
B'NAI BRITH OF THE CANADA LEAGUE FOR HUMAN RIGHTS**

Interveners

APPLICATION FOR JUDICIAL REVIEW
pursuant to Rule 18.1 of the *Federal Courts Act*

**MEMORANDUM OF FACT AND LAW OF THE INTERVENERS
CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

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OVERVIEW

- [1] The Centre for Free Expression (“CFE”) and the Canadian Association of University Teachers (“CAUT”) (“Interveners”) have been granted leave to jointly intervene in the application for judicial review respecting the May 20, 2021 decision of the Canadian Judicial Council (“CJC”) with respect to complaints made regarding the conduct of Justice David Spiro of the Tax Court of Canada (the “Application”).
- [2] The Interveners submissions will elaborate on, and provide insight and perspective on, the issue of academic freedom underlying the issues in this Application. The Interveners submissions will address the impact on academic freedom of Justice Spiro’s intervention in the University of Toronto’s hiring process, and the impact on academic freedom of the failure of the CJC to consider this issue.
- [3] It is the position of the Interveners that Justice Spiro’s actions caused significant harm to academic freedom and that the CJC failed to appreciate or consider the seriousness of Justice Spiro’s conduct in terms of its impact on academic freedom.
- [4] In its Report on the Review Panel and response to the complaints, the CJC failed to refer to, consider, or in any way address, the harmful effect of Justice Spiro’s conduct on academic freedom within the University of Toronto. Despite concerns respecting the impact of Justice Spiro’s actions on academic freedom having been raised by several of the complainants, and at multiple instances during the proceedings, the CJC made no reference what-so-ever to academic freedom in its review of Justice Spiro’s conduct.

[5] The Interveners submit that the CJC’s failure to give any consideration to the impact on academic freedom in its review of Justice Spiro’s conduct is a fundamental error which renders its decisions unreasonable.

PART I. FACTS

A. Background

[6] In September 2020, after learning of the potential appointment of Dr. Valentina Azarova to the position of Director of the International Human Rights Program (“IHRP”) of the Faculty of Law at the University of Toronto, Tax Court of Canada Justice David Spiro raised concerns with a senior official of the Faculty that this potential appointment would cause harm to the Faculty. His concerns were based on Dr. Azarova’s published work respecting Israel. Justice Spiro’s concerns were communicated to the Dean of the Faculty.¹

[7] Dr. Azarova had been unanimously recommended by the hiring committee composed of University of Toronto academics and the hiring process was well under way, including the University having retained lawyers to work on the immigration process for Dr. Azarova. However, after being advised of Justice Spiro’s concerns the Dean told members of the hiring committee that “Dr. Azarova’s appointment would not go ahead.”²

[8] On January 11, 2021, members of the Judicial Conduct Committee convened a Review Panel to investigate the matter. The Review Panel issued its Report on April 13, 2021,

¹ *Certified Tribunal Record*, pp. 331 to 332.

² *Certified Tribunal Record*, pp. 277 and 332 to 333.

and on May 20, 2021, the CJC provided its decisions and reasons in response to the complaints.³

B. Interveners

[9] The CFE is a non-partisan research, public education, and advocacy centre guided by an Advisory Panel made up of fifteen prominent Canadians. The CFE serves as a hub for a wide range of activities related to free expression and the public's rights to seek, receive, and share information.⁴ The CFE has a significant interest in protecting freedom of expression and specifically protecting academic freedom that is critical to the mandate of educational institutions to disseminate and advance knowledge. It engages in public education about the nature and importance of academic freedom, highlights current threats, and works to ensure that academic freedom rights are extended to all academic staff.⁵

[10] CAUT is a federation of academic staff associations/unions and is the national voice for academic personnel in Canada representing the overwhelming majority of academic staff in Canada at universities and colleges across the country. CAUT represents 72,000 teachers, librarians, researchers and other academic professional and staff.⁶ CAUT has a particular mandate to defend academic freedom and works in the public interest to improve the quality and accessibility of post-secondary education in Canada.⁷

³ *Certified Tribunal Record*, pp. 269 and 436.

⁴ "Centre for Free Expression", online: <<https://cfe.ryerson.ca/>>.

⁵ *Ibid.*

⁶ "CAUT/ACPPU", online: <<https://www.caut.ca/>>.

⁷ *Ibid.*

C. Academic Freedom in the Record

[11] Academic freedom interests arise in the Tribunal Record at multiple instances, including the following:

- a. In their complaints to the CJC, several complainants specifically mentioned issues of academic freedom.⁸ Complainant Professor Leslie Green explained that academics may be “one-sided” in their work and are “entitled to fully advocate, within the law, for any position they find convincing.”⁹ Complainant Mustafa Farooq, CEO of the National Council of Canadian Muslims (NCCM), raised academic freedom concerns by explaining that the NCCM had heard complaints from “Canadian Muslim academics, who feel that the incident demonstrates that judges may routinely engage in interfering in hiring decisions, which ultimately may restrict their academic freedom in terms of being able to take positions on certain subject.”¹⁰
- b. In a letter to the CJC, Justice Spiro admitted that his opinion of Dr. Azarova was based on ignorance and the brief summary of her scholarship prepared for him by the Center for Israel Jewish Affairs (CIJA). Justice Spiro also admitted that he was concerned for the reputation of the Faculty of Law, due to “strong feelings on both sides” of the Israel-Palestine conflict, and that he was hoping to help the Faculty of Law avoid controversy.¹¹
- c. Justice Nielsen referred to Dr. Azarova’s published scholarship in his reasons for referring the complaint against Justice Spiro to a Review Committee.¹²
- d. The CIJA memo from CIJA staff member, Ms. Zelikovitz, to Justice Spiro is clear that they oppose Dr. Azarova’s academic scholarship, publications, and service.¹³

⁸ Professor Leslie Green refers to academic freedom in his supplemental letter of September 29, 2020, found at pages 15-18 of the *Certified Tribunal Record* Mustafa Farooq, CEO of the National Council of Canadian Muslims mentions academic freedom in his complaint letter of September 21, 2021, page 33 of the *Certified Tribunal Record*.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Certified Tribunal Record*, p. 60, 85-86, 137.

¹² *Certified Tribunal Record*, p. 82.

¹³ *Certified Tribunal Record*, p. 145.

- e. The Cromwell Report, an independent review of the search process for the directorship of the IHRP, acknowledged that “terminating a candidacy of a qualified candidate on the basis of outside pressure would be improper” as a violation of academic freedom.¹⁴
- f. In an article on the “IHRP Hiring Scandal”, Vincent Wong wrote that Israel and Palestine have become a “taboo subject” at the Faculty of Law, following the Cromwell Report and thus has documented the chilling effect on debate and discourse at the Faculty of Law.¹⁵

PART II. ISSUES

[12] This judicial review raises the following issue: Was the CJC’s decision to not constitute an Inquiry Committee to further investigate the complaints about Justice Spiro reasonable?

PART III. SUBMISSIONS

A. Standard of Review

[13] As the Supreme Court stated in *Vavilov*, a Court’s analysis on judicial review begins with a “presumption that reasonableness is the applicable standard in all cases.”¹⁶ There is no basis on which to rebut this presumption in the circumstances of this case, and as such the appropriate standard of review is that of reasonableness.

¹⁴ *Certified Tribunal Record*, pp. 305 and 364-365.

¹⁵ *Certified Tribunal Record*, p. 432.

¹⁶ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16, 23 [*Vavilov*].

B. The Importance of Academic Freedom

[14] Academic freedom is essential to the teaching and scholarship upon which every university is built and is fundamental to the operation of universities and the role of post-secondary education in Canadian democracy.¹⁷ It is a professional right of academic staff that has four components: to use their best judgment in matters related to their teaching, research and scholarship, participation in the collegial governance of their institution (intramural academic freedom), and exercise of their rights as citizens without sanction by their employer (extramural academic freedom). It is a right necessary for academic staff to fulfill their institutional and societal obligations to educate students and advance knowledge.¹⁸

[15] These four aspects of academic freedom are spelled out in the CAUT policy statement on academic freedom,¹⁹ in the *Declaration of Principles on Academic Freedom and Academic Tenure* by the American Association of University Professors,²⁰ and by the General Conference of UNESCO, with delegates from more than 150 countries, which adopted the *Recommendation concerning the Status of Higher-Education Teaching*

¹⁷ V.C. Fowke and Bora Laskin, “Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of H.S. Crowe by United College, Winnipeg, Manitoba” (November 21, 1958), online: <<https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-the-investigation-into-the-dismissal-of-professor-h-s-crowe-by-united-college-winnipeg-manitoba-%281958%29.pdf>>

¹⁸ James L. Turk, “Introduction”, pp. 11-12 in James L. Turk (ed.), *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University*. Toronto: James Lorimer & Co, 2014. See also Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom*. New Haven: Yale University Press, 2009, pp. 6-8.

¹⁹ CAUT Policy Statement: Academic Freedom, online: <<https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>>.

²⁰ American Association of University Professors, “Appendix I: 1915 Declaration of Principles on Academic Freedom and Academic Tenure”, *Policy Documents and Reports* (Eleventh Ed.), p. 297, online, <<https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>>.

Personnel,²¹ the first international recognition of academic freedom and it explicitly identified these same four components of academic freedom.

[16] Academic staff must be free to model in their teaching the freedom of mind and critical thought that are the purpose of the university. Advancement of knowledge through research and scholarship depends on academics having the freedom to decide issues to address, perspectives to be pursued, methods to be used, and freedom to share their findings with colleagues, the academic and scientific community, and the public. Universities, from their outset, have been institutions in which collegial governance has been essential to protect the integrity of the university's academic mission. This has meant that academic decisions are made by the collegium of academics, each of whom has the right to speak out about any aspect of the policy and practices of their institution.²²

[17] Extramural academic freedom is the fourth component, as Matthew Finkin and Robert Post explain, because "... faculty can promote knowledge or model independent thought in the classroom only if they are *actively and imaginatively* engaged in their work. If faculty experience their institutions as repressive, they will be vulnerable to forms of self-censorship and self-restraint that are inconsistent with the confidence necessary for research and teaching. The harm would be enhanced if faculty were confused about which communications were protected by freedom of research and which communications would be exposed to punishment if freedom of extramural speech were

²¹ UNESCO, *Recommendation concerning the Status of Higher-Education Teaching Personnel*. Paris, 1997 At para 25-30, online: <http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html>

²²James L. Turk, "Understanding Academic Freedom in Canada", CFE Occasional Paper Series, March 2022, pp. 14-15, online: <<https://cfe.ryerson.ca/sites/default/files/Understanding%20Academic%20Freedom%20CFE%20Occasional%20Paper%202022.03.pdf>> [Turk, 2022].

not a recognized dimension of academic freedom.”²³ The arbiter of standards for academic work (and hence for academic freedom) is not the corporate institution, but the collective academic staff in the institution and in the collectivity that constitute the academic disciplines within which academics work.²⁴

[18] Academic freedom includes the freedom to express one’s opinion about the institution and its administration and entails freedom from institutional censorship. Academic freedom and collegial governance (the process whereby academic staff participate in the governing of the university) are intertwined. The Supreme Court of Canada has recognized collegial governance as “a safeguard of academic freedom.”²⁵

[19] The core rationale for academic freedom is to protect the academic integrity of the university by preventing inappropriate interference in academic matters (e.g., curriculum; teaching of students; research and scholarship within the university; hiring, promotion, discipline, and termination of academic staff; and academic policies and priorities). Interference can arise from outside the university (by donors, alumni, politicians, religious institutions, lobby groups, or businesses and corporations) or from within (by boards, administrators, colleagues, staff or students).²⁶

[20] Arbitrators and courts have recognized the importance of academic freedom, to universities and also to society as a whole. The Supreme Court of Canada has said that academic freedom “is vital to our society and has important implications for all of us.

²³ Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom*. New Haven: Yale University Press, 2009, p. 139.

²⁴ *Turk*, 2022, pp. 18-19. See also Joan W. Scott, “Academic Freedom as an Ethical Practice.” In *The Future of Academic Freedom*, edited by Louis Menand, Chicago: University of Chicago Press, 1996, 163-189.

²⁵ *Mckinney v. University of Guelph*, [1990] 3 SCR 229 at p. 283.

²⁶ *Turk*, 2022, pp. 17-19. See also Jonathan R. Cole, “Academic Freedom Under Fire.” In *Who’s Afraid of Academic Freedom* edited by Akeel Bilgrami and Jonathan R. Cole, New York: Columbia University Press, 2014, pp. 40-56.

Academic freedom and excellence is essential to our continuance as a lively democracy.”²⁷

- [21] In *AUPE v University of Calgary*, the arbitrator reiterated the role academic freedom plays in the university context and the unique nature of a university’s mandate and governance structure:

[...] It is almost impossible to overstate the importance of academic freedom to the nature of a modern university. One of the core beliefs in western liberal democracies is that society is best served by the existence of a free "marketplace" of ideas, where enquiry and expression can take place generally unconstrained by state power. Universities have evolved into perhaps the purest institutional embodiment of free enquiry and expression. Universities recruit and select their own academic staff on the basis of merit. Academic staff members receive compensation from the institution itself, freeing them from dependence on private enterprise and other patrons. Academics advance in rank, compensation and perquisites by their scholarly activity, widely defined, which activity is evaluated by peers inside and outside their particular university....

[...] By long tradition, close institutional control over scholarly activities is anathema to universities and their scholars alike...As we noted earlier, the whole concept of a university is that of a community of scholars, supported by the state or the institution or both, who in return for a general commitment to apply themselves to advance the state of human knowledge receive an extraordinary freedom to define for themselves how to go about doing that ...²⁸

- [22] As stated in *York University v York University Faculty Association*:

There are few concepts or principles more important to the healthy and vibrant functioning of a university than academic freedom. The academy is and must be a bulwark against conventional thought and received opinion not just for the benefit of its members but for society at large. It is through free thought, investigation, and the development and dissemination of ideas that society advances and progress is made. Today’s accepted practices and beliefs become tomorrow’s discredited notions and out-moded ideas when exposed to the freedom of public debate and scientific scrutiny. The university has an essential role to play in this process – a role that can only be fulfilled if academic freedom is broadly defined and jealously guarded.²⁹

²⁷ *Mckinney v. University of Guelph*, [1990] 3 SCR 229 at p. 287.

²⁸ *AUPE v University of Calgary* 2008 CarswellAlta 678 at paras 16-17, 280 [2008] Alta. L.R.B.R. 129.

²⁹ *York University and York University Faculty Association*, 2007 CanLII 50108 (ON LA) at pp. 17-18, online: <<https://canlii.ca/t/1ts19>>.

C. The Impact on Academic Freedom of Justice Spiro's Actions

[23] It is submitted that, given his status as a member of the judiciary, Justice Spiro's actions were a classic case of outside interference as he brought pressure to bear on the University of Toronto Faculty of Law in relation to its decision as to who would become the director of the IHRP at the University's law school, which led to a violation of the academic freedom of Dr. Azarova. His actions were also an interference in the collegial governance process which the hiring committee had engaged in, resulting in the resignation of the Chair and three members of the hiring committee.³⁰ In addition, Justice Spiro's actions chilled the academic freedom of other academics at the University of Toronto (and perhaps elsewhere).

[24] Justice Spiro raised concerns about Dr. Azarova being hired based on work she had published about Israel – scholarship and publications already presented at conferences and in articles throughout the world. After the Dean was made aware of Justice Spiro's concerns, the process for the hiring of Dr. Azarova was halted.³¹

[25] In expressing his concerns about Dr. Azarova's academic scholarship and concerns for the reputation of the Faculty of Law, Justice Spiro gave no consideration to Dr. Azarova's academic freedom to write, criticize and publish. Justice Spiro also did not consider that research and writings of academic staff in a law school would likely attract controversy from time to time. Academic freedom permits academics to advance positions that may be unpopular or controversial.³²

³⁰ *Certified Tribunal Record*, pp. 11 and 378.

³¹ *Certified Tribunal Record*, pp. 277 and 332 to 333.

³² CAUT's Policy on Academic Freedom, online:< <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>>.

[26] If members of the judiciary engage in actions which interfere in university hiring decisions or in any other university academic decision-making, there is a real and substantial risk to academic freedom. Prospective academic staff may self-censor in anticipation of presenting as more palatable to a hiring committee or the university. Additionally, prospective academic staff may avoid applying to certain academic institutions where outside interference is known to occur, thus depriving these particular institutions of diverse perspectives and meaningful debate. More generally, interventions by members of the judiciary may cause academic staff to self-censor in their teaching or scholarly work to avoid controversy.

[27] Justice Spiro's intervention in the University's hiring process has broad implications with respect to interference in the academic freedom of current and prospective academic staff. Hiring, tenure, and promotion policies and practices at all Canadian universities must be free from outside interference – whether direct or indirect. There is a serious risk of “academic chill” and self-censorship if outside interference is permitted in these university decisions.

D. The CJC's Decision was Unreasonable

[28] The Interveners submit that the CJC's decision was unreasonable as it failed to give any consideration what-so-ever to the impacts on academic freedom interests resulting from Justice Spiro's actions, despite these concerns having been raised by the complaints and other materials before the CJC.

[29] As stated by the Supreme Court in *Vavilov*, a decision-maker falls short when there is a “fundamental gap” in reasoning or “it is [im]possible to understand the

decision-maker's reasoning on a critical point.”³³ These “critical points” are shaped, in part, by the “central issues and concerns raised by the parties” and are “sufficiently central or significant” such that they point to “sufficiently serious shortcomings in the decision.”³⁴ A decision-maker must demonstrate that it was “actually alert and sensitive to the matter before it.”³⁵ External interference connected to hiring at a university is a threat to academic freedom. The CJC's failure to consider the impact on academic freedom of Justice Spiro's conduct constitutes a fundamental gap and its decision is therefore untenable.³⁶

[30] In order to have reached a reasonable decision, the CJC needed to address the academic freedom concerns that had been raised before it. Despite the centrality of the harm caused to academic freedom by Justice Spiro's actions, the CJC makes no reference to this issue in its Report of the Review Panel or in the decisions issued to the complainants. Consideration of the principle of academic freedom is entirely absent from the CJC's decision making. Nowhere does the CJC address the impact of Justice Spiro's interference on the academic freedom.

[31] The right to academic freedom applies to all university academic staff and must inform every element of university policy and education, including hiring, tenure and promotion decisions. By failing to address Justice Spiro's interference with academic freedom interests, the CJC failed to fully appreciate the grave nature and significant

³³ *Vavilov* at paras 102-104.

³⁴ *Vavilov* at paras 100, 127-128. See also *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at paras 12-13 [*Alexion*].

³⁵ *Vavilov* at paras 127-128.

³⁶ *Vavilov* at paras 85, 101, 102-107.

consequences of Justice Spiro's misconduct, thereby rendering unreasonable its decision to close the complaints and to not constitute an Inquiry Committee.

[32] The CJC's failure to consider academic freedom in its review of Justice Spiro's actions raises significant public interest concerns. Academic freedom has been recognized by the Supreme Court as essential, "[...] to our continuance as a lively democracy".³⁷ Similarly, both the Court of Appeal of Alberta and the Court of Appeal for Ontario have expressed how important academic freedom is to Canadian society.³⁸ Failing to consider the impact of Justice Spiro's actions on academic freedom is not a minor or inconsequential omission.³⁹

[33] The CJC is entrusted with a significant degree of oversight over the judiciary, an oversight which is essential to public confidence in the judiciary, and must therefore ensure that their reviews of judicial misconduct properly examine and appreciate all consequences of judicial interference in the decision-making process of a public institution such as a university.

[34] Given the importance of academic freedom to the societal missions of universities and to democracy, the CJC's failure to address this issue calls into question whether the CJC was alert and sensitive to the gravity of Justice Spiro's conduct.⁴⁰ Judicial interference in the professional rights of academic staff and the academic integrity of a public institution should be carefully scrutinized. Ignoring the academic freedom

³⁷ *Mckinney v. University of Guelph*, [1990] 3 SCR 229 at p. 287.

³⁸ *Pridgen v. University of Calgary*, 2012 ABCA 139, at paras 113-115; *Longueépée v. University of Waterloo*, 2020 ONCA 830 at para 102.

³⁹ See *Alexion* at para 18; *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, at para 11; *Vavilov* at para 97.

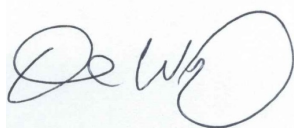
⁴⁰ *Vavilov* at para 128.

implications of Justice Spiro's conduct during the CJC's decision-making process, renders its review of Justice Spiro's actions incomplete and its decision unreasonable.

PART IV. ORDER SOUGHT

[35] The Interveners submit that this Court grant the application for judicial review, quash the CJC's decisions and remit the matter back to the CJC for re-determination with due consideration to the impact on academic freedom of Justice Spiro's conduct. In accordance with the order granting leave to intervene, the Interveners do not seek their costs and ask that no costs be ordered against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of March, 2022.



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PART V. AUTHORITIES

Jurisprudence

1. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65
2. *AUPE v University of Calgary* 2008 CarswellAlta 678, [2008] Alta. L.R.B.R. 129
3. *York University and York University Faculty Association*, 2007 CanLII 50108 (ON LA)
4. *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157
5. *McKinney v. University of Guelph*, [1990] 3 SCR 229
6. *Pridgen v. University of Calgary*, 2012 ABCA 139
7. *Longuepée v. University of Waterloo*, 2020 ONCA 830
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