UNIVERSITY OF TORONTO
FACULTY OF LAW

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Dear President Gertler,

We are writing this letter to you in our capacities as professors in the University of Toronto Faculty of Law in response to the Cromwell Report, and your letter embracing its conclusions. This letter does not reflect all our comments on the Report, but provides an overview of some of the key concerns we have with the Report and with the University's public statements embracing it. Particularly troubling to us are the failures to (1) acknowledge the fundamental limitations in Justice Cromwell's findings, (2) address the shocking institutional weaknesses the Report disclosed, (3) reject Justice Cromwell's conclusion that the actions of Justice Spiro were not improper, and (4) dismiss outright two of Justice Cromwell's recommendations that would both reduce the scope for legitimate faculty criticism of administrative actions *and* invite further third-party interventions in confidential hiring processes.

1. Factual Background

After a lengthy and confidential international hiring process, a Selection Committee unanimously chose Dr. Azarova, a non-Canadian resident of Germany, as their preferred candidate to be director of the Faculty of Law's International Human Rights Program ("IHRP"). (The alternative choice was also a non-Canadian). She was offered the position on August 11, pending acquisition of a work permit, which was reasonably expected to take about 2-3 months to obtain. On Friday September 4, the Friday of the long Labour Day weekend, the Dean of the Faculty of Law, Edward Iacobucci, actively inserted himself into the process for the first time. Dean Iacobucci intervened only after Justice David Spiro, a sitting judge on the Tax Court of Canada, an alumnus and, along with his extended family, a major donor to the University of Toronto and the University of Toronto Faculty of Law, advised the University of objections to her hire based on her scholarship on Israel's occupation of the Palestinian Territories. Justice Spiro specifically alleged that hiring her would cause "reputational damage" to the Faculty of Law, controversy with the Jewish community, and negatively affect fundraising. Justice Spiro learned of her prospective hire, despite the confidentiality of the hiring process, from the Centre for Israel and Jewish Affairs ("CIJA"), a group that, among other things, lobbies governments and universities on behalf of what it perceives to be pro-Israel positions. CIJA itself learned of the offer to Dr. Azarova from an academic based outside of Canada. The Cromwell Report does not explain how that person obtained knowledge of the imminent hire of Dr. Azarova. Approximately 48 hours later, the Dean decided to terminate the hire.

In the meantime, Professor Audrey Macklin, who had chaired the search committee, resigned as Faculty Chair of the International Human Rights Programme. Three faculty members who were not directly involved in the search also resigned from the Programme's advisory committee. They had failed to obtain a response from the Dean to their questions for further information about the interference by a judge and a clarification about the cancellation of the appointment.

News of what happened became public after the Dean announced cancellation of the search, and many observers suspected that the Dean terminated the hire due to pressure from Justice Spiro. In response to these concerns, you commissioned former Justice Thomas Cromwell of the Supreme Court of Canada to review the matter.

The Cromwell Report on its surface seems to exonerate the former Dean from any wrongdoing in connection with the termination of the hiring process for the Director of the IHRP and chooses to accept the former Dean's assertations that it was complications related to her immigration status that forced his hand, not pressure from Justice Spiro. The University immediately released a letter claiming vindication. We believe, however, that the claim that the Cromwell Report vindicates the former Dean and the University is not borne out by a review of the evidence actually revealed in the Report. Indeed, the Cromwell Report, despite its conclusions, raises more questions than it answers.

We offer here a sample of our concerns with the Report that we shared with the current Dean of the Faculty of Law.

2. Because of Mr. Cromwell's self-imposed limitations, his conclusions are not entitled to deference

Mr. Cromwell states repeatedly that he would not resolve disputed facts or judge credibility. Therefore, the only permissible conclusion that can be drawn from the Report is that the Dean *repeatedly declared* that immigration issues were the sole reason for terminating the hiring process for the IHRP. Any further inference as to whether the former Dean's declarations of his motives for action, or whether any particular statements of fact made by him were true or sincerely believed (mistakenly or not), contradicts Mr. Cromwell's starting premise. Mr. Cromwell, throughout the Report, simply treated as true whatever the Dean says he sincerely believed to be true, instead of seriously considering what was most likely true or reasonably believed in light of all available evidence. Since we already knew that the Dean claimed he was uninfluenced by anything other than the technicalities of meeting immigration requirements by a given deadline, Mr. Cromwell's decision to credit the former Dean's statements – without systematically addressing the contrary evidence assembled in the Report – adds nothing of value to the former Dean's own statements.

Far from establishing that there was *no basis* for concern that donor interference was *a factor* in the Dean's reasoning, the information Mr. Cromwell assembled from different sources, provides additional reasons why reasonable persons could conclude that donor interference was at least *a factor*, even the *predominant factor*, in the former Dean's decisionmaking. Indeed, even the Dean is described as having admitted to the Provost, in a conversation over the Labour Day weekend, that Justice Spiro's communication was a "complicating factor" in the decision. The Provost, in turn, recognized the delicate situation the Dean found himself in as a result of Justice Spiro's intervention, noting the Dean was now in a "'no-win' situation in that whatever decision he made there would be people who would be very upset (p. 37)"

The Dean's account of his decisionmaking relied on several hotly contested points that Justice Cromwell declined to resolve. An example is that the Dean claimed an honest belief that September 30 was a hard starting date (for an offer made to an international candidate on August 11), and since Dr. Azarova could not start work by September 30, her offer had to be terminated. But the Dean contradicts himself by also telling Mr.

Cromwell that he hoped to find a Canadian candidate to arrive by September 30 or sometime in the fall. Justice Cromwell put it this way:

"Fourth, [Dean Iacobucci] understood that even as of September 8, there was a good chance of finding a qualified Canadian to fill the position before the end of the month or at least in the fall (p. 42)."

Yet, no one contested the opinion of the University's immigration lawyer that Dr. Azarova could obtain her work permit and arrive sometime in the fall. Cromwell ignores this contradiction. In addition, others with direct involvement in the IHRP denied that September 30 held any significance for the programme or the hiring process. The candidate denied being told of a hard September 30 starting date. Nor did the Dean mention this deadline when he spoke to Professor Audrey Macklin on September 6 about the problems he saw in hiring Dr. Azarova. Similarly, the Dean claimed that he thought it was feasible to find a qualified Canadian candidate (based on CVs of rejected candidates), but others who interviewed those candidates told him there were none. Indeed, it would have been improper to have selected Dr. Azarova if there had been qualified Canadians in the pool in the first place.

Accepting the truth of the Dean's account turns on both the consistency and the plausibility of his explanation. This is the standard approach in all legal contexts involving differing accounts of an event. We respectfully believe the former Dean's claim that September 30 was a hard deadline is implausible for several reasons: The only source in support of the Dean's belief that September 30 was a hard deadline is the Dean himself and the Assistant Dean's oral account to Mr. Cromwell. Nothing in the emails exchanged among the participants in the IHRP search independently corroborates the Dean and the Assistant Dean's claim that September 30 was a hard deadline. All things being equal, written evidence, created in real time and before any controversy has erupted, ought to be given more weight than exculpatory testimony taking place several months after the events took place and after controvery has erupted.

Moreover, and given that the second choice of the committee was also a non-Canadian, who would also need a work permit, it is inconceivable that an offer would be first made on August 11, conditioned on a hard requirement of starting work by September 30, when it would be even more difficult for the back up candidate to secure a work permit by the same date should negotiations fail with the first choice. This gives us the choice of either believing that the former Dean authorized an international search with parameters designed to produce a failed search, or that the claim of a hard September 30 deadline is unfounded. Because we find it inconceivable that the former Dean would approve parameters for an international search that would be bound to fail, we must conclude that the former Dean and Assistant Dean are mistaken in their belief that September 30 was a hard deadline.

Finally, even if one accepts that the former Dean sincerely believed that Justice Spiro's intervention in the process did not influence his decision, such a belief does not prove that he was not actually influenced. As we know, people may not be fully conscious of the factors and motivations animating their decisions. In the absence of other reasonable ground for cancellation of the appointment, the potential impact of unconscious influence becomes a more plausible explanation.

We therefore see no good reason for us, or any objective third party, to accept Mr. Cromwell's conclusions regarding the motivations of the Dean's conduct in terminating abruptly the hiring process for Dr. Azarova. Our skepticism is especially warranted in light of the extensive external effort to derail her hire, and the abject failure of University officials to protect the integrity of the hiring process. The institutional failures of the University and the Faculty of Law are further described below.

3. The Cromwell Report inexplicably minimizes interference in a confidential hiring process

Although the report emphasizes that external influence in the hiring process is inappropriate, and that no external persons ought to have known about the candidate selected, the Report whitewashes the coordinated efforts of third parties to undermine the IHRP appointment process, Justice Spiro's willingness to further this effort, and its successful aftermath. It is shocking that Mr. Cromwell minimizes, and in the end, even exonerates such interference and gives the greenlight for similar interventions in the future.

The Cromwell Report confirms that CIJA, an organization for which Justice Spiro had served as a director, expressly sought to interfere in the hiring of Dr. Azarova because her academic work was critical of Israel. It is equally incontrovertible that within 48 hours CIJA got exactly what it wanted. The Cromwell Report confirms that upon hearing from Justice Spiro that some members of the Jewish community (including donors like him) would object to hiring Dr. Azarova, three senior University personnel, one working in the University's President's Office, another in the Faculty of Law's Advancement Office, and the Assistant Dean of the Faculty of Law, cooperated fully with him. Not only did they fail to rebuff Justice Spiro's attempt to interfere in what was supposed to be a confidential hiring process, but they unhesitatingly aided and abetted his intervention by communicating his concerns to the former Dean. They even assured Justice Spiro that he would be kept informed — and he was kept informed, despite the claim that the Assistant Vice President of Development was told to "back off". Justice Spiro even offered his ongoing assistance in providing further information to tar the candidate.

It takes a remarkable degree of naivete – or wilful blindness – in the face of these uncontested facts to conclude that Justice Spiro did not attempt to interfere in the hiring process but was merely sharing his views to encourage "due diligence." But *even if this were true*, such sharing of views would amount to a gross interference in a confidential job search and is indisputable evidence of egregious violations of University hiring procedures.

These newly uncovered facts raise more questions and concerns than were apparent at the outset of this controversy in September 2020, questions that remain unanswered. Why, for example, did senior University and law school administrators pass on Justice Spiro's concerns if they understood that such interference was completely unacceptable, as the University and the law school claim to be the case? Why did the Assistant Dean provide confidential information to advancement staff, knowing it would be shared with Justice Spiro? Why did she ask the advancement staff to "brief" the Dean about Justice Spiro's reservations (p. 33)? Why would Justice Cromwell approve a carveout to confidentiality protections in hiring decisions that would authorize politically

interested third-parties such as CIJA to interfere in hiring decisions on alleged grounds of a canditate's "fitness"?

4. Confidentiality and privacy cannot be used as a shield against accountability

Mr. Cromwell explains the Dean's refusal to engage with colleagues, including members of the faculty advisory committee to the programme, as resulting from "legal counsel advice to the Dean in e-mail exchanges". Remarkably, the Cromwell Report fails to explain the legal grounds for these claims. A Dean, the University's administration, or an independent reviewer should not be able to avoid accountability by merely invoking conclusory claims of confidentiality and privacy without explaining their basis in law.

First, faculty advisory committee members have been previously involved in the discussions around the hiring of a new director for the IHRP. Privacy law does not prohibit such discussions and University policy explicitly authorizes disclosing such information "to a University officer, employee, agent or consultant, who needs the personal information for the performance of his/her duties, if the disclosure is necessary and proper in the discharge of the University's functions."[1] Clearly, sharing information about the hiring process with members of the advisory committee of the IHRP and with members of Faculty Council is necessary and proper for the discharge of their functions. Even in the absence of that policy, privacy law includes a public interest justification and other principles that justify sharing information with members of the faculty advisory committee, and even all faculty members.

While the law can impose a duty not to disclose confidential information provided by a third party, the law does not prohibit anyone from disclosing their own information. It is not clear whose confidentiality legal counsel considered and on what grounds, and whether they considered relevant public interest exceptions. The invocation of unspecified and conclusory confidentiality grounds hampered efforts of colleagues to press concerns affecting the credibility of the IHRP in national and international circles.

In any event, the most directly interested party, Dr. Azarova, would have given permission for sharing of relevant personal information. Who else's interests were at stake? Those of employees who funnelled donor concerns to the Dean's office? The alumnus who intervened? Surely, the public had a right to know that CIJA and Justice Spiro acted in concert to subvert a confidential hiring process and that senior university personnel, instead of resisting such efforts, aided and abetted them.

A bare invocation of privacy is insufficient to excuse refusal to discuss in a timely fashion matters of shared concern and potentially involving the public interest.

5. The Report misunderstands the proper scope of confidentiality requirements

Members of the IHRP search and advisory committees resigned out of basic respect for the integrity of their professional role as faculty members and commitment to the values of the institution. Faced with impending serious damage to the integrity and credibility of the IHRP programme, they could not fulfill that role without basic information that the former Dean refused to provide them.

Rather than recognizing the validity of these concerns, Mr. Cromwell proposes that members of search committees henceforth sign strict confidentiality agreements.

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[1] University of Toronto, FIPPA - General and Administrative Access and Privacy Practices (2011).

This would preclude sharing any information to anyone outside a search committee, even when there are reasonable public interest grounds to do so. Mr. Cromwell not only accepts everything the former Dean says as true, he apparently thinks we should always be *required* to accept Decanal and University administrators' assertions as true. His recommendation, if adopted, would further undermine the ability of faculty to ask questions, stifle whistleblowing, reduce public accountability, and suppress the disclosure of controversies related to internal wrongdoing. Implementing this recommendation will not only be against the public interest, but will also render hollow the University Statement on Freedom of Speech, which includes the right to criticize the University. How can one criticize the University without disclosing the details that underly the criticism?

The message from the Cromwell Report and from the University's endorsement of the Cromwell Report is that, when faced with evidence of possible outside pressure or interference in a hiring process, we must trust that individuals in positions of power in our institution always act appropriately. Smoke can never mean fire at the University of Toronto. Nor does it seem independently important to avoid the *appearance* of financial or political interference in decision making.

Only if we had reason to believe that the University is immune from the sort of human and institutional failings that good rules and processes are designed to prevent could we accept Mr. Cromwell's report. That is too much to ask of citizens in a democracy, to say nothing of law professors who on a daily basis teach their students to be sceptical of the claims of the powerful.

We are therefore profoundly disappointed to see the University embrace Justice Cromwell's recommendations without qualification. The complicity of the University and the Law Faculty's Advancement Offices in aiding and abetting the breach of the hiring process for the director of the IHRP, and the ineffectual institutional response to that breach, conclusively proves that much work remains to be done at the central administration level as well as at the Faculty of Law to insulate sensitive academic processes from external interfence and to assure collegial governance.

6. Reconciliation?

The Cromwell Report concludes by urging all sides in this divisive controversy to reconcile based on shared values of the University. We are also keen on using Mr. Cromwell's findings as a basis for reconciliation, but we start from his undisputed findings, not his controversial conclusions.

First, it is uncontested that third parties, opposed to Dr. Azarova's appointment to head up the IHRP because of her work on Israel's conduct in the Occupied Palestinian Territories, acted in concert with Justice Spiro to prevent her from being hired.

Second, it is undisputed that Justice Spiro used his position as a privileged donor to raise concerns about Dr. Azarova that were unrelated to her qualifications for her position in order to discourage the Faculty of Law from hiring her.

Third, it is undisputed that senior University personnel working in the University's and Faculty of Law's Advancement Offices, instead of rebuffing this attempt to interfere, cooperated fully with Justice Spiro, faithfully and without hesitatition communicating his concerns to the former Dean. It is undisputed that senior

administrators in the Law Faculty obliged by furnishing confidential information to be relayed back to Justice Spiro.

Fourth, it is undisputed that the former Dean "abruptly terminated" what Mr. Cromwell called "advanced negotiations" with Dr. Azarova after being informed of Justice Spiro's concerns.

Fifth, it is also undisputed that Dr. Azarova was the best qualified candidate for the position of Director of the IHRP.

It is virtually indisputable that, regardless of the former Dean's motives, Justice Spiro's improper intervention was the "but for" cause for the termination of negotiations with Dr. Azarova. Accordingly, and based on the undisputed facts of the Cromwell Report, the easiest path forward to effect reconciliation – if that is indeed the desire of the University and the Faculty of Law – is simply to offer Dr. Azarova the position of Director of the IHRP. The only way to rectify the undeniable harm done to her is to offer her this position promptly. Only by offering her the position will the University and the Faculty of Law unequivocally repudiate the still lingering suspicion, which the uncontested facts of the Cromwell Report have only served to strengthen, that the failure to give Dr. Azarova the directorship of the IHRP was a result of improper donor influence.

We are of course prepared to meet with you to discuss respectfully our concerns with the Cromwell Report and our recommendations on how to move forward in the best interests of the University and the Faculty of Law.

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