

An Analysis of the Cromwell Report

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I INTRODUCTION

In August 2020, Dr. Valentina Azarova was in advanced negotiations with the University of Toronto about becoming Director of the International Human Rights Program (IHRP). On September 4, the Dean of Law was advised that a prominent alumnus objected to the hire based on Dr. Azarova's scholarship on Israel/Palestine. On September 6, the Dean decided to terminate the hire. Former Supreme Court Justice Thomas Cromwell was asked, inter alia, to review these events to provide "a comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy." Cromwell says "the inference of improper influence is not one that I would draw."

President Gertler has praised the report, for its "full review of all the information" and for providing the "analysis needed to clarify and settle key aspects of this controversial matter." He implicitly validates Cromwell's characterization of an undenied external intervention into a confidential hiring process as a friendly 'heads up' about likely controversy, not as a warning about what like-minded people and donors would do if Dr. Azarova were hired.

In commissioning this review, U of T declined the 'best practice' proposal by several Law faculty to appoint a panel representing different constituencies with a neutral chair. The Terms of Reference were set by the University, and Cromwell decided on his own process without explanation or consultation.

Cromwell was asked *what the basis was for* the decision to discontinue negotiations with Dr. Azarova. He chose to adopt this constraint on his inquiry: it "is not one that is suitable for making of findings of credibility... My task has been to construct a comprehensive factual narrative, not to resolve points on which memories differ. *I will accordingly limit myself to setting out the facts about which there can be no serious dispute* and putting them in the full context of unfolding events." (p. 46) However, key facts in the Dean's explanation of his decision are disputed. If Cromwell had avoided relying on any of these disputed factual claims in crafting his narrative, he would not have been unable to say much at all. One cannot decide what reasons or motives were probably operating without deciding whether factual claims relied on are probably true. Instead, at each point of material disagreement he proceeds as though the Dean's account is true.

At least four claims that Cromwell treats as true are, in fact, disputed (these are analyzed in more detail below):

- that the Dean acknowledged the donor's intervention to Selection Committee 1 at the outset, but described it as 'irrelevant' rather than as 'an issue that it was unnecessary to get to',
- that the starting date was September 30, 2020 rather than 'before the January 2021 term',
- that the independent contractor arrangement necessary to permit Dr. Azarova to start by September 30 was not feasible, and
- that there were qualified Canadian candidates.

In fact, Cromwell slides silently from declining to assess credibility to simply accepting the Dean's own account, however contested or implausible. Cromwell's analysis is essentially this:

- The Dean and the Assistant Dean recount a version of the facts that is mostly consistent with the Dean's insistence that he acted for reasons unrelated to a donor's intervention.
- Cromwell presumes that the Dean honestly believed he acted for reasons unrelated to a donor's intervention, despite evidence challenging or undermining his claim.
- Cromwell concludes that he would not infer improper influence.

The Dean's *sincere subjective belief* that he was not influenced is equated to the *objective absence* of actual influence. This method of 'finding facts' bears no relation to fact-finding in any legal or scholarly setting; it does not produce a meaningful, reliable, or authoritative factual narrative.

More than an inquiry into sincerity is needed to determine what actually happened, especially when there are conflicting stories, and particularly when the ultimate question is motives for action. The inability to recognize or acknowledge to oneself (much less others) that one acted for improper motives is familiar. A sincerely held falsehood does not by dint of its sincerity become true. A person's assertion about what was in their mind is only one piece of evidence, even with respect to sincerity. According to Cromwell, a finding of improper influence requires no less than that the Dean consciously understood himself to be influenced by the external objections, and *deliberately* concocted pretextual reasons for terminating the hire (p. 52).

This defies legal principle and common sense. Credibility is a function of both consistency and plausibility. A story full of contradictions is probably not true, but a perfectly consistent story may still be untrue. A story that requires us to believe a claim that doesn't make sense, or seems farfetched calls into question its veracity, even though we may believe the speaker sincere.

Cromwell only considered consistency (and even then, ignored a critical contradiction); he did not probe the plausibility of pivotal claims. This approach is flawed. In Labour Law and Discrimination Law it has long been understood that the ability to tell a consistent story does not, by itself, entitle one to be believed. If an employer denies firing someone because of their race, it does not conclusively settle the issue that the employer previously complained about the employee's tardiness and boasted about being 'the least racist person in the company'.

Further, a report about one's own motives is insufficient proof. It is not simply that people may deliberately manufacture a legitimate explanation in order to disguise other factors. The issue is that our own motivations may be opaque to us, especially when one has an incentive not to see how one might be influenced by an improper factor. Training against unconscious bias is based on this familiar fact of human psychology. Cases in which officials are improperly influenced are often cases where people lack self-awareness rather than conscious pandering to external pressure. People may actually be influenced even when they sincerely think they are not.

Yet not only does Cromwell base his narrative on what the Dean believed his own motives to be, he even chastises those who doubted the Dean for giving inadequate weight to the Dean's self-report. (p. 47) He should, instead, have asked whether it was likely that Dean Iacobucci was actually influenced by outside pressure irrespective of his avowed beliefs. Although Cromwell did not have the benefit of a full fact-finding process, there is enough information in the record to have actually addressed the issue set out by the terms of reference – what was the basis for the decision to discontinue Dr. Azarova's candidacy.

Cromwell's failure to explore the points of disagreement in the record with a critical eye left him with nothing except the Dean's earnest assertion that his motives were legitimate. A closer look

reveals that the Dean unreasonably, implausibly and peremptorily converted ordinary administrative matters into insurmountable obstacles.

II CHRONOLOGY

1. The Selection Committee consisted of the Assistant Dean (a non-academic administrator who reports to the Dean) the Chair of the Faculty Advisory Committee to the IHRP (a faculty member who is the Chair in Human Rights Law) and a Research Associate (lawyer/human rights defender) working at the IHRP since 2019. The IHRP had been without a permanent Director since September 19; the Interim Director departed in August 2020.
2. Dr. Azarova was the “strong, unanimous and enthusiastic first choice” of the Selection Committee arising out of an international search and confidential hiring process that received 140 applications. References, including from Jewish and Israeli law professors were “glowing”. (p. 5, 6, 11).
3. August 11: provisional offer made to Dr. Azarova, conditional on obtaining a work permit in time to teach in January 2021; favourable reply by Dr. Azarova on August 17.
4. August 17: Assistant Dean briefed the Dean about the candidate, the offer and the need to arrange work permit.
5. August 19: Immigration Lawyer advises that work permit will take 2-3 months to obtain; it would likely be received sometime in November or December. Immigration Lawyer alerts Assistant Dean to the possibility that Dr. Azarova may be able to begin working remotely as an independent contractor until work permit issued.
6. In early Sept, parties figuring out logistics of hiring Dr. Azarova, and addressing immigration hurdles. Assistant Dean scheduled to meet with Dean on Tuesday, Sept 8 where “she planned to brief the Dean and seek his approval to make the offer”. (p35) Until this point, Dean was not involved. (p. 35)
7. Fri Sept 4 AM: Assistant Dean working on completing work permit application, contacts immigration lawyer to advise that “they would be moving forward to provide [Dr. Azarova] with an independent contractor agreement ‘next week’”. (p28-29)
8. Fri Sept 4, ‘around the same time’(p. 30): Assistant Vice President of Alumni Relations has a “normal ‘reach out’ to donors” call with Justice Spiro (the Donor) . Summary of call filed in Spiro’s “Major Gifts plan”. (p31) During the call, Spiro says that he had just been asked by Centre for Israel & Jewish Affairs to inquire about appointment of Dr. Azarova; CIJA sent Spiro a memo detailing objections to Dr. Azarova, (p31), describing her as a “major anti-Israeli activist” about to be appointed to a “major law school position”. The memo then suggests:

If someone could quietly find out the current status and confirm [Dr. Azarova’s] pending appointment, that would be very helpful. The hope is that through quiet discussions, top university officials will realize that this appointment is academically unworthy and that a public protest campaign will do major damage to the university, including fundraising” (p. 32)
9. Sept. 4, PM: Assistant VP undertakes to find out current status of confidential hiring process, contacts law school Assistant Dean of Alumni and Development, who obtains information

from Assistant Dean confirming identity of candidate and status of hire; Assistant Dean, Alumni and Development briefs the Dean on Justice Spiro's objection to Dr. Azarova; Dean instructs Assistant Dean, Alumni and Advancement to advise [AVP] that he would not engage with Advancement further. Later that day, AVP contacts Justice Spiro to say "...understand from [the Dean] that no decisions have been made in the matter discussed. I've communicated the points discussed and he will connect w [sic] me next week. Look forward to closing the loop w [sic] you"; Justice Spiro replied "If you need any further information on this matter, please don't hesitate to let me know."¹ (p. 35)

10. Sept. 4: Dean asks Assistant Dean for Dr. Azarova's CV, says he knew nothing about her until then, despite August 17 briefing; reviews dossier, status of work permit, independent contractor agreement, request to be absent from campus for part of summer
11. Sept. 5: Dean speaks with Provost and VP Human Resources and Equity; raises donor concern as "complicating factor", but says it is irrelevant, expresses concern about legality of independent contractor agreement
12. September 6: Dean informs Selection Committee Member 1 of his intention to terminate hire and appoint Canadian from list of applicants rejected by Selection Committee
13. Sept. 9: Dean emails formal decision to terminate hire
14. Sept. 9: Assistant VP follows up with inquiry about status of hiring decision so she can update Donor; suggests distributing Dr. Azarova's dossier to other alumni to canvass their opinions about candidate; Dean declines further contact with Assistant VP (p. 43)

III CROMWELL'S ANALYSIS

A. Donor Intervention

1. *'Sharing Views'?*

In the interest of privacy, Cromwell uses the labels "The Organization" and "the Alumnus" to refer to the Center for Israel Jewish Affairs (CIJA), and Justice David Spiro of the Federal Tax Court and former director of CIJA. Anonymizing these actors precludes a contextual understanding of the narrative and enables Cromwell to downplay the significance of the CIJA/Spiro intervention. This lends plausibility to the Dean's claim that it played no role in his thinking.

Justice Spiro's conversations were with an "Assistant Vice President," (AVP) likely Chantelle Courtney, an official within the Division of University Advancement. Previously, she was Assistant Dean, Advancement at the Faculty of Law² and would have reported to Dean Iacobucci. Courtney was familiar with the Faculty of Law's fundraising culture as set by Dean Iacobucci. She has also been a practicing lawyer.

Justice Spiro is a major donor to the university, as are members of his extended family. In this capacity, he received a pre-arranged stewardship call from the AVP. He is a former director of the Centre for Israel and Jewish Affairs (CIJA), a pro-Israel advocacy organization that focuses

¹ Cromwell notes that the AVP did not speak to the Dean directly (p. 35).

² Ms. Courtney's LinkedIn account indicated she served in this role from February 2014-March 2019. Edward Iacobucci's became Dean on January 1, 2015.

particularly on campus issues. CIJA provided Justice Spiro with a memo about Dr. Azarova, asking him to raise the subject of Dr. Azarova's hire.

Cromwell recounts the conversation between Justice Spiro and the AVP as follows:

The AVP ... remembered the Alumnus indicated that as a judge he could not become involved but that he wanted to alert the University that if the appointment were made it would be controversial and could cause reputational harm to the University and particularly to the Faculty of Law. He wanted to ensure that the University did the necessary due diligence. It is unclear to me what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred to [Dr. Azarova's] published work on Israel. He did not provide the AVP with the source of his information or go into any further details about the nature of the concern. (pp. 32-33)

We also learn that CIJA officials prompted Spiro to make the inquiry:

The Alumnus advised me...he learned of the potential appointment of the [Dr. Azarova] as Director of the IHRP. This information was relayed to him by a staff member of an Organization [CIJA] of which the Alumnus had been a director until his appointment to the bench. The staff member asked if the Alumnus could contact the Dean about the potential appointment. The Alumnus declined to approach the Dean being of the view that it would be inappropriate for him to do so. The staff member also asked whether the Alumnus could find out whether the appointment had been made or was still under consideration and provided him with a memorandum that a professor from a university outside Canada had sent to the Organization" (pp. 31-32)

CIJA hoped that "through quiet discussions, top university officials will realize that this appointment is academically unworthy, and that a public protest campaign will do major damage to the university, including in fundraising." (p. 32).

In Cromwell's view this conversation did not reflect Justice Spiro's own objection or amount to an attempt to block the appointment. Instead, Cromwell concludes "that the Alumnus simply shared the view that the appointment would be controversial with the Jewish community and cause reputational harm to the University". (p. 48)

Decontextualizing the exchange obscures its nature. An outside organization (CIJA) attempted to influence a hiring decision at the UofT. The University delivered exactly what CIJA wanted within two days. Understanding the nexus of money, power, and influence involved casts doubt on Cromwell's finding that Justice Spiro's aim in the conversation with the AVP was purely informative, and not an attempt to trade on his extensive relationship to the Faculty in the service of an external organization's point of view. In 2005 David Noble raised a similar alarm:

This is not about Jews. It is not about race, ethnicity or religion. It is about power. The new Israel lobby in Canada — the Canadian Council for Israel and Jewish Advocacy (CIJA) — has enormous power, derived from abundant resources, corporate connections, political associations, elaborate and able organization and a cadre of dedicated activists. Since its inception several years ago, this hard-line lobby has used its power, first, to gain political hegemony and impose ideological conformity on the matter of Israel within a heretofore diverse Jewish community, and second, to influence government decisions and shape public opinion regarding Israel — ostensibly in the name of all Canadian Jewry. From the outset, a

primary focus of this lobby's attentions has been the university campus, alleged centre of anti-Israel sentiment, conveniently construed as anti-Semitism.³

Recall that Justice Spiro was once director of CIJA, "the advocacy agent of Jewish Federations across Canada."⁴ CIJA was founded in late 2003 under the auspices of the United Israel Appeal at the instigation of what was then called the Israel Emergency Cabinet, "a nationwide group of committed volunteers [acting] in response to emerging world trends and the continuing crisis in Israel."⁵ CIJA's creation coincided with an increase in public criticism of Israel's ongoing occupation of Palestinian territories under then Prime Minister Ariel Sharon. The founders of CIJA include prominent members of the Canadian Jewish community, including Larry Tanenbaum (Toronto Maple Leafs and Toronto Raptors). Justice Spiro is part of the extended Tanenbaum family, who are generous donors to University of Toronto. Although CIJA claims to speak on behalf of Canadian Jewry, this claim has been publicly rejected by members of the Jewish community.⁶ Yet Justice Spiro represented CIJA's concern as that of "the Jewish community."

CIJA's original founders include several people who have been generous donors to the University of Toronto and to the Faculty of Law. It is not hard to understand that University officials would be reluctant to alienate them.

Moreover, recall that the AVP involved in this discussion had been the Assistant Dean of Advancement at the Faculty of Law under then Dean Edward Iacobucci. She would have known or been closely engaged with donors like Justice Spiro. Indeed, the AVP was concerned to reassure him that his concerns were communicated, making a series of promises to get back to him with information. The Assistant Dean fully cooperated in this by confirming Dr. Azarova's identity and providing information about the stage of the process.

Justice Spiro's intervention elicited an immediate and anxious response from the AVP, the Assistant Dean of Alumni and Advancement (Law), the Assistant Dean and the Dean himself. The AVP was eager to share confidential hiring information with Justice Spiro, to keep him apprised about the progress and outcome of a confidential hiring process, to attempt to gather more information for him, and to even suggest that the Law Faculty canvass other alumni donors about their views regarding Dr. Azarova.

Given all this, should we believe that it is more likely that

Justice Spiro meant and was understood to be merely passing along information,

Or

Justice Spiro attempted to use longstanding philanthropic ties to exert influence and his intervention was so understood and acted upon?

2. The Dean Denies that he was Influenced

³ David Noble, "The New Israel Lobby," *Canadian Dimension*, 1 November 2005, online: <https://canadiandimension.com/articles/view/the-new-israel-lobby-in-action-david-noble>

⁴ <https://www.cija.ca/about-us/>

⁵ "Our new advocacy organization. What it means for Canadian Jewry," *Canadian Jewish News*, 6 October 2003, 20.

⁶ Andrew Cohen, "Unelected, Unaccountable, Untroubled: CIJA Says What it Wants, Then Says it Speaks For Us," *Canadian Jewish Record*, 16 December 2020, online: <https://canadianjewishrecord.ca/2020/12/16/unelected-unaccountable-untroubled-cija-says-what-it-wants-then-says-it-speaks-for-us/> (accessed April 6, 2021).

The Dean insisted that Justice Spiro's objections did not influence him; he said he directed Advancement to 'back off.' These claims must be assessed in light of his actions: upon being briefed about Justice Spiro's objections, he immediately examined Dr. Azarova's file, over the course of the Labour Day weekend, for the first time in the entire process. He did this only because he has been warned that she was controversial. He was scheduled to meet the Assistant Dean on September 8 to review and approve an offer, yet he urgently began to review the file on Sept. 4.

The Dean raised Justice Spiro's objections in each meeting with senior university administration over the weekend and described it as a 'complicating factor' before turning to other concerns. He did not explain, nor did Cromwell ask, why it was necessary to brief senior administrators at all about routine immigration or timing issues that were allegedly his sole motives for action.

By Sunday, he informed Selection Committee Member 1 of his decision to terminate the offer due to irresolvable problems that he identified between Friday and Sunday: that he objected to the independent contractor arrangement and that Dr. Azarova's request to spend part of the summer away from her office at the law school offended him. The Selection Committee Member suggested solutions to the immigration issue (which included waiting for the work permit to be issued) and suggested rejecting the proposed summer absence if it was unacceptable.

According to Selection Committee Member 1, she then raised her concern that another issue was in play, namely the subject matter of Dr. Azarova's scholarship. She assured the Dean that she and the Assistant Dean had done their "due diligence" and vetted Dr. Azarova thoroughly. Her references (including Israeli and Jewish law professors) confirmed that her scholarship on Israel/Palestine was of high quality and well within the range of mainstream international legal scholarship on the law of occupation. The Dean responded that the subject matter of her work "was an issue, but given the other two reasons, I don't need to get to the third issue". According to the Dean, he was the one who raised the 'controversial' nature of her work. He told Cromwell he had said it was irrelevant (pp. 39-40).

This is the first point on which conflicting accounts emerged. Cromwell deals with it by saying "Whether this was an issue that did not need to be considered (according to Selection Committee Membership 1's recollection) or was irrelevant (according to the Dean's recollection), the exchange provides no support for an inference that the inquiry played a role in the decision-making." (p. 50)

This is mysterious. If the Dean did not raise the issue (though he did with senior university officials), but responded to Selection Committee Member 1 by saying Dr. Azarova's scholarship was 'an issue' this might pull in the direction of thinking he was influenced. Raising it himself, only to say it is irrelevant, may pull in the opposite direction. Based on his own ground rules, Cromwell should have presented the conflict and said nothing more. Denying that the conflict supports an inference against the Dean treats the Dean's version as the default.

In fact, the Dean's behaviour overall does indeed support an inference of influence. If he truly believed outside interference was inappropriate, we might have expected him to let the Assistant Dean carry on her work on the administrative details. Instead, he quickly concluded that insurmountable hurdles unrelated to an important donor's objections nevertheless mandated the result sought by the donor: terminate the hire. This might well make one think that the Dean was influenced by these objections even if he did not believe himself to be.

Cromwell also does not consider how we should expect university officials to proceed when an important donor had attempted to influence a confidential hiring process, especially given their professed abhorrence of such interference. As far as we are told, the Dean did not ask that the central administration bring its advancement arm under control. We are not told how the Dean reacted when told that his Assistant Dean conveyed confidential information to the Assistant Dean of Alumni and Advancement (Law) to be passed on to the AVP and then to Justice Spiro. We don't know if anyone told the AVP to stop encouraging Justice Spiro. These omissions contribute to an inference that the Dean was affected by considerations other than the administrative feasibility of the appointment.

Given all this, should we believe that

Despite his view that outside interference is improper, the Dean interrupted the process at the last minute, urgently discussed the matter with senior university officers, brushed off solutions to the problems he had found, and concluded they were insurmountable

Or

Ordinary details were turned into major obstacles, consciously or unconsciously, to allow the administration to avoid the consequences threatened by Justice Spiro?

B. Stated Reasons for Terminating Hire

If we are unpersuaded thus far that the Dean was not influenced by Justice Spiro's concerns, we need a convincing account that there were other reasons for the decision to put suspicion to rest. The Dean and Assistant Dean provide the following explanation for terminating the offer:

1. The offer was conditional on Dr. Azarova's availability to start working on September 30.
2. Because the independent contract arrangement was illegal, Dr. Azarova could not begin working by the required date.
3. Other qualified Canadian candidates were available who could begin by September 30

Here, too, there are important disputes about the facts which should have blocked Cromwell's conclusion. Furthermore, many parts of the record Cromwell amassed raise serious credibility questions about the Dean's explanation.

1. Hard Starting Date of September 30

Dr. Azarova was approached on August 11, 2020. Having decided to interview international candidates, the Selection Committee knew that it was very unlikely that a new Director could begin in time for the start of the fall term on September 8. (p. 51) For this reason, no IHRP course was planned in the fall term, nor would students be supervised. Two Research Associates (one of whom was Selection Committee Member 2), would continue to perform the work of the IHRP in the fall.

According to Selection Committee Members 1 and 2 the consensus in the Committee was that the Director had to be in place to teach in the January 2021 term. A work permit would be secured so that she could enter sometime in the fall and prior to January. The Immigration Lawyer retained by the University affirmed that Dr. Azarova could obtain a work permit in two to three months, and therefore arrive sometime in the fall in time to begin teaching in January.

The Assistant Dean (Committee Member 3) told Cromwell she believed that Dr. Azarova had to start work by September 30. She claimed that the other Members were "very clear" (p. 22) that the new Director had to begin in September, that there was a "clear requirement and firm

understanding” to this effect.⁷ Selection Committee Member 1 denied that a September start date was raised with her at any time (p. 23). No correspondence with the Selection Committee supports the Assistant Dean’s claim. The Assistant Dean ultimately admitted to uncertainty about whether the other Committee members shared her understanding that September 30 was a deadline. (p. 22)

The Assistant Dean also claimed, but Dr. Azarova denied, that a September 30 start date was a condition of the offer discussed on August 11. As Dr. Azarova explained to Cromwell, when she started work depended not on her own willingness, but on immigration matters out of her control.

Cromwell simply states that he “cannot assess whose recollections are more accurate” (p. 23). Again, in the face of a direct dispute over the facts, Cromwell, according to his own rules, should have refused to decide what the Assistant Dean and the Dean believed. Either there was a consensus in the Committee or there wasn’t. If the former, it is implausible to think the Assistant Dean could have misinformed the Dean. Ignoring the dispute, Cromwell accepts the Assistant Dean’s professed belief as proof of its truth.

But the plausibility of the Assistant Dean’s account is open to question. In its support, Cromwell notes that she raised the September date as early as August 11 internally with other university staff. The Assistant Dean may have genuinely wanted to have Dr. Azarova start on September 30 and may have pressed her administrative colleague (the HR Consultant) act expeditiously to that end and proposed it to the immigration lawyer. That does not prove she imposed the September 30 date on the candidate. In fact, she had no authority to unilaterally set an earlier starting date than the Committee agreed to, much less a date barely six weeks after Dr. Azarova was approached.

On August 11, the Assistant Dean had not yet spoken to the Immigration Lawyer retained by the University for his expertise in this area. It would make no sense to settle on September 30 before consulting him about work permit timelines. Although she told him on August 14 that “we need the candidate to start the position no later than September 30”, he informed her on August 19, that Dr. Azarova could likely obtain a work permit within 2-3 months, which would enable her to start in January. He suggested exploring an independent contractor arrangement to bridge the gap – an option that the Assistant Dean did not know about until then.

The offer was provisionally accepted on August 17, before the idea of working remotely as an independent contractor was introduced. If contract negotiations begin with an international candidate (or even to a domestic one) on August 11, expecting them to start by September 30 would be completely unrealistic.

Furthermore, September 30 had no practical significance. As the Assistant Dean knew, there were no program activities scheduled requiring the Director’s presence at the end of September.

There are, therefore, reasons to doubt the Assistant Dean’s account. However, Cromwell accepts that the Assistant Dean told the Dean that having someone in post by the end of September was key, and finds that the Dean so believed and inquired no further. Whether this is plausible turns on whether it is likely that the Associate Dean would have told him that September 30 was crucial.

More tellingly, the Dean’s account of what he believed is contradicted by his own evidence and conduct. In his call with Selection Committee Member 1, he did not mention a September 30 start

⁷ The evidence offered in support of this is an August 20 email from the Assistant Dean about how the independent contractor arrangement ‘needs’ “to bridge the time from now until a work-permit is issued”. (p. 28). ‘Need’ refers to the function of the independent contractor arrangement – it would last until a work permit was in hand.

date. In subsequently deciding to look for a Canadian candidate, the Dean he said he believed there was a good chance of finding someone to fill the position “before the end of [September] *or at least in the fall*” (p. 42, 54). But it was clear that Dr. Azarova would herself obtain a work permit and arrive “*in the fall*”. Either the Assistant Dean did not, in fact, tell the Dean that there was a hard starting date of September 30, or the Dean did not, in fact, accept that limitation. Cromwell ignores this direct contradiction from the Dean himself that September 30 was a hard deadline.

The only justification offered (by the Dean) for the September 30 start date was that it would reduce the Assistant Dean’s workload. Yet the Dean discussed with no one the costs and benefits of letting Dr. Azarova start a month or two later, when she obtained her work permit. Does it make sense that a candidate repeatedly extolled for her excellence by the Selection Committee (including the Assistant Dean) should be passed up to save the Assistant Dean some work over a one- or two-month period? The Assistant Dean’s comment on September 1 that “[Dr. Azarova] will bring much more to the table than we have ever had before at the IHRP,” (p. 26) suggests not.

Given all this, should we believe that:

The Assistant Dean, alone, adopted a wholly unrealistic September 30 deadline unnecessary to the program, without consultation with the Committee or counsel, that she told the Dean this date was crucial, that he believed it was necessary to lighten her workload even though he was prepared to have a Canadian candidate start later,

Or

A reasonable desire to have the Director start as soon as possible turned into a firm September 30 deadline, consciously or unconsciously, to allow the administration to avoid the consequences threatened by Justice Spiro?

2. Independent Contractor

The Dean claimed that Dr. Azarova could only meet the requirement to start by September 30 if she could start as an independent contractor while outside the country. This option arose after the provisional offer was made, even after it was favourably received on August 17. It was intended to bridge the time until receipt of a work permit. Another factual dispute arises over this issue.

The Assistant Dean consulted German lawyers about this option because Dr. Azarova was then resident in Germany. She described having received their advice on September 3 and 4 that the proposed agreement was “illegal” under German and possibly Canadian law. (p.30) She recalled that the Dean said on September 5 that “there was “no way” he would approve entering into an “*illegal*” independent contractor agreement.” (p. 36) Although Cromwell never directly attributes this characterization to the Dean, he treats it as part of his reasons for terminating the hiring process and thereafter repeatedly refers to the option as “illegal”. (p. 47, 48) Yet, Selection Committee Member 1 recalls that the Dean referred, on September 6, to the proposed arrangement as “improper” or “unethical”. (p. 38) ‘Illegality’ was not mentioned when the Assistant Dean spoke to Selection Committee Member 1 on September 6.

Thus, Cromwell takes the Dean to have thought the independent contractor arrangement was illegal. On the other hand, Selection Committee Member 1 was not informed of this serious impediment. In fact, she thought the independent contractor option was unnecessary, a mere bonus that would allow Dr. Azarova to make some start in the position even before she was able to acquire a work permit. She was also unaware of an alleged September 30 starting date because neither the Dean nor the Assistant Dean ever raised it.

This lack of transparency might itself incline one to doubt the reliability of the Assistant Dean's and Dean's account. Instead of confronting these differences, Cromwell consistently simply echoes the "illegality" language, adopting the view he attributes to the Dean.

However, was it plausible for the Dean to have treated the arrangement as *illegal*? An independent contractor is distinguished in law from an employee. The German lawyers consulted signaled their concern that the proposed relationship could be viewed as employment under German law, though they said the risk of challenge to the contract was "low." And if this low risk materialized, the University would be required to remit social security payments to the German government for the short length of the contract or face penalties (p. 28). When the Assistant Dean received this advice on September 3, she set up a call with the University employment lawyer to discuss the matter on September 8 (the following Tuesday). We can infer that she did not yet think this problem was insurmountable.

The University employment lawyers told Cromwell that having recently "consulted with external counsel on these types of issues at some length," (p. 18) the legal risks were considered acceptable by the University especially if the independent contractor does not teach during this period. (Dr. Azarova would not have been teaching in the fall.) The University had most recently relied on these agreements for foreign nationals hired abroad who could not enter due to COVID restrictions. The VP Human Resources and Equity confirmed that the university was comfortable using independent contractor agreements. (p. 38) Working out such arrangements is a routine task for an international research university such as the University of Toronto.

The Dean did not consider consulting the University employment lawyer as scheduled on Tuesday September 8 before deciding for himself that the contract was 'illegal'. The Dean's legal training makes this behaviour more, not less, curious. He should understand the value of expert legal advice. Importantly, the Assistant Dean drafted the contract sent to the German lawyers without the benefit of input of University employment lawyers. Alternative language might solve the problem had the employment lawyers been asked. The Dean knew the University had assumed the risks involved with such arrangements in similar circumstances. There is no support for the Dean's assertion that the contract was indeed "illegal" and/or that the flagged issues were irresolvable. The employment lawyer does not affirm the Dean's view, and states only that "risk tolerance was a decision for the Dean," (p. 55) taking the usual lawyer's stance: such decisions lie with the client, not counsel.

Given all this, should we believe that:

An experienced administrator honestly trying to solve a problem would have hastily decided an arrangement was "illegal" without advice from expert counsel and without alerting Selection Committee Member 1 to his stark characterization,

Or

A small legal risk turned into an insurmountable obstacle, consciously or unconsciously, to allow the administration to avoid the consequences threatened by Justice Spiro?

3. Qualified Canadian Candidates

Selection Committee Members 1 and 2 stated that it was the Committee's unanimous view that if neither the first nor second choice (both foreign nationals) were available, the search would have failed. The Committee's process was consensus-based. Yet the Assistant Dean stated that she did

not recall any consensus on this point. (p. 11) This can only mean she thought there was no consensus, but it makes no sense to leave such an important matter hanging.

This is the fourth factual dispute: two members of the Selection Committee claimed there were no qualified Canadian candidates; the Assistant Dean says she thought there were and told the Dean so. However, Selection Committee Member 1 told the Dean on September 6 that there were no eligible, qualified Canadians. It is possible that the Dean took the Assistant Dean's view over that of the Chair of the Selection Committee, but there is good reason to doubt that the Assistant Dean gave this advice to the Dean or that he believed it.

Cromwell notes that one of two pathways to a work permit required that there be no qualified Canadians. The Associate Dean understood that both routes would be pursued, in the alternative, relying on whichever could be approved most quickly. One pathway requires an employer to show that there are no qualified Canadians. Cromwell observes that

That state of facts is consistent with the recollection of both Selection Committee Members 1 and 2 that if neither of the two non-Canadian applicants who had received second interviews could be hired, then no one else was appropriate for the position. (p. 41).

It seems incredible that the Assistant Dean would nonetheless advise the Dean that there were qualified Canadians when she was engaged in immigration applications, one of which required the University to certify otherwise.

The HR staff person, who the Assistant Dean worked closely with, ultimately affirmed the weakness of the Canadian candidates when the Dean took over the search process (p. 44). It is hard to believe that her judgment was unknown or discounted.

Instead of addressing these weaknesses in the account, Cromwell claims "...the key point as I see it is that the Dean's source of information was the Assistant Dean and her advice to him was that there were qualified Canadian candidates, a view with which he concurred after having looked at some of the resumes of Canadian applicants." (p. 54)

Given all this, should we believe that:

Despite the Assistant Dean's active efforts to apply for a work permit, she advised the Dean that there were qualified Canadians and he concurred the basis of reading CVs of candidates whom Selection Committee Member 1 told him had already been interviewed and rejected

Or

The hope of finding a Canadian turned into a reason, consciously or unconsciously, that would allow the administration to avoid the consequences threatened by Justice Spiro?

IV CONCLUSION

At each step in the narrative Cromwell constructs the consistency and plausibility of material claims may be questioned.

All in all, we should ask which is the most plausible story:

- a) **that a minor technical difficulty resulting at worst in a minor administrative inconvenience was seen by the Dean as so insurmountable as to derail this process,**

or

- b) that he was sufficiently concerned about the controversy threatened by the donor that he exaggerated, even unconsciously,**
- i. the administrative problems remaining to be resolved, and**
 - ii. the feasibility of avoiding them altogether by appointing a Canadian**

The answer is clear. Experienced administrators expect problems, and their job is to try to solve them. The Dean put no effort into assessing the severity of the problem or finding solutions. A very plausible explanation is that treating the technical difficulties as insurmountable would obviate a serious political difficulty. It is reasonable to conclude that the Dean was influenced by the donor's threat of repercussions if Dr. Azarova were hired.

In saying repeatedly that he "would not draw" an inference that the Dean had taken improper considerations into account, Cromwell merely registers his inclination to simply take the Dean's word about his motives. He reverse-engineers the evidence to this end. President Gertler portrays this as 'clarifying and settling key aspects of this controversial matter.' At best, the narrative only tells the reader what they must believe in order to conclude that the Dean was not influenced by improper factors. Yet, by minimizing the significance of the Justice Spiro's intervention, and by refusing to resolve critical and disputed factual claims, Cromwell gives the reader no reason to accept this account as true or even probable. And as the foregoing indicates, there is ample reason not to accept it.