

**Independent Review of the Search Process for the  
Directorship of the International Human Rights Program at  
the University of Toronto, Faculty of Law**

The Honourable Thomas A. Cromwell C.C.

March 15, 2021

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## FOREWORD

I have conducted my independent review of the search process for the directorship of the International Human Rights Program (“IHRP” or “**the Program**”) at the University of Toronto Faculty of Law. The Review addresses the three main subjects specified in the Terms of Reference attached to your December 7, 2020 statement:

1. A comprehensive factual narrative of events pertaining to the search committee process and the basis for the decision to discontinue the candidacy of the search committee’s Preferred Candidate;
2. Whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process; and
3. Any pertinent guidance or advice for your consideration relating to any matters arising out of the processes that were involved in this search.

There are three preliminary matters that I bring to your attention before turning to the substance of my Review: privacy concerns, the existence of other processes, and topics that I need not address in detail.

### **A. PRIVACY CONCERNS**

You have indicated your intention to make my Review public, subject to “the privacy of individual candidates.”<sup>1</sup> I am also aware that the University’s obligations to protect personal privacy may place other constraints on the release of information in this Review. In an effort to avoid the need for redaction and to ease the public release of the Review, I have referred to all individuals and groups by descriptors including, for the sake of consistency, those whose involvement is already in the public domain. I am providing you alone with an appendix that contains a concordance of the names corresponding to the descriptors that I have used (see Appendix “A”).

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<sup>1</sup> Terms of Reference, December 7, 2020.

## B. OTHER PROCESSES

My Review occurs in a complicated and sensitive context as a result of other ongoing processes arising out of the same events. There are complaints pending before the Canadian Judicial Council about the conduct of a federally appointed judge “relating to the judge’s alleged interference in the appointment of a Director of the International Human Rights Program at the University of Toronto.”<sup>2</sup> The Council of the Canadian Association of University Teachers has passed a motion to censure the University as a result of the Association’s understanding of the facts.<sup>3</sup> Within the University, grievances have been filed by the University of Toronto Faculty Association alleging various breaches of the *Memorandum of Agreement between the Faculty Association and the University*, the University’s *Statement of Institutional Purpose*, the *Statement on Freedom of Speech* as well as any other

relevant policy, procedure, practice, or law.

I have done my best to address fully the points referred to me in the Terms of Reference without commenting unnecessarily on matters that are central to the resolution of these other processes.

## C. MATTERS NOT ADDRESSED IN DETAIL

I must refer to two matters in order to clarify the scope of my Review.

First, my Terms of Reference do not ask me to opine on the qualifications of the Preferred Candidate. That individual was the strong, unanimous and enthusiastic first choice of the selection committee<sup>4</sup> after an international search resulting in over 140 applications and after two interviews and conversations with references. Moreover, no decision-maker in the University has at any point to my knowledge justified or attempted to support the decision not to proceed with

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<sup>2</sup> “Canadian Judicial Council constitutes a Review Panel in the matter involving the Honourable D.E. Spiro” Canadian Judicial Council Press Release (January 11, 2021), online: <https://cjc-ccm.ca/en/news/canadian-judicial-council-constitutes-review-panel-matter-involving-honourable-de-spiro>

<sup>3</sup> “CAUT Council passes motion of censure against the University of Toronto”, CAUT News Release

(November 20, 2021), online:

<https://www.caut.ca/latest/2020/11/caut-council-passes-motion-censure-against-university-toronto>

<sup>4</sup> The material that I have refers to this group by various names, including the “hiring committee”, the “search committee” and the “hiring panel”. I have used the term “selection committee” with the understanding that the final “selection” of the person to be hired was to be made by the Dean.

the Preferred Candidate's recruitment on the basis of the candidate's qualifications. In short, the selection committee found that she was highly qualified and the University has never suggested otherwise. I have therefore not engaged with unsolicited submissions made to me about the Preferred Candidate's suitability for the position. To do so would be outside my Terms of Reference. It would also be inappropriate and presumptuous given the deliberations of the selection committee and the University's position.

Second, I do not need to explore the precise contours of academic freedom in the context of recruitment for this position. Whatever those contours may be, the University clearly and unequivocally is of the view that terminating a candidacy of a qualified candidate for this position on the basis of

outside pressure would be improper. The University's public statements have been that the candidacy was discontinued on the basis that "legal constraints on cross-border hiring meant that a candidate could not meet the Faculty's timing needs" and that "assertions that outside influence affected the outcome of [the] search are untrue and objectionable. University leadership and [the Dean] would never allow outside pressure to be a factor in a hiring decision."<sup>5</sup> Moreover, as I will discuss in detail, having reviewed all of the relevant facts as fully as I can, I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate. The inference that such influence played a role in that decision is the basis of the concern about academic freedom but, as I see it, that inference is not justified.

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<sup>5</sup> Dean's letter to faculty September 17, 2020.

## PART I: FACTUAL NARRATIVE AND BASIS FOR DECISION OF SEARCH COMMITTEE PROCESS

### A. FACTUAL NARRATIVE

#### 1. Introduction to the Program and the Position

The search process for the Director of the IHRP in 2020 began when the advertisement was posted during the last week of April and concluded when the Dean decided in early September to terminate the recruitment of the selection committee's Preferred Candidate. I am not aware of any concerns about how this search unfolded up until the morning of September 4, 2020. However, to provide the "comprehensive factual narrative" as required by my Terms of Reference, I must set out a thorough review of the recruitment process.

#### *(a.) The International Human Rights Program*

The IHRP was established in 1987 with summer internships and student volunteer working groups and expanded in 2002 to include what I understand to be Canada's first international human rights clinic.<sup>6</sup> The Program's mission is to

advance the field of international human rights law through advocacy, knowledge exchange, experiential learning and capacity-building. It has an expansive understanding of "advocacy", reaching beyond traditional client representation and litigation to include, for example, drafting fact-finding reports and making submissions to international bodies. A "central and unique goal" of the Program is to facilitate experiential learning opportunities by exposing students to the theory and practice of international human rights law emphasizing intellectual rigour and professionalism.<sup>7</sup>

What one person described to me as the "flagship" element of the IHRP is the clinical course that consists of a seminar and clinical projects. The seminar meets once per week for three hours and is structured around skill-building sessions, case-studies, thematic analysis and weekly discussion of projects. The clinical projects involve, for example, students formulating theories and

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<sup>6</sup> University of Toronto, Faculty of Law, International Human Rights Program, *Advancing the Field of International Human Rights Law: Strategic Plan 2011 updated 2014*, online:

[https://ihrp.law.utoronto.ca/utfl\\_file/count/HOME/IHRP%20Strategic%20Plan%202014%20update.pdf](https://ihrp.law.utoronto.ca/utfl_file/count/HOME/IHRP%20Strategic%20Plan%202014%20update.pdf).

<sup>7</sup> *Ibid.* p 7.

advocacy strategies, conducting legal research, legal drafting, carrying out fact-finding field work and creating public legal education materials.<sup>8</sup>

It was clear from the submissions to me and from my interviews that the IHRP has committed alumni and alumnae who place tremendous value on their personal experience in the Program and who view those experiences as both the highlight of their time in law school and a cause of transformational thinking about their role in the legal profession. They have in the past expressed concern about what they perceive to be inadequate support of the Program by the Faculty of Law and they have raised with me their deep concerns about the Program's future in light of the controversy that led to my Review.

#### *(b.) The Director's Position*

The Director, working under the direction of the Assistant Dean, provides clinical, educational and administrative leadership and support to the IHRP.<sup>9</sup> The position is in the "Professional/Managerial" Group at the "PM 4" level and falls within the category of "administrative staff" as defined in the

*University of Toronto Act, 1971*. The position has been treated consistently as not falling within the positions addressed by the *Memorandum of Understanding between the Governing Council of the University of Toronto and the University of Toronto Faculty Association*. Selection Committee Member 1 and the Assistant Dean advised me, and I have no reason to doubt, that it was made clear to the Preferred Candidate in the recruiting process that this is neither an academic position nor a pathway to one.

A number of people to whom I spoke questioned whether the Professional/Managerial classification is apt for this position given the importance of the clinical training component and their perceived need to have stronger protections for the person occupying the position. The Director of a human rights program is "in the business" of tackling controversial issues and taking positions that may well be objectionable to some. I received several eloquent explanations about why the Director and the Program need protection from critics who do not like its positions on various issues. I will

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<sup>8</sup> "Excellence in Clinical Legal Education", IHRP (undated), online: <https://ihrp.law.utoronto.ca/page/overview-0>

<sup>9</sup> Job Posting (Job #2001027).



return to this issue in the final section of my review.

Two of the requirements for the Director's position are an LLB or JD degree and a licence to practice law in Ontario with consideration to be given to applicants licensed to practice in other jurisdictions. From the perspective of the University's human resources specialists, the requirement to be a practising lawyer is an essential aspect of maintaining the job classification and relaxing that requirement would risk lowering the job classification to a lower salary level. In previous searches, the University required that candidates be licensed to practice in Ontario but, with considerable effort, the Faculty of Law received permission to modify this requirement to permit consideration of candidates licenced to practice in other jurisdictions.<sup>10</sup>

Although not specified in the job posting, timing was an important aspect of the Director search. The IHRP had not had a permanent Director since the previous Director left for another position in September of 2019. The recruiting

process at that time failed when the candidate decided in December 2019 not to accept the position. The IHRP operated under an Interim Director for the 2019 – 2020 academic year, but that individual had committed to another position beginning in the summer of 2020. The hope was to have someone in place for the opening of the fall semester in early September of 2020 but, as the search progressed, it was recognized that this might not be possible.<sup>11</sup>

As I will discuss later, there are different recollections among the members of the selection committee as to the importance of having the Director in place in September. It was clear to everyone, however, that the new Director needed to be physically present in Toronto and ready to teach the clinical course at the beginning of January 2021.

## 2. The Search Process

### *(a.) The Process Up to the Selection of the Preferred Candidate*

I have not been able to locate any written policy on how the selection committee is to be established, its composition, the procedures to be followed or terms of reference. There is some lack of clarity

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<sup>10</sup> Email July 15, 2020 number 68; Email July 16 number 70.

<sup>11</sup> Email July 6 2020 number 39.

about the decision-making process. The HR consultant assigned to the process thought that the Assistant Dean, to whom the Director reports, had the final say. However, the members of the selection committee were of the view that their function was advisory and that the Dean was the ultimate decision-maker to whom they would provide their advice.

As far as I can tell, there was no discussion of the confidentiality of the search process among the selection committee and the HR Consultant did not address it expressly. However, all understood that the search process was to remain confidential. I was told that in other recruitment processes, such as for a dean, members of the search committee must sign confidentiality agreements.

The position was not posted until the third week of April with a closing date of June 17, 2020. The posting was delayed to obtain an exemption from a University-wide hiring freeze and to loosen the requirement that the Director be licenced to practice law in Ontario. The posting was widely distributed, including

internationally, and resulted in 146 applications.<sup>12</sup>

The HR Consultant and the Assistant Dean reviewed all applications and produced a “long list” of over 20 candidates that was provided to the selection committee on July 6, 2020. The selection committee members were asked to send their selection of the top 10 candidates with no more than three or four candidates outside Canada who would require work permits.<sup>13</sup> The committee agreed on their “short list” of eight, two of whom would require work permits, on July 9.<sup>14</sup> However, one of the short-listed candidates advised the HR Consultant that he could not begin work until “January/February 2021.” Committee members agreed that this was a “problem”<sup>15</sup> or a “major issue”<sup>16</sup> and the person was dropped from the short list.

Interviews started the second week of July 2020. Following the first six interviews on July 14 and 15, the Assistant Dean proposed that the committee broaden the pool. Three additional names were added to the first

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<sup>12</sup> Email June 25, 2020 number 28.

<sup>13</sup> Email July 6, 2020 number 39.

<sup>14</sup> Email July 9, 2020 number 49.

<sup>15</sup> Email July 11, 2020 number 51.

<sup>16</sup> Email July 11, 2020 number 52.

round interview list, including the person who became the Preferred Candidate.<sup>17</sup>

Following the first round of interviews, the committee selected three candidates, including the Preferred Candidate, for second interviews that occurred on July 30. Two of the three individuals were international candidates while the third was a Canadian permanent resident working abroad. Each candidate was asked when they would be available to start and advised that the University term was to begin on September 7. The Canadian permanent resident was available at the end of the August; the timing of the others' availability depended on immigration approval.

Following the interviews, the Preferred Candidate was identified and, with the candidate's permission, references were checked. They were glowing.

All members of the selection committee recall that the Preferred Candidate was their unanimous first choice. However, recollections differ on the selection committee's views on the remaining two candidates. Selection committee Members 1 and 2 recall that in addition to

the Preferred Candidate, one other candidate of the three finalists was identified as a viable option but that if neither of those two were available, there would be a failed search. The Assistant Dean recalls that the committee identified two candidates from the second round as the leaders but does not recall any consensus that if neither were available there would be a failed search.

On August 4, the Assistant Dean advised the HR Consultant she "would like to move forward to make an offer to the [Preferred Candidate] asap when [the Assistant Dean] return[ed] [from vacation] next week".<sup>18</sup> On August 9, the selection committee members exchanged emails on the status of the process. The Assistant Dean advised that she had a meeting scheduled with the HR Consultant on August 10 "to discuss our offer" to the Preferred Candidate<sup>19</sup> and scheduled a Zoom meeting with the Preferred Candidate for August 11 "to discuss the IHRP Director position."<sup>20</sup>

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<sup>17</sup> Email July 15, 2020 number 65.

<sup>18</sup> Email August 4, 2020 number 100.

<sup>19</sup> Email August 9, 2020 number 102.

<sup>20</sup> Email August 10, 2020 number 103.

*(b.)Negotiation with the Preferred Candidate August 11 – September 2, 2020*

On August 11, the Assistant Dean had a meeting with the Preferred Candidate after which she reported to the HR Consultant that she had “just finished a very nice call with [the Preferred Candidate]. She seems very receptive to receiving an offer, but we agreed that the immigration/work permit issue is a very important part of the conversation.”<sup>21</sup> Later that same day the Assistant Dean was in touch with the HR Consultant again looking for some “basic immigration policy information that would apply in this situation.”<sup>22</sup> She noted that the Preferred Candidate “understands that we need her to be able to start the position no later than Sept 30” but that she was not required “to be in Toronto until the first week back in Jan 2021.”<sup>23</sup>

The Preferred Candidate’s recollection of the August 11 meeting was provided in a written chronology that she prepared. We discussed her recollection of the meeting during my interview with her. The chronology reads that she received an offer of employment during this

meeting on August 11. In my interview with her, she indicated that she was told that the Faculty wanted her to be the Director if the terms could be worked out and that the big “if” was immigration and whether it could happen on time.

There has been a good deal said in the public domain about the University withdrawing an accepted offer. As I see it, no offer and acceptance in the strictly legal sense of those words were ever exchanged. It was clear on August 11 that the immigration issues needed to be resolved before there could be any formal offer and, as we shall see, the subsequent communications show that negotiations about the terms of employment continued into early September. However, it was also clear that the University wanted to hire the Preferred Candidate and that she wanted the position. As far as I can tell, this is a situation in which advanced negotiations were abruptly halted, not a situation in which an accepted offer was rescinded.

On August 12, the HR Consultant contacted the Assistant Dean, noting that the in-house immigration specialists at

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<sup>21</sup> Email August 11, 2020 number 106.

<sup>22</sup> Email August 11, 2020 number 106

<sup>23</sup> Email August 11, 2020 number 108.

the University had raised some questions about why a foreign national was being selected rather than a Canadian. She noted that the Preferred Candidate would be “ineligible to work from outside of the country until she obtains a valid work permit.”<sup>24</sup>

On August 14, the Assistant Dean emailed the HR Consultant hoping to discuss the immigration information for the Preferred Candidate and noting that she “had another call with her on Monday [i.e. August 17] at 11 am during which I am hoping we will come to a decision about whether she wants the position and [if] the timing will work.”<sup>25</sup>

Also on August 14, the Assistant Dean was in touch with an immigration lawyer whom the University retained to seek advice regarding the Preferred Candidate’s immigration situation. The Assistant Dean advised the immigration lawyer that they had “... a new candidate to whom we would like to make an offer” noting, however, that she wished to first obtain advice in relation to obtaining a work permit.<sup>26</sup> In that email, the Assistant

Dean told the immigration lawyer that “[w]e need the candidate to start the position no later than September 30, 2020, although we don’t need her to move back to Toronto until the start of January.”<sup>27</sup>

I note that this is the second of several occasions (before any controversy had arisen) that the Assistant Dean stated in writing that the Preferred Candidate would have to start in September or at least before the end of the two to three month period that it would likely take to get a work permit.

The Assistant Dean met with the immigration lawyer (via Zoom) on August 19 and 21 and arranged for the Preferred Candidate to meet with the immigration lawyer directly on August 24<sup>th</sup>.

A call had been scheduled with the Preferred Candidate for Monday, August 17 to discuss her “questions and thoughts”.<sup>28</sup> However, because the Assistant Dean was waiting for additional information regarding the immigration process, she proposed that the meeting be postponed. The Preferred Candidate

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<sup>24</sup> Email August 12, 2020 number 108. I am not sure that this statement is completely correct, but it was the advice received by the Assistant Dean.

<sup>25</sup> Email August 14, 2020 number 114.

<sup>26</sup> Email August 14, 2020 number 130.

<sup>27</sup> Email August 14, 2020 number 130.

<sup>28</sup> Email August 12, 2020 number 113.

agreed, noting that she had “spent much of the weekend thinking about your very exciting offer and discussing it with colleagues (including my referees)” and that she was “very enthusiastic about being able to accept [the] offer” but that she did “have a couple of questions [...] first”.<sup>29</sup>

Around the same time, the outgoing acting Director of the IHRP inquired about the status of the hiring process for transition purposes. She was advised by the Assistant Dean that the Preferred Candidate had been informed that the outgoing acting Director would like to meet her before August 21, and that the Assistant Dean would be in touch when they were further into the contract offer discussions.<sup>30</sup>

On August 17th, the Assistant Dean had her regular bi-weekly meeting with the Dean. Her memory of the meeting, which is consistent with the Dean’s less detailed recollection, is that she told the Dean that: the selection committee had unanimously selected a Preferred Candidate; the Preferred Candidate had impressive legal clinic administrative experience, lived in Europe, had a PhD,

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<sup>29</sup> Email August 12, 2020 number 121.

and had worked as an instructor at European law schools; and the selection committee was working to determine whether the candidate could obtain a work permit by the September deadline to meet the Faculty’s timing requirements.

The Dean expressed concern that the candidate’s background as an academic may not be a good fit for the administrative IHRP Director role, and asked whether there was a risk that she was interested in the role because she hoped that it would turn into an academic one. The Assistant Dean responded that the search committee had made it very clear to the Preferred Candidate that the role was administrative and not a pathway to an academic appointment.

She and the Dean agreed to speak again when she had more information about the timing of the work permit. Neither the Dean nor the Assistant Dean recall any discussion during this meeting about the details of the potential immigration routes that were being explored.

Email exchanges between the Assistant Dean and the HR Consultant around the

<sup>30</sup> Email August 12, 2020 number 109.

same time provide some insight as to why the Assistant Dean felt it was realistic to have an international hire in the position with a work permit by September. The previous failed IHRP search had selected a U.S citizen who had the benefit of favourable immigration rules that exist with the United States. Leading up to the Assistant Dean's meeting with the immigration lawyer, the HR Consultant wrote to the Assistant Dean asking "can you please confirm who it was that advised you that a Labour Market Assessment would not be required for this role? I recall we had this discussion earlier this year but immigration [referring to internal immigration resources] is now advising that this may be a problem." The Assistant Dean indicated in response that she had received that advice from the University Retained Immigration Lawyer (presumably during the last search). On the morning of August 17, 2020 the Assistant Dean indicated to the HR Consultant that "I think one of the main issues here is that last time we were governed by NAFTA provisions, which are very favourable. This time, no."<sup>31</sup>

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<sup>31</sup> Emails August 14 to August 17, 2020 number 129.

The initial email to the University Retained Immigration lawyer contained basic information about the Preferred Candidate including the position for which she was being hired, her citizenship, her current country of residence (Germany) and that she was married to a Canadian citizen. The email referred to her plan to make a permanent move back to Canada, the family connections in Canada and the University's timing requirements which was for the candidate to start no later than September 30 (although she would not have to be in Toronto until the start of January). The immigration lawyer agreed to meet with the Assistant Dean on August 19<sup>th</sup> and asked for a copy of the Preferred Candidate's CV. He pointed out in the email that the IHRP candidate from the prior search was an American and they had been considering a work permit as a "NAFTA Professional." He indicated that this would not be a consideration for the current Preferred Candidate.<sup>32</sup>

On August 19<sup>th</sup>, the Assistant Dean met with the immigration lawyer who advised that it was reasonable to expect that the

<sup>32</sup> Emails August 17, 2020 number 130.

Preferred Candidate could have a work permit in two to three months after applying. The Assistant Dean recalls being dismayed that it would take that long and the immigration lawyer mentioned the possibility that the Preferred Candidate might be able to begin working as an independent contractor to “bridge the gap” between September and December.<sup>33</sup> He suggested that the University could “check that out”, but of course his advice was limited to immigration matters and did not extend to employment law.<sup>34</sup>

In my conversation with the immigration lawyer, he recalled that the University had apparently been under the impression that a non-Canadian could not be employed by a Canadian employer without a work permit while living outside of the country. That understanding is consistent with the email from the HR Consultant to the Assistant Dean on August 12 which I referred to earlier.<sup>35</sup> The immigration lawyer told me that, from an immigration law perspective, this is not correct: there is no immigration issue about a non-

Canadian working for a Canadian employer provided that the non-Canadian is not working in Canada. There are, however, other difficulties from an employment law perspective in having an employee working outside Canada who is not eligible to work in Canada. My understanding is that those difficulties make such employment impractical for the University and that it is something that it would not do. These employment law issues were not matters on which the immigration lawyer gave advice.

With respect to the work permit for the Preferred Candidate, the immigration lawyer suggested two paths forward, each of which could make possible the hiring of a non-Canadian citizen or permanent resident.

One of the pathways involved a Labour Market Impact Assessment (“**LMIA**”) which required the University to advertise the position for 30 days and demonstrate that no Canadian or Permanent Resident suitable for the position had applied. The concern about this route was the timing

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<sup>33</sup> Chronology Item 132.

<sup>34</sup> Interview with Immigration Lawyer February 8, 2021.

<sup>35</sup> Email August 8, 2020 number 108.



of the advertising for the position, as I will discuss below.

The other pathway was a “substantial benefit” application with the objective of establishing that hiring the Preferred Candidate would bring a substantial benefit to Canada. For that route, it was not necessary to show that there was no suitable Canadian applicant.

I should add a word about the immigration implications of the fact that the Preferred Candidate’s spouse is a Canadian citizen. In some of the public discussion of this controversy, it has been suggested that this fact provided a more rapid path to a work permit. The information that I have received from the immigration lawyer is that this is not the case. While marriage to a Canadian eases the path to entry to Canada and to permanent residency and may positively affect the outcome of an LMIA application (because the non-Canadian is expected to become a Canadian), it has no impact on the time that it will likely take to obtain a work permit. Based on what I have been told by immigration counsel, speculation that the work permit could have been obtained more quickly

because the Preferred Candidate is the foreign spouse of a Canadian is erroneous.

After receiving the advice from the immigration lawyer, the Assistant Dean was in touch with the HR Consultant to advise (on August 19) that she now had “a clear sense of what needs to happen.”<sup>36</sup>

The Assistant Dean and the Preferred Candidate met on August 19 and 21. Their recollections of the conversations differ in some respects. Before I set out their recollections, I will place those conversations in the context of what else was happening at around the same time.

The Assistant Dean contacted University Employment Lawyer 1 and requested a meeting to discuss the “specific details and explore what might be possible.”<sup>37</sup> She advised that “after a very extensive search, we discovered that the strongest candidates are not Canadian citizens” and that “[w]e need [the Preferred Candidate] to start working before she will be realistically able to obtain a Canadian work permit. She will be working remotely ... until December

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<sup>36</sup> Email August 19, 2020 number 132.

<sup>37</sup> Email August 20, 2020 number 135.

when she will relocate to Toronto ...”. In a subsequent email, the Assistant Dean indicated that the timing for hiring this individual was “as soon as possible”.<sup>38</sup> University Employment Lawyer 1 advised that he and his colleague (University Employment Lawyer 2) had “consulted with external counsel on these types of issues at some length recently.”<sup>39</sup> A meeting with University Employment Lawyer 2 was scheduled for August 21. I note that here again the Assistant Dean indicated in writing before any controversy arose that the Preferred Candidate needed to start work before the time frame within which she could likely obtain a work permit.

The Assistant Dean updated the other members of the selection committee by email on August 20. She wrote: “Just letting you know that I am continuing to push this forward. I have spoken with [the Preferred Candidate] 3x since we decided to go with her. She seems to get more excited each time I speak to her. I spoke to an immigration lawyer yesterday and I will be speaking to the UT employment lawyers tomorrow. In a nutshell, we are hoping to work out a way

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<sup>38</sup> Email August 20, 2020 number 135.

<sup>39</sup> Email August 20, 2020 number 134.

for [her] to start work for us before she has a Cdn [sic] work permit in hand. The immigration lawyer is estimating that she could have one in 2 – 3 months. We need to bridge the time between now and then. [The Preferred Candidate] is willing to start working remotely immediately. She plans to move to Canada by December”<sup>40</sup>(emphasis added).

In response to this email, Selection Committee Member 1 said “wonderful” and Selection Committee Member 2 said “[o]ptimistic that we can find some work arounds to bridge the time gap.”<sup>41</sup> I note that the Assistant Dean referred, in writing and before any controversy had arisen, to the “need” to bridge the time gap between “now” and two to three months from now when the Preferred Candidate was likely to have a permit to work in Canada.

The Assistant Dean met with University Employment Lawyer 2 (and others) on August 21. The lawyer’s notes of the meeting indicate that the immigration lawyer’s advice was that the Preferred Candidate would not have a work permit in hand “any sooner than 3 months from

<sup>40</sup> Email August 20, 2020 number 136.

<sup>41</sup> Email August 20, 2020 number 137.

now” and that it was indicated (presumably by the Assistant Dean) that “we cannot wait that long.” The Preferred Candidate could start remotely immediately but that she understands that she has to be in Toronto not later than the end of the calendar year because she is required to teach in person in January. The plan agreed to at this meeting was that they would: explore an independent contractor route, find out if the Preferred Candidate was interested in that option, work with HR on an offer, and then the Assistant Dean and HR would prepare an independent contractor agreement to be reviewed by German counsel (since the Preferred Candidate was a resident of Germany). The concept was to provide an offer of employment that would be revocable if she was not able to get to Toronto by December 31 and an independent contractor agreement that could be terminated on 2 weeks’ notice.

As University Employment Lawyer 2 explained to me, the University had recently received general external advice about options for a Canadian employer to legally employ someone who would need to work in a foreign jurisdiction. She explained that the employment of an

employee working in a foreign jurisdiction would be governed by the laws of that jurisdiction including tax, payroll and workplace laws. Accordingly, the options for a legal entity such as the University that does not have a business presence in the foreign country would be to register a business in that country in compliance with applicable local laws, or contract with a registered business or professional employer organization in that country that could hire the employee on their payroll in compliance with applicable local laws and arrange a secondment to the Canadian employer. She advised that these are not practical options for the University.

University Employment Lawyer 2 told me about circumstances in which the University had entered into independent contractor arrangements with a small number of foreign nationals who had been offered and accepted faculty positions. These were generally people who were eligible to receive Canadian work permits upon arrival in Canada but who could not come to Canada as a result of COVID-19 related travel restrictions. In those cases, until they were able to come to Canada to work as faculty members, they contracted to

provide limited services such as independent research, which is part of the duties of faculty members but is not subject to the direction or control of the University. These arrangements were viewed as having an acceptably low legal risk to the University. In a few cases, the duties also included some remote teaching. As I understand it, these were considered to carry somewhat more legal risk and it was up to the relevant academic administrator in consultation with counsel to decide whether to accept the risk in each particular case. University Employment Lawyer 2 said that she was consulted on the general structure of these arrangements and advised on template engagement letters.

On the same day, August 21, the Assistant Dean wrote to the Preferred Candidate indicating that she “had great meetings with employment and immigration lawyers and am keen to update you.”<sup>42</sup> The Assistant Dean also emailed the immigration lawyer to provide him with an update and request his availability in order to put him in contact with the Preferred Candidate. She advised that “it looks like we can

proceed with hiring our candidate as an independent contractor effective immediately and simply roll her into a permanent position as soon as she receives her Canadian work permit.” She added “... this scenario will work for the law school only if she receives her permit before Dec 31 2020 (she is required to be onsite to teach a course starting Jan 4 2020).”<sup>43</sup> She indicated that she had spoken with the Preferred Candidate that day and that “we both agreed that getting greater certainty about the immigration/work permit timeframe will be necessary before we can determine whether our strategy is realistic.”<sup>44</sup> She proposed that the immigration lawyer speak directly to the Preferred Candidate and he scheduled that meeting for August 24 (discussed below).

In his email to the Assistant Dean confirming that he would meet with the Preferred Candidate directly, the immigration lawyer provided some high level information about the LMIA and the significant benefit routes. In response to this, the Assistant Dean replied, in part “As we discussed, our strong preference

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<sup>42</sup> Email August 21, 2020 number 142.

<sup>43</sup> Email August 21, 2020 number 144.

<sup>44</sup> Email August 21, 2020 number 144.

would be to not go down the LMIA route.”<sup>45</sup>

The Assistant Dean also wrote to update the other members of the selection committee, indicating that she “was continuing to have positive discussions with [the Preferred Candidate] and others. [That she] [s]poke to the UT employment lawyers today and they confirmed that we can hire [the Preferred Candidate] as an independent contractor and roll her into the permanent position when she has her permit in hand. The [Preferred Candidate] is happy with this. The next step is to connect her with the employment [sic – I believe that this should read “immigration”] lawyer directly to make sure the 3 month timeframe that he gave me is in fact realistic in her circumstances.”<sup>46</sup>

The Assistant Dean and the Preferred Candidate met on August 19 and 21. Their recollections of these discussions, particularly in relation to what the Assistant Dean viewed as the critical nature of the September start date, do not coincide.

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<sup>45</sup> Email August 21, 2020 number 153.

The Assistant Dean’s recollection of the meetings with the Preferred Candidate on August 19 and 21 is that she (i.e. the Assistant Dean: (i) reiterated the vital importance of a September start date and that the Preferred Candidate could not have the job if she could not start in September 2020; (ii) relayed the advice from the immigration lawyer that it would take approximately two to three months to get a work permit; (iii) advised that it may be possible to use an independent contractor agreement to bridge the gap between September and December (when she was likely to receive a work permit); and (iv) offered to connect the Preferred Candidate directly with the immigration lawyer to receive advice about obtaining a work permit and making an application for Permanent Residency.

As the Assistant Dean recalls it, the Preferred Candidate advised that she continued to be interested in the position; she was prepared to work with the Assistant Dean to investigate whether she could meet the timing deadline; and that she would consider entering into an independent contractor agreement to

<sup>46</sup> Email August 21, 2020 number 146.

bridge the time between September and December, when she would likely obtain a work permit.

The Assistant Dean noted in her written chronology of events that, in her view, the other two members of the selection committee were “very clear” that it was critical that the new Director be in place in September, that it was a “clear requirement and firm understanding” that she needed to start in September.<sup>47</sup> However, in my interview with the Assistant Dean, she indicated that it was hard for her to say whether the other members of the selection committee knew that September was a hard stop and that they never discussed what would happen if the Preferred Candidate could not start working in September. As the Assistant Dean put it, this was clear in her mind, but she is not sure that the other members “connected those dots.”

The Preferred Candidate’s recollection is that on August 19, she accepted the offer made to her on August 11. She recalls being told in these meetings with the Assistant Dean that it would take approximately three months to obtain her Canadian work permit. In the interim, the

University proposed to hire her as a foreign consultant, starting immediately, so that she could prepare for her role as Director. She would then obtain her work permit on arrival in Canada before her work on campus was set to begin at the beginning of January 2021. The Assistant Dean advised her that this arrangement had received the necessary approvals from the University’s in-house lawyers and Human Resources department. The Preferred Candidate understood that the University viewed it as important to get someone into the job fast and the idea of working remotely as a consultant (i.e. an independent contractor) originated with the University.

The Preferred Candidate told me that she indicated to the Assistant Dean that she was willing to do the required course preparation for her teaching in January without getting paid before January as she had experienced preparing to teach with no extra remuneration in the past. She was aware that there were activities that the University wanted to have happen in the fall and they needed someone to be in the job in the fall. However, she also understood that the

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<sup>47</sup> Interview with Assistant Dean, February 12, 2021.

University had selected an international candidate, knowing the immigration requirements that would be involved. She did not understand that an arrangement to begin work remotely no later than the end of September was a condition of proceeding with the recruitment.

The other members of the selection committee do not seem to have appreciated what, to the Assistant Dean, was the critical nature of the September start date. Selection Committee Member 2 told me that it was not a “major issue” if the new Director could not start in September, although the Member had noted in earlier email correspondence that the fact that the earliest another candidate could start was “January/February 2021” had been a “major issue” at that time.<sup>48</sup> Selection Committee Member 1 told me that there was no moment at which it was said that the recruitment could not proceed because the person could not begin in September.<sup>49</sup> When I asked about the perception that it was “indeed a problem” that another candidate could not start until “January/February 2021,” Selection

Committee Member 1 explained that that timing meant that the person would not be able to teach the clinical course starting in January and that they were optimistic at the early point in the process when this exchange occurred about finding someone who could start sooner.<sup>50</sup>

I cannot assess whose recollections are more accurate. However, it is clear that the Dean’s source of information about this recruitment process was the Assistant Dean and that it was clear in her mind (and consistent with what she had stated in writing before any controversy arose) that it was critically important to get the candidate started working before the end of the two to three month time period that it would likely take to get a work permit.

The immigration lawyer and the Preferred Candidate spoke on August 24. In the meantime, the Assistant Dean wrote to the HR Consultant saying that “it would be great to get a draft employment contract to [the Preferred Candidate] for her review. This would include the top hiring range salary plus language about it

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<sup>48</sup> Email July 11, 2020 number 52.

<sup>49</sup> Interview Selection Committee Member 1 February 10, 2021.

<sup>50</sup> Interview Selection Committee Member 1 February 10, 2021.

being conditional on her being able to work in Canada.”<sup>51</sup>

The HR Consultant requested more details in order to prepare the draft, namely whether they had received confirmation from the immigration lawyer that three months would be sufficient time for the Preferred Candidate to obtain her work permit, and whether the document would be provided as a draft offer for the time being.<sup>52</sup> The Assistant Dean advised that she would work on the independent contractor agreement, that the permanent employment contract would commence on January 4, 2021 and that they should prepare a draft offer for the Preferred Candidate’s consideration “to give her something to base a discussion on.” The HR Consultant suggested that both the employment and the independent contractor agreements be provided to the Preferred Candidate at the same time.<sup>53</sup>

Later that day, the Assistant Dean sent the HR Consultant a copy of the draft independent contractor agreement that the Assistant Dean had prepared, clarifying that it would have to first be sent

to an international law firm to ensure compliance with German law.<sup>54</sup> The HR Consultant recommended some changes to the draft to better reflect an independent contractor relationship, rather than an employment relationship.<sup>55</sup>

On the same day (August 24), the Preferred Candidate provided an email update and summary of her conversation with the immigration lawyer. In my interview with the immigration lawyer, he confirmed that her email was a fair summary of their conversation.

The plan was to submit two different applications simultaneously and as soon as possible in order to obtain a work permit by December. The first would be via the LMIA process based on a market assessment and inability to find a suitable Canadian candidate and the second on the basis that the Preferred Candidate’s employment would make a substantial contribution to Canada. To the extent that the latter option worked, the former could be abandoned. The Preferred Candidate also expressed support for starting the process for the

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<sup>51</sup> Email August 24, 2020 number 160.

<sup>52</sup> Email August 24, 2020 number 166.

<sup>53</sup> Email August 24, 2020 number 166.

<sup>54</sup> Email August 24, 2020 number 168.

<sup>55</sup> Email August 24, 2020 number 169.



application for permanent residency. However, she noted some complexities and likely COVID-related delays in relation to collecting the necessary information and asked whether the University would be willing to contribute to the costs of her lawyer related to this permanent residency application.

The Preferred Candidate concluded that she was “a bit fuzzy on our/my next step(s) aside from those that [the immigration lawyer] will be taking with the university (contingent on [the Assistant Dean’s] approval?).”<sup>56</sup> The Assistant Dean indicated that she would be in touch with the immigration lawyer and the Preferred Candidate regarding concrete next steps.<sup>57</sup>

The draft independent contractor agreement was subsequently shared with the German employment lawyers on August 27.<sup>58</sup> It was not shared with the University employment lawyers before being sent to the German lawyers.

On September 1, the Assistant Dean requested the HR Consultant to provide a summary of the offer that they intended

to make to the Preferred Candidate “in case it makes sense to send [it] to [her] this week.”<sup>59</sup> This timing corresponds with the Preferred Candidate’s recollection that she expected to receive a written offer the week of September 7.<sup>60</sup> The Assistant Dean also spoke to the Preferred Candidate on September 1. During this discussion, the Preferred Candidate raised the possibility of her working from Europe for the summer. In an email the next day (September 2), the Assistant Dean summarized the call for the HR Consultant and provided her views about the path forward. She wrote, in part:<sup>61</sup>

I had a very good call with [the Preferred Candidate] yesterday.

She understands that we require her to be in residence in Toronto for at least 9 months of the year, and definitely during term time ... After a lengthy discussion about the nature that work (will benefit the IHRP and our students), and that we can’t guarantee that amount of time that she will work remotely every year (she understands that), I am feeling much more comfortable with moving ahead with her candidacy...

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<sup>56</sup> Email August 24, 2020 number 170.

<sup>57</sup> Email August 25, 2020 number 171.

<sup>58</sup> Email August 27, 2020 number 186.

<sup>59</sup> Email September 1, 2020 number 194.

<sup>60</sup> Interview with Preferred Candidate February 9, 2021.

<sup>61</sup> Email September 2, 2020 number 200.

I find her to be candid and reasonable in our phone calls. She also comes across as extremely interested in the position. She would like to get started with the independent contractor agreement right away, and will provide everything we need for the work permit routes we discussed.

I understand that this is a bit of a risk, but on balance, one worth taking. She will bring much more to the table than we have ever had before at the IHRP.

Here are the next steps:

- I connect with the international law firm to get the independent contractor agreement back and send to [the Preferred Candidate]
- [The HR Consultant] sends me the point form summary of employment contract terms; I send to [the Preferred Candidate]
- Work with [the immigration lawyer] to initiate work permit routes; [The HR Consultant] and I to discuss how to manage the job posting issue. Ideally, she will be able to start work as soon as we sort out the independent contractor agreement (ideally September 14<sup>th</sup>).

The “job posting issue” referred to in this email relates to the LMIA route to a work permit. There was some lack of clarity about whether the advertising for the position was timely for the purposes of

the LMIA application. If it was not, then the position would have to be reposted for 30 days before the LMIA application could be submitted. It was as a result of this concern that the immigration lawyer had advised proceeding on both the LMIA and the substantial benefit tracks. If the advertising turned out to have been timely, the substantial benefit track (which was viewed as the less likely to succeed of the two) could be abandoned. If, on the other hand, the advertising was timely for the LMIA route, then it might well succeed and the substantial benefit track could be abandoned.

After the meeting with the Preferred Candidate on September 1, the Assistant Dean advised the immigration lawyer that they would be moving forward with the two proposed paths for obtaining a work permit for the Preferred Candidate and that she would get started on the significant benefit letter.<sup>62</sup>

The Assistant Dean also spoke with Selection Committee Member 1 on September 1. Selection Committee Member 1’s recollection of the discussion was that it centred on the Preferred Candidates request to be away for two

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<sup>62</sup> Email September 1, 2020, number197.

months in the summer to return to Europe. Selection Committee Member 1 was not concerned by the request as long as the work of the IHRP was getting done. The Assistant Dean recalls that she also provided an update on work permit and timing issues.

*(c.) September 3 and the morning of September 4*

A number of immigration and employment law developments occurred on September 3 and 4 and the inquiry from the alumnus occurred on September 4. That date was the Friday before the Labour Day long-weekend and a few days before the opening of the Law Faculty fall term in the midst of the COVID-19 pandemic.

On September 3, the Assistant Dean emailed the Preferred Candidate thanking her for their meeting earlier in the week and writing: “[a]s we discussed, I am taking several steps at this end to move things forward including: following up with the international law firm about the independent contractor agreement, drafting a summary of the terms of what would be included in a subsequent

employment contract, and working with [the University-retained immigration lawyer] to start the special contribution and LMIA processes to obtain your work permit. I have been in touch on all of these fronts and am waiting to hear back. I hope to be in touch to update you very soon.”

As of September 3, the intent was to proceed with the LMIA process that involved the University convincing the authorities that there was no qualified Canadian available for the position. This was noted in the Preferred Candidate’s summary of her conversation with the immigration lawyer on August 24 and which was provided to the Assistant Dean that day.

On September 3 at 12:22 pm the German employment lawyers sent the Assistant Dean a marked up copy of the draft independent contractor agreement. The Assistant Dean advised me during her interview that she did not read the document or the covering email until the next day when there was a call with German employment lawyers sometime in the morning after 10 am.<sup>63</sup>

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<sup>63</sup> Email September 3, 2020 number 202.

In the covering email, the German employment lawyers noted that they had “concerns that this relationship is not a true independent contractor relationship.” They added that “the likelihood that the relationship will be challenged either by the governmental authorities or by the individual is likely quite low (especially considering its short length), so the University may be willing to take that risk.”<sup>64</sup>

In the annotations to the draft agreement, the German employment lawyers commented that if the Preferred Candidate were found to be an employee rather than an independent contractor under German law, “[t]his can have rather severe consequences, first and foremost the employer’s duty to pay social security contributions and the risk of criminal charges if this is omitted.”<sup>65</sup>

At 1:11 pm on September 3 the Assistant Dean forwarded the email received from the German employment lawyers to University Employment Lawyer #2. The Assistant Dean noted, in part, that she had “received the attached comments back” and invited University Employment

Lawyer #2 to join a meeting the next day at 10 am.<sup>66</sup>

On September 4, the Assistant Dean emailed University Employment Lawyer #2 again on this issue at just after 6 am asking for a meeting to discuss the matter the week of September 8.<sup>67</sup> University Employment Lawyer #2 was on vacation and not available for a meeting until the next week as indicated by her out of office automatic email reply.

As of the morning of September 4, the University’s employment lawyers had not provided comments on the proposed draft independent contractor agreement which, in accordance with their usual practice, had been referred out to the local (in this case German) employment lawyers.

Around the same time (September 4 around 6 am), the Assistant Dean emailed the HR consultant asking for an update on the status of the IHRP Director employment contract language and indicated that she would “like to send this to [the Preferred Candidate] asap.” She noted that she had the independent

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<sup>64</sup> Email September 3, 2020 number 202.

<sup>65</sup> Annotated draft independent contractor agreement number 203.

<sup>66</sup> Email September 3, 2020 number 203.

<sup>67</sup> Email September 4, 2020 number 205.

contractor agreement and referred to a future meeting to discuss it with University Employment Lawyer 2.<sup>68</sup>

She then sent a follow up email to the University retained immigration lawyer advising that: they would be moving forward to provide the Preferred Candidate with an independent contractor agreement “next week”, that they would like to get started on the work permit routes, and asking how he would like to proceed.<sup>69</sup> A meeting to discuss the matter was subsequently confirmed for Tuesday, September 8.<sup>70</sup>

Later on the morning of September 4, just before 9 am, the immigration lawyer advised the Assistant Dean that in order to pursue the LMIA route for the Preferred Candidate, it would be necessary to re-advertise the position for a 30 day period. They were not able to pursue the LMIA academic stream (which would have avoided re-publication) because it would require the position to be a predominantly academic one with only corollary administrative and managerial duties. The immigration lawyer recommended that the University

“move ahead immediately with respect to an application for an LMIA-exempt work permit based on ‘significant benefit’ while preparing for another round of advertising for the position. [His] hope [was] that we will get an approval on the “significant benefit” application before the ads for an LMIA application need to be placed in the media.”<sup>71</sup>

This was the first time the Assistant Dean had been told that republication – something she hoped to avoid – would definitely be required in order to pursue the LMIA route. The Assistant Dean responded at 9:09 am that this “sounds like a great plan” and she would “get started on the significant benefit letter.”<sup>72</sup>

The Assistant Dean then, in an email sent at 9:13 am, enlisted the assistance of Selection Committee Member 1 in drafting that letter. The latter prefaced her suggestions for language for the letter with this: “Thanks so much for all of your hard work, patience and [d]iplomacy in managing all of this.”<sup>73</sup> This email was received by the Assistant Dean at 10:48 am.

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<sup>68</sup> Email September 4, 2020 number 204.

<sup>69</sup> Email September 4, 2020 number 206.

<sup>70</sup> Email September 4, 2020 number 213.

<sup>71</sup> Email September 4, 2020 number 208.

<sup>72</sup> Email September 4, 2020 number 209.

<sup>73</sup> Email September 4, 2020 number 215.

Notwithstanding the Assistant Dean's email instructions to the immigration lawyer to pursue both immigration routes, she explained to me that in her mind the LMIA route was not a viable option because of the requirement to repost the position for 30 days and because in her mind there were qualified Canadians. Her focus was on the significant benefit route. She advised me that, in her view, if that did not work, the Faculty would have had to decline to offer the position to the Preferred Candidate and repost. So far as I can tell, this belief was not communicated to the Preferred Candidate, the immigration lawyer or the other members of the selection committee.

The Assistant Dean advised me that she had scheduled a further meeting with the immigration lawyer on September 8 to "dig into the details" of the immigration issues. She felt that once they had a further discussion, it would have been clear that only the special benefit route would have been a viable option.

The Assistant Dean spoke to the German employment lawyers around 10:30 am on

September 4. (University Employment Lawyer #2 did not attend the meeting). According to the Assistant Dean, the German lawyers reiterated the advice provided by email the previous day (but which the Assistant Dean told me she had not read until that morning) that the independent contractor agreement was "illegal" under German law and likely under Canadian law as well. There was some discussion of the risk of detection which was considered to be low.

Around the same time, at 10:19 am, the Assistant Dean received an email from the HR Consultant attaching a document containing high level details that would be incorporated into a future employment agreement. The details included only the anticipated start date in Canada (January 2), salary, links to University benefits, pension and policy information and that a performance/merit review would be conducted annually.<sup>74</sup>

*(d.) The inquiry by the alumnus on September 4*

An inquiry by an Alumnus was made on September 4 of the Assistant Vice President ("**AVP**"). The inquiry was made around the same time that the Assistant

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<sup>74</sup> Email September 4, 2020 number 214 and attachment 214.1.

Dean was engaging in the various emails and discussions referred to earlier although she would not learn of the inquiry until later in the day, as noted below. I obtained the recollection of both parties to the original conversation by means of an interview with the AVP and, at my suggestion, a written account from the Alumnus through counsel.

The telephone conversation between the AVP and the Alumnus was a pre-scheduled stewardship call initiated by the AVP. The Alumnus had, before appointment to the bench, worked with the AVP in her previous role with the Faculty of Law on a successful fundraising campaign. The call was scheduled for 10:00 am on September 4 by an email exchange that began on August 30 with the AVP inviting the Alumnus to have a call to catch up. The AVP described the call as a normal “reach out” to donors. The AVP entered (on September 6) a summary of the call into her Major Gifts plan for the Alumnus. It reflects a wide-ranging conversation of roughly an hour’s duration about various aspects of the University. Her summary contains no mention of the directorship of the IHRP.

According to the AVP, towards the end of the call the Alumnus raised the matter that led to the controversy that occasioned my Review. The conversation was brief. But first, some background.

The Alumnus advised me that prior to the call, on September 3, he learned of the potential appointment of the Preferred Candidate as Director of the IHRP. This information was relayed to him by a staff member of an Organization 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.

The professor stated in his email attaching the memorandum that he had learned of the potential appointment from a faculty member, who is not identified by

name or institution. The Organization staff member told the Alumnus that the potential appointment had come to light as a result of a posting seeking housing for the Preferred Candidate in Toronto. (The Preferred Candidate told me that this is unlikely and I cannot otherwise verify this information.) The Alumnus, through counsel, has provided me with the email chain and the attached document.

The professor's email and memorandum are well-summed up in the email's subject line: "U of T pending appointment of major anti-Israel activist to important law school position." The email states that "[f]rom the faculty member who found out about this and informed me, it appears that the internal appointment process in the law school has been completed." It adds, "[i]f someone could quietly find out the current status, and confirm [the Preferred Candidate'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 in fundraising."<sup>75</sup>

As was previously mentioned, towards the end of the conversation on the stewardship call with the AVP, the Alumnus raised the appointment of a new IHRP Director. Their respective recollections of the conversation are consistent on the essential points.<sup>76</sup>

The Alumnus asked the AVP whether she knew anything about the potential appointment, naming the Preferred Candidate and the position. The AVP replied that she did not. She remembered that 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 exactly what was said about the reason for the controversy, but the AVP recalls that the Alumnus referred

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<sup>75</sup> Email September 2, 2020.

<sup>76</sup> The account is based on my interview with the AVP on February 3, 2020 a detailed account provided

by counsel for the alumnus and copies of email and documents provided by both.



to the Preferred Candidate'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.

So far as I can determine, the AVP in fact did not communicate directly with the Dean about this conversation, although a later email implies that she did. Rather, she communicated with the Assistant Dean Alumni and Development in the Faculty of Law.

The Assistant Dean Alumni and Development received a call (which based on the email exchanges must have been about noon) on September 4 from the AVP. The latter mentioned the name of the Preferred Candidate and the name of the Alumnus. The AVP recalled flagging the importance of due diligence on the IHRP file. The Assistant Dean Alumni and Development recalls that the AVP told her that the message had been relayed that the Jewish community would not be pleased by the Preferred Candidate's appointment and that she wanted to have more information about the search.

The first that anyone involved in the search heard about the inquiry from the

Alumnus was shortly afterwards and, again based on the emails, likely between 12:00 pm and 12:30 pm.

The Assistant Dean received a call from the Law Faculty's Assistant Dean Alumni and Development who indicated that she had received an inquiry from her boss, the AVP, about the IHRP Director recruitment. The Assistant Dean Alumni and Development advised the Assistant Dean that an alumnus, a federally appointed judge, had inquired about the search process, naming the Preferred Candidate and indicating that there was concern in the Jewish community about her potential appointment. The Assistant Dean confirmed that the named person was the Preferred Candidate, that no decision had yet been made and expressed concern that the candidate's name was apparently known outside the circle of people involved in the recruiting process.

The Assistant Dean asked the Assistant Dean Alumni and Development to brief the Dean which she did by telephone

after emailing him at 12:29 pm requesting a call.<sup>77</sup>

The information about the state of the search was relayed to the AVP and in turn to the alumnus as noted below.

The Assistant Dean Alumni and Development's recollection of the call with the Dean is that she told the Dean that the Alumnus had passed on concern about hiring the Preferred Candidate. The Dean expressed concern about the fact that the name of the candidate was known and indicated that he should "get up to speed" on the search.<sup>78</sup> The Dean recalls that this is the first time he had heard the Preferred Candidate's name and that he understood from the conversation that the Alumnus had indicated that the appointment would be controversial in the Jewish community.<sup>79</sup> He had no personal knowledge at that time about the Preferred Candidate or why her appointment would be controversial. He gave instructions that he would have no engagement with Advancement on the matter and the Assistant Dean Alumni and Development

was to advise the AVP that there would be no further follow up on the matter.

In the meantime, the Assistant Dean had a telephone conversation with Selection Committee Member 1 sometime shortly after 12:30. Their respective recollections of the conversation are largely consistent. The Assistant Dean relayed both the Alumnus' name and that he had expressed concern about the appointment because of the Preferred Candidate's Israel/Palestine work.<sup>80</sup> The Assistant Dean was unsure how to interpret this information and in particular did not understand how the Alumnus knew about the search or the candidate or why the candidacy was controversial.<sup>81</sup>

Selection Committee Member 1 followed up with an email (at 3:02 pm) setting out what she suspected was going on and noting the possibility of a link among the Alumnus, the Organization and another entity on the website of which she had found material relating to the Preferred Candidate's scholarship. She noted that "I still don't know how they got [the Preferred Candidate's] name but it hardly

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<sup>77</sup> Email September 4, 2020.

<sup>78</sup> Interview with Assistant Dean Alumni and Development.

<sup>79</sup> Interview with Dean.

<sup>80</sup> Selection Committee Member 1 chronology.

<sup>81</sup> Assistant Dean interview February 12, 2021.

matters because as soon as her appointment was announced, it would've happened anyway." She concluded by raising concerns about the involvement by a judge "engaging with the law school in this way."<sup>82</sup>

The Assistant Dean and the Dean spoke briefly by telephone in the early afternoon. It was agreed that the Assistant Dean would send him the Preferred Candidate's CV (which she did at 6:38 pm that evening) and that they would talk again over the weekend.

Later the same day (at 2:01 pm on September 4), the AVP followed up with the Alumnus by email, writing: "Quick update – 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."<sup>83</sup> Notwithstanding what this email suggests, the AVP did not speak to the Dean about the matter at this point and in fact their only communication on this subject occurred when the Dean was in contact with the AVP to tell her to "back

off" any involvement in the recruiting process.

The Alumnus responded to the AVP (at 2:20 pm) "I look forward to closing the loop as well. If you need any further information on this matter, please don't hesitate to let me know."<sup>84</sup>

#### *(e.) Events September 5 - 8*

The Assistant Dean and the Dean had a regular bi-weekly meeting scheduled for an hour on Tuesday September 8. At that meeting, she planned to brief the Dean and seek his approval to make the offer to the Preferred Candidate. As a result of the events of the 4<sup>th</sup>, however, she provided information to him over the weekend on Saturday the 5<sup>th</sup> and Sunday the 6<sup>th</sup>.

She recalls explaining that the selection committee's consensus was that the Preferred Candidate was very strong and had "great experience" and that she (i.e. the Assistant Dean) was enthusiastic about the candidate until she received the advice from the German employment lawyers on the morning of September 4 about the problems with the independent contractor agreement. However, it was

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<sup>82</sup> Email September 4, 2020 number 219.

<sup>83</sup> Email September 4, 2020 page 12 of Alumnus response.

<sup>84</sup> Email September 4, 2020 page 12 of Alumnus response.

still her intention to make an offer to the Preferred Candidate if the timing issues related to the work permit could be resolved. She provided the Dean with a summary of her conversations with the Preferred Candidate, the immigration and work permit timing advice that she had received from the immigration lawyer and that she had been exploring the independent contractor route. She also explained that the September start date was critical.

She provided the Dean with a summary of the legal advice received from the German employment lawyers and referred to the Preferred Candidate's request to have summers (roughly about 20% of her time) away from the campus in Europe.

As an aside, the Preferred Candidate explained to me that part of the reason that this option interested her was that she wanted to see if she could get part of the benefit of being a faculty member and that she was interested in "semi-quasi" faculty treatment.

As the Assistant Dean recalls the meetings, the Dean had quickly looked at the Preferred Candidate's CV and concluded why her scholarship might be

controversial in the eyes of some. But in her recollection of the meetings, the Dean thought that the potentially controversial nature of the scholarship did not matter and he was focused on the legal advice from the German lawyers concerning the independent contractor arrangement. He was clear that there was "no way" he would approve entering into an "illegal" independent contractor agreement. He was also concerned that the request to be away from the campus reflected a mis-alignment with the position, referring to his concerns (referenced earlier) about this being an administrative, not an academic position.

As the Assistant Dean recalls it, there was discussion that the timing was unfortunate and that the breach of confidentiality of the search process was troubling, but that the Dean's focus was on the "illegality" of the proposed independent contractor arrangement and the request to be away from campus. As the Assistant Dean presented the matter to him, the September start date was also critical. It appears that, consistent with what the HR Consultant had noted in the August 12<sup>th</sup> email referred to above, the Assistant Dean was operating on the understanding that the independent

contractor route was the only path to having the Preferred Candidate in the role (albeit remotely) in September. For practical purposes, that understanding was correct.

It is important to note what, according to the independent recollection of the Dean and the Assistant Dean, was not discussed in detail with the Dean. The Dean was not briefed by the Assistant Dean on the specifics of the LMIA route to obtain a work permit. In particular, the Dean was not told, by the Assistant Dean or otherwise, that it would require the University to indicate that there was no qualified Canadian.

Also over the weekend, the Dean spoke to the Vice President and Provost (“**Provost**”) and to the Vice President Human Resources and Equity (“**VPHR**”). The Provost recalls that the Dean was concerned about the search and steps taken by the committee. In his view, the search committee had moved forward in a way that was not expected of a body that was “advisory” and that he had been advised late in the day. He expressed concern about the proposed independent contractor arrangement and that the Preferred Candidate was an academic

coming into a staff role, reflected by her request for 20% of her time to be spent off campus. He also referred to a “complicating factor” resulting from the Alumnus’ communication as described above.

The Provost referred the Dean to the VPHR because the matter concerned a staff position that fell under her authority and not that of the Provost. The Provost told me that she realized from the Dean’s account that he was in a “no-win” situation in that whatever decision he made there would be people who would be very upset. She was concerned that someone outside the search process had found out about the selection process because confidentiality in such processes is very important. She noted that in decanal searches, participants sign confidentiality agreements.

The VPHR recalls that the Dean called her to discuss the situation. He was concerned about the legality of the proposed independent contractor arrangement. The VPHR was aware that the University had brought people in on an independent contractor basis and knew that University Legal Counsel 2 would have been consulted and had

experience with such matters. She also was aware that if there was no independent contractor arrangement it would be hard to pay the individual.

The Dean also raised the Preferred Candidate's wish to be away from campus 20% of the time and the VPHR indicated that this was a staff position and was "100% full-time equivalent." As a practical matter this meant that the person was expected to be in the position in Toronto full time. The VPHR was a bit taken aback by the Dean's reluctance about the independent contractor arrangement because she knew in general terms that the University had entered into independent contractor arrangements in other situations.

The Dean then mentioned that the VPHR should be aware of the information relayed by the *Alumnus* although it was not relevant to his decision-making. In her perception, his main concerns were wanting somebody in the position now but that, in his view, the risk of going the independent contractor route was too great. Her view was that if the person was not in Canada and not eligible to work in

Canada, there was a problem. The Dean's preoccupation was with the independent contractor approach not being right.

On Sunday, September 6, the Dean and Selection Committee Member 1 spoke on the telephone, at the Dean's request.<sup>85</sup> Selection Committee Member 1 made notes about a week after the conversation that form part of the "chronology" that was ultimately given to the *Globe and Mail*, although not by her. She recalls that they discussed five main topics.<sup>86</sup>

First, the Dean expressed his concern about the independent contractor agreement as a bridge until the work permit was obtained. His view was that this was improper and could not be done and that he had consulted with the VPHR about this. Selection Committee Member 1 suggested that the immigration issue could be addressed by spousal sponsorship and that it was not the Preferred Candidate's fault if the University was proposing something that was inappropriate. (As noted earlier, the spousal sponsorship route would not,

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<sup>86</sup> Documents received from Selection Committee Member 1

according to the immigration lawyer, change the likely time frame for obtaining the work permit.)

Second, the Dean indicated that there was no way that the Preferred Candidate could be absent in the summer given that it was an administrative position. He also raised his concern that the Preferred Candidate really wanted an academic position. Selection Committee Member 1 responded that if the absence was unacceptable the University could “take it off the table” and that it had been made very clear to the Preferred Candidate that this was not an academic position.

Third, Selection Committee Member 1 raised her concern that the Preferred Candidate’s work on Israel/Palestine was an issue but that her work was “well within the zone of legitimate, professional, international legal analysis.” The Dean responded that given the other issues, he did not need to get to that one. Selection Committee Member 1 recalls that the Dean said “it [i.e. the Preferred Candidate’s work on Israel/Palestine] is an issue, but given the other two reasons, I don’t need to get to the third issue.”

Fourth, the Dean indicated that they needed to hire a Canadian so someone could start right away. Selection Committee Member 1 had indicated in her chronology that the only eligible Canadian was disqualified by HR and that other Canadians were not viable and did not even make the short list.” I noted in our interview that a Canadian permanent resident who was available to start at the end of August received a second interview. Selection Committee Member 1 advised that her note contained a small error in that it should have read “qualified” not eligible. She advised that in the view of the selection committee the Canadian permanent resident who received a second interview was not “qualified.”

Finally, Selection Committee Member 1 recalls asking whether the Dean was seeking her views or informing her of his decision and that the Dean replied “the former, well, both.”

The Dean recalls that the purpose of the conversation was to ensure that he had not missed something. His decision to discontinue the candidacy was, in fact, made over the weekend and into the early part of the week. He recalls that it

was he who first raised the subject matter of the Alumnus' inquiry (because he knew that Selection Committee Member 1 knew of it) and told Selection Committee Member 1 that any controversy was "irrelevant" and that the inquiry by the Alumnus played no role in his thinking. He recalls that Selection Committee Member 1 defended the Preferred Candidate in light of the controversy and that he said that this was irrelevant. He was certain that he was clear that the cross-border - timing issue was the threshold issue and that he had serious reservations about the 20% request and that because of those two reasons, the controversy was irrelevant.<sup>87</sup>

Following the call, Selection Committee Member 1 had a telephone conversation with the Assistant Dean.<sup>88</sup> The Assistant Dean's recollection of the call is that Selection Committee Member 1 told her that the Dean called her to seek her input on the hiring issue. She advised the Assistant Dean that she was concerned that the Dean appeared to be leaning towards discontinuing the Preferred Candidate's candidacy. The Assistant

Dean recalls that Selection Committee Member 1 was very bothered, upset and concerned about this development. Based on what she heard from the Dean, she also thought that not all of the immigration options had been considered. In response, the Assistant Dean briefly summarized the legal advice that the immigration and German employment lawyers had provided.

Selection Committee Member 1 remembers aspects of the call differently. She recalls telling the Assistant Dean that she would have to resign if they did not proceed with the Preferred Candidate and that it was not fair to pull the rug out from under her at this point. The Assistant Dean confirmed the advice received from the German employment lawyers but that Selection Committee Member 1 thought that there were other immigration routes to consider. The Assistant Dean recounted the advice that they had received and that it "didn't tally" with the suggestion that there were other routes.

The VPHR also had a brief conversation with Selection Committee Member 1 who expressed her concern about the

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<sup>87</sup> Interview with the Dean.

<sup>88</sup> September 6, 2020, number 220.



Alumnus' call. The VPHR advised that the Director needed to start right away, that it was the Dean's decision. The VPHR reiterated that the Alumnus' information was not part of the Dean's decision.

In the evening of Sunday, September 6, 2020, the Assistant Dean forwarded to the Dean the application letters and resumes of two Canadian applicants who had received interviews as well as the most recent email (received September 4) from the Preferred Candidate.<sup>89</sup> The idea was to arrange interviews with the Canadian applicants including the Canadian permanent resident who had received a second interview.<sup>90</sup> These interviews were ultimately cancelled as a result of the cancelling of the search. As of this point, the Preferred Candidate had not been notified that any issues had arisen.

There are two issues that appear not to have been discussed with the Dean or considered by him.

The first was that the immigration plan for the Preferred Candidate involved making an application based on the LMIA

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<sup>89</sup> IHRP Emails and Attachments received from Dean dated September 6, 2020..

process. That process required the University to indicate that there was no suitably qualified Canadian available for the position. 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.

Second, University Employment Lawyer 2, with whom the independent contractor route had been discussed, had not been consulted again since the advice had been received from the German employment lawyers that there were concerns about the draft independent contractor agreement (which had been prepared by the Assistant Dean and the HR Consultant).

At the point that the Dean made the decision to terminate the candidacy, his understanding of the situation, so far as I can determine, was as follows.

First, he understood that it was essential for the new Director to begin work no later than the end of September. From his point of view, this was not only important for

<sup>90</sup> Email September 10, 2020 document 233.

the IHRP, but also for the Assistant Dean. He noted that she was already overburdened with trying to start the term in the midst of a pandemic and that it would be inappropriate to expect her to have the sort of hands-on role that she would need to have with the IHRP if no Director were in place in the fall.

Second, he understood that the independent contractor arrangement was the only way that the Preferred Candidate would be able to start work, albeit remotely, within the necessary timeframe.

Third, he understood that the legal advice was that the independent contractor agreement was illegal and could potentially expose the University to liability.

Fourth, he 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.

On September 8, the Dean sent a draft email to the Assistant Dean for her review. The draft email was addressed to the Assistant Dean and Selection

Committee Member 1 and indicated that he would not be proceeding with the recruitment of the Preferred Candidate. It read as follows:

Thanks for the conversations, both of you. Even setting aside my considerable misgivings about the fact that [the Preferred Candidate] asked to be away 20% of the year, after speaking with you two, and with [the VPHR] I don't see a viable path to hire a non-Canadian. I'm hoping that we can quickly choose from the Canadians that remain in the mix. ... [W]e've re-confirmed with HR that we can't hire someone without a law degree that would entitle her to practice somewhere – not only is that offside [of] our advertisement, but it presents insurmountable challenges from a collective bargaining perspective. Frustrating but not surprising – I'm used to dealing with undesirable constraints when it comes to HR matters.

I understand that there were two Canadians in the long-ish list who meet the ad's requirements, one of whom had a second interview and one of whom didn't. I'm open to interviewing them both again if you are, and I'll join the interviews this time. Or I'm happy just on my own to have a conversation with one or both candidates, as I did with our previously unsuccessful search that landed on a non-Canadian, if you prefer not to be involved in more interviews.<sup>91</sup>

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<sup>91</sup> Email September 8, 2020 document 222.

On September 8, the Assistant Dean met with the Dean to discuss how to proceed with the IHRP Director search. According to the Assistant Dean, they discussed interviewing strong candidates from the first and second interview rounds who were Canadian citizens and therefore might be able to start the position by, or very close to, the September deadline.

The next day, September 9, the draft email was sent.<sup>92</sup> The same day, the Assistant Dean advised University Employment Lawyer 2 that they would not proceed with the offer to the Preferred Candidate.<sup>93</sup>

Also on September 9, the Assistant Dean Alumni and Development emailed the Assistant Dean requesting a call for a quick update.<sup>94</sup> She sent a further email requesting a phone call after having connected with the AVP in the afternoon.<sup>95</sup> This email chain was forwarded by the Assistant Dean to the Dean, advising that the AVP was pressing for an update about the hiring of the Candidate so that the AVP could share this with the alumnus. As the Assistant Dean recalls the matter, the

AVP had also suggested during their September 9 telephone call that they canvass other alumni for their views on the Preferred Candidate. The Assistant Dean stated in her email to the Dean that she was unsure why the AVP would continue to be involved in a confidential HR matter and expressed some concerns about where this could go.<sup>96</sup>

The Dean was then in touch with the AVP to tell her that they would not engage with Advancement on this matter.

The Preferred Candidate was advised the following day (September 10) during a Zoom meeting with the Assistant Dean that the University would not be proceeding with the candidacy. The Preferred Candidate recalls the meeting as being quite short and that the Assistant Dean advised that the consultancy agreement (i.e., the independent contractor agreement) would not work because they had advice that there were legal risks and that the Faculty could not wait the two – three months for the Preferred Candidate to get the work permit. The Preferred Candidate recalls asking the Assistant

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<sup>92</sup> Chronology prepared by the Assistant Dean.

<sup>93</sup> Email September 9, 2020 document 223.

<sup>94</sup> Email September 9, 2020 document 226.

<sup>95</sup> Email September 9, 2020 document 228.

<sup>96</sup> Email September 9, 2020 document 229.

Dean if the decision was based on the “ongoing negotiations” in relation to her request to spend the summers in Europe and that the Assistant Dean said it was not.

In a letter dated September 11 (but sent by email at 9:59 pm on the 10<sup>th</sup>) Selection Committee Member 1 resigned from the Faculty Advisory Committee for the IHRP citing the Dean’s decision to “overrule the hiring committee’s decision” as the reason for her resignation.

Additional interview arrangements were subsequently made with the assistance of the HR Consultant to be conducted by the Assistant Dean and the Dean.<sup>97</sup> The HR Consultant noted that the feedback from the interviews of these individuals was “underwhelming”, and they were not strong candidates. She advised that she understood why they were proceeding in this manner, but asked if the Dean was aware of the interview feedback, and asked whether other candidates should be considered.<sup>98</sup>

In the days that followed the Assistant Dean received emails from different individuals regarding the position and the

growing controversy. On September 10 Selection Committee Member 2 (who had not been involved in any of the discussions on September 4 – 6) emailed the Assistant Dean for an update about the process and was informed that the Candidate’s “immigration situation turned out to be more complicated than we thought, and the tools at our disposal to address it were fewer than we hoped. As a result, after conferring with senior HR leaders, we concluded yesterday that we cannot proceed with her candidacy.”<sup>99</sup>

A former IHRP director informed the Assistant Dean during a September 11 meeting that he was aware that an Alumnus had contacted the law school about the Preferred Candidate and that he indicated that things would “get very bad” for the law school if the Dean’s decision was not reversed. The next day, a faculty member emailed the Assistant Dean to advise that he knew an alumnus contacted the law school about the Preferred Candidate’s candidacy and that, unless the Dean reversed the decision, there would likely be very negative media for the law school and

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<sup>97</sup> Email September 10, 2020 document 233.

<sup>98</sup> Email September 10, 2020 document 234.

<sup>99</sup> Email September 10, 2020 document 239.

perhaps an ethics investigation for the *Alumnus*.<sup>100</sup>

The media attention started shortly thereafter, with the first article published by the *Toronto Star* on September 17. The initial account refers to

communications written by Selection Committee Members 1 and 2 as well as a letter from two past directors of the IHRP. Several other media reports followed. Ultimately, it was decided, as a result of the controversy, to cancel the search.

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<sup>100</sup> Email September 12, 2020 document 230.

## B. BASIS OF THE DECISION TO TERMINATE THE CANDIDACY

### 1. Introduction

My Terms of Reference require me to address the basis for the Dean's decision to discontinue the candidacy of the selection committee's Preferred Candidate. The concern is that external intervention by the Alumnus played a role in the decision.

Much of the concern about this hiring process has arisen because of the view that the Dean's stated reasons for his decision were pretextual and that improper influence, contrary to his public statements, should be inferred from the facts.

The process that I have been engaged to undertake is not one that is suitable for making findings of credibility. Virtually none of the safeguards that exist in contexts in which such findings are made are present in this process. 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. I note that none of the critics or participants expressing concerns have had the benefit of a full review of all of the information with which I have been provided.

My conclusion is that the inference of improper influence is not one that I would draw.

### 2. The stated reasons

In his email of September 9 to the Assistant Dean and Selection Committee Member 1, the Dean wrote, "[e]ven setting aside my considerable misgivings about the fact that [the Preferred Candidate] asked to be away 20% of the year, after speaking with you two, and with [the VPHR], I don't see a viable path to hire a non-Canadian."<sup>101</sup>

In his letter to Faculty on September 17, the Dean stated that "no offer was made because of legal constraints on cross-border hiring that meant that a candidate

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<sup>101</sup> Email September 9, 2020 document 231

could not meet the Faculty's timing needs. Other considerations, including political views for and against any candidate, or their scholarship, were and are irrelevant. ... As the Dean's advisory committee leading the search understood – and as was stressed to me on several occasions by the non-academic administrator to whom the director would report – the timing needs existed because of the absence of a director at the moment, and the hope that a new director could mount a full clinical and volunteer program for students this academic year.”<sup>102</sup>

In my interview with the Dean, he indicated (as detailed earlier) that his understanding was that timing was of the essence and that the selection committee was “aware and agreed” that “we were determined to have someone in place as close to the start of term as possible.” He also understood on the basis of the legal advice received by the Assistant Dean that the only way to meet the “timing needs” was to enter into an independent contractor agreement with the Preferred Candidate. He had learned (on the same day that he became aware

of the by inquiry by the Alumnus) that the Assistant Dean had been advised that the Independent Contractor Agreement arrangement was illegal or at least likely illegal.

It has been suggested to me that a number of the facts support an inference that the Alumnus' inquiry factored into the decision to terminate the Preferred Candidate's candidacy. While of course drawing an inference from known facts is not an exact science, I would not be ready, based on the materials that I have reviewed and considered, to draw the inference that some others have. I will explain.

First, some of the facts said to support the inference are erroneous. Second, there are a number of facts that do not support the inference. Third, the willingness to draw the inference gives no weight to the Dean's insistence that external influence played no role in his decision. As with any review, I am obligated to see well-founded evidence before I can reasonably draw the inference that someone has been untruthful. That is not an inference that I

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<sup>102</sup> Dean's letter to Faculty September 17, 2020.

could reasonably draw on the information available to me.

I will first turn to the points that others have alluded to in support of the inference and will then consider the other facts that are not supportive of that inference. Of course, when reviewing the facts I have not looked at individual facts in a piecemeal manner. In reviewing the facts, I have considered their cumulative effect.

Based on my review, it appears that the nature of the Alumnus' inquiry has been misunderstood in much of the public discussion. It has at various points been described as an "objection" to the candidacy, as "external interference", as a "complaint" about the candidacy, as "outside political pressure", as an "attempt to block the appointment."

Those descriptions adequately convey the intent of the professor's approach to the Organization that led to the Alumnus being contacted by the Organization. However, having the benefit of a detailed account from both parties to the initial conversation, my conclusion is that the Alumnus simply shared the view that the

appointment would be controversial with the Jewish community and cause reputational harm to the University.

This would hardly be news to anyone who had taken a moment or two to look on the internet. As Selection Committee Member 1 pointed out in an email to the Assistant Dean, the controversial nature of the appointment would have been evident "as soon as [the Preferred Candidate's] name was announced."<sup>103</sup>

The timing of the Dean's intervention shortly after the Alumnus' inquiry has been said to support the inference that his decision was based on that inquiry. This overlooks the fact that on September 3 and 4, the University through the Assistant Dean, received the advice from external counsel in Germany that the independent contractor arrangement was illegal.

In addition, the University was advised just before 9 am on September 4 that the LMIA route would require the University to re-advertise the position for 30 days. This was a step that the Assistant Dean had hoped to avoid throughout her discussions with the University's

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<sup>103</sup> Email September 4, 2020 document 219.



immigration counsel. This requirement to re-advertise meant that the LMIA route, even if otherwise viable, put in doubt the ability of the Preferred Candidate to be in place in Toronto at the beginning of January, something that everyone agreed was critical.

Moreover, the advice about the illegality of the independent contractor approach was only received orally on September 4 and conveyed to the Dean on September 5<sup>th</sup>. As noted earlier, the Dean understood that the independent contractor arrangement was the only way the University could begin paying the Preferred Candidate to work for the University remotely from outside Canada without a Canadian work permit.

These aspects, and particularly the timing of the receipt of this advice and the Dean's reaction to it take away much of the force of the inference of improper influence based on the timing of the Alumnus' inquiry and the making of the decision.

It has been said that the Dean was "entirely negative" about the Preferred Candidate. Whether or not "entirely negative" is a fair characterization, there is no doubt that the Dean expressed

reservations about the candidacy at a meeting with the Assistant Dean on August 17<sup>th</sup> which was well before the Alumnus' inquiry on September 4. It does not appear that those reservations were relayed back to the rest of the search committee by the Assistant Dean and of course by that point, the selection committee had completed its role of identifying the Preferred Candidate.

As noted earlier in Part I of my review, the Dean was concerned that the candidate was really looking for an academic position which the Directorship was not and that this in turn gave rise to a concern that the candidate's interests and the position were mis-aligned. The Dean's concern in that regard was not a new concern that surfaced only after the alumnus' inquiry. He had expressed it to the Assistant Dean in mid-August. Moreover, the concern was not unfounded in light of information that I have learned.

The Preferred Candidate explained to me that her interest in working from Europe for the summers was in part that she wanted to see if she could get part of the benefit of being a faculty member and

that she was interested in “semi-quasi” faculty status.

Some have referred to the fact that the VPHR acknowledged that she and the Dean discussed the Preferred Candidate’s scholarly work as evidence that supports the inference of improper influence. I do not agree.

It would have been clear to the Dean that the appointment would be controversial in some quarters. I do not find it surprising that the Dean, realizing this, decided to alert the senior administration of the University to a potential public controversy involving University decision-making.

Moreover, I have spoken at length to the VPHR and her recollection (reflected in her public statements) was that the Dean simply advised her that she should be aware of the Alumnus’ inquiry but that the Dean told her that it was not relevant to his decision-making. Rather the Dean’s preoccupation seemed to her to be that the independent contractor route was not right in light of the legal advice.

The VPHR’s recollection of the brief conversation with Selection Committee

Member 1 was that the VPHR advised that the Alumnus’ call had nothing to do with the decision.<sup>104</sup>

It is suggested that the Dean “admitted” that the substance of the Preferred Candidate’s scholarship was “an issue” for him. However, the notes of the conversation, made about a week after it occurred, in which this alleged admission occurred indicate that the Dean also said that in light of the independent contractor and 20% request, he did not need to consider that third “issue.”

Moreover the Dean has a different recollection as set out in detail above. The key point is that he recalls being clear that any controversy about the Preferred Candidate’s scholarship was irrelevant to his decision. 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.

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<sup>104</sup> Interview with VPHR February 4, 2021.

It has also been suggested by a number of sources that the “timing needs” were not a plausible explanation for the decision to not proceed with hiring the Preferred Candidate.

I do not think that a full understanding of the facts supports this inference.

It is true that the Assistant Dean acknowledged that it might not be possible to have someone in the position for the beginning of September. In an email of July 6, she wrote that “my fervent hope is that we will have someone in the role by Sept 7, but I accept that this might not be possible.”<sup>105</sup> Three days later, the Assistant Dean wrote to the members of the Selection Committee commenting that “[r]emember that, if we are not happy with the first list [i.e. the first group of interviews] we can decide later if we need to interview more candidates (although this will mean that we won’t have someone until later in the fall).”<sup>106</sup>

There are several points to note from these emails.

First, neither of them is inconsistent with wanting to have the Director in place in the fall.

Second, there are at least five occasions before the controversy arose on which the Assistant Dean indicated that the Director had to be in place before the end of September or at least before the work permit would likely be obtained.<sup>107</sup>

1. On August 11, the day on which she had a meeting with the Preferred Candidate, the Assistant Dean wrote to the HR Consultant that “[the Preferred Candidate] understands that we need her to be able to start the position no later than Sept. 30. I don’t require her to be in Toronto until the first week back in January 2021.”<sup>108</sup>
2. On August 14, the Assistant Dean wrote the immigration lawyer that “we need the candidate to start the position no later than September 30, 2020 although we don’t need her to move back to Toronto until the start of January.”<sup>109</sup>

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<sup>105</sup> Email July 6, 2020 number 39.

<sup>106</sup> Email July 9, 2020 number 46.

<sup>107</sup> Email August 14, 2020 number 130.

<sup>108</sup> Email August 11, 2020 number 108.

<sup>109</sup> Email August 14 2020 number 130.

3. In an August 20 email to University Employment Lawyer 1, the Assistant Dean wrote that “[w]e need her [i.e. the Preferred Candidate] to start working before she will be realistically able to obtain a Canadian work permit.”<sup>110</sup>
4. Also on that date, the Assistant Dean wrote to the members of the selection committee, noting that “we are hoping to work out a way for [the Preferred Candidate] to start work for us before she has a Cdn [*sic*] work permit in hand. The immigration lawyer is estimating that she could have one in 2 – 3 months. We need to bridge the time between not [*sic*] and then.”<sup>111</sup>
5. On September 2, the Assistant Dean wrote to the HR Consultant that “[i]deally she [i.e. the Preferred Candidate] will be able to start work as soon as we sort out the independent contractor agreement (ideally Sept 14).”<sup>112</sup>

Third, and most importantly for the purposes of drawing an inference about the basis of the Dean’s decision based

on timing, the Assistant Dean advised the Dean that having someone in the position by the end of September was critical and the Dean thought that was the case.<sup>113</sup>

The strength of the inference of improper influence depends on the timing issue being a pretext. For the purposes of evaluating the strength of this inference, whether the Assistant Dean’s view of the importance of timing was realistic and whether that was adequately communicated to the other members of the selection committee and to the Preferred Candidate are not the issue. There is no doubt that the Assistant Dean viewed this as a requirement well before the controversy arose; it was not a pretext developed after the fact.

There is also no doubt that the Assistant Dean communicated this requirement to the Dean who, as a result, thought that it was critical to the recruitment process. On his understanding, this was a requirement of the position, not a pretext developed after the fact.

It has also been said that the selection of the Preferred Candidate and the August

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<sup>110</sup> Email August 20 number 135.

<sup>111</sup> Email August 20 number 136.

<sup>112</sup> Email September 2 number 200.

11 offer were not contingent on her being available at the beginning of September and that it would have been irrational to impose such a condition on an international candidate.

Putting aside that no offer in the legal sense of the word was made on August 11, recollections differ about whether the importance of the September start date was communicated to the Selection Committee or to the Preferred Candidate. However, as I have reviewed earlier, it is clear that the Assistant Dean spoke of this as a requirement of the job to both the immigration lawyer and the HR Consultant in emails before any controversy arose and that she recalls briefing the Dean on this requirement at their meeting on August 17.

It has also been suggested that the illegality of the independent contractor arrangement could not have been the true reason for the decision. This line of thinking proceeds as follows.

The immigration advice was that the Preferred Candidate could likely have a work permit in time to be in Toronto to start teaching the clinical course in time for the beginning of the January term; the independent contractor arrangement

was proposed by the University and the fact that it was not possible did not leave the IHRP in a worse position. The Preferred Candidate was still likely to be available to mount the full IHRP program starting in the winter of 2021. Thus, the reasoning goes, the illegality of the independent contractor position was not a true reason for terminating the candidacy.

However, as discussed above, there is no doubt that a fall or no later than September 30 start date was viewed as critical by the Assistant Dean and that this view was communicated to and relied on by the Dean in making his decision. The Dean's understanding was that the independent contractor arrangement was the only way that the start date (i.e. the Faculty's timing requirements) could be met. And that understanding, so far as I am able to determine, was correct. On the Dean's understanding of the situation, without the independent contractor arrangement, the timing requirement could not be met.

It has also been suggested that the timing issue was a pretext because there were other immigration options that could have resulted in an earlier work permit.

As discussed earlier, my understanding based on information provided by the immigration lawyer is that this is not the case.

It has been said that the Dean's decision to look for a qualified Canadian was a sham because the selection committee had found no eligible and qualified Canadian candidates for the position and declared a failed search if the top two candidates were not available.

As discussed in Part I, recollections on this point differ. But 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.

The Dean told me that he had not been consulted about and had not approved resort to the LMIA process and that after looking at the resumes of some of the Canadian applicants, he would not have approved proceeding by that route as in his opinion there were qualified Canadians.

It is also suggested that the Dean's statement that the candidacy was terminated so as to allow the Faculty "to

mount a full clinical and volunteer program for the students this academic year" does not make sense. This line of thinking is that by the time the candidacy was terminated it was already too late to get a Director in place in the fall.

However, I am far from sure that, as the Dean understood the situations, this was the case. There was a Canadian permanent resident who received a second interview and who had indicated an availability to start work at the end of August. I understand that Selection Committee Member 1 and 2 were of the view that there was no suitable Canadian candidate and that Selection Committee Member 1 alluded to this in a conversation with the Dean after the Alumnus' inquiry. However, the Dean understood from the Assistant Dean that there was a reasonable chance of filling the position with someone who could start virtually right away. Based on the information that the Dean had, it was not inconceivable that a new Director could be in place in the fall.

Some of those who believe that the timing and independent contractor issues were not the true or only bases for the Dean's decision point to the fact that

there was no indication that the Dean consulted with the immigration or employment lawyers, the Faculty Advisory Committee or the Research Associates about how the needs of the program and the students would be best served. I do not find this line of reasoning persuasive.

With respect to legal advice, the Assistant Dean had up to the minute advice from the German employment lawyers and the immigration lawyer as of September 4 which she shared with the Dean.

Moreover, when Selection Committee Member 1 suggested on September 6 that there were other immigration routes that might be explored, the Dean reviewed the options with the Assistant Dean and concluded that no other routes would lead to the granting of a work permit more quickly than the time-frame cited by the immigration lawyer. The information that I received from the immigration lawyer confirms that view was correct.

So far as I know, no one has suggested that the proposed independent contractor arrangement would survive scrutiny or has cast doubt on the correctness of the

advice received on September 3 and 4 from the outside German employment lawyers. The failure to obtain further legal advice does not support any adverse inference. The advice that was already in hand was accurate. During my discussions with University Employment Lawyer #2, she advised me that risk tolerance was a decision for the Dean and she would not have discouraged the decision that he made had she been consulted.

With respect to consultation, it would have been better, with the benefit of hindsight, had the Dean met with the members of the selection committee and fully explained the reasons for his decision. The members of the committee were all within the cone of confidentiality that applied to the search process and the Dean would have been able to share information in that context which he would not be able to share more broadly. However, I would not draw from this absence of consultation an inference of any improper motive affecting the decision.

Finally, some found that the University's muted and undetailed response to the allegation of improper influence

suggested that something had indeed been amiss. This chain of reasoning, however, fails to take into account the legal constraints relating to confidentiality and protection of privacy under which the University operates. The Dean wanted to provide more detailed information to the IHRP Faculty Advisory Committee. But the legal advice that he received – and which I have reviewed -- discouraged him

from doing so on grounds of confidentiality and protection of privacy.<sup>114</sup>

Looking at all of the fact as I understand them, I would not draw the inference that the Dean's decision was influenced by improper considerations resulting from the Alumnus' inquiry.

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<sup>114</sup> Legal counsel advice to Dean in email exchanges on September 15 and 16, 2020.



## PART II: WHETHER EXISTING UNIVERSITY POLICIES AND PROCEDURES WERE FOLLOWED

### A. INTRODUCTION

The second element of my Terms of Reference requires me to “consider whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process.”<sup>115</sup>

This aspect of my mandate can be addressed quite briefly. I will develop three main points.

First, there is no suggestion that I am aware of—and I have seen no evidence—that there was any failure to observe “existing University policies and procedures” in this search up until about noon on September 4<sup>th</sup>, 2020. It is only at that point that concerns about academic freedom and confidentiality arise. That said, my view is that the University’s policy and procedure framework for this search was unclear and not well known by some of the participants.

I will set out what I understand to be the governing policies and offer some suggestions for clarification.

Second, while a great deal of concern has been expressed about academic freedom, it has been the conventional thinking at the University that the existing formal protections in the University for academic freedom apply to faculty members and librarians but not to positions in the “Professional/ Managerial” classification. There are distinct hiring policies and the *Memorandum of Agreement between the University and the Faculty Association* refer to the policies governing academic appointments and appointments of librarians, but not to the policy relating to professional/managerial staff. The Director’s position in the IHRP is so classified.

However, the central concern with this search process is that outside influence played a role in over-ruling the merit-based assessment by the selection committee of the Preferred Candidate.

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<sup>115</sup> [Terms of Reference](#) at p. 3 (December 7, 2020).

No one in the University administration, to my knowledge, has ever suggested that this would be appropriate. Quite the opposite as set out in the Foreword, above, Section “C.” Given the apparent consensus on this point coupled with my conclusion that I would not draw the inference that improper outside influence played a role in the decision and the current parallel processes by the Canadian Association of University Teachers and the University of Toronto Faculty Association, it seems to me that it would be imprudent for me to do anything more than to provide you with a few general thoughts on this subject in the context of the third element of my Terms of Reference: to provide “any pertinent guidance or advice” for the University’s consideration “relating to any matters arising out of the processes that were involved in this search.”

Third, there were several instances in which the confidentiality of the search process was not respected. However, my review of the relevant University policies has led me to think that the nature and extent of the obligation of confidentiality in the search process need clarification and emphasis. Moreover, the nature of the University’s obligations to protect

personal information and how that affects the conduct of those working on its behalf, and the constraints it imposes on administrators (particularly in this case, the Dean), need to be better understood by the University community.

I should also address a point that was of great concern to many of the individuals who were in touch with me in connection with my Review. Several members of the University community are of the view that this controversy is at least in part the result of a failure of collegial governance within the Faculty of Law. While I appreciate the thoughtful submissions that I have received, this is a broad and important subject that is far beyond my Terms of Reference. However, I will offer one modest suggestion touching on an aspect of collegial governance in the final section of my Review.

## **B. POLICIES AND PROCEDURES GOVERNING THE SEARCH PROCESS**

### **1. University of Toronto Act, 1971**

The University is constituted under the *University of Toronto Act, 1971*. The *Act* outlines the composition of the Governing Council and its Executive Committee, and describes the powers of the Council.

Central to this Review, the *Act* outlines different types of staff within the University. This nomenclature is adopted by supplemental University policies (as described later). The *Act* defines “administrative staff” as “the employees of the University, University College, the constituent colleges and the federated universities who are not members of the teaching staff thereof.”<sup>116</sup> “Teaching staff” is defined as follows:

...employees of the University, University College, the constituent colleges and the arts and science faculties of the federated universities who hold the academic rank of professor, associate professor, assistant professor, full-time lecturer or part-time lecturer, unless such part-time lecturer is registered as a student, or who hold any other rank created by the Governing Council and designated by it as an academic rank for the purposes of this clause.<sup>117</sup>

The *Act* authorizes the Governing Council to appoint, promote, suspend and remove the members of the teaching and administrative staffs of the University.<sup>118</sup>

<sup>116</sup> [The University of Toronto Act, 1971](#), s 1(1) (“interpretation”).

<sup>117</sup> *Ibid* at s 1(1)(m).

<sup>118</sup> *Ibid* at s 2(14)(b).

## 2. [Statement of Institutional Purpose](#)

In addition to the *Act*, the *Statement of Institutional Purpose*, implemented by the Governing Council, serves as the University’s lodestar. It defines, among other things, the University’s mission, purpose, and objectives in the areas of research and teaching.<sup>119</sup> In particular, the University’s mission is identified as “committed to being an internationally significant research university, with undergraduate, graduate and professional programs of excellent quality.”<sup>120</sup>

The *Statement of Institutional Purpose* describes the University as being “dedicated to fostering an academic community in which the learning and scholarship of every member may flourish, with vigilant protection for individual human rights, and a resolute commitment to the principles of equal opportunity, equity and justice.” In this context, the *Statement of Institutional Purpose* states:

...the most crucial of all human rights are the rights of freedom of speech, academic freedom, and

<sup>119</sup> [University of Toronto Governing Council Statement of Institutional Purpose](#), October 15, 1992.

<sup>120</sup> *Ibid*.

freedom of research. And we [the University] affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.<sup>121</sup>

Underlying these broad objectives, the *Statement of Institutional Purpose* outlines that the University is committed to four principles:

- Respect for intellectual integrity, freedom of enquiry and rational discussion;
- Promotion of equity and justice within the University and recognition of the diversity of the University community;
- A collegial form of governance; and
- Fiscal responsibility and accountability.<sup>122</sup>

### 3. University Hiring Policies

As previously stated, the Director of the IHRP is a PM-4 “administrative/managerial”, non-

academic position. The Assistant Dean and Selection Committee Member 1 indicated that it was made clear to the Preferred Candidate that this was an administrative/managerial role, and not an academic position or a pathway to one. The Preferred Candidate also advised me that she understood that this position had the status of administrative staff. While I understand that some members of the University community and beyond are concerned that this classification is not apt having regard to the nature of the Director’s duties, no one to whom I spoke thought that the position as currently classified was anything other than a PM-4 administrative position.

The “Job Description” of the Director that was publicly advertised sets out seven major activities: planning and policy development, advocacy, experiential education delivery, external relations and communications, development, administration and human resources management. The advocacy activity includes selecting approximately 10 students for the clinic, developing seminars and workshops and mentoring students by applying legal background

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

and practicing experience, supervising all advocacy initiatives undertaken by students and analyzing recent case studies, scholarship, law and applying the highest professional standards. The experiential education delivery activity includes providing experiential learning opportunities for students by applying legal background and practicing experience and developing clinical legal education programs, courses, material and case studies based on knowledge of relevant scholarship, law, professional standards, and the Faculty of Law requirements.

#### 4. Policies for Professional and Managerial Staff

The PM-4 classification is a mid-range managerial role under the direct supervision of the Assistant Dean. PM-4 has an assigned salary range being the fourth of the 11 pay bands within the PM classification (i.e. PM1 – PM11).

The *Policies for Professional and Managerial Staff* (in this section, the “Policies”) states the goals of hiring “the best qualified candidate in accordance with the policies of the University” and providing “opportunities for career

development of Professionals/Managers...”.<sup>123</sup> The *Policies* set out the rights and responsibilities of “administrative Professionals/Managers,” covering a broad array of issues including but not limited to short-term disability leave, pension, performance review, pregnancy leave, and termination.<sup>124</sup>

With regard to the hiring process, the *Policies* address the process for advertising positions and the requirement for written applications. Most importantly for present purposes, they provide that the selection “will be based on the best qualified candidate for the position taking into account factors such as the candidate’s qualifications, skill, education, training, previous related experience, ability and potential, and the requirements of the position.”<sup>125</sup>

I am advised that the *Policies* are supplemented by a series of guidelines and documents that speak to best practices throughout the recruitment process for human resources recruiters, available on the HR SharePoint Portal and a number of which have been

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<sup>123</sup> [Policies for Professional and Managerial Staff](#), effective March 5 2012, section II.

<sup>124</sup> *Ibid* at sections II.

<sup>125</sup> *Ibid* at sections II (see “Selection”).

provided to me at my request. These guidelines and documents are recommended for use by divisional human resources representatives who assist divisions in professional and managerial searches. There is, for example, a “Hiring Manager’s Toolkit” that sets out how the various steps of a recruitment process ought to be conducted. In this case, the Assistant Dean was the “hiring manager”.

The “Toolkit” provides that every job competition is to result in selecting the individual “who is demonstrably the most qualified for the position.”<sup>126</sup> It goes on to provide that “[t]he determination of the most qualified candidate must be based on merit, determined through an evaluation of the candidate’s education, experience, skills, knowledge and abilities in relation to the selection criteria.” The Toolkit notes that while this is a matter of judgment “on the part of the selection committee”, it is a judgment to be reached “taking into account all the information that has been collected throughout the recruitment process: [t]he written application; [t]he interview(s);

[r]esults of any tests or assessments; and Reference checks.”<sup>127</sup>

##### 5. Other Hiring Policies

The University also has a policy on “academic administrators.” The *Policy on Appointment of Academic Administrator* provides that “[a]cademic administrative positions should be held by teaching staff who are willing to assume, for a time, special responsibility for the harmonious and effective functioning of their respective divisions or departments.”<sup>128</sup> The term “teaching staff” used in this policy is presumably intended to have the same meaning as the definition of that term in the *University of Toronto Act, 1971*.

This policy governs faculty members who take on additional administrative functions within the University. In so doing, it details the process for appointing deans and principals of colleges and associate deans. It is not applicable to the position of the Director of the IHRP.

##### 6. Policies on the Selection Committee

I was not able to locate any policy documents relating expressly to the

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<sup>126</sup> Hiring Manager’s Toolkit.

<sup>127</sup> Hiring Manager’s Toolkit.

<sup>128</sup> [Policy on Appointment of Academic Administrators](#), October 30, 2003.

constitution, appointment or terms of reference of what I have called the selection committee. (There are of course the “Toolkit” resources noted earlier.) However, I have not heard any objection or adverse comment on the way the selection committee in this case was assembled or how it went about its work of reviewing applications, establishing a short list, conducting interviews or selecting their Preferred Candidate. It also appears to be generally accepted that the selection committee is advisory to the Dean with the Dean being the final decision-maker.

#### 7. [Resources for Hiring International Candidates](#)

The Division of Human Resources and Equity at the University has a number of resources in relation to the hiring of international applicants. The most relevant aspects covered are these:

- Staff who come to the University as foreign nationals require work permits under Canadian immigration law;
- In order to get a work permit for working in Canada, foreign

nationals will need a positive LMIA from Employment and Social Development Canada;

- A positive LMIA will only be granted if Employment and Social Development Canada, among other things, reaches the following conclusions:
  - There is no Canadian worker available to do the job;
  - There is a need for the temporary foreign worker (“TFW”) to fill the job;
  - Hiring a TFW will not negatively affect the Canadian labour market; and
  - There is a plan in place to transition the work in question to the Canadian workforce within a reasonable period of time.<sup>129</sup>

I obtained further information on this aspect from the immigration lawyer. I was advised that the LMIA process requires the employer to demonstrate “that no Canadian worker or permanent resident is available or qualified to do the job.”

It ought to have been clear that the LMIA route would require the University to show that there was no Canadian available or qualified to do the job.

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<sup>129</sup> [“Criteria to Hire a Foreign National”](#), University of Toronto, Human Resources and Equity (undated).

So far as I can determine, the immigration resources do not address the “substantial benefit” route that was being considered for the Preferred Candidate.

#### 8. Confidentiality in the hiring process

Everyone in the University community to whom I spoke understands that the hiring process is confidential. In response to my request to be referred to all relevant University policies, the Chief Human Resources Officer noted that “[i]t is axiomatic in Human Resources best practices that the personal information about candidates that is supplied as part of a search, and the deliberations of the search committee itself, are strictly confidential.” However, I was not able to find this best practice expressly reflected in any University policy that applies to recruitment for this position.

There is a 2006 memorandum by former President Naylor to University administrators to assist in search processes for academic and senior non-academic administrators in which it was stated that “[c]onfidentiality is mandatory in order to ensure frank discussion and to

respect the input and participation of everyone involved in each phase of the committee’s work. This requirement will ensure that the qualifications and appropriateness of individual candidates can be discussed openly within the committee, and that none of these discussions, even in part, will be disclosed. Members are committed to upholding the highest standards of confidentiality with respect to the committee’s activities.”<sup>130</sup> I doubt that this memorandum applies to the recruitment of the IHRP Director as the position is neither an academic nor a senior non-academic appointment.

Similarly in a 2002 memorandum, then Vice-Provost Goel instructed university administrators that “material [submitted by an applicant] should remain confidential to the members of the duly constituted search committee.”<sup>131</sup> Materials can be circulated more broadly to members of the department when the consent of the author is obtained. This memorandum is silent with respect to whom it applies, although it appears to

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<sup>130</sup> [Search Committee Principles & Practices \(Memorandum\)](#), dated November 3, 2006.

<sup>131</sup> [Confidentiality of Search Committee Records \(Memorandum\)](#), January 8, 2002.



provide general guidance on best practices for hiring processes generally.

#### 9. [Alumni and Donor Input into University Decision-making](#)

The University has some policies touching on aspects of its relationship with alumni and donors. For example, the *Provostial Guidelines on Donations* provide that the “University values and will protect its integrity, autonomy, and academic freedom, and does not accept gifts when a condition of such acceptance would compromise these fundamental principles.”<sup>132</sup>

Virtually everyone to whom I spoke in the University community recognized that donors and alumni should not have any inappropriate role in hiring decisions. That said, there is no formal policy speaking expressly to the question of if and to what extent alumni and donors may appropriately be involved in the University’s hiring decisions.

There are doubtless instances, particularly in professional faculties, in which input from the broader community may be valuable and ought to be welcomed. However, any such input into

hiring decisions should occur only in the context of the established hiring process and must be consistent with the goal of identifying the most highly qualified candidates based on objective criteria. The sort of “quiet discussions” with “top university officials” contemplated by the professor in the email to the Organization that I have described earlier have no place in a merit-based recruitment process.

There ought to be express University policy reflecting this view and providing guidance to those to whom such approaches are made.

### C. ANALYSIS

#### 1. [Academic Freedom](#)

The current understanding is that the existing formal protections in the University for the foundational principle of academic freedom do not apply to positions in the “Professional/Managerial” classification such as the Director’s position in the IHRP. That said, academic freedom, as the University’s policies recognize, is central to the proper functioning of a university and more broadly the search

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<sup>132</sup> [Provostial Guidelines on Donations](#), April 30, 1998.

for the truth. The concern with the search process in this case was that external actors considered the Preferred Candidate's scholarship objectionable and that this external influence played a role in the decision not to proceed with the recruitment.

In my interviews with members of the University administration and community, no one has suggested that such outside intervention is appropriate. On the contrary, I heard multiple times from University administrators and interested parties that permitting those outside of the University to play a determinative role in University hiring runs afoul of the principles for which the University stands. This understanding is reflected in the University's public statements concerning this controversy.

For example, in an email to Faculty of Law members, the Dean stated that "[l]et me say at the outset that assertions that outside influence affected the outcome of that search are untrue and objectionable. University leadership and I would never allow outside pressure to be a factor in a hiring decision."<sup>133</sup> The VPHR also stated that "[t]o assert that external

views, from any individual or organization, either for or against the potential hiring of a particular candidate were a factor in the decision not to proceed with an offer of employment, is false."<sup>134</sup>

Giving effect to such outside influence would of course be inconsistent with the fundamental policy of selecting the candidate that is most highly qualified based on objective criteria as assessed through the selection process.

As I noted in the introduction, given (i) the apparent consensus on this point; (ii) the fact that I would not draw an inference that external influence played a role in this case and (iii) the current ongoing parallel processes by the Canadian Association of University Teachers and the University of Toronto Faculty Association, it would be imprudent for me to do anything more than to provide you with a few thoughts on this subject in the context of the third element of my Terms of Reference, namely to offer "any pertinent guidance or advice" for the University's consideration "relating to any

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<sup>133</sup> Email from Dean to the Faculty of Law.

<sup>134</sup> Email from VPHR.

matters arising out of the processes that were involved in this search.”

## 2. Confidentiality

As noted, there is a surprising gap in the University’s written policies with respect to the requirement of confidentiality in the recruiting process. However, virtually everyone to whom I spoke in the University community recognized and accepted that requirement.

There are sound reasons for this. First, candidates will often have to provide confidential information in order to place a full picture of their candidacy before the selection committee. Their candour ought to give rise to a corresponding duty to keep that information confidential and to use it only for the purposes of evaluating the candidate’s application.

Second, a robust recruiting process requires a full and frank exchange of views among the selection committee members who, in a sense, are deliberating among themselves in order to find the most highly qualified candidate. As in many other settings, confidentiality fosters the sort of candid

exchange which ought to characterize those deliberations and that is vital to finding the best candidate.

Finally, the University is under statutory obligations to protect the privacy of personal information.<sup>135</sup>

There is no doubt that confidential information about the search process was disclosed outside the selection committee’s deliberations. Information about the state of the search was shared with the AVP and relayed to the alumnus. Selection Committee Members 1 and 2 shared information outside the selection process circle. A chronology prepared by Selection Committee Member 1 was provided to the *Globe and Mail*, although so far as I can determine not by the Selection Committee Member. Selection Committee Member 2 tweeted copies of emails that had been exchanged relating to the search process once the matter was in the public domain as a result of press coverage following the Dean’s announcement at a faculty meeting that the search was being cancelled. Some

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<sup>135</sup> *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31.

of the participants in the initial meeting with Selection Committee Member 1 shared what they had learned and the Preferred Candidate herself shared information about the search process with others.

The fact that this information came to be in the public domain put the University in a difficult position. It had legal advice to the effect that it could not release more information than the brief statements that it issued. But in the eyes of some, this rather general and brief response to the various allegations reinforced the view that the Alumnus' information was the true basis for, or at least a contributing factor to, the decision not to continue with the Preferred Candidate's recruitment.

In the concluding section of my review, I will have a number of suggestions for your consideration in relation to the confidentiality of recruitment processes.

### 3. Conclusion

The concern in this case is that external influence was inappropriately brought to

bear on a hiring decision. There is no doubt that this, if it occurred, would be contrary to University policy that applies to the recruitment of Professional/Managerial Staff. However, as discussed at length above, I would not draw the inference that external influence had an impact on the decision-making in this case. Given the broad consensus about the impropriety of such influence playing any role and my conclusion that it did not, and given the existing processes involving the Canadian Association of University Teachers and the University of Toronto Faculty Association, I do not think it prudent for me to say more about the parameters, if any, of academic freedom in this situation.

With respect to confidentiality, there were several instances in which the confidentiality of the search process was not observed. However, I found there to be significant gaps in the University's policy framework in this regard.

## PART III: PERTINENT GUIDANCE FOR YOUR CONSIDERATION

### A. INTRODUCTION

The third and final element of my review addresses your request that I provide “any pertinent guidance” for your consideration “relating to any matters arising out of the processes that were involved in this search.” I have several suggestions that I hope may be helpful to the University. I will address five main aspects: (i) the basis of recruiting decisions; (ii) the recruiting process; (iii) confidentiality; (iv) protections for clinical instructors; and (v) reconciliation.

### B. THE BASIS OF RECRUITING DECISIONS

As I have explained at length earlier, I do not think it prudent to embark on an extended discussion of academic freedom and issues such as whether it applies at all to professional/managerial staff and if so how it applies with respect to candidates during the recruiting process.

However, at the root of the concerns expressed to me about academic freedom is the basic point that the University must be clear that external pressure cannot play a role in its recruiting decisions.

I suggest that it would be timely for the University to re-affirm a fundamental principle: attempts by anyone – including lobby groups, corporations and donors – to attempt to block, prevent or disqualify an applicant in a merit-based hiring process on the basis of the candidate’s religious or political views, their scholarly or other public work or their social activism must be firmly rejected unless the matter raised can be demonstrated to be evidence of unfitness for the duties of the position.

In addition, it should be made explicit that “input” of this nature is not to be made through “back channels”, such as “quiet discussions” with “top university officials.”

This suggested re-affirmation is consistent with the commitment to justice and equity in the *Statement of Institutional Purpose* and with the principle that the best qualified person should be hired as set out in the *Policies for Professional and Managerial Staff*. Specifically, the *Statement of Institutional Purpose* recognizes that “the most crucial of all human rights are the rights of freedom of speech, academic

freedom, and freedom of research.”<sup>136</sup> In so doing, the *Statement of Institutional Purpose* commits the University to cultivating a culture of equal opportunity. Similarly, the *Policies for Professional and Managerial Staff* seek to, among other things, “foster excellence in the work place and contribute to the achievement of the mission of the University through hiring the best qualified candidate.”<sup>137</sup> An express prohibition of outside interference is entirely consistent with and promotes the values of the University.

In the same vein, it would be helpful for the University to develop explicit policies or protocols as to how to handle any inquiries made by an alumnus or others regarding a recruitment process. There are many ways these policies or protocols could be formulated. One approach to consider would be to stipulate that the University should respond to these sorts of inquiries by indicating that: (a) recruiting processes are confidential; (b) decisions are made on the basis of the material obtained during the recruiting process; and (c) only

concerns put in writing and that will be shared with the candidate will be received. If a policy along these lines had been in place and observed at the time of the alumnus conversation with the AVP, this whole unfortunate controversy would likely have never arisen.

### C. THE RECRUITING PROCESS

There are several aspects of the recruiting process that would benefit from a more explicit policy framework.

1. [The Constitution and Role of the Selection Committee Should be Specified](#)

I was not able to locate any terms of reference or other written policy that addressed how the selection committee for this position should be constituted or what its role should be. There has been no objection to this aspect of the process in this case and what was done was, so far as I can tell, consistent with past practice. I did note, however, that the HR Consultant thought that the Assistant Dean was the decision-maker while everyone I have heard from in the Faculty of Law understood that the committee’s role was advisory to the Dean who was the ultimate decision-maker. There is

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<sup>136</sup> *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992.

<sup>137</sup> [Policies for Professional and Managerial Staff](#), effective March 5 2012, section II.

certainly excellent guidance available, as noted earlier, in the Hiring Manager's Toolkit, but that material is not routinely available to members of selection committees.

My understanding is that Hiring Managers and selection committees look to the HR Consultant for guidance on questions of process. No doubt that is appropriate and wise. However, I suggest that it would be helpful for there to be explicit written guidance provided to members of selection committees about the process that they are to follow as well as written Faculty or other procedures to address the composition and appointment of members of a selection committee for PM positions.

## 2. All Requirements of the Position Should be Made Explicit

All requirements should ideally be specified in the advertisement or at least made explicit at the time that interviews are conducted. The problem with not doing this is apparent from looking at what happened in this case.

It appears that there was a misunderstanding within the selection committee with respect to the timing for entry into the position. As discussed in Part I, the Assistant Dean understood

throughout that it was essential that someone be in the role in the fall, while the other members of the selection committee thought that the crucial date was the beginning of January. If the position requires that the person start work by a certain date, that should be specified in the advertisement and, if not specified there, it should at least be made clear to candidates no later than at the time that interviews are conducted. If timing is flexible within certain limits, this too should be specified or made clear in the same way.

## 3. Key Decisions Should be Recorded

Key decisions by a selection committee should be put in writing. This practice would have prevented an apparent serious misunderstanding in this case. Two members of the selection committee recalled that the committee had unanimously agreed that if neither of two candidates could be hired, there would be a failed search. The third member did not share that recollection. My suggestion is not that there be any elaborate minutes or formal record kept. All I have in mind is a succinct email confirming key decisions.

#### 4. Immigration Advice Should be Obtained Early in the Process

The selection committee and the hiring manager should have more detailed immigration information earlier in the process when they embark on an international search. It is a significant step for the University to represent that there is no Canadian applicant suitable for the position. The timing implications of the process, both in relation to the timing of advertising and in terms of how long it will likely take to obtain required approvals should be understood at the beginning, not at the end of the process.

#### 5. Recommendations to the Decision-maker From the Selection Committee Should be in Writing

Where, as in this case, the selection committee is advisory, it should report to the decision-maker in writing. This need not be an elaborate document, but it should set out the key elements of the committee's recommendation and the reasons for it. This could take the form of a brief email, composed while all the members of the committee are present, at the conclusion of their deliberations.

#### 6. The Decision-maker Should Meet with the Selection Committee Before Departing from their Recommendation

Collegial governance is one of the four principles to which the University is committed.<sup>138</sup> As I see it, where a decision-maker feels unable to accept the recommendation of a selection committee, the principle of collegial governance supports full consultation and discussion before a final decision is made. This approach has the benefit of ensuring that there are no information gaps or misunderstandings between the committee and the decision-maker and it also allows for a full airing of differences of view within the cone of confidentiality before a final decision is made.

#### **D. CONFIDENTIALITY**

While everyone to whom I spoke understood that confidentiality is important in the hiring process, I was not able to find much in the line of explicit policy on this topic or much consensus about the details.

There are several aspects of confidentiality that arose in this case:

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<sup>138</sup> *University of Toronto Governing Council Statement of Institutional Purpose*, October 15, 1992, see section on "The University Community".



- First, was it appropriate for an advancement professional to agree with an alumnus to find out the state of a particular hiring process?
- Second, was it appropriate for a recruiting manager to share information about a recruiting process with a peer in the same faculty?
- Third, was it appropriate for that peer to share the information with her boss, the advancement professional?
- Fourth, was it appropriate for the advancement professional to pass on the information received to the alumnus?
- Fifth, was it appropriate for a member of the selection committee to brief concerned colleagues on the details of the selection committee's decision-making and to provide notes of that process to others?
- Sixth, was it appropriate for a member of the selection committee to tweet emails concerning the process?
- Seventh, was it appropriate for someone to provide a copy of the selection committee member's notes to the press?

- Eighth, should an adverse inference be drawn when a university official respects the obligation to keep personal information confidential?

In my view, the answer to all of these questions is “no.” But one would look in vain for express, written University policy that provides clear answers to any of these questions. That, in my view, ought to change.

I suggest that there ought to be written confidentiality guidelines for PM recruitment processes. The guidelines should address specific examples of what the obligation of confidentiality entails in that context. The obligation of confidentiality ought to include at least the identity of candidates, their personal information and the deliberations of the selection committee. In addition, members of selection committees ought to be required to sign written confidentiality agreements spelling out the obligations of confidentiality which they are accepting. Finally, it should be clear that under no circumstances are details of a recruitment process to be shared with anyone not directly involved except for the purposes of checking references or obtaining necessary legal advice.

In addition, members of selection committees and members of the University community in general ought to be provided with practical summaries of the University's obligations under privacy legislation.

#### **E. PROTECTIONS FOR CLINICAL INSTRUCTORS**

I will not engage with the debate about how the principle of academic freedom relates to the employment of professional/managerial staff at the University. I do wish to comment, however, on what to me is a broader, valid point raised by many who were in touch with me.

Clinical instructors, especially in human rights and public interest law clinics are literally "in the business" of taking on controversial and unpopular causes. One can think of issues about allegations of human rights abuses or environmental damage committed by Canadian companies abroad, the plight of asylum seekers, or the alleged mistreatment of minority groups by foreign powers. All of these, and many other issues, are likely to be controversial and cause discomfort to some powerful people, groups and institutions.

These clinical instructors need courage to fearlessly advance unpopular positions and to advocate on behalf of the powerless. But they deserve to know that the University "has their back" as they do so. I suggest that the University examine the protections for clinical instructors and similar positions whose duties require them to tackle topics likely to arouse controversy and to take steps to ensure that their efforts will be supported so long as they meet the highest professional standards.

#### **F. RECONCILIATION**

This controversy has left deep wounds in its wake. I believe that everyone involved in the University community acted in good faith, although undoubtedly there were things that, at least with the benefit of hindsight, ought to have been done differently. The question, though, is how should the Faculty of Law and University move forward?

I suggest that you, in consultation with the current Dean of the Faculty of Law, explore the possibility of engaging in a reconciliation process, both internally and with the Preferred Candidate. I am sure that there is much more that unites all of these people than divides them. I sense a widely-shared and profound

commitment to the values that the University seeks to embody. A process that helps to refocus the community on those values and acknowledges the harm done to the Preferred Candidate has the promise of helping to bring

together colleagues who share these important values, even though those values may have led them to very different stances on this controversy.

### CONCLUDING REMARKS

I have provided a comprehensive factual narrative of the recruitment process for the IHRP. I have concluded that I would not draw the inference that improper outside influence played any role in the decision to discontinue the candidacy of the Preferred Candidate.

In light of that conclusion and of ongoing processes within and beyond the University, I have thought it imprudent to opine on the role, if any, of academic freedom in the recruitment process for this PM-4 position.

Finally, I have offered a number of suggestions for changes to or clarifications of University policy and practice and suggested that consideration be given to instituting a reconciliation process within the Faculty of Law and with the Preferred Candidate who has been seriously victimized by the this controversy.

I hope that I have fully responded to the task that you asked me to undertake and I hope that what I have provided will be of assistance.

APPENDIX A – CONFIDENTIAL CONCORDANCE FOR PRESIDENT GERTLER  
ONLY

[redacted]

## APPENDIX B – LIST OF SUBMISSIONS RECEIVED

Although this was not a public review or process, a number of individuals, groups of individuals and organizations took the time to write to me to provide their insight into the subject matter of my review and the underlying events. Below is a list of submissions received.

1. Submission of B’Nai Brith Canada dated December 2020.
2. Letter from Professor Abigail Bakan dated January 20, 2021.
3. Email from Professor Emeritus Joseph Carens dated January 21, 2021.
4. Email from Professor Judith Taylor dated January 21, 2021.
5. Submission received from Associate Professor Vincent Chiao, Professor Patrick Macklem, Professor Anver Emon, Professor Denise Réaume, Professor Mohammad Fadel, Professor Kent Roach, Associate Professor Ariel Katz, Professor David Schneiderman, Professor Trudo Lemmens, Associate Professor Anna Su, and Professor Jeffrey MacIntosh (all tenured faculty at the University of Toronto Faculty of Law) dated January 22, 2021.
6. Letter from seven Israeli scholars and practitioners of international and human rights law, dated January 28, 2021.
7. Submission received from Associate Professor Ralph Wilde and Professor GM Scobbie dated January 29, 2021.
8. Submission received from the Arab Canadian Lawyers Association and Independent Jewish Voices Canada dated February 2, 2021.
9. Submission received from the Canadian Association of University Teachers dated February 8, 2021.
10. Email and documentation sent on behalf of the University of Toronto Faculty Association dated February 9, 2021.

11. Letter from Karen Bellinger, Carmen Cheung, Associate Professor Vincent Chiao, Samer Muscati, Cheryl Milne, and Professor Kent Roach dated February 10, 2021.
12. Letter from Professor Reem Bahdi and Dr. Ardi Imseis dated February 15, 2021.
13. Letter from Professor Michael Lynk and Dr. Ardi Imseis dated February 24, 2021.
14. Letter from 86 Faculty Members and Librarians in the Social Sciences and Humanities at the University of Toronto, received March 3, 2021.