DIVERSITY HIGH COURT OF CANADA

BETWEEN:

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

Applicants

– and –

THE ATTORNEY GENERAL OF CANADA

Respondent

APPLICATION FOR **JUDICIAL REVIEW** PURSUANT TO SECTION 18.1 OF THE *FEDERAL COURTS ACT*

APPLICANT'S FACTUM

Team Identifier: 400

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I. OVERVIEW

1. The judge is the pillar of our justice system. Despite swearing to be independent and impartial decision-makers, judges are not immune to unconscious racial biases. This creates tension between the uncomfortable possibility that judges may render decisions that depend on improper unconscious biases on the one hand and respect for the judiciary on the other.

2. The Canadian Judicial Council (**"CJC"**) is responsible for ensuring that negative unconscious biases are accounted for within the federal judiciary. However, as evidenced by the CJC's decision in the matter of Justice David E. Spiro, unconscious bias is not always appropriately dealt with by the very body that should be the most attuned to it.

3. This Court should find the CJC's decision that Justice Spiro's conduct was not serious enough to warrant his removal is unreasonable. The decision relies on faulty logic, misconstrues the issues before it, and is unjustifiable in light of the evidence before the body.

4. Canada must continue to strive towards a deeper understanding of how race impacts societal structures. Addressing unconscious biases in the judiciary will require approaching the issue of racial bias from the perspective of critical race theory. Doing so will allow the judiciary to eschew a kind of colourblind reasoning that precludes a meaningful assessment of unconscious bias. Critical race theory also demonstrates how the CJC's self-regulating nature jeopardizes the public's ability to trust in the independence of the judiciary.

II. STATEMENT OF FACTS

(1) The decision under review

5. On April 13, 2020, a Judicial Conduct Review Panel (**"Review Panel"**) constituted by the CJC concluded that the conduct of Justice David E. Spiro of the Tax Court of Canada was

not serious enough to warrant removal from office.[1] Accordingly, the Review Panel declined to escalate the matter to an Inquiry Committee.

6. The CJC was tasked with considering allegations that Justice Spiro improperly interfered in the appointment of Dr. Valentina Azarova as Director of the University of Toronto Faculty of Law's International Human Rights Program (**"IHRP"**) due to disapproval of Dr. Azarova's past academic work which critiqued Israel's occupation of Palestine. A staff member from the Centre for Israel and Jewish Affairs ("**CIJA**") alerted the judge to the impending appointment of Dr. Azarova.

(2) Facts giving rise to the decision

7. Justice Spiro is an alumnus and donor of the University of Toronto Faculty of Law (**"Faculty of Law"**). He also served on CIJA's Board prior to being appointed to the bench.

8. The CJC concluded that Justice Spiro did not actively campaign against Dr. Azarova's appointment.[2] Instead, as a proud alumnus of the Faculty of Law, Justice Spiro intended to warn that such an appointment would generate "unwanted controversy and harsh publicity."[3]

9. The CJC also found that the fear of bias was not well-founded. First, Justice Spiro had not done anything in his career to suggest such a bias.[4] Second, influential people in the legal community provided letters in support of Justice Spiro.[5] Third, Justice Spiro's past involvement with CIJA could not indicate bias because "most, if not all, appointees to judicial office […] carry the burdens of their past on appointment to office."[6]

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[1] *Report of the Review Panel Constituted by the Canadian Judicial Council Regarding the Honourable D.E. Spiro* (12 October 2021) at para 1, online: Canadian Judicial Council <https://cjc-ccm.ca/sites/default/files/documents/2021/Report%20of%20the%20Review%20Panel%20-%20Spiro.pdf> [*CJC decision*] at para 5.
[2] *Ibid* at para 58.
[3] *Ibid* at para 59.
[4] *Ibid* at para 47.
[5] *Ibid.*
[6] *Ibid* at para 54

10. The CJC relied on a report on an independent review of the IHRP hiring process written by former Supreme Court of Canada Justice Thomas Cromwell ("**Cromwell Report**").[7] The Cromwell Report concluded that external influence played no part in the Faculty of Law's decision to halt Dr. Azarova's recruitment.[8]

11. The CJC received complaints from Professor Les Green, Professor Craig Scott, the National Council of Canadian Muslims, the Canadian Association of Muslim Women in Law, and the Canadian Muslim Lawyers Association. The Arab Canadian Lawyers Association ("**ACLA**"), Independent Jewish Voices ("**IJV**"), and the British Columbia Civil Liberties Association ("**BCCLA**") also filed a joint complaint.

III. STATEMENT OF ISSUES

A. Doctrinal Argument #1: The standard of review is reasonableness.

B. Doctrinal Argument #2: The CJC's decision to not constitute an Inquiry Committee to further investigate the conduct of Justice Spiro was unreasonable.

C. Theoretical Argument #1: The reasonable apprehension of bias test must incorporate critical race theory to account for unconscious bias.

D. Theoretical Argument #2: The CJC's self-regulating scheme harbours inherent biases that harm judicial independence.

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[7] The Honourable Thomas A. Cromwell C.C. Cromwell, "Independent Review of the Search Process for the Directorship of the International Human Rights Program at the University of Toronto, Faculty of Law" (15 March 2021) online (pdf): <https://live-presidents-office.pantheonsite.io/wp-content/uploads/2021/12/Report-of-the-Hon-Thomas-A-Cromwell-CC-–-March-15-2021.pdf> [*Cromwell Report*] at 4.

[8] *Ibid* at 6.

IV. ARGUMENT

A. Doctrinal Argument #1: The standard of review is reasonableness

12. The standard of review for the CJC's decision to not constitute an Inquiry Committee in the matter of Justice Spiro is reasonableness. In *Smith,* the Federal Court affirmed reasonableness is the appropriate standard for reviewing CJC decisions.[9]

13. In *Vavilov,* the Supreme Court of Canada ("**SCC**") held that a reasonable decision is justified "in light of the facts" and exhibits "a rational chain of analysis."[10] Reviewers must be able to identify a "line of analysis" that could "reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived."[11] While a decision maker is not required to address every argument raised by complainants, reasons must "meaningfully account" for the central issues and concerns.[12] A decision maker must justify its reasons for departing from evidence since reasonableness may be jeopardized "where the decision maker has fundamentally misapprehended or failed to account for the evidence before it."[13]

B. Doctrinal Argument #2: The CJC decision was unreasonable

14. The CJC decision was unreasonable due to a lack of transparency in its reasoning process. First, the decision displays internal incoherence by stating multiple conclusions without articulating a chain of rational analysis. Second, the CJC fails to meaningfully grapple with the issues before it by unfairly narrowing the complaints. Finally, the CJC does not account for several pieces of important evidence before it and does not explain its reasons for departing from this evidence.

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[9] *Smith v. Canada (Attorney General),* 2020 FC 629 at para 53 [*Smith*].
[10] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 126 and 85 [*Vavilov*].
[11] *Ibid* at para 102.
[12] *Ibid* at para 127.
[13] *Ibid* at para 126.

15. Under s. 2(4) of the By-Laws, a Review Panel is required to determine whether a judge's conduct "might be serious enough" to warrant removal.[14] As the CJC articulates, the "might be" threshold is less than a balance of probabilities.[15] The CJC unreasonably concluded that Justice Spiro's conduct did not meet this low standard and the reasons provided failed to justify otherwise.

(1) The CJC decision is internally inconsistent and lacks a chain of rational reasoning

16. The CJC relies on a series of conclusory statements without outlining the path of reasoning that led to such conclusions. Although decision makers are not required to meet a standard of perfection in their analysis, reasons that simply state a conclusion will rarely assist a court in understanding the decision.[16]

17. The CJC's decision to not recommend *any* type of disciplinary action contradicts their acknowledgement that a "serious mistake" occurred.[17] When a Review Panel concludes that the complaint has merits but is not "serious enough" for a formal hearing by an Inquiry committee, it may recommend counselling or other remedial measures.[18] The Review Panel therefore was required to explain why such remedial measures were unnecessary for Justice Spiro in light of his "serious mistake."

18. The CJC engages in faulty reasoning when it concludes that Justice Spiro did not actively join a campaign to prevent Dr. Azarova's appointment in part because Justice Spiro did not make direct contact with the Dean.[19] Whether Justice Spiro advanced the interests of a

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[14] *Canadian Judicial Council Inquiries and Investigations By-laws, 2015,* SOR/2015-203, s 2(4) [*By-laws*].
[15] *CJC Decision*, *supra* note 1 at para 14.
[16] *Vavilov*, *supra* note 10 at para 102.
[17] *CJC Decision, supra* note 1 at para 59.
[18] Canadian Judicial Council, *Update in the case of an Inquiry regarding Justice P.T. Matlow* (June 2008), online: <https://cjc-ccm.ca/en/news/update-case-inquiry-regarding-justice-pt-matlow>.
[19] *CJC Decision*, *supra* note 1 at para 58.

political campaign is not premised upon whether he made direct contact with the Dean. His intervention in the process formed the basis of the complaints; direct contact with the Dean was merely an aggravating factor. By concluding the misconduct allegation was unfounded because one of its premises was false, the CJC's conclusion relied on an illogical chain of reasoning.

(2) The CJC failed to grapple with key issues raised by the complainants

19. The CJC's decision unfairly narrows the issues before it. The CJC also does not justify why it chose to limit the issues before them in this way.

20. *Vavilov* held that a decision may be unreasonable for failing to "meaningfully grapple with key issues or central arguments raised by the parties" since such failure "may call into question whether the decision maker was actually alert and sensitive to the matter before it."[20]

21. The CJC summarizes the complaints before them as signalling two major concerns. First, that Justice Spiro "improperly interfered in the appointment process" of Dr. Azarova.[21] Second, that such interference was "motivated by [Justice Spiro's] disapproval of Dr. Azarova's research on Israeli occupation of Palestinian lands" which would in turn cause "any party or lawyer" who is "Palestinian, Arab, or Muslim" to "reasonably fear bias."[22]

22. First, this characterization de-emphasizes key aspects of the complaints before the CJC. These errors include, but are not limited to, the following:

- The CJC narrows the issue before them to whether Justice Spiro interfered with an appointment process due to disapproval of Dr. Azarova's research despite a complaint that asserts "it would be wrong for a judge to attempt to influence a university appointment [...], no matter in what direction or with what outcome."[23]

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[20] *Vavilov*, *supra* note 10 at para 128.
[21] *CJC Decision*, *supra* note 1 para 17.
[22] *Ibid* at para 18.
[23] Federal Court Certified Tribunal Record, Leslie Green complaint letter of September 17, 2020 online (pdf): <https://censureuoft.files.wordpress.com/2021/09/t-1005-21-certified-tribunal-record-cjc-july-13-2021.pdf> at 6 [*Certified Tribunal Record*].

- The CJC does not explain why it rejected evidence that Justice Spiro had made his "own views" on the Israel/Palestine conflict "clear in his public statements of June 2009" when it concludes that "nothing in the career of David Spiro or his work supports" the suggestion of "bias against Palestinian, Arab or Muslim interests."[24]
- The CJC does not consider the broader allegation of bias articulated by a complainant who alleged the "spectre of bias or perceived bias" prompted concern beyond the Palestinian, Arab, or Muslim communities to include "others that similarly rely on or promote international human rights law – including Canadian Indigenous groups, who may appear before the Federal Tax Court."[25]
- The CJC does not explain why it rejects assertions made by members of reputable organizations such as the Arab Canadian Lawyers Association, Independent Jewish Voice, and the British Columbia Civil Liberties Association who assert that they, "as reasonable, fair minded, and informed persons," have already "lost confidence in Justice Spiro's ability to carry out his judicial duties in an impartial manner."[26]

23. Second, the CJC further skews the issue before them by dismissing the notion that "a Palestinian, Arab, or Muslim" would reasonably fear bias merely because such fear is "based on misinformation and speculation."[27] An overreliance on the Cromwell Report may be to blame. The CJC notes that the Cromwell Report's characterization of the facts is "helpful," but then cites the Cromwell Report's conclusion that Justice Spiro "shared [CIJA's] view that the appointment would be controversial with the Jewish community and cause reputational harm to the University." However, the Cromwell Report's purpose was to assess whether the Faculty of Law's hiring decision was subject to external influence. It did explicitly consider whether Justice Spiro's conduct reflected bias.[28] The Report's conclusions do not preclude the reasonable apprehension that Justice Spiro may be biased or impartial.

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[24] *Ibid,* Leslie Green complaint of 29 September 2020, at 16. See also *CJC Decision*, *supra* note 1 at para 47.
[25] *Ibid,* CAMWL and CMLA complaint of 8 October, 2020, at 49.
[26] *Ibid,* ACLA, IJV, and BCCLA complaint of October 10, 2020 at 43.
[27] *CJC Decision*, *supra* note 1 at paras 51-2.
[28] *Cromwell Report,* supra note 7 at 4-6.

24. Moreover, the "misinformation" the CJC refers to is irrelevant and does not affect the substance of the complaints. The CJC focuses on the fact that Justice Spiro did not contact the Faculty of Law directly. That is immaterial to the issue at hand. CIJA describes itself as "the only registered lobbyist for the Jewish community."[29] It is uncontested that Justice Spiro relayed concerns from a lobbying group without questioning their validity.[30] Further, Justice Spiro shared such concerns with an official at the University of Toronto on a Friday morning, and the Dean of the Faculty of Law was aware of them by that afternoon.[31] It is uncontested that the Dean mentioned Justice Spiro's comments to at least three different people both within and outside the Faculty of Law.[32] At a minimum, Justice Spiro impacted the process of Dr. Azarova's appointment by sharing an advocacy organization's view on a human rights matter.[33] The question for the CJC was whether this contributes to a finding that Justice Spiro's conduct *might* be serious enough to warrant removal.

25. Finally, the CJC stresses the importance of a distinction between "actively campaigning against Dr. Azarova's appointment" and "expressing concern that the appointment might subject the faculty to adverse criticism."[34] This distinction further obfuscates the issue before the CJC. The mere fact of a judge expressing concern over an appointment using one-sided, unverified information from an advocacy group is cause for concern. In this context, expressing 'adverse criticism' is akin to implying there is something wrong with a given appointment.

(3) The CJC decision is not justified in light of all the facts and evidence

26. The CJC either did not consider or does not adequately explain why it did not consider certain key pieces of evidence before it.

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[29] Centre for Israel and Jewish Affairs, "Frequently Asked Questions" (2021) online: *Centre for Israel and Jewish Affairs* <https://www.cija.ca/faq/>.
[30] *Cromwell Report,* supra note 7 at 31-32.
[31] *Cromwell Report,* supra note 7 at 35.
[32] *Cromwell Report,* supra note 7 at 37-38.
[33] *Cromwell Report,* supra note 7 at 37-42.
[34] *CJC Decision,* supra note 1 at para 44.

27. *Vavilov* held that a decision may be unreasonable if the decision-maker "fundamentally misapprehended or failed to account for the evidence before it."[35] Ultimately, reasonableness review is concerned not only with whether a decision is justifiable but also with whether the decision is justified "by way of" the decision maker's reasons.[36]

28. The CJC states that "right thinking persons" would not conclude Justice Spiro was biased but does not explain why.[37] In *Vavilov*, the SCC emphasized that simply "repeat[ing] statutory language [...] and then stat[ing] a peremptory conclusion" may be unreasonable.[38] In *Laporte*, the Federal Court held that a review board was required to explain *how* it determined that the "reasonable person in society" would be of the belief that an officer's conduct discredited the RCMP as a whole.[39] Similarly, the CJC was required to address how a "right thinking person" would not conclude that Justice Spiro harboured biases against Palestinian, Arab, or Muslim interests. Thus, the CJC failed to adequately explain both why the complainants' concerns were unfounded and how it decided on a fundamental issue.

29. Moreover, the context in which Justice Spiro expressed this opinion on behalf of CIJA — as an alumnus, a donor, and a judge — is critical.[40] The combination of these personal factors informs why Justice Spiro in particular became the recipient and disseminator of CIJA's opinion regarding Dr. Azarova's appointment. Accounting for the full factual matrix weakens the CJC's ultimate conclusion that Justice Spiro's concern for the Faculty of Law's reputation did not raise significantly serious ethical concerns.

30. The CJC relied on two other grounds to dismiss the bias complaint before it. The first ground was the fact that the CJC received "supporting letters" from "persons of undoubted

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[35] *Vavilov, supra* note 10 at para 126.
[36] *Ibid* at para 86.
[37] *CJC Decision, supra* note 1 at para 50.
[38] *Vavilov, supra* note 10 at para 102.
[39] *Laporte v Canada,* 2021 FC 118 at paras 25-6 [*Laporte*].
[40] See *Cybulsky v. Hamilton Health Sciences*, 2021 HRTO 213 [*Cybulski*].

reputation" who described Justice Spiro as "a highly ethical man."[41] Such letters merely support a finding that, in the opinions of these people, Justice Spiro has not, to their knowledge, demonstrated actual bias in the past. To not consider whether Justice Spiro may be influenced by unconscious bias is effectively to argue that we ought to wait until there is concrete evidence that someone has been discriminated against or that someone holds biased views before we can identify bias.

31. The CJC's second reason for dismissing the bias complaints is that "all judges carry the burdens of their past on appointment to office" such that Justice Spiro's past affiliation with CIJA does not lead to a reasonable apprehension of bias.[42] However, Justice Spiro's past affiliation with CIJA is not in contention.

32. As Justice Abella wrote in *Yukon*, "membership in an association affiliated with the interests of a particular race, nationality, religion, or language is not, without more, a basis for concluding that a perception of bias can reasonably be said to arise."[43] The operative words in this quote are "without more." Justice Spiro relayed concerns that he had not looked into on his own to an official of the University of Toronto, suggesting that he is open to being influenced by advocacy organizations. This constitutes the "more" that Justice Abella contemplated in *Yukon*. To be clear, Justice Spiro's religion or past affiliation with CIJA does not call his commitment to impartiality into question. However, due to his past affiliation, Justice Spiro knew that CIJA advocates for a particular point of view. He acted without considering the validity of CIJA's concerns, the impact that the suggestion of being anti-Israel could have on Dr. Azarova's career, or the impact on the Faculty's reputation if it is seen as harbouring biases against human rights advocates. These actions *do* call his commitment to impartiality into question.

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[41] *CJC Decision, supra* note 1 at para 47.
[42] *Ibid* at para 54.
[43] *Yukon Francophone School Board Education Area #23 v. Yukon (Attorney General),* 2015 SCC 25 at para 61 [*Yukon*].

B. Theoretical #1: The reasonable apprehension of bias test must change to incorporate critical race theory in order to account for unconscious bias

33. The reasonable apprehension of bias ("**RAB**") test must evolve to incorporate critical race theory (**"CRT"**) in order to meaningfully account for the danger that improper unconscious biases pose to the judiciary. The imaginary reasonable person must be construed as someone who understands how societal power structures inform the way unconscious racial bias manifests. Since the appearance of unconscious bias is just as corrosive to the public's confidence in the proper administration of justice as actual bias, the reasonable person aspect of the RAB test must be designed to specifically guard against unconscious bias. However, as evidenced by the CJC decision, this standard fails to do so because it promotes colourblindness.

34. The judiciary cannot succeed in confronting the issue of racial unconscious bias without explicitly acknowledging it; after all, "racism must be acknowledged to be fixed; its denial, conversely, ensures its persistence."[44]

(1) The failure to account for unconscious bias results in colourblind judging

35. The CJC decision demonstrates that colourblind judging impedes the identification of unconscious biases. Colourblindness is the "non-utilization of race" in how "people comprehend, rationalise, and act in the world."[45] The CJC decision applies the RAB test without considering the inherent power structures that underpin Justice Spiro's actions, thereby failing to identify concerns regarding the judge's potential unconscious bias.

36. In other words, colourblind judging leaves race at the door and precludes an appreciation of the "seemingly endless differentiations, inequalities, and injustices of existing social

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[44] Joshua Sealy Harrington, "Untelling the Story of Race" (October 13, 2020) online: *The Walrus* <https://thewalrus.ca/untelling-the-story-of-race/>.
[45] Devon W Carbado & Cheryl I Harris, "The New Racial Preferences" (2008) 96:5 Cal L Rev 1139 at 1142.

relations."[46] Colourblindess is a "technology of power" that "operates as the default intellectual and ethical position for racial justice."[47] Judicial institutions — particularly the CJC, as the only body empowered to discipline the federal judiciary — must be realistic about how existing technologies of power dictate who is reasonable and who is allowed to raise reasonable concerns. CRT suggests that the crucial problem with failing to account for race dynamics is that it simply breeds more racism.

37. As the SCC stated in *Cojocaro*, the presumption of impartiality for the judiciary reflects respect for the judicial oath and "serves the policy need for finality in judicial proceedings."[48] There is, however, an important difference between presuming impartiality and recognizing — as Canadian courts have done for years — that we *all* live in a system built on racism. The presumption of impartiality requires "active and conscientious work."[49] Given modern understandings of unconscious bias, failing to recognize the impact of systemic racism when considering whether a RAB exists is akin to "render[ing] invisible by judicial fiat the reality of Canadian racism."[50]

38. Further, the reasonable person standard marginalizes minority perspectives by hiding under the guise of objectivity and neutrality.[51] The standard is premised on the dominant group's view of "normal" behaviour, thereby reinforcing assumptions about what constitutes reasonable behavior. Consequently, the reasonable person standard will always risk "accomodat[ing] for

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[46] Kimberlé Williams Crenshaw et al, "Introduction" in *Seeing Race Again: Countering Colorblindness Across the Disciplines* (Los Angeles: UCLA Press, 2019) 1-11 at 3 [*Seeing Race Again*].
[47] *Ibid* at 13.
[48] *Cojocaru v. British Columbia Women's Hospital and Health Centre*, 2013 SCC 30 at para 15 [*Cojocaru*].
[49] *R v Chouhan,* 2021 SCC 26 at para 63.
[50] Richard F. Devlin, "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*" (1995) 18:2 Dal LJ 408 at 439 [*Suspicious Minds*].
[51] Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford: Oxford University Press, 2003) [*Moran*].

prejudice, bias, superstition, and gullibility" and may "reinforce and uphold stereotypes" rather than dispel them.[52]

39. A more inclusive reasonableness analysis would require the CJC to assess judicial conduct from a "right thinking person" perspective reflective of majority *and* minority groups. A CRT approach is even more beneficial because it would require the CJC to go one step further and consider Justice Spiro's actions in light of the unique experiences of minority groups and the power imbalances invoked by his status as a donor and alumnus.

(2) Judges must account for critical race theory when applying the RAB test

40. The RAB test should evolve to explicitly consider elements of CRT in order to meaningfully account for unconscious bias.

41. The rationale for the change proposed is comparable to the SCC's rationale in *R v Le.* In *Le*, the SCC held that an objective assessment of police detention must be determined based on the perception of a reasonable person in the shoes of the accused.[53] This requires considering "how the combination of a racialized context and minority status would affect the perception of a reasonable person in the shoes of the accused."[54] In effect, then, the SCC incorporates tenets of CRT in their judgment.

42. The move towards contextualization of an objective test in *R v Le* represents a modern interpretation of the way Justices L'Heureux-Dubé and McLachlin proposed contextualizing the reasonable person in the RAB test in *R v RDS*. In *RDS*, the Justices stated that the reasonable person tasked with considering whether a judge's actions give rise to a RAB must be "cognizant of the racial dynamics in the local community."[55] In other words, determining the reasonable

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[52] John Gardener, "The Many Faces of the Reasonable Person" (2015) 131 L Q Rev 563 at 573 [Gardener].
[53] *R v Le,* 2019 SCC 34 at para 106 [*Le*].
[54] *Ibid* at para 75.
[55] *R v RDS*, [1997] 3 SCR 484 at para 48 [*RDS*].

person's opinion calls for "judging that fully recognizes the prevalent racism […] in Canada's history."[56]

43. Further, Canadian courts in different contexts have recognized that systemic discrimination is an important element of judicial reasoning. In *Morris*, the Ontario Court of Appeal "wholeheartedly" accepted that "sentencing judges must acknowledge societal complicity in systemic racism and be alert to the possibility that the sentencing process itself may foster that complicity."[57] In *Cybulsky*, the Human Rights Tribunal of Ontario held that unconscious biases relating to women in male dominated workplaces in society were appropriate grounds upon which to find that the applicant, the sole "female head of cardiac surgery in Canada," faced gender discrimination in the workplace.[58]

44. Such decisions demonstrate the judicial system's growing awareness of how systemic discrimination impacts legal reasoning and decision-making. This is in line with CRT. The RAB test should similarly account for how CRT helps the reasonable person identify and conceive of unconscious biases.

(3) Application to CJC decision under review

45. Had the CJC applied the RAB test with CRT in mind, Justice Spiro's conduct would have been understood in a more contextual way that would have better illuminated the actual unconscious bias at play.

46. The complainants spelled out the relevant power dynamics engaged by Justice Spiro's conduct. One of the "most dangerous forms" of anti-Palestinian racism "consists of attempts to deny the history and ongoing suffering of the Palestinian people" and "to paint those who are critical of Israel's treatment of Palestinians as anti-Semitic and unfit for employment."[59]

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[56] Sujith Xavier, "Biased Impartiality: A Survey of Post-*RDS* Caselaw on Bias, Race, and Indigeneity" (2021) 99 Can Bar Rev 354-388 at para 27 [*Biased Impartiality*].
[57] *R v Morris*, 2021 ONCA 680 at para 86 [*Morris*].
[58] *Cybulsky, supra* note 40 at paras 2, 33-35.
[59] *Certified Tribunal Record, supra* note 26 at ACLA, IJV, and BCCLA complaint at 39.

Moreover, "lobbying against Palestinians and those who address Israel's violations of Palestinian human rights" leads to a "reduced understanding of Palestinian experiences and perspectives," which in turn allows for the "[negative] stereotyp[ing of] human rights advocates and scholars as violent and/or prone to be critical of Israel out of anti-semitism."[60] Justice Spiro's position as judge, alumnus, and donor granted him the power to impact the process of a hiring procedure. The fact that such power was used to further an advocacy group's opinion on a human rights issue is the crux of the complaints filed at the CJC.

47. This framing also more accurately describes the actual bias at issue. The concern is not only that Justice Spiro may harbour unconscious biases against Palestinians, Muslims, and Arabs. There is an additional and equally valid concern over whether he harbours unconscious biases *for* those who agree with CIJA's opinion, which he unquestionably relayed to the University of Toronto. To be clear, it is Justice Spiro's decision to unquestionably relay CIJA's concerns that suggests an inability to maintain impartiality.

48. CRT developed out of a recognition that "patterns of segregation and racial power were built not simply on formal rules and 'White Only' signs" but also through "practices, networks, and other social interactions that predictably reproduced White dominance across the social terrain."[61] CRT therefore represents an "awareness of how conceptions such as [colourblindness] obscure the continuing patterns of racial power in presumptively race-neutral institutions."[62] In the context of the RAB test, a judge who is not attuned to how the act of imagining a reasonable person may be unconsciously influenced by these subtle patterns of racial power may misinterpret the ill of the alleged bias.

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[60] *Ibid.*

[61] Kimberlé Williams Crenshaw,"Unmasking Colorblindness in the Law: Lessons From the Formation of Critical Race Theory" in *Seeing Race Again: Countering Colorblindness Across the Disciplines* (Los Angeles: UCLA Press, 2019) 1-11, 52-84 at 53 [*Unmasking Colorblindness*].

[62] *Ibid* at 67.

49. The CJC considered evidence of how Justice Spiro's colleagues, peers, and friends perceived his actions. This merely proves that the CJC had no evidence of actual bias. By failing to consider whether Justice Spiro's actions evidenced an unconscious bias either for parties who think like him *or* against Palestinians, Muslims, or Arabs, the CJC effectively eliminated the possibility that he may hold such unconscious biases.

50. The long-term impact of unchecked unconscious judicial bias is far more damaging to the public's confidence in the proper administration of justice than folding critical aspects of CRT into the RAB test. There must be a "recognition that principles and rules of law are themselves historically, culturally and socially contingent and therefore in need of reconsideration and possible reconfiguration."[63] Canadian society is changing for the better. It is time the law followed suit.

D. Theoretical Argument #2: The CJC's self-regulating scheme harbours inherent biases that harm judicial independence

51. The constitutional guarantee of a neutral decision-maker is undermined if disciplinary proceedings against judges are heard by their colleagues on the bench. Judges have an inherent stake in judicial disciplinary hearings and are vulnerable to unconscious biases that favour other judges.

52. A self-regulating scheme for judicial disciplinary review offends the procedural fairness principle of an impartial decision maker. The guarantee of both actual and perceived impartiality in judicial decision-making is vital to fostering public confidence in the fairness and objectivity of our judiciary.[64] Instead, the CJC's judicial disciplinary scheme must include meaningful lay participation at every stage to secure an objective and public-oriented discipline system that achieves fair results.

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[63] *Suspicious Minds, supra* note 51 at 442.
[64] *Valente v The Queen*, 1985 CanLII 25 (SCC), [1985] 2 SCR 673 at para 22 [*Valente*].

(1) Judges are not immune to unconscious biases

53. The judiciary is a human institution. Judges are nuanced decision-makers who are prone to — and indeed, invited to — rely on their own perspectives to decide difficult questions.[65] While some biases are easy to identify, others are not. A CRT approach to judicial review requires the legal system to recognize that judges are influenced by implicit biases, and that issues may arise when judges are entrusted to police their own.

54. There is growing jurisprudential evidence suggesting that unconscious biases influence judicial decisions. According to an American study, 80% of white judges strongly associate Black individuals with negative words and White individuals with positive words.[66] Studies also find political and gender biases in judicial decisions: Republican judges are more likely to cite each other, and male judges are more likely to cite other male judges.[67]

55. Yet, research further demonstrates that judges have difficulties detecting and admitting to their implicit biases. A study from Duke University explored whether administrative law judges were prone to self-serving bias – an individual's tendency to perceive oneself in an overly favourable manner.[68] When researchers asked these judges about their ability to avoid racial-bias in decision-making, 97% of judges rated themselves better than the median judge.[69] Taken together, these results suggest that judges are just as prone to implicit biases and failing to safeguard against them as most adults.

56. Canadian judges are susceptible to the same dangers. In Canada, a study on appellate court judges described judging as a "human process" that "likely bears close relation to the

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[65] *RDS*, *supra* note 55 at paras 38 and 119.
[66] Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, "Does Unconscious Bias Affect Trial Judges?" (2009) 84 Notre Dame L. Rev. at 1195.
[67] Stephen J Choi, "Bias in Judicial Citations: A Window into the Behavior of Judges?" (2008) The Journal of Legal Studies , Vol. 37, No.1 at 87-129.
[68] Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, "The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice," (2009) 58 Duke L.J. at 1477.
[69] *Ibid* at 1519.

background and family contexts of the judges."[70] Moreover, appellate courts have affirmed as a "sociological fact that stereotyping is usually a result of subtle *unconscious* beliefs, biases, and prejudice."[71]

57. Canadian judges also have difficulty identifying implicit biases and recognizing when these biases can taint their decisions. The existence of statutory protections recognizes that biases and mistreatment against certain groups are historically embedded in Canada's legal system. For example, Bill C-3 amended the *Judges Act* to require all federally appointed judges to take continuing education on sexual assault law and the surrounding "social context" which includes systemic racism and discrimination.[72] These amendments were introduced largely in response to Justice Camp's comments in a sexual assault trial, demonstrating Parliament's recognition that judges may not always be capable of detecting their own biases. [73]

58. The presence of unconscious biases does not imply malicious intent. In fact, the SCC in *Wewaykum Indian Band v Canada* noted that "unconscious bias can exist, even where the judge is in good faith."[74] A CRT analysis requires the legal system to recognize that prejudice does not only happen through bad faith or explicit forms. Rather, it is nuanced, subtle, and built into the same structures that are powerful enough to fight against it.[75]

(2) Judges are subconsciously influenced by biases that favour their colleagues

59. Judges must be attuned to the possibility of unconscious predispositions to favour other judges. This phenomenon is known as the 'guild mentality' — a subtle type of bias that explains how judges are predisposed to trust their colleagues and protect the judiciary from undue

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[70] Devlin, Richard, Kim N. and MacKay, A.W., "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary, or Toward a "Triple P" Judiciary" (2000) 38 Alberta L.W. 734 at 757.
[71] *Peel Law Assn v Pieters*, 2013 ONCA 396 at para 111.
[72] Ryan Patrick Jones, *Sexual assault training now required for new federally appointed judges* (May 2021), online: <https://www.cbc.ca/news/politics/law-training-sexual-assault-1.6017711>.
[73] *Ibid.*
[74] *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 66 [*Wewaykum*].
[75] Khiara Bridges, *Critical Race Theory: A Primer* (New York: Foundation Press, 2019) at 7.

criticism to preserve the reputation of their profession.[76] This raises concerns about the judiciary's ability to discipline their own.

60. The judicial 'identity' contains the highest standards of ethical behavior and judges place high value on judicial collegiality, expertise, and discretion.[77] This phenomenon may explain why the CJC heavily referenced and relied on Justice Cromwell's report and Tax Court Chief Justice Rossiter's letter of support, instead of complaints written by law professors and community organizations.

61. Judges take their oath to integrity and impartiality very seriously. It is for this reason they may find it difficult to accept allegations that they have fallen short of their professional obligations.[78] Any allegation that "a fellow professional is guilty of malpractice is a *prima facie* invitation to other professions to retreat to a guild mentality, denying that the infraction took place."[79] Consequently, judges may have more sympathy for other judges, understate the misconduct problem, or frame their colleague's actions in an excessively positive light.

62. When judges are disproportionately favourable and deferential to their colleagues, it creates "a perception of institutional bias that may harm the judiciary" as a whole.[80] Neglecting the existence of biases does nothing to protect the legal system against them while also harming public confidence in the judiciary.

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[76] Anthony D'Amato, "Self-Regulation of Judicial Misconduct Could Be Mis-Regulation" (1990) 89 Michigan L Rev at 609.
[77] Dana A Remus, 'The Institutional Politics of Federal Judicial Conduct Regulation' (2012) 31 Yale L & Pol'y Rev at 33, 71.
[78] Bernice B. Donald, Jeffrey Rachlinski, Andrew J. Wistrich, 'Getting Explicit About Implicit Bias, (2021) online: *Judicature Duke Law School* <https://judicature.duke.edu/articles/getting-explicit-about-implicit-bias/>.
[79] *D'Amato, supra* note 76 at 609.
[80] Lara A Bazelon, "Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It" (2009) 97 Kentucky L J at 439.

(3) Self-regulation in judicial discipline harms judicial independence

63. The CJC's framework for judicial discipline harms judicial independence by entrusting judges to discipline each other without meaningful lay participation.

64. Judicial independence is an unwritten constitutional principle fundamental to our democracy.[81] At its core, judicial independence represents protection of the public and its confidence in the administration of justice.[82] Where an adjudicator's impartiality is "questioned or destabilised through actions, decisions, or actors of institutions involved," judicial independence will suffer.[83]

65. The CJC's Review Panel composition of four judges and one layperson does not provide the impartiality required of a decision-maker under judicial independence.[84] Judges have experience navigating the notoriously complex legal system and tend to trust each other. This persists even when the public's opinion is crucial and the question to be determined concerns the public's confidence in the judiciary and not legal issues.

66. The SCC has long held that the primary justification for self-regulation is the protection of the public.[85] However, there is growing evidence to suggest that the public has become skeptical of the CJC's impartiality and its effectiveness in addressing judicial misconduct. In the last decade, there has been a dramatic spike in the number of complaints to the CJC — from 200 per year in 2010, to nearly 360 per year in 2020.[86] These numbers represent an "increasing public concern with Canadian judges and [...] public awareness of the CJC's processes" and

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[81] *Re Remuneration of the Judges of the Provincial Court of PEI*, 1997 CanLII 317 (SCC), [1997] 3 SCR 3 at para 83.
[82] *Cosgrove v. Canadian Judicial Council,* 2007 FCA 103 at paras 30 and 31.
[83] *Slansky v Canada (AG),* 2013 FCA 199 at paras 329-330.
[84] *By-Laws*, *supra* note 14.
[85] *Rocket v Royal College of Dental Surgeons (Ontario)*, [1990] 2 SCR 232, 71 DLR (4th) at para 68.
[86] Richard Devlin and Sheila Wildeman, *Disciplining Judges: Contemporary Challenges and Controversies* at 71.

inadequacies in addressing judicial misconduct.[87] Similarly, the public criticized the CJC for failing to properly assess judicial conduct in light of equality and unconscious biases when dealing with Indigenous individuals in the recent cases of *Girouard* and *Douglas*.[88]

67. Self regulation can, in some situations, enhance judicial independence. In *Moreau-Bérubé v New Brunswick*, the SCC held that judges are uniquely "alive to the delicate balance between judicial independence and judicial integrity" such that they are in the best position to take appropriate remedial measures against a fellow judge's misconduct.[89] However, judges must also "be alive" to the dangers of self-regulation such as favouring their colleagues on the bench, under-stating complainants' concerns, and imposing disproportionately lenient sanctions that decrease public confidence in the judiciary.

68. Moreover, lay participation can also enhance judicial independence by reinforcing the fairness and integrity of the process and boosting public confidence. According to the SCC in *Therrien (Re)*, lay individuals can "bring another perspective to the public's perceptions [...] of the judiciary."[90] The Canadian Parliament has recently introduced Bill S-5 to increase lay participation in the CJC.[91] Taken together, this demonstrates Canada's increasing recognition that the CJC's self-regulated judicial discipline system is outdated. Decisions made under this framework are procedurally unfair and should not be upheld.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 10TH DAY OF JANUARY, 2021.

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[87] *Ibid.*
[88] *Ibid.*
[89] *Moreau-Bérubé v New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11 at para 60 [*Moreau-Bérubé*].
[90] *Therrien (Re),* 2001 SCC 35 (CanLII), [2001] 2 SCR 3 at para 101 [*Therrien*].
[91] *Judicial Conduct: Reforming the complaints process* (12 December 2021) online: <https://www.justice.gc.ca/eng/csj-sjc/pl/jc-cj/index.html >; Under Bill S-5, every complaint would be reviewed by a three-person Review Panel composed of two judges and one lay person. The Review Panel would then be able to refer the complaint to a five-person hearing panel, composed of three judges, one lawyer, and one lay person.