SUPREME COURT OF NOVA SCOTIA

Citation: *Saint Mary's University v. Nova Scotia Human Rights Commission*, 2025 NSSC 107

Date: 20250417
Docket: Hfx No. 535607
Registry: Halifax

Between:

Saint Mary's University

Applicant

v.

Nova Scotia Human Rights Commission, Kendra Gould, and Society for Academic Freedom and Scholarship

Respondents

Decision

Judge:	The Honourable Justice Denise Boudreau
Heard:	January 28 and February 13, 2025, in Halifax, Nova Scotia
Counsel:	Tara Erskine, K.C., and Caroline Spindler, for the Applicant Jason Cooke, K.C., and Ashley Hamp-Gonslaves, for the Respondent Nova Scotia Human Rights Commission Chris Fleury, for the Respondent Society for Academic Freedom and Scholarship

By the Court:

[1] This is a judicial review brought by the applicant in relation to a decision of the respondent Nova Scotia Human Rights Commission ("the Commission"), referring a complaint of Ms. Kendra Gould to a Board of Inquiry (the "Complaint").

Background Facts

[2] Ms. Gould was a student at the applicant university from the fall 2017 until the summer of 2020. During the winter term of 2018, Ms. Gould was enrolled in a Philosophy of Law class taught by Associate Professor Dr. John MacKinnon.

[3] The respondent Society for Academic Freedom and Scholarship ("the Society") is a nonprofit organization, registered in Ontario. It is independent of the applicant and unaffiliated with it.

[4] The Society publishes a newsletter for its members. In their January 2019 edition, the Society published an article written by Dr. MacKinnon entitled "Indigenize This". The applicant was uninvolved with this article, or its publication.

[5] In this article Dr. MacKinnon expressed criticism toward the applicant (his employer) for its approach to indigenous issues and students. He discussed his specific experiences with a Mi'kmaq student (who he calls "Q") in his Philosophy of Law class during the winter of 2018. He noted that Q did quite poorly in his class, and by late in the term was on her way to earning a failing grade. To his surprise the applicant granted her a "withdrawal" from the class instead (outside of the applicable deadline). Dr. MacKinnon suggested that this student had received preferential treatment.

[6] Ms. Gould became aware of this article in September 2019. She believed that she was the student referenced as "Q" in the article; in fact, she was correct. The parties have acknowledged that she was the student referenced in the article.

[7] Ms. Gould felt aggrieved by this article and pursued the matter through the University's internal conflict resolution process. She also contacted the Commission in late September 2019 and spoke to an Officer about the matter. Ms. Gould was told she could file a complaint if she wished and would be sent a form to complete. A form was sent to Ms. Gould; however, it is unclear when it was sent.

[8] On February 1, 2020, Ms. Gould sent a completed inquiry form to the Commission. For the next few weeks, Ms. Gould and the Officer engaged in some discussions about perfecting the complaint.

[9] The next significant event occurred on September 14, 2020, when the complaint form was sent to Ms. Gould for her signature. Ms. Gould returned the signed form (the "Complaint") to the Commission in October of that year (date stamped October 20, 2020). The Complaint named both the applicant and the Society (and, interestingly, was backdated to February 14, 2020).

[10] This Complaint alleged discrimination (by both respondents) on one prohibited ground, namely, in "the provision of or access to services or facilities" on the basis of "ethnic, national or aboriginal origin", contrary to sections 5(a) and (q) of the *Nova Scotia Human Rights Act*, RSNS 1989, c. 214 (the "*Act*"). For ease of reference, I reproduce the relevant sections of the *Act* here:

> **Meaning of discrimination**
>
> **4** For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

Prohibition of discrimination

5 (1) No person shall in respect of

(a) the provision of or access to services or facilities;

(b) accommodation;

(c) the purchase or sale of property;

(d) employment;

(e) volunteer public service;

(f) a publication, broadcast or advertisement;

(g) membership in a professional association, business or trade association, employers' organization or employees' organization,

discriminate against an individual or class of individuals on account of

(h) age;

(i) race;

(j) colour;

(k) religion;

(l) creed;

(m) sex;

(n) sexual orientation;

(na) gender identity;

(nb) gender expression;

(o) physical disability or mental disability;

(p) an irrational fear of contracting an illness or disease;

(q) ethnic, national or aboriginal origin;

(r) family status;

(s) marital status;

(t) source of income;

(u) political belief, affiliation or activity;

(v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

[11] The Complaint provided the following questions, and answers from Ms. Gould:

> 1. **What is your protected characteristic(s)? Please explain.**
>
> My protected characteristic is my Aboriginal Origin. As an Indigenous student I was ridiculed for my ethnicity and my cultural history.
>
> ...
>
> 3. **Please provide example(s) of the discriminatory treatment you say you experienced by the Respondent.**
>
> John McKinnon wrote an article about me, mocking me as a student and how disappointing my grades at university were. He then went on to write about how Saint Mary's University does not owe Indigenous peoples acknowledgement about unceded territory because the Mi'kmaq had nothing to do with founding the university. Then started to write about how Indigenous students who learn and got an education on the reserve need to stay on the reserve because we don't have the proper education for university.
>
> 4. **Why do you believe the treatment you received is because of your protected characteristic?**
>
> I believe I received this treatment due to the fact that I am indigenous because of the way he expresses himself towards Indigenous people.
>
> 5. **Do you believe you are the only person who has experienced this treatment?**
>
> Yes.
>
> 6. **How did this affect you?**
>
> I was fearful seeing this instructor in the school. I was afraid of retribution for reporting him. I felt that I was judged and labelled by the university for my indigenous ancestry and experience, I felt I was labelled as a Dumb Indian and made to feel I didn't belong in a post-secondary institution. I felt demeaned and embarrassed. I felt I was now mocked by the university by this professor's comments on Mi'kmaq history and experience.

[12] It should also be noted that the *Act* provides a one-year limitation period for the filing of complaints:

Procedure on complaint

29 **(1)** ...

(2) Any complaint must be made within twelve months of the date of the action or conduct complained of, or within twelve months of the last instance of the action or conduct if the action or conduct is ongoing.

(3) Notwithstanding subsection (2), the Director may, in exceptional circumstances, grant a complainant an additional period of not more than twelve months to make a complaint if to do so would be in the public interest and, having regard to any prejudice to the complainant or the respondent, would be equitable.

[13] In December 2020, an Officer from the Commission contacted Ms. Gould and discussed with her the expired limitation period. The Officer advised Ms. Gould that, in the view of the officer, this was an error on the part of the Officer and the Commission, and she apologized to Ms. Gould. Ms. Gould was asked to submit a request for extension to the Commission.

[14] Ms. Gould provided the request for extension on January 2, 2021. As for the reasons for the request, Ms. Gould noted: "provided submissions before the limitation period but the complaint form was not mailed out by the Human Rights Officer for signature until after the limitation period had passed."

[15] The Commission Acting CEO, Kymberly Franklin, granted the extension by decision dated April 13, 2021. In doing so, she first noted that the test for the granting of an extension was (a) whether the circumstances leading to the request for extension were exceptional; (b) whether the decision to grant an extension

would be equitable with regard to any prejudice to the complainant or the respondent; and (c) whether the extension would be in the public interest.

[16] Acting CEO Franklin determined that, in her view, exceptional circumstances did exist, as she found that the delay had been caused through the fault of the Commission and its Officer, and not through any fault of Ms. Gould's.

[17] As to the question of prejudice, Acting CEO Franklin noted only that she saw no prejudice to the "named respondent" in the granting of the extension. This is unclear as there were, in fact, two respondents.

[18] As to the third branch of the test for extension (whether it was in the "public interest") Acting CEO Franklin made no mention of that in her decision.

[19] Later (during 2021) the Commission allowed a number of amendments to the Complaint: most notably, by the addition of a new ground of discrimination, "publication" (s. 5(1)(f) of the *Act*). Further, the date of the "discrimination" was changed from January 2018 to January 2019 (this may have been a typo in the original Complaint), and details of the University's internal processes were added.

[20] It should be noted that, through all of these decisions/amendments, neither the applicant nor the Society were advised of the Complaint. They were not aware that a Complaint had been filed, nor that an extension had been sought and granted,

nor that amendments were being made. Obviously, not being aware, they did not have the opportunity to make submissions on any of these processes.

[21] It was not until June 4, 2021, that the applicant and the Society were provided copies of the Complaint. However, they did not receive the entire record; for example, they were not advised of the extension decision, nor that amendments had been made to the original complaint. It was only after further discussions between the applicant and the Commission, that the applicant became aware that this Complaint had been the subject of an extension, as well as amendments.

[22] The applicant was greatly displeased that a number of procedures had already occurred without notice to, or any involvement of, itself (and/or the second respondent, the Society). In their view they should have been advised much sooner of the process and allowed to make submissions along the way.

[23] In any event, the Commission continued with its processes. In March 2024, an Officer of the Commission (Ms. Robin Martelly) advised the parties that she would be recommending that the Complaint be referred to a Board of Inquiry for adjudication, pursuant to s. 32A of the *Act*. She provided an Investigation Report dated March 13, 2024, where her recommendation was made (and her reasons provided).

[24] I note here, for ease of reference, some additional portions of the *Act* that deal with administration of complaints, and provide the options available to the Commission:

> **Procedure on complaint**
>
> **29** **(1)** The Commission shall inquire into and endeavour to effect a settlement of any complaint of an alleged violation of this Act where
>
> (a) the person aggrieved makes a complaint in writing on a form prescribed by the Director; or
>
> (b) the Commission has reasonable grounds for believing that a complaint exists.
>
> **(2)** ...
>
> **(3)** ...
>
> **(4)** The Commission or the Director may dismiss a complaint at any time if
>
> (a) the best interests of the individual or class of individuals on whose behalf the complaint was made will not be served by continuing with the complaint;
>
> (b) the complaint is without merit;
>
> (c) the complaint raises no significant issues of discrimination;
>
> (d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding;
>
> (e) the complaint is made in bad faith or for improper motives or is frivolous or vexatious;
>
> (f) there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act; or
>
> (g) the complaint arises out of circumstances for which an exemption order has been made pursuant to Section 9.

...

Referral of settlement to Commission for approval

32 **(1)** When, at any stage after the filing of a complaint and before the commencement of a hearing before a board of inquiry, a settlement is agreed on by the parties, the terms of the settlement shall be referred to the Commission for approval or rejection.

(2) Where the Commission approves or rejects the terms of a settlement referred to in subsection (1), it shall so certify and notify the parties.

Board of inquiry

32A **(1)** The Commission may, at any stage after the filing of a complaint, appoint a board of inquiry to inquire into the complaint.

...

[25] The applicant made submissions in response to Ms. Martelly's recommendation, as did the Society. Both asked that the recommendation be rejected and the Complaint dismissed.

[26] On June 26, 2024, the Commission provided its decision ("the Decision"), confirming that the matter would be referred on to a Board of Inquiry.

[27] The Decision provides no detail. It merely notes that:

> At its meeting of June 24, 2024, the Commissioners of the Nova Scotia Human Rights Commission, adopted the following motion:
>
> > Motion that the complaint against the Respondent be referred to a Board of Inquiry pursuant to Section 32A(1) of the Human Rights Act to determine whether discrimination has occurred.

[28] It is accepted by the parties that where the Commission provides no reasons in a decision to refer a matter to a Board of Inquiry, the reviewing court is entitled to assume that the Commission relied upon the reasons provided in the Investigative Report (*Leon's Furniture Limited v. Downey and Nova Scotia (Human Rights Commission)*, 2024 NSSC 249).

[29] It is from this Decision that judicial review is sought by the applicant. The applicant submits that the Decision is flawed because, firstly, the Commission breached its duty or procedural fairness to the applicant, and secondly, that the Decision is unreasonable as that term has been defined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

Standard of Review

[30] The applicant has raised the issue of procedural fairness, in relation to the process undertaken by the Commission (and described in the preceding paragraphs).

[31] It is understood that there is no "standard" of review in matters raising procedural fairness; rather, a reviewing court must determine whether the party was afforded an appropriate level of procedural fairness by applying the factors set

out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[32] The parties further agree that the standard of review in relation to the substantive grounds put forward by the applicant in relation to the impugned Decision, is reasonableness.

[33] The standard of "reasonableness" was expanded upon by our Supreme Court in *Vavilov (supra)*. The Court therein noted that a reasonable decision is one that is both "rational" and "logical", as well as justifiable in light of the facts and applicable law:

> [101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is, however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.
>
> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56.
> ...
>
> [103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in

> which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: ... A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken ... or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point ...
>
> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[34] An often-quoted follow-up to *Vavilov* is the case of *Alexion Pharmaceuticals Inc v. Canada (Attorney General)*, 2021 FCA 157, where the Federal Court of Appeal provided further explanation as to the concept of a "reasonable" decision:

> [12] *Vavilov* tells us that a reasoned explanation has two related components:
>
> • *Adequacy*. The reviewing court must be able to discern an "internally coherent and rational chain of analysis" that the "reviewing court must be able to trace" and must be able to understand. Here, an administrator falls short when there is a "fundamental gap" in reasoning, a "fail[ure] to reveal a rational chain of analysis" or it is "[im]possible to understand the decision maker's reasoning on a critical point" such that there isn't really any reasoning at all: *Vavilov* at paras. 103-104.
>
> • *Logic, coherence and rationality*. The reasoning given must be "rational and logical" without "fatal flaws in its overarching logic": *Vavilov* at para. 102. Here, the reasoning given by an administrator falls short when it "fail[s] to reveal a rational chain of analysis", has a "flawed basis", "is based on an unreasonable chain of analysis" or "an irrational chain of analysis", or contains "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104.
>
> [13] These shortcomings must be evident on "critical point[s]": *Vavilov* at paras. 102-103. The "critical point[s]" are shaped, in part, by "the central issues and concerns raised by the parties": *Vavilov* at paras. 127-128. They are also

> points that are "sufficiently central or significant" such that they point to "sufficiently serious shortcomings in the decision": *Vavilov* at para. 100. They must be "more than merely superficial or peripheral to the merits of the decision": *Vavilov* at para. 100.

[35] Obviously, in determining whether a decision meets the standard of reasonableness, a reviewing court must understand what task was put before the original decision-maker. In this case, the Commission's task was to determine whether the evidence supported this Complaint being referred to a Board of Inquiry. The Commission's Decision answered "yes" to this question; I must determine if that answer was reasonable.

[36] One might wonder what standard the Commission is to use in making this decision: is it a "*prima facie*" case, or on a "balance of probabilities", or another standard altogether? I am guided in this regard by the comments of the court in *Leon's Furniture Limited (supra)*, where the court dealt with a similar circumstance and context:

> [55] Though this is an important part of the discrimination analysis, the *prima facie* discrimination analysis is not undertaken during the investigative stage of a human rights complaint. The role of the Commission is not to determine whether a *prima facie* case of discrimination does exist, but whether the complaint should go on to be considered by a Board of Inquiry who will conduct the discrimination analysis. However, the elements of discrimination are relevant to the review of the Commissioner's decision.
>
> [56] In order to refer the complaint to the Board of Inquiry, the Commission must be satisfied that the facts, if proven, could establish a *prima facie* case of discrimination. If the facts supporting the complaint could not lead to a finding of discrimination, the complaint cannot reasonably be referred to a Board of Inquiry.

[37] I shall be guided by all of these principles as I move forward.

Position of the parties

[38] It is the submission of the applicant that it was not afforded procedural fairness in relation to the various steps in the process that occurred and, in particular, in the period of time before the applicant was notified of the Complaint. The applicant notes, for example, the request/granting of the extension, as well as the various amendments.

[39] The applicant acknowledges that the present judicial review does not formally seek review of those "interlocutory" decisions. However, in the applicant's view, any procedural "failings" in relation to those decisions are still relevant. They note that the extension and amendment proceedings were included in, and formed part of, the Report/Recommendation made by Officer Martelly. Therefore, submits the applicant, those proceedings (along with any procedural flaws therein) form part of the Decision.

[40] The applicant notes that neither itself, nor the Society, was made aware of the Complaint when it was first filed, nor of the extension request/decision, nor of the various amendments. The Commission/Acting CEO did not seek submissions from the applicant or the Society as to any of these processes and, in particular, in

relation to the question of prejudice in granting an extension. The applicant questions the procedural fairness of those processes.

[41] Moving on to their substantive arguments, the applicant submits that the Decision of the Commission to refer this matter to a Board of Inquiry is unreasonable. This is because it "relied on the extension decision contrary to jurisprudence; relied on both false and extraneous information; failed to consider and disregarded evidence; and made conclusions without evidence or explanation resulting in gaps and illogical chain of reasoning". (Brief of the applicant, para. 121.) The applicant seeks that the Decision to refer the matter to a Board of Inquiry be quashed.

[42] The Society supports the applicant's submissions/request and is also of the view that the Decision of the Commission was unreasonable. In addition to the grounds already referenced by the applicant, the Society adds a few more: first, that the Decision is also unreasonable because there was no evidence before the Commission that Ms. Gould experienced any actual "discrimination" (as defined in the *Act*) as a result of the article's publication. Second, because it did not engage in any way with the fundamental principle of freedom of expression (a principle specifically protected by s. 7 of the *Act*).

[43] The Commission, in response, submits that first, in its view, it did not breach any requirements of procedural fairness in its processes. Second, that the applicant has never sought judicial review of the extension decision (dated April 13, 2021) and it is now out of time for doing so; therefore, any complaint about the extension request or the extension decision is moot.

[44] The Commission further submits that the impugned Decision (to refer the matter to a Board of Inquiry) was reasonable. The Commission notes, in particular, that the Decision is only a decision "to refer"; it makes no conclusions about any "discrimination" having occurred. The Decision merely provides that a Board of Inquiry should be struck so that a hearing may be held on the merits of the Complaint.

[45] The Commission further notes that the Report is well organized and easy to follow, and that it identifies the relevant issues as well as the history of the matter. The Commission notes that the Report then concludes that if the allegations were proven on a balance of probabilities, a finding of discrimination could be made as against both the applicant and the Society. In the view of the Commission, the Report clearly shows the reasons behind the decision for a full inquiry into the matter.

Analysis

[46] As noted, the Decision provides no reasons. Therefore, the only way to determine its "reasonableness" is by examining the Investigative Report upon which the Decision was based (the "Report").

[47] The Report, dated March 13, 2024, begins by outlining the facts, followed by the parties' positions. The Report continues, as follows, under the heading "Analysis":

> *Does the evidence support a case of discrimination, on account of Aboriginal Origin, as alleged by the Complainant?*
>
> 28. Section 4 of the *Nova Scotia Human Rights Act* states that:
>
> > *"For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society."*
>
> 29. In order for Gould's allegations to be substantiated, it needs to be demonstrated that she was treated differentially by SMU and SAFS and that this treatment had the effect of imposing a burden, obligation or disadvantage upon her not imposed upon others, and that the reason for this being imposed upon her was based on her Aboriginal Origin.

[48] In the above-noted passage, the Officer is correctly identifying the legislative provision that is engaged by this case and, as a result, is noting the

question(s) to be addressed in her investigation. In my view, the Officer thereby found an appropriate starting point for her analysis.

[49] However, having done so, the remainder of the Officer's analysis does not engage with these questions, in my view. Her Report, most unfortunately, does not address the issues that she herself identified as crucial.

[50] Following the above-quoted passages, the Report goes on to discuss more of the history of the matter, including the applicant's "conflict resolution" process, as well as the extension request and decision. The Officer then goes on to say the following, provided as her explanation for her ultimate decision:

> 34. It must also be considered that there is a history of systemic racism in Nova Scotia regarding historically marginalized vulnerable groups. There are long-standing stereotypes about the Mi'kmaq people, and this historical context must be considered, as it may have played a part in SMU, MacKinnon, and SAFS's actions, whether intentional or not.
>
> ...
>
> 47. It appears that SMU is trying to deflect their responsibility onto MacKinnon and SAFS by saying MacKinnon made the decision to write the article, and SAFS published the article, but it's not connected to MacKinnon's employment.
>
> 48. It must be considered that MacKinnon and Mercer are both employees at SMU and colleagues in the Philosophy department. Mercer has been employed at SMU since 1999.
>
> 49. It must also be considered that aside from Mercer being the President of SAFS from May 2015 to May 2023, he was also the Editor when the article "*Indigenize This*" was published by SAFS.
>
> 50. In 2020, Mercer received disciplinary action by SMU when he wrote an article that was offensive to others. Please refer to Appendix H – Disciplinary Action against Me by My University.

...

53. Intentional or not, this matter does directly relate to MacKinnon's employment, as he was clearly talking about a student that he taught at SMU, that student being Gould.

54. It appears that SMU is not taking an equitable approach to accountability and discipline to their employee's actions.

55. At question, is whether Gould was discriminated against due to her Aboriginal Origin. It appears that as a result of MacKinnon writing the article "*Indigenize This*" and SAFS publishing the article in January 2019, Gould may have faced discrimination. [Emphasis added]

56. There are a number of reasons that a recommendation for a Board of Inquiry is most appropriate for this file:

A. SMU raises questions around the timeline of the complaint, and the extension granted. This would most appropriately be reviewed as a Board of Inquiry.

B. The article contained discriminatory, anti-Indigenous language and rhetoric.

C. SAFS' editor at the time, Mercer, was a colleague of MacKinnon's at SMU. He faced discipline action himself for publishing another article the following year.

D. All though SMU alleges these actions aren't tied to MacKinnon's employment, the content of the article was directly related to his employment at SMU and his role as a professor. The article was written in such a way that Gould could be identified as the subject matter as she was the only indigenous person in her class at the time, which is how the article came to Gould's attention.

...

[51] These paragraphs are the only portions of the Report that purport to provide the Officer's justification for her decision to recommend that the matter be referred to a Board of Inquiry. With respect, these paragraphs are not responsive to the issue(s) that the Officer was tasked with, as she herself identified at paragraph 29 of her Report.

[52] As Officer Martelly noted, she was to determine if she could substantiate the allegation that Ms. Gould "was treated differentially by SMU and SAFS and that this treatment had the effect of imposing a burden, obligation or disadvantage upon her not imposed upon others, and that the reason for this being imposed upon her was based on her Aboriginal Origin". In my view, she did not properly engage with that analysis but rather got distracted with other facts, that were either tangential or entirely non-relevant. As a result, I do not see her conclusions as being reasonable, in the context of the material facts before her and the analysis to be undertaken.

[53] I shall go through the Officer's "reasons" in more detail.

[54] Officer Martelly first noted (at para. 34) the reality of "a history of systemic racism in Nova Scotia regarding historically marginalized vulnerable groups". The Officer references this reality as "historical context" to her Report. I do not dispute or take issue with her inclusion of such "context".

[55] Having said that, context cannot move a complaint forward to an inquiry. The *Act* itself (and the protections found therein) represents an acknowledgement that vulnerable groups exist and are in need of protection. Any complaint must be assessed individually, and on its own merits.

[56] The end of paragraph 34 reads: "… this historical context must be considered, as it may have played a part in SMU, MacKinnon, and SAFS's actions, whether intentional or not." [Emphasis added]

[57] In my view, that sentence adds nothing to the analysis. Simply stating that the "historical context" *might perhaps* warrant further investigation in this (or any) case, is simply too general/unsubstantiated a comment to be helpful.

[58] Officer Martelly next notes that Mr. MacKinnon and Mr. Mercer (who is an individual affiliated with the Society) work in the same department at Saint Mary's University. She then notes that Mr. Mercer was disciplined on another occasion, for another writing, entirely independent of this matter.

[59] There is no explanation provided by the Officer as to why either of these facts are relevant, in any way, to her task, i.e., to assess whether there is merit to the allegation that Ms. Gould experienced discrimination at the hands of the applicant and/or the Society in the publication of this article. The connection is, at best, based on speculation. In my view, such comments have no place in a report of this nature.

[60] In *Leon's Furniture (supra)*, the court was faced with a similar situation, where the Commission cited a prior (unrelated) finding of discrimination against the employer, as evidence in relation to the complaint at hand:

> [95] Another occurrence that was reviewed by the HRO relates to a previous complaint of discrimination against the Employer. In 2014, a complaint was sent to a Board of Inquiry (the "2014 Board of Inquiry") which determined that discrimination had occurred. As part of the ruling against the Employer, the Board of Inquiry ordered that the employees undertake anti-racism and discrimination training. The HRO found that the Employer conducted two training sessions shortly after being ordered to do so by the 2014 Board of Inquiry.
>
> [96] In commenting on the 2014 Board of Inquiry, the HRO said that although the Employer commenced discrimination training immediately after the 2014 Board of Inquiry decision, they did not continue providing that training to employees. She noted that the employees she interviewed as part of this complaint did not remember partaking in similar anti-racism training.
>
> [97] The 2014 Board of Inquiry was brought up several times throughout the analysis section of the HRO's report, which suggests, contrary to the Commission's submission during oral argument, that it was more than simply a passing comment.
>
> [98] Though Commissioners are entitled to consider policy reasons for sending a complaint to a Board of Inquiry and would be entitled to consider the 2014 Board of Inquiry as part of their decision, it was not appropriate for the HRO to use the 2014 Board of Inquiry to form part of her analysis of the complaint.
>
> [99] The scope of her report was limited to determining if the evidence of the Employer's conduct toward Diondra Downey supported an allegation of discrimination, not to provide an analysis of the Employer's historical management practices.
>
> [100] The HRO's analysis demonstrates that she considered the previous human rights complaint and the 2014 Board of Inquiry finding of discrimination against the Employer in concluding that there was sufficient evidence to support a finding of unconscious bias and possibly systemic racism.
>
> [101] It was not within the HRO's authority to conclude that the 2014 Board of Inquiry impacted Ms. Downey's experience. She was tasked with determining if Diondra Downey's allegations established discrimination.

[61] Similarly, here, the Officer was not engaging in any generalized analysis of the applicant, its employees, or their relationships with each other; nor was she analysing prior complaints against any of the parties. This Report was to deal with the specific Complaint of Ms. Gould, and to determine if there was substance to that Complaint.

[62] At paragraph 56A, the Report goes on to note that "SMU raises questions around the timeline of the complaint, and the extension granted", as another factor requiring a Board of Inquiry. No explanation is provided for why such would be the case. To be frank, and again, I fail to see any logic in that conclusion; how does that relate to the substance of the complaint? Furthermore, if a respondent is questioning the fairness of the process to date, why would continuing the process be helpful?

[63] At paragraph 56B, the Report provides the following as the (main) reason for the recommendation to refer the Complaint to an Inquiry: that "the article contains discriminatory, anti-Indigenous language and rhetoric", and that Ms. Gould, while referenced as "Q" in the article, could be identified.

[64] Once again, whether or not these allegations are true, I still have difficulty understanding how they lead us to the conclusion(s) reached by the Officer. Her

task was to determine if there was substance to the allegation that Ms. Gould "was treated differentially by SMU and/or SAFS", and that "this treatment had the effect of imposing a burden, obligation or disadvantage upon her not imposed upon others". Put another way, the Officer's task was to determine if there was evidence that, if it was accepted, could show at least a *prima facie* case of discrimination towards Ms. Gould on the part of either or both. I find it very difficult to see a sound path of logic in her reasoning.

[65] In relation to the applicant, the Report fails, in my view, to make any connection whatsoever between the applicant and the article. The Report notes, correctly, that the author of the article worked as a professor for the applicant at the time the article was published; and that he mentioned some events from his coursework (relating to Ms. Gould, albeit called "Q") in the article. What goes unmentioned and unaddressed is the fact that the applicant was not involved in the production or publication of the article in any way. There is no analysis or explanation by the Officer as to how these circumstances engage the applicant *as a potential source of discrimination* against Ms. Gould.

[66] There is no evidence (at least none identified by Officer Martelly) that the applicant treated Ms. Gould "differently", or imposed any burden on her, by the publication of this article. They were entirely uninvolved.

[67] As for the Society, it did publish the article, and an indigenous student named "Q" was referenced in an example contained therein ("Q" was, and is now confirmed to be, Ms. Gould). Ms. Gould certainly felt that the article was insulting and demeaning to her, and to indigenous persons in general.

[68] However, I find it difficult to see how those facts, even on their face, meet the requirements of "discrimination" as defined by s. 4 of the *Act*; Officer Martelly has not explained how she makes that connection. Was Ms. Gould "treated differentially" by the Society? Officer Martelly does not address this question. Next, even if Ms. Gould was treated differently, did this differential treatment imposed a "burden, obligation or disadvantage" upon her? Once again, this question is not addressed in the Report.

[69] It should be noted that even Ms. Gould herself did not/could not identify any such "treatment" or "burden, obligation or disadvantage" upon herself, as can be noted from her Complaint (see para. 11 hereinabove). It cannot be surprising that Officer Martelly did not/could not identify any either.

[70] Having read the Report, and considering it as a whole, in my view, the Officer simply did not engage or grapple with the actual question(s) before her.

[71] I note further problems with the Report; for example, it does contain some false (or misleading) information. For example, at paragraphs 19 and 51, the Report discusses the issue of a "Code of Conduct" and appears to impugn the applicant for failing to produce such a document to the Officer. As noted by the applicant, such a document does not exist, and that fact was made clear to the Officer. As another example, paragraphs 12C and 39 reference an "apology letter" from Dr. MacKinnon to Ms. Gould which the Officer states was "never received"; again, this is inaccurate. The Record shows that an apology letter was offered to Ms. Gould, but she rejected that offer.

[72] As noted hereinabove, the Society also raised the issue of s. 7 of the *Act*, which reads:

> **7(2)** Nothing in this Section is deemed to interfere with the free expression of opinion upon any subject in speech or in writing.

[73] There was no reference in the Report to this provision at all, nor was there any reference to "free expression of opinion" as a possible issue to be considered in the analysis. I must conclude that the Officer was unaware of this provision of the *Act*, and/or simply never considered this issue.

[74] I agree that this is an important and fundamental element of this case which makes it somewhat different than some of the "discrimination" cases provided by

the parties. This case involves an article, published by an academic, in a newsletter produced by an organization promoting "academic freedom" (I surmise this from its name). Dr. MacKinnon's opinions may/may not be controversial, and they may/may not be unpopular, but they are (or were) his opinions. Let us recall that freedom of expression is a *Charter* protected right in Canada.

[75] In my view, the present case raises significant, obvious, and important questions of freedom of expression. Those questions have been entirely ignored by this Officer, by this Report, and by the Commission in its Decision. In my view, such is another significant and substantive flaw.

[76] I acknowledge that the Recommendation/Decision was in the nature of a "screening" function. However, Section 7 of the *Act* makes clear that "freedom of expression" is not to be interfered with. In a case where the Complaint centered around an article that expressed opinions, this issue should have at least been specifically considered and addressed by the Officer and the Commission in their analysis. Ignoring this issue, or (worse) being unaware of it, is unacceptable.

[77] The Commission's task in making such a decision may be "screening", but it is not meaningless, nor is it a "rubber stamp'. The parties are entitled to a decision

made fairly, carefully, and, dare I say, judiciously. It must take into account all of the important facts and law.

[78] The Federal Court of Appeal in *Canada Post Corp. v. Barrette (C.A.)*, [2000] 4 FC 145, noted this about the Commissions "screening function":

> [22] It seems to me, having read the memorandum of fact and law of the Commission and heard from its counsel, that the Commission does not take very seriously the preliminary screening process set out in section 41 of the Act. It is true that the courts have repeatedly held that they would not intervene lightly with decisions of the Commission made in the performance of its screening function under section 44 of the Act and even less so when the decisions are made in the performance of the Commission's preliminary screening function under section 41 of the Act. However, these judicial rulings were made on the assumption that the Commission did in fact perform its functions under these two sections and that it did not do so lightly.
>
> [23] Section 41 imposes a duty on the Commission to ensure, even *proprio motu*, that a complaint is worth being dealt with. ...
>
> ...
>
> [25] Unless the Commission turns its mind to the issues raised by the person against whom a complaint is made, in this case the employer, it neglects a duty imposed by law. An employer has a legal right to seek an early brushing aside of a complaint for the reasons set out in subsection 41(1). This is not to suggest that stringent procedural standards be imposed on the Commission at that stage nor that a close scrutiny of decisions made under subsection 41(1) be undertaken by the courts. This is only to say that the Commission must do its work diligently even at a preliminary stage where only a *prima facie* screening is required.

[79] In my view, the Commission could not have addressed this Complaint without at least considering the fundamental issue of freedom of expression.

[80] Having said all of this, one fact is undeniable: Ms. Gould was very upset about this article and felt that it demeaned her personally, as an aboriginal person. I

can accept that such was the case. However, being upset or offended is not the same as discrimination.

[81] In *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, the court was dealing with a complaint made to the Commission by a disabled young person who had been the subject of a comedian's "jokes" during a public comedy show. The comments made by the respondent were insulting and hurtful. The matter reached the Supreme Court who noted that despite the hurt and humiliation suffered by the complainant, such did not meet the definition of "discrimination":

> [107] Mr. Gabriel's testimony spoke volumes about the pain caused to him by those hurtful words, which date back to a time when he was still a young teenager. There is certainly nothing uplifting in the fact that a popular, well-known comedian used his platform to make fun of a young man with a disability. Be that as it may, the question here is not whether Mr. Ward's comments were in good or in bad taste; rather, a legal framework must be applied to comments that were made in a specific context. That legal framework is focused on the likely discriminatory effects of the comments, not on the emotional harm suffered by the person targeted.
>
> [108] In our view, a reasonable person aware of the relevant circumstances would not view Mr. Ward's comments about Mr. Gabriel as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. His comments, considered in their context, cannot be taken at face value. Although Mr. Ward said some nasty and disgraceful things about Mr. Gabriel's disability, his comments did not incite the audience to treat Mr. Gabriel as subhuman.
>
> [109] In both his video and his show, Mr. Ward mocked some of Mr. Gabriel's physical characteristics. Making fun of a person's physical characteristics may be repugnant; it most certainly is when the person in question is a young person with a disability who contributes with determination to society. But expression of this kind does not, simply by being

> repugnant, incite others to detest or vilify the humanity of the person targeted (*Whatcott*, at paras. 90-91). The first requirement of the test is therefore not met, and the analysis could end here.
>
> [110] That being said, even if we had found that the comments incited others to vilify Mr. Gabriel or to detest his humanity on the basis of a prohibited ground, the analysis of the second requirement of the test set out in this decision would also have led to the denial of his claim. A reasonable person could not view the comments made by Mr. Ward, considered in their context, as likely to lead to discriminatory treatment of Mr. Gabriel. [Emphasis added]

[82] I also quote the noted paragraphs of *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11:

> [90] ... Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, for the reasons discussed above, offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred.
>
> [91] There may be circumstances where expression that "ridicules" members of a protected group goes beyond humour or satire and risks exposing the person to detestation and vilification on the basis of a prohibited ground of discrimination. In such circumstances, however, the risk results from the intensity of the ridicule reaching a level where the target becomes exposed to hatred. While ridicule, taken to the extreme, can conceivably lead to exposure to hatred, in my view, "ridicule" in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address.

[83] The case of *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, addressed in part a circumstance where one party's "expression" caused offence to others. The court therein also noted that "offence" and "discrimination" were not the same.

[84] After making reference to the Supreme Court of Canada's decision in *Whatcott (supra)*, the court noted that people have the right to disagree and that there exists no protection in law from being offended:

> [203] The position of the court is again not substantially different in *Whatcott* from *TWU v. BCCT*. The same kind of balancing has to take place and equality rights are not privileged over freedom of conscience or freedom of religious expression.
>
> > Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However for the reasons discussed above, offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of distain or superiority, it does not expose the targeted group to hatred.
>
> [204] People are not protected from being offended or suffering minority stress by the exercise of another person's freedoms, even if that expression is objectively offensive. Justice Rothstein went on the say with regard to religious freedom that "the protection provided under s. 2(a) should extend broadly." Two of Whatcott's flyers were photocopies of classified advertisements from a publication called *Perceptions*. Printed in hand at the top, were the words, "Saskatchewan's largest gay magazine allows ads for men seeking boys". He added a biblical reference, "'If you cause one of these little ones stumble it would be better that a millstone was tied around your neck and you were cast into the sea,' Jesus Christ". Whatcott also added, "[t]he ads with men advertising as bottoms are men who want to get sodomized. This shouldn't be legal in Saskatchewan."
>
> [205] The court held that while the expressions were offensive, that is not enough. There is no legal protection from offense. With respect to the excerpt from the Bible the court agreed with comments of Richards J.A. in *Owens v. Human Rights Commission (Sask.)* urging care in dealing with whether the foundational documents of a religion violate human rights legislation. Even if Mr. Whatcott's words were interpreted as urging that homosexuality should be made illegal, the flyers were "potentially offensive but lawful contributions to the public debate on the morality of homosexuality."
>
> [206] With respect, some might wonder at the use of the word, "potentially." They might also ask, "Public debate? What public debate?" Many people consider that any debate about the morality of homosexuality is over. The only people

> talking about it are seen by many as being out of touch with modern mainstream society and those who have not realized that the issue just is not relevant to most people anymore. But Justice Rothstein's point is that there are large sections of society that have different views. Those views for some are based on interpretations of sacred texts and religious traditions. The freedom to hold those views is protected. How those views are expressed and made part of public debate and how those views are put into practice must be considered as part of the delineation and balancing process. But a person has a constitutional right to express religiously based views that ridicule, belittle, or affront the dignity of other people, including sexual or other minorities. [Emphasis added]

[85] This is a fundamental point, particularly in cases where the alleged discrimination is made by way of "publication", as with the case at bar. Again. this important area was entirely ignored by the Report and the Decision.

Conclusion

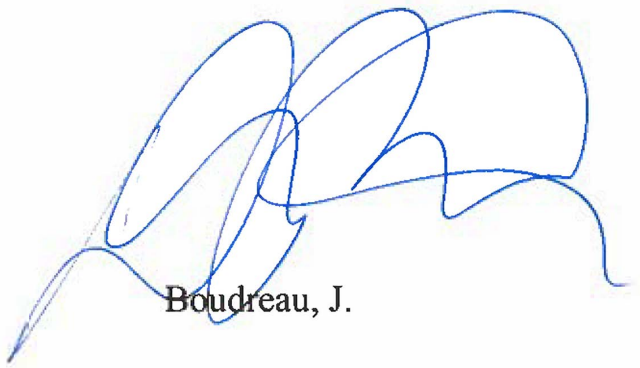
[86] Returning to the standard of review of "reasonableness" as defined in *Vavilov*, one cannot describe a decision as "reasonable" if it does not engage with the questions that were to be asked, or the test to be applied.

[87] In the present case, the Officer needed to identify *some* evidence that the requirements of s. 4 of the *Act* had, at least possibly or *prima facie*, been engaged. In my view, she did not identify any such evidence. There was little to no evidence of any "differential treatment" (of Ms. Gould) that was before the Officer. Certainly not from the applicant, and precious little from the Society. There was no evidence of any "burden, obligation or disadvantage imposed upon her not

imposed upon others"; certainly none imposed by either the applicant or the Society.

[88] In my view, as I have noted in the previous paragraphs, the reasons given by the Officer for her recommendation were either irrelevant, erroneous, or insufficient to meet the requirements as referenced in *Leon's* (supra). I find no discernable path of logic from the Officer's reasons to her recommendation. In my view, this Report/Decision does not meet the *Vavilov* test, and is not a reasonable decision as that term was defined therein. It must be quashed.

[89] The parties shall have 30 days to try and resolve the issue of costs. If the parties cannot do so, I would ask that they provide concise written submissions.



Boudreau, J.