SUPREME COURT OF NOVA SCOTIA

Citation: *K.O. v. Nova Scotia (Human Rights Commission)*, 2023 NSSC 40

Date: 20230214
Docket: Hfx No. 514203
Registry: Halifax

Between:

K.O.

Applicant

v.

Nova Scotia Human Rights Commission and Burnside Law Group

Respondents

Decision

Judge:	The Honourable Justice Peter Rosinski
Heard:	January 25, 2023, in Halifax, Nova Scotia
Final Written	February 14, 2023
Counsel:	Mary B. Rolf, for the Applicant Kendrick H. Douglas, for the Respondent Nova Scotia Human Rights Commission Rebecca Saturley and Richard Jordan, for the Respondent Burnside Law Group

By the Court:

A-Introduction

[1] K.O. sought an articling position with the Burnside Law Group ["Burnside"].

[2] On July 28, 2020, during her second interview for employment, she encountered what she believed to be discriminatory treatment.

[3] On July 31, 2020, and before she heard back from Burnside, she filled out a Complaint Form with the Nova Scotia Barristers Society alleging discriminatory treatment.

[4] On or about August 8, 2020, she contacted staff of the Nova Scotia Human Rights Commission ["the Commission"]. She filed a formal Complaint on December 11, 2020.

[5] An investigation by one of the Commission's Human Rights Officers ["HRO"] ensued.

[6] The Investigative Report of that HRO recommended that K.O.'s complaint be dismissed on the basis that it was "without merit" pursuant to s. 29(4)(b) of the *Nova Scotia Human Rights Act*, RSNS 1989, c. 214.

[7] At a meeting on March 10, 2022, the Commissioners considered the Complaint, all the materials gathered by the HRO, including the November 9, 2021, legal submissions filed by K.O.'s counsel. As is the norm, neither K.O., nor her legal counsel were present.

[8] The Commissioners also had the benefit of the opportunity: to question the HRO, who was in attendance, regarding the investigation; and to obtain advice from its own legal counsel, Kymberly Franklin, in relation to K.O.'s complaint.

[9] The Commission formally notified K.O. on March 11, 2022, that they had dismissed her Complaint. The Commission is under no statutory obligation to give reasons explaining their decision.

[10] Their letter stated:

> Based on a thorough review of the matter, the Commissioners decided that the Complaint is dismissed pursuant to section 29(4)(b) of the *Human Rights Act* because '(b) the complaint is without merit'.
>
> Decisions by the Commissioners of the Nova Scotia Human Rights Commission are final. If you are not in agreement with the Commissioners' decision, you can file a judicial review at the Supreme Court of Nova Scotia.

[11] Through her legal counsel, K.O. filed a Notice for Judicial Review on April 19, 2022.

[12] She requests that this Court set aside the Commission's decision to dismiss her Complaint, and either that I:

- direct the Commission to appoint a Board of Inquiry to hear her complaint; or
- remit the matter back to the Commission to conduct a new investigation and to reconsider her complaint.

[13] To be clear, my review is limited to the decision of the Commission.

[14] While I consider the general factual circumstances of the allegations to better understand the arguments put forward by each of the parties, it is *not* within my responsibility in this hearing to come to conclusions about what happened and whether that constituted discriminatory treatment. I do not make evidentiary findings about the merits of K.O.'s complaint to the Commission.[1]

[15] I keep in mind the relevant jurisprudential materials drawn to my attention, and which I have located on my own.

[16] After very careful consideration, I am not satisfied that the Commission's decision to dismiss K.O.'s Complaint was tainted by reviewable error.

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[1] As Justice Norton stated in *Murphy v. Unifor Local 4606*, 2021 NSSC 323 at para. 22: "The legal principles that govern my analysis of the decision were clarified by the Supreme Court of Canada in…*Vavilov*…. The majority of the court stated that the role of a reviewing court is to review the decision – including both rationale and outcome – and decide if it was unreasonable. It is not the role of a reviewing court to conduct its own analysis."

[17] Therefore, K.O. has not established that she is entitled to the remedies she claims.[2]

B-Background

[18] K.O. filed a formal Complaint Form ["the Complaint"] with the Commission on December 11, 2020.

[19] In it she alleged discrimination with respect to employment on the following bases of protected characteristics: "age, sex, sexual orientation, gender identity, gender expression, mental disability, and perception of these characteristics arising out of this second interview".

[20] Regarding the statutory framework, Justice Arthur LeBlanc helpfully set this out in his decision in *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65:

> Legislative Framework
>
> 31 Section 4 of *the Human Rights Act* defines discrimination as follows:
>
> > 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.
>
> 32 Section 5 of the Act states in part:
>
> > 5 (1) No person shall in respect of
> > . . .
> > (d) employment;
> >
> > (e) volunteer public service;
> > . . .

[2] If counsel are unable to agree on costs among themselves, I will require that they each file a maximum five page brief in the following sequence: K.O. will file 20 days after the release of the decision; the Commission and Burnside will file no later than 15 days thereafter. If K.O. wishes she may file a Reply no later than five days after receipt of the Respondents' briefs. Having said so, I appreciate that in its brief, the Commission stated: "41- The Commission is not seeking costs in this matter."

discriminate against an individual or class of individuals on account of
. . .
(m) sex;
. . .
(o) physical disability or mental disability
. . .

(3) No person shall harass an individual or group with respect to a prohibited ground of discrimination.

33 The procedure to be followed in filing a complaint under the *Act* is set out at section 29, which provides, in part:

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
. . .

(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.

[My underlining added]

[21] The generic legal test for "discrimination" is well-established and can be found articulated in *Moore v. British Columbia (Education)*, [2012] 3 SCR 360:

> 33 As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, *complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact.* Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.
> [My italicization added]

[22] For present purposes, these criteria can be restated as – to demonstrate a *prima facie* case of discrimination, a complainant must establish:

> 1-they have a characteristic protected from discrimination under [the legislation]
> 2-that they experienced an adverse impact with respect to [employment]; and
> 3-that the protected characteristic was a factor in the adverse impact.

[23] The Complaint was investigated by a Human Rights Officer ["HRO"].

[24] On or about October 21, 2021, she produced a 20-pages long Investigation Report (including Burnside's written Response to the Complaint as authored by its legal counsel under the heading "Respondent's Position"; as was K.O.'s Rebuttal thereto, as authored by her legal counsel).

[25] The HRO recommended that "the complaint of discrimination, based on employment be dismissed pursuant to section 29(4)(b) of the *Nova Scotia Human Rights Act*."

[26] Through her legal counsel, on or about November 9, 2021, K.O. made extensive written submissions to the Commissioners following receipt and review of the HRO's Investigation Report.

[27] The HRO subsequently provided the Commissioners with the HRO's "Memorandum", dated January 17, 2022. Attached thereto were:

- a copy of the Complaint Form filed December 11, 2020;
- a copy of her Investigation Report dated October 21, 2021;

- and a copy of KO's legal counsel's written submissions dated November 9, 2021.[3]

[28] By letter dated March 10, 2022, the Vice-Chairman of Commissioners of the Nova Scotia Human Rights Commission wrote to K.O. informing her that:

> "We are writing to advise you that the above-named Complaint was discussed at the meeting of the Commissioners of the Nova Scotia Human Rights Commission held on March 10, 2022.
>
> Based on a thorough review of the matter, the Commissioners decided that the Complaint is dismissed pursuant to section 29(4)(b) of the *Human Rights Act* because 'the complaint is without merit'. Decisions by the Commissioners of the Nova Scotia Human Rights Commission are final."[4]

[29] On April 19, 2022, K.O. filed a Notice for Judicial Review in this Court.

[30] Therein, K.O. cites the following Grounds for Review of the Commissioners' decision to dismiss her Complaint:

> 1-the Decision made by the Commissioners… was unreasonable, as the Commissioners did not provide sufficient reasons to meet the standard of being justified, intelligible and transparent.
>
> 2-the Decision made… failed to provide the Applicant with procedural fairness due to the insufficiency of its reasons.
>
> 3-the Decision… to dismiss the Complaint because it was "without merit" was unreasonable given the Record that was before it.
>
> 4-… if the Commissioners relied upon [the HRO's report of October 22, 2021], the Commissioners' Decision denied the Applicant procedural fairness. The investigation itself denied the Applicant procedural fairness. The investigation was not neutral and thorough and therefore did not meet the required standard for procedural fairness.

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[3] K.O.'s November 9, 2021, submissions [pages 133-137 of the Record] are similar to those argued before the Court on Judicial Review [e.g. Initial Brief, paras. 83-84]. In the conclusion, K.O.'s counsel stated: "It is readily apparent solely from [Burnside's] Mr. Shannon's own response to the Complaint that the Complaint itself has merit and raises significant enough issues of discrimination for the Complaint to be referred to a Board of Inquiry hearing. [The HRO's] recommendation should not be followed, as her Report contains a number of errors. K.O. respectfully requests that this matter be referred to a Board of Inquiry hearing."

[4] That is, there is no statutory appeal provided for in the legislation. Therefore, the only recourse for K.O. is an application for judicial review in the Supreme Court of Nova Scotia.

> 5-… if the Commissioners relied upon [the HRO's Report of October 22, 2021], the Commissioners' Decision was unreasonable, as the Investigator's Report contained the following flaws:
>
> a) the Investigator's analysis disregarded well-established principles of Human Rights and professional regulatory law;
>
> b) the Investigator's Report itself demonstrated a discriminatory attitude towards persons with mental health issues;
>
> c) the Investigator's Report relied upon immaterial factors or placed undue weight upon immaterial factors;
>
> d) the Investigator's Report disregarded relevant evidence or did not place sufficient weight on relevant evidence;
>
> e) the Investigator's Report did not address the allegation in the Complaint concerning the Complainant's protected characteristics of sex, gender identity, and gender expression;
>
> f) the Investigator's reasoning was not justifiable, transparent, and intelligible;
>
> g) the Investigator reached an unreasonable conclusion.
>
> 6-such further and other grounds as counsel may advise and that this Honourable Court may permit.

[31] K.O. seeks an order quashing and setting aside the decision to dismiss her Complaint, and an order referring the matter back to the Commission to conduct a new investigation; in the alternative, referring the matter directly to a Board of Inquiry for hearing.

[32] She also seeks declarations that the Commissioners acted unreasonably, contrary to the principles of procedural fairness, contrary to natural justice by failing to provide sufficient reasons for their decision; and that they acted unreasonably in dismissing her Complaint.

[33] She requests costs and any other relief or remedy that she requests and that the Court considers just in the circumstances.[5]

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[5] The Commission confirmed in its written submission that it is not seeking costs.

C-The issues at the Judicial Review hearing

[34] All parties agreed that this Judicial Review is limited to the following supervening issues, in light of the arguments put forward by K.O., and the Respondents:[6]

1-What is the applicable standard(s) of review?

2-Does the Commission's decision meet the standard of review?

3-If the Commission's decision does not meet the standard of review, what is the appropriate remedy?

1-Standard of review

[35] All Counsel agree that the "reasonableness" standard is applicable to the issues raised. I agree.

[36] The most recent and binding authority from the Supreme Court of Canada on "judicial review" is set out in its reasons in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* [2019] 4 SCR 653.

[37] As Justice Norton stated in *Murphy,* 2021 NSSC 323 (affirmed 2023 NSCA 4):

> [23] In *Carroll v.* Canada (Minister of Justice), 2021 NSCA 71, the Nova Scotia Court of Appeal described *Vavilov* as setting out a roadmap for a reviewing court, at para 27:
>
> > [27] The majority judgment of the Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, set out the roadmap for a reviewing court. It begins with the guidance to examine the written reasons (if any) with a view to understand the reasoning process followed by the decision maker. Ultimately, a reasonable decision is one based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law:
> >
> > > [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker

[6] As is evident from the oral and written submissions of K.O., some of the specific "Grounds of Review" have not been pursued by the Applicant.

> communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.
>
> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, **a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.**
>
> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see Dunsmuir, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. **Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.** [Bold emphasis added]

[24] Justice David Stratas of the Federal Court of Appeal is a recognized authority on administrative law. His analysis of the *Vavilov* decision in Alexion Pharmaceuticals Inc. v. Canada (Attorney General),2021 FCA 157, is very helpful. By way of introduction to *Vavilov* , Justice Strata[s] observed:

> 7 *Vavilov* did not substantially change the jurisprudence in this Court concerning the unreasonableness of outcomes reached by administrators: *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100at paras. 22-37. The approach is a contextual one that considers the ambit of acceptable and defensible decision-making open to administrators or, put another

> way, the constraints acting upon administrators. However, *Vavilov* did change the law substantially by requiring that reviewing courts be able to discern a reasoned explanation for administrators' decisions. This change in the law affects the outcome of this appeal.

[25] Justice Strata[s] made the following analysis of the *Vavilov* approach to judicial review:

> 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.
>
> [Emphasis in the original]

[38] It must be borne in mind when reading the reasons in *Vavilov*, particularly the Court's comments and suggested analysis regarding discerning "a reasoned explanation for" an administrator's/administrative body's decision, that they were

made in a specific factual and legislative context, albeit written to have broad application.[7]

[39] Let me briefly set out, from the reasons of the Majority, what concerns they considered as the central issues they wished to address:

> 7 The first aspect is *the analysis for determining the standard of review*. It has become clear that *Dunsmuir* 's promise of simplicity and predictability in this respect has not been fully realized.
> …
> 11 The second aspect is the need for better guidance from this Court on the *proper application of the reasonableness standard*. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. *The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making*, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.
>
> [My italicization added]

[40] The Commission it is not required to, nor did it expressly, give reasons for its decision to dismiss K.O.'s Complaint as being "without merit".

[41] Regarding the deference that this Court owes to an administrative body regarding its factual findings, *and* considerations when an administrative body

[7] While not formally part of the reasons in the case, the summary of the case in [2019] 4 SCR 653 gives a sense of the factual and legal background in *Vavilov*: "Applicant's parents were foreign agents who entered Canada and assumed identities of deceased Canadians - Parents returned to Russia from United States (US), and Applicant's passport and US citizenship were revoked - Applicant amended birth certificate to parents' true identities to obtain Certificate of Canadian Citizenship - Registrar cancelled certificate as parents were not lawfully Canadian citizens or permanent residents and were employees/representatives of foreign government under s. 3(2)(a) of Citizenship Act - Applicant's application for judicial review was dismissed on basis that anyone who moved to Canada with goal of establishing life to further foreign intelligence operation was in service of, or employee/representative of, foreign government - Applicant's appeal to Federal Court was dismissed and appeal to Federal Court of Appeal was allowed - Minister of Citizenship and Immigration appealed - Appeal dismissed."

makes a decision with an absence of expressed reasons, the Majority in *Vavilov* commented:[8]

> (d) Evidence Before the Decision Maker
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> 125 *It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings.* The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also Khosa, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> 126 *That being said, a reasonable decision is one that is justified in light of the facts: Dunsmuir, para. 47.* The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and *its decision must be reasonable in light of them*: see Southam, at para. 56. *The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it*. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> …
>
> *F. Review in the Absence of Reasons*
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> 136 Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party, but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. *In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all*: *Baker*, at para. 43.

[8] I appreciate that dismissing a complaint before a formal inquiry into the circumstances thereof does not produce the “factual findings” and reasons that would a Board of Inquiry hearing. I suggest therefore that preliminary decisions such as the one at Bar require even greater deference to the administrative decision-maker, all other things being equal.

> *137 Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided.* This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. *It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision*: *Baker* , at para. 44. For example, as McLachlin C.J. noted in *Catalyst* , "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw ... clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli* .
>
> 138 *There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision.* In such a case, the reviewing court must still examine the decision in light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. *But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.*
>
> [My italicization added]

[42] More specifically relevant in the present case, are the reasons of Justice Bryson (as he then was) in *Green*[9]:

> 28 The *Human Rights Act* provides the Commission with broad authority to dispose of complaints at a preliminary stage. Section 29 (4) (b) authorizes the Board to dismiss a complaint at any time if the complaint "is without merit". Section 32A (1) provides that the Commission "may" appoint a Board of Inquiry at any time after the filing of a complaint. The *Board of Inquiry Regulations*, O.I.C. 91-1222, N.S. Reg. 221/91 say:
>
> > The Nova Scotia Human Rights Commission may, at any stage after the filing of a complaint, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to a Human Rights Board of Inquiry to inquire into the complaint if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted.

[9] The Commission may also consider “public policy considerations” when it screens complaints of discrimination – see Justice Oland’s reasons at para. 40, 2011 NSCA 8, affirming Justice Bryson’s reasons.

> [Emphasis added]
>
> …
>
> 36 An absence of reasons does not frustrate judicial review where the record allows the court to discern whether the decision was reasonable in all of the circumstances (*Hiscock, Gardner*). Deference extends to reasons *that could be offered* in support of the Commission's decision (*Dunsmuir* ¶48).
>
> [My italicization and underlining added]

[43] Therefore, in an attempt to assess the reasonableness of the Commission's decision, this Court is left to consider by inference what reasons the Commission *could have contemplated* in support of its decision to dismiss K.O.'s complaint.

[44] K.O. agrees that it is a reasonable inference that the Commissioners relied upon the HRO's Investigation Report and Memorandum, for their March 10, 2022, consideration of K.O.'s Complaint.

2-Does the Commission's decision not meet the standard of reasonableness?

[45] I start by observing that the persuasive burden to establish this is on K.O.

[46] Let me then turn to her arguments.

[47] K.O.'s counsel confirmed at the Judicial Review hearing that she is not alleging that the Commission's decision was tainted by lack of procedural fairness or lack of neutrality.[10]

[48] In her Initial Brief, K.O. stated:

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[10] As she stated in the Reply brief at paragraph 34: **"[K.O.] has not argued in her brief that there was a breach of procedural fairness. She argues that the Commission's decision was unreasonable based on flaws in the investigator's reasons**, **not flaws in the investigation itself**. This is a matter that can be rectified by reconsideration of the existing Record." This seems at odds with her position found in the "order proposed" portion of the Notice for Judicial Review: "The Applicant requests … 2. An Order referring the matter back to the [Commission] to conduct a new investigation."; unless she intended to merely ask for a reconsideration of the existing investigation results.

68 The role of the court in reasonableness review is to review the reasons offered by the Commissioners in support of the decision. It is not the role of the reviewing court to conduct its own analysis of the issue or to infer its own rationale.

- The reviewing court should not re-weigh or re-assess the evidence considered by the Commissioners. Absent exceptional circumstances, the reviewing court will not interfere with findings of fact.

- Reasonableness review is a review of the reasons as a whole and not a line-by-line treasure hunt for error. A reasonable decision is based on adequate reasons that contain an internally coherent and rational chain of analysis and is justified in relation to the facts and law.

- Reasonableness review is contextual and must be sensitive to the administrative context in which the decision was made.

- A reasonable decision does not need to engage with all of the issues raised and arguments made by the parties. However, a reasonable decision must meaningfully account for and grapple with the key issues or central arguments raised by the parties.

…

71…If the reviewing court finds that the HRO's analysis in support of dismissing the Complaint is logical, coherent, and justified with respect to the facts and the law, the Commissioners' decision which accepted the HRO's recommendation to dismiss may likewise be justified, logical and coherent by extension. **If the reviewing court finds that the HRO's analysis is unreasonable, the Commissioners' decision will necessarily be unreasonable, too**.

72 **[K.O.] respectfully submits that the HRO's analysis is unreasonable with respect to the legal and factual context that was before her and does not meet the requisites of reasonableness review because:**

A- the HRO did not apply the appropriate legal test for the investigative stage of the Human Rights Complaint, which led to a line of analysis that resulted in improper and irrelevant considerations.

B- the HRO misconstrued the evidence on a point that is critical to the complainant central concerns with respect to discrimination on the basis of mental disability.

C- the HRO did not address several of the protected grounds which the complainant included in her complaint when alleging discrimination.

…

A- The HRO applied the Wrong Test at the Investigative Stage which led to Inapplicable Analysis

75 [K.O.] submits that **the HRO charged herself with the incorrect legal test at the investigative stage which led to a line of analysis that resulted in improperly justified and irrelevant conclusions. This renders the HRO's analysis unreasonable**.

76 The HRO articulated the issue before her at the investigative stage as whether the evidence supported a case of discrimination:

> Does the evidence support a case of discrimination, based on age, sex, sexual orientation, gender identity, gender expression, mental disability, and a perception of an above characteristic as alleged by the complainant?

[My bolding added]

i-What is the correct test and proper considerations for determining whether a complaint is "without merit"?

[49] K.O. cites a number of relevant cases that suggest the test in Nova Scotia for dismissal of a complaint as "without merit" is simply that there is no reasonable basis in the evidence to warrant taking on the complaint to the next stage.

[50] It must also be borne in mind that Nova Scotian jurisprudence has found that the Commission is not limited to purely evidentiary considerations in making such determinations about whether to dismiss a case as "without merit" or not:

[51] As Justice Bryson (as he then was) stated in *Green* (2010 NSSC 242):[11]

> 28 The *Human Rights Act* provides the Commission with broad authority to dispose of complaints at a preliminary stage. Section 29 (4) (b) authorizes the Board to dismiss a complaint at any time if the complaint "is without merit". Section 32A (1) provides that the Commission "may" appoint a Board of Inquiry at any time after the filing of a complaint. The *Board of Inquiry Regulations*, O.I.C. 91-1222, N.S. Reg. 221/91 say:

[11] The reasons in *Green v. Nova Scotia (Human Rights Commission)*, 2010 NSSC 242, were upheld: 2011 NSCA 47. In a similar vein, see the reasons of Cromwell, J., at paras. 1-3 of *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, [2012] 1 SCR 364, which noted the Commission's decision on a preliminary question such as its jurisdiction, was to be reviewed on the following standard: "a reviewing court should intervene only if there is no reasonable basis in law or on the evidence to support the Commission's decision." Cromwell, J. also stated at para. 23: "In deciding to refer a complaint to a board of inquiry, the Commission's function is one of screening and administration, *not of adjudication*." [My italicization added]

> The Nova Scotia Human Rights Commission may, at any stage after the filing of a complaint, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to a Human Rights Board of Inquiry to inquire into the complaint **if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted**. [Emphasis added]

29 It is clear from the *Act* and *Regulations* that the Commission enjoys a discretion concerning whether or not to refer a complaint to a Board of Inquiry. The Commission's decision is entitled to a substantial degree of deference particularly in view of the specialized human rights regime and the establishment of the statutory scheme for examining and vindicating those rights where appropriate (*Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2010 NSCA 8 (N.S. C.A.) ¶ 14 and following).

30 **In exercising its discretion, the Commission is not required to follow the recommendation of its investigator**. If it were otherwise, there would be no need for a Commission. **The Commission's mandate is obviously broader than that of an investigator. The Commission must consider the public interest and policy issues which can involve factors other than those relating to the parties alone** (*Garnhum v. Canada (Deputy Attorney General)* (1996), 30 C.H.R.R. D/152 (Fed. T.D.) at ¶ 30).

31 Where the appropriate standard of review is reasonableness, a court should not interfere unless the applicant positively demonstrates that the decision under review was unreasonable (*Ryan, supra*, at ¶48).

32 Whether a complaint should be referred to a Board of Inquiry depends on whether there is a reasonable basis on the evidence to take a complaint to the next level, (Cooper v. Canada (Human Rights Commission) (1996), 27 C.H.R.R. D/173 (S.C.C.) At ¶53 of Cooper, the Court drew an analogy between the Commission's screening function and that of judge at a preliminary inquiry.

33 In *Rogers v. British Columbia (Council of Human Rights)* (1993), 21 C.H.R.R. D/67 (B.C. S.C.), the court formulated the following test after reviewing the appropriate jurisprudence:

> In my opinion, the test which is better suited to the scheme of the Human Rights Act is one which may be derived from *S.E.P.Q.A. v. Cohen*, supra. I would articulate it as follows: The Human Rights Council may discontinue the proceedings on a complaint if it determines that there is no reasonable basis in the evidence to warrant taking on the complaint to the next stage. In making this determination the council may evaluate the information in the investigator's report and in doing so, may use the collective experience and common sense of its members. The scope of the evaluation

> is limited to that which is necessary to determine whether there is a reasonable basis in the evidence for carrying on the claim to the next stage**.**

34 The foregoing was approved in *Lee v. British Columbia (Attorney General),* 50 C.H.R.R. D/295, 2004 BCCA 457 (B.C. C.A.) at ¶26, where the court noted that the *mere possibility* of discrimination cannot be enough to require a hearing.

35 It is not the role of this court to determine whether or not Ms. Green suffered discrimination, but rather to review the Commission's decision to determine whether its refusal to move Ms. Green's complaint to the next stage of a Board of Inquiry, was within a reasonable set of outcomes, (*Dunsmuir* ¶ 47) .

36 An absence of reasons does not frustrate judicial review where the record allows the court to discern whether the decision was reasonable in all of the circumstances (*Hiscock, Gardner*). Deference extends to reasons *that could be offered* in support of the Commission's decision (*Dunsmuir* ¶48).

[My bolding added]

[52] In affirming his decision, 2011 NSCA 47, our Court of Appeal, per Oland JA, stated:

4 The appellant's complaint against the University was made pursuant to s. 5(1)(o) of the *Human Rights Act*, R.S.N.S. 1989, c. 214, as amended. It provides that no person shall discriminate against an individual on account of physical or mental disability.

5 Complaints filed with the Commission do not automatically proceed to a public hearing before a board of inquiry. Section 32A of the *Act* provides that, at any time after the filing of a complaint, the Commission "may" appoint a board of inquiry. That this is a discretionary decision is also apparent from the *Board of Inquiry Regulations*, O.I.C. 91-1222, N.S. Reg. 221/91:

> The Nova Scotia Human Rights Commission may, at any stage after the filing of a complaint, request the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to a Human Rights Board of Inquiry to inquire into the complaint if the Commission is satisfied that, having regard to all circumstances of the complaint, an inquiry thereinto is warranted. [Emphasis added]

6 The Commission has the authority to dispose of complaints at a preliminary stage. Section 29(4)(b) of the *Act* provides:

> 29(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. [Emphasis added]

7 The Commission's decision which dismissed the appellant's complaint, and is the subject of this appeal, was made at this "screening" stage.

…

29 *While Ms. Green accepts that not every dismissal pursuant to s. 29(4) will warrant reasons, she submits that they should be given in this case because of the particular factual background and the decision's importance to her.* As to what will constitute sufficient reasons for a dismissal at the screening stage, she offers that these could vary from fulsome archival decisions to brief ones which follow a template.

30 With respect, after considering the *Act*, the Commission's screening function and public policy role, and the rationale behind the provision of reasons in situations such as that which is the subject of this appeal, *I am unable to accept the appellant's arguments*.

31 The Legislature entrusted the Commission, which has specialized expertise in the field of human rights, to screen complaints of alleged violations of such rights. *It authorized it to dismiss a complaint at any time for any of the reasons set out in s. 29(4), including that it is "without merit".*

32 When a public hearing is held before a board of inquiry, s. 34A of the *Act* stipulates that a written decision shall be rendered within six months. *In contrast, the Act does not contain any statutory requirement for reasons, beyond those in s. 29(4), in a screening decision. Nor does it set out a statutory right of appeal of those decisions. That the Legislature did not do so indicates that it made a deliberate policy choice, namely, that the Commission need not provide fuller reasons than those in s. 29(4) of the Act when*

> *declining to refer a complaint to a board of inquiry. Hiscock*, *Spurrell* and *Coady* all drew and relied on this inference based on an examination of the statutory provisions in similar legislation. They decided that extensive reasons need not be given by the equivalent Commission in Newfoundland.
>
> 33 While a board of inquiry must provide reasons, *it is clear that the Act did not impose that burden on the Commission beyond citing the words of s. 29(4), when it decides whether or not to refer the complaint further. I add that the words "without merit" are not meaningless. They indicate that, having weighed the evidence before it, the Commission was of the view that the complaint did not warrant referral to a board of inquiry because there is no chance the complaint will succeed.*
>
> 34 Moreover, as the appellant has properly acknowledged, the decision of the Commission under appeal was made at the screening stage. It is an administrative decision.
>
> 35 In *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.), La Forest, J., writing for the majority, described the screening role of the Canadian Human Rights Commission as follows:
>
> > [53] The Commission is not an adjudicative body; that is the role of a tribunal appointed under the Act. When deciding whether a complaint should proceed to be inquired into by a tribunal, the Commission fulfills a screening analysis somewhat analogous to that of a judge at a preliminary inquiry. It is not the job of the Commission to determine if the complaint is made out. Rather its duty is to decide if, under the provisions of the Act, an inquiry is warranted having regard to all the facts. The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it. ... [Emphasis added]
>
> [My italicization added]

[53] I am satisfied that it is within the Commission's mandate to decide, based on its assessment of the sufficiency of the evidence before it (if under s. 29(4)(b) of the *Act*), whether the complaint is "without merit".

[54] However, it is important to appreciate that, when the Commission considers whether a complaint is "without merit", it is not restricted to only "assessing the sufficiency of the evidence of before it". This is because it must also consider once sufficient evidence is available, whether it should request the appointment of a Board of Inquiry, which involves an exercise of its discretion.

[55] To my mind, the Commission's full responsibility includes its consideration of not only "the sufficiency of the evidence before it", but also other legitimate

factors that would inform its exercise of discretion to forward a complaint to a Board of Inquiry **or** dismiss it. The sufficiency of the evidence is part of the broader concept, "merit" of a complaint, which includes a limited consideration of issues of credibility of the potential witnesses, and the "strength of the case" factors, such as whether there is a viable justification(s) for what would otherwise appear to be a *prima facie* case of discrimination (para. 33, *Moore,* [2012] 3 SCR 360).

[56] This discretionary aspect of the Commission's statutory mandate was discussed in numerous cases, including *Green*, as well as by Justice Bourgeois (as she then was) in *Cape Breton (Regional Municipality) v. Nova Scotia (Human Rights Commission),* 2013 NSSC 193.

[57] Therein, she concluded that s. 32A of the *Human Rights Act* permits the Commission's decision to make a direct referral to a Board of Inquiry *without* a preceding investigation:

> Nature of the Decision Under Review
>
> 34 The CBRM is challenging the Commission's decision to refer a number of complaints, originally six and now four, to a BOI. That seems simple enough. However, in my view, given that the nature of the decision impacts on the assessment of procedural fairness, as well as the abuse of process arguments, it is prudent to look at the determination under review more closely.
>
> 35 *The nature of a referral decision under the Act has been recently addressed by the Supreme Court of Canada* in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission), supra*. Writing for the Court, *Justice Cromwell characterizes such a decision as being discretionary, and serving a screening function*. He writes:
>
> > [19] I respectfully agree with the Court of Appeal. *The Commission's decision to refer a complaint to a board of inquiry is not a determination of whether the complaint falls within the Act. Rather, within the scheme of the Act, the commission plays an initial screening and administrative role; it may, for example, decide to refer a complaint to a board of inquiry so that the board can resolve a jurisdictional matter.*
>
> And further:
>
> > [23] *What is important here is that a decision to refer a complaint to a board of inquiry is not a determination that the complaint is well founded or even within the purview of the Act.* Those determinations may be made by the board of inquiry. In

> deciding to refer a complaint to a board of inquiry, *the Commission's function is one of screening and administration, not of adjudication*.
>
> [24] The nature of this role has been recognized in the Nova Scotia case law and in the case law which has developed in relation to the similarly worded provisions of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ... *While there is some limited assessment of the merits inherent in this screening and administrative role, the Commission is not making any final determination about the complaint's ultimate success or failure*. (citations omitted)

52 Considering the provisions in question liberally and purposively, in my view the Commission's interpretation falls within a range of reasonable outcomes. I will explain.

53 *The CBRM and CUPE submit that a referral under section 32A to a BOI is permissible only after the preconditions in section 29(1) have been met*-namely, a complaint has been inquired into and attempts at settlement have been undertaken. *These parties equate "inquire into" as meaning "investigate".* In the present case, clearly there was no investigation, nor attempts at settlement, and as such, it is submitted the Commission was unable to make a referral under section 32A.

54 There are a number of considerations which support the Commission's interpretation as a reasonable one. *It is not inconsistent with the legislation to interpret section 32A as permitting a referral to a BOI without first attempting to investigate or settle the complaint. Arguably, not even section 29 requires these steps as mandatory pre-conditions when considering an outright dismissal. Section 29(4)(f) permits the Commission to dismiss "a complaint at any time" if "there is no reasonable likelihood that an investigation will reveal evidence of a contravention of this Act".*

55 It thus appears that a dismissal, without an investigation, is specifically contemplated by section 29(4)(f). If the legislature intended such a streamlined approach to be available for the dismissal of a complaint, it is not unreasonable to interpret the relevant provisions to permit the Commission to move a complaint to the BOI stage, also without investigation. *In my view, the contents of section 29(4) supports the Commission's interpretation that section 29(1) does not create mandatory pre-conditions in the handling of all complaints, and specifically those where a direct referral to a BOI is felt to be warranted by the Commission.*

56 There is also support from the Court in terms of the reasonableness of the Commission's interpretation of sections 29 and 32A. Hallett, J.A. in *Cowan v. Aylward*, 2002 NSCA 76 (N.S. C.A.), writes:

> 45 Section 29 of the *Act* is clear. The Commission shall instruct the Director or some other officer to inquire into and endeavour to effect a settlement of any complaint of an alleged violation of the *Act*. This is a mandatory direction to the Commission as to what it is to do when a person aggrieved makes a complaint in writing or if the

> Commission has reasonable grounds for believing that a discrimination complaint exists. I tend to think that under the circumstances of this case that the Commission had reasonable grounds for believing that a complaint by Professor Aylward against Dalhousie existed. The Commission can **either** cause the complaint to be inquired into and an attempt made to have the parties settle **or** the Commission could appoint a board of inquiry once the complaint is filed (s. 32A). (Emphasis added)

57 The "reasonableness" of the Commission's interpretation is further supported in my view by the "Board of Inquiry Regulations", N.S. Reg. 221/91 which provide:

> 1 The *Nova Scotia Human Rights Commission may, at any stage after the filing of a complaint, request* the Chief Judge of the Provincial Court to nominate a person or persons for appointment by the Commission to *a Human Rights Board of Inquiry to inquire into the complaint if* the Commission is satisfied that, *having regard to all circumstances of the complaint, an inquiry thereinto is warranted.*

58 The purpose of the *Act* is to promote of course, human rights and the dignity of all persons. A stated purpose is also to "extend the statute law relating to human rights and provide for its effective administration"-section 2(f). *The "direct referral" process envisioned within the Commission's interpretation of sections 29 and 32A, would prevent some complaints, not suitable for settlement attempts, to proceed directly to a BOI without "going through the motions" of steps which the Applicant argues are mandatory.* This, in my view, aligns with the stated purpose of administrative effectiveness.

[My italicization added]

[58] In cases such as the one at Bar, the Investigator's Report will be relied upon by:

- the Investigator in forming the basis for their recommendation; and
- the Commission in assessing the "merit" of the Complaint (including a limited assessment of the credibility of those persons contacted who could become witnesses if the matter proceeded to a hearing by a Board of Inquiry).[12]

[12] See for example Justice Gabriel's reasons in *Selig v. Nova Scotia (Human Rights Commission)*, 2018 NSSC 116 at paras. 129-134. In her Reply brief K.O. states at para. 10:" [[K.O.] does not argue that every case involving issues of credibility at the investigative stage should be referred to a Board of Inquiry. Determinations of credibility are necessary at the investigative stage, but [K.O.] maintains that the HRO's approach to fact-finding and allusions to credibility led to a series of conclusions that are wholly unresponsive to the accepted test at the investigative stage of Human Rights complaint… do not show why she concluded that the allegations, if proven true on a balance of

[59] It is àpropos as well to point out what the court stated in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404:

> 36 *The Applications Judge treated the analysis in the investigator's Reports as representing the Commission's reasoning for its decision, citing the brevity of the Commission's decision as a factor necessitating this approach (para. 12).* The appellant argues that this treatment constitutes an error of law, as such treatment is said to negate the separate and distinct roles of the investigator and the Commission.
>
> 37 In my view, the appellant's argument on this issue must fail. While it is true that the investigator and Commission do have "mostly separate identities" (*Pathak v. Canada (Human Rights Commission)* (1995), 180 N.R. 152, [1995] 2 F.C. 455 (Fed. C.A.) at para. 21, *per* MacGuigan J.A., (Décary J.A. concurring)), *it is also well-established that, for the purpose of a screening decision by the Commission pursuant to section 44(3) of the Act, the investigator cannot be regarded as a mere independent witness before the Commission* (*S.E.P.Q.A. v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at para. 25 [*S.E.P.Q.A.*]). The investigator's Report is prepared *for* the Commission, and hence *for the purposes of the investigation, the investigator is considered to be an extension of the Commission* (*S.E.P.Q.A.*, *supra* at para. 25). ***When the Commission adopts an investigator's recommendations and provides no reasons or only brief reasons, the Courts have rightly treated the investigator's Report as constituting the Commission's reasoning for the purpose of the screening decision*** under section 44(3) of the *Act* (*S.E.P.Q.A.*, *supra* at para. 35; *Bell Canada v. C.E.P.* (1998), 167 D.L.R. (4th) 432, [1999] 1 F.C. 113 (Fed. C.A.) at para. 30 (C.A.) [*Bell Canada*]; *Canadian Broadcasting Corp. v. Paul* (2001), 274 N.R. 47, 2001 FCA 93 (Fed. C.A.) at para. 43).
>
> 38 *This approach is not, as the appellant claims, incompatible with* ***the well-accepted notion that flaws in the investigator's Report will not vitiate a Commission's decision, so long as such flaws are not so fundamental that they cannot be remedied by further responding submissions by the parties*** (*Slattery v. Canada (Human Rights Commission)* (1994), 73 F.T.R. 161, [1994] 2 F.C. 574 (Fed. T.D.), affirmed (1996), 205 N.R. 383 (Fed. C.A.) [*Slattery*]). ***A reviewing Court's focus under this approach ultimately remains upon the Commission's screening decision, which is reviewed with a high degree of deference with respect to fact-finding activities*****: only errors evincing an error of law, patent unreasonableness in fact-finding, or a breach of procedural fairness will justify the intervention of a Court on review** (*Bell Canada*, *supra* at para. 38; *Connolly v. Canada Post Corp.*, 2002 FCT 185 (Fed. T.D.) at para. 28, affirmed (2003), 238 F.T.R. 208 (note), 2003 FCA 47 (Fed. C.A.) [*Connolly*]). ***Such errors belong, virtually by definition, to the category of investigative flaws that are so fundamental that they cannot be remedied by the parties' further responding submissions.*** The applicable standard for reviewing investigative thoroughness is therefore

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probabilities, would not establish a case of discrimination. Indeed, the HRO's conclusions that Mr. Shannon was justified, would tend to support that the protected ground of mental disability was a factor in Burnside Law's decision-making process."

> equivalent to that which applies on review of the Commission's decision under section 44(3). **As a result, there is no necessary inconsistency if, in appropriate circumstances like those of the case at bar*, the investigator's Report is treated as constituting the Commission's reasoning*.**
>
> [My bolding and italicization added]

[60] As a follow-up, I note that case was recently favourably referenced in *Bergeron v. Canada (Attorney General)* 2022 FCA 209:

> 29 This Court observed in *Bergeron FCA* that the concept of "adequacy" is "highly judgmental and fact-based". It is informed, in part, by the policy that "the Commission should not devote scarce resources to matters that have been, in substance, addressed elsewhere or that could have been addressed elsewhere": at para. 47.
>
> 30 As this Court further recognized in *Canada (Attorney General) v. Ennis*, 2021 FCA 95, this discretion "derives from judicial recognition of the Commission's expertise in performing its important screening and gate-keeping role": at para. 56. See also *Bergeron FCA* at para. 74. Consequently, *the Commission is afforded great latitude when courts review decisions such as this*: *Bergeron FCA*, above at para. 45; *Ennis*, above at para.57; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, at para. 38.
>
> [My italicization added]

[61] Having focused on the components of the "test" for referral to a Board of Inquiry (i.e. the sufficiency of the evidentiary merits *and* the legitimate discretionary factors), let me next turn to the circumstances in this case.

ii-A consideration of the *prima facie* reasonableness of the Commission's decision to dismiss KO's complaint as "without merit"

[62] Regarding whether there was a reasonable basis *in the evidence* for proceeding to the next stage, I bear in mind that the Commission may also take a broader view than of the HRO in her Investigative Report, and each of the following suggest a substantial degree of deference should be given to the Commission's decision:

- its highly specialized expertise;

- the benefit of what has been colloquially referred to as "the collective wisdom and common sense of" the Commissioners;

- their having had access to all the available information (evidence and arguments-including those of K.O.);

- their having had the benefit of the opportunity to question the HRO *and* take advice from their own legal counsel, both of whom were present, on March 10, 2022.

[63] Bearing in mind the absence of expressed reasons for having made the decision to dismiss the Complaint as "without merit", and upon examining the Record *on its face*, I am not satisfied that K.O. has established the Commissioners' decision was unreasonable.

[64] However, I must go on to consider whether K.O. has raised sufficient concern that the HRO's analysis and reasoning in her Report was seriously flawed, and therefore the underlying risk that the Commission made its decision based upon a materially flawed basis.[13]

[65] As observed in the jurisprudence, such flaws must rise to a serious level (*Sketchley*, 2005 FCA 404): *"so fundamental that they cannot be remedied by the parties' further responding submissions"*; thus sufficiently tainting the decision made by the Commission, such that it cannot be considered "reasonable".

[66] Let me examine each of these argued three flaws.

iii-The 3 argued "flaws"

1-Did the HRO use the wrong test that resulted in an analysis which improperly justified the result and lead to irrelevant conclusions?

[13] K.O. has not satisfied me that the HRO's investigation was not sufficiently thorough and was carried out in a non-neutral manner. Moreover, as noted earlier, K.O.'s position is stated at paragraph 34 of her Reply brief: "… The Commission's decision was unreasonable based on flaws in the Investigator's reasons, not flaws in the investigation itself."

[67] The HRO stated a question in the following terms at two locations in her Investigative Report (at pp. 50 and 52 of the Record): "G. Issues to be Considered"; "I. Analysis":

> "Does the evidence support a case of discrimination, based on age, sex, sexual of orientation, gender identity, gender expression, mental disability, and a perception of an above characteristic as alleged by the complainant?"

[68] While on a plain reading thereof, this is a question suited for a Board of Inquiry decision-maker, I am satisfied the HRO was merely stating the question that a Board of Inquiry would ask itself, but that she recognized this question was *not* the one she should ask herself, and she did not answer this question herself in the Report.

[69] This statement must be seen in context of her later statement under "Analysis" at paragraph 80 of her Investigative Report attached to her Memorandum dated January 17, 2022, for the Commissioners (p. 54 of the Record):

> In conclusion, in order for the complaint to be referred to a Board of Inquiry, there must be some evidence to establish a case of discrimination based on a protected characteristic. The evidence must demonstrate a link between the protected characteristic (age, sex, sexual orientation, gender identity, gender expression, mental disability, and a perception of an above characteristic) and the actions alleged to cause the discrimination (denial of an opportunity for an articling position). Based on the above I recommend the complaint be dismissed.
>
> [My underlining added]

[70] She continued in her "Recommendation" section (p. 54):

> An Investigation Report does not determine whether or not there has been discrimination. It determines if there are allegations which, if proven on a balance of probabilities, could establish discrimination on the grounds alleged in the complaint. A Board of Inquiry can only be appointed by the Human Rights Commissioners, not by Commission staff. The appointment of a Board of Inquiry is the final internal step in the Commission's process and a number of factors have to be considered by the Commissioners before a Board of Inquiry is appointed, such as deciding whether or not it is in the public interest to appoint a Board of Inquiry.

> Based on the above information, I recommend the complaint of discrimination based on employment be dismissed pursuant to section 29(4)(b) of the *Nova Scotia Human Rights Act*.
>
> [My underling added]

[71] From a review of her written materials, it is clear to me that the HRO properly understood her function.[14]

[72] Moreover, her recommendation is just that.

[73] The Commissioners do not have to accept her recommendation, and one would expect them to make their own independent assessment of whether K.O.'s complaint should be dismissed, or not.

[74] Moreover, the Commissioners also are entitled to take into account factors beyond just the state of the evidence.

[75] Therefore, I am not satisfied that K.O. has established her first claimed "flaw" in the HRO's Investigative Report or Memorandum to the Commissioners.

2-Did the HRO misconstrue evidence on a point critical to the Complaint with respect to mental disability?

[76] The error by the HRO is argued to be in paragraph 71 of the Investigation Report. I will set out the entirety of the paragraph:

> The Complainant in her Rebuttal states 'that I would like to take my own car to court. I told him that if we were to have a meeting I may have to step out if I were to have a panic attack. I told him if there was a meeting on the 18th floor of the building, I would probably be anxious, but I would cope with it by practising going to the building. I told him crossing the bridge gives me anxiety'. The Complaint goes on further to say, '*he seems to have assumed that I would need these accommodations as a result of what I did state regarding my anxiety'. Based on the Complainant's statement regarding having a panic attack and that crossing the bridge gives her anxiety, this would give cause for the Respondent to ask further questions*. As the Principal that would be responsible for her articling plan, it would be incumbent upon the Respondent to ask for further details so that he could determine if this was something he would need to know prior to developing an articling plan.

[14] See also para. 81 "Recommendation" where the HRO correctly restates the "test" – are there "allegations which if proven on a balance of probabilities, could establish discrimination on the grounds alleged in the Complaint".

[My italicization added]

[77] Burnside responded to this argument in their brief to this Court, as follows:

73. In the Applicant's Complaint, she explained that she has a mental disability and explained some of the accommodations which she may require:

> I answered his questions honestly. *I told him that I have an anxiety disorder and that I was planning to bring it up if I was hired at the firm. I said I may require some accommodation during the articling year.* […] [Mr. Shannon] asked that I disclose more about my condition in detail. […] *I explained that I would likely only require minor accommodations*, such as being able to drive myself to court in my own car rather than travelling in a group. *Mr. Shannon said that would be fine but continued to press me for more information. […] He then asked me for specific examples* of how my anxiety disorder might impact my work, and *what accommodations would be required. I said that, for example*, I may have to step out of a meeting for a few minutes if I were to have a panic attack.

74. Mr. Shannon then provided his [written] Response:

> *I then asked [KO] whether there were any issues that might, in her view, impede her in successfully performing her articles or any issues that the Firm might need to accommodate in order for her to be able to do so.* She told me that she suffers from an anxiety disorder. I explained that we have staff and lawyers, present company included, who have dealt with and continue to manage anxiety, that we actively promote and support mindfulness activities and physical health activities as a critical component of practice. *I asked her how serious this issue was and how the anxiety issue manifested itself.* She told me that she would not, for example, be able to travel in the same vehicle as the other lawyers and that crossing the bridge and being in closed spaces causes her uncontrollable anxiety. She explained that large gatherings of people cause her to suffer anxiety. She advised that it may take her longer to complete her tasks and assignments. *It was clear to me that there may be other areas in the articling plan that would possibly need to be modified in order to accommodate this student*, notably trial practice techniques, interviewing and client management.

75. The Applicant provides the following Rebuttal to the Respondent's submission on this point:

> Page 5 – I <u>did not</u> say that "being in closed spaces causes [me] uncontrollable anxiety." I also <u>did not</u> say that large gatherings cause me to suffer anxiety. I <u>did not</u> say that it would take me longer to complete my tasks or assignments. Instead, I said that I would like to take my own car to court. I told him that if we were to have a meeting I may have to step out if I were to have a panic attack. I told him if there was

> a meeting on the 18th floor of a building, I would probably be anxious, but I would cope with it by practicing going to the building. I told him crossing the bridge gives me anxiety.,
>
> Page 5 – Mr. Shannon stated that "it was clear to me that there may be other areas in the articling plan that would possibly need to be modified in order to accommodate this student, notably trial practice techniques, interviewing and client management." *I did not mention anything to Mr. Shannon about needing accommodation with respect to these areas. He seems to have made the assumption that I would need these accommodations as a result of what I did state regarding my anxiety. I submit that this statement is also indicative of a stigmatized attitude towards persons with mental illnesses.*

76. The HRO provided the following summary of this evidence in her Report:

> 71 The Complainant in her Rebuttal states, "that I would like to take my own car to court. I told him that if we were to have a meeting I may have to step out if I were to have a panic attack. I told him if there was a meeting on the 18th floor of a building, I would probably be anxious, but I would cope with it by practicing going to the building. I told him crossing the bridge gives me anxiety." The Complainant goes on further to say, "he seems to have assumed that I would need these accommodations as a result of what I did state regarding my anxiety." *Based on the Complainant's statement regarding having a panic attack and that crossing the bridge gives her anxiety, this would give cause for the Respondent to ask further questions.* As the Principal that would be responsible for her articling plan, it would be incumbent upon the Respondent to ask for further details so that he could determine if this was something, he would need to know prior to developing an articling plan.

77. The HRO makes the same comment that is emphasized above in her Memorandum to the Commissioners.

78. With respect, it is difficult to understand precisely the nature of this alleged "critical error". As the Respondent understands the Applicant's submission, the Applicant is alleging that the HRO "obscures Mr. Shannon's own evidence that he assumed [KO] would need a more significant scope of accommodation that she shared with him," and that this is an assumption or stereotype that the HRO should have weighed when determining whether there was a reasonable basis to proceed with a human rights complaint.

79. The Applicant implies that had the Commission weighed this assumption or stereotype, it may have adjudicated her complaint differently. The Applicant also appears to be suggesting that because Mr. Shannon assumed that [KO] may require accommodation with respect to trial practice techniques, interviewing and client management, the HRO's report somehow obscured this issue.

80. This submission must fail, simply because the Applicant had an opportunity in her response to the Report to raise the fact that the HRO had "misconstrued the evidence" on this allegedly critical point. She did not do so. As a result, it is difficult to understand how she can now allege, on judicial review, that this is a "critical" error rendering the Decision unreasonable when she failed to raise it before the Commission.

81. The words of the Federal Court from the recent decision in *Kirkpatrick v. Canada (Attorney General)* [2019 FC 196 at para. 40] are apt here:

> I fail to see how an issue not raised in the accommodation process or during the investigation can become *ex post facto* a reasonableness issue since the decision maker could not have considered the issue. Not only the applicant did not participate in the accommodation process, considering rather that the Chair Protocol was redundant, but the issue was never raised. The Commission's decision can hardly be faulted for not agreeing with arguments that were not raised.

82. In *Ritchie* [*v. Canada* (*AG)*, 2017 FCA 114], the Federal Court of Appeal explained that "incorrect or vague facts, which are inconsequential to a determination of whether discriminatory acts actually occurred, cannot, on their own, result in a finding that a decision is unreasonable. Absent the demonstration that a decision under review was essentially based on incorrect facts, there is no reviewable error warranting this Court's intervention.

83. In summary, *Vavilov* reminds reviewing courts that in order for a decision to be unreasonable, 'any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision.' Respectfully, the Applicant's critique of the HRO's report with respect to this ground of judicial review is on a marginal issue. While the Respondent is unsure whether the HRO's report contains any error, *Vavilov* is clear that even if this is so, 'it would be improper for a reviewing court to overturn an administrative decision simply because it's reasoning exhibits a minor misstep.'"

[Underlining by Burnside in its brief; my italicization added]

[78] In K.O.'s Reply Brief to this Court, she states:

12 Burnside Law makes two arguments regarding the HRO's misconstruction of the evidence on a point critical to [KO's] complaint of discrimination with respect to mental disability:

a) it is not clear what the nature of the critical error is, and

b) the critical error should have been raised before the Commissioners.

13. [K.O.] has clearly articulated the critical error at paragraphs 87 – 89 of her [Initial Brief to this Court].

…

16. [Regarding paragraph 71 of the HRO's Analysis in her Report]
This is a clear misstatement of [K.O.'s Rebuttal] submission in her July 21, 2022 letter [I understand this to be in the Investigation Report under "Rebuttal of the Complainant at p. 46 Record]. *The result of this misstatement is that it appeared to the HRO and to the Commission that [K.O.] was discussing accommodations she raised, not assumptions about accommodations she did not raise.* Contrary to Burnside Law's argument at paragraph 79 of its brief, *this did in fact obscure [K.O.'s] submission, notwithstanding the fact that it was accurately reproduced in the HRO's Investigation Report*.

17. Logically assumptions about accommodations and individual requests would not be supportive of a prima facie case of discrimination. *Assumptions about accommodations not requested by an individual but which are imposed as a 'threshold issue' in whether to offer an individual any kind of employment are highly relevant to the outcome at the investigative stage.… The failure of the HRO to properly apprehend this is critical to the outcome at the investigative stage*. While it is not for this Court to make the actual determination at stake here, considering the potential impact of the HRO's misconstruction of the evidence is a necessary part of the reasonableness review.

…

19. … *It is not fatal that [KO] did not argue the HRO's analysis was unreasonable before the Commission for containing a critical error according to the principles of judicial review*."

[79] K.O. argues in her Initial Brief to this Court (paras. 90-92):

"*This is an error on a significant point… because it obscures Mr. Shannon's own evidence that he assumed KO would need a much more significant scope of accommodation than she shared with him. Admissions about assumptions and stereotypes about disabilities are important evidence when weighing whether there is a reasonable basis to proceed with the Human Rights Complaint.* [KO] submits that *this is not a superficial or peripheral error and could very likely have made a meaningful difference in the HRO's analysis on the central issues before her. If she had clearly captured the nature of Mr. Shannon's additional assumptions, she may have come to a different recommendation for the Commissioners. This, in turn, could have made a meaningful difference to the Commissioners and reviewing the HRO's analysis and recommendation.* **To the extent that the HRO's analysis relies on demonstrable errors in what the evidence plainly states, it is not consistent with the factual constraints of the case and is unreasonable, and so too is the Commissioners' decision**."

[My italicization and bolding added]

[80] Respectfully, I find Burnside's position is persuasive on this point.

3. Did the HRO not address KO's allegations of discrimination related to sex and sexual orientation?

[81] In her the Initial Brief, KO puts it as follows:

> 95. It is not reasonable for the HRO not to render a determination with respect to multiple allegations of discrimination… nor it is reasonable for the Commissioners to follow a recommendation to dismiss that does not account for all allegations of discrimination made in a Complaint.

[82] In K.O.'s Reply Brief, she states:

> 23. [K.O.] submits that the Record does not reflect that the HRO came to a conclusion with respect to her complaint of discrimination on the basis of sex and sexual orientation.
>
> 24. It is true that the Commission is not required to respond to every allegation or line of argument, but [K.O.] submits that this is not the same as the HRO failing to render a decision on with respect to discrimination on each protected ground in the Complaint.
>
> 25. Further, Burnside Law asserts that the court can infer the HRO's decision from the Record, this is not the case. A reviewing court can infer the rationale for a decision, not a decision… [citing from quotation in *Vavilov* at para. 98].
>
> 26. [K.O.] submits that the [sic] neither a decision nor a rationale with respect to her Complaint of discrimination on the basis of sex and sexual orientation is evident based on the Record. As such, the Commissioners' decision regarding this protected ground is not justified, transparent or intelligible in accordance with the requirements in *Vavilov.*

[83] K.O. argues that the HRO's analysis and reasoning was flawed, as a result of this omission, which led to a flawed Investigation Report and recommendation to dismiss each of K.O.'s complaints, which led to a flawed decision by the Commissioners.

[84] Let me briefly examine the context of each of the stages.

i) The Complaint Form

[85] The Complaint Form filed by K.O. (p. 17 Record) included the following references under the caption "What is your Protected Characteristic(s)? Please explain":

Age

Sex

Sexual Orientation

Gender Identity

Gender Expression

Mental Disability

Perception of an Above Characteristic.

…

Sexual Orientation. *During the interview, Mr. Shannon asked me if I was gay. I believe that Mr. Shannon's perception of my sexual orientation as part of the reason Burnside Law Group did not offer me the position.*

Sex, **Gender Identity, and Gender Expression**. *During the interview, Mr. Shannon asked me what area of law I was interested in. I said business law. Mr. Shannon said that most firms in the Halifax Regional Municipality would expect young women like me to practice family law. I believe that Mr. Shannon's expectation that, as a woman, I should be interested in family law, is part of the reason Burnside Law Group did not offer me the position.*

…

[Under the title "Please provide examples of discriminatory treatment you say you experienced by the Respondent", K.O. wrote]:

…

About halfway through the interview, Mr. Shannon asked me if I was 'gay', a "member of any kind of group' or had 'special needs' that he should know about before hiring me. At first, I thought maybe he genuinely wanted to learn more about me, or there was some other good faith reason for his questions. In retrospect, I cannot think of any good faith reason for asking someone if they are gay in the middle of a law interview.…

…

At the end of the interview, … Mr. Shannon said… 'We'll be back to you about this by the end of the week. It's just a matter of where we're going to put you.'

…

> On the morning of Friday, July 31, I waited to see if someone from Burnside Law Group would call or email me about the position like Mr. Shannon said they would. Deep down, I knew that even if they offered me the position, I couldn't work for someone who had treated me that way. *When no one contacted me about the position on Friday morning, I felt I was right and Mr. Shannon had discriminated against me during the interview*, and that *his reasons for not hiring me were related solely to my disability, my weight* (which is related to my disability), *my sex, gender identity, and gender expression, my age, and his perception of my sexual orientation*."
>
> [My italicization added]

ii) The HRO's Investigation Report[15]

[86] In her Report, the HRO included therein under "Nature of Allegation":

> [K.O.] alleges the Respondent Burnside Law Group Ltd. discriminated against her when *they denied her an opportunity for a position as an articled clerk, based on her* age, *sex, sexual orientation, gender identity, gender expression*, mental disability, and a perception of an above characteristic.
>
> [My italicization added]

[87] Under "Evidence for Individual Allegations and Issues – Witness information" the HRO summarized her interviews of two witnesses who had been articled clerks with the Burnside Law Group between the years August 2016 and June 2020. One of them was openly bisexual and referenced another employee who was openly transgender. One of them experienced a mental health crisis while there. Both confirmed that everyone at Burnside Law were very supportive of them and they did not hear any derogatory or discriminatory references against anyone while they were there.

---

[15] I have not expressly addressed the HRO's Memorandum created January 17, 2022, for the Commissioners because it is a very cursory two-page document that summarizes the HRO's Investigation Report and recommendation. While I acknowledge that the Memorandum focused on the "mental disability" complaint, it was submitted to the Commissioners with the following appended documents: copy of the Complaint Form dated December 10, 2020; copy of the Investigation Report dated October 21, 2021; copy of Complainant's Submission dated November 9, 2021. It could hardly be argued that the Commissioners were unaware that KO still maintained her discrimination complaint on the basis of Sex and Sexual Orientation [including gender identity and gender expression], the factual allegations underlying the claims, and her legal arguments.

[88] Under "Respondent's Position", one finds a lengthy written recitation of Mr. Shannon's recollection. Therein, he stated:

> 34. *At no time did I ask [K.O.] whether she was gay*, it frankly does not matter to me her personal sexual orientation and would not affect the hiring decision if disclosed. I explained that we had hired and encouraged diversity in our firm and have worked and continue to work with members of the LGBT QIA2S+ community during the course of our practice and will continue to do so with pride.
>
> …
>
> 43(b). Gender or Sexual orientation -based discrimination – *I never asked [K.O.] her sexual orientation during the interview.* It was immaterial to me. It would not matter at all about her sexual orientation. I did spend some time attempting to understand my role in mentoring an articled clerk whom I had hired who was LGBTQIA2S+ to understand how I can best serve as her Principal, and accommodate in a culture of integrity and respect. It was done without fear of discrimination or judgement.
>
> 44. *[K.O.] further states that I advised her during the interview that most firms in the HRM would want young women to practice family law is again simply false.* I cannot speak for most firms. *I did ask her about family law as our ability to offer adequate supervision in this area of practice is compromised as noted above.*
>
> 45. *It is not in my interest whatsoever to discourage anyone, based on gender, from pursuing their chosen field of practice*. The fact that she could choose what type of practice she wanted to develop was discussed with [*K.O.*] and made very clear to her in the interview. Gender is simply and has never been a factor in hiring decisions, suffice that I would like to achieve some gender balance within my firm. Some of the most successful, diligent and accomplished commercial lawyers are female lawyers who will achieve more in their careers than I could possibly imagine. This holds true with other disciplines as well. The suggestion that one could subscribe to some preconceived notion of career success based on gender in this day and age is generations out of date and quite frankly bizarre. *It was never implied nor stated in any time during the interview.*
>
> 46. It might be worthy of note that of the shortlisted candidates ALL in this instance were female students. Our last articling clerk was a female and self identified as a member of the LGBTQIA2S+ community. She was welcome in our firm, and we still support her development; I encouraged and respected her decision to come out.
>
> Disability-based Discrimination
>
> …
>
> 50. *My immediate reaction to this disclosure was to inquire as to the severity and extent of this disorder and to determine whether and on what basis she would require*

accommodation during her articles. This was the reason for the request for a sharing of medical information and transparency with the Society, as they would be required to approve any articling plan submitted.

…

55. *I take exception to the comments that the Complainant alleges that I made during this interview as it pertains to her and about others within this firm and find many of them to be untrue*, egregious, distasteful, and entirely uncharacteristic of my conduct during this short interview.

[My italicization added]

iii) KO's Rebuttal to Burnside Law's Response to Her Complaint

[89] K.O. responded in her written Rebuttal (Record, pp. 80-84).

[90] She reiterated her previous position at paragraph 64:

He asked me if I was gay, a member of any kind of group, or if I had special needs.;

…

Mr. Shannon did state that most firms in HRM would expect young women to practice family law.

iv) Burnside's legal position

[91] In their Brief to this Court, one finds the following excerpts:

87. The HRO [in her Investigation Report] provided the following analysis with respect to the Applicant's allegations of discrimination based on sex and sexual orientation (para. 78):

> "One of the witnesses interviewed regarding this matter stated 'they' are openly bisexual and the lawyers at Burnside Law Group were aware of this, and it did not affect how 'they' were treated. Further, [M] a contract paralegal, is transgender and the lawyers at Burnside Law are also aware of this as she is openly transgender. Burnside Law Group has worked hard at having [M] escape the politics of being a transgender individual living and working in Florida by assisting [Canadian Immigration] and trying to bring [M] to Nova Scotia. This information seems

> contrary to the Complainant's allegation of discrimination based on sex, sexual orientation, gender identity, gender expression."
>
> 88. The HRO concluded at paragraph 80 of her Report:
>
> > In conclusion, in order for the Complaint to be referred to a Board of Inquiry, there must be some evidence to establish a case of discrimination based on a protected characteristic. The evidence must demonstrate a link between the protected characteristic (age, sex, sexual orientation, gender identity, gender expression, mental disability, and a perception of an above characteristic) and the actions alleged to cause the discrimination (denial of an opportunity for an articling position). Based on the above, I recommend the complaint be dismissed.
>
> 89. This Court can infer from the HRO's reasons at paragraph 80 of her Report that the HRO did not find any link between the Applicant's personal characteristics and the denial of an opportunity for an articling position (the alleged adverse treatment), which is the third factor outlined in *Moore* [*v. British Columbia, (Education),* 2012 SCC 61].

[92] I am satisfied that throughout the process up to and including March 10, 2022, the HRO continued to identify and consider all the claimed grounds of discrimination, including specifically "sex", "sexual orientation", "gender identity", and "gender expression".

[93] I generally agree with the comments of Justice Marc Nadon (as he then was) in *Slattery v. Canada (Human Rights Commission)*, (1994) 22 CHRRD/205; [1994] 2 FC 574 No. 181 (affirmed [1996] F.C.J. No. 385, 118 F.T.R. 318 (note)):

> 34 The CHRC's decision to dismiss both of the applicant's complaints without proceeding to a request for a full tribunal hearing was dated February 21, 1992 and reads as follows:
>
> > Dear Ms. Slattery:
> >
> > The Canadian Human Rights Commission has reviewed the investigation report of your complaints (H30995) and (H31558) against Department of National Defence dated February 19, 1988 and October 6, 1989 respectively, alleging discrimination in employment on the grounds of age and sex. The Commission also reviewed the submission dated February 6, 1992, signed by Lucie Laliberté.
> >
> > The Commission has decided, pursuant to subparagraph 44(3)(b)(i) of the Canadian Human Rights Act, to dismiss the complaints because on the evidence the allegation of discrimination is unfounded.
> >
> > As the Commission's decision is final, we have closed our files on these complaints.

……

67 Finally, the applicant submits that the investigation lacked thoroughness in the sense that some witnesses listed by her in support of the complaint were not interviewed by the investigator. In addition, **the applicant submitted that the Investigator's Report contained no analysis regarding the role played by the 01 section head in harassing the applicant and in disestablishing her position.**

68 Although the investigation appears to have only been conducted over a period of three days, *it appears from the report that all of the fundamental issues contained in the applicant's complaint, including the section head's treatment of the applicant, were considered by the investigator.* **The fact that "no analysis" of certain specific allegations was contained in the written report of the investigator (the investigator's report contained only a summary of each side's story) or in the CHRC's reasons for dismissal of the complaint does not indicate that these allegations were not considered by the investigator and is by no means a ground for review.** …

…

70 **The fact that the investigator did not interview each and every witness that the applicant would have liked her to and the fact that the conclusion reached by the investigator did not address each and every alleged incident of discrimination are not in and of themselves fatal as well. This is particularly the case where the applicant has the opportunity to fill in gaps left by the investigator in subsequent submissions of her own.** In the absence of guiding regulations, the investigator, much like the CHRC, must be master of his own procedure, and *judicial review of an allegedly deficient investigation should only be warranted where the investigation is clearly deficient.* In the case at bar, *I find that the investigator did not fail to address any fundamental aspect of the applicant's complaint, as it was worded, nor were any other, more minor but relevant points inadequately dealt with that could not be dealt with in the applicant's responding submissions.*

[My italicization and bolding added].

[94] Moreover, there are substantial differences in the written Record regarding what was said during the second interview between Mr. Shannon and K.O.

[95] Credibility, including honesty and reliability, are important features which could be considered by the HRO in her investigation, and the Commission in making their decision to dismiss K.O.’s complaint.

[96] Complaints can be dismissed at the investigative stage even when there are contradictory versions of the claimed discriminatory conduct – such complaints

need not therefore necessarily be referred to a Board of Inquiry: *Larsh v. Canada (Attorney General)*, [1999] 166 F.T.R. 101, (1999) 5 CHRR D/ 68, per Evans (as he then was):[16]

> B. The issues
>
> *Issue 1*
>
> 7 *The applicant alleges that the Commission's decision is erroneous in law because, in dismissing the complaint, the Commission weighed the conflicting evidence before it and must have determined that Ms. Larsh was not credible. Counsel argued that only the Tribunal may make a determination of this nature after holding an adjudicative hearing at which both Ms. Larsh and the immigration officers could be cross-examined.*
>
> *Issue 2*
>
> 8 It was also argued on behalf of Mr. Larsh that, by dismissing the complaint because the officers denied making the remarks in question and there was no independent witness to corroborate the applicant's account of what occurred, the Commission thereby abused its statutory discretion. More particularly, counsel contended, for the Commission to set the evidential threshold this high would frustrate the purpose of the Act, namely the vindication of the right of individuals to be free from direct discrimination on the statutorily proscribed grounds.
>
> C. The legislation
>
> 9 The only provision of the *Canadian Human Rights Act* that is directly relevant to this application is subsection 44(3), which states that, on receipt of a report from an investigator, the Commission
>
> (*b*) shall dismiss the complaint to which the report relates if it is satisfied
>
> (i) that, having regard to all the circumstances of the complaint, an inquiry into the complaint is not warranted, ...
>
> *b*) rejette la plainte, si elle est convaincue:
>
> (i) soit que, compte tenu des circonstances relatives à la plainte, l'examen de celle-cin'est pas justifié, ...

[16] Some courts have gone so far as to conclude that an investigation is not thorough which does not investigate the credibility of witnesses who offer contrasting perspectives on the relevant issues – e.g., see Justice Simpson's reasons in *Canada (Attorney General) v. Tran*, 2011 FC 1519, which was cited with approval by Justice Gabriel in *Selig*, 2018 NSSC 116, at para. 32.

D. Factual Background

10 It was common ground between the parties that an important element of the Commission's statutory function is to screen out complaints that are insufficiently well-grounded in either law or the evidence as to be worthy of a full hearing by the Tribunal. **Nor did counsel for the Minister dispute that, if made, the remarks in question would constitute discriminatory conduct. The only question is whether they were made at all.**

…

14 The Minister conducted an internal investigation of Ms. Larsh's complaints about the officers' behaviour and concluded that the complaints were unfounded. Finally, it should be noted that an immigration officer who was sitting outside the office from which Ms. Larsh complained that she has been unceremoniously ejected, said that he had not heard the remarks allegedly made by the officer, and that the door was not slammed as Ms. Larsh left.

E. Analysis

15 **Counsel for Ms. Larsh advanced the following bold proposition of law. Subject to the following qualifications, whenever the Commission is faced with contradictory versions of conduct that is the subject of a complaint, the Commission must refer the complaint to the Tribunal. The qualifications to this proposition are that it should be clear that, if the complainant's version is true, the conduct would be a violation of the Act, and that there is no reliable way of resolving the contradictions in the evidence without cross-examination. For the Commission to dismiss a complaint as a result of resolving an issue of credibility adversely to the complainant would be a usurpation of a function of the Commission as the trier of fact.**

…

18 **Despite the attractive manner in which counsel developed her argument, I am not satisfied that it is correct. First, the argument seems to me to give insufficient weight to the broad discretion conferred on the Commission by the wording of paragraph 44(3)(*b*)(*i*): namely, that it shall dismiss the complaint "if it is satisfied" that "having regard to all the circumstances of the complaint, an inquiry into it is not warranted". The applicant's contention that whenever credibility is a central issue in a human rights complaint it must be referred to the Tribunal does not seem consistent with the subjective wording of paragraph 44(3)(*b*)(*i*), nor with the expertise and experience of the Commission as the specialist agency charged with investigating and screening human rights complaints.**

19 **Second, while it is true that a decision to dismiss a complaint is final in the sense described above, it does not follow that the Commission is required to approach the**

evidence in the same manner as an adjudicative tribunal, or to make findings of fact, including whether the complainant is credible.

20 The nature of the Commission's statutory function in the processing of complaints was stated clearly in *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.), 891, where La Forest J. said:

> *It is not the job of the Commission to determine if the complaint is made out*. Rather, its duty is to decide if, under the provision of the Act, an inquiry is warranted having regard to all the facts. *The central component of the Commission's role, then, is that of assessing the sufficiency of the evidence before it*. [emphasis added]

See also *Boahene-Agbo v. Canada (Human Rights Commission)* (1994), 86 F.T.R. 101 (Fed. T.D.), 119-120.

21 **Thus, in this case the Commission was not required to make a finding on whether Ms. Larsh was telling the truth about what the immigration officers had said to her.** Indeed, since the investigating officer did not speak to Ms. Larsh it would have been quite inappropriate if it had attempted to do so. **The Commission is simply not equipped to make findings of fact of this kind.**

22 **It is the Commission's responsibility to assess the evidence before it as a whole for the limited purpose of considering whether it is reasonably capable of supporting a finding by the Tribunal that a complainant has been subject to unlawful discrimination**: *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.), 899.

[My bolding added]

[97] In the case at Bar, the claims based on the protected characteristics “sex” and “sexual orientation” [including “gender identity” and “gender expression”] are based upon portions of K.O.’s recollection of the second interview with Mr. Shannon.

[98] Mr. Shannon denies asking if K.O. was “gay” and that he suggested she should consider family law *because* she is female.

[99] Mr. Shannon provides a different context in relation to these issues.

[100] In Burnside Law Group’s Response to the HRO, he states:

> 31 To set her at ease, I explained, we currently have staff who suffer from severe anxiety, and we have taken steps to accommodate them. We have another part-time staff member who is transgender and identifies as female and who works regularly with our lawyers,

including Derek Brett, who both mentored this staffer during their legal education and encouraged her retention with Burnside Law. Derek Brett and I have been and remain extremely supportive of members of the transgender community. Likewise, I explained that our prior clerk identified as LGBTQIA2S+ and that we encourage her to self identify and took steps to provide services to this community. We do not and have never simply paid lip service to the issue of diversity but have embraced it as a strength and would require the same open attitude for all members, or potential members of our firm going forward.

… At no time did I ask [K.O.] whether she was gay….

…

Following the receipt of the complaint with the Nova Scotia Barristers Society, [which K.O. stated she filed on the afternoon of July 31, 2020 -p. 24 Record] and in consideration of the uncertainties associated with the pandemic issues facing us at that point with what was then a potential second wave and potential for further lockdowns, we elected to remain in our current space and did not hire anyone for the position during the 2020/2021 year.

...

46 It might be worthy of note that of the shortlisted candidates, ALL in this instance were female students. Our last articling clerk was a female and self identified as a member of the LGBTQIA2S+ community. She was welcome in our firm, and we still support her development; I encouraged and respected her decision to come out."

[101] The HRO continuously referenced the "protected characteristics" at issue, and specifically "sexual orientation", "sex", "gender identity" and "gender expression". She stated in the "Analysis" heading of her Investigation Report:

70. *In order for [KO's] allegation to be substantiated, it needs to be demonstrated that the Complainant was treated differentially by the Respondent 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 her age, sex, sexual orientation, gender identity, gender expression, mental disability, and a perception of an above characteristic.*

…

77. *Interviews were conducted with two prior articled clerks that obtained permanent positions with the Respondent once they are admitted to the Bar. Both witnesses state that they had no issues or heard any comments during their time with Burnside Law firm that would be considered derogatory or discriminatory to any person or class of persons. One witness after articling with the Respondent and working with the firm after they were*

admitted to the Bar decided to leave private practice due to a mental disability. The witness stated that the respondent, Patrick Shannon, went above and beyond to help "them" conclude their work and move into another area of work outside of private practice.

78. One of the witnesses interviewed regarding this matter stated "they" are openly bisexual and the lawyers at Burnside Law group were aware of this, and it did not affect how "they" were treated. Further [M], a contract paralegal, is transgender and the lawyers at Burnside Law are also aware of this as she is openly transgender. Burnside Law Group has worked hard at having [M] escape the politics of being a transgender individual living and working in Florida by assisting Canadian immigration and attempting to bring [M] to Nova Scotia. *This information seems contrary to the Complainant's allegation of discrimination based on sex, sexual orientation, gender identity, gender expression*.

…

79. In both the Complaint Form and Rebuttal the Complainant brought forward various statements that she maintains were made to her by the Respondent *including* statements about her weight and age. *These allegations are not supported by evidence as the interview involve Kelly Shannon and the complainant only, and as such there is no independent evidence relating to these allegations.*

80. In conclusion, in order for the Complaint to be referred to a Board of Inquiry, *there must be some evidence to establish a case of discrimination* based on a protected characteristic. The *evidence must demonstrate a link between the protected characteristic… and the actions alleged to cause the discrimination* (denial of an opportunity for an articling position). Based on the above I recommend the complaint be dismissed.

[My italicization added]

[102] I am not at all satisfied that the HRO "did not address the allegation in the Complaint concerning the Complainant's protected characteristics of sex, gender identity and gender expression [sexual identity]" as referenced in the Grounds for Review. Moreover, even if one were satisfied of the absence of reasons or analysis of those grounds in the HRO's report, the "taint" thereof must be a "serious" one and should not be presumed to have "tainted" the Commissioners' decision to agree with the HRO's overall recommendation to dismiss the Complaints.[17]

[17] As Mr. Douglas put it in oral argument, "There is no obligation on the Commissioners to cling to flawed reasoning by the HRO, if that is the case."

Conclusion on the merits of the Judicial Review

[103] K.O. has not satisfied me that any of her Grounds for Judicial Review (as modified by her legal arguments) are sufficiently established to permit this Court to intervene, and consequently order a remedy in her favour.[18]

[104] I dismiss the Application for Judicial Review.

Rosinski, J.

[18] Had I been satisfied that one or more Grounds for Review had been established, thus requiring me to consider the matter of "remedy", I would not have ordered the Commission to appoint a Board of Inquiry as requested by K.O. (citing *Vavilov* at paras. 140-142) presuming the Court has this power (which is questioned in *Tessier v. Nova Scotia (Human Rights Commission)*, 2014 NSSC 65, at paras. 69-70, per LeBlanc J. (as he then was). While Justice LeBlanc cited as support of his conclusion that he did not have "jurisdiction" to order the appointment of a Board of Inquiry, based upon the Federal Court's decision in *Grover v. National Research Council of Canada*, 2001 FCT 687, at para. 74, I recognize that this court has "inherent jurisdiction", whereas the Federal Court is a statutory court. Nevertheless, given the broad discretionary mandate of the Commission, in my opinion this Court should be extremely reluctant to "wade into the Commission's jurisdictional waters", and impose an outcome on this specialized tribunal.