Aurora College v. Niziol, 2007 NWTSC34 Date: 2007 05 25

Docket: S-1-2006000183

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

AURORA COLLEGE

Appellant

-and-

MARIE NIZIOL

Complainant/Respondent

-and-

THÉRÈSE BOULLARD

Director of Human Rights

Appeal by Aurora College from an adjudicator's decision under the *Human Rights Act*, S.N.W.T. 2002, c. 18.

Heard at Yellowknife, NT on April 5, 2007

Reasons filed: May 25, 2007

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Karen Shaner
Counsel for the Respondent/Complainant: Cayley Jane Thomas
No one appearing for the Director of Human Rights

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REASONS FOR JUDGMENT

[1] This is an appeal by Aurora College from an adjudicator's decision under the *Human Rights Act*, S.N.W.T. 2002, c. 18 (the "*Act*"). The adjudicator heard an appeal from a decision by the Director of the Northwest Territories Human Rights Commission, dismissing a complaint of discrimination and harassment. The adjudicator modified that decision by postponing its effect pending further investigation and a supplementary decision by the Director.

Preliminary issue

[2] As a preliminary issue, counsel for the College sought an order that the Record be sealed and that witnesses involved in the complaint investigation be identified by initials only in my decision and any transcript of the hearing of this application. Counsel for the Complainant did not oppose the order but asked that the Complainant also be identified by initials only. The Record has been subject to an earlier sealing order (Fiat of Richard J. filed February 1, 2007).

[3] The rationale for attaching confidentiality to the Record and the names of the witnesses is that the complaint is still at the investigatory stage, the evidence has not been tested and no findings as to the merits of the complaint have been made. The allegations of discrimination and harassment should be considered serious. If the end result is that the complaint is dismissed, there would not normally be any publication of the circumstances of the complaint.

[4] The test as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, 2002 SCC 41 requires that a court exercise its inherent jurisdiction to grant what is, in effect, a publication ban, only if (a) the ban is necessary to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (b) the salutary effects of the ban outweigh its deleterious effects, including effects on the right to free expression and the public interest in open and accessible court proceedings.

[5] The important interest at risk here is the privacy interests of the individuals against whom the Complainant has made allegations and the potential harm to their reputations from what are at this stage unproven allegations.

[6] There is no reasonable alternative available. The ban sought is a limitedone and does not restrict access to the court proceedings, but only to the Record (which also contains personal information of the Complainant) and the names of the individuals who are the subject of the complaint. The subject matter of the litigation in this Court is not the merits of the complaint but only the process followed under the *Human Rights Act*; much of the record is not, strictly speaking, relevant to the determination the Court has to make.

[7] While granting the order will have a negative effect on the public interest in access to court proceedings, I am satisfied that it is outweighed by the interest at risk because this matter is still at the investigatory stage.

[8] I am not, however, persuaded that there is any reason to identify the Complainant by initials only. There are no allegations against her and any sensitive personal information is in the Record, which will be sealed.

[9] For these reasons, I order that the Record remain sealed and that any transcript of the application refer to witnesses (if any were identified) by their initials only. As I

do not refer to any witnesses by name in this decision, I need not make an order in that regard.

Issues on the appeal

[10] This appeal raises the following issues: (i)the standard of review this Court should apply on an appeal from an adjudicator's decision under s. 66 of the *Act*; (ii) the standard of review an adjudicator should apply on an appeal under s. 45 of the *Act* from the decision of the Director; (iii) whether, after application of the appropriate standard of review, the adjudicator's decision should be set aside.

Background

[11] The Complainant, an aboriginalstudent in the College'snursing program,filed a complaintwith the Human Rights Commission, allegingdiscrimination and harassment on the basis of her race, colour and ancestry, contrary to sections 11 and 14 of the *Act*. She claimed that as a result of unfair treatment from some of her instructors, she did not successfully complete the program. The College's position was and is that the Complainant's failure in the program was the result of her inabilityto achievethe level of skill and competence required and that there was no discrimination or harassment.

[12] After reviewing the investigation into the complaint, the Director dismissed it under s. 44(1)(c) of the *Act*, finding that there was insufficient evidence to warrant proceeding to a hearing of the complaint. The Complainant then appealed under s. 45 to the adjudication panel. Her appeal was heard by the chair of the panel (the "adjudicator"), who, acting under s. 62(5) of the *Act*, allowed the appeal and modified the Director's decision by postponing its effect pending a further investigation and a supplementary decision by the Director. The adjudicator found that the Director had failed to understand the complaint as alleging systemic as well as personal discrimination, that she had erred in weighing evidence, and that the investigationwas procedurally unfair to the Complainant.

Statutory Provisions

[13] The purpose of the *Human Rights Act* is set out in its preamble:the promotionof respect for and observance of human rights in the Northwest Territories by every person. The *Act* prescribes certain prohibited grounds of discrimination, among which are race, colour and ancestry. Under s. 29(1), the complaint process permits an individual who has reasonable grounds for believing that a person has contravenedthe *Act*, and who claims to be aggrieved because of it, to file a complaint, which may then be deferred, dismissed, referred for adjudication on the merits or settled with the assistance of the Commission.

[14] The relevant procedural provisions of the *Act* are as follows:

> Part 4
>
> Complaints
>
> General
>
> 30. (1) The Director shall review and inquire into a complaint to the extent that the Director determines is warranted in the circumstances and for the purposesof this Part.
>
> ...
>
> 35. The Director may, at any time before a complaint is deferred or dismissed under this Part, designate in writing a Commission employee or assistant as an investigator to investigate the complaint.
>
> ...
>
> 44. (1) The Director may, at any time before a complaint is referred for an adjudication under section 46, dismiss all or part of the complaint if the Director is satisfied that
>
> ...
>
> (c) the complaint or that part of the complaint is trivial, frivolous, vexatious or made in bad faith;
>
> ...

45. Where a complaint or part of a complaint is dismissed, any party to the complaint may, within 30 days after service of the written notice of the dismissal, appeal the dismissal by filing a notice of appeal with the adjudication panel and serving it on all parties to the complaint and the Director

....

Part 5

Adjudication and Appeal

47. In this Part, “hearing” means a hearing in respect of a complaint or of an appeal.

...

51. The chairperson of the adjudication panel shall designate one member of the adjudication panel, including the chairperson,

...

(b) on an appeal to the adjudication panel, to hear the appeal.

...

56. (1) Evidence may be given before an adjudicator in any manner that the adjudicator considers appropriate and, subject to subsection (2), the adjudicator is not bound by the rules of law respecting evidence in civil actions or proceedings.

...

59. For the purpose of adjudicating a complaint or hearing an appeal, an adjudicator has all the powers of a Board appointed under the *Public Inquiries Act.*

...

62 (5) The adjudicator may, on hearing an appeal made under section 45,

(a) make an order that affirms, reverses or modifies the dismissal; and

(b) provide any direction that he or she considers necessary.

...

66. (1) Any party to a complaint or to an appeal made under section 45 may, at any time within 30 days after service of an order of the adjudicator on that party, appeal to the Supreme Court to have the order reversed or modified by filing a notice of a appeal with the Clerk of the Supreme Court and serving it on all the parties to the complaint or to the appeal, as the case may be.

(2) The Supreme Court may, on hearing an appeal made under subsection (1), make an order that affirms, reverses or modifies the order of the adjudicator, and make any other order that the Supreme Court considers necessary.

[15] The powers given to an adjudicator under s. 59 include the power to compel witnesses to attend and testify and to produce documents: *Public Inquiries Act*, R.S.N.W.T. 1988, c. P-14, ss. 4 and 5.

The Standard of Review by this Court

[16] Section 66 of the *Act* allows for an appeal from the adjudicator's decisionto this Court. Although counsel for the Complainantacknowledgedthat the decisionmade by the adjudicator in this case might be characterized as an "interim interim"decision and not subject to appeal, she declined to raise that as an obstacle to the College's appeal, so I need not deal with that issue.

[17] Since this is an appeal from a statutory non-judicial decision-maker, the usual principles of judicial review apply: *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226. The College takes the position that this Court should review the adjudicator's decision on a standard of correctness and that his decision was not correct. The Complainant submits that the standardis reasonableness and seeks to uphold the decision. If the standard is reasonableness, the College says that the adjudicator's decision was not reasonable.

[18] The standard of review and level of deference to be accorded to the adjudicator must be determined according to the factors in the pragmatic and functional approach in *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982: (i) the presence or absence of a privative clause or statutory right of appeal; (ii) the expertise of the tribunal relativeto that of the reviewing court on the issue in question; (iii) the purpose of the legislation and the specific provision; (iv) the nature of the question - whether law, fact or mixed law and fact.

[19] As to the first *Pushpanathan* factor, the absence in the *Human Rights Act* of any privative clause for the adjudicator's decision and the right of appeal to this Court suggest that little or no deference is due to the adjudicator.

[20] As to the second factor, expertise, the *Act* requires that a person appointed as a member of the adjudication panel have experience and an interestin, and sensitivityto, human rights, and that they be a member of at least five years good standing of a law society or have at least five years experience as a member of an administrativetribunal or a court [s. 49(3)]. Although this suggests that the legislature recognized a need for some practical expertise as well as legal background,the SupremeCourt of Canadahas held that a human rights tribunal has no special expertise with respect to questions of law: *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

[21] Thus, no deference is due to the adjudicator on questions of law. On questions involving fact, however, the expertiseof an adjudicatorin human rights issues suggests that the Court should accord some degree of deference. There should also be some deference shown to the adjudicator on procedural issues in dealing with complaints, considering that under the *Act* an adjudicator sits not only on appeals but also on hearings at which the merits of complaints are adjudicated (s. 51). That deference is owed only so long as the procedural choices comply with the duty of fairness, as a reviewing court owes no deference in determining the fairness of an administrative agency's process: *Tahmourpourv. Canada (SolicitorGeneral)* (2005), 27 Admin. L.R. (4^{th}) 315 (Fed. C.A.).

[22] The complaint process under the *Act* deals with disputes between parties,which generally does not call for much deference. The specific provision facing the Director and the adjudicator was the complaint-screening function. Cases dealing with similar legislation have concluded that generally, subject to specific statutory provisions, this function is an administrative one with a low threshold involving discretion on the part

of the screener. It does not require a decision on the merits of the complaint; it requires simply that the decision-maker be satisfied that, having regard to all the circumstances of the complaint, an inquiry is warranted: *Tahmourpour*, *supra; Ayangma v. Prince Edward Island (Human Rights Commission)*, [2002] P.E.I.J. No. 20 (C.A.); *Bell Canada v. Communications, Energy and Paperworkers Union of Canada*, [1999] 1 F.C. 113 (C.A.). This will generally be a fact-driven exercise, which means that some deference should be accorded to the adjudicator's decision.

[23] The fourth factor is the nature of the question. As I have already noted, the standard of review used by the adjudicator for the Director's decision is a question of law and calls for no deference from this Court. The adjudicator's application of that standard of review may involve mixed law and fact, but to the extent that he had to review and assess the evidence before the Director, it is fact-intensive. On this latter aspect, considerable deference is warranted.

[24] On balancing the above factors, I conclude that although no deference should be accorded to the adjudicator on questions of law such as the standard of review on an appeal from the Director, some deference is required on questions of fact. This corresponds to a correctness standard for the standard of review he used and a reasonableness standard for his assessment and determination of factual matters.

The standard of review to be applied by the adjudicator to the Director's decision

[25] The College argues that on an appeal to the adjudicator from the decision of the Director, the adjudicator should apply a standard of reasonableness and that he did not do so in this case or, alternatively, was wrong in holding that the Director's decision was unreasonable. The Complainant submits that the standard of review is correctness and that even if the adjudicator was not consistent in applying that standard, his assessment of the Director's decision should stand.

[26] Section 45 of the *Human Rights Act* simply refers to an appeal of the Director's dismissal of a complaint. Much of the argument before me centered on whether there is any difference between the term "appeal" and the term "review", the latter being used in the human rights statutes of some other jurisdictions: for example, Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14; *The Saskatchewan Human Rights Code*, S.S. 1979.

[27] The British Columbia Court of Appeal has held that the words "may appeal" do not have a fixed meaning and must be read having regard for the legislative scheme and for the purposes of the legislation: *B.C. Chicken Marketing Board v. B.C. Marketing Board*, 2002 B.C.C.A. 473.

[28] The scheme of the *Human Rights Act* is such that the Director is to review and inquire into a complaint [s. 30(1)] and may designate an investigator to investigate the complaint [s. 35]. The Director does not hear any evidence, but may apply to the Supreme Court for an order to compel someone to respond to her inquiry or produce documents [s. 36]. The Director does have substantial discretion in this screening function: section 44(1) provides that she may dismiss all or part of the complaintif she is satisfied that it falls within any of the categories set out in that section.

[29] On the other hand, the adjudicator on appeal from the Director's dismissal of a complaint has the powers of a Board appointed under the *Public Inquiries Act* to compel witnesses and production of documents [s. 59]. Therefore, the adjudicator has broader powers than the Director in this regard, bearing in mind that the adjudicator's task on such an appeal is not to adjudicate on the merits of the complaint, but only to decide whether it should have been dismissed by the Director. The appeal is not limited to the record that was before the Director; the adjudicatorcan hear new or other evidence: ss. 52, 56, 59. The adjudicator may, on hearing an appeal, affirm, reverse or modify the Director's decision and provide any direction that he or she considers necessary: s. 62(5). Thus, the adjudicator's decision also involves discretion.

[30] All of this suggests that the s. 45 appeal is similar to an "appeal by way of rehearing", where the adjudicator is not limited to a scrutiny of the Director'sdecision, but should form his own judgment on the issues, as in an appeal under the *Residential Tenancies Act*, R.S.N.W.T. 1988, c. R-5, s. 87, so described by Vertes J. in *Inuvik Housing Authority v. Kendi*, 2005 NWTSC 46.

[31] Counsel for the College argued that the Northwest Territories' statute is more like the *Canadian Human Rights Act*, R.S. 1985, c. H-6, than the statutes of Alberta and Saskatchewan with their internal review provisions which have been held to provide for a secondary screening: *Mis v. Alberta(Human Rights Commission)*, [2001] A.J. No. 1094; 2001 ABCA 212; *SaskatoonRegional HealthAuthorityv. Kahsai*, 2004 SKQB 240. However, the federal statute contains no provision for an internal administrative appeal. The complainant whose complaint is dismissed at first instance

by the Human Rights Commission must have recourse to judicialreview in the Federal Court. Although the adjudicator under the Northwest Territories *Human Rights Act* has to be mindful of the fact that he is sitting on an appeal and is not considering the matter at first instance, a wider scope is appropriate for his role than that of a Court because he is the final level of appeal within the administrative scheme. As Berger J.A. noted in *Economic Development Edmonton v. Wong*, 2005 ABCA 278, "the human rights dispute process ... is promoted if access is facilitated rather than impeded or deterred" (at paragraph 19).

[32] Therefore, on the first factor in the pragmaticand functionalanalysis, I conclude that little deference is due to the Director by the adjudicator.

[33] A person appointed as Director must have experience and an interest in, and sensitivity to, human rights [s. 23(2)] as must an adjudicator [s. 48(3)]. An adjudicator has the added requirement for some legal training or experience as a court or tribunal member. In terms of expertise, there is no reason to find the Director has more than the adjudicator so this factor does not call for deference by the adjudicator.

[34] The purpose of the provision in question is to screen complaints. This is not an adjudicative function, since the very issue is whether the complaint merits an adjudicative hearing. It is an administrative function with a low threshold of assessment of merit. The adjudicator is faced with the same questionas the Director:is there a reasonable basis in the evidence for sending the complaint to a hearing? For the reasons explained above, the adjudicator's role on an appeal should not be greatly restricted; at the same time, it should not duplicate the role of the Director and calls for some deference.

[35] The nature of the question, whether there is a reasonable basis in the evidence for sending the complaint to a hearing, is primarily fact-driven. Although that would normally require deference to the decision-maker, since the adjudicator can also hear evidence and submissions on the question, this is not decisive.

[36] After reviewing the factors,I concludethat althoughsome degree of deferenceis due by the adjudicator to the Director, the adjudicator also has to exercise his own judgment; the standard of review is therefore reasonableness: *Dr. Q, supra,* paragraph 35.

The decision of the adjudicator

[37] The adjudicator correctly decided that he was to review the Director'sdismissal of the complaint on a standard of reasonableness, although, as I will explain below, he was not consistent in applying that standard. Ultimately his decision was based on the following findings:

> 1. that the Director's decision was unreasonable because she did not identify the complaint as alleging systemic as well as personal discrimination;
>
> 2. that the Director weighed the evidence gathered by the investigator and chose to accept the evidence of the College instructors over that of the Complainant. Despite his initial finding that the standard of review is reasonableness, the adjudicator decided this was an error of law or mixed law and fact which must be reviewed on a standard of correctness or, alternatively, that it was procedurally unfair;
>
> 3. that there was procedural unfairness arising from the investigator's failure to interview witnesses suggested by the Complainant and obtain certain documents.

[38] I will deal with each of the above separately.

The finding that the complaint involved systemic discrimination

[39] The adjudicator's decision does not contain a definition of systemic discrimination, nor does the *Human Rights Act* specifically refer to that concept. Section 6 of the *Act* does, however, provide that discrimination in contravention of the *Act* does not require an intention to discriminate, which can be the case with systemic discrimination.

[40] In *C.N.R. v. Canada (Human Rights Commission)*, [1987] S.C.J. No. 42, [1987] 1 S.C.R. 1114, the Supreme Court of Canada adopted the definition of "systemic discrimination" set out in the 1984 Abella Report on Equality in Employment. The definition as quoted by the Court is as follows (at paragraph 34):

> Discrimination ... means practices or attitudesthat have, whetherby design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics ... It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently

> motivated practices or systems. If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory.

[41] The definition as stated is wide enough to apply not only in the employment context but also the education context.

[42] The Complainant did not use the words "systemic discrimination" in her complaint. She did, however, refer to aspects of her instructors' interactions with her that she said gave rise to cultural issues. Her use of laughter in dealing with a patient was said by her to be appropriate in her culture but was deemed inappropriate by an instructor. Some of her performance evaluations referred in a critical way to her lack of active participation in class and being very quiet, both of which the Complainant attributed to norms of her culture.

[43] Another aboriginal student told the investigator that she also had difficulty with one of the instructors who was the subject of the complaint and attributed it to race. In the material she submitted to the adjudicator, the Complainantsaid that the College has a high level of aboriginal students who drop out; some of these studentswere known to the Complainant and she also submitted that statistics should be produced on the subject. The investigator also recognized that statistics would have been helpful but noted in her report that they were not available.

[44] The Director referred to the issue of other students by saying that no witnesses could confirm the ratio of and success of aboriginal and non-aboriginal students in the program at the time the Complainant was enrolled. The Director did note that in the practicum failed by the Complainant, one student of unknown race withdrew and an aboriginal student failed but later returned. She also quoted one of the instructors about whom the complaint was made as having said that the College has many aboriginal students who are successful in their programs.

[45] It is fair to say from the above that the issue of the success rate for aboriginal students in the program was raised by the complainant, so that her complaint did touch on systemic discrimination. The investigator and the Director also touched on the issue, but did not follow up on it.

[46] The adjudicator noted that the performance evaluations of the Complainant attributed her failure in the program to factors other than her quietness and lack of

participation in class. He found that there was an assumption by the investigator and the Director that the performance evaluations were racially neutral without inquiries having been made to determine whether that was in fact the case or whether other problems the Complainant had in the program were affected by the cultural issues. He concluded that the Director's decision to dismiss the complaint was unreasonable because she had not turned her mind to the systemic issues and had them investigated. He also noted that the investigator had been made aware of the existence of a College policy on cultural issues, but had not reviewed the policy.

[47] Although some of the language used by the adjudicator suggests that he was making findings of fact, in the end it is clear that he was not doing so. He was of the view that had the systemic issues been thoroughly investigated, the Director "might have drawn a reasonable inference that there was sufficient evidence to proceed to a hearing". It is important to bear in mind that the adjudicator did not find that there was a prima facie case of systemic discrimination that warranted a hearing. He found only that there was enough indication of the possibility of systemic discrimination to warrant further investigation. Such investigation may or may not find evidence that teaching practices in the program have adverse effects on the ability of aboriginal students to succeed due to cultural differences.

[48] The Director had before her more than just the "subjectively drawn inferences" of the Complainant based on her own experiences, as submitted by the College. There was also evidence that other aboriginal students had problems. The investigation of that might have provided evidence of a College policy, practice or attitude that adversely affected those students or it might have provided circumstantial evidence in support of the Complainant's allegations: *Tahmourpour*, *supra*.

[49] The reasonableness standard permits a decision to stand unless none of the reasons given by the tribunal can stand up to a somewhat probing examination. A decision may satisfy the reasonableness standard if it is supported by a tenable explanation, taking the reasons as a whole, even if the explanation is not one that the court finds compelling: *Law Society of New Brunswick v. Ryan,* [2003] 1 S.C.R. 247.

[50] Although the evidence suggestive of systemic discrimination is not particularly strong, I am satisfied on a somewhat probing examination that the adjudicator's decision to order further investigation is reasonable. Although that is sufficient to

allow his decision to stand, I will consider the other points argued as they deal with other aspects of the complaint.

Weighing of evidence by the Director

[51] The next issue concerns the adjudicator's decision that the Director erred by weighing the evidence. The adjudicator said that this was a question of law or mixed law and fact or, alternatively, a question of procedural unfairness.

[52] The statute does not give the Director the task of weighing the evidence. That task is for the adjudication panel if the complaint is referred on to a hearing. The low threshold that the evidence must meet, i.e. that an inquiry is warranted, means that issues of credibility and weighing of the evidence of one party against that of another are not the task of the Director. At the same time, the Director should make a common sense assessment of the evidence, for example, to determine whether the complaint is "trivial" or "made in bad faith" pursuant to s. 44(1)(c). In this case, the Director did not make any specific finding that the complaint was trivial or made in bad faith or fell into any of the other categories specified in s. 44(1)(c). She used the section to dismiss for insufficient basis to warrant proceeding to a hearing. There is no dispute that, in appropriate circumstances, she is entitled to dismiss on that basis.

[53] The College argued that the Director did nothing more than make a common sense assessment of the evidence and did not cross the line into determiningcredibility or weighing contradictory evidence.

[54] The Director adopted the analysis in the investigator's report. That report contains several references to there being no evidence or no witnessesin support of the Complainant's allegations. For example, the Complainant said that during an internal appeal of her failing grade in one practicum, the individual dealing with the appeal verbally attacked her when they were alone in the room. That individual denied doing so. The investigator concluded that because no one else heard or saw the attack, there was no evidence to support the allegation. Similarly, where the Complainant said that certain instructors harassed or picked on her and they denied it and there was no other evidence, the investigator concluded that there was not enough evidence.

[55] What the investigator and Director appear to have overlooked is that the Complainant's version of events is "some" evidence. There is no requirement that the

Complainant produce a witness for every incident or allegation and in any event, as I will note further on, the investigator did not interview witnesses suggested by the Complainantwho might have providedevidence, direct or circumstantial, supportiveof the Complainant's evidence.

[56] There may be instances where the Complainant says that an instructor did something and the instructor denies it and no other evidence can be found to support one version or the other. In that case, the Director should consider whether, if the Complainant's version is accepted as true, it could reasonably be considered as evidence of the discrimination or harassment alleged and warrant a hearing.

[57] I do note that the Director stated in her decision that she was not determiningthe merits of the complaint or assessing credibility. She did, however, agree with the investigator's analysis and find that there was not enough informationin support of the Complainant's allegations of discrimination and harassment based on race, colour and ancestry to warrant a hearing. This was after she had noted that witnesses denied or gave no evidence to support the Complainant's evidencethat certainincidentsoccurred so it is not clear that the Director considered whether, if the Complainant's versionwas accepted, that would provide enough evidence to warrant a hearing.

[58] The College submitted that the following passage in the adjudicator's reasons suggests that a complainant's evidence should be assessed in isolation from the evidence of the party complained of to determine whether there is any evidence to warrant a hearing:

> I distill the following principles from these cases: that *all of the circumstances* of a case must be considered; that there need only be a *reasonable basis in the evidence* to proceed to a hearing; that the enquiry must be as to whether there is *any* (reasonable) evidence; that *regardless of the respondent's evidence*, if the evidentiary burden is discharged a hearing is warranted.

[59] In my view, the adjudicator was simply noting that there must be a reasonable basis in the evidence to proceed to a hearing. Since an adjudication panel at a hearing could accept a complainant's version of events rather than a respondent's, where there is contradictory evidence, the person screeningthe complaintshould considerwhether, if the complainant's version is accepted, the complaintcould be found to have merit. If so, a hearing will likely be warranted even though the respondent may be able to point to contrary evidence. I do not understand the adjudicator to be suggesting that the

respondent's evidence is to be completely disregarded in deciding whether a hearing should be ordered.

[60] The Director did not, however, undertake this type of analysis. Although she said that she was not determining credibility, the references to there being no evidence to support the Complainant's version of interactions with her instructors suggest that she treated the Complainant's evidence as "no evidence". In the result, the adjudicator's finding that the Director weighedthe evidencewhen that was not her task was not unreasonable.

[61] Since the standard the adjudicator was to apply was a reasonableness standard,it was not necessary for him to characterize the weighing of evidence as a mistakeof law or otherwise, or apply a correctness standard to that aspect of the Director's decision. In my view, he could have come to the same conclusion using the reasonableness standard. So the fact that he used a standard of correctness for this aspect of his decision or one of procedural unfairness does not render his decision unreasonable.

Failure to interview witnesses

[62] The third finding made by the adjudicator is that the investigator's failure to interview more witnesses, some of whom were suggested by the Complainant, was procedurally unfair. The investigator had interviewed three employeesof the College, all of whom were implicated in the complaint, and two students. One of these students had been suggested to her by the Complainant. That student's evidence was that she had a negative experience similar to the Complainant's with one of the instructors. The other student, who was not suggested by the Complainant, had no recollection of the Complainant being in her class, so it is difficult to see how she could be of any assistance to the investigation.

[63] The investigator did not interview aboriginal students identified by the Complainant, two other instructors implicated in her complaint, nor two studentswho had left the practicum the Complainant failed, one of whom was aboriginal. The investigator did not provide any explanation for not interviewing these individuals. And although the investigator noted in her report that statistics about the race, colour and ancestry of students in the nursing program would have been helpful but were not available, it does not appear that any efforts were made to pursue that line of inquiry. In her decision, the Director said that none of the witnesses, which I take to mean

witnesses interviewed by the investigator, could confirm the ratio of and success of aboriginal and non-aboriginal students in the program. Yet no inquiries were made beyond those particular witnesses.

[64] In *Slattery v. Canada, (Human Rights Commission)*, [1994] 2 F.C. 574 Nadon J. held that the investigation into a complaint under the federal *Human Rights Act* must satisfy at least two conditions: neutrality and thoroughness. It must balance the interests of the complainant in having the complaint investigated, the respondent in procedural fairness and the human rights commission in maintaining a workable and administratively effective system. Only where unreasonable omissions are made, for example, the failure to investigate obviously crucial evidence, will judicial review be warranted. In other words, a court should be loathe to interfere in the way an administrative body conducts its investigations.

[65] The adjudicator noted that there were a number of avenues not covered by the investigation. Where the decision to dismiss a complaint to a hearing is based at least in part on there being no evidence in support of the Complainant'sevidence and where avenues of investigation that might provide some evidence,direct or circumstantial, are noted but not pursued, the investigation cannot be said to be truly thorough. Without thoroughness, the investigator will not always know if crucial evidence has been missed.

[66] In argument before me, counsel for the College indicated that statistics were unavailable to the investigator because they are not kept. However, it may be that helpful information is available from other sources even if it is not in the form of statistics.

[67] It follows from the above that there was a basis upon which the adjudicator could find that there were shortcomings in the investigation; his decision to order further investigation is not unreasonable.

[68] In summary, having found that the reasons given by the adjudicatorcan stand up to a somewhat probing examination, I conclude that his decision is reasonable. The appeal is accordingly dismissed and the adjudicator's decision is affirmed.

[69] I do not propose to add to what the adjudicator said in his decision about the delays in the processing of the complaint; it would be in the best interests of all that the steps to carry out the adjudicator's decision be taken promptly.

[70] Should counsel wish to speak to costs or be unable to agree on an order in that regard, they may make arrangements to appear before me by contacting the Registry within 30 days of the date these reasons are filed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT this
25th day of May, 2007

Counsel for the Appellant: Karen Shaner
Counsel for the Respondent/Complainant: Cayley Jane Thomas
No one appearing for the Director of Human Rights