317. The Nova Scotia Human Rights Commission Attacks SAFS

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In June 2021, the Society for Academic Freedom and Scholarship (SAFS) heard from the Nova Scotia Human Rights Commission (NSHRC) that the commission was pursuing a complaint against it. A young woman who had recently graduated from Saint Mary's University, in Halifax, alleged that SAFS had wrongfully discriminated against her when it published in its January 2019 SAFS Newsletter the article "Indigenize This!", by John E. MacKinnon. The young woman had been a student in MacKinnon's philosophy of law class in the Fall of 2018. She had come across MacKinnon's article and recognized herself as the student MacKinnon had named Q.

MacKinnon had written in the article that he suspected Q was allowed by administrators at Saint Mary's to withdraw from his class past the deadline and without his consent because she was indigenous and administrators were concerned about the university's reputation among the indigenous communities from which it draws students. He justified his suspicion by quoting an anonymous administrator. Had the rules been followed, Q's transcript would have recorded an F in the course. MacKinnon wondered in his article how many other rules have been bent or broken out of sensitivity to indigenous communities, recruitment strategies or the university's commitment to indigenization. MacKinnon also noted in his article Saint Mary's tendency to exaggerate or invent contributions by local indigenous groups to the university over its history.

The article "Indigenize This!" is not about Q but about rule-breaking and favouritism at Saint Mary's and the motivations behind them. Nonetheless, MacKinnon's portrait of Q is not flattering. She comes off looking both academically and temperamentally unprepared for university-level work and responsibilities. MacKinnon's article is also about the disservice that universities do to both individuals and communities when they lower their standards for admitting students and when they trundle weak students along rather than creating conditions for them to succeed on their own.

Q became aware of the article only in September 2019, at least seven months after it was published. How she became aware of it is unclear; the SAFS Newsletter is not well known outside professional circles and rarely do people on the street just stumble upon it. It's likely that an administrator at Saint Mary's showed her the article, perhaps meaning to stir up trouble. Although Q quickly contacted the NSHRC, she didn't formally file her complaint until October 2020, after a year of consultation with human rights officials. She filed her final, amended form in April 2021. Two months later, about two and a half years after the publication of "Indigenize This!", the NSHRC contacted SAFS.

Q was not at fault for the delays, the NSHRC said. According to the commission, staffing problems and internal disorder were responsible. Either way, the NSHRC had failed to remain within the deadlines specified in its enabling legislation.

Q's terms for a Settlement Agreement included a talking circle that SAFS people would attend, a letter of apology and $10,000. SAFS agreed out of courtesy to attend a talking circle but, since the society had not discriminated against Q or wronged her in any way, SAFS declined to issue an apology or to pay any money. Q had alleged that the publication of "Indigenize This!" constituted discrimination against her as an indigenous Canadian. According to statute, though, wrongful discrimination against a member of a protected group is discrimination that imposes burdens, obligations or disadvantages on that person or has the effect of withholding or limiting access to opportunities, benefits or advantages to him or her. SAFS's publishing of the article had imposed no burdens on Q and had denied her no opportunities.

SAFS accepted the NSHRC's invitation to join an informal dispute resolution process, which seemed to involve nothing more than attending a talking circle. For reasons unknown to SAFS, after a year or so, the NSHRC abandoned the informal resolution process. Perhaps Q changed her mind about it, as SAFS continued to maintain that it had done nothing wrong by publishing the article.

On 13 March 2024, four years after the article appeared, Robyn Martelly, an investigator for the NSHRC, filed an Investigation Report, in which Martelly recommended that the complaint be referred to a Board of Inquiry. The board would be charged to discover whether SAFS had wrongfully discriminated against Q and to recommend penalties. On 26 June 2024, the NSHRC confirmed that it accepted the investigator's recommendation to set up a board. During this period, SAFS retained a lawyer, Chris Fleury, through the Justice Centre for Constitutional Freedoms. On 3 December 2024, Mr Fleury applied for a judicial review of the NSHRC's decision to refer the complaint to a board.

On 17 April 2025, Justice Denise Boudreau of the Nova Scotia Supreme Court rendered a decision quashing the referral of the complaint to a Board of Inquiry.

Mr Fleury had made two arguments to Justice Boudreau. One was that the NSHRC failed to follow its rules and deadlines in handling the case, in such a way that the decision to refer the complaint to a board was procedurally unfair to SAFS. The other was that the decision to refer the complaint was unreasonable, in that nothing in Ms Martelly's Investigation Report made even a prima facie case that SAFS had discriminated against the complainant.

The Investigation Report gave two and only two reasons in support of the investigator's recommendation that the complaint against SAFS be referred to a Board of Inquiry. 1) "The article contains discriminatory, anti-Indigenous language and rhetoric" (p. 11, #56, "B"). 2) The editor of that issue of the SAFS Newsletter (Mark Mercer, the writer of this article) had "faced discipline action [by Saint Mary's University] himself for publishing another article the following year" (p. 11, #56, "C").

Justice Boudreau noted that even if the article in the newsletter contained such language and rhetoric, nothing in the report indicated that the complainant was subject to any discrimination on the basis of her indigeneity or anything else. She also noted that the editor's having been called to a disciplinary meeting has no bearing on the matter whether the complainant was wrongfully discriminated against.

Justice Boudreau's decision can rightly be called scathing. Justice Boudreau chastises the NSHRC for electing to pursue a complaint it should have realized from the beginning to be without merit. The complainant alleged that SAFS wrongfully discriminated against her, but neither she nor the NSHRC mentioned any incident in which SAFS imposed a burden on her or denied her any opportunity. It's hard to imagine what such an incident could look like. Did SAFS deny Q a membership in the society, or reject a submission she made to the SAFS Newsletter without reading it?

I wonder whether the NSHRC pursued this complaint in bad faith, knowing that the complaint had no merit under the Human Rights Act as originally conceived but hoping to create a new, expanded, understanding of wrongful discrimination if it could find a sympathetic judge. Happily, Justice Boudreau was not going to let that happen.

Justice Boudreau criticizes the NSHRC for having brought the complaint all the way to a Board of Inquiry when it was plain that the complaint lacked merit. The NSHRC is to dismiss a complaint at any point if proceeding is not in the best interests of the complainant, the complaint is without merit, the complainant raises no significant issues of discrimination or there is no likelihood that the complaint will succeed. Each of these four is true with regard to the complaint against SAFS. (SAFS had added in one of its responses that the complaint had been made in bad faith or for improper purpose, given the complainant's demand for money.) According to the official record of the case, three different officers of the NSHRC could along the way have dismissed the complaint before it reached the investigator, who herself certainly should have recommending dismissing it. And the officers of the NSHRC who acted on the investigator's recommendation had in hand the SAFS response to the report, which laid out clearly the non-sequiturs and the irrelevances Justice Boudreau would eventually cite in her decision.

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I hold that lack of discrimination should have been all that Justice Boudreau relied on in her decision. Neither Q nor the NSHRC had supplied any evidence that SAFS discriminated against Q, SAFS was never really in a position to discriminate against Q anyway, even if it somehow wanted to, and the commission should have seen when Q first contacted it that SAFS had not discriminated against her.

Justice Boudreau, however, went on in her decision to chastise the NSHRC for ignoring freedom of expression. Now, it's refreshing that a judge affirms freedom of expression as a Canadian value, one protected (to some degree) by the Canadian Charter of Rights and Freedoms. But Justice Boudreau's mention of it suggests that in such cases the NSHRC is to perform a balancing test between freedom of expression and wrongful discrimination. If it's a matter of balancing competing values or interests, then freedom of expression might well lose out in certain cases. I wonder how expression could ever clash with anything under the NSHRC's purview. Did Justice

Boudreau in her decision allow that the NSHRC might be within its rights to penalize and stifle the non-violent expression of news, opinion or emotion, just so long as the commission gets the balance between expression and discrimination right?

Many of our human rights commissions do seem to have a limited prerogative to interfere in expression, but few apart from the Canadian Human Rights Commission have the statutory ability to watch for anything anyone might, rightly or wrongly, call hate speech. The NSHRC doesn't. The NSHRC appears to have a statutory right to investigate and penalize expressions of *intention* to discriminate wrongfully against people from select groups on the basis of their group membership. Employers and landlords might properly attract the commission's attention, then, if they post that they will not hire or rent to the aged, to Hindus or to people of Albanian heritage, independently of whether they actually discriminate against people belonging to any protected groups. Setting aside whether the NSHRC or other commissions should have the power to police expressions of intention to discriminate, that power is the only power regarding expression that the NSHRC currently possesses.

That is why Justice Boudreau's reference in her decision to freedom of expression puzzles me and seems to me dangerous.

One might argue that Justice Boudreau's mention of freedom of expression is merely a helpful reminder to the NSHRC that it has duties to the Charter and the civil liberties described in it. It is true that by pursuing Q's complaint, the NSHRC offended against freedom of expression. No one wants to be the subject of an investigation by a human rights commission, and knowledge that one might come under the scrutiny of the NSHRC merely for saying something objectionable or upsetting to a member of a protected group will stifle expression and discussion. SAFS might well have been intimidated by the NSHRC into turning away from cases or discussions that could provoke the commission's ire. Justice Boudreau is to be commended, then, one might add, for telling the NSHRC that it is not to interfere in the peaceful expression of news, opinion or emotion.

But Justice Boudreau says that Ms Martelly's Investigation Report should have taken freedom of expression into account. To honour freedom of expression as a recognized Canadian value, though, the NSHRC should not have gone as far with the case as commissioning a report. It was too late in the process to fault the Investigation Report for overlooking either the NSHRC's antagonistic attitude toward freedom of expression or the threat to that freedom posed by the commission's pursuing the complaint. The NSHRC acted against freedom of expression the moment it accepted to pursue the complaint.

Nothing in Justice Boudreau's decision to quash the referring of the complaint to a Board of Inquiry depends on protecting freedom of expression. Ms Martelly's Investigation Report simply fails to mention any wrongful discrimination suffered by the complainant, and that is enough for the NSHRC to be unreasonable in referring the complaint to a board. I worry that Justice Boudreau's discussion of freedom of expression and how the NSHRC must take it into account could be read by the NSHRC as encouraging the commission to continue to interfere with expression. Justice Boudreau might be taken to be simply admonishing the NSHRC to be careful to get the balance right when it contemplates interfering with expression in a case that falls under its expanded conception of discrimination.

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Astonishingly, given the rough treatment it received at the hands of Justice Boudreau, on 27 May 2025 the NSHRC filed an appeal of the decision quashing the referral of the complaint to a board of inquiry. The NSHRC claimed, without citing evidence, that in the official record was indeed a prima facie case that Q was discriminated against. In addition, it denied that it relied solely on the Investigation Report in accepting Ms Martelly's recommendation to set up a board, though it did not say what else it considered. The NSHRC simply gainsaid Justice Boudreau's findings.

But, then, on 30 July, the NSHRC discontinued its appeal. Why it discontinued its appeal is unknown. It is hard to believe the NSHRC gave up because it finally saw the hopelessness of its cause, let alone that it actually came to agree that SAFS had not wrongfully discriminated against a member of a protected group. First, it had no good reason to think its cause hopeless. All it needed was to have the appeal heard by a social-justice judge, one happy to expand the concept of discrimination. Second, even if the NSHRC thought that the appeal would fail and, thereby, that appealing would waste taxpayers' money, that would not for it be a reason to throw in the towel. The NSHRC has always been willing to squander resources in what it takes to be its social-justice mission. Continuing the appeal would serve the purpose of continuing the intimidation. Even more, expanding the range of what counts legally as wrongful discrimination is for human rights commissions a goal worth pursuing to the end. The facts of the case had not changed in the month between filing the appeal and discontinuing it, so the NSHRC did not change its mind because it learned something. The strong commitment the NSHRC has shown to this case suggests that something somewhere happened such that the NSHRC judged that its social justice interests would be served best by a tactical retreat.

It is not entirely clear just what the situation with the complaint currently is. While the NSHRC may not use Robyn Martelly's Investigation Report to set up a board of inquiry, perhaps it may commission another report. Perhaps there are other avenues the commission can pursue on Q's behalf. SAFS has received no official word that the NSHRC has dismissed or dropped the complaint and will no longer pursue it. For all it has said, the NSHRC might be contemplating other ways to harass SAFS and to continue to interfere with Nova Scotians' non-violent and non-discriminatory expression of news and opinion.

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