



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**Citation:** *Barter v. Memorial University of Newfoundland*, 2025 NLSC 67

**Date:** April 14, 2025

**Docket:** 202201G1492

**BETWEEN:**

**MATTHEW BARTER**

**APPLICANT**

**AND:**

**MEMORIAL UNIVERSITY OF  
NEWFOUNDLAND**

**RESPONDENT**

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**Before:** Associate Chief Justice Rosalie McGrath

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**Place of Hearing:** St. John's, Newfoundland and Labrador

**Date(s) of Hearing:** March 22, 2023

**Summary:**

The Court found the Decision of a university adjudicative body to be unreasonable in respect of certain findings of violations of a student code of conduct. The matter was remitted back for reconsideration.

Costs were awarded to the Applicant.

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intimidation, or harassment. They further allege that this behaviour therefore constituted a disturbance of an event, which is another violation of the Code.

[3] On the other hand, the Student takes the position that his conduct was a silent and peaceful demonstration that did not amount to a breach of any section of the Code.

## **BACKGROUND**

[4] The Student has been a vocal critic of the higher level administration at the University for many years. Throughout that time, he has been a strong advocate for student rights with a focus on the University's administrative salaries, deteriorating infrastructure and tuition hikes.

[5] On December 2, 2021, the Student attended an event at the University's St. John's Campus (the Event). The purpose of the Event was to make an announcement about government funding of tuition for international students. The University's President, several politicians, university staff and students were present during this public event.

[6] As the University's then President, Dr. Vianne Timmons, approached the podium at the Event to speak, the Student placed a sign on the podium which read 'STOP VIANNE! No to tuition hikes and out of control spending'. The Student then positioned himself close to the podium during the President's speech while holding a sign similar to the one he had placed on the podium. He proceeded to take a selfie that he later shared on social media and his blog. The Student was silent throughout the Event. The President and other presenters continued their presentations as planned.

[7] On December 3, 2021, the Student received an email with correspondence sent on behalf of the Director of Student Life at the University (the Director) informing him that a complaint will be laid against him in accordance with the

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provisions of the Code. In particular, she alleged that the Student demonstrated behaviours interpreted as harassing and intimidating towards the President and her staff during the Event and at other recent public events in which the President had made appearances. As a result, interim measures were being imposed under section 6(b) of the Code, including banning the Student from all St. John's campuses until further notice. However, the Student was able to attend campus for the sole purpose of accessing classes and labs, exams or any other supportive medical services, provided that he first check in with the University's campus enforcement. As well, he was not to have any further contact, direct or indirect, with the President and/or executive members or their offices effective immediately until the matter could be further reviewed and assessed.

[8] On December 7, 2021, the Student received a letter from the Director informing him that a complaint had been laid against him alleging violations of sections 5(a)(5) and 5(e)(4) of the Code. Those sections read as follows:

**5. OFFENCES**

The following shall constitute offences under this Code for which a sanction may result:

a) Offences against persons, which include:

...

5) Bullying, intimidating or harassing another person;

...

e) Offences involving disruption, which include:

...

4) Acting, threatening or otherwise causing a disturbance that obstructs any activity organized by the University or by any of its faculties, schools, departments or divisions, clubs, societies or resource centres, or the rights of a member of the University community to carry on their legitimate activities, to speak to or associate with others.

Students and members of the University community enjoy the freedom to pursue their intellectual and personal interests without interference. The objectives of the University are the pursuit of learning through scholarship, teaching and research within a spirit of free enquiry and expression. The University recognizes academic

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freedom and the right to free speech, creative expression and peaceful protest, acknowledging that the common good of society depends upon the search for knowledge and its free expression.

The following are not considered “disruption” in accordance with this section:

- Peaceful assemblies, demonstrations, picketing or other activity outside a class or meeting that does not substantially interfere with the communication inside, or impede access to the meeting or class.
- Silent or symbolic protest.

However, noise that obstructs the conduct of a meeting or class, or forcibly blocking access to an activity constitutes “disruption” under this Code.

[9] On December 8, 2021, the Student received a letter from the Office of the Chief Risk Officer (CRO) at Memorial complaining about the Student’s behaviour on December 2, 2021 (the Complaint). That letter also references certain events dating back to 2018 and events that occurred in the province of Ontario. It also identifies that it was being filed due to:

- 1) The past patterns of behaviour by Mr. Barter that have targeted senior female leadership and other employees of the University; a history of aggression, intimidation in interactions with members of the university community; and, despite repeated warnings provided to him, his refusal to change his actions.
- 2) The safety risk to the individuals participating in the provincial government announcement created by Mr. Barter suddenly and without warning jumping up and appearing within their personal space in a threatening or intimidating manner.
- 3) Past patterns of behaviour involving Mr. Barter that suggest his actions can be volatile and unpredictable, and which have led individuals within the Memorial community to feel threatened in the workplace.
- 4) Violating the university COVID-19 safety protocols and requirements for physical distancing.

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[10] An investigator (the Investigator) was engaged by the University to complete an investigation into the Complaint. On February 28, 2022, the Investigator found in her report (the Investigative Report) that the Student violated sections 5(a)(5) and 5(e)(4) of the Code. The Investigator suggested that the Student be directed to refrain from personal attacks in his protests in the future, and that he refrain from protesting inside any class, meeting, or event, being mindful to still keep within the requirements of the Code. She further stated that other restrictions and any other interim measures should be immediately lifted. Finally, she also suggested that this investigation could present a worthwhile opportunity for a review of the Code given its somewhat ambiguous language.

[11] On March 18, 2022, the Student received a letter from the Director accepting the Investigator's findings but imposing different sanctions than those suggested by her. The sanctions that the Director imposed on the Student included (1) a letter of reprimand; (2) the requirement to attend an educational seminar on the impact of bullying, intimidation and harassment; and (3) placing him on non-academic probation for 1 year. The Director also suggested that if the Student protested in the future, he should refrain from personal attacks and targeted behaviour, as it could be cause for further sanctions.

[12] The Student appealed the decision of the Director in respect of both the offence and sanction. The University assigned an internal person to consider the appeal on the record (the Final Decision Maker). On April 12, 2022, the Student received a letter from the individual dismissing his appeal (the Appeal Decision). The Final Decision Maker accepted the findings that the Student violated sections 5(a)(5) and 5(e)(4) of the Code. She also found that the sanctions imposed by the Director were, in her view, on the lighter side of the available options but were within a reasonable range of sanction outcomes. It is that decision that is subject to review by this Court.

## ISSUES

[13] The following are the issues that I must decide:

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1. Did the Appeal Decision violate principles of procedural fairness?
2. What is the standard of review?
3. Was the Appeal Decision reasonable?
4. If the Appeal Decision violates principles of procedural fairness or is not reasonable, what is the appropriate remedy?

**Issue 1 – Did the Appeal Decision violate principles of procedural fairness?**

[14] The Student alleges that errors were made both in respect of the laying of the Complaint and the investigation.

[15] With respect to the laying of the Complaint, the Student identifies the following preliminary problems:

- a) The Director erred in imposing sanctions on December 3, 2021, as no complaint had been laid. This suggests a pre-judgement of the Student's conduct which may explain the refusal to conduct any additional investigation;
- b) The Director erred in her letter to the Student of December 7, 2021, by informing him that there was a complaint, as the CRO did not file a complaint in writing until the next day; and

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- c) Further, the CRO was not a proper party to file a complaint as he had not attended the Event. It is only a person who was at the Event who would know whether their participation in the Event was substantially disrupted or if they felt harassed, intimidated or bullied.

[16] The Student also alleges a flaw in the process as two University administrative employees were the ones tasked with initiating the Complaint, imposing interim sanctions prior to its filing and making a decision as to how the Complaint was handled. The Student says this shows some degree of communication and perhaps collaboration.

[17] Further, the CRO's Complaint mischaracterized the conduct at the Event, as demonstrated by the findings of the Investigator.

[18] With respect to submissions regarding process issues, the University referred me to section 7.24 of the text by Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Canada: Thomson Reuters, 2021). The authors note that deference has been shown in respect of the procedures followed by university committees in discipline matters, student evaluation and tenure matter on the ground that "universities are self-governing bodies with their own internal decision-making structures and should be subject to only limited interference by the courts."

[19] I agree with that general statement on deference but the authors also acknowledge that it has been stated by courts that there is no reason for deference or a more stringent standard of review for universities where all internal tribunals deny a student procedural fairness.

[20] This same view was expressed by Barry, J., as he then was, in *Healey v. Memorial University of Newfoundland* (1993), 106 Nfld. & P.E.I.R. 304, 334 A.P.R. 304 (Nfld. S.C. (T.D.)). At paragraph 77, he noted that the courts should respect the Legislature's intention that internal problems be resolved by the university itself, without the "legal formalism and trappings of courts". However, he noted that the

restraint that a court should afford is when it is still possible for the university to correct any errors within its own institutional processes. In this case, the Student has exhausted all internal University procedures such that any issues of procedural fairness are properly before the court on review.

[21] I agree that, in exercising my judicial review function, I must keep in mind the nature of the decision and the academic environment in which the decision is made. However, as with any administrative body on judicial review, I am mindful that while the Court must show appropriate deference to the specialized nature of those internal administrative bodies, it must also be mindful to ensure procedural fairness was afforded to the affected party throughout.

[22] While this internal process was comprised of various internal stages, the University submits that the Student can only seek judicial review of the Appeal Decision and that any alleged errors in respect of the Complaint itself, the interim measures or the Investigative Report do not warrant judicial review. They merely form part of the record of the decision under review.

[23] I agree with the University's position that it is only the decision of the Final Decision Maker that is under review as the Student pursued all appeal mechanisms available to him. However, that is not to say that I should disregard all issues raised by the Student as the Complaint, interim measures, Investigative Report and the Director's decision all form the substance of the record before the Final Decision Maker.

[24] The Student made many submissions that the process leading to the imposition of interim measures was flawed. I will not repeat all of those in this decision but note that some submissions have merit, including the fact that no written complaint had yet been filed under section 6(a)(1) of the Code when the interim measures were imposed. Further, the explanation by the Director that section 6(b) of the Code could have been applicable to impose the interim measures is not compelling. That section says that "Under certain circumstances, such as situations involving a potential risk of harm to any person, proceedings under this Code may be initiated by the Student Code of Conduct Officer without a written complaint."

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[25] The information before the Student Code of Conduct Officer and the evidence as to the circumstances surrounding the Event do not suggest the Student posed a potential risk of harm to any person.

[26] However, with respect to the alleged errors regarding the imposition of interim sanctions, the imposition of interim measures was not a decision that was before the Final Decision Maker. By the time the matter reached that stage, those interim measures had been lifted. As such, I cannot find that the Appeal Decision was unreasonable on those grounds.

[27] As for the other submissions alleging procedural unfairness and errors in bringing forward the Complaint, I do agree with the Student that the CRO mischaracterized certain conduct during the Event, which is not surprising since he was not present. However, the Investigator did not simply rely on the allegations in the Complaint. She interviewed persons who were actually present at the Event. Any errors with respect to factual events were therefore identified in the record before the Final Decision Maker.

[28] I also agree with the Student that the CRO's Complaint was flawed in that it alleged breaches by the Student that went further than the Event, including allegations of past patterns of harassing behaviour and breaches of Covid-19 policy. However, the Investigator rightly did not deal with allegations that were not founded on the evidence of the Event and those aspects of the Complaint were not the subject of the Appeal Decision. A failure by the Final Decision Maker to deal with something that should not have been part of a complaint in the first place does not amount to procedural unfairness or result in an unreasonable decision.

[29] Another issue the Student raised is that the Complaint was less than clear in respect of the allegations. Importantly, it did not identify the President as the person who was impacted by the Student's conduct. This lack of clarity could make it confusing and difficult for the Student to respond. However, in these circumstances and in light of the conduct of the Investigation, I find that it was evident and, most importantly, the Student understood, that he was being investigated for behaviour that was alleged to have harassed, intimidated or bullied the President. He had an

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effective opportunity to respond to the Complaint and make his position known to the Investigator and ultimately the Final Decision Maker.

[30] What the Student is really complaining about, however, is that the allegations in the Complaint and the manner in which the CRO and Director brought them forward demonstrated that the University as an institution was attempting to punish him for protesting.

[31] However, it is not unusual in a post-secondary institution that an employee of the Institution would be the one laying a complaint, another employee then brings it forward and yet another person within the institution deals with an appeal. That does not of itself amount to procedural unfairness. The University had its own internal process in place with checks and balances. An independent person carried out an investigation and then persons within the University, unrelated to the person who laid the Complaint, dealt with any disciplinary decision, including any appeal of that decision.

[32] The Student also takes issue with the thoroughness of the Investigation on which the Final Decision Maker relied. The Student says the Investigator only interviewed select witnesses presented by the University and did not speak with other members of the University community who were not employees or government officials who were present at the Event. They may have offered a different view. The Student identified these other potential witnesses who could contradict evidence of the University witnesses as well as witnesses to the Event who supported his actions, including politicians. However, the Investigator chose not to interview those individuals.

[33] While it is true that there were a large number of witnesses to the Event who could have been interviewed, again, I must consider the nature of the administrative decision that is under review.

[34] The level of procedural fairness owed in administrative proceedings is determined by analyzing the factors set out by the Supreme Court of Canada in

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*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 77, citing from *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699. These are: “(1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself”.

[35] In the decision in *Kennedy v. Law Society (Newfoundland)*, 2005 NLTD 112, Justice Thompson quoted from *Charlebois v. Canada (Human Rights Commission)*, 1998 CarswellNat 1809, 154 F.T.R. 119 (F.C. (T.D.)), at page 13 of his decision. The Federal Court of Canada dealt with the thoroughness required of an investigation conducted by the CHRC. Such an investigation must be neutral and thorough, being mindful of the various interests of the parties involved. However, there is no obligation to interview each and every person suggested by the parties, especially when the parties have the right to fill in the gaps by way of response.

[36] In this instance, the appeal was in a non-academic student disciplinary matter as opposed to an academic disciplinary matter, suggesting a somewhat lower standard of procedural fairness. However, even with this lower expectation, the Student was provided with the right to make written submissions and be interviewed. An independent investigator was retained and the Student was represented by legal counsel throughout the entire process.

[37] The Investigator chose to interview only the principal persons involved or impacted by the actions of the Student during the Event. However, she also noted that the Student identified specific individuals who would provide a different perspective on the Event. In light of the nature of the issues and the non-academic sanctions that could be issued, I find that the failure to broaden the number of persons interviewed does not amount to procedural unfairness.

[38] The Student had the opportunity to make the submission that others took the same position as he did. There was nothing to suggest that the Investigator and, ultimately, the Final Decision Maker, disputed that assertion. As such, I find it was

not procedurally unfair to limit the numbers of persons to be interviewed. How she dealt with, or failed to deal with, the submissions and hearsay evidence that others viewed the Student's actions differently than those who were interviewed will be discussed later in this decision.

[39] Further, while it is true that the Student did not have a hearing on the sanctions to be imposed, the University's process would have required one if the recommendation was a suspension or expulsion, such as was the case in *Zaki v. University of Manitoba*, 2021 MBQB 178. I find that the sanction options that were recommended by the Investigator, as well as the slightly more serious sanction that was ultimately imposed, did not necessitate such a high level of procedural fairness. A formal hearing was not required.

[40] Overall, I find that the Student was afforded the degree of procedural fairness required in light of the severity of the potential sanctions and the type of administrative decision that was under consideration in a university environment.

## **Issue 2 – What is the Standard of Review?**

[41] Both parties agree that the standard of review is that of reasonableness, applying the Supreme Court of Canada's analysis in *Vavilov*.

[42] In *Vavilov*, the Supreme Court of Canada wrote extensively on how reviewing courts should carry out a reasonableness review, commenting on the approach to be taken as follows at paragraph 13:

Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

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[43] At paragraph 99, the Court noted that a reviewing court must ask itself whether the decision bears the hallmarks of reasonableness, namely, justification, transparency and intelligibility.

[44] Further, at paragraphs 84 and 85 of *Vavilov*, the Court commented on the importance of a decision-maker's written reasons in determining its rationale for the decision. 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 applicable facts and law.

[45] Finally, at paragraphs 105 and 106, the Court identified a non-exhaustive list of elements that will generally be relevant in evaluating whether a decision is reasonable, namely: the governing statutory scheme; other relevant statutory or common law; principles of statutory interpretation; the evidence before the decision-maker and facts of which the decision-maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies.

### **Issue 3 – Was the Appeal Decision reasonable?**

[46] In respect of the decision under review, in my view, the most significant elements to consider in determining whether the Appeal Decision was reasonable is (i) whether the Final Decision Maker reasonably considered and interpreted the Code, in light of the relevant evidence; and (ii) whether the key submissions of the parties were addressed.

[47] In considering the evidence before the Final Decision Maker, the University again asks me to be mindful that it is not the Investigative Report that is under review. The decision under review is that of the Final Decision Maker. Nevertheless, in this instance, the Final Decision Maker conducted an appeal on the record and did not conduct her own interviews or investigation. In fact, she essentially adopted the factual findings and ultimate findings on violations of the Investigator.

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[48] As such, to the extent there were errors in the factual findings based on the record that could have rendered the Appeal Decision unreasonable, I will consider those on this review.

[49] The Final Decision Maker also conducted little to no analysis of the issues after accepting findings of the Code violations made in the Investigative Report. The only other comments in the Final Decision in respect of the violations are as follows:

With respect to 5a) 5) I agree with the observations made in the Investigative report particularly "there is an element of personal animosity in his methods that makes this excessively targeted." The behaviours were very personal against an individual rather than protesting the decisions of the collective administration of Memorial.

With respect to 5e(4) as per the Investigative Report "his actions were outside the parameter of what would be contemplated by silent protest. It was meant to take attention away from the actual event, not merely be silent and symbolic."

I think it is important to point out that this case was not about the right to protest but the manner in which the protest was carried out. The complaint was put forward because of the targeted and harassing behaviour. Your behaviour that day crossed a line from a peaceful protest to bullying, intimidating and harassing behavior...

[50] As such, it is apparent that the Final Decision Maker whole heartedly adopted the findings and analysis of the Investigator, repeating her words in the Final Decision. In the absence of any further independent reasoning in the Final Decision, I am left to consider the findings in the excerpts above which are based on the analysis provided by the Investigator, and then adopted by the Final Decision Maker.

#### *Section 5(e)(4)*

[51] In terms of how the Final Decision Maker considered and interpreted the Code, the Student notes that the Appeal Decision does not even reference section 5(e)(4) of the Code. That is clearly the most relevant section as it provides guidance to students on what constitutes a "disruption". In particular, it provides that silent or symbolic protest is not considered a "disruption".

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[52] The evidence is clear that at no time did the Student speak – he merely posted and held up a sign. However, the issue of whether the actions of the Student constituted a silent or symbolic protest was not analyzed by the Final Decision Maker other than adopting the Investigator’s statement that the actions “were outside the parameter of what would be considered silent protest. They were meant to take attention away from the actual event, not merely be silent and symbolic.” The Final Decision Maker also stated that “the behaviour that day crossed a line from a peaceful protest to bullying, intimidating and harassing behavior”, very similar but not identical language to that used by the Investigator.

[53] This of necessity leads me to consider the reasoning for the underlying finding of the Investigator that was adopted by the Final Decision Maker.

[54] The Investigator properly recognized that any protest is inherently disruptive and that the Code specifically exempts out actions that could otherwise be considered disruptive, including silent or symbolic protests.

[55] Rather than determining whether the actions of the Student in remaining near the podium where the President was speaking, while holding the protest sign and taking a selfie constituted “noise”, she chose not to adopt such a narrow and strict approach.

[56] Instead, she chose to objectively assess whether a reasonable student would feel the conduct “was acceptable or whether it crossed a line, being mindful of the spirit of the Student Code of Conduct”. In doing so, she was guided by the statements of a University employee, as opposed to a student, who was present at the event. That employee believed the Student had crossed a line. The Investigator specifically found that the employee’s discomfort was an indication that the Student had substantially interfered with the “purpose” of the Event and was therefore disruptive. The Investigator further found that the Student’s goal was to gain attention and media coverage for his cause regardless of the negative effect it might have on another student cause.

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[57] While the Final Decision Maker did not expressly cite the exceptions to disruption in section 5(e)(4) of the Code, she adopted the Investigator's findings that the acts "crossed the line", were not a silent protest and were meant to take attention away from the actual event. This clearly mirrors the Investigator's findings.

[58] However, as is apparent from the above comments and analysis, the decision on the section 5(e)(4) violation was really based on undefined parameters of what would or would not be "acceptable" conduct and focused on the fact that the protest took away from another cause. This criterion is not contained or discernible within section 5(e)(4). Further, it would be stifling to free expression and peaceful protests if students were expected to only demonstrate at events where their actions would not detract in any way from the purpose of the event. The whole purpose of a student protest or demonstration is to direct attention to the student cause that is the subject of the protest.

[59] While I accept that an administrative decision-maker may have specialized expertise and experience, especially when interpreting its own enabling statute (or, in this case, a student code of conduct), it was acknowledged that there were no previous decisions to provide guidance as to the interpretation of that particular section. In such circumstances, the Student would be entitled to expect that a decision-maker would focus on the wording of the Code and not engage in an overall assessment of the acceptability of the Student's conduct.

[60] In fact, it was noted that the Student had actually read these sections in advance of the protest to ensure he was in compliance with the Code. For her part, the Investigator commented that these sections of the Code could potentially apply but were unclear which is why she adopted the overall assessment approach. The Investigator even suggested the wording of the Code should be revised and the Student should not be sanctioned.

[61] I also note that while the Investigator found that the Student's actions were a disruption, she based this finding on the discomfort felt by one University employee who was interviewed. The Investigator's summary of that employee's evidence indicates that employee was not familiar with these types of events and she was

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alarmed. She described the actions as disrespectful (in using the President's first name), inappropriate and they made her feel uncomfortable. She was also upset because she felt the acts took away from an announcement that she viewed as very positive.

[62] However, that employee was also wondering why everyone else at the Event was acting as if it was normal. When she asked the Dean of Graduate Studies, he responded that people have the right to express themselves. This corresponds with the submissions of the Student that there were many others who would make similar statements.

[63] Perhaps most importantly, the evidence summarized in the Investigative Report clearly indicates that the announcement went ahead as scheduled; all scheduled speakers did their presentations without any delay. The President herself said she just ignored the Student. She said some people were upset at what transpired but she only mentioned the one employee who looked afraid.

[64] Having characterized the acts as disruption on the basis of the above evidence, the Investigator specifically found a violation of section 5(e)(4). However, no reasons were given as to how the impugned conduct fell within the actions prohibited by that subsection; ie., "**acting, threatening or otherwise causing a disturbance that obstructs** any activities organized by the University...., or the rights of any member of the University community to carry on their legitimate activities, to speak to or associate with others" [emphasis added]. The Final Decision Maker also did not consider that subsection.

[65] Had an analysis of that subsection been undertaken, the decision maker would have had to consider whether the actions **obstructed** the Event. In such circumstances, I find it unreasonable to rely on the subjective experience of one University employee and fail to consider the evidence that the Event proceeded as planned with the attendants, other than the employee that was interviewed, having no apparent reaction.

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[66] As noted above, while an administrative decision maker should not be held to the same standard in giving reasons for its decision, I find that the Final Decision Maker, in adopting the reasoning of the Investigator as supplemented by her own comments, failed to demonstrate an internally coherent and rational chain of analysis that is justified in relation to the applicable facts and law. The reasons failed to interpret the wording of the Code (however ambiguous it may have been) and imparted unwritten and previously unknown considerations into determining whether a Code section was violated. This is a failure of rationality internal to the reasoning process. Further, the decision maker failed to take into account evidence and submissions that were clearly relevant to the determination of whether there was actually a disruption within the meaning of the Code, including whether the Student's actions obstructed the Event or the right of a member of the University community to carry on their legitimate activities, to speak to or associate with others.

[67] As these shortcomings are sufficiently central and significant, I find the decision on the section 5 (e)(4) violation is unreasonable.

[68] Having made this finding, I must consider the comments of the Supreme Court of Canada at paragraph 96 of *Vavilov*, in which they refer to *N.L.N.U. v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. In that decision, Justice Abella noted that if there was a defect in an arbitrator's reasoning, the court ought to first consider whether there are other reasons which could intelligibly be offered in support of the decision. However, the Supreme Court of Canada cautions against taking this decision to far in paragraph 96 of *Valilov* reproduced below.

Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the

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extent that cases such as *Newfoundland Nurses and Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[69] As a result, I will not consider what other justifications could have led to a finding of a violation of section 5(e)(4). I therefore find that the decision that the Student violated section 5(e)(4) of the Code was unreasonable and should be remitted to the Final Decision Maker for reconsideration taking into account these reasons.

### *Section 5(a)(5)*

[70] In respect of the alleged violation of section 5(a)(5) of the Code, the Student also notes that one of the key submissions he made through legal counsel was that the protest was not aimed at the President in her personal capacity but in her role as the President, an individual who is the highest official and therefore the effective face of the University. The Student had provided examples of other times when signs protesting actions of the University were made public naming a former President of the University, with no disciplinary measures being invoked.

[71] While these submissions were made throughout the process, the Final Decision Maker merely agreed with the observations in the Investigative Report that “there was an element of personal animosity in his methods that makes this excessively targeted” and also added that “the behaviours were very personal against an individual rather than protesting the decisions of the collective administration of Memorial”.

[72] The Final Decision Maker stated that “The complaint was put forward because of the targeted and harassing behaviour. Your behaviour that day crossed a line from a peaceful protest to bullying, intimidating and harassing behavior. I believe this is a serious offense as everyone has the right to be in a safe and respectful environment free of harassment and intimidation (sic)”. Those statements show a conflation of the elements of two different alleged violations and lends further support to the finding of a lack of internal reasoning with respect to the section 5(e)(4) violation finding. However, I repeat these words here as they also appear to indicate that the

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Final Decision Maker found that the Student's actions went beyond the findings of both the Investigator and the Director who found the actions to be bullying and harassment. They did not make a finding of intimidation.

[73] The Final Decision Maker gave no reasons for her above two statements indicating that she found that the Student intimidated the President.

[74] The Student notes that while the Code does not define "intimidation", there is a long recognized legal definition of the tort of intimidation. In *R. v. Gibbons*, 2014 ONSC 4269, at paragraph 23, Trotter, J. defines the tort as arising where the defendant either threatens to use unlawful means to coerce a third person to damage the plaintiff or threatens unlawful acts that directly compel the plaintiff to act to their detriment.

[75] The Student also notes that the Decision does not address the fact that the person who was allegedly individually targeted was not actually intimidated or fearful. As noted above, the President continued on with her speech, deciding to ignore the Student's presence with the sign. She merely commented to the Investigator that she feared others may be incited. She also stated that other people were upset, including the individual who spoke after the President. That person was interviewed by the Investigator and she confirmed that she was fearful. However, the President herself said she did not feel the Student meant any harm.

[76] Again, while administrative tribunals are not held to the same standards of courts, there should be some form of analysis of an alleged ground of misconduct based on the evidence. There was no analysis of whether the conduct was intimidating and there was no suggestion that the Student had engaged in any unlawful acts.

[77] In this case, the Final Decision Maker heavily relied on and adopted the Investigative Report. She also did no analysis of this aspect of section 5(a)(5), a sub-issue on which there was little to no evidence. As such, it seems apparent that the Final Decision Maker failed to appreciate that the language of section 5(a)(5)

was disjunctive rather than conjunctive. It was not necessary to find that the conduct met all three adjectives. The decision of the Final Decision Maker that the conduct of the Student was intimidating was therefore unreasonable.

[78] However, I will also consider whether the Final Decision Maker's decision that there was a violation of section 5(a)(5) was unreasonable based on the other two grounds; i.e. did the Student's behaviour constitute bullying or harassment?

[79] The summary of evidence in the Investigative Report indicates the following:

1. The Student placed a sign on both the podium at which the President was speaking immediately before she spoke and held a similar sign in front of himself. That sign contained the words "STOP VIANNE!", using the President's first name only, in all cap lettering. In much smaller lowercase lettering at the bottom of the sign was the following message: "No to tuition hikes and out of control spending!"
2. The Student stood in close proximity to the President - only a foot away – the entire time she was speaking.
3. The Student took a selfie depicting the President in the photo. That selfie was posted to social media.

[80] Those were relevant considerations. It was for these reasons that the Investigator found that there were personal aspects to the attack that made it excessively targeted. The Final Decision Maker expressly adopted this finding and found that the behaviours were very personal against an individual rather than the institution.

Rm

[81] While the Student suggests it is unreasonable to make such a finding in light of the fact that there were protests against a prior President in which his first name was used, I cannot agree with that assertion. The Investigative Report does reference an occasion when a protest involved the display of “pink slips” to a former President using his name, however, no complaint was laid in that case.

[82] The mere fact that no complaint was laid does not mean the conduct was condoned and could not have been found to violate section 5(a)(5) of the Code if a complaint had actually been laid. While the Final Decision Maker did not deal with this submission directly in her decision, she clearly read and adopted the reasoning in the Investigative Report which contained this reasoning for the finding that the prior protest was not relevant to the analysis.

[83] The Student also notes that the President indicated to the Investigator that she herself continued on with her speech and she felt the student meant no harm. However, it is not the reaction of the person who is harassed or bullied that determines whether a student commits a violation of section 5(a)(5). The decision maker must consider the nature of the acts against that person and whether an objective and reasonable person, in all the circumstances, would consider them to constitute bullying or harassment. A student cannot rely on the thick skin of the victim to avoid liability for such behaviour.

[84] Overall, having considered the submissions of the parties, the Appeal Decision and the record before the Final Decision Maker I find that the decision on a violation of section 5(a)(5) as it related to a finding of bullying or harassment of an individual is not unreasonable.

[85] While I may not necessarily have come to the same finding based on the evidence I have referred to above, I cannot say that the conclusion reached was not within a range of reasonable outcomes. It is not my role on judicial review to interfere with factual findings or re-evaluate the evidence.

Rm

[86] As a result, I find that the decision of the Final Decision Maker with respect to the finding of a breach of section 5(a)(5) as it relates to the violation of bullying or harassment is within a range of reasonable outcomes whereas the decision as it related to intimidation is not, for the reasons set out above. Nevertheless, as the wording of section 5(a)(5) is conjunctive, a finding of bullying or harassment is sufficient to find a Code violation.

#### **Issue 4 - What is the appropriate remedy?**

[87] As noted by the Supreme Court of Canada in *Vavilov*, the usual remedy when a decision is found to be unreasonable is to remit the matter back to the decision-maker for reconsideration in accordance with the reasons of the court. However, in circumstances where the result would be inevitable, the reviewing court can make that determination. Such is not the case in this instance as the issues require a consideration of various factors. The fairest course would be to remit the matter back for a redetermination on the issue of whether the Student violated section 5(e)(4) in light of these reasons and to make a determination of an appropriate sanction on the basis of any findings.

#### **CONCLUSION**

[88] In light of my ruling that the decision of the Final Decision Maker was unreasonable on the finding of a violation of section 5(e)(4) of the Code and in one aspect of the nature of the violation of section 5(a)(5) of the Code, I must send the matter back for reconsideration with the benefit of these reasons.

[89] As the nature of the findings in the reconsideration will have significant bearing on the sanctions to be imposed, I decline to deal with the issue of sanctions.

*RM*

[90] The Applicant is entitled to costs in accordance with Column 3 of the Scale of Costs under Rule 55 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986. c. 42, Sched. D.

  

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**ROSALIE MCGRATH**  
Associate Chief Justice