

SUPREME COURT OF YUKON

Citation: *Bachli v Yukon Human Rights Commission*,
2022 YKSC 49

Date: 20221006
S.C. No. 21-AP008
Registry: Whitehorse

BETWEEN:

ERWIN BACHLI

PETITIONER

AND

YUKON HUMAN RIGHTS COMMISSION and GOVERNMENT OF YUKON
(DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

RESPONDENTS

Before Justice E.M. Campbell

Appearing on his own behalf

Erwin Bachli

Counsel for the Respondent,
Yukon Human Rights Commission

Alexander Dezan

Counsel for the Respondent,
Government of Yukon

Lesley Banton

REASONS FOR DECISION

INTRODUCTION

[1] Mr. Bachli is a senior citizen and resident of Yukon. He became paraplegic in 2010. Since then, the Government of Yukon (Department of Health and Social Services) (“Yukon”) has provided equipment (including a wheelchair and a commode) as well as related services to Mr. Bachli through its home care program.

[2] Mr. Bachli filed a complaint with the Yukon Human Rights Commission (the “Commission”) alleging discrimination by Yukon in the provision of services and goods

to the public. In his complaint, Mr. Bachli alleged Yukon breached the Yukon *Human Rights Act*, RSY 2002, c 116 (the “*Act*”) by discriminating against him on the basis of age and physical or mental disability, two protected characteristics under the *Act*, in providing to him a wheelchair and a commode that are dysfunctional, inadequate for someone living at home rather than in care, not certified, and unsafe for him and for those who assist him, including his wife. In addition, Mr. Bachli alleges Yukon has ignored his repeated requests over the years for maintenance, replacement, and repairs. According to Mr. Bachli, this situation has impeded his ability to live at home, and enjoy work, recreation and socialization with his family and friends.

[3] The Director of Human Rights (the “Director”) accepted Mr. Bachli’s complaint against Yukon for investigation on the prohibited ground of physical or mental disability in connection with the provision of services, goods, or facilities to the public. However, he did not accept Mr. Bachli’s complaint for investigation on the prohibited ground of age. The Director stated the latter did not meet the requirements of the Commission’s reasonable ground policy. The Director found the facts alleged in the complaint could not reasonably support a conclusion there was a link between the alleged unfavourable treatment and the protected characteristic of age.

[4] Mr. Bachli requested the Commission review the Director’s decision. Upon review, the Commission dismissed Mr. Bachli’s request and confirmed the decision of the Director not to investigate the parts of his complaint based on the prohibited ground of age. The Commission agreed with the Director that the factual allegations contained in the complaint and the additional materials it had received from Mr. Bachli did not disclose a link between the alleged unfavourable treatment and age.

[5] Mr. Bachli seeks judicial review of the Commission's decision. He seeks that the Commission's decision be overturned and that his complaint in discrimination against Yukon be investigated on the basis of the prohibited ground of age in addition to physical or mental disability. Mr. Bachli raises the following issues in support of his petition. First, he submits that, according to its enabling legislation, the Commission does not have the authority to refuse to investigate a complaint of discrimination or part of a complaint of discrimination it receives. Second, if the Commission does have jurisdiction to screen complaints, it erred in confirming the Director's decision to not accept his complaint of discrimination based on age for investigation. Third, Mr. Bachli submits he was denied due process before the Commission because he was not permitted to attend and present oral evidence and submissions at the review hearing. Finally, Mr. Bachli submits the Commission is in a situation of conflict of interest because the Director and the Commission received legal advice from the same in-house counsel.

[6] Yukon and the Commission oppose Mr. Bachli's application. They request the Court affirm the decision of the Commission and dismiss the Petition.

History of the proceeding

[7] On May 17, 2021, Mr. Bachli filed a complaint with the Commission alleging that Yukon had discriminated against him based on the prohibited grounds of age and physical or mental disability when offering or providing goods and services to the public.

[8] In his complaint, Mr. Bachli stated he is a client of Yukon (Home Care) by necessity due to his paraplegia. He stated the self-driving wheelchair and commode that Yukon provided to him are dysfunctional and inadequate to meet his basic needs. In

addition, he stated the equipment is not certified. He added that there are design issues with his commode and wheelchair that create health and safety issues for him and his wife as well as for anyone else helping him maneuver his equipment. He stated that Yukon employees have ignored the multiple requests he has made over the years for proper and adapted equipment, as well as for maintenance and repairs of his equipment.

[9] Finally, he stated that Yukon employees do not have the willingness, experience, knowledge, certification or ability to order, maintain or fix the equipment he requires as a senior with a disability to enjoy work, recreation and socialization with his family and friends.

[10] The Director accepted Mr. Bachli's complaint for investigation on the prohibited ground of physical or mental disability. However, he refused the complaint for investigation on the prohibited ground of age.

[11] The Director communicated his decision and the reasons for his decision to Mr. Bachli in a letter dated May 30, 2021. The Director stated that based on his preliminary analysis, Mr. Bachli's complaint in discrimination against Yukon on the ground of physical and mental disability was accepted for investigation. However, he stated there was no reasonable basis for the Commission to accept the parts of Mr. Bachli's complaint in discrimination on the ground of age. The Director then explained that his decision not to accept Mr. Bachli's complaint based on age was made pursuant to s. 20(1) of the *Act*. He stated that pursuant to that section:

... the Commission has an obligation to screen complaints at this initial stage to ensure that there are reasonable grounds for believing that discrimination occurred. If the Commission

does not find that there are reasonable grounds for such a belief, the Commission cannot accept the complaint.

[12] He explained the notion of reasonable grounds as: “allegations, which if proven at a hearing and viewed objectively by a reasonable person, would lead that person to conclude that there was likely a contravention to the Act.”

[13] The Director then set out the five elements of the Commission’s “reasonable grounds analysis” and briefly explained his findings under each element. He found Mr. Bachli’s complaint with respect to the protected characteristic of age met all but one element of the analysis.

[14] Under the heading: “Is there a reasonable argument that the alleged unfavourable treatment and the prohibited ground are linked?”, the Director stated Mr. Bachli had not provided any information in his complaint indicating how he believed his age was a factor in the unfavourable treatment he experienced. The Director stated the facts alleged in Mr. Bachli’s complaint could not reasonably support a conclusion that the unfavourable treatment and the prohibited ground of age were linked

[15] The Director recognized “that discrimination is something that can occur without any conscious intention or will.” However, he stated that:

... At the same time, it is not enough to state that one has a protected characteristic and experienced unfavourable treatment. In order to establish discrimination, a complaint must allege some material facts that are capable of substantiating an inference that the protected characteristic was a factor in the adverse treatment. [see *Weinberg v Ombudsperson of BC*, 2019 BCHRT 226] In your complaint you did not allege sufficient material facts about *why* you believe that your age was a factor in the Respondent’s failure to accommodate you and provide you with adequate equipment. For example, you state in your complaint that you require proper equipment for basic living as a senior. However, you do not allege that any specific comment or

reference was made about your protected characteristic in communications with the Respondent.

In order to accept a complaint, I require specific facts to explain how the protected ground was a factor in the Respondent's failure to provide adequate equipment. A mere allegation, speculation or conjecture is not sufficient. [*ibid*] It is well established in the case law that while discrimination is often subtle, "without a factual basis a complainant's personal belief of discriminatory treatment, no matter how sincerely felt, can only be said to be based on speculation and conjecture, rooted in feelings, suspicions and beliefs" [*Li v Options Community Services and Others, 2020 BCHRT 104 at para. 78*] Determining whether there are reasonable grounds for believing there has been a contravention of the *Act* requires careful consideration of both the allegations and the context in which they arise. I found nothing in the materials before to reasonably suggest that your age was a factor in the Respondent's failure to provide you with reasonable accommodations and proper equipment.

[16] On June 20, 2021, Mr. Bachli requested that the Commission review and overturn the Director's decision. Mr. Bachli filed written submissions and provided several documents in support of his request.

[17] On August 24, 2021, the Commission members met to consider Mr. Bachli's request for review.

[18] In a letter dated September 10, 2021, the Commission informed Mr. Bachli that, after review, it had decided to confirm the Director's decision to accept his complaint for investigation based on physical or mental disability but not based on age. The Commission provided reasons for its decision.

[19] The Commission stated it considered Mr. Bachli's initial complaint, his submissions as well as the other documents he had filed in support of his review. The Commission also stated it considered the Director's Decision Letter to Mr. Bachli, the Commission's No Reasonable Grounds Policy, a legal opinion, the *Act* and caselaw in

coming to its decision. The Commission stated that, pursuant to s. 20(1) of the *Act*, it had to determine whether there are reasonable grounds to accept Mr. Bachli's complaint of discrimination for investigation. The Commission briefly explained what it meant by reasonable grounds and set out the five elements of the reasonable grounds analysis it applied on review. One of the elements of that analysis, as set out by the Commission, is whether there is a "reasonable argument" that "the alleged unfavourable treatment and the prohibited grounds(s) are linked." The Commission stated that, upon review, it agreed with the Director that Mr. Bachli had not provided facts that showed a link between the alleged unfavourable treatment and the protected characteristic of age. As a result, the Commission concluded Mr. Bachli's complaint did not disclose reasonable grounds for believing there had been discrimination under the *Act* based on age. Therefore, it was not statutorily required to investigate that part of his complaint based on the facts he provided to the Commission.

[20] On September 13, 2021, the Director sent a letter to Yukon informing the government that Mr. Bachli had made a complaint in discrimination against Yukon; and that his complaint had been accepted for investigation on the basis of physical or mental disability but not on the basis of age. He further stated that Mr. Bachli had appealed the decision but that his appeal had not been successful. Yukon stated it was not aware that Mr. Bachli had filed a complaint with the Commission prior to receiving that letter, and, consequently, did not participate in the pre-investigation process that led to the Commission's decision under judicial review.

ISSUES

[21] This judicial review raises the following issues:

- i. What is the standard of review applicable to the questions raised in this judicial review proceeding?
- ii. Does the Commission have the statutory authority to screen the complaints it receives to determine whether to investigate them in totality or in part pursuant to s. 20(1) of the *Act*?
- iii. Did the Commission breach its duty of procedural fairness:
 - (a) by not permitting Mr. Bachli to attend the review hearing and/or present oral evidence and/or make oral submissions at the review hearing; and
 - (b) due to conflict of interest arising from the same in-house counsel providing legal advice to the Director and the Commission with respect to Mr. Bachli's complaint?
- iv. Did the Commission err in affirming the Director's decision to investigate Mr. Bachli's complaint in discrimination on the prohibited ground of physical or mental disability but not investigate his complaint on the prohibited ground of age?

PREAMBLE

[22] There is no doubt Mr. Bachli needs a new wheelchair and commode. The affidavits and photos filed by Mr. Bachli in this proceeding reveal his equipment is in a state of disrepair and has been in that state for some time now. I am also alive to the fact that this situation has caused a lot of frustration and grief to Mr. Bachli and his wife,

who supports him the best she can. Counsel for Yukon clearly stated on the record that Yukon is prepared to work with Mr. Bachli to provide him with new functioning equipment – a wheelchair and a commode. At the hearing, I encouraged the parties to enter into discussions in that regard, acknowledging they may have different expectations with respect to the individuals who should participate in those discussions for Yukon, the procurement process, and the type of equipment and services Yukon may be required to provide to Mr. Bachli to meet his needs. I also acknowledge that Mr. Bachli is of the view that Yukon already has all the information it requires to order the proper wheelchair and commode for him. At the hearing, counsel for the Commission stated the Commission was prepared to facilitate those discussions. I requested that an update on those discussions be provided to me. It is my understanding that, following the hearing, the Commission has facilitated exchanges between Yukon and Mr. Bachli to try to resolve this issue. While I am not privy to the exchanges that have taken place, it is my understanding that, so far, they have been unsuccessful. In addition, I acknowledge that the replacement of Mr. Bachli's equipment may only form part of the redress he is seeking through his human rights complaint, and that he may be entitled to, if it is found that his complaint in discrimination is founded.

[23] Before I go any further, I also want to reiterate what I told Mr. Bachli during the proceeding, which is that the only issue before me on this judicial review is whether the Commission erred in refusing to investigate the parts of his complaint of discrimination against Yukon based on the prohibited ground of age. I cannot grant any other relief, including any relief against Yukon, based on the petition Mr. Bachli filed with the Court.

i. What is the standard of review applicable to the questions raised in this judicial review proceeding?

Positions of the Parties

The Petitioner - Mr. Bachli

[24] Mr. Bachli did not advance a specific position with respect to the standard of review applicable in this case.

The Respondent - the Commission

[25] The Commission submits the applicable standard of review to its decision is reasonableness.

The Respondent - Yukon

[26] Yukon submits the applicable standard of review to the Commission's decision is reasonableness.

Analysis

[27] The starting point is that reasonableness is presumed to be the applicable standard of review of an administrative decision on judicial review. Derogation from that standard is justified only where required by a clear indication of legislative intent or by the rule of law (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (“*Vavilov*”) at para. 10).

[28] In *Vavilov*, the majority of the Supreme Court of Canada identified five situations where a derogation from the reasonableness standard is warranted (para. 69). Two of these situations flow from legislative intent: (i) where the standard of review is expressly prescribed by legislation; and (ii) where the legislature specifically provided for an appeal from an administrative decision to a court without prescribing a standard of review. In that situation, the standard of review will be determined with reference to the

nature of the question before the court and the jurisprudence on appellate standards of review (*Vavilov* at paras. 33-36). The other three exceptions, where the standard of correctness applies, are required by the Rule of Law. They consist of (i) constitutional questions; (ii) general questions of law of central importance to the legal system as a whole; and (iii) questions regarding the jurisdictional boundaries between two or more administrative tribunals (*Vavilov* at para. 53).

[29] None of the recognized exceptions apply here. Under the standard of review framework adopted in *Vavilov*, even the question of statutory interpretation regarding the Commission's authority to screen complaints at the pre-investigative stage falls under the reasonableness standard of review. The court in *Vavilov* specifically rejected the necessity to apply a correctness standard to all jurisdictional questions (paras. 65-68).

[30] Finally, while the Supreme Court of Canada in *Vavilov* did not foreclose the possibility that another category requiring a derogation from the presumption of reasonableness could be recognized in a future case, it warned that any new basis for a derogation would have to be exceptional (*Vavilov* at para. 70). The questions raised in this proceeding with respect to the Commission's decision do not raise any exceptional basis that would require departing from the presumption.

[31] Therefore, the Commission's interpretation of its statutory authority to screen complaints at the pre-investigative stage as well as the Commission's decision to confirm the Director's decision to refuse to investigate the part of Mr. Bachli's complaint based on the prohibited ground of age are reviewable according to the reasonableness standard.

[32] However, in *Vavilov*, the Supreme Court of Canada did not expressly identify the standard of review for questions of procedural fairness. Nonetheless, the court stated that, in considering questions of procedural fairness, reviewing courts must consider whether the procedure was fair having regard to all the circumstances, including the factors identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (“*Baker*”) at paras. 22-27. While this exercise is best reflected in the correctness standard of review and has been described as akin to correctness, strictly speaking, no standard of review is being applied to questions of procedural fairness. *Vavilov* at para. 77 citing *Baker* at paras. 22-27; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para. 54; *Canadian Pacific Railway Company v Canada (Transportation Agency)*, 2021 FCA 69 at para. 46; *Burlacu v Canada (Attorney General)*, 2022 FC 1223 (“*Burlacu*”) at para. 15, *Stukanov v Canada (Attorney General)*, 2021 FC 49 at paras. 28 and 29.

The Reasonableness Standard of Review

[33] A review based on the reasonableness standard is a deferential but “robust form of review” (*Burlacu* at para. 14 and *Vavilov* at paras. 12-13, 75 and 85).

As stated in *Vavilov* at paras. 13: reasonableness review “finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision-makers” and is “meant to ensure that courts intervene in administrative matters only where it is truly necessary [...] to safeguard the legality, rationality and fairness of the administrative process.”

[34] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, Rowe J., writing for the majority, summarized the reviewing court’s role in conducting a

reasonableness review under the *Vavilov* framework where reasons from the administrative decision-maker are required:

[31] A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “. . . what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[35] In addition, the administrative decision-maker’s reasons for decision need “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” *Zalys v Canada (Royal Canadian Mounted Police)*, 2020 FCA 81 at para. 5; *Vavilov* at para. 91, citing *Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16.

[36] The burden is on the party challenging the decision to demonstrate that it is unreasonable. In addition: “the court must be satisfied that any shortcomings or flaws

relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para. 100).

ii. Does the Commission have the statutory authority to screen the complaints it receives to determine whether to investigate them in totality or in part pursuant to s. 20(1) of the Act?

[37] At the hearing of the judicial review, Mr. Bachli questioned the authority of the Commission to screen the complaints it receives to determine whether to investigate them. Mr. Bachli did not raise this argument before the Commission. He raised it for the first time on judicial review. Therefore, the Commission's reasons for decision do not address this issue. The Commission simply applied its reasonable grounds analysis. As a result, at the hearing, I requested that the parties, including the Commission, provide written submissions on the issue of statutory interpretation raised by Mr. Bachli, which they later did.

Positions of the Parties

The Petitioner - Mr. Bachli

[38] Mr. Bachli submits the Commission does not have the authority to refuse to investigate a complaint or part of a complaint it receives. According to Mr. Bachli, the wording of the *Act* reveals the Commission must investigate all complaints it receives. Mr. Bachli submits the Commission's duty to investigate encompasses a detailed examination and analysis of the facts, documents and context of the complaint prior to making a determination. According to Mr. Bachli, this was not done in this case. Mr. Bachli questions how the Commission could decide to refuse parts of his complaint without obtaining and analyzing all the required facts and information. In addition, or in the alternative, Mr. Bachli submits the Director does not have the authority to screen

complaints made to the Commission because it is the Commission, not the Director, that has jurisdiction to investigate complaints.

The Respondent - the Commission

[39] The Commission submits s. 20(1) of the *Act* requires the Director to screen human rights complaints and accept only those where the complainant sufficiently demonstrates that they “ha[ve] reasonable grounds” for believing there has been a violation of the *Act*.

[40] The Commission submits the *Act* was amended in 2009 specifically to raise the standard required for accepting human rights complaints and to empower the Commission, or the Director on its behalf, to screen complaints. According to the Commission, prior to 2009, s. 20(1) only required a belief there had been a violation of the *Act* to make a complaint. In 2009, the words “reasonable grounds” were added to the wording of s. 20(1). The Commission submits this amendment requires prospective complainants to have and demonstrate some reasonable grounds for believing there has been a violation of the *Act* in their complaint. The Commission also relies on comments made by the Minister of Justice when she introduced the Bill amending the *Act* in March 2009 to support its position.

[41] The Commission points out there is no definition of “reasonable grounds” in the *Act* nor any Yukon precedents providing guidance on how the Commission should determine what constitutes “reasonable grounds”. However, the Commission submits that caselaw emanating from other Canadian jurisdictions with similarly worded human rights legislation, and more particularly caselaw emanating from the Federal Court

regarding the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, (“*CHRA*”) supports the existence of an initial screening power.

[42] The Commission submits the caselaw supports its position that it is required to assess at the pre-investigative stage whether a complaint, based on the facts as alleged and taken to be true, falls within the Commission’s “true jurisdiction” as well as its mandate because, if it does not, the Commission has no jurisdiction to investigate.

[43] The Commission submits it has developed a reasonable grounds analysis in keeping with its enabling legislation and relevant caselaw. This pre-investigative stage analysis considers five elements:

1. the Commission’s jurisdiction to investigate the complaint;
2. the allegations must engage a prohibited area of discrimination under s. 9 of the *Act*;
3. the allegations must engage a prohibited ground of discrimination under s. 7 of the *Act*;
4. there must be an allegation of unfavourable treatment; and
5. there must be a reasonable argument that the alleged unfavourable treatment and the prohibited ground are linked.

[44] The Commission submits its five-element reasonable grounds analysis conforms with the relevant caselaw because it effectively distinguishes between those cases it must accept and those “plain and obvious” cases where the complainant does not have reasonable grounds for believing there has been a contravention of the *Act*.

[45] The Commission states its analysis first considers whether it has “true jurisdiction” over a matter. The second element allows the Commission to satisfy itself

that the allegations occurred in a context protected by the *Act*, which also speaks to its jurisdiction.

[46] The Commission argues the last three elements of its analysis conform with the relevant caselaw regarding the essential elements to establish discrimination. The Commission interprets s. 20(1) and the caselaw as mandating it to screen complaints to ensure the prospective complainant has disclosed sufficient information or facts to show a link between the alleged unfavourable treatment and a prohibited ground of discrimination. The Commission submits that, without that link, the complaint would fall outside its mandate and the Commission would not have the authority to investigate it. The Commission also submits that without that link a complaint could also be considered frivolous under s. 20(1)(b).

[47] The Commission acknowledges complainants have no obligation to provide evidence when they make a complaint. Therefore, the Commission takes the allegations made in a complaint as true when it conducts its initial analysis.

[48] Nonetheless, the Commission submits the jurisprudence recognizes it is the complainant who has the burden of providing sufficient information or facts to demonstrate the link between the alleged unfavourable treatment and a prohibited ground of discrimination. The Commission submits a complainant will only have “reasonable grounds” for believing there has been a contravention of the *Act* where they can at least describe a situation that could, if later supported by the evidence, establish the legal test for discrimination.

The Respondent - Yukon

[49] Yukon supports the Commission's position that it has the authority to screen complaints for investigation pursuant to s. 20(1) of the *Act*. However, it proposes a slightly different interpretation of that section.

[50] Yukon submits that s. 20(1) of the *Act* requires the Commission to screen potential complaints to ensure the existence of reasonable grounds.

[51] Yukon submits that "having reasonable grounds" to believe there has been a contravention of the *Act* is a requirement that must be met before the information provided by the person to the Commission can be considered a "complaint" under the *Act*.

[52] Yukon submits it is only when a person has shown reasonable grounds for their belief that there has been a contravention of the *Act* that they "may complain". It is at that time that the second part of s. 20(1) applies and mandates that the Commission investigate the complaint unless the circumstances presented in subsections (a) to (i) exist.

[53] Yukon submits that if a person is unable to show that they have reasonable grounds for their belief, they may not complain and there is consequently no complaint for the Commission to investigate regardless of the circumstances. Yukon did not provide caselaw in addition to the cases filed by the Commission to support the interpretation it proposes.

[54] Yukon further submits the reasonable grounds analysis developed by the Commission to screen the potential complaints at the pre-investigative stage is reasonable and in accordance with the caselaw.

Analysis

Applying the reasonableness standard to issues of statutory interpretation

[55] A court reviewing a matter of statutory interpretation based on the standard of reasonableness does not conduct a *de novo* analysis or ask itself what the correct statutory interpretation would be. Instead, the court must look at the administrative decision-maker's decision as a whole and determine whether the decision-maker has properly justified its interpretation of the statute in light of the surrounding context:

[116] ... Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached. (*Vavilov* at para. 116)

[56] The administrative decision under review must remain at the center of the analysis. In *Canada (Minister of Citizenship and Immigration) v Mason*, 2021 FCA 156 at para. 17, the Federal Court of Appeal cautioned that reviewing courts "should not make any definitive judgments and conclusions themselves" on the statutory interpretation component of a reasonableness review as "[t]hat would take them down the road of creating their own yardstick and measuring the administrator's interpretation to make sure it fits" (see also *Burlacu v Canada (Attorney General)*, 2022 FCA 10 at para. 19).

[57] Also, a court conducting a reasonableness review involving matters of statutory interpretation will do so in keeping with the modern principle of statutory interpretation

and the statutory rules that explicitly govern the interpretation of statutes and regulations (*Vavilov* at paras. 117 and 118).

[58] Here, as I stated earlier, the Commission did not issue reasons regarding its interpretation of the scope of its authority to screen complaints for investigation under s. 20(1) because its authority to do so was not challenged at the time. The Commission therefore applied the reasonable grounds analysis it has developed in keeping with its interpretation of its authority pursuant to s. 20(1) to determine whether to confirm or reverse the Director's decision to refuse to investigate the parts of Mr. Bachli's complaint based on age. Nonetheless, on this judicial review, counsel for the Commission provided submissions regarding the Commission's position and interpretation of its authority under s. 20(1). I will therefore review the issue of statutory interpretation raised by Mr. Bachli in light of the position the Commission has put forward before me.

The statutory scheme: the *Yukon Human Rights Act* and the *Human Rights Regulations*

The objects of the *Act*

[59] The objects of the *Act*, as amended, are set out at s. 1 of the *Act*:

- (1) The objects of this Act are
 - (a) to further in the Yukon the public policy that every individual is free and equal in dignity and rights;
 - (b) to discourage and eliminate discrimination;
 - (c) to promote recognition of the inherent dignity and worth and of the equal and inalienable rights of all members of the human family, these being principles underlying the *Canadian Charter of Rights and Freedoms* and the *Universal Declaration of Human Rights*

Rights and other solemn undertakings, international and national, which Canada honours.

[60] Section 16 of the *Act* establishes the Commission. It states that the Commission's overarching responsibilities are to:

- (a) promote the principle that every individual is free and equal in dignity and rights;
- (b) promote the principle that cultural diversity is a fundamental human value and a basic human right;
- (c) promote education and research designed to eliminate discrimination;
- (d) promote a settlement of complaints in accordance with the objects of this Act by agreement of all parties;
- (e) cause complaints which are not settled by agreement to be adjudicated, and at the adjudication adopt the position which in the opinion of the commission best promotes the objects of this Act.

[61] In addition, s. 16(2) provides that the Commission "shall conduct education and research on the principle of equal pay for work of equal value in the private sector."

[62] Section 20(1) establishes the Commission's statutory authority and mandate to receive and investigate complaints of contraventions of the *Act*. Section 20(1) reads as follows:

Any person having reasonable grounds for believing that there has been a contravention of this *Act* against them may complain to the commission who shall investigate the complaint unless

- (a) the complaint is beyond the jurisdiction of the commission;
- (b) the complaint is frivolous or vexatious;
- (c) the complainant asks that the investigation be stopped;

- (d) the commission asks a board of adjudication to decide the complaint without investigation;
- (e) the commission asks the Director of Human Rights to try to settle the complaint on terms agreed to by the parties prior to or during investigation;
- (f) the complainant abandons the complaint or fails to cooperate with the investigation;
- (g) the complainant at any time prior to the conclusion of the investigation declines a settlement offer that the commission considers fair and reasonable;
- (h) the complainant has not exhausted grievance or review procedures which are otherwise reasonably available or procedures provided for under another Act; or
- (i) the substance of the complaint has already been dealt with in another proceeding.

[63] I note that s. 5(3) of the *Interpretation Act*, RSY 2002, c 125, provides that the expression “shall” in territorial legislation “be read as imperative” and the expression “may”, as “permissive and empowering”.

[64] Section 36 of the *Act* provides that regulations can be made, among other things, to establish the procedures of the Commission. The Commissioner in Executive Council has exercised this power in establishing the Yukon *Human Rights Regulations*, OIC 1988/170 (the “*Regulations*”). Section 4 of the *Regulations* specifically sets out the role and authority of the Director in the treatment of complaints filed with the Commission.

4. Investigation of complaints

- (1) The investigation of a complaint by the Commission shall be conducted or directed on its behalf by the Director.
- (2) If the Director is satisfied that a complaint requires investigation under subsection 20(1) of the Act, the Director shall forthwith notify the respondent

- (a) that an investigation is being started;
- (b) about the subject matter of the complaint;
- (c) about any subsequent change in the subject matter of the complaint;
- (d) of any withdrawal or abandonment of the complaint; and
- (e) when the investigation has been completed.

[65] In addition, s. 5(1) of the *Regulations* provides that “[t]he Director may decide to suspend or stop an investigation if the Director believes on reasonable grounds that the Commission is no longer required to investigate the complaint under subsection 20(1) of the Act.” Section 5 also establishes the process to be followed in such cases, including the right for the complainant to seek a review of the Director’s decision by the Commission.

[66] The wording of s. 20(1) taken in the context of the objects of the *Act* and the statutory role and mandate of the Commission, in relation to complaints, supports the Commission’s interpretation that it has the authority and duty to screen complaints at the pre-investigative stage to determine whether it is required to investigate them.

[67] The language of s. 20(1) is clear. The Commission’s duty to investigate is triggered when someone files a complaint that discloses reasonable grounds for believing there has been a violation of the *Act*. In addition, s. 20(1) states the Commission’s obligation to investigate is subject to exceptions that are set out at subsections (a) to (i). The exceptions include situations of lack of jurisdiction as well as frivolous and vexatious complaints. It flows from the wording of s. 20(1) that, prior to

commencing an investigation, the Commission has to ensure the complaint meets the reasonable grounds threshold established in s. 20(1).

Legislative History

[68] Between 1987 and 2009, s. 20(1) read as follow:

Any person believing that there has been a contravention of this Act against them may complain to the commission who shall investigate the complaint unless

- (a) the complaint is beyond the jurisdiction of the commission;
- (b) the complaint is frivolous and vexatious; or
- (c) the victim of the contravention asks that the investigation be stopped. (my emphasis)

[69] In 2009, several sections of the *Act*, including s. 20(1), were amended (see Bill 71, *Act to Amend the Human Rights Act*, 1st Session, 32nd Legislature, Yukon, 2009 (assented to May 14, 2009), cl 2). The words “having reasonable grounds” were added to qualify the belief upon which a person may file a complaint that the Commission shall investigate. Paragraphs (d) to (i), which represent additional situations where the Commission shall not investigate, were also added to s. 20(1).

[70] The *Act to Amend the Human Rights Act* was assented to on May 14, 2009. It came into effect on December 10, 2009. The wording of s. 20(1) has not been amended since.

[71] The 2009 amendments further support the Commission’s position. Finding otherwise would lead to the conclusion that the addition of the words “reasonable grounds” in 2009 was redundant or did not serve any purpose whereas the law is considered as always speaking (s. 5(1) of the *Interpretation Act*).

Legislative intent

[72] On March 30, 2009, when moving for the amendments to the *Act* to be read a second time in the Legislative Assembly, the Minister of Justice, the Honourable Marion Horne (“the Minister”), spoke about the process that led to the proposed amendments that were, ultimately, adopted by the Legislative Assembly:

...

Yukon’s *Human Rights Act* was originally passed by the Legislature in 1987, following significant and vigorous debate. Following more than 20 years of implementing the act, it has become necessary to update and modernize the legislation. The Legislative Assembly agreed with the need for updating. We collectively appointed a three-member Select Committee on Human Rights.

...

The select committee held advertised public hearings and provided opportunities for submissions or discussions. Public hearings were held in 16 communities over three weeks. Over 100 people participated in the hearings and 24 written submissions were received. My colleagues and I were moved by the various stories of individual experiences with the human rights system.

...

The committee made 25 recommendations based on the submissions. Some recommendations were directly related to the legislation. Others deal with operations or ways to move forward on the more complex changes.

The committee recommended a two-phased approach to implementing the recommendations, as a number of them will take a longer time to effect. All of the recommendations were considered in light of this two-phase recommendation.

... eight of the recommendations are captured in the bill tabled in the Assembly. (Hon. Marion Horne, Yukon Legislative Assembly, Hansard, 32nd Legislature, 1st Session (30 March 2009 at page 4007))

[73] During her speech, the Minister outlined the four major objectives behind the proposed amendments, one of them being “to simplify the complaints process by increasing the reasons why a complaint is not investigated”:

Overall, the amendment should accomplish four major objective: one, improve access to the complaints process by increasing the timelines and clarifying the basis on which a complaint can be filed; two, simplify the complaints process by increasing the reasons why a complaint is not investigated, allowing for direct referral to mediation or decision without investigation and clarifying the relationship of the human rights complaint process to other procedures and legislation; three, modernize some of the language based on specific wording recommendations by the committee, recognizing there is more work to do in future; four, clarify the language around the panel of adjudication and boards of adjudication, specify the number of members for each and the process, and outline the panel’s accountability to the Legislature.

[74] The Minister also addressed the specific recommendations that led to the proposed amendments to s. 20(1) of the *Act*;

These amendments will address specific recommendations of the Select Committee on Human Rights, particularly recommendation number 1: that the *Human Rights Act* be amended under section 20, Complaints, so that the threshold for filing a complaint under the act is raised from its current level, i.e. that a complainant believes that they have been harassed or discriminated against, to the requirement that there be reasonable grounds for such a belief. This wording is proposed in the amendment before you.

Recommendation 2: that the *Human Rights Act* be amended under section 20, Complaints, to expand the circumstances in which the commission shall not investigate a complaint by adding, after 20.1(c), (a) the commission decides to refer the complaint to the board of adjudication or to mediation; (b) the complaint has either been abandoned by the complainant, or the complainant fails to cooperate with the investigation; (c) the complainant has declined what the director considers a fair and reasonable settlement offer; or (d) the substance of the complaint has been or could be dealt with within another

proceeding or review procedure, or under another act. This recommendation is addressed in full.

[75] The comments of the Minister further support the position of the Commission that it has statutory authority to screen complaints at the pre-investigative stage; and that the 2009 amendments were intended to give it broader authority to refuse to investigate complaints, including those that do not meet the added reasonable grounds threshold.

Caselaw

[76] There are no Yukon precedents that address the specific interpretation issue before me.

[77] However, the Commission filed caselaw emanating from the Federal Court that recognizes the authority of the Canadian Human Rights Commission (“CHRC”) to screen human rights complaints at the pre-investigative stage to decide whether to deal with them.

[78] The *CHRA* contains language that is similar to the *Act* with respect to the authority of the CHRC to receive and investigate human rights complaints in matters of federal jurisdiction.

[79] More specifically, s. 40(1) of the *CHRA* requires a person to have reasonable grounds to believe that a person is engaging or has engaged in discriminatory practice to file a complaint with the CHRC:

40(1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint in a form acceptable to the Commission.

[80] In addition, s. 41(1) of the *CHRA* provides that the CHRC shall deal with any complaint filed with it subject to a number of exceptions, which are similar to the

exceptions provided under s. 20(1) of the *Act*. Lack of jurisdiction is one of those exceptions.

41(1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.

[81] Section 41 has been interpreted as giving the CHRC authority to screen complaints and decide not to deal with them at the pre-investigative stage in plain and obvious cases.

[82] In *Canada Post Corp. v Canada (Canadian Human Rights Commission) (re Canadian Postmasters and Assistants Assn*, [1997] 130 FTR 241 (“*Canada Post*”) at para. 3, the Federal Court recognized that the CHRC has authority to decide not to deal with a complaint at the pre-investigative stage based on one of the enumerated circumstances listed in s. 41(1)(a) to (e) of the *CHRA*. However, the Federal Court also stated that, because a decision under s. 41 is usually made at a very early stage, before

any investigation is initiated, the CHRC should only decide not to deal with a complaint in plain and obvious cases.

[3] A decision by the Commission under section 41 is normally made at an early stage before any investigation is carried out. Because a decision not to deal with the complaint will summarily end a matter before the complaint is investigated, the Commission should only decide not to deal with a complaint at this stage in plain and obvious cases. The timely processing of complaints also supports such an approach. A lengthy analysis of a complaint at this stage is, at least to some extent, duplicative of the investigation yet to be carried out. A time consuming analysis will, where the Commission decides to deal with the complaint, delay the processing of the complaint. If it is not plain and obvious to the Commission that the complaint falls under one of the grounds for not dealing with it under section 41, the Commission should, with dispatch, proceed to deal with it.

[83] The plain and obvious approach adopted in *Canada Post* has since been consistently cited with approval by the Federal Court (see *Attorney General of Canada v Mohawks of the Bay of Quinte*, 2012 FC 105 (“*Maracle*”) at paras. 38-40). I note s. 41(1) has not been amended since *Canada Post*.

[84] In addition, the Federal Court has held that the CHRC has no jurisdiction to deal with and investigate a complaint if it falls outside its true jurisdiction or its statutory mandate.

[85] In *Hartjes v Canada (Attorney General)*, 2008 FC 830 (“*Hartjes*”), the Federal Court upheld the CHRC’s pre-investigative stage decision to refuse to investigate Ms. Hartjes’ complaint on the basis it was beyond its jurisdiction pursuant to s. 41(1)(c). Ms. Hartjes alleged in her complaint that the inadequate medical care she had received while incarcerated in a federal institution was a result of discrimination in the provision of services based on race, national or ethnic origin and colour because she was an

Indigenous woman. The CHRC rejected Ms. Hartjes' complaint based on lack of jurisdiction because it was of the view that Ms. Hartjes had not shown any link between the unfavourable treatment she stated she had received, and a prohibited ground of discrimination.

[86] In upholding the decision of the CHRC, the Federal Court concluded the term jurisdiction found in s. 41(1)(c) not only refers to the notion of “true jurisdiction ... where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter” (*Hartjes* at para. 12 citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 59) but also, in a broader context, its statutory mandate, which involves, at the pre-investigative stage, an assessment of the allegations contained in the complaint.

[12] As I read s. 41(1)(c), “jurisdiction” could refer to two different categories of matters. For example, a complaint by an inmate of a provincial institution could likely be dismissed under s. 41(1)(c); this would be a question of “true jurisdiction ... where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter” (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 59). In a broader context, a complainant may complain of certain acts that are, on their own, not allegations that fall within the mandate of the Commission but allege that these acts took place because of race, ethnic origin, disability or another prohibited ground. In such a case, unless the complainant can disclose sufficient information or facts to show a link to a prohibited ground of discrimination, the acts complained of are not within the statutory mandate of the Commission. In this second example, the pre-screening exercise involves an assessment of the sufficiency of the evidence. (my emphasis)

[87] In addition, the Federal Court ruled the CHRC has no mandate to investigate a complaint unless a complainant provides sufficient information to disclose a link

between the unfavorable treatment complained of and a prohibited ground of discrimination (*Hartjes* at para. 13; *Maracle* at para. 44).

[88] Furthermore, the Federal Court found the burden is on “a complainant to put sufficient information or evidence forward to persuade the Commission that there is a link between the complained-of-acts and a prohibited ground.” The court also found that this is a low threshold to meet (*Hartjes* at para. 23; see also *Maracle* at para. 41).

[89] In *Maracle* at paras. 42 and 43, the Federal Court stated that, for the purpose of determining whether it has jurisdiction to deal with a complaint at the pre-investigative stage, the CHRC should take the facts alleged in a complaint as true or capable of proof, because this is consistent with the approach that the CHRC should decide to not deal with a complaint only in plain and obvious cases.

[90] In addition, in *Love v (Canada) Privacy Commissioner*, 2015 FCA 198 at paras. 23 and 24, the Federal Court of Appeal confirmed that a complaint may be dismissed by the CHRC based on frivolousness pursuant to s. 41(1)(d) “if the complainant fails to set out a reasonable or *prima facie* basis for the allegation of discrimination.” The court confirmed that, at the pre-investigative stage, the inquiry to be conducted by the CHRC “is akin to that made by a court in the context of a motion to strike pleadings and involves accepting the facts as alleged by the claimant and asking whether it is “plain and obvious” that the complaint could not succeed”. The Court of Appeal confirmed the CHRC may reasonably conclude that a complaint could not succeed if the complainant fails to assert material facts that discloses a link between the conduct complained of and a prohibited ground of discrimination, or “to put the matter another way, fails to

explain why the adverse treatment was connected to one of the grounds prohibited under the CHRA.”

[91] In addition to the decisions filed by the Commission, I reviewed the recent decision of the Federal Court in *Asghar v Rogers Communications Inc*, 2020 FC 951, that specifically refers to and discusses the reasonable grounds threshold for filing a complaint embedded in s. 40 of the CHRA. In *Asghar*, the court agreed that s. 40 imposes on complainants a reasonable grounds threshold for believing a person is engaging or has engaged in a discriminatory practice for filing a complaint. It interpreted s. 40 as imposing a low threshold on complainants to present some credible evidence to satisfy the Commission of the complaint’s merits. If the complainant fails to meet that low threshold, the Commission may exercise its pre-investigative stage authority to dismiss the complaint as being frivolous, pursuant to s. 41, for failing to set out a reasonable or *prima facie* basis for the allegation of discrimination.

[20] Here, the Commission properly identified the “plain and obvious” test for frivolousness. The Commission further identified that the CHRA requires a complainant to have a reasonable basis for filing a complaint. Specifically, section 40 of the CHRA only enables complainants “having reasonable grounds for believing” there exists a discriminatory practice or conduct to file a complaint:

40 (1) Subject to subsections (5) and (7), any individual or group of individuals having reasonable grounds for believing that a person is engaging or has engaged in a discriminatory practice may file with the Commission a complaint

40 (1) Sous réserve des paragraphes (5) et (7), un individu ou un groupe d’individus ayant des motifs raisonnables de croire qu’une personne a commis un acte discriminatoire peut déposer une plainte devant la Commission en la forme acceptable pour cette dernière.

in a form acceptable to the Commission. [souligné dans l'original.]
[Emphasis in original]

[21] The threshold of “reasonable grounds for believing” a discriminatory practice has transpired may be low, but it nonetheless exists. Thus, the Commission may dismiss a complaint for frivolousness under paragraph 41(1)(d) where that complaint fails to set out a reasonable or *prima facie* basis for the allegation of discrimination (*Love* at para 23): see also *Public Service Alliance of Canada v Canada (Attorney General)*, 2015 FCA 174 at para 33. Looking at the other side of the same coin, the complainant must present some credible evidence to satisfy the Commission of the complaint’s merit, or risk having the claim rejected (*Gregg* at para 7).

[92] Considering the many similarities between the *Act* and the *CHRA*, I am of the view that the findings and principles emanating from the Federal Court jurisprudence regarding the CHRC’s mandate and authority to screen complaints at the pre-investigative stage, as well as the reasonable grounds threshold imposed on complainants for filing a complaint under the *CHRA*, are both relevant and persuasive in determining whether the Commission’s interpretation of its own statutory authority and the analysis it has developed to exercise that authority are reasonable. I note the Commission’s interpretation of its authority and the five-element reasonable grounds analysis it has developed and applies are in keeping with the caselaw emanating from the Federal Court.

[93] I am also of the view that the absence of the expression “it appears to the Commission” from s. 20(1) of the *Act*, which appears in s. 41(1) of the *CHRA* and has been interpreted as inferring the exercise of discretion on the part of the CHRC, does not, in and of itself, lessens the relevance of the Federal Court’s jurisprudence in interpreting s. 20(1) of the *Act*. The Federal Court’s findings do not revolve around that

expression, which has been viewed as confirming the considerable amount of discretion conferred upon the CHRC (see *Hartjes* at para. 14).

[94] Therefore, I see no reason to depart from the findings and principles emanating from the Federal Court's caselaw in determining the Commission's authority and duty at the pre-investigative stage pursuant to s. 20(1).

The Commission's interpretation of its statutory authority under s. 20(1) of the Act and the reasonable grounds analysis it has developed are reasonable

[95] I am of the view that the Commission's interpretation of its statutory authority and duty to screen complaints under s. 20(1) to determine whether they disclose reasonable grounds for believing there has been a violation of the *Act* is reasonable. The Commission's position is in keeping with the wording of s. 20(1) interpreted in the context of the objects of the *Act* and the statutory mandate of the Commission regarding human rights complaints; the legislative history of s. 20(1); the legislative intent behind the 2009 amendments; and the relevant caselaw.

[96] In addition, I find that the five-element reasonable grounds analysis developed by the Commission falls within its authority and is a reasonable exercise of its authority under s. 20(1). Furthermore, the analysis is consistent with the caselaw emanating from the Federal Court, which I have found relevant and persuasive in determining the extent of the Commission's authority to screen complaints for investigation pursuant to s. 20(1).

[97] For ease of reference, I will repeat the five elements of the reasonable grounds analysis applied by the Commission to determine whether it is required to investigate a complaint in discrimination pursuant to s. 20(1):

1. the commission's jurisdiction to investigate the complaint;
2. the allegations must engage a prohibited area of discrimination under s. 9 of the *Act*;
3. the allegations must engage a prohibited ground of discrimination under s. 7 of the *Act*;
4. there must be an allegation of unfavourable treatment; and
5. there must be a reasonable argument that the alleged unfavourable treatment and the prohibited ground are linked.

[98] The first element of the analysis relates to the Commission's true jurisdiction to deal with a complaint. Clearly, the Commission would have no jurisdiction over a complaint if it related to a matter that falls within the jurisdiction of the federal government or of another territory or province.

[99] In addition, the Commission would have no jurisdiction to investigate a complaint that does not engage one of the prohibited areas of discrimination listed under s. 9 of the *Act*. Negative treatment occurring outside the areas set out in s. 9 do not constitute discrimination under the *Act*.

[100] The next three elements of the Commission's analysis, including the requirement that the complaint disclose a link between the alleged unfavourable treatment and a prohibited ground of discrimination, flow directly from: s. 7, which sets out the protected characteristics under the *Act*; the Commission's statutory mandate to investigate complaints of discriminatory practices under the *Act*; and the elements of the legal test to establish discrimination stated in *Moore v British Columbia (Education)*, 2012 SCC 61 at para. 33:

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

[101] In the absence of a factual foundation for one or more of these three elements, there would be no reasonable grounds to believe there has been discrimination under the *Act*.

[102] Therefore, the five elements of the analysis established by the Commission are all directly related to determining whether the complaint discloses reasonable grounds to believe there has been a violation of the *Act*. This is consistent with the authority and duty of the Commission under s. 20(1).

[103] In addition, I am of the view that requiring complainants to present or provide sufficient information or facts to satisfy the Commission that the situation they describe in their complaints could, if later supported by the evidence, establish the legal test for discrimination, is consistent with the reasonable grounds threshold that s. 20(1) imposes on complainants for filing a complaint with the Commission. Also, conducting the initial review on the basis that the allegations made in a complaint are true recognizes that complainants have no obligation to provide evidence when they make a complaint.

[104] In addition, the analysis adopted by the Commission is consistent with the approach set out in the relevant federal court jurisprudence that a decision to refuse a

complaint at the pre-investigative stage should only be made in plain and obvious cases. The initial review conducted under s. 20(1) takes place at a very early stage of the process and a decision to refuse a complaint in totality or in part before it is investigated essentially equates to a summarily dismissal. Therefore, I find the Commission's approach reasonable because it is consistent with its authority under s. 20(1) in light of the objects of the *Act* and its statutory mandate regarding complaints.

[105] Further, the initial reasonable grounds review ensures the Commission does not exceed its jurisdiction by investigating a complaint it clearly does not have the statutory authority or mandate to investigate. It also ensures the Commission's resources are properly directed and utilized to fulfill its important mandate under the *Act*.

[106] In addition, I am of the view that the slightly different interpretation proposed by Yukon does not affect the reasonableness of the Commission's interpretation of its authority pursuant to s. 20(1). Considering that the interpretation put forward by Yukon would not have much practical implications (Yukon agrees the Commission has the authority to screen complaints under s. 20(1) and agrees that the reasonable grounds analysis developed and applied by the Commission is in keeping with its statutory authority); and considering that I am not conducting a correctness review, I am of the view that I do not need to delve into Yukon's submissions any further to decide the question before me.

[107] As a result, I find that the Commission's interpretation of s. 20(1) as giving it authority to screen complaints at the pre-investigative stage to ensure they disclose reasonable grounds for believing there has been a contravention of the *Act*, and the

five-element reasonable grounds analysis it has developed to exercise that authority are reasonable.

[108] Mr. Bachli also argues the Director has no authority to screen complaints.

Mr. Bachli submits only the Commission, not the Director, is vested with the power to investigate complaints.

[109] Section 19 of the *Act* sets out the responsibilities of the Director. It directly addresses and answers Mr. Bachli's concerns and argument on this point.

Section 19 reads:

There shall be a Director of Human Rights responsible to the commission for

- (a) ensuring that complaints are dealt with in accordance with this Act;
- (b) carrying out, in accordance with the commission's policies and directives, the administration of this Act.

[110] Pursuant to s. 20(1), complaints are made to the Commission and it is the Commission that is responsible for their investigation. However, s. 19 specifically confers upon the Director the authority to deal with complaints and the responsibility to ensure they are dealt with in accordance with the *Act*.

[111] Also, the wording of s. 4 of the *Regulations* provides that the Director has the mandate to conduct or direct investigation of a complaint on behalf of the Commission. It also gives the Director the mandate to determine whether a complaint requires investigation under s. 20(1).

[112] The *Regulations* also set out a process that provides for a review of the Director's decision by the Commission.

[113] Therefore, the Commission's position that the Director has the authority and responsibility, at the initial stage, to determine whether a complaint requires investigation in accordance with s. 20(1) of the *Act*, subject to the Commission's review, is reasonable.

[114] Mr. Bachli's argument on this issue cannot succeed and is dismissed.

(iii) Mr. Bachli's Rights to Procedural Fairness

- (a) Did the Commission breach its duty of procedural fairness by not permitting Mr. Bachli to attend the review hearing and/or present oral evidence and/or make oral submissions at the review hearing?**

Positions of the Parties

The Petitioner - Mr. Bachli

[115] Mr. Bachli submits the Commission breached its duty of procedural fairness by denying him the right to attend his review hearing to provide oral evidence. He submits he was barred from the review hearing. In addition, Mr. Bachli submits there is no record demonstrating that the Commission Members reviewed the documents he provided in support of the review.

The Respondent - the Commission

[116] Counsel for the Commission submits the Commission does not have the statutory obligation to hold a formal hearing or to allow a complainant to make both written and oral submissions on review.

[117] Counsel for the Commission submits the Commission met its duty of procedural fairness by allowing Mr. Bachli to file extensive written submissions and documentation that the Commission Members considered on review.

The Respondent - Yukon

[118] Counsel for Yukon did not make submissions on this point, which Mr. Bachli raised in his oral submissions at the hearing of the judicial review.

Analysis

[119] Before addressing this ground of review, I want to clarify that, even though all parties appeared to refer, to some extent, to Mr. Bachli's appeal to the Commission, there is no statutory right of appeal of a decision of the Director to the Commission.

[120] Section 5 of the *Regulations* is the only provision that specifically provides for a right of review, not an appeal, of a decision made by the Director to the Commission.

Section 5(3) states that a complainant may ask the Commission to review the Director's decision to suspend or stop an investigation by filing a written request with the Commission within 30 days of receiving written notice of the Director's decision.

[121] Whether the Commission had the specific procedural duty to allow Mr. Bachli to attend the review in person or remotely to present oral evidence and/or make oral submissions must be determined with reference to all the circumstances. That determination is informed by a list of non-exhaustive factors set out in *Baker* that include:

... (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:
... (*Vavilov* at para. 77, citing *Baker* at paras. 22-27)

[122] First, neither the *Act* nor the *Regulations* require the Commission to hold a formal review hearing of a decision made by the Director regarding the investigation of a complaint.

[123] Section 5(4) of the *Regulations* provides that the Commission must give the complainant at least 30 days notice of when it will review the Director's decision.

[124] Section 5(5) of the *Regulations* sets out what the Commission must consider in reviewing the Director's decision. The Commission must consider the Director's written notice (reasons) of decision provided to the complainant. It must also review any written or oral submissions by or on behalf of the complainant with respect to the Director's decision.

5(5) In reviewing the Director's decision, the Commission shall consider

(a) the Director's written notice of the decision given to the complainant under subsection (2); and

(b) any written or oral submissions by or on behalf of the complainant pertaining to the Director's decision to suspend or stop the investigation. (my emphasis)

[125] The use of the word "or" reveals the Commission must consider either written submissions or oral submissions by a complainant. Therefore, the Commission does not have the statutory obligation to allow a complainant to make both written and oral submissions on review. In addition, the Commission is not statutorily required to accept or consider written or oral evidence on review. As previously stated, at the pre-investigative stage, the complainant bears the burden of providing sufficient allegations of facts or information to reveal reasonable grounds for believing there has been a contravention of the *Act*. At this early stage in the process, a complainant is not required

to provide evidence. It would run contrary to the purpose and efficiency of the pre-investigative review process to impose on the Commission a procedural duty to receive oral or written evidence where its review is performed on the basis that the complainant's factual allegations or information are true. The reasons provided by the Commission Members reveal they accepted Mr. Bachli's allegations as true, including those regarding the unsuitability and unsafe condition of his equipment, the lack of proper services provided by Yukon, and the negative impact on him and his family.

[126] The record reveals that, on June 23, 2021, Commission staff emailed Mr. Bachli to acknowledge receipt of his written request for a review. In this email Commission staff clearly stated to Mr. Bachli that he was entitled and encouraged to provide written submissions in support of his position. In the alternative, Commission staff indicated he may be permitted to make oral submissions:

... Any written submissions will be due 10 days before the review hearing and are intended to provide the Commission Members with reasons why they should overturn the Director's decision. Alternatively, we require notification if you wish to appear at the Review Hearing to make oral submissions on the decision to not accept the complaint, rather than written submissions. We do not encourage oral submissions at this time due to the COVID-19 pandemic.
(my emphasis)

[127] On June 24, 2021, Commission staff sent a letter by email to Mr. Bachli informing him that the hearing would take place on August 23, 2021. The letter clearly indicated that he had until Friday, August 13, 2021, to provide any further written submissions or to make a request to attend the review hearing by teleconference to make oral submissions.

[128] The record reveals Mr. Bachli received these two emails. However, Mr. Bachli did not specifically nor directly indicate or confirm he wanted to attend or appear at the review hearing within the timeline provided to him. The only passage of Mr. Bachli's correspondence that could be interpreted as such is found in the body of the written submissions his wife emailed to Commission staff on July 15, 2021, in which he states: "I will also provide factual evidence on the hearing date".

[129] On July 16, 2021, Commission staff emailed Mr. Bachli to inform him that the review hearing would take place on August 24, 2021, instead of August 23rd. In that email, Commission staff also addressed questions Mr. Bachli had regarding the identity and qualifications of the Commission Members who had been assigned to the review. There is nothing in that email that could be seen as an acknowledgement or understanding on the part of Commission staff that Mr. Bachli wanted to attend the review hearing.

[130] It is only in the afternoon of August 23rd, the day before the review, that, for the first time, Mr. Bachli clearly indicated his intention to attend the review, not by teleconference, as provided by the Commission, but in person. Mr. Bachli wrote:

Lisa, with the hearing being set for 5:00, how do I get into your building, as I will be present for this hearing?

[131] Commission staff promptly responded to Mr. Bachli that the Commission allows complainants to make oral submissions when they are unable to provide written submissions. However, the Commission does not allow complainants to make both oral and written submissions. Commission staff added:

... In any case, if a complainant needed to make oral submissions they would only be allowed in the meeting to make such submissions (10 minutes) then they would leave

the meeting as the Commission Members' deliberations are privileged. As such, with your written submissions provided to the Commission Members, you will not need to attend in person. Furthermore, as stated in my email below from June 23, 2021 we would have required much more notice of your intention to make oral submissions.

[132] As a result, Mr. Bachli did not appear in person or by teleconference at the review hearing, which proceeded as scheduled on August 24th.

[133] The facts before me do not support Mr. Bachli's argument that the review proceeded in secret and that he was denied procedural fairness.

[134] First, the Commission does not have the statutory obligation to hold a formal review hearing. Second, the Commission does not have the statutory obligation to allow a complainant to make both written and oral submissions on review. It must permit and consider one or the other.

[135] Clearly, the Commission's decision on review was important to Mr. Bachli because it would determine whether parts of his complaint would be investigated or not. In addition, in light of all the circumstances before me, it was legitimate for Mr. Bachli to expect he would be able to make either written or oral submissions in support of his position on review. The same cannot be said about Mr. Bachli's expectations that he would also have the right to appear and give oral evidence before the Commission. The record reveals Mr. Bachli was permitted to provide extensive written materials in support of his request for a review. In addition to his initial request for review and accompanying submissions, the record reveals that on July 4, 2021, Mr. Bachli provided documentation that included several emails in support of his position. He provided further submissions on July 15th and August 15th. Mr. Bachli's wife also delivered an envelope containing documents to the Commission's office. The record reveals

Mr. Bachli's written submissions and documentation were accepted by the Commission and provided to the Commission Members before the review. The record, including the decision letter sent by the Commission to Mr. Bachli, reveals the Commission Members considered what he submitted for the review.

[136] As a result, I am of the view the Commission met its duty of procedural fairness by allowing, accepting, and considering Mr. Bachli's written submissions and documentation.

[137] In addition, even though the Commission did not have the statutory obligation to allow Mr. Bachli to make both written and oral submissions on review, Commission staff clearly communicated to Mr. Bachli he had until August 13th to advise if he wanted to make oral submissions by teleconference at the review. However, I find Mr. Bachli failed to properly notify the Commission of his desire to do so in a timely manner. Mr. Bachli never responded directly to Commission staff that he wanted to attend the review to provide oral evidence or make oral submissions. The short sentence Mr. Bachli inserted in the middle of the written submissions emailed to the Commission on July 15th, stating his intention to provide evidence at the hearing, was not sufficient to properly and timely communicate his desire to attend the review to make oral submissions (or provide oral evidence as he argued before me). I note Mr. Bachli's submissions were destined to the Commission Members not Commission staff who was tasked with corresponding with him regarding the review process. In addition, I fail to see how the email Mr. Bachli sent to Commission staff, the afternoon before the review, advising the Commission he intended to attend the review in person – despite being advised that any appearance, if authorized, would have to be by teleconference – triggers any procedural obligation on

the part of the Commission to facilitate Mr. Bachli's attendance. In addition, I am of the view the COVID-19 pandemic justified the Commission taking further health precautions, such as requiring that any oral submissions, if permitted, be made by teleconference.

[138] The record does not support Mr. Bachli's submission that important information appearing on the cover page of his complaint entitled "Original Contact Information Human Rights Complaint" was withheld from the Commission. Even if that specific page were not provided to the Commission Members on review, the record reveals the Commission accepted and reviewed all of Mr. Bachli's written submissions and documentation, which, overall, contained that information.

[139] Finally, the Commission Members did not have to allow Mr. Bachli to observe or listen to their deliberations, which are privileged, or provide him with a copy of the notes they may have taken while reviewing the documents or discussing his matter. Nor did they have the obligation to record the content of their deliberations. The agenda of the Commission Members meeting of August 24, 2021, which is part of the record before me, reveal they met to discuss a number of matters, including Mr. Bachli's request for review. The fact there is no record of the content of the Commission Members discussions does not mean the Members did not review or analyze the documents before them, as Mr. Bachli suggests. The written reasons for decision are the record. Furthermore, the Commission Members notified Mr. Bachli of their reasons for decision in writing by way of a letter, as provided in the *Regulations*. The fact Mr. Bachli disagrees with the Commission Members' reasons for decision or finds they did not elaborate sufficiently with respect to certain issues he raised, including the safety and

unsuitability of his equipment, does not mean they failed to review and analyze the materials provided to them. The sufficiency of reasons is a separate issue I will consider when reviewing the reasonableness of the Commission's decision.

[140] Mr. Bachli's argument on this point cannot succeed.

- (b) Did the Commission breach its duty of procedural fairness due to conflict of interest arising from the same in-house counsel providing legal advice to the Director and the Commission with respect to Mr. Bachli's complaint?**

Positions of the Parties

The Petitioner - Mr. Bachli

[141] Mr. Bachli submits the Director's decision to reject parts of his complaint for investigation was informed by the interpretation of caselaw by in-house counsel.

Mr. Bachli also submits that in-house counsel provided legal advice to the Commission Members before they made their decision on review. Mr. Bachli submits he was unaware of the complexity of the human rights process at the intake level and was surprised by the complexity of the decision he received, which, he submits demonstrate the Director and the Commission had a staff lawyer directing their thinking process at all levels. Mr. Bachli submits that the Commission receiving essentially the same legal advice that was provided to the Director nullifies any argument the Commission took a "fresh look" at his case.

[142] Mr. Bachli also submits that the joint documents he received from the Commission and Yukon in this matter as well as the similar positions they advanced on judicial review demonstrate the Commission is not independent.

The Respondent - the Commission

[143] Counsel for the Commission made brief oral submissions on this issue, which was raised by Mr. Bachli at the hearing of the judicial review. Counsel for the Commission acknowledged that the Commission's in-house counsel provides legal advice to the Director, in the execution of his duties for the Commission, upon request. In-house counsel also provides legal advice to the Commission upon request. However, counsel submits the Director and Commission Members do not request legal advice every time they make a decision regarding a complaint. In addition, counsel submits that, even when they request legal advice, the Director and the Commission Members are not bound to follow legal advice they receive. Finally, counsel submits the Director and the Commission, not counsel, are the decision-makers.

[144] Counsel for the Commission acknowledged that he and counsel for Yukon compiled and filed a joint book of authorities. Counsel submits they did so to comply with the *Rules of Court* and Practice Directions of the Supreme Court of Yukon.

The Respondent - Yukon

[145] Yukon did not make submissions on this issue, which was raised by Mr. Bachli at the judicial review hearing.

Analysis

[146] First, as I indicated to Mr. Bachli at the hearing, the fact the Commission and Yukon filed a joint book of authorities in this matter, in keeping with Practice Direction, General-7 of the Supreme Court of Yukon, and advanced similar arguments to oppose Mr. Bachli's petition do not lead to the conclusion that the Commission does not act independently from Yukon.

[147] Second, with respect to the issue of legal advice provided by in-house counsel raised by Mr. Bachli, counsel for the Commission acknowledged that the Commission's in-house counsel provides legal advice to the Director, in the execution of his duties for the Commission and Commission Members upon request.

[148] The record reveals Commission Members sought and received legal advice from in-house counsel prior to making their decision on review.

[149] The record before me does not reveal the Director sought legal advice prior to making his decision. In addition, the record does not support drawing the inference he did. The fact the Director's decision is articulated around the five-element reasonable grounds policy adopted by the Commission and refers to caselaw does not necessarily lead to the conclusion he sought legal advice prior to making his decision or that legal counsel was involved in the Director's decision. As the record does not support the premise upon which Mr. Bachli has raised the issue of conflict of interest or appearance of conflict of interest, I do not need to analyze this issue in any more details before rejecting it. In any event, I note the Director and the Commission Members are the decision-makers. As such, they are free to accept, adopt, reject or refuse part or all of any legal advice they may receive on a specific question or issue in coming to their respective decisions.

[150] Mr. Bachli's argument on this point cannot succeed.

[151] As a result, I find the Commission did not breach its duty of procedural fairness.

iv. Did the Commission err in affirming the Director's decision to investigate Mr. Bachli's complaint in discrimination on the prohibited ground of physical or mental disability but not investigate his complaint on the prohibited ground of age?

[152] The Commission Members agreed with the Director that the facts alleged in Mr. Bachli's complaint could not reasonably support the conclusion there is a link between the alleged unfavourable treatment by Yukon and the prohibited ground of age. Therefore, it confirmed the Director's decision not to accept for investigation the parts of Mr. Bachli's complaint in discrimination based on age.

[153] The issue on review is whether the Commission Members' decision was reasonable.

Positions of the Parties

The Petitioner - Mr. Bachli

[154] Mr. Bachli disagrees with the Commission Members' decision. He submits his complaint reveals that age was a factor in the unfavourable manner in which he alleges Yukon treated him.

[155] Mr. Bachli questions the competence of the Commission Members. He argues they are not qualified or knowledgeable in equipment structure, fabrication, upholstery, and safety requirements for equipment used by paraplegics. He submits that, as a result, they did not understand the mechanical aspect of his complaint, which supports a conclusion that age was a factor in the unfavourable treatment he allegedly received. Mr. Bachli submits only a qualified tradesman in that area can understand that aspect of his complaint. Mr. Bachli submits the equipment manual as well as the examples of equipment failure he provided demonstrate the equipment provided by Yukon is so inadequate that it constitutes a personal insult.

[156] Mr. Bachli submits the Commission Members erred in failing to consider and thoroughly investigate the safety issues and concerns arising from the inadequate and faulty equipment provided to him. Mr. Bachli submits it was not reasonable for the Commission Members to reject his complaint without analyzing and examining in detail what impact faulty and dysfunctional equipment has on someone his age. Mr. Bachli submits he provided concrete examples revealing the lack of safety of his faulty equipment.

[157] Mr. Bachli also submits the Commission failed to uphold the requirement of Yukon to maintain the equipment it provides in a state of good repair.

[158] Mr. Bachli submits the physical disability aspect of his complaint, which was accepted by the Commission, is connected to age because he cannot manipulate faulty equipment. Mr. Bachli submits the facts he put forward demonstrate how dysfunctional equipment affects him, as a senior citizen, and his wife who assists him.

[159] Mr. Bachli submits that he and his wife's repeated requests for proper and adequate services and equipment to all levels of Yukon government over the past decade have been ignored.

[160] In addition, Mr. Bachli submits Yukon has sent unqualified workers to his home to provide the required services or perform the needed repairs to his equipment. Mr. Bachli submits that, at least once, they have been told by Yukon staff to perform the necessary repairs themselves.

[161] Mr. Bachli submits his complaint reveals Yukon is in possession of all the specifications it needs to order the equipment he requires. Yet, Yukon has not replaced

his commode, which was due for replacement many years ago. In addition, the replacement of his wheelchair (now irreparable and non-functioning) is also overdue.

[162] Mr. Bachli submits the elderly have the inherent right to life, dignity and integrity of their persons under the *Canadian Charter of Rights and Freedom*, Part 1 of the *Constitution Act, 1982* (the “*Charter*”). He submits the *Charter* also protects the right of Canadians to live anywhere in Canada. Mr. Bachli submits this includes the right of senior citizens to remain in their home as long as possible. Mr. Bachli submits government agencies, such as Home Care in the Yukon, have been established to support that right. Mr. Bachli submits Yukon has breached that duty by failing to supply and maintain the basic equipment he requires as a senior with a physical disability to remain in his home and enjoy basic living activities such as work, recreation and socialization.

[163] Mr. Bachli submits it should be clear that with age people lose agility and require proper equipment that is adapted to the environment in which they live. Mr. Bachli submits it is reasonable to assume life becomes more difficult as one ages, and, as a senior, it is also more difficult to heal from any injuries suffered caused by defective and unsafe equipment.

[164] In addition, Mr. Bachli submits the equipment provided to him (or lent to him after his wheelchair became unusable) is not meant for home use. It is meant for institutional settings. He submits the equipment is too big, not meant to be operated by one person and not safe for him and those helping him, including his wife. Mr. Bachli submits this has greatly affected his quality of life. Mr. Bachli submits his right to dignity has also been impacted because his wife has to stay in the room when he uses the commode.

Mr. Bachli submits that, if nothing is done to remedy the situation, he will no longer be able to reside at home with his family and will be facing institutional care soon.

[165] Mr. Bachli submits those involved in this administrative and court process have failed to hold Yukon accountable for failing and avoiding to meet its obligations towards him. Mr. Bachli submits that not only have the administrative and court processes not solved his situation, they have further negatively impacted his and his wife's lives and have taken a toll on his and his wife's mental health.

The Respondent - the Commission

[166] The Commission made limited submissions on the reasonableness of its decision.

[167] The Commission opposes Mr. Bachli's petition and submits its written decision is intelligible, coherent, and justified.

[168] The Commission submits its decision and the Director's decision specifically referred to and addressed the factors considered in determining they could not accept Mr. Bachli's complaint in discrimination based on age for investigation. In addition, the Commission submits its decision directly addressed Mr. Bachli's stated concerns with respect to the Director's decision.

[169] The Commission submits it accepted and reviewed all the documents and submissions filed by Mr. Bachli in support of his request for a review. However, it was unable to find in those documents a sufficient link between the facts related to the alleged unfavourable treatment and the prohibited ground of age.

[170] The Commission submits its decision is reasonable and should not be overturned.

The Respondent - Yukon

[171] Yukon submits the Commission Members' decision to confirm the Director's decision was within the Commission's authority under the *Regulations*. In addition, Yukon submits the written reasons issued by the Commission demonstrate the decision is justified, intelligible, and transparent.

[172] Yukon submits the information provided by Mr. Bachli did not demonstrate he had reasonable grounds for believing Yukon had discriminated against him based on age. Yukon submits the Commission's decision is reasonable.

Analysis

[173] In my view, the decision of the Commission Members to confirm the Director's decision not to investigate the parts of Mr. Bachli's complaint against Yukon based on the prohibited ground of age is reasonable.

[174] The Commission Members communicated their decision by way of a letter to Mr. Bachli. In their letter, the Commission Members first informed Mr. Bachli of their decision to confirm the Director's decision to accept the parts of his complaint in discrimination against Yukon based on physical or mental disability but to refuse the parts of his complaint based on age. The Commission Members listed the materials they considered in coming to their decision. They then accurately set out and explained the reasonable grounds analysis the Commission applies under s. 20(1) of the *Act*, as well as the five-element of the reasonable grounds analysis they use in determining whether to overturn or confirm the Director's decision.

[175] The Commission Members adequately summarized the background of Mr. Bachli's complaint and Mr. Bachli's submissions on review. Their summary captures

the essence of the lengthy submissions and supporting documentation Mr. Bachli filed in support of his review, which are included in the record before me. The Commission Members properly regrouped Mr. Bachli's submissions in two themes before reviewing them: (i) problems with Mr. Bachli's equipment; and (ii) allegations of conflict of interest among Commission Members based on their regular employment outside their appointment as members of the Commission. I do not intend to review the latter because Mr. Bachli did not raise the Commission Members' respective regular employment as an issue on judicial review.

[176] The Commission Members did not disregard Mr. Bachli's information and submissions regarding the lack of suitability and safety of his equipment. They specifically noted Mr. Bachli reported that Yukon had failed to conduct proper safety inspection and to provide him with the equipment manual. They also noted Mr. Bachli had provided information regarding the unsuitability of his equipment for home use. In addition, they noted Mr. Bachli had provided a recent example of Yukon's failure to perform proper and timely repair on his wheelchair. In doing so, the Commission Members recognized Mr. Bachli had provided sufficient information regarding the existence of an alleged unfavourable treatment by Yukon. However, as stated earlier, at the initial stage, the Commission does not have to conduct a thorough investigation into a complainant's factual allegations because the Commission's analysis proceeds on the basis the factual allegations are true. Therefore, the Commission did not have to appoint an expert or a qualified tradesman to analyze the mechanical aspect of Mr. Bachli's complaint or research the impact of faulty equipment and lack of repairs and services on seniors. They based their assessment on the material facts asserted by

Mr. Bachli. As previously stated, the Commission is not statutorily mandated to investigate a matter until it is satisfied the complaint discloses reasonable grounds for believing there has been discrimination under the *Act*. As stated earlier, it is incumbent on the complainant to provide sufficient information or factual allegations in support of their complaint.

[177] The Commission Members noted the issues Mr. Bachli identified in his submissions mirrored the issues raised in his complaint. The Commission Members' conclusion in that regard is justified based on the record before me.

[178] The Commission Members appropriately stated that the only issue before them with respect to Mr. Bachli's complaint was to determine whether there was any error in the Director's reasons, or any additional information provided to them, indicating that Mr. Bachli's complaint should be accepted on the basis of age in addition to physical or mental disability.

[179] The Commission Members' decision reveal they appropriately and importantly identified that the Director had refused the parts of Mr. Bachli's complaint based on age because he determined the facts alleged in the complaint could not reasonably support the conclusion that the unfavourable treatment and the prohibited ground of age were linked. The Commission Members properly clarified this was the discrete issue they needed to review.

[180] As stated previously, it is reasonable for the Commission to interpret s. 20(1) of the *Act* as requiring it to determine whether a complainant has reasonable grounds for believing there has been a contravention of the *Act* before investigating a complaint. In addition, it is also reasonable to interpret s. 20(1) as requiring the complainant to assert

the facts or information that, if taken as true, could provide a basis to conclude that a contravention of the *Act*, in other words discrimination under the *Act*, has occurred. To establish discrimination, there must be sufficient information or factual allegations to reveal, among other things, that a protected characteristic under the *Act*, in this case age, was a factor in the unfavourable manner in which the complainant was treated. It is therefore reasonable for the Commission to ensure, at the pre-investigative stage, that the facts or information put forward in a complaint, if taken as true, could reveal a causal link between the unfavourable treatment and a prohibited ground of discrimination. Otherwise, there would not be reasonable grounds to believe discrimination has occurred under the *Act* and the Commission would not have jurisdiction to investigate the complaint.

[181] It is clear the Commission accepted that Mr. Bachli, as a senior citizen, possesses the protected characteristic of age. In addition, they accepted that the lack of safety and suitability of the equipment as well as the lack of proper and timely repairs by Yukon particularly affected Mr. Bachli as a senior and impacted his ability to live and remain at home. The Commission Members stated in their letter:

At point 4 above, you state that dealing with a flat tire on your wheelchair is particularly difficult, as you are a senior. You also note at point 5 that it should be clear that one loses agility with age, and that proper equipment is required in the environment in which a senior lives. The Commission Members do not question that any alleged difficulties with the equipment would be harder for a senior with reduced mobility. We accept that this would be true, and sympathize with any such difficulties.

[182] Having acknowledged that Mr. Bachli, as a senior, was particularly affected by the alleged unfavourable treatment by Yukon, the Commission Members returned to the

question raised by Mr. Bachli on review, which is whether the factual allegations he put forward could support the conclusion there is a link between the alleged unfavourable treatment and the prohibited ground of age. The Commission Members determined the facts provided by Mr. Bachli did not reveal such a link:

However, that is not the issue in the present appeal. Although the Commission Members appreciate that your age may make the alleged faulty equipment more difficult to live with, in order for a Complaint to be accepted, the facts alleged in a complaint must indicate a direct connection between the alleged unfavourable treatment and someone's protected characteristic. This means that you must provide facts indicating *your age was a factor* in the manner in which you were treated by the Respondent. In this case, this would mean providing some facts indicating that the Respondent has failed to provide you with appropriate equipment, failed to respond promptly to your requests, or failed to do a safety inspection *because of your age*. Even if the negative impacts of the alleged behaviour are particularly impactful because of your age, this does not mean that decisions were made *because of your age*.

Accordingly, the Commission Members accept the Director's Decision that no such facts were present in your Complaint. No additional information was provided in your appeal submissions or additional materials indicating that your age was a factor in the unfavourable treatment you have described.

[183] I am of the view the Commission Members' conclusion is reasonable. While the factual allegations provided by Mr. Bachli, if taken as true, reveal the faulty and unsuitable equipment, as well as the lack of timely and proper services, have been particularly impactful on him because of his age and have impeded his ability to live and remain at home, these allegations do not necessarily lead to the conclusion that Yukon acted the way it did in whole or in part because Mr. Bachli is a senior citizen. While the impact of an alleged unfavourable treatment may be considered in determining whether

the complainant has alleged sufficient material facts to reveal a causal link between the prohibited ground and the unfavourable treatment, it is not necessarily conclusive. It was therefore reasonable for the Commission Members to determine that the particular impact of the alleged unfavourable treatment felt by Mr. Bachli because of his age did not on its own reveal a link between the prohibited ground of age and the unfavourable treatment.

[184] In addition, to address Mr. Bachli's *Charter* argument (without deciding whether the facts alleged by Mr. Bachli could amount to a *Charter* violation or a failure by Yukon to fulfill its statutory obligations), I would say that a *Charter* breach or the failure by government to fulfill its statutory obligations do not necessarily amount to discrimination.

[185] In addition, the specific allegations that Yukon staff told Mr. Bachli and/or his family to repair his equipment themselves; and that Yukon staff have referred to Mr. Bachli as a difficult client, do not provide a basis to conclude Mr. Bachli's age played a role in the alleged unfavourable treatment he received, even when considered in light of the other factual allegations.

[186] I note that neither Mr. Bachli's initial complaint nor the additional information and submissions he provided refer to any specific incident where Yukon would have overtly negatively referred to or commented on Mr. Bachli's age, referenced his age, or made any insinuation regarding his age when dealing with him. In addition, the facts as alleged in the complaint and the additional materials Mr. Bachli provided to the Commission on review do not support a conclusion that Yukon treated Mr. Bachli differently because of his age.

[187] Finally, I am unable to agree with Mr. Bachli that his situation has reached such a level that it necessarily leads to the conclusion his age was a factor in the manner in which Yukon has allegedly treated him.

[188] I acknowledge that signs of discrimination may be subtle and contextual. Nonetheless, a complainant must allege material facts capable of supporting an inference that a prohibited ground was a factor in the adverse or unfavourable treatment complained of, or, put another way, that there is a link between the prohibited ground and the unfavourable treatment to trigger the Commission's statutory mandate to investigate under the *Act*.

[189] I am of the view it was reasonable for the Commission Members to conclude the facts Mr. Bachli alleges cannot reasonably support the conclusion that age was a factor in the unfavourable manner in which he has allegedly been treated by Yukon.

Therefore, it was reasonable to conclude there are no reasonable grounds for believing there has been a contravention of the *Act* with respect to the parts of Mr. Bachli's complaint based on age. As a result, I find the Commission Members' decision to confirm the Director's decision to refuse the parts of Mr. Bachli's complaint based on age is reasonable.

CONCLUSION

[190] The Commission's interpretation of s. 20(1) of the *Act* as giving it statutory authority to screen complaints it receives to determine whether to investigate them in whole or in part pursuant to s. 20(1) of the *Act* is reasonable.

[191] The reasonable grounds analysis the Commission has developed to screen complaints at the pre-investigative stage pursuant to s. 20(1) of the *Act* is reasonable.

[192] The Commission did not breach its duty of procedural fairness on review.

[193] The decision of the Commission Members to confirm the Director's decision to accept for investigation Mr. Bachli's complaint in discrimination against Yukon based on physical or mental disability but not based on age is reasonable. It is, therefore, upheld.

[194] Mr. Bachli's petition is dismissed.

CAMPBELL J.