NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Human Rights Commission) v. Charlton*, 2017 NSCA 55

Date: 20170620
Docket: CA 456573
Registry: Halifax

Between:

The Nova Scotia Human Rights Commission

Appellant

v.

Dewayne Charlton, Holmestead Cheese Sales Inc., Kathryn A. Raymond, in her capacity as Nova Scotia Human Rights Board of Inquiry Chair, and the Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia

Respondents

Judge:	The Honourable Justice Joel Fichaud
Appeal Heard:	June 1, 2017, in Halifax, Nova Scotia
Subject:	Settlement of complaint under *Human Rights Act*, R.S.N.S. 1989, c. 214
Summary:	Mr. Charlton filed a complaint under the *Human Rights Act* against his employer. The employer denied discrimination. The Human Rights Commission appointed a Board of Inquiry. Section 34(5) of the *Act* says that, upon settlement, the Board "shall report the terms of settlement in its decision with any comments the board deems appropriate". The parties settled the dispute, for an apology and compensation but without an admission of discrimination, and submitted the settlement agreement to the Board under s. 34(5). The Board declined to report the settlement for several reasons, mainly because the terms of settlement did not require the employer adopt a sufficiently detailed program to define and prevent discrimination and promote affirmative action. The Human Rights Commission appealed.

Issues: Did the Board commit an appealable error by applying a merits-based adjudication to the Board's reporting function under s. 34(5) of the *Act*?

Result: The Court of Appeal allowed the appeal and directed that the settlement agreement be reported under s. 34(5).
The Board's reporting function under s. 34(5) did not authorize the Board of Inquiry to disapprove the merits or substance of the parties' terms of settlement. The Court listed the standards to be considered by a Board of Inquiry under s. 34(5). The settlement agreement complied with those standards. The Board's refusal to report the settlement agreement derived from the Board's unreasonable interpretation of its authority under s. 34(5).

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Respondents

Judges:	Fichaud, Bryson and Van den Eynden, JJ.A.
Appeal Heard:	June 1, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Fichaud, J.A., Bryson and Van den Eynden, JJ.A. concurring
Counsel:	Kymberly Franklin for the Appellant Edward A. Gores, Q.C., for the Respondent Attorney General of Nova Scotia, watching only The other Respondents not appearing

Reasons for judgment:

[1] Mr. Charlton filed a complaint under the *Human Rights Act*. He alleged his employer, Holmestead Cheese Sales, discriminated against him based on physical disability. Holmestead denied the allegation. The Human Rights Commission appointed a Board of Inquiry. But the parties preferred negotiation to litigation. They presented the Board with a written settlement agreement. The agreement did not acknowledge that there had been discrimination, but gave Mr. Charlton compensation and a written apology. Mr. Charlton and Holmestead were content.

[2] Section 34(5) of the *Human Rights Act* says where the complaint "is settled by agreement among all parties, the board shall report the terms of settlement in its decision with any comments the board deems appropriate". Reporting means the agreement is appended to a Board order, to assist with enforcement. The Board declined to "report" the Charlton/Holmestead settlement agreement. The Board said the settlement was not in the public interest, mainly because its terms did not require that Holmestead adopt a sufficiently detailed program to define and prevent discrimination and promote affirmative action.

[3] The Commission appeals the Board's refusal to report the settlement agreement. The appeal turns on whether s. 34(5) entitles the Board of Inquiry to question the merits or substance of the terms of settlement.

Background

[4] On October 31, 2014, Mr. Dewayne Charlton filed a complaint with the Nova Scotia Human Rights Commission.

[5] He had been employed as a truck driver by Holmestead Cheese Sales Inc. of Aylesford, in the Annapolis Valley. On July 21, 2014, he suffered a hernia, and Holmestead placed him on medical leave. On August 26, 2014, Mr. Charlton had corrective surgery, followed by a period of recuperation. On October 2, 2014, he broached his return to work with Holmestead's Mr. Nick Tziolas. According to Mr. Charlton's complaint, Mr. Tziolas accused him of "doing nothing all summer but lazing around at home instead of coming to work", and terminated Mr. Charlton's employment. According to Holmestead, Mr. Charlton had been observed doing physical work, from which Mr. Tziolas inferred that he was malingering. There has been no trial to determine the accuracy of either version.

[6] Mr. Charlton's complaint said that Holmestead discriminated based on disability, a prohibited ground under ss. 5(1)(d) and (o) of the *Human Rights Act*, R.S.N.S. 1989, c. 214.

[7] On June 18, 2015, under s. 32A(1) of the *Human Rights Act*, the Human Rights Commission appointed Ms. Kathryn Raymond to chair a one-person Board of Inquiry. My references to the "Chair" mean Ms. Raymond in this capacity.

[8] On July 22, 2015, the Chair held a case management conference attended by the parties. Mr. Charlton and Holmestead were unrepresented, and the Human Rights Commission had counsel. The parties expressed an interest in settling. The Commission assists with restorative negotiation which is premised on mutual understanding rather than assignment of fault.

[9] Further case management conferences with the Chair occurred on September 3 and October 7, 2015.

[10] On October 7, the Commission's counsel informed the Chair that, the day before, the parties had agreed to settle on the basis that Holmestead would apologize to Mr. Charlton and pay Mr. Charlton $752.08, representing two weeks' pay. As yet, there was no signed agreement, the wording of the apology was unfinalized and it was not clear whether Holmestead was admitting liability. The October 7 meeting was adjourned.

[11] On October 27, and again on October 29, 2015, the Chair wrote to the parties with directions on the process for presenting a settlement to a board of inquiry under s. 34(5). The correspondence said, among other things, that the Board must be satisfied the settlement was in the "public interest". From these letters, it was apparent that, in the Chair's view, the Board's assessment of public interest could involve a significant factual inquiry into the merits, needing evidence, and determination of substantive issues such as whether the settlement is "reasonable" when compared to the outcomes in reported adjudicated cases.

[12] The Board of Inquiry reconvened on November 3, 2015. Still there was no signed settlement agreement. The Chair again adjourned so the parties could culminate their arrangement.

[13] On November 4, 2015, counsel for the Commission wrote to the Chair, copied to Mr. Charlton and Holmestead's principals:

> Further to our discussions on yesterday's date. I can confirm that the parties wish to continue with settlement discussions. The parties had originally agreed to the restorative process and wish to proceed with that process. We will be scheduling a meeting with all parties present, as time permits. Once we have come to a full agreement on more than just the two items that have been indicated, I will contact you and we can schedule a teleconference. Should any of the parties have a question for you we will contact immediately.
>
> …

[14] On March 15, 2016, the Board of Inquiry reconvened with the parties and the Commission's counsel. The Chair was presented with a written "Restorative Agreement" signed by Mr. Charlton, Holmestead and counsel for the Commission ("Restorative Agreement"). Holmestead was to pay Mr. Charlton $752.08, or two weeks' pay, "as general damages" and provide a written apology that was appended during the hearing. The Restorative Agreement recited that: (1) Mr. Charlton "believes that he was discriminated against", though (2) Holmestead "denies it discriminated against the Complainant", and that (3) Mr. Charlton and the Commission "understand and accept that [Holmestead] does not, by this Restorative Agreement, admit any liability", while (4) Holmestead "acknowledges the hurt feelings of the Complainant". Article 6 spoke to the public interest:

> 6. The NSHRC supports the Agreement as being in the public interest in the circumstances of this case because the parties have assessed and addressed the concerns raised by each other which is represented by the resolutions found in this solution. The parties also indicated to the NSHRC that they prefer the outcomes they can create and take responsibility for than those imposed by a Board Chair at a Board of Inquiry.

[15] As for the Commission's formal approval of the Restorative Agreement, at the March 15 hearing the Commission's counsel informed the Chair:

> … This agreement went [to] the meeting of the Commissioners in the November 2015 meeting and it was approved by the Board of Commissioners at the Commission as being in the public interest. Given the fact that the parties live outside of the city and our Board Chair has been out of the country, she has not signed the agreement. It has been approved in the minutes so there is nothing about the agreement that is going to change on behalf of the Commission. I have signed the agreement on behalf of the Commission and just part of the process is that the Board Chair, I'm sorry, the Commission Chair will also sign the agreement. So what I will do is present you with an agreement today that is signed by the three parties and once I have the Commission Chair sign the agreement, I will then forward the entire document to your attention.

[16] Mr. Charlton supported the settlement, as he explained on March 15:

> **THE CHAIR:** Thank you. So Mr. Charlton has advised the Board that he's had a reasonable opportunity to consider the letter of apology. So Mr. Charlton, is there anything you'd like to say to the Board about why this settlement agreement is in the public interest?
>
> **MR. CHARLTON:** Why it is?
>
> **THE CHAIR:** Yes.
>
> **MR. CHARLTON:** Their agreement, I just feel I'm happy with that agreement and the employees should be looked after and it has and the letter of apology is very nice. Thank you, George.

[17] The Chair then questioned Mr. Charlton about the Restorative Agreement's terms and negotiation, and whether he had legal advice. The Chair asked Mr. Charlton whether the $752.08 was to be net of tax and UI deductions. Mr. Charlton said he understood there might be deductions, and he had received legal advice on the point. The Chair asked Mr. Charlton whether he was concerned about the labels "general damages" or "loss of income", to which he replied:

> **A.** No, I just want to get it over with.

The Chair asked a similar question to Mr. Tziolas:

> **Q.** Mr. Tziolas, I'll ask you whether, in terms of the payment of the $752.08, are you able to refer me to some basis that this could be described as general damages?
>
> **A.** No I feel like it should go under loss of income over general damages; I thought that was the agreement; I have no problem either way.

[18] The Chair questioned the Commission's counsel why the Restorative Agreement was in the public interest, to which counsel replied:

> **A.** Most certainly. Because it's a settlement agreement that was derived with the parties. This wasn't something that was imposed on them. It was something that they contributed to from the start to finish and as far as the Commission is concerned, it's in the public interest that the parties participate in a settlement agreement because it's their agreement. …

[19] The Chair asked the Commission's counsel whether the $752.08 was "so small that it would constitute a minor cost of doing business", to which counsel replied:

> **A.** Well first of all the participation on behalf of Holmestead Cheese, the respondent, which is a small, family-owned business, they were very cooperative and they participated in the process. We didn't have to chase them down. They readily met with us and this whole process is not here to penalize them. It's here to educate them and all of that was taken into account with the amount and in the discussions between the parties. So, in this particular case, on behalf of the Commission I don't see that as a window or a door for them to reoffend. Quite frankly I think they've taken it quite seriously and I don't think they ever want to be in this situation again from my discussions with the Respondents. …

[20] The Chair questioned Mr. Tziolas on Holmestead's anti-discrimination policy:

> **Q**. So is there a written document that's a discrimination policy?
>
> **A**. There is, actually.
>
> **Q**. And when was that created?
>
> **A**. I can't give an exact date, between the first Hearing and now but it's also we're a member of certain business practices, organizations that obligate us to have those policies.
>
> **Q**. So you do have a written discrimination policy now?
>
> **A**. Yeah, an electronic copy.

[21] The Chair then asked the Commission's counsel why the Restorative Agreement did not require Holmestead to adopt a prescribed anti-discrimination policy. Counsel's response included:

> **A.**...We can't provide legal advice and, in this particular situation we were of the understanding that both parties took the matter serious enough to address it and I believe they have so we believe it is in the public interest and it doesn't necessarily have to be imposed. And as far as – I use the word "imposed" because when you have parties that are cooperating, there isn't a need to put everything in the settlement agreement when they've already started doing something so we didn't see the need to put that in.
>
> … Just because a complaint is filed and just because the Commission has accepted a complaint, and even if it's referred to a Board of Inquiry, that doesn't necessarily mean that an employer is an offender. And, even if there's a settlement of that case, that, too, doesn't mean that an employer is an offender. That means the matter has been dealt with to this point sufficiently in the Commission's eye and in the public interest …
>
> … Just to make sure that you understand what I'm saying, the Commission most definitely supports any business having a policy. … I mean that's what we're here

> for and that's what we're here to protect but if we have a Respondent who is willingly working with us, and have done so, then we continue to support them.
>
> … And I think that's the whole idea behind the restorative principles and approaching the files that some of the files, not all of them, but approaching the files the way we do now working with both parties and doing so together so that there's an open discussion about what happened, what could change, what needs to be done and what we can do in the future.

[22] On September 14, 2016, the Board of Inquiry issued a written Decision that declined to "report" the Restorative Agreement under s. 34(5). The Board's reasons included:

1. Signature by all parties: The Board said any settlement must be by a written agreement signed by all parties:

> 50. … Without such a written agreement, in my view, there is no settlement. Furthermore, settlement agreements are required to be executed by all parties.

Though the Commission's board of commissioners had approved the Restorative Agreement and the Commission's counsel had signed it, the Commission's Chair had not yet signed as she was outside the country.

2. Detailed anti-discrimination program: Article 9 of the Restorative Agreement stated the parties agreed on "the importance of preventing circumstances of a hostile work environment or preventing miscommunications". The Board's reasons said:

> 53. This is merely a statement of agreement that these issues are important. There is no commitment to any particular action.

Articles 10 through 12 of the Restorative Agreement stated "the parties have discussed the kinds of communication and policy required to ensure a safe and respectful work environment", the parties' conversation "provided education on the obligations of both parties to ensure a respectful work environment", and Holmestead "agreed to explore ways to ensure the company follows the proper procedures when dealing with employees and conflict". In the Board's view, this was insufficient to satisfy the "public interest":

> 56. … the settlement agreement does not state that human rights or discrimination was discussed. I asked the parties about whether their discussions had included the topic of human rights and it was suggested that they had. No rationale was offered as to why this would not appear in the settlement agreement. I note that the settlement agreement states that there is no admission of liability by the Respondent.
>
> …
>
> 57. … While it is not contrary to the public interest to include these provisions in the agreement, there is a public interest in having settlement agreements in human rights matters address human rights issues, particularly those that have relevancy to the issues in the complaint. …
>
> 58. For example, the "prevention" aspect of this agreement does not specifically address how discrimination is defined, what is encompassed within the duty to accommodate, or a recognition of the ways in which employers can address a situation where they believe that an employee is lying to them about being disabled, which was the issue in this case. …
>
> …
>
> 60. The Respondent did not have a discrimination policy and there is nothing in this settlement agreement that requires the Respondent to have any discrimination policy.
>
> …
>
> 62. I determined that the Respondent had recently adopted a discrimination policy, a matter which is not referenced in the agreement.

3. Characterization of the compensation: The Board said that the payment of $752.08, quantified as two weeks' income, should not be termed "general damages" despite the parties' agreement to so characterize it. The Board said:

> 66. … While it is in the public interest from the perspective of the administration of justice that the Board assist the parties in achieving resolution, the Board must maintain its independence from the parties in the context of settlement, as it would if it were issuing a decision on the merits.

4. General release: Article 17 of the Agreement said Mr. Charlton "cannot make any further claims or legal actions against the Respondent, or anyone associated with them, on the facts arising from this complaint and the Complainant's employment, including the ending of that employment, with the Respondent". The Board's reasons said:

> 67. … My jurisdiction to approve settlement terms is limited to settlement terms applicable to the human rights complaint that was referred to me for adjudication. The parties are free to agree upon separate terms of settlement respecting other existing or potential claims outside the *Act* arising from the Respondent's termination of the Complainant's employment among themselves. …

[23] On October 18, 2016, the Commission filed a Notice of Appeal to the Court of Appeal. The *Human Rights Act*, s. 36(1), permits an appeal on a question of law from a Board of Inquiry's decision.

[24] The Notice of Appeal named as Respondents Mr. Charlton, Holmestead Cheese Sales Inc., Ms. Raymond in her capacity as Board's Chair, and Her Majesty the Queen represented by the Attorney General of Nova Scotia. None of the Respondents filed a factum. On June 1, 2017, the Court heard the appeal. The Attorney General appeared by counsel watching only, and the other Respondents did not appear.

Issue

[25] The Commission's Notice of Appeal and factum make several arguments that cluster into a theme. I consolidate the grounds into one, *i.e.* that the Board of Inquiry erred in law by applying a merits-based adjudication to the process of reporting the terms of settlement under s. 34(5) of the *Human Rights Act*.

Standard of Review

[26] *Nova Scotia (Human Rights Commission) v. Grant*, 2016 NSCA 37, involved whether this Court should set aside a Human Rights Board of Inquiry's decision that declined to endorse a settlement under s. 34 of the *Human Rights Act*. I adopt Chief Justice MacDonald's ruling (para. 7) that this Court's standard of review is reasonableness.

[27] In *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, Justice Moldaver for the majority succinctly explained reasonableness:

> [20] … However, the analysis that follows is based on this Court's existing jurisprudence – and it is designed to bring a measure of predictability and clarity to that framework.
>
> `…

> [32] In plain terms, because legislatures do not always speak clearly and because the tools of statutory interpretation do not always guarantee a single clear answer, legislative provisions will on occasion be susceptible to multiple *reasonable* interpretations. … The question that arises, then, is *who gets to decide among these competing reasonable interpretations?*
>
> [33] The answer, as this Court has repeatedly indicated since *Dunsmuir*, is that the resolution of unclear language in the administrative decision maker's home statute is usually best left to the decision maker. That is so because the choice between multiple reasonable interpretations will often involve policy considerations that we presume the legislature desired the *administrative decision maker* – not the courts – to make….
>
> [38] … Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance. [citations omitted]
>
> [Justice Moldaver's italics]

[28] In *Grant*, para. 19, the Chief Justice applied *McLean*'s test.

Analysis

[29] Section 34(5) of the *Human Rights Act* governs a board of inquiry's functions for a settlement:

> 34 (5) Where the complaint referred to a board of inquiry is settled by agreement among all parties, the board **shall report the terms of settlement** in its decision with any comment the board deems appropriate. [emphasis added]

[30] The next three subsections concern the board of inquiry's powers, in the absence of settlement, to adjudicate whether there was prohibited discrimination:

> 34 (6) **Where the complaint** referred to a board of inquiry **is not settled** by agreement among all parties the board shall continue the inquiry.
>
> (7) A board of inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to **whether or not any person has contravened this Act** or for the making of any order pursuant to such decision.
>
> (8) A board of inquiry may order **any party who has contravened this Act** to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations,

> may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.
>
> [emphasis added]

[31] In *Grant*, the human rights complaint alleged that the provincial Department of Natural Resources had discriminated against Mr. Grant based on physical disability respecting access to Crown lands. The Commission referred the complaint to a board of inquiry. The Department, while maintaining its denial of discrimination, offered an arrangement that satisfied Mr. Grant. The parties presented their settlement to the Board of Inquiry further to s. 34(5). The Board declined to approve the settlement unless either the respondent Department acknowledged discrimination, or there was evidence upon which the Board could make a finding of discrimination. In this respect, the Board relied on s. 34(8).

[32] This Court overturned the Board's ruling. The Chief Justice, for the Court, held that the Board's refusal to endorse the settlement stemmed from an unreasonable interpretation of s. 34. He noted (para. 12) that s. 29(1) of the *Human Rights Act* directs that the Commission "shall … endeavour to effect a settlement". The Chief Justice (para. 13) emphasized the significance of the *Act*'s settlement process by adopting the following passages from decisions of human rights tribunals:

> - There is a strong public policy in favour of encouraging parties to human rights complaints to resolve their disputes on a voluntary, consensual basis.
> - When parties are able to resolve their human rights disputes by way of settlement agreement, considerable public and private resources may be saved. They may be able to resolve the dispute complaint more expeditiously than would a formal hearing process. The parties may be able to craft a resolution which more closely matches their needs and interests than would a decision of the Tribunal. Finally, the mediation process itself may be better for the parties' relationship than a formal hearing. For all these reasons, the Tribunal encourages and assists parties in attempting to resolve complaints.
> - … it may not further the purposes of the *Code* to proceed with a complaint where the underlying dispute has been settled or the respondent has already taken appropriate action to remedy the problem.
> - Generally, the Tribunal's ability to ensure that any of the purposes of the *Code* will be fulfilled is harmed insofar as its resources are taken up with matters that have already been adequately addressed, whether through settlement, unilateral respondent action or other proceedings. More specifically, where a complaint of discrimination has already been appropriately resolved, through whatever means, there is no need to proceed with the complaint in order to

> prevent discrimination or provide a means of redress – the discrimination has already been remedied. Further, the promotion of a climate of understanding and mutual respect where all are equal in dignity and rights may be enhanced by parties resolving claims of discrimination through consensual as opposed to adjudicated processes.

[33] In *Grant*, the Chief Justice stated that, under s. 34(5), the Board could issue an order that incorporated the settlement despite the absence of either an acknowledgement of discrimination by the respondent or an adjudicated finding of discrimination by the Board of Inquiry:

> [16] Section 34(5) clearly deals with settlements, such as the one achieved here. Furthermore, this Court in *Gavel v. Nova Scotia*, 2014 NSCA 34 (at paras. 41 and 42) confirmed that the Board's s. 34(5) obligations can be achieved by issuing an order incorporating a settlement (as requested here).
>
> [17] It is equally clear to me that the ensuing provisions, ss. 34(6), 34(7) and 34(8) target circumstances where no settlement has been reached and the Board must, therefore, exercise its authority to impose a resolution. Read in this light, s. 34(8) simply means that the Board must find discrimination before it can impose a resolution upon an unwilling respondent. In other words, there is no procedural nexus between s. 34(5) and 34(8) as the Board incorrectly concluded.

[34] From *Grant*, it is clear that the Board of Inquiry's authority under s. 34(5), respecting a settlement, is independent of ss. 34(6) through (8), that govern the Board's adjudication of a contested dispute. This is the only reasonable interpretation of those provisions. A settlement aims to avoid an adjudication, not invite one. In *Grant*, the Board of Inquiry assumed that the words of s. 34(8) – "any party who has contravened this Act" – authorized the Board to apply a merits-based adjudication to a settlement submitted under s. 34(5). As that assumption misinterpreted s. 34, the Chief Justice concluded:

> [20] Respectfully, the Board's interpretation of s. 34(8) is unreasonable. It cannot stand as an obstacle to settlement and, therefore, must be set aside.

[35] In *Grant*, the Chief Justice's reasons, for the unanimous Court, said nothing about the "public interest" as a criterion for a board of inquiry's reporting of settlements under s. 34(5). Justice Saunders, who concurred with the Chief Justice's reasons, added separate reasons that discussed the "public interest":

> [25] The point I wish to address is the Board's second assertion where Mr. Murray [the Board's Chair] says:

> … in order for this Board of Inquiry to make a finding that the settlement is in the public interest, some factual foundation for those conclusions need (sic) to be provided by the parties in the form of agreed submissions, an agreed Statement of Facts, or evidence provided in some other manner. [Justice Saunders' underlining]

[26] I respectfully reject the Board's position. It is not a correct statement of the law, or the practice, or the procedure that ought to apply in such matters.

[27] As I read the Board's decision in this case, its mistaken view that a settlement depended upon a proven violation of the *Act*, is intertwined with an equally erroneous view that before any Board can "approve" a settlement and issue an order affirming it, the Board must first:

> i. be satisfied that the settlement is in the public interest, and
>
> ii to do that there must be some "evidence provided" proving that it is in the public interest, and
>
> iii if such "evidence" is not forthcoming, then the only way the parties can "resolve the matter by agreement" will be to "withdraw … the complaint" which will then end the dispute.

In my opinion, those propositions are erroneous and run contrary to the clear meaning and intent of the legislation.

[28] The phrase "in the public interest" does not appear anywhere in the legislation. This is not a case where we are asked to explore the amorphous meaning of those words. But I think it important to explain in this decision that the analysis does not demand the type of inquiry or evidential threshold described by the Board as being a condition precedent to approving the settlement by an order under s. 34.

[29] To the extent Mr. Murray was expressing the view that before a settlement can be "approved" under the *Act*, there must first be evidence presented to satisfy the Board that the settlement is in the public interest, he is wrong. Such a proposition implies that there is a positive duty upon the proponent of the settlement to offer further proof of the *bona fides* of the agreement. Such a proposition is erroneous from at least two perspectives. First, its effect would be to compel some form of hearing and inquiry where such evidence could be presented and tested, a requirement which to my mind at least, ignores the clear legislated separation between approving a settlement without the need for an inquiry as is mandated by s. 34(5), contrasted with the necessity of continuing the inquiry when the settlement of a complaint has not been reached, pursuant to s. 34(6). Second, to require such "proof" adds an extra and wholly unnecessary layer of resources, time, and expense to a process where settlement has already been achieved through non-adversarial discussions between the parties, which of course is the Commission's primary objective under s. 29 of the *Act*, in the first place.

> [30] Generally speaking, the mere fact that a settlement has been concluded will, in and of itself, be seen to be in the public interest. Of course a Board will always review the terms of the proffered settlement agreement to assure itself that there is nothing to indicate its affirmation would *not* [Justice Saunders' italics] be in the public interest – for example, if there were concerns about it being a sham, or clearly unfair, or obtained through duress. In such cases a Board would be expected to require evidence, in some form, coupled with a heightened level of scrutiny, before ratifying or rejecting the settlement agreement. …

[36] In Mr. Charlton's case, the Board (paras. 24 and 26) took the final two sentences of Justice Saunders' para. 30 as authority for the proposition that, under s. 34(5), the Board may adjudicate the fairness and public interest embodied by the terms of settlement. Then the Board declined to endorse the Restorative Agreement between Mr. Charlton and Holmestead on the bases I have recited earlier (para. 22).

[37] On the appeal, the Commission says the Board misinterpreted its powers under s. 34(5) and unreasonably intruded into the merits beyond the ambit contemplated by *Grant*. According to the Commission, the outcome leaves Mr. Charlton and Holmestead suspended in legal confusion while the Board's approach would, in the future, annul constructive restorative agreements and deter the amicable resolution of human rights complaints. The Commission requests clarity.

[38] I will try to be clear:

> **1. Settlement *versus* adjudication:** The *Human Rights Act* separates settlement and adjudication. Under s. 34(5) the Board "shall report" the terms of settlement. Reporting is not adjudication. The Board adjudicates only "[w]here the complaint … is not settled" [s. 34(6)], which leads to a determination whether there was a contravention [ss. 34(7) and (8)].
>
> Settlement isn't just an interloper on the adversarial battlefield. As the Chief Justice pointed out in *Grant*, the *Act* prefers settlement (see above, para. 32). Under s. 34(5), the Board should look for an avenue to make the parties' resolution work, not detour them to formal adjudication.
>
> **2. "Fairness" or "reasonableness" of terms:** A settlement agreement is a contract. As with any contract, the adequacy of consideration *inter se* is for the parties. It is not for the court or other adjudicator, such as a board of inquiry. A board of inquiry may not, under s. 34(5), reject a settlement because the Chair holds the view that different terms of settlement would be more "fair" or "reasonable" between the parties. A Board's Chair who is so

tempted should recall there has been no adjudication and ruling and, in many cases like this one, no admission whether there even was discrimination. There is no anchorage for any conclusion about substantive merit.

Nor are the parties interested in the abstract exercise of litigating a settled dispute. Mr. Charlton and Holmestead want to move on.

Another reason the Board should avoid a substantive inquiry is settlement privilege. The Board's "reporting" function under s. 34(5) does not authorize an interrogation of the parties, in each other's presence, about their negotiating positions by the decision-maker who would adjudicate their dispute once the Board rejects the settlement.

3. "Public interest" in the terms: The *Human Rights Act* does not assign to a board of inquiry the assessment of "public interest" as a freestanding criterion under s. 34(5). The *Act* does not mention "public interest". Instead, the *Act* expresses its purposes ("Purpose of Act" in s. 2), that are extrapolated throughout the statutory scheme. Sections 24(1)(a) and 29(1) say "[t]he Commission shall … administer and enforce the provisions of this Act" and "[t]he Commission shall inquire into and endeavour to effect a settlement of any complaint". The statute tasks the Commission with ensuring that a settlement satisfies the purposes and scheme of the *Human Rights Act*. The Commission participates in the negotiation to see that the settlement does so.

When, as occurred here, the Commission is party to a settlement agreement that says, in article 6, "[t]he NSHRC supports the Agreement as being in the public interest in the circumstances of this case …", then, subject to my comments in #4 below, the Board of Inquiry should defer to the stipulation that the Commission has performed its task.

4. The Board's functions under s. 34(5): What is the Board to do under s. 34(5)? Its powers may be deduced from the statutory language. Section 34(5) applies where a "complaint referred to a board of inquiry is settled by agreement", after which the board "shall report" the settlement "with any comment the board deems appropriate". Accordingly:

> **(a) The Board is to satisfy itself that there is a "complaint".** This means a complaint that, on its face, relates to an allegation of prohibited discrimination under the *Human Rights Act*. Determining the point does not involve an adjudication whether there was discrimination.

Mr. Charlton's complaint on its face alleged a contravention of ss. 5(1)(d) and (o) of the *Act.*

(b) The Board is to satisfy itself that the complaint has been "referred to a board of inquiry". Section 32A gives the Commission the discretion to refer a complaint to a board of inquiry.

On June 18, 2015, the Commission referred Mr. Charlton's complaint to the Board.

(c) The Board is to be satisfied that the complaint was "settled by agreement". The *Act* does not require that there be a written agreement signed by all parties. The form of agreement is for the Board to appraise in each case. If the Board of Inquiry is satisfied that there has been a settlement of the allegations in the complaint, the Board is not legally precluded from "reporting" an unsigned agreement under s. 34(5). Nonetheless, it is prudent and not unreasonable for a board to require a written and fully executed settlement agreement.

Here, on March 15, 2016, there was a written agreement signed by Mr. Charlton, Holmestead and the Commission's counsel coupled with the stipulation by the Commission's counsel that the Commission's board of commissioners had approved the settlement. Counsel said the Commission's chairperson had been out of the country and unavailable to sign before the case management meeting of March 15. Clearly, the complaint was "settled by agreement" of the parties. The Commission's chairperson signed the Restorative Agreement later, on September 22, 2016.

If the Board of Inquiry's Chair wanted to lay eyes on the signature of the Commission's chairperson, the Board of Inquiry should have adjourned to await the signature, rather than refuse to report the Restorative Agreement that Mr. Charlton and Holmestead had signed.

As an aside, I add that a settlement agreement, approved by the Commission's board of commissioners in November 2015, should have attracted the appropriate signature, on the Commission's behalf, long before September 22, 2016. The Commission's obligations under ss. 24(1)(a) and 29(1) of the *Act* demand more expedition.

(d) The settlement "agreement" is a contract. This means **the Board is to be satisfied that the settlement agreement has the certainty needed for a valid contract.** By this, I do not mean the Board may reject a settlement agreement because the Board holds the view that (1) other terms would be more fair or reasonable to one party or the other, or (2) additional remedies would better serve the public interest.

Here, the Restorative Agreement would not be void for uncertainty under the principles of contract.

(e) There are limited legally-recognized bases to vitiate a contract – *e.g.* fraud, misrepresentation, undue influence, duress, mistake. Simple fairness or reasonableness and generic public interest are not among them. **The Board may satisfy itself that those legally recognized grounds of vitiation do not exist**. This is not an invitation for the Board to conduct a free-ranging evidential inquiry every time a settlement is presented under s. 34(5). The Commission has participated in the negotiation to safeguard the process. When the Agreement recites the Commission's sanction, as this one does, the Board should defer unless there is some reason for suspicion that justifies a deeper inquiry.

Here, there was no basis to suspect a vitiating element.

(f) The Board should satisfy itself that the Settlement Agreement includes a remedy that is authorized by the *Human Rights Act*. This does not mean the Board may insist on additional remedies, such as a detailed policy to combat discrimination and promote affirmative action, as posited by the Board for Holmestead.

In this case, the *Human Rights Act*'s armoury includes compensation and an apology – the remedies specified in the Restorative Agreement.

(g) Section 34(5) says **the board shall "report" the agreement "with any comment the board deems appropriate".**

One of the Chair's reasons for rejecting the Restorative Agreement was that the release extended to claims outside the *Human Rights Act*. It isn't surprising that a settlement agreement includes a general release. The parties want to end the matter. That does not entitle the Board to reject the human rights elements of the settlement

> agreement. The Board should "report" the otherwise compliant agreement that settles the human rights complaint with human rights remedies, then add a "comment". The comment might be that other specified aspects of the agreement are outside the Board's authority under the *Human Rights Act*. Then those outlying components would retain their contractual force, but would assume no further legal status from either the *Human Rights Act* or their attachment to the Board of Inquiry's "report".

[39] As I have discussed, this Restorative Agreement satisfied every standard that s. 34(5) assigns to the Board of Inquiry. The Chair's refusal to "report" the Restorative Agreement resulted from the misinterpretation of the Board's powers under s. 34(5). No reasonable construction of s. 34(5), in its statutory scheme and context, permitted the Board to intrude into the merits of the settlement on the bases cited for the Board's refusal to report the Restorative Agreement.

Conclusion

[40] I would allow the appeal, set aside the Board of Inquiry's decision as unreasonable, and substitute an order that directs the reporting of the Restorative Agreement under s. 34(5) of the *Human Rights Act*.

[41] I would not award costs.

Fichaud, J.A.

Concurred: Bryson, J.A.

Van den Eynden, J.A.