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COURT OF APPEAL FOR ONTARIO

WEILER, ROSENBERG and LANG JJ.A.

B E T W E E N :	)	
	)	
CHRISTOPHER LOSENNO	)	**Kevin D. MacNeill**
	)	**for the appellant**
Applicant	)	
(Appellant)	)	
	)	
- and -	)	**Anthony D. Griffin and**
	)	**Amyn Hadibhai**
ONTARIO HUMAN RIGHTS	)	**for the respondent, Ontario**
COMMISSION	)	**Human Rights Commission**
	)	
Respondent	)	
(Respondent)	)	**Christopher G. Riggs and**
	)	**Rachel M. Arbour for the**
- and -	)	**Respondent, Metroland Inc.**
	)	
METROLAND INC.	)	
	)	
Intervenor	)	**Heard: April 20, 2005**
(Respondent)	)	

On appeal from the judgment of the Divisional Court (O'Driscoll, Lane and Jennings JJ.) dated June 21, 2004, reported at (2004), 242 D.L.R. (4th) 550.

ROSENBERG J.A.:

[1] The appellant Christopher Losenno claims that his former employer Metroland Inc. discriminated against him on the basis of physical disability contrary to the *Human Rights Code*, R.S.O. 1990, c.H.19. He therefore filed a complaint with the Ontario Human Rights Commission. Following two investigations, the Commission decided not

to refer the complaint to a board of inquiry.[1] The sole basis for the refusal was the adequacy of Metroland's settlement offer, which the appellant refused to accept. Among other things, the appellant submits that the Commission erred in taking the settlement offer into account. The appellant raises other subsidiary issues, including a submission that the offer itself was privileged and should not have been provided to the Commission for use in deciding whether to refer the complaint. The Divisional Court dismissed the appellant's application for judicial review. For the following reasons, I would dismiss the appeal from that decision.

THE FACTS

[2] The appellant was employed by Metroland in various capacities from 1988. His early positions involved physical labour. In 1992, he suffered a non-work related accident and, by 1996, he could no longer perform his regular duties. Metroland accommodated the appellant to some extent but the appellant claims that the accommodation was not sufficient. Accordingly, in 1997, he complained to the Commission, alleging discrimination on the basis of disability. An investigation officer with the Commission prepared a case analysis in January 2001. This case analysis recommended that the appellant's complaint be referred to a board of inquiry. Metroland made further submissions that included reference to its offer to settle. As a result, a second case analysis was prepared.

[3] This time the officer, while assuming that the appellant's allegations were true, recommended that the complaint not be referred to a board of inquiry because of the adequacy of the settlement offer. The offer remained open for thirty days following the Commission's decision. The appellant's counsel made detailed submissions to the Commission as to why the offer to settle was not a valid reason for refusing to refer the complaint to a board of inquiry. Counsel took the position that the Commission had no jurisdiction to take into account the offer and, in any event, that the offer was inadequate.

[4] The Commission decided that it was not appropriate to refer the complaint to a board of inquiry pursuant to s. 36 of the *Human Rights Code*. The Commission gave the following reasons:

> 1. The evidence indicates that, given the circumstances of the complaint, the corporate respondent's offer to settle is one that the complainant could reasonably expect to receive should this case proceed to the board of inquiry.

[1] Now the Human Rights Tribunal of Ontario.

> 2. The evidence indicates that the offer of settlement made by the corporate respondent is reasonable with regard to general, specific and public interest remedies.

[5] Appellant's counsel requested that the Commission reconsider its decision pursuant to s. 37 of the Code and raised a natural justice complaint concerning this process. Metroland also made submissions. Commission staff recommended that the Commission not grant the reconsideration request. In July 2002, the Commission upheld its original decision. By this time, nearly six years had expired since the original complaint and the date of expiry of the offer (thirty days from the date of the Commission's first decision) had long past. The Commission gave the following reasons for upholding the original decision:

> The Commission remains of the view that the procedure of referral of the subject matter of this complaint to the board of inquiry is inappropriate.

DECISION OF THE DIVISIONAL COURT

[6] Writing for a unanimous court, Jennings J. (O'Driscoll and Lane JJ. concurring) dismissed the appellant's application for judicial review. He held as follows:

(1) It was unnecessary to decide the standard of review of the Commission's decision interpreting its own statute since it correctly determined those issues.

(2) The standard of review of the exercise of the Commission's discretion under s. 36 is patent unreasonableness.

(3) The rule of privilege concerning without prejudice settlement discussions is a rule of evidence and is inapplicable to the investigatory procedure mandated by the *Code*.

(4) The Commission was correct in considering the settlement offer.

(5) The assessment of the offer to settle was within the Commission's core function and area of expertise and there was ample evidence to warrant the Commission's conclusion that, in view of the settlement, a referral to a board of inquiry was not the appropriate procedure.

(6) The Commission followed its normal procedures in dealing with the complaint and there was no denial of fundamental fairness.

THE ISSUES

[7] This appeal presents the following issues:

(1) What standards of review apply?

(2) Was the Commission entitled to refer to the without prejudice settlement offer from the appellant's employer?

(3) Was the Commission entitled to take the settlement offer into account under s. 36 of the *Code*?

(4) If so, was its assessment of the reasonableness of the offer proper?

(5) Was the appellant denied fundamental fairness because of the manner in which the complaint was handled by the Commission?

ANALYSIS

(1) The standard of review

[8] Like the Divisional Court, I do not find it necessary to consider the question of standard of review at any great length as applied to the principal issue. I will assume that the interpretation of s. 36 of the *Code* and the question of privilege attract the correctness standard. However, as I explain below, I am satisfied that the Commission was correct in its determinations on those issues.

[9] I agree with the Divisional Court that in exercising its jurisdiction under ss. 36 and 37 and especially in considering the adequacy of the offer to settle the Commission was acting within its core jurisdiction and the standard of review is patent unreasonableness.

[10] As is well known, the standard of review is determined by application of the pragmatic and functional approach. In applying this approach the court is to weigh four factors: (a) the presence or absence of a privative clause or right of appeal; (b) the relative expertise of the Commission; (c) the purpose of the legislation as a whole and the particular provision under consideration; and, (d) the nature of the question under review.

[11] The *Human Rights Code* does not contain a general privative clause but also does not contain any right of appeal from the decision of the Commission under ss. 36 and 37. On the other hand, s. 37(3) provides that every decision of the Commission on reconsideration "shall be final". This may be compared with s. 42, which gives parties a broad right of appeal to the Divisional Court on questions of law or fact from the decision of the Tribunal.

[12] The Commission has an acknowledged expertise in dealing with human rights issues. The Legislature established the Commission to further the policies of the *Code*: see s. 29 of the *Code*. While the courts have over time, and especially since 1985 when the equality provisions in s. 15 of the *Canadian Charter of Rights and Freedoms* came into force, gained expertise in dealing with disability issues, it seems to me that the Commission continues as a reservoir of expertise in dealing with these very difficult issues.

[13] In *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at para. 29, McLachlin C.J.C. referred to some of the factors that relate to the issue of relative expertise, including a statutory requirement that decision-makers have expert qualifications, have accumulated experience in a particular area or play a role in policy development. As well, an administrative body "might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise".

[14] At least some of these factors suggest deference based on relative expertise in this case. Section 29 of the *Code* gives the Commission an important policy development function. It is required to forward the policy of the Act and to develop and conduct programs to eliminate discriminatory practices. The Legislature's acknowledgement of the Commission's expertise is most clearly expressed in s. 29(e), which provides that the Commission is "to examine and review any statute or regulation, and any program or policy made by or under a statute and make recommendations on any provision, program or policy, that in its opinion is inconsistent with the intent of this Act". In performing these various functions it has acquired a significant experience and very specialized expertise. Furthermore, in the context of s. 36, because the Commission is so habitually called upon to make findings of fact in this particular and distinct legislative context, it has gained a great deal of relative institutional expertise.

[15] The purpose of the *Code* and, in particular, s. 36 suggests deference to the Commission's decision. The Legislature has conferred on the Commission a broad discretion to screen complaints. It is only if referral to a board of inquiry "appears to the Commission" to be "appropriate" that the complaint will proceed to that stage. This function is more administrative than judicial in nature. At this stage, given that the Commission is not engaged in seeking to resolve disputes or determine rights between parties, much more deference is demanded. See *Dr. Q*, at para. 32. As Blair R.S.J. wrote in *Gismondi v. Ontario (Human Rights Commission)* (2003), 169 O.A.C. 62 (Div. Ct.) at para. 24:

> The Commission - whose relative expertise in fact finding and processing complaints in the human rights context is well-recognized - is engaging in a screening function, which

> is more administrative than quasi-judicial in nature. The fundamental purpose of the Code is to establish a legislative framework "to ensure that all members of our society enjoy the essential right to be free from discrimination on racial and other grounds": *Payne v. Ontario (Human Rights Commission)* (2000), 192 D.L.R. (4th) 315 (Ont. C.A.) at 361. The Commission is the statutory vehicle established to carry out that function. Its role is to investigate complaints, to screen them, and, where warranted, to establish a Board of Inquiry to hear and determine the complaints. In carrying out the first two of these roles the Commission is not sitting as a tribunal (whose decision may be appealed to the Divisional Court) but rather it is acting in an investigative and administrative screening capacity.

[16] As McLachlin C.J.C. said in *Dr. Q* at para. 31, provisions that confer a broad discretionary power "will generally suggest policy-laden purposes and, consequently, a less searching standard of review". The reviewing court must also consider "the breadth, specialization, and technical or scientific nature of the issues that the legislation asks the administrative tribunal to consider". Some of the issues the Commission must consider in deciding whether to refer a complaint to a board of inquiry are of a specialized nature, especially in disability cases and in considering the question of accommodation. Admittedly, some of the other issues that can be engaged by s. 36 are of a less specialized nature, such as, in this case, the assessment of special damages as an element of the settlement offer. But, in most other respects, the s. 36 decision engages the specialized expertise of the Commission.

[17] The final factor, the nature of the question under review, also suggests deference to the Commission in the exercise of the decision whether to refer to a board of inquiry. Assuming the Commission properly interpreted its governing statute, the decision to be made is concerned with fact and policy-driven matters that command greater deference. See *Dr. Q* at para. 34.

[18] To conclude, all the factors, but particularly the last three, point towards substantial deference to the Commission's decision under s. 36 and its decision on reconsideration under s. 37. In my view, the most deferential standard of patent unreasonableness applies. I note that the Divisional Court has repeatedly held to the same effect. See the summary by Blair R.S.J. in *Gismondi* at paras. 22 to 26 of the various decisions.

(2) The privilege issue

[19] The appellant submits that without prejudice settlement discussions are privileged and the investigation report should not have disclosed that the respondent offered to settle the complaint. He submits that, accordingly, the Commission should not have taken that offer into account. The appellant also relies on settlement privilege to support his argument that settlement offers cannot be relied on under s. 36. I would point out that apparently the Commission attempted to mediate the complaint in 1998. None of the proceedings at the mediation were disclosed to the Commission. There is no evidence that the respondent's offer to settle was part of the 1998 mediation process.

[20] As indicated, the Divisional Court did not give effect to the appellant's argument regarding privilege on the basis that without prejudice privilege is a rule of evidence. I think this may state the privilege too narrowly since, where it exists, the privilege also protects from discovery. See J. Sopinka, S. N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at §14.206. That said, the ruling of the Divisional Court can be supported on other grounds.

[21] First, the conditions for recognition of privilege are not satisfied. Sopinka, Lederman and Bryant summarize the conditions for recognition of the privilege as follows at §14.207:

> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[22] In this case, the second condition is not satisfied because Metroland did not make its offer to settle with the express or implied intention that it would not be disclosed to the Commission in the event negotiations failed.

[23] Second, recognizing privilege in this context does not further the objectives underlying the common law privilege. The courts recognize the privilege to further the objective of encouraging settlements on the theory that "few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming": Sopinka, Lederman and Bryant at §14.203. The authorities also suggest that "without prejudice"

offers to settle should not be admitted into evidence because they are of limited probative value; for example, parties make settlement offers not as recognition of a weak case but simply to buy peace. See Sopinka, Lederman and Bryant at §14.204.

[24] Third, in my view, to recognize the privilege against the Commission is inconsistent with the scheme of the *Code* and the legislative policy. The Commission has a statutory mandate to attempt to effect a settlement and to approve settlements. It can hardly fulfil that mandate if it cannot refer to offers to settle. Also, it is not really a stranger to the negotiations.

[25] Fourth, case law does not help advance the appellant's argument. For instance, the appellant relies on *Canadian Broadcasting Corp. v. Paul*, [2001] F.C.J. No. 542, where the Federal Court of Appeal considered the question of settlement privilege in the human rights context. The case concerned the *Canadian Human Rights Act*, R.S.C. 1995, c.H-6, which is different from the *Code* in important respects. In that case, the investigator recommended that the Commission appoint a conciliator under s. 47 of the Act to attempt to bring about a settlement. The parties met with the conciliator but were unable to agree on a settlement. The conciliator prepared a report that included detailed reference to the CBC's settlement offer. The CBC objected when it learned that the report would be provided to the Commission, stating that its offer to settle had been made on a strictly confidential basis and that disclosure was contrary to s. 47 of the Act. Section 47(3) provides that, "Any information received by a conciliator in the course of attempting to reach a settlement of a complaint is confidential and may not be disclosed except with the consent of the person who gave the information."

[26] The Federal Court of Appeal ultimately rested its opinion on the wording of s. 47(3). It held that the subsection created an absolute prohibition on disclosure of conciliation discussions, even to the Commission, without the consent of the party who provided the information and the CBC did not consent. However, the court also provided a helpful review of the history of the settlement privilege. It noted the consistent statement of the privilege is that any concession made by a party in the course of settlement discussions cannot be used to the prejudice of the party: see paragraphs 23 to 28. This, of course, is consistent with s. 47(3), which only prohibits disclosure without the consent of the party who provided the information. The court at para. 30 also noted the importance of confidentiality in encouraging the frank exchange of views during conciliation. As it said, "Without the protection of confidentiality, parties are likely to be inhibited from participating fully in the process - either by 'posturing' for the ultimate decision-maker or by exercising undue caution in exploring common interests and in making concessions or offers of compromise - thereby rendering the conciliation scheme ineffective."

[27] I agree with those comments, but they do not assist the appellant in this case. Metroland did not object to disclosure of its offer, and, in fact, referred to its offer in its response to the investigation report, clarifying one aspect of it.

[28] Another case dealing with the privilege issue in the human rights context is *Jazairi v. Ontario (Human Rights Commission)* (1997), 146 D.L.R. (4th) 297. In *Jazairi* at pp. 305-6, the Divisional Court held that the Commission was entitled to consider information contained in the case summary including "the fact of settlement discussions notwithstanding that the parties entered into the settlement discussions on a without prejudice basis for the purpose of effecting settlement". The court qualified this statement at p. 306 to the extent that it held that "in some circumstances, particular terms of a settlement may be inappropriately included in material presented to the Commission, the fact of and the nature of a settlement process and its outcome are properly before the Commission". The full content of the case summary is not set out in the report of the *Jazairi* case. However, at p. 302 an excerpt from the case summary is set out verbatim including the following:

> The settlement offer made by the respondent appears to cover all possible remedies which may be obtained at a Board of Inquiry. The complainant refused to accept the settlement. This refusal appears to be unreasonable in all the circumstances.

[29] On appeal, this court upheld the decision of the Divisional Court without reference to this issue: (1999), 122 O.A.C. 356, leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 448. *Jazairi* is therefore consistent with my conclusion on the privilege issue in this case.

[30] In conclusion, the settlement offer made by the employer is not privileged as against the Commission. I need not consider whether discussions of settlement in the context of the formal mediation process are privileged as the issue does not arise in this case. I note, however, that the mediation agreement included a provision that any information disclosed during mediation "cannot be used in any subsequent stay of the complaint process or any other proceeding". There is no suggestion that disclosure of the later settlement offer violated this agreement.

(3) Interpretation of s. 36 of the *Human Rights Code*

[31] This brings me to the principal question in this case: whether the Commission was entitled to refuse to refer a complaint to a board of inquiry because of the reasonableness of an offer to settle. The resolution of this question requires an interpretation of s. 36 of the *Code* and, in particular, the meaning of the phrase "it appears to the Commission that

the procedure is appropriate". The Commission and the employer submit that the reasonableness of a settlement offer from the respondent to a complainant is a proper factor for the Commission to take into account. The appellant submits that s. 36 does not permit consideration of the settlement offer.

[32] A recent expression of the modern rule of interpretation of statutes is found in *R. v. Ulybel Enterprises Ltd.* (2001), 157 C.C.C. (3d) 353 (S.C.C.) at para. 28:

> In numerous cases, this Court has endorsed the approach to the construction of statutes set out in the following passage from Driedger's *Construction of Statutes* (2nd ed. 1983), at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[33] I will consider the interpretation of s. 36 in light of this approach.

(i) Grammatical and ordinary meaning

[34] At the relevant time, s. 36(1) of the *Human Rights Code* provided as follows:

> (1) Where the Commission does not effect a settlement of the complaint and it appears to the Commission that the procedure is appropriate and the evidence warrants an inquiry, the Commission may refer the subject-matter of the complaint to the board of inquiry.

[35] Section 36(1) appears to be framed in broad discretionary terms and sets out two prerequisites for referring a complaint to a board of inquiry. First, the referral procedure must be "appropriate". Second, the evidence must warrant an inquiry. The second prerequisite concerns the sufficiency of evidence. The Commission performs a screening process and only refers cases to a board where there is some evidentiary basis for the complaint as determined through the Commission's investigation. This second prerequisite is not in issue in this case. The investigating officer assumed that appellant's allegations were true and that they would amount to discrimination on the prohibited ground of disability. The issue is the meaning to be given to the term "appropriate".

[36] Rules of statutory interpretation suggest that “appropriate” means something other than sufficiency of evidence. It is an accepted principle of statutory interpretation that legislative provisions should not be interpreted so as to render terms mere surplusage. It would seem that the Legislature intended there to be a meaningful distinction between the two prerequisites. See *R. v. Proulx*, [2000] 1 S.C.R. 61 at para. 28.

[37] This court has considered the interpretation of s. 36 in *Payne v. Ontario (Human Rights Commission)*. At para. 74 of her dissenting opinion, Abella J.A. pointed out the discretionary and dual nature of the decision to refer under s. 36:

> It is up to the Commission to determine whether to refer an investigated complaint to an oral hearing by the Board of Inquiry. It is not an automatic right. It is an exercise of discretion based on the Commission's determination that "the procedure is appropriate and the evidence warrants an inquiry". The Commission, in other words, may refer a complaint if it considers it appropriate to do so and the evidence supports such a decision, but it is not obliged to do so.

[38] Speaking for the majority in *Payne*, Sharpe J.A. did not draw as sharp a distinction between sufficiency of evidence and “appropriate”, although he too recognized the discretionary nature of the s. 36 decision. He said the following at para. 155:

> The decision-making powers of the Commission in relation to complaints are cast in ss. 34, 36 and 37 in terms of a discretion. The Divisional Court has held that the exercise of the Commission's discretion necessarily involves consideration of the evidence: *Jazairi v. Ontario (Human Rights Commission) … As I see it, the only legitimate factor to be considered by the Commission in the exercise of its discretion is whether there is any merit in the complaint. If the Commission were to base its decision on some extraneous factor, the court would intervene on judicial review*. I did not understand counsel appearing on behalf of the Commission to dispute this basic point which flows from the nature of the Commission's statutory mandate. The decision not to refer a complaint puts an end to an allegation that a fundamental human right has been violated. In my opinion, it would be entirely inconsistent with the nature of a fundamental human right if the Commission were, as is alleged in the Wharton affidavit, to dismiss a complaint for reasons of cost or

> because of "strategic concerns": see, for example, *Singh v. Canada (Minister of Employment and Immigration)* (1985), 17 D.L.R. (4th) 422 (S.C.C.) at 469, per Wilson J.; Dworkin, *Taking Rights Seriously* (1977), at pp. 90-100. [Emphasis added.]

[39] The appellant heavily relies on this passage from the reasons of Sharpe J.A. in support of his position that the only criterion that the Commission can take into account is the sufficiency of the evidence. I do not agree with this submission. Sharpe J.A. did not suggest any such limitation on the Commission's discretion. It seems to me that this important passage identifies two fundamental aspects of the s. 36 discretion. First, the only legitimate factor is whether there is "merit" to the complaint. Second, the Commission cannot take into account extraneous factors, that is, factors that are unrelated to the merit of the particular complaint such as cost or strategic concerns.

[40] In my view, given the discretionary nature of the s. 36 decision and the inclusion of the term "appropriate", merit must embrace more than simply sufficiency of evidence but can include other factors related to the particular complaint that suggest to the Commission that the board of inquiry procedure is not appropriate. The problem presented by this case is whether the nature of a settlement offer is an appropriate consideration. Or, put another way, the problem is whether it goes to the merit of the complaint or is extraneous to it. That question can only be answered by looking to other aspects of the statutory interpretation question.

(ii) Legislative intention

[41] In *Payne* at para. 154, Sharpe J.A. identified several important factors that show the Legislature's intention. First, the rights conferred by the *Human Rights Code* are fundamental and quasi-constitutional. Second, the *Code* "lies at the very heart of the legal arrangements designed to ensure that all members of our society enjoy the essential right to be free from discrimination on racial and other grounds". Third, the Commission has been entrusted with exclusive jurisdiction to determine the merit of the complaint. Should the Commission refuse to refer a complaint to a board of inquiry, the complainant has no further recourse other than judicial review.

[42] The courts have identified a further aspect of the Legislature's intent - the remedial nature of the scheme. The *Code* is intended to remedy discrimination individually and systemically rather than punish the wrongdoer. As McIntyre J. said in *Ontario (Human Rights Commission) v. Simpson Sears Ltd.*, [1985] 2 S.C.R. 536 at 547:

> The *Code* aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to

> punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant.

[43] Section 36 should be interpreted, so far as possible, having regard to all of these purposes. A complainant should not lightly be deprived of his or her right to access the procedure under the *Code*. As Dickson C.J.C. said in *Action Travail des Femmes v. Canadian National Railway Co.* (1987), 40 D.L.R. (4th) 193 (S.C.C.) at 206:

> [I]n the construction of [human rights] legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.

On the other hand, it is important to recognize that formal board of inquiry proceedings are not the only way to vindicate an individual's rights as guaranteed under the *Code*.

[44] Board proceedings can be lengthy and costly to the complainant, especially if the Commission withdraws from the procedure after referral to a board, as it might well do because of the sufficiency of an offer, and the complainant is forced to carry on before the board of inquiry on his or her own: see *McKenzie Forest Products Inc. v. Tilberg* (2000), 185 D.L.R. (4th) 257 (Ont. C.A.), leave to appeal refused [2000] S.C.C.A. No. 285. An offer to settle can recognize the injury done to the complainant, provide reasonable compensation and uphold the public interest. In my view, allowing the Commission to consider an offer to settle is consistent with the legislative intent.

(iii) The scheme of the Code

[45] The legislative scheme of the *Code* has been described in several cases and so I only intend to give a description that focuses on the issues in this case, namely, the role of the Commission and discrimination by reason of physical disability.

[46] Section 29 sets out what the Divisional Court has accurately described in *Re Consumers' Distributing Co. Ltd. and Ontario Human Rights Commission* (1987), 36 D.L.R. (4th) 589 at 594, as "a broad, complex and subtle statutory mandate":

> It is the function of the Commission,
>
> (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and

opportunities be provided without discrimination that is contrary to law;

(b) to promote an understanding and acceptance of and compliance with this Act;

(c) to recommend for consideration a special plan or program designed to meet the requirements of subsection 14(1), subject to the right of a person aggrieved by the implementation of the plan or program to request the Commission to reconsider its recommendation and section 37 applies with necessary modifications;

(d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act;

(e) to examine and review any statute or regulation, and any program or policy made by or under a statute and make recommendations on any provision, program or policy, that in its opinion is inconsistent with the intent of this Act;

(f) to inquire into incidents of and conditions leading or tending to lead to tension or conflict based upon identification by a prohibited ground of discrimination and take appropriate action to eliminate the source of tension or conflict;

(g) to initiate investigations into problems based upon identification by a prohibited ground of discrimination that may arise in a community, and encourage and co-ordinate plans, programs and activities to reduce or prevent such problems;

(h) to promote, assist and encourage public, municipal or private agencies, organizations, groups or persons to engage in programs to alleviate tensions and conflicts based upon identification by a prohibited ground of discrimination;

(i) to enforce this Act and orders of the Tribunal; and

> (j) to perform the functions assigned to it by this or any other Act.

[47] Under s. 5 every person has a right to equal treatment with respect to employment without discrimination because of, *inter alia*, disability. Section 17 deals expressly with disability and the duty to accommodate. Under s. 17(4), where the Commission determines that the evidence does not warrant a complaint being referred to a board because the complainant is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability, it "may nevertheless use its best endeavours to effect a settlement as to the duties or requirements".

[48] As the Divisional Court pointed out, referring to *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181, "Effecting a settlement has been described as the first duty of the Commission." Several aspects of the *Code*, in addition to s. 17(4), suggest the importance of effecting a settlement and the central nature of settlement to the Commission's mandate. Section 33(1) imposes a mandatory duty on the Commission to investigate a complaint "and endeavour to effect a settlement". Section 36, which lies at the centre of the controversy in this case, expressly recognizes the importance of attempting to effect a settlement. The Commission can only refer the case to a board if it does not effect a settlement. Finally, s. 43 provides that breach of any settlement between the parties is itself grounds for a complaint, provided the settlement was approved by the Commission.

[49] The appeal in this case, of course, goes beyond the question of enforcing voluntarily entered into settlements. It requires consideration of mere offers to settle. In determining whether the Commission has a right to take into account settlement offers, competing policy considerations must be weighed. It is apparent from the repeated reference to the Commission's role in effecting settlements that the *Code* should be interpreted in a manner that encourages parties to make reasonable settlement offers. Further, the *Code* ought not to be interpreted in a way that would encourage parties to take obstinate and unreasonable positions. On the other hand, it is important that complainants, many of whom are already disadvantaged and vulnerable, not be coerced into entering into improvident settlements for fear that they will otherwise lose their rights. That said, I think the court must be cautious in attempting to predict how parties will act depending upon whether the Commission is entitled to take a settlement offer into account in deciding whether to refer the complaint to the board of inquiry. See *Tilberg* at para. 51.

[50] The Commission also has an important gate keeping function. The Commission is not required to investigate every complaint that is brought to its attention. Section 34 gives the Commission a discretion not to deal with a complaint where, for example, the

subject matter of the complaint is trivial, frivolous, vexatious or made in bad faith, or the facts upon which the complaint is based occurred more than six months before the complaint was filed, unless the Commission is satisfied that, *inter alia*, the delay was incurred in good faith.

[51] Another central feature of the scheme under our *Code* is that the decision to refer a complaint to the board is that of the Commission not the complainant. If the appellant is correct, any time the complaint passes the evidentiary sufficiency threshold, the Commission is bound to refer the complaint. As the Divisional Court observed, this would result in a transfer of decision making from the Commission to the complainant. That is not our system. That said, this court has held that where the Commission withdraws from a board hearing because it has effected a settlement with the employer, the complainant is entitled to proceed with the hearing. As McMurtry C.J.O. said in *Tilberg* at para. 47, to require the presence of the Commission before the tribunal in every case for the complaint to proceed "would unduly frustrate the fundamental policy goals of the *Code*".

[52] In conclusion, the Legislature has clearly provided the Commission with a statutory mandate to encourage settlement and to act as a gatekeeper. At the same time, I recognize the importance of protecting the rights of vulnerable and disadvantaged complainants. But, recognizing the right of the Commission to consider offers to settle does not necessarily further disadvantage these complainants. The Commission is independent of the parties and the state. The refusal to refer an assumed meritorious complaint in this case was not just because there had been an offer to settle but because there was a reasonable offer to settle that was consistent with the *Code* and because the complainant could not expect to achieve a better result before a board of inquiry. By applying its expertise, the Commission can protect a complainant from being pressured into accepting an improvident settlement. As the Commission points out in its factum, s. 43 "reflects the legislature's confidence in the Commission's expertise as to what is an appropriate resolution of a complaint". The scheme of the *Code* favours allowing the Commission to consider offers to settle.

(iv) The legislative context

[53] The appellant relies upon the legislative context to support his position that the Commission is not entitled to refuse to refer a complaint because of an offer to settle. He points out that nowhere in the *Code* is the Commission expressly authorized to take an offer to settle into account. He contrasts this with legislation in other provinces. For example, s. 22(1)(b) of Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14, gives the Director the power to discontinue the proceedings "if the director is of the opinion that the complainant has refused to accept a proposed settlement that is fair and reasonable". Similarly, s. 29(2)(b) of the Manitoba *Human Rights Code*,

S.M. 1987-88, c. 45, provides that the Commission shall terminate its proceedings in respect of the complaint "if the respondent proposes an offer of settlement that the Commission considers reasonable but the complainant rejects". And s. 22(4)(b) of Prince Edward Island's *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, provides that the Executive Director may discontinue further action on a complaint "if, in the opinion of the Executive Director, the complainant has refused to accept a proposed settlement that is fair and reasonable".

[54] The appellant fairly submits that if the Legislature intended the Commission to take into account an offer to settle in deciding whether to refer a case to a board it could have said so explicitly as has been done in these other provinces. Of course, the other lesson that can be drawn is that these other provinces have seen nothing inconsistent with the goals of human rights legislation to give a Commission or its equivalent an express power to refuse to continue a complaint because the complainant has refused to accept a fair and reasonable settlement offer.

[55] Given the broad scope of the Commission's mandate in s. 36, as identified by the use of the term "appropriate", the failure of the Ontario Legislature to expressly refer to refusal to accept offers to settle is not fatal to an interpretation of s. 36 that would give the Commission that power.

(v) Conclusion on the interpretation of s. 36

[56] For these reasons, it is my view that in considering whether it is appropriate to refer a complaint to a board of inquiry under s. 36 the Commission may take into account an offer to settle from the respondent. I would therefore not give effect to this ground of appeal.

(4) The Commission's decision

[57] As I have said, the standard of review of the decision not to refer a complaint to the board of inquiry is patent unreasonableness. In *Ryan v. Law Society of New Brunswick* (2003), 223 D.L.R. (4th) 577 (S.C.C.) at para. 52, Iacobucci J. described the standard of patent unreasonableness in these terms:

> The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of

> doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, 101 D.L.R. (4th) 673, per Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, 138 D.L.R. (4th) 193, at paras. 9-12, per Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

[58] In my view, the decision of the Commission is not patently unreasonable. There is a rational basis for the Commission's decision. It evaluated the employer's offer and found that it was equivalent to what the appellant could reasonably expect to receive should the case proceed to a board of inquiry. It also found that the offer was reasonable with regard to general, specific and public interest remedies. In his factum and in his submissions to the Commission, appellant's counsel has closely analyzed the employer's offer to show that the appellant might well receive a much better result before a board of inquiry. Counsel for the Commission has performed a similar exercise in its factum. I have reviewed those submissions together with the extensive case law referred to by the appellant. I agree with counsel for the Commission that it was open to the Commission to find that many of the claims made by the appellant would not receive compensation. For example, the appellant's claim for losses arising from the sale of his home after he left Metroland is arguably too remote to receive compensation.

[59] The appellant submits that had the complaint gone to a board of inquiry the employer would have been required to renovate its premises to accommodate him. Given the efforts that the employer made to accommodate the appellant, it cannot be said that it was patently unreasonable for the Commission to conclude otherwise.

[60] In my view, the Commission's decision might even be upheld on the less deferential standard of reasonableness *simpliciter* where the court asks "after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" See *Ryan* at para. 47. At the very least, it cannot be said that the Commission's decision is clearly irrational.

(5) The fairness issue

[61] Finally, I would not give effect to the appellant's complaint of procedural unfairness. The appellant submits that the Commission should have provided him with Metroland's submissions so that he could respond to them and make relevant representations. He complains that he was not given the Metroland's letters of

February 15, 2001 and November 15, 2001. The February letter was written in response to the first case analysis. The November letter was written in response to the appellant's request for reconsideration. Set out below in chart form is a brief review of the chronology:

March 25, 1997	Appellant ceases employment with Metroland.
September 18, 1997	Appellant files complaint with Commission.
December 16, 1997	Metroland files response to complaint.
March 11, 1998	Mediation attempted and fails.
June 17, 1998	Appellant files reply and amendment to complaint.
November 3, 1999	Letter from appellant's counsel setting out on a without prejudice basis the appellant's estimated losses.
January 25, 2001	First case analysis recommends referral of complaint to a board of inquiry.
February 15, 2001	Respondent's submissions in response to first case analysis. [Not disclosed to the appellant.]
May 31, 2001	Counsel for appellant requests copies of Metroland's submissions to the Commission and any further submissions.
July 6, 2001	Second case analysis recommends against referral to a board of inquiry in light of Metroland's offer to settle.
August 17, 2001	Counsel for appellant again requests copies of Metroland's submissions to the Commission.
August 24, 2001	Metroland makes submissions in response to second case analysis. [These submissions were not disclosed to Metroland.]

August 30, 2001	Appellant makes submissions in response to second case analysis. These submissions were not disclosed to Metroland.
October 9, 2001	Commission's s. 36 decision refusing referral to Board.
October 18, 2001	Request by appellant for reconsideration.
November 15, 2001	Respondent files submissions in response to application for reconsideration. [These submissions were not disclosed to the appellant.]
May 30, 2002	Reconsideration report mailed to the parties. Parties informed that they may make submissions within 15 days.
July 17, 2002	Commission's s. 37 reconsideration decision.

[62] In my view, the Commission complied with its duty of fairness. As was said by Sharpe J.A. in *Payne* at para. 156, "procedural fairness dictates that the complainant and other parties who may be affected by a decision of the Commission be given notice of the facts, arguments and considerations upon which the decision is to be based and an opportunity to make submissions". The duty of fairness imposed on the Commission does not require that it disclose to the parties the actual correspondence from the other side, provided the parties know the case they have to meet. See *Federation of Women Teachers' Associations of Canada v. Ontario (Human Rights Commission)* (1988), 56 D.L.R. (4th) 721 (Ont. Div. Ct.) at 733, and *Gismondi* at para. 34. In the case analyses and the reconsideration report, Commission staff provided the appellant with a summary of the submissions made by the respondent employer. The appellant was thus made aware of the positions taken by the respondent employer. He made extensive submissions concerning the propriety of the Commission considering the settlement offer and the sufficiency of that offer. In the Commission's reconsideration report he was made aware of the position taken by the employer and was offered the opportunity to make further submissions.

[63] The appellant also submits that the delay in processing this case deprived him of fundamental fairness. I would not give effect to this submission since the appellant has not shown that the delay compromised his right to a fair hearing: *Blencoe v. British Columbia,* [2000] 2 S.C.R. 307.

DISPOSITION

[64] Accordingly, I would dismiss the appeal. As the respondents did not seek costs, the appeal is dismissed without costs.

Signed: "M. Rosenberg J.A."
"I agree K.M. Weiler J.A."
"I agree S.E. Lang J.A."

RELEASED: "KMW" October 11, 2005