Registrar's Office
TransCanada Pipelines Tower
2600, 450 – 1st ST SW
Calgary AB T2P 5H1

TEL: (403) 297-2206
FAX: (403) 297-5294

Registrar's Office
Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

TEL: (780) 422-1095
FAX: (780) 422-4127

I. Moore
Deputy Registrar, Calgary and Edmonton

COURT OF APPEAL OF ALBERTA

https://albertacourts.ca

June 22, 2017

Ms. L. M. Chahley
Blair Chahley
Fax: 1-877-835-8920

Sarah Crummy
Ackroyd LLP
Fax: 780-423-8946

Janice R. Ashcroft, QC
Alberta Human Rights Commission
Fax: 403-476-4945

Cristina Wendel
~~Dentons Canada LLP~~ Blair Chahley
Fax: ~~780-423-7276~~ 1-877-835-8920

Anna Loparco
Dentons Canada LLP
Fax: 780-423-7276

Re: ***Jan Buterman (A) v. The Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No. 734 (R) and others***
Appeal No. 1603-0104AC

This is to advise that the reserved judgment in the above named case will be released the morning of June 23, 2017. On that day, **between 9:30 a.m. and 10:00 a.m.**, a copy of the judgment will be sent to you as set out above.

That same day, the judgment will also be sent to the Canadian Legal Information Institute (CanLII) at 10:00 a.m. for publishing to its website, which may occur that same day. Any concerns with on line judgments should be raised directly with CanLII.

If you have any concerns about the judgment being sent to you as set out above, please contact our office as soon as possible to make alternate delivery arrangements.

Thank you,

Deputy Registrar
Court of Appeal – Edmonton
rz

Date: June 23, 2017

As indicated above, attached is the judgment which was released today.

Thank you.

In the Court of Appeal of Alberta

Citation: Buterman v St. Albert Roman Catholic Separate School District No. 734, 2017 ABCA 196

Date: 20170623
Docket: 1603-0104-AC
Registry: Edmonton

Between:

Jan Buterman

Appellant
(Applicant)

- and -

The Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No. 734 and Alberta Human Rights Commission (Tribunal)

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Barbara Veldhuis

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice Donald Lee
Dated the 17th day of March, 2016
Filed on the 4th day of May, 2016
(2016 ABQB 159, Docket: 1403 16635; 1503 03297)

Memorandum of Judgment

The Court:

I. Introduction

[1] The Alberta Human Rights Commission Tribunal ("Tribunal") found that Mr Buterman had relinquished his human rights claim against the Board of Trustees of the Greater St Albert Roman Catholic Separate School Board District No. 734 ("Board") because the Board and Mr Buterman had entered into a settlement agreement.

[2] A Queen's Bench judge concluded that the Tribunal's decision was reasonable and dismissed Mr Buterman's appeal: *Buterman v Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No. 734,* 2016 ABQB 159.

[3] We dismiss Mr Buterman's appeal.

II. Background

[4] On October 14, 2008, Mr Buterman was removed from the Board's roster of substitute teachers because he was a transgender person in the process of transitioning from female to male. He was advised by the Board in writing that "the teaching of the Catholic Church is that persons cannot change their gender. One's gender is considered what God created us to be ... Since you have made a personal choice to change your gender, which is contrary to Catholic teachings, we have had no choice but to remove you from the substitute teaching list": Reasons at para 5. On October 1, 2009 Mr Buterman filed a human rights complaint with the Alberta Human Rights Commission.

[5] On October 2, 2009 the Board offered to settle the human rights complaint by way of a cash settlement of $78,000 (five years pay as a substitute teacher) in exchange for withdrawal of the complaint, a covenant not to advance any further human rights complaints or legal process in relation to the complaint, and a standard release containing a confidentiality clause. Mr Buterman rejected that offer.

[6] Almost a year later, on September 8, 2010, the Board made a different offer. Mr Buterman rejected that offer but in the letter of rejection his counsel wrote the following:

> Mr. Buterman has instructed us to notify you that he is willing to accept the proposal put forward by GSACRD on October 2, 2009 according to which GSACRD would make a conciliation payment to Mr. Buterman in the amount of $78,000. In view of GSACRD's commitment to finding a fair and reasonable resolution, we expect that this offer is still open for acceptance notwithstanding Mr.

> Buterman's earlier rejection of the offer. We would appreciate if you could confirm whether your client is still prepared to resolve Mr. Buterman's complaint on this basis. Once we receive this confirmation, we can discuss the details of the settlement. (emphasis added)

[7] Later that day the Board advised that the offer of October 2, 2009 had remained open continuously from October 2, 2009, and agreed to the acceptance of that offer. In its letter of September 8, 2010 the Board included an excerpt of its October 2, 2009 letter, setting out the offer:

> Please consider this as a formal offer for The Greater St. Albert C.R.D. No.29 to pay to Jan Buterman the sum of $78,000.00 in exchange for the following:
>
> 1. Withdrawal of the Human Rights Complaint of October 1, 2009;
>
> 2. A covenant that no further Human Rights Complaint or legal process will be commenced after this date arising out of the circumstances by which [Jan Buterman's] name [was] removed from the substitute teaching list for The Greater St. Albert C.R.D. No. 29; and
>
> 3. Provision of a standard Release from Jan Buterman, containing a confidentiality clause prohibiting Jan Buterman from disclosing the existence or terms of the settlement with anyone other than [Jan Buterman's] legal counsel.

[8] Some months later, after an exchange of correspondence regarding the form of the release and confidentiality agreement, Mr Buterman's counsel returned the monies and the unsigned documents. Mr Buterman's counsel ceased to act and in April, 2011 the Board's counsel sent the draft settlement documents directly to Mr Buterman. Although Mr Buterman did not directly communicate with the Board, on April 10, 2011, he advised the media that he had rejected the Board's settlement offer due to the confidentiality clause contained in the release.

[9] In 2014 the Board applied to the Tribunal for a preliminary determination as to whether the Tribunal had jurisdiction to hear the complaint given that the parties had entered into a settlement agreement.

III. Decisions of the Tribunal: *Buterman v Greater St Albert Regional Division No 29*, 2014 AHRC 8, and 2015 AHRC 2

[10] The Tribunal conducted a three-day hearing to consider the Board's preliminary application. Mr Buterman had retained new counsel who represented him before the Tribunal. In addition to the documentary record, the Tribunal heard from two witnesses who gave evidence on behalf of the Board.

[11] In a reserved decision issued on October 30, 2014 a majority of the Tribunal determined that there was a contract of settlement which was executory until the follow-up terms were finalized. It viewed the offer as having been made by the Board on October 2, 2009 and accepted by Mr. Buterman on September 8, 2010. In the alternative, there was an offer made by Mr Buterman on September 8, 2010 which was accepted by the Board on September 8, 2010. The Tribunal also concluded that the exchange of correspondence after the settlement, while the parties were working out the wording of release and confidentiality provisions, was not a repudiation of the settlement agreement by the Board. The dissenting member of the Tribunal found that there was no settlement agreement.

[12] The Tribunal seized itself of the proceeding.

[13] On November 5, 2014 the Board's counsel wrote to Mr Buterman's counsel and enclosed a cheque in the amount of $78,000 plus interest and the settlement documents indicating that they were merely draft documents for discussion purposes. The Board indicated that it was open to further negotiation and changes to the documents. The letter made clear that the Board was not rescinding the September 8, 2010 settlement agreement.

[14] On November 14, 2014 Mr Buterman filed a notice of appeal of the Tribunal's decision. On November 24, 2014, the Board's counsel wrote to Mr Buterman's counsel advising that it waived the execution of the settlement documents as those terms were for its unilateral benefit. It took the position that the settlement had been concluded.

[15] On February 4, 2015, the Tribunal majority determined that it had no remaining jurisdiction over the complaint because the parties had entered into a settlement agreement which had been fully executed. In the result, Mr Buterman had relinquished his human rights complaint in favour of a settlement.

IV. Decision of the Court of Queen's Bench

[16] The appeal judge held at para 138:

> "Reasonableness" in this context means the Tribunal majority reasons support their conclusions. Deference allows the Court to supplement the Tribunal's reasoning as long as their reasoning, taken as a whole, is tenable. The tribunal majority reasons in this case allow me to understand how it made its decisions and they are sufficient. I determine that their conclusions are within the range of acceptable outcomes. In this regard, I am following the Supreme Court of Canada's definition of "reasonableness" as found in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 12 and 16; and in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paragraphs 55 and 56.

V. Grounds of Appeal and Standards of Review

[17] Somewhat restated, Mr Buterman submits that the appeal judge erred:

> (i) in finding that there was a settlement and if there was a settlement, it had not been repudiated by the Board;
>
> (ii) in finding that the Tribunal had not exceeded its jurisdiction when it remained seized of the matter; and
>
> (iii) in concluding that the settlement was not unconscionable.

[18] There are two standards of review at play: first, the standard applied by the Queen's Bench appeal judge to the Tribunal's decision; and second, the standard applied by this court to the Queen's Bench decision.

[19] Dealing with the first, when an administrative tribunal interprets its own statute the standard of review is presumed to be reasonableness: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, [2016] 2 SCR 293, 2016 SCC 47 at para 22.

[20] A statutory right of appeal does not change the presumption: *ibid* at para 26. When a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal": *Mouvement laique québécois v Saguenay (City)*, 2015 SCC 16 at para 38, [2015] 2 SCR 3.

[21] Recently, in *Stewart v Elk Valley Coal Company*, 2017 SCC 30, the Supreme Court stated at paras 19 and 20:

> Beneath the rhetoric that surrounds standard of review lies the question of deference: Should the reviewing court approach the decision below with deference?
>
> Reviewing courts generally approach the decisions of tribunals under human rights statutes with considerable deference. It is the tribunal's task to evaluate the evidence, find the facts and draw reasonable inferences from the facts. And it is the tribunal's task to interpret the statute in ways that make practical and legal sense in the case before them, guided by applicable jurisprudence. Reviewing courts tread lightly in these areas.

[22] In the result, with respect to the first two grounds of appeal, the Tribunal's decision attracts a standard of reasonableness. Indeed, at the hearing Mr Buterman's counsel acknowledged this and argued based on a reasonableness standard.

[23] The role of this court is to determine whether the appeal judge chose and applied the appropriate standard of review and, if not, to assess the administrative tribunal's decision in light of the correct standard: *Health Sciences Association of Alberta v David Thompson Health Region*, 2004 ABCA 185, 348 AR 361 at para 7; *Lethbridge Police Service v Lethbridge Police Association*, 2013 ABCA 47 at paras 25 to 29. 542 AR 252, leave denied [2013] SCCA No 159 (QL) (SCC No 35317) (on human rights issues). Whether the appropriate standard was properly applied by the reviewing judge is also a question of law, subject to the correctness standard on appeal: *CUPE (Local 784) v Board of Trustees (Edmonton School District No 7)*, 2005 ABCA 74, 363 AR 123; *Lethbridge Police Service*; *Telecommunications Workers Union v Telus Communications Inc*, 2014 ABCA 154 at para 24, 74 Admin LR 5th 140. In those regards, it has been compactly put by the Supreme Court of Canada that the appeal court steps into the "shoes" of the review court: see *Agraira v Canada*, 2013 SCC 36 at para 45 to 46, [2013] 2 SCR 559.

[24] The remaining ground of appeal, whether the agreement was unconscionable, was not considered by the Tribunal in its reasons. Accordingly, only the appeal judge's application of the law to the facts is challenged. This decision is reviewed for palpable and overriding error.

VI. Analysis

[25] The appeal judge correctly determined that the reasonableness standard of review applied to his review of the Tribunal's decision. Whether that standard was correctly applied is discussed next.

Was the Original Offer Still Open for Acceptance?

[26] The Tribunal concluded that the Board's original offer dated October 2, 2009 remained open for acceptance on September 8, 2010. Mr Buterman contends that the Tribunal's decision is unreasonable and contrary to law, as offers do not normally remain open indefinitely.

[27] The Tribunal had regard to Waddams S.M., *The Law of Contracts* (6 ed 2010) at para 116 and explained the principle as follows: "rejection of an offer 'generally' extinguishes the offeree's right to accept it. In this way, the offeror is freed from holding it open and available for acceptance and is then able to make the offer elsewhere without risk of being bound to the original offer": *Buterman v Greater St. Albert Regional Division No. 29*, 2014 AHRC 8 at para 38.

[28] However, the Tribunal reasoned that on the facts, this general principle did not apply. It reasoned that this was not a case where the offeror would take its offer elsewhere. The offer could only be made to Mr Buterman. Moreover, the offer was not time limited and there was no risk to either party if the offer remained open for acceptance.

[29] In our view, it was reasonable for the Tribunal to conclude that the October 2, 2009 offer remained open. The Tribunal had regard to the appropriate legal principle and applied it reasonably to the facts. This is particularly so given that it was Mr Buterman who expressed an

interest in accepting that offer and the Board immediately confirmed that it was still open. This conclusion was certainly within a range of reasonable outcomes available to the Tribunal: *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247 at paras 55 and 56; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12 and 16, [2011] 3 SCR 708. Further, it would have been an equally reasonable interpretation to conclude that it was Mr Buterman that made an offer in his letter of September 8, 2010 and that the Board accepted that offer in its letter of the same date.

Was There Agreement to the Essential Terms of the Settlement?

[30] After September 8, 2010 the parties corresponded regarding the settlement documents. Mr Buterman submits that there was insufficient certainty of terms to constitute a meeting of the minds.

[31] Central to this issue is the decision in *Feiguth v Acklands Ltd* (1989), 37 BCLR (2d) 62, 59 DLR (4th) 114 (CA) which held that a settlement may be reached by the parties before they complete the settlement documentation. McEachern CJBC commented:

> [35] In these matters it is necessary to separate the question of formation of contract from its completion. The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.
>
> [36] The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[32] Both the Tribunal majority and the dissent had regard to *Feiguth*. Where they differed was in the characterization of the correspondence after September 8, 2010. The Tribunal majority found it amounted to documenting the settlement. The minority found that the correspondence added essential terms.

[33] It is necessary to set out the correspondence in some detail. On September 28, 2010 the Board's counsel wrote to Mr Buterman's counsel confirming that he had the trust funds in his account. The letter also responded affirmatively to a request from Mr Buterman's counsel about whether the payment could be structured for tax purposes. The letter restated the terms of the September 8, 2010 "settlement" and stated:

> I enclose … three draft documents which will fulfill, when executed and provided to various recipients, the terms of the settlement:
>
> (1) Our draft correspondence from Jan Buterman to the [Tribunal] withdrawing the complaint of October 1, 2009;
>
> (2) Our draft covenant that no further human rights complaint or legal processes will be commenced; and
>
> (3) Our draft release and confidentiality agreement.

The letter continued by noting that the release and confidentiality agreement was modelled upon other documentation negotiated in wrongful dismissal litigation between the same law firms.

[34] The draft correspondence referred to in item 1 in the paragraph above states in part that Mr Buterman will withdraw and discontinue his complaint and will not refile nor repeat "this complaint" against the Board or the school division.

[35] The covenant referred to in item 2 in paragraph 27 states in part:

> I, Jan Buterman, covenant and agree that no further human rights complaint or legal process will be commenced against the Division, the Board of Trustees, or any other Catholic public or separate school, district, district, division, school division or regional division, or educational regional division, association or entity in the Province of Alberta after this date, arising out of the circumstances by which I had my name removed from the substitute teaching list for the Division by, with the knowledge and consent of, or for, the Board of Trustees, or in any way related to the facts set out in my Alberta Human Rights Complaint #N2009/10/2016, or related in any way to my complaint that I have been the subject of discrimination in the areas of employment refused and termination of employment, or on the grounds of mental disability, physical disability or gender, or arising out of or in any way connected with my diagnosis of being transgendered, suffering from gender identity disorder, or my undergoing a treatment plan with goal of sex reassignment.

[36] The relevant terms of the release and confidentiality agreement referred to in item 3 of paragraph 27 are:

I, Jan Buterman, do for myself and my heirs, executors, administrators and assigns, release the Board of Trustees and the Division, their predecessor and successors, each of their trustees, educational administrators, officers, directors, employees and agents, their respective heirs, executors, administrators and assigns (collectively referred to as the "releasees") from all human rights complaints, actions, causes of action, suits, claims and demands of any kind whatsoever, at law or in equity or under legislation, including the *Employment Standards Code (Alberta),* the *Freedom of Information and Protection of Privacy Act (Alberta)* and the *Alberta Human Rights Act,* which I ever had, now have or which I or my heirs, executors, administrators and assigns may subsequently have against the releasees of any of them by reason of anything existing up to the present time, including but not limited to my Alberta Human Rights complaint #N2009/10/[2016], or my complaint that I have been the subject of discrimination in the areas of employment refused and termination of employment, or on the grounds of mental disability, physical disability or gender, or arising out of or in any way connected with my diagnosis of being transgendered, suffering from gender identity disorder, or my undergoing a treatment plan with the goal of sex reassignment.

[...]

I agree that I will not discuss nor speak about my Alberta Human Rights complaint #N2009/10/[2016], nor my complaint that I have been the subject of discrimination in the areas of employment refused and termination of employment, or on the grounds of mental disability, physical disability or gender, or arising out of or in [any] way connected with my diagnosis, of being transgendered or my undergoing a treatment plan with the goal of sex reassignment, and I will not disclose nor speak about the terms of this release and confidentiality agreement to any person other than my legal counsel, my financial advisor or any person with lawful authority to inquire about matters contained in this release and confidentiality agreement. I also agree that such disclosure to my legal counsel, financial advisor or such person with lawful authority, may only be made if the person to whom the disclosure is made agrees not to disclose the Human Rights complaint #N2009/10/[2016], or the terms of this release and confidentiality agreement to any person. The phrase "terms of this release and confidentiality agreement" in this paragraph does not include any communication from Jan Buterman to any employer or a potential employer or in the course of legal proceedings where Jan Buterman is under a legal duty to disclose the existence of the Human rights complaint #N2009/10/[2016], or this release and confidentiality agreement, or both.

[37] In a November 9, 2010 follow up letter to Mr Buterman's counsel, the Board's counsel referred to telephone conversations on October 19 and 30, 2010 and to having sent the documents in Word form so that Mr Buterman's counsel could: "propose minor alternate wording changes, without fundamentally altering the settlement agreement of September 8, 2010."

[38] A January 4, 2011 letter from the Board's counsel to Mr Buterman's counsel referred to conversations and exchanged voicemails about "some of your proposed minor wording changes", and concluded with the following: "the changes we have discussed over the past four months to settlement documentation have been quite minor, and I have said that I have no difficulty with the concepts of the changes you proposed. However, we have never received draft amended documents, formal proposals for wording changes incorporated into those documents, or signed settlement documentation."

[39] On January 7, 2011, Mr Buterman's counsel replied in writing. He said that it had taken longer than expected to consider and discuss issues with his client and that there was "one issue with respect to the settlement documentation that we want to discuss." He returned the monies "until agreement had been reached with respect to the settlement documentation."

[40] At issue is whether the essential terms of the settlement were contained in the September 8, 2010 correspondence, or whether the language of the settlement documents, in particular the release and confidentiality agreement, contained essential terms.

[41] The Tribunal majority interpreted the exchange of correspondence as "minuting" the settlement. The documents were provided in draft form. The evidence showed that changes were discussed and that the Board's counsel had no difficulty with the proposed changes which he characterized as minor.

[42] The dissenting opinion found that the broader wording of the covenant to include parties in addition to the Board (any other Catholic public or separate school, district, district, division, school division or regional division, or educational regional division, association or entity), the appearance that the release might cover future breaches of the Act, and the broad confidentiality provisions that would prohibit Mr Buterman from disclosing the settlement to anyone other than his counsel amounted to the creation of essential terms of the contract. As there was no meeting of the minds on these issues, there was no settlement.

[43] The heart of the debate is the meaning of "essential" terms. The Tribunal majority reasoned that there were four essential terms: (i) payment of $78,000; (ii) withdrawal of the complaint; (iii) a covenant not to issue new complaints arising of the circumstance of the complaint; and (iv) execution of a release and confidentiality agreement. These terms were all set out in the September 8, 2010 correspondence. Mr Buterman submits that the settlement documents also contained essential terms to which he did not agree. He contends that as a human rights complaint has different aspects than a wrongful dismissal claim, the Board ought not to have used precedents from wrongful dismissal claims to draft the settlement documents.

[44] The distinction drawn by the majority Tribunal can best be described as finding that the execution of the release and confidentiality agreement was an essential term but the *form* of the document was not. Viewed from this perspective, in our view it was not unreasonable for the Tribunal majority to characterize the draft settlement documents as "minuting" the settlement as described in *Fieguth*. The Tribunal majority decision contains a line of analysis which led to its conclusion. There is a tenable explanation for the majority's conclusion. Accordingly, we are not persuaded that there is any reviewable error in the Tribunal majority's decision that the parties entered into a settlement agreement.

Repudiation

[45] Mr Buterman submits that if there was an agreement, the Board repudiated the agreement by its proposed form of release and confidentiality clauses.

[46] *Fieguth* also considered the issue of repudiation at para 44:

> It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated, such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.

[47] The Tribunal majority concluded that there had been no repudiation. It reviewed the correspondence sent by the Board's counsel and the settlement documents which were consistently provided in draft form and which invited comments from Mr Buterman's counsel. The majority concluded that Mr Buterman had not demonstrated that the draft settlement documents were inflexible or final. It reasoned that, to the contrary, the evidence strongly supported a conclusion that the parties were engaged in an exchange concerning the final wording of the documents.

[48] Mr Buterman specifically contended that the letter of April 7, 2011 sent to him directly (as he no longer had counsel) constituted a repudiation of the agreement. The Tribunal majority noted

that the documents were identical to those sent in draft form previously, and it was reasonable to infer that Mr Buterman was aware of the draft settlement documents prior to receiving them on April 7, 2011. The Tribunal majority observed that the documents were identified in the letter as drafts and although Mr Buterman was asked to sign them, there was no suggestion that the Board was insistent on the documents being signed in the form presented. The Tribunal majority concluded that "the record demonstrates that the [Board] was receptive to amendments to the documents at all times after they were presented on September 28, 2010."

[49] This was a conclusion that was available on this record. Moreover, when a party repudiates a contract, the non-repudiating party must accept that repudiation: *Guarantee Co of North America v Gordon Capital Corp,* [1999] 3 SCR 423 at para 40, 178 DLR (4th) 1. The non-repudiating party must "by words or conduct" evidence an intention not to be bound by the contract: *ibid.*

[50] As the Court held in *Fieguth*, "[w]hen disputes arise in this connection the question will seldom be one of repudiation": para 44. See also *Remedy Drug Store Co Inc v Farnham*, 2015 ONCA 576 at paras 42-44, 389 DLR 4th 671. The most that can be said is that while Mr Buterman communicated with the media at no time did he communicate his acceptance of the Board's [illegible] repudiation (if any) to the Board.

[51] In our view, the requirement of a clear acceptance of a repudiation by the non-repudiating party, as discerned on an objective standard is particularly appropriate in relation to settlement agreements. The object of a settlement agreement is to bring an existing dispute to a close, not to create a situation where either or both of the parties can treat the agreement as merely another step in a continuing dispute. Where there is no objective basis to conclude that repudiation has occurred, it is open to the court to find that the parties have completely walked away from the settlement.

[52] On this record there is no objective basis to conclude that the Board repudiated the agreement or that Mr Buterman accepted that repudiation. The Tribunal majority decision on this issue is reasonable.

Jurisdiction to Remain Seized of the Complaint

[53] In its first decision the Tribunal majority concluded that there was a contract of settlement which was executory. It seized itself of the matter and directed the parties to return when the settlement had been executed. The appeal judge found the Tribunal's decision to remain seized of the complaint until the settlement documents were finalized to be reasonable. As he noted, administrative tribunals control their own procedures as long as they comply with the rules of fairness: *Prassad v Canada (Minister of Employment and Immigration),* [1989] 1 SCR 560 at para 46, 57 DLR (4th) 663. This was a preliminary application regarding whether there had been a settlement. The Tribunal majority found that there had been and that the parties were to return when the terms had been finalized. It was within its mandate to remain seized pending finalization

of the settlement. There is no reviewable error in the Tribunal majority's decision or in the appeal judge's decision.

Unconscionability

[54] Mr Buterman contends that the settlement should be disregarded on the grounds of public policy. He relies upon the equitable doctrine of unconscionability. Although this argument was raised before the Tribunal, the Tribunal majority did not address it. The dissent made only a passing comment. The appeal judge considered it briefly and found that while some of the terms were likely unenforceable, overall the settlement was not unconscionable.

[55] While indicia of unconscionability are context-specific, case law suggests several useful factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties: *Redstone Enterprises Ltd v Simple Technology Inc*, 2017 ONCA 282 at para 30. See also *Cain v Clarica Insurance Company*, 2005 ABCA 437 at paras 31 to 32, 384 AR 11.

[56] None of these indicia is apparent on the record. As regards the bargaining power, Mr Buterman was represented by counsel through most of the negotiations: see eg *Settlement Lenders Inc v Blicharz* at para 2016 ABCA 33 at paras 25 to 29. After the retainer with his lawyer was terminated, he received a letter from the Board, which contained identical draft documents to those which had been sent previously. The Tribunal majority reasonably concluded that Mr Buterman would not have been taken by surprise by the content of the draft documents. The record demonstrates that Mr Buterman was quite able to distinguish between elements of the settlement and to advance his position without reticence. In short, there was little, if any, inequality of bargaining power at the relevant time.

[57] Mr Buterman contends that the settlement documents contained an unenforceable term; that he relinquish potential future human rights complaints. His submission finds support in *Chow v Mobil Oil Canada,* 1999 ABQB 1026, 248 AR 372. Indeed, the appeal judge acknowledged that not all the terms of the settlement might be enforceable. Mr Buterman also submits that the myriad of entities against whom he was required to release his claims was too broad.

[58] In our view, this is not a sufficient basis to find that the settlement agreement was unconscionable. We need to place this argument into the context of the Tribunal's reasons. In its initial decision it found that the parties had a settlement but still had to document the settlement. The Tribunal majority found that the parties were still negotiating the minutes of the settlement and that all of the Board's documents were sent in draft form and invited comments. Mr Buterman's counsel never suggested that the documents should be modified to reflect the concerns that form the basis of Mr Buterman's argument. The only response on the record is a comment that the suggested changes were minimal.

[59] By the time the parties returned to the Tribunal in December 2014, the settlement was complete. The monies were paid and the Board had waived the requirement that Mr Buterman execute the documents. Any concern regarding a confidentiality clause was overtaken by Mr Buterman's interview with the press. We appreciate that the time at which to assess whether a bargain is unconscionable is at the time of the bargain, but we cannot ignore the entire context of this dispute. An inference which can be reasonably drawn from the record is that Mr Buterman regretted his decision to settle the complaint.

[60] Unconscionability is an equitable doctrine and the remedy is discretionary. In the circumstances of this appeal, we are not persuaded that this is an appropriate case to exercise that discretion. We dismiss this ground of appeal.

VII. Conclusion

[61] We find no reviewable errors in the decision on appeal. The appeal judge applied the correct standard of review and the Tribunal majority's decision is reasonable. The appeal is dismissed.

Appeal heard on May 4, 2017

Memorandum filed at Edmonton, Alberta
this 23rd day of June, 2017

REGISTRAR
FILED
JUN 23 2017
Court of Appeal of Alberta

Watson J.A.

Rowbotham J.A.

Authorized to sign for: Veldhuis J.A.

Appearances:

L.M. Chahley and S.C. Crummy
for the Appellant

A. Loparco and C.R.C. Wendel
for the Respondent The Board of Trustees of the Greater St. Albert Roman Catholic Separate School District No.734

J.R. Ashcroft, Q.C.
for the Respondent the Alberta Human Rights Tribunal