Court of Appeal for Saskatchewan
Docket: CACV4099

Citation: *Saskatchewan Human Rights Commission v Saskatchewan Power Corporation*, 2024 SKCA 13
Date: 2024-02-13

Between:

Saskatchewan Human Rights Commission

Appellant
(Respondent/Applicant)

And

Saskatchewan Power Corporation

Respondent
(Applicant/Respondent)

And

Bradly Schumacher

Respondent
(Respondent/Complainant)

Before:	Leurer C.J.S., Barrington-Foote and Tholl JJ.A.
Disposition:	Appeal allowed
Written reasons by: In concurrence:	The Honourable Mr. Justice Tholl The Honourable Chief Justice Leurer The Honourable Mr. Justice Barrington-Foote
On appeal from: Appeal heard:	QBG-SA-00885-2021 (Sask KB), Saskatoon September 18, 2023
Counsel:	Jay Watson for the Appellant Susan Barber, K.C., and Calen Nixon for Saskatchewan Power Corporation Patrick Thomson for Bradly Schumacher

Tholl J.A.

I. INTRODUCTION

[1] After his employment was terminated by the Saskatchewan Power Corporation [SaskPower], Bradly Schumacher filed a complaint with the Saskatchewan Human Rights Commission [Commission], asserting that SaskPower had discriminated against him on the basis of disability and had failed to accommodate him. The Chief Commissioner of the Commission applied to the Court of Queen's Bench, as it was at the time, under s. 34 of *The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2 [*Code*], seeking a hearing of Mr. Schumacher's complaint. As part of the application, the Chief Commissioner alleged that SaskPower had engaged in systemic discrimination against disabled employees. SaskPower successfully applied to have those allegations struck as being immaterial, prejudicial, and an abuse of process: *Saskatchewan Human Rights Commission v Schumacher* (4 November 2022) Saskatoon, QBG-SA-00885-2021 (Sask KB) [*Chambers Decision*]. The Commission appeals from that finding.

[2] For the reasons that follow, the appeal is allowed.

II. BACKGROUND

[3] It is useful to provide a high-level summary of the procedure used in Saskatchewan to address a human rights complaint relating to employment under the *Code* because the process in Saskatchewan differs greatly from many other jurisdictions.

[4] An individual who reasonably believes that they have been discriminated against in employment on the basis of a prohibited ground may file a written complaint with the Commission: ss. 2, 16, and 29 of the *Code*. The Commission takes on an investigatory role and may dismiss the complaint for a variety of reasons: ss. 30–32 of the *Code*. A complaint may be referred to mediation: s. 33 of the *Code*. If the Commission determines that it is appropriate to proceed with an adjudication of the complaint, it may apply to the Court of King's Bench and request a hearing: s. 34 of the *Code*. The Court of King's Bench is required to fix a date for the hearing, but it is entitled to set the matter down for a pre-hearing conference prior to doing so: s. 35 of the *Code*. A Court of King's Bench practice directive, "Applications under *The Saskatchewan Human Rights*

Code", CV-PD 5 (1 October 2019) [Civil Practice Directive #5], sets out the detailed procedure that is used in that court. One of the requirements of that practice directive is that the particulars of the complaint be set out in an appendix attached to the application. If the matter is not resolved at a pre-hearing conference, it is set down for a hearing before a Chambers judge in the Court of King's Bench. The Commission is a full party to the hearing and has carriage of the complaint: s. 37 of the *Code*. In practice, its counsel prosecutes the complaint and calls witnesses, tenders evidence, and makes submissions.

[5] This brings us to the facts of the matter at hand. Mr. Schumacher commenced employment with SaskPower in 1979. He suffered a back injury in 2004 and received workers' compensation benefits until he returned to work with no restrictions in 2006. In 2016, SaskPower informed Mr. Schumacher that he would be required to work in a new location, but would continue to perform the same job duties. Mr. Schumacher expressed a belief, supported by a letter from his physician, that, because of his previous back injury, he was physically unable to perform the work SaskPower was now asking him to do. There was an initial accommodation; after which, Mr. Schumacher went on sick leave pending an assessment of his medical situation. In August of 2016, he began working again under a return-to-work plan, but his employment was ultimately terminated by SaskPower on September 1, 2016. Because the merits of Mr. Schumacher's individual claim are not at issue in this appeal, I will not recount the reasons SaskPower gave for that termination.

[6] Mr. Schumacher grieved his termination, but the grievance was denied at three levels and was ultimately withdrawn by his union. On November 24, 2017, Mr. Schumacher filed a complaint with the Commission under s. 16 of the *Code*, alleging that SaskPower had failed to make the appropriate accommodations for him and that he had been discriminated against by SaskPower on the basis of disability. An investigation was conducted by the Commission, and the matter was directed to mediation. The mediation was unsuccessful.

[7] The Chief Commissioner of the Commission applied to the Court of Queen's Bench, pursuant to s. 34 of the *Code*, seeking a hearing of Mr. Schumacher's complaint. In addition to alleging that SaskPower had discriminated against Mr. Schumacher and failed to accommodate him, the Commission's application, in appendix A, contained the following allegations about systemic discrimination within SaskPower:

> [41] Schumacher says that SaskPower has engaged in a pattern of conduct that recklessly disregarded his rights, and the rights of other disabled employees under the *Code*, the particulars of which include:
>
> > a. SaskPower questions the veracity of disabled employees' medical limitations without proper foundation or justification;
> >
> > b. SaskPower contradicts the medical advice of disabled employees' treating physicians;
> >
> > c. SaskPower assesses medical issues and accommodation without sufficient expertise and without obtaining professional advice;
> >
> > d. SaskPower pressures disabled employees to return to regular duties under threat of discipline despite knowledge that this is contrary to medical advice;
> >
> > e. SaskPower fails to accommodate employees with disabilities to the point of undue hardship; and
> >
> > f. SaskPower terminates the employment of disabled employees without cause as a result of their disabilities.

[8] The Commission asserts that it is entitled to lead evidence relating to these allegations on the basis of s. 35(4) of the *Code*:

> **Hearing**
>
> **35**(1) Subject to subsection (2), on the receipt of an application for a hearing pursuant to subsection 34(1), the court shall fix a date, time and place for the hearing.
>
> (2) Before setting a hearing date, the court may direct the parties to participate in a pre-hearing conference.
>
> (3) Except where modified by this Act, *The King's Bench Rules* apply to a hearing pursuant to this section.
>
> (4) The court is entitled:
>
> > (a) to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act; and
> >
> > (b) in arriving at its decision, to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence.

[9] In January of 2022, SaskPower conducted a questioning of Mr. Schumacher. He was unable to answer, in any meaningful way, how it was that SaskPower had "engaged in a pattern of conduct that recklessly disregarded his rights and the rights of other disabled employees under the *Code*", as was alleged in paragraph 41 of the application. Based on this, on February 24, 2022, SaskPower sent the Commission a letter requesting that it withdraw the allegations in paragraph 41 or provide more specific particulars of this allegation. In response, on March 8, 2022, and July 27, 2022, the Commission provided information regarding complaints by six other SaskPower

employees. Broadly described, four of those complaints had been settled without an admission of liability by SaskPower, one had been resolved through the grievance process, and one was still pending. None of the five concluded matters had resulted in an admission or a finding that SaskPower had discriminated against an employee or had failed to accommodate them.

[10] As already noted, SaskPower then applied to the Court of Queen's Bench seeking to strike paragraph 41 of the Commission's application. The application was made pursuant to Rule 7-9 (striking out a pleading or other document)*'*. In the alternative, SaskPower asked the court to strike the impugned paragraph under Rule 7-2 (summary judgment) or Rule 7-1 (application to resolve issues). The parties agreed this alternative relief should be adjourned pending the outcome of the Rule 7-9 portion of the application. SaskPower also asked for other relief that is not at issue in this appeal and will not be further addressed.

III. COURT OF KING'S BENCH DECISION

[11] The Chambers judge set out the issues and facts and then addressed whether paragraph 41 should be struck pursuant to Rule 7-9. He noted this Court's discussion in *Reisinger v J.C. Atkin Architect Ltd.*, 2017 SKCA 11, 411 DLR (4th) 687 [*Reisinger*], where it stated that the purpose of Rule 7-9 is "to identify the real issues in dispute" and to get to a resolution of the claim for the least expense (at para 38). He set out the positions of the parties relating to the admission of pattern of practice evidence, which he noted is "often called propensity evidence or similar fact evidence" (*Chambers Decision* at para 30).

[12] The Chambers judge opened his analysis by observing that pattern of practice evidence is often "submitted to show that the respondent is the sort of corporation which is likely to have committed such an offence"; he opined that "[s]uch evidence is generally inadmissible" (at para 30). He then quoted from *R v Handy*, 2002 SCC 56, [2002] 2 SCR 908, and analyzed three cases relied upon by SaskPower: *Fitkall v Great Pacific Industries Inc., (No. 2)*, 2005 BCHRT 183; *Sinclair v London (City)*, 2008 HRTO 48, 63 CHRR 513 [*Sinclair*]; and *Morin v Huawei Technologies Canada Co., Ltd.*, 2019 CanLII 56957 (Ont LRB).

[13] Following this, the Chambers judge allowed SaskPower's "application to strike paragraph 41 of the Formal Complaint and the resultant particulars provided pursuant to Rule 7-9(2)(c), (d) and (e) on the basis that paragraph 41 is immaterial, prejudicial and an abuse of process" (*Chambers Decision* at para 38).

IV. ISSUES

[14] In its factum, the Commission describes three grounds of appeal. The first two are rooted in how the Chambers judge interpreted s. 35(4) of the *Code* and assert that he "erred in law by determining that pattern and practice evidence is only admissible as evidence if there is a finding or admission of liability with respect to the issue in question" and by "unreasonably narrowing the scope of pattern and practice evidence that can potentially be called pursuant to section 35(4) of the *Code*". The third ground is that the Chambers judge "erred in law by making an evidentiary determination without having heard the evidence, that should have been made by the trier of fact at the hearing". Considering these grounds of appeal, the outcome of the Commission's appeal turns on whether the Chambers judge properly interpreted s. 35(4) of the *Code*.

V. ANALYSIS

[15] The Commission submits that the Chambers judge erred by determining that only human rights complaints that had terminated with a finding of discrimination or an admission of discrimination could be tendered as evidence of a pattern of conduct or a practice under s. 35(4) of the *Code*. It bases this argument on the Chambers judge's consideration of *Sinclair* (*Chambers Decision*):

> [33] In the *Sinclair* case, the Ontario Human Rights Tribunal referred to the *Handy* case and stated at para. 26:
>
> > [26] The balancing of probative value against prejudicial effect, developed primarily in criminal cases such as *Handy*, must be applied with consideration of the nature of human rights cases and the values relevant to human rights proceedings. These include the fact that discrimination is often subtle and may be difficult to prove, and that a pattern of conduct may be particularly probative in many human rights cases. At the same time, the Tribunal is committed to fair, just and expeditious resolution of human rights cases, and the prejudicial effect of hearing evidence not only on the particular incident in question, but one or more other incidents, and the credibility of witnesses in relation to those events, may cause a

> significant lengthening of a hearing with little benefit for the determination of the issues in the case. There is also often prejudice to respondents in having to defend themselves against allegations that never formed the subject matter of human rights proceedings at the time they occurred. These factors must be taken into account in the balancing analysis.
>
> [34] I am satisfied that if the Chief Commissioner were allowed to call pattern of evidence in this case, it must do so with specific reference to individuals who were found to have been discriminated against on the basis of disability as was alleged by Schumacher. Mere reference to situations in which disability is alleged is not evidence of propensity. *The settlements or resolutions which may have been achieved in respect to the six other complaints does not lead to a propensity unless liability has been admitted*. The parties agree that liability was not admitted in any of the cases and that there were, in fact, confidentiality clauses and any payments made without admission of liability in respect to the settlements. I find that the prejudice of SaskPower would outweigh the probative value of such evidence.
>
> [35] I am also satisfied that if propensity evidence is allowed in situations such as this, it would prevent future settlements of cases for fear of establishing a precedent.
>
> (Emphasis added)

[16] The Commission's specific assertion is that, by stating that "settlements or resolutions which may have been achieved … does not lead to a propensity *unless liability has been admitted*" (emphasis added, at para 34), the Chambers judge impermissibly narrowed the scope of s. 35(4). In short, the Commission submits that the Chambers judge erred by interpreting the provision in a manner completely at odds with its grammatical and ordinary meaning, the object and purpose of the *Code*, the related provisions in the *Code*, and the legislative history of s. 35(4).

[17] SaskPower argues that the Chambers judge did not err in his interpretation of s. 35(4) or in his determinations on the scope of evidence that would be permitted to be called in a future hearing. It contends that it should not be required to relitigate matters that have been resolved. While it recognizes that pattern or practice evidence may be admitted under s. 35(4) of the *Code*, SaskPower asserts that the Chambers judge properly struck the allegations in this specific matter.

[18] The question in this appeal comes down to one of statutory interpretation and, therefore, raises a question of law. As such, this portion of the *Chambers Decision* is reviewable on the standard of correctness: *Regina Bypass Design Builders v Supreme Steel LP*, 2021 SKCA 82 at para 22. My approach to the interpretation of the legislation is based on s. 2-10 of *The Legislation Act*, SS 2019, c L-10.2, and the framework described in paragraphs 23 to 28 of *Regina Bypass*.

[19] In *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62, [2017] 2 SCR 795, the Supreme Court indicated that a broad and liberal approach must be used in the interpretation exercise when human rights legislation is involved:

> [31] Added to the modern principle are the particular rules that apply to the interpretation of human rights legislation. The protections afforded by human rights legislation are fundamental to our society. For this reason, human rights laws are given broad and liberal interpretations so as better to achieve their goals (*Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at pp. 546–47; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at pp. 1133–36; *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, at pp. 89–90). As this Court has affirmed, "[t]he *Code* is quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes" (*McCormick* [2014 SCC 39], at para. 17). In light of this, courts must favour interpretations that align with the purposes of human rights laws like the *Code* rather than adopt narrow or technical constructions that would frustrate those purposes (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at §§ 19.3–19.7).

[20] As recognized by the parties, s. 35(4)(a) of the *Code* permits the Commission to call evidence of "a pattern or practice of resistance to or disregard or denial of any of the rights secured" by the *Code*. In my view, the outcome of this appeal does not turn on whether, ultimately, this evidence is admissible, but whether the admissibility of this evidence should have been determined at this preliminary stage, through the striking of the paragraph of the claim to which it related.

[21] The starting point in the interpretive exercise is a determination of the purpose of the provision in question. This purpose is grounded in the purpose and objects of the *Code* as a whole, as set out in s. 3:

> **Objects**
>
> **3** The objects of this Act are:
>
> (a) to promote recognition of the inherent dignity and the equal and inalienable rights of all members of the human family;
>
> (b) to further public policy in Saskatchewan that every person is free and equal in dignity and rights and to discourage and eliminate discrimination.

[22] Section 3 of the *Code* does not limit its object and purpose to the reception, investigation, and adjudication of individual complaints. Its goals are wider and extend to the promotion of human rights and the furtherance of the public policy of identification and elimination of discrimination in Saskatchewan.

[23] As part of its mandate, the Commission has duties that extend from dealing with complaints of individual discrimination into the realm of addressing systemic discrimination. This is evident in the following portions of s. 24 of the *Code*:

> **Duties of commission**
> **24** The commission shall:
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> …
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> (b) promote an understanding and acceptance of, and compliance with, this Act;
>
> (c) develop and conduct educational programs designed to eliminate discriminatory practices;
>
> …
>
> (h) promote and pursue measures to prevent and address systemic patterns of discrimination … .

[24] The more specific purpose of s. 34 and s. 35 of the *Code* is to provide the mechanism for a complaint to be set down for a hearing in the Court of King's Bench and to provide for the procedure by which the hearing is to be conducted.

[25] This brings me to an examination of the text of s. 35(4) itself. For ease of reference, I will repeat it here:

> **35**(4) The court is entitled:
>
> (a) to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act; and
>
> (b) in arriving at its decision, to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence.

[26] Under common law, evidence of extrinsic misconduct of an accused person, known as propensity evidence, is inadmissible in a trial if it is sought to be used to suggest that an accused person's alleged bad character or prior bad acts makes them more likely to have committed the crime for which they are charged: *Handy* at paras 31–40 and *R v Calnen*, 2019 SCC 6 at para 134, [2019] 1 SCR 301. The term *propensity evidence* refers to presumptively inadmissible character evidence in the criminal law context. While the parties and the Chambers judge referred to the proposed evidence in the matter at hand as *propensity evidence*, I prefer to call it *pattern or practice evidence*, given that propensity evidence has a specific meaning in the criminal law sphere and has been the subject of a voluminous amount of jurisprudence that does not translate very well into the current context, where an enactment has changed the default position for the adjudication of human

rights complaints. Additionally, propensity evidence relies on past conduct to infer guilt for a new allegation (*Handy* at para 31 or *Calnen* at para 42), while pattern or practice evidence is used to expose systemic wrongdoings that are at the core of a human rights complaint: *X. v Empire Investments Corporation*, 2014 CanLII 150064 at para 50 (Sask QB) [*Empire Investments*]. In the matter at hand, in addition to the specific complaint regarding Mr. Schumacher, the Commission is alleging that SaskPower engaged in systemic discrimination. This portion of the allegations is not relying on past conduct solely to infer guilt for a new individualized complaint.

[27] There is limited guidance from other jurisdictions in Canada in interpreting provisions equivalent to s. 35(4) of the *Code*. Yukon and Nunavut human rights legislation contain provisions similar to s. 35(4), as set out in *Human Rights Regulations*, YOIC 1988/170, s 11(2), and *Human Rights Act*, CSNu, c H-70, s 30(3). Other jurisdictions do not have similar provisions. I note that British Columbia and Manitoba have taken a different approach to this issue by enacting remedial provisions to address discriminatory patterns or practices that are established after a hearing, but their provisions are not comparable: *Human Rights Code*, RSBC 1996, c 210, s 37(2)(c)(ii), and *The Human Rights Code*, CCSM c H175, s 43(2)(e).

[28] The Yukon Human Rights Panel of Adjudication [Yukon Panel] has held that "evidence of similar acts for the purpose of providing a pattern of conduct or a practice" is presumptively admissible (*Hureau v Yukon (Human Rights Board of Adjudication) (No 1)*, 2012 CanLII 151130 (YK HRC) at para 28, aff'd 2014 YKSC 21, 79 CHRR 85), and it is the Yukon Panel's responsibility to "use its expertise and discretion in according appropriate weight and relevance" to this evidence (at para 30). No reported decisions referencing or interpreting Nunavut's enactment were brought to the Court's attention or located in its own research.

[29] In my view, the common law principle that pattern or practice evidence is presumptively inadmissible has been unambiguously displaced by s. 35(4) of the *Code* when a hearing is being conducted pursuant to s. 34 and s. 35. A similar enactment in a prior version of the *Code* has been interpreted by the Court of Queen's Bench. In *Empire Investments*, the pattern or practice evidence consisted of employees' experiences with their employer and was sought to be tendered to demonstrate that the employer engaged in systemic, gender-based discrimination: see paragraph 47. Justice Wilkinson referred to the reception of this type of evidence under comparable predecessor legislation, which was not materially different from s. 35(4):

> [7] The court is entitled to receive evidence regarding a pattern of practice in terms of prior discrimination by the respondents, and to rely on that evidence in reaching a decision: see s. 29.7(4) of the [1979] *Code* which states:
>
> > 29.7(4) The court is entitled to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights secured by this Act, and the court is entitled to place any reliance that it considers appropriate on the evidence and on any pattern or practice disclosed by the evidence in arriving at its decision.
>
> [8] The test for the reception of "pattern of practice" evidence is whether it is (1) credible, cogent, and bears sufficient similarity to the evidence of the complainant, and (2) of sufficiently probative value to outweigh any prejudicial effect upon the respondents: *Howard Johnson Inn v. Saskatchewan (Human Rights Tribunal)* and *C.L.*, 2010 SKQB 333, [2010] S.J. No. 557 (QL) [CHRR Doc. 10-3517].
>
> …
>
> [50] … "Pattern of practice" evidence is presumptively admissible. It is left to the court to decide what use to make of the evidence. The more focussed and specific the evidence is in relation to the complaint, the more cogent its probative value. Accordingly, depending on its weight and significance, "pattern of practice" evidence might conceivably be the preponderant evidence in establishing a violation of the *Code.* In other cases, it might provide needed corroboration in terms of giving credence to the complaint and buttressing a witness's credibility – for example, in circumstances involving a potentially unreliable witness, or one who stands to receive material advantage from court testimony.

[30] Section 35(4) of the *Code* is permissive in that it entitles the Court of King's Bench to receive pattern or practice evidence at the hearing, but does not require that it do so. The provision is otherwise drafted in a very broad manner, permitting a party to attempt to tender such evidence, and the court to admit it, for the purpose of the Commission establishing that the subject of the complaint has engaged in a "pattern or practice of resistance to or disregard or denial of any of the rights" in question in this matter. There is no limiting language in the section. Under s. 35(4)(b), the Court of King's Bench is entitled to rely and place the weight it determines is appropriate on any such evidence in deciding whether the Commission has proven either specific breaches of the *Code* in relation to a complainant or a pattern or practice that is a breach in and of itself.

[31] As part of the relief it sought in its application to the Court of Queen's Bench, the Commission asked for the following remedy: "An Order under s. 39(1)(a) of *The Saskatchewan Human Rights Code, 2018* (the '*Code*') requiring SaskPower to cease contravention of the *Code* and take measures to prevent similar contraventions of the *Code*". This invoked the following sections of the *Code*:

Orders by court

39(1) If the court finds that there has been a contravention of this Act or any other Act administered by the commission, the court may, subject to section 41, order any person to do any act or thing that in the opinion of the court constitutes full compliance with that provision and to rectify any injury caused to any person and to make compensation for that injury, including:

(a) requiring that person to cease contravening that provision and to take measures, including adoption of a program mentioned in section 55, to prevent the same or a similar contravention occurring in the future … .

…

Programs, approved or ordered by commission

55(1) On the application of any person or on its own initiative, the commission may approve or order any program to be undertaken by any person if the program is designed to prevent disadvantages that are likely to be suffered by, or to eliminate or reduce disadvantages that are suffered by, any group of individuals when those disadvantages would be or are based on or related to the race, creed, religion, colour, sex, gender identity, sexual orientation, family status, marital status, disability, age, nationality, ancestry or place of origin of members of that group, or the receipt of public assistance by members of that group, by improving opportunities respecting services, facilities, accommodation, employment or education in relation to that group or the receipt of public assistance by members of that group.

[32] As can be seen from the requested remedy, and the contents of paragraph 41, the Commission was alleging a systemic problem with the manner in which SaskPower deals with employees who seek accommodation for disabilities. The adjudication of such an allegation, with the tendering of the required evidence to establish such a pattern of conduct or practice, is clearly contemplated and permitted by ss. 3, 16, 24, 35(4), 39(1)(a), and 55(1) of the *Code*. In fact, although evidence of a pattern or practice may be relevant to the complaint by a particular individual who alleges discrimination, it can also be more. A pattern or practice may also constitute a breach in and of itself.

[33] This brings me to the restriction imposed by the Chambers judge in paragraph 34 of his reasons, where he effectively prohibited evidence of alleged previous discrimination absent a prior finding or admission of liability. In my view, the Chambers judge went astray by believing that the Commission had proposed to only call evidence of the fact that complaints had been filed by six individuals and would then attempt to rely on the existence of the complaints alone to establish a pattern or practice. That is not what the Commission planned to do. It expected to call evidence of the *underlying facts* of the complaints, not the bare fact that the complaints had been made and how some of them had been resolved.

[34] Taking the broad language of s. 35(4) into account – *to receive and accept evidence led for the purpose of establishing a pattern or practice of resistance to or disregard or denial of any of the rights* – I see no reason why such evidence could be called only if SaskPower had admitted liability or an adjudication had determined that discrimination had occurred. Section 35(4) contains no such restriction. If this were the law, parties would be able to bury damaging facts and avoid the calling of evidence of a pattern or practice by settling any problematic matters without an admission of liability. This would defeat one of the purposes of the *Code*, which is to hold employers liable for systemic discrimination. The terms of a settlement, and perhaps even the fact that a settlement occurred, *might* not be admissible, but, as a general principle, a party should not be able to take underlying relevant facts out of play in a human rights matter through the device of a settlement agreement.

[35] If an adjudication or settlement had resulted in a finding or agreement by the parties that there had been no discrimination, then the situation might have been different. SaskPower would have had a better argument that it should not have to defend against the same allegations that had already been resolved in its favour and were accordingly *res judicata*. But those are not the circumstances in the matter at hand. Here, there have been no findings or admissions one way or the other.

[36] SaskPower argues that it will have no incentive to settle any future human rights matters if it knows that it might have to face the same allegations in a later proceeding. This position ignores the numerous reasons why parties might settle a complaint, including a negative assessment of the risk of liability, the risk of a potentially large quantum of damages, certainty regarding the remedy in the specific matter, the minimization of bad publicity, bringing an end to a dispute that may be causing disharmony in the workplace, and the unlikelihood that a similar claim would be asserted in another proceeding. In some cases, SaskPower might decide that it had acted in a manner that was inappropriate and want to rectify the situation through a negotiated resolution. Most importantly, it ignores the clear statutory language of s. 35(4) of the *Code* that does not rely on the presence or absence of a settlement or a live dispute. It is noteworthy that under s. 31(3) of the *Code*, the Commission, in its sole discretion, is entitled to publish any settlement that has resolved a complaint under the *Code*, so the possibility of a benefit accruing to an employer from the confidentiality of a settlement is not engaged.

[37] I find that the Chambers judge erred by narrowing the scope of the evidence that could be tendered under s. 35(4) of the *Code.* Such evidence is not limited to circumstances where liability has been previously established in relation to other persons. Such evidence is – as stated by Wilkinson J. in *Empire Investments* – presumptively admissible. The Chambers judge erred in striking the impugned paragraph.

[38] Of course, this judgment is not offering any comment on whether SaskPower has engaged in the alleged conduct or whether the proffered evidence will ultimately be admitted or relied upon to any degree by the judge who conducts the hearing. This decision merely determines that the Commission, in the context of a Rule 7-9 application, should not have been summarily prevented from making its allegations and attempting to tender evidence to prove those allegations. I note that I arrive at this conclusion assuming, without deciding, that Rule 7-9 applies to an application filed with the Court of King's Bench under s. 34 of the *Code.* That issue was not fully argued and is best addressed in another matter where the answer to that question is relevant to the outcome of the appeal.

VI. CONCLUSION

[39] The appeal is allowed and paragraph 1 of the order, which struck paragraph 41 of appendix A of the Commission's application, is set aside. The matter is remitted to the Court of King's Bench to hear SaskPower's applications under Rules 7-1 and 7-2.

[40] Pursuant to s. 36 of the *Code*, this Court cannot award costs to any party unless there has been vexatious, frivolous, or abusive conduct. Such behaviour has not been established, so there shall be no costs for this appeal.

"Tholl J.A."

Tholl J.A.

I concur.

"Leurer C.J.S."

Leurer C.J.S.

I concur.

"Barrington-Foote J.A."

Barrington-Foote J.A.