

Guideline on the Section 19(2)(f) Process:

Dismissing a Complaint due to a Complainant Declining a Fair and Reasonable Settlement Offer

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COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Please Note:

The New Brunswick Human Rights Commission (“Commission”) develops guidelines as part of its mandate to prevent discrimination and inform the public. These guidelines are intended to help individuals understand their legal rights and responsibilities under the New Brunswick *Human Rights Act* (“Act”).

This guideline gives the Commission’s interpretation of the provision in the *Act* relating to the Commission’s authority to dismiss complaints where the Commission has exercised its discretion and determined that a fair and reasonable settlement offer has been declined by a complainant. It is subject to decisions by boards of inquiry, tribunals and courts. Read this guideline in conjunction with those decisions and with the specific language of the *Act*. If there is any conflict between this guideline and the *Act*, the *Act* prevails. This guideline is not a substitute for legal advice. Direct any questions regarding this guideline to the Commission’s staff.

Introduction

On May 5, 2017, the *Act* was amended to provide the Commission with additional authority to dismiss human rights complaints under certain circumstances. One such circumstance is where a complainant has declined a settlement offer that the Commission has determined is fair and reasonable:

19(2) The Commission may dismiss a complaint at any stage of the proceedings, in whole or in part, if the Commission in its discretion determines

...
(f) the complainant has declined a settlement offer that the Commission considers fair and reasonable.

The s. 19(2)(f) process is not intended to be an initial step toward the resolution of complaints, and should not be used in that manner. The s. 19(2)(f) process is primarily intended for when the parties have been unsuccessful in resolving a complaint through the Commission's mediation process, or where a respondent has indicated a willingness to participate in mediation but a complainant has declined to do so. The Commission's mediation process continues to be done on a "without prejudice" basis, and declining an offer during mediation will not result in the dismissal of a complaint pursuant to s. 19(2)(f). The Commission encourages parties to make good faith efforts to come to mutually beneficial agreements through its mediation process, rather than resorting to the s. 19(2)(f) process.

If a complainant has declined a settlement offer outside the Commission's mediation process or other without prejudice settlement discussions, and the Commission determines that the settlement offer is fair and reasonable, the Commission will not dismiss the complaint immediately. A complainant must be provided another opportunity to accept the settlement offer after the Commission has determined that the offer is fair and reasonable. A respondent submitting an offer through the s. 19(2)(f) process must be prepared to keep the offer open for acceptance for a minimum of twenty (20) business days (or another time period set by the Commission if deemed appropriate in the circumstances) after the parties have been informed of the Commission's determination in the matter. The Commission will only dismiss a complaint pursuant to s. 19(2)(f) if the offer is not accepted within the time period set by the Commission.

This guideline outlines the Commission's process for determining whether a settlement offer is fair and reasonable, and the steps respondents and complainants are expected to follow throughout the s. 19(2)(f) process.

1. Purpose of Section 19(2)(f)

Courts have recognized the purposes and policy rationales behind provisions in human rights legislation that permit complaints to be dismissed because a complainant has declined a fair and reasonable settlement offer. One purpose is to eliminate an expensive investigation and adjudication process where a respondent has made an offer that reasonably approximates what an adjudicator would have ordered if the complaint had been proven.¹ Another “is to encourage respondents to make reasonable settlement offers and to encourage complainants to act reasonably in deciding whether to accept an offer”.²

Courts have also found that a human rights commission’s consideration of fair and reasonable settlement offers is not inconsistent with its role of protecting the rights of vulnerable and disadvantaged members of society. This is because these individuals would not be expected to achieve a better result at a hearing, and therefore would not be further disadvantaged.³ The exercise of a human rights commission’s discretion to dismiss a complaint “requires it to balance considerations arising from its public policy role, including that of administrative efficiency, with the need of complainants to have their complaints adjudicated”.⁴

It is important that parties to the Commission’s complaint process always keep the remedial purposes of the *Act* in mind. The remedies available through the *Act* are restorative in nature, and are not intended to punish alleged wrongdoers. A desire for retribution or personal satisfaction (e.g. to get a “day in court”), or a wish to punish a respondent in some way, is not consistent with the *Act*’s remedial purposes, and is not a valid reason for refusing a settlement offer that is otherwise fair and reasonable.⁵

2. Steps Prior to Initiating the Section 19(2)(f) Process

As noted earlier in this guideline, the expectation is that a respondent will only resort to the s. 19(2)(f) process after the parties have unsuccessfully attempted mediation or a complainant has declined to participate in mediation. If it is not possible to resolve a human rights complaint through mediation, a respondent may wish to submit a settlement offer to the complainant for the purposes of s. 19(2)(f), and if the offer is declined, request that the Commission determine that the offer is fair and reasonable for the purposes of possible dismissal of the complaint under s. 19(2)(f).

2.1 Overview of the Commission's Mediation Process

In light of the key role mediation plays in the s. 19(2)(f) process, some background on the Commission's mediation process may be helpful.

Mediation is voluntary, and it is where parties make a good faith attempt to reach an agreement. During mediation, parties have an opportunity to resolve all of their differences (e.g. grievances under a collective agreement, wrongful dismissal claims, complaints with other regulatory bodies, etc.), and find creative solutions that work for everyone involved. The Commission facilitates the process and does not make any decisions with respect to the complaint's merits or a settlement offer's fairness and reasonableness. In some cases, mediation can result in parties reaching an agreement on their own terms relatively early in the complaint process, avoiding a potentially time-consuming investigation.

The mediation process is confidential and there is no admission of liability if an agreement is reached. All offers and counter-offers made during the Commission's mediation process are made on a "without prejudice" basis, meaning they cannot be disclosed later or used in other proceedings (e.g. an investigation by the Commission, other legal proceedings between the complainant and respondent, etc.). As a result, if a complainant declines a respondent's offer during mediation, that fact cannot be used later by a respondent for the purposes of s. 19(2)(f).

2.2 Submitting an Offer to a Complainant for the Purposes of Section 19(2)(f)

As noted earlier in this guideline, a settlement offer used for the s. 19(2)(f) process must have been made and declined outside of the Commission's mediation process or other without prejudice settlement discussions between the parties. A respondent can make the offer directly to a complainant (or the complainant's lawyer or representative). If direct communication between the parties is not practical or possible (e.g. due to animosity between the parties or a no contact order), a respondent may request that the Commission forward the offer to a complainant. The Commission will only be acting as

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a facilitator and will **not** be reviewing the offer for its compliance with this guideline or its fairness and reasonableness.

The settlement offer must be limited to resolving the human rights complaint filed with the Commission, and cannot cover proceedings that fall outside the Commission's jurisdiction. Remedies offered must also reasonably approximate what the Labour and Employment Board would order under s. 23(7) of the *Act* if the complaint reached the hearing stage and a finding of discrimination were made. If applicable, monetary remedies must be divided between special damages (compensation for expenditures, financial losses or deprivation of benefits), and those intended for general damages (compensation for injury to dignity, feelings or self-respect). For more information on terms and remedies, and how they will be evaluated by the Commission for fairness and reasonableness, see Section 4.2 of this guideline.

Settlement offers that may later be submitted to the Commission for the purposes of s. 19(2)(f) cannot be privileged in relation to the s.19(2)(f) process. Commission members and staff need the ability to view the offer to evaluate it, as may the courts if judicial review of the Commission's determination is sought. The offer can be made "without prejudice", provided that it clearly contains an exception for use through the s. 19(2)(f) process if it is declined.

2.3 Content of the Settlement Offer

A settlement offer used for the purposes of s. 19(2)(f) must contain the following:

- A letter to the complainant;
- The proposed Minutes of Settlement; and
- The proposed Release Agreement.

All of these documents must be submitted by a respondent to the Commission when a respondent initiates the s. 19(2)(f) process, and will be considered by the Commission when determining whether the settlement offer is fair and reasonable.

If a respondent included any other documents with the offer at the time the settlement offer was made, these must also be submitted to the Commission.

2.3.1 Letter to the Complainant

A respondent's letter to a complainant must clearly set out, in plain language:

- The terms of the settlement offer, as contained in the Minutes of Settlement and Release Agreement;
- The implications of accepting the settlement offer;
- The deadline for accepting the settlement offer; and
- That if the settlement offer is declined by the complainant, the settlement offer will be submitted to the Commission for consideration under s. 19(2)(f) of the *Act*.

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A complainant must be given a reasonable amount of time to consider the settlement offer. What is considered reasonable will depend on the circumstances, but the Commission recommends a minimum of twenty (20) business days for accepting the offer. A respondent may need to provide additional time for acceptance if aware (or reasonably ought to know) that a complainant will have difficulty responding within a shorter time period (e.g. due to a work schedule, scheduled surgery, family commitments, etc.). Additional time may also be necessary where a respondent has asked the Commission to forward the offer to a complainant (as discussed earlier in this guideline).

A sample letter to the complainant is provided at Appendix A.

2.3.2 Proposed Minutes of Settlement

The proposed Minutes of Settlement must formally set out what the parties agree to do if the settlement offer is accepted. It must clearly state what remedial steps a respondent agrees to take and any monetary compensation that is to be paid to a complainant. It may also require a complainant to agree to sign a Release Agreement (discussed below) and keep the terms of the settlement confidential. A respondent is not required to admit liability.

In some instances it may be fair and reasonable for a complainant to take certain other steps as part of the agreement (e.g. to facilitate the accommodation process), but typically a respondent will have most of the obligations in the proposed Minutes of Settlement.

A sample Minutes of Settlement is provided at Appendix B. For more information on terms and remedies that may be included in settlement offers, and how the Commission will evaluate those terms and remedies for fairness and reasonableness, see Section 4 of this guideline.

2.3.3 Proposed Release Agreement

The proposed Release Agreement will release and permanently discharge a respondent from liability with respect to the human rights complaint if the settlement offer is accepted. A Release Agreement must be limited to the human rights complaint filed with the Commission, and cannot be of a general nature, such as one releasing “any and all claims” the complainant has against a respondent.

A sample Release Agreement is provided at Appendix C of this guideline. For more information on how the Commission will evaluate the fairness and reasonableness of a settlement offer, including a Release Agreement, see Section 4 of this guideline.

2.4 A Complainant's Decision to Accept or Decline a Settlement Offer

If a complainant has received a settlement offer from a respondent, and the offer indicates it may be used later for the purposes of s. 19(2)(f), that complainant may wish to seek independent legal advice prior to making a decision to accept or decline the offer. As the Commission does not represent either complainants or respondents and does not provide legal advice to parties, Commission staff cannot advise a complainant about whether an offer should be accepted.

As noted earlier in this guideline, if the settlement offer is declined and the Commission subsequently determines that the offer is fair and reasonable, a respondent must keep the offer open for acceptance for a period of time after the Commission has made that determination. If the offer is not accepted during that period of time, the complaint may be dismissed.

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If a respondent has confirmed that a complainant has declined the settlement offer within the time for acceptance, or a respondent reasonably believes a complainant has received the offer and failed to respond to it, that respondent may request the Commission determine that the offer is fair and reasonable for the purposes of possible dismissal of the complaint under s. 19(2)(f). Only a respondent, or their lawyer or representative, may initiate the s. 19(2)(f) process.

In a respondent's request to the Commission, a respondent must provide:

- Copies of the letter to the complainant, proposed Minutes of Settlement and proposed Release Agreement that were sent to the complainant as part of the settlement offer;
- Copies of any other documents that were sent to the complainant with the settlement offer;
- Information or documentation about when/how the settlement offer was declined, or why there is reason to believe the complainant received the offer but did not respond to it;
- A detailed explanation about why the settlement offer is fair and reasonable; and
- Any supporting documentation that may be relevant to the determination of the fairness and reasonableness of the settlement offer (i.e. documentation that would show that the offer's remedial measures and/or monetary compensation are appropriate).

A respondent's request to initiate the s. 19(2)(f) process, and any other documentation provided with the request, will be shared with the complainant.

The complainant, after receiving a respondent's request to initiate the s. 19(2)(f) process, will be provided an opportunity to respond to the request. If the complainant does not believe that the settlement offer is fair and reasonable, that complainant must provide to the Commission:

- A detailed explanation stating why the settlement offer is not fair and reasonable; and
- Any supporting documentation that may be relevant to the determination of the fairness and reasonableness of the settlement offer (i.e. documentation that would show that the offer's remedial measures and/or monetary compensation are inadequate).

The complainant's response to the s. 19(2)(f) request, and any other documentation provided with the response, will be shared with the respondent. A failure to provide a response may result in the Commission proceeding with the determination on the settlement offer's fairness and reasonableness without the complainant's involvement.

The respondent will be provided an opportunity to provide a rebuttal to the complainant's response. However, if a respondent wishes to submit a new settlement offer after reviewing the complainant's response and supporting documentation, it must

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notify the Commission of this as soon as possible. For more information on making additional offers for the purposes of s. 19(2)(f), see Section 3.3 of this guideline.

The Commission may, at its discretion, continue or temporarily suspend its investigation into a complaint (if one is ongoing) while the s. 19(2)(f) process is underway. The Commission will make this determination on a case-by-case basis.

3.1 Supporting Documentation

Parties must provide documentation in support of their positions on the fairness and reasonableness of remedial measures and/or monetary compensation. Any supporting documentation provided by a party will be shared with the other parties to the settlement offer. Supporting documentation may include, but is not limited to:

- Pay stubs or T4s;
- Receipts or invoices;
- Estimates provided by professionals;
- Job postings;
- Advertisements for services or housing; and
- Current or proposed workplace policies or rules.

Complainants may be required to provide supporting medical documentation if they dispute the reasonableness of accommodations, or are seeking compensation for the impact the alleged discrimination had on their physical and/or mental health.

Parties may also provide case law to support their respective positions on what is fair and reasonable in terms of remedial efforts and/or monetary compensation. If possible, cases should be relatively recent and involve similar allegations or circumstances to those contained in a complainant's human rights complaint with the Commission.

Commission staff may seek additional information and supporting documentation from the parties in relation to their respective positions.

3.2 Evaluation of a Settlement Offer's Fairness and Reasonableness

Once the parties have made their submissions on the fairness and reasonableness of a settlement offer, Commission staff will review the submissions. Commission staff will consider relevant case law from New Brunswick and other Canadian jurisdictions relating to damages awards and remedial measures. If an investigation into the complaint has been completed, an Officer's Report (OR) or Case Analysis Report (CAR) will be considered, if the parties have had an opportunity to provide a response to it.

Commission staff will then prepare a report on the fairness and reasonableness of the settlement offer, and this report will contain a recommendation on whether the Commission should determine that the settlement offer is fair and reasonable. For more information on terms and remedies that may be included in offers, and how the

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Commission will evaluate those terms and remedies for fairness and reasonableness, see Section 4 of this guideline.

The report will be provided to the parties, who may then submit a response to it. The responses may or may not change the recommendation in the report. If the recommendation does change, the parties will be notified and an addendum report may be prepared by Commission staff.

3.2.1 Where the Recommendation is that the Settlement Offer is Fair and Reasonable

If the recommendation is that the Commission determine the settlement offer is fair and reasonable, Commission members will decide whether or not to accept that recommendation at a future Commission meeting. When making this determination, Commission members will consider:

- The respondent's s. 19(2)(f) request, including:
 - The respondent's letter to the complainant;
 - The proposed Minutes of Settlement;
 - The proposed Release Agreement;
 - Any other documents submitted with the settlement offer;
- The complainant's response to the s. 19(2)(f) request;
- The respondent's rebuttal;
- The report prepared by Commission staff;
- Parties' responses to the report;
- Any addendum reports prepared by Commission staff;
- An OR or CAR and any responses to it, if an investigation has been completed and the parties have had an opportunity to provide a response to that OR or CAR.

If the Commission members accept the recommendation and determine that the settlement offer is fair and reasonable, the parties will be notified of the Commission's decision. The complainant will be provided twenty (20) business days (or another time period set by the Commission) to accept the respondent's offer, after which time the complaint will be dismissed if it is confirmed that the complainant has declined the settlement offer or has failed or refused to respond to the offer without a *bona fide* or justified reason. The respondent must keep the offer open for acceptance during this period.

If the complainant accepts the settlement offer within the time period, the Commission will follow its standard procedures with respect to settled complaints and then close the file.

If the complainant does not accept the settlement offer within the time period, or fails to provide a response to the Commission's determination, the complaint will be dismissed pursuant to s. 19(2)(f).

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However, if the Commission members do not accept the recommendation and decline to determine that the settlement offer is fair and reasonable, Commission members will provide reasons for such a determination and will provide direction on how the complaint is to proceed. Parties will be notified of the Commission's decision and advised about next steps, which could include the complaint proceeding through the Commission's complaint process.

3.2.2 Where the Recommendation is that the Settlement Offer is not Fair and Reasonable

If the recommendation contained in the staff member's report is that the Commission decline to determine the settlement offer is fair and reasonable, the Commission's Director will decide whether or not to accept that recommendation pursuant to the delegation authority under s. 18.1 of the *Act* and the Commission's *Guideline on Delegation of Compliance Functions under the Human Rights Act*. When making this determination, the Director will consider:

- The respondent's s. 19(2)(f) request, including:
 - The respondent's letter to the complainant;
 - The proposed Minutes of Settlement;
 - The proposed Release Agreement;
 - Any other documents submitted with the settlement offer;
- The complainant's response to the s. 19(2)(f) request;
- The respondent's rebuttal;
- The report prepared by Commission staff;
- Parties' responses to the report;
- Any addendum reports prepared by Commission staff;
- An OR or CAR and any responses to it, if an investigation has been completed and the parties have had an opportunity to provide a response to that OR or CAR.

If the Director accepts the recommendation and declines to determine that the settlement offer is fair and reasonable, the parties will be notified of the decision and the complaint will proceed through the Commission's complaint process. A respondent may seek review of the Director's decision pursuant to s. 22(2) of the *Act*.

If the Director does not accept the recommendation, the Director will provide direction on how the complaint is to proceed. Parties will be notified of the Director's decision and advised about next steps, which could include preparing an addendum report for responses from the parties and referring the s. 19(2)(f) request to Commission members for their consideration.

3.3 Making Additional Settlement Offers and Requests through the Section 19(2)(f) Process

If the Commission (either the Commission members or Director) decline to determine that a respondent's settlement offer is fair and reasonable, that respondent may submit

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a new offer to the complainant for the purposes of s. 19(2)(f). Subsequent requests through the s. 19(2)(f) process are subject to the same requirements as initial requests.

There is no limit on the number of times a respondent may request that the Commission determine a settlement offer is fair and reasonable for the purposes of s. 19(2)(f) with respect to a single complaint. However, the Commission expects respondents to have made the underlying offers in good faith and with the belief that they are fair and reasonable. Respondents should endeavour to ensure that their initial offer submitted through the s. 19(2)(f) process is one that is likely to be found fair and reasonable.

If a respondent receives a complainant's response to the s. 19(2)(f) request and wishes to submit a new settlement offer based on the information provided by that complainant (e.g. where a complainant has provided documentation on financial losses that was not previously available to the respondent), the Commission must be notified of this intention as soon as possible and prior to the Commission's report being sent to the parties.

The Commission may decline to consider further s. 19(2)(f) requests by a respondent under some circumstances. This may occur where the Commission is of the view that a respondent is not using the s. 19(2)(f) process in a good faith attempt to resolve the complaint and evaluating further settlement offers would amount to an abuse of the Commission's process. Abuse of the s. 19(2)(f) process could include, but is not limited to:

- Submitting multiple "lowball" settlement offers for the Commission's consideration under s. 19(2)(f);
- Repeatedly failing to comply with the Commission's instructions and/or the requirements of this guideline;
- Failing to keep a settlement offer open for acceptance after the Commission has determined that the offer is fair and reasonable; and/or
- Using the s. 19(2)(f) process to harass or vex a complainant.

Under such circumstances, settlement offers may still be submitted to a complainant unless that complainant has indicated a desire to no longer receive them.

4. The Commission's Determination on the Fairness and Reasonableness of Settlement Offers

The following sections discuss how the Commission will determine whether a settlement offer is fair and reasonable for the purposes of s. 19(2)(f), and the terms and remedies that may be included in a settlement offer.

4.1. Treatment of Allegations

When evaluating whether a settlement offer is fair and reasonable, the Commission will treat the allegations in a complaint as having been proven, subject to some exceptions (discussed further below). In doing so, the Commission is not making any findings of fact or a determination that the respondent contravened the *Act*.

It is expected that settlement offers submitted for the purposes of s. 19(2)(f) will address **all** of the allegations in a complaint that have been made against the respondent making the offer, as well as any other respondent that the settlement is intended to cover. Settlement offers that fail to address all of the allegations risk not being found fair and reasonable by the Commission. A dispute between the parties about the facts is an insufficient basis for a respondent failing to address all of the allegations in a complaint.

In some instances, the Commission may decline to consider some of the allegations in a complaint when determining whether a settlement offer is fair and reasonable. This may occur where it appears the allegations:

- Are speculative or highly improbable;⁶
- Are frivolous, vexatious or made in bad faith;
- Would not amount to a contravention of the *Act*, even if proven true;⁷
- Are outside the Commission's jurisdiction;
- Have already been dealt with in another proceeding;⁸
- Are covered by an earlier settlement;
- Are outside the one-year time limit for filing a complaint and a request for a time limit extension has not been submitted by the complainant; or
- Do not involve and/or cannot be attributed to the respondent submitting the settlement offer, or any other respondent the settlement is intended to cover.

The above list is not exhaustive. In such cases, if there are no other named respondents that the allegations can proceed against, the Commission may exercise its discretion under s. 19(2) and dismiss the portions of a complaint that were not considered for the purposes of s. 19(2)(f).

4.2 Evaluation of Terms and Remedies

The Commission will only consider remedies that reasonably approximate what the Labour and Employment Board would order if a contravention of the *Act* were found at

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the conclusion of an inquiry. The Labour and Employment Board's authority to order a remedy is outlined in s. 23(7) of the *Act*:

23(7) At the conclusion of an inquiry, if the Labour and Employment Board finds on a balance of probabilities that a violation of this Act has occurred, it may order a party found to have violated the Act

- (a) to do, or refrain from doing, any act or acts so as to effect compliance with the Act,
- (b) to rectify any harm caused by the violation,
- (c) to restore a party adversely affected by the violation to the position that party would have been in but for the violation,
- (d) to reinstate a party who has been removed from a position of employment in violation of the Act,
- (e) to compensate a party adversely affected by the violation for any consequent expenditure, financial loss or deprivation of benefit, in the amount that the Labour and Employment Board considers just and appropriate, and
- (f) to compensate a party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feelings or self-respect, in the amount that the Labour and Employment Board considers just and appropriate.

For the purposes of the s. 19(2)(f) process, the Commission has divided the s. 23(7) remedies into the following four categories:

- Compliance remedies (s. 23(7)(a));
- Restorative remedies (s. 23(7)(b), (c) and (d));
- Compensation for expenditures, financial losses or deprivation of benefits (s. 23(7)(e)); and
- Compensation for injury to dignity, feelings or self-respect (s. 23(7)(f)).

For more information on how the Commission will evaluate remedies offered under these headings, see Sections 4.2.1 to 4.2.4 of this guideline.

A respondent's settlement offer can include remedies the Labour and Employment Board would not necessarily order (e.g. an apology or charitable donation),⁹ but these remedies will not be considered by the Commission when evaluating the offer's fairness and reasonableness. A complainant cannot refuse an offer because it fails to include a remedy that the Labour and Employment Board would not order.

A settlement offer does not necessarily need to contain a remedy under each of the four headings above in order to be found fair and reasonable, as some complaints may not require remedial steps or action under a particular heading. However, if a respondent has not included a remedy under a particular heading, and the Commission is of the view that a remedy under that heading is warranted under the circumstances, it could result in the Commission determining that the offer is not fair and reasonable.

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As noted above, respondents are required to set out why they consider their settlement offers fair and reasonable in their submissions to the Commission. This may include explaining why no remedy is being offered under one of the four headings above.

4.2.1 Compliance Remedies

Compliance remedies are intended to address possible past or current deficiencies in respondents' compliance with the *Act*, and promote future compliance. The focus of compliance remedies is on respondents and how the alleged discrimination is being addressed internally. Compliance remedies may include, but are not limited to:

- Implementing an anti-harassment or anti-discrimination policy;
- Communicating an existing policy to staff and posting copies of it around a respondent's place of business;
- Making a respondent's place of business accessible to persons with disabilities;
- Providing spaces, facilities or equipment for people with certain characteristics (e.g. diaper changing stations for parents with small children);
- Providing training to staff on their rights and responsibilities under the *Act*, and directing staff to the Commission's guidelines and other resources; and
- Changing or abolishing a particular policy, rule or practice that may be discriminatory or have discriminatory effects on certain individuals.

The compliance remedies set out in a respondent's settlement offer "must be definite, clear and enforceable".¹⁰ Remedial steps will not be fair and reasonable if they are indefinite, vague, or largely discretionary on the part of a respondent (e.g. a respondent uses language like "will consider the possibility of" or "will make efforts to" with respect to the remedial steps).¹¹

A respondent does not need to admit a complainant's allegations in order to include compliance remedies in its settlement offer. Compliance remedies may assure a complainant that the allegations were taken seriously, and may include drawing up a policy for dealing with discrimination complaints, and informing managers and staff about impermissible distinctions.¹²

Where a respondent has already implemented compliance remedies (e.g. staff education or implementation of a new policy), the Commission may take that into consideration when evaluating a settlement offer's fairness and reasonableness.¹³ If a respondent wishes to rely on measures already taken as part of an offer under s. 19(2)(f), these measures must be clearly set out in both the offer to the complainant and submissions to the Commission. The measures must have been taken after the alleged discrimination occurred. A respondent may be required to provide supporting documentation in relation to these remedial actions.

The Commission is available to review anti-harassment or anti-discrimination policies for compliance with the *Act*. If a respondent wishes to involve the Commission in the remedial measures and include this involvement as part of the settlement offer, the

respondent must contact the Commission prior to doing so to determine whether the Commission can assist in the manner desired. The Commission's involvement should not be viewed as approval or endorsement of a respondent's offer, or as an indication the Commission will later determine the offer is fair and reasonable.

4.2.2 Restorative Remedies

Restorative remedies are intended to put complainants in the position they would have been had the alleged discrimination not occurred. The focus of restorative remedies is on a complainant, and what a respondent will do for that complainant to rectify the alleged discrimination. Restorative remedies may include, but are not limited to:

- Reinstating a complainant to a previous job or restoring a complainant's employment status;
- Providing a reasonable accommodation for a complainant as part of the respondent's duty to accommodate;
- Providing the product, service, housing, etc. to a complainant at the earliest opportunity; and
- Repairing damage done to a complainant's property.

As with compliance remedies, the restorative remedies set out in a respondent's settlement offer "must be definite, clear and enforceable".¹⁴ Remedial steps will not be fair and reasonable if they are indefinite, vague, or largely discretionary on the part of a respondent (e.g. a respondent uses language like "will consider the possibility of" or "will make efforts to" with respect to the remedial steps).¹⁵

Further, if a respondent has already taken restorative measures with respect to the alleged discrimination, these can be considered by the Commission when evaluating a settlement offer's fairness and reasonableness.¹⁶ As with compliance remedies, the restorative steps already implemented by a respondent must be clearly set out in both the offer to the complainant and submissions to the Commission. A respondent may be required to provide supporting documentation in relation to these measures, and the complainant will have an opportunity to make submissions about the measures' adequacy and effectiveness.

4.2.3 Compensation for Expenditures, Financial Losses or Deprivation of Benefits

Compensation for expenditures, financial losses or deprivation of benefits is commonly known as "special damages". The compensation provided under this heading is intended to address monetary expenditures or losses experienced by a complainant arising from the alleged discrimination. The expenditures or losses are capable of being measured and having a specific dollar amount assigned to them. This may include, but are not limited to, compensation for:

- Lost wages, including expected bonuses and raises;
- Lost benefits (e.g. pension contributions, vacation time allowances, etc.);

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- Out-of-pocket expenses to replace the product, service or housing, or repair damage to property;
- Medical expenses; and
- Expenses for therapy or counselling.

As discussed earlier in this guideline, parties must provide supporting documentation to support their positions on the fairness and reasonableness of compensation for expenditures, financial losses or deprivation of benefits. This includes documentation that shows entitlement to compensation and its connection to the alleged discrimination. Unlike the treatment of allegations of discrimination (see Section 4.1 of this guideline), claims of entitlement to compensation will not necessarily be accepted as having been proven. Any supporting documentation provided by a party will be shared with the other parties.

Complainants must take steps to limit or mitigate their losses. Mitigation could include (but is not limited to) making reasonable attempts to seek alternative employment, services or housing (as the case may be). If a complainant could have limited the losses suffered or avoided some losses altogether, this will be considered by the Commission when determining whether a settlement offer is fair and reasonable.

Legal fees incurred as a result of a contravention of human rights legislation are not eligible expenses.¹⁷ If a complainant chooses to be represented by a lawyer through all or part of the Commission's process, that complainant is responsible for any legal fees incurred. As such, it is unnecessary for a respondent to provide compensation for a complainant's legal fees in a settlement offer submitted through the s. 19(2)(f) process.

As noted earlier in this guideline, settlement offers submitted through the s. 19(2)(f) process can only resolve the human rights complaint with the Commission. As a result, monetary compensation included in an offer under this heading must be limited to monetary expenditures or losses arising from the alleged discrimination. Monetary compensation intended to resolve other disputes between the parties (e.g. court proceedings for wrongful dismissal, or proceedings under the *Employment Standards Act* or other legislation) cannot be included in an offer, and the Commission will not consider the fairness and reasonableness of any amounts earmarked for such purposes.

Compensation intended to cover expenditures, financial losses or deprivation of benefits must be separated from "general damages" (compensation for injury to dignity, feelings or self-respect) in a respondent's settlement offer. The Commission will not consider possible tax implications when evaluating settlement offers for the purposes of s. 19(2)(f).

4.2.4 Compensation for Injury to Dignity, Feelings or Self-Respect

Compensation for injury to dignity, feelings or self-respect is commonly known as “general damages”. The Human Rights Tribunal of Ontario (HRTO) has described this type of compensation as follows:

Monetary compensation for injury to dignity, feelings and self-respect recognizes that the injury to a person who experiences discrimination is more than just quantifiable financial losses, such as lost wages. The harm, for example, of being discriminatorily denied a service, an employment opportunity, or housing is not just the lost service, job or home but the harm of being treated with less dignity, as less worthy of concern and respect because of personal characteristics, and the consequent psychological effects.¹⁸

The compensation under this heading is for losses that are intangible in nature.¹⁹ The compensation is intended to make a complainant whole,²⁰ and does not include an element of punishment.²¹ The amount should be high enough to compensate a complainant for the harm suffered and encourage compliance with the *Act*, but not low enough to trivialize the *Act*'s importance.²²

When determining whether a settlement offer's compensation for injury to dignity, feelings or self-respect is fair and reasonable, the Commission will consider the specific allegations made by a complainant (see Section 4.1 of this guideline), and awards by boards and tribunals in New Brunswick and other Canadian jurisdictions for similar complaints.

To date in New Brunswick, neither the Labour and Employment Board nor earlier boards of inquiry have set out a framework for determining compensation for injury to dignity, feelings or self-respect. However, for the purposes of the s. 19(2)(f) process, the Commission will apply a variation of the HRTO's framework for making these determinations,²³ which the Commission views as consistent with the approach taken in New Brunswick previously.²⁴ Under this framework, the Commission will evaluate the fairness and reasonableness of a settlement offer's compensation for injury to dignity, feelings or self-respect based on the following two criteria:

1. The objective seriousness of the alleged conduct; and
2. The effect on the particular complainant.

The HRTO described these criteria as follows:

The first criterion recognizes that injury to dignity, feelings, and self respect is generally more serious depending, objectively, upon what occurred. For example, dismissal from employment for discriminatory reasons usually affects dignity more than a comment made on one occasion. Losing long-term employment because of discrimination is typically more harmful than losing a new job. The more prolonged, hurtful, and serious harassing comments are, the greater the injury to dignity, feelings and self-respect.

The second criterion recognizes the [complainant]'s particular experience in

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response to the discrimination. Damages will be generally at the high end of the relevant range when the [complainant] has experienced particular emotional difficulties as a result of the event, and when his or her particular circumstances make the effects particularly serious.²⁵

Factors that may be relevant when applying the above criteria include, but are not limited to:

- The vulnerability of the complainant (e.g. age, financial circumstances, etc.);
- The frequency and/or intensity of the alleged discriminatory conduct;
- Whether the complainant objected to the alleged discriminatory conduct, or whether the respondent knew or reasonably ought to have known the conduct was unwelcome;
- The immediate and/or ongoing impact of the alleged discrimination on the complainant's:
 - Emotional or physical health;
 - Personal or professional relationships;
- The degree of anxiety caused by the alleged discrimination;²⁶

What is considered fair and reasonable compensation for injury to dignity, feelings or self-respect will ultimately depend on the circumstances. For less serious alleged conduct with a limited personal impact, an amount of \$1,000 or less may be appropriate, based on awards from other Canadian jurisdictions.²⁷ The highest award to date in New Brunswick is \$15,000.²⁸ Higher awards have been made in other Canadian jurisdictions, but awards exceeding \$25,000 are relatively uncommon. It is also important to note that there is no cap on the amount the Labour and Employment Board may award for injury to dignity, feelings or self-respect.

Complainants may be required to provide supporting medical documentation if they are seeking compensation for the impact the alleged discrimination had on their physical and/or mental health.

4.2.5 Other Terms

There is no requirement for a respondent to admit liability in order for a settlement offer to be found fair and reasonable.²⁹ An offer may also require that an agreement remain confidential.³⁰

In some instances it may be fair and reasonable for a complainant to take certain other steps as part of the agreement (e.g. to facilitate the accommodation process), but typically a respondent will have most of the obligations under a proposed settlement offer. An offer will not be fair and reasonable if it requires a complainant to admit wrongdoing, such as unacceptable workplace conduct.³¹

4.2.6 Release Agreement

As noted earlier in this guideline, a respondent submitting a settlement offer for the purposes of s. 19(2)(f) must include the proposed Release Agreement with the offer. A

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Release Agreement will be considered by the Commission when evaluating a settlement offer's fairness and reasonableness. A sample Release Agreement is contained in Appendix C of this guideline.

A Release Agreement must be limited to the human rights complaint filed with the Commission. A Release Agreement cannot be of a general nature, such as one releasing "any and all claims" a complainant has against the respondent.³² A Release Agreement also cannot apply to remedies under other legislation that are outside the Commission's jurisdiction, although a broad release covering other proceedings may still be negotiated between the parties through the Commission's mediation process.³³

While a Release Agreement can bar a complainant from filing a new human rights complaint against the same respondent involving the same facts, it cannot preclude a new complaint involving different allegations (e.g. a subsequent failure to accommodate),³⁴ or reprisal discrimination under s. 11 of the Act.

4.3 Determining Fairness and Reasonableness

If a settlement offer reasonably approximates what the Labour and Employment Board would order, the Commission may exercise its discretion and determine that the offer is fair and reasonable.

Typically, the reason for the Commission declining to find a settlement offer fair and reasonable will be that it fails to reasonably approximate what the Labour and Employment Board would order. However, there may be other situations where the Commission declines to exercise its discretion under s. 19(2)(f). These instances may include, but are not limited to, where:

- The Commission is unable to determine the reasonableness of the accommodation(s) offered or the feasibility of the remedies sought;³⁵
- The respective positions of the complainant and respondent are supported by the law and evidence, but the complainant could arguably make a case for significantly higher compensation than contained in the settlement offer;³⁶
- The range for possible monetary awards is very wide, and the Labour and Employment Board could reasonably award significantly higher compensation than contained in the settlement offer; and
- It would be in the public interest for the complaint to proceed through the Commission's process (e.g. there is a novel question of human rights law to be decided, or a decision could impact many people).³⁷

For More Information

For further information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at <http://www.gnb.ca/hrc-cdp> or email us at hrc.cdp@gnb.ca

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Appendix A: Sample Letter to Complainant

WITHOUT PREJUDICE, except for the purposes of s. 19(2)(f) of the New Brunswick *Human Rights Act*

[Date]

Dear [Complainant]:

RE: Human Rights Complaint of [Complainant]

This letter and the attached Minutes of Settlement and Release Agreement are a settlement offer with respect to the above-noted human rights complaint filed against [Respondent(s)], dated [date], with the New Brunswick Human Rights Commission (hereinafter “the Commission”), alleging [discrimination] under to section [#] of the New Brunswick *Human Rights Act* (hereinafter “the Act”).

The terms of the offer, as contained in the Minutes of Settlement (attached), are as follows:

- [Terms of offer]
- You will also be required to sign the attached Release Agreement. This will require you to withdraw your human rights complaint against [Respondent], and prevent the filing of another human rights complaint with the Commission against [Respondent] involving the same allegations.

This settlement offer has been prepared in accordance with the Commission’s *Guideline on the Section 19(2)(f) Process: Dismissing a Complaint due to a Complainant Declining a Fair and Reasonable Settlement Offer*. If this offer is not accepted by [date], [Respondent] will submit it to the Commission and request that the Commission determine that the offer is fair and reasonable for the purposes of possible dismissal of the complaint under s. 19(2)(f) of the *Act*.

Yours truly,

[Signature]

Appendix B: Sample Minutes of Settlement

MINUTES OF SETTLEMENT

BETWEEN:

[NAME OF COMPLAINANT] (the “Complainant”)

-AND-

[NAME OF RESPONDENT OR RESPONDENTS] (the “Respondent[s]”)

WHEREAS the Complainant, [Name of Complainant], had filed a Human Rights Complaint with the New Brunswick Human Rights Commission (the “Commission”) against the Respondent[s], [Name of the Respondent[[s], with regard to [Name of area (employment, services, etc.) on the basis of [Name of ground (physical disability, age, etc.)] discrimination (the “Complaint”);

AND WHEREAS the Complainant and the Respondent[s] resolved the Complaint without proceeding through the rest of the Commission’s complaint process;

AND WHEREAS the parties wish to evidence the terms of settlement in these Minutes of Settlement;

NOW THEREFORE, THIS AGREEMENT WITNESSETH that, in consideration of the premises and agreements herein contained and for good and valuable consideration the parties agree as follows:

1. [The Respondent agrees to draft and implement a policy on [Subject], and disseminate copies of this policy to all staff.]
2. [The Respondent agrees to reinstate the Complainant to the position of [Position], effective [Date].]
3. [The Respondent agrees to pay the Complainant [\$AMOUNT] (less statutory deductions) as special damages for settlement of the Complainant’s claimed lost wages.]
4. [The Respondent agrees to pay the Complainant [\$AMOUNT] as general damages (no deductions) for settlement of the Complainant’s claimed injury to [her/his] dignity, feelings, and self-respect.]
5. [OTHER TERMS IN SEPARATE PARAGRAPHS]

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6. The Complainant agrees to sign a Release in the attached form (Schedule A), which includes but is not limited to a confidentiality clause, and a withdrawal of [his/her] human rights complaint.
7. The Parties agree that all terms of settlement are strictly confidential and the settlement is made without any admission of liability whatsoever on the part of the Respondent[s].
8. The Parties acknowledge that they have either received independent legal advice in this matter or they have waived this right.

IN WITNESS WHEREOF the parties have agreed to the terms of settlement on [DATE] and have executed these Minutes of Settlement on the dates indicated below their respective signatures.

SIGNED, SEALED AND DELIVERED)
)
)
_____) **[NAME OF COMPLAINANT]**
 Witness)
) **Date:** _____

AND

SIGNED, SEALED AND DELIVERED)
) **[NAME OF RESPONDENT COMPANY]**
)
_____) **Per:** _____
 Witness)
) **Date:** _____

AND

SIGNED, SEALED AND DELIVERED)
)
)
_____) **[NAME OF PERSONAL**
 RESPONDENT]
 Witness)
) **Date:** _____

Appendix C: Sample Release Agreement

Schedule A

STRICTLY CONFIDENTIAL

RELEASE

I, **[Name of Complainant]** (hereafter "**Releasor**"), of [Name of City Name of Province], for myself, my heirs, executors, administrators and assigns in consideration of the **Terms set out in the Minutes of Settlement agreed to on [Date Agreed to]**, hereto remise, release and forever discharge [Name of Respondent(s)] (hereafter "**Releasee[s]**"), along with all of their parents, subsidiaries, affiliates, benefits providers, insurers and associated companies, and together with all respective present and former officers, directors, employees, servants and agents and their successors and assigns jointly and severally, of and from any human rights complaint, past, present, or future (with the exception of a discrimination complaint under section 11 of the *Human Rights Act* (hereafter "**Act**") which may arise based on incidents that occur after the date of this Release), arising out of, or in any way relating to alleged incidents of discrimination on the ground of [ground[(s)] as set out in my Complaint filed with the New Brunswick Human Rights Commission on [Date filed and revised on Date if revised] (hereafter "**Complaint**"), up to and including the date that this Release is fully executed by myself, the Releasor.

FURTHERMORE, I hereby immediately withdraw, discontinue and cancel, release, and forever discharge the Releasee[s] of and from all allegations contained in the matter of the Complaint by myself, the Releasor, against the Releasee[s] under [section 4, 5, 6, etc.] of the *Act*. I, the Releasor, also hereby immediately withdraw, discontinue and cancel, and release and forever discharge the Releasee[s] from any human rights complaint based on the allegations set out in my Complaint, with the exception of a discrimination complaint under section 11 of the *Act* for incidents that occur after the date of this Release.

AND IT IS FINALLY UNDERSTOOD AND AGREED that the terms and conditions of settlement are not to be construed as an admission of liability on the part of the said Releasee[s], and in fact, such is expressly denied by the Releasee[s].

[**AND** I, the Releasor, hereby declare that I was informed that I have the right to seek independent legal advice with respect to this Release and I voluntarily waived this

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right and hereby voluntarily accept the said terms for the purpose of making full and final compromise, adjustment and settlement of all claims aforesaid.]

Or

[**AND** I, the Releasor, hereby declare that I have had an opportunity to seek independent legal advice with respect to this Release and I fully understand it. I, the Releasor, hereby voluntarily accept the said terms for the purpose of making full and final compromise, adjustment and settlement of all claims as aforesaid.]

IN WITNESS WHEREOF, [Name of Complainant], the Releasor, has hereunto set [her/his] hand and seal this ___ th day of _____, 201__.

SIGNED, SEALED AND DELIVERED

_____)	_____
)	
)	
)	
)	
)	
Witness)	Releasor
)	

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¹ *Manitoba (Human Rights Commission) v. Jewish Community Campus of Winnipeg Inc.*, 2015 MBQB 47 at para. 26.

² *Ibid.* at para. 28.

³ *Losenno v. Ontario Human Rights Commission*, [2005] O.J. No. 4315 at para. 52.

⁴ *Garnhum v. Canada (Canadian Human Rights Commission) (re Canada (Canadian Armed Forces))*, [1996] F.C.J. No. 1254 at para. 31.

⁵ *Lawrence v. Chartwell Construction Ltd.*, 2007 BCHRT 49 at paras. 52, 56 [*Lawrence*]; *Complainant v. Health Authority (No. 2)*, 2017 BCHRT 150 at paras. 31, 35 [*Complainant*].

⁶ *Metaser v. Jewish Community Campus of Winnipeg Inc.*, 2013 MHRBAD 6 at para. 11.

⁷ *Allenberg v. Johnson*, 2015 BCHRT 86 at paras. 77-78 [*Allenberg*].

⁸ *Yirgaw v. Post 83 Co-operative Housing Assn. (No. 4)*, 2014 BCHRT 251 at para. 73.

⁹ *Issa v. Loblaw Co.*, 2009 BCHRT 264 at paras. 38-39; *Complainant*, *supra* note 5 at paras. 27-28.

¹⁰ *Borutski v. Crescent Housing Society*, 2012 BCHRT 69, at para. 25 [*Borutski*].

¹¹ *Ibid.* at paras. 21-24.

¹² *Hansen v. Lyncorp Drilling Services Ltd. (No. 2)*, 2010 BCHRT 171 at paras. 24-25; *Sleath v. Shoppers Drug Mart Inc.*, 2016 BCHRT 72 at para. 182 [*Sleath*].

¹³ *Demasi v. Vancouver (City)*, 2006 BCHRT 220 at paras. 25-26 [*Demasi*].

¹⁴ *Borutski*, *supra* note 10 at para. 25.

¹⁵ *Ibid.* at paras. 21-24.

¹⁶ *Demasi*, *supra* note 13 at paras. 25-26.

¹⁷ *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53.

¹⁸ *Arunachalam v. Best Buy Canada Ltd.*, 2010 HRTO 1880, at para. 46 [*Arunachalam*].

¹⁹ *Ibid.*

²⁰ *Senyk v. WFG Agency Network (B.C.) Inc.*, 2008 BCHRT 376, at para. 448.

²¹ *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4, at para. 51.

²² *Ewart v. Kilburn*, [2007] N.B.H.R.B.I.D. No. 2, at para. 41 [*Ewart*]; *Arunachalam*, *supra* note 18 at para. 49; *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520, at para. 59 [*Strudwick*].

²³ *Arunachalam*, *ibid.*, at para. 52.

²⁴ *Ewart*, *supra* note 22 at paras. 41-42.

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²⁵ *Arunachalam*, *supra* note 18 at paras. 53-54.

²⁶ *Sanford v. Koop*, 2005 HRTO 5, at para. 38; *Ewart*, *supra* note 22 at para. 42; *Strudwick*, *supra* note 22 at para. 62;

²⁷ See e.g. *Wollenberg v. North West Athletics*, 2012 BCHRT 178; *Haykin v. Roth*, 2009 HRTO 2017; *Glanville v. 1212551 Ontario Ltd. o/a Tim Hortons*, 2015 HRTO 1182;

²⁸ *Ewart*, *supra* note 22 at para. 46.

²⁹ See e.g. *Grant v. FortisBC Inc.*, 2009 BCHRT 336 at para. 28; *Gerrard v. Olive's Market Whistler*, 2015 BCHRT 102, at para. 28; *Complainant*, *supra* note 5 at para. 23.

³⁰ *Allenberg*, *supra* note 7 at paras. 26, 81.

³¹ *Frick v. University of British Columbia*, 2009 BCHRT 85 at para. 57.

³² *Korsch v. Manitoba (Human Rights Commission)*, 2011 MBQB 222 at paras. 10, 14-15, 50.

³³ *Lowther v. Vancouver Island Health Authority (No. 1)*, 2013 BCHRT 20 at paras. 39-41.
See also: *Pasutti v. Best Buy Canada Ltd.*, 2008 BCHRT 56, at para. 28; *Moiceanu v. British Columbia (Hydro and Power Authority)*, 2009 BCHRT 275 at para. 48.

³⁴ *Sleath*, *supra* note 12 at paras. 187-94.

³⁵ *Damianakos v. University of Manitoba*, 2015 MHRBAD 1 at paras. 74-79.

³⁶ *Young v. Amsted Canada Inc.*, 2015 MHRBAD 5 at para. 29.

³⁷ *Lawrence*, *supra* note 5 at para. 54.
See also: *Demasi*, *supra* note 13 at para. 24.