

**IN THE MATTER OF:**     *The Nova Scotia Human Rights Act (the “Act”), R.S.N.S. 1989, c. 214; as amended by S.N.S. 1991, c. 12*  
**Case Number: 42000-30H09-1654**

**BETWEEN:**

**ANDRELLA DAVID**  
 (“Complainant”)

- and -

**SOBEYS GROUP INC.**  
 (“Respondent”)

- and -

**THE NOVA SCOTIA HUMAN RIGHTS COMMISSION**  
 (“NSHRC”)

### **DECISION**

1.           **WHEREAS** this is the decision of the Board of Inquiry concerning the above-noted matter. This Inquiry was mandated to enquire into allegations of discrimination under s. 5(1)(a)(i), (j) and (t) of the Nova Scotia *Human Rights Act* in the provision of services due to race and/or colour and/or perception regarding source of income. This matter proceeding by Board of Inquiry was held on March 2, 3, 4, 5 and 6, 2015; reconvening on May 26, 27 and 28, 2015, with a reservation on further inquiry limited to remedy alone in the event discrimination pursuant to the *Human Rights Act*, as aforementioned, is founded.

#### **Summary of Complaint/Background**

2.           Please see the following summary of the complaint of Ms. David; such shall not be construed as a determination of the facts as they apply to this case, but are simply a background summary of the allegations of fact suggested by Ms. David forming the foundation of this complaint under the *Act*.

3.           The Complainant filed a complaint with the NSHRC on January 14, 2010, against the Respondent, alleging discrimination against her in the provision of services on May 26, 2009 and continuing, pursuant to s. 5(1)(a) (i), (j) and (t), on the basis of race and/or colour and/or perceived source of income. The Complainant’s complaint is summarized as follows:

4. On May 26, 2009 at approximately 9 o'clock p.m., the Complainant entered the Sobeys store in Tantallon, Nova Scotia to make a purchase. While waiting in line to pay for her purchase, a Sobeys' employee approached the Complainant and accused her of past thefts in the store, which the store had allegedly captured on video surveillance. The Sobeys' employee, Jennie Barnhill, indicated that if it happened again, they would be pressing charges against the Complainant.

5. The Complainant demanded to see the videotape, as she sought to convince Ms. Barnhill that she was not, in fact, one and the same person that Ms. Barnhill believed had committed theft in Sobeys prior to May 26, 2009. Jennie Barnhill and a fellow bakery manager employee, Raymond Halfyard, took the Complainant to an office with surveillance equipment. Ms. Barnhill, over an extended period of time, attempted to locate the videotape alleged to have positively identified the Complainant as the alleged shoplifter in the store on May 19, 2009 and prior thereto. Ms. Barnhill indicated that she was 100 per cent sure that the Complainant was the shoplifter on the previous occasion. Ms. Barnhill indicated that next door in the Nova Scotia Liquor Commission (the "NSLC"), the Complainant had been identified as the shoplifter going through the NSLC doors and getting into a black two-door Cavalier. The Complainant denied any and all allegations of Ms. Barnhill. The Complainant had further exchanges with Ms. Barnhill, where Ms. Barnhill continued to insist that the Complainant was the previous alleged shoplifter in Sobeys. The Complainant eventually left the store. Later, the Complainant attempted to rectify the situation with Sobeys' management in its Head Office, but was simply told that Sobeys accepted Jennie Barnhill's word over the Complainant's.

6. The Complainant alleges that Respondent has discriminated against her in the provision of or access to services on the basis of her race and/or colour and/or a perception regarding her source of income when it falsely accused her of stealing from the store, and such caused the Complainant much humiliation and embarrassment.

### **Preliminary Proceedings**

7. **UPON** the filing of this complaint on January 14, 2010 with the NSHRC, this matter was referred to a Board of Inquiry by the NSHRC and subsequently this Chair herein was appointed as Board of Inquiry Chair, pursuant to of s. 32A of the *Act*. Upon appointment, the Chair has all the powers and privileges of a commissioner under the *Public Inquiries Act*, R.S.N.S. 1989, c. 372. Therefore, the Chair during the course of the Board of Inquiry has broad jurisdiction and authority to determine process, admit/call evidence and compel witness testimony during the course of this proceeding. This matter was set down for a Board of Inquiry for the dates of Nov. 4 - 8, 2013 in the course of a pre-organizational Board of Inquiry teleconference.

8. **AND UPON** the parties requesting and consenting to an adjournment of the scheduled Board of Inquiry of Nov. 4 - 8, 2013, in the interest of furthering settlement discussions to allow the personal and public interest remedies to crystallize in discussions between the parties. Additionally, the parties indicated that they were at the cusp of settlement, subject to further refinements as to the terms and conditions of settlement.

9. **AND UPON** the Chair agreeing to adjourn the matter to allow the efforts of the parties to effect an agreement to reach potential fruition; subsequently a pre-organizational Board of Inquiry teleconference was arranged to review the status of any potential agreement and effect directives regarding procedure, confirmation of dates for Board of Inquiry and legal submissions of the parties in the event settlement discussions between the parties were not successful.

10. **AND UPON** it being apparent in such pre-organizational Board of Inquiry teleconferences that such settlement discussions between the parties after a reasonable period of time extensions had not been effective.

11. **AND UPON** the Board of Inquiry being set down for hearing on March 2, 3, 4, 5 and 6, 2015 and reconvening on May 26, 27 and 28, 2015.

12. **AND UPON** during the course of this proceeding, Lisa Teryl, Counsel on behalf of the NSHRC, subsequently being changed to Lester Jesudason and thereafter to Ian Joyce. Additionally, Sean Kelly assisted Grant Machum, as co-Counsel for the Respondent.

13. **AND UPON** this matter proceeding to scheduled Board of Inquiry commencing March 2, 2015 and continuing thereafter and the Chair encouraging the continuation of structured settlement discussions within the first one-and-one-half days of this proceeding by consent of all counsel, the Complainant and subject to the comment and consent of Lisa Teryl, previous counsel for the NSHRC via teleconference on March 2, 2015. The following is the agreed-upon procedure, with consent of the parties and noted objections, on such date on record, as understood and summarized:

*Chair*

*Structured discussions, facilitated by the Chair off-the-record, with the understanding that we will allow caucusing and shuffling as between the parties to effect settlement discussions that at the end of the day may result in settlement, narrowed or remaining issues. In the event matters remain unresolved as a result of such structured settlement discussions, the Chair reserves the right to make a decision in that regard and to call further evidence as may be necessary to effect such decision.*

...

*. . . A Med-Arb model, mediation arbitration model. With the understanding that at the end of the day in the event that the issues are narrowed or there's not complete consensus on all issues, effectively the Board of Inquiry Chair reserves the right to request the parties to call further evidence as may be required to effect a decision on the narrowed issues or the issues remaining for the Board of Inquiry Chair decision purposes. The Chair will act as a facilitator and shall not be privy to the shuffling or caucusing process that will be limited to the parties.*

[Summarized from Transcript dated March 2, 2015]

14. **AND UPON** this matter reconvening on March 3, 2015 and the matter going on-the-record, as a result of a termination of the off-the-record settlement discussions, the results thereof, summarized by the Chair as follows:

*Chair*

*...all parties to this proceeding have indicated that there is no resolution on any issues and all issues remain for the Board of Inquiry Chair determination...and again I reiterate the consensus and agreement on record previously as procedurally it was agreed to.*

[Summarized from Transcript, p. 42, lines 5 – 8 and 16 - 18]

15. **AND UPON** Mr. Machum, on behalf of the Respondent, making a motion during the course of the proceeding on March 2-6, 2015, upon breakdown of settlement discussions, that the Chair recuse herself and have this hearing adjourned due to apprehension of bias and to have a new Board of Inquiry appointed due to the Chair's involvement with the mediation/arbitration procedure previously agreed to by all parties and such motion being unsupported by the other parties is this procedure on record. The Chair's determination in response/consideration of the motion and submissions of Mr. Machum and the other parties is stated as follows:

*Chair*

*On that particular motion it's my determination that I will not be recusing myself and that it was agreed upon during the course of the initial on record dialogue in terms of the procedure that would take place. And that effectively it was agreed to by all parties and consented to that I would have the ability in a less formal process to try to effect constructive dialogue to reach some sort of consensus and resolution on a consent basis as between the parties. And the parties were afforded the opportunity within that process to reach a consent basis without my assistance at the end of the dialogue and discussion. And my*

*understanding is discussions as limited to the parties themselves was without fruition and was without consensus and agreement. Therefore it was clear that the only recourse with regards to this matter would be to proceed with a formalized process. With the ultimate understanding that all issues currently outstanding and that the Board of Inquiry Chair would make the ultimate determination of that matter after a full exploration of the facts and after full legal submissions and formalized process as suggested. So I would say that is the decision that I am rendering and in regard to that motion.*

[Transcript, p. 48, lines 12 – 21; p. 49, lines 1 - 17]

16. **AND UPON** the remedy portion of this proceeding being scheduled for September 16, 17 and 18, 2015 at the end of the Board of Inquiry, subject to the remedy proceeding being indicated in the event discrimination pursuant to s. 5(1)(a)(i), (j) or (t) of the *Act* is determined to be established.

17. **AND UPON** the issuance of a preliminary decision dated August 26, 2015 being issued by the Chair after due consideration of all legal submissions and evidence in this proceeding, including, but not limited to, written submissions, *viva voce* evidence and transcription records provided for the purpose of refreshing the evidence provided in this proceeding and such preliminary decision indicating discrimination pursuant to s. 5(1)(a)(i), (j) and (t) was determined to be established with written finding of facts and reasons to follow, stated as follows:

*I hereby make the finding of fact that Ms. David was discriminated against by the Respondent, Sobeys Group, pursuant to Section 5(1)(a)(i),(j),(t) of the Act on the grounds of discrimination in the matter of services because of race and/or colour and/or source of income, such being established and founded, with a detailed summary of the finding of facts and reasons to follow. I make this preliminary determination upon due consideration of all evidence as presented in this herein proceeding, including written submissions and argument. I, as Board Chair, provide this preliminary summary of my decision, subject to further detailed summary of facts and reasons, in the interest of expediency and efficiency of process, and as not to further delay and impede the reconvening of the Board of Inquiry to address the issue of remedy only, previously scheduled for September 15, 16 and 17, 2015. I limit all evidence in the proceeding of September 15, 16 and 17, 2015 to evidence and argument regarding remedy alone as may apply in the public interest, as well as private remedy to the Complainant, Ms. David. Written submissions relevant to the issue of proposed remedy and counter-arguments shall be post Board of Inquiry, as directed by the Chair at the end of this proceeding.*

18. **AND UPON** further consideration of a joint request by all the parties in this proceeding to have the remedy proceeding adjourned by consent and a pre-organizational Board of Inquiry (Remedy only) teleconference arranged, which took place on September 9, 2015, resulting in the Chair accepting such joint recommendation. The preliminary decision dated August 26, 2015 thereafter being revised and the matter regarding the remedy proceeding being adjourned by consent of the parties from September 16, 17 and 18, 2015 until October 27 and 28, 2015, pending receipt/review of the written finding of facts and reasons as they relate to discrimination being established in this matter to follow within approximately 2 weeks.

19. **AND UPON** the full written decision, including findings of fact and reasons being herein provided.

20. **Issues for determination**

1. Is the Complainant a member of a group that is protected by the *Human Rights Act*?
2. If so, was the Complainant subjected to adverse treatment on May 26, 2009 by the Respondent?
3. If so, was the Complainant's race, colour, and/or perceived source of income a factor in the adverse treatment?
4. If so, did the Respondent provide a credible and non-discriminatory explanation/justification for the adverse treatment, including an assessment of potential racial profiling?

**Summary of findings of facts:**

21. The following is a digested version of the findings of fact, following due consideration of the written submissions of the parties (excluding any pre-hearing disclosure of "will say" statements to the Board Chair); admissible evidence during the course of this proceeding; written and verbal submissions providing argument, evidence and testimony of witnesses; namely, the Complainant, Jenny Barnhill, Raymond Halfyard and Jennifer Russell. I make the following findings of fact, further digested and determined in the course of the subsequent legal analysis, application of the facts/law and conclusions indicated in this matter, as follows:

22. The Complainant arrived at the Sobeys store in Tantallon, Nova Scotia on May 26, 2009 at approximately at 9:00 p.m. The Complainant was a frequent shopper at Sobeys historically and would often attend at Sobeys to purchase items related to selling her home-cooked food items as an additional income source for herself and for purchases for her family's use. Additionally, the Complainant frequented the NSLC, which shared a common entrance with the Sobeys store in Tantallon. The Complainant intended to make a brief stop to purchase ice cream as a treat for her 6-year-old daughter who was waiting at home and beer at the NSLC for herself. Ms. David drove with her friend in her friend's car, a white four-door Grand Am; her friend parked close to the doors by the NSLC and waited while the Complainant entered the Sobeys store and went directly to the freezer section where the ice cream was contained. She selected a tub of ice cream and proceeded up the aisle to the cash register to pay for her purchase. During the course of the Complainant's short visit into the store, the Complainant felt as if she was being watched; however, she felt that was not unusual. The Complainant indicated, "*As a black woman, she took note of it, but she did not think much of it, she is used to being followed in retail stores as all African Nova Scotians likely are and that she has a thick skin because of it.*" The Complainant did not stop for a shopping cart and had no green bags; she only had in her hands ice cream, her debit card and a black handbag, as she approached the cash register.

23. When the Complainant arrived at the cash register she felt someone come up behind her in the lineup at the checkout. There was another customer at that same cash register completing their purchase and the cashier, as the Complainant heard someone speak behind her. Ms. Jenny Barnhill, the acting assistant manager for Sobeys that night, approached the Complainant in the cash line from behind and accused the Complainant of being a known shoplifter in the store, where she had been observed shoplifting on previous occasions. Ms. Barnhill informed the Complainant that she had observed and she had proof on the store video surveillance of the Complainant shoplifting on a number of other occasions in the past. Ms. Barnhill wanted it to stop or the Complainant would be charged. Ms. Barnhill did not accuse the Complainant of shoplifting on that day, but, rather, accused her of being a habitual shoplifter who had stolen items in the past. The Complainant adamantly denied being the shoplifter. In response, Ms. Barnhill indicated that she had video surveillance footage of her shoplifting which had been recorded on Tuesday, May 19, 2009. At some point, the then Bakery Manager, Raymond Halfyard, arrived on the scene. The Complainant requested to view the video to prove that she was not the same person. Ms. Barnhill, after some hesitation, agreed and all three walked upstairs to the Store Manager's office where the video screens were located. Mr. Halfyard accompanied the parties to the office where the video surveillance equipment and videos were housed behind closed doors. I accept that at no time did the Complainant believe she was being detained; the Complainant simply wished to disprove and convince Ms. Barnhill that she was not the alleged shoplifter. I accept, nor is there any evidence or allegation by the Respondent to the contrary, that the Complainant had not committed any theft on May 26, 2009.

24. I accept that while Ms. Barnhill searched through the video footage, she continued to maintain that the Complainant was the shoplifter she had witnessed stealing on a number of occasions. The Complainant maintained that she was not a shoplifter. The Complainant wanted to see the video herself so she could shame Ms. Barnhill like Ms. Barnhill shamed her when she falsely accused her of shoplifting. Ms. Barnhill, at one point, explained to the Complainant that the NSLC employees also knew about this shoplifting and could confirm that the Complainant

was a known shoplifter, who had previously taken groceries and water bottles unpaid from the store and through the NSLC exit in a cart. The video footage/still shots of May 19, 2009 shown to the Complainant and provided as evidence in this Inquiry as Exhibit 1 and Exhibit 2 (Tabs 5 & 6) provided by the Respondent depicted video pictures that were unclear and of poor quality. The quality of the video and pictures provided were of such a nature that there was no ability to positively identify the Complainant, as the facial features/hair of the alleged shoplifter were not distinct. Although Sobeys was able to produce the burned video and still shots from May 19, 2009 for Inquiry purposes, such evidence was not provided for May 26, 2009. Ms. Barnhill gave evidence that the store did not previously have the ability to produce still pictures from security videos and, in any event, the May 26, 2009 video had been overridden and was not available to be offered as evidence.

25. Ms. Barnhill pointed out various reasons why she maintained that the person in the video was the Complainant and that she was 100 per cent certain that the Complainant was one and the same person. The Complainant remained adamant that she was not the shoplifter and pointed out various differences in her appearance from that of the shoplifter. Ms. Barnhill remained unconvinced and the Complainant stated, *"If you think that's me, you must think all black people look alike."* Ms. Barnhill notified the Complainant that, exactly one week earlier, she had observed the Complainant put items in her bag and not pay for them. Ms. Barnhill advised the Complainant that they wanted the shoplifting to stop and that, if the Complainant was ever caught shoplifting in the future, she would call the police and would seek to have the Complainant charged criminally.

26. Ms. Barnhill has had considerable experience with theft at Sobeys since her initial employment in 2000, followed by her being appointed to a management capacity at the Sobeys store in 2006. I accept Ms. Barnhill's evidence that over her years of employment with Sobeys, she has personally experienced approximately 200 incidents of suspicious activity, with the triggering factors indicating potential theft being suspicious activity, patterns and behaviours. Ms. Barnhill indicated and I accept that normally *"we get a call or we noticed some suspicious behaviour we would, in the management team, we would probably start to follow the employee and make sure that we didn't take our eyes off them"*. [Transcript, p. 89, lines 5 - 9] On May 26, 2009, Ms. Barnhill did not follow the normal practice or her own past practice with respect to her response to potential shoplifting triggers, as the Complainant's behaviour on May 26, 2009 provided no triggers for suspicion. The Complainant went directly to retrieve the one item she wished to purchase in the freezer section of the store and to the cash register to pay for the item. I accept and Ms. Barnhill admitted that she did not follow Sobeys' Apprehension of Shoplifters Policy and Procedure; she did not see the Complainant take a stolen item and conceal it, the Complainant's item was paid for at the cash register and she did not keep the Complainant under constant surveillance until she left the store with a stolen item. Additionally, the Policy called for the alleged shoplifter only to be confronted once outside the store with the stolen item. Ms. Barnhill states in her testimony and I accept that, *"The policy explains how we're to - if there's a suspected theft that we're not to let the person out of our sight at all and you're not able to approach them 'til they leave the store and you have to be 100 per cent confident, 100 per cent sure that they did steal"*. [Transcript, p. 93, lines 7 - 12]



27. I find that Ms. Barnhill made a direct statement regarding “*catching someone stealing not too long ago from Pockwock Road*”, such being the Complainant’s community and such being common knowledge and known historically as a Black Settlement community. In addition, during discussions about which day of the week the Complainant had most likely previously attended at the store, Ms. Barnhill made a reference to “cheque day,” to the Complainant. I accept and it is supported by Ms. Barnhill’s own testimony that Ms. Barnhill made these alleged remarks. During her evidence, Ms. Barnhill explained that her remarks were not meant to offend and further explained that the meaning of her comments was non-discriminatory and unintentional, however such intent was never explained to the Complainant on May 26, 2009. The Complainant found Ms. Barnhill’s actions, accusations and comments discriminatory against her on the basis of race, colour and perceived source of income. The Complainant’s actions and reactions were consistent with a person being wrongly accused of an offence and offended by remarks that were construed by her as an attack on her race, colour and perceived source of income. The Respondent had no evidence against the Complainant that would support a charge of shoplifting, nor were shoplifting charges initiated against the Complainant. Ms. Barnhill indicated and I accept that the Complainant knew she was not being detained by Sobeys. When asked, under cross-examination, whether the Complainant would be welcome as a shopper at Sobeys, Ms. Barnhill maintained that the Complainant would no longer be welcome back at Sobeys, her reason for this being that in the eyes of Sobeys, the Complainant is not a customer, but a shoplifter.

28. The Complainant has not shopped at the Sobeys’ Tantallon store since the incident on May 26, 2009. The Respondent continues to support its employee’s, Ms. Barnhill’s, allegation that the Complainant was the alleged shoplifter in the video/still photos of May 19, 2009 and previously, referring to the person in the video of May 19, 2009 as “Ms. David” throughout the proceeding. Ms. Barnhill bases her positive identification of the person in the video of May 19, 2009, as one and the same person as the Complainant on two brief sightings of the alleged shoplifter face-to-face; once, briefly in passing, in 2008 and another face-to-face encounter for a period of two seconds on May 19, 2009. On both occasions, the alleged thief was not followed, as Ms. Barnhill became distracted by other customer requests, nor has the alleged thief ever been charged. Ms. Barnhill indicates that she did not rely on the video for identification purposes. I do not accept such, as it is clear that Ms. Barnhill relied heavily on the video evidence supported by her two brief sightings of the alleged shoplifter. There is nothing in the preponderance of evidence, circumstantial or otherwise, to suggest that the Complainant could be positively identified by Ms. Barnhill as the previous alleged shoplifter.

29. Ms. Barnhill admitted in evidence:

*“Well I know what I did was wrong. I know the way I approached her was inappropriate and I knew that from the moment that I did it and I guess you know looking back obviously I would never have handled it that way again because that approach was inappropriate.”*

...

*... you know I didn't see her take any product, conceal any product and leave the store, right?*

*... It was off the cuff and I was inappropriate. I would want Andrella to know that I handled the situation wrong."*

[Summarized from Transcript, Direct Examination, p. 172 - p. 174]

30. I accept that the Complainant left the upstairs office and returned to her car, where she shared what had happened with her friend who was still waiting. The Complainant and her friend then proceeded to the NSLC to speak with any employees who might have information about a shoplifter the prior week. As the Complainant was frequently in the NSLC, she intended to prove that she was not the same person as the alleged shoplifter. I accept that Sobeys had communicated with and provided pictures from the surveillance video of the alleged shoplifter to the NSLC, as they shared a common entrance and often exchanged security information. Upon entering the NSLC, the Complainant and her friend spoke with store employee, Jennifer Russell, as well as the Store Manager, Karen Caine. Jennifer Russell confirmed that she was aware of an alleged shoplifter taking water bottles from Sobeys and had seen the women in question on a previous occasion. She positively identified the Complainant as not being one and the same person. I find Ms. Russell's testimony consistent and reliable. Ms. Russell stated in evidence, as follows:

*I just thought that it's, you know, I mean this is the 21<sup>st</sup> century and, you know, she's being accused of something she didn't do. I just thought it was - I just felt bad for her, right. I mean here's, I mean I don't know, you know, here's this black women being accused of shoplifting. I guess for black women it probably happens all the time, you know, that they are probably always feeling suspect or, you know, just because she was short and in the store doesn't mean she was doing anything wrong.*

[Transcript, p. 105, lines 10 – 20]

31. After their discussion, the Complainant entered the Sobeys store one last time to acquire Ms. Barnhill's name and the manager's name and contact information. The Complainant was upset and angry, threatened to sue and accused Ms. Barnhill of being a racist. Ms. Barnhill gave her name and the manager's phone number to the Complainant. The Complainant left the store angry, upset and crying.

32. The Complainant retained a lawyer to attempt to resolve the matter prior to initiating a Human Rights complaint. The Complainant requested a personal remedy and an apology from the Respondent through her counsel, to which the Respondent responded as follows:

**Summary of Exhibit 5 (with prejudice communication dated February 12, 2010)**

**Respondent's response:**

*Sobeys has set out the facts which illustrate that Ms. David was not denied access to services or facilities. At no time was she asked to leave the store and at no time was she detained or prevented from making any purchases from the store. As well, Ms. David has not been banned from the store, despite the evidence which led Sobeys employees to conclude that Ms. David had previously shoplifted from the Tantallon store.*

*The decision to confront Ms. David on the evening of May 26<sup>th</sup> resulted from a good faith effort to prevent theft and loss of product. Ms. David was not discriminated against in the provision of or access to services. Anyone who was accused of shoplifting would react negatively and would likely suffer embarrassment irrespective of that person's race, colour or socio-economic background. While Ms. Barnhill could have approached Ms. David more discreetly, this does not amount to discrimination. Sobeys remains convinced that Ms. Barnhill accurately identified Ms. David as the shoplifter and that Ms. David did not experience any discrimination.*

*We note that no one else fitting Ms. David's description or similar to her description has been witnessed or suspected of shoplifting from the Tantallon store following the events of May 26, 2009.*

**The Law of Discrimination**

33. S. 2 of the *Human Rights Act* states as follows:

**Purpose of Act**

2 *The purpose of this Act is to*

*(a) recognize the inherent dignity and the equal and inalienable rights of all members of the human family;*

*(b) proclaim a common standard for achievement of basic human rights by all Nova Scotians;*

*(c) recognize that human rights must be protected by the rules of law;*

*(d) affirm the principle that every person is free and equal in dignity and rights;*

*(e) recognize that the government, all public agencies and all persons in the Province have the responsibility to ensure that persons; and*

*every individual in*

*(f) extend the statute law relating to human rights and provide for its effective administration.*

34. S. 5(1) of the *Act* sets out the duty of non-discrimination.

5(1) *No person shall in respect of*

*(a) the provision of or access to services or facilities;*

*...*

*discriminate against an individual or class of individuals on account of*

*...*

*(i) race;*

*(j) colour;*

*...*

*(t) source of income;*

35. S. 4 of the *Act* provides the meaning of the term “discrimination”:

#### **Meaning of discrimination**

4 *For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.*

36. The applicable legal test and leading authority in this area was established by the Supreme Court of Canada in *Ontario Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (which is set out at Tab 2 of the Commission’s Book of Authorities). The Supreme Court of Canada explained that the onus is on the Complainant to first establish a *prima facie* case, which must satisfy:

1. that the Complainant is a member of a group which is protected by the *Act*;
2. that she was subjected to adverse treatment; and
3. that her race or colour or perceived source of income was a factor in the alleged adverse treatment.

37. The onus rests upon the Complainant to establish the prohibited ground of discrimination in accordance with the “prima facie test.” The Complainant must establish discrimination on the balance of probabilities. If she succeeds, a *prima facie* case is established and the evidentiary burden shifts to the Respondent, Sobeys, who must then provide a credible and non-discriminatory explanation for the alleged actions, which is referred to as the justification stage.

### **Legal analysis**

**1. Is the Complainant a member of a group that is protected by the *Human Rights Act*?**

38. The Complainant must establish that she is a member of a group that is protected under s. 5(1) of the *Human Rights Act*. The Complainant self-identifies as, “*I’m a black woman, a black Nova Scotian.*” [Transcript, p. 309, lines 2-3] Her status as a member of a minority group is not an issue in dispute between the parties.

**2. If so, was the Complainant subjected to adverse treatment by the Respondent on May 26, 2009?**

39. The fact that the Complainant is a member of a group protected by the *Act* with respect to her race and colour has been admitted in evidence and is not in dispute; therefore such is established. The question becomes whether the Complainant was subjected to adverse treatment at the hands of the Respondent on May 26, 2009.

40. The following findings of fact are determined as follows:

41. When Ms. Barnhill approached the Complainant at the checkout and alleged that she was a shoplifter, the Complainant was subjected to public shame and humiliation due to the fact that there was another customer at the checkout in front of the Complainant, as confirmed in the testimony of Jenny Barnhill under direct examination, where she admits as follows:

*Q. Now she gave this evidence at the hearing here about your conversation in the lineup and she says,*

*You’ve been coming here every Tuesday night around this time stealing from the store and if it happens again we will be calling the police and you will be charged.*

*Is that what you recall saying to her?*

A. *I recall saying that we know that there's been shoplifting going on and that she resembled one of the shoplifters, that we weren't going to be detaining or pressing charges and that we just wanted it to stop and I know when we went over by the cash office when we were talking more about it, I said that it was happening Tuesday evenings. That is all I recall.*

Q. *Okay. Now she said in the lineup that "you were speaking to me loud enough" that people in the checkout that you were in, she said this checkout, if there were people there, could definitely hear you. Do you agree with that?*

A. *Looking back I would agree that the woman would've heard yes, yes.*

[Transcript, p. 225; line 14 - p. 227, line 2]

42. It is clear from the evidence that the Complainant's colour and race were important factor in Ms. Barnhill's decision to accuse her of being a shoplifter at Sobeys.

43. When the Complainant requested to go to the office with Ms. Barnhill to view the video surveillance, the Complainant's intent was to "*shame Ms. Barnhill as she had shamed me*". Ms. Barnhill came to the realisation that her actions in confronting the Complainant as she did were "*inappropriate*" and "*off-the-cuff*" once the Complainant demanded and Ms. Barnhill agreed to view the video with the Complainant in the manager's office, accompanied by Raymond Halfyard. The Complainant's behavior in response to the allegations was not that of a person who was guilty of shoplifting, and not detained or charged with an offence. The Complainant showed no signs of guilt, remorse or relief when the exchange was over and she left the store. The Complainant remained adamant that she was, in fact, not one and the same person as the alleged shoplifter, after various attempts to explain the differences in features and characteristics between her and the alleged shoplifter, stating, "*to me the only thing she has in common with me is that she's black and I'm black... If you think that girl looks like me you must think all black people look alike.*" [Transcript, pp. 233 - 235]. The Complainant described the differences in appearance between herself and the alleged shoplifter as darker-skinned black, hair not up in a ponytail, her hair completely out and draped over to one side, smaller, wearing flip flops in May (the Complainant stated that she would not be wearing flip flops in May), fuller face, bigger cheeks, rounder cheeks, large breasts and lighter skin. The Complainant gave additional evidence clearly articulating that the alleged shoplifter captured on the May 19<sup>th</sup> video footage had darker skin than she and that the Complainant had lighter skin than the woman in the May 19<sup>th</sup> video.

44. During cross-examination, Ms Barnhill gave evidence, as follow:

*Q. It's your testimony that of course Ms. David's race had nothing to do with your identification.*

*A. That had nothing to do with it.*

*Q. That she was black.*

*A. Pardon?*

*Q. She was black, you made that observation.*

*A. Oh, yes, yes.*

*Q. So Ms. Barnhill if a white woman with brown eyes, long brown hair and braids with the same build as the shoplifter, and the same height, same clothes, same accessories would have walked by you, would you have thought that it was the same shoplifter that you'd previously seen?*

*A. No.*

[Transcript, p. 346, lines 4 – 19]

45. Ms. Barnhill, throughout the proceedings, maintained that she was 100 per cent certain that the person in the previous sightings in the video was the Complainant. Ms. Barnhill maintained throughout her testimony that the Complainant was positively identified as the previous shoplifter and she would be treated accordingly were she to enter the Sobeys store in the future. However, Ms. Barnhill admitted to several errors in judgment, including the fact that in her experience of personally dealing with over 200 potential shoplifters during the course of her employment, on no previous occasion had she accused somebody of shoplifting until they were observed, followed and outside the store and she was certain that the stolen item was on their person. Ms. Barnhill was aware of Sobeys' Shoplifters Apprehension Policy and reviewed the Policy on a regular basis, confirming her review of same within the past year. In addition, she would look for suspicious behaviors and patterns of activity commonly exhibited by potential shoplifters. The previous shoplifter had often entered Sobeys with a cart; would often put green bags in the cart to cover items; and stole water bottles, emptying the water bottles in the parking lot and then returning the bottles for refund. On May 26, 2009, the Complainant exhibited no sign of such behaviors or patterns of activity similar to that of the previous alleged shoplifter.

46. The Complainant exhibited no behaviours or patterns of activity that would have drawn Ms. Barnhill's attention and triggered suspicion that the Complainant was a potential shoplifter. Ms. Barnhill indicated in evidence that there had been no occasion in the past when she had ever approached a shopper in the store in such a manner. Ms. Barnhill, while maintaining that she was 100 per cent sure that the Complainant was the alleged shoplifter, at the same time was apologetic to the Complainant, indicating on several occasions that her behavior in approaching the Complainant as she had, "*was off the cuff and I was inappropriate. I would want Andrella to know that I handled the situation wrong*".

47. Ms. Barnhill indicated that in normal instances when a shoplifter was confronted there was actual evidence of such theft, including the fact that the shoplifter was outside the store with the item. In the event that charges were not laid and the alleged perpetrator was allowed to leave the store, relief would often be exhibited by the shoplifter, especially, in instances when charges were not laid and occasionally Sobeys would put forth a *Protection of Property Act* Order in lieu thereof. Ms. Barnhill stated, "*They just wouldn't be able to come back on the property for a year.*" [Transcript, p. 95, lines 14 - 15]. In this instance, charges were not laid against the Complainant and the evidence does not suggest any foundation for the laying of charges against the Complainant or a finding sufficient to support a *Protection of Property Act* Order. Ms. Barnhill admitted that on May 26, 2009, she did not see the Complainant shoplifting, stating in direct examination, "*Well there would be nothing because had paid for her product and I hadn't seen her take anything.*" [Transcript, p.146, lines 1 - 3]

48. The Complainant did not exhibit any of the normal reactions that would indicate she was guilty of any alleged offense when initially approached at the cash register by Ms. Barnhill or at any later time. There was no expression of relief by the Complainant when charges were not laid and she was not detained. The Complainant asked/demanded to go to the office to view the video, expressed adamant objections throughout that she was not one and the same person, showed no relief that she was not detained or charged and returned to the store to further complain about the adverse treatment she had experienced and request Ms. Barnhill's name and the manager's phone number. The Complainant expressed herself as follows regarding Ms. Barnhill's original approach:

*"I was hoping to God there was somebody else behind me that she was talking to. But when I turned around and she was talking to me I was so shamed. I don't even know how to explain it, it was like I'm really, really embarrassed but then I'm kind of mad at the same time that she would really think that I would steal something."*

[Transcript, p. 363, lines 8 - 15]

49. I accept that the aforementioned statement is a true reflection of the Complainant's reaction and feelings during the confrontation on May 26, 2009 between herself and Ms. Barnhill.



50. I do not accept that Ms. Barnhill had sufficient information and evidence to identify the Complainant as a past or current shoplifter at Sobeys. Ms. Barnhill only had two brief sightings of the alleged shoplifter; one being in 2008, only briefly in passing and the other in May, 2009 during a face-to-face meeting lasting two seconds. On neither occasion did Ms. Barnhill attempt to follow the alleged shoplifter, as she was distracted by other customers in the store with requests at the time. The quality of the video evidence and the still pictures from the video of May 19, 2009 are of such poor quality that it would be impossible to distinguish or clearly and positively identify who the person was based on the video evidence. The most distinguishing feature that could be positively identified from the pictures and the video evidence was the fact that the alleged shoplifter was a black woman with dark hair. I find on the balance of probabilities that, based on the limited and lack of evidence on May 26, 2009, it would not be possible for Ms. Barnhill to positively identify the Complainant as the alleged shoplifter with 100 per cent certainty, as she suggests.

51. To be clear, I find that Ms. Barnhill honestly believed that she was accurate and correct in identifying the Complainant as the suggested shoplifter. She was credible and forthright in her testimony of the facts and allegations against the Complainant, often corroborating the evidence suggested by Complainant. However, Ms. Barnhill was motivated by her own lack of ability to accept on a conscious level her own error in judgment in terms of identifying the Complainant erroneously, not following the normal practice when shoplifting is suspected, inclusive of the terms and conditions of Sobeys' Shoplifting Apprehension Policy. Ms. Barnhill was apologetic for being inappropriate on May 26, 2009 in terms of her actions and how she handled the situation, but held firm to her conviction that the Complainant, in her mind, was a shoplifter at Sobeys and would be treated as such by her in the future. I find that, on an unconscious level, Ms. Barnhill subjected the Complainant to adverse discriminatory treatment and, in her capacity as employee/management at Sobeys, did not afford the Complainant her recognized and inherent right to dignity, freedom and equality pursuant to s. 4 of the *Act*, whether intentional or not. To accept otherwise, Ms. Barnhill would have to recognize on a conscious level that her unconscious biases and prejudices had impacted her decision to confront the Complainant without evidence to justify doing so on May 26, 2009. Ms. Barnhill would rather believe that the Complainant is a known shoplifter than accept her own unconscious and internal prejudicial attitudes directed towards the Complainant on May 26, 2009. The thought of such to Ms. Barnhill, that she could have prejudicial attitudes directed towards the Complainant's race, color or social and economic status were abhorrent to her.

52. The Respondent supported Ms. Barnhill's erroneous belief, unsubstantiated by the preponderance of evidence and the facts of this case, with responses such as previously set out in Exhibit 5; namely, "*as Sobeys remains convinced that Ms. Barnhill accurately identified Ms. David as the shoplifter and that Ms. David did not experience any discrimination*". I do not accept that Sobeys acted reasonably under the circumstances, especially after Ms. Barnhill indicated that she had not handled the situation appropriately and effectively reported her actions to the management that same evening of May 26, 2009 and made a subsequent statement regarding the events of that night for Sobeys' records' purposes, of such written statement omitted many of the facts including reference to Pockwock Road or cheque day. Additionally, Sobeys had the ability to maintain the security

records and video from May 26, 2009; however, it chose not to retain and provide such for evidentiary purposes during the course of this proceeding. Sobeys was aware that the Complainant had been accused on May 26, 2009; that there was no evidence of theft or a foundation for any charges; and that their policies and procedures related to shoplifting and customer courtesy had not been followed by Ms. Barnhill. When Ms. Barnhill was asked during direct examination to clarify Sobeys' customer courtesy policy as it relates to the treatment of customers in the store, Ms. Barnhill's evidence was as follows:

*Q. What is Sobeys policy or strategy with respect to customers and the treatment of customers? Do they have a policy dealing with how they expect their employees to deal with customers?*

*A. Yes, we have the code of conduct, yes.*

*Q. So we'll get into that in a little bit – in more detail but generally can you tell me what is Sobeys' objection with respect to its customers?*

*A. We have to treat our customers – we promote excellence in customer service and prevent any sort of discrimination or anything like that against customers.*

[Transcript, p. 17, line 19 - p. 18, line 11]

53. It is clear on the evidence that Ms. Barnhill did not comply with Sobeys' Code of Conduct, as it is clear from the evidence that the Complainant, as a customer in the Sobeys store, did not receive excellence of service and was, in fact, subjected to adverse treatment at the hands of a Sobeys' employee.

54. The Respondent was well aware that as of and prior to the date of these proceedings, the Complainant had no criminal convictions or history of shoplifting. I find that the Respondent's continuous support of Ms. Barnhill's allegation that the Complainant is a known shoplifter at Sobeys and should be treated as such in the face of the preponderance of evidence to the contrary unreasonable and, as such, had an adverse effect on the Complainant.

55. In *MacAulay v. Port Hawkesbury (Town)* [2008] 63 N.S.H.R.B.I.D. No. 1 [Respondent's Submissions dated February 20, 2015, Tab 2], the Board stated:

*The inference that the protected characteristic played some role in that treatment is in harmony with the preponderance of probabilities a practical and informed person would readily recognize as reasonable in that place and in those conditions.*

The Respondent's actions related to the incident of May 26, 2009 resulted in denial of future access to services by the Respondent, as the Complainant was

constructively denied services, when falsely accused, without supporting evidence to substantiate the conviction and/or charges, publically humiliated and embarrassed. The Complainant in evidence indicated she has not entered Sobeys since the incident of May 26, 2009 as it is clear she will be treated as a shoplifter. No “practical minded person” in harmony with the preponderance of probabilities, a practical and informed person would not re-enter Sobeys under those circumstances and conditions. Ms. Barnhill indicated in evidence that she would continue to treat the Complainant, if she entered the store as a shoplifter.

56. I infer on the evidence provided and find as a fact that three separate protected characteristics of the Complainant were factors in the adverse treatment she experienced on May 26, 2009 and that such is in harmony with the preponderance of probabilities that a practical and informed person would readily recognize as reasonable in that place and under those conditions. Additionally, I find, based on the preponderance of the evidence, that Ms. Barnhill, in her managerial capacity at Sobeys, subjected the Complainant to adverse treatment.

**3. If so, was the Complainant’s race, colour, and/or perceived source of income a factor in the adverse treatment?**

57. The onus rests upon the Complainant to establish the prohibited ground of discrimination in accordance with the “*prima facie* test.” Discrimination must be established on the balance of probabilities. If she succeeds, the *prima facie* case is established and the evidentiary burden shifts to the Respondent, Sobeys. (*Ontario Human Rights Comm. v. Simpson-Sears, supra*). The following factors indicate the prohibited grounds alleged by the Complainant; each alleged ground will be dealt with each in turn. The establishment of any one or more of the following factors on a balance of probabilities will support and establish a *prima facie* case of discrimination, determined and outlined as follows:

- 5(1)** *No person shall in respect of*  
*(a) the provision of or access to services or facilities;*  
...  
*discriminate against an individual or class of individuals*  
*on account of*  
...  
*(i) race;*  
*(j) colour;*  
...  
*(t) source of income;*

58. It is clear based on the previous analysis that adverse treatment of the Complainant is established on a balance of probabilities based on the previous reasons; the analysis continues in terms of the determination of whether any of the aforementioned factors were at play, determined as follows:

## **Race/Colour**

59. During the course of the evidence provided in this proceeding it was clear that race played a role related to the Complainant's adverse treatment, for the reasons previously mentioned. Ms. Barnhill gave evidence that, all things being equal, had the Complainant been white, she would never have been approached. Therefore, race played a predominant consideration in Ms. Barnhill's decision to approach the Complainant. Additionally, the Complainant was subjected to discriminatory comments related to the Complainant's community of Pockwock Road by Ms. Barnhill, stated in evidence under direct examination, as follows:

*Q. And any other discussions about Pockwock Road?*

*A. I know when she told me that she lived on the Pockwock Road that I know it came into my mind at the time that we had charged somebody from the Pockwock Road the week before and I did say that.*

*Q. And why did you say that?*

*A. It did pop into my mind while we were talking about shoplifting but it just popped into my mind.*

[Transcript, p. 185, lines 3 -13]

60. Ms. Barnhill, after her response to the evidence provided above, attempted to explain that she had non-discriminatory reasons for mentioning the Complainant's community and the person charged from the Pockwock community when the Complainant indicated that she was from that community. Ms. Barnhill indicated that the previous charge was against a white person; however, such a distinction was never made to the Complainant during the course of her discussions on May 26, 2009 with Ms. Barnhill. The Pockwock community is commonly known and the Complainant indicated in evidence that historically the Pockwock community was a black settlement community in the Tantallon area. The Complainant indicated in evidence that Ms. Barnhill's comments were taken as an attack on her community, family and race. The Complainant's evidence indicated and I accept that the Complainant felt offended, humiliated and insulted and viewed such remarks as a personal attack on her predominately black race community in Pockwock, where the Complainant had been born and lived her entire life surrounded by her sisters, brothers, aunts, uncles and other extended community members, all of whom felt like family. I accept that such a comment would raise inferences in the Complainant's mind that she and her community were being discriminated against on the basis of her race. I find that any practical and informed individual would come to the same conclusion and infer that race played a factor on a balance of probabilities under those same conditions.

## Perceived source of income

61. Although a further analysis is not required once a finding of discrimination on any of the discriminatory grounds establishes a *prima facie* case of discrimination, I will make a further finding of fact on the balance of probabilities based on the preponderance of the evidence.

62. Ms. Barnhill during the course of discussions and accusations directed at the Complainant while in the office viewing the video, mentioned “cheque day” to the Complainant when the Complainant questioned which day she was accused of being present in and shoplifting at the store prior to May 26, 2009. There is no doubt that this is a common understanding and inference and a practical and informed individual would come to the conclusion that Ms. Barnhill’s meaning was derogatory towards some sort of government funds or assistance as being the source of the Complainant’s income. Ms. Barnhill’s evidence during direct exam was as follows:

*Q. Do you remember any other discussions in that store manager’s office?*

*A. I know that we talked about – at one point we were having a discussion because I told her that the date of May 19<sup>th</sup> and she said she didn't remember being in shopping that week and she said that she could maybe have been in Monday or Thursday and I said could it have been Thursday, I said because that’s cheque day.*

*Q. And can you tell me what cheque day means in the retail sector?*

*A. It’s kind of a term that we use because we have to plan for scheduling and things. It’s the day that old age pension, baby bonus, social assistance come.*

[Transcript, p.186, lines 3 - 17]

63. I accept the NSHRC’s submission that, in light of all the other obvious differences between herself and the shoplifter, the Complainant’s skin colour, the direct discriminatory comments directed at the Complainant’s community “Pockwock Road” and the reference to “cheque day” should be construed on a balance of probabilities as establishing grounds that the Complainant was discriminated against based on her perceived source of income and race, such being the *primary* factors in Ms. Barnhill’s determination, misidentification, and subsequent treatment of the Complainant on May 26, 2009.

**4. If so, did the Respondent provide a credible and non-discriminatory explanation/justification for the adverse treatment; including assessment of potential racial profiling?**

64. The onus now shifts to the Respondent to provide a credible and non-discriminatory explanation /justification for the Complainant's adverse treatment.

**65. Defining Consumer Racial Profiling**

*Consumer racial profiling is defined as any type of differential treatment based on a perception of the consumer's race or ethnicity that constitutes the denial or degradation of the product or services offered to the consumer (Williams et al., 2001). This practice may or may not be intentional. Through the literature, consumer racial profiling has been shown to affect members of racialized groups including those who identify as Black, African, Hispanic, Asian, and First Nations. Since September 11, 2001, there has been heightened interest and concerns about consumer racial profiling of those perceived by others as Middle Eastern or Muslim.*

*Consumer racial profiling can take many different forms, including avoidance (ignoring); rejection (refusing service); discouragement (providing slow service); verbal actions (using degrading racial epithets); and physical actions (subjecting to detentions, interrogations, or arrests). Anecdotal information and research evidence indicate that the practice does not occur only in retail settings. Harris (2003) suggests that this type of marketplace discrimination frequently occurs in hotels, restaurants, gas stations, grocery stores, clothing stores, department stores, home improvement stores, and office equipment stores. However, the nature of these experiences, the relationships between these experiences, and their results has not been well defined through research.*

*Victims of consumer racial profiling often feel humiliated and abused. Many racialized consumers suffer insults, often in the presence of their children and other customers, with no place to obtain justice (Gabbidon et al., 2008; Gabbidon & Higgins, 2007). Victims live with the humiliation of not knowing what to do about the unfair treatment they have experienced or how to deal with the insulting burden they are forced to carry.*

*Research has also moved into exploring public opinion around consumer racial profiling. Studies have found that approximately 60% of people believe that consumer racial profiling exists (Gabbidon & Higgins, 2011; Jordan, Gabbidon, & Higgins, 2009). This statistic may initially seem encouraging. A significant number of people, though, are unaware of consumer racial profiling. Further, many believe in the effectiveness of consumer-racial-profiling*

*practices and support their use. Jordan et al. (2009) found that those with conservative views were most likely to support such practices while those with higher levels of income and education were less likely to support the practices. Similarly, Black respondents were more likely than Whites to believe in the widespread nature of consumer-racial-profiling practices.*

[NSHRC; “Working Together to Better Service all Nova Scotians”, May 2013]

66. In the decision of *Gilpin v. Halifax Alehouse Limited* 2013 CanLII 43798 (NS HRC), Chair Thompson was guided, *inter alia*, by the opinion of Prof. Girard in *Johnson v. Halifax (Regional Municipality) Police Service*, [2003] N.S.H.R.B.I.D. No. 2 (NS HRC); aff’d (2005), 232 NSR (2d) 161 (N.S.C.A.). In *Johnson v. Halifax (Regional Municipality) Police Service* (*supra*), Chair Girard indicated that any analysis of discrimination that raises the issue of racial profiling must consider that “*discriminatory acts by the police (or anyone) can arise from a process of subconscious stereotyping as well as from conscious decisions. Thus I must be alert at all stages of the inquiry for evidence from which stereotyping might be inferred.*” [Respondent’s Brief dated February 20, 2015; Tab 4]

67. **The Respondent’s explanation/justification summarized from various legal submissions and arguments throughout the course of this proceeding is as follows:**

1. Theft is a serious concern in the grocery industry and costs Sobeys millions of dollars per year. Sobeys has a legitimate and *bona fide* interest in actively preventing theft at its stores and is within its legal rights in doing so. The Complainant was approached by Ms. Barnhill as she was exiting the Sobeys store in Tantallon, Nova Scotia (the “Sobeys Store”) on May 26, 2009 because she was a known shoplifter, not because she was black.
2. The video surveillance evidence was not being used by Ms. Barnhill to identify the shoplifter - Ms. Barnhill relied on her personal observation of the Complainant in the Sobeys Store on various occasions. The video surveillance was only confirmation that the Complainant had left the Sobeys Store through the NSLC without paying for groceries.
3. Ms Barnhill did not follow Sobeys’ Shoplifter Apprehension Policy (the “Policy”) because she was not apprehending or detaining the Complainant. Although she acknowledged that, in hindsight, she should have handled the situation differently, the fact that she did not follow the Policy does not, *per se*, constitute racial profiling. Even if Ms. Barnhill wrongly identified the Complainant as the known shoplifter, this was a mistake, not discrimination.
4. Sobeys is well-aware of its obligations under human rights legislation and goes to great lengths to ensure that its customers are treated in a respectful and dignified manner.

5. The Complainant was a known shoplifter to Sobeys and was approached as a result of clear video evidence that she had shoplifted at the Sobeys Store on May 19, 2006. Sobeys did not deny the Complainant access to services or engage in racial profiling. There is no nexus between the Complainant's race or ethnicity and her being approached due to shoplifting - any suggestion to the contrary is based entirely on speculation and conjecture.
6. The statements alleged to have been made by Barnhill to the Complainant in relation to her African-Nova Scotia heritage and/or source of income are self-serving and are not credible. There was no adverse treatment against the Complainant that can be connected to a prohibited ground of discrimination under the *Act* and this complaint should be therefore dismissed.

### **The Justifications**

68. The Respondent, when confronted with a *prima facie* case, must provide an explanation that is "credible on all of the evidence." (*Shaw v. Phipps*, 2012 ONCA 155 )

69. On the issue of being consumer racially-profiled, the Complainant is not required to establish that the Respondent's actions resulted from no other factor but discrimination; rather, that an inference of discrimination is more probable from the evidence than the actual explanations offered by the Respondent. (*Shaw v. Phipps, supra*). The test is met if one of the factors, on a balance of probabilities, influencing the actions of the Sobeys' staff when subjecting the Complainants to adverse treatment was her race, colour or perceived source of income.

70. The justification offered by Sobeys must be sufficient to dislodge the discrimination proven in the *prima facie* case. If the Complainant has shown on a balance of probabilities that discrimination is at least one factor, even if a small factor, then discrimination is made out. This is so unless the justification provided dislodges the claim and pushes the proof of discrimination back below the balance of probabilities. *Shaw v. Phipps (supra)* further states, "...subjective intention to discriminate is not a necessary component of the test. There is seldom direct evidence of a subjective intention to discriminate, because "[r]acial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices" and racial discrimination "often operates on an unconscious level." [para. 34]

71. Should one of the factors that influenced the Sobeys' staff member to accuse the Complainant be her race, then, given all the circumstances, the test is met and a finding of discrimination may be made. If the justification provided by Sobeys is enough to question whether race was a factor so that it is less than the balance of probabilities, then the complaint should be dismissed.



72. The justifications provided by Sobeys related to shoplifting being a serious issue for Sobeys resulting in serious financial losses, I find it to be a legitimate concern for Sobeys. However, the Respondent's continuous identification of the Complainant as a "known shoplifter" is unjustified. The preponderance of evidence indicates that Ms. Barnhill did not have evidence sufficient for her to positively identify the Complainant on May 26, 2009 or previously as a known shoplifter for the reasons previously herein stated. I do not accept that Ms. Barnhill did not rely on the video evidence, as Ms. Barnhill would not have sufficient evidence to identify the Complainant on the basis of her limited sighting of the alleged shoplifter in the store in 2008 and a brief viewing of the alleged shoplifter on May 19, 2009. On both occasions, the alleged shoplifter was not followed by Ms. Barnhill and charges have never been laid against the alleged shoplifter. Ms. Barnhill, on May 26, 2009, did not act according to either Sobeys' Shoplifting Apprehension Policy or Code of Business Conduct and Ethics, or her own past practices when approaching potential shoplifters.

73. The Respondent has stated that "*Sobeys is well-aware of its obligations under human rights legislation and goes to great lengths to ensure that its customers are treated in a respectful and dignified manner.*" In this particular case, Sobeys remains in denial of the fact that the Complainant was not afforded the rights, respect and dignity required pursuant to the purposes contained in the Act "*to recognize the inherent dignity and the equal and inalienable rights of all members of the human family*". Ms. Barnhill acted on "*subconscious stereotyping*", as well as from conscious decisions when she approached the Complainant at the cash register on May 26, 2009 and subjected the Complainant to adverse discriminatory comments on the basis of her race, colour and source of income, both directly as they related to comments made to the Complainant regarding her community of "Pockwock Road" and "cheque day" and indirectly by her actions on that date. Explanations offered by Sobeys and Ms. Barnhill during the course of this proceeding were not what the Complainant would have understood in the course of events occurring on May 26, 2009. The complainant's perception that she was being humiliated, disrespected and shamed I find to be legitimate upon the preponderance of evidence on a balance of probabilities under such circumstances. The refusal of the Respondent to acknowledge the wrongs committed against the Complainant and to right those wrongs, including effecting an apology to the Complainant related to such wrongs, is unjustified. Additionally, Ms. Barnhill suffered considerable disadvantage due to the fact that other than being aware of the Shoplifters Apprehension Policy and Sobeys' Code of Business Conduct and Ethics, she had little knowledge of human rights issues and the application of the law as a manager. Ms. Barnhill gave evidence that discrimination was unethical, but not illegal. Additionally, Ms. Barnhill had no diversity training to address unconscious stereotyping, as witnessed by her following comment, during cross examination:

*Q. And it's your understanding that discrimination, while unethical, is not illegal, right?*

*A. Correct.*

[Transcript, p.337, lines 13 -16]

74. Additionally, on the issue of credibility, the factors outlined in *Quilty-MacAskill v Community Justice Society*, 2013 CanLII 33709 (N.S.H.R.C.) have been given due consideration, which states, “*The Board’s task is to determine which of the witnesses’ versions of events is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.*” [para. 26] I find on the issue of credibility that the Complainant’s evidence was credible and in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions. Additionally, Ms. Barnhill’s and Ms. Russell’s evidence corroborated and supported the evidence suggested by the Complainant. Ms. Barnhill was candid and honest regarding her underlying motives on a conscious level, often explaining and justifying her actions as being non-discriminatory. However, as per my previous findings, I find that Ms. Barnhill discriminated against the Complainant by her “*subconscious stereotyping*” of the Complainant, based on her race, colour and perceived source of income. The Respondent’s justifications are not found sufficient on a balance of probabilities to dislodge the previously established *prima facie* case of the Complainant on all grounds alleged.

75. In *Johnson v. Halifax (Regional Municipality) Police Service (supra)*, the facts were summarized as follows:

*In December of 1998, Kirk Johnson, an internationally recognized Nova Scotia boxer, laid a complaint under the Nova Scotia Act alleging that he was the victim of discrimination at the hands of the Halifax Regional Police, a division of the appellant Halifax Regional Municipality. The complaint was prompted by an incident that occurred on the evening of April 12<sup>th</sup> of that year. On that date, Mr. Johnson and his friend, Earl Fraser, were stopped by Constable Michael Sanford of the Halifax Regional Police. Mr. Fraser was driving Mr. Johnson’s 1993 Texas registered Ford Mustang at the time. Both Mr. Johnson and Mr. Fraser are black. The officer asked for proof of insurance and registration. Not satisfied with what was produced, the officer then ticketed Mr. Fraser and had the vehicle towed. It was confirmed the next day that Mr. Johnson’s vehicle was properly registered and insured. Neither gentleman had committed an infraction. The vehicle was then released.*

[*Gilpin v. Halifax Alehouse Limited (supra)* at para. 8]

76. I find the facts in *Johnson v. Halifax (Regional Municipality) Police Service (supra)* analogous to the facts herein determined. Racial profiling is, in fact, a reality that occurred in this case and will be dealt with further in the remedy portion of this proceeding.

77. Prof. Girard, in *Johnson v. Halifax (Regional Municipality) Police Service (supra)* indicated:

*I find that the events of 12 April were very humiliating, stressful and painful for Mr. Johnson, and that this injury continued long after the night in question. Dr. Bernard testified as to the sense of violation that members of minorities experience when subjected to acts of racism: she analogized it to an assault. We understand that a person who has been physically assaulted will continue experience after-effects for some period of time line after any physical injury has healed. A similar reaction can occur after a direct encounter with racism. When the act occurs at the hands of the police, contact with whom one has no control over, it is bound to create an ongoing sense of vulnerability.*

[*Gilpin v. Halifax Alehouse Limited (supra)* at para. 10]

78. When confronted with a *prima facie* case, the Respondent must provide an explanation that is “credible on all of the evidence.” (*Shaw v. Phipps, supra*). I find that Sobeys’ justifications are unsupported by the evidence and the circumstances of this case. The *prima facie* case of discrimination, as alleged by the Complainant, pursuant to s. 5(1)(a)(i), (j) and (t) of the *Act* on the grounds of discrimination in the matter of services because of race and/or colour, perceived source of income hereby stands as established.

### **Reservation on Remedy**

79. Under s.34(8) of the *Act*, a Board of Inquiry has the discretion whether to order a party who has contravened the *Act* to do any act or thing that constitutes full compliance with the *Act*, and to rectify any injury caused to any person.

80. The Chair pursuant to the aforementioned authority reserves on the issue of applicable remedy alone, such Board of Inquiry to continue inquiry on October 27 and 28, 2015. The parties shall have the ability to resolve by consent between themselves the issues of applicable remedy as may apply, subject to continuation of this matter should the applicable remedy remain unresolved. The Chair strongly recommends the Complainant seek independent legal advice regarding the issue of any potential remedy, as it applies to her personal remedy. The facts of the case from this proceeding, including transcribed records, shall be used as supporting evidence relating to an applicable remedy in future remedy proceedings and in determining further findings of fact. The continuation of this proceeding herein shall not be for the purpose of re-hearing this matter, but solely to provide the parties with the opportunity to call further evidence and adduce argument for the limited purpose of assessing an appropriate remedy in the circumstances, in order to rectify the injury caused to the Complainant, and public interest, as contravention of the Complainant’s rights under the *Act* is hereby established. Written submissions limited to remedy shall be post Board of Inquiry, as directed by the Chair at the end of this proceeding.

Dated at Kentville, Nova Scotia, this 28th day of September, 2015.

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Marion Hill, Board of Inquiry Chair