

IN THE MATTER OF: THE NOVA SCOTIA *HUMAN RIGHTS ACT* (the “Act”)

and

IN THE MATTER OF: Board File No. 51000-30-H12-0247

BETWEEN:

**Javonna Borden and Jennifer Smith,
on behalf of Jordan and Davhon Smith**

Complainants

- and –

Bob’s Taxi and/or Aleksey Osipenkov

Respondents

- and –

Nova Scotia Human Rights Commission

DECISION

Chair: Dennis James, Q. C.

Hearing Date: November 25, 26, 27, 2014 and December 4, 2014

Location: Dartmouth, Nova Scotia

**Counsel: Kendrick Douglas, Counsel for Javonna Borden and Jennifer Smith, on
 behalf of Jordan and Davhon Smith, Complainants
 Bob’s Taxi (Kim DeMont), Respondent, Self-represented
 Aleksey Osipenkov, Respondent, Self-represented
 Ann Smith, Q.C., Jason Cooke, Counsel for Nova Scotia Human
 Rights Commission**

Appointment and Preliminary Proceedings

1. The Board was appointed by Order of Chief Judge Pamela Williams dated July 17, 2013. I was notified of the appointment by the Commission on October 8, 2013. The appointment was to inquire into a complaint of discrimination pursuant to ss 5(1)(a)(i)(j) of the *Human Rights Act* by Jennifer Smith, on behalf of Davhon Smith and Jordan Smith and Javonna Borden. The alleged discrimination was in regards access to services, particularly taxi services. Immediately after notice of the appointment was received the Board attempted to secure dates for a hearing. Originally the matter was scheduled to be heard January 20 and 21, 2014 but an adjournment was required due to the availability of the lawyer for the Commission.
2. New dates were set for the hearing of the matter on April 3 and 4, 2014. Again, the Commission required an adjournment which led to further lengthy delay as the Respondent Aleksey Osipenkov was working on the offshore for an extended period of time due to the availability of counsel. This was not Ms. Ann Smith, Q.C., who was retained mere days before the scheduled hearing dates of November 25 to 27 2014.
3. When the Board and the parties convened to select new dates for the hearing, the Board was advised that Mr. Osipenkov was then working offshore and would be for an extended period of time. Unfortunately Mr. Osipenkov chose not to advise the Board of his unavailability nor when he was scheduled to be back. The Board scheduled the dates of November 25 to 27, 2014 for the hearing. Due to the conduct of Mr. Osipenkov on November 25, further time was required. The hearing proceeded on November 26 and 27 and resumed on December 4 to hear the submissions of all parties.
4. The Board and the parties were assisted ably by the participation of Stanislav Orlov, who functioned as a translator throughout the proceedings. He translated between English and Russian to ensure Mr. Osipenkov was able to understand and participate in the hearing. There were occasions when Mr. Orlov attempted to assist in maintaining decorum by managing Mr. Osipenkov's disruptive and disrespectful behaviour which extended throughout the hearing.

November 25, 2014

5. A subpoena was issued on June 11, 2014 to secure Mr. Osipenkov's attendance at the hearing for the purposes of providing evidence. According to an Affidavit of Service he was served this Subpoena on September 18, 2014.
6. On the morning of November 25, 2014 failed to attend. Based on the advice of Ms. Demont and Mr. Orlov, it appears that Mr. Osipenkov was in Dartmouth and available to attend.
7. On the motion of Counsel for the Commission, supported by Counsel for the Complainants, the Board issued an Order requiring the Sheriff to take all reasonable steps to secure the attendance of Mr. Osipenkov for 9:30 a.m. the morning of November

26. The Order also advised Mr. Osipenkov that the hearing would be proceeding in any event.
8. As it turned out Mr. Osipenkov was available to attend on November 25 but chose not to. He denied that he had been served with the subpoena although the Commission had provided an affidavit of service from Rodney Rogers confirming that Mr. Osipenkov was served personally and that the means of identification was Mr. Osipenkov's self-identification. The Board is also satisfied that Mr. Osipenkov was well aware of the hearing dates as he was provided with copy of all correspondence by use of an email address that had been given to the parties by his spouse and by the fact that all correspondence was also sent by regular mail to his home address.
 9. Mr. Osipenkov did attend on November 26 on his own. Sheriff's deputies attended at his residence to enforce the subpoena but he was in his vehicle and drove to the hearing location on his own. It was clear that the tactics deployed by Mr. Osipenkov led to his own sense of satisfaction. One can only describe his behaviour as defiant and immature. Throughout the proceeding Mr. Osipenkov was co-operative only and as long as he felt his position was not being directly challenged. Whenever he was in a situation where evidence was being introduced that was not favourable to his position, Mr. Osipenkov chose a course of disruption and outburst. He would leave the hearing room whenever he wanted and would arrive whenever he chose.
 10. The Board was clear to Mr. Osipenkov that while a subpoena was issued to secure his evidence, whether and how Mr. Osipenkov chose to defend himself was entirely within his control. The Board made it clear that the hearing would proceed whether Mr. Osipenkov chose to attend further or not. For the most part, he participated through the remaining hearing dates.

Abuse of Process

11. The main argument that was advanced by Mr. Osipenkov is that the hearing pursuant to the *Human Rights Act* was an abuse of process as he had already been acquitted of these matters as a result of a previous hearing. The previous hearing was before the Provincial Court and concerned charges laid against Mr. Osipenkov pursuant to the Halifax Regional Municipality's Taxi By-law arising from the factual circumstances that were at the heart of this hearing.
12. Ms. Smith, on behalf of the Commission, drew to the attention of the Board the findings of The Honourable Castor A. Williams, Judge of the Provincial Court. Specifically, she pointed out that Judge Castor found indicated that the Crown had not met the evidentiary burden to prove the challenges especially on the issue of identification. Judge Castor stated in his decision (pp. 86-87):

I am not satisfied on the total evidence before me, and for the reasons that I have stated, that the Crown has met its burden of

proof that it was indeed the Defendant who was the driver. The burden is upon the Crown to prove these facts beyond a reasonable doubt, and I am not satisfied. Even if the burden was on a balance of probabilities, I am still not satisfied. So, having said that, I must conclude and find the Defendant not guilty as charged. Acquittal will be entered.

13. A case that is relevant on the facts herein is the decision in *Polgrain Estates v. Toronto East General Hospital*, 2008 ONCA 427, 2008 CarswellOnt 3103 (Ont. C.A.) In that case the Court heard an appeal from the plaintiff in a civil action. The plaintiff was the estate of a former patient of the defendant hospital. A nurse at the hospital, Peter Cocchio, was accused by two other staff members of sexually assaulting the patient and was charged criminally.
14. The criminal trial judge reviewed testimony, noted inconsistencies, and on the totality of the evidence, ruled that the defendant nurse was not guilty. In particular, the criminal trial judge was critical of several of the Crown's key witnesses, and indicated that he found the defendant to be a sincere witness with reasonable explanations for his conduct. The nurse was acquitted of all charges.
15. After the patient's death, her estate brought a civil action against the hospital and the nurse. The hospital made a motion for dismissal of the action as an abuse of process. The motions judge granted the motion, finding that the reasons of the criminal trial judge expressed a finding that the sexual assault had not occurred. The patient's estate appealed.
16. The Court of Appeal allowed the appeal, ruling that since an acquittal is based only on a finding of a failure to prove the offence beyond a reasonable doubt, there was no bar to a plaintiff being able to prove the case on a balance of probabilities in a civil action. The court also noted that a civil action may raise other causes of action and involve other parties than did the criminal matter. Justice Rosenberg (Simmons and Feldman, J.J.A. concurring) provided a summary of the previous leading case on this issue, considering at length the Supreme Court of Canada's decision in *City of Toronto* noting:

20 The reasons of the Supreme Court on the issue of abuse of process were written by Arbour J. She considered three doctrines that could prevent the relitigation of the conviction in the grievance proceedings: (1) issue estoppel, (2) collateral attack, and (3) abuse of process. She concluded that the better approach was through the doctrine of abuse of process.

21 The reasoning that led her to that approach applies equally to this case. **Issue estoppel does not apply because the parties are not the same. In this case, neither the appellant nor the respondent hospital had been parties to the criminal proceeding.**

The doctrine against collateral attack also does not apply because the appellant does not seek to overturn the acquittal. The appellant, as it must, accepts the acquittal; but it says that because of the different burdens of proof it is entitled to attempt to establish on a balance of probabilities that Mrs. Polgrain was sexually assaulted.

...

28 I agree with many of the hospital's submissions. In particular, I **accept that the factors favouring relitigation as enunciated in C.U.P.E. do not apply.** The criminal trial was not tainted by fraud or dishonesty. The proposed additional evidence is neither fresh nor conclusive, as there was some evidence at the criminal trial about nursing standards from the nurse witnesses. Further, **the case did not really turn on nursing standards but on the credibility and reliability of the eye-witnesses and of Mr. Cocchio.**

29 I am also of the view that the reasons of the trial judge are reasonably open to the interpretation that he did not simply have a reasonable doubt. **Rather, he was satisfied, at least on a balance of probabilities, that there was no sexual assault.**

30 Further, if unfairness is fully defined by the question of whether the party had a sufficient incentive to defend or prosecute the case then there was no unfairness. In my view, however, unfairness encompasses additional dimensions. **I am also of the view that in considering the broader question of the integrity of the judicial process there are other policy interests that are important.**

(2) Policy Considerations

31 I start with the other dimensions of unfairness. A concern in this case is that **there is no way for the appellant, or any other party to the litigation, to review the judicial findings upon which the hospital relies.** An appeal is against the verdict, not the reasons for the verdict. The only part played by the reasons is that they may disclose an error in reasoning that taints the lawfulness of the verdict. That the trial judge went further than he had to and found not simply a reasonable doubt but that the sexual assaults did not occur was not a ground for an appeal.

32 One of the core principles underlying the abuse of process doctrine in the relitigation context is that judicial findings are final

and binding and conclusive unless set aside on appeal or lawfully quashed. **It is therefore significant that there may be no way for any of the parties to appeal additional findings made by a trial judge in a criminal matter.** The appellant obviously had no right to appeal the result of the criminal trial. But more importantly, not even the Crown, who was a party to the criminal proceeding, had a right of appeal against the trial judge's reasons. It could only appeal against the verdict. Even if the Crown was of the view that the trial judge erred in his findings of fact, unless those findings tainted the validity of the verdict the Crown could not successfully appeal.

33 This question of availability of review and the concept of appeal from the verdict rather than the reasons is **not simply a matter of semantics or the idiosyncratic nature of criminal appeals. It goes to the essential nature of the criminal trial and what constitutes a judicial finding in that context.** Barring unusual circumstances where a finding may have to be made on a balance of probabilities, [FN2] the judicial finding to be made by the criminal court is whether the case has been proved beyond a reasonable doubt. That burden of proof is the touchstone of the criminal trial and is the lens through which the facts are viewed and findings made. Any findings by the trial judge must be understood in that context.

34 Further, as this court explained in *R. v. M. (W.)* (2007), 87 O.R. (3d) 425 (Ont. C.A.), **an acquittal of a wrongfully convicted individual re-establishes the accused's legal innocence but does not address factual innocence.** In delivering reasons for judgment, a trial judge may express in clear and strong terms the reasons for the acquittal. The trial judge in this case and the court of appeal in *Mullins-Johnson* did so but the criminal court cannot make a formal legal declaration of an accused's factual innocence.

35 Accordingly, in my view, the reasons of the trial judge in acquitting Mr. Cocchio are not judicial findings that attract the same relitigation concerns as does the formal verdict. **To dismiss this suit as an abuse of process would attribute to the reasons of the trial judge a declaration of innocence, a verdict that was not legally open in the criminal proceedings.** Again, this is not a matter of semantics. There are important policy reasons for not recognizing a verdict of factual innocence. As was explained in *Mullins-Johnson* at para. 25, the most compelling is the impact on other persons found not guilty:

As Professor Kent Roach observed in a report he prepared for the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell, "there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict" (p. 39). To recognize a third verdict in the criminal trial process would, in effect, create two classes of people: those found to be factually innocent and those who benefited from the presumption of innocence and the high standard of proof beyond a reasonable doubt.

36 I am also concerned about the impact on the integrity of the judicial process in another sense. In applying the abuse of process or issue estoppel doctrines a court will be required on occasion to review the reasons for conviction to determine the matters in issue and the essential findings: see *Trang v. Alberta (Director, Edmonton Remand Centre)* (2002), 322 A.R. 212 (Alta. Q.B.). **But where the accused is acquitted, the only essential finding is simply that the case was not proved beyond a reasonable doubt. The trial judge may arrive at that conclusion for any number of reasons.** For example, in a sexual assault trial there may be a reasonable doubt that the complainant consented, that the act occurred, that the accused was the perpetrator or that the touching was of a sexual nature. It is not essential that the trial judge find as a fact that there was consent, that the act did not occur, that the accused was not the perpetrator or that the touching was not of a sexual nature. It is enough that the trial judge had a reasonable doubt on one or more of those features of the case. **The judge is not required and it is not essential that the judge make a positive finding in the accused's favour on any of those issues. To give full legal significance for abuse of process purposes to matters that were not essential to the decision would confuse the roles of the criminal and civil courts.**

37 Finally, I would not want to interpret or apply the abuse of process doctrine in a way that would interfere with the wide discretion given to judges for the manner in which they express their reasons. Trial judges in criminal cases should feel free, as did LaForme J. in this case and as did this court in *Mullins-Johnson*, to express their reasons for acquittal in the manner they consider appropriate. They ought to be able to call the facts as they see

them and express their reasons in a way that may give the parties solace, satisfaction or even vindication.

17. On that basis, the Court allowed the appeal and set aside the order dismissing the action.
18. The Board agrees with the decision of the Ontario Court of Appeal *Polgrain Estates, supra*, and applies the principles to this case. It is open to the Commission and the Complainants to advance the matter even in light of the result of the provincial court proceedings. The *Human Rights Act* expressly permits the Commission to consider whether the matters have been adequately addressed the issues complained of. Specifically, Section 29 (4) provides:

The Commission or Director may dismiss a complaint at any time if:

...

(d) the substance of the complaint has been appropriately dealt with pursuant to another Act or proceeding.

19. In reaching a conclusion on whether the substance of the complaint had been appropriately dealt with the Commission would consider the fact that the burden on the prosecution was beyond a reasonable doubt which is substantially different than the burden under the *Human Rights Act*. It would be relevant as well that neither the Commission nor the Complainants had control over the proceeding, nor the possible appeal of the decision. This had practical implications as one witness, Jimmy Lee Clayton, who testified in this proceeding before the Board, did not testify before Judge Castor.
20. The only conclusion that follows from Judge Williams' decision is that the Crown failed to prove its case against Mr. Osipenkov of violation of the taxi by-law under the legal standard required of it. A proceeding under the *Human Rights Act* has a different purpose, scope and a different evidentiary burden. Neither the Commission, the Complainants nor this Board is bound by the acquittal of Mr. Osipenkov of the charges under the taxi by-law.
21. In considering the elements of the allegations under the *Human Rights Act* the Board must be satisfied on the balance of probabilities. In this regard, I agree with the submission for the Commission that the Complainants must establish on a civil balance of probabilities that:
 1. the Complainants have a protected characteristic under the *Act*; and
 2. the characteristic was a factor in suffering a burden.

Witnesses

Javonna Borden

22. Javonna Borden is an African-Canadian woman. She testified that July 15, 2011 was her 20th birthday and she wanted to celebrate the day by taking her two nephews, Jordan Smith and Davhon Smith, to Jack Astor's, a local restaurant. Ms. Borden was employed at Jack Astor's at the time and chose that restaurant for her birthday dinner.
23. She said after having dinner they took a bus from Jack Astor's to Needs Convenience Store on Highfield Park Drive, Dartmouth ("Needs"). While they were traveling on the bus Ms. Borden said she called Bob's Taxi to have a cab meet them at the Needs. Her recollection is that a cab was waiting for them when they got off the bus.
24. Ms. Borden said that as they approached the taxi, Jordan got in the front passenger seat and that she and Davhon got in the back seat. As the doors were being shut, she said the taxi driver yelled at Jordan to get out of the front seat. She challenged the taxi driver and spoke or yelled at him that he could not speak to her nephew in that manner. In response, she says the taxi driver yelled "you fucking niggers, get out of my car".
25. Ms. Borden said the three of them got out of the car. She said the boys were standing on the right side of the car near the back. She exited the car on the left and was standing towards the back of the car as well. Ms. Borden said she was angry about what had just happened and that she went to back of car and kicked the vehicle.
26. She said the driver approached her and they were standing face to face when she noticed that Jimmy Lee Clayton had come to the scene. She and Mr. Clayton were acquainted and have a distant familial connection. During her testimony she said she thought Mr. Clayton had been sitting in a car and got out of the car to come over.
27. When Mr. Clayton was approaching the vehicle, he asked "what is going on Javonna"? She said that she told Mr. Clayton what had happened as he was walking toward the driver. As Mr. Clayton approached him, the driver got into the car and drove off. She believes that Mr. Clayton got into a car with his girlfriend and followed the taxi. She said she watched his vehicle turn in the same direction as the direction that the taxi was heading.
28. Ms. Borden testified that she thought the taxi cab was white. She said that she did recall looking to the rook light and saw a Bob's Taxi roof light bearing number 251.
29. Ms. Borden testified that she called a second cab from Bob's Taxi and was driven home by the second taxi cab. She described the driver of that second vehicle as being very nice and she told him what had happened with the first taxi. She said that the second driver recommended that she should call dispatch for Bob's Taxi to report what had happened. Ms. Borden testified that she called dispatch while driving in the second taxi and she was

told to call “Bob’s Taxi Commission” later. She said she did not say anything else to the dispatcher.

30. Ms. Borden testified that the interaction with the taxi driver occurred between 7:30 to 8:00 p.m. and that she was back at her home at 8:00 p.m. At the time of the incident she was residing with Ms. Jennifer Smith and her sons, Jordan and Davhon. When she arrived at the apartment, she and Ms. Smith spoke of the incident. She said that the two boys were involved at the very beginning of the conversation, but for most of the evening, they were off in another room.
31. The next morning, July 16, Ms. Borden was getting ready to go to work. She called Bob’s Taxi for a car but after a period of about 20 minutes no car had arrived. Ms. Borden testified that she called Bob’s Taxi back to check on the status of the car and she was told that there would be no car because of what happened last night. Ms. Borden said she something to the effect that she would sue Bob’s Taxi as she was being discriminated against and the person on the phone said “good luck with that”. The conversation was not a long one and Ms. Borden denied that anything more was said. She specifically rejected a suggestion that she threatened a taxi driver.
32. In response to questioning by her lawyer, Ms. Borden said that she felt denigrated as a human being by Mr. Osipenkov’s verbal assault. It made her feel like she was being treated as a lesser human being. The refusal of services on July 16 was further injury to her.
33. Ms. Borden did follow the complaint process with the Halifax Regional Municipality Taxi Commission after she and Ms. Smith met Trevor Zinck, then Member of the Legislative Assembly for their neighbourhood. She testified that in the Taxi Commission process she was shown pictures of various drivers. She described these as being in black and white and on poor quality paper. She was quite firm in her testimony that the photographs she was shown were not coloured photographs. She was not able to identify the driver by use of the photographs.
34. Upon questioning by the Board, Ms. Borden identified Mr. Osipenkov as the driver of the taxi vehicle that made the offensive statement that she alleges was made to her, Jordan and Davhon on July 15, 2011.

Jennifer Smith

35. Jennifer Smith is the mother of Jordan and Davhon. She is African-Canadian. She did not go to Jack Astor’s that evening but was waiting at home when Ms. Borden and her sons arrived home. As a result she is not a witness to any of the alleged events of July 15. Ms. Smith is definite that Ms. Borden and her sons arrived at her home before 8:00 p.m.
36. She said as soon as she opened the door she knew something was wrong as Ms. Borden looked upset. Ms. Smith said that the boys had a look on their faces “that a mother

should not have to see.” She asked them what was wrong and Ms. Borden told her what had happened. Included in that discussion was the fact that the driver had a “Russian or other European-type accent”. Ms. Smith said that the boys were present for the initial discussion but moved into other room and not involved for most of the conversation that she and Ms. Borden had about the incident.

37. Ms. Smith testified that one of her main responses was that “we are going to handle this matter the right way; the legal way.” By that she meant to exclude taking matters into their own hands and instead choosing to follow legal processes such as the complaints filed under the *Human Rights Act*.
38. The next morning, Ms. Smith heard Ms. Borden call for a taxi cab. She said 15 or 20 minutes later she told Ms. Borden that she should call back as no car had arrived. Ms. Smith said she felt something was wrong so she suggested to Ms. Borden that she put her phone on the speaker function so she, Ms. Smith, could hear as well.
39. Ms. Smith recalled the dispatcher said there would be no taxi because of what happened last night. She said that she told Ms. Borden to hang up and she does not recall anything else being said. During cross-examination she testified that she heard the entire second call that Ms. Borden had with Bob’s Taxi on July 16 and that no threat was made by Ms. Borden.
40. Ms. Smith testified that as a result of this experience, her sons Jordan and Davhon “have had to grow up a little faster”. She testified that she believed this was the first occasion that her sons had experienced overt racism.
41. Even though she was not a witness to the alleged incidents, Ms. Smith testified that due to the events, she suffered from the weight of what happened. She said that her relationship with co-workers of other cultures and races became strained. As a result of the stress that she said she experienced she requested and was able to take two months off of work. Ms. Smith is a client service representative at Scotia Bank business centre located in Scotia Square.
42. The first step Ms. Smith took to report the incident was to contact her then MLA, Trevor Zinck. She said that she has not called Bob’s Taxi since the incident and in fact she hopes that as a result of this alleged incident that people do not call Bob’s Taxi for their taxi needs. Mr. Zinck advised them to file a complaint with the Halifax Regional Municipality (“HRM”) Taxi Commission and also to pursue a complaint with the Human Rights Commission. She followed his advice and filed complaints with both entities.
43. Ms. Smith indicates that one of the consequences the episode had on her and her family is that she was not available to support her father when he was going through chemotherapy. Her father was diagnosed with cancer in this same time frame and undertook treatment in the fall of 2011. She said that her father was very understanding

and told her to focus on her family, but she feels the pain of not being available more to her father at a critical time.

44. Since July 15, 2011 Ms. Smith has refused to hire a taxi cab from Bob's Taxi and this has had a significant impact on her day-to-day living. She is reliant on bus transportation or friends and family for driving which she appreciates but says this has added significant time and complexity to her daily schedule. She confirmed on cross-examination that she has not been refused taxi service by Bob's Taxi and that she made the decision to avoid the company as a result of the alleged incident.
45. Ms. Smith attended the Provincial Court proceeding to deal with the two charges against Mr. Osipenkov and she was surprised to see him. She testified that Mr. Osipenkov had provided taxi services for her on two or three previous dealings. On those occasions she found him to be friendly and helpful.
46. Ms. Smith testified that her salary is performance based and that she makes between \$38,000 and \$43,000 per annum. Her average bonus is \$2,000.

Jimmy Lee Clayton

47. Mr. Clayton works for Moffatt Moving. He is a distant relative of Ms. Smith and Ms. Borden but it is clear that he was not close to either of them. He said that he did not see either of them very often and during his testimony, Mr. Clayton could not recall Jordan's or Davhon's names.
48. Mr. Clayton said he had not been called to testify in the provincial court proceeding, but was unclear why not. He did testify in this proceeding that he was walking in the vicinity of the Needs Store when he recognized Javonna Borden and saw that there was a commotion. He knew Ms. Borden so he crossed the street to see what was going on. Mr. Clayton noticed that Ms. Borden, Jordan and Davhon were all upset.
49. Mr. Clayton said that Ms. Borden told him what was said by the taxi driver and then he asked the driver "what was going on?" He said the driver got in his car and drove off. Mr. Clayton was not able to recall the car or other details of the incident although he did identify Mr. Osipenkov as the taxi driver in question.
50. He testified that after Ms. Osipenkov's taxi left, his girlfriend arrived to pick him up. He said that they drove in the same direction of the taxi but that it was by coincidence and that it was not a deliberate attempt to follow.

Jordan Smith

51. Ms. Smith's oldest son Jordan is 17 and he is in Grade 11 at Dartmouth High. He was 13 on July 15, 2011. Jordan identifies as African-Canadian.

52. On July 11, 2011, Jordan was taken to Jack Astor's by his Aunt, Javonna Borden, together with his younger brother, Davhon. He said that from Jack Astor's they took a bus to Needs. He said that while on the bus his Aunt Javonna called for a taxi. He believed the taxi car arrived just after they got off the bus stop at Needs.
53. Jordan said that he got in the front seat of the taxi cab and had just shut the door when the driver yelled at him to get out of the front seat. He said that his Aunt Javonna yelled back at the driver to the effect that he cannot yell at her nephew. Jordan testified that at that point the driver said "Get out of the car you fucking niggers."
54. Jordan said that all three of them left the cab and that he was standing on the passenger side of the vehicle but near the back of the car. He said his Aunt, Ms. Borden, kicked the back of the taxi. He testified that "Jimmy Lee" came by and approached the driver asking what was going on. He said at that point the taxi driver got in car and left.
55. He said that they got a second taxi and that the driver of the taxi who ended up driving them home was very nice. He recalled that Ms. Borden told the taxi driver about what had happened to them with the first taxi driver.
56. Jordan said that when they arrived at their home they told their mother what had happened. He said that as a result of the incident he was upset and wanted to do something. He did not say exactly what he had in mind but the inference I make is that he was thinking of something to retaliate against Bob's Taxi or Ms. Osipenkov.
57. Jordan said the family decided that they had to try to remedy the situation in the right way. He said that as a result of what had happened he realized "life is not here to help you, here to test ya". A difficult lesson to learn at 13.
58. Jordan has not spoken to many people about the incident. At his high school he has spoken only to the African-Canadian support worker. He said that he is unable to relate to other teachers who are mostly Caucasians "since being called a nigger". Contrary to what his mother believed, Jordan testified that July 15 was the third incident of overt racism that he experienced with the previous two having taken place in school. He decided that as a result of this third incident of racism that he was he was not going to take it anymore. Jordan said he had not previously told his mother about first two incidents.
59. Jordan described the impact the events have had on his mother. He said that by not being able to use the taxi service his mother has had to spend a great deal more time on travel for work and for personal needs like groceries. He said he would like her to be able to get a car.
60. Jordan testified that when he was shown pictures by the official at the taxi commission that he did identify Mr. Osipenkov despite the fact that the photographs were on black and white photocopy style paper.

61. Jordan identified Mr. Osipenkov in this proceeding as the taxi driver who yelled at him, his brother and his Aunt on July 15, 2011.

Davhon Smith

62. Jordan's younger brother was 10 at the time of the alleged incident. He is African-Canadian. He recalled going to Jack Astor's with his Aunt Javonna and his brother, Jordan.
63. He said his Aunt Javonna called for a taxi while on the bus they had taken from the restaurant. He said that he got in the back of the car with Ms. Borden while Jordan got in the front seat of the taxi.
64. Davhon testified that the driver yelled at Jordan and that Ms. Borden yelled at the driver. In response he said that driver yelled "get out of my car you f-ing niggers".
65. Davhon testified that after the driver yelled that he and Jordan got out of the car and ended up standing on the same side of the taxi and towards the back. He said he saw his Aunt Javonna kick the back of the taxi.
66. Davhon identified Mr. Osipenkov as the taxi driver that yelled at him, his brother and his Aunt.
67. Davhon testified that he saw the Bob's Taxi sign on the top of the taxi. He said he thinks the car was white. He thought it was a "classic police style car" although he did not really describe what he meant by that.
68. Davhon said this was the first occasion in his life that the term "nigger" was said to him although he heard it in movies or other places. He said that the language used by the taxi driver "made him feel bad" and that "he felt bad as that was Javonna's birthday."
69. Davhon testified that he was not really involved in the discussion at home after they initially told his mother what had happened.
70. Davhon identified Mr. Osipenkov in this proceeding but he said he was not able to identify him in the photographs when they attended the Taxi Commission. He said that the photographs were in black and white only and only on photocopy paper.

Kim Demont

71. Ms. Demont is the general manager of Bob's Taxi which is owned by her father Calvin Demont and George Pothier. She said they are both older and are not actively involved in the business.
72. The main point of Ms. Demont's testimony was to describe the relationship with the drivers for Bob's Taxi as one of an independent contractor. She said that the taxi drivers

handle all of their own money and pay \$100 a week to Bob's Taxi for the benefits of being associated with the company and to receive the dispatched fares.

73. Ms. Demont testified that she was not aware of anything about the alleged incident of July 15, 2011 until she received notice of the Human Rights complaint nine months later. She said after receiving the complaint form she spoke to Mr. Osipenkov who told her that he was not at the location on the date of the incident. Bob's Taxi took no other steps to investigate the matter.
74. Ms. Demont testified about a complaint about Ms. Borden that Bob's Taxi had received that she said may have some relevance to this proceeding. It was clear she had no first-hand information of the matter and was very imprecise about its nature other than it was regarded by her company as a threat against Mr. Osipenkov. She was clear she did not know of the complaint directly and had not reviewed the matter in preparation for the hearing. She thought it came through a male dispatcher.
75. As she was on the stand, Ms. Demont said later in her evidence she indicated that the source of the information for this complaint might be a woman named Jaye Keddy who is currently on maternity leave. Ms. Demont had not spoken to Ms. Keddy in preparation for the hearing.
76. Ms. Demont said it was Daphne Downey who refused the taxi service to Ms. Borden on July 16, 2011 and made the point that Ms. Downey was African Canadian. She also said that her ex-husband is African Canadian and that "she does not have a racist bone in her body". She said that she would not condone this type of behaviour.
77. Ms. Demont spoke to documents that were introduced as records of electronic communication from a software called Mobility Knowledge. Bob's Taxi used Mobility Knowledge for its communication with drivers, Exhibit 4. In reference to the Activity Report entitled Driver's Report for car #251 for activity period 07/15/2011 6:00 p.m. to 07/15/2011 11:00 p.m. she testified that the first entry in a box entitled "Pickup" records when the call was received by Bob's Taxi. A second entry in a box called "Time Assigned" records when the driver confirms that he accepts the dispatch. A third box called "Time Done" records when the fare is completed.
78. Ms. Demont explained that the recording of a dispatched call as a "No Show" entirely relied on the taxi driver. It is the driver who entered that into the system although the dispatcher must accept the No Show entry if the driver is to retain his or her "place in the dispatch rotation".
79. Ms. Demont was challenged on cross examination about the complaint that caused Ms. Borden to be denied taxi service. She said in reply that she has to take such complaints seriously and referred to instances where taxi drivers have been killed.
80. In response to further cross-examination, Ms. Demont complained that with Human Rights complaints, the company is caught in middle. She explained that she once

suspended a taxi driver for 6 hours and ended up responding to a Human Right's complaint by the driver although the complaint did not go beyond the investigation stage. She said that if she made a decision on Mr. Osipenkov without a legal process confirming the allegations it would be discrimination against him. She claimed she has no authority over the drivers.

81. Even though she claimed that she had no authority over the drivers she did acknowledge Bob's Taxi had the right to refuse dispatching services to the driver. In response she again said that based on her previous experience with Human Rights complaint filed against her she is dependent on a court or other process before she can make a decision.
82. Ms. Demont emphasized that Bob's Taxi did not cut Jennifer Smith off from taxi services and that was Ms. Smith's choice. In fact, she said the termination of service only applied to Ms. Borden's cell phone number and that if she called from a different number then a taxi would be dispatched as they have no way of tracing the call to her.
83. Ms. Demont denied that a complaint by either Ms. Smith or Ms. Borden ever was called into Bob's Taxi. She testified that dispatchers are trained to give people the office number and if someone called they would speak to her, her sister or daughter, who together make up the staff in Bob's Taxi's office.
84. It was clear that Ms. Demont did not really understand the Mobility Knowledge software nor did she really make any amount of effort to search for relevant records. On the other hand it was clear to the Board that no one in the Commission made sufficient effort to inquire of Bob's Taxi's records or understand the software that the Company used. Ms. Demont could not say whether the records could be searched to produce a record of the number of times Ms. Borden's phone number called into Bob's Taxi. As a result of the Board's inquiry Ms. Demont gave permission for the Claimants' counsel, Mr. Douglas, to contact Mobility Knowledge for a more complete search of possibly relevant records.
85. In questioning from the Board, Ms. Demont agreed that the provision of taxi service is an important part of the transportation alternatives to the public. She agreed that taxis provide a service that people may choose to use or are required to use for the lack of better alternatives. She agreed that the loss of taxi services could have a significant impact on a person.
86. She said that under the current system Bob's Taxi is not responsible for training of drivers. She said all qualifications and licensing requirements are administered by the HRM Taxi Commission. She is aware of a test by Commission that tests driving and geographical knowledge. There is also tourism training. She said that she has been asking for a number of years that the Taxi Commission provide training or at least material on dealing with people, including issues of human rights but that has never taken place.

87. Ms. Demont also confirmed during questioning by the Board that the driver's report generated through Mobility Knowledge deals only with dispatched calls and confirmed that it does not deal with non-dispatched fares. She said if a driver has a fare that is not dispatched, the fare is between the driver and passenger and Bob's Taxi would not have a record or any role.
88. She confirmed to the Board that she could not personally verify the reason for excluding Ms. Borden from taxi services. During a break in the proceeding, she did get a "photo shot" from her Smart Phone of the complaint form she was recalling. She testified that she received the photo shot by contacting her daughter at Bob's Taxi. The Board read the material from the photo shot into the record and a paper copy was later filed as an Exhibit.
89. The record is of a screen that identifies (902) 292-1786 and records "no cars threatened to kill a driver see page 1 #3". There is no name attached either to the person who uttered the threat or to the dispatcher who claims to have heard the threat and recorded it in the system. There is at the bottom of the record an indication that the "Last Ride Date 7/15/11 8:56:16 PM".
90. There was also a copy of notebook page that Ms. Demont brought and introduced for the first time during her closing argument. She did not have an acceptable explanation why this was not introduced earlier or made available to the Commission at an earlier stage. While the Board does not ascribe an overtly negative intent on the part of Ms. Demont, it is an example of the fact that she was lacked any diligence in trying to co-operate and participate fully in the proceeding.
91. The relevant entry from the notebook reads as follows:

3) 292-1786 Threatened to kill drive 251 as well as pushed him.
(Name she gave: Borden)
92. Ms. Demont testified that Mr. Osipenkov has driven for Bob's Taxi for approximately 12 years.

Aleksy Osipenkov

93. Mr. Osipenkov proved to be a very difficult person during this proceeding and served to disrupt the proceedings on many occasions. He was disrespectful to the Complainants, Counsel and to the Board showing a disregard for the hearing. Still he did testify and did ultimately participate to ask questions of witnesses. Even though a translator was required to assist him, Mr. Osipenkov demonstrated he was able to understand the proceeding and his questioning and testimony showed clearly he understood the issues and the proceeding.
94. He has been a licensed taxi driver since 2002 and has been with Bob's Taxi since getting his licence. He says he pays \$130 per week to be associated with Bob's Taxi. He says

that he has a Master's degree and works on an offshore drilling or platform as his primary occupation. He drives a taxi cab while not working on the platform. He confirmed that car number 251 is the car number he has always had while with Bob's Taxi and that he has sole control of the roof light so long as he continues his relationship. He did not lend his car to anyone on July 15, 2011 and that he was driving his taxi on that evening.

95. Mr. Osipenkov testified that he was not involved in the incident and says he was not at the Needs at the time that the Complainants claim they had the alleged encounter. He says that this same allegation was addressed through the Provincial Court proceeding when he was charged under the Taxi By-law. He introduced the certificates of acquittal as evidence and relies on these certificates to show that the same issues were dealt with and dismissed. He feels the acquittals are a complete answer to this proceeding under the *Human Rights Act*.
96. Mr. Osipenkov described his vehicle that he uses as a taxi as a 2003 dark grey Grand Prix. He says this is significant as at least two of the witnesses recalled that the driver was driving a white car. He says that the Grand Prix is the only car that he ever had as a taxi cab.
97. He denies that he uttered the alleged offensive phrase at the Complainants and he denies most adamantly that Javonna Borden kicked his vehicle as she says she did. He pointedly told the Board that while living in Russia that he was in the military and he was engaged in two wars: Chechnya and Afghanistan. His point in referring to these experiences is to show that he would have not simply permitted anyone to damage his vehicle without retaliation.
98. During his direct evidence, Mr. Osipenkov says he could not recall where he was that evening other than he was reminded by the driver's report or other records from Mobility Knowledge. Later during his closing comments in argument, as he was dissecting the time line, he claimed he was on Primrose Street prior to his attending at Needs. He made this point to say that considerable time would be required to get from Primrose Street to the Needs. He did not testify to this fact during his examination and provided no evidence to establish that location of Primrose Street.
99. Mr. Osipenkov acknowledges that he was at Needs but says it was later in the evening of July 15, 2011. Ironically the reports show that he was provided with a dispatch of a call received from 902-292-1786, which according to the evidence is Mr. Borden's number. According to the more complete phone report that was produced in response to the Board's inquiry, he was the only driver for Bob's Taxi on the night in question that was dispatched a call concerning that number. Regardless, Mr. Osipenkov says the records demonstrate that the call from 902-292-1786 was a No-Show.
100. Mr. Osipenkov testified that in the Soviet Union people were raised to act as one. He said that there were no prejudices that are seen here in Canada. He says that he has

good relationship with the other drivers with Bob's Taxi including drivers of many different racial groups or drivers of colour. He denies absolutely that he has any issues with African-Canadians or people of other races or colour.

101. He did say that as a result of this incident that he now has recording devices in his taxi vehicle.

Events of July 15, 2011

102. The Board is left to consider two divergent scenarios. In dealing with situations such as these the Board must look at the entirety of the evidence to assess the testimony.
103. In this proceeding I find Jordan Smith, in particular, as well as the other witnesses for the complainants to be reliable and in any instance where there is conflict as to the events of July 15, 2011, I prefer the evidence of the Complainants to that of Mr. Osipenkov. Based on my observation of the witnesses and the totality of the evidence, I make the following findings:
1. That Ms. Borden called Bob's Taxi services during the evening of July 15, 2011 as she and her nephews Jordan Smith and Davhon Smith returned from a birthday celebration at the restaurant Jack Astor's.
 2. That Mr. Osipenkov received and accepted the dispatch call and showed up at Needs Convenience Store at 100 Highfield Park Drive, Dartmouth
 3. That Ms. Borden, Jordan and Davhon entered the cab with Jordan getting into the front seat and Ms. Borden and Davhon getting in the back seat.
 4. That Mr. Osipenkov yelled at Jordan Smith to get out of the front seat and in response to Ms. Borden yelling at him he said to Ms. Borden, Jordan Smith and Davhon Smith, "Get out of my car, you fucking niggers."
 5. That Ms. Borden, Jordan and Davhon got out of the taxi car and Ms. Borden was able to identify the taxi roof light number as Bob's Taxi 251.
 6. That Mr. Osipenkov is the holder of Bob's Taxi 251 and was driving his taxi cab on July 15, 2011.
 7. That Ms. Borden did not call Bob's Taxi and utter a threat to kill Mr. Osipenkov. Rather it appears that someone else provided the information to the dispatcher Bob's Taxi who in turn recorded it in the system.
 8. That in reliance on that information Bob's Taxi discontinued service to Ms. Borden so long as she used her cell phone number 902-292-1786.

104. In reaching its conclusion, the Board considered the evidence offered by all the witnesses and was mindful of the absolute denial by Mr. Osipenkov. The Board found Jordan Borden to be a most reliable witness and it makes sense that he would be able to identify Mr. Osipenkov during the review of photographs with the HRM Taxi Commission and again during this hearing. Jordan was the person who got in the front seat of the car and had the most direct interaction with Mr. Osipenkov. The Board is satisfied that in the circumstances that the incident would be quite memorable to him even at the age of 13 years.
105. Jordan gave his evidence in a mature, respectful manner and he was very careful not to overstate what he recalled. He also acknowledged evidence that could be seen in a negative light, like his first negative reaction of possible retribution against Mr. Osipenkov.
106. Jordan's recall of the circumstances is supported by the evidence of Ms. Borden and Mr. Clayton both of whom I find to be credible witnesses. It is also supported by his brother Davhon who also showed a great deal of maturity and respect while testifying. The Board's only concern with Davhon relates to his young age at the time of the incident.
107. The Board's conclusions are supported by the uncontroverted evidence that Mr. Osipenkov is the owner of Bob's Taxi car number 251. Ms. Borden was very clear she saw the number and the Board accepts her evidence on this point.
108. The Board's findings are also supported by the documentary evidence. Before reviewing the documentary evidence the Board wishes to observe that more could have and should have been done by Ms. Demont to review the records of Bob's Taxi prior to the hearing. Similarly, more could have and should have been done by the Human Rights Commission to cause more documentary production by Bob's Taxi. It appears to the Board that insufficient attention was paid to the records of Bob's Taxi before the hearing. I specifically exclude Ms. Ann Smith, QC from these comments as she was retained at the very last minute to represent the Commission at the hearing.
109. The records are clear that Ms. Borden used her cell phone, her phone number being 902-292-1786, to call Bob's Taxi on July 15, 2011. Mr. Osipenkov contested that this was even Ms. Borden's phone number which speaks to the aggressive, argumentative approach he took in this hearing. Had Mr. Osipenkov even taken a moment to consider matters, he would have realized his position is without merit on this point.
110. There are two records which support the fact that Ms. Borden called and that the request for taxi service was dispatched to Mr. Osipenkov. The first is Exhibit 7 which was produced through Mobility Knowledge at the request of the Board and by the attendance of Mr. Douglas. The exhibit is a listing of calls from 902-292-1786 to Bob's Taxi from March 14, 2009 to July 15, 2011. The last entry on the sheet reads in part: "Needs Plus 100 Highfield Park Dr Alecksey Osipenkov". There is no other record of a call from that phone number being dispatched to any other driver for Bob's Taxi that evening.

111. The second document is a Tab 3 of Exhibit 1 and it is a Driver Report for Mr. Osipenkov for July 15, 2011. The record confirms that the call for taxi service attached to 902-292-1786 was dispatched and accepted by Osipenkov. The entry discloses a "No Show".
112. Mr. Osipenkov says two things about the records. First, he notes that the time contained on the records do not accord with the time estimates provided by Ms. Borden and Ms. Smith. There is a difference of one hour. Second, he relies on the record of the "No Show" to prove there was no interaction.
113. As to the time, the evidence around the Mobility Knowledge software was quite sparse. There was no one from Bob's Taxi who could speak with any knowledge about the system. If the records were intended to be relied to prove the accuracy of the times they could have had a witness available. The Board does not rely on these records as conclusive as to the times shown. The value of the records is that they do confirm the call and they do confirm the dispatch accepted by Mr. Osipenkov for Ms. Borden's request, a fact which he absolutely accepts happens but then she did not show.
114. As to the record of No Show, the evidence was clear that the No Show entry into the Mobility Knowledge system was at the instance of the driver. While Mr. Osipenkov and Ms. Demont say the dispatcher has to accept the No Show in order to preserve the driver's place in the dispatch sequence, there is no reason to believe the dispatcher would refuse. It is quite easy for the Board to believe that the No Show was entered to create a record for Mr. Osipenkov's denial of the incident. The Board places no weight on the record of No Show.
115. Mr. Osipenkov's behaviour during the hearing allowed the Board to see how he could erupt with anger with little warning. The Board observed conduct that showed that Mr. Osipenkov could barely control himself if he was challenged and other times where he would deliberately engage in behaviour intended to intimidate. It is clear from his evidence and his conduct that he has little regard for anyone who disagrees with him. The type of conduct described by Jordan Smith, Ms. Borden and Davhon Smith is consistent with Mr. Osipenkov's behaviour during the hearing.
116. As to the suggestion that Ms. Borden called Bob's Taxi and threatened Mr. Osipenkov, the Board finds the evidence does not support that allegation. First, the Board considers the denial by Ms. Borden, which I accept. Second, there was no one with first-hand information about the record of the alleged threat called to speak to the record.
117. The first possible original record that speaks to the suggestion that Ms. Borden called in a threat is a copy of a journal that Ms. Demont introduced during her closing. Counsel for the complainants and the Commission had a chance to review and agreed the note should be entered on a limited basis.
118. The entry that appears to relate to Ms. Borden's threat is interesting. It reads:

3) 292-1786 Threatind (sic) to kill drive 251 as well as pushed him.
(Name she gave: Borden)

119. The wording of the entry suggests to the Board that it was not record of a call by Ms. Borden but of an allegation against Ms. Borden. There was absolutely no evidence at all about Ms. Borden pushing Mr. Osipenkov. The only evidence of her mis-behaviour, which she admitted, was kicking the back end of his taxi. It begs the question then how would the dispatcher know “as well as push him”. It does not seem at all realistic that in the course of a threatening phone call that Ms. Borden said in effect, “I pushed him earlier today.” While the Board cannot go as far as to find that Mr. Osipenkov was the source of the information contained in the journal entry, the Board finds it is far more probable that he provided the information of the alleged threat than Ms. Borden. The Board finds based on the evidence that there is no reasonable basis for Bob’s Taxi to attribute that threat to Ms. Borden.
120. Unfortunately, for all concerned, Ms. Demont did nothing after receiving the complaint from the Human Rights Commission. She did say that she spoke to Mr. Osipenkov and that he denied it. However, she undertook not even the most cursory review of Bob’s Taxi’s records to understand what had happened and reach her own conclusions. Ms. Demont spent a lot of time during her testimony and in her closing comments trying to have the Board understand how everything is out of her business’ control in these situations and that she is entirely dependent on third party processes. The Board finds that in taking the approach it did, Bob’s Taxi failed the Complainants by not responding in an acceptable manner to a serious issue. The effect was to punish Ms. Borden for something she did not do.

Liability

i. Aleksy Osipenkov

121. The Commission in its Brief set out the test at law that the Complainants have to meet in order to succeed in a complaint. I agree with the Commission that in order for the Complainants to succeed they must show the following:
1. On a *prima facie* basis, they are members of a group protected by the ad;
 2. On a *prima facie* basis, they were subjected to adverse treatment; and
 3. On a *prima facie* basis, race or colour was a factor in the alleged adverse treatment.
122. If the Complainants satisfy those three conditions, then the onus shifts on the Respondents to justify the conduct.
123. In my view, the Complainants have more than sufficient evidence to satisfy these three tests. The three individuals concerned are members of a group protected by the *Act*. The

evidence is clear that they were subjected to adverse treatment in the utterings of the offensive phrase by Mr. Osipenkov as well as the denial of access to taxi service both on July 15th and in the case of Ms. Borden subsequently.

124. The Board is satisfied that the race and colour of the Complainants was a factor in the alleged adverse treatment.
125. The Respondents did not offer any justification for the comments made by Mr. Osipenkov on July 15, 2011. Indeed Ms. Demont on behalf of Bob's Taxi said that she found such conduct to be offensive and conduct that she would not tolerate. Mr. Osipenkov did not attempt to justify the comments or his actions by asking the Complainants to leave the taxi. Rather, his position is that he denied he made the statement or took the action of having them from the vehicle. The Board has already found that it prefers the evidence of the Complainants.
126. In the absence of any evidence to justify the conduct, the Board finds that Mr. Osipenkov has discriminated against the Complainants and there is no justification for his actions.

ii. Bob's Taxi

127. The Respondent, Bob's Taxi, argues that it cannot be responsible for its taxi drivers as the drivers are independent contractors and they have a minimal relationship with the company such that Bob's Taxi cannot control them as one would expect in an employment relationship. In this case, there is some validity to what Ms. Demont contends. The normal employer-employee work relationship does not appear to apply. However, that is not the end of the analysis.
128. The starting point for the analysis is the definition of employer as set out in the Human Rights Act, Section 3 (e):

“employer includes a person who contracts with a person for services to be performed by that person or wholly or partly by another person.”
129. It is significant that the definition does not attempt to set out a comprehensive definition for employer. Rather it identifies only that in addition to other undefined situations an employer may include a circumstance where a person contracts with another person for services.
130. Justice Abella, writing for the Court in *McCormick v. Fasken Martineau DuMollin* 2014 SCC 39, confirmed that there should be an expansive approach to the definition of employment or employ in human rights legislation. She states at Para 22:

[22] The jurisprudence confirms that there should be an expansive approach to the definition of “employment” under the *Code*. Independent contractors, for example, have been found to be employees for purposes of human rights legislation, even though they would not be considered employees in other legal contexts: *Canadian Pacific Ltd. v. Canada (Human Rights Commission)*, [1991] 1 F.C. 571 (C.A.); *Pannu v. Prestige Cab Ltd.* (1986), 73 A.R. 166 (C.A.); *Yu v. Shell Canada Ltd.* (2004), 49 C.H.R.R. D/56 (B.C.H.R.T.). See also *Canada (Attorney General) v. Rosin*, [1991] 1 F.C. 391 (C.A.); *Mans v. British Columbia Council of Licensed Practical Nurses* (1990), 14 C.H.R.R. D/221 (B.C.C.H.R.).

131. The relationship between the taxi driver and the taxi company was explored in *Pannu v. Prestige Taxi Company* 1986 ABCA 203. In that decision the Court confirmed that the approach to interpretation must be reflective of the purpose of the statute. In reaching a decision that there was an employment relationship, the Court recognized that the same relationship may not be considered an employment relationship in the context of another statute. Chief Justice Laycraft stated the following:

[15] I respectfully agree with these broad interpretations of s.7 of the Individual’s Rights Protection Act. “Employ” and “employment” or words derived from them can, indeed, be used in the sense of the common law master/servant relationship in which control is a principle factor in determining the existence of the relationship. But, as the analysis by McDonald, J. in *Cormier* indicates, the meaning may be restricted or extended by statutory definition or some particular aspect may be emphasized as in *Yellow Cab Ltd. v. Board of Industrial Relations* (supra). Without such a statutory definition the word “employ” and its derivatives are ambiguous. It is a common, and grammatically correct, use of “employ” or “employment” to use the words in the sense of “utilize”.

132. The reasoning of Justice Bracco of the Alberta’s Queen Bench was set out by Chief Justice Laycraft in Para 7:

[7] Mr. Justice Bracco held that the drivers, whether they own their vehicles or rent them, are employees within the meaning of s.7 of the Individual’s Rights Protection Act. He said:

“In my view, the arrangement between Prestige and its drivers, although unique and unusual in the sense of any employment contract, is in fact a realistic accommodation of the taxi business. By charging each driver, whether a driver/owner or rental/driver, a set fee reflecting both

costs and profits to Prestige and then allowing the drivers to retain all fares earned by the drivers, is in essence an arrangement whereby the drivers are able to earn their livelihood by driving a taxi. ...

The mode of payment, in my view, is not determinative of the relationship. In looking at the work involved, the manner in which it is carried out, the joint responsibility in responding to requests for taxi service, as well as the financial and related arrangements, I conclude that the relationship between driver/owners and rental/drivers and Prestige is that of employee-employer for the purpose of section 7 of the *Individual's Rights Protection Act*."

133. In adopting this rationale, Chief Justice Laycroft stated at Para 16:

[16] In my view the whole context of the Individual's Rights Protection Act, demonstrates that in s.7 the words are used in a sense broader than the ordinary master/servant relationship. The Act does not purport to intervene in purely private relationships but where a person provides a service to the public it seems clear the Act does intervene. **It does so not primarily by aiming at the offender but by establishing a mechanism to remedy the wrong done or about to be done to the victim of the discrimination. In that context the broader sense of "employ" as meaning "to utilize", is in my opinion, the proper interpretation. (emphasis added)**

134. The Court in *McCormick, supra*, directs that control and dependency define the essence of the employment relationship for the purposes of the human rights legislation:

[27] Control and dependency, in other words, are a function not only of whether the worker receives immediate direction from, or is affected by the decisions of others, **but also whether he or she has the ability to influence decisions that critically affect his or her working life. The answers to these questions represent the compass for determining the true nature of the relationship.**

[28] While control and dependency define the essence of an employment relationship for purposes of human rights legislation, this does not mean that other indicia that courts and tribunals have developed, such as the *Crane* factors, are unhelpful in assessing the extent to which control and dependency are present. But such factors are unweighted taxonomies, a checklist that helps explore different aspects of the relationship. While helpful in

framing the inquiry, they should not be applied formulaically. **What is more defining than any particular facts or factors is the extent to which they illuminate the essential character of the relationship and the underlying control and dependency. Ultimately, the key is the degree of control, that is, the extent to which the worker is subject and subordinate to someone else's decision-making over working conditions and remuneration: Geoffrey England, *Individual Employment Law* (2nd ed. 2008), at p. 19. (emphasis added)**

135. Applying the principles of *McCormick, supra*, the following salient points appear from the relationship between Bob's Taxi and Mr. Osipenkov:
 1. There is a contractual relationship that establishes a right for the driver to be associated with Bob's Taxi and with that right they are able to receive dispatched calls, use the Bob's Taxi car sign and use the company taxi stands.
 2. There is a value that is derived from the relationship such that the driver pays \$130 per week to Bob's Taxi for the benefit of being able to earn a living, in whole or part, as a taxi driver.
 3. Bob's Taxi entirely controls the dispatch process that applies to the distribution of requests for services from the public
 4. Bob's Taxi has the right to establish criteria for taxi drivers to adhere to in order to maintain a relationship with the company.
 5. Bob's Taxi has the right to discipline taxi drivers.
136. The Board finds that for the purpose of the *Human Rights Act*, that Bob's Taxi is an employer of Mr. Osipenkov. As the Court in *Pannu, supra* found the fact that the drivers keep their own earnings, a fact that was emphasized by Ms. Demont, is not determinative of the issue of whether Bob's Taxi was an employer. Having regard to all the evidence that is relevant to the relationship between the company and Mr. Osipenkov, the Board is satisfied that there is a relationship of control and dependency by Bob's Taxi over the driver, Mr. Osipenkov, such that Bob's Taxi is an employer.
137. The Board accepts the Commission's submission that an employer can be liable for the acts of employees.
138. In *Robichaud v Canada (Treasury Board)* [1987] 2 S.C.R. 84, the Supreme Court of Canada found that the Human Rights legislation contemplates the imposition of liability on employers for acts of their employees. Specifically the court stated the following:

17 Hence, I would conclude that the statute contemplates the imposition of liability on employers for all acts of their employees "in the course of employment", interpreted in the purposive fashion outlined earlier as being in some way related or associated with the employment. It is unnecessary to attach any label to this

type of liability; it is purely statutory. However, it serves a purpose somewhat similar to that of vicarious liability in tort, by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions. I agree with the following remarks of Marshall J., who was joined by Brennan, Blackmun and Stevens JJ., in his concurring opinion in the United States Supreme Court decision in *Meritor Savings Bank, FSB v. Vinson*, 106 S.Ct. 2399 (1986), at pp. 2410-11 concerning sexual discrimination by supervisory personnel:

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt company-wide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.

.....

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.

139. Justice LaForest, on behalf of the court, rejected a narrow definition of the phraseology in respect to employment or in the course of employment saying that to define it on their terms would be contrary to the intent and purpose of Human Rights legislation. He said at paragraph 15:

15 It is clear to me that the remedial objectives of the Act would be stultified if the above remedies were not available as against the employer. As MacGuigan J. observed in the Court of Appeal, [1984] 2 F.C. 799, at p. 845:

The broad remedies provided by section 41, the general necessity for effective follow-up, including the cessation of the discriminatory practice, imply a similar responsibility on the part of the employer. That is most clearly the case with respect to the requirement in paragraph 41(2)(a) that the person against whom an order is made “take measures, including the adoption of a special program, plan or arrangement ... to prevent the same or a similar practice occurring in the future”. Only an employer could fulfil such a mandate.

MacGuigan J.’s comment equally applies to an order to make available the rights denied to the victims under para. (b). Who but the employer could order reinstatement? This is true as well of para. (c) which provides for compensation for lost wages and expenses. Indeed, if the Act is concerned with the effects of discrimination rather than its causes (or motivations), it must be admitted that only an employer can remedy undesirable effects; only an employer can provide the most important remedy — a healthy work environment. The legislative emphasis on prevention and elimination of undesirable conditions, rather than on fault, moral responsibility and punishment, argues for making the Act’s carefully crafted remedies effective. It indicates that the intention of the employer is irrelevant, at least for purposes of s. 41(2). Indeed, it is significant that s. 41(3) provides for additional remedies in circumstances where the discrimination was reckless or wilful (i.e., intentional). In short, I have no doubt that if the Act is to achieve its purpose, the Commission must be empowered to strike at the heart of the problem, to prevent its recurrence and to require that steps be taken to enhance the work environment.

140. The Commission also referred the Board to the decision of *Gough v C. R. Falkenham Backhoe Services*, 2007 NSHRC 4 (CanLII). In that decision, Board Member Hodder referred to elements set out in *Francois v C.P. Rail*, 1988 CanLII 113. The Commission suggests the decision stands for the proposition that employers can avoid liability if:

1. The employer did not consent to the commission of the act or commission complained of;
2. The employer exercised all due diligence to prevent the act or commission from being committed; and
3. The employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission.

141. The difficulty with this proposition is that *Francois v C.P. Rail, supra*, was dealing with Section 48(6) of the *Canadian Human Rights Act* which set out these three elements to be satisfied by the employer to avoid the liability under s. 48(5) of the *Act*. One cannot simply impose this statutory language into the Nova Scotia regime.
142. Generally, these considerations can have some relevance on remedy as Justice LaForest says in *Robichaud, supra*:

19 I should perhaps add that while the conduct of an employer is theoretically irrelevant to the imposition of liability in a case like this, it may nonetheless have important practical implications for the employer. Its conduct may preclude or render redundant many of the contemplated remedies. For example, an employer who responds quickly and effectively to a complaint by instituting a scheme to remedy and prevent recurrence will not be liable to the same extent, if at all, as an employer who fails to adopt such steps. These matters, however, go to remedial consequences, not liability.

143. In this case there is no evidence that Bob's Taxi consented to Mr. Osipenkov's conduct. However, Bob's Taxi did not respond to the complaint at all, let alone quickly. In fact, Bob's Taxi did nothing to reach its own conclusions on the incident. Nor did it attempt to determine whether the denial of services to Ms. Borden was justified.

Remedies

144. Having found that the events of July 15, 2011 did take place and that Mr. Osipenko uttered the offensive phrase, the Board must decide on the appropriate remedy. There are a number of features of the case that the Board wishes to consider:
1. The cruelty of the demeaning language that Mr. Osipenkov directed towards the Ms. Borden, Jordan and Davhon;
 2. The ages of Jordan and Davhon at the time of the incident;
 3. The denial of public transport to Ms. Borden caused by Bob's Taxi; and,
 4. The failure of Bob's Taxi to take appropriate steps to investigate a serious complaint made against one of its drivers.

Demeaning Language

145. There can be no dispute that the language used by Mr. Osipenkov is deplorable. It is language that is debilitating to African-Canadians. The use of the word "nigger" demeans, humiliates and asserts a dangerous sense of racial superiority. It is often dismissed as arising from anger or loss of control but that is not an answer. The demeaning language reveals an underlying disrespect and hostility. It must not be tolerated in anyway and condemned at every opportunity.

146. While there is no justification for this dangerous term being used against any person in any circumstance, the Board is particularly concerned that Mr. Osipenkov's conduct affected two young boys, Jordan and Davhon. This is not to diminish the impact on Ms. Borden in anyway but the impact on a 13 year old and a 10 year old is particularly egregious. Mr. Osipenkov has much to learn from the respectful and mature manner that Jordan and Davhon conducted themselves in response to such hurtful conduct. Rather than strike out in a course of action of aimless revenge, the Complainants correctly chose to utilize the legal processes that are available to address instances of violations of their human right. In this case they had a right to be free of discrimination when seeking access to public transit.
147. This discrimination continued beyond July 15, 2011 for Ms. Borden as Bob's Taxi continued to deny her access to taxi services. It was furthered by the complaint that was recorded against her by name and by her phone number. I have found that Ms. Borden did not threaten Mr. Osipenkov. Yet even through this hearing Ms. Demont defended the denial of taxi service to Ms. Borden on the basis of this poorly recorded and uninvestigated note of a threat. Had Bob's Taxi even exercised a modicum of diligence the Board is satisfied it would have concluded the allegation of the threat was specious at best.
148. Unlike the circumstance in *Cromwell v. Leon's Furniture Limited*, 2014 CanLii 6399, I do not have to assess the reasonableness of Bob's Taxi actions in response to the complaint advanced by Ms. Borden and Ms. Smith on behalf of her two sons. There is insufficient evidence to conclude that Bob's Taxi was aware of the complaint earlier than 9 months later when it received communication from the Human Rights Commission. However, what is clear is that from that point on Bob's Taxi did nothing to make independent inquiry other than speaking to Mr. Osipenkov.
149. Bob's Taxi acknowledged during the hearing that the role of the taxi service is an important part of public transportation. It is a highly regulated industry designed to ensure a safe, supply of taxi service for the public. Ms. Demont recognized the need for better training at least at it relates to "how to deal with people, including human rights". Unfortunately, Ms. Demont did not take independent steps to introduce such training into her company. She suggested her only role was to try to get the HRM Taxi Commission to impose such additional training.
150. Of course, Mr. Osipenkov told Bob's Taxi he was not involved and denied everything. Bob's Taxi failed in its responsibility to the Complainants to deal with a serious complaint. The evidence is that neither Ms. Demont, nor anyone on her behalf, made any effort to contact any the Complainants to learn from them what happened. Nor did she ever go back to assess the recorded complaint against Ms. Borden that caused Bob Taxi's to discontinue service in light of the complaint. Instead, Ms. Demont held up her hands and said it was not Bob's Taxi's issue and that they had to wait for the legal processes to unfold. The Board finds that view to be disconcerting and a complete

abdication of corporate responsibility. In this case it is clear the original act of racism contributed to Ms. Borden being denied taxi services by Bob's Taxi.

Monetary Awards

151. In reaching a conclusion on the appropriate monetary awards, the Board reviewed the decisions in *Cromwell, supra*, *Gilpin v. Halifax Alehouse Limited* 2013 CanLii 43798 and *Johnson v. Halifax Regional Police* (2003) 48 C.H.R.R.D/307. These are each helpful in understanding the impact of instances of racial discrimination such as the situation before the Board.
152. The verbal assault by M. Osipenkov made Ms. Borden feel disrespected which seems self-evident. In fact, one can readily see how this would understate the impact that such language can have on an individual, especially for an adult who was responsible for her two young nephews. Jordan said this was the first occasion outside the school ground when he experienced overt racism. He said he felt that he could not share his feelings with any adults at his high school except the African-Canadian support teacher. This was the first "real-life" discrimination for Davhon who was ten years old at the time. It made him feel bad and feel bad for his aunt.
153. Taking into account the demeaning and hurtful language used by Mr. Osipenkov in this case, the fact that it lead to a denial, albeit one trip, of public transport and the fact that Bob's Taxi did nothing to investigate the complaints once learning of them, the Board finds that each of Ms. Borden, Jordan Smith and Davhon Smith shall receive \$7,500 from the Respondents together with interest of 2.5% from the date of the complaint. The awards are payable within 60 days from the Order.
154. In the case of Ms. Borden, she shall receive an additional \$2,500, plus interest, for the refusal of service on July 16, 2011 and the continued assertion by Bob's Taxi that such a threat was made by her. The Board finds the accusation of an alleged threat by Ms. Borden was related to the discriminatory conduct of Mr. Osipenkov and caused by the failure by Bob's Taxi to investigate the complaint. The further award is payable within 60 days of the Order.
155. There was a submission that monetary compensation be awarded to Jennifer Smith. There was evidence that Ms. Smith took time off work for two months although the evidence was lacking as to the reason why this length of time was required. The Board accepts the submission that Ms. Smith should receive compensation as she was affected by the harm inflicted on her sons. In spite of that injury Ms. Smith counselled the correct response and much is to be learned by how she has handled this matter. However, the Board does not feel it has the evidence needed to justify compensation for loss of wages. The Board awards Ms. Smith \$2,500, plus pre-judgement interest at the rate of 2.5% from the date of the complaint. The award is payable within 60 days of the Order.

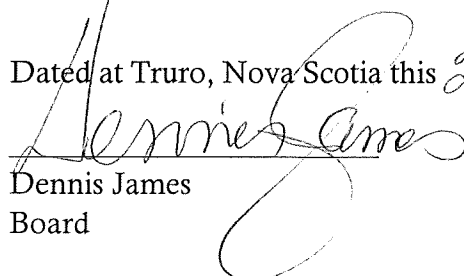
Public Interest Remedies

156. Taking Ms. Demont at her word that she feels there is room for training on Human Rights, the Board directs that Bob's Taxi work with the Human Rights Commission to develop an appropriate training program and material for its staff and drivers including an obligation to orient every new driver with the *Human Rights Act*.
157. The Board further orders that Bob's Taxi to work with the Human Rights Commission to develop an appropriate policy and process for the investigation of Human Rights complaints against the company and/or any of its drivers.
158. The Board orders Mr. Osipenkov to undergo Human Rights training with the Human Rights Commission within six months of the Order.
159. The Board retains jurisdiction to address any issues arising from the implementation of the public interest remedies.

Conclusion

160. The Board takes Ms. Demont at her word that she is a tolerant person. It looks to Bob's Taxi to repair the deficiencies in its policies and practices in regards to Human Rights training and the investigation of complaints. The Board is mindful of the important role that Bob's Taxi plays in the provision of public transportation in Halifax Regional Municipality and expects the company to better reflect this responsibility in its work.
161. The Board encourages Mr. Osipenkov to reflect on his conduct on July 15, 2011 and his conduct in response to the complaint and the hearing that was conducted into the complaint. There are many failings in how Mr. Osipenkov conducted himself and he has much to learn about respect towards others, foremost from Jordan Smith and Davhon Smith.
162. Finally, the Board is grateful to Mr. Orlov who was indispensable in support of the hearing by his provision of translation services for Mr. Osipenkov. He was professional and congenial throughout a trying hearing and working with a very difficult Respondent.

Dated at Truro, Nova Scotia this 2 day of March, 2015.


 Dennis James
 Board