

IN THE MATTER OF: ***The Nova Scotia Human Rights Act (the “Act”), R.S.N.S. 1989, c.214, as amended by 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] Upon this matter coming before the Board of Inquiry on October 27 and 28th of 2015 related to the issue of remedy alone pursuant to the Decision of the Board of Inquiry dated August 26, 2015, with a written Decision following and dated September 28, 2015. Whereupon this Board of Inquiry held that the Respondent discriminated against the Complainant in the provision of services, due to race and/or colour and/or source of income, contrary to sections 5(1) (a), (i), (j) and (t) of the *Act*.

[2] Whereas this herein Board of Inquiry hearing further evidence limited to the issue of appropriate remedy, as a result of the Decision rendered on August 26, 2015, stated in the written Decision, as follows:

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 & 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.

[Decision dated September 28, 2015, p. 27, paragraphs 79 and 80]

[3] The Nova Scotia Human Rights Commission puts forth the following position/argument regarding remedy duly summarized as follows:

1. *Sobeys Group Inc. shall issue a written apology to Ms. David for its discriminatory treatment of her. Without limiting the generality of the foregoing, the apology letter shall confirm that Sobeys Group Inc. did not have a sufficient evidentiary basis to allege that Ms. David was on any date a shoplifter at its store.*
2. *Sobeys Group Inc. shall pay to Ms. David \$797.76 as special damages, together with pre-judgment interest from the date of the filing of the complaint and post-judgment interest from the date of the issuance of the remedy Decision.*
3. *Sobeys Group Inc. shall pay to Ms. David \$20,000 as general damages, together with pre-judgment interest from the date of the filing of the complaint and post-judgment interest from the date of the issuance of the remedy Decision.*
- ...
4. *Sobeys Group Inc. shall, at its own cost, participate in training from the Nova Scotia Human Rights Commission*

relating to or with respect to consumer racial profiling, discrimination based on race, discrimination based on colour, and discrimination based on perceived source of income (“Commission Training”). The Commission Training shall be delivered to Sobeys Group Inc. management representatives agreed to by the parties. Within twelve months of the completion of Commission Training, Sobeys Group Inc. shall, at its own cost, train all Nova Scotia store management team members and store employees with relating to and with respect to consumer racial profiling, discrimination based on race, discrimination based on colour, and discrimination based on perceived source of income (“Store Training”).

5. *Within two months of the completion of Store Training Sobeys Group Inc. shall prepare and deliver to the Nova Scotia Human Rights Commission a report confirming the full particulars of Store Training that has been delivered in accordance with this Order “Report”. Without limiting the generality of the foregoing, the Report shall set out the names of all employees who attended the training, the dates, times and locations of training sessions, and a copy of all curriculum, brochures, guides and documentation relating thereto.*
6. *Jennie Barnhill shall, at the cost of Sobeys Group Inc., attend and actively participate in a comprehensive Human Rights Act training program to be delivered by the Nova Scotia Human Rights Commission (“Barnhill Training”).*

[Blois, Nickerson and Bryson’s submission dated November 24, 2015; Paragraph No. 60, subsections a-c and f-h, page 15]

[4] The Respondent put forward the following summary of their position/argument regarding remedy duly summarized, as follows:

1. *In summary, Sobeys’ position on remedy is that an appropriate award of general damages in this case would be \$2,000 - \$4,000. There should be no award for out of pocket expenses. The Board should not order an apology. The Board does not have jurisdiction to impose a public interest remedy regarding any Sobeys location other than the Tantallon store where the complaint occurred. In any event, a public interest remedy would not be appropriate in this case because there is no evidence before the Board of*

systematic discrimination, of continuing discriminatory practices, or that any staff member or customer has been subject to racial profiling at any Sobeys store in Nova Scotia since the complaint in 2009.

2. *The Board of Inquiry's remedial power is found in subsection 34(8) of the Nova Scotia Human Rights Act, R.S.N.S. 1989, c. 214 ("the Act"), which states:*

(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

3. *Three general principles frame Sobeys' position on remedy. First, the Commission is seeking windfall compensation for Ms. David in the form of \$20,000 in general damages. As one leading text points out, "the remedial powers of Nova Scotia Board of Inquiries are stated in classic 'make whole' fashion". Sobeys accepts that a Board of Inquiry should try to restore the individual discriminated against as far as possible to his or her original position had the discrimination not occurred. However, the Federal Court has also pointed out that a "corollary of this principle of restoring the victim to his/her rightful place is that the victim is not overcompensated – that the human rights awards do not result in unrealistic or windfall compensation."*
4. *Second, as Sobeys will illustrate throughout these submissions, each of the Commission's proposed remedies is punitive in nature. This is contrary to the Supreme Court of Canada's jurisprudence that the purpose of human rights legislation "is not to punish wrongdoing, but to prevent discrimination."*
5. *Third, as the Ontario Court of Appeal has held, "the range of remedies available to the Board ... shift must be linked to the subject-matter of the complaint." In Ontario Human Rights Commission v. Christian Horizons, the Divisional Court struck down a number of the Tribunal's public interest*

remedies on the basis that the Board overreached in making orders that were not related to the complaint. However, the Divisional Court agreed with the Tribunal's comment that "in order for remedies to be fair and effective, they must be tailored to the particular facts in a case and must flow from the violation that has been found."

[summary of Stewart McKelvey's submission dated December 17, 2015, Paragraph No.'s 2-6, Pages 1-2]

[5] The following position /argument provided by the Complainant, Andrella David during the course of the remedy proceeding, with additional supporting formal written and verbal submissions being provided by Counsel for the NSHRC:

MS. DAVID: The last six years have been very stressful. Even though this was a fight I had to fight I had to question myself if it was all worth it. After this event at Sobeys, I didn't go back to any Sobeys stores in six years which means this has been an inconvenience for me because Sobeys is the closest grocery store to my home and since this incident occurred, I have to drive further distances and go out of my way to go grocery shopping. That might sound silly but I was a single mother putting myself through school and what I used to do is check the flyers, do all the majority of my shopping at Sobeys but if there was an item on sale at another grocery store, I would go there for that item.

I no longer have that option so I've been spending more money. Every time I have to re-tell my story, write a statement or do a telephone conference it would make me sick to my stomach. It was like reliving what Mrs. Barnhill did to me all over again. It was so easy for me to walk away and not pursue this but I had to convince myself that it would be all worth it and end but was it? Still now, six years later, no-one wants to be accountable for what they've done to me. Now that the public knows about the story, there are just more people that judge me in a negative way. I get asked if I'm the girl in the paper with weird looks when I go into stores. There's talk at work about it and the worst part about it is when it involves my family. Instead of people saying, "I heard Andrella was accused of stealing at Sobeys," they say, "Did you hear Russell's daughter was caught stealing at Sobeys?" In no way did my family deserve that negative image.

Now that I've stood up for my rights and pressed on the face of unfairness and diversity yet I'm still stained. Knowing that when people look at me for no reason they may view me as a menace to society instead of a productive member of society that I've worked so hard to become.

I have lost faith in humanity and justice. Even though this outcome seems like it's in my favour, the comments, stereotypes and degrading actions haunt me, not just me but my whole family and community. I don't feel better. I feel emotionally scarred and I don't feel vindicated. This one incident changed me. I will never be the same person that I once was before that day. As I said before, Jennie Barnhill took something from me that day that I just can't get back. I was degraded, spoken to with no decency or respect and treated like a second rate human being. This incident has been hanging over my head for the last six long years. Innocent until proven guilty isn't really my reality. The false accusations of stealing was a big enough blow but to say I'm on welfare, insults regarding my community still make me angry. I would like an apology from Sobeys for the false accusations of me being a shoplifter and for the inappropriate actions and comments from Jennie Barnhill.

When I first made my complaint I was told that this type of case doesn't get much money when I got legal advice. From Day 1 I've told numerous people that this wasn't all about the money, but for the principle. I didn't want this to happen to somebody else. Right now it feels like I have to put a dollar on my self-worth.

The public interest is just as important to me. We need to educate people. I would like to see Jennie Barnhill and the managers of Sobeys take training on racial profiling and diversity so that this doesn't happen again in the future and not just turn a blind eye to it and pretend this doesn't exist. Thank you.

[Transcript from October 27, 2015, page 68, lines 12-21, pages 69, 70, 71 – lines 1-21, and page 72, lines 1-4]

[6] The entirety of the evidence provided during the course of this proceeding, including the evidence provided during the initial finding of discriminatory conduct by the Respondent shall be a consideration in this Decision, as it is determined to be relevant to the issue of remedy alone.

ISSUES

[7] There are two issues:

Issue 1: What is the appropriate private remedy?

- A. apology
- B. special damages
- C. general damages

Issue 2: What is the appropriate public interest remedy?

LAW

[8] The Board of Inquiry Chair is afforded broad remedial authority pursuant to the Nova Scotia *Human Rights Act*, as set out more particularly as follows:

s.34(8) A board of inquiry may order any party who has contravened this Act to do any act or thing that constitutes full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor and, where authorized by and to the extent permitted by the regulations, may make any order against that party, unless that party is the complainant, as to costs as it considers appropriate in the circumstances.

[9] I accept the Respondent's submissions regarding the fact that the application of the aforementioned remedial authority is not punitive in nature. The objective of the legislation is to ensure "full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor...".

[10] The law is settled that an employer will be held liable for any actions of their employees in the course of their employment, the following being a Supreme Court of Canada Decision followed and cited in the *Borden v Bob's Taxi*, 2015 CanLII 9153 (NS HRC), at paragraph 138, as follows:

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...

...

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.

Further, at paragraph 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:*

Summary of evidence and factual findings

[11] Due to the Complainant being successful in establishing discrimination in the initial stage of this proceeding, it is critical that the Complainant's voice be heard describing the impact, injury and harms of the discriminatory conduct on the Complainant. Summarized, in the words of the Complainant during the course of this proceeding, as it is found to be relevant to the issue of remedy, as follows:

Q. What's your view about shoplifting?

A. I think there's nothing worse than a thief. My dad raised me like that and I teach my daughter don't take things that don't belong to you. You pay for it, you work hard for what you want and you pay for it. And people that do steal I don't feel sorry for them when they do get into trouble and they go to jail. Well, then you'll think twice before you steal other people's stuff that they worked hard for.

[Transcripts from March 2, 3, 4 & 6, 2015, page 359, lines 15-21, page 360, lines 1-3, Jesudason to David]

Q. All right. Now at the time this Sobeys employee speaking to you can you describe how loud she was speaking to you?

A. She wasn't screaming across the whole grocery store but she was speaking to me loud enough that the people in this checkout, if there were people there, and this checkout could definitely hear her. So it was like this aisle, this aisle and this aisle, basically. It wasn't like she was screaming to me way down there. But she was talking to me loud enough that if there were lineups I would have been shamed

[Transcripts from March 2, 3, 4 & 6, 2015, page 360, lines 15-21 and page 361, lines 1-2, Jesudason to David]

A. I actually, honestly, when I heard the person come behind me I really didn't think this person was talking

to me. 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.

[Transcripts from March 2, 3, 4 & 6, 2015, page 363, lines 6-15, Jesudason to David]

A. Because honestly she shamed me and embarrassed me so bad in the middle of that grocery store all I wanted to do is show her that that wasn't me. And I told her that I wanted her to apologize to me once she sees it's not me.

[Transcripts from March 2, 3, 4 & 6, 2015, page 365, lines 7-11, Jesudason to David]

A. Well I demanded to see the tape, I said to her that – “Good, I'd like to see that tape. And when you see that girl on that video is not me you can apologize to me and all these people you're shaming me in front of.” And off we went. We started walking ahead. I left the ice cream there without paying for it and we started walking towards upstairs which went that way. But as we were walking she kind of went like this and then got...

[Transcripts from March 2, 3, 4 & 6, 2015, page 366, lines 3-12, Jesudason to David]

A. I'm being honest about it. She embarrassed me and I was determined that she's going to look at that girl and say, “Oh my God, I made a mistake,” and then I was going to make her apologize.

Q. So you were expecting to get...

A. Be vindicated. As soon as seen the tape I was convinced that she would say, “Oh yeah, you're right.” That's how I thought it was going to go.

[Transcripts from March 2, 3, 4 & 6, 2015, page 369, lines 18-21, and page 370, lines 1-6, Jesudason to David]

Q. How did you feel?

A. I was almost like, I can't put emotion to it really, I cry about it. I just look at it like I teach my daughter to love everybody and shame on her, shame on her painting every black person with the same brush. There's a lot of good people from my community, a lot of good, hardworking people that had to jump over hurdles to get where they're at. And shame on her for painting everybody with the same brush. And shame on her for not admitting that she knew that wasn't me in the videotape because I'm convinced that she knows that wasn't me.

[Transcripts from March 2, 3, 4 & 6, 2015, page 398, lines 14-21 and page 399, lines 1-5, Jesudason to David]

A. She was insinuating I was on welfare.

Q. Okay. And how did that make you feel, Ms. David?

A. The same way it made me feel when she said, "You people from Pockwock Road do this kind of stuff," like she was painting everybody with the same brush. It's like wow, the way I was looking at it, like, you mean to tell me Ms. Barnhill got all this from the way I looked? I'm on welfare, we all steal, like really? Like to me I was so shocked, like I don't even know how to explain it, I was shocked, like I don't even have a word to explain the emotion that went through me when she was saying these things, I mean that ruined my doubt. That's why every time I'm talking about it I cry, because I don't know how to put it to words.

[Transcripts from March 2, 3, 4 & 6, 2015, page 404, lines 12-21, and page 405, lines 1-7, Jesudason to David]

Q. So how did it make you feel when somebody – you're receiving disability for depression and somebody insinuates you're receiving social assistance and is it cheque day, how did that make you feel?

A. Well I already was ashamed of myself for getting so depressed and I had to overcome it. So I had to fight my fears, get myself back in school and better myself. So I almost felt as if she was kicking me when I was down. I already wasn't happy with myself. If I could walk away from myself those days I would, you know, when you just want to

shake something and you can't, that's how it was.

[Transcripts from March 2, 3, 4 & 6, 2015, page 405, lines 14-21, and page 406, lines 1-6, Jesudason to David]

A. Never. Never approached me about stealing anything at Sobeys until that day.

Q. So how were you feeling at this point?

A. I don't know. I'm just – I almost can't wait for this all to be over with.

Q. Why do you say that?

A. Because I've been stressed out for like almost six years about it and I feel like every time I get an email, every time I get any conversation, telephone conferences, I have to rehash that day all over again. And I'm glad that we've come so far and we had to deal with it and get it over with but win or lose, I still feel like I won. I mean it hurts inside but at least I didn't just roll over and let somebody do that to me and I didn't put a complaint. Because a lot of black people when they go in the store they're followed around and they're harassed, they don't put in a complaint and they don't take it as far as I took it. That's probably why there's no discrimination suits against other retail sectors, if you know what I'm saying. Not everybody goes as far as I did. So whether I win or not, whether I come out of this with nothing it still was all worth it because this was for a purpose. This wasn't for money, this is not for all this foolishness that they're trying to make it out to be. If it was I would have took \$2,000 and ran with it a long time ago, like you know, if I was a thief stealing water bottles, really, getting a \$10 deposit, really? That's dumb.

[Transcripts from March 2, 3, 4 & 6, 2015, page 406, lines 12-21, and page 407, lines 1-21, Jesudason to David]

Q. Did you have any further conversation with Ms. Russell at that point that you can recall?

A. I was just more – I was in shock and I was just kind of just, not freaking out but inside I was freaking out. But I don't know, I was just really, really upset and I just told her what happened to me and how I was up in the room and how she accused me of being a thief, how she was saying I was coming and stealing all of the time...

[Transcripts from March 2, 3, 4 & 6, 2015, page 416, lines 17-21, and page 417, lines 1-6 Jesudason to David]

A. I cried the whole drive home and I was telling Melissa more details of what happened because I only gave her a brief before we went back in, you know, the quick version of it.

[Transcripts from March 2, 3, 4 & 6, 2015, page 430, lines 12-15, Jesudason to David]

Q. All right. And so then how were you feeling when you got home?

A. The same, I was devastated.

[Transcripts from March 2, 3, 4 & 6, 2015, page 431, lines 4-6, Jesudason to David]

A. No, I just ended writing details of exactly what happened with the situation. And then after I finished writing that I was just shocked. I told a lot of people, I think I made a lot of calls that night, honestly.

...

A. I don't know how to explain it. I can't explain how you feel when somebody does something like that. Like there's not really no word that you can really put to it. I felt sick to my stomach. I felt devastated. I felt like this is 2009, really, people like her still exist? Like, I don't know, it was just, I don't know, nothing ever happened like that to me before. So, I mean I would be lying if I said I wasn't watched in the store, you know, that happens to almost all black people that I know, you go in a store and they watch you just in case you might steal. You know, that happens, I'm used to it, I have thick skin because of it. But I never had anybody approach me, accuse me of something and then say racist stuff to me to go along with it.

[Transcripts from March 2, 3, 4 & 6, 2015, page 432, lines 6-21, and page 433, lines 1-11, Jesudason to David]

Q. All right. The next morning, what can you recall of the next morning, how were you feeling?

A. Honestly I was sick to my stomach for days, it wasn't just like the next morning I woke up and I felt refreshed and I felt good. I felt worse the next day and then the next day and then the next day and then basically I – somebody told me about calling a lawyer regarding it. And then I called a lawyer and I met with him.

[Transcripts from March 2, 3, 4 & 6, 2015, page 435, lines 1-10, Jesudason to David]

A. Well, I definitely knew I wasn't going back in Sobeys again, especially not that one.

Q. Okay.

A. I don't know, it just made me, like honestly when you're depressed and you're anxious and stuff you have this paranoia all the time, right. So one of the things you have to overcome is being paranoid, it just feels like people are watching you. It feels like, I don't know, it's an uncomfortable feeling, that's how I describe it, a really uncomfortable feeling. And it was just – I was starting to get better and then it was almost like I backtracked a little bit. And then I had to overcome it again. Like, you know, I went in the other grocery stores and I almost felt like they were following me around the Superstore. When in Valufoods I thought they were following me in Valufoods. It was almost like I was paranoid bad because of what Sobeys did to me.

[Transcripts from March 2, 3, 4 & 6, 2015, page 437, lines 14-21, and page 438, lines 1-12, Jesudason to David]

... I got treated like a dog when I went into Sobeys that day.”

[Transcripts from March 2, 3, 4 & 6, 2015, page 439, lines 5-6, Jesudason to David]

Q. All right, well we don't necessarily want to get into hearsay with your daughter, but why haven't you told your daughter up until she found out as you said you're coming here. Why haven't you told your daughter why you're not going to Sobeys?

A. *I don't know, I just, because I didn't want to rehash that. I feel like every time – like until like the last little while I've been avoiding even talking about it lately and it just rehashes what I had to live that day. And I don't want to talk to her and tell her what happened to me and then break down crying. I think that's more the reason why I didn't tell her, because I don't want to sit and cry in front of her. I show her that I'm strong all the time, right, and you know, suck it up and not show so much emotion. So I didn't really want to talk about because you see how I get, every time I talk about it I start crying about it. So I don't want her to feel bad about it so I've kind of been avoiding it. But she knows now.*

[Transcripts from March 2, 3, 4 & 6, 2015, page 456, lines 10-21, page 457, lines 1-10, Jesudason to David]

[12] I accept the previous statements and evidence provided by the Complainant as a true and accurate reflection of her feelings, impact of the harms and injury to the Complainant, as a result of the discriminatory conduct experienced by the Complainant as a result of the incident on May 26, 2009 in the Sobeys Tantallon store. The Complainant, throughout the course of this entire proceeding, has been a truthful and credible witness.

[13] Jim Cormier, director for Atlantic Canada for the Retail Counsel of Canada, provided the following evidence which is summarized, as follows:

Q. *Can you tell me generally what the role of the Retail Council of Canada is?*

A. *Sure. We represent retail. We are an industry association. We represent everybody from your small main street retailer we call the mom and pop shops all the way up through to some of the largest, in fact the largest national and international retailers in the country and in the world. We represent over 45,000 storefronts from coast to coast and we also represent obviously in this case the grocery sector.*

Q. *And are you a for profit or not for profit organization?*

A. *We are not for profit.*

Q. *Okay, and how do you get your funding?*

A. *Members pay a membership fee and it's a tiered membership.*

[Transcripts from October 27, 2015, page 10, lines 2-18, Machum to Cormier]

“Retail Council of Canada members are committed to equality and the respectful treatment of all their customers, employees, managers and staff and stakeholders. Retailers are committed to work with each other, their employees, customers and stakeholders to ensure that the work environment and customer experience includes respect and the commitment to equality.”

[Transcripts from October 27, 2015, page 28, lines 7-17, Machum to Cormier]

.... You know we always have to walk a fine line where we don't get involved in the day-to-day operations of our members but in this case we had the go forward from our members to say yes, keep going with this. And that's when we started getting the ideas bantered back and forth with the Human Rights Commission about maybe we form a committee, a stakeholder committee that retailers could be involved with but other associations as well where we could look at new ways, different ways where the Human Rights Commission could work with industry to make it a more positive and productive outcome, you know?

[Transcripts from October 27, 2015, page 33, lines 14-21, and page 34, lines 1-6, Machum to Cormier]

Q. And according to the RCC website, it describes the function of the grocery division in these terms and I'll read it verbatim,

“Building on past successes through our closed partnerships with the grocery sector, RCC collaborates with the grocers to provide a strategic focus on grocery retailing using synergies within the grocery and general mass merchandise categories, RCC is able to provide increased benefits and efficiencies for all retailers.”

Is that correct?

A. Yes.

[Transcripts from October 27, 2015, page 46, lines 11-21, and page 47, lines 1-7, Machum to Cormier]

A. Again it's all about what we can provide that our members actually want. Like we do some online training, that sort of thing with, you know, lower level sales training, lower level management training, that sort of thing.

Q. Okay, and you would agree with me that education and training is a minor function when you look at the overall function of RCC, right?

A. Yes.

[Transcripts from October 27, 2015, page 47, lines 19-21, and page 48, lines 1-6, Machum to Cormier]

Q. And similarly, the RCC doesn't have the ability to compel any member to take any training sessions, right?

A. That's right.

Q. It's entirely voluntary.

A. Yes.

[Transcripts from October 27, 2015, page 49, lines 3-8, Machum to Cormier]

Q. And you'll agree with me that the RCC doesn't have any authority to make any of its training binding on its members, does it?

A. That's true.

Q. So, for instance, the RCC can't require Sobeys to participate in any training offered by it.

A. That's true.

Q. And the ability of any member to maintain its standing, or its membership is in no way tied to the completion of education, is it?

A. That's true.

...

Q. And you'll agree with me that the RCC does not supervise the delivery of either education or training to its members, does it?

A. Other than the small amount of training that I've mentioned that we do, you know, with some of the online training programs that we offer, you know we have a bit of an oversight role there but it's minor.

- Q. Giving any mechanism to enforce that oversight?*
A. Oh, mechanism to enforce it? No, no.

[summary of Transcripts from October 27, 2015, page 49, lines 20-21, and page 50, lines 1-21, Machum to Cormier]

[14] I conclude on the basis of the evidence provided by Mr. Cormier that the Retail Counsel of Canada is a non-profit industry association representing retail. The Association provides little in the way of training regarding diversity/equity and has a policy with an objective of commitment to “ensure that the work environment and customer experience includes respect and a commitment to equality.” The Retail Council of Canada is strictly a voluntary organization without any enforcement mechanisms to ensure non-discriminatory conduct and compliance with the Human Rights legislation in the respective Province where the retailers operate.

ANALYSIS

[15] The application of the law and due process of law, as it applies to Human Rights legislation, should be restorative in nature and sensitive to the diversity of those parties participating in the Board of Inquiry. The legislation envisions any remedy indicated provide for “*full compliance with the Act and to rectify any injury caused to any person or class of persons or to make compensation therefor.*” Human Rights complaints should not be a technical exercise in the application of the law without focus on the end result of education, rectification of the harms, human dignity and equality, once a finding of discrimination on one of the enumerated grounds is founded. Any analysis and tailoring of a remedy, has a twofold analysis; one focusing on a private remedy addressing compensation and rectification of the wrong on an individual level and a second analysis of the public interest remedy in order to ensure future compliance with the Act.

Private Remedy Analysis

[16] The Respondent acknowledges in their written submissions and argument that the Board of Inquiry has jurisdiction as outlined as follows, “*the remedial powers of Nova Scotia Board of Inquiries are stated in classic make ‘whole fashion’. Sobeys accepts that a Board of Inquiry should try to restore the individual discriminated against as far as possible to his or her original position had the discrimination not occurred.*” [William Pentney, (eds.), *Discrimination and the Law*, loose-leaf, (Toronto: Carswell, 2015), at 15 – 161; *Piazza v. Airport Taxicab (Malton) Assn.*, 1989 CanLII 4071 (Ont. C.A.), at para. 9; *Trask v. Nova Scotia (Justice)*, 2010 NSHRC 1, at para. 190 [*Trask*]. Respondent’s brief dated December 17, 2015 at page 2].

[17] The facts are clear and conclusive in this case that the Complainant was discriminated against both directly and indirectly due to Ms. Barnhill’s unconscious

stereotyping related to the Complainant's race/colour, source of income and access to services, as stated in the previous written reasons contained in the initial Decision. Ms. Barnhill, acting in a management capacity for the Respondent, conceded to the fact that her actions were inappropriate as a supervisor on duty on May 26, 2009 and there was no foundational evidence to support a shoplifting offense on that same date or on any other occasion against the Complainant. Additionally, all efforts by the Complainant to seek acknowledgement from the Respondent that she was in fact not a shoplifter at Sobeys and was deserving of an apology, were to no avail. The lack of acknowledgement that the Complainant was in fact not a shoplifter at Sobeys and lack of apology for the harms caused to the Complainant, having the most adverse effect on the Complainant. I find that the Complainant suffered and suffers continuing harm, as a result of the Respondent's actions. The Complainant suffered injury in the form of depression, continuing emotional upset, physical symptoms such as upset stomach and stress, paranoia, shame and public embarrassment. There is no doubt based on the balance of probabilities, that the Complainant will suffer ill effects well into the future regardless of any apology or compensation that will be offered at this point. In the Complainant's own words [Transcript from October 27, 2015, page 70, lines 12-19], "*I have lost faith in humanity and justice. Even though this outcome seems like it's in my favour; the comments, stereotypes and degrading actions haunt me, not just me but my whole family and community. I don't feel better. I feel emotionally scarred and I don't feel vindicated. This one incident changed me. I will never be the same person that I once was before that day.*"

[18] With due deference and respect; the recourse of law has brought this matter to public light. The Complainant's courage and willingness to reveal her private hurts and injury in a public forum come with a personal cost to the Complainant that will have lasting personal adverse effects. The real damage relates to the lack of acknowledgment and respect given to the Complainant from the date of May 26th, 2009 to date; such lack of acknowledgement of the Complainant's right to human dignity, respect and equality, exacerbated the harm to the Complainant, as well as that of the greater community.

[19] Walter in *Gilpin* [*Gilpin v. Halifax Alehouse Limited*, 2013 CanLII 43798 (NSHRC)] Decision at Paragraph No. 4, states;

I concluded that the Alehouse publicly humiliated Mr. Gilpin. The Alehouse, in their social relations with Mr. Gilpin, failed to accord Mr. Gilpin the respect due him as a guest in their premises. As Maya Angelou has said:

*I have learned that people will forget what you said,
people will forget what you did, but people will never
forget how you made them feel.*

*[5] Mr. Gilpin wept as he told his story. He will never forget
how he was made to feel by the Alehouse.*

[20] The facts in this case are analogous to the *Gilpin* Decision, Ms. David wept often during the course of her testimony, was visibly upset and shaken when referenced during the course of the cross-examination as a “shoplifter” in Sobey’s. Ms. David will never forget how she felt and was made to feel by the Respondent.

[21] The facts in this case are analogous to the *Willow* Decision [*Willow v. Halifax Regional School Board*, 2006 NSHRC 2 (CanLII)] and *Johnson* [*Johnson v. Halifax Regional Police Service*, 2003 CarswellNS 621] and [*Johnson v. Halifax (Regional Municipality) Police Service*, 2005 NSCA 70]. In both these Decisions, the Complainants suffered harm and injury, as a result of being falsely accused of criminal conduct, unsupported by the facts and without efforts by the Respondents to right the wrongs and effect satisfactory apology. The general damages and personal remedy indicated in *Willow*, shall be applied and followed in this herein Decision, such attempts to provide compensation for continuing harm on a yearly basis pending a final determination of this matter.

Public Interest Remedy Analysis

[22] Ms. Barnhill, indicated in evidence that she was aware of the Respondent’s policies regarding equity, equality and respect for the customers. However, the evidence is conclusive that Ms. Barnhill had little or no training related to equality, diversity and racial profiling issues as it impacts the retail sector. In Ms. Barnhill’s evidence; she admitted that she had an “*understanding that discrimination, while unethical, is not illegal*” [Transcripts from May 26, 27, and 28, 2015, page 337, lines 13-16, Joyce and Barnhill]. I find on the basis of the evidence provided during the entire course of this proceeding that although the Respondent had policies in place and participated in the Retail Council of Canada, with objectives of equality and diversity, there was little commitment to such in the form of active training and education programs for their employees regarding such issues. Had Ms. Barnhill had the opportunity to receive sensitivity training regarding the issues of equity, diversity, equality and racial profiling; her unconscious biases resulting in the impact and harm to the Complainant may have been avoided. The Respondent has an obligation to the greater community to ensure that their employees, especially those working in a supervisory capacity, have the tools and education to ensure that the public at large are protected from future discriminatory conduct. When describing the community at large, by definition; such community is not distinguishable on the basis of race and/or colour and/or perceived source of income, as well as the other enumerated grounds as stated in the *Act*. Harms and injury committed against a person(s) in the form of discrimination, additionally harms the greater community. The Respondent, operating business in the retail sector in the Province of Nova Scotia, has an obligation to the greater community to ensure their employees are educated and trained to ensure against future discriminatory conduct and harm. I do not accept the Respondent’s position that the remedy only impacts the Tantallon store, as the *Act* has jurisdiction in the entire Province of Nova Scotia. Therefore, the Respondent, providing retail services to the public in the Province of Nova Scotia, has an obligation to ensure that its employees are properly trained and educated regarding

diversity, equality and racial profiling as it impacts the retail industry.

[23] The Respondent has been a member in good standing with the Retail Council of Canada and has shown cooperation with the objectives of the organization, including creating a working committee to create a dialogue between the NSHRC and the Retail Council of Canada. The evidence is conclusive that the Respondent has shown a commitment to diversity and equality, as an objective within the realm of their own policy and procedures, as well as their commitment to the objects as suggested by participation in the Retail Council of Canada. However, such commitment has not been translated in the Respondent taking active independent and proactive steps to ensure that issues such as diversity, equality and racial profiling are addressed within the realm of their retail operation.

[24] The evidence is conclusive, that Jenny Barnhill, was acting in a managerial capacity on May 26, 2009, during the course of her employment with the Respondent when her discriminatory conduct caused harm and an injury to the Complainant. Additionally, the facts are clear that Ms. Barnhill suffered a considerable disservice and harm to herself and her own reputation; due to the fact that her employer did not provide her with education and training regarding diversity, equality and the impact of racial profiling in the retail sector and the greater community. These harms could have been averted, had the Respondent ensured that its employees, especially those in a managerial capacity, had the skill sets and training related to discrimination, equality, diversity and racial profiling, as such issues are forefront issues in the retail industry. Additionally, equality and respect for customers in the retail sector, were a common objective, as it relates to their association with the Retail Council of Canada.

[25] The Respondent has an independent obligation to comply with its own internal equity and equality terms and conditions contained in its internal policies/protocol; as well as the equitable principles contained in the purposes of its association with the Retail Council of Canada. Otherwise, such policies/protocol and associations would be rhetorical in nature, without teeth, purpose or ability to effect enforcement.

CONCLUSION

[26] The Complainant is hereby awarded the following:

Private Interest Remedy

A. Apology

The Respondent shall issue a written apology to the Complainant for its discriminatory treatment directed towards her. Without limiting the generality of the foregoing, the apology letter shall confirm that Sobeys Group Inc. did not have a sufficient evidentiary basis to allege that Ms. David was on any date a shoplifter at its store and the actions of the employee on May 26, 2009 was

against their normal shoplifting apprehension policies, discriminatory and inappropriate.

B. Special damages of the Complainant

The Complainant shall be reimbursed for Special Damages incurred as a result of personal costs to her to attend the Board of Inquiry proceedings, inclusive of the remedy proceeding, as follows:

i. Lost Wages

Ms. David is claiming lost wages for March 2nd and 3rd, 2015 with working hours from 2pm-11pm. Ms. David's rate of pay is \$19.08/hour prior to 7pm (first 4 hours). After 7pm she gets \$20.90/hour [Transcript from October 27, 2015, page 111, lines 1-4]. The Complainant shall be awarded a total of \$361.64 in lost wages, payable from the Respondent to the Complainant.

ii. Parking Expenses

I am satisfied on the basis of the evidence provided by the complainant that parking expenses were incurred on a daily basis at a rate of \$20/day for attendance at the Board of Inquiry proceedings and the facts support the finding of \$200.00.

The claim is supported by Ms. David's claim for appearance at the Board of Inquiry on eight occasions plus October 27 and 28, 2015. The Complainant shall be awarded a total of \$200.00 reimbursement for parking expenses, payable from the Respondent to the Complainant.

iii. Mileage

On the issue of mileage, Ms. David is awarded \$237.95 on the basis of the 538 kilometres claimed at the government rate of 44.23 cents per kilometre as outlined in Exhibit 3 as the applicable government rate for transportation allowance purposes. The Complainant shall be awarded a total of \$200.00 in travel expenses, payable from the Respondent to the Complainant.

This award for reimbursement of personal expenses incurred by the Complainant shall not be considered a costs award, but simply part of the remedial powers of this Board of Inquiry to attempt to make whole and restore the Complainant to her original position had the discriminatory conduct not occurred. I allow simple interest at a rate of 2.5% on the total amount of all the special damages as noted above accumulating from May 26, 2009 up to and including such

date upon which this award has been paid in full from the Respondent to the Complainant.

C. General damages

I assess damages of \$3,000.00 per year for the false accusation and treatment of the Complainant as a shoplifter, in the face of the preponderance of evidence to the contrary. Continuing injury to the Complainant by the Respondent caused by the Respondent's treatment of the Complainant as a shoplifter, without apology or efforts on the part of the Respondent to right the wrongs and harm to the Complainant, inclusive of an apology to date. Therefore, I assess damages in the year 2009 at \$3,000.00 and for every year thereafter up to and including the year 2016, at a rate of \$3,000.00 for a total award of \$21,000.00. Additionally, I allow simple interest at a rate of 2.5% on the amount accumulating from year to year, starting May 26, 2009 up to and including the date that this award has been paid in full from the Respondent to the Complainant.

Public Interest Remedy

- A.** Sobeys Group Inc. shall, at its own cost, participate in training approved by the Nova Scotia Human Rights Commission relating to or with respect to consumer racial profiling, discrimination based on race, discrimination based on colour, and discrimination based on perceived source of income ("Commission Training"). The Commission Training shall be delivered to Sobeys Group Inc. management representatives agreed to by the parties, including but not limited to Jenny Barnhill, such management training shall be effected within a period of six months from the date of this Decision. Thereafter, within twelve months of the completion of Commission Training, Sobeys Group Inc. shall, at its own cost, train all Nova Scotia store management team members and store employees with relating to and with respect to consumer racial profiling, discrimination based on race, discrimination based on colour, and discrimination based on perceived source of income ("Store Training"). Sobeys Group Inc. shall have the ability to outsource such training provided that the Nova Scotia Human Rights Commission approves the qualifications of the trainers and the content of the training provided by those providing the Commission/Store Training.
- B.** Within two months of the completion of Store Training, Sobeys Group Inc. shall prepare and deliver to the Nova Scotia Human Rights Commission a report confirming the full particulars of

Store Training that has been delivered in accordance with this Order “Report”. Without limiting the generality of the foregoing, the Report shall set out the names of all employees who attended the training, the dates, times and locations of training sessions, and a copy of all curriculum, brochures, guides and documentation relating thereto.

- C. This herein Board of Inquiry reserves jurisdiction on the issue of enforcement of the remedy, in the event of non-compliance on the part of the Respondent with the terms and conditions of the public interest remedy as set out herein.

Dated at Kentville, Nova Scotia, this 28th day of April, 2016.

Marion Hill
Board of Inquiry Chair