

IN THE MATTER OF: The Nova Scotia Human Rights Act (the "Act")

AND IN THE MATTER OF: Board File No. 42000-30-H22-0571

BETWEEN:

Sherri Borden Colley
("Complainant")

- and -

The Source
("Respondent")

- and -

The Nova Scotia Human Rights Commission
("NSHRC")

Board of Inquiry: Eric K. Slone, Chair

Heard: February 6 and 7, and March 20 and 29, 2025, with
written submissions thereafter

Counsel: Asaf Rashid for the Complainant

Kendrick Douglas for the Commission

Kiersten Amos for the Respondent

Date of Decision: July 14, 2026

DECISION OF THE BOARD OF INQUIRY

1. On December 20, 2023, at the request of the Nova Scotia Human Rights Commission, I was appointed by the Chief Judge of the Provincial Court of Nova Scotia as a one-member Board of Inquiry under the Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c.214, to inquire into the December 9,

2022 complaint of Sherri Borden Colley (Ph.D.) against the retail store, The Source.

2. Dr. Borden Colley is a well-known journalist and human rights advocate in Nova Scotia.
3. The Source was an electronics store, most recently part of the Bell Canada group of companies. It was at one time known as Radio Shack. The Source ceased business in 2024.
4. In that complaint, Dr. Borden Colley says that she was “discriminated against with respect to the provision of or access to services or facilities because of my race, colour and sex” on March 17, 2022 when she was shopping at the store in question, in Elmsdale, Nova Scotia.
5. Her version of events has been stated and restated several times, in different forms, but has not materially changed from what she said in her written complaint form which is as good a version as any to start with.
6. The complaint reads (in part:)

I am an African Nova Scotian female. When visiting electronics store The Source, I was followed by staff the whole time during my visit due to my race and colour. When I questioned the employees about this violation of my human rights, I was told by one employee that “We have been instructed by management to shadow all customers because we have been shoplifted.” So the automatic assumption when I visited the store to purchase a printer was that I was there to shoplift. This was a pure case of consumer racial profiling based on my race and colour. All of the store staff were men, and I believe my sex or gender played a role in their treatment of me.

7. She continued her recitation of the events:

When I first walked in the door, one employee immediately approached me and asked if I needed assistance. I told him no, that I was just browsing. When I went to the back of the tiny store to look at the printers that were on sale, the same employee saw fit to follow me and watch my every move from just around the little corner. I asked him the price of the ink for one of the printers I was looking at. He asked me what the ink numbers were. I said they should be on the box. He told me the ink prices and then returned to his previous area where he could still watch me.

As I moved over to the next printers that were the same sale price, he moved again right behind me keeping a watchful eye. He was pretending to be cleaning the shelves with a small tissue or cloth while monitoring me.

I left the store without buying a printer. Once I got into the parking lot, I decided to go back inside the store and asked to speak to a manager.

Another male employee told me there was no manager on duty.

I relayed to the three employees, who all looked white, that I was racially profiled during my entire time in the store because I am Black. The employee that racially profiled me piped up and said that he is an immigrant (he presents as white) and took offence to being called a racist. I stopped him right there and told him that my experience as an African Nova Scotian and his experience as an immigrant are not the same because as Black people, we are racially profiled in stores ALL THE TIME and that it needs to stop.

He again said he is not a racist.

The second employee then said that they “have been instructed by management to shadow all customers because we have been shoplifted.”

I looked at him and asked do you really think I'm going to walk out of the store with a printer? I never picked up any item the entire time I was in this store.

Again he said that they do this to all customers. I told them that I shop at the store often and have never been treated this way by other employees and that I will never step foot inside their store again. This employee then told me to have a nice day.

I am so sick and tired of this treatment. Being racially discriminated against is so upsetting. Believe me this is not our imagination. We know when we are being racially profiled. I felt it that day in the pit of my stomach.

8. When asked by the Complaint form “why do you believe the treatment you received is because of your protected characteristic?,” she replied:

I believe I was racially profiled in this store because of race and colour and because I am a woman. I can conclude from the actions and the words of the employee following me in the store the whole time, and that one employee told me they had been instructed by management to follow all customers “because we have been shoplifted” that these employees automatically assume that as soon as I walked in the store to look at printers and purchase one that I had intentions to shoplift. I believe their baseless assumption was due to my race, colour and gender.

9. She goes on in her Complaint to describe how this incident affected her:

Being automatically assumed to be a thief it's caused me emotional and psychological harm. I felt physically sick the day of this incident. This incident has impacted my mental health and sense of safety in any store. Each time I walk into any store, I am hyper vigilant, I expect to be followed, surveilled, assumed to be a potential shoplifter, asked to have my receipts or bags checked. I no longer enjoy shopping as a leisure activity or “me time.” This incident brought me to tears. I was so upset by this incident that I could barely speak as I was confronting the store employees for their discriminatory actions and words. I broke down in tears on the phone as I was speaking to The Source management and internal investigator. I have a fear of being falsely accused of shoplifting in stores, being publicly humiliated, of having security and or the police called and of being physically assaulted by these officers based on unfounded allegations. I automatically feel like a target to be harmed when I enter stores. I'm also very upset that The Source refuses to issue me a written apology. This refusal invalidates the depths of the harm caused to me by this psychological discriminatory act of violence against my personhood. I now constantly tell my children what to do and what not to do in stores so as not to draw attention to themselves as African Nova Scotian customers.

I can no longer shop at The Source in my community and have to order my computer supplies online or use extra gas and time to drive from my rural community into town for these items. I have a real fear of being accused of being a potential shoplifter if I enter that store.

10. The Board of Inquiry hearing took place over four days on February 6 and 7, and March 20 and 29, 2025. During the hearing, we received oral evidence from four witnesses as follows:
 - a. Dr. Borden Colley, who testified on her own behalf;
 - b. Employee “E”, who testified on behalf of the Respondent. E was the Sales Associate present in the Elmsdale Store on March 17, 2022, who had the encounter with Dr. Borden Colley;
 - c. Melissa Woods, called by the Respondent. Ms. Woods was the Corporate Security Investigator who conducted the post-incident investigation in response to Dr. Borden Colley’s complaint to the Respondent at the time of the incident; and
 - d. Carol Barnard, also called by the Respondent. Ms. Barnard was the Director of Retail Sales, Atlantic, responsible for the Elmsdale Store operations at the time of the alleged incident.
11. The Respondent was able to preserve and produce video surveillance footage of the events in question, which unfortunately does not include sound but gives a good visual view of the parts of the store that are significant. This footage was played multiple times at the hearing, and I personally have since watched it dozens of times trying to discern what was, or was not, happening.
12. Following the completion of the evidence, a transcript was prepared and the parties provided their arguments by way of written submissions.

The evidence of witnesses

13. Dr. Borden Colley testified on her own behalf.
14. She identifies as African Nova Scotian and resides in Enfield, Nova Scotia which is a predominantly white community. She is deeply connected to Black Nova Scotian communities and is active on social media. She described herself as a social connector with a particular interest in stories that feature Black elements. As an African Nova Scotian, she has experienced racial profiling at several stores, including Walmart, Staples, and Superstore. She reports that she is frequently asked for her receipt and is followed and monitored. On previous visits to The Source store, she had only positive experiences.
15. After the incident in question, when she returned to the store a few minutes later, she found the three staff members to be dismissive and defensive, which upset her. E was especially offended by being called a racist, which she insisted she had not accused him of.
16. Following the event, she posted on Twitter and Facebook to share her experience. She said she was trying to get the store's attention and was at least partly successful, as she received a call back the next day from the acting manager. This led to conversations with corporate representatives. Ms. Woods, in particular, told her that an investigation was needed.
17. Dr. Borden Colley had hoped for a written apology, which never arrived because the Respondent concluded that no fault or discrimination had occurred in relation to the incident.
18. Dr. Borden Colley admitted that she was angry during her second visit to the store but does not concede that she was irritated during her first visit.

19. She went on to describe the impact this event has had on her and her family. In her career as a journalist, she has produced pieces on systemic racism and other stories focussed on the Black community in Nova Scotia.
20. When asked why she believed sex or gender played a role in the staff's treatment of her, she said she thought the stereotype of the angry Black woman was a factor - particularly in the way she was treated when she came back in the store to complain.
21. She does not contend that she was ever denied entry or assistance by staff at any point. She was never stopped by staff nor accused of shoplifting.

Employee "E"

22. The staff member involved, E, is a young man who had graduated from high school just a few years prior and had been working for the Source for less than a year when the incident occurred. At that time, his role was retail sales associate, which included duties such as assisting customers with purchases, cleaning the store, and restocking shelves. He earned wages plus commission on sales. His mandated responsibility was to greet every customer upon entering the store, attempt to address their needs, and offer assistance. If a customer declined help, he was expected to allow them to browse freely.
23. Around the time of the incident, the store had recently experienced an unusual increase in shoplifting, so management expected staff to monitor all customers closely at all times. The policy was to treat all customers equally. Additionally, since this was during the COVID period, there was a heightened focus on cleaning.

24. The instructions for customers who were just browsing were that staff should position themselves in the store so that customers could see them. This applied to all customers who were browsing, without exception.
25. E described the events of March 17, 2002 as follows:
26. He said he greeted the customer when she entered the store, but she declined his offer of help, visibly waving him off, saying she was just browsing. He noted that her manner was somewhat abrupt. He then positioned himself so that they could see each other. At one point, she asked him a question about printer ink, which he answered. Shortly afterward, she left, saying, "I'm good."
27. He mentioned that he thought he recognized her from previous visits but was not certain.
28. When she returned a few minutes later, she first approached another staff member and accused him (E) of racially profiling her. E immediately denied the accusation, stating that own his mixed-race background meant he would never treat anyone differently based on race, gender, or other such factors. He described her as loud and unwilling to listen.
29. After the customer left, E went to the back room and experienced a panic attack. He explained that he has a history of anxiety and depression and that this was not his first panic attack.
30. The following day, he sent an email to management detailing his recollections, expanding on his account of the incident, which is consistent with his testimony before the Board.

31. He stated that he does not doubt the accuracy of Dr. Borden Colley's experience, nor does he dispute the sincerity of her feelings, but firmly maintains that he never intended to single her out and instead treated her as he would any other customer.
32. E testified that they had received some training on racism, but nothing specifically focussed on racial profiling.

Melissa Woods

33. Melissa Woods, a corporate Security Investigator for Bell Canada, was assigned to investigate this incident. She was appointed lead investigator on March 18, 2022, the day after the event. One of her initial actions was to review the CCTV footage of the incident and to compare it with clips of random customers. She also interviewed all employees who were working that day and collected statements from each of them.
34. Upon reviewing the video from March 17, she testified that nothing about E's proximity to the customer stood out to her. She noted that the store is small, and it was common to see the employees keeping busy by cleaning items on the shelves. When reviewing videos of various other customers, she did not observe anything unusual.
35. She then spoke with Dr. Borden Colley by phone to hear her perspective and subsequently reported her findings to management. She stated that determining whether racial profiling had occurred was the responsibility of other stakeholders, not her.
36. From her video analysis, she noted that E looked directly at Dr. Borden Colley for only about 15 seconds during the roughly four minutes she was in the store.

37. She described the loss prevention policy in place, which involved being near customers but not shadowing them. In her phone conversation with Dr. Borden Colley, she denied calling E racist, only stating that he was watching her.

Carole Barnard

38. Carole Barnard, a senior management official involved in the investigation, was the director for The Source stores in 2022. Part of her role was to ensure policies were followed.
39. She first became aware of the incident on March 18 and immediately checked Twitter to see what was happening. Based on the investigation findings eventually reported to her and other senior management, they concluded that no racial profiling had taken place. She also spoke with Dr. Borden Colley and attempted to show empathy for what she was clearly experiencing.
40. Although she did not watch the video footage at the time, she has viewed it recently and concluded that E was performing his job appropriately, staying close to the customer while also keeping busy by cleaning. This practice was emphasised during COVID. Staying near customers is not only for loss prevention but also to be available to answer questions. Maintaining reasonable proximity to customers acts as a theft deterrent.
41. The instruction to keep merchandise dusted is intended to prevent items from appearing old due to dust accumulation, which could discourage sales. She stated that dust accumulates quickly due to the ventilation system.

Policies

42. As a large corporate Employer, The Source had written policies directing how staff should behave, and in particular with a view to avoiding losses through theft. The entire suite of policies need not be quoted, but the following excerpt arguably sets out the expectation:

To prevent theft in our corporate retail locations, You should:

- Greet and make eye contact with every individual who enters your store.
- Be attentive, courteous, and offer assistance to every customer, even when the store is busy.
- Say something that would make the individual know that they have been recognized (such as a comment as to what they are wearing.)
- Always ensure there is an employee present on the sales floor.
- Always look alert and busy, and position yourself so that you can view the entire store.
- Keep your store neat and tidy (this is the best way to notice when items are missing or out of place.)
- Never leave any inventory, customer or personal items on sales floor unattended (customer cell phones, store inventory waiting to be shipped or received etc.)
- Never leave the cash register open when your back is turned.
- Be aware of cars parked directly in front of the doors.
- Be on the lookout for any of the characteristics of thieves described above.

The following are psychological deterrents to prevent theft:

- Sales staff who greet all customers and keep the store neat and clean.
- Sales staff who give the best customer service, and who respond to the customer's needs.

43. E was not necessarily conversant with the entire policy but had been trained by his manager consistent with the policy.

The parties' positions

44. The Complainant's position is that she was racially profiled and subjected to differential treatment on account of her race, as well as her gender.
45. The Respondent's position is that, based on the evidence before the Board of Inquiry, Dr. Borden Colley has not established a *prima facie* case of discrimination. It acknowledges that Dr. Borden Colley is of African Nova Scotian heritage and identifies as female, making her a member of groups protected under subsections 5(i)(j) and (m) of the *Act*. The Respondent says the evidence does not establish that she was subjected to any adverse treatment, whether in relation to her protected characteristic or otherwise – i.e., she suffered no discrimination with respect to the provision of services.
46. The Commission remained fairly neutral in its position though it believes there is a case of racial profiling made out in this case, perhaps best grounded in a theory of indirect or adverse effect discrimination.

The applicable law

47. The Commission helpfully set out a blueprint, based on the case law, for assessing the evidence. The elements are:
 - a. Dr. Borden Colley must prove a *prima facie* case of discrimination based on prohibited grounds under the Act on a balance of probabilities, showing she has a protected characteristic that was a factor. If there is no *prima facie* case, that ends the matter. If successful, the burden shifts to the Respondent.

- b. The Respondent must then provide a credible, non-discriminatory explanation. Here, witnesses stated Dr. Borden Colley was treated equally as per store policy, though case law shows equal treatment does not always mean fairness.
 - c. The Respondent's justification must be strong enough to counter the *prima facie* case. If the Complainant shows discrimination was at least a minor factor, it stands unless the Respondent disproves it beyond a balance of probabilities.
48. Racial profiling is not specifically named in the *Human Rights Act* (“the *Act*”) *but* is understood as “the practice of targeting a consumer for discriminatory treatment based on the consumer’s race, or ethnicity, or both. This practice may or may not be intentional.”¹
49. This constitutes a breach of the *Act*. Section 4 of the *Act* defines “discrimination” as follows:
- For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.
50. Paragraph 5(a) of the *Act* prohibits discrimination in the “provision of or access to services or facilities.”

¹May, 2013 Nova Scotia Human Rights Commission Report on Consumer Racial Profiling in Nova Scotia entitled *Working Together to Better Serve All Nova Scotians* at p.17

51. The Board of Inquiry in *Symonds v Halifax Regional Municipality (Halifax Regional Police Department) (Re)*, 2021 CanLII 37128 (NS HRC) set out the test for establishing discrimination in this context:

[107] There is a two-part test for establishing discrimination in the provision of services under human rights legislation (*Moore v British Columbia (Education)*, 2012 SCC 61 at para 33) ...

[108] First, a complainant must first prove, on a balance of probabilities (which is the same as saying “more likely than not”):

- i) that they have a characteristic protected from discrimination under the Act;
- ii) that they experienced an adverse impact with respect to the service; and
- iii) that the protected characteristic was a factor in the adverse impact (*Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31 at paras 33–37 [*Canadian Elevator*]).

[109] Second, if each of these factors are proven, the burden shifts to the respondent to justify its conduct within the exceptions outlined in the Act (*Canadian Elevator* at para 37). If a respondent cannot justify its conduct, discrimination is established in contravention of the *Act*.

52. In simple terms, it would be objectionable racial profiling to receive inordinate attention from sales staff, where that attention is motivated, in some part, by a negative attitude toward, or assumptions about, persons of a different race or ethnicity.
53. Several other cases from courts and Boards were cited to me, which emphasize how subtle the discrimination may be.

What is on the video

54. The video of the incident in question shows that on March 17, 2022, at about 5:16 p.m., Dr. Borden Colley entered the Elmsdale Store and was greeted by E, who testified that his duties included greeting customers, offering assistance, and staying visible if help was declined. When Dr. Borden Colley said she was just browsing, he continued cleaning while keeping her in sight. The footage shows E moving around the store but not closely following her. He occasionally glanced her way, as might be expected.
55. In her testimony, Ms. Woods stated that she reviewed the video and noted that Dr. Borden Colley was in the store for four minutes and twenty seconds, with E looking directly at her for about 15 seconds. It can be inferred that he had her in his peripheral vision at some other times. Dr. Borden Colley later approached E in the printer section to ask about ink prices, and he responded while continuing to tidy the area. About ninety seconds after this interaction, Dr. Colley left the store, saying something not audible but which E reported was “Okay. I’m good. Bye,” to which E replied, “Okay.”
56. Dr. Borden Colley left the store around 5:20:48 p.m., with E at the back, who did not follow or try to stop her but moved to the cash register to continue cleaning. As shown on a separate clip, she returned two and a half minutes later, approached staff including E and spoke with them for nearly two minutes. Dr. Borden Colley said she raised concerns about being racially profiled, with staff consistently stating that the instruction to shadow customers applied to all. She admitted no staff accused her of shoplifting during or after the incident. She left about two minutes later.
57. Two other video clips were produced, showing interactions with other customers. Counsel for Dr. Borden Colley characterized what is shown as follows:

Store surveillance videos of interactions with other customers on the same day (March 17, 2022) show that customers who were not Black women were not subjected to the same level of scrutiny as Dr. Borden Colley, establishing differential and adverse treatment of Dr. Borden Colley. In the video Exhibit 1-L, two customers are seen, who appear to be Caucasian. There is a person wearing a red/orange jacket, who is left alone without any staff watching or shadowing them from the 1:00 to 2:50 mark (bottom left of the screen). In the video in Exhibit 1-M, a lone customer, who appears to be a Caucasian male is initially being assisted by staff. He is then seen walking from the back of the store to the front door between the 1:52 – 2:00 mark, without being watched, and without having purchased anything. The surveillance videos from March 17, 2022, show that Dr. Borden Colley was subjected to intense scrutiny by [E], while this was not the case for other customers who were not Black women. This adverse treatment and the discomfort it caused Dr. Borden Colley, drove her to leave the store, effectively denying her service.

58. With respect, I do not share these perceptions. What is seen on these two random videos is entirely consistent with the store policy. Staff were never far away from any of the customers, except arguably when they were busy serving other customers. The “lone customer” in Exhibit 1-M was with a staff member for all but less than 10 seconds when he briskly walked out of the store. It would have been alarming to see staff chasing after him.
59. The customer in Exhibit 1-L was given a bit more space because the available staff members were busy attending to other customers. On the other hand, Dr. Borden Colley was alone in the store with three staff members theoretically available to help her.
60. Even if something can be gleaned from the videos involving other customers, the sample size is so small that it would be dangerous to draw the inference that Dr. Borden Colley was treated differently in any significant way. To conclude that any difference (if so found) was because of her sex or colour would be a major stretch.

What can be inferred

61. No one has suggested that there is any direct evidence of discrimination. The fact that Dr. Borden Colley “felt” that she was being profiled is not the test. It is an objective test. Inferences must be drawn from objective facts. This is not an easy task.
62. Board Chair Benjamin Perryman in *Gray v Halifax-Dartmouth Bridge Commission*, 2024 CanLII 69158, put it well at paragraph 74:

Human rights case law recognizes there is often limited direct evidence of racial discrimination. The “connection” or “factor” played by race in a particular distinction may be inferred from the surrounding circumstances. Relevant considerations include whether the respondent’s conduct was abnormal, disproportionate, discourteous, or inexplicable.

[...]

In summary, the board must be satisfied, on a balance of probabilities, that there was a "connection" between race or colour and the impugned distinction or that race or colour was a "factor" in the distinction. Race or colour does not have to be the only explanation for the distinction, but it must be more likely than not that there was a sufficient link between race or colour and the distinction.

63. As put some years earlier by Board Chair Crawford in *Ibrahim v. Dartmouth Volkswagen*, 2002 CanLII 78182 (NS HRC):

[77] Direct evidence of discrimination is very seldom present in enabling a complainant to prove discrimination. The comment at paragraph 38482 in *Basi v. C.N.R.*, (1988), 1988 CanLII 108 (CHRT), 9 C.H.R.R. D/5029 (C.H.R.T.) is most helpful in explaining whether or not a complainant has

been able to prove that an explanation is pretextual by inference from what is, in most cases, circumstantial evidence:

"Discrimination on the grounds of race or colour are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurrence. In a case where direct evidence is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is at issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analyzed and scrutinized in the context of the situation in which it arises" [*Kennedy v. Mohawk College* (1973) (Ont. Bd. Inq.) (Borons) [unreported]].

64. Applying these principles, I must be satisfied that there is evidence that allows an inference to be drawn that Dr. Borden Colley's sex or colour was a factor in how she was treated on that occasion. This rightly includes being prepared to say that unconscious biases were behind the treatment.
65. But there must be something in how she was treated that is different from how others were treated.
66. Human Rights law does not prohibit clumsy or overly solicitous sales behaviour. Staff including E were given instruction on how to approach customers who are "just browsing" and communicate that they would like to be left in peace to do so. The Respondent admits that browsing customers present a higher risk for shoplifting.
67. As such, salespeople walk a tightrope between too much and too little attention to be paid to a browsing customer. With too little attention the customer may feel ignored or not valued. A sale could be lost from a customer who felt unvalued. Too much attention may make the customer feel pressured or not trusted to walk the floor freely. The better salespeople strike the right balance that remains helpful but respectful of the customer's space. It is all too easy for the salesperson to be seen to have erred on one side or the other, depending on how it is perceived by the individual customer.

68. It is my assessment that there is nothing in the evidence from which an inference can be drawn that Dr. Borden Colley's sex or colour was a factor in how she was treated on that occasion. E was following the policy which represented management's expectation.
69. None of this is to deny the prevalence of racist views and the harms that they perpetuate. Not that there is any evidence here to that effect, but it is not a violation of Human Rights law to hold conscious or even unconscious beliefs that are racist or sexist, so long as those biases are held firmly in check and do not motivate differential treatment.
70. A lot of attention was placed in the evidence and the submissions on how the Respondent and store staff responded to Dr. Borden Colley and how they conducted their investigation. It is suggested that they were dismissive or disrespectful.
71. I do not agree. On the occasion in question, Dr. Borden Colley came in and confronted the three staff members with accusations about being racially profiled. Might they have reacted a bit defensively? Perhaps, but understandably. They were three young sales representatives responding to an obviously upset customer and would probably have benefited from having a manager on duty.
72. At the corporate level, the Source sprung into action and launched a thorough and professional investigation. All appropriate steps were taken.
73. But these events are beside the point. Either there was racial profiling or there wasn't.

74. This is not a contest of credibility. Dr. Borden Colley can be believed when she says she “felt” that she was being profiled. But was that a legitimate perception? Or did she misread the situation?
75. As someone who had been racially profiled in the past, though not at this store, her antennae were clearly up and she was more likely to be uncomfortable with the level of scrutiny that she was experiencing. But E and The Source had no duty to treat her differently; they had a duty to treat her the same as they treated all customers.
76. As well meaning and sincere as Dr. Borden Colley appears to be, I find that her evidence does not make out a *prima facie* case that The Source (or any of its staff) made a *distinction, whether intentional or not, based on a [protected characteristic] ... that has the effect of imposing burdens, obligations or disadvantages on [her] ... not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society.*

Adverse effect discrimination

77. I must also consider the arguments advanced by the Commission concerning adverse effect discrimination, which is defined by the Supreme Court of Canada in *Ont. Human Rights Comm. v. Simpsons-Sears*, 1985 CanLII 18 (SCC), [1985] 2 SCR 536 (the “O’Malley decision”) as arising:

... where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.

78. The Nova Scotia Court of Appeal, in *Canadian Elevator Industry Welfare Trust Fund v. Skinner*, 2018 NSCA 31, at para 36, commented that:

For the purposes of the Act, discrimination embraces both direct and indirect discrimination. Indirect discrimination occurs where otherwise neutral policies have an adverse effect on groups or individuals, based on enumerated grounds in the Act.

79. The Commission refers to a specific policy document (Ex. 6 - Tab 3) entitled “Retail Threats” which has a section that identifies “Characteristics of Thieves” as potentially offending the Act. The policy identifies numerous potential characteristics of ostensible shoppers who may have an intention to shoplift, such as shopping in groups, wearing bulky out of season clothing, rude behaviour etc.

80. Though it does not explicitly identify race or colour, says the Commission, it nevertheless demands employees follow protocol and, as a result, it innocently causes an employee to access its “database of stereotypes.” The Commission refers to the words of Ontario Appeal Court Justice Doherty in *R. v. Parks*, 1993 CanLII 3383 (ON CA), cited in *Symonds*:

... A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Blacks are among the primary victims of that evil."

81. In the present case, the Commission states its adverse discrimination theory as follows:

There is no question the Source created a policy to address theft and expected employees to follow that procedure. [Employee E] did exactly what his employer expected him to do: follow policy/protocol. The policy at issue in this case demands employees profile customers and, as a result, it unlocks or call into play their unconscious bias.

82. One needs to consider the above words of the Commission carefully. Indeed, there was a policy – “Retail Threats” created by the Store, which the Commission referenced. In theory, following some of the policy directives in the “Retail Threats” policy might have provided an employee the opportunity to “access his or her database of stereotypes”.
83. But this is irrelevant for two reasons:
- a. The evidence is that the Source’s employees didn’t actually read the Retail Threats policy. Ms. Barnard testified that the Retail Threats policy was a reference document on the internal server that Sales Associates were not trained on and were not required to read.
 - b. The policy that the employee actually followed here – which involved keeping customers in view - was that set out in the very different Loss Prevention guideline.
84. The Loss Prevention policy doesn’t ask the employee to profile customers – i.e. to determine how to treat a customer based on particular characteristics – but simply directs that any customer be kept in view while in the store. The evidence is that employee E simply did as the policy directed. He kept Dr. Borden Colley in view and offered assistance when invited to. There is no evidence that he or other employees opted to keep some customers in view but not others. To the contrary, the evidence indicates that the Preventing Threats policy was applied uniformly. Such uniformity is the opposite of profiling.
85. There is no evidence that Dr. Borden Colley was treated differently from other Source customers after the Retail Threats policy came into effect. However, as she likely was not aware of the Retail Threats policy and might have shopped at the Source before the policy was implemented, it is possible that Dr. Borden Colley intuitively felt that being “kept in view” was a discriminatory act that only a person of her background would experience.

But from the standpoint of the employer and its employee the evidence is that the Policy itself had a non-discriminatory aim (reducing theft), was meant to be applied even-handedly, and was so applied by E and his fellow employees. Accordingly, neither the employees nor their employer acted inappropriately with respect to Dr. Borden Colley.

86. The loss prevention policy expressly disclaims the existence of any “single type of customer to identify as a shoplifter.” Assuming E was being mindful of any such policy, he was not being directed to profile customers but to be attentive to behaviours.
87. It is totally speculative to suggest that E was acting as he did to any degree because of unconscious biases, in the absence of any evidence that he treated Dr. Borden Colley differently from how he might have treated any other customer.
88. These arguments also lose sight of the fact that the complaint is not that The Source has discriminatory policies; it is that the Complainant asserts that she was racially profiled by one particular employee. It must stand or fall on the evidence of what occurred on that day, no matter what corporate policies were in existence.

Conclusion

89. In the result, I find no objective basis to hold The Source or any of its employees liable for having profiled Dr. Borden Colley. As such the Complaint must be dismissed.

Eric K. Slone, Board of Inquiry Chair