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

and

IN THE MATTER OF: Board File No. 51000-30-H05-1860

BETWEEN:

Y.Z.
("Complainant")

- and -

Halifax Regional Municipality
("Respondent")

- and -

The Nova Scotia Human Rights Commission
("NSHRC")

DECISION OF THE BOARD OF INQUIRY ON LIABILITY

The Complainant, Y.Z., hereinafter referred to as "Y.Z." filed a complaint against the Respondent, Halifax Regional Municipality, hereinafter referred to as "HRM" on July 13, 2006.

An agreed statement of facts was entered into by the parties and is **Exhibit "1"** to this Board of Inquiry. The agreed statement of facts set out the events which led to Y.Z's complaint.

I. INTRODUCTION

1. Procedural History

The Board of Inquiry was referred to the Board Chair on October 13, 2014. A hearing in relation to a proposed publication ban was heard on December 2, 2013 and a decision was rendered on October 30, 2014. The publication ban is still in existence and a copy of the Order is attached as a schedule to this decision for ease of reference. Requests were made for Y.Z. to attend for an independent orthopedic medical examination, which was scheduled for June 23, 2015. This created a further delay in the commencement of the hearing of the Complaint. Further, the Board of Inquiry was rescheduled to deal with the outstanding disclosure issues. There was further delay created when counsel for HRM made application

to have certain current and former employees of the Respondent named as individual Respondents to the proceeding. As a result of this motion, dates were scheduled to deal with the motion to add additional parties on January 22, 2016. This motion was denied and an oral decision was rendered on the record. The Board of Inquiry dates were scheduled for February 9 – 12, 2016, March 7 – 10, 2016, April 10 – 22, 2016, and June 13 – 15, 2016. Further, Board of Inquiry dates were scheduled for September 19 – 21, 26 and 27, 2016, October 19, 20, 25 – 27, 2016, November 9, 15 – 17, 21 and 25, 2016, and March 22 and 23, 2017.

2. *Agreed History*

Y.Z. is __ years of age ___ ___ and had been employed with Metro Transit maintenance department as a mechanic since November 5, 1979 by the predecessors of HRM.

From September 1, 2000 to the present, the terms of Y.Z.'s employment at Metro Transit have been governed in part by the terms of collective agreements between HRM and the Amalgamated Transit Union Local 508 (the "Union").

Y.Z. was unable to work at Metro Transit from about June 22, 2004 until July 30, 2006.

On June 5, 2000, Dave Buckle, an Inuit, was hired as a mechanic to work at the Metro Transit Maintenance Department. About 6 years later, Dave Buckle left Metro Transit to work as a mechanic in the Transport and Public Works Department of HRM.

In October, 2000, Randy Symonds, an African Canadian, was hired as an employee in the parts department ("Stores") of Metro Transit.

On November 5, 2000, ___ , the wife of Y.Z. made a written complaint to Paul Beauchamp alleging rude behavior of Arthur Maddox towards her on the phone on October 26, 2000.

Mr. Hartlen's notes of November 6 and 7, 2000 record that he received ___ complaint from Paul Beauchamp on November 6, 2000 and that on November 7, 2000, Arthur Maddox "assured us he was not rude and there was definitely not racial intent".

Arthur Maddox was terminated on the 2nd day of May, 2001, because of an incident involving Randy Symonds.

On April 17, 2002, HRM and the Union notified staff of the settlement by a memorandum dated April 17, 2002, under the terms of which Arthur Maddox was reinstated effective April 30, 2002.

As a result of recommendations made in the Fleet Transfer Services, Operational Review 2002 Summary Report, on May 8, 2002 and September 28, 2002, HRM posted mechanics

positions for the Metro Transit Maintenance Department at 200 Ilsley Avenue, Dartmouth designated for African Canadian candidates.

In 2003, Della Risley, as a result of complaints made by David Buckle, Y.Z. and Randy Symonds to the Mayor's office, prepared a written report concerning their allegations of discrimination in the workplace.

On January 16, 2004, Mr. Beauchamp sent [redacted] a letter in response to her November 2000 complaint. This response was after a complaint to the Mayor's Office by Randy Symonds was internally investigated by Della Risley and her May 14, 2003 and June 10, 2003 reports specifically recommended that Mr. Beauchamp give a written response to [redacted] complaint. The January 16, 2004 letter from Mr. Beauchamp stated that "we took your complaint on Arthur's conduct to him and appropriate action was taken."

On October 24, 2005 Y.Z. filed an intake form with the Nova Scotia Human Rights Commission complaining of discrimination at HRM Metro Transit Maintenance Department related to race, colour or aboriginal origin of persons with whom he associated.

On July 13, 2006, Y.Z. filed a formal complaint with the Nova Scotia Human Rights Commission against HRM Metro Transit Maintenance Department alleging discrimination related to race, colour or aboriginal origin, of persons with whom he associated.

Y.Z. returned to work at Metro Transit on light duties from July 31, 2006 until about January 17, 2007, in an attempt to rehabilitate himself back in to the workplace.

Y.Z was unable to resume his full duties as a mechanic and he has been unable to work at all from January 19, 2007 to present time.

Y.Z. has been receiving non-taxable Long Term Disability benefits effective from January 19, 2007 to the present time under Policy 901855 of the Maritime Life Assurance Company. The Manufacturers Life Insurance Company is the successor insurer, which has been paying him these benefits.

3. *The Complaint*

Y.Z. filed his formal complaint on July 11, 2006. It is found at **Tab "B"** of the Exhibit "2" to the Board of Inquiry. In it, he alleges the following:

a) Over the past several years his co-workers had made degrading and racially discriminatory comments against African Nova Scotians and other minorities;

b) The situation became more racially intolerant in 1999 when his supervisor became Burkley Gallant;

c) The situation further deteriorated with the hiring of David Buckle;

d) The situation worsened with the hiring in October of 2000 of Randy Symonds, an African Nova Scotian;

e) There was an incident on October 26, 2000 between Y.Z.'s wife, ___ who identified as being African Nova Scotian, and Arthur Maddox;

f) In October 2001, after the firing of Mr. Maddox, the Union held a vote of the membership to determine whether or not it would challenge his dismissal, and on that same weekend the vote was held, a message appeared on the men's bathroom wall, which stated "all minorities not welcome, show you care, burn a cross" and it was signed "a member of the Baby Hitler";

g) Y.Z. and his wife, _____ were not used as witnesses to testify in relation to an arbitration concerning Mr. Maddox. Mr. Maddox returned to work after being terminated;

h) Mr. Maddox tried to run Y.Z. over with a bus;

i) Y.Z. was provided with jobs which were more difficult and more time consuming than other mechanics in his workplace;

j) Y.Z. was not provided with a 1" tire impact gun on or about November 9, 2003;

k) Despite having raised concerns about racism in the workplace, there was no response back from the Respondent;

l) On November 18, 2003, Y.Z. made a formal complaint to IIRM, which resulted the mediation that was facilitated by the then Deputy Chief of Police, Chris McNeil;

m) Because of a stressful work environment, Y.Z. went off on Long Term Disability at the end of May, 2004.

Y.Z's complaint was filed prior to the amendment of the *Human Rights Act* limiting the complaint period to one year prior to the date the complaint was filed.

It was the evidence of Y.Z. that his role as a support person for David Buckle, his marriage to ___ who identifies as African Nova Scotian, and his role as a support person for Randy Symonds, resulted in him being discriminated against in the workplace. Further, it was the evidence of Y.Z. that working in the racially poisoned work environment of Metro Transit resulted in the breakdown in his mental and physical health.

Y.Z. filed a complaint alleging that he was discriminated against based on his association with individuals, of race, colour, and of aboriginal origin. The formal complaint form cites sections 5(1)(d)(i)(j)(o)(q) and (v) of the *Act,* which states:

> No person shall in respect of employment, shall discriminate against an individual or class of individuals on account of race, colour, ethnic, national or aboriginal origin, or that individual's association with another individual or class of individuals having characteristics referred to in clauses H to U.

2. LEGAL PRINCIPLES

a. The Onus and Degree of Proof

The Complainant, Y.Z., bears the burden of proving on a balance of probabilities that a *prima facie* case of discrimination has occurred. To do so, the Complainant must prove three elements: (1) that he has a protected characteristic; (2) a distinction, exclusion, adverse impact or preference; and (3) a connection between (1) and (2) i.e. the protected characteristic was a factor in the differential treatment or adverse impact. Importantly, the third requirement is met even if it is only one of a number of relevant factors or connections, even if it is just a "small" factor behind the allegedly discriminatory conduct.

The Board of Inquiry in ***Brothers v. Black Educators' Association***, 2013 CanLii 94697 stated:

> 19. Therefore, it is not necessary for a claimant in a human rights proceeding to prove that discrimination was the only reason for an employer's behaviour, or that it was a dominant reason for the employer's action. It is enough to prove discrimination if the whole of the evidence persuades me, as the Board of Inquiry, that discriminatory thinking in relation to any of the identified grounds was a factor in the sense **that it contributed in a real way to the decision or behaviour in issue.** (Emphasis added.)

The Respondent, HRM, may offer a non-discriminatory explanation of the alleged discriminatory actions. If the justifications provided by HRM are enough to question whether the protected characteristic is a factor, so that it falls below the balance of probabilities, then the complaint should be dismissed. However, if the Board finds that some or all of the allegations of discrimination are true, given all the circumstances, the test is met and a finding of discrimination may be made (subject to the respondent justifying their decision on the basis of one of the exemptions provided in the legislation).

What I must determine is whether or not the Complainant, Y.Z., suffered a burden, obligation or disadvantage in respect to his employment with HRM, because of a prohibited ground in the *Act*, because of his association with an individual or class of individuals of a particular race, colour or ethnic national or aboriginal origin.

In ***Moore v British Columbia (Education)*** 2012 SCC 61 (CanLii) the prohibited ground of discrimination was mental or physical disability with respect to the "service" of education. The case involved the need for accommodation of a special needs student suffering from dyslexia, so that he could access a general education program available to the public. The Supreme Court of Canada at paragraph 33 of the decision, described the three elements of a *prima facie* case of discrimination as follows:

> As the Tribunal properly recognized, to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they have experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, the discrimination is found to occur.

In ***Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc. (Bombardier Aerospace Training Center)*** 2015 SCC 39 (CanLii) at paragraph 31, the Supreme Court of Canada noted that the Quebec *Charter of Human Rights and Freedoms* and other provincial human rights legislation are to be given a "liberal, contextual and purposive interpretation" and interpreted in a manner consistent with other provincial human rights legislation, unless a legislature clearly intends otherwise. The ***Bombardier*** statement of the elements of a *prima facie* case of discrimination, has been applied by our Court of Appeal to the Nova Scotia *Human Rights Act*, in ***Nova Scotia Liquor Corporation v Nova Scotia (Board of Inquiry)***, 2016 NSCA 28 (CanLii) at paragraph 43-47:

> [43] Similar definitions appear in the other legislative schemes across the country. There has been ample opportunity for courts to consider the content and application of the statutory definitions of discrimination. The parties cite *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (CanLII) as the most recent statement of the test for discrimination in the human rights context. Although considering the Quebec Charter of Rights, the principles contained therein have broad applicability.
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> [44] In *Bombardier*, Justices Wagner and Côté succinctly set out a three-part test for a finding of discrimination:
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> > [35] First, s. 10 requires that the plaintiff prove three elements: "(1) a 'distinction, exclusion or preference', (2) based on one of the grounds listed in the first paragraph, and (3) which 'has the effect of nullifying or impairing' the right to full and equal recognition and exercise of a human right or freedom" (*Forget*, at p. 98; *Ford* , at pp. 783-84; *Devine v. Quebecj (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790, at p. 817; *Bergevin*, at p. 538).

> [36] If these three elements are established in accordance with, the degree of proof we will specify below, there is "*prima facie* discrimination". This is the first step of the analysis.

[45] They then proceeded to consider the content of the elements required to establish a prima facie case of discrimination. With respect to the obligation to establish differential treatment, the Court noted:

> 42. . .The plaintiff must prove the existence of differential treatment, that is, that a decision, a measure or conduct "affects [him or her] differently from others to whom it may apply": *O'Malley*, at p. 551. This might be the case, for example, of obligations, penalties or restrictive conditions that are not imposed on others: *ibid.*; see also *Andrews*, at pp. 173-174.

[46] Justices Wagner and Côté then addressed competing views advanced with respect to the third element. Must a commission or complainant show a "causal connection" between a prohibited ground and the differential treatment experienced, or did it suffice that the ground was a factor in the objectionable treatment? They concluded that requiring a causal relationship was problematic, preferring terms such as "factor" or "connection":

> 49 In a recent decision concerning the *Human Rights Code*, R.S.O. 1990, c. H.19, the Ontario Court of Appeal found that it is preferable to use the terms commonly used by the courts in dealing with discrimination, such as "connection" and "factor": *Peel Law Assn. v. Pieters*, 2013 ONCA 396 (Can.Lii), 116 O.R. (3d) 80, at para. 59. In that court's opinion, the use of the modifier "causal" elevates the test beyond what is required, since human rights jurisprudence focuses on the discriminatory effects of conduct rather than on the existence of an intention to discriminate or of direct causes: para . 60. We agree with the Ontario Court of Appeal's reasoning on this point. Moreover, this Court used the term "factor" in a recent decision concerning British Columbia's human rights code: *Moore*, at para. 33.
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> ...
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> 51 A close relationship is not required in a discrimination case under the Charter, however ; to hold otherwise would be to disregard the fact that, since there may be many different reasons for a defendant's acts, proof of such a relationship could impose too heavy a burden on the plaintiff. Some of those reasons may, of course, provide a justification for the defendant's acts, but the burden is on the defendant to prove this. It is therefore neither appropriate nor accurate to use the expression "causal connection" in the discrimination context.
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> 52 In short, as regards the second element of *prima facie* discrimination, the plaintiff has the burden of showing that there is a connection between a

> prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains or, in other words, that the ground in question was a factor in the distinction, exclusion or preference. Finally, it should be noted that the list of prohibited grounds in s. 10 of the Charter is exhaustive, unlike the one in the *Canadian Charter*. *City of Montreal*, at para. 69.
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> [47] Justices Wagner and Côté were careful however, to confirm that the move away from causation terminology did not equate to a burden of proof less than the balance of probabilities (para. 55 and 56).

Bombardier stands for the following propositions:

(a) the adverse effect or differential treatment need not be based solely on the prohibited ground of discrimination – the prohibited ground need only have <u>contributed</u> to it (Para. 48);

(b) a complainant need <u>not</u> prove a "causal relationship" or "causal connection" or a "close relationship", and terminology suggesting such should be avoided. As there may be many different factors contributing to a defendant's acts, it would place too heavy a burden on a complainant to require a "causal" or "substantial" relationship (Para 50-51);

(c) a complainant need only prove that the prohibited ground was a "factor" in, or "connected" to the adverse impact or differential effect (Para. 49-50 and 52).

In ***Stewart v. Elk Valley Coal Corp.***, 2017 SCC 30 (CanLii), Stewart worked in a mine operated by Elk Valley Coal Corporation driving a loader. The mine operations were dangerous, and maintaining a safe worksite was a matter of great importance to the employer and the employees. To ensure safety, the employer implemented a policy requiring that employees disclose any dependence or addiction issues before any drug related incident occurred. If they did, they would be offered treatment. However, if they failed to disclose and were involved in an incident and tested positive for drugs, they would be terminated.

Stewart used cocaine on his days off and did not tell his employer that he was doing so. He tested positive for drugs and later said that he thought he was addicted to cocaine. His employer terminated his employment. Stewart through his union representative argued that he was terminated for addiction and that constituted discrimination under section 7 of the Alberta *Human Rights, Citizenship and Multiculturalism Act*.

The Alberta Human Rights Tribunal held that Stewart was terminated for breaching the policy, not because of his addiction. Its decision was affirmed by the Alberta Court of

Queen's Bench and the Alberta Court of Appeal. The decision was ultimately appealed to the Supreme Court of Canada.

Then Chief Justice McLachlin wrote the majority decision. The issue she considered was whether or not there was a change in the test for proving *prima facie* discrimination. She stated at paragraphs 45 and 46 of the majority decision:

> [45] First, I see no basis to alter the test for *prima facie* discrimination by adding a fourth requirement of finding of stereotypical or arbitrary decision-making. The goal of protecting people from arbitrary or stereotypical treatment or treatment that creates disadvantage by perpetuating prejudice is accomplished by ensuring that there is a link or connection between the protected ground and adverse treatment. The existence of arbitrariness or stereotyping is not a stand-alone requirement for proving *prima facie* discrimination. Requiring otherwise would improperly focus on "whether a discriminatory attitude exists, not a discriminatory impact", the focus of discrimination inquiry: *Quebec (Attorney General) v. A*, 2013 SCC 5 (CanLii), [2013] 1 S.C.R. 61, at para. 327 (emphasis in original). The tribunal expressly noted that proof of arbitrariness and stereotyping was not required, at para 117.
>
> [46] Second, I see no need to alter the settled view that the protected ground or characteristic need only be "a factor" in the decision. It was suggested in argument that adjectives should be added: the ground should be a "significant" factor, or a "material" factor. Little is gained by adding adjectives to the requirement that the impugned ground be "a factor" in the adverse treatment. In each case, the Tribunal must decide on the factor or factors that played a role in the adverse treatment. This is a matter of fact. If a protected ground contributed to the adverse treatment, then it must be material.

b. What is a Poisoned Work Environment?

Even though our *Act* does not explicitly deal with what has been termed as "poisoned work environment", it is well established that the atmosphere of a workplace can ground a finding of discrimination in the same manner as discriminatory treatment with respect to hiring, work allocation, or other aspects of employment.

In ***Dhillon v F. W. Woolworth Co.***, 1982 CarswellOnt 4024 (Ont BOI) ("***Dhillon***"), ***Dhillon*** made allegations of racial discrimination and harassment in a warehouse distribution centre, specifically against East Indian employees. There was (not all of which were accepted as proven by the Board) racist graffiti in the bathrooms; an incident where an employee was run into by a truck; widespread use of racial epithets and swearing; unfair work distribution in that lighter jobs were given to white employees over East Indian employees; and a lack of response by management to the issues of discrimination raised by employees.

The Board accepted that racial name-calling was widespread throughout the warehouse and held that the atmosphere that resulted for East Indian employees in and of itself constituted discrimination:

> 79 Verbal racial harassment, through name-calling, in itself, is in my view prohibited conduct under the Code. The atmosphere of the workplace is a "term or condition of employment" just as much as more visible terms of conditions, such as hours of work or rate of pay. The words "term or condition of employment" are broad enough to include the emotional and psychological circumstances in the workplace. There is a duty on an employer to take reasonable steps to eradicate this form of discrimination, and if the employer does not, he is liable under the Code. I find on the evidence that the Respondent (its management knowing of the racial name-calling problem) did not take reasonable steps to eradicate such form of discrimination toward the East Indian employees.
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> [...]
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> 81 The Ontario Human Rights Code, Revised Statutes of Ontario, 1970, Chapter 318, as amended, provides:
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> 4. (1) No person shall,
> (g) discriminate against any employee with regard to any term or condition of employment...because of race... of such person or employee.
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> 81 This clause expressly prohibits the imposition of more, or less, onerous duties of employment on employees according to their race. Likewise, it explicitly prohibits the differential distribution of the rewards of employment to employees according to their race. In my view, paragraph 4(1)(g) should also be interpreted as a prohibition against un-welcomed racist remarks made by employers or other employees, the words "term or condition of employment" being broad enough to include the emotional and psychological circumstances in the workplace. An employee may be found to have been discriminated against even though that discrimination did not take a visible form in the employee's hours of work, duties, advancement, or pay cheque.
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> [...]
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> 112 As I have said, verbal racial harassment, through name-calling, in itself, is in my view prohibited conduct under the Code. The atmosphere of the workplace is a "term or condition of employment" just as much as more visible terms or conditions, such as hours of work or rate of pay. The words "term or condition of employment" are broad enough to include the emotional and psychological circumstances in the workplace. There is a duty on an employer to take reasonable steps to eradicate this form of discrimination, and if the employer does not, he is liable under the Code. I find on the evidence that the Respondent (its management knowing of the racial name-calling problem) did not take reasonable steps to

> eradicate such form of discrimination toward the East Indian employees, and specifically, toward the Complainant.

In ***Cromwell v Leon's Furniture Ltd.***, 2014 CarswellNS 331 (NS BOI) ("***Cromwell***"), the complainant alleged that she was disciplined more harshly and frequently, as a result of her race, than other employees at the same level of employment. The Board concluded that her race was a factor in this treatment even though not all of the comments she was exposed to were overtly racialized and that "the on-going negative commentary in the workplace constituted a form of discriminatory harassment based on race" (para 294).

Adverse treatment based on race may be proven or inferred from a pattern of objectionable behaviour that poisons the work environment or establishes harassment. The "nature, frequency and severity" of the objectionable behaviour should be considered in determining whether there is harassment or a poisoned work environment. Depending on the nature and severity of the objectionable behaviour, an isolated incident may not be sufficient, but this is a factual determination in each case.

It has been clear since the decision of the Supreme Court of Canada in ***Robichaud v. Canada (Treasury Board)*** (1987) S.C.J. No. 47 that an employer is obligated to provide a work environment which is free from prohibited discrimination and that an employer is liable to impacted employees when a discrimination free environment is not provided. The Supreme Court in ***Robichaud*** used the phrase "poisoned work environment" to describe work environment tainted with prohibited discrimination:

> 11 ....the central purpose of a Human Rights Act is remedial - to eradicate anti-social conditions without regard to the motives or intention of those who cause them.
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> 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 [page 94] 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.
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> MacGuigan J's comment equally applies to an order to make available the rights denied to the victims under para. (b). Who but an 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. ..... 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.
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> 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 .....
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> 18 In the light of these conclusions, it is unnecessary for me to examine the allegations that the Crown would, in any event, be directly liable for management's failure to adequately investigate Robichaud's complaints, thereby perpetuating the poisoned work environment. At all events, this too involves the acts of employees.
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> [Emphasis added]

In ***Janzen v Platy Enterprises Ltd*** 1989 CanLII 97 (SCC), the Supreme Court of Canada used words like "intimidating", "hostile", "offensive" and "detrimentally affect[ed]" to describe a work environment tainted by discrimination rather than the word "poisoned". At p. 25 of the internet report, the Court in ***Janzen*** stated:

> I am in accord with the following dictum of the United States Court of Appeals for the Eleventh Circuit in *Henson v Dundee*, quoted with approval in the *Meritor Savings Bank* case:·
>
> > Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest racial epithets.
>
> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as

> unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. (emphasis added)

In ***Naraine v Ford Motor Company of Canada*** (Ont. Bd. of Inquiry) (1996) 27 C.H.R.R. D/ 230 (No. 4) (Ont. Bd. Inq.) aff'd (1999) 34 C.H.R.R. D/ 405 (Ont. Gen. Div.) aff'd except regarding reinstatement (2001) 41 C.H.R.R. D/ 349 (Ont. C.A.) leave to appeal denied [2002] S.C.C.A. No. 69; Professor Backhouse throughout her decision used the term "poisoned work environment" to describe the racialized workplace of skilled tradesman working at the Ford auto plant in Windsor, Ontario. Her finding of a "poisoned work environment" was based only on evidence of racial slurs and racial graffiti in the workplace.

Professor Backhouse in ***Naraine*** at p. 26 refers to an early line of cases which declined to recognize that racial slurs alone were unlawful if for example, there was only evidence of one racial slur or for example, if the board characterized the verbal racial abuse as "shop talk within the plant" for which the employer was not responsible unless the racial abuse became "a condition of the employment situation" and something "more than personal interplay between the employees."

Professor Backhouse in ***Naraine*** at p. 27 states:

> Our case can be distinguished from these earlier decisions, since the racial slurs and graffiti at Ford were so widespread and continuous as to become a "term or condition of employment," something that even these earlier boards recognized could constitute unlawful conduct. However, counsel for the Commission requested that this board do more than distinguish the current case. She argued that I should expressly decline to follow these early decisions on the basis that the adjudicators did not appreciate fully the impact that words can have in fomenting and solidifying racial discrimination in the work place. I agree with this. It is intellectually dishonest to continue distinguishing this earlier line of authority based on factual differences. In fact, name-calling and graffiti should be recognized for their inherent, detrimental impact on racial equality in the labour force. (Emphasis added)

This was explicitly acknowledge in *Dhillon v F. W. Woolworth Co. Ltd* (1982), 3 C.H.R.R. D/743 (Ont. Bd. of Inq.) at D/760:

> Verbal racial harassment, through name-calling, in itself, is in my view prohibited conduct under the *Code*. The atmosphere of the workplace is a "term or condition of employment" just as much as more visible terms or conditions, such as hours of work or rate of pay. The words "term or condition of employment" are broad enough to include the emotional and psychological circumstances in the workplace. There is a duty on the employer to take reasonable steps to eradicate this form of discrimination, and if the employer does not, he is liable under the Code.

In ***Smith v. Menzies Chrysler***, 2009 HRTO 1936 (CanLII) ("***Smith***") the Human Rights Tribunal of Ontario on November 13, 2009 at para. 151, stated:

> The purpose of section 7(2) of the Code is to protect employees from sexual harassment and this includes inappropriate sexualization of the workplace. Human rights jurisprudence has long accepted that the "emotional and psychological circumstances in the workplace" which underlie the work atmosphere constitute part of the terms and conditions of employment: see *Dhillon v. F. W. Woolworth Co.* (1982) 31 C.H.R.R. D/ 743 (Ont. Bd. Inq.) at para. 6691 and *Moffat v. Kinark Child & Family Services* (1998) 35 C.H.R.R.D/ 205 (Ont. Bd. Inq.) ("*Moffatt*"). It is well settled law that the prohibition against discrimination in s. 5(1) affords employees the right to be free from a poisoned work environment in relation to Code-protected grounds. If sexually charged comments and conduct contaminate the work environment, then such circumstances can constitute a discriminatory term or condition of employment contrary to both section 5(1) and 7(2) of the Code: see *Cugliari v. Telefficiency Corporation* 2006 HRTO 7 (CanLII) and *Moffatt*, supra. (Emphasis added)

In ***Gough v C.R. Falkenham Backhoe Services***, 2007 NSHRC-4, Chair Hodder stated at paragraphs 64-68 of the decision:

> 64. I find that Mr. Gough has made out a *prima facie* case of discrimination based on race and colour. I find that Mr. Gough's race was an operative element in the conduct of his employer Falkenham and his co-workers towards him. In analyzing the totality of the evidence presented at the Inquiry I find that racism was present in the Falkenham workplace. The evidence of Keven Shaw was detailed and credible regarding many of the specific instances of racism to which Mr. Gough testified. Mr. Shaw clearly stated that he heard racist comments being made in the workplace and that racist comments were directed towards Mr. Gough. Mr. Shaw is still employed at Falkenham and continues to work with the employees whose testimony he contradicted. He had nothing to gain from testifying at this inquiry. I find that Mr. Shaw's testimony to be compelling and where it conflicts with the testimony of John MacNeil, Glen Pierce and Angela Falkenham, I prefer the evidence of Mr. Shaw.
>
> 65. The burden now shifts to Falkenham to show that its actions and the actions of its employees were not discriminatory. I find that Falkenham has not demonstrated any rational or credible justification for the conduct of its employees. As mentioned earlier in this decision, the attempts to characterize some of the racist comments as being phrases from old English were contrived and quite frankly offensive. I find that Falkenham has not demonstrated that its employees' actions were not discriminatory.

66. On a number of occasions Falkenham employees testified that "nobody meant anything" by the comments and that there of joking around in the construction industry.

The Irrelevance of Intention

67. It is settled law that intention is not a factor meriting consideration in Human Rights Law.

68. In the Nova Scotia racial discrimination case, *Downey v. Metropolitan Transit Commission*, [1991] N.S.H.R.B.I.D. No. 1, the Board reaffirmed the irrelevance of intention in Human Rights Law stating at p. 6:

> "Finally, a most important and significant reason not to require 'intention' is the Human Rights Legislation itself. The Act is remedial. It is not designed to punish or suggest moral turpitude. It is designed to prevent discrimination, both direct and systemic."

As Board Chair I must consider the evidence and determine if it is more probable than not that race and association based on race can be inferred as the reason or part of the reason for the differential treatment of the Complainant, and, also, whether the Complainant's work life was impacted by his reasonable perception of discrimination. The Board must consider whether the Complainant's assessment of the situation was reasonable under the circumstances.

c. Discrimination Based on Association

In ***Hill v Misener***, 1997 CarswellNS 590 (NS 801) (***"Misener"***), the complainant alleged discrimination on account of her association with African-Canadians, when a potential landlord told her that he would not rent an apartment to her if she was going to have people there who were black. The landlord did not know that the complainant's children were African-Canadian when he made the statement, but the Board determined that there had been discrimination on account of association in any event:

> 53 I find it is not necessary for Mr. Misener to have actual knowledge of Ms. Hill's association with African-Canadians in order to find he discriminated against her on the basis of her association with African-Canadians contrary to the provisions of the Nova Scotia Human Rights Act. My reasons are the following.
>
> 57 The definition of the Nova Scotia Human Rights *Act* specifically excludes the need for intention. The opening of Section 4 states "for the purposes of this *Act* a person discriminates where the person makes a distinction, whether intentional or not, ...". To find that Mr. Misener had to have actual knowledge of Ms. Hill's association with "coloured people" in order to find that he discriminated against he would impart a level of intent that is not required by the Act.

> 58 If Mr. Misener had to have actual knowledge of Ms. Hill's association with "coloured people" it would place far too high a burden on association discrimination cases. Furthermore, it would be contrary to the spirit of the Act. Mr. Misener overtly and directly stated the condition upon which his apartment was available to rent to individuals. There was nothing subtle about his statement. This is exactly the type of discrimination which the *Act* attempts to prevent. To find that this is not discrimination because Ms. Hill did not subsequently advise of her association with "coloured people" would be contrary to the spirit and intent of the legislation. [Emphasis added]

Misener suggests that establishing discrimination on account of association is no more complicated than establishing, first, that the complainant has an association with someone that falls under a prohibited ground, and second, that the complainant had a burden imposed upon him or her as a result of that association.

Carrying this analysis over to the present matter, allegations of a poisoned work environment and racial harassment should be treated no differently. To establish a *prima facie* case under this framework, Y.Z. must prove that he suffered a burden from the allegedly poisoned environment and racial harassment (or HRM's failure to investigate and respond to complaints of discrimination) because of his association with his wife and other minorities. As per ***Misener***, complicating the analysis more than this would not be consistent with the remedial purpose of the *Act*, which is to be interpreted liberally.

*d. **Duty of the Employer to Reasonably Investigate***

Much of Y.Z.'s complaint turns on HRM's alleged unresponsiveness to issues of discrimination that were raised by him and others on various occasions and HRM's alleged failure to discipline employees responsible for the inappropriate behaviour.

It is well established that implicit within the right to discrimination-free employment and a harassment free workplace, is an obligation on employers to take reasonable steps to ensure that these rights are not compromised.

A leading case on an employer's duty in this regard is ***Laskowska v Marineland of Canada Inc.***, 2005 HRTO 30 ("***Laskowska***"), which involved a human rights complaint based on sexual harassment. Specifically, the complainant alleged that her complaint of sexual touching was not reasonably responded to by her employer and therefore her rights under the Ontario Human Rights Code were infringed. Although the case involved an instance of sexual harassment as opposed to racial harassment, the underlying analysis remains the same in either instance.

The Tribunal held that not imposing a positive duty of investigation on an employer would make the human rights granted under the Ontario Code "hollow". It went on to explain the approach that should be taken when considering an employer's response to complaints of

harassment on account of a prohibited ground, which includes six criteria of "corporate reasonableness":

> [51] Subsection 5(1) of the Code provides that "Every person has a right to equal treatment with respect to employment without discrimination because of...sex." The Tribunal and the courts have included in that right, such things as the right to a discrimination-free environment, or a non-poisoned workplace, even though it does not explicitly state that in the concisely worded general anti-discrimination provision of subsection 5(1). From that general workplace anti-discrimination clause flows other obligations, such as the duty not to condone or further a discriminatory *Act* that has already occurred (see *Payne*) and the duty on an employer to investigate a complaint of discrimination.
>
> [52] I agree with Vice-Chair Laird's statement in *Moffat v. Kinark Child and Family Services*, [1998] O.H.R.B.I.D. No. 19, at para. 234:
>
> > Human rights jurisprudence has established that an employer is under a duty to take reasonable steps to address allegations of discrimination in the workplace, and that a failure to do so will itself result in liability under the Code: *Dhillon v. F. W Woolworth Company* (1982), 3 C.H.R.R. D/743; *Olarte v. DeFilippis and Commodore Business Machines Ltd.* (1982),3 C.H.R.R. D/1705; *Persaud v. Consumer 's Distributing Ltd.* (1990), 14 C.H.R.R. D/23.
>
> [53] It would make the protection under subsection 5(1) to a discrimination-free work environment a hollow one if an employer could sit idly when a complaint of discrimination was made and not have to investigate it. If that were so, how could it determine if a discriminatory act occurred or a poisoned work environment existed? The duty to investigate is a "means" by which the employer ensures that it is achieving the Code-mandated "ends" of operating in a discrimination-free environment and providing its employees with a safe work environment.
>
> [...]
>
> [58] Having determined that the Code is engaged here and that Marineland owed a duty to Ms Laskowska to reasonably and adequately respond to the alleged incident of August 13, 1999, I turn now to an analysis of whether Marineland discharged that obligation.
>
> [59] The six criteria of corporate "reasonableness" in Wall have been adopted in previous decisions of the Board of Inquiry. I adopt a conflated version of them. The criteria are:
>
> (1) Awareness of issues of discrimination/harassment, Policy, Complaint Mechanism and Training: Was there an awareness of issues of discrimination and harassment in the workplace at the time of the incident? Was there a suitable

anti-discrimination/harassment policy? Was there a proper complaint mechanism in place? Was adequate training given to management and employees;

(2) Post-Complaint: Seriousness, Promptness, Taking Care of its Employee, Investigation and Action: Once an internal complaint was made, did the employer treat it' seriously? Did it deal with the matter promptly and sensitively? Did it reasonably investigate and act; and

(3) Resolution of the Complaint (including providing the Complainant with a Healthy Work Environment) and Communication: Did the employer provide a reasonable resolution in the circumstances? If the complainant chose to return to work, could the employer provide her/him with a healthy, discrimination-free work environment? Did it communicate its findings and action to the complainant.

[60] While the above three elements are of a general nature, their application must retain some flexibility to take into account the unique facts of each case. The standard is one of reasonableness, not correctness or perfection. There may have been several options - all reasonable - open to the employer. The employer need not satisfy each element in every case in order to be judged to have acted reasonably, although that would be the exception rather than the norm. One must look at each element individually and then in the aggregate before passing judgment on whether the employer acted reasonably. [Emphasis added]

The corollary of this analysis from ***Laskowska*** was concisely summarized by the Tribunal in ***Toop v Canadian Union of Public Employees***, 2014 HRTO 145:

[122] What is clear from its origin in the employment area is that the duty to investigate is not a free-standing obligation under the Code. Rather, it is the means by which an employer ensures that it is complying with its obligation to provide a discrimination-free work environment under s. 5(1) of the Code.

[123] As a corollary of that, when the Tribunal finds that a respondent breached the Code by failing to investigate, it is really finding that by failing to investigate, the respondent has failed in its obligation to provide a discrimination-free workplace (or by extension, perhaps, a discrimination-free service experience). [Emphasis added]

In other words, there does not have to be a finding of underlying discrimination to find liability against an employer under human rights legislation. A failure to properly respond to allegations of discrimination in the workplace can lead to liability on an employer because addressing allegations of discrimination in the workplace is part and parcel of providing a discrimination-free workplace, whether a complaint of discrimination in any given case will bear out or not. If no investigation is conducted, it is much harder to assess whether a complainant's rights to discrimination-free employment were upheld.

The Board of Inquiry in ***Cromwell*** found that the duties set out in ***Laskowska*** had not been satisfied and, as such, the employer should not escape liability for the differential treatment of the Complainant or the work environment that she had been exposed to:

> 268 The Respondent is under an obligation to provide a healthy work environment and that includes ensuring that its employees are not subjected to discriminatory comments at work-related social functions, whether by other employees or guests. The law is clear in this respect. (See, for example, the *Laskowska* decision referenced at a later point in these reasons).
>
> 391 For the above reasons, I have concluded that the Complainant was subjected to discriminatory comments and differential treatment by the Respondent. The Respondent is liable under the Human Rights *Act* for the actions of its employees, as was held in Robichaud. It was appropriate for the Respondent to have investigated the allegations. I acknowledge that an investigation ought not to be held to a standard of perfection. However, the manner in which the complaint was investigated and concluded fails to meet a fundamental level of reasonableness in the circumstances. There was also a lack of awareness respecting discrimination in the workplace that contributed to what occurred. The Respondent, therefore, cannot avoid liability on the basis of its response to the complaint. [Emphasis added]

e. Vicarious Liability

In ***Gough v C.R. Falkenham Backhoe Services***, 2007 NSHRC-4, Chair Hodder made the following findings at paragraphs 70-74 of the decision:

> 70. It is well established that employers are liable for the discriminatory acts of their employees because only employers have the ability to provide a harassment-free working environment. In the decision of the Supreme Court of Canada, *Robichaud v. Canada (Treasury Board)* [1987] 2 S.C.R. 84, the Court discussed an employer's liability for the discriminatory acts of its employees in the context of providing a workplace free from discrimination. Given that Human Rights Legislation is remedial, it is important that the entity which has the ability to address and eliminate discriminatory conduct to be held liable. The Court held:
>
> > "...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...
> >
> > ... I would conclude that the Statute contemplates the imposition of liability on employers for all acts of their employees ... 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. ...
>
> ... 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. ... 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.

71. A poisoned work environment may constitute discrimination under the Act. In *Hinds v. Canada Employment and Immigration Commission* [1988], 10 C.H.R.D. No. 13, a complaint dealing with racial harassment, the Tribunal held that an employer is not obligated to maintain a "pristine working environment", however:

> "... There is a duty upon an employer to take prompt and effectual action when it knows or should now of a co-employees' conduct in the workplace amounting to racial harassment. ... To satisfy the burden upon it, the employer's response should bear some relationship to the seriousness of the incident itself. ... To avoid liability, the employer is obligated to take reasonable steps to alleviate, as best it can, the distress arising within the work environment and to reassure those concerned that it is committed to the maintenance of a workplace free of racial harassment." (p. 8).

72. Furthermore, even if an employer is unaware of the discriminatory acts of its employees, it is not absolved from liability for that individual's discriminatory conduct. In *Smith v. Zenith Security and Investigation Limited*, [2002] B.C.H.R.T.D. No. 25, the employer claimed to be unaware of the discriminatory conduct of his employee. The Tribunal relied on *Robichaud, supra*, to find the following at para. 32:

> "I accept that Mr. Steffanson may not have known anything about the individual Respondent's conduct towards Ms. Smith. However, Zenith is not absolved from liability for the individual Respondent's conduct towards Ms. Smith due to the failure of Zenith staff to tell him about it. Employers are vicariously liable for discriminatory acts of their employees because only employers have the ability to provide a harassment-free working environment.

73. The three basic elements that must be satisfied if an employer is to avoid liability were set out by the Tribunals in *Francais v. C.P. Rail* (1985), 9 C.H.R.D./4724 which was adopted by the Tribunal in *Hinds, supra*, as follows:

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

74. The law is clear. Falkenham is liable for the discriminatory conduct of its employees against Mr. Gough. I find that Angela Falkenham was aware of the discriminatory conduct of Falkenham's employees towards Mr. Gough.

f. Credibility and Reliability

One of the most frequently-cited passages concerning the assessment of witness credibility comes from the British Columbia Court of Appeal in ***Faryna v Chorney*** [1952], 2 DLR 354:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of its consistency with the probabilities that surround the currently existing conditions.
>
> In short, the real test of truth of the story of a witness in such as case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and long and successful experience combining skillful exaggeration with partial suppression of the truth.
>
> Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

A more recent statement of the well-established factors for assessing witness credibility has been articulated by the Alberta Court of Queen's Bench at paragraph 70 of ***Leach v Canadian Blood Services***, 2001 ABQB 54:

> 1. The witness's evidence should be the first considered on a "stand alone" basis. In this regard, [the trier of fact should consider] factors such as firmness, memory, accuracy, evasiveness, and whether the witness's story is inherently believable.
>
> 2. If the witness's evidence survives the first test above, the assessment moves on to a comparison of that witness's evidence with the evidence of others and documentary evidence.

> 3. Finally, the court must determine which version of events, if conflicting versions exist, is most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions."

There is, as well, a distinction between credibility and reliability. The Honourable Justice Doherty in ***R. v. Morrisey***, 1995 Carswell ONT 18 (ONCA) stated:

> 33 Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness' sincerity, that is his or her willingness to speak the truth as the witness believes it to be true. The latter concerns relate to the actual accuracy of the witness' testimony. The accuracy of a witness' testimony involves considerations of the witness' ability to accurately observe, recall and recount the events in issue. **When one is concerned with a witness' veracity, one speaks of the witness' credibility. When one is concerned with the accuracy of a witness' testimony, one speaks to the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest, witness may, however, still be unreliable**. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination. (Emphasis added)

In ***Naraine v Ford Motor Company of Canada*** (Ont. Bd. of Inquiry) (1996) 27 C.H.R.R. D/ 230 (No. 4) (Ont. Bd. Inq.) aff'd (1999) 34 C.H.R.R. D/ 405 (Ont. Gen. Div.) aff'd except regarding reinstatement (2001) 41 C.H.R.R. D/ 349 (Ont. C.A.) leave to appeal denied [2002] S.C.C.A. No. 69, at p. 11, Professor Backhouse said the following about credibility:

> ... Given the inconsistency in testimony, it has been necessary to make many assessments of credibility. Counsel for all parties were diligent to point out the inconsistencies in the testimony, often asserting that inconsistency was fatal to credibility. I do not think that this is necessarily determinative in every case. Other factors, such as demeanor, may occasionally be more compelling than absolutely consistent description and recall. Some witnesses may vary the words and phrases they choose to describe their experiences and yet be fundamentally accurate about the crucial aspects of the events in question. Other witnesses may tell exactly the same story in exactly the same terminology over and over again, and yet be constructing complete fabrications.

In ***Naraine*** Professor Backhouse accepted the credibility of Mr. Naraine regarding the core elements of this evidence and at p. 17 described Mr. Naraine's testimony as follows:

> Mr. Naraine testified that during his time at Ford, he experienced continuous racial harassment in the form of racial graffiti, slurs, comments and "jokes".

Giving this testimony was extremely difficult for Mr. Naraine, who was forced to stop frequently, his voice breaking with emotion. He was reduced to tears as he described how angry and ashamed he had been. It is also fair to say that Mr. Naraine was not a witness who found it easy to communicate his thoughts verbally. Counsel for the Respondents seized upon this, arguing that Mr. Naraine was not a credible witness in part because of the incoherence of his replies and wavering responses to various questions.

3. THE EVIDENCE

a. The Walter Dominix Years

It was the evidence of Y.Z. that prior to commencement of his work at Metro Transit in 1979, he began living with his wife, ' ' At the time of the wedding he was working night shifts at Metro Transit. Y.Z. made a request a week in advance of his wedding day to Walter Dominix, his general foreman, to have the night of his wedding off by permission. It was the evidence of Y.Z. that Mr. Dominix did not grant his request, the result of which was he had to find someone else to work his shift, and he had to pay them for working the shift. It was the evidence of Y.Z. that getting time off to get married was typically not a problem. It was the evidence of Y.Z. that after his marriage to his wife, ' ' who Mr. Dominix knew was black, his treatment by Mr. Dominix became different.

In cross examination Y.Z. stated that Mr. Dominix would have seen his wife, ' ' dropping him off at work for two years prior to their wedding date. He also acknowledged receiving a letter, being **Exhibit "28", Tab "1"**, where he was reprimanded for not coming to work after being denied a request to be off by permission in May of 1982.

There was evidence from other witnesses on the difficulty of obtaining time off by permission from Mr. Dominix. Steve Gillis, a former superintendent in the Maintenance Department, testified that when he asked Mr. Dominix for time off for his wedding, he was told to see Mr. Dominix a week in advance at which time he was given four of the seven days that he requested.

Albert Burke was a former storesman supervisor at Metro Transit. He had worked under Mr. Dominix for a time. His evidence was he did not have any issue with Mr. Dominix aside from some difficulty getting some time off to be best man at a wedding. Mr. Burke's evidence was that Mr. Dominix told him he could not tell him whether he was authorizing the time off until the day before, which resulted in Mr. Burke taking a vacation week to ensure that he would be able to attend.

It was the evidence of Y.Z. that he did not get promotions and receive training that he felt he was entitled to while he was supervised by Mr. Dominix. It was his evidence that he had to fight to obtain training authorized by Mr. Dominix, but he could not provide any specifics. As well, he could not provide any details of being denied any promotions. The only example that Y.Z. could provide was a circumstance in which Ray Brushett received a day time job

that he believed he was entitled to, because he had been working there longer than Mr. Brushett. His evidence given on June 15, 2016 at page 40 of the transcript, suggests the reason why he didn't get the position and Mr. Brushett did was "Walter Dominix liked him more so than me". It was noted, as well, on cross examination that Mr. Dominix had been sending him warning letters about his attendance at work over a twelve-year period according to the letters. Y.Z's health issues pre-date his wedding, although Y.Z.'s explanation for his poor attendance was because he was being treated differently and unfairly, and that it "makes you sick. It makes you off sick". (Transcript, June 15, 2016, page 57 – 58).

It was Y.Z.'s evidence that Shapir Bhathena was promoted under Mr. Dominix to a foreman, and that "Shapir snuck into that position otherwise he would never have got that position as supervisor" (Transcript, June 15, 2016, page 100). However, there was no other evidence led to support the proposition that Mr. Bhathena got the job over Y.Z because of a violation of the Act.

b. The 508 Club Incident

Cathy Martin is currently a buyer for Procurement at Metro Transit. She was employed as the store rooms' clerk at the Ilsley Avenue location from 1992 until 2000. She then became a buyer. Ms. Martin's evidence was that she ceased working at Ilsley Avenue in 2010 when she moved to another Metro Transit facility. She attributes this move partially to the behaviour against fellow employees based on race (Transcript, March 7, 2016, pages 168-169)

Cathy Martin testified that she was friends with Y.Z. and his wife, and attended events outside of work with them, including a funeral, dances at Strawberry Hill in Halifax, with other employees from Metro Transit; and visited Y.Z.'s trailer at a camp ground, and other social events.

Ms. Martin described one particular event in the late 1990's, which was a barbeque put on by the "508 Club" at a mechanic's home in Dartmouth. The "508 Club" was a club which existed outside of work, for unionized Metro Transit workers. There was a fee paid to be a member of the social club. Ms. Martin, who was a member of the club, attended with her husband and invited Y.Z. and his wife, to attend with them.

has black skin and has a Band Status Card. Her mother was a member of Acadia First Nation and identifies her own and her father's race as African Nova Scotian

It was the evidence of Ms. Martin that she heard Mr. Maddox comment loudly towards Y.Z. and his wife "who invited those people here?... We don't want those kind of people here, they weren't invited". (Transcript, March 8, 2016, page 403). It was the evidence of Ms. Martin that Y.Z. and his wife left after the comment was made, and Ms. Martin interpreted the comment as meaning that Mr. Maddox did not want anyone of "colour" at the party.

Y.Z.'s evidence concerning this incident was very similar to that of Ms. Martin. Further, the evidence of his wife, , in describing the 508 barbeque was very similar to that of Ms. Martin, although she did state in addition to the comments attributed to Arthur Maddox by Cathy Martin, that Mr. Maddox stated "blacks are not welcome". did not know who Arthur Maddox was, but testified that he was identified for her by her husband, Y.Z. Arthur Maddox in his evidence denied that this incident occurred, however, there are serious issues with the credibility of Mr. Maddox, which will be addressed later in this decision.

c. – *The Phone Call Incident*

Y.Z.'s wife, _____, testified about an incident which involved her trying to leave a phone message for her husband, Y.Z, at Metro Transit. This incident occurred after the barbeque incident. She needed to reach him. She called Y.Z. on Burkley Gallant's phone, who was Y.Z.'s supervisor at the time, which was located in his office. She stated that Mr. Maddox answered the phone and was rude with her on the phone. His tone of voice was loud and aggressive. wrote a letter of complaint to Paul Beauchamp, who was a supervisor at Metro Transit, about the incident, which is found at **Exhibit "2", Tab "8"**. She stated in this incident occurred on Thursday, October 26, 2000. She said the message for Y.Z. was important. She said Arthur Maddox answered the phone with a "what", in a loud and aggressive tone of voice. She paused and asked if she could speak to Y.Z. Her evidence was that he replied "No" she stated that she responded to him "No" and then he replied "he's busy". She asked him to get Y.Z. to call his wife at work please and then he responded "in a moment". ended up contacting her friend, Cathy Martin, who passed the message on to Y.Z.

Steve Liddard provided an Affidavit stating that he was present in the office during the call. Arthur Maddox and Burkley Gallant gave evidence that Burkley Gallant was not present during the call. It was evidence that Burkley Gallant usually answered the telephone in his office. testified that the phone call incident was racist, because of her experience with Arthur Maddox at the barbeque. Her evidence was that Arthur Maddox said at the barbeque "Blacks were not welcome" (Transcript, April 19, 2017, page 40).

Although Mr. Beauchamp told Y.Z. to tell his wife that Arthur Maddox had been terminated, there was no formal follow up by Paul Beauchamp with in relation to the complaint until four years later.

Y.Z. testified that:

> Q. I – I believe you gave some evidence that when Arthur Maddox was terminated that Mr. Beauchamp told you to tell Ms. … that Mr. Maddox had been terminated?
>
> A. Yeah. He stopped me in front of Burkley Gallant's office that day and told me to – he said, "Tell your wife I hope she's happy that Arthur Maddox is

– is – been fired." So then I was at the fountain there so then he turned around and then he turned right back around again and he made the comment – he said "I wanted him gone – terminated, but Mike Hartlen fought to keep him – to keep his job" and then he went to…

Q. Okay.

A. …down towards his office.

Q. So I – I take it that it would be fair to say you interpreted that Mr. Beauchamp telling you to tell Ms that part of the resolution of the phone call was in his termination?

A. Well to me it was but it wasn't – it wasn't the…

Q. It wasn't a letter to her but it was a communication with you to tell her?

A. Well it's a poor way to do it

There was a letter received by after the release of the Risley Report, which was two years after the event. The letter dated January 16, 2004 was signed by Paul Beauchamp and it stated "we took your complaint to Arthur… and appropriate action was taken".

d. The Bus Incident

Y.Z.'s position was in paragraph 11 of his Complaint, that Mr. Maddox "blamed me and my wife for his dismissal. That I believe that this was an attempt to get revenge".

Y.Z testified that Arthur Maddox tried to run him over with a bus on October 10, 2002. This was Y.Z.'s first day back to work following a workplace injury, and after Arthur Maddox had been reinstated.

It was the evidence of Y.Z. that he was standing at the back of the garage on the back of the 10 and 11 lines (near the exit door while clear of any buses) watching the parking lot for a mechanic who was coming to pick up his truck. His evidence was that he looked and saw a bus "aimed right for" him. Mr. Maddox was driving the bus. Y.Z. testified that "it appeared to be that he was going to run me over so I jumped out of the way, I jumped back, jumped out of the way. He went by me, I can remember him going by me and then I can remember him laughing, laughing and I felt the wind of the bus as at went by".

Y.Z. testified that he reported the incident to Mike Hartlen that morning. He also testified that Mike Hartlen did not investigate the complaint.

In cross examination Y.Z. acknowledged that he may not have been looking towards the lane where Mr. Maddox drove through with the bus while standing in the garage. He further acknowledged that he could not prove the incident happened and there is a good possibility that Mr. Maddox could not have been able to veer straight at him, if he was driving a larger bus.

Y.Z. admitted that a standard forty-foot bus maneuvering through two sets of doors would be able to complete an arc, but not a swerve towards him. Because of the distance of the bus and the area in the garage, there was not enough room for the bus to change its path and swerve at Y.Z. Y.Z. also admitted in his evidence that he should have seen the bus coming through the door, he was not paying attention. Y.Z. testified that he did not see the bus coming through the first set of doors, he did not know whether or not or to what extent it might have veered in his direction, and it was unlikely, based on the evidence of the distance in the bays and the length for a bus to actually be able to swerve towards him to hit him.

In cross examination Y.Z. stated that he did not hear a horn being sounded as the bus was going through the exit door, nor did the bus stop at the exit door (Transcript, April 22, 2017, page 143). He also testified that it was a 500-series bus that was purchased in British Columbia, which is a smaller bus and would have been able to swerve at Y.Z. within the garage.

Arthur Maddox testified about the alleged bus incident and denied that he tried to run Y.Z. over with the bus, or tried to scare him with the bus. He further testified that the first time that he heard the allegation was in 2014 when he received Y.Z.'s complaint for the first time.

Mike Hartlen testified that he had no recollection of the alleged incident where Mr. Maddox tried to run Y.Z. over with the bus.

Della Risley testified about the bus incident. Her evidence was that Y.Z. disclosed this incident to her and she believed that Y.Z. "genuinely believed that Mr. Maddox was trying to hit him". Her evidence was that she concluded that Mr. Maddox had been attempting to scare Y.Z. because she did not have Mr. Maddox's side of the story. Ms. Risley testified that her report would have been better if she had recommended that this allegation be investigated. She wrote in her report (Exhibit "2", tab "21", page 31):

> ... That Y.Z. has possibly been subjected to some retaliation from Arthur Maddox for his... support of diversity in HRM. In this regard I am thinking of the incident in which Mr. Maddox swerved the bus he was driving towards Y.Z. in an apparent effort to frighten Y.Z.

In 2003, as part of Della Risley's investigation and subsequent report, Mike Hartlen was given the date of November 2002 as the time of the bus incident. He was asked to check his records. Mike Hartlen reported to Della Risley that he had no memory of being told about the incident by Y.Z. and that he could not find any records of being told about it.

Steven Gillis gave evidence about the types of buses in rotation at HRM at the time of the incident, being Exhibit 37. It was his evidence that at the time the 500 series British Columbia buses were a standard length of forty feet. Metro Transit records supported that there were some thirty-foot commuter buses in service at that time. Mr. Gillis also gave evidence concerning the bus garage area, being Exhibit 36, and photographs of the garage, being Exhibits 38 and 39. It was Mr. Gillis' evidence that based on the size of the buses that were in use at the time, and based on the measurements within the garage, that it was not physically possible for Mr. Maddox to attempt to run Y.Z. over with the bus. It should be noted that although Mr. Gillis did testify in a straightforward manner, he certainly does not have any particular expertise to substantiate those conclusions other than a common-sense analysis.

e. Wet Paper Towel Incidents

Y.Z. testified that when he was using the toilet at work and, in particular, was there for a long period of time because of his health issues, that wet paper towels were thrown over the cubicle at him. He alleged that this occurred for racist reasons.

f. Mediation with Burkley Gallant and Conducted by Chris McNeil – Workplace Rights Complaint

On or about January 12, 2004, Y.Z. filed a workplace rights complaint, a copy of which is found at **Exhibit "2", Tab "1b"**. In it, Y.Z. alleged that he was harassed by his supervisor, Burkley Gallant, and that there was unfair distribution of work within his shop. In particular, he was given more difficult "dirty" work to complete. Most of the allegations in the workplace rights complaint dealt with issues that were addressed in the Della Risley Report. However, there was an added allegation that Y.Z. did not get a tire impact gun on or about November 18, 2003, when other individuals in his shop were receiving them. Burkley Gallant made the decision as to who would receive the tire impact guns. Y.Z. kept a record of who was being assigned what work on a daily basis from November 19, 2003 until December 18, 2003. Because of his complaints about how Burkley Gallant treated him, Scott Sears took over as Y.Z's foreman on or about December 8, 2003; however, in his complaint Y.Z. alleged that he observed Mr. Sears and Mr. Gallant confer on December 17, 2003 over work assignments.

It was the evidence of former Deputy Chief of Police, Chris McNeil, that he was appointed to conduct a 2004 investigation and mediation of the workplace rights complaint. The focus of Y.Z.'s allegation was in relation to unfair work distribution, specifically against Mr. Gallant.

Laura (Gay) Nolan was tasked with organizing the statistical analysis of the work assignments in the Brake Shop. She was assisted in this task by Steve Gillis, who obtained the information from internal records, as to the assignment of and frequency of brake jobs versus other types of work. Laura (Gay) Nolan in 2004 was employed as a Labour Relations Specialist in the Human Resources Department of HRM and was assigned to the Police

Department. She became a Senior Human Resource Consultant in April 2003, and had previously worked with Mr. McNeil on investigations.

It was the evidence of Mr. McNeil that the Brake Shop was a very challenging work environment, and upon his review of the Della Risley Report, it was clear to him that the front-line supervisors did not fully appreciate or understand their role in workplace rights. It was his evidence that the supervisors saw the role as more passive than what he did. In particular, they thought the role was to report things up the chain of command, and it was Mr. McNeil's position that the front-line supervisors had a responsibility to intervene immediately. It was also his evidence that supervisors did not feel supported by management. He noted a lack of training for front line supervisors and a gap between supervisors and management, which required additional training to fill.

It was the evidence of Y.Z. that he felt pressured and coerced into signing the mediated agreement prepared by Laura (Gay) Nolan and mediated by Chris McNeil between himself and Burkley Gallant. Y.Z. gave detailed evidence of the devastating emotional impact and stress that he experienced by participating and signing of that mediation, and the after affect that the conclusion of the mediation had on him after he left where the mediation was conducted. However, the only evidence that Y.Z. has to support his view of how he was treated by Mr. McNeil in the mediation process was his own. Chris McNeil clearly denied any attempt to coerce or bully Y.Z. into signing the mediated agreement. Laura (Gay) Nolan's notes were part of the Inquiry record and she testified, as well. Ms. Nolan listened to the mediation and made contemporaneous notes during the meeting from an adjoining room. Her notes and testimony do not confirm Y.Z.'s version of events.

Burkley Gallant testified at the Board of Inquiry about the Workplace Right's complaint filed by Y.Z. It was his evidence that everybody got as equal work as he could give out, and that Y.Z. did not get more dirty work than anyone else. Mr. Gallant stated that the only explanation that he got from Mr. Hartlen for the switch between himself and Scott Sears was that Y.Z. wanted to be in the Brake Shop without Mr. Gallant as his supervisor.

In relation to the 2004 mediation, it was Mr. Gallant's evidence that he did not recall Ms. Gay being present. He recalled Y.Z. being "calm and receptive" during the mediation and there was nothing out of the ordinary about Y.Z.'s composure when the Agreement was signed. He did not recall Y.Z. wanting to leave the mediation. Mr. Gallant did not remember Y.Z.'s interaction with Mr. McNeil during the mediation, but testified that Y.Z. and Mr. McNeil had gone into a room by themselves before the Agreement was signed at the end of the day. He also stated that Y.Z. and Mr. McNeil had lunch together without Mr. Gallant.

g. Lug Nut Incident

Y.Z. filed a Workers' Compensation Board accident report on June 27, 2004, found at Exhibit "2", Tab "62". He alleged an injury to his back and neck, shoulders and back, and cited injuries due to emotional stress due to his ongoing work situation. WCB on July 19,

2004 advised HRM about Y.Z.'s allegations that a lug nut was thrown at him at the work place. Mike Hartlen in a written response to WCB advised that he heard that "one of the worker supervisors had said that the worker had said that a co-worker was throwing wheel nuts. When he asked the worker to pursue it further the worker did not want to".

Mike Hartlen in his evidence had no recollection of the incident.

The evidence of Y.Z. found in the transcript of April 22, 2017 at page 247 was:

> But I can remember working away working on the front part of the bus the next thing I know bang, off the wall, something bangs off the wall, hit the side of the bus and just misses my head.

Y.Z. further stated:

> Yes I took the wheel nut, the exact one that someone throw and took it right down to Mike Hartlen's office and gave it to him and told him what happened, explained to him what happened (Transcript, April 22, 2017, page 248).

This incident occurred after the work place rights complaint. It was Y.Z.'s evidence that he was working on ten hoist in the Preventative Maintenance Shop.

There is no evidence as to who threw the lug nut and what the motivation was for doing so.

h. Garbage on Work Bench

Y.Z. testified that on various occasions his work bench was covered with garbage, which was similar to what was being done to Mr. Buckle. His evidence was these occurrences coincided with his various meetings with HRM. He testified that if something was going on racially usually he or Mr. Buckle were being targeted (Transcript, June 13, 2016, pages 124-126). It was his evidence that he did not report these incidents, because at that point it was "a waste of his time complaining, because they, being HRM, were not doing nothing anyway" (Transcript, September 19, 2016, pages 26-27).

i. David Buckle

David Buckle is a mechanic and is Inuit. He was hired on June 5, 2000 at the Ilsley Avenue location on the night shift. He worked there until January of 2007. Mr. Buckle left his job at Metro Transit in 2007 for a number of reasons, one being having a better opportunity to have a day shift, but primarily he left because of the work environment.

In his evidence Mr. Buckle stated that a number of incidents occurred which he took exception to. He also stated that he was a known associate of Y.Z. in the workplace, even though they worked different shifts. They would speak at shift change over.

The first incident, which was on his first night shift, involved Wayne Swinimer who said "so you're the f-ing new guy". "And he kind of gave me the Miranda Act right there as to how things were ran... and that I dare not step out of that line" (Transcript of Evidence, March 9, 2016, pages 493-494).

The second involved Mr. Buckle's on the job training. His evidence was that the training he received was inadequate because the person training being, Everett Cleversey "more or less walked away" (Transcript, March 9, 2016, pages 510-511).

Mr. Buckle testified that his tool box was damaged by a ball-pein hammer and he had a dinky truck glued to it. He also testified as to a monster truck being glued to his work box with the word "quit" written on it (Transcript, March 9, 2016, pages 527-528).

Mr. Buckle testified that his own personal tools would go missing. Further, the air hose that the was supplied by HRM had razor blades slots cut into it by someone rendering it useless and the trouble light that he was given had part of it super glued together (Transcript, March 9, 2016 pages 524-525). Further, Mr. Buckle testified that there was writing on the bathroom wall stating "beware of the Buckle bus, perception is deception" (Transcript, March 9, 2016, page 531).

The last incident was in relation to Arthur Maddox, who made derogatory comments about his hair, which was long and was typically in a ponytail. When Mr. Buckle asked Mr. Maddox not to make the comments, Mr. Maddox started yelling and threatened to hurt him (Transcript, March 9, 2016, pages 536-538):

> So I was doing my write up and he looked over kind of like this and he said, "quite the do going on there this morning," referring to my hair. My ponytail or what not. I said to Arthur, "Arthur, I really don't – I really don't like that. You know that – the comments that you make." And with that he kind of just started yelling and by then Scott Sears had heard the – well he made sure that if you weren't deaf you would be by that – came out and he said, "the altercation," and he said "what's going on?" you know so I – I made the comment that – that Arthur had said this and told him what had happened and you know – I mean he was right in my face you know (Transcript, March 9, 2016, pages 536-537).

Mr. Buckle testified that he reported these incidents to his immediate foreman, Mike Hartlen, at the time they occurred. He also gave a statement to Rob Kirby regarding concerns of harassment and discrimination, being Exhibit "2", Tab "40". Mr. Buckle gave a statement to a Human Rights Officer, which he testified was true and accurate. He stated in that statement that he was concerned about retaliation from management for what he had said in the past.

Mr. Buckle testified that he was present at an incident at the Stores counter where Walter Seroul and Randy Symonds were having a conversation about coal mining and working

underground. Mr. Seoul stated "that was nigger work and for whops" (Transcript, March 9, 2016, pages 567-568).

Arthur Maddox testified about his relationship with Mr. Buckle. It was his evidence that he and Mr. Buckle's relationship was "pretty good up until the hairdo part". It was Mr. Maddox's evidence that he told Mr. Buckle that he had a "nice do". He testified, as well, that Mr. Buckle had "beautiful hair". Mr. Maddox denied threatening Mr. Buckle with violence, but he stated that he did not speak to Mr. Buckle again after he was suspended for this incident.

Cathy Martin testified that there was an incident which involved Danny Deal, a mechanic at Metro Transit. Mr. Deal stood on the floor in Preventative Maintenance and hollered for everyone to hear that he would not train "no good-for-nothing Indian". (Transcript, March 7, 2016, pages 257--258)

Y.Z. testified that around the time Dave Buckle was supposed to receive his training in the Brake Shop, Danny Deal and Steve Gillis said words to the effect of "I won't be training any fucking Indians". Further, it was the evidence of David Buckle, who showed Steve Gillis, his supervisor, the writing on the men's washroom wall "beware of the Buckle bus, perception is deception", that Steve Gillis told Mr. Buckle to clean the writing off the washroom wall. Mr. Buckle was not the cleaner.

Evidence was also given that some mechanics would describe a job done poorly or mistakenly as being "Buckled".

It was the evidence of Steven Gillis, as well, in relation to the comments made by Wayne Swinimer to Mr. Buckle, that similar type of comments had been made to him when he started work at Metro Transit. His evidence was that it was a union shop that a mechanic by the name of Carl Lewis said to him, as he was walking by the foreman's office, "and he abruptly stopped me in my tracks and said, 'you better slow down because you are making us look bad" (Transcript, October 20, 2016, pages 44–45). As well, Mr. Gillis testified that he did not refuse to train Mr. Buckle, that he had not heard anyone else saying that they would not train him. His evidence was that he trained Mr. Buckle on three or four different occasions, including helping him out on the shop floor after Mr. Gillis became a supervisor. In relation to the "Beware of the Buckle Bus" writing, it was Mr. Gillis' evidence that the incident occurred on night shift and there was no cleaner on duty. Therefore, employees would be expected to do their own cleaning (Transcript, October 20, 2016, pages 170–171).

Both Steve Gillis and Burkley Gallant testified that Mr. Buckle's work was not up to standard. In particular, Mr. Gallant stated that the expression "got Buckled" described a job left over from Dave Buckle (Transcript, April 20, 2016, page 173), and that the expression "got Buckled" was a reference to the fact that "because they would expect that things would be dirty, incorrect, that there would be problems with the job".

j. Randy Symonds

i. *Agreed Statement of Facts*

According to the agreed statement of facts, on April 29, 2001, Randy Symonds, an African Nova Scotian employee working in the parts department, complained to his supervisor Jim Burgess that on April 28, 2001, Arthur Maddox had threatened him with physical violence [the truth of this allegation was not admitted by HRM].

Copies of HRM Notes for the Maddox mediation/arbitration hearing and Mike Hartlen's notes of April 23 and 30 and May 2, 2001 formed part of the agreed Statement of Facts. Mike Hartlen's notes of April 30, 2001 record that Arthur Maddox admitted that he had threatened Randy Symonds with physical violence and that Arthur Maddox stated "I've been this way for X amount of years, I'm not changing the way I am."

Mike Hartlen's notes of May 2, 2001 record that Randy Symonds complained that he had many prior instances with Arthur Maddox using racial slurs and other discriminatory remarks, as many as six – seven times a week and that on at least one occasion Arthur Maddox had stated to Randy Symonds:

> "Why do we have you here? [insinuating that Randy who is a visible minority, doesn't deserve his job, and that his kind are not welcome here]"

Mike Hartlen recorded in a written statement signed by him on November 1, 2001, that on May 2, 2001, Mike Hartlen told Arthur Maddox that his employment was terminated effective immediately. The November 1, 2001 statement also recorded that on May 14, 2001, Shift Foreman Shapu (sic) Bhathena had stated that he was not present on April 28, 2001 during the incident between Arthur Maddox and Randy Symonds, but Mr. Bhathena had heard Arthur Maddox state at lunch that day:

> Racism, racism, should be a law that you can shoot somebody and get away with it

On May 9, 2001, Mike Hartlen, Maintenance Supervisor, signed a letter to Mr. Maddox, confirming the termination of his employment effective May 2, 2001.

Mr. Maddox filed a grievance against the termination of his employment. The grievance of Mr. Maddox was settled at a mediation hearing on April 16, 2002 and confirmed by a mediation award dated April 19, 2002.

The May 14, 2003 Report of Della Risley at p. 11, states that on October 24, 2001, Mike Hartlen emailed Shapir Bhathena about rumors Mike Hartlen had heard about an incident on the weekend between mechanics Ray Brushett, Paul Lapierre, Dave Randle on one part and Randy Symonds, stores employee, on the other and another incident between Shapir Bhathena, mechanics foreman and Randy Symonds.

The October 24, 2001 email response from Mr. Bhathena stated in part:

> Yes Mike, as you hear things so do I. The only thing I can do is be nutral (sic) and be with them at the counter as much I can and then things don't happen.

Randy Symonds died on Monday, January 15, 2007 and on Wednesday January 17, 2007, the Halifax Mail Star published a newspaper article regarding Randy Symonds.

ii. *Evidence – Cathy Martin*

Cathy Martin testified about her observations concerning Mr. Symonds. She stated that he was African Nova Scotian and worked as a Stores Room Clerk. In fact, he took over her job when she went to the supervisor position. She stated in her direct evidence:

> Q. How did Randy Symonds appear at an emotional level about how he felt about how he was treated at Metro Transit?
>
> A. He couldn't believe that in the professional workplace that we were working in that he could be subjected to the type of environment of being treated with disrespect, bullied, and racist slurs sent against him right from the beginning of his time being there, and to the point of not accepting him to be there.
>
> The work environment became – leading up to before Randy came to work there it became a very poisonous environment. And so they didn't – some of the people that worked there didn't respect or accept diversity, and they made that well-known to different employees of different race and they discriminated against different races. (Transcript, March 7, 2016, page 160)

It was the evidence of Ms. Martin that Randy Symonds confided in her and she mentored him in his position as Stores Room Clerk.

It was the evidence of Ms. Martin that Mr. Symonds was "stressed", "emotionally upset" and "didn't know where to turn or what to do in order to eliminate this kind of behaviour towards him because he definitely wasn't doing anything to warrant this type of behaviour inflicted on him". Ms. Martin provided an example of what she observed with the treatment of Mr. Symonds from the beginning of his employment:

> Q. So can you try and just briefly summarize what type of mistreatment of Randy Symonds that you witnessed? Without getting into specific incidents and so on can you just kind of – is that possible for you to kind of give a...
>
> A. Well, right from the beginning I can remember – I'll use Arthur Maddox for one of the persons that – when we were introducing Randy to the different staff that would come – the different employees that would come to the counter

to interact and get their parts or ask whatever, we would introduce, you know, "This is our new employee, Randy," and one of the first things that Arthur said to him is, "How did you get the job here?" And in the line of, like – and also, "I suppose we're all going to end up getting one of you working here." That type of comment towards Randy. Like, didn't welcome him or anything like that. He said, "How did you end getting the job here?" "How did you get this job?"

Q. Okay

A. And in the line of, like "I suppose we all have to have one." Meaning black race in the workforce...

Q. Did you witness this particular incident?

A. Yes, I did.

It was Ms. Martin's evidence that she filed a grievance because of Mr. Maddox's behaviour. Further, Ms. Martin testified that certain individuals showed Mr. Symonds disrespect including Arthur Maddox, Steve Liddard, Danny Deal and Carl Hood. All of these individuals were mechanics. It was her evidence that they contributed to the "poisonous atmosphere" at Metro Transit. Further, it was Ms. Martin's evidence that the poisonous work environment escalated when Mr. Symonds started in the Stores Room in 2000.

iii. *Evidence of Stephanie Wright*

Ms. Wright is a former Stores Room employee at Metro Transit. She currently works at HRM as the administrative assistant to the manager of Corporate Fleet. Ms. Wright started working at Metro Transit in 1999 in the Stores Room and beside Ms. Martin. It was the evidence of Ms. Wright that Mr. Maddox would come to the Stores Room counter and say "get me that part boy". This was a comment made by Mr. Maddox to all of the Stores Room employees; however, Mr. Symonds took the comments more personally because of his race. It was the evidence of Ms. Wright that Mr. Symonds told her about "Baby Hitler" graffiti on the bathroom wall and that "everybody was talking about it".

Ms. Wright described an incident where she spoke to Mr. Maddox in the hallway and Mr. Symonds came into the Store Room shut the door of the office and started yelling at her, and then smashed his fist into the inbox. Her evidence was that Mr. Symonds was sent home that day.

She also stated that Mr. Symonds was very paranoid about racial issues. She stated that his personality was not consistently stable. She described the way people were treated at Metro Transit as "normal everyday stuff". Her evidence was that although it "wasn't acceptable (she) didn't feel it had to do with race".

iv. *Evidence of Arthur Maddox*

Mr. Maddox testified that his relationship with Mr. Symonds was not the best and that he treated him the same as the other Stores Room counter personnel. Mr. Maddox admitted threatening Mr. Symonds with violence and he said that he had anger issues at the time. He stated he went over the counter at Mr. Symonds and Mr. Symonds crawled up into the fetal position in anticipation of the assault. He did not recall telling Mr. Symonds not to report him for being racist. Mr. Maddox stated that he could not recall stating "there should be a law that you can shoot someone and get away with it". He later testified that he could not say for sure "if he said it or not" (Transcript, November 15, 2016, page 23). It was Mr. Maddox's evidence that Mr. Symonds fabricated portions of Mr. Symonds' complaint in respect to this incident and including attributing to Mr. Maddox saying the words "suck me boy". Mr. Maddox stated, as a result of questions asked by the Board Chair, in his evidence that he did not think calling a black person "boy" had any kind of racial connotation to it.

v. *Evidence of Burkley Gallant*

Burkley Gallant, in his evidence, stated that the complaints about how quickly Mr. Symonds got parts for them, and he did comment "there is millions of parts in there, it takes a while for people to learn". He also stated that Walter Seroul used the word "nigger" in front of Mr. Symonds on or about August 11, 2002.

vi. *Evidence of Steve Gillis*

Mr. Gillis testified that on the weekends there was difficulty trying to get Mr. Symonds onto the Store Room counter. He also testified that although he never had any issues with him, there were times where there were issues with getting him to go to the Store Room counter to get parts.

vii. *Emails*

The Board of Inquiry did not have the benefit of hearing Mr. Symonds testify; however, a number of his emails were admitted as part of the evidence, and the appropriate weight to be assigned to them will be determined as part of this decision.

In an email of Randy Symonds dated April 14, 2001, he complained that Arthur Maddox repeatedly came to the counter and spoke to him in the manner of a stereotypical black "New York ghetto dweller".

There are a number of emails that were admitted into evidence between Randy Symonds and others in the workplace. I admitted the emails in a *voir dire* and I found that they were *prima facie* admissible and that the weight and purpose of admissibility were issues that I would

decide. The statements are as follows:

Exhibit "2", Tab "1", the report of Mike Hartlen;

Exhibit "2", Tab "21", the report of Della Risley, page 19, first paragraph;

Exhibit "2", Tab "22", email of Randy Symonds to Jim Burgess;

Exhibit "2", Tab "24", email of Randy Symonds to Albert Burke and Bill Hallowell;

Exhibit "2", Tab "27", email of Randy Symonds dated November 11, 2001;

Exhibit "2", Tab "28", email of Randy Symonds dated November 13, 2001;

Exhibit "2", Tab "29", report of Bill Hallowell, page 2, second last paragraph;

Exhibit "2", Tab "30", email of Randy Symonds to Dale MacLellan;

Exhibit "2", Tab "30", email of Randy Symonds dated November 8, 2002;

Exhibit "2", Tab "26", email of Paul Fleming to Randy Symonds;

Most, if not all, of the information contained in the above-noted exhibits are corroborated by other individuals. In relation to Exhibit "1", Tab "14", Mike Hartlen testified in relation to these notes. In relation to Exhibit "2", Tab "21", this is a first version of the Della Risley Report. Ms. Risley testified as to the preparation of the Report. Exhibit "2", Tab "22" is an email of Randy Symonds to Jim Burgess which sets out the incident which resulted in Mr. Symonds being discharged. The description of the assault that Randy Symonds provided in his email to Jim Burgess is as follows:

> ...Arther Maddox comes to the counter and we makes eye contact and immediately says to me **suck me boy, suck me boy' (twice)**. Rather calmly, I asked Arthur why is it whenever you come to the counter, why do you always have to have something ignorant to say to me and said to Arther that I wanted him to stop this. This seemed to irritate him greatly, and immediately replied that I had better not go to the foreman and say that he was being racist towards me. ... Auther went away yelling fuck off, I assume this was for me apparently there wasn't anyone else around but me and Darrel Gerrald. In any event, Auther comes back approximately a half hour later, I happen to be down back working and he yells down and before I even get half way up the isle he points and says over here. **Arthur said if I went to the foreman and said that he was being racist towards me that there would be physical violence and I would be getting hurt...**
>
> [Emphasis added]

It is important to note that Mr. Symonds' version of events as set out in his email is not as bad as the evidence of Mr. Maddox. Mr. Symonds' email does not describe Mr. Maddox jumping over the counter and chasing after Mr. Symonds and Mr. Symonds dropping to the ground into the fetal position. I accept the evidence of Mr. Maddox. However, there are portions of this email, in particular, the expression "suck me boy", Mr. Maddox's rude behaviour and his attempts at intimidation, that are corroborated in the testimony of others. I therefore, admit this Exhibit.

In relation to Exhibit "2", Tab "23", both Mr. Bhathena and Mr. Hartlen testified about the work environment and their dealings with Mr. Symonds and Mr. Maddox.

In relation to Exhibit "2", Tab "24", which is an email of Randy Symonds to Albert Burke and Bill Hallowell, this email confirms Mr. Symonds' difficulties with Shapir Bhatena, which Mr. Bhathena spoke to as did other witnesses and, as well, describes the incident where Arthur Maddox arrived after hours when he was working for Detroit Diesel to obtain parts. There was evidence from Mr. Bhathena and Mr. Hartlen about this incident.

Exhibit "2", Tab "27" is an email of Randy Symonds to Charla Williams, Dale MacLellan and Geri Kaizer, which set out background information about the work environment. Exhibit "2", Tab "28" is an email which describes Mr. Symonds perception of work difficulties he was experiencing with Derek Smith and Shapir Bhathena. Exhibit "2", Tab "30", second paragraph, page two and Exhibit "2", Tab "33" and Exhibit "2", Tab "34" provide background information concerning Mr. Symonds' perception of what his work environment was.

I have enough direct evidence either through the agreed statement of facts, the contents of the Della Risley Report which was covered in the evidence of Ms. Risley, the evidence of Stephanie Wright, the evidence of Arthur Maddox, the evidence of Cathy Martin, and other witnesses to corroborate (a) Mr. Symonds' perception of his treatment of the workplace; and (b) that there were negative actions taken against him because of his race. Therefore, those emails are admissible to provide background information for my consideration. I am prepared to rely on those emails for the limited purpose of concluding that Randy Symonds perceived that he was a victim of discrimination based on race in the workplace and that the oral evidence of a number of witnesses support my finding that Mr. Symonds was so victimized. Further, the evidence of Arthur Maddox confirms a significant amount of the written information contained in the emails.

k. Evidence of an Alleged Poisoned Work Environment

i. Writing on the Bathroom Wall

In October 2001 there was graffiti written on the bathroom wall at Metro Transit, which stated "all minorities not welcome, show you care, burn a cross – a member of Baby Hitler".

This writing occurred at the time when the union members were taking a vote to determine whether or not Arthur Maddox's grievance filed as a result of his termination would go to arbitration.

It was the evidence of Y.Z. and Mike Hartlen that the offending writing was removed immediately. Mike Hartlen testified that subsequently cameras were put up around the facility to prevent a possible reoccurrence and to increase monitoring of the bathrooms. It was the evidence of Mike Hartlen that Metro Transit "put cameras pretty much everywhere that we legally could" (Transcript, October 25, 2016, page 46). Mike Hartlen further testified:

> Unfortunately, like I said, we weren't allowed to put cameras in there, but anything that was out of the bathroom, we managed to sort of mitigate and reduce some probably eliminate because of the cameras. But getting that stuff on the bathroom wall was kind of an oddity one that you really couldn't catch who was doing it. I mean, you don't follow people into the washroom, but you try to get rid of it as soon as you see it and that's what we thought we could do with the maintenance supervisor going in there daily and just monitoring it and wiping it off or taking cleaner and wiping it off, or painting over it if it was scratched in or whatever. (Transcript, October 25, 2016, page 81 – 82)

It was the evidence of Y.Z. that he was unhappy about the lack of investigation. His evidence was that he took a photo of the writing; he did not provide it to management nor did he even advise management that it existed. He never filed a written complaint about the incident. He never made any inquiries about what was being done about it. He testified that he figured out who had written it by the hand writing that he had seen on the bulletin board, but he did not bring it to management's attention. His evidence was that the culprit had a unique way of writing "y" and that he subsequently saw a note on a bulletin board with a backwards "y", he did not go to management to seek investigation. Y.Z. did confirm that HRM acted to remove the writing immediately.

Stephanie Wright, who is a former Stores Room Employee at Metro Transit and who befriended Randy Symonds, also testified about the bathroom wall writing incident. She recalled in her evidence that Mr. Symonds told her about the "Baby Hitler" graffiti on the bathroom wall and that "everybody was talking about it". She reported it to her director, because she believed it should have been resolved immediately. It was her evidence that she did not know if any investigation was done. She testified that managers were not happy about the writing.

ii. Evidence of Cathy Martin

Ms. Martin also provided general descriptions of the type of behavior she witnessed in the workplace on regular basis:

> A. ...the lobby, and that's where we would go and have our meals. We'd all sit up there. And a lot of the guys would go up there, the employees from the Transit garage would go up front to have meals. So we'd sit down. And that's when conversations would be communicated, loud, profanity, racist remarks, would call black people niggers, and make jokes or comments. And didn't never think that they were insensitive to anybody else around them that they would make these types of comments or racist slurs. And disrespect people. And if you said anything it didn't matter, they still went off like they didn't' have to holding to anybody about it.
>
> So you would have that kind of opportunity to hear that type of conversations and statements and racial remarks made. Like I said, that's how you learned to know who's racist and who's not.
>
> And then there was times that, being on the front counter all the time, you were privy to conversations constantly with several guys standing together conversing or a group. They could be making fun of Dave Buckle because he's a no-good Indian or you could have a conversation pertaining to a no-good nigger or a wagon burner.
>
> And when people say those things, at times, it used to throw me off guard when they would come up with – the first time I ever heard someone say wagon burner; well, it kind of stops you, right? (Transcript of Evidence, March 7, 2016, pages 180 – 181).

It was the evidence of Ms. Martin that as the first female to work in the Stores Room, she had to prove herself and she was treated with disrespect and subjected to sexism. Her evidence, as well, was that Shapir Bhathena, who was an East Indian supervisor at HRM, was made fun of all the time, belittled and disrespected. Ms. Martin described one incident with Danny Deal, a mechanic at Metro Transit, stood on the floor in Preventative Maintenance and hollered for everyone to hear that he would not train "no good-for-nothing Indians". The statement was made in relation to the training of David Buckle.

It was Ms. Martin's evidence that there were certain individuals, including Arthur Maddox, Steve Liddard, Danny Deal and Carl Hood, who were all mechanics at Metro Transit and contributed to the poisonous atmosphere in the workplace. Ms. Martin, in her own words, described the atmosphere at Metro Transit as being poisonous, attributing the environment in part to discrimination in relation to colour or race and gender. Things worsened with the hiring of Randy Symonds as Storeroom Clerk in 2000.

Cathy Martin in her testimony, identified a small core group of perpetrators when it came to making racial comments in the workplace. However in cross examination she was unable to provide evidence of wider spread use of racial comments outside of this core group of four or five people, all of whom were associates of Arthur Maddox.

The evidence of Cathy Martin was largely un-contradicted. She testified in a clear and concise way. She had a clear grasp and recollection of certain events which occurred, even with the passage of time. Counsel was not able to shake her recollection of events in cross examination. I find her to be a credible and reliable witness.

iii. Evidence of Stephanie Wright

Ms. Wright testified that:

> And the aggressiveness, it was the behaviour in shop entirely, that's what we were all used to, the mechanics were rough and they come to the counter and they treated you like that. Not that it was acceptable but that's the way the environment was there. And he didn't tolerate it. I suppose maybe I was used to it or hearing about it and he didn't want to tolerate it. (Transcript, October 19, 2016, pages 111–112)

iv. Evidence of Paul LaPierre

Paul LaPierre testified about the sensitivity training that was conducted by HRM. In particular, he testified as to being kicked out of sensitivity training:

> Q. Okay. Could you maybe first of all discuss what the sensitivity training that's being referenced there is?
>
> A. Racial, racism.
>
> Q. Okay. But in terms of the program, was it done – were – was the pro…
>
> A. We were down at… Akerley Landing, I guess it would be….she was showing us films of the – what was going on down in the southern states. And I said, yes, there's no argument there is simple prejudice down there, but this is Nova Scotia, we're not that prejudiced.
>
> […]
>
> Q. Okay. So you're at this training session, and could you just, to the best of your recollection, just slowly and to the extent that you can explain what was discussed at the session?
>
> A. We told her the films were wrong. That's – you can't teach what happened some where's else, you go to teach what happens here. She didn't like that. And then we said, "Well, we have issues with why is it the coloured kids are paid to go to school and whites aren't?
>
> Q. So what do – what do you mean?

A. Equal rights for everybody.

Q. So what do you mean by that comment?

A. Coloured families were getting a subsidy to put their kid in school.

[...]

Q. Okay. So who – who raised that point, do you remember?

A. I believe it was Danny, but I – we all heard it before and we were just saying, you know, if you're going to treat racial... treat us all the same. Don't say these ones are going to get this, these ones are going to get nothing, these ones are going to get that. That's not the way it works, we're all treated the same.

Q. Okay.

A. And that's when she kicked us out.

[...]

Q. But can you just explain that to me again, like what – you were talking about seeing the people down south...

A. She wasn't...

Q. ...in the movie that she was showing you and you felt that wasn't applicable to you?

A. It wasn't applicable to Nova Scotia or Canada.... Yeah, this – this – these things – these atrocities happened, nobody's going to argue the fact....Nobody's going to argue that. But that's not the way it is here.

Q. And then did – and did you voice the opinion to her like that – when the...

A. Yes.

Q. ...black school children being subsidized was...

A. Was wrong.

Q. it was wrong because it was not equal treatment in the sense of it wasn't identical treatment of blacks and whites, is that – that's what you expressed?

A. Yes.

Q. Okay. And so you didn't – you didn't choose to leave, she kicked you out?

A. That's correct.

[...]

Q. Can you remember how that came up? Did somebody interrupt the trainer, or was it during the questions session?

A. It was during the question session, like we're trying to explain to her that you can't put this stuff on, it's not relevant. There's issues that we're having in Nova Scotia where kids are just brought up wrong, but that's not racist. Like what happened back then was an atrocity, it was bad, and the States were bad for it. Canada has never been that way.

[...]

Q. So you indicated that you thought that Miss – that Charla Williams was the trainer, and you think she was fired later on for being racist, wat that your evidence.

A. Yes.

Q. Do you feel that she was being racist at the session in showing these films?

A. Over-zealous, I guess would be the word, she was really, "We've been discriminated since we were born, and this is the way it is now," and blah, blah, blah. That's the impression we got.

Mr. LaPierre testified that he, Danny Deal, and perhaps several others were asked to leave for disrupting the class. They then attended a strip bar until there was a drive for them back to work. Mr. LaPierre testified that "it was better years ago" and explained by saying that a person had to be careful with what they say now "even though we used to say it and it never bothered anybody".

v. Other Evidence of an Alleged Poisoned Work Environment

Mr. Gallant testified as to the use of the term "nigger up". Mr. Sears testified as to Bob Andrews referring to one individual under his supervision as "fucky". Mr. Gillis testified that Steve Liddard made reference to the "n word" and also confirmed the use of the name "fucky" as a term referring to Martin Green, who was supervised by Bob Andrews. Albert Burke testified that he did not hear racial slurs but it was no means "a real happy place to work", and that there was "a lot of cursing and people talking about each other". He testified that the negativity remained until he retired in 2013. There was evidence given in relation to the "Baby Hitler" writing on the wall and "beware of the Buckle bus" writing on the wall, as well as the term "Buckled". Danny Deal made a racist comment "I won't be training any fucking Indians" at the time David Buckle started in 2002. This evidence was uncontradicted. Further, Y.Z. testified that when Shapir Bhathena was promoted to Foreman, Danny Deal stated in the presence of Mike Hartlen and Burkley Gallant "I won't be taking any orders from black Indians". There was no evidence lead to contradict this statement either.

Y.Z. gave evidence that there were postings on the bulletin board with jokes or pictures or news stories which he found offensive. He stated the literature was posted on the bulletin board that had "racial comments" that had "to do with minorities or stuff like that there" (Transcript, April 20, 2017, page 43). He could not, however, provide specific examples of the contents; however, he did testify that after sensitivity seminar occurred the posting of this type of material stopped. There was evidence that a small group of mechanics used the term "wagon burner" in reference to aboriginals. There is no evidence that this phrase was heard by supervisors or said in the presence of Mr. Buckle.

Y.Z. was given the opportunity to go through the Mike Dunphy training employee list and indicate who he felt was racist and why. Y.Z. in his evidence had the following to say about Transit managers:

> Q. Okay, well we'll get to that in a second. But you've never heard any of the managers saying anything racist.
>
> A. No, not.
>
> Q. And I put it to you you've never heard anybody tell you that they've heard any of the managers say anything racist.
>
> A. Yeah, I don't remember anything directly that I heard or that come from any of the managers, no, not through saying something or making a comment or whatever type thing, yes. (Transcript, June 15, 2016, page 72)

Della Risley, in her evidence, made it quite clear that Halifax Metro Transit had a very dysfunctional work place. She did not, however, see racism as being "rampant". Ms. Risley stated:

> My investigation revealed to me serious incidents, in my mind, in my opinion, of racism. And of course the sexism issue did come up, but that was not my mandate. I saw a workplace where those incidents were occurring...
>
> So I did see a workplace where racism and some sexism was occurring. I did not see it as rampant. There were incidents of it. And I also felt that it was being very poorly managed...They weren't stopping that from happening. And it was challenging to the other mechanics.

According to the Agreed Statement of Facts, the Fleet Transit Service, Shared Services, Operational Review 2002 Summary Report to Geri Kaiser, Director of Shared Services ("the Operational Review") was completed on October 31, 2002 by Abel Lazarus, Maria Medioli and Cathie Osborne. The Operational Review was carried out between June 17, 2002 and September 20, 2002.

The Operational Review made the following finding and recommendations at p. 20:

E2 Negative workplace environment evidenced by incidents of conflict, fear of repercussions for speaking up, inappropriate discipline and perceived favouritism

Recommendation:

1. Continue to provide access to programs that focus on respect in the work place and valuing cultural diversity.

Action Plan:

1. Provide training for all new staff in valuing diversity.
2. Develop an affirmative action plan for hiring practices that is more reflective with the diversity of the community.
3. Creating working committees to discuss and resolve issues as they arise. (Such as labour/management, peer group meetings, etc.).

2. Continue the practice of no-tolerance policy for any infractions or intolerance or disrespect.

l. Scott Sears

Scott Sears is a former supervisor at Metro Transit. He is currently employed as a Superintendent with IIRM Corporate Fleet. He started working as a supervisor in 2002 at Ilsely Avenue.

According the agreed statement of facts, on March 25, 2003 at about 7:00 a.m., Foreman Scott Sears was present when there was an incident between David Buckle and Arthur Maddox at work.

On April 29, 2003 after an investigation had been carried out, Mike Hartlen sent Arthur Maddox a letter which stated in part:

> On March 25, 2003 you approached David Buckle at approximately 6:50 am, made inappropriate comments about his hair style and continued to harass and threaten David when told by him to stop.

Mike Hartlen was Mr. Sears' direct supervisor. Mr. Beauchamp supervised Mr. Hartlen. Mr. Sears recorded conflict between Mr. Maddox and Mr. Buckle in an email (Exhibit "2", Tab "44"). Mr. Sears had heard Mr. Maddox's voice raised and came to understand from Mr. Buckle that the comments Mr. Maddox had made about his hair, which Mr. Buckle objected to.

Mr. Sears testified that his relationship with Mr. Symonds at the workplace was good, but that Mr. Symonds had accused Mr. Sears of not wanting to drive Mr. Symonds home, despite the fact that they lived close together, because it was "a race thing". Mr. Sears denied this and told Mr. Symonds that he was not his main transportation to and from work, because of the cost of running his vehicle, but that he did not mind giving him a drive home on occasion.

It was Mr. Sears' evidence that prior to the training in November 2001 with Michael Dunphy, that there was a general lack of respect between employees and employees and supervisors. That there was "just kind of a not willing to work together". He testified that there were supervisors who used the wrong language when talking to others, such as Bob Andrews, who referred to one individual as "fucky". Mr. Sears described Mr. Maddox as arrogant and bullying. Mr. Maddox was also insubordinate a few times for not following direction. Although Mr. Sears testified that he had never heard Mr. Maddox use the word "nigger" he agreed it would not surprise him if he were told by someone that Mr. Maddox had done so. Mr. Sears confirmed that he supervised Y.Z. for a period of time in December 2003. He confirmed, as well, that he was moved in a supervisor to the Brake Shop because of a dispute between Y.Z. and Mr. Gallant. He also stated that complaints of unfair work distribution were common among mechanics at Metro Transit.

m. Steven Gillis

According to the agreed statement of facts, Steve Gillis started employment with Metro Transit on June 24, 1990 as a part-time mechanic and he has been employed at Metro Transit ever since. He was hired by Walter Dominix.

His current personnel files, contain no record that he was ever counseled or disciplined regarding human rights matters and contain no record that his supervisors had knowledge of any human rights violations by him or had knowledge of any failure by him to discipline employees committing human rights violations.

Steve Gillis is currently a Superintendent of Bus Maintenance at Metro Transit's Burnside facility. He started as a part-time mechanic in 1990 and moved to a full-time position in 1991, a relief part-time supervisor in 1996 or 1997, Fleet Manager in 2000 or 2001 and a full-time supervisor in 2002. He became a Quality Analysist eight months after becoming a full-time supervisor. He remained in that role until 2014.

In relation to Mr. Buckle's testimony concerning Wayne Swinimer's comment to him when he started at Metro Transit, Mr. Gillis stated that he thought that Wayne would say that to "just about anyone who came in", because it was a unionized workplace. His evidence was that pranks were common in the workplace, and the he had been subject to some of these, as well. Mr. Buckle came to Mr. Gillis to advise that Mr. Maddox had been making fun of his hair. Mr. Gillis told Mr. Buckle to speak to Mr. Maddox about it and to come back if there were any further issues. Mr. Gillis then informed Mr. Hartlen. Mr. Gillis has no recollection of the writing on the bathroom wall concerning the "Buckle bus", but was aware of the "Baby Hitler" writing on the bathroom wall. His evidence was that he trained Mr. Buckle on three or four different occasions and would help him out on the shop floor as supervisor. He respected Mr. Buckle on a personal level. Mr. Gillis testified that he recalled Steve Liddard, the Shop Steward, making a reference to the "n word" and he told Mr. Liddard it was inappropriate to use that word in the workplace. He recalled one employee's name being "fucky". Bob Andrews was the supervisor who referred to Martin Green this way. He stated, as well, he had heard the term "wagon burner" before but not at Metro Transit. He admitted that the work environment was a "rough" work environment, and there was lots of foul language and cussing. He admitted, as well, that the fact that Mr. Maddox was terminated over threatening an employee created the perception of a poisoned workplace.

It was the evidence of Mr. Gillis that Mr. Symonds was treated by Mr. Maddox as "would be Jim, or myself, when I was working on the floor or any other mechanic".

n. Shapir Bhathena

Mr. Bhathena is a supervisor at Metro Transit, he is of Indian decent, and identified his race as Zoroastrian. He was hired in 1990 as a mechanic on the day shift. When Mr. Bhathena was hired, he was trained by Y.Z. for about a month. Mr. Bhathena found Y.Z. to be a "very good worker". Mr. Bhathena testified as to his role in disciplining employees:

> Q. What was your understanding of what your role was in disciplining employees that you were supervising?

A. I had to write whatever, you know, the person had done on a memo or an email and send it to Mike Hartlen.

Q. And what was your understanding of what would happen after you sent the information to Mike Hartlen?

A. That he would take whatever had to be done.

Q. So any discipline would be decided by him?

A. By him.

Q. And in your understanding what there anything that you were allowed to do at all if you saw some misbehavior?

A. To correct the person right away.

Q. To correct them?

A. Right away, not tomorrow. To tell them not to do it and stop it.

Q. Right. And did you understand you had any power to take any particular action other than that?

A. I could send him home, but then there was – still then everything had to be done through Mr. Hartlen.

Q. So everything being whatever discipline action would be decided by Mr. Hartlen?

A. That's right.

Mr. Bhathena testified that Mr. Maddox's behaviour towards him was appropriate "most of the time". Mr. Bhathena described an incident between Marlena Bourgeois and Arthur Maddox that he reported to Mike Hartlen. Ms. Bourgeois was a female bus driver. She and Mr. Maddox had conflict and Mr. Maddox approached her in an aggressive manner. Mr. Bhathena testified that Mr. Hartlen should have taken some action against Mr. Maddox, because Mr. Maddox "rubbed it in" to Mr. Bhathena and told him to "fuck off". He did not write Mr. Maddox up for inappropriate behaviour towards himself "there was nothing I could do because he wasn't event punished and he learned his lesson:

> So now even if I write him up again what's going to happen? Nothing, so there is no sense of me going any further" (Transcript, March 9, 2016, pages 633 – 638).

Mr. Bhathena could not remember, during his testimony, whether or not he heard Mr. Maddox make the statement "racism, racism, should be a law that you can shoot someone and get away with it" at lunch on the day that he was terminated. The statement was captured in memo prepared by Mike Hartlen. Mr. Bhathena testified that Mr. Maddox was rude to "everybody", he did however testify that Mr. Maddox and his friends, Steve Liddard and Derek Smith, openly used racial slurs, which Mr. Bhathena corrected. Mr. Bhathena acknowledged that he had issues with Mr. Symonds, but that he treated Mr. Symonds fairly.

There was an incident after the termination of Mr. Maddox where Mr. Maddox, while an employee of Detroit Diesel, which did contract work on HRM buses, attended at the Stores Room counter with Mr. Bhathena, and Mr. Symonds was expected to serve him. Mr. Bhathena directed Mr. Symonds to serve Mr. Maddox. This resulted in a complaint to management and was clearly an error on the part of Mr. Bhathena.

It was documented by a number of witnesses that Mr. Bhathena was extremely vigilant in monitoring the work of Mr. Symonds. In particular, Mr. Symonds accused Mr. Bhathena of harassing him or picking on him, and not treating him the same as others in the parts department.

o. Albert Burke

According to the agreed statement of facts, Albert Burke has been employed at Metro Transit since October 10, 2001. He successively held the positions of Stores Person, Inventory Buyer (1998) and Storeroom Supervisor at Metro Transit in Burnside Industrial Park until August 31, 2009 when he transferred to the Metro Transit location in Ragged Lake to be the Storeroom Supervisor there.

His current HRM personnel file, contains no record that he was ever trained, counseled or disciplined regarding human rights matters and contains no record, that his supervisors had knowledge of any human rights violations by him at Metro Transit or had no knowledge of failure by him to discipline employees committing human rights violations.

Mr. Burke was hired in June of 1979 as a hostler and moved through several positions before coming the Store Room supervisor in 2004. He also acted in this capacity in 1997 and again in 2001. Mr. Burke's evidence was that mechanics were often rude, loud and impatient at the Stores Room counter. He did not think that Mr. Symonds was singled out in any way, but did testify that "sometimes he would be treated differently" (Transcript, October 19, 2016, pages 14-16). Mr. Burke also testified there were confrontations and he did not believe that Mr. Symonds was the cause of all of them. It was Mr. Burke's evidence that Mr. Bhathena should not have been in the Stores Room every weekend asking Mr. Symonds what he was doing, and that the type of questioning he was engaging in was not normal. Mr. Burke denied that he made a comment to Ray Brushett about white people acting like black people. He said it was not in his nature and that he considered Y.Z. to be a friend. He also testified that he was not asked about this incident by anyone at HRM. Mr. Burke attended the

November 2001 mandatory training conducted by Mr. Michael Dunphy and also testified that he and Steve Liddard attended a course called "Transcending Difference About Fairness and Equality".

It was Mr. Burke's evidence concerning the environment in his workplace that:

> Over the years it became negative. It was a negative place to the point where people actually called it poison. It was by no means a real happy place to work.

He denied hearing any racial slurs or complaints of racial slurs, but did testify that there was a lot of cursing and people talking about each other. Mr. Burke testified that the negativity in the workplace remained there until the date that he retired in 2013, and it was one of the reasons why he retired.

p. Burkley Gallant

According to the agreed statement of facts, Burkley Gallant was employed as a mechanic at Metro Transit from November 19, 1985 to August 5, 1991 which he was promoted to Foreman/Supervisor. He has been employed as a Supervisor at Metro Transit ever since and he has been the Supervisor in the Preventative Maintenance & Brake Shop since 1995. From 1992 to 1995 his supervisor was Walter Dominix, General Foreman. From 2001 to 2011 his supervisor was Mike Hartlen and his indirect supervisor was Paul Beauchamp.

According to the agreed statement of facts, Mr. Gallant's current HRM personnel files, contain no record that he was ever counseled or disciplined regarding human rights matters and contain no record, that his supervisors had knowledge of any failure by him to discipline employees committing human rights violations.

Burkley Gallant was the immediate supervisor of Y.Z. for a significant period of his employment with HRM. It was the evidence of Y.Z. that Mr. Gallant and Mr. Maddox were hunting buddies and that they hunted their beagles together. Mr. Gallant in his testimony stated that he and Mr. Maddox hunted together with their beagles only on three occasions and described their relationship as friendly. It was the evidence of Mr. Gallant that Mr. Buckle received training in his shop and that Mr. Gallant would have assigned someone to work with him. He testified that they normally look for volunteers to conduct the training, rather than to force employees to train others. He had no recollection of anyone saying they would not train "an Indian". Mr. Gallant was not aware of any writing about the "Buckle bus" on the washroom wall, but testified that the expression "got Buckled" was used in the workplace to describe a job that was done by Mr. Buckle. The expression was used because Mr. Buckle would often leave jobs dirty, incorrect, or with other problems.

Mr. Gallant described Mr. Maddox as being loud and obnoxious. In relation to the phone

call with Mr. Gallant testified that he was not in the building when it happened, and he was not sure when he was made aware of it. He does not remember laughing about it with Mr. Maddox the next day. Mr. Gallant's evidence was that his relationship with Y.Z. was good until approximately 1999 or 2000 and then things changed when concerns were raised about Y.Z. not being able to get his jobs done on time. Mr. Gallant testified that he was not aware of terms like "nigger" or "wagon burner" at Metro Transit and he was not witness to individuals speaking in those terms. He testified that he had not witnessed anything at Metro Transit that he would characterize as racist or making a derogatory comment. Mr. Gallant clarified that he had heard the term "niggered up" many times in the workplace. This phrase was used to refer to a temporary repair. His evidence was that the atmosphere at Metro Transit was "pretty good". He testified that as a supervisor he was responsible to deal with and report racist comments. It was his evidence that it was the supervisor's responsibility to deal with situations as they came about. It was the evidence of Mr. Gallant that he personally never had any problems with the service provided by Randy Symonds, however, he overheard people say that he would not go the extra effort to find if there was a part there, he took too long to get parts. He testified if maintenance staff were not able to get parts from Mr. Symonds, he would go and deal with it at the counter. He did state in his testimony on November 16, 2016 at page 163:

> I'm not sure how new he was at the time but there's millions of parts in there, it takes a while for people to learn.

q. Arthur Maddox

i. *Agreed Statement of Facts*

On January 27, 1992, David Pritchard's evaluation of Arthur's performance as a relief foreman included the following:

> - Although the form did not ask whether Mr. Maddox showed respect for employees in the workplace, Mr. Pritchard altered the form and wrote that in regard to "giving directive to employees .... seems to down grade people"
>
> - proper regard for company tools, equipment and company policies... NO

On January 27, 1992, Mike Hartlen's evaluation of Arthur's performance as a relief foreman included the following:

> - how does this person function.... Unsatisfactory rating 2 out of 10 and states: "Does not take the position seriously. Thinks the job is a joke."
>
> - get along with other workers.... Unsatisfactory rating 3 out of 10 and states" "Gets along well spend more time talking which keeps other employees from working."

> - personal attitude.... Unsatisfactory rating 2 out of 10 and states: "As a relief foreman his attitude is poor."
>
> - could the employee improve with more training – NO
>
> - does this employee interrupt others when they are working – YES
>
> - ... other pertinent information.... "... his out look toward the position is all wrong.... this employee spends a lot of time talking to other employees and interrupting their work."

In his performance appraisal for May 1, 1999 to April 30, 1999, Mike Hartlen, Department Head, made comments including:

> "Arthur, has come a long way from his previous antics. I hope he continues on his present path....

ii. Evidence

Mr. Maddox is a mechanic at Metro Transit and has been since 1988. He testified that he got along well with Y.Z. until about 2000 or 2001, which was the timeframe when Mr. Maddox "had supposedly talked bad to Y.Z.'s wife". His evidence was that Y.Z. was lazy and incompetent as a mechanic. He testified that he knew for a long time that Y.Z.'s wife was African Nova Scotian, but that "they got along great... dance... drank... ate together at (their club parties)". Mr. Maddox denied saying anything to the effect that Y.Z. and were not welcome at the barbeque.

In relation to the phone call with Mr. Maddox stated that he went and got Y.Z. to tell him that was on the phone. He testified that he answered the phone and did not recall any specifics about the conversation. He denied laughing about it with Burkley Gallant. He described Mr. Gallant as being his "hunting buddy". His evidence was that on the day and time of the call there could have been as many as five people in the office, at that time. After reviewing his Affidavit, Mr. Maddox stated that he was about to make a phone call and when he picked up the phone he heard voice instead of the dial tone. Mr. Maddox later stated that he knew it was when she asked to speak to Y.Z. Mr. Maddox denied that he was rude, but also admitted he did not remember the conversation. Mr. Maddox denied trying to run Y.Z. over with the bus or even scaring him with the bus. He stated that the first time he heard the allegation was in 2014 when he received Y.Z.'s complaint. Mr. Maddox volunteered in his testimony that Y.Z. had swastika tattoos on his right arm and left hand. Mr. Maddox was asked if there was anything else he wished to tell the Board. He responded:

> Well, I can clearly say that I am not a racist person. Unlike [Y.Z.], with clearly decorated swastikas on his arms and hands, and that can be proven very

quickly. I'm not so sure that – I'm not so sure why I am here to be honest with you and that's, I'll leave it open like that.

Mr. Maddox's evidence was that he treated Mr. Symonds the same as he treated the other Stores Room counter clerks, but that their relationship was not the best. He admitted to threatening Mr. Symonds with violence and said he had anger issues at the time. He testified that he went over the counter at Mr. Symonds, who curled up in the fetal position. He did not recall telling Mr. Symonds not to report him for being racist. He did not recall stating "There should be a law that you can shoot somebody and get away with it". He testified that he could not say for sure if he said it or not. Mr. Maddox testified that both he and Mr. Symonds were rude on the day that he jumped over the counter at him. Mr. Maddox stated, as a result of questions asked from the Commission, that he did not think calling a black person "boy" had any kind of racial connotation to it.

Mr. Maddox testified that his relationship with Mr. Buckle was pretty good "up until the hair do part". Mr. Maddox testified that Mr. Buckle had "beautiful hair", and that Mr. Maddox told him that he had a "nice do". Mr. Maddox denied threatening Mr. Buckle with violence, but said that he did not speak to Mr. Buckle again after the suspension that he received as a result of the comments. It was Mr. Maddox's evidence that the whole shop used the term "wagon burner", and he could have used it as well. He also testified that the word "nigger" was used and the workplace and that he had probably used it himself.

Mr. Maddox testified that there was a culture shift at HRM somewhere around 2000 to 2002. Before this culture shift people could say and do things to each other and get away with it, with no fear. As a result of the incident with Mr. Symonds, a Code of Conduct was put into place. He testified that employees do not use the same racial terms in the workplace anymore, because they know the consequences of doing so. Mr. Maddox acknowledged that he disagreed with a lot of the evidence that was provided to the Board by other witnesses, including _____ version of the phone call incident, Mr. Buckle's version of his and Mr. Maddox's conversation about his hair, Y.Z.'s version of the incident where Mr. Maddox allegedly tried to run him over, the evidence of Mike Hartlen, and many aspects of Mr. Symonds' version of their physical altercation. He also had a very different versions of events for the incidents that were set out in Exhibit "41", which was the discipline record against him. Mr. Maddox admitted that he had worked on anger issues with a psychiatrist since 2001. He testified that as a result of this work, he was not as explosive and was able to deal with people on a more professional level.

It was Mr. Maddox's evidence that he did not have anything against African Nova Scotians and in support, three African Nova Scotian employees of HRM Metro Transit provided evidence. Richard Wright, who had been a friend since high school, described Mr. Maddox as helping work on his car as being someone he can trust, whose house he has been. Mr. Wright is now a coworker and described Mr. Maddox as a friend and their relationship as excellent. Mr. Maddox has a pleasant working relationship with African Nova Scotian coworker, Derek William, since the 1990's. While they did not work side-by-side, they

talked in passing approximately twenty times per year. Mr. Maddox did work side-by-side for a period with Cleveland Williams, and they had a good workplace relationship since 2008 and closely worked together in 2012, during which time there were no issues, and Williams felt that Mr. Maddox treated him with respect.

Shapir Bhathena gave evidence that Mr. Maddox treated everyone in the workplace disrespectfully:

> Q. Did you feel that his being disrespectful at that moment that your race played any role in what he was saying or how he was treating you then?
>
> A. No. Because he said that to everybody, like, he was rude to everybody.
>
> Q. So by everybody you mean, non…
>
> A. Doesn't matter who it was.
>
> Q. White employees normally?
>
> A. That's right. That's right. (Transcript, March 9, 2016, p.659)

It does not appear that Mr. Maddox ever used any explicit racial slurs directly to Randy Symonds. On this point, Cathy Martin's evidence was:

> Q. Okay, now let's go on to Mr. Maddox. So Mr. Maddox certainly would talk to Mr. Symonds at the counter in what you described I think as a belittling manner?
>
> A. M-hm.
>
> Q. But he didn't use any racist words? You said he called him boy?
>
> A. Not that I heard but he did say racist words to Randy because Randy told me that he did but didn't hear them. But I did hear the demeaning words and the belittling words, yes. (Transcript, March 8, 2016, p.446)

Likewise, Y.Z. was unable to identify that Arthur Maddox had ever directly addressed Randy Symonds with an explicit racial slur. Y.Z.'s evidence on this point was:

> Q. But – okay but do you – do you remember any specific incidents when you were present and Randy was disrespectfully treated?

A. I don't know. Right now there's nothing... (Transcript, April 22, 2016 p. 97)

...

So Mr. Maddox basically had a problem with all of the people at the service desk, didn't he?

A. He had a problem with a lot of people, yes.

Q. Yeah.

So - and we've – so did you ever hear Mr. Maddox say, "Suck me, boy?"

A. I wasn't here, no, at that...

Q. I'm not talking about any particular incident; I'm talking generally. Did you ever hear him use that expression?

A. I don't think in my presence, no. (Transcript, September 19, 2016, p.36)

...

Q. If we – taking away the incident where Mr. Maddox is alleged to have threatened Mr. Symonds, there's nothing to suggest that he was treating Mr. Symonds any differently than anybody else he was dealing with at the counter.

A. Well, that could be true. You're still comparing apples and oranges. Like, I still – I can't comprehend that. (Transcript, September 19, 2016, p 44)

r. Mike Hartlen

Mike Hartlen is a former Superintendent at Metro Transit, he started at HRM in 1986 as mechanic, moving to a Quality Analyst after eight or nine years, Maintenance Supervisor for about five years, and Superintendent responsible for the whole facility and the Maintenance Department until approximately 2010, when he left and obtained employment in a supervisor capacity in the private sector.

According to the agreed statement of facts, Mr. Hartlen's current personnel files, contain no record that he was ever counseled or disciplined regarding human rights matters and contain no record that his supervisors, had knowledge of any human rights violations by him or had knowledge of failure by him to discipline employees committing human rights violations or

failure by him to discipline supervisors who were not disciplining employees for human rights violations.

It was Mr. Hartlen's evidence that he had no recollection of writing on the bathroom wall regarding the "Buckle bus". He also had no recollection of writing on the bathroom wall signed by "Baby Hitler". Mr. Hartlen had no recollection of the incident where Mr. Maddox tried to run Y.Z. over with a bus, or the incident where a lug nut was thrown at Y.Z.

Upon review of a statement at Exhibit "2", Tab "63", in cross examination, Mr. Hartlen testified he was aware of Y.Z. alleging a lug nut had been thrown at him, but through Y.Z.'s supervisor. His evidence was that he would have requested the supervisor to do follow up work on obtaining evidence to investigate. He agreed that the role and responsibility of supervisors was to stop acts of violence, whether the employee wanted to pursue the issue or not. He further testified that the lug nut incident was not investigated by him or anyone else that he is aware of.

Mr. Hartlen agreed to the comments made in the Della Risley report about the hazing and teasing of mechanics when making mistakes. He further testified that pranks occurred in the workplace. Cameras were put in the shop to help detect this type of activity.

Mr. Hartlen's evidence was that he had received complaints about the difficulty of getting parts on the weekends and night shifts, because no one was working at the Stores Room counter. As a result, Mr. Hartlen emailed Mr. Bhathena, who was the supervisor on duty during those times, and asked him what was going on. Mr. Bhathena reported back that Mr. Symonds would complain that Mr. Bhathena was picking on him whenever he tried to address the issue with him. Mr. Hartlen told Mr. Bhathena that he would have to work with the Stores supervisor, Bill Hallowell, to address the issues.

Mr. Hartlen described his relationship with Y.Z. as being decent. He stated that Y.Z. was sensible that he did not require discipline, he was a good employee, showed up for work and did his work. He testified that when Y.Z. came to him with issues, he would bring in the involved individuals and meet with them to resolve the problem. He would also make a note of incidents Y.Z. brought to his attention by writing them down. In relation to the meeting where Y.Z. reported to Robin West that there was "a large problem of a racial nature", Mr. Hartlen said he would have passed the concern on to his supervisor, Paul Beauchamp.

Mr. Hartlen testified in relation to the phone call with _____ that he "lectured" Mr. Maddox, because he should not have been answering the phone in the training room/office.

It was the evidence of Mr. Hartlen that it was "about time" Mr. Maddox's employment was terminated. Mr. Maddox's statement about not changing and his lack of remorse for his actions left HRM with no alternative but to terminate his employment. Mr. Hartlen did not provide Mr. Maddox with a reference and when he was called for a reference check by Detroit Diesel, he told them he would not hire Mr. Maddox again. Mr. Hartlen was shocked

when Mr. Maddox was reinstated, because there was a binder of incidents illustrating progressive discipline. Mr. Hartlen testified the binder reflected verbal and written warnings to Mr. Maddox and lengthy suspensions. The contents of the binder were entered as Exhibit "41". Mr. Hartlen reviewed this binder and agreed there were no record that Mr. Maddox was ever disciplined for making racial slurs or other racist behaviour. Mr. Hartlen also admitted that at the time, Mr. Maddox was terminated for making a physical threat of violence against Mr. Symonds. Mr. Hartlen did not investigate Mr. Maddox for racial discrimination.

Mr. Hartlen testified that when Y.Z. was at the end of his work hardening in 2003, following a physical injury, he gave him the option to work elsewhere other than the Brake Shop, because of the issues that he experienced there. He asked Y.Z. to sign a paper confirming his desire to return to the Brake Shop. Mr. Hartlen testified he switched Mr. Gallant for Mr. Sears as Y.Z.'s supervisor around this time, because of the tension between Y.Z. and Mr. Gallant over work distribution. Mr. Hartlen did not believe that Y.Z. was being treated unfairly by Mr. Gallant.

It was also the evidence of Mike Hartlen that the managers were attempting an open door policy in an attempt to avoid being involved in grievance processes. The January 14, 2002 memo of Mike Hartlen implies that management had to deliver a policy of not responding to "every little issue and incident".

s. Mary Ellen Donovan

Mary Ellen Donovan was a senior solicitor with the legal department for the Respondent, HRM, and she handled the grievance filed by the Union to reinstate Arthur Maddox after his termination. It was her evidence that because of Mr. Symonds' unwillingness to participate in the arbitration and because he was the key to the success of upholding HRM's decision to terminate Arthur Maddox, she had no alternative but to proceed in mediation and settle the grievance. Ms. Donovan addressed the problems created by the "sunset clause" in the Collective Agreement for assessing a disciplinary record. The "sunset clause" provides:

47. Article 8.01 of the Collective Agreement between HRM (Metro Transit) and the Amalgamated Transit Union, Local 508 for the period of September 1, 2000 to August 31, 2003 provided as follows:

> The Employer agrees that the employee will be notified of any complaints or infractions within 15 days of the Employer's knowledge or receipt. After twelve (12) months with no recurrence, an infraction or letter of criticism will not be considered as part of the employee's file. Complaints for which no discipline has been taken or complaints that discipline has been taken and after twelve (12) months there has been no recurrence, do not form part of the file.

48. Article 8.01 of the Collective Agreement between HRM (Metro Transit) and the Amalgamated Transit Union, Local 508 for the period of September 1, 2003 to August 31, 2006 provided as follows:

> (a) The Employer agrees that the employee will be notified of any complaints, policy or rule violations within fifteen days of the Employer's knowledge or receipt. Any complaints which do not give rise to discipline within three (3) months will be removed from the personnel file. Any policy or rule violations, which do not give rise to discipline within six (6) months, will be removed from the file.
>
> * * * *
>
> (d) Any record of discipline shall not be relied upon by the employer after twenty-four (24) months from the date of occurrence and shall be removed from the file. However, such records shall not be removed from the file until twenty-four (24) months have expired from the most recent record of discipline relating to the same or a similar offence.
>
> (e) Notwithstanding 8.01(a) and (d), the record confirmed instances of work-related assault and sexual harassment that an employee has been disciplined for shall remain on an employee's file for two (2) years. In addition, any criminal conviction which has an impact on the ability of the employee to carry out his duties shall remain on the file for two (2) years.
>
> (f) Notwithstanding the above, articles 8.01(d) and 8.01(e) will not apply to any discipline that was impose prior to the signing date of this collective agreement

She testified that she had met with and interviewed twelve or thirteen people during the grievance process, including Y.Z. and his wife, The notes of Ms. Donovan about her January 3, 2003 meeting with Mike Hartlen, Paul Beauchamp, Geri Kaiser and Paul Fleming were admitted into evidence. In those notes it was stated that "Randy Symonds" had "gone to human rights complaint alleging racial harassment at the workplace, the incident between Randy Symonds and Arthur Maddox had prompted termination, and a whole series of complaints". In the notes there is a series of names of other persons with complaints against Arthur Maddox. Further, in Exhibit "48" the January 3, 2003 notes of Ms. Donovan state the following:

> Randy Symonds might not be able to give solid focus evidence. Symonds seems a bit paranoid – has a hard time answering questions...

Ms. Donovan testified that she decided that Mr. Symonds would not make a reliable witness, that was key factor in HRM's decision to mediate Mr. Maddox's grievance:

Q. Okay. Now – so as I understand it this was originally supposed to be an arbitration?

A. Yes.

Q. And it ended up as a mediation?

A. Yes.

Q. Can you maybe explain to us how it happened?

A. Well my recollection is that it largely turned on the conversation that I just related with Randy Symonds in the library on occasion. He was the key to the – to the potential of success of – of that arbitration because he was the Complainant and the events centered around what the interaction between himself and Arthur Maddox and so if he was unprepared to proceed as a Complainant then that, from my perspective, was largely the end of what I could do with respect to the arbitration.

This was – this situation that the organization was presented with because of Arthur Maddox's behaviours exhibited over a protracted period of time in the workplace. It was a very serious – it was seen by the management team as a very serious issue and so the pro – so the prospect of not being able to sustain the termination was of tremendous concern within the organization.

So given that it looked like the arbitration was not going to be successful because a second aspect of this of – of my interview with – with Mr. Symonds is – is that even if he was prepared to move forward with the arbitration it was quite apparent that on cross examination one had no idea what he was going to say. No idea at all.

Whether he would stand behind his allegations or whether –you just had no idea what so – what was discussed at that point is what the options were and the option that was ultimately identified and went forward was converting the – the process for – to a mediation.

Now that didn't shut down the arbitration necessarily unless the mediation of – was concluded with an agreement which did happen here but the – so anyway the decision was is that going forward with a mediation the – there was a possibility that – that one could minimally get a suspension without pay of some period or other – and in the end what was negotiated was this six month suspension without pay although there was no deduction for monies earned in – during that period while he was off the job.

Q. Okay. So what was your assessment of the settlement?

A. At the time I certainly thought that we had done absolutely the best – that we had the best possible outcome given the very difficult situation we have – we had with essentially a very – very – either no witness or a very problematic witness. (Transcript, November 9, 2016, pages 140-142)

Much was made by Counsel for the Complainant about Ms. Donovan's lack of action in relation to the Arthur Maddox arbitration and the decision to mediate as opposed to proceed to hearing. It was Ms. Donovan's position given what she had to work with that she had no real alternative but to mediate, because management for HRM did not want to risk the potential for reinstatement. Ultimately, it was her decision to make and unfortunately for the workforce, because of her assessment of Mr. Symonds, Mr. Maddox returned to it.

t. Della Risley

Della Risley prepared a report on Fleet Services at HRM in 2003 in response to complaints of discrimination by several individuals including Randy Symonds, Dave Buckle and Y.Z. Ms. Risley was last actively employed at HRM, in the Human Resources Department, in 2008. The report, which was Exhibit "29" to the Board of Inquiry, was prepared by Ms. Risley as a result of complaints of racism and discrimination made by Mr. Symonds, which were brought forward with the assistance of Rob Kirby to the Executive Management Committee of the Mayor's office. Ms. Risley's supervisor, who was the Manager of Labour Relations, appointed her to look into these issues. There were also complaints at the time, which had been made to the union from Mr. Buckle and Y.Z. that had come to the Executive Management Committee's attention.

As a result, Della Risley was asked to do a "broad investigation to determine:

(a) why HRM is failing to resolve its diversity challenges in the Metro Transit Fleet/ Stores area, and

(b) what HRM has to do to create an appropriate work place environment for managers and employees alike.

Ms. Risley's mandate was to investigate the concerns of these three employees. Ms. Risley stated that she did not interview Mr. Maddox during her investigation, because he was on suspension at the time and had been advised by his Union not to speak with her. Ms. Risley was asked about her statement in her report that "Mr. Maddox had been reinstated due to a lack of progressive discipline". Ms. Risley testified that she had been advised by Geri Kaiser who stated that "she had agreed to the reinstatement of Mr. Maddox because she did not believe they could win the arbitration due to these factors" (Transcript, October 23, 2016, page 17). Ms. Risley also testified that Mary Ellen Donovan had told her that Mr. Symonds could not be called as a witness that there was good reason to recommend a settlement in the arbitration of Mr. Maddox's grievance (Transcript, October 23, 2016, page 18).

Ms. Risley testified that Y.Z. genuinely believed that Mr. Maddox was trying to hit him with the bus. Her conclusion that Mr. Maddox had been attempting to scare Y.Z. was made because she did not have Mr. Maddox's side of the story (Transcript, October 26, 2016, pages 19-20).

Ms. Risley advised that an anonymous letter, which was attached as an appendix to her report (Exhibit "29", page 167), which dealt with keeping minorities out of the shop, was investigated by HRM. A handwriting expert determined that it was written by more than one person and those individuals could not be identified.

Further, Ms. Risley testified she found evidence of objectionable racist and sexist conduct by employees and a lack of appropriate responsiveness at some levels of management (Transcript, October 26, 2016, page 60). She further stated:

> Q. Okay. And so given your investigation and all the documents and that, could you maybe just kind of give us an overall view of your assessment of what the situation was in the machine shop area or the depot there?
>
> A. My investigation revealed to me serious incidents, in my mind, my opinion, of racism. And of course the sexism issue did come up, but that was not in my mandate. I saw a workplace where those incidents were occurring.
>
> I saw that they coloured – in my opinion, for example, Mr. Maddox's constant referencing Mr. Buckle's hairdo and his reference to Mr. Buckle's, you know, the last time he saw hair that thick was on a sheep and that, in my opinion, that was outright racism and it coloured all the other instances. You couldn't – you couldn't just look at, you know, "Beware of the Buckle bus" and not see it as that.
>
> So I did see a workplace where racism and some sexism was occurring. I did not see it as rampant. There were incidents of it. And I also felt that it was being very poorly managed.... They weren't stopping that from happening. And it was challenging to the other mechanics.

Ms. Risley testified that it was her belief that it was the duty of management to investigate and take action if appropriate, and that lower management lacked an understanding in this regard. She specifically identified a problem with the inaction at the level of Mr. Harlten (Transcript, October 26, 2016, pages 43-44, 54-57).

Further, Ms. Risley in her report of May 14, 2003 stated at p. 15:

> As indicated above when preparing for the Maddox arbitration management developed rather lengthy list of similar behaviour on the part of Mr. Maddox

> dating back to 1993. However, while some of these instances had been raised with Mr. Maddox, there was no formal discipline on the record and Mr. Maddox had never been suspended for any of these instances. **This lack of progressive discipline was the key factor in subsequent reinstatement of Mr. Maddox.**
>
> [emphasis added]
>
> * * *
>
> Prior to Mr. Maddox's return HR put a course on progressive discipline for Fleet foreman

The May 14, 2003 report at p. 25 and the June 10, 2003 report at p. 23 both record that Y.Z. complained to Della Risley, alleging that in the fall of 2002, Arthur Maddox had swerved a bus he was driving toward Y.Z. and that Y.Z. had complained to Mike Hartlen about this.

The June 10, 2003 report recorded at p. 23:

> Mr. Hartlen advises that in checking his notes he has no record that would related (sic) to any conversation of this type.

The May 14, 2003 report of Della Risley at p. 20 stated:

> January 2003
>
> At some point in January 2003 Charla Williams received a hate letter.

The June 10, 2003 report included the following findings and recommendations:

> -p. 14 - In January, 2002 HRM decided to develop and implement a "Guiding Principles for the workplace" policy which later became known as the "Code of Conduct"
>
> -p. 18 - in May, 2003 the Code of Conduct was still not complete.
>
> -p. 25 - many employees indicated that the finalization and enforcement of the Code of Conduct will be a positive step towards improving the atmosphere at Transit.
>
> -p. 25 - Management in Stores/Fleet do not seem to be applying training in practice. Example 1: failing to take action against employee violations within 15 day time limit in Article 8.01 of Collective Agreement. Example 2: Despite training in progressive discipline, foremen are still not applying progressive discipline to the behaviour of Mr. Maddox.

-p. 29 - "During my interviews I gleaned that the impact of racial comments on the victim is not something that is fully understood by many of HRM's management and/ or staff including the author of this report."

-p. 32 - The report found inconsistent enforcement of rules by managers. Example: "the number of times that Mr. Maddox was allowed to come to the parts counter by himself even though there was a management decision to have a supervisor accompany him when Randy Symonds was working."

-p. 33 - Recommendation: "However it needs to be emphasized that training will not be the full answer here. During the investigation it became clear that the management is not acting when it should nor is management reading the collective agreement when it should. Therefore in addition to education it is recommended that senior management in the Fleet/Stores area meet with their management team and ensure that team members fully understand what is expected of them in the area of application of knowledge gained in training. Additionally, senior management in the Financial Services business unit and the Real Property and Asset Management business unit should immediately meet their managers, team leads and front line supervisors to emphasize that they are accountable to act when incidents that could constitute harassment or other unacceptable behaviour come to their attention. This accountability includes advising aggrieved employees of any action taken in response to their concerns."

-p. 36 -"It is clear from this investigation that many of the recommendations being made mirror those made in the Fleet Transit Services, Shared Services, Operational Review, 2002 which was completed at the end of October, 2002. Despite the 5 months between this operational review and this investigation the problems persist. The recommendations in this report also consist, in part, of recommending that action that was to be taken following the termination of Arthur Maddox in early May, 2001 be completed in a more timely manner or be carried out in a more consistent manner."

ii. Michael Dunphy

Mr. Dunphy testified about mandatory training for HRM employees on diversity and respect in the workplace that took place in November 2001. He is currently a Conflict Resolution Consultant at HRM.

Mr. Dunphy testified that he submitted the proposal at Exhibit "2", tab "54", following a request from (likely) the Employment Equity or Diversity Consultant at HRM to submit a proposal to provide training at their Transit Maintenance group. He could not remember why he was asked to provide training, but testified that the conversation would have come about

from issues of concern in the workplace. The proposal would have been to apply a training package at Metro Transit to "communicate what the workers' rights were and also what their responsibilities were in the workplace." The training "covered issues around discrimination. Issues around harassment particularly. Issues around conflicts. What some of the early warning signs were and what some of the resolutions were".

Mr. Dunphy confirmed that Exhibit "2", tab "55", listed the attendees to the training (which took place in November 2001), and tab "56" was a handout given to each student in the class entitled "Workplace Rights, Respect, and Responsibility". Mr. Dunphy had no recollection of anyone leaving in the middle of his seminars during the training or disruptive behaviour that he found "offensive, intimidating, or strongly disrespectful", although there "was some pushback".

Mr. Dunphy also testified about his involvement with implementing a Workplace Code of Values at Metro Transit, for which he was asked to attend meetings and facilitate the development of. The Code of Values was not intended to be a compliance tool so much as positive social marketing whereby "people would voluntarily describe to those and be recognized and rewarded for living up to those values." Early versions of the Code of Values looked quite different than the final version (which is easily ascertained by looking at Exhibit "2", tab "38", p 227 and p 208 – the final version at p .208 is condensed just into fourteen words without descriptors). Mr. Dunphy's sense was that incentives to live up to the values were not implemented in the workplace after the Code was put in place.

Mr. Dunphy testified about HRM's workplace rights policy as well (Exhibit "2", tab "2D" and Exhibit "19"). Mr. Dunphy did not help draft the policy (the one implemented in 2005), but he had some input into using the term "workplace rights" as an umbrella name for several policies. In his understanding, the policy lays out "the employer's commitment to having a workplace that's free of harassment... defines what harassment is and also lays out the complaint process and resolution process". Mr. Dunphy was asked to provide input and advice on updating his policy in 2006, and the policy was being revised again at the time of his testimony.

When asked about the current state of diversity in the maintenance workshop at HRM, he stated "it's minimal in terms of diversity", citing low diversity in terms of gender and race in particular. Based on his experience, he had dealt with all of the visible minorities working at the Ilsley Avenue location and there were five to six of these individuals total, but he could not recall a specific complaint of racial harassment.

On cross-examination, Mr. Dunphy stated that there was information on the impact of harassment or discrimination on victims in his November 2001 training materials because his impression is "that those who were engaging in harassing type of behaviors did not have a lot of insight into the impact those behaviours on their victims', and therefore this information was important.

Mr. Dunphy also provided general descriptions of his experience working with the Metro Transit workforce during the training and work on the Code of Values:

A. Okay-okay. Well certainly in – in talking about the workforce there I sensed there was a lot of conflict between employees and supervisors; supervisors not giving clear direction for example, those complaints. Supervisors being rude. Oh. In terms of communication being poor, in terms of what has to be achieved there I felt is- yeah, chaotic was the summary I took away from this.

Q. I – I wasn't clear what – what exactly that means and – and why that would be an issue. Could you elaborate on that?

A. Okay. It certainly refers to more of a generational shift. Many of the workers there had – are longstanding- at that time were longstanding workers, maybe 35 years' service in and I found generally that they were very productive of their seniority rights and very – very resistant to any changes unless it came through the collective agreement.

For example transferring. Going from night shift to day shift and which sometimes was a barrier for younger workers, of course, trying to get from night shift to day shift and transfers.

As well I found that group in the training a – a little more resistant in questioning of the principles of the training versus those who say who were you know maybe five to eight, nine years on the job.

[...]

Q. And I – I want to come back to the training but since you mentioned it I'd – I'd like to follow-up...

A. Sure.

Q. ... on it now because you mentioned I guess- I think you used the word resistant or resistance from some of these older employees and how did that manifest with some of them?

A. Well in the training certainly the body language was such that they would you know sort of give a – cross their arms and lean back and fall asleep or be – not really paying attention that much. They'd ask questions like "Why can't I do this? Why can't I do that? How can they tell me not to do this" et cetera.

So very pointed questions. Not really accepting the concepts that well but that – other than disruptive ways so – well not in a overwhelming way that it disrupted the training...

Q. Yup.

A. ...but just a general sense of – or resistance to it.

Mr. Dunphy also testified that to ignore terms used in the workplace like "nigger", "wagon burner", and "fucking Indian", would be unacceptable conduct by an employer – in his words, doing so "would fly in the face of the due diligence the employer has for – for a harassment free environment. Absolutely unacceptable".

4. FACTUAL/LEGAL ISSUES

The first part of my analysis will deal with credibility/evidentiary issues. The legal issues that I must consider in my analysis are as follows:

1. Does Y.Z. fall under a protected ground under the *Human Rights Act*?
2. Did the Complainant suffer a disadvantage/harm, and specifically was he exposed to a poisoned work environment?
3. Was his protected ground a factor or connected to the discrimination? Specifically, was "race" or "association with those of race" a factor or "connected" to the harm or disadvantage?
4. HRM's "freedom of speech" defence.
5. Is HRM vicariously liable for the actions of its employees?
6. If there is liability, what is the appropriate measure of various categories of damages?

5. ANALYSIS/DECISION

Complainant's Credibility and Assessment of the Circumstances

There are some discrepancies between the evidence of Y.Z. and the evidence of other individuals on some fairly critical points. The first instance that is offered to support the proposition that Y.Z. is not credible, is two versions of events in relation to the statement being made "I won't be training no fucking Indians". In his first version of events, Y.Z. made the statement that it was made in the presence of David Buckle and it was made by both Everett Cleversey and Steve Gillis. In his second version, when he testified, he expressed that it had to have been said the day before Dave Buckle arrived. As well, in his

second version of his testimony, Mr. Cleversey did not make the statement "I'm not training no fucking Indian", but simply walked away.

The next issue of discrepancy that was raised by Counsel for HRM was Y.Z.'s evidence that he did not move to the new facility on Thornhill Drive, because it would be a different union and a different bargaining unit.

Y.Z. had the benefit of hearing Mr. Hartlen confirm that the facility on Thornhill Drive was the exact same union. Y.Z. stated that "I can't remember now" and further stated "I was mixed up there I don't know".

What Y.Z. consistently stated in both versions of his reasons not to move to Thornhill Drive, was he did not want to be forced out of his workplace by the actions of others.

The next area of discrepancy which was raised by Counsel for HRM was the evidence concerning whether or not Mr. Ron Doubleday had told him that his co-workers wanted him moved out of the shop on January 15, 2007, because they did not want him there; versus a discussion with Burkley Gallant about him moving to the general shop, because of his work limitations. I think it is important to note that these conversations occurred in 2007 and given the nature of the work environment Y.Z. was in, I suspect it was a reasonable inference for him to draw, that he was not wanted around that shop anymore.

Counsel for HRM made reference to alleged comments made by Y.Z.'s co-workers concerning Tiger Woods, that these comments were made at time in Y.Z.'s work life when Tiger Woods would have been ten to twelve years of age, and would not have been golfing professionally.

Counsel for HRM on numerous occasions raised the issue of Y.Z. accusing others of not telling the truth. In particular, he raised the statement made by Y.Z.:

> You bring any of them in here and put them on the stand and I'll guarantee you they'll all fucking perjure themselves on the stand just like Deputy Chief McNeil did (Transcript, June 15, 2016, page 137).

Y.Z., as well, accused Mr. Bhathena of lying when he stated that he had a positive work experience at Transit. Y.Z. testified "Shapi knew the truth and – and he did not say that – I mean if he had come out and said yes he – he put up with a little bit of harassment when he first started it would have been true right even if he didn't go into a big explanation of it but he totally denied it. He totally said it was a beautiful place to work. Well that's not true right... it wasn't the truth and he was under oath" (Transcript, June 15, 2016, pages 101-102).

There were discrepancies between the evidence of Y.Z. and some of the other witnesses.

In particular, I have already commented on the discrepancy of the evidence between Y.Z. and former Deputy Chief of Police Chris McNeil. I find in relation to that particular incident, being the workplace rights complaint/mediation, that it is quite possible Y.Z. misconstrued the actions of Chris McNeil in the context of the mediation. I find that he had been in that workplace for some period of time. The Della Risley Report had been released. I suspect that his stress level was particularly high and that coloured his recollection of what occurred.

In relation to Y.Z.'s comments concerning the evidence of Shapir Bhathena, we have evidence of other individuals which contradicts Mr. Bhathena's statement about what the work environment was like. Those statements of individuals such as Cathy Martin, Stephanie Wright and others support the evidence of Y.Z. that Mr. Bhathena experienced difficulties in the workplace, and in particular, with Mr. Maddox.

There is a significant amount of evidence about the bus incident. There was evidence about the type of bus, the length of the bus. There was the evidence of Arthur Maddox, who clearly stated that he did not try to run Y.Z. over with the bus and would not try to run Y.Z. over with the bus, because he had, unfortunately in the past, had the experience of removing body parts from the bottom of a bus that had struck a pedestrian.

To find that there was discrimination, I do not need to find as a fact that Arthur Maddox tried to run Y.Z. over with the bus. I find on the balance of probabilities that (a) Y.Z. believed that Arthur Maddox tried to run him over with the bus; (b) based on all of the evidence that I have heard concerning the behaviour and character of Arthur Maddox, he was quite capable of taking the opportunity to frighten Y.Z.; (c) he did take that opportunity; and (d) Y.Z.'s marriage to his wife, [redacted] and his association with Randy Symonds and David Buckle was a factor in Arthur Maddox taking the opportunity.

I find, therefore, that Y.Z. is a credible witness and there are some issues in relation to his reliability; however, this does not result in me not accepting the bulk of his evidence. In doing so, I rely on the decision in ***Naraine***. The issues concerning his reliability are partially due to the passage of time, and partially due to his mental health status, which Dr. Genest testified about and, as well, his experiences in a poisoned work environment. Further, there is ample evidence of other witnesses who were largely uncontradicted to support the proposition that discrimination was ongoing in the workplace, and was being perpetrated against Dave Buckle and Randy Symonds, individuals that Y.Z. associated himself with, or to his wife, [redacted] Further, there is ample evidence of a poisoned work environment from those who are even in a supervisory position for HRM and, in particular, Cathy Martin.

Credibility of Arthur Maddox

Lastly, I must comment on the credibility of Arthur Maddox. I find as a fact, other than the incident in which he described his assault of Randy Symonds, that where his evidence differs

from any other witnesses that I accept the evidence of the other witness. Arthur Maddox presented as self-serving and disingenuous. I find that he used his size and his voice and his demeanor in the workplace to intimidate, bully and harass those who were around him. There were several honest statements in his testimony, that he had suffered from anger management issues, and his aforementioned description of the assault on Randy Symonds, which was graphic in nature. There is ample evidence before me to conclude that Arthur Maddox was the perpetrator of several incidents of racist and/or bullying behaviour in relation to Randy Symonds, David Buckle and that his attempt to terrorize Y.Z. with the bus was simply "payback" for his association with those individuals, and for his support of Randy Symonds, whom he associated with, because Mr. Symonds was responsible for his termination.

I find as a fact, based on the whole of the evidence of Mr. Maddox, and the evidence about Mr. Maddox and the evidence of Y.Z., that Mr. Maddox took an opportunity to frighten Y.Z. and drove the bus closer to him than what he should have done. Mr. Maddox took advantage of a situation to play a cruel joke. I find that Mr. Maddox was trying to terrorize Y.Z., but I cannot find that he tried to intentionally kill him.

I find, however, given the circumstances of Mr. Maddox's termination and reinstatement and given the whole of the evidence about his actions towards Randy Symonds and David Buckle, and his behaviour at the barbeque, Mr. Maddox would have perceived that Y.Z. was an individual who supported his termination, because of his connection to Randy Symonds, David Buckle and That in itself provided enough motivation and opportunity for Mr. Maddox to terrorize Y.Z. with a bus.

Was Y.Z.'s Assessment of the Situation Reasonable Under the Circumstances?

I find that Y.Z.'s assessment of the situation was reasonable under the circumstances and, in doing so, I rely on the evidence of Cathy Martin, David Buckle, Stephanie Wright, Scott Sears, Paul LaPierre and Albert Burke. I rely on the evidence which corroborates the writings on the bathroom wall in relation to "Baby Hitler" and "beware of the Buckle bus". I rely on the evidence of the countless witnesses that I have already cited who spoke of the negative work environment, the racist language that existed in that workplace. There is enough evidence from other individuals which corroborates the evidence of Y.Z. that I can make such a finding, even though there are, in some instances, issues with Y.Z.'s reliability.

I find that there is no evidence to substantiate that Y.Z. was being discriminated against based on his association with his wife, during the years he was under the supervision of Walter Dominix.

I find that there is no evidence to support Y.Z.'s allegation that he was bullied into signing the mediated agreement and that Mr. McNeil did not take his concerns seriously. Chris McNeil, by his own admission, had very little independent recollection of the mediation process. However, he was clear that the scope of his investigation was narrow and that once

be determined he did not have empirical evidence to support the allegation of unfair work assignment, his strategy was to try to come up with an agreement which allowed the two individuals the ability to work together in the future. It is clear that Mr. McNeil did not recommend that the Arthur Maddox bus incident be referred for criminal investigation. I accept that he did not view this allegation as part of his mandate in the mediation process.

Y.Z. certainly, in his evidence, provided a very different description of Mr. McNeil's actions in the mediation. I think it is fair to say, given the amount of stress that he had been under as a result of the environment he was working in, it is quite possible that he misconstrued or did not understand the actions of Mr. McNeil. Mr. McNeil, at that point in his career path, would have absolutely no reason to be party to any cover up scheme as to the work environment at Halifax Metro Transit, given his involvement post-dated the Della Risley report, which made clear findings in relation to the discriminatory conduct in the workplace.

However, there were enough direct instances of inappropriate behaviour in relation to Y.Z. and his wife, [redacted] for Y.Z. to form the assessment of the circumstances that he did. There was the incident at the 508 barbeque. There was the incident with the [redacted] 'phone call. There was a bus incident in relation to Arthur Maddox. There were instances where wet paper towels were thrown over bathroom stalls, garbage was left on tool boxes, damage was done to tools, lug nuts were thrown and inappropriate racial slurs used in the workplace were uncorrected by management.

1. **Does Y.Z. fall under a protected ground under the *Human Rights Act*?**

The protected ground that Y.Z. is alleging in his complaint is association with those of race. The Act clearly protects the right to associate with those of race. Y.Z. was married to [redacted] who self-identified as being black, but also had her Band Status card. There was ample evidence of his association at work and support of Randy Symonds in his struggles at the workplace and in his Human Rights Complaint, and, as well, during the investigation by Della Risley. There is ample evidence of Y.Z.'s associate with David Buckle and the contact that he had with him at shift change. There is ample evidence of Mr. Buckle and Mr. Symonds being discriminated against in the workplace by fellow workers.

2. **Did the Complainant suffer a disadvantage/harm/adverse impact, and specifically was he exposed to a poisoned work environment?**

I find that Y.Z.'s work life was negatively impacted in a number of ways. First, I find that he was targeted by other employees because of marriage to [redacted] his relationship with David Buckle and Randy Symonds, and because he brought forward complaints of inappropriate conduct in the workplace. I find that some of the harassment that he endured may have had to do with his health issues, but they were, in part, due to his association with these individuals, and the stance that he took in supporting them. Further, I find that Arthur Maddox's attempt to terrorize him only occurred because of his support of Randy Symonds and David Buckle, and because [redacted] had complained about how he had answered the

phone. I also find that despite management's efforts to improve the situation, particularly after the Della Risley Report, little to nothing was done leading up to the termination of Arthur Maddox to ensure that individuals in the workplace were not subjected to the language and behaviour of Arthur Maddox and his supporters. Further, after Arthur Maddox returned to the workplace, I find that there was no safety net in place to protect those individuals who would potentially be targeted by his behaviours. Action was taken to improve training in the work culture; however, Arthur Maddox continued in the workplace and his mere presence there negatively impacted Y.Z. A prime example of how his presence negatively impacted Y.Z. was the bus incident.

In finding that Y.Z. was subjected to a poisoned work environment that was based on race, I rely on the decisions in ***Dhillon***, ***Cromwell***, ***Jansen*** and ***Naraine***, in so finding. I also rely on ***Smith*** and find that the emotional and psychological circumstances in the workplace, which underline the work atmosphere, constitute part of the terms and conditions of employment, and that Y.Z. was subjected to a poisoned work environment, which was a form of discrimination against him, because of who he was married to, how he associated with and because he complained about the work environment that he was exposed to.

I find particularly in the early years of Y.Z.'s employment that management and, in particular Mike Hartlen, did not effectively investigate and discipline when inappropriate racially motivated statements were made. This finding is supported by the comments made in the Della Risley Report. I also find that management did not do enough to shut down this type of discriminatory behaviour in the workplace. In making this finding I rely on the evidence that I have heard, the findings of the Della Risley Report and, in particular, the evidence of Ms. Risley and the evidence of Chris McNeil. It took the allegation of assault on Randy Symonds for Arthur Maddox to be terminated and removed from the workplace. Management allowed a bully who made racist statements to fellow employees run rampant in the workplace. Clearly, the open-door policy that Mike Hartlen testified about and the attempts to get away from grievance process were not working to combat and control the behaviours that were ongoing in that work place.

Further, Mike Hartlen switching of supervisors of Y.Z. at about the same time that the workplace rights complaint came forward in 2004, was too little too late. The evidence clearly supports the proposition that Burkley Gallant and Arthur Maddox were friends. Arthur Maddox was a tormentor of Y.Z., Randy Symonds and David Buckle. Further, the suggestion that Y.Z. move to a different work site was not the answer to the problem. The answer was an effective investigation and discipline within the workplace. There is no evidence of any attempt to investigate the "Baby Hitler" and/or the "Buckle bus" writing on the bathroom wall, the pranks, the damage to equipment and work benches, and other disruptive behaviour in the workplace.

From all of the evidence that I have heard the only reasonable conclusion to draw that Y.Z. worked in a poisoned work environment, which negatively affected his health and his

employment. Further, he was treated differentially because of his association with those of colour.

It was not until the Della Risley Report that management began the process of ensuring that there was education and training in relation to workplace rights. For Y.Z. this training came too little too late.

The irony does not escape the Chair that Arthur Maddox, who was the perpetrator of most of the wrong doing in the workplace of the Respondent, is still the only one that continues to be employed there. It is the evidence of a number of witnesses that came in contact with Mr. Maddox that his behaviour was, at least in part, the reason for their departure from that work environment.

3. **Was his protected ground a factor or connected to the discrimination? Specifically, was "race" or "association with those of race" a factor or "connected" to the harm or disadvantage?**

The evidence of David Buckle is relevant to Y.Z.'s claim of discrimination because he was a known associate of Y.Z., and Y.Z. provided support to him in the workplace. Mr. Buckle, Y.Z. and Randy Symonds participated in the Della Risley Report investigation process.

I find that David Buckle was a victim of racial discrimination and I rely on the evidence as cited in this decision in coming to that conclusion. I also find that Y.Z. was a support person to Mr. Buckle throughout the course of his employment at Metro Transit. They were both involved with the Della Risley Report. Y.Z. was known in the workplace to support David Buckle and it was Mr. Buckle's evidence that he and Y.Z. were in contact with each other primarily at shift changes and it was at those occasions that they shared information concerning the atmosphere in the workplace. Further, I accept the evidence of Y.Z. that experienced differential treatment in the workplace based on his association with Mr. Buckle, examples of which were damage to his tools, garbage on his tool box.

I find that Randy Symonds was discriminated against in the workplace, in particular by Arthur Maddox, based on his race, and also by other individuals, based on statements that were made in his presence about his race. I rely on the evidence of Cathy Martin, Stephanie Wright, Arthur Maddox, Burkley Gallant, notes of Mike Hartlen at the time of Arthur Maddox's termination and subsequent to his termination, and the contents of the Agreed Statement of Facts.

It was the evidence of Y.Z. that he was in contact with Randy Symonds in relation to his Human Rights complaint and in relation to the finalization of the Della Risley report. It was Y.Z.'s evidence that Mr. Symonds shared with him a preliminary version of that report. It was the evidence of Y.Z. that he provided emotional support to Randy Symonds through the

course of his employment with the Respondent. It was the evidence of Y.Z. that it was known in the workplace that he associated with Randy Symonds.

I find that Y.Z. was fully aware of Randy Symonds' struggles in the workplace and that awareness and support of Mr. Symonds negatively affected Y.Z. in the workplace.

David Buckle was a victim of discrimination based on race in his workplace, based on the actions of his co-workers, the comments that were made to him, the writing on the bathroom wall and the expressions. He and Y.Z. shared this information at shift changes. They were both involved in the investigation surrounding the Della Risley Report. They were both subjected to the same type of behaviour in relation to their tools and their tool boxes.

The common theme throughout Y.Z.'s difficulties in his work environment is his marriage to his wife, _____ and his friendship and support of David Buckle and Randy Symonds, who were the only two visible minority workers in the Brake Shop. There is ample evidence that both Mr. Buckle and Mr. Symonds were discriminated against in the workplace. Y.Z., Mr. Buckle and Mr. Symonds all participated in the Della Risley investigative process for her report. Counsel for HRM suggested in argument and other witnesses suggested, as well, that the perpetrator, Arthur Maddox, treated everybody the same way. However, there is a connection between the race of David Buckle, the race of Randy Symons and the bullying and racially charged language that Arthur Maddox used in his dealings with them. Y.Z.'s treatment in the workplace was connected to his association with those of race.

Is it More Probable Than Not That Race and/or Association with Those of Race is the Reason or Part of the Reason for Differential Treatment of the Complainant?

I find the comments attributed to Arthur Maddox at the 508 barbeque were, in fact, made to Y.Z. and his wife, _____. I rely on the evidence of Y.Z., _____ and Cathy Martin. Although, these statements did not occur in the workplace, they were made at a workplace event where co-workers and their spouses were present. These statements set the tone for the treatment of Y.Z. into the future by Arthur Maddox and other individuals in the Respondent's employ.

In relation to the telephone incident involving _____ I find that Arthur Maddox's tone of voice and attitude when he answered the phone call of _____ was, in fact, racially motivated. Management's lack of action and/or investigation negatively impacted Y.Z. and there were comments made to him in the workplace by Paul Beauchamp about this incident when Arthur Maddox was terminated. I find, as well, the lack of communication with _____ until after the Della Risley Report was a symptom of the poisoned work environment and managements lack of investigation of these types of incidents.

I find, as well, that there were instances of direct discrimination against David Buckle. In particular, I accept that statements were made by Danny Deal that he was "not going to train no f***ing Indian". These statements were uncorrected in the workplace. I find as a fact that

David Buckle was harassed about his hair by Arthur Maddox and was threatened by him, if he made a complaint alleging that it was racially motivated. I find, as well, that David Buckle was harassed in the workplace because of his ethnic background. The harassment took the form of garbage being left at his workplace, damage being done to his tools, the monster truck being glued to his work box with the word "quit" written on it. I find that Arthur Maddox started yelling and threatened to hurt David Buckle when he objected to the comments about Mr. Maddox's comments about his hair. I find, as well, that the statement "beware of the Buckle bus" was written in the men's bathroom. I also find that it was inappropriate that Steve Gillis asked Mr. Buckle to remove it given that the statement was directed towards him. I find as a fact, as well, that the statements were made in the workplace of a job being done poorly or mistakenly as being "Buckled". I find that these actions were taken for the most part, not because of Mr. Buckle's work quality, but primarily because of his ethnicity.

In relation to Mr. Symonds, I find that he was discriminated against and harassed in the workplace by a number of individuals, most particularly, Arthur Maddox, who by his own admission came to the counter and told him to "suck me boy", admitted to referring to Mr. Symonds as "boy" and, as well, assaulted verbally and threatened to batter Mr. Symonds. I find, as well, as a fact that Walter Serroul made the statement "nigger work" and I also find that the term "niggered up" was used regularly in the workplace. I find, as well, that Arthur Maddox on the day that he was about to be terminated for his assault on Randy Symonds, made the statement "racism racism, should be a law that you can shoot somebody and get away with it". I also accept the notes made by Mike Hartlen to the effect that Mr. Symonds complained that there were many prior instances where Arthur Maddox used racial slurs and other discriminatory remarks at least six to seven times a week. I accept the evidence of Cathy Martin when she described what she heard and observed in relation to the treatment of Randy Symonds at the store counter and his comments to her about how he was being treated in the workplace.

I also find that there are many examples and instances of a poisoned work environment. In particular, I find the writing on the bathroom wall referencing "Baby Hitler" and, as well, "beware of Buckle bus", as examples of a poisoned work environment. I find the lug nut incident in relation to Y.Z. and the use of the terms "niggered up", "Buckled", "wagon burner", the evidence of Cathy Martin as to the statements made in the workplace and the need to have her lunch break with other likeminded individuals, away from those who were spouting inappropriate comments in the workplace. I also rely on the evidence of Scott Sears and Paul LaPierre concerning the training delivered by Charla Williams. In rely on the evidence of Burkley Gallant, Albert Burke and Steve Gillis concerning the negative statements that were made in the workplace. Mr. Bhathena noted the incident between Mr. Maddox and Marlena Bourgeois, a female driver, and his inability to discipline Mr. Maddox, and he testified as to his frustration that Mr. Maddox was unable to be disciplined.

The evidence of Mike Hartlen confirms that Arthur Maddox was able to act in a disrespectful, aggressive and racist way, and that because of the provisions of the Collective Agreement, he was able to continue on in his employment. I accept that the lack of progressive discipline and the provisions of the Collective Agreement, as well as his friendship with Burkley Gallant, allowed Arthur Maddox to have free rein in the workplace and allowed him to bully his co-workers and intimidate them into silence. Further, the lack of investigation by the Respondent, HRM, into the allegations of misbehavior, whether it was racially motivated or not, created for Y.Z. the sense that he was not valued and protected in the workplace, and allowed the atmosphere of a poisoned work environment to continue to fester. Management, prior to the Della Risley report, made a conscious decision to investigate "every little complaint", and to try to have a "open door policy", which reduced the number and frequency of grievances. The result of this decision was to allow these behaviours to go unchecked. Further, Mr. MacNeil commented on the lack of direction provided to shop floor supervisors on when and how they were to discipline and the steps that they should be taking.

I find there are many examples of instances where actions were taken of a discriminatory nature, which provide direct evidence of a poisoned work environment.

I find that the actions taken against Y.Z. in the workplace were as a result of his association with his wife, [redacted] David Buckle and Randy Symonds, and the poisoned work environment which existed in the workplace.

Therefore, based on the above, the Complainant has established a *prima facie* case of discrimination.

4. **HRM's "freedom of expression" defence.**

Counsel for HRM offers as a defence the Supreme Court of Canada decision in ***Saskatchewan (Human Rights Commission) v. Whatcott***, 2013 SCC 11. Counsel for HRM argues that in ***Whatcott*** the Supreme Court of Canada applied the *Charter of Rights and Freedoms* to limit the application of the Human Rights Legislation intrusions on freedom of expression. It was respectfully submitted by Counsel for HRM that the comments and dialogue of the co-workers and management personally appear to fall within the scope of constitutionally protected expression as set out in ***Whatcott***.

One preliminary issue is whether this defence should be categorized as part of HRM's case to negative the Complainant's attempt to establish a *prima facie* case of discrimination, or is it HRM's attempt, once *prima facie* discrimination has been established, to justify the conduct on the basis of "exemptions provided for in the applicable human rights legislation or those developed by the courts" (paragraph 37 of ***Bombardier***). It is my view, based on the character and importance of *Charter* arguments, that such arguments form the basis of

defences or exemptions which the Respondent has the burden of establishing once a *prima facie* case of discrimination has been established.

The factual circumstances in ***Whatcott*** were significantly different than in the matter before me. In ***Whatcott*** there were four complaints filed with the Saskatchewan Human Rights Commission concerning four flyers published and distributed. The Complainants alleged that the flyers promoted hatred against individuals on the basis of their sexual orientation. The first two flyers were entitled "Keep Homosexuality out of Saskatoon's Public Schools!" and "Sodomites in our Public Schools". The other two flyers were identical to one another and were a re-print of a page of classified advertisements to which handwritten comments were added.

The case before me does not have anything to do with freedom of speech or the distribution of pamphlets. ***Whatcott*** deals with public discourse on issues of some public relevance, and not discourse in a work environment where an employee is subjected to inappropriate comments and has little, if any, recourse but to endure it or seek its cessation.

The decision in ***Whatcott*** is not applicable to the case before me because it deals with the public distribution of flyers, as opposed to statements made in a work environment where an employee subjected to it would have little, if any, recourse but to endure it and seek its cessation. Factually, I find that the ***Whatcott*** decision is not applicable and that circumstances before me do not touch on freedom of expression, as described in the ***Whatcott*** decision.

Further, Counsel for HRM argues that it is not responsible for the actions of individual employees, that it's hands were tied by the sunset clause of the Collective Agreement, and that subsequent to the Della Risley Report they took adequate steps to improve and promote non-discriminatory behaviour in the workplace.

The difficulty with that analysis is that the majority of the witnesses that I heard from all openly acknowledged that Arthur Maddox, who was a prime instigator, and his core group of followers continued on in the workplace and were unchecked and unchallenged until the assault of Randy Symonds came to light. Up to that point in time, despite the discipline binder that was produced by Mike Hartlen, it was clear that Arthur Maddox continued on in his behaviours. Counsel for HRM argues that HRM is not responsible for the actions of Arthur Maddox; however, they continue to employ him, they allowed him to proceed unsanctioned throughout the workplace. And it is not just the actions of Arthur Maddox, it is the evidence surrounding the comments that are racially motivated that are acknowledged to have been made on a regular and consistent basis in the work environment. There were two instances of the writings on the wall, which show racial intent. HRM is vicariously liable for the actions of its employees if they do not take proper and adequate steps to correct the

situation. A major issue is the lack of investigation that went on in the workplace until after the Della Risley Report. There is a lack of training of employees in the issues of inclusion, diversity and respect in the workplace. The evidence concerning the actions of the participants is disturbing.

Mr. Dunphy testified that to ignore terms used in the workplace like "nigger", "wagon burner", and "fucking Indian", would be unacceptable conduct by an employer that, in his words, "doing so would fly in the face of the due diligence of the employer has for – for a harassment free environment. Absolutely unacceptable". This is a statement made by a witness produced by HRM.

HRM did not do enough to address the comments and the poisoned work environment. ***Whatcott*** is not applicable and does not provide a defence to HRM in these circumstances.

HRM did not advance or attempt to establish any other *Code* or "Court established" exemption or defence in this proceeding.

5. Is HRM vicariously liable for the actions of its employees?

I finding that HRM is vicariously liable for the actions of their employees. I rely upon the previously quoted decision of ***Gough v C.R. Falkenham Backhoe Services***, 2007 NSHRC-4, and, in particular, paragraphs 64-66 of the decision. I also rely on paragraph 67 and 68 of that decision in relation to the question of intention. Lastly, in relation to the question of vicarious liability, I again rely on paragraphs 70-74 of the decision of Chair Hodder in the ***Gough*** decision. I find based on the facts and the case law that HRM was liable for the actions of its employees and did not do enough to curb their inappropriate behaviour.

6. SUMMARY OF THE FINDINGS ON LIABILITY AND THE ISSUE OF DAMAGES

Based on my finding that the Complaint has (a) been discriminated against in contravention of sections 5(1)(d)(i)(j)(o)(q) and (v) of the *Act* (b) the Respondent is vicariously liable for the actions of its employees (c) the Respondent HRM did not do enough to address the comments and/or actions and the poisoned work environment, and (d) ***Whatcott*** is not applicable and does not provide a defence to HRM in these circumstances, I now must consider the assessment of damages.

On damages and remedies, I retain jurisdiction to hear further submissions on the following issues:

1. the quantum of general damages - counsel for the Complainant made lengthy submissions but I would like to hear further from Counsel for the Respondent on this issue;

2. the calculation of interest on general damages;

3. I am seeking an updated number of the past lost income and future lost income report of Jesse Shaw Gmeiner, BScH, MSc, FCIA, FSA, as of the date of this decision on liability;

4. the impact of the decision of Chair Raymond in **Wakeham** v. **N.S.** (2017) CanLII 51556, on Counsels' submissions on the potential deduction of past and future LTD benefits from an award for past lost income and/or future lost income;

5. the tax treatment of any award I may make for past lost income and/or future lost income;

6. further submissions on the public interest remedy.

I retain jurisdiction to reconvene another hearing date and to receive further oral and written submissions on the above noted issues. I will shortly canvass Counsel for their available dates so this matter can be concluded as quickly as possible.

Dated at Kentville, Nova Scotia, this 15th day of March, 2018.

Lynn M. Connors, Q.C.
Board Chair

SCHEDULE A

IN THE MATTER OF: The Nova Scotia *Human Rights Act*

-and-

IN THE MATTER OF: The Complaint of Y.Z. v. Halifax Regional Municipality

Before Lynn Connors, Q.C., Chair of the Board of Inquiry

DECISION

Y.Z., the Complainant, has applied for in Identity Publication Ban and Sealing Order protecting his identity.

The Application was originally scheduled for September 27th, 2013, which was delayed for hearing until December 2nd, 2013 because the Media had not been notified of the Application.

A Consent Order was entered into by the Complainant, Commission Counsel, Counsel for the Respondent and, Counsel for the Media's undertaking, to avoid the Board of Inquiry making a ruling on its jurisdiction to grant an Identity Publication Ban, (hereinafter referred to as an I.P.B.), and so the process could continue without there being any risk to the Complainant that any of his identifying features would be published until the final determination had been made.

The Consent Order confirmed counsel for the Media's undertaking not to publish the name of or any information which would identify the Complainant. This Order remains in effect until such time as I render a decision.

Written and oral submissions were made by counsel for the Complainant, Commission Counsel, and Counsel for the Media. Before I rendered a decision at the conclusion of the hearing in December of 2013, Counsel for the Complainant, Commission Counsel, and Counsel for the Respondent advised that they wished to attempt to resolve the substance of the complaint through alternative dispute resolution. As a result, the matter was then adjourned and a return date was set for June, 2014.

Because of a conflict in my schedule, the matter was subsequently adjourned over to August 19th, 2014 to deal with issues concerning the production of documents by way of

subpoenas and as well, for the decision on the I.P.B. When this hearing reconvened in August of 2014, I was also to make a determination as to the admissibility as to the subsequently filed medical evidence on behalf of the Complainant. I admitted the evidence as part of that hearing and as well, despite the fact that is was filed late and after the initial Application for the I.P.B. was filed, I am admitting the evidence because of the nature of this sensitive Application and because of the submissions made concerning the Complainant's mental health status.

There are a number of issues that I must resolve in relation to the Application for an I.P.B. They are as follows:

1. Does a Board of Inquiry, pursuant to the Human Rights Act, R.S.N.S. 1989, c. 214 as amended and/or the Public Inquiries Act, have jurisdiction to make an I.P.B.?;
2. If some form of an I.P.B. is granted, how broad should it be in the circumstances of this case?;
3. What is the proper process for notifying the Media in relation to a request for I.P.B. before a Board of Inquiry?

In relation to the last issue, which is a process issue, I am going to defer my comments in the interest of time and will subsequently render a decision at a later date.

The more pressing issue is the question of the merits of this Application.

1. Jurisdiction

It was originally the position of Counsel for the Media that a Nova Scotia Human Rights Commission Board of Inquiry lacks jurisdiction to grant the I.P.B. sought.

Counsel for the Media has subsequently conceded that the Board of Inquiry has jurisdiction expressly granted by statute arising by necessary implication to carry out its authorized mandate. Section 8 of the Regulations of the Human Rights Act mandates a public hearing but gives discretion to exclude members of the public in whole or in part if it is in the public interest to do so. Counsel for the Media has also submitted that a Board of Inquiry must act consistent with the Charter of Rights and Freedoms and its values when exercising its statutory functions and the Board must consider lesser measures than an Order excluding members of the public.

Section 34 (1) the *Human Rights Act* states:

> *"A Board of Inquiry shall conduct a public hearing and has all the powers and privileges of a commissioner under the Public Inquiries Act."*

Section 34 (7) says that the general jurisdiction of the Board of Inquiry is:

> *"A Board of Inquiry has jurisdiction and authority to determine any question of fact or law or both required to be decided in reaching a decision as to whether or not any person has contravened this Act or for the making of any order pursuant to such decision."*

Regulation 8 under section 42 of the Human Rights Act R.S.N.S. 1989 c. 219, N.S. Reg. states:

> *"A hearing of the Board of Inquiry shall be public, but a Board of Inquiry may exclude members of the public during the whole or any part of the hearing if it considers such exclusion to be in the public interest."*

Section 5 of the Public Inquiries Act, R.S.N.S. 1989, c. 372 as amended gives the Board of Inquiry "... the same privileges and immunities as a judge of the Supreme Court."

In *A.B. v. C.D. (1992), 18 C.H.R.R.D./147 (N.S. Bd. Inq.)* the Board of Inquiry found jurisdiction to issue a Publication Ban pursuant to the Human Rights Act, within the power to decide questions of law and fact and relied upon section 34 (7). This provision provided the Board Chair with the ability to decide jurisdictional issues. Jurisdiction to grant a Publication Ban was found implicitly in the Act, and the Chair found that a reason of safety is sufficient to grant the ban.

Further, in both *A.B. v. Nova Scotia Youth Facility 2009 (N.S. B.d. Inq.)* and *A.B. v. C.D. (1992) 18 C.H.R.R. D / 147 (NS Bd Inquiry),* the Boards of Inquiry held that they had jurisdiction to ban the publication of the identity of a party or parties to the complaint. Both Boards issue Orders banning publication of the identities of the parties.

In *A.B. v. Nova Scotia Youth Facility*, the Board of Inquiry at page 3 of the decision stated:

"Section 34(1) of the Human Rights Act and s. 8 of the Board of Inquiry Regulations made there under stipulate in no uncertain terms that Board hearings are to be public. That said, s. 8 of the Regulations also reserves a power to the Board to exclude the public from hearings where that is deemed to be in the public interest.

An order for such an in camera hearing is a more invasive restriction on public access to information than is a publication ban or an order restricting the disclosure of identifying information. As such, I consider that the power to exclude the public from a hearing includes the lesser power to restrict public access to the contents of the hearing by means of a publication ban. Further, the Board's power to determine questions of law under s. 34(7) of the Human Rights Act accords me the power to make such legal determinations as are necessary to a finding as to whether a publication ban is appropriate.

Likewise, s. 7 of the Regulations and ss. 4 and 5 of the Public Inquiries Act accord me the power to make orders respecting the manner in which evidence is to be presented before the Board. Finally, s. 34(9) of the Human Rights Act allows me to determine the manner of publication of Board Decisions, and, accordingly, whether such decisions should contain indentifying information."

The Board of Inquiry in *A.B. v. Nova Scotia Youth Facility* has sufficiently distinguished the decision in *McLellan v. MacTara Ltd. (No. 1), 2004, 51 C.H.R.R.D/89 (N.S. Bd. Inq.)* which dealt with an Application for the ban of publication of the Respondent's financial documents and other financial information.

Further, on May 14th, 2012, Walter Thompson, Q.C. issued an I.P.B. *in A.B. v. Canadian Maritime Engineering Limited* (unreported) without rendering a written decision, after receiving written submissions and Affidavit evidence from the Complainant and oral arguments.

I also find that the statutory provisions gives the Board of Inquiry the jurisdiction to exercise its discretion to issue an I.P.B. in an appropriate circumstance and I rely specifically on *A.B. v. C.D. (1992) 18 C.H.N.D.D./147* at paragraphs 8 – 9 (Nova Scotia

Board of Inquiry) and *A.B. v. Nova Scotia Youth Facility*.

2. ***What are the Applicable Principles in Deciding Whether or Not to Grant the I.P.B.?***

a. Case law

In *Dagenais v. Canadian Broadcasting Corporation [1994] 3 S.C.R.835 (S.C.C.)* persons facing a criminal trial on charges of sexual abuse of children in training schools in Ontario, applied for an injunction barring the CBC from broadcasting a fictional drama depicting sexual abuse of children in a Catholic institution in Newfoundland. The rights in conflict were freedom of expression and freedom of the press under s. 2(b) of the Charter, versus the right to a fair trial for the accused under s. 11(d) of the Charter.

The majority of the Supreme Court of Canada stated at paragraph 73:

> *"... it is necessary to reformulate the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Charter. Given that publication bans, by their very definition, curtail freedom of expression of third parties, I believe that the common law rule must be adapted so as to require a consideration both of the objectives of a publication ban, and the proportionality of the ban to its effect on protected Charter rights. The modified rule may be stated as follows:*
>
> *A publication ban should only be ordered when:*
>
> *a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alterative measures will not prevent the risk; and*
>
> *b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban."*
>
> *(emphasis added)*

The more generalized test stated in *Degenais* is found in the underlined portions of the above quotation. The "modified rule" stated above, is the rule applicable where the

conflicting rights are freedom of expression versus right to fair criminal trial.

In *R. v. Mentuck 2001 SCC 76* a publication ban (regarding the identities of police officers involved in an undercover operations, who had been identified by the Crown during a criminal trial) was issued at the request of the Crown to protect the safety of the police officers. In this context, the Supreme Court of Canada found it necessary to re-state the applicable principle more generally than the "modified rule" stated in *Dagenais.*

In *Mentuck (S.C.C.)* the Supreme Court of Canada at paragraph 31 stated:

> *However, the common law rule under which the trial judge considered the publication ban in this case is broader than its specific application in Dagenais. The rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect the substance of the Oakes test", we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.*
>
> *(emphasis added)*

While *Mentuck* at paragraph 32 refers to *Dagenais* simply requiring "...findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects." The Supreme Court found it necessary to restate the rule in *Dagenais* more generally at paragraphs 32-22 as follows:

> *A publication ban should only be ordered when:*
>
> *(a) Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk;*
>
> *(b) The salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the*

> *right of the accused to a fair and public trial, and the efficacy of the administration of justice.*
>
> *This reformulation of the Dagenais test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression..... For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well .....*

It is submitted by Counsel for the Media that a Human Rights Board of Inquiry, being an administrative tribunal, does not detract from the general statements referring to "courts" and that the test in *Mentuck* applies. It is a quasi-judicial tribunal with all the attributes of a court – including the power to subpoena witnesses, compel testimony and hear and render a decision based on examination and cross-examination. Further, law-makers have made it clear that a Human Rights Board of Inquiry is a public process. Therefore, the test in *Dagenais/Mentuck* applies to the Board of Inquiry process.

In *Loveridge v. H.M.T.Q., 2005 B.C.S.C. 1068 (CanLii),* the plaintiff claimed damages for sexual assault committed by a prison guard while he was incarcerated. The same assaults were the subject of criminal charges against the prison guard. In the criminal proceedings, a publication ban was granted in respect of the complainant's name, Mr. Loveridge, under s.486(3) of the Criminal Code. Similar to the publication ban sought in this case, Mr. Loveridge applied to ban his identity in his civil action.

Justice Fraser began by observing paragraph 66 of the decision:

> *Any case in which the personal characteristics and history of the plaintiff are relevant, whether it be a case like this one, a motor vehicle accident, medical negligence, wrongful dismissal case or otherwise, carries with it the potential that the plaintiff will be required to lay bare private information he or she would prefer to keep secret. ...*

The request for a ban in *Loveridge* rested on two premises. First, that potential claimants

will be discouraged from pursuing civil actions if it is made known they are the victim of a sexual assault; and second, that it is desirable for sexual assault victims to be encouraged to bring actions for damages. Justice Fraser observed that the first premise rested on behavioral social science as a predictor of conduct; the second premise is social policy (at para.68). In relation to both, he stated that he lacked information to endorse or refute the premise. Ultimately, in the absence of unequivocal social science establishing the chilling effect publication might have on those pursuing civil claims for historic sexual abuse or a legislative change, Justice Fraser declined the ban sought. He continued at paragraph 76 of the decision:

> *" It is not apparent to me why a plaintiff commencing action in this Court should be seen as having a smaller obligation to the integrity of the process than does the Judge, the jury, the sheriff, the court clerk, counsel and other witnesses.* ***By commencing action, a plaintiff commits himself or herself to various kinds of proper conduct, including the obligation to disclose information and the obligation to speak the truth. I can see no rationale for protecting the plaintiff by a publication ban from the risk of public opprobrium for breach of these obligations. Everyone else in the process is at that risk."*** *(emphasis added)*

A similar argument was made and rejected in *R. v. Rhyno, 2001 NSPC 9.* In that case, the Crown sought an order banning publication of the names of two alleged victims as well as the name of the accused. The accused was charged with assault causing bodily harm. It was argued that there was a societal interest in encouraging the reporting of offences and to have victims and witnesses participate in the criminal process that may follow. The two alleged victims were sisters aged 11 and 13 years and they, along with the accused who was the boyfriend of the mother, lived in the small community of Sheet Harbour which has a population of between 100 and 200 people.

The Crown called as a witness, an R.C.M.P. officer, stationed in Sheet Harbour, who testified as to his belief (based upon his discussions with the girls) that they would be humiliated if their names were published. He testified to the reluctance by the public to come forward and report criminal activity for fear of being labelled a "fake" or fear of retaliation in Sheet Harbour.

The court considered the factors in Section 486(4.7) of the Criminal Code (essentially, a codification of the *Dagenais/Mentuck* criteria). Ultimately, the court rejected the argument there was a substantial risk the victims would suffer significant harm if their identities were disclosed, observing that the possibility of embarrassment or humiliation did not meet the evidentiary standard of significant harm. The Court also observed that it could also be reasonable to speculate that positive or sympathetic responses may be evoked in the community, regardless of the outcome. With respect to the public interest in reporting offences and participation in the criminal process, Associate Chief Judge Gibson observed:

> *"(d) There was no evidence before me that the alleged victims in this case would have difficulty participating in the trial as witnesses if their names were not banned from publication or that their cooperation in the investigation of these charges was predicated upon the seeking of such a ban. Society clearly has an interest in the reporting of offences, however, there is no evidence before me that without such bans, as sought here, in respect of these types of alleged offences, that individuals will be discouraged from reporting such offences.*
>
> *There is a certain reality about the making of a complaint to the police or the reporting of alleged offences that must be recognized. It is the fact that it is a serious matter to complain or report that someone has allegedly committed a criminal offence. Such a complaint, when made to the police, is usually the initial step causing the State, through police agencies, to investigate. Thus, the power of the State is invoked through a complaint made to the police. The public always has an interest and right to be informed when the investigation leads to criminal charges because it is the State, on behalf of society, that brings criminal charges against an individual. Those who make complaints of possible criminal conduct ought to know and expect that the investigation of such complaints which leads to criminal charges, will be subject to public scrutiny. Public scrutiny provides a balance. That balance ought to exist and is presumed to exist even with respect to alleged child victims other than those victims of the offences enumerated in s.486(3) of the Criminal Code."*

In *A.B. v. Bragg Communications Inc., [2012] 2 SCR 567, 2012 SCC 46, (S.C.C.),* a 15-year-old girl found out that someone had posted a fake Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her. The picture was accompanied by unflattering commentary about the girl's appearance along with sexually explicit references. Through her father as litigation guardian, the girl brought an application for an order requiring the Internet provider to disclose the identity of the person(s) who used the IP address to publish the profile so that she could identify potential defendants for an action in defamation. As part of her application, she asked for permission to anonymously seek the identity of the creator of the profile and for a publication ban on the contents of the profile. Two Media groups opposed the request for anonymity and the ban. The Supreme Court of Nova Scotia granted the request that the Internet provider disclose the information about the publisher of the profile, but denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl. The judge stayed that part of his order requiring the Internet provider to disclose the publisher's identity until either a successful appeal allowed the girl to proceed anonymously or until she filed a draft order which used her own and her father's real names. The Court of Appeal upheld the decision primarily on the ground that the girl had not discharged the onus of showing that there was evidence of harm to her which justified restricting access to the Media.

The judgment of the Supreme Court of Canada was delivered by Abella J.

The Appellant's Appeal to the Supreme Court of Canada was based on what she claimed as the failure to properly balance the harm in revealing her identity versus the risk to her by proceeding in open court. Unless her privacy was protected, she argued that young victims of sexualized cyber bullying like herself, would refuse to proceed with their claims and will as a result, be denied access to justice.

The open court principle was clearly stated by Abella J. at paragraph eleven of the decision. In paragraph 14 of the decision, Abella J. made the following statement:

> *"The girl's privacy interests are tied both to her age, and to the nature of the victimization she seeks protection from and is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying."*

In paragraph 15 of the decision Abella J. made the following statements:

> *The amicus curiae pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernible harm.*

Abella J. paragraph 17 of the decision, made the following statements concerning the recognition of the inherent vulnerability of children:

> *Recognition of the inherent vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the Criminal Code, R.S.C. 1985, c. C-46 (s. 486), the Youth Criminal Justice Act, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the Convention on the Rights of the Child, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child. As a result, in an application involving sexualized cyber bullying, there is no need for a particular child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament: See R. v. D.B., 2008 SCC 25 (CanLII), [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; R. v. Sharpe, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at paras. 170-74.*

Abella J. made the following statement at paragraph 23 of the decision:

> *In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children — and the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.*

In paragraph 28 – 30 of the decision, Abella J. engages in the balancing inquiry and made the following findings:

> *The answer to the other side of the balancing inquiry — what are the countervailing harms to the open courts principle and freedom of the press*

— has already been decided by this Court in Canadian Newspapers. In that case, the constitutionality of the provision in the Criminal Code *prohibiting disclosure of the identity of sexual assault complainants was challenged on the basis that its mandatory nature unduly restricted freedom of the press. In upholding the constitutionality of the provision, Lamer J. observed that:*

> *While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the Media's rights are minimal. . . . Nothing prevents the Media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. [Emphasis added; p. 133.]*

In other words, the harm has been found to be "minimal". This perspective of the relative insignificance of knowing a party's identity was confirmed by Binnie J. in F.N. where he referred to identity in the context of the Young Offenders legislation as being merely a "sliver of information": F.N. (Re), 2000 SCC 35 (CanLII), [2000] 1 S.C.R. 880, at para. 12.

The acknowledgment of the relative unimportance of the identity of a sexual assault victim is a complete answer to the argument that the non-disclosure of the identity of a young victim of online sexualized bullying is harmful to the exercise of press freedom or the open courts principle. Canadian Newspapers clearly establishes that the benefits of protecting such victims through anonymity outweigh the risk to the open court principle.

On the other hand, as in Canadian Newspapers, once A.B.'s identity is protected through her right to proceed anonymously, there seems to me to be little justification for a publication ban on the non-identifying content of the fake Facebook profile. If the non-identifying information is made public, there is no harmful impact since the information cannot be connected to A.B. The public's right to open courts and press freedom

therefore prevail with respect to the non-identifying Facebook content.

I would allow the appeal in part to permit A.B. to proceed anonymously in her application for an order requiring Eastlink to disclose the identity of the relevant IP user(s). I would, however, not impose a publication ban on that part of the fake Facebook profile that contains no identifying information. I would set aside the costs orders against A.B. in the prior proceedings but would not make a costs order in this Court.

In *M.E.H. v. Williams: the Ottawa Citizen,* 2012 ONCA 35, the estranged wife of Colonel Williams sought to divorce her husband after learning that he was in reality a sexual predator and serial murderer. There was a request for a non-publication ban. An Affidavit was filed from her treating psychiatrist Dr. W. Kwan. He was cross examined on his Affidavit. His testimony begins in paragraph 38 of the decision. Dr. Kwan first saw Ms. Williams in March of 2010. He stated that she was initially devastated by the revelations about her husband, shocked, confused, and unable to sleep and focus. Due to publicity associated with his criminal trial, she left the country. Dr. Kwan further stated that:

... There is a very real and great potential that her fragile recovery can be seriously compromised if she cannot be protected from the persistent, insistent and incessant efforts of the Media to gain entry into her private life.

... [Her] precarious mental and emotional state would be imperiled if she continued to be the subject of Media harassment regarding her private life and Mr. Williams.

... Currently has a very tenuous hold on her mental health and is a mere shadow of her usual self.

... requires calm, peace and quiet if she is to continue functioning normally, which I believe will not occur if her application for divorce plays out in the media.

... I believe that if pushed further by constant invasions of her privacy,

there is a very strong possibility that Mrs. Williams will deteriorate and be incapable of functioning at her current level of ability.

Dr. Kuan did not offer any opinion as to whether she would seek out the divorce if she was not guaranteed the kind of anonymity and privacy she sought. The Court of Appeal concluded:

> *Assuming that Dr. Kuan's opinion goes so far as to assert a real risk that the respondent would suffer the degree of emotional harm required to engage the public interest in maintaining access to the courts, that opinion rests entirely on his assumption that the respondent would be subject to media harassment occasioned by "persistent, insistent and incessant" efforts to invade her privacy. These assumptions have no foundation in the evidence. Consequently, Dr. Kuan's opinion cannot be said to provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the Daganais/Mentuck test.*

Dr. Kuan expressed the view that the publicity surrounding the divorce proceeding could adversely affect Mrs. Williams employment which in turn could cause significant damage to her emotional well-being. The court rejected that this was evidence of harm.

b. Medical Evidence Submitted by the Complainant

At the original hearing date, which was September 23rd, 2013, an Affidavit was filed on behalf of the Complainant. In relation to his mental health history, at paragraph 12 of the Affidavit, he states:

> *"By June, 2004, the poisoned work environment, harassment, humiliation, social isolation, and attempts to cause me physical harm, or causing or contributing to, me suffering stress, anxiety, depression, dizziness and blackouts, and as a result, I was unable to work from June 22nd, 2004 to July 30th, 2006."*

Further, the Affidavit states in paragraphs 14-18:

14. On July 18, 2006, I filed a complaint with the Nova Scotia Human Rights Commission, alleging discrimination by the HRM ... in relation to race, colour and ethnic, national or aboriginal origin.

15. I returned to work on light duties from July 31, 2006 until January 19, 2007, in an attempt to rehabilitate myself back into the workplace.

16. My return to the poisoned work environment ... aggravated my anxiety and depression symptoms, and I have been unable to work at any employment since January 19, 2007 due to my health.

17. In the fall of 2007, I attempted to commit suicide.

18. In June of 2008, I was assessed by Dr Rosenberg, a psychiatrist, who diagnosed me as having a Major Depressive Disorder and Generalized Anxiety Disorder and who gave the opinion that any return to work ... would fail unless the workplace harassment issues were addressed and resolved.

Further, in relation to his mental health status, the Complainant made the following statements in paragraphs 21-23 of his Affidavit:

21. I have been asked by medical doctors on various occasions, whether I have thoughts of committing suicide and I believe that suicide could be a risk for me if my medical condition worsens.

22. I have been informed by medical doctors and I believe that stress can worsen my medical condition and symptoms.

23. Since before June, 2004, I have suffered from anxiety in varying degrees, which is aggravated by stress.

In December of 2013, at the hearing, Counsel for the Media, in November of 2013, Counsel for the Media questioned the sufficiency of the medical evidence that was before the Board, based on the case law that was provided for the Board's consideration. At that point, Counsel for the Complainant requested the opportunity to provide more evidence

and the matter was ultimately adjourned to a review date in June of 2014.

By way of a subsequent Order, I allowed the admission of further and more detailed medical evidence concerning the Complainant's mental health. I note the objection made by Counsel for the Media, however, under the circumstances and because of the nature of the request, and the nature of the medical information involved, I have admitted this information. What I received as part of exhibit 1, is a copy of a request for a medical legal opinion dated April 23rd, 2014, written by Counsel for the Complainant also attached are a series of medical legal reports attached to exhibit 1, the latest being a medical legal report of Dr. E.M.Rosenburg, Psychiatrist, dated June 10th, 2008.

The updated history that was requested, is comprised of two letters written by Dr. T.J.P. Graham dated June 26th, 2014, one dealing with the specifics of this Application and the other dealing with a disability claim from the set up and contents of the letter. The rest of the medical legal reports set out in exhibit 1 are attached to these two reports.

Dr. Graham, who is a family doctor, states in the report:

> *"In my opinion, the Complainant's participation in the public hearing of his complaint would expose him to a significant risk of emotional harm. As you know, the Complainant has been followed for some time in the past by Dr. William McCormick. Eventually, Dr. McCormick sent me a note on November 15, 2011, which said, in part"... He has settled and is now able to live reasonably well He should remain on his meds for the foreseeable future... At that point Dr. McCormick discharged Y.Z. to me for ongoing management of his medications. In the interval since then, I have found him to be quite stable. However, over several visits in April, May, and June, he let me know that he had an upcoming public hearing, likely to be quite protracted, concerning an identity publication ban. The anticipation of this hearing had caused significant anxiety, and he complained of a recurrence of previous symptoms, including irritability, dizzy spells, flashbacks, and nightmares. I did adjust his medication during this time, and he did realize some benefit. However, he expressed concern that he would be unable to function during a long and protracted hearing. I believe that the*

recurrence of his symptoms was brought about by anxiety surrounding the upcoming hearing. Since the anticipation of this hearing was sufficient to bring about a recurrence of symptoms, I believe that participation in the actual event would in fact be quite detrimental, and would lead to worsening of the symptoms mentioned above."

Counsel for the Media has argued that there is no foundation laid in the report of Dr. Graham to come to his conclusion that an I.P.B. regarding the Complainant's name, identity, and image would in fact reduce the likelihood of further worsening of the symptoms.

There is a lack of updated medical information. It appears from the letter of Dr. Graham that the Complainant has not seen his treating Psychiatrist Dr. McCormick since November 15th, 2011. At that time, Dr. McCormick wrote:

"...He has settled and is now able to live reasonably well. He should remain on his meds for the foreseeable future."

There is no updated psychiatric information concerning the status of the Complainant that has been produced to substantiate the opinion provided by Dr. Graham, the family doctor.

We are left with the historical medical reports hat has been produced. The best summary of that medical history is contained in the letter of Dr. Graham to Mr. Evans dated October 21st, 2007 in relation to a long term disability claim. In this letter, the family doctor sets out the physical, psychological, and psychiatric history of the Complainant. There had been other medical reports that pre-date the difficulties he experienced in the work place. It appears from the review of the medical records and the summary provided by Dr. Graham, that the first record of difficulties being experienced at work was in November of 2003. The Complainant reported at that time, as set out in page 3-4 of Dr. Graham's report the following:

"...There had been dissention between him and one of his supervisors, that he filed a harassment complaints, and that an investigation was underway. In the meantime he had ongoing trouble coping, complained of major

stress, and had arranged counselling through the employee assistance program at his workplace. I heard next from his EAP counsellor, who informed me that the Complainant had scored high on a depression scale. I therefore arranged to see him, began treatment with Effexor, an antidepressant medication in December, 2003. When I saw him in follow-up in January, 2004, he complained of some gastro-intestinal side effects from the Effexor, and he was switched to Paxil, another antidepressant."

The report continues to state that in late January 2004, a referral was made to Dr. David Andrews an ophthalmologist who prescribed reading glasses. There was a follow-up appointment in May 2004, during which the Complainant, complained of ongoing stress and anxiety related mostly to his work. He had continued to take Effexor, but had run out of this several weeks before and was seeing his EAP counsellor, was taking Temazepam for sleep and Alprazolam for anxiety.

In June 2004 the Complainant saw his family doctor and reported symptoms of dizzy spells with occasional near blackouts. Physiotherapy was recommended, Effexor was increased, and there was some improvement in the Complainant's depression. He continued to see his EAP counsellor.

The dizzy spells reoccurred later in July of 2004. There was a referral to Dr. David King a neurologist who arranged for a CT scan, and a carotid ultrasound exam, and who concluded that the Complainant had a variant of migraine and began him on Sibelium, a medication for the disorder. It was the opinion of Dr. King that the Complainant's migraines were probably related to stress in the workplace.

The Complainant had begun seeing a counsellor through his EAP program and the counsellor had suggested that he be referred to Dr. Allan Abbass, who was a psychiatrist at the Abby J. Lane Hospital because of depression. This referral was made in August of 2004 and the Complainant began attending sessions at the Abby J. Lane in April of 2005.

Dr. Graham saw the Complainant in May of 2005 and noted that the Complainant had stopped taking his antidepressant medication because he thought that the antidepressants

could not be taken together with the Sibelium prescribed by Dr. King for the migraines.

There were attendances at physiotherapy during the last half of 2004 and the first month of 2005 as a result of a referral made by Dr. Alexander. An MRI was ordered by Dr. Alexander, as a result of meeting with the Complainant in January of 2006, he felt that there were no neurological problems present. Despite this, the Complainant continued to have problems varying in severity, with left leg pain and numbness, which caused problems with walking. Pain had been an ongoing problem and a number of analgesics have been tried and he eventually had good relief with Tramacet.

Through the last half of 2005, the Complainant remained off work, attended physiotherapy and attended his sessions at the Abby J. Lane. Physiotherapy sessions continued through 2006, and he attended at the Abby J. Lane for the first half of the year. In April of 2006 he reported to his family doctor that the Human Rights Commission had started to deal with his work situation. In May of 2006 he reported some dizzy spells, which he related to his physio/exercise schedule. In June of 2006 he began seeing Mark Russell, a psychologist through his LTD insurer. A return to work plan had been developed as a result of the Complainant seeing Mr. Russell and he did go back to work on July 31st, 2006 on light duties. The plan was modified from time to time. From October 23rd, 2006 until January 19th, 2006 the investigation of his human rights complaint was ongoing. The Complainant continued to experience intermitted back pain, with associated left side sciatica. On January 2nd, 2007, he experienced chest tightness and nausea. An EKG was done and was normal.

Dr. Graham saw the Complainant on January 23rd, 2007, when he reported to have developed reoccurring migraines and dizzy spells. The Complainant reported experiencing further problems at his workplace; he said his co-workers wanted him out of the workplace. He also reported that though he was placed on light duties, his supervisor appeared to be unaware of this. He had discontinued work because of illness on January 19th, 2007.

At a subsequent visit on February 27th, 2007, because the Complainant was very upset by the recent death of a friend who he worked with, and having discussed the Complainant's condition with the E.A.P. psychologist, Mr. Russell, the family doctor found that the

Complainant was significantly depressed and started him again on Effexor. The Complainant has been off on long term disability since that time. Dr. Graham at that time wrote:

> *"I believe that the above description of the Complainant's past history gives appropriate details of the various medications and treatment prescribed during this period in question. I would have to say that he has significant physical pain, suffering, and disability as a result of his various musculoskeletal problems described above. These, in and of themselves, have been sufficient to curtail his ability to work, and to lead a reasonable normal life. In addition, however, and just as importantly, he has had and continues to have very significant anxiety and depression, which still have a considerable impact on his life."*

The next medical report of significance is that of Dr. Rosenburg which is dated June 10th, 2008. It is in this report that Dr. Rosenburg documents the Complainant's attempt on his life, which was thwarted by the efforts of his brother, and as well, provided his diagnosis of major depressive disorder, recurrent, moderate severity with features of anxiety, psychosocial stress relating to perception of intimidation and harassment at the workplace, moderate symptomatology with moderate difficulty in social and occupational functioning.

Dr. Rosenburg stated that the Complainant was suffering from a major depression, which is generally viewed as a chronic and reoccurring condition, the initial episodes of which may be preceded by significant psychosocial stressors, as may subsequent episodes. He further writes that individuals suffering with depressive illness are susceptible to stressors (which may be particular to them), which will serve to augment and sustain depressive symptomatology. Numerous recommendations were made for medication and lifestyle changes. Dr. Rosenburg at the conclusion of his report wrote:

> *"... At this stage I am unable to provide a prognosis regarding the Complainant's return to the workplace. If the Complainant is correct in his assumption that there is non-resolution of his complaints regarding harassment at the workplace, then any program designed to return him to*

work will likely fail, because of his perception of stress. The Complainant's response to stress in the past have been characterised by emotional symptomatology ... and are likely to continue without resolution of what the Complainant views as significant personal/personnel issues."

c. Analysis – Dagenais / Mentuck Test

The first step that I must address is whether or not an I.P.B. is necessary in order to prevent serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

The risk is the first prong of the Dagenais/Mentuck test analysis, and as noted by Iacobucci J. must be:

"...Real, substantial, and well grounded in the evidence; that must be "a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration justice sought to be obtained (Mentuck, 2001 Carswell Man 535 (SCC), at para 34)."

It is the position of Counsel for the Media that the Complainant has failed to meet the first branch of the test. Counsel for the Media submits that the privacy and medical risk identified are speculative, not grounded in reliable evidence of specific circumstances and conditions of the Complainant to demonstrate this case takes it beyond personal and emotional stress to serious, debilitating, physical and emotional harm.

I have some difficulty with the Counsel for the Media's characterization of the medical evidence produced on behalf of the Complainant. There is a long standing history of a major depressive disorder and a general anxiety disorder since 2008. A four year process of counseling, medication, and short term disability did not ameliorate the Complainant's stress level in the workplace. Based on the medical evidence I have before me there was no improvement, in fact a deterioration of the Complainant's mental health status, largely brought on by the work environment he was functioning in, plus the commencement of the human rights investigation. Stress aggravates anxiety levels. As stated at page 7 of Dr. Rosenburg's report:

> *"Major depression is generally viewed as a chronic reocurrant condition, the intital episodes of which may be proceeded by significant psychosocial stressors, as may subsequent episodes. Further, individuals suffering with depressive illness are susceptible to stressors (which may be unique to them), which will serve to augment and sustain depressive symptomatology."*

Further, Dr. Graham, the family doctor, has written:

> *"Since the anticipation of the this hearing was sufficient to bring him out a reoccurrence of symptoms, I believe that participation in the actual event would in act be quite detrimental, and would lead to worsening of the symptoms mentioned above."*

Unlike the decision in *Loveridge; M.E.H. v. Williams; the Ottawa Citizen*; and *R. v. Rhyno*; the Complainant in this case has a long standing and well documented mental health history. Certainly it would have been helpful to me to have more detailed, updated information, however, the medical history, the fact that the Complainant still remains medicated and off work, and the family doctor's report, all lead to the conclusion that there is a substantial risk that participation in this process will increase the Complainant's stress level, anxiety, and depressive symptoms, which will affect his ability to participate in the hearing.

It is true that an I.P.B. would place a significant restriction on freedom of the press, however, if an individual with a well documented and long standing mental health history is unable to mentally deal with the stress generated by a Board of Inquiry process appointed to address the cause of his mental health condition, restricting that Complainant's ability to participate poses a serious threat to the proper administration of justice. I find that there is a serious danger to the administration of justice, which ought to be avoided. Justice cannot be achieved in this matter if the Complainant is potentially unable to participate because of the aggravation of his long standing and pre existing mental health condition. There are no reasonable alternative measures. Counsel for the Complainant has not requested that the court room be empty when the Complainant testifies or any other, more restrictive measures. The barebones request is that the Complainant's name and any identifying features of the Complainant not be published.

I find that the risks are real to the administration of justice because of the potential limitation of the Complainant's ability to fully participate in the hearing process. Because of the recent deterioration of the Complainant's mental health, I find that an I.P.B. of a very limited nature can address this issue.

The next question I must address is:

> Whether or not the salutary effects of the I.P.B. outweigh the deleterious effects of rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

I now move to the balancing analysis, I note that the presumption is an open court process which can only be overcome with sufficient and convincing evidence.

Does the lack of publication of the Complainant's name affect Counsel for the Respondent's ability to hold up the Complainant's testimony to public scrutiny? There will be no restrictions to the ability to cross examine the Complainant and to test, in the normal trial process, the credibility of his testimony. His name can be used for the purposes of cross examination and in the proceeding. The Complainant will testify in the normal course and be subjected to cross-examination. He must face those that he has accused.

Further, there is no request to seal any of the medical evidence to be adduced at trial. The medical evidence will be subject to public scrutiny and the scrutiny of the Board of Inquiry. Other than the name, and other identifying features of the Complainant, the trial shall be conducted in the normal course. An I.P.B. will not restrict the open court process. The ability to challenge the credibility of the Complainant and the accuracy of his medical evidence will be subject to cross examination. The only restriction on the Media is the ban on identifying the name of the Complainant and any of his identifying features.

Therefore, I am, on a limited basis, granting the Application for the Identity Publication Ban. I order the following:

1. The Media shall not publish the name or any information which would identify the

Complainant;

2. No member of the public shall publish the name or any information which would identify the Complainant.

DATED by the Board of Inquiry as of October 30th, 2014.

ISSUED by the Board of Inquiry as of October 30th, 2014.

LYNN M. CONNORS, Q.C., Chair
Human Rights Board of Inquiry