

**CITATION:** Shaw v. Phipps, 2010 ONSC 3884  
**DIVISIONAL COURT FILE NO.:** 577/09; 582/09; 285/10  
**DATE:** 20101006

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

**J. WILSON, SWINTON and NORDHEIMER JJ.**

**BETWEEN:** ) **DIVISIONAL COURT FILE NO.: 577/09**  
)  
MICHAEL SHAW AND CHIEF ) *Kevin McGivney*, for the Applicants Michael  
WILLIAM BLAIR ) Shaw and Chief William Blair  
)  
Applicants )  
)  
- and - )  
)  
RONALD PHIPPS AND TORONTO ) *Jayson W. Thomas*, for the Respondent  
POLICE SERVICES BOARD ) Ronald Phipps  
)  
Respondents ) *Antonella Ceddia*, for the Respondent  
) Toronto Police Services Board  
)  
- and - )  
)  
ONTARIO HUMAN RIGHTS ) *Anthony D. Griffin*, for the Intervenor  
COMMISSION ) Ontario Human Rights Commission  
)  
Intervenor )  
) *Margaret Leighton*, for the Human Rights  
) Tribunal of Ontario  
)  
**AND BETWEEN:** ) **DIVISIONAL COURT FILE NO.: 582/09**  
)  
TORONTO POLICE SERVICES BOARD )  
)  
Applicant ) *Antonella Ceddia*, for the Applicant Toronto  
) Police Services Board  
)  
- and - )  
)  
RONALD PHIPPS, MICHAEL SHAW, ) *Jayson W. Thomas*, Amicus for the  
WILLIAM BLAIR and ONTARIO ) Respondent Ronald Phipps

HUMAN RIGHTS COMMISSION )  
 )  
 Respondents ) *Kevin McGivney*, for the Respondents  
 ) Michael Shaw and William Blair  
 )  
 ) *Anthony D. Griffin*, for the Ontario Human  
 ) Rights Commission  
 )  
 ) *Margaret Leighton*, for the Human Rights  
 ) Tribunal of Ontario  
 )  
**AND BETWEEN:** ) **DIVISIONAL COURT FILE NO.: 285/10**  
 )  
 RONALD PHIPPS ) In person  
 )  
 Applicant )  
 )  
**- and -** )  
 )  
 MICHAEL SHAW, WILLIAM BLAIR and ) *Kevin McGivney*, for the Respondents  
 TORONTO POLICE SERVICES BOARD ) Michael Shaw and William Blair  
 )  
 Respondents ) *Antonella Ceddia*, for the Toronto Police  
 ) Services Board  
 )  
 ) *Margaret Leighton*, for the Human Rights  
 ) Tribunal of Ontario  
 )  
 ) **HEARD at Toronto:** July 6, 2010

**REASONS FOR JUDGMENT**

**J. WILSON AND SWINTON JJ.:**

**The Three Applications**

[1] Police Constable Michael Shaw (“Officer Shaw”) and Chief of Police William Blair (“Chief of Police”) (Court File 577/09) apply for judicial review of the decision of *Phipps v. Toronto Police Services Board* of the Human Rights Tribunal of Ontario (the “Tribunal”) dated June 18, 2009 (the “Liability Decision”). The Tribunal found that Officer Shaw had discriminated against Ronald Phipps (“Mr. Phipps”) on the basis of race contrary to ss. 1 and 9 of the *Human Rights Code*, R.S.O. 1990, c. H.19 as amended (the “Code”).

[2] The Toronto Police Services Board (“TPSB”) (Court File 582/09) and Mr. Phipps (Court File 285/10) are each applying for judicial review of the second decision of *Phipps v. Toronto Police Services Board* of the Tribunal dated October 6, 2009 (the “Remedy Decision”). The

Board seeks to overturn the conclusion in the Remedy Decision that it is jointly and severally liable with the Chief of Police for the discriminatory conduct of Officer Shaw. Mr. Phipps seeks to increase the damages awarded and to add a systemic remedy.

[3] The Tribunal appeared to provide submissions on the appropriate standard of review of its decisions. The Ontario Human Rights Commission (the “Commission”) was granted intervenor status in the first application and was a party in the second. It provided submissions on the applicable standard of review, as well as the merits of the Liability Decision.

**The incident giving rise to this proceeding**

[4] The following facts are outlined in the Tribunal’s reasons in the Liability Decision and, unless noted, are not in dispute.

[5] Mr. Phipps is a letter carrier with Canada Post. He self-identifies as African-Canadian. He is black.

[6] On March 9, 2005, he was a relief carrier delivering mail in the affluent Bridle Path neighbourhood in the City of Toronto. It was his second day working on this route. Mr. Phipps was wearing the Canada Post coat, and was carrying a mail satchel used by letter carriers. He was delivering regular mail and flyers. He did not stop at every house, as there was no mail for some houses and other houses had a “no flyer” notation.

[7] Officer Shaw is a police officer with 30 years experience who has worked in the Bridle Path neighbourhood for several years. On March 9, 2005, he was on patrol and was training a new constable, Diane Noto. At the beginning of their shift, they were given a Directed Patrol Assignment, recommending that they patrol the Bridle Path area because of break ins where phone lines had been cut by suspects described as male, white and East European and using a vehicle.

[8] The officers turned onto Vernham Avenue in their marked police cruiser, and Officer Shaw pointed out Mr. Phipps further down the street. Officer Shaw alleged that Mr. Phipps was crossing the street back and forth in a suspicious manner. Officer Shaw was of the impression that Mr. Phipps was going to households without vehicles in the driveway. Whether Mr. Phipps was doing anything suspicious, or simply delivering mail in a routine manner, was in dispute.

[9] As the police officers drew nearer, they saw that Mr. Phipps was a black man and was wearing a Canada Post uniform. Officer Shaw did not recognize Mr. Phipps as the regular mail carrier in the area. The officers followed Mr. Phipps at a slow pace in their vehicle and observed him go up to a house, knock on the door, and speak to a woman without delivering any mail. The officers testified that they regarded this as peculiar.

[10] Officer Shaw testified that in his experience as a police officer, people will use uniforms for potentially illegal purposes:

I have been involved in several other cases where TTC jackets were used to gain entrance onto the TTC bus system, and also police officer badges and red lights

were used to stop females, and doctors' gowns were, you know, worn by criminals that have just committed crimes. I know for a fact that just because you have a specific clothing, it does not necessarily mean that that is what you are doing.

[11] Therefore, Officer Noto went to speak with the resident, Hanna Katz, after Mr. Phipps left. Ms. Katz confirmed that Mr. Phipps had spoken to her about some misdelivered mail. The officer did not ask any further questions.

[12] This scenario was confirmed in the evidence of Mr. Phipps. He testified that he wished to rectify his error with respect to misdirected mail from the previous day.

[13] After the interaction with Ms. Katz, the officers were not satisfied that Mr. Phipps was a genuine letter carrier carrying out his duties. They drove on and stopped Mr. Phipps. They asked him for identification, which he willingly and politely provided. Officer Shaw told Mr. Phipps that he was investigating break and enters in the area. Mr. Phipps provided his driver's license and his Canada Post employee identification card.

[14] There were no reports of any break and enters in the area being linked to anyone posing as a postal worker, or using a uniform for an improper purpose. Mr. Phipps bore no resemblance to the description of the individuals who had cut telephone wires, as he was not white or East European and he was travelling on foot, not in a vehicle.

[15] After inspecting the identification documents, which included photo identification on the driver's license, Officer Shaw was still suspicious and was not satisfied that Mr. Phipps was a genuine letter carrier. He was concerned that Mr. Phipps might have been impersonating a letter carrier with forged identification for a potentially illegal purpose. He therefore decided to conduct a criminal record search of Mr. Phipps on the various data bases available to the police on the computer system in the cruiser.

[16] The criminal record search revealed nothing. Officer Noto advised Officer Shaw of the results of the CPIC search and returned Mr. Phipps' identification to him. After some conversation, the contents and tone of which are in dispute, the officers returned to their cruiser and continued their patrol of the area.

[17] After seeing the interaction with Mr. Phipps and the police, Ms. Katz had called Canada Post. There is a report of Ms. Katz's conversation with the Canada Post representative which she adopted in her evidence:

“Letter carrier rang customer doorbell to advise her he misdelivered the neighbour's mail yesterday; was back to retrieve it. She indicated that the letter carrier was very polite.”

“Customer stated that she appreciated him coming to tell her, and that she had already delivered the mail correctly”

“... a few minutes later the doorbell rang again, and it was the police. Apparently they had been patrolling the area, noticed the letter carrier at her door, wondered if there was a problem...”

“...customer advised that ... he was just there as a courtesy, as he had misdelivered some mail...”

[18] While the officers continued driving through the neighbourhood, they soon came across another letter carrier whom Officer Shaw recognized as the regular letter carrier on a nearby route. Officer Shaw asked the letter carrier, Mr. Finlay, about other carriers in the area, and Mr. Finlay replied that a temporary black carrier was delivering mail in the area. The Tribunal found that “only after Mr. Finlay identified a ‘Black man’ who was acting as a temporary letter carrier did Constable Shaw cease his inquiries”.

[19] Shortly after this, Mr. Phipps came across the officers again, and he asked them why they had stopped him. The Tribunal accepted Mr. Phipps’ evidence that he was dazed, upset and in shock after his encounter with the police.

[20] As with their first conversation, the parties disagreed about the contents and tone of this conversation. Mr. Phipps believed that the decision of Officer Shaw to stop and question him was because of his skin colour.

[21] While continuing on his route that day Mr. Phipps conducted investigations to see if other white non-residents in the area had been stopped and questioned by the police. He stopped at three construction sites where there were a number of white workers to ask if any of them had been stopped or questioned by the police. None had been stopped or questioned.

[22] The applicants do not dispute that Mr. Phipps was the only person who was stopped and questioned that day by the officers. For example, Officer Shaw mentioned that a white male delivering water in the neighbourhood was not stopped because the man was not doing anything out of the ordinary.

[23] On July 7, 2005, Mr. Phipps filed a complaint with the Commission. Three years later, the Commission had still not referred the matter for adjudication. In 2008, amendments to the *Code* came into effect, by which the Commission would no longer perform a “gatekeeping” function with respect to referral of complaints for adjudication. Transitional provisions enabled applicants with outstanding complaints that had not been referred to the Tribunal to request a summary hearing called a “Case Resolution Conference”. Mr. Phipps applied to have his complaint heard by the expedited process on November 13, 2008, pursuant to s. 53 of the *Code*.

[24] On June 4, 2009 the Tribunal heard evidence from Mr. Phipps, Officers Shaw and Noto, the householder who had received the misdirected mail, and the letter carrier on the nearby route, as well as legal submissions. Mr. Phipps and Officer Shaw gave two different versions of the tone and content of the conversations between them. Although the Tribunal rejected Officer Shaw’s reasons for stopping and investigating Mr. Phipps, it did not accept all of Mr. Phipps’ version of the tone and content of the two conversations. It concluded:

I accept the applicant's evidence that he felt intimidated by being approached by two police officers wearing guns, one of whom, Constable Shaw, is a very large man. I note that the applicant has a small stature. I also accept that he perceived that the officers did not treat him respectfully. However, I am not persuaded on a balance of probabilities that Constable Shaw used the police vehicle in an intimidating manner, that he approached the applicant in an intimidating manner or that he spoke rudely to the applicant.

[25] The Tribunal released its Liability Decision on June 18, 2009. It found that Officer Shaw had discriminated against Mr. Phipps on the basis of race.

[26] On September 14, 2009 the Board heard submissions with respect to the remedy sought by Mr. Phipps as well as the submissions from the Board. The Remedy Decision was released on October 6, 2009. In that decision, the Tribunal held that the TPSB, as well as the Chief of Police, was liable for the discriminatory conduct of Officer Shaw. In addition, the Tribunal awarded \$10,000.00 to Mr. Phipps as monetary compensation for the loss arising out of the infringement of the *Code*, including compensation for injury to dignity, feelings and self-respect. The Tribunal refused to make an order to ensure future compliance, given efforts by the Toronto Police Service, the TPSB and the Chief of Police to reduce the occurrence of racial discrimination in policing. The Tribunal also held that Mr. Phipps had failed to prove his other claims for monetary compensation.

### **The issues raised in the three applications**

1. What is the appropriate standard of review?

#### **Issues raised in the Liability Decision**

2. Did the Tribunal err by failing to impose the burden upon Mr. Phipps to prove a *prima facie* case of discrimination before requiring an explanation from Officer Shaw for his actions?
3. If the evidence supports a finding of a *prima facie* case of discrimination, did the Tribunal err in applying an unduly high standard of proof in assessing the explanation of Officer Shaw?
4. Did the Tribunal parse out individual facts relied upon by the officers to justify their conduct or fail to consider their evidence as a whole?
5. Did the Tribunal inappropriately rely upon "unconscious discrimination" that is impossible to rebut?
6. Further, in considering the explanation given by Officer Shaw, did the Tribunal err by failing to consider the unique statutory and common law duties of police officers?

#### **Issues raised in the Remedy Decision**

7. Did the Tribunal err in finding that the TPSB can be deemed liable pursuant to s. 46.3(1) for breaches of the *Code* committed by individual police officers?
8. Did the Tribunal err in its assessment of the damages awarded to Mr. Phipps and its failure to order a remedy for future compliance?

### **The Standard of Review**

[27] In December 2006, the Ontario Legislature enacted significant amendments to the *Code* (see *Human Rights Code Amendment Act, 2006*, S.O. 2006, c. 30, s. 5), including the elimination of the gatekeeper role played by the Commission, which had controlled the complaints referred to the Tribunal for adjudication.

[28] The amendments made it clear that the Tribunal is a specialized body whose sole task is to resolve human rights complaints through adjudication or alternative dispute resolution. It must be staffed by individuals who have gone through a selection process and demonstrated that they possess experience, knowledge or training in human rights, an aptitude for impartial adjudication and an aptitude for applying alternative adjudicative practices and procedures (*Code*, s. 32). The Tribunal has the power to adopt procedures and practices which, in its opinion, “offer the best opportunity for a fair, just and expeditious resolution of the merits” of applications (*Code*, s. 40).

[29] A decision of the Tribunal is no longer subject to a right of appeal, as was the case with the decisions of boards of inquiry and the Tribunal prior to the proclamation of the amendments (see s. 42 of the *Code*, as in force prior to the 2006 amendments). The Tribunal’s decisions now can only be challenged by way of an application for judicial review.

[30] Significantly, s. 45.8 was added. It now contains both a privative clause and a legislated standard of review:

... a decision of the Tribunal is final and not subject to appeal and shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable.

[31] While the Legislature enacted s. 45.8 in December 2006, the section, among others, was not proclaimed to come into force until June 30, 2008. In early March, 2008, the Supreme Court of Canada decided *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. In that decision, the Court held that there are only two standards of review with respect to decisions of administrative tribunals: reasonableness and correctness. The standard of patent unreasonableness was merged with the reasonableness standard.

[32] The first issue in this present application for judicial review is, therefore, to determine the import of s. 45.8 of the *Code*. The Tribunal argues that the section sets out a legislated standard of review - that of patent unreasonableness. Therefore, its decisions must not be set aside unless they are “clearly irrational” or “evidently not in accordance with reason” (*Canada (Attorney*

*General*) v. *Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, 101 D.L.R. (4th) 673 at 690). Mr. Phipps supports this approach.

[33] The Commission, the Chief of Police, Officer Shaw and the TPSB argue that a standard of review analysis should be undertaken in light of *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[34] The Supreme Court of Canada stated in *R. v. Owen*, [2003] 1 S.C.R. 779 that a legislature can specify the standard of review to be applied, and in the absence of a constitutional challenge, that standard should be applied (at para. 32).

[35] More recently, in *Khosa, supra*, the Supreme Court reaffirmed that “where the legislature has enacted judicial review legislation, an analysis of that legislation is the first order of business” (at para. 18). Binnie J., writing for the majority, discussed the effect of British Columbia’s *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which provides, in s. 58(2)(a), that “a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable”. According to Binnie J. (at para. 19):

The expression “patently unreasonable” did not spring unassisted from the mind of the legislator. It was obviously intended to be understood in the context of the common law jurisprudence, although a number of indicia of patent unreasonableness are given in s. 58(3). Despite *Dunsmuir*, “patent unreasonableness” will live on in British Columbia, but the *content* of the expression, and the precise degree of deference it commands in the diverse circumstances of a large provincial administration, will necessarily continue to be calibrated according to general principles of administrative law.

He also observed that the B.C. legislation directs the courts to provide a high degree of deference on issues of fact.

[36] The British Columbia Court of Appeal in *Manz v. Sundher*, 2009 BCCA 92 (at para. 36) and *Victoria Times Colonist v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229 (at paras. 28-29) has continued to apply the standard of patent unreasonableness. In *Victoria Times Colonist*, the Court made reference to the passage from *Khosa* quoted above and concluded that the statutory standard of patent unreasonableness must be interpreted in the context of general principles of administrative law (at para. 8). While the Court did not accept that patent unreasonableness always equates with irrationality, it applied the test of irrationality to determine whether a decision of the British Columbia Labour Relations Board interpreting its constituent statute was patently unreasonable (at paras. 10, 28-29).

[37] In enacting s. 45.8 of the *Code*, the Ontario Legislature has specified the appropriate standard of review to be applied in an application for judicial review of the Tribunal’s decisions – that is, patent unreasonableness. At the time of the enactment, that was the most deferential standard of review according to common law principles. However, as in British Columbia, the content of the patent unreasonableness standard in s. 45.8 of the *Code* must be determined in light of general principles of administrative law.



[38] It is obvious that when the Legislature enacted that standard in December 2006, the intent was to have the courts accord the same high degree of deference to the Tribunal that they accorded to other experienced and expert administrative tribunals, such as the Ontario Labour Relations Board (for example, in *Ajax (Town) v. CAW – Canada (Local 222)*, [2000] 1 S.C.R. 538), the Workplace Safety and Insurance Appeals Tribunal (*Rodriguez v. Ontario (Workplace Safety and Insurance Appeals Tribunal)* (2008), 92 O.R. (3d) 757 (C.A.) at para. 16) and labour arbitrators interpreting and applying collective agreements (*Lakeport Beverages v. Teamsters Local Union 938* (2005), 77 O.R. (3d) 543 (C.A.) at paras. 30-31).

[39] Does that mean that a decision of the Tribunal is to be upheld if irrational, but not “clearly irrational”? Bastarache and LeBel JJ., writing for the majority in *Dunsmuir*, concluded that a review of the case law showed that any distinction between reasonableness and patent unreasonableness, as applied by judges, is illusory. They stated (at para. 41):

This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal’s decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal’s decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision.

Moreover, they held that it would be inconsistent with the rule of law to uphold an irrational decision just because the irrationality of the decision was not clear enough (at para. 42). For these reasons, they merged the patent unreasonableness and reasonableness standards.

[40] There is not a spectrum or continuum of deference within the reasonableness standard, with varying degrees of deference within that standard (*Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, [2008] O.J. No. 2150 (C.A.) at para. 19). Nevertheless, in *Khosa*, Binnie J. observed that “[r]easonableness is a single standard that takes its colour from the context” (at para. 59). Professor Gerald Heckman has suggested that this means that the range of possible, acceptable outcomes will expand or contract depending on factors such as the presence of a privative clause, the nature of the question, the purpose of the decision-maker and its expertise (“Substantive Review in Appellate Courts Since *Dunsmuir*” (2010), 47 *Osgoode Hall L.J.* 751 at 778-79). Similarly, the Court of Appeal in *Mills* stated (at para. 22):

My conclusion does not signal that factors such as the nature and mandate of the decision-maker and the nature of the question being decided are to be ignored. Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account. Where, for example, the decision-maker is a minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad. In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.

[41] Therefore, reading the words of s. 45.8 of the *Code* purposively and in light of general principles of administrative law, it would follow that the highest degree of deference is to be accorded to decisions of the Tribunal on judicial review with respect to determinations of fact and the interpretation and application of human rights law, where the Tribunal has a specialized expertise.

[42] With respect to the present applications for judicial review, a high degree of deference is therefore to be accorded to the Tribunal's determination whether there has been discrimination under the *Code* and what the appropriate remedy should be, given that these are questions within the specialized expertise of the Tribunal. In other words, the decisions on liability and on remedy must be respected unless they are not rationally supported – in other words, they are unreasonable (*Dunsmuir*, para. 42).

[43] With respect to the determination of the TPSB's liability, the applicable standard of review will be discussed later in these reasons, as it turns on an analysis of the particular questions to be determined by the Tribunal.

### **The Liability Decision of the Tribunal**

#### **Failure to require the applicant to establish a *prima facie* case**

[44] Section 1 of the *Code* provides that every person has the right to equal treatment with respect to services without discrimination because of, *inter alia*, race and colour. Section 9 provides that “[n]o person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.”

[45] Officer Shaw and the Chief of Police argue that the Tribunal failed to make a finding that a *prima facie* case had been made out by Mr. Phipps before requiring Officer Shaw to prove on a balance of probabilities that his conduct was rational, non-discriminatory and credible on all of the evidence. The applicants argue that the Tribunal assumed discrimination and improperly shifted the onus upon Officer Shaw to disprove discrimination.

[46] The individual who brings a human rights complaint bears the onus of proving a *prima facie* case of discrimination. To establish that race was a factor in the alleged adverse treatment, the complainant must demonstrate a nexus between race and the alleged discriminatory conduct. To satisfy this burden, he or she must establish a *prima facie* case of discrimination which “is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent” (*Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28).

[47] The elements of a *prima facie* case that the complainant must prove are outlined in *Dang v. PTPC Corrugated Co.*, 2007 BCHRT 27:

1. That he or she is a member of a group protected by the *Code*;
2. That he or she was subjected to adverse treatment; and

3. That his or her gender, race, colour or ancestry was a factor in the alleged adverse treatment.

[48] In argument before this Court, the applicants concede that the first two requirements of a *prima facie* case have been made out – that is, that Mr. Phipps is a member of a protected group and that there was adverse treatment. However the applicants dispute whether the third element – the nexus between race and the adverse treatment – has been proved by Mr. Phipps on a balance of probabilities.

[49] In its reasons, the Tribunal did not make the specific finding that Mr. Phipps had proved a *prima facie* case on a balance of probabilities. However, the Tribunal outlines at para. 17 of its reasons the principles that apply in cases of circumstantial evidence of discrimination, including the first principle that the applicant bears the initial onus of proof. The Tribunal confirms that “[o]nce a *prima facie* case of discrimination has been established, the burden shifts to the respondent to provide a rational explanation which is not discriminatory”.

[50] This principle of the shifting onus is confirmed in *Johnson v. Halifax Regional Police Service*, [2003] N.S.H.R.B.I.D. No. 2:

When a *prima facie* case is made out, the burden then shifts to the respondent to demonstrate, on a balance of probabilities, that there was a rational and credible justification for his/her conduct. At that point, the burden of proof shifts back to the applicant to show that the justifications are “mere pretexts or veils” for discriminatory conduct.

[51] It appears from the oral submissions made on behalf of Officer Shaw and the Chief of Police that the elements of a *prima facie* case may have been conceded by counsel for Officer Shaw in her submissions to the Tribunal, which may explain why the Tribunal did not address the issue of whether a *prima facie* case had been proved in its reasons. The following is an excerpt from the submissions of counsel for Officer Shaw:

So the material facts of this case for which Mr. Phipps relies upon to support his claim is firstly, his race as a factor that he was stopped and asked for ID, that fact, which is, like I said earlier, not in dispute, that the day that he was stopped, he was working for Canada Post and was wearing a uniform, and that there were other individuals in the area who were white, or non-black.... We are not entirely sure if they were white, but they were in the area and they were not stopped and asked for ID.

So in response to these basic facts, there is very little dispute. The respondents don’t deny Mr. Phipps’ race. They do not deny he was stopped, nor do they deny that he was wearing a uniform and working that day as an individual for Canada Post.

And finally, there is no question that of the individuals that the officer saw during the material time, they did not stop and ask those others for ID as well. That was not .... None of these facts are disputed.

[52] It appears that counsel for Officer Shaw did not argue that the appropriate test requires the applicant to prove a *prima facie* case, and then shifts the onus to the respondent to provide a credible non-discriminatory explanation for the conduct. Instead, counsel for Officer Shaw relied upon the decision of *Kampe v. Toronto Police Services Board*, 2008 HRTO 304 at paras. 11-13.

[53] *Kampe* adopts the criminal law test for potential racial profiling in the context of a *Charter* challenge to exclude evidence, as outlined in *R. v. Singh*, 2003 CanLII 20804 (Ont. S.C.). Counsel suggested at p. 255 of the submissions in the present case that the test was whether there was an articulable reason for the police to stop an individual, and second whether there was any improper purpose in the decision to stop. In accordance with the *Singh* decision, the applicant advancing the *Charter* challenge to exclude evidence on the basis of racial profiling in the criminal context bears the onus of proving these two elements on a balance of probabilities.

[54] The Tribunal in the present case commented that the appropriate test was “whether the applicant’s skin colour was a factor in Constable Shaw’s surveillance of, decision to stop, and subsequent inquiry about the applicant” (at para. 20).

[55] Counsel for Officer Shaw agreed that this was the question to be answered. Although the Tribunal did not explicitly state it, this essential question is the third step of the *prima facie* test – that is the requirement that there be a nexus between the applicant’s race and the discriminatory conduct.

[56] No submissions were made before the Tribunal suggesting that the applicant had failed to meet his onus of proving a *prima facie* case, as counsel did not appear to apply these principles in her argument. This may explain why this issue was not specifically addressed by the Tribunal. No application for a non-suit was brought on behalf of Officer Shaw after the applicant testified challenging whether a *prima facie* case had been established on Mr. Phipps’ evidence. The respondents’ submissions focused on whether Officer Shaw had an articulable reason for stopping Mr. Phipps, and whether there was an improper purpose in the decision to stop and investigate.

[57] The Tribunal focused on whether race or colour played a role in the decision of Officer Shaw to stop and investigate Mr. Phipps from start to finish. In other words, it focused on the only part of the *prima facie* test that the parties argue is in contention – the question of nexus. It then considered in detail the explanation given by Officer Shaw for his conduct, and found it wanting.

[58] If the transcript does not support the conclusion that the elements of a *prima facie* case were conceded by counsel, as this aspect of the case was not in issue, we nonetheless conclude that the evidence before the Tribunal amply supports a finding that a *prima facie* case had been established

[59] Mr. Phipps was the only person stopped and questioned in the neighbourhood. He was in uniform doing his job. He was the only black man in the neighbourhood. Several other individuals in the immediate area were not questioned by the police including several men doing their job working on three construction sites, and an individual doing his job delivering water. The uncontradicted evidence of Mr. Phipps was that all of these individuals who were not questioned or investigated were white.

[60] We do not accept the argument of the applicants that the test for racial profiling in the criminal law context of a *Charter* challenge should be adopted to assess whether there is a potential *Code* infraction. The test applicable to assess whether there is a potential *Code* infraction is established, and that is the test the Tribunal reasonably applied. The Tribunal has no expertise to assess the question posed in criminal cases, particularly whether an officer has an “articulable cause” to stop or detain. Caution must be used in introducing criminal law concepts developed for another purpose and a different context to the question of whether the *Code* has been breached. Simply adopting the *Singh* framework, without any analysis, muddies the waters unnecessarily.

[61] It would have been appropriate for the Tribunal to specifically reject the *Singh* test and articulate its application of the *prima facie* case test. Nevertheless, the reasons are sufficient to indicate that a *prima facie* case was made out.

[62] We therefore conclude that the argument that Mr. Phipps failed to meet the onus of proving a *prima facie* case is without merit. The facts that are not in dispute support the conclusion that a *prima facie* case was established. The Tribunal did not assume discrimination without evidence supporting the nexus between the adverse treatment and colour, nor did it shift the burden of proof inappropriately to Officer Shaw to disprove discrimination.

[63] Once a *prima facie* case is made out, the issue then becomes whether Officer Shaw has provided a credible justification for his actions that is non-discriminatory.

**Did the Tribunal fail to properly weigh the evidence of Officer Shaw in reaching its conclusions?**

[64] The applicants argue that the Tribunal erred and was unreasonable in assessing the evidence of Officer Shaw for several reasons:

- The Tribunal applied a standard of proof in assessing Officer Shaw’s explanation that is too high;
- The Tribunal parsed out individual facts relied upon by the officers to justify their conduct and the Tribunal erred in failing to consider their evidence as a whole;
- The Tribunal improperly and unfairly relied upon unconscious discrimination that is impossible for Officer Shaw to rebut; and

- The Tribunal failed to consider the unique statutory and common law duties of police officers to investigate and prevent crime in assessing their conduct and their evidence.

**Improper application of the standard of proof**

[65] The applicants assert that the correct standard of proof with respect to justification as follows: the respondent must demonstrate, on a balance of probabilities, a credible justification for his or her conduct that is non-discriminatory.

[66] The Tribunal held that the respondent could not rebut the inference of discrimination just by offering any rational alternative explanation. Officer Shaw argues that the Tribunal erred in requiring Officer Shaw to offer an explanation that was non-discriminatory which was “credible on all the evidence”.

[67] The “credible on all the evidence” language is from *Mitchell v. Nobilium Products Limited* (1981), 3 C.H.R.R. D/641 (Ont. Bd. of Inquiry). This language simply indicates that the Tribunal must consider all the evidence. It does not alter the burden of proof of a balance of probabilities.

[68] We conclude that the Tribunal correctly stipulated and applied the onus upon Officer Shaw to provide a non-discriminatory explanation for his conduct that was credible when considering all “of the evidence”.

**Improperly parsing the evidence and failing to consider the evidence as a whole**

[69] Once a *prima facie* case has been made out, the Tribunal asked itself the correct question, that is: “Whether the applicant’s skin colour was a factor in Constable Shaw’s surveillance of, decision to stop, and subsequent inquiry about the applicant” (Liability Decision, para. 20).

[70] Simply put, the Tribunal did not accept the explanations given by Officer Shaw for his conduct as being credible and non-discriminatory.

[71] The Tribunal canvassed in detail the reasons suggested by Officer Shaw to justify his actions, and did not accept that any of the reasons given, when considered either individually or cumulatively, were credible and non-discriminatory. The Tribunal provided detailed reasons as to why it did not accept his evidence:

In my view, the above chronology, as described by the respondent Shaw is more consistent with a finding that the applicant’s skin colour played a role in his actions than the applicant’s alleged unusual activity.

First, the fact that the applicant was not the usual White male letter carrier is surely not a suspicious circumstance. Letter carriers take vacation, retire and/or switch routes, so the fact that another letter carrier was delivering the mail on that particular day cannot explain Constable Shaw’s heightened alertness. I find

significant that he did not respond in a similar way to an unfamiliar White male delivering water in the area.

Second, Constable Noto testified that immediately upon turning onto Vernham Avenue, Constable Shaw pointed out the applicant as a person of note. It is not likely that Constable Shaw had already noticed the applicant's alleged crossing back and forth across the street in an unusual manner as soon as they turned the corner. Whether or not Constables Shaw and Noto noticed a figure in the distance when they turned onto Vernham Avenue, I do not accept their evidence that the figure was crossing back and forth across the street in an unusual manner.

Third, it is not in keeping with the preponderance of probabilities that the applicant was constantly crossing back and forth across the street. The applicant could not recall whether or how often he crossed the street that day. However, he testified and his evidence is in keeping with the preponderance of probabilities that while letter carriers usually deliver their mail on one side of the street and then the other, if they make a mistake in preparing their mail they might cross the street mid-street, occasionally. Since there is no dispute that the applicant was, in fact, a legitimate letter carrier, either he made an unusual number of mistakes and crossed the street an extraordinary number of times on that day, or in the usual manner of letter carriers, he may have crossed the street once or at most twice. I do not accept Constable Shaw's evidence as in keeping with the preponderance of probabilities that the applicant was crossing the street back and forth in an unusual fashion.

Fourth, Constable Shaw in his original response to the complaint, his will say statement and his evidence at the hearing, noted the fact that the applicant did not stop at every house as an unusual circumstance. However, the evidence of the applicant and Mr. Finlay was that it is not unusual for a letter carrier to skip houses if there is no mail to be delivered and the householder has asked not to have flyers delivered. Indeed, Constable Shaw conceded in cross examination by the applicant that he had in the past seen letter carriers skip houses. In my view, it is in keeping with the preponderance of probabilities that Constable Shaw was well aware that letter carriers do not stop at every house.

Accordingly, I conclude that it was not unusual behaviour on the applicant's part that caused Constable Shaw to decide to place the applicant under surveillance but rather the fact that he was an African Canadian male in an affluent neighbourhood. His suspicions were not alleviated by the Canada Post uniform, mailbag or mail delivery. It is also noteworthy that the Directed Patrol Assignment related to suspicious persons in the neighbourhood with entirely different characteristics: White, Eastern European, using a vehicle. The fact that it was an African Canadian male without a vehicle that attracted Constable Shaw's attention is what is unusual. I am further reinforced in my conclusions by Constable Shaw's continued actions, described below.

Having decided to scrutinize the applicant, Constable Shaw found it suspicious that the applicant knocked on a resident's door and spoke to a woman but did not deliver any mail or flyers. Mr. Finlay testified that it was not unusual to misdeliver mail and to go back and try to retrieve it, which is what the applicant did that day. Nonetheless, Constable Shaw found this to be suspicious behavior and asked Constable Noto to ask the resident what the applicant had been doing. Constable Noto testified Ms. Katz advised her that the applicant said he had misdelivered something.

Ms. Katz testified that she could barely recall the events of that day. However, she did call Canada Post that day to report the events and she agreed that the Canada Post report was likely accurate and that she was the only source of information on the Canada Post report. Her report to Canada Post was that she told the police that the applicant had come to retrieve misdelivered mail. Had Constable Noto inquired, she would undoubtedly have learned that Ms. Katz had in fact received misdelivered mail the previous day, that she had delivered it to the correct address, and that she had told the applicant that. Constable Noto apparently did not learn this as she immediately returned to Constable Shaw with the information that the applicant had said he knocked on the door to inquire about a misdelivery. Constable Shaw concluded that this was suspicious behaviour, as it was not unknown for criminals to disguise themselves with legitimate uniforms and check out houses with false explanations. In my view, but for Constable Shaw's improperly heightened suspicion of the applicant, he would not have found the applicant's alleged misdelivery suspicious.

[72] The Tribunal considered each fact relied upon by Officer Shaw as grounds for suspicion and rejected each and every explanation. The Tribunal did not, as alleged, "parse" the evidence or consider each fact in isolation. The Tribunal further found that the evidence considered as a whole and in context only reinforced its conclusion that race was at the foundation of Officer Shaw's actions. It stated "the combination of his actions when viewed together further supports my conclusion" (at para. 33). That was a reasonable conclusion that the Tribunal could reach on the evidence.

### **Improper and unfair reliance upon unconscious discrimination**

[73] The applicants assert that the Tribunal essentially used the concept of "unconscious discrimination" to make a finding of discrimination in the absence of supporting evidence.

[74] We disagree.

[75] Many discrimination cases, such as this case, do not involve direct evidence that a complainant's colour or race was a factor in the incident in question. A tribunal must draw reasonable inferences from proven facts.



[76] That is exactly what the Tribunal did in this case. The Tribunal correctly outlined the principles that apply in cases involving an allegation of racial discrimination. The applicants do not dispute that these principles apply to the decision-making process:

- (a) The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;
- (b) There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is the effect of the respondent's actions on the complainant;
- (c) There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and
- (d) Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.

*Radek v. Henderson Development (Canada) Ltd. (No. 3)* (2005), 52 C.H.R.R. D/430, 2005 BCHRT 302 at para. 482; *Pritchard v. Ziedler* (2007), CHRR Doc. 07-527 (Sask. H.R.T.).

[77] In cases where discrimination must be proved by circumstantial evidence, there are no bright lines. The Tribunal must determine what reasonable inferences can be drawn from proven facts. These are difficult, nuanced cases that are important to both the parties, to society and the neighbourhoods in which we live. The Tribunal notes (at para. 17):

In this case, as in many cases alleging racial discrimination, there is no direct evidence that race was a factor in the officer's decision to take the actions that he did. As a result, the issue of whether the officer's actions amount to racial discrimination in violation of the *Code* falls to be determined in accordance with the following well-established principles applicable to circumstantial evidence cases.

- (1) Once a *prima facie* case of discrimination has been established, the burden shifts to the respondent to provide a rational explanation which is not discriminatory.
- (2) It is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence.
- (3) A complainant is not required to establish that the respondent's actions lead to no other conclusion but that discrimination was the basis for the decision at issue in a given case.
- (4) There is no requirement that the respondent's conduct, to be found discriminatory, must be consistent with the allegation of discrimination and inconsistent with any other rational explanation.

- (5) The ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent.

[78] The Tribunal confirms that it did not have to find that race was the only or the major factor leading to the discriminatory conduct. It also did not need to find that there was an intention to discriminate, as racial stereotyping will often stem from unconscious biases or beliefs. The Tribunal was well aware of the difficult, nuanced question that it had to determine. It states (at paras. 18-19):

In determining whether the inference of racial discrimination is more probable than the explanations offered by the respondent officer, I also need to be mindful of the nature of racial discrimination as it is understood today and that it will often be the product of learned attitudes and biases and often operates on an unconscious level: *Nassiah v. Peel (Regional Municipality) Services Board*, 2007 HRTO 4 (CanLII).

Courts in Canada have accepted that racial profiling by police occurs in Canada and have indicated their willingness to scrutinize seemingly “neutral” police behaviour to assess whether it falls within the phenomenon of racial profiling. In *R. v. Brown* (2003) 64 O.R. (3) 161 (Ont. CA) at para. 9, Morden J.A. stated that the Crown’s concession that the phenomenon of racial profiling existed was “a responsible position to take because ... this conclusion is supported by significant social science research”. In *Peart v. Peel Regional Police Service Board*, [2006] O.J. No. 4456 (Ont. CA), Doherty J.A. stated the “racial profiling occurs and is a day-to-day reality in the lives of those minorities affected by it.”

[79] While the applicants acknowledge that discrimination may arise from subconscious beliefs, they argue that there must be some evidence of racial profiling aside from the complainant’s belief. The applicants argue that the Tribunal assumed that African Canadians in affluent neighbourhoods are subject to racial profiling by police, without the necessary factual underpinning to reach this conclusion.

[80] We disagree with the applicants’ characterization of the Tribunal’s reasons.

[81] The Tribunal cannot make a finding of discrimination based on the concept of “unconscious discrimination” without supporting evidence. However, the Tribunal’s decision must be considered in the context of all of the facts. The Tribunal did not simply rely on Mr. Phipps’ perception of racism. The Tribunal carefully considered all of the evidence and rejected the evidence that the conduct of Mr. Phipps should have aroused the suspicion of the police of potential illegal activity. The Tribunal found that the most rational explanation for the actions of Officer Shaw was that they were motivated by race – that is, Mr. Phipps was an unknown black man in an affluent neighbourhood, and, therefore, he may be disguised as a postal worker, acting for an improper or illegal purpose.

[82] There was no evidence of obvious malice in this case, as may be present in other cases. The Tribunal concluded in the circumstances of this case that the discrimination could be

conscious or unconscious. It concluded however that discrimination had been proved, and it did not accept the evidence of Officer Shaw as providing a credible explanation for his conduct that was non-discriminatory.

[83] There is no need for Mr. Phipps to prove an additional improper purpose. We conclude that the applicants have misconstrued the Tribunal's application of *Kampe v. Toronto Police Services Board*, above. This case provides that once a respondent has successfully rebutted a *prima facie* finding of discrimination, the complainant may still establish that there was an "additional improper purpose" or ulterior motive. This case does not establish a requirement that a complainant must *always* demonstrate an additional improper purpose.

[84] The Tribunal in this case applied the principles outlined in the cases appropriately. It carefully considered Officer Shaw's explanations for his conduct and found that he was unable to rebut the *prima facie* case of discrimination.

[85] The Tribunal concluded that on a balance of probabilities, the applicant's skin colour was a significant, and probably the predominant factor in Officer Shaw's surveillance, decision to stop, and subsequent inquiries, including a criminal record search and the inquiry made to another letter carrier. This conclusion was reasonable and was supported by the evidence. In accordance with *Dunsmuir*, we find that that the conclusion "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

**Did the Tribunal fail to consider the unique statutory and common law duties of police officers?**

[86] The applicants submit that police officers have a common law and statutory duty to investigate circumstances of a possible wrongdoing. Officers can investigate on any basis as long as they act reasonably. The applicants argue that Officer Shaw's explanations for his conduct were objectively reasonable judged by the standard of a reasonable police officer in similar circumstances.

[87] The applicants argue that *Hill v. Hamilton-Wentworth Police Services Board*, 2007 SCC 41 should apply to establish the test of what a reasonable police officer would do in comparable circumstances. They submit that the Tribunal erred by failing to evaluate Officer Shaw's conduct in light of the duties and obligations of a reasonable police officer in similar circumstances to investigate potential illegal activity and to protect the public (see *Hill* at para. 73).

[88] We disagree that the *Hill* decision applies to this case as suggested by the applicants.

[89] First, the *Hill* decision was a case of negligence alleged against a police officer. Of course the standard in negligence is in relation to the conduct of a reasonable police officer in similar circumstances. This has little to do with determining whether Officer Shaw's actions constituted discrimination in violation of the *Code*. In a negligence case, there is generally expert evidence called about what a reasonable professional would have done in similar

circumstances. No such expert evidence was called in this case suggesting that Officer Shaw's conduct was reasonable for an officer with his experience in the circumstances.

[90] This issue was not raised in argument before the Tribunal. It would not be appropriate for the Tribunal to embark upon an inquiry using the legal analysis for a negligence case unless the issue was raised and there was expert evidence introduced that Officer Shaw's conduct for the purpose of the *Code* complaint should be assessed against the standard of a reasonable officer in his circumstances.

[91] The Tribunal articulated the appropriate legal principles in reaching its decision and did not fail to have regard to the unique duties of police officers. Section 1 of the *Police Services Act*, R.S.O. 1990, c. P.15 ("*PSA*") provides that police services are to safeguard the rights in the *Code* and be sensitive to the multiracial character of Canadian society. Police officers therefore have a statutory duty to uphold the *Code*, and in this the Tribunal had proper regard to police officers' statutory duties.

[92] The limited role of the Tribunal is confirmed in the decision *Ritlop v. Toronto Police Services Board*, [2009] HRTO 307 at para 15:

I emphasize that my role is not to decide or comment on the appropriateness of the investigative techniques used, but rather to determine whether there has been a violation of the *Code*.

[93] While there is no mention in *Hill* of the *Code*, the Court did state that an "officer's duty to the public is not to investigate in an unconstrained manner. It is a duty to investigate in accordance with the law" (at para. 41, emphasis added). The Court defined the law as having many elements, emanating from the *Charter* and the *Criminal Code*, presumably including any applicable human rights codes.

[94] For these reasons we reject the applicants' suggestion that the Tribunal should have embarked on the analysis outlined in *Hill* appropriate to negligence cases involving police officers.

[95] The Tribunal decision must be appropriately contextual to the facts of each case. Here, the Tribunal recognized the obligations of Officer Shaw to investigate crime. Its task was to determine whether the powers exercised by this police officer in carrying out this duty complied with the *Code*.

[96] Once the *prima facie* case was established, as the Tribunal confirmed, it was to determine whether Mr. Phipps' race was a factor in how Officer Shaw dealt with him on March 9, 2005 from start to finish. The Tribunal's conclusion that race was a factor, and probably a predominant factor, is reasonable, entitled to considerable deference and amply supported by the evidence.

[97] For these reasons the application to judicially review the Liability Decision is dismissed.

**The TPSB Application Respecting Liability**

[98] In the second application, the TPSB seeks judicial review of the decision of the Tribunal dated October 6, 2009. In that decision, the Tribunal found that the TPSB and the Chief of Police were jointly and severally liable for the discriminatory conduct of Officer Shaw and ordered them to pay \$10,000 in damages to Mr. Phipps.

[99] The Tribunal based its finding of liability on the deemed liability provision of the *Code*, 46.3(1). That section reads:

For the purposes of this Act, except subsection 2(2), subsection 5(2), section 7 and subsection 46.2(1) any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation, trade union, trade or occupational association, unincorporated association or employers' organization shall be deemed to be an act or thing done or omitted to be done by the corporation, trade union, trade or occupational association, unincorporated association or employers' organization.

[100] The TPSB submits that the Tribunal erred in law in finding that a police services board can be deemed liable for breaches of the *Code* committed by police officers while carrying out their statutory law enforcement duties. Specifically, the TPSB says that the Tribunal erred in its interpretation of s. 46.3(1) of the *Code*, and in its interpretation of the *Police Services Act* ("PSA") and related case law.

### **Standard of review**

[101] The TPSB submits that the issue of its liability for the damages awarded for the discriminatory conduct of a police officer involves a question of law. In particular, it involves the proper interpretation not only of s. 46.3(1) of the *Code*, but also the proper interpretation of various provisions of the *PSA*. As a consequence, the TPSB submits that the standard of review is correctness.

[102] In response, the Commission submits that the standard of review is reasonableness and that, within the spectrum of deference that attaches to the reasonableness standard of review, the Tribunal's decision is entitled to a high degree of deference.

[103] In our view, the standard of review on this particular issue involves both standards, but at different stages of the analysis. The standard of review applicable to the interpretation and application of s. 46.3(1) of the *Code* generally is one of reasonableness, as the Tribunal is involved in interpreting its own enabling statute. Therefore, in accordance with s. 45.8 of the *Code*, its decision is entitled to deference.

[104] However, in this particular instance, the ultimate decision also involves the proper interpretation of another statute, namely the *PSA*. The Tribunal has no specialized expertise in the application of that statute and consequently must be correct in its interpretation of it – see *Dunsmuir v. New Brunswick*, *supra* at para. 60. If the Tribunal errs in its interpretation of the *PSA* in the course of deciding the application of s. 46.3(1), then its decision is not entitled to deference. On the other hand, if the Tribunal correctly interprets the *PSA*, then its determination

of the ultimate issue as to the application of s. 46.3(1) must stand, as long as it meets the reasonableness standard.

### **The liability of the TPSB**

[105] The Tribunal concluded that the TPSB was liable for the discriminatory actions of the police officer because they were carried out in the course of his employment. The Tribunal relied on the deeming provision in s. 46.3(1) of the *Code* to hold the TPSB liable for the damages it awarded for the discriminatory conduct. The central issue, therefore, is whether the Tribunal reasonably concluded that the TPSB was properly considered as the employer of the police officer for the purposes of s. 46.3(1).

[106] The TPSB correctly points out that s. 46.3(1) does not make any reference to a police services board. Rather the section refers only to “corporation, trade union, trade or occupational association, unincorporated association or employers’ organization”. The TPSB contrasts the contents of s. 46.3(1) with the definition of “person” contained in s. 46 of the *Code* that reads:

“person” in addition to the extended meaning given it by Part VI (Interpretation) of the Legislation Act, 2006, includes an employment agency, an employers’ organization, an unincorporated association, a trade or occupational association, a trade union, a partnership, a municipality, a board of police commissioners established under the Police Act, being chapter 381 of the Revised Statutes of Ontario, 1980, and a police services board established under the Police Services Act. [emphasis added]

[107] The TPSB submits that the inclusion of a police services board in the definition of “person” in s. 46 shows that the Legislature did not consider a police services board to be the same as any of the entities in s. 46.3(1). The TPSB further submits that the fact that the Legislature expressly included police services boards in s. 46 must lead to the conclusion that the Legislature intended to exclude police services boards from s. 46.3(1).

[108] While we accept that a police services board is different from the other entities listed in s. 46.3(1), that reality is not an answer to the issue that presents itself here. The issue here is whether a police services board is the functional equivalent of the employer of a police officer for purposes of liability for violations of the *Code* by an individual police officer. If it is, then a police services board falls squarely within the Legislature’s obvious intent in enacting s. 46.3(1) and that is to make employers liable for the discriminatory acts of their employees.

[109] In addition, the fact that the Legislature chose to specifically include reference to a police services board in s. 46 is also not determinative of the issue. There may have been other reasons why the Legislature specifically included a police services board in the definition of a person. As the Commission fairly pointed out, the inclusion of a broader list of entities in the definition of “person” in s. 46 of the *Code* was more likely the result of the desire by the Legislature to ensure an expansive coverage of human rights protection. If that is true, then the desire for expansive coverage of human rights protection would be furthered by the conclusion that a

police services board is in an analogous position to the other types of employers referred to in s. 46.3(1).

[110] To answer the question whether a police services board is akin to the employer of a police officer for the purposes of s. 46.3(1) of the *Code* requires a consideration of a number of provisions in the *PSA*. First and foremost is s. 50(1) which reads:

The board or the Crown in right of Ontario, as the case may be, is liable in respect of torts committed by members of the police force in the course of their employment.

[111] The TPSB argued that the existence of s. 50(1) supported its position that police officers are not its employees. If they were, according to the TPSB, there would be no need for the Legislature to enact s. 50(1) because vicarious liability would occur, as a matter of law, based on an employer-employee relationship, and principles related to proximity and duty of care. The TPSB further argues that since s. 50(1) provides for liability for torts, liability should not be found here, because a human rights complaint is not a tort.

[112] We do not accept the TPSB's position. In our view, s. 50(1) is a clear statement by the Legislature that police services boards are to be considered the employers of police officers. It was open to the Legislature to expressly so provide, rather than rely on the common law to establish that liability with the possibility that other interpretations might prevail. The Legislature evidences a plain intention through s. 50(1) to hold police services board liable for the negligent acts of police officers. It then becomes difficult to see why a police services board should not similarly be held liable for discriminatory acts of police officers. We can see no logical distinction between the two.

[113] The TPSB attempts to direct liability away from itself by drawing a distinction between the role of a police services board and that of the Chief of Police. The TPSB submits that it is the Chief of Police who is the employer for these purposes and not the police services board. Indeed, the TPSB points to the fact that the Chief of Police in this case has accepted liability for the damages award as further support for its position in this regard.

[114] It is not clear to us upon what basis the Chief of Police in this case accepted liability for the damages award. However, the fact that he did so is not determinative of the issue that is before us. A person can, of course, accept liability for the acts of another person even though they may not be legally liable for those acts. That is a matter of personal decision. Regardless of any voluntary acceptance of liability, our task is to determine where the legal liability properly rests.

[115] In terms of the distinction set out in the *PSA* between the responsibilities of the police services board and those of the Chief of Police, we do not agree that that distinction supports the TPSB's position. Indeed, if one has reference to the various sections of the *PSA* that touch on the distinction, we see more that suggests liability rests with the TPSB than it does with the Chief of Police. In particular, we have reference to the responsibilities of a police services board that are set out in s. 31(1) of the *PSA*:

A board is responsible for the provision of adequate and effective police services in the municipality and shall,

- (a) appoint the members of the municipal police force;
- (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
- (c) establish policies for the effective management of the police force;
- (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;
- (e) direct the chief of police and monitor his or her performance;
- (f) establish policies respecting the disclosure by chiefs of police of personal information about individuals;
- (g) receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);
- (h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;
- (i) establish guidelines for dealing with complaints under Part V, subject to subsection (1.1);
- (j) review the chief of police's administration of the complaints system under Part V and receive regular reports from the chief of police on his or her administration of the complaints system.

[116] We first note that it is the police services board who appoints the members of the police service, not the Chief of Police. That authority supports the conclusion that the police services board is the entity that hires or employs the police officers. Further, the responsibilities assigned to a police services board are very much the same as the responsibilities assigned to a board of directors of a corporation. The fact that a corporation may have a Chief Executive Officer who is responsible for the day-to-day operations of the corporation (much in the same way as a Chief of Police is responsible for the day-to-day operations of his or her police service), does not mean that the board of directors is still not ultimately responsible for how those operations are carried out.

[117] In addition to these considerations, we refer to the provision set out in s. 31(2) of the *PSA*, which reads:

The members of the police force, whether they were appointed by the board or not, are under the board's jurisdiction.

[118] We appreciate that the *PSA* expressly precludes a police services board from giving orders or directions to individual police officers. That authority is expressly reserved to the Chief of Police. That demarcation, however, only reflects the unique operational requirements of a police service. It does not change the fact that a police services board may give orders and directions to the Chief of Police, who in turn gives orders and directions to his or her officers, and that a police services board is ultimately responsible for the performance of the Chief of



Police. It would follow, in our view, that it is the police services board that is ultimately responsible for the actions of the members of the police service.

[119] Lastly on this point, the conclusion that a police services board is liable for the discriminatory acts of individual police officers is also consistent with the acknowledgment in this case by the TPSB that it would properly be held liable for any human rights violation found as a result of an employment discrimination complaint brought by a police officer. It is again difficult to see a rational distinction between the TPSB being liable in that context but not liable in the context of discriminatory acts of individual officers. If that distinction were to carry the day, then a police services board would be liable for discrimination against police officers but not liable for discrimination by police officers.

[120] We have concluded, therefore, that the Tribunal correctly interpreted the provisions of the *PSA*. Its decision that s. 46.3(1) of the *Code* is applicable to police service boards is not only reasonable, but in our view, correct. We note that such a conclusion is consistent with affording a broad, liberal and purposive interpretation to the *Code* generally.

[121] The application for judicial review by the TPSB is dismissed.

### **Mr. Phipps' Application Respecting Remedy**

[122] Mr. Phipps challenges both the amount of compensation awarded in the Remedy Decision and the Tribunal's decision to make no order respecting future compliance with the *Code*, given the efforts undertaken by the Toronto Police Service to address racial discrimination in policing. He asks for \$400,000.00, including damages for psychological harm, lost opportunity costs and medical expenses, as well as an order for future compliance.

[123] The Tribunal has a broad remedial authority pursuant to s. 45.2 of the *Code*, which provides:

- (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:
  1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
  2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
  3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.
- (2) For greater certainty, an order under paragraph 3 of subsection (1),
  - (a) may direct a person to do anything with respect to future practices; and

(b) may be made even if no order under that paragraph was requested.

[124] The Tribunal concluded that Mr. Phipps had not proven his economic loss claims, including claims for compensation for lost opportunity for overtime and loss of business income. It also concluded that there was insufficient causal relationship between his medical ailments and the act of discrimination.

[125] In our view, the Tribunal's decision on remedy was reasonable, given the evidence before it. Mr. Phipps has not shown that the Tribunal failed to appreciate material evidence in reaching its decision.

[126] Similarly, the Tribunal reasonably concluded that there was no need for a remedy to ensure future compliance with the *Code*, given the evidence of efforts made by the Toronto Police Service and the TPSB to deal with racial discrimination.

[127] Therefore, Mr. Phipps' application for judicial review is dismissed.

### **Conclusion**

[128] The three applications for judicial review are dismissed.

[129] The Tribunal and the Commission do not seek costs. Mr. Phipps seeks costs of \$2,000 if successful in the Officer Shaw/Chief of Police application. Given his success, costs of \$2,000 are payable to him by the applicants in that application. In the other applications, no costs are awarded.

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J. Wilson J.

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Swinton J.

**NORDHEIMER J. (dissenting in part):**

[130] I agree with my colleagues' disposition of the application by the Toronto Police Services Board (Court File 582/09) and the application by Ronald Phipps (Court File 285/10) regarding the Remedy Decision. I also agree with my colleagues' determination of the standard of review that is applicable to the application by Michael Shaw and Chief of Police William Blair (Court File 577/09) regarding the Liability Decision. Where I part company with my colleagues is regarding their conclusion that the Liability Decision meets the standard of reasonableness as we have defined it. For the following reasons, I have concluded that the Liability Decision does not meet that standard and must be set aside.

[131] Michael Shaw and Chief William Blair seek judicial review of the decision of the Human Rights Tribunal of Ontario dated June 18, 2009 in which the Tribunal found that Michael Shaw, in his capacity as an officer of the Toronto Police Service, discriminated against Ronald Phipps on account of his colour when Officer Shaw stopped Mr. Phipps in the circumstances described above. The applicants submit that the Tribunal erred in three basic respects:

- (ii) it proceeded to make a finding of discrimination against Officer Shaw in the absence of any *prima facie* case of discrimination;
- (iii) in concluding that discrimination occurred, the Tribunal relied on information that was unavailable to the officer at the time, and;
- (iv) the Tribunal failed to take into consideration the unique statutory and common law duties of police officers.

[132] I agree that the analysis and reasoning of the Tribunal, upon which it based its decision that discrimination occurred, is fundamentally flawed. Even the highest degree of deference cannot avoid, overlook or overcome the failings that are evident in the Tribunal's analysis and reasoning such as would permit a conclusion that the decision is a reasonable one.

[133] In setting out my reasons for so finding, some repetition of the facts is unavoidable. However, there is another reason why a more extensive outline of the facts is necessary. The facts are fundamental to any consideration of the reasonableness of the conclusion that the actions of Officer Shaw in his dealings with Mr. Phipps were the result of discrimination. My colleagues are content to rely on the facts as set out in the decision of the Tribunal. I am not because, in my view, a close review of the evidence demonstrates that some critical facts relied upon by the Tribunal are either not borne out by the evidence or are stated in a fashion that does not fully, accurately or completely reflect the evidence. In addition, as I shall outline, the Tribunal ascribed motivations to certain actions taken by Officer Shaw and rejected explanations offered by him for other actions without any proper foundation for so doing. Still further, the Tribunal failed to resolve the contest over a number of disputed facts that were essential to any conclusion that discrimination underlay the officer's actions.

[134] At the outset of its analysis, the Tribunal referred to the fact that in many cases of racial discrimination there is no evidence that race was a factor in the actions taken. Consequently, the Tribunal said that the issue as to whether Officer Shaw's actions amounted to racial

discrimination fell to be determined in accordance to what it referred to as “the following well-established principles applicable to circumstantial evidence cases”.<sup>1</sup> Those principles, as stated by the Tribunal, are:

- (i) Once a *prima facie* case of discrimination has been established, the burden shifts to the respondent to provide a rational explanation which is not discriminatory.
- (ii) It is not sufficient to rebut an inference of discrimination that the respondent is able to suggest just any rational alternative explanation. The respondent must offer an explanation which is credible on all the evidence.
- (iii) A complainant is not required to establish that the respondent’s actions lead to no other conclusion but that discrimination was the basis for the decision at issue in a given case.
- (iv) There is no requirement that the respondent’s conduct, to be found discriminatory, must be consistent with the allegation of discrimination and inconsistent with any other rational explanation.
- (v) The ultimate issue is whether an inference of discrimination is more probable from the evidence than the actual explanations offered by the respondent.

[135] Having set out those principles, the Tribunal then referred to some other points of general application including:

- that racial discrimination will often be the product of learned attitudes and biases and often operates on an unconscious level.<sup>2</sup>
- that courts in Canada have accepted that racial profiling by police occurs in Canada and have indicated their willingness to scrutinize seemingly “neutral” police behaviour to assess whether it falls within the phenomenon of racial profiling.<sup>3</sup>

[136] The Tribunal moved from these statements of general principles directly to a consideration of the evidence of Officer Shaw and his escort on that day, Officer Noto. Neither at this early point, nor at any other time during the course of its reasons, does the Tribunal make any finding that the evidence of Mr. Phipps and the other witnesses established a *prima facie* case of discrimination, notwithstanding that that was the first stage of the applicable analysis, or threshold issue, that the Tribunal itself had identified as part of the necessary framework for its consideration of the central issue. Rather, the Tribunal moved from its statement of the analytical framework directly into its evaluation of the explanations offered by Officer Shaw for his actions as supplemented by the evidence of Officer Noto – explanations that the Tribunal rejected. This singular failure of not addressing the threshold issue creates a series of problems for a reviewing court, as I shall attempt to explain. It also raises the spectre that the analysis and

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<sup>1</sup> Reasons at para. 17

<sup>2</sup> Reasons at para. 18

<sup>3</sup> Reasons at para. 19

conclusions of the Tribunal did not proceed in a two stage process as required but, rather, proceeded on the basis of a presumption that discrimination had occurred which then had to be disproved.

[137] I accept that the Tribunal was not required to slavishly follow any particular structure in reaching its conclusions. In particular, the Tribunal was entitled to hear the evidence in whatever order it considered appropriate and the Tribunal was entitled to consider all of the evidence in reaching its conclusions. Accepting that reality, however, is not the same thing as saying that the Tribunal was allowed to omit a necessary step in the analysis. If there was no *prima facie* case of discrimination made out by Mr. Phipps, then there was no obligation on Officer Shaw to explain his actions nor was it appropriate to use the rejection of any explanations offered by Officer Shaw as the sole foundation for finding that he acted in a discriminatory manner. Yet on a careful reading of the Tribunal's reasons, it is clear that the rejection of Officer Shaw's explanations lies at the core of the Tribunal's decision that discrimination was present in Officer Shaw's actions. In the end result, the approach taken by the Tribunal reversed the burden of proof. Skipping this essential first step results in the onus then being placed on the person accused of discrimination to prove that he or she is innocent of discriminatory conduct before any preliminary determination has been made that discrimination appears to have occurred. The error of that approach is obvious.

[138] My colleagues seek to avoid this issue by, in essence, finding that counsel for Officer Shaw and Chief Blair had conceded that a *prima facie* case of discrimination had been made out. They refer, for example, to the fact that "[n]o application for a non-suit was brought" after Mr. Phipps gave his evidence. I confess that I find the reference to the absence of a non-suit application a curious explanation to be relied upon on this issue, recognizing the essential nature of the proceedings that come before the Tribunal and its customary approach to the conduct of such proceedings. In any event, there is nothing in the submissions of counsel before the Tribunal that I can see as being fairly characterized as any concession of this threshold issue. Counsel did concede that two of the three elements of a *prima facie* case, as I shall outline them in a moment, were demonstrated. The same concession was fairly made before this court. However, I cannot find that any concession was made by counsel regarding the third element nor is there any reference in the reasons of the Tribunal to such a concession having been made. Certainly none appears in the excerpt from the closing submissions that my colleagues quote. It seems to me to be fundamentally unfair to resolve this issue adversely to the applicants through a minute examination of counsel's words uttered in closing submissions. In my view, absent an express concession by counsel, the Tribunal was duty bound to directly address each element of the threshold issue.

[139] The failure of the Tribunal to make this express finding might be of little consequence if the reasons otherwise demonstrated that a *prima facie* case of discrimination was made out. In order to establish a *prima facie* case of discrimination, three elements must be shown. Those elements are:

- (i) that the complainant belongs to one of the groups that are protected by the *Code*;
- (ii) that the complainant has suffered adverse treatment, and;

- (iii) that there is some evidence of a nexus between the prohibited ground and the adverse treatment.

[140] As I have already alluded to, there is no dispute in this case regarding the presence of the first two elements. It is on the third element where the difficult but necessary determination remained to be made as to whether the threshold of a *prima facie* case had been crossed. It is the absence of any finding regarding the third element that is pointed to by the applicants as a fatal flaw in the reasons of the Tribunal. This third element is a critical step in a proper analysis. Indeed, the importance of this third element was explained by Abella J. in her concurring reasons in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161 where she said, at paras. 49-50:

What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. ... It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

If such a link is made, a *prima facie* case of discrimination has been shown.

The identification of that link, that is, the finding of a nexus between the prohibited ground and the adverse treatment, is therefore central to a proper analysis.

[141] It then becomes necessary to attempt to identify the facts that would satisfy this third element in an effort to bridge the gap in the reasons regarding the threshold issue. That effort is hampered, however, because certain important and necessary findings of fact are not made by the Tribunal. Consequently, it becomes difficult to identify the necessary facts upon which a reviewing court could be satisfied that a *prima facie* case of discrimination had been shown. Simply put, if one considers all of the evidence adduced, prior to any consideration of the Tribunal's views of the evidence of Officer Shaw, it is difficult to discern what facts could have satisfied the necessary third element so as to establish a *prima facie* case of discrimination. We know that Mr. Phipps is a black man (element #1) and we know that Officer Shaw stopped and questioned him (element #2) but the facts that would form a nexus between those two elements are missing from the Tribunal's reasons. With respect, they are similarly absent from my colleagues' reasons.

[142] This additional failing in the reasons requires this court to review the facts that were placed before the Tribunal and determine if there was a factual foundation upon which the Tribunal could have found the presence of this third element, such that this court could conclude that the Tribunal had implicitly found a *prima facie* case of discrimination to have been made out. In that regard, it is perhaps helpful to describe what it is that constitutes a *prima facie* case. The Supreme Court of Canada expressed the requirement in the following terms in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 where McIntyre J. said, at p. 558:

The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[143] In my effort to discern the available facts, I begin with the Tribunal's recitation of the facts as found in its reasons recognizing the caveat that the Tribunal itself put on its recitation of the events, that is, that they were to be taken as setting out events that were not in dispute:

... except where I specifically note, by using words such as alleged, or asserted, or otherwise indicate a contested point.<sup>4</sup>

[144] As earlier recited, Mr. Phipps was delivering mail in the area of the Bridle Path. Officers Shaw and Noto had been given a direct assignment to patrol that area and to record all suspicious events. It is important to understand the reason for this assignment. It was said by the Tribunal to have resulted from the fact that "phone lines had been cut in the area by suspects described as Male, White and East European, who were using a vehicle".<sup>5</sup> With respect, that statement does not accurately set out the critical rationale for the assignment. The central reason for the patrol assignment was the fact that there had been a number of daytime entries made to homes in the area. These entries had included phone lines being cut but it was the fact that homes had been entered that was of paramount importance. It is crucial in considering the actions of Officer Shaw to be cognizant of the fact that it was these daytime entries into homes, more commonly referred to as "break and enters", that led to him and his escort being tasked with patrolling the area and looking for suspicious activity.

[145] The events between Mr. Phipps and the officers begin with the officers turning from Farrington Drive onto Vernham Avenue. At this point in its reasons, the Tribunal said that Officer Shaw "allegedly" pointed out a person, who was subsequently identified as Mr. Phipps, at the other end of Vernham Avenue who he thought was engaged in unusual activity. The Tribunal added that this observation was made from a distance where the two officers "assert" that they were unable to discern the gender or the skin colour of the person. Notwithstanding the caveat that the Tribunal put on its recitation of the facts at the outset, and that I recited above, the Tribunal does not determine then, or at any later point, whether it accepts that this occurred nor is it otherwise clear as to the Tribunal's views of this evidence. I say that it is unclear because, as the reasons progress, the Tribunal accepts Officer Shaw's evidence on certain points and rejects his evidence on other points. This is not a case where Officer Shaw's evidence was wholly accepted or wholly rejected such that a blanket credibility finding could be extrapolated to other unresolved factual issues. Were it such a case then other areas of conflicts in the evidence that the Tribunal did not resolve might more easily be determined. This particular gap in the findings of fact is of significant importance, of course, because if Officer Shaw had his suspicions first raised at a point before he knew the colour of Mr. Phipps' skin, that fact would

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<sup>4</sup> Reasons at para. 6

<sup>5</sup> Reasons at para. 8

be of considerable significance in determining whether discrimination was at the root of his subsequent actions.

[146] After their initial observation, the officers continued to watch Mr. Phipps as the distance between them diminished. It is in this subsequent period that the officers became aware that the person they were watching was male, black and wearing a Canada Post uniform. As their observations continued, they saw Mr. Phipps go to a house, knock on the door and have a brief conversation with the woman who came to the door. The officers did not see Mr. Phipps deliver anything to the woman. Officer Shaw considered this odd so he sent Officer Noto to the same house to inquire why Mr. Phipps had knocked on the door. The woman told Officer Noto that Mr. Phipps had said that he had made a mistake delivering some mail. Officer Noto reported this to Officer Shaw. Officer Shaw then decided to approach Mr. Phipps to ask for identification. In that regard, it should be noted that Officer Shaw was familiar with this area. He had patrolled it for some years, he knew the usual letter carrier for this area and he knew that Mr. Phipps was not the usual letter carrier.

[147] Mr. Phipps produced his driver's licence and Canada Post employee card. The identification was checked by Officer Noto and did not reveal any concerns. The officers returned the identification to Mr. Phipps and they left. That was the sum and substance of the encounter between Officer Shaw and Mr. Phipps as found by the Tribunal. Mr. Phipps had contended before the Tribunal that the officers first used their police vehicle in an intimidating manner, then approached him in an intimidating manner and then spoke to him rudely. The Tribunal did not accept that those events had occurred. Since Mr. Phipps had asserted that the officers had so acted and the officers had denied doing so, the conclusion reached by the Tribunal must be taken as a rejection of Mr. Phipps' evidence and an acceptance of the officers' evidence, at least regarding this disputed event.

[148] I pause at this point to once again take issue with my colleagues' recitation of the facts. They state that after Mr. Phipps produced his identification, Officer Shaw "was still suspicious" and "therefore decided" to conduct a criminal record search of Mr. Phipps. With respect, that does not accurately reflect the chain of events. The evidence is that as soon as Mr. Phipps produced his identification it was given to Officer Noto to run a computer check on it. There was nothing unusual about that standard procedure of immediately checking identification as anyone who has ever been stopped by the police can attest to. It is simply not correct to portray this action as evidencing some continuing or increasing suspicion regarding Mr. Phipps by Officer Shaw nor, I would note, did the Tribunal portray it as such.

[149] The officers continued their patrol. They happened upon another letter carrier, Mr. Findlay, who Officer Shaw knew to be one of the regular letter carriers in the area. Officer Shaw stopped and spoke to Mr. Findlay and asked him about the letter carriers who were working in the area. Mr. Findlay first described the usual letter carrier who worked the route that included Vernham Avenue. Officer Shaw asked if there was anyone else in the area and Mr. Findlay then mentioned a temporary letter carrier, whom Mr. Findlay described as a "black man". There was no further discussion between the officers and Mr. Findlay.



[150] There were three construction sites in the area. After his encounter with the police, Mr. Phipps went to these construction sites and asked the workers, whom Mr. Phipps described as all being white, whether any of them had been stopped by the police and they all said No. There was also a white male delivering water in the area who was not stopped by the officers, a fact that I will have more to say about shortly.

[151] Those are the basic facts that were known to the Tribunal and upon which it would have had to conclude that there was a *prima facie* case of discrimination made out in the actions of Officer Shaw before the Tribunal could consider his explanations for the actions that he took. I will say that it is difficult to discern where in those facts one is to find the necessary evidence of a nexus between the first two elements and the presence of discrimination that is necessary to satisfy the third element of a *prima facie* case. There is no doubt that a distinction was drawn by Officer Shaw between his treatment of Mr. Phipps and his treatment of others in the area but, as Justice Abella said above, there is an important difference between a distinction and discrimination.

[152] It is also difficult to conclude that a *prima facie* case of discrimination is made out by those facts given that no finding was made regarding the evidence of Officer Shaw, confirmed by Officer Noto, that Officer Shaw's suspicions regarding Mr. Phipps were first raised prior to him knowing the gender or skin colour of the person. As I earlier noted, the Tribunal did not make any finding regarding that evidence and it is not possible, for the reasons I set out above, to make any assumption as to what that finding must have been. It is, of course, possible to conclude that *prima facie* evidence of discrimination is made out by those facts if you accept that the fact that Mr. Phipps is black is sufficient by itself to reach that conclusion. That approach, however, skips the necessary third element of a proper analysis. Indeed, it abandons analysis in favour of a presumption.

[153] The reality is that it is simply not possible to identify the facts that would provide the necessary support for a conclusion that the third element is made out. Any attempt to portray the facts here as substantiating a positive conclusion regarding the third element would simply transform conjecture or suspicion into a factual foundation. In essence, it would amount to supplanting the requirement of a *prima facie* case by the application of a presumption. It must be concluded, therefore, that the Tribunal failed in the essential first step of its mandate.

[154] However, even assuming that, based on the evidence that was before the Tribunal, it can in some fashion be concluded that the Tribunal must have found that a *prima facie* case of discrimination was made out, I believe that the Tribunal's ultimate conclusion, that Officer Shaw discriminated against Mr. Phipps based on the colour of his skin, reveals a series of errors that renders any reliance on that conclusion unsafe. It is at this stage that it becomes necessary to look at the explanations offered by Officer Shaw for his actions, along with other evidence. It also becomes necessary to consider the reasons why the Tribunal rejected those explanations.

[155] Officer Shaw is a seasoned police officer. He was familiar with the area that he was patrolling that day. Officer Noto was a "trainee" officer. As I have already said, Officer Shaw's evidence was that he was suspicious of the activities of Mr. Phipps as soon as he turned onto Vernham Avenue and before he knew Mr. Phipps' gender or skin colour. Officer Noto

confirmed that Officer Shaw noted the person as possibly suspicious at that early stage and that they discussed the reasons for his suspicions.

[156] In considering Officer Shaw's stated suspicions, one has to take into account the background known to Officer Shaw. Officer Shaw had been directed to look for suspicious activity in the area because there had been daytime entries into homes. Indeed, Mr. Findlay, the other regular letter carrier, gave evidence that there had been "lots" of break and enters in the area. The current suspect was described as male, white and East European but, as Officer Shaw said, the fact that a person did not fit that description did not mean that he should ignore the actions of other persons in the area who he might view as suspicious. Officer Shaw added what might be obvious, that is, that the type of persons who commit break and enters is not a fixed category and can include persons of almost any age and of any race.

[157] From his experience, Officer Shaw was also aware that people use uniforms as a cover or disguise to facilitate the commission of criminal activity. The fact that Mr. Phipps was in a Canada Post uniform therefore did not, by that fact alone, preclude him from being a possible perpetrator in the eyes of Officer Shaw. Any concern in that regard was heightened by the fact that Officer Shaw knew that Mr. Phipps was not the regular letter carrier for the area.

[158] The Tribunal does not address any of this background or how it might have informed Officer Shaw's actions on the day in question, save and except for the fact that Mr. Phipps was not the regular letter carrier. This was the first of four reasons isolated by the Tribunal regarding the suspicions of Officer Shaw in relation to Mr. Phipps, each of which the Tribunal then proceeded to expressly reject. On this first point, the Tribunal held that the fact that Mr. Phipps was not the regular letter carrier was "surely not a suspicious circumstance".<sup>6</sup> I fail to understand the basis upon which the Tribunal reached that conclusion. While there may be other explanations for why the regular letter carrier was not delivering mail in the area, the presence of other possible explanations does not change the fact that Mr. Phipps was not the regular letter carrier – a fact that would fairly raise a question, or at least be curious, to any regular resident of the area, not to mention a police officer expressly tasked with keeping an eye out for persons who might be scouting for opportunities to commit criminal acts. Also, in relying on the possibility of other innocent explanations to reject this reason for Officer Shaw's suspicion, the Tribunal did not make any allowance for the fact that Officer Shaw did not have any information that any of those other reasons explained the presence of Mr. Phipps. Indeed, it was not until Officer Shaw spoke with Mr. Findlay that he became aware that Mr. Phipps was a temporary worker in the area. The Tribunal also failed to take into account that there was no reason for Officer Shaw, in the course of his duties as a police officer generally and in furtherance of his current assignment specifically, to assume an innocent explanation for activity that he viewed as suspicious. There was also, of course, no way for Officer Shaw to determine the authenticity of Mr. Phipps' apparent role as a Canada Post worker without doing what he did: stopping Mr. Phipps and asking for identification.

[159] The second reason identified by the Tribunal also dealt with the assertion that Officer Shaw had his attention drawn to Mr. Phipps as soon as the officers turned onto Vernham

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<sup>6</sup> Reasons at para. 24

Avenue. Officer Shaw said that his attention had been drawn to Mr. Phipps because Mr. Phipps was crossing back and forth across the road. The Tribunal found that it was “not likely” that Officer Shaw noticed the crossing back and forth as soon as he turned the corner even though Officer Noto confirmed that this action was something that the two officers had discussed as being unusual. The Tribunal rejected both officers’ evidence on this point without providing any reason for that rejection. While the Tribunal was entitled to reject the officers’ evidence, if it was going to do so, it was obliged to say why it was rejecting their evidence and this the Tribunal did not do.

[160] The third reason identified and addressed by the Tribunal also dealt with the evidence about Mr. Phipps crossing back and forth across the street. Notwithstanding the earlier conclusion that the officers could not likely have noticed the crossing back and forth as soon as they turned onto the street, the Tribunal at this point determined that Mr. Phipps had not in fact crossed back and forth. The Tribunal found that it was not “in keeping with the preponderance of probabilities” that Mr. Phipps was constantly crossing back and forth. It is difficult to understand how the preponderance of probabilities could sustain this conclusion especially when Mr. Phipps himself gave evidence that he could not recall whether he had gone back and forth across the street.

[161] The fourth reason identified by the Tribunal dealt with another of the sources of Officer Shaw’s suspicions, that is, that Mr. Phipps was not going to each house on the street. The Tribunal rejected this as a basis for suspicion because it concluded that it was not unusual for a letter carrier to skip houses if there was no mail to be delivered and/or the householder had asked not to have flyers delivered – a fact by itself that Officer Shaw acknowledged. In fairness, however, it is important to recite the totality of what Officer Shaw said on this point. Officer Shaw did not say simply that Mr. Phipps was skipping houses. As already noted, it was acknowledged that that might be normal. What Officer Shaw said was that he noticed that Mr. Phipps was only going to houses where there were no cars in the driveways. The Tribunal makes no mention of this latter point notwithstanding the obvious connection it has to the purpose of the patrol assignment. The fact that a driveway is empty might suggest that the house is unoccupied and therefore a prime target for a break and enter.

[162] Having rejected each of Officer Shaw’s reasons for why his attention was drawn to Mr. Phipps, the Tribunal went on to consider another event that Officer Shaw thought was unusual and that was Mr. Phipps’ attendance at the one house where someone was home. As I earlier mentioned, Officer Shaw had seen Mr. Phipps approach a home and knock on the door. He considered this to be somewhat unusual for a letter carrier to do given that the letter carrier did not deliver anything to the homeowner. As I also earlier mentioned, Officer Shaw was aware that persons who are engaged in criminal activity may disguise themselves with legitimate uniforms and then check out houses armed with false explanations to be employed if they are unexpectedly confronted. This concern was why Officer Shaw had Officer Noto go to the home and ask the homeowner what Mr. Phipps had spoken to her about. The homeowner told Officer Noto simply that Mr. Phipps had inquired about misdelivered mail. The use of such a reason for knocking on the door of the house would be consistent with the false explanation scenario.

[163] The Tribunal rejected this reason for Officer Shaw's suspicions on the basis that the homeowner had told Mr. Phipps that she had received misdelivered mail the day before but that she had taken it to the correct address. Once again, the Tribunal's reliance on this piece of information to reject Officer Shaw's reasoning, fails to take into account that Officer Shaw was unaware of this additional and expanded explanation due to the fact that the homeowner had not informed Officer Noto of it. This additional information only became known as part of the Tribunal process when information was disclosed regarding a call that the homeowner had made to Canada Post after the encounter between the officers and Mr. Phipps. The Tribunal was quite aware that the officers did not have this additional information as the reasons state that "[h]ad Constable Noto inquired"<sup>7</sup> she would have found this information out. Nevertheless, the Tribunal proceeded to reject Officer Shaw's explanation based on information that it knew the officer did not have.

[164] Finally on this aspect of the reasons, Officer Shaw made it clear in his evidence that it was not any single event that alerted him to what Mr. Phipps was doing but rather it was the combination of events that led to his concern. The only reference to the cumulative effect of the various pieces of information available to Officer Shaw is made by the Tribunal towards the end of its reasons where it states:

I emphasize that although I have rejected each of Constable Shaw's explanations as not consistent with the preponderance of probabilities, the combination of his actions when viewed together further supports my conclusions.<sup>8</sup>

Unfortunately, the Tribunal does not explain how the combination of Officer Shaw's actions "further" supported its conclusions. The statement is simply made. It is then followed in the very next paragraph by the conclusion that Mr. Phipps' colour was a factor in Officer Shaw's actions.

[165] In considering fully the reasons of the Tribunal, it is necessary to address two other pieces of evidence that were not mentioned by the Tribunal but that have some relevance to a proper appreciation of the facts of this case. One was the fact that Officer Shaw did not take notes of his encounter with Mr. Phipps nor did he complete a "208" regarding the encounter. Officer Shaw explained that a "208" is an information card that officers complete when they have dealings in the course of an investigation with people about whom they have suspicions. Officer Shaw explained that he did not make notes of his encounter with Mr. Phipps or complete a "208" because, after he spoke with Mr. Phipps, he was completely satisfied that Mr. Phipps was simply doing his job. There was, therefore, no reason to record the encounter according to Officer Shaw. The Tribunal does not attempt to reconcile its finding that Officer Shaw had "a heightened suspicion" regarding Mr. Phipps throughout his dealings with him with the fact that no record was made by the officer of the type that police procedure would have required if such suspicions in fact existed nor was Officer Shaw questioned about any apparent inconsistency in this respect.

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<sup>7</sup> Reasons at para. 30

<sup>8</sup> Reasons at para. 33

[166] The other piece of evidence related to the second encounter between the officers and Mr. Phipps. After having stopped and questioned Mr. Phipps, the officers continued their patrol. At some point, the officers had their chat with Mr. Findlay. Sometime later, they saw Mr. Phipps again. He waved them down. Mr. Phipps asked why the officers had stopped him. According to Officer Shaw, he had about a ten minute conversation with Mr. Phipps. Officer Shaw explained what they were concerned about, showed Mr. Phipps a copy of their directed patrol sheet regarding the break and enters, explained why he had stopped to ask Mr. Phipps for identification and explained to Mr. Phipps that, notwithstanding the reference to white Eastern European males in the directed patrol sheet, “it is not just male whites that do these kind of things”. Officer Shaw said that Mr. Phipps was polite throughout this conversation and that, at its conclusion, Mr. Phipps thanked him and they each told the other to have a good day.

[167] The contents of this second conversation might be seen as being inconsistent with Officer Shaw having a discriminatory attitude towards Mr. Phipps. Certainly there is nothing in this second conversation that would assist in concluding that Officer Shaw had a generally discriminatory attitude when it came to Mr. Phipps or others of his race. The Tribunal does not mention the contents of this second conversation in its reasons other than to say that because Mr. Phipps did not give any detailed evidence regarding this second conversation “it is unnecessary to make any findings of fact about the manner in which he was treated at that time”.<sup>9</sup> If one is trying to determine the motivations underlying the interactions between Officer Shaw and Mr. Phipps, one would think that there would be some significance to this second encounter between the two and some need to determine the nature of that encounter. Just because Mr. Phipps did not give evidence regarding this encounter (and there might be a variety of reasons for that) does not mean that the encounter is of no relevance to the fact finding obligations of the Tribunal.

[168] I am mindful of the fact that it was open to the Tribunal to reject the explanations of Officer Shaw but it could only do so after a proper analysis and on a proper basis. Instead, it appears that the Tribunal rejected Officer Shaw’s evidence either because it did not match the Tribunal’s notion of what a police officer should consider unusual in the circumstances or because it did not square with other facts – none of which were known to Officer Shaw. Neither of those considerations provide a proper rationale for rejecting the officer’s explanations. As my colleagues note in their discussion of the standard of review regarding the liability of the Police Services Board, the Tribunal has no specialized expertise in the operations of police services or their governing statute. Given that lack of expertise, conclusions by the Tribunal regarding what police officers should or should not do in performing their investigative duties are not entitled to deference. In addition to those considerations, on a more general basis, it is inappropriate to reject the explanations of a witness based on things that the witness did not, and could not, know.

[169] To the degree that comparisons between cases may be of assistance, I contrast the analysis undertaken in this case with the one undertaken in *Ritlop v. Toronto Police Services Board*, [2009] HRT0 308. In *Ritlop*, the police were investigating the purchase of electronic components that could be used for detonation. Mr. Ritlop had ordered the components by phone from a company in the United States and had paid for them with his mother’s credit card. After the investigators spoke with Mr. Ritlop’s mother and Mr. Ritlop, they advised Mr. Ritlop that the

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<sup>9</sup> Reasons at para. 38

investigation would not be pursued. Mr. Ritlop then complained that the police had discriminated against him based on ancestry, ethnic origin, disability and family status.

[170] The Tribunal in *Ritlop* rejected the claim of discrimination. In doing so, the Tribunal made two observations that could have equal application to the case here. At paragraph 15 of its reasons, the Tribunal said:

I emphasize that my role is not to decide or comment on the appropriateness of the investigative techniques used, but rather to determine whether there was a violation of the Code.

and then later at paragraph 18:

It is, however, a legitimate role of police to investigate possible wrongdoing in order to protect the community. I note that the investigation ended as soon as DC Dahan had verified information about the purpose of the purchases and that she readily accepted the applicant's explanation. That is a further factor supporting my conclusion that Code grounds were not a factor in the police actions.

Officer Shaw said that his concerns respecting Mr. Phipps ended as soon as he spoke with Mr. Phipps and his identification was checked, yet the Tribunal concluded that he was engaged in discriminatory conduct. The contrast in results between these two cases is stark.

[171] In considering the actions of Officer Shaw, it was also important to consider the context in which his encounter with Mr. Phipps occurred. As I earlier mentioned, Officers Shaw and Noto were specifically tasked with keeping an eye out for persons who might be engaged in the planning and execution of break and enters into homes in the area. In undertaking that task, the officers were inevitably going to come into contact with members of the public. Members of the public may not, indeed they probably do not, like being stopped by a police officer and asked questions. However, that is what police officers must do as part of their job. The public cannot on the one hand object to being questioned by police officers in the course of their duties and at the same time also expect the police to do the investigative and surveillance aspects of their job that are critical to the prevention of crime. While all of us may be uncomfortable, and perhaps also annoyed, when we are stopped and questioned by the police, such occurrences are a necessary part of the task that we assign to the police and those consequences must be accepted by us if that task is to be properly performed. As was observed by McLachlin C.J.C. in *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129 at para. 42:

It may be that a citizen has an interest in or preference for being left alone. But I know of no authority for the proposition that an investigating police officer is under a duty to leave people alone.

[172] It may be that the Tribunal was bothered by the fact that Officer Shaw chose to stop and ask Mr. Phipps questions when he did not stop and ask questions of other white males who were in the area. This certainly seems to be an important factor in the reasons of my colleagues. Indeed, it appears to take on a greater significance in their analysis than it did in the analysis of

the Tribunal. If that fact is the tipping point in the analysis, then it again becomes of some consequence to examine the evidence with respect to that point and how it was treated before the Tribunal. Very little was said about this at the Tribunal. In fact, it was not Mr. Phipps, but rather Officer Shaw, who even mentioned that he had not questioned the white male delivering water. Notwithstanding that it was Officer Shaw who volunteered this fact, it was never suggested to him that this distinction in treatment could be evidence of discriminatory conduct. Thus, Officer Shaw was not given any opportunity to explain why he did not take the same approach to these other males that he took to Mr. Phipps. It is a basic principle of fairness that if a particular characterization is going to be advanced regarding a person's actions, that characterization should be put to the witness so that the witness has an opportunity to respond to it. As Lord Herschell said in the seminal case on this point, *Browne v. Dunn* (1893), 6 R. 67 (H.L.) at p. 70:

My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

[173] In any event, there are larger ramifications inherent in relying on the simple fact that Officer Shaw did not question white males who were in the same area as sufficient in and of itself to establish discrimination. If that is the determining event that moves from distinction to discrimination, then it must follow that any officer, in order to avoid a finding of discrimination in his or her conduct, should ensure that, in such circumstances, they also question a person of another colour in order to establish that the original questioning was not the result of discrimination. The problems with such a premise would, I trust, be plain to anyone.

[174] It may also be that the Tribunal was troubled by the manner in which Officer Shaw went about his patrol assignment when it came to checking out the *bona fides* of Mr. Phipps. Perhaps a less direct or intrusive approach could have been taken. However, courts and tribunals should be wary of second-guessing how police officers choose to fulfill their duties and responsibilities. Police officers, like other professionals, must be accorded a certain amount of discretion in how they go about their tasks. They have to be allowed, within reasonable limits, to decide how best to perform their duties. This reality was also the subject of comment in *Hill* where McLachlin C.J.C. said, at para. 52:

Discretion, hunch and intuition have their proper place in police investigation.

and at para. 54:

Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals.

[175] None of this is, of course, intended to excuse, or provide cover for, improper conduct by police officers – especially not discriminatory conduct. What it does serve to do is to remind those who are called upon to review the conduct of police officers that our views as to the

appropriateness of police conduct must always be tempered by the realities in which police officers are called upon to perform their duties. It follows that it becomes even more important, when police conduct is going to be criticized, that the foundation for that criticism is clearly established and equally clearly explained.

[176] Throughout my consideration of this matter, I have not lost sight of the fact that proving cases of discrimination can pose a difficult evidentiary challenge. I accept that there is not usually an open admission of discrimination. At the same time, though, there is often other evidence of actions by the alleged discriminator that can be pointed to as evidencing such a discriminatory attitude. As was said in *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457 (C.A.) by Doherty J.A., at para. 95:

Racial profiling can seldom be proved by direct evidence. Rather, it must be inferred from the circumstances surrounding the police action that is said to be the product of racial profiling.

That is why the surrounding circumstances are so important to the analysis and why clear findings regarding the surrounding circumstances are necessary.

[177] In any event, the fact that it may be difficult to directly prove discrimination cannot be used as an excuse to take analytical shortcuts or to justify findings of discrimination based on guesswork or suspicion or presumption. The conclusion that discrimination has occurred must be based on evidence: on the facts of the individual case. Under our system of laws and procedure, the burden of proof remains on the person, who advances an allegation of discrimination, to establish it. As Doherty J.A. also said in *Peart*, at para. 139:

In civil proceedings, the burden of persuasion in respect of a fact in issue is generally on the party alleging that fact. The appellants claim that they were the victims of racial profiling at the hands of the police and demand compensation. Applying the normal rule, the appellants must bear the burden of proving racial profiling on the balance of probabilities: [citations omitted]

[178] Reaching a conclusion that a person has acted in a racially discriminatory fashion is an extremely serious finding, especially so where the person holds a public office as police officers do. Suspicion about a person's motivations is an insufficient basis to reach such a conclusion. There must be a solid evidentiary foundation for such a finding and the evidence that forms that foundation must be set out with clarity. Reasons are the structure in which factual findings that support a conclusion by a court or tribunal are enunciated. They are the vehicle by which the basis for a finding is communicated to the interested parties and to others. The purpose that reasons serve was outlined in *R. v. R.E.M.*, [2008] 3 S.C.R. 3 where McLachlin C.J.C. said, at para. 25:

The functional approach advocated in Sheppard suggests that what is required are reasons sufficient to perform the functions reasons serve – to inform the parties of the basis of the verdict, to provide public accountability and to permit meaningful appeal.



[179] In my view, it would be very difficult for Officer Shaw to understand the base of knowledge or experience that was relied upon by the Tribunal to reject his explanations for his actions and even more difficult to understand the basis upon which the Tribunal concluded that his actions were the result of discrimination.

[180] This latter point raises a further issue that I believe should be addressed. I am troubled by the terms in which the Tribunal expressed its conclusion that Officer Shaw had acted in a manner that discriminated against Mr. Phipps. The Tribunal stated its conclusion as follows:

However, I find that on a balance of probabilities, the fact that the applicant was an African Canadian in an affluent neighbourhood was a factor, a significant factor, and probably the predominant factor, whether consciously or unconsciously, in Constable Shaw's actions.<sup>10</sup> [emphasis added]

[181] This was not the only reference to unconscious racism made in the course of the Tribunal's reasons. These references generally, and the above statement in particular, effectively result in a situation where Officer Shaw has been found to have discriminated against another person "unconsciously". It is a conclusion that is highly problematic for a number of reasons. I start from the basic principle that our system of justice is predicated on the notion that only those who act voluntarily should be punished.<sup>11</sup> In addition, I do not know how a Tribunal, or any other decision-making body for that matter, purports to reach a conclusion that a person has acted unconsciously in his or her discrimination against another person. Further, it is virtually impossible for a person, who is the subject of a discrimination complaint, to establish that they did not act unconsciously. The body of evidence that a person could lead to establish that fact is unknown to me. Still further, such a finding suggests that the conclusion is not based on the specific facts of the case and the specific actions of the person accused but appears, rather, to be based on a generalized view of the actions of certain people when they interrelate with certain other people. Generalizations may be correct and they may be useful in certain contexts but they are not appropriately relied upon for a formal finding by a Tribunal regarding an explicit allegation made against a particular individual. In those instances, the person whose actions are challenged must be judged based on what he or she did or did not do. Otherwise a conclusion that a person has discriminated runs the very real risk of being seen as having been reached not because of what the person did but who the person is.

[182] The risk that arises from reliance on generalizations or preconceptions of the type that are raised when reference is made to unconscious acts was discussed by the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484, a case that involved some comments that had been made by a judge, in her reasons for acquitting a young man, about racial attitudes of police and how they might have affected the evidence of police officers. In expressing concerns about the use of generalized comments in the course of reasons, Mr. Justice Cory said, at para. 133:

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<sup>10</sup> Reasons at para. 21

<sup>11</sup> see *R. v. Parks*, [1992] 2 S.C.R. 871

If there is no evidence linking the generalization to the particular witness, these situations might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. This does not mean that the particular generalization -- that police officers have historically discriminated against visible minorities or that women have historically been abused by men -- is not true, or is without foundation. The difficulty is that reasonable and informed people may perceive that the judge has used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility. As a general rule, judges should avoid placing themselves in this position.

[183] Similarly, in this case, when the Tribunal speaks of racial discrimination being the “product of learned attitudes and biases and often operates on an unconscious level”,<sup>12</sup> coupled with the failure to make express findings of fact regarding the central events that are in issue, or the credibility of the parties involved, it raises a concern that the ultimate conclusion that racial discrimination has occurred may have resulted not from any detached evaluation of the evidence but from an overriding concern that, because discrimination exists, it must of necessity be found.

[184] It is for these reasons that I have concluded that the analysis undertaken by the Tribunal was fatally flawed. I have also concluded that the Tribunal failed to make the necessary findings of fact that could support a conclusion one way or the other. On either basis, the decision cannot safely stand. It also follows that, if the decision lacks evidentiary support and flows from an incomplete analysis, it cannot be said to be a reasonable decision. No level of deference can rescue a decision that suffers from such failings.

[185] I would therefore grant the application for judicial review, set aside the Liability Decision and remit the matter back to the Tribunal, differently constituted, for a fresh hearing.

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Nordheimer J.

**Released:** October 6, 2010

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<sup>12</sup> Reasons at para. 18

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**DIVISIONAL COURT FILE NOS.:** 577/09; 582/09; 285/10  
**DATE:** 20101006

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

**J. WILSON, SWINTON and NORDHEIMER JJ.**

**BETWEEN:**

MICHAEL SHAW and CHIEF WILLIAM BLAIR

- and -

RONALD PHIPPS and TORONTO POLICE  
SERVICES BOARD

- and -

ONTARIO HUMAN RIGHTS COMMISSION

**AND BETWEEN:**

TORONTO POLICE SERVICES BOARD

- and -

RONALD PHIPPS, MICHAEL SHAW, WILLIAM BLAIR and  
ONTARIO HUMAN RIGHTS COMMISSION

**AND BETWEEN:**

RONALD PHIPPS

- and -

MICHAEL SHAW, WILLIAM BLAIR and  
TORONTO POLICE SERVICES BOARD

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**REASONS FOR JUDGMENT**

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**J. Wilson and Swinton JJ., Nordheimer J. (dissenting)**

**Released:** October 6, 2010